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DATE

19TH OCTOBER1921

[illegible]CULATION :—

Grindle

Lambert

Read

Masterton Smith.

Wood

Churchill

SUBJECT.

DIVORCE ORDINANCE 1904

Reports appt of Commission of Enquiry to consider question of desirable alterations to existing Divorce and Bastardy Laws. Requests expedition of consideration of steps to validate any divorces granted to persons not domiciled there.

Previous Paper

Gov 58061

MINUTES

Mr [illegible] Bottomley

The draft validating Bill [illegible] have gone out on 58061 Nyasa [illegible] amendment of the [illegible] law [illegible] we now have the reports by the C J + A.G. for which we asked on 29137, but as a Commission of Enquiry has been set up it will be best [illegible] for its report.

At any rate, wait [illegible] of [illegible] from Uganda to our [illegible] on 49157 [illegible] [illegible] [illegible] [illegible] [illegible] Nyasaland [illegible]

[illegible] 7.12.21

Subsequent Paper

Gov 10006/22

I think that this can wait for the time being, but in passing I would note that the use of the expression "domiciled in", in para: 3 of the despatch on 29157/21, was not a mistake, as the Chief Justice supposes, not unnaturally perhaps. I used the expression after a good deal of consideration. It is true that the claim is made in this country to grant nullity in respect to a marriage [illegible] outside the country and of which the parties are domiciled outside this country, provided that they are resident within the country, but I [illegible] to be dangerous, too dangerous for adoption in places like Kenya or Nyasaland. We can consider the position anew with Mr. Risley later on, but for the moment I am inclined to think that they had better confine their jurisdiction of nullity to cases in which the marriage was either contracted locally or the parties were domiciled locally.

15/12/21

I think that this can wait for the time being, but in passing I would note that the use of the expression "domiciled in", in para: 3 of the despatch on 29157/21. was not a mistake, as the Chief Justice supposes, not unnaturally perhaps. I used the expression after a good deal of consideration. It is true that the claim is made in this country to grant nullity in respect to a marriage celebrated outside the country and of which the parties are domiciled outside this country, provided that they are resident within the country but I know of no case in which this has actually been done. I have always thought that this is dangerous and to be avoided for adoption in places like Kenya and Nyasaland. We can consider the position anew with Mr. Risley later on, but for the moment I am inclined to think that they had better confine their jurisdiction of nullity to cases in which the marriage was either contracted locally or the parties were domiciled locally.

wait

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GOVERNMENT HOUSE,
NAIROBI,
KENYA

19th October, 1921.

59570

Sir,

With reference to your despatch No. [illegible] of July 9th, 1921 regarding certain amendments which appear to be necessary to the Divorce Ordinance 1904, I have the honour to transmit in accordance with your wishes expressed in the 5th paragraph of your despatch Memoranda by the Chief Justice and the Attorney General and intimate that in terms of a Resolution carried in Legislative Council on August 31st a Commission of Enquiry is being appointed to consider what alterations are desirable in the existing Divorce and Matrimonial Laws of this Colony and Protectorate.

2. In view of the fact stated by the Chief Justice that certain Divorces have been granted in this Colony in which the Husband had no domicile here I trust that you will be able to expedite the steps advised in the last paragraph of your despatch under reference.

I have the honour to be,

Sir,

Your humble, obedient servant,

Edward Northey

G.

THE RIGHT HONOURABLE
WINSTON CHURCHILL, P.C., M.P.,
SECRETARY OF STATE FOR THE COLONIES,
DOWNING STREET, LONDON, S.W.

19

SUPREME COURT OF KENYA.

NAIROBI,

[illegible]th October 1921.

The Honourable
The Acting Colonial Secretary,
Nairobi

Ref. No. 19758/79 of the 10th August 1921.
re:DIVORCE ORDINANCE.

