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Conflict of Laws -- Annulment of Marriage -- Jurisdiction of British Columbia Court to Declare Marriage Void Based on Domicile and Residence of Petitioner -- State Decisis

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CONFLICT OF LAWS—ANNULMENT OF MARRIAGE—JURISDICTION OF BRITISH COLUMBIA COURT TO DECLARE MARRIAGE VOID BASED ON DOMICILE AND RESIDENCE OF PETITIONER—STARE DECISIS.—In *Savelieff* v. *Glouchkoff*,[1] the petitioner, the husband, resident and domiciled in British Columbia, sought a declaration that his marriage in the City of Algiers to the respondent wife was void by reason of her prior and subsisting marriage. At the time of the petition the respondent was resident and domiciled in Ontario.

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the protection of section 3 of the Trade Disputes Act, 1906. Such was the decision of the majority in *J. T. Stratford and Son Ltd.* v. *Lindley*, [1964] the Times, March 26th, a clear attempt by the Court of Appeal to cut down the wide sweep of the House of Lords' judgments in *Rookes* v. *Barnard*, *supra*, footnote 1. In Canada, the trade union official could be held liable for "inducing breach of contract", if the stringent requirements of that tort were satisfied. See *D. C. Thompson and Son Ltd.* v. *Deakin*, *supra*, footnote 17.

[71] I am much indebted to Mr. K. W. Wedderburn for discussion on *Rookes* v. *Barnard*. See also (1964), 27 Mod. L. Rev. 257.

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[1] (1963), 41 D.L.R. 768 (B.C.).

The court dismissed the action for want of jurisdiction on the ground that the domicile and residence of the petitioner is not by itself sufficient to confer jurisdiction. Hutcheson J. of the Supreme Court of British Columbia, relying on *Shaw* v. *Shaw*[2] and *Gower* v. *Starrett*[3] was of the opinion that in that province the court has jurisdiction to entertain an annulment action in three cases only: where both parties are domiciled in British Columbia,[4] where the respondent is resident in the province,[5] or where the ceremony was performed there.[6] These three bases of jurisdiction are said to exist whether or not the marriage is alleged to be void *ab initio* or merely voidable. It was also reiterated that jurisdiction cannot be conferred on the court by the attornment of the respondent thereto where none of these three bases of jurisdiction are present.[7]

Hutcheson J. rejected Manson J's opinion in *Khan* v. *Khan*[8] that the domicile of the petitioner is sufficient to confer upon a British Columbia court jurisdiction to grant a nullity decree. In that case the petitioner, the wife, was domiciled in British Columbia whereas her husband the respondent, was domiciled in the State of Pakistan. She claimed a decree of nullity either by reason of the informality of the marriage which had taken place in the Pakistan Embassy in Washington or by reason of her want of capacity.

In *Shaw* v. *Shaw*[9] the wife petitioned for a decree of nullity of marriage on the ground of the impotency of the husband. The wife resided in British Columbia but her husband was neither resident nor domiciled in the province and the marriage was celebrated in Alberta. The Chief Justice of the Supreme Court of British Columbia followed *Inverclyde* v. *Inverclyde*[10] and dismissed the petition as the respondent was not domiciled within the jurisdiction. From this decision appeal was taken to the Court of

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[2] [1946] 1 D.L.R. 168, 62 B.C.R. 52, [1945] 3 W.W.R. 577 (C.A.).

[3] [1948] 2 D.L.R. 853, [1948] 1 W.W.R. 529 (S.C.).

[4] See *Salvesen* v. *Austrian Property Administrator*, [1927] A.C. 641.

[5] *Cf. Ramsay-Fairfax* v. *Ramsay-Fairfax*, [1955] 3 All E.R. 695, [1956] P. 115, 126 (C.A.).

[6] *Cf. Ross Smith* v. *Ross Smith*, [1962] 1 All E.R. 344 (H.L.) discussed *infra*.

[7] His Lordship relied on *Gower* v. *Starrett*, *supra*, footnote 3, at p. 861 (D.L.R.).

[8] (1959), 29 W.W.R. 181, 21 D.L.R. (2d) 171 (B.C.S.C.).

[9] *Supra*, footnote 2.

[10] [1931] P. 29 where it was held that a decree annulling a marriage on the ground of impotency deals with a marriage that until the date of the decree is voidable only and can be pronounced exclusively by the court of the domicile of the parties. This case was overruled by *Ramsay-Fairfax* v. *Ramsay-Fairfax*, *supra*, footnote 5, and acknowledged to be so by the House of Lords in *Ross Smith* v. *Ross Smith*, *supra*, footnote 6.

Appeal. Although the majority of the court held that the trial judge erred in holding that a decree of nullity could only be pronounced by the court of the respondent's domicile, it dismissed the appeal since the respondent was neither domiciled nor resident in British Columbia and the marriage was not performed in that province. The reasons for judgment of Robertson (with whom Sloan C.J. agreed) and Sidney Smith JJ.A. are based on *Easterbrook* v. *Easterbrook*[11] and *Hutter* v. *Hutter*[12] and support the proposition that in a nullity action on the ground of impotency, the court of the residence of the parties to the marriage would have jurisdiction to declare the marriage invalid. Robertson J.A. pointed out that:[13]

> The ecclesiastical courts did not exercise jurisdiction in nullity cases unless the person cited was either resident or domiciled in the jurisdiction or the *de facto* marriage was performed there.

