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CONFLICTS OF LAW-DIVORCE-CANADIAN CHOICE OF LAW

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COMMENTS

CONFLICTS OF LAW—DIVORCE—CANADIAN CHOICE OF LAW—A judge of a Canadian court, when determining his jurisdictional authority to award a valid divorce decree, employs a rather simple standard:

Is the domicile of the parties seeking the divorce within the forum?¹ As the husband's domicile is considered to be the controlling one in determining the domicile of the parties,² the judge may properly decree a divorce consistent with the jurisdictional requirements when he finds that the domicile of the husband is within the forum. In his finding of domicile, of course, he will use the law of the forum.³

When the problem confronting the judge is one of recognizing a divorce decree awarded by a foreign state, then once again the domiciliary concept will be used to determine the jurisdictional competency of the court making the award. The foreign divorce decree will be accepted as lawful and proper if it was given by the court of the husband's domicile or if the decree is one which would be accepted as valid by that court.⁴ The authority underlying the latter proposition originates in the case of *Armitage v. Attorney-General*.⁵ It is the purpose of this comment to examine briefly the doctrine of that case and its implications, with special reference being made to the problems that may arise in connection with the current United States divorce law.

I. *The Armitage Doctrine*

The case of *Armitage v. Attorney-General* was commenced by a petition brought by Mrs. Armitage under the Legitimacy Declaration

¹ A person versed in Canadian law may protest the over-simplification of jurisdictional requirements as set forth in the suggested standard. It is undoubtedly true that there are further implications and factors that must be considered, but the purpose here is to set forth the basic standard. See READ, *RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS* 201 (1938); POWER, *LAW OF DIVORCE IN CANADA* 285 (1948); A. J. Wickens and R. Tuck, "Recognition of Foreign Divorces—Domicile," 23 *CAN. B. REV.* 244 (1945). There have been some significant statutory developments in this field, and they must be taken into consideration in dealing with this problem. FALCONBRIDGE, *CONFLICTS OF LAW* 613 (1947). England, whose divorce pattern is somewhat similar to Canada's, has recently adopted some far-reaching legislation. An excellent discussion of this legislation may be found in an article by Graveson, "Jurisdiction, Unity of Domicile and Choice of Law Under the Reform Act, 1949," 3 *INT. L. Q.* 371 (1950).

² *Attorney-General for Alberta v. Cook*, [1926] A.C. 444, 2 D.L.R. 762, 1 W.W.R. 742.

³ POWER, *LAW OF DIVORCE IN CANADA* 128 (1948); Morris, "Recognition of Divorces Granted Outside the Domicile," 24 *CAN. B. REV.* 73 at 80 (1946).

⁴ The alternative basis which the courts will use in determining whether to recognize a foreign divorce is usually cast in this language. Dicey seems to have gone farther than any writer in his statement that a foreign divorce of a state where the parties were not domiciled would be accepted so long as the state where the parties were domiciled would so accept it. DICEY, *CONFLICTS OF LAW*, 5th ed., Exception I to Rule 99, p. 430 (1932). This position was challenged by many writers, notably Morris, "Recognition of Divorces Granted Outside the Domicile," 24 *CAN. B. REV.* 73 at 81 (1946). On a revision of Dicey, Mr. Morris was responsible for this material, and the text of Dicey has now been changed to the more accepted view. DICEY, *CONFLICTS OF LAW*, 6th ed., Exception I to Rule 72, p. 376 (1949).

⁵ [1906] P. 135, 22 T.L.R. 306.

Act⁶ asking for a declaration of validity of her second marriage. In order that the court might determine the validity of this second marriage it was found necessary to settle the validity of a divorce secured by the petitioner from her husband in a state other than his domicile. The court concluded, after inspecting New York law, New York being the domicile of the husband at the time of the decree, that the South Dakota decree obtained by the wife would be accepted by New York. Consequently, the court felt compelled to hold that the marriage relationship had been effectively dissolved "all over the world."⁷

