APPLICATION OF JEWISH LAW IN ENGLAND

It is a strange fact that although whenever the English have established courts in India, Africa or Asia, one of the fundamental principles of the administration of justice that has been adopted has been that of a system of multiple personal laws — the personal law of each person depending upon his religious profession — no such principle is admitted in England. The object of this paper is to show, with reference to the position of the Jews in England, how close the English courts once came to admitting this principle. For while to-day it is axiomatic that the personal law of domiciled English Jews is English law and not Jewish law, this does not appear always to have been the case, and in showing the extent to which this was so we also hope to shed some light on the problems of how, when and why the change took place.

It should first be noted that the attitude of the English courts towards the Jews appears to have undergone a profound change at the end of the seventeenth century, shortly after the return of the Jews to England.[1] The savage opinion of Coke, which appears in his report of *Calvin's* case, was that: [2]

> All infidels are in law *perpetui inimici,* perpetual enemies (for the law presumes not that they will be converted, that being *remota potentia,* a remote possibility) for between them, as with the devils, whose subjects they be, and the Christian, there is perpetual hostility and can be no peace.

This view was rejected by Littleton in his reading on the statute 27 Ed. III c. 7 in which he stated: [3]

> Turks and infidels are not *perpetui inimici,* nor is there any particular enmity between them and us; but this is a common error founded on a groundless opinion of Justice Brooke; for although there be a difference between our religion and theirs, that does not oblige us to be enemies to their persons; they are the creatures of God, and of the same kind as we are, and it would be a sin in us to hurt their persons.

Thus towards the end of the seventeenth century it was admitted that Jews were entitled to bring actions in common law courts. In *Wells* v. *Williams* the court is reported as having stated :[4]

1. The traditional date for the return of the Jews to England is 1685. See on this Henriques, *The Jews and the English Law* (1908).
2. (1608) 7 Co. Rep. 1a, at pp. 17a, 17b.
3. Reported in 1 Salk. 46.
4. (1697) 1 Ld. Raym. 282, see also *Omichund* v. *Barker* (1745) Willes 538.

> A Jew may sue at this day, but heretofore he could not, for then they were looked upon as enemies. But now commerce has taught the world more humanity.

As early as 1668 it had been held, in *Robeley* v. *Langston*[5] that a Jew could take the oath on the Old Testament only, whilst in *Barker* v. *Warren*[6] leave was given to alter the venue of an action from London to Middlesex because all the sittings in London were on a Saturday, and the plaintiff's witness was a Jew.

The Jews having thus established some sort of standing before the courts the question that arose was by what law were English Jews to be governed. The common law courts had little difficulty with this. Since, at this time, they applied English common law almost indiscriminately in all cases over which they were prepared to assume jurisdiction, English Jews were naturally regarded as being subject to English law, at least in all matters of substance.

The ecclesiastical courts, however, had rather more difficulty. These courts had exclusive jurisdiction over marriage in England, but as courts Christian they were courts for Christians and they therefore applied, in the main, only the ecclesiastical law. It is for this reason that the problem of Jewish marriages, when it arose before the ecclesiastical courts, is of such great interest.

The first question that arises for consideration is, however, whether, so far as the ecclesiastical courts were concerned, a marriage celebrated between two Jews according to Jewish rites was a Jewish marriage in the sense that it was, in any way, governed by the Jewish law. Lord Stowell was clearly of the opinion that it was. In *Lindo* v. *Belisario*[7] he gave what is probably the classic exposition of the position of Jewish marriages in England, from which it is worth quoting the following rather lengthy extract. The case was one in which a suit for jactitation of marriage was brought in respect of a marriage between two Jews which had been celebrated according to Jewish rites in England. His Lordship had this to say:[8]

> This is a case which comes before this Court by the direction of the Lord Chancellor. Under the sanction of that high authority I shall certainly apply myself closely to the investigation of the question, although otherwise I should have entertained considerable doubt, if not on the jurisdiction itself, at least on the propriety of exercising it in this case. The Ecclesiastical Court has an undoubted jurisdiction upon the general law of marriage, so far as the

5. (1668) 2 Keb. 314.
6. (1677) 2 Mod. Rep. 271.
7. (1795) 1 Hag. Con. 216.
8. Ibid, at p. 216.

> legality of that contract is constituted by the law of this country. It also examines questions of foreign marriages, in cases of British subjects, and sometimes of aliens; and it does this from necessity in order to prevent a failure of justice; and with the satisfaction of knowing that the principles which regulate English marriages, are such as are also generally applicable to marriages of foreign Christian countries; the marriage law of Europe being founded on the same general principles, and having for its basis the ancient canon law; so that there is not much danger that the Court can proceed wrongly on such general principles, and on such a basis. This is a question of marriage of a very different kind — between persons governed by a peculiar law of their own, and administered, to a certain degree, by a jurisdiction established among themselves — a jurisdiction competent to decide upon questions of this nature with peculiar advantage, and with sufficient authority. It would, therefore, have been a matter of grave consideration with me, if the question had been brought in the ordinary way, and without any such recommendation; whether it would not have been referred more conveniently to that tribunal to which I have alluded; for I cannot but be sensible, that in applying the general principles of the law of marriage to this case, I may be adopting rules that are not duly founded, and which may prove highly inexpedient. On the other hand, if I am to apply the peculiar principles of the Jewish law, which I conceive is the obligation imposed upon me, I may run the hazard of mistaking those principles, having a very moderate knowledge of that law.

Whatever doubts his Lordship may have had regarding exercising jurisdiction in this case there can be no doubt that he took the view that the marriages of English Jews were governed by the Jewish law and not by the only law which, at that date, governed English gentile marriages, the ecclesiastical law. His Lordship repeated this view in several subsequent cases. Thus in *Goldsmith* v. *Bromer,*[9] another case in which a suit for jactitation of marriage was brought in respect of a Jewish marriage his Lordship said, having by this time apparently lost his doubts regarding the propriety of exercising jurisdiction in such cases :[10]

> The parties are both Jews, and both appeal to the Jewish law, by which this question must be decided, for on the mere fact there is no question. The Jews, although British subjects, have the enjoyment of their own laws in religious ceremonies; and the marriage act acknowledges this privilege, by exempting them out of its provisions: to deny them the benefit of their own law, upon such subjects would be to deny to a distinct body of people the full benefit of the toleration to which they have long been held to be entitled.

Finally in *Ruding* v. Smith[11] his Lordship enunciated the following dictum :[12]

> The matrimonial law of England for the Jews is their matrimonial law; and an English Court Christian, examining the validity of an English Jew marriage, would examine it by that law, and by that law only, as has been done in the

9. (1798) 1 Hag. Con. 324.
10. *Ibid.* at p. 324.
11. (1821) 2 Hag. Con. 371.
12. *Ibid.* at p. 385.

> cases that were determined in this Court on those very principles ... If a rule of that law be that the fact of a witness to the marriage having eaten prohibited viands, or having profaned the Sabbath day, would vitiate that marriage itself, an English court would give it that effect when duly proved, though a total stranger to any such effect upon an English marriage generally.

It seems therefore that Lord Stowell was clearly of the opinion that marriages celebrated in England between two Jews according to Jewish rites were Jewish marriages in the sense that they were governed by the Jewish law. Despite this, this very question was hotly debated in the House of Lords in the case of *R.* v. Millis.[13] In that case Lords Brougham and Campbell took the view that Jewish marriages were merely examples of marriages celebrated *per verba de praesenti* which had been held to be valid despite the absence of an episcopally ordained priest, and it was this view which, at least in part, led their Lordships to dissent from the view taken by the other two learned lords who voted on the final question. Thus Lord Brougham stated :[14]

> It is vain for these learned persons to seek an escape from this conclusion, so far as it affects the Jews, by setting up the notion, destitute of all warrant from analogy, and repugnant to every principle of law, that the Jews are *quasi* foreigners, and that therefore they are a law unto themselves. The Judges [sic] are no more foreigners than we ourselves, or the learned Judges are foreigners; and if they were, their laws and usages could no more exempt them from the operation of our law than any admitted foreigner could be suffered in England to set up a marriage void by our law, as good by the foreign law of the country he belonged to.

It is possible, however, to discern some slight doubt in his Lordship's mind for he subsequently added: "even if we were to admit their doctrine as to the Jews, the Quaker marriages would remain annulled; and that is quite enough for my argument."

