[HIGH COURT OF AUSTRALIA.]

MILLER . . . . . APPELLANT;
PETITIONER,

AND

TEALE . . . . . RESPONDENT.
RESPONDENT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *Sept.* 8; *Nov.* 23.

Dixon C.J., McTiernan, Fullagar, Kitto and Taylor JJ.

Matrimonial Causes—Nullity—Prior marriage—Dissolution by foreign court of domicile—Order absolute—Remarriage whilst time for appeal against order absolute unexpired—Validity of second marriage.

Private International Law—Capacity to remarry—Restraint imposed by law of State dissolving prior marriage—Recognition—Extra-territorial effect—Domicile—Choice of law.

Time—Two acts done on one day—Judicial act—Priority.

The appellant and the respondent went through a ceremony of marriage in Grafton, New South Wales, on the same day as the order nisi for dissolution of the respondent's prior marriage was made absolute in Adelaide, South Australia. The order absolute was made in the morning and the ceremony of marriage took place in the afternoon. The appellant subsequently sought a decree of nullity in the Supreme Court of New South Wales on the ground that, at the time of the ceremony, the respondent was incapable of contracting a valid marriage. The suit was dismissed. On appeal:

Held, that the respondent at the time of the ceremony was incapable, according to the law of New South Wales and by reason of the application of the *Matrimonial Causes Act* 1929 (S.A.), s. 17, of contracting a valid marriage.

Where the law under which a decree absolute is granted imposes a restraint on both parties to such decree merely to provide against a remarriage before the time for appeal against such decree has expired, such restraint is regarded as a temporary qualification of the effect of the decree and as entitled to extra-territorial recognition when the question arises whether the parties to

the marriage are yet remitted finally and in all respects to the status of unmarried persons with all the capacity of that status.

Warter v. *Warter* (1890) 15 P.D. 35, applied; *Pezet* v. *Pezet* (1946) 47 S.R. (N.S.W.) 45; 63 W.N. 238, disapproved.

Decision of the Supreme Court of New South Wales (*Nield* J.), reversed.

APPEAL from the Supreme Court of New South Wales.

The respondent was first married, on 30th December 1913, to one Teale at Gilberton, South Australia. The parties to the marriage were both resident and domiciled in that State. On 4th March 1931 the husband was granted an order nisi for dissolution of the marriage on the ground of the respondent's desertion for a period of five years from June 1925. The order was made absolute on Saturday, 5th September 1931. After leaving her husband the respondent went to New South Wales, where she continued to live, working as a travelling saleswoman and using her maiden name of Fraser. She met the appellant in "the middle of 1930", and he, shortly afterwards, asked her to marry him. She told the appellant that she had been married previously, and had two children; she also said that she had been separated for some years, but that a divorce was going through, and it would be all fixed up long before the date of the marriage. On being asked by the appellant about her use of the name Lila Fraser, she said that she had traded in that name for some years, but would have it legally attended to immediately by deed poll. The date of the wedding was fixed—5th September 1931. On 22nd May 1931 the respondent executed a declaration renouncing the use of the name Priscilla Maud Teale and adopting the name Lila Fraser. The declaration was deposited in the General Registry Office for the State of South Australia on 29th May 1931. The ceremony of marriage between the appellant and the respondent took place on the day appointed at Grafton, New South Wales. They separated in 1946. On 1st June 1953 the appellant filed a petition for nullity in the Supreme Court of New South Wales. The issues were:—1. Whether Priscilla Maud Teale known as Lila Fraser the respondent was married to one Thomas Frederick Teale prior to 5th September 1931? 2. Whether a ceremony of marriage was performed between the petitioner and the respondent on 5th September 1931? 3. Whether on 5th September 1931 the date of the performance of the marriage ceremony the subject of the second question the said Thomas Frederick Teale was alive and was the lawful husband of the respondent? On the hearing of the petition the respondent did not appear. *Nield* J. dismissed the petition, answering the first two questions in the

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affirmative, and the third as follows :—That on 5th September 1931 the date of the performance of the marriage ceremony the subject of the second question the said Thomas Frederick Teale was alive but that the petitioner had not sufficiently proved that on 5th September 1931 the said Thomas Frederick Teale was the lawful husband of the respondent.

From this decision the petitioner appealed to the High Court.

