

12-1-1958

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Recommended Citation

Edward Kaufman, *Conflict of Laws -- Non-Judicial Divorces*, 13 U. Miami L. Rev. 240 (1958)
Available at: <http://repository.law.miami.edu/umlr/vol13/iss2/9>

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The courts should be reluctant to formulate crystalized, rigid rules of law for an occurrence subject to such infinite variation in its facts as an automobile collision. Its very nature demands that reason weigh and consider all attendant circumstances before any conclusion can be rationally drawn as to their effect upon liability. "No two collisions are exactly alike, and . . . particularly in a rear-end collision, issues of fact are raised, which should be submitted to the jury . . ." ³³ (Emphasis added) This underlies, in part, the rationale of the prevailing view that permits the inference of negligence. Moreover, this approach tacitly recognizes that in this situation, negligence can only be established by circumstantial evidence, collision and injury being the "facts" from which reasonable men can infer the ultimate fact, negligence. "Negligence is never presumed; it, or the circumstantial basis for the inference of it, must be established by competent proof, and whether it exists is pre-eminently a question . . . for the jury."³⁴ *It should remain such.*

SAMUEL L. HELLER

CONFLICT OF LAWS—NON-JUDICIAL DIVORCES

The petitioner, a non-immigrant alien student, temporarily in the United States, was granted a non-judicial divorce from his wife living in Pakistan, by an Islamic religious official in New York. Although this proceeding was apparently valid in the domiciliary country of Pakistan, New York Law required a "due judicial proceeding" in order to secure a divorce. The petitioner brought an action to review an order denying his application for a change in status to that of a permanent resident alien, by reason of his marriage to an American citizen. *Held*, the marriage was void because of the invalidity of the prior divorce. *Shikoh v. Murff*, 257 F.2d 306 (2d Cir. 1958).

A widely held view is that non-judicial divorces¹ must be authorized by the law of the state wherein they took place; this rule prevails even in situations where such divorces have been obtained in compliance with the law of the nationality or domicile of the parties which generally governs their personal status.² The reason for this view is based on primary

33. *O'Donnell v. United Electric Rys. Co.*, 48 R.I. 18, 134 Atl. 642(1926).

34. *Murphy v. Terzako*, 14 N.J. Super. 254, 82 A.2d 1(1951).

1. The casenote will concern itself with a comparative study of the English and American positions on recognition of nonjudicial divorces occurring within their territorial jurisdiction, but valid according to the law of the foreign domicile of the individual parties.

2. 1 RABEL, *THE CONFLICT OF LAWS: A COMPARATIVE STUDY* 485 (1947); 3 ARMINJON, *PRECIS DE DROIT INTERNATIONAL PRIVE* 34, 35 (1931); WOLFF, *INTERNATIONALES PRIVATRECHT* 132 (1933); NUSSBAUM, *DEUTSCHES INTERNATIONALES PRIVATRECHT UNTER BESONDEREN BERÜCKSICHTIGUNG DES ÖSTERREICHISCHEN UND SCHWEIZER-*

principles of international law. It is well established that a nation exercises within its own territory an absolute and exclusive jurisdiction over the acts of residents and aliens alike.³ Conversely, a foremost restriction imposed by international law upon any other state is, that in the absence of a permissive rule to the contrary, it may not exercise its powers in any form in the territory of the former nation.⁴

The *lex loci actus*, therefore, determines the effect of a divorce by controlling the form in which divorce is granted, if at all, including the determination of authorities granting the divorce. If foreigners may be divorced at all, they are limited to the form prescribed for subjects of the forum by the local law. A divorce granted through other procedures or by other officials would, by local standards, have no legal significance.⁵ Upon this proposition, religious and private divorces have been declared void when performed within the United States.⁶

This jurisdictional approach results in the following conflict of laws problem: if a divorce has been pronounced by someone who has no authority to do so according to the *lex loci actus*, the act is a nullity in the country where pronounced even though it might be valid under the personal, i.e., national or domiciliary, law of the parties. The result is what has been described as a "limping" divorce.⁷

To avoid this situation, the opposite view advances the proposition that non-contentious divorces should be recognized by every jurisdiction, even when they are not made in compliance with the law of the state in whose territory they are rendered, provided only that they are recognized

RISCHEN RECHTS 164 n. 5 (1932); cf. 3 FREEMAN, LAW OF JUDGMENTS 3095 (5th ed. 1925).

