THE PROLEPTIC DOMICILE PUZZLE

By W. L. MORISON*

"THERE exist a certain village, V, and a certain barber, B, who lives in V. The barber shaves *all* those, *and only those,* who live in V and who do *not* shave themselves. Now, does the barber shave himself? If he does, he doesn't. If he doesn't, he does. Therefore . . .".[1]

It is to be supposed that medieval theologians disputed the number of angels who could balance on the point of a needle with as much enjoyment as a modern conference of law lecturers, in its infrequent moments of relaxation, will ponder the problem of how to discover the odd-weighted penny in ten by using a pair of scales only three times. But times are not what they were. The modern philosopher, faced with a logical problem, will often deprecate any effort to find a logical solution. This attitude he will justify by placing strictures upon the validity of logic itself, reinforcing his condemnation by some reference to the inadequacy of the verbal symbols in which the problem is stated. For instance, Denis Lloyd, among legal scholars, argues that "in any contact between life and logic it is not logic that is successful". [2] This is disillusioning to one who, like the writer, was brought up to believe that no man ever tried to break logic but in the end logic broke him. Symptomatic of this same unpopularity of logic is the fact that in the controversies which have continued for nearly fifty years about the case of *Ogden v. Ogden*[3] progressively less attention has been paid by text writers to the neat logical puzzle which is raised by that case.[4] It will be suggested in this article that closer consideration of the formal implications of this puzzle can do much to clarify the issues of legal principle involved, and that this clarification will reveal unsatisfactory features in the reasoning by which the views currently held by text writers are supported.

The question which faced Sir Gorell Barnes in *Ogden v. Ogden*[5] was whether a French decree of nullity, pronounced of a marriage

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[1] Bell, *Numerology* (1933) 168, quoted by W. W. Cook, *Logical and Legal Bases of the Conflict of Laws* (1942) 213.

[2] *Reason and Logic in the Common Law,* (1948) 64 L.Q.R. 468, 473 quoting H. J. Laski, *Studies in the Problem of Sovereignty* 201. Contrast Professor Oliver Wendell Holmes Senior's sturdy advocacy of logic in *The Wonderful "One-Hoss Shay":* "Logic is logic, that's what I say".

[3] [1908] P. 46.

[4] Some aspects of it are, however, extensively discussed in J. G. Fleming's Domicil in Nullity Proceedings (1949) 1 *Annual Law Review* 193.

[5] [1908] P. 46.

between a domiciled Frenchman and a woman whose pre-marriage domicile was English, and who remained in England after her marriage, was entitled to recognition. It was argued by counsel that the decree should be recognised, on the analogy of decrees of dissolution, because it was a decree of the Court of the parties' common domicile. To this Sir Gorell Barnes replied that there were differences between suits for dissolution of marriage and those in which a declaration of nullity was claimed. "The question raised in the latter class of suits," he said, "is whether a valid marriage ever took place at all. Of course, if it took place, the domicil of the wife becomes the domicil of the husband. But, if it did not take place, the mere fact that a ceremony was gone through would not change the domicil of the wife, and she would not, therefore, necessarily have the same domicil as her intended husband".[6]

Sir Gorell Barnes does not explicitly and immediately draw any conclusion from these propositions. But it is submitted that the sense of the paragraphs which follow is that Sir Gorell Barnes' inference was that there can be no completely general rule that the Courts of the domicile of the parties have jurisdiction to decree nullity. For in the peculiar type of case before the Court such a rule would be incapable of application. Whether there was a common domicile or not would be unascertainable until the Court knew whether or not the marriage was valid, and the Court could not ascertain whether the marriage was valid until it knew whether or not the foreign nullity decree was pronounced by the Court of the common domicile. The French Court was clearly the Court of the domicile of one of the parties, but this in Sir Gorell Barnes' view did not in the then state of the authorities entitle the decree to recognition, and neither was it a decree of the Court of the place of celebration of the marriage.[7]

The argument was first attacked by a resort to logic. Professor Hughes, who condemns the "somewhat hasty rejection of the fetters of logic implied in much that is written today",[8] offered the following criticism of Sir Gorell Barnes' position: "The question is put", he says, "How can you recognise a decree of nullity on the ground that it was given by the Courts of the domicil when the decree itself denies the domicil which is the basis of its recognition? The reply comes at once, How can you argue that the domicil necessary for recognition of the decree does not exist without recognising the

