JURISDICTION IN NULLITY SUITS.

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In *Hutter v. Hutter* 1944 2 A.E.R. 369, Mr. Justice Pilcher grappled in no uncertain manner with the tangled skein of conflicting principles relating to the jurisdiction of the English Divorce Division to declare a marriage null on the ground of the respondent's wilful refusal to consummate. The facts in the case were as simple as the law was not. The petitioning husband was an American soldier, domiciled in the U.S.A., who married in England a woman there resident and domiciled. He sought a decree for the reason above mentioned. The English court was then the forum of the place of celebration, and the residence of the respondent [and, if the marriage was a nullity, her domicile]. It was not the forum of the putative husband's domicile nor in any real sense the forum of his residence, since he was present in England on military service. There was for practical purposes no real matrimonial residence owing to the very short and unsubstantial nature of the matrimonial life. The suit was undefended, but the Attorney General with two other counsel appeared to argue for the King's Proctor. The twenty cases referred to by the learned judge exhaust all the authorities directly relevant to the question and some which merely illustrate collateral issues. In the conclusion Pilcher J. took jurisdiction and decreed nullity. The ground of jurisdiction may be treated as either the fact that the ceremony was celebrated within the territory of the forum or that the respondent was there resident. Each basis has a respectable amount of authority to support it derived from the practice of the Ecclesiastical Courts prior to the Matrimonial Causes Act 1857. In particular it may be noted that the residence of the respondent (and not the petitioner) was the important matter in those courts, if and when residence was taken into consideration. See *Bennett v. White* 1937 P. 111.

If abundant authority existed, how comes it that the Attorney General was invited to argue in an undefended nullity suit in which the merits of the petitioner were unmistakeable, and why should the Court embark on so elaborate an examination of the authorities? The answer is to be found in the confluence of two streams of thought creating a flood which only deliberate and conscious judicial engineering could reduce to manageable proportions.

The jurisdiction of the Divorce Division to decree nullity derives, by way of the statute, from the Ecclesiastical courts. These courts were not concerned with domicile in its modern sense at all. The jurisdiction to dissolve a marriage in the modern sense of divorce is the creation of the Act of 1857. Ultimately, by the end of the century, it had come to be accepted that jurisdiction to decree dissolution should be limited to the forum of the domicile [*Le Mesurier v. Le Mesurier* 1895 A.C. 517]. The basis for this view, expressed with unrivalled clarity by Brett L.J. (diss.) in *Niboyet v. Niboyet* [1878] 4 P.D. 1 is that divorce involves a change in the status of the parties and is properly therefore exclusively the concern of the community to which the parties belong and therefore the courts and law of their domicile.

The result of the devolution of the ecclesiastical jurisdiction and the evolution of the statutory divorce jurisdiction was thus to present a genuine conflict of theories—though this might never have disturbed the equanimity of the Divorce Division but for the desire of the Administrator of Property of Austrian (Ex-Enemy) Nationals after 1920, to swell his assets by seeking to include those of Mrs. Von Lorang. She decided to assert her Scots character by securing a declaration of the nullity of her marriage with her Austrian putative husband from the court of her Wiesbaden domicile. She did so. The House of Lords unanimously approved of her achievement, asserting the universal validity of the Wiesbaden decree as a pronouncement on status by the forum domicilii. *Salvesen or Von Lorang v. Administrator of Austrian Property* 1927 A.C. 641.

Here was a concealed threat to the placid inconsistencies of the Divorce Division. The concealment was soon thrust aside. In *Inverclyde v. Inverclyde* 1931 P. 29 Mr. Norman Birkett (as he then was) found himself briefed by the noble owner of Castle Wemyss in the County of Renfrew to resist the allegations of his supposed wife that owing to his impotence their marriage was a nullity. The supposed Lady Inverclyde had not ventured far from the West End Stage of which she was a decoration. So she brought suit in London. There was also a claim, hardly to be mentioned in this rarefied atmosphere of jurisdictional proprieties, for alimony. Mr. Birkett faced the problem—and the claim for alimony—with resource. It was true that the marriage had been celebrated in England. It was also true that decrees of nullity had not infrequently been pronounced by the English court as the *forum loci celebrationis*. Calling to aid the House of Lords, counsel contended that in this case at all events, since the marriage was voidable, the question was essentially one of status. It was pointed out that a nullification for impotence was undistinguishable in substance from dissolution. It was actually dealt with in U.S.A. in divorce and not nullity proceedings. The logic of *Salvesen's* case should therefore prevail—the statutory definition of the jurisdiction should be qualified by yielding to the desirable unity of exclusive domiciliary control, and jurisdiction should be refused. Mr. Justice Bateson so decided. Here was a complication upon a conflict. The inherited nullity jurisdiction lost some of its most distinctive characteristics for one category of disputes (those relating to voidable marriages), and retained them for others. The development might have continued. The growth which led through *Wilson v. Wilson* L.R. 2 P. & D. 438 and *Niboyet v. Niboyet* (cit. sup.) to *Le Mesurier v. Le Mesurier* (cit. sup.) in the divorce jurisdiction might have been repeated in the nullity jurisdiction. The forum of the domicile might have prevailed against all comers in the interest of that uniformity of matrimonial condition which all jurists applaud. Thus in 1931 in *De Massa v. De Massa* the error of disregarding the domiciliary decree displayed in *Ogden v. Ogden* 1909 P. 46 was put aside. And this tendency has continued [see *Galene v. Galene* 1939 P. 237]. But the forces of tradition [and in some respects convenience] persisted. In *White v. White* 1937 P. 111 jurisdiction in nullity was taken based on the residence of the petitioner. The alleged marriage in this case was a bigamous one. But the English

