With this latest pronouncement and most liberal approach to domicile, jurisdiction, and the recognition of foreign divorce decrees by a common law court, the question naturally arises: "How do Civil Code countries approach this problem?" The articles that follow by members of the European Law Committee of the International and Comparative Section and by Dr. Roland Huber, an attorney-at-law of Zurich, Switzerland, give representative answers.

he was domiciled in New York when the foreign state divorce proceedings were commenced. Strong doubt exists whether this section is constitutional if it is attempted to be applied to decrees rendered in sister states as a denial of full faith and credit, except where collateral attack is permitted by the state of rendition (Sherrer v. Sherrer, 334 U.S. 343; 68 S.C. 1087). It is also possible that the courts will judicially construe this section as applying only to unilateral divorces to avoid conflict with New York's long established policy of extending recognition to foreign state decrees as a matter of comity.

THE UNITED KINGDOM

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The *Rosenstiel* decision validated tens of thousands of Mexican decrees obtained by New York residents. However, would a Mexican divorce be recognized in the United Kingdom? Would British citizens who obtained such decrees, or foreigners who have property in the United Kingdom, be permitted to enforce rights flowing from obtaining of such decrees? Proper consideration of the question requires examining the Mexican divorce statutes, the comparable British statutes, and British public policy as expressed by its courts in the enforcement of foreign divorce decrees.

Mexican Divorce Laws

Mexico, like the United States, is a union of many states and has a Federal District and two territories, Quintana Roo and the northern part of lower California. Each of its 30 states, like each of the 50 states in the United States, enacts its own divorce law and the jurisdictional requirement varies from the easiest to comply with,

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that required by the State of Chihuahua, to that of the Federal District where the divorce law confers jurisdiction upon the judge in the court of conjugal domicile. Since the wife's domicile is that of the husband's, it is the court of the husband's domicile. Habitual residence of six months or more therein creates a presumption of compliance with the domiciliary provision. Should desertion be the ground for divorce, jurisdiction would vest in the court of the domicile of the deserted spouse.

The divorce law of the State of Chihuahua, Mexico, provides that the court may exercise jurisdiction either on the basis of residence or submission. Article 22 thereof provides that the judge "competent to take cognizance of a contested divorce" is the judge "of the place of residence of the plaintiff," and, in the case of a divorce "by mutual consent," the judge "of the residence of either of the spouses." Residence "shall be proven" by the "certificate of the Municipal Register" of the place (Article 24). That is generally established by a certificate from a mayor as to the entry in the "Municipal Register." Article 23 provides that judicial competance "may also be fixed" by express or tacit submission. The voluntary appearance of the other spouse in the foreign court by an attorney tends to give support to an acquired jurisdiction over the marriage as a legal entity.

The Chihuahua divorce law details twenty grounds for the granting of a decree, from mutual consent to adultery. Most of the Mexican states grant relief on similar grounds. The only serious difference among them concerns itself with the jurisdiction of the courts to entertain the litigation.

The Divorce Laws of the United Kingdom

The British courts have a more conservative approach to the question of dissolving marriages. The High Court in England has jurisdiction of matrimonial causes, declarations of legitimacy, the validity of marriages and matters incidental thereto in both England and Wales.[1] Comparable power is vested in the Court of Session in

[1] The Matrimonial Causes Act, 1950 (14 Geo. 6 c. 25); Wilson v. Wilson (1872) L.R. 2P v D.435; Le Mesurier v. Le Mesurier [1895] A.C. 517, 540 (P.C.); See Dicey's Conflict of Laws—Seventh Edition, exceptions 1 and 2 to Rule 40; Section 21 of the Supreme Court of Judicature (Consolidated) Act, 1925 (c. 49).

Scotland [2] and the High Court in Northern Ireland [3] for the applicable laws relating to those countries.

These courts will entertain divorce proceedings only if both husband and wife are domiciled in their respective countries at the commencement of the proceeding. The wife's domicile is that of her husband.[4]

Under the laws of the United Kingdom, every person acquires a domicile of origin. That is the domicile of the father.[5] Should the child be illegitimate, or be born after the death of the father, it would have the domicile of the mother. In the United Kingdom a person of full age, except a married woman, and in Scotland a minor, may acquire an independent domicile of choice. To establish it one must be able to prove that he has established not only a residence in a new country but that he intends to remain there permanently.[6] This intention distinguishes domicile under the English and Scottish law from residence. One's personal choice, when proven, is controlling and results in the suspension of the domicile of origin until it is abandoned, in which case the domicile of origin is revived.

