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# RECOGNITION OF FOREIGN DIVORCES: THE TIME FACTOR

## I. RECOGNITION IN ENGLAND OF FOREIGN DIVORCES

### *Indyka v. Indyka*

The Statute<sup>1</sup> which gave the English Divorce Court power to grant a decree of divorce *a vinculo matrimonii* contained no express limitation with respect to internal jurisdiction. Nor did that statute lay down the principles upon which decrees of foreign courts were to be recognized in England. It was not until the decision of the Privy Council in *Le Mesurier v. Le Mesurier*<sup>2</sup> that it became settled that domicile of the parties within England or Wales was the sole jurisdictional basis for the granting of a decree by the English Courts: "the domicile for the time being of the married pair affords the only true test of jurisdiction to dissolve this marriage"<sup>3</sup>. *Le Mesurier v. Le Mesurier*<sup>2</sup>, while strictly concerned only with the basis of internal jurisdiction, was soon regarded as the leading authority on the subject of international jurisdiction<sup>4</sup>. Consequently it became accepted that a foreign divorce would be recognized in England, if it was either granted by the courts of the domicile, or, being granted elsewhere, was nonetheless entitled to recognition by the courts of the domicile.

In 1937<sup>5</sup>, and again in 1949<sup>6</sup>, major alterations were made by statute to the basis of internal jurisdiction in England. Domicile of the parties remained a sufficient basis for jurisdiction, but two alternatives were added. The English courts were to have jurisdiction, first, in respect of a petition by a wife who had been deserted by her husband where, immediately prior to desertion, the husband had been domiciled in England or Wales, and secondly, in

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1. Matrimonial Causes Act 1857 (Eng.)

2. [1895] A.C. 517.

3. *Id.* at 540.

4. A court has international jurisdiction in this sense if its decree would be entitled to recognition in England.

5. Matrimonial Causes Act 1937 (Eng.), s.13.

6. Law Reform (Misc. Provisions) Act 1949 (Eng.), s.1.

respect of a petition brought by a wife who had, prior to the date of the petition, been resident in England for at least three years. Although neither of these statutes made any reference to recognition of foreign divorces, the rule as to recognition was soon revised by the Court of Appeal in *Travers v. Holley*<sup>7</sup>, where it was laid down that an English Court should recognize a decree of divorce of a foreign court whenever an English Court, *mutatis mutandis*, would have claimed jurisdiction itself to grant such a decree.

One of the many problems which arose under this extension of the grounds for recognition was whether an English Court would recognize a foreign decree which, *mutatis mutandis*, an English Court itself could have given after 1937 or 1949<sup>8</sup>, despite the fact that, at the time the foreign decree was made, no such internal English jurisdiction had existed. Such a problem arose in *Indyka v. Indyka*<sup>9</sup>. It appeared that the husband, at the time of his first marriage in 1938, had been domiciled in Czechoslovakia. On the outbreak of war he joined the Czech Army. He was captured by the Russians and eventually served with the Polish Army under General Sikorski, finally arriving and becoming domiciled in England in 1946. On January 18th, 1949, his first wife obtained a decree of divorce in Czechoslovakia, where she had been resident throughout. In 1959 the husband married his second wife, who, in 1964, petitioned in England for divorce on the grounds of cruelty. In his defence the husband alleged that, as the Czechoslovakian divorce would not be recognized in England, his marriage to the petitioner was invalid. Latey J.<sup>10</sup> accepted this contention and granted a decree of nullity of the second marriage. This decision was reversed by the Court of Appeal (Lord Denning M.R. and Diplock L.J., Russell L.J. dissenting)<sup>11</sup>, the majority holding that as the relevant date was after the passing of the Act which gave internal jurisdiction in similar circumstances to an English Court, the first divorce would be recognized as valid in England. An appeal from that decision was dismissed by the House of Lords<sup>9</sup>.

The Court of Appeal reached its conclusion by interpreting and applying *Travers v. Holley*<sup>7</sup>. Despite a vigorous dissent by Russell L.J., the majority held that the rule in *Travers v. Holley*<sup>7</sup> operated so as to require recognition of a decree granted by a court in circumstances in which an English court would not, at that time, have claimed internal jurisdiction. None of their Lordships in the House of Lords was content to rest his decision merely upon that ground. Instead, a reconsideration of the whole basis of recognition of foreign decrees was undertaken by the House, and sweeping, if somewhat uncertain, changes were made to the hitherto accepted principles. *Le Mesurier v. Le Mesurier*<sup>2</sup>, insofar as it laid down the principle that *only* decrees of the courts of the domicile should be recognized, was rejected by their Lordships. Though domicile of the parties is to remain *sufficient*<sup>12</sup>, the bases of jurisdic-

7. [1953] P.246.

8. See *supra* nn. 5 and 6.

9. [1967] 3 W.L.R. 510.

10. [1966] 2 W.L.R. 892.

11. [1966] 3 W.L.R. 603.

12. Lord Pearson suggested, however, that a decree of the court of the domicile might be refused recognition if there was, in fact, no real and substantial connection between petitioner and forum—See [1967] 3 W.L.R. 510 at 563-564.

tion must be far wider than implied in that case. Moreover, the rule in *Travers v. Holley*<sup>7</sup>, though it departed from the principle of domicile as the sole basis for recognition, provides an alternative to that principle which is insufficient for present-day conditions.

*Travers v. Holley*<sup>7</sup> itself survived the decision in *Indyka v. Indyka*<sup>12a</sup> only by a majority of three to two. Lord Morris of Borth-y-Gest<sup>13</sup>, Lord Pearce<sup>14</sup> and Lord Pearson<sup>15</sup> accepted the rule laid down in the former case despite the fact that, as pointed out by Lord Reid<sup>17</sup>, application of the rule in *Travers v. Holley*<sup>7</sup> could in some circumstances lead to undesirable results.

While so much is clear, the exact bases upon which the House of Lords in *Indyka v. Indyka*<sup>9</sup> thought that English Courts should in the future recognize foreign divorce decrees are far from certain. In the course of the speeches delivered by their Lordships, several alternative grounds of international jurisdiction were suggested.

