

THE LAW REFORM COMMISSION  
AN COIMISIÚN UM ATHCHÓIRIÚ AN DLÍ

(LRC 20-1985)

REPORT ON JURISDICTION IN PROCEEDINGS FOR  
NULLITY OF MARRIAGE, RECOGNITION OF FOREIGN NULLITY DECREES,  
AND THE HAGUE CONVENTION ON THE CELEBRATION AND RECOGNITION  
OF THE VALIDITY OF MARRIAGES (1978)

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First published 1985

**CHAPTER 1 INTRODUCTION**

In our Report on Private International Law Aspects of the Capacity to Marry and Choice-of-Law in Proceedings for Nullity of Marriage<sup>1</sup> we proposed wide-ranging reforms of the law on these two themes. In the present Report, we examine three remaining aspects of the subject of marriage in private international law. These are, first, the question of jurisdiction in proceedings for nullity of marriage, second, the question of recognition of foreign nullity decrees, and finally the question whether the Hague Convention on the Celebration and Recognition of the Validity of Marriages (1978) should become part of our law.

In Chapters 2 and 3 we set out the main features of the present law relating to jurisdiction and to recognition of foreign nullity decrees. In Chapters 4 and 5 we make proposals for reform on these two subjects. In Chapter 6, we examine the question whether the Hague Convention on Marriage should become part of our law. Chapter 7 contains a summary of our recommendations on these three subjects.

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<sup>1</sup> LRC 19-1985.

CHAPTER 2      JURISDICTION IN PROCEEDINGS FOR NULLITY OF  
MARRIAGE - THE PRESENT LAW

Introduction

Much uncertainty attaches to the question of jurisdiction. The courts "have not adopted a consistent position on the question, and the result is that the battlefield presents a somewhat scarred appearance".<sup>1</sup>

The easiest way of approaching the subject is to consider void and voidable marriages in turn.

The Distinction between Void and Voidable Marriages

Marriages that are invalid are divided, in Irish law, into two categories: those that are void and those that are voidable. There are several important differences between these two categories. Perhaps most important is the distinction regarding nullity proceedings. In the case of void marriages, no decree is necessary. Any court and any person may treat such marriages as void without being concerned to obtain a judicial decree to this effect (although in practice some categories of void marriages would raise such uncertainty as to their status that a decree might be essential to resolve the issue).

The next most important distinction is that the validity of a void marriage may be challenged by any person with a sufficient interest,<sup>2</sup> even after the death of the parties, whereas a voidable marriage may be challenged only by one of the parties during the lifetime of both; until it is annulled it is regarded as valid.

Other differences may be noted. Children of a void

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<sup>1</sup> Dicey & Morris, 8th ed., 1967, p. 349.

<sup>2</sup> Cf. Jackson, 100-102.

marriage are illegitimate. Children of voidable marriages<sup>3</sup> are regarded as legitimate unless or until the marriage is annulled.

Marriages that are void are those invalid on the grounds of nonage, prior subsisting marriage, prohibited degrees of relationship, formal defect and lack of consent (other than at least certain instances of mental incapacity which render a marriage voidable).<sup>4</sup> Impotence also renders a marriage voidable.

### Void Marriages

#### (1) Domicile

There is reasonably clear Irish authority for the proposition that the domicile of the respondent affords a basis of jurisdiction in nullity proceedings in respect of a void marriage. In Johnson (falsely called Cooke) v Cooke,<sup>5</sup> the respondent, a domiciled Irishman, already married to another woman in Ireland, subsequently went through a ceremony of marriage with the petitioner in India. The petitioner, ten years later, petitioned for a decree of nullity in Ireland, the respondent having returned to live in this country. In her petition the petitioner made no allegation relating to her own domicile: she was at the time

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<sup>3</sup> Formerly it was not generally appreciated that there could be children of a voidable marriage where one of the parties was impotent (the only ground that, until recently at all events, was generally considered to render a marriage voidable). It is now realised that this is wrong: the child may have been conceived before the marriage at a time when the impotent condition did not exist, or may have been conceived by fecundatio ab extra or by artificial insemination homologous (A.I.H.). See further our Report on Illegitimacy, (LRC 4-1982) paras. 100-101, and our Report on Nullity of Marriage, (LRC 9-1984) p. 73.

<sup>4</sup> Controversy surrounds the question whether marriages invalid for lack of consent are void or voidable: see our Report on Nullity of Marriage, p.73.

<sup>5</sup> [1898] 2 I.R. 130 (Q.B. Div., (Mat.) Madden, J., 1897).

residing in England.<sup>6</sup> Madden, J. held that the court had jurisdiction to grant the relief sought, "the respondent being domiciled in Ireland".<sup>7</sup> The decree of nullity specifically stated that the Judge found that the court had jurisdiction, "notwithstanding that it is not stated that the petitioner has an Irish domicil, the respondent having an Irish domicil".<sup>8</sup>

It should be noted that, in Johnson, the respondent was resident, as well as domiciled, in Ireland, and one commentator has observed that "it is not clear to what extent this fact played a part in the decision".<sup>9</sup> It is, perhaps, possible to argue that, in spite of Madden, J.'s failure to refer to the respondent's Irish residence, it was an assumed ingredient in the determination of the issue of jurisdiction.

Scots authority<sup>10</sup> and Canadian dicta<sup>11</sup> are in accord with the approach favoured in Johnson v Cooke.<sup>12</sup> In Johnson v Cooke, the respondent was the husband. On principle

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<sup>6</sup> Cf. North, 362:

"From the facts, it seems most unlikely that [the petitioner] was domiciled in Ireland for 'she was born in India of English parents and resided there' [": "[1898] 2 I.R. 130, at 132]."

<sup>7</sup> [1898] 2 I.R., at 133.

<sup>8</sup> Id., at 134.

<sup>9</sup> Rafferty, Recognition of Foreign Nullity Decrees, 46 Sask. L. Rev. 73, at 78, fn. 41 (1981).

<sup>10</sup> Aldridge v Aldridge, 1954 S.C. 58 (following Johnson v Cooke). See also Martin v Buret, 1938 S.L.T. 479.

<sup>11</sup> Berand v Berand, [1955] 1 D.L.R. 854 (N.S. Ct. for Div. & Mat. Causes,) Khan v Khan, 29 W.W.R. 181, at 184 (B.C. Sup. Ct., 1959), Re Capon, 49 D.L.R. (2d 675, at 684 (Ont. C.A., per Schroeder, J.A., 1965). See Castel, vol. 2, 166-167, Rafferty, Recognition of Foreign Nullity Decrees, 46 Sask. L. Rev. 73, at 78 (1981).

<sup>12</sup> Supra.

(supported by some authority)<sup>13</sup> the same rule should apply in respect of a respondent wife. It should be noted that, since the marriage is alleged to be void, the wife would never acquire her husband's domicile by operation of law and thus her domicile would be a matter for determination entirely independently of that of the man with whom she went through a ceremony of marriage. So far as jurisdiction is concerned, where a marriage is alleged to be void, the courts assume the outcome of the proceedings to the extent that they accept jurisdiction on the assumption that the allegation that the marriage is void is true; otherwise there would be an unbroken circularity of thought, which would have the effect of discriminating against women.

In England<sup>14</sup> and Scotland<sup>15</sup>, the courts have gone considerably further in accepting the domicile of the petitioner<sup>16</sup> as a basis of jurisdiction in respect of void marriages. One commentator has suggested<sup>17</sup> that an Irish court could take the same view though there are, of course, policy arguments both ways on this question.<sup>18</sup>

(2) Residence<sup>19</sup>

There is no direct modern authority on residence as a basis of jurisdiction in proceedings for a decree of nullity of a

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<sup>13</sup> Cf. Balshaw v Balshaw, 1967 S.C. 63, at 73, 84.

<sup>14</sup> White v White, [1937] P. 111, De Reneville v De Reneville, [1948] P. 100, at 112-113. See also Apt v Apt, [1948] P. 83, Casey v Casey, [1949] P. 420 (C.A.), Ross-Smith v Ross-Smith, [1963] A.C. 280, at 310 (per Lord Cohen) and 347 (per Lord Guest).

<sup>15</sup> Balshay v Balshaw, 1967 S.C. 63, at 80 (per Lord Guthrie).

<sup>16</sup> Whether husband e.g. (Balshaw v Balshaw, *supra*, Martin v Buret, *supra*) or wife (e.g. White v White, *supra*).

<sup>17</sup> North, 361.

<sup>18</sup> See Goodrich, Jurisdiction to Annul a Marriage, 32 Harv. L. Rev. 806 (1919).

<sup>19</sup> See North, Nullity Jurisdiction Based on Residence, 106 Sol. J. 949 (1962).

void marriage. An important decision, however, which would be likely to command much respect, is Mason v Mason (otherwise Pennington)<sup>20</sup>, decided in 1943 by Andrews, L.J.C. of Northern Ireland's King's Bench Division. There, after a detailed review of the judicial and scholarly authorities, Andrews, L.C.J. held that the residence of both parties afforded a good basis of jurisdiction. Rejecting Cheshire's advocacy<sup>21</sup> of domicile as the sole basis, Andrews, L.C.J. said:

"It may be that the law would be more acceptable to the jurists, and that it would be more certain, though perhaps in some ways less convenient, if domicile were made the sole test of jurisdiction in nullity as in divorce; but in my opinion that day has not yet arrived: and when it does come the change - for change I believe it to be - should be effected by clear and unmistakable legislation."<sup>22</sup>

Andrews, L.C.J. made it clear that, in referring to "residence", he was referring to bona fide residence not resulting "from any mere desire on the part of either spouse to attract the jurisdiction"<sup>23</sup> of the court.

Of course, the jurisdiction of the Ecclesiastical Courts was based on the residence of the respondent,<sup>24</sup> and it is difficult on this account to see why it should be necessary for the petitioner to establish that both parties were resident in the jurisdiction. It would seem only reasonable that Mason v Mason (otherwise Pennington)<sup>25</sup> should not be regarded as being inconsistent with recognising the residence of the respondent as an adequate basis of jurisdiction. Certainly English authority has

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<sup>20</sup> [1944] N.I. 134 (K. B. Div. (Mat.), Andrews, L.C.J., 1943).

<sup>21</sup> 2nd ed., 337-339.

<sup>22</sup> [1944] N.I., at 158.

<sup>23</sup> Id., at 142.

<sup>24</sup> Cf. id., at 143.

<sup>25</sup> Supra.



made such an extension.<sup>26</sup> (In this context North points out<sup>27</sup> that, in Johnson v Cooke<sup>28</sup> the respondent was resident as well as domiciled in Ireland, but it seems clear<sup>29</sup> that Madden, J. in this case did not base jurisdiction in any way on the element of residence.)

There is no Irish authority that supports basing jurisdiction on the residence of the petitioner alone. Authorities in other common law jurisdictions are clearly opposed<sup>30</sup> and there seems little likelihood of our courts accepting this head of jurisdiction.

