SOME COMMENTS ON THE CONFLICT OF LAWS PROVISIONS OF THE DIVORCE ACT, 1968

D. MENDES DA COSTA*
Toronto

Under section 91 (26) of the British North America Act[1] exclusive legislative authority over "Marriage and divorce" is conferred upon the federal Parliament. For many years the divorce laws of Canada continued without comprehensive review. In recent years it became increasingly clear that the state of the laws relating to divorce in Canada was unsatisfactory. A number of private members' bills were introduced. This activity culminated in the appointment of a Special Joint Committee of the Senate and the House of Commons. The terms of reference of this Committee were wide: "to enquire into and report upon divorce in Canada and the social and legal problems relating thereto, and such matters as may be referred to it by either House".[1A] Commencing on June 28th, 1966 the Special Joint Committee held twenty-four open meetings and received more than seventy briefs. The *Report* of the Committee, released in June, 1967, contained some twenty-one recommendations. Its proposals were restated in the form of a draft bill contained in Part V of the *Report*. On December 4th, 1967 the Divorce Bill, Bill C-187, was introduced in Parliament and read for the first time. The *Report* of the Special Joint Committee was used as a guide in the preparation of Bill C-187, though there are differences of substance between this Bill and the draft bill of the Special Joint Committee. Bill C-187 was assented to on February 1st, 1968 and is expected to come into force on July 2nd, 1968.

The purpose of this article is not to discuss generally the Divorce Act, 1968.[2] All that is here intended is to comment upon

*D. Mendes da Costa, of Osgoode Hall Law School, Toronto, Ontario.
[1] 1867, 30 & 31 Vict., c. 3, as am.
[1A] Report of the Special Joint Committee of the Senate and House of Commons on Divorce (1967).
[2] S.C., 1968, c. 24.

the provisions of this Act so far as they relate to the conflict of laws.

I. *Jurisdiction.*

Section 5 (1) of the Divorce Act, 1968 provides:

> 5. (1) The court for any province has jurisdiction to entertain a petition for divorce and to grant relief in respect thereof if,
> (a) the petition is presented by a person domiciled in Canada; and
> (b) either the petitioner or the respondent has been ordinarily resident in that province for a period of at least one year immediately preceding the presentation of the petition and has actually resided in that province for at least ten months of that period.

It is well established that at common law jurisdiction in divorce proceedings depends upon the domicile of the parties within the jurisdiction.[3] This rule was not established without hesitation:[4] indeed the law might have developed "quite differently".[5] That domicile is the source of jurisdiction was, however, unequivocally asserted by the Privy Council in 1895 in *Le Mesurier* v. *Le Mesurier*, a decision anticipated in Ontario in *Magurn* v. *Magurn*.[6] In the *Le Mesurier* case, which has been accepted as the "final statement of the principle of jurisdiction"[7] in divorce actions, Lord Watson said:[8]

> Their Lordships have in these circumstances, and upon these considerations, come to the conclusion that, according to international law, the domicile for the time being of the married pair affords the only true test of jurisdiction to dissolve their marriage. . . . Different communities

---

[3] Mc*Cormack* v. *McCormack* (1920), 55 D.L.R. 386 (Alta S.C. App. Div.); *Swift* v. *Swift* (1920), 55 D.L.R. 393 (Alta S.C.); *McKeever* v. *McKeever* (1956), 17 W.W.R. (N.S.) 393 (Alta S.C.); *Adams* v. *Adams* (1909), 11 W.L.R. 358 (B.C.S.C.); *Cutler* v. *Cutler* (1914), 6 W.W.R. 1231 (B.C.S.C.); *Plummer* v. *Plummer* (1962), 31 D.L.R. (2d) 723 (B.C.S.C.); *Breen* v. *Breen*, [1930] 1 D.L.R. 1006 (Man. C.A.); *Young* v. *Young* (1959), 21 D.L.R. (2d) 616 (Man. C.A.); *Stadel* v. *Stadel* (1959), 67 Man. R. 36; *Patterson* v. *Patterson* (1955), 3 D.L.R. (2d) 266 (N.S.); *Lauritson* v. *Lauritson* (1932), 41 O.W.N. 274; *Bavin* v. *Bavin*, [1939] O.R. 385; *Omeljanow* v. *Omeljanow*, [1958] O.W.N. 13; *Yates* v. *Davis*, [1960] O.W.N. 201; *Re Needham* v. *Needham*, [1964] 1 O.R. 645; *Beaman* v. *Beaman* (1967), 63 D.L.R. (2d) 457 (N.B.S.C. App. Div.); *Kalenczuk v. Kalenczuk* (1920), 52 D.L.R. 406 (Sask. C.A.); *Harris* v. *Harris*, [1930] 4 D.L.R. 736 (Sask. C.A.); *Nelson* v. *Nelson*, [1930] 3 D.L.R. 522 (Sask. C.A.).

[4] *Brodie* v. *Brodie* (1861), 2 Sw. & Tr. 259 (*bona fide* residence); *Niboyet* v. *Niboyet* (1878), 4 P.D. 1 (residence).

[5] *Indyka* v. *Indyka*, [1967] 3 W.L.R. 510, at p. 530.

[6] (1883), 3 O.R. 570, aff'd (1885), 11 O.A.R. 178.

[7] *Yates* v. *Davis*, *supra*, footnote 3, at p. 202 per Spence J.

[8] [1895] A.C. 517, at p. 540. Approving *Wilson* v. *Wilson* (1872), L.R. 2 P. & D. 435. For an earlier view see *Niboyet* v. *Niboyet*, *supra*, footnote 4. Also, *Chatenay* v. *Chatenay*, [1938] 3 D.L.R. 379 (B.C.S.C.) (Cantons of Switzerland).

> have different views and laws respecting matrimonial obligations, and a different estimate of the causes which should justify divorce. It is both just and reasonable, therefore, 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.

At common law no specific period of domicile is required. Nor, once domicile is established, does it seem relevant that resort has been made to the jurisdiction for the specific purpose of divorce proceedings.[9] A determination as to domicile should not, however, be made on an interlocutory application, but should be decided by the court on the hearing of the divorce proceedings.[10]

(1) *Retention of Domicile*

So far as section 5 (1) grounds divorce jurisdiction upon the domicile of the petitioner, it remains true to the principle of *Le Mesurier* v. *Le Mesurier*. It evinces the decision of the Act to retain domicile as the jurisdictional base in divorce proceedings in preference to other possible alternatives; for example, residence. The Act does not define domicile. Therefore, except in so far as the statute otherwise provides, this concept is to be ascertained in accordance with present common law principles.[11] Carried over therefore will be, *inter alia*, the common law requirement of residence and intention and the notion of the revival of the domicile of origin. Recent movements towards change in the law relating to domicile indicate clearly the growing dissatisfaction that has been engendered by the rules governing the determination of this concept.[12] As stated in another context by Lord Denning M.R. in

---

[9] Dicey and Morris, The Conflict of Laws (8th ed., 1967), pp. 98, 298. *Cf. White* v. *White*, [1952] 1 D.L.R. 133 (Man. C.A.).

[10] *Christenson* v. *Christenson* (1963), 45 W.W.R. (N.S.) 47 (Sask. Q.B.). Also, *Gillan* v. *Gillan*, [1934] O.W.N. 84; *Bavaria* v. *Bavaria and Baker*, [1946] O.W.N. 262.

[11] *Re Martin*, [1900] P. 211; *Re Annesley*, [1926] Ch. 692. Although there is no authority it may be that this is an area in which a federal common law exists. See Laskin, Canadian Constitutional Law (3rd ed., 1966), p. 818. The effect of a different view of domicile in the courts of two provinces in divorce proceedings is undecided. Presumably the final view would be established by the Supreme Court of Canada. *Quaere* whether provincial statutes can constitutionally define the concept of domicile for purposes of divorce jurisdiction. See, for example, the Civil Code of Quebec, arts 79-81; the Married Women's Property Act, R.S.N.B., 1952, c. 140, s. 9 (2). See *McMullen* v. *Wadsworth* (1889), 14 App. Cas. 631.

[12] First Report of the Private International Law Committee (1954), Cmd. 9068; see Graveson, Reform of the Law of Domicile (1954), 70 L.Q. Rev. 492; Wortley, (1954), 40 Tr. Gr. Soc. 121; Stone, The English Concept of Domicile (1954), 17 Mod. L. Rev. 244; Cohn, Domicile—Convention and Committee (1955), 71 L.Q. Rev. 562. Seventh Report of

In re P. (G.E.) (An Infant):[13]

> The tests of *domicile* are far too unsatisfactory. In order to find out a person's domicile, you have to apply a lot of archaic rules. They ought to have been done away with long ago. But they still survive. Particularly the rule that a wife takes the domicile of her husband.

Departure from the rule as to the domicile of the wife is one of the changes effected by the Act. But the Act does not concern itself with any general re-writing of the law of domicile. And there are no doubt very real constitutional reasons which militated against this approach. Perhaps to achieve such a re-writing combined federal and provincial activity would be required. Whatever the position may be, legislation modifying the concept of domicile as this term is understood at common law would seem most desirable.

(2) *Canadian Domicile*

Section 5 (1) of the Act confers divorce jurisdiction upon a court for any province[14] if the petition is presented by a person "domiciled in Canada". Two interpretations of this phrase are possible.[15] It may mean merely that a party has Canadian domicile if he is domiciled in any province of Canada. Alternatively it may, for the purposes of the Act, effect the translation of domicile from a provincial to a national concept.

Discussing the position under the Australian Matrimonial Causes Act, 1959, the Court in *Lloyd* v. *Lloyd* stated:[16]

> It appears a necessary incident of the power to make a law with respect to matrimonial causes that the foundation of jurisdiction should be prescribed.

These comments must be related to the provisions of the British North America Act, but they indicate, persuasively it is considered, that the existence of a national domicile is not precluded by constitutional considerations.

---

the Private International Law Committee (1963), Cmd. 1955, para. 33; see Mann, The Seventh Report of the Private International Law Committee on Domicile (1963), 12 Int. & Comp. L.Q. 1326; Latey, Conflicts of Jurisdiction in Matrimonial Causes (1965), 14 Int. & Comp. L.Q. 845, at p. 861. Draft Model Statute on the Law of Domicile approved by the Conference of Commissioners on Uniformity of Legislation in Canada; see Kennedy, (1961), 39 Can. Bar Rev. 124. Also see Mann, The Domicile Bills (1959), 8 Int. & Comp. L.Q. 457; also Bland, (1958), 7 Int. & Comp. L.Q. 753.

[13] [1965] Ch. 568, at p. 583.

[14] Interpretation Act, S.C., 1967, c. 7, s. 28 (29), "province" means a province of Canada, and includes the Yukon Territory and the Northwest Territories. See also s. 2 (e) (vi) of the Divorce Act, 1968.

[15] *Lee* v. *Commissioner of Taxation* (1963), 6 F.L.R. 285 (Tas. S.C.).

[16] [1962] V.R. 70, at p. 71.

The view is expressed that the latter of the two propositions mentioned above is correct and that, in relation to divorce proceedings, a national domicile does now exist. Clause 9 of the draft bill of the Special Joint Committee also used the expression "domiciled in Canada". But by clause 9 (2) it was expressly provided that a party should have Canadian domicile "if he is domiciled . . . in any province of Canada". No such pre-requisite is written into the Act. Its absence may be considered not without significance.

(a) *Prior to the Divorce Act, 1968*

In *Attorney-General for Alberta* v. *Cook*[17] the Privy Council rejected the contention that a person could acquire a domicile in Canada as distinct from a domicile in a province of Canada. In *White* v. *White* the Manitoba Court of King's Bench summarized the effect of this decision in this way:[18]

> The *Cook* case also decided a matter of importance to the Canadian Courts, namely, that, as the legislation then stood in Canada, although the subject of divorce is exclusively for the Dominion Parliament, a Canadian domicile is not thereby created and it is provincial domicile which governs in matters of divorce *a vinculo*.

In *Voghell* v. *Voghell*[19] the same reasoning was held applicable to the Northwest Territories, that is at common law domicile in the Northwest Territories is required to invoke the jurisdiction of the courts of those Territories in divorce. In *Wilton* v. *Wilton*[20] the *Cook* case was applied by the High Court of Ontario. Wilson J. rejected the contention that a divorce jurisdiction could be entertained upon the basis of a common Canadian domicile and asserted that divorce jurisdiction required a domicile in Ontario. The court found that the husband's domicile was in Alberta, and accordingly dismissed the wife's suit, holding that it had no jurisdiction. This case seems to illustrate the undesirable situation that heretofore prevailed. A party, domiciled in one province, was denied matrimonial redress by the courts of the province of residence. As in *Wilton* v. *Wilton*, this situation was aggravated where it was a wife who sought a divorce, for she was dependent upon her husband for her domicile wherever she might have made her

---

[17] [1926] A.C. 444.

