RECOGNITION OF FOREIGN DIVORCES: RETROSPECTS AND PROSPECTS

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During the last decade the legislation and the practice in the Commonwealth have shown a tendency to extend the recognition of foreign decrees of divorce either in line with an enlarged jurisdiction or in contrast to a more restricted jurisdiction of the courts of the forum. In the light of a recent decision of the House of Lords, the author examines the assumptions on which extended jurisdiction is recognized and the consequences which arise therefrom. He suggests that a more diversified system of rules is called for, which distinguishes between an extended recognition of divorces granted abroad to parties who are domiciled in the recognizing country and a very restricted recognition if the parties are domiciled in a third country.

I. THE BACKGROUND

For some twenty-five years up to 1953 it seemed to be finally established that, at common law, a foreign divorce could be recognized only if the foreign decree had been pronounced by the courts of the domicile of the spouses [1] or, in case it had been pronounced elsewhere, if the decree would be recognized by the courts of their domicile, which was that of the husband. [2] No exception was permitted at common law, even if the husband had deserted the wife and had acquired a domicile elsewhere, [3] or if a decree of judicial separation had been granted to the wife [4] or if the parties had separated by agreement. [5] The narrowness and rigidity of this rule was matched by a similar self-restraint on the part of the courts in England

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[1] Conway v. Beazley, 3 Hagg. Ecc. 639, 645, 648, 651-52, 162 Eng. Rep. 1292, 1295-97 (Ecc. 1831); Tollemache v. Tollemache, 1 Sw. & Tr. 557, 561 (Div. & Mat. Causes Ct. 1859); Palmer v. Palmer, 1 Sw. & Tr. 551, 552 (Div. & Mat. Causes Ct. 1859); Pitt v. Pitt, 4 Macqueen App. Cas. 627, 635, 636 (H.L. 1864); Shaw v. Gould, L.R. 3 H.L. 55, 69, 76, 83, 87 (1868); Harvey v. Farnie, 8 App. Cas. 43, 50, 57 (1882); Le Mesurier v. Le Mesurier, [1895] A.C. 517, 527 (P.C.); *See also* Brett, L.J., in Niboyet v. Niboyet, 4 P.D. 1, at 14, 19, 20 (1878).

[2] Armitage v. Attorney-General, [1906] P. 135.

[3] Herd v. Herd, [1936] P. 205; H. v. H., [1928] P. 206, at 212.

[4] Attorney-General for Alberta v. Cook, [1926] A.C. 444 (P.C.).

[5] Lord Advocate v. Jaffrey, [1921] 1 A.C. 146; In Scot., *sub nom.* Mackinnon's Trs. v. Inland Revenue, [1920] Sess. Cas. 171.

to assume jurisdiction unless the spouses were domiciled in England. [6] Both rules reflect the consideration, to be examined later on, that a judicial decree of divorce is not merely a judgment which attracts the common-law rules of the conflict of laws concerning the recognition and enforcement of foreign judgments, but affects status. Since status is governed by the law of the domicile, the courts of the domicile alone can decide whether the status is to be changed by applying their *lex fori* or whatever law their own choice of law rules declare to be applicable. [7]

Isolated attempts by a few individual judges, in the form of an obiter dictum [8] or as a course of decision amounting at least to a practice, [9] to attribute to a deserted wife a separate domicile for the purpose of justifying the assumption of jurisdiction in divorce by English courts—though not where the recognition of foreign divorces was in issue—remained unsuccessful in England. In Scotland, on the other hand, jurisdiction was assumed if the last matrimonial home, in the sense of the place of residence of the married pair, was in Scotland where they were then domiciled. In the view of the Scottish courts, it is irrelevant that: the husband had deserted the wife; [10] the wife had given the husband grounds for leaving her, taking up a domicile abroad; [11] the wife had refused to follow her husband when he went abroad, [12] provided only, so it would appear, that the parties had not separated voluntarily. [13] This jurisdiction is not determined by the circumstance that the marriage had been concluded in Scotland [14] or that the matrimonial offence had taken place there, [15] but is grounded on the existence of a proper home or residence of the parties in Scotland [16] which the husband had not transferred abroad. [17] Despite

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[6] Wilson v. Wilson, L.R. 2 P. & D. 435, 441-42 (1872).

[7] Shaw v. Gould, L.R. 3 H.L. 55, at 70, 83 (1868); Wilson v. Wilson, L.R. 2 P. & D. 435 (1872); Harvey v. Farnie, 8 App. Cas. 43, at 50, 57 (1882); Le Mesurier v. Le Mesurier, [1895] A.C. 517, at 526-27 (P.C.).

[8] *E.g.*, Niboyet v. Niboyet, 4 P.D. 1, at 14 (1878) (per Brett, L.J.); Armytage v. Armytage, [1898] P. 178, 185 (per Sir Gorrell Barnes, P.); Bater v. Bater, [1906] P. 209, 216; Ogden v. Ogden, [1908] P. 46, at 82.

[9] Le Sueur v. Le Sueur, 1 P.D. 130, 142 (1876); Stathatos v. Stathatos, [1913] P. 46 (per Bargrave Deane, J.); De Montaigu v. De Montaigu, [1913] P. 154 (per Sir Samuel Evans, P.) and, probably, a number of undefended cases. *See* Lord Wilberforce *in* Indyka v. Indyka, [1967] 3 W.L.R. 510, at 553 (H.L.), *citing* the REPORT OF THE ROYAL COMMISSION ON DIVORCE, CD. NO. 6478 (1912). The ground on which jurisdiction was assumed in the curious case of San Teodoro v. San Teodoro, 5 P.D. 79, 83 (1880), does not emerge clearly from the report.

[10] Jack v. Jack, 24 Sess. Cas. (2d s.) 467, 483, 485 (Scot. 1862); Hume v. Hume, 24 Sess. Cas. (2d s.) 1342, 1343 (Scot. 1862); *See also* Warrender v. Warrender, 2 Cl. & F. 488, 556 (H.L. 1835); Ringer v. Churchill, 2 Sess. Cas. (2d s.) 307, 313, 315 (Scot. 1840).

[11] Shields v. Shields, 15 Sess. Cas. (2d s.) 142, 144, 146 (Scot. 1852).

[12] Jack v. Jack, 24 Sess. Cas. (2d s.) 467, at 485 (Scot. 1862).

[13] Lord Advocate v. Jaffrey, [1921] 1 A.C. 146, at 161 (per Viscount Cave); Jack v. Jack, 24 Sess. Cas. (2d s.) 467, at 485 (Scot. 1862).

[14] Jack v. Jack, 24 Sess. Cas. (2d s.) 467, at 475 (Scot. 1862).

[15] Stavert v. Stavert, 9 Sess. Cas. (4th s.) 519, 529 (Scot. 1882); Jack v. Jack, 24 Sess. Cas. (2d s.) 467, at 474, 478, 482 (Scot. 1862); *but see* Shields v. Shields, 15 Sess. Cas. (2d s.) 142, at 146, 147 (Scot. 1852).

[16] Jack v. Jack, 24 Sess. Cas. (2d s.) 467, at 475, 477, 478, 482 (Scot. 1862); Hume v. Hume, 24 Sess. Cas. (2d s.) 1342, at 1343 (Scot. 1862).

