COMMENT

NULLITY JURISDICTION AND PROBLEMS OF DOMICILE

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The Ontario case of *Re Capon v. McLay* [1] is a commentator's delight. [2] It fairly bristles with problems, has an interesting set of facts, involves an application of *Travers v. Holley* [3] to the recognition of a foreign nullity decree for the first time in Canada, changes what appeared to be the law in Ontario as to jurisdiction in nullity suits, and in the midst of a competent judgment even exhibits a measure of judicial fallibility. It is only as to the law of domicile that the court fails to maintain its high standard of performance.

John made a will in 1952 under which his estate was to be divided equally between his mother and sister. In 1957 John and Mary went through a form of marriage in Toronto. They lived together as man and wife for a year, but in 1958 Mary had John committed to the Ontario Mental Hospital. In July 1959 Mary left Toronto and took up residence in Nevada. Shortly thereafter she instituted nullity proceedings in that state. She obtained a nullity decree from the Nevada court in October, 1959. The decree was granted on the ground of John's mental incapacity at the time of ceremony. The Nevada court's jurisdiction was based on Mary's six-week residence in Nevada, sufficient "domicile" under the law of that state. Mary re-married in the United States on the strength of the Nevada decree.

John died and an issue arose over probating his will as to whether his subsequent "marriage" to Mary revoked the will under section 20 of the Wills Act. [4] Mary argued that the will was revoked by John's marriage to her in 1957 and that she therefore was entitled to share in John's estate as his lawful widow in accordance with the provisions of the Devolution of Estates Act. [5] As for the Nevada decree, Mary contended that it was granted without jurisdiction and therefore invalid. She claimed that she was not precluded from asserting that she was John's widow and could claim a portion

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[1] [1965] 2 Ont. 83.

[2] This case was the subject of an extensive comment by Professor Castel in 43 CAN. B. REV. 647 (1965). It is indicative of the many issues raised by the case that neither that comment nor the present one exhausts the topics for discussion.

[3] [1953] P. 246, [1953] 2 All E.R. 794, (C.A.).

[4] ONT. REV. STAT. c. 433 (1960).

[5] ONT. REV. STAT. c. 106 (1960).

of his estate even though she had invoked the Nevada court's jurisdiction and obtained its decree of nullity.

John's mother and sister argued that the Nevada decree was valid because the alleged marriage was void ab initio. Mary therefore had the capacity to acquire a domicile in Nevada so as to give the courts of that state jurisdiction to make a declaration as to her status. In the alternative they claimed that, even if the Nevada decree were invalid, Mary could not attack the jurisdiction of the Nevada court when she herself invoked that jurisdiction.

The will was admitted to probate by the surrogate court without recorded reasons. The judgment in the Court of Appeal was delivered by Mr. Justice Schroeder who held that: (1) where one of the parties is mentally incapacitated at the time of marriage the marriage is void ab initio rather than voidable; (2) the domicile of the petitioner [6] alone is a sufficient basis for jurisdiction in nullity in Ontario; (3) therefore the Nevada decree, having been granted on a similar basis, should be recognized and although this was sufficient to determine the case; (4) he would have no hesitation in deciding that Mary could not impugn the Nevada decree when she herself had obtained the decree in that court. Mary had failed to show that she was John's wife, and therefore the will was admitted to probate. John's mother and sister shared under the will. Mary got nothing.

From a conflict of laws point of view the significant aspect of the *Capon* decision is the holding that a foreign nullity decree based on the petitioner's domicile alone will be recognized in Ontario. The significance of this cannot be fully appreciated without an examination of the law of nullity jurisdiction based on domicile.

JURISDICTION IN NULLITY

In the *Capon* case the court was faced with the recognition of a foreign nullity decree, a problem which has arisen before the courts on relatively few occasions. Most of the leading decisions on nullity jurisdiction have concerned jurisdiction of the court of the forum to hear the case at first instance. Even at this local level the law has not been clear enough to form a firm foundation for the development of rules on the recognition of foreign decrees.