[18] [1950] 4 D.L.R. 474 (Man. K.B.), at p. 477, per Williams C.J.K.B. aff'd, [1952] 1 D.L.R. 133. Also see *Jolly* v. *Jolly*, [1940] 2 D.L.R. 759, at p. 765 (B.C.C.A.).

[19] (1961), 27 D.L.R. (2d) 216 (N.W.T.C.A.).

[20] [1946] O.R. 117. But see Kennedy, (1946), 24 Can. Bar Rev. 151. See also *Marriaggi* v. *Marriaggi*, [1923] 4 D.L.R. 463 (Man. K.B.).

home.[21] For reasons of this sort, *Attorney-General for Alberta* v. *Cook* became subject to considerable criticism. A steadily increasing call arose for a single Canadian domicile.[22]

(b) *Canadian domicile and the Canadian immigration legislation*

The Act of 1968 is not the first federal statute to talk in terms of a Canadian domicile. Attention has been directed to the Canadian Citizenship Act [23] and the Canadian Immigration Act[24] which contain the words "Canadian domicile" and "place of domicile". Section 4 (1) of the Canadian Immigration Act provides:

> 4. (1) Canadian domicile is acquired for the purposes of this Act by a person having his place of domicile for at least five years in Canada after having been landed in Canada.

Section 4 (2) prescribes conditions during which no period shall be counted towards the acquisition of Canadian domicile. Section 4 (3) states that Canadian domicile is lost by a person voluntarily residing out of Canada with the intention of making his permanent home out of Canada and not for a mere special or temporary purpose. This subsection continues by defining circumstances by virtue of which residence out of Canada shall in no case cause loss of Canadian domicile.

In *Bednar and Bednar* v. *Deputy Registrar General of Vital Statistics*[25] the parties' domicile of origin was in Czechoslovakia. They married in 1927. The husband deserted his wife and came to Canada. In 1939 he acquired a domicile in Alberta and in due course acquired Canadian citizenship. In 1951 the Czechoslovakian courts granted a decree of divorce on the suit by the wife. The Alberta Supreme Court recognized the Czechoslovakian decree under the doctrine of *Travers* v. *Holley*,[26] and accordingly issued an

---

[21] *Attorney-General for Alberta* v. *Cook*, *supra*, footnote 17. See *Beaman* v. *Beaman*, *supra*, footnote 3.

[22] See the sources referred to by Sissons J., at first instance, in *Voghell* v. *Voghell* (1959), 22 D.L.R. (2d) 579, at pp. 592-597 (N.W.T. Terr. C.); reversed in part (1961), 27 D.L.R. (2d) 216 (N.W.T.C.A.). See also Castel, Private International Law (1960), p. 54; Kennedy, *op. cit.*, footnote 20; Skelly, A Canadian Domicile (1966), 9 Can. Bar J. 493; Skelly, Divorce Reform (1967), 6 Western Ont. L. Rev. 128, at pp. 131-135.

[23] R.S.C., 1952, c. 33, as am. Ss. 2 (bb) and (mm), added by 1953, c. 23, s. 12, provide: S. 2 (bb)—"Canadian domicile" means Canadian domicile as defined in the laws respecting immigration that are or were in force at the time the Canadian domicile of a person is relevant under this Act. S. 2 (mm)—"place of domicile" means the place in which a person has his home or in which he resides or to which he returns as his place of permanent abode and does not mean a place in which he stays for a mere special or temporary purpose.

[24] R.S.C., 1952, c. 325, as am.

[25] (1960), 24 D.L.R. (2d) 238 (Alta S.C.).

[26] [1953] P. 246.

order of *mandamus* requiring the Deputy Registrar General of Vital Statistics to issue a marriage licence. Of present interest, however, was the further argument by the husband that the common law rules of domicile relating to divorce jurisdiction as established by *Le Mesurier* v. *Le Mesurier* and *Attorney-General for Alberta* v. *Cook* were not applicable to alien immigrants where the other spouse resided abroad and had never been admitted to Canada. Presumably the contention was that as the wife had not complied with section 4 of the Immigration Act, 1952 (that is had not, *inter alia,* landed in Canada) she could not acquire a domicile in Canada, notwithstanding that her husband had so complied with the statute and had acquired a "Canadian domicile". Therefore she must be taken to have retained her domicile in Czechoslovakia. Apparently this argument was favourably received by the court. In the view of Milvain J. it was plain that under the immigration legislation an alien married woman could not acquire a domicile in Canada by operation of the common law rule. This Act required her lawful admittance to Canada. Conversely, if she complied with the Act, she could acquire a domicile in Canada even though such a domicile might never be acquired by her husband. Milvain J. said:[27]

> To hold that the domicile for purposes of the citizenship and immigration legislation and the domicile in common law are two distinct domiciles of the same person would destroy the doctrine of domicile as known to the international private law, for a person can have only one domicile in law.
>
> In the light of the above statutory enactments the *Le Mesurier* rule with respect to matrimonial domicile must now be considered inapplicable in so far as alien immigrants to Canada are concerned.
>
> It is submitted that in the case of alien immigrants where one spouse is domiciled in Canada and the other spouse is domiciled in a foreign country, the Courts of both countries of domicile of the spouses possess concurrent jurisdiction over the marriage, and on principles of comity and reciprocity, one jurisdiction should recognize as valid a decree of divorce granted in the other jurisdiction.

This reasoning may be doubted. Earlier, in *Re Carmichael*,[28] the Supreme Court of British Columbia saw nothing in the Immigration Act to support the contention that a wife could acquire thereunder a domicile separate and apart from her husband. Coady J. stated that it would take "very clear and explicit language indeed" to grant to a wife such an independant domicile. Further, that if

[27] *Bednar and Bednar* v. *Deputy Registrar General of Vital Statistics, supra,* footnote 25, at p. 240.

[28] [1942] 3 D.L.R. 519, at p. 522 (B.C.S.C.).

such were the intention of the Act, it would be set forth in the most express terms.

The proposition that a person cannot, at a given time, have more than one domicile was developed in England, a unitary legal system. In a federal jurisdiction two systems of law have concurrent operation. The suggestion that the notion of a federal domicile should be accepted, necessarily carries with it the possibility that a person may, at one and the same time, possess two operative domiciles. For an individual may be domiciled in Canada for federal purposes and yet be domiciled elsewhere in relation to matters which fall within the legislative competence of the provinces. This is not to deny the unity of domicile. Rather it is a necessary and desirable qualification which results when this doctrine, developed in a unitary system, is sought to be applied to a federation.[29] Unity of domicile, as Barry J. pointed out in *Lloyd* v. *Lloyd*,[30] "seems designed to avoid conflicts and inconsistencies in respect of personal law, and in a constitutional framework such as exists in Australia, it probably requires qualification . . .".

Adopting this reasoning a Canadian domicile could be acquired; but there would be qualifications. Such a domicile may exist but only for federal purposes, that is only in relation to matters wherein there exists uniformity of law. On the assumption that a Canadian domicile is brought into existence by the Immigration Act, such a domicile could not, it is considered, at the date of the *Bednar and Bednar* case, have been acquired for the purposes of matrimonial causes: for at that date uniformity of law in respect of divorce did not exist in Canada. Indeed section 4 of the Immigration Act specifically provides that Canadian domicile is acquired "for the purposes of this Act". There is also a further point. The Immigration Act goes beyond the sphere of operation of the Divorce Act, 1968. It does more than conceive a geographical area of Canada transgressing provincial boundaries. It also sets out the *conditions* under which a Canadian domicile may be acquired and may be lost. In *Re Leong Ba Chai*,[31] the Court of Appeal of British Columbia was concerned with an application for *mandamus*. The respondent's father had applied to the Immigration Department to permit his son, the respondent, to enter

[29] Cowen and Mendes da Costa, The Unity of Domicile (1962), 78 L.Q. Rev. 62.

[30] *Supra*, footnote 16, at p. 71.

[31] [1953] 2 D.L.R. 766 (B.C.C.A.), aff'd on other grounds, *R.* v. *Leong*, [1954] 1 D.L.R. 401 (S.C.).

Canada. The Department refused permission and the issue before the court turned upon whether the respondent was legitimate. According to the principles of the common law the court found that the father was, at the material date, domiciled in China and that the respondent was legitimate. To this it was submitted that domicile at common law was excluded by the provisions of the Immigration Act.[32] In rejecting this submission, Robertson J. A. said:[33]

> I am of the opinion that the word "domicile" in this section is used in the sense of residence, and does not refer to international domicile.

At least to the extent that the Immigation Act controls the method of acquisition and of loss of a "Canadian domicile", this seems the correct construction of the statute. Further, this internal codification of a "Canadian domicile" seems to indicate that the intention of the Act is in no way to concern itself with the common law rules relating to domicile. All that it does is to define the degree of connexion with Canada which is required for immigration matters, a degree of connexion termed, perhaps unfortunately, domicile. This concept may be pivotal to the operation of the Act, but likewise it is so restricted in its operation.

(c) *Position under the Divorce Act, 1968*

Domicile is a connecting factor. It is a concept used by the law to relate a person to a legal system. To fulfill this function the geographical area over which domicile extends must necessarily coincide with the territorial limits of any particular system of law. In *Attorney-General for Alberta* v. *Cook*, Lord Merrivale said:[34]

> Uniformity of law, civil institutions existing within ascertained territorial limits, and juristic authority in being there for the administration of the law under which rights attributable to domicile are claimed, are indicia of domicile, all of which are found in the Provinces. Unity of law in respect of the matters which depend on domicile does not at present extend to the Dominion.

Accordingly the Privy Council did not deny the possibility of a Canadian domicile, for Lord Merrivale expressly pointed out that uniformity of law in respect to matters which depend on domicile did not at that date extend to Canada. This did not pass unnoticed in *White* v. *White*,[35] where Williams, C.J.K.B. referring to the *Cook*

[32] R.S.C., 1927, c. 93, s. 2A; enacted, S.C., 1946, c. 54, s. 4.

[33] *Re Leong Ba Chai, supra*, footnote 31, at pp. 773-774. Also see *McMullen* v. *Wadsworth, supra*, footnote 11.

[34] *Supra*, footnote 17, at p. 450. See Cowen and Mendes da Costa, *op. cit.*, footnote 29, at p. 64.

[35] *Supra*, footnote 18, at p. 477.

case, said ". . . , as the legislation then stood in Canada, . . .": so too in *Wilton* v. *Wilton*,[36] where the Ontario court used the words ". . . in the absence of Dominion legislation giving the provincial Courts such" jurisdiction.

The Australian Matrimonial Causes Act, 1959 confers a uniform law of matrimonial causes upon the Commonwealth of Australia.[37] It has been contended that the effect of this statute has been the creation of a national Australian domicile.[38] In expressing this view, Barry J. in *Lloyd* v. *Lloyd*[39] pointed out that the enactment of the Australian Act of 1959 had created a state of affairs "very different" from that which was considered by the Privy Council. The impact of the Divorce Act, 1968 is, it is considered, analogous in this respect. Section 26 effects a general repeal of all laws respecting divorce that were in force in Canada or any province immediately before the commencement of the Act and displays the clear intention of this statute to cover the field in relation to substantive divorce law. There is, therefore, now in Canada unity of law, in relation to divorce, that does extend over the geographical area of Canada. Further, contrary to the position under the Immigration Act, the Divorce Act does not prescribe the method of acquisition and loss of Canadian domicile. Accordingly, this is to be established as a matter of common law: by the common law determinants of domicile, *animus* and *factum*. Similar to the Australian experience, it is submitted that a national Canadian domicile does now exist. In *Trottier* v. *Rajotte* Duff C. J. said:[40]

> So with regard to the United States, an intention indefinite as to locality to live somewhere in the United States is in itself inconclusive where the question at issue is: Has A, the person whose domicile is in dispute, taken up residence in a given state with the intention of residing permanently in that State? Residing in Philadelphia with the intention, not of making his permanent home in Philadelphia, but of making his home in Philadelphia, Baltimore or Washington, could not be effective to displace the domicile of origin.