He also stated:[14]

> In my opinion, so far as jurisdiction over the parties to a marriage void on account of illegality, or, void on account of impotency existing at the time of the marriage, but voidable, in this respect that a declaration might be refused under certain circumstances, is concerned, there was no difference in the principles and rules applied in the ecclesiastical courts.

Sidney Smith J.A., was also of the opinion that[15] for the purpose of the exercise of the jurisdiction of the ecclesiastical courts to declare a marriage void all that was required was the *bona fide* residence of the party cited within the appropriate territorial jurisdiction, and continued:[16]

> From the foregoing considerations there would appear to be no authority in English law that residence of the petitioner alone is suffi-

[11] [1944] 1 All E.R. 90, [1944] P. 10. In this case the petitioner in a nullity suit on the ground of wilful refusal to consummate the marriage was domiciled in Canada and the respondent was domiciled in England. The ceremony of marriage took place in England and thereafter both parties were resident in England. Hodson J. held that the court had jurisdiction to entertain the petition and rejected the distinction for the purpose of jurisdiction between voidable and void marriages.

[12] [1944] 2 All E.R. 368, [1944] P. 95. The petitioner sought a decree of nullity of marriage on the ground that the ceremony of marriage which took place in England had never been consummated owing to the wilful refusal of the respondent. The petitioner was domiciled in one of the United States of America. At the time of the institution of the suit, both parties were resident in England. Pilcher J. was also of the opinion that with respect to the court's jurisdiction there was no difference between void and voidable marriages and held that it had jurisdiction to pronounce a decree.

[13] *Supra*, footnote 2, at pp. 174 (D.L.R.), 60 (B.C.R.), 584 (W.W.R.).

[14] *Ibid.*, at pp. 172 (D.L.R.), 58 (B.C.R.), 582 (W.W.R.).

[15] *Ibid.*, at pp. 177 (D.L.R.), 64 (B.C.R.), 588 (W.W.R.).

[16] *Ibid.*, at pp. 181 (D.L.R.), 67-68 (B.C.R.), 592 (W.W.R.).

cient to found jurisdiction in suits for nullity. In my judgment it cannot be held to do so in the present case.

Moreover, I am of opinion that even if the petitioner had acquired a domicile of choice in the Province of British Columbia, upon the assumption that her marriage was void *ab initio* and that therefore no matrimonial domicile had ever existed, the court would still be without jurisdiction. The authorities seem to be clear that while the court of the residence of the party cited has jurisdiction, it has not exclusive jurisdiction; that there may also be jurisdiction in the court where the marriage was celebrated and also in the court of the domicile of both parties. But the facts in this case are not such as to bring them within either of these other categories.

Bird J.A. reserved the point:[17]

In these circumstances I do not find it necessary to deal with the question raised in the course of argument and founded upon the decisions in *Inverclyde* v. *Inverclyde*, [1931] P. 29, followed in *Fleming* v. *Fleming*, [1934] 4. D.L.R. 90, at pp. 94-95, [1934] O.R. 588, at p. 592, as to whether, in a suit for nullity upon the ground of impotence, jurisdiction does or does not depend solely upon domicile, since here there is neither domicile nor residence of the respondent.

In *Gower* v. *Starrett*,[18] the petitioner, the wife, sought a declaration of nullity on the ground that the respondent had previously been married in Ireland and that his wife at the time of his second marriage was living and had not been divorced. The petitioner and respondent were married in Vancouver and lived together for some time. The domicile of the respondent was assumed to be in Ireland.

Counsel for the petitioner relied on *Spencer* v. *Ladd*; *Finlay* v. *Boettner*[19] in contending that the court has jurisdiction in the case where the petitioner is domiciled in the province. He also contended that jurisdiction exists where the respondent has attorned to the court, and where the petitioner is resident in and the marriage contract was entered into in the province. Farris C.J.S.C., stated:[20]

It would seem rather fortunate that the three points raised by counsel for the petitioner are now definitely before the court for decision, as confusion has arisen as a result of conflicting decisions in respect to how jurisdiction is conferred on the court in respect to nullity actions

[17] *Ibid.*, at pp. 187-188 (D.L.R.), 75 (B.C.R.), 600 (W.W.R.).

[18] *Supra*, footnote 3.

[19] [1948] 1 D.L.R. 39, Where Boyd McBride J. held that the Supreme Court of Alberta had jurisdiction to decree the nullity of a marriage celebrated outside Alberta between the plaintiff, a woman domiciled in the province, and the defendant who was domiciled elsewhere, where the marriage was void *ab initio* because of the defendant's bigamy.

[20] *Supra*, footnote 3, at pp. 854 (D.L.R.), 530 (W.W.R.).

on the grounds: (a) Where the marriage is void *ab initio*, and (b) Where it is based on a voidable marriage.

In order that the Bar of this Province may have the law in respect thereto clearly defined, I have deemed it advisable to confer with my brother judges. They unanimously agree, after a complete examination of this judgment and full consideration thereof, that the findings in this case express the law as they will apply it in like cases until such time as the law is otherwise cited by a court whose judgment is binding on this court.

