CHANGES OF DOMICILE DURING PROCEEDINGS FOR DIVORCE

It is the function of this article to point out that an unsuspected problem lies hidden behind the familiar English conflict of laws rule based on *Le Mesurier v. Le Mesurier*[1] that "jurisdiction to pronounce a decree of divorce belongs (apart from statute) only to the courts of the country in which the parties are domiciled *at the time of the commencement of the suit*.[2] Though it was English judges who formulated this apparently straightforward rule, it is the Australian and Canadian judges who have found it to contain snags. And, as Professor Fleming has shown,[3] it has certainly brought difficulties to Australian courts.

The truth appears to be that the problem is threefold: the above statement gives rise to three questions requiring discussion.

1. Has an English Court jurisdiction to dissolve the marriage of parties domiciled within the forum at the date of the commencement of the suit, but who lose it before the case comes on for hearing?

There is no English authority which decides this very point, although one does find preliminary trials on the issue of domicile, *e.g. Bryce v. Bryce*,[4] and cases where the question of jurisdiction and the divorce itself are dealt with together, *e.g. Goulder v. Goulder*.[5] There would seem to be nothing, upon a literal interpretation of Rule 4 (1) (d) of the English Matrimonial Causes Rules, 1950, (which requires the parties' domicile "at the date of the institution of the cause" to be stated in the petition) to prevent an English court from holding that it still had jurisdiction. Indeed, there is much Commonwealth authority tending to show that domicile at the date of the commencement of the suit is enough: to take a few examples, the headnote to *Kalenczuk v. Kalenczuk*[6] reads:—

1. [1895] A.C. 517.
2. Italics supplied. See, *e.g.* Morris, *Cases on Private International Law*, 2nd edn., p. 94; Dicey, *Conflict of Laws*, 6th edn., Rule 31, p. 216, and see p. 219; Wolff, *Private International Law*, 2nd edn., para. 71, p. 74; Cheshire, *Private International Law*, 4th edn., p. 360; Schmitthoff, *The English Conflict of Laws*, 3rd edn., p. 338; Tolstoy, *Law and Practice of Divorce*, p. 15; Halsbury (Simonds Edn.) Vol. 7, para. 182; Read. *Recognition and Enforcement of Foreign Judgments*, pp. 201-2.
3. In *"Divorce and Domicile"*, 2 *International and Comparative Law Quarterly* 303.
4. [1933] P. 83. *Gulbenkian v. Gulbenkian*, [1937] 4 All E. R. 618, is another example.
5. [1892] P. 240, a first instance decision of Lopes, L.J.; the respondent husband did not appear and filed no answer. The case is discussed *infra*.
6. [1920] 2 W.W.R. 415 (Sask. C. A.). In accord is *McCormack v. McCormack* [1920] W.W.R. 714 (Alberta Supreme Court, Appellate Division), per Harvey, C. J.

> "A petitioner for divorce must clearly establish that the parties whose marriage it is sought to dissolve were domiciled within the province at the commencement of the proceedings."

McNiven, J., in *Meise v. Meise*[7] said:—

> "Domicile at the time of the issue of the writ determines the jurisdiction of the court: *Goulder v. Goulder* 1892 P. 240."

But far stronger is this extract from the headnote to *Russell v. Russell*,[8] which reads as follows:—

> "There is no authority for the proposition that the jurisdiction of the Court to make an order for divorce . . . depends upon the domicile at the time when the order is made. The relevant time is the time when the action is begun."

Closely related to the first question is the second:—

2. Has the English court jurisdiction to grant a decree absolute where the parties were domiciled within the *forum* not only at the date of the commencement of the proceedings but also at the date of the decree *nisi*, but the husband changes his domicile before the grant of the decree absolute?

Although English courts have not yet been confronted with this problem, a learned English writer[9] has suggested that jurisdiction is lost not only in the present situation but also in that which has already been discussed. The problem has, however, arisen directly in the High Court of Ontario in *Pearson v. Pearson*.[10] There, the husband plaintiff, believing himself to be suffering from an incurable disease returned, between the date of the granting of the decree *nisi* and that

7. [1947] 1 W.W.R. 949, at p. 950 (Sask. K. B.). There, the husband petitioner, domiciled in Saskatchewan, had been married before being sent abroad for three years. On his return home he found that his wife had had a baby a few weeks before. He issued his writ four days before discharge from the army, his intention then being to go to British Columbia to live as living conditions were better there and his parents had moved to that province. It was held that whilst in the army he could not change his domicile, that he was still domiciled within the province, and that the court had jurisdiction as the operative time was the date of the issue of the writ.

