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Conflict of Laws -- Validity of Foreign Divorce Decree Based on Jurisdictional Ground not Recognized in English Law at the Time When Obtained -- Subsequent Change in English Law -- Retrospective Operation of Travers v. Holley -- Public Policy

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procedural effect to be given to a violation, the court did not commit the error of adopting too rigid an approach but rather preferred flexibility. The word formula enunciated, *prima facie* evidence of negligence, is both familiar and workable.

Nevertheless the *Sterling Trusts Corporation* decision left many questions unanswered. The Supreme Court did not explain what it meant by *prima facie* evidence of negligence nor what procedural effect it would have. It did not clearly define which excuses would be tolerated nor who had the onus of proof with regard to them. Neither did the court fully discuss all of the policy issues inherent in their choice and the priorities accorded them. Nor did the Supreme Court indicate how far their decision would extend, whether to tail-light cases alone, to all lighting cases, to all equipment cases or to all violations of statutes. All of these questions were left for the future. The *Sterling Trusts Corporation* decision is, therefore, extremely significant for what it has decided; however, it may be even more significant because of the gaps that remain unfilled.

**ALLEN M. LINDEN**

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**Conflict of Laws—Validity of Foreign Divorce Decree Based on Jurisdictional Ground Not Recognized in English Law at Time When Obtained—Subsequent Change in English Law—Retrospective Operation of *Travers v. Holley*¹—Public Policy.—At the end of the nineteenth century, English courts became fully committed by judicial decision to the view that the only domicile of a married couple is that of the husband. Further, a marriage could only be dissolved in England if the husband was domiciled there at the time at which the proceedings were commenced.² In selecting the domicile of the husband as the sole basis of jurisdiction, English judges were actuated by the belief that all other civilized countries had adopted the same criterion and that, since a husband can only have one domicile at a time and his wife shares it, there could be only one court in the civilized world competent to dissolve a marriage at any given time.

English courts adopted the same criterion for recognizing the jurisdiction of foreign courts to dissolve marriages and would only recognize foreign decrees of divorce which were pronounced by the courts of the husband's domicile at the commencement of the proceedings. Domicile became the exclusive common law basis for domestic jurisdiction and for recognition of foreign decrees. English courts thought that the possibility of limping marriages would thus be avoided. Actually, the rule was merely an application of the more general rule of English conflict of laws that the legal capacity of a natural person is regulated solely by the law of his domicile, so long as this does not offend against English rules of public policy.

It soon became apparent that domicile was not a universal criterion. In many countries, the nationality of the spouses, their common residence or that of the petitioner alone or the mere submission of both or even one party to the court, is a sufficient basis for divorce jurisdiction. However, so long as the jurisdiction of English courts to dissolve marriages was limited by intractable precedent to those of which the husband was domiciled in England at the date of the commencement of the proceedings, they refused to recognize a foreign decree pronounced by the courts of a country in which the husband was not domiciled at the time the proceedings were begun. Gradually though, the courts began to doubt the wisdom of the old common law rules of the unity of domicile of the husband and wife and of the exclusive jurisdiction of the forum domicilli, particularly when it became obvious that these rules, in combination, were causing great hardship to the deserted wife who could only have recourse to the courts of the country of her husband's domicile to obtain dissolution of her marriage. Clearly, something had to be done to mitigate the rigour of these rules. Thus, during the twentieth century, the English Parliament and then the courts began to give relief to both English and foreign wives. On two occasions the English Parliament extended the grounds on which English courts might assume jurisdiction to dissolve a marriage.

The Matrimonial Causes Act was enacted in 1937 and in section 13 provided that:

Where a wife has been deserted by her husband or where her husband has been deported from the United Kingdom under any law for the time being in force relating to the deportation of aliens, and the husband was immediately before the desertion or deportation domiciled

3 Edw. 8 & 1 Geo. 6, c. 57.
in England and Wales, the court shall have jurisdiction for the purpose of any proceedings under Part VIII of the principal Act notwithstanding that the husband has changed his domicile since the desertion or deportation.