In the past the most contentious issue has been whether a court had jurisdiction to grant a nullity decree when the only basis of jurisdiction was the domicile of the petitioner. [7] Here one must keep in mind the well settled,

[6] For convenience the terms "petitioner" and "respondent" are used although the parties are styled "plaintiff" and "defendant" according to the Ontario Rules of Practice.

[7] Other recognized bases included: domicile of both parties, Salvesen v. Adm'r of Austrian Property, [1927] A.C. 641, [1927] All E.R. Rep. 78; residence of both parties, Ramsay-Fairfax v.

if incongruous, distinction between marriages void ab initio and marriages merely voidable at the instance of one of the parties, and the effect of that distinction on the ability of the wife to acquire a separate domicile.

It is well settled that the domicile of a wife is dependent upon that of her husband. [8] While nullity decrees for both void and voidable marriages declare that the marriage never existed, in the case of a voidable marriage the domicile of the wife is dependent upon that of her husband until such time as the decree becomes effective. In the case of a void marriage the wife is free at any time to acquire a domicile of choice. Her domicile never becomes legally dependent on that of her putative husband. [9] Our contentious issue only arises then in cases of void marriages. In voidable marriages the parties are either domiciled in the forum or they are not. It will depend upon the man's residence and intention.

There is in the earlier cases a considerable body of judicial opinion supporting the view that the domicile of the petitioner alone is not in itself a sufficient basis for the exercise of nullity jurisdiction. [10] For example, in *Hutchings v. Hutchings* [11] the Manitoba Court of Appeal refused to grant a decree of nullity to a husband on the ground that he had entered the marriage in question while he was still validly married to his first wife who was living at the time. The husband had gotten a divorce from his first wife in Illinois at a time when he had not established a domicile there. He therefore claimed to be still validly married to his first wife. The defect, if proved, was such as would render the marriage void. The husband was resident and domiciled in Manitoba. The wife was neither resident nor domiciled there. In refusing to make the decree of nullity, the court pointed out that this involved a finding that the marriage was in fact void. [12]

More recently the courts have exhibited a tendency to broaden the bases of jurisdiction in nullity, prompted largely by sympathy for the plight of the petitioning spouse. The first murmurings were heard in England in the case of *White v. White.* [13] There a woman petitioned for a declaration of nullity on the ground that the respondent, with whom she had gone through

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Ramsay-Fairfax, [1956] P. 126, [1955] 3 All E.R. 695 (C.A.); and the place of celebration of the marriage — at least where the marriage is characterized as void rather than voidable, Ross-Smith v. Ross-Smith, [1963] A.C. 280, [1962] 1 All E.R. 344 (C.A.).

[8] Attorney General for Alberta v. Cook, [1926] A.C. 444, 95 L.J.P.C. 102.

[9] See judgment of Lord Greene in De Reneville v. De Reneville, [1948] P. 100, at 111-12, [1948] 1 All E.R. 56, at 60 (C.A.).

[10] Gower v. Starrett, [1948] 2 D.L.R. 853, [1948] 1 West. Weekly R. 529 (B.C. Sup. Ct.); Hutchings v. Hutchings, [1930] 4 D.L.R. 673, [1930] 2 West. Weekly R. 565 (Man.); Manella v. Manella, [1942] Ont. 630, [1942] 4 D.L.R. 712; Smart v. Maxwell, 47 Weekly N. 100 (Austl., N.S.W. 1930); Johnson v. Cooke, [1898] 2 Ir. R. 130; Aldridge v. Aldridge, [1954] Sess. Cas. 58.

[11] *Supra* note 10.

[12] This raises an interesting question as to the position of the petitioning husband when the court has said that the marriage was void but refuses to make a declaration to that effect. Will he be in the same position for all practical purposes as if he had obtained a decree of nullity?

