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Annulments--A Comparative Study of Jurisdiction and Recognition of Foreign Decrees

Donald J. Newman

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Annulments — A Comparative Study of Jurisdiction and Recognition of Foreign Decrees

I. INTRODUCTION

AN ANNULMENT is not the usual decree sought when dissolution of a marriage is desired. This is evidenced by the disproportionate number of divorce decrees rendered as opposed to nullity decrees. Various explanations might be tendered to explain why nullity decrees are in such lesser demand. The obvious explanation is that the generally recognized grounds for annulment such as bigamy, incapacity, willful refusal to consummate, and consanguinity, occur much less frequently than do normal grounds for the breakdown of marriages. Another explanation is the conceptual difficulty presented by the definition of annulment. A divorce terminates an existing marriage whereas an annulment declares that the parties were never legally married. The conceptual difficulty arises when two persons have been living together for a period of time subsequent to a ceremony and a decree is rendered to the effect that their marriage never existed. Finally, the similarity of effect on the parties' status resulting from a divorce or nullity decree, coupled with the historically more definite and extensive jurisdiction of the divorce courts, might be a factor in making a divorce more desirable. Recognition of this similarity has led some states to provide that jurisdictional requirements be the same for annulment and divorce actions.

1 Disparate statistics are found regarding the ratio of annulments to divorces in the United States. One estimate is to the effect that annulments constituted three percent of marriage dissolutions in the 1950's. P. JACOBSON, AMERICAN MARRIAGE AND DIVORCE 90 (1959). Vernon, Labyrinthine Ways: Jurisdiction to Annul, 10 J. PUB. L. 47, 48 (1961), notes that in the United States for every annulment approximately 137 divorces are granted. It is assumed that similar proportions obtain in the other jurisdictions to be considered in this Note.


3 An interesting portrayal of this problem is made in Storke, Annulment in the Conflict of Laws, 43 MINN. L. REV. 849 (1959).

4 It has been argued that jurisdiction over a nullity action should be exercised only if the state in which the court sat was also the place of the celebration of the marriage or the domicile of the parties at the time of the marriage. See Goodrich, Jurisdiction to Annul a Marriage, 32 HARV. L. REV. 806 (1919). This position was criticized by McMurray & Cunningham, Jurisdiction to Pronounce Null a Marriage Celebrated in Another State or Foreign Country, 18 CALIF. L. REV. 105, 111 (1930), who argued that "there is no reasonable justification for denying relief on a theory that only one country or state must have exclusive power. There is room for action by several states.”

5 E.g., GA. CODE ANN. § 53-604 (1961); MASS. GEN'L LAWS ANN. ch. 207, § 14
Nonetheless, annulments are presently a distinct aspect of domestic relations law and the problems which arise in this area must be dealt with accordingly. This Note will outline the bases of jurisdiction over nullity actions in England, Scotland, Canada, Australia, and the United States. In addition, it will depict these countries' positions with respect to the recognition of foreign nullity decrees.

To facilitate understanding of the ensuing discussion, a terminological foundation must be laid. Any marriage which would be subject to a nullity decree is classified as either "void" or "voidable." Historically, civil impediments such as prior marriage and mental illness rendered a marriage void, while canonical impediments such as consanguinity, affinity, and impotence rendered a marriage voidable. This distinction was based on the differences in jurisdiction of the English ecclesiastical courts and the common law and chancery courts.

Today, however, it is generally recognized that a marriage is void from its inception for lack of form or age, consanguinity, affinity, bigamy, or the certified lunacy of either party at the time of the marriage. A petition for an annulment of a void marriage attacks

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6 The argument has been advanced that nullity actions should be equivalent to divorce actions in all respects. H. CLARK, THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES 143 (1968). Vernon, supra note 2, at 276, argues that the element of social stigma which attaches to divorce is sufficient justification for keeping the remedies separate. Storke, supra note 3, at 871-72, observes that such an equivalence might provide too much recognition to bigamous marriages, and also that large groups of persons are opposed to divorce on religious grounds.

7 H. CLARK, supra note 6, at 120; J. JACKSON, THE FORMATION AND ANNULMENT OF MARRIAGE 80-81 (1969). For a lucid description and delineation of void and voidable marriages, see the discussion in De Reneville v. De Reneville, [1948] P. 100, 111 (C.A.). The definitions given there are accepted in all of the jurisdictions under study.


9 DICEY & MORRIS, supra note 8, state that:

[T]he ecclesiastical courts had exclusive jurisdiction over canonical impediments (e.g., consanguinity, affinity and impotence), while the common law and chancery courts as well as the ecclesiastical courts could treat a marriage as a nullity because of a civil impediment (e.g., prior marriage, lack of age, lunacy, etc.). Since the common law courts would interfere by writ of prohibition to prevent the ecclesiastical courts from exercising their exclusive jurisdiction to annul a marriage after the death of one of the parties, the essence of the distinction [between void and voidable marriages] came to be that a voidable marriage could only be annulled during the parties' joint lives. Id. at 347.

10 These are more akin to the distinct defects as recognized in English domestic law. DICEY & MORRIS, supra note 8, at 346. See also Matrimonial Causes Act 1959, §§ 18, 21 (Austl.). In the United States, however, such a broad statement is not accurate. Some states declare bigamy to be a ground for divorce as does Canada. In Ohio, nonage has been indicated to be more appropriately classified as constituting a voidable
the form or validity of the ceremony itself. The remark is often made that a void marriage can be treated by the parties as never having taken place, even in the absence of a judicial declaration. Thus a nullity decree of a void marriage merely declares that no marriage has ever existed.

A voidable marriage has been recognized as a union entailing less serious defects. Incapacity and refusal to consummate are generally considered to be such defects. However, in a voidable marriage — as opposed to a void marriage — if a decree of annulment is not obtained, the presumption is that the marriage is valid.

The effect of a nullity decree on a voidable marriage has traditionally been to declare that the decree relates back to the ceremony and hence the marriage never existed. In reality though, it has been recognized that "in its effect on the personal status of the spouses the annulment of a voidable marriage has the same effect as the dissolution of a valid marriage . . . ."

Whether actions to annul voidable marriages should be completely equivalent to divorce actions is beyond the scope of this Note. The purpose here will be to outline the bases of jurisdiction in the different common law countries. When the similarities and differences have been compared, however, conclusions may be drawn regarding the advisability of identical bases of jurisdiction.

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11 See, e.g., Grodecki, supra note 5, at 567. It has been asked why the parties even bother obtaining a judicial decree if this definition is truly correct. One answer is that a person has a right to a judicial declaration when there is a legal defect in his marriage. Another answer is that the mere occurrence of the ceremony creates expectations and reliance by the public, hence a court declaration is merely for the convenience of these domestic connections. P. Jackson, supra note 7, at 83-84.

12 H. Clark, supra note 6, at 120-21. Decrees annulling void marriages are sometimes referred to as "declaratory." A. Ehrenzweig, Conflict of Laws 300 (1962); Storke, supra note 3, at 850.

13 Storke, supra note 3, at 850.

14 Again, the generalization is more applicable in English domestic law. Dicey & Morris, supra note 8, at 346. In Australia, for example, willful refusal to consummate is a ground for divorce. P. Joske, supra note 2, at 181, 361.

15 H. Clark, supra note 6, at 121.

16 This decree has been classified as "constitutive." A. Ehrenzweig, supra note 12, at 301; McMurray & Cunningham, supra note 4, at 112.

17 H. Clark, supra note 6, at 121; Dicey & Morris, supra note 8, at 347-48; Storke, supra note 3, at 851.

II. JURISDICTION

A. England

For centuries the English ecclesiastical courts exercised jurisdiction over nullity actions, treating them without regard to whether a marriage was void or voidable. Their jurisdiction was exercised pro salute animae — for the sake of the souls of the parties who were before the courts. Nonetheless, the distinction was at that time clearly embedded in the law. In 1857, the jurisdiction previously exercised by the ecclesiastical courts in divorce suits and nullity actions was transferred to the Court for Divorce and Matrimonial Causes. In addition to the jurisdiction previously exercised by the ecclesiastical courts, the newly established divorce courts were also vested with jurisdictional powers expressly conferred by the statute.

The first jurisdictional issue presented to the new court was the case of Simonin v. Mallac. In Simonin both parties were domiciled in Paris and over 21 years of age. Unable to obtain parental consent to marry (required by the Code Napoléon), they came to England to have the ceremony performed. Upon solemnisation, they returned to Paris but thereafter never cohabited. The wife sought and obtained from the French court a decree declaring the marriage void. Subsequently she came to reside in England. Unsure of her status in that country she sought a decree of nullity from the English court. The court found that it had jurisdiction over the matter because the parties, "by professing to enter into a contract in England, mutually gave to each other the right to have the force and effect of that contract determined by an English tribunal." It

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19 See Ross-Smith v. Ross-Smith, [1962] 1 All E.R. 344, 350 (H.L.) and Gower v. Starrett, [1948] 2 D.L.R. 853, 860 where these courts have reviewed the historical development of void and voidable marriages. See also Dicey & Morris, supra note 8, at 348.


