JURISDICTION AND THE CHOICE OF LAW IN NULLITY SUITS.

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In a previous article in this Review,[1] Mr. P. D. Phillips, K.C. discussed this problem, in the light of the cases decided up to 1946, with particular reference to the criticisms made of the judgment of Bateson J. in *Inverclyde v. Inverclyde*.[2] It was clear that there was a clash between history and the modern desire to rationalise the law. The ecclesiastical courts based jurisdiction in nullity cases on residence—as there was a universal law applicable, the question as to jurisdiction did not raise a matter of substance, but only one of convenience. To-day, more substantial issues lie concealed in the argument concerning jurisdiction. Even in divorce, it was only gradually that domicil was regarded as the sole test—the decisive case was in 1895.[3] The rational justification for emphasising domicil is that divorce is a matter of status and that jurisdiction should be exercised by the community to which one belongs. Bateson J. emphasised that where it is alleged that the marriage is voidable only, the granting of a decree of nullity changes the status of the parties; if the marriage is altogether void, then the decree merely makes clear what is the existing position. A void marriage is treated as if it had never existed and the point may be raised not only by the parties, but also by other interested persons, even after the death of the parties. A voidable marriage is valid until annulled and the decree can be made only at the instance of one of the parties. Where the marriage is voidable only, he felt that, in spite of forms, the substance of the matter was that the petitioner was seeking to dissolve a marriage and hence he leaned to the analogy of jurisdiction in divorce.[4] This judgment really ignored the effect of history, but attempted to create a uniform body of doctrine. Hodson J.[5] and Pilcher J.[6] in 1944 refused to follow the lead of Bateson J.

It is sometimes suggested that to make domicil the test in the case of nullity is to argue in a circle. If we assume that a domiciled Frenchman marries a domiciled Englishwoman, it is said that the court can determine the issue of jurisdiction only by deciding first whether the marriage is valid or not. There is, however, no practical difficulty. If the cause of complaint is one that makes the marriage void *ab initio*, the Court will for the purpose of determining jurisdiction treat the woman as domiciled in England, the reason being that no decree of any court is really necessary to avoid the marriage. If the plea would make the marriage voidable only, then the wife has by law the domicil of the husband, till a decree of nullity is made.[7] She is then presumably

1. Vol. III. (May 1946), 15-18; *Jurisdiction in Nullity Suits.*
2. [1931] P. 29.
3. *Le Mesurier* v. *Le Mesurier*, [1895] A.C. 517.
4. Lord Greene M.R. in *De Reneville v. De Reneville*, [1948] P. 100, approves this approach in looking at the substance of the matter. Bucknill L.J. in *Casey v. Casey*, [1949] 2 All E.R. 110, at 115, sees no valid reason for distinguishing, so far as jurisdiction is concerned, between divorce and a suit for nullity on the ground of wilful refusal to consummate.
5. *Easterbrook v. Easterbrook*, [1944] P. 10.
6. *Hutter v. Hutter*, [1944] P. 95.
7. Lord Greene M.R. in *De Reneville v. De Reneville* (*supra*) emphasised that the mere presenting of a petition cannot be treated as giving to the wife her own domicil. The petition is discussed at length by J. G. Fleming, (1949) 1 *Annual Law R.* 193.

remitted to her English domicil, unless in the meantime she has acquired a new domicil of choice.

Bateson J. (whether he fully realised it or not) raised the following questions: firstly, whether the historical unity of the theory of nullity was to be sundered by a distinction between void and voidable marriages, although the form of the decree was the same in each case. (Lord Greene M.R. emphasises in *De Reneville v. De Reneville*[8] that it is particularly unfortunate that the old form of decree was used for the new causes of nullity laid down by the Act of 1937.[9]) Secondly, if the English courts considered the residence of both parties (or even of the petitioner) to be enough, was English law to be applicable merely because English courts took jurisdiction? Some assumed that this was so—in divorce the rules relating to jurisdiction and choice of law were the same, but no trouble arose since jurisdiction was based on domicil alone. If English courts widened their jurisdiction in nullity cases, they should still apply the law of the domicil, save possibly in cases relating to the formal validity of the marriage ceremony, when the law of the *lex loci celebrationis* should be applied.