In the United States, cases recognizing such divorces when it was found that the parties were domiciled in the foreign country where granted, seem to imply this attitude; see, e.g., *Miller v. Miller*, 70 Misc. 368, 128 N.Y. Supp. 787, 790 (Sup. Ct. 1911), "A rabbinical divorce granted here would have no validity." However, it seems that the *Shikoh* case is the first one to stand for the proposition factually.

3. Case of the S.S. "Lotus" P.C.I.J., ser. A, No. 10 (1927); RESTATEMENT, FOREIGN RELATIONS LAW § 9 (Tent. Draft No. 1, (1957)).

4. *Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 11, 136 (1812); Case of the S.S. "Lotus" P.C.I.J., ser. A, No. 10 (1927).

5. 1 RABEL *supra* note 2, at 417.

6. *In re Goldman's Estate*, 156 Misc. 817, 282 N.Y. Supp. 787, 790 (Surr. Ct. 1935); "Since the effect of any act must be determined by the law of the place where such act is performed, . . . and the transactions purporting to grant the divorce were performed in the state of New York whose fundamental law provides that no divorce shall be granted other than due judicial proceedings, it follows that the purported divorce was a nullity and wholly ineffectual to dissolve the marriage between the parties."

Accord, In re Spiegel, 24 F. 2d 605 (S.D.N.Y. 1928); *Chertok v. Chertok*, 208 App. Div. 161, 203 N.Y. Supp. 163 (Sup. Ct. 1924), (divorce decree by a Rabbi in New York, granted to a husband in New York, against his wife living in Russia, held invalid despite compliance with the law of the Soviet government); *In re Cheney's Estate*, 162 Misc. 764, 295 N.Y. Supp. 567 (Surr. Ct. 1937).

7. WOLFF, PRIVATE INTERNATIONAL LAW 369 (2d ed. 1950).

by the state of which the parties are nationals or domiciliaries.⁸ The justification is sought in the principle that alterations of status are governed by the personal law of the parties.⁹

Regarding domicile as of paramount importance in determining questions of status,¹⁰ English courts have recently adopted this principle in a fact pattern strikingly similar to the instant case. In *Har-Shefi v. Har-Shefi*,¹¹ an Englishwoman had married an Israeli domiciled in Israel.¹² Shortly afterwards they visited England where the husband gave his wife a bill of divorcement in the presence of, and sanctioned by, a Rabbi in London.¹³ Subsequent to the husband's deportation, the wife asked for a declaratory judgment of the English court as to the validity of the divorce. Deciding on the merits of the case,¹⁴ the court found that upon the evidence the divorce was valid according to the law of Israel. It did not consider that the absence of a judicial proceeding affected

8. In England, DICEY, *CONFLICT OF LAWS* 314 (7th ed. 1958), and CHESHIRE, *PRIVATE INTERNATIONAL LAW* 380 (5th ed. 1957) both adopt this view. In accord, Ryan, *Conflict of Laws—Recognition of "Foreign Divorce"—Jurisdiction to Make a Declaration of Status*, 32 CAN. B. REV. 1027 (1954).

See, 1 RABEL *supra* note 2 at 485; 3 FRANKENSTEIN, *INTERNATIONALES PRIVATRECHT* 560 n. 70 (1926-1935) and decisions cited by him.

French courts have allowed foreign Jewish couples to divorce on French soil in Jewish form, i.e., by bill of divorcement, PILLET & NIBOYET, *MANUEL DE DROIT INTERNATIONAL PRIVE* 870 (2d ed. 1928); 3 ARMINJON, *PRECIS DE DROIT INTERNATIONAL PRIVE* 35 n. 3 (1931).

