REFORM IN THE PRIVATE INTERNATIONAL LAW OF DIVORCE

A Comparative Study of two recent Draft Codes.

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Although Conflict of Laws, at least at University level, may be regarded as one of the more esoteric subjects, no-one could deny that practical questions of jurisdiction in divorce causes between foreign parties and recognition of foreign divorces and nullity decrees are, in both Canada and England, of some difficulty and complexity, and the fact that such cases do not arise very often does not make these questions of any less importance. For this reason, the outcome (if any) in England of the recommendations of the Royal Commission on Marriage and Divorce, presented to the United Kingdom Parliament in March, 1956,[1] especially the possible effect on any proposed legislation of the Commission's recommended Code on Jurisdiction and Recognition,[2] will be awaited, if not with some foreboding,[3] at least with interest.

Almost contemporaneously with the release of the Royal Commission's Report and recommendations, the Draft Family Code for the State of Israel was released in translation by the Harvard Law School.[4] This latest develop-

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[1]Report of the Royal Commission on Marriage and Divorce (1951-1955), Cmd. 9678. The significant sections of the Report for our purposes are paragraphs 772-919, and the Commission's Draft Code on Jurisdiction and Recognition, annexed to the Report as Appendix IV, pp. 394-396.

[2]See *supra*, note 1.

[3]The provisions of the Draft Code in reference to their possible effect on the existing English and New Zealand Law are exhaustively discussed by Mr. J. W. Davies and the present writer in *Divorce, the Royal Commission, and the Conflict of Laws,* (1957) 6 Am. Journ. Comp. L., 215 . . It is there emphasized that although there are some sections of the Commission's Code which undoubtedly constitute an improvement on the English common law rules, the Code as a whole is more a manifestation of progressive academicism that a Code of practical measures to overcome practical problems, and in the event of its wholesale adoption would be likely to create more difficulties than it is aimed at alleviating.

[4]The Israeli Draft Family Code was prepared and annotated by the Israeli Ministry of Justice, and translated by the Harvard-Brandeis Co-operative Research on Israel's Legal Development. The translation from the original Hebrew was made to enable the staff and consultants of the Harvard-Brandeis research programme to comment on the Code, and "to call the attention of interested members of the legal profession here [in the United States] and abroad to the legislative problems of Israel.": Draft Family Code, p.i (Translator's Note).

ment is of considerable interest and importance. The Royal Commission's Draft Code was prepared by English lawyers, working against a background and within the framework of the existing English common law, and departs to no very great extent from existing common law concepts. The Israeli Draft Code, on the other hand, although necessarily similarly prepared against a background of the English common and ordinance law imposed in Palestine under the Palestine Mandate, and reflecting to a certain extent Jewish Biblical and Rabbinical precepts,[5] has also as its basis the influence of lawyers trained in a wide variety of European legal systems, and it may be assumed that the Draft Code represents, at least in its Conflict of Laws section, a synthesis of what its framers thought were the most desirable aspects of a number of legal systems.[6]

No-one would be sufficiently insular to say that the English Common Law system of Conflict of Laws did not have its imperfections: nor would one expect that its imperfections could be lessened to any significant degree by elaborating on them, as the Royal Commission appears to have done. In marked contrast, whether one agrees with its provisions or not, the Israeli Draft Code must be regarded as of exceptional interest to both practitioners and academicians alike as a significant and instructive experiment in Comparative Law:[7] it is very much more than a new approach to old problems.

It is hoped that this rather lengthy preamble will have served to indicate not only that it is the purpose of this article to examine the provisions of the Israeli Draft Family Code in some detail, and to compare them with the provisions of the Royal Commission's Draft Code, but also that it is of more than academic significance to do so.

I. Domicil.

The English law of domicil has the very positive virtue of certainty, but in what may in fact be isolated cases has the equally positive disadvantage of

[5]These have not intruded to any large degree into the sections of the Draft Family Code dealing with the Conflict of Laws. An excellent study of Jewish family law (in English) is to be found in Horowitz, *The Spirit of Jewish Law* (New York, 1953), Chapters XVII - XIX.

[6]For example, in drafting the sections on domicil (discussed *post*, pp. 43 48..) the laws of the following countries were considered: France, Italy, Spain, Portugal, Germany, Egypt, Argentine, Brazil, Mexico, Switzerland, Great Britain, and the United States. See the Draft Family Code, Comment, pp. 26-27, for an illuminating discussion of these various laws.

[7]Comparative Law, as a field of study, is of fairly recent origin, and is fully discussed as such in the first issue of the *American Journal of Comparative Law:* (1952) 1 Am. Journ. Comp. L. See particularly Professor Hessel E. Yntema, *Comparative Legal Research,* (1956) 54 Mich. L. Rev., 899, and *Comparative Legal Studies and the Mission of the Law School,* (1957), 17 Louisiana L. Rev., 538, which, incidentally, contain highly stimulating and not unjustified strictures on American legal education. See also Rheinstein, (1952) 1 Am. Journ. Comp. L. 95-114.

unreality.[8] It also bestows on married woman what has appeared to some[9] to be the disability of being unable to acquire a domicil apart from that of her husband.[10] The difficulties arising in divorce cases from this legal inconvenience the Royal Commission sought to remove by recommending[11] that residence of both parties, or either party (if the marriage was celebrated in England) should be sufficient to found jurisdiction, provided that a decree is not to be pronounced unless the personal law of both parties recognizes as a sufficient ground for divorce a ground substantially similar to that on which a decree is granted in England, or the personal law of both parties would in the circumstances of the case permit the petitioner to obtain a divorce on some other ground. The further difficulties inherent in this recommendation are discussed later,[12] but it is sufficient to point out here that the Royal Commission made no attempt to remedy whatever defects it found in the existing law of domicil[13] by recommending a change in the law of domicil itself.

The drafters of the Israeli Draft Family Code have, on the other hand, chosen to solve the problem of domicil, not by substituting the concepts of nationality, or residence with a greater or less degree of *animus manendi,* but by redefining the concept:[14]

> §.28. A person's domicil is the place which is the centre of his life.
> §.31. Where a person's domicil is unknown, his residence is deemed to be his domicil.
> §.30.[15] An individual's residence is the place where he resides, either permanently or temporarily.

It will be seen at once that the common law concept of the domicil of origin is excluded from this definition, and whether this is likely to appeal to common law lawyers is a question which turns on a number of factors. For practical purposes, as applied to persons of full age,[16] the domicil of origin is a purely fictional device used for ensuring that in cases where domicil

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[8]*Winans* v. *Attorney-General* [1904] A.C. 287 and *Ramsay* v. *Liverpool Royal Infirmary* [1930] A.C. 588 are leading cases which are also examples of the extremes to which the law on this point has been taken.

[9]Report of Royal Commission, paras. 791, ff. And see discussion, *post,* pp. 43. ., ff.

[10]This is not strictly a disability in cases where a married woman in England, whose husband has acquired some other than an English domicil, petitions for a divorce under s.18(1)(*b*) of the Matrimonial Causes Act, 1950. It should, however, be emphasized that the jurisdictional fact here is residence, and not, as in other Commonwealth countries, domicil.

[11]Draft Code, section 1.

[12]*Post,* p. 49.

[13]But see the Report of the Standing Committee on Private International Law (1954), Cmd. 9068, in which the present English law of domicil comes under severe criticism; and see the Report of the Royal Commission on Marriage and Divorce, paras. 791, ff.

[14]See note 6, *supra.*

[15]The sections are rearranged here for the sake of convenience in discussion.

[16]The domicil of minors and incompetents is considered, *post,* p. 46.

is relevant it is always possible to ascertain what the domicil is. Hence, where an individual dies in transit from a country which he has made his domicil of choice, to another country which would have become his new domicil of choice had he arrived there, his domicil at the time of his death is settled as his domicil of origin in a third country. The fact that he may have left that country at the age of two, and remained out of it all his life without any thought of returning to it makes no difference.