### 1. Nationality

While there was much discussion of nationality as affording a sufficient basis for recognition, only Lord Pearce<sup>18</sup> fully adopted the recommendation contained in paragraph 857 of the *Report of the Royal Commission of Marriage and Divorce (1956)* which is to the effect that

“recognition should be given in England and Scotland to the validity of a divorce (i) which has been obtained, whether judicially or otherwise, by a spouse in accordance with the law of the country of which both husband and wife were nationals, or of which either the husband or the wife was a national at the time of the proceedings, or (ii) which would be granted recognition by the law of that country.”

Lord Morris of Borth-y-Gest<sup>19</sup> seems to have been inclined towards the same view, but expressed no decided opinion, while Lord Reid<sup>20</sup> deliberately refrained from comment. Lord Wilberforce<sup>21</sup>, though accepting in principle “the relevance of nationality as a connecting factor in certain cases” expressed his inability at the present, “to define the situations in which nationality may be taken into account”, and Lord Pearson<sup>22</sup> also thought that although nationality was a relevant factor, it might in some circumstances be regarded as insufficient to found jurisdiction.

12a. See now *Tijanic v. Tijanic* [1967] 3 All E.R. 976.

13. *Id.* at 534.

14. *Id.* at 546.

15. *Id.* at 562.

16. Subject in the cases of Lord Pearce and Lord Pearson, to vague limitations; see at pp. 544 and 564.

17. *Id.* at 519-520.

18. *Id.* at 545-546.

19. *Id.* at 534.

20. *Id.* at 527.

21. *Id.* at 557-558.

22. *Id.* at 563-564.

2. *A real and substantial connection with the country where the decree was granted.*

Lord Morris of Borth-y-Gest<sup>23</sup>, Lord Pearce<sup>24</sup>, Lord Wilberforce<sup>25</sup> and Lord Pearson<sup>26</sup> placed great emphasis on the fact that Mrs. Indyka had a real and substantial connection with Czechoslovakia at the time when she petitioned the courts of that country for her divorce. However, it is not certain whether their Lordships contemplated the "real and substantial connection" as a separate ground, or simply as a limitation upon nationality or residence as a criterion for recognition. While Lord Pearce seems to have treated it as a ground sufficient in itself, the speeches of Lord Morris of Borth-y-Gest and Lord Pearson indicate no more than that nationality, coupled with a real and substantial connection with the country of the courts granting a decree, will be sufficient to ground international jurisdiction in those courts. Lord Wilberforce, on the other hand, treated the "real and substantial connection" in such a way as to recognize it as a criterion for recognition *only* when coupled with the *bona fide* residence of the petitioner-wife.

The distinction between the views of Lord Pearce on the one hand, and Lord Pearson and Lord Morris of Borth-y-Gest on the other, is crucial since, if recognition will be accorded only if there was a combination of nationality and a real and substantial connection with the country of the court which granted the divorce, a decree of a court of a country of which the petitioner was neither a national nor a domiciliary will not be entitled to recognition in England, despite the fact that the petitioner had a real and substantial connection with that country.

3. *Residence*

Although residence of the petitioner was discussed as a possible ground by some of their Lordships it seems that only Lord Wilberforce supported this as a possible basis for international jurisdiction. In dealing with the suggestion that recognition might be extended to decrees made on a residence basis, either generally, or in the particular case of wives living apart from their husbands, Lord Wilberforce at first declined to make any general pronouncement:

"although it may be possible, without any general change in the law by Parliament, for judicial decision to allow recognition generally to decrees based on the non-domiciliary residence of the spouses, to do so in the present context appears to me to go further than is justified by the considerations advanced before us"<sup>27</sup>.

His Lordship nonetheless proceeded to frame precisely in terms of the residence of the wife-petitioner what he considered to be the suitable alternative to the domicile test.

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23. *Id.* at 534.

24. *Id.* at 546.

25. *Id.* at 558.

26. *Id.* at 563-564.

27. *Id.* at 558.

"In my opinion it would be in accordance with the developments I have mentioned . . . to recognize divorces given to wives by the courts of their residence wherever a real and substantial connection is shown between the petitioner and the country, or territory, exercising jurisdiction"<sup>28</sup>.

Lord Pearson<sup>29</sup>, on the other hand, rejected the view that residence could itself provide a test for recognition. His Lordship's opinion is ambiguous, however, for he was willing to recognize a less exacting definition of domicile than<sup>30</sup> is to be found in English case-law, a definition that comes far closer to residence than the hitherto accepted definition and certainly would do away with the well-established principle of the unity of domicile of husband and wife. Lord Pearce, Lord Reid and Lord Morris gave no indication that they contemplated residence of the petitioner as a ground *per se* for international jurisdiction. Residence of the petitioner within the foreign country would, of course, be treated as a factor, and a highly relevant one, in determining whether there was a real and substantial connection with the country whose courts granted the foreign decree.

#### 4. *Matrimonial Home*

Lord Reid<sup>31</sup> alone put forward the view that, in the absence of domicile in the country whose courts have granted the decree, that decree should be recognized in England if the parties had their matrimonial home in the former country. No support for so limited an alternative is to be found in the other speeches in *Indyka v. Indyka*<sup>9</sup> and Lord Reid himself seems to have allowed at least the possibility of development by the courts of a further alternative, that of nationality. Of course, any definition of "real and substantial connection" would be satisfied if the matrimonial home of the parties were in the country whose courts granted the relevant decree.

It is submitted that none of these alternatives was clearly accepted by a majority of the House of Lords in *Indyka v. Indyka*<sup>9</sup>. The only new principle which can be said to be clearly laid down in that case is that a decree of the courts of a country of which one or both parties is a national, *and* with which the petitioner had a real and substantial connection at the time of the petition will be entitled to recognition in England. Such a principle was acceptable to Lord Morris of Borth-y-Gest and Lord Pearson, as also to Lord Pearce, although the latter was willing to adopt even more liberal criteria. Nationality as a ground *per se* was accepted only by Lord Pearce whereas Lord Wilberforce adopted the view that a real and substantial connection with the country of the courts granting the decree would, given the *bona fide* residence of the petitioner-wife, be sufficient. Consequently the result of the decision in *Indyka*

28. *Ibid.*

29. *Id.* at 564.