It seems clear that a domicile of choice would not be so acquired. For there was an absence of a legal system, the territorial limits of

---

[36] *Supra*, footnote 20, at p. 120.

[37] See generally, Cowen and Mendes da Costa, Matrimonial Causes Jurisdiction (1961).

[38] *Lloyd* v. *Lloyd*, *supra*, footnote 16. Also, *Lee* v. *Commissioner of Taxation*, *supra*, footnote 15. Generally, Cowen and Mendes da Costa, *op. cit.*, footnote 29.

[39] *Supra*, footnote 16, at p. 71.

[40] [1940] S.C.R. 203, at pp. 210-211.

which extended over the area referred to by the court. The position in Canada is now, however, different from that which exists in the United States. The Act of 1968 has enlarged the law area over which domicile operates. Residing in Vancouver with the intention, not of making a permanent home in Vancouver, but of making a home in Winnipeg, Toronto or Montreal, should be effective to displace a domicile of origin. For a domicile of choice in the national unit of Canada may now be so acquired and will result as a matter of common law: by the application of common law principles which will no longer relate to provincial boundaries but will have application throughout the area of unity of law established by the Act.

(3) *Two Operative Domiciles*

Domicile as traditionally understood carries with it the capability of its acquisition without the necessity of establishing a nexus with any local division existing within the geographical unit it encompasses. In *Trottier* v. *Rajotte* Duff C. J. said:[41]

> The issue is not whether the husband had left Quebec with the intention of settling somewhere in the United States and not returning to Quebec, but whether he had taken up his residence in the State of Connecticut with a fixed, settled determination of making his permanent residence in that state.

Applying this reasoning it would seem clear that if a party arrives in Ontario with a fixed, settled determination of making his permanent residence in Ontario, he will acquire a domicile in Ontario. This notwithstanding that he is equivocal as to whether he will settle in Toronto or in Sudbury. Put another way, other factors being present, it is surely not necessary for the acquisition of a domicile in Ontario that a decision must first be made as to specific location in terms of cities, towns, villages or suburbs. Likewise, under the Act of 1968, accepting the notion of a national Canadian domicile, it should be possible for a party arriving in Canada to acquire a domicile in Canada although he is as yet undecided between Toronto and Montreal. This domicile would be a federal domicile for federal purposes, that is divorce. This notwithstanding that for purposes governed by provincial laws, he may at the same time be held to be domiciled elsewhere. For if provincial laws are involved a provincial domicile must be established, and this will not occur until a decision is made between Toronto and Montreal. Pending this, the existing domicile will control. Such

[41] *Ibid.*, at p. 209.

circumstances would result in *two* operative domiciles: one, Canadian domicile for divorce; the other, the existing domicile for matters governed by provincial laws. This result, as mentioned, entails a qualification of the notion of unity of domicile. It is not supported by the statements of the court in the *Bednar and Bednar* case cited above.[42] But in *Lloyd* v. *Lloyd* the Supreme Court of Victoria, referring to the situation in Australia after the Australian statute, said that it saw no reason inherent in the common law concept of domicile why an Australian domicile could not exist with respect to matrimonial causes, even though for other purposes domicile might be connected only with a state or territory. Barry J. continued:[43]

> Probably difficulties will not often arise, because if a person is domiciled in Australia, ordinarily he would be resident and domiciled in a State or a Territory. If it is necessary, a domicile in one of those localities would satisfy the strict requirements of private international law, even if, contrary to the view I hold, the assertion of the Act that there is an Australian domicile is not in conformity with classical notions. However, cases do occur where evidence is not available from a husband whose domicile of origin was in another country, and although it may be clear that he has abandoned that domicile, and has resided in Australia with the intention of permanent or indefinite residence in this country, the court may not be able to find with sufficient assurance that he has acquired a domicile in a particular State or Territory. In such a case the question whether there is, for the purposes of private international law, an Australian domicile may be of importance, and in my opinion it should be answered affirmatively.

It is considered that the opinion of Barry J. is to be preferred to the view expressed in the *Bednar and Bednar* case and that a court ought to recognize the acquisition of a Canadian domicile in the circumstances mentioned above and, as a necessary corollary, ought to accept a departure from the traditional doctrine of unity of domicile.

(4) *Domicile of a Wife*

Section 6 (1) of the Divorce Act provides:

> 6. (1) For all purposes of establishing the jurisdiction of a court to grant a decree of divorce under this Act, the domicile of a married woman shall be determined as if she were unmarried and, if she is a minor, as if she had attained her majority.

The reference to the possibility that a wife may be a minor fills a lacuna which existed in the proposed bill of the Special Joint

[42] See p. 258, *supra*.
[43] *Supra*, footnote 16, at pp. 71-72. See Cowen and Mendes da Costa, *op cit.*, footnote 29, at p. 67.

Committee. For clause 9 (2) (b) of that bill provided that a wife had Canadian domicile if she would, if unmarried, be domiciled, in accordance with the existing rules of private international law, in any province of Canada. And a wife, if an infant and if unmarried, would, under the existing rules of private international law, be dependent for her domicile upon her parent. Section 6 (1) contains, however, no mention of Canadian domicile. It is therefore possible to contend that the sole function of this subsection is to enable the domicile of a married woman to be determined as if she were unmarried. Accordingly, a wife would still be tied to a provincial domicile. Section 6 (1) operates, however, for "all purposes of establishing the jurisdiction of a court to grant" a divorce; and section 5 (1) provides that the "court for any province has jurisdiction to entertain a petition for divorce" if, *inter alia*, the petition is presented by a person domiciled in Canada. Presumably "person" is meant to include a wife and the provisions of section 5 (1) are meant to be read in the light of section 6 (1).

(a) *Common law*

Attorney-General for Alberta v. *Cook* established the principle that a wife is dependent upon her husband for her domicile, a dependence that continues notwithstanding desertion by the husband[44] and notwithstanding the granting of a decree of judicial separation.[45] This principle, combined with the rule of the exclusive competence of the courts of the domicile to grant divorce, could cause real hardship to a deserted wife. The ability to change the spouses' domicile is vested solely in the husband. The wife is powerless to prevent her domicile from following his changes. The husband might desert his wife and acquire a domicile far away from the matrimonial home. The wife, seeking divorce, must at common law follow him to that domicile to institute proceedings: that is, if she can ascertain the whereabouts of this new domicile;

---

[44] *Yelverton* v. *Yelverton* (1859), 1 Sw. & Tr. 574; *Jolly* v. *Jolly*, *supra*, footnote 18; *Harris* v. *Harris*, *supra*, footnote 3.

[45] *Supra*, footnote 17. Also see *Lord Advocate* v. *Jaffrey*, [1921] A.C. 146; *Garthwaite* v. *Garthwaite*, [1964] P. 356. See too on the general principle of unity of domicile, *Marriaggi* v. *Marriaggi*, *supra*, footnote 20; *Breen* v. *Breen*, [1929] 4 D.L.R. 649 (Man.); reversed on another ground, [1930] 1 D.L.R. 1006 (Man. C.A.); *K.* v. *K.*, [1943] 2 D.L.R. 102 (N.S. S.C.); *R.* v. *Brinkley* (1907), 14 O.L.R. 434; *Welsh* v. *Bagnall*, [1944] 4 D.L.R. 439 (Ont.); *Marshall* v. *Marshall*, [1952] O.W.N. 308; *Capon* v. *Capon* (1965), 49 D.L.R. (2d) 675 (Ont. C.A.); *Joyce* v. *Joyce*, [1943] 3 W.W.R. 283 (Sask. K.B.); *Nelson* v. *Nelson*, *supra*, footnote 3; *Christenson* v. *Christenson*, *supra*, footnote 10.

and if that domicile permits divorce. In *K.* v. *K.* the predicament of a deserted wife was clearly demonstrated by Hall J. where (in holding that the Nova Scotia Supreme Court had jurisdiction under the Divorce Jurisdiction Act, referred to below) he said:[46]

> I have reached this conclusion on the weight of evidence but it seems desirable to point out the intolerable position in which this woman is placed if the Nova Scotia Court is held to be without jurisdiction for it is in evidence that divorces are not granted in Newfoundland and it would probably follow that she is bound for life to a man who deserted her at the church door and has never been a husband to her or a father to their son.

In two English decisions,[47] indeed, relief was granted to English wives married to husbands domiciled abroad where their marriages had been annulled in the husband's domicile at a date when such annulments were not recognized in England.[48] These cases were followed at first instance in Alberta.[49] But subsequent decisions in British Columbia,[50] Saskatchewan[51] and in England[52] reaffirmed the exclusive competence of the courts of the domicile.

(b) *Divorce Jurisdiction Act, 1930*

This unsatisfactory state of the common law had initiated legislative reform in many Commonwealth countries. It was "hardly surprising"[53] that in 1930, four years after the *Cook* case, the Canadian Parliament intervened by enacting the Divorce Jurisdiction Act, 1930.[54] This statute is now repealed by section 26 of

[46] *Supra*, footnote 45, at p. 107.

[47] *Stathatos* v. *Stathatos*, [1913] P. 46; *De Montaigue* v. *De Montaigue*, [1913] P. 154. These decisions followed a dictum in *Ogden* v. *Ogden*, [1908] P. 46. See *Indyka* v. *Indyka, supra*, footnote 5, at pp. 538-539, 554. Also, *Gower* v. *Starrett*, [1948] 2 D.L.R. 853 (B.C.S.C.), where, referring to *Stathatos* v. *Stathatos* and *De Montaigue* v. *De Montaigue*, Farris C.J.S.C., at p. 858, said: "These cases need little comment and have apparently not been treated very seriously in any of the English reported cases, and one can readily see the reason therefor. Jurisdiction is not something to be assumed by a Court, but is conferred upon a Court. It matters not how great the hardship may be, unless the Court has in it jurisdiction to hear the case the case cannot be heard, nor can the Court assume that jurisdiction which it has not."

[48] As to recognition of foreign annulments, see Dicey and Morris, *op. cit.*, footnote 9, pp. 371-372.

[49] *Payn* v. *Payn*, [1924] 3 D.L.R. 1006 (Alta). Also see *Chaisson* v. *Chaisson* (1920), 53 D.L.R. 360 (N.S.).

[50] *Jolly* v. *Jolly, supra*, footnote 18. Also see *Cutler* v. *Cutler, supra*, footnote 3.

[51] *Harris* v. *Harris, supra*, footnote 3; *Nelson* v. *Nelson, supra*, footnote 3. Also *Marriaggi* v. *Marriaggi, supra*, footnote 20.

[52] *H.* v. *H.*, [1928] P. 206; *Herd* v. *Herd*, [1936] P. 205. Also, *Welsh* v. *Bagnall, supra*, footnote 45.

[53] *Indyka* v. *Indyka, supra*, footnote 5, at p. 555.

[54] R.S.C., 1952, c. 84.

the Divorce Act, 1968. But a brief mention may be made of its former application. Section 2 of the Divorce Jurisdiction Act introduced "an exception"[55] to the requirement of domicile as a basis of divorce jurisdiction:

> 2. A married woman who either before or after the passing of this Act has been deserted by and has been living separate and apart from her husband for a period of two years and upwards and is still living separate and apart from her husband may, in any one of those provinces of Canada in which there is a court having jurisdiction to grant a divorce *a vinculo matrimonii*, commence in the court of such province having such jurisdiction proceedings for divorce *a vinculo matrimonii* praying that her marriage may be dissolved on any grounds that may entitle her to such divorce according to the law of such province, and such court has jurisdiction to grant such divorce if immediately prior to such desertion the husband of such married woman was domiciled in the province in which such proceedings are commenced.

If the requirements of this section were satisfied a "special jurisdiction"[56] was conferred upon the courts of the province in which the husband was domiciled immediately prior to the desertion.[57] A deserted wife had, however, the onus of establishing her husband's domicile.[58] Also a wife had to establish not only that she had been deserted, but also that following desertion she had lived separate and apart from her husband for a period of at least two years.[59] This period of two years was measured from the date of desertion; proceedings under the section could not be commenced until such period had expired.[60] In *Le Blanc* v. *Le Blanc*[61] the Nova Scotia Court held that a petition for annulment on the ground of impotence came within the provisions of the Divorce Jurisdiction Act. This seemed clearly inconsistent with the statute which, by its wording, conferred jurisdiction in relation only to

---

[55] *Welsh* v. *Bagnall*, *supra*, footnote 45, at p. 442.

