not necessarily mean that "industrial disputes" should and will be limited to that conception. That the High Court has not regarded itself as so bound is evident from the developments already mentioned and, in particular, from the extension of the notion of "industrial dispute" to embrace employee — employee disputes.[22] Industry and industrial relations in this country have become so varied and complex and the disputes which can (and do) occur in relation to them so multifarious in character,[23] that the High Court will doubtless continue to be called upon to decide whether relationships, not envisaged by the framers of the Constitution, should be regarded as "industrial". The difficulties experienced in the past in having the scope of s.51 (xxxv) altered by referendum,[24] have, to a large extent, placed upon the High Court the responsibility of determining the future pattern of industrial regulation in this country,[25] in terms, what is more, of a statically worded power. It is for that Court, therefore, to decide whether to halt the expansive definition of the conciliation and arbitration power or pursue a progressive, though generic, policy of interpretation to accord with the economic, social and technological developments of the mid-twentieth century.[26]

The High Court has, for the present at least, halted the expansive definition of "industrial dispute" in this particular regard. But ' "industrial dispute" is not an institution in a state of arrested development',[27] and one may be permitted to conjecture that the concept will at some future time, be extended to embrace employer-employer disputes, at least between employers in the same industry and, provided, of course, such disputes relate to "industrial matters". As already suggested, this might still be done without expressly overruling *R.* v. *Portus*,[28] but in view of the difficulties involved, employer-employer disputes will doubtless continue to remain outside the scope of s.51 (xxxv), until such time as the High Court sees fit to overrule that decision.

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MARRIAGE UNDER DURESS
H. v. *H.*

The decision of Karminski, J. in *H.* v. *H.*[1] is interesting from the point of view of the principles of English Private International Law relating to questions of choice of law in suits for nullity of marriage and also raises the

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[22] *E.g., Paper Mills Case* (1943) 67 C.L.R. 619.

[23] The complex nature of "industrial interests" is well illustrated by the United Kingdom case of *Crofter Handwoven Harris Tweed Co.* v. *Veitch* (1942) A.C. 435, where the House of Lords held that employers and unions may have such an industrial interest in the manner in which another employer obtains his raw material as to enable them to combine for the protection of that interest, against that other employer, without committing the tort of conspiracy. The manner in which an employer obtains his raw material may well effect the terms of competition between all employers in an industry and so determine the wages and other working conditions which they can offer to their employees.

[24] See n.4 *supra.*

[25] Particularly since the labour standards laid down in the Commonwealth industrial jurisdiction determine or influence those prescribed in State jurisdictions.

[26] "Industry itself is constantly changing — scientific, social and other causes bring about great transformations. Disputes will . . . vary accordingly . . . but so long as the fundamental concept of 'industrial dispute' is present, none of these evolutionary modifications prevent the matter from being within the ambit of the (conciliation and arbitration) power." *Burwood Cinema Case* (1925) 35 C.L.R., at 539, *per* Isaacs, J.

[27] *Municipalities Case* (1919) 26 C.L.R., at 554, *per* Isaacs and Rich, JJ.

[28] (1954) A.L.R. 76.

[1] (1954) P. 258.

question of what duress is sufficient in English law to avoid a marriage.[2]

The case was a suit for nullity of a marriage performed in Hungary in 1949. At that time the Republic of Hungary was ruled by a Communist Government, the kind of Government that might not regard well-to-do families sympathetically. The petitioner was a member of such a family and her position, like that of many others of her class, had deteriorated since the Communist Government had come to power. She had heard many stories of people in her position being taken to prison and to concentration camps and she believed herself to be in real danger of sharing a similar fate.

It was in these circumstances that the petitioner, a Hungarian girl of eighteen, fearing for her life, liberty and virtue, went through a ceremony of marriage with the respondent, a French citizen some six months her junior, with the sole object of obtaining a foreign passport which would enable her to leave the country. She had previously agreed with the respondent that they should not live together after their marriage and in fact the parties separated immediately after the ceremony. The petitioner in due course obtained a French passport and travelled to England where she remained resident for over three years before presenting a petition for nullity of the marriage on the ground of duress. The respondent returned to France shortly after the ceremony and did not defend the suit.

