Louisiana Law Review

Volume 14 | Number 1
The Work of the Louisiana Supreme Court for the 1952-1953 Term
December 1953

Jurisdiction to Divorce Non-Domiciliary Plaintiffs

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Comments

Jurisdiction to Divorce Non-Domiciliary Plaintiffs*

The purpose of this Comment is to inquire whether a divorce granted by a state in which only the defendant is domiciled is entitled to full faith and credit.[1] No decision of the United States Supreme Court has ever pronounced a judgment on this question.

What we do know about the basis of divorce jurisdiction was summarized in the case of *Williams v. North Carolina* I.[2] Although there have been later cases involving recognition of foreign divorce decrees, none of these have altered the basis of jurisdiction[3] as set forth in the *Williams* case. Briefly the facts were: two domiciliaries of Nevada, divorced from their respective North Carolina spouses in the courts of Nevada, applying Nevada law, and then married in Nevada, were convicted of bigamy by North Carolina. The court held that such conviction would be a denial of full faith and credit to the Nevada decree and reversed the conviction.

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* A different approach to this topic will be presented in a later issue of the REVIEW.

1. U.S. Const. Art. IV, § 1; "Full Faith and Credit shall be given in each State to the public Acts, Records, and Judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."

Under this authority Congress has enacted: "Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken." Act of June 25, 1948, c. 646, § 1, 62 Stat. 947, 28 U.S.C. 1738.

For a detailed discussion of the History of Art. IV, Sec. I, see Crosskey, Politics and the Constitution in the History of the United States 541 et seq. (1953).

2. 317 U.S. 287 (1942).

3. More recent cases have applied the doctrine of res adjudicata in determining the state of domicile, but they have not altered the Court's position that the basis of jurisdiction is domicile. See Sherrer v. Sherrer, 334 U.S. 343 (1948); Coe v. Coe, 334 U.S. 378 (1948); Cook v. Cook, 342 U.S. 126 (1951); Johnson v. Muelberger, 340 U.S. 581 (1951); see also Goodrich, Handbook of the Conflict of Laws 401, n. 23 (3 ed. 1948). For a review of Supreme Court decisions on divorce jurisdiction through February 1951, see Bozeman, The Supreme Court and Migratory Divorce: A re-examination of an Old Problem, 37 A.B.A.J. 107 (1951).

From the facts of the case, disregarding the language of the decision, the following conclusions can be drawn:

(1) Since the decrees were rendered after only constructive notice to the absent defendants, divorce proceedings are not actions *in personam.*[4]

(2) Since only the plaintiffs were domiciled in Nevada, domicile of the plaintiff gives a state judicial competence to grant a divorce.

(3) Since the laws of Nevada were applied, domicile of the plaintiff gives a state legislative competence to regulate the marital status of at least that person.

Whether domicile of the defendant will give a state jurisdiction to grant a divorce to a non-domiciled plaintiff is one of the problems[5] which was not settled by the *Williams* case. Most writers who have mentioned the matter, however, have concluded that it is immaterial which party brings the action. The Restatement says that a state can dissolve a marriage when one spouse is domiciled within the state and makes no distinction between plaintiff and defendant.[6] Judge Goodrich says that "on principle" it should not make any difference whether the plaintiff or the defendant is domiciled at the forum.[7] Professor Bingham, listing

4. The Court said that divorce actions are not proceedings *in rem*, nor were they strictly proceedings *in personam*, "Domicile of the plaintiff, immaterial to jurisdiction in a personal action, is recognized . . . as essential in order to give the court jurisdiction which will entitle the divorce action to extraterritorial effect, *at least when the defendant has neither been personally served nor entered an appearance.*" (Italics supplied) 317 U.S. 287, 297. The italicized portion would indicate that a divorce action is a personal action, at least when both parties appear; See Lorenzen, Selected Articles on the Conflict of Laws 406, n. 20 (1947). Later cases, however, have refused to so hold. This language may have been a portent of the position the Court would take in applying the doctrine of res adjudicata when both parties appear, see supra note 3.

