DOMICIL IN NULLITY PROCEEDINGS

Only a decade ago, references to the domiciliary basis of nullity jurisdiction as finally established by the decision of the House of Lords in *Salvesen v. Administrator of Austrian Property*[1] usually proceeded on the assumption that the domicils of petitioner and respondent are identical. Nonetheless, in the course of the elicitation and evolution of the appropriate jurisdictional criteria for the purpose of these proceedings a peculiar feature, concomitant to the concept of domicil, has projected itself which at one time seriously threatened the existence of that basis of jurisdiction, but has more recently been relegated to the less reprehensible role of serving as a vehicle in enlarging the competence of our courts. This factor can no longer be ignored with impunity, though in retrospect it may well merit the appellation of a *pons asinorum*. It may be conveniently stated in these terms: Since a decree of nullity declares the *ab initio* invalidity of the marriage, it is incompatible with legal logic to attribute the "husband's" domicil to his putative wife solely by virtue of the celebration of the marriage ceremony; and as James, L.J, observed in *Niboyet v. Niboyet*, "how would it be possible to make domicil the test of jurisdiction in such a case? Suppose the alleged wife were the complainant, her domicil would depend on the very matter in controversy. If she were really married, her domicil would be the domicil of her husband, if not married then it would be her previous domicil."[2]

In two situations this dilemma does not arise. First, where the domicils of both parties were, at the time of the marriage, and still are identical. Thus in *De Massa v. De Massa*[3] and *Galene v. Galene*,[4] French decrees were recognised without hesitation as having been pronounced by the domiciliary courts of both parties. Secondly, in a great number of cases, although the "spouses" had separate pre-marital domicils, their subsequent identity may be assumed by a principle which has become known as the rule in *Turner v. Thompson*: "A woman when she marries a man does acquire the domicil of her husband, not only by construction of law, but absolutely as a matter of fact, *if she lives with him in the country of his*

[1] [1927] A.C. 641.
[2] (1878) L.R. 4 P.D. 1, 9.
[3] Morris, *Cases on Private International Law*, 165.
[4] [1939] P. 237.

domicil."[5] Although the condition deprives that principle of a great deal of its efficacy, the existence of the qualification is now well-recognised. One may well wonder, however, whether Hannen, P., had not been minded to supply an unconditional answer to the whole dilemma, regardless altogether of the consideration whether the "wife" had actually followed her "husband" to his home country. The facts of the case in *Turner v. Thompson* do not elucidate this point, but it must be acknowledged that the rule has been accepted only in its limited sense. It was successfully applied in *Salvesen's Case* where, as will be recalled, the putative wife had a Scottish domicil when contracting her marriage with a domiciled Austrian. Subsequently, both parties settled in Germany and continued to reside in that country for many years. It was not disputed that the "husband" had, at the time of the Wiesbaden nullity proceedings, acquired a domicil of choice in Germany. Lord Dunedin countered the argument that the German court was not the "wife's" competent domiciliary tribunal by the observation that she had in fact by continuous residence with her alleged husband acquired the same domicil as the latter.[6] It does not appear clearly from Sir J. Hannen's judgment in *Turner v. Thompson* whether the learned President contemplated a restriction of this rule to cases of so-called voidable marriages. His reference to the voidable nature of the marriage before him, following on his enunciation of the unqualified principle quoted above, must be understood as an attempt to support his conclusion on the special facts. Unfortunately, however, the headnote in the Law Reports is misleading and suggestive of the contrary view by stating that "as the marriage was voidable and not void, the petitioner had acquired an American[7] domicil."[8] The rule in *Turner v. Thompson* has not been thus limited in subsequent cases. In *Mitford v. Mitford*[9] it was considered theoretically applicable to a marriage void by reason of error, and was invoked in *Salvesen's Case* where the cause of nullity consisted of non-compliance with the formalities of the *lex loci celebrationis*. It is indeed difficult to comprehend on what basis the factual test of the rule could be displaced by legal distinction. In the New Zealand case of *Gagen v. Gagen*,[10] Smith, J., considered that it was solely germane to voidable marriages, but two considerations destroy the weight of this opinion: (a) The learned judge was under

[5] per Hannen, P., (1888) L.R. 13 P.D. 37, 41. The test is purely factual, and was stated by Lord Jamieson in *MacDougall v. Chitnavis*, [1937] S.C. 390, 395, in these words: "If she was not truly married, could residence in India for the space of three years, under conditions in which she was not recognised as the lawful wife of the defender, confer an Indian domicil?"

[6] [1927] A.C. 641, 662-3. Cf. Lord Greene, M.R., in *De Reneville v. De Reneville*, [1948] P. 100, 109-110.

[7] The petitioner had gone through a ceremony of marriage with an American; vide infra.

[8] (1888) L.R. 13 P.D. 37.

[9] [1923] P. 130, 139. Sir H. Duke mistakenly treated the German decree as having been pronounced on a ground entailing total nullity instead of voidability.

[10] [1929] N.Z.L.R. 177, 181-2.

the misapprehension that the principle stood for the proposition that in all voidable marriages the wife *automatically* acquires her "husband's" domicil; (b) it was an obiter dictum, since the putative wife had not in fact followed the petitioner to New Zealand so as to confer jurisdiction in nullity on the courts of that country. It is conceived that the observations of Jones, J., sitting as a court of first instance in *De Reneville v. De Reneville,*[11] which are not entirely free from ambiguity, have not detracted from the correctness of the view advanced in this paragraph.

