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Conflict of Laws - Recognition of Foreign Divorce Decrees

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Intermeddlers would have no such connection or arguable interest.

Interestingly, had Springfield remained silent, the subrogation would not have been before the court, and the plaintiff might have been successful in his action to recover damages. Springfield then could have recovered the money from the plaintiff, who would hold it only as constructive trustee.[14]

If this decision is followed, total subrogees, as the proper parties to sue, will not be able to take advantage of suits filed by the subrogor by adding themselves as party plaintiffs through amendment. The court has given the words of the Code a literal interpretation and has thereby prevented the subrogor's suit from having any effect.

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CONFLICT OF LAWS—RECOGNITION OF FOREIGN DIVORCE DECREES

Wife sued to have a certain immovable declared her separate property. Prior to its purchase both wife and defendant-husband had gone to Mexico and within three days secured divorces from their respective spouses and married each other. The parties returned to Louisiana to live, later secured Louisiana divorces from their "former" spouses and were married in a Louisiana ceremony. The property in question, however, was purchased prior to the Louisiana ceremony. *Held*, the immovable was the wife's separate property. The Mexican divorces and marriage were invalid, therefore no community of acquets and gains existed between the parties at the time of the purchase. Although the court was unable to locate a single pertinent Louisiana case, it reasoned that since Louisiana courts are not required by the full faith and credit clause to recognize divorces granted in foreign countries it follows, a fortiori, that such divorces, which do not meet the standards required for recognition of divorces granted by sister states, need not be recognized. Under the full faith and credit clause a divorce granted in a sister state is entitled to recognition only when one of the parties is domiciled there. Neither the parties nor their spouses

14. Moncrieff v. Lacobie, 89 So.2d 471, 474-75 (La. App. 1st Cir. 1956).

were domiciled in Mexico when the divorces were obtained. *Clark v. Clark*, 192 So.2d 594 (La. App. 3d Cir. 1966).

The full faith and credit clause of the United States Constitution does not require the states to recognize divorces obtained in foreign countries. Each state, therefore, is in a position similar to that of a sovereign nation as to whether or not it will recognize such divorces. The issue is one to be resolved by application of principles of private international law. A court must seek the sources of this law in treaties; the local law with respect to what should be done in international questions; international custom; or reasonable principles of legislative and judicial jurisdiction. No treaty exists between the United States and Mexico on the recognition of divorce judgments, nor is there any Louisiana legislation on the subject, and international custom varies. In cases of this kind, therefore, the Louisiana judiciary should act according to its best judgment in the light of reasonable principles of legislative and judicial competence.

Basically, there are two approaches to the question of who has jurisdiction.[1] One view is that each state or nation is free to decide for itself, solely as a political question, over which matters it will assert jurisdiction. The criteria by which it claims jurisdiction may be eminently just and reasonable or totally perverse and irrational. On the other hand, some recognize that states are limited in their exercise of jurisdiction and that there are certain reasonable standards by which the appropriate extent of a state's jurisdiction is to be determined. States are free to adopt different criteria by which they assert jurisdiction, but these criteria are dependent upon reasonableness and appropriateness for their validity.[2]

1. 1 E. RABEL, THE CONFLICT OF LAWS: A COMPARATIVE STUDY 6-11 (2d ed. 1958) distinguishes primarily between "internationalists," *i.e.*, those visualizing an *international law* of legislative and judicial competence, and "nationalists," *i.e.*, those treating these matters as a branch of the national law. Rheinstein, *The Constitutional Bases of Jurisdiction*, 22 U. CHI. L. REV. 775 (1955), takes the position that the framers of the United States Constitution based the full faith and credit clause on their acceptance of the tradition of a "Law of Nations" (*Jus Gentium*) supplying principles limiting states in the exercise of legislative and judicial power.

Contrary to the "internationalists" views are those of persons limiting rules for the delineation of legislative and judicial jurisdiction to rules enacted or accepted by the sovereign at the forum, whether by (a) legislation, (b) treaty, or (c) acknowledgment of the force of international custom. The "territorialism" of J. BEALE, A TREATISE ON THE CONFLICT OF LAWS (1935) is a typical example.

2. Thus some countries may assert jurisdiction on the basis of nationality of the parties while others may require that the party or parties be domiciliaries. Either of these would be reasonable criteria.