### (3) Place of Celebration of Marriage

There is clear Irish authority in favour of basing jurisdiction on the fact that the marriage took place in Ireland. In Sproule v Hopkins,<sup>31</sup> the parties went through a ceremony of marriage in Ireland. The petitioner was domiciled and resident here; the respondent had been

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<sup>26</sup> Russ v Russ (No. 2), 106 Sol. J. 632 (1962), where Scarman, J. considered that the previous practice of the Ecclesiastical Courts supported this basis of jurisdiction. See North, Nullity Jurisdiction Based on Residence, 106 Sol. J. 949, at 950 (1962). In Canada it was originally held that the residence of the respondent alone would not be a good basis of jurisdiction: Purdy v Purdy, [1919] 2 W.W.R. 551, Vamvakidis v Kirkoff, [1929] 4 D.L.R. 1060; but later decisions support the view that such residence will suffice: Adelman v Adelman, [1948] 1 W.W.R. 1071 (Alta.), Khan (Worresck) v Khan, 21 D.L.R. (2d) 171 (B.C., 1959).

<sup>27</sup> North, 362.

<sup>28</sup> Supra.

<sup>29</sup> From the text of Madden, J.'s judgment as well as from the terms of the decree.

<sup>30</sup> Cf. De Reneville v De Reneville, [1948] P. 100, at 116-118 (C.A., per Lord Greene, M.R., 1947), Adelman v Adelman, supra, Shaw v Shaw, [1946] 1 D.L.R. 168 (B.C.C.A.), D. v D., 36 D.L.R. (3d) 17 (Ont., 1973).

<sup>31</sup> [1903] 2 I.R. 133 (K. B. Div. (Mat.) Andrews, J., 1902).

originally domiciled in Ireland but (he alleged)<sup>32</sup> had acquired an English domicile by the time of the ceremony of marriage. The petitioner sought a decree of nullity on the basis that the respondent was already married to another woman at the time of the ceremony.

Andrews, J. held that the court had:

"jurisdiction to hear and determine the question of the validity or invalidity of the marriage contracted between the parties in Ireland irrespective of any question as to the respondent's domicil or place of residence."<sup>33</sup>

Andrews, J. relied on the "very learned and well-considered judgment"<sup>34</sup> of Sir Creswell Creswell in Simonin v Mallac<sup>35</sup> as authority for this holding. He noted that in the later decision of Sottomayor v De Barros<sup>36</sup> Simonin v Mallac had been referred to without question.<sup>37</sup>

In Simonin v Mallac,<sup>38</sup> Sir Creswell Creswell had said that:

"There is nothing contrary to natural justice in calling upon [a person residing out of the

<sup>32</sup> Unsuccessfully, on the evidence: cf. [1903] 2 I.R., at 137-138.

<sup>33</sup> Id., at 136. See also id., at 137.

<sup>34</sup> Id.

<sup>35</sup> 2 Sw. & Tr. 67.

<sup>36</sup> 5 P.D. 94.

<sup>37</sup> See also Cooper v Crane, [1891] P. 369, Linke (otherwise Van Aerde) or Van Aerde, 10 Times L.R. 426 (P.D.A. Div., Gorell Barnes, J., 1894), Valier v Valier, 133 L.T. 830 (1925), Hussein v Hussein, [1938] P. 159, Simons v Simons, [1939] 1 K.B. 490, at 498, Hutter v Hutter, [1944] P. 95, at 102; all cited by Dicey & Morris, 8th ed., 1967, 354, fn. 35.

<sup>38</sup> 2 Sw. & Tr., at 75.

jurisdiction] to have the validity or invalidity of a supposed contract ascertained and determined by the tribunal of the country where it was entered into by him; for, according to Lord Stowell, in Dalrymple v Dalrymple,<sup>39</sup> it is an indispensable rule of law, as exercised in all civilised countries, that a man who contracts in a country engages for a competent knowledge of the law of contracts in that country. If he rashly presumes to contract without knowledge, he must take the inconveniences resulting from such ignorance upon himself, and not attempt to throw them upon the other party."

This view of jurisdiction in respect of contracts generally is no longer tenable<sup>40</sup> and it is scarcely surprising that in England, the authority of Simonin v Mallac<sup>41</sup> has subsequently come into question. The decision has been rejected in respect of jurisdiction for voidable marriages, but in Ross Smith v Ross Smith<sup>42</sup>, the House of Lords was divided as to its continuing operation with respect to void marriages. Later decisions<sup>43</sup> have interpreted Ross Smith as, in its result, affirming Simonin v Mallac in respect of void marriages.

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<sup>39</sup> 2 Hag. Con. 54, at 61 (1811).

<sup>40</sup> Cf. Ross Smith v Ross Smith, [1963] A.C. 280, at 295 (H.L. (Eng.), per Lord Reid, 1962):

"It is almost obvious to us today that the mere fact that an ordinary contract has been made in a particular country does not confer jurisdiction on the courts of that country to entertain an action with regard to that contract against a defendant who is neither present, resident nor domiciled in that country when the action is commenced. But the principles of private international law ... were developed surprisingly slowly, and that was by no means obvious in 1860."

<sup>41</sup> Supra.

<sup>42</sup> [1963] A.C. 280 (H.L. (Eng.), 1962).

<sup>43</sup> Padolecchia v Padolecchia (otherwise Leis), [1968] P. 314 (Sir Jocelyn Simon P., 1967), Garthwaite v Garthwaite, [1964] P. 356, at 390-391 (C.A., per Diplock, L.J.).

Voidable Marriages(1) Domicile

There are no Irish decisions in respect of domicile, but in England and Scotland the common domicile of the spouses has been held to afford a good basis for jurisdiction.<sup>44</sup> Since a voidable marriage is regarded as valid until a decree of nullity is obtained, the "wife" is regarded as taking the domicile of her "husband", so in practice the domicile of the "husband" at the time of the institution of the proceedings is the sole base of jurisdiction.<sup>45</sup> At all events, this has been the accepted approach in the several English decisions which have considered the question. In view of Constitutional, legislative and judicial developments in this country, especially over the past twenty years, it may well be that, if the issue were to come before an Irish court today, a different view, consistent with sex equality, would be adopted.

(2) Residence

There are no Irish decisions on the question of residence as a possible base for jurisdiction in respect of voidable marriages. The developments in England on this question are instructive. In Inverclyde (otherwise Tripp) v Inverclyde,<sup>46</sup> in 1930, Bateson, J. took the view that a decree of nullity in respect of a marriage voidable for impotence was in essence a decree for divorce rather than nullity:

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<sup>44</sup> Von Lorang v Administrator of Australian Property, [1927] A.C. 641 (H.L.Sc.), De Reneville v De Reneville, [1948] P. 100, at 109 (C.A., per Lord Greene, M.R., 1947), Szechter (otherwise Karsov) v Szechter, [1971] P. 286 (Sir Jocelyn Simon, P. 1970). See also Ramsay-Fairfax (otherwise Scott-Gibson) v Ramsay-Fairfax, [1956] P. 115, at 134 (C.A., per Denning, L.J., 1955).

<sup>45</sup> Cf. North, 363.

<sup>46</sup> [1931] P. 29, at 42. This approach is contrary to Irish law: cf. our Report on Nullity of Marriage (LRC 9-1984), p. 146.

"To call it a suit for nullity does not alter its essential and real character of a suit for dissolution. That is a mere difference in form ...."

Having taken this approach, Bateson, J. propounded domicile as the exclusive basis for jurisdiction in respect of nullity proceedings for impotence, as it had already been established<sup>47</sup> in relation to divorce.

In Ramsay-Fairfax (otherwise Scott-Gibson) v Ramsay-Fairfax, in 1955, the Court of Appeal rejected Bateson, J.'s approach.<sup>48</sup> In Ramsay-Fairfax the petitioner alleged that the marriage was voidable on the ground either of impotence or the respondent's wilful refusal to consummate the marriage.<sup>49</sup> Denning, L.J. (as he then was) said:

"Looking at the ground of wilful refusal from a legalistic standpoint, and treating marriage as a contract, the remedy of nullity does look like a remedy of divorce or dissolution, because it depends on events which occur subsequent to the marriage; but looking at it from a sensible standpoint, and having regard to the

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<sup>47</sup> Le Mesurier v Le Mesurier, [1895] A.C. 517.

<sup>48</sup> [1956] P. 115.

<sup>49</sup> Wilful refusal to consummate a marriage was introduced in England in 1937 as a statutory ground for nullity, rendering the marriage voidable. It is still part of English law: Matrimonial Causes Act 1973, section 12(b). See Cretney, 67-72. There is no directly equivalent ground in Irish law. For consideration of private international law aspects of this ground, see our Report on Private International Law Aspects of the Capacity to Marry and Choice-of-Law in Proceedings for Nullity of Marriage, pp. 129-133 (LRC 19-1985). In our Report on Nullity of Marriage (LRC 9-1984) (p. 146), we rejected the argument that wilful refusal to consummate should, of itself, be a ground for nullity of marriage; we proposed (p. 118) that the fraudulent non-disclosure of an intention at the time of entering the marriage not to consummate the marriage should be a ground for a decree of nullity.

true ends of marriage, one of the principal aims of which is the procreation of children, it seems to me that the remedy falls more truly within the category of nullity. No one can call a marriage a real marriage when it has not been consummated; and this is the same, no matter whether the want of consummation is due to incapacity or to wilful refusal. Let the theologians dispute as they will, so far as the lawyers are concerned, parliament has made it quite plain that wilful refusal and incapacity stand together as grounds for nullity and not for dissolution: and being grounds for nullity, they fall within the old ecclesiastical practice, in which the jurisdiction of the courts is founded upon residence and not upon domicile."<sup>50</sup>

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<sup>50</sup> [1956] P., at 132-133. See also, to the same effect, Easterbrook v Easterbrook, [1944] P. 10 (Hudson, J., 1943), Hutter v Hutter, [1944] P. 95 (Pilcher, J.).

CHAPTER 3      RECOGNITION OF FOREIGN NULLITY DECREES:  
THE PRESENT LAW

There appears to be no Irish decision on the subject of the recognition of foreign nullity decrees.<sup>1</sup> Professor North has commented that "[o]ne can merely suggest that the courts will recognise foreign nullity decrees on bases similar to those on which they have been recognised in England".<sup>2</sup> As English law diverges progressively from Irish law, the relevance of English decisions appears to be gradually weakening. But that is not to say that they should not be studied: the issues confronting the courts in many of these decisions are often precisely the same as those which an Irish court must eventually decide, unless legislation resolves the question first. It is necessary to consider briefly the grounds of recognition which have found favour in the English courts, against a background of developments in other common law jurisdictions.

1. Domicile

(a) Common domicile

There is clear authority in Britain for recognising a decree of nullity obtained in a country where both parties are domiciled. In Von Lorang v Austrian Property

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<sup>1</sup> See Castel, vol. 2, 179-186, Smith, The Recognition of Foreign Nullity Decrees, 96 L. Q. Rev. 380 (1980), Rafferty, Recognition of Foreign Nullity Decrees, 46 Sask. L. Rev. 73 (1981), Nott, Foreign Nullity Decrees: Perrini v Perrini, 29 Int. & Comp. L. Q. 510 (1980), Young, id., 515, Kennedy, Recognition of Foreign Divorce and Nullity Decrees, 35 Can. Bar Rev. 628 (1957), Lysyk, Jurisdiction and Recognition of Foreign Decrees in Nullity Suits, 29 Sask. Bar Rev. 143, at 151-159 (1964).