   It should be noted that the petitioner had not moved to British Columbia at the time of the proceedings.

   To the same effect is the headnote of *Slater v. Slater* [1928] S.A.S.R. 161 (supr. Ct.): "In order to found jurisdiction to entertain a suit for divorce it must be shown that the husband was domiciled in South Australia at the commencement of the proceedings. Unconditional submission to the jurisdiction by the husband is insufficient." See, too, *Moss v. Moss* (1937) Q.S.R. 1.

8. [1935] S.A.S.R. 85. This accords with Cheshire, *op. cit.*, p. 360. In this case, a decree of judicial separation was made in the circumstances, and not a decree of divorce. The husband was the plaintiff.

9. Professor Graveson in *The Conflict of Laws*, 3rd edn., pp. 382-3, citing *Kerrison v. Kerrison* (1952) 69 W.N. (N.S.W.) 305, which, strictly speaking, falls under question 1.

10. [1951] 2 D.L.R. 851.

of the decree absolute, to Sweden, the country of his domicile of origin. His purpose was to be "at home" for treatment by his family doctor, and it was, in fact, clear that he really did intend to remain in Sweden and really had cast off his domicile of choice in Ontario. Notwithstanding this, Gale, J., made the decree absolute. Gale, J.'s judgment purports to follow that of Lopes, L.J., in *Goulder v. Goulder*,[11] the English case which has already been mentioned, where it is stated that:—

> "The English Divorce Court has jurisdiction to dissolve the marriage of any parties domiciled in England *at the commencement of such proceedings* . . . I have come to the conclusion that the (parties) *at the time of the commencement of the divorce proceedings* . . . were domiciled in England, and that, therefore, this court has power to dissolve the marriage."

In the opinion of Gale, J., the use of the italicised words could not have been "casual," so that the subsequent change of the husband's domicile could not deprive the Ontario court of jurisdiction. He found further support from the South African case of *Balfour v. Balfour*,[12] in which Stratford, J., stated that he was

> "of the opinion that proper proceedings duly instituted in the forum of the parties' domicile at the time may be continued although there has been a subsequent change of domicile. Domicile must be established at the time proceedings are initiated and once this is established the Court has jurisdiction to deal with the matter until the final end and determination thereof."

It is respectfully suggested that Gale, J., failed to take into account the fact that Lopes, L.J., had not been concerned with a case where the parties' domicile was changed during the suit, for the respondent husband had, since 1885, been leading an unsettled life in New Zealand and Australia and was held never to have lost his domicile of origin. It would therefore seem that *Goulder v. Goulder*[13] is not of conclusive use in solving the present problem. In *Balfour v. Balfour*,[14] it is true, the domicile of the husband plaintiff changed, after 1919 when the action was instituted, from the Transvaal to the Portuguese territory of Lourenco Marques. But the point about that case which appears to have escaped the notice of Gale, J., was that it merely concerned a wife's counterclaim for alimony *pendente lite*, a purely ancil-

11. *Supra*, at p. 243. Lopes, L.J., gives no authority for this statement.
12. [1922-3] W.L.D. 133. No reasons are given for reaching this important conclusion. Cheshire, *op. cit.*, cites the case as authority for his proposition that a change of domicile after the commencement of the suit is immaterial.
13. *Supra.*
14. *Supra.*

lary proceeding not affecting the parties' status at all. It was, therefore, not really analogous to *Pearson v. Pearson*[15] at all.

3. Has the English court jurisdiction to dissolve the marriage of parties becoming domiciled within the *forum* only after the institution of the proceedings?

It is clear from the decision in *Russell v. Russell* [16] that the answer must be in the negative; and, anyway, the parties will not have been domiciled in England at the time of the commencement of the cause as required by Rule 4 (1) (d), so that a new petition will have to be filed.[17]

One is now left to wonder whether the correct rule might not be:—

"At common law, the English court has jurisdiction to pronounce a decree absolute of divorce if the parties are domiciled within the forum throughout the proceedings, *i.e.* from the date of the commencement of the suit down to the date of the decree absolute."