Lord Campbell, however, seemed to have no doubts on the matter :[15]

> (The Jews) have married here according to their own rites and ceremonies, and their marriages so contracted have undoubtedly been considered valid. Did the Marriage Act mean again to banish them from England, or to prevent them from entering into the married state? It is said they were considered as foreigners. There can be no doubt that when born in England, they are in all respects British subjects. But suppose they were aliens; aliens can only contract marriage in England according to the law of England; and if by that law the presence of a priest episcopally ordained were necessary to the due constitution of marriage, without the presence of such a priest marriage could not be lawfully constituted between any aliens in England. Therefore, the moment it is allowed that in England a marriage contracted by Jews according to their own rites and ceremonies is valid, the doctrine is gone that by the common law the presence of a priest episcopally ordained was necessary to the due constitution of marriage.

13. (1844) 10 Cl. Fin. 534.
14. Ibid. at pp. 738-9.
15. Ibid. at p. 795.

As against these views, however, there were several expressions of a contrary opinion. Thus the Attorney-General, in the course of his argument, observed :[16]

> No observations need be made on the case of the Jews; for however anomalous their right to celebrate a marriage in their own forms, it must be admitted that they have been considered and treated as a peculiar people; so that no argument of any great weight can be derived from the case of the Jews.

This view was echoed by Tindal C.J. in giving the advice of the judges: [17]

> As to the case of the Jews, it is well known that in early times they stood in a very peculiar and excepted condition. For many centuries they were treated not as natural-born subjects, but as foreigners, and scarcely recognised as participating in the civil rights of other subjects of the Crown. The ceremony of marriage by their own peculiar forms might therefore be regarded as constituting a legal marriage, without affording any argument as to the nature of the contract of marriage *per verba de praesenti* between other subjects. But even in the case of a Jewish marriage it was more than a mere contract; it was a religious ceremony of marriage; and the case of *Lindo* v. *Belisario* in so far from being an authority that a mere contract of marriage was a good marriage, that the marriage was held void precisely because part of the religious ceremony held necessary by the Jewish law was found to have been omitted.

The Lord Chancellor was of the same opinion, for, quoting the view of Lord Stowell in *Ruding* v. *Smith,* his Lordship observed :[18]

> No such argument can, I think, be justly raised from the decisions respecting marriages among the Jews. They are treated in those decisions as a distinct people, governed, as to this subject, by their own religious observations and institutions among which marriage is included.

Finally we may note the opinion of Lord Cottenham who, after citing the earlier cases, observed :[19]

> These cases prove that the marriages of Jews have been supported upon grounds wholly inapplicable to the present case. It was assumed that the validity of these marriages would be determined by their own laws and usages, and not by the laws and usages of this country.

Earlier, commenting upon the decision in *Lindo* v. *Belisario* his Lordship observed :

> Now whether this was or was not proper principle upon which the validity of a Jewish marriage in this country was to be tried, is quite immaterial to the present case, and upon it I offer no opinion. But as such was the principle acted upon, the fact of the Jewish marriages being held to be good which appeared to be one of the strongest arguments in favour of the validity of a contract *per verba de praesenti* must be struck out of the list of arguments supporting that proposition.

16. Ibid. at p. 571.
17. Ibid. at pp. 672-3.
18. *Ibid.* at p. 864.
19. *Ibid.* at p. 900.

It is submitted that in fact there can be little doubt that Jewish marriages were regarded by the ecclesiastical court as being governed by Jewish law and not as deriving their validity from the mere fact that they constituted marriage *per verba de praesenti.* Quite apart from the fact that there is nothing in the judgments of the ecclesiastical court in the earlier cases which gives any support to the view that they were treated as merely marriages *per verba de praesenti,* the decision in *Lindo* v. *Belisario* is decisively against this view, as was pointed out by Tindal C.J. Lord Campbell made a most unconvincing attempt to distinguish *Lindo* v. *Belisario* when he stated that:[20]

> The contract *per verba de praesenti* only constitutes marriage when the parties intend that it should do so without any subsequent ceremony; but that when a subsequent ceremony is necessary to the completion of the marriage, the *verba de praesenti* only operate as an executory contract.

One need only enquire which law determines whether a subsequent ceremony is necessary to realise the fallacy of Lord Campbell's reasoning. It may finally be pointed out that Lords Brougham and Campbell were operating with a false analogy of aliens or foreigners. The argument was not, as Lord Brougham suggested, that the Jews were aliens, it was simply that they were "a peculiar people" meaning by that simply that they were entitled to rely upon the provisions of the Jewish law despite the fact that they were English Jews.

We submit therefore that marriages celebrated in England between Jews according to Jewish rites were regarded by the ecclesiastical court as Jewish marriages in the sense that they were governed, at least as regards formalities, by the Jewish law. If this is so we may turn to consider the position of such marriages in the ecclesiastical courts. The essential point which needs to be made in this connection is that these Jewish marriages were recognised by the ecclesiastical courts as marriages. The idea that English courts can only recognise Christian marriages does not appear until *Hyde* v. *Hyde* and despite the fact that the proposition was demonstrably inaccurate it passed into the mythology of English law. The recognition of Jewish marriages by the ecclesiastical courts constitutes a demonstration of the historical inaccuracy of Sir James Wilde's views and a body of authority which his Lordship chose to ignore.

The first actually reported case in the ecclesiastical courts concerning Jewish marriages appears to be *D'Aguilar* v. *D'Aguilar*[21] although the industry of Dr. Haggard in his report of *Lindo* v. *Belisario* revealed two earlier cases. The first of these was *Da Costa* v. *Villa Real*[22] in which an

20. Ibid. at p. 797.

21. (1794) 1 Hag. Ecc. 773.

22. (1733) noted in 1 Hag. Con. at p. 242.

action was brought to enforce a contract of marriage between two persons of the Jewish faith. The point at issue was the effect of the lady's promise to marry "at the end of the year from her husband's death, if her father should consent." Dr. Bettesworth, in the Court of Arches, held that the promise was merely a conditional promise. It was argued that because the parties were of the Jewish faith the ecclesiastical court was not competent to assume jurisdiction. Regarding this point the learned Doctor had this to say :[23]

> An objection has been made, which is new in my opinion, that this is an irregular application, because the case was between persons of a different religion, and therefore not to be done and solemnised *in foro ecclesiae,* that is, as I apprehend, it could not be done in their way. It would be very extraordinary indeed if the Court was persuaded that it had full proof that the parties had contracted, or bound themselves to each other in marriage, and that, at the expiration of the time agreed on, he demands, and she refuses to perform. I say this would be fruitless if the Ecclesiastical Court was not possessed of authority to decide therein. But I think this Court is possessed of that authority; and I know not where else persons could have any remedy except here.

In *Andreas v. Andreas,*[24] an unreported case referred to by Sir William Wynne in his judgment in *Lindo* v. *Belisario,* a suit was instituted for restitution of conjugal rights arising out of a marriage which had been celebrated according to Jewish rites. Dr. Strahan objected that the ecclesiastical court could take no notice of such a marriage but Dr. Henchman, sitting in the Consistory Court admitted the plea although it appears that no further proceedings were taken.

The second case noted by Dr. Haggard in his report of *Lindo* v. *Belisario* is that of *Vigevena and Silveira* v. *Alvarez*[25] which came before Sir William Wynne in the Prerogative Court. Regarding the objection that the ecclesiastical court had no jurisdiction over Jewish marriages Sir William had this to say :[26]

> The objection taken is, as far as I know, perfectly novel. I do not recollect any case which I can name in which a Jewish marriage has been pleaded; and I take it there has been no case in which a Jew has been called upon to prove his marriage. If there had, I conceive that the mode of proof must have been conformable to Jewish rites; particularly since the marriage act, which lays down the law of this country as to marriage by banns or licence, for all marriages had according to the rites of the Church of England, and with an exception for Jews and Quakers: that is a strong recognition of the validity of such marriages. As to Dissenters there is no such exception, and no one would trust to the rules of their particular dissenting congregations for the

23. Ibid. at pp. 242-3.

24. (1737) noted in 1 Hag. Con. (App.) at p. 9.

25. (1794) noted in 1 Hag. Con. (App.) at p. 7.