Now if, as has always been said to be the case, the concept of domicil is founded basically on the idea that the law of the country with which the individual has the closest real connection should govern a given situation, it is immediately seen that there are serious disadvantages in adopting any unduly technical or formalistic means of arriving at a finding of that connection. It can hardly be said that, in the example given above, there is any real connection, if indeed any connection whatever, between the deceased and the law of the country of his domicil of origin. While there is, as has been indicated, the advantage that the individual's affairs ean never be without a connecting link to a given legal system, the main difficulty is seen to lie in the means used to choose that system, and in the nature of the connecting link. In some cases, such as the above example, the introduction of the domicil of origin is to provide a connecting link which is entirely insubstantial and unreal; it is similarly easy to visualize situations in which nationality, as a connecting link, could be even more unrcal, just as residence alone, as a connecting link, may in certain circumstances be far too weak.

The concept of "the centre of an individual's life" as a connecting link, on the other hand, not only avoids the technicalities and fictions involved in the concept of the domicil of origin, but also, when considered in relation to §§.30 and 31 of the Draft Code, provides sufficient fiexibility to overcome the difficulties inherent in the concept of the domicil of choice.[17] There may be, however, in certain cases difficulties involved in the ascertainment of the "centre of a person's life" which are not satisfactorily solved by the presumption applied by §.31, that a person's residence is deemed to be his domicil when the "centre of his life" is unknown, and the further provision in §.30, defining residence for the purposes of the Draft Family Code as

[17]"Another element emphasized in some laws is the 'intention to remain', the *animus manendi*. See, *e.g.*, the Mexican Code 'place of abode in which one lives with the intention to settle' and particularly the Swiss Code 'the place at which one stays with the intention of remaining permanently.' In Anglo-American law, intention forms a separate, subjective factor in addition to the factual prerequisites for creating a domicil; this is also the law in France with respect to change of domicil (Sec. 103 of the Civil Code). We prefer to base our definitions only on the objective aspect. Intention is no more than one of the date that the judge will consider in determining the 'centre of life'. It is not an independent factor strong enough to take the place of other factors (as in the Swiss definition), nor is it an additional requirement (as in England and Mexico)": Comment on §.28, p. 27.

either permanent or temporary. The Comment to §.28 gives the example of an immigrant who dies aboard ship on his way to Israel, points out that in such a case English law would distribute his estate according to the law of his father's domicil at the time of his birth,[18] and indicates that "[u]nder our Bill, the law having the closest connection with the matter and with the deceased's presumed intent will apply, *i.e.*, the law of Israel where that person's 'centre of life' is already situated at that time."[19]

As an example chosen by the drafters to illustrate the proposed effects of the Code, this is not perhaps the most fortunate. The question whether an individual has his "centre of life" in a specified country is apparently to be answered by reference to objective facts, the individual's intention being of relatively minor importance.[20] In the case of a Jewish immigrant on his way to Israel it is no doubt true to say that Israel is even at that stage the "centre of his life", and that his present intention is not a factor, compared with other factors, of any great weight. In other cases, however, where there are no strong religious, political, family or other ties, it is difficult to say that merely because a person is immigrating to a country it is the centre of his life, without also saying that it is the individual's intention that that country shall be the centre of his life when he gets there and settles in.[21] It is doubtful whether the bare wording of §.28[22] can be taken so far as to include this type of situation in all cases.

If the above analysis is correct, it would seem that the average, *e.g.*, emigrant, who has renounced his former country as the "centre of his life", can hardly say that his life has a centre in the territorial sense, or that he has a residence, while he is in transit.[23] A solution to the difficulty by imputing to such an emigrant the domicil of the country to which his ship or his aircraft belongs could conceivably lead to odd results. It is hard to see how this type of problem could be solved without resorting to some type of fictional domicil, residence, or "centre of life". English law, as has been said, escapes the difficulty by referring to the domicil of origin, and the principal question the prospective reformer will have to answer is which fiction is most objectionable.

The domicil of minors and incompetents is regulated by a separate section of the Draft Family Code:

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[18]Assuming, of course, that he was legitimate.

[19]Draft Family Code, p. 27.

[20]See Draft Family Code, Comment, p. 27; note 17, *supra*.

[21]There may, of course, be factors which would tend to lessen the difficulty of such a situation, such as the purchase by the immigrant of a home in the country to which he is immigrating.

[22]As read with §§.30 and 31.

[23]It is not perhaps too fantastic in this connection to use as examples the international tramp, who wanders from country to country doing odd jobs, being never more than a transient in any, or the retired millionaire whose only "residence" is his caravan, or the person who sleeps, and has part of his social life in Windsor, Ontario, but does all his business and has an equal amount of social life in Detroit, Michigan.

§.29. A minor and an incompetent shall be presumed to have the domicil of his parents or the parent in whose custody he is, or of his guardian, unless he is shown to have another domicil.[24]

It is seen that those responsible for drafting the Code have rejected the concept of the "derivative" domicil. In the case of minors and incompetents, the reason for attributing to them the domicil of their parent or guardian has been, of course, that they have been regarded as incapable of forming their own domiciliary intention. Naturally this latter proposition remains relevant only while the concept of intention as an essential element of a domicil of choice is relevant, and this is removed by the other sections of the Draft Family Code already discussed.[25]

It was considered by the drafters of the Code that there was nothing in minority or in incompetency which necessarily precluded the individual concerned from acquiring a "centre of life" not that of his parent or guardian. While, however, minors or incompetents have relatively few concerns of their own, it seems reasonable to presume that their domicil is identical with that of the adults in charge of them unless the contrary is proved.[26]

A provision of this nature enables the courts to deal intelligently with questions relating to married minors, which under the common law cause difficulty. In a situation where a child is living on a permanent basis with some person who is neither its parents nor a guardian, and whose parents are domiciled in another country, it is undoubtedly appropriate that the law of the country where the child has in fact the "centre of his life" should be applied.[27] The section, of course, benefits most those minors who have attained sufficient discretion to exercise a certain degree of freedom of choice in the matter of where their lives should be centred: in the case of young children, however, it is no doubt wise to provide a presumption that they retain their domicil of dependence unless the contrary is proved.

It should again be emphasized that the principal value of the sections of the Israeli Draft Family Code dealing with domicil is in the fact that they may be regarded, to a certain extent, as a synthesis of the best of the concepts applied in this matter by a wide variety of Western countries. The language

[24]It should at this stage be pointed out that no distinction is drawn in the Draft Family Code between men and women, or between single, married, or divorced women. "The equality of rights and the independence of the wife call for the elimination of . . . automatic dependence on her husband. Even 'legal certainty' does not justify the imposition on her of her husband's domicil by force of law.": Draft Code, Comment, p. 28. For further discussion on this topic, see *post,* p. ... It is of interest to note the view taken by the drafters of the Code on marriage generally: it is based on the equality of husband and wife and their joint effort to "make the household thrive": see Code, §§.48-57, and Comments thereon (pp. 55-69).

[25]§§.28, 30, 31. See *ante,* p. 44

[26]Comment on §.29, Draft Family Code, p. 29.

[27]That in such a case the domicil of the child should change with each change of domicil of its parents, which is the present position, is of course absurd.

of the sections is simple, direct, and brief:[28] so simple, direct, and brief, in fact, that it will probably allow for a considerable degree of judicial latitude.

Whether this will not result in the creation of a set of rules which may differ in their effects from those intended by the drafters of the Code remains to be seen, and whether this is an advantage or a disadvantage is a matter of opinion. Brevity is not, however, necessarily a drawback in codified law, and it may be wondered whether it was entirely desirable for the English Standing Committee on Private International Law, in its Draft Code on Domicil referred to earlier,[29] to have followed an apparently growing tendency in Commonwealth legislative drafting by attempting to provide for every conceivable type of situation.