[17] Jack v. Jack, 24 Sess. Cas. (2d s.) 467, at 471 (Scot. 1862).

protestations that this test is couched in "phraseology calculated to mislead, is figurative and wants judicial precision" [18] and does not exist in law, [19] it has maintained itself in Scotland. The test serves not only to relieve the hardship which might be caused to a wife who would have to seek out the proper jurisdiction abroad, [20] but also enables a husband to seize the jurisdiction of Scottish courts, if for instance the courts of his present domicile deny him a remedy. [21] Shorn of any technical language which is expressed in terms of a wife's separate domicile or of a "matrimonial domicile," the Scottish rule permits Scottish courts to entertain proceedings in divorce, if the last common home was in Scotland (always provided that the spouses did not part by agreement). Such a principle comes near to the jurisdictional test adopted in a number of continental countries. [22] At the same time it must be noticed that the courts in Scotland appear to be unwilling to concede a similar jurisdiction to courts abroad, if the parties are domiciled in England. [23]

In 1937 and 1949, the jurisdiction of English courts was extended, following a similar development in other parts of the Commonwealth, [24] to permit the courts to entertain a petition by a wife who had been deserted by her husband or whose husband had been deported from the United Kingdom, if the husband was immediately before the desertion or deportation domiciled in England [25] or by a wife who is resident in England and has been ordinarily resident there for a period of three years immediately preceding the commencement of the proceedings, and the husband is not domiciled in Scotland, Northern Ireland, the Channel Islands or the Isle of Man. [26] Within a short time thereafter the question arose whether this extension of English jurisdiction in divorce was matched by a comparable concession of jurisdiction to other countries.

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[18] *Id.* at 473 (per Lord Deas).

[19] Stavert v. Stavert, 9 Sess. Cas. (2d s.) 519, at 530 (Scot. 1882) (per Lord Deas), 533 (per Lord Shand); Lord Advocate v. Jaffrey, [1921] 1 A.C. 146, at 161, at 168 (per Lord Shaw of Dunfermline).

[20] Redding v. Redding, 15 Sess. Cas. (2d s.) 1102, 1104 (Scot. 1888); Robertson v. Robertson, [1915] 2 Scots L.T.R. 96, [1916] 2 Scots L.T.R. 95; Ramsay v. Ramsay, [1925] Sess. Cas. 216, 219, 220; Hannah v. Hannah, [1926] Scots L.T.R. 370; Lack v. Lack, [1926] Scots L.T.R. 656; Crabtree v. Crabtree, [1929] Scots L.T.R. 675.

[21] Shields v. Shields, 15 Sess. Cas. (2d s.) 142, at 146 (Scot. 1852).

[22] *E.g.*, Germany, ZPO § 606(a)(2).

[23] Warden v. Warden, [1951] Sess. Cas. 508; *but see* A. DICEY, CONFLICT OF LAWS 313, n.32 (8th ed. J. Morris 1967).

[24] Griswold, *Divorce Jurisdiction and Recognition of Divorce Decrees—A Comparative Study*, 65 HARV. L. REV. 193, at 200-07 (1951); *see also* Griswold, *The Reciprocal Recognition of Divorce Decrees*, 67 HARV. L. REV. 823 (1954).

[25] Matrimonial Causes Act, 1937, 1 Edw. 8, 1 Geo. 6, c. 57, § 13; Matrimonial Causes Act, 1950, 14 & 15 Geo. 6, c. 25, § 18(1)(a); Matrimonial Causes Act 1965, c. 25, § 40(1)(a); and see A. DICEY, *op. cit. supra* note 23, at 295, n.20, for the legislation in other parts of the United Kingdom and in the Commonwealth; for Canada, *see* The Divorce Jurisdiction Act, CAN. REV. STAT. c. 84 (1952).

[26] Law Reform (Miscellaneous Provisions) Act, 1949, 12 & 14 Geo. 6, c. 100, § 1; Matrimonial Causes Act, 1950, 14 & 15 Geo. 6, c. 25, at § 18(1)(b); Matrimonial Causes Act 1965, c. 25, at § 40(1)(b); see A. DICEY, *op. cit. supra* note 23, at 296, n.21 for the legislation in other parts of the United Kingdom and in the Commonwealth.

The gradual evolution between 1955 and 1958 of a number of technical rules enlarging these jurisdictional rules of English courts into rules for the recognition of foreign decrees need be set out here in outline only. First, by converting the unilateral rules of English statute law into bilateral rules, recognition was accorded to decrees based on provisions of foreign law which are substantially identical with those of English law. [27] Then the principle of equivalence was adopted, which permitted the recognition of decrees, if the facts before the foreign court were such that, had they occurred in England, English courts would have been able to exercise jurisdiction. [28] Finally, the artificial restriction, developed in English divorce proceedings, that the court could only exercise this extraordinary jurisdiction on the basis of a petition by a wife, to the exclusion of any cross-petition by the husband, [29] was engrafted on the exceptional rule of recognition of foreign divorces. [30]

II. Analysis and Critique of the Present Rules

The result cannot be described as satisfactory. In the first place, the technical process of interpreting a statute extensively, so as to read a unilateral rule of jurisdiction as a bilateral rule, or even as sanctioning the principle of equivalence, may be acceptable to continental lawyers, whose systems of private international law have been greatly enhanced by this device, but cannot easily be reconciled with the English canons of statutory interpretation. In the second place, it has been alleged that the principle extending the recognition of foreign decrees in the circumstances described above purports to be based on the common law, [31] and, in particular, on the ground that the English rules on the recognition of foreign decrees of divorce have no positive but only a negative content. English courts will not recognize foreign judgments affecting status given in circumstances in which *mutatis mutandis* English courts themselves would not have jurisdiction, and it is the policy of English law to avoid the creation of limping marriages. If this is true, the charge must be levelled that sight has been lost of the function of the rule which restricted the recognition of foreign divorces to decrees given by the courts of the foreign domicile of the parties, no matter whether the courts of the forum (whether English or foreign) were empowered by provisions "exorbitant de droit commun" to assume jurisdiction on a broader basis. [32]

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[27] Travers v. Holley, [1953] P. 246; Dunne v. Saban, [1955] P. 178; *see also* Carr v. Carr, [1955] 1 W.L.R. 422 (P.D. & A.).

[28] Arnold v. Arnold, [1957] P. 237; Manning v. Manning, [1958] P. 112; Robinson-Scott v. Robinson-Scott, [1958] P. 71.

[29] Russell v. Russell, [1957] P. 375.

[30] Levett v. Levett, [1957] P. 156 (C.A.).

[31] Indyka v. Indyka, [1966] 3 W.L.R. 603, at 609, 613 (C.A.) (per Lord Denning, M.R., and Diplock, L.J.).

[32] *Cf.* Le Mesurier v. Le Mesurier, [1895] A.C. 517, at 527 (P.C.).

This charge must now be developed in some detail. The original rule that jurisdiction in divorce is attributed exclusively to the courts of the domicile of the spouses, which is that of the husband, found its justification in the idea—first developed in Northwestern Europe during the fourteenth century and has maintained its relevance to this day—that jurisdiction is to be entrusted to the courts of the country with which the parties are most closely connected. Thus jurisdiction and choice of law were co-extensive. While this consideration is important in commercial and personal matters, it is paramount in matters of divorce. A decree of divorce does not simply record the breakdown of the marriage, the existence of certain obligations of maintenance, the award of custody and, possibly, the settlement of property. The spouses can separate by agreement, or a spouse may disappear, and the marriage comes equally to an end; maintenance obligations and custody can be determined in proceedings other than for a divorce, and so can a settlement of property. The essence of a decree of divorce is its final acknowledgement of the breakdown of the marriage by conferring on both parties to the marriage the capacity to marry again. Thus the favourite catchword that a divorce affects status must be understood to refer not so much to the existing marital status as to the newly acquired capacity to enter into another marriage.

It follows that, ideally, the same law should determine the dissolution of a previous marriage and the capacity of either spouse to marry again. Leaving aside, for the moment, the difficulty that the parties may have acquired a new domicile after the dissolution of their previous marriage, the postulate set out above can be given concrete expression by linking the two aspects of the validity of a divorce, on the one hand, and of capacity to marry on the other, either by requiring the observation of the same choice of law rule in both situations [33] or by concentrating the judicial process in the same jurisdiction as that which must determine, by its domestic law, the capacity of the spouses to marry again.

