stantial numbers of whom were contributing in circumstances which negatived any right of exception on their part to any return of their money in any circumstances.

His Lordship then put the matter on a slightly different basis when he said:[20] "Where there are many sources of contribution to a charitable fund, then all contributions should, in the absence of special circumstances, be taken to contribute on terms common to all; and the only such terms possible in the present case deny any right to the return of their money to all contributors."

In the first passage quoted, his Lordship imputes a special knowledge to the donor, and draws an inference from this, and in the second passage an inference is drawn without the intervention of any imputation of knowledge, but by way of application of a general rule. Jenkins, L.J. in the principal case explained these *dicta* by saying that no general rule was intended, though he recognised that the inclusion in the fund of sums raised from anonymous sources was a factor to be taken into account in determining the intention of the donor. It is submitted that Evershed, M.R., on the contrary, was in *Hillier's Case* attempting to lay down a general rule notwithstanding his qualifying remarks in the *Ulverston Case*,[21] and (with respect) that such a general rule seems not substantiated at law, nor supported by modern accounting and administrative methods. It also seems to disregard the tight control which would necessarily be held over such a fund. Even Jenkins, L.J.'s modified and tentative view[22] that the intention of the donor would in fact be swayed by the thought of a mingling of the moneys received, seems questionable, since the trustees would be bound to keep strict accounts. Here again the present writer believes that the search for the donor's actual intention can end often only in dubious guesswork. In fact, it is unlikely that most donors would have been swayed either way by these considerations. It may be added that Evershed, M.R.'s position seems first to impute certain knowledge to the donor, and then draw inferences of fact as to the donor's intention from this imputed knowledge as if it were actually present. And his Lordship in the *Ulverston Case* may to a degree have recanted his view above in *Hillier's Case*.[23]

The present view, then, is that the inclusion of anonymous donations should make no difference to any general presumptions of intention made in respect of named donors, since it will always be possible to make a rateable adjustment at any stage.

It is submitted, in conclusion, that the law should treat charities more favourably and should be less ready to find only a particular charitable intention; that such a merely limited intention should only be found where it is expressly stated by the donor, and that in other cases an imputation of general charitable intent should be imputed to the donors, so that there will be an application cy-près on failure of the gift.

R. J. SMITH, B.A., Case Editor — Fourth Year Student.

THE RECOGNITION OF FOREIGN DECREES OF DIVORCE IN AUSTRALIA

FENTON V. *FENTON*

Are the members of the Full Court of Victoria who recently decided the case of *Fenton* v. *Fenton*[1] to be relegated to the company of "timorous souls"[2]

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[20] (1954) 1 W.L.R. at 712. His Lordship said that unless an express intention was to be found in the terms of the gift then the evidence of the fact that "he must be taken to have known that his contributions would be mingled with thousands of others" would be relevant and admissible in "determining his true intention." (1954) 1 W.L.R. at 712.

[21] (1956) 3 W.L.R. 559. [22] *Id.* at 566. [23] *Id.* at 574.

[1] (1957) V.L.R. 11.

[2] *Per* Denning, L.J., in *Candler* v. *Crane, Christmas & Co.* (1951) 2 K.B. 164 at 178.

for refusing to follow the decision of the Court of Appeal in *Travers* v. *Holley?*[3] This decision, it may be recalled, was widely acclaimed as a vital step towards achieving a primary aim of the law relating to the recognition of foreign divorce, namely to ensure that persons are not both married and not married, according to where they are. The importance of the case was not, however, limited to the field of recognition of foreign divorces, nor indeed to private international law. It was emphasised that the decision illustrated "the great strength"[4] of the common law to adapt itself to changing circumstances and changing needs. It is suggested that the answer to the above question depends on a consideration of the following points: 1. Whether the decision in *Fenton* v. *Fenton* is in accordance with the letter of the authorities. 2. Whether it conforms with the spirit of the principles to be found in this branch of the law. 3. The desirability of the rule in *Travers* v. *Holley*.