Noel McIntosh Q.C. (with him *J. O. Baldock*), for the appellant. The trial judge found that both parties were domiciled in New South Wales at the time of the marriage. The respondent had a domicile in South Australia at least up to the moment of remarriage. If the domicile of the respondent was still in South Australia at the time of the marriage, the marriage would not have been valid because she had a personal incapacity according to the law of her domicile. Under s. 28 of the *Matrimonial Causes Act* (N.S.W.) 1899-1951 the right of remarriage is conferred only on persons divorced by New South Wales courts. If the divorce takes place out of New South Wales there is no right to remarry in this State. In South Australia the position is similar—*Matrimonial Causes Act* 1929 (S.A.), s. 17. The fact of a dissolution does not give a right to remarry. Originally a marriage was indissoluble. Statutes later gave rights to remarry. There was no general right to remarry after a dissolution unless there was a statutory right. The law in South Australia and New South Wales as to remarriage after decree or order absolute is the same. The State of New South Wales should give full faith and credit to the laws of South Australia : *State and Territorial Laws and Records Recognition Act* 1901-1950 (Cth.), s. 18. If the South Australian section means that the respondent may remarry in South Australia after order absolute, one position would apply ; if it means that remarriage may take place anywhere after three months, it would apply in New South Wales. If the view is accepted that the law of South Australia should not be recognized, the South Australian section could have no bearing on the point if she is domiciled in New South Wales. If she is not domiciled in New South Wales the marriage (if in South Australia) would not have been valid. The only evidence of domicile is that the respondent had a South Australian domicile of origin, a husband domiciled in that State, and had lived in New South Wales for some time. There is no evidence that she expressed any intention of changing her domicile. The trial judge found that the order absolute in South Australia changed her domicile, without her knowledge of it, by reason of the fact that she had come to New

South Wales with the intention of making her permanent home there. The order absolute must depend on an Act of Parliament. It is a record and could be a judicial proceeding. Section 18 of the *State and Territorial Laws and Records Recognition Act* 1901 should be applied to s. 17 of the *Matrimonial Causes Act* (S.A.) 1929. The South Australian section gives power to persons divorced in South Australia to remarry in certain circumstances. There is no other power to remarry. *Emanuel* v. *Emanuel* (1) decided that s. 28 (1) (a) of the *Matrimonial Causes Act* 1899-1951 prohibits remarriage within the time limited for appeal against the dissolution. The South Australian section gives a power to remarry. If full faith and credit be given to the South Australian law, the respondent could not remarry at the time. [He referred to *Pezet* v. *Pezet* (2).] In *Warter* v. *Warter* (3) the domicile was considered to persist. It was held that the law involved was not a penal law. What is prohibited is remarriage. [He referred to *Travers* v. *Holley* (4); *Latey* on *Divorce*, 14th ed. (1952), at pp. 360, 365; *Marsh* v. *Marsh* (5).]

There was no appearance for the respondent.

Cur. adv. vult.

Nov. 23.

The following written judgments were delivered:—

DIXON C.J., McTIERNAN, FULLAGAR AND TAYLOR JJ. This is an appeal from a decree of the Supreme Court of New South Wales in its matrimonial causes jurisdiction dismissing a suit for nullity of marriage. It is a husband's suit and the ground of the petition for a decree of nullity was, in effect, that at the time when the parties went through the ceremony of marriage it was not competent for the wife to contract a marriage because she had been previously married and, although a decree absolute for the dissolution of the prior marriage had been made, the ceremony took place before the expiration of the period within which neither party was permitted by law to remarry: cf. *Emanuel* v. *Emanuel* (1); *Re Dawson* (6); *Owens* v. *Owens* (7).

The facts are peculiar. The prior marriage was contracted in South Australia. It was solemnized at Gilberton, Adelaide, on 30th December 1913, both parties thereto then residing, and doubtless being domiciled, in that State which seems to have been their

(1) (1943) 60 W.N. (N.S.W.) 182.
(2) (1946) 47 S.R. (N.S.W.) 45, at pp. 49, 54, 68; 63 W.N. 238.
(3) (1890) 15 P.D. 152.
(4) (1953) P. 246, at pp. 250, 251, 256.
(5) (1945) A.C. 271, at p. 278.
(6) (1948) 65 W.N. (N.S.W.) 91.
(7) (1944) S.A.S.R. 154.

