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Conflict of Laws -- Annulment of Marriage Void Ab Initio -- Jurisdiction of Court of "Wife's" Domicile -- Recognition of Foreign Decree -- Reciprocity -- Right of Party Who has Invoked Foreign Jurisdiction to Question that Jurisdiction and Deny Validity of Decree

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ence of either party has contributed to the loss, it should be borne by that party in the whole or in the greater part. Devlin L.J. had in mind the analogy of the contributory negligence acts. If such a rule had been adopted in Newtons' case, it would probably have been held that the plaintiffs had been negligent in releasing the car to a complete stranger and that it was therefore just that they should bear the whole loss. An apportionment rule would cause hardship to the innocent third party in cases where the person entrusted with possession of the goods is a "professional", and this is why the writer suggests that it should be confined to private transactions.

All of these suggestions presuppose that no system of registration, certificate of title, or other equivalent system for giving notice of proprietary interests has been established for the particular class of transaction in question. If such a system has been established, as it has been, for example, in the case of security interests, and it is not unreasonable to expect third parties to make an appropriate search before treating the person in possession as an unqualified owner, then there is no need to engrat additional rules on the system.

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CONFICT OF LAWS—ANNULMENT OF MARRIAGE VOID AB INITIO—JURISDICTION OF COURT OF "WIFE'S" DOMICILE—RECOGNITION OF FOREIGN DECREES—RECIPROCITY—RIGHT OF PARTY WHO HAS INVOKED FOREIGN JURISDICTION TO QUESTION THAT JURISDICTION AND DENY VALIDITY OF DECREES.—Re Capon, Capon and O'Brien v. McLay,1 a decision of the Ontario Court of Appeal in the field of recognition of foreign nullity decrees deserves to be noted as it clarifies some important common law principles, applies for the first time in Ontario Travers v. Holley2 and reaffirms other rules in the field of conflict of laws.

The court was of the opinion that:

I. In the case of a marriage void ab initio, the putative wife does not automatically acquire the putative husband's domicile. She is free to acquire a domicile of choice different from his, and

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in seeking an annulment may invoke the jurisdiction of the courts of that domicile.

II. The courts of Ontario are entitled to assume jurisdiction to annul a marriage void \textit{ab initio} on the ground that the petitioner alone is domiciled in the province whether or not the marriage was celebrated in Ontario.

III. The courts of Ontario will recognize a foreign nullity decree rendered on a jurisdictional basis similar to their own and will not review such a decree even though the putative husband was domiciled in this province at the time of the commencement of the proceedings.

IV. A putative wife cannot impugn the validity of a nullity decree obtained by her from a court the jurisdiction of which she herself invoked and on the basis of which she acted by subsequently remarrying.

Although propositions I and II were made by the court in solving a hypothetical case they were relevant in order to apply \textit{Travers v. Holley} and decide the suit. Proposition III contains the \textit{ratio decidendi} of the case whereas proposition IV is clearly \textit{obiter}.

In 1952, Mr. Capon made a will in which he nominated his mother sole executrix and directed that his whole estate be divided equally between her and his sister. In 1957 he married in Toronto. The “spouses” lived together until 1958 when, at the instance of the “wife”, the “husband” was committed to the Ontario Mental Hospital. In 1959 she left Toronto and established a \textit{bona fide} domicile in Nevada in accordance with the laws of this State and of Ontario. She then instituted proceedings in Nevada against her “husband” to have the marriage declared null and void \textit{ab initio} on the ground of his insanity at the time of the ceremony. Upon obtaining a decree of nullity she remarried.

After Mr. Capon’s death, and upon application for probate of the will in Ontario where the deceased was domiciled, the Surrogate Court judge declared that the “wife” had failed to establish that she was one of Mr. Capon’s next-of-kin and admitted the will to probate. The “wife” in the court of first instance and in the Court of Appeal argued that the Nevada decree was made without jurisdiction and could not affect her status in Ontario since she had been domiciled in this province from the date of the “marriage” until her “husband’s” death. According to section 20 of the \textit{Wills Act},\footnote{R.S.O., 1960, c. 433.} the 1952 will was revoked by the 1957 marriage and he died intestate. She was entitled to share in his estate as his lawful
widow in accordance with the provisions of the Devolution of Estates Act as upon an intestacy despite the fact that she had invoked the foreign court's jurisdiction and obtained a decree of nullity of her marriage.

The beneficiaries under the will relied on the Nevada decree and maintained that Mr. Capon's lack of mental capacity at the time of the ceremony made the marriage absolutely null and void ab initio. It followed that his domicile did not automatically attach to her. The putative wife retained the domicile she had at the time of the marriage ceremony and was free to establish a domicile of choice in Nevada and seek a declaration as to her status in the courts of this State. Alternatively they argued that if the Nevada decree was invalid, the wife, having invoked the jurisdiction of the court of this State, could not now attack the validity of the decree.

I - II

The Court of Appeal after examining the relevant authorities held that the Ontario marriage was void ab initio because of the insanity of one of the parties at the time of the ceremony.