9. See generally 1 Rabel *supra* note 2 at 101-160.

10. *Niboyet v. Niboyet* [1878] L.R. 4 P.D. 1, 12 *per* Brett, L.J. dissenting: "The law which enables a court to decree an alteration in the relation between husband and wife . . . is a matter of principle the law of the country to which by . . . domicile they owe obedience. The only court which can divorce by virtue of such law is the court of that country." This reasoning followed that in *Wilson v. Wilson*, [1872] L.R. 2 P. & D. 435; and the rule that divorce jurisdiction belongs exclusively to the law of the domicile and the law applied, that of the domicile, was subsequently established in *Le Mousier v. Le Mousier*, [1895] 20 A.C. 517 (P.C.). The exception, see DICEY *supra* note 8 at 314, in *Armitage v. Attorney General*, [1906] P. 135, allows recognition in England of a foreign divorce where it was granted outside the domiciliary state provided the divorce is recognized as valid according to the law of the domicile. But note that the rule is consistent with the opinion that domicile is of paramount importance in determining questions of status.

11. [1953] P. 220; following the reasoning in *Sasson v. Sasson*, [1924] A.C. 1007 (P.C.); followed in *Mandel v. Mandel*, [1925] Vict. L.R. 51.

12. In England, the doctrine that the domicile of the husband is, by law, the wife's as well, *Harvey v. Farnie* [1882] 8 A.C. 43; Attorney General for Alberta v. *Cook* [1926] A.C. 444 (P.C.); see DICEY *supra* note 8 at 119; is subject only to the qualifications made by the Matrimonial Causes Acts, 1937, 1 Edw. 8 & 1 Geo. 6, c. 57; 1944, 7 & 8 Geo. 6, c. 43; 1949, 12, 13 & 14 Geo. 6, c. 100; Grisvold, *Divorce Jurisdiction and Recognition of Divorce Decrees—A Comparative Study*, 65 HARV. L. REV. 193, 197 (1951).

In the United States, a wife may establish a separate domicile of her own for purposes of divorce, *Cheever v. Wilson*, 76 U.S. (9 Wall) 108 (1869); *Ditson v. Ditson*, 4 R.I. 87 (1856).

13. The only divorce known to the law of Israel was that given by religious tribunals; for Jews the Rabbinical court, and for Moslems the Shari court. Bentwich, *Recognition of Religious Divorce*, 102 L.J. 662 (1952).

14. *Har-Shefi v. Har-Shefi* [1953] P. 163, was concerned with the procedural question of whether the wife had standing to bring a suit for a declaratory judgment.

the recognition of the divorce¹⁵ and held that the marriage, having been dissolved by the only form of divorce open to a Jew domiciled in Israel, should be recognized as having been dissolved for the purposes of English law.

It is to be noted that no judicial process had been put in motion in the Israeli domicile, and that what was held to constitute a valid divorce was an act performed wholly in England. The determinative question was not whether it had been obtained within the country of domicile, but whether it had been obtained in compliance with the law of the domicile without regard to the fact that this law was put into operation outside of such domicile.¹⁶

The *Har-Shefi* decision presents an interesting contrast with the instant case. One significant fact in *Shikoh* was that the purported divorce was apparently valid according to the law of the domicile, it being the only form of divorce available to a Moslem domiciled in Pakistan.¹⁷ But of equal significance here was the fact that the parties interested were both non-domiciliaries of this country, a fact which was not present in cases before our courts invalidating previous non-judicial divorces granted within this country.¹⁸ Clearly, the status of a person domiciled here could not be affected by such a divorce. But what of non-domiciliaries whose personal law, in matters of status, makes non-judicial divorces available?¹⁹

15. Had one, or both of the parties been domiciled in England, the delivery of the bill of divorcement would have had no effect upon the status of the parties since England insists on judicial proceedings to effectuate a valid divorce. *Preger v. Preger*, [1926] 42 T.L.R. 281; *Joseph v. Joseph* [1953] 2 All E.R. 710 (C.A.).

16. The decision in the *Har-Shefi* case was enthusiastically received by English textwriters. DICEY, *CONFLICT OF LAWS* 307,8 (7th ed. 1958) "Such recognition is consistent with the status theory of divorce and with the paramount importance of domicile in question of status."; CHESHIRE, *supra* note 8 at 380; " . . . since it satisfies the general principle that alterations of status are governed by the *lex domicilii*", and note the forceful reasoning that follows; Ryan, *Conflict of Laws—Recognition of "Foreign Divorce"—Jurisdiction to Make Declaration of Status*, 32 CAN. B. REV. 1027, 1043 (1954), "The writer would express the hope that the *Har-Shefi* decision marks the beginning of a rational approach by our (English) courts to problems of this kind, based not on an assumption of the superiority of our institutions, but on a desire to recognize facts arising from the rules of foreign laws over which our courts should not wish to exercise any control."

