RECOGNITION OF FOREIGN DIVORCES: A REPLY TO A CRITICISM

RAPHAEL TUCK
Montreal

I have been taken to task in a recent issue of the Canadian Bar Review by Mr. J. H. C. Morris of Magdalen College, Oxford,[1] for the views I expressed in an earlier number of the same journal [2] concerning a fairly recent case in British Columbia involving the recognition of foreign divorces.[3] In this article I propose to reply to Mr. Morris's criticism and, at the same time, to attempt to vindicate my own position. Before doing this, however, I should like to comment upon Mr. Morris's views in the above-mentioned article and to take issue with him regarding them.

The central theme in Mr. Morris's article is the famous and (hitherto) generally accepted and recognized case of *Armitage* v. *the Attorney General*,[4] and it is his thesis that this case was wrongly decided. *Armitage* v. *A-G.* engrafted an exception upon one of our well-established rules in the conflict of laws, that "the domicile for the time being of the married pair affords the only true test of jurisdiction to dissolve their marriage".[5] This exception comes into play, according to the *Armitage* case, when, although the parties are not domiciled in the state which has granted the divorce, yet the courts of the state in which they are domiciled recognize this divorce as binding, notwithstanding even the fact that it was given on grounds which those courts would not recognize as valid grounds for divorce in that state. In such a case, according to the rule in the *Armitage* case, the English courts will also recognize the binding effect of such a decree. The basis for such recognition is that the personal law of the parties is the law of their domicile and if, by that law, they are no longer husband and wife, they should be no longer husband and wife anywhere; since the court of the state of their domicile recognizes the marriage as dissolved, that marriage should be recognized as dissolved everywhere.

The facts of the *Armitage* case, briefly, were: Mr. and Mrs. Gillig were married in England, but domiciled in New York — Gillig never lost his New York domicile. Eight years later Mrs.

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[1] Recognition of Divorces Granted Outside the Domicile (1946), 24 Can. Bar Rev. 73, at p. 84.

[2] Can. We Afford to Ignore the American Law of Divorce? (1944), 22 Can. Bar Rev. 62.

[3] *Henderson* v. *Muncey*, [1943] 2 W.W.R. 120, [1943] 3 D.L.R. 515; [1943] 3 W.W.R. 242, [1943] 4 D.L.R. 758.

[4] [1906] P. 135.

[5] *Le Mesurier* v. *Le Mesurier*, [1895] A.C. 517, *per* Lord Watson at p. 540.

Gillig went to South Dakota, where she obtained a decree of divorce from her husband on the ground of desertion. Later on she married an Englishman domiciled in England, and this was a petition by her, under the Legitimacy Declaration Act, 1858, for a declaration that her second marriage was valid. The court found that although desertion was not a valid ground for divorce in New York, which was the state in which the Gilligs were domiciled at the time the decree of divorce was granted in South Dakota, yet the courts of the state of New York would recognize that decree, and Sir Gorell Barnes therefore held that the English courts should recognize it also.

It may be noted, in passing, that what the learned judge was doing was nothing more than implicitly adopting that particular view of the Renvoi — in cases of divorce — for which Dean Griswold of the Harvard Law School has lately contended,[6] and which is recognized by such cases as *In Re Ross*[7] or *In Re Askew*,[8] — *viz.* that if our conflict of laws rule refers us say to the law of the domicile, we should inquire not merely what is the *domestic* law of that state, but rather "what would the courts of that state do if this case came before them?", and whatever these courts would do should be our own course of action. The very object of the conflict of laws is to achieve some uniformity, and this object is defeated if the answer to a particular question in law depends on *where* the action is brought. In the instant case, whether the action had been brought in New York or in England, the result would have been the same — the South Dakota decree would have been recognized as valid; whereas if the decision contended for by Mr. Morris had held sway in the English court, the result of the case would have varied according as to whether the action had been taken in the state of New York or in England.[9]

Mr. Morris bases his submission on three grounds:[10]

(1) the English court had no jurisdiction to determine the case;

(2) the court was mistaken as to the New York law;

(3) that in any case the decision was in conflict with the well-settled rules of domicile.