Fenton v. *Fenton* was a case stated by Sholl, J., pursuant to s. 115(2) of the Victorian Marriage Act of 1928. The facts were briefly these: F whose domicile of origin was Victorian, acquired a domicile of choice in England and there married E in 1932. F deserted E in England and returned to Victoria re-establishing his domicile of origin. In 1938 the wife E, relying on "deserted wife legislation" (namely s. 13 of the Matrimonial Causes Act, 1937, (Eng.)), petitioned for the dissolution of her marriage to F on the ground of his desertion. In 1949 a decree absolute was pronounced by the English court on E's petition, and after this F went through a form of marriage with S in Sydney. F now petitioned for a divorce from S. The question was therefore raised whether the Victorian Court should refuse to recognise the English decree on the ground that the *forum* was not the domicile of the parties at the time the decree was pronounced, or whether, having regard to the similarity between s. 75 of the Victorian Act and s. 13 of the Imperial Act, the English decree should be accorded recognition on the basis that "our Courts in this matter should recognise a jurisdiction which they themselves claim."[5]

The members of the Victorian court took the first approach. Placing particular emphasis on the decision of the House of Lords in *Shaw* v. *Gould*[6] they refused to follow *Travers* v. *Holley* on the ground that the way to the conclusion arrived at in that case was closed by authority.

The petitioner in *Fenton* v. *Fenton* relied solely on *Travers* v. *Holley*. The facts of that case were similar, but converse, to those in *Fenton* v. *Fenton*. A husband deserted his wife in New South Wales and established a domicile in England. The wife obtained a decree of dissolution of the marriage in New South Wales under s. 16(a) of the Matrimonial Causes Act, 1899.[7] The English court unanimously and unhesitatingly accorded recognition to this decree. The decision of the Court of Appeal can perhaps best be expressed in the words of the "grand recommendation" of a paper presented by Dean Griswold of the Harvard Law School to the seventh Legal Convention of the Law Council of Australia in July, 1951:

> the applicable conflict of laws rule should be that a divorce should be recognised in the *forum* when it was granted under circumstances which are those under which the *forum* will itself grant a divorce. In other words that the recognition rule applied by a Court should follow and indeed be a reflection of its jurisdiction rule.[8]

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[3] (1953) P. 246. *Travers* v. *Holley* has since been followed, and its principle applied in *Carr* v. *Carr* (1951) 1 W.L.R. 422 and *Arnold* v. *Arnold* (1957) 2 W.L.R. 366. The principle was also approved by the Court of Appeal in *Levett* v. *Levett* (1957) 1 All E.R. 720.

[4] *Per* Professor G. D. Kennedy (1953) 31 *Can. Bar Rev.* 799. See also his article in 32 *Can. Bar Rev.* 361, esp. at 362, and R. H. Graveson (1954) 17 *Mod. L.R.* 501 esp. at 509ff.

[5] *Per* Somervell, L.J. in *Travers* v. *Holley* (*supra* at 251).

[6] (1868) L.R. 3 H.L. 55.

[7] This provision is practically identical to the corresponding provision in the Victorian Act.

[8] 25 *A.L.J.* 248, 264.

It might be pointed out here that when this paper was discussed at the Legal Convention the merit of the "grand recommendation" was not impugned, but it was claimed by at least two eminent lawyers that the way to such a rule was "closed by authority".[9]

The decision of the Court of Appeal in *Travers* v. *Holley* which gave the *imprimatur* to Dean Griswold's suggestion was extremely well received by writers all over the common law world and not a single voice was raised against the desirability of the rule there expressed.[10] The only criticisms that were made were directed at the reasoning of the learned Lords Justices,[11] and it was claimed by some writers that the authorities stood in the way of such a decision. Such an objection was very strongly stated by Professor R. A. Blackburn[12] who posed the following question.

> Would an Australian court be able to return the compliment by coming to a conclusion similar to that of the Court of Appeal in *Travers* v. *Holley* — in other words, using Australian jurisdiction similar to Section 18 of the Matrimonial Causes Act 1950 as the reason for recognising an English divorce granted under that Section?