17. GLEDHILL, *PAKISTAN, THE DEVELOPMENT OF ITS LAWS AND CONSTITUTION* 192 (1957); GIBB & KRAMERS, *SHORTER ENCYCLOPEDIA OF ISLAM* 564 (1953).

18. Religious divorces occurring within this country have been invalidated, but in every instance at least one of the parties was domiciled here. See, *In re Spiegel*, 24 F. 2d 605 (S.D.N.Y. 1928); *Chertok v. Chertok*, 208 App. Div. 161, 203 N.Y. Supp. 163 (Sup. Ct. 1924); *In re Cheney's Estate*, 162 Misc. 764, 295 N.Y. Supp. 567 (Surr. Ct. 1937); *In re Goldman's Estate*, 156 Misc. 817, 282 N.Y. Supp. 787 (Surr. Ct. 1935).

19. It is accepted in the United States, as well as in England, that matters of status are determined by the law of the domicile. See, e.g., *Strader v. Graham*, 51 U.S. (10 How.) 82 (1850); *Pfeifer v. Wright*, 34 F. 2d 690 (N.D. Okla. 1927); *Woodward v. Woodward*, 87 Tenn. 644, 11 S.W. 892 (1889). Also, *RESTATEMENT (FIRST), CONFLICT OF LAWS* § 54 (1934); 1 BEALE, *CONFLICT OF LAWS* 468 (1935): "the state of domicile of the parties to a status is the state which is generally agreed in our law to have jurisdiction over status." And again, "Jurisdiction of the state of domicile . . . is . . . based upon legal reason. It is because the state of domicile is most concerned with the family life of those whose home is in its territory."; GOODRICH, *CONFLICT OF LAWS* 396 (3d ed. 1949).

The court noted that had the divorce been obtained within the country of domicile, it would most likely receive recognition here.²⁰ But recognition would not be extended²¹ where the act purporting to be a divorce took place within the territorial jurisdiction of New York between persons even if not domiciled therein. The court referred to the *lex loci actus* to declare that the divorce must be secured in accordance with the laws of that state.²²

20. Courts in the United States generally recognize foreign religious divorces when they are recognized as valid when granted within the domiciliary state. See, e.g., *Sobel v. People*, 212 Ill. 238, 72 N.E. 382 (1904); *Roth v. Roth*, 104 Ill. 35, 44 Am. Rep. 81 (1882); *Kapigian v. Minassian*, 212 Mass. 412, 99 N.E. 264 (1912); *Matter of Spondre*, 98 Misc. 524, 162 N.Y. Supp. 943 (Sup. Ct. 1917); *Miller v. Miller*, 70 Misc. 368, 128 N.Y. Supp. 787 (Sup. Ct. 1911); *Saperstone v. Saperstone*, 73 Misc. 631, 131 N.Y. Supp. 241 (Sup. Ct. 1911); *Leshinsky v. Leshinsky*, 5 Misc. 495, 25 N.Y. Supp. 841 (Super. Ct. 1893); *Matter of Rubinstein's Estate*, 143 Misc. 917, 257 N.Y. Supp. 637 (Surr. Ct. 1932); *Machransky v. Machransky*, 31 Ohio App. 482, 166 N.E. 423 (1927). See 27 C.J.S. *Divorce* § 327 (1958).

Other non-contentious divorces recognized here when performed within foreign jurisdictions are found in the following cases: *Starr v. Pease*, 8 Conn. 541 (1831); *Levins v. Sleator*, 2 Greene, Iowa 604 (1850); *Adams v. Palmer*, 51 Me. 480 (1863); *Clark v. Clark*, 10 N.H. 380 (1839), (legislative decrees); *Sorenson v. Sorenson*, 219 App. Div. 344, 220 N.Y. Supp. 242 (Sup. Ct. 1927) (executive decree); *Maris v. Sockey*, 170 F. 2d 597 (10th Cir. 1948), cert. denied, 336 U.S. 914 (1949); *La Framboise v. Day*, 136 Minn. 239, 161 N.W. 529 (1917); *James v. Adams*, 56 Okla. 450, 155 P. 1121 (1915) (Indian divorces when performed on the reservations).