The Court considered the case on the basis that English law was applicable and held that the petitioner's fears were reasonably entertained and were of such a kind as to negative her consent to the marriage which was accordingly null and void.

In all cases such as this, involving questions of private international law or conflict of laws, the court must decide two preliminary questions:—

(1) Has it jurisdiction to hear the suit, and
(2) If so, by reference to the law of what country should the issue in question be determined.

In the present case the petitioner relied upon s.18 (1) (b) of the English Matrimonial Causes Act, 1950,[3] in respect of jurisdiction; this section provides that an English Court shall have jurisdiction to entertain proceedings by a wife "in the case of proceedings for divorce or nullity, if the wife is resident in England and has been ordinarily resident there for a period of three years immediately preceding the commencement of the proceedings, and the husband is not domiciled in any other part of the United Kingdom or in the Channel Islands or the Isle of Man." It is respectfully agreed that the Court had jurisdiction under this provision to hear and determine the present case.

With respect however, to the second of the above questions, viz. by reference to the law of what country should the issue in question be determined, Karminski, J. appears to have almost completely disregarded the relevant principles of English Private International Law. The learned judge's reasoning in arriving at the conclusion that English Law was applicable was as follows: "It is alleged only that either English law or Hungarian law is applicable to the present case; there is no contention that French law is applicable. Now English law and Hungarian law in relation to the question to be decided, i.e. the avoidance of a marriage under fear or duress, are largely similar, therefore I shall consider the case on the basis that English law is applicable." His Lordship made no reference to any of the choice-of-law rules of English Private International Law applicable in such cases.

What exactly these rules are is doubtful and there is diversity of opinion amongst the text writers as to what is the correct position. Dr. Cheshire is of

[2] For other notes on this case see O. M. Stone, "Mariage de Convenance" (1954) 17 *Mod. L.R.* 149, and (1954) 70 *L.Q.R.* 309.
[3] 14 Geo. 6, c.25.

the opinion that, according to English law, the proper law to be applied in such a case as the present is the law of the country in which the marriage was celebrated.[4] Professor Graveson,[5] Dr. Morris[6] and Rupert Cross,[7] on the other hand, are of the opinion that the proper law in such a case is the law of the antenuptial domicile of each party.[8]

Dr. Cheshire draws a distinction between the contract of marriage and the status that emerges from the contract when it is implemented and then draws a corresponding distinction between contractual defects and personal defects in the marriage. Contractual defects are those affecting the validity of the contract and the ensuing ceremony in which the identity of the actual parties is a matter of indifference. Personal defects are those that affect the parties personally. According to Dr. Cheshire the former, such as want of form, are subject to the *lex loci celebrationis* while the latter are subject to the personal law of the parties. What defects, however, are to be classed as contractual, says Dr. Cheshire, is not entirely free from doubt, but he submits that "anything which negatives the free consent that is a fundamental requirement of general contract law must . . . be classed as contractual".[9] Thus, according to this view, the question whether annulment is to be decreed on the ground that the petitioner was the victim of duress, is a question to be determined by the *lex loci celebrationis*. Dr. Cheshire regards the decision in *Mehta* v. *Mehta*[10] as supporting this view. In that case the petitioner was a woman domiciled in England who went through a ceremony of marriage in Bombay with the respondent, who was domiciled in India. The ceremony was carried out in a language unknown to the petitioner who believed that its only purpose was to convert her to the Hindu faith. After the ceremony she was informed that her conversion and marriage had been effected at the same time. Barnard, J. held that the petitioner did not intend to marry the respondent and that she had been the victim of a fraud and accordingly granted her a decree of nullity. Dr. Cheshire points out that it cannot be predicated that the learned judge treated the defect as contractual (as he did not enquire whether the mistake would be regarded by the *lex loci celebrationis* as a sufficient ground for relief) but that a not unreasonable conclusion is that he presumed Indian and English law to be the same on the matter.