The learned writer then answered this question by a submission which foreshadowed the decision in *Fenton* v. *Fenton*—

> It is submitted that this would be impossible. Since *Piro* v. *Foster*,[12a] Australian courts have been bound to prefer a House of Lords decision to a conflicting decision of the High Court of Australia itself. They could hardly decline to be bound by *Shaw* v. *Gould* when no Australian decision conflicts with it.[13]

For the Full Court of Victoria *Shaw* v. *Gould* was conclusive; Gavan Duffy, J., refers to this case and says,

> This Court, however, in my judgment should not take upon itself to dismiss the test of domicile nor to substitute the new test for extra-territorial recognition, that it depends upon a sufficient identity of the foreign court's ground for jurisdiction with ours. . . . We have a clear direction from authority which is binding on us and we should follow this, leaving to the parliament or to courts which to us are courts of final authority to make a change if a change is desirable.[14]

In an enlightening article on the problems raised by the decision in *Fenton* v. *Fenton* Professor Z. Cowen has said:

> The crux of the argument as a matter of authority is *Shaw* v. *Gould;* if that case is authority for the proposition for which it was repeatedly cited by the Victorian Court in *Fenton* v. *Fenton* it is difficult to see how *Travers* v. *Holley* can be supported on any strict doctrine of precedent.[15]

It is suggested that this observation is fully justified but it may be pointed out here that the Victorian court did rely on authority other than *Shaw* v. *Gould* to support its conclusion. Thus, if *Shaw* v. *Gould* is not authority for the proposition for which it was cited in *Fenton* v. *Fenton*, this of itself will not necessarily be fatal to upholding the decision in that case.

The issue in *Shaw* v. *Gould* was one of legitimacy, this question depending on the recognition by the English court of a Scottish decree of divorce. The parties to the dissolution proceedings in Scotland had "resorted" to that country for such time as gave jurisdiction to the Scottish court. The House of Lords refused to recognise a decree pronounced under such circumstances. The

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[9] *Per* Drs. Bray and Fleming, *supra* at 273-74.
[10] See E. N. Griswold, 67 *Harv. L.R.* 823, F. A. Mann, 17 *Mod. L.R.* 79, G. D. Kennedy, 31 *Can. Bar Rev.* 799, 32 *id.* 211, 359.
[11] Somervell, Jenkins and Hodson, L.JJ.
[12] 17 *Mod. L.R.* 471. [12a] (1945) 68 C.L.R. 313. [13] 17 *Mod. L.R.* at 472.
[14] (1957) V.L.R. at 18-19. [15] 31 *A.L.J.* 9, at 15.

Victorian court[16] took this refusal to be based on the principle that the court will only recognise decrees of foreign divorce pronounced by the court of the "actual"[17] domicile.[18]

It is submitted that a critical examination of *Shaw* v. *Gould* reveals that it is not authority for the proposition for which it was cited in *Fenton* v. *Fenton;* that at most only two of the four Law Lords espoused the above principle. Lords Chelmsford and Colonsay denied recognition to the Scots decree on the narrow ground that it had "been obtained by preconcerted arrangement, the parties resorting to the Scotch courts for the sole purpose of making it instrumental to the attainment of their objects".[19] Lord Chelmsford adverted to the problem of recognition in relation to domicile but did not make any definite pronouncement on the matter. Lord Colonsay, so far from maintaining that the court would only recognise a decree of the court of the domicile of the parties, ventured to say that in some circumstances a decree pronounced by the court of a country in which the parties had a mere "jurisdictional" domicile as opposed to an "actual" domicile, or as he says a domicile "for all purposes", would be recognised. "Jurisdiction to redress wrongs in regard to domestic relations does not necessarily depend on domicile for all purposes."[20] Lord Westbury plainly insisted on the test of "actual" domicile in relation to the recognition of foreign divorces. "One of the best established rules of universal jurisprudence . . . certainly is that questions of personal status depend on the law of the actual domicile."[21]

Lord Cranworth, however, did not go so far, and his judgment, it is suggested, is *sui generis,* falling midway between that of Lord Westbury on the one hand and those of Lords Chelmsford and Colonsay on the other. His Lordship said:

> The facts of this case do not raise the question as to what would have been the status of these children if Buxton and E. H. though married at Manchester had always been Scottish persons and had always lived in Scotland; or even what it would have been, if, before the proceedings for the divorce B had actually *bona fide* quitted England permanently and had established himself in Scotland so as to have acquired a Scottish domicile for all events and purposes. It may be that in these circumstances the courts of this country would recognise the status of these children (as legitimate) but on that point I express no opinion.[22]