He then referred to the decision of the Court of Appeal in *Shaw* v. *Shaw*[21] and said:[22]

The effect of the judgments of the majority of the Court of Appeal, was in effect that I was wrong in holding in respect to a nullity action in a voidable marriage, that domicile was necessary in order to give jurisdiction. The court held that the elements to give jurisdiction in a nullity action were the same whether the marriage was void *ab initio* or voidable only, and further held that only if one of the three following elements were present, would the court have jurisdiction, the three elements being: (a) Where the parties are domiciled within the jurisdiction; (b) where the respondent was resident within the jurisdiction, and (c) where the marriage contract was entered into within the jurisdiction.

Farris C.J.S.C., also specifically rejected Boyd McBride J's opinion in *Finlay* v. *Boettner*[23] that the court has jurisdiction when the petitioner only is domiciled within the province.

The court nevertheless held that it had jurisdiction to annul the marriage on the ground that, being a marriage void *ab initio*, it had been celebrated in British Columbia.

Farris C.J.C., considered the decision of the High Court of Justice of England in *De Reneville* v. *De Reneville*[24] but not that of the English Court of Appeal.[25] In that case an Englishwoman, domiciled and resident in England before her marriage, had married in France a domiciled Frenchman and had lived with him in France and French possessions for some years. She then returned to England and presented a petition for nullity on the ground of the incapacity or wilful refusal of the respondent who appeared under protest and objected to the jurisdiction. The issue of jurisdiction was ordered to be tried separately. Jones J.[26] held that there was

[21] *Supra*, footnote 2.
[22] *Supra*, footnote 3, at pp. 855 (D.L.R.), 531 (W.W.R.).
[23] *Supra*, footnote 19. [24] [1947] 2 All E.R. 112.
[25] [1948] 1 All E.R. 56, [1948] P. 100 and see J.D. Falconbridge, Annulment Jurisdiction and Law: Void and Voidable Marriages (1948), 26 Can. Bar Rev. 907; J. Jackson, Annulment and the Choice of Law (1949), 27 Can. Bar Rev. 173; in general S. Ryan, Nullity of Marriage: Jurisdiction, Choice of Law and Related Problems (1950), 28 Can. Bar Rev. 964.
[26] *Supra*, footnote 24.

no jurisdiction and the matter came to the Court of Appeal. In the course of the argument before the Court of Appeal it appeared that it was doubtful whether under French law the facts alleged by the petitioner, if established, would make the marriage void or voidable and the court decided to deal with the preliminary point on two alternative hypotheses: one that the marriage was void and the other that the marriage was voidable.

On the hypothesis that the marriage was void and in view of the fact that on this basis the petitioner was domiciled in England, Lord Green M.R., was of opinion that the court would have jurisdiction to decide the suit despite the fact that the respondent was not resident within the jurisdiction. He said:[27]

> If, however, the marriage is by its proper law a void marriage, no decree of any court is required to avoid it. The wife in that case did not acquire the French domicile of the husband by operation of law. She was free to acquire it or not as she chose, and, if she acquired it, to abandon it or change it for a different domicile of choice. It is clear on the facts that, if she was competent to do so, she did abandon her French domicile (which I am assuming she had acquired) and that she thereby resumed her domicile of origin, which was English. Her domicile, therefore, on the hypothesis that the marriage was void, was English. This at once raises a question as to the jurisdiction of the English courts to entertain a petition for nullity by a supposed wife who is in a position to prove that her supposed marriage was void and that her domicile on that basis is English at the date of the presentation of the petition.

Lord Greene then referred to the decision in *White (otherwise Bennett)* v. *White* and cited the following passage from the judgment in that case of Bucknill J.:[28]

> It seems to me just to the petitioner, and also in the public interest, that the petitioner, being domiciled and resident in this country, should have her status as a single or as a married woman judicially established by this court.

Lord Greene continued:[29]

> This view does, of course, theoretically at least, open up the possibility of conflicting judgments by the courts of the respective domiciles, but, if it be not the right view and if the only court with jurisdiction is a court in a country where both are domiciled, the problem of jurisdiction based on domicile in the case of a void marriage where the domiciles are different would appear to be insoluble.

After rejecting the view that submission to or not objecting to the jurisdiction could found jurisdiction, he said:[30]

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[27] *Supra*, footnote 25, at pp. 60 (All E.R.), 112 (P.).
[28] [1937] 1 All E.R. 708, at p. 713.
[29] *Supra*, footnote 25, at pp. 61 (All E.R.), 113 (P.).
[30] *Ibid.*

> . . . if the marriage was void and not merely voidable, the fact that the husband has protested cannot, in my opinion, deprive the English court of jurisdiction to declare the status of a domiciled Englishwoman. Conversely, if the marriage is voidable only, no such jurisdiction exists and could not be created by the fact, if fact it had been, that the husband had not protested.

Proceeding to consider the matter on the basis that the petitioner was resident but not domiciled in England, he assumed that residence of both parties to a suit is sufficient to found jurisdiction. On this basis he agreed with Jones J., that residence of the petitioner alone was not enough to found jurisdiction.

In the result Lord Greene, with whose judgment Somervell L.J., concurred, held that in the case of void marriages, but not in the case of voidable marriages, where the wife before marriage had been domiciled in England, the English court had jurisdiction to entertain a suit for declaracion of nullity.