30. Lord Pearce intimated that the House of Lords might be willing in a future case, to remove one of the anomalies in the law of domicile—that which was introduced by the decision in *Winans v. A.G.* [1904] A.C. 287. See [1967] 3 W.L.R. 510 at 537-538.

31. *Id.* at 527.

by way of binding authority in England may be summarized as follows: A foreign decree will be entitled to recognition in England if either

- (a) it was granted by, or would be recognized by, the courts of the parties' domicile; or
- (b) it was granted by a court in the circumstances where, *mutatis mutandis*, an English court would itself claim jurisdiction; or
- (c) it was granted by the courts of a country of which one or both parties were nationals and with which the petitioner<sup>32</sup> had a real and substantial connection.

It would be most misleading, however, to suggest that these are to be the *only* grounds for recognition in England of foreign decrees. Their Lordships in *Indyka* recognized the possibility of future judicial development of this branch of law; they intended to produce no more than general lines of guidance for their brethren in lower courts in the English judicial hierarchy.

There are, in England, three further problems associated with the decision of *Indyka v. Indyka*<sup>9</sup>. First, there is a *dictum* by Lord Wilberforce in that case to the effect that the extension which he would make to the grounds of recognition is one available only in respect of a decree made in favour of a wife, not in respect of one made in favour of a husband.

"If it be said that it is illogical, or asymmetrical, to sanction a breach in the domicile rule in favour of wives and not in favour of husbands, then the answer must be that experience has shown (and has so convinced our own and other legislatures) that it is the wife who requires this mitigation, that the nature of what is required has been clearly shown, and that (with the possible exception of the case where he is respondent to a wife petitioner and desires to cross-petition) no corresponding case has been shown to exist as regards the husband. He retains his domicile and the right to change it. All that this development does is to remove an inequitable inequality arising from the anachronistic dependence of the wife for her domicile on her husband"<sup>33</sup>.

It seems clear that his Lordship was considering *only* the factor of residence as a criterion of recognition, not that of nationality. In respect of his matrimonial home theory, Lord Reid commented that he could see "no good reason for making any distinction between the husband and wife"<sup>34</sup>, and Lord Pearce in accepting paragraph 857 of the Report of the Royal Commission on Marriage and Divorce implied the same with respect to the nationality principle.

32. It is perhaps not *absolutely* clear that Lord Morris of Borth-y-Gest would have regarded the nationality of the petitioner *alone* as sufficient. For subsequent interpretation of *Indyka v. Indyka*, see *Angelo v. Angelo* [1967] 3 All E.R. 318 and *Peters v. Peters* [1967] 3 All E.R. 314.

33. [1967] 3 W.L.R. 510 at 558.

34. *Id.* at 527.

It is true that the need for a revision of the rules of recognition was largely brought about by the difficulty faced by wives in that their husbands are, according to English law, capable of changing the domicile of both of them and that even when separated from their husbands for many years, wives are unable to acquire a separate domicile. It is also true that the rule in *Travers v. Holley*<sup>7</sup>, given the present state of the law as to *internal* jurisdiction, operates only in favour of wives. However, there seems to be no good reason why, if a totally separate ground for recognition is to be adopted, it should not apply in favour of husbands as well as wives, especially when the House of Lords adopted a modified nationality principle largely because the principle of nationality is generally recognized on the Continent, where no such preference is shown to a wife petitioner.

Secondly, there is very little indication in the speeches in *Indyka v. Indyka*<sup>9</sup> as to the exact status of the rule in *Armitage v. Attorney-General*<sup>35</sup> in respect of grounds (b) and (c) (*supra*) for the recognition of foreign divorce decrees. The principle in *Armitage* was, of course, laid down at a time when domicile was the sole test of international jurisdiction. When the rule in *Travers v. Holley*<sup>7</sup> had derogated in some respects from the thitherto accepted principle, it was argued for the petitioner in *Mountbatten v. Mountbatten*<sup>36</sup> that the rule in *Armitage* should be extended so as to require recognition of a foreign decree which itself could not be directly recognized in England either under *Le Mesurier v. Le Mesurier*<sup>2</sup> or under *Travers v. Holley*<sup>7</sup>, provided that the decree in question would be recognised by a court whose own decree could have been recognized under the rule established in the latter case. Davies J. rejected the argument on the basis that while English courts acknowledge the right of the wife's court of residence to grant her a divorce, there was no reason to treat the court as being an arbiter of the personal law of the wife in other respects. In *Indyka v. Indyka*<sup>9</sup>, Lord Pearce, the only one of their Lordships to comment on the decision of Davies J. in *Mountbatten v. Mountbatten*<sup>36</sup>, expressly approved it.

The question that arises is whether the new basis for recognition is similarly limited, or whether the principle of *Armitage* is applicable thereto. It seems likely that the latter is the correct view. *Armitage* is not applied to *Travers v. Holley*<sup>7</sup> simply because the exceptions to the domicile test laid down in that case *were* exceptions—and the dominant test still remained: were the parties domiciled in the foreign country? However, the new test for international jurisdiction to grant a divorce *a vinculo* can hardly be treated as of equivalent status to the exceptions created by *Travers v. Holley*<sup>7</sup>. Rather, their Lordships in *Indyka v. Indyka*<sup>9</sup>, by laying down new criteria for recognition, obviously intended to do more than simply graft one further exception onto the domicile rule; instead, they provided a real alternative to domicile as a test for international jurisdiction. It may well be, therefore, that the principle laid down in *Armitage* will apply in future so as to require recognition in England of a decree obtained from a court which is neither that of the domicile nor that of the nationality of the petitioner, provided that

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35. [1906] P. 135.

36. [1959] P. 43.

the courts of the place of either the domicile *or* the nationality would themselves recognise the decree. Unfortunately this point was not expressly considered in *Indyka*, although Lord Pearce in giving unqualified assent to paragraph 857 of the Report of the Royal Commission on Marriage and Divorce, impliedly accepted the rule that any decree which would be recognized by the court of the nationality should be recognized in England.