[13] [1937] P. 111.

a form of marriage in Australia, was at the time of the marriage the husband of another woman. The petitioner was resident and domiciled in England. The respondent was neither resident nor domiciled there. The English court held that it had jurisdiction and made a declaration of nullity. It is clear that Mr. Justice Bucknill was influenced by the hardship that a contrary decision would have had on the petitioner: "[I]s it necessary for her to proceed to whatever part of the world the respondent may happen to reside in, in order to get her status established by a decree of nullity? This would impose a heavy burden indeed on the petitioner, for the respondent may move about from place to place and have no fixed residence." [14]

The cry was taken up by the authoritative voice of Lord Greene in *De Reneville v. De Reneville* : [15]

> In *White v. White* my brother Bucknill used words with which (save as regards the reference to residence which was in my opinion unnecessary) I respectfully agree. He said : "It seems to me just to the petitioner and also in the public interest that the petitioner, being domiciled and resident in this country should have her status as a single or a married woman judicially established by this court." This view does, of course, theoretically at least, open the possibility of conflicting judgments by the courts of the respective domiciles. But if it be not the right view, and if the only court with jurisdiction is a court in a country where both are domiciled, the problem of jurisdiction based on domicile in the case of a void marriage where the domiciles are different would appear to be insoluble. [16]

This view has gained considerable support since the *De Reneville* decision. In Canada, British Columbia has been a battlefield for the opposing views during the last two decades with both sides winning skirmishes. [17] It appears that with the decision of the British Columbia Court of Appeal in *Savelieff v. Glouchkoff* [18] the pro domicile-of-the-petitioner forces have won the day in that province.

There were decisions from other jurisdictions which supported the *De Reneville* view, [19] but until the *Capon* decision the position in Ontario appeared to be that the domicile of the petitioner would not itself be a sufficient ground for establishing nullity jurisdiction. The main reason for this

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[14] *Id.* at 125.

[15] [1948] P. 100.

[16] *Id.* at 113.

[17] Savelieff v. Glouchkoff, 45 D.L.R.2d 520, 48 West. Weekly R. 335 (B.C. 1964); Shaw v. Shaw, [1946] 1 D.L.R. 168, [1945] 3 West. Weekly R. 577 (B.C.); Khan v. Khan, 29 West. Weekly R. 181 (B.C. Sup. Ct. 1959); Gower v. Starrett, [1948] 2 D.L.R. 853, [1948] 1 West. Weekly R. 529 (B.C. Sup. Ct.). See further, comments by Castel, 42 CAN. B. REV. 474 (1964), and by Lysyk, 43 CAN. B. REV. 107 (1965).

[18] *Supra* note 17.

[19] Finlay v. Boettner, [1948] 1 D.L.R. 39 (Alta. Sup. Ct.); Bevand v. Bevand, [1955] 1 D.L.R. 854 (N.S. Sup. Ct.). Also in Har-Shefi v. Har-Shefi, [1953] P. 161, a petition for a declaration as to the validity of a foreign divorce decree was treated by the English Court of Appeal as analogous to nullity proceedings and a majority held in favour of jurisdiction based on the petitioner-wife's English domicile.

was the judgment of the Ontario Court of Appeal in *Manella v. Manella.* [20] In that case a man sought a declaration of nullity in Ontario on the basis that the woman with whom he had gone through a form of marriage "was and ever since has been insane." The marriage had taken place in Manitoba. The woman at all relevant times was resident in Saskatchewan. The only possible basis of jurisdiction for the Ontario court was the domicile of the petitioner. The marriage being one which, if the allegation were proved, would be void, the woman's domicile did not follow that of the petitioner. The Court of Appeal was clearly of the view that it did not have jurisdiction where the domicile of the petitioner was the only basis for jurisdiction. Mr. Justice Middleton said : "I think it will be found that the wife did not change her domicile by reason of her husband's change of domicile, and that the Courts of this Province have no power to declare the invalidity." [21]

The authority of the *Manella* case on the jurisdictional point was, however, clouded by another aspect of the decision. The man, having failed to establish at trial the woman's insanity at the time of marriage, asked on appeal for a new trial. The Court of Appeal refused to grant a new trial, pointing out that the man had failed to apply for an order appointing a guardian for the mentally incompetent woman as required by the rules of the court. [22] It is this latter aspect of the decision that is seized upon by the court in the *Capon* case as the ratio decidendi in *Manella v. Manella.* [23] It afforded a relatively easy means of distinguishing a precedent which the court did not wish to follow.