Our courts have also recognized judicial divorces granted in a foreign jurisdiction at a time when the parties thereto were residing in the United States. In each case, however, it was found that the parties were still properly subject to the jurisdiction of the foreign court. *Oettgen v. Oettgen*, 196 Misc. 937, 94 N.Y.S. 2d 168 (Sup. Ct. 1949); *Hansen v. Hansen*, 255 App. Div. 1016, 8 N.Y.S. 2d 655 (Sup. Ct. 1938); *Weill v. Weill*, 26 N.Y.S. 2d 467 (Dom. Rel. Ct. 1941).

21. It is interesting to note that the principle laid down in *Armitage v. Attorney General* [1906] P. 135, to which England [Clark v. Clark 1921 37 T.L.R. 815; Perin v. Perin (1950) Scots L.T.R. 51; Walker v. Walker 1950 4 D.L.R. 2531 and the United States [Dean v. Dean, 241 N.Y. 240, 149 N.E. 844 (1925); Ball v. Cross, 231 N.Y. 329, 132 N.E. 106 (1921)] have ascribed, has eventually led to a split. The *Armitage* case established an exception to the rule of *Le Mousier v. Le Mousier*, 118951 A.C. 517, that a divorce could be granted only in the state of domicile. Under the *Armitage* doctrine, a divorce obtained outside of the domicile, but valid according to its law, will be recognized as valid in the forum considering the question. The facts of the *Armitage* case involved a South Dakota divorce, where the husband, by English standards, was domiciled in New York. Since the divorce was recognized as valid in New York, then England, the forum considering the question, would also recognize its validity. The *Har-Shefi* case appears to have extended and supported the doctrine to include recognition of divorces granted, not in a third jurisdiction, but in England itself, by a process which has no legal significance there. See DICEY, *CONFLICTS OF LAW* 314 (7th ed. 198); Thomas, *Declaration as to Effect of a Foreign Decree of Divorce*, 2 INT'L & COMP. L.Q. 444 (1953). Faced with the same factual opportunity, the court in the *Shikoh* case declined to follow the example set in the *Har-Shefi* case. Although not applied in the *Shikoh* case, the *Armitage* principle is not without support in the United States. It has been described as being ". . . in accordance with sound doctrine," BEALE, *CONFLICTS OF LAWS* 470 (1935). Also, Griswold, *Divorce Jurisdiction and Recognition of Divorce Decrees—A Comparative Study*, 65 HARV. L. REV. 193, 223 (1951), "This appears to be an entirely sound decision. The underlying basis of the rule of domicile in divorce jurisdiction is the desire for certainty. The state of domicile is regarded as the state having the closest connection with the parties, and the greatest interest in their status. If that state regards them as divorced, the fact should be recognized elsewhere."

22. N.Y. CONST. art. I, § 9 (1894), provides in part: ". . . nor shall any divorce be granted other than by due judicial proceedings; . . ."

Tested against established international principles,²³ the decision in the *Shikoh* case seems reasonable. Although domicile determines the controlling law as to the personal status of the individuals,²⁴ it still does not confer any extra-territorial governmental powers on an agent of a government, or a quasi-governmental agent of a religious organization in the country of domicile.²⁵ This applies even more so to a unilateral act of repudiation by a private party attempting to effectuate a divorce in this country according to the law of his domicile.²⁶ What law applies to the substantive question in the case is a choice of law problem; but who has power to administer the controlling law remains first and foremost a question of jurisdiction.

It is this latter question which the English court turned aside in the *Har-Shefi* case, giving effect to the personal law of the individuals as contained in their law of domicile; a decision which Cheshire describes as exemplifying a "shift of emphasis from jurisdiction to choice of law."²⁷

The fact remains that in both the *Shikoh* and *Har-Shefi* cases, a religious divorce was effectuated in jurisdictions which insist on judicial proceedings. In effect, the power vested under local law in local judicial authorities was being usurped by a quasi-governmental agent of a foreign religious society with jurisdictional powers limited to such foreign country. This represents a clear contravention of the international principle that prohibits one country from exercising extra-territorial powers in another without the latter's consent. Furthermore, the function was exercised in a form unknown to local law.