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domicile of origin. In June 1925, as was held by the Supreme Court of South Australia, the wife, the now respondent, deserted the husband of that marriage. On 4th March 1931 he obtained an order or judgment nisi from the Supreme Court of South Australia for dissolution of the marriage on the ground of his wife's desertion for five years. His domicile remained South Australian and of course her domicile was the same as his. She had, however, in the meantime done all that would have been necessary to acquire a domicile of choice in New South Wales, had she possessed capacity to acquire an independent domicile. After deserting her husband she went to New South Wales where she lived and worked, outwardly manifesting sufficient appearance of regarding that State as providing her permanent home. She resumed her maiden name and under that name engaged in the occupation of a travelling saleswoman. In the year 1930 the now appellant met her and after a time proposed marriage, a proposal she accepted. She explained to him that she had previously married in South Australia, that she had been separated from her husband for some years and that a divorce was to take place. In May 1931, that is after the order nisi for dissolution had been granted in South Australia, she executed a formal document or documents to adopt the name she used and a copy of such a document was deposited in the General Registry Office of South Australia. But that proceeding probably meant no more than that she desired to be identified as the party to the divorce suit pending in the Supreme Court of South Australia. It did not mean that her intention to live in New South Wales wavered or weakened. She fixed Saturday, 5th September 1931, as the day for her wedding with the appellant and the ceremony was performed at Christ Church Cathedral in Grafton on that day. As will appear, the hour at which it took place might be important and unfortunately it is not fixed by the evidence. However, the learned judge who heard the suit thought that it should be assumed that it took place in the afternoon and, for the appellant, it was conceded that even upon a rehearing of the suit he could not show that the assumption was wrong. In fixing 5th September 1931 as the wedding day the respondent said that by that time her divorce would be completed. But in fact it was not until that very day that the order nisi for dissolution granted on 4th March 1931 was made absolute in the Supreme Court of South Australia. As it was a Saturday it may be taken as certain that it was in the morning that the order nisi was made absolute. The result of making the order absolute was to dissolve the marriage at latest from the point of time when that judicial act was done. 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. "In cases between subjects, there is no doubt that priority of events which have occurred on the same day may be inquired into when it becomes material." —per *Parke* B., *R.* v. *Edwards* (1). It may be, however, that the making of the order absolute should be regarded as a judicial act and therefore as dating from the commencement of the day. "The doctrine that judicial acts are to be taken always to date from the earliest minute of the day in which they are done stands upon ancient and clear authority."—per *Coleridge* J. for the Exchequer Chamber: see *Edwards* v. *Reginam* (2); *Wright* v. *Mills* (3); *Thompson* v. *De Lissa* (4); *Re Warren*; *Ex parte Wheeler* v. *Trustee in Bankruptcy* (5). This rule, as part of the law of South Australia, probably is applicable in a New South Wales forum with respect to a judicial act in the former State affecting the status of persons who at the actual time it was done were there domiciled. But in any case this Court should act on the view adopted by the learned judge who heard the suit since the appellant finds himself unable to show that it did not correspond with the facts and should proceed on the basis that the marriage ceremony took place in Grafton in the afternoon and the order absolute was made in Adelaide in the morning.

Now the consequence which South Australian law attached to the order absolute for the dissolution of marriage was stated by the *Matrimonial Causes Act* 1929 of that State. In terms it operated immediately to dissolve the marriage and therefore to remit the parties to the marriage to the status of unmarried persons. But s. 17 of the Act provided that the parties to a marriage may remarry after the expiration of three months from the order absolute or upon the dismissal of any appeal against that order, whichever may happen last.

The purpose of this provision appears to have been to prevent or incapacitate the parties to a marriage dissolved by an order absolute from contracting another marriage until the time for appealing against the order absolute for dissolution had expired or, if there were such an appeal, until the appeal had been disposed of. On the surface of s. 17 the connection between the period of three months named and the time within which an appeal might be brought may not appear. But an examination of the history of the legislation previously in force suggests strongly that it must

(1) (1853) 9 Ex. 32, at p. 53 [156 E.R. 14, at p. 23].
(2) (1854) 9 Ex. 628, at p. 631 [156 E.R. 268, at p. 269].
(3) (1859) 4 H. & N. 488 [157 E.R. 931].
(4) (1881) 2 N.S.W.L.R. 165.
(5) (1938) Ch. 725, at pp. 737-739.