In cases not falling within these two categories, the dilemma remains unsolved. It arises in three possible circumstances—(a) Where the pre-marital domicils of the parties were distinct and had not become identical at the time of the proceedings by the woman factually acquiring her putative husband's domicil; (b) where the pre-marital domicil was identical, but the "husband" has subsequently acquired an independent domicil of choice in a country to which she has not followed him[12]; and (c) in the converse case, where the putative wife has left her "husband" and acquired a permanent residence elsewhere.[13] Frequently, the problem is further complicated by the fact that the alleged nullity may depend on the validity of a divorce decree obtained by one of the parties prior to re-marriage. Thus, in *Bater v. Bater,*[14] A., the husband, married B. in 1880, both spouses being domiciled in England at the time of the ceremony. In 1889 A. went to live in New York, and in the following year his wife obtained a decree of dissolution in that state. She subsequently, in 1893, married a domiciled Englishman C. who, in the present proceedings, petitioned for nullity alleging the existence of a subsisting marriage between A. and B. How could Sir G. Barnes attribute an English domicil to B. until the validity of the New York divorce had been judicially established? The learned judge chose to ignore this difficulty, and, after assuming jurisdiction on the basis of the parties' domicil, rejected the petition on the ground that the divorce decree was entitled to recognition, having been pronounced by the courts of the first husband's domicil. Similarly, in *Armitage v. Attorney-General*[15] the petitioner, a domiciled Englishwoman, married a New York citizen and, after four years' cohabitation in England, went to the United States and obtained an *ex parte* divorce in South Dakota. She subsequently married a domiciled Englishman and presented a petition for a declaration of the validity of her second marriage under sec. 1 of the Legitimacy Act 1858 which makes jurisdiction conditional on the English domicil of the pro-

[11] [1947] P. 168, particularly at 173, 175, 176.

[12] e.g., in *Manella v. Manella,* infra.

[13] See *Shaw v. Shaw* [1946] 1 D.L.R. 168. A subsequent change of domicil was also alleged by the petitioner in *Simonin v. Mallac,* (1860) 2 Sw. & Tr. 67, 74, but her capacity to effect such change was rejected by Sir C. Creswell. This might very well be different now; see *Mehta v. Mehta, Apt v. Apt, etc.*

[14] [1906] P. 206.

[15] [1906] P. 135.

positus.[16] It has been argued[17] that, if the divorce had been invalid, she was still married to her first husband and therefore domiciled in New York. How then could an English court assume jurisdiction under the Act, except on the supposition that the subsequent marriage was *valid?* Again, in *Turner v. Thompson*[18] an Englishwoman married a domiciled American in 1872. She went to live with her husband in the United States and there obtained a decree of dissolution in 1879 on the ground of his impotence. She then returned to England and in 1888 petitioned the High Court for a decree of nullity. Assuming her residence in America to have been insufficient for a factual acquisition of an American domicil, the Court would have been in insurmountable difficulties. The fact that the marriage was voidable by English law might have rendered the attempt to obtain a decree of divorce at her "husband's" domicil completely nugatory.[19] If this argument were sustained, it would, particularly in view of the modern tendency to legislative extension of grounds of nullity, furnish a facile vehicle for the collateral attack on otherwise perfectly valid foreign divorce decrees. It is not altogether suprising, therefore, that this contention was not pursued in any of these cases.[20]

The assumed invalidity of the marriage in respect of which the petition is presented constitutes the basis for the rejection of the unity of domicil. This specious contention, however, is not irrefutable, since it is logically as much a fallacy to presume the nullity of the relationship before it is judicially established as it is to assume its validity. This aspect was emphasised as early as 1860 in *Simonin v. Mallac,* where two French domiciliaries had concluded a marriage in London. The woman came to reside in England and petitioned for a decree of nullity, contending that the court was competent, inter alia, by virtue of her domicil within the jurisdiction. This submission was rejected by Sir C. Creswell as "begging the main ques-

[16] This is the more peculiar as sec. 1 clearly recognises the possibility of nationality depending on the very issue of the validity of the marriage, by providing: "Any natural-born subject of the Queen, or any person whose right to be deemed a natural-born subject depends wholly or in part on . . . the validity of the marriage . . ." This qualification is not repeated in connection with domicil.

[17] J.H.C. Morris in 24 Can. Bar R. 73; reply by Professor Raphael Tuck in 25 Can. Bar R. 226.

[18] (1888) L.R. 13 P.D. 37.

[19] A similar situation may well occur in relation to the statutory ground of nullity consisting of wilful refusal to consummate which, in other jurisdictions (notably in the U.S.A.) is frequently admitted as a cause of divorce; although it is to be noted that in English law it does not constitute desertion: *Weatherley v. Weatherley,* [1947] A.C. 628. For the inconvenience arising from a state of affairs where non-consummation and an issue of dissolution may arise on the same facts, see Sir J. Hannen in *Ousey v. Ousey,* (1874) L.R. 3 P. & D. 223. It will be seen, however, that this particular difficulty has now been solved in relation to voidable marriages.

[20] The relative novelty of the whole doctrine is emphasised by the fact that Shelford, writing in 1841, was completely unaware of its feasibility. See *Marriage and Divorce,* 488.

tion in dispute, for if the marriage be valid, it is not her domicil."[21] It must be conceded, therefore, that a jurisdictional rule cannot satisfactorily be made to depend on this peculiar aspect of nullity proceedings. In either case, to employ a picturesque simile, "the cart is put before the horse," since the argument makes the determination of the jurisdictional basis conditional on the substantive merits of the petition itself.[22] The logical indefensibility and the practical inconvenience of the "divided domicil" theory is even more incontrovertible in its application to the recognition of foreign nullity decrees. Its fallacy has been emphasised by Professor Hughes who pertinently asked: "How can you argue that the domicil necessary for the recognition of the decree does not exist without recognising the decree for the very purpose of providing your basis for rejecting it?"[23] The choice of jurisdictional bases cannot be sought in the realm of legalistic niceties but ought to rest on considerations of social policy and requirements of convenience. Since the criterion of domicil is acknowledged as the most pertinent "connecting factor" for the determination of issues of status, and has been accepted as a legitimate platform of jurisdiction in nullity proceedings, it is difficult to elicit any plausible reason for insisting on this dilemma which can only spell confusion and increased complexity. One may be excused for failing to appreciate on what grounds of policy the rule in *A.-G. for Alberta v. Cook*[24] should be sustained in the field of divorce but rejected in nullity proceedings. Is it not nonsensical to attempt a relaxation of its rigidity in cases where its existence is an almost indispensable platform for a coherent system of jurisdictional rules? It is apprehended that, for this reason, it has met with well-nigh unanimous condemnation by academic writers.[25]

The protagonists of the rejection of the "unitary domicil" are prepared to allow an exception in cases where identity of domicil can be assumed by virtue of a spurious application of the doctrine of estoppel.[26] It is asserted that, if the wife is the respondent in a nullity suit and is defending the validity of the marriage, she is thereby admitting that her putative husband's domicil is her own

21 (1860) 2 Sw. & Tr. 67, 74.

