COMMENT

AUSTRALIAN DIVORCES IN CANADA

Your editor has asked me to comment upon the recognition that may be accorded in Canada to Australian divorces under the new federal legislation.[1] I have not seen the text of the legislation but understand that it permits a wife to secure a divorce in Australia upon a jurisdictional basis of three years' residence in Australia. I do not know whether the residence for the stated period must be within the State where the petition for divorce is launched[2] or merely anywhere in Australia, but the point makes no difference insofar as Canadian recognition is concerned. Further, I do not know whether domicil must be in some Australian State,[3] even though not the State where the petition is launched. I assume that it need not be, and that the legislation permits a wife not domiciled in Australia at all to bring divorce proceedings. (If domicil somewhere in Australia is required, no problem will arise in Canada: the divorce will be recognised, as we shall see shortly.)

Let me, first, direct attention to recognition of foreign divorces in Canada. The well-known common-law basis arising out of the *LeMesurier* case[4] applies in Canada. Under the rule derived from an application of this case a divorce granted by the court[5] of the domicil of the parties will be recognized in other common-law territories. As a common-law rule, the principle applies to the eleven common-law parts of Canada. In the twelfth, Quebec province, the same rule appears to be applicable.[6] The only interesting point which the *LeMesurier* principle might raise for divorces under the new Australian legisiation would arise if (1) the new jurisdiction were to be exercised by federal courts[7] and (2) the petitioner had to be domiciled somewhere in Australia.[8]

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[1] The following Comment is published to indicate the reception which will be given in another British Commonwealth country to the recent Commonwealth divorce legislation, noted *infra* 310.—Ed.

[2] (Yes.—Ed.).

[3] (No.—Ed.).

[4] (1895) A.C. 517 (P.C.). This was a case on domestic jurisdiction, not recognition, but the principle laid down has been treated as equally applicable to recognition.

[5] It would seem today that the decree need not be made by a court; it is sufficient if granted by the appropriate divorce-granting authority in the domicil, be it the legislature, a religious tribunal or an administrative official or tribunal.

[6] *Cf.* Walter S. Johnson (1954) 14 *Rev. du Barreau* 301, where he discusses the Quebec appellate court's decision in *Gauvin* v. *Rancourt* (1953) *Rev. Legale* 517, which recognised the validity in Quebec of a Michigan divorce dissolving the Quebec marriage of parties domiciled at the time of the decree in Michigan.

[7] There is an argument that even if the federal legislature conferred the jurisdiction upon *State* courts (and legislation in Canada comparable to Australia's new legislation would probably confer the jurisdiction upon the provincial or territorial courts of the province or territory in which the petitioner had been resident for the three years), the divorce would be recognised abroad if the parties were domiciled anywhere within the territorial limits of the legislating body (Australia). When we apply the *Le Mesurier* rule which refers to domicil within the jurisdiction, do we mean domicil within the territory over which the particular court has jurisdiction, or do we mean domicil, at least in the case of federations, in the territory over which the law-making source (in this case, the Commonwealth Parliament) has jurisdiction or authority? I prefer the latter. *Cf.* an early expression of my view, from the standpoint of jurisdiction rather than recognition: (1946) 24 *Can. Bar Rev.* 151; more recently, (1954) 32 *Can. Bar Rev.* 211; (1955) 33 *Can. Bar Rev.* 516, 517-18. I have not taken into account any Australian Constitution provisions for full faith etc., and have looked to the common-law position only.

[8] (This is not the position under the new amendment to the Australian Act, but the

The *LeMesurier* rule would then operate to provide recognition in Canada of divorces granted under the new Australian legislation because the divorce would, on these premises, be a divorce granted by a court in the judicial territory (Australia) in which the parties were domiciled, even though they were not domiciled in the State in which the federal court may have sat when hearing the petition or granting the decree. As the Commonwealth parliament is competent to legislate upon divorce jurisdiction, (a concurrent power, it is true), it would seem that when it does so, domicil anywhere within the territory of the competent legislature should be sufficient for the *LeMesurier* rule. But as I believe domicil in Australia is not required under the new legislation, the *LeMesurier* rule cannot be invoked generally, but only in any particular case in which the parties were domiciled in Australia despite the formal basis of jurisdiction alleged or proved in the actual case. The common-law recognition rule has long looked to the actual domicil, in the common-law sense, rather than the formal basis of jurisdiction. Thus while six weeks' residence in Reno, Nevada, constitutes a statutory presumption of domicil in Nevada, and while "domicil" in Nevada in the United States' sense which, inter alia, permits a separate domicil for a married woman, is sufficient for a divorce in Reno, only some Reno divorces are recognized as valid in Canada—namely those in which the parties were domiciled, in the common-law sense, in Nevada. So, too, in applying the *LeMesurier* rule to divorces under the new Australian legislation, any in which the parties are in fact domiciled within Australia (or within the particular granting State, if the recognition rule is so confined) will be recognized in Canada, even though the petitioning wife proceeds upon the basis of three years' residence under the new statute.

