

La Pierre v. Walter

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Commentary

Citation Information

Lewis, Milton J.. "La Pierre v. Walter." *Osgoode Hall Law Journal* 2.2 (1961) : 266-269.
<http://digitalcommons.osgoode.yorku.ca/ohlj/vol2/iss2/9>

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LA PIERRE v. WALTER—RECOGNITION OF FOREIGN DIVORCE DECREE—PREFERENCE FOR RESTRICTIVE VIEW OF SHAW v. GOULD—LIBERAL APPROACH OF TRAVERS v. HOLLEY. The important conflict of laws problem of the recognition of foreign decrees of divorce arose again in the interesting case of *La Pierre v. Walter*,¹ heard recently in the Supreme Court of Alberta. There, Riley J. considered the problem fully; then he rejected emphatically the rule in *Travers v. Holley*² and adopted what appeared to him to be the orthodox approach as declared in *Shaw v. Gould*³ and affirmed in *Le Mesurier v. Le Mesurier*.⁴ This comment is confined to brief discussion of the learned judge's approach to the problem and the possible relevance his decision may bear for an Ontario court.

The basic common law position was clearly laid down in *Shaw v. Gould*, where the House of Lords held that the English courts would recognize a foreign decree of divorce only if the parties were domiciled in the foreign country at the time of the divorce proceedings. The Privy Council in *Le Mesurier v. Le Mesurier* reiterated the rule. Lord Watson put it this way:

“A decree of divorce *a vinculo*, pronounced by a Court whose jurisdiction is solely derived from some rule of municipal law peculiar to its forum, cannot, when it trenches upon the interests of any other country to whose tribunals the spouses were amenable, claim extra-territorial authority”⁵

This same rule also applied at common law in relation to the assumption of jurisdiction in matters of divorce. Strictly speaking,

²⁰ [1959] S.C.R. 478; (1959), 14 D.L.R. (2d) 153; (1959), 37 Can. Bcy. R. 1; affirming [1958] O.W.N. 324.

²¹ (1959), 37 Can. Bcy. R. 1 at 5.

²² The author has not examined the economic problems created by section 3, viz. the effect on the number of advances to contractors generally, to the classes of contractors or the effect of a possible interest rate increase.

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¹ (1960), 31 W.W.R. 26; 24 D.L.R. (2d) 483.

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

³ (1868), L.R. 3 H.L. 55.

⁴ [1895] A.C. 517. (P.C.).

⁵ *Ibid* at p. 528.

the English courts would only entertain divorce proceedings if the parties' domicile (the husband's) was English at the time of the institution of those proceedings. In recent times, however, the legislators of both the United Kingdom and Canada have seen fit to extend the jurisdiction of the local forums to enable them to grant divorces under certain circumstances, even though the husband is not domiciled there at the time of the institution of the action.⁶ There is comparable legislation in other parts of the Commonwealth and in the United States.

The enactment of such legislation raises many new and difficult problems for the courts. Should they adhere to the strict domicile rule in relation to the recognition of foreign divorces when they themselves assume jurisdiction in matters of divorce in certain non-domicile situations? The much-discussed case of *Travers v. Holley*⁷ offers a solution to this somewhat complex problem. In that case the Court of Appeal held that the English courts should recognize a divorce decree of a non-domicile court, *if* the foreign court had exercised a jurisdiction comparable to that which the English courts themselves exercised by statute. Lord Somervell said this:

"On principle it seems to me plain that our courts in this matter should recognize a jurisdiction which they themselves claim. I did not myself really understand on what grounds it was submitted that the result should be otherwise".⁸

This case has been followed and approved in a series of English decisions since 1953.⁹ Yet *Travers v. Holley* is not without its critics,¹⁰ in fact, in both *Warden v. Warden*¹¹ and *Fenton v. Fenton*¹² Scottish and Australian courts, respectively, have unequivocally rejected the principle laid down in that case and found the strict common law rule in recognition matters preferable. This criticism is of importance since Riley J. in the case under discussion clearly followed those decisions.