In order to diminish further the authority of *Manella v. Manella* (and with it *Hutchings v. Hutchings*) Mr. Justice Schroeder offers this bit of judicial hindsight :

> These decisions were made at a time when the law was not so clearly settled in England as it is today. I humbly venture to suggest that if the *De Reneville* case which has received the approval of such high judicial authority in England had been available to the Courts in the two cases

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[20] [1942] 4 D.L.R. 712.

[21] *Id.* at 717.

[22] See unsigned comment, *Domicil and Nullity Actions,* 12 FORTNIGHTLY L.J. 167 (1943), criticizing the *Manella* decision partly on the issue of jurisdiction. See also a rebuttal by Hancock, Comment, 21 CAN. B. REV. 149 (1943) defending *Manella.* Professor Hancock's comments represent a widely held view at the time. "Why does the writer of the article referred to object to the decision in *Manella v. Manella*? Although he does not say so specifically it would seem to be his contention that the court should have exercised jurisdiction because the plaintiff husband was resident in Ontario. It will be recalled that the wife was neither resident nor domiciled in Ontario and had not even been served with process there. The marriage was not celebrated in Ontario but in Manitoba. Since the wife had done nothing to bring herself or her rights arising out of the marriage ceremony under the control of the Ontario courts, would it not be somewhat unusual, not to say unjust, for the Ontario courts to make a judicial pronouncement upon the validity of her marriage? True, the plaintiff was domiciled and resident in Ontario, but he ought not to be permitted, by his own acts alone, to establish a basis for jurisdiction over the defendant." *Id.* 151-52.

[23] Schroeder, J. A., said : "In any event it was held in the *Manella* case that the plaintiff's failure to obtain an order appointing a guardian for the defendant wife who was a mental incompetent was fatal, and that on that ground alone the plaintiff was disentitled to the relief which he sought." [1965] 2 Ont. at 95.

> cited, the question of jurisdiction would have been determined in favour of the petitioners in both actions. [24]

He then goes on to give a clear statement of his view of jurisdiction in nullity suits: "I have formed the view that the Courts of Ontario would be entitled to assume jurisdiction on the ground that the petitioner alone is domiciled in this Province whether the marriage was celebrated here or not." [25]

This statement is made because the judge had chosen to discuss the matter first as though Mary had been domiciled in Ontario and was seeking a nullity decree against John who was domiciled elsewhere. In other words he is discussing the case as one arising in the first instance in Ontario. In fact of course, the situation at bar is one of recognition of a foreign decree. Thus what is said about local nullity jurisdiction in the *Capon* case is strictly speaking obiter dicta. It is, however, clearly stated, and in view of the general trend toward acceptance of jurisdiction in such cases, it is fairly safe to predict that when the matter arises directly for decision in an Ontario court, the *Capon* viewpoint will be followed.

In principle it would seem that in the converse case of the respondent alone being domiciled in the forum, the court would have jurisdiction to grant the nullity decree. [26]

The express ratio of the *Capon* case lay in the recognition of the Nevada nullity decree. [27] Having decided that a court in Ontario would have jurisdiction if a spouse were to petition it on the basis of his or her domicile alone, Schroeder concluded: "To deny the equivalent right to a foreign Court would be inconsistent and contrary to well-recognized principles."

In saying this the judge relied upon what may prove to be the most significant decision in Anglo-Canadian conflict of laws in this century — *Travers v. Holley*. [28] In *Travers v. Holley* the English Court of Appeal

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[24] *Id.* at 95.

[25] *Id.* at 96.

[26] One of the obstacles to the acceptance of the rule that the petitioner's domicile in the forum is sufficient to establish jurisdiction is that the respondent may be deprived of a proper opportunity to defend. See note 22 *supra*. This objection is obviated when the petitioner comes to the respondent's domicile to seek a decree.

[27] In deciding that a putative wife cannot impugn the validity of a nullity decree granted by a court the jurisdiction of which she herself invoked, and on the basis of which she acted by subsequently marrying, Schroeder, J. A., said: "While, for the reasons stated, I do not find it necessary to rest my judgment on this alternative ground taken by the respondents, I would not hesitate to do so if the other ground upon which I have based it were invalid." [1965] 2 Ont. at 100.

