THE VALIDITY OF MARRIAGE
AND THE PROPER LAW

RICHARD FENTIMAN*

I. INTRODUCTORY

Contemporary convention has it that the essential validity of marriage in the conflict of laws is governed by the law of each partner's pre-nuptial domicile. But this is contestable. The present argument is that the cases which are said to authorise the traditional conceptual pattern are in reality examples of the proper law of status at work in English law.¹

The idea of the proper law of status, with its obvious affinities with the proper law of contracts, can be taken in this context to approximate to the test for a marriage's validity expressed in §283 of the American Restatement of the Conflict of Laws:

The validity of a marriage will be determined by the local law . . . which, with respect to the particular issue, has the most significant relationship with the spouses and the marriage.²

Such a test implies that courts are required not merely to operate a mechanical test of validity, whether by applying the orthodox "dual domicile" test, or by referring to the law of a couple's intended matrimonial home, which is the usual alternative in academic circles. Instead, they must examine in the context of particular cases which legal system has the strongest interest in applying.

The cases reveal a proper law approach to marriage in this way:

1. Questions of the formal validity of marriage are referred to the lex loci celebrationis. This is the orthodox rule, and it is unswervingly supported in the authorities, but it is worth emphasising afresh that the origin of the rule was neither haphazard nor thoughtless: early cases express a clear judicial perception that the lex loci has a positive interest in applying to issues of merely formal validity.³

2. Questions of essential validity are resolved, where possible, by

¹ I am grateful to Professor A. T. von Mehren, Dr David Pearl and Mr J. G. Collier for their helpful comments on earlier versions of this paper.
³ Ogden v. Ogden [1908] P. 46; Simonin v. Mallac (1860) 2 Sw. & Tr. 67.
reference to the law of the country with which a marriage has its most real and substantial connection. Such a legal system is apparently perceived to have the dominant interest in being applied. The requisite substantial connection is most easily identified where a couple share a common pre-nuptial domicile in the country of their matrimonial home. Early cases also suggest that the law of a couple’s common pre-nuptial domicile may, by itself, indicate the place with which a marriage is best connected. Again, the more difficult case, where the pre-nuptial domiciles are separate, is apparently easily handled where an established matrimonial home is discernible; the location of the matrimonial home points to the best connected law. The truly hard case arises where a couple have separate domiciles and no matrimonial home is visible. Unsurprisingly, the courts’ response to this difficult, and relatively uncommon, problem has not been uniform. There are cases in which the fact that one partner has an English domicile has justified the application of English law. In others an English lex loci celebrationis, or a combination of one English domicile and an English lex loci have produced a similar result. More recently, however, the courts have favoured some kind of a presumption as a way out of their dilemma. There is recent evidence that courts might use what is in effect a presumption of validity and apply whichever law has the effect of upholding a marriage. This conflicts with orthodoxy, however, because the dual domicile test is effectively a presumption of invalidity, requiring as it does that a marriage is invalid if either of the parties lacks capacity to marry. As will emerge, it is unclear precisely how cases such as this are to be handled, although it is possible to imagine a principled way of dealing with them.

Before elaborating upon this analysis, two recent cases must be noticed immediately. These are Vervaeke v. Smith and Lawrence v. Lawrence.

II. THE PROPER LAW REVEALED: VERVAEKE AND LAWRENCE

In Vervaeke v. Smith the proper law approach is expressly articulated through an interesting use of the doctrine of public policy.

The concept of public policy has always looked wide enough to accommodate a search for the proper law. Convention, however, and

6 Mette v. Mette (1859) 1 Sw. & Tr. 416; Pugh v. Pugh [1955] P. 482.
7 Sottomayor v. De Barros (No. 2) (1879) 5 P.D. 94.
8 E.g. Lawrence v. Lawrence [1985] 1 All E.R. 506. Anthony Lincoln J.’s decision was upheld on appeal (Times, 27 March 1985). The Court of Appeal expressly declined to discuss the nature of the test of essential validity.
10 Supra, n.8.
several cases, have placed tight limits on its use. But that is not to say that judges have been reluctant to exploit its possibilities. A concept which allows a court to disregard a foreign rule which offends English notions of conscience and justice confers a wide discretion. And it collapses easily into the subtly different but wider view that judges at their discretion may disregard foreign rules. As Willmer L.J. has said: a court "retains a residual discretion not to apply the law of the domicile where it is not proper to do so in the circumstances of a particular case." Such a power allows courts to decide cases in terms of the appropriateness of particular rules in particular cases. It also offers a way to evade the dual domicile test, should it otherwise apply. Moreover, Sir Jocelyn Simon P. seems to suggest in Lepre v. Lepre that foreign rules might be denied effect in England if it is inappropriate for them to apply. In that case he suggested that it was inappropriate to apply extraterritorially a foreign rule requiring valid marriages to be celebrated in church. He said that public policy justified disregarding the rule. This apparent use of public policy to ensure that an appropriate law applied, dimly visible in Lepre, finds interesting expression in his speech in Vervaeke v. Smith.

In Vervaeke the English courts were asked to recognise a Belgian decree declaring invalid an English marriage between a Belgian domiciled woman and an English domiciled man. Ormrod J. had already held the marriage valid in English proceedings. The House of Lords were apparently unanimous in thinking that public policy had some role to play in preventing recognition; the wife had only gone to law in Belgium to reopen the claim (itself bogus) dealt with by Ormrod J. Lord Simon expressed the matter in a singular fashion. For him the main reason for denying recognition on public policy grounds was the fact that the marriage was substantially connected with England. It was irrelevant to this view that, had the choice between English and Belgian law arisen in a dispute about the marriage's essential validity, Belgian law might have prevailed; it was that of the wife's domicile and, by the dual domicile test, would have made the marriage invalid in English law. As Lord Simon said:

This criterion of a real and substantial connection seems to me to be useful and relevant in considering the choice of law for testing, if not all questions of essential validity, at least the question of the sort of quintessential validity in issue in this appeal—the question which law's public policy should determine the validity of the marriage.  