Finally, their Lordships in *Indyka*, again with the exception of Lord Pearce, failed to discuss the question whether the new basis for recognition was available only in respect of foreign judicial decrees<sup>38</sup> or whether it also embraced those divorces which are obtainable in some countries otherwise than by judicial determination. There seems to be no adequate reason why recognition of extra-judicial foreign divorces should be limited to those effected under the law of the domicile and there is nothing in any of their Lordships' speeches which suggests to the contrary.

## II. RECOGNITION IN AUSTRALIA OF FOREIGN DIVORCES

### *The Matrimonial Causes Act 1959 and The Time Factor*

#### (a) Section 95 (5): *Indyka v. Indyka*

The question whether the decision in *Indyka v. Indyka*<sup>37</sup> will have any effect on the recognition of foreign divorces within Australia under section 95 Matrimonial Causes Act 1959 is by no means easy of solution. In section 95(5), which reads

"Any dissolution or annulment of a marriage that would be recognized as valid under the common law rules of private international law but to which none of the preceding provisions of this section applies shall be recognized as valid in Australia, and the operation of this subsection shall not be limited by any implication from these provisions."

the phrase "common law rules of private international law" seems to refer not merely to those rules as established at the date of the coming into effect of the Matrimonial Causes Act 1959, but also to those rules which, from time to time, are developed by the courts from the basic principles of private international law. *Prima facie*, then, a divorce which would be recognized under the new principle established in *Indyka* is, by virtue of section 95(5) entitled to recognition in Australia even if it does not satisfy the criteria laid

37. *Supra*. In deciding that the principle in *Armitage v. A.G.* did not apply in combination with *Travers v. Holley*, Davies J. in *Mountbatten v. Mountbatten* pointed out that an English court might otherwise recognize a decree *not* recognized by the court of the domicile. However, this point seems not to be of crucial importance since the rule in *Travers v. Holley* itself leads in some cases to the same conflict, as will the new nationality principle expressed in *Indyka*.

38. It may be pertinent to point out that some of their Lordships seemed to treat as relevant the *reasons* why the foreign court accepted jurisdiction. Strictly, of course, the reasons of the foreign court are irrelevant; it is the actual connection between parties and court which is the crucial inquiry.

down in any of the other subsections of section 95. However, the matter is not so simple. Their Lordships in *Indyka* obviously accepted the proposition that in certain areas of the law, they have legislative powers. That, of course, is by no means a revolutionary proposition. However, their Lordships viewed the legislative power as not being limited, as hitherto, to the development and refinement of existing principles, but as also embracing full powers of law reform in limited areas.

Lord Pearce<sup>39</sup>, for example, adopted as the *present law*, the recommendations contained in paragraph 857 of the Report of the Royal Commission on Marriage and Divorce, those recommendations having been made to Parliament in the hope of initiating remedial legislation! Lord Wilberforce adopted a basically similar attitude towards the power of the House of Lords to legislate in the field of recognition of foreign divorces.

"The principle stated in [*Le Mesurier's Case*] and followed, no doubt quite correctly, by the courts in the intervening period, now, so far as it relates to the recognition of foreign decrees, calls for modification"<sup>40</sup>.

Finally, a passage from the speech of Lord Pearson must be quoted in full:

"At this stage I am conscious of the lack of the apparatus of law reform—issuing a questionnaire and awaiting considered replies to it, receiving memoranda, hearing oral evidence, collecting statistics and obtaining information as to the systems prevailing in other countries. But we have had valuable assistance from counsel, and there is a great deal of information set out in the Report of the Royal Commission on Marriage and Divorce, presented in 1956 (1956 Cmd. 9678). The Royal Commission made recommendations for legislation on the subject of the recommendations for legislation on the subject of the recognition divorces granted in other countries. Since then there has not been any legislation implementing those recommendations or otherwise providing for such recognition. In the meantime the courts have to operate. There is a practical need for some guidance to be given by your Lordships' House, even if it can only be given in rather general terms. I am not intending to say that there necessarily ought to be legislation, but only that in the absence of legislation it is appropriate that there should be some general guidance from this House"<sup>41</sup>.

It is clear that their Lordships in *Indyka* regarded themselves as having the requisite power to alter established law in this field only because Parliament had, with very minor exceptions, left the question of recognition of foreign divorce decrees to be settled judicially. Such being the quite articulate major premise behind the alteration of the law in *Indyka* it is at least arguable that that alteration should *not* be adopted in Australia<sup>42</sup>, where Parliament

39. [1967] 3 W.L.R. 510 at 545-546.

40. *Id.* at 556.

41. *Id.* at 562-563.

42. Lord Pearce obviously contemplated the possibility of a divergence between Australia and English views on this matter—see the comment on *Fenton v. Fenton* [1957] V.R. 17 at [1967] 3 W.L.R. 510 at 544.

has intervened and legislated over the whole field in question. However, it could equally be argued that, as Parliament, in enacting section 95(5), has allowed for subsequent judicial development of the common law recognition rules, the reform of the common law in *Indyka* may without difficulty be imported into Australia by the operation of section 95(5).

Even so, it is open to Australian courts to reject, or place limits upon, the principle of nationality established in *Indyka*. In fact, there seem to be good reasons why that principle should not be judicially adopted in Australia. The first reason is that although Lord Wilberforce had "no fears that uncertainty will be introduced into the law"<sup>43</sup>, the substitution of vague criteria, in limiting the nationality principle to cases where there was a "real and substantial connection"<sup>44</sup> with the foreign country, can hardly do otherwise than introduce uncertainty into an area of the law where such a factor is highly undesirable. True enough, a simple nationality principle as an alternative to domicile might lead to the recognition by the English courts of some divorces which they would, other things being equal, prefer not to recognize. However, such an unfortunate consequence might well be preferable to the uncertainty and consequent increase in expensive litigation brought about by the adoption of vague criteria which will often not enable a lawyer to advise his client with any degree of confidence.