5. Other questions still unanswered by the Supreme Court are:

(1) May judicial competence be separated from legislative competence so as to allow a state to grant a divorce to a non-domiciliary applying the laws of that person's domicile: (a) when the defendant is a domiciliary, (b) when neither party is a domiciliary and only the plaintiff submits to the jurisdiction of the court, (c) when neither party is a domiciliary, but both submit to the jurisdiction of the court?

(2) Does the full faith and credit clause require that when one party to a marriage is granted a valid divorce, the other spouse must also be considered divorced?

(3) Is a decree not entitled to full faith and credit valid even in the state in which it is rendered?

These questions will be discussed in this comment only when they have a bearing on the problem under discussion.

6. The American Law Institute, Restatement of the Law Continued, Tentative Drafts No. 1, Conflict of Laws, § 113 (1953).

7. Goodrich, Handbook of the Conflict of Laws 406, n. 40 (3 ed. 1948).

the "clear spots in the fog" in an article written before the *Williams* case, states that the action brought at the domicile of the defendant is always entitled to full faith.[8] A later article[9] indicates that he has not changed his opinion. Professor Rabel says that "probably" such a decree must be given recognition.[10] Only Professor Lorenzen hints that he thinks otherwise. Discussing the advantages of treating divorce as a personal action, he states that, if it were so considered, the action could be brought at the domicile of the defendant. This would appear to imply that he feels that the proceeding cannot be brought at the defendant's domicile unless it is considered a personal action.[11] No one, however, gives the reasons for his conclusion, nor was a decision found in which any court, state or federal, discussed whether such decrees are entitled to recognition.

More than one-third of the states have laws giving their courts divorce jurisdiction when either the plaintiff or the defendant is a domiciliary.[12] These states uniformly apply the law of the forum, regardless of whether the plaintiff or the defendant is the domiciliary. The courts seem to feel that the matter is completely within the discretion of the state legislature. A great majority of the states, including those which have laws requiring that the plaintiff be a domiciliary, will permit a divorce on the reconventional demand of a non-domiciled defendant, showing that they do not regard domicile of the plaintiff as a prerequisite for the assurance of full faith and credit.[13] Those which do not permit the defendant to obtain a divorce on reconvention, refuse it on the basis of the interpretation placed on their statutes.

What is the basis for this great preponderance of opinion that a divorce granted where either party is domiciled is entitled to recognition? No general discussion of the matter could be

8. Bingham, The American Law Institute vs. The Supreme Court, In The Matter of Haddock v. Haddock, 21 Cornell L.Q. 393, 399 (1936).

9. Bingham, Song of Sixpence, Some Comments on Williams v. North Carolina, 29 Cornell L.Q. 1 (1943), printed in Selected Essays on Family Law 1075 (1950).

10. 1 Rabel, The Conflict of Laws—A Comparative Study 465 (1945).

11. Lorenzen, Haddock v. Haddock Overruled, 52 Yale L.J. 341, 350 (1943), printed in Lorenzen, Selected Articles on the Conflict of Laws 403, 412 (1947).

12. Ala. Code of 1940, Tit. 47, § 47; Conn. Gen. Stat. 1949, § 7334; Del. Rev. Code 1935, § 3505; Smith-Hurd's Ill. Ann. Stat. 1936, c. 40, § 3; Iowa Code Ann. 1946, § 598.1; Md. Code 1939, Art. 16, § 31; Me. Rev. Stat. 1944, c. 153, § 55; Mo. Rev. Stat. 1939, § 2.050; N. J. Rev. Stat. 1937, 2-A-34-10; N. M. Stat. 1941, § 1147; N. C. Gen. Stat. 1943, § 50-5-(4); R. I. Gen. Laws 1938, c. 1682; S. C. Code 1942, § 20-103; Va. Code 1949, § 20-97; W. Va. Code Ann. 1943, § 4708; Wis. Stat. 1945, § 277.06.