21 Id. at 329. The distinction, however, was apparently real only to the judiciary, as the ecclesiastical courts did not pay much attention to it. Lord Morris in Ross-Smith v. Ross-Smith, [1962] 1 All E.R. 344 (H.L.), noted that: The long-established and long-spoken-of contrast between "void" and "voidable" marriages was recognized in the Marriage Act, 1835 (5 & 6 Will. 4 c. 54) by which it was provided that marriages within the prohibited degrees (which previously to the Act were voidable) should be absolutely void. If an ecclesiastical court pronounced a sentence of nullity in the case of a voidable marriage the form of words used was in fact the same as that used in reference to a void marriage. Id. at 362.


23 2 Sw. & Tr. 67 (1860).

24 Id. at 75. One commentator has observed that "[t]his ruling marked a clear departure from ecclesiastical practice which . . . insisted on exclusive residence jurisdic-
then dismissed the petition because by English law the marriage was valid. The contractual basis for the assertion of jurisdiction over a nullity action in which a void marriage is sought to be annulled has been severely criticized but the law is unchanged. English courts will exercise jurisdiction even if the ceremony is the only connection of the parties to the forum.

The rationale of the *Simonin* decision was seriously undermined by the House of Lords in *Ross-Smith v. Ross-Smith*. In that case the petitioner-wife sought to have a voidable marriage annulled, alleging incapacity or, in the alternative, willful refusal to consummate. The marriage had been performed in England but at the time of the suit the wife merely resided there while the husband was domiciled in Scotland. This is important because unless a void marriage is alleged, the domicile of the wife is considered to be that of the husband. The argument made by the wife was that *Simonin* supported the exercise of jurisdiction in her case, but Lord Reid concluded that the *ratio decidendi* of *Simonin* was unsupportable. The court then held that when a voidable marriage is sought to be annulled, the place of the ceremony by itself is not sufficient to authorize jurisdiction over the matter. Further, it expressly limited the holding of *Simonin* to instances where void marriages are being contested and refused to expand the holding in *Simonin* to include voidable marriages.

Where both parties to the marriage share a common domicile, the court of that domicile has authority to assert jurisdiction irrespective of whether the marriage is void or voidable. With respect to a void marriage, common domicile as a basis of jurisdiction was conclusively established in *Von Lorang v. Administrator of Austrian Property*. When a voidable marriage is in issue the general pre-

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26 *Simonin* was followed in Padolecchia v. Padolecchia, [1968] P. 314, 334 (1967). Sir Jocelyn Simon noted that valid reasons existed for the assertion of jurisdiction in addition to the precedent established in *Simonin*. For example, public convenience may dictate that the court exercise jurisdiction. The court of the ceremony is especially well qualified to decide on the validity of the marriage as its own law will be applied. In addition, the country of celebration has an interest in correcting its civil registers. See also W. RAYDEN, supra note 2, at 56.
28 Id. at 349.
29 The court was inclined to expressly overrule *Simonin*, but the fact that it had been accepted as law for a generation inhibited this inclination. Id. at 349. Lords Cohen and Morris concurred with Lord Reid on this point.
30 [1927] A.C. 641 (Scot.). This case is also found cited as *Salvesen or Von Lorang v. Administrator of Austrian Property*. This is a principal case in the area of recogni-
sumption of English domestic law must be kept in mind, namely, that upon completion of the ceremony the domicile of the wife is changed and becomes that of the husband. Thus where a voidable defect is alleged the proper court is that of the husband's domicile.31

The domicile of either party will allow the court of that domicile to exercise jurisdiction where a void marriage is alleged. In White v. White32 the husband was domiciled in Australia where the ceremony had taken place. The wife had been domiciled in England prior to the marriage and since a void defect (bigamy) was alleged, the court had no difficulty finding that the wife was also domiciled in England at the commencement of the proceedings.33 Hence it had the authority to hear the petition of the wife and grant the appropriate relief.34 Where a voidable defect is alleged, the presumption of unity of domicile precludes jurisdiction in any court other than in the place of the husband's domicile.35

If a voidable marriage is sought to be annulled, the court may also assert jurisdiction if both parties reside in England. In Ramsay-Fairfax v. Ramsay-Fairfax,36 the wife brought a petition for annulment on the ground of incapacity or, in the alternative, willful refusal to consummate. The marriage had occurred in the United Kingdom but the husband's domicile was Scotland. At the time of the petition both parties resided in England, but their residency period was less than that required by statute to authorize the exerci-

31 This was established in De Reneville v. De Reneville, [1948] P. 100 (1947), and followed in Parojcic v. Parojcic, [1958] 1 W.L.R. 1280. In De Reneville the petition of the wife was dismissed because the domicile of the husband was in France. In Parojcic, however, the marriage was between two Yugoslavians who had immigrated to England, where the marriage occurred. In order to achieve justice in this case the court found that the husband had adopted England as his domicile of choice. Thus jurisdiction could be exercised on the basis of common domicile.


33 The court talked in terms of domicile and residence, but the reference to residence was considered both unnecessary and incorrect by Lord Greene, M.R., in De Reneville v. De Reneville, [1948] P. 100, 117 (1947).

34 This principle — domicile of either party — was followed in Apt v. Apt, [1948] P. 83 (1947), where the English petitioner-wife entered into a marriage by proxy with an Argentine domiciliary. She sought to have the ceremony annulled as void on the ground that a proxy marriage was contra to English law. The court found that this form of marriage created a defect in the ceremony and thus asserted jurisdiction on the basis of the petitioner's domicile. However the place of celebration was held to be Argentina and the validity of the marriage was to be governed by Argentine law, which considered proxy marriages valid. Accordingly, the court dismissed the petition.


cise of jurisdiction.\textsuperscript{37} In relying on its residuary jurisdiction inherited from the ecclesiastical courts, Lord Dunning noted:

It is quite clear that the ecclesiastical courts based their jurisdiction in cases of nullity on residence, not upon domicile. If the respondent . . . was resident within the local jurisdiction of the court, then the court had jurisdiction to determine it.\textsuperscript{38}

While the facts of the case suggest a holding to the effect that common residency is necessary for the assertion of jurisdiction, resort to the residuary jurisdiction indicates that residence of the respondent will be sufficient.\textsuperscript{39} Reliance on the residuary bases precludes the necessity of considering whether the defect renders the marriage void or voidable.\textsuperscript{40} Thus residence of the respondent will be a sufficient basis for the assertion of jurisdiction in any nullity action.

Statutory bases of jurisdiction have been provided to enable a wife to escape the difficulties inherent in a voidable marriage situation where the husband is neither domiciled nor a resident in England. These provisions are also applicable where a void marriage is alleged, but the necessity to rely on them in this situation probably occurs less frequently. If a wife has been deserted by the husband and the husband was domiciled in England immediately prior to the desertion, jurisdiction may be exercised.\textsuperscript{41} In addition, if the wife has been ordinarily resident in England for a three year period immediately prior to commencement of the proceedings and the husband is not domiciled in any other part of the United Kingdom\textsuperscript{42} the court is authorized to assert jurisdiction.\textsuperscript{43} Uninterrupted presence in England is not necessary to fulfill the residence requirement, but the precise meaning of "ordinarily resident" has not yet been authoritatively established.\textsuperscript{44} Further, it does not appear that the whole period of residence must be during the marriage.\textsuperscript{45}

Once the court asserts jurisdiction over a matter the next issue presented is which country's law should be applied. When juris-

\textsuperscript{37} The statutory bases of jurisdiction are discussed in the text accompanying notes 41-45, infra.

\textsuperscript{38} [1956] P. 115, 132.

\textsuperscript{39} Hutter v. Hutter, [1944] P. 95 (dictum).

\textsuperscript{40} J. JACKSON, supra note 7, at 388-89.

\textsuperscript{41} Matrimonial Causes Act 1965, § 40(1)(a). It has been noted that the rule has a limited scope: "[F]irst because it is confined to cases where the husband was domiciled in England, secondly because the desertion or deportation must precede the husband's change of domicile, and thirdly because it only applies if the husband is deported or is guilty of desertion." DICEY & MORRIS, supra note 8, at 300.

\textsuperscript{42} Or in the Channel Islands or the Isle of Man.

\textsuperscript{43} Matrimonial Causes Act 1965, § 40(1)(b).