In *Robert v. Robert*,[10] Barnard J. thought that it was enough to give jurisdiction if the wife, who was petitioner, was resident in England at the time of the institution of the suit, although the husband then resided at Guernsey and was also domiciled there. This shews that the tide was turning against the view of Bateson J., but two recent decisions of the Court of Appeal have re-established to some extent the views of that judge: *De Reneville v. De Reneville*[11] and *Casey v. Casey*[12]. In the former case, a wife brought a suit on the ground of non-consummation owing to incapacity or wilful refusal of the husband, and the husband appeared under protest against the jurisdiction of the court. The wife was born in England and resident in England at the time of bringing suit. The husband was domiciled in France and resided there at all material times. The marriage took place in Paris where the parties resided together for four years. It was held that whether the marriage was void or voidable should be determined by French law, either because it was the law of the domicil or preferably because it was the law of the matrimonial home. As there was no evidence concerning French law, the Court assumed that it was the same as English. Under English law, since the marriage was voidable only, the domicil of the wife was French at the institution of the suit and remained French until the marriage was dissolved. The English courts, therefore, had no jurisdiction. *Robert v. Robert*[13] was overruled in so far as it founded jurisdiction on residence of the petitioner.

In the second case, the parties were married in England and the wife before marriage was domiciled and resident in England. The husband was a member of the Canadian forces, domiciled and resident in Canada

8. [1948] P. 100.
9. *Matrimonial Causes Act* 1937.
10. [1947] P. 164.
11. [1948] P. 100.
12. [1949] 2 All E.R. 110.
13. *Supra.* J. G. Fleming, (1949) 1 *Annual L.R.* 193, submits this case to an incisive examination. It is true that the result may be attacked from the logical point of view, but it at least provides a workable rule in distinguishing between cases of void and voidable marriages.

and spent only a few days in England. The wife petitioned on the ground of wilful refusal to consummate. Again, although one would have thought the previous decision would have emphasised the necessity of expert evidence on the material foreign law, no such evidence was given and the Court was again forced to assume that the foreign law was the same as English. The decision was that the celebration of the marriage in England did not oust the rule that, in a marriage only voidable, the wife's domicil followed that of the husband and therefore that the English courts had no jurisdiction.

These cases at first sight seem to approve entirely of *Inverclyde v. Inverclyde*. But this is only partially so. Bateson J. applied English law to determine whether the marriage was void or voidable; the Court of Appeal considered that the law of the domicil should apply.

If these cases could be regarded as laying down that the only basis of jurisdiction is domicil, the law would be much simplified. Unfortunately that is not so.

(1) Firstly in each case the distinction is made between void and voidable marriages. It may be true that this point largely relates to the domicil of the wife. If the marriage is void *ab initio*, the " wife " acquires her " husband's " domicil, if at all, only by the exercise of choice and residence abroad.

(2) Lord Greene M.R., in *De Reneville v. De Reneville*, left open the point of jurisdiction based on common residence, his words being: " without expressing an opinion upon the question whether residence of both parties within the jurisdiction is sufficient."[14] Somervell L.J. in *Casey v. Casey* stated: " No doubt there is force in the argument that nullity suits where the marriage is voidable are similar to suits for dissolution. On the other hand, there seems to me considerable reasons of convenience for giving the courts where the respondent or both parties reside jurisdiction in this class of case, and I would desire, so far as this court is concerned, to keep that point open until it arises."[15]

(3) The Court refrained from overruling some of the earlier cases dealing with void marriages. Hence the validity of these decisions must await further judgments of higher courts. Lord Greene M.R. pointed out that in *Salvesen v. Administrator of Austrian Property*,[16] the Lords left open the question whether there might not be other grounds than domicil and he refrained from discussing this issue.