22 Read (*Recognition of Judgments,* 243), commenting on *White v. White* explains that Bucknill, J., "would then have been exercising competence to decide the merits of the controversy concerning the validity of the putative marriage for the purpose of determining the preliminary question of whether that very competence existed."

23 44 L.Q.R. 217, 226.

24 [1926] A.C. 444.

25 Hughes, 44 L.Q.R. 217; Wolff, *Private International Law,* 80 (de lege lata! This is unfounded); J.H.C. Morris, *Cases* (1939), 179. Cheshire bypassed this problem in his 2nd edn (p. 339) by rejecting the view as "academic." Unfortunately, it has not remained such (see now 3rd edn., 450). Johnson, Vol. 2, 205, 246.

26 This has become known as the rule in *Chichester v. Donegal,* (1822) 1 Add. 5, 19. Cf. the analogous dilemma in which the pursuer was placed in *Mangrulkar v. Mangrulkar* [1939] S.C. 239.

and thus conferring jurisdiction on the courts of that domicil.[27] This postulate is not altogether unanswerable, since, in case of her failure to establish the validity of the marriage, the dilemma would arise anew.

What are the practical consequences of the assumption that the "husband's" domicil may ordinarily not be imputed to his "wife"? Prior to the decision in *Salvesen's Case* it provided one of the principal levers for the rejection of the domiciliary basis of nullity jurisdiction. Thus, in *Ogden v. Ogden*[28] it was adduced by Sir G. Barnes as an additional reason for refusing to recognise a French decree annulling a marriage between a Frenchman and an Englishwoman.[29] It must be observed, however, that the judgment primarily proceeded on the ground that a foreign decree is not entitled to recognition if the court, in contravention of English conflict rules, purported to annul a marriage celebrated in England in due compliance with English formalities. This heretical proposition was unanimously rejected by the House of Lords in *Salvesen v. Administrator of Austrian Property,* but Lord Phillimore, anxious to avoid the direct condemnation of a judgment by so outstanding an authority as Lord Gorell, attempted to find a distinction between the two cases in the circumstance that in *Ogden v. Ogden* the woman had never in fact resided in France so as factually and legally to acquire her "husband's" domicil.[30] This observation was regrettable because, as Lord Dunedin fully appreciated,[31] the preceding contention was too closely bound up with the wider proposition upheld in that case that a foreign nullity decree is not conclusive in the sense of precluding a re-examination of its substantive merits by English courts. With the rejection of this major premise, its concomitant deserved a similar fate.[32] Since the decision in *Salvesen's Case,* English courts have not been called upon to determine the effect of that doctrine on the recognition of foreign domiciliary decrees, although, as we

[27] Thus Westlake (7th edn., s.49) rejected the domiciliary basis of jurisdiction altogether, except in this instance. See also Dicey, 5th edn., 298-9.

[28] [1908] P. 46, 78.

[29] This was definitely a subsidiary reason for judgment, since the learned President claimed to derive authority for the decision of the Court of Appeal from the cases of *Sinclair v Sinclair* and *Simonin v. Mallac.* There can be little doubt that his conclusion would have been the same if both parties had been domiciled in France.

[30] [1927] A.C. 641, 669.

[31] ibid, at 662. Lord Haldane's observations (at 660) are too obscure on this point to be of assistance.

[32] It should be stressed that, prior to *Salvesen's Case,* the "divided domicil" theory was not seriously advanced, with the sole exception of *Ogden v. Ogden.* It was ignored in *Stathatos v. Stathatos,* [1913] P. 46, 50-51; *De Montaigu v. De Montaigu,* [1931] P. 154, 158-9; *Attorney General for Alberta v. Cook,* [1926] A.C. 454-6. In *De Gasquet James v. Duke of Mecklenburg-Schwerin,* [1914] P. 53, the petitioner intended to rely on *Ogden v. Ogden,* but the court precluded this argument by holding that it had no jurisdiction to entertain proceedings for restitution of conjugal rights, with the result that the French decree did not become material.

shall see, the issue has been canvassed in the New Zealand case of *Carter v. Carter*.[33] It has, however, been repeatedly invoked to substantiate the claim for jurisdiction by the *forum loci celebrationis*, both where the latter was a foreign[34] and where it was a domestic court.[35] Thus Pilcher, J., in *Hutter v. Hutter* and Lord Jamieson in *MacDougall v. Chitnavis*[36] avoided the cogency of the contention that *Salvesen's Case* had established the exclusive competence of the domicil by the argument that the woman's separate domicil produced a legal impasse which could be satisfactorily bridged only by conceding concurrent competence either to the *locus celebrationis* or to the country of residence. When the possibility of challenging the principle of domiciliary jurisdiction in nullity proceedings had disappeared, Sir G. Barnes's "oddity" was disinterred so as to widen the platform for the assumption of jurisdiction by English courts. Thus, whereas in origin the rule had been intended to safeguard the jurisdictional competence of our courts in respect of "English" marriages to the exclusion of the courts of the domicil, it has now found a novel use in extending instead of, as formerly, in contracting the bases of jurisdiction in these proceedings.