\textsuperscript{44} DICEY & MORRIS, supra note 8, at 301.

diction is based on the statute the law which would have been applicable if both parties were domiciled in England at the commencement of the proceedings is to be applied. Where void marriages are in issue, even if the parties were domiciled in England, the general rule is that the court will apply the lex loci contractus. For example, in *De Reneville v. De Reneville*, the petitioner was domiciled in England prior to her marriage in France with the respondent. She returned to England after living with the respondent for some time and sought a decree of nullity on the ground of incapacity, or in the alternative, willful refusal to consummate. Lord Bucknill noted that:

> I think it essential that the law of one country should prevail and that it is reasonable that the law of the country where the ceremony of marriage took place and where the parties intended to live together, should be regarded as the law which controls the validity of their marriage.

However, the French law on this matter was never proven to the court. The normal procedure when this occurs is for the court to presume that the foreign law is identical to England's. Lord Bucknill was willing to do this, but Lord Greene was theoretically inclined to remand the case to the trial court and allow petitioner the opportunity to have the governing French law submitted into evidence. Ultimately he decided against this procedure because of the extreme inconvenience it would impose upon the respondent, a foreign domiciliary, and the petitioner’s claim was dismissed.

The *De Reneville* decision leaves the question open as to what law is to be applied when a voidable marriage is sought to be annulled; however a safe assumption is that the law of the husband's domicile is based on the statute the law which would have been applicable if both parties were domiciled in England at the commencement of the proceedings is to be applied. Where void marriages are in issue, even if the parties were domiciled in England, the general rule is that the court will apply the *lex loci contractus*. For example, in *De Reneville v. De Reneville*, the petitioner was domiciled in England prior to her marriage in France with the respondent. She returned to England after living with the respondent for some time and sought a decree of nullity on the ground of incapacity, or in the alternative, willful refusal to consummate. Lord Bucknill noted that:

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domicile will govern the action, that being the personal law of the parties.  

B. Scotland

The Scottish courts have not had the opportunity to get involved with the jurisdictional problems associated with the void-voidable distinction. The principal reason for this non-involvement is simply that the courts have had to deal only with petitions concerning void marriages. However, from the cases that have been settled, concrete precedent has been established.

*Von Lorang v. Administrator of Austrian Property,* which clearly established common domicile of the parties to be a sufficient basis for the assertion of jurisdiction by English courts, applies with equal force in Scotland. While a void marriage was in issue in that case, it is thought that if a voidable marriage were sought to be annulled Scottish courts would assert jurisdiction under the *Von Lorang* principle.

The concept of domicile has been extended to authorize the assertion of jurisdiction where only the defendant is domiciled in Scotland. In *Aldridge v. Aldridge,* the wife, a domiciled Englishwoman, sought a nullity decree on the ground that the husband had a prior existing marriage at the time of their ceremony in England. Proof of the husband's Scottish domicile was accepted at the trial. Lord Thompson had no difficulty in accepting jurisdiction even though he noted that no precedent actually existed.

No express holding dictates that the court assert jurisdiction in a similar fact situation where the defect renders the marriage voidable. That Scottish courts will assert jurisdiction in this type of case is im-

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54 See Ramsay-Fairfax v. Ramsay-Fairfax, [1956] P. 115, 125. The court had an affidavit from a Scottish lawyer which stated that Scots law was similar to English law in these proceedings. This information was incorrect. Matheson & Webb, *A Note on the Recognition of Foreign Decrees of Nullity Granted to Scots Domiciliaries,* 7 JURID. REV. 21, 22 (1962).


57 [1927] A.C. 641 (Scot.).

58 The commentators on this point seem to feel that the domicile of the husband is controlling, irrespective of *Von Lorang.* A. ANTON, *PRIVATE INTERNATIONAL LAW* 295 (1967); Davis, *supra* note 55, at 49.

plied by dictum in *Balshaw v. Kelly*. There the husband had obtained a Scottish domicile of choice. The ceremony had taken place in England where the respondent wife was currently domiciled. The husband sought a nullity decree alleging his wife's bigamy. The court felt the controlling element regarding the exercise of jurisdiction was the husband's domicile, irrespective that he was the petitioner. Clearly if the man's domicile is to be controlling, no judicial tension is involved by asserting jurisdiction where the defect renders the marriage voidable.

It is clear that the emphasis upon the husband's domicile will result in a hardship to a wife whose husband takes up domicile in another country. This is alleviated somewhat by statute. After 1949, the court was authorized to assert jurisdiction if the wife has been ordinarily resident in Scotland for a period of three years immediately prior to the commencement of the proceedings. Further, the statute makes no reference to whether the marriage is void or voidable. In addition, it has been argued that the Scottish courts are likely to assert jurisdiction where the wife is domiciled in Scotland. This argument is bolstered by the language used in *Balshaw* where Lord Kissen stated: "It seems to me in accordance with principle that either party should . . . be entitled to invoke the law of that party's domicile on the question of status." If domicile can be established with less than three years residence, the statutory provision could conceivably become meaningless.

There is some controversy as to whether the courts will assert jurisdiction solely because the celebration had occurred there. The cases supporting this as a basis of jurisdiction have been undermined. Nonetheless, the issue was decided in the affirmative in *Prawdzic-Lazarska v. Prawdzic-Lazarski*. In that case, however, not only was Scotland the place of celebration, but the wife had also been ordinarily resident there for three years. One commentator has argued that the mere fact of celebration is not likely to be sufficient

61 Law Reform (Miscellaneous Provisions) Act 1949, § 2. The definitions of the terms used in this section, such as "ordinarily resident" do not appear to have been presented to the courts for clarification.
62 Davis, supra note 55, at 49-50.
64 Simonin v. Mallac, [1860] 2 Sw. & Tr. 67. The limitation of this case to void marriages in England was discussed earlier. See notes 27-29 supra & accompanying text. Scottish courts have relied on the Simonin decision. See MacDougall v. Chitavis, [1937] Sess. Cas. 390; Miller v. Deakin, [1912] 1 Scots L.T.R. 253. In MacDougall however, Lord President Normand thought that the question may have to be reconsidered.
for the assertion of jurisdiction irrespective of the defect alleged. Another has argued that where a void marriage is contested, the place of celebration should be a sufficient base. The latter proposition is likely to be followed by the Scottish courts, but in all likelihood they will also require that the defendant be personally served there.

Residence of both or either party has not as yet been held to be a basis for jurisdiction. But the argument has been urged that a 40 day residence is all that should be required when a void marriage is questioned. The dictum of Lord Thompson in Aldridge supports this position where he suggests that because a void marriage confers no status, "the grounds of jurisdiction should be the ordinary grounds competent in a civil court." Further, some treatise writers are also in favor of unrestricted jurisdiction over void marriages. Hence while some support exists for residency as a basis of jurisdiction in Scotland, the support extends only to void marriages and not to voidable ones.

The void-voidable distinction is considered significant in Scotland when the question as to proper law arises. If the court is being asked to annul a void marriage it normally will apply the law which governed the marriage at the time of its creation.

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66 A. Anton, supra note 58, states:
Simonin v. Mallac is not binding as an authority in Scotland, so that there is here no question of overruling a long-standing authority. Since it has been largely deprived of its persuasive authority, the Scottish decisions which rest upon it would appear to have lost their force [as a result of Ross-Smith v. Ross-Smith, [1962] 1 All E.R. 344]. The court will require to consider the question de novo, and it seems unlikely that the doctrine of jurisdiction ratione contractus will survive in matters of status. Id. at 299.

67 Davis, supra note 55, at 50, notes, correctly this writer believes, that "[t]he decision in Ross-Smith thus lends no clear support to the contention of Professor Anton that an accepted ground of jurisdiction [place of celebration] over void marriages may have to be abandoned by the Court of Session."

68 This personal service was missing in MacDougall v. Chitnavis, [1937] Sess. Cas. 390, and Davis, supra note 55, at 51, suggests that this may have been the reason for the expressed misgiving regarding the exercise of jurisdiction. As noted earlier, the wife's compliance with the statutory requirement of three years residence negated the necessity for personal service on the husband. See Pradwzic-Lazarska v. Prawdzic-Lazarски, [1954] Sess. Cas. 98.

69 Davis, supra note 55, at 51-52.


71 See, e.g., G. Cheshire, Private International Law 318 (7th ed. 1965); Davis, supra note 55, at 51-52. See also Aldridge v. Aldridge, [1954] Sess. Cas. 58, where Lord Thompson adds in dictum: "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." Id. at 85.

would result in a decision which is offensive to Scottish law.\textsuperscript{73} When a voidable marriage is in issue, the personal law of the parties at the time of the proceedings will be applied.\textsuperscript{74}

C. Canada

The Canadian courts are presumably no longer plagued with the void-voidable distinction as it relates to their jurisdiction over annulment actions. The reason for this is that in 1968 Parliament enacted An Act Respecting Divorce which incorporated the traditional defects that rendered marriages voidable (incapacity and willful refusal to consummate) into the grounds for divorce.\textsuperscript{75} Thus it appears that nullity actions which will be brought in the future will be to annul void marriages. Also bigamy, a major ground for void marriage annulments, has been included in the Divorce Act as a ground for divorce.\textsuperscript{76} The ensuing discussion will concern itself with the bases of jurisdiction where a void marriage is alleged.\textsuperscript{77}

Where a marriage has been celebrated in a given province, that element by itself is likely to be sufficient for the court of that province to exercise jurisdiction.\textsuperscript{78} However the authority for this proposition is more restricted than is desirable. For example, in both Grower v. Starrett\textsuperscript{79} and Spencer v. Ladd,\textsuperscript{80} while the courts purportedly based their decision on the fact that the celebration had occurred in the province, in both instances the petitioning wife was also domiciled in that province.

