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 ordinarily 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]

T. SIMOS, Case Editor — Third Year Student.

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.

South Wales under "deserted wife" legislation will receive recognition in other common law countries with similar legislation. The case is also important from a jurisprudential point of view in that it illustrates the capacity of the courts to develop and refine the common law and to bring it into line with changing conditions and new situations.

The question to be determined in the *Travers Case* was whether an English court would recognize a decree of divorce granted by a New South Wales court under s. 16 (a) of the Matrimonial Causes Act, 1899 (N.S.W.).[2] The facts were briefly as follow: Mr. and Mrs. Travers had left England shortly after their marriage and come to Sydney where Mr. Travers deserted his wife, went to the country and later returned to England. After three years' desertion, Mrs. Travers in New South Wales petitioned for and obtained a divorce under s.16(a) of the Matrimonial Causes Act, 1899 and later, relying on that divorce, married a Mr. Holley. Subsequently Mr. Travers in England petitioned for divorce on the ground of his wife's adultery with Mr. Holley, his contention being that he had never acquired a domicile of choice in New South Wales, and even if he had, the New South Wales court would have no jurisdiction in the eyes of an English court to dissolve the marriage unless at the date of the institution of proceedings in New South Wales both parties were domiciled there. His argument was however rejected, all three judges (Somervell, Hodson and Jenkins, L.JJ.) holding that by virtue of s. 16 (a) of the New South Wales Matrimonial Causes Act, 1899 and s. 13 of the English Matrimonial Causes Act, 1937[3], both the New South Wales and English courts claimed the same jurisdiction, and that, even if while in desertion the husband abandoned his New South Wales domicile of choice and reverted to his domicile of origin, the New South Wales court would not be deprived of jurisdiction.

The argument against the recognition of the New South Wales divorce was based on a decision of the Privy Council in 1895 in *Le Mesurier* v. *Le Mesurier*[4] which for many years has been the authority on the question of jurisdiction in divorce. The principle laid down in that case was that matrimonial status is governed by the law of the domicile of the parties; jurisdiction to grant a divorce is thus limited to the court of the domicile.[5] The rule requiring domicile as the basis of jurisdiction in divorce was however found in practice to create many hardships, and statutory exceptions to the rule were created by the legislatures of most of the Australian states and England. But whilst such legislation created an exception to the rule laid down in *Le Mesurier* v. *Le Mesurier*[6] so far as the court granting the divorce was concerned, no legislative provision was made, as a general rule[7], for a divorce granted under such legislation in another State to be recognized in the forum. It was argued that such recognition would contravene what was regarded as a basic principle of private international law.

This view has been strongly criticized by, among others, Dean Erwin Griswold of the Harvard Law School who advocated, in a notable address to the Australian Law Convention in 1951, "that the recognition rule applied by a

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[2] Act No. 14, 1899. By s. 16(a) it was provided that in cases of desertion, a wife who has at the time of the institution of the proceedings been domiciled in New South Wales for three years and upwards and was so domiciled when the desertion commenced, may present a petition to the court for dissolution of her marriage, and she shall not be deemed to have lost her domicile merely because her husband has thereafter acquired a foreign domicile. In effect, it gives a deserted wife what may be called a "notional domicile" for the purposes of the court's jurisdiction.

[3] 1 Ewd. 8 & 1 Geo. 6 c.57 (now s. 18 of the Matrimonial Causes Act, 1950 (Eng.).

[4] (1895) A.C. 517 (P.C.).

[5] The first exception to this principle was laid down in *Armitage* v. *Attorney-General* (1906) P. 135 where it was held that a divorce, even although it is not granted by the domicile will be recognized in England if it is recognized at the domicile.

[6] (1895) A.C. 517 (P.C.).