[6] *Id.*, 78. Cf. *Niboyet v. Niboyet* (1878) L.R. 4 P.D. 1, 9 per James L.J.
[7] [1908]P. 46, 78-81.
[8] J. D. I. Hughes, "Judicial Method and the Problem in *Ogden v. Ogden*" (1928) 44 *L.Q.R.* 217, 226.

decree for the very purpose of providing your basis for rejecting it? In other words, we get into a *circulus inextricabilis* even more inexorable than that alleged in another connexion."[9] This argument is adopted by H. E. Read,[10] Rupert Cross,[11] and J. G. Fleming.[12]

A situation thus arises in which Sir Gorell Barnes is debunked by the critics by reference to the very same circle which, according to the writer's understanding of his position, Sir Gorell Barnes used to justify his own conclusions. It is submitted, however, that the true position is that Sir Gorell Barnes is not caught in the web of his own creation in the manner suggested by writers. What is happening is that two different solutions to a logical puzzle are being propounded, either of which may be correct, but neither of which can be established as correct by the information which is given in stating the puzzle.

This may be demonstrated by casting the puzzle into the same form as Cook's barber puzzle quoted at the head of this article.

The Court of the common domicile of a man and a woman has jurisdiction to determine whether a marriage alleged to exist between them is valid. A woman has by operation of law the same domicile in law as her husband when a marriage is valid, but not where the marriage is invalid if she has not acquired it in fact. Now, in a case where the woman would not have the same domicile as her husband if the marriage was invalid, and the only ground of invalidity of the marriage alleged is the decree of nullity of the Court of the husband's domicile, and jurisdiction is claimed for the Court in question on the ground that it is the Court of the domicile of both parties, has that Court jurisdiction? If it has, it hasn't. If it hasn't it has. Therefore . . .

It is submitted that the dispute between Sir Gorell Barnes and his critics is really about what should follow the "therefore". Sir Gorell Barnes' conclusion was that the premise that the Court of the domicile of the parties has jurisdiction to decree nullity in all cases must be wrong, because *it* is what leads to the contradictions. The critics' claim really comes to this, that the second premise must be wrong, in the sense in which it was understood by Sir Gorell Barnes, and that *it* leads to the contradictions. That is, it cannot be true that in all cases where a marriage is invalid the woman does not acquire the man's domicile as a matter of law. She must, they

[9] *Ibid.*

[10] *Recognition and Enforcement of Foreign Judgments* (1938), 248-49.

[11] "The Recognition of a Foreign Nullity Decree", (1950), 3 *International Law Quarterly*, 247, 251.

[12] Australian Commentary, 2 *International and Comparative Law Quarterly*, 453, 454.

would assert, acquire it as a matter of law where the only ground of invalidity of a marriage is that it has been declared invalid, even void *ab initio,* by a foreign Court.[13] Thus Professor Hughes says that it is the degree of attention given to the retrospective operation of the decree which leads to the insuperable difficulties.[14]

But the mere existence of the contradictions does not establish either of these positions. All that can be inferred from the contradictions is that *one* or more of the premises must be wrong. It is only the combination of them which leads to contradictions, and which element in the combination is false must be established *ab extra.* The position is the same with Cook's barber puzzle, where the solution appears the more simply because the terms are less complex. The barber puzzle first states *two* perfectly distinct propositions, one that all villagers who do not shave themselves are shaved by the barber and the other that all who are shaved by the barber are villagers who do not shave themselves. The *first* of these propositions is inconsistent with the further proposition that the barber *does not* shave himself, for combined with the latter proposition it leads to the absurd conclusion that the barber *does* shave himself. It is, however, perfectly consistent with the proposition that the barber does shave himself, for there is nothing to prevent the barber shaving everybody who does not shave himself and somebody else as well. The *second* of the two main propositions is inconsistent with the proposition that the barber *does* shave himself, for combined with this proposition it leads to the absurd conclusion that the barber *does not* shave himself. But it is perfectly consistent with the proposition that the barber does not shave himself, for the barber may not shave at all. The first of our two main propositions, then, is only consistent with the proposition that the barber shaves himself, the second with the proposition that he does not. One of the main propositions at least must therefore be wrong, but we are not given sufficient information to say which is false or whether both are.