Jurisdiction will be exercised in a nullity action if both parties are domiciled in the province.\textsuperscript{81} Domicile of the petitioner has been held to be sufficient in a few cases but the rationale utilized by

\textsuperscript{74} A. ANTON, supra note 58, at 300.
\textsuperscript{75} An Act Respecting Divorce 1968, § 4(1)(d).
\textsuperscript{76} Id. § 3(c). The Divorce Act is reprinted in J. MACDONALD, CANADIAN DIVORCE LAW AND PRACTICE (1969). This work contains the rules of procedure governing every province, the forms applicable in each, and a practitioner's check list for every ground for divorce covered by the Act.
\textsuperscript{77} For purposes of comparison with the other countries' treatment of voidable marriages the grounds for jurisdiction over a divorce in Canada are reproduced. Section 5(1) authorizes jurisdiction when the petition is presented by a Canadian domiciliary and either the petitioner or respondent has been ordinarily resident in that province for a period of one year prior to the proceeding. During this period the actual residence must have existed for ten months.
\textsuperscript{79} [1948] 2 D.L.R. 853 (B.C.).
\textsuperscript{80} [1948] 1 D.L.R. 39 (Alta.).
the court placed emphasis on the fact that it was righting a wrong.\textsuperscript{82} The argument might be made that an analogy to the jurisdictional provisions of the Divorce Act is appropriate. Section 5 authorizes jurisdiction if the petitioner is domiciled in Canada\textsuperscript{83} and either the petitioner or respondent has been an ordinary resident in that province for one year preceding the petition.\textsuperscript{84} If this argument were to prevail it would extend the rules of jurisdiction heretofore established by the common law, namely that residence of the respondent in the province will be sufficient,\textsuperscript{85} but residence of the petitioner will not.\textsuperscript{86}

Because void marriages are likely to be the only ones where a nullity decree will be sought, choice of law problems presumably will be non-existent. Canadian courts are quite willing to apply the \textit{lex loci celebrationis} when they are confronted with a petition to annul a void marriage.\textsuperscript{87} This accords with the general English rule.\textsuperscript{88}

D. \textit{Australia}

Australia has retained, for the most part, the English distinction between void and voidable marriages. This distinction is expressly promulgated in the Matrimonial Causes Act 1959.\textsuperscript{89} However Australia, like Canada, has provided that a spouse's willful refusal to consummate the marriage is a ground for divorce.\textsuperscript{90} Similar to England and Scotland, incapacity will render a marriage voidable. The statute incorporates the recommendation of the Royal Commission on Marriage and Divorce that voidable marriages be treated

\begin{itemize}
\item \textsuperscript{82} Finlay v. Boetner, [1948] 1 D.L.R. 39 (Alta.). \textit{See also} Somberg v. Zaracoff and Rothblatt, [1949] Que.L.R. 301. In Quebec, higher authority has ruled to the contrary in Main v. Wright, [1945] K.B. 105 (Que. C.A.). However, the principle of stare decisis is not applicable in that province.
\item \textsuperscript{84} "Neither 'ordinarily resident' nor 'actually resided' [see note 77 supra] are defined in the Act. The assumption appears to be that a person may be 'ordinarily resident' in a province without 'actually' being so resident. Presumably actual residence connotes a degree of physical presence not required to establish ordinary residence." Mendes da Costa, supra note 83, at 272.
\item \textsuperscript{85} Castel, \textit{Canadian Private International Law Rules Relating to Domestic Relations}, 5 MCGILL L.J. 1, 9 (1958).
\item \textsuperscript{86} Hutchings v. Hutchings, [1930] 4 D.L.R. 673 (Man.).
\item \textsuperscript{87} \textit{See}, e.g., Hunt v. Hunt, [1958] 14 D.L.R.2d 243 (Ont.).
\item \textsuperscript{88} \textit{See} note 47 supra \& accompanying text.
\item \textsuperscript{89} Matrimonial Causes Act 1959, §§ 18, 21.
\item \textsuperscript{90} \textit{Id.} § 28.
\end{itemize}
like divorces with respect to rules of jurisdiction. This jurisdiction will be authorized in an action to annul a voidable marriage only if the petitioner is domiciled in Australia. To avoid the presumption that in a voidable marriage the wife's domicile becomes that of the husband, the statute provides that a woman is considered domiciled in Australia if she has resided there for three years prior to the proceeding.

The emphasis on domicile is lessened when a void marriage is being questioned. Jurisdiction will be exercised if the petitioner is either domiciled or resident in Australia. The statute defines residency as "ordinarily resident in the Territory," which has been construed to be the place where one has his home despite absence from it for a substantial period of time. An alternative definition provided by the statute is that the petitioner must have been a resident in the Territory for a period of not less than six months prior to the proceeding. Implicit in this section of the statute is the concept of an Australian domicile as opposed to a particular state or territory domicile. The fact that the petitioner has moved from state to state will not preclude the court from asserting jurisdiction, if

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92 Matrimonial Causes Act 1959, § 23(4).


94 Matrimonial Causes Act 1959, § 23(5).

95 Id. § 23(7)(a).

96 P. Joske, Marriage and Divorce 170 (4th ed. 1963, Supp. 1966). No cases have been decided on this point since the enactment of this particular statute. However, the question had been considered earlier in Caldwell v. Caldwell, [1946] S. Austl. 185. There the husband was in the service and stationed in Queensland where he was also domiciled. He married respondent in the State of South Australia where she was domiciled prior to the marriage. While he was stationed elsewhere, the wife rented a room from her mother which became the matrimonial home. Petitioner's husband would cohabit with his wife there when he was on a leave. Upon his discharge he returned to the matrimonial home only to be informed that his wife loved another. After remaining in South Australia for six months he petitioned for a divorce. In calculating his year of residence which the statute required the court counted nearly six months when he had been stationed in Queensland.

97 Matrimonial Causes Act 1959, § 23(7)(b).

98 Barry, J., in Lloyd v. Lloyd, [1962] Vict. 70 (1961), stated: I see no reason inherent in the common law concept of domicile why the Parliament of the Commonwealth is not competent to create or recognize the existence of an Australian domicile for the purpose of its law with respect to matrimonial causes, even though for other purposes the domicile of an Australian citizen may be connected only with a State or Territory. Id. at 71.

It has been suggested that such a view is consistent with the intention of the statute. Cowen & Mendes da Costa, The Unity of Domicile, 78 L.Q. Rev. 62, 67 (1962).
the six months residence requirement has been fulfilled. Jurisdiction then does not present a difficult problem in Australia, as compared to the other countries considered, because it is governed exclusively by statute. It should be noted, however, that the Australian courts do not have jurisdiction to annul a void marriage merely on the basis of the marriage being celebrated there.99

Once jurisdiction is established, the courts are directed to proceed and give relief in accordance with the principles and rules applied by the English ecclesiastical courts prior to the Matrimonial Causes Act 1857.100 Thus when a void marriage is sought to be annulled, the Australian courts will apply the lex loci celebrationis.101 If the celebration occurred prior to the enactment of the statute the court will proceed in accordance with the procedures of the statute, but will apply the law which existed at the time of the celebration.102 Where a voidable marriage is in issue, the law of the domicile (husband's) will be applied.103

E. United States

In the United States, jurisdiction over annulment actions is a matter governed exclusively by the states.104 Where states have enacted statutes granting the courts jurisdiction, the various bases for the exercise of it are as follows: (1) that the plaintiff shall be a domicili-

100 Matrimonial Causes Act 1959, § 25.
101 P. JOSKE, supra note 96, at 229.
102 Vidovic v. Vidovic, [1967] Vict. 680. In this case the Victorian Marriage Act 1958 rendered a result no different than would have been obtained had the Matrimonial Causes Act 1959 been applied.
104 Originally courts in the United States exercised jurisdiction over matrimonial causes on the basis of their equity power. Chancellor Kent in Wightman v. Wightman, 4 Johns. Ch. 343 (1820), stated that: "All matrimonial, and other causes of ecclesiastical cognisance, belonged originally to the temporal Courts; ... and when the Spiritual Courts cease, the cognisance of such causes would seem, as of course, to revert back to the lay tribunals." Id. at 347. However, the power of equity was interpreted differently in the courts of the various states. In a comprehensive study of the development of this jurisdiction, Speca, The Development of Jurisdiction in Annulment and Marriage Cases, 22 U. KAN. CITY L. REV. 109, 134 (1954), it is observed that five separate theories emerged regarding the power of an equity court. These are as follows:
1. The Court of Chancery had inherent power to rescind a contract based on fraud, duress, or mistake, or lack of consent, and to annul a marriage where the impediment was the same as in an ordinary contract.
2. No court had jurisdiction without intervention of legislation.
3. The rules applied in the Ecclesiastical Courts were part of the English common law which we adopted in our common law.
4. Annulment was not recognized as a proper form of relief between husband and wife.
5. The Chancery Court was a court of granted powers — whatever power it had must have been specifically conferred on it either by the Constitution or by statute.
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ary of the state at the commencement of the action; (2) that at least one of the parties be a domiciliary of the state at the commencement of the action; (3) that one of the parties must reside in the county where the action is brought; and (4) where a local marriage is involved, residency of the parties is irrelevant. The majority of states, however, have left the resolution of nullity jurisdiction to the courts. The practices of these courts indicates rather clearly that domicile is a proper base for the assertion of jurisdiction, especially if both parties are domiciled in the state.