Mr. Justice Schroeder, who wrote the opinion of the court, then stated that under the rules of international law recognized in Ontario, the only court having jurisdiction to pronounce a judgment of divorce a vinculo matrimonii is that of the country in which both parties were domiciled at the time of institution of proceedings and that the same rule applies to nullity cases where the marriage is merely voidable. The wife acquires the domicile of her husband on marriage and retains it until a decree of avoidance is pronounced by a competent tribunal. "This is not so in the case of a marriage void ab initio, and to the extent that domicile may be the criterion of the court's jurisdiction, the court from which a decree of nullity is asked may be confronted by two litigants who have not a common domicile but who have separate and different domiciles." If the putative wife lives with her putative husband and acquires the same domicile, she acquires it as a domicile of choice and not as a domicile of dependence. His lordship said:

Assuming the correctness of the facts proven by the appellant in the Nevada suit, and assuming that at the date of institution of those proceedings the appellant had acquired a domicile of choice in Nevada, the point which falls to be determined is whether her domicile alone, the defendant husband being then domiciled in the Province of Ontario,

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4 R.S.O., 1960, c. 106.  
5 Supra, footnote 1, at p. 92.  
6 Ibid.
invested the Nevada court with jurisdiction to pronounce the decree of nullity herein.

To answer this question and be in a position to apply *Travers v. Holley* he examined the hypothetical case of a putative wife domiciled in Ontario and seeking in an Ontario forum a decree of nullity of a marriage void *ab initio* when the putative husband is domiciled elsewhere at the date of the institution of the action. After pointing out that the law upon this subject has long been in an unsatisfactory state, Mr. Justice Schroeder found that in England, at common law, in the absence of a statute, it is established by *White (otherwise Bennett) v. White*, *De Reneville v. De Reneville*, and supported by passages from the speeches of Lord Cohen and Lord Guest in *Ross Smith v. Ross Smith* that jurisdiction in the case of a marriage void *ab initio* can properly be based on the ground of the petitioning wife's domicile.

Turning to Canadian authorities the Court of Appeal disregarded *Manella v. Manella*, one of its previous decisions, as well as *Hutchings v. Hutchings*, decided by the Manitoba Court of Appeal, mostly because they antedated *De Reneville*. His Lordship preferred *Spencer v. Ladd, Finlay v. Boettner* where Boyd McBride J., of the Alberta Supreme Court, gave effect to the rule laid down in the *De Reneville* case and held that the domicile of the petitioner in the country of the forum was a valid basis for the exercise of the court's jurisdiction.

Schroeder J.A. stated:  

In my 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 properly 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

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7 Supra, footnote 2.
13 Supra, footnote 9.
15 Supra, footnote 1, at p. 95.
and concluded that the courts of Ontario "would be entitled to assume jurisdiction on the ground that the petitioner alone is domiciled in this province whether the marriage was celebrated here or not". To the authorities cited by the Ontario Court of Appeal should be added Savelieff v. Glouchkoff, a recent decision of the British Columbia Court of Appeal supporting the same conclusion.

This part of the court's opinion is welcome as it clarifies the law in a decisive manner even though the ratio decidendi of the case is elsewhere. It seems now established by the Court of Appeal that at common law, a "wife" domiciled in Ontario may petition the courts of this province even though her "husband" is domiciled elsewhere, where the ground on which the annulment of the marriage is sought renders it void ab initio. And it would not seem to matter that the marriage was celebrated out of Ontario. Nor does there appear to be any good reason to deny a like result in the converse case where the petitioner is resident in Ontario, the respondent being there domiciled. Actually "if the domicile of the petitioner alone is a sufficient jurisdictional ground, it would be difficult indeed to deny the sufficiency of the domicile of the respondent alone". In other words, where the marriage is void the Ontario

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16 Ibid., at p. 96.
17 (1963), 41 D.L.R. (2d) 767 (B.C.S.C.) and comment by J.-G. Castel (1964), 42 Can. Bar Rev. 474, rev. on appeal (1964), 48 W.W.R. 335 and comment by K. Lysyk (1965), 43 Can. Bar Rev. 107. See also Kahn v. Kahn (1959), 21 D.L.R. (2d) 171, (1959), 29 W.W.R. 181 (B.C.S.C.); Ambrose v. Ambrose (Harnish v. Harnish) (1960), 32 W.W.R. 433, at p. 447; Bevand v. Bevand, [1955] 1 D.L.R. 354 (N.S.). One must assume that Manella v. Manella, supra, footnote 11, is now overruled by Re Capon, supra, footnote 1. Actually it is open to question whether Manella v. Manella did reject the domicile of the petitioner as a valid ground for exercising nullity jurisdiction. The case involved a marriage alleged by the plaintiff husband domiciled in Ontario to have been void ab initio on the ground of the wife's insantity at the time of the ceremony. The Court of Appeal held that the husband's failure "to obtain an order appointing a guardian for the defendant wife who was a mental incompetent was fatal and on that ground alone the plaintiff was disentitled to the relief which he sought". See the words of Mr. Justice Schroeder in Re Capon distinguishing the case, at p. 95. Middleton J.A. in Manella stated however (at p. 634 (O.R.)) that "I think it will be found that the wife did not change her domicile by reason of her husband's change of domicile, and that the courts of this Province have no power to declare the invalidity". This is probably obiter in view of the judge's earlier position with respect to the appointment of a guardian when the wife did not enter an appearance to the writ of summons.
courts should assume jurisdiction when either party is domiciled in the province. Conferring jurisdiction upon the courts of the petitioner's or the respondent's domicile, theoretically at least, opens up the possibility of conflicting judgments by the courts of the respective domiciles but this is to be preferred to a situation where no court would have nullity jurisdiction, a result which would follow if common domicile was insisted upon, the parties being domiciled in different jurisdictions.¹⁹