There is a *dictum* as long ago as 1883 lending support to this statement—in a Canadian case, *Guest v. Guest*[18] in which Boyd, C., said:—

> "The validity of a divorce depends on the law of the domicile of the parties at the time the proceedings were begun and judgement given."

There is further authority in the New South Wales case of *Kerrison v. Kerrison.*[19] There, Edwards, J., held that the court had no jurisdiction in suits brought under s. 12 of the Matrimonial Causes Acts, 1899-1951 (N.S.W.) to dissolve a marriage unless it be satisfied that the husband was domiciled in that State, not only at the time of the institution of the suit, but also at the time of the pronouncement of the decree absolute.

Such a rule as that posited above and supported by Edwards, J., does take into account the time element in divorce cases, a factor which is brought out on a moment's reflection on the rule in *Armitage v. Attorney-General.*[20] This rule is stated by Dicey as follows:—

15. *Supra.*
16. *Supra.*
17. *Qu*: would an English court require a wife petitioning under s. 18 (1) (a) or (b) of the English Matrimonial Causes Act, 1950, to recommence her suit upon discovery she had become domiciled in England since the commencement of the suit?
18. (1883) 3 O.R. 344, at p. 345, (Ch.D).
19. *Supra.*
20. [1906] P. 135.

> "If the courts of a foreign country where the parties are not domiciled dissolve their marriage, and if the divorce would be recognised by the courts of the country where, *at the date of the decree*, the parties are domiciled, it will be recognised here."[21]

How is it, then, one asks, that the *Le Mesurier v. Le Mesurier*[22] rule looks to the parties' domicile at the commencement of the suit while the *Armitage v. A-G*[23] rule concentrates on their domicile at the end of the suit? And further, by which rule would an English court test the validity of the decree in *Pearson v. Pearson?*[24] For, if the former test be applied, the decree would be recognised, while if the latter were applied, recognition would only be accorded in England if the Swedish courts recognised the decree.

The trouble would seem to stem from the fact that some judges, such as Stratford and Gale, JJ., consider that domicile at the commencement of the suit is a jurisdictional fact and no more. Thus Cozens-Hardy, L. J., in *Bater v. Bater* said of the respondent husband that:—

> ". . in 1890, *when the divorce proceedings were instituted*, he had abandoned his English domicile, and had acquired a domicile in the State of New York."[25]

Other judges have tended to make statements showing that the time factor problem was not present to their minds at all. Thus in *Le Mesurier v. Le Mesurier* itself, Lord Watson says:—

> "It is both just and reasonable, therefore, that the differences of married people should be adjusted in accordance with

21. *Op. cit.*, Rule 72, Exception 1, page 376 ff. None of the other text books bring out the italicised words; these are important, for Sir Gorell Barnes, P., clearly said in the case, at p. 141, "Gillig and his former wife, the present petitioner, have ceased to be husband and wife in the place where they were domiciled *at the date of the decree.*" (italics supplied).

    It may, of course, be that the learned President intended to indicate that he would not have recognised the decree in the following type of case: Suppose A, a German national domiciled in New York, obtained a final decree of divorce in the German courts, which assume jurisdiction over him by virtue of his German nationality. Such a decree would not be recognised by the courts of New York because the German court, not being the court of his domicile, would have no jurisdiction to entertain the proceedings. Suppose A then acquired a French domicile of choice and invited an English court to recognise his German decree on the ground that, by his present domiciliary law, the law of France, it is recognised as having been granted by the courts of his nationality.

22. *Supra.*

23. *Supra.*

24. *Supra.*

25. [1906] P. 209, at p. 238. Italics supplied.

> the laws of the community to which they belong and dealt with by the tribunals which alone can administer those laws."[26]

So, too, Lord Haldane's statement in *Lord Advocate v. Jaffrey*[27] that:—

> "Nothing short of a full juridical domicile within its jurisdiction can justify a British Court in pronouncing a decree of divorce."

One is similarly left without exact guidance by Hodson, L.J., in *Travers v. Holley*[28] when he stated that the court has no jurisdiction

> "unless the parties were at the time of the proceedings domiciled in the jurisdiction of the foreign court."

On the other hand, it is clear that there has been a tendency on the part of other judges to consider domicile at the date of the final decree as being of importance.