It will be seen then that Lord Cranworth expressly left open the question whether the court would recognise a decree of the court of the actual domicile of the parties; he did not therefore adopt the principle that domicile is the basis of the recognition of foreign divorce. It is suggested that the ratio of his Lordship's judgment is this — that the court will not recognise a decree of divorce pronounced by the court of a country in which the parties had mere "jurisdictional" domicile. This stops short of the principle that the test of recognition is "actual" domicile — a foreign decree of divorce will only be recognised if it is pronounced by a court of the actual domicile of the parties. It is this latter principle which the Court in *Fenton* v. *Fenton* said was established by *Shaw* v. *Gould.*

It has been suggested above that although *Fenton* v. *Fenton* must stand if *Shaw* v. *Gould* is authority for the proposition for which it was relied on in

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[16] Amongst others see *supra* n. 4.

[17] By the "actual" domicile is meant domicile as understood by the forum considering the question of recognition as opposed to a domicile which the Court pronouncing the decree may take as sufficient to give it jurisdiction. Domicile is always used n this former sense when talking of the recognition of decrees of the domicile of the parties.

[18] This of course must be read together with the principle in *Armitage* v. *A.-G.* (1906) P. 135.

[19] *Per* Lord Chelmsford *supra,* at 79.

[20] *Supra,* at 96. [21] *Supra,* at 82. [22] *Supra,* at 69-70.

this case, the decision will not necessarily fall if *Shaw* v. *Gould* cannot be so interpreted. The Victorian court relied on many *dicta* of the highest authority to support its view, both in the letter and in the spirit of the principles claimed to be at issue, and it must here be borne in mind that "to suggest narrow limits to what is absolutely binding does not deny the tremendous influence of a broad general principle expressed in a judgment if the lips that uttered it were worthy of respect".[23]

The issue is here reduced to a consideration of the "broad general principles" involved and a consequent examination of the authorities to see if they support the principle stated in *Fenton* v. *Fenton* that "domicile is the basis of recognition in cases of foreign divorce because divorce is a matter of status and a person's statusis to be determined by the law of his domicile,"[24] or the principle in *Travers* v. *Holley* that "our Courts in this matter should recognise a jurisdiction which they themselves claim".[25] It is suggested that the conflict between *Travers* v. *Holley* and *Fenton* v. *Fenton* is a conflict between these two principles. If it is a basic principle that questions of personal status are governed exclusively by the law of the domicile of the parties, from which may be derived the rule that only decrees granted by the court of such domicile will be recognised, *Fenton* v. *Fenton* must stand. If, on the other hand, the operation of the above principle in the field of recognition is limited to the period before "deserted wife" legislation became common, by conceding that the controlling principle is really that a court's recognition rule follows and is indeed "a reflection of its jurisdictional rule",[26] *Fenton* v. *Fenton* must fall. On this premise a court's recognition rule alters as domestic jurisdiction is enlarged and corresponds with the jurisdiction of the Court pronouncing the foreign decree. The Victorian court thought that this latter argument "would not stand examination", since while English courts were insisting upon domicile in the strict sense as a basis of recognition of foreign decrees they were themselves, after the Divorce Act of 1857, taking jurisdiction when the parties had what was described as a "matrimonial domicile" in England.[27]

The latter part of this proposition is certainly supported by authority[28] but the former part itself depends on there being authority for the statement that English courts were insisting on domicile in the strict sense as a basis of recognition of foreign divorces. It is submitted with the greatest respect that there is no such authority; and indeed, if there were, it could be used to support *Fenton* v. *Fenton* on the narrower ground claimed for *Shaw* v. *Gould* without the necessity to resort to a consideration of the "broad general principles". As Professor Cowen points out, "it is certain that (English courts) were granting decrees on a basis short of domicile, what is uncertain is the rule with respect to the recognition of foreign decrees".[29] However, so long as there is this uncertainty it is not possible to claim that before *Travers* v. *Holley* the principle applied in the law relating to the recognition of foreign divorces was that the recognition rule should follow the jurisdiction rule. It has indeed been claimed that there is direct authority against such a principle.