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[6] Renvoi Revisited (1937-38), 51 Harv. L. Rev. 1165.

[7] [1930] 1 Ch. 377.

[8] [1930] 2 Ch. 259.

[9] I fully realize, as Mr. Morris points out in his article, that the conflict of laws rules do not, by any means, always result in that uniformity which is so desirable; but had the decision in the *Armitage* case gone the other way, it would have added another class to the cases already in existence of a person's being married in one state and single in another.

[10] (1946), 24 Can. Bar Rev. 73, at p. 77.

He further submits:

(4) that the case is no authority for Dicey's exception to rule 99.[11]

I propose to deal with the first, third and fourth of these contentions (omitting the second, since the New York law becomes part of the *facts* of the case when it comes up before the English court) and, in doing so, to justify the view which I took of the case of *Henderson* v. *Muncey* [12] in the above-mentioned article,[13] which was the target for Mr. Morris's criticism.

(1) *The English court had no jurisdiction to determine the case.*

Mr. Morris bases this contention on section 1 of the Legitimacy Declaration Act of 1858, on which the petition was founded. The section reads "Any natural-born subject of the Queen, or any person whose right to be deemed a national-born subject depends wholly or in part on his (her) legitimacy or on the validity of a marriage, *being domiciled in England* [14]. . . . . may apply by petition to the court. . . . . for a decree declaring that his marriage was or is a valid marriage". Mr. Morris's argument is that "Mrs. Armitage" had to be domiciled in England in order to be able to apply to take proceedings under the act. But whether or not she was so domiciled depended upon whether her "divorce" from Gillig was valid, since, if she was still married to him, her domicile would still be the same as his domicile, *viz.* New York. If, therefore, the English court decided that she was domiciled in England — and consequently able to petition the court under the act — implicit in that decision would be another decision, *viz.* that the South Dakota divorce from Gillig was valid — which was the very question in dispute before the court. The court would thus have decided this question before even the petitioner came before it. In other words, in order to reach his decision, the judge had to put his conclusion into his premise.

May I point out, however, that even had the court reached the opposite conclusion, and denied jurisdiction, the same unsatisfactory state of affairs would have prevailed — the judge would have had to put his conclusion into his premise? In other words, whatever decision the court might reach, it is caught up in this form of "circular reasoning". Let us, for a moment,

[11] "The courts of a foreign country, where the parties to a marriage are not domiciled, have jurisdiction to dissolve their marriage, if the divorce granted by such courts would be held valid by the courts of the country where at the time of the proceedings for divorce the parties are domiciled."

[12] See footnote 3.

[13] See footnote 2.

[14] The italics are mine.

look at it the other way round, and assume the decision contended for by Mr. Morris, *i.e.* the English court holds that it cannot entertain the plea, because "Mrs. Armitage" is not domiciled in England, and therefore the court has no jurisdiction under the Act of 1858. What does this imply? Assuming for a moment that "Mrs. Armitage" *was* divorced from her former husband, her domicile would surely now be English — quite apart from her new husband's domicile, which she acquires by operation of law — for she was living in England with Armitage presumably with the intention of remaining there permanently and thus, animo et facto, her domicile was England. Therefore, if the English court denied jurisdiction under the act of 1858 on the grounds that "Mrs. Armitage" was *not* domiciled in England, implicit in that decision would be another decision, *viz.* that her South Dakota divorce from Gillig was *not* valid — which was the very question in dispute before the court.

Thus, whichever way the courts decide as to their jurisdiction to entertain "Mrs. Armitage's" petition, they are deciding the real matter in dispute before she ever comes before them, in which case, as far as legal reasoning is concerned, there is no stronger reason for denying jurisdiction than there is for asserting it.