[56] *Schiach* v. *Schiach*, [1941] 2 D.L.R. 590, 593 (Sask. K.B.).

[57] *K.* v. *K.*, *supra*, footnote 45; *L.* v. *L.*, [1943] 3 D.L.R. 333 (Sask. C.A.). No such domicile and jurisdiction refused: see *Jolly* v *Jolly*, *supra*, footnote 18. Also, *Macleod* v. *Macleod*, [1931] 1 W.W.R. 811 (Alta S.C.); *Levko* v. *Levko*, [1947] O.W.N. 702.

[58] *Stadel* v. *Stadel*, *supra*, footnote 3; *Zehring* v. *Zehring* (1965), 55 D.L.R. (2d) 283 (Man. Q.B.); *K.* v. *K.*, *supra*, footnote 45. See also *Januszkiewicz* v. *Januszkiewicz* (1965), 55 D.L.R. (2d) 727 (Man. Q.B.).

[59] *Schiach* v. *Schiach*, *supra*, footnote 56, where the meaning of the words "separate and apart" are discussed.

[60] *Porkolab* v. *Porkolab*, [1941] 2 D.L.R. 804 (Sask.); aff'd, [1941] 3 D.L.R. 578 (Sask.). But a separation agreement had been held not to be a bar to suit: *Elkins* v. *Elkins* (1952), 6 W.W.R. (N.S.) 48 (B.C.S.C.). If jurisdiction existed, *quaere* whether the court had jurisdiction to deal with the custody and guardianship of children: see *Schiach* v. *Schiach*, *supra*, footnote 56.

[61] [1955] 1 D.L.R. 676 (N.S. Ct. for Divorce and Matrimonial Causes).

divorce *a vinculo matrimonii*. Thus in *Burnett* v. *Burnett*[62] the Supreme Court of British Columbia held that, being an Act respecting jurisdiction in proceedings for divorce, the federal legislation did not apply to an action brought for judicial separation.

(c) *The Divorce Act, 1968*

Section 6 (1) is the provision that the Act substitutes in lieu of the now repealed Divorce Jurisdiction Act, 1930. And this provision is to be preferred for it provides a less cumbersome and more extensive jurisdictional device. No longer, to obtain a forum, is it incumbent upon a wife to prove her desertion and the requirement of living separate and apart from her husband. Neither element is required by section 6 (1). A wife, whether or not she has been deserted, may be able to bring herself within the operation of this subsection. Unlike the position under the Australian Matrimonial Causes Act, section 6 (1) does not create a statutory fiction: it does not provide that a married woman who satisfies prescribed conditions should be deemed to be domiciled in Canada and accordingly allowed to petition on the basis of domicile, notwithstanding that such domicile does not satisfy the requirements of the common law.[63] Rather its effect is to confer upon a married woman the *capacity* to acquire a separate domicile. For her domicile is to be ascertained as if she were unmarried and, if she is a minor, as if she had attained her majority: that is in accordance with the established common law rules. Assume, however, that a husband is domiciled in Canada, but that his wife, according to section 6 (1), is domiciled outside of Canada. Presumably she will not be able to proceed for divorce in a Canadian court. For section 6 (1) applies for "all purposes" of divorce jurisdiction. Therefore any petition she may present would not, apparently, be presented by a person domiciled in Canada.

In *Gray* v. *Formosa* Lord Denning M.R. referred to the reason for the rule of unity of domicile of husband and wife in this way:[64]

> Now what is the reason for that rule, you may ask. It is the old notion that in English law a husband and wife are one: and the husband is that one. That rule has been swept away in nearly all branches of the law. At this very moment Parliament is sweeping away one of the remaining relics: it is allowing a husband and wife to sue one another in tort. The one relic which remains is the rule that a wife takes her husband's domicile; it is the last barbarous relic of a wife's servitude. Yet sitting in this court we must still observe it.

[62] [1945] 3 D.L.R. 319 (B.C.S.C.).
[63] Cowen and Mendes da Costa, *op. cit.*, footnote 37, pp. 35-36.
[64] [1963] P. 259, at p. 267.

The question as to whether and to what extent a married woman should be granted capacity to acquire a separate domicile has been much debated and different views have been expressed.[65] The solution provided by section 6 (1) is clear: a wife may acquire a domicile separate from that of her husband—but only for the purpose of divorce jurisdiction. In relation to other matrimonial causes the old law will continue to apply, for the Act deals only with divorce. Indeed for all purposes other than establishing the jurisdiction of a court to grant a decree of divorce her domicile will continue to depend upon that of her husband. In this respect, therefore, the "last barbarous relic of a wife's servitude" remains. No doubt, however, this link between the separate domicile of a wife and divorce jurisdiction was dictated by constitutional considerations.

(5) *Point of Time Domicile Must Exist*

Assuming that domicile exists at the date of the institution of proceedings, what is the effect of a change of domicile by a husband before a decree is pronounced? Is jurisdiction withdrawn? Opinions have differed.[66]

(a) *The "once competent-always competent" rule*

Statements in a number of Australian decisions support the view that domicile at the date of the institution of proceedings is decisive.[67] To this effect also is the South African case of *Balfour* v. *Balfour*;[68] also *Meise* v. *Meise*,[69] a decision of the Saskatchewan Court of King's Bench, and *Goldenberg* v. *Triffon*,[70] a decision of the Superior Court of Quebec. *Balfour* v. *Balfour* was applied by

---

[65] Generally, Dicey and Morris, *op. cit.*, footnote 9, pp. 113-114, 118-120; Cheshire, Private International Law (7th ed., 1965), pp. 167-168; Graveson, The Conflict of Laws (5th ed., 1965), pp. 148-149, 173-178. Also, Report of the Royal Commission on Marriage and Divorce (1951-55), Cmd. 9678, paras 825, 894. See Latey, Jurisdiction in Divorce and Nullity (1956), 5 Int. & Comp. L.Q. 499, at pp. 503-504; Graveson and Crane, A Century of Family Law (1957), 435. See too the material referred to in footnote 12, *supra*.

[66] Dicey and Morris, *op. cit.*, footnote 9, p. 298; (see Dicey, The Conflict of Laws (7th ed., 1958), p. 291); Cheshire, *op. cit.*, footnote 65, p. 332; Rayden, Practice and Law of Divorce (9th ed., 1964), p. 31; (see now (10th ed., 1967), p. 31). Also see Fleming, (1953), 2 Int. & Comp. L.Q. 303.

[67] *Russell* v. *Russell*, [1935] S.A.S.R. 85; *Moss* v. *Moss*, [1937] S.R. Qd. 1; *Flakemore* v. *Flakemore*, [1942] V.L.R. 156; *Gane* v. *Gane* (1941), 58 W.N. (N.S.W.) 83. Also, *Leech* v. *Leech*, [1953] V.L.R. 621. Generally see Cowen and Mendes da Costa, *op. cit.*, footnote 37, pp. 32-34.

[68] [1922] W.L.D. 133.

[69] [1947] 1 W.W.R. 949 (Sask.).

[70] [1955] Que. S.C. 341.

the High Court of Ontario in *Pearson* v. *Pearson and Menard*.[71] There the husband-petitioner in 1951 applied for a decree absolute. The Ontario High Court had granted him a decree nisi of divorce in 1939 when he was domiciled in Ontario. The husband had then returned to Sweden, where he had abandoned his Ontario domicile of choice and had reverted to his Swedish domicile of origin. The reasons for the delay in making application for a decree absolute were satisfactorily explained to the court. The court held that judgment absolute might issue. The principle accepted by the court was that if jurisdiction exists when divorce proceedings are commenced, that jurisdiction is not ousted by a change of domicile during the course of the proceedings. Gale J., after citing from *Goulder* v. *Goulder*,[72] stated:[73]

> That judgment would, therefore, seem to provide clear support for the proposition that if the Court has jurisdiction when the action commences, that jurisdiction is not ousted by a change of domicile during the course of the proceedings. Confirmation for that view is also to be found in a case in the Supreme Court of the Union of South Africa. The case is *Balfour* v. *Balfour*, [1922-23] W.L.D. 133. There the domicile of the husband plaintiff was changed after the action was instituted from South Africa to Lourenço Marques, and the decision is, therefore, particularly pertinent.

(b) *Jurisdiction withdrawn*

In *Kerrison* v. *Kerrison*, however, the Supreme Court of New South Wales had no doubt that jurisdiction was vested only in the court of the domicile at the time of the decree affecting the parties' status and not in the court of some past and abandoned domicile. Edwards J. said:[74]

> If a change of domicile is to have any meaning it must mean that the person concerned has become subject to the laws and institutions of his new domicile and entitled to its privileges; conversely he must be taken to have dissociated himself from his previous domicile and his obligations and privileges thereunder. To hold that a man may retain the privileges of both his past and present domicile is to destroy the meaning and effects of the legal doctrine of domicile.

The reasoning of the court, therefore, proceeded upon the principle that a husband, by a change of domicile, dissociates himself from his obligations and privileges under his former domiciliary law.

---

[71] [1951] 2 D.L.R. 851 (Ont.). See Mendes da Costa, Polygamous Marriages in the Conflict of Laws (1966), 44 Can. Bar Rev. 293, at p. 331.

[72] [1892] P. 240.

[73] *Supra*, footnote 71, at pp. 852-853.

[74] (1952), 69 W.N. (N.S.W.) 305, at p. 308.

(c) *Recent English cases*

Until recently the issue here discussed had not been explicitly decided by the English courts. There had been a "series of unequivocal judicial pronouncements"[75] that domicile at the date of the institution of proceedings satisfied the conditions for jurisdiction.[76] It was not, however, until *Mansell* v. *Mansell*[77] that a change of domicile after institution of suit was directly in issue. In this case the domicile of origin of the husband was English. He was married in 1960 in Denmark, where he acquired a domicile of choice. In 1961 the wife left the husband. Thereafter the parties entered into a separation agreement in accordance with Danish law. In 1962 an application for divorce, initiated by the wife but signed by the husband, was submitted to the Danish courts and a royal decree was issued in Denmark dissolving the marriage, in February 1963. Immediately before this date the husband had resumed his English domicile of origin. The present proceedings were commenced by the husband for a declaration that the Danish decree was valid by English law. After a review of the authorities, the court held that domicile at the date of institution of proceedings is not only necessary, but is also sufficient to found jurisdiction at the date of decree. Accordingly the husband was entitled to the declaration he sought. Cumming-Bruce J. was unable to see why the husband should be taken to have dissociated himself from the determination of his status by the very court in which he was still proceeding merely because, during the pendency of that suit, he changed his domicile. Cumming-Bruce J. continued:[78]

> On that narrow ground I could rest my decision in this case; but the concept of domicile has been made the test of jurisdiction as a matter of convenience and comity. Where the matrimonial status has been referred to the court of domicile at the date of institution of proceedings, I can see no ground, in convenience or comity, in raising, or applying, a presumption that, by subsequent change of domicile, either party had dissociated himself from the final determination of those proceedings and the results thereof. In my respectful opinion, Edwards J. in *Kerrison* v. *Kerrison* was led by the logic which explains the selection of domicile as the test of jurisdiction to a conclusion which (a) gives rise to a serious inconvenience in the administration of private international law, and (b) is liable to lead to injustice, as Brett L.J. indicated in his judgment in *Niboyet* v. *Niboyet*.

In *Leon* v. *Leon*[79] the husband's domicile of origin was in Guyana.

[75] *Mansell* v. *Mansell*, [1967] P. 306, at p. 309.

[76] *Silver* v. *Silver* (1962), 106 Sol. Jo. 1012; *Brownrigg* v. *Brownrigg* (1963), 107 Sol. Jo. 176; *Henderson* v. *Henderson*, [1967] P. 77. *Garrow* v. *Garrow* (1965), The Times, June 30th.

[77] *Supra*, footnote 75. [78] *Ibid.*, at p. 312. [79] [1967] P. 275.