Two opponents of the "grand recommendation" put by Dean Griswold[30] cited *Schibsby* v. *Westenholz*[31] and *Godard* v. *Gray*[32] as laying down "that the mere fact that an English court would assume jurisdiction on the basis of statutory authority is no reason for recognising a foreign judgment which has been given under equal circumstances".[33] It was pointed out however, in a Note on *Travers* v. *Holley*[34] that Denning, L.J., in *Re Dulles Settlement*

[23] G. W. Paton *Jurisprudence* (2 ed. 1951) 161.
[24] *Per* Herring, C. J. and O'Bryan, J., (1957) V.L.R. 11, at 33.
[25] *Per* Somervell, L.J. (1953) P. 246, at 251.
[26] 25 *A.L.J.* 248, 264.
[27] (1957) V.L.R. 11, at 30.
[28] *Niboyet* v. *Niboyet* (1878) P.D. 1 (cited by the Victorian Court).
[29] 31 *A.L.J.* 9, at 14.
[30] *Supra* n. 9.
[31] (1870) L.R. 6 Q.B. 155.
[32] (1870) L.R. 6 Q.B. 139.
[33] See the writers cited *supra* n. 9.
[34] (1955) 1 *Sydney L.R.* 402.

Trusts[35] implicity disapproved of both these cases. In that case, the learned Lord Justice in discussing the decision in *Harris* v. *Taylor*[36] said (though it is submitted *obiter*),

> the defendant entered a conditional appearance in the Manx court and took the point that the cause of action had not arisen within the Manx jurisdiction. That point depended on the facts of the case and it was decided against him whence it followed that he was properly served out of the Manx jurisdiction in accordance with the rules of the Manx court. Those rules correspond with the English rules for service out of the jurisdiction contained in R.S.C. Ord. 11. and I do not doubt that our court would recognise a judgment properly obtained in the Manx Court for a tort committed there, whether the defendant voluntarily submitted to the jurisdiction or not, just as we expect the Manx court in a converse case to recognise a judgment obtained in our courts against a resident in the Isle of Man on his being properly served out of our jurisdiction for a tort committed there.

At all events it is suggested that the decisions in *Schibsby* v. *Westenholz* and *Godard* v. *Gray* do not provide a formidable barrier to the acceptance of *Travers* v. *Holley*. These two cases are clearly distinguishable on the ground that neither of them was concerned with the recognition of *decrees of divorce* which, of course, involve the special element of status.

However, even if not for the reasons given in *Fenton* v. *Fenton*, it can be said that prior to *Travers* v. *Holley* there was no authority (apart from the *dicta* of Denning, L.J., cited above) to support the principle that the English court's rule of recognition of foreign decrees of divorce depended on their jurisdictional rule. If therefore the *dicta* relied upon in *Fenton* v. *Fenton* support the proposition that the English courts would only recognise foreign decrees of divorce if granted by the court of the domicile of the parties, they cannot be explained away on the ground that they were correct then, when domestic jurisdiction was based on domicile, but must now be of no weight as this jurisdiction has been extended by statute.[37] The preliminary question, however, is whether the above statement of principle in *Fenton* v. *Fenton* is supported by the *dicta* there cited. It must be admitted that these *dicta* do support the principle that questions of personal status depend on the law of the domicile.[38] If this principle be established, it is an attractive and simple deduction that domicile is the exclusive basis for the recognition of foreign divorces. The court in *Fenton* v. *Fenton* found *dicta* to support this latter conclusion although they were not as strong as those relied upon to establish the basic principle (e.g. in *Chia* v. *Chia*, *Le Mesurier* v. *Le Mesurier*[39] and

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[35] (1951) 2 All E.R. 69, at 73.

[36] (1915) 2 K.B. 580.

[37] This point was nevertheless taken by Professor Kennedy (31 *Can. Bar Rev.* at 99) in arguing that *dicta* in *Chia* v. *Chia* (1921) D.L.R. 566, 575, and *Worth* v. *Worth* ((1931) N.Z.L.R. 110 (to the effect that a divorce granted on a special jurisdictional basis would have no claims to extra-territorial recognition) were strictly correct at the time of these decisions, but now must give way to the "wider view" owing to the enactment in other common law countries of "deserted wife" legislation similar to that which founded jurisdiction in those cases.