I think, however, that we might obviate this difficulty by a different form of reasoning and thereby give the court the jurisdiction which Mr. Morris would deny it. The reasoning of the court would be along these lines:

> The petitioner is applying for a declaration under the Act of 1858 *that her marriage to Mr. Armitage is valid* (this is the sole requirement of the declaration). Whether or not this court has jurisdiction to entertain her petition depends upon whether she is domiciled in England; if so, then this court has jurisdiction. The petitioner was formerly married to one Gillig, who was at all times domiciled in the state of New York. By operation of law, therefore, her domicile was also the state of New York. She obtained a decree divorcing her from her husband in the state of South Dakota. If this decree is valid, she no longer has a domicile in New York by operation of law, but is free to adopt a domicile of choice which, according to the facts, she has done. This "domicile" is England. Whether she is domiciled in England, therefore, depends upon whether the decree of divorce which she obtained in South Dakota is valid — *i.e.* whether this court will recognize that decree. This court decides to give it recognition, since it finds that the state of the domicile at the

> time of the decree (New York) would recognize it as binding. The petitioner is therefore domiciled in England, and this court thus has jurisdiction to entertain her application for a *declaration that her marriage to Mr. Armitage is valid.*

The court then proceeds to decide the question before it — whether the petitioner is validly married to Mr. Armitage — and it finds that the lex loci celebrationis has been satisfied as to form and the lex domicilii as to capacity. It proceeds, therefore, to declare the marriage valid.

Mr. Morris may not agree with this reasoning, but I submit that it is the only way out of the impasse, described above, to which his argument, logical though it may seem, leads us.[15]

Incidentally, if I may be permitted to digress, it might be noted that there are other classes of cases in which the type of circular reasoning discussed by Mr. Morris has created a most awkward and unjust situation for the parties. The locus classicus, I should say, was the case of *Ogden* v. *Ogden* [16] in 1908, the facts of which, briefly, were that in 1898 a marriage in England was celebrated between an Englishwoman domiciled in England and a Frenchman domiciled in France. The latter was under twenty-one years of age and did not have the consent of his parents as required by French (though not English) law. A decree of nullity was therefore pronounced by the French court in 1901, and the Frenchman subsequently remarried in France. In 1904 the Englishwoman, his "ex-wife", went through the ceremony of marriage with Ogden, an Englishman domiciled in England, who later instituted proceedings for a decree of nullity of this marriage on the ground that the woman was already married. Both the court of first instance and the Court of Appeal upheld this claim on the ground that parental consent is merely a formality and was not required, by English law, to the marriage of 1898, which was therefore good. This point has been violently criticized by various authorities and I do not propose to deal with it here. The other question, however, concerning the validity of the French decree of nullity, seems to me to be the perfection of circular reasoning. Sir Gorell Barnes made it clear that here the question was not whether a pre-existing marriage had been

[15] In any case, legally speaking, the sole question before the court is the validity or otherwise of a marriage; the petition before the court is limited to a declaration that such marriage is valid. This depends upon form and capacity being satisfied. The question of the domicile of the petitioner, which rests on the validity of a previous alleged divorce, is brought in merely to decide the preliminary question of the court's jurisdiction, which has to be tested before the court can entertain the petition.

[16] [1908] P. 46.

dissolved, but whether a marriage had ever taken place at all. Thus, until the court was sure that a marriage had taken place, it could not attribute to the alleged wife the domicile of her alleged husband (*i.e.* France). But in the same breath, almost, he held that this marriage was perfectly good in England and consequently the subsequent "marriage" to Ogden was null and void. Now the court cannot run with the hare and the hounds. *Either* the woman never acquired the domicile of her alleged husband — in which case there was no marriage in 1898, and she is free to marry Mr. Ogden, *or* the marriage of 1898 was perfectly good (as the court said it was) according to English law, in which case (again according to English law) the wife must have acquired the domicile of her husband, which was France. Therefore, since both parties were domiciled in France, effect should be given to the decree of nullity pronounced by the French court, and again the woman should be free to marry Ogden. *But by saying that the domicile of the woman had not changed in 1898, the court was implicitly holding the French decree of nullity valid, for the very purpose of providing a basis for refusing to recognize it,* and this reasoning produced a grave injustice, since the woman was still married to the Frenchman according to English law, though her husband was free from her in France and had, in fact, married again.[17]

Returning from this digression to the *Armitage* case, I disagree with Mr. Morris's first contention and submit that the court was perfectly right in assuming jurisdiction to determine the case.