Court which made the decree could not claim jurisdiction either as the *forum loci celebrationis* or as that of the respondent's domicile. Since this was the case of a void marriage it did not directly challenge *Inverclyde's* case. See also *Hussein v. Hussein* 1938 P. 159 (a case of a voidable marriage celebrated in England).

Finally in 1943 Mr. Justice Hodson expressed, in a short judgment in an undefended suit, his dissatisfaction with the conclusion in *Inverclyde's* case. In *Easterbrook v. Easterbrook* 1944 1 A.E.R. 90 he granted a decree nisi of nullity on the ground of wilful non consummation without the petitioning male being domiciled in England. As we have seen the same result was reached, after full consideration, in *Hutter's* case [July 1944].

Is the rejection of the tendency disclosed in *Inverclyde's* case desirable ? It is easy to justify the latest decision on the simple ground that the statutory definition of jurisdiction admits of no qualification. This indeed is the kernel of Mr. Justice Pilcher's judgment. There is really no room for doubt as to what were the " principles and rules on which the ecclesiastical courts . . . acted." Jurisdiction was not for them based on domicile. But it may be doubted whether this mechanical method of solution does justice to the underlying idea in Mr. Justice Bateson's decision in *Inverclyde's* case. He there said that in the case of nullification for impotence " To call it a suit for nullity does not alter its essential and real character of a suit for dissolution" [1931 P. 41.] On this Pilcher J. says " I confess that I find some difficulty in following the conclusion at which the judge arrives in (this quoted sentence)." [1944 2 A.E.R. at 372].

So much for attempts to substitute juridical analysis for statutory interpretation. It may be suggested without disrespect that the learned judge's conclusion is not difficult to understand though perhaps it is expressed in somewhat too absolute terms. It is clear enough that he was searching after substance rather than form. Such is not, except within narrow limits, a task that is likely to survive the scrutiny of successors. The truth is that once the doctrine of the exclusiveness of the domicile in divorce had prevailed in the Privy Council and the reality of nullity as a matter of status in the House of Lords, there was room for a conflict between tradition and principle. At the moment tradition has prevailed. In part this is due to the fact that the tradition is reinforced by a statutory pronouncement of unusual clarity. Indeed we must not lose sight of the " principle " that judges must interpret statutes and not amend them. Moreover if the justification for Mr. Justice Bateson is to be found in a broad principle of social and international policy it is unfortunate that it should come to be rested upon so refined a distinction as that between the nullification of a " void " and " voidable " marriage. It would be better to go the whole way, reject this distinction, assimilate nullity to divorce as a modification of status, and found jurisdiction upon the domicile of the respondent. There are difficulties—especially arising from the fact that the man and woman concerned may each have a separate domicile if in fact they are not validly married. This however is not an insuperable difficulty. There is also a natural tendency to think that the *forum loci celebrationis* should pass upon the formalities of the

ceremony. This tendency however confuses between the choice of the appropriate law (*lex loci celebrationis*) and the determination of the appropriate tribunal. Such a confusion would in the last resort destroy the efficacy of conflict of law rules altogether.

It is not improbable that only legislation can produce the clarification of this problem which seems desirable—unless indeed a final court of appeal were to recognise that in *Hutter v. Hutter* jurisdiction was in fact exercised by the court of the domicile of the respondent and in *Inverclyde v. Inverclyde* the litigation was referred to such court and that the cases are therefore not in conflict!