It is evident that the Divorce Ordinance 1904 which was sent out in draft by the Foreign Office for enactment in the Protectorate is based on the Indian Divorce Act 1869 the partial application of that Act by the East Africa [illegible] revoked by implication by virtue of the enactment of the Divorce Ordinance 1904 which dealt with matrimonial [illegible] in these parts [illegible] the [illegible]

[illegible] Secretary of State [illegible] to the effect that divorces [illegible] the Colony [illegible]

3. The Court here has [illegible] jurisdiction to grant [illegible] decree of divorce on domicil. The question of the meaning of section 2(1) together with section 4 of the Divorce Ordinance was discussed in Madgean v Madgean, a copy of the judgment has already been sent to you under cover of my No.1919/21 of the [illegible]th May last. But since the receipt of the telegram of the [illegible]th April from the Secretary of State I have gone through the records of divorce cases and find that in a [illegible] number of cases in recent years in which a decree of divorce has been pronounced the question of domicil was not raised, although it appears to me that in some of such cases it is obvious that the [illegible] was not domiciled in the Colony or Protectorate [illegible] only assume that the importance of [illegible] domicil is

the basis of jurisdiction was overlooked because it was not raised in the pleadings or at the trial by the parties. The basis of jurisdiction was in any event not discussed in the cases to which I refer.

4 Section 2 of the Divorce Ordinance was apparently taken from the Indian Divorce Act 1869 with the addition to the qualification of professing the Christian religion of the alternative qualifications of having been married under the Marriage Ordinance of East Africa, Uganda or British Central Africa I do not know what was the intention of this section which with section 7 of the Ordinance corresponding to section 4 of the Divorce Ordinance is discussed in Prof. Kahn-Freund's Conflict of Laws 2nd Edition page [illegible]. The reference to the Christian religion may be a relic in the mind of the draughtsmen of the Ecclesiastical Courts Jurisdiction Act 1857 which in matrimonial causes/it may well be that ... probable have been inserted in the Indian Act to ... its operation from Hindus, Parsees and other sects ... personal law in matrimonial causes applies based on ... religious law.

However of opinion that ... reference to the Christian religion should be omitted that the Court should have full jurisdiction in divorce & nullity over all persons domiciled in the Colony or Protectorate who have entered into a monogamous marriage wherever such marriage may have been contracted or wherever the matrimonial offence may have been committed. The jurisdiction in ... cases of nullity ... forms of relief such as judicial separation and restitution of conjugal rights should in my opinion be based on the same principles as those applied in England to petitions for similar relief. On this question I would suggest that jurisdiction in suits for nullity should be based on (1) residence, ... or domicil or (2) ... the

marriage was solemnised in the Colony or Protectorate vide Roberts v Brennan (1902) page 14[illegible] and Dicey's Conflict of Laws page 268).

As the Secretary of State states in his third para "domicil" is not essential to confer jurisdiction in nullity cases. It therefore appears as if the word "domiciled" in clause (2) of the suggested amendment to section [illegible] of the Divorce Ordinance 1904 is a slip for "resident".

Subject to the above remarks I think the suggested amendment of section [illegible] of the Ordinance puts the jurisdiction on a satisfactory footing.

[illegible] section [illegible] of the Ordinance [illegible] native Christian population [illegible] it is necessary [illegible] against a possible [illegible] with [illegible] marriage with another woman. [illegible] the clause [illegible] or has been guilty of [illegible] separate from its context so [illegible] distinct ground of divorce and is not dependent on [illegible] profession of Christianity.

[illegible] section [illegible] not clear why in addition to bigamy with adultery as a ground of divorce there is a provision [illegible] marriage with another woman with adultery being a further ground of divorce. [illegible] absence of any real reason [illegible] apparently duplicated provisions might go.

I have not dealt with the question of the reform of the Divorce Law generally as that will be the subject of an inquiry by a Commission.

Sd. [illegible] W. BARTH

Chief Justice

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As the Secretary of State states in his third para "domicil" is not essential to confer jurisdiction in nullity cases. It therefore appears as if the word "domiciled" in clause (2) of the suggested amendment to Section 2 of the Divorce Ordinance 1904 is a slip for "resident".

Subject to the above remarks I think the suggested amendment of Section 2 of the Ordinance puts the jurisdiction on a satisfactory footing.

The first part of Section 5 (2) of the Ordinance should in my opinion stand. With a native Christian population in a Mohamedan country such as the Protectorate it is necessary to protect the wife against a possible change of faith on the part of the husband plus marriage with another woman. I am however of opinion that the clause may make guilty of insofar adultery should be separated from its context so as to make it clear that it is a distinct ground of divorce and is not dependent on a change of a profession of Christianity.

