

THE MARRIAGE AMENDMENT ACT 1985 — THE REASON WHY¹

'If there is one thing that the people are entitled to expect from their lawmakers, it is rules of law that will enable individuals to tell whether they are married and, if so, to whom. Today many people who have simply lived in more than one state do not know, and the most learned lawyer cannot advise them with any confidence ... It is therefore important that, whatever we do, we shall not add to the confusion.' - *Estin v Estin* 334 US 541, 553 per Jackson J.

1. INTRODUCTION

The principal purpose of the Marriage Amendment Act 1985 (hereafter the 1985 Act) is to give legislative effect in Australia to the 1978 Hague Convention on Celebration and Recognition of the Validity of Marriages signed by Australia on 22 July 1980.² The effect of s13 of the 1985 Act, s42(2) of the Family Law Act 1975 notwithstanding, is that the common law rules of private international law are abrogated in respect of marriages solemnised in Australia on or after 7 April 1986.³ All such marriages are now subject to Australian law exclusively both as to formal validity and essential validity.

The common law rules of private international law are also affected by s23 of the 1985 Act. This inserts a new Part VA into the Marriage Act 1961 (hereafter the Principal Act) which gives legislative effect in Australia to Chapter II of the 1978 Hague Convention dealing with the recognition of foreign marriages.⁴ The complex implications of s23 are

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1 Cecil Woodham Smith, *The Reason Why* (1953) gives a graphic account of the blunders leading to the pointless charge of Lord Cardigan's Light Brigade at Balaclava on 25 October 1854.

2 See Aust, Parl., *Debates*, S (22 February 1985) 57; H of R (20 March 1985) 616, and the explanatory memorandum which accompanied the Marriage Amendment Bill, first introduced in April 1984.

3 Section 13 does not apply to marriages solemnised under Division 3 of Part IV of the Principal Act, ie those celebrated in Australia by foreign diplomatic or consular officers, where one of the parties, at least, is a national of a proclaimed overseas country, and neither is an Australian citizen.

4 Marriage Act 1961 (Cth) s88A. Part VA has retrospective effect; it applies to marriages solemnised before or after the date on which it was proclaimed, ie 7 April 1986: s88C. With certain exceptions, Chapter II of the Hague Convention refers the issue of the validity of marriages to the *lex loci celebrationis* whether or not the country of celebration is a party to the Convention. Sections 88C(1) and D(1) of the Principal Act give effect to this policy by enacting that a marriage solemnised in a foreign country which is recognized as valid under the law of that country (the 'local law') will also be recognised as valid in Australia. However, when Chapter II refers to 'the law' (*tout court*) of the place where the marriage was celebrated, that jurisdiction's choice of law rules are included. (See eg *Actes et documents de la treizieme Session*, (1978) *Tome III*, 300). Nygh J states, in *Guide to the Family Law Act* (4th edn 1986) 17, that s88B(1) defines 'local law' to mean the domestic or internal law of the foreign country where the marriage was solemnised. It does not. Parliament may have meant to exorcise the spectre of *renvoi*, in defiance of the language and intendment of Chapter II, but if so, the words of s88B(1) are not apt for the purpose.

outside the scope of this article. However, it is pertinent to remark that the new Part VA is, if anything, even more misconceived than the new Division 2. The new recognition rules in Part VA will serve only to make confusion worse confounded. The then Shadow Attorney-General (Mr N A Brown) may have exaggerated when he claimed that the common law rules governing the recognition of foreign marriages were so difficult that generations of law students and lawyers had been kept awake at night grappling with them.⁵ What is certain is that s23 of the 1985 Act is unlikely to improve their chances of a good night's sleep.

By contrast, in applying the *lex loci celebrationis* to marriages in Australia on or after 7 April 1986, s13 has, at least, simplified matters considerably. But it has done so at the cost of failing to apply the proper law to the issue of capacity to marry.⁶ The application of that test was advocated over 30 years ago by Professor E I Sykes,⁷ who conceded, however, that what was then and still is the conventional wisdom on the matter would prove difficult to supplant.⁸ The orthodox dual domicile rule, Sykes submitted,⁹ 'has been given the strongest support by judicial reasoning, and the decisions in *Mette v Mette*¹⁰ and *Re Paine*¹¹ are its strong buttresses'. Nonetheless, Professor Sykes argued,¹² referring capacity to marry to the laws of both premarital domiciles 'has little to commend it from a community point of view'. Furthermore he dismissed as 'merely an unsatisfactory half-way house'¹³ the alternative derived from 'the eminent learning of Professor Cheshire',¹⁴ which suggested that capacity to marry should be referred to the law of the intended matrimonial home.

There remained a third conceivable connecting factor. Capacity to marry might be referred to the *lex loci celebrationis*. But Sykes considered¹⁵ that it would be

'impossible to contend that a marriage bad by the domiciliary law would be saved by compliance with the *lex loci celebrationis* by reason of the line of cases represented by *Brook v Brook*¹⁶.

Moreover, in his opinion,

'it would be anomalous to regard the law of the place where the ceremony took place as governing, either to validate or invalidate, the whole consensual bargain which brings into being the marital status'.¹⁷

And yet it is precisely this anomaly which has been perpetrated by the

5 Aust, Parl, *Debates*, H of R (20 March 1985) 618.

6 See *Bonython v Commonwealth of Australia* [1951] AC 201, 219: 'The proper law...[is] the system of law...with which the transaction has its most real and substantial connection.'

7 'The Essential: Validity of Marriage' (1955) 4 ICLQ 159.

8 *Ibid* 169.

9 *Ibid* 161.

10 (1859) 164 ER 792.

11 [1940] Ch 46.

12 *Supra* n 7 at 167.

13 *Ibid* 164.

14 *Ibid* 163, citing Cheshire, *Private International Law* (2nd edn 1938) 220.

15 *Ibid* 160.

16 (1861) 11 ER 703.

17 *Supra* n 7 at 160.

Marriage Amendment Act 1985. Parliament has chosen to ignore the trenchant *dictum* of Lord Campbell LC in *Brook*:

'It is quite obvious that no civilised state can allow its domiciled subjects or citizens, by making a temporary visit to a foreign country to enter into a contract, to be performed in the place of domicile, if the contract is forbidden by the law of the place of domicile as contrary to religion, or morality, or to any of its fundamental institutions.'¹⁸

This article argues that the 'new' statutory choice of law rule governing capacity to marry which the 1985 Act imposes upon the Australian courts is a giant step backwards. Section 13 of the 1985 Act restores the *ratio decidendi* of the Full Divorce Court in *Simonin v Mallac*¹⁹ which has been disregarded for over 120 years. The startling reversion to the reasoning of the mid-nineteenth century was prompted by two assumptions both of which were false. First, Parliament proceeded on the basis that s13 of the 1985 Act was required in order to honour Australia's obligations under Chapter I of the 1978 Hague Convention. Secondly, Parliament accepted the premise that there was 'a mischief or defect' for which the common law rules of private international law did not provide and for which s13 was the appropriate remedy; 'a disease of the Commonwealth' for which s13 was the appropriate cure.²⁰ In fact there was no such mischief and no such disease; the patient was perfectly healthy and surgery superfluous. Moreover, s13 is not merely otiose: one of its effects will certainly be to increase rather than diminish the number of 'limping marriages', which Lord Watson described as 'the scandal which arises when a man and woman are held to be man and wife in one country and strangers in another'.²¹

2. DIVISION 2 AND CHAPTER I: THE ILLUSORY CONNECTION

The 1984 explanatory memorandum refers to what was then clause 13 of the Marriage Amendment Bill 1984 and continues:

'This clause inserts a new Division 2 into Part III of the Act to accord with Chapter I of the Convention. This Chapter imposes an obligation on Australia to allow the celebration of a marriage where either -

- the parties to the intended marriage both comply with the requirements of Australian law dealing with the capacity of people domiciled in Australia to marry and one of them is an Australian citizen or habitually resides in Australia; or
- the parties to the intended marriage each comply with the law of the relevant country determined by what are called the 'choice of law' rules of Australia; i.e. the rules of law which choose for a particular area of law, which country should be regarded as relevant for that area.'²²

18 Supra n 16 at 711.

19 (1860) 164 ER 917.

20 The phrases in quotation marks are, of course, taken from *Heydon's Case* (1584) 76 ER 637, 638.

21 *Le Mesurier* [1895] AC 517, 540.

22 CCH's *Family Law and Practice* (New Developments, Vol 3 at 74,151) said the same thing word for word.

Moreover, both the Attorney-General (Mr Bowen) and Senator Evans (his immediate predecessor in office), who moved the Second Reading of the 1985 Marriage Amendment Bill in the House of Representatives and the Senate respectively, said:

'Chapter 1 of the Hague Convention deals with the celebration of marriages in countries party to the Convention...At the moment Australian law forbids the marriage of parties in Australia where the law of the domicile of both of the parties forbids it...To enable Australia to comply with Chapter I of the Hague Convention the application of Part III of the Marriage Act - dealing with void marriages - is varied...so that the rules of that Part will apply to all marriages solemnised after the amending provisions come into force in Australia or outside Australia under Australian law. This...means that each of the parties to a marriage will only be required to meet the requirements of Australian law before they may marry under that law.'²³

There are two mistakes here. The first and more fundamental is that Chapter I of the 1978 Convention is not relevant to the concerns of Division 2 and *vice versa*. The second is that even if both were *ad idem*, it is not the case that Chapter I of the 1978 Convention imposes any obligations on Australia.

Chapter I is concerned to facilitate the *celebration* of marriages, ie with enabling a wedding ceremony to take place, and not with whether that ceremony alters the legal status of the parties. Its purpose is to make it easier for people to 'get married' in the colloquial sense, notwithstanding that a court of competent jurisdiction may subsequently declare that they were never really married at all. The headnote to Chapter I is '*Celebration of Marriages*' and Article I states:

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

The intention of Chapter I is simply to remove the barriers which some European states, such as France and West Germany, have erected to make it difficult for foreigners in their countries (especially migrant workers) to marry either amongst themselves or with nationals of the host country.²⁴

The essential problem that Chapter I aims to solve is the reluctance of some European countries to permit a marriage ceremony to take place unless their officials are satisfied that the parties comply not merely with the prescriptions of the *lex loci celebrationis* but with those of their own personal law(s), whether that be domicile or nationality. Chapter I has nothing whatsoever to do with the *ex post facto* adjudication of marital status, which is the subject matter of Division 2.²⁵

The Questionnaire on the Conflict of Laws in Respect of Marriage prepared by the Permanent Secretariat of the Hague Conference²⁶ and

23 *Supra* n 2.

24 Some striking illustrations of these bureaucratic impediments were provided to the 13th Hague Conference by ISS in Geneva. See *Actes et documents*, *supra* n 4 at 144 et seq.

25 Chapter I merely recommends that contracting states celebrate marriages when certain preconditions are fulfilled. There is nothing to prevent a state which allows a marriage to be celebrated in accordance with the provisions of Chapter I from subsequently referring the validity of that marriage to a legal system other than its own.

26 *Actes et documents*, *supra* n 4, Preliminary document No 1 of July 1974, 9 et seq.

the answers of the member States of the Hague Conference to that questionnaire²⁷ provide clear and unambiguous support for this submission. The problem to be dealt with by Chapter I was that of differing State policies on the matter of granting marriage licences. Despite the assertions of the Attorney-General (Mr Bowen) and Senator Evans it has never been the case that 'Australian law forbids the marriage of parties in Australia where the domicile of both parties forbids it'. Nothing in Australian law has ever prevented State officials from issuing a marriage licence, or authorised celebrants from 'marrying' (ie performing a marriage ceremony) in the case of parties whose countries of nationality or domicile may regard the marriage as void. There is no reference to domicile or nationality in the Notice of Intended Marriage which has to be given to an authorised celebrant pursuant to s42(1) of the Principal Act.²⁸

The second mistake is that, contrary to the averments of the Attorney and Senator Evans, Chapter I imposes no 'obligations' and 'requires' nothing whatsoever of Australia. It is not simply that the obligations of signatory States are always dependent, in the Hague Conventions, upon ratification; it is that the provisions of Chapter I are no more than precatory or hortative. Article 16 of the Convention reads:

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

The delegates of the UK and the USA made the point more than once that neither country could be expected to ratify the Convention were Chapter I mandatory.²⁹ It is hard to understand the significance of 'obligations' one is at perfect liberty to disregard.

It is hard also to understand the Commonwealth Parliament's enthusiasm for the 1978 Convention in general. No more than five States have signed it: Australia, Finland, Luxembourg, Portugal and Egypt. None so far has ratified it. Both the Law Commission and the Scottish Law Commission have dismissed it as 'unsatisfactory', observing that 'the Government [ie the UK Government] does not propose that the United Kingdom should sign or ratify the Convention'.³⁰ Indeed the Chairman of the Thirteenth Conference's Special Commission, Emeritus Professor Willis Reese, was less than impressed with its outcome.³¹ He predicted

27 Ibid 67 et seq.

28 Nothing has changed in this respect since 1975, when the Australian Government replied to the Hague Conference Secretariat's Questionnaire as follows:

'At present Australian law governs the prospective requirements of a marriage celebrated in Australia, a system whereby persons authorized to celebrate marriages in Australia would have to pay regard to foreign laws would be a radical change to that practice and cumbersome to apply. At the same time Australia acknowledges that the country of the personal law of a party has a legitimate interest in the marriage of that party abroad, which is an interest which Australia asserts herself. Australia favours a solution whereby compliance with the mandatory rules of the place of celebration relating to both form and substance will be necessary, but in addition certain requirements of the personal law of each party should be observed. Of course the law of the place of celebration may defer on some issues to the personal law.' (*Actes et documents*, supra n 4 at 152-3).