In the present case Hutcheson J. concluded that:[31]

> . . . if the grounds for jurisdiction in an action for a declaration of nullity in this province as laid down in *Shaw* v. *Shaw* and *Gower* v. *Starrett* are going to be enlarged to include domicile of the petitioner within the jurisdiction as decided, so far as the courts of England are concerned, in *De Reneville* v. *De Reneville* it must be so decided by the Court of Appeal upon a reconsideration of their decision in *Shaw* v. *Shaw* and overruling *Gower* v. *Starrett* in so far as it excludes as an element giving the court jurisdiction the domicile of the petitioner within the jurisdiction.

From the point of view of stare decisis, *Gower* v. *Starrett*[32] cannot be said to be an authority on the question of whether or not the domicile of the petitioner alone is sufficient to give jurisdiction to the court of British Columbia to annul a marriage void *ab initio* as in *Savelieff* v. *Glouchkoff*.[33] The *ratio decidendi* is otherwise. *Gower* v. *Starrett* stands for the proposition that a British Columbia court has jurisdiction to annul a marriage void *ab initio* where such marriage has been celebrated in the province. The other statements as to the law of British Columbia are merely *obiter* dicta. Furthermore it is only a trial court decision. *Shaw* v. *Shaw*[34] on the other hand is a decision of the Court of Appeal and clearly supports the proposition that the residence or domicile

[31] *Supra*, footnote 1, at p. 773.

[32] *Supra*, footnote 3.

[33] *Supra*, foonotte 1.

[34] *Supra*, footnote 2. The British Columbia Matrimonial Causes Act 1857 (R.S.B.C., 1960, c. 118, s. 6) provides that in all matrimonial suits including suits for nullity of marriage, but excluding suits for dissolution, the court shall proceed and act and give relief on principles and rules which shall conform as closely as possible to the principles and rules acted upon by the ecclesiastical courts in England.

of the petitioner is not sufficient to found jurisdiction in suits for nullity on the ground of impotency.

The *ratio decidendi* in *Savelieff* v. *Glouchkoff* would appear to be in direct contradiction with the views expressed by Manson J. in *Kahn* v. *Kahn*:[35]

> The second point whether the court has jurisdiction in nullity proceedings or to grant a declaration where the petitioner only is domiciled in the jurisdiction raises some difficulty in view of two earlier cases in this province. Apart from these cases the over-whelming weight of judicial authority and other legal opinion recognizes the right of the court to assume jurisdiction in a case where the marriage is alleged to have been void *ab initio* and any one of the following three connective factors is present, namely: The domicile of either of the parties; the residence of the respondent, or the celebration of the marriage in each case within the jurisdiction of the court. Whether these rules are equally applicable to voidable marriages is a question which it is unnecessary to decide. Earlier decisions in this province have indicated that there is no difference for purposes of jurisdiction between the two types of cases and the more recent decisions in England have been inclined to favour this view, overruling the earlier case of *Inverclyde* v. *Inverclyde*, [1931] P. 29. . . . Having regard to all the cases and the observations made by the learned judges, I incline to the view that the court has jurisdiction to grant a nullity decree where the petitioner alone is domiciled within the province.

However, it is difficult to maintain that *Kahn* v. *Kahn* stands for the proposition that the domicile of the petitioner alone is sufficient to confer jurisdiction upon the British Columbia court to annul *even* a marriage void *ab initio* since the petitioner claimed a decree of nullity and alternatively a declaration that she was no longer married to the respondent by reason of a bill of divorcement that was given by her husband and was valid by the law of his domicile. The court said:[36]

> Unfortunately by reason of the expense involved evidence was not led as to the validity of the marriage performed under the circumstances mentioned above in an embassy situate in the district of Columbia, U.S.A. I have the gravest doubts as to the validity of a ceremony performed within the embassy other than in conformity with the laws of the district of Columbia. Without pursuing the matter further, I am satisfied that if the marriage was valid the bill of divorcement was also valid. Alternatively, if the ceremony did not constitute a valid marriage, then the petitioner is entitled to a decree of nullity. It follows therefore that the parties are no longer husband and wife.

This passage seems to indicate that the case only involved the recognition of the foreign bill of divorcement. This interpretation leaves us with *Shaw* v. *Shaw* and a series of conflicting *obiter* dicta.

[35] *Supra*, footnote 8. [36] *Ibid.*, at p. 176 (D.L.R.).

In the field of matrimonial causes the courts perhaps should place less emphasis on stare decisis and more on the necessity of meeting present-day problems. Be that as it may, in view of the difference of judicial opinion in British Columbia and the importance of the subject, it is to be hoped that the British Columbia Court of Appeal will heed Mr. Justice Hutchison's request and at the first opportunity reconsider the whole question of the jurisdiction of the Supreme Court of British Columbia in suits for declaration of nullity of marriage.

