CAPACITY AND THE CONFLICT OF LAWS

This article is an attempt at a scientific analysis of the principles involved in that difficult tangle of cases of which *Sottomayor v. De Barros (No. 2)*,[1] *Ogden v. Ogden*,[2] and *Chetti v. Chetti*[3] form the central knot. One feels a certain temerity in approaching this subject, which Cheshire with some feeling describes as "intractable"[4] and perhaps greater temerity in suggesting that the law at a very early stage took a wrong turning which has resulted in the present chaotic position.

Reading through some of the cases on the general topic of marriage-validity and remarking the frequence of vague *dicta* to the effect that "capacity to marry" is governed by the *lex domicilii*[5] and even sometimes that *capacity generally* is governed by the *lex domicilii*, one is tempted to wish that some attempt had first been made to analyse the concept of capacity and to enquire why it should of necessity be linked with domicil.

One starts, it is submitted, with the concept of status. Status is a condition attached to a class of persons by virtue of which the law attaches certain rules to the individuals who make up that class independently of their wishes and sometimes in spite of their wishes. The class concerned is composed of persons who for some reason or other have characteristics which deviate from the norm; for example, infants, lunatics, married women, bankrupts, corporations. Some types of status arise from the facts of nature, such as infancy or lunacy. It is a sheer necessity, for instance, for the law to have special rules governing the rights and liabilities of infants. Other types of status arise from contract; for example, marriage. Others again arise from the judgment of a competent court; for example, bankruptcy. Even where the status is brought into being by agreement, more than agreement is involved. The law superadds rules and obligations which do not spring from agreement and cannot be got rid of by agreement; for example, in the case of marriage, the obligation of the husband to support the wife, and the fact that the relationship can only be dissolved by a judgment of the court (see the classical statement in *Salvesen v. Administrator of Austrian Property*[6]). The types of status in the modern world seem to be

[1] (1879) L.R. 5 P.D. 94.
[2] [1908] P. 46.
[3] [1909] P. 67.
[4] *Private International Law* (3rd edn.) 290.
[5] e.g. *Sottomayor v. De Barros* (*No.* 1), (1877) L.R. 3 P.D. 1, at 5.
[6] [1927] A.C. at 653.

increasing. Thus the relationship of employer and employee has come to present some of the characteristics of a status.

Capacity is not the same as status. It is derivative from it. It really connotes the power or lack of power of a person endowed or burdened by law with a particular status to enter into some or all of the normal legal relationships of modern life. Thus we speak of the capacity of an infant to contract, the capacity of a bankrupt to acquire property.

It can be accepted that the law of the domicil regulates matters of status *stricto sensu;* in fact a status is regarded as a *res* notionally situate in the country of the domicil. It is for this reason that jurisdiction in matters of status—for example, jurisdiction to dissolve a marriage—belongs usually though not invariably to the courts of the domicil. We would also look quite naturally to the law of the domicil to determine whether a status arises, and if it does what are the incidents thereof. Thus to determine whether a child is illegitimate resort is had to the law of the domicil.

It is submitted, however, that those writers who assert that *capacity* is governed by the *lex domicilii* are really confusing status with capacity. If the state of Erewhon were to create a class of persons described as "anti-social" and were to provide that "anti-social" persons should be incapable of entering into a contract without the approval of the Erewhonian government, then it is obvious that in considering the case of a contract entered into in England by an "anti-social" person domiciled in Erewhon the English court would necessarily look to Erewhonian law as the *lex domicilii* to determine what was an "anti-social" person and what peculiar rules applied to him. But it would be quite a different proposition to assert that Erewhonian law would govern his *capacity* to enter into legal relationships outside Erewhon so that he could, for instance, evade liability for contracts made in England with persons resident there. To do so would be to attribute too great a predominance to the personal law.

The parallelism between this example and a case such as infancy is obscured because in the case of infancy no resort is necessary to the law of the domicil to determine the nature of the status, it being so well known; but the case of legitimacy perhaps renders the matter clearer. You look at the person's domicil to determine whether he is legitimate but not to that law to determine whether he can, for instance, inherit under a will.