The wisdom and good sense of this decision has been acclaimed since the day of its rendition.⁸ The arguments in favor of the doctrine have taken many forms. Some writers support the doctrine on the basis that it is a logical result of the common law theory that the marriage relationship is a matter of status and that only the domiciliary court should be allowed to vary or change it.⁹ Others suggest that its foundation lies in the theory of *renvoi*, with the forum looking to the law of the domicile in making its determinations in respect to the question before it.¹⁰ Others compare it to the usual enforcement in personam of a judgment rendered in another foreign state.¹¹ The doctrine has not gone completely without challenge, but the primary attack of those who contest it is directed at the reasoning of the court and not with the policy which the decision incorporates.¹²

Although the *Armitage* doctrine has been the subject of a great deal of scholarly debate and discussion, it has enjoyed relatively limited use

⁶ 21 & 22 Vict., c. 93 (1858).

⁷ This is the language used by the court in its opinion. [1906] P. 135 at 142.

⁸ 2 JOHNSON, *CONFLICTS OF LAW WITH SPECIAL REFERENCE TO THE LAW OF QUEBEC* 85 (1934); CHESNIRE, *PRIVATE INTERNATIONAL LAW*, 3d ed., 481 (1947); 1 BEALE, *CONFLICT OF LAWS* 470 (1935).

⁹ Such an argument seems to be implicit in FOOTE, *PRIVATE INTERNATIONAL LAW*, 5th ed., 145 (1925).

¹⁰ Griswold, "Renvoi Revisited," 51 *HARV. L. REV.* 1165 (1938); READ, *RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS* 216 (1938). Professor Falconbridge, an accomplished scholar in this field of the law, once supported the idea of *renvoi* as the basis of the doctrine. He has since rejected the idea. FALCONBRIDGE, *CONFLICTS OF LAW* 621 (1947).

¹¹ Professor Falconbridge suggests that this might be the foundation of the doctrine. He speaks of it in terms of an "analogous case." FALCONBRIDGE, *CONFLICTS OF LAW* 621 (1947).

¹² BATY, *POLARIZED LAW* 66 (1914); Schreiber, "Doctrine of Renvoi in Anglo-American Law," 31 *HARV. L. REV.* 523 at 560 (1918). The most effective criticism of the doctrine has been made by Morris, "Recognition of Divorces Granted Outside the Domicile," 24 *CAN. B. REV.* 73 (1946). His main criticism is with an alleged inconsistency by the court in respect to domicile. He contends that the court should not at one time say that the domicile of the wife is with the husband and also that the domicile of the wife may be apart from the husband. He says at 84, "You cannot have it both ways."

by the courts.¹³ Even more striking than the limited application is the fact that in all the previous cases where it has been used the courts have found that the state of the husband's domicile would not accept the foreign decree and hence the forum state should not accept it.¹⁴ *Walker v. Walker*,¹⁵ a case recently decided by the British Columbia Supreme Court, is especially noteworthy because it not only applies the doctrine but, what is more, it finds that the state of the husband's domicile would be obliged to accept the foreign decree. In this case, a petition was brought by the second husband of the defendant praying for an annulment¹⁶ of their marriage on the grounds that the defendant had never been legally divorced from her first husband. On the trial of the action it appeared in evidence that the defendant had been married to one Johnson, whose domicile was in California. Marital difficulties having arisen between the parties, the defendant left the husband Johnson, journeyed to Nevada, and took up residence in that state. Defendant continued to reside in Nevada for some six weeks, and then she filed suit in the Nevada court asking for a divorce from Johnson. In this proceeding Johnson filed an appearance and waiver¹⁷ but never personally appeared in court. The Nevada court awarded the defendant a divorce after finding as a fact that she had been domiciled in the state for the requisite statutory period. The British Columbia court denied the petition brought in the principal case on the grounds that there had been a lawful divorce between the defendant and her first husband, basing its decision on California law which it found would be obliged to accept the Nevada divorce under compulsion of the United States Constitution.

¹³ There appear to be only three cases where the doctrine is used as authority. *Owen v. Robinson*, [1925] N.Z.L.R. 591 (the court found that the state of New York would not accept a Nevada divorce); *Wyllie v. Martin*, 44 B.C.R. 486 (1931) (the court found that Oregon would not accept a California divorce); *Cass v. Cass*, [1910] P. 1, 26 T.L.R. 305 (the court found that Massachusetts would not accept a South Dakota divorce). In *Clark v. Clark*, [1921] 37 T.L.R. 815, the court followed the Armitage doctrine and did find that New York would accept a French decree.