Since January 1st, 1938, when a husband, who is domiciled in England, deserts his wife and establishes a new domicile in another country, she is no longer bound to follow him to his new country in order to obtain a divorce. She can still sue him in England.

In 1949, the Law Reform (Miscellaneous Provisions) Act in section 1 added a new jurisdictional ground:

The High Court in England shall have jurisdiction in proceedings by a wife for divorce, notwithstanding that the husband is not domiciled in England, if—(a) the wife is resident in England and has been ordinarily resident there for a period of three years immediately preceding the commencement of the proceedings, and (b) the husband is not domiciled in any other part of the United Kingdom or in the Channel Islands or the Isle of Man.

Since December 16th, 1949, when a wife has been ordinarily resident in England for three years, although her husband is domiciled abroad, she can sue him for divorce in the English courts.

These two Acts make it now impossible to maintain that under English rules of conflict of laws a person’s legal capacity, so far as it results from the existence or non-existence of the married status, is regulated solely by the law of his or her domicile, since English courts may in certain circumstances dissolve the marriage of persons not domiciled in England.

Since these statutes do not provide for the recognition of foreign divorce decrees, the question arose whether, without specific statutory provision, this extension of domestic jurisdiction, worked a corresponding extension of the common law rules of recognition. Without hesitation, the English courts answered in the affirmative and soon began to give relief to wives who obtained foreign divorces.

Already, in 1906, Armitage v. the Attorney General had, in an indirect way, extended the basis for recognizing the jurisdiction of foreign courts. The English court recognized a divorce decree pronounced in South Dakota, on proof that the decree would be

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4. 12, 13 & 14 Geo. 6, c. 100. The Act was repealed by the Matrimonial Causes Act, 1950, 14 & 15 Geo. 6, c. 25, but the rule of s. 1 was repeated in s. 18 (1) (b). This section is now repealed and re-enacted by s. 40 of the Matrimonial Causes Act, 1965, 13 & 14 Eliz. 2, c. 72.

5. The Matrimonial Causes (War Marriages) Act 1944, dealt with recognition of foreign decrees, 7 & 8 Geo. 6, c. 43.

recognized in New York where the parties were domiciled in the eyes of the court. In other words, where a foreign decree is recognized as valid by the courts of the country of the husband’s domicile at the time the decree was pronounced, the English courts will treat it as effective to alter his married status.

The first serious attempt to extend the common law basis for recognition took place in 1953 in the now famous case of *Travers v. Holley*\(^7\) decided by the English Court of Appeal. It was held that English courts should recognize in foreign courts a like jurisdiction to that which they claim for themselves. If English courts have, by statute, jurisdiction to grant divorces to wives whose husbands are not domiciled in England, a corresponding jurisdiction should, as a matter of common law, be accorded to foreign courts, to grant divorces to wives whose husbands were not domiciled in the foreign countries where the divorces were sought. As Hodson L.J. said:\(^8\) “Where, as here, 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 recognize a jurisdiction which *mutatis mutandis* they claim for themselves.” The nexus, falling short of domicile, between the petitioning wife and the foreign forum which was relevant in *Travers v. Holley*, was that the wife should have been deserted at a time when her husband was domiciled in this foreign country. As a result of this decision, if a wife domiciled in a foreign country is there deserted by her husband who then changes his domicile and she obtains a divorce in the courts of his former domicile, this divorce will be recognized in England. The decision was a bold and beneficial piece of judicial legislation intended to reduce the incidence of “limping marriages”.

In *Travers v. Holley*, the jurisdiction claimed by the English court (in a domestic context) was that conferred by the deserted wife provision of the Act of 1937.\(^9\) In 1958, in *Robinson-Scott v. Robinson-Scott*,\(^10\) reciprocity was established by reference to sec-

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\(^7\) *Supra*, footnote 1. In that case it will be recalled that a decree pronounced under the deserted wife statute of New South Wales was held entitled to recognition in England on the ground that English law since 1937 provided for a substantially similar basis of jurisdiction. *Travers v. Holley* was not followed in *Fenton v. Fenton*, [1957] V.L.R. 17. The Full Court of Victoria treated the existing judge-made rule as to recognition of foreign decrees of dissolution of marriages as too firmly established to be susceptible of alteration by judicial decision. This case was abrogated by s. 4 of the Marriage (Amendment) Act 1957 (Victoria), No. 6186. See now s. 95 (2) of the Commonwealth Matrimonial Causes Act, 1959, No. 104, of 1959.