III

Relying upon the much publicized case of *Travers v. Holley*²⁰ the Ontario Court of Appeal went on to say: "To deny the equivalent right to a foreign court would be inconsistent and contrary to well recognized principles. . . ."²¹

*Travers v. Holley*, it will be recalled, involved the recognition of a divorce decree rendered by a court of New South Wales whose jurisdiction was based on section 16(a) of the New South Wales Matrimonial Causes Act, 1899 which provided as follows:²²

Any wife who at the time of the institution of the suit has been domiciled in New South Wales for three years and upwards (provided she did not resort to New South Wales for the purpose of such institution) may present a petition to the court praying that her marriage be dissolved on one or more of the grounds following: (a) that her husband has without just cause or excuse wilfully deserted the petitioner and without any such cause or excuse left her continuously so deserted during three years and upwards and no wife who was domiciled in New South Wales when the desertion commenced shall be deemed to have lost her domicile by reason only of her husband having thereafter acquired a foreign domicile.

In this case the English Court of Appeal held that a foreign divorce obtained by a wife in circumstances substantially similar to those in which English courts exercise jurisdiction under section 13 of the Matrimonial Causes Act, 1937²³ will be recognized in England, although the husband was not domiciled in the foreign country at the commencement of the divorce proceedings. Since the New South Wales court had assumed jurisdiction under a local statute identical to the English Act the court upheld the validity of the decree.

¹⁹ *De Reneville v. De Reneville*, supra, footnote 9, per Lord Greene M.R., at p. 113 (P).
²⁰ *Supra*, footnote 2.
²¹ *Supra*, footnote 1, at p. 96.
²² 62 & 63 Vict., No. 15. Now see Matrimonial Causes Act (Commonwealth) 1959, No. 104.
²³ 1 Edw. 8 & 1 Geo. 6, c. 57 now found in the Act of 1950, s. 18(1)(a), infra, footnote 28.
Hodson L.J. said: 24

I would say 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. The principle laid down and followed since Le Mesurier case must, I think, be interpreted in the light of the legislation which has extended the power of the courts of this country in the case of persons not domiciled here.

It is important to underline the distinction that exists between a decree of divorce pronounced upon a common law ground of jurisdiction and one given on the basis of a deserted wife statute. At common law, the actual domicile of the husband at the time when the proceedings are commenced is the sole test of jurisdiction. This test was established by the Privy Council in Le Mesurier v. Le Mesurier. 25 In 1937, 26 and in 1949-1950 27 the common law grounds on which an English court might assume jurisdiction to dissolve or annul a marriage were extended by statute so that the wife can now institute divorce proceedings in England notwithstanding the foreign domicile of her husband if certain conditions laid out in the legislation are met.

At common law, the fundamental doctrine respecting the recognition of foreign decrees of divorce in England follows the same pattern. Nothing short of domicile enables a foreign court to pronounce a decree that will be recognized in England. 28 However, if the court of the domicile recognizes the jurisdiction of a court of another country, a decree given by the latter is valid in England. 29 Travers v. Holley 30 predicates a statutory extension of common law jurisdiction beyond the domicile. The common law doctrine of recognition which was developed before the passage of the 1937 and 1949-1950 Acts and indeed before the English courts themselves had divorce jurisdiction 31 was extended and modified in Travers v. Holley so as to permit recognition of a foreign decree based jurisdictionally upon some ground other than domicile, provided that the facts that existed before the foreign court would have enabled the English court to take jurisdiction under the above mentioned legislation. It is in connection with

24 Supra, footnote 2, at pp. 257 (P.), 800 (All E.R.). Italics mine.
26 Supra, footnote 23.
27 Law Reform (Miscellaneous Provisions) Act, 12, 13, 14 Geo. 6, c. 100.
28 Matrimonial Causes Act, 14 Geo. 6, c. 25.
29 See Le Mesurier v. Le Mesurier, supra, footnote 25.
31 Supra, footnote 2.
this statutory extension of the common law jurisdiction that Mr. Justice Hodson said: "Where, as here, there is in substance recipro-city ...".