¹⁴ This is true in those cases where the Armitage doctrine was really in issue. In *Clark v. Clark*, [1921] 37 T.L.R. 815, there was an uncontested suit and so the authority is somewhat doubtful on this very proposition.

¹⁵ [1950] 2 D.L.R. 90.

¹⁶ The various problems arising in the annulment actions will not be discussed in this comment. Attention of the interested reader is directed to an excellent article by Professor Falconbridge dealing with annulment. "Annulment Jurisdiction and Law: Void and Voidable Marriages," 26 CAN. B. REV. 907 (1948).

¹⁷ The pertinent provisions of this document are "The undersigned . . . does hereby submit himself to the jurisdiction of the Second Judicial District Court of the State of Nevada . . . hereby waives all time to demur, answer or otherwise plead . . . and further waives service of all notices and process required by law in the premises." Principal case at 92.

II. *United States Divorce Law*

In the United States vast changes have occurred within the past decade with respect to our thinking concerning the final and conclusive effect in one state of a divorce decree awarded in a sister state.¹⁸ As may be readily recognized from *Walker v. Walker*, the effects of this change are not limited to the states within the United States but may have extraterritorial effects influencing decisions of courts not directly affected by the United States Constitution.¹⁹ The troublesome point of inquiry is in finding the degree of influence which is exerted. Is there any means of foretelling with any degree of accuracy the position which will be taken by a Canadian court, assuming we know the position of the domiciliary state court? Will the result in a Canadian decision in respect to a certain set of facts be the same as would be made in a state court of the United States other than the domiciliary state? In answering these questions, three different fact situations may be examined.²⁰

1. Suppose that *H* and *W* make their home in State *X* so that each is personally subject to the jurisdiction of State *X*. *W*, becoming dissatisfied with *H*, brings suit in a court of State *X* seeking a divorce. *H* is served with process and enters a defense in the proceedings. The court of State *X* awards a divorce to *W*. Later, in a suit between *H* and *W* in the courts of State *Y*, the validity of the divorce in State *X* is brought in question. May either of the parties make an attack on the *X* decree on the theory that the court lacked jurisdiction? A negative reply seems to be the proper one. It now appears clear that a court in

¹⁸ The legal periodicals have contained many pages of articles dealing with this change in attitude. In general, the quality of these articles has been very high, and every aspect of the problem is discussed in one manner or another. Although no attempt will be made here to give an extensive citation of these articles, the following are offered as representative. Bingham, "Song of Sixpence," 29 *CORN. L. Q.* 1 (1943), reprinted in *SELECTED ESSAYS ON FAMILY LAW* 1075 (1950); Powell, "And Repent at Leisure," 58 *HARV. L. REV.* 930 (1945); Lorenzen, "Extraterritorial Divorce—*Williams v. North Carolina*: II," 54 *YALE L. J.* 799 (1945), reprinted in *SELECTED ESSAYS ON FAMILY LAW* 1100 (1950); Carey and Mac Chesney, "Divorce by the Consent of the Parties and Divisible Divorce Decrees," 43 *ILL. L. REV.* 608 (1948); Address by H. F. Goodrich, 72 *N.Y. STATE BAR ASSN. REPORT* 177 (1949); Holt, "The Conflicts of Law in Divorce," *UNIV. OF ILL. LAW FORUM* 625 (1949); Baer, "The Aftermath of *Williams v. North Carolina*," 28 *N. C. L. REV.* 265 (1950).

¹⁹ An illustration of this may be found in an article by Ralph Tuck, "Can We Afford To Ignore the American Law of Divorce," 22 *CAN. B. REV.* 62 (1944).

