

RECOGNITION OF FOREIGN DIVORCES—DOMICILE

A CONTROVERSY

The following exchange of correspondence between A. J. Wickens, K.C., of Moose Jaw, Sask., and Professor Raphael Tuck of the University of Saskatchewan, dealing with the recognition of foreign divorces, contained so much of general interest to the profession that we felt the writers should permit publication of their letters for the benefit and education of our readers. Both parties having consented the correspondence is here set forth.

9 November, 1944.

PROF. RAPHAEL TUCK,
University of Saskatchewan,
Saskatoon, Sask.

My dear Professor:—

I have read with interest your address before the Saskatchewan Law Society as printed in the CANADIAN BAR REVIEW October 1944 issue.

There is one observation contained on page 691 of the BAR REVIEW October issue, which I rather question. You point out that England would not recognize a Canadian divorce granted to a wife in the matrimonial domicile in Canada wherein she had been deserted for two years and that Canada would not recognize an English divorce granted under the converse conditions.

With respect, I rather disagree with you on that point. Under the principles of international law our courts recognize any divorce granted anywhere on any grounds by a court having jurisdiction on grounds recognized as giving jurisdiction to our own courts and the same is true in England.

The reason our courts refused to recognize theretofore divorces given to wives in a jurisdiction other than that of the husband's domicile was because that was the only basis our courts recognized for their own jurisdiction. When the basis of the jurisdiction of our courts was extended, I hold the view that the same rule of international law would apply and we would have to give effect to any divorce granted by any court exercising jurisdiction on the same ground as we would exercise it.

In all cases which have come under my observation the test has always been "Did the forum which granted the decree have jurisdiction as required in our own courts?" If it did then the decree was valid.

Applying that rule of international law and that question to the case of a wife whose husband domiciled in the State of Nevada, deserted her there for example, and who two years after that desertion still living in Nevada brought action there for divorce, could our courts be heard to say that the Nevada court hadn't jurisdiction, when we under the same circumstances would assert jurisdiction in our courts.

With due respect, I think not. No more than we could be heard to say that the Nevada Court would have no jurisdiction if the husband in fact were domiciled there when the writ was issued.

If there is anything in the rules of international law which I have overlooked which prevents the application of an established principle to future conditions, I would be very happy if you would direct my attention to it.

Yours truly,

"A. J. WICKENS."

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January 12, 1945.

ALFRED J. WICKENS, ESQ., K.C.,
Walter Scott Block,
Moose Jaw, Sask.

Dear Mr. Wickens:—

I read your letter of November 9th, 1944, with interest, and note that you disagree with my observation on page 691 of the October issue of the CANADIAN BAR REVIEW, regarding recognition by the English courts of a divorce granted in one of the Provinces of Canada under the Divorce Jurisdiction Act of 1930, the husband in my hypothetical case having become domiciled in England immediately after desertion. The point I made was that England would not recognize such a divorce, as its courts are not bound by the Divorce Jurisdiction Act of Canada. "The courts of a foreign country have no jurisdiction to dissolve the marriage of parties not domiciled in such foreign country at the commencement of the proceedings for divorce", says Dicey (Conflict of Laws, 4th edition, page 422). Applying this rule, the husband being domiciled in England, the courts of England are the only courts having jurisdiction to grant a divorce (according to *English* law — which is not subject to any foreign statute).

I have searched through the various authorities, but I am unable to find therein any statement favouring the rule you adduce in your letter, namely, that our courts must recognize any divorce granted anywhere on any grounds recognized as giving jurisdiction to our own courts, the same being true in England.

May I refer you to Falconbridge in [1932] 4 D.L.R., at page 40, where he gives the example of a husband domiciled in Ontario who deserts his wife there, in which case, under the Canadian Act, the Ontario Court may entertain the wife's suit for divorce, no matter where the husband is domiciled at the commencement of the suit. He points out, however, that although the Ontario decree is entitled to recognition in the court of any other Province (because all Canadian courts are bound by the statute of the Dominion Parliament), yet, "An English court is, however, not bound by the statute, and if the question of the validity of the Ontario decree comes before an English court, that court will be obliged to ascertain the domicile of the husband at the time of the commencement of the Ontario suit. . . . If the English court finds the husband to have been domiciled at that time outside of Ontario, then the Ontario decree is not entitled to recognition in England on the ground of its being a decree of the court of the domicile, but may in certain circumstances be entitled to

recognition in England by virtue of the doctrine next to be discussed." This doctrine he explains by the following: "If a decree of divorce is made by a court which is not the court of the domicile, and is therefore according to the principles already discussed not entitled to recognition in England, it may, according to the decision in *Armitage v. Attorney-General*, nevertheless be entitled to recognition in England if it is proved that the validity of the decree would be recognized by the court of the domicile."