[28] *Supra* note 3. It would seem that the application of *Travers v. Holley* was not necessary in order to recognize the Nevada nullity decree in *Capon*. The Ontario Court of Appeal had found that the domicile of the petitioner alone was a sufficient basis for nullity jurisdiction in Ontario at common law. That in itself should make it an exercise of jurisdiction in the "conflicts" or "international" sense so as to enable foreign decrees granted on that basis to be recognized. *Travers v. Holley* was decided in the context of divorce jurisdiction where the only common-law basis had been the domicile of the parties, yet many countries had passed legislation giving a wider jurisdiction to their own courts in the case of a deserted wife. *Travers v. Holley* and the

recognized a divorce decree granted by a New South Wales court where the statutory basis for jurisdiction was substantially the same as would be invoked by an English court if the action had first arisen in England. The decision marked a change of judicial attitude from the older view that a foreign judgment would not be recognized if granted on a jurisdictional basis other than is accepted at common law as giving jurisdiction in the conflicts sense, even though a court of the forum would have exercised jurisdiction on the same basis had the matter arisen before it in the first instance. [29]

The statutory expansion of jurisdiction in matrimonial causes is widely accepted. Domicile of the parties, the traditional basis of jurisdiction for divorce, has been joined by other bases set out in the various deserted wives' matrimonial causes statutes. [30] By giving effect to a foreign decree granted on the basis of one of these statutes, *Travers v. Holley* broadened very considerably the bases of recognition. The principle enunciated in the case has prompted considerable judicial development both within [31] and beyond [32] the field of divorce recognition.

In the *Capon* decision we find the first express application of *Travers v. Holley* in Ontario. [33] It also marks the first Canadian application of *Travers v. Holley* to a decree of nullity. If *Travers v. Holley* is applied in order to recognize a foreign nullity decree, a fortiori it should be applied to the recognition of foreign divorce decrees in Ontario. [34]

THE PROBLEM OF THE NEVADA DOMICILE

The matter of Mary's acquisition of a domicile of choice in Nevada was brushed over very quickly by the Court of Appeal in the *Capon* judgment. It was lost amidst the other important issues raised in the case. [35]

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cases following it grant recognition according to the standard set by the legislation of the forum. In nullity the problem has been to establish what the common-law bases of jurisdiction are. This point is brought out in Castel, *op. cit. supra*, note 2, at 658-59.

[29] *Compare* the reasoning in *Travers v. Holley with* that in Schibsby v. Westenholz, L.R. 6 Q.B. 155, 40 L.J.Q.B. 73 (1870).

[30] See *e.g.*, Divorce Jurisdiction Act, CAN. REV. STAT. c. 84, § 2 (1952).

[31] For instance, in Robinson-Scott v. Robinson-Scott. [1958] P. 71, [1957] 3 All E.R. 473, an English judge held that it is not essential for recognition in England that the foreign court should assume jurisdiction on the basis of legislation similar to the English Matrimonial Causes Act, 1950. It is sufficient if the facts exist which would have enabled the English courts to assume jurisdiction.

[32] For its application in nullity : see *e.g.* Merker v. Merker, [1962] 3 All E.R. 928 (P.D. & A.). Note the wide scope for *Travers v. Holley* advocated by Kennedy, *"Reciprocity" in the Recognition of Foreign Judgments; The Implications of Travers v. Holley*, 32 CAN. B. REV. 359 (1954).

[33] There was implicit application of *Travers v. Holley* in Summers v. Summers, [1958] Ont. Weekly N. 73, 13 D.L.R.2d 454 (Treleaven, J., in High Ct. Chambers). See Read, *Judicial Decisions Affecting Uniform Acts 1958*, in PROCEEDINGS CONF. COMM. UNIFORMITY LEG. CANADA 58, at 65 (1959).