In Canada the principle laid down in Le Mesurier v. Le Mesurier has been unanimously approved by the courts. Furthermore the decision of the Privy Council in A.-G. for Alberta v. Cook to the effect that a wife deserted by her husband cannot acquire a domicile separate from his so as to give the court of that domicile jurisdiction to dissolve the marriage even though she was judicially separated from him led to the enactment by Parliament in 1930 of the Divorce Jurisdiction Act which provides in section 2 that "a married woman who whether before or after the passing of the Act has been deserted by and has been living separate and apart from her husband for a period of two years and upwards and is still living separate and apart from her husband may, in any of those provinces in Canada in which there is a court having jurisdiction to grant a divorce a vinculo matrimonii, commence in the court of such province having jurisdiction proceedings for a divorce a vinculo matrimonii praying that her marriage may be dissolved on any grounds that may entitle her to such divorce according to the law of such province, and such court has jurisdiction to grant such divorce if immediately prior to such desertion the husband of such married woman was domiciled in the province in which such proceedings are commenced". The Act applies only to wives deserted in Canada and where the proceedings are commenced in the province where the husband was domiciled immediately prior to desertion.

Clearly this legislation constitutes a departure from common law rules and must be compared to similar legislation elsewhere, especially in England and Australia. Here is the proper field of application of Travers v. Holley.

33 Supra, footnote 25.
36 R.S.C., 1952, c. 84.
38 Note however that Travers v. Holley has been interpreted widely by English courts. The foreign statutory law need not correspond to the English Matrimonial Causes Act. The English court will not compare laws but merely ascertain whether in roughly comparable circumstances it would have acted. See Arnold, [1957] 1 All E.R. 570; Carr v. Carr, [1955] 2 All E.R. 61; Levett v. Smith, [1957] 1 All E.R. 720; Manning v. Manning, [1958] P. 112. Comparison does not require an exact identity of details but substantial connection with the foreign jurisdiction. It is not essential for recognition in England that the foreign court should assume jurisdiction.
When foreign divorce decrees are sought to be recognized in Canada, our courts have also generally followed the rules adopted in England in similar cases. Although domicile is still the only basis for recognizing foreign divorces in all the provinces by virtue of the rule laid down by the Privy Council in *Le Mesurier v. Le Mesurier*, some Canadian courts have adopted the reasoning of *Armitage v. Att.-Gen.* and *Travers v. Holley*.

Thus, recently, in *Re Allarle*, it was held by the Alberta Supreme Court that a divorce decree granted in England under the "deserted wife" jurisdiction conferred by section 13 of the Matrimonial Causes Act, 1937, should be recognized in Alberta on the basis that the courts of this province are entitled to assume substantially similar jurisdiction under the provisions of the Divorce Jurisdiction Act of 1930. The court quoting *Travers v. Holley* said that it would be contrary to principle and inconsistent with comity if the courts of Alberta were to refuse to recognize a jurisdiction which *mutatis mutandis* they claim for themselves.

*Travers v. Holley* was not followed in *La Pierre v. Walter* on the ground that the Act of 1930 which was also invoked in this case, did not make any provision whatever in regard to the recognition of foreign decrees of divorce. The court observed that, had it been the intention of the Canadian Parliament that the law as to the recognition of foreign decrees should also be changed, some provision to this effect would have been included in the Act.

In Ontario the applicability of the doctrine of *Travers v. Holley* to foreign decrees of divorces has not yet been tested but in the light of the present decision one must assume that the Court of Appeal would be prepared to consider it as part of the law of Ontario. If the principle of *Travers v. Holley* now applies to foreign nullity decrees, there is no reason why it should not be equally

on the grounds laid down by the Matrimonial Causes Act, 1950. It is sufficient that the facts exist which would have enabled the English courts to assume jurisdiction. *Robinson v. Robinson Scott*, [1958] P. 71.

40 *Supra*, footnote 30. 41 *Supra*, footnote 2. 42 (1964), 41 D.L.R. (2d) 553. 43 *Supra*, footnote 23. 44 *Supra*, footnote 36.


46 (1960), 31 W.W.R. 26 (Alta.). Actually in this case, *Travers v. Holley* could not have been applied as the legislation under which the foreign decree was granted did not correspond at all to the Canadian Act of 1930. The circumstances in which the wife petitioned in the foreign country were not sufficiently similar to the circumstances in which, in a like case, she could have petitioned in Canada.
applied to foreign judgments of divorce or to other forms of matrimonial relief.

Except for the present case, there is to my knowledge no other judicial authority in Canada extending Travers v. Holley to foreign annulment proceedings.47

In England in the case of a void marriage, recent decisions seem to indicate that the courts will recognize the international validity of a nullity decree granted by the courts of the country in which the petitioner alone was domiciled. It is interesting to note that on several occasions, divorce cases have been relied upon in nullity proceedings. In Abate v. Cauvin (Abate)48 the court cited Armitage v. Att.-Gen.49 and held that an English court will recognize the validity of a decree of nullity pronounced by a foreign court if that decree is recognized by the court of the country where the parties were domiciled at the time of the proceedings. If Travers v. Holley is law in Ontario, a fortiori there is no reason why the courts of this province should not extend Armitage v. Att.-Gen. to nullity cases when domicile is a relevant jurisdictional ground.