Read, in his book "*Recognition and Enforcement of Foreign Judgments*" (published in 1938) at page 219, gives an example of a husband and wife, domiciled in Nova Scotia. The husband deserts his wife, journeys to Florida, acquires a domicile there and bigamously marries. The Nova Scotia courts will have jurisdiction, under our Divorce Jurisdiction Act of 1930, to grant the deserted wife a divorce, even though both husband and deserted wife are now, according to Nova Scotia law, domiciled in Florida. This decree must be recognized throughout Canada as being valid, but, continues Mr. Read, (page 220), "would it be recognized as valid elsewhere, in England for example, where the common law is extant? It is submitted that it would not, at least, unless the peculiar factual situation discussed in the next paragraph exists, and it is elementary learning when neither party is domiciled within a law district at the time action is commenced, no divorce can be validly granted by its courts due to lack of jurisdiction in the international sense." He then goes on to discuss the "peculiar factual situation" mentioned in the last sentence, and points out that if the State of Florida recognizes the divorce obtained in Nova Scotia as valid, then, under the doctrine of *Armitage v. Att. Gen.*, the English courts will recognize it too.

May I finally refer you to Johnson on the Conflict of Laws, at page 94, volume 2, where he gives the same kind of example.

If there are authorities which I have overlooked, I shall be glad if you will refer me to them. At present, however, I must, with respect, disagree with the view expressed in your letter, and adhere to the opinion I expressed on page 691 of the October issue of the CANADIAN BAR REVIEW.

I must point out, however, that even on the assumption that you are right on this point of law, I maintain my view that reciprocity of legislation is absolutely necessary to avoid perpetrating injustices, since the principle underlying this argument remains the same. It is only by chance that both Canada and England have fixed the same time limit — i.e. two years. Suppose, for example, England passes another statute to-morrow, reducing that time to one year, and under that statute a divorce is granted to a woman who has been deserted by her husband for a year, the husband having meanwhile become domiciled in Ontario. The ex-wife comes out to Ontario and re-marries. She can be prosecuted in Ontario for bigamy, and convicted, since, according to the law of Ontario, she is still married to her first husband, the English courts having no jurisdiction to grant her a divorce. In my view, therefore, reciprocal arrangements are absolutely necessary — at least in the British Commonwealth — to avoid such an injustice.

Yours very truly,

"RAPHAEL TUCK."

16 January, 1945.

PROF. RAPHAEL TUCK,
College of Law,
University of Saskatchewan,
Saskatoon, Saskatchewan.

My dear Professor:—

It is these differences of opinion that make the practice of law interesting and make necessary references to such high courts as the Privy Council.

The principle of law for which I contend is not a new one. If you have access to the Fifth Edition of Westlake's *Private International Law* and turn to page 99 under heading 51, particularly in the second paragraph of that heading, you will find specifically laid down the very principle for which I contend.

There are two reasons apart from that authority why I contend for that principle. The first is that it seems to me too much emphasis is being placed on the intrinsic quality of domicile. It is my view that domicile of itself has no intrinsic merit as a determining factor. Domicile became the measuring stick by virtue of the fact and only so that it was the basis of the assumption of jurisdiction by the English Courts. The difficulty and the confusion would not arise had the English Courts instead of saying that domicile is the test had said "The test is what is the basis of the jurisdiction of the English courts; that (being domicile) is the basis of foreign jurisdiction that this court recognizes"; and the court now pronouncing on the situation would propound the same question "What is the basis of jurisdiction recognized by the English Courts? That (in addition the domicile) is the continued residence in the last domicile of the deserted wife".

In examining these authorities and applying them one should ascertain the actual factual basis, not the name by which the factual basis is known at the time.

The reason the English Courts recognize decrees of foreign courts having jurisdiction on the ground of domicile was not because there was any alchemy attached to domicile but simply because domicile was the basis and the only basis upon which the English Courts themselves would assert jurisdiction.