The question of jurisdiction in nullity suits involved in *Savelieff* v. *Glouchkoff* arises at an opportune moment in view of the decision of the English Court of Appeal in *Ramsay-Fairfax* v. *Ramsay-Fairfax*[37] and that of the House of Lords in *Ross Smith* v. *Ross Smith*.[38]

In the former case, the parties were both resident in England at the time of the wife's petition for a decree of nullity on the ground of her husband's wilful refusal to consummate the marriage and incapacity. The Court of Appeal held that jurisdiction may be founded on residence where the ground for the decree of nullity is one on which the ecclesiastical courts had jurisdiction.[39] The court pointed out that the ecclesiastical courts based their jurisdiction in cases of nullity on residence not on domicile. If the defendant to a petition was resident within the local jurisdiction of the court then the court had jurisdiction to determine it, which was the situation in *Ramsay-Fairfax*. Lord Denning stated:[40]

> No one can call a marriage a real marriage when it has not been consummated; and this is the same no matter whether the want of consummation is due to incapacity or to wilful refusal. Let the theologians dispute as they will, so far as the lawyers are concerned, Parliament has made it plain that wilful refusal and incapacity stand together as grounds of nullity and not for dissolution: and being grounds of nullity, they fall within the old ecclesiastical practice, in which the jurisdiction of the courts is founded on residence and not upon domicile. [Counsel for the husband] sought to draw a distinction between a marriage which was void and a marriage which was voidable. He admitted that in marriages which were void, the courts where the parties

[37] *Supra*, footnote 5. [38] *Supra*, footnote 6.

[39] And also where the ground is an additional one now enacted in section 8 of the Matrimonial Causes Act, 1950, 14 Geo. 6, c. 25 as it was the case here with respect to wilful refusal.

[40] *Supra*, footnote 5, at pp. 697 (All E.R.), 133 (P.). Note that in the All E.R., Lord Denning is reported to have said: "The courts of the place where the marriage was celebrated also may have jurisdiction, but the courts where both parties reside certainly have jurisdiction". This passage does not appear in The Law Reports.

> resided had jurisdiction, but he said that in marriages that were voidable, it was only the courts of the domicile. However valid this distinction may be for some purposes, it is not valid for our present purposes. Take the case of impotence itself, which has always made a marriage voidable. The old ecclesiastical courts would certainly assume jurisdiction on the grounds of residence and not of domicile; and if they would have assumed jurisdiction, so should we also. Likewise with wilful refusal, which also makes a marriage voidable.

Referring to *Easterbrook* v. *Easterbrook*[41] and *Hutter* v. *Hutter*[42] he said:[43]

> I am clearly of opinion that those two cases were rightly decided and should be upheld: but *Inverclyde* v. *Inverclyde*, [1931] P. 29 was wrongly decided and should be overruled.
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> One word more. It may be in these nullity cases that the courts of the domicile also have jurisdiction: so may the courts of the place where the marriage was celebrated: but the courts where both parties reside certainly have jurisdiction.

In *Ross Smith* v. *Ross Smith*,[44] the parties were married in England in 1955. In 1959 the husband being domiciled in Scotland and resident in Kuwait, the wife, who was resident in England, presented a petition for nullity of the marriage on the ground of the husband's incapacity or wilful refusal to consummate the marriage. Karminski J. held that there was no jurisdiction based on the place of celebration alone where the grounds for nullity were incapacity or wilful refusal.[45] The Court of Appeal reversed his decision and held that the English Court had jurisdiction.[46] On appeal, the majority of the House of Lords agreed with Karminski J. and held that jurisdiction in nullity over a marriage that is voidable, as distinct from being void, is not conferred on the High Court of Justice of England merely by the fact that the marriage was celebrated in England. Their Lordships felt that *Simonin* v. *Mallac*[47] should not be extended to voidable marriages.

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[41] *Supra*, footnote 11.

[42] *Supra*, footnote 12.

[43] *Supra*, footnote 5, at p. 698. Note that in *Ross Smith* v. *Ross Smith*, *supra*, footnote 6, at p. 354 (All E.R.), Lord Reid was also of the opinion that *Inverclyde* v. *Inverclyde*, *supra*, footnote 10, was wrongly decided so far as it refused to recognize residence of the respondent as a ground of jurisdiction in a suit of a kind that could have been entertained by the ecclesiastical courts.

[44] *Ibid.*, And see: W. Laley, Basis of Jurisdiction in Nullity of Marriage (1962), 78 L.Q. Rev. 417; J. K. Grodecki, P. R. H. Webb, P.S.C. Lewis, Nullity Jurisdiction: Three Commentaries on the Ross Smith Case (1962), 11 Int. & Comp. L.Q. 651.

[45] [1960] 3 All E.R. 70, [1961] P. 39.

[46] [1961] 1 All E.R. 255, [1961] P. 39.

[47] (1860), 2 Sw & Tr 67. In that case it was held for the first time that by reason of the marriage having been celebrated in England, an English court had jurisdiction to entertain a petition for annulment of the marriage although the respondent was neither resident nor domiciled in Eng-

Lord Cohen said:[48]

> I think it is too late now to overrule that case. I would, however, confine its operation to cases where the marriage in question was alleged to be void. . . . There seems to me to be a fundamental distinction between a so-called marriage which was void *ab initio* because, *e.g.*, it was bigamous, and a voidable marriage which remains binding on the parties unless and until the competent court declares it to be null. In the case of the first class of marriage, if it was celebrated in England, I am compelled by the decision in *Simonin* v. *Mallac* to hold that the High Court had jurisdiction to declare it null even though the respondent is neither domiciled nor resident in England, but I see no reason why I should extend this anomalous decision to the case of a voidable marriage.