\(^8\) *Ibid.*, at p. 257 (P.).

\(^9\) *Supra*, footnote 3.

tion 18 (1) (b) of the Matrimonial Causes Act, 1950, which deals with the residence of the wife. The court held that a divorce obtained by a wife who had been resident in Switzerland for over three years would be recognized in England, even though her husband was not domiciled in that foreign country at the time of the commencement of the proceedings. The principle of Travers v. Holley was refined by Karminski J. The Swiss court had exercised jurisdiction on the basis that the wife had, in the circumstances, acquired a separate domicile from that of the husband. But the basis upon which the Swiss court proceeded was not considered relevant. What mattered was whether, on analogous facts, the English courts could have taken jurisdiction: "It is not necessary that the foreign statutory grounds of jurisdiction be substantially similar to the English ones. It is sufficient that facts exist which would enable the English courts to assume jurisdiction". However, the foreign divorce decree must not have been granted by the courts of the country where the wife had only transitory residence.

Recognition of the effectiveness of a foreign decree granted by the courts of the domicile does not depend upon the grounds upon which the foreign court had acted. This proposition should have equal application to the recognition of a foreign decree under the Travers v. Holley doctrine. Thus, in Januszkiewicz v. Januszkiewicz, Nitikman J. of the Manitoba Court of Queen's Bench said: "Having found in the case before me that the Polish court had jurisdiction to entertain the suit for divorce, there remains merely the question: Is it necessary that the grounds for divorce be such as are required in our jurisdiction? The answer to that must be in the negative. Once it is recognized the foreign court has jurisdiction to deal with the matter, it follows that a divorce granted by that court, on grounds proper to it, is valid, and must be so found by our courts."

To sum up, in England today, the courts will recognize the validity of a foreign decree of divorce rendered either by the court of the husband's domicile or the court of the wife's three-year residence, or that of the country where her husband was domiciled when he deserted her. English courts will also uphold a foreign

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11 Supra, footnote 4.
12 Supra, footnote 10, per Karminski J., at p. 88 (P.).
14 (1965), 55 D.L.R. (2d) 727, at p. 735. The Polish court had exercised jurisdiction to declare the marriage dissolved in circumstances which the Canadian courts themselves recognize as a sufficient basis for taking jurisdiction. See Divorce Jurisdiction Act, R.S.C., 1952, c. 84, s. 2. This section is analogous to s. 13 of the 1937 Matrimonial Causes Act (U.K.) which was relevant in Travers v. Holley, supra, footnote 3.
divorce decree if its validity is admitted by the law of the husband’s domicile.

What still remained unclear until recently, was whether the doctrine of *Travers v. Holley* could be made retrospective to divorces granted before the passage of the statutes extending the grounds of domestic jurisdiction of English courts. Should a foreign decree be recognized if it were pronounced at a date prior to the conferment of comparable non-domiciliary jurisdiction in the English courts?

This problem had not escaped the attention of some scholars. In 1961, Dean Z. Cowen and Professor Mendes da Costa had this to say:15

In *Travers v. Holley*, Hodson L.J. pointed to the fact that at the material time at which the New South Wales proceedings were instituted, the comparable English legislation was in force; but in *Arnold v. Arnold* recognition was given to the foreign decree notwithstanding the fact that foreign proceedings were instituted and a decree pronounced at a time when three years’ residence was not yet a ground of jurisdiction in English law. As a practical matter, this is a good result, as it will tend to avoid limping marriages, and it is submitted that as a matter of common law, the decisive date should be the time at which the foreign