In consequence of the rejection of the "unitary" concept of domicil, the courts were faced with the problem whether to acknowledge the jurisdictional competence of the domicil of either party, or only that of the respondent or of the putative husband. Several Dominion decisions have established a practice of conceding jurisdiction, on that basis, only to the courts of the respondent's domicil, on the assumption that the petitioner's *forum domicilii* has no authority to pronounce on the status of a non-domiciled party and, more particularly, in reliance on Dicey's Rule 65 to which Canadian courts especially are wont to extend implicit subservience. In *Gagen v. Gagen*[37] where the "husband" had acquired a domicil in New Zealand, but the respondent was domiciled outside the jurisdiction, his petition alleging bigamy was rejected. This decision was followed by the Court of Appeal of Manitoba in *Hutchings v. Hutchings*[38] and by the Ontario Supreme Court in *Manella v. Manella*.[39] The practice was re-affirmed by the Court of Appeal of British Columbia in *Shaw v. Shaw*[40] where Sidney Smith, J.A., adverting to the petitioner's suggestion that her domicil in that province conferred jurisdiction to annul her marriage solemnized in Alberta where her putative husband was both resident and domiciled at the time of the proceedings, confessed that "these facts are far away from those of any

[33] [1932] N.Z.L.R. 1104.
[34] per Sir H. Duke, as he then was, in *Mitford v. Mitford*, [1923] P. 130, 139.
[35] *Easterbrook v. Easterbrook, Hutter v. Hutter*, etc., infra.
[36] [1937] S.C. 390, 395.
[37] [1929] N.Z.L.R. 177.
[38] [1930] 4 D.L.R. 673.
[39] [1942] Ont. L.R. 630, 4 D.L.R. 712.
[40] [1945] 1 D.L.R. 413; [1946] 1 D.L.R. 168.

authority referred to us on the hearing or that I can find anywhere in the books."[41]

A departure from this catena of authority was recently ventured by Boyd McBride, J., in *Finlay v. Boettner*[42] when allowing service outside the jurisdiction by reason of assumed competence to entertain a petition for nullity on the ground of bigamy on proof of the petitioner's domicil in Saskatchewan, notwithstanding that the marriage *de quo* had been celebrated in British Columbia and that the respondent was neither resident nor domiciled within the province. After referring to the hardship involved in a refusal to entertain the suit, the learned judge relied on the reflection that "the doctrine of domicil is of comparatively recent origin and growth, and if it is to remain a vital and valuable principle and not to become a legal anachronism, effect must be given to the line of authority," holding that the petitioner's domicil confers jurisdiction.[43] The British Columbia Court, however, has still more recently refused to accept that proposition and has reasserted its earlier conclusion "which it will apply in like cases until such time as the law is otherwise stated by a court whose judgment is binding on this Court."[44]

In accordance with the prevalent view taken in these cases, it appears to be conceded that the courts of the respondent's domicil may entertain proceedings,[45] although Dicey in terms confined the jurisdiction to the courts of the domicil of *both* parties. This differentiation in respect of competence between the domicils of the petitioner and of the respondent is, in the present writer's submission, difficult to substantiate. A nullity decree is a judicial sentence *in rem*. The alleged legal impossibility of assuming identity of the parties' domicil by virtue of the ceremony of marriage[46] ought to entail either an absolute negation, in these circumstances, of domiciliary jurisdiction, or preferably the concession of competence to the courts of the domicil of either party, including that of the petitioner. Restriction to the respondent's domicil implies an introduction of the rules appertaining to jurisdiction *in personam*.[47] Failure to appreciate that the requirement of the *respondent's* resi-

[41] [1946] 1 D.L.R. 168, 181. All members of the Court of Appeal were of the opinion that the *White, Hutter* and *Easterbrook cases* (infra) were decided on the residence basis. The alternative reference to the petitioner's and respondent's domicil was disregarded. It should also be remembered that *Shaw v. Shaw* was decided prior to the more recent English cases of *Mehta v. Mehta* and *Apt v. Apt*, and *De Reneville*, infra.

[42] [1948] 1 D.L.R. 39.

[43] at 46.

[44] *Gower v. Starrett*, [1948] 2 D.L.R. 853, per Farris, C.J., notwithstanding the view to the contrary by the English Court of Appeal in the *De Reneville* case. The decree was in fact granted on the basis of *locus celebrationis*.

[45] e.g. Robertson, J.A., in *Shaw v. Shaw*, [1946] 1 D.L.R. at 174.

[46] At any rate, where the alleged defect would result in the complete nullity of the marriage, vide infra.

[47] In England, the respondent's domicil has not hitherto been acknowledged as a legitimate basis of jurisdiction *in personam*, although it is otherwise in the U.S.A.: *Milliken v. Meyer*, (1940) 311 U.S. 457.

dence rests on a statutory basis and is not the consequence of a common law principle of jurisdiction has indubitably contributed towards this confusion.[48] The reasoning which led to the decision of the United States Supreme Court in *Williams and Hendrix v. North Carolina* (No. 1)[49] in relation to divorce is equally applicable to nullity proceedings, once the initial step of recognising the existence of the putative wife's separate domicil has been taken.

This convenient and legally consistent conclusion has been adopted in England.[50] It appears to be now well established that the courts of the domicil of either party are competent to render decrees of nullity, and the "res" theory has been consistently upheld in acknowledging the jurisdiction of the petitioner's domicil. This process of development has been gradual and originated in a desire to support the assumption of jurisdiction by English courts in cases where, in addition, the respondent was also resident in England and/or the marriage had been celebrated there. It was invoked for the first time in *White v. White*[51] where a domiciled Englishwoman had gone through a ceremony of marriage with an Australian in Melbourne and, after a few days' residence in Victoria, had returned to England. Bucknill, J., acceded to her petition on the ground of the respondent's bigamy, and held that she had retained her pre-marital domicil. The learned judge acknowledged this factor as a contributory, though not perhaps conclusive, element in conferring jurisdiction on the court: "It seems to me just that the petitioner . . being domiciled and resident in this country should have her status as a single or as a married woman judicially established by this court."[52] Since neither the respondent was resident nor the marriage had been contracted in England, Bucknill, J., rightly considered that the petitioner's domicil within the jurisdiction justified his entertaining the proceedings, without having to place undue reliance on the authority of the much discredited, and now exploded,[53] decision in *Roberts v. Brennan*. In the two subsequent cases of *Easterbrook v. Easterbrook*[54] and *Hutter v. Hutter*,[55] the marriages had been celebrated in England, the respondents were resident in that country,

[48] See Hancock, in 21 Can. Bar R. 149, whose analogy to jurisdiction in respect of commercial contracts appears totally inapposite.