Mr. Morris's third contention is that

(3) *The court's decision was in conflict with the well-settled rules of domicile.*

Mr. Morris reaches this conclusion, I submit with great respect, by falling into the error of confusing the two types of "domicile" relevant to the case, or, putting it another way, confusing questions of fact and questions of law (and by "law" I mean *English* law, including conflict of laws) before the court. The confusion is so complete that it is difficult to know at what

[17] Cheshire gives an interesting suggestion for the solution of such a difficulty as the *Ogden* case presents (in his Private International Law), *viz.* attribute to a woman the domicile of her husband if a marriage ceremony takes place (assuming, of course, that it is valid by the lex loci celebrationis) until such marriage is declared void by a competent court. Professor Hughes also — in "Judicial Method and the Problem in Ogden v. Ogden" (1928), 44 L.Q.R. 217 — contends that "metaphysical difficulties arising out of the retrospective operation of the decree of nullity" need not prevent our ascribing to the woman the domicile of her husband until the decree is pronounced. The question and reply on page 226 of the same article are particularly apt.

point to break into the argument in order to refute it. Let me, at the outset, repeat the *ratio decidendi* of the case:

The English court held that as the courts of the husband's (and therefore the wife's) domicile, *i.e.* the courts of the state of New York, would recognize the South Dakota decree of divorce as binding, such decree must be recognized as valid by the courts of England.

We may therefore say that *Mr. and Mrs. Gillig's being domiciled in New York was one of the foundations upon which the whole case rests.* Mr. Morris certainly recognizes this when he says "There can surely be no doubt that in the English sense Mrs. Gillig was domiciled in New York at the date of the commencement of the South Dakota proceedings, for Gillig was domiciled in New York at all material times".[18] However, on the same page, Mr. Morris comes out with the astonishing statement that "there is ample evidence that the learned President did actually find that Mrs. Gillig was domiciled in South Dakota at the date of the proceedings there". With due respect, may I point out that it was absolutely impossible for the President so to find, since Mr. Gillig was at all material times domiciled in the state of New York and therefore by operation of law, Mrs. Gillig's domicile must also have been New York according to English conflict of laws rules, even if she had never visited that state but had spent all her life in South Dakota.

What the learned President *did* say — and Mr. Morris actually quotes him[19] — was that "The petitioner proceeded to Yankton, in the state of South Dakota, and one of her objects in doing so was to institute proceedings there for divorce. She acquired a domicile there *in the sense which is recognized in America, but is foreign to our notion in this country.*"[20] In other words, Mrs. Gillig had not acquired a domicile in South Dakota according to English law, but merely a bona fide residence in the state of South Dakota sufficient to entitle the decree of divorce granted to her in that state to recognition in the state of New York (her domicile according to English law). Whether we call this factum "bona fide residence in the New York sense" or "domicile in the New York sense" makes no difference. It is merely the *reason* for New York's recognizing the decree. As Mr. Morris himself tells us "the expert witness stated that in his opinion New York would recognize the South Dakota decree because Mrs Gillig was domiciled in South Dakota in the New York sense. No other

[18] *Op. cit.*, p. 80.
[19] *Ibid.*
[20] The italics are mine.