The rules of private international law in England and elsewhere do not differentiate between capacity to marry in general and any such capacity arising from a decree of divorce, and thus capacity to marry depends upon the laws of the respective domiciles of the spouses. [34] As a result of the failure to perceive the function of jurisdiction in divorce and its link with choice of law in the private international law of common-law (as distinct from civil-law) countries, the danger of limping divorces and of limping marriages is increased. This danger was absent when the ecclesiastical courts administered matrimonial jurisdiction in England on the assumption,

[33] Cheshire, *The International Validity of Divorces*, 61 L.Q.R. 352 (1945); *cf.* Matrimonial Causes and Personal Status Code § 14(b) (West. Austl. 1948).

[34] Sottomayor v. de Barros (No. 1), 3 P.D. 1 (C.A. 1877); A. DICEY, *op. cit. supra* note 23, rule 31, at 254.

however unfounded it may have been even at that time, that the law applied by these courts was universal in character. Thus Lord Justice James in *Niboyet v. Niboyet*[35] could contemplate with equanimity the exercise of jurisdiction on the basis of residence only, by the courts of the diocese of Winchester over spouses domiciled in the Channel Islands, or by the courts of the province of York over those domiciled in the Isle of Man, even if the law of the Channel Islands and of the Isle of Man differed from the law of England. If divorces granted by courts other than those of the domicile of the spouses are recognized by the courts of the forum but not by the courts of the foreign domicile of the spouses, the policy, if it should exist, of avoiding the creation of limping marriages is disregarded and certainly not observed.

In the absence of any jurisdictional choice of law rule in section 40(1)(a) and (b) of the English Matrimonial Causes Act, 1965 (and of its predecessors) which would enjoin English courts to recognize foreign decrees of divorces granted by foreign courts other than those of the domicile in circumstances identical with, or equivalent to, those laid down by the statute extending the jurisdiction of English courts, the question has been put whether the interpretation placed on this section in *Travers v. Holley*[36] was self-evident. If limping divorces and subsequent limping marriages are to be avoided, the operation of the provisions of this section must be restricted to spouses who are domiciled in England, in so far as the recognition of foreign divorces granted on the basis of identical legal provisions or equivalent circumstances is concerned.[37] The rule in *Travers v. Holley* would then merely constitute an aspect of the rule in *Armitage v. Attorney-General*[38] limited to the divorce of spouses domiciled in England. Thus a divorce granted in Ontario by virtue of the Divorce Jurisdiction Act, 1930, on the ground that the petitioning wife had been deserted by her husband[39] who, immediately prior to the desertion, had been domiciled in Ontario, would be recognized in England only if the husband had subsequently acquired a domicile in England. Similar recognition would be accorded to an Australian divorce under the Australian Matrimonial Causes Act, 1959, section 24(2) on the ground that the petitioning wife was resident in Australia and had been so resident for the period of three years immediately

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[35] 4 P.D. 1, at 5 (1878).

[36] [1953] P. 246.

[37] See Sinclair, Note, 30 BRIT. Y.B. INT'L L. 527 (1953); Latham, Letter to the Editor, 33 CAN. B. REV. 514 (1955); Lipstein, Comment, [1959] CAMB. L.J. 10, at 12; Lipstein, Comment, [1967] CAMB. L.J. 42, at 44. *But see*: Griswold, *Divorce Jurisdiction and Recognition of Divorce Decrees —A Comparative Study*, 65 HARV. L. REV. 193, at 228, n.108 (1951); Griswold, *The Reciprocal Recognition of Divorce Decrees*, 67 HARV. L. REV. 823, at 827 (1954); Webb, *Recognition in England of Non-Domiciliary Divorce Decrees*, 6 INT'L & COMP. L.Q. 608, at 615 (1955); A. DICEY, *op. cit. supra* note 23, at 314.

[38] [1906] P. 135.

[39] The requirement that the petitioning wife must have lived separate and apart from her husband for a period of two years would be disregarded by the courts of England.

preceding that date only if the husband had subsequently acquired a domicile in England or had been so domiciled throughout. Of course, English courts themselves are bound to entertain a petition brought by a wife whose husband has deserted her or has been deported from the United Kingdom, if the husband was immediately before the desertion or deportation domiciled in England, even if the husband has acquired a new domicile abroad at the time the wife brings a petition for divorce in England.[40] Similarly, English courts themselves are bound to entertain a petition brought by a wife who is resident and has been ordinarily resident in England for a period of three years preceding the commencement of the proceedings.[41] In both cases the likelihood is great that the divorce will not be recognized by the law of the husband's domicile, but as Lord Watson pointed out in *Le Mesurier v. Le Mesurier*,[42] the *lex fori* can exceed in its jurisdictional provisions the limits set by what he believed to be a precept of international law or at least an acknowledged international custom, and can permit the exercise of jurisdiction, even if the domicile of the spouses is not in the country of the forum. In short, the *lex fori* may permit the assumption of jurisdiction on an exceedingly wide range of facts, but it does so at the risk of non-recognition abroad. The failure to gear the special jurisdictional provisions of the English Matrimonial Causes Act, 1965, to the rule of the conflict of laws which determines capacity to marry by reference to the law of the domicile of the parties may lead, but has not led so far, to an unusual conflict. If the wife, who has obtained a divorce in the circumstances described above wishes to marry again in England, the refusal by the law of her domicile (which is that of the former husband) to recognize the divorce will normally be held to be irrelevant, since a wife who remains in England after her husband has deserted her or has been deported, has abandoned his English domicile and has acquired a new domicile abroad, will be regarded as having acquired a separate domicile of her own in England at the moment the decree of divorce became absolute.[43] The same applies if a wife, whose husband is domiciled abroad, obtains a divorce in England after having been ordinarily resident in England for three years. Matters become more complicated if the husband, domiciled abroad, wishes to avail himself of the decree obtained by his wife in England. Confronted with an English decree of divorce, which purports to sever any existing marital ties, and the provisions of the law of the husband's foreign domicile, which refuses to recognize the decree, the question remains open whether an English court must give full effect to the English decree, or treat it as unilateral and as pronounced in favour of the wife only, or must determine the incidents of the decree, in so far as capacity to marry again is concerned,

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[40] Matrimonial Causes Act 1965, c. 25, § 40(1)(a).

[41] *Id.* at § 40(1)(b).

[42] [1895] A.C. 517 (P.C.).

[43] *Cf. Re* Scullard, [1957] Ch. 107; Miller v. Teale, 92 Comnw. L.R. 406, 419 (Austl. High Ct. 1952).

by reference to the law of the husband's foreign domicile, in disregard of the decree.[44] It is suggested, though with considerable hesitation, that English courts will adopt the last-mentioned course of action.

Although the view that recognition in virtue of the rule in *Travers v. Holley*[45] should be restricted to divorces abroad of spouses who are domiciled in England either at the time of the foreign divorce or of the conclusion of a new marriage has not commended itself to the English courts, some support for it can be derived from other legislation which has extended the jurisdiction in divorce of English courts in exceptional circumstances. Thus the Indian Divorces (Validity) Act, 1921, and the Indian and Colonial Divorce Jurisdiction Act, 1926, section 1(1) extended the recognition of Indian divorces, granted in circumstances amounting to less than domicile, to divorces pronounced in respect of spouses domiciled in England or Scotland. Again, the Matrimonial Causes (War Marriages) Act, 1944, operated only in favour of women who, prior to their marriage, had been domiciled in England or Scotland and had not taken up residence in the country of their husband's domicile.[46] It must be admitted that, in the last instance, the English domicile is that of the wife before the marriage and after the divorce. Nevertheless, that connection with England, apart from exclusive residence in England, is significant, not only because it introduces the notion of domicile into the rule of jurisdiction, but also because the relevant domicile is that of the wife after the divorce. As was suggested above, the same factor is relevant in considering the effect of an English divorce granted to the wife by virtue of paragraph (a) or (b) of section 40(1) of the Matrimonial Causes Act, 1965. Its existence raises the question whether the recognition of foreign divorces is an independent principal question in the conflict of laws, or whether it constitutes a preliminary question.