29 See eg *Actes* supra n 4 at 113, and the detailed observations of the UK government on the preliminary draft Convention.

30 See *Private International Law: Choice of Law Rules in Marriage* (Scottish Law Commission, Consultative Memorandum no 64, 1985; Law Commission, Working Paper no 89) Appendix A, 164-171.

31 See (1977) 55 Can. B Rev 586 and (1980) 20 Va J of Int Law 100.

that the 1978 Convention would prove to be of little or no significance. He was right.

3. THE COMMON LAW RULES OF PRIVATE INTERNATIONAL LAW : THE MYTHS

The 'mischief or defect' for which it was alleged the common law did not provide, and which Division 2 purports to cure, was stated by Senator Evans as follows:

'In 1983 35% of all marriages taking place in Australia involved one party who had been born overseas. The common law rules as they now stand would refer the validity of those marriages where one party was still domiciled outside Australia partly to the law of the domicile.'³²

However, the common law rules of private international law 'as they now stand' are not as they were represented to Parliament.

The assertions of Senator Evans and Senator Durack make sense only on the premise that what is usually referred to as the 'dual domicile' doctrine correctly states the common law. The premise of the dual domicile doctrine is that capacity to marry depends upon each party's personal law immediately before the ceremony. In common law countries the personal law is that of the domicile, and it follows that the incapacity of either party under the law of his or her domicile to contract that marriage renders it null and void. Nygh gives the following example:

'An Australian marries his New Zealand niece in Sydney. They intend to establish their matrimonial home in Australia. Such a marriage does not fall within the prohibited relationships as defined in s23(2) of the Marriage Act 1961 (Cth). Under the law of New Zealand the marriage is void...By what law is their capacity to marry to be determined?''³³

After discussing some of the authorities Nygh concludes:

'The test...is that each party must under the law of his or her antenuptial domicile have the capacity to marry the other. In the example given...the marriage would be void both in New Zealand and Australia.'³⁴

The dual domicile theory of capacity to marry originated with A.V. Dicey's *Digest of the Law of England with Reference to the Conflict of Laws* which was first published in 1896. However, he had previously expressed another and, arguably, better opinion. In *Sottomayer v De Barros*(No 2) Sir James Hannen P refers to Dicey's 'excellent treatise on Domicile (at p.233)' and quotes the following passage:

32 Aust, Parl, *Debates*, S (22 February 1985) 58. A former Liberal Attorney-General (Senator Durack) made the same point. He referred to 'the enormously complicated rules that exist...under the common law of this country', and continued:

'therefore in 35% of all marriages in Australia there is the potential...that these marriages could be struck down because of some invalid aspect arising from the fact that one party may not have been domiciled in Australia, or is not an Australian citizen. That is a striking feature of Australian society.'

33 *Conflict of Laws in Australia* (4th edn 1984) 315.

34 *Ibid* 320.

'A marriage celebrated in England is not invalid on account of any incapacity of either of the parties which, though enforced by the law of his or her domicile is of a kind to which our courts refuse recognition.'³⁵

The most recent editions of the leading English and Australian text books demonstrate a remarkable unanimity in espousing the Dicey's revised opinion and rejecting its alternative, the intended matrimonial home theory of Dr Cheshire.³⁶ The most recent textbook on Australian Family Law states:

'According to the common law rules of private international law the parties must have capacity according to the law of the ante-nuptial domicile of each to contract the particular marriage.'³⁷

The editors of CCH's *Family Law and Practice* observe correctly that s23B of the Principal Act, inserted therein by s13 of the 1985 Act 'is not subject to the rules of private international law'.³⁸ But then they continue (misleadingly):

'This means that the question of capacity of parties to enter into a marriage under Australian law is not *now* decided by reference to the laws of their respective domiciles but wholly by reference to Australian law.'³⁹

Dicey-Morris, perhaps the leading English textbook on Conflict of Laws, pronounces *ex cathedra*:

'The rule that capacity to marry depends upon the law of the ante-nuptial domicile of each of the parties is borne out to the full by the authorities.'⁴⁰

At first sight Morris-North appears less dogmatic. The learned authors tell us:

'Capacity to marry is governed (in general) by the *lex domicilii* of each party immediately before the marriage.'⁴¹

35 (1879) 5 PD 94 at 104.

36 Cheshire's theory, *supra* at n 14, has even been abandoned by the learned editor of the later editions of Cheshire's own book. See Cheshire-North, *Private International Law* (10th edn 1979) 340 et seq.

37 Finlay, Bradbrook and Bailey-Harris, *Family Law, Cases and Commentary* (1986) 97. The same point is made once more, at 107. And in the latest edition of his book on the Family Law Act, Nygh J agrees (*supra* n 4 at 16). Stating the law as it was before the commencement of s13 of the 1985 Act the learned author writes:

'Section 22 of the Marriage Act made the common law rules of private international law applicable to the capacity to marry of persons domiciled abroad. If either of them by his or her domiciliary law was unable to marry the other the marriage was void in Australia also.'

38 Vol I, 11,104.

39 *Ibid.* Emphasis added. Exactly those words were used by the author(s) of the explanatory memorandum which accompanied the Marriage Amendment Bill in 1984. It is interesting that the learned editors of CCH's *Family Law and Practice* said something significantly different, and closer to the truth, in an earlier Newsletter, ie that the rule to be applied to marriages 'on or before 7 April 1986' (sic) is that 'the capacity of people to contract a valid marriage is governed by the law of their domicile at the time of the marriage' (emphasis added). However, see Acts Interpretation Act 1901 s5(2).

40 *Conflict of Laws* (10th edn 1980) 285. Not surprisingly Dr JHC Morris gave the same account of the common law rules in his own *Conflict of Laws* (1980) 112.

41 *Cases and Materials on Private International Law* (1984) 232.

However, the bracketed qualification turns out to be no more than the most grudging concession to the crucial decision of Cumming-Bruce J in *Radwan (No 2)*.⁴² This is made clear when the authors say:

'Capacity to contract a polygamous marriage may (*semble*) be governed by the law of the intended matrimonial home.'⁴³

They leave no doubt that, in their opinion, the decision in *Radwan (No 2)* was an aberration to which no more than a nodding deference need be paid, and perhaps not even that.⁴⁴

Sykes-Pryles is the sole textbook to emphasise the need for caution:

'the cases illustrate a struggle between two views, references to the ante-nuptial laws of the domiciles of both parties, or to the law of the intended matrimonial home...the matter is far from resolved'.⁴⁵

It is simply untrue that the dual domicile doctrine is 'borne out to the full by the authorities', nor is it even the case that 'the balance of authority supports [it]'. In this matter God is not on the side of the big battalions. Hobbes, again, was right:

'But they that trusting only to the authority of books, follow the blind blindly, are like him that, trusting to the false rules of a master of fence, ventures presumptuously upon an adversary that either kills or disgraces him.'⁴⁶

4. THE COMMON LAW RULES OF PRIVATE INTERNATIONAL LAW: THE DECISIONS

(a) *Brook* and Before

All textwriters agree that the leading authority for the dual domicile doctrine is *Brook*⁴⁷ followed almost invariably by *Mette*.⁴⁸ There is no doubt that the decision in *Brook* - or rather what has wrongly been regarded as the *ratio* of that decision - brought about a sea-change in the law.⁴⁹ Before *Brook* the decisions drew no distinction between issues of capacity and those of formality. Both were referred to the *lex loci celebrationis*, and the idea that the law of the parties' domicile should

42 [1973] Fam 35.

43 *Supra* n 41 at 280.

44 Morris-North makes no attempt to conceal its contempt for both the decision and the reasoning in *Radwan (No 2)*.

'It seems safe to say [I] that few cases on the English conflict of laws decided in the last fifty years have had a worse press than this one. Academic lawyers are almost unanimous in regarding it as wrongly decided...The case is printed here not because the present editors have changed their minds [ie in stating the dual domicile doctrine to be unquestioned law] but in order to present the student with the opposing view, wrong though we believe it to be' (*ibid* 285).

45 *International and Inter-State Conflict of Laws* (2nd edn 1981) 399. And see also the joint opinion of the Working Parties appointed by the Law Commission and the Scottish Law Commission, *supra* n 30 at 58, 60.

46 *Leviathan* (1651) ch 5.

47 *Supra* n 16.

48 *Supra* n 10.

49 The first judgment to misinterpret the decision of the House of Lords in *Brook* was *Sottomayor v De Barros (No 1)* (1877) 3 PD 1. Despite current textbook conventions (see eg Nygh *supra* n 33 at 316, 317) this ought to be cited as *Sottomayor v De Barros (No 2)*, since the neglected decision of Phillimore J (1877) 2 PD 81, reversed on appeal, is technically No 1.

apply was regarded as a notion peculiar to foreign jurists like Huber or Voet.⁵⁰ The first suggestion that domicile might be significant as a connecting factor came when parties domiciled in England resorted to Scotland (usually Gretna Green as the first watering hole north of the border) in order to evade the formal requirements imposed by Lord Hardwicke's Marriage Act of 1753.⁵¹

In *Robinson v Bland*⁵² Lord Mansfield suggested (obiter) that these marriages might be void as a fraud on the law of the domicile. However, this suggestion was not adopted, and the matter was decided on the straightforward ground of statutory interpretation.⁵³ The Scotch marriages were simply not within the intendment of Lord Hardwicke's Act and no other consideration was regarded as relevant.

It was, of course, accepted by the judges that the *lex loci celebrationis* did not apply without exception. In *Brook*,⁵⁴ Lord Campbell referred to the 'valuable treatise on the Conflict of Laws' written by Mr Justice Story. Lord Campbell observed that Story admitted⁵⁵ an exception to the application of the *lex loci* in the case of 'marriages involving polygamy and incest, those positively prohibited by the public law of a country from motives of policy, and those celebrated in foreign countries by subjects entitling themselves, under special circumstances, to the benefits of the law of their own country'.⁵⁶ The decisions in *Brook*⁵⁷ and *Mette*⁵⁸ were no more than examples of the second of Story's exceptions. It was not until the decision of the Court of Appeal in *Sottomayor v De Barros*⁵⁹ that a fourth 'exception' was introduced which textwriters later allowed to swallow up the rule.

The pre-eminence of the *lex loci* in all matters affecting the validity of a marriage remained well-established doctrine in the USA throughout the 19th Century. Initially the rule adopted in most jurisdictions was limited only by marriages which would 'tend to outrage the principles and feelings of all civilised nations';⁶⁰ or by 'marriages which are deemed contrary to the law of nature as generally recognised in Christian countries'.⁶¹ However, these exceptions were gradually extended so that some States would not recognise a 'foreign' marriage which offended 'the prevailing sense of good morals' enshrined by the *lex fori*, or which violated a statute of the forum enacted 'by reason of a positive policy of the State for the protection of the morals and good order of society against serious social evils'.⁶² However, the present trend in the USA is in the opposite direction to that in Australia. It is towards giving the

50 See *Scrimshire v Scrimshire* (1752) 161 ER 782.

51 26 Geo II c 33. Lord Hardwicke's Act did not apply to marriages in Scotland, or to those 'across the seas', ie in Ireland or the colonies.

52 (1760) 97 ER 717, 718-719.

53 See *Compton v Bearcroft* (1769) 161 ER 799.

54 *Supra* n 16 at 710.

55 At s113a.

56 This referred to the kind of situation dealt with in *Ruding v Smith* (1821) 161 ER 774 and *Taczanowska v Taczanowski* [1957] P 301.

57 *Supra* n 16.

58 *Supra* n 10.

59 *Supra* n 49.

60 *Medway v Needham* (1819) 16 Mass 157, 161.

61 *Commonwealth v Love* (1873) 113 Mass 458, 463.

62 *Wilson v Cook* (1912) 100 NE 222, 223.

lex loci no more than a merely presumptive validity, and in favour of a proper law approach to the issues.⁶³

One significant aspect of the earlier refusal in *Brook*⁶⁴ and *Mette*⁶⁵ to apply the *lex loci celebrationis* lies in the fact that they were cases involving incest. It may seem strange now, but marriages between a man and his deceased wife's sister were a cause of outrage in England in the 19th Century, particularly amongst the Bishops who sat as of right in the House of Lords.⁶⁶ In *Brook*, Lord Wensleydale referred to such marriages as:

'a violation of the commands of God in Holy Scripture...prejudicial to our social interest and of hateful example'.⁶⁷

Until 1835 most incestuous marriages (ie those between persons within the prohibited degrees of consanguinity or affinity) were merely voidable by English law. However, Lord Lyndhurst's Marriage Act of 1835 made them void *ab initio*. The prohibited degrees within which marriage was proscribed by English law were considerably wider than those of most European countries, and some (usually wealthy) English couples adopted a simple scheme of evasion. They went abroad, married there and then returned home. They thought their marriages were saved by the line of authority established by the Gretna Green cases. That opinion was controverted by the decision in *Brook*⁶⁸ by which, or so it has been repeatedly said, the House of Lords finally established that a distinction must be drawn between the formalities of marriage governed by the *lex loci celebrationis*, and capacity to marry, governed by the law of each party's antenuptial domicile.⁶⁹ But in fact the House of Lords established nothing of the kind.