26. Ibid. at p. 7.

> validity of marriage. The comparison, therefore, between the Jews and Dissenters does not hold, and more particularly in this, that the Jews are anti-Christian, the Dissenters Christian. Dissenters marry and Papists marry in the Church of England. In *Hayden* v. *Gould* the marriage was according to their own invention and the Prerogative Court refused to acknowledge that marriage. Here the parties are alleged to have been married "according to the rites of the Jewish Church." And I am of opinion that this allegation is very proper to be admitted.

Finally we come to the first reported case concerning a Jewish marriage, namely, *D'Aguilar* v. *D'Aguilar*[27] in which Lady D'Aguilar who had been married according to Jewish rites petitioned for separation on the ground of cruelty and adultery. Sir William Scott (as he then was) had no doubt that he had jurisdiction in the case :[28]

> The Court does not remember any proceeding between such parties in a case of this nature: there may have been such, but whether there have been or not there is no doubt that the suit may be entertained. The marriages of Jews are expressly protected by the marriage act; and persons of that persuasion are as much entitled to the justice of this country as any others; for I take the doctrine to be that all persons who stand in the relation of husband and wife in any way the law allows, as by a foreign marriage, or by a domestic marriage not contrary to law, have a claim to relief on the violation of any matrimonial duty. Jews in this country have the same rights of succession to property, and of administration, as other subjects; and they come to the Ecclesiastical Court in order to have such rights secured. Many of them are possessed of considerable personal property, and they have the same right to transmit as others. It would be hard, then, if they had not the same mode of securing the legitimacy of their children, and consequently if the same rights of divorce did not belong to them. I have therefore no doubt that it is the duty of the Court to entertain such a suit between Jews as between others of a different persuasion.

Regarding the allegation of adultery it was argued that a Jew could not be guilty of adultery since the Jewish law allowed polygamy. Regarding this point Sir William Scott said :[29]

> It has been suggested that the Jewish religious regulations allow concubines. By the Mosaic law, as at present received, is there any such privilege? If there be any such among the Jews themselves, it would be a great question how it could be attended to in a Christian Court to which they have resorted: and if it could be noticed, it ought to have been specially pleaded, but I think it could not.

These cases, together with *Lindo* v. *Belisario* and *Goldsmid* v. *Bromer,* which were mentioned earlier, make it quite clear that the ecclesiastical courts recognised Jewish marriages even for the purposes of matrimonial relief. There seems to be no reported case in which the non-Christian nature of a Jewish marriage was taken as a ground upon which refusal

27. (1794) 1 Hag. Ecc. 773.

28. *Ibid*. at p. 773.

29. *Ibid*. at p. 785.

to recognise such marriage could be based. The recognition of such marriages, even for the purpose of granting matrimonial relief, constitutes a body of authority which was totally ignored by Sir James Wilde in *Hyde* v. *Hyde*[30] and which is contrary to the decision that his Lordship reached in that case. The decisions of the ecclesiastical courts on this point were in fact particularly strong authorities since a Christian ecclesiastical court has much greater justification for refusing to recognise non-Christian marriages than Sir James Wilde had who was sitting in a secular court. It is surely rather strange to find a secular judge invoking the non-Christian nature of the marriage as a ground for refusing to recognise it when the ecclesiastical courts had in fact rejected this very argument.

It may be that in ignoring the earlier authorities Sir James Wilde was relying upon the decision of the Judicial Committee in *Ardasser Cursetjee* v. *Peroseboye*[31] which came before the Board on appeal from the Supreme Court of Bombay. In reversing the decision of Perry C.J. the Judicial Committee held that the ecclesiastical side of the Bombay Supreme Court had no jurisdiction to grant restitution of conjugal rights in respect of a Parsi marriage, and in delivering the opinion of the Board Dr. Lushington had this to say regarding the practice of the ecclesiastical court in relation to Jewish marriages :[32]

> We are aware that, under peculiar circumstances, the Ecclesiastical Courts in England have exercised jurisdiction with respect to Jewish marriages, ascertaining their validity by Jewish laws; but the very great difficulties attending such investigation, and the almost absurd consequences to which they lead, would not induce us to follow those precedents further than strict necessity requires.

It may be observed that enquiries into the Jewish law seem to present no greater difficulties than those associated with any other enquiries to discover the provisions of a foreign law and further that the almost absurd consequences referred to by Dr. Lushington do not seem to be very apparent in those few cases concerning Jewish marriages which have been reported. Even, however, if Sir James Wilde was prepared to accept Dr. Lushington's reasoning on this point the opinion still provided him with no real authority for ignoring the earlier cases, for Dr. Lushington's opinion was confined to the jurisdiction of ecclesiastical side of the Bombay Supreme Court. He was also of opinion that relief might have been obtainable if sought from the civil side of the same court :[33]

30. (1866) L.R. 1 P. & D. 130.

31. (1856) 6 M.I.A. 348.

32. *Ibid.* at p. 388.

33. *Ibid.* at p. 390.

> The Civil Courts in India can bend their administration of justice to the laws of the various suitors who seek their aid. They can administer Mohamedan laws to Mohamedans, Hindoo laws to Hindoos; but the Ecclesiastical law has no such flexibility. Change it in its essential character, and it ceases to be Ecclesiastical law altogether.

The decision of the Privy Council, therefore, seems not to have been that non-Christian marriage could not be recognised for the purposes of matrimonial relief, but simply that, owing to the ecclesiastical nature of the remedy of restitution of conjugal rights it could not be granted by a court sitting as an ecclesiastical court in respect of marriages which were not Christian.[34] Sir James Wilde was not sitting in an ecclesiastical court and he was not asked to grant an ecclesiastical remedy. It can only be concluded that his Lordship must have completely misunderstood the decision otherwise he would never have quoted it.

Before turning to consider other aspects of the application of the Jewish law in England it will be convenient to consider the present position regarding the celebration of marriages according to Jewish rites in England. As we have seen the view taken by the ecclesiastical court in the eighteenth century was that they were governed, at least as to formalities, by Jewish law *proprio vigore.* This view was based largely upon historical considerations coupled with the fact that the Marriage Act of 1753[35] made no specific provision for Jewish marriages: it merely exempted them from the operation of the Act. The same was also true of the Marriage Act of 1823.[36] With the Marriage Act of 1836,[37] however, we notice a change. The relevant provision in this Act read as follows :[38]

> Persons professing the Jewish Religion may continue to contract and solemnize Marriage according to the Usages of ... the said Persons . . . and every such Marriage is hereby declared and confirmed good in Law, provided that the Parties to such Marriage be ... both Persons professing the Jewish Religion . . . provided also, that Notice to the Registrar shall have been given, and the Registrar's Certificate shall have been issued in manner hereinafter provided.

34. This view was in fact followed by Sir James Colville who delivered the opinion of the Judicial Committee in *Moonshee Buzloor Raheem* v. *Shumsoonnissa Begum* (1867) 11 M.I.A. 51. He stated: "Upon authority then, as well as principle, their Lordships have no doubt that the Musulman husband may institute a suit in the civil courts of India for a declaration of his right to the possession of his wife, and for a sentence that she return to cohabitation." In Malaya, in *R.* v. *Loon* (1864) Wood 39 the same view was suggested and appears to have been acted upon in two unreported cases *Toh Lye* v. *Keng Neoh* and *Mohamed Hashim* v. *Katijah Bee.* In *Lim Chye Peow* v. *Wee Boon Tek,* (1871) 1 Ky. 236 it was held following *Hyde* v. *Hyde* that no matrimonial jurisdiction over potentially polygamous marriages existed on either side of the court.
35. 26 Geo. II, c. 33.
36. 4 Geo. IV, c. 76.
37. 6 & 7 Will. IV, c. 85, s.
38. S. 2.

It is possible, therefore, after this Act to take the view that marriages celebrated according to Jewish rites derived their validity not from the Jewish law *proprio vigore* but from the Act itself. That this is so seems to be supported by the fact that earlier in the same session Parliament had expressed in legislative form doubts regarding the validity of marriages celebrated according to Jewish rites. This was in the statute levying rates for the purpose of the French war. The Act provided that :[39]

> All Jews and other persons who cohabit and live together as man and wife shall and are hereby made liable to pay the several and respective duties and sums of money payable upon marriages according to their respective degrees, titles, orders and qualifications as they ought to have paid by virtue of this Act as if they had been married according to the law of England.