The attack on *Ogden v. Ogden*[15] which alleges that Sir Gorell Barnes involves himself in logical contradictions therefore falls to the ground. The most that can be said in criticism of his argument here is that he may have been wrong in regarding the premise that the validity or otherwise of the foreign decree of nullity affects the wife's domicile prior to the decree as established, and the premise that the Court of the domicile of the parties has

[13] That is, where the marriage is valid according to English choice of law rules. [14] (1928) 44 L.Q.R. 217, 226. [15] [1908] P. 46.

jurisdiction to decree nullity as the questionable one, with the result that he drew the wrong conclusion from his use of the logical puzzle. An attack along these lines has indeed been made by a stream of text writers since the decision in *Salvesen v. Administrator of Austrian Property*[16] and more particularly since interest in the subject was revived by *Chapelle v. Chapelle*[17] and *Vassallo v. Vassallo.*[18]

At first sight *Salvesen v. The Administrator of Austrian Property*[19] would appear to establish the correctness of this line of criticism at a stroke. This case is commonly regarded as establishing finally and in all its generality the proposition that the Court of the common domicile has jurisdiction to decree nullity. Professor Hughes, writing immediately after the *Salvesen* Case, thought that it was authoritative against the objections in *Ogden v. Ogden.* It logically required that the Court of the domicile of the husband must be granted jurisdiction to decree nullity in all cases as being the Court of the domicile of the parties, at least for the purposes of the English suit for recognition of the decree.

The fact remains that the three members of the House of Lords who delivered full judgments distinguished *Ogden v. Ogden* in terms which indicated that they wished to leave its correctness open,[20] and Lord Phillimore in particular used language indicating that he did not find the argument of Sir Gorell Barnes on the question of the ambiguity in the wife's domicile if the decree were recognised easy to answer.[21] It is submitted that in these circumstances the true ratio of *Salvesen's* Case is that the Court of the common domicile of the parties has jurisdiction to grant a decree in those circumstances where the domicile of the wife cannot depend on the validity of the marriage whatever view one takes of the effect of a nullity decree on a party's domicile. In *Salvesen's* Case the domicile of the wife did not depend on the validity of the marriage. If the parties were validly married, the wife was domiciled in Wiesbaden because it was the domicile of choice of her husband. If not, she had a domicile of choice there, for she had done the very same things which satisfied the Court that the husband had a domicile of choice there.[22] There is no circle involved here, so long as the argument is framed in such a way as to make it clear that the Court in determining the domiciles for the purpose of testing the validity of the decree is leaving the question of the

[16] [1927] A.C. 641. [17] [1950] P. 134. [18] [1952] S.A.S.R. 129.
[19] [1927] A.C. 641.
[20] *Id.*, 660 per Viscount Haldane, 662 per Viscount Dunedin, 669-670 per Lord Phillimore [21] *Id.*, 669. [22] *Id.*, 650 per Viscount Haldene.

validity of the marriage open. So stated, the *decision* in *Salvesen's* Case leaves the argument in *Ogden v. Ogden* untouched.[23]

In these circumstances it is difficult to condemn the decision of the New Zealand Court which followed *Ogden v. Ogden* in *Carter v. Carter*,[24] despite the fact that *Salvesen v. Administrator of Austrian Property* had intervened between the two cases. But when *Chapelle v. Chapelle*[25] was decided by Willmer J. eighteen years later, a new factor had entered into the situation in the decision of the Court of Appeal in *De Reneville v. De Reneville*.[26] Willmer J. nevertheless applied Sir Gorell Barnes' reasoning in *Ogden v. Ogden* to the case before him.

