THE RECOGNITION OF FOREIGN DIVORCES

A volte-face in the House of Lords

Revolution is in the air, even in the august atmosphere of the House of Lords. In zealous exercise of its recent — and self-conferred — power to overrule its own decisions, in *Indyka* v. *Indyka*[1] the House reviewed the leading cases relating to the recognition, by English courts, of foreign decrees of divorce and has made it possible or even imperative for those courts now to recognise the validity of many foreign decrees which, before *Indyka,* they would have had no hesitation in rejecting. Since most members of the House were critical of the reasoning which ultimately led the English courts, since judicial dissolution of marriage became possible in 1857, to the conclusion that the jurisdiction *must* be founded on the domicile of the parties and (apart from a very few instances of later statutory and sometimes temporary modification) on domicile alone and on a genuine domicile at that, it may well be that English courts will in future entertain petitions for divorce more readily where the parties are not domiciled in England. A careful reading of *Indyka* leads to the conclusion that both the Court of Appeal and the House of Lords were primarily concerned with the problem of so-called "limping"[2] marriages and were determined to resolve it; but it is submitted that in consequence of the decision in the House of Lords English courts must be prepared to exercise their own divorce jurisdiction on bases other than or in addition to domicile.

The factual story of *Indyka* begins in 1938, the litigious in England in 1966. In January 1938 Rudolph Indyka married Helena Putniorzova in Czechoslovakia; both appear to have been Czech citizens and to have had their domiciles of origin in Czechoslovakia and to have been domiciled there at the time of their marriage. When later in 1938 their country was invaded by Germany Rudolph enlisted in the Czech army; when Czech resistance quickly broke down he escaped to Poland and joined the army there. In 1939, when Poland's brief opposition to the German invasion had ended, Rudolph was captured, not by the Germans, but by the Russians who promptly sent him to a prisoner of war camp in Siberia.[3]

1. [1967] 1 W.L.R. 510.

2. A "limping" marriage is one which, because of the divergent laws of many countries and of the different basis on which jurisdiction is founded, is validly terminated by divorce in one country but may still subsist so far as other countries are concerned.

3. At that time the U.S.S.R. seems to have been obsessed by the fear that Czechs and Poles captured during actual fighting, or Czechs who claimed that they had been conscripted into the German army and deserted on the first opportunity, were all actual or potential fifth-columnists. Hence practically all of them were treated as prisoners of war until the U.S.S.R. was in its turn attacked by Germany.

When Russia in its turn was attacked by Germany he and many others were released in order that they might join the forces which the Polish government-in-exile in London had authorised General Sikorski to raise. He served in those forces in the Middle East and in Italy, ultimately reaching England in 1946 where he was discharged and then told that he could either remain in England or go back to Czechoslovakia. According to his evidence before Latey J. twenty years later he had been unable (presumably during his imprisonment in Siberia and his service in the Polish army) to communicate with his wife. Again according to his evidence before Latey J., after his discharge he wrote to Helena (it seems to have been his first and only letter to her since the war ended in 1945) saying that he wanted to live with her again and was prepared to set up a home for her either in Czechoslovakia or in England, whichever she preferred. No copy of this letter or other evidence of its having been sent was produced. To this letter Helena replied (again the letter was not produced; Latey J. accepted Rudolph's version of its contents) that she had no wish or intention to live with him again; she had not heard from him for several years, she had formed an attachment for another man by whom she had had a child. He did not write to her again, nor did he take divorce proceedings based on his wife's confession of adultery as he could have done if the statement attributed to her were true (though if he had petitioned in England at any time before 1949 he might well have found it very difficult to convince the Probate Division that he had already acquired an English domicile of choice); he simply acquiesced in the situation and remained in England.

In 1949, according to his evidence before Latey J., he received a telephone message from his mother in Czechoslovakia that Helena had obtained a decree of divorce from him in a Czech court; he also said that he had not received any prior notice of those proceedings. He then asked his mother to get from the Czech authorities an official copy of all those proceedings — and these he had retained and he produced them before Latey J. Helena's petition — which Lord Denning read in the Court of Appeal[4] — alleged "a deep disruption of marital relations for which the respondent is exclusively responsible." The petition also alleged that she had written asking him to return to her (Rudolph did not mention this letter, if in fact he had received it, in his evidence before Latey J.) and that *he* had suggested divorce. The Czech court granted Helena's petition by a decree which became effective on 18th January 1949.

Rudolph wrote to his mother thanking her for the various documents and then took them to the Inland Revenue Office in order to establish that from his arrival in England in 1946 until the date of the Czech decree he was a married man and and therefore entitled to some tax relief. (Since liability to income tax in the United Kingdom does not depend upon nationality or domicile but on residence, he could have made such a claim in 1946 by producing the correspondence between himself and Helena as evidence of his marital status; but that correspondence would have shewn that she was not living with him, and he would no doubt have been asked awkward questions as to whether he was maintaining her. Did he optimistically hope that when in 1949 he produced the Czech official documents the Inland Revenue authorities would obligingly assume

4. [1966] 3 All E.R. 583, at p. 584.

that he had been maintaining Helena up to the time of the divorce?). He took no other action; he simply acquiesced in the situation and remained in England.

Early in 1959 he met in England Rose, the woman who was to become his second wife; he showed her the official copy of the proceedings in Czechoslovakia so as to establish his freedom to marry again, and later wrote on the marriage certificate, "Previous marriage dissolved." They were married at a registry office in England on 20th March 1959. But the second venture into matrimony was no more successful than the first. Some five years later Rose went before magistrates charging Rudolph with cruelty; the magistrates were not impressed, and dismissed the complaint. Undaunted, in August 1964 Rose petitioned for divorce on the ground of persistent cruelty; in November, Rudolph's answer admitted the marriage but denied the cruelty. Seven months later he changed his ground; he obtained leave to amend his answer, now denying the validity of his 1959 marriage by asserting the invalidity of the Czech decree of 1949 on the ground that he was not domiciled in Czechoslovakia at the commencement of the proceedings in that country. He now cross-petitioned for a declaration of the nullity of his purported marriage with Rose. Early in 1966 the case was heard before Latey J. who was asked by counsel for both parties to deal first with the issue of the validity of the Czech decree.

