CASE NOTES

FENTON v. FENTON[1]

Private International Law – Divorce – Foreign Decree – Not pronounced by court of domicil – Refusal to recognize by Victorian Court

A husband petitioned for divorce in Victoria on the ground of desertion, which was proved. In 1932 the petitioner, whose domicil of origin was Victorian, married his first wife in England where he had acquired a domicil of choice. Leaving her in England in 1933, he returned to Victoria and resumed his Victorian domicil. In 1949 the wife obtained a divorce in England from the husband (who thereafter remarried) on the ground of desertion under section 13 of the English Matrimonial Causes Act, 1937,[2] which gives an English court jurisdiction on the basis of the husband's domicil at the date of desertion notwithstanding that he may subsequently have acquired a new domicil. Thus, a decree could be pronounced by the Victorian court only if it recognized the English decree of 1949. Upon this point, Sholl J. stated a case to the Full Court, which unanimously held that the English decree should not be recognized because it was not a decree of the court of the petitioning wife's domicil. It followed that the petitioner had not been free to marry the respondent and that therefore his petition for a divorce from her failed.

The petitioner relied on the now celebrated case of *Travers v. Holley*[3] in which the Court of Appeal decided that a foreign decree of divorce, although not a decree of the *forum domicilii,* but one pronounced under a statutorily-conferred jurisdiction, may be accorded extra-territorial recognition by a court able to exercise substantially equal jurisdiction. However, O'Bryan J., with whom Herring C.J. and Gavan Duffy J. concurred, declined to follow the example of *Travers v. Holley* on the ground 'that there is a decision of the House of Lords, *viz. Shaw v. Gould,*[4] and there are *dicta* of the highest authority, *e.g.* in *Le Mesurier v. Le Mesurier;*[5] *Lord Advocate v.*

[1] [1957] V.R. 17. Supreme Court of Victoria; Herring C.J., O'Bryan and Gavan Duffy JJ.

[2] 'Where a wife has been deserted by her husband, or where her husband has been deported from the United Kingdom under any law for the time being in force relating to the deportation of aliens, and the husband was immediately before the desertion or deportation domiciled in England and Wales, the court shall have jurisdiction for the purpose of any proceedings under Part VIII of the principal Act, notwithstanding that the husband has changed his domicil since the desertion or deportation.' This section is now s. 18 (1) Matrimonial Causes Act, 1950, (Eng.).

[3] [1953] P. 246. [4] (1868) L.R. 3 H.L. 55. [5] [1895] A.C. 517.

Jaffrey;[6] *Attorney-General for Alberta v. Cook*;[7] *Salvesen v. Administrator of Austrian Property*,[8] which state in the plainest language that domicil is the basis of recognition of foreign decrees in divorce . . .'.[9] Accordingly, extra-territorial recognition of a foreign divorce decree pronounced under any basis of jurisdiction other than that conferred by domicil was absolutely precluded.

The decision in *Travers v. Holley*[10] has been very favourably received by learned writers on the conflict of laws[11] as expressing sound common sense, and only one commentator, Professor Blackburn,[12] has regretfully contended that it cannot be supported in law, being contrary to higher authority. The general tenor of the remarks was that the courts should not adopt an insular 'holier than thou' attitude but should recognize a foreign divorce when it was granted in circumstances substantially similar to those under which the forum would itself grant a divorce.

It has been forcefully demonstrated[13] that only two of the four members of the House of Lords which decided *Shaw v. Gould*,[14] Lord Cranworth and Lord Westbury, rested their decisions on the ground attributed by O'Bryan J. in the present case to the whole House, and claimed by Professor Blackburn[15] to stand in the way of the *Travers v. Holley* doctrine. It is, therefore, at least arguable that, since of the remaining members, Lord Colonsay expressly dissented from the proposition and Lord Chelmsford expressed no decided opinion upon it, *Shaw v. Gould* is not so imperatively and conclusively opposed to the reasoning in *Travers v. Holley* as it is thought to be.

It cannot be denied that Lords Cranworth and Westbury in *Shaw v. Gould* expressed the opinion that a foreign decree of divorce should only be recognized if it is the decree of the *forum domicilii;* and that certain of the *dicta* in the Privy Council decisions cited by O'Bryan J. reflected the rule. But if the reasons for this conclusion are investigated, rather than the naked conclusion itself, it is believed that the cases do not uncompromisingly compel the result in *Fenton v. Fenton*. The basis of the rule, it is submitted, is that English

[6] [1921] 1 A.C. 146. [7] [1926] A.C. 444. [8] [1927] A.C. 641.
[9] [1957] V.R. 17, 33. [10] [1953] P. 246.
[11] Kennedy (1953) 31 *Canadian Bar Review*, 799 and 1079; (1954) 32 *Canadian Bar Review* 211; '"Reciprocity" in the Recognition of Foreign Judgments' (1954) 32 *Canadian Bar Review*, 359; Ziegel (1953) 31 *Canadian Bar Review* 1077; Mann (1954) 17 *Modern Law Review* 79; Graveson, 'Judicial Interpretation of Divorce Jurisdiction in the Conflict of Laws' (1954) 17 *Modern Law Review* 501; Gow (1954) 3 *International and Comparative Law Quarterly* 152; Griswold, 'The Reciprocal Recognition of Divorce Decrees' (1954) 67 *Harvard Law Review* 823; Cowen, 'Divorce and the Domicile' (1957) 31 *Australian Law Journal* 8; Schmithoff *A Textbook of the English Conflict of Laws* (3rd ed., 1954) 339; Graveson *The Conflict of Laws* (3rd ed., 1955) 394-398; Cheshire, *Private International Law* (5th ed., 1957) 382-384.
[12] (1954) 17 *Modern Law Review*, 471; see also Thomas (1954) 3 *International and Comparative Law Quarterly*, 156.
[13] Cowen, 'Divorce and the Domicile' (1957) 31 *Australian Law Journal*, 8, especially 11-12. [14] (1868) L.R. 3 H.L. 55. [15] *Supra*, n. 12.