The learned judge conceded,[27] and it is now common ground, that the actual decision in *Ogden v. Ogden* was wrong. For *De Reneville v. De Reneville* established that a decree of an English Court annulling a marriage on a ground which renders it voidable does not have any retrospective effect upon the domicile of the woman between the date of the ceremony and the date of the nullity decree.[28] It seems inconceivable in these circumstances that the law would give such a retrospective effect to a *foreign* nullity decree which annuls a marriage on the ground that it is voidable. And in *Ogden v. Ogden* the French decree which was the subject of the Court's consideration was based upon the voidable character of the marriage under French law.[29] Therefore *Ogden v. Ogden* was not a case in which the determination of the domicile of the parties at the time of the institution of the French suit depended upon the question whether or not recognition was given to the decree. The case fell within the general rule as to the jurisdiction of Courts of the domicile propounded in *Salvesen's* Case and not within the exceptional class of circumstance there left open.

Chapelle v. Chapelle, on the other hand, was a case in which the foreign decree, that of the Maltese Court of the husband's domicile,

[23] This point, it is respectfully submitted, has been obscured by some judges, for example by Willmer J. in *Chapelle v. Chapelle* [1950] P. 134. The judge accepted the view that there is a universal rule that the Court of the common domicile has jurisdiction (at p. 141), then, purporting to apply *Ogden v. Ogden*, denied the woman's domicile in the foreign country for the purposes of the nullity suit, and then, by refusing to recognize the nullity decree, demonstrated that she was domiciled in the foreign country. What *Ogden v. Ogden* actually does is to deny the jurisdiction of the Court of the common domicile in certain circumstances, thus avoiding the contradictions in which Willmer J. involved himself. Dr Fleming argues (article cited *supra* n. 4, 198-99) that these contradictions are forced on any adherent of the *Ogden v. Ogden* view by *Salvesen's* case. But this is to reduce to nonsense the statements in *Salvesen's* case cited above leaving the problem in *Ogden v. Ogden* open.

[24] [1932] N.Z.L.R. 1104.
[25] [1950] P. 134.
[26] [1948] P. 100.
[27] [1950] P. 134, 143,
[28] [1948] P. 100, 111-12, 122-23.
[29] [1908] P. 46, 56-57.

purported to declare the marriage void *ab initio*. In such circumstances, Willmer J. conceived, *De Reneville v. De Reneville* bound him to hold that Sir Gorell Barnes' principle still applied and he refused to recognise the decree. His reasoning was deceptively simple. *De Reneville v. De Reneville,* he pointed out, established that where a woman comes before an English Court seeking a decree of nullity the woman's domicile is to be determined for the purposes of jurisdiction by asking whether the marriage is void or voidable. If it is void her domicile is determined on the basis that she is a single woman, if voidable on the basis that she is married.[30] "Conversely", says Willmer J., "it seems to follow that such a wife, suing abroad in the Court of her husband's domicile, shares a common domicile with her husband in the case of a marriage which is merely voidable, but not if the marriage is void ab initio."[31]

It is submitted that it does not follow, for the reason that where the decree is sought in England, as in *De Reneville v. De Reneville,* and no foreign decree is involved, no question of a retrospective operation of the decree on the woman's domicile arises. Lord Greene was extremely careful to point this out. He said first, in dealing with the effect of a voidable marriage, that a declaration of nullity of such a marriage cannot change the domicile of the wife retrospectively. She could not be treated as having resumed "proleptically so to speak" her domicile as a single woman prior to the decree.[32] Going on to explain that in the case of a void marriage the petitioner's domicile at the institution of the suit for nullity is determined by the principles applicable to a single woman, he said: "I must point out that we are not on this hypothesis concerned to do what I have declined to do in the case of a voidable marriage, namely, to give to a decree of nullity which it is assumed will be obtained what I have called a proleptic operation in conferring on a wife a domicile which, until she obtains the decree she is seeking, she is incapable in law of possessing. In the present case, if the marriage was void, the domicile of the petitioner is English: it would be held to be English by any Court in the country before whom the relevant facts were established, for example, in matters of succession no decree of the Divorce Court would have to be produced . . ."[33]

In the circumstances of *Chapelle v. Chapelle,* on the other hand, the marriage was perfectly valid if one confines one's attention to English choice of law rules,[34] and any English Court before which a question of domicile arose prior to the Maltese decree would have

[30] *loc. cit. supra,* n. 28. [31] [1950] P. 134, 142. [32] [1948] P. 100, 111.
[33] *Id.,* 112. [34] See *infra* p. 515.