[38] "It is both just and reasonable therefore that the differences of married people should be adjusted in accordance with the laws of the community to which they belong and dealt with by the tribunals which alone can administer those laws (*per* Lord Penzance in *Wilson* v. *Wilson* (1872) L.R. 2 P.D. 435). "In the judgment in *Le Mesurier* v. *Le Mesurier* the modern doctrine of domicile as the true test prevails unrestrainedly" (*per* Viscount Haldane in *Salvesen* v. *Administrator of Austrian Property* (1927) A.C. 641, at 652). "Ever since the case of *Le Mesurier* v. *Le Mesurier* the general rule which has been accepted by the Court of Session is that jurisdiction in divorce belongs only to the Courts of the permanent domicile of the husband" (*per* Lord Strachan in *Warden* v. *Warden* (1951) S.C. 508 at 510-511. See also *Advocate* v. *Jaffrey* (1921) A.C. 126, *A.-G. for Alberta* v. *Cook* (1926) A.C. 444. *Shaw* v. *Gould* (1868) L.R. 3 H.L. 55 esp. *per* Lord Westbury at 83; *Armitage* v. *A.-G.* (1906) P. 135, *per* Sir Gorell Barnes, at 141-42.

[39] *Per* Lord Watson at 527-28 and *Shaw* v. *Gould supra* n. 38.

Shaw v. *Gould*).[40]

From the foregoing discussion the following conclusion may, it is submitted, be drawn. *Fenton* v. *Fenton* is not consistent with the letter of the authorities on the subject, in as much as *Travers* v. *Holley* is the only authority directly in point. The conclusion reached in that case is diametrically opposed to that of the Victorian court. On the question of principle there are *dicta* of considerable authority to support the principle that questions of personal status depend on the law of the domicile of the parties. It must be reiterated, however, that the ultimate proposition that only decrees of the court of the domicile of the parties will be recognised is not established by authority. The Victorian court in *Fenton* v. *Fenton* was thus faced with a decision of the Court of Appeal which was not inconsistent with any prior authority.[41] If this itself were not a decisive reason for following the Court of Appeal it is submitted with respect that the desirability of the rule in *Travers* v. *Holley* should have settled the issue.

It was not until the case of *Fenton* v. *Fenton* that the desirability of the rule in *Travers* v. *Holley* was questioned. Herring, C.J., and O'Bryan, J., took the view that an adherence to that rule would, at least in Australia, lead to even greater confusion in that branch of the law relating to the recognition of foreign divorces. Far from leading to fewer cases of "limping marriages", the rule, their Honours claimed, would tend to the propagation of this evil. This proposition was illustrated by an example[42] which, as Professor Cowen has pointed out, is indeed an unfortunate one.[44] The case given is covered by the Commonwealth Matrimonial Causes Act 1945, making three years residence by a woman a ground for jurisdiction throughout Australia, and this provision was apparently not adverted to by their Honours.

It is believed that the desirability of the rule in *Travers* v. *Holley* may be demonstrated as simply as this. "Deserted wife" legislation has now been enacted by most legislatures in the British Commonwealth of Nations and the rule will lead to the recognition of decrees of divorce based on such legislation between those jurisdictions. It is apparent, therefore, that an adherence to the rule will lead to a uniformity of status which would not otherwise be achieved. If the decree is recognised under *Travers* v. *Holley* the parties will be regarded as not married in both countries as between which the question of recognition arises. If the decree is refused recognition, as it would be under *Fenton* v. *Fenton*, the parties would be married in the one country and not married in the other — their marriage would "limp". As between the Australian States, of course, such defects might be cured by the "full faith and credit" clauses of s. 118 of the Constitution and s. 18 of the State and Territorial Laws and Records Recognition Act. Such an approach, however, would depend on the scope to be given to these provisions, and "Australian authority in this matter is meagre".[45]

It is clear of course that *Travers* v. *Holley* will not dispose of all "limping

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[40] *Per* Lord Westbury *supra*.

[41] The *dicta* relied on in *Fenton* v. *Fenton* may perhaps be used to reach an opposite conclusion. These *dicta* were unfortunately not referred to in *Travers* v. *Holley* and indeed the weakest point of this case is the lamentably scant reference which was made to authority.