13. Aucutt v. Aucutt, 122 Tex. 518, 62 S.W. 2d 77, 89 A.L.R. 1198 (1933).

found. The Restatement, however, seems to take the position that the marriage status is one indivisible *res*.[14] This designation of the marriage as a *res* would seem to support the contention that domicile of either spouse vests jurisdiction; for if marriage is a single *res* existing at the domicile of each spouse, and either state has jurisdiction to grant a divorce because each has an interest in the *res*, it would seem to follow that it makes no difference which spouse brings the action.

The Supreme Court, however, has never held that the marriage relation is a *res*. In the *Williams* case, the Court said that it does not aid in the consideration of the problem to consider divorce as a proceeding *in rem*.[15] The Court bases jurisdiction solely on a state's interest in the marital status of its domiciliaries.[16] Does it add to our knowledge of the nature of marriage to designate the relationship as a *res*? An examination of the statement that "the *res* exists at the domicile" shows that it does not. This statement is a conclusion; it explains nothing. The *res* being an intangible, how are we made aware that it exists at the domicile and only at the domicile? Could it not just as well be found where each of the parties happens to be, or only where

14. Restatement, Conflict of Laws, § 113 (Supp. 1948). "*Comment*: *a*. The state of domicil of one spouse has an interest in the marriage status. The state of domicil of the other spouse also has an interest in that status. Since the status is based upon the continuity of a dual relation, the status can be terminated by the state of domicil of one spouse. . . ." If jurisdiction is based on "an interest in that status," then the status must be a *res*.

A proposed amendment to the above comment a, states: "Where the spouses have separate domicils, each state of domicil has an interest in their marriage status. . . ." Restatement of the Law Continued, Tentative Drafts No. 1, Conflict of Laws § 113, Comment a, (1953). The words, "their marriage status," could mean: (a) there is but one status, a *res*, in which each state has an interest; or (b) marriage is not a *res*, but the combined status of the parties, and each state has an interest in the individual status of *both* of the parties. Since it has been held repeatedly in this country that each state has an interest in the status of its own domiciliaries, but it has never been suggested that a state has any interest in the status of a non-domiciliary, the first interpretation must have been intended.

15. 317 U.S. 287, 297 (1942).

16. Formerly marriage was conceived to be a civil contract though of a very special type. This conception of marriage caused considerable difficulty in allowing a state to grant a divorce when only one party was before the court, Bishop, New Commentaries on Marriage and Divorce (1891). Mr. Bishop relates that he was the first to formulate the concept that marriage was a status, Bishop, supra, at § 11, and that divorce jurisdiction should be based on the state's right to regulate the status of its domiciliaries. The view was adopted in Ditson v. Ditson, 4 R.I. 87 (1856), a landmark case in the field of divorce jurisdiction. See, for instance, Atherton v. Atherton, 181 U.S. 155 (1901), in which the Court quoted Judge Cooley's statement that "there is no case in the books more full and satisfactory upon the whole subject of jurisdiction in divorce suits." 181 U.S. 155, 166.

they are both together, or at any other place? The representation of marriage as a *res* tells us nothing as to the nature of the intricacies of divorce jurisdiction; it is merely a convenient method of designating concepts which have been formulated. We can say with assurance that the *res* is located at the domicile of each party only because in our system of law, as formulated by the courts, each state will regulate the marital status of its own domiciliaries.[17] Since the concept of marriage as a *res* adds nothing to this, our problem may be stated: is a state regulating the status of a domiciled defendant when it grants a divorce to a non-domiciled plaintiff? It is submitted that when a state grants a divorce, it is regulating the status of the plaintiff and that any alteration which occurs in the status of the defendant is but a consequence of that regulation of the plaintiff. When a plaintiff petitions for a divorce away from his domicile, the object of his action is to have a state other than the state in which he is domiciled regulate his status.