²⁰ It is well to keep in mind that our problems are restricted to the case where the divorce decree was rendered by a state other than that of the husband's domicile. If the decree is rendered by the husband's domicile, then the Canadian courts will accept it without further challenge by reason of the *Armitage* doctrine. However, American law would not distinguish the case where the divorce was rendered by the husband's domicile from that where rendered by the wife's domicile.

one state may not challenge the decree awarded by another state when the decree is brought in issue in a suit between the original parties to the foreign suit,²¹ and this is true whether the issue of jurisdiction was litigated or not.²²

The position taken by the courts in these circumstances is founded on the doctrine of *res judicata*. In the field of divorce, as in other fields of law,²³ there is a strong feeling that there should not be endless litigation of an issue which may be settled by virtue of the appeal process. It is part and parcel of the idea that justice demands a "day in court" for every litigant on a matter, but after this opportunity has been afforded, the issue should be closed off from further litigation.²⁴

A Canadian court, handling the question by referring to the approach taken by the domiciliary court, would reach the same result. In this particular fact situation we find uniformity of result in regard to the disposition of the case among the Canadian court, the domiciliary court, and a court of a sister state of the domiciliary state located in the United States.

2. Suppose the same set of facts as outlined in (1) above, but vary them in regard to the person making the attack on the X decree. Suppose S married W after she had been divorced, and now S brings suit in State Y in which he attacks the validity of the X decree on the grounds that the court had no jurisdiction. Will this party be prevented from attacking the decree?

This is essentially the fact situation presented in *Walker v. Walker*. The court there prevented the attack, relying on California law which it found expressed in *Heuer v. Heuer*.²⁵ In the *Heuer* case, however, the real fighting issue was between the parties to the original action where the decree was issued. Therefore, there is an important factual distinction between the cases, and it is submitted that *res judicata* which was the foundation of the *Heuer* case should not be relied upon in the

²¹ *Davis v. Davis*, 305 U.S. 32, 59 S.Ct. 3 (1938).

²² *Sherrer v. Sherrer*, 334 U.S. 343, 68 S.Ct. 1087 (1948); *Coe v. Coe*, 334 U.S. 378, 68 S.Ct. 1094 (1948). Comment on these cases may be found in 11 *Md. L. Rev.* 143 (1950). An interesting case dealing with fraud in these circumstances is *Chirelstein v. Chirelstein*, (1950 N.J. Sup. Ct.) 73 A. (2d) 628.

²³ *Baldwin v. Iowa State Travelling Men's Association*, 283 U.S. 522, 51 S.Ct. 517 (1931); *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 60 S.Ct. 907 (1940).

²⁴ "Courts to determine the rights of parties are an integral part of our system of government. It is just as important that there should be a place to end as that there should be a place to begin litigation. After a party has his day in court, with opportunity to present his evidence and his view of the law, a collateral attack upon the decision as to jurisdiction there rendered merely retries the issue previously determined." *Stoll v. Gottlieb*, 305 U.S. 165 at 172, 59 S.Ct. 134 (1938).

²⁵ 33 Cal. (2d) 268, 201 P. (2d) 385 (1949).

Walker case. This is consistent with the usual attitude that *res judicata* is applicable only to the parties to the original action.²⁶

One theory which might be advanced to prevent attack by the second spouse is that of estoppel. This theory is used to prevent attack by the original parties, on the grounds that a person should not be allowed to take inconsistent positions in regard to the same fact in two different lawsuits.²⁷ The majority of the courts have not used estoppel as to the second spouse, though a few have used it when bad faith is present.²⁸ The California law in regard to estoppel in these circumstances is not clear, but estoppel was used to prevent an attack by the second spouse when he alleged that the foreign decree was fraudulent.²⁹

In this fact situation we see that the courts may take inconsistent positions with respect to one another. The domiciliary court, and the Canadian court by reason of following the domicile, may apply estoppel and prevent attack while the sister state of the domicile would not estop any attack.

3. Suppose *W* brings suit in State *X* asking for a divorce from *H*, but *H* is not personally subject to the jurisdiction of State *X* and makes no appearance in the proceedings. State *X* makes a finding that *W* has met the statutory requirements of State *X* and has a domicile within the state, and thereafter awards a divorce to *W*. Later, in an action in State *Y*, the validity of the decree is challenged. Is State *Y* allowed to accept or reject the *X* decree, or is it obliged to accept it as final and conclusive? It now seems clear that under the full faith and credit clause of the United States Constitution one state must accept as final a decree of divorce awarded in a sister state where one of the parties to the marriage relationship was domiciled, but the forum may determine for itself

²⁶ GOODRICH, *CONFLICTS OF LAW* 630 (1949). A recent case dealing with *res judicata* in divorce proceedings as applied to third parties is *Johnson v. Muelberger*, (U.S. 1951) 71 S.Ct. 474.

