

# RECOGNITION OF FOREIGN DIVORCE AND NULLITY DECREES

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## I

The common law has long treated the recognition of foreign judgments as a question of jurisdiction. Did the foreign court have, in the eyes of the recognizing court, jurisdiction to grant the decree? That jurisdiction of the foreign court, sometimes referred to as its "international jurisdiction", might or might not correspond with its own jurisdiction for domestic purposes. The foreign court might have jurisdiction by reason of a local rule or statute in a specific case, but none in the eyes of the court where the question of recognition now arises. In cases of this sort, the foreign court's order would be quite valid within the territory of the foreign court but invalid "internationally"—that is, more accurately, in those other places, such as England and other common-law countries, which refuse recognition to foreign decrees granted "without" jurisdiction in the "international" sense. The soundness of this common-law approach cannot be judged properly until its application to specific problems is examined.

If, then, we are prepared to recognize those foreign orders granted by a court which has, in our eyes, jurisdiction to make the order, what basis or yardstick do we use to measure the foreign court's jurisdiction? In what cases, for example, has a German court jurisdiction to dissolve a marriage celebrated in Germany between a German girl and a Canadian serviceman? This article deals with foreign decrees of divorce and nullity, yet the same question might, at this stage of the inquiry, be asked of a German order under which a German child is adopted by an English serviceman, or of a German order under which a Canadian business corporation is ordered to pay damages for breach of a contract to buy German goods. The usual answer in the ordinary

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textbooks on the conflict of laws is found in detailed rules worked out by the English and other common-law courts, and apparently depends upon the presence of domicile, residence, the carrying-on of business, or other factor connecting persons or property to the territory of the foreign court. On the surface, the rules may seem somewhat incongruous, with little to support them other than the fact that they have been laid down by a court. Yet, on examination, it becomes apparent that the rules for testing a foreign court's jurisdiction are largely an expression, at the time the rules were initially expounded, of the domestic rules of the forum delimiting the jurisdiction of its own courts. In this light, some reason can be seen for the rules testing a foreign court's jurisdiction. They simply reflect the rules used to test our own court's powers. Were law static, the only comment might lie in criticism of our domestic rules: Are they suitable today? But law does grow in many ways; changes are introduced by the courts and by the legislature.

Do existing conflict rules for testing a foreign court's jurisdiction reflect the changes that have occurred in our domestic jurisdiction? For foreign divorces, it is now possible to say that they do—*Travers v. Holley*.<sup>1</sup> Until the English Court of Appeal's clear pronouncement in 1953, many writers had argued otherwise—that the common-law rules adopted in the early years of the conflict of laws could not be expanded to include new bases of "jurisdiction".<sup>2</sup> Unless the existing conflict rules were expressly enlarged by statute, alterations in the rules for domestic jurisdiction had no effect upon the rules for recognition of foreign judgments.<sup>3</sup> On the other hand, a few writers<sup>4</sup> argued for the view that recognition rules not only should, but do, reflect the rules for domestic jurisdiction by according to the foreign court "jurisdiction" in those cases where a court in the recognizing territory would have been prepared to assert jurisdiction for itself in roughly comparable circumstances. Today, in the light of *Travers v. Holley*, the last-mentioned view prevails in divorce. Can we say the same thing of matters other than divorce?

Falconbridge showed by his approach to problems of recog-

<sup>1</sup> [1953] P. 246; [1953] 2 All E.R. 794 (C.A.).

<sup>2</sup> See my earlier discussions of this development (1953), 31 Can. Bar Rev. 799, at pp. 800-802 (esp. footnote 7); (1954), 32 Can. Bar Rev. 359.

<sup>3</sup> Graveson; in rejecting (before *Travers v. Holley*) the suggestion that domestic rules reflect the conflict rule, thought that it did not represent English law: *The Recognition of Foreign Divorce Decrees* (1951), 37 Transactions of the Grotius Society 149, at pp. 165-167.

<sup>4</sup> See (1953), 31 Can. Bar Rev. 799, at pp. 801-802 (esp. footnotes 10-11). The late Dr. Rabel should be added to the list there set out.

dition that he considered changes in domestic jurisdiction in any field sufficient to raise the question of an implied alteration in the conflict recognition rules. In 1940, he cautiously applied this suggestion to foreign adoptions.<sup>5</sup> And in 1953, when *Travers v. Holley* accepted the thesis that recognition may be approached through domestic jurisdiction, there was no suggestion of any limitation to foreign divorces. That decision recognized a foreign divorce, but the premise upon which the judgment rests is equally applicable to foreign judgments generally.<sup>6</sup> Its application to foreign nullity decrees covers an especially wide area of modern social problems and I discuss it more fully in part V.

These introductory remarks would not be complete without reference to a problem arising occasionally out of the wording of the test for recognition: Did the foreign court have jurisdiction? The divorce or nullity decree may not be the judgment of a court at all. It is sufficient to suggest, at the moment, that the foreign tribunal, be it legislature, religious body or functionary, or one of the parties themselves, should be treated for this purpose in the same manner as a court.

## II. *Is the Present Basis for Recognition Sound?*

The preliminary survey of the common law's approach to recognition of foreign judgments shows an emphasis upon jurisdiction. If the foreign court has jurisdiction in our eyes, its judgment will be recognized. The survey also shows that foreign courts are normally said to have jurisdiction when acting in circumstances comparable to those in which our courts act. Is recognition so based sound? What are the problems of recognition? In the case of judgments *in personam*, very often for damages expressed in a monetary sum, the problems are primarily those of enforcement. The judgment creditor seeks to recover what was awarded to him by a foreign court. Should he be allowed to do so? The policy behind recognizing and enforcing foreign judgments granted in circumstances comparable to those in which the local court would have acted appears on the whole to be eminently satisfactory for personal judgments. But may the same be said of judgments or orders affecting status?

Judgments which define a person's status present additional

<sup>5</sup> (1940), 18 Can. Bar Rev. 491, at p. 495; I have suggested elsewhere that O'Connell has misinterpreted Falconbridge's views on foreign adoptions: (1956), 34 Can. Bar Rev. 507, at pp. 526-528.

<sup>6</sup> See for further discussion of *Travers v. Holley* in relation to foreign judgments other than decrees of divorce, Kennedy (1954), 32 Can. Bar Rev. 359, at pp. 368-386; (1957), 35 Can. Bar Rev. 123.

problems. Domestically, a court order is not necessary for the creation of many legal relationships giving rise to status. The acts of birth, marriage and death give rise, for example, to the status involved in legitimacy, illegitimacy, legitimation, widowhood. Recognition of a status is useless by itself. Persons having a particular status are accorded specific rights and responsibilities. So, too, in the case of adoptions, divorces, nullity decrees and other court orders affecting status, emphasis is placed upon the rights and obligations flowing from a recognition of the status. The problem is not one of "enforcement" but of attributing incidental effects to a recognized status. The conflict problem, then, is two-fold. Should the status acquired abroad be recognized and, if it is, what law governs the selection of rights and obligations attributed to that recognized status, whether acquired without (marriage), or with (divorce), judicial intervention?

On what basis, then, should foreign judgments affecting status be recognized? Is it sufficient to say that, if the forum would have accepted jurisdiction to alter or declare status in circumstances comparable to those in which the foreign court acted, the foreign judgment should be recognized? Or, alternatively, should status be set up on a pedestal by itself—a pedestal of domicile? Because the *lex domicilii* is applied to so many questions of *choice of law* when determining the validity and effect of acts of status, should the *court* of the domicile exclusively control changes of status? Many writers and judges have thought so.