The relevant facts of *Brook*⁷⁰ may be briefly stated. H and W, his deceased wife's sister, married in Denmark. They were both native-born British subjects domiciled in England who intended to return to England immediately after their marriage, and in fact did so. The principal issue was the succession to H's property. H executed a will 'in the early part of the day on which he died' from cholera. (W had died from that disease two days before). In his will H left his property to his five infant children by name. One died of cholera a few days later. The incidental issue was the one which concerned the House of Lords. If H and W were not validly married their children were illegitimate (or so it was

63 The most recent ALI *Restatement of the Law: Conflict of Laws* (2d edn 1971) states: 's283 *Validity of Marriage*

(2) A marriage which satisfies the requirements of the State where the marriage was contracted will everywhere be recognised as valid unless it violates the strong public policy of another state which had the most significant relationship to the spouses...at the time of the marriage.'

64 *Supra* n 16.

65 *Supra* n 10.

66 See Turner, *Roads to Ruin* ch 5 for an entertaining account of this topic.

67 *Supra* n 16 at 724. And Lord Campbell stigmatised them as 'contrary to law, human and divine and...shocking to the universal feelings of Christians' (*ibid* 709).

68 *Supra* n 16.

69 See eg Morris, *supra* n 40 at 110.

70 *Supra* n 16.

then assumed), and the dead child's 1/5 share would pass to the Crown as *bona vacantia*.⁷¹ The House of Lords held the marriage null and void.

Perhaps the most frequently quoted *dictum* is from the speech of Lord Campbell.⁷² His Lordship observed:

'There can be no doubt of the general rule, that 'a foreign marriage, valid according to the law of a country where it is celebrated is good everywhere'. But while the forms of entering into the contract of marriage are to be regulated by the *lex loci contractus*, the law of the country in which it is celebrated, the essentials of the contract depend upon the *lex domicilii*, the law of the country in which the parties are domiciled at the time of the marriage, and in which the matrimonial residence is contemplated. Although the forms of celebrating the foreign marriage may be different from those required by the law of the country of domicile, the marriage may be good everywhere. But if the contract of marriage is such, in essentials, as to be contrary to the law of the country of domicile, and it is declared void by that law, it is to be regarded as void in the country of domicile, though not contrary to the law of the country in which it was celebrated.'

Most textwriters concede that Cheshire was correct in pointing out that this is equivocal. They agree that Lord Campbell's language is ambiguous and supports both the dual domicile theory and that of the intended matrimonial home. Moreover it is generally admitted that as it was not necessary in *Brook* to decide between those theories, what Lord Campbell said in favour of the former is no part of the *ratio decidendi*. But these concessions by the Dicey-Morris school do not go far enough. In the first place none of their Lordships other than Lord Campbell truly considered the case to be one concerned with choice of law principles at all. They treated it as one involving no more than an issue of statutory interpretation: ie was the Act 5 and 6 Wm IV, c 54 (usually referred to as Lord Lyndhurst's Marriage Act) intended to have extra-territorial application?⁷³ Lord Lyndhurst's Act provided:

'2. All marriages which shall hereafter be celebrated between persons within the prohibited degrees of consanguinity or affinity shall be absolutely void to all intents and purposes whatsoever.'

It was argued for the appellants in *Brook*⁷⁴ that s2 was limited to marriages in England, but that submission was rejected by the House of Lords. It was unacceptable that people should be able to drive a coach and six through Lord Lyndhurst's Act⁷⁵ 'by making a temporary visit

71 It was assumed for the sake of argument that such a marriage was valid according to Danish law. However, Lord Campbell doubted whether that was so (ibid 711).

72 Ibid 709.

73 Unlike Lord Hardwicke's Act in 1753, the 1835 Act did not deal with this point expressly, although it did specifically exclude Scotland from its application.

74 Supra n 16.

75 Lord Lyndhurst's Act did not change the law with respect to which marriages were within the prohibited degrees of consanguinity or affinity. That was to be found in Statutes passed in the reign of Henry VIII which proscribed certain marriages as 'plainly prohibited and detested by the law of God'.

to a foreign country'.⁷⁶ The essence of the matter so far as their Lordships were concerned was the interpretation of Acts of Parliament directly in point, not choice of law doctrine. The basis of their approach is to be found in the following passage from the speech of Lord St Leonards:

'My Lords, the question before the House is one of great importance, but not of much difficulty...I consider this as purely an English question. It depends wholly upon our own laws, binding upon all the Queen's subjects...The grounds upon which, in my opinion, this marriage in Denmark is void...depend upon our Acts of Parliament, and upon the rule that we do not admit any foreign law to be of force here, where it is opposed to God's law, according to our view of that law.'⁷⁷

The substance of Lord Campbell's judgment is to the same effect. He said:

'Sitting here as a judge to declare and enforce the law of England as fixed by King, Lords, and Commons, the supreme power of this realm...I can...only look to what was the solemnly pronounced opinion of the legislature when the laws were passed which I am called upon to interpret...The general principles of jurisprudence which I have expounded have uniformly been acted upon by English tribunals. Thus in the great case of *Hill v Good* (Vaugh Rep 302) Lord Chief Justice Vaughan and his brother Judges of the Court of Common Pleas, held, that 'When an Act of Parliament declares a marriage to be against God's law, it must be admitted in all Courts and proceedings of the kingdom to be so'.⁷⁸

In the second place, Lord Campbell's language throughout his speech is neither ambiguous nor equivocal. Never once does it so much as dally with the dual domicile rule. This, properly so-called, refers capacity to marry to the *ante-nuptial* domicile of *each* party, ie it emphasises that the parties may have different domiciles before marriage and if so it requires that *both* be satisfied as to the validity of the marriage. There is not one word in Lord Campbell's speech which lends support to such a doctrine. In the first place, Lord Campbell attaches as much importance to nationality as to domicile. But what is even more significant is that every time Lord Campbell refers to domicile he does so in the singular, and whenever he refers to the parties he does so in the plural. Moreover, throughout his speech there is never once an elision between the concept of domicile and the place where the parties intend to establish their matrimonial home. In that respect his use of the term is the same as Lord Brougham's in *Warrender v Warrender*⁷⁹ in which Lord Campbell had been leading counsel for Sir George Warrender's wife. In *Warrender* Lord Brougham at no point equiparates the word 'domicile' to the husband's (and hence, at that time, the wife's) domicile of succession. At no point does he convey the slightest suggestion that he had in mind

⁷⁶ *Brook*, supra n 16 per Lord Campbell at 711.

⁷⁷ *Ibid* 718.

⁷⁸ *Ibid* 710.

⁷⁹ (1835) 6 ER 1239.

the *ante-nuptial* domicile of both parties, far less the ante-nuptial domicile of each separately. Marriage, for Lord Brougham, may not have been a *res*, but it 'savoured of a *res*'⁸⁰ and the *locus* of that metaphysical *res* was the matrimonial domicile, ie where the parties lived together as man and wife. As he said:

'[A] connexion formed for cohabitation, for mutual comfort, protection and endearment, appears to be a contract having a most peculiar reference to the contemplated residence of the wedded pair; the home where they are to fulfill their mutual promises, and perform those duties which were the objects of the union; in a word, their domicile.'⁸¹

It is too often ignored that before the advice of the Privy Council in *Le Mesurier*⁸² the law in both England and Scotland was that a matrimonial domicile created by a bona fide residence of the spouses, not necessarily intended to be permanent or indefinite, was sufficient to found jurisdiction in actions of divorce.⁸³ Considerable weight was given by the Board which decided *Le Mesurier* to the observations of Lord Westbury in *Shaw v Gould*,⁸⁴ and in particular to his statement that one of 'the best established rules...is that questions of personal status depend on the law of the actual domicile'.⁸⁵ However, as Lord Reid observed in *Indyka*:

'I am afraid these observations require qualification in several respects. In the first place it is clear that the jurists whom he quotes were using domicile in the sense of habitual residence...But more importantly Lord Westbury has ignored the notorious fact that...the older jurists were much more inclined to state the law as they thought it to be than to investigate the law as it was in fact.'⁸⁶

To cite *Brook*⁸⁷ as the leading authority for the dual domicile is an unfortunate misrepresentation. The kernel of the dual domicile doctrine is the idea of an incapacity imposed by an *ante-nuptial* personal law which invalidates a marriage wherever it is celebrated and wherever the matrimonial home is subsequently established. In *Brook* Lord Campbell rejected that idea in plain and vigorous terms. He said:

'Sir FitzRoy Kelly...argued with great force, that both Sir Cresswell Cresswell and Vice Chancellor Stuart have laid down that Lord Lyndhurst's Act binds all English subjects wherever they may be, and prevents the relation of husband and wife from subsisting between any subjects of the realm of England within the prohibited degrees. I am bound to

80 The phrase is Viscount Dunedin's. See *Von Lorang v Administrator of Austrian Property* [1927] All ER Rep 78, 86.

81 *Supra* n 79 at 1256.

82 *Supra* n 21.

83 See the decisions of the Court of Appeal in *Niboyet* (1878) LR 4 PD 1, and the decision of the Whole Court of Session in *Jack v Jack* (1862) 24 D 467.

84 (1868) LR 33 HL 55.

85 *Ibid* 83.

86 [1967] 3 WLR 510, 521. For a review of the Scottish authorities on the use of the word 'domicile' in matrimonial cases prior to *Le Mesurier* see Davis, 'Jurisdiction in Actions of Divorce: the stone that the builders rejected...?' [1967] SLT 185.

87 *Supra* n 16.

say that in my opinion this is incorrect,...my opinion in this case does not rest on the notion of any personal incapacity to contract such a marriage being impressed by Lord Lyndhurst's Act on all Englishmen, and carried about with them all over the world; but on the ground of the marriage being prohibited *in England* as 'contrary to God's Law'.⁸⁸

In *Mette*⁸⁹ the facts differed from *Brook*⁹⁰ in three relevant respects. First, in *Brook* both parties had been native-born British subjects whereas in the later⁹¹ case Bernhard Mette was born in Marburg and came to England when he was 13. He became a naturalised British subject in 1836. Secondly, in *Brook* both parties lived in England and had gone to Denmark solely to get married. Bernhard Mette's deceased wife's sister Emma Maria Schaefer had never lived in England, or indeed anywhere other than Frankfurt until he married her.⁹² Thirdly, the marriage in *Brook* was prohibited as incestuous by the law of the place of ordinary residence of both parties before and after their marriage to each other. That was not so in *Mette* where the marriage was invalid according to English law but not according to the law of Frankfurt.⁹³

The essential facts of *Mette*⁹⁴ are that in 1841 Mette made a will. In 1844 his first wife died and he married her sister in 1846 in Frankfurt. The question for Sir C Cresswell was whether this 'marriage' revoked the will. According to the headnote:

'Held, that the principle laid down in *Brook* as to the disability of a native-born English [sic] subject to contract such a marriage applied equally to a naturalized subject...and the probate of the will granted.'

That is the *ratio* of *Mette*: a British subject, even by naturalisation, was bound by the terms of Lord Lyndhurst's Act, and therefore his marriage was void *in England* to all intents and purposes whatsoever.

Amongst the submissions relied on by counsel for the plaintiff (*Mette*'s eldest son by his first marriage, who sought successfully to set up the will of 1841) was the following:

'[A]s England was, at the time of the marriage the contemplated matrimonial domicile of both parties, the capacity of the parties to contract it must be determined by the law of England.'⁹⁵

The authorities cited in support were *Brook v Brook* (1)⁹⁶ and *Warrender v Warrender*.⁹⁷ In his judgment Sir C Cresswell dealt with this submission first. He did not reject it. What he said was:

88 Ibid 712. Emphasis added.

89 Supra n 10.

90 Supra n 16.

91 *Brook* had been decided at first instance by Stuart VC following the advice of his Assessor, Sir Cresswell Cresswell, before the latter ruled on *Mette v Mette*.