[49] (1942) 317 U.S. 287.

[50] The practice in Scotland affords little guidance. Although Lord Jamieson in *MacDougall v. Chitnavis* (supra) assented to the view that the putative wife, at any rate in cases of complete nullity, does not acquire her "husband's" domicil automatically, there has been no recent case in which this jurisdictional issue has arisen, apart from those where the marriage was also celebrated in Scotland. Jurisdiction was entertained on the basis of the respondent's domicil in *Reid v. Reid* (O.H.), 29.12.1905 unrep., and of the petitioner's domicil in *Wilson v. Horn*, (1904) 41 S.L.T. 312. See also Duncan and Dykes, p. 190.

[51] [1937] P. 111.

[52] at 125-6.

[53] *De Reneville v. De Reneville*, [1948] P. 100. 116-7.

[54] [1944] P. 10, 11.

[55] [1944] P. 95, 103.

but the petitioning "husbands" were domiciled in "Canada" and the "U.S.A." respectively.[56] Hodson and Pilcher, JJ., upheld the petitions alleging wilful refusal to consummate, and although the marriages were voidable, not void, observed that the putative wives had not relinquished their pre-marital domicils. Jurisdiction was entertained on the cumulative bases of place of celebration as well as the respondents' residence and domicil. In *Srini Vasan v. Srini Vasan*[57] and *Baindail v. Baindail*,[58] decrees of nullity were granted in respect of "second" monogamous marriages contracted in England by Hindus with domiciled Englishwomen, but the jurisdictional issue was not raised in either case.[59] The first decision in which the *petitioner's* domicil alone was held to confer jurisdiction was *Mehta v. Mehta*,[60] where Barnard, J., acceded to a petition by an Englishwoman who had gone through a ceremony of marriage with a domiciled Indian in Bombay. The respondent was not before the Court. The learned judge curtly observed: "As the law now stands, and as it really always has stood, I think the fact that the petitioner was at all material times domiciled in England gives this Court jurisdiction to deal, as far as nullity is concerned, with the marriage she went through with the respondent."[61] Although Mr. Justice Barnard's impression of a long practice of the court in this sense may be open to some doubt, this unequivocal ruling is both welcome and sound in law. The principle was followed without argument by Lord Merriman, P., and the Court of Appeal in *Apt v. Apt*[62] and received the express approval of Lord Greene, M.R., and Bucknill, L.J., in the case of *De Reneville v. De Reneville*[63]; in the latter case both judges were prepared to assume jurisdiction and grant the decree on proof that the marriage in question was absolutely void, not voidable, by French law, on which hypothesis the petitioner would have retained her English domicil of origin. It will be noted that in none of these cases was a distinction drawn between the competence of the petitioner's and the respondent's, or the husband's and the wife's domicil, respectively.[64] In *White v. White*, *Mehta v. Mehta*, and *Apt v. Apt*, it was the petitioner's domicil, in *Easterbrook*

[56] See Falconbridge, *Essays*, ch. 42.

[57] [1946] P. 67.

[58] [1946] P. 122.

[59] See the writer's article in 11 Convey. (N.S.) 201.

[60] [1945] 2 All E.R. 690.

[61] at 692. Approved by Bucknill, L.J., in *De Reneville v. De Reneville*, [1948] P. 100, 122. (C.A.).

[62] [1947] P. 127; [1948] P. 122. Discussed by R. H. Graveson, 12 Convey. (N.S.) 145.

[63] [1948] P. 100, 113, 122.

[64] This disposes of the proposal to restrict jurisdiction to the putative husband's domicil, as suggested *de lege ferenda* by F. H. in 60 L.Q.R. 115, 116. No such distinction was drawn by Sir H. Duke in *Mitford v. Mitford*, [1923] P. 130, 139.

v. Easterbrook and *Hutter v. Hutter* it was the respondent's domicil[65] which justified the assumption of the jurisdiction, and in all cases the operative domicil was that of the putative wife.[66] These modern decisions have to a large extent eclipsed the statutory jurisdiction of English courts under the Matrimonial Causes Act 1937, s. 13, and the Matrimonial Causes Act 1944. In Australia, prior to the federal Matrimonial Causes Act 1945, courts had not apparently been given an opportunity of pronouncing on this issue; but in consequence of the wider competence introduced by that statute, the occasions which would still require reference to the common law position must of necessity decrease further. That the actuality of the present problem, however, has not been altogether eliminated is illustrated by the recent case of *Lougheed v. Clark*.[67]

The question whether unity of domicil must be presumed by operation of law in cases of voidability has been the subject of divergent decisions. Sir G. Barnes in *Ogden v. Ogden* appeared to limit the application of his notorious principle to totally void marriages,[68] and this proposition appears to have received Lord Haldane's tentative approval in *Salvesen's Case*[69] and gained Lord Jamieson's explicit support in the Scottish decision of *MacDougall v. Chitnavis*.[70] *Inverclyde v. Inverclyde* did not raise this issue, either expressly or by implication, since both parties were at all times domiciled in Scotland. The major premise of the judgment of Bateson, J., however, consisting in the conceptualistic distinction between the two forms of nullity as impinging on the appropriate bases of jurisdiction for the respective proceedings, was not accepted in the subsequent decisions of *Easterbrook, Hutter,* and *Robert,*[71] which repudiated the proposition that the courts of the domicil are exclusively competent to annul voidable marriages. Moreover, in the first two of those cases, it was expressly held that a woman does not acquire her putative husband's domicil, even although the alleged cause of invalidity consisted in the respondent's wilful refusal to consummate the marriage.