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have been so. In South Australia an appeal existed to an anomalous Court of Appeals consisting of the Governor and members of the Executive Council, except law officers. Originally this local Court of Appeals was established by s. 16 of Ordinance No. 5 of 7 Wm. IV but that ordinance and others amending it were consolidated by Act No. 31 of 1855-1856. In that Act s. 18 constituted the Court of Appeals. It was confirmed and made a court of record by Act No. 5 of 1861. Act No. 15 of 1865, s. 1, empowered the Court of Appeals to receive and hear appeals from the judgments, decrees, orders and sentences of the Supreme Court in all cases. Before the enactment of the *Matrimonial Causes Act* 1929, a consolidating measure by which the prior provisions were rewritten, the law on the subject of divorce, judicial separation, and other connubial relief was contained in the *Matrimonial Causes Act* 1867 to 1928 (that is Act No. 3 of 1867, Act No. 1356 of 1918 and Act No. 1889 of 1928). Section 40 of that Act, which was founded on s. 57 of the *Matrimonial Causes Act* 1857 (Imp.), now represented by s. 184 of the *Supreme Court of Judicature Act* 1925, provided that, when the time limited for appealing should have expired and no appeal should have been presented, or when any such appeal should have been dismissed, or when in the result of any appeal any marriage should be declared dissolved but not sooner, it should be lawful for the parties thereto to marry again as if the prior marriage had been dissolved by death. Section 55 of the *Matrimonial Causes Act* 1857 (Imp.) went on to provide for an appeal within a period of three months from a decree made by the Judge Ordinary to the Full Court for Divorce and Matrimonial Causes. Section 66 of the *Matrimonial Causes Act* 1867 (S.A.) was based on the English s. 55 but gave the appeal from the Supreme Court to the Court of Appeals already described consisting of the Governor and certain Executive Councillors. The time for appealing was limited to three months. At the time when the *Matrimonial Causes Act* 1929 was passed this Court of Appeals still existed : see *Owens* v. *Owens* (1). The appeal thereto given by Act No. 15 of 1865 was wide enough to include orders of the Supreme Court made under the new *Matrimonial Causes Act*. The sidenote to s. 2 of Act No. 15 of 1865 says " any person may appeal within three months after decision ". Possibly there is some mistake in the body of the section but, as expressed, the reference there to three months relates only to a period " from the passing hereof " which ought to mean from the passing of the Act. The new Act repealed the whole of the old *Matrimonial Causes Act* 1867 including s. 66. While this did not affect the

(1) (1944) S.A.S.R. 155, at p. 156.

right of appeal, because it continued to exist under s. 1 of Act No. 15 of 1865, it does seem to have removed the limitation of three months for its exercise. For, so far as can be discovered, that limitation is not imposed elsewhere, but that fact the draftsman of the Act of 1929 apparently did not notice. Clearly enough s. 17 of the Act of 1929 is based upon s. 40 of the old Act, and the inference seems to be that three months was mentioned because it was regarded as the time for appealing to the Court of Appeals from the order absolute. The Master is to issue the order absolute as of course: s. 16 of the *Matrimonial Causes Act* 1929. But apparently he may refer it to the court if any question arises and in any case there is an appeal from the Master to the court (*Matrimonial Causes Act* 1929, Second Sched. O. LXVIII, rr. 28 & 30: see ss. 72 (1) (iv) and 83 of the *Supreme Court Act* 1935-1953 (S.A.)).

Perhaps it should be added, though it is not material to the decision of the present case, that s. 17 has since been repealed and another provision substituted (Act No. 51 of 1941, s. 9) and that no longer does the anomalous Court of Appeals exist. The Acts establishing it were repealed by the *Supreme Court Act* 1935.

But, as the law of South Australia stood on 5th September 1931, when the order nisi for dissolution was made absolute, a comparatively brief restraint upon the competence of the parties to remarry was imposed upon them solely for the purpose of allowing of the exercise of a right of appeal and of the disposal of the appeal should the right be exercised.

The question for decision is whether such an impediment should receive extra-territorial effect in New South Wales. To this question a negative answer has been given in *Pezet* v. *Pezet* (1), by *Jordan* C.J. and *Maxwell* J., *Bonney* J. dissenting. *Pezet's Case* (1) was a case resembling the present in every particular but one. A party to a marriage celebrated in New South Wales had recently been freed from a previous marriage by a decree absolute pronounced in another jurisdiction, that of the Australian Capital Territory, and she contracted the second marriage before the time for appealing from the decree absolute had run out. The law of the jurisdiction pronouncing the decree forbad marriage until the time for appealing expired or an appeal, if there were one, was dismissed. The second marriage was nevertheless held to be valid. The particular in which the case differed from the present is that, as in effect it was hypothetically assumed, the divorced party at the time of the remarriage was domiciled in the jurisdiction granting the decree of dissolution. In the present case the learned judge held that the

(1) (1946) 47 S.R. (N.S.W.) 45; 63 W.N. 238.