In addition to the question of the two approaches to the competency of states to exercise jurisdiction generally, there is the problem of analyzing jurisdiction in its dual aspects. These two aspects are legislative jurisdiction and judicial jurisdiction. The criteria by which a state asserts jurisdiction in the former need not be the same as in the latter. In certain matters a state has the exclusive right to legislate for its citizens, and as long as one remains a citizen he is subject to that law even if temporarily absent. For example, state *X* may legislate as to divorce for its citizens. Thus, in the matter of divorce, a citizen of state *X* would be subject to its legislative jurisdiction even if he were temporarily present in state *Y*. State *Y* would be incompetent to assert legislative jurisdiction over him. On the other hand, judicial jurisdiction, the power and authority to hear a certain class of cases, does not ordinarily require as close a nexus between an individual and a political unit as is required for an individual to be subjected to its legislative jurisdiction.[3]

These two aspects of jurisdiction give rise to the following question. Why may not a state, lacking legislative jurisdiction, grant a person a divorce in its courts if it applies the law of the state which is competent to assert legislative jurisdiction? If this were done, it would undoubtedly be superior to the granting of a divorce by a state without legislative jurisdiction applying its own law. One drawback to this approach is that the forum state would not be as familiar with the law to be applied as the enacting state itself would be. Also, there is no guarantee that a court which is either very liberal or very conservative in granting divorces under its own law would be any less so because it was applying a different law.

With these observations in mind it may be helpful to analyze the United States Supreme Court's approach to the problem of legislative and judicial jurisdictional conflicts between the states. Article IV, section 1 of the Federal Constitution provides: "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

3. It is recognized, of course, that there are matters in which there need be no special relationship between an individual and the state other than physical presence for the state properly to assert both legislative and judicial jurisdiction. An example is the criminal law. *All* persons, resident and nonresident alike, present in a state, are subject to its laws prohibiting criminal conduct and to action by its courts if they violate those laws. See LA. CIVIL CODE art. 9 (1870).

manner in which such Acts, Records and Proceedings shall be proved, and the Effects thereof." Congress, however, has not exercised the power thus granted to it to delineate the jurisdiction of states. If the bare full faith and credit clause were taken literally, one might conclude that, Congress not having acted to delineate the jurisdiction of states, *all* acts, records, and judicial proceedings are entitled to full faith and credit in sister states no matter how these acts or proceedings may interfere with what is properly the concern of the sister state alone. However, the Supreme Court recognized early that states are limited in both legislative and judicial jurisdiction. In the absence of constitutional and congressional directives the Court has undertaken the task of discovering and articulating the reasonable standards by which the legislative acts and judicial proceedings of one state are to be considered entitled to full faith and credit in other states.[4]

Usually, the Court has approached the problem of judicial jurisdiction in recognition cases on the basis of a deprivation of procedural due process. Lack of legislative jurisdiction, on the other hand, has been dealt with in terms of a denial of substantive due process.[5] The due process rationale, however, was not really essential.[6] The real problem lay in discovering jurisdictional standards. The Court ultimately shifted its emphasis from a due process context to one of full faith and credit.

What are the jurisdictional standards in a divorce proceed-

4. See Rheinstein, *The Constitutional Bases of Jurisdiction*, 22 U. CHI. L. REV. 775 (1955). In this article Professor Rheinstein maintains that the basis upon which the Supreme Court limits jurisdiction of the states is rooted in principles derived from the Law of Nations. This term is not to be confused with international law as it is understood today. Rather, the Law of Nations is a concept which traces its roots back to the *jus gentium* of the ancient Romans, and according to which there is a body of legal principles applicable to all peoples and states. According to these principles a state is limited in its assertion of jurisdiction. This was understood by the framers of the Constitution, and this understanding is reflected in the decisions of the Supreme Court.

5. For cases illustrative of these two approaches, respectively, see Pennoyer v. Neff, 95 U.S. 714 (1878), and Pink A.A.A. Highway Express, Inc., 314 U.S. 201 (1941).

6. In the article cited in note 4 *supra*, Professor Rheinstein argues that the due process rationale may not even be applicable in a divorce proceeding. He notes that the due process clause says that no one shall be deprived of life, liberty, or property without due process of law. In what sense may it be said that a divorce judgment alone deprives anyone of life, liberty, or property, he asks. This question, it should be noted, assumes a restrictive concept of property as opposed to the Lockian concept of property as including all human interests.

ing? The Court has held that domicile[7] is required to give a state "jurisdiction." Before 1942 it was held generally that only the state of the last matrimonial domicile was competent to render a divorce.[8] In *Williams v. North Carolina* (1942)[9] this doctrine was overruled and it was asserted that if the plaintiff is a bona fide domiciliary of a state, that state's courts may grant him a divorce even from his non-domiciliary spouse if all requirements of procedural due process are met.