II. Jurisdiction in divorce and nullity suits.

It has been necessary to consider the question of domicil at some length on account of its importance as a jurisdictional basis in divorce.

The Royal Commission's Draft Code avoids a change in the substantive law of domicil by changing the jurisdictional basis: hence, to escape from, in particular, the difficulties which arise due to the dependence of the wife's domicil on that of her husband,[30] the Commission's Code provides that the Court shall have jurisdiction to entertain divorce proceedings on the bases of (*a*) the petitioner's domicil in England at the commencement of the proceedings;[31] (*b*) the fact of the petitioner's presence[32] in England at the commencement of the proceedings, where the last residence of the parties was England; and (*c*) the residence of both parties in England at the commence-

[28]The sections occupy a total of 7 lines in the writer's mimeographed copy of the Draft Family Code. Contrast the Draft Code on Domicil prepared by the English Standing Committee on Private International Law and contained in its First Report (1954) (Cmd. 9068), which contains the Committee's view of what it considered "the law should be" (Report, para. 11) in 5 Articles with 12 sections, occupying altogether approximately 90 lines of print.

[29]*Supra*, note 28. Attention should be drawn to the valuable analysis and evaluation of the Draft Code on Domicil by Professor Graveson in (1954) 70 L.Q.R. 492. The learned writer there points out that "essentially, the Code in its present form is incomplete. It would be most misleading for it to be regarded as a complete statement of all the rules (or even of all the existing ones) affecting this topic in our private international law. . . . The Committee's excellent proposals for reform of this part of the English Conflict of Laws are so easily amenable to improvement that it is worth a little patience on our part to avoid the need for piecemeal legislation.": *ibid.*, 513. Articles 1, 3, 4 and 5 of the Draft Code on Domicil are reproduced in their entirety in the course of the above article, and Article 2 is reproduced in the same author's *Conflict of Laws* (3rd ed., 1955) at pp. 86 and 90.

[30]Royal Commission's Report, para. 796.

[31]Royal Commission's Draft Code, section 1(*a*).

[32]*Ibid.*, section 1(*b*). Nothing here is said about any residence requirement on the petitioner's part at the commencement of the proceedings.

ment of the proceedings.[33] The Court may not, however, grant a divorce on the latter two bases unless the personal law of the parties recognizes as sufficient ground for divorce or nullity a ground substantially similar to that on which a divorce is sought in England, or the personal law of the parties would in the circumstances of the case permit the petitioner to obtain a divorce on some other ground.[34]

These proposals, however theoretically desirable they may seem, nevertheless raise considerable practical difficulties, as does the further provision of the Commission's Code defining the "personal law" of the parties.[35] These difficulties have already been discussed in detail elsewhere:[36] it is sufficient to say here that, firstly, it is a little difficult to see what adequate justification there can be for providing a divorce forum on a simple residence basis to "assist those persons who have to live in England or Scotland for some time but have no intention of becoming domiciled therein";[37] and secondly, in its desire to foster reciprocity with other countries in regard to divorce matters, the Commission has lured the question of divorce jurisdiction into the dismal swamp of partial *renvoi,* filled with quaking quagmires[38] in which the law may well founder without the attainment of the reciprocity which the Commission was anxious to encourage. If complete reciprocity was desired, the so-called total *renvoi,* or "foreign court", theory, considerably less on the

[33]*Ibid.,* section 1(*c*).

[34]*Ibid.,* section 1, proviso.

[35]*Ibid.,* section 9, which reads: "(1) For the purposes of this part of the Code, the personal law of a party shall be: (*a*) the domestic law of the country in which that party is domiciled, if, under the rules of private international law of that country, questions of personal status are governed by the law of the country in which the person is domiciled; failing which (*b*) the domestic law of the country of which that party is a national, if, under the rules of private international law of that country, questions of personal status are governed by the law of the country of which a person is a national; failing which (*c*) the domestic law of the country in which that party is domiciled. (2) Where the Court is required under subsection (1)(*b*) above to look to the law of a party's nationality and he has more than one nationality, he shall be taken to be a national of that country in which he is also domiciled, or, failing that, a national of that country of which he last became a national."

[36]By Mr. J. W. Davies and the present writer in (1957) 6 Am. Journ. Comp. L., 215, 220 ff.

[37]Report, para. 811. The Committee was also of the view that the strict requirements of domicil as a jurisdictional basis should be relaxed in order to bring English law into line with that of other countries.

[38]By section 9 in particular: See *supra,* note 35. This felicitous and expressive phrase is borrowed from Professor William L. Prosser, *Selected Topics on the Law of Torts* (Michigan, 1953), p. 89. Professor Prosser's words are well worth preserving in full: "The realm of the conflict of laws is a dismal swamp, filled with quaking quagmires, and inhabited by learned but eccentric professors who theorize about mysterious matters in a strange and incomprehensible jargon. The ordinary court, or lawyer, is quite lost when engulfed and entangled in it."

nightmare fringe of the conflict of laws,[39] would, it is suggested, have been a far more satisfactory and realistic device to choose.[40]

The sections of the Israeli Draft Family Code dealing with the jurisdiction of Israeli courts in matters of personal status[41] do not deal directly with jurisdiction in divorce and nullity suits. Any such proceedings which originate in Israel are for the time being dealt with by the religious courts, and it is hardly appropriate here to consider the jurisdictional requirements in such circumstances. It is, however, helpful to consider the provisions of §.183, which confers on Israeli secular courts

> jurisdiction to declare a person to be of age, to declare a person incompetent, to establish paternity, to issue an adoption order or to render any other decision involving the determination or change of the personal status of any person (save matters of marriage and divorce) where that person's domicil is in Israel.

Assuming that this section supplies a jurisdictional basis for divorce suits, which, of course, it does not, it is seen that the difficulties inherent in the corresponding sections of the Royal Commission's Draft Code are largely avoided by the abandonment of the concept of the wife's "derivative" domicil: "The equality of rights and the independence of the wife call for the elimination of [the] automatic dependence [for her domicil] on her husband. Even 'legal certainty' does not justify the imposition on her of her husband's domicil by force of law. . . . Doubtless, as a matter of fact, the husband's domicil will be an important element in the determination of a married woman's domicil, just as her domicil goes a long way to prove the husband's domicil, but there is no reason for a fixed rule providing an automatic answer."[42]

No doubt, in these times, it is wise to allow for the fact that the centre of a wife's life may not necessarily be her husband, but, on the legal aspect, there is an equally strong view the other way, succinctly expressed by Professor Graveson:[43]

> In retaining the basic principle of the unity of domicil of husband and wife the Committee have shown a wisdom and experience not to be blinded by superficially attractive arguments on social justice and sex equality, whatever that may mean. For this principle is but one aspect of the broader concept of the bond of legal unity of the whole family in matters of personal law. The basis of the concept, as of the principle of unity, is simple and normal fact. But if law so rationalizes

[39]But see the judgment of Wynn-Parry, J., in *In re Duke of Wellington* [1947] Ch. 506, 515.

[40]And see also section 2 of the Draft Code, which would provide the court with jurisdiction "if the petitioner is a citizen of the United Kingdom and Colonies and is domiciled in a country, the law of which requires questions of personal status to be determined by the law of the country of which the petitioner is a national, and does not permit divorce to be granted on the basis of the petitioner's domicil or residence." It is difficult to see any real necessity for this provision; and see further (1957) 6 Am. Journ. Comp. L., at p. 223. .

[41]§§.183-185.

[42]Draft Family Code, Comment, p. 28.

[43]*Reform of the Law of Domicile,* (1954) 70 L.Q.R. 492, 504.