---

13 [1965] P. 52, 64.  
Such a test explicitly recalls the familiar test for determining the proper law in contract cases. As has been said:

The proper law of the contract [is] the system of law by reference to which the contract is made or that with which the transaction has its most real and substantial connection.15

Lord Simon endorses a proper law approach in several other ways. First, he denies the universality of either the dual domicile or intended matrimonial home tests of validity by identifying a situation where they have no role. Secondly, by distinguishing cases of essential and “quintessential” validity he conforms to the requirement of a proper law approach that different issues call for the application of different rules. Thirdly, in allocating an appropriate place to the lex domicilii he suggests that it only has a function where a couple share a pre-nuptial domicile: he saw “no reason why the personal law should be invoked, particularly as the personal law of the parties differed.”16 This is noteworthy precisely because orthodoxy attaches little weight to the distinction between cases where a couple share a common domicile and those where they do not; the distinction only becomes relevant if a universal dual domicile test is not accepted. Fourthly, Lord Simon makes the point that the intended matrimonial home test captures something of the principle truly at work in validity cases but is defective in ignoring the importance of a matrimonial home’s actually being established. As emerges below, only if the home is established will courts refer to it; only then is there disclosed a legal system best connected with a marriage.

The effect of the proper law approach envisaged by Lord Simon is potentially dramatic. Although it may be confined to “quintessential” conflicts between the public policies of different systems, to say so is not to provide practical limits to the use of the idea. Quite simply, any conflicts situation might be seen as a conflict between local policies; to the extent that this is possible, every case on the validity of marriage is potentially referable to the proper law. Such a view deeply subverts the orthodox conceptual pattern of conflicts rules in marriage cases. And it does so ingeniously; as Lord Simon’s approach applies only to “quintessential” invalidity, the popular dual domicile theory is left formally untouched, though effectively emasculated.

Assuming that this is desirable, Lord Simon’s views may be contained in several ways. First, they were expressed obiter as the opinion of a single judge in one case, worthy of respect though they

---

must be. Secondly, Lord Simon's approach only has the impact suggested for it if courts are able and willing to reduce conflicts of substantive rules into conflicts of policy. Principle permits this but everything depends on the limited scope of public policy in English law; courts and commentators frequently urge caution in its use. Thirdly, the immediate context of Lord Simon's remarks might suggest that he never intended them to be applied extensively. They appear in his discussion of how English law, on the basis of public policy, can disregard a foreign rule. That might be taken to mean that the substantial connection test can only be used to select between English law and a prima-facie applicable foreign rule; if a third law is the most substantially connected it would have to be ignored. That would make it a poor kind of proper law approach.

Such limitations on Lord Simon's remarks in Vervaeke are not entirely convincing, and to try to impose them is, to some extent, to miss his point. Thus the third might simply be turned around. It might be said that the irrationality of confining a substantial connection test to cases where the contest is between English law and a foreign rule makes such a limitation impossible to accept. Arguably, Lord Simon could not have intended it. Again, the second limitation is weakened because the first is misconceived. To say that the scope of public policy is narrow is only to say that courts prefer to avoid open-ended, discretionary bases for decision. But this is not apparently true of the common law's treatment of marriage conflicts cases. Lord Simon's opinion in Vervaeke does not stand alone; in several ways, though not by using public policy, courts employ an open-ended, flexible test and apply the law which is best connected with a marriage. That is why to minimise the impact of Lord Simon's speech is to miss its point. By itself it is merely interesting, but because it is not isolated it becomes important as an example of the proper law at work in marriage validity cases.

That Lord Simon's position is not isolated was recently, and sharply, illustrated by Anthony Lincoln J.'s handling of Lawrence v. Lawrence. Here a wife petitioned in England for nullity of her marriage. Had the dual domicile test applied she would have succeeded; by the Brazilian law of her pre-nuptial domicile she was married to her previous husband. Had the intended matrimonial home test governed she would have failed; English law allowed her capacity to remarry. But Anthony Lincoln J. applied neither of the traditionally competing tests. He decided that English law applied, and thus upheld the marriage, but he did so expressly because

17 The other members of the House of Lords agreed that public policy operated in Vervaeke v. Smith, though they did not subject it to the same degree of analysis as Lord Simon.
18 Supra, n.8.
England was the country with which the marriage had its real and substantial connection.

*Lawrence* is important in three principal ways. First, Anthony Lincoln J. saw some of the keystone cases on the validity of marriage as supporting, or not opposing, a real and substantial connection test. It is surely significant that he did not regard his position in this regard as at all heterodox. Secondly, it is striking that he made no attempt to limit the impact of Lord Simon’s views as expressed in *Vervaeke v. Smith*. He characterised the issue before him—the wife’s capacity to remarry—as one of “quintessential validity.” In so doing he must either have thought that the conflict of legal rules which the case involved was reducible to a conflict of policies; or that the idea of substantial connection could apply even where no such conflict of policies was present. On either view, he endorses the dramatic implications of Lord Simon’s remarks. Thirdly, Anthony Lincoln J. expressly articulates the policy consideration which justifies referring the validity of a marriage to the law of the matrimonial home, namely that to do so is to give effect to the expectations of the parties:

... when the petitioner and the respondent were marrying they were looking to the future, to a married life in England and to an established matrimonial home in this country, not backwards to the period in which Brazil had played a very important part in the respondent’s life and scarcely any in the life of the petitioner.19

It remains to demonstrate how the position adopted by Lord Simon and Anthony Lincoln J. is far from being heterodox by examining the ways in which the common law endorses a substantial connection test, and the proper law approach of which it is one aspect.

III. THE PROPER LAW ILLUSTRATED

A. The Significance of a Common Domicile

It may be that the dual domicile test lacks the support in the cases that is often assumed. But the *lex domicilii* may nonetheless be important, at least where a couple share a common domicile, in the search for the proper law of a marriage. Three classes of case must be examined.

1. The common domicile and the matrimonial home are congruent

Where a couple’s common pre-nuptial domicile is in the same place as their matrimonial home there is no dispute as to which law should

govern. But it is necessary to examine such cases to see on what principles they are decided. The obviousness of the result in this situation has often led to imprecise reasoning in the courts and the ambiguity thus caused has given comfort to advocates of both the dual domicile and the intended matrimonial home tests. It will be argued that *Brook v. Brook*\(^{20}\) and *Sottomayor v. De Barros (No 1)*,\(^{21}\) the prominent cases of this type, in fact support a proper law analysis.