Latey J. referred briefly to the events of 1946 as revealed by Rudolph's evidence, in the following words: "On arrival in England (in 1946) he was offered the choice of returning to Czechoslovakia or remaining in England. He was still domiciled in Czechoslovakia. He chose to remain and settle in England where he has stayed ever since. *There is no dispute that, by so doing, he acquired a domicile of choice in England in 1946 and that he has remained domiciled here ever since. I so find."* [5] With respect, this was a precipitate and almost unprecedented conclusion, a remarkable example of *post hoc propter hoc* reasoning; because Rudolph had lived in England for twenty years when the divorce proceedings begun, *therefore* he had formed the intention in 1946 to live permanently or indefinitely in England. But the course of judicial decision for more than half a century had been to impose a very heavy burden of proof on the party alleging a change of domicile, particularly where the change has involved the abandonment of the domicile of origin. Speaking in the House of Lords in *Winans* v. *Attorney-General,*[6] Lord Macnaghten quoted with approval from Lord Chelmsford in *Udny* v. *Udny* [7] that "the question is not whether there is evidence of intention to retain the domicile of origin but *whether it is proved that there was an intention to acquire another domicile"*[8] and from Lord Westbury in *Bell* v. *Kennedy,*[9] "(there must be) a fixed and settled purpose. And, unless you are able to show that with perfect clearness and satisfaction to yourselves, it follows that the domicile of origin continues. . . . A

5. [1966] 1 All E.R. 781, at p. 782; emphasis added.
6. [1904] A.C. 287.
7. (1869) L.R. 1 H.L. (Sc.) 455.
8. Emphasis added.
9. (1868) L.R. 1 H.L. (Sc.) 307 at p. 321.

change of domicile is a serious matter — serious enough when the competition is between two domiciles both within the ambit of one and the same kingdom or country — more serious still when one of the two is altogether foreign." Reliance on those dicta and their own conclusions from the evidence enabled Lord Macnaghten and Lord Halsbury to decide that an American citizen with an American domicile of origin had retained that domicile in spite of the facts that (1) only the first 27 years of his life (he died at the age of 74) were spent in the United States, (2) he married in England a British subject, (3) he had lived partly in Great Britain and partly in Russia or Germany for 43 years, and (4) his only fixed home for 37 years had been in England. The countervailing facts were (1) that for many years he had been trying to invent a safe and navigable spindle-shaped ship with which he hoped the United States would be able to oust England from its then dominant position in merchant shipping and (2) that although his designs were uniformly unsuccessful he never gave up hope and shortly before his death had bought some 200 acres near Baltimore, Md., on which shipyards might some day be built and where he himself would then live. On this evidence their Lordships were satisfied that the deceased had always intended to retain his domicile of origin and that in law he had done so; Lord Lindley, the third member of the House sitting on the appeal, dissented. In this Lord Lindley was in good company; the action had been first heard before Kennedy and Phillimore JJ.,[10] the former saying, "We do not question that, there being a domicile of origin in America, the burden of proof lies on the Crown. I think that on the evidence the Crown has discharged that burden." The judgment of these two judges was unanimously upheld by a strong Court of Appeal consisting of Collins M.R., Stirling and Mathew L.JJ.,[11] but all to no avail.

Equally far reaching, and equally tenacious of the view that evidence in support of an alleged abandonment of the domicile of origin must be extremely cogent, is the later decision of the House of Lords in *Bowie or Ramsay* v. *Liverpool Royal Infirmary,*[12] in which the House had to pronounce upon the validity of a holograph will executed in England by George Bowie, a man who had started life in Glasgow in 1845 with a Scots domicile of origin. When 37 years old he became tired of working, gave up his job as a commercial traveller, and went to live with his mother and sister in Glasgow and at their expense; he had been cautious enough not to saddle himself with a wife. After ten years with mother and sister, in 1892 he attached himself to a brother who had just settled in Liverpool; for 11 years he lived in lodgings there, apparently at his brother's expense. On the brother's death in 1913 a sister took over his house; thereupon George Bowie moved in on her; his sister dying in 1920 and having thoughtfully left house and other property to him, he remained in sole occupation until his death in 1929. Since his move to Liverpool in 1892 he had made one short visit to the United States of America and had had one brief holiday in the Isle of Man; but he refused to make the effort to go to his mother's funeral in Glasgow in 1905. His will, as indeed his whole life, was marked by economy of effort; for, after

10. (1900) 83 L.T. 634.

11. (1901) 85 L.T. 508.

12. [1930] A.C. 588.

the charitable bequests, there was a laconic sentence, "These infirmary bequests to be anamous (*sic*), say a Glasgow man." But the House of Lords could not find in these facts evidence of *any* intention; the long residence in Liverpool was due solely to inertia; the appellant had not discharged the burden of proving a change of domicile.

It is true that some of the post-1930 divorces have departed slightly from this highly artificial attitude towards an alleged change of domicile; even *Travers* v. *Holley,*[13] which Latey J. was asked to apply to *Indyka,* refers to some tendency to depart from the rigidity of the then existing rules. On this point *Indyka* could not go any further than it actually did, because the learned judge seems to have held that almost at the very moment when Rudolph received Helena's letter saying that she did not want to have anything more to do with him he not only decided to remain in England but simultaneously abandoned his Czech domicile of origin and acquired an English domicile of choice. Having so held, the learned judge had no alternative but to declare that the Czech court had no jurisdiction at the time of Helena's petition late in 1948 because she too must be regarded as having a domicile of choice in England. Therefore the Czech decree could not be recognised in England unless it could be brought within the scope of *Travers* v. *Holley*; but he went on to hold that the *Travers* v. *Holley* rule was based on the postulate that at the time of the foreign proceedings a corresponding jurisdiction must have been conferred on English courts. But the English Act which conferred jurisdiction over the matrimonial problems of married women *resident* in England during the three years preceding the institution of the suit did not come into effect until December 1949 whereas the Czech decree had been pronounced in the previous January. Since, when it was given, the Czech decree could not have been based on Helena's domicile there (in the English sense) but only on her residence or some other factor, Latey J. declined to recognise it; it followed that in an English court the decree was completely devoid of legal effect and the second marriage to Rose was no marriage at all because Rudolph was still married to Helena. Decree of nullity on the cross-petition was therefore granted and Rose's petition for divorce dismissed. From this decision Rose appealed; though in one sense it gave her what she wanted, i.e., release from the marital bond with Rudolph, it may be assumed that she did not want to be categorised as a woman who had lived, however innocently, for more than five years with a man who had never validly married her. This assumption is voiced by Lord Denning M.R. in the Court of Appeal when, referring to the fact that Rose could now (because of the reversal of the judgment of Latey J.) proceed with her petition for divorce, he said, "She is not to be reduced to the status of a woman living with a man who is not her husband."

The Court of Appeal (Lord Denning M.R. and Diplock L.J., Russell L.J. dissenting) reversed the judgment of Latey J.[14] Lord Denning's judgment, it is submitted with the utmost respect, is marred by emotionalism and rhetorical passages. After reciting the facts as found he roundly declares, "I must say that the decision of the judge fills me with dismay. If the courts of England were not to recognise this Czecho-

13. [1953] P. 246.

14. [1966] 3 All E.R. 583.

slovakian divorce, it would be a disgrace to the law which should prevail between nations." [15] He goes on to refer to the outcome of 19th century decisions as to domicile and to their significance in relation to divorce proceedings, saying, ". . . in January 1949 Helena, if she wanted to obtain a divorce, ought to have come to England because her husband was then domiciled in England. She ought to have obtained a divorce in the courts of England. It matters not that she was living behind the Iron Curtain and would not have been allowed to leave Czechoslovakia. Nor does it matter that she had no money to pay her fare, or even enough to instruct lawyers here. Nor does it count that she had lived in Czechoslovakia all her life, indeed in her native town, and never left it. Nor does it matter that she went to her own courts and obtained there a divorce that was perfectly valid in Czechoslovakia. That divorce, so held the judge, will not be recognised in England." [16] What justification was there for these references to life behind the Iron Curtain (which only began to descend in 1948) ? The summary of the facts set out by Latey J. contains no reference to such matters; on the contrary, he says specifically, "Neither party has adduced evidence from the first wife in person or by affidavit or statement. I do not say that in any way critically, for one knows the serious practical difficulties." [17] That second sentence is a curious way of describing Helena's situation in 1949 if there had been any evidence whatever that she was unable, for the reasons given by Lord Denning, to take proceedings in England. Moreover, as appears in Lord Denning's own judgment, it is very doubtful whether the "practical difficulties" were as serious as he contends; for he mentions without comment that Rudolph's mother was able to telephone from Czechoslovakia to England in 1949 to tell him that Helena had got a divorce. The Iron Curtain had not descended so far as to shut off telephone communication, nor to prevent Rudolph's mother from obtaining official copies of the Czech proceedings and sending them to her son; the statements about Helena's inability to leave Czechoslovakia and her poverty seem to belong to the the realm of fiction rather than of fact.