possible basis for this recognition was suggested."[21] But this *reason* for New York's recognition has nothing whatever to do with English law and to jump from one to the other merely confuses the issue. I am consequently unable to follow Mr. Morris's reasoning when he says[22] "How could the President possibly find that Mrs. Gillig was domiciled in South Dakota in the New York sense, *and base his decision on that finding*,[23] without abandoning his own Conflict rules (*a*) that the only domicile which is relevant in an English court is a domicile in the English sense, and (b) that the domicile of a married woman is the same as that of her husband? . . . . . There was therefore no justification for basing the decision on a supposed South Dakota domicile in the New York sense, for in an English court, Mrs. Gillig's domicile in the New York sense should have had no significance whatsoever."[24] The learned judge did not for one moment abandon either of the above rules, nor did he "base his decision" on the finding that Mrs. Gillig was domiciled in South Dakota in the New York sense. The decision — as I have noted above — was based on the fact that the courts of New York — *the state of the domicile* (this is fully in accord with rules (a) and (b) above) — would recognize the South Dakota decree of divorce as binding. The *reason why* the courts of New York would recognize it — which, in the instant case, was that Mrs. Gillig was domiciled in South Dakota in the New York sense — was part of the *facts* of the case and should have no more effect on the English law than if the reason had been the fact that the husband hit his wife over the head with a dishpan. That is the business of the New York courts and had nothing to do with English law. It was brought in merely to show that the New York courts would recognize this decree, and in this sense only it is of value in the case, or of "significance", as Mr. Morris puts it, "in an English court".

I maintain, therefore, that there has been no departure whatever from the well-known English conflict of laws rules regarding domicile.

The same criticism can be levelled at Mr. Morris's fourth submission:

4. *That the case is no authority for Dicey's exception to rule 99.*

This rule states "The courts of a foreign country where the parties to a marriage are not domiciled have jurisdiction to dissolve their marriage, if the divorce granted by such courts

[21] *Op. cit.*, p. 80.
[22] *Ibid.*
[23] The italics are mine.
[24] *Op. cit.*, p. 81.

would be held valid by the courts of the country where at the time of the proceedings for divorce the parties are domiciled".

Mr. Morris contends that [25] "*Armitage* v. *A.-G.* is no authority whatever for this supposed rule, because the President found *as a fact* [26] that Mrs. Gillig was domiciled in South Dakota at the date of the proceedings there, whereas the rule requires that she should have been domiciled in New York". With due respect, I am utterly unable to see that the learned President found anything of the sort. How could he possibly have found that Mrs. Gillig was domiciled in South Dakota — "as a fact" or as anything else — when, according to English law, Mr. (and therefore Mrs.) Gillig was domiciled in New York and a person cannot have more than one domicile at the same time? Actually, the President states explicitly in his judgment that Gillig was domiciled in New York and not in South Dakota — *in fact, this was the basis for the whole decision.* "Are we [says the President [27]] to recognize in this country the binding effect of a decree *obtained in a state in which the husband is not domiciled, if the courts of the state in which he is domiciled recognize the validity of that decree?*"[28] And he answers the question [29] "In my view, this question must be answered in the affirmative. It seems to me impossible to come to any other conclusion, because the status is affected and determined by the decree that is recognized in the state of New York— *the state of the domicile* [30] as having affected and determined it."

I am therefore in complete disagreement with Mr. Morris's contention. In support of it he quotes Mr. Barratt,[31] who, in a discussion at the Grotius Society in 1931, said, in reference to Dicey's exception to rule 99, that the case of *Armitage* v. *A.-G.* does *not* support it, since "the President found as a fact that the wife had acquired a bona fide permanent domicile in South Dakota and had abandoned all intention of living in England". With due respect, I would again point out that her intention of living in England had nothing whatever to do with the case. She was domiciled in New York, because her husband was domiciled in New York, and the "bona fide permanent domicile" as Mr. Barratt describes it — in South Dakota was nothing more than a bona fide residence sufficient in the eyes of the New York courts to entitle the decree to their recognition. It was no more a domicile

[25] *Ibid.*
[26] The italics are mine.
[27] [1906] P. 135, at p. 141.
[28] The italics are mine.
[29] [1906] P. 135, at p. 141.
[30] The italics are mine.
[31] *Op. cit.*, p. 81.