Thus, in *Shaw v. Gould*[29] Lord Cranworth said: —

> "If Thomas Buxton, being a domiciled Scotchman, had married in Edinburgh, Elizabeth Hickson, being a domiciled Scotchwoman, and afterwards, *while their Scotch domicile continued*, she had obtained a decree of divorce in the Court of Session, and then had married John Shaw, the issue of that marriage would certainly have been legitimate."[30]

26. *Supra*, at p. 540. What does he mean when he refers, *ibid.*, to "domicile for the time being of the married pair"? A large selection of similar statements showing that the issues involved have not been fully appreciated can be found, such as *Salvesen's* case [1927] A.C. 641, at pp. 653-4, per Lord Haldane; at pp. 665-6, per Lord Phillimore; H. v H. [1928] P. 206 at p. 212, per Lord Merrivale, P.; *Ramsay-Fairfax v. Ramsay-Fairfax* [1956] P. 115 at p. 131, per Denning, L.J., who appears to have overlooked the 1950 Act. *Travers v. Holley* [1953] 2 All E.R. 794, and the admittedly discredited cases of *Stathatos v. Stathatos* [1913] P. 46 and *De Montaigu v. De Montaigu* [1913] P. 154.

27. [1921] A.C. 146, at p. 152. This is quoted twice by Lord Merivale, P., in *Alberta (A-G for) v. Cook* [1926] A.C. 444, at pp. 451, 458.

28. *Supra*, at p. 799. But earlier on the same page he had said: "The New South Wales court would have no jurisdiction in the eyes of the courts of this country to dissolve the marriage unless at the date of the institution of the proceedings in New South Wales both parties were there domiciled."

29. (1868) L.R. 3 H.L. 55, at page 69. Italics supplied. The headnote of this case seems to be misleading, for it is not supported by the language of any of their Lordships. It states that "A foreign tribunal has no authority as far as any consequences in England are concerned, to pronounce a decree of divorce *a vinculo* in the case of an English marriage between English subjects unless such subjects are *at the time of such decree pronounced*, bona fide domiciled in the country where that tribunal has jurisdiction."

30. With this approach may be compared that of Lord Westbury, who, in dealing with *Warrender v. Warrender*, 2 Cl and F 488, says (at p. 87) that he prefers the reasoning in that case of Lords Lyndhurst and Brougham "that the husband who obtained the divorce was *throughout* a domiciled Scotchman, and that as no other domicile could be legally ascribed to the wife, both parties were domiciled in Scotland *at the time of the suit and of the decree*."

And, (*ibid.*) as to *Pitt v. Pitt* (1864) 4 Macq. Sc. App. 627, he says, "counsel for Colonel Pitt admitted that the sentence of divorce which he had obtained in Scotland could not be upheld, unless it could be shown that *before and during the suit* Colonel Pitt was permanently domiciled in Scotland." This is a variant from his "before and at the time of the suit" on page 85.

So also Romer, L.J., in *Bater v. Bater* says that the husband:—

> "had at the time when the action was brought in the State of New York *and the decree of divorce was pronounced* acquired a domicile in that State . . . according to English law, I take it that, *at the time of action brought and divorce granted there,* the domicile of both the husband and wife was the domicile of the state in which the court in which the action was brought was situated, so that the court there had ample jurisdiction according to English law."[31]

Such an approach is consonant with the principle enunciated in *Niboyet v. Niboyet*[32] by Brett, L.J., which has been apparently lost sight of by the "jurisdiction once, jurisdiction always" school:—

> "It follows upon principle that the only law which should assume to alter (the husband's) status as a married man is the law of the country of his domicile; the only court which should assume to decree such alteration is a court administering the law of that country."

A combination of both these approaches is to be found in a statement by Sir James Hannen, P., in *Harvey v. Farnie*[33] where he says that:—

> (the principle in *Lolley's* Case[34]) did "not apply where the parties are domiciled Scotch, or where the husband is a domiciled Scotchman, *and during the continuance of that domicile* his marriage is dissolved by the competent Court of jurisdiction in Scotland. In my judgment that is a good divorce everywhere, *since it actually changes the status of the man.*"[35]

It seems, then, that there are some grounds for suggesting that the parties' domicile ought to last throughout the proceedings. Beside the *dicta* above quoted, it has to be remembered that under any legal system (inconvenient though it may be) where divorce decrees are decrees *nisi* in the first instance, the marriage is not dissolved until the decree absolute of divorce is pronounced, and that the decree *nisi* is a provisional dissolution only which does not put an end to the marriage.[36] It would, further, not be too illogical to suggest that, in view