[65] The last two cases, however, no longer provide authority that in voidable marriages the woman's domicil is not necessarily identical with that of her putative husband; vide infra.

[66] It has been suggested by Cheshire (3rd edn., 455) that in *Wolfenden v. Wolfenden,* [1946] P. 61, the court assumed jurisdiction on the basis of the husband's domicil. The parties were married in China and it is stated that, after a short cohabitation, the "wife" returned to her home in Canada. The jurisdictional issue was not raised, but it appears that the respondent woman was actually before the court and therefore "resident" in England. The case is, therefore, inconclusive.

[67] [1948] Q.S.R. 157, vide infra.

[68] [1908] P. 46, 78, 80.

[69] [1927] A.C. 641, 659.

[70] [1937] S.C. 390, 395. See also Dicey, 5th edn, 112.

[71] [1947] P. 164. Discussed by the writer in 11 Mod. L.R. 98.

These decisions have now been overruled on this point in *De Reneville v. De Reneville.*[72] The judgments of the Court of Appeal in that case deserve credit for having contributed towards a substantial clarification of this issue by establishing the principle that in voidable marriages the putative wife assumes her "husband's" domicil by operation of law. Lord Greene's justification of this conclusion was based on the consideration that, where the marriage is totally void, no decree of the Divorce Court is required to establish in any suit whatever that—

> "she possessed that freedom in the choice of a domicil which the law denies to a woman so long as her status is that of a married woman. The fact that she has an English domicil can be established in the nullity proceedings themselves, as she attempted to establish it here, on a preliminary issue, whereas if all she could show was a voidable marriage, the trial of a preliminary issue could only result in a finding that at the date of the presentation of the petition she was domiciled in France[73] . . . It appears to me quite impossible to suggest that she is to be treated as having resumed, proleptically, so to speak, her English domicil, merely because she has presented a petition for a decree of nullity to which, in point of substance, she might not be able to establish her claim."[74]

It is submitted with the greatest respect that this sequence of reasoning is unconvincing. The argument that the mere commencement of nullity proceedings should not have the legal effect of entitling her to a separate domicil appears to apply with equal cogency to a petition alleging an impediment which results in complete nullity, because in either case the contrary conclusion would prejudge the substantive issue before the court, viz., whether the petition can be sustained on its merits. The undoubted principle that, in a case of complete nullity, the marriage may be treated as invalid in the absence of a specific judicial sentence, with the result that for general purposes the woman must be conceded a separate domicil at any rate after an incidental inquiry into the validity of the marriage, has no relevance whatever where the petitioner is instituting specific proceedings to establish its nullity, because that issue is, *ex hypothesi,* clearly *sub judice* until the decree has actually been pronounced. If, on the other hand, the resuscitation of the "wife's" premarital domicil is the established consequence of the submission by her of a petition alleging complete nullity, this should also be operative in the case of a voidable marriage, because in either instance the suggested conclusion is theoretically conditional upon affirmative and satisfactory proof that the petition will be sustained on its merits, in which circumstance the decree, in respect of both void and voidable marriages, has

[72] [1948] P. 100. See R. H. Graveson in an article entitled *"Recent Developments in Nullity of Marriage",* 12 Convey. (N.S.) 185.
[73] [1948] P. 100, at 112.
[74] *ibid.,* at 111.

the effect of *declaring* that it was null and void from the beginning. To say that, in the latter case, the trial of a preliminary issue as to domicil could only result in a finding that at the date of the presentation of the petition she had her husband's domicil is stating an *a priori* conclusion, and not a reason supporting that proposition. Nonetheless, the unfortunate distinction thus established by the Court of Appeal, though in the present writer's submission at variance with the traditional concept of nullity of marriage, must now be accepted as authoritative, at least in England.

This re-orientation of the law necessitates a reconsideration of the rule in *Turner v. Thompson* because in that case identity of the parties' domicil should have been assumed as a matter of law, irrespective of the fact that the putative wife had factually cohabited with her "husband" in his home country. It is a little curious to reflect that this rule, which originated in a decision concerning a voidable marriage, must now be regarded as inapposite to such cases and restricted solely to void marriages with which it was not necessarily associated at its inception.

Dominion practice manifests considerable divergence and vacillation of views on this issue. In *Gagen v. Gagen*[75] Smith, J., suggested that "where the marriage is voidable only, and the wife has lived with her husband, the wife's domicil is that of her husband—*Turner v. Thompson*. Where, however, the marriage is void *ab initio*, the form of marriage has not, I think, the effect of making the domicil of the wife that of her husband." The authority of this comment upon the point now under discussion is, as has already been pointed out, materially weakened by reason of the unwarranted interpretation predicated of the decision in *Turner v. Thompson* and by its failure to elucidate the position where the putative wife has not in actual fact cohabited with her husband. In Canada, the judicial attitude has been largely conditioned by the individual approach of judges to the related issue whether jurisdiction in nullity proceedings in respect of voidable marriages should be confined exclusively to the courts of the domicil.[76] The discrepancy between the alternative views is fully illustrated by the considered judgments in *Shaw v. Shaw*,[77] where the petitioner sought a decree of nullity on the ground of her husband's impotence. The parties were married in Alberta, but the putative wife subsequently settled in British Columbia where she acquired a permanent residence and initiated proceedings against the respondent who was resident and domiciled in Alberta. The petition was dismissed by Farris, C.J., who held that jurisdiction in the case of voidable marriages was exclusive to the courts of the respondent's domicil, but intimated that, in contrast, where the