Dr. Cheshire finally submits that "to classify want of consent as a personal defect and to assign it to the law that governs status seems utterly wrong on principle."[11] He points out that "a valid agreement by the parties to go through a marriage ceremony is an essential preliminary to the creation of the married status,"[12] and that "fundamental error nullifies not only the agreement, but also the ceremony in which it finds its fulfilment, and whether the facts disclose error of that nature must surely be a matter for the law that governs the ceremony, i.e. the law that determines whether a ceremony sufficient to effect a change of status has come into existence,"[13] namely the *lex loci celebrationis*.

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[4] G. C. Cheshire, *Private International Law* (4 ed. 1952) 347-49.
[5] R. H. Graveson, *The Conflict of Laws* (2 ed. 1952) 110.
[6] J. H. C. Morris, *Cases on Private International Law* (2 ed. 1951) 142.
[7] J. H. C. Morris (General Ed.), *Dicey's Conflict of Laws* (6 ed. 1949) 264-65.
[8] Although not stated specifically by any of these writers, presumably the law of the antenuptial domicile of the party alleging the duress is what is meant.
The case of *De Reneville* v. *De Reneville* (1948) P. 100 contains certain *dicta* which suggest a third view as to the law governing consent. It is there said (at 114, 121) that questions as to the "essentials" of a marriage should be decided by reference to the law of the intended matrimonial home. Questions as to the consent of the parties to a marriage would certainly seem to be questions as to "essentials," but *De Reneville* v. *De Reneville* is of no assistance in the present case as here there was no intended matrimonial home.
[9] G. C. Cheshire, *Private International Law* (4 ed. 1952) 348.
[10] (1945) 2 All E. R. 690.
[11] G. C. Cheshire, *Private International Law* (4 ed. 1952) 349.
[12] *Ibid.* [13] *Ibid.*

The other view, held by Professor Graveson, Dr. Morris and Rupert Cross, is that, according to English Private International Law principles, the proper law to be applied in a case such as the present is the law of the antenuptial domicile of each party. In the words of Dr. Morris: "The question whether a marriage is *valid or void* for reasons like . . . lack of consent . . . is a matter for the law of the antenuptial domicile of each party."[14] Cross submits that this view is consistent with all the decisions and that "it may perhaps be justified on the ground that the question raised is analagous to one of capacity in that marriage is essentially a 'voluntary union' and the question as to whether a union is in law voluntary should depend upon the personal law to which each of the parties was subject at the date of the ceremony".[15] Cross is also of the opinion that *Mehta* v. *Mehta*,[16] a case which Dr. Cheshire cites as supporting his view, is, in fact, inconsistent with Dr. Cheshire's view, as here a marriage was held void on the ground of the wife's mistake as to the nature of the ceremony without reference to the law of India where the marriage was celebrated and the husband was domiciled. Cross is further of the opinion that Dr. Cheshire's view is perhaps inconsistent with the distinction drawn by the Court of Appeal in *Apt* v. *Apt*[17] between the fact of and the method of giving consent, the latter alone being referable to the *lex loci celebrationis*.