[34] If *Travers v. Holley* can be applied for the purposes of nullity recognition, there seems to be no reason why the rule in Armitage v. Attorney General, [1906] P. 135, could not be used to broaden the scope of recognition even further, for instance, if Mary had been domiciled in Wisconsin and gotten a nullity decree in Nevada and Wisconsin would recognize that decree, then so should Ontario. See Castel, *op. cit. supra* note 2, at 656.

[35] A possible further explanation may lie in the preliminary skirmish in the Court of Appeal where counsel for Mary contended that a ruling by the trial judge had deprived her of an opportunity

The case has, however, two important implications for the general law of domicile in Canada. The first concerns the ease with which the Nevada domicile was acquired. The second has to do with the law by which the domicile was characterized.

In the first place the reasons given by the court for accepting that Mary had acquired a domicile of choice in Nevada are not convincing. Her testimony on the question of domicile given before the Nevada court was as follows:

> Q. Now, when you came to this state on July 2, 1959, was it with the intention of making your home permanently in the State of Nevada?
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> A. Yes, sir:
>
> Q. You have since been admitted from Canada as a quota member under the Immigration Law?
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> A. Yes, I have.
>
> Q. And you are to make your residence permanently in the United States?
>
> A. Yes.[36]

The relevant part of Schroeder's judgment is this:

> [I]t appears that not only did the appellant declare her intention formally and under oath to abandon her Ontario domicile in favour of a domicile of choice in Nevada, but she had been "admitted from Canada as a quota member under the immigration laws of the United States of America." Furthermore, since the pronouncement of the decree she married her present husband and at the time of the proceedings in the Surrogate Court before Judge Macdonnell she was residing in the State of Wisconsin. There is thus substantial evidence to support the conclusion that she had effectively abandoned her Ontario domicile and acquired a new domicile of choice in Nevada.[37]

This reasoning should be examined closely because it bears the seed of its own destruction.

1. Mary's residence in Wisconsin, though it may tend to show the loss of a domicile in Ontario, does not support the conclusion that she acquired a domicile of choice in Nevada. If anything it tends to negate the proposition that it was her intention to remain in Nevada. It is true that the crucial time for the determination of domicile is when the nullity proceedings were brought, but Mary's move to Wisconsin could be relevant in indicating that it was not her intention, at the time action was brought, to remain in Nevada.

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of giving evidence as to the circumstances under which she obtained the Nevada decree and as to her true domicile, [1965] 2 Ont. at 88. Schroeder, J. A., rejected this, however, as "highly improbable," and apparently subscribed to the view taken by opposing counsel that Mary was afforded the opportunity of offering testimony at trial but elected not to do so.

[36] [1965] 2 Ont. at 86.

[37] *Id.* at 96-97.

2. Mary's testimony that she intended to remain in Nevada should be scrutinized closely as it is self-serving evidence. The general attitude of the courts is to treat such evidence with great caution. [38]

3. The fact that Mary had been admitted to the United States as a quota member under the immigration laws of that country is quite equivocal insofar as the establishment of a domicile of choice in Nevada is concerned. As was pointed out by the Supreme Court of Canada in *Trottier v. Rajotte,* [39] this type of evidence leads us to the United States, it does not lead us to Nevada. This point is accentuated when there is some connection with another American state, as there was in the *Capon* case.

4. What does lead us to Nevada? Apart from Mary's declared intention under oath to remain in Nevada, what evidence was there of such an intention? We are not told what sort of living accommodation she maintained in Nevada, though the situation suggests that it might have been a motel. She may well have moved on to Wisconsin as soon as she got her nullity decree. Again, this does not appear from the reported facts. [40] We do have an indication of the length of time that Mary was resident in Nevada at the time she brought action. She took up residence in Nevada on or after July 2, 1959. Sometime after that she instituted the nullity proceedings. The action came on for trial on October 5, 1959, and the decree bore that date. At the time the decision was given Mary had been resident in Nevada for just over three months. While we do not know exactly when the proceedings were begun we do know that she must have been resident in Nevada for less than three months. In fact it was expressly stated in the Nevada decree that Mary "was at the time of commencement of this suit and for more than six weeks prior thereto continuously had been and still and now is an actual and bona fide resident of and domiciled within" the State of Nevada. The clear implication is that this was the basis of the Nevada court's jurisdiction.