in the English sense, and recognizable by the English courts, than it would have been if the parties had gone to Reno, stayed for six weeks, obtained their decree there and then returned to New York. No one would dream of contending that *on these facts alone* such a divorce should be recognized in England; however, it is at this point that the *Armitage* case comes into play: according to it, if the courts of New York — their domicile (*i.e.* the domicile which the English courts recognize) — accept such a decree as valid, then the English courts will follow suit. Mr. Barratt has committed the same error of taking a *fact* as found by the court — *viz.* that the New York courts would have held Mrs. Gillig to be domiciled in South Dakota (in the New York sense) and would therefore have recognized the South Dakota decree — and transferring it bodily into the realm of *law*, by saying that the English court found that Mrs. Gillig was domiciled in South Dakota, and concluding that this was the basis for the English court's decision. There is nothing whatever in the judgment to warrant such a jump and, moreover, it results in a total confusion of the whole issue. This is amply demonstrated in the hypothetical case which Mr. Morris gives on pages 83-4 of his article, and the conclusion he draws therefrom. He postulates the case of a husband and wife, married and domiciled in Pennsylvania. The wife acquires a domicile in Nevada — in the Pennsylvania sense, but not in the English or Canadian sense, because the husband remains domiciled in Pennsylvania — and obtains a divorce from the Nevada court. According to the Full Faith and Credit Clause of the Constitution the Nevada divorce would be recognized in every state of the Union (provided that this "domicile" in Nevada was bona fide). From here, as far as English courts were concerned, it would all seem plain sailing and, under the doctrine of *Armitage* v. *A.-G.*, English or Canadian courts should recognize the Nevada decree: but Mr. Morris, with his two "domiciles" in mind, cannot accept this. "But how" he says [32] "could a Canadian or English court recognize the Nevada decree (under the doctrine of *Armitage* v. *A.-G.*) on the ground that Pennsylvania recognizes it, without first abandoning its Conflict rule that the wife is domiciled (in the Canadian or English sense) in Pennsylvania?" With due respect, there is no contradiction between recognizing the decree under the doctrine of *Armitage* v. *A.-G.* and holding to the conflict of laws rule that the wife is domiciled (in the English sense) in Pennsylvania; in fact, the application of the doctrine of *Armitage* v. *A.-G.* depends here for its validity on the fact that the wife *was* domiciled in Pennsylvania (or at least in some state which

[32] *Ibid.*, p. 84.

recognizes the Nevada decree). The steps in the reasoning would be as follows: The wife is domiciled — according to English law — in Pennsylvania. Pennsylvania will recognize the Nevada decree, because Pennsylvania deems the wife to be a bona fide resident (or domiciliary) of Nevada at the time of the decree. Therefore the English court will follow the Pennsylvania court — *the court of the domicile* — and will also recognize the decree.

The apparent difficulty which Mr. Morris finds arises from the error of confusing the two kinds of "domicile" and the whole case is thereby made to appear contradictory. Mr. Morris, in fact, heads this part of his article with the title "Where the conflict is between domicile in two different senses". I submit that there is no conflict at all if we keep the two concepts separate (as, indeed, they are) — the one being the domicile *according to English law* of the parties at the time of the decree and the other, the bona fide residence of the wife or husband in the state granting the decree *according to the law of the domicile,* which is the *reason* for the recognition of such decree by the courts of that domicile.

Bearing the above in mind, we can now turn to Mr. Morris's criticism [33] of my treatment [34] of the case of *Henderson* v *Muncey,*[35] which was a case in British Columbia of breach of promise of marriage. The defence was that, at the time of the alleged contract in 1933, the plaintiff was a married woman and therefore could not enter into a valid contract to marry. This the plaintiff denied, alleging that she had been divorced from her husband in 1923 by a decree granted by the courts of the state of Oregon. The case therefore turned upon the question as to whether or not the courts of British Columbia would recognize this Oregon divorce. Her husband's domicile of origin was Michigan, but the British Columbia court held that, at the time of the alleged divorce, he was actually domiciled in Oregon and therefore that the divorce was recognizable by British Columbia as valid.