Lord Guest stated:[49]

> It is said that because the ecclesiastical courts did not for the purposes of jurisdiction draw any distinction between void and voidable marriages therefore the High Court should not. But there was no occasion for the ecclesiastical courts to draw a distinction because their jurisdiction was founded on residence in both cases. And I accept that the High Court has jurisdiction in relation to void and voidable marriages founded on residence and that *Inverclyde* (*otherwise Tripp*) v. *Inverclyde*, [1931] P. 29 was wrongly decided.
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> I have already referred to some of the distinctions between void and voidable marriages. The most notable appear to be these. In a void marriage the wife, if petitioner, can go to the court of her domicile to have the marriage annulled. *De Reneville* v. *De Reneville*, [1948] P. 100. In a voidable marriage she must adopt the domicile of her husband for the purpose of obtaining a decree of nullity. In a void marriage the decision depends on the ascertainment of a state of facts instantly verifiable at the date of the marriage, such as lack of capacity or of the necessary consents or duress. This challenge can be made by third parties at any time. Where a marriage is voidable the decision depends on supervening circumstances such as wilful refusal to consummate the marriage or impotence which may be *quoad hanc* and therefore not ascertainable till after the parties have cohabited. A voidable marriage can only be challenged by parties during their lives. These are sufficient distinctions to show why if the court of the place of the celebration is to have jurisdiction to annul a void marriage, it should not have a similar jurisdiction in the case of a voidable marriage. The jurisdiction, in my view, should depend on residence or domicile. This was the decision of the Court of Appeal in *Casey* v. *Casey*, [1949] 2 All E.R. 110 although it is true that the members of the court based their decision on differing grounds. The Court of Appeal in the present case would, I think, have felt themselves bound to

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land. This decision has been followed in many cases both in England and in other jurisdictions within the Commonwealth but in all the earlier cases the marriage was alleged to be void and not merely voidable. See *Gower* v. *Starrett*, *supra*, footnote 3.

[48] *Supra*, footnote 6, at p. 360.

[49] *Ibid.*, at p. 383.

follow *Casey* but for the decision in *Ramsay-Fairfax (otherwise Scott-Gibson)* v. *Ramsay-Fairfax*, [1956] P. 115 which they considered established that for the purpose of founding jurisdiction in nullity cases no distinction can be drawn between void and voidable marriages. *Ramsay-Fairfax* did not concern the place of celebration but the residence of the parties. All that was decided was that residence gave jurisdiction in the case of void and voidable marriages which was an inevitable decision in view of the inherent jurisdiction of the ecclesiastical courts.

It was not until *Hill (otherwise Petchey)* v. *Hill*, [1960] P. 130 that it was held in England that the place of celebration gave jurisdiction in the case of voidable marriages. This case had been preceded by *Addison (otherwise McAllister)* v. *Addison*, [1955] N.I. 1 where Lord MacDermott, C.J. sitting as a single judge, held to the same effect. In my view these decisions cannot be justified either in principle or on precedent.

For these reasons I agree with my noble and learned friend on the Woolsack that the decision of *Simonin* v. *Mallac* should not be extended to voidable marriages.

As for Lord Morris of Borth-y-Gest, he was of the opinion that:[50]

If however, the decision in *Simonin* v. *Mallac* can be supported, I cannot find in it any good reason for applying the jurisdiction so as to cover one who is not domiciled or resident in England and who is the respondent to a petition to annul a voidable marriage. Where there is such a petition the court is being invited to bring marriage status to an end and to do so with retrospective effect. If it can be said that by marrying in a particular country parties impliedly agree to have "the force and effect" of their marriage decided on by the courts of that country I cannot think that any agreement should be implied which extends beyond some agreement to have a decision in such courts whether the marriage was or was not valid *ab initio*. The laws of different countries may vary in their provisions concerning the annulment of marriages which are valid *ab initio*: they may vary in their provisions as to what ancillary relief may be granted in the event of such an annulment. The particular place where the ceremony of marriage takes place may have no relevance as between the parties so far as their marriage status is concerned assuming that the ceremony did bring about such a marriage status. It seems to me that it would be most unlikely that parties who enter into a valid marriage in one particular country which is not intended to be the country of their domicile or residence would intend that the law to be applied to their future married status should be the law of the country in which the actual ceremony of marriage took place and I cannot think that any agreement to such effect ought to be implied. It has not been suggested that the fact that a marriage ceremony takes place within the jurisdiction can be the basis for jurisdiction to dissolve the marriage.

If a respondent is domiciled or resident in England then there may be a decree of nullity either if the marriage is void or if it is voidable.

[50] *Ibid.*, at pp. 366-367.

> It does not follow from this that if jurisdiction over a respondent in nullity proceedings can be asserted for the reason that the respondent has married in England the jurisdiction should extend both to voidable and void marriages. If the reasoning in *Simonin* v. *Mallac* can be relied on at all it seems to me that its application ought to be limited to cases where what is sought is a decree of nullity in respect of a "void marriage" or, stating the matter otherwise, a decree which in effect declares that some ceremony of marriage that took place within the jurisdiction did not, for one reason or another, bring it about that there was a marriage which *ab initio* was valid.

