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Interstate Divorce Law

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NOTES AND COMMENTS

INTERSTATE DIVORCE LAW

THE Supreme Court has again spoken on the complicated law of divorce obtained in foreign jurisdictions, this time in the case of *Johnson v. Muelberger*.[1] The divorce problem considered in that case has to do with the effect and validity of divorces obtained in one state when enforcement is sought in another state. Prior to a careful consideration of *Johnson v. Muelberger* it would be well to review the conflict of laws principles governing the out-of-state divorce problem.

Legally speaking, a marriage is a contract between the husband and wife, but the state is also an interested party to the contract. Thus the parties cannot of their own accord abandon the relationship of man and wife, but can only do so with the sanction of the state. A divorce can be stated simply as "the termination of the legal relationship between husband and wife by an act of law."[2] The nature of the divorce action itself is not without its complications. It is certainly not an *in personam* action, for if it were, a judgment could be rendered in any state which had jurisdiction of the parties, and, moreover, a valid decree could not be rendered with constructive service only of the defendant. It is much closer in nature to an *in rem* or a *quasi in rem* action with the marital relation before the court as the *res*. This does not seem to be such an absurd fiction when it is considered that our modern social structure is built around the family relationship.

The basis for granting recognition to the judgments of sister states is found in the Full Faith and Credit Clause[3] of the Constitution of the United States. However, this clause does not require that judgments of a court not possessing jurisdiction in the conflict of laws sense to be recognized by sister states. Hence a judgment which is not based on jurisdiction, obtained in *X* state, will not

[1] 340 U. S. 581 (1951).

[2] GOODRICH, CONFLICT OF LAWS (3d ed. 1949) 395.

[3] U. S. CONST. Art. IV, § 1.

be required, under the Constitution, to be enforced and recognized in *Y* state.[4] Therefore, at the outset, the important question of migratory divorce law is, "What jurisdictional facts are necessary to be pleaded and proved in order to give a court jurisdiction to sever the marital relation?" There is no doubt, since the Supreme Court handed down *Williams v. North Carolina*,[5] that the most basic jurisdictional fact is the domicil of the parties, and this domicil is the domicil of the parties at the time the divorce action is instituted.[6]

Since the first *Williams* case,[7] it seems firmly established that the state of the domicil of either spouse has jurisdiction to render a divorce decree which is valid and will be given full faith and credit by the other states. This appears to be a logical result, if domicil is necessary for jurisdiction in the first place, inasmuch as the state of the person's domicil is intimately concerned with that person, and hence should have the power to terminate his marital relation. Prior to the decision in the *Williams* case the Supreme Court had held in *Haddock v. Haddock*[8] that divorces required to be recognized everywhere could only be rendered in the state of the matrimonial domicil, which seemed to be the last domicil of the husband and wife while they were still living together. However, the *Haddock* doctrine seems to violate the modern principle of domiciliary law, which recognizes that a wife can acquire domicil separate and apart from her husband, and the *Williams* case effectively overruled the *Haddock* decision.

It has already been observed that a state is only required to recognize judgments rendered in the courts of a sister state when based on valid jurisdiction. That a record can be contradicted as

[4] Pennoyer v. Neff, 95 U. S. 714 (1877).

[5] 325 U. S. 226 (1945).

[6] The principles of domiciliary law will not be discussed here. The RESTATEMENT OF CONFLICT OF LAWS (1934), § 9, states that domicil is "the place with which a person has a settled connection for certain legal purposes, either because his home is there, or because that place is assigned to him by the law."

[7] Williams v. North Carolina, 317 U. S. 287 (1942).

[8] 201 U. S. 562 (1905).

to the facts necessary to give a court jurisdiction is another principle which is firmly established by early decisions[9], and which is restated in the second *Williams* case.[10]

In the famous *Dorrance* cases,[11] where the power to levy a death tax depended on the domicil of the deceased, Pennsylvania courts found the deceased had been domiciled in Pennsylvania prior to his death and levied the tax on the estate. In another action New Jersey courts found that the deceased had been domiciled in New Jersey prior to his death, and levied the tax in favor of New Jersey. The Supreme Court denied certiorari,[12] thus holding that the courts of one state are not bound by the finding of domicil made in the courts of a sister state.

The decision in the second *Williams* case logically follows with an application of the principles just discussed. In this case the Supreme Court upheld a conviction of bigamous cohabitation of the defendants, Mr. Williams and Mrs. Hendrix. The defendants had lived in North Carolina; they went to Nevada and obtained uncontested divorces from their respective spouses; then they married each other and returned to North Carolina. The Supreme Court said that the North Carolina court could make a finding independent of that of the Nevada court on the issue of domicil, which the North Carolina court did. Since the defendants were not found to be domiciled in Nevada, the Nevada divorce decree did not have to be given full faith and credit.

The principle that domicil can be relitigated to attack the validity of a divorce on the grounds of no jurisdiction thus appears to be firmly established unless overruled by a legislative body. The problem of the decisions subsequent to the *Williams* cases has been, "Who can relitigate the issue of domicil?"

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[9] Thompson v. Whitman, 18 Wall. 457 (1873).