<sup>2</sup> North, 386.

Administrator,<sup>3</sup> in 1927, the House of Lords, on appeal from the First Division of the Court of Session, recognised a decree of nullity of a marriage celebrated in France granted by a German court, the parties being domiciled in Germany at the time of the decree. The decree was based on lack of compliance with the formal requirements of French law, the German court having taken "proper steps to inform itself of the French law and [given] judgment according to the law proved before it".<sup>4</sup> The House of Lords was clearly influenced by the recognition rules applicable to divorce. The judges appeared willing to endorse the questionable syllogism that since divorce was concerned with status, and nullity was also concerned with status,<sup>5</sup> the recognition rules relating to foreign divorce and nullity decrees should be the same.

Yet the two processes, though similar in some respects, involve important differences: divorce changes a status, whereas a nullity decree (at all events of a void marriage) does not - it merely declares that a particular status has not been disturbed by the parties' going through a ceremony of marriage; since divorce changes an existing legal relationship, it may be considered reasonable to look to the country of the spouses' common domicile at the time of the divorce; but, since nullity does not change the legal relationship, and merely declares that a vitiating element invalidated a marriage from the start, there is less reason to refer this adjudication to a country in which the parties happen to be at some particular time after they have gone through the ceremony of marriage.

If the social realities are examined, this objection may be modified. In some cases where a decree of nullity is sought, the parties to the allegedly invalid marriage will have had an interpersonal relationship after the ceremony,

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<sup>3</sup> [1927] A.C. 641 (H.L.(Sc.)). See Hughes, Judicial Method and the Problem in Ogden v Ogden, 44 L. Q. Rev. 217 (1928). Canadian authorities are in accord with Von Lorang: Castel, vol. 2, 179, citing Wilcox v Wilcox, 6 W.W.R. 213, 24 Man. R. 93, 16 D.L.R. 491 (C.A.).

<sup>4</sup> [1927] A.C., at 663 (per Viscount Dunedin).

<sup>5</sup> Id., at 662 (per Viscount Dunedin: "Now it seems to me that celibacy is just as much a status as marriage .... The judgment in a nullity case decrees either a status of marriage or a status of celibacy").



and have lived together as though they were man and wife. Perhaps it is not inappropriate for the recognition criterion to have regard to this dimension. To this argument, it may be replied that in some other cases where nullity proceedings are sought there may have been no such relationship: in "sham" marriages, for example,<sup>6</sup> where the parties never live together as man and wife. There are also cases when the relationship, although seeming normal to the outsider, was not in fact so. These would include some cases of duress,<sup>7</sup> fraud and mistake,<sup>8</sup> insanity,<sup>9</sup> and impotence.<sup>10</sup>

There is, moreover, something curious about looking to the country in which the parties happen to be domiciled, possibly several years after the marriage, as having the say in determining whether a vitiating element existed in their marriage from the start. Of course, if that country has a choice of law rule requiring the courts to answer the question of validity according to the same personal law of the parties<sup>11</sup> as the one to which our law refers, there may be no harm in recognising the decree; but if that country instead determines the question of the validity of the marriage by reference to its own law of nullity or to a different personal law, then there may well be reason to be cautious about recognising that decree.

At all events, it is clear that an English court will recognise a nullity decree obtained in a foreign country where both parties are domiciled; and it seems equally clear that it will do so even if the court of the foreign country applied some choice of law rules other than an English court would have done, or misapplied the choice of law rules. Thus, a foreign decree of nullity given in the country where both spouses are domiciled may be

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<sup>6</sup> Cf. our Report on Nullity of Marriage, pp. 64-65. The question whether such marriages are, or should be, invalid raises difficult issues.

<sup>7</sup> Cf. id., pp. 32-42.

<sup>8</sup> Cf. id., pp. 42-45.

<sup>9</sup> Cf. id., pp. 13-31.

<sup>10</sup> Cf. id., pp. 144-147.

<sup>11</sup> Or the lex loci celebrationis, if a formal defect is alleged.

recognised even where the marriage was celebrated in England and even where the marriage duly celebrated there is annulled on the ground of lack of form.

(b) Decree obtained in the country where one of the parties is domiciled

When we turn to the position relating to a foreign decree of nullity obtained in a country where one of the parties is domiciled, the position becomes quite uncertain. We must examine in particular three decisions,<sup>12</sup> all involving Maltese annulments based on the failure of a Catholic Maltese husband marrying in England to marry in a Catholic Church, as required by Maltese law of all its citizens wherever the marriage might be celebrated. In each of the cases, the husband was domiciled in Malta at the time of the nullity proceedings, the wife living in England with the intention of remaining there.

In none of the cases did the English court recognise the Maltese decree. Two factors were of particular force: the technical and arbitrary operation of the doctrine of domicile of dependency of married women - "the last barbarous relic of a wife's servitude";<sup>13</sup> and the particular effects of Maltese marriage law, which offended against English sensibilities.<sup>14</sup> These factors, no doubt important in their own right, played so great a role that it is difficult to discern any coherent general policy towards the question of recognition of foreign annulments based on the domicile of one of the parties.

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<sup>12</sup> Chapelle v Chapelle, [1950] P. 134 (Willmer, J., 1949), Gray v Formosa, [1963] P. 259 (C.A., 1962), Lepre v Lepre, [1965] P. 52 (Sir Jocelyn Simon, P., 1962).

<sup>13</sup> Gray v Formosa, [1963] P., at 267 (per Lord Denning, M.R.).

<sup>14</sup> Cf. id., at 270 (per Donovan, L.J.):

"It ill accords with present-day notions of tolerance and justice that a wife, validly married according to our law, should be told by a foreign court that she is a mere concubine and her children bastards, simply on the ground that her husband did not marry her in the church of a particular religious denomination."

In Chapelle v Chapelle,<sup>15</sup> in 1949, Willmer, J. considered that he would be following, rather than departing from, the principle laid in Von Lorang v Austrian Property Administrator,<sup>16</sup> by holding that the English court should not:

"accept as binding a decree of the court in Malta which, by its very terms, destroys the one and only ground on which the claim to exercise jurisdiction over the wife would be based."

He did:

"not think that a wife can, at one and the same time, claim a common domicile with her husband in Malta, and yet rely on the decree of the Maltese court which destroys the foundation on which that claim is based."<sup>17</sup>

In Gray v Formosa,<sup>18</sup> in 1962, the refusal by the English Court of Appeal to recognise the Maltese decree was based on the finding that it offended against English views of substantial justice. The Court thus did not have to determine whether the principle recommended in Chapelle v Chapelle<sup>19</sup> was sound. Lord Denning, M.R. expressed his neutrality in a way<sup>20</sup> that indicated little enthusiasm for Willmer, J.'s approach. Donovan, L.J. would, if necessary, have followed Chapelle v Chapelle. Pearson, L.J. favoured a different approach. He said:

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<sup>15</sup> [1950] P. 134, at 144 (Willmer, J., 1949).

<sup>16</sup> [1927] A.C. 641 (H.L.(Sc.)).

<sup>17</sup> [1950] P., at 144.

<sup>18</sup> [1963] P. 259 (C.A., 1962).

<sup>19</sup> Supra.

<sup>20</sup> "I know that academic writers have criticised .... Chapelle v Chapelle, with all the sophistry at their command. I will not embark on that controversy today."

"The argument is that the jurisdiction of the Maltese court depended on the man and woman having a common domicile in Malta, and that common domicile depended on their marriage, and the annulment of the marriage struck at the root of the supposed jurisdiction. But I am not clear as to that argument, because there is a time factor involved. It is clear that after the decree of nullity took effect the wife did not then have the domicile of her husband, but it does not follow that she had her own separate domicile at the earlier time before the decree was made. The material time for the existence or non-existence of jurisdiction presumably is .... the time of the commencement of the proceedings in Malta. At that time there was, according to the law of England, and probably according to the law of some other countries, a valid marriage subsisting between the man and the woman and they had, according to English law, a common domicile in Malta."<sup>21</sup>

In Lepre v Lepre,<sup>22</sup> five months later, Sir Jocelyn Simon, P. applied Gray v Formosa<sup>23</sup> in refusing to recognise the Maltese decree on the basis that it offended against the concept of justice that prevailed in English courts. He thought that the crux of the Court of Appeal decision was that "it was an intolerable injustice that a system of law should seek to impose extraterritorially, as a condition of the validity of a marriage, that it should take place according to the tenets of a particular faith".<sup>24</sup>

Sir Jocelyn Simon, P. adopted a clear analysis of the issue. The question of the wife's domicile depended on whether the marriage was void, voidable or valid in the eyes of the legal system which should be invoked; if valid or voidable, the wife remained married to the husband until the pronouncement of the decree of nullity and therefore took his domicile until that event; if void she had her own

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<sup>21</sup> [1963] P., at 271-272.

<sup>22</sup> [1965] P. 52 (Sir Jocelyn Simon, P., 1962).

<sup>23</sup> Supra.

<sup>24</sup> [1965] P., at 64.

legal domicile throughout. The marital defect in the instant case was clearly one characterised by English law as relating to formalities. Its legal result, according to Lord Greene, M.R., in De Reneville v De Reneville,<sup>25</sup> must in those circumstances be referred to the lex loci celebrationis - English law. According to English law, the marriage was valid, and the wife thus had a Maltese domicile at the commencement of the Maltese proceedings. The nullity decree "was a judgment of the court of common domicile and should, therefore, be recognised here as binding and conclusive".<sup>26</sup>

Sir Jocelyn Simon, P. conceded that where the jurisdiction of a foreign court was in question it might reasonably be argued that English law should have regard not only to its own characterisation of the nature of the defect in question, but also to how it was characterised by the foreign court. In the case before him, the same result ensued:

"In truth, there is no real difficulty in the present case: all the systems of law to which reference could be made - the lex loci contractus, the lex domicilii of the husband, the leges domicilii of the wife, the lex causae and the lex fori - concur at the time the Maltese proceedings started that the wife was married to the husband and domiciled with him in Malta. If that is so, then, whatever the words of the decree, it is inadmissible to relate it back so as to destroy the basis of the jurisdiction to make it."<sup>27</sup>

What Sir Jocelyn Simon P. did not attempt to resolve, outside the context where the Travers v Holley principle applies,<sup>28</sup> was the very formidable question of what approach

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<sup>25</sup> [1948] P. 100.

<sup>26</sup> [1965] P., at 60.

<sup>27</sup> Id., at 61. Sir Jocelyn Simon, P. held that even if the marriage were void ipso jure, so that the husband alone was domiciled in Malta at the start of the proceedings, the decree should be recognised in England, on the basis of the Travers v Holley principle.

<sup>28</sup> See infra, pp. 23-24.

should be favoured where the characterisation of the law of the country called on to recognise the nullity decree differs from that of one or more of the various foreign systems of law to which reference might legitimately be made.

(c) Decree recognised as valid in the country of the parties' common domicile

In Abate v Abate,<sup>29</sup> Lloyd-Jones, J. applied to recognition of nullity decrees the rule relating to recognition of foreign divorces established in Armitage v A.G.<sup>30</sup> In a short judgment, Lloyd Jones, J. was content to rely, without any analysis, on the view of the textbook writers that recognition was desirable where, although the decree was not obtained in the country of the parties' common domicile, it was recognised there.