31. *Supra*, at pp. 233-4.
32. (1878) 4 P.D.1, at p. 13. There was, however, no change of domicile on the husband's part here, as he was domiciled in France throughout the suit. As is well known, Brett L.J.'s judgment was a dissenting one.
33. (1880) L.R. 5 P.D. 153.
34. Russ and Ry. 237.
35. At p. 162. Italics supplied.
36. See, *e.g. Stanhope v. Stanhope* (1886 11 P.D. 103, at pp. 105-6, per Cotton, L.J., and at p. 109, per Bowen, L.J. See, too, *Fender v. St. John-Mildmay* [1938] A.C. 1, at p. 28, per Lord Russell of Killowen, in his dissenting judgment.

    Sometimes, even, the parties will be prevented from remarrying during a certain period after the decree absolute: see *Miller v. Teale* (1955) 29 A.L.J. 91 and the present writer's note thereon in 5 I. and C.L.Q. 137, and *Buckle v. Buckle* [1955] 3 W.L.R. 989.

of this point and the above quoted *dicta*, the court which makes absolute a decree *nisi* must be a court which can properly pass on the status of the parties—that is, a court of their domicile at the date of that final decree.

Indeed, it might just even be argued that, since divorce proceedings are considered to be proceedings *in rem*,[37] the well-known statement of Blackburn, J., in *Castrique v. Imrie*[38] is in point. That learned judge said:—

> "We think the inquiry is, first, whether the subject matter was so situated as to be within the lawful control of the state under the authority of which the court sits; and, secondly, whether the sovereign authority of that state has conferred on the court jurisdiction to decide as to the disposition of the thing, and the court has acted within its jurisdiction. If these conditions are fulfilled, the adjudication is conclusive against all the world."

There would thus be room for suggesting that if the parties are not required to remain domiciled within the jurisdiction of the divorcing court when it grants the decree absolute, they are no longer "so situated as to be within the lawful control of the state under the authority of which the court sits." The "jurisdiction at the outset of the suit jurisdiction throughout" rule laid down in *Carrick v. Hancock*[39] for actions *in personam*, in other words, ought not to apply to divorce suits. This much appears to have been obvious to Edwards, J., in *Kerrison v. Kerrison*[40] when he said:—

> "If a change of domicile is to have any meaning at all it must mean that the person concerned has become subject to the laws and institutions of his new domicile and entitled to its privileges; conversely, he must be taken to have disassociated[41] himself from his previous domicile and his obligations and privileges thereunder. To hold that a man may retain the privileges of both his past and present domicile is to destroy the meaning and effects of the legal doctrine of domicile";

and also to Brett, L.J., in *Niboyet v. Niboyet*,[42] who stated that:—

> ". . . everyone who elects to become domiciled in a country is bound by the laws of that country, so long as he remains domiciled in it . . ."

The main objection to a rule requiring the domicile of the parties to be retained throughout the suit is that it will leave the door wide

37. See, *e.g. Salvesen's* case, *supra*, at p. 662, per Viscount Dunedin.
38. (1870) L.R. 4 H.L. 414, at p. 429.
39. (1895) 12 T.L.R. 59.
40. *Supra*, at p. 308.
41. Except, presumably, where a "Miller v. Teale" situation arises.
42. *Supra*, at p. 12. This again would not apply in a "Miller v. Teale" situation.

open to a husband bent on making difficulties for his wife.[43] This objection has been voiced by Angus Parsons, A.C.J., in *Russell v. Russell*[44]:—

> ". . . it would put into the hands of a guilty husband the power, by changing his domicile before the decree was pronounced and made absolute, to prevent his wife obtaining relief in the Court to which she—or it may be he himself—had resorted."

Even so, it is worthy of note that he almost at once went on to observe that:—

> "Moreover, the decree actually pronounced is one for judicial separation which involves no alteration in status."