Professor Graveson states the position as follows: "The consent to marriage of the parties themselves (as distinct from that of third parties, such as parents) is a matter of essentials and governed by the personal law of each party"[18] and cites as authority for this view the case of *Way* v. *Way*.[19] There, a Russian wife was forbidden by the Soviet authorities to join her husband in England. The petitioner was a British subject domiciled in England who went through a ceremony of marriage at Archangel with the respondent who was domiciled in Russia. The petitioner believed he had been legally married. He later claimed annulment on the grounds, (1) that certain formalities required by Russian law had been omitted, (2) that the marriage was void for want of consent, since at the time of the ceremony he believed that his wife would be permitted to accompany him to England and also that it was the duty of both parties to live together. Having regard to Russian law he was mistaken on both grounds. Hodson, J. held first that the Russian formalities had been complied with. He then held that "questions of consent are to be dealt with by reference to the personal law of the parties rather than by reference to the law of the place where the contract was made"[20] and that it was "justifiable and consistent with authority to apply the matrimonial law of each of the parties"[21] to the issue in dispute. Hodson, J. found support for his holding in certain dicta of Lord Merriman P. in *Apt* v. *Apt*[22] and in dicta of Cohen, L.J. when giving the judgment of the Court of Appeal dismissing the petitioner's appeal in this latter case. When the case of *Way* v. *Way*[23] went on appeal[24], the Court of Appeal held the marriage to be void on the ground of failure to observe the Russian formalities and accordingly any pronouncements on the law governing consent were obiter. Bucknill, L.J., and Denning, L.J., did not refer to the matter but Sir Raymond Evershed, M.R. "assumed" that it was correct for Hodson, J. to refer the question to the personal law of the parties.[25]

In the present case, whichever of the two views stated above is correct, Hungarian law was applicable, as in nullity proceedings the relevant date for

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[14] J. H. C. Morris, *Cases on Private International Law* (2 ed. 1951) 142.
[15] J. H. C. Morris (General Ed.), *Dicey's Conflict of Laws* (6 ed. 1949) 265.
[16] (1945) 2 All E.R. 690.
[17] (1947) P. 127; (1948) P. 83, 88 (C.A.).
[18] R. H. Graveson, *The Conflict of Laws* (2 ed. 1952) 110.
[19] (1950) P.71.
[20] *Id.*, at 78.
[21] *Id.*, at 79.
[22] (1947) P. at 146; (1948) P. at 88.
[23] (1950) P. 71.
[24] *Sub.nom. Kenward* v. *Kenward* (1951) P. 124.
[25] *Id.*, at 133.

ascertaining the personal law of the parties is the time immediately prior to the marriage. Even though this is the position however, it is doubtful whether Karminski, J. was correct in considering the case on the basis that English law was applicable because of the presumed similarity of Hungarian law on the issue to be decided, in view of the fact that expert evidence of Hungarian law was available. Further it is submitted with respect that, even if his Lordship were correct in applying English law on this basis, some reference at least should have been made to the relevant English choice-of-law rules discussed above, unsettled though they may be.

Even assuming however, that it was correct to apply English law to the present case the decision of the Court is not entirely free from doubt on the question of duress as a ground for nullity of marriage.

It is a well established principle of English law that the free consent of the parties themselves is an essential to the validity of any contract including that of marriage. "If a person is induced to go through a ceremony of marriage by threats or duress . . . and without any real consent to the marriage it is invalid."[26] The learned Judge in the present case observed that "The general doctrine that fear may negative consent to marriage has long been accepted in the courts of this country."[27] In the present case the petitioner alleged that she had been induced to be a party to the marriage ceremony not of her own free will but through fear and duress. She alleged that she would never have consented to go through the ceremony of marriage had she not with good cause been in fear of her life, liberty and virtue. His Lordship found as a fact that the petitioners' fears were reasonably entertained and were of such a kind as to negative her consent to the marriage.

The learned judge observed in his judgment that "So far as has been revealed by the industry of counsel, there appears to be no case reported where fear or duress emanated from any other source than from the respondent, his servants or agents."[28] and it is in this that the present case differs substantially from decided cases. There are, however, certain statements in the judgments of the members of the Court of Appeal in *Talbot* v. *Von Boris*[29] which bear on this matter. These dicta seem to indicate that duress proceeding from a third party may avoid the contract if the other contracting party was aware of it. This case was an action against a wife upon joint and several promissory notes of her husband and herself, the wife having joined in making the notes as surety for the repayment by the husband of the sums advanced to him by the plaintiff. The wife alleged that she was induced to sign the notes by duress on the part of her husband and that the plaintiff knew of that duress and she sought to set this up as a defence to the action. The wife could not bring evidence to show that the plaintiff was in fact aware of the duress and the defence failed. On the question of duress as a defence Farwell, L.J. said: "To support such a defence, where the alleged duress is that of a person other than the person contracted with, it must be shown that the duress by which the contract was procured was known to the plaintiff when he entered into the contract."[30] On the same question Kennedy, L.J. stated that "The result of the evidence, therefore, is that the defendant was induced to sign the notes by duress on the part of her husband but that the plaintiff did not know this. That being so, there appears to me to be an end of the case."[31] These statements and certain others which appear in the judgment of Vaughan Williams, L.J.[32] seem to indicate that had it been proved that the plaintiff was aware of the duress, then the wife's defence would have succeeded, even though this would have meant that here was a case where the duress did not emanate from the plaintiff,