(d) Decree recognised as valid in the country of the domicile of one party

There are as yet no decisions in England which have addressed the question whether a decree recognised as valid in the country of the domicile of one of the parties to the marriage should be recognised in England. Commentators generally take the view<sup>31</sup> that it should. The English and Scottish Law Commissions accept<sup>32</sup> that, if both domiciliary laws of the parties agree as to their status it should in principle make no difference that the legal systems of two countries are involved rather than one. That unquestionably is the easier case. The harder case is where the domiciliary laws disagree: here the English and

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<sup>29</sup> [1961] P. 29 (Lloyd-Jones, J.).

<sup>30</sup> [1906] P. 135.

<sup>31</sup> Cf. Anton, 255, Dicey & Morris, 383, Morris, 212, Cheshire & North, 409.

<sup>32</sup> The English and Scottish Law Commissions' Report, Private International Law: Recognition of Foreign Nullity Decrees and Related Matters, para. 2.23, fn. 123 (Law Com. No. 137, Scot. Law Com. No. 88, 1984).

Scottish Commissions are more cautious. They comment that:

"[i]f, as seems likely, the courts in England and Scotland will recognise a foreign nullity decree on the basis of one party's domicile . . . , then it may be that, despite the statutory rules for divorce recognition,<sup>33</sup> they will recognise a nullity decree which would be recognised as valid in the domicile of one of the parties but not in the domicile of the other."<sup>34</sup>

In Canada, there are only dicta to the effect that a decree recognised in the country of the parties' common domicile will be recognised by the courts in Canada.<sup>35</sup> Where the parties do not have a common domicile, the view has been expressed that "presumably the same result would ensue if the foreign decree would be recognised by each of the party's (sic) domiciles".<sup>36</sup>

(2) Residence

(a) Common residence

There are three English decisions<sup>37</sup> consistent with recognising a foreign decree obtained in the country which was the parties' common residence at the time the proceedings were commenced. In Mitford v Mitford,<sup>38</sup> in 1923, a German decree of nullity with respect to a marriage celebrated there, the parties residing in Germany at the

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<sup>33</sup> Cf. id., para. 2.23.

<sup>34</sup> Id., para. 2.23, fn. 124.

<sup>35</sup> Rafferty, Recognition of Foreign Nullity Decrees, 46 Sask. L. Rev. 73, at 80 (1981), citing Gwyn v Mellen, 6 W.W.R. 385, at 390 (B.C.C.A.).

<sup>36</sup> Rafferty, supra, at 81.

<sup>37</sup> Mitford v Mitford, [1923] P. 130, Corbett v Corbett, [1957] 1 All E.R. 621, Merker v Merker, [1963] P. 283.

<sup>38</sup> [1923] P. 130.

time of the proceedings, was recognised by the English court. It is not clear whether each of the two factors (the locus celebrationis and the residence of the parties) was independently a sufficient ground for recognition.<sup>39</sup> In Corbett v Corbett,<sup>40</sup> in 1957, Barnard, J. did not resolve conclusively whether the parties' residence would suffice: again the locus celebrationis was an alternative basis of recognition and it was on that he relied primarily.<sup>41</sup>

In Merker v Merker,<sup>42</sup> in 1962, there again were the two factors of locus celebrationis and the parties' residence in the state granting the annulment. Sir Jocelyn Simon, P. made it clear that common residence constituted a sufficient connecting factor in its own right, insofar as England should recognise, on the ground of comity, a foreign jurisdiction which it itself claimed.

To the extent that Sir Jocelyn Simon, P. rested recognition on the ground that the English court would itself claim jurisdiction in such circumstances, a question arises in England today as to whether the common residence of the parties continues to afford a ground for recognition, since this is no longer a ground for jurisdiction. The practical scope of the change is, however, small, since the issue will be of significance only in "the rare case"<sup>43</sup> in which the common residence of both parties falls short of being an habitual residence of either of them.<sup>44</sup>

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<sup>39</sup> Cf. the English and Scottish Law Commissions' Report, supra, para. 2.20.

<sup>40</sup> [1957] 1 All E.R. 621 (P.D.A. Div., Barnard, J.).

<sup>41</sup> Cf. Lysyk, Jurisdiction and Recognition of Foreign Decrees in Nullity Suits, 29 Sask. L. Rev. 143, at 156 (1964).

<sup>42</sup> [1963] P. 283.

<sup>43</sup> English and Scottish Law Commission's Report, supra, para. 2.20.

<sup>44</sup> Cf. Britain's Domicile and Matrimonial Proceedings Act 1973.



(b) Residence of one party

There appears to be no reported decision in which the residence of one of the parties was held sufficient to justify recognition of a foreign nullity decree. One commentator, noting that, at common law, the English courts took jurisdiction themselves on the basis of the residence of the respondent but not of the petitioner, has argued that "there is at least an inference that decrees of the residence of the petitioner alone will not be recognised for that reason".<sup>45</sup> Again the change in jurisdictional rules in 1973 would affect the position to a limited degree.

(c) Habitual Residence

The English jurisdictional rules in nullity since 1973 permit proceedings to be based on the habitual residence of either party for the minimum of one year before the institution of the proceedings. The application of the Travers v Holley principle would afford recognition to foreign decrees based on a similar jurisdictional entitlement.

Reciprocity

Reference has been made earlier to the Travers v Holley<sup>46</sup> principle. That decision established that in England courts must recognise foreign divorces obtained in circumstances in which, *mutatis mutandis*, there was jurisdiction in England to grant a decree.<sup>47</sup> The principle has been extended in England to nullity decrees<sup>48</sup> and it seems likely<sup>49</sup> that the Scottish courts would take a similar

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<sup>45</sup> North, 256.

<sup>46</sup> [1953] P. 246.

<sup>47</sup> Cf. the English and Scottish Law Commissions' Report, *supra*, para. 2.10.

<sup>48</sup> Cf. Merker v Merker, [1963] P. 283 (Sir Jocelyn Simon, P., 1962), Vervaecke v Smith, [1983] 1 A.C. 145.

<sup>49</sup> Cf. the English and Scottish Law Commissions' Report, *supra*, para. 2.11.

view. Canadian decisions<sup>50</sup> are in accord.

The "Real and Substantial Connection" Test

The "real and substantial connection" test of Indyka v Inkyka<sup>51</sup> in relation to divorce recognition has also been applied in relation to the recognition of foreign nullity decrees. In Law v Gustin,<sup>52</sup> in 1975, Bagnall, J. had "no doubt" that he ought to follow the lead of Indyka and its divorce progeny, and in Perrini v Perrini,<sup>53</sup> three years later, Sir George Baker, P. took the same view. He was "unable to discover any reason why any different principle should apply to a decree of nullity and as the English statutory provisions cover both divorce and nullity there is every reason why the principle should apply".<sup>54</sup>

Of course, the "real and substantial connection" test "eats up" many of the older more specific grounds of recognition, and may well in some cases go further than these grounds. The English and Scottish Law Commissions have observed that:

"It is reasonable to assume that the nature of the real and substantial connection (which Bagnall, J. decided was 'a question of fact, to be decided .... on a consideration all the relevant circumstances') may be gathered by reference to divorce recognition cases. On this basis a 'real and substantial connection' for foreign nullity recognition purposes might be established, for example, by virtue of either party's domicile (even though less exactly defined than by English law), residence or even nationality if it is reinforced by other factors. It is sufficient that

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<sup>50</sup> Re Capon, Capon and O'Brien v McLay, [1965] 2 O.R. 83 (C.A.), Gwyn v Mellen, [1979] 6 W.W.R. 385 (B.C.C.A.).

<sup>51</sup> [1969] 1 A.C. 33.

<sup>52</sup> [1976] Fam. 155 (Bagnall, J., 1975).

<sup>53</sup> [1979] Fam. 84, at 92 (Sir George Baker, P., 1978).

<sup>54</sup> Id., Canadian law is in accord: see Gwyn v Mellen, [1979] 6 W.W.R. 385 (B.C.C.A.), considered by Rafferty, supra, at 85-86.

only one spouse has a real and substantial connection with the country of the court. However, one connecting factor which may not, by itself, be sufficient to justify recognition of a foreign nullity decree is the fact that the decree was granted by the court of the country of the celebration of the marriage. Before 1974, when the Domicile and Matrimonial Proceedings Act 1973 came into force, courts in the United Kingdom would accept jurisdiction in nullity on this basis (though following Ross-Smith v Ross-Smith, the English court would do so only in the case of a marriage void *ab initio*) and accordingly would recognise a foreign decree granted on this basis. But the 1973 Act has deprived all courts in the United Kingdom of jurisdiction on this ground, and it is questionable whether any United Kingdom court would now extend recognition to a foreign nullity decree so obtained if there were no other substantial connecting factors."<sup>55</sup>

There is no English authority on whether the Indyka principle should be extended, in combination with Armitage v Attorney-General,<sup>56</sup> so that the English court would recognise a foreign nullity decree recognised in a country with which a party has a real and substantial connection. Divorce decisions to a similar effect<sup>57</sup> would perhaps encourage recognition of nullity decrees on this basis.

#### The Place of Celebration

The place of celebration has been held to be a good ground for recognition in a number of English decisions,<sup>58</sup> where

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<sup>55</sup> English and Scottish Law Commissions' Report, supra, para. 2.14.

<sup>56</sup> [1906] P. 135.

<sup>57</sup> Cf. the English and Scottish Law Commissions' Report, supra, paras. 2.22-2.23.

<sup>58</sup> Mitford v Mitford, [1973] P. 130, Corbett v Corbett, [1957] 1 All E.R. 621, Merker v Merker, [1963] P. 283. See also Gwyn v Mellen, [1979] 6 W.W.R. 385 (B.C.C.A.), considered by Rafferty, Recognition of Foreign Nullity Decrees, 46 Sask. L. Rev. 73, at 84-85 (1981).

the marriage was void. The principle of reciprocity has played an important role in justifying this ground in the more recent cases, and, as we have seen, since the jurisdiction no longer exists with respect to the place of marriage, this ground is more doubtful, at all events so far as reciprocity is its rationale.

#### Grounds for Withholding Recognition

Three grounds for withholding recognition of a foreign nullity decree may be considered briefly.

##### 1. Recognition Contrary to "Substantial Justice" or Public Policy

The English and Scottish Law Commissions have observed as follows:

"That an English court might withhold recognition from a foreign nullity decree which offends against English ideas of 'substantial justice' is the least well defined and most controversial<sup>59</sup> ground for denying recognition."<sup>60</sup>

We have seen how in Gray v Formosa<sup>61</sup>, the English Court of Appeal denied recognition to a Maltese decree of nullity on the ground that certain principles of Maltese marriage law were offensive to English notions of "substantial justice". In Lepre v Lepre<sup>62</sup>, Sir Jocelyn Simon, P., "with some misgiving" adopted the same approach; and in the

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<sup>59</sup> Citing Carter, 38 B.Y.B.L.L. 497 (1962), Lewis, 12 I.C.L.Q. 298 (1963), Blom-Cooper, 26 M.L.R. 94 (1963), Smart, 99 L.Q.R. 24 (1983), Jaffey, 32 I.C.L.Q. 500 (1983).