*Brook v. Brook* well illustrates the idea of law of the matrimonial home as the proper law. A man and his deceased wife's sister married in Denmark. Both had English domiciles. English law prohibited their marriage on grounds of affinity, though in Denmark it was valid. The House of Lords applied English law and the marriage was held invalid. The decision could be rationalised in any one of three ways. English law might have applied by the intended matrimonial home test; or by the dual domicile test; or by some third test whereby the law of a couple's common domicile always governs. But the reasoning betrays a more flexible view. In particular, while there is constant reference to the parties' domiciles, that does not mean that any dual, or common, domicile test was in play. Indeed, the sense in which the references to domicile were meant is revealed by Lord Campbell when he said that

> ... the essentials of the contract depend upon the *lex domicilii*, the law of the country in which the parties are domiciled at the time of the marriage, and in which the matrimonial residence is contemplated.\(^{22}\)

There is a famous ambiguity in these remarks. They might appear to support any of the three explanations of *Brook*. This ambiguity might be resolved in favour of a rival, proper law interpretation in the following way. First, Lord Campbell in *Brook* approvingly cites *Warrender v. Warrender*,\(^{23}\) in which, intriguingly, he appeared as counsel. In *Warrender* a couple had separate, English and Scottish, pre-nuptial domiciles, but a Scottish matrimonial home. Deciding that Scottish law governed the husband's allegations of adultery, Lord Brougham said:

> ... if we infer the nature of any mutual obligation from the presumed intentions of the parties. ... there is fully more reason to suppose they had the law of their own home in their view, where they purposed to live ... \(^{24}\)

Similarly, Lord Campbell noted in *Brook* the significance of the

---

\(^{20}\) (1861) 9 H.L.Cas. 193.

\(^{21}\) (1877) L.R. 3 P.D. 1.

\(^{22}\) Ibid., at 207.

\(^{23}\) (1835) 2 Cl. & F. 488.

\(^{24}\) Ibid., at 536-537.
"conjugal residence of the married couple." Such approval of Warrender suggests, first, that for Lord Campbell a couple's matrimonial home and not their common domicile was the crucial element in Brook; and, secondly, that the overall test was the parties' presumed intentions. If so, Brook denies any role to the lex domicilii as such. It also supports not an intended matrimonial home test, but a proper law approach in which the matrimonial home is the principal ingredient. This is because, if the ultimate test is the parties' presumed intentions, the possibility remains that the parties might be presumed to intend some law other than that of their home to apply, however unusual that might be.

Again, there is Stuart V.-C.'s interesting judgment at first instance in the case. Assuming that the House of Lords were familiar with the grounds of his decision, his reasoning becomes important, and in particular his view that "England was the country with a view to which, and in which, the marriage contract was to have its permanent effect." In so saying he suggests that neither the fact that England was the lex domicilii nor that it was the intended matrimonial home was conclusive. Instead, what is important is the fact that England is the place with which the marriage has its strongest social connection, and the fact that the parties have this in mind. If the speeches in the House of Lords lack the clarity of this endorsement of a proper law approach, neither do they question the correctness of Stuart V.-C.'s position.

Brook and Warrender between them, therefore, suggest that the validity of marriage in the conflict of laws is not a matter either for the lex domicilii or for the intended matrimonial home. It is a matter for the law of the country which is most substantially connected with a marriage, the law of which the parties are presumed to expect to govern. This will generally be the law of the actual, and not merely intended, matrimonial home.

This presentation of the early cases is further supported by Sottomayor v. De Barros (No. 1) and Sottomayor v. De Barros (No. 2.) Read together, both firmly deny the role of the dual domicile test and affirm instead the importance of selecting the most appropriate law to govern particular cases. Both decisions concerned the same two cousins, who married in England, where they established their home. On the incorrect assumption that the cousins shared a Portuguese domicile, the Court of Appeal held that Portuguese law applied, by which the marriage was invalid. The

25 (1861) 9 H.L.Cas. 193, 212.
26 (1858) 3 Sm. & Giff. 481, 532.
27 (1877) 3 P.D. 1.
28 (1879) 5 P.D. 94.
matter subsequently came before Sir James Hannen P. on the amended basis that the couple were separately domiciled, he in England, she in Portugal. The judge applied English law and upheld the marriage.

Both courts agreed as to the principles to be applied and neither endorsed a dual domicile test. The judgments, particularly that of Sir James Hannen P., proceeded as if the task was to locate the most appropriate law to govern, and the idea of referring all questions of validity to the lex domicilii was considered and rejected. It was decided, first, to vindicate the interests of English law in a case where one partner was English-domiciled; and secondly to recognise the claim of the lex domicilii to govern in situations where a couple shared a common domicile. It is not material that the law of the matrimonial home, with its claims to be the best connected law, seemed to carry no weight; just because the courts' view of what counts as the most appropriate law might not always be uniform does not detract from the general proper law approach. Most importantly, in finding that the lex domicilii applied where a couple shared a domicile it seems to have been the fact that it was shared, rather than the claims of the lex domicilii per se, which influenced Sir James Hannen P.; arguably the sharing of a common domicile, the presence of a matrimonial home notwithstanding, is a potent indicator of the law with which a marriage has its substantial connection. Indeed, later cases would seem to confirm that Sir James's approach is correct, though they would place no great weight on the existence of a shared domicile where there is also an established matrimonial home.

2. The Common Domicile and the Matrimonial Home Are Different

The authorities discussed above give credence to the proper law approach, and show the importance of a marriage's substantial connection with a place. But they expose a new problem: what if the parties' common domicile and their matrimonial home are different and their laws conflict? A robust, and probably right, answer is that English law so often favours the law of the matrimonial home to the exclusion of others that it would do so here. This is certainly consistent with the thought that a couple should be taken to be looking to their future, not their past.