courts consider that questions involving the status of persons, of which divorce is one, should be determined only by courts competent to do so by English standards, and that the court of the parties' domicil, administering the law with which they are supposedly most intimately connected, is in this respect eminently competent. Accordingly, it became the settled common law rule that in matters of divorce an English court would assume jurisdiction over the parties if it were the *forum domicilii,* but not otherwise; and to carry the rule to its logical conclusion, it would acknowledge the authority of a foreign tribunal to do likewise if by English standards it were competent to do so. Later, the rule was adapted to allow the recognition of a decree which, although not pronounced by the *forum domicilii* was recognized by it.[16] Thus, there was a logical equation of the English domestic rule for pronouncement of decrees with the conflict of laws recognition rule; the latter was framed by direct reference to the former. That O'Bryan J. acknowledged this appears from the following passage in his judgment: 'It appears therefore from all these decisions that the reason why reference was made to the court of the domicil of the parties (using domicil in the strict sense of that word) was that divorce was treated as affecting the status of the parties and that English law referred questions of status to the personal law of the parties, which according to the common law of England is the law of their domicil.'[17] If O'Bryan J. acknowledges that the recognition rule is a corollary of the domestic rule[18] and rationalizes the former in the light of the latter, it is difficult to follow His Honour's next line of reasoning: while acknowledging that the Victorian common law domestic rule has been widened by statute,[19] and that the recognition rule depends on the domestic rule, he declined to acknowledge the corresponding widening of the recognition rule. His Honour said: '. . . I do not think that the widening of our jurisdiction to grant a decree of divorce *a vinculo* should lead to the inference that the Legislature intended thereby to give a like wider recognition to foreign decrees.'[20]

O'Bryan J. considered that express legislation was necessary to widen the basis of recognition of foreign decrees, and that in its absence the pronouncements in the cases cited concluded the matter so far as Victoria was concerned. The learned judge supported this reasoning by reference to the English[21] and Commonwealth[22] war marriages legislation and the Western Australian 'deserted wives' statute,[23] in each of which, when a basis of jurisdiction wider than

[16] *Armitage v. A-G* [1906] P. 135.
[17] [1957] V.R. 17, 29.
[18] As laid down in *Le Mesurier v. Le Mesurier* [1895] A.C. 517.
[19] Marriage Act, 1928 (Vic.) s. 75.
[20] [1957] V.R. 17, 32.
[21] Matrimonial Causes (War Marriages) Act 1944, s. 4.
[22] Matrimonial Causes Act 1945, s. 8.
[23] Matrimonial Causes and Personal Status Code 1948, s. 14.

domicil was conferred to dissolve marriage, the basis of recognition of foreign decrees was expressly extended. With respect, it is difficult to see that such express legislation is necessary if the above premises be correct; it may well have been desirable to include express reference to foreign recognition in the very specialized and temporary war marriage legislation, and the section dealing with extended recognition in the Western Australian Act was probably enacted *ex abundanti cautela*. If the cases cited by O'Bryan J. decided that domicil was the basis for recognition of foreign decrees, a reference to the jurisdiction of the forum was the reason, and there is nothing in the opinions in those cases that leads to the conclusion that the bases for recognition were closed and that domicil was the only conceivable basis for recognition in the future unless the legislature otherwise expressly provided. Here, surely, was a case requiring the application of the notion expressed in the maxim *cessante ratione legis, cessat ipsa lex*.[24] The reason for restricting recognition of foreign decrees to those of the *forum domicilii* was that this was the only forum Victorian courts considered to be competent to determine matters of status. When Victorian law came to concede that a court other than the *forum domicilii* was in certain circumstances competent to make divorce decrees, by allowing a Victorian court to pronounce a decree when it was not the *forum domicilii*, there was no reason to restrict the recognition rule, and it should have been broadened accordingly to permit recognition at least of a decree of a foreign court pronounced in circumstances under which a Victorian court would pronounce a decree. *Fenton v. Fenton* was a case of this class.

An unbending and unsympathetic system of law is as embarrassing and unseemly in the international law sphere as it is inconvenient at home. In the common law system such inelegance should be unnecessary. The great virtue of *Travers v. Holley*, and the reason for the widespread approval of its principle[25] is that it recognizes and manifests the adaptability of the common law. *Fenton v. Fenton*, on the other hand, provides a particularly regrettable example of 'mechanical jurisprudence', adhering to a verbal formula without regard to policy, and in consequence inhibiting the evolution of liberal principles by which the law should be moulded to the requirements of the community.

R. C. TADGELL

[24] *Cf.* Mann (1954) 17 *Modern Law Review*, 79.

[25] *Travers v. Holley* has been recently followed in *Arnold v. Arnold* [1957] 2 W.L.R. 366. It was approved, *obiter*, in *Morris v. Morris* [1955] S.A.S.R. 80.