<sup>60</sup> Op. cit., para. 2.24.

<sup>61</sup> [1963] P. 259.

<sup>62</sup> [1965] P. 52, at 63.

House of Lords decisions of Vervaeke v Smith<sup>63</sup> Lord Simon observed that an English court would exercise this jurisdiction to refuse to recognise a decree "with extreme reserve".

(2) Fraud in Obtaining the Foreign Decree

The decision of Van Lorang v Administrator of Austrian Property<sup>64</sup> appears to concede that an English or Scottish court could withhold recognition from a foreign nullity decree obtained by fraud. The English and Scottish Law Commissions have noted that:

"Lord Phillimore's examples of fraud in that case suggest that both fraud as to the foreign court's jurisdiction and fraud as to the actual merits of the petition may be relevant, but the latter was not at common law a sufficient ground for withholding recognition from a foreign divorce."<sup>65</sup>

(3) Foreign Decree Offends Against the Rules of Natural Justice

Some English dicta<sup>66</sup> and Scottish authorities<sup>67</sup> indicate that recognition may be withheld where the foreign decree offends in some way against the rules of natural justice.

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<sup>63</sup> [1983] 1 A.C. 145, at 164 (H.L.(Eng.)), 1982).

<sup>64</sup> [1927] A.C. 641. See also Merker v Merker, [1963] P. 283, at 296 (per Sir Jocelyn Simon, P., 1962), Chapelle v Chapelle, [1950] P. 134, at 140.

<sup>65</sup> Op. cit., para. 2.24.

<sup>66</sup> Cf. the English and Scottish Law Commission's Report, para. 2.25, citing Mitford v Mitford, [1923] P. 130, at 137, 141-142, Merker v Merker, [1963] 283, at 296, 299 and Law v Gustin, [1976] Fam. 155, at 159.

<sup>67</sup> Cf. id., para. 2.25, citing Crabtree v Crabtree, 1929 S.L.T. 675, at 676, Scott v Scott, 1937 S.L.T. 632 and Perin v Perin, 1950 S.L.T. 51, at 53.

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but the scope of this exclusion appears relatively narrow<sup>68</sup> and the mere fact that the proceedings were undefended is not of itself a reason for refusing to deny recognition to the decree.<sup>69</sup>

(4) Foreign Decree Offends Against Constitutional Justice

(5) Res Judicata

In Vervaeke v Smith,<sup>70</sup> the House of Lords applied the doctrine of res judicata to deny recognition to a foreign nullity decree, where in English proceedings, prior to the foreign decree, the validity of the marriage had been upheld.

Extra-judicial Foreign Annulments

It is open to question whether the fact that a foreign annulment was extra-judicial should be a ground for non-recognition in English law. Certain types of extra-judicial divorces (such as the talaq and gett) are in some circumstances recognised in English law; it may be that a similar development would take place with respect to nullity decrees.

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<sup>68</sup> Cf. id., para. 2.25, noting (in fn. 130) that "[i]n Mitford v Mitford the court was prepared to recognise a German decree, even though it was granted during wartime when the English respondent husband was unable to reach Germany ([1923] P. 130, 141); and in Law v Gustin the court ignored the fact that the respondent had received only five days' notice in which to enter a defence [[1976] Fam. 155, 158]."

<sup>69</sup> Id., para. 2.25, citing Von Lorang v Administrator of Austrian Property, per Lord Sands in 1926 S.C. 598, 627, cited with approval by Lord Hodson in Ross-Smith v Ross-Smith, [1963] A.C. 280, 341.

<sup>70</sup> [1983] 1 A.C. 145.

### Effects of a Foreign Nullity Decree

The effects of a foreign nullity decree which is recognised in Ireland is not clear, in the absence of case law on the subject. A major question of principle arises as to how the Irish courts would deal with a situation where the effects of the foreign decree under the law of the foreign country differ from those under Irish law. This problem would arise where under Irish law the marriage was void but under the law of the foreign court was voidable, or where under Irish law the marriage was voidable and under the law of the foreign country it was void. The English and Scottish Law Commissions have observed that "[t]he cases give no firm guidance on this problem, although a dictum of Viscount Haldane in the Von Lorang case might be taken to indicate that the foreign effect of a foreign decree should be recognised<sup>71</sup>".<sup>72</sup>

### Capacity to Remarry After a Foreign Nullity Decree

As a general rule, the recognition by Irish law of a foreign nullity decree will mean that the parties are free to remarry. But another general rule is that a person's capacity to marry is determined by the law of his or her domicile at the time of the marriage. Thus the situation could arise where a foreign nullity decree was recognised in this country but not in the country of a spouse's domicile.<sup>73</sup> In the divorce context in England it was held<sup>74</sup> that the country of the domicile would prevail. In Perrini v Perrini,<sup>75</sup> however, Sir George Baker, P., took a different view. Having recognised a nullity decree

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<sup>71</sup> Citing Von Lorang's case, [1927] A.C. 641, at 654-655, and North, 267.

<sup>72</sup> Op. cit., para. 2.33.

<sup>73</sup> Cf. the English and Scottish Law Commissions' Report, para. 2.35.

<sup>74</sup> In R. v Brentwood Superintendent Registrar of Marriages, Ex Parte Arias, [1968] 2 Q.B. 956. The Recognition of Divorces and Legal Separations Act 1971, section 7 effectively reverses this decision.

<sup>75</sup> [1979] Fam. 84.

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obtained against an Italian respondent in New Jersey, he said:

"Once the New Jersey decree is recognised here the fact that the respondent could not marry in Italy, the country of his domicile, on April 8, 1967 is, in my opinion, no bar to his marrying in England where by the New Jersey decree he was free to marry. No incapacity existed in English law."<sup>76</sup>

Sir George Baker, P. did not mention R. v Brentwood Superintendent Registrar of Marriages, Ex Parte Arias.<sup>77</sup>

Some uncertainty remains as to the effect of Perrini v Perrini. There is a passage in the judgment which suggests an adherence to the intended matrimonial residence as a test for validity of the marriage.<sup>78</sup> If, however, the rule is that once an English court has recognised a foreign nullity decree, then any subsequent English marriage will be valid, then the position regarding the validity of marriages in other countries is not clear.

#### Ancillary Relief

There is no Irish authority on the question of ancillary relief; nor is there any authority in England or Scotland directly in point. The English and Scottish Law

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<sup>76</sup> [1979] Fam. 84, at 92.

<sup>77</sup> Supra.

<sup>78</sup> Cf. Nott, Foreign Nullity Decrees: Perrini v Perrini - I, 29 Int. & Comp. L. Q. 510, at 514-515 (1980), and Young, Foreign Nullity Decrees: Perrini v Perrini - II, 29 Int. & Comp. L. Q. 515, at 517 (1980) criticising Perrini for failing to note that in Radwan v Radwan, [1973] Fam. 37, Cumming-Bruce, J. acknowledged that Brentwood Superintendent had been correctly decided, and had specifically restricted the scope of the intended matrimonial residence test to capacity to contract a polygamous marriage.



Commissions suggest<sup>79</sup> that the divorce analogy would be likely to be followed, so that a foreign order for financial relief would be recognised only if it were final and conclusive or fell within the statutory rules for the recognition of maintenance orders. In the converse case, where one of the parties wishes to seek financial relief in England following a foreign decree of nullity, it appears that "the English courts will decline jurisdiction on the ground that there is no subsisting marriage".<sup>80</sup>

Where the Foreign Nullity Decree is not Recognised

There is no direct authority on the position where a foreign nullity decree is not recognised in Ireland. On principle, it would appear that the parties must all be regarded by Irish law as married, unless, of course, the marriage is invalid under Irish law.

Where the question of remarriage arises, the position becomes more unclear. If a spouse with such an unrecognised foreign decree remarries and that remarriage is valid according to the law (or laws) of the country (or countries) of domicile of the spouse and the person he or she marries, then we have a similar problem to that arising in the Brentwood Superintendent Registrar of Marriages case. In Canada<sup>81</sup> it has been held that the capacity rule rather than recognition should prevail.

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<sup>79</sup> English and Scottish Law Commissions' Report, supra, para. 2.36.

<sup>80</sup> Id., citing the divorce case of Quazi v Quazi, [1980] A.C. 744.

<sup>81</sup> Schwebel v Ungar, 48 D.L.R. (2d) 644 (1964), aff'g 42 D.L.R. (2d) 622 (1963). The case involved remarriage after divorce rather than annulment.

CHAPTER 4 JURISDICTION IN NULLITY PROCEEDINGS:  
PROPOSALS FOR REFORM

We now consider the question of jurisdiction in respect of nullity proceedings. As may readily be appreciated, the practical importance of jurisdictional issues varies in proportion to the extent to which the lex fori or personal law of the parties is applied by our courts. If our courts apply the lex fori, then there may be a temptation for people living abroad to resort to the jurisdiction of our courts in order to obtain a decree of nullity based on a ground to which they would not otherwise have access. If, on the other hand, our courts apply the choice-of-law rules which we have proposed,<sup>1</sup> there will be little or no incentive for persons living abroad to engage in forum shopping here so far as grounds of nullity are concerned.<sup>2</sup>

It should be noted that the ancillary orders in nullity proceedings, relating to financial rights and obligations, which we have recommended in our Report on Nullity of Marriage,<sup>3</sup> might prove an incentive to a small number of

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<sup>1</sup> In our Report on Private International Law Aspects of the Capacity to Marry and Choice-of-Law in Proceedings for Nullity of Marriage, ch. 3 (LRC 19-1985).

<sup>2</sup> Cf. Aldridge v Aldridge, 1954 S.C. 58, at 60 (per the Lord Justice-Clerk (Thomson)):

"There can be little objection to increasing the grounds of jurisdiction for entertaining an action of nullity, provided the Court which accepts the jurisdiction is careful to see that the proper law is applied."

It is however, true, as the Scottish Law Commission points out, that

"[s]o long ... as different legal systems choose the personal law of the parties in different ways, 'forum-shopping' may occasionally present real attractions." Report on Jurisdiction in Consistorial Causes Affecting Matrimonial Status, para. 45 (Scot. Law Com. No. 25, 1972).

<sup>3</sup> LRC 9-1984, ch. 12.

people living abroad to resort to the jurisdiction of our courts. In view of legislative trends internationally in line with our recommendations on this subject, and in the light of the general international uncertainty as to when such ancillary orders may be enforced in other countries,<sup>4</sup> we are satisfied that these factors will discourage resort to the jurisdiction in inappropriate circumstances by people living abroad.

In our view, our courts should have jurisdiction in nullity proceedings where, in broad terms, the parties have a reasonable connection with the State. In other words, speaking negatively, our courts have no business exercising such jurisdiction over parties neither of whom has any connection with the State. But what constitutes a "reasonable connection"? We consider that the best approach would be for the legislation to set out a list of specific circumstances which constitute a "reasonable connection", supplemented by a more broadly-framed, discretionary entitlement. The approach would be on the following lines: a court should have jurisdiction to hear and determine a petition for nullity of marriage in any of the following cases:

1. Where, at the time of the marriage, the validity of which is in question, either party had his or her habitual residence in the State;
2. Where, at the time of the proceedings, either party has his or her habitual residence in the State;
3. Where the marriage was celebrated in the State and a ground on which the marriage is alleged to be invalid is one to which the lex loci celebrationis applies.
4. Where, in the opinion of the Court, either spouse has, or has had, such substantial ties<sup>5</sup> with the State as to make it appropriate to hear and determine the petition.

