CASE COMMENTS AND NOTES

JURISDICTION IN DIVORCE—COMITY—RETROACTIVE EFFECT TO SECTION 40, MATRIMONIAL CAUSES ACT, 1965 C. 72—*INDYKA* v. *INDYKA*

At common law the only ground on which the English courts would take jurisdiction to grant a decree of divorce was that of domicile. The corollary of this was that the courts would recognize decrees of dissolution granted by the courts of those countries in which the parties were domiciled according to common law conceptions of domicile. Conversely, decrees granted by courts of a state in which the parties were not domiciled would not be recognized by the English courts. When husband and wife are separated the husband's domicile will determine that of the wife even though she resides in a different law district and does not know where her husband is.

Now, according to s. 40 of the Matrimonial Causes Act, 1965, the English court may take jurisdiction on grounds other than that of domicile. This jurisdiction may be taken by the courts where the husband was domiciled in England immediately prior to his desertion or deportation to a foreign country or where the wife has resided in England for three years prior to the commencement of proceedings.[1]

As a matter of comity the English courts will recognize the jurisdiction of a foreign court to grant divorce where, if the circumstances had been reversed, the English court would have assumed jurisdiction. This principle of reciprocity was expounded by the Court of Appeal in *Travers* v. *Holley*.[1a] In that case a husband and wife were domiciled in England and the wife petitioned a New South Wales court and obtained a divorce decree on the ground of desertion. The New South Wales court assumed jurisdiction under a local statute, similar in terms to the current English provisions, and the English court recognized the assumption of jurisdiction.

That the foreign court need not assume jurisdiction on the same legal grounds as the English court would is demonstrated by *Robinson-Scott* v. *Robinson-Scott*,[2] but the reservation that the English courts must have been empowered to hear the case if the fact situation had been reversed was still retained. "It is the facts of the case and not the content of the jurisdictional rule, that must be investigated."[3]

In the case of *Indyka* v. *Indyka*[4] the husband and wife were married in Czechoslovakia and the husband later acquired a domicile of choice in

1 For logical reasons why this should not have changed the rules of recognition see Rathwell, (1966), 4 Alta. L. Rev. 430, at 436.

1a [1953] P. 246, [1953] 2 All E.R. 794. The extent to which the principle of *Travers* v. *Holley* has been received in Canada is outlined by Rathwell, *ibid*, at 444 *et seq*. There the writer minimizes the effect of comity or reciprocity in the existence of the principle.

2 [1958] P. 71; [1957] 3 All E.R. 473.

3 *Decisions of British Courts During* 1958-59 *Involving Questions of Public or Private International Law, Part B. Private International Law, per* Carter, P. B., 35 B.Y.B.I.L. 260, at 266.

4 [1966] 1 All E.R. 781, reversed at [1966] 3 All E.R. 583.

England. The wife would not join him there and she, in January, 1949, obtained a decree of divorce from the Czech court for "deep disruption of marital relations," which was valid according to Czech law. In December, 1949, an enactment was passed allowing the English courts to take jurisdiction where the wife had resided in England for three years. Ten years later the husband remarried. The second wife petitioned for a decree of divorce and one of his defences was that the marriage was bigamous. Latey, J. held that the Czech decree was invalid and was not validated by the subsequent statutory extension of the jurisdiction of the English court. The refusal to recognize the divorce decrees resulted in the second marriage being bigamous.

Latey, J. referred to two articles in which it was claimed that judge made rules are retroactive and that in these types of circumstances the decree should be recognized. Professor Kennedy had argued: [5]

> But is the principle of reciprocity retroactive in the sense that it validates since 1930 in Canada, and since 1937 in England [the respective dates after which deserted wives were permitted to take steps to obtain divorce in their local courts] divorces granted before those dates? It is suggested that there is no rule of public policy which would prevent its application qua matters arising after 1930 (or 1937). Thus a remarriage before 1930 would be bigamous in Canada, but one after would not.