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respondent became domiciled in New South Wales *eo instanti* that her prior marriage was dissolved. It was the existence of that marriage which alone stood in the way of her acquiring a New South Wales domicile. The *animus manendi* and the factum had long persisted, but her incapacity as a married woman to acquire an independent domicile made it legally impossible that the factum and animus should operate. At the moment when the incapacity was terminated by the order absolute for dissolution her domicile changed so as to accord with the facts. The ground of the decision in *Pezet's Case* (1) 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. Obviously, if this decision is correct it applies *a fortiori* to the present case. But is it correct ? The ground of the decision was that if one party to the marriage is domiciled in the place of celebration (at all events if that is the place of the forum) and by the law of that place has full capacity to marry, it is immaterial that the other party, being domiciled elsewhere, has not capacity according to the law of his or her domicile, or at all events is at the time under a prohibition by that law against marriage, whatever the purpose of the prohibition. This version of the law was the result of the dubious guidance of *Sottomayer* v. *De Barros* [*No.* 2] (2) and *Ogden* v. *Ogden* (3) 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 and of its connection with the judicial process set up by the law of South Australia for dissolving the prior marriage which, if it remained in force, would itself provide a status involving an incapacity to contract another marriage universally recognized in Christian countries. 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 and the choice of law governing particular impediments or prohibitions. American law has shown a greater persistence than English law in the preference for the *lex loci celebrationis* over the *lex domicilii* in all matters affecting the essential validity of the contract of marriage. 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

(1) (1946) 47 S.R. (N.S.W.) 45; 63 W.N. 238.

(2) (1879) 5 P.D. 94.

(3) (1908) P.D. 46.

dissolving a prior marriage, and *ex hypothesi* the decree must have been granted under the law of the then existing domicile of the parties to that marriage, or at all events be regarded by the law of the domicile of the party in question as effectively destroying his or her married status.

Once the status of marriage is completely destroyed as by a final decree absolute any attempt by the law under which the decree of dissolution is granted to impose upon a party to the marriage a prohibition against remarriage is treated as territorial only if it is by way of punishment, discipline or example: *Scott* v. *Attorney-General* (1); *Loughran* v. *Loughran* (2); *Beale*, "*Conflict of Laws*" (1935), pp. 685, 686. Of course in Australia what s. 118 of the Constitution has to say to this might have to be considered. However for the purpose of the doctrine it does not matter whether the party to the dissolved marriage retains or changes his domicile. 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 when the question arises whether the parties to the marriage are yet remitted finally and in all respects to the status of unmarried persons with all the capacity that belongs to that status: cf. *Beale*, "*Conflict of Laws*" (1935), pp. 684, 685.

In English law a restraint on remarriage so as to allow time for appealing appears to be regarded as designed to give a provisional or tentative character to the decree dissolving the marriage so that it does not yet take effect in all respects. It is regarded as ancillary to the provision of the law which for a comparatively brief time makes the decree absolute for dissolution contingently defeasible in the event of appeal. It is as if there is a residual incapacity to remarry arising out of the previous marriage and not yet removed by the process provided for dissolving it.

As the foreign law effecting the dissolution which alone sets the party free to marry treats the dissolution as incomplete and not yet productive of that consequence, the law by which the validity of the subsequent marriage is determined cannot disregard it. And that will be so whether the question is referred to the *lex domicilii* as a matter of capacity or is governed by the *lex loci celebrationis* as one of the essentials to the marriage. The question is dealt with by *Cussen* J. in *Lundgren* v. *O'Brien* [*No.* 2] (3), where after pointing

(1) (1886) 11 P.D. 128.
(2) (1934) 292 U.S. 216 [78 Law. Ed. 1219].
(3) (1921) V.L.R. 361.

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out that such a prohibition is held to be an integral part of the proceeding by which alone both parties could be released from the marriage, that learned judge said :—" I doubt whether any importance can be attached to the question of change of domicil. It appears that there was here an intention by the plaintiff to change her domicil, but, apart from that, the distinction appears to be this : If the law of the country where the marriage is dissolved says that the dissolution shall not be complete until after the expiration of a certain time . . . it may be held, as a matter of construction, that the dissolution is not complete until the time has elapsed ; but where only a personal disability is attached, then, I think, whether it is imposed by reason of any misconduct or not, this disability will not be given effect to in our Court after the conclusion is properly reached that the marriage is finally dissolved " (1).

The decisions in England from which the special rule relating to such a restraint upon remarriage is to be deduced are clear in their result, although perhaps the statement of the grounds upon which they proceed has not always been precise. In *Warter* v. *Warter* (2), the question arose out of a provision of the Indian *Divorce Act* 1869, s. 57, which in form closely resembled s. 57 of the *Matrimonial Causes Act* 1857 (Imp.) except that the period after the decree absolute within which the parties could not remarry was limited to six months. The proceeding giving rise to the question was a probate suit in which the issue was whether a will was revoked by a subsequent marriage. The testator had married a woman who had been divorced by the High Court of Judicature at Calcutta. He had gone through a ceremony of marriage with her in England before the period of six months limited by s. 57 of the Indian *Divorce Act* had expired. Shortly after the ceremony he had made his will. Some time afterwards doubt was thrown on the validity of this marriage on the ground that his wife at the time of the ceremony was not completely free to remarry. To obviate the doubt the parties then went through a second ceremony of marriage. The question for decision was whether the will had been revoked by the second ceremony of marriage and that depended on the question whether the first ceremony of marriage resulted in a valid marriage or not. Sir *James Hannen* P. decided that a valid marriage did not result from the first ceremony on the ground that at that date the wife was not at liberty to remarry because of the limitation imposed by the Indian law with respect to the effect of the decree. If it matters, the wife had been domiciled in England before her first marriage, which took place in India. It does not appear from

(1) (1921) V.L.R., at p. 364.