Support for the view that the law of the matrimonial home takes priority over an inconsistent common lex domicilii comes from Sir Jocelyn Simons's decision in Szechter v. Szechter, which appears to

29 E.g., ibid, at 104.
30 E.g., ibid, at 101.
31 See Lawrence v. Lawrence, supra, n.8 at 511-512.
be authority for the dual domicile test but which, on closer inspection, may not be. In Szechter a couple married in Poland, the country of their common domicile. This had the effect of securing the woman's release from political detention; the man had divorced his first wife for the purpose. The question was whether the woman had consented to the marriage; if not, the man could resume his previous married life. Sir Jocelyn Simon held that she had not consented. Plainly, the discussion of principle in the case is distorted because justice so manifestly demanded the result eventually reached. But it cannot for that reason be ignored.

Sir Jocelyn apparently endorsed the dual domicile theory, accepting Dicey's rule that the essential validity of a marriage was referrable to the law of each parties' pre-nuptial domicile. But in two important respects the case is insecure authority for such a rule. First, each partner's domicile was Polish; the case is at best authority for applying the law of a couple's common pre-nuptial domicile. Secondly, it seems clear that English law, the law of the couple's matrimonial home, played a significant part in the decision. In particular, Sir Jocelyn only seems to have applied the Polish lex domicilii on the assumption that Polish law and English law were the same. It is hard to see why English law was relevant on the basis of the dual domicile test, though the reference to it is explicable if the learned President is taken to have adopted what amounts to a proper law approach. Thus, England was the place of the couple's post-nuptial residence and both parties acquired a domicile of choice there. Plausibly, England was the country which was most substantially connected with the marriage and it might have been for that reason that it became important to the decision. It might be objected to such an interpretation that the special nature of the facts explain Sir Jocelyn's anxiety to ensure the invalidity of the marriage; or mention might be made of his own reasons for referring to English law, namely that the nullity of a marriage was a serious matter, and that the evidence as to Polish law might be defective (thereby making English law relevant). But these objections are, in the end, unconvincing. On the one hand, Sir Jocelyn was clearly trying to decide the case in accordance with general principles rather than sentiment. On the other, the idea that English law became relevant because of the seriousness of nullity proceedings is simply mysterious. Again, it is hard to see what was wrong with the affidavit evidence as to Polish law to which, in any event, the Queen's Proctor took no objection. Arguably, Sir Jocelyn's reasoning simply betrays an attempt to make English law relevant in the face of the

33 Ibid., at 294.
34 Ibid., at 295–296.
conventional wisdom that the dual domicile test applied. As such, Szechter is support for the proper law approach to cases of the essential validity of marriage. It also suggests that, in a conflict between the lex domicilii and the matrimonial home, the latter may prevail as the proper law. As a prototype of Lord Simon's approach in Vervaeke v. Smith it is also intriguing.

3. The common domicile applies where there is no matrimonial home

Szechter may show that, in selecting the proper law, the law of the matrimonial home takes precedence over that of a couple's shared domicile. Where there is no matrimonial home, however, the law of the parties' common domicile might nonetheless govern. R. v. Brentwood Superintendent Registrar of Marriages, ex parte Arias illustrates the point. Here a couple, both domiciled in Switzerland and intending to live there after marriage, applied to marry in England. The local registrar refused to do so because by Swiss law the man, who was divorced, could not marry. The Divisional Court agreed with the registrar and refused mandamus. The case is commonly thought to be support for the dual domicile test because of Sachs L.J.'s apparently approving reference to Dicey and Morris's rule. But its authority in this respect is unclear for two reasons. First, the case concerned a couple with a common pre-nuptial domicile, and there is evidence in Sachs L.J.'s language that he had this fact in the forefront of his mind. On that basis it says nothing for the situation where a couples' domiciles are separate. Secondly, even if Arias is some authority for applying the lex domicilii, it does not threaten the principle that the proper law of a marriage is that with which it is most substantially connected, at least where that is identified with the law of the actual matrimonial home. Quite simply, there was no matrimonial home, and no best connected law, in Arias purely because the parties had not married. As such, Arias may merely support the view that the lex domicilii may have a role where no substantially connected law is discernible.

B. The Problem of Separate Domiciles

1. Substantial connection and the matrimonial home

Cases where a couple have separate pre-nuptial domiciles raise distinct problems and call for special treatment. As in common domicile cases, however, English courts apply the law of the country with which a marriage has its most real and substantial connection, typically the country of the matrimonial home.

---

36 Ibid., at 968.
The first case to consider must be *Radwan v. Radwan (No. 2).*37 Here an Englishwoman domiciled in England married an Egyptian domiciled in Egypt. The ceremony took place in the Egyptian consulate in Paris. The couple established an Egyptian matrimonial home. When the wife petitioned for divorce in England, the question arose whether the marriage was valid: had the wife capacity to contract a polygamous marriage? Cumming-Bruce J. applied the Egyptian law of the matrimonial home and held that she had.

From a technical point of view the decision in *Radwan* is plainly suspect; however much the dual domicile test might be criticised as a universal test for the validity of marriages, it clearly governs in cases concerning polygamous marriage by virtue of section 11(d) of the Matrimonial Causes Act 1973. But it also seems to deny the proper law approach and the idea of real and substantial connection with a marriage; Cumming-Bruce J. apparently endorsed a universal intended matrimonial home test rather than a flexible reference to the best connected law. As the weight of authorities suggests, to say so is to prove too much; the intended matrimonial home test captures something of the true position by focusing on the place of the marital home but fails to reflect the complexity of the proper law idea.

Whatever might be the case's technical insecurity, *Radwan* in fact does no harm to the proper law approach and may indirectly stand in its favour. Thus it may simply be taken as authority for an invariable intended matrimonial home test in cases concerning polygamous marriage. As such, it may be wrong in that limited area while it remains consistent with the operation of a proper law approach in others. This view neutralises the case and leaves intact the integrity of the proper law approach. But if its technical status is thus dealt with, *Radwan* at least gives oblique support to the idea of real and substantial connection; it is a case where the claims of the place of the matrimonial home to be applied are expressly articulated, and where the status of the dual domicile test was forcefully questioned, in the sense that Cumming-Bruce J. was prepared to reject it notwithstanding the wording of the 1973 Act and the strength of academic hostility which he clearly expected to attract.38

These features of a proper law approach, imperfectly revealed in *Radwan*, are articulated in *De Reneville v. De Reneville.*39 An Englishwoman domiciled in England married in Paris a Frenchman domiciled in France. When the wife petitioned for nullity on the basis of the husband's physical incapacity to consummate, the question arose which law governed whether the marriage was void or voidable.