The classing of marriages between Jews with " other pretended marriages" and persons who cohabit together as man and wife seems to suggest that doubts had developed regarding the validity of Jewish marriages and this may account for the fact that in the Marriage Act of the same year the provision respecting Jewish marriages was altered from a mere exempting clause to one which declared and enacted that such marriages were valid. This makes it possible to argue that after 1836 Jewish marriages celebrated in England drew their validity not from the Jewish law *proprio vigore* but from the statutory provision declaring their validity.

The 1836 Act was repealed by the Marriage Act, 1949[40] and the question that therefore arises is what is the present position of marriage celebrated according to Jewish rites in England. The only provision in the 1949 Act relating to Jewish marriages is one which states that a marriage between two Jews celebrated according to the usages of the Jews may be celebrated on the authority of a superintendent registrar's certificate: there being no clause exempting Jewish marriages from the provisions of the Act. The question that arises is whether a Jewish marriage celebrated in England after 1949 derives its validity from the application of the Jewish law or from the statute. This question may be discussed in terms of the problem whether a marriage "according to the usages of the Jews" will be invalid if any requirements of the Jewish law relating to the celebration of marriage are omitted or disregarded. Most of the writers seem to take the view that such a marriage will be invalid and the authority they quote for this proposition is *Lindo* v. *Belisario.*[41] That decision, however, it will be remembered, proceeded on the basis that the Jewish law applied *proprio vigore.* If, under the

39. 6 & 7 Will. III, c. 6 (1695).

40. 12, 13 & 14 Geo. VI, c. 76.

41. (1795) 1 Hag. Con. 216.

1949 Act, that is no longer so then there is no longer the same justification for taking the view that any infringement of the Jewish law relating to the celebration of marriage will render such a marriage invalid.

A marriage according to Jewish rites is a marriage under Part III of the Marriage Act, 1949 and the only provisions relating to the formal invalidity of marriages celebrated under that Part of the Act are those set out in section 49 which does not include infringement of the Jewish law as a ground of nullity. This, therefore, raises the question whether the nullity provisions of section 49 are exhaustive of the formal defects which will render marriages celebrated under Part III of the Act null and void.

This problem raises a much wider issue of interpretation of the 1949 Act than merely one relating to Jewish marriages. It raised the question whether the provisions of the 1949 Act are exhaustive in the sense that no marriage celebrated in England can be valid unless valid under the provisions of that Act. On the face of it the Act is not exhaustive. After setting out in Part I certain restrictions on marriage relating to age and prohibited degrees which apply to all marriages celebrated in England, the Act sets out, in Parts II and III the two main methods by which marriages may be celebrated in England, namely, marriages according to the rites of the Church of England and marriage under a superintendent registrar's certificate, respectively. There are provisions of nullity in each Part of the Act which apply where persons knowingly and wilfully contravene the provisions of that part of the Act under which they are marrying, but there is no provision which in terms makes marriages celebrated neither under Part II or Part III void; that is to celebration of marriage do not appear to be exhaustive.

There are grounds for thinking that this may be largely accidental, for until 1949 it would seem to have been clear that the legislative provisions relating to the celebration of marriages in England were exhaustive. The Marriage Act, 1753 section 8 contained nullity provisions worded as follows :

> All marriages solemnized from and after the twenty-fifth day of March in the year one thousand seven hundred and fifty-four in any place other than a church or such public chapel, unless by special licence as aforesaid, or without publication of banns or licence of marriage from a person or persons having authority to grant the same, first had and obtained shall be null and void to all intents and purposes whatsoever.

The Marriage Act of 1823 had essentially the same provision with the addition of the requirement of not knowingly and wilfully infringing the provisions of the Act. Subject, therefore, to the statutory exceptions in relation to Jews and Quakers, no marriage celebrated in England could be considered valid unless the requirements of the Marriage Act had been complied with.

By the Marriage Act, 1836 civil marriage was introduced into England and section 42 of the Act contained the following nullity provision:

> If any person shall knowingly and wilfully intermarry after the said first day of March under the provisions of this Act in any place other than the Church, Chapel, registered building or office or other place specified in the notice or certificate as aforesaid or without due notice to the superintendent registrar, or without certificate or notice duly issued, or without licence, in case a licence is necessary under this Act, or in the absence of a Registrar or Superintendent Registrar where the presence of a Registrar or Superintendent Registrar is necessary under this Act the marriage of such persons except in any case hereinafter excepted shall be null and void: Provided that nothing herein contained shall extend to annul any marriage legally solemnized according to the provisions of (the Marriage Act, 1823).

Any marriage which was not a marriage "under the provisions of this Act" was nevertheless a marriage within the meaning of the 1823 Act and would therefore, unless celebrated in accordance with the provisions of the latter Act be invalidated under the nullity provisions of that Act, which were not limited to marriages "under the provisions of that Act" but extended to all marriages. It was because the nullity provisions of the 1823 Act were not so limited that the two Acts, read together, were exhaustive in that a marriage celebrated in England had, to be valid, to be celebrated in accordance with the requirements of either one or the other.

That was the position up to 1949, the nullity provisions of the Marriage Act of that year, however, are limited to marriages which are celebrated under Parts II and III of that Act; they do not apply to marriages which are celebrated under neither Part and there is no provision that a marriage which has not been celebrated under either Part is invalid. This omission may be due to the fact that the 1949 Act is, with amendments, simply the 1823 and the 1836 Acts combined into one Act. Both sets of nullity provisions have been retained but both have been limited in their application to marriages taking place under their respective Parts. Whether accidental or not the fact remains that the Act of 1949 is not, on the face of it, exhaustive, and it is difficult to see how mere interpretation can make it so. It is therefore submitted that there is the possibility of valid marriages being celebrated in England which are not celebrated in accordance with either Part II or Part III of the Marriage Act, 1949. Leaving aside for the moment the problem of Jewish marriages it seems reasonable to conclude that the validity of marriages which are celebrated outside the terms of the Marriage Act fall to be determined by the common law, as the law which was previously applicable before statutory intervention. By the decision in *R.* v. *Millis*[42] *a* common law marriage, at least if celebrated in England, requires the presence of an episcopally ordained priest and it is therefore difficult to

42. (1844) 10 C1. & Fin. 534.

avoid the conclusion that marriages which do not purport to be either marriages according to the rites of the Church of England or marriages under a superintendent registrar's certificate will be valid if valid as common law marriages.

In this context we may consider the problem which arose in *R.* v. *Rahman.*[43] In this case an alleged marriage had been celebrated in England in a private house, between two Muslims by an unauthorised person who was himself a Muslim. The husband, who was domiciled in India, was already married to an Indian lady. Streatfeild J. had no difficulty in holding that the ceremony was a sufficient ceremony for the purposes of section 39 of the Marriage Act, 1836.[44] His Lordship stated :[45]

> It was, in my opinion, none the less the solemnisation of a marriage, and I construe the word "marriage" in section 39 of the Act of 1836 as having the same meaning as it does in the Offences against the Person Act, 1861, section 57.

The only problem that arose for consideration in *R.* v. *Rahman* was whether an offence had been committed under section 39 of the 1836 Act. The further question that arises however is whether the ceremony resulted in, or could result in, the creation of a valid marriage. On the facts of *R.* v. *Rahman* the man was already married and if, therefore, we assume that the principle of *Srini Vasan* v. *Srini Vasan*[46] and *Baindail* v. *Baindail*[47] apply to all marriages howsoever solemnised in England then the marriage in *R.* v. *Rahman* would have been void on that ground alone, quite apart from any question of formalities. Suppose, however, that the husband had not been previously married, would the marriage have then been invalid?[48] Such a ceremony could not be considered as a marriage "under the provisions of" either Part II or Part III of the 1949 Act and it would not therefore fall under the nullity provisions of either Part. In our submission it would be a marriage whose validity fell to be determined by the common law, and as such it would be invalid merely because of the necessary application of the principle in *R.* v. *Millis,* namely, that such marriages are only valid if celebrated in the presence of an episcopally ordained priest.

43. [1949] 2 All E.R. 165.

44. The equivalent section of the 1949 Act is s. 75.

45. At p. 168.

46. [1946] P. 67. The spelling of the name in the Law Reports is incorrect. The correct spelling is Srinivasan, see Vesey-FitzGerald, "Mixed Marriages" (1948) 3 *Current Legal Problems* 222.

47. [1946] P. 122.

48. In both re *Ullee* (1885) 54 L.T. 286 and *re Abdul Beshah Majid* (1926) *The Times* 16 & 18 Dec.; (1927) *The Times* 14 & 18 Jan. the court even seemed prepared to hold subsequent marriages thus celebrated to be valid polygamous marriages.