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15 Matrimonial Causes Jurisdiction (1961), p. 86. See also: G. D. Kennedy, “Reciprocity” in the Recognition of Foreign Judgments: The Implication of *Travers v. Holley* (1954), 32 Can. Bar Rev. 359, at p. 367 who suggests that the principle of reciprocity is retroactive, there being no rule of public policy which prevents it being so. The date of remarriage is the decisive date. If that date follows the date of the change in the municipal law, the English court can disregard the fact, that at the time when it was pronounced the foreign decree was invalid in English law. J. K. Grodecki, in Conflicts of Laws in Time (1959), 35 Br. Y. B. Int. L. 58, at p. 62, believes that the material time at which the statutory similarity must exist is the time of the institution of the English proceedings. *Contra:* Dicey, Conflict of Laws (7th ed., 1958), p. 322, par (5) where it is stated: “The material time at which the similarity must exist is the time when the foreign divorce proceedings are instituted.” The words of Hodson L.J. in *Travers v. Holley*, supra, footnote 1, at p. 256 (P.), are referred to as the basis of this statement: “Since 1937 this exception has been largely extended first by the Matrimonial Causes (War Marriages) Act, 1944 (a temporary war measure), and later by the Matrimonial Causes Act, 1950, s. 13. It is unnecessary to consider the effect of these later statutory provisions since, at the material time, when the New South Wales proceedings were instituted, the Act of 1937 was in force and s. 13 of this Act corresponds in substance with the provision under which the New South Wales court claimed jurisdiction between the parties to this appeal.” (Italics mine).

Professor J. H. C. Morris, in an article entitled The Time Factor in the Conflict of Laws (1966), 15 Int. and Comp. L.Q. 422, at p. 425 says: “The foreign divorce which was recognised in *Travers v. Holley* on the analogy of the English statute of 1937 had been obtained in 1943. The question therefore arises, would the decision have been the same if the divorce had been obtained before 1937? Since the decision would have been inconceivable before the statutory change made in that year, it is submitted that on principle no divorce granted before 1937 or 1949, as the case may be, should be recognised in England under the doctrine of *Travers v. Holley*.”
proceedings come into question, so that if at that time there is a comparable basis of jurisdiction in the forum, the foreign decree should be recognized.

Actually, in both *Travers v. Holley* and *Arnold v. Arnold*, the court did not consider the retrospective operation of the statutes involved. This problem was the major issue in *Indyka v. Indyka* just decided by the English Court of Appeal. Lord Denning expressed the opinion that: "If a wife was resident in a foreign country for three years and validly obtained a divorce there, that is, in the courts of her three-year residence, we should recognize it as valid here for all relevant purposes, no matter, whether the divorce was granted before or after December, 1949."

In this case, the wife who had always resided in Czechoslovakia but whose Czech-born husband had acquired a domicile of choice in England in 1946, was granted a decree of divorce by a court in Czechoslovakia in January 1949, which became final in February 1949. In 1959, the husband went through a ceremony of marriage with his second wife. Six years later, she petitioned for a divorce on the ground of her husband’s cruelty. By an amended answer, the husband claimed that the marriage was void for bigamy in that the Czech decree purporting to dissolve his previous marriage was not valid in England, as he was domiciled in England at the time when it was made. Accordingly, he was still married to his first wife. In a reserved judgment, Latey J., on the question of the validity of the English marriage, held that the Czech decree pronounced in 1949 was not valid in English law, with the result that there was no marriage to dissolve and, he made a declaration of nullity. Latey J. based his decision on the view that the Act of 1949—by which, as noted, the English courts first assumed jurisdiction to grant divorces to wives domiciled abroad but resident in England and the consequential change of recognition of foreign decrees—altered the law in December 1949, prospectively and not retrospectively. He accepted the rationale of *Travers v. Holley* and *Robinson-Scott v. Robinson-Scott* but was prepared to apply

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16 [1957] P. 237. In that case a Finnish decree of divorce was recognized notwithstanding that it was granted in 1940, that is nine years before the coming into effect of the English Act of 1949. But the ground upon which jurisdiction was based is not clear: See J. H. C. Morris, The Australian Matrimonial Causes Act, 1959 (1962), 11 Int. and Comp. L. Q. 641. See also V. L. Korah, Recognition of Foreign Divorce Decrees (1957), 20 Mod. L. Rev. 278, at p. 280.