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[26] 16 *Halsbury's Laws of England* (2 ed.) 561, 562.
[27] (1954) P., at 266.
[28] *Id.*, at 267.
[29] (1911) 1 K.B. 854.
[30] *Id.*, at 863.
[31] *Id.*, at 866
[32] *Id.*, at 859, 860.

his servants or agents.

This case would therefore appear to contain some justification from Karminski, J.'s ruling in the present case that the duress was of a kind recognised by English law as sufficient to negative a party's consent to a marriage even though the duress emanated from a source other than from the other party, his servants or agents.

It has been argued that the decision in the present case is wrong since "in order to negative consent to a marriage the fear relied upon must relate to the consequences expected to flow directly from a failure to go through the ceremony and that the petitioner's fear in the present case could not be said to be of that kind".[33] It has also been argued that the decision is opposed to precedent since all the previous cases on duress appear to have involved the threat of specific action, and a vague and general fear of unpleasant consequences appears never to have been successfully pleaded before".[34] An examination of the leading cases on the subject supports these essentially similar submissions[35], and as in the present case the petitioner had survived the Soviet occupation, and a number of years of communist rule without loss of life, liberty or virtue, it would appear that Karminski, J.'s decision is wrong on these grounds.

A third point which the present case raises is the status of marriages which have been termed by some American text writers[36] "sham marriages", i.e. marriages between parties who go through a ceremony of marriage with some object other than that of creating a true marriage. Such a case was the South African case of *Martens* v. *Martens*[37] which was considered in the judgment in the present case. There, a Greek woman living in Greece desired to enter the Union of South Africa in order to live with Mr. H., a married man there residing. To secure admission to the Union, she married another man resident in South Africa. After the marriage she went to live with Mr. H. and had lived with him ever since. Clayden, J. found "that the facts show that the parties did intend that the defendant should become the wife of the plaintiff. That was the very object of the ceremony, so that she could remain in this country, and that object was brought about with a realisation by both contracting parties that there would be need for divorce to end the marriage."[38] A decree of nullity was accordingly refused. Karminski, J. stated that he agreed with the reasoning of this case but distinguished it on the ground that the marriage there was not entered into under any fear. The learned judge stated: "If the present case was devoid of the element of fear I should be compelled to find that the parties to the present suit intended that the petitioner should become the wife of the respondent."[39] His Lordship also referred to *Brodie* v. *Brodie* [40] where the petitioner, expecting a child by the respondent, pressed him to marry her. The respondent agreed to marry the petitioner on the condition that she sign an agreement to live apart after the marriage. An agreement to this effect was signed on the day before the marriage and a further confirmatory agreement endorsed upon the previous agreement was signed on the day of the marriage after the ceremony. Horridge, J. held that the agreement was void as against public policy and affirmed the validity of the marriage by granting a decree for restitution of conjugal rights.

Martens v. *Martens*[41], *Brodie* v. *Brodie*[42] and the present case are authority

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[33] (1954) 27 A.L.J. 614.

[34] O. M. Stone, "*Mariage de Convenance*" (1954) 17 Mod. I.R. 150.

[35] See e.g. *Scott* v. *Sebright* 12 P.D. 21; *Ford* v. *Stier* (1896) P.1; *Hussein* v. *Hussein* (1938) P.159.