The learned editor of Dicey, in agreeing that such a marriage would be invalid states, however, that it would be invalid because "no provision of the Marriage Act, 1949, could conceivably make it valid,'[49] and he accuse me, in a footnote, of having overlooked, on a previous occasion,[50] that such a marriage would not be within either Parts II or III of the Marriage Act. I had not overlooked the fact: I had assumed it. It is in fact the learned editor of Dicey who seems to have overlooked the fact that there is no provision in the Marriage Act making such a marriage invalid. He appears to assume that the Act is exhaustive whereas in our submission it is not. There may be no provision in the Act making such a marriage valid, but equally there is no provision making it invalid.

The test case in this context would be one which, for example, involved a marriage celebrated in England according to the rites of the Greek Orthodox Church, between members of that Church, none of the parties being aware that anything other than a religious ceremony was necessary to constitute marriage in England. Would such a marriage be valid in circumstances in which no attempt had been made to comply with the requirements of the Marriage Act? Such a ceremony could hardly be considered as a ceremony "under the provisions of" either Part II or Part III of the 1949 Act. Its formal validity could not, therefore, fall to be determined under the nullity provisions of that Act. It follows, therefore, in our submission, that its validity would be a matter for common law by which, because of the expression of consent *per verba de praesenti* in the presence of an episcopally ordained priest, it would be valid. Dr. Morris would presumably argue that it would be invalid because no provision of the 1949 Act could conceivably make it valid. In our submission it would be valid because no provision of the 1949 Act could conceivably make it invalid.

The really crucial problem in this context is that of elucidating what is meant by a marriage "under the provisions of" either Part II or Part III of the Act. It is necessary at some point to draw a line between a ceremony which is not "under the provisions of" either Part II or Part III of the Act, and a ceremony which takes place "under the provisions of" either Part but is invalid because of contravention of those provisions; but there is no indication of where this line is to be drawn.

It would perhaps not be unreasonable to assume that any ceremony which took place in an Anglican Church, and possibly any ceremony celebrated by an Anglican clergyman, whatever formal defects there may

49. 7th. ed. 1958 at p. 275.

50. 17 M.L.R., p. 347.

be, would be a marriage under Part II of the Act, *i.e., a* marriage according to the rites of the Church of England, but it is difficult to see how any other ceremony could be so considered.

The problem of defining when a marriage is a marriage "under the provisions of" Part III is rather more difficult, but if not the slightest attempt has been made to obtain a certificate or a licence or in any way to involve a registrar of marriages, it is difficult to see how such a ceremony, such as a ceremony celebrated in a private house by a private individual — as in *R.* v. *Rahman* — could be regarded as a ceremony "under the provisions of" Part III. In the absence of any authority on the point it is not possible to say any more here — nor indeed would it be strictly relevant to do so. It is sufficient for our purposes to submit that there may be marriages which may be celebrated "under the provisions of" neither Part II nor Part III of the 1949 Act, and that the formal validity of such marriages are not therefore determined by reference to the nullity provisions of that Act.

We turn, therefore, to consider, the application of our conclusion to the problem of Jewish marriages. In so far as the marriage can be characterised as a marriage "according to the usages of the Jews" it is a marriage under Part III and is therefore subject to the nullity provisions of section 49 which do not, as mentioned, earlier include infringement of the Jewish law relating to the celebration of marriage as a ground of nullity. The question that therefore arises is whether a marriage under Part III of the Act can be annulled for formal defects other than those specified in section 49. It is submitted that the nullity provisions of section 49 must in fact be considered as exhaustive, for the legislature has made it clear that in setting out the formalities of marriage it did not intend every infringement of those formalities to invalidate the marriage, and in view of this it is submitted that it is not open to the courts to extend the grounds upon which a marriage celebrated under Part III can be invalidated for formal defects.

This however, does not solve our problem, for there remains the question of the extent to which a marriage between two Jews, in which there has been an infringement of the Jewish law relating to the celebration of marriage, can be considered a marriage "according to the usages of the Jews." If it cannot be so considered then it cannot be classified as a marriage under Part III of the 1949 Act and would therefore escape the nullity provisions of section 49. Earlier we suggested, in the case of other marriages which were not celebrated under either Parts II or III of the 1949 Act, that the validity of such marriages would have to be determined by the common law. This conclusion, however, cannot be applied to Jewish marriages in so far as they fall outside Part III of the Act, for Jewish marriages were never

subjected to the requirements of the common law: they were subjected to the Jewish law applying *proprio vigore,* and by analogy, therefore, we would submit that the validity of a Jewish marriage which falls outside the scope of Part III of the 1949 Act must be determined by the Jewish law *proprio vigore.* Since, however, the reason why such a marriage falls outside the application of Part III of the Act is that it is not celebrated "according to the usages of the Jews" it follows that it will be invalid by the Jewish law. The question that remains, therefore, is whether a Jewish marriage whose celebration has involved some infringement of the Jewish law is, by reason of that fact, taken outside the operation of Part III of the Act.

We would submit that the mere fact that the celebration of a Jewish marriage has involved some infringement of the Jewish law can no more be taken as meaning that the marriage is no longer a marriage "according to the usages of the Jews" than can the fact that a marriage which has been celebrated without publication of banns mean that it is no longer a marriage according to the rites of the Church of England. It is submitted that a marriage must be regarded as a marriage "according to the usages of the Jews" if the ceremony purports to be or is, on the face of it, according to Jewish custom. It is thus submitted that a marriage does not cease to be a marriage "according to the usages of the Jews" merely because, for example, one of the witnesses has profaned the Sabbath and is therefore not a competent witness according to Jewish law. If this is so then such a marriage does not cease to be a marriage under Part III of the Act and therefore its validity falls to be determined by section 49 under which that fact that a witness has profaned the Sabbath is not a ground of nullity. Such a marriage, we would submit, must be regarded as a valid marriage by English law despite the fact that it would not be valid by the Jewish law.

We would therefore conclude that it is no longer true to say that in the celebration of a Jewish Marriage Jewish law is either applicable or must be adhered to. A marriage purporting to be a Jewish marriage is a marriage under Part III of the Marriage Act, 1949 and will be valid provide d that the requirements of that Part are complied with. The decision in *Lindo* v. *Belisario* can therefore no longer be regarded as an authority regarding the celebration of Jewish marriage.

So far we have been concerned only with the formalities of the celebration of marriage. We turn now to consider whether, at any time, the extent of the application of Jewish law went any further than this, and the first point to warrant discussion is whether the question of capacity to marry was ever included within the scope of the application of Jewish law. There is unfortunately very little authority on this point, although it may be surmised that the Jewish law was in fact regarded as being so applicable. Lord Stowell's view, quoted above, was

that the matrimonial law for English Jews was the Jewish law which he regarded as being administered in the main by Jewish tribunals. If in fact the Jews took most of their matrimonial problems to Jewish tribunals then clearly Jewish law would be applied and that law would include the law relating to capacity to marry.

Some slight authority for this is provided by the decision in *Jones* v. *Robinson*[51] *a* case which concerned the validity of a marriage which had been celebrated according to Christian rites by a Jewish minor without her father's consent. Sir William Scott, as he then was, observed: [52]

> The question, however, is whether the general law of marriage applies to this case? The general law of the marriage act makes the marriage by licence of minors, without consent null. This clause is restrained, as to its effect, where the parties are Quakers or Jews; that is, where they are both so, they having rights of marriage of their own. The woman appears to be a Jewess, at least she is descended from Jewish parents; that she continues so is not proved: taking it to be so, she is not within the clause, which is as to the case of both parties.
>
> The marriage was solemnized after the Christian form — whatever her persuasion was she conformed in this respect to the Christian religion, so she submits to the restrictions of that form, and is bound to the consequences if she departs from them.

It seems not unreasonable to deduce from this that had the marriage been celebrated according to Jewish rites between two Jews his Lordship would not have regarded the English law as being applicable.

However, be that as it may, the fact remains that with the transfer of the jurisdiction of the ecclesiastical courts to secular courts the idea that the Jews, although domiciled in England possessed their own personal law declined: the courts at least showed no disposition to extend it further than necessary and taking advantage of the relatively recently developed distinction between capacity and formality they took the view that in so far as Jewish law applied at all it only applied to formalities and not to capacity. This was the view taken by Stuart V.C. in *Goodman* v. *Goodman*[53] in a case which involved a marriage between a Jew and a Christian. His Lordship held that he could not take notice of the fact that such a marriage would be invalid by Jewish law, although it should be noticed that he was uncertain whether the marriage would in fact be treated as totally invalid for all purposes in Jewish law :[54]

51. (1815) 2 Phillm. 285.