[7] An exception to this lies in legislation of Western Australia and the Union of South Africa. See E. Griswold "Reciprocal Recognition of Divorce Decrees" (1954) 67 *H.L.R.* 823 at 828.

court should follow and indeed be a reflection of its jurisdictional rule."[8] The Dean pointed out that no case[9] had yet decided the recognition question as applied to the modern jurisdictional situation which did not exist when the *Le Mesurier Case* or the cases it reflected[10] were decided.

Travers v. *Holley*[11] was therefore the first case to decide the recognition question as applied to the modern jurisdictional situation, and gave strength to Dean Griswold's contention. It is interesting to note that the Court relied on *Le Mesurier* v. *Le Mesurier*[12] to support its judgment and quoted the following passage from the judgment of Lord Watson:

> A decree of divorce *a vinculo*, pronounced by a court whose jurisdiction is solely derived from some rule of municipal law peculiar to its forum, cannot, when it trenches upon the interests of any other country to whose tribunals the spouses were amenable, claim extra territorial authority.[13]

Hodson, L.J. applied this in converse and said that

> . . . where it is found that the municipal law is not peculiar to the forum of one country but corresponds with a law of a second country, such municipal law cannot be said to trench upon the interests of that country . . . . Where, as here, there is in substance reciprocity, it would be contrary to principle and inconsistent with comity if the courts of this country were to refuse to recognize a jurisdiction which mutatis mutandis they claim for themselves.[14]

The question remains, of course, as to the extent to which the decision in *Travers* v. *Holley*[15] will be carried. Although the actual facts of the case were confined to the recognition of a decree for the dissolution of a marriage, there seems to be no reason why the reciprocity which an English court would grant in a divorce decree should not be granted in a nullity decree.[16] Further, it seems clear that the effect of the decision will not be confined to the field of divorce or domestic relations, but may extend to other fields, for example, the fields of contracts and torts, and that the principle of reciprocity may become a major feature in private international law. This view is supported by dicta of Denning, L.J. in *Re Dulles Settlement Trusts*[17], which suggested even before *Travers* v. *Holley*[18], that if a foreign court has assumed jurisdiction in similar circumstances to those in which an English court would have assumed jurisdiction, then the judgment of the foreign court should be recognized.[19]

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[8] This criticism was contained in a paper presented to the Seventh Legal Convention of the Law Council of Australia in July, 1951. See E. Griswold, "Divorce Jurisdiction and Recognition of Divorce Decrees — A Comparative Study" (1951) 25 *A.L.J.* 248, 264.

[9] In 1951 in *Warden* v. *Warden* (1951) S.L.T. 406 the Scottish Court of Sessions had held, on facts similar to those in *Travers* v. *Holley* (1953) 3 W.L.R. 507 that s. 2 of the Law Reform (Miscellaneous Provisions) Act 1949 did not empower the Scottish courts to recognize decrees of divorce other than those pronounced by the courts of the husband's domicile or recognized by those courts. Lord Strachan stated that the Act of 1949 made no provision for the recognition of foreign decrees, and was of the opinion that some provision to that effect would have been made if Parliament had intended an alteration in the law as to the recognition of foreign decrees. However, he did say that even if the principle of reciprocity should be applied, there was no evidence in the instant case that the law of Nevada, under which the decree of divorce was granted, was substantially similar to that of Scotland.

[10] *Warrender* v. *Warrender* (1835) 2 Cl. and F. 488; *Dolphin* v. *Robbins* (1859) 7 H.L.C. 390; *Shaw* v. *Gould* (1868) L.R. 3 H.L. 55; *Harvey* v. *Farnie* (1882) 8 A. C. 45.

[11] (1953) 3 W.L.R. 507.

[12] (1895) A.C. 517 (P.C.).

[13] (1953) 3 W.L.R. at 516.

[14] *Ibid.*

[15] (1953) 3 W.L.R. 507.

[16] If this is so, it provides a ground for criticism of the judgment of Willmer, J. in *Chapelle* v. *Chapelle* (1950) P. 134. As an English court exercises jurisdiction on the ground of the domicile in England of one party only, the Maltese decree in *Chapelle's Case* should have been recognized as the decree of the court of the domicil of the husband.

