A dictum in which Latham C.J. summarises the decision of the learned trial judge is so wide as to mislead unless considered only in relation to the particular facts of this case: "An occupier of land is not subject to a duty to search for nuisances which may or may not exist." Many cases show that an occupier is under a duty to take reasonable steps to remedy even the dangers created by trespassers in certain cases—this obviously requires a duty to search for nuisances "which may or may not exist" in the exercise of reasonable care in controlling the premises.

—G. W. PATON.

IN RE PAINE, GRIFFITH *v.* WATERHOUSE, [1940] 1 Ch. 46.

The demands of social morality and public policy on substantive legal rules are well illustrated in the law of contract. Particularly vivid instances of their operation are found in the conflict of law rules relating to capacity to contract marriage. "The community as a social entity may be indifferent to the breach of a contract to deliver goods but it cannot ignore an open infraction of its recognized code of morals."[1] The crucial problem then arises—"which community when a marriage affects more countries than one is entitled to demand pre-eminent consideration for its code of social morality?"[2]

One aspect of this question of "capacity" to marry was raised in the case of *In re Paine*. The problem confronting the Court in that case arose from the alleged marriage of a domiciled Englishwoman A, prohibited from marrying according to English law her deceased sister's husband, to B, a domiciled German, the marriage being valid according to the *lex loci celebrationis* which was German. Under the will of her mother, A was entitled absolutely to (*inter alia*) a bequest if she should have "any child or children" living at her decease, with a gift over if she had no children. One child of the marriage survived her. The question, then, was whether in the eyes of English law the marriage between A and B was valid, the evidence accepted by the judge revealing that A was a domiciled Englishwoman before her purported marriage and that B had never lost his German domicil of origin.[3]

Bennett J. disposed of the issue in a summary judgment, holding that the marriage was invalid because B had been the husband of A's deceased sister and the marriage was therefore one which she was prohibited from making by English law.[4] In support of his view that A had not the capacity to contract the marriage, Bennett J. expressly followed *Mette v. Mette* in which Sir Cresswell Cresswell laid it down that "there could be no valid contract unless each was competent to contract with the other."[5] He also referred to the statements of the law by Dicey, Westlake and Halsbury to the effect that each party must have capacity according to the law of his or her domicil. Westlake states categorically

1. Cheshire, *Private International Law*, 2nd edn., p. 218.
2. *ibid*; p. 219.
3. See [1940] 1 Ch., at p. 47.
4. *ibid*; at p. 49.
5. (1859) 1 Sw.& Tr. 416, at p. 423.

that " a marriage is invalid . . . if either party is by his personal law under an incapacity to contract it, whether absolute, in respect of age, or relative in respect of the prohibited degrees of consanguinity or affinity."[6]

It will be noted, in passing, that Bennett J. deals with the case on the basis of the issue raised being a pure question of capacity. English cases beginning with *Mette v. Mette* have used the terms " prohibited marriage " and marriage of which the parties are " incapable " almost interchangeably. No attempt is made in this case to carry the analysis any further by distinguishing—as American jurists have done—between capacity and essential validity.

The decision is very interesting in view of its complete rejection of Cheshire's advocacy of the law of the matrimonial domicil as the governing law for marriage-capacity issues. He contends that " it is the law of the husband's domicil, i.e., the law of the matrimonial domicil, which ought to decide, for example, whether the parties are of sufficient age to marry or whether the marriage is prohibited on the ground of near relationship."[7] He claims, further, that logically and on principle it is the community of the husband's domicil that must be solely interested in the status of its married inhabitants. *Mette v. Mette* is explained as upholding this argument on the ground that both parties contemplated a matrimonial residence in England.

As we have seen, however, Bennett J. in the case under discussion paid no heed to the view that the matrimonial domicil of the parties was of any importance in *Mette v. Mette*. Actually in the case under discussion the husband retained his domicil of origin. Unless this decision is reversed or overruled it seems then that Cheshire's contention must be rejected—however commendable a single unifying rule may be in conflict of law cases. In terms of local law *In re Paine* may be summed up as follows: if a Victorian incapable of marriage according to Victorian law marries abroad a person there domiciled, the marriage being valid according to the *lex loci celebrationis*, the marriage will not be recognized in Victoria.

—T. PYMAN.

6. *Private International Law*, 7th edn., p. 57.
7. Cheshire, op. cit., p. 220.

THE WHEAT INDUSTRY ASSISTANCE SCHEME.[1]

Deputy-Federal Commissioner of Taxes (N.S.W.) v. Moran Pty. Ltd.[2]

In execution of a scheme to ensure a payable price to wheat-growers, evolved at a conference of Commonwealth and State representatives, the Commonwealth Parliament passed four Acts[3] imposing taxes on flour, payable by the millers, and the Wheat Industry Assistance Act, 1938 (W.I.A.A.) appropriating the revenue " for financial assistance to the States in the provision of assistance to the wheat industry."[4] Section 6 of this Act provided for payments to the States, expressly for distribution

1. The writer gratefully acknowledges the assistance he has derived in preparing this note from discussion with the Honours class in Constitutional Law II.
2. (1939) 61 C.L.R. 735; [1940] 3 All E.R. 269.
3. Flour Tax Act, 1938; Flour Tax (Stocks) Act, 1938; Flour Tax (Imports and Exports) Act, 1938; Flour Tax (Wheat Industry Assistance) Assessment Act, 1938.
4. The title of the Act.