[75] [1929] N.Z.L.R. 177, 181-2.
[76] Contrast *W. v. W.*, (1934) 42 Man. R. 578, *Fleming v. Fleming*, [1934] Ont. W.N. 487, *Diatchuk v. Diatchuk*, [1941] 2 D.L.R. 607, with *Shaw v. Shaw* (infra) and *Gower v. Starrett* (supra).
[77] [1945] 1 D.L.R. 413; [1946] 1 D.L.R. 168.

marriage was totally void the *de facto* wife did not acquire her "husband's" domicil, so that she must sue at her place of residence, provided the respondent was also resident there. Since it appears to be generally conceded that the petitioner's domicil alone will not render a Canadian court competent to pronounce a decree of nullity, whether in respect of a void or voidable marriage, this judgment implied that (a) with regard to the former type of proceedings, domiciliary jurisdiction can be sustained only if, at the time of the suit, either both parties, or possibly the respondent alone, are domiciled within the province, and (b) in the case of voidable marriages, the domicil of the parties is by law presumed to be identical. Advocates of the *Inverclyde v. Inverclyde* doctrine are indeed faced with the dilemma that, unless the *de facto* husband's domicil is invariably attributed to the other spouse, no tribunal could be recognised as having competence to annul a voidable marriage in these circumstances. The Court of Appeal notably differed from the reasoning of Farris, C.J. Sidney Smith, J.A., expressed the opinion that, though the case before him was argued on the assumption that the petitioner was only resident within the province,[78] he saw no reason precluding him from holding that she had acquired a legal domicil apart from that of her "husband" although the alleged cause of nullity was impotence. As already noted, the learned judge and the majority of the Court rejected the distinction between void and voidable marriages which had been unhappily engrafted on English principles of jurisdiction by Bateson, J., but discarded in the subsequent decisions of *Easterbrook* and *Hutter*.[79] In the actual circumstances of the case, this discrepancy of views proved of no material importance, since the Court of Appeal unanimously rejected the contention that the courts of the petitioner's domicil were competent to sustain proceedings in either type of suit. The difference would have been vital, however, if the position of the parties had been reversed, i.e., had the husband been the petitioner. On those facts, Farris, C.J., would have been prepared to grant a decree on the ground that the respondent had by virtue of the marriage ceremony acquired her putative husband's domicil, whereas Sidney Smith and Robertson, JJ.A., would, it is submitted, have considered themselves bound by the decisions in *Hutchings v. Hutchings*[80] and *Manella v. Manella*[81] to reject the petition. Farris, C.J., has more recently declared his adherence to the view of the Court of Appeal to the effect that jurisdiction in respect of impotence is not confined to the courts of the domicil,[82] but it may well be that the decision in *De Reneville v. De Reneville* will demand a reconsideration of the opinion ex-

[78] [1946] 1 D.L.R. 168, 177.

[79] The judgments in *De Reneville* cannot be interpreted as adding support to the principle in *Inverclyde*. See Lord Merriman, P., in *Harthan v. Harthan* [1948] 2 All E.R. 639, 652 and Farris, C.J., in *Gower v. Starrett*, [1948] 2 D.L.R. 853; contra, *Lougheed v. Clark*, [1948] Q.S.R. 157.

[80] [1940] 4 D.L.R. 673.

[81] [1942] 4 D.L.R. 712.

[82] In *Gower v. Starrett*. [1948] 2 D.L.R. 853.

pressed by Sidney Smith, J.A., on the question of the woman's separate domicil in these suits.

As already indicated, the Australian law reports do not furnish a great deal of direct authority on the subject of nullity jurisdiction in general and the present issue in particular. The only relevant pronouncement is that of the Queensland court in the recent case of *Lougheed v. Clark*,[83] where Mansfield, S.P.J., considered himself bound by a somewhat eclectic interpretation of selected passages from the judgments of the English Court of Appeal in *De Reneville* to set aside a writ against a respondent who was at all material times domiciled in New South Wales, and to reject the petition by his putative wife alleging impotence, notwithstanding that the marriage had been celebrated in Queensland. It may be surmised that, by reason of the same precedent, the petitioner did not deem herself free to aver the existence of a separate domicil in view of the fact that the marriage was alleged to be voidable, not void.

In the absence of express judicial authority in England, it is of interest to speculate whether the principle adopted in the recent decisions of *Mehta, Apt,* and *De Reneville* will be reciprocally acknowledged by English courts in relation to nullity decrees pronounced by foreign tribunals. Although the "divided domicil" doctrine was originally invoked in *Ogden v. Ogden* for the purpose of justifying the non-recognition of a decree pronounced by the forum of the husband's domicil against a spouse who, prior to her marriage in England, was domiciled in that country, its subsequent development has followed the direction of extending, not restricting, competence. In view of the decisions in *De Massa* and *Galene,* foreign domiciliary decrees of nullity can no longer be impugned on the ground that the adjudicating tribunal failed to apply English conflict rules, with the result that the authority, if any, of *Ogden v. Ogden* must now rest on the proposition that the putative husband's domiciliary courts are jurisdictionally incompetent to pronounce an internationally valid decree of nullity against a spouse with a separate pre-marital domicil.[84] The wholly pernicious effect of this contention is self-evident. In relation to foreign decrees it is also logically untenable. For not only does it beg the question by assuming the invalidity of the marriage before subjecting it to judicial scrutiny, but a refusal to recognise the decree implies the validity of the marriage in English law with the consequential identity of the parties' domicil. It is, therefore, doubly fallacious.