Joseph Jackson[17] suggests that there is no real distinction, so far as jurisdiction is concerned, between void and voidable marriages, save the point that if the marriage is void, the wife does not change her domicil on

14. [1948] P. 100, at p. 128.
15. [1949] 2 All E.R. 110, at p. 118.
16. [1927] A.C. 641.
17. 27 *Can. B.R.* (1949) 173. His thesis is that the court in all cases should assume the marriage to be valid and test the situation by the law of the husband's domicil. If this law gives the wife a separate domicil, then the country of that domicil may exercise jurisdiction. This is a logical way to attack the problem and would avoid many difficulties. But it does not seem to be the approach in the English cases. Although Lord Phillimore in *Salvesen v. Administrator of Austrian Property*, [1927] A.C., at p. 671, thought that in all cases of nullity, the decree of the court of domicil was alone competent. In *De Massa v. De Massa*, [1939] 2 All E.R. 150*n*., the plea was that the marriage in England was invalid as a necessary consent had not been obtained. The domicil of both parties was French. Lord Merrivale P. thought that the matter was one for a French tribunal and adjourned the proceedings till the decree of a French court had been obtained. Presumably the marriage was void, and not voidable; yet he thought the courts of the domicil had exclusive jurisdiction.

marriage (if the husband has a different domicil): whereas if the marriage is merely voidable, the wife by a rule of law has her husband's domicil. This may be so, but it is convenient for purposes of summarising the law to deal with the two cases separately. Where the marriage is void *ab initio* there is clearly a strong case for the exercise of a wider jurisdiction.

Jurisdiction of English Courts.

Void Marriages.

1. *Marriage celebrated in England.* Dicey[18] lays down that this is a ground of jurisdiction in all cases of nullity, but *Casey v. Casey* disagrees so far as voidable marriages are concerned. Presumably this leaves open the question of void marriages and so the old cases bind, until they are overruled. The validity of a marriage, so far as form is concerned, is a matter for the *lex loci celebrationis* (according to English theory) and therefore it is reasonable to allow jurisdiction to the courts of that country: it is, so to speak, a matter of correcting the marriage register. There is some force in this argument but, as Bucknill L.J. points out in *De Reneville v. De Reneville*,[19] if neither party was resident nor domiciled in that country, it is difficult to see what interest that country would have in his or her matrimonial status.

However, the jurisdiction of the country of celebration to deal with formal defects is supported by *Simonin v. Mallac*[20] and *Linke v. Van Aerde*[21]. The former case is nearly ninety years old and the second over fifty: the rules of private international law have developed so fast that neither can be relied upon. Somervell L.J. states, without deciding the point: "It may well be convenient that the courts of the country where a ceremony of marriage has been performed should have jurisdiction to entertain suits where the validity of that ceremony is in issue."[22]

It is possible that this ground of jurisdiction is confined to void marriages, in which the formal validity of the marriage is attacked. "Where, however, the ceremony is not attacked, a different issue arises and there seems to me no ground in principle for giving jurisdiction to the courts of the country of the ceremony."[23]

2. *Both parties domiciled in England.* This rule is not questioned by any writer or decided case. It is beyond doubt, states Lord Greene M.R. in *De Reneville v. De Reneville.* There is a common domicil in the case of a marriage void *ab initio* where the parties had the same domicil before marriage or, if the domicil of the wife before marriage was different from that of her husband, then if she secures by residence and intent the domicil of the husband.

3. *Petitioner domiciled in England before marriage.* This view is supported by Lord Greene M.R. in *De Reneville v. De Reneville.*[24] It does, of course, open up the possibility of conflicting decisions. The

18. *The Conflict of Laws*, Rule 35 (3). The editors state that this Rule must be received "with caution" (6th Edition, 1949, at p. 245).
19. [1948] P. 100, at p. 122.
20. (1860) 2 Sw. & Tr. 67. Followed in Victoria, though with some doubt, by Madden C.J. in *Corbett v. Adamson*, (1894) 20 V.L.R. 278.
21. (1894) 10 T.L.R. 426.
22. *Casey v. Casey*, [1949] 2 All E.R. 110, at p. 117.
23. *per* Somervell L.J., same case, at p. 117.
24. Also by Barnard J. (in *Mehta v. Mehta*, [1945] 2 All E.R. 690) who had no hesitation about the question of jurisdiction.

woman domiciled in England may obtain a decree of nullity: the man domiciled in France may obtain a declaration that the marriage is valid. The justification for the rule is that, if the marriage is void, the lady retains her old domicil. Where the wife is the petitioner and has remained in England, the reason for the rule is that her domicil has not changed. It is quite illogical, however, to apply this rule to the husband, if he changes his domicil after marriage.