---

37 [1973] Fam. 35.
38 See especially *ibid.*, at 54.
In answering, Lord Greene M.R. (with Bucknill and Somervell L.JJ. agreeing) said that matters concerning the essential validity of marriage should be referred to "the law of the matrimonial domicile in reference to which the parties may have been supposed to enter into the bonds of marriage."\textsuperscript{40} Again, as Bucknill L.J. put it, the law applied which was "the law of the country where the ceremony of marriage took place and where the parties intended to live together and where they did in fact live together."\textsuperscript{41}

This approach echoes some familiar themes. The matrimonial home matters not because of any intended matrimonial home test but because it discloses the legal system best connected with a marriage. This requires that the home must be actual, not merely intended. Lord Greene spoke of the matrimonial home in \textit{De Reneville} as being "clearly French"\textsuperscript{42}; had it not been clear it presumably would not have applied. And the appropriate law may rest on an accumulation of factors, as Bucknill L.J.'s approach suggests, precisely as happens when the proper law of a contract is sought. Furthermore, the chosen law must be the one most appropriate for the issue in dispute. In this respect, there is a policy argument linking physical incapacity to the matrimonial home because it is a matter affecting the conduct of a marriage; Bucknill L.J. for one was well aware of the idea that the applicable law must have an interest in the issue in dispute.\textsuperscript{43}

The remarks of Lord Greene and Bucknill L.J. on the subject of capacity are, however, \textit{obiter}; the issue in \textit{De Reneville} did not directly concern the essential validity of a marriage. Like \textit{Radwan}, therefore, the case is not strictly authority for the proper law approach; but neither is it authority against it. Moreover, both cases plainly proceed on the assumption that the law of the matrimonial home ought to govern in capacity cases and the dual domicile test should not.

2. \textit{The lex domicilii and the proper law}

Support in the cases for the dual domicile test is far less solid than is commonly thought. But academic support for the idea is too distinguished, and the cases which pay lip-service to it too famous, for anyone to imagine that it can simply be discarded. It therefore remains to see what place, if any, the dual domicile test has in testing the validity of a marriage.

The prominent case in favour of the dual domicile test, which seems to challenge directly the substantial connection approach in

\textsuperscript{40} Ibid., at 114.
\textsuperscript{41} Ibid., at 122.
\textsuperscript{42} Ibid., at 114.
\textsuperscript{43} Ibid., at 122.
cases of separate domiciles, is *Padolecchia v. Padolecchia*.*44* Here a man domiciled in Italy and a woman domiciled in Denmark married in England. Sir Jocelyn Simon P. held the marriage to be invalid; by his Italian domiciliary law the husband could not marry because his previous divorce was unrecognised. Superficially, the decision favours the dual domicile test, and the President’s approval of that test is plain.45 But the implications of the case are more complex, and its support for the dual domicile test less secure, than it would seem. On the one hand, it might, on inspection, be quite consistent with the substantial connection approach. Indeed the decision in favour of the husband’s *lex domicilii* is exactly what such an approach would require. Of the systems that might have applied, it might have looked too unorthodox to apply the *lex loci celebrationis*, while the *De Barros (No. 2)—Ogden* line of cases,46 controversial as they are, were of no help as neither party had an English domicile. Above all, no matrimonial home in any meaningful sense existed as it had in *Radwan* and *De Reneville*; although the couple in *Padolecchia* started living together in Denmark, the woman left home after three months and there was, as the President noted, at best only “intermittent cohabitation between the petitioner and the respondent in Copenhagen.”47 If there was thus no matrimonial home and no substantial connection between the marriage and any one country, the use of the dual domicile test in *Padolecchia* is no challenge to the substantial connection approach.

Even in this limited sense, however, *Padolecchia* may not provide much support for the dual domicile test. In several senses its authority might be questioned: the case was undefended and argument was only offered on the basis that the dual domicile test applied; again, the decision rested squarely on the authority of *Re Paine* and *Pugh v. Pugh*, the status of which as dual domicile decisions is questionable.48 Above all, the law of the putative matrimonial home and of the wife’s domicile (both Danish) may have agreed with that of the husband’s domicile in not recognising the marriage.49 If so, and the point is not certain, it would not have mattered which of the competing laws applied, and the case would have concerned a “false conflict.” If so, its authority is substantially weakened.

It is therefore possible to read *Padolecchia* in one of two ways.

---

46 Infra., n.69.
47 Ibid., at 325.
48 Infra., pp. 272–273; *Re Paine* [1940] Ch. 46 falls away as a dual domicile authority in so far as it rests on a dual domicile reading of *Mette v. Mette*, supra n.6.
49 Ibid., at 337.
Either it is support for the dual domicile test being applied in situations where no substantially connected country is discernible; or it is not support for the test in any circumstances. *Perrini v. Perrini*[^50] is consistent both with the former proposition and, by some extension, with the idea that the dual domicile test never has a role in validity cases. In *Perrini* an Italian-domiciled man married an English-domiciled woman in England. At the time of the marriage the man lacked capacity to marry under his *lex domicilii* because Italian law refused to recognise a New Jersey decree nullifying a previous marriage. Sir George Baker P. upheld the marriage by treating the issue as the recognition of the nullity decree, rather than the husband’s capacity to remarry, and finding that the decree was recognisable.

Much of the judgment in *Perrini* is concerned with whether English law would recognise the New Jersey decree. But it is possible to reconstruct Sir George Baker P.’s position on the husband’s capacity to remarry. First, he expressly declined to follow *Padolecchia*, apparently doubting its authority.[^51] Secondly, by treating the issue as one of recognition, and by recognising the New Jersey decree, he reached a position in which English law, that of the couple’s matrimonial home, was applied. In so doing he gave effect to the law of the country with which the marriage had its most real and substantial connection.[^52] Thirdly, he apparently denied, as a matter of principle, that the dual domicile test ought to operate in validity cases: “I cannot pretend to be other than satisfied with this result because I think first the court should if possible uphold a marriage.”[^53] In so saying he subverts the idea, central to the dual domicile test, that an incapacity affecting one partner to a marriage, imposed by his *lex domicilii*, should invariably operate to invalidate a marriage. He replaces the dual domicile test’s inbuilt presumption of invalidity with his own presumption of validity.