The Restatement (Second) of Conflicts urges that a court have the power to exercise jurisdiction in a nullity proceeding under the following circumstances. It would have jurisdiction if the action were for divorce, or if the state has a paramount interest in the action, or finally if the marriage were celebrated within its boundaries. These bases of jurisdiction have been recognized by American courts for many years. Further, whether a marriage is void or voidable does not appear to be a factor of consideration in the courts' decisions. Normally, the state can be said to have a paramount interest in the status of the parties if one or both of them resides or is domiciled in that state. In addition, if the marriage was celebrated within the state, jurisdiction is usually authorized though personal service on the defendant has been required.

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106 Id. at 65. In his article Vernor provides an extremely comprehensive and detailed study of the practices of all these states. The intent of this Note is not to duplicate his study, but instead to merely highlight the elements upon which state courts generally will or will not exercise jurisdiction in order to make some comparison with the other four countries considered herein. Obviously, any assertions are subject to refutation by the practice of one or two states, and to this extent the ultimate comparison is suspect.
107 Id.
109 Id. § 76. The Restatement position is that the rules of jurisdiction should be the same for the annulment and divorce proceedings. Id. § 76 comment c. It has been argued, however, that this equivalence is inappropriate because divorce jurisdiction statutes are drafted to discourage hasty divorces. Nullity decrees, especially where void marriages are involved, should be judicially declared void as soon as possible. Annot., 32 A.L.R.2d 734, 736 (1953).
112 R. LEFLAR, supra note 110, at 560.
113 State ex rel. Pavlo v. Scoggins, 60 N.M. 111, 287 P.2d 998 (1955). The proviso regarding personal jurisdiction over the defendant is included by the drafters of the Restatement in comment c, of § 76.
However, it should be noted that the principle of domicile has decidedly prevailed over the place of celebration as a jurisdictional basis in the United States.\textsuperscript{114}

In the United States the general rule is that in a nullity action the \textit{lex loci celebrationis} is applicable.\textsuperscript{115} As a result, American courts have had to resort to public policy rationales to apply a law other than that of the place of celebration.\textsuperscript{116} Adoption of the English rule, that when a voidable marriage is alleged the law of the domicile ought to control, would preclude policy-oriented decisions and be more consistent with the choice of law principles espoused in the \textit{Restatement}.\textsuperscript{117}

III. RECOGNITION OF FOREIGN NULLITY DECREES

A. England

The problem of recognition of foreign nullity decrees is basically a question of the competence of the court which rendered the decree.\textsuperscript{118} The competence of the rendering court is ascertained by asking whether it had jurisdiction over the subject matter and the parties. Normally the English courts will recognize a foreign nullity decree granted by a court at the place where both parties to the marriage were domiciled when the proceedings commenced.\textsuperscript{119} A corollary to this is recognition of a decree which would be recognized by the court of common domicile.\textsuperscript{120} Finally, it has been established that the English courts will recognize a decree rendered by the court of the place where the marriage was celebrated, provided the marriage was void.\textsuperscript{121}

The rule that English courts would recognize a decree rendered by the court where both parties were domiciled was firmly estab-


\textsuperscript{115} Storke, \textit{Annulment in the Conflict of Laws}, 43 Minn. L. Rev. 849, 866 (1959); Vernon, \textit{supra} note 105, at 77. Such a rule obviously ignores the void-voidable distinction.

\textsuperscript{116} E. Rabel, \textit{supra} note 114, at 583.

\textsuperscript{117} \textit{Restatement (Second) of Conflict of Laws} § 6 (Proposed Official Draft 1967).


\textsuperscript{120} This principle was originally established in a case which dealt with recognition of a foreign divorce decree, Armitage v. Attorney General, [1906] P. 135. The court had little difficulty in applying the principle to a foreign nullity decree annulling a voidable marriage when the first opportunity presented itself 55 years later. Abate v. Abate, [1961] P. 29.

\textsuperscript{121} Merker v. Merker, [1963] P. 283; W. Rayden, \textit{supra} note 119 at 82.
lished in *Von Lorang v. Administrator of Austrian Property*.\(^\text{122}\) There the House of Lords recognized a German nullity decree which annulled a marriage celebrated in France. At the time of the German proceeding both parties were domiciled in Germany. The German court applied the *lex loci celebrationis* because the defects went to the formalities of the ceremony. Hence even if the decree were originally sought in England, the result would be the same because English courts would have applied the same law.\(^\text{123}\)

The issue of whether the domicile of the husband was sufficient to render the decreeing court competent was faced by the court in *Chapelle v. Chapelle*.\(^\text{124}\) In that case the petitioner husband sought a divorce decree in England. He had been domiciled in Malta but had married an English domiciliary in England. Subsequently the parties returned to Malta. The husband obtained a nullity decree there on the ground that no religious ceremony had ever been performed. Later the husband moved to England (thereby acquiring a new domicile of choice) and, unclear as to his marital status in England, sought a divorce. The wife pleaded that the nullity decree was controlling. The court, however, noted that the Malta decree rendered the marriage void. That being the case, it did not follow that her domicile became that of the husband's by operation of law. She also failed to prove that she had acquired Maltese domicile in any other manner, so the court, purportedly following *Von Lorang*, refused to recognize the decree and granted the husband relief.

The *Chapelle* decision has been subjected to much criticism.\(^\text{125}\) Specifically, since the ceremony was performed in England, the court should have looked to English law to determine the validity of the ceremony.\(^\text{126}\) Under English law the marriage was clearly valid; thus the wife's domicile would have been that of the husband's by operation of law. Malta then would have been the common domicile of the parties and the Maltese decree recognizable. Another incongruity of the decision is the court's willingness to assume the correctness of the Maltese court's decree that the marriage was void.\(^\text{127}\) By the definition of a void marriage propounded by the Court of Appeal in *De Reneville v. De Reneville*,\(^\text{128}\) the marriage was void

\(^{122}\)[1927] A.C. 641 (Scot.).

\(^{123}\) This aspect was not crucial to the decision, however. *Dicey & Morris, supra* note 8, at 372.


\(^{125}\) *Dicey & Morris, supra* note 8, at 374 n.72; Grodecki, *supra* note 118, at 230-32 & n.31.

\(^{126}\) *Dicey & Morris, supra* note 8, at 374.

\(^{127}\) Grodecki, *supra* note 118, at 234.

without the benefit of a decree. The problem with this definition is that it lacks precision in an international choice of law context, because if it were correct, then no recognition problem arises where a void marriage is in issue.\textsuperscript{129}

Whether the \textit{Chapelle} decision is still binding in England is questionable. Under a similar fact situation, except that the husband apparently obtained a Maltese domicile by choice after the marriage, the Court of Appeal in \textit{Gray v. Formosa}\textsuperscript{130} was divided on whether \textit{Chapelle} should govern. Two years later, however, it observed in \textit{Lepre v. Lepre}\textsuperscript{131} that the discussion in \textit{Gray} was dictum. Because the husband was domiciled in Malta, that court was competent to declare his status. The decree constituted judgment in rem and thus “should be regarded universally as conclusive as to his status . . .”\textsuperscript{132} However, in both \textit{Gray} and \textit{Lepre} the decrees were not recognized on the rationale that they offended the English concept of justice. Thus, irrespective of the rule which English courts might formulate as to recognition of foreign nullity decrees, the result in each particular case is likely to be decided on the basis of its facts.