4. *Residence of both parties.* This point was left open by the Lords in *Salvesen's Case*: Lord Greene M.R. in *De Reneville's Case* apparently thought it sufficient, although he did not decide the point. After this decision, it is clear that residence of the petitioner is insufficient. "That a wife who is resident but *ex hypothesi*, not domiciled here can compel her husband who is both domiciled and resident abroad to come to this country and submit the question of his status to the courts of this country appears to me to be contrary both to principle and to convenience."[25] Presumably, however, if the petitioner travelled to the residence of the respondent and there brought suit, the court would assume common residence.

5. *Consent of the parties.* This cannot create competence in jurisdiction, nor can failure of the respondent to protest. This is supported by Lord Greene M.R. in *De Reneville v. De Reneville*, and is merely an application of the rule relating to divorce.

Voidable Marriages.

Domicil is probably the only basis, although possibly there may be jurisdiction where both parties are resident in England at the time of the institution of the suit.[26] Logically, common residence should not be regarded as sufficient; the rule should depend on domicil alone. The fact that the marriage is celebrated in England is not sufficient.[27]

English Recognition of Foreign Decrees.

The cases on this point are somewhat old and the doctrines in the books will need to be reconsidered in the light of recent cases. The distinction between void and voidable marriages is not discussed by the courts in this connexion,[28] and it is probable that, if the House of Lords does not overrule *De Reneville v. De Reneville*, the law relating to the recognition of foreign decrees will gradually be re-formulated.

(1) It is not clear whether English courts will recognise annulment in the country where the marriage was celebrated, if the parties are neither domiciled nor resident there. Possibly recognition may be given if the cause of annulment was a formal defect in the ceremony of the marriage. Dicey recognises this in Rule 73 (2) but prefaces the clause with *semble*. Goddard L.J. seems to recognise this ground in an *obiter dictum*.[29]

25. [1948] P. 100, at p. 118. It is not clear whether this paragraph of Lord Greene's judgment is meant to refer to void marriages, voidable marriages or to both.
26. Bucknill L.J. in *Casey v. Casey*, [1949] 2 All E.R. at p. 115, leaves open the question of common residence, though he supports in the case of voidable marriages the analogy of divorce. *Hutter v. Hutter*, [1944] P. 95, where Pilcher J. approved of common residence, has not been specifically overruled.
27. *Casey v. Casey, supra.*
28. Dicey, *op. cit.*, 383.
29. *Simons v. Simons*, [1939] 1 K.B. 490, at pp. 498-9.

(2) The decision of the courts of the domicil is recognised, if it is a common domicil. This is conclusively laid down in *Salvesen v. Administrator of Austrian Property.*[30] It is still uncertain what view will prevail if the marriage is void *ab initio* and the domicil of the parties differs.[31] Dicey thinks that in this case the English court should recognise the decree of a country in which either is domiciled[32]: if there were two contradictory decrees, one in the country of the domicil of the man and one in the country of the domicil of the woman, we would reach an impasse.

(3) According to *Mitford v. Mitford,*[33] English courts should recognise a decree of the country where both parties reside. Dicey does not recognise this ground in Rule 73, as he holds that no other case supports *Mitford v. Mitford.*

(4) Dicey adds another case "*semble* if the decree would be recognised as annulling the marriage in the country where the parties were domiciled at the date of the decree."[34] This is based on the analogy of the rules relating to divorce.[35]

(5) As between the Australian States, there may be a greater recognition of decrees of nullity under section 18 of the *State and Territorial Laws and Records Recognition Act,* 1901-28 as interpreted by Fullagar J. in *Harris v. Harris.*[36]

Choice of Law in Nullity Cases.