> the major fact of family life, it should no less rationalize in exceptions to the principle the fact that husband and wife often do not live together. This the Committee has done to a limited extent in allowing a wife judicially separated to acquire an independent domicil, as well as in respect of infants.[44]

The main disadvantage of allowing a complete independence of a wife's domicil from that of her husband is the possibility of a resulting "limping marriage." It should be pointed out, however, that the relevant sections of the Israeli Draft Family Code are not concerned with jurisdiction in Israeli divorce proceedings, and indeed under present Jewish law and practice the problem of a "limping" Jewish marriage could hardly arise. In any event, the difference between the English and Israeli views on the topic of unity of domicil is not as great as it might seem. The English view as expressed by Graveson is, in substance, that there should be unity of domicil between husband and wife, subject to exceptions where there is in fact no unity in actual family relationship. The view of the drafters of the Israeli Code is, on the other hand, that (in effect) unless there is shown to be actual family unity there is no necessary unity of domicil. One of the mose obvious difficulties involved in adopting too wide a view of the "equality" of husband and wife as far as domicil is concerned is that of uncertainty, which the drafters of the Israeli Code did not regard as serious,[45] and indeed the problem, in relation to present Israeli law, is not serious in Israel. As far as England is concerned, however, certainty appears to be a much more real value than the avoidance of "imposition on [a wife] of her husband's domicil by force of law,"[46] an evil which does not appear to many lawyers who have to deal with this type of case particularly outrageous. Possibly a mild palliative to these difficulties might be the employment of a rebuttable presumption of unity of domicil during the subsistence of the marriage in question. The advantages are obvious, and include a higher degree of certainty, convenience, and social justice, for whatever the latter may be worth in this particular context. The possibility of a resulting "limping marriage" is, however, not removed.

The peculiarly original concept of domicil adopted by the drafters of the Israeli Code must, however, be borne in mind,[47] and it is seen that the choice of this type of domicil as the basis of divorce jurisdiction (which is not at present the case in Israel) involves its own problems. Under the Code as it stands Israeli courts have jurisdiction to deal with matters of personal status even if the person whose status is in question has been "domiciled" in Israel for only a very brief period: indeed, no period of "domicil" is specified.[48] No

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[44]Report of Committee on Domicil, Appendix A, Article 4(4).

[45]See *ante*, p. 50.

[46]Draft Family Code, Comment, p. 28.

[47]See *supra*, pp.44., ff.

[48]See Draft Code, Comment, p. 206: "Under the Bill, domicil is required without specification of any period whatever. The Courts will be competent to deal with the case of an immigrant even if the action is filled only one day after his arrival."

doubt the courts would exercise caution, in the case of a very brief period of residence, in arriving at a finding of domicil, but as far as divorce is concerned it is doubtful whether provisions such as these are adequate to guarantee against the parties' perjury. Florida and Nevada require residence for a few weeks only to found jurisdiction in divorce suits, and such requirements have come under severe attack both in the United States and elsewhere.

Although the drafters of the Israeli Code are insistent that "the Court should not have jurisdiction over [the matters regulated by §.183][49] unless the person whose status is being determined has a lasting and close link with this country, *i.e.*, the link of domicil",[50] it is extremely doubtful whether the "centre of life" concept of Israeli domicil alone goes nearly far enough to provide a link which is either close or lasting in divorce cases. This difficulty would of course be overcome by provision for a specified period of "domicil" before the commencement of a divorce suit. The present requirement in most British Commonwealth jurisdictions of two or three years' domicil (in the English sense) or, as in the case in England where a deserted wife is the petitioner, three years' residence, can hardly be said to impose undue hardship on prospective petitioners, especially when those petitioners are entitled, on such a basis, to be considerably more confident that their divorce decrees have a reasonably good chance of being recoguized overseas.

It should again be emphasized that the provisions of the Israeli Draft Family Code considered in connection with this particular topic are not intended to cover jurisdiction in divorce suits, and if and when it is ever necessary to make such provision no doubt considerations such as the above will be taken into account.

The recommendations of the Royal Commission on the question of jurisdiction in cases where the wife is the petitioner are embodied in section 6(1) of the Draft Code, where it is provided that for the purpose of establishing jurisdiction in divorce and nullity[51] suits a wife who is living separate and apart from her husband is entitled to claim a separate English domicil notwithstanding that her husband is not domiciled in England at the commencement of the proceedings, provided that, in the circumstances, had she been a single woman, the court would regard her as having an English domicil. Section 6(2) provides that where a wife who is claiming a separate English domicil was domiciled in England immediately before her marriage or immediately before her separation from her husband, and is resident in England at the commencement of the proceedings, she is deemed to have acquired an English domicil unless there is evidence to the contrary. There is, it will be noted, no substantial difference between these provisions and the provisions of

[49]See *supra*, p. 50..

[50]Draft Code, Comment, p. 206.

[51]As to the Commission's recommendations in regard to nullity suits, see *post*, p. ...53

existing Australian and New Zealand legislation, with the important exception that no period of residence is prescribed, and there seems no good reason for leaving it out, especially in regard to cases which might possibly arise under section 6(1). The evils of migratory divorces have been spoken of too often to bear repetition here, and it must be borne in mind that even though the English test of domicil is stringent, the fact that, in theory at least, no period of residence is required under the Draft Code may at least possibly create a situation similar to that existing in regard to Florida and Nevada divorce decrees.[52]

The provisions of the Royal Commission's Draft Code relating to jurisdiction in nullity suits have already been fully considered elsewhere,[53] and all that needs to be said here is that, in view of the fact that a declaration of nullity of a void marriage is in no sense a declaration of a change of status, exception can hardly be taken to the liberal rules recommended by the Commission in this respect, or to their suggested choice of law rules as a limiting factor on the exercise of jurisdiction.[54] As to voidable marriages, the provisions recommended by the Commission[55] are substantially similar to those recommended by them in regard to divorce jurisdiction, and what has already been said concerning the latter[56] applies equally here.[57]

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[52]And see *ante*. p. 52.

[53](1957) 6 Am. Journ. Comp. L., at p. 223 to 229.

[54]See section 4(2) and (3) of the Commission's Draft Code. "(2) If the marriage is alleged to be void on the ground of lack of formalities, that issue shall be determined in accordance with the law of the country in which the marriage ceremony took place. (3) If the marriage is alleged to be void on a ground other than that of lack of formalities, that issue shall be determined in accordance with the personal law or laws of the parties at the time of the marriage (so that the marriage shall be declared null and void if it is invalid by the personal law of one or other or both of the parties); Provided that a marriage which was celebrated elsewhere than in England or Scotland shall not be declared void if it is valid according to the law of the country in which the parties intended at the time of the marriage to make their matrimonial home and such intention has in fact been carried out." But as to "personal law" see *ante*, p. ...49

[55]In section 5 of the Draft Code. The court has jurisdiction if the petitioner is in England at the commencement of the proceedings, and the place where the parties last resided together was England, or where the parties to the marriage are both resident in England at the commencement of the proceedings. A proviso states that the court shall not grant a decree of nullity unless the personal law or laws of one or other or both of the parties at the time of the marriage recognized as sufficient ground for nullity of marriage or divorce a ground substantially similar to that on which annulment is sought in England.

[56]See *ante*. p. 42..

[57]But section 5 is less revolutionary in the law of nullity than is section 1 in the law of divorce, as the residence of both parties is already a basis of jurisdiction for the annulment of a voidable marriage: *Ramsay-Fairfax* v. *Ramsay-Fairfax* [1956] P. 115 (C.A.). Also, the foreign law to be applied is the law at the time of the marriage, and not, as in divorce, at the time of the commencement of proceedings. Nor is the

III. Recognition of foreign marriages

This topic is really a part of the main topic of nullity of marriage, but it is sufficiently important to be dealt with separately.