III. Recognition of Foreign Divorces: Preliminary or Main Question

An affirmative answer in favour of the second alternative was given by Mr. Justice MacKay in *Schwebel v. Ungar*[47] when he said: "To determine that status ... our inquiry must be directed not to the effect to be given under Ontario law to the divorce proceedings in Italy, but to the effect to be given to these proceedings by the law of the country in which she was domiciled at the time of the marriage to the plaintiff in 1957, namely

[44] *Cf.* M. Wolff, Private International Law § 358, at 379, & n.3 (with references) (2d ed. 1950).

[45] [1953] P. 246.

[46] The Matrimonial Causes (Dominion Troops) Act, 1919, 9 & 10 Geo. 5, c. 28, was an imperial statute which claimed recognition throughout the British Empire, as it then was.

[47] [1964] 1 Ont. 430, at 441, 42 D.L.R.2d 622, at 633 and also see the valuable comment by Lysyk, 43 Can. B. Rev. 363 (1965); Webb, *Bigamy and Capacity to Marry*, 14 Int'l & Comp. L.Q. 659 (1965).

Israel." The Court of Appeal of Ontario relied on the law of the domicile at the time of the marriage in issue, *i.e.*, on the law governing capacity to enter into a new marriage, as well as on the rules of the conflict of laws of the latter, and treated the recognition of the Italian divorce as a preliminary question. Thus it was able to hold that a previous informal divorce in Italy between spouses who at the time were domiciled in Hungary (where the divorce could not be recognized) was nevertheless effective in dissolving the previous marriage since the divorce was recognized by the law of the subsequent domicile of the spouses, Israel. If the court had regarded the question of the recognition of the divorce in Italy as a main question, independent of, and on an equal footing with, the question whether the wife, who had been so divorced, could marry again, it would have had to deny recognition of the divorce in Ontario since, at common law, only the courts of the domicile at the time of the divorce have jurisdiction to pronounce such a decree.

The Supreme Court,[48] employing a pragmatic approach, did not dissociate itself from the approach adopted by the Ontario Court of Appeal and may thus be said to have approved this approach, at least within the narrow limits of the facts of the case.

It was probably unnecessary in the particular circumstances to draw this distinction and to consider the recognition of the informal divorce in Italy as anything else but a principal question. The court was confronted with a conflict of laws in time. According to Hungarian law, which was applicable according to the Ontario rules of the conflict of laws as the law of the domicile of the spouses at the time of the divorce, the divorce in Italy was ineffective. Therefore the marriage subsisted. At the moment when the parties obtained a domicile in Israel, the marriage terminated, since the law of Israel recognizes extrajudicial divorces of Jews pronounced in the presence of any Rabbinical court. Thus, whether the wife was domiciled in Israel or in Ontario at the time when she entered into a new marriage in Ontario, she was an unmarried woman capable of marrying again.

In the particular circumstances of *Schwebel v. Ungar*, the result is the same irrespective of whether the recognition of the divorce in Italy is treated as a main or as a preliminary question incidental to the determination of the question whether the divorced wife has capacity to enter into a new marriage. However, the problem must be put in more general terms: Is the question of the recognition of a foreign divorce always a main question, with the result that the conflict rules of the forum determine uniformly in all disputes concerning a foreign divorce (such as capacity to marry, duty to maintain, custody) whether the divorce must be recognized or not? Alternatively, is the question of the recognition of a foreign divorce (at

[48] Schwebel v. Ungar, [1965] Sup Ct. 148, 48 D.L.R.2d 644.

times) a preliminary question with the result that at one time the conflict rules of the forum and at other times the conflict rules of the *lex causæ* of the particular main question determine, for the purposes of the particular issue before the court only, whether the divorce must be recognized or not? So formulated, the problem is whether the divisible divorce is a reality outside the United States.

The House of Lords, in *Shaw v. Gould*, [49] set a course whereby each legal issue is determined in historical sequence, and the rules of the conflict of laws of the forum apply to each issue successively. Thus, in the circumstances before the House of Lords, the issues, in a historical order of events, were: the marriage of Elizabeth to Buxton in England, the recognition of the decree of divorce obtained in Scotland while the spouses were domiciled in England, the validity of the subsequent marriage of Elizabeth in Scotland to Shaw, who was domiciled in Scotland, and the legitimacy of the children born in Scotland of the second union. If these issues had not been treated, one and all, as main questions, but some of them as preliminary questions, the result would have been the opposite. If the main issue is the legitimacy of the children born of the second union in Scotland, it must be decided in accordance with the law of the alleged lawful father's domicile, which is Scotland. The law of Scotland as the *lex causæ*, including its rules of the conflict of laws, must determine the capacity of Elizabeth and Shaw to enter into a marriage as well as the validity of the previous divorce in Scotland. On the strength of these considerations, the children would have been legitimate, not illegitimate as the House of Lords held them to be. However, the last mentioned approach was used by Mr. Justice Romer in *Re Bischoffsheim*. [50]

The problem is, therefore, which approach is to be preferred in determining whether a foreign divorce is to be recognized. The solution lies, it is believed, in the answer to the question whether the institution (legitimacy, divorce) differs considerably from country to country, or is uniform. When English domestic law regarded as legitimate only those children who were born in lawful wedlock, while foreign law took notice of legitimacy arising from legitimation by subsequent marriage or otherwise, and as a consequence of a putative marriage, it is understandable that English private international law, as part of the *lex fori*, insisted on compliance with its own tests and was loath to subordinate this determination to the rules of the conflict of laws of a foreign *lex causæ*. A lawful marriage according to the English rules of private international law had to exist, not a general status of legitimacy. Today, when legitimation by subsequent

[49] L.R. 3 H.L. 55, at 80 (1868); *but see id.* at 97 (per Lord Colonsay).
[50] [1948] Ch. 79.

marriage [51] and legitimacy arising from a putative marriage [52] have become part of English domestic law, insistence on proof of a valid marriage according to the rules of English private international law has become pointless. It remains to apply these conclusions to the problem of divorce, bearing in mind that what appears at first sight to be a problem of jurisdiction may conceal a real choice of law. As long as divorce was unknown in English law, and perhaps even when the earliest English provisions on divorce had been enacted, it is understandable that English private international law, as part of the *lex fori*, insisted on compliance with its own tests. Moreover, capacity to marry became subject to the rigid test of domicile only in 1877, [53] while it was formerly determined by the fortuitous circumstance that the marriage took place in a certain country. Today, when the institution of divorce has assumed fairly uniform features throughout the world, the time may have come, not for diversifying and enlarging the English rules on the recognition of foreign jurisdictions to pronounce divorces, but to subordinate this recognition, as a preliminary question, to the law governing the capacity to remarry, including its rules of the conflict of laws.