92 Supra n 10 at 795.

93 One of Germany's Free Cities until it was annexed by Prussia after the 1866 Austro-Prussian War.

94 Supra n 10.

95 Ibid 794.

96 Supra n 16.

97 Supra n 79.

'That question depends upon the applicability of the decision of Stuart V.C. [which was, of course, taken on his advice] in *Brook v Brook* to this case, and the argument was very properly confined to that point. *Assuming the law to be as laid down in that case...* had the marriage now in question been solemnized between natural-born British subjects, it would have been void to all intents and purposes, and therefore could not have had the effect of revoking a former will by virtue of 1 Vict. C26, s.18.'⁹⁸

Sir C Cresswell then considered whether the facts of *Mette* were distinguishable from those of *Brook*. There were two distinctions: first, *Mette* was not a natural-born British subject; and secondly, the wife was

'a native of Frankfurt, and, until her marriage, domiciled there. If *Bernhard Mette* was incapacitated from contracting such a marriage, this latter distinction cannot have any effect. *There could be no valid contract unless each was competent to contract with the other.* The question rests upon the effect of domicile *and naturalization...* By the law of England a natural-born subject cannot put off his allegiance, but he may take upon himself the duty of allegiance to another State by becoming naturalized there...It appears to me, therefore, that at the time of the second marriage he, *as a natural liege subject owed obedience to the Statute 5 & 6 Wm IV, c54 and could not contract a marriage in contravention of it.*'⁹⁹

It is hardly necessary to comment. The incompetence to contract was that of *Bernhard Mette*, not of persons in general. And the incompetence resulted from his naturalisation, ie it flowed from his nationality, or at least from that and his matrimonial domicile; not from his 'domicile' as the term came to be used after Lord Watson's judgment in *Le Mesurier*.¹⁰⁰ Moreover, the significance that most supporters of the dual domicile test¹⁰¹ attach to the words 'there could be no valid contract unless each was competent to contract with the other' seems to be exaggerated, if not disingenuous. There is nothing to indicate that Sir C Cresswell would have assented to any suggestion that his ruling was universalisable.¹⁰² He was doing no more, in using the words 'competent to contract with each other', than making it clear that what the law of Frankfurt had to say on the question of capacity was of no relevance to a judge sitting in an English court of law and obliged to give effect to an English statute. Having decided that *Mette* as a naturalised British subject had no capacity (was not competent) to marry his deceased wife's sister, *cedit quaestio*.¹⁰³ It is a *petitio principii* to assert that Sir C Cresswell would have reached the same result in an English court had it been Emma Schaefer who lacked capacity, by the law of Frankfurt, to marry *Bernhard Mette*. Essentially his words were no more than a truism: contract is a bilateral relationship. The real question was which system of law should determine whether each was competent to contract with the other.

98 *Supra* n 10 at 795. Emphasis added.

99 *Ibid* 795-6. Emphasis added.

100 *Supra* n 21.

101 Eg *Dicey-Morris*, *supra* n 40 at 291; *Cheshire-North*, *supra* n 36 at 336.

102 In the sense of the word given to it by Hare, *Language of Morals* (1961).

103 See the concluding paragraph of his judgment, *supra* n 10 at 796.

According to the law of Frankfurt Bernhard Mette and Emma Schaefer were competent to do so; according to English law they were not. Sir C Cresswell applied English law because he was an English judge sitting in an English court and engaged in the interpretation of an English Act of Parliament. It is a *non sequitur* to assume that if English law had said each was competent to contract the marriage in question and the law of Frankfurt that each was *not*, Sir C Cresswell would have declared the marriage void, all other facts remaining the same. There is no reason to believe that Sir C Cresswell would have paid the slightest attention to the law of the ante nuptial domicile of Emma Maria Schaefer. There is much more reason to believe that he would have anticipated the decision of Cumming-Bruce J in *Radwan (No 2)*¹⁰⁴ and upheld the marriage on the ground that England was both the intended and the actual matrimonial domicile of Mette and Schaefer, just as Egypt was to be later for Mr Radwan and Miss Magson.

One final comment on *Brook*¹⁰⁵ and *Mette*¹⁰⁶ neither is authority for the dual domicile doctrine as it is stated by Dicey-Morris, Cheshire-North, Finlay, Bradbrook and Bailey-Harris, Mr Justice Nygh etc. The point is very simple: in neither *Brook* nor *Mette* was the *lex loci* the same as the *lex fori*. The distinction is vital and it explains why Sir C Cresswell said of *Simonin v Mallac*¹⁰⁷ that it was a case *primae impressionis*.¹⁰⁸ It seems clear that neither *Brook* nor *Mette* supports the dual domicile doctrine even in the case of marriages celebrated in a foreign jurisdiction. It is beyond all doubt that neither supports it in the case of marriages celebrated in England or Australia.

Simonin v Mallac,¹⁰⁹ the next case to consider the matter, was heard by the Full Divorce Court¹¹⁰ consisting of the Judge Ordinary Sir C Cresswell, Channel B, and Keating J in April 1860, ie after *Brook* was decided at first instance, but before that case was argued on appeal in the House of Lords. The petitioner, Valerie Simonin, married the respondent, Leon Mallac, in the church of St Martin-in-the-Fields on 21 June 1854. Two days later they returned to Paris, and it was alleged that the marriage was not consummated. Both parties were citizens of France and domiciled in that country.¹¹¹ They had decided to marry in England so as to evade the requirements of French law which prohibited their marriage in France. Valerie Simonin subsequently petitioned in France to have the marriage set aside and on 1 December 1854 the Civil Tribunal of the department of the Seine, sitting at Paris, declared it null and void. She then came to England and in 1858 filed a petition in the Divorce

104 Supra n 42.

105 Supra n 16.

106 Supra n 10.

107 Supra n 19.

108 And see *Sottomayer v De Barros (No 2)* supra n 35 at 105.

109 Supra n 19.

110 The decisions of the Full Divorce Court could be set aside at that date only by the House of Lords, and *Simonin v Mallac* therefore has the status of a decision of the Court of Appeal.

111 The petition set forth that 'your petitioner and the said Leon Mallac are native subjects of France...domiciled in the city of Paris aforesaid' (supra n 19 at 917). Paris had no system of law separate from the rest of France and the parties were obviously not 'domiciled' there in the modern sense, but in the sense in which the word was used by English and Scottish judges for the greater part of the nineteenth century. See supra n 83.

Court for a decree of nullity. The Full Court held that the respondent, who did not enter appearance, was subject to the jurisdiction of the English courts because the contract of marriage was entered into in England. Secondly, it held:

'that the personal status resulting from such contract is to be ascertained by the law of the country in which the contract was made, and not by any special law of the country of the domicile of the parties to the contract.'¹¹²

At first impression this appears the antithesis of what had been decided at first instance in *Brook*.¹¹³ That decision was upheld on appeal to the House of Lords, which (strangely!) did not overrule *Simonin v Mallac*.¹¹⁴ The oddity of all this is heightened by the fact that Sir C Cresswell, who delivered the judgment of the Full Divorce Court in *Simonin v Mallac* had ended it with an invitation to the House of Lords to correct that decision were it wrong in law:

'It may be unfortunate for the petitioner that she should be held a wife in England and not so in France. If she had remained in her own country, she might have enjoyed there the freedom conferred upon her by a French tribunal; having elected England as her residence, she must be contented to take English law as she finds it, and to be treated as bound by the contract which she there made. The novelty and importance of the question has cast upon the Court much anxiety, but from some portion of it we are relieved by the consideration that, if our judgment is wrong, it may be corrected by the highest tribunal in this country.'¹¹⁵

Of course, as every conflicts student knows, Lord Campbell in *Brook*¹¹⁶ distinguished *Simonin v Mallac* on the ground that it was intended to deal with formalities and not with capacity. But his *dictum* to that effect must have surprised Sir C Cresswell and his brethren Channel B and Keating J. Sir C Cresswell said:

'But taking the decree of the French Court, in the suit there instituted, as evidence that by the law of France this marriage was void, we again come to the broad question, is it to be judged of here by the law of England or the law of France...

It is very remarkable that neither in the writings of jurists, nor in the arguments of counsel, nor in the judgments delivered in the courts of justice, is any case quoted or suggestion offered to establish the proposition that the tribunals of a country where a marriage has been solemnized in conformity with the laws of that country should hold it void because the parties to the contract were the domiciled subjects of another country where such a marriage would not be allowed. No such argument has been advanced even in the case of marriages deemed to be incestuous.'¹¹⁷

112 Ibid.

113 *Supra* n 16.

114 *Supra* n 19.

115 Ibid 925.

116 *Supra* n 16 at 713.

117 *Supra* n 19 at 921-924.

It is submitted that the attempt by Lord Campbell in *Brook* to drive a wedge into Sir C Cresswell's learned and elegantly expressed judgment by asserting that its scope was confined to formalities was merely a convenient sophistry.

(b) After *Brook v Brook* and before *Lawrence v Lawrence*¹¹⁸

The first case to be decided after *Brook* was *In the Will of Swan*.¹¹⁹ Like *Mette*,¹²⁰ it concerned the revocation of a will by a subsequent marriage, this time in Scotland between parties domiciled in Victoria. The marriage was void *ab initio* by Scots law because W was H's deceased wife's niece, but by the law of Victoria it was merely voidable, and therefore beyond challenge outside the joint lifetime of H and W. Molesworth J held that the marriage revoked H's will. He said:

"The validity of the marriage as to ceremonial and so forth depends upon the law of the place of the marriage, but...the occurrence of such marriages and their results should depend, I think, upon the laws of the country of the place in which they are afterwards probably to live."¹²¹

Obviously, the same *decision* would have been reached by applying the law of the antenuptial domicile of the parties, but Molesworth J clearly favoured Dr Cheshire's test.

Until 1877, therefore, the sole reported *decision* in respect of a marriage which took place *within* the jurisdiction of the *forum* is *Simonin v Mallac*,¹²² and that refutes any explanation of the common law rules of private international law which refers capacity to marry to the domicile, whether of both parties jointly or of each severally, and whether the domicile be ante-nuptial or post-nuptial. *Simonin v Mallac* applies the same rule as the new Division 2 of Part III of the Marriage Act, ie the validity of marriages is determined, both as to formalities and capacity, by the rules of the *lex loci celebrationis*. On this point *Simonin v Mallac* has never been over-ruled.¹²³

Then came *Sottomayor v De Barros*. At first instance¹²⁴ Phillimore J reluctantly¹²⁵ followed *Simonin v Mallac*.¹²⁶ The case was almost certainly collusive (which was why it was referred by Phillimore J to the Queen's Proctor). It arose out of the marriage, arranged by their respective parents, of the petitioner Ignacia Sottomayer¹²⁷ to the respondent, her first cousin

118 [1985] Fam 106.

119 (1871) 2 VR 47.

120 Supra n 10.

121 Supra n 119 at 50.

122 Supra n 19.

123 The criticisms of *Simonin v Mallac* in *Von Lorang*, supra n 72 and *Ross-Smith* [1963] AC 280 related to its refusal to recognise a decree of the domicile and its assumption of jurisdiction *ratione contractus*.

124 (1877) 2 PD 81.

125 He said (at 85-6): 'Looking at all the circumstances, I think it is not improper to say that this is a marriage which the Court would not be reluctant to pronounce invalid, but I must be on my guard against taking any other view than a strictly legal one of the unfortunate relationship in which these parties have been placed by their own acts.'

126 Supra n 19.

127 The spelling of the petitioner's name varies in the reports. In (1877) 2 PD 81 and (1877) 3 PD 1 her name is spelt Sottomayor. In (1879) 5 PD 94 it is spelt Sottomayer. This article retains the different spellings when referring to the particular cases, but prefers Sottomayer, as used in the report of the case presided over by Sir James Hannen P, when referring to the petitioner herself.

Gonzalo De Barros. She was 14, he 16, at the time of their wedding which took place at a London registry office in 1866. Several grounds of annulment were relied on. The only one which concerns us is that by Portuguese law, which was that of their domicile, first cousins were under a personal incapacity to marry each other unless they had previously received a Papal dispensation. The petition was not defended, but Phillimore J sent the papers to the Queen's Proctor so that he might instruct counsel to argue the issue of whether (a) the suit was collusive; and (b) whether, if not, the petitioner had grounds in law and fact for a decree of nullity. Counsel for the Queen's Proctor prayed that the petition be dismissed. His objections went mostly to averments of fact, and evidence was taken on commission in Portugal. There was, however, a crucial plea-in-law: 'that the petitioner and respondent were domiciled in England at the time of the said marriage, and intended to live together as man and wife in England and did so live for six years, and that the validity of the marriage was therefore to be determined by the law of England'.¹²⁸ By consent of the parties it was ordered that this plea-in-law be argued first. Phillimore J upheld it and dismissed the petition. He said:

'I have considered all the judgments which have been given in this country upon the much vexed subject of foreign marriages. The decided cases establish the doctrine that the Court of the domicile recognizes certain incapacities, affixed by the law of the domicile, as invalidating a marriage between parties belonging to that domicile in a foreign state in which such marriage is lawful. But the decided cases do not establish the converse doctrine that the Court of the place of the contract of marriage is bound to recognize the incapacities affixed by the law of the domicile on the parties to the contract, when those incapacities do not exist according to the *lex loci contractus*. It may appear that according to the *jus gentium* the latter proposition is a consequence of the former; and I remember addressing such an argument to the full Court of Divorce in the case of *Simonin v Mallac*, but in vain.'¹²⁹

The petitioner appealed. The unanimous decision of the Court of Appeal¹³⁰ was that the appeal must succeed. The judgment of the court was given by Cotton LJ on the same assumptions as to fact as the decision appealed against, ie it was assumed that both parties at the time of their marriage, and subsequently, were Portuguese subjects and domiciled in Portugal.¹³¹ The judgment of the Court of Appeal is brief and far from convincing. According to Cotton LJ:

'If the parties had been subjects of Her Majesty domiciled in England, the marriage would undoubtedly have been valid.

128 *Supra* n 124 at 82.

129 *Ibid* 87.

130 *Sottomayor v De Barros (No 1)* (1877) 3 PD 1.