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<sup>4</sup> For an account of the attempts to introduce greater international harmony on this matter, see McClellan, ch. 7.

<sup>5</sup> Cf. the Scottish Law Commission's Report on Jurisdiction in Consistorial Causes Affecting Matrimonial Status, para. 48, (Scot. Law Com. No. 25, 1972).

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As may be seen, the jurisdictional tests we propose are simple and straight-forward. They are designed to harmonise with our recommendations on choice of law in nullity proceedings.

CHAPTER 5      RECOGNITION OF FOREIGN NULLITY DECREES:  
                  PROPOSALS FOR REFORM

We must now consider the difficult subject of the recognition of foreign decrees of nullity of marriage. As we have seen,<sup>1</sup> the present law is in a state of some uncertainty, in view of the fact that the courts have had no opportunity in recent years to develop the law, in the absence of cases coming before them.

The difficulties presented by foreign nullity decrees are merely part of a wider problem. If all countries adhered to the same approach towards private international law aspects of marriage, then the question of recognition would be a relatively easy one to resolve. Every country would apply the same choice of law rule when dealing with a nullity petition and every other country would have little difficulty recognising that decree<sup>2</sup> since it would be based on the same choice of law rule as they would have applied had the petition come before their court.

Unfortunately life is not that simple. Different countries apply widely differing choice of law rules: some refer the questions of capacity and consent to the law of the spouses' nationality, others to their domicile, others to the country of their habitual residence; still others apply the lex fori, frequently in seeming ignorance of even the existence of a choice of law dimension to the case. Moreover, where recognition of a foreign nullity decree is concerned, some countries concern themselves with the choice of law rules adopted by the court in the foreign country; others are more interested in ensuring that the parties had fulfilled various jurisdictional criteria, such as domicile or residence, in the foreign country.

Another factor which comes into play with the recognition of foreign annulments is that, as a matter of practical

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<sup>1</sup> Supra, ch. 3.

<sup>2</sup> Assuming, of course, that there is no question that the decree was obtained by fraud or against the rules of natural justice, and that no other reason existed for failing to recognise the decree.

reality, parties will frequently have their marriages annulled in countries where they are living (or with which they have close connections) at the time of the annulment proceedings. It will often take some time for a particular defect - impotence, for example - to be established with sufficient certainty. Countries called on later to recognise these foreign nullity proceedings may find that the court in question applied the lex fori with no regard for the parties' personal law. To deny recognition to such a decree on account of the fact that it ignored the parties' personal law will often run directly contrary to the legitimate expectations of the parties, their families and others whose personal or business relationships with the parties were also premised on a justified assumption that the nullity decree would be internationally efficacious.

In our view, the best approach would be for our law to recognise nullity decrees when, in simple terms, the parties would reasonably expect that the decree should be recognised. We think that concentrating on the reasonable expectations of the parties offers a sensible broad criterion against which to test whether a decree should be recognised under our law.

Translating this broad and general criterion into specific terms is, however, a matter of some difficulty. We have come to the conclusion, and so recommend, that a nullity decree obtained outside the State should be recognised here in any of the following cases:

1. Where the court granting the decree applied the choice-of-law rules which we have proposed in our 19th Report.<sup>3</sup>
2. Where the decree was obtained or recognised in the country of either spouse's habitual residence.
3. Where the decree was obtained or recognised in a country with which either spouse has a real and substantial connection.

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<sup>3</sup> Report on Private International Law Aspects of the Capacity to Marry and Choice of Law in Proceedings for Nullity of Marriage (LRC 19-1985).

We are satisfied that these rules for recognition are in harmony with the reasonable expectation of the parties. So far as grounds for withholding recognition are concerned, we consider that the best approach would be for the courts rather than the legislature to develop the law. Clearly questions of public policy, natural, substantial and constitutional justice, and res judicata are more easily considered in the context of a general judicial discretion rather than in terms of detailed statutory provision which could not hope to anticipate in specific terms the wide variety of factual circumstances with which the courts may have to deal.

So far as fraud is concerned we recommend that fraud, whether as to the foreign court's jurisdiction or as to the actual merits of the petition, should be a ground for non-recognition of a foreign nullity decree. Moreover, where a party's predominant purpose in seeking to establish an habitual residence in, or real and substantial connection with, a particular country was to obtain a nullity decree there which would not otherwise be recognised, the decree should not in such circumstances be recognised. In other words, forum shopping would be discouraged. On a proper application of the concepts of "habitual residence" and "real and substantial connection" it would not appear likely that such a decree would in any event be recognised without this specific recommendation.

CHAPTER 6 ANALYSIS OF THE HAGUE CONVENTION ON MARRIAGE  
(1978)

We now consider the Hague Convention on the Celebration and Recognition of the Validity of Marriages (1978). The Convention deals with the celebration of marriages in Chapter I, in Articles 1 to 6. It should at the outset be noted that Chapter I is optional. Article 16 gives a Contracting State the right to exclude the application of Chapter I. Article 2 provides that the formal requirements for marriages are to be governed by the law of the State of celebration.<sup>2</sup> Article 3 provides as follows:

"A marriage shall be celebrated -

1. where the future spouses meet the substantive requirements of the internal law of the State of celebration and one of them has the nationality of that State or habitually resides there; or
2. where each of the future spouses meets the substantive requirements of the internal law designated by the choice of law rules of the State of celebration."

Thus, to take the first sub-paragraph, where both the prospective spouses fulfil the requirements of Irish law and one of them is Irish or habitually resides here then they will be entitled to be married here, regardless of any question of their capacity to marry under their personal law. However, Article 6 provides that a Contracting State

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<sup>1</sup> For analysis of the Convention, see Lalive, La Convention de la Haye du 14 Mars 1978 sur la célébration et la reconnaissance de la validité des mariages, 34 Schweizerisches Jahrbuch für Internationales Recht 31 (1978), Reese, The Hague Convention on Celebration and Recognition of the Validity of Marriages, 20 Virginia J. of Internat. L. 25 (1979), Glenn, Comment: Conflict of Laws - The 1976 Hague Conventions on Marriage and Matrimonial Property Regimes, 55 Can. Bar Rev. 586, at 588-595 (1977).

<sup>2</sup> The expression "law" here includes the choice-of-law rules of the State of celebration. Thus renvoi is not excluded.



may reserve<sup>3</sup> the right, by way of derogation from Article 3, sub-paragraph 1, not to apply its internal law to the substantive requirements for marriage in respect of a prospective spouse who neither is a national of that State nor habitually resides there. Thus, if Ireland were to make a reservation under Article 6, it would no longer be sufficient for this prospective spouse to comply with the requirements of Irish law. The Convention does not specify what law should be applied to that person. In the normal course it would be the personal law of that person, so far as matters of essential validity are concerned, and the lex loci celebrationis, so far as matters of formal validity are concerned.

Article 5 provides that the application of a foreign law declared applicable by Chapter I may be refused only if such application is manifestly incompatible with the public policy ('ordre public') of the State of celebration. The effect of Article 3, sub-paragraph 1 and Article 5 is that if Ireland were to accept the Convention, Irish law would be required to authorise the celebration of a marriage here of persons who may have no connection with the State where those persons meet the substantive requirements of the law of their own country, even though they do not meet the substantive requirements of Irish law, unless to allow them to do so would be manifestly incompatible with Irish public policy ('ordre public'), or unless Ireland reserves the right under Article 6, to derogate from Article 3, sub-paragraph 1.

Article 4 is a practical provision. It provides that the State of celebration may require the future spouse to furnish any necessary evidence as to the content of any foreign law which is applicable under Articles 1 to 3. Thus, for example, if two people whose personal law is that of Hong Kong seek to marry here, Article 4 would enable our law to require them to furnish evidence of the law in Hong Kong.

#### Commentary on Chapter I

Professor Malmström, in his Report on the Convention, referring to Article 3, sub-paragraph 1, says:

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<sup>3</sup> Not later than at the time of ratification, acceptance, approval or accession: Article 28.

"If one of the future spouses is connected with the State of celebration either through nationality or through habitual residence, this connecting factor makes the law of that State applicable to both of the future spouses, irrespective of the connecting factors proper to the other spouse. This reference to a single law avoids naturally a whole series of complications which may arise from the application of a separate law to each of the future spouses in question about substantive requirements for marriage .... [T]he new solution may on the other hand increase the risk that the marriage may be annulled (or regarded as non-valid) in the country of origin of the spouse whose personal law has not been respected, when this country is a non-Contracting State. If the country in question is a Contracting State it is bound by the rules of Chapter II of the Convention."<sup>4</sup>

This possibility of creating a limping marriage is a factor to which some weight should be given when deciding whether to incorporate the Convention into our law.

The comments on Chapter I by the English and Scottish Law Commissions are worth recording. They note that Chapter I:

"lays down what appear to be choice of law rules for the celebration of a marriage, though they are far from being a complete set of rules. Their form is strongly influenced by the principle underlying the chapter and indeed the Convention as a whole, namely that of 'favouring the institution of marriage'. The question that Chapter I seeks to answer is whether the authorities in a Contracting State are obliged to celebrate a marriage between two parties with connections with more than one State. In the process, Chapter I lays down some choice of law rules, though not a complete 'code'."<sup>5</sup>

Having quoted Article 3, the Commissions state in relation to it:

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<sup>4</sup> Malström Report, Actes et Documents de la Treizieme Session, tome III, Marriage, p. 296.

<sup>5</sup> English Law Commission Working Paper No. 89 and Scottish Law Commission Consultative Memorandum No. 64, Private International Law: Choice of Law Rules in Marriage, p. 164 (1985).

"what this does not do is lay down a general choice of law rule for the essential validity of marriage. Indeed it assumes that the State of celebration has such a rule, but without defining it. What the Article appears to do is to make an inroad into the principle adopted in a number of countries that a marriage must comply with the local law and the law applicable by reason of the forum's choice of law rules. The effect of Article 3(2) is that a marriage shall be celebrated in, for example, England between two 15-year-olds both of whom are domiciled in a country where the age of marriage is 14, notwithstanding the fact that the minimum age of marriage in England is 16. This is because the choice of law rules of the State of celebration, England, refer the question of capacity to the law of the domicile. Article 3(1) provides an inroad into the forum's general choice of law rule by, in effect, stating that incapacity under a foreign domiciliary or national law may be ignored if one of the parties marrying in England is resident there. This perpetuates a variant of the English rule<sup>6</sup> that a foreign incapacity may be ignored if one of the spouses is domiciled in England and the marriage is celebrated there."<sup>7</sup>

We consider that, on balance, Chapter I would present too many difficulties for its incorporation into Irish law. Under our proposals regarding capacity to marry contained in our Report on Private International Law Aspects of the Capacity to Marry and Choice-of-Law in Proceedings for Nullity of Marriage,<sup>8</sup> capacity to marry would, as a general rule, be determined by the law of the habitual residence of the spouses. We specifically considered and rejected the lex loci celebrationis<sup>9</sup> and the lex patriae<sup>10</sup> as possible tests for capacity. We consider that the fact that a marriage is celebrated in Ireland should not, of itself, be a reason for conferring validity on it where it fails to comply with the substantive conditions as to validity contained in the law of the parties' habitual residence.