Finally, a most interesting factor present in the instant case seems to distinguish it from the *Har-Shefi* case. The latter case concerned an inter-party private relationship, where the effect of the divorce sought only to bind the two individuals. In the *Shikoh* case the divorce sought to have a binding effect not only upon the private relationship, but also upon an arm of the national government represented by the Immigration and Naturalization Service for the District of New York.

It is difficult indeed to imagine on what constitutional basis a private

23. *Schooner Exchange v. Mc Faddon*, 11 U.S. (7 Cranch) 116, 136 (1812); *Case of the S.S. "Lotus"* P.C.I.J., ser. A, No. 10 (1927).

24. See notes 10 and 19 *supra*.

25. "... a state . . . may not exercise its power in any form in the territory of another state." *Case of the S.S. "Lotus"* P.C.I.J., ser. A, No. 10 (1927).

26. In a similar situation, an Iranian national in Turkey attempted to divorce his wife by unilateral repudiation in accordance with the law of his nationality, to wit, Moslem religious law. Even Turkish courts [Cour de Cassation, October 28, 1950] would not allow it, one of the grounds being that repudiation is contrary to Turkish public policy. "It will be seen that this institution (Moslem unilateral repudiation, *talaq*) which forms part of Moslem Law, is very different from civil divorce under Turkish Law, which can only be granted after judicial inquiry upon certain specific grounds laid down by law." 84 *Journal du droit international* 1041 (1956).

27. CHESHIRE, *supra* note 8 at 384.

act, authenticated by an official of a foreign religious society even if locally incorporated, would be binding upon a governmental agency.

EDWARD KAUFMAN

DUE PROCESS* — JURISDICTION OVER NON-RESIDENT TRUSTEES

A testatrix-settlor executed an inter vivos trust naming a Delaware corporate trustee. Power to alter, amend, revoke, change the trustee and receive income for life was reserved. It was further provided that the settlor had a power of appointment as to the remaining corpus, either inter vivos or testamentary. After becoming domiciled in Florida, she made her last appointment in favor of two previously created trusts in Delaware, with the remainder in favor of the executrix, the appellant. The will directed the portion appointed to the appellant be paid in equal installments to the testatrix's two daughters, the appellees. The latter sued for declaratory relief urging the invalidity of the last created trusts as an invalid disposition under the Florida statute of wills.¹ Personal service was effected upon a majority of interested persons except the Delaware trustee; however, a copy of the pleadings together with a notice to appear were sent to the trustee and notice was published locally in compliance with the Florida constructive service statute.² The Florida court held the trust invalid and that jurisdiction to construe the will entailed substantive jurisdiction over absent defendants even though the trust assets were not within the state.³ The appellant-executrix brought suit in Delaware and that state's supreme court held that there had been a lack of jurisdiction and refused full faith and credit to the Florida decree.⁴ On certiorari to the United States Supreme Court, *held*, Florida decree reversed (that state having had insufficient contacts to give it jurisdiction); Delaware decree affirmed. *Hanson v. Denkla*, 357 U.S. 235 (1958).

The law in regard to a forum state's jurisdiction over non-residents has passed through three major stages in its evolutionary process.⁵ Stage One need only be traced back to the landmark case of *Pennoyer v. Neff*

*For a detailed discussion see Comment, this issue p. 205, *supra*.

1. FLA. STAT. § 731.07 (1957).

2. FLA. STAT. § 48.01 (1957).

3. *Hanson v. Denckla*, 100 So. 2d 378 (Fla. 1956).

4. *Hanson v. Wilmington Trust Co.*, 119 A.2d 901 (Del. 1957).

5. Presence, minimum contacts, minimum contact, (seemingly from the case of *McGee v. International Life Insurance Co.*, 355 U.S. 220 (1957)) 1. Consent is embraced in the presence theory, see *Travelers Ass'n v. Virginia*, 339 U.S. 643 (1950).