His Lordship seems to have overlooked the elementary and primary distinction between jurisdiction and choice of law. Where the court of the place of celebration takes jurisdiction it will not necessarily apply its own substantive law to determine whether or not the marriage should be annulled. The ascertainment of the proper law in a nullity suit depends upon an analysis of the intrinsic nature of the alleged defect in the marriage. It is necessary to separate the contractual defects of the marriage from those that affect status. If the defect is one of form the court might apply the *lex fori* which is also the *lex celebrationis* but in case of impotency or wilful refusal it might apply the law of the domicile of the parties. In other words the answer will be given by the appropriate choice of law rule in force in the forum. The argument that "it would be most unlikely that parties who enter into a valid marriage in one particular country which is not intended to be the country of their domicile or residence would intend that the law to be applied to their future married status should be the law of the country in which the actual ceremony of marriage took place . . ." is not well founded and irrelevant as far as the jurisdiction of the court is concerned. The law of the place of celebration is not necessarily the proper law of the marriage. Again, we are dealing here exclusively with a question of jurisdiction and not the law to be applied by the court of the place of celebration. There would probably be less objection to the jurisdiction of the *forum celebrationis* if such forum were prepared to apply, wherever appropriate, the personal law of the parties. It is certainly wrong for the forum to annul a marriage on a ground not recognized as sufficient by the proper foreign law.

The dissenting opinion of Lord Hodson is to be preferred to that of the majority. He said in part:[51]

> I cannot find the distinction between void and voidable any more satisfactory for the purpose of jurisdiction than that between one kind of void marriage and another.

[51] *Ibid.*, at pp. 371-372.

> Whether the marriage is void or voidable the question to be determined is always the same, that is to say, was it or was it not a valid marriage. Leaving formality on one side the question will be, was there capacity to marry?
>
> The distinction between divorce and nullity proceedings is vital. The one seeks to destroy a valid marriage the other seeks to establish that there was no marriage.
>
> With all respect to those who take a contrary view I remain convinced that the line of cleavage for jurisdictional purposes is between divorce and nullity and not between different kinds of nullity proceedings. I see no justification for maintaining the distinction between void and voidable marriages when jurisdiction is exercised on the ground that the marriage was celebrated in England and rejecting the distinction when jurisdiction is exercised on the ground of residence.

Lord Merriman, also dissenting, stated:[52]

> As regards the jurisdiction of the court of the ceremony, it has throughout the argument been sought to distinguish between void and voidable marriages. It is apparently conceded that the court of the ceremony may pronounce on void marriages, but it is argued that in the case of voidable marriages it is otherwise. In my opinion, no satisfactory point of principle has been offered in support of this distinction. The distinction cannot be derived from the ecclesiastical courts because the distinction was not recognized by these courts in connexion with jurisdiction. As far as my researches have gone, the first reasoned distinction between void and voidable marriages was drawn by Sir James Wilde (afterwards Lord Penzance) in 1868 in *A.* v. *B.* (1868), L.R. 1 P & D, at p. 561. What is lacking, however, is any suggestion that the distinction between a void and voidable marriage has any bearing on the jurisdiction of the court.

The most unfortunate result of *Ross Smith* v. *Ross Smith* is undoubtedly the acceptance by the House of Lords of the relevance for the purpose of jurisdiction of the distinction between void and voidable marriages that had been rejected in the *Ramsay-Fairfax* case. Thus, today in England this distinction is relevant when the basis of jurisdiction is the *locus celebrationis* and not when it is the residence of the parties. As a result of the decision of the House of Lords, *Ramsay-Fairfax* must be interpreted within narrow limits.

In Canada it is interesting to note that in *Steele* v. *Steele*,[53] Bissett J. of the Nova Scotia Court for Divorce and Matrimonial Causes, preferred to follow the decision of the Court of Appeal[54] and held that celebration of a marriage in the province is sufficient to confer jurisdiction to annul a voidable marriage.

To conclude it is suggested that the distinction between void

[52] *Ibid.*, at pp. 376, 377.
[53] (1964), 43 D.L.R. (2d) 57 (N.S.).
[54] [1961] 1 All E.R. 255.

and voidable marriages has no bearing on the jurisdiction of the court and that the doctrine of the majority of the House of Lords in the *Ross Smith* case should be rejected in Canada.[55] The rule adopted in the *Ramsay-Fairfax* case, which bases jurisdiction on the residence of the parties, has already been accepted in British Columbia.[56] On the other hand the *ratio decidendi* of the *De Reneville* case, if incorporated in the rules of jurisdiction applicable in nullity cases in British Columbia, would be most beneficial and in conformity with logic and historical tradition. What really matters in nullity suits involving a foreign element is whether or not the court seized with the case will apply the proper law. In the common-law provinces if the ground of annulment is lack of formality, this issue should be determined in accordance with the *lex loci celebrationis;* if any other basis for relief is alleged, the issue should be determined in accordance with the personal law or laws of the parties at the time of marriage. Liberalization of jurisdictional rules is dangerous only where the substantive law of the forum is applied as a matter of course. Why place needless restrictions upon the right of a party to claim matrimonial relief? The bases of jurisdiction could be multiplied if the application of the proper law were insisted upon. Of course, there will not always be a consistent choice of law in the various jurisdictions of the world although in practice the number of connecting factors is rather limited. For this reason and for reasons of convenience to the parties and in the interest of administration of justice some sensible limitations must be placed upon the number of courts that can exercise jurisdiction to grant nullity decrees. The jurisdiction of the British Columbia court in nullity of marriage proceedings as enunciated by the Court of Appeal in *Shaw* v. *Shaw* and *Gower* v. *Starret* could be slightly modified to read as follows:

The court has jurisdiction to annul a marriage whether it is alleged to be void or voidable if:[57]

1. *Either party* is domiciled in British Columbia at the commencement of the proceedings.[58]

[55] Especially in view of the fact that the British Columbia court must conform as closely as possible to the principles and rules acted upon by the ecclesiastical courts in England. In *Shaw* v. *Shaw*, *supra*, footnote 2, Sidney Smith J.A. said at p. 178 (D.L.R.), referring to English cases: "The decisions in these cases are of course not binding upon us, and this court will not follow them unless in its opinion they correctly express the law."