The English Statutes

The grave hardship resulting from the wife's domicile being that of the husband was rectified, in part, by Parliament by certain statutory exceptions to the High Court's jurisdictional requirement of domicile. The Matrimonial Causes Act, 1950, applicable to England and Wales, conferred on the High Court in England jurisdiction to entertain proceedings by a wife for divorce, notwithstanding that her husband was not domiciled in England, (a) if she had been deserted by him, or if he had been deported from the United Kingdom, provided that he was domiciled in England immediately before the desertion or deportation, (§18(1)(a)), or (b) if she was a resident in England and resided there for a period of three years immediately preceding the commencement of the proceedings, provided that her

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[2] Indian and Colonial Divorce Jurisdiction Act, 1926, s. 1(3) as amended by the Act of 1940, s. 4(2); Le Mesurier v. Le Mesurier, *supra.*

[3] Colonial and Other Territories (Divorce Jurisdiction) Act. 1950, s. 1.

[4] Report of Royal Commission on Marriage and Divorce, 1951-1955 p. 209, pars. 792, 796.

[5] *Id.*

[6] Winans v. Attorney General, [1904] A.C. 287; Ramsay v. Liverpool Royal Infirmary [1930], A.C. 588.

husband was not domiciled in any part of the United Kingdom or in the Channel Islands or the Isle of Man (§18(1)(b)).

By Section 18(2) of that Act the court was given jurisdiction to entertain proceedings by a wife for a decree determining that there is a presumption of death and for the dissolution of a marriage if she was a resident in England and had resided there for a period of three years immediately preceding the commencement of the proceedings.

English and Scottish women who married members of the armed forces of other countries during their stay in those countries during World War II were granted the right to bring divorce actions by the Matrimonial Causes (War Marriages) Act, 1944. This was limited to marriages between September 3, 1939, and June 1, 1950, and the action for divorce had to be brought by the latter date.

The exceptions to domicile, detailed in the Matrimonial Causes Act, 1950, are also found in the comparable statutes applicable to Scotland [7] and Northern Ireland.[8]

The provision in the Matrimonial Causes Act, 1950, that at least three years must pass since the date of the marriage before institution of an action for divorce, may be waived by the High Court by its approval of an application for waiver which shows exceptional hardship suffered by the petitioner or exceptional depravity of the respondent. The waiver must be obtained before filing the petition for divorce.[9]

That Act details as grounds for divorce (which may be sought by either spouse) that the respondent since the celebration of the marriage either committed adultery, deserted the petitioner without cause for a period of at least three years immediately preceding the presentation of the petition, has treated the petitioner with cruelty, or is incurably of unsound mind and has been continuously under care and treatment for a period of at least five years immediately preceding the petition; and by the wife, on the ground that her husband has, since the celebration of the marriage, been guilty of rape, sodomy, or beastiality.[10]

The Divorce (Insanity and Desertion) Act, 1958 (c.54) permits acceptance of the certification of proof of mental incapacity from

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[7] Law Reform (Miscellaneous Provisions) Act, 1949, s. 2.
[8] Chapter 100, Enacted by British Parliament 12/16/1949, s. 10.
[9] The Matrimonial Causes Act, 1950 (c. 25) s. 2.
[10] *Ibid.*, s. 1.

an accredited hospital which renders the type of service supplied to mental patients by the hospitals named in the Matrimonial Causes Act, 1950.

The courts in England and Scotland apply their respective laws to determine the issues in all cases even where jurisdiction is not based on domicile.

Divorce Legislation for Scotland

The Court of Session, Scotland, has jurisdiction to consider this particular remedy. The Divorce (Scotland) Act of 1938 altered the then existing statute concerning grounds for relief by adding four new grounds, namely incurable insanity, cruelty, sodomy, and beastiality. These, when added to the prior provisions, made the grounds for relief in both Scotland and England very much alike.