131 This was a domicile of dependence. Their parents had not lost their Portuguese domicile of origin although they lived in London. This is the first case in which the technicalities and artificialities of the domicile of succession established by the House of Lords in such Scotch cases as *Bell v Kennedy* (1868) LR 1 Sc & D 307 and *Udny v Udny* (1869) LR 1 Sc&D 441 were applied to a married couple in matrimonial proceedings.

But it is a well-recognised principle of law that the question of personal capacity to enter into any contract is to be decided by the law of the domicile.¹³²

He went on:

‘[P]ersonal capacity must depend on the law of the domicile; and if the laws of any country prohibit its subjects from contracting marriage...this imposes on the subjects of that country a personal incapacity, which continues to affect them so long as they are domiciled in the country where this law prevails, and renders invalid a marriage between persons both at the time of their marriage subjects of and domiciled in the country which imposes the restriction, wherever such marriage may be solemnised.’¹³³

Three things are clear: (1) The *dictum* is far too broadly stated. Even at that time capacity to make a commercial contract was referred to the *lex loci contractus*; and if the principle that capacity to contract marriage should be referred to the *lex domicilii* was ‘a well-recognised’ one, why did Phillimore J in the court below regard the case as ‘in some measure *primae impressionis*’?¹³⁴ (2) The repeated references to nationality as well as domicile can scarcely be dismissed as *per incuriam*, yet they have been studiously ignored both by judges and by textwriters. (3) The assertion that a personal incapacity imposed by the law of the ante nuptial domicile has extra-territorial application ignores the contrary dictum of Lord Campbell in *Brook*.¹³⁵ The reasoning of Cotton LJ in *Sottomayer v De Barros (No 1)* is ‘unworthy of a place in a respectable system of the conflict of laws’.¹³⁶ The deference paid to it by three generations of textwriters is incomprehensible. Never have so many been misled for so long by so few.

Having reversed the judgment of Sir Robert Phillimore, the Court of Appeal remitted the case¹³⁷ to the Division so that the questions of fact raised by the Queen’s Proctor’s pleas might be determined. It was heard by the President, Sir James Hannen, who found that the respondent was domiciled in England at the time of the marriage. He then applied the law as decided by the Court of Appeal’s ruling and held that the marriage was valid. He said:

‘It is clear that the judgment which has been already given by the Court of Appeal is not applicable to such a state of facts. The language of the Court of Appeal is explicit. ‘It was pressed upon us in argument that a decision in favour of the petitioner would lead to many difficulties, if questions

132 *Supra* n 130 at 5.

133 *Ibid.*

134 *Supra* n 124 at 86.

135 *Supra* n 16 at 712. At first instance Sir James Stuart had described the incapacity allegedly imposed by the law of the ante-nuptial domicile in vivid and memorable language. ‘It is a personal quality...which travels around everywhere with the persons; inseparable from them as their shadow.’ (*Brook* (1858) 65 ER at 746.) This heresy was rejected by Lord Campbell only to be revived by Cotton LJ.

136 The phrase is borrowed from Falconbridge, *Conflict of Laws* (2nd edn 1954) 711. It will reappear.

137 Now *Sottomayer v De Barros (No 2)* (1879) 5 PD 94.

should arise as to the validity of a marriage between an English subject and a foreigner, in consequence of prohibitions imposed by the law of the domicile of the latter. Our opinion in this appeal is confined to the case where both the contracting parties are at the time of their marriage domiciled in a country the laws of which prohibit their marriage.' This passage leaves me free to consider whether the marriage of a domiciled Englishman in England, with a woman subject by the law of her domicile to a personal incapacity not recognised by English law, must be declared invalid by the tribunals of this country.'¹³⁸.

After pointing out that marriage was not merely a contract but a status, to which every country is entitled to attach its own conditions, Sir James continued:

'In some countries no other condition is imposed than that the parties, being of a certain age and not related within certain specified degrees, shall have contracted with each other to become man and wife. . . If the subject be regarded from this point of view, the effect of the recent decision of the Court of Appeal has only been to define a further condition imposed by English Law, namely, that the parties do not both belong by domicile to a country the laws of which prohibit their marriage. But, as I have already pointed out, that judgment expressly leaves altogether untouched the case of the marriage of a British subject in England, where the marriage is lawful, with a person domiciled in a country where the marriage is prohibited. With regard to such a marriage, all the arguments which have hitherto been urged in support of the larger proposition, that a marriage good by the law of the country where it is solemnised must be deemed by the tribunals of that country to be valid, irrespective of the law of the domicile of the parties, remain with undiminished effect.'¹³⁹

It should be obvious that the reasoning of Sir James Hannen was entirely consistent with that of the House of Lords in *Brook*.¹⁴⁰ When the case was before the Court of Appeal, the main argument of counsel for the appellant had been:

'This case is governed by *Brook* where a marriage between a man and his deceased wife's sister, both being domiciled British subjects, was held invalid, though solemnised in a country where such marriages are lawful.'¹⁴¹.

Cotton LJ rejected that argument. He remarked:

'In the case of *Brook* the parties were under an incapacity imposed by our own statute law. A case where, on the ground of a foreign law, we are asked to declare a marriage bad which would have been perfectly good if the parties

138 Ibid 99-100.

139 Ibid 101-102.

140 Supra n 16.

141 Supra n 130 at 2.

had been English subjects, seems to be in a different position.¹⁴²

Indeed it is. Moreover, as should be equally obvious, even had both parties in *Sottomayer v De Barros* been Portuguese domiciliaries, the facts would still have been distinguishable. In *Brook* it was material, at least so far as Lord Chancellor Campbell was concerned, that the parties had resorted to Denmark for no other purpose than to get married. They were there on 'a temporary visit' intent on evading the law of the place which had been their settled residence and to which they intended to return as soon as they were man and wife. The circumstances in the case of Ignacia Sottomayer and Gonzalo De Barros were quite different.

Neither the judgment of the Court of Appeal in *Sottomayer v De Barros*¹⁴³ nor that of Sir James Hannen P in *Sottomayer v De Barros (No 2)*¹⁴⁴ lends any support to the dual domicile doctrine. Neither countenances any cumulative application of each party's personal law in order to invalidate a marriage. The Court of Appeal reserved its opinion on the case where the parties did not have a common domicile; Sir James was unequivocal. He followed *Simonin v Mallac*¹⁴⁵ to the extent that the Court of Appeal had left him free to do so. If his decision is sound in law the dual domicile doctrine cannot stand.¹⁴⁶ Perhaps this explains why it is hard to find a textwriter who agrees without equivocation that the ratio of *Sottomayer v De Barros (No 2)* is one of the common law rules of private international law.¹⁴⁷ Indeed Sir James Hannen's reasoning has been excoriated by academics. Nygh is correct when he says 'the rule in *Sottomayer v De Barros (No 2)* is almost universally disliked'.¹⁴⁸ Morris, for example, states that:

'The judgment of Hannen P seems to be based on the theory that capacity to marry is governed by the *lex loci celebrationis*, which is, to put it mildly, difficult to reconcile with *Brook* and *Sottomayer v De Barros (No 1)*. There is obvious difficulty in reconciling this decision with the other cases, and especially with *Mette v Mette* and *Re Paine*

142 Ibid.

143 Supra n 130.

144 Supra n 137.

145 Supra n 19.

146 I believe that Cheshire-North, supra n 36, at least, is aware of this. *Sottomayer v De Barros (No 2)* is discussed and the question is asked (at 342): 'How then is it to be reconciled with the dual domicile doctrine?' This is an academic version of the policy of Procrustes, and the practice of some journalists: never allow a good theory to be affected by the facts.

147 But see Graveson, *The Conflict of Laws* (6th edn 1969) 272-3.

148 Supra n 33 at 321. The most extravagant language is probably that of Falconbridge, who describes the decision as 'unworthy of a place in a respectable system of the conflict of laws' (supra n 136), while Sykes comments abusively 'the decision is a thoroughly vicious one' (supra n 7 at 162). Nygh himself (supra n 33 at 320) refers to *Sottomayer v De Barros (No 2)* as a 'decision the reasoning of which is quite wrong', and he denies its authority in Australia. Clive, *Husband and Wife* (2nd edn 1977 at 162-3) dismisses the decision in *Sottomayer v De Barros (No 2)* as 'anomalous' and 'nationalistic'. He disputes its authority in Scotland, which is surprising since it was followed by a unanimous bench of the First Division of the Inner House in *MacDougall v Chitnavis* [1937] SC 390.

. . .Dicey found it necessary to make an exception to his general rule. . .This exception is admittedly illogical.¹⁴⁹

But the scope of *Sottomayer v De Barros (No 2)* is such that it cannot be relegated to the status of an inelegant 'exception' to some supposed 'general rule'. That is effectively to put the cart before the horse. The rule in *Sottomayer v De Barros (No 2)* applies to marriages celebrated in England (or Australia) where one party is domiciled within the jurisdiction — or is a citizen thereof — and the other is not. At best the alleged 'general rule' applies only to marriages celebrated abroad, or those in England or Australia where neither party has any real and substantial connection with the *locus celebrationis*. It is the rule in *Sottomayer v De Barros (No 1)* which is the exception, and a dubious one at that, to the rule in *Sottomayer v De Barros (No 2)*; and not, as the textwriters would have us believe, *vice versa*.

The most recent English case to discuss the rule in *Sottomayer v De Barros (No 2)* is the sordid dispute between a former prostitute and the brothel-owning family of her deceased husband, *Vervaeke v Smith (Messina and A-G intervening)*.¹⁵⁰ The petitioner, Vervaeke, born in Belgium and with a domicile of origin there, married the respondent, Smith, a domiciled Englishman, in 1954. The main purpose of the marriage was to enable Vervaeke to acquire British nationality to that she could carry on her trade as a prostitute without fear of deportation. In 1970 the petitioner went through a ceremony of marriage in Italy with one Eugenio Messina, who died the same day leaving property of considerable value in England, to which the petitioner would have a claim only if her marriage to Messina was valid. In proceedings begun in 1970, the petitioner sought a declaration of nullity in respect of the 1954 marriage, on the ground that she had not effectively consented to it. Ormrod J dismissed the petition.¹⁵¹ In December 1971 the petitioner began proceedings in Belgium for a declaration that the 1954 marriage was void ab initio. The court granted the declaration on the ground that the 1954 marriage was a sham, as the parties had had no intention of living together, and that judgment was affirmed on appeal. In 1973 the petitioner filed a petition in England seeking a declaration that the Belgian decree was entitled to be recognised in this country by virtue of s8 of the Foreign Judgments (Reciprocal Enforcement) Act 1933 and article 3(1) of the Convention between the United Kingdom and Belgium for the Reciprocal Enforcement of Judgments in Civil and Commercial Matters, dated 2 May 1934. A second petition prayed for a declaration that the marriage between the petitioner and Messina was valid. Waterhouse J dismissed both petitions. Appeals to the Court of Appeal and the House of Lord were unsuccessful.

In the Court of Appeal the leading judgment was given by Sir John Arnold P. He said:

'[I]t is relevant to observe that in this court the validity of the marriage between the petitioner and the respondent falls to be determined by reference to English law. The petitioner had a Belgian domicile immediately before marriage,

149 *Supra* n 40 at 111-112.

150 [1981] Fam 77 (CA), [1982] 2 All ER 144 (HL).

151 *Messina v Smith* [1971] P 322.

and the respondent an English domicile. In those circumstances, according to declared law binding upon this court, the *lex loci celebrationis*, that is the law of England, applies to determine the validity of the marriage: see *Sottomayor v De Barros*. . .and *Sottomayer v De Barros (No 2)*. . .and *Ogden v Ogden (orse. Philip)*¹⁵². . .In a situation in which there is a judgment of the High Court of this country deciding the matter according to English law in one sense and a judgment of a foreign court deciding the matter by reference to foreign law in an opposite sense, there can in my judgment be nothing in the common law of this country to require a subsequent court here, recognizing that English law applies, to give recognition to the foreign judgment in preference to the English judgment. Thus it is only if recognition is required by statute or by an instrument having statutory force that the opposite result will follow.¹⁵³

Cumming-Bruce LJ concurred with the learned President, as did Eveleigh LJ subject to a reservation not presently material.

In the light of this *dictum*, not to mention the decisions in *Chetti*¹⁵⁴ and *Perrini*,¹⁵⁵ Nygh's treatment of *Sottomayer v De Barros (No 2)*¹⁵⁶ is odd. Nygh writes:

'In *Miller v Teale*¹⁵⁷. . .the High Court referred to the 'dubious guidance' of *Sottomayor v De Barros (No 2)* and suggested that the effect of this decision and that of the Court of Appeal in *Ogden v Ogden* should be 'confined to a condition imposed by the law of the domicile that a specified consent or consents should be given'. Though the remark was made *obiter*, it was one in which all of their Honours concurred, and thus represents in all probability the law in Australia. It follows that an Australian court would in all probability hold invalid a marriage celebrated in Australia in accordance with Australian law in which one of the parties by virtue of a foreign personal law lacked capacity to marry the other, unless that lack of capacity could have been cured by a consent or dispensation under the foreign law concerned.'¹⁵⁸

But, with respect, this is almost all wrong.¹⁵⁹ The remark was made in a joint judgment by Sir Owen Dixon CJ, McTiernan, Fullagar and Taylor JJ. Nygh's quotation is taken out of context. He implies that the High Court disapproved of the rule in *Sottomayer v De Barros (No 2)*,¹⁶⁰ and suggested that it should be narrowly confined, but this is not so. It was not the correctness of the ruling of Sir James Hannen that was in issue. It was the appropriateness of the NSW Full Court's decision to follow

152 [1908] P 46.