19 *Supra*, footnote 1. Note that in the present case the husband did not desert the first wife in Czechoslovakia, the latter having refused to live with him in England.

20 *Supra*, footnote 9.
it only if the first wife had obtained a divorce in Czechoslovakia after December 1949. Since the 1949 statute was enacted eleven months after the foreign decree was granted, such decree could not be recognized in England.

On appeal by the second wife, the decision of Latey J. was reversed by a majority of the Court of Appeal. Lord Denning was of the opinion that: "If the courts of England were not to recognize this Czech divorce, it would be a disgrace to the law that should prevail between nations." Applying Travers v. Holley and Robinson-Scott v. Robinson-Scott, two decisions which have proved most beneficial to foreign wives, his Lordship properly points out that the doctrine of these cases is judge-made law, "and the judges can make it retrospective to divorces before 1949 if it is just and proper to do so". And in his opinion, it is the policy of the English law that it should be so.

The majority of the Court of Appeal believed that Latey J. was wrong to think that the doctrine of Travers v. Holley was based on an implied enactment by Parliament in December 1949. The doctrine is not based on any implication in the English statute. This statute only deals with the jurisdiction of English courts to grant a divorce; it does not say a word about the recognition of foreign divorces. The English rules of recognition of foreign divorce decrees are common law rules and nothing else. For this reason also, the application of the doctrine does not depend on a showing of substantially similar form in the foreign domestic ground of jurisdiction.

Diplock L.J. bases his decision supporting the validity of the Czech divorce on the view that it is, "... a well established principle of public policy applied by English courts that, so far as it lies within their power to ensure it, the status of a person as married or single should be the same in every country which he visits, that is that there should not be 'limping marriages'". Existing rules as to recognition of foreign decrees must be constantly re-examined, "... in the light of changed social conditions and of developments in the public policy towards the dissolution of marriages which the statutory alterations in their own jurisdiction disclosed".

Diplock L.J. believes that the underlying ratio decidendi of Travers v. Holley is that:

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21 Supra, footnote 17, at p. 607.
22 Supra, footnote 1.
23 Supra, footnote 10.
24 Supra, footnote 17, at p. 609.
25 Ibid., at p. 610.
26 Ibid., at p. 612.
27 Ibid., at p. 613.
If it be right that the public policy which underlay the original judge-made rules both as to the jurisdiction of the English courts to dissolve marriages and as to the recognition of the effectiveness of foreign decrees is to avoid the creation of marriages which limped in England or abroad, this policy would lead the English courts to recognize as effective in England every decree of dissolution of marriage pronounced by a foreign court which they were not inhibited from so recognizing by the competing rule that the English courts do not recognize as effective to alter the legal rights in this country of any person any judgment of a foreign court given in circumstances in which *mutatis mutandis* the English courts themselves would not have jurisdiction to adjudicate by reason of the subject-matter of the litigation or the parties thereto. It follows, therefore, that to the extent that that inhibition is removed by the extension of the jurisdiction of the English courts themselves to decree dissolution of marriages, the public policy requires the English courts to recognize the effectiveness of decrees of dissolution of marriage pronounced by foreign courts in exercising their jurisdiction in the new circumstances which *mutatis mutandis* would entitle an English court to exercise its extended jurisdiction to dissolve a marriage.