Against this objection, it could be argued that the court can, in appropriate circumstances, hold that the husband's motive was to make matters difficult for his wife and that there was thus no true intention to cast off his domicile in the country of the *forum* for another domicile. Inevitably, there must be the rare case where the husband is found to have acquired a fresh domicile. A case illustrative of such a state of affairs—though not a divorce case—is *Drexel v. Drexel*.[45] The defendant husband closed his English home and went to Paris and sought permission from the French authorities to acquire a French domicile for a limited time. The sole object of this conduct was to obtain a French divorce so as to get rid of a separation deed under which he had agreed to pay his wife a substantial annual sum. Neville, J., was forced to hold that the husband was truly domiciled in France, obvious though it was that the husband went there to evade the jurisdiction of the English court and generally to make matters as troublesome as possible for his wife. Although justice was achieved for the wife in this case by another route, the case does show that there can be circumstances where a person may deliberately put himself beyond the jurisdiction of the court and that the court must accept the fact. Fortunately, this situation is alleviated somewhat in England by s. 18 (1) (a) of the Matrimonial Causes Act, 1950, which enacts that the court shall have jurisdiction to entertain (*inter alia*) divorce proceedings by a wife if she has been deserted by her husband or if the husband has been deported as an alien from the United Kingdom, provided that he was domiciled in England immediately before the desertion or deportation. So it is difficult to see, at any rate in England,

43. There is no suggestion in either *Pearson v. Pearson* (where the husband petitioner was granted a decree) or in *Balfour v. Balfour* as to this eventuality. Possibly more thought would have been given to the matter had Gale and Stratford, JJ., been faced with such a situation.

44. *Supra*. The husband was petitioner here, and, in the events which happened, only a decree of judicial separation could be granted.

45. [1916] 1 Ch. 251 (action by wife to enforce provisions of a separation deed).

how very great hardship could arise,[46] if domicile within the jurisdiction were required throughout the suit.

What, then, lies at the root of this problem? Maybe it is this: when a judge is confronted with a petition for a divorce, he is apt to consider whether he has jurisdiction to entertain the petition and to leave aside such questions as whether a foreign court would recognise his decree. It will not, in most cases, occur to him to think that his jurisdiction will not be spent and that the parties' status will not be altered until the final decree is given. His inclination is therefore to seek a rule which will tell him whether he has jurisdiction at a given moment of time. And so he is satisfied with a rule which tells him that he has jurisdiction if the parties are domiciled within the country of the *forum* at the moment the wheels of the *lex fori* begin to move. If the domicile changes *in mediis rebus*, it is of no concern, for the domicile only goes to jurisdiction to entertain the proceedings, not to jurisdiction finally to dissolve the marriage. In contrast, the approach of the judge considering whether he should recognise a foreign decree of divorce is psychologically different. For him, the grant of the final decree is a *fait accompli*. He yields to the temptation of asking simply "were the parties domiciled in the country whose courts granted that decree when that decree was given?"[47] He thus gives the impression that domicile is something more than a mere jurisdictional fact, that he realises that it is the decree absolute that dissolves the marriage and that it is the decree absolute which alters the parties' status. One cannot help sympathising with this line of approach, but should not the judge really reason thus: "in my view, the foreign court cannot grant a final decree of divorce which I will recognise unless in the first place it had jurisdiction to entertain those proceedings"? He

46. This section does not, of course, assist a deserted wife whose domicile before her marriage to a husband domiciled abroad was English. She will be forced to proceed against him in the courts of his domicile, and thus risk a true change of domicile on his part during the suit and a consequent loss of jurisdiction of the court, or take advantage of s. 18 (1) (b), which—though involving her returning to this country if abroad—gives the court jurisdiction to grant her a divorce if she is resident in England and has been ordinarily resident there for three years immediately preceding the commencement of the proceedings and the husband is not domiciled in any other part of the United Kingdom, or the Channel Islands or Isle of Man.

47. Thus, in *Donaldson v. Donaldson* [1949] P. 363, at p. 366, Ormerod, J., says, "in 1944, when this decree was made he had every intention of remaining in Florida and had acquired a domicile of choice there", when speaking of the husband.

There is, perhaps, an historical reason for the existence of the two different approaches. English judges were well accustomed to dealing with cases of recognition of divorce decrees granted by foreign courts when they were first given jurisdiction in 1857 themselves to dissolve marriages, so that there may have grown up since that time an unconscious tendency to use language pertaining to recognition when dealing with cases involving their own jurisdiction to entertain divorce proceedings.

should then ask: "What, then, gives the foreign court such jurisdiction?" And he should then think; "the same element which gives my native courts jurisdiction—namely the domicile of the parties to the suit at the commencement of the suit." In short, it is not the decree which is recognised, but the jurisdiction of the court granting it. It is clear that Lord Westbury understood this vital point in *Shaw v. Gould*[48] when he spoke of a "*jurisdiction* which the courts of another country ought to recognise and admit."