Such a change of attitude would not operate as a panacea and would leave a number of problems unsolved. In some instances, it would relieve existing difficulties, as the following example will show. *H*, an Italian national, is married to *W*, who has retained her original Swiss citizenship. They are domiciled in Switzerland. On a petition for divorce brought by *W* in Switzerland, the Swiss court assumes jurisdiction on the ground, admitted by Swiss law, that *W* is a Swiss national, applies Swiss law and pronounces a decree of divorce. *H* wishes to marry again. According to Swiss private international law [54] capacity to marry is governed by the *lex patriæ*, *i.e.*, Italian law. Italian law does not recognize foreign divorces of Italian nationals. [55] Since Switzerland and Italy are parties to the Hague Convention on Marriage of 12 June 1902, Swiss courts are precluded, in the circumstances, from disregarding on the ground of public policy *H*'s incapacity to enter into a second marriage. *H* is validly divorced in Switzerland, but he cannot marry there. *H*, wishing to marry *X*, a German national domiciled in Germany, comes to England. According to English private international law, the Swiss divorce will be recognized since *H* was domiciled in Switzerland at the relevant time; moreover, *W* was ordinarily resident there all her life and was a Swiss national. *H*'s capacity to marry is governed by the law of his domicile, Switzerland, and renvoi is excluded here. A Swiss divorce

[51] Legitimacy Act, 1926, 16 & 17 Geo. 5, c. 60, § 1; Legitimacy Act, 1959, 7 & 8 Eliz. 2, c. 73, § 1.

[52] Legitimacy Act, 1959, 7 & 8 Eliz. 2, c. 73, § 2.

[53] Sottomayor v. de Barros (No. 1), 3 P.D. 1 (C.A. 1877).

[54] Gesetz betr. die zivilrechtlichen Verhältnisse der Niedergelassenen und Aufenthalter art. 7(c) (Law of June 25, 1891, Swit.).

[55] Pro. Gen. App. Bari v. Trizio, *in* [1957] RIVISTA DI DIRITTO INTERNAZIONALE 147 (Corte di Cassazione 1955); Proc. Gen. App. Turin v. Ghinolfi, *in* [1957] RIVISTA DI DIRITTO INTERNAZIONALE 575 (Corte di Cassazione 1956).

confers capacity to marry again. Thus *H* is free to marry in England, but the marriage is invalid in Switzerland. [56] If the validity of the divorce were to be treated as a preliminary question, it would be found to be ineffective in Switzerland, at least in so far as *H*, though not *W*, is concerned, and a greater harmony of decision would be achieved.

In other instances, the technique of treating the question of the recognition of foreign divorces as a preliminary question may create a dangerous state of uncertainty and confusion. Thus a divorce obtained abroad in circumstances such as those in *Travers v. Holley* [57] would be ineffective in England, if one of the spouses, being domiciled abroad where such a divorce is not recognized, wished to enter into a new marriage in England, and he would be precluded from doing so. If that spouse subsequently acquired a domicile in England and died there intestate, without having entered into a new marriage, his former wife would be precluded from claiming a share under the Intestate Estates Act, 1952, [58] since English law governs the succession, and English private international law governs the preliminary question.

In most other situations it will make little difference whether the recognition of a foreign divorce is treated as a preliminary or as a main question, since English law will be both the *lex fori* and the *lex causæ*. Such is the case when one of the spouses brings a petition for judicial separation or for restitution of conjugal rights. The recognition of a foreign divorce is clearly a main question—and perhaps the only instance of such recognition being a main question—when an action for a declaration that the divorce is valid is brought in England. However, a prudent practice requires the petitioner in such proceedings to be domiciled in England. [59]

IV. Preliminary Conclusions

The conclusion, so far, has been this: In view of the close link between divorce and capacity to marry,

> (1) The recognition of foreign divorces can be determined by broad rules, in so far as the spouses are domiciled in the forum (England); if the spouses are not domiciled in the forum a rigid rule which co-ordinates the recognition of the foreign divorce with the law governing capacity to marry is desirable. At the time when the foreign proceedings are instituted, this is the law of the domicile of the parties at that time, and no allowance can be made with respect to a possible change of this domicile after the divorce. Therefore, jurisdiction should be

[56] Caliaro v. Canton de Argovie, 80 Pt. I. BGE 427 (1954), [1957] Revue critique de droit international privé 52. *See also* Reymond, Comment, 5 Int'l & Comp. L.Q. 144 (1956).

[57] [1953] P. 246.

[58] Intestates' Estates Act, 1952, 15 & 16 Geo. 6, 1 Eliz. 2, c. 64 as amended.

[59] Har-Shefi v. Har-Shefi (No. 1), [1953] P. 161; *cf.* Garthwaite v. Garthwaite, [1964] P. 356.

concentrated on the courts of the foreign domicile; alternatively, the recognition of such foreign divorces should be treated as a preliminary question to be decided according to the law of the foreign domicile, including its rules of the conflict of laws, of the spouse who wishes to marry again or the distribution of whose estate is in issue.

(2) The exercise of jurisdiction by the courts of the forum (England) on a broad basis, such as that provided by section 40(1)(a), (b) of the English Matrimonial Causes Act, 1965, causes little difficulty and will normally enable the wife to marry again.[60] The case of the divorced husband, who is domiciled abroad, is more difficult. Here the choice lies between allowing him to marry again on the strength of the English decree in disregard of his personal law, if this should not recognize the English divorce, or of observing the precepts of his personal law, which continues to regard him as married, and of denying him the right to marry again, in disregard of the English decree of divorce.

V. Recognition of Foreign Divorces in the Commonwealth

It is interesting to observe that the development in the Commonwealth has followed the opposite course. Recognition has been accorded to foreign divorces on a scale which exceeds by far the limits within which the courts in the Commonwealth can exercise jurisdiction themselves.

Little need be said about the Canadian legislation[61] and practice. In matters of recognition of decrees granted outside Canada it would seem that the English rules known as the rules in *Le Mesurier v. Le Mesurier*[62] and *Travers v. Holley*[63] have been taken over.[64] Whether recognition of divorces pronounced in other provinces follows from the federal character of the extending local jurisdiction, or whether such recognition requires, once more, recourse to the doctrine in *Travers v. Holley* appears to have remained an open question.[65] In addition, the rule in *Armitage v. Attorney-General*[66] applies.[67] These rules, together with the principle that the

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[60] *See* discussion in text at 54-56 *supra*.

[61] The Divorce Jurisdiction Act, Can. Rev. Stat. c. 84 (1952).

[62] [1895] A.C. 517 (P.C.).

[63] [1953] P. 246.

[64] Bednar v. Dep'y Reg. of Vital Statistics, 31 W.W.R. (n.s.) 40, 24 D.L.R.2d 238 (Alta. Sup. Ct. 1960) (separate domicile); *Re* Allarie, 41 D.L.R.2d 553 (Alta. Sup. Ct. 1963); Yeger v. Reg. of Vital Statistics, 26 W.W.R. (n.s.) 651 (Alta. Sup. Ct. 1958); *but see* La Pierre v. Walter, 31 W.W.R. (n.s.) 26, 24 D.L.R.2d 483 (Alta. Sup. Ct. 1960). For the rule in *Le Mesurier v. Le Mesurier*, see J. Castel, Private International Law 122 (1960), and the cases cited in n.85.

[65] *Cf.* Kennedy, Comment, 32 Can. B. Rev. 211, at 213 (1954); Payne, *Recognition of Foreign Divorce Decrees in the Canadian Courts*, 10 Int'l & Comp. L.Q. 847 (1961); Griswold, *Divorce Jurisdiction and Recognition of Divorce Decrees—A Comparative Study*, 65 Harv. L. Rev. 193, at 219 (1951).

[66] [1906] P. 135.

[67] Wyllie v. Martin, [1931] 3 W.W.R. 465 (B.C. Sup. Ct.); Burnfiel v. Burnfiel, [1926] 1 W.W.R. 657, [1926] 2 D.L.R. 129 (Sask.); Lyon v. Lyon, [1959] Ont. 305; Walker v. Walker, [1950] 2 W.W.R. 411, [1950] 4 D.L.R. 253 (B.C.).

courts of the domicile of the spouses have general jurisdiction in divorce, make up a balanced system, in which the local exercise of jurisdiction is matched by the recognition of the same, or similar or equivalent jurisdiction abroad.