Furthermore, one of the most important consequences flowing from this decision is brought to light by his Lordship when he points out that:

> . . . the rule as to the recognition of foreign decrees of dissolution of marriage can no longer be regarded as merely part of a more general rule of English private international law that a natural person's legal capacity in this country is regulated by the law of his domicile. It is a separate rule in its own right about recognition of judgments of foreign courts. The decision in *Travers v. Holley*, [1953] P. 246, creates an exception to the more general rule that the law of his domicile alone governs legal capacity by recognizing the right of some courts which are not courts of a natural person's domicile by a decree of dissolution of marriage to effect changes in his legal capacity in England in so far as this is dependent upon the existence or non-existence of his married status but not otherwise. But the *ratio decidendi* of *Travers v. Holley*, as I have expanded it, does not, in the absence of such a decree, permit an English court to treat any law other than the law of a natural person's domicile as regulating in any respect his legal capacity, including his married status, in this country. This was what was decided by Davies J. in *Mountbatten v. Mountbatten*, [1959] P. 43.

On the question whether the court should recognize the effectiveness of the Czech decree rendered on a jurisdictional basis similar to that which, a few months later, was bestowed upon the English courts, Diplock L.J. considers, as the relevant date, the husband's second marriage in 1959, for if it were ineffective, then he lacked the capacity to marry again. He acknowledges the cogency and logic of the reasoning which led Latey J. to the con-

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clusion that, "... the law is that when the English municipal law is altered to widen the divorce jurisdiction of the English courts, comity and reciprocity require the appropriately widened recognition of decrees pronounced abroad after and not before the change in the municipal law: the two changes coincide in point of time and are both prospective", but rejects it as, in his opinion:

We are dealing with a rule of public policy whose object is to prevent creating "limping marriages".

The Act of 1949 removed an inhibition upon the application of that policy to the recognition of decrees of dissolution of marriage pronounced by foreign courts in the circumstances in which the Czech decree was made. Ever since that inhibition has been removed, it has, in my opinion been open to this court to say:

"We now recognise that residence of a wife petitioner within the jurisdiction of a court of a foreign state for three years immediately preceding her petition for a divorce is a sufficient nexus between the spouse and that foreign state on which to found the jurisdiction of its court effectively to dissolve their marriage."

And I see no reason why if we now recognise that nexus as sufficient, we are not entitled to recognise the validity of such a decree of a foreign court whenever made where that nexus between the spouses and the foreign state in fact existed at the time that it was made. To restrict recognition to decrees made by a foreign court after the Act of 1949 was passed would be to defeat to that extent the public policy of avoiding "limping marriages" which is the purpose and justification of the changes which the courts since Travers v. Holley, [1943] P. 246, have been making in the common law as to the recognition of the effectiveness of foreign judgments of dissolution of marriage.

Turning to the proper function of the courts, Diplock L.J. points out that the common law is not changeless. "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 of each man’s duty to his neighbour. . . . And 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." On that basis, he did not hesitate to reject the narrower basis of recognition of foreign decrees of dissolution which Latey J. adopted in the court below. To recognize the effectiveness of the Czech decree accords, "better with the public policy of avoiding ‘limping marriages’ and with what the common man would think was common sense".

This policy-oriented approach to the solution of conflict of laws problems did not satisfy Russell L.J. who, in a dissenting opinion, also took a narrower basis of recognition. His legalistic
approach as to whether the Act of 1949 could retroactively validate the Czech divorce seems correct up to a certain point only. He quite properly states that: "The validity (or effect) in English law of the English post-1949 marriage must have depended upon the matrimonial status in English law of the husband at the time when it was contracted. That in turn must have depended upon the validity (or effect) in English law of the pre-1949 Czech divorce. When that decree was made it cannot be doubted that in English law it was invalid and ineffective, and effected in English law no change in the matrimonial status of the husband. At that time it is beyond dispute that English law required her to bring proceedings in this country if she wanted a divorce." Thus, according to Russell L.J., the Act of 1949 could not validate in English law, on the day on which it came into operation, all invalid foreign divorce decrees in cases where the appropriate conditions existed, automatically altering on that day the matrimonial status in English law of the parties. Why not? It would seem that as long as, on the date of remarriage, the Czech divorce could have been recognized as valid on the basis of *Travers v. Holley*, the husband was capable of contracting marriage.