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<sup>6</sup> Citing Sottomayor v De Barros (No. 2), 5 P.D. 94 (1879).

<sup>7</sup> Op. cit., p. 165.

<sup>8</sup> LRC 19-1985, ch. 3.

<sup>9</sup> Id.

<sup>10</sup> Id.

Whether the marriage complies with the lex loci celebrationis in such circumstances is not of great importance.

Similarly, if, for example, an Irish national, habitually resident in Manitoba for over twenty, chooses to marry in Ireland, we have already taken the view<sup>11</sup> that this fact is no reason to refer the question of the substantive validity of the marriage to Irish law. If we were to contemplate the incorporation of Chapter I into Irish law, it would seem essential that Ireland should avail itself of the right, under Article 6, to derogate from Article 3, sub-paragraph 1: it would, in our view be quite unsatisfactory that we should be required to marry persons, one of whom is neither a national nor an habitual resident of the State, where the marriage would be invalid according to the law of that party's personal law. Nevertheless, the objections to the Chapter as a whole are sufficiently strong in our view, to make it, on balance, unsuitable for incorporation into Irish law.

Chapter II "forms the core of the Convention".<sup>12</sup> The Chapter "is 'obligatory' in the sense that it is not possible to accept the Convention while excluding Chapter II".<sup>13</sup>

The Chapter applies to the recognition in a Contracting State of the validity of marriages entered into in other States (Article 7). It does not apply to five specific types of marriage:

- (1) marriages celebrated by military authorities;
- (2) marriages celebrated aboard ships or aircraft;
- (3) proxy marriages;
- (4) posthumous marriages;

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<sup>11</sup> Id.

<sup>12</sup> Malström Report, p. 298.

<sup>13</sup> Id.

(5) informal marriages.<sup>14</sup>

Article 9, "which may be called the heart of Chapter II",<sup>15</sup> provides as follows:

"A marriage validly entered into under the law of the State of celebration or which subsequently becomes valid under that law shall be considered as such in all Contracting States, subject to the provisions of this Chapter.

A marriage celebrated by a diplomatic agent or consular official in accordance with his law shall similarly be considered valid in all Contracting States, provided that the celebration is not prohibited by the State of celebration."

Article 10 provides that:

"[w]here a marriage certificate has been issued by a competent authority, the marriage shall be presumed to be valid until the contrary is established."

Article 11 represents an important counterweight to Article 9. It provides as follows:

"A Contracting State may refuse to recognise the validity of a marriage only where, at the time of the marriage, under the law of that State -

1. one of the spouses was already married; or
2. the spouses were related to one another, by blood or by adoption, in the direct line or as brother and sister; or
3. one of the spouses had not attained the minimum age required for marriage, nor had obtained the necessary dispensation; or

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<sup>14</sup> Article 8.

<sup>15</sup> Malström Report, p. 300.

4. one of the spouses did not have the mental capacity to consent; or
5. one of the spouses did not freely consent to the marriage.

However, recognition may not be refused where, in the case mentioned in sub-paragraph 1 of the preceding paragraph, the marriage has subsequently become valid by reason of the dissolution or annulment of the prior marriage."

Article 12 provides that the rules of Chapter II are to apply even where the recognition of the validity of a marriage is to be dealt with as an incidental question in the context of another question;<sup>16</sup> however, these rules need not be applied where the other question, under the choice of law rules of the forum, is governed by the law of a non-Contracting State.

Article 13 provides that the Convention is not to prevent the application in a Contracting State of rules of law more favourable to the recognition of foreign marriages.

Article 14 provides that a Contracting State may refuse to recognise the validity of a marriage where such recognition is manifestly incompatible with its public policy ('ordre public').

Finally, Article 15 provides that Chapter II shall apply

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<sup>16</sup> See generally Gotlieb, The Incidental Question in Anglo-American Conflict of Laws, 33 Can. Bar Rev. 523 (1955), Gotlieb, The Incidental Question Revisited - Theory and Practice in the Conflict of Laws, 26 Int. & Comp. L. Q. 734 (1977). Regarding Article 12, the English and Scottish Law Commissions, op. cit., p. 167, fn. 10, comment:

"This exception is a pretty rough and ready one. If one assumes that the main question is one of succession and the subsidiary issue is the validity of the marriage of a potential beneficiary, then whether the Convention applies to the latter issue depends on whether the forum's conflict rules, including possibly renvoi, apply to the succession laws of a State which has ratified the Convention."

regardless of the date on which the marriage was celebrated. It also provides, however, that a Contracting State may reserve the right not to apply Chapter II to a marriage celebrated before the date on which, in relation to that State, the Convention enters into force.

Before examining the implications of specific Articles in Chapter II, some general observations are in order. The Chapter represents a compromise between those states which refer to the law of domicile of the parties to determine the essential validity of marriage and those states which refer to the lex patriae. In settling for the lex loci celebrationis,<sup>17</sup> the Convention is favouring a rule abandoned long ago by most countries and under attack in the United States,<sup>18</sup> and some other countries<sup>19</sup> where it has had a longer influence.

Another criticism that has been voiced in relation to Chapter II is that it "leaves a large number of issues still dependent on the unharmonised, unreformed choice of law rules of the individual States, bearing in mind in particular that the rules of the Convention shall not prevent the application of rules of law more favourable to the recognition of the validity of foreign marriages".<sup>20</sup> Moreover, as the English and Scottish Law Commissions point out,

"[p]erhaps most significant of all is that Chapter II only provides for the recognition of the validity of marriages which are valid under the law of the place of celebration. It provides no rules for recognition of the validity of marriages which are invalid under that

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17 Cf. our Report on Private International Law Aspects of the Capacity to Marry and Choice-of-Law in Proceedings for Nullity of Marriage, (LRC 19-1985), p. 50.

18 Cf. Scoles & Hay, 421, Leflar, 533.

19 Cf. Rabel, vol. 1, p. 264, Pålsson, paras. 33-37.

20 English Law Commission Working Paper No. 89 and Scottish Law Commission Consultative Memorandum No. 64, Private International Law: Choice of Law Rules in Marriage, p. 169 (1985). (This criticism is addressed to the Convention as a whole.)

law. Such recognition still depends on the choice of law rules of the forum."<sup>21</sup>

It should be noted, in relation to the first paragraph of Article 9, that the term "law", when referring to the law of the State of celebration means not only its internal law but also its choice-of-law rules. Thus, if the state of celebration refers questions of substantive validity to the law of the habitual residence of the parties, this would be satisfactory so far as Irish law is concerned, since that is the very reference which (under our proposals)<sup>22</sup> Irish law would itself make. On the other hand, if the law of the place of celebration contains no reference to the parties' personal law, or refers to some other test, such as the domicile or nationality of the parties, Article 9 would require us to recognise the validity of the marriage even though it fails to comply with the substantive requirements of the law of the parties' habitual residence. We could avail ourselves of the limited right to refuse recognition under Article 11 or the right to refuse recognition under Article 14 "where such recognition is manifestly incompatible with public policy". Would this be a sufficient protection?

In favour of the view that it would, it may be argued that Article 11 covers most of the central grounds of nullity of marriage, and that any other important grounds may be dealt with under the general terms of Article 14. Article 11 would, within the limits of the factors it specifies, permit the operation of choice-of-law rules of the state called on to recognise the decree.

This significantly reduces the potential impact of Article 9. Nevertheless, the limits of Article 11 should be noted. It does not cover marriages invalid by reason of affinity,<sup>23</sup> or marriages invalid for consanguinity outside relations in the direct line and between brother and sister;<sup>24</sup> marriages

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<sup>21</sup> *Id.*, p. 170. See further Glenn, *supra*, at 593.

<sup>22</sup> In our Report on Private International Law Aspects of the Capacity to Marry and Choice-of-Law in Proceedings for Nullity of Marriage, (LRC 19-1985), ch. 3.

<sup>23</sup> Cf. our Report on Nullity of Marriage, pp. 45, 47, 139, 135-142 (LRC 9-1984), *Binchy*, 82.

<sup>24</sup> Cf. Glenn, *supra*, at 529.



between persons of the same sex<sup>25</sup> are not included, though these would without serious question be covered by the public policy proviso in Article 14; impotence is not referred to, although, in some cases at least, it could possibly be dealt with under sub-paragraphs 4 or 5 of Article 11.

So far as sub-paragraph 3 of Article 11 is concerned, it should be noted that the rule is one about the minimum age for marriage and is not about parental consent requirements. Thus, "[n]othing in article 11 entitles a Contracting State to use the fact that a spouse has not obtained parental consent as a ground for refusal of recognition".<sup>26</sup> Of course, it would be open for a Contracting State to invoke Article 14. We consider that our recommendations as to parental consent requirements, made in our Report on the Age of Majority, the Age for Marriage and Some Connected Subjects,<sup>27</sup> and reiterated in our Report on Private International Law Aspects of the Capacity to Marry and Choice-of-Law in Proceedings for Nullity of Marriage,<sup>28</sup> would clearly support such an invocation.

It could be contended that it is wrong to overload the public policy proviso. A further criticism is that the only reason why Article 9 would work satisfactorily is because it may be effectively eclipsed by the continued operation of Articles 11 and 14.

The Convention as a whole does not seek to resolve in a comprehensive manner the choice-of-law rules relating to

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<sup>25</sup> Cf. our Report on Nullity of Marriage, pp. 4-8, 90-92; and see Glenn, supra, at 594.

<sup>26</sup> Malström Report, p. 305.

<sup>27</sup> LRC 5-1983.

<sup>28</sup> LRC 19-1985.

marriage.<sup>29</sup> On the contrary, it permits the differing choice-of-law rules of several states to continue to operate, in somewhat narrower and at times arbitrary circumstances, subject to the addition of the extra choice-of-law rules prescribed by the Convention. We consider that the effect of this would be to enhance rather than reduce the present complexity of the international dimensions of this subject.

On balance, therefore, we recommend that the Hague Convention on the Celebration and Recognition of the Validity of Marriages (1978) should not be incorporated into Irish law.

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<sup>29</sup> Cf. the English Law Commission Working Paper No. 89 and the Scottish Law Commission Consultative Memorandum No. 64, Private International Law: Choice of Law Rules in Marriage, p. 170 (1985):

"The choice of law rules in the Convention are incomplete. They cannot, therefore, be regarded as meeting the need for reform of the choice of law rules relating to marriage."

**CHAPTER 7      SUMMARY OF RECOMMENDATIONS**

1. A court should have jurisdiction to hear and determine a petition for nullity of marriage in any of the following cases:
  - (a) Where, at the time of the marriage, the validity of which is in question, either party had his or her habitual residence in the State;
  - (b) Where, at the time of the proceedings, either party had his or her habitual residence in the State;
  - (c) Where the marriage was celebrated in the State and a ground on which the marriage is alleged to be invalid is one to which the lex loci celebrationis applies;
  - (d) Where, in the opinion of the court, either party has, or has had, such substantial ties with the State as to make it appropriate to hear and determine the petition.
  