(2) (1890) 15 P.D. 152.

any of the reports whether her first husband was domiciled in England or in India, although in the Law Journal Report he is described as a broker residing and carrying on business at Calcutta. Sir *James Hannen* said that she—" . . . was subject to the Indian law of divorce, and she could only contract a valid second marriage by shewing that the incapacity arising from her previous marriage had been effectually removed by the proceedings taken under that law. This could not be done, as the Indian law, like our own, does not completely dissolve the tie of marriage until the lapse of a specified time after the decree. This is an integral part of the proceedings by which alone both the parties can be released from their incapacity to contract a fresh marriage. The case of *Scott* v. *Attorney-General* (1) was relied on for the plaintiff. I there held that a colonial law prohibiting the marriage of the guilty party, so long as the other remained unmarried, did not operate as a bar to marriage where the guilty party had acquired a domicil in this country. The distinction between that case and the present is that there the incapacity to remarry imposed by the colonial law only attached to the guilty party. It was, therefore, penal in its character, and as such was inoperative out of the jurisdiction under which it was inflicted " (2).

This decision was followed by Lord *Merrivale* P. in *Le Mesurier* v. *Le Mesurier* (3). That was a suit for nullity on the ground that the petitioner when she went through the ceremony of marriage was under the like disability in consequence of s. 57 of the Indian *Divorce Act* 1869. The marriage of which she sought the annulment took place in Ceylon in 1921 within a month of the date when a decree absolute dissolving her marriage with her previous husband had been pronounced at Lahore by the High Court. That marriage had been celebrated in England and, if it is material, everything points to the domicile of the parties to the marriage being English. In order to legitimate an expected child she desired to marry her second husband at once. It was because of the limitation imposed by s. 57 of the Indian *Divorce Act* 1869 that Ceylon was chosen as the country where she should go through the ceremony of marriage with him. Lord *Merrivale* expressed the ground of his decision in a single sentence : " The decree did not dissolve the bond between herself and her then husband until July 1921, and there must be a decree *nisi* of nullity " (4). *Warter* v. *Warter* (5) had been cited during the argument.

(1) (1886) 11 P. D. 128.
(2) (1890) 15 P.D., at p. 155.
(3) (1930) 142 L.T. 496 ; 99 L.J. (P.) 33 ; 46 T.L.R. 203.
(4) (1930) 142 L.T., at p. 497 ; 99 L.J. (P.), at p. 34 ; 46 T.L.R., at p. 204.
(5) (1890) 15 P.D. 152.

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The two decisions have been followed by *Wallington* J. in *Boettcher* v. *Boettcher* (1). In that case the question arose under the laws of Indiana, U.S.A., where a decree dissolving a prior marriage had been pronounced. According to the short report of the judgment, the decree of the court in Indiana forbad the remarriage of the divorced parties until two years after the date of the decree. The husband, who had obtained the divorce in Indiana, however, remarried in England before that period expired. The woman he married in England petitioned for a decree of dissolution on the ground of cruelty. *Wallington* J. held that because the decree of the court of Indiana forbad remarriage for two years the second marriage was void. His Lordship said: "This had in English law the effect of making the marriage subsist until that date: *Warter* v. *Warter* (2); *Le Mesurier* v. *Le Mesurier* (3)" (4). His Lordship's statement is perhaps too compendious a way of describing the position taken by English law in relation to the recognition of the restraint imposed by foreign law on the operation of the decree absolute for dissolution. The expression of Sir *James Hannen* is more accurate, namely that the limitation is an integral part of the proceedings by which alone both the parties can be released from their incapacity to contract a fresh marriage.