In Lepre v. Lepre50 Sir Jocelyn Simon specifically referred to Travers v. Holley. He said:51

But even if this marriage were void ipso jure, so that the husband alone was domiciled in Malta at the start of the proceedings there, in my judgment we should still accord recognition to the Maltese decree. In the case of a marriage void ipso jure, such as a marriage fundamentally defective as to formalities, the English court assumes jurisdiction in nullity if the petitioner alone is domiciled in England: De Reneville v. De Reneville, [1948] 1 All E.R. 56, [1948] P. 100; Apt (ors. Magnus) v. Apt, [1947] 2 All E.R. 677, [1948] P. 83; Kenward v. Kenward, [1950] 2 All E.R. 297, [1951] P. 124, to cite only authorities in the Court of Appeal. Moreover, in such circumstances we purport to operate on the status not only of the petitioner who is domiciled within the jurisdiction but also of the respondent who is not; it is for this reason that we insist that he or she should be made a party to the proceedings, so as to be bound by our decree. If we ourselves claim a ground of jurisdiction we must concede a similar ground of jurisdiction to foreign courts: Travers v. Holley and Holley, [1953] 2 All E.R. 794, [1953] P. 246; Corbett v. Corbett, [1957] 1 All E.R. 621. Therefore even if the wife were, contrary to my view, domiciled in England at the start of the Maltese proceedings by reason of the nullity of the marriage, we should none the less concede recognition to the Maltese decree, because

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47 In Le Blanc v. Le Blanc, [1955] 1 D.L.R. 676, the Nova Scotia Court for Divorce and Matrimonial Causes applied erroneously, in my opinion, the Divorce Jurisdiction Act to proceedings brought by a deserted wife for the annulment of a voidable marriage.
49 Supra, footnote 30.
51 Ibid., at pp. 55-57.
we would regard ourselves as competent to pronounce a decree of nullity of a marriage void *ipso jure* were the husband domiciled in England and the wife in Malta. . . . Furthermore such assumption and concession of a binding jurisdiction in nullity based on the domicile of one party only seems to me to accord with principle. A judgment declaratory of the status of some subject-matter legally situated within the national [sic] and jurisdiction of the court pronouncing the judgment constitutes a judgment in rem which is universally conclusive. The husband was legally situated within the jurisdiction of the Maltese court because he was domiciled in Malta. That court was, therefore, competent to declare his status by a decree of nullity; such a decree constitutes a judgment in rem, and should be regarded universally as conclusive as to his status, that is to say, that he is unmarried. . . .

Therefore, in my judgment, we should accept the Maltese decree as binding and conclusive—primarily as a decree of the court of the common domicil at the commencement of the proceedings there, though alternatively as a decree of the husband’s domicil alone at that time—provided always that it is not vitiated by fraud or contrary to natural justice.

His lordship refused to recognize the Maltese decree on the ground that it offended grossly against the forum’s notions of justice.52

The difficulty in applying *Travers v. Holley* to nullity cases is that, in Ontario, unlike in England or elsewhere, there are no statutory provisions dealing with the nullity jurisdiction of domestic courts. At present I believe that *Travers v. Holley* should be invoked in Canada only in divorces involving factual situations substantially similar to those covered by the 1930 Divorce Jurisdiction Act.53


53 *Supra*, footnote 36. See also Dicey, *op. cit.*, footnote 32, p. 382: “It is submitted that great caution should be exercised before English courts extend the grounds on which foreign nullity decrees will be recognised in England. At first sight it might seem reasonable to concede jurisdiction to foreign courts on the same grounds as those on which English courts exercise jurisdiction, perhaps by way of analogy from the principle of *Travers v. Holley* in divorce. This may be unobjectionable if the grounds on which foreign decrees are recognised are limited to those on which English courts exercise jurisdiction to annul voidable marriages. It is otherwise, however, if foreign decrees are recognised whenever the circumstances are such that English courts would have jurisdiction to annul
Of course since Canadian courts assume nullity jurisdiction on the basis of the domicile of the petitioner alone in the case of void marriages, it would be incongruous that the equivalent right of foreign courts should be denied. As Dr. Cheshire points out: "If a void marriage is a complete nullity and can be so treated by every court and every private person, what possible reason can there be for refusing recognition to a decree recording its non-existence and granted in the domicile of one of the parties?" He also states elsewhere: "If the law is to be a harmonious whole it seems that what is regarded as sufficient to confer jurisdiction upon the English court should be equally effective in the case of foreign courts." In the present case however the jurisdictional ground involved is established by common law and not by statute. Without having to rely upon Travers v. Holley, especially in a nullity case, the Ontario Court of Appeal could have reached the same conclusion by simply pointing out that a foreign decree made by the court of the domicile of the petitioner is entitled at common law to recognition in Ontario. It would be wholly illogical at common law to refuse to recognize a similar jurisdiction exercised by the courts of a foreign country.