Up to the present, English law has regarded foreign marriages as valid if, firstly, the form prescribed by the *lex loci celebrationis* has been observed; and secondly, the parties, by their personal law, had capacity to marry,[58] or, possibly, the parties had capacity to marry by the law of the *husband's* domicil, especially if that domicil happened to be English.[59]

The Royal Commission's Draft Code retains the rule that where a foreign marriage is alleged to be void on the ground of lack of formalities, that issue shall be determined by the *lex loci celebrationis,*[60] but also broadens the rule as stated above in relation to grounds other than lack of formalities, making it clear that a foreign marriage is void in England if *either* party lacked capacity according to his or her personal law. A more startling innovation, however, is the proviso that a marriage celebrated elsewhere than in England or Scotland "shall not be declared void if it is valid according to the law of the country in which the parties intended at the time of the marriage to make their matrimonial home and such intention has in fact been carried out."[61]

It is unnecessary here to discuss at lengtb the doctrine of the "proposed matrimonial home", which, in the present state of the law, can hardly be taken seriously, supported as it is only by inconclusive *dicta* in three cases.[62] It is, however, necessary to point out that the doctrine not only appears to offer to parties otherwise incapacitated the right to confer capacity on themselves by the choice of an appropriate matrimonial home, but also appears to invoke the proposition that the rule will require a prolonged investigation into the question

court required to consider whether the personal law or laws of the parties "would, in the circumstances of the case, permit the petitioner to obtain a [decree] on some other ground" (as in section 1), which considerably simplifies the proof of foreign law.

[58]See, e.g.. *Brook* v. *Brook* (1861), 9 H.L.C. 193; *Sottomayor* v. *de Barros* (1) (1877), 3 P.D. 1 (C.A.)

[59]The decisions in *Sottomayor* v. *de Barros* (2) (1879), 5 P.D. 94 and *Pugh* v. *Pugh* [1951] P. 482 might appear to lead to this conclusion. However, in *In re Paine* [1940] Ch. 46, Bennett, J., relying on *Mette* v. *Mette* (1859), 1 Sw. & Tr. 416, held orally that a marriage between a domiciled Englishwoman and a domiciled German was void on the ground that the wife lacked capacity at English law. But *Mette* v. *Mette* was concerned with the incapacity of the husband at English law, and *In re Paine* appears to be the only decision contrary to the view expressed above, and, indeed, the only case in which the wife's incapacity to marry (as distinguished from the husband's) at English law seems to have been considered in this regard.

[60]Section 4(2).

[61]Section 4(3).

[62]*De Reneville* v. *De Reneville* [1948] P. 100, per Lord Greene, M.R. at 114 and Bucknill, L.J. at 122; *Kenward* v. *Kenward* [1951] P. 124, 144, per Denning, L.J. There are also certain very insubstantial *dicta* of Lord Campbell in *Brook* v. *Brook* (1861), 9 H.L.C. 193, 207.

of the *situs* of the matrimonial home, and especially, the intention of the parties at the time of the marriage. As to the former, possibly some evidence of habitual residence will be required. The latter question is, however, one of some difficulty. It would seem essential that concrete evidence of the parties' intention be given if the rule is not to become merely that the marriage is to be upheld if it is valid by the law of the country where the parties have their home at the time of the proceedings; but in the majority of cases likely to arise it is difficult to see what evidence could be produced.

Theoretically, of course, it is possibly desirable that the law of the country having the closest connection with the parties' married life should be taken into account. This is no doubt a realistic view, since the fact that nullity proceedings have been commenced does not alter the fact that the parties have in fact gone through a ceremony of marriage and have in fact been living together as husband and wife, possibly for a considerable period. What the "matrimonial home" doctrine does not take into account, however, is that the personal law of the parties is surely the only law which has any interest in saying whether the parties can or cannot marry. No amount of insistence on the theoretical or practical advantages of the "matrimonial home" doctrine can avoid the fact that it enables (and possibly even encourages) the evasion of contractual disabilities. It is no justification of the evasion of such a disability to say that the parties are now in fact married, and the jurisdiction in which they intended to set up their home when they evaded their respective contractual disabilities does not recognize those disabilities as a bar to a valid marriage. It is certainly convenient to recognize a *fait accompli,* but this does not make the parties, before the marriage, any more capable of marrying.

The "matrimonial home" doctrine appears also in the Israeli Draft Family Code,[63] but the other provisions of the Code relating to form and capacity should be considered first. The Code provides that[64] the form and validity of a marriage is to be governed by the law of the domicil of the parties at the time of its solemnization; but the marriage of a person domiciled in a foreign country, even though not valid under the law of that country, is valid, firstly, if it is valid under Israeli law, and secondly, if, as regards form, it was solemnized in accordance with the law of the place of solemnization.

It is seen, therefore, that the effect of this provision is:

(1) As regards parties domiciled in Israel[65] at the time of the marriage, the marriage will be regarded as valid in Israel if it is valid as to substance under Israeli law, and if it was celebrated in Israeli form.

(2) As regards parties not domiciled in Israel[65] at the time of the marriage, the marriage will be regarded as valid in Israel if:

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[63] §.194, considered *post,* p. 58..

[64] §.190.

[65] As to the effect of the "matrimonial domicil" doctrine incorporated into the Code by §.194, see *post.* p. 58..

(*a*) it is valid as to substance under Israeli law, and was celebrated in Israeli form; or

(*b*) it is valid as to substance under the *lex domicilii* of the parties at the time of the marriage, and is also valid as to form under that law; or

(*c*) it is valid as to substance by the *lex domicilii* of the parties, and valid as to form under the *lex loci celebrationis.*

One of the considerable advantages of a provision such as this is that the necessity to distinguish between form and substance in marriage is largely done away with, and in fact arises only in a case where the marriage is valid as to substance by the law of the parties' domicil, but is not valid as to form either under that law or Israeli law, where the parties are at the time of the marriage not domiciled in Israel. The distinction between form and substance has always been a problem of some difficulty in England, and, understandably, one of rather greater difficulty in Jewish law.[66] However, the danger of "limping marriages" arising from a disregard of the requirements of the foreign form cannot be dismissed lightly. The drafters of the Code give as an example the case of a Jewish citizen and resident of France, who has married there according to Jewish law (and only according to Jewish law) who cannot allege in Israel, under the provisions of the Code, that the marriage is invalid.[67] It is not suggested that a rule leading to such results is not morally desirable both in and out of the Israeli context, but a situation in which a man is regarded in France as unmarried but regarded in Israel as married is one which private international law should, it is suggested, be aimed at avoiding. The fact that there are many cases in this particular field of private international law in which conflicts rules do not avoid such situations does not mean that this result is desirable either from the point of view of comity or from the point of view of certainty.

What would appear to be a further disadvantage in this type of provision is that it requires Israeli domiciliaries, wherever they marry, to marry according to Israeli form.[68] In Israel there is no form of civil marriage available for

[66]The interesting decision of the Israeli Supreme Court in *Hershenhorn* v. *The Attorney-General* (Criminal Appeal 54/54) 8 Piskei Din 1300 provides a good illustration.

[67]Draft Family Code, Comment, p. 217.