I suggest that any rule requiring domicile as a basis of the *recognition* of foreign judgments affecting status is unsound on two grounds. The rule may be an attempt to reflect our choice-of-law rules for determining status questions. But the choice-of-law rules do not specify courts—they specify laws to be used in courts. Should it matter what court exercises jurisdiction, whether it be the court of the domicile or not, so long as the proper *law* is applied by that court? The questions of choice of law and of jurisdiction are entirely separate questions, as the rules for nullity of marriage are at last making clear. But further, apart from the first point, is it fair to refuse recognition to foreign status-judgments not made by a court of the domicile of one of the parties when so many of the courts where recognition arises are more and more moving away from domicile as the sole basis for domestic jurisdiction in questions of status? It is no longer the sole basis in divorce; it is not, and may never have been, the sole basis in nullity of marriage or in adoption.

The community has an interest in having a person's status acquired in one territory recognized and accepted the world over. But so long as all countries do not use the same bases for determining a status, either locally or abroad, we shall have marriages valid in one place, invalid in another. The refusal by some countries to accord validity to foreign judicial acts of status, except when acquired in a court of the domicile of one or all of the parties, provides rather than removes conflicting rulings on status. The couple divorced in Nevada, for instance, remains married in Alberta. Should we abandon, in the light of an evident desire to obtain uniform recognition of status, not only the test of domicile, now outmoded, but also the test based upon *Travers v. Holley*? That case does not avoid "limping marriages" and other unrecognized acts of foreign status where the foreign court acted in circumstances where the present forum would not have done so. And this result is true in a large number of instances.

Many divorces granted in England today may not be recognized as valid in much of the common-law world, because England has provided a further main basis of domestic jurisdiction—residence for three years—which is not used in most other countries. Should Canadian courts accept, as they implicitly do in so many other fields of law, the divorce decrees of an English court without question? If so, why not Nevada divorces? Or should we continue with the *Travers v. Holley* test of comparability of jurisdiction, but forget the Privy Council's pronouncement, regardless of the facts of life and of law, that husband and wife are one for purposes of domicile?<sup>7</sup> Is a wife's three-years residence comparable to domicile and a sufficient basis for recognizing English divorces in those countries where, as in Canada, the United States, parts of Australia, New Zealand, South Africa and some continental countries, domicile of one party is the basis for domestic jurisdiction? In doing so, some barriers to an acceptance of any and all foreign judicial acts of status would be preserved, yet an outdated rule would be removed.

Should any barrier to acceptance of a foreign-acquired status be preserved? Canada refuses to accept as valid most Nevada divorces to which Canadians are parties. Should she continue to do so? As long as some countries offer considerably fewer hurdles than others to a change of status, public policy may require, in those countries with more hurdles, some limits upon a free acceptance of all foreign changes of status. Few will suggest a complete

<sup>7</sup> *Attorney General for Alberta v. Cook*, [1926] A.C. 444 (J.C.P.C.).

equality of hurdles before recognition is accorded. Whatever restriction is applied should merely be sufficient to bar wholesale avoidance of local policy. Marriage and divorce are obvious illustrations. (I need not enter here into the hypocrisy of divorce laws in parts of the British Commonwealth, which detracts from the usefulness of the illustration.) An ideal world order would probably allow any court to alter a person's status provided the law appropriate to the parties or to one of them is applied. So long as this approach is ignored by the divorce laws of Britain, Canada, the United States, most of Australia, New Zealand and other major common-law nations, the present basis of recognition will, and should, continue to prevail. This basis has much room for development, as a detailed discussion of foreign divorces and nullity decrees shows.

### III. Foreign Divorces: General Rules

Any recognition of a foreign divorce depends today upon the bases of jurisdiction exercised by the recognizing forum. From 1858 to 1937, with some uncertainties from time to time, the only basis of local jurisdiction in England was the common-law basis laid down by the Judicial Committee in *LeMesurier*<sup>8</sup> and accepted by the English courts since then.<sup>9</sup> So long as domicile was the basis of local jurisdiction, it is not surprising that the English courts used it as the basis for recognizing foreign divorces.<sup>10</sup> Were the parties

<sup>8</sup> [1895] A.C. 517 (J.C.P.C.).

<sup>9</sup> Subject to two "hardship" cases later considered to be bad law: the *Stathatos* and *De Montaignu* cases in 1913: [1913] P. 46, 154.

<sup>10</sup> Griswold has suggested that in *LeMesurier*, "the jurisdictional rule was tied to the views then existing on recognition": (1951), 25 Aust. L.J. 248, at p. 265. I suggest that the opposite was, if anything, true. There were some views expressed in two House of Lords cases discussed in *LeMesurier*, that only divorces granted by the domicile would be recognized in England, but the same speakers also suggested that only the court of the domicile had jurisdiction. Neither case, in deciding that a Scottish divorce of parties domiciled in England would not be recognized in England, accepts the Scottish divorce as valid in Scotland. In both cases, much emphasis was placed, as *LeMesurier* notes, upon the "mere mockery and collusion" of the Scottish proceedings. In addition, it is difficult to say that the earlier case, *Dolphin v. Robins* (1859), 7 H.L.C. 390, accepted any basis less than domicile for domestic jurisdiction in Scotland and, when ultimately questioned, the House of Lords in dealing with Scots, not English, law in no way suggested that the divorce in the *Dolphin* case was valid in Scotland. In fact they treated the decision as showing that, in Scots law, Mrs. Dolphin could not acquire a separate domicile in Scotland or elsewhere, not even by means of a Scottish divorce based on something less than domicile: *Mackinnon's Trustees v. The Lord Advocate*, 1920 2 S.L.T. 240 (H.L.). In the other case, *Shaw v. Gould* (1868), L.R. 3 E. & I. 55, it is true that the house proceeded on the premise that the divorce was valid in Scotland, but only Lord Colonsay indicated any approval of the premise. Lords Cranworth and Westbury strongly expressed the opposite view. I should hesitate to say that *LeMesurier* tied the jurisdictional rule

domiciled, in the English meaning of domicile, in the foreign territory where the divorce was obtained? If so, the divorce was recognized in England regardless of the grounds upon which it was obtained.

The basic rule of recognition—domicile—has been so long a part of our common law and is so well-known and accepted that it needs no further elaboration. For a time, some of us misconstrued its origin and, forgetting that the domestic test of jurisdiction had been judicially based exclusively on domicile, were inclined to argue that domicile was *the* basis for changing status. A divorce granted abroad on any other basis was bad in England, not because the jurisdictional basis differed from that used in England, but simply because the parties were not domiciled in the territory where the divorce was obtained. *LeMesurier* lent apparent substance to this belief with its acceptance of Lord Penzance's earlier statement that it is both just and reasonable "that the differences of married people should be adjusted in accordance with the laws of the community to which they belong, and dealt with by the tribunals which alone can administer those laws".<sup>11</sup> The statement does not, however, justify the assertion that only the *court* of the domicile may adjust or deal with marital differences. Lord Watson and Lord Penzance were attempting to justify the exclusive jurisdiction of the court of the domicile, but the language of their reasons says something that presents quite a different solution—that the *law* to be applied, by whatever tribunals that apply it, is the law of the domicile. Even though directly contrary to Lord Watson's conclusion, the reasoning would permit a court of the residence, applying the law of the domicile, to grant a divorce.

The conclusion drawn by Lord Watson that only the court of the domicile has jurisdiction has coloured much of our thinking and prevented us from seeing exactly what Lord Penzance did say. The latter's emphasis in his reasoning, not upon the *jurisdiction* of the court of the domicile but upon the application of the *law* of the domicile, might have foreshadowed an entirely different approach to "then existing" views on recognition. In fact, in the one clear passage in *LeMesurier*, where Lord Watson refers to Bar, that author is quoted as saying that, subject to statute, the only competent judge is that of the domicile or nationality, and as then adding that a divorce granted elsewhere than in the place of domicile or nationality is to be regarded in other countries as inoperative. These passages not only tie recognition to jurisdiction but show that as long ago as Bar's time recognition on bases other than domicile was possible where other bases for jurisdiction prevailed.