Basis for Divorce Legislation in Northern Ireland

The British Parliament enacted in the Matrimonial Causes and Marriage Laws of 1870 divorce legislation for Northern Ireland.[11] That body, in 1949, stated that the Parliament of Northern Ireland had the power to enact divorce laws similar to certain sections which the British Parliament had enacted in the Matrimonial Causes Act of 1937. But the question as to the jurisdiction of the court where such causes may be tried is resolved by analyzing the laws enacted to apply to "Colonial and Other Territories."

The British Parliament in 1926 enacted the Indian and Colonial Jurisdiction Act. This conferred jurisdiction on Indian courts to consider divorce litigation where the parties were British subjects domiciled in England or Scotland.[12] That statute conferred like jurisdiction on the courts of any of her Majesty's Dominion (other than self-governed dominions), to which the Act was extended by Orders in Council.[13] The Colonial and Other Territories (Divorce Jurisdiction) Act, 1950, extended the jurisdictional authority detailed in the 1926 Act to the High Court of Northern Ireland and permitted that Court to confer the self-same rights to persons domiciled in that area.

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[11] Matrimonial Causes and Marriage Law (1) 33-34 V, c. 110, 1870 and 1871 (b).

[12] Act of 1926, s. 1(1) (a) as amended by Act of 1940, s. 1(1).

[13] They may not be extended to Canada, Australia, New Zealand, South Africa, Newfoundland, and Southern Rhodesia. It no longer applies to India.

Analysis of Cases

The English courts prior to 1953 held that since they had refused to entertain a divorce action unless the parties were domiciled in England they would not recognize a foreign decree unless the parties were domiciled in the foreign country at the time the action was brought.[14] No substitute was accepted for domicile. Neither residence nor nationality was accepted as the basis for jurisdiction.[15]

In *Travers v. Holley*,[16] decided that year, a different rule emerged. There, a married couple, domiciled in England, had emigrated to Australia and acquired a domicile in New South Wales. The husband deserted his wife, returned to England, and re-established his domicile in that country. The wife sued in New South Wales and was granted a divorce on the grounds of desertion. The Australian Court invoked a local statute similar to the English Matrimonial Causes Act, 1950, to grant the necessary relief. The English courts recognized that foreign decree. The doctrine upon which the court acted was based on notions of reciprocity and comity.

If the courts of the domicile recognized the jurisdiction of the court of another country, a decree granted by the latter court would be deemed valid in England. It should follow that a divorce decree obtained in a country foreign to the domicile upon a ground that would be insufficient by the law of the particular country or state, but which is recognized as valid on the ground of comity or by private international law, should be enforced in England.

That conclusion was reached in *Armitage v. Attorney General*.[17] There an English wife of an American citizen, domiciled in New York, after residing for 90 days in South Dakota, obtained a divorce decree in that State on the ground of desertion. The New York divorce law, prior to the legislation in 1966 which becomes operative on September 1, 1967, granted no such relief. The full faith and credit provision of the United States Constitution required New York to recognize the South Dakota decree. Sir Gorell Barnes held that the decree was equally binding in England. His reasoning was that since all questions of status are subject to the *lex domicilii*, and the

[14] Harvey v. Farnie (1880), 5 P.D. 153; (1882), 8 App. Cas. 43; Bater v. Bater [1906] P. 209; Le Mesurier v. Le Mesurier, *supra;* Lankester v. Lankester, [1925] P. 114.

[15] Papadopoulos v. Papadopoulous [1930], P. 55; Armitage v. Attorney General, [1906] P. 135, 140.

[16] [1953] P. 246.

[17] [1906] P. 135.

laws of New York recognized the decree as affecting the status of the husband and wife, the English courts should accept that conclusion.

Robinson-Scott v. Robinson-Scott,[18] in 1958, by Judge Karminski, approved the reasoning of *Travers* and established that the test of reciprocity is the factual position and not the jurisdictional requirement. The Learned Judge held that the true rule in *Travers* was not that an English court would recognize a foreign divorce decree whenever the foreign court assumed jurisdiction in circumstances similar to those in which an English court would assume jurisdiction but that the facts of the case must be investigated to determine whether reciprocity may be employed.