[17] (1951) 2 All E.R. 69. See also E. Griswold "Reciprocal Recognition of Divorce Decrees" (1954) 67 *H.L.R.* 823, 829; Cheshire, *Private International Law* (4 ed. 1952) 609.

[18] (1953) 3 W.L.R. 507.

[19] By his dicta in this case Denning, L.J. would appear to have tacitly disapproved *Godard* v. *Gray* (1870) L.R. 6 Q.B. 139 and *Schibsby* v. *Westenholz* (1870) L.R. 6 Q.B. 155.

The question also arises as to what decree of similarity is necessary between the laws of two countries before recognition of judgments or decrees will be given. In the *Travers Case* the legislation of New South Wales and England was practically identical, but would the same result have been reached had that not been the position? The language of the court seems to suggest that complete similarity between the different laws is not essential.[20] That language, it is submitted, is even wide enough to allow courts in future cases to grant recognition to a foreign decree if, whatever the basis of the foreign court's jurisdiction, it is given in circumstances similar to those in which we would ourselves give a decree. Suppose, for example, a wife, deserted by a husband who has since acquired another domicile is granted a divorce in one of the American States, the American court exercising juridiction not under any statute but on the common law ground of the wife's separate domicile in that State.[21] On the view submitted above, it is suggested that the divorce would be entitled to recognition in New South Wales if the facts were such that, had the matter originally arisen in a New South Wales court, the wife would have been granted a divorce under s.16(a) of the Matrimonial Causes Act, 1899.

The final point to be considered in relation to *Travers* v. *Holley*[22] is the extent to which its operation might possibly be limited by a further decision of the Court of Appeal, also given last year, in *Har-Shefi* v. *Har-Shefi*[23], a decision extending the scope of the law of the domicile. In that case it was held that a divorce of two Israeli domiciliaries obtained in England by a Jewish bill of divorcement, sufficient according to the Jewish Rabbinical law to dissolve the marriage, would be recognised in England.[24] The principle of the case may be said to be that a divorce granted anywhere by any process will be recognized in England if the court of the domicile recognizes it. With the extended scope given to the law of the domicile by *Har-Shefi* v. *Har-Shefi*[25] and the multiplication of grounds of jurisdiction in divorce which will of necessity follow from an application of that case and of *Travers* v. *Holley*[26], the situation might well arise where a court is faced with the following problem: Ought it to recognize a decree given by a court exercising similar statutory jurisdiction in preference to a decree given by the court of the domicile of the parties. This problem would, of course, only arise where there was a conflict between the two decrees and it can best be illustrated by the following hypothetical case. A and B are married in New South Wales. After a few years B, the husband, deserts A and goes to X country where he acquires a domicile of choice. Three years afterwards A in New South Wales petition for, and is granted, a divorce under s.16(a). X has no similar legislation and does not recognize the divorce. At the same time as A's petition for divorce in New South Wales, B in X petitions for and is granted a judicial

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[20] For a further discussion on this point see article by G. Kennedy (*supra* n. 1).

[21] In the United States of America a wife is regarded in certain circumstances as capable of acquiring a domicile separate from that of her husband. An attempt was made to introduce that notion into English law in *Attorney-General for Alberta* v. *Cook* (1926) A.C. 444 (P.C.) but did not succeed. Lord Merrivale said ". . . insofar as British tribunals are concerned it is a requisite of the jurisdiction to dissolve marriage that the defendant in the suit shall be domiciled within the jurisdiction. In such cases *actor sequitur forum rei.*".

[22] (1953) 3 W.L.R. 507.

[23] (1953) P. 161. Judgment in this case was delivered only a few months before that in the *Travers Case* and represents an extension of the principle in *Armitage* v. *Attorney. General* (1906) P. 135 (*supra* n. 5).