<sup>11</sup> Lord Penzance in *Wilson* (1872), L.R. 2 P. & D. 435, at p. 442, concurred in "without reservation" by Lord Watson in *LeMesurier*, [1895] A.C. 517, at p. 540 (J.C.P.C.).

to status. Discussions of recognition might have ignored "jurisdiction". Is the jurisdiction of the foreign court relevant so long as the foreign court applies the law of the domicile?

But Lord Watson prevailed on domestic jurisdiction. Without domicile an English court lacked power. What, then, of recognition? In an earlier part of his judgment, Lord Watson had apparently accepted as valid the idea that "foreign" jurisdiction depended upon domestic jurisdiction. But lawyers, having made this initial election on domestic jurisdiction, were inclined to forget that recognition merely followed the domestic rule. The emphasis came to be put, not upon the nature of the problem of recognition and its solution in the common law on the basis of recognizing in others what is done locally, but upon the result obtained by the application of that solution to foreign divorces at the turn of the century—domicile. The rule by which the result was reached was too often lost in the glorification of the result. It was an easy step to the concept introduced in 1906 that divorces accepted by the law of the domicile should be recognized in England. Thus, in *Armitage v. Attorney-General*,<sup>12</sup> an English court held valid in England a divorce granted by the state of the wife's residence (South Dakota) because the divorce was accepted as valid by the law of the domicile (New York). The case has been hailed as an acceptable exception to a recognition rule based solely on domicile in the foreign territory. It will, it is said, validate in the Commonwealth some continental divorces (where the divorce granted by the nationality is recognized in the domicile, being a country which also grants divorces on the basis of nationality) as well as some "deserted-wife" divorces granted in Canada, provided that the husband's new domicile is in Canada.<sup>13</sup> These things it does. And, despite *Morris*,<sup>14</sup> it does one thing more which is of considerable importance to Canada. It makes valid in Canada (and elsewhere in the Commonwealth) divorces granted in Nevada, or other American divorce mecca, in cases where the husband was domiciled in another state of the United States and that other state recognizes the divorce as valid, as it is bound to do in many cases

<sup>12</sup> [1906] P. 135 (Barnes P.).

<sup>13</sup> *Morris*, Recognition of Divorces Granted Outside the Domicile (1946), 24 Can. Bar Rev. 73, at pp. 82-83.

<sup>14</sup> *Ibid.*, at pp. 83-85. Griswold's criticism of *Morris* on this point seems unanswerable: *op. cit.*, footnote 10, at pp. 263-264. Today, *Walker*, [1950] 2 W.W.R. 411, [1950] 4 D.L.R. 253 (B.C.C.A.), is an application of the *Armitage* rule to this very type of case. A Nevada divorce was recognized in British Columbia because the court was satisfied that the state of domicile (California) would accept this particular divorce as valid.



under the federal constitution. I need not enlarge upon these applications of the *Armitage* rule.<sup>15</sup>

On the other hand, the *Armitage* case has been severely criticized by Morris.<sup>16</sup> Few have accepted Morris's arguments. With respect, I suggest that Morris is right in saying that the case is unsound, but not for any of the four reasons he advances. The court ignored the common-law basis of recognition of foreign judgments in answer to the question whether the foreign court has jurisdiction in the eyes of the English court: Was it exercising a jurisdiction comparable to that which an English court would have exercised? No. The foreign court did not have jurisdiction in our eyes, and the divorce was not recognizable.<sup>17</sup> Not even Lord Watson denied the basic common-law approach to foreign judgments. His quotation from Bar tacitly approves it.<sup>18</sup> It is probably now too late, however, to question the *Armitage* "exception", as Dicey calls it.<sup>19</sup> Practically all writers approve it, and it has been followed in a number of parts of the Commonwealth. Had Lord Penzance's reasoning about the law of the domicile prevailed, rather than Lord

<sup>15</sup> See Morris (*ante*, footnote 13), Griswold (*ante*, footnote 10) and Kennedy (1954), 32 Can. Bar Rev. 211.

<sup>16</sup> *Ante*, footnote 13, at pp. 75-81.

<sup>17</sup> Subject to one qualification in 1906, but not since 1926: the unity of domicile of husband and wife was not firmly established in 1906. If the wife had a *bona fide* domicile in South Dakota at the time of her divorce there, the result might have been different, had she been deserted. Since *Attorney-General for Alberta v. Cook*, [1926] A.C. 444 (J.C.P.C.), this qualification cannot stand.

<sup>18</sup> See, *ante*, footnote 10, last two sentences. This point was overlooked by the Victorian Full Court in *Fenton*, [1957] V.R. 17, at p. 24, where O'Bryan J. quotes Lord Watson's references to Bar. The *Fenton* report arrived long after completion of this manuscript. The court refuses to follow the *Travers* case, believing that it is inconsistent with *Shaw v. Gould* (H.L.) and obiter dicta in other "leading" cases. The difficulty is that the House of Lords could not have decided in *Shaw* the problem in *Travers* because the jurisdiction of the English court at the time of *Shaw* (1868) was assumed by the judges in *Shaw* (correctly, according to *Le-Mesurier*) to be limited to domicile. It was not so limited by the time of *Travers* (1953). Blackburn (1954), 17 Mod. L. Rev. 471, at p. 472, had argued that *Travers* (C.A.) was inconsistent with *Shaw* (H.L.). Their lordships in *Shaw* did state that recognition was dependent upon domicile of the parties in the territory granting the divorce. And Blackburn's thesis is that this was the decision, not just obiter. The court in *Fenton* refers to Blackburn, but was not apparently referred to the answers to Blackburn by Graveson (1954), 17 Mod. L. Rev. 501, at p. 513; and myself (1955), 4 Int'l and Comp. L. Q. 389. All that *Shaw v. Gould* decided was that a divorce granted in a place which was not the domicile would not be recognized in England at a time when England's sole basis of domestic jurisdiction was domicile. If the *Shaw* statements are to be taken literally, *Armitage*, *ante*, footnote 12, would equally be inconsistent with that decision. Blackburn and *Fenton* would deny the whole process of distinguishing and of determining exactly what an earlier case actually did decide. The generalities of *Shaw* cover the *Travers* facts; the decision does not.

<sup>19</sup> (6th ed., 1947) p. 376.

Watson's limitation of domestic jurisdiction to the *court* of the domicile, the *Armitage* case would have been a logical step in the development of English recognition rules.

With domicile as the sole basis of jurisdiction at English common law, two problems arose. Many cases of hardship resulted from a combination of the domicile rule and the rule, finally enshrined in the *Cook* case,<sup>20</sup> that husband and wife have the same domicile so long as they are legally husband and wife, regardless of the facts of domestic life. Deserted or even separated wives could not secure a divorce except in the territory of the husband's domicile. That was a domestic problem requiring a domestic solution. On the other hand, other countries did not strictly adhere to the domiciliary basis of jurisdiction. More and more, the world was departing from it. And in the United States, at common law, the wife might obtain her own domicile when living in *bona fide* separation from her husband, as if she were a *feme sole*. Foreign divorces in these cases were not receiving recognition in those countries adhering to the domicile basis of jurisdiction.

The gradual provision for hardship cases in domestic law throughout the Commonwealth, eventually reaching England in 1937, is well-known. Griswold has provided a very useful summary.<sup>21</sup> More recently, in 1949, England and Scotland have gone farther and provided a general basis of residence for three years in the case of a wife's petition. Western Australia has slight variations of the English provisions.<sup>22</sup> The legislation, by departing from the domiciliary basis of domestic jurisdiction, has enlarged the number of situations where foreign divorces will not be recognized. The effect of the English Court of Appeal's recent decision in *Travers v. Holley* applying the basic recognition rule to the widened domestic jurisdiction has been so widely discussed that only a short mention will be made here.<sup>23</sup> In that case the English court recognized as valid in England a divorce granted in New South Wales to a wife who was not domiciled in that state but who had been deserted while domiciled there. By statute, the state court had jurisdiction within the state to grant a divorce in such circumstances. England (as well as Canada, other Australian states, New

<sup>20</sup> *Ante*, footnote 17.