No such neat balance as that to be found in Canadian conflict of laws is expressed in the modern legislation which has been recently enacted in New Zealand [68] and in Australia. [69] These acts distinguish clearly between the conditions under which New Zealand and Australian courts respectively can exercise jurisdiction and those under which foreign decrees can be recognized in New Zealand and Australia. Before this legislation can be analysed, it must be noted that, for the purposes of jurisdiction in divorce, whether exercised by Australian or New Zealand courts, or by courts elsewhere, a married woman is accorded a separate domicile. The two acts achieve this result by somewhat different means. The New Zealand act states generally [70] that, for the purposes of the act, the domicile of a married woman, wherever she was married, shall be determined as if she were unmarried and, if she is a minor, as if she were an adult. The term "domicile" bears the meaning attributed to it by the law of New Zealand. The Australian act provides that a deserted wife, who was domiciled in Australia either immediately before her marriage or immediately before the desertion, shall be deemed to be domiciled in Australia and that a wife, who is resident in Australia at the date of instituting proceedings and has been so resident for the period of three years immediately preceding that date, shall be deemed to be domiciled in Australia at that date. [71] This unilateral rule, which establishes only a separate domicile of married women in Australia, has its exact counterpart in Part X of the Australian act, which deals with the recognition of foreign divorces and accords to wives a separate foreign domicile under the same conditions. [72] Thus both acts attribute to a wife a separate domicile for purposes of jurisdiction in divorce. Only the New Zealand act employs the general rules on domicile, by way of the fiction that the wife is a *feme sole*. The Australian act relies on the modern criteria of desertion and on a previous domicile in the country concerned, or on residence for a period of three years. The only notable differences between these provisions seem to consist in the treatment of deserting wives and of wives who have separated from their husbands by agreement. While such married women appear to be able to acquire a separate domicile at any time according to the law of New Zealand, they cannot enjoy the benefit of a fictitious domicile of their own under the Australian act, except after three years' ordinary residence in the country concerned.

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[68] Matrimonial Proceedings Act, Act No. 71 of 1963 (N.Z.). [Hereinafter cited N.Z. Act.].
[69] Matrimonial Causes Act, Act No. 104 of 1959 (Austl.). [Hereinafter cited Austl. Act.].
[70] N.Z. Act at § 3.
[71] Austl. Act at § 24.
[72] Austl. Act at § 95(3).

With these notions of a separate domicile of a married woman in mind, it is possible to examine the jurisdictional provisions of these acts. A foreign divorce is recognized:

> (a) If one or both of the parties were domiciled in the foreign country concerned. [73]

It is irrelevant, for the present purpose, that according to the New Zealand act, the party or parties concerned must have been domiciled in the foreign country at the time of the decree, while the Australian act requires the domicile to have existed at the time when the proceedings were instituted. It is noteworthy, however, that according to the Australian act, the party at whose instance the dissolution was effected, or if it was effected at the instance of both parties, either of those parties, must have been so domiciled. This may be an attempt to perpetuate, unnecessarily it is believed, the rule in *Levett v. Levett* [74] which was itself the product of a liberal technique of statutory interpretation.

> (b) If one or both of the parties were resident in the foreign country and had been so resident for a continuous period of not less than two years at the time when the proceedings were commenced. [75]

In this form the provision is only to be found in the New Zealand act. The Australian act, however, in so far as it relies on residence, refers to residence by a wife for a period of three years immediately preceding the institution of the proceedings. [76]

> (c) If one or both of the parties were nationals or citizens of the foreign country or of the sovereign state of which that country forms part. [77]

This provision is peculiar to New Zealand and has no counterpart in the law of Australia.

> (d) If the wife was deserted by her husband, and the husband was immediately before the desertion domiciled in the foreign country [78] or if the wife was so domiciled immediately before her marriage or immediately before her desertion. [79]

These provisions reflect, respectively, the techniques of the New Zealand and Australian legislation to attribute to a wife a separate domicile, either generally or in specific circumstances. They are recalled here, separately,

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[73] N.Z. Act at § 82(1)(a); Austl. Act at § 95(2)(a).
[74] [1957] P. 156 (C.A.).
[75] N.Z. Act at § 82(1)(b)(i).
[76] Austl. Act at § 95(3)(b).
[77] N.Z. Act at § 82(1)(b)(ii).
[78] N.Z. Act at § 82(1)(b)(iii).
[79] Austl. Act at § 95(3)(a).

since their factual basis rather than their legal characterization is significant in the present context.

> (e) If the husband was deported and the husband was immediately before the deportation domiciled in the foreign country. [80]

No such provision is to be found in the Australian act.

> (f) If the wife was legally separated from her husband, by order of a competent court or by agreement, and the husband was at the date of the order or agreement domiciled in that country. [81]

This provision, the purpose of which seems to be to eliminate the effect of *Lord Advocate v. Jaffrey* [82] and *Attorney-General of Alberta v. Cook*, [83] has no equivalent in the Australian act.

> (g) If the rule in *Armitage v. Attorney-General* [84] applies.

Since the New Zealand act acknowledges the existence of a separate domicile of the wife in matters of divorce, the act is satisfied if the foreign divorce is recognized by the courts of the country where one of the parties to the marriage is domiciled. [85] The Australian act, on the other hand, attempts to cut down a possible extended effect of the rule by requiring that the foreign decree must be recognized by the courts of the country where the parties were domiciled at the time of the dissolution of the marriage. [86] While the Australian act has thus succeeded in eliminating the operation of the rule in *Armitage v. Attorney-General* [87] in circumstances comparable to those in *Mountbatten v. Mountbatten*, [88] but which are of greater importance in Australia, given the broad range of foreign jurisdictions which are recognized by the act, it may be doubted whether it has achieved this result in situations such as that which presented itself in *Schwebel v. Ungar*. [89]

> (h) If the divorce obtained abroad is recognized under the common-law rules of private international law in addition to the rules incorporated in the act. [90]

In face of this extensive array of provisions permitting the courts of New Zealand and Australia to recognize foreign divorces in a great variety of circumstances, even if the parties are not domiciled in New Zealand or Australia, it is even more striking to observe the strict limits within which

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[80] N.Z. Act at § 82(1)(b)(iii).
[81] N.Z. Act at § 82(1)(b)(iv).
[82] [1921] 1 A.C. 146, at 161.
[83] [1926] A.C. 444 (P.C.).
[84] [1906] P. 135.
[85] N.Z. Act at § 82(1)(c); Gould, *The Matrimonial Proceedings Act, 1963 and the Conflict of Laws, in* A. G. DAVIS ESSAYS 26, at 34 (J. Northey ed. 1965).
[86] Austl. Act at § 95(4).
[87] [1906] P. 135.
[88] [1959] P. 43.
[89] [1964] 1 Ont. 430, 42 D.L.R.2d 622 and authorities cited in notes 47 & 48 *supra*.
[90] N.Z. Act at § 82(2); Austl. Act § 95(5).

these same courts can exercise jurisdiction themselves. In New Zealand, where the wife is accorded a separate domicile of her own, the petitioner or the respondent must be domiciled in the country. In a limited number of circumstances, residence for at least two years immediately preceding the filing of the petition is required in addition.[91] In Australia, the petitioner must be domiciled in the country.[92] For this purpose, a deserted wife who was domiciled in Australia either immediately before her marriage or before the desertion, and a wife who is resident in Australia at the date of instituting proceedings and has been so resident for three years, are deemed to be domiciled in Australia.[93]

VI. New Trends: England

In the light of the development sketched above and of the theoretical and practical conclusions drawn therefrom, it is now necessary to turn to the recent decision of the House of Lords in *Indyka v. Indyka.*[94] Its practical effect is difficult to gauge at present, but it is clear that, as regards recognition of foreign divorces, the evolution which covered the last hundred years has been given a new direction.