[36] E.g., E. Rabel, 1 *The Conflict of Laws* (Chicago 1945) 272. See also the judgment of Frank, J. in *United States* v. *Rubenstein* 151 Fed. Rep. (2nd ser.) 915, at 919.

[37] (1952) 3 S.A.L.R. 771.

[38] *Id.*, at 775.

[39] (1954) P., at 269.

[40] (1917) P., at 271.

[41] (1952) 3 S.A.L.R. 771.

[42] (1917) P., at 271.

for the proposition that English law regards "sham" marriages as valid, a proposition expressly affirmed by Karminski, J. in the present case which, however, he distinguished because of the presence of the element of fear. United States law, on the other hand, regards "sham" marriages as void. This is illustrated by the American case of *United States* v. *Rubenstein*[43] which was considered in the judgment in the present case. There, a Czechoslovak woman married an American man in order that she might stay in the United States. The man received two hundred dollars from the woman and it was agreed that a divorce should be obtained six months after the marriage. After the marriage the parties had separated, had always lived apart and the marriage was never consummated. In considering these facts which came before the U.S. Circuit Court of Appeal in connection with an appeal from a conviction for conspiracy to obtain the illegal entry of an alien into the United States, L. Hand, J. said: "Mutual consent is necessary to every contract: and no matter what forms or ceremonies the parties may go through indicating the contrary, they do not contract if they do not in fact assent, which may always be proved . . . If the spouses agree to a marriage only for the sake of representing it as such to the outside world and with the understanding that they will put an end to it as soon as it has served its purpose to deceive, they have never really agreed to be married at all. They must assent to enter into the relation as it is ordinarly understood, and it is not ordinarily understood as merely a pretence, or cover, to deceive others."[44] Karminski, J. rejected this case as a precedent for English law, preferring the South African case of similar facts, viz., *Martens* v. *Martens*[45] referred to above.

It is submitted, finally, that on sociological grounds "sham" marriages should be regarded by law as valid and binding on the parties. Marriage is an institution of great social significance and is intimately connected with public policy. It is the source of the family and as such is one of the bases of civilised society.[46] In view, therefore, of its undoubted importance as a social institution, it is essential that marriage be not regarded lightly nor used simply as a convenience. As Lord Merrivale has said: "In a country like ours, where the marriage status is of very great consequence and where the enforcement of marriage laws is a matter of great public concern, it would be intolerable if the marriage law could be played with by people who thought fit to go to a register office and subsequently, after some change of mind, to affirm that it was not a marriage because they did not so regard it."[47]

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RECIPROCITY IN INTERNATIONAL RECOGNITION OF DIVORCES: *TRAVERS* v. *HOLLEY*

The controversial question of the recognition to be accorded by English courts to foreign divorce decrees came once again before the Court of Appeal last year in the case of *Travers* v. *Holley*[1] and the decision in this case represents a departure from the insularity of outlook which had previously marked many decisions of the English courts on the subject of private international law. The importance of the case from a practical point of view might be said to lie in the fact that a New South Wales legal practitioner can now, on the authority of a decision of the Court of Appeal, advise a client that a divorce granted in New

[43] 151 Fed. Rep. (2nd ser.) 915.

[44] *Id.*, at 918-19.

[45] (1952) 3 S.A.L.R. 771.

[46] See *Mordaunt* v. *Mordaunt* (1870) L.R. 2 P. & D. 103, 126, *per* Lord Penzance.

[47] *Kelly* v. *Kelly* 148 L.T. 143, 144.

[1] (1953) 3 W.L.R. 507. For further literature on this case see the following: E. Griswold, "Reciprocal Recognition of Divorce Decrees" (1954) 67 *H.L.R.* 823; G. A. Kennedy, "Conflict of Laws — Foreign Divorce Granted to Deserted Wife — Recognition in Another Deserted Wife Jurisdiction" (1954) 31 *Can. Bar Rev.* 799.