However, the whole purpose of the legislation seems to be to get away from domicil and more particularly to provide for cases where a wife is not domiciled within the territory. The likelihood, therefore, of any useful application of the *LeMesurier* rule is very small. The next rule, also a common-law rule, is known as the rule in *Armitage* v. *The Attorney-General*,[9] accepted in at least two reported cases in Canada.[10] Under the *Armitage* rule, a divorce recognized by the law of the domicil will be recognized at common-law, even though the decree was not granted in the domicil. This rule would automatically apply to divorces under the new Australian statute if domicil was required in some Australian State. That State must recognize a divorce granted in another State under the authority of federal legislation. And hence we in Canada would recognize it. But, again, the probability of domicil in another State is not great. If, however, in any individual case, it was present, the rule would apply. This rule, like its predecessor, applies to the individual facts of each case, not to laws generally. So, too, if the law of the foreign domicil recognized the divorce, we will treat it as valid in Canada.

This brings us to the third and last common-law basis of recognition, that set forth in *Travers* v. *Holley*.[11] Under the rule applied by the English Court of Appeal in that case, a foreign divorce obtained in circumstances comparable to those which would give rise to divorce jurisdiction locally will be recognized locally, even though neither of the earlier rules is applicable. Thus, in the facts of the *Travers* case, a divorce granted to a deserted wife in New South Wales was recognized as valid in England even though the parties were not domiciled in New South Wales, and the law of the domicil

jurisdiction under Part III of the Act is exercisable by State courts exercising federal jurisdiction where a party has been resident in the State one year and is domiciled elsewhere in the Commonwealth of Australia. Professor Kennedy's remarks in footnote 7 *supra* are therefore relevant to situations arising under Part III.—Ed.).

[9] (1906) P. 135 (Barnes, P.).

[10] *Wyllie* v. *Martin* (1931) 44 B.C.R. (Fisher, J.); *Walker* v. *Walker* (1950) 4 D.L.R. 253 (B.C.C.A.).

[11] (1953) P. 246; (1953) 2 All E.R. 794 (C.A.).

would not have recognized the divorce (apart from the *Travers* principle). The English court was prepared to recognize the Australian decree because England had a special basis of divorce jurisdiction comparable, though not identical with, that used in New South Wales. While England would not normally recognize divorces not granted by, or recognized in, the domicil, it would be improper not to recognize those non-domiciliary divorces granted on a basis comparable to one England itself uses. "On principle it seems to me plain that our courts in this matter should recognize a jurisdiction which they themselves claim."[12]

The *Travers* basis of recognition is new; the breadth of its application is as yet unexplored in judicial decisions. In a number of comments[13] on the case and on the one subsequent English case,[14] I have dealt very fully with its application to the many and varied situations which arise out of the world's differing bases for divorce jurisdiction. In substance I have suggested first, that we do not compare laws in general but examine the relationship of the actual facts to the present forum's jurisdiction rules, and, secondly, that we should apply the *Travers* rule when there is comparability in substance, not necessarily in exact particulars. There is general agreement as to the first point[15] despite the apparent approach of Davies, J. in *Dunne* v. *Saban*[16] on the basis of comparability of laws. There is obvious disagreement[17] on the second. It is, however, around these two points that any discussion of Canadian recognition of divorces granted under the new Australian legislation will revolve.