In 1955 he married in Guyana and in 1956 he came to England leaving his wife in Guyana. The court found that at that date he had abandoned his domicile of origin and had acquired an English domicile. Further that he kept this domicile until he reverted to his domicile of origin on his return to Guyana in 1964. In 1962, prior to his return to Guyana, the husband petitioned the English courts for divorce on the grounds of the wife's adultery and desertion. In 1963 the wife filed an answer denying these allegations and cross-prayed for divorce on the ground of the husband's desertion. In 1964, after his return to Guyana, the husband instructed his solicitors to discontinue the proceedings on his petition and in 1965 he commenced divorce proceedings in Guyana. The issue before the court was whether, the husband having reverted to his domicile of origin, the court nevertheless retained jurisdiction to entertain the wife's cross petition. The court found that the husband had deserted his wife. Baker J. held that the court had jurisdiction under the English deserted wives' legislation.[80] However, the court also considered and decided whether this legislation was the sole fount of jurisdiction or whether jurisdiction also existed at common law because of the husband's English domicile at the date of the English petition. Baker J. pointed out that were he to adopt the "narrow ground" approach referred to by Cumming-Bruce J. in *Mansell* v. *Mansell*, he would be driven to accede to the husband's application and to dismiss all proceedings, including the wife's cross-petition. For the husband had done all he could to dissociate himself from a determination of his status by the English courts; unlike in *Mansell* v. *Mansell*, he had not only changed his domicile but was proceeding in a foreign jurisdiction and was himself seeking the dismissal of the English proceedings. But the court referred to, and agreed with, the general statement by Cumming-Bruce J. that a conclusion that a change of domicile withdraws divorce jurisdiction is one which gives rise to serious inconvenience in the administration of private international law and also is one which is liable to lead to injustice. Baker J. said:[81]

> In my opinion the true rule is "once competent, always competent". I cannot accept that by changing his domicile a man must be taken to have dissociated himself from his obligations thereunder. . . .
>
> The husband must perish by the sword that he has drawn.

Accordingly a decree nisi of divorce was granted on the wife's cross-petition.

---

[80] The Matrimonial Causes Act, 1965, c. 72, s. 40.
[81] *Leon* v. *Leon*, *supra*, footnote 79, at p. 284.

(d) *The Divorce Act, 1968*

Divorce proceedings by a wife will be founded upon her own separate domicile. This follows from sections 5 and 6 (1). In such a case the domicile, at any time, of the respondent husband appears irrelevant. However the situation may still arise where the domicile of the petitioner—husband or wife—is varied subsequent to the institution of proceedings. Section 5 (1) provides merely that a court for any province has jurisdiction if the petition is presented by a person domiciled in Canada. There is, therefore, no express statutory solution to the question here discussed. The "once competent, always competent" rule appears to reflect the mainstream of authority. It is to be hoped that this approach will be adopted by the courts in the interpretation of section 5 (1).

(6) *Year's Residence*

For a court for any province to have jurisdiction under section 5, the petition must not only be presented by a person domiciled in Canada, but also by section 5 (1) (b) either the petitioner or the respondent must have been ordinarily resident in that province for a period of at least one year immediately preceding the presentation of the petition and must have actually resided there for at least ten months of that period. This residence qualification did not exist at common law. Only domicile was required. A husband arriving in Canada may forthwith acquire a domicile providing he has the necessary *animus* and *factum*. At common law he could have immediately commenced divorce proceedings. Under section 5 (1) (b) he must wait at least one year. That is unless the residence of his wife satisfies section 5 (1) (b) and he proceeds in the province of her residence.

(a) *Meaning of "ordinarily resident"*

Neither "ordinarily resident" nor "actually resided" are defined in the Act. The assumption appears to be that a person may be "ordinarily" resident in a province without being "actually" so resident. Presumably actual residence connotes a degree of physical presence not required to establish ordinary residence. The expression "ordinarily resident" is found in other statutes. A discussion of some of the cases wherein these words have been judicially considered may, perhaps, provide assistance in the construction of section 5.[82]

---

[82] Generally, Dicey and Morris, *op. cit.*, footnote 9, pp. 88-89.

In *Thomson* v. *Minister of National Revenue,* Rand J., in an income tax context, after a consideration of English cases,[83] said:[84]

> The expression "ordinarily resident" carries a restricted signification, and although the first impression seems to be that of preponderance in time, the decisions on the English Act reject that view. It is held to mean residence in the course of the customary mode of life of the person concerned, and it is contrasted with special or occasional or casual residence. The general mode of life is, therefore, relevant to a question of its application.

Construing highway traffic legislation, the Ontario High Court expressed the view that the word "ordinarily" was meant to be contrasted with qualifying words such as "sporadically" or "temporarily" or "intermittently", but that it was not meant to be completely synonymous with "mainly".[85] Indeed, it has been stated, a person may have more than one ordinary residence.[86] A closer analogy may be provided by section 40 (1) of the Matrimonial Causes Act, 1965 whereby, *inter alia,* divorce jurisdiction is conferred on English courts at the suit of a wife if she is resident in England and has been ordinarily resident there for a period of three years immediately preceding the commencement of the proceedings.[87] It has been said that ordinary residence can be changed in a day.[88] On the other hand, to satisfy this provision physical presence without interruption is not necessarily required. While each case must depend upon its own facts, it seems that mere temporary absence for the purpose of holidays abroad will not make a gap in the period of ordinary residence: no more so will a longer absence for business purposes necessarily break the period of ordinary residence: one test is the location of the real home and it is, therefore, material to consider whether a residence has been maintained within the jurisdiction readily available for occupation.[89]

---

[83] *Levene* v. *I.R.C.*, [1928] A.C. 217; *I.R.C.* v. *Lysaght*, [1928] A.C. 234.

[84] [1946] S.C. 209, at p. 224. Also, *Re an Election in St. John's South, Newfoundland* (1959), 22 D.L.R. (2d) 288 (N.S.C.); *ex. p. Charlton* (1965), 53 D.L.R. (2d) 743 (N.B.S.C. App. Div.).

[85] *Re The Service Fire Insurance Company of New York* v. *Eggens*, [1955] O.W.N. 116.

[86] *Mester* v. *Kummu*, [1957] O.W.N. 534.

[87] Generally, Dicey and Morris, *op. cit.*, footnote 9, pp. 295-305; Cheshire, *op. cit.*, footnote 65, pp. 335-336; Cowen and Mendes da Costa, *op. cit.*, footnote 37, pp. 35-42.

[88] *Macrae* v. *Macrae*, [1949] P. 397.

[89] *Stransky* v. *Stransky*, [1954] P. 428. Followed, *Lewis* v. *Lewis*, [1956] 1 W.L.R. 200. Also see *R.* v. *Edgehill*, [1963] 2 W.L.R. 170; *Appah* v. *Monseu*, [1967] 1 W.L.R. 893; *Re an Election in St. John's South, Newfoundland, supra,* footnote 84. But see *Hopkins* v. *Hopkins*, [1951] P. 116.

(b) *Purpose of the residence qualification*

Reference to residence in a province is curiously incongruous to the concept of domicile within the national unit of Canada. To a person domiciled in Canada, the courts of British Columbia are as much the courts of his domicile as are the courts of Ontario. The courts of any province should, it is considered, be competent to entertain his petition, regardless of the location of his residence. But this result is denied by section 5 (1) (b). Is it the purpose of this paragraph to prohibit resort to the jurisdiction? Resorting provisions did (prior to the Commonwealth Matrimonial Causes Act, 1959) exist in the legislation of some Australian states. They reflected an imperfect apprehension of the concept of domicile and gave rise to additional complications.[90] However, if it is considered that resorting provisions are required, section 5 (1) (b) clearly accomplishes this result.

It may be suggested that the purpose of section 5 (1) (b) is to preclude the choice of an inconvenient forum, or possibly to preclude "forum shopping". If so, could no other method have been adopted? Section 26 (2) of the Australian Matrimonial Causes Act, 1959 offered one possible alternative:[91]

> 26. (2) Where it appears to a court in which a matrimonial cause has been instituted under this Act (including a matrimonial cause in relation to which the last preceding sub-section applies) that it is in the interests of justice that the cause be dealt with in another court having jurisdiction to hear and determine that cause, the court may transfer the cause to the other court.

A solution of this kind would have appeared more desirable. It is more flexible. Suppose, for example, that the matrimonial home is in Ontario, that the parties have always lived in Ontario and that the witnesses also reside there. Suppose further that the husband goes to British Columbia and, after a year, commences proceedings in the courts of that Province. Should provision analogous to section 26 (2) of the Australian Act be operative, the British Columbia court might, if it appeared to be in the interests of justice, transfer the cause to the Ontario court. No such power of transfer is contained in the provisions of section 5 (1) of the Divorce Act.

(c) *Concurrent proceedings*

That parties domiciled in Canada may petition in the courts

---

[90] Cowen and Mendes da Costa, *op. cit.*, footnote 37, pp. 8, 31.
[91] See Cowen and Mendes da Costa, *op. cit.*, *ibid.*, pp. 24-29.

of different provinces is contemplated by section 5 (2) which deals with petitions pending before two courts:

> 5. (2) Where petitions for divorce are pending between a husband and wife before each of two courts that would otherwise have jurisdiction under this Act respectively to entertain them and to grant relief in respect thereof,
>
> (a) if the petitions were presented on different days and the petition that was presented first is not discontinued within thirty days after the day it was presented, the court to which a petition was first presented has exclusive jurisdiction to grant relief between the parties and the other petition shall be deemed to be discontinued; and
>
> (b) if the petitions were presented on the same day and neither of them is discontinued within thirty days after that day, the Divorce Division of the Exchequer Court has exclusive jurisdiction to grant relief between the parties and the petition or petitions pending before the other court or courts shall be removed, by direction of the Divorce Division of the Exchequer Court, into that Court for adjudication.

Assume that both spouses are domiciled in Canada and that the husband is resident in British Columbia and the wife resident in Ontario. The husband may present a petition to the courts of British Columbia and the wife may petition the Ontario courts. Section 5 (2) is clearly designed to control this kind of situation. Section 5 (1) (b), however, requires that *either* the petitioner or the respondent should have the necessary residence qualification. Apparently, therefore, the husband could not only petition in British Columbia but, taking advantage of his wife's residence, could also present a petition in Ontario.[92] In either event the solution of section 5 (2) is, briefly stated, that the court to which a petition is first presented has exclusive jurisdiction, and if petitions are presented on the same day, the Divorce Division of the Exchequer Court has exclusive jurisdiction. That this will always be the desirable answer may be doubted. To refer to the above example of the husband who moved from the matrimonial home in Ontario to British Columbia. Suppose, after his petition is presented in British Columbia the wife petitions the Ontario courts. Should it necessarily follow that the British Columbia court should have exclusive jurisdiction merely because the husband petitioned first? Should the advice to the wife have been to petition

---

[92] *Quaere* the effect of legislation analogous to the Judicature Act, R.S.O., 1960, c. 197, s. 21. See *Empire-Universal Films Ltd.* v. *Rank*, [1947] O.R. 775; *Henderson* v. *Newall*, [1967] 1 O.R. 289.

forthwith? Does this encourage reconciliation? Section 26 (1) of the Australian Matrimonial Causes Act provides:

> 26. (1) Where it appears to a court in which a matrimonial cause has been instituted under this Act that a matrimonial cause between the parties to the marriage or purported marriage has been instituted in another court having jurisdiction under this Act, the court may, in its discretion, stay the cause for such time as it thinks fit.

This enables a court to stay proceedings in its discretion. As it is discretionary, competing claims can more realistically be balanced. Section 26 (2) specifically includes a matrimonial cause to which section 26 (1) applies. So in a case of simultaneous proceedings alternative remedies of stay, or transfer of proceedings, may be sought.

Section 5 (3) deals with situations where a petition is opposed. By this subsection where a husband or wife opposes a petition for divorce, the court may grant to such spouse the relief that might have been granted to him or to her if he or she had presented a petition to the court seeking that relief and the court had had jurisdiction to entertain the petition under the Act. In the above example, therefore, the wife may oppose the husband's petition in the British Columbia courts, and although she is unable to satisfy the residence requirements of section 5 (1) (b), the court is nevertheless empowered to grant her relief. Indeed the wording of section 5 (3) would appear general enough to cover also the situation where a husband, domiciled and resident in England, opposes his wife's petition presented to the Ontario courts, on the basis of her own separate domicile.[93]

It may be mentioned that section 5 (2) does not apply to a situation where proceedings are pending in a court having jurisdiction under the Act and proceedings for the same or substantially the same relief are simultaneously pending in a foreign court. Such circumstances will be determined by the application of the common law principles of *lis alibi pendens*.[94]

(7) *Polygamous Marriages*

The Divorce Act makes no reference to polygamous marriages. The rule in *Hyde* v. *Hyde*,[95] that the courts will not entertain matrimonial jurisdiction in relation to a polygamous or a potentially polygamous marriage is, therefore, perpetuated. This rule has been

[93] *Cf.* Dicey and Morris, *op. cit.*, footnote 9, p. 300.
[94] Generally, Cowen and Mendes da Costa, *op. cit.*, footnote 37, pp. 24-29.
[95] (1866), L.R. 1 P. & D. 130.

subject to criticism. A more detailed discussion of polygamous marriages may be found elsewhere,[96] where reference has been made to the Australian Matrimonial Causes Act, 1965, which amends the Matrimonial Causes Act, 1959 and confers limited jurisdiction upon the Australian courts in relation to polygamous and potentially polygamous marriages.[97] This amendment would appear to reflect a concern that injustice may be caused by the application of the *Hyde* rule. That a social problem is involved seems supported by the growing case law on this topic. Both Australia and Canada are countries of emigration and there seems no reason to suppose that the policy factors which induced the amendment of 1965 in Australia are necessarily absent in Canada. It is accordingly regretted that this opportunity was not taken to effect in Canadian law a modification, if not an abrogation, of the rule in *Hyde* v. *Hyde*.