In *Lundgren* v. *O'Brien* [*No.* 2] (5), as already mentioned, the question arose, curiously enough, upon a proposed plea or defence to an action of breach of promise of marriage. It was an appeal to the Full Court of the Supreme Court of Victoria from an order refusing leave to amend the defence by adding a paragraph. The proposed plea stated that the plaintiff in the breach of promise action had been divorced in Belgium from a previous husband who was still living, that Belgium was her country of domicile and that she was forbidden under the law of that country to remarry until after the expiration of ten months from the date of the decree, a period which had not expired at the date fixed by the supposed contract sued upon for the remarriage. It was ascertained that under the law of Belgium the prohibition affected not both parties to the marriage but only the plaintiff as the woman against whom the divorce was granted. The Full Court of the Supreme Court of Victoria would not allow an amendment setting up this plea, upon the ground that, as drawn, it did not show a reasonable probability of its amounting to a successful defence. During the

(1) (1949) W.N. (E.) 83; 93 Sol. J. 237.
(2) (1890) 15 P.D. 152.
(3) (1930) 142 L.T., at p. 496; 99 L.J. (P.) 33; 46 T.L.R. 203.
(4) (1949) W.N. (E.), at p. 84; 93 Sol. J., at p. 238.
(5) (1921) V.L.R. 361.

course of the argument *Cussen* J. remarked: "If one party can marry, the marriage is dissolved. In *Warter* v. *Warter* (1) the dissolution was not complete" (2). The judgment of the court dismissing the appeal was based upon the ground that it did not appear from the proposed plea that under the law of Belgium there was anything but a personal disability imposed on one party to the dissolved marriage.

In the present case it seems quite clear that the South Australian law which imposed the restraint against remarriage upon both parties to the marriage dissolved by the order or judgment absolute did so as an integral part of the proceedings by which alone both parties could be released from the marriage and because an appeal was possible within that time and (as was supposed) not after it expired. It is immaterial, if the now respondent had acquired, as probably she did, a domicile of choice in New South Wales before the actual hour of the ceremony. She had not been completely freed from her incapacity to marry which her previous marriage imposed. The law of New South Wales as the *lex loci celebrationis* could not regard her as otherwise than under a disability which rendered the marriage at Grafton void. The petitioner was therefore entitled to a decree of nullity.

The appeal should be allowed, the order of the Supreme Court discharged and in lieu thereof a decree nisi for nullity of marriage should be pronounced on the ground that at the time of the marriage the respondent was under an incapacity by reason of a prior marriage the dissolution of which had not at the date of the marriage yet conferred upon her complete capacity to marry.

KITTO J. I agree. I wish only to add a few words in connection with the case of *Warter* v. *Warter* (1).

In that case a decree absolute dissolving a marriage had been made by an Indian court. The jurisdiction of the Indian court to dissolve the marriage was acknowledged by English law. The Indian law under which the decree was made provided for appeals from such decrees, and it also provided that for a specified period after the making of such a decree neither party should be at liberty to remarry. The provision against remarriage was on its face not a substantive and independent enactment; it was plainly ancillary or complementary to the provision for appeals: see s. 57 of the Indian Act, set out in the report of the case in the *Law Times* (3). The decision of Sir *James Hannen* P. was that English

(1) (1890) 15 P.D. 152.
(2) (1921) V.L.R., at p. 362.
(3) (1890) 63 L.T., at p. 251.

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law would recognize such a provision as effective to incapacitate the divorced parties from remarrying in England during the period of its purported operation.

His Lordship distinguished his own previous decision in *Scott* v. *Attorney-General* (1), on the ground that the incapacity imposed by the foreign law in question in the latter case, being imposed upon the guilty party only, was penal in character and for that reason ought not to receive recognition out of the jurisdiction in which the penalty was inflicted. But his Lordship did not so far disregard the general rule as to the choice of law for determining general capacity to marry as to hold that whenever an incapacity to remarry within a specified period is imposed, by the law of the country in which a marriage is dissolved, upon both parties to the proceedings, or for any other reason is not to be considered penal in character, the incapacity ought to be recognized by the courts of other countries. Still less did he hold, as suggested in *Halsbury's Laws of England* (2nd ed.), vol. 6, p. 311, par. 364, that a provision creating such an incapacity should be construed as postponing the actual date from which the former marriage is to be reckoned as dissolved.

The critical passage in the judgment follows immediately upon the statement that the divorced wife could only contract a valid second marriage by showing that the incapacity arising from her previous marriage had been effectually removed by the proceedings taken under the Indian law. "This could not be done", said the learned President, "as the Indian law, like our own, does not completely dissolve the tie of marriage until the lapse of a specified time after the decree. This is an integral part of the proceedings by which alone both the parties can be released from their incapacity to contract a fresh marriage" (2). His Lordship cannot have meant that after the decree absolute had been made there was anything of the marriage left. During the interval between decree nisi and decree absolute the marriage, of course, continued to subsist; the parties continued to be husband and wife. But after the decree absolute the situation was radically different. Upon the making of that decree, and notwithstanding that it was subject to appeal, the marriage and all its incidents came to an end immediately, and the status of the parties became that of single persons.