Capacity in general is not governed by any one system of law. It falls to be governed by the law which governs the particular transaction.[7] Thus contractual questions are governed by the proper law of the contract, and it seems that capacity to contract is also governed by that law. *Male v. Roberts,*[8] which appears to be the

[7] See Schmitthof, *English Conflict of Laws,* 271-2.
[8] (1800) 3 Esp. 163.

only reported case, is consistent with this theory, though the actual decision was in favour of the *lex loci contractus*. It certainly does not give any countenance to the domicil theory (see also *Sottomayor v. De Barros No. 2*).[9] Again, capacity to transfer or take a transfer of immovables is, like other questions concerning immovables, governed by the *lex situs*.[10]

Yet when we approach the question of capacity to enter into the marriage contract, we find that from the earliest times there was a strong emphasis on the law of the domicil, and the domiciliary theory in fact is still the orthodox theory. This appears to have been based upon a vague feeling that because marriage was involved and marriage was a status, *therefore* the law of the domicil was the correct law. Yet apart from the error of confusing status with capacity, there appears to be yet another fallacy involved here. The marriage ceremony is a contract; the status of marriage is merely the *result* thereof. The status which might originate or call into being an incapacity to enter into such a contract comes from another direction. Thus if the question concerns the capacity of an infant to marry, the status which gives rise to the suggested incapacity is that of infancy, not that of marriage. The latter is not a *source* of any incapacity. However, the decided cases and the two most influential theories on the subject of marriage-validity ascribe capacity to the *lex domicilii*. The results reached are a commentary on the soundness of such a theory.

The bald statement that capacity to enter into the marriage contract is regulated by the law of the domicil was appropriate only to solve the simpler type of case, that is, when there was only one domiciliary law involved. In such decisions, however, as *Brook v. Brook*[11] and *Sottomayor v. De Barros (No. 1)*[12] no difficulty was experienced. Both of these cases are decisions involving a common pre-marital domicil, and a prohibition contained in the law of the domicil was held to invalidate a marriage good by the law of the place of its celebration. The first case involved an English prohibition of marriage between a man and his deceased wife's sister, the second a Portuguese prohibition of marriage between first cousins. In each case the marriage was held bad. However, the old case of *Scrimshire v. Scrimshire*,[13] where a marriage which was good by the common pre-marriage domicil was held bad because by the *lex loci celebrationis* (French law) certain consents were necessary in the case of minors, made it necessary to admit an exception to the domiciliary rule. It seems impossible to regard this last case as merely an authority on formal validity; it warranted the rule that in cases of capacity the *lex loci celebrationis* at least must be satisfied.

[9] (1879) L.R. 5 P.D. 94, at 102.
[10] *Bank of Africa v. Cohen*, [1909] 2 Ch. 129 (not an entirely satisfactory decision).
[11] (1861) 9 H.L.C. 192.
[12] (1877) L.R. 3 P.D. 1.
[13] (1752) 2 Hag. Con. 395.

The testing ground of the domicil theory emerged when cases came up for decision involving the question of separate pre-marital domicils. With the decision in *Mette v. Mette*[14] the orthodox theory took full shape, viz., that the marriage had to pass the gauntlet of the laws of both domicils. An invalidity imposed by one was fatal. In this case (one of a marriage between a man and his deceased wife's sister) English law, which regarded the marriage as invalid, was held to prevail over German law, which was the law of the other domicil and the law of the place of celebration.[15] This doctrine is a very rigorous one, and one of its implications would be to render invalid an English marriage because the domiciliary law of one party might contain some foreign (and therefore strange) incapacity. English law therefore discovered a tenderness for an English marriage, and in the logically insupportable decision of *Sottomayor v. De Barros* (*No. 2*) an English marriage between first cousins, one of whom (the husband) was domiciled in England, was held *valid* in spite of the prohibition imposed on such marriage by the domiciliary law of the woman. This insular tendency was again recognised in *Ogden v. Ogden,* often regarded as the "villain of the piece." Here French law, which was the law of the husband's domicil and which rendered void a marriage celebrated between minors without certain consents, was ignored in favour of English law which was the law of the place of celebration and of the woman's domicil. To the same general effect is *Chetti v. Chetti,* though this case may perhaps be distinguishable as involving a disqualification of a religious nature obnoxious to English conceptions of public policy.