<sup>21</sup> *Ante*, footnote 10, at pp. 249-255.

<sup>22</sup> *Matrimonial Causes and Personal Status Code*, 1948, No. 73, s. 14. The code provides, *inter alia*, the following bases: (1) residence of both husband and wife; (2) domicile at the time of separation by agreement or court order; and (3) "living" in the state for three years plus domicile had wife been a *feme sole*. The last two bases apply to wives only.

<sup>23</sup> See for full discussion, Kennedy, "Reciprocity" in the Recognition of Foreign Judgments: The Implications of *Travers v. Holley* (1954), 32 *Can. Bar Rev.* 359, and comments referred to in footnote 10 of that article.

Zealand and elsewhere) had also by statute given its court a comparable jurisdiction. The English court therefore held that the New South Wales court had jurisdiction in English eyes and recognized the divorce.

The principle for which *Travers v. Holley* stands is the recognition as valid in others of something which we ourselves are prepared to do. The important feature of the court's exposition of the principle is that it does not require the law of both places to correspond. English courts "should recognize a jurisdiction which they themselves claim". In applying the recognition principle to the new situations, care must be taken not to compare the stated jurisdictions of each. When domicile was England's sole basis of domestic jurisdiction, the English looked, in cases of foreign divorces, not to the stated bases of jurisdiction of the foreign court under its own law—for example, Nevada's statutory presumption of domicile upon six weeks residence—but to the actual facts of the particular case. Was the husband domiciled in Nevada in the English sense? If so, England would recognize, regardless of what Nevada law said was the basis of its jurisdiction. With the enlarged basis of domestic jurisdiction, an English court will not compare laws, but will merely ascertain whether in roughly comparable circumstances it would have acted. This point was neglected in the admittedly hasty decision of Davies J. in *Dunne v. Saban*,<sup>24</sup> where his lordship compared laws, not facts. On the facts, the Florida divorce would have been recognized in Canada, assuming the wife had been deserted. But Davies J. looked not to the wife's actual residence in Florida of two years (not to mention her domicile there in the American sense) but to the Florida law which presumed domicile on ninety days residence, an unfortunate blunder.

This point was expressly alluded to by Mr. Commissioner Latey in his recent decision in *Arnold*,<sup>24</sup> decided since this article was originally prepared. In that case, an English court recognized as valid in England a divorce obtained in Finland by a wife whose husband was domiciled at the time of the divorce in England. The husband had been domiciled in Finland at the time of his desertion from the matrimonial home and the facts therefore, on the surface, look comparable to *Travers v. Holley*. However, in

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<sup>24</sup> *Dunne v. Saban*, [1955] P. 178; [1954] 3 All E.R. 586 (Davies J.). Cf. Ziegel (1955), 33 Can. Bar Rev. 475; Kennedy, *ibid.* 516, at p. 517; (1955), 4 Int'l. & Comp. L. Q. 389. See, more recently, *Levett*, [1957] 1 All E.R. 720, at p. 726 (C.A.); *Arnold*, [1957] 1 All E.R. 570 (Mr. Commissioner Latey).

the *Travers* case, both England and New South Wales had laws giving the divorce court jurisdiction, notwithstanding the husband's domicile abroad, where the husband had deserted the wife while domiciled within the territory. In the *Arnold* case, Finland's law was not quite the same as England's law on this subject, but there was no question that Finland had jurisdiction under its own laws in the circumstances of the *Arnold* case and there was therefore an opportunity for comparability of facts, not laws. On this point, the court said, at pages 575-576:

The fact that only six weeks' or sixty or ninety days' residence suffices in certain states in the United States of America, to found jurisdiction seems to me to be beside the point if in fact there had been, say, two years' residence or more, or even less, if the residence is genuine and bona fide and not merely for the purpose of getting a divorce in a convenient court. The necessity laid down by statute in England for three years' residence in the case of a wife whose husband is domiciled abroad, is probably due to the notion that our courts should not be used for the convenience of birds of passage and that the court had to satisfy itself that the petitioning wife had chosen her home in England, though by operation of law her domicile was that of her husband domiciled abroad, and living either abroad or in England.

It is true that the court then goes on to refer to the wife's one-year desertion under Finnish law and what is said to be the English period of three years desertion. There is a slight confusion here between the grounds for divorce and the basis of jurisdiction in a court. The court in the *Arnold* case had at an earlier stage in its judgment, at page 575, made it clear that comparability of grounds for divorce had no place in the problems of recognition of the foreign divorce and therefore of *Travers v. Holley*, unless of course the foreign law where the divorce was granted required, in the case of foreigners, some comparability on the question of grounds between the national or domiciliary law and the law of the place where the divorce was being granted. It would seem clear, therefore, despite the confusion, that the court was directing its mind to the question of jurisdiction when it goes on to say, immediately after the previous quotation at page 576:

It is true that in *Travers v. Holley* the period of desertion prescribed was the same as in the laws of both England and New South Wales—three years—whereas in Finnish law one year's desertion suffices for a decree. But, in the present case, the desertion, as found by the Finnish court, was for far more than three years, and surely the principle of comity and reciprocity laid down in *Travers v. Holley* must be applied?

Anything that the court did say on this point was of course

obiter because of the very long residence of the wife in Finland before the granting of the divorce there, but it is very useful to have this point made clear—that facts, not laws, should be looked to. And in *Levett*<sup>24</sup> Ormerod L.J. states, still more recently, the principle of the *Travers* case in terms which leave no doubt that the comparison is between the facts of the individual case applied to the law of each of the two countries involved, and not the law generally. It is useful also to note that in *Arnold* the court declined to accept the view of Davies J. in the *Dunne* case that the principle of reciprocity in *Travers v. Holley* was obiter.

On the other hand, when we look to see whether the English or other recognizing court would itself have exercised jurisdiction in comparable circumstances, we should not be artificially strict in examining comparability. If the wife had been resident in Florida for two years, eleven months and three weeks, an English court which would exercise jurisdiction in the case of residence for three years should recognize the Florida decree. Comparability requires not an exact identity of details but substantial connection with the foreign jurisdiction. England has provided for wives the three-year residence basis as an alternative to the theoretical legal concept of domicile. I have suggested elsewhere that we should treat any substantial connection with the foreign territory which really links the party involved to that territory as sufficient.<sup>25</sup> In *Dunne*, the wife's Florida residence of two years plus her domicile there (in the separate sense allowed to married women at common law in the United States) showed a substantial factual connection with Florida. Equally, a divorce in a continental country on the basis of nationality shows a substantial legal connection with the country exercising jurisdiction.<sup>26</sup> The former is comparable to England's three years residence; the latter to England's basis of domicile. The full application of the rule that recognition of a for-

<sup>25</sup> (1954), 32 Can. Bar Rev. 359, at pp. 363-367; (1955), 33 *ibid.* 516 at pp. 517, 520-521; (1955), 4 Int'l. & Comp. L. Q. 389. Ziegel, and possibly Griswold, would appear to limit the recognition rule to cases where in the factual situation the recognizing court would itself on those exact facts, transported to the recognizing country, have exercised jurisdiction. Ziegel (1953), 31 Can. Bar Rev. 1077; (1955), 33 *ibid.* 475, at pp. 481-482. Griswold (1951), 25 Aust. L.J. 248, at pp. 264-265. Recently the English Court of Appeal has refused recognition to a divorce granted to a husband in Germany where the wife was ordinarily resident, though for a period of less than three years: *Levett*, *ante*, footnote 24. The court proceeded upon the technical ground that it was a husband's foreign divorce, not a wife's—an unfortunate approach.