Will Canada, or any court in Canada, recognize as valid a divorce granted in Australia to a wife who has been resident in Australia for three years immediately prior to the petition, but who is not domiciled in Australia? If we accept the limited approach to the *Travers* principle suggested by Davies, J. in *Dunne* v. *Saban* and compare laws, there will be no Canadian recognition of any of these Australian divorces on the simple basis of *Travers* v. *Holley*. There is no provision for divorce in Canada on the basis of three years' residence. But as it is generally agreed that Davies, J. was wrong on this point, whatever may be said for his ultimate decision in the case, let us approach comparability not of laws but of facts, as has been the practice for years in the case of the earlier rules for recognizing foreign divorces. Are there any bases for divorce jurisdiction in Canada other than domicil? Yes, since 1930, a wife who has been deserted for two years or more may petition for divorce in the province[18] in which the husband was domiciled immediately preceding the desertion.[19] It is generally conceded that if a wife who had been deserted by her husband for two years or more obtained an Australian divorce in the territory[20] in which the husband was domiciled immediately prior to desertion, Canada would recognize such divorce by virtue of the rule in *Travers* v. *Holley*, whatever may have been the jurisdictional basis of the

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[12] *Id.* at 797, *per* Somervell, L.J.

[13] (1953) 31 *Can. Bar Rev.* 799, 1077; 32 *id.* 359; (1955) 33 *id.* 516; (1955) 4 *Int. & Comp. L.Q.* 389.

[14] *Dunne* v. *Saban* (1955) P. 178; (1954) 3 All E.R. 586 (Davies, J.).

[15] See J. S. Ziegel (1955) 33 *Can. Bar Rev.* 475, 477-81; also comments referred to by Ziegel at 475-482; R. H. Graveson, *Conflict of Laws* (3 ed. 1955) 397.

[16] *Supra* n.14.

[17] *Cf.* my own "liberal approach" (esp. (1955) 4 *Int. & Comp. L.Q.* 389) and those of Graveson, *op. cit.*, with those of Ziegel, *supra* n.15, at 481-82, and V. Latham, (1955) 33 *Can. Bar Rev.* 514.

[18] In the case of Newfoundland and Quebec, petitions go to the Canadian Parliament, not to the courts.

[19] Divorce Jurisdiction Act, R.S.C. 1952, c. 84.

[20] Whether domicil in Australia, and hence a divorce obtained anywhere in Australia, would be sufficient for this purpose need not be enlarged upon here. It is clear that if domicil before desertion was in the *State* or *territory* of Australia where the divorce was granted, there would be no difficulty. But with the Commonwealth Parliament's competence in divorce-jurisdiction matters, I prefer the wider view that domicil before desertion

Australian divorce. Thus, the Florida divorce in question in *Dunne* v. *Saban* and granted on the basis of domicil (in the United States' sense which allows a wife a domicil separate from her husband), plus ninety days' residence was refused recognition in England because, *inter alia*, the wife had not been resident in Florida for three years, one of the bases of jurisdiction available in England. But if the wife had been deserted for *two* years and the husband's domicil prior to desertion was Florida (and these may have been the facts of the *Dunne* case), the Florida divorce in that case would have been recognized in Canada, even though not recognized in England.[21] It is possible, too, if these facts existed, that even England would have recognized the divorce, apart from the basis of three years' residence, on the deserted-wife basis. England, too, has deserted-wife legislation. In summary to this point, if the facts in any particular Australian three-year divorce were such that, had they arisen in Canada, the wife could have petitioned under our Divorce Jurisdiction Act as a deserted wife then Canada will recognize the Australian three-year divorce. This approach involves a strict "reciprocity" (in the sense of comparability) between the Australian facts and the facts required by Canadian law.

In addition to those Australian three-year divorces which will be recognized in Canada on the principle of *Travers* v. *Holley*, as set out in the last paragraph, there may be others. The principle of the *Travers* case requires that there be comparability "in substance". It does not require exact comparability, even though some writers, such as Ziegel, suggest it. In the case of recognition in a country which itself grants divorces on the basis of residence for a certain period, it is easier to formulate comparisons. In the light of the new legislation, would an Australian court grant recognition to a divorce granted outside Australia where the petitioning wife had resided in the divorce territory for two years, eleven months and three weeks. Certainly, because there is in substance reciprocity or comparability. But the comparison is not always between details, such as length of time. I have suggested that where there is some substantial connexion with the divorce forum reasonably comparable to that used in the recognizing State, then *Travers* v. *Holley* can be applied. Thus a divorce granted by a continental country to one of its nationals, where nationality is a basis comparable to domicil in the common-law countries, should receive recognition in the common-law countries.[22] And my suggestion would include recognition in Australia, England or Scotland of the Florida divorce involved in *Dunne* v. *Saban* because of the comparability of the two years' residence plus domicil in the United States' sense to the three years' residence in Australia, England or Scotland.[23] It is more difficult to conceive of situations substantially comparable to domicil immediately preceding desertion and desertion continuing for two years—together, the basis for Canada's one departure from the common-law domiciliary basis for jurisdiction. Canada's provision is a special exception to meet a limited number of cases. England's or Australia's three-year provision, on the other hand, is a general provision aimed at including with simple clarity as many people as possible as have some substantial connexion with the country. Three years' residence is chosen as providing that connexion. Few Australian cases, beyond those mentioned in the last paragraph, will fit Canada's special case. I should, however, like to leave the way open for inclusion of any cases that might have substantial connexion.