[42] (1957) V.L.R. at 32-33; "Western Australia takes jurisdiction if the wife is the petitioner and she has lived in the State apart from her husband for not less than three years immediately prior to the commencement of the action if in the circumstances she would have, had she been unmarried, been deemed to have a domicile in the State. Victoria and most other States have no such provision. Suppose a person who is domiciled in Victoria is divorced in America by a court having a like jurisdiction to the Western Australian court. According to *Travers* v. *Holley* that decree would be recognised in Western Australia, but it would not be recognised in Victoria. The parties would be divorced in Western Australia but not elsewhere in Australia . . ." *Per* Herring, C.J., and O'Bryan, J.

[43] 31 *A.L.J.*, 15. [44] *Ibid.* [45] Dean Griswold, 67 *Harv. L.R.* at 823.

marriages." Problems will continue to arise as between jurisdictions which do not share the same statutory bases of jurisdiction. It is submitted, however, that the fact that the rule in *Travers* v. *Holley* would tend towards the establishment of a uniform status of married or not married persons as between the Commonwealth jurisdictions, is sufficient to justify the court in "accepting its own jurisdictional rule as a proper test for the recognition of another court's decree."[45] Of course, the rule in *Travers* v. *Holley* will not always be easy to apply, the problem of determining the similarity required between the bases of jurisdictions being apparent. Such a problem arose in *Dunne* v. *Saban*[46] and it was specifically alluded to in *Fenton* v. *Fenton*.[47] The suggestion is here made, however, that the other benefits of the rule outweigh such considerations, and it must be borne in mind that "conflict rules are not tailored for simplicity".[48]

It may be further seen that an adherence to the decision in *Fenton* v. *Fenton* would not only tend to the frustration of the aim of this branch of the law that people should be either married or not married everywhere, but in some cases would lead to quite arbitrary results. Take, for example, a case where H and W are domiciled in New Zealand. H deserts W in New Zealand and acquires a domicile of choice in England. W obtains a divorce from H in New Zealand under the "deserted wife" legislation of that country. This decree would be recognised in England under *Travers* v. *Holley*. If the question of its recognition arose in Victoria, the Victorian court would presumably be obliged to accord it recognition under the principle of *Armitage* v. *A.-G.*[49] If, however, the question of recognition arose in Victoria without H having acquired a domicile in England (or any other country that would recognise the decree under *Travers* v. *Holley*) the decree would not be recognised under *Fenton* v. *Fenton*.

If in the above case H had a domicile of origin in Victoria, and the Victorian court escaped the application of the rule in *Armitage* v. *A.-G.* by holding that H did not establish a domicile of choice in England but that his domicile of origin revived, it would simply be another instance of a "limping marriage" caused by preferring *Fenton* v. *Fenton* to *Travers* v. *Holley*. The parties would be not married in New Zealand, not married in England, but married in Victoria.

It might be of interest to consider finally, whether an acceptance of the rule in *Travers* v. *Holley* leaves the domicile test without sphere of operation in the field of recognition of foreign divorces. In all the voluminous writing that followed upon the decision in *Travers* v. *Holley* the question was little considered. It was, however, suggested by Professor Kennedy that *Travers* v. *Holley* does not substitute an entirely new basis for recognition — it does not replace, for instance, domicile as a basis for jurisdictional competence."[50]

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[46] *Dunne* v. *Saban* (1955) P. 178. The rule in *Travers* v. *Holley* was not applied by Davies, J., in this case on the ground that there was not sufficient similarity between the bases of jurisdiction of the *forum* and of the foreign court. His Lordship said that these bases of jurisdiction had to correspond "almost exactly" before the rule would apply. A much wider view of this requirement of similarity was taken in *Arnold* v. *Arnold* (1957) 2 W.L.R. 366 by Mr. Commissioner Latey, Q.C., who said, "Does the decision in *Travers* v. *Holley* involve the grounds of divorce being substantially the same? I think not. The basis of jurisdiction does not depend on that ground . . ." (377). It later stated that "the court has to look at the realities" (378). It is implied in this part of the judgment that in looking at realities the court should not confine itself to the wording of the provision giving the foreign court jurisdiction, but should look beyond to the judicial interpretation of the provision and the substance of the ground relied upon in the particular case. (See, however, *Robinson-Scott* v. *Robinson-Scott* (1957) 3 W.L.R. 842.—Ed.).