The whole system of divorce procedure is centered around altering the status of the plaintiff. Unless it is said that divorce is a penalty, the status of the defendant is not an issue in the trial. If the defendant opposes the action he does so, not by showing that his status should or should not be altered, but by showing that the plaintiff's status should not be altered. When the plaintiff is granted a divorce, the status of the defendant is usually considered altered too, but this is not logically necessary.[18]

Marriage is a word used to describe a complex bundle of legal relations. Some of these relations exist only between parties; but some of them are capable of existing apart from the relationship between the parties, such as the disability to marry again. This disability is not always dissolved when a divorce is granted, even when both parties are domiciliaries. Several states have laws providing that a defendant who is divorced because of adultery can never marry his accomplice.[19] In the words of Professor Bingham, the objection to saying that one spouse can be considered married and the other divorced manifests "the tyranny which words exercise over logic and the sophistry to which a narrow interpretation of our forms of expression lead

17. Ibid.

18. For a complete analysis of the nature of marriage see Bingham, In the Matter of Haddock v. Haddock, 21 Cornell L.Q. 393, 414 (1936).

19. See, for instance, Art. 161, La. Civil Code of 1870; New York Domestic Relations Law, §§ 6, 8.

us."[20] Judge Goodrich admits that logically the basis of divorce jurisdiction—the states' inherent interest in the status of the domiciliary—could be held to prevent a divorce from affecting the status of a non-domiciliary,[21] although he strongly objects to allowing this result.[22] All of this indicates that a divorce regulates the status of the plaintiff, and the effect which a divorce of a plaintiff will have on the status of the defendant is a matter for the separate determination of the state in which he is domiciled.[23]

If, then, a divorce is a regulation of the status of the plaintiff, a state is not regulating the status of a domiciliary unless

20. Bingham, loc. cit. supra note 18.

21. Goodrich, Handbook of the Conflict of Laws 412 (2 ed. 1948). This was not the result of Haddock v. Haddock, 201 U.S. 562 (1906). In the *Haddock* case it was held that both parties would be divorced in Connecticut, the state which had granted the divorce found not entitled to recognition; but neither was divorced in any other state which chose to consider them still married. The *Williams* case makes it clear that the person who has obtained a valid divorce must be recognized as divorced by all other states, but had no occasion to rule as to the effect which that divorce will have on a defendant not domiciled in the state which grants the divorce.

22. Professor Bingham in a later article also argues that this should not be allowed, Bingham, Song of Sixpence, Some Comments on Williams v. North Carolina, 29 Cornell L.Q. 1, 22 (1943) printed in Selected Essays on Family Law 1075, 1096 (1950). He feels that the language of the *Williams* case indicates that the Supreme Court would require the same recognition of the Nevada decree that North Carolina gives to its own divorce decrees. Estin v. Estin, 334 U.S. 541 (1948) and Kreiger v. Kreiger, 334 U.S. 555 (1948) seem to hold that the *Williams* case does not go this far. Previous New York decisions had held that a support order did not survive a divorce decree obtained by the person ordered to pay when the divorce was obtained in New York. When the instant cases involving Nevada decrees were before the New York Court of Appeals, however, that court held that the alimony order did survive the decree. The Supreme Court, while mentioning that it had no right to hold that New York could not change its previous law, seemed to base its decision on the proposition that all that full faith demanded was that New York not interfere with interests which Nevada had a right to regulate. Although the matter in dispute in these cases was the alimony order, and the Court did not say that New York could have considered her spouse still married if she had so chosen, the logic and language of the decision indicate that the Court would have no objection on the ground that it would be a violation of due process. The Court said, "It accommodates the interest of both Nevada and New York in this broken marriage by restricting each State to the matters of her dominant concern." 334 U.S. 541, 548. The *Estin* case, however, would seem to affirm Professor Bingham's assertion that if the facts of the *Haddock* case came before the Court, the factual results would be the same.

23. Three states have laws permitting a divorce to be granted to their domiciliaries when the spouse of those domiciliaries have obtained divorces in other jurisdictions. See Fla. Stat. Ann. 1943, § 65.04; Mich. Stat. Ann. 1931, § 25.86; Page's Ohio Gen. Code 1946, § 8003-1.