153 *Supra* n 150 at 122.

154 [1908] P 67.

155 [1979] Fam 84.

156 *Supra* n 137.

157 (1954) 92 CLR 406.

158 *Supra* n 33 at 321.

159 Nygh is correct in saying that the remark in question was made *obiter*.

160 *Supra* n 137.

it in *Pezet v Pezet*.¹⁶¹ (It was agreed that if the decision in *Pezet* were sound it applied *a fortiori* to the issue in *Miller v Teale*.) But the facts of *Sottomayer's* case and those of *Pezet's* case were arguably different in at least two material respects. This is why it was said that the *ratio* of *Sottomayer v De Barros* offered 'dubious guidance' in the circumstances of *Pezet's* case; ie it was doubtful whether it was an appropriate precedent.¹⁶² The material facts of *Sottomayer v De Barros* were: (a) the respondent was domiciled in the place of the *forum*, (b) the marriage was solemnised there; (c) the petitioner was domiciled in a foreign country of which she was also a national, ie her *lex domicilii* and her *lex patriae* were one and the same; (d) the foreign law imposed an incapacity on the petitioner marrying the respondent; and (e) that incapacity was of a kind not recognised by the *lex fori*. There were arguably two reasons therefore why *Sottomayer* was a 'dubious' precedent in *Pezet's* case. First, item (e) did not apply at all. Secondly the 'incapacity' imposed — ie the equivalent of item (d) — was of a kind which Sir James Hannen himself held to be distinguishable from that imposed on the petitioner in *Sottomayer v De Barros*.¹⁶³

According to the High Court the facts of *Miller v Teale*¹⁶⁴ were 'peculiar'. Two judgments were handed down. The first, effectively the unanimous judgment of the High Court, and a second by Kitto J who agreed, but wished¹⁶⁵ 'only to add a few words' in order to emphasise the soundness of Sir James Hannen's reasoning in *Warter*¹⁶⁶ which the NSW Full Court had declined to follow in *Pezet's case*.¹⁶⁷ The High Court pointed out¹⁶⁸ that the respondent was domiciled in South Australia prior to her first marriage, and after that acquired a domicile dependent on that of her husband. He remained domiciled in South Australia. The respondent eventually deserted her first husband and went to NSW where, had it then been possible to do so, she would have acquired a domicile

161 (1946) 63 WN (NSW) 238.

162 It clearly was not: Dixon CJ, McTiernan, Fullager and Taylor JJ might have prevented the subsequent confusion if they had been less polite.

163 Nygh's account of *Miller v Teale* is, arguably, the *causa causans* of s13 of the Marriage Amendment Act 1985. Parliament accepted the academic canard that *Sottomayer v De Barros* was bad law, or at best 'dubious' law and accordingly swallowed the dual domicile theory hook, line and sinker. Nygh's assertion (*supra* n 33 at 317) that Sir James Hannen's reasoning was 'untenable' and 'conflicted with what the Court of Appeal had previously held in *Sottomayer v De Barros (No 1)*' was, regrettably, adopted verbatim by Baker J in *Barriga (No 2)* (1981) FLC 91-088 at 76,603. Baker J continued: 'His Honour (sic) confined the effect of the decision in the No 1 case to circumstances where 'the parties do...both belong by domicile to a country the law of which prohibits their marriage'.'

But the words Baker J places in quotation marks are not those of Sir James Hannen. They are from the judgment of Cotton LJ in *Sottomayer v De Barros (No 1)*. It was not 'His Honour' who 'confined the effect of the decision' etc. It was the Court of Appeal.

164 *Supra* n 157.

165 *Ibid* 419.

166 (1890) 15 PD 152. Sir James Hannen P was described by Kitto J as 'that learned President'. Nygh's cavalier treatment of him contrasts unfavourably with this assessment and with contemporary opinion. In 1894 Lord Coleridge CJ said: 'If there has been a greater English judge during the seventy-three years of my life than Lord Hannen [Sir James Hannen was made a Lord of Appeal in Ordinary in 1891], it has not been my good fortune to know him' (*Dictionary of National Biography*, Supp Vol II at 387).

167 *Supra* n 161.

168 *Supra* n. 157 at 410.

of choice.¹⁶⁹ The second marriage took place on 5 September 1931 apparently at some time during the afternoon. On the same day the decree nisi in respect of her first marriage was made absolute in SA. 'As it was a Saturday it may be taken as certain that it was in the morning.'¹⁷⁰ The Matrimonial Causes Act 1929 (SA) s17 provided that the parties to a marriage might remarry three months from the order absolute or upon the dismissal of any appeal against that order whichever might happen last.¹⁷¹ Whether such an impediment should receive extra-territorial recognition in NSW had been answered negatively by the Full Court in *Pezet*.¹⁷² The Full Court of NSW held the second marriage valid. It is in that context that the *obiter dictum* quoted by Nygh was made. What the High Court said was:

'The ground of the decision in *Pezet's* case was that the incapacity of one of the parties under a foreign law, even though it was the law of that party's domicile, was not enough to invalidate a marriage solemnized in New South Wales, the other party being there domiciled. . . This version of the law was the result of the dubious guidance of *Sottomayor v De Barros [No 2]* and *Ogden v Ogden* which were treated as not confined to a condition imposed by the law of the domicile that a specified consent or consents should be given. Thus the decision takes no account of the peculiar character of the prohibition. . . It is upon the character of the prohibition that the present case really turns. Neither English nor American law has perhaps yet reached a final conclusion as to the choice of law governing general capacity to marry. . . But the law of both countries has dealt in the same way with the kind of question which arises here. The question relates to the recognition of an *impedimentum ligaminis* connected with a foreign decree dissolving a prior marriage. . . Where the law under which the decree was granted imposes a restraint on both parties and it is merely in order to provide against a remarriage before the time for appealing has expired, the restraint is then regarded as a temporary qualification of the effect of the decree and as entitled to extra-territorial recognition.'¹⁷³

It is apparent from Sir James Hannen's judgment in *Warter*¹⁷⁴ that the rule in *Sottomayer v De Barros (No 2)*¹⁷⁵ did not apply to the facts of *Pezet's* case.¹⁷⁶ In *Warter* Sir James accepted that the *impedimentum ligaminis* was a type of domiciliary incapacity entitled, at least *prima*

169 See now the Domicile Act 1982 (Cth) s6.

170 Supra n 157 per Dixon CJ at 410. He continued: 'In matters of such a kind parts of a day may be taken into account, if the order of priority governs the validity of what is done.'

171 An appeal was time-barred after three months. When H brought his nullity suit, s17 of the SA Act had been repealed, but the law to be applied was that in force at the time of the ceremony: see *Schmidt* [1976] FLC 90-052 and *In the Marriage of C and D* (1979) 5 Fam LR 636.

172 The facts in *Pezet*, supra n 161, were the same in all material respects.

173 Supra n 157 at 414.

174 Supra n 166.

175 Supra n 137.

176 Supra n 161.

facie, to extra-territorial recognition. 'It is upon the character of the prohibition that the present case really turns.' That single sentence from the High Court's judgment is fatal to the false inference that *Sottomar v De Barros (No 2)* and *Miller v Teale*¹⁷⁷ are not perfectly reconcilable.

An examination of the decisions after *Sottomayer v De Barros (No 2)*¹⁷⁸ strengthens the conclusion that the dual domicile rule is not as firmly buttressed as its proponents would have us believe. The English authorities will be dealt with first.

In *Re Paine*¹⁷⁹ as in *Brook*¹⁸⁰ and *Mette*,¹⁸¹ the issue of capacity to marry was incidental to a question involving the law of succession. It was decided at a time when the 'plain meaning' of the word 'children' in a will governed by English law was 'legitimate children', and this 'plain meaning' could not be disturbed by extrinsic evidence that the testator plainly meant otherwise. In this case the testatrix, who died in 1884, had directed that a sum of £250, part of a trust fund settled on her by the will of her father, Thomas Paine, should be held by her trustees in order to pay the income therefrom to her daughter Ada Paine or Toepfer while she was alive and on her death survived by any child or children to transfer the principal to any child or children who should then be alive. (There was the usual gift over should Ada Paine or Toepfer die without a surviving child or children.) Ada Paine, then domiciled in England, had gone through a ceremony of marriage in 1875 with Franz Toepfer, formerly her deceased sister's husband, at Frankfurt¹⁸² where Toepfer was domiciled. When Mrs Toepfer died in 1939 she was survived by one child of her marriage. Bennett J held that it was necessary to ascertain whether the child was legitimate, and that this turned on whether Ada Paine had validly married Franz Toepfer.¹⁸³ By English law (ie English municipal or domestic or internal law) the marriage was incestuous and void. By Prussian law (the internal law applicable in Frankfurt) the marriage was valid. The question for Bennett J was whether he should give effect to the prohibition of English domestic law. His Lordship rightly followed *Mette* and decided the marriage was void. Consequently the gift-over took effect. It was, however, unnecessary for him to make the comment that the dual domicile doctrine correctly stated the choice of law rule he had to apply,¹⁸⁴ because the decision would have been no different if he had applied Cheshire's theory. *Re Paine* is often said to be one of the 'strong buttresses'¹⁸⁵ of the dual domicile doctrine, and is cited as authority for that rule by Cheshire-North and Finlay, Bradbrook & Bailey-Harris. However, as the former concedes:

'Since England was the country where W was domiciled, where H was resident before the marriage, where they intended to reside together and where in fact they resided

177 *Supra* n 157.

178 *Supra* n 137.

179 [1940] Ch 46.

180 *Supra* n 16.

181 *Supra* n 10.

182 It is an odd coincidence that Frankfurt was where Bernhard Mette had married.

183 This reasoning was not followed by Romer J (as he then was) in *Re Bischoffsheim* [1948] Ch 79.

184 *Supra* n 179 at 49.

185 Eg by Sykes, *supra* n 7 at 161.

throughout their married lives, the decision that English law must prevail could scarcely have been different.¹⁸⁶

That is true. But an even better reason why the decision 'could scarcely have been different' is that the English courts cannot disregard the clear and unambiguous terms of an Act of Parliament directly in point.

In *Pugh*¹⁸⁷ W was born in Hungary and her domicile of origin was Hungarian. In 1945 she and her parents fled from Hungary to Austria in order to escape the Russian army. There she met H, an officer in the British army and domiciled in England. H and W were married to each other in Austria in 1946 when W was 15 years old. They lived together for some time in Austria and Germany, but it was always their intention to settle in England when H returned to civilian life. In 1950 H and W came to England but separated soon after. W then petitioned her a decree of nullity on the ground that she lacked capacity to marry in 1946 as she was then under marriageable age according to English law. She relied on English law because no other relevant legal system would serve her cause. According to Austrian law (the *lex loci celebrationis*) she was old enough to marry at 15. Her ante-nuptial domicile was either the same as the *locus celebrationis* or it was Hungarian. According to Hungarian law the marriage was voidable but the *locus poenitentiae* had expired when W reached 17. Pearce J applied English law and annulled the marriage. (Even such a dyed-in-the-wool dual domicile hard-liner as Morris admitted this result to be 'anomalous'¹⁸⁸). Pearce J said that W may have had capacity to marry H according to the law of her anti-nuptial domicile but H had no capacity to marry W according to this. The reason, of course, was the Age of Marriage Act 1929 s1 (now the Marriage Act s2) which stated peremptorily:

'A marriage between persons either of whom is under the age of 16 shall be void.'

Counsel for W was Simon QC (later Sir Jocelyn Simon P and later still Lord Simon of Glaisdale). He submitted;

- 1) H had no capacity to marry because, as a British subject with an English domicile he was bound by the 1929 Act; and
- 2) English law governed the essential validity of the marriage either as H's antenuptial *lex domicilii* or as the law of the intended matrimonial home.

Pearce J upheld both submissions, so that the decision in *Pugh* is equivocal. Admittedly his Lordship said that the marriage was void 'since by the law of the husband's domicile it was a marriage into which he could not lawfully enter'.¹⁸⁹ Cheshire-North states:

'This passage coupled with the citation of *Re Paine* undoubtedly suggests that the learned judge applied English law as being the *lex domicilii* of the husband before the marriage.'¹⁹⁰

But that suggestion is open to grave doubts. For a start, Cheshire-North

186 Supra n 36 at 339.

187 [1951] 2 All ER 680.

188 Supra n 40 at 123.

189 Supra n 187 at 688.

190 Supra n 36 at 339.

concedes that the decision 'is compatible with the doctrine of the intended matrimonial domicile'.¹⁹¹ It is also compatible with the view that s1 of the Age of Marriage Act 1929 left Pearce J with no alternative but to decide as he did.