Only by analogy to the recognition of foreign divorce decrees by English courts can the \textit{Von Lorang} rule be expanded.\textsuperscript{133} This expansion would include the recognition of nullity decrees pronounced by foreign courts where only one of the parties was domiciled or where jurisdiction was exercised on the basis of the residence of the parties. The leading case in this area is \textit{Travers v. Holley},\textsuperscript{134} where the Court of Appeal recognized a foreign divorce despite the fact that the wife was not domiciled at the place of the court.\textsuperscript{135} The court of New South Wales had asserted jurisdiction under a deserted wife statute\textsuperscript{136} which authorized jurisdiction where a wife had

\textsuperscript{129} For a criticism of the definitions of the marriage categories enunciated by the \textit{De Reneville} court see, Grodecki, \textit{Recent Developments in Nullity Jurisdiction}, 20 MOD. L. REV. 566, 569-73 (1957).

\textsuperscript{130} [1963] P. 259 (C.A.). Lord Denning, M. R. and Donovan, L. J. would not recognize the Malta decree rendering an English marriage void because no religious ceremony was performed and thus followed the \textit{Chapelle} reasoning. Pearson, L. J., however, was convinced that the decree should be recognized.

\textsuperscript{131} [1965] P. 52.

\textsuperscript{132} \textit{Id.} at 62. This view is approved by \textit{DICEY \& MORRIS, supra} note 8, at 374.

\textsuperscript{133} The analogy is appropriate in light of the effect upon the parties’ status under either an annulment or a divorce decree.

\textsuperscript{134} [1953] P. 246 (C.A.).


\textsuperscript{136} New South Wales Matrimonial Causes Act 1899, § 16(a).
resided in the county for three years preceding the action. After noting that England had identical statutory provisions, Lord Hodson concluded that:

where, as here, there is in substance reciprocity, it would be contrary to principle and inconsistent with comity if the courts of this country were to refuse to recognize a jurisdiction which mutatis mutandis they claim for themselves.

Theoretically, the Travers reciprocity principle is appealing with respect to the recognition of foreign nullity decrees; however, it has presented problems in its application. The facts of Travers do not determine whether the reciprocity must be of statutory jurisdictional allowances or factual situations. Equivalent statutory provisions were involved in Carr v. Carr where the court recognized a divorce decree of the Northern Ireland court. However in Dunne v. Saban the court refused to recognize a Florida decree where the Florida statute authorized jurisdiction when a deserted wife had been a resident in Florida for ninety days. In fact the wife had resided in the state for two years prior to bringing the action. The English court found that the ninety day residence requirement was not sufficiently similar to the three year requirement in England and hence it did not recognize the decree. It appears, however, that the "jurisdictional approach" adopted in Carr and Dunne does not represent the present English attitude toward expanding the Travers principle in divorce recognition cases. A "factual approach" was

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137 Matrimonial Causes Act 1937, § 13 (Eng.).
138 Travers v. Holley, [1953] P. 246, 257. Lord Sommervell remarked: "On principle it seems to me plain that our courts in this matter should recognize a jurisdiction which they themselves claim." Id. at 251.
139 It is consistent with the principle enunciated by Mr. Justice Frankfurter in Williams v. North Carolina, 325 U.S. 226 (1945).
As to the truth or existence of a fact, like that of domicil, upon which depends the power to exert judicial authority, a State not a party to the exertion of such judicial authority in another State but seriously affected by it has a right, when asserting its own unquestioned authority, to ascertain the truth or existence of that crucial fact. Id. at 230.
The thesis that the Travers court might have been unconsciously adopting the Williams approach was expressed in Webb, Recognition in England of Non-Domiciliary Divorce Decrees, 6 INT'L & COMP. L.Q. 608, 618-21 (1957).
141 [1955] 1 All E.R. 61. The Matrimonial Causes Act 1939, § 26 (N. Ire.), provided that jurisdiction could be exercised over a wife's petition for divorce if the husband had been domiciled in Northern Ireland immediately prior to deserting the wife. The facts allowed the assertion of jurisdiction under this provision which was similar to § 18(1)(6) of the Matrimonial Causes Act 1950 (Eng.).
143 Matrimonial Causes Act 1950, § 18(1)(6).
144 Webb, supra note 139, notes that these cases "[r]eveal the logical outcome of applying the literal rule of statutory interpretation even if they also betray a tendency
adopted in *Arnold v. Arnold* when the court was unable to find a similarity in the foreign jurisdiction statute. The court noted that since the wife had been a resident of the foreign country for more than three years prior to the divorce, an English court would have been able to assert jurisdiction had the action been brought in England. Accordingly the decree was recognized. But it should be noted that the problem here is not the expansion of the *Travers* doctrine, but rather its extension to foreign nullity decrees.

The *Travers* principle has been applied to a foreign nullity decree, albeit in dictum, in *Merker v. Merker*. In that case two Polish domiciliaries, serving in the Polish army in Germany, were married in a Roman Catholic ceremony there. However, the formalities of German law were not complied with. Later the wife left the husband because of his alleged cruelty. The German court declared the marriage a complete nullity. There was a discrepancy between the English and German definition of void, namely void under German law was equivalent to voidable under English law. If the proper German law had been applied, the decree would have pronounced the marriage non-existent rather than void. Nonetheless, Sir Jocelyn Simon felt the German court should be recognized as competent to annul the marriage in this case, on the ground that it was celebrated in Germany and was in German law properly void ipso jure. Even if regard were to be paid at this stage to the form of the Aurich judgment and the marriage were to be considered voidable in the conflict of law sense... the parties were both resident within the jurisdiction of the Aurich court at the time of the proceedings, and the English courts claim jurisdiction in such circumstances....

Thus English courts will recognize a foreign nullity decree if both parties were resident within the jurisdiction of the decreeing court.

towards 'homeward tendism' and show up some of the evils of enacting unilateral conflict of law rules." *Id.* at 615.

145 This was first delineated by Dean Griswold, *supra* note 135, at 227-28.


147 *DICEY & MORRIS, supra* note 8, at 376, argue that the application of the *Travers* doctrine is reasonable where the foreign court asserted jurisdiction on facts similar to those recognized by the English statute. Recognition would obtain if the nullity decree was granted to a wife who had been deserted or her husband had been deported from a country and prior to either event he had been domiciled in the country whose court issued the decree. In addition, the decree could be recognized if the wife was ordinarily a resident in the country where the issuing court was located for three years immediately prior to the proceedings. *See* Matrimonial Causes Act 1965, § 40(1)(a) & (6). Under this argument an English court could recognize the decree even if the foreign court did not have a similar statute.


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Whether recognition will be extended to nullity decrees issued by foreign courts whose basis for jurisdiction is not equivalent to any recognized by English courts, such as residence of the wife for less than three years, is a question which must be answered in future decisions. The indication is that the decree will be recognized. In *Indyka v. Indyka*, the House of Lords recognized a foreign divorce decree rendered prior to the enactment of the English statute. This statute authorized English courts to exercise jurisdiction over a deserted wife's petition, provided that the wife had resided in England for three years immediately prior to the proceeding. In examining the separate opinions given regarding recognition of foreign divorce decrees one point stands out — a foreign court's competence is not dependent upon its exercising rules of jurisdiction identical to those in England.

B. Scotland

Scottish recognition of foreign nullity decrees is similar to England's rules but much more restrictive. The basic rule is that a foreign decree pronounced by a competent court will be recognized in Scotland. However, the dearth of cases dealing with recognition of foreign nullity decrees dictates that any discussion of the expansion of the basic rule be merely speculative.

One settled principle of Scottish law is that a decree issued by a foreign court located in the place of common domicile of the parties will be recognized. This holds true whether the marriage was void or voidable. In addition, recognition will probably obtain if

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151 See Matrimonial Causes Act 1949. The wife had resided in Czechoslovakia for well over three years prior to the proceeding.
152 Lord Reid felt that the decree of the court where the matrimonial home is located should be recognized. In this respect, he added, he could "see no good reason for making any distinction between the husband and the wife. If we recognize a decree granted to the one, we ought equally to recognise a decree granted to the other . . ." *Indyka v. Indyka*, [1967] 2 A11 E.R. 689, 702. Lord Morris stated that:

The evidence was that the Czech court accepted jurisdiction on the ground that both the parties were and always had been Czechoslovakian citizens. The first wife at the time when she presented her petition in Czechoslovakia undoubtedly had a real and substantial connexion with that country. I see no reason why the decree . . . should not . . . be recognised. *Id.* at 708.

Lord Wilberforce, in noting that *Travers v. Holley* was clearly an unexceptional decision stated that: "I am unwilling to accept either that the law as to recognition of foreign divorces (still less other) jurisdiction must be a mirror image of our own law or that the pace of recognition must be geared to the haphazard movement of our legislative process." *Id.* at 727.