It is curious that no member of the Court of Appeal commented critically or even *en passant* upon the finding of Latey J. of Rudolph's acquisition of a domicile of choice in England in 1946; indeed, Lord Denning says, "Latey J. found that the husband did not desert his first wife, but that she deserted him. The judge found that since 1946 the husband had been domiciled in England. We must accept those findings." Since when has the Court of Appeal been bound to accept the finding of the trial judge as to the crucial fact of domicile? In both *Winans* and *Ramsay* the immediate appellate tribunal was asked to overrule the findings of the trial court as to domicile; far from saying that they must "accept the finding" of the trial judge, in both cases the appellate tribunals gave the most careful consideration to the evidence and in the result affirmed the decisions of the courts below. In *Winans* and in its turn *Ramsay* the House of Lords was asked to review the findings as to domicile; in the former it allowed the appeal, in *Ramsay* it agreed with the Court of Justiciary and dismissed the appeal.

15. *Ibid*., at p. 585.

16. *Ibid*., at p. 585.

17. [1966] 1 All E.R. 781. at p. 782.

Latey J. had in effect been of the opinion that if Helena had divorced Rudolph in Czechoslovakia in 1946, 1947, or 1948, and if during any of those years Rudolph had re-married in England or elsewhere and the validity of such a second marriage had come before an English court before December 1949 (when for the first time the three-year residence of the wife was legislatively established as a basis of jurisdiction), it must have been held to be void because no English court could then have recognised the decree granted to Helena at a time when *(pace* Latey J.) Rudolph was domiciled in England. He did not think that *Travers* v. *Holley* either had or should be given a retrospective effect so as to call for recognition in England of a pre-December 1949 foreign decree. Lord Denning did not agree; "The English statute (of 1949)", he said, "deals only with English divorces. It does not say a word about the recognition of foreign divorces. The doctrine of *Travers* v. *Holley* is judge-made law, and nothing else; and the judges can make it retrospective to *(sc.* foreign) divorces before 1949, if it is just and proper to do so." [18] And that is precisely what he thought the Court of Appeal should do; Helena had resided in Czechoslovakia all her life (far more than the trivial period of three years required by the English Act of 1949) and she should therefore be regarded as having obtained a valid divorce there and a divorce which English courts should recognise.

Diplock L.J. confessed to having some difficulty in understanding the precise legal concept underlying the decision in *Travers* v. *Holley* but did not regard himself as free to ignore it. He asserted that when, in the absence of legislative direction in the first Matrimonial Causes Act of 1857, the English judges had to select a basis for the exercise of jurisdiction in divorce they chose domicile in the belief that all civilised countries did the same; therefore no "limping" marriage could ever be encountered because only one court in the civilised world could terminate a marriage — the court of the husband's domicile. Then he added caustically, "Unbeknown to the English judges of the nineteenth century, there were lesser breeds without the English law of domicile, particularly as it has developed since that time, and some of them adopted as the basis of their jurisdiction to dissolve a marriage such varying criteria as the nationality of the spouses, the residence of the petitioner, or the mere submission of both or even of one party to the jurisdiction of the court." His Lordship then proceeded to criticise the concepts of reciprocity and comity as adequate bases for the recognition of foreign decrees, and pointed out that when Parliament began to confer on English courts a jurisdiction in divorce which was not based on domicile "the logical justification of the existing judge-made rule about recognition of foreign decrees broke down", and that public policy — the avoidance of "limping" marriages — demanded reconsideration of the rules of non-recognition in the light both of changed social conditions and the English statutory abandonment, in certain cases, of the domiciliary basis of jurisdiction. That reconsideration was first effected, he said, in *Travers* v. *Holley* in which the then Court of Appeal, "in a few throw-away lines", gave its reasons for departing from the earlier and strict rule of non-recognition. He considered that the underlying ratio decidendi in *Travers* v. *Holley* (though he conceded that it was "rather more elliptically expressed") was that "public policy requires the English courts to recognise the effec-

18. [1966] 3 All E.R. 583, at p. 586.

tiveness of decrees of dissolution of marriage pronounced by foreign courts in exercising their jurisdiction in circumstances which mutatis mutandis would entitle an English court to exercise its extended jurisdiction to dissolve a marriage."

He then paid tribute to the "cogency and logic" of the reasoning which led Latey J. to the conclusion that an English court could not in 1966 recognise the Czech decree of 1949 because it could not have recognised it at the time it was granted, but says that this reasoning ignores the "public policy" aspect of the change in the rules as to the recognition of foreign decrees. He ended his judgment with a statement with which, it is submitted, there will be widespread agreement: "Let us not pretend that the common law is changeless. If it were, it would have long ago been replaced by statutory codes. It is the function of the courts to mould the common law and to adapt it to the changing society for which it provides the rules for each man's duty to his neighbour; and that is what the courts have been doing since 1953 in this important field of common law. Within the limits that we are at liberty to do so, let us adapt the common law in a way that makes common sense to the common man. I think that in this present case we have the liberty, unfettered by any precedent, to choose between the narrower basis of recognition of foreign decrees of dissolution which Latey J. adopted and the wider basis which I have stated above. The latter seems to me to accord better with the public policy of avoiding "limping marriages" and with what the common man would think was common sense. I should, therefore, so choose and allow this appeal." [19]

Russell L.J. delivered a short but emphatic dissent. In particular he attacked the wide concept of the operation of public policy stated by Diplock L.J., not because he was unconcerned by the problem of the limping marriage but for other reasons which he expressed in these words: "Let me suppose that there is to be such a policy, nevertheless I think it must be pursued within the framework of English legislation and law as it stands at the time when the foreign decree, which is one leg of the limp, was made. The judiciary is not unfettered by domestic legislation in pursuing such public policy, otherwise all limping marriages would be avoided by recognition of all foreign divorce decrees. It is accepted that our attitude to foreign divorce decrees is conditioned by domestic legislation; and if domestic legislation is prospective, I do not think that this can justify a retrospective attitude by the judiciary. ... In my judgment Latey J. was right in law." But Russell L.J. was a lone voice, and the appeal was allowed; leave to appeal to the House of Lords was then sought and was granted.