The English Courts will always recognize decrees on whatever grounds granted of any court having jurisdiction based on the recognized ground for jurisdiction in the English Courts. That attitude was based on a fundamental rule of equity that if you assert a right yourself you must grant the same right to others.

I am quite convinced that the Privy Council if a case were submitted to it would hold that the English Courts having widened their ground for jurisdiction must recognize the same grounds for jurisdiction in any other court. The whole basis of jurisdiction in personal matters would fall to the ground otherwise and it would be necessary to have a treaty made with every country in the world every time any change were made. I revert to the opening expression of opinion that the basis of jurisdiction recognized by an English Court is the basis which it itself asserts, and that it is an erroneous submission in law that because domicile happened to be the only

basis for many years which the English Courts asserted under English law, that domicil itself as domicil has acquired any particular force.

You will find on page 94 under heading 46 a general exposition of the law applicable to the case of a deserted wife out of which grew that particular amendment to the Matrimonial Causes Act in England and I can see no answer to the proposition that a court which itself asserts jurisdiction on certain grounds can be heard to deny that jurisdiction to another court if such jurisdiction is in accordance with the domestic laws of the State in which that court is situate.

I ran across somewhere some years ago a decision by my grandfather, late Vice-Chancellor of the Probate Admiralty and Divorce Division in London, laying down that very rule but unfortunately I have misplaced the citation and I cannot for the life of me find it.

Yours truly,

"A. J. WICKENS."

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January 18, 1945.

ALFRED J. WICKENS, Esq., K.C.,
Walter Scott Building,
Moose Jaw, Sask.

Dear Mr. Wickens:—

Many thanks for your letter of the 16th inst. I referred to the passage in Westlake, 5th edition, which you mentioned (page 99, heading 51, second paragraph). His statement that "the English court would grant a divorce to the wife who was justified in not following her husband in a change of domicile from England" (referring to his heading 46, page 94), is wrong. It is true that in both *Armstrong v. Armstrong*, [1898] P. 179, and *Ogden v. Ogden*, [1908] P. 46, Sir Gorell Barnes advanced the suggestion that it would be possible to grant a divorce to a deserted wife, even though her husband was domiciled elsewhere, the result being arrived at either by a quasi estoppel, *i.e.* the husband cannot be heard to say that he has changed his domicile, or by considering that the wife must *ex necessitate* be entitled to treat the country of her previous matrimonial domicile as the country of her domicile; but this idea was definitely vetoed by the Privy Council in *Att. Gen. for Alta. v. Cook*, [1926] A.C. 444. Of course, as you point out, the Matrimonial Causes Act in England was based on this idea, and supersedes the Common Law in that respect.

As far as the second part of the paragraph is concerned, Westlake says that the "recognition of a foreign divorce and the grant of a divorce in England *ought to be* governed by the same rules." He gives no authority, and, as far as I can gather, is talking in the optative, rather than the indicative mood. I am fully in agreement with the principle for which he and you contend—the point I wished to make, however, is that this principle has not, so far, been given recognition by our courts. I concur in your view that too much emphasis *has* been placed on the intrinsic quality of domicile, and am of the opinion that it would be far more reasonable to adopt the views you have expressed. It may be that the Privy Council *will* adopt these views, if a case is submitted to it, but if it does

so, it will be departing from the rigid rule laid down and established as a precedent in *Le Mesurier v. Le Mesurier*, [1895] A.C. 517, and followed ever since. Judges have often succeeded in re-shaping the law, without admitting that they are doing so. I, for one, should heartily welcome the change. It seems entirely out of all reason that two countries which have enacted the very same law to remedy the same evil should fail to give effect to each other's law, on the technical ground that they are not bound by each other's statutes.

You may be interested to know — if you do not know already — that the King's Bench Rule 502 (2), which I attacked in the article in the *BAR REVIEW* (at pages 684-6), was declared *ultra vires* by the Court of Appeal last week. I was very glad indeed to hear of the decision.

Yours sincerely,

"RAPHAEL TUCK."

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[In a subsequent letter, a copy of which we have not received, Mr. Wickens pointed out that the *Cook* case, cited by Professor Tuck, was decided before the respective amendments to Canadian and English law, and further, in that case, the husband had never at any time acquired an Alberta domicile, and the principle there contended for — that a deserted wife could acquire a separate domicile of choice — was a much different contention than that made by Mr. Wickens.]