<sup>26</sup> Graveson has shown that there is already a "little wedge of precedent" for this proposition in the English case of *Mezger*, [1936] 3 All E.R. 130, at pp. 132, 136; (1952), 37 Grotius Society Transactions 149, at pp. 156-157.

sign judgment depends upon local jurisdiction is yet to be worked out, now that local jurisdiction has been put, in many countries, upon a wider base.

Any study of divorce—domestic and foreign—makes one conclusion all too readily apparent. In Canada and other lands where legislative change is understandably difficult, the courts should dissolve the artificial unity of domicile between husband and wife. There is a solemn obligation to recognize that the decision of the Judicial Committee was a heritage from a long-departed age when wives were legally under the subjection of man. Such is no longer true. *Cessat ratiōne, cessat lex*. The wife's separate domicile is a natural area not only for solution through normal growth and development of the common law, but one where our judges, as statesmen, can give the kind of leadership in a world of politicians that restores our faith in the common law. May it not be long before the Supreme Court of Canada declines to follow the *Cook* case.<sup>27</sup>

#### IV. Foreign Divorces: Special Problems

Rules for the international recognition of foreign divorces must take account of non-judicial divorces, *ex parte* divorces, dissolutions of polygamous marriages. Graveson has provided us with an excellent summary of these problems and England's method of dealing with them.<sup>28</sup> I propose to discuss certain aspects only.

A foreign union that is not treated in the forum as a marriage will, of course, not need dissolution in the forum, nor will a foreign dissolution of such a marriage need recognition. There has been some suggestion, not yet overruled, that a foreign polygamous marriage will not be recognized as a valid marriage, at least for some purposes, in England and other "Christian" countries: *Hyde*.<sup>29</sup> *Hyde* is said by the reporter to be "interesting because of

<sup>27</sup> In England, the Standing Committee on Private International Law recommended in its first report (Cmd. 9068/54) that a wife who has been judicially separated be allowed for all purposes a separate domicile. More recently the Royal Commission on Marriage and Divorce, whose report (Cmd. 9678/56) was recently reviewed in this Review by Mr. Kent Power (1956), 34 Can. Bar Rev. 1181, recommended a separate domicile for any wife "who is living separate and apart from her husband", but only for purposes of establishing jurisdiction in matrimonial causes (para. 825). Paragraphs 849 and 850 make it clear that the separate domicile principle applies also for purposes of recognition. The most interesting feature in this aspect of the report is that despite the commission's refusal to approve, in principle, of a separate domicile for wives, it did make a very clear and unqualified recommendation for a separate domicile in matrimonial causes.

<sup>28</sup> *Ante*, footnote 26, at pp. 158-164.

<sup>29</sup> (1866), L.R. 1 P. & D. 130, at p. 133; 12 Jur. N.S. 414 (Sir James Wilde); criticized but followed in, *e.g.*, *Lim*, [1948] 2 D.L.R. 353 (B.C., Coady J.).

the clear exposition . . . of the matrimonial law of Christendom as opposed to polygamy"!<sup>30</sup> In that case, Lord Penzance (as he later became) refused recognition in England to a marriage in Utah between two Mormons originally from England, celebrated at a time when polygamy was lawful in Utah. The evidence was to the effect that the marriage was valid in the United States. It was the first marriage of each party to it. The husband was entitled to but did not take further wives. The English court declined to recognize the marriage because it was "non-Christian" in the sense that it was not the voluntary union for life of one man and one woman to the exclusion of all others. But Lord Penzance placed limits: it was only invalid for purposes of using the "remedies, the adjudication or the relief of the matrimonial law of England". Specifically, its validity for rights of succession or legitimacy was left open. Since then, the validity of polygamous marriages for these purposes, even to the extent of recognizing both wives, if there are two, is clearly recognized.<sup>31</sup> What about Mr. Hyde's chances of remarriage? His divorce petition in England was dismissed because he was not "married". Could he remarry in England on the assumption that he was a bachelor? Was the marriage, valid for succession and other purposes, invalid for purposes of marriage and bigamy *as well as* the "remedies, adjudication or relief" of the English matrimonial law?

Suppose Hyde had obtained a divorce from his wife under Utah law at a time when he was domiciled there.<sup>32</sup> The marriage was valid for some purposes. Would a judicial dissolution in the domicile dissolve the marriage in England for those purposes for which it would have been valid there? Or must recognition be refused to the dissolution of a polygamous marriage simply because we might ourselves refuse to dissolve it (if *Hyde* is good law)? Graveason would appear, if I understand his submission correctly, to suggest that we are sound in refusing recognition to, for example, an Egyptian divorce on the ground that the divorce was applicable to a "non-Christian" type of marriage and could not be applied to a marriage in England in English form, even where the husband at the time of the marriage was, and afterwards continued to be, domiciled in Egypt.<sup>33</sup> He is dealing with the dissolution, under a

<sup>30</sup> 12 Jur. N.S. 414, at p. 415.

<sup>31</sup> *E.g., Re Lee Cheong*, [1924] 1 D.L.R. 1166 (B.C.C.A.).

<sup>32</sup> It is not clear from any of the four reports that he ever lost his domicile of origin in England. The Law Journal says he "returned to England" (he was an English convert in London to the Mormon faith and travelled as a missionary).

<sup>33</sup> *Conflict of Laws* (3rd ed., 1955) p. 399, citing *R. v. Hammersmith*,

law permitting polygamy, of a marriage allegedly "Christian". And if his view is sound that the method of dissolution is "inappropriate to such a union", then logically, I suppose, it would be appropriate to a polygamous marriage and we should recognize the suggested Utah divorce. One difficulty with this analysis is that the reasoning which Graveson accepts as sound may not be so. It is difficult to be categorical in the realm of public policy. If a couple, one of whom is English, marry in England, go to a foreign country (perhaps the domicile of origin of one of the parties), establish a domicile there, and after many years there one of them uses the facilities for divorce under the law of that country, their domicile, it is difficult to deny recognition. Where is the line to be drawn between *Maher* and such a case? Perhaps none should be drawn, and *Maher* should be overruled.<sup>34</sup> If so, an unfortunate anomaly is removed. By ruling out the Egyptian divorce in *Maher*, yet making it quite clear that the wife was domiciled in Egypt, as Barnard J. did, the wife was not validly divorced, in English eyes, by the law of her domicile and, unless Egyptian law provided other methods for mixed religious marriages, perhaps could not be. It was only the statutory provision of a new basis for jurisdiction (residence for three years) in 1949 that allowed Mrs. Maher to obtain a divorce in England on the ground of desertion.

The cases on Egyptian divorces raise the question of divorces by non-judicial means. Must the foreign divorce be granted by a court before it is recognized? I suggest not.<sup>35</sup> We are recognizing a foreign act of status of a type normally but not exclusively accomplished in the Commonwealth and the United States by a court order. Some acts of status are occasionally accomplished without the intervention of the courts—adoption in two states

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[1917] 1 K.B. 634 (C.A.); *Maher v. Maher*, [1951] P. 342; [1951] 2 All E.R. 37 (Barnard J.). The other major basis of the decision in these two cases, founded upon an obvious misinterpretation of Lord Brougham's remarks, taken out of context, in *Warrender* (1835), 2 Cl. & F. 488, at pp. 534-535 (H.L.), is clearly unfounded: see (1955), 33 Can. Bar Rev. 379.

<sup>34</sup> It may no longer represent English law. The English Royal Commission can see no merit in refusing recognition to the divorce granted by the religious law of the husband's domicile, if that law is one of the appropriate matrimonial laws applicable to the parties; it makes no difference whether the wife adheres to her husband's religion or not, so long as the law of the domicile permits the religious law to dissolve the marriage. If so, has the royal commission in effect denied the basis in public policy which is alleged to be the ground upon which the *Hammersmith* and the more recent *Maher* cases were decided? Cf. report, *ante*, footnote 27, para. 863-864.