The first judgment in the House was delivered by Lord Reid, who accepted without comment the finding of Latey J. as to Rudolph's domicile in 1946, from which it followed that "when the wife began proceedings and obtained her decree both she and her husband were, according to our law, domiciled in England. But both were citizens of Czechoslovakia, their home was there after they married until he left it, and the wife resided in that country all her life. It is not clear from the evidence whether jurisdiction under Czech law depended on the nationality of the

19. *Ibid*., at p. 591.

parties or the residence of the wife or both, but it clearly had nothing to do with domicile in our sense. The question is whether your Lordships are precluded by English law from recognising this foreign decree by the mere fact that at the relevant time the parties were domiciled in England. I accept for the purposes of this case the present doctrine of English law that during the subsistence of a marriage the wife cannot have a domicile different from that of her husband. ... to alter (that rule) might have wide repercussions and I think that this matter had better be left to Parliament." [20]

His Lordship then went on to say that argument before Latey J. and the Court of Appeal turned on the application of *Travers* v. *Holley;* he approved that decision, but thought it ought to be based on wider grounds than those pronounced by the judges who enunciated it. He took exception to two statements made by Hodson L.J. (as he then was) made in *Travers* v. *Holley* in support of his view that the New South Wales decree that was there being challenged should be recognised, (1) that where "there is in substance reciprocity, it would be contrary to principle and inconsistent with comity if the courts of this country were to refuse to recognise a jurisdiction which mutatis mutandis they claim for themselves", and (2) his reference to "the courts of this country (arrogating) to themselves jurisdiction in the case of persons not domiciled here at the material date." Admittedly the latter statement was unfortunate; English courts did not "arrogate" to themselves a new jurisdiction, it was conferred on them by the Matrimonial Causes Act, 1937, sec. 13, whereby the courts were told to exercise jurisdiction on a wife's petition where she was domiciled in England at the commencement of desertion notwithstanding that the husband had changed his domicile (and therefore hers) since the desertion began. With respect this is carping criticism; the unhappy choice of words with which to describe the new jurisdiction exercised since 1937 does not alter the fact that the courts had become vested with it. On the reciprocity and comity argument Lord Reid stood on more solid ground; these have not, at least for nearly a century (i.e., since *Schibsby* v. *Westenholz*[21]), been recognised as in themselves affording good ground for the recognition of foreign rights or judgments. Having said[22] that the decision in *Travers* v. *Holley* was right, Lord Reid now says [23] that the doctrine expressed in that case would not lead to a rational development of the law for reasons which he then proceeds to give. He refers to some of the consequences of the new jurisdiction conferred on English courts by the Law Reform (Miscellaneous Provisions) Act 1949, sec. 1 (now incorporated in the Matrimonial Causes Act 1965, sec. 40), to hear a wife's petition for divorce, even when her husband is not domiciled in England,[24] so long as she herself has lived there for the three years immediately preceding the commencement of proceedings. If some other country exercises a somewhat similar jurisdiction in regard to married women resident there, the application of

20. [1967] 3 W.L.R. 510 at p. 515.

21. (1870) L.R. 6 Q.B. 155.

22. [1967] 3 W.L.R. 510 at p. 515.

23. *Ibid.*, at p. 519.

24. And, indeed, where he may never at any time have been domiciled or even resident.

the *Travers* v. *Holley* doctrine would require English courts to recognise any decree which the foreign court might grant. Since His Lordship thought that such a development would lead to "very undesirable consequences" he was at pains to discover a basis for *Travers* v. *Holley* other than that which appeared to have gained the approval of Somervell and Hodson L.JJ., and with that end in view he started by reviewing the course of judicial decision which had led to the establishment of domicile as the criterion of jurisdiction.

He points out that the matrimonial jurisdiction exercised by the ecclesiastical courts before 1857 had never been based on the domicile but on the residence of the parties.[25] In England and Scotland that jurisdiction extended to divorce *a vinculo* (nullity), divorce *a mensa et thoro* (the modern judicial separation), restitution of conjugal rights (in effect an order to the parties to resume cohabitation), but the church had long set its face against terminating, on any ground whatsoever, a valid marriage. After the Reformation the Scots courts, but not the English, acquired power to dissolve marriages, and not unnaturally based their jurisdiction in this regard on the same fact, namely the residence of the parties, as they had always required to be established in other matrimonial proceedings before them. No comparable power was vested in any English court until 1857, by which time matrimonial relations, though still within the exclusive cognisance of the ecclesiastical courts, had come to be regarded as more of a secular than a spiritual nature. Moreover, there was for the English only one way out (in England) of a valid marriage, and even that was only available to the husband and on the sole ground of his wife's adultery. This was by the successful prosecution of the action euphemistically and erroneously called criminal conversation, followed by the promotion of a private Act of Parliament to dissolve the marriage. Few indeed were the husbands who could afford this expensive and dilatory process; hence it was not unnatural for English courts to hold the view that an English marriage was virtually indissoluble so long as the parties were subject to the jurisdiction of English courts. How could they escape from that jurisdiction? Only by acquiring a *domicile,* a permanent home, in a country whose courts did have power to dissolve marriages. This was at the heart of Lord Westbury's judgment in *Shaw* v. *Gould,*[26] in support of his view that "all Christian nations hold that questions of personal law depend on the law of the actual domicile", and he quoted in support from continental writers such as Huber (1636-1694) and Rodenberg (1618-1688), both writers of respectable antiquity but hardly reliable guides to the ascertainment of legal principle or rule even in 1868. But, as Lord Reid points out — and, with respect, rightly points out — when those writers referred to domicile

25. Since matrimonial discord might lead either or both spouses to commit the sin of fornication or other breach of their marital vows, it was essential from the point of view of the mediaeval and post-mediaeval church to try to end that discord and its natural propensity to sin. If the efforts of the parties' confessor or spiritual guide failed, it was right and proper for the court of the bishop of the diocese in which they lived to intervene at the request of either party. It is no exaggeration to say that in so intervening the ecclesiastical courts were primarily concerned with the salvation of the souls of the parties, not with their mundane welfare.

26. (1868) L.R. 3 H.L. 55, where the House of Lords had to consider the recognition, in England, of a divorce granted in Scotland where the parties had been temporarily resident there although at all relevant times domiciled in England.

as the law governing personal rights they were using the word as a synonym for the "habitual residence" of the parties;[27] moreover, even when Lord Westbury pronounced judgment, the concept of nationality had already begun to challenge domicile as the appropriate law for the determination of questions of status, etc.

Twenty years after the Act of 1857 the basis of the jurisdiction in divorce was still in doubt. In *Niboyet* v. *Niboyet*[28] a majority of the Court of Appeal overruled Phillimore J. and held, in the words of James L.J., that "where and while the matrimonial home is English, and the wrong is done here, then the English jurisdiction exists;" Brett L.J. vigorously dissented, in effect repeating Lord Westbury's assertion that by the universal consent of nations domicile is the sole factor which attracts the jurisdiction of its courts and the application of its law. The position was still uncertain until in *Le Mesurier* v. *Le Mesurier*[29] the Judicial Committee of the Privy Council, on appeal from the Supreme Court of Ceylon, held that domicile and domicile alone afforded a basis for jurisdiction in petitions for dissolution.[30] It imitated Lord Westbury in quoting from the earlier continental writers and for good measure selected in support of its view a much later passage from Bar (1836-1913) which read in translation, "A decree of divorce . . . pronounced by any other judge than a judge of the domicile *or nationality* is to be regarded in all other countries as inoperative." The two words to which emphasis is here given are not so emphasised in the actual judgment of the Judicial Committee; in fact they were for all practical purposes completely ignored by it. Since, as Lord Reid rightly points out, in many countries the nationality of the parties had already become the basis for divorce jurisdiction even in 1895, it followed that the reiterated assertion that all civilised countries then recognised domicile as the exclusive basis