II. *Choice of Law.*

It is generally stated that no choice of law problem arises in divorce proceedings: that is once the court takes jurisdiction it will apply its own domestic rules in relation to the grounds for divorce.[98] There is little judicial discussion on this issue and no explicit choice of law rule has been established. The reason is, presumably, that at common law only the courts of the domicile had jurisdiction and accordingly applied their own law without comment. While such exclusive jurisdiction continued it was unnecessary to determine whether this law was applied as the *lex domicilii* or as the *lex fori*. The need for the formulation of a discrete choice of law rule became apparent, however, with the statutory creation of extra-domiciliary jurisdiction. In *Zanelli* v. *Zanelli*[99] the court,

---

[96] Mendes da Costa, *op. cit.*, footnote 71.

[97] Matrimonial Causes Act, 1965, No. 99 of 1965. See Mendes da Costa, *op. cit., ibid.*, at p. 335. Also Cowen, (1963), 12 Int. & Comp. L.Q. 1407, 1411; Davis and Webb, (1966), 15 Int. & Comp. L.Q. 1185; Jackson, Monogamous Polygamy (1966), 40 Austr. L. Jo. 148.

[98] Dicey and Morris, *op. cit.*, footnote 9, p. 307; Cheshire, *op. cit.*, footnote 65, p. 339; Graveson, *op. cit.*, footnote 65, pp. 248-250; Castel, *op. cit.*, footnote 22, p. 121. Conversely a divorce in the domicile will be recognized even though granted for reasons which would not suffice in the forum: see *Bater* v. *Bater*, [1906] P. 209; *Indyka* v. *Indyka, supra*, footnote 5; *Tijanic* v. *Tijanic*, [1967] 3 W.L.R. 1566; *Walker* v. *Walker*, [1950] 4 D.L.R. 253 (B.C.C.A.); *Goldenberg* v. *Triffon, supra*, footnote 70. *Cf. Pledge* v. *Walter* (1961), 36 W.W.R. 95 (Alta).

[99] (1948), 64 T.L.R. 556. The Matrimonial Causes Act, 1937, c. 57, s. 13; now s. 40 (1) of the Matrimonial Causes Act, 1965, c. 72. The Act of 1937, under which *Zanelli* v. *Zanelli* was decided, did not impose a choice of law rule.

exercising jurisdiction under the English deserted wife provisions, granted a divorce to the wife though by the *lex domicilii,* Italian law, divorce between the parties was legally impossible. English law applied, apparently, as the *lex fori.* This result has now been ensured by an amendment to the statute.[100] In proceedings under the Divorce Jurisdiction Act the same result would have been achieved, for section 2 provided that a deserted wife might commence proceedings in the courts of the province in which her husband was domiciled immediately prior to her desertion, praying that "her marriage may be dissolved on any grounds that may entitle her to such divorce *according to the law of such province*".

(1) *Absence of Choice of Law Provision*

The Divorce Act contains no choice of law provision. This absence produces no difficulty on a petition by a husband for the *lex fori* and the *lex domicilii* will coincide. On a petition by a wife the position is not so clear. Section 5 provides that a petition must be presented by a person domiciled in Canada and section 6 confers upon a wife capacity to acquire a separate domicile. Assume that a husband is domiciled in England but that under section 6 a wife acquires a Canadian domicile. This domicile will satisfy section 5 and be sufficient to invoke the jurisdiction of a court. Section 6 is, however, restricted to all purposes of establishing the *jurisdiction* of a court. Will this section operate also at the choice of law stage? If not there will exist competing claims of the *lex domicilii,* English law, and the *lex fori,* Canadian law. It may be that the Divorce Act, 1968, contains grounds for divorce not recognized as such by the law of the domicile. Conversely a divorce may be sought in a Canadian court on a ground which is so recognized by the *lex domicilii* but which is not present in the federal statute.[101] How the choice of law process will be resolved cannot be stated with certainty. However the residence requirements of section 5 ensure some degree of connection with the forum and, as with the case of the husband's petition, there is no reason in the cases to suggest that any law other than Canadian law will apply.

Assume in the example above that the husband opposes the wife's petition, as apparently he could under section 5 (3). This subsection provides that the court may grant him the relief that

[100] S. 18 (3) of the Matrimonial Causes Act, 1950, c. 25. See now s. 40 (2) of the Matrimonial Causes Act, 1965, *ibid.*

[101] Dicey and Morris, *op. cit.*, footnote 9, pp. 307-308.

it might have granted him if he had presented a petition to the court seeking that relief and the court had had jurisdiction to entertain the petition. Accordingly, in this event, no choice of law problem would seem to arise.

(2) *Foreign Factors*

The place where the alleged matrimonial offence was committed is not a relevant factor in the exercise of divorce jurisdiction.[102] No more so is the domicile of the parties at such time. This was so held in *Myanduk* v. *Myanduk*.[103] The husband, while domiciled in Poland, committed adultery. At a later date the husband acquired a domicile in Alberta. The wife commenced divorce proceedings, basing her action upon the adultery committed while the parties' domicile was Polish. The wife's claim succeeded. The ground for divorce had arisen outside the jurisdiction and had occurred before the change of domicile from Poland to Alberta, but the Court did not consider these facts relevant.

In *Myanduk* v. *Myanduk* the *quality* of the conduct alleged under Polish law was not considered material. Indeed the court stated that it had no evidence of the matrimonial laws of Poland. There is, however, discussion of this issue in a series of three Victorian cases. In these cases (in all of which a decree was ultimately pronounced) the view was advanced that divorce ought not to be granted, unless the domestic legislation is specific on the point, where the act complained of was lawful by the law of the domicile[104] at the time of commission. In *Cremer* v. *Cremer* the Full Court of the Supreme Court of Victoria put the doctrine this way:[105]

> We think that the true conclusion is, that if the act complained of is lawful where done, the parties being then domiciled there, a divorce should not be granted here unless our legislation is specific on the point.

---

[102] *Wilson* v. *Wilson, supra,* footnote 8; *Goulder* v. *Goulder, supra,* footnote 72, at p. 243. As to jurisdiction to award damages for adultery, where the act of adultery was committed out of the jurisdiction, see *Holeczy* v. *Holeczy* (1966), 9 F.L.R. 193 (Vict. S.C.). Also, Cowen and Mendes da Costa, *op. cit.*, footnote 37, at pp. 107-117.

[103] [1931] 2 D.L.R. 693 (Alta S.C.). Also see *Cutler* v. *Cutler, supra,* footnote 3.

[104] *Grummett* v. *Grummett* (1965), 7 F.L.R. 415 (Q'ld S.C.). Gibbs J., referring to *Cremer* v. *Cremer*, [1905] V.L.R. 532, said: "Although the court spoke of the place of commission of the act, it appears that it intended to refer to the place in which the parties were domiciled when the act was committed."

[105] *Ibid.*, at p. 535. Also, *Boyd* v. *Boyd*, [1913] V.L.R. 282; *Russell* v. *Russell*, [1941] V.L.R. 46. Generally, Cowen and Mendes da Costa, *op. cit.*, footnote 37, pp. 43-44.

> But if the act is not lawful where committed, even though not a ground for a divorce there, then this Court can dissolve the marriage, provided all other conditions are complied with.

In *Grummett* v. *Grummett*[106] a divorce was sought on the ground, *inter alia*, of desertion. Part of the period had run while the parties were domiciled in Saskatchewan and the court had been informed that desertion was not then a ground for divorce in this Province. Reference was made to the Victorian cases. The court apparently doubted the existence of the doctrine but held that whatever may have been the law before the passing of the Commonwealth Matrimonial Causes Act, 1959,[107] there was no room for any such doctrine since its enactment.

There is no English authority directly in point. In *Ali* v. *Ali*[108] a husband petitioned the English courts for divorce. The marriage had been celebrated in India. At the date of the marriage the husband was domiciled in India and the marriage was a valid potentially polygamous marriage. The husband subsequently acquired a domicile of choice in England. English courts have no matrimonial jurisdiction in relation to a polygamous marriage. The court held, however, that the acquisition of an English domicile had the effect of converting the potentially polygamous marriage into a monogamous marriage and that consequently jurisdiction existed. The husband alleged desertion on the part of the wife. The wife in her answer alleged cruelty. The conduct out of which these allegations arose occurred prior to 1961: that is at a time when the marriage was still potentially polygamous and when the court did not have jurisdiction. Could these allegations be entertained as a basis for relief? It was held that they could not. It seemed to the court quite impossible to entertain an allegation of a matrimonial offence committed at the time when the union was still a potentially polygamous one over which the court exercised no jurisdiction at all. Cumming-Bruce J. said:[109]

> At the time of the desertion alleged in the petition the marriage remained of that character and it remained of that character, upon my finding, until the middle of 1961—which is less than two years before the inception of these proceedings. In my view, therefore, the court is precluded from exercising jurisdiction over alleged matrimonial offences committed during the continuance of a potentially polygamous union of a kind over which the courts matrimonial of this country exercise

---

[106] *Ibid.*

[107] Cowen and Mendes da Costa, *op. cit.*, footnote 37, p. 43.

[108] [1966] 2 W.L.R. 620. See Mendes da Costa, *op. cit.*, footnote 71, at p. 307.

[109] *Ibid.*, at p. 633.

> no jurisdiction. The same applies to the wife's complaints of cruelty. Those matters of cruelty we know were matters which arose during the time when the marriage was potentially polygamous and this court can entertain no jurisdiction in respect of those complaints, for the union was still, at the time of the matters complained of, of a type with which this court does not concern itself.

A decree nisi was, however, granted to the wife on the ground of her husband's adultery which had occurred *after* the husband had acquired an English domicile. In *Ali* v. *Ali* the attention of the court was directed, not to the quality of the act by the *lex domicilii* at the time the cause of action arose, but to the nature of the marriage as at that date. It does not, therefore, precisely deal with the issue here discussed. Yet in both *Myanduk* v. *Myanduk* and *Ali* v. *Ali*, at the date when the conduct complained of occurred, the Court would have been without jurisdiction.

At the time of the conduct alleged, and at the time of proceedings, the husband may be domiciled in a jurisdiction by the laws of which such conduct is lawful. Nevertheless the policy of the statute, to provide relief on the basis of marriage breakdown, indicates that a Canadian court will be concerned only with the provisions of the Act of 1968.

III. *Recognition.*

Section 14 of the Act provides, *inter alia*, that a decree of divorce granted under the Act has legal effect throughout Canada. Thus, for example, a divorce granted by the courts of British Columbia is assured recognition in Ontario. This precludes the contention that such a decree should be denied effect in Ontario: for example, because the petitioner was not domiciled in Canada according to the interpretation, by the Ontario courts of the concept of domicile.[110]

Section 6 (2) of the Act provides:

> 6. (2) For all purposes of determining the marital status in Canada of any person and without limiting or restricting any existing rule of law applicable to the recognition of decrees of divorce granted otherwise than under this Act, recognition shall be given to a decree of divorce, granted after the coming into force of this Act under a law of a country or subdivision of a country other than Canada by a tribunal or other competent authority that had jurisdiction under that law to grant the decree, on the basis of the domicile of the wife in that country or subdivision determined as if she were unmarried and, if she was a minor, as if she had attained her majority.