In *La Pierre v. Walter*, the court had to decide whether to recognize a Scottish divorce, even though the husband was never *at any time* domiciled in Scotland. The Court of Session in Scotland had jurisdiction because of the Law Reform (Miscellaneous Provisions) Act 1949¹³ extended the jurisdiction of the Scottish courts in cases where

⁶ *Divorce Jurisdiction Act*, 1930, 20-21 Geo. V, c. 15, s. 2, (Now R.S.C. 1952, c. 84) in Canada, and *Matrimonial Causes Act*, 1950, 14 Geo. VI, c. 25, s. 18 in England.

⁷ See *supra* footnote 2.

⁸ *Ibid.* at p. 251.

⁹ See the following cases as examples: *Carr v. Carr*, [1955] 2 All E.R. 61; [1955] 1 W.W.R. 422, (P.D.A.); *Arnold v. Arnold*, [1957] P. 237; [1957] 1 All E.R. 570 (P.D.A.); *Manning v. Manning*, [1958] P. 112; [1958] 1 All E.R. 291 (P.D.A.).

¹⁰ See for example: R. R. Blackburn in (1954), 17 Mod. Law Rev. pp. 471-3; J. S. Ziegel in (1953), 31 Can. Bar Rev. pp. 1077-9; F. A. Mann in (1954), 17 Mod. Law Rev. pp. 79-81.

¹¹ *Warden v. Warden*, [1951] Sess. C. 508; [1951] Scot. L.T. 406.

¹² *Fenton v. Fenton*, [1957] V.L.R. 17 which was referred to but not followed in *Manning v. Manning*, *supra*, footnote 9.

¹³ *Law Reform (Miscellaneous Provisions) Act 1949*, 12, 13 & 14 Geo. VI, c. 100, s. 2.

the wife was ordinarily resident in Scotland for three years prior to the institution of the divorce proceedings notwithstanding that her husband was not domiciled in Scotland at that time. Riley J., considered *Travers v. Holley*,¹⁴ decided it should not be followed in Alberta, and held that the reasoning in *Warden v. Warden* and *Fenton v. Fenton* was to be preferred.

Lord Strachan in the former case reasoned this way: when the legislature extends the jurisdiction of the courts in the matter of *granting* divorces, it does not necessarily follow that the rules of recognition of foreign divorce decrees are similarly extended. His Lordship pointed out that the *Matrimonial Causes (War Marriages) Act, 1944*¹⁵ expressly provided for the extension of circumstances in which foreign divorces would be *recognized*. The statute in question did not so provide. In summary Lord Strachan said:

"The real point is, however, that in sharp contrast to that earlier Act, the Act of 1949 made no provision for the recognition of the decrees of other courts. In my opinion, the necessary inference is that Parliament in 1949 did not intend to innovate at all upon that matter, and it seems to me that there is no warrant for me to depart from the previous judicial precedents which recognized in divorce only the decrees of the husband's domicile or decrees recognized by those courts".¹⁶

In the *Fenton* case, the Victoria Full Court followed *Warden v. Warden*; O'Bryan J. criticised *Travers v. Holley* in this way:

"The position therefore, is that I find a decision of the House of Lords, viz., *Shaw v. Gould* . . . which states in the plainest language that domicile is the basis of recognition of foreign decrees in divorce because divorce is a matter of status . . . In *Travers v. Holley* the learned Lord Justices appear to have regarded *Le Mesurier's* as the only case which stood in the way of recognition of the New South Wales decree. That case was not concerned with the recognition of a foreign decree at all . . . Their Lordships made no reference to the important decision of *Shaw v. Gould*, where the recognition of foreign decrees directly arose . . . With the greatest respect to the learned Lord Justices I do not find the reasoning in *Travers v. Holley* convincing and in my opinion it is contrary to higher authority and should not be followed by this court".¹⁷

Travers v. Holley might be criticised on another point not considered by his Lordship in *La Pierre v. Walter*. It is a rule of statutory interpretation that a statute is presumed to displace the common law only within the narrow limits of the words used by the legislature. The statute in question in *Travers v. Holley* did not deal with the recognition of foreign divorces; therefore, the court was wrong in using the statute as a basis for so extending the common law.