[68]"Residents [sic] of this country cannot marry otherwise than in the form recognized by Israeli law, and that is the religious form. Celebration of the marriage abroad does not relieve from compliance with this form; but where this form has been complied with, the marriage will be recognized in Israel even though it was not solemnized in accordance with the law of the place of its celebration:" *ibid.* This does not, of course, mean that the only form of marriage recognized in Israel is the Jewish form, but the position is that a marriage must be celebrated by the religious functionaries of the various communities, and section 182 of the Criminal Code Ordinance, as amended by the Marriage Age Law, 5710-1950, prohibits the solemnization of a marriage otherwise than in accordance with the law applicable to the parties. Oddly enough,

persons who do not belong to any particular religious community,[69] and while such a provision is entirely appropriate as regards the Jewish community, one effect of it seems to be that persons domiciled in Israel who have no particular religious convictions, or do not belong to any particular religious community are obliged, if they wish to marry outside Israel, to marry according to some religious form which is in the closest accordance with their beliefs, if any. Rule 4(*b*) of the Personal Status (Consular Powers) Regulations 1922, which enables the Consuls of foreign countries in Israel to perform marriage ceremonies is hardly, of course, of any help. The difficulties of such a situation need not be stressed. It is no doubt convenient to have a provision the effect of which is that the marriage of a person domiciled in Israel is valid in Israel if, had it been celebrated in Israel in the form in which it was celebrated elsewhere, it would have been a valid marriage, but what it is intended to indicate here is that it may be difficult, in some cases, for persons who wish to marry outside Israel, yet are domiciled there, to find a form which will meet Israel's rather stringent requirements.[69a]

It will be recalled that under the proviso to section 4(3) of the Royal Commission's Draft Code, the validity of a foreign marriage could, as far as substance is concerned, but need not necessarily, turn on the question whether

there is no provision in the Draft Family Code expressly covering this topic, although what has been said above is possibly reinforced by §.37 of the Code, which provides that no person is authorized to celebrate a marriage unless a notice to that effect is published in the Official Gazette.

[69]See note 68 above. There is, however, provision for the celebration of marriages by the Consuls of foreign countries: Personal Status (Consular Powers) Regulations 1922, Rule 4(*b*).

[69a]Indeed, even in Israel itself, under the existing law it is almost impossible for parties of different religious faiths to marry. The difficulty is particularly acute in cases where one of the parties is Jewish, and stems from a desire for strict adherence to religious law. It is thought that any relaxation of the present law, such as the provision of a form of civil marriage to meet cases either where a religious marriage is impossible, or is not desired by the parties, would lead to even greater difficulties within the ranks of the Jewish community: under Jewish religious law, the issue of a marriage "unsanctified by God", whether or not both parties are Jewish, is not legitimately Jewish and cannot marry a true Jew. Such a result is certainly unfortunate, and the political entity responsible for emphasizing it is the United Religious Front, which is strongly opposed to any form of civil marriage or any relaxation of the religious law. It is a little difficult to see what vital interest the United Religious Front could have in the marriages of non-Jews, however, and it is surprising that the strictness of Israeli law in this particular field has not been relaxed to meet at least the hardship imposed on non-Jewish persons domiciled in Israel. There are, however, other political entities in Israel which consider that everyone, whether Jewish or not, should have a free choice between a civil or a religious marriage, and that it is essentially immoral to insist that an agnostic or nonconformist take marriage vows "according to the laws of God and Moses" when he does not believe in those laws. The question is really a political one, and no doubt in the course of time it will be possible to arrive at a solution which will overcome the present unsatisfactory position.

it was valid according to the law of the country where the parties at the time of the marriage intended to make their matrimonial home, and had carried out their intention; however, if the marriage in question was valid in form under the *lex loci celebrationis,* and valid as to substance by the law of the domicil of both parties, the question of their intended matrimonial home would not arise.[70]

On the other hand, in view of the manner in which the "intended matrimonial home" doctrine is brought into the Israeli Draft Family Code by §.194, the difficulties in regard to the doctrine mentioned earlier[71] are likely to arise in a far greater proportion of cases. This, in turn, arises from the rejection, in the Code, of the notion of the wife's "derivative" domicil.[72]

It is provided by §.194 that, where spouses have different domiciles, and where the time of the celebration of the marriage is controlling, the law of the place "which at that time was the intended joint domicil of the spouses" shall apply in all matters determined by the law of the domicil.[73]

In a large number of cases involving foreign marriages, it is not unlikely that the husband and wife will have different domiciles at the time of the marriage. In all such cases it may appear to some to be rather alarming that the validity of such a marriage in Israel will depend, not on whether it is valid by the law of the parties' respective domiciles, but on whether it is valid by the law of their intended joint domicil. It is not difficult to conceive of instances where it may happen that there is no impediment of any sort to the marriage by the law of either party's domicil, yet the marriage may be regarded as void if the country where they intend to establish the centre of their life, and is consequently void in Israel.

An example which could readily become reality would be that of a husband and wife, not Jews, to whose marriage there was no impediment either in substance or in form by the laws of their different domiciles, whose intention it was to immigrate to Israel and set up their home there after their marriage, yet who had not gone through a ceremony of marriage recognized by Israeli law. In such circumstances, it is clear that the marriage would not be recognized in Israel for the reason that under §.194 the parties' domicil at the relevant time would be Israel, and the marriage was not one coming within the terms of §.190. It is hard to find any justification for this type of consequence: indeed, it is not shown in the brief Comment to §.194 that such a consequence was envisaged by the drafters of the Code.[74]

It has already been pointed out[75] that the use of the "intended matrimonial home" doctrine is, under the Royal Commission's Draft Code, more or less

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[70]The provisions of section 4 of the Royal Commission's Draft Code are stated *ante.*p. 54

[72]Draft Family Code, Comment, p. 28. And see discussion, *ante.* p. 50.

[73]§.194(1). The provisions of §.194(2) are not relevant to this discussion.

[74]See Draft Family Code, Comment, p. 222.

[75]*Ante.* p.58..

a device of last resort, so to speak, when all other tests of the substantive validity of the marriage have failed. It is suggested that in view of the evidentiary and other difficulties of the doctrine, already discussed, if it must be employed at all it is infinitely preferable that it be employed in this limited way, rather than indiscriminately and automatically in all cases where parties of different domiciles marry. One of the advantages of the use of the doctrine under the Royal Commission's Code is that it may operate to sustain the validity of a foreign marriage whether or not the parties had different domiciles at the time of the marriage. The Israeli Draft Code, in restricting and at the same time (in effect) broadening the application of the doctrine to cases where the parties have different domiciles, loses this very real advantage. The truth of the matter is, probably, that the drafters of the Israeli Code intended §.194 only as machinery for ascertaining domicil in itself, and did not consider the possibility of going beyond this aim to a wider view of the section's effects in the field of recognition of the validity of foreign marriages.

IV. Recognition of foreign divorces.

This topic is one in which the views expressed depend largely on the extent to which it is thought desirable that divorces obtained by a wife as petitioner on the basis of her separate residence or domicil should be recognized. At common law a foreign divorce could not be recognized unless the marriage had been dissolved by the courts of the husband's domicil,[76] or, if dissolved by the courts of some other country, unless the courts of the country of the husband's domicil would recognize the marriage as having been effectively dissolved.[77] A few years ago this rule was extended, enabling the courts to recognize foreign divorces granted on the basis of the wife's residence or separate domicil, if the foreign court had assumed jurisdiction on a basis substantially similar to that on which the English (and therefore also, presumably, the Commonwealth) courts assume jurisdiction in such an instance.[78] Such a basis is apparently continuous residence at least for two years or upward.[79]

Under this rule it is, of course, possible for a husband domiciled in, *e.g.*, England, to obtain a Nevada divorce on the basis of six weeks' residence, resulting in his "domicil" there, and the decree would presumably be recognized in England.[80] A similar result would follow in the case of a wife, whose husband

[76]*Le Mesurier* v. *Le Mesurier* [1895] A.C. 517.

[77]*Armitage* v. *The Attorney-General* [1906] P. 135.

[78]*Travers* v. *Holley* [1953] P. 246 (C.A.).

[79]*Dunne* v. *Saban* [1955] P. 178.

[80]But it seems that the test of his "domicil" in Nevada is the test of domicil at English law: see, on this point *Bater* v. *Bater* [1906] P. 209; *Crowe* v. *Crowe* [1937]. 2 All E.R. 723; *Walker* v. *Walker* [1950]. 2 W.W.R. 411, [1950], 4 D.L.R. 253 (British Columbia Court of Appeal); and see also *Bonaparte* v. *Bonaparte* (*orse. Megone*) [1892] P. 402; *Drake* (*orse, MacLaren*) v. *Drake* [1929], 2 W.W.R. 87, [1929], 3 D.L.R. 159.

is domiciled in a country where Nevada decrees obtained on the basis of a wife's separate domicil are recognized.