<sup>35</sup> The English royal commission says, fortunately, of non-judicial divorces, apparently both legislative and otherwise, that it "is probable that . . . English or Scottish courts would grant recognition": Report, para. 865.



of Australia.<sup>36</sup> We should treat the foreign method as comparable to our judicial proceeding. No one can require exact comparability in any question incidental to status—forms of marriage ceremony, effects of marriage, methods of divorce or adoption or legitimation. What must be ascertained is whether, despite differences, the acts in question do constitute in substance something comparable to the local status with which it is being compared and, if not, that it be treated separately on its merits. Does a statute of the parliament of Canada dissolving the marriage of persons domiciled in Canada, wherever they were married, constitute a divorce as it is generally known to the common-law world? Certainly. And I suggest that the concurrent power of a court in some cases to grant a divorce to the same couple does not deprive the legislative divorce of its character as a divorce.<sup>37</sup>

The long history of legislative divorce in England will be recalled. It would be difficult for a common-law court to deny validity to a foreign legislative divorce granted to persons domiciled within the territory of the legislature. There is no real problem here, not even if the divorce is granted to persons not domiciled within the territory of the legislature, so long as a comparable jurisdictional basis exists. Thus England should recognize Canadian parliamentary divorces granted to, *inter alia*, persons domiciled in Canada, a wife deserted while domiciled in Canada or a wife resident in Canada for three years.

But what of other types of non-judicial divorces? The laws of some countries have from time to time allowed divorces by mere agreement of the parties before a marriage registrar or consul.<sup>38</sup> Should a divorce obtained under such a law at a time when the parties are domiciled there be recognized? Yes, provided it is an act which dissolves the marriage ties—is comparable in substance to our “divorce”. The two cases of Egyptian divorces already referred to<sup>39</sup> rely upon a statement from Lord Brougham in the

<sup>36</sup> See, Kennedy (1955), 33 Can. Bar Rev. 751, at p. 753.

<sup>37</sup> Normally the Canadian Parliament restricts its divorces to persons domiciled in a province with no judicial divorce, but if there is doubt in which of two Canadian provinces, one with judicial divorce and one without, an applicant is domiciled, Parliament accepts jurisdiction: Canada, Senate Debates, 1951 (1st sess.), p. 648. In fact, the chairman of the Senate Divorce Committee stated that he doubted if the committee could refuse to hear a petitioner from any province, a remark approved of by a former government leader in the Senate (Mr. King): *ibid.*

<sup>38</sup> Cf. Russian law described in *Nachimson*, [1930] P. 217 (C.A.); while this case did involve the validity of such a divorce, only the preliminary proceedings to determine the validity of the marriage appear to have been reported. What was the ultimate decision on the validity of the divorce?

<sup>39</sup> *Ante*, footnote 33.

House of Lords, where his lordship refers to countries "in which marriage could be dissolved without any judicial proceeding at all, merely by the parties agreeing in *pais* to separate". Unfortunately a number of writers and judges, including those in the two cases involving Egyptian divorces, misconstrued his lordship's statement and thought that he was declaring absurd any suggestion that we should recognize a non-judicial divorce. I have shown elsewhere<sup>40</sup> that this was not the case, and that his lordship was dealing with an argument by counsel on jurisdiction — a marriage is governed, for purposes of dissolution, by the law of the place of celebration. His lordship pointed out that a logical consequence of the argument would be that if the marriage was celebrated in a country with the type of law to which he referred, England ought to allow parties domiciled in England so to dissolve their marriage. It was this proposition, founded on counsel's argument, which Lord Brougham said was absurd. It has nothing to do with the recognition of foreign divorces obtained under such a law by parties connected at the time of divorce with that law by reason of domicile, or, today, in the case of a wife seeking recognition in England, residence for three years. To the extent that the *Hammer-smith* and *Maher* cases<sup>41</sup> are founded on Lord Brougham's statement, they cannot stand.

On the other hand, Romer L. J. in *Nachimson* not only does not condemn the type of non-judicial dissolution by consent then available in Russia but in obiter impliedly approves a divorce of this sort. "But the dissolution in Russia is as much or as little a dissolution by the State as it is in England."<sup>42</sup> It is true that Romer L. J. is dealing with an argument that a marriage dissoluble by an act of state may be a Christian marriage but that a marriage dissoluble simply by act of the parties without intervention of the state is not a Christian marriage. In holding that in both countries the dissolution is an act of state, he says that the only distinction between the two laws lies in the circumstances to be proved by the party applying, and in the official who performs the act of state. "In Russia the . . . official . . . is a registrar. In this country he is a judge." There is no suggestion, directly or indirectly, that the non-judicial nature of the dissolution makes it any the less effective or that England should refuse to recognize it.<sup>43</sup> (The Russian law did require the recording of the parties' agreement to separate and terminate their marriage before a vital statistics officer.)

<sup>40</sup> *Ibid.*

<sup>41</sup> *Ibid.*

<sup>42</sup> *Ante*, footnote 38, at p. 245.

<sup>43</sup> The same is true of the reasons for judgment delivered by Lord Hanworth M.R. and Lawrence L.J.

Further, it should make no difference that the law of the domicile uses the religious law of one of the parties as its divorce law. There should be no objection to an Egyptian or Israeli divorce simply because the law of Egypt applies the law of Islam to marriages where one or both of the parties adheres to that faith, or that Israeli law applies Hebrew law to Hebrews. It is probably fair to say that Barnard J. in *Maher* did not accept counsel's argument based upon the fact that the divorce was obtained under the husband's religious law. And, in *Har-Shefi*,<sup>44</sup> the court recognized such a divorce, the parties being domiciled in Israel. But a religious divorce has no standing as a legal divorce if the parties are not domiciled in a country where their religious law is part of the law of the land.<sup>45</sup>

The absence of any notice to the divorced party may make a difference in recognition. Where the foreign procedure is totally *ex parte* as a matter of course, our courts are in a difficult position. On the one hand, should they deny recognition on the ground of "natural justice" — a failure to give the opposite party any notice? On the other, should the standards of the forum apply to persons domiciled in a foreign country and who, under the laws of that country, not only marry but are later divorced by the *ex parte* action of one of them? One of the parties then moves to England and expects to be treated as free to remarry. A slight hint that the second view is better appears in *Maher*, where counsel argued that the *ex parte* nature of the Egyptian divorce would prevent its validity in England. The court rejected this argument because "no amount of notice would have enabled the wife to have contested the husband's unilateral declaration of divorce".<sup>46</sup> On the other hand, in cases where normal proceedings are comparable to a

<sup>44</sup> [1953] 2 All E.R. 373 (Pearce J.); followed in *Goldenberg v. Triffon*, [1955] C.S. 341 (Que., Smith J.); *Mandel*, [1955] V.L.R. 51 (Lowe J.).

<sup>45</sup> *Somberg v. Zaracoff*, [1949] C.S. 301 (Que., Tyndale C.J.); *Joseph*, [1953] 2 All E.R. 710 (C.A.). The *Joseph* case, as a decision on domestic law, is probably wrong. In refusing a divorce to the wife on the ground of her husband's desertion from 1937 onwards, the court held that the desertion had come to an end when the wife, in 1948, after trying to get her husband to return, instituted negotiations which resulted in the husband obtaining a Jewish bill of divorcement from the Beth Din in London. Such conduct on her part, the court held, brought the husband's desertion to an end. The court failed to appreciate that, for some persons, a religious dissolution or annulment is, under their religious law, the proper procedure before seeking the civil remedy. It is true the religious dissolution is ineffective civilly as a divorce. But should the parties be penalized for using their religious machinery first? The Court of Appeal saw only the technical legal steps, ignoring the other aspects of the problem — the social and religious. On domestic law, *Joseph* was not followed in *Corbett*, [1957] 1 All E.R. 621, at pp. 624-625 (Barnard J.).