In this section I am not clear why addition to bigamy with adultery as a ground of divorce there is a provision for marriage with another woman with adultery being a further ground of divorce. One of these grounds in the absence of any real reason for the apparently duplicated provisions might go.

I have not dealt with the question of the reform of the Divorce Law generally as that will be the subject of an inquiry by a Commission.

Sd J. W. BARTH

CHIEF JUSTICE.

MEMORANDUM
ON THE DIVORCE ORDINANCE, 1904, AND THE SECRETARY
OF STATE'S DESPATCH 1064 DATED 9TH JULY, 1921.

1. The practice usually followed in the Local High Courts has been, I am informed, to refuse divorce to parties not domiciled in the Colony and Protectorate. In a case which came before the Chief Justice the other day the principle laid down in Le Mesurier v Le Mesurier 1895 A.C.517 was adhered to. It appears however that in one or two cases recently decided by puisne judges the principle has been lost sight of and divorces have been granted without due regard to the necessity of establishing a local domicile in order to found jurisdiction.

2. It appears desirable therefore that clause 2 should be amended so as to make it clear that local domicile is an essential qualification to enable the Courts to grant divorce. It is also in accordance with the principles of English jurisprudence that jurisdiction in cases of nullity should be determined on the lines suggested by the Secretary of State.

3. The reference in Section 2 of the Divorce Ordinance, 1904, to marriages celebrated under various local Marriage Ordinances as distinguished from Christian marriages appears to be of some importance.

4. Under the East Africa Marriage Ordinance, 1902, it appears that monogamous marriages may be solemnised and registered under the Ordinance though the parties are not Christians and this is in fact done by Jews and Parsees. It is settled law that such marriages have the same effect

as

ns marriages contracted according to Christian rites. Brinkley v Attorney General (1890) 15 P.D. 76. It seems necessary to provide similar relief in respect of these marriages as is provided in the case of Christian ones. In cases where the parties are domiciled in Kenya unless facilities for divorce are provided here they cannot obtain divorce anywhere, on the principle of Le Mesurier.

5. Neither the Marriage Ordinance, 1902, nor the Divorce Ordinance, 1904, is intended to apply to any but monogamous marriages.

This limited application seems to be clear in the case of the Marriage Ordinance more especially from Sections 43, 44, 51 and 52. In Nyasaland and I understand in this Colony the Ordinance has always been so interpreted. It is clear however that in Uganda the corresponding Ordinance was applied to Mohammedan Marriages until 1926 when a special Ordinance was passed to deal with such marriages.

The Divorce Ordinance, 1904, applies only to Christian Marriages or to marriages celebrated under one or other of the aforesaid Ordinances consequently only to monogamous marriages. It has however the defect referred to in the preceding paragraph that no relief can be granted in the case of other monogamous marriages although the parties are domiciled here.

6. I suggest that this difficulty might be overcome by substituting in the Divorce Ordinance for the present section 2 the section suggested by the Secretary of State and by adding a definition in Section 3 of the term "marriage" in some such terms as the following:-

"Marriage" means the union of one man and one woman for life to the exclusion of all others. Provided that such union may be dissolved in accordance with the provisions of this Ordinance".

7. If this change is made it will be necessary to alter ...tion 5 (2). I suggest that the grounds on which a wife ...uld obtain divorce should be the following:-

Bigamy;

Rape, sodomy, or bestiality;

Adultery coupled with cruelty;

Adultery coupled with desertion without reasonable excuse for two years.

Incestuous adultery;

Contracting a polygamous union or a union by native law or custom.

8. The Indian Divorce Act, 1869, has not been expressly ...ealed by the Divorce Ordinance but all its provisions are ...rred by that Ordinance and it is no longer applicable. ...agree however that if amending legislation is to be ...troduced the application of that Act should be expressly ...rred.

9. Other amendments of the Divorce law might be ...gested ...ising broader issues but these are questions rather of ...icy than law. It has been suggested for instance that ...some respects the provisions in regard to divorce of ...ots law in respect ... wife's remedies are better adapted ...modern ideas than those of English law. These are ...wever controversial matters which are outside the scope ...is memorandum.

Ed. R. W. LYALL-GRANT.

Nairobi,

22nd August, 1921. ATTORNEY GENERAL.

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Ed. W. W. LYALL-GRANT.

Nairobi,

22nd August, 1921. ATTORNEY GENERAL.