153 See A. ANTON, PRIVATE INTERNATIONAL LAW 300-01 (1967), for a discussion of the historical development of this principle.
154 The case which establishes this rule in Scotland is the same case which governs in England, *Von Lorang v. Administrator of Austrian Property*, [1927] A.C. 641 (Scot.).
the decreeing court asserted jurisdiction on bases similar to those where Scottish courts by statute are authorized to exercise jurisdiction. This is limited to suits brought by a wife, notwithstanding the husband's domicile, who has been a resident of Scotland for three years immediately preceding the commencement of the proceedings.\footnote{Law Reform (Miscellaneous Provisions) Act 1949, § 2. It has been suggested that this provision is exhaustive where the assertion of jurisdiction is based on residence. Matheson & Webb, A Note on the Recognition of Foreign Decrees of Nullity Granted to Scots Domiciliaries, 7 JURID. REV. 21, 26 (1962). "If the Scottish courts accept the Travers v. Holley principle ... they would presumably recognise foreign nullity decrees based on similar residential qualifications; otherwise, there would seem to be no ground upon which such decrees may be recognized." A. ANTON, supra note 153, at 303.}

Finally, the courts of Scotland are likely to recognize a nullity decree of a void marriage if the celebration occurred at the place of the court.\footnote{Hitherto, the Scottish courts have assumed jurisdiction only where Scotland was the \textit{locus celebrationis} and the marriage was found to be void .... Given, however, that the Scottish courts themselves assume jurisdiction in the case of void marriages where Scotland is the \textit{locus celebrationis}, it seems only reasonable also to expect them to recognize a decree granted by a foreign court which assumed jurisdiction on the same basis (even if one or both of the parties are domiciled in Scotland) provided that the marriage was void in the eyes of Scots law and that there was not any other reason for impugning the decree. Matheson & Webb, supra note 155, at 29.}

If \textit{Warden v. Warden} represents the ultimate statement regarding Scottish recognition of divorce decrees, then the \textit{Travers} principle of reciprocity is unlikely to have any effect in Scotland. In \textit{Warden} the husband petitioner, a domiciliary of Scotland, sought a divorce decree in Scotland based on his wife's adultery. The wife pleaded, in essence, that a Nevada divorce obtained by her was res judicata in the instant proceeding. The argument for recognition of this decree was that since the courts of Scotland were authorized to exercise jurisdiction in an action brought by a wife who was a resident in Scotland for three years prior to the proceeding,\footnote{See Law Reform (Miscellaneous Provisions) Act 1949, § 2.} a foreign court exercising jurisdiction on a residency basis was competent. However, nothing in the opinion indicated that in fact the wife had been a resident in Nevada for three years prior to her petition for divorce. That proposition not being asserted, Lord Strachan was probably justified in assuming that she was a resident in Nevada only for the period required by statute, namely six weeks. Thus the nonrecognition of the Nevada decree was arguably the appropriate result, and, had the \textit{Travers} principle been in effect in Scotland at that time, the decision would likely be the same.\footnote{See, e.g., Dunne v. Saban, [1955] P. 178, where a Florida decree of divorce was not recognized because jurisdiction was based on a statute requiring only a ninety day residency period. The "real and substantial" connection test promulgated by Lord Reid}
Lord Strachan's dictum in *Warden*, however, must be overcome if Scottish courts are to expand the recognition of foreign decrees where jurisdiction was exercised on grounds similar to those acknowledged in Scotland. For example, the good Lord felt that if reciprocal recognition were meant to be the rule, Parliament would have explicitly provided for it in the statute.\textsuperscript{160} This reasoning is clearly inconsistent with that of the English Court of Appeal in *Travers*.\textsuperscript{161} Should the appropriate cases present themselves to the Scottish courts, and if the most restrictive reading of the *Travers* principle were adopted,\textsuperscript{162} then recognition would obtain when the foreign court's rule of jurisdiction was the exact equivalent of Scotland's. Conceivably then, foreign nullity decrees would be recognized where the decreeing court exercised jurisdiction on the basis of the husband's domicile alone, irrespective of who is the petitioner.\textsuperscript{163}

\textbf{C. Canada}

When a foreign nullity decree is urged upon a Canadian court for recognition, the court will recognize the decree if the jurisdiction of the decreeing court coincides with the common law bases of jurisdiction recognized in Canada.\textsuperscript{164} Generally these bases include common domicile of the parties, residence of the respondent, and celebration of the marriage.\textsuperscript{165} A further basis, domicile of the petitioner, is accepted in some provinces.\textsuperscript{166} When recognition is

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\textsuperscript{161} In *Travers* the decree which was recognized had been rendered prior to enactment of the statute which authorized English courts to assert jurisdiction on similar grounds.

\textsuperscript{162} This interpretation, that the foreign court's rule be the "mirror image" of the recognizing court, was rejected by Lord Wilberforce in *Indyka v. Indyka*, [1967] 2 A11 E.R. 689, 727-28.

\textsuperscript{163} This assumes a void marriage. In *Aldridge v. Aldridge*, [1954] Sess. Cas. 58, the husband was domiciled in Scotland and the wife, a domiciliary of England, sought a decree rendering the Scottish marriage void because of bigamy. Jurisdiction was exercised and the decree granted. In *Balshaw v. Kelly*, [1967] Scots L.T. 5, jurisdiction was asserted on the basis of the husband's domicile in Scotland where he was the petitioner.

\textsuperscript{164} See, e.g., *Capon v. McFay*, [1965] 2 Ont. 83. Appellant, in trying to obtain her intestate share of decedent's (her former husband) estate, argued that a nullity decree she obtained in Nevada was invalid because the Nevada court did not have proper jurisdiction to make the declaration. To ascertain whether recognition was appropriate the court hypothesized whether it could have asserted jurisdiction had it been in the position of the Nevada court.


accorded, it is grounded upon an equation of the common law bases of jurisdiction. However, as noted in the discussion of Canadian court's jurisdiction, the common law bases of jurisdiction have been restricted to void marriages. Therefore, it might be the case that the equation of common law bases will not be appropriate if a decree annulling a voidable marriage is urged upon the court for recognition. The party urging recognition would be well advised to be familiar with the *Travers* principle.

The *Travers* principle authorizes recognition if the foreign bases of jurisdiction comports with local statutory extensions of the common law bases. This principle has been extended to recognition of foreign nullity decrees by the Ontario Court of Appeal in *Capon v. McFay*. There the wife, after having the husband committed to a mental institution in Ontario, established a bona fide domicile in Nevada and eventually secured a decree declaring her marriage void because of the husband's insanity at the time of the ceremony. Upon the husband's death however, she sought to obtain her intestate share of his estate arguing that the Nevada decree was invalid because the court did not have proper jurisdiction over her. The court concluded that it would be entitled to exercise jurisdiction solely on the ground that the petitioner was domiciled in Ontario. The learned judge felt that failure to recognize such a decree would be "inconsistent and contrary" to the well recognized principle enunciated in *Travers*.

Admittedly, the reference to *Travers* was unnecessary in *Capon* because clearly the equation of common law bases of jurisdiction to the effect that domicile of the petitioner is not sufficient. Hutchings v. Hutchings, [1930] 4 D.L.R. 673 (Man. C.A.) held that it was not sufficient. In Ontario, presumably *Capon v. McFay*, [1965] 2 Ont. 83 (C.A.) would control. There the court stated that in its view, the assumption of jurisdiction by the English Courts in the case of a void marriage is founded on sound reason, for if a void marriage is a complete nullity and can be regarded in that light by every Court and by all persons, there can be no valid reason for withholding recognition from a decree recording its non-existence made by the forum of the country in which only one of the parties is domiciled. To restrict jurisdictional recognition to the Courts of the country of the common domicile would result in the creation of an intolerable situation in the case of a void marriage where the domicile of the parties, as has been demonstrated, may be different. In such a case the problem of jurisdiction would be hopelessly insoluble, leading to the creation, as in the case at bar, of a deplorable condition in which one of the parties would be regarded as married in one country and unmarried in another. *Id.* at 95.

*Castel, Comment, 43 CAN. B. REV. 647, 659 (1965).*


*Castel, supra note 167, at 658-59.*

*168 [1965] 2 Ont. 83 (C.A.).*
rendered recognition appropriate.\textsuperscript{171} The lack of cases on the point makes any statement regarding recognition of foreign nullity decrees on the basis of the \textit{Travers} principal purely conjectural. It is to be noted that Canadian commentators have been urging the adoption of this principle with respect to the recognition of foreign nullity decrees for years.\textsuperscript{172} However, it has been noted that the \textit{Indyka v. Indyka}\textsuperscript{173} expansion of \textit{Travers} to the effect that the recognizing court should look only to see if the party had "a real and substantial" connection with the forum which asserted jurisdiction, will render the provisions of the Divorce Act\textsuperscript{174} of diminished importance in recognizing foreign divorce decrees.\textsuperscript{175} A fortiori the effect would be the same in recognizing nullity decrees. Thus domicile of the petitioner in the place of the decreeing court may not ultimately be necessary.