27. The continental jurists usually quoted in support of the universality of the domiciliary basis of jurisdiction are French, German, or Italian. But there was no uniform or universal French law until the enactment of the Code Napoleon; until then it would have been meaningless to speak of "French" law as determining the personal rights and duties of a Frenchman living in France — it would have been necessary to apply the law of that part of France in which he was living. Germany and Italy, as *national* units, are both products of the later nineteenth century (we need only remind ourselves that the army of Blucher which took part in the battle of Waterloo in 1815 was a Prussian army, and that the war of 1870 with France is always and correctly described as the Franco-Prussian War) and did not exist as such in the time of the jurists quoted by Lord Westbury. Unification of law in the newly created German Empire did not begin until the very end of the 19th century. As to Italy, that had for many centuries been merely a geographical expression; the inhabitants of that peninsula were Italian only in the sense that since the days of Dante all classes had begun to speak a common tongue. The individual's personal law was that of the particular republic, duchy, or kingdom in which he lived; the artists who flocked to Florence from all parts of "Italy" during the heyday of the Medici family acquired the personal law of that republic — until some of them left it to go to Milan or Venice or Rome where they automatically acquired a new personal law.

28. (1878) 4 P.D. 1.

29. [1895] A.C. 517.

30. Since decisions of the Judicial Committee have persuasive value only in English courts, no other court in that country need have followed *Le Mesurier* until the House of Lords decided to do so; but in fact *Le Mesurier* came to be generally adopted.

of this particular jurisdiction was without any substantial foundation. But the consequence of this misunderstanding (to use a mild term) of the passage in Bar was inevitable; a decree of divorce granted by a court of the nationality of the spouses, unless they were also domiciled in the rigid English sense of that term in the country of their nationality, was "to be regarded in all (?) other countries as inoperative." It mattered not that a French or an Italian or an Austro-Hungarian court, if *their* law recognised nationality as the basis of divorce jurisdiction, would have regarded a German decree divorcing two German nationals as binding on them; all were out of step except England. The "limping" marriage was bound to occur and to come to the notice of English courts more and more frequently after *Le Mesurier*. The last word on that case is well expressed by Lord Reid when he says, "... I would find it surprising if their Lordships really thought that they were keeping in line with other countries. It is just possible that they were actuated by the hope, common in Victorian times, that if England showed the way, others would see the light and follow; if so, any such hope has been grievously disappointed."[31]

Lord Reid then goes on to express the view that English courts should recognise foreign decrees based on a jurisdiction even wider than that conferred on themselves by the 1937 Act, for that was limited to a wife's petition based on desertion. He considers that "where a husband leaves his wife in the matrimonial (*sic*) domicile and she has by the law of that country a right to obtain a divorce which accrued before he changed his domicile but only sues for and obtains her divorce thereafter, we ought to disregard that change of domicile and recognise the foreign decree."[32] But he would not stop there; he would revive the concept of the matrimonial home as the sounder basis both for jurisdiction and recognition. He does not suggest that this should completely oust the present basis of domicile, since there may be the occasional case of spouses who never settle down long enough in any particular country to establish a matrimonial home there, in which event it may be necessary to fall back on domicile (or nationality?). From a practical point of view it will always be easier to say in what country the spouses have (or had at the relevant moment) their matrimonial home, because this must be a question of fact to be decided in the light of evidence of the surrounding circumstances. Lord Reid would therefore be prepared to recognise a decree, granted to either husband or wife, by the courts of the matrimonial home notwithstanding that one of the spouses may have left that home before proceedings are commenced. He refuses to commit himself to saying that where at a wife's instance a foreign court exercises jurisdiction on the basis of her residence for three years (as English courts can now do) there should always be automatic recognition in England of the foreign decree; and he prefers to express no opinion at all as to what recognition should be conceded to a foreign decree where the jurisdiction was based on the nationality of the petitioner.

Lord Morris said that there was logical justification for applying the *Le Mesurier* concept of the exclusiveness of domicile as the basis of jurisdiction in order to determine the validity, in England, of a foreign

31. [1967] 3 W.L.R. 510 at pp. 523-524.

32. *Ibid*., at p. 526.

decree of divorce, but only so long as the legislature did not authorise any exception to that concept in regard to the jurisdiction vested in English courts. But once permanent inroads on that concept were made by the Acts of 1937 and 1949 (the Acts of 1919 and 1944 were only temporary exceptions to the domiciliary rule and moreover made specific provision for the area of recognition of decrees granted thereunder), it became impossible for English courts to go on refusing to recognise decrees granted by foreign courts on a like basis. "There is peril", he said, "in assuming that only our rules are rational and justifiable. Looking back upon the course of judicial decisions it is readily seen that though doctrine evolved one way it might quite easily have evolved another way. This leads me to the view that no essential or fundamental superiority of our basis for jurisdiction can be claimed over all others." [33] In the present case he would go further than the Court of Appeal and put its decision to recognise the Czech decree on a wider basis. He was satisfied that the Czech court accepted jurisdiction because the parties were and always had been Czech citizens; moreover, the wife at the time of petitioning had a real and substantial connection with that country; he therefore saw no reason why the Czech decree should not be recognised.

It would appear that in Lord Morris's opinion English courts should now recognise *all* foreign decrees where the wife had been resident for three years and, *semble,* decrees granted by the court of a foreign nationality if the petitioner still had a real and substantial connection with that country.

Lord Pearce remarked that "It is a matter for each country to decide both in respect of what marriages or parties its courts will assume jurisdiction and also what decrees of divorce by foreign courts it will recognise. It may recognise all or none or take some intermediate position. In this it will be largely influenced by public policy. The boundaries which it sets for answering each of the problems need not necessarily coincide. But in so far as it confines its recognition more narrowly than its jurisdiction, it is adding to the sum of unilateral marriages. Thus the definition of jurisdiction should be closely related to that of recognition." [34] He follows Lord Reid in commenting upon the failure of the Judicial Committee in *Le Mesurier* to take note that the rule which it had quoted from Bar had two prongs, domicile *or* nationality, and then goes on to say that as a result of the decisions in *Winans* and *Ramsay* "our word "domicile" unfortunately attained a meaning which it did not have at the time of *Le Mesurier's* case." Thus confusion became worse confounded, and Parliament frequently found it necessary to intervene and vest a wider jurisdiction in the English courts than they could assume unaided, short of repudiating *Le Mesurier* and going back to *Niboyet* or discovering some compromise between the two. But those legislative interventions only dealt with one aspect of *Le Mesurier* — the rule that the English divorce court is only open to persons domiciled in England; they left untouched the second aspect — the corollary of the first — that

33. *Ibid*., at p. 534.