*Padolecchia*¹⁹² is alleged by Cheshire-North to be 'the most significant of recent decisions' in support of the dual domicile rule,¹⁹³ for which it is claimed to provide 'clear and explicit authority'.¹⁹⁴ However, Fentiman disagrees.¹⁹⁵ As he correctly points out:

'The case was undefended and argument was only offered on the basis that the dual domicile test applied. . . Above all, the law of the putative matrimonial home and of the wife's domicile (both Danish) may have agreed with the husband's domicile in not recognising the marriage. If so, it would not have mattered which of the competing laws applied. . . [and] its authority is substantially reduced.'¹⁹⁶

The authority of *R v Brentwood Superintendent of Marriages ex parte Arias*,¹⁹⁷ which Nygh cites in support of the dual domicile doctrine,¹⁹⁸ is equally suspect. It is true that in the leading judgment Sachs LJ¹⁹⁹ referred to Dicey and Morris²⁰⁰ and *Brook v Brook*²⁰¹ as the bases of his decision, but no alternative to the dual domicile rule was so much as suggested in argument, nor does the judgment contain any analysis whatsoever of the earlier decisions.²⁰²

*Szechter*²⁰³ is, once again, a decision of Sir Jocelyn Simon P. The harrowing facts are well-known and need not be rehearsed; it is scarcely conceivable that any English judge would have cared what rule was applied, provided it entailed the conclusion that the courageous and compassionate agreement between Professor Szechter and Nina Karsov did not mean that they were married in law any more than in fact. Since the dual domicile test amounts almost to a presumption against the validity of a marriage it is understandable that Sir Jocelyn Simon P should have followed his own decision in *Padolecchia*²⁰⁴ and endorsed it. He said:

'So far as capacity. . . is concerned there can be no doubt that no marriage is valid if by either party's domicile one of the parties is incapable of marrying the other.'²⁰⁵

He then applied English law to determine whether the marriage was void for duress, decided it was and ordered accordingly. Of course, neither

191 Ibid.

192 [1968] P 314.

193 Supra n 36 at 340.

194 Ibid.

195 'The Validity of Marriage and the Proper Law' (1985) 44 CLJ 256.

196 Ibid 269.

197 [1968] 2 QB 956.

198 Supra n 33 at 319.

199 Supra n 197 at 967.

200 *Conflict of Laws* (8th edn) Rule 31.

201 Supra n 16.

202 The major premise of *R v Brentwood* has been reversed by the Recognition of Divorces and Legal Separations Act 1971, s7 (as amended by the Domicile and Matrimonial Proceedings Act 1973, s15(2)).

203 [1971] P 286.

204 Supra n 192.

205 Supra n 203 at 295.

party was domiciled in England at the time of the marriage, nor was England (or any other country) their intended matrimonial domicile. It is usually said of *Szechter* that English law was applied not, as is here submitted, *qua lex fori* and for reasons of public policy, but simply because there was no satisfactory evidence of Polish law; the presumption in such a case being, of course, that foreign law does not differ from English law. But even if there had been competent and conclusive evidence that Polish law regarded the marriage as valid, it would have been treated as irrelevant for the reasons expressed by Lord Denning in *Gray v Formosa*.²⁰⁶ And, since *Szechter* there is not one reported English decision in which support for the dual domicile rule has been other than lukewarm to say the least.

The first indication that the textwriters were backing the wrong horse was the case of *Radwan (No 2)*.²⁰⁷ Both parties were 26 years of age when they met in Paris in 1951. Radwan was a student there, with a wife in Egypt where he was domiciled. Mary Magson was unmarried and domiciled in England. She was in Paris on holiday. Ten days after they met they were married to each other in the Egyptian Consulate General in Paris. The marriage was expressly polygamous, both parties declaring before witnesses that they wished to marry according to Islamic law. They remained one month in Paris and then went to live in Egypt as they had intended to do all along. In 1953 W became a Moslem. In 1956 they came to England where they remained. In 1970 W filed for divorce on the ground of cruelty. H denied cruelty and cross-petitioned for divorce on the ground of irretrievable breakdown. Both parties obviously assumed there was a valid subsisting marriage between them. However, the judge asked the Queen's Proctor to brief counsel so that he could have the benefit of argument on whether their assumption was well-founded. According to Cumming-Bruce J this depended on whether or not the dual domicile doctrine was the choice of law rule he was obliged to apply. He said:

'I have, with proper humility, to grasp the nettle and decide whether to award the accolade to Dr J H C Morris or to Professor Cheshire.'²⁰⁸

If Dicey-Morris were correct, the marriage was void, because W had no capacity by English law to contract a bigamous marriage. If Cheshire were right it was valid, since by Egyptian law she had. After hearing four days of argument Cumming-Bruce J upheld the validity of the marriage. However, he was scrupulous in confining his decision to the facts before him. He said:

'Nothing in this judgment bears upon the capacity of minors, the law of affinity, or the effect of bigamy upon capacity to enter into a monogamous marriage.'²⁰⁹

This proper circumspection has been seized on by some textwriter to support the tendentious proposition that *Radwan (No 2)* is a decision

206 [1963] P 259.

207 [1973] Fam 35.

208 *ibid* 45.

209 *Ibid* 54.

of little or no consequence.²¹⁰ With remarkable ingenuity Nygh goes further and succeeds,²¹¹ at least to his own satisfaction, in transmuting *Radwan (No 2)* into an authority which *supports* the dual domicile theory. He says its alleged inconsistency with the latter is only 'apparent', and continues:

'...his Lordship distinguished the question of capacity to enter into a polygamous marriage from other aspects of capacity to marry. Consequently the decision does not detract from, and might even be said to enhance, the conclusion that as a general principle questions affecting the essential validity of a marriage are determined by the law of the antenuptial domicile of each spouse.'²¹²

It is submitted that *Radwan (No 2)*²¹³ was rightly decided. In the first place, applying the dual domicile rule to the facts would have resulted in a travesty of justice. It would have defeated the legitimate expectations of the parties, annulled a marriage which had lasted over 20 years and bastardised eight children. Cumming-Bruce J pointed out²¹⁴ that his decision to reject the dual domicile theory was *not* precluded by *Brook*²¹⁵ and, indeed, had the support of *dicta* in *De Renneville*²¹⁶ from judges of such high authority as Lord Greene MR and Bucknill LJ. The latter put his objections to the dual domicile theory with some vigour:

'To hold that the law of the country where each spouse is domiciled before marriage must decide as to the validity of the marriage in this case might lead to the deplorable result, if the laws happened to differ, that the marriage would be held valid in one country and void in the other country. . . It is reasonable that the law of the country where the ceremony of marriage took place and where the parties intended to live together and where they in fact lived together, should be regarded as the law which controls the validity of their marriage.'²¹⁷

Being free to do so, Cumming-Bruce J was entirely right to prefer Cheshire's theory on grounds both of principle and policy. Of course, as he pointed out,²¹⁸ counsel for the Queen's Proctor had called attention to the confidence and the unqualified character of the *dicta* in favour of the dual domicile theory and reminded him that there was no vestige of a continuing judicial appreciation that matrimonial residence was relevant. His retort was crushing:

'But that may well be because the matter has never been argued until today, and I have to consider whether the assumption that has been made as a result of the expressions of view in the cases to which I have referred is solidly founded upon the common law foundations that are supposed

210 See eg *Morris*, supra n 40 at 128. *Morris* states 'the case was wrongly decided' and 'has been heavily criticised by academic writers'.

211 *Supra* n 33 at 318-319.

212 *Ibid.*

213 *Supra* n 207.

214 *Ibid* 48.

215 *Supra* n 16.

216 [1948] P 100.

217 *Ibid* 121.

218 *Supra* n 207 at 172.

to lie beneath them, and I have come to the conclusion that Mr. Michael Davies is right in his submission that it is my duty to return to examine the foundations in *Brook v Brook*. . . and *Warrender v Warrender*. . . of the propositions that have since been founded upon them. And my conclusion is that Miss Magson had the capacity to enter into a polygamous union by virtue of her prenuptial decision to separate herself from the land of her domicile and to make her life with her husband in his country, where the Mohammedan law of polygamous marriage was the normal institution of marriage.²¹⁹

Notwithstanding *Radwan (No 2)*²²⁰ the dual domicile doctrine retained the allegiance of English and Australian textwriters. Indeed it has been endorsed in all subsequent reported cases in Australia, but none took into account *Radwan (No 2)*, and the endorsements, it is suggested, are unlikely to be repeated given the later English decisions in *Perrini*²²¹ and *Lawrence*.²²²

In *Perrini*²²³ H was domiciled in Italy at all relevant times. He married in Italy but W1 returned to the USA almost immediately after the ceremony and the marriage was annulled in New Jersey where W1 had lived before her marriage and was ordinarily resident at the time of its annulment. H later married W2 in England. They then went to Italy for several months, but returned to England and set up home there. H and W2 separated, and two years later W2 petitioned for a decree of nullity on the ground that at the time of her marriage to H he was still married to W1. The New Jersey decree was not recognized in Italian law at the time of the marriage between H and W2, so that he had no capacity to contract it according to law of his pre-marriage domicile. If the dual domicile rule applied in this sort of situation, the marriage between H and W2 was void. However, Sir George Baker P upheld its validity. He did not rely on *Radwan (No 2)*,²²⁴ which may, arguably, not have been in point, since the *locus* of the intended matrimonial home was unclear. The learned President followed *Law v Gustin*²²⁵ in which Bagnall J accepted the submission that the reasoning of the House of Lords in *Indyka*²²⁶ applied to the recognition of foreign annulments as well as foreign divorces. Morris treats the decision in *Perrini* with contempt,²²⁷ relegating it to a footnote alleging that it was 'decided *per incuriam*'. (Despite this it was approved by Anthony Lincoln J in *Lawrence*²²⁸ and his decision was upheld by the Court of Appeal.) It is submitted that the ratio of *Perrini* is identical to that of *Sottomayer v De Barros (No 2)*.²²⁹ Sir George Baker P said:

'Once the New Jersey decree is recognised here, the fact that the respondent could not marry in Italy, the country

219 *Ibid* 54.

220 *Supra* n 207.

221 [1979] Fam 84.

222 [1985] Fam 106.

223 *Supra* n 221.

224 *Supra* n 207.

225 [1967] Fam 155.

226 *Supra* n 86.

227 *Supra* n 40 at 117.

228 *Supra* n 222.

229 *Supra* n 137.

of his domicile. . . is, in my opinion, no bar to his marrying in England. . . No incapacity existed in English law.²³⁰

Since *Radwan (No 2)*,²³¹ but before the decision of the Court of Appeal in *Lawrence*,²³² there have been three reported cases in Australia in which the common law rules of private international law regarding capacity to marry were referred to in the judgments. Any reference to *Radwan (No 2)* is conspicuous by its absence from all of them and none, therefore, is other than the weakest of authorities in favour of the dual domicile theory.

*Stankus*²³³ was an undefended petition for nullity or, alternatively, for a decree of divorce on the ground of desertion. The husband's evidence was that he was married, by a religious ceremony, in Lithuania in 1933. As a result of the invasion of Lithuania by the Germans in 1942, and by the Russians in 1944, he became separated from his wife and children and after the war was unable to find out anything about them. In 1950 he went through a civil ceremony of marriage with another woman in Germany. In about 1963 he learned that his first wife had emigrated to Canada and was alive there; and he produced a document purporting to be a Canadian burial certificate and purporting to show that his first wife had died in 1965. The husband was unable to produce any certificate of his first marriage as his certificate had been lost during the war and the church in which he was married had been destroyed. Expert evidence was given that according to Lithuanian law the husband's first marriage would have been a valid marriage, and that his second marriage, if his first wife were alive at the time, would not have been valid. There is no doubt that Bray CJ had no alternative but to find the 1950 marriage in Germany void. But it does not follow that the *ratio decidendi* of *Stankus* is sound. Bray CJ held the marriage void on account of H's incapacity to contract it according to the law of his ante-nuptial domicile. However, even if H had not lacked capacity by Lithuanian law, Dr Bray would certainly have refused to recognize the marriage. It would have been contrary to Australian public policy to do so since, as he said, this would have been to 'create a class of potentially polygamous marriages'.²³⁴

*Suria*²³⁵ is an equally nebulous authority in favour of the dual domicile theory. In *Suria*, an Australian woman applied for a decree of nullity of her marriage to a Filipino man with whom she had corresponded before the ceremony in question. She was almost totally blind and had flown to Manila with her mother to meet him. He wanted to marry her immediately but she became terrified and returned to Australia the same day she arrived. Later she returned to Manila and went through a ceremony of marriage but was admitted to hospital the same night under 'great nervous stress'. She returned to Australia nine days later. Her husband joined her on a temporary visa and lived with her and her family

230 Supra n 221 at 92.

231 Supra n 207.

232 Supra n 222.

233 (1974) 9 SASR 20.

234 Ibid 24-25. In any event *Stankus* is yet another case of the 'false conflict'. The marriage was void according to Lithuanian law, Australian law and German law. No other system of law was relevant.