Since the *Williams* case, however, the courts of two of these states have refused to apply them on the ground that to apply them would be a denial of full faith as expounded by the *Williams* case. See Albaugh v. Albaugh, 320 Mich. 16, 30 N.W. 2d 415, 175 A.L.R. 289 (1948).

the plaintiff is a domiciliary, and the fact that a defendant is a domiciliary does not give the state jurisdiction to divorce a non-domiciled plaintiff.

In addition to the reasoning thus far advanced, it would seem that to require recognition of a divorce granted to a non-domiciled plaintiff by a state applying its own law would be to ignore that part of the full faith and credit clause which demands that recognition be given to the legislation of the plaintiff's domicile.

It is universally agreed that in the United States every state has legislative competence to regulate the status of its domiciliaries. Article IV, Section I, of the Constitution compels recognition of such legislation to the same extent that it compels recognition of judicial decrees.[24] It would seem, then, that for a state to attempt to apply its own divorce laws to a plaintiff who is a domiciliary of another state, and therefore subject to regulation by that state, would be a denial of full faith and credit to the laws of that person's domicile.

To hold that a state in which only the defendant is domiciled could apply its own laws to a non-domiciled plaintiff, it would have to be held that domicile of either spouse gives a state legislative competence to regulate the status of both spouses. If both states are equally competent, which law would be applied? The absurd but logical consequence would be that a plaintiff domiciled in New York could seek a divorce in that state from a Nevada spouse and demand that the New York courts apply Nevada law, Nevada under this theory having as much competence to regulate his status as does New York. Admittedly this would be intolerable, yet what is the difference in the results obtained from allowing this and the results obtained from allowing the plaintiff to bring the suit in the courts of the defendant's domicile? In either instance married persons having separate domiciles are allowed to choose the law which will regulate their status.

To this point we have considered the effects of allowing a state to grant a divorce to a non-domiciled plaintiff when that state applies its own law. If, when a state entertained a divorce

24. The Court, however, has not formulated rules as to the recognition which must be given to legislation as clearly as it has for judgments. In the words of Mr. Justice Jackson, Full Faith and Credit, The Lawyers Clause of the Constitution 28 (1945) "[it is] difficult to point to any field in which the Court has more completely demonstrated or more candidly confessed the lack of guiding standards of a legal character than in trying to determine what choice of law is required by the Constitution."

action instituted by a non-domiciled plaintiff, it applied the law of the plaintiff's domicile, would this be giving full faith to those laws? The Restatement says that the law of the forum is always applied because the same considerations which allow it to grant a divorce make it appropriate for it to determine the grounds.[25] This would not seem to answer the question. Since jurisdiction is based on the right to regulate the status of domiciliaries, and since regulation is accomplished by statute exclusively in the field of divorce,[26] the primary concern would seem to be, what law should be applied? That question being answered, then the question as to what courts can apply this law becomes important. It is impossible to answer this question as a matter of pure logic since the phrase, *full faith and credit*, has never been authoritatively defined. Applying the laws of a person's domicile would certainly be giving more faith to those laws than is the present practice of ignoring them completely when the defendant is a domiciliary. Justice Jackson and Professor Cook suggest that nothing would prevent a state from entertaining a divorce action in a case where both parties are non-domiciliaries, providing there is jurisdiction over both parties, and the court applies the law of their domicile.[27] There is much to recommend some such method of divorce procedure, at least when the defendant is a domiciliary. Both parties would be before the court; therefore the court would have the power to make awards which require jurisdiction over both parties, and yet the plaintiff would not be allowed to obtain a divorce on grounds not sufficient for a divorce at this domicile.