In *Robinson-Scott* the husband was domiciled in England. His Swiss wife, domiciled under Swiss law in Switzerland, was granted a divorce decree by the District Court of Zurich. The husband petitioned the High Court for a declaration that the marriage had been validly dissolved by the Swiss court. Judge Karminski said in part:

> It is clear that, in the present case, there can be no question of the Zurich court's exercising a jurisdiction *mutatis mutandis* on the same basis as the English courts, since the jurisdiction of the Zurich court was based on a concept of domicile wholly unrecognized by English law.[19]

The English judge recognized the decree because the wife had been a resident in the canton of Zurich for at least three years prior to the commencement of the Swiss action, a period of time similar to the English requirement.

Judge Davies followed a similar approach in refusing to recognize a Florida divorce in *Dunne v. Sabin* [20] where the wife who obtained a divorce had resided in that State for two years. He said:

> Where, as here, you find a court purporting, no doubt completely properly according to the laws of Florida, to exercise jurisdiction upon 90 days residence, even though that is coupled with something that we do not recognize, namely, a separate domicile of the wife in the United States, the only possible answer which this court can give is to say that the decree of the foreign court was in our law invalid.[21]

The rule that an English court will recognize decrees of the court of the domicile means that it will recognize decrees of the country in which the parties were domiciled in the English sense.

[18] [1958] P. 71.
[19] [1958] P. 71, 84-85.
[20] [1955] P. 178.
[21] [1955] P. 178, 190.

The appropriate inquiry required is whether, on the facts, the connection as defined by English law is present. Had the wife been a resident of Florida for at least three years prior to the commencement of the action the decree would in all likelihood have been recognized and enforced in England because of a similar right existing in England and available to a wife based on residence.

Commissioner Latey recognized a Norwegian divorce decree in *Manning v. Manning*.[22] There the wife, domiciled in England, had obtained a Norwegian divorce decree based upon a period of separation. The Norwegian court assumed jurisdiction on the ground that the last common residence of the parties had been in Norway. The Commissioner recognized the decree because the wife, at the time the Norway action was commenced, had been a resident in Norway for at least three years.

A similar determination was made in *Carr v. Carr*[23] where a Northern Irish divorce based on the husband's desertion was recognized.

The grounds for the decrees in *Robinson-Scott* and in *Manning* were unknown to English domestic law. The decrees were recognized because the facts in those cases were similar to those upon which an English court would entertain jurisdiction without regard to the ground for the action. Choice of law and the content of the chosen law are immaterial in problems of recognition.

It follows that although an Englishwoman's domicile is that of her husband, she can take up residence for three years in any other country which grants divorce decree on grounds unknown to English law, return, and have the English courts recognize and enforce the decree.

The English reaction to a Mexican decree was expressed in *Mountbatten v. Mountbatten*.[24] The husband, there, whose domicile or origin was England, married in New York in 1950 and lived with his wife in New York until 1952 when he returned to England. He alleged that his wife refused to follow him. The wife, in 1954, obtained a divorce decree in the State of Chihuahua in Mexico. The Mexican court assumed jurisdiction on the ground that the wife was a resident of Mexico, this fact being noted by her physical presence there, and that both parties submitted to the jurisdiction. The ground

[22] [1958] P. 112.
[23] [1955] 1 W.L.R. 422.
[24] [1959] 2 W.L.R. 128.

for relief was incompatibility of temperament. The husband brought a proceeding in England to have the court determine that his marriage had been validly dissolved by the Mexican decree. The English court accepted evidence that the Mexican decree would be recognized in New York. The wife had returned to New York immediately after having obtained the Mexican decree and continued to live there until the English proceeding was undertaken.

The substance of the husband's contention was that his wife was a resident in New York for more than three years and was subject to the jurisdiction of its courts. If the New York courts accepted the Mexican decree he believed that that instrument should be accepted in England under the rule in *Travers.* He claimed, further, that if the parties were domiciled in a country or state where the Mexican decree would be recognized, it should be valid under the rule in *Armitage. Travers* makes three years' residence by the wife equivalent to domicile. And *Armitage* renders recognition equivalent to pronouncement. The husband believed that recognition by the courts of three years' residence by the wife should be treated in the same way as pronouncement by that court and, therefore, as recognition by the courts of the domicile.