Although *Kerrison v. Kerrison*[49] has done sterling service in removing the unfortunate legal situation arising out of *Gane v. Gane*,[50] it is to be hoped that it will not be followed on the domicile requirement. While *Kerrison v. Kerrison*[51] stands, it is clear that legal advisers will have to remember that for New South Wales (and any other country having a similar approach) the *Le Mesurier v. Le Mesurier*[52] rule is stricter than in other jurisdictions, and runs as follows:—

> "Jurisdiction to pronounce a final decree of divorce will only be exercised by a New South Wales court if the parties are domiciled in that State throughout the proceedings."

One can see difficult problems of recognition ahead for other State courts in Australia. Suppose H and W are domiciled in New South Wales when W commences divorce proceedings in that state, and that during the course of the suit H changes his domicile to, let us say, Queensland, but, in view of the *Kerrison*[53] case, this information is withheld from the court, which in due course grants W a decree absolute. If in later proceedings the validity of this decree is called in question, what is the correct approach in, say, an English court? To argue that the parties were domiciled in New South Wales at the beginning of the suit and that that is sufficient? Or does one contend that the parties have defrauded the New South Wales court by allowing it to think that it continued to have jurisdiction when it in fact had not, so that the decree ought not to be recognised?[54] At first sight, it might seem that the latter argument should prevail, but to allow it to

48. *Supra*, at p. 81.
49. *Supra*.
50. (1941) 58 W.N. (N.S.W.) 83; *i.e.* that two competent courts cannot, apart from statute, have concurrent jurisdiction to entertain proceedings for divorce.
51. *Supra*.
52. *Supra*.
53. *Supra*.
54. One wonders what is the position as regards recognition of foreign decrees of divorce in New South Wales. Judging from *Kerrison v. Kerrison*, its courts ought logically to refuse to recognise the decree in *Pearson v. Pearson* because the husband was not domiciled in Ontario when he was granted his decree absolute by the High Court of that province.

do so would involve the English court in classifying the connecting factor of domicile by the *lex causae* instead of by the *lex fori*.[55]

In conclusion, it is thought that:—

(a) Jurisdiction to pronounce a decree of divorce belongs (apart from statute) only to the courts in which the parties were domiciled at the commencement of the suit and that subsequent changes of domicile during the course of proceedings are immaterial.

Accordingly, any courts applying this rule would recognise the decrees in *Pearson v. Pearson*[56] and *Russell v. Russell*[57] situations; they would, on the other hand, be compelled to accept that there may be *Kerrison v. Kerrison*[58] situations in which no decree will be forthcoming and thus nothing to recognise at all.

(b) The *Armitage v. A-G*[59] rule requires to be rewritten slightly so as to harmonise more closely with the *Le Mesurier v. Le Mesurier*[60] rule; the following is submitted:—

"If the courts of a foreign country where the parties are not domiciled when the proceedings are commenced dissolve their marriage, and if the divorce would be recognised by the courts of the country where, at the date of the commencement of the proceedings, the parties are domiciled, it will be recognised in England."

Though it is freely admitted that these conclusions ignore what logically should be taken into account, namely that the marriage is only dissolved by and the status of the parties altered by the decree absolute, it is felt that justice, morality, public policy and expedience require them to be applied in the form in which they have been stated. They are precise; they obviate the mischief which could be occasioned by a runaway husband; they minimise the possibility of parties to suits defrauding the courts; and yet they leave it open to courts which originally had jurisdiction to continue with the proceedings notwithstanding a change of domicile, so saving the expense of commencing fresh proceedings in a new *forum*. At the same time, they do allow fresh proceedings to be taken in the "new" domiciliary courts if so desired, *e.g.* if a decree could be obtained more quickly than in the "old" domiciliary courts whose cause lists are longer. And, finally, they make some attempt to integrate the rules for assuming jurisdiction and recognising foreign decrees.

P. R. H. WEBB*

55. See *Re Annesley* [1926] Ch. 692.
56. *Supra.*
57. *Supra.*
58. *Supra.*
59. *Supra.*
60. *Supra.*

* M.A., LL.B., (Cantab.); Lecturer in Law, University of Nottingham, England.