52. At p. 285.

53. (1862) 28 L.S. Ch. 745.

54. At p. 748n. The specific question of capacity was not discussed on appeal.

> Isaac was a Jew and Charlotte was a Christian and it seems plain that, to Jews, a marriage with a Christian woman, so far from being a thing readily recognised as an acceptable thing, is considered an odious marriage, and one rather to be rejected. It appears in fact that the authorities of the Jewish law would rather refuse recognition of the validity of such a marriage. Upon the other hand, it was said that in this very cause there was the legitimate and admitted — I mean admitted by the Jews as legitimate — daughter of a brother of this Isaac by a Christian woman, with whom he had formerly lived as his mistress. That no doubt is a circumstance which shows that between Jews the validity of a marriage is for judicial purposes recognised, and it must be recognised; but when I speak of the recognition of a marriage, and of the effect in this case of the non-recognition of this marriage by the Jewish relatives of the alleged husband, who was a Jew, it must be taken with the qualification which arises from the unquestionable fact that as between a Jew and a Christian woman, the marriage was, to Jews and according to the law of the Jews, an odious marriage. Still that is not a conclusive circumstance for the proceedings in the cause show that the Jews would recognise such a marriage as legitimate because the law of England compels them; and it is vain therefore to attempt to do otherwise.

In *re de Wilton*[55] Stirling J. delivered a judgment which was much more assured on the point. The point arose in connection with a marriage which had been celebrated in Germany between a Jew and his niece, both of them being domiciled British subjects. Rejecting the contention that the marriage should be recognised on the ground that it was valid by Jewish law Stirling J., after citing Lord Stowell's judgment in *Lindo* v. *Belisario* stated: [56]

> The language would not have been inappropriate if the question before Lord Stowell had related to the capacity of the contracting parties as well as to the formalities of the marriage. In fact, however, the question related to the formalities only; it was one of intricacy and difficulty, and I am unable to find anything in the judgment which indicates that the observations to which I have referred were directed to anything beyond that which the learned judge was called on to decide; certainly I cannot look on them as an authority for the proposition that the capacity of members of the Jewish faith to contract marriage is regulated by their own law and not by the law of this country.

Stirling J.'s judgment, although more assured than that of Stuart V.C., is hardly any more logical. Having stated that Lord Stowell's language could be construed as applying to the question of capacity as well as that of formalities, he proceeded to state that there was nothing in the judgment which indicated that Lord Stowell was thinking of anything but formalities. It is quite true that the only question before Lord Stowell was one of formalities and that therefore anything which his Lordship had to say on the question of capacity would be *obiter,* but the fact remains that his Lordship's language was wide enough to comprehend capacity as well as formalities, and as we have suggested should be interpreted in such a way. As such it was a dictum regarding the

55. [1900] 2 Ch. 481.

56. At p. 491.

attitude of the ecclesiastical courts towards the question of capacity in Jewish marriages. As a dictum it may not have been binding upon Stirling J., but it is nevertheless submitted that it cannot be interpreted as not applying to the question of capacity.

Be that as it may the question relating to the capacity of domiciled English Jews to marry was generally regarded as settled after *de Wilton.* There appear to have been no significant cases subsequently on the point, but it is worth remarking that the subjection of domiciled English Jews to the English law relating to capacity to marry appears to be contrary to the view taken by the ecclesiastical court and to rest upon nothing more substantial than a couple of chancery cases concerned with the interpretation of wills. There can be no doubt that the law as it stands is that the capacity of domiciled English Jews to marry is governed by English law, but this appears to have come about almost accidentally and as a consequence of the transfer of the jurisdiction of the ecclesiastical courts to secular courts.

It is worth noting, however, that occasional echoes of the views of ecclesiastical court on this point can still be heard. In *Meczyk* v. *Meczyk* [57] a woman petitioned for divorce on the ground of adultery and desertion. After her marriage to her husband at a London Registry Office her husband discovered that she was a divorced woman and he claimed that as he was a Cohen, a member of the priestly family, he was unable by Jewish law to marry a divorced woman. He thereupon left her and no religious ceremony was ever performed. Subsequently, in Germany, he went through a ceremony of marriage with another woman. Bargrave Deane J. expressed some doubt as to whether he could dissolve the first marriage. He thus stated to counsel in the course of argument:

> You ought to dispose of his claim to be a Cohen. He may be a strict Jew and unable lawfully to marry a divorced woman.

Counsel attempted to argue that the marriage was valid despite the respondent's claim. Bargrave Deane J. replied :

> I do not want authority the law is clear. I want evidence that this man is not a Cohen. If he is, according to Jewish law and religion he cannot lawfully marry a divorced woman.

Counsel attempted to cite *re de Wilton* but his Lordship was adamant :

> Unless you satisfy me that there has been a valid marriage, there is nothing to dissolve.

57. (1905) *The Times* 25 & 31 Oct. 1 & 7 Nov.

Counsel thereupon asked leave to amend the petition to one for nullity. This was granted, but subsequently a decree nisi of divorce was granted on the ground that there was no evidence before the court to support the respondent's claim.

This case is hardly of great significance, but it does demonstrate how casual was the way in which the present legal position of domiciled English Jews was achieved, so far as concerned their capacity to marry. Equally casual was the way in which the Jews were deprived of the benefit of their law relating to legitimation *per subsequens matrimonium.* In *Levy* v. *Solomon*[58] Malins V.C. dismissed the argument that in interpreting the will of a domiciled English Jew he should look at the Jewish law on the question of legitimacy, in the following words :[59]

> It was said that here all the circumstances must be looked at — the fact of the testator being a Jew, and of these children, illegitimate by the law of England, being legitimate by Jewish law. Those facts could make no difference, for the law he was administering was the law of England, the law of the testator's domicil, and unless it could be shown from something within the four corners of the will that by "children" the testator meant illegitimate as well as legitimate children, only the latter could take.

Thus the Chancery Division deprived domiciled English Jews of the benefit of yet another provision of the Jewish law.

We turn finally to consider the problem of the recognition of Jewish divorces. This is a problem regarding which there is a surprising dearth of authority. Two situations have, however, to be distinguished. First, the case of the divorce of domiciled English Jews; second, the recognition of the divorces of Jews other than those domiciled in England. As regards the first the only early authority which we have been able to discover is that of Moss v. *Smith*[60] in which the only objection that Erskine J. took to a plea that a marriage had been dissolved by the Jewish authorities in England was that it had not been proved in the absence of the bill of divorcement. This suggests that it was conceded that Jewish marriages could be dissolved by the Jewish authorities in England, and this is supported by certain extrinsic evidence. Thus in the House of Lords debate on the Matrimonial Causes Bill 1857 the Lord Chancellor stated that he intended to propose an additional clause to follow clause LXIII which was to read :[61]

> Nothing herein contained shall give the Court hereby established Jurisdiction in relation to any Marriage of Persons both professing the Jewish Religion contracted and solemnized according to their own Usages.

58. (1877) 25 W.R. 842.

59. At p. 843.

60. (1840) 1 Man. & Gr. 228.

61. Hansard 3rd series Vol. CXLV p. 1658.

This could hardly be interpreted as meaning that Jewish marriages were to be made indissoluble, nor that a new jurisdiction was to be conferred on the Jewish courts, so that the only reasonable interpretation seems to be that the Lord Chancellor regarded Jewish marriages as already being subject to the Jewish authorities in the matter of divorce and wished to make it clear that this was to continue. For some reason, however, the proposed clause was dropped. It should further be added that in giving evidence before the Royal Commission on Divorce and Matrimonial Causes in 1912 the Chief Rabbi, Dr. Herman Adler, stated that before 1857 the Jewish Rabbinat exercised divorce jurisdiction in respect of Jewish marriages and indeed continued to do so until 1866 when the Registrar-General refused to register Jewish divorces thus obtained.[62] Thereafter they would only grant Jewish religious divorces after a civil divorce had been obtained. This seems to suggest that domiciled English Jews lost the benefit of their own divorce law by what looks like a side-wind, if not by a mere administrative decision by the Registrar-General.