In *Easterbrook v. Easterbrook*[37] and *Hutter v. Hutter*[38] although the husband was domiciled in Canada, a decree was sought on the ground of wilful refusal to consummate. Cheshire emphasises that the municipal law of England was irrelevant, but a decree was granted although in none of the provinces of Canada was such a plea a valid ground for annulment.[39] However, Cheshire's fear that England may become the "Nevada of annulment" is somewhat removed by the two recent decisions of the Court of Appeal, where the need of considering the law of the domicil was stressed.

Is it the domicil at the time of proceedings that is important, or the pre-marriage domicil of each party? This raises another question. Is wilful refusal to consummate a matter that falls under the heading of capacity? This view is supported by J. G. Fleming.[40] This brings in the difficulty, however, that there is authority for the view that capacity to marry should be tested by the law of the pre-marriage domicil of the parties. This would mean that if the suit was against the wife, we should apply, not the law of the husband's domicil, but that of the wife's pre-marriage domicil. This introduces a complication in the choice of law which was not envisaged by the Court of Appeal in its recent decisions. Fleming considers that the law of the domicil at the time of proceedings

30. [1927] A.C. 641: *Galene v. Galene,* [1939] 2 All E.R. 148.
31. Cheshire, *Private International Law* (3rd ed.), 464.
32. *op. cit.,* 383.
33. [1923] P. 130.
34. Rule 73 (3).
35. The leading case in divorce relating to this point is *Armitage v. A.-G.,* [1906] P. 135.
36. [1947] A.L.R. 106.
37. [1944] P. 10.
38. [1944] P. 95.
39. *Private International Law* (3rd ed.) 459.
40. 11 *Mod.L.R.* (1948) 98: See also the same author's article in (1949) 23 A.L.J. 458.

is entirely irrelevant, on the theory that the causes of voidability relate to defects of an ante-nuptial character. This view is historically correct, but it has not been fully considered either by text-writers or courts.

Impotence may be regarded as a defect in capacity which is ante-nuptial. But it is more convenient to test this by the law of domicil at the time of proceedings—the community in which the parties are domiciled has most claim to determine this question. This may require an exception to the general rule that the capacity of each party is to be tested by the law of the domicil before marriage. Of the new causes of nullity added by the *Matrimonial Causes Act* 1937—unsoundness of mind at the time of marriage, the existence of venereal disease or pregnancy by a person other than the petitioner—these relate to ante-nuptial defects. Wilful refusal to consummate may, however, be due to a quarrel after marriage.

Lord Greene M.R. in *De Reneville v. De Reneville* does not even consider the possibility of applying the law of the pre-marriage domicil of a respondent who is the wife. He stated that the question must be determined by the law of France because it was the husband's domicil at the date of the marriage or 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. This supports the view that the law to be applied should be that of the matrimonial home. Bucknill L.J. stated that it was " reasonable that the law of the country where the ceremony of marriage took place, and where the parties intended to live together and where they, in fact, lived together, should be regarded as the law which controls the validity of their marriage." R. Cross, in the new *Dicey*,[41] attempts to reconcile these *dicta* with the orthodox rules concerning capacity by regarding *De Reneville's Case* merely as adding a gloss to the established rule *i.e.* if an incapacity imposed by the law of the wife's pre-marriage domicil merely renders the marriage voidable, the question whether the marriage is void, voidable or valid will be determined by the law of the husband's domicil at the date of the marriage.[42]

The only other method of reconciling the *dicta* in *De Reneville v. De Reneville* concerning choice of law with the orthodox rules as to capacity would be to regard allegations of impotence and wilful refusal to consummate as raising some question other than that of capacity.[43] Cross considers that since Lord Greene M.R. speaks of the question as one of essential validity, he does mean it to relate to capacity. The new *Dicey*, therefore, tries to force all questions relating to choice of law into the divisions of matters of form and matters of capacity.[44]

41. *op. cit.* 260.
42. *op. cit.* 262.
43. *op. cit.* 262.
44. It is admitted that the question relating to consent may be a possible exception: see *op. cit.* 264-5.