*Perrini v. Perrini* is thus consistent, both in result and by virtue of Sir George Baker P.’s language, with the proposition that the law of the country which is most substantially connected with a marriage governs the marriage’s validity. Implicitly, however, Sir George Baker’s attitude suggests the stronger proposition that the dual domicile test should not apply even where no substantially connected law is discernible. This stronger claim, dimly glimpsed in *Perrini* though it is, must now be examined.

[^50]: [1979] Fam. 84.
[^51]: *Ibid.*, at 89.
[^52]: *Ibid.*, at 89.
The difficulty with arguing that the dual domicile test is irrelevant even where no substantially connected law is present is that two prominent cases seem to support the test in precisely that situation. These are Mette v. Mette and Pugh v. Pugh, in both of which a couple were separately domiciled, and in neither of which, for different reasons, could the law of the matrimonial home have applied as the best connected law. Both cases, however, appear to be based on the idea that English law has an interest in applying in cases where one partner in a marriage has an English domicile and no matrimonial home is discernible.

Mette was decided by Sir Cresswell Cresswell who, in other cases, revealed some sympathy for a proper law approach. But at first sight the case is a plain endorsement of the dual domicile test. A domiciled Englishman married his deceased wife's sister in Germany, and it was held that the marriage was invalid because by English law the man was incapable of contracting such a marriage. He said: "There could be no valid contract unless each was competent to contract with the other." And he clearly ignored the fact that there was in Mette a clearly established matrimonial home. This is all unfavourable to a proper law analysis.

In fact, this disregard of an established matrimonial home, typical evidence of the law best connected with a marriage, is easily explained because of the context in which the claim in Mette arose. The specific question for determination was whether a will made by the deceased husband was revoked by his subsequent marriage to his deceased wife's sister; whether or not that marriage was valid was a subsidiary issue. That meant that the case was governed by section 19 of the Wills Act 1837, which provided that a will could not be revoked as a result of any presumption of intention. The significance of this is that it prevented the judge from making use of the couple's connection with their matrimonial home; at the time, as Brook v. Brook shows and the judge knew, such a connection would have been expressed by reference to the parties' presumed intentions. Sir Cresswell Cresswell clearly knew of and, plausibly, endorsed Stuart V.-C.'s approach in Brook, but felt unable to use it. It is this that has the effect of turning Mette into a case similar in pattern to Padolecchia; a case of separate domiciles with no legal system substantially connected with the marriage. But Sir Cresswell Cresswell did not resolve it by applying the dual domicile test. He

54 Supra., n.6.
55 Supra., n.6.
56 Simonin v. Mallac (1860) 2 Sw. & Tr. 67; Brook v. Brook 3 Sm. & Giff. 481.
57 (1859) 1 Sw. & Tr. 416, 423.
58 Ibid., at 423.
applied the law of the husband’s domicile because it was English.

It seems clear from the argument of counsel in Mette and from the judgment that the question being asked was whether English law should apply in a case where only one of the parties to a marriage was domiciled in England. Brook v. Brook was relevant because it showed that English law governed the marriage of a couple who were both domiciled in England and not because it might support a dual domicile test. The only issue was whether the claims of English law to govern, suggested by Brook, were lessened in a case like Mette where only one partner was domiciled in England, and was not a natural-born Englishman. In deciding that they were not, Sir Cresswell Cresswell solved the separate domicile problem by deciding that, in principle, in such a case English law should apply.

This essentially proper law approach recurs in Pugh. A Hungarian-domiciled, fifteen-year-old girl and an English-domiciled man married in Austria. Pearce J. held the marriage invalid. By English law the man lacked capacity to marry. Pearce J. appears to lend support to the dual domicile test: “by the law of the husband’s domicile it was a marriage into which he could not enter.” But for two reasons it is misleading to leave matters there. First, the law of the matrimonial home could never have been applied in Pugh, any more than in Padolecchia. The husband was a soldier and the couple’s married life was foot-loose as they moved with his postings. As soon as they arrived in England, their intended home, they parted. For that reason there was never an established matrimonial home and, in that sense, no substantially connected law in Pugh. If the case is any support for the lex domicilii it is confined to cases where there is no matrimonial home. Secondly, and more strongly, it seems evident that Pearce J. was only concerned with the lex domicilii because the husband’s domicile was English. The nerve of his reasoning is that the husband was, because of his domicile, subject to the provisions of the Age of Marriage Act 1929. The case quite simply fell within the scope of the English statutory rule and it is the application of that rule, not any dual domicile test, which shaped the decision.

In the end, it seems that Mette and Pugh, commonly seen as instances of the dual domicile theory, might stand for quite a different idea. As authority for the dual domicile approach, each looks weak; neither threatens substantial connection with a marriage as the primary test; and both are consistent with a proper law approach by vindicating, albeit controversially, the interests of 59 Ibid., at 423–424. Cresswell J. seemed to think that the situation where one party was domiciled in England was within Brook; his doubt was whether the same was true of a naturalised subject. 60 [1955] P. 482, 494.
English law. If this view is correct, and if Padolecchia is simply an inconclusive authority, then the dual domicile test may be unsupported even in separate domicile cases where there is no matrimonial home.

3. The hard case

The foregoing analysis identifies the truly hard case in this area; it is unclear which legal system a court is required to apply in situations involving a separately domiciled couple without a matrimonial home. It is necessary, therefore, to examine how to respond to the difficulty thus exposed. In passing, the previous argument will be further supported, in so far as the cases here offer little comfort to the dual domicile test; indeed, they tend to show the dominance of the idea of substantial connection because it is usually only in cases where no such connection is present that alternative connecting factors are discussed. There are six ways of handling a situation where there is no substantially connected law.