It is, however, quite clear that to-day domiciled English Jews are subject to the ordinary English law of divorce. As early as 1908 Gorrell Barnes J., in *Friedberg* v. *Friedberg*[63] assented without comment to the proposition that a *ghett* would be ineffective if pronounced in England.

It seems also to have been assumed in *Levi* v. *Levi*[64] that a divorce from a Jewish Rabbi in Amsterdam would be ineffectual in England for the King's Proctor, intervening in the cause, pleaded that "the petitioner was well aware that the alleged dissolution of his marriage with the respondent was invalid and ineffectual according to the law of England." In *Preger* v. *Preger*[65] Hill J. remarked regarding a Jewish divorce which had been obtained in England :[66]

> It was not disputed, however, that it was the ceremony by which a husband divorces a wife according to the law of Moses and Israel. Both the husband and the wife knew that such a ceremony had no effect to dissolve the marriage according to English law.

More recent cases have confirmed this view. In *Joseph* v. *Joseph*[67] the Court of Appeal not only held that a divorce obtained from the London Beth Din was ineffective to dissolve a marriage both parties to which were probably domiciled in England but also held that the procedure

62. Cmd. 6481 Vol. III p. 407.

63. (1908) Jewish Chronicle Oct. 16.

64. (1910) *The Times* Feb. 18.

65. (1926) 42 T.L.R. 281.

66. At p. 283.

67. [1953] 2 All E.R. 710.

involved operated analogously to a separation agreement and prevented the wife from obtaining a divorce on the ground of her husband's adultery. In *Leeser* v. *Leeser*[68] Davies J. held that even the Beth Din in Haifa was not competent to dissolve a marriage of domiciled England Jews :

> The English courts would not in any event concede jurisdiction to the courts of Israel to dissolve a marriage the parties to which were domiciled in England.

The law thus is clear, but it appears to be a law which only goes back to 1857 and to have resulted as an accidental consequence of the Matrimonial Causes Act of that year.

The problem of the recognition of Jewish divorces obtained by Jews other than those domiciled in England has been complicated by difficulties arising from the interpretation of the well known decision in *R.* v. *Superintendent Registrar of Marriages for Hammersmith ex p. Mir-Anwarrudin*[69] in which it was held that a pronouncement of *talaq,* pronounced in England by an Indian Muslim was not effective to dissolve his marriage to an Englishwoman, which had been celebrated in an English Registry office. Dr. Cheshire has suggested two possible interpretations for the decision.[70] The first is that: "English law will not recognise a foreign divorce unless it has been decreed by a court of law." This possible interpretation Dr. Cheshire himself attacks and in so doing he relies upon the decision of the Judicial Committee of the Privy Council in *Sasson* v. *Sasson*[71] saying that :[72]

> The decision is valuable for, though given on appeal from a court in Egypt and concerned with the interpretation of an Order in Council, it shows that it is not the policy of English law to disregard a divorce binding in the domicil merely because it has been granted without judicial investigation.

Despite Dr. Cheshire's remarks, the decision in *Sasson* v. *Sasson* throws no light whatsoever on the policy of English law in this matter since English law was not even remotely concerned with the case. The Ottoman Order in Council, 1910 provided, in section 10, that :

> In all matters involving religious law or custom the court shall in the case of persons belonging to non-Christian communities, recognise and apply the religious law or custom of the persons concerned.

The persons concerned in *Sasson* v. *Sasson* were Jews domiciled in Egypt and the case concerned the recognition of a Jewish divorce which

68. (1955) *The Times* Feb. 5.

69. [1917] 1 K.B. 634.

70. *Private International Law* 5th ed. pp. 380-1.

71. [1924] 1 A.C. 1007.

72. *Op. cit.* at p. 382.

had been obtained before the Grand Rabbinat at Alexandria. The recognition of this divorce by the British Consular courts has no relevance whatsoever to the "policy of English law" since it was not English law, but Jewish law which was applicable. Indeed as the Judicial Committee themselves pointed out in that case the situation before them was identical with that existing in India at the time. The Indian courts had for years before *Sasson* v. *Sasson* been recognising the validity of pronouncements of *talaq,* and the decision in *Sasson* v. *Sasson* had no more relevance to the policy of English law than had the hundreds of Indian decisions concerned with the same point.

However, this is not to say that the first possible interpretation of the *Hammersmith Marriage* case is to be justified or defended. In the place it should be pointed out that there are earlier English decisions in which extra-judicial divorces, i.e., the Jewish *ghett* had been recognised by the English courts. As early as 1791 Lord Kenyon, in *Garner* v. *Lady Lanesborough*[73] allowed the defendant to counter a traverse of a plea of coverture by showing that, although her husband was still living, she had been divorced from him at Leghorn according to the customs of the Jews. Moss v. *Smith,*[74] which we cited earlier, also suggested that the courts would have been prepared to recognise a Jewish divorce if it had been proved.

Indeed in the *Hammersmith Marriage* case itself Bargrave Deane J. had held that Dr. Mir-Anwarrudin's marriage had been dissolved by the pronouncement of *talaq,* for before his petition for a writ of mandamus Dr. Mir-Anwarrudin had petitioned the English court seeking either a declaration that his marriage had been dissolved by the pronouncement of *talaq* or alternatively a decree of divorce. Bargrave Deane J. held that he had no jurisdiction to do either on the ground *inter alia* that there was no marriage left to dissolve. In so holding his Lordship was, in effect, merely following his own earlier decision in *Seni Bhidak* v. *Seni Bhidak*[75] in which the petitioner, an American by birth, who had formerly been married to a German, petitioned for a decree of judicial separation from her second hushand, a Siamese whom she had married in London. The parties had left England after their marriage and went to Singapore where the husband left his wife and went on to Bangkok where he made a declaration "which in effect amounted to a dissolution of marriage." Bargrave Deane J. dismissed the petition saying that: there is now no marriage, as the marriage had been dissolved by the law of the domicil."

73. (1791) 1 Peake 17.

74. (1840) 1 Man. & Gr. 228.

75. (1912) *The Times* Dec. 3.

However, any doubts which might conceivably have remained on this point have been removed by the recent decision of *Har-Shefi* v. *Har-Shefi*[76] in which a marriage which had been celebrated in Israel between a domiciled Israeli and a woman domiciled in England had been dissolved by the delivery of a *ghett.* Pearce J. held that he could recognise the divorce and in so doing purported to follow *Sasson* v. *Sasson,* saying :[77]

> In my view, this court must recognise the validity of that divorce ... In the case before me the marriage has been validly dissolved by the only form of divorce which is open to a Jew domiciled in Israel. To hold that a marriage, which has been validly dissolved according to the law of the domicil, continues binding in this country is to create confusion and hardship, and is, in my opinion, contrary to the principle laid down in *Le Mesurier* v. *Le Mesurier* and the principles of international law.

The first possible interpretation suggested by Dr. Cheshire is thus contrary to both prior and subsequent authority and cannot be sustained.

We turn, therefore, to consider Dr. Cheshire's second possible interpretation, which is the one which he himself accepts. This interpretation is predicated on the view that any marriage celebrated in England is a monogamous marriage, and on this assumption he argues that a monogamous marriage cannot be dissolved by a polygamous method: [78]

> It is clear, therefore, that the court could no more recognise a divorce by a non-monogamous method than it could permit the husband to contract further valid marriages in England.

Whether this interpretation is tenable depends upon what Dr. Cheshire means by a "non-monogamous methods" of divorce, for on the fact of it is a concept without any content. It seems to be based on the assumption that methods of divorce can be classified into monogamous and polygamous. This, it is submitted, is simply not so. In Islam the right to take additional wives and an extra-judicial method of divorce coincide; in Russia, until 1921, marriage was monogamous but divorce was extra-judicial, whilst in India, until 1955, Hindu marriage was polygamous but there was no divorce at all. There is therefore no correlation between methods of divorce and the nature of the marriage, and if this is so the idea of a "non-monogamous method" of divorce becomes meaningless,[78a] and Dr. Cheshire's second interpretation becomes untenable.

76. [1953] 2 All E.R. 372.
77. At p. 374.
78. *Op. cit.,* at p. 383.
78a. Dr. Cheshire *op. cit.* at p. 383 writes: "A Japanese divorce stands upon an entirely different footing for, although it is obtainable without judicial intervention it is designed for monogamous marriages." Unfortunately he does not explain what he means by a method of divorce being "designed for" monogamous marriage.