been bound to determine the woman's domicile on the basis that the marriage was valid. But, in Willmer J's view, Lord Greene's principles involved the conclusion that, if the foreign decree under consideration in *Chapelle v. Chapelle* was recognised, any English Court which had to consider the woman's domicile prior to the decree in an action brought after it, would have to determine the domicile on different principles. Willmer J., is therefore seeking to involve Lord Greene in the very proleptic domicile doctrine which Lord Greene was most careful to say was not involved in anything he was saying. And if it be said that in the result Willmer J. did not in fact give the woman a proleptic domicile, because he did not recognise the foreign decree after all, the answer may be made that the recognition of the proleptic domicile principle is one premise of his argument and the principle could have practical results in other cases. Such a case would arise, for instance, if the woman was residing in the country of her husband's domicile with the intention of living there permanently at the time of the nullity suit in that country, but at some previous time during the currency of the marriage had been living elsewhere with a similar intention of permanent residence. On Willmer J's reasoning, the domicile at such previous time would be determined differently according as an English Court had to deal with the matter before or after the foreign nullity suit.

One is tempted to argue at this point that Lord Greene in the remarks quoted above condemned the proleptic domicile notion altogether, and that therefore *Chapelle v. Chapelle* is inconsistent with *De Reneville v. De Reneville*. But what Lord Greene seems rather to be saying is merely that the proleptic domicile problem did not arise in the case with which he was dealing and did not have to be considered. Some reference to the matter was necessary because it had been claimed by some writers that a woman petitioner before an English Court could not have a separate domicile from her husband for the purposes of any nullity suit at all, even where, as in *De Reneville v. De Reneville* and *White v. White*,[35] there was no foreign nullity decree involved. For instance, H. E. Read had offered the following refutation of Bucknill J's conclusion that the woman petitioner in *White v. White* was domiciled in England apart from her husband: "Certainly her home was there in fact, but, equally certainly, he" (Bucknill, J.) "could not have held that she was in law domiciled there in the face of the rule in *Attorney General for Alberta v. Cook*,[36] without first having decided that she was not the

[35] [1937] P. 111 [36] [1926] A.C. 444.

wife of the respondent. He 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. It cannot fairly be imputed that even judical boot straps can stand the strain of so heavy a burden."[37] This supposed refutation was itself nicely refuted by Lord Greene.[38]

In summary, it is submitted that Willmer J. erred in considering that *De Reneville v. De Reneville* bound him to decide *Chapelle v. Chapelle* in the way he did. For all that we have so far gleaned from *De Reneville v. De Reneville,* it left the question open. But there are other aspects of *De Reneville v. De Reneville* on which critics have concentrated their attention, and which show, they contend, that *Chapelle v. Chapelle* is wrong.

It will be convenient to expound the argument of the critics by following the lucid and comprehensive summarising note on the subject written by Dr J. G. Fleming.[39] Dr Fleming begins by condemning the resort to formal logic which has crept into the subject, a condemnation with which the writer respectfully disagrees.[40] But, having entered this protest, Dr Fleming goes on to put an argument which to the writer looks just like logic. After referring to the authorities he adopts Mr Cross's position that Willmer J., though professedly basing himself on Lord Greene's judgment in *De Reneville v. De Reneville* disregarded an important link therein. "Determination of the putative wife's domicile", Dr Fleming continues, "on that authority depends upon whether the marriage is void or voidable, which question falls for decision according to the law of the country that governs the alleged impediment. By English conflict rules the marriage *de quo*" (that is, the marriage with which *Chapelle v. Chapelle* was concerned) "was valid since observance of formalities is a matter for the *lex loci celebrationis.* It should have followed that W had consequently acquired H's domicile by

[37] *Recognition and Enforcement of Foreign Judgments* (1938), 242-43.

[38] Dr Fleming finds Lord Greene's refutation unconvincing and repeats Read's argument. (See "Domicil in Nullity Proceedings", (1949) 1 *Annual Law Review* 193, 204-5). But why is there a circle here? The wife's domicile at the institution of the suit does depend on the validity of the marriage, but the validity of the marriage does not depend, as Lord Greene shows, on the wife's domicile at the institution of the suit. This is the same formal situation as arose in *Har-Shefi v. Har-Shefi* [1953] P. 161 and *Har-Shefi v. Har-Shefi* (No. 2) [1953] P. 220 with regard to the continuance of a marriage, where *De Reneville v. De Reneville* was applied.