Re Paine,[16] which caused Cheshire such trouble, is merely an application of the orthodox theory. It raised the same problem as *Mette v. Mette* with the distinction, immaterial to the propounders of the orthodox theory, that the English law which prevailed and which treated the marriage as invalid was the law of the woman's domicil whereas in *Mette v. Mette* it was the law of the man's domicil.

Cheshire, in his first and second editions, attacked the orthodox theory vigorously and propounded the view that the law of the matrimonial domicil should be decisive both as to validity and invalidity, with the qualification that the law of the place of celebration must also be satisfied.[17] In view of the fact that the meaning attributed to the phrase "matrimonial domicil," even apparently by Cheshire, was merely that of the husband's domicil at time of marriage, it is difficult to see why the theory had any greater claims to ideal justice than the orthodox theory, unless one attributed some special virtue to the husband's domicil as opposed to that of the wife. Cheshire was able to point to the actual decision in *Sottomayor v. De Barros* (*No. 2*) as favouring his theory, though the reasoning

[14] (1859) 1 Sw. & Tr. 416.
[15] See, for example, Westlake, s.21, p.57; Dicey, 635.
[16] [1940] Ch. 46.
[17] Cheshire, *Private International Law,* (2nd. edn.), 220-1, 222.

therein is on entirely different lines. The theory was of course opposed to *Ogden v. Ogden,* unless one adopted the seemingly impossible course of regarding this as a decision based on mere formal validity. The theory, however, met its Waterloo in the decision in *Re Paine.* Cheshire had regarded the decision in *Mette v. Mette* as a powerful authority in favour of his theory, since the husband's domicil was English and English law was held to be the applicable law. In *Re Paine,* however, the same result was reached where the wife's domicil was English. In fact the judge merely purported to follow *Mette v. Mette.*

In the latest edition of his work Cheshire has propounded a variation of his prior theory. This is the view that the marriage should be governed by the law of the *intended* matrimonial home, i.e., the country intended by the parties at the time of the ceremony to be their marital home.[18] He points out that this is not inconsistent with *Re Paine* since in the latter case, though the husband's pre-marital domicil was German, both parties intended to reside and did later reside in England; therefore English law was the law that prevailed.[19] That fact, however, played no part in the reasoning of the court. In fact Cheshire's theory is supported by no judicial dicta save some remarks in *Brook v. Brook* and the comments of Lord Greene, M.R., in *De Reneville v. De Reneville*[20] where he said that the question whether a marriage was void or voidable for sexual impotence or wilful refusal to consummate was governed by the law of France "either because that is the law of the husband's domicil at the date of the marriage or (preferably in my view) because at that date it was the law of the matrimonial domicil in reference to which the parties may have been supposed to enter into the bonds of marriage." The theory seems to have a plausible ground of justice and reasonableness when the country in which the parties intend to settle later becomes or continues to be their matrimonial home, but becomes somewhat nebulous when the parties either have no intention or change it subsequently. Cheshire suggests[21] that this could be met by a sub-rule that the law of the intended matrimonial home would be presumed to be the law of the husband's domicil at time of marriage. This, however, would not meet the case where, the husband's domicil at the time of marriage being in one country, there is *clear evidence* that the parties intend to reside in another country but they later change their minds and either remain in the first-mentioned country or establish a domicil in a third country. In such a case why should an evanescent intention govern such an important matter?

The actual results of decided cases can be expressed very simply in one general rule and one exception. The general rule is that a marriage must be valid by the law of both domicils (*Mette v. Mette,*

18 *Private International Law* (3rd edn.), 269.
19 *ibid.,* at 283.
20 [1948] P. 100, at 114.
21 *op. cit.,* 277.