[24] The judgment in *Har-Shefi's Case* appears to be contrary to that given by the Court of Appeal in *R.* v. *Hammersmith Superintendent Registrar of Marriages, ex parte Mir-Anwaruddin* (1917) 1 K.B. 634, where it was held that a divorce granted by non judicial process would not be recognised in England. The actual basis of the decision is doubtful, but insofar as it purports to refuse recognition to a divorce obtained by non judicial process has been severely criticized. See R.P. Roulston, "The Validity of Divorce by Extra Judicial Process" 25 *A.L.J.* 578; see also Cheshire *Private International* Law (4 ed. 1952) 370.

[25] (1953) P. 161.

[26] (1953) 3 W.L.R. 507.

separation. A some years later goes to England, and the question of her marital status is for some reason raised for determination by an English court. According to the law of New South Wales she is divorced, according to the law of X she is married. What line would the English court take in such a situation? By the decision in *Travers* v. *Holley*[27] it is bound to recognize the decree of the New South Wales court given under similar assumed jurisdiction — by the decision in *Har-Shefi* v. *Har-Shefi*[28] it is bound to give effect to the decree of the court of the domicile. If such a situation, or a similar one, were to arise, the court would have to choose which decree would prevail, as the two can obviously not stand together.

In conclusion, therefore, it is pointed out that whilst *Travers* v. *Holley*[29] attempts to liberalize the recognition of divorces in the international sphere, an application of the rule laid down in the case may in certain situations such as those mentioned above, come into conflict with the law of the domicile. In those situations the rule must either prevent the courts from giving full scope to the law of the domicile, or its application must be limited to those cases where there is no conflict with the domicile.

JEAN AUSTIN, *Case Editor — Fifth Year Student.*

COLLUSIVE AGREEMENTS

JOHANNSEN v. *JOHANNSEN*

This South Australian case of *Johannsen* v. *Johannsen*[1] again raised the problem of what test is to be applied in order to determine whether arrangements between parties to a matrimonial suit are collusive or not. Here Johannsen's mother-in-law offered to pay his costs if he would institute divorce proceedings against his deserting wife. Subsequently, Johannsen decided that reconciliation was impossible and he commenced a suit accepting a sum of Fifty Pounds from his mother-in-law. The Court held that this arrangement between Johannsen and his mother-in-law was not one "tending to pervert the course of justice" and was therefore not collusive.

Ross, J., when delivering judgment, assumed that the proper view of collusion was that which had been stated by the South Australian Full Court in *Brine* v. *Brine*,[2] and later by the New South Wales Supreme Court in *Cohen* v. *Cohen*.[3] He preferred to regard as qualified the broad proposition enunciated in *Churchward* v. *Churchward*[4] even though the High Court had approved it in *Hanson* v. *Hanson*.[5]

In *Churchward* v. *Churchward*[6] Sir Francis Jeune said: "if the initiation of a suit be procured, and its conduct (especially if abstention from defence be a term) provided for by agreement, that constitutes collusion although no one can put his finger on any fact falsely dealt with or withheld. . . ."[7] Here the petitioner was induced to institute a suit on the ground of adultery, which was not to be defended, in consideration of the respondent undertaking, *inter alia*, to settle money on the child of the marriage and pay certain costs. The court held that the petition was presented purely in accord with and in consequence of the agreement between the parties and collusion was established.

In *Brine* v. *Brine*,[8] however, two of the judges thought collusion required something more than a mere bare agreement relating to the institution or the

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[27] *Ibid.*
[28] 1953) P. 161.
[29] (153) S.A.S.R. 141.
[1] (1953) S.A.S.R. 141.
[2] (1924) S.A.S.R. 433.
[3] (1942) 43 S.R. (N.S.W.) 37.
[4] (1895) P.7.
[5] (1937) 58 C.L.R. 259.
[6] (1895) P.7.
[7] *Id.*, at 30.
[8] (1924) S.A.S.R. 433, *per* Poole and Murray, JJ.