2. A nullity decree obtained outside the State should be recognised here in any of the following cases:
  - (a) Where the court granting the decree applied the choice-of-law rules which we proposed earlier in our **Report on Private International Law Aspects of Capacity to Marriage and Choice of Law in Proceedings for Nullity of Marriage** (LRC 19-1985).
  - (b) Where the decree was obtained or recognised in the country of either party's habitual residence.
  - (c) Where the decree was obtained or recognised in a country with which either party has a real and substantial connection.
  
3. Fraud, whether as to the foreign court's jurisdiction or as to the actual merits of the petition should be a ground for non-recognition of a foreign nullity decree.
  
4. Where a party's predominant purpose in seeking to establish an habitual residence in, or real and substantial connection with, a particular country was to obtain a nullity decree there which would not otherwise

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be recognised, the decree should not in such circumstances be recognised.

5. The Hague Convention on the Celebration and Recognition of the Validity of Marriage (1978) should not be incorporated into Irish law.

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## APPENDIX

TEXT OF THE HAGUE CONVENTION ON CELEBRATION AND RECOGNITION  
OF THE VALIDITY OF MARRIAGES (1978)Extract from the Final Act of the Thirteenth Session

The States signatory to the present Convention,

Desiring to facilitate the celebration of marriages and the recognition of the validity of marriages,

Have resolved to conclude a Convention to this effect, and have agreed on the following provisions -

Chapter 1 - Celebration of Marriages**Article 1**

This Chapter shall apply to the requirements in a Contracting State for celebration of marriages.

**Article 2**

The formal requirements for marriages shall be governed by the law of the State of celebration.

**Article 3**

A marriage shall be celebrated -

1. where the future spouses meet the substantive requirements of the internal law of the State of celebration and one of them has the nationality of that State or habitually resides there; or
2. where each of the future spouses meets the substantive requirements of the internal law designated by the choice of law rules of the State of celebration.

**Article 4**

The State of celebration may require the future spouses to furnish any necessary evidence as to the content of any foreign law which is applicable under the preceding Articles.

**Article 5**

The application of a foreign law declared applicable by this Chapter may be refused only if such application is manifestly incompatible with the public policy ('ordre public') of the State of celebration.

**Article 6**

A Contracting State may reserve the right, by way of derogation from Article 3, sub-paragraph 1, not to apply its internal law to the substantive requirements for marriage in respect of a future spouse who neither is a national of that State nor habitually resides there.

**Chapter II - Recognition of the Validity of Marriages**

**Article 7**

This Chapter shall apply to the recognition in a Contracting State of the validity of marriages entered into in other States.

**Article 8**

This Chapter shall not apply to -

- 1 marriages celebrated by military authorities;
- 2 marriages celebrated aboard ships or aircraft;
- 3 proxy marriages;
- 4 posthumous marriages;
- 5 informal marriages.

**Article 9**

A marriage validly entered into under the law of the State



of celebration or which subsequently becomes valid under that law shall be considered as such in all Contracting States, subject to the provisions of this Chapter.

A marriage celebrated by a diplomatic agent or consular official in accordance with his law shall similarly be considered valid in all Contracting States, provided that the celebration is not prohibited by the State of celebration.

#### Article 10

Where a marriage certificate has been issued by a competent authority, the marriage shall be presumed to be valid until the contrary is established.

#### Article 11

A Contracting State may refuse to recognize the validity of a marriage only where, at the time of the marriage, under the law of that State -

- 1 one of the spouses was already married; or
- 2 the spouses were related to one another, by blood or by adoption, in the direct line or as brother and sister; or
- 3 one of the spouses had not attained the minimum age required for marriage, nor had obtained the necessary dispensation; or
- 4 one of the spouses did not have the mental capacity to consent; or
- 5 one of the spouses did not freely consent to the marriage.

However, recognition may not be refused where, in the case mentioned in sub-paragraph 1 of the preceding paragraph, the marriage has subsequently become valid by reason of the dissolution or annulment of the prior marriage.

#### Article 12

The rules of this Chapter shall apply even where the recognition of the validity of a marriage is to be dealt with as an incidental question in the context of another question. However, these rules need not be applied where that other question, under the choice of law rules of the forum, is governed by the law of a non-Contracting State.

**Article 13**

This Convention shall not prevent the application in a Contracting State of rules of law more favourable to the recognition of foreign divorces.

**Article 14**

A Contracting State may refuse to recognize the validity of a marriage where such recognition is manifestly incompatible with its public policy ('ordre public').

**Article 15**

This Chapter shall apply regardless of the date on which the marriage was celebrated.

However, a Contracting State may reserve the right not to apply this Chapter to a marriage celebrated before the date on which, in relation to that State, the Convention enters into force.

**Chapter III - General Clauses**

**Article 16**

A Contracting State may reserve the right to exclude the application of Chapter 1.

**Article 17**

Where a State has two or more territorial units in which different systems of law apply in relation to marriage, any reference to the law of the State of celebration shall be construed as referring to the law of the territorial unit in which the marriage is or was celebrated.

**Article 18**

Where a State has two or more territorial units in which different systems of law apply in relation to marriage, any reference to the law of that State in connection with the recognition of the validity of a marriage shall be construed as referring to the law of the territorial unit in which recognition is sought.

**Article 19**

Where a State has two or more territorial units in which different systems of law apply in relation to marriage, this Convention need not be applied to the recognition in one territorial unit of the validity of a marriage entered into in another territorial unit.

**Article 20**

Where a State has, in relation to marriage, two or more systems of law applicable to different categories of persons, any reference to the law of that State shall be construed as referring to the system of law designated by the rules in force in that State.

**Article 21**

The Convention shall not affect the application of any convention containing provisions on the celebration or recognition of the validity of marriages to which a Contracting State is a Party at the time this Convention enters into force for that State.

This Convention shall not affect the right of a Contracting State to become a Party to a convention, based on special ties of a regional or other nature, containing provisions on the celebration or recognition of validity of marriages.

**Article 22**

This Convention shall replace, in the relations between the States who are Parties to it, the Convention Governing Conflicts of Laws Concerning Marriage, concluded at The Hague, the 12th of June 1902.

**Article 23**

Each Contracting State shall, at the time of signature, ratification, acceptance, approval or accession, inform the Ministry of Foreign Affairs of the Netherlands of the authorities which under its law are competent to issue a marriage certificate as mentioned in Article 10 and, subsequently, of any changes relating to such authorities.

**Chapter IV - Final Clauses****Article 24**

The Convention shall be open for signature by the States which were Members of the Hague Conference on Private International Law at the time of its Thirteenth Session.

It shall be ratified, accepted or approved and the instruments of ratification, acceptance or approval shall be deposited with the Ministry of Foreign Affairs of the Netherlands.

**Article 25**

Any other State may accede to the Convention.

The instrument of accession shall be deposited with the Ministry of Foreign Affairs of the Netherlands.

**Article 26**

Any State may, at the time of signature, ratification, acceptance, approval or accession, declare that the Convention shall extend to all the territories for the international relations of which it is responsible, or to one or more of them. Such a declaration shall take effect at the time the Convention enters into force for that State.

Such declaration, as well as any subsequent extension, shall be notified to the Ministry of Foreign Affairs of the Netherlands.

**Article 27**

A Contracting State which has two or more territorial units in which different systems of law apply in relation to marriage may, at the time of signature, ratification, acceptance, approval or accession, declare that the Convention shall apply to all its territorial units or only to one or more of them, and may extend its declaration at any time thereafter.

These declarations shall be notified to the Ministry of Foreign Affairs of the Netherlands, and shall state expressly the territorial unit to which the Convention applies.

**Article 28**

Any State may, not later than the time of ratification, acceptance, approval or accession, make one or more of the reservations provided for in Articles 6, 15 and 16. No other reservation shall be permitted.

Any State may at any time withdraw a reservation it has made. The withdrawal shall be notified to the Ministry of Foreign Affairs of the Netherlands.

The reservation shall cease to have effect on the first day of the third calendar month after the notification referred to in the preceding paragraph.

**Article 29**

The Convention shall enter into force on the first day of the third calendar month after the deposit of the third instrument of ratification, acceptance, approval or accession referred to in Articles 24 and 25.

Thereafter the Convention shall enter into force -

1 for each State ratifying, accepting, approving or acceding to it subsequently, on the first day of the third calendar month after the deposit of its instrument of ratification, acceptance, approval or accession;

2 for a territory to which the Convention has been extended in conformity with Article 26, on the first day of the third calendar month after the notification referred to in that Article.

**Article 30**

The Convention shall remain in force for five years from the date of its entry into force in accordance with the first paragraph of Article 29 even for States which subsequently have ratified, accepted, approved it or acceded to it.

If there has been no denunciation, it shall be renewed tacitly every five years.

Any denunciation shall be notified to the Ministry of Foreign Affairs of the Netherlands, at least six months before the expiry of the five year period. It may be limited to certain of the territories or territorial units to which the Convention applies.

The denunciation shall have effect only as regards the State

which has notified it. The Convention shall remain in force for the other Contracting States.

**Article 31**

The Ministry of Foreign Affairs of the Netherlands shall notify the States Members of the Conference, and the States which have acceded in accordance with Article 25, of the following -

- 1 the signatures and ratifications, acceptances and approvals referred to in Article 24;
- 2 the accessions referred to in Article 25;
- 3 the date on which the Convention enters into force in accordance with Article 29;
- 4 the extensions referred to in Article 26;
- 5 the declarations referred to in Article 27;
- 6 the reservations referred to in Articles 6, 15 and 16, and the withdrawals referred to in Article 28;
- 7 the information communicated under Article 23;
- 8 the denunciations referred to in Article 30.

In witness whereof the undersigned, being duly authorised thereto, have signed this Convention.

Done at The Hague, on the .. day of ..... 19.., in the English and French languages, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Government of the Netherlands, and of which a certified copy shall be sent, through the diplomatic channel, to each of the States Members of the Hague Conference on Private International Law at the date of its Thirteenth Session.

### INTRODUCTION

1. This Report, which covers the period from 1 January 1985 to 31 December 1985, is addressed to the Attorney General pursuant to section 6 of the Law Reform Commission Act, 1975.

2. On 20th October, 1975 the Law Reform Commission, consisting of a President and four other members appointed by the Government, was established as a statutory body corporate under the Law Reform Commission Act, 1975. Vacancies in membership of the Commission arose during 1985 with the untimely death of Mr John Lovatt-Dolan, S.C., and the expiration of the terms of office of the President, the Hon. Mr Justice Brian Walsh and Professor James Casey.

3. The Commission has a general function to keep the law under review and, in accordance with the provisions of the Law Reform Commission Act, 1975, to undertake examinations and conduct research with a view to reforming the law and to formulate proposals for law reform. The Commission's programme prepared in consultation with the Attorney General for submission by the Taoiseach to the Government, was approved by the Government and copies of it laid before both Houses of the Oireachtas on 4th January 1977. Pursuant to recommendations contained in its programme, the Commission has now formulated and submitted to the Taoiseach 20 Reports containing proposals for reform of the law. [See Appendix]