The view of Professor Grodecki[6] to the same effect was disapproved of by Latey, J., who stated:

> Judge-made "rules" or "law" declare what the law is and, inevitably, has been for some time; but the question is, for how long? If the court is called on to interpret and does interpret what a statute has done, it interprets what the statute did at the time when it did it. Neither s. 13 of the Act of 1937 nor s. 1 of the Act of 1949 was retrospective or retroactive. . . . It is logical that, just as the change in the municipal law operates prospectively, so does the consequential change in recognition of foreign law operate prospectively to cover decrees pronounced after the change. Were it otherwise "comity" and "reciprocity" would be inapt.

On appeal to the Court of Appeal the decision of Latey, J. was reversed and the divorce was regarded as retrospectively validated. Both Lord Denning, M. R. and Diplock, L. J. took the view that the statutory relaxation of the principle that only the courts of the country of domicile had jurisdiction was a release from oppression and should be extended as widely as possible. Lord Denning said: "The doctrine of *Travers* v. *Holley* is judge-made law, and nothing else; and the judges can make it retrospective to divorces before 1949, if it is just and proper so to do." He discarded the theoretical objection that judicial decisions are merely particular applications of a pre-existing rule. It is suggested that before application of the rule that the English courts will recognize divorces granted where they would have taken jurisdiction, there must be an examination of the provisions determining when they would take jurisdiction. If such provisions are embodied in a statute then the date which the statute comes into effect is an integral part of those provisions for the English court could not take jurisdiction before that date. Either all the conditions which should be fulfilled by the English court when taking jurisdiction should be required when applying the reciprocity rule in *Travers* v. *Holley*, or some of these criteria may be regarded as

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5 *"Reciprocity" in the Recognition of Foreign Judgments: The Implications of Travers v. Holley* (1959), 32 Can. Bar Rev. 359, at 368.

6 *Conflicts of Laws in Time*, [1959] 35 B.Y.B.I.L. 58, at 62.

dispensable. If the latter view is taken (as it was by the Court of Appeal) a value judgment on the importance of each condition is required of the court. Diplock, L. J. stated: [7]

> I recognize the cogency and logic of the reasoning which has led Latey, J. to the conclusion that we cannot regard it as effective then because we would not have recognized it as effective at the time at which it was made. We are dealing, however, with a rule of public policy whose object is to prevent creating "limping marriage".

That "limping marriages" (i.e. marriages valid in one country while invalid in another) should be prevented is certainly the policy of the Act but it is submitted that the alteration in the law should coincide with the effect given by the courts to public policy and both changes should be prospective. If it were otherwise the courts would be giving effect to a policy which was contrary to the law when the cause of action arose. An individual can only regulate his affairs by reference to the law and policy currently being enforced. Should his expectations be defeated by retroactive common law or statute?

On the theme of pursuing the policy of preventing "limping marriages" to extremes, Russell, L. J. (dissenting) said: [8]

> The judiciary is not unfettered by domestic legislation in pursuing such public policy, otherwise all limping marriages would be avoided by recognition of all foreign divorce decrees.

In this case both parties to the second marriage wished to end the matrimonial relationship and the result was that they remained bound by it since the Czechoslovakian divorce was recognized. Thus it would not even have taken a "hard case to make good law."

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7 [1966] 3 All E.R. 583, at 590.
8 *Id.*, at 592.
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MUNICIPAL COUNCILLORS—DISQUALIFICATION FOR INTEREST—APPLICATION OF THE RULE IN *KEECH* v. *SANFORD*— *R. ex rel ANDERSON* v. *HAWRELAK; STARR* v. *CITY OF CALGARY*

Introduction

Provincial legislation prescribes qualifications relating to candidacy for municipal office. These not only may disqualify a candidate running for office, but may disqualify a person from holding office after he has been duly elected. One of the most common is that which disqualifies councillors who have a direct or indirect interest in any subsisting contract with the municipality.

Statutory Interpretation

The courts have tended to give full effect to these provisions and to enforce them strictly against council members.[1] However, they have

1 R. v. *Homan* (1911), 19 O. R. 427, 621; *Coughlan and Mayo* v. *City of Victoria* (1893), 3 B. C.R. 57: "A rigorous interpretation must . . . be applied to section 30 (similar to S.97(f) of the Alberta City Act) if the intention of the legislature is to be carried out."—per Walkem, J. at 66.