[39] (1953) 2 *International and Comparative Law Quarterly* 453. For Dr Fleming's more detailed views on the authorities up to *De Reneville v. De Reneville* see article cited last note.

[40] 2 *International and Comparative Law Quarterly,* 453, 454.

operation of law and that the Maltese Court was competent to render the decree as the domiciliary tribunal of *both* parties."[41]

It does not seem to the writer that this follows from *De Reneville v. De Reneville* any more than the inference which Willmer J. drew from the case. It will be seen that the first premise of the argument is that the Court in *De Reneville v. De Reneville* laid down that the domicile of the woman depends upon whether the marriage is void or voidable. The second is that the Court laid down that this in turn depends upon the law governing the alleged impediment. It is from that point that the difficulties begin. For Dr Fleming uses this proposition, which purports to offer the test to determine whether a marriage is *void* or *voidable,* to arrive at the conclusion that the marriage in *Chapelle v. Chapelle* was *valid.* He then applies this result to determine the woman's domicile.

It is submitted that this logical jump is one that cannot fairly be made. Since *De Reneville v. De Reneville* was an English nullity suit with no foreign nullity decree involved, the marriage *had* to be void or voidable by English choice of law rules if relief was ultimately to be given. If it had turned out to be valid by such rules, any jurisdiction question would have become purely academic. The language used by Lord Greene therefore indicates that it is with reference only to such cases where no foreign nullity decree is involved that the principle as it is stated in *De Reneville v. De Reneville* has to be understood, and not as purporting to lay down in terms a rule applying to suits for recognition of foreign nullity decrees.

Nevertheless it can properly be argued that this proposition—that whether a marriage is void or voidable in a case like *De Reneville v. De Reneville,* depends upon English choice of law rules—is but a particularisation of a more general proposition. This is that an English Court must in every case determine the question whether a marriage is valid, voidable or void for the purpose of determining domicile, by applying English conflicts rules. This proposition is implicit in Dr Fleming's argument and the writer agrees with it. But if one extracts this proposition from *De Reneville v. De Reneville* difficulties still stand in the way of drawing the inference which Dr Fleming draws, namely, that the validity of the marriage in *Chapelle v. Chapelle* depended on English choice of law rules. For English conflicts rules are not to be identified with English choice of law rules. The conflicts rules comprehend as well the rules for recognition of foreign judgments. In *De Reneville v.*

[41] *Id.,* 456-57.

De Reneville itself the application of English conflicts rules to determine the validity of the marriage was properly carried out by applying the choice of law rules, just because there was no foreign decree and therefore no question of applying the recognition rules arose. Dr Fleming's argument depends on identifying the conflicts rules with the choice of law rules in a case where the main point in dispute is whether the laying down of a certain recognition rule would affect the validity of the marriage for the purpose of determining the woman's domicile. The argument begs the question.

It is respectfully submitted that this same begging of the question is inherent in the whole stream of articles which insist that the "vital" question is the choice of law question.[42] To insist on the vital character of the choice of law question is simply to deny, without the assistance of any compelling authority, the relevance of the recognition rules to the question of the validity of the marriage for the purpose of determing the woman's domicile.

The decision in *Vassallo v. Vassallo,* [43] where the South Australian Court recognized a Maltese decree of nullity in circumstances which to the writer appear similar in all essential respects to *Chapelle v. Chapelle,* was arrived at firstly by a similar process of reasoning to that of the text writers.[44] Reed J., however, pushed the argument further by giving an interpretation to *Chapelle v. Chapelle* which would reconcile it with the text writers' views on this point. He claimed that the marriage in *Chapelle v. Chapelle* was void by English choice of law rules, and that it was for this reason that the foreign decree could not be recognised. The foreign Court giving the decree was the Court of the domicile of the husband alone on the facts before the Court at that stage.[45] This attempted distinction has been effectively criticized[46] and need not be considered in detail here. Dr Fleming has demonstrated that the marriage was valid by English choice of law rules,[47] and one may be permitted merely to add that no other view could have been held by Willmer J. The proleptic domicile problem arose in *Chapelle v. Chapelle* in the context of a divorce suit, the question being whether the foreign nullity decree was a bar to the husband's English suit for dissolution of the marriage. Willmer J. decided it could not be recognized on