In the article referred to above [36] I argued that the British Columbia court need not have gone to all the trouble to find out whether the husband was domiciled in Michigan or in Oregon, since the same result should have ensued in either case. If he was domiciled in Oregon, the British Columbia courts would recognize the divorce, as having been granted by the courts of the domicile (which was what the court actually held). If,

[33] *Ibid.*

[34] Can We Afford to Ignore the American Law of Divorce? (1944), 22 Can. Bar Rev. 62.

[35] [1943] 2 W.W.R. 120, [1943] 3 D.L.R. 515; [1943] 3 W.W.R. 242, [1943] 4 D.L.R. 758.

[36] See footnote 34.

however, he was domiciled in Michigan, then, according to the Full Faith and Credit Clause of the United States Constitution, Michigan would have been bound to recognize the Oregon divorce.[37] Applying now the principle of *Armitage* v. *A.-G.*: since the courts of the domicile (in this case, Michigan) recognize this Oregon divorce, the British Columbia courts should also recognize it.

However, Mr. Morris will not allow this argument. He writes as follows:[38]

> With all respect to Professor Tuck, I cannot follow his argument. If the British Columbia court had found that the plaintiff's husband was domiciled in Michigan, I do not see how it could have recognized an Oregon divorce predicated on an Oregon domicile in the Michigan sense without first abandoning its Conflict rule that the husband was domiciled in Michigan in the British Columbia sense. You cannot have it both ways; either the husband was domiciled in Oregon or he was domiciled in Michigan. If he was domiciled in Michigan, Oregon had no jurisdiction to divorce him. Whether he was domiciled in Oregon or Michigan was a matter for the British Columbia court to decide for itself; the view of the Michigan law should have been irrelevant.

With respect, I submit that here again we have the same confusion running through the whole treatment. Of course "you cannot have it both ways", but I am not for one moment suggesting that we should. I quite agree that "either the husband was domiciled in Oregon or he was domiciled in Michigan", similarly that "whether he was domiciled in Oregon or in Michigan was a matter for the British Columbia court to decide for itself". It *did* decide for itself — that he was domiciled in Oregon. But if it had decided that he was domiciled in Michigan, then, Mr. Morris says, "Oregon had no jurisdiction to divorce him". Why not? Actually, in such a case, we cannot say whether Oregon has such jurisdiction or not until we have answered the preliminary question — *will Michigan recognize that Oregon divorce?* If so, then, according to *Armitage* v. *A.-G.*, British Columbia must also recognize it, since Michigan is the state of the domicile. The British Columbia court does not "abandon its Conflict rule that the husband was domiciled in Michigan in the British Columbia sense". *On the contrary, the domicile in Michigan is the very basis for the decision* and it makes no difference to the result of the case that the Michigan recognition was "predicated on an Oregon domicile in the Michigan sense" any more than it would if such recognition had been predicated on the fact that both husband and wife had submitted to the jurisdiction of the Oregon court.

[37] This is the rule laid down in *Williams* v. *North Carolina* No. 1 (1942), 317 U.S. 287—and later qualified by No. 2 (1945), 325 U.S. 226 (see *infra*).

[38] *Op. cit.*, p. 84.

That is merely the *reason* for Michigan's recognition and should have no effect whatever upon the English law on the subject.

Neither can I allow the further claim of Mr. Morris [39] that:

> The Supreme Court of the United States has further falsified Professor Tuck's argument by deciding, in *Williams* v. *North Carolina* No. 2, 325 U.S. 226, that Michigan would not be constitutionally bound to recognize the Oregon divorce unless Michigan found for itself that the husband was domiciled in Oregon.