Despite this it must be admitted that Dr. Cheshire's second interpretation of the *Hammersmith Marriage* case appears to have been that adopted by Barnard J. in *Maher* v. *Maher*[79] in which the marriage in question had been celebrated in London between an Egyptian domiciled in Egypt and a domiciled Englishwoman. The husband pronounced a *talaq* in Egypt which was communicated to the wife in England. Barnard J. refused to recognise the efficacy of the pronouncement of *talaq* to dissolve the marriage, saying :[80]

> It was a marriage in the Christian sense and cannot be dissolved by a method of divorce which is appropriate to a polygamous union.

The weight that can be attached to the decision in *Maher* v. *Maher* is a matter which will be discussed later, for the moment it is sufficient to say that not even judicial recognition can give meaningful content to a meaningless concept.[80a]

We must therefore search for another interpretation of the *Hammersmith Marriage* case. The proper place to commence a search for the interpretation of any decision is the judgment delivered, but unfortunately, in this case, several judgments were delivered both at first instance and on appeal, and not all of their Lordships seemed to be thinking along the same lines. One interpretation, however, is suggested by several of the judgments, and this is that a marriage celebrated in England cannot be dissolved, in the eyes of the English court, by an extra-judicial method. Thus Lord Reading stated :[81]

> This case raises an important question, namely, whether the declaration of divorcement made by the applicant has the effect in England of dissolving a marriage contracted according to English law so as to entitle the applicant to marry again in this country.

His Lordship later added :[82]

> Neither authority nor principle can be found in English law to establish the proposition that a marriage contracted in England is dissolved according to the law of England by the mere operation of the laws of religion of the husband and without decree of a Court of law.

79. [1951] 2 All E.R. 37.

80. At p. 39.

80a. This appears now to have been appreciated by Professor Graveson. In the third edition of his *The Conflict of Laws* (1955) at p. 399 Professor Graveson regarded Dr. Cheshire's second interpretation as "sound." In his fourth edition he states that "it misconceives the issue."

81. At p. 639.

82. At pp. 642-3.

Bray J. seemed equally clear :[83]

> These cases [*i.e.,* those decided in *Harvey* v. *Farnie*] do not decide that the Courts here will act on the law of the domicil. They decide that if there is a decree of a foreign Court, that the marriage has been dissolved, these Courts will regard that decree and act upon it. There has been no such decree here ... I am not disposed to go further than the authorities have gone.

In the Court of Appeal both Swinfen Eady and Bankes L.JJ. adopted the following passage from the speech of Lord Brougham in *Warrender* v. *Warrender* :[84]

> Indeed, another consequence would follow from this doctrine of confounding with the nature of the contract that which is only a matter touching the jurisdiction of the Courts, and their power of dealing with the rights and duties of the parties to it; if there were a country in which marriage could be dissolved without any judicial proceeding at all, merely by the parties agreeing in pais to separate, every other country ought to sanction a separation had in pais there, and uphold a second marriage contracted after such a separation. It may safely be asserted, that so absurd a proposition never could for a moment be entertained.

Despite all the talk about monogamy and polygamy which occurs in the *Hammersmith Marriage* case it is not unreasonable to suggest that their Lordships were deciding that a marriage which has been celebrated in England cannot be dissolved by an extra-judicial method. This interpretation, however, has become difficult to reconcile with the more recent decisions in *Yousef* v. *Yousef*[85] and *El-Riyami* v. *El-Riyami.*[86] In *Yousef* v. *Yousef* the court was concerned with a divorce by *talaq* which had been pronounced in Cairo respecting a marriage which had been celebrated in a registry office in England between a domiciled Egyptian and a domiciled Englishwoman. Mr. Commissioner Grazebrook Q.C. held that the marriage had been dissolved by the Cairo divorce and he distinguished the *Hammersmith Marriage* case on the ground that :

> A distinction had been drawn between a divorce obtained by a husband merely according to the law of his religion and a divorce according to the law of the religion and the domicile.

This suggests that the learned Commissioner was relying upon doubts which had been expressed in the *Hammersmith Marriage* case concerning whether the pronouncement of *talaq* in that case would have been recognised in India. It is difficult to reconcile such a point of distinction, however, with the decision in *Maher* v. *Maher* for there was never the slightest doubt that the pronouncement of *talaq* in that case would have

83. At p. 653.

84. (1835) 2 Cl. & F. 488 at p. 534.

85. (1957) *The Times* 1st Aug.

86. (1958) *The Times* 1st April.

been recognised by the Egyptian courts. The learned Commissioner, however, purported to distinguish *Maher* v. *Maher* on the ground that:

> In that case the marriage had been purported to be dissolved by a unilateral declaration by the husband according to Mohammedan law.

With respect this is hardly a valid point of distinction. Both divorces were obtained before the Cairo Court of Personal Status, and in both cases the *talaq* was pronounced by the husband and not by the court.

However, further difficulty is caused by the subsequent decision in *El-Riyami* v. *El-Riyami* in which the divorce took the form of a straight pronouncement of *talaq* in Zanzibar, the marriage to which it related having been celebrated in a registry office in England. Mr. Commissioner Latey Q.C. held, the following *Yousef* v. *Yousef,* that the marriage had been dissolved by the pronouncement of *talaq.* The difficulty presented by this decision is simply that the learned Commissioner seems to have overlooked the distinction drawn in *Yousef* v. *Yousef* between that case and the decision in *Maher* v. *Maher* for, assuming that there is any validity in the distinction, the facts of *El-Riyami* v. *El-Riyami* seem to fall within *Maher* v. *Maher* rather than *Yousef* v. *Yousef.*

The only conclusion that can be drawn is that in the present state of the authorities no dogmatic pronouncement on the extent to which the English courts will recognise extra-judicial divorce is possible, at least in so far as they relate to marriages which have been celebrated in England. On the only really tenable interpretation of the *Hammersmith Marriage* case recognition of such divorces would be denied, and this has been in effect followed in *Maher* v. *Maher.* Although it is now opposed by both *Yousef* v. *Yousef* and *El-Riyami* v. *El-Riyami.*

There would seem to be two possibilities. First to regard both *Yousef* v. *Yousef* and *El-Riyami* v. *El-Riyami* as wrongly decided on the ground that they are inconsistent with the *Hammersmith Marriage* case and to regard the law as being that stated in the *Hammersmith Marriage* case as interpreted above. Second, to regard the *Hammersmith Marriage* case as turning on the fact that it was doubtful whether the pronouncement of *talaq* in that case would have been recognised in India, and to regard *Maher* v. *Maher* as wrongly decided, the law being taken to be that which is consistent with *Yousef* v. *Yousef* and *El-Riyami* v. *El-Riyami.* The latter course, it is submitted, is more consistent with general principle, but it rests upon what the more conservative would doubtless regard as a strained interpretation of the *Hammersmith Marriage* case. For the moment the point must be regarded as open, until the Court of Appeal has had another opportunity to consider the matter.

Applying this conclusion to the case of the recognition of Jewish divorces obtained by persons who are not domiciled in England we can say that in so far as the marriage in question was celebrated outside England the Jewish divorce would almost certainly be recognised by the English courts. If, however, the marriage in question was celebrated in England the position is unclear. If *Yousef* v. *Yousef* and *El-Riyami* v. *El-Riyami* represent the law then the divorce would be recognised if recognised by the law of the domicil, but if the *Hammersmith Marriage* case, as interpreted above, and *Maher* v. *Maher* represent the law, then they would not be recognised.

We may conclude that the application of Jewish law in England was a consequence of the fact that matrimonial causes were within the jurisdiction of the ecclesiastical courts who normally applied only ecclesiastical law, the courts therefore taking the view that Jewish marriages, since they must be governed by some law, were governed by the Jewish law. Doubts regarding the validity of marriages celebrated according to Jewish rites arising out of some misapplied history which culminated in the case of *R.* v. *Millis* led to Parliament enacting and declaring that marriages so celebrated were valid. For the rest the transfer of jurisdiction from the ecclesiastical courts to secular courts in 1857 seems to have been responsible for depriving domiciled English Jews of the application of their own law in matters of capacity, legitimacy and divorce. To-day domiciled English Jews are governed in all matters by the law of England but this position has been reached, not apparently as the result of any deliberate policy, but merely as the result of a series of accidents.

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