<sup>46</sup> [1951] 2 All E.R. 37, at p. 38 (Barnard J.).

judicial contest as it is known in the common law, absence of notice may be a ground of invalidity. But the fact that a court has, under its rules, dispensed with notice or provided an ineffective substitute, in the particular case, will not bar validity. This is a problem where the courts apply the same test to the procedural aspect as they do to the substantive. The courts of the forum will accept as a valid procedural device a foreign order or rule dispensing with service in a particular case where the foreign court acts in circumstances comparable to those in which the courts of the forum will act.<sup>47</sup>

### V. Foreign Nullity Decrees

The fundamental problems and the common-law approach to them are no different for nullity decrees than for divorce. In essence, jurisdiction exercised by others should be recognized when the forum is prepared to act in roughly comparable circumstances. The difficulty in cases of nullity is to determine where English and Commonwealth courts will exercise jurisdiction. There is no doubt about jurisdiction based on domicile of the parties. Is the domicile of one party sufficient, either the petitioner or the respondent? Residence of the parties is also sufficient, it now seems clear.<sup>48</sup> Again, is residence of one of them sufficient? Normal rules of justice might suggest that the proposed petitioner should choose the domicile or residence of the respondent. So far as residence is concerned, the courts are generally agreed that residence of the petitioner alone is not sufficient,<sup>49</sup> but there would seem to be no good reason to deny jurisdiction to the court of the respondent's residence or domicile, if the place of residence or domicile of both parties is sufficient.<sup>50</sup> In addition, the English courts have, in the case of domicile, held the petitioner's domicile sufficient.<sup>51</sup> Further, there have been many suggestions that the courts of the place of celebration have jurisdiction.<sup>52</sup> In England, there was some thought that the suggestion about place of celebration did not apply to voidable marriages. *Casey* so held, but there were other reasons

<sup>47</sup> See cases collected (1954), 32 Can. Bar Rev. 359, at pp. 383-386. See more recently *Wood*, [1957] 2 All E.R. 14 (C.A.).

<sup>48</sup> *Ramsay-Fairfax*, [1955] 3 All E.R. 695; [1956] P. 115 (C.A.).

<sup>49</sup> *De Reneville*, [1948] P. 100; [1948] 1 All E.R. 56 (C.A.).

<sup>50</sup> The Scottish and Quebec courts have accepted the respondent's domicile as sufficient: *Aldridge*, 1954 S.C. 58; 1954 S.L.T. 84 (Lord Thomson); *Somberg v. Zaracoff*, [1949] C.S. 301 (Que., Tyndale C.J.).

<sup>51</sup> *White*, [1937] P. 111; [1937] 1 All E.R. 708 (Bucknill J.), as explained by *De Reneville* (C.A.) *ante*, footnote 49, a court which included Bucknill L.J. as he had become.

<sup>52</sup> Many cases are collected in Dicey (6th ed., 1949) pp. 244, 250-252.

why the court could not grant the decree in that case, and it is now of doubtful authority.<sup>53</sup>

In summary, in England, jurisdiction at common law is exercised where (a) either party is domiciled in England, (b) the respondent is resident in England, or (c) the marriage was celebrated in England. The third basis may be limited to void marriages, or may not apply to the specific defect of wilful refusal, if *Casey* is good law on jurisdiction. In the Commonwealth, Canadian courts are in rough agreement. *Casey* is not law in British Columbia.<sup>54</sup> Other difficulties have arisen out of England's distinction from 1930 to 1955 between void and voidable marriages for purposes of jurisdiction. Falconbridge has provided a thorough analysis of the English and Canadian cases up to *Casey* in 1949,<sup>55</sup> and is careful to note the limited purposes for which a difference between void and voidable marriages may be useful in questions of jurisdiction—if by the proper law the marriage is voidable only, the wife will have the husband's domicile and cannot, so long as unity of domicile remains, rely upon her own separate domicile as a basis of jurisdiction.<sup>56</sup> A few differences for Canada may be noted shortly. In British Columbia and Ontario, there is a suggestion, in obiter, that the domicile of the petitioner alone is not sufficient for jurisdiction.<sup>57</sup> In Manitoba there is a decision to the same effect.<sup>58</sup> These cases appeared before the emphasis upon proper law, rather than suitability of forum to the defendant, and do not represent the law in other provinces.<sup>59</sup> In Quebec there is some

<sup>53</sup> [1949] P. 420 (C.A.); under normal conflict rules, in the absence of a statute, the court should apply the proper law applicable to the defect alleged in the marriage. In *Casey*, the proper law was that of one of the Canadian provinces or territories, under the law of none of which the defect alleged (wilful refusal) was a ground for annulment. More recently, the Northern Ireland court has attempted to show that *Casey* is wrong on the question of jurisdiction: *Addison*, [1955] N.I. 1 (Lord Normand L.J.C.). The more recent overruling by the English Court of Appeal of *Inverclyde* and its distinction for jurisdictional purposes between void and voidable marriages takes the ground from under the court's earlier decision in *Casey*. In fact there is obiter in *Ramsay-Fairfax*, ante, footnote 48, which contradicts the decision in *Casey*. In Canada, jurisdiction was accepted in similar circumstances: *Reid v. Francis*, [1929] 4 D.L.R. 311; [1929] 3 W.W.R. 102 (Sask. C.A.).

<sup>54</sup> *Gower v. Starrett*, [1948] 2 D.L.R. 853; [1948] 1 W.W.R. 529 (B. C., Farris C.J.S.C.) (obiter, after discussion with all judges of the court). The opposite view was put forward in obiter in Ontario: *Fleming*, [1934] 4 D.L.R. 90, at p. 98 (Ont., Macdonell J.A.).

<sup>55</sup> *Conflict of Laws* (2nd ed., 1954) pp. 663-690.

<sup>56</sup> *Ibid.*, at pp. 684-685.

<sup>57</sup> *Gower v. Starrett*, ante, footnote 54; *Shaw*, [1945] 1 D.L.R. 413; 1 W.W.R. 156 (B.C.C.A.); *Manella*, [1942] 4 D.L.R. 712 (Ont. C.A.).

<sup>58</sup> *Hutchings*, [1930] 4 D.L.R. 673; [1930] 2 W.W.R. 565 (Man. C.A.).

<sup>59</sup> *Finlay v. Boettner*, [1948] 1 D.L.R. 39; [1947] 2 W.W.R. 817 (Alta., Boyd McBride J.); *Bevand*, [1955] 1 D.L.R. 854 (N.S., Doull J.) (alternative basis of jurisdiction: place of celebration).

authority that the place of celebration is not sufficient basis, even for a void marriage.<sup>60</sup> In Australia there has been the occasional departure from the rules set out, no doubt due to uncertainties about voidable marriages.<sup>61</sup> In New Zealand,<sup>62</sup> the same qualification appears as in Manitoba.

The somewhat detailed analysis of domestic jurisdiction at common law affords a basis for determining situations in which we should recognize foreign orders. But problems will remain. A girl petitions the court of her husband's domicile to annul her marriage which is, by the law of the place of celebration, *voidable* owing to the absence of parental consent. The consent was not required by the law of the husband's domicile (British Columbia) or, in this case, by the law of the girl's domicile (Alberta or Saskatchewan). But the law of the place of celebration (Nevada) required their consent and provided that in its absence the girl could apply to have the marriage annulled in "a court of competent authority". She applied to the court of the husband's domicile. That court, applying the law of the place of celebration, annulled the marriage on the ground of want of consent.<sup>63</sup> There may be some question whether the Nevada law dealing with consent was correctly characterized as one of form rather than substance, especially when it is remembered that the defect made the marriage voidable, not void, in Nevada. If the defect alleged was one of substance and not form, then by the laws of the domicile governing substance, the marriage was valid.<sup>64</sup> But if application had been made to the Nevada court where the *lex celebrationis* is applied to questions of both form and substance, that court would have annulled the marriage. If British Columbia is prepared to exercise jurisdiction in the case of voidable marriages when the only connection of the parties with the province is the celebration of marriage there, that province should recognize a decree granted by the court of the place of celebration.<sup>65</sup> Even though British Columbia

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<sup>60</sup> *Main v. Wright*, [1945] B.R. 105 (Que. C.A.); cf. *Trott v. Parkes*, [1945] C.S. 1 (Que., Cousineau J.).