[42] E.g., R. Cross, "The Recognition of a Foreign Nullity Decree", (1950) 3 *International Law Quarterly,* 247, 249-50; Z. Cowen, "Nullity in the Conflict of Laws", (1953) 27 *A.L.J.* 19, 20; J. Jackson, Case Note (1950) 28 *Canadian Bar Review* 679, 682-83; G. C. Cheshire, *Private International Law* (4th ed., 1952), 355; J. H. C. Morris, *Cases on Private International Law* (2nd ed., 1951), 143.

[43] [1952] S.A.S.R. 129. [44] *Id.,* 134-35. [45] *Id.,* 134.

[46] By J. G. Fleming in 2 *International and Comparative Law Quarterly,* 453, 458 and Z. Cowen in 27 *A.L.J.* 19, 21. [47] *loc. cit.* last note.

the materials then before him, and allowed the divorce suit to proceed.[48] If he had thought that the marriage was void apart from the effect of the Maltese decree the divorce suit could not have been allowed to proceed in any case.

It may therefore be concluded that the argument based on the "choice of law" principle in *De Reneville v. De Reneville* fails to demonstrate the falsity of the proleptic domicile doctrine. But there is yet another aspect of *De Reneville v. De Reneville* from which an argument has been developed to demonstrate the incorrectness of *Chapelle v. Chapelle*. The former case decided that an English Court will exercise jurisdiction to decree nullity where one party is domiciled in England.[49] If there is a general principle that English Courts will recognize foreign decrees in circumstances similar to those in which they themselves exercise jurisdiction,[50] or even that they will recognize such decrees in circumstances where they themselves exercise ordinary as distinct from assumed statutory jurisdiction,[51] then the Court in *Chapelle v. Chapelle* should have recognized the Maltese decree as the court of the domicile of the husband. This course was adopted by a South African Court in similar circumstances in *De Bono v. De Bono*[52] and it is described by Dr Fleming as "the simplest and most acceptable solution".[53]

This argument is attractive, since it does not impute to the Court in *De Reneville v. De Reneville* an intention to deal with the case of recognition of foreign decrees, which it is submitted one cannot find in the judgments. It concentrates instead on the effect of *De Reneville v. De Reneville* in the light of a principle induced from a stream of other authorities. Moreover, if accepted, it would resolve Sir Gorell Barnes' dilemma. The dilemma, as he put it, only arises where the foreign Court's jurisdiction is claimed on the ground that it is the common domicile of both parties. If the husband's domicile alone is sufficient, all the spectacular contradictions mentioned

[48] [1950] P. 134, 144-45.

[49] [1948] P. 100, 112-13, 122. See also *White v. White* [1937] P. 111, *Mehta v. Mehta* [1945] 2 All E.R. 690 and *Apt. v. Apt.* [1947] P. 127, [1948] P. 83.

[50] See *Travers v. Holley* [1953] P. 246, *In re Dulles Settlement* (No. 2) [1951] Ch. 842, 851 and E. N. Griswold, "Divorce Jurisdiction and Recognition of Divorce Decrees—Comparative Study," (1951) 25 *A.L.J.* 248, 264; 65 *Harvard Law Review* 193, 227.

[51] See J. J. Bray and J. G. Fleming in 25 *A.L.J.* 273-76.

[52] [1948] 2 South Africa Law Reports 802.

[53] 2 *International and Comparative Law Quarterly* 453, 456. Similarly R. Cross, 3 *International Law Quarterly* 247, 251-54. J. Jackson, 28 *Canadian Bar Review* 679, 681-82, G. C. Cheshire, *Private International Law* (4th ed., 1952) 356; J. H. C. Morris, *Cases on Private International Law* (2nd edn, 1951) 143. For the encouragement this argument now receives from *Travers v. Holley* [1953] P. 246 see G. D. Kennedy's note in (1953) 31 *Canadian Bar Review* 799, 807.

earlier[54] do not arise out of recognition of the decree of his domicile, whatever view one takes of the effect of that decree on the domicile of the wife.