²⁷ *Krause v. Krause*, 282 N.Y. 355, 26 N.E. (2d) 290 (1940). An excellent discussion of the whole field of estoppel, with extensive citation of authorities, may be found in 61 *HARV. L. REV.* 326 (1948).

²⁸ The number of cases which have appeared in this field may make it unwise to attempt stating a majority rule. The following indicate there should be no estoppel: *Swanston v. Swanston*, 82 N.Y.S. (2d) 454 (1948); *Rosenberg v. Perles*, 182 Misc. 727, 50 N.Y. S. (2d) 24 (1944); *Lane v. Lane*, 188 Misc. 435, 68 N.Y.S. (2d) 712 (1947); *Hughey v. Ray*, 207 S.C. 374, 36 S.E. (2d) 33 (1945). *Contra*, *Gaylord v. Gaylord*, (Fla. 1950) 45 S. (2d) 507; *Mussey v. Mussey*, 251 Ala. 439, 37 S. (2d) 921 (1948). Comment on third party attack may be found in 6 *WASH. & LEE L. REV.* 184 (1949); 61 *HARV. L. REV.* 326 at 332 (1948).

²⁹ The California cases have been somewhat restricted to the facts of the principal case, and we are unable to forecast definitely the California decision on this precise point. Cf. *Rediker v. Rediker*, 35 Cal. (2d) 796, 221 P. (2d) 1 (1950) and *Mumma v. Mumma*, 86 Cal. App. (2d) 133, 194 P. (2d) 138 (1948).

whether there was in fact domicile within the foreign state.³⁰ The primary dispute which is evident in state reports now concerns the domicile question, there being a divergence of views as to the necessary fundamentals to establish domicile.³¹

In determining the position which the Canadian court is likely to take in this fact situation, it is necessary to refer to the language of the opinion in *Walker v. Walker*. The court repeatedly and emphatically declared that there should be no retrial of a finding of fact made by the Nevada court.³² At the same time the court stated that they would determine the question according to the "laws of California."³³ It is submitted that their refusal to re-try determinations of fact by the Nevada court is inconsistent with both the *Armitage* doctrine and the laws of California. Any state in the United States will examine the question of whether or not there was a domicile within the foreign state.³⁴ The very basis of the American law demonstrates the importance of going into the evidence of foreign domicile, since in the first *Williams* case³⁵ the forum was obliged to accept the finding of foreign domicile and could not successfully prosecute for bigamy. In the second *Williams* case,³⁶ the ability to look at the question of foreign domicile was the factor which allowed the successful suit. Although there is a certain amount of variation among the state courts as to the degree of presumption which will be accorded a foreign finding of domicile,³⁷ this

³⁰ *Williams v. North Carolina*, 325 U.S. 226, 65 S.Ct. 1092 (1945); *Parker v. Parker*, 335 Ill. App. 293, 81 N.E. (2d) 745 (1948); *Welker v. Welker*, 325 Mass. 738, 92 N.E. (2d) 373 (1950); *Boardman v. Boardman*, 135 Conn. 124, 62 A. (2d) 521 (1948); *Smith v. Smith*, 364 Pa. 1, 70 A. (2d) 630 (1950); *Broemmer v. Broemmer*, (St. Louis App., 1949) 219 S.W. (2d) 300 (1949).

³¹ *Standish v. Standish*, 179 Misc. 564, 40 N.Y.S. (2d) 538 (1943), in which the court said, at 570, that there might be "rejection of a sister state default decree of divorce against a New York State domiciliary in any case where it is apparent that the tourist plaintiff cocked one eye askance at the examining Justice while solemnly swearing intention to remain permanently in the divorce forum State and with the other eye anxiously watched the court room clock in nervous concern about catching the afternoon train 'back home.'" See also, *Brasier v. Brasier*, 200 Okla. 689, 200 P. (2d) 427 (1948); *Rodda v. Rodda*, 185 Ore. 140, 200 P. (2d) 616 (1948); *Bean v. Bean*, 95 N.Y.S. (2d) 477 (1950); *Gage v. Gage*, (D.C. D.C. 1950) 89 F. Supp. 987; *Lawler v. Lawler*, 2 N.J. 527, 66 A. (2d) 855 (1949); *Royal v. Royal*, 324 Mass. 613, 87 N.E. (2d) 850 (1949); *Neal v. Neal*, (Ohio Com. Pl. 1949) 85 N.E. (2d) 147.