Adoption of the *Indyka* test may, in a few cases, lead to even more undesirable results. Lord Reid recognized that "we ought not to alter what is presently understood to be the law if that involves any real likelihood of injustice to people who have relied on the present position in arranging their affairs. But", his Lordship continued, "I have been unable to think of any case and counsel has been unable to suggest any case where such injustice would result from what I have invited your Lordship to accept"<sup>45</sup>. However so sanguine a view fails to take into account the fact that judicial legislation is, of its very nature, retrospective in its operation<sup>46</sup>, and it is unfortunate that neither Lord Reid nor his brethren in the House of Lords at any stage adverted to the case of possible injustice brought about by retrospective recognition which was emphasized in the dissenting judgment of Russell L.J. in the Court of Appeal. In dealing, *obiter*, with the question whether recognition granted under the rule in *Travers v. Holley*<sup>7</sup> operated retrospectively, his Lordship gave the following example of the undesirable effects of an affirmative answer:

"Suppose a relevant pre-1949 decree of divorce and a pre-1949 death of the husband intestate with estate in England not having attempted remarriage. The wife would in English law have rights to his estate accruing on his death as being his widow. Would the coming into operation of the Act of 1949 deprive her of those rights? And, if so, would such deprivation be limited to undistributed assets?"<sup>47</sup>.

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43. *Id.* at 559.

44. *Id.* at 558.

45. *Id.* at 527.

46. See *infra* n. 50.

47. [1966] 3 W.L.R. 603 at 616.

Other complications might arise. Would it be possible to trace property already distributed? Would there be an action against the administrator of the estate for wrong distribution of the estate?

The retrospective validation of a divorce decree and the possible consequential invalidation of a subsequent marriage give rise to other startling results. For example, circumstances could exist where the effect of retrospective recognition might be to impose retrospective criminal liability. Suppose that W obtains a divorce on the grounds of adultery from H in California in 1955, she being resident there for only two years, being a national of the U.S. and having a real and substantial connection therewith immediately preceding her petition. She remarries H2 in California in 1956. In 1957, W and H2 migrate to England and W who wishes to divorce H2 is advised that she cannot do so, as, in English law, she is regarded as being still married to H1. H1 dies in 1958 and W then marries H3 in 1960. W is charged with bigamy in 1968. If the effect of *Indyka v. Indyka*<sup>48</sup> is to validate the divorce from H as from 1955, then, as a person commits the offence of bigamy who, being already married, goes through a ceremony of marriage with a person not his or her spouse, W could be found guilty in 1967 of bigamy in being married to H2 in 1965 as her second marriage must also be retrospectively validated. It is, of course, a well-recognized defence to a charge of bigamy<sup>48</sup> if the accused can show that he or she made a mistake of fact<sup>49</sup>. However it seems clear that such a defence would not be available to W in the example above, firstly because, in 1960 neither W nor her adviser made any mistake at all; secondly because if any mistake was made, it was a mistake of law rather than one of fact, and a mistake of law is not normally regarded as a valid defence to a charge of bigamy<sup>50</sup>. It is, of course, hardly conceivable that an Australian court would find an accused guilty of bigamy in such a case, but it is by no means clear just what avenue of escape a court could follow.

A further result of adopting a principle of retrospective recognition would be to bastardize certain otherwise legitimate children. Whether such a consideration is of crucial importance in administering practical justice in this field in England or Australia, is, however, open to doubt. That it is difficult to construct cases where the effect of *Indyka v. Indyka*<sup>9</sup> in Australia would be

48. It is assumed that this defence applies to a charge under s.94(1) of the Marriage Act 1961 (Cth.) even though the only *express* defence is a reasonable belief in the death of one's first spouse—see s.94(2). Cf s.94(4) which could provide the basis for a charge against H3 in the example in the text, but which requires knowledge, or *reasonable grounds for believing*, that the other party is married. No such reasonable grounds would, *semble*, exist in the present case.

49. It may be that the mistake has to be a *reasonable* one. See *Thomas v. R.* (1937) 59 C.L.R. 279; *R. v. Bonnor* [1957] V.R. 227.

50. See *Thomas v. R.* (1937) 59 C.L.R. 279 per Latham C.J. at 286, Starke J. at 296, but cf. Dixon J. at 306, 309-310. See also Hall, *General Principles of Criminal Law* Chapter XI. Cf. *Long v. State* 44 Del. 262; *Paulsen v. Kadish—Criminal Law and its Processes* pp. 270-299.

Professor Brett has recently argued that in some circumstances, which would clearly cover the present example, a mistake of law may be a valid defence. See (1966) 5 Melbourne Law Review 179. However, in the field of bigamy, the dicta in *Thomas v. R. supra*, would provide a serious obstacle. See also Braybrooke: "The Future of Precedent", a paper submitted to the 1967 A.U.L.S.A. Conference in Melbourne.

to bastardize an otherwise legitimate child is a mediate effect of section 91 of the Marriage Act 1961, the relevant parts of which read as follows:

"91.(1) Subject to this section, a child of a marriage that is void shall be deemed for all purposes to be the legitimate child of his parents as from his birth or the commencement of this Act, whichever was the later, if at the time of the intercourse that resulted in the birth of the child or the time when the ceremony of marriage took place whichever was the later, either party to the marriage believed on reasonable grounds that the marriage was valid.

(2) The last preceding sub-section does not apply unless one of the parents of the child was domiciled in Australia at the time of the birth of the child, or having died before that time, was domiciled in Australia immediately before his death.

(3) Sub-section (1) of this section applies in relation to a child whether the child was born before or after the commencement of this Act, whether the ceremony took place before or after the commencement of this Act and whether the ceremony of marriage took place in or outside Australia."

The only cases, then, where the effect of adopting *Indyka* in Australia would be to bastardize otherwise legitimate children will be those not covered by the doctrine of putative marriage as expressed in section 91 Marriage Act 1961. Those cases fall into two classes. Firstly, where the parents of the child had no reasonable belief in the validity of their marriage; secondly, where the parents, although they did not have such a belief, were not domiciled in Australia at the date of the child's birth. At least in the former class of cases the bastardization of the child would appear to have no adverse effect upon the *reasonable* expectations of the parents as to the status of their child. The occurrence of a case falling within the latter class depends upon the fulfilment of all the following conditions—

- (a) the child must have been born of a *third* or *subsequent* "marriage".
- (b) both the child's parents must have been domiciled outside Australia at the date of birth of the child (section 91)
- (c) the child must be illegitimate according to the law of the domicile of origin.