First, English law might be applied if one partner in a marriage has an English domicile. But it is unlikely that a court would nowadays find this possibility attractive. Not only is this solution confined to cases where one partner does have an English domicile, but the idea of favouring English law on this basis alone is suspect. English law per se exerted no influence in Radwan v. Radwan and Lord Simon in Vervaeke v. Smith treated it as just one factor which tended to disclose the proper law. Furthermore, the current attitude of the courts is generally in favour of "comity" rather than "chauvinism."  

Secondly, a court might presume in favour of validity and apply whichever law has the effect of upholding a marriage. It is apparent that authority is heavily against this solution in cases where a substantially connected legal system is discernible. But in principle it might be used in situations where that is not so. There is, however, no authority on the point. It may be that the idea of a presumption in favour of validity is merely interesting as a clue to the policy which the courts will adopt in validity cases.

Thirdly, the lex loci celebrationis might be applied. Although English law places little weight on the lex loci as a connecting factor in marriage cases, that does not mean that it has no weight at all. A proper law approach certainly permits recourse to the lex loci if it is regarded as the most appropriate law to govern in a particular case; in cases where no substantially connected law is visible, it is arguable

---

61 Soitomayor v. De Barros (No. 2), supra, n.7.
63 Lawrence v. Lawrence, supra, n.8.
64 The much criticised decision in Breen v. Breen [1964] P. 144 might, at its weakest, stand as authority for this possibility.
that it is indeed the most appropriate law. Such authority as exists on
the role of the *lex loci* as the proper law is inconclusive. Two points,
however, are relatively clear. First, the cases indicate support for the
view that the *lex loci* only has a function where no matrimonial home
has been established. They confirm that courts will, if possible, apply
the best connected law (*i.e.*, for practical purposes that of the
matrimonial home). Only where none is visible should they consider
particular connecting factors such as the *lex domicilii* or the *lex loci
celebrationis*. Thus, possibly the strongest authority against the *lex
loci*’s having any role is also one of the clearest examples of the
application of the law of the matrimonial home.65 Conversely, the
dicta which suggests that the *lex loci* might be relevant are to be found
in cases where no matrimonial home was established.66 The second
moderately firm point is that the *lex loci* might only be relevant, if at
all, where it is English.67 This is because, as a matter of policy, it
might be inappropriate to expect a local registrar of marriages to
permit a marriage which is essentially invalid according to English
law.68 The particular importance of this policy is that it provides a
defence to the charge that a court would never select a connecting
factor merely because it is English. It suggests that sound policy
rather than chauvinism is the reason for doing so. This distinguishes
the application of an English *lex loci* from the other possibilities
discussed in this section for dealing with cases where no marital home
is established. Again, this policy-based use of the *lex loci* is important in
a system which normally gives priority to the most substantially
connected law. This is because one frequent situation in which no
matrimonial home, and no best connected law, is discernible is one in
which a registrar must decide whether to sanction a marriage. The
application of an English *lex loci* would resolve a registrar’s problem
as to which law to apply and would ensure that he was not required to
sanction an invalid marriage. For these reasons the use of an English
*lex loci* may have something to commend it in cases where no best
connected law is visible.

Fourthly, where the *lex loci celebrationis* and the law of one
partner’s domicile are the same, this congruence of connecting
factors might indicate the legal system which is best connected with a
marriage. The combined weight of these factors was the basis of
several decisions in which English Law applied.69 If the only reason
for recognising these elements in a situation is, however, to cause

65 *In the Will of Swan* (1871) 2 V.R. (I.E. & M.) 47.
66 *Padolecchia v. Padolecchia*, supra n.44, at 335; *Pugh v. Pugh*, supra n.55, at 491–492; *cf.* The
Marriage (Scotland) Act 1977, ss.1(2), 2(1)(a).
69 *Sottomayor v. De Barros (No. 2)*, supra n.7; *Odgen v. Ogden* [1908] P. 46; *Chetti v. Chetti* [1909]
P. 67.
English law to govern, there is little in principle to commend the idea; certainly, it adds nothing to the reasons that exist for applying the *lex loci* where it is English. It is possible that the cases which support this solution would not now be followed, though they remain interesting as further examples of decisions which are inadequately explained in terms of the dual domicile test.

Fifthly, it may be inferred from dicta in some cases that the validity of a marriage is, in the absence of a substantially connected law, to be referred to the law which the parties intend to govern. A rationalisation of this position would be to say that the overriding aim in validity cases is to give effect to a couple’s intentions or expectations; while their intentions can be definitively inferred from the existence of a real and substantial connection with a place, it may also be indicated in other ways. Thus, in one case effect was apparently given to a couple’s express intentions on the matter. 70 Again, dicta in another suggest that, where a couple’s domiciles are different (and the substantial connection indicated by a common domicile is absent), reference is made to their presumed intentions. 71 Arguably, the real importance of such cases is simply that they deny any place to the dual domicile test. They also confirm the importance of the idea of real and substantial connection in so far as they imply that, where such a connection is discoverable, the best connected law will apply; and they are a reminder of the importance of giving effect to a couple’s expectations. The authority for referring to the parties’ intentions, in the absence of a substantially connected law, is however, too thin to place too much weight on the idea. And it might, in any event, be unwise to introduce the fiction of a couple’s intention in cases where there is neither an express choice of law, nor a substantial connection from which it might reasonably be inferred.

Sixthly, it might be possible, after all, to apply the dual domicile test in cases where there is no significantly connected law. *Padolecchia v. Padolecchia*, though insecure, is in its favour. Neither *Pugh v. Pugh* nor *Mette v. Mette*, which seem to prevent the test’s role in this area, are conclusively hostile to it; indeed, it may be that neither would now be followed in so far as they rest on the view that merely because one partner to a marriage has an English domicile English law should apply. Furthermore, there might be a compelling argument of principle in favour of following *Padolecchia*: arguably, the right view in cases where no matrimonial home has been established, and no substantially connected law is visible, is that the law of the pre-nuptial domicile is that with which each partner is most significantly connected. If so, then the dual domicile test in such a

case discloses the most appropriate law to govern the marriage. A practical difficulty with this solution is, however, that the lower courts seem to have set their face against any use of the dual domicile test where it can be avoided.\footnote{Perrini v. Perrini, supra n.50 at 92, Lawrence v. Lawrence, supra n.8 at 511.}