[47] (1957) V.L.R. 11.

[48] G. D. Kennedy, 31 *Can. Bar Rev.* 799, at 803.

[49] This principle is that a divorce, no matter where or how obtained, which is valid by the law of the country which is the domicile according to the standards of the *forum* which is considering the question, will be recognised as authority in that *forum*.

[50] 32 *Can. Bar. Rev.* 361. This view is supported by a statement by Davies, J. in *Dunne* v. *Saban* (1955) P. 178, at 190: "In my judgment the observations in *Travers* v. *Holley*

To the extent that domicile is retained by foreign courts as the basis of jurisdiction in divorce, the rule in *Travers* v. *Holley* will, of course, involve respect for the jurisdiction of the country of the parties' domicile. It is conceivable, however, that a case might arise in which the forum will be faced with the problem whether to recognise a decree of the court of the domicile of the parties or a decree conflicting therewith of a court exercising similar assumed jurisdiction and thus entitled to recognition under the doctrine of *Travers* v. *Holley*.[51] It may well be that if faced with such a conflict the court would prefer that the primary power over the marriage status, which has been traditionally ascribed to the law of the domicile, should prevail over a rule engendered by necessary statutory encroachments on the exclusiveness of this power.

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decided that this court will recognise the rights of foreign courts to encroach upon the principle of domicile only to the extent to which this court also does." This statement was approved by Hodson, L.J. in *Levett* v. *Levett* (1957) 1 All E.R., at 723.

[51] *Cf.* Note, (1955) 1 *Sydney L.R.* 403-4. The instance offered in that Note involved a conflict, not of two divorce decrees, but of a decree of judicial separation with a divorce decree.

BOOK REVIEWS

The Quantum of Damages, Vol. 2 — *Fatal Injury Claims*, by David A. McI. Kemp and Margaret Sylvia Kemp with a foreword by the Right Honorable Sir Norman Birkett. London, Sweet & Maxwell Ltd. Australia, Law Book Co. of Australasia Pty. Ltd. 1956. xx and 326 pp. (£2/5/6 in Australia).

This book is a companion work to the author's recent publication on the *Quantum of Damages in Personal Injury Claims*.[1] It follows the plan of the earlier work to the extent that brief statements of the law precede extensive quotations from judgments so that the features of a text book and a case book are in a measure combined. The cases include some which are not reported elsewhere, for the reason that they do not contain novel points of law, but which nevertheless may prove useful to the practitioner as a guide to the amount of damages likely to be awarded in particular sets of circumstances. The question posed in the earlier work regarding the extent to which cases showing the amounts awarded in similar circumstances previously arising might be cited in court is now answered by *Waldon* v. *War Office*.[2] There it was held that it was within the Judge's discretion whether he would permit such reference or not, but that previous awards should not be cited to a jury.

A preliminary chapter is devoted to an exposition of the general principles on which damages are assessed in claims brought under the Fatal Accidents Acts and this is followed by an enumeration of the main classes of benefits derived by a dependent in consequence of the deceased's death, with a discussion of the extent to which such benefits must be deducted from the damages. Chapter 3 lists with brief discussion the statutory exceptions to the principle that all net pecuniary benefits received by a dependent are to be so deducted. Chapter 4 in effect commences a new part of the work concerned not so much with legal principle as with the actual practice in assessing damages under these Acts. The general review of practice in this chapter is succeeded by chapters in which cases are classified into claims for the death of a husband where he is a working man with steady earnings, a working man with prospects of increased earnings, or a business or professional man. Claims for death of a wife, an adult child, an infant child, a parent, are next treated and finally the practice on appeals against the amount of damages awarded is considered. Some miscellaneous points of law are next collected, to be followed by some miscellaneous cases set out more or less *in extenso* and in Part III claims under the Law Reform (Miscellaneous Provisions) Act, 1934 receive attention. The Appendices include relevant statutory provisions, life tables, and parliamentary answers dealing with the purchasing power of the pound sterling.

It is scarcely necessary to sound a note of warning regarding the local

[1] Published 1954. [2] (1956) 1 W.L.R. 51 (C.A.).