In 1938, while domiciled in Czechoslovakia, the husband married there. As a result of the war, he found himself in England and, in 1946, acquired an English domicile. The wife, who had stayed behind, obtained a divorce from a Czech court in January, 1949 on the ground of profound disruption of matrimonial relations. In 1959, the husband entered into a new marriage in England. In subsequent proceedings brought by the second wife, the validity in England of the Czech divorce was in issue. In 1937, the Matrimonial Causes Act, 1937, section 13 (now section 40(1)(a) of the Matrimonial Causes Act, 1965) enabled a deserted woman, whose husband had been domiciled in England immediately before the desertion, to resort to the English courts for the purpose of obtaining a divorce. On December 16, 1949, the Law Reform (Miscellaneous Provisions) Act, 1949, came into force, section 1(1) of which (now section 40(1)(b) of the Matrimonial Causes Act, 1965) permitted a woman who had been ordinarily resident in England for three years to petition for a decree in England, although the husband was domiciled abroad. In 1953, it was decided in *Travers v. Holley*[95] that these provisions, as consolidated in section 18(1)(a), (b) of the Matrimonial Causes Act, 1950, operated as a bilateral rule. The question was whether the Czech decree of January, 1949, could be recognized, by virtue of the rule in *Travers v. Holley*, in the reciprocal application of

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[91] N.Z. Act at § 20, in conjunction with § 21(m), (n) & (o).

[92] Austl. Act at § 23(4).

[93] *Id.* at § 24(1) & (2).

[94] [1966] 2 W.L.R. 892 (P.D.A.) (per Latey, J.); [1966] 3 W.L.R. 603 (C.A.); [1967] 3 W.L.R. 510 (H.L.).

[95] [1953] P. 246.

section 40(1)(a) or (b), notwithstanding that the forerunner of this section had been first enacted after the divorce had been pronounced in Czechoslovakia. Both Mr. Justice Latey, who refused to recognize the decree, and the Court of Appeal, which held that it was effective in England, considered the problem to be one of applying the rule in *Travers v. Holley* in a conflict of laws in time. The former did so by way of statutory interpretation; the latter on the strength of alleged principles of the common law. [96]

The House of Lords held that the Czech decree must be recognized, but the reasons differed from those adduced in the courts below. Their Lordships drew a clear distinction between jurisdiction in divorce and the recognition of foreign decrees of divorce. [97] In order to do so, they had to dissociate themselves from a long line of authorities beginning in 1868 and ending in 1936. [98] They did so partly by reference to the statutory extensions of English jurisdiction and comparable enlargements of the jurisdiction of foreign courts, [99] partly by reference to unsuccessful attempts in the past by English courts to enlarge their jurisdiction, [100] partly on the reports and recommendations of two royal commissions [101] and partly by means of frontal assaults on some old favourites of the conflict of laws. Since the first two aspects were examined before, and the third was not canvassed to any extent, it is only necessary to concentrate on the last.

In their Lordships' view, the advice of the Privy Council in *Le Mesurier v. Le Mesurier* [102] was the main obstacle barring a more generous approach towards the recognition of foreign judgments. Although *Le Mesurier* was concerned with jurisdiction and not with the recognition of foreign judgments, and only with the jurisdiction of the courts in Ceylon in virtue of Roman-Dutch law there in force, it must be admitted that the generality of the principle formulated by the Privy Council applied equally to both aspects. However, in criticising the Privy Council for having misconstrued the authority of von Bar,[103] Lords Reid and Pearce did less than justice to the acumen of Lord Watson and gave too much credit to a translation. [104] In fact, von Bar, dealing with choice of law in matters of divorce, said this:

> Divorce and permanent separation pronounced by a court (*separatio a thoro et mensa, séparation de corps*) ... are also subject to the national (domiciliary) law of the spouses....
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> ...

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[96] For a critical appraisal see Lipstein, Comment, [1967] CAMB. L.J. 42.

[97] [1967] 3 W.W.R. 510, at 519D, 524F (per Lord Reid), 531E, 532A (per Lord Morris), 535D (per Lord Pearce), 548B, C (per Lord Wilberforce); *but see* at 557B.

[98] *See* authorities cited in notes 1-5 *supra.*

[99] *See* discussion in text at 54-56 *supra.*

[100] *See* authorities cited in notes 7 & 8 *supra.*

[101] REPORT OF THE ROYAL COMMISSION ON DIVORCE, CD. 6478 (1912); REPORT OF THE ROYAL COMMISSION ON MARRIAGE AND DIVORCE, CMD. 9678 (1956); see [1967] 3 W.L.R. at 534, 545, 553.

[102] [1895] A.C. 517 (P.C.).

[103] L. VON BAR, PRIVATE INTERNATIONAL LAW § 173, at 382 (Gillespie transl. 1892).

[104] [1967] 3 W.L.R. at 523B (per Lord Reid), 537A (per Lord Pearce).

> The dilemma that, on the one hand, the national law, and, on the other hand, the *lex fori* applies is solved, however, by the device that in matrimonial causes only the national courts have jurisdiction, leaving aside any legislation to the contrary.... Therefore a decree of divorce pronounced by any other courts than a Court of the *home state* is to be regarded in all other countries as inoperative. [105]

Speaking of jurisdiction in proceedings affecting status, and of proceedings for a declaration that a divorce is invalid, von Bar said :

> Consequently the courts of the States to which the parties belong must have *exclusive jurisdiction.* It is true that this exclusive jurisdiction may create great inconvenience, if the distance between the home State and the place of the foreign domicile is considerable and especially if the domicile is of long standing.... Nevertheless it is necessary, as a matter of principle, to insist on this exclusive jurisdiction, if questions of status are to be governed at all by the law of the nationality.... [106]

Thus von Bar was treating jurisdiction of local and of foreign courts on an equal footing and according to the same principles. He envisaged only one, exclusive jurisdiction, namely, that of the courts of the country, the law of which was the personal law of the parties. In his view, this was the *lex patriae,* [107] but the words in brackets, cited above, show that he was prepared, as an alternative, to make a concession in favour of the courts of the country of the domicile, if the law of the country concerned relied on the *lex domicilii* to determine personal status. By postulating an exclusive jurisdiction, he forged the link between jurisdiction and the personal law which, in the absence of an exclusive jurisdiction, can only be achieved by postulating a uniform rule of choice of law. As a realistic student of comparative private international law he acknowledged that the exclusive jurisdiction must be *either* that of the country of the nationality *or* that of the country of the domicile of the spouses. The Privy Council, in *Le Mesurier,* followed this train of thought faithfully. The other two authorities of considerable weight, *Shaw v. Gould* [108] and *Harvey v. Farnie* [109] were hardly given more than passing attention, [110] and all these decisions were regarded as coloured by the subsequent ossification of the concept of domicile.

In the opinion of their Lordships, the statutory expansion of the jurisdiction of English courts required to be matched, but not copied, by broad rules permitting the recognition of foreign decrees of divorce. Unfortunately, the clarity with which this need was expressed was not equalled

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[105] 1 L. VON BAR, THEORIE UND PRAXIS DES INTERNATIONALEN PRIVATRECHTS § 173, at 482-84 (2d ed. 1889). (Writer's transl., emphasis added.).

[106] 2 *id.* § 421, at 435; *see also* 1 *id.* § 178, at 497. (Writer's transl., emphasis added.).

[107] *See also* J. WESTLAKE, PRIVATE INTERNATIONAL LAW § 41, at 76 (2d ed. 1880).

[108] L.R. 3 H.L. 55 (1868).

[109] 8 App. Cas. 43 (1882).