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anywhere in Australia and a divorce anywhere in Australia would be acceptable. See *supra* n.7.

[21] Ziegel, *supra* n.15, at 482; G. D. Kennedy, (1955) 33 *Can. Bar Rev.* 516, 517; (1955) 4 *Int. & Comp. L.Q.* 389.

[22] In another field, adoption, such an approach was not accepted: *R.* v. *A.* (1955) V.L.R. 241 (Herring, C.J.); Kennedy, (1956) 34 *Can. Bar Rev.* 507, 529.

[23] See my comments, *supra* n.21; Graveson, *supra* n.15. Ziegel would not agree on this point.

Finally, in connexion with the principle of *Travers* v. *Holley*, we have a third group of cases where Canada will recognize the new Australian divorces. This group includes those which raise a combination of the *Travers* rule and the *Armitage* rule. England and Scotland will undoubtedly recognize the new Australian divorces: both countries grant divorces to a wife on a similar basis—three years' residence. If the wife is domiciled in either England or Scotland at the time of her Australian divorce, we in Canada will then recognize it on the basis of the *Armitage* rule because the law of the domicil will, on the basis of the *Travers* rule, recognize it. This double application of the two rules may well be applicable to quite a number of cases where the domicil is in any other country whose law, for one reason or another, will recognize the Australian divorce. In any of these cases, we shall do likewise.

So far, I have dealt only with common-law recognition. Canada has no statutory provision for recognition of foreign divorces, not even those granted in England to English wives of Canadian servicemen. The Canadian Bar Association has on a number of occasions requested legislation for these cases, but none has been forthcoming. Only the Canadian parliament could legislate upon such a matter. The provincial legislatures or territorial councils may in their legislation provide that persons having certain foreign divorces, otherwise invalid in Canada, be treated for purposes of, for example, succession to property, as if the divorce were valid. I know of no such legislation, though British Columbia has used that type of legislation to provide succession rights for "spouses" and "children" of certain second "marriages" which are or may be invalid.

In summary, then, Canada will recognize as valid only some of the divorces granted under the new Australian legislation which provides three years' residence as a jurisdictional basis for a wife's petition. We will recognize (a) those granted in one State where the parties are domiciled in another State or territory of Australia; (b) those granted to persons domiciled outside Australia where by the law of the domicil they would be recognized as valid, and as part of this class we may include those recognized as valid by the law of the domicil on the basis of *Travers* v. *Holley*—probably any in which the domicil is in England or Scotland; (c) those where the wife has been deserted for the two years preceding the petition and was immediately prior to the desertion domiciled in Australia (or possibly, on a restricted interpretation, that part of Australia where the divorce was later granted); and (d) those few, as yet unidentified cases which may also fall within the principle of *Travers* v. *Holley* on a basis of substantial comparability or reciprocity. The prospect for a larger area of recognition through Canadian legislation is slim at the moment. Canada has been growing up as a nation. Canadians as individuals have been and are very conscious of their "rights". On occasions many of them fail to see that by asserting their own social, political and religious theories to the full they may be preserving for the moment their own "rights" but are at the same time destroying the right or liberty of other Canadians to seek and secure changes from time to time for themselves. There are a few signs of maturity in recent years. Many more are needed to overcome the growing plague of minority "rights" which threaten to take over Canada.

GILBERT D. KENNEDY*

* M.A., LL.B. (Tor.), S.J.D. (Harv.); Professor of Law, University of British Columbia.