It seems arguable that the extreme unlikelihood of the occurrence of a case falling within the class is such as to render it proper for Australian courts to ignore the possibility altogether when considering whether *Indyka* should be adopted in Australia, especially as an ancillary effect might be to legitimate some otherwise bastard children.

Nonetheless, the simple fact that two persons who were, before 1967, validly married have now had their marriage retrospectively invalidated by virtue of the rule laid down in *Indyka* is in itself sufficient ground for refusing to adopt that rule judicially in Australia *via* section 95(5) of the Matrimonial Causes Act. Suppose that H and W, in 1968, realized that, because the *prior* divorce of

W would not be recognized in Australia they were not validly married. H therefore forebore to petition for divorce on the grounds of adultery, and married W2. Suppose further that the prior divorce could be recognized now under the criteria laid out in *Indyka*. If the latter decision is to be imported into Australia via section 95(5) then it is clear that H is now validly married to W, and that his marriage with W2 is now null and void. Add to this the fact that, even if he realizes that this is the effect of the Matrimonial Causes Act 1959 section 95 (which is, to say the least, highly unlikely) he will, very probably, be in a difficult position in proving in 1968 W's adultery should he now seek the divorce he could *not* have obtained in 1958!

In view of the difficulties brought about by the retrospective nature of judicial legislation it is suggested that, as Parliament has legislated but recently in the field, the Australian courts should take the view that such a radical change in the law as has been effected in England by the decision in *Indyka* should not be judicially imported into the Australian scene *via* section 95(5) of the Matrimonial Causes Act 1959. Admittedly, it may be desirable to recognize foreign divorces which are valid under the law of the nationality of one or both of the parties, but taking into account the factors mentioned above, it would be better for any change to be left to the Commonwealth Parliament which can avoid retrospectivity by making due allowance, as it has in analogous fields<sup>51</sup>, for changes in status effected under the law previously in force<sup>52</sup>. There is, as yet, no definite judicial pronouncement on this matter one way or another although Mitchell J., of the S.A. Supreme Court, did discuss the matter briefly in *Alexsandrov v. Alexandrov*<sup>53</sup>, noting in respect of *Indyka v. Indyka*<sup>9</sup> that "there may be some doubt as to whether that approach is available to this Court". It may well be that her Honour's doubts related to questions of *stare decisis* in the Australian hierarchy rather than to problems of the type which have been discussed in this section.

### (b) Section 95 (2), (3) and The Time Factor

The decisions of both the Court of Appeal and the House of Lords in *Indyka* are clear in stating that, for English law at least, *Travers v. Holley*<sup>7</sup> applies so as to require recognition of a decree of a foreign court even if it was given at a time when, *mutatis mutandis*, the English courts would not have had jurisdiction. However, there is no clear statement, in either the Court of Appeal or the House of Lords that this rule applies so as to validate such a foreign decree retrospectively from the date when it was made. This question was, of course, not before the courts on the facts of *Indyka*, but there

51. See *e.g.* Marriage Act, 1966 (Cth.) s.89 (1) and s.91.

52. Both Brett and Braybrooke have recently adverted to the possibility of judicial law-making being confined in its operation to prospectivity. See *e.g.* Brett, 6 Melbourne Law Review 179 at 198 and the cases cited therein; and *n.b.* "In its past handling of a long-standing precedent by which it was not bound, the House [of Lords] has shown no disposition to flirt with the idea of prospective overruling."

(Braybrooke: The Future of Precedent, *supra* n. 70).

See also [1960] 109 University of Pennsylvania Law Review 1; [1962] 25 Modern Law Review 153, 177.

53. (1967) L.S.J. Scheme 270. Not yet reported in the South Australian State Reports.

was strong emphasis both in the Court of Appeal and in the House of Lords on the particular sequence of events in that case<sup>54</sup>, especially upon the fact that the relevant time for considering whether the decree could be recognized was at the date of the second marriage in 1956, that is, after the time when the English courts were empowered, *mutatis mutandis*, to take internal jurisdiction to grant a divorce.

The question whether the reciprocity principle in *Travers v. Holley*<sup>57</sup> requires retrospective recognition may arise in Australia even if *Indyka* is to be fully accepted here<sup>55</sup>. If such a case should arise, the question of retrospective or prospective recognition will revolve around the correct interpretation of section 95 of the Matrimonial Causes Act 1959. Section 95(2) and 3 read as follows<sup>56</sup>:

"(2) A dissolution or annulment of a marriage effected in accordance with the law of a foreign country shall be recognised as valid in Australia where, at the date of the institution of the proceedings that resulted in the dissolution or annulment, the party at whose instance the dissolution or annulment was effected (or, if it was effected at the instance of both parties, either of those parties) was—

- (a) in the case of the dissolution of a marriage or the annulment of a voidable marriage—domiciled in that foreign country; or
  - (b) in the case of the annulment of a void marriage—domiciled or resident in that foreign country.
- (3) For the purposes of the last preceding sub-section—
- (a) where a dissolution of a marriage was effected in accordance with the law of a foreign country at the instance of a deserted wife who was domiciled in that foreign country either immediately before her marriage or immediately before the desertion, she shall be deemed to have been domiciled in that foreign country at the date of the institution of the proceedings that resulted in the dissolution; and
  - (b) a wife who, at the date of the institution of the proceedings that

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54. As to the distinction between retrospective and prospective effect of the rule in *Travers v. Holley*, see per Russell L.J. [1966] 3 W.L.R. 603; Kennedy, 32 Canadian Bar Review 359 at 367; Grodecki, 35 British Year Book of International Law 58 at 62; Castel, 45 Canadian Bar Review 140.

55. Although if that decision is so accepted, only in rare cases will reliance for recognition purposes have to be made on the legislative partial enactment of *Travers v. Holley* in s.95 Matrimonial Causes Act 1959 (Cth.). If *Indyka* is not accepted, then s.95(5) may need to be relied upon when a grant of internal jurisdiction is not mirrored in the recognition provisions. Cf. the wording of s.24(1) and s.95(3)(a). If such a case were to arise, a court would have to choose between *Travers v. Holley* and *Fenton v. Fenton* [1957] V.L.R. 17.