The words "and without limiting or restricting any existing rule of

[110] *Re Martin, supra,* footnote 11; *Re Annesley, supra,* footnote 11.

law applicable to the recognition of decrees of divorce granted otherwise than under this Act" were not contained in the original draft of Bill C-187 but were added by a later amendment.[111] These words make it clear that the Act does not intend to control as a general matter the recognition of foreign divorces but is concerned only with the particular situation to which it relates. The common law rules of recognition accordingly remain applicable, and the salient points thereof deserve a brief mention.[112]

(1) *Common Law*

(a) *Prior to Indyka* v. *Indyka*

Originally only decrees of the courts of the domicile were afforded recognition.[113] But common law extensions have been engrafted on to this rule. In *Armitage* v. *Attorney-General*[114] it was decided that recognition would be accorded to a foreign divorce which, though not granted by the courts of the domicile, would, at the date of the decree, be recognized as valid by those courts. The *Armitage* case has been expressly left open for further consideration in Alberta[115] and has been followed in British Columbia.[116] It was referred to with apparent approval in Saskatchewan.[117] So too by the Ontario Court of Appeal in *Schwebel* v. *Ungar*,[118] though the precise principle upon which this decision rests has been the subject of comment.[119] In 1937 and in 1949

[111] There are further differences. Clause 6 (2) of Bill C-187 contained the words "on the basis of the domicile of the husband or wife . . .". These words are omitted from s. 6 (2). The meaning of these words in clause 6 (2) of Bill C-187 was not clear.

[112] On recognition of foreign divorces generally, see Dicey and Morris, *op. cit.*, footnote 9, pp. 308-324; Cheshire, *op. cit.*, footnote 65, pp. 340-351; Graveson, *op. cit.*, footnote 65, pp. 253-266; Castel, *op. cit.*, footnote 22, pp. 121-129; Cowen and Mendes da Costa, *op. cit.*, footnote 37, Ch. VII.

[113] For circumstances which may preclude the recognition of foreign divorces see Dicey and Morris, *op. cit.*, *ibid.*, pp. 317-319.

[114] [1906] P. 135. Also, *Abate* v. *Abate*, [1961] P. 29; *Mountbatten* v. *Mountbatten*, [1959] P. 43. See Falconbridge, Essays on the Conflict of Laws (2nd ed., 1954), 740 *et seq.* Also see criticism by Morris, Recognition of Divorces Granted Outside the Domicile (1946), 24 Can. Bar Rev. 73.

[115] *Holmes* v. *Holmes*, [1927] 2 W.W.R. 253 (Alta S.C.). Also see *Yeger and Duder* v. *Registrar General of Vital Statistics* (1958), 26 W.W.R. 651 (Alta S.C.).

[116] *Wyllie* v. *Martin*, [1931] 3 W.W.R. 465 (B.C.S.C.); *Walker* v. *Walker*, *supra*, footnote 98.

[117] *Burnfiel* v. *Burnfiel*, [1926] 2 D.L.R. 129 (Sask. C.A.).

[118] [1964] 1 O.R. 430, aff'd, [1965] S.C.R. 148. Also *R.* v. *Brinkley*, *supra*, footnote 45. See *Padolecchia* v. *Padolecchia*, [1968] 2 W.L.R. 173, agreeing with *Schwebel* v. *Ungar*. Also *Lyon* v. *Lyon*, [1959] O.R. 305.

[119] Lysyk, (1965), 43 Can. Bar Rev. 363; Hartley, (1965), 4 Western Ont. L. Rev. 99; Webb, Bigamy and Capacity to Marry (1965), 14 Int. & Comp. L.Q. 659.

domestic divorce jurisdiction was, by statute, widened in England. Domicile ceased to be the sole connecting factor. Extra-domiciliary jurisdiction could thereafter be taken at the suit of a deserted wife and also on the basis of three years residence in England by a wife. The question was raised whether, though the statute was silent as to recognition, this extension of domestic jurisdiction carried with it, as a matter of common law, a corresponding extension of recognition rules. In *Travers* v. *Holley*[120] the English Court of Appeal, referring to the principles of comity and reciprocity, held that it did. Initially what was required to ensure recognition was a substantial similarity between the English and the foreign jurisdictional bases. Since *Robinson-Scott* v. *Robinson-Scott*,[121] however, the form in which the foreign jurisdiction is phrased has ceased to be emphasized. Attention has been directed to the question whether facts exist which *mutatis mutandis* would have supported jurisdiction in the English courts.[122] It is not yet entirely clear whether the doctrine of *Travers* v. *Holley* will be received as law in all Canadian jurisdictions.[123] From the decision of the Court of Appeal in *Re Capon*[124] it does appear to be the law in Ontario, and it has been applied in Manitoba.[125] There seems a conflict of opinion in Alberta[126] and the other provinces have not yet spoken.[127]

(b) *Indyka* v. *Indyka*

Recently in *Indyka* v. *Indyka*,[128] the law as to recognition of foreign divorces underwent "rather an abrupt change".[129] In this

[120] *Supra*, footnote 26. See Kennedy, "Reciprocity" in the Recognition of Foreign Judgments (1954), 32 Can. Bar Rev. 359; Recognition of Foreign Divorces and Nullity Decrees (1957), 35 Can. Bar Rev. 628.

[121] [1958] P. 71.

[122] As the English legislation was however available only to a wife, recognition was refused to a divorce granted to a husband on his cross-petition: *Levett* v. *Levett and Smith*, [1957] P. 156; also *Russell* v. *Russell and Roebuck*, [1957] P. 375. Further the principles of *Armitage* v. *Attorney-General* and *Travers* v. *Holley* have been held not to have combined application: *Mountbatten* v. *Mountbatten*, *supra*, footnote 114; also *Schwebel* v. *Ungar*, *supra*, footnote 118.

[123] Payne, Recognition of Foreign Divorce Decrees in the Canadian Courts (1961), 10 Int. & Comp. L.Q. 846.

[124] *Supra*, footnote 45. See Castel, (1965), 43 Can. Bar Rev. 647, at p. 655.

[125] *Januszkiewicz* v. *Januszkiewicz*, *supra*, footnote 58.

[126] *Bednar and Bednar* v. *Deputy Registrar General of Vital Statistics*, *supra*, footnote 25; *Re Allarie and Director of Vital Statistics (Alberta)* (1963), 41 D.L.R. (2d) 553 (Alta S.C.). But see *La Pierre* v. *Walter* (1960), 24 D.L.R. (2d) 483 (Alta S.C.).

[127] But see *Buehler* v. *Buehler* (1956), 4 D.L.R. (2d) 326 (Sask. Q.B.).

[128] *Supra*, footnote 5; see *Sinclair* v. *Sinclair*, [1967] 3 W.L.R. 1540.

[129] *Angelo* v. *Angelo*, [1968] 1 W.L.R. 401, at p. 402.

case the husband, the appellant, married his first wife in Czechoslovakia in 1938. On January 18th, 1949 the first wife, who had always resided in Czechoslovakia, was granted a decree of divorce by the Czechoslovakian courts. The domicile of origin of the husband was Czechoslovakian, but by the date of the divorce proceedings he had acquired an English domicile of choice. On March 20th, 1959 the husband went through a ceremony of marriage in England with the second wife, the respondent. In 1965 the respondent petitioned for divorce. In his answer the husband, *inter alia*, cross-prayed for nullity. The foundation of his case was that the Czechoslovakian decree was not recognized in English law and that, therefore, the English marriage was bigamous and void. By agreement the issue as to the validity of the English marriage was first determined. As the husband's domicile was English, the Czechoslovakian decree could not command recognition as a decree of the *forum domicilii*. Nor could validity be sought under the principle of *Armitage* v. *Attorney-General*. The contention was that recognition should be granted under the doctrine of *Travers* v. *Holley*. The point was that the statute conferring jurisdiction upon the English courts on the basis of three years residence was not enacted until December, 1949,[130] whereas the Czechoslovakian decree had become final in February of that year. At first instance the decree was denied recognition, but this decision was reversed on appeal.[131] An appeal to the House of Lords was dismissed.[132] In varying degrees, Lord Morris of Borth-Y-Gest, Lord Pearce and Lord Pearson approved *Travers* v. *Holley* and upheld its application notwithstanding that the Czechoslovakian decree ante-dated the English statute.[133]

---

[130] Law Reform (Miscellaneous Provisions) Act, 1949, c. 100. See now, Matrimonial Causes Act, 1965, c. 72, s. 40 (1) (b).

[131] [1966] 3 W.L.R. 603. See Castel, (1967), 45 Can. Bar Rev. 140.

[132] *Supra*, footnote 5.

[133] *Ibid.*, at pp. 533, 546, 561-562. See *Tijanic* v. *Tijanic*, *supra*, footnote 98. In *Indyka* v. *Indyka* Lord Reid was more critical. He was of the view that Parliament had left the courts free to develop recognition rules and he saw no reason why, by adopting the reasoning behind *Travers* v. *Holley*, the courts should tie this development to a reflection of piecemeal legislative changes, enacted with quite a different object in view: at p. 519, also generally, at pp. 516-520. Lord Wilberforce did not find it necessary to discuss *Travers* v. *Holley* in detail, since he said that he was in general agreement with what Lord Reid had said about it. Specifically Lord Wilberforce did not regard the *Travers* v. *Holley* rule (the "quasi-mathematical application in reverse of domestic legislation") as amounting to more than a general working principle that changes in domestic jurisdiction should be taken into account by the courts in making determinations as to what foreign decrees they will recognize: at p. 559. Also *Brown* v. *Brown*, [1968] 2 W.L.R. 969.

The judgments of the members of the House of Lords, however, went far beyond an appraisal of the *Travers* v. *Holley* doctrine. They contain a complete re-examination and re-appraisal of the significance of domicile in matrimonial matters. Detailed discussion of this decision is beyond the scope of this article, but may be found elsewhere.[134] Suffice it here to say that *Le Mesurier* v. *Le Mesurier*,[135] in so far as it held that only decrees of the domicile should be afforded recognition, was not followed. Each member of the House of Lords considered that the Czechoslovakian decree was entitled to recognition though, aside from the *Travers* v. *Holley* issue, it is not easy to state shortly the purport of each judgment. In so far as any statement may be taken as representative of the diverse factors discussed, reference may be made to the statement of Lord Pearce:[136]

> There are further reasons which, in my opinion, compel the recognition of the decree. Both parties to the marriage were nationals of Czechoslovakia (and incidentally domiciled there as well until 1946), the matrimonial home was there, the petitioning wife resided there all her life, and their courts took jurisdiction there on the ground of nationality. Undoubtedly the country of the nationality was the predominant country with regard to the parties to this marriage, and as such its decree ought to be recognised in this country.

It seems clear that the House of Lords in *Indyka* v. *Indyka* was fully aware that it was breaking new ground, and setting out an "entirely new test or tests"[137] of recognition. The precise ratio of the *Indyka* case cannot be stated with any certainty. It has been said that each "of their lordships expresses much the same broad view of what should be the new recognition rule, although stating it in quite different terms".[138] If this is so, the rule can perhaps be stated in this way: a foreign divorce will be recognized where there exists some real and substantial connexion between the petitioner and the granting jurisdiction. This is subject to the existing requirement that a decree should not be obtained by fraud or that there should not otherwise be a denial of natural justice.[139] In addition there seems a further limitation. The decree must be a

---

[134] Latey, Recognition of Foreign Decrees of Divorce (1967), 16 Int. & Comp. L.Q. 982; Webb, The Old Order Changeth—Travers v. Holley Reinterpreted (1967), 14 Int. & Comp. L.Q. 997; Bale, (1968), 46 Can. Bar Rev. 113.

[135] *Supra*, footnote 8.

[136] *Supra*, footnote 5, at p. 546.

[137] *Angelo* v. *Angelo, supra*, footnote 129, at p. 405. Also *Brown* v. *Brown, supra*, footnote 133.

[138] *Ibid.*, at p. 403 per Ormrod J.

[139] *Indyka* v. *Indyka, supra*, footnote 5, at pp. 531, 554, 563.

"genuine divorce".[140] The notion of a "genuine divorce" in this context seems to relate as much to the question as to whether jurisdiction exists as to the subsequent issue of whether, jurisdiction present, recognition is to be denied for some vitiating factor.