34. *Ibid*., at p. 535. Lord Pearce prefers to speak of unilateral than limping marriages because he considers it a better description of a situation in which one spouse (under his or her law) is free to marry again but the other spouse (under another law) is not.

the only foreign decrees that an English court could recognise were those granted by a court of the domicile of the parties. But he did not interpret this omission as being in the nature of a legislative prohibition of judicial action to extend the area of recognition; on the contrary, he concluded that Parliament intended to leave it to the courts to decide what decrees they would in future recognise, bearing in mind the legislative policy of extending jurisdiction in England and the social necessities that, in England as in other countries, underlay that policy. This was precisely what the Court of Appeal had done in *Travers* v. *Holley,* a decision which his Lordship not only approved but which he also thought might well be extended; he did not share Lord Reid's fear that recognition of *all* decrees granted by foreign courts on the basis of the wife's three-year residence as in England might lead to undesirable results; "I would regard the possibilities of wives going abroad for three years to secure relief as insufficient to outweigh the advantages of the rule in *Travers* v. *Holley."* [35] But he would not like to see a mechanical application of that rule; or perhaps it is nearer to the spirit of his comments thereon to say that he would extend its application generally to like foreign decrees subject only to the proviso that it should be refused where the foreign decree conflicts substantially with English ideas of public policy; as, for example, where the ground for divorce is something akin to "mutual incompatibility of temperament" or where the requisite period of residence before bringing suit is so short as to provide for what may be called cash on delivery divorces. Given a foreign decree otherwise within this broadened concept of *Travers* v. *Holley,* he saw no reason to exclude from the operation of that concept a foreign decree analogous to an English decree under the 1937 or 1949 amendments but in point of time anterior to the relevant English Act.

He concludes with a passage in which he states that there were compelling reasons for recognising the Czech decree of 1949. "Both parties to the marriage were nationals of Czechoslovakia (and incidentally domiciled there as well until 1946), the petitioning wife resided there all her life, and their courts took jurisdiction there on the ground of nationality. Undoubtedly the country of the nationality was the predominant country with regard to the parties to this marriage, and as such its decree ought to be recognised in this country." [36]

Lord Wilberforce made a point which is absent from all the preceding speeches because he baldly states that "under Czech law, *as an expert proved at the trial,* nationality is the relevant connecting factor for purposes of divorce." [37] He then points out some of the peculiar consequences of insisting that domicile is the only generally recognised basis for the exercise of jurisdiction in divorce, but follows this up with a warning that the House was not being asked to review the basis of the jurisdiction of English courts and, "though this House may be free to review the matter, it would not be right to use the present as an occasion for reconsidering whether the accepted doctrine requires modification,

35. *Ibid*., at p. 543.

36. *Ibid*., at p. 546.

37. *Ibid*., at p. 547; emphasis added.

and, if so, in what direction." [38] All that the House was called upon to decide was whether the basis of recognition of foreign decrees by English courts was satisfactory or called for alteration. He first turned to *Shaw* v. *Gould,*[39] which he regards as having a much more limited effect than is generally attributed to it; he considers it to be authority — and in support of this he quotes persuasively from Lord Colonsay's judgment — not for a generalised proposition that only the courts of the domicile can exercise jurisdiction in divorce, but for the more limited proposition that where spouses deliberately resort to a court of a country in which they are not domiciled for the purpose of obtaining a decree of divorce which they could not get in the country of their actual domicile the resulting decree will not be recognised by the courts of that domicile. But, as Lord Wilberforce points out, Lord Westbury's reasoning "went beyond that limited conclusion and undoubtedly influenced the later development of the law." Referring to the omission of the Judicial Committee in *Le Mesurier* to attach any significance to Bar's alternative, domicile *or* nationality, he charitably states of Lord Watson, who read the Committee's advice, that "the reference to nationality does not seem to have struck his attention; at least he makes no further reference to it." The persistence of the domiciliary basis of jurisdiction is criticised in the following passage: "Important differences as to the meaning of "domi-

38. *Ibid*., at p. 548.

39. (1868) L.R. 3 H.L. 55. It may be interesting to recall that if the parties to the divorce the validity of which was of vital importance in that case had been better advised, the issue would never have arisen. According to the statement of facts given in 3 H.L. 55, in 1828 Miss Elizabeth Hickson, then aged sixteen, was persuaded by the fraud of one James Buxton (a fraud for which he was sentenced to and served three years' imprisonment) to go through a ceremony of marriage with him in England. The marriage was never consummated; after his release from prison Buxton began to live in adultery with another woman. Mr. Shaw, a young man reading law in England, wanted to marry Elizabeth but was uncertain whether he could validly do so because of the Buxton marriage. The obvious course, one would have thought, would have been for Elizabeth to petition in England for a decree of nullity based on (1) Buxton's fraudulent inducement and (2) non-consummation; no divorce proceedings were possible in England because all this occurred many years before the Act of 1857. Such a decree of nullity, if the facts set out in the report could have been substantiated, would surely have been granted; Shaw and Elizabeth could thereafter have validly married. If this simple and straightforward course had been adopted there would have been no subsequent trouble; but for some reason (it is not unreasonable to suppose that it was planned by young Mr. Shaw, the law student, for whom "a little learning (was to prove) a dangerous thing"), a more tortuous course was adopted. In 1844 Buxton was bribed to go to Scotland and to stay there long enough to satisfy the Scots requirement as to residence; he would then be made respondent to a divorce petition brought by Elizabeth and based on his adultery; it was a condition of the bribe that he would not give any evidence that might lead to a decree being refused. All went well with that sorry plan. In 1845 a decree of divorce was granted to Elizabeth by a Scots court; after a seemly interval she married Shaw and had three children by him.

In 1868, in *Shaw* v. *Gould,* the issue was whether those children were entitled to devises and legacies in an English will to "the children of Elizabeth Shaw." As it had been held that there was nothing in the will to displace the presumption that "children" meant legitimate children, the validity of the Scots divorce and of the subsequent marriage was directly in issue. Even so, the question could have been answered without raising the domicile question at all; English courts have properly refused to concede recognition to any judgment obtained by fraud. It is manifest that the Scots decree of divorce was so obtained; the proceedings before it were plainly collusive.

cile" have emerged, both as between common law and civil law systems, and at least within the former, between one country and another. ... developments in English law, particularly since *Winans'* case, and its persistent refusal to allow a separate domicile to a married woman even if separated from or abandoned by her husband, have meant that "domicile" frequently does not represent the community to which people belong." [40] He then points to the increasing competition between domicile and nationality and to the fact that "Visiting forces in two world wars brought about a large number of mixed marriages and these have been added to by displacements of population leaving one spouse in a different country from that to which the other has moved, often, even if willing, unable to move there." [41]

Dissatisfaction with rigid judicial adherence to the domiciliary test led to legislative intervention. After the Judicial Committee (once more the villain in the piece!) had held in *Attorney-General for Alberta,* v. *Cook* [42] that even a decree of judicial separation did not enable the wife to acquire a domicile different from that of her husband, the Canadian Parliament in 1930 enabled a wife deserted by her husband and living apart from him for more than two years to obtain a divorce in the province where he was domiciled at the time of desertion. This commonsense view was not followed in England until 1937, although it had been anticipated by many years in Australasia.[43] Later amendments to the English Matrimonial Causes Act, in Lord Wilberforce's opinion, had made "such extensive breaches in the unitary domicile theory" as to call for the abandonment once and for all of the outmoded idea that English courts should still limit their recognition of foreign decrees to those granted by a court of the domicile. He concedes that they should continue to recognise such decrees; he also thinks that recognition "might, in appropriate circumstances, be given to the factor of nationality" though he confesses to being unable to define all the situations in which nationality might be taken into account.[44] While he is prepared to recognise decrees granted by a foreign country to women there deserted or living apart from their husbands he was not prepared, in the absence of legislative authority, to concede general recognition to decrees of the

40. [1967] 3 W.L.R. 510 at p. 551.