56. S.67(1) Matrimonial Causes Act 1959 (Cth.), which reads—  
 "A decree may be made, or refused, under this Part by reason of facts and circumstances notwithstanding that those facts and circumstances, or some of them, took place before the commencement of this Act or outside Australia."  
 is of no assistance here since it concerns only the grounds upon which matrimonial relief is sought.

resulted in a dissolution or annulment of her marriage in accordance with the law of a foreign country, was resident in that foreign country and had been so resident for a period of three years immediately preceding that date shall be deemed to have been domiciled in that foreign country at that date"<sup>57</sup>.

Although there is no indication in section 95(2) and (3) that recognition is required of decrees granted prior to the coming into effect of the Matrimonial Causes Act, recognition is required of such decrees by section 95(8) which lays down that—

"Sub-sections (2) to (7) of this section apply in relation to dissolutions and annulments effected, whether by decree, legislation or otherwise before or after the commencement of this Act."

As section 95(3) requires a court, in applying section 95(2), to treat a deserted wife who was domiciled in a foreign country immediately before the marriage or immediately prior to the desertion, or a wife who was resident in a foreign city for three years immediately prior to her petition, as having been *domiciled* in the foreign country *at the date of the institution* of the proceedings that resulted in the dissolution or annulment of the marriage, it might well be argued that section 95(2) and section 95(3) read in conjunction with section 95(8), require the full recognition of the foreign decree, even for purposes where the relevant date is *prior* to the coming into effect of the Matrimonial Causes Act 1959.

There may, however, be a means of demonstrating an alternative interpretation of section 95 under which retrospective recognition is not required. One might contend that there is, in section 95(2) Matrimonial Causes Act 1959, an ambiguity in the phrase "shall be recognized as valid in Australia". This phrase could be interpreted as "shall in all aspects, be recognized as valid in Australia" or as "shall, in respect of all matters arising after the coming into effect of this Act, be recognized as valid in Australia"<sup>58</sup>. All that section 95(8) does is to lay down that the recognition provisions in section 95(2) and section 95(3) should be applied in respect of *all* foreign decrees whether made before or after the date of the coming into effect of the Matrimonial Causes Act 1959. It is possible to "recognize as valid in Australia" *all* decrees, both those made before, and those made after, February 1st, 1961, and yet not adopt the *prima facie* conclusion as to the interpretation of section 95. In determining the validity of a marriage celebrated, say, in 1958, a court could refuse to apply section 95 in considering the validity of a foreign divorce pronounced in 1950, simply on the grounds that since the relevant time for considering the capacity of the parties to the marriage is 1958, section 95 of the Matrimonial Causes Act is, itself, not relevant. It would only be relevant if the marriage had been concluded after the date of the coming into effect of the said Act. To make such a distinction would in no way ignore section 95(8) for all that subsection requires is that the dissolution be recognized as valid in Australia—

57. It is to be noted that s.95(2) and (3)(b), but not (3)(a), apply to annulment as well as divorce.

58. A similar distinction in respect of the operation of *Travers v. Holley* is adverted to in the judgment of Russell L.J. in the Court of Appeal in *Indyka v. Indyka* [1966] 3 W.L.R. 603.

the question remains open: is it to be recognized as valid after February 1st, 1961 in respect of all matters, or only in respect of those matters which arise after February 1st, 1961?

Consequently, we are not forced to conclude that section 95 requires retrospective recognition. Instead we are faced with a choice between two interpretations equally open to us. Two factors seem to point towards that interpretation which does not involve retrospectivity but, rather, *prospective* recognition of *prior* foreign divorce decrees. First, there is the fact that, as we have seen above, to interpret section 95 as requiring retrospective recognition of the foreign decree leads to results and complications which are legally anomalous and socially undesirable. That these would be the results of retrospective recognition is itself sufficient ground for choosing an interpretation of section 95(2) and (3) which will avoid them.

However, it is not necessary to rely on this ground alone, for it is a fundamental rule of English law that no statute shall be construed as having a retrospective operation unless such a construction appears very clearly in the terms of the Act, or arises by necessary implication therefrom. This presumption applies particularly in cases where the enactment would, as in the present case, otherwise "prejudicially affect vested rights, or the legality of past transactions"<sup>59</sup>. Indeed, it has been laid down that even in construing a section which is to some extent retrospective, the presumption against retrospectivity "ought to be borne in mind as applicable whenever the line is reached at which the words of the section cease to be plain"<sup>60</sup>.

In view of these two separate reasons, it is strongly urged that a court when faced with interpreting section 95 Matrimonial Causes Act 1959 is not bound to interpret that section as requiring retrospective recognition, but is enabled, consistently with the rules relating to statutory interpretation, to hold that although subsections (2) and (3) of section 95 when read with section 95(8) require retrospective effect in the sense that, for post-1961 purposes, decrees made before 1961 are validated by the Act, they do not require recognition for purposes *prior* to 1961.

There have been only two Australian decisions in which the effect of section 95 in relation to retrospective recognition has been discussed. The first of these decisions was *Sheldon v. Douglas* (No. 1)<sup>61</sup>, wherein the Full Court of the Supreme Court of New South Wales was faced with the following fact situation. In 1942 W divorced H1 in California. W had been resident in California for more than one year, but H was, then and at all material times, domiciled in Northern Ireland. W "married" H3 in California in 1947. In a suit for decree of annulment of the 1947 marriage, the judgment of Nield J. dealt extensively with the type of problem discussed in this section. Nield J. pointed out that section 95(2) and (3) were not relevant since W had not in fact been resident in California for three years immediately prior to the proceedings which resulted in her divorce from H1. Moreover, section 95(4) was of no assistance since the decree would not be recognized in Northern Ireland.

59. *Maxwell on Interpretation of Statutes* (11th ed.) 206.

60. *Id.* at 205-206 and cases therein cited.

61. [1963] N.S.W.R. 442.

That left only section 95(5); but the Common Law rules of private international law (here the principle of comity in *Travers v. Holley*<sup>7</sup>) did not permit retrospective recognition to 1947, that is, at a time when three years' residence by the wife was not a ground for jurisdiction in N.S.W.