Re Paine) and by the *lex loci celebrationis* (*Scrimshire v Scrimshire*). The exception is that where the marriage is an English marriage and valid by English law, then in order to destroy that validity you must have the laws of *both* the domicils uniting to regard it as invalid.[22] The decided cases do not present us with an instance of a third country being involved; in fact in all the cases which establish the exception England was one of the domicils. However, the introduction of a third country would not seem to render necessary any modification of the manner in which the exception is stated above. Thus an English marriage regarded as good by English law between persons separately domiciled in two other countries would only be bad if bad by both those other laws. If the marriage was non-English, then the general principle instanced by *Mette v. Mette* would apply.

This exception is regarded by Cheshire as expressing a principle which would be a disgrace to any civilised system of jurisprudence.[23] Nevertheless it is a clear inference from the decided cases. In *Pezet v. Pezet*[24] the Full Court of New South Wales carried the principle to an extraordinary length in upholding a New South Wales marriage which, by the law of the Australian Capital Territory (the wife's pre-marital domicil), was void because contracted before the expiration of the time allowed for appeal from a decree of the Territory dissolving a prior marriage of the wife. The very same prohibition was part of New South Wales law, though limited by that law to New South Wales divorce decrees. In fact the same statute was in force in both "countries."

The existence of the exception cannot be doubted and is an instance of what the unwise application of the domiciliary theory has led to, as it merely represented the attempt on grounds of expediency to modify the far-reaching application of the personal law.

Cheshire's latest theory approaches but does not quite reach the concept of the "proper law" of the contract. Under such a concept the fact of domicil in one country, or the celebration of the marriage in another, would be merely elements to assist the court in deciding with what system of law the marriage contract had the most real connection. The fact that the parties intended to make their home in a particular country would be of the same type, i.e., only an element in the concept of proper law. The theory of a proper law of the marriage contract, it is submitted, is the one that should have been adopted. It is not supported by the reasoning in any of the decided cases, but it would be possible with some ingenuity to reconcile the actual results of the decisions with it. However, it would be for the House of Lords to make such a synthesis. One can at present find no basis save the logical one.

[22] *Sottomayor v. De Barros* (*No. 2*), *Ogden v. Ogden, Chetti v. Chetti.*
[23] 2nd edn., 228; 3rd edn., 285.
[24] [1947] S.R. (N.S.W.) 45.

It has been pointed out that many of the marriage-validity cases do not pertain to capacity at all. The question of laws prohibiting marriages between first cousins or between a man and his deceased wife's sister appears to be a mere case of a general statutory prohibition. However, such matters at least pertain to essential validity, and capacity in its normal relation to contracts is merely one aspect of essential validity. The learned writer of an article in the Australian Law Journal[25] does suggest that questions of essential validity *other than capacity* are governed by the *lex loci celebrationis,* and that *Pezet v. Pezet* might be justified on that ground. Such a view seems to be also implicit in the remarks of Barnard, J., in *Robert v. Robert,*[26] where he said that the effect of wilful refusal to consummate a marriage must be considered on the basis of such wilful refusal being a defect in the marriage, an error in the quality of the respondent, and being governed by the *lex loci celebrationis.* He was careful to add that if he was wrong and the matter went to capacity, then he must apply the *lex domicilii* (which happened in this case to be the same law as the *lex loci celebrationis*). The writer would concede that the topic of prohibited marriages pertained to the sphere of capacity. This of course gives a strained meaning to the concept of capacity. Moreover, Lord Greene, M.R., in *De Reneville v. De Reneville,*[27] whilst stating that the question involved was one of essential validity was of opinion that it should be governed by the law of the matrimonial domicil. The suggested distinction does not seem to be borne out by authority, and it seems that so far as the cases discussed in this article are concerned it would be equally true to say that they all dealt with the broad topic of essential validity. The use of this latter phrase, however, in some of the later cases is a refreshing indication that the judges are beginning to concern themselves with the question of the correct category involved.

If the theory of a "proper law" of the marriage contract were to be adopted, then just as in other cases of contract capacity would fall naturally into its place as merely one aspect of the essential validity of contracts.

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[25] W. L. Morison, *"Sottomayor v. De Barros 'Translated',"* 21 A.L.J. 4, 7.
[26] [1947] P. 164, at 167-8.
[27] [1948] P. 100, at 114.