<sup>61</sup> *Lougheed v. Clark*, [1948] Q.S.R. 157 (Mansfield J.) (place of celebration not sufficient in case of voidable marriage).

<sup>62</sup> *Gagen*, [1929] N.Z.L.R. 177 (Smith J.).

<sup>63</sup> *Solomon v. Walters* (1956), 3 D.L.R. (2d) 78 (B. C., Wood J.).

<sup>64</sup> I assume that compliance with laws of the place of celebration characterized as laws dealing with substance is not necessary for validity at common law; cf. more recent views of Cheshire (4th ed., 1952) p. 301 and Schmitthoff (3rd ed., 1954) pp. 310-316, compared with views expressed earlier: Cheshire (3rd ed., 1947) pp. 277-278 and Schmitthoff (2nd ed., 1948) p. 294.

<sup>65</sup> And so declared very recently for England: Barnard J. in *Corbett*, [1957] 1 All E.R. 621, at p. 623.

might have held the marriage valid, it will recognize the decree of some foreign courts annulling the marriage.

The courts have long recognized the decrees of a court of the domicile of both parties.<sup>66</sup> Few courts have had the opportunity to test decrees founded on other jurisdictional bases. In an Ontario case where the decree of the place of celebration annulling a voidable marriage was refused recognition, the whole discussion related to jurisdiction. When it was decided to follow *Inverclyde* and hold that the local courts would not exercise jurisdiction in voidable cases in the absence of domicile, the court concluded in one sentence that the California decree granted in the absence of domicile would not be recognized.<sup>67</sup> While *Inverclyde* no longer represents good law in England and parts of Canada, and may not in Ontario today, the whole approach of the court is interesting. Recognition was not discussed as something separate and apart from domestic jurisdiction. In fact, in the court's approach, the question before the court, recognition, is solved as soon as the question of domestic jurisdiction is resolved. Recognition is related to domestic jurisdiction.

One English decision of a trial judge has been justly criticized because it fails to accept as valid in England a nullity decree granted in Malta where the husband petitioner, but not the wife, was domiciled: *Chapelle*.<sup>68</sup> On comparable facts, the South Australian court has purported to distinguish the indistinguishable and held the nullity decree valid: *Vassallo*.<sup>69</sup> The court in the latter case appears to have assumed that the wife had her husband's domicile until the decree, in which case the decree is that of the domicile of both parties. But the same facts existed in *Chapelle* on this point. *Vassallo* is sound in result because it recognizes as valid a Maltese decree, made at the time of the husband's domicile in Malta and invalidating a marriage that was void under Maltese law, notwithstanding that the marriage was perfectly good by the domestic law of South Australia, which was not only the forum but also the place of celebration and the domicile of each party before and for a time subsequent to the marriage. On the other hand, the case raises the wisdom of allowing the court of the present domicile of the petitioner to accept jurisdiction under our domestic rules. Criticism of the wisdom of the decision should be directed not to

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<sup>66</sup> *Salvesen v. Administrator*, [1927] A.C. 641 (H.L.), and cases collected in Dicey, *ante*, footnote 52, pp. 381-383.

<sup>67</sup> *Fleming*, *ante*, footnote 54

<sup>68</sup> [1950] P. 134; [1950] 1 All E.R. 236 (Willmer J.).

<sup>69</sup> [1952] S.A.S.R. 129 (Reed J.).

the conflict rule but to the domestic rules under which a court assumes jurisdiction over an absent defendant in nullity cases if the petitioner is domiciled in the forum.

Unless we question the foundation of the conflict rule, which looks only to jurisdiction and not to merits, the recognizing forum will not question the grounds upon which the foreign court reached its conclusion or even the conflict rules applied by the foreign court. So long as the common law applies, in questions of marriage, the law of the domicile to questions of substance and the *lex celebrationis* to questions of form, and applies comparable characterization rules, little conflict should occur between common-law countries, except in so far as the common law develops differently in different countries, as it does, and in so far as statute law provides additional variations. But outside the common law a number of different rules exist. And under either system an individual court will interpret facts differently. Thus, in *Vassallo*, the Australian court found the husband domiciled in South Australia at marriage; the Maltese court annulled the marriage because as a man domiciled, in its view, in Malta at the time of marriage he had not complied with the marriage laws of Malta. Yet the Australian court did not go behind the decision of the Maltese court once that court was found to have jurisdiction. The policy of non-interference with the merits is, on the whole, wise in the light of the uncertainties that would arise if a court's decision were not final. The policy runs through the whole fabric of our law of foreign judgments, whether it be a question of divorce, nullity, damages or even the procedure in litigation.

#### VI. Conclusions

Today distinctions are not drawn between the local bases of jurisdiction and those which a court in the forum is prepared to concede to others. The basic problems today lie in making suitable domestic rules. If the legislature or the courts go too far in broadening the jurisdiction of the domestic courts without considering the connection of the parties, particularly the proposed defendant, with the territory, the courts cannot complain of jurisdiction exercised abroad in comparable cases. In so far as the court in any particular case applies one law, the proper law applicable to the defect alleged as sufficient to dissolve or annul the marriage, no serious problem of jurisdiction arises other than mere convenience to the parties, who should, in such case, have some reasonable connection with the territory selected. But in all too many cases



the tendency when jurisdiction is enlarged is to provide that the law of the forum be applied, whether or not that law would be proper at common law. Thus, the legislation extending jurisdiction in England, Scotland, Canada and parts of Australia expressly made applicable that law which the court would apply to persons domiciled within its territory—the law of the forum. On the other hand, Western Australia has five bases of jurisdiction. Domicile of the husband is one, and gives no problem. Three others are silent as to the proper law. The fifth allows jurisdiction on residence of both parties but only if “by the law of the domicile of the husband the plaintiff would be entitled to obtain relief on grounds substantially similar to the grounds on which relief is claimed” in Western Australia.<sup>70</sup> So long as some nations apply their own law, rather than the “proper” law, and even the latter may vary by reason of differences in conflict rules and in characterization, caution must be exercised in extending our domestic bases of jurisdiction.

To the rule that recognition in divorce, nullity or any other case depends upon local jurisdiction, there is one obvious variation where the forum has no provision for the type of relief obtained abroad. Ireland has no divorce law. England had none before 1858 other than by private act of parliament. Private acts are the only means available today in Quebec and Newfoundland. Some basis of recognition has to be worked out by such territories. Quebec accepts dissolutions, even of Quebec marriages, made by the domicile.<sup>71</sup> Ontario, which before 1930 lacked judicial divorce, was prepared to recognize similar divorces. Probably divorces or annulments granted by a court in the territory whose law is the proper law should be accepted without difficulty in those cases where no local divorce or nullity is available.

Throughout the development of conflict recognition rules, there is a steadily developing desire to recognize foreign acts of status and to prevent the tangles of a valid marriage in one place, a dissolved or annulled marriage in others. Subject to an overriding rule of policy which endeavours to prevent the law with the widest opportunities for changing status from becoming in effect the law of the forum, today's rules for recognition do provide a large measure of recognition in those countries with widened domestic jurisdiction. In Canada, and other countries where domestic jurisdic-

<sup>70</sup> Matrimonial Causes and Personal Status Code, 1948, No. 73, s. 14 (1)(b).

<sup>71</sup> *Gauvin v. Rancourt*, [1953] B.R. 663n; R.L. 517 (Que. C.A.). Cf. *Johnson* (1954), 14 *Revue du Barreau* 301.

tion remains somewhat limited, consideration should be given to legislation providing for the recognition of divorces and nullity decrees from other countries upon a wider basis, provided the parties or one of them has some substantial connection with the territory where the decree is granted.

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