It seems clear from the judgment of Nield J. that, if the marriage to H3 had been performed after 1955 (the date when it was enacted in N.S.W. that three years' residence by W was sufficient for "internal" jurisdiction), and if W had been resident in California for three years prior to the petition in that State, then the 1942 divorce could not have been recognized and the marriage to H3 would have been valid. It is not clear why his Honour failed to discuss section 95(8) which, in its own terms, is to apply to section 95(5) as well as section 95(2) and (3). It may be that his Honour thought section 95(8) merely declaratory with respect to section 95(5). Alternatively, the failure to discuss section 95(8) may have been due to inadvertence. Since the reason does not appear clearly from the judgment, *Sheldon v. Douglas*<sup>61</sup> cannot be regarded as strong authority in favour of that interpretation of section 95(2) and (3), read in conjunction with section 95(8) which has been contended for in this article, an interpretation which does not require retrospective recognition of foreign divorces.

A more recent decision, which contains dicta inconsistent with the approach of Nield J. in *Sheldon v. Douglas* (No. 1)<sup>61</sup>, is *Alexsandrov v. Alexandrov*<sup>62</sup>, where Mitchell J. of the S.A. Supreme Court was faced with the following fact situation. A woman sought a divorce on the grounds of cruelty and desertion, the marriage having been performed on 16th February 1961. The respondent claimed, *inter alia*, that at the date of the marriage he was still lawfully married to another person, and that the purported marriage between himself and the petitioner was therefore void. The respondent asserted that he had been married in Bulgaria in December, 1926, and that although he had obtained a divorce in Bulgaria from his first wife prior to 1961, the court which had granted the decree had no competence in the international sense as the respondent was then domiciled in Australia. Her Honour accepted that the respondent had in fact been domiciled in Australia at the relevant time, but held nonetheless that the divorce obtained in Bulgaria was to be recognized in Australia by virtue of section 95(2) and section 95(3) of the Matrimonial Causes Act 1959.

As the relevant time for considering recognition was at the date of the second marriage, that is, after the coming into effect of that Act, it was not necessary for Mitchell J. to consider whether section 95(8) requires that retrospective effect be given to a divorce recognized by virtue of section 95(2) and (3). Her Honour nonetheless adverted to the problem, conceding that fully retrospective recognition could involve startling results, one of which her Honour instanced:

"If . . . a person domiciled in Victoria had been divorced outside Victoria in circumstances in which, having regard to the decision in

62. The contrast between "retrospective" and "prospective" has been preferred in this article to that between "retroactive" and "retrospective" since the latter distinction is one which has not always been consistently made.

*Fenton v. Fenton*, the Victorian courts would not have recognized the validity of the divorce but in circumstances which came within section 95(3)(a) of the Matrimonial Causes Act (Cth.) and had remarried and assuming on the authority of *Fenton v. Fenton* that the subsequent marriage was invalid, had married a third time, in the lifetime of the person with whom he had contracted the second marriage (all these events having taken place before the coming into operation of the Federal Act) then if section 95(2) - 95(7) are retroactive, the second marriage would be valid and the third marriage invalid<sup>63</sup>.

Nevertheless, her Honour considered that section 95(2), (3) and (8) are clear in requiring fully retrospective recognition. It is submitted, with respect, that, for the reasons explained above, the language of these sub-sections do not compel the courts to adopt her Honour's conclusion.

### (c) Section 95 (1)

The final point to notice is the effect of section 95 (1) of the Matrimonial Causes Act 1959, which reads as follows:

"95 (1) A decree of dissolution or nullity of marriage—

- (a) made before the commencement of this Act by a court in Australia or made after the commencement of this Act by such a court in accordance with Part XIII of this Act [Transitional Provisions]; or
- (b) made, whether before or after the commencement of this Act, by a court of a Territory of the Commonwealth other than a Territory to which this Act applies,

shall be recognized as valid in the Commonwealth and all the Territories of the Commonwealth."

This section deals only with recognition within Australia of decrees made by the courts of a State or Territory of the Commonwealth. It provides no criteria for recognition other than that the decree was made by the relevant court, thus resolving the controversy concerning the correctness of the decision of Fullagar J. in *Harris v. Harris*<sup>64</sup>. Furthermore, it would seem that when read with section 95(8) of the Act it requires the same type of recognition as section 95(2) and section 95(3), when read with the same subsection.

## III. CONCLUSIONS

1. *Indyka v. Indyka*<sup>9</sup> has considerably relaxed the pre-existing rules relating to the recognition in England of foreign divorce decrees. While domicile in the foreign country remains a sufficient basis for international jurisdiction, the alternative basis provided by the decision in *Travers v. Holley*<sup>7</sup> has

63. [1967] L.S.J. Scheme 270 at 273.

64. [1947] V.L.R. 44.

been accepted by the House of Lords. Moreover, a further basis for international jurisdiction has been created by *Indyka v. Indyka*<sup>9</sup>. A decree which could not be recognized on the basis of either domicile or *Travers v. Holley*<sup>7</sup>, will be recognized in England if the petitioner was a national of, and had a real and substantial connection with, the country of the court which granted the decree.

2. The principle in *Armitage v. Attorney-General*<sup>30</sup> applies so as to require recognition in England not only of a divorce not granted, but recognized, by the courts of the domicile but also of one not granted, but recognized, by the courts of a country of which the petitioner was a national and with which the petitioner had a real and substantial connection.
  3. The new basis of international jurisdiction applies in respect of divorces whether judicial or otherwise.
  4. The speeches in the House of Lords in *Indyka v. Indyka*<sup>9</sup> demonstrate a willingness in future cases to relax even further the grounds for recognition in England of foreign divorces.
  5. The new basis for international jurisdiction should not be imported into Australia via section 95(5) Matrimonial Causes Act. The retrospective nature of judicial law reform such as effected in England by the decision in *Indyka v. Indyka*<sup>9</sup> produces anomalous results in the fields of status, succession and, possibly, crime. Law reform of such a sweeping nature should be left to the Commonwealth Parliament since legislative change does not normally involve retrospectivity.
  6. Section 95(1), section 95(2), and section 95(3) are not retrospective in their operation. When read with section 95(8), those subsections do no more than require recognition of certain foreign divorces granted before the coming into effect of the Matrimonial Causes Act 1959 when the relevant time for considering the validity of that decree is itself after February 1st, 1961.
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