It is important to note that in none of these decisions has the Supreme Court separated, in express manner, the two aspects of jurisdiction discussed above. Domicile has been viewed as necessary to give a state both legislative and judicial jurisdiction over a divorce proceeding. The dissenting judge in the federal court of appeal case *Alton v. Alton*[10] suggests that it would be more desirable to keep these two aspects of the jurisdictional problem separate. In his opinion a divorce may be rendered by a state in which neither party is domiciled if it will apply the law of the state of domicile. That this suggestion has been ignored, if not implicitly rejected, by the Supreme Court is reflected in the later case of *Granville-Smith v. Granville-Smith*[11] which was in effect an appeal from the *Alton* case.[12]

This identification of the legislative and judicial aspects of divorce jurisdiction should not be considered a universal phenomenon. The laws of the many European countries clearly distinguish these two concepts.[13] In France, if parties of the same nationality are seeking a divorce, their national law will be applied. Conversely, French law governs the capacity of French citizens to obtain a divorce in a foreign country.[14] Similarly, Dutch subjects may obtain a divorce in a foreign court having judicial jurisdiction (according to its own law) if the divorce

7. "Domicile" is understood as physical presence in a state plus the intention to make it one's permanent home. See Alton v. Alton, 207 F.2d 667 (3d Cir. 1953).

8. Atherton v. Atherton, 181 U.S. 155 (1901).

9. 317 U.S. 287 (1942).

10. 207 F.2d 667 (3d Cir. 1953).

11. 349 U.S. 1 (1955).

12. By the time *Alton* was appealed to the Supreme Court the question had been rendered moot by the parties' securing a valid divorce in their home state. *Granville-Smith* arose later with an essentially similar fact situation. The court of appeal reached the same decision as in *Alton*, basing its decision on that prior holding. Thus, the appeal of *Granville-Smith* to the Supreme Court was in effect an appeal of the *Alton* case.

13. See generally, 1 E. RABEL, THE CONFLICT OF LAWS: A COMPARATIVE STUDY ch. 11 (2d ed. 1958). Note especially the material beginning at 459.

14. G. DELAUME, AMERICAN-FRENCH PRIVATE INTERNATIONAL LAW (1961).

is based on grounds also recognized under Dutch law.[15] As these examples illustrate, some continental countries assert legislative jurisdiction over their absent citizens in the matter of divorce while recognizing the judicial jurisdiction of foreign countries. Also applying the separation of legislative and judicial jurisdiction is the *exequatur* doctrine widely accepted by continental countries. Under this doctrine a country will give effect to the judgment granted to one of its nationals by a foreign state with judicial jurisdiction if it finds that under the same facts, applying its own law, it would have reached the same decision.[16]

The above reflections suggest some conclusions about recognition in the United States of foreign divorce judgments. It is clear that, in principle, it is certainly reasonable to recognize a divorce granted by a foreign court if the proper law was applied and the court had proper judicial jurisdiction according to acceptable standards of judicial due process. Thus it would not be unreasonable for Louisiana to recognize a Mexican divorce granted to Louisiana domiciliaries if the Louisiana substantive law were properly applied in a Mexican court having judicial jurisdiction. Furthermore, it would not be unreasonable to recognize foreign divorces under the *exequatur* doctrine as is done in some other countries. However, it does not seem desirable that Louisiana should adopt less stringent standards for recognition of foreign divorces than those imposed by the full faith and credit clause as applied by the United States Supreme Court for recognition of divorces granted in sister states. Thus, while there are reasonable alternatives, the holding in *Clark v. Clark* was perhaps the best solution to the problem.[17]

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15. R. HOLLEWIJN, AMERICAN-DUTCH PRIVATE INTERNATIONAL LAW (1961).

16. This solution avoids one of the dangers inherent in the separation of legislative and judicial jurisdiction—the misapplication of the applicable law. On the detailed conditions for *exequatur* in France, see DALLOZ, NOUVEAU RÉPERTOIRE DE DROIT, *Jugement*, §§ 214-224, 227 (2d ed. 1963); BATIFFOL, TRAITÉ ÉLÉMENTAIRE DE DROIT nº 741 (3d ed. 1959).

17. It should be noted, however, that a draft convention on foreign divorce recognition proposed by the Hague Conference on Private International Law, to which the United States might become a party, would provide for recognition of foreign divorces in instances in which recognition would not have to be given to divorces rendered in sister states. Draft Convention on the Recognition of Divorces and Legal Separations, adopted June 9, 1967, by the Special Commission of the Hague Conference on Private International Law.