It is presumptuous, of course, to look on all Nevada divorces as necessarily bad and undesirable: it would seem, however, that when they are granted to persons whose sole aim in residing in Nevada at all is to get a divorce without what they regard as any delay apart from that resulting from Nevada's six weeks residence requirement, the country in which such persons are in reality domiciled is entitled to say whether or not it will regard such a decree as validly dissolving a family unit with whose welfare it, and it alone, is in reality concerned. This is in fact the position which up to now English and Commonwealth courts appear to have adopted,[81] by insisting that the husband[82] must have been domiciled in the jurisdiction granting the decree in the English sense.[83]

This, it would seem, is an adequate safeguard against the recognition of "tourist" divorces in English and Commonwealth courts. It is true that in the *Armitage* v. *The Attorney-General*[84] type of situation the English court is, in effect, obliged to recognize this type of divorce, but there can hardly be any complaint here, as the divorce is in fact being recognized because it would be recognized by the courts of the husband's domicil.

Section 7 of the Royal Commission's Draft Code not only embodies the existing law as stated above, but on one interpretation broadens it almost beyond recognition. Under its provisions the court must

> . . . recognize as valid a divorce, obtained by judicial process or otherwise,
> (*a*) which has been granted in accordance with the law of the country in which one spouse was, or both spouses were, domiciled at the time of the proceedings, or which would be given recognition by the law of that country; or
> (*b*) which has been granted in accordance with the law of the country of which one spouse was a national, or both spouses were nationals, at the time of the proceedings, or which would be given recognition by the law of that country; or
> (*c*) which has been granted in circumstances substantially similar to those in which the court in England exercises divorce jurisdiction in respect of persons who are not domiciled in England . . .

There is, on the face of it, nothing unduly novel about this provision. The basis for recognition under the first part of paragraph (*a*) of the section is still domicil, and on a first reading this word might be taken to be used in the

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[81]See the cases cited in note 80, above, from which it also appears that the motive in acquiring the domicil in the jurisdiction in which the decree is granted is immaterial. The fact that the domicil has been acquired in the English sense appears to be the only relevant consideration.

[82]What is said in this sentence does not, of course, apply to the type of situation considered in *Armitage* v. *The Attorney-General* [1906] P. 135.

[83]Thus, in *MacDonald* v. *Nash* [1929], 2 W.W.R. 84, [1929], 4 D.L.R. 1051, and in *Drake* (*orse. MacLaren*) v. *MacLaren* [1929], 2 W.W.R. 87, [1929], 3 D.L.R. 159, it was held that residence in Reno sufficient to found jurisdiction in the Nevada courts, but for the sole purpose of obtaining a Nevada divorce, was insufficient to give the Nevada court jurisdiction (in the Canadian sense) to grant the decrees.

[84][1906] P. 135.

English sense; the second part of the paragraph on its face restates the principle in the *Armitage* case,[86] and on this reading of the paragraph no comment is called for. Paragraph (*b*) recognizes, on a first reading, nationality as a jurisdictional requirement, embodies the existing law in regard to it, and also applies the *Armitage* principle. It is hard to find any real objection to this. Paragraph (*c*) seemingly restates the rule in *Travers* v. *Holley*[87] and here, again, no comment is called for.

On a closer study, however, the section reveals pitfalls and traps for the unwary which may not have been within the contemplation of the Royal Commission. Firstly, paragraph (*a*) expressly refrains from saying that the "one spouse" who must have been domiciled in the country where the decree was made must be the husband, and it seems to follow that the Commission must have intended that divorces based on the wife's separate domicil should be recognized. But this is impossible if "domicil" is read in the English sense, since the English common law rule has always been that a wife cannot, during the subsistence of the marriage, obtain a domicil apart from that of her husband, and no foreign decree obtained on such a jurisdictional basis will be recognized in England, unless it falls within the *Armitage* or *Travers* v. *Holley* rules, which are inapplicable here. It can hardly be asserted that the construction of the word "domicil" in paragraph (*a*) is to depend on whether the husband or the wife was the petitioner, and it is suggested that the conclusion must be drawn that the word is to be construed in the sense in which it was used by the foreign court granting the decree. It would appear to follow that in many, if not all, cases arising under paragraph (*a*) the court could not go behind the foreign court's exercise of jurisdiction on the basis of the foreign court's notion of domicil, and it therefore further follows that paragraph (*a*) alone has dealt a death-blow to any protection whatever that now exists against the recognition of "tourist" decrees, and in fact throws the door wide open for their recognition in England. Whether or not this result was intended, its evils are obvious, and they are dealt with briefly later.[88]

Secondly, in paragraph (*b*), although the recognition of decrees based on the jurisdictional fact of nationality is no doubt a desirable relaxation of the common law rule, it is to be noted that nothing whatever is said in the paragraph about nationality as a jurisdictional fact. Apparently it was thought desirable that foreign decrees should be recognized, no matter on what jurisdictional basis they were granted, provided the petitioners happened to have been nationals of the country granting them. This leads to the result that a wife who is an American national, married to a domiciled Englishman, can at any time, at the expense of a visit to one of the United States which operates

[86][1906] P. 135.
[87][1953] P. 246.
[88]*Post.* p.62 . . .

a "bargain-counter divorce mill for profit",[89] and perhaps a little perjury as to her domicil, obtain a decree recognized in England solely due to the coincidence of her American nationality. It is doubtful whether the most ardent English reformer would consider such a position desirable, even disregarding the fact that a view which leads to such a result flies in the face of stated English policy in such matters.[90]

Nor must it be overlooked that the enactment of paragraphs (*a*) and (*b*) appear on the interpretation suggested here to constitute an open invitation to disaffected English husbands and wives to go abroad in search of divorce decrees which may be obtained without any undue delay on grounds such as "mental cruelty" (which is a favourite choice in the more popular American divorce states) or "incompatibility of temperament" with which an inconsiderate English legislature does not provide them. This may, of course, be a desirable result, but it might be thought that a marriage between parties who are to all intents and purposes domiciled in England would be one in which the English, and only the English, courts or legislature have a legitimate interest.

It is unnecessary to comment on paragraph (*c*) at any length: this substantially restates the rule in *Travers* v. *Holley*,[91] but enlarges it to include the new English jurisdictional requirements advocated in the earlier sections of the Draft Code. What has already been said about these sections[92] applies here also, but it is desirable to add that the evidentiary problems inherent in those sections are not to any degree lessened by being, so to speak, once removed.

Section 7 of the Draft Code[93] is obviously drafted with a view to encouraging the reciprocity with other countries which the Commission considered desirable. It is, however, possible to be reciprocal without being indiscriminate, whether largely indiscriminate recognition of foreign decrees was intended or not.

The corresponding provisions of the Israeli Draft Family Code are far from indiscriminate, and merit the closest scrutiny. It is provided, firstly, that

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[89]This pungent phrase is borrowed from Joseph Dainow, *Policy Considerations in Divorce Jurisdiction and Recognition*, 10 Louisiana L. Rev. 54 (1949).

[90]" . . . the interest of the community at large [is] to be judged by maintaining a true balance between respect for the binding sanctity of marriage and the social considerations which make it contrary to public policy to insist on the maintenance of a union which has utterly broken down": *Blunt* v. *Blunt* [1943] A.C. 517, 525, *per* Viscount Simon, L.C.; "The Divorce Court does not exist for the purpose of promoting the dissolution of marriages but for the purpose of discharging the painful duty of dissolving them when all reasonable hope of reconciliation between the parties has come to an end": *Cohen* v. *Cohen* [1940] A.C. 631, 645, *per* Lord Romer.

[91][1953] P. 246.

[92]See *ante*. p. 42.

[93]Section 8, dealing with recognition of foreign decrees of nullity, is in substantially the same terms and to the same effect.