With due respect, I submit that the decision in this case has not falsified my argument in the slightest degree. The case of *Williams* v. *North Carolina* No. 2 [40] merely "tightened up" *Williams* v. *North Carolina* No. 1,[41] as far as recognition of divorce granted in another state of the Union was concerned. In the No. 1 case the Supreme Court of the United States held that, according to the Full Faith and Credit Clause of the Constitution, the courts of North Carolina must recognize a decree of divorce obtained in Reno, Nevada. It assumed that the parties were bona fide resident or domiciled there,[42] and no question of a sham domicile was raised, though, clearly, the "domicile" in Nevada for six weeks only (just to get the divorce) was not a bona fide one. In the No. 2 case it was held that North Carolina need not recognize this divorce, since the parties were really not domiciled in Nevada in the North Carolina sense. In other words, North Carolina need not recognize the divorce unless it finds for itself that the husband or wife was domiciled in Nevada. *But this does nothing to detract from the principle of Armitage* v. *A.-G.* This principle comes into play only after it is found that the North Carolina courts *will* recognize such a divorce. Then, as North Carolina is the state of the domicile (according to English law), English or Canadian courts will also give such a divorce their recognition.

If, of course, the decision in *Armitage* v. *A.-G.* is wrong, then my whole argument falls to the ground. But on the assumption that the decision stands (and we must assume this unless and until it is overruled), then I am unable to follow any part of Mr. Morris's argument. I fully agree with him that if we invoke the doctrine of *Armitage* v. *A.-G.* in the *Williams* v. *North Carolina* situation (assuming that North Carolina *does* recognize this

[39] *Ibid.*, footnote 58 on p. 85.
[40] (1945), 325 U.S. 226.
[41] (1942), 317 U.S. 287.
[42] Both terms are used in the judgments. Mr. Justice Frankfurter talks about "Nevada residents" rather than Nevada domiciliaries—at p. 307, while Mr. Justice Douglas says "The provision of the Nevada statute that a plaintiff in this type of case must 'reside' in the state for the required period requires him to have a domicile, as distinguished from a mere residence in the state"—at p. 298.

"tourist divorce"[43]), "so as to give validity in England or Canada to a Nevada divorce, the tendency would be for the divorce law of Nevada to become the law not only of the United States, but of the whole world".[44] We must remember, however, that if we repeal or overrule *Armitage* v. *A.-G.*, then, in such cases, husbands and wives will be divorced in the United States (in *all* the states), but still married in England or Canada, which situation it is the very object of the conflict of laws to avoid. In this connection may I again urge the necessity for reciprocal legislation between the countries — at least of the British Commonwealth of Nations — to enable a deserted wife to obtain a divorce in countries other than that of her husband's domicile, in order to avoid perpetuating grave injustices of the kind outlined by Mr. Morris in his article.[45] As the situation stands to-day, invoking *Armitage* v. *A.-G.* would be of no use whatsoever in such cases.

In conclusion I submit, therefore, on the basis of the foregoing, that the rule in *Armitage* v. *A.-G.* is legally perfectly sound and that the principle which it lays down is in accord with the aim and purpose of the conflict of laws.[46] Furthermore, I take exactly the same stand on the case of *Henderson* v. *Muncey* as I took three years ago in the above-mentioned article.

THE MAKING OF A STATESMAN

Now he could not walk away when he was bored. He listened, and out of it learned what he later held with such conviction as a basis of action — that 'everybody wants to have the sense of belonging, of being on the inside,' that 'no one wants to be left out,' as he put it years later in a Columbus, Ohio, speech. He learned that people are afraid of insecurity and that they cling to small accustomed activities. He learned that only a few are ambitious. He became thoroughly familiar with the concept that good and evil, hope and fear, wisdom and ignorance, selfishness and sacrifice, are inseparably mixed in most human beings. (Francis Perkins: The Roosevelt I Knew. New York: The Viking Press. 1946)

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[43] See Mr. Justice Jackson's ironical criticism in his dissenting opinion in the case.

[44] *Op. cit.*, p. 86.

[45] See also my article, Let No Court Put Asunder (1944), 22 Can. Bar Rev. at p. 691, and the controversy between Mr. A. J. Wickens, K.C., and myself in (1945), 23 Can. Bar Rev. 244.

[46] *Cf.* Falconbridge "I still adhere to the opinion expressed in (1943), 21 Can. Bar Rev. 135, that the doctrine [of *Armitage* v. *A.-G.*] is logically and socially justified". —(1945), 23 Can. Bar Rev. 595, footnote 15.