As the Ontario Court of Appeal pointed out, at common law, one of the established bases of jurisdiction for the annulment of a void marriage is the domicile of the petitioner; thus it seems only sensible and appropriate that recognition should be accorded to a foreign decree which was based on a similar jurisdictional ground. This is not an application of the doctrine of Travers v. Holley which supports the recognition of decrees based on a foreign assumption of jurisdiction substantially similar to a local basis of jurisdiction.

a void marriage. For if we are right in our view that there should be no restrictions on the jurisdiction of English courts to annul a void marriage, the analogy of Travers v. Holley might logically require English courts to recognise any foreign decree annulling a void marriage. This, of course, is too sweeping a proposition to be acceptable, for, as Hodson L.J. said in Ramsay-Fairfax v. Ramsay-Fairfax, [1956] P. 115, 135, citing Sir William Scott in Sinclair v. Sinclair (1798), 1 Hagg. Cons. 294, 297, "the conclusion is carried too far when it is said that a sentence of nullity of marriage is necessarily and universally binding in all countries."

55 See Lord Greene, M.R., in De Reneville v. De Reneville, supra, footnote 9, at p. 60 (All E.R.). In Re Rogers, Rogers v. Rogers (1963), 36 D.L.R. (2d) 661 (B.C.S.C.), aff'd (1963), 39 D.L.R. (2d) 141 (B.C.C.A.), Ruttan J. said, at p. 666: "Nowhere in the British Columbia Marriage Act, R.S.B.C., 1960, c. 232, is it laid down that previous void marriages must be nullified by court order before one may apply for a marriage licence." An order annulling a void marriage is declaratory only. It reaffirms an existing status, it does not change or create a new one.
57 See Corbett v. Corbett, per Barnard J., supra, footnote 52.
that statutorily extended the jurisdiction allowed at common law. It is rather an equation of common law bases of jurisdiction for the purpose of recognition of foreign decrees.

It is therefore submitted that in the circumstances it was wrong and unnecessary to rely upon *Travers v. Holley* in order to find that the Ontario “marriage” was a complete nullity and did not have the effect of revoking the putative husband’s will which was therefore admitted to probate. 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. Actually it would be better not to invoke reciprocity and frankly acknowledge that in Ontario conflict of laws rules are of a bilateral nature. There is little room for a double standard in conflict of laws. As Professor Paul-A. Crépeau points out a coherent system of private international law should normally contain bilateral rules for two reasons (i) a very practical reason: a unilateral conflict rule solves but one half of the problem; (ii) a more theoretical reason: a bilateral rule expresses an idea of equality and of confidence among states.

It must be noted that the Court of Appeal also stated:

> Once it is determined that the judgment of the foreign court was within its jurisdiction, the court which is asked to extend recognition to such judgment will not review the judgment of the foreign court to ascertain if, e.g., the decision was supported by the evidence or was otherwise erroneous unless, of course, the proceedings offend against our views of substantial justice: *Pemberton v. Hughes*, [1899] 1 Ch. 781; *Jones v. Smith*, [1925] 2 D.L.R. 790, 56 O.L.R. 550; *Igra v. Igra*, [1951] P. 404.

To the authorities cited should be added *Formosa v. Formosa* and *Lepre v. Lepre*. It is clear that today, in England and in Ontario, when the recognition of a foreign decree is involved, jurisdiction is decisive and the fact that the court of the domicile pronounced the decree on grounds which are not part of the domestic law of the country in which recognition is sought, is not of itself

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69 A unilateral rule is one in which the connecting factor is so specific that the rule can only apply to a certain category of conflictual situations localized either in the forum or abroad. A bilateral rule is one in which the connecting factor is so general or broad that the rule can apply to conflictual situations whether localized in the forum or abroad. Paul A. Crépeau, *op. cit.*, pp. 12-13.
61 *Supra*, footnote 1, at p. 96.
a ground for dismissal of the action as long as the foreign decree is not collusive or otherwise fraudulent and does not offend against the forum ideas of substantial justice.

IV

The last part of the judgment is also of great interest although obiter dictum. The Court of Appeal relying on a long line of authorities in Ontario and elsewhere in Canada in the field of divorce expressed the opinion that a wife cannot attack the validity of a nullity decree obtained by her from a court the jurisdiction of which she herself invoked. The court was not prepared to overrule cases that had been relied upon for many years in Ontario and adopt the views expressed in Burnfiel v. Burnfiel unless forced to do so by a court of higher jurisdiction. The court also disregarded a statement of principle made by Duff C.J. in Stephens v. Falchi, a decision of the Supreme Court of Canada, on the ground that it did not apply to the facts of the present case.