41. *Ibid*., at p. 552.

42. [1926] A.C. 444.

43. Victoria, 1889; New South Wales, 1892; New Zealand, 1898; Western Australia, 1911; Tasmania, 1919; Queensland, 1923; and South Australia in 1928. It should be noted that without exception these Acts have a limited operation; instead of directly empowering a deserted (or judicially separated) wife to acquire a separate domicile of her own, they attach her firmly to the domicile of her husband *at the time of desertion.* Hence, if after desertion she found refuge with relatives or friends in another province (in Canada) or State (in Australia), or moved to another province or State in search of employment, she must return to the place where she was deserted in order to obtain matrimonial relief and she must there satisfy a court that her husband was domiciled within its jurisdiction at the commencement of the desertion.

44. There are, as Lord Wilberforce points out, a number of complications involved in the concept of nationality. For example, "British subject" (or national) includes a number of separate citizenships; some persons have dual nationality; other may have no nationality because for technical or other reasons they are "stateless."

courts of the residence of the parties or one of them. He finds *Travers* v. *Holley* unexceptionable but does not regard it as "amounting to more than a general working principle that changes in domestic jurisdiction should be taken into account by the courts in decisions as to what foreign decrees they will recognise." [45]

Lord Pearson considered that the English Acts of 1937 and 1949 "struck at the roots of the former system" of basing the divorce jurisdiction solely on domicile, and said that although they merely conferred a wider jurisdiction on English courts their enactment was bound to affect English judicial rules as to the recognition of foreign decrees. He was of opinion that in regard to the appeal then before the House the doctrine of *Travers* v. *Holley* should be applied "as a minimum", though he would prefer to regard the rule in that case as a general principle and not as "a cast-iron rule in every case without regard to the relevant English legislation." He admits "the plain fact that divorce jurisdiction is exercised on different bases in different countries"; for himself he would like to see alternative bases recognised as justifying the exercise of jurisdiction by foreign courts, and suggested (1) domicile, though "according to a less exacting definition"; (2) nationality (though he concedes that this will not work in a federation where divorce jurisdiction is vested in the individual states) ; and, possibly, (3) the separate domicile of a judicially separated or deserted wife where the country in which the decree was granted or the desertion commenced allows the wife to acquire such an independent domicile. As to decrees based upon residence as the foundation of jurisdiction, he would not at present go beyond a *Travers* v. *Holley* basis, i.e., to recognise divorces granted to wives resident for three or more years (as in England) but not to wives resident for a shorter period or to any husband merely resident in the foreign country. He agreed with the other members of the House that the Czech decree of 1949 was valid and should therefore be recognised in England because (1) it was covered by the *Travers* v. *Holley* principle and (2) it was granted by the courts of the petitioner's nationality at a time when "there was no lack of real and substantial connection with Czechoslovakia."

CONCLUSION

It will be obvious from the foregoing analysis of the judgments of the five law lords who took part in the *Indyka* appeal that their Lordships are far from unanimous as to the grounds, other than domicile at the commencement of the foreign proceedings, on which English courts should recognise the validity of foreign decrees; indeed it may be said that *Indyka* has posed new problems for future judicial decision. But the House did take the opportunity of confirming *Travers* v. *Holley* even though its members disagree as to the correct underlying principle and as to the extent of its future application. In summary, the bases on which the law lords would concede recognition to foreign decrees of divorce appear to be

Per Lord Reid: The law of the matrimonial home or the law of the domicile.

45. [1967] 3 W.L.R. 510 at p. 559.

	He doubts whether recognition should be granted automatically where the foreign court has based its jurisdiction on a petitioner wife's residence for three years even though English courts have been empowered to do so since 1949, and expresses no opinion as to nationality as a basis of jurisdiction.
Per Lord Morris:	The law of the domicile; or the law of the nationality where either or both parties had a real and substantial connection with the country of the nationality at the time of the commencement of proceedings; or the law of the country in which the wife has been resident for three years.
Per Lord Pearce:	The law of the domicile; or the law of the country of the nationality where on the facts it is the "predominating" country; or the law of the country in which the wife has been resident for three years — subject however to considerations of English public policy.
Per Lord Wilberforce:	The law of the husband's domicile; or the law of the nationality in situations similar to *Indyka;* or the law of the wife's residence where there is a real and substantial connection between the petitioner and the country exercising jurisdiction.
Per Lord Pearson:	The law of the husband's domicile; or the law of the nationality; or the law of the country which permits a wife living apart from her husband to acquire a separate domicile or nationality.

The result of *Indyka* can also be put in the following form:— English courts will recognise the divorce decrees of foreign courts where the basis of the jurisdiction of those courts was (1) the domicile of the husband (Lord Reid, Morris, Pearce, Wilberforce, and Pearson) (2) the the petitioning wife's residence for three years (Lords Morris, Pearce, Wilberforce, and Pearson) ; or (3) the nationality of the wife provided there is a "real and substantial connection" between her and the country of her nationality (Lords Morris, Pearce, Wilberforce, and Pearson[46]).

EPILOGUE.

Angelo v. *Angelo.*[47]

This was a case in which Ormrod J., whose attention had been drawn by counsel to the then very recent decision in *Indyka,* purported to base

46. Lords Wilberforce and Pearson with some doubts and misgivings.

47. Concisely reported in *The Times* (London) of 31st May 1967; briefly noted in (1967) 111 Sol. J. 457 and [1967] 5 *Current Law* 400b, but not reported in full elsewhere.

his decision on the speeches of the law lords but appears to have gone even further than the majority of them were prepared to go. In *Angelo,* H. was a domiciled Englishman; W. was a German national who had always lived in Germany until (either late in 1959 or early in 1960) she went to England *au pair.*[48] H. and W. were married at a London registry office in May 1960 and shortly afterwards went to Nancy, in France, for reasons connected with H.'s business. More than two years later W. left her husband at Nancy and went back to her original home in Germany; she refused to rejoin him and in April 1963, i.e., about six months after leaving him, was granted a divorce by a court of the district in which she was then living; the ground of the divorce is not stated in the brief report H. in 1967 sought a declaratory judgment that the German decree was valid because pronounced by a court of W.'s nationality within whose jurisdictional area she was habitually resident; Ormrod J. granted the declaration as prayed.[49]

Angelo is obviously outside jurisdictional basis (1) of the Conclusion as the parties were not domiciled in Germany; does it come within the scope of jurisdictional basis (2), i.e., the petitioning wife's residence for three years? It is true that none of the four law lords who in *Indyka* were of opinion that the jurisdiction of the foreign court could properly be based on the wife's residence asserted dogmatically that, like the residence required by the English Act, it must be during the three immediately preceding the petition; nor did they, with the exception of Lord Pearson, commit themselves in express terms to a minimum period of three years. But neither Lord Pearce nor Lord Wilberforce were prepared to say that all decrees based on the wife's residence should be recognised; Lord Pearson said that he would *not* approve a foreign decree based on a wife's residence for less than three years, and Lord Morris appears to agree with him. Lord Reid, who read the first judgment, would not concede automatic recognition even where three years' residence had been established. In *Angelo,* although the wife had always, until early in 1960 or perhaps late in 1959, lived in Germany, there was an absence of nearly three years before she left her husband and went back to Germany, where a German court granted a decree six months afterwards. There are clearly difficulties in applying the *Indyka* reasoning, as to the wife's residence being a basis of jurisdiction, to a case like *Angelo.*

48. A not uncommon arrangement under which a foreign girl is received into an English family which provides her with a home in return for light services (domestic, child-minding, etc.); she thus has an opportunity to learn English (or to improve her knowledge of that language) and, because she is not seeking paid employment, has no difficulties with the immigration authorities.