The suggested choice of jurisdiction rule does seem to express in general terms the theme which runs through much of *Indyka* v. *Indyka*. But what is a "real and substantial connexion"? Some guide lines were laid down: Lord Wilberforce said:[141]

> How far should this relaxation go? In my opinion, it would be in accordance with the developments I have mentioned and with the trend of legislation—mainly our own but also that of other countries with similar social systems—to recognise divorces given to wives by the courts of their residence wherever a real and substantial connection is shown between the petitioner and the country, or territory, exercising jurisdiction. I use these expressions so as to enable the courts, who must decide each case, to consider both the length and quality of the residence and to take into account such other factors as nationality which may reinforce the connection. Equally they would enable the courts (as they habitually do without difficulty) to reject residence of passage or residence, to use the descriptive expression of the older cases, resorted to by persons who properly should seek relief here for the purpose of obtaining relief which our courts would not give.

It is only to be expected, therefore, that the principles expressed in *Indyka* v. *Indyka* will be judicially explored and discussed. The *Indyka* case has not yet been considered by Canadian courts. The process of refinement has, however, already commenced in English cases.

(c) *Judicial interpretation of Indyka* v. *Indyka*

In *Angelo* v. *Angelo*,[142] the parties married in 1960 in London. The husband was a British subject domiciled in England. Later the parties went to live in France. The wife then returned to Germany and in 1963 she obtained a divorce from the German courts. The wife was a German national and Ormrod J. stated that she was clearly habitually resident within the jurisdiction of the German court granting the decree. In those circumstances she seemed to the court clearly to fall within the test proposed by all of their Lordships in the *Indyka* case. Accordingly the relief sought was granted. In *Peters* v. *Peters*[143] the question the court was faced with was whether a decree granted by a foreign court which had assumed jurisdiction solely on the ground that the marriage was celebrated within its jurisdiction, was entitled to recognition. Refer-

[140] *Ibid.*, at pp. 544, 563-564.
[141] *Ibid.*, at p. 558.
[142] *Supra*, footnote 129.
[143] [1967] 3 W.L.R. 1235.

ence was made to *Indyka* v. *Indyka* and *Angelo* v. *Angelo*. That recognition should be afforded to a foreign decree wherever there is a real and substantial connexion between the petitioner and the granting forum, seemed to Wrangham J. to be the "high water mark" of these decisions. However, there was no need to consider whether the *Indyka* case went that far, because the court was satisfied that the mere fact of the celebration of marriage within a particular jurisdiction was not enough to create such a real and substantial connexion. Neither did Wrangham J. think that it would be enough to assert the foreign nationality or domicile of the parties at the time of the marriage:[144]

> If they continued to be nationals of that jurisdiction, either of them, or if there continued to be any question of domicile in that jurisdiction, of course the matter would be wholly different.

In the present case, however, both parties had abandoned their Yugoslavian nationality and domicile prior to the adjudication of the Belgrade court. The latest case is *Tijanic* v. *Tijanic*.[145] Recognition was afforded to a divorce obtained from the Yugoslavian courts. The husband was domiciled in England but had initiated divorce proceedings in Yugoslavia under a provision of Yugoslav law whereby a marriage might be dissolved where the parties had lived separate for a long period and both consented to the divorce. Whatever may have been the formal position, the court found that the reality of the proceedings were that the wife joined with the husband in seeking relief and that the decree had been granted to both parties. While referring to the *Indyka* case and pointing out that there might be other grounds upon which the divorce should be accorded recognition, Sir Jocelyn Simon P. said:[146]

> It follows that in so far as the wife joined in the application and the decree was granted to her, it was granted to a woman who had been for the whole of her life within the jurisdiction of the court concerned. The English court assumes jurisdiction in divorce in such circumstances. It follows that we should accord recognition to a similar assumption of jurisdiction by a foreign court: see *Travers* v. *Holley*, approved in *Indyka* v. *Indyka*.

Accordingly the declaration sought was granted.

(2) *The Divorce Act, 1968*

Section 6 (2) provides an *additional* means of according recognition to a decree granted to a wife. It applies, however, only

---

[144] *Ibid.*, at p. 1238.

[145] *Supra*, footnote 98. See now also *Brown* v. *Brown*, *supra*, footnote 133.

[146] *Ibid.*, at p. 1568.

for all purposes of determining the marital status in Canada of any person. The reference to "a decree of divorce, granted . . . under a law of a country . . . by a tribunal or other competent authority . . ." clearly empowers recognition of decrees that have not been pronounced by a court, and this accords with the position at common law.[147] But the use of the word "decree" is unnecessarily restrictive for divorces in other jurisdictions may be awarded by religious or legislative acts. The provisions of this subsection apply only to decrees granted "after the coming into force of this Act". This temporal limitation invokes the kind of philosophy specifically rejected by the Court of Appeal and by the House of Lords in the *Indyka* case.[148] And the Australian Matrimonial Causes Act is expressly made to apply in relation to divorces effected before or after its commencement.[149] Recognition is to be afforded to divorces granted "under a law of a country . . . by a tribunal . . . that had jurisdiction under that law to grant the decree, on the basis of the domicile of the wife in that country . . .". Is a divorce recognized under the *Pemberton* v. *Hughes*[150] principle so granted: if a foreign court possesses international jurisdiction (that is, is the court of the domicile), what is the effect of lack of internal competence?[151] Further section 6 (2) states that recognition "shall be given . . .". Does this require recognition to be afforded to a decree which would be refused recognition at common law on the ground of fraud, or otherwise for a denial of natural justice;[152] or which offends the forum's views of substantial justice?[153] Presumably it will not be so interpreted.

There is another problem. In section 6 (2) does the word "granted" relate, as it seems to do, to the words "on the basis"? If so, section 6 (2) demands recognition only of a decree granted to a wife by a foreign tribunal or other competent authority whose laws permit her to acquire a separate domicile. For example, a decree granted to a wife who has always lived in England, whose

[147] Dicey and Morris, *op. cit.*, footnote 9, pp. 319-321.

[148] Also see s. 25 (1): "A petition for divorce presented in Canada after the coming into force of this Act shall be governed and regulated by this Act, whether or not the material facts or circumstances giving rise to the petition occurred wholly or partly before the coming into force of this Act."

[149] Cowen and Mendes da Costa, *op. cit.*, footnote 37, p. 100.

[150] [1899] 1 Ch. 781.

[151] See Dicey and Morris, *op. cit.*, footnote 9, p. 319.

[152] Dicey and Morris, *op. cit., ibid.*, pp. 317-319; Castel, *op. cit.*, footnote 22, pp. 127-128.

[153] *Gray* v. *Formosa*, *supra*, footnote 64. See Lewis, Principle and Discretion in the Recognition of Foreign Nullity Decrees (1963), 12 Int. & Comp. L.Q. 298. Also, *Lepre* v. *Lepre*, [1965] P. 52; *Middleton* v. *Middleton*, [1967] P. 62.

husband deserts her and who petitions under the English deserted wife statute, would not on this reading fall within section 6 (2), for it would be granted by an English court on the basis of the English legislation and not upon the basis of her separate domicile. This interpretation could be supported by the argument that section 6 (1) confers capacity upon a wife to acquire a separate domicile for domestic jurisdictional purposes: likewise, while the concept of domicile is to be interpreted by Canadian courts in accordance with common law principles,[154] the *capacity* of a wife to acquire a domicile of her own is referred to the law of the granting jurisdiction. In this respect section 6 (1) is a complement to section 6 (2) though, unlike section 6 (1), section 6 (2) is not subject to a residence qualification. However, if this is the case, it is not easy to appreciate the meaning of the words at the end of the subsection "as if she were unmarried and, if she was a minor, as if she had attained her majority", for these considerations may or may not be present in a foreign law. More likely therefore the intention of section 6 (2) is to afford recognition to a foreign decree granted in such circumstances that, were like facts *mutatis mutandis* before a Canadian court, that court could have exercised jurisdiction under the Divorce Act, 1968. On this basis the English divorce referred to above would call for recognition. Involved would be a reference to Canadian law, not only of the concept of domicile, but also of the capacity of a married woman to acquire a separate domicile. Again however the residence qualification of section 5 is not carried over to section 6 (2). This latter construction seems preferable for it renders section 6 (2) wider in application though it does not, it is considered, entail a statutory adoption of the *Travers* v. *Holley* principle.[155]

However this may be, and whatever interpretation may be afforded to section 6 (2), it seems clear that if the wide ratio of the *Indyka* case is accepted by Canadian courts, section 6 (2) will thereby be rendered of diminished importance, if not otiose. If a court affords recognition to a decree under section 6 (2), will it not usually follow that a "real and substantial connexion" will

---

[154] *Re Martin, supra,* footnote 11; *Re Annesley, supra,* footnote 11.

[155] If s. 6 (1) is to be regarded as a statutory extension of jurisdiction beyond the domicile, this interpretation would work a statutory adoption of *Travers* v. *Holley* as interpreted in *Robinson-Scott* v. *Robinson-Scott.* But the view is expressed that the exercise of jurisdiction upon the separate domicile of a wife acquired under s. 6 (1) is properly to be regarded as a *common law* extension consequent upon a statutory conferral of capacity upon a wife to so acquire a separate domicile.

exist between the wife and the foreign forum so as to also entitle the divorce to recognition under this authority?

(3) *Suggested Development*

In *Indyka* v. *Indyka* Lord Morris of Borth-Y-Gest said:[156]

> The principle underlying such recognition may have been that it was felt that confidence could be reposed in courts that acted and proceeded in like manner as the English courts and whose conceptions were in accord with those of the English courts.

This was stated in the context of a statement that, if a foreign court possesses divorce jurisdiction, there is no insistence that the grounds of divorce should conform or correspond to those that exist in English law. In other words if a foreign court will only take jurisdiction upon a base that is acceptable to the English courts, this is an indication that reliance can be placed upon its legal system and this reliance, induced by the foreign court's selection of a jurisdictional base, renders unnecessary an examination of the law it chooses to apply to the substantive issue before it. The question this poses is whether, if the *Indyka* case is accepted into Canadian law, it is desirable to proceed one step further. Now that, according to the *Indyka* case, domicile is no longer to be regarded as the sole consideration in jurisdictional enquiries, does it make good sense to evaluate reliance of any particular legal system not by reference merely to the base upon which its courts take jurisidiction, but rather to the general working of their legal machinery. Section 83 of the Child Welfare Act, 1965 provides:[157]

> Every person heretofore adopted under the laws of Ontario and every person adopted under the laws of any other province or territory of Canada or under the laws of any other country shall for all purposes in Ontario be governed by this Part.

This ensures recognition in Ontario of an adoption order made outside of Canada. The public policy behind this legislation is clearly the welfare of the child. It is a complete movement away from the requirement of domicile as a test of adoption recognition.[158] Recognition is afforded to an adoption made "under the laws of any other country". The situation will not arise, therefore, where a child adopted in a foreign jurisdiction will be subsequently prejudiced by his or her adoption being denied effect in Ontario. It may well be going too far to suggest that Dominion legislation should provide for the recognition in Canada of a divorce obtained

---

[156] *Supra*, footnote 5, at p. 532. [157] S.O., 1965, c. 14.
[158] Dicey and Morris, *op. cit.*, footnote 9, pp. 461-469.

"under the laws of any other country". One possibility, however, is that Parliament could provide for recognition of decrees granted under the laws of legal systems specified by the Governor in Council. The recognition of relief granted by those not so selected would continue to be determined as a matter of common law, or, if enacted, in accordance with statutory choice of jurisdiction rules.

Great care would have to be taken in the selection of appropriate legal systems. It would clearly be insufficient merely to have regard to the jurisdictional bases under which such systems operate, though this would of course be one material consideration. A more thorough examination would be required. Factors to be considered would include the method of divorce—whether this relief may be obtained by consent or as a result of a unilateral declaration; whether the form of divorce is applicable to monogamous marriages or is related to polygamy; whether the proceedings by which divorce is obtained is adversary or inquisitorial. The grounds upon which divorce may be obtained would also be a material consideration. So too would be the question of whether the relief of divorce is viewed as a commercial undertaking rather than as a method of granting relief to persons with some real connection with the jurisdiction. Legislation of this nature would be answering for society as a whole some of the questions a court, under the *Indyka* approach, would be called upon to determine for individual parties. The policy behind such an enactment would be to confer uniformity of recognition for all of Canada and also to render the recognition of foreign divorces more simple and more certain.

So far as is known, this approach is novel. On a careful scrutiny no doubt many difficulties may arise and this suggestion rejected as impracticable, not worthwhile or unsatisfactory. Again, however, detailed consideration may produce some viable provisions, and such consideration is all that is here suggested.