³² Principal case at 95, 96.

³³ Principal case at 96.

³⁴ See cases cited in notes 30 and 31 supra. *Morton v. Morton*, (Dom. Rel. Ct. of N.Y., 1950) 99 N.Y.S. (2d) 155, suggests this idea when it remarks that the domicile problem is an additional element in burden of proof.

³⁵ 317 U.S. 287, 63 S.Ct. 207 (1942).

³⁶ 325 U.S. 226, 65 S.Ct. 1092 (1945).

³⁷ See cases cited in notes 30 and 31 supra. Also, *Commonwealth v. McCormack*, 164 Pa. Super. 553, 67 A. (2d) 603 (1949). An important element in every case where the court is asked to overthrow a marriage on the charge that there had been no prior effective

writer has not found a single case where the court has entirely refused to go into the question.

The refusal of the court to re-try Nevada findings does not seem to be compelled by the original case. In the *Armitage* case, the court found as a fact that Mrs. Armitage acquired a South Dakota domicile.³⁸ The other cases which have dealt with the *Armitage* case have not discussed retrial of findings of fact, but this is not controlling, as never before have the findings been the important element in deciding the question. It is probably true that a retrial of findings of fact will involve the Canadian court in a number of complications and problems, but this is likewise true in state courts in the United States and it has not proved so burdensome as to warrant a refusal to perform the task.

In this fact situation we find that the Canadian court would handle the case in a different manner than would a state court in the United States. What is more striking, however, is the fact that the Canadian court would probably dispose of the case differently than would the domiciliary court itself. It is this unfortunate situation to which the court in the original *Armitage* case directed itself and which it tried to prevent.

III. Conclusion

Various writers³⁹ have suggested that some new scheme be adopted to deal with the problems connected with the recognition of foreign divorce decrees. In the past it has been possible to meet these arguments by pointing out that the forum is determining the matter as would the state where the parties are domiciled, and, in so doing, produces a satisfactory result. However, the British Columbia court may have so lim-

divorce is the thought expressed in the following opinion: "From a pragmatic viewpoint, judicial invalidation of irregular foreign divorces and attendant remarriages, years after both events, is a less than effective sanction against an institution whose charm lies in its immediate respectability." *Goodloe v. Hawk*, (D.C. Cir. 1940) 113 F. (2d) 753 at 757. In this regard it is important to notice the Uniform Divorce Recognition Act which California adopted in 1949. The code sets up certain facts which will be prima facie evidence that the person in question was domiciled within the forum. This is especially important in view of California's rule that presumption should be considered evidentiary. A discussion of these possibilities and a serious inquiry as to the constitutionality of the act may be found in an article by Ruymann, "California's New Uniform Divorce Recognition Act," 15 *NEVADA STATE B. J.* 126 (1950).

³⁸ Discussed in Lacey, "Some International Aspects of Divorce and Nullity," 17 *GROTIUS SOCIETY PROCEEDINGS* 113, 133 (1932).

³⁹ COOK, *LOGICAL AND LEGAL BASES OF THE CONFLICTS OF LAW* 466 (1942); Gutteridge, "Conflicts of Jurisdiction in Matrimonial Suits," 18 *BRIT. Y.B. INT. L.* 19, 38 (1938); Cheshire, "The International Validity of Divorces," 61 *L. Q. REV.* 352 (1945); Morris, "Recognition of Divorces Granted Outside Domicile," 24 *CAN. B. REV.* 73 at 86 (1946).

ited the *Armitage* doctrine that one may no longer make such a reply. If the conclusions of that court are to become real and lasting limitations in the application of the doctrine, then it may be wise to examine more seriously the alternative proposals of these writers.

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