Yet there is no doubt that Sir Gorell Barnes could defend his original position by posing a further dilemma. The argument would run as follows:

There can be no completely general rule that a foreign Court of the domicile of one of the parties has jurisdiction to decree nullity. For such a rule would be unworkable in certain cases. Suppose a marriage which is valid by English choice of law rules; the wife goes to a country different from the domicile of her husband and takes up residence there intending to remain permanently. She then obtains a decree of nullity from the Court of this country on the ground that the marriage is void *ab initio*. Now, has the Court got jurisdiction, accepting the view that it has if it is the Court of the wife's domicile? If it has, it has. If it has not, it has not. But we can never discover which is the true position. In other words, we cannot determine the wife's domicile until we know whether the marriage is valid, and we cannot determine whether the marriage is valid until we know the wife's domicile.

What this dilemma proves is that a general rule recognising the decree of the Court of the domicile of the one party is inconsistent with Sir Gorell Barnes' proleptic domicile doctrine, which the dilemma argument assumes. To deny, as the argument does, that the English jurisdiction rule should also be made a recognition rule, is, however, only one possible solution. A second solution is to say that, since the recognition rule rejected by the first solution is supported by the weight of authority, it is right and the proleptic domicile doctrine is wrong. A third solution is to argue by analogy to *Salvesen v. Administrator of Austrian Property* and to say that it is only in the case where jurisdiction is claimed for the Court of the woman's domicile that the difficulties arise. This case should be treated as open, but the decree of the husband's domicile should be recognised, and *Chapelle v. Chapelle* is wrongly decided.

When these alternatives have been pointed out, one has gone as far as and almost certainly further than any logical deductions from principles laid down in decided cases can carry the matter. In view of the judicial doubts expressed about the doctrine in *Ogden v. Ogden,* particularly in *Salvesen's* Case the first solution, which assumes its correctness, cannot be regarded as established. The second has stronger claims, but the extreme generality of the premise that recognition rules reflect jurisdiction rules leaves us

[54] *Supra* p. 507.

with something short of certainty. The third is an argument from analogy and has the weaknesses inseparable from any such argument.

A final solution therefore cannot be reached without resort to arguments from "reasonableness", rather than reasoning from decided cases. That is, there must be resort to policy considerations. This is not because of defects in the validity of logic, but because there are insufficient established premises.

On a policy basis the third solution of the problems which have so far come before the courts seems preferable for the time being. The Courts have now, it is submitted, had sufficient exeprience of the types of situation instanced by *Chapelle v. Chapelle* for it to be clear that the injustices arising from the chaos caused by a refusal to recognise such a decree outweigh the dangers of a multiplication of bases of nullity jurisdiction. But the case supposed in the dilemma stated above would appear to require further consideration.

If the view expressed by the critics of *Chapelle v. Chapelle* is correct, that the validity of the marriage for the purpose of determining the woman's domicile depends purely on English choice of law rules, the Court in the example above is not the Court of the woman's domicile and the decree will not be recognised. Likewise, if the above dilemma argument based on the proleptic domicile doctrine is accepted, the decree will not be recognised. But this result, reached on either view, seems unsatisfactory. It might well turn out that the Courts will find that policy requires that the English Court should recognise foreign nullity decrees generally if the foreign Court has exercised jurisdiction in circumstances parallel to those in which an English Court would regard itself as having jurisdiction. But this reciprocity will be of a formal and empty kind if the English Courts arrogate to themselves the power to exercise jurisdiction based on the woman's domicile, but refuse ever to find that a woman has a separate domicile for the purposes of a foreign suit except where the marriage is void by English choice of law rules and the English Court is therefore not likely to be asked to recognise the foreign decree. If the party has to prove that the marriage is void by English law to obtain recognition for the foreign decree there will usually be no point in relying on the foreign decree. It is tentatively suggested that justice might demand that when the case supposed in the above dilemma argument arises, some re-interpretation of the proleptic domicile doctrine might be useful for the purpose of recognising the foreign decree. This is a matter on which we may find that the Courts will feel their way along in the light of experience.