[56] *Whitaker* v. *McNeilly* (1957-58), 23 W.W.R. 210, 11 D.L.R. (2d) 90 (B.C.).

[57] Modifications in italics. For a proposal in England see Report of the Royal Commission on Marriage and Divorce, 1956 Cmd. 9678.

[58] See *Salvesen* v. *Austrian Property Administrator*, *supra*, footnote 4;

2. The respondent is resident in British Columbia at the commencement of the proceedings.[59]
3. The marriage was celebrated in British Columbia.[60]

This proposal embodies the views expressed by Manson J. in *Khan* v. *Khan* with respect to marriages void *ab initio* and extends them to cover voidable marriages.[61]

Until the British Columbia Court of Appeal or eventually the Supreme Court of Canada, determines once and for all the bases of jurisdiction of the court in nullity suits, controversies on the subject are likely to continue. Lawyers in British Columbia are now faced with a number of seemingly conflicting Supreme Court decisions that call for prompt solution if hardship for petitioners is to be avoided. As for the rest of Canada, the picture is even more confusing.[62] The best approach would undoubtedly be for Parlia-

De Reneville v. *De Reneville, supra,* footnote 25; *Kahn* v. *Kahn, supra,* footnote 8; *Solomon* v. *Walters* (1956), 3 D.L.R. (2d) 78 (B.C.); also *Sheppard* v. *Sheppard,* [1947] 2 W.W.R. 826 (B.C.); *Gill* v. *Gill,* [1927] 2 W.W.R. 761 (B.C.); and *Finlay* v. *Boettner,* [1948] 1 D.L.R. 39 (Alta.) (domicile of plaintiff); *Bevand* v. *Bevand,* [1955] 1 D.L.R. 854 (N.S.). Note that the distinction between void and voidable marriages is still relevant for determining the domicile of the petitioning wife or at least until British Columbia adopts the Uniform Domicile Code (1961), see Proceedings of 43rd Annual Meeting of the Conference of Commissioners on Uniformity of Legislation in Canada, p. 139. Note also that whether the marriage is void or voidable depends upon the particular defect alleged by the petitioner if recognized by the proper law as a ground of nullity.

[59] *Ramsay-Fairfax* v. *Ramsay-Fairfax, supra,* footnote 5; *Whitaker* v. *McNeilly, supra,* footnote 53. *Purdy* v. *Purdy,* [1919] 2 W.W.R. 551 (B.C.) seems to be overruled. *Cf. Adelman* v. *Adelman,* [1948] 1 W.W.R. 1071 (Alta.).

[60] *Gower* v. *Starret, supra,* footnote 3; see also *Reid* v. *Francis,* [1929] 3 W.W.R. 102 (Sask. C.A.); *Bevand* v. *Bevand, supra,* footnote 56; *Hinds* v. *McDonald,* [1932] 1 D.L.R. 96 (N.S.); *Spencer* v. *Ladd,* [1948] 1 D.L.R. 39 (Alta.); *G.* v. *G.,* [1928] 1 W.W.R. 651 (Sask.).

[61] It is unfortunate that for constitutional reasons (see s. 91 (26) of the B.N.A. Act, 30 & 31 Vict., c. 3) the Legislature of the Province of British Columbia cannot add a section to the Divorce and Matrimonial Causes Act, *supra,* footnote 34, that would cover specifically the cases in which the courts of that province have jurisdiction to annul a marriage.

Note that in *LeBlanc* v. *LeBlanc,* [1955] 1 D.L.R. 676, the Nova Scotia Court for Divorce and Matrimonial Causes applied The Divorce Jurisdiction Act 1930, R.S.C., 1952, c. 84, to proceedings brought by a deserted wife for the annulment of a voidable marriage. It is submitted that this is wrong as the Act deals with jurisdiction for the purpose of divorce only.

In *Abate* v. *Abate,* [1961] 2 W.L.R. 221, the court applying *Armitage* v. *Attorney-General,* [1906] P. 135, held that the principle that the English courts will recognize as valid a decree of divorce obtained in a State where the husband was not domiciled, if the courts of his domicile would recognize the validity of the decree applies also to foreign nullity decrees. See also G. D. Kennedy, Recognition of Foreign Divorce and Nullity Decrees (1957), 35 Can Bar Rev. 628.

[62] For a survey see Castel, Private International Law (1960), p. 110 *et seq.*; Cartwright, Lovekin, The Law and Practice of Divorce in Canada (3rd ed., 1962), p. 44, *et seq*; Power, The Law and Practice Relating to Divorce (1948), p. 136 *et seq.*

ment to adopt a uniform federal law on the subject as was done in the field of divorce in 1930 when the Divorce Jurisdiction Act was passed.[63]

J.-G. C.