D. \textit{Australia}

For an Australian court to recognize a nullity decree of a foreign country, the necessary bases upon which the foreign court must have asserted jurisdiction are explicitly delineated by statute.\textsuperscript{176} These bases are a mirror of those which enable Australian courts to exercise jurisdiction. Where a voidable marriage is annulled, the decreeing court must be the place of the domicile of the petitioner.\textsuperscript{177} A decree annulling a void marriage can be declared by the court of domicile or residence of the petitioner.\textsuperscript{178} Further, if a foreign nullity decree was not based on the petitioner's domicile or residence, and the law of the foreign country authorizes the assertion of jurisdiction on the basis of the respondent being domiciled there, then

\textsuperscript{171} This argument is made by Castel, \textit{supra} note 167, at 659. The author further points out that:

This is not to say that the new philosophy adopted by the Ontario Court of Appeal in the field of recognition of foreign decrees in matrimonial causes should be rejected altogether. Comity or rather reciprocity in appropriate cases facilitates the recognition of foreign decrees based on jurisdictional grounds similar to those upon which Ontario courts declare themselves competent. \textit{Id.}

\textsuperscript{172} Castel, \textit{supra} note 165, at 12; Kennedy, "Reciprocity" in the Recognition of Foreign Judgments, 32 \textit{CAN. B. REV.} 359, 368 (1954); cf. Lewis, Principle and Discretion in the Recognition of Foreign Nullity Decrees, 12 \textit{INT'L & COMP. L.Q.} 298, 301 (1963); 2 OSGOODE HALL L.J. 266 (1961).


\textsuperscript{174} An Act Respecting Divorce 1968.


\textsuperscript{176} Matrimonial Causes Act 1959, § 95.

\textsuperscript{177} \textit{Id.} § 95(2)(a).

\textsuperscript{178} \textit{Id.} § 95(2)(b).
Australian courts are authorized to recognize the decree. A proviso in the statute allows the court to deny recognition to a foreign decree where, under the common law rules of private international law, recognition would be denied because a party would be denied natural justice. This is consistent with the principle adopted by the English courts in Gray v. Formosa and Lepre v. Lepre.

The statutory provisions for recognition of foreign decrees are purportedly in addition to those already established under the common law rules of private international law. Presumably where a foreign court has annulled a voidable marriage exercising jurisdiction on the basis of common residency of the parties or where a court decrees a marriage void and the only basis for jurisdiction is that the court is located at the place of celebration, these decrees will be recognized by the courts of Australia. Recognition in the latter instance is easily justified if the decreeing court applied its own law, the lex loci celebrationis, because even if the action were brought before the Australian courts the same law would be applied and hence the result would be the same. In the former situation, recognition could only be obtained if the court were to acknowledge that residuary jurisdiction is derived from the old ecclesiastical courts where residency of the respondent was sufficient. Whether this will be acceptable to Australian courts as a liberal reading of section 95(7) of the Matrimonial Causes Act 1959 is unclear.

A further problem, not yet presented to the Australian courts, is whether they will recognize the decree of a foreign court annulling a voidable marriage where the decreeing court acknowledges domicile to be equivalent to six weeks residence. If the domicile of the petitioner were the only basis for the foreign court’s exercise of jurisdiction, how likely would it be that an Australian court would recognize the decree despite the apparent authorization in section 95(4) of the statute? To answer this question, a look to Australian recognition of foreign divorce decrees is necessary.

179 Id. § 95(4).
180 Id. § 95(7).
185 See P. JOSKE, supra note 183, at 229.
187 The obvious reference is to the Dunne v. Saban, [1955] P. 178, situation, though the periods of time involved are different.
In *Fenton v. Fenton*\(^{188}\) the Full Court of Victoria had occasion to rule on the identical issue presented in the *Travers* decision, namely, whether it should recognize the decree of a foreign court having statutory jurisdiction similar to that granted the Victorian courts. The Full Court rejected the *Travers* principle of reciprocity.\(^{189}\) Reacting to the decision, the Victorian Parliament amended its statute to expressly provide for recognition of a foreign decree where the deserted wife was the petitioner.\(^{190}\) Presumably, section 95(4) of the Commonwealth's Matrimonial Causes Act 1959 would abrogate the *Fenton* holding to an even greater extent in that if the law of the place where the decree is rendered considers it valid, then the Australian courts should also.

In the hypothetical posed, conceivably recognition could be denied under the principle of *Indyka v. Indyka*\(^{191}\) because the wife arguably did not have a "real and substantial" connection with the forum. Such an approach would be possible under the statute which does not prevent the application of common law principles.\(^{192}\) It has been speculated that Australian courts are likely to invoke the doctrine where the result would be nonrecognition and reject it if expansion of recognition policies would obtain.\(^{193}\)

E.  **United States**

No particular set of rules govern United States' courts recognition of foreign nullity decrees. Contrary to Australia where a federal statute determines recognition standards for the separate states,\(^{194}\) in the United States, each state has its own rules of recognition. Apart from the common law, no state is compelled to recognize any foreign decree.\(^{195}\) However, despite the inherent uncertainty in such a system, certain general principles of recognition have evolved.

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\(^{188}\) [1957] Vict. 11.

\(^{189}\) The decision was severely criticized. 2 *SIDNEY L. REV.* 602 (1956-58); 17 *FACULTY L. REV.* U. TORONTO 146 (1959).


\(^{192}\) Matrimonial Causes Act 1959, § 95(5).


\(^{194}\) Matrimonial Causes Act 1959, § 95 (Austl.).

\(^{195}\) R. LEFLAR, *AMERICAN CONFLICTS LAW* 172 (rev. ed. of *The Law of Conflict of Laws* 1968). The converse is also true — no state is compelled to deny recognition from a foreign judgment. This is most vividly illustrated by the history of *Hilton v. Guyot*, 159 U.S. 113 (1895). In that case the Supreme Court upheld the denial of recognition to a foreign decree on the basis that similar judgment rendered by an American court would not be afforded res judicata effect in the foreign court. This retaliation doctrine has never been accepted by American state courts. The states rejection of the doc-
Annulment decrees rendered in an American state are entitled to recognition in sister states under the full faith and credit clause of the Constitution. This was conclusively established by the Supreme Court in *Sutton v. Leib.* The full faith and credit clause does not preclude a state from inquiring into the jurisdictional facts upon which the foreign decree was founded. Thus the principle of recognition in the United States, with respect to sister state judgments, is equivalent to that of England: A decree will be recognized if the decreeing court was competent, that is, it had jurisdiction. The argument has been made that the same principle should be applied to foreign nullity decrees and this argument appears to have prevailed though case law on the matter is virtually non-existent.

The *Restatement* urges that a valid judgment of a foreign country should be recognized if the decreeing court was competent and had jurisdiction to act in the matter. A further restriction on the recognition is that the defendant must have been notified of the action and provided with a reasonable opportunity to be heard. Finally, the decreeing court must have complied with any requirements imposed upon it for the valid assertion of its power.

The *Restatement* approach, which represents the amalgamation of cases dealing with judgments of foreign countries generally, appears to overcome many of the recognition problems which have
confronted the courts of the other countries considered, namely those presented by the reciprocity principle of Travers. In addition, the mechanical manner in which the Restatement approach can be applied obviates the need to consider whether the parties had a "real and substantial" connection with the forum, a test suggested in Indyka. Arguably, if the decree is considered valid in the country where rendered, nonrecognition of such judgments will not facilitate the domestic relations of the parties involved.

IV. CONCLUSION

The above has been an attempt to answer the general question: Given a particular set of circumstances, will the court exercise jurisdiction and pronounce a nullity decree? The discussion has attempted to illustrate the various authorities which support the exercise of jurisdiction in each instance. In addition, possible arguments for the extension of present jurisdictional bases have been suggested. The following table purports to illustrate the situations where jurisdiction questions arise and provide some indication as to whether jurisdiction will be be asserted. "X" designates that jurisdiction will be absolute, "Y" that some qualifications are involved such as the petitioner must be the husband or various residence periods exist, and "Z" indicates that jurisdiction has not as yet been asserted in the situation, but that some possibility exists that the court will in the future. A dash suggests that the exercise of jurisdiction is highly unlikely.

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The table clearly indicates a greater accessibility to the courts when a void marriage is alleged. This is somewhat justifiable on
the presumption that a void marriage needs no judicial decree to render it a nullity. However, arguments can be made that identical jurisdiction should obtain when a voidable marriage is alleged because the choice of law problem posed is no different than when a void marriage is in issue. In both instances the decreeing court must look elsewhere for the substantive law which it will apply. Presumably, the proper application of this law will result in a decree which is universally recognized.

Nonrecognition of a nullity decree results in a "limping marriage" — one recognized in one country and not in another. This would likely be the consequence if just one country decided to expand the bases of jurisdiction over voidable marriage cases. However, recognition rules such as those propounded in *Indyka* and the *Restatement* would tend to preclude the problem of these limping marriages. Should any of the countries studied consider the expansion of the bases of jurisdiction over voidable marriages, a corollary consideration should be a similar expansion of the rules for recognition of foreign nullity decrees.

DONALD J. NEWMAN