Actually, the 1937 and 1949 statutes dealt with future divorces *in England* only, therefore one cannot argue that they should only have prospective operation also with respect to foreign divorces. As the majority of the Court of Appeal points out, the issue is simply a question of recognition by the English court of a foreign decree, and there is no reason why the court should not be able to make the doctrine of *Travers v. Holley* retrospective. In cases, where the circumstances of the foreign decree are such that, if it were made at the time of the remarriage or at the date of the English proceedings, it could have been validly made in English law, it will be recognized as valid in England. As Mr. Grodecki points out, the fact that a judicial rule is modelled on the analogy of a statute, does not mean that it should share with that statute its non-retroactive character:

There would seem no warrant for such a finding, with its logical corollary, that in order to obtain recognition in this country, the foreign decree must have been made since 1953 [date of *Travers v. Holley*]. If in fact the Acts [of 1937 and 1949] had been concerned with recognition a conflict would have arisen between the judicial rule and the new statutory rule and, subject to special transitional provisions in the Acts, the Finnish decree in *Arnold* [1957] P. 377 could not have been recog-

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34 *Supra*, footnote 1.
nised. This result would be so inconvenient as to force the conclusion that in such an event the Acts would have indubitably been made, in some measure at any rate, retrospective.

It is true that the solution adopted by the majority could lead to some difficulties and should not be followed when it would defeat vested rights. For instance, where there is a pre-1949 foreign decree followed by a pre-1949 English marriage, it might be wrong to hold the marriage valid in post-1949 proceedings. Or, as Russell L.J. points out:

Suppose a relevant pre-1949 decree of divorce, and a pre-1949 death of the husband intestate with estate in England, not having attempted remarriage, the wife would in English law have rights to his estate accruing on his death as being his widow. Would the coming into operation of the Act of 1949 deprive her of those rights? And, if so, would such deprivations be limited to undistributed assets?

It is perhaps, however, asserted as a proposition of English law, that if the event upon which English law operates (e.g. remarriage, or death intestate) and which is related for its validity or effect to a pre-1949 foreign decree, is itself post-1949, the foreign decree is valid in English law; but if the event is pre-1949 the foreign decree is invalid in English law. But this limited way of putting the case still does not appeal to me. As I see it, it comes back in the end to the proposition that the Act of 1949 operated in English law to alter the then existing matrimonial status; and that proposition I cannot accept.

However, if the relevant date is that of the remarriage, and at that time the foreign divorce could have been recognized as valid in England, these problems do not arise and one need not be concerned with vested rights. If, on the other hand, one considers as relevant the date of the English proceedings and the remarriage took place before the domestic legislation was enacted, Russell L.J.’s remarks have much force.

Russell L.J. rejects the argument based on the public policy of avoiding “limping marriages” on the ground that it has been singularly ignored by the legislature except in a few special cases. Yet he is forced to admit that the attitude of the English courts to foreign divorce decrees has been conditioned by domestic legislation. Since legislation is prospective, why does he ask, should the judiciary adopt a retrospective attitude? The public policy of avoiding “limping marriages”, “must be preserved 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.

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36 Supra, footnote 17, at pp. 616-617. See also the example given by Latey J., supra, footnote 29, at p. 901.
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".37

Finally his Lordship argues that from a "common man's" point of view whose supposed reactions might not always "be a dependable guide through the necessarily complicated path of a legal system"28 the facts of the case call for a dismissal of the appeal.

This decision is of great value, first of all because the majority of the Court of Appeal took great pains to explain the *ratio decidendi* of *Travers v. Holley*39 and to analyse the consequences which follow from it. Secondly, by deciding that recognition of foreign divorce decrees should not be restricted to those made by foreign courts after the Act of 1949 was passed, the Court of Appeal breaks new ground and puts the finishing touches on *Travers v. Holley* with respect to conflict of laws in time.