[110] Indyka v. Indyka, [1967] 3 W.L.R. 510, at 532G (per Lord Morris), 536C (per Lord Pearce), 548F, 550D (per Lord Wilberforce).

by precise indications of the criteria to be employed henceforth. Moreover, since all members of the House [111] approved of the result reached by the Court of Appeal in recognizing the Czech divorce in reliance on the rule in *Travers v. Holley*, it is not easy to say which, if any, of the new criteria can be regarded as a *ratio decidendi*. They will now be reviewed in succession.

In the first place, the courts of the domicile of the spouses have jurisdiction. [112] The majority understood this to mean the domicile of the husband, [113] but Lord Pearson was prepared to recognize the jurisdiction of foreign courts which had acted on a different characterization of domicile consonant with their own notions. [114] Such a conclusion strikes at the roots of any system of conflict of laws, for if any principle is accepted today, it is that the characterization of connecting factors must rely on the notions of the *lex fori*, no matter whether rules of choice of law or of jurisdiction are concerned. [115]

In the second place, the courts of the nationality of the spouses have jurisdiction. [116] This suggestion was put forward tentatively only by some members, [117] by others as indicating a substantial connection [118] and by one or possibly two as including jurisdiction based on the nationality of one spouse only, if the nationality of the spouses should differ. [119]

In the third place, their Lordships were agreed that the rule in *Armitage v. Attorney-General* [120] is to be maintained in supplementing the jurisdiction of the courts of the domicile and, possibly, also of the nationality of the spouses [121] or even of one of them only. [122]

In the fourth place, their Lordships were attracted by the test of residence, but their conception of residence was not uniform. Lord Reid relied on the notion of the matrimonial home; [123] Lord Pearce and Lord

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[111] *Id.* at 515D, 517H (per Lord Reid), 533A-F, 534C (per Lord Morris), 540G, 542F, 546B (per Lord Pearce), 559B, F (per Lord Wilberforce), 561G, 562E, 564H (per Lord Pearson).

[112] *Id.* at 525A (per Lord Reid), 531E (per Lord Morris), 541F, 545E (per Lord Pearce), 548A, 556F, 557D (per Lord Wilberforce), 563C, G (per Lord Pearson).

[113] *Id.* at 557D (per Lord Wilberforce).

[114] *Id.* at 563G.

[115] *E.g.*, *Re* Annesley, [1926] Ch. 692; A. DICEY, *op. cit. supra* note 23, at 31, n.62, 718 & n.58; Entores, Ltd. v. Miles Far East Corp., [1955] 2 Q.B. 327, [1955] 2 All E.R. 493 (C.A.).

[116] Indyka v. Indyka, [1967] 3 W.L.R. 510, at 527E (per Lord Reid), 534D (per Lord Morris); 537A, 545F (per Lord Pearce), 551C, 557G (per Lord Wilberforce), 563D, F, 565A (per Lord Pearson); *but see* Shaw v. Gould, L.R. 3 H.L. 55, at 84 (1868), rejecting the interpretation by J. STORY, COMMENTARIES ON THE CONFLICT OF LAWS § 205, at 254, especially n.1 (6th ed. I. Redfield 1865).

[117] Indyka v. Indyka, [1967] 3 W.L.R. 510, at 527E, 521D, 523C (per Lord Reid), 557G (per Lord Wilberforce).

[118] *Id.* at 534D (per Lord Morris), 558A, G (per Lord Wilberforce).

[119] *Id.* at 563G (per Lord Pearson), 558A (per Lord Wilberforce).

[120] [1906] P. 135.

[121] Indyka v. Indyka, [1967] 3 W.L.R. 510, at 532A (per Lord Morris), 541G (per Lord Pearce), 557F (per Lord Wilberforce).

[122] *Id.* at 546A (per Lord Pearce).

[123] *Id.* at 523B, 525F-526B, 527A, G.

Wilberforce were impressed by this notion, having regard to the position of resident wives in England; [124] Lord Wilberforce considered residence either generally or in the particular case of wives living apart from their husband, [125] though with some hesitation, unless some substantial connection is found to exist. [126] Lord Pearson expressed similar sentiments. [127]

The somewhat hesitant allusions to residence probably reflect, negatively, a detachment from the present rigidly technical notion of domicile and, positively, the existence of the limited jurisdiction in England in virtue of section 40(1)(a), (b) of the Matrimonial Causes Act, 1965. However, Lord Reid's reliance on the matrimonial home, if it means the same as the matrimonial domicile in Scots law, requires further examination and definition, since in former times this concept perplexed Lord Deas [128] and was said by Lord Watson to be "vague." [129] As shown above, [130] the courts in Scotland have exercised jurisdiction, if the spouses were formerly domiciled in Scotland, if the last common place of residence was there and the husband has moved abroad, irrespective of whether he acquired a domicile in the foreign country, provided only that the parties had not separated by agreement. The matrimonial home or domicile is thus the last domicile where the parties lived together. Far from replacing the domicile it perpetuates it. If, as it seems most likely, this notion moved Lord Reid, his statements, couched in modern terms of English law, amount to this: in proceedings for divorce not only the wife, but also the husband, may seize the courts of the former domicile, if either the husband has deserted the wife or if the wife has given the husband grounds for leaving her. If this is and has been a rule of English law, the introduction, in 1937, of what is now section 40(1)(a) of the Matrimonial Causes Act, 1965, was *otiose*. If, on the other hand, Lord Reid intended to refer to the place of the present common residence of the spouses, shorn of the ballast of the requirement of a domicile of the husband in that country, it would mean that the decision of the majority in *Niboyet v. Niboyet* [131] had been restored. However, this interpretation is excluded, seeing that Lord Reid rested his judgment on the notion of a matrimonial home, in circumstances where no such home had existed for ten years.

Finally, it is possible, but unlikely, that Lord Reid envisaged the place of the last common residence of the spouses, not being their domicile, as a proper forum for proceedings in divorce, even if one or both of the spouses reside in another country at the time when the proceedings are

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[124] *Id.* at 546C, 547F.
[125] *Id.* at 557D, 558B.
[126] *Id.* at 558C, G.
[127] *Id.* at 564C, G.
[128] *See* authorities cited in notes 18 & 19.
[129] Le Mesurier v. Le Mesurier, [1895] A.C. 517, at 538 (P.C.).
[130] *See* discussion in text at 49-51 *supra*.
[131] 4 P.D. 1 (1878).

begun. Such a notion would not be in keeping with Scots law or with the opinion of the majority in *Niboyet v. Niboyet.*

VII. Conclusions

The principles for determining the recognition of foreign decrees of divorce formulated by the House of Lords do not differ to any noticeable extent from those which have been expressed by the legislature in New Zealand and in Australia. Like the latter, they fail to relate the recognition of foreign decrees of divorce to the resulting choice of law affecting capacity. As stated above, this correlation can only be achieved in one of two ways: either by concentrating jurisdiction in the country the law of which determines the ensuing capacity to marry or by linking jurisdiction, however extensive, to the requirement that the personal law must have been applied. The solutions in England, Australia and New Zealand fulfil neither of these conditions, and the danger of creating limping marriages has been greatly increased.

As pointed out above, this danger does not arise if recognition on an extensive scale is accorded to foreign decrees of divorce only if the spouses are domiciled in the recognizing country, *i.e.*, in the present case in England. In other words, if extensive recognition is to be accorded, a much more sophisticated system of rules must be devised which differentiates on the lines set out above between divorces granted abroad to spouses who are domiciled in the recognizing country and to those who are not.

The objections raised against the decision of the House of Lords in *Indyka v. Indyka,*[132] therefore, lose much of their force, if the decision can be restricted to the particular facts of the case, where the husband was domiciled in England at all relevant times. However, the generality of the statements made there renders this conclusion difficult. The danger of limping divorces may have been reduced, but this will have been achieved at the expense of the intended beneficiaries who may well be condemned to unmarried celibacy or exposed to the threat of nullity proceedings if they succeed in entering into a second marriage.

[132] [1967] 3 W.L.R. 510.