This is a short time indeed from which to infer an intention to remain. If one questions that the intention to remain was clearly established from the other surrounding facts, it is difficult to accept that a domicile of choice was acquired in Nevada. It is true that a prolonged period of residence is not necessary in order to establish a domicile of choice. [41] Two recent Cana-

[38] See *e.g.*, the attitude of the House of Lords to the testimony of Mr. Bell, in Bell v. Kennedy, L.R. 1 Sc. & Div. 307, at 313 (1868).

[39] [1940] Sup. Ct. 203, at 216, 1 D.L.R. 433, at 444 (1939).

[40] In all fairness it should be pointed out that Mary was not evading the law of Ontario. Her nullity suit could have been brought successfully in Ontario, both from the point of view of jurisdiction and substantive law. Insanity at the time of marriage was a sufficient basis in substantive law for the granting of a declaration of nullity both in Ontario and Nevada.

[41] The classic illustration of this can be found in the American case of White v. Tennant, 31 W. Va. 790, 8 S.E. 596 [1888]. CHESHIRE, PRIVATE INTERNATIONAL LAW 152 (7th ed. 1965) says "brevity of residence is no obstacle to the acquisition of a domicile if the necessary intention exists. If a man clearly intends to live in another country permanently, as, for example, where an emigrant, having wound up his affairs in the country of his origin, sets sail with his wife and family for Australia, his mere arrival there will satisfy the element of residence." He quotes the following words of Lord

dian judgments indicate that our courts are prepared to hold that a domicile has been acquired by the mere fact of arrival in the new law district.[42] But this can only be so where the intention to remain can be clearly proved, and I suggest that there is not clear proof in the *Capon* case.

It is also true that there has been a marked trend in recent Canadian cases toward a greater ease of acquisition of a domicile of choice.[43] But the *Capon* case appears to go further than any other Canadian case in the ease with which the court finds an acquisition of a domicile of choice.[44]

It is difficult to quarrel with the result of the case,[45] and the question of domicile was fundamental to the ratio decidendi. However, if the Court of Appeal is taking steps forward in the law of domicile it would be better if this were expressly recognized by the court. Involved as it was in a number of other questions, perhaps the court didn't realize the full implication of finding a domicile in Nevada in these circumstances.[46] If it did, further discussion would have been helpful in determining the effect of the finding on the general law of domicile.

The other main point of criticism of the decision as it affects the law of domicile is the way in which domicile was characterized. It appears that one reason why there was not much discussion of Mary's acquisition of a Nevada domicile lies in the implication in Mr. Justice Schroeder's judgment that the Ontario court should accept the finding of the Nevada court as to domicile.

> Once it is determined that the judgment of the foreign Court was within its jurisdiction, the Court which is asked to extend recognition to such

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Chelmsford in Bell v. Kennedy, L.R. 1 Sc. & Div. 307, at 319 (1868) : "It may be conceded that if the intention of permanently residing in a place exists, a residence in pursuance of that intention, however short, will establish a domicile."

[42] Schwebel v. Ungar, [1965] Sup. Ct. 148, 48 D.L.R.2d 644; Zehring v. Zehring, 55 West. Weekly R. 90 (Man. Q.B. 1966).

[43] See *e.g.*, Osvath-Latkoczy v. Osvath-Latkoczy, [1959] Sup. Ct. 751, 19 D.L.R.2d 495; Gunn v. Gunn, 18 West. Weekly R. 85, 2 D.L.R.2d 351 (Sask. 1956); also Schwebel v. Ungar and Zehring v. Zehring, *supra* note 42.

[44] In spite of what was said in *Schwebel* and in *Zehring* compared with *Capon* the facts in both cases gave the courts much longer periods of residence from which to infer the necessary intention to remain.

[45] As Schroeder, J. A., put it, a contrary result would "constitute a parody of justice." [1965] 2 Ont. at 100.