235 (1977) FLC 90-305.

for several weeks until his visa expired. Before the ceremony he had told her that the marriage would enable him to migrate to Australia. The woman did not deny that there had been a ceremony, that she had known at the time it was a ceremony of marriage, and that after it she had signed the marriage certificate in her own hand. Frederico J distinguished his own decision in *Deniz*²³⁶ on the issues of fraud and duress and continued:

'So far as capacity is concerned, there can be no doubt that no marriage is valid if by the law of either party's domicile one of the parties is incapable of marrying the other: *Re Paine* (1940) Ch. 46; *Pugh v Pugh* (1951) P.482.'²³⁷

In the first place, it is significant that Australian law was applied.²³⁸ Indeed, whatever the judges may say about the *lex domicilii*, there is no reported decision in Australia, England or Scotland where the *lex fori* has not been applied in cases involving fraud or duress. Secondly, *Suria*,²³⁹ like *Stankus*,²⁴⁰ was undefended. The respondent did not enter appearance, although a 'Motion to Dismiss' was filed on his behalf by a Manila lawyer. No suggestion seems to have been made that the dual domicile rule might not apply; and if *Radwan (No 2)*²⁴¹ were cited in argument that fact is not mentioned in the report and the case was not referred to in His Honour's judgment. Thirdly, even if the intended matrimonial home theory, or the matrimonial domicile theory, or the 'proper law' theory had received the accolade of Frederico J, the decision would have been the same, ie all gave Australian law as the appropriate connecting factor. *Suria* is, like *Stankus*, another 'false conflict' decision, and therefore of minimal authority. Finally, the decisions relied on by Frederico J as precedents for the application of the dual domicile doctrine do not support it.

That leaves *Barriga (No 2)*,²⁴² and *Re B*.²⁴³ The latter was concerned with a proxy marriage in Lebanon between the 15-year-old applicant who was domiciled in Australia, and the respondent who lived, and apparently was domiciled, in Lebanon. While the applicant's age clearly raised the issue of her capacity, that issue fell to be determined, as Fogarty J realised, by the relevant provisions of ss10 and 11 of the Marriage Act 1961. His Honour was not therefore obliged to concern himself with what may or may not have been the appropriate common law rule of private international law.²⁴⁴ In *Barriga*²⁴⁵ the parties married by proxy in Mexico on 15 December 1969. In 1973 they went through a religious form of marriage in Australia. When the parties had first met each other in Argentina, the husband had been married. In 1969, he instituted proceedings in Mexico for the dissolution of that marriage and on 10 December 1969 a decree nisi was pronounced. (The husband had never resided in Mexico before his institution of divorce proceedings and he

236 (1977) FLC 90-252.

237 Supra n 235 at 76,612-76,613.

238 As it was in *Di Mento v Visalli* (1973) 1 ALR 351 notwithstanding the fact that the *lex loci celebrationis* was Italian, as was the domicile of both the petitioner and the respondent.

239 Supra n 235.

240 Supra n 233.

241 Supra n 207.

242 (1981) FLC 91-087.

243 (1983) FLC 91-332.

244 *ibid* 78,260-78,261.

245 Supra n 242.

had not gone to Mexico for the hearing.) In 1979 the wife applied to the Family Court of Australia for a dissolution of marriage, but later applied for a decree of nullity instead. The case was undefended.

Baker J held both the Mexican marriage and the later Australian marriage null and void. The Mexican divorce was not recognised in Argentina which was the domicile of both parties at the time of their marriage in Mexico; nor was it recognised in Australia, the domicile of both parties at the time of their marriage here. Unfortunately, neither *Radwan (No 2)*²⁴⁶ nor *Perrini*²⁴⁷ were referred to by Baker J, who was content to follow his understanding of *Brook*,²⁴⁸ *Sottomayor v De Barros (No 1)*²⁴⁹ and *Padolecchia*,²⁵⁰ and accordingly applied the dual domicile test to the question of the husband's capacity to contract each marriage. So far as the marriage in Mexico was concerned, Baker J was not required to decide between the dual domicile rule and any other that has recently been suggested as flowing from the decisions.²⁵¹ Argentine law was that of the parties' ante-nuptial domicile, and that of their matrimonial domicile, and that of their intended matrimonial home. So far as the marriage in Australia was concerned, no genuine choice of law problem existed either. On any test the law governing the parties' capacity was Australian law, and Australian law did not recognise the Mexican divorce.²⁵² Accordingly the husband's Australian marriage, like his Mexican marriage, was bigamous and hence void.

(c) *Lawrence v Lawrence*²⁵³ — a new approach?

The facts in *Lawrence* are similar to those of *Barriga (No 2)*.²⁵⁴ W was domiciled in Brazil when she divorced H in Nevada. (The divorce was valid by English but not Brazilian law). The next day W married H2 in Nevada. H2 was domiciled in England where the couple set up their matrimonial home, in accordance with their pre-marriage intention. W eventually petitioned for a decree of nullity of her second marriage. She claimed it was void because Brazilian law was that of her ante-nuptial domicile, and by Brazilian law she had not been free to marry at the time. Anthony Lincoln J held that the validity of the marriage between W and H2 was *not* governed by their ante-nuptial domiciles but by English law. According to Jaffey²⁵⁵ this was because England was the intended matrimonial home. But the judgment is not clear on this point, and Fentiman has suggested that the test applied was that of the proper law of the marriage.²⁵⁶ Anthony Lincoln J emphasised:

'I am satisfied that if the marriage had prospered the petitioner and respondent would have remained at the matrimonial home or its successor, always in England.'²⁵⁷

246 Supra n 207.

247 Supra n 221.

248 Supra n 16.

249 Supra n 130.

250 Supra n 192.

251 No judge and no textwriter has suggested the *lex loci celebrationis* as the appropriate connecting factor since Sir Cresswell Cresswell did so in *Simonin v Mallac*, supra n 19.

252 Family Law Act s104.

253 Supra n 222.

254 Supra n 242.

255 'The Incidental Question and Capacity to Remarry' (1985) 48 MLR 465-471.

256 Supra n 195 at 261.

257 Supra n 222 at 111.

This seems a clear endorsement of Jaffey. However, after discussing the cases allegedly supporting the Dicey-Morris line, and in particular *Padolecchia*,²⁵⁸ his Lordship stated:

'My examination of these authorities persuades me that while the dual domicile test has been applied over and over again, there is no case relating to a foreign divorce and subsequent marriage in which the courts have been confronted with a choice between the competing doctrines — dual domicile or intended matrimonial domicile. (I use this latter phrase to refer to the law of the country with which the marriage has the most real and substantial connection).'²⁵⁹

It is submitted, therefore, that the judgment at first instance in *Lawrence* may be cited as authority for (a) the intended matrimonial home test; or (b) the matrimonial domicile test (these would, of course, have produced the same result in *Lawrence*, as they would in the overwhelming majority of cases); or (c) the proper law of the marriage test; or (d) any test that would favour the validity of the marriage in issue. What it is *not* possible to derive from the judgment of Anthony Lincoln J in *Lawrence* is support for the dual domicile test.

W appealed, and her counsel invited the Court of Appeal to declare unequivocally for the dual domicile rule so that the law would at least be clear.²⁶⁰ The Court of Appeal declined the invitation. It also declined the invitation by counsel for H that it give its authority to the 'proper law' approach by directing that the issue of capacity to marry should be referred to the system of law with which the marriage had the most real and substantial connection.²⁶¹

According to Ackner LJ the general issue of capacity to marry did not require to be considered in *Lawrence*. Like Cuming-Bruce J in *Radwan*,²⁶² he insisted on confining the *ratio decidendi* to the narrowest possible front, observing:

'We are concerned with one — and only one — species of alleged incapacity to marry. That incapacity is said to arise, notwithstanding the Nevada divorce, out of the continued existence of the marriage contracted by W in Brazil in 1944.'²⁶³

Ackner LJ thought that argument unsound, and that the appeal could be dismissed without going further. He said:

'The inevitable consequence of our recognising the Nevada decree — as we are bound to do under the Act — is to recognise that the dissolved marriage could no longer be a bar to the wife's remarriage and no other incapacity is alleged.'²⁶⁴

258 *Supra* n 192.

259 *Supra* n 222 at 114.

260 *Ibid* 118.

261 *Ibid* 120.

262 *Supra* n 207.

263 *Supra* n 222 at 125.

264 *Ibid*.

His Lordship's reasoning seems irrefutable. To recognise a divorce, while saying that the marriage which has been dissolved still exists (in the sense that either party to it may not remarry) is to make the 'recognition' of the divorce no more than a hollow gesture.²⁶⁵

Purchase LJ, unlike Ackner LJ, did discuss the general issue of capacity. He said:

'The traditional approach is the ante-nuptial *lex domicilii*, but there has been a body of opinion in favour of the law of the intended residence. Each has its advantages and disadvantages. The traditional test has the advantage of certainty. . . The 'law of the intended domicile' or 'law having a real and substantial connection' approach has the advantage of applying a 'meaningful' law which is accepted in the area in which the parties are to live; but has the disadvantage of uncertainty. Parties may genuinely intend to live in a certain jurisdiction at the time they are entering the marriage but this may be overtaken by events, or perhaps, more naturally, the parties may change their minds.'²⁶⁶

With respect, the weight of the argument from uncertainty is greatly exaggerated. It is almost always employed by dual domicile adherents to counter the sociological disadvantages of their preferred rule. But it was demolished by Cook 40 years ago.²⁶⁷

It is surely much better to have a rule which is satisfactory in the great majority of cases but unsatisfactory in an insignificant minority rather than *vice versa*. The 'hard case' may properly be applied to prove the rule, but what is the point of a 'rule' which is appropriate only to the hard case? Purchas LJ ends tamely:

'Anthony Lincoln J—after a careful review of the case law — came to the conclusion that the correct approach to the determination of the wife's capacity to contract the Nevada marriage was the law of the intended domicile, namely, England. . . For the reasons already set out in this judgment, I must express considerable doubt as to whether this would be justified as a general proposition. However, it is happily not necessary for the determination of this appeal to resolve

265 It is impossible to believe that it was the intention of the UK Parliament, when it enacted the Recognition of Divorces and Legal Separations Act in 1971, to give 'divorce' this sterile and artificial construction.

266 *Supra* n 222 at 127.

267 'Doubtless some critics will suggest the possibility - not likely to arise, but possible - that at the time of the ceremony in state X, A and B intended to make their home together in state Y, but after the ceremony one of them died on the way to the prospective new domicile in state Y. How, they will ask, can state Y's law apply? My reply is: 'Why not?' Which, being interpreted, means that once one has surrendered the naive territorialism which has plagued writers and courts, one sees no inherent difficulty in applying the rule of that system of law which social policy seems to him to demand. If this is too strong meat for the territorialist's stomach, we can, of course, fall back in these exceptional cases on the 'law' of state X (place of celebration) as of more importance than that of state Z, whose only interest is based upon a purely technical domicile ascribed to one of the parties. And, in any event, if the intended family domicile is already the technical domicile of one of the parties, as it nearly always is, there seems to be no valid objection which even a convinced adherent to the 'territorial' theory can raise.' *Logical and Legal Bases of the Conflict of Laws* (1949) 455.

the extremely difficult but interesting academic controversy into which the judge saw fit to enter.²⁶⁸

His approach, and that of Ackner LJ, in deciding *Lawrence* in 1985 was the same as that of the majority of the House of Lords in 1861 in deciding *Brook*,²⁶⁹ and of Sir Cresswell Cresswell in 1857 in deciding *Mette*.²⁷⁰ Their concern was limited to the proper construction of an Act of Parliament.

However, the brief judgment of Sir David Cairns is interesting.²⁷¹ He took the view that *either* the intended matrimonial domicile of the parties or the pre-marital domiciles of the parties was a satisfactory connecting factor in the case of a foreign marriage, *provided* (semble) that both led to the marriage being recognised as valid. It should be remarked that Sir David Cairns was careful to speak only of *foreign* marriages. The reason is clear. Marriages celebrated in England²⁷² do not depend for their validity on the ante-nuptial domiciles of the parties, nor on their intended matrimonial residence, nor on the proper law of the marriage, but on the rule laid down by Sir James Hannen in *Sottomayer v De Barros (No 2)*.²⁷³

In *Lawrence*²⁷⁴ the Court of Appeal granted leave to appeal to the House of Lords, but no decisions has so far ensued.

5. CONCLUSION

Section 13 of the Marriage Amendment Act 1985 was occasioned by a misconception about the common law rules of private international law. The new Division 2, inserted by s13 into Part III of the Marriage Act 1961, replaces those rules, in the case of marriages celebrated in Australia on or after 7 April 1986, with a statutory choice of law rule which is anomalous and unlikely to be adopted by any other civilised state.²⁷⁵ The all-embracing application of the *lex loci celebrationis* entails that the validity of marriages celebrated in Australia on or after 7 April 1986 will have to be determined by the Australian courts according to Australian law, even in cases where neither party to the marriage has other than a fortuitous or fleeting connection with Australia. It seems beyond argument that the country with which the parties are genuinely associated has a more significant interest than the *locus celebrationis* in the creation of marital status (apart, that is, from the formalities involved). As English judges like Lord Brougham and Lord Campbell clearly understood over 100 years ago, a choice of law rule which is framed without any regard to its impact upon the community most closely affected by its operation can command little respect.

268 Supra n 222 at 128.

269 Supra n 16.

270 Supra n 10.

271 Supra n 222 at 134.

272 And in Australia *mutatis mutandis*. The assumption being made, of course, is that in all but an insignificant number of such marriages one at least of the parties will be domiciled in England or a UK citizen.

273 Supra n 137.

274 Supra n 222.

275 Given the failure of the 1978 Hague Convention, Australia's adoption of the *lex loci celebrationis* will simply increase the number of limping marriages.