"divorces shall be governed by the law of the place of the domicil of the spouses at the time of the divorce, but the divorce of a foreign resident obtained abroad, even though invalid by the law of domicil, shall be valid if valid according to the law of Israel."[94] "Divorce" is defined as including annulment and dissolution of marriage and judicial separation.[95]

It is seen that in its extraterritorial effects this provision cannot be criticized on the grounds on which the corresponding provisions of the Royal Commission's Draft Code may be attacked. Bearing in mind the concept of domicil introduced elsewhere in the Draft Family Code,[96] it is clear that a foreign divorce will be recognized under §.193 only if it is based on the jurisdictional fact of the petitioner's "centre of life", or if it is valid according to Israeli law. The protection against recognition of "tourist" decrees is therefore present, and may indeed be stronger than the existing English rule, as an Israeli court, in considering whether a petitioner has acquired a "centre of life" in the foreign jurisdiction will presumably, in most cases, incorporate the petitioner's motive in settling within that jurisdiction as an essential ingredient of domicil.[97] The problem dealt with in *Travers* v. *Holley*[98] does not of course arise, as there is no bar under the Israeli Code to a wife acquiring a separate domicil in the Israeli sense.

An even more important, and it is suggested highly desirable, provision in regard to this topic is contained in §.186, with which §.193 must be read:

> A foreign judgment concerning marriage or divorce or any other determination or change of personal status shall be recognized in Israel upon confirmation by an Israeli Court, in such manner as shall be prescribed by regulations, that the following conditions are complied with:
> (1) the court which gave the judgment had jurisdiction to do so under the law of its country and the judgment is a final decision according to that law;[99]
> (2) the judgment was not obtained in evasion of the jurisdiction of another court or religious tribunal[100] and was not given without affording both parties an opportunity to be heard;
> (3) the procedure of obtaining the judgment and its contents are not contrary to the policy of Israel.

On the assumption that the state in which persons have (to use the Israeli term) the centre of their lives is the only jurisdiction having any real interest in whether or not marriages between such persons should or should not be

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[94] §.193.

[95] *Ibid.*

[96] §§.28, 30, 31, considered *ante.*

[97] The test adopted is, according to the drafters of the Code, objective: see Comment, p. 27, cited in footnote 17.

[98] [1953] P. 246.

[99] This subsection must, it is suggested, be read with §.193, cited *ante.* See, however, *post,* note 102.

[100] In Israel, the religious tribunals have exclusive jurisdiction in matters of divorce: see, *e.g.,* in regard to the Jewish community, the provisions of the Rabbinical Courts Jurisdiction (Marriage and Divorce) Law, 5713-1953; and see also the Palestine Orders in Council, 1922-1947.

dissolved, it is seen that the provisions of the section contrain much of considerable value. For example, under §§.186 and 193, read together,[101] the evasion of the divorce requirements of such a jurisdiction by means of a quick visit to another with more relaxed rules is rendered almost impossible. Not only must the foreign court have had jurisdiction under foreign law, but its country must have been the centre of the parties' lives at the relevant time.[102] Further, even if that country was in fact at that time the centre of the parties' lives, the decree will not be recognized if it was obtained by an evasion of (presumably) the requirements of the country or the state which could be said to have a legitimate interest in the regulation of the marriage relation.[103] Even if this requirement is satisfactorily disposed of, the decree will still not be recognized if the manner of obtaining it is contrary to the policy of Israel.[104]

It is seen that these requirements are stringent, yet there should be no difficulty in meeting them in *bona fide* cases. What is certain is that requirements such as these achieve an infinitely more satisfactory result than the vague and indiscriminate nature of the requirements (if they can be called such) of section 7 of the Royal Commission's Draft Code.

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[101]See *post*, note 102.

[102]This was apparently not the intention of the Code's drafters, but it is submitted that this result follows from §.193, cited ante, p. ... See Comment to §.186, Draft Family Code, pp. 212, 213: "In this country the foreign court was required to have jurisdiction both under the rules of Israel and of the foreign country . . . The Bill does not require more than jurisdiction under the law of the foreign country.

"'The law of its country' means the rules of that country which define the jurisdiction of its courts. . . .

" . . . Under the proposed Section, an order of adoption given in Florida will accordingly be recognized in Israel if the parties were resident there for three months (as required by Florida law) even though their domicil . . . was elsewhere.

" . . . If this is a liberal approach, the necessary safeguard appear in Clause (2); The Israeli Court will recognize the judgment only if it appears that they merely 'concocted' the jurisdiction of the Florida courts and evaded that of another court (foreign or Israeli) recognition will be refused."

It is possible, however, that §.186, standing alone, is sufficient without any reference to §.193, and achieves a result similar to that which follows if both are read together. An advantage of excluding §.193 from the operation of §.186 is that, probably, reciprocity would be encouraged. A disadvantage of following this course is that it excludes, technically at least, the legitimate interest Israel may have in the continuance of a marriage of its domiciliaries.

[103]See Draft Family Code, Comment, p. 213: "The word 'evasion' implies fraud, *'fraude à la loi'*; this will authorize the Court to disregard a foreign judgment not only where 'concoction' or abuse of the foreign jurisdiction constituted an evasion of the jurisdiction of an Israeli court or tribunal, but also where the evasion is of the jurisdiction of a third country."

[104]By "policy" the drafters of the Code mean "the basic values accepted in Israel"; Comment, p. 213. The Comment continues. "These values are part of the concept of public policy (*'ordre public'*) which cannot be defined and must receive its meaning through judicial precedents."

If, in the course of this article, the impression has been given that the writer's view is that on the whole the Royal Commission's Draft Code, as compared with the conflicts sections of the Israeli Draft Code, is of markedly inferior quality, such an impression should be corrected now. It is quite obvious that the conflicts sections of the Israeli Code contain provisions which, if grafted on English law, would involve far more radical change than it is likely that anyone would want. The principal objections raised here to the provisions of both Codes have been mainly objections to the policies sought to be implemented, and on this matter there can of course be different views. What it has been sought to suggest, however, is that the drafters' approach to their preparation of the Israeli Code is, in comparison with that which seems to have been adopted by the Royal Commission, likely to lead to very much more productive results.

There is every indication that the Royal Commission has studied the existing English law of divorce jurisdiction and recognition with scrupulous care, and indeed one would not expect the position to be otherwise. It must be said, however, that the disadvantages of preparing a new body of law by endeavouring to patch, sew up, repair, and fill the gaps in the old body of law are made glaringly manifest by some of the results which it may be conjectured would follow were the Royal Commission's Code to become law. The effect of pouring new wine into old bottles is frequently more drastic than is really desired, and the sections of the Draft Code dealing with the recognition of foreign divorce decrees is an admirable example in point. It is true that the rules of private international law are frequently said to be based on the comity of nations, but comity among nations is not necessarily achieved by a hectic striving for reciprocity at the expense of domestic policies built up over generations.

It has already been pointed out that the main interest in the Israeli Draft Family Code lies in the fact that it is an extremely valuable experiment in comparative law, and is an outstandingly successful synthesis of what its drafters regarded as the best features of a large number of foreign codes and foreign bodies of law in which they had been trained and within whose framework they had worked. It is refreshing to note that, in spite of this, the drafters are not prepared to abandon certain fundamental policies as a sop to attract reciprocity in other jurisdictions.

It is hoped from what has been said that it will appear that some of the suggested measures appearing in the Israeli Draft Code deserve the most careful scrutiny and consideration, and that some of the measures advocated in the Royal Commission's Code deserve the most careful scrutiny and reconsideration. It is not likely that it will ever be suggested that our own law, and our own legal concepts, are "so good and so right"[105] that we cannot afford to learn from others.

[105] *Per* James, L. J., in *In re Goodman's Trusts* (1881), 17 Ch. D. 266, 299.