Schroeder J.A. speaking of the putative wife said:

She elected to change her domicile to one of the United States of America and there secured a decree of nullity with any and all advantages which might flow from it. She married her present husband

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64 [1926] 2 D.L.R. 129, [1926] 1 W.W.R. 657 (Sask. C.A.). Recently in Fife v. Fife (1965), 49 D.L.R. (2d) 648 (Sask. Q.B.) the applicant domiciled at all times in Saskatchewan went to Nevada accompanied by the respondent. After having fulfilled the six weeks' residence period required by Nevada law, he obtained a divorce and on the same day married the respondent. The following day they returned to Saskatchewan where they lived together until the applicant left the respondent. The latter brought proceedings for and was awarded maintenance as a deserted wife under the Deserted Wives' and Children's Maintenance Act, R.S.S., 1953, c. 305. The magistrate found that the respondent was the wife of the applicant for the purpose of the Act and that he was estopped from denying the validity of the divorce which he himself had obtained. On appeal, Bence, C.J.Q.B., relying on Lamont J.A.'s opinion in Burnfiel v. Burnfiel held that the Nevada divorce could not be recognized as valid in Saskatchewan and that the applicant was not precluded or estopped from challenging the jurisdiction of the foreign court, at least where the respondent was fully aware of the true situation as was the applicant, and there was no representation made by him on which the respondent acted to her prejudice. The marriage between the applicant and respondent was null and void ab initio and the latter had no status as wife to maintain an action for maintenance.


66 Supra, footnote 1, at p. 100.
under the protection of that decree and doubtless she was living with her new spouse at the time of the testator's death, and they may be still cohabiting. She publicly repudiated her marriage with the testator in the most formal and solemn manner possible in the nullity suit instituted by her in Nevada, acted upon the decree thus obtained, and with startling inconsistency she now lays claim upon the major portion of his estate by reason of that very marriage. If she were now permitted to impeach the validity of that decree and her present contentions were to prevail, it would, to my mind, constitute a parody of justice.

It seems to be beyond controversy that if a divorce is decreed by a foreign court without jurisdiction, the fact that one of the spouses has invoked the jurisdiction and that the other has submitted to it does not preclude or estop any of them from afterwards asserting that the divorce is a nullity so far as their status as husband and wife is concerned. In other words the consent or submission of one or both of the spouses to the jurisdiction of the foreign court will not prevent a subsequent marriage of one of them from being bigamous and therefore void.67

There has, however, been a great difference of opinion in Canada on the question whether a person who obtains an invalid foreign divorce, or submits to the jurisdiction of the court which grants the divorce, is later on precluded or estopped from claiming as husband or wife against the estate of his or her deceased spouse. In *Re Plummer, (Plummer v. Sloan)*,68 decided by the Appellate Division of the Supreme Court of Alberta, a woman obtained a divorce in the State of Washington notwithstanding that her husband was domiciled in Alberta, and upon her husband's death claimed a share in his estate in Alberta as his widow. Although the foreign divorce was obviously invalid in Alberta, Harvey C.J., and

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67 Stephens v. Falchi, *supra*, footnote 63, overruling *Stevens v. Fisk* (1885), Cameron S.C. 392, esp. per Ritchie C.J., at p. 416. Gordon S. Cowan (1938), 16 Can. Bar Rev. 57, at p. 59, referring to the case said: "The effect of the statement of Ritchie C.J. . . . is that, although the foreign court may have acted without jurisdiction and the resulting divorce decree is therefore invalid here according to the rules of English conflict of laws, a party who has submitted to the foreign jurisdiction may be prevented from setting up that invalidity. As against him the divorce decree will be effective, but it will not be valid and effective as against third parties who are not so prevented from setting up its invalidity, e.g., the Crown in a prosecution for bigamy (R. v. Woods (1903), 6 O.L.R. 41, 23 C.L.T. 220, 7 C.C.C. 226 (C.A.) W. & H. obtained a collusive divorce in Michigan which was invalid since they were domiciled in Ontario. W. was convicted of bigamy. *Cf.* if W. had claimed dower on the death of H. *In re Hodgins* (1920), 18 O.W.N. 231.), or a second wife who has married in ignorance of the invalid divorce (*Drake v. MacLaren*, [1929] 3 D.L.R. 159, Mitchell J.A. (Alta.))." Note that in *Stevens v. Fisk* the person alleging the invalidity of the divorce was the defendant in the foreign suit while in most cases it is the foreign plaintiff who denies that the foreign court had jurisdiction.

68 *Supra*, footnote 63.
three other judges held that having invoked the jurisdiction of the Washington court she could not now be heard to question the existence of that jurisdiction and contend that the foreign judgment obtained by her was invalid. The analogy adopted by the majority of the court was to a foreign judgment in personam as far as her claim as widow was concerned. The decision was similar in effect to Carter v. Patrick, in which a husband who had obtained an invalid divorce was not allowed to claim a share in his wife's estate on death. In Re Plummer, Ford J.A., dissented from the majority of the court, relying chiefly on the judgments of Lamont, J.A., in Burnfie1 v. Burnfit and on Duff, C.J., in Stephens v. Falchi. In the latter case Duff C.J., said that "consent on the part of the spouses to the exercise of jurisdiction is of no significance", and pointed out that the status of the parties to the first marriage as husband and wife was not affected by the invalid divorce obtained by the wife or by the subsequent putative marriage of the wife with the respondent. Actually in Stephens v. Falchi the Supreme Court of Canada had only to decide the question whether the putative husband had a valid claim against the estate of his putative wife on her death. The court was not asked to determine, as in Re Plummer, whether a wife who gets an invalid divorce may as widow claim against the estate of her deceased husband.