In this case, the conflict of laws in time, involves a change in the conflict rule of the forum.40 We must ask ourselves whether *Travers v. Holley*, a judicial decree which reverses an earlier judicial rule, should have a retrospective effect. The majority of the Court of Appeal found no difficulty in holding that a new English common law rule of conflict of laws may be made to apply to a legal situation which came into existence before the adoption of the new rule. This approach is consistent with the view that judge-made law is retrospective, whereas statute law is usually prospective. Nevertheless, as Dr. Morris observes,41 sharing Russell L.J.'s doubts: "But what is the position when a rule of judge-made law is modelled on the analogy of a prospective statute. Is the new rule fully retrospective, or only to the date when the statute came into force?" As Mr. Grodecki points out,42 "the position should not be different, retroactivity is implicit in judge-made rules".

The change in the conflict rule of the recognising court was only *indirectly* based on the modification of the *domestic* law by Parliament, therefore the question of the retroactive application

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37 Ibid., at p. 617.  
28 Ibid.  
39 Supra, footnote 1.  
40 See authors cited, supra, footnote 15; In Canada, J.-G. Castel, Conflict of Laws in Space and in Time (1961), 39 Can. Bar Rev. 604. A change in the conflict rule of the forum does not differ from a change in any other rule of law and its effect must be ascertained in accordance with English rules of statutory interpretation and judicial precedent. In general there is a strong but rebuttable presumption that a statute is not intended to have retrospective effect. See J. H. C. Morris, loc. cit., footnote 15, at p. 423.  
42 Loc. cit., supra, footnote 15.
of a statutory rule could not arise. Again it must be emphasized that the court was faced with the problem of determining the respective scope of operation in time of successive common law rules of conflict of laws and the majority decided to give retrospective effect to the principle of Travers v. Holley. This approach accords with established principles. The Court of Appeal was free to decide this question completely unfettered by any legislative provision or rule of statutory interpretation. There is no reason why a common law rule should not be made retrospective, as long as vested rights are not infringed.

Indyka v. Indyka\(^{43}\) is also of interest to students of jurisprudence as the majority of the court emphasized that its decision was motivated by public policy. A policy-oriented approach to the solution of conflict of laws problems is not new, although judges often hesitate to acknowledge it openly. The courts are always prepared to modify the common law to adapt it to a changing society. This attitude clearly indicates that today, the declaratory theory of precedent is no longer a basic principle of the common law. However, it does not mean that when a precedent is overruled by a higher court, the effect should not be retrospective. A legalistic approach must yield to strong public policy reasons.

Actually, even from a legalistic point of view, it seems that the result could be upheld. The problem was whether, on March 20th, 1959, when the husband went through the second ceremony of marriage in England, he was capable of doing so. Such capacity did exist because, at that time, by virtue of the 1949 Act and the rationale of Travers v. Holley, his divorce, if it had been questioned then, would have been recognized as valid in England, the country of his domicile. Thus, contrary to what Latey J. held,\(^{44}\) it is possible to recognize the decree as effective not because English courts would not have recognized it at the time when it was made but because they would have recognized it as effective at the time of the second marriage.

It would seem that in matrimonial cases, the decisive date should be when the second marriage takes place and not necessarily, as some scholars have proposed\(^{45}\) and the majority of the Court of Appeal has decided,\(^{46}\) when the foreign proceedings come

\(^{43}\) Supra, footnote 17. For a criticism see F. A. Mann, (1967), 30 Mod. L. Rev. 94. The case is also noted in (1967), 83 L.Q. Rev. 6.

\(^{44}\) Supra, footnote 29, at p. 901. \(^{45}\) See op. cit., footnote 15.

\(^{45}\) Supra, footnote 17, per Lord Denning at p. 609: "... no matter whether the divorce was granted before or after December, 1949"; per Diplock J., at p. 615: "I see no reason why ... we are not entitled to recognise the validity of such a decree of a foreign court whenever made...."
into question before the English courts. In the present case, to consider as decisive the date of the second marriage, would be consistent with the view that a person's capacity is governed by the law of his domicile.\footnote{47}

In summary, \textit{Indyka v. Indyka}\footnote{48} constitutes an important landmark in the development of conflict of laws in space and time in the field of recognition of foreign divorces in England as it solves another difficult problem arising from \textit{Travers v. Holley}.\footnote{49}

J.-G. Castel*