The real issue is, however, should his Lordship have considered *Travers v. Holley* at all? On the facts it seems apparent that the rule would not have been applicable anyway. There is no legislation in Canada extending jurisdiction to situations whereby a wife may bring divorce proceedings if she has been resident in Canada for a stipulated period of time and even though her husband is no longer domi-

¹⁴ *Supra* footnote 2.

¹⁵ *Supra* footnote 13, sec. 1.

¹⁶ 1951, S.C. 508 at 511. [1951] Sess. C. 508 at 511.

¹⁷ *Supra* footnote 12 at p. 33.

ciled in Canada. Nor would the *Divorce Jurisdiction Act* have been applicable in the *Travers* sense, for at no time was the husband domiciled in Scotland and that Act requires a domicile in a Canadian province before the desertion. Thus his Lordship could have achieved what in his opinion was a just solution on the facts in very simple fashion. The foreign court was not the court of the domicile; *Travers v. Holley* was not applicable; therefore the divorce in question should not be recognized in Alberta.

There can be little quarrel with his Lordship's reasons for judgment. From a strictly *stare decisis* point of view he was quite correct in refusing to adopt *Travers v. Holley* in favour of the more orthodox approach in *Warden v. Warden*¹⁸ and *Fenton v. Fenton*.¹⁹ Naturally he was not bound by an English Court of Appeal decision. However it is respectfully suggested that his Lordship should not have rejected what appears to be a desirable advance in the law—especially when that rejection was not necessary in order to reach his decision.

One of the aims of our courts in this area should be to eliminate, wherever possible, so-called 'limping' marriages. There is nothing more socially disruptive than to have persons married in one jurisdiction and single in another; or children who are legitimate in one jurisdiction and illegitimate in another. No one would suggest that every foreign divorce be recognized by our courts. Yet where our courts are exercising divorce jurisdiction in more and more non-domicile situations, is it not reasonable that they should in turn recognize foreign decrees of non-domicile courts? For if the courts in the common law jurisdictions of the world continue to grant divorces in non-domicile situations (and there is no reason why they will not) and if they refuse to recognize such divorces (as Riley J. seems to intend) then the number of 'limping' marriages must of necessity increase. And this, it is submitted, is a most unsatisfactory social situation—one which *Travers v. Holley* solves, at least partially.

There are no cases in Ontario dealing with a *Travers v. Holley* problem; though there are two other Canadian cases that refer to the *Travers* rule, one with approval.²⁰ When the question does come before the Ontario courts it is to be hoped that our courts will follow the principles of *Travers v. Holley*.

MILTON J. LEWIS*

¹⁸ *Supra* footnote 11.

¹⁹ *Supra* footnote 12.

²⁰ See *Yeger and Duder v. Reg. General* (1958), 26 W.W.R. 651, where the court discussed *Travers v. Holley* with approval but found it inapplicable in the particular fact situation.

In *Bednar and Bednar v. Dep. Reg. General* (1960), 31 W.W.R. 40; 24 D.L.R. (2d) 238, the court used *Travers v. Holley* as one ground of its decision although not discussing the principle at any length. Milvain J. stated in the first paragraph of his judgment that, "As some interest has been indicated, I have decided to write my reasons for granting the order". The interest no doubt arose due to the fact that his brother judge in the *La Pierre* decision had come to the opposite conclusion some eleven days beforehand. Milvain J. had the benefit of counsel appearing in both sides whereas the *La Pierre* action was undefended.

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