It is difficult to follow the reasoning by which a wife who obtains a divorce or a nullity decree from a foreign court is entitled for one purpose and not for another to assert that the court had no jurisdiction and that the decree is invalid. If the proceedings purporting to affect the status of the parties are in rem, consent or submission of the parties cannot confer jurisdiction on the foreign court: the parties to the foreign decree or judgment are still husband and wife. If the husband dies and his wife claims a share in his estate, it is submitted that even for this purpose the invalid foreign judgment in rem cannot be considered as a valid judgment in personam rendered on the basis of the consent or submission of the parties especially because the right to inherit flows from status. It must be invalid for all purposes. Without contending that the

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69 Ibid.
70 Ibid., at p. 37 (D.L.R.).
71 Supra, footnote 64.
72 Supra, footnote 65. See also C. v. C. (1917), 39 O.L.R. 571.
73 Supra, footnote 63.
74 In Hayward v. Hayward, [1961] P. 152, [1961] 1 All E.R. 236, it was held that the doctrine of estoppel does not preclude a party to a bigamous ceremony of marriage from alleging it to be null and void even though he had previously asserted its validity in judicial proceedings. No conflict of laws was involved. Phillimore J. said at pp. 158-159 (P.), 241-242 (All E.R.):

"It seems to me that it would be contrary to all principle if a ceremony,
foreign judgment is in personam, it has been argued that a person who as plaintiff obtains the foreign divorce or nullity decree, as distinguished from a person who as defendant merely submitted to the jurisdiction of the foreign court, should not be allowed to claim an advantage, such as the right to succeed on the death of his or her spouse, which is inconsistent with the divorce or nullity decree obtained as plaintiff. The distinction was drawn in the case of Re Plummer and seems to have been approved by the courts in several other cases. It would be better for the courts to abandon these various approaches to the problem and openly recognize that it is against the public policy of the forum to give the plaintiff in a foreign suit the right to impugn the validity of the decree, obtained on his own motion, in order to gain some advantage here. This view finds strong support in Mr. Justice Schroeder's reference to "a parody of justice".

To conclude, the decision of the Ontario Court of Appeal in the present case appears to be basically sound but some lawyers will no doubt be slightly dismayed by the method followed in arriving at the desired result. The court should certainly be congratulated for its liberal and humane attitude with respect to the recognition of foreign decrees, an attitude in conformity with the which is by definition null and void, could be converted into something valid and capable of conferring status by the act or inaction of a party to it. It would surely be remarkable as a proposition of law if this court were to be prevented from declaring the truth, namely, that a marriage is bigamous and so correcting the status of parties to it and of their dependants merely because one or both of them had chosen to assert its validity or because one of them had failed to dispute or had concurred in the assertion of its validity by the other.

This court deals not merely with disputes between parties but with status. It is an old maxim that estoppels are odious because they tend to shut out the truth and it is well settled that they cannot override the law of the land. I think [the court] must declare the truth, now that the truth is known, and then correct the error, just as it has to do if, for example, judgment is obtained against a party that does not exist."

_Cf._ P. M. Bromley, _Family Law_ (2nd ed., 1962), pp. 62-63, who distinguishes estoppel by conduct and _per rem judicatum._

75 _Supra_, footnote 63.


77 In _Detro v. Detro_ (1922), 70 D.L.R. 61 (Alta.) Simmons J. said, at p. 64: "It is quite obvious that it would be a scandalous proceeding for a party to obtain a decree of divorce in one jurisdiction and attempt to renounce or escape from the effects of the same in a proceeding in another jurisdiction; but I am not able to apply the same reasoning to a decree which goes no further than judicial separation and an allowance for support."
present spirit of international co-operation in the field of conflict of laws. What Canada really needs is comprehensive legislation dealing with matrimonial causes generally.

J.-G. Castel*

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1 S.C., 1953-54, c. 51. Section 101 provides as follows:

Every one who
(a) being a justice, police commissioner, peace officer, public officer, or officer of a juvenile court, or being employed in the administration of criminal law, corruptly
   (i) accepts or obtains,
   (ii) agrees to accept, or
   (iii) attempts to obtain,
for himself or any other person any money, valuable consideration, office, place or employment with intent
   (iv) to interfere with the administration of justice,
   (v) to procure or facilitate the commission of an offence, or
   (vi) to protect from detection or punishment a person who has committed or who intends to commit an offence; or
(b) gives or offers, corruptly, to a person mentioned in paragraph (a) any money, valuable consideration, office, place or employment with intent that the person should do anything mentioned in subparagraph (iv), (v) or (vi) of paragraph (a),
is guilty of an indictable offence and is liable to imprisonment for fourteen years.