This has been explicitly laid down in more recent times by the Privy Council in *Marsh* v. *Marsh* (3), and Sir *James Hannen* could not have been under any misapprehension on the point. When his Lordship said that the Indian law did not "completely" dissolve

(1) (1886) 11 P.D. 128.
(2) (1890) 15 P.D., at p. 155.
(3) (1945) A.C. 271, at p. 278.

the tie of marriage until the lapse of a specified time after the decree, and that this was an integral part of the dissolution proceedings, I apprehend that he had in mind the fact that the dissolution, though undoubtedly complete in one sense, was not indefeasible, but on the contrary was defeasible, by condition subsequent as it were, so long as the decree absolute remained liable to be discharged on appeal. He was pointing out, I think, that the defeasibility of the Indian dissolution was inherent in the Indian divorce procedure, and that the proscription of remarriage, being in essence incidental to it, should receive the like recognition. The principle of the decision, in my opinion, is that whatever be the law by which a person's general capacity to marry is to be determined according to the rules applied by the English courts, if he is a divorced person those courts will recognize an incapacity to remarry which is imposed upon him by the law of the country in which his former marriage was dissolved, provided that the incapacity is imposed incidentally to the provision of a right of appeal against the judgment of dissolution.

This is not to say that in the present case, for example, the courts of New South Wales should treat s. 17 of the South Australian Act as having operated during the period mentioned in it to prolong the cause of incapacity to marry which existed during the subsistence of the respondent's previous marriage. The dissolution ended that cause of incapacity and s. 17 created a new one. If the purported marriage which was celebrated between the appellant and the respondent had taken place before instead of after the making of the decree absolute, it would have been held invalid because polygamous. As, however, it took place after the making of the decree absolute, it is invalid because of an applicable rule of law which invalidates even monogamous marriages.

It would be strange indeed if this principle were not to be accepted, for if the courts of one country recognize the jurisdiction of the courts of another country to give a judgment dissolving a marriage, they must of necessity recognize the jurisdiction of an appellate court of that other country to reverse the judgment and so to undo the dissolution *ab initio*. If effect is to be given by the law of New South Wales to a provision of the law of South Australia which may thus operate to invalidate retrospectively a marriage contracted by one of the divorced parties in the interval between judgment for dissolution and judgment on appeal, it is entirely reasonable that recognition should also be given to a provision of South Australian law which precludes either of the divorced parties from

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involving a third person in a marriage which, because contracted in that interval, may turn out to be polygamous.

Reading *Warter* v. *Warter* (1) in the sense I have indicated, I am unable to subscribe to the view of *Jordan* C.J. and *Maxwell* J. in *Pezet* v. *Pezet* (2) that *Warter* v. *Warter* (1) should not be followed. The application of its doctrine in the present case is that the appeal should be allowed and a decree nisi for nullity should be pronounced.

Appeal allowed. Decree of the Supreme Court discharged. In lieu thereof, decree nisi pronouncing that the petitioner has proved—

(1) *that both the petitioner and the respondent were at the time of the institution of the suit and at the time of the ceremony of marriage which was performed between them as hereinafter mentioned domiciled in New South Wales*

(2) *that the respondent was married to one Thomas Frederick Teale prior to 5th September* 1931

(3) *that on 5th September* 1931 *but before the ceremony of marriage hereinafter mentioned the marriage of the respondent and the said Thomas Frederick Teale was dissolved by a decree absolute pronounced under and by virtue of the provisions of the Matrimonial Causes Act* 1929 *of the State of South Australia*

(4) *that on 5th September* 1931 *and after the said decree absolute had been pronounced and made a ceremony of marriage was performed between the petitioner and the respondent at Grafton in the State of New South Wales*

(5) *that at the time of the said ceremony of marriage the said Thomas Frederick Teale was alive.*

And ordering and declaring that the said ceremony of marriage performed between the petitioner and the respondent on 5th September 1931 *be null and void and of no effect on the ground that at the time of the said ceremony the respondent was incapable according to the law of New South Wales and by reason of the application of s.* 17 *of the Matrimonial Causes Act* 1929 *of the State of South Australia of contracting*

(1) (1890) 15 P.D. 152.

(2) (1946) 47 S.R. (N.S.W.) 45, at p. 51; 63 W.N. 238.

a valid marriage, unless within six months from the date of the service of this decree upon the Crown Solicitor for the State of New South Wales any person shall show cause why this decree should not be made absolute or the said Crown Solicitor shall under the direction of the Attorney-General of the State of New South Wales by leave of the Supreme Court of New South Wales intervene or unless it shall otherwise appear that this decree should not be made absolute.

Solicitors for the appellant, *H. E. McIntosh & Adrian.*

G. D. N.