[10] "In short, the decree of divorce is a conclusive adjudication of everything except the jurisdictional facts upon which it is founded, and domicil is a jurisdictional fact. To permit the necessary finding of domicil by one State to foreclose all States in the protection of their social institutions would be intolerable." 325 U. S. at 232.

[11] *In re* Dorrance's Estate, 309 Pa. 151, 163 Atl. 303 (1932); *id.*, 115 N. J. Eq. 327, 170 Atl. 601 (1934).

[12] Dorrance v. Martin, 298 U. S. 678 (1936).

A spouse who appears and answers in a divorce proceeding cannot attack the validity of the divorce on the issue of domicil, because the finding of the court granting the divorce is *res judicata* as to him.[13] This is true whether or not the party actually contests the issue of domicil in the divorce proceeding, for if the divorce is contested, then he has had the opportunity to contest domicil.

The equitable principle of estoppel also applies to preclude a later attack on the validity of a divorce. Thus, a party procuring an invalid divorce will later be estopped from asserting any rights as a spouse.[14] A spouse who relies on an invalid divorce and remarries will not be permitted to annul the second marriage on the grounds that the divorce decree was invalid.[15]

The latest pronouncement by the Supreme Court is in the principal case, *Johnson v. Muelberger*. The facts of the *Johnson* case were as follows: Mr. Johnson married his first wife, and a daughter, the defendant in the case, was born of this marriage. The first wife died, and Mr. Johnson married Madoline Ham. She and Mr. Johnson lived in New York until she obtained a divorce, which was contested by Mr. Johnson, in Florida. The undisputed facts of the present case showed that Madoline Ham did not comply with the jurisdictional ninety-day residence statute of Florida. Later Mr. Johnson contracted marriage again, this time to Genevieve Johnson, the plaintiff in the present case. He lived with her until he died testate, leaving all of his estate to his daughter. However, under New York law his third wife had a right to one-third of the estate, and she elected to take this statutory share. The election was contested by the daughter, who contended that Mr. Johnson and his third wife were not legally married because Mr. Johnson was not validly divorced from his second wife. The case was a collateral attack on the validity of a divorce by a stranger to the divorce judgment. The Supreme Court held that the daughter could not attack the divorce decree of Florida, saying:

[13] Sherrer v. Sherrer, 334 U. S. 343 (1948).

[14] Curry v. Curry, 79 F. 2d 172 (D.C. App. 1935).

[15] Goodloe v. Hawk, 113 F. 2d 753 (D.C. App. 1940).

> When a divorce cannot be attacked for lack of jurisdiction by parties actually before the court or strangers in the rendering state, it cannot be attacked by them anywhere in the Union. The Full Faith and Credit clause forbids.[16]

It is interesting to note that in principle this was the holding of the New York state court, but the court found that the daughter *could have* attacked the divorce in Florida. The Supreme Court held that the daughter *could not* have attacked the divorce in Florida saying, "No Florida case has come to our attention holding that a child may contest in Florida its parent's divorce where the parent was barred from contesting, as here, by *res judicata*."[17] The Supreme Court further reasoned that if the laws of Florida were such that the child was in privity with her father, then she would be barred from attacking the validity of the divorce, for her father was barred by estoppel under the doctrine of *Sherrer v. Sherrer*.[18] Or if the Florida law is like the New York law in such a case, then the daughter had a mere expectancy as an heir at the time of the divorce, and this would not be enough to qualify her to bring a suit.

It seems evident that the United States Supreme Court is not inclined to invalidate a divorce if it is possible to uphold it. At least this is the trend since the *Williams* cases were decided, for since those decisions each subsequent case has restricted the right of parties to challenge a divorce decree. In the opinion of this writer a better rule could not be adopted by the Court than that which Freeman declared in his work on Judgments and which the Supreme Court quoted in the *Johnson* decision:

> It is only those strangers who, if the judgment were given full faith and credit and effect, would be prejudiced in regard to some pre-existing right, that are permitted to impeach the judgment. Being neither parties to the action, nor entitled to manage the cause nor appeal from the judgment, they are by law allowed to impeach it whenever it is at-

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[16] 340 U. S. at 589.

[17] *Id.* at 587.

[18] 334 U. S. 343 (1948).

> tempted to be enforced against them so as to affect rights or interest acquired prior to its rendition.[19]

The *Johnson* case could have been decided using this rule, for the daughter had no right or interest, beyond a mere expectancy, which was affected by the divorce decree. The Court in principle seems to have followed the rule, which seems to be a desirable one. Such a rule would not prevent a state from enforcing its strong public policy against migratory divorces, for it would have its remedy in the form of bigamy prosecutions.

Perhaps the best solution is suggested by Stumberg, who indicates that a person who lives in a state which has stringent divorce laws, should either actually move out of the state or remain married. He writes:

> The real underlying point of controversy as to migratory divorce is whether those who are unwilling to cut loose their home ties to secure a divorce may get the one while still retaining the other. In a sense they want to eat their cake and have it, too.[20]

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[19] 1 FREEMAN, JUDGMENTS (5th ed. 1925) 636.

[20] STUMBERG, CONFLICT OF LAWS (2d ed. 1951) 306.

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