49. In *Peters* v. *Peters,* (1967) 111 Sol. J. 559, [1967] 7 *Current Law* 452c, Wrangham J. distinguished *Indyka* and *Angelo.* In *Peters,* H. and W. were married in Jugoslavia in 1946 when both were nationals of and domiciled in that country. In 1947 they went to England and become naturalised British subjects in 1949; they were later deemed to have acquired a domicile of choice there. In 1962, by arrangement with H., W. went to Belgrade and there obtained a divorce from a court which assumed jurisdiction on the basis of the parties, then being Jugoslav nationals having been married there. Later, H. re-married in England. In 1967 W. petitioned for a declaration of the validity of the Belgrade decree. Wrangham J. refused to grant the declaration; in his opinion, none of the bases of recognition approved in *Indyka* were applicable, though the position would have been different if the parties had retained their Jugoslav nationality or domicile.

Can *Angelo* be brought within the scope of jurisdictional basis (3), i.e., nationality? None of the law lords who referred to this as an alternative basis of jurisdiction did so in unconditional terms; all thought, though they did not express their thoughts in identical words, that the petitioning wife must have "a real and substantial connection with the country of her nationality." In *Indyka,* the wife had never lived in any country but Czechoslovakia, as Lord Morris emphasised; but it is very doubtful, in view of his language, whether he would have been prepared to recognise her Czech decree of early 1949 if she had gone to England in 1946 to live with her husband and had then decided, some time in 1948, to leave him and to go back to Czechoslovakia. Lord Pearce spoke in somewhat similar terms to Lord Morris when he said that "the country of the nationality was the predominating country with regard to the parties to this marriage"; he did not say, "with regard to this wife." Would he have regarded Germany as the "predominating country" with regard to the parties to the *Angelo* marriage? All that Lord Wilberforce would concede was that recognition "might, in appropriate cases, be given to the factor of nationality"; the whole tenor of his judgment leads to the conclusion that he might well have had great doubts about regarding *Angelo* as an appropriate case. Lord Pearson's second reason for recognising the Czech decree in Indyka was that it was granted by a court of the wife's nationality at a time when "there was no lack of real and substantial connection with Czechoslovakia"; would he have said that there was a real and substantial connection of Mrs Angelo with Germany when, after nearly three years' absence, she went back there and within six months had obtained a decree of divorce — by proceedings which may well have started within a few weeks, or even days, of her return? Lord Reid preferred to express no opinion as to whether recognition should be given to a foreign decree where the jurisdiction had been based on the nationality of the parties.[50] It is a reasonable inference from all the judgments that when their lordships spoke of "nationality" as a possible basis for divorce jurisdiction they only had in mind marriages where both spouses were of the same nationality; the problem that may well arise where the parties are of different nationalities does not appear to have been considered.

The recognition of foreign decrees by Singapore.

There appears to be a dearth of reported decisions in the High Court of Singapore (and its predecessors) on the recognition of decrees of divorce granted by foreign courts whereby the marital status of a Singapore citizen or of a person domiciled in Singapore may have been affected. Section 126 of the Women's Charter, 1961, now gives to the High Court jurisdiction over petitions (a) by a woman whose husband was domiciled in Singapore when he deserted her or was deported (or banished or exiled), and (b) by a woman who has lived in Singapore for the three years immediately preceding the presentation of her petition. As these provisions are on all fours with the English legislation,

50. His Lordship's refusal is all the more interesting in view of his criticism of the judgment of the Judicial Committee in *Le Mesurier,* a criticism founded upon its having ignored the alternative basis for jurisdiction in divorce — domicile *or* nationality — in the quotation from Bar which the Committee had used in support of its finding (see above at p. 212).

what may be called a *Travers* v. *Holley* [51] situation may well arise here. It would be anomalous and would contribute to the continuance of some "limping" marriages if the High Court refused recognition of a decree of divorce granted to a woman in another country whose courts have exercised by statutory authority a like jurisdiction to that conferred on the High Court by section 126. But, even if the High Court were to follow *Travers* v. *Holley* and so recognise such a foreign decree, would it go all the way with the House of Lords in a case where the foreign decree was based on some jurisdictional ground not substantially similar to section 126? It may be that the Court would find some guidance in section 81 which requires it, in proceedings under Part IX of the Women's Charter, to follow the principles upon which the matrimonial causes jurisdiction is exercised by the High Court of Justice in England. But Part IX says nothing about an application to the High Court in Singapore for a declaration as to the validity, in the Republic, of a foreign decree of divorce, and therefore in strictness section 81 is irrelevant to such an application; but it is submitted that it would be consistent with the spirit of section 81 for the High Court at least to apply the underlying principle of *Travers* v. *Holley* as explained by the House of Lords. *Indyka* is another matter altogether, since it appears to create almost as many problems as it solves.

The New Zealand initiative.

The decision of the House of Lords in *Indyka* will have no persuasive effect on courts in New Zealand because that country, four years ago, took the initiative by making statutory provision, under section 82 of its Matrimonial Proceedings Act, 1963, for the recognition of foreign decrees.[52] At the same time it discarded the venerable concept of the unity of the domicile of the spouses by providing in section 3 that "for the purposes of the Act" the domicile of a married woman, wherever she was married, is to be determined as if she were unmarried and (if she is a minor) as if she were of full age.

The bases of recognition of foreign decrees by New Zealand courts are wider still than those approved by the House of Lords in *Indyka;* those courts must recognise decrees granted by any of the following:

(1) the country of the domicile of either party;

(2) the country in which either party had resided continuously for two years before the commencement of proceedings;

(3) the country of the nationality of either party;

(4) the country in which the husband was domiciled at the time of deserting his wife or at the time of his deportation ;

51. [1953] at p. 246.

52. The word "decree" in effect includes an order or legislative enactment for divorce or dissolution or nullity; "foreign" means any country other than New Zealand, and includes any State (province, etc.) which is part of a federation and which exercises jurisdiction in matrimonial matters.

(5) the country in which the husband was domiciled when his wife was legally separated from him by court order or by agreement;

(6) in nullity, an additional ground for recognition is that the decree was based on some factor existing at the time of a marriage which was celebrated in the country pronouncing the decree.

Finally, in order to ensure that the Act is not restrictively interpreted so as to supersede all prior judicial decisions as to recognition of foreign decrees, the section specifically preserves the authority of such decisions.

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