The only modern authority on this question is the New Zealand decision in *Carter v. Carter*.[85] In that case, a marriage solemnised in New Zealand between a woman domiciled in that country and a man domiciled in California had been annulled by the "husband's"

[83] [1948] Q.S.R. 157.
[84] Cf. Lord Phillimore in *Salvesen's Case,* [1927] A.C. 641, 669.
[85] [1932] N.Z.L.R. 1104.

domiciliary court on the ground of his minority and failure to obtain parental consent. Following *Ogden v. Ogden,* it was held that the decree was not entitled to recognition and that foreign decrees of nullity are conclusive only if pronounced by the courts of the country where *both* parties are domiciled or the marriage was celebrated. The New Zealand Court could consequently consider the validity of a marriage contracted there, although one of the parties was domiciled abroad and the marriage had been declared invalid by the courts of the putative husband's domicil. The learned judge conceded that, had the decree been a sentence of dissolution, it would have been upheld, because the parties' domicil would on that hypothesis have been identical, but proceeded to assert that, because the foreign court had impeached the initial validity of the marriage, the respondent was precluded from contesting that the woman had never lost her pre-marital domicil. As already demonstrated, this sequence of reasoning cannot be described as satisfactory because, in order to repudiate the domiciliary decree, the New Zealand Court had to assume the invalidity of the marriage *de quo,* which conclusion it subsequently repudiated by holding that it was good in contemplation of its own principles of the conflict of laws.

J.D. Falconbridge also appears to have accepted the inevitability of the resulting invalidity of a nullity decree granted by the "husband's" domiciliary court against a non-domiciled respondent. He confines this regrettable conclusion, however, to cases where the marriage was completely void, because in cases of mere voidability the man's domicil is by law attributed to his putative wife as a consequence of the pretended marriage. He adds that "the case of *Ogden v. Ogden* would not be affected, if it is assumed that the marriage in that case was void *ab initio,* but would be affected if, as was almost certainly the case, the marriage was merely voidable."[86] We may be permitted to infer that this evaluation of *Ogden v. Ogden* is materially influenced by the view that the petitioner's domicil alone does not furnish a sufficient basis for entertaining these proceedings.[87] The difficulty disappears, however, if we accept the correctness of that jurisdictional criterion as evolved in England. That practice is not justified by any enabling statutory provision confined to the assumption of jurisdiction, in contrast to the residence rule, but represents an indigenous growth of common law principles of jurisdiction. It is consistent with the decision in *Salvesen's Case*[88] and in no way detracts from the acceptance of the status theory of nullity proceedings. Since the courts in *Mehta v. Mehta* and *Apt v. Apt* were undoubtedly professing to act on general principles of international law, this practice should be accorded universal validity and be equally applied to the competence of foreign tribunals. Statutory

[86] *Essays on the Conflict of Laws,* 632.

[87] This observation also applies with equal force to the decision in *Carter v. Carter,* in view of *Gagen v. Gagen,* supra; which furnishes an additional reason for regarding that decision with some degree of caution.

[88] See *De Reneville v. De Reneville,* passim.

exceptions apart, the principle of reciprocity has been consistently followed in other conflict situations, and will it is hoped[89] commend itself to the courts in relation to foreign nullity decrees. This will mean that an annulment by the domiciliary court, whether the husband's or the wife's, must be accorded recognition even if the other party is domiciled and the marriage has been contracted within the jurisdiction of the court which is asked to predicate extra-territorial validity to that decree. It is fully conceded that consideration of these consequences might well have deterred English courts from striking a path which is now too well trodden to allow of deviation.

In the present writer's submission, the combination of two well-recognised principles ought to prevent a collateral attack on decrees pronounced in these circumstances. These are (a) that a decree of a competent tribunal is conclusive, and (b) that the courts of either party's domicil have jurisdiction to render a decree *in rem*. This conclusion is strongly suggested by the decision in *Mitford v. Mitford*[90] where an annulment by the *forum loci celebrationis* was recognised as conclusive, although pronounced against a husband domiciled in England on a ground unknown to English internal law. It has been asserted[91] that, since the cause of nullity was characterised as error and therefore determinable by German law as the *lex loci celebrationis*, the decision is explicable on the additional ground that the foreign court applied the correct English conflict rule. This observation, however, is of secondary importance only in view of Sir H. Duke's unambiguous statement that a decree of a foreign court having jurisdiction in the international sense must be acknowledged as conclusive. "When the validity of a marriage arises for determination in a court which has jurisdiction over the subject-matter and over the parties, and proceeds in accordance with what, in English law, are deemed to be the requirements of natural justice, the judgment pronounced there would seem to be as conclusive as a like judgment in any other civil proceeding."[92]

Against these considerations must be set the following remark by Lord Phillimore in *Salvesen's Case*: "For the purpose of pronouncing upon the status of the parties as well as for the purpose of affecting that status the court of law which regulates and determines the personal status of the parties, if they are *both* subject to the same law, decides exclusively."[93] It is arguable that this dictum may provide a lever for the non-recognition of a decree pronounced by a domiciliary tribunal against a non-domiciled party but, as in the United States, the courts may well come to the conclusion that the domicil of either party is jurisdictionally competent to affect and

[89] Thus also Cheshire (3rd edn.), 464-5, but see qualifying remarks, *de lege ferenda*, at 467-8. Contra: Dicey (5th edn), 434.
[90] [1923] P. 130.
[91] Cheshire (3rd edn.), 468.
[92] [1923] P. 130, 137. Cf. Lord Sands in *Salvesen's Case*.
[93] [1927] A.C. 641, 670.

determine status so as to bind both "spouses." This view is strengthened by an observation passed by Lord Greene, M.R., in *De Reneville v. De Reneville* to the effect that Lord Phillimore's remark cannot be read as "an expression of opinion on a point which did not arise and was not for consideration, *viz.*, Has such a court jurisdiction where only one of the parties is subject to its law, that is, domiciled in its country?"[94] As the learned Master of the Rolls subsequently pointed out, if a negative answer be predicated, "the problem of jurisdiction based on domicil in the case of a void marriage where the domicils are different would appear to be insoluble."[95]

J. G. FLEMING.

[94] [1948] P. 100, 110.
[95] *ibid.*, at 113.

EDITORIAL NOTE: This article was already in print before the publication of *Casey v. Casey*, [1949] 2 All E.R. 110.