Judge Davies rejected that view and refused to recognize the validity of the Mexican divorce. He expressed doubt as to whether at the moment of obtaining the Mexican divorce the wife retained her New York residence. He said:

> Here we have a case of a woman who quite deliberately, with the knowledge and consent of her husband, left the place where she was ordinarily resident, went abroad and obtained a certificate of resident in a foreign country in order to give jurisdiction to the courts of that country.[25]

The judge expressed dissatisfaction with the breadth of the rule in *Armitage.* He suggested that its operation was limited to cases in which the reason why the courts of the domicile would recognize the decree is that it was "pronounced by a court in the jurisdiction of which the wife had obtained a separate domicile."

He decided that even if the wife was a resident in New York for three years immediately preceding the commencement of the Mexican proceedings, and accepting the wide interpretation of *Armitage,* the divorce decree could not be recognized simply because it would have been regarded as valid in New York. He would have

[25] [1959] 2 W.L.R. 128, 150.

ruled differently if the decree had been rendered by a New York court.

The approach of Judge Davies is that the law of the domicile is still paramount and that the exception which Parliament created must be narrowly construed. He said:

> . . . It is, in my judgment, impossible to hold that a decree to which this court would not give direct recognition is owing to the interposition of a residential qualification of the wife in a third State entitled on account of such residential qualification to be recognized here.
> The proposition advanced for the husband is that the test for recognition is now a dual one. Is the decree valid either by the law of the domicile or by the law of the place in which we recognize that the wife is concurrently entitled to proceed? If the answer to either of these questions is in the affirmative, then, it is said, the decree is entitled to recognition here. The proposition is, in my judgment, a wholly illegitimate extension of the principle of comity upon which the case of *Travers v. Holley* and the subsequent cases turn. It is not difficult to frame an example to illustrate the impossibility of such an extension. Suppose a husband and wife domiciled in, say, Victoria, Australia. The wife goes off to New York and ordinarily resides there for over three years. She then goes to Mexico and obtains a decree there in similar circumstances to those in which the present wife obtained her decree. That Mexican decree is not recognized by the courts of the domicile, Victoria, but is recognized by the courts of the wife's residence, New York. In subsequent proceedings in the English courts the validity of the Mexican decree is called in question—for example, in proceedings as to legitimacy or inheritance after a subsequent marriage of one of the parties. This court would be faced with the position that the Mexican decree was not recognized by the court of the domicile but was recognized by the court of the wife's residence. Can it possibly be doubted that this court would hold, following the court of the domicile, that the decree was not entitled to recognition.[26]

Judge Davies's opinion appears to run counter to the reasons applied to recognize the foreign decree in *Travers*. Many of the rules relating to the recognition of decrees by reference to domicile have been carried into the area of decrees recognized by reference to alternative connecting factors under *Travers*. The connecting factor is interpreted according to English notions. Neither the reason why the foreign court assumed jurisdiction nor the grounds upon which it grants a divorce is material. If the connecting factor is not domicile, validity on account of recognition is not equated to validity on account of actual pronouncement.

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[26] [1959] 2 W.L.R. 128, 154-5.

Conclusion

The foregoing discussion leads to the following conclusions in determining whether a Mexican divorce decree will be recognized and enforced in the United Kingdom. England, Scotland, Wales, and Northern Ireland still adhere to the common law principle that the jurisdiction of the court in divorce proceedings is based on the domicile of the parties, and the wife's domicile is that of the husband. The English concept of domicile is quite different from the common understanding of the term, and, once existing, requires considerable proof to establish a change. The sole exception to that premise for jurisdiction is the instance of a wife being deserted and, in that event, the court will entertain jurisdiction based on the wife's continued residence of at least three years in the jurisdiction prior to the institution of the action. Should a foreign divorce proceeding be based on similar jurisdictional facts the British courts, on the establishment of such evidence, will recognize the foreign decree regardless of the grounds upon which it was granted.

Mountbatten reduces recognition of foreign decrees based on the premise that the decree would be recognized by the state where the plaintiff resided, although that state would not grant a decree on the ground obtained in the foreign court. The 1906 decision in *Armitage* was rendered before the British Parliament permitted a deserted wife to bring an action based on a residence requirement. It is obvious from the above that a Mexican divorce decree issued on the familiar residence requirement in the State of Chihuahua will not be recognized in the United Kingdom, nor enforced there.

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