It is, of course, difficult to predict which of these solutions will prevail should the point arise for decision. But several factors are likely to affect a court's approach to the matter. It is, for example, doubtful that a court would favour any of the solutions simply because it allowed the application of English law. That might disqualify the first and fourth possibilities from serious consideration. The second and fifth also might not be seriously arguable, at least in a higher court, simply because they lack authoritative support. Both the third and sixth possibilities, however, have some foundation in principle and authority: either the \textit{lex loci celebrationis} or the dual domicile test might legitimately be applied. Strictly, there may be some cases where it will not be necessary to decide between them; if the rationale for using the \textit{lex loci} only applies when it is English, there is room for the dual domicile test to operate where it is not. But in reality it is hard to tell which solution a court will prefer. Traditionally, the \textit{lex loci} has received little weight, so habit if not principle is against it. Conversely, the dual domicile test is made acceptable perhaps by long usage, although recent trends suggest hostility to it. If, however, the answer to this dilemma is elusive, it is perhaps important to have identified the right question; the idea of a universal dual domicile test obscures the fact that the truly hard case on the essential validity of marriage concerns a separately domiciled couple without a matrimonial home.

V. CONCLUSIONS

The law on the essential validity of marriage in the conflict of laws is, it seems, neither as inflexible, nor as confused, as the traditional contest between the dual domicile and intended matrimonial home tests would suggest. The reason, indeed, why neither traditional test finds unequivocal support in the cases is that the courts have carefully avoided adopting one universal test at all. Again, the important issue in this area is not whether one or other test universally applies; it is how to handle the situation where a couple are separately domiciled but lack a matrimonial home. Furthermore, the idea that questions of validity may legitimately be referred to the law of the country with which a marriage has its most real and substantial connection, recently exemplified by Lord Simon's speech in \textit{Vervaeke v. Smith}.
and *Lawrence v. Lawrence* is, on examination, well supported by authority.

But even if English law adopts this position, what matters in the end is whether, in principle and policy, that position is sound. The debate about which law, in an ideal world, ought to govern the essential validity of a marriage is complex and familiar. For present purposes, it is important to see whether the law as it presently stands can be defended against two powerful criticisms. If either is successful then the law is open to serious objection not because it fails to reflect the best policy, but, more fundamentally, because it is practically unworkable and possibly unjust.

The first objection is that the proper law approach is too uncertain in its application, lacking as it does the firmness and clarity of a universal dual domicile test. It is, of course, a truism that certainty in the law is bought at the expense of flexibility, and that the supporters of one goal will never be persuaded by the arguments in favour of the other. But there are several reasons why the charge of uncertainty cannot be made convincingly against the proper law approach. One is simply that whatever certainty there is in the dual domicile test is attributable to the familiar artificiality associated with the concept which is, presumably, best avoided. Again, it may be that the concept of domicile is actually not certain in its application at all; its working is arguably so unpredictable that it is hard to prefer the dual domicile test to the proper law on the grounds of certainty. Finally, it is curious and unsatisfying to force the law into the rigid framework of the dual domicile test when the cases firmly resist such a simple analysis; the courts, it seems, if not commentators, have opted for flexibility rather than certainty.

The second criticism is against the law’s apparent preference, when selecting the proper law, for the law of the country with which the marriage is most substantially connected, which is standardly that of the matrimonial home. There are two principal ways of justifying this preference: as a matter of policy the law of the nuptial home is said to have the strongest interest in applying to the validity of marriages which continue within its jurisdiction; it is thought to have the greatest social connection with the marriage; alternatively, it may be said to indicate the law which the parties to a marriage expect to apply to them, the justification for imposing a country’s laws upon them being that to do so is to give effect to their reasonable expectations. Nothing can be fairer, it might be thought, than doing what people intend. The second justification is compelling and has found favour in the courts. It leads to the idea that the strong

74 E.g., *Lawrence v. Lawrence*, supra n.8.
inference to be drawn from a marriage’s substantial connection with a place is that a couple intend the law of that place to govern their marriage.

Whatever the merits of the idea of substantial connection, however, it might be said that two hard cases reveal the limitations of the idea. The first is the situation where a couple, their advisers, or a local registrar of marriages are concerned to know at the time of the ceremony whether a couple can validly marry. The second is where a couple have successive matrimonial homes, each of which, for a time, is substantially connected with the marriage. The problem in each of these cases is said to be that there is no single substantially connected law which could apply; in the first situation because the couple have yet to form a link with any country, and in the second because of an embarrassment of choice. In reality, neither counter-example presents any difficulty. It may, for example, be perfectly possible, notwithstanding a change in matrimonial home, to identify the legal system which is best connected with a marriage. This simply depends on the facts of individual cases. Again, if this is not possible, or in the first of the situations mentioned, the right analysis is presumably that there is no substantially connected law, and that the case is to be determined under the principles which apply where there is not. There is only a difficulty if it is incorrectly assumed that one law has to govern a marriage’s validity in all situations. This indeed arises in relation to an intended matrimonial home test but it is the virtue of the proper law approach that it allows different laws to govern in different situations. It might, however, still be objected that it is curious and unjust that the validity of a marriage may depend on the time when it comes to be determined; a marriage which is invalid at the time of the ceremony—say, on the dual domicile test—would have been valid had its validity been assessed some years later in accordance with the law of a subsequently established matrimonial home. This point is not well taken because precisely the same situation might arise under a universally applied dual domicile test. Whether or not the marriage is valid depends on the law of each partner’s pre-nuptial domicile, but the location of someone’s domicile clearly changes during his or her life; the time of determination manifestly affects the validity of the marriage. In sum, it seems that cases where there is no substantially connected country, far from jeopardising the proper law approach, merely show its strength.

The last reflection prompts perhaps the most telling point to be made in favour of the proper law approach and, in particular, of the idea of real and substantial connection. Justice lies not in the certainty of one true test for the validity of marriage, but in having a
test which is flexible enough to respond to the needs of particular cases. In situations where a couple have established a matrimonial home there is every reason to give effect to their legitimate expectations that the law of that place will regulate their married life; the fact that there are cases where no firm connection with any country is apparent, and no expectations revealed, is no reason to ignore such expectations where they do exist.