[46] Lest we become too concerned with conceptual problems over domicile it is well to keep in mind the view widely held in the United States that domicile is a flexible concept, varying according to the nature of the case. Domicile then is not an end in itself but merely a judicial instrument for the proper administration of justice. One writer goes so far as to suggest the abolition of domicile. "If it is desirable ... to manipulate the meaning of 'domicile' ... it is because of reasons revealed by an analysis of the policies underlying the apparently conflicting domestic rules .... Without such an analysis, manipulation of the meaning of 'domicile' is unreasoned and blind, and, therefore, unwise. With such an analysis, molding 'domicile' to fit our needs is unnecessary. It is unnecessary because, having made the analysis, we can base the result directly upon the relevance or irrelevance of the domestic policies in issue and need not, therefore should not, speak of 'domicile' at all. The time has come to bury the albatross." Weintraub, *An Inquiry into the Utility of "Domicile" as a Concept in Conflicts Analysis*, 63 MICH. L. REV. 961, at 985-86 (1965). It is perhaps unnecessary to add that in Canada we are a long way from burying the "albatross" of domicile.

> judgment will not review the judgment of the foreign Court to ascertain if, *e.g.*, the decision was supported by the evidence or was otherwise erroneous unless, of course, the proceedings offend against our views of substantial justice. [47]

He continues later: "Even if it were competent for this Court to criticize the evidence upon which the Nevada decree was based . . ."; [48] and then goes on to set out what he considers to be the relevant facts as to the acquisition of a domicile of choice.

As a general proposition it is quite true that a foreign judgment will be recognized once the jurisdiction of the foreign court has been established. In the context of the *Capon* case, however, the statement leads us nowhere. The Ontario court has a right, in fact a duty, to inquire into the domicile evidence before the Nevada court because domicile goes directly to the question of jurisdiction. A foreign court does not have jurisdiction simply because it said that it had jurisdiction. It is fundamental to the recognition of all foreign judgments that the court granting it must have jurisdiction or the judgment is in effect a nullity. [49] It is implicit in this that the jurisdiction is determined by the court which is being asked to recognize the judgment.

It seems from Mr. Justice Schroeder's statement "even if it were competent for this Court to criticize the evidence upon which the Nevada decree was based," that in his view the Ontario court must accept the Nevada court's assessment of the domicile evidence. This is wrong on the basis of authority. It is clearly contrary to the well-established rule, exemplified in *Re Annesley,* [50] that what is meant by "domicile" is to be determined by the law of the forum.

Whether the court of the forum should give greater credence to the determination of domicile by a foreign court is another question. It is a position for which some support might be found on principle. [51] Unfortunately we find no discussion of principle on this point in *Capon,* only a certain confusion on the law of domicile.

The *Capon* decision is to be welcomed for its clarification of the law on nullity jurisdiction and its use of *Travers v. Holley* in the recognition of a foreign nullity decree. In addition it contains useful discussions on the nature of marriage contracted while one of the parties lacked the necessary capacity, and on the right of a party invoking the jurisdiction of a foreign court to deny the validity of a decree granted by the foreign court. When a case has such credentials it may appear to be seeking perfection to criticize

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[47] [1965] 2 Ont. at 96.
[48] *Ibid.*
[49] Singh v. Rajah of Faridkote, [1894] A.C. 670 (P.C.).
[50] [1926] Ch. 692, 95 L.J. Ch. 404.
[51] It would, for example, serve to broaden the scope of recognition of foreign decrees.

what was said, or left unsaid, in the field of domicile. However the case does leave something to be desired in this respect. It remains to be seen whether it will have any significant effect on the development of the law of domicile. [52]

[52] Was there a simpler solution open to the court? Could it not have characterized the marriage as void ab initio and left the matter there without any consideration of the Nevada decree at all? The ultimate issue was whether Mary was to share in John's estate. If there never was any marriage then she would not. It is well established that a decree of nullity is not necessary where the marriage is found to be void ab initio. Here no decree of nullity was necessary in any event. All that was needed was a finding that the marriage in question was void. What was said in the case was that mental incapacity renders a marriage void ab initio. It seems that if the court had said more directly, "this marriage is void ab initio," it would have rendered all other discussions mere obiter dicta.