Unless the doctrine of *forum non conveniens* could be applied, however, such procedure would compel a state to grant a divorce through its courts which it would not grant under its own laws to its own domiciliaries. It could also be argued that marriage is such a basic institution in our society that a state has a right to control completely the marital status of its citizens, and hence

25. Restatement, Conflict of Laws, § 135 (1935).
"The law of the forum governs the right to divorce.
"Comment:
"a. *Rationale.* The law of the forum governs the right to divorce not because it is the place where the action is brought but because it is the domicil of one or both of the parties . . . . The same considerations which make it appropriate for a state to grant a divorce to or from its domiciliary, make it appropriate for it to determine the grounds upon which a divorce shall be granted."

26. At common law there was no divorce, the entire field of divorce is regulated by statute, the courts only applying the law.

27. Cook, The Logical and Legal Bases of the Conflict of Laws 463-465 (1942); Jackson, Full Faith and Credit, The Lawyers Clause of the Constitution 23 (1945).

it must have not only exclusive legislative competence, but also exclusive judicial competence. These arguments would not seem to outweigh the arguments in favor of allowing judicial and legislative competence to be separated.

If it is held that a divorce granted at the domicile of the defendant to a non-domiciled plaintiff does not demand recognition when the law of the forum is applied, what is the effect of such a decree? The Court has repeatedly refrained from any holding on this point, even when it is found that neither party is domiciled in the state which grants the divorce. In a dissenting opinion in *Haddock v. Haddock*,[28] Justice Holmes expressed the opinion that the Constitution and the legislation which Congress has enacted make it clear that every decree valid where rendered is entitled to full faith and credit. The language of the *Williams* case seems to indicate that the Court based its decision on this point. If this is the case, then a holding that a decree is not entitled to recognition is a finding that the decree is invalid. This would seem to be the better interpretation. The Constitution demands that public acts be afforded recognition as compellingly as it demands recognition of judicial proceedings. In the *Williams* case, the North Carolina judgment which denied full faith to a judicial proceeding of Nevada was void, even in North Carolina. Hence it would seem that if a divorce granted to a non-domiciliary denies recognition to the laws of another state, then this action would likewise be void, even in the state which grants the divorce.

Conclusion

It might be urged that since in practice a valid divorce granted at the plaintiff's domicile does divorce a non-domiciled defendant, why not allow a state to grant a divorce at the insistence of either party? The recent Louisiana case of *Davidson v. Helm*[29] illustrates that it does make a practical difference in the extent to which a state is deprived of control of the status of its domiciliaries.

In the *Davidson* case the plaintiff wife was a domiciliary of Mississippi, her husband was a domiciliary of Louisiana. The Louisiana husband had shown no desire for a divorce, and this state may never have been called upon to alter his status, yet

28. 201 U.S. 562, 632 (1906).
29. 222 La. 759, 63 So. 2d 866 (1953).

simply because the husband was a Louisianian this state granted a divorce to his wife on grounds which would not have been valid at her domicile. If this decree is entitled to recognition, Mississippi will have been deprived of her right to regulate the status of its domiciliary because Louisiana has seen fit to regulate this non-domiciliary's status.

Congress, acting under the authority given it by Article IV, Section I, to determine the effect which the laws of a state will have in another state, could make such a decree valid.[30] But Congress has not so acted, and it would seem to be the function of the Supreme Court to interpret the Constitution in such a way that each state will have the maximum power to regulate its own interests, consistent with the interests of the Union as a whole. It is submitted that this goal, set up by the full faith and credit clause, would not be achieved by allowing a state, acting in disregard of the laws of another state, to grant a divorce to a non-domiciliary.

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30. Professor Cook and Mr. Crosskey seem to have demonstrated conclusively that it was the intent of the drafters of the Constitution that the field of the conflict of laws should be a branch of the federal law, and that Congress should have complete power to regulate these matters. Justice Jackson also feels that Congress has broad powers in this field. See Cook, The Legal and Logical Basis of the Conflict of Laws 90 et seq.; Crosskey, Politics and The Constitution in the History of the United States, v. 1, p. 547 et seq., v. 2, p. 1055 (1953); Jackson, Full Faith and Credit, The Lawyers Clause of the Constitution 36 et seq. (1945).