Michigan Law Review

Volume 30 | Issue 2

1931

DIVORCE - DOMICIL - RECOGNITION OF FOREIGN DECREES

Florence K. Frankel
University of Michigan Law School

DIVORCE — DOMICIL — RECOGNITION OF FOREIGN DECREES. — The New York Court of Appeals has re-emphasized some well-established principles of divorce jurisdiction in the recent case of *Fischer v. Fischer*.[1] In a suit involving the validity of a second marriage, W proved a Nevada divorce from her first husband, a citizen of New York, who had been served in New York but had not appeared to defend the litigation. The court denied recognition to the Nevada decree because W's residence in Nevada, while it conformed with the statutory requirements of that forum, was proved to have been acquired solely for the purpose of securing a divorce. The invalidity of

[1] 254 N. Y. 463, 173 N.E. 680 (1930).

such a decree, the court said, was not "open to doubt."[2] Indeed, the long settled rule is that one who goes to another state for the sole purpose of procuring a divorce, not intending a permanent change of residence, does not acquire a new domicil; hence, his divorce proceeding is a fraud both on the court of the forum and of his own state, and is void.[3] Since domicil or residence is a jurisdictional fact, the second court has the power to inquire into the facts to determine for itself whether or not the court rendering the decree had jurisdiction.[4] While a foreign judgment is considered prima facie valid, and clear and convincing proof is needed to impeach it,[5] the tendency of late years has been to reexamine the facts when the question arises in relation to a foreign, and especially a Nevada, divorce decree.[6] This policy has been crystallized in statutes in several states, a typical one reading substantially as follows: If any inhabitant go into another state in order to obtain a decree of divorce for a cause which occurred while in this state, or for a cause not a ground in this state, a decree so obtained shall be of no effect.[7] The Missouri court, in *Wagoner v. Wagoner*,[8] gave weight to these evidentiary facts, that the plaintiff had taken room and board for the statutory period of time only, had obtained a position in Reno from a "friend" who required only an hour's time each day, had told neither his business associates nor friends of his change of residence, and had returned to his home state immediately on obtaining his decree. On the basis of such showings the court decided that his residence was merely colorable, insufficient to confer on the Nevada court jurisdiction to decree a valid divorce.[9]

[2] The court cites for this statement, Atherton v. Atherton, 181 U. S. 155, 21 Sup. Ct. 544, 45 L. ed. 794 (1901); Haddock v. Haddock, 201 U. S. 562, 26 Sup. Ct. 525, 50 L. ed. 867 (1906); Baumann v. Baumann, 250 N. Y. 382, 165 N.E. 819 (1929).

[3] 2 BISHOP: MARRIAGE, DIVORCE AND SEPARATION, sec. 102 (1891). New York has also recognized a long-continued and bona fide residence as sufficient to found jurisdiction in Gould v. Gould, 235 N. Y. 14, 138 N.E. 490 (1923).

[4] State v. Cooke, 110 Conn. 348, 148 Atl. 385 (1930); Benson v. Benson, 40 F.(2d) 159 (1930); Parker v. Parker, 222 Fed. 186 (1915).

[5] Parmelee v. Hutchins, 238 Mass. 561, 131 N.E. 443 (1921); De Bouchel v. Candler, 296 Fed. 482 (1924); Knowlton v. Knowlton, 155 Ill. 158, 39 N.E. 595 (1895).

[6] Bell v. Bell, 181 U. S. 175, 21 Sup. Ct. 551, 45 L. ed. 804 (1901); Streitwolf v. Streitwolf, 181 U. S. 179, 21 Sup. Ct. 553, 45 L. ed. 807 (1901); Anthony v. Tarpley, 45 Cal. App. 72, 187 Pac. 779 (1919). Cf. Cole v. Cole, 96 N. J. Eq. 206, 124 Atl. 359 (1924).

[7] N. J. Comp. Stat. (1910) 2042; Mass. Gen. Laws (1921) c. 208, sec. 39.

[8] 287 Mo. 567, 229 S.W. 1064 (1921).

[9] The question of estoppel often arises in these cases. The court, in the instant case, held that there were no grounds for estoppel. Each case must be examined

It is clear, then, that where there is no bona fide domicil or residence, there is no jurisdiction over the subject matter of the suit, the marriage status. Nor can jurisdiction be conferred by the consent of one party, as is seen from the cases already cited, or by the consent of both, as in the case where both parties go into another state to secure a divorce.[10] But if there is domicil, what is the status of the foreign divorce decree?[11] If it was obtained in the state of the matrimonial domicil, the full faith and credit clause of the Constitution requires its recognition.[12] If it is being questioned in a court that was not the domicil of either party at the time of the decree, the doctrine of "renvoi" will be applied. That is, the court of the forum will look to the law of the domicil to determine whether the latter would recognize or deny the decree.[13] Since the cases of *Ditson v. Ditson*[14] and *Cheever v. Wilson*,[15] where it was decided that the wife could get a separate domicil, the difficult situation is the one in which the decree was obtained at the domicil of one party only. It has been settled by *Haddock v. Haddock*[16] that such a decree is not entitled to recognition under the full faith and credit clause. It is, then, within the power of each state to recognize or deny the foreign divorce decree. The majority of courts in this country recognize such a decree as valid and binding.[17] Many of them do so under the claim of comity;[18] but this, it must be understood, is "neither a matter of absolute obligation on the one hand nor mere courtesy and good will on the other — but it is the recognition which one nation allows within its territory to the . . . judicial acts of another, having due regard both to international duty and convenience and to the rights of its

with reference to its particular fact situation. See Starbuck v. Starbuck, 173 N. Y. 503, 66 N.E. 193 (1903); Parmelee v. Hutchins, 238 Mass. 561, 131 N.E. 443 (1921). General expressions against allowing an estoppel because the policy of the state is involved are found in Hollingshead v. Hollingshead, 91 N. J. Eq. 261, 110 Atl. 19 (1920); Smith v. Smith, 13 Gray (79 Mass.) 209 (1859).

[10] Lister v. Lister, 86 N. J. Eq. 30, 97 Atl. 170 (1916).

[11] For a complete answer, see Beale, "Haddock Revisited," 39 HARV. L. REV. 417 (1926).

[12] Atherton v. Atherton, 181 U. S. 155, 21 Sup. Ct. 544, 45 L. ed. 794 (1901); Thompson v. Thompson, 226 U. S. 551, 33 Sup. Ct. 129 (1913).

[13] Dean v. Dean, 241 N. Y. 240, 149 N.E. 844 (1906); Ball v. Cross, 231 N. Y. 329, 132 N.E. 106 (1921).

[14] 4 R. I. 87 (1856).

[15] 9 Wall. 108 (1870).

[16] 201 U. S. 562, 26 Sup. Ct. 525, 50 L. ed. 867 (1906).

[17] GOODRICH, CONFLICT OF LAWS, sec. 127, p. 296 (1927).

[18] Pettis v. Pettis, 91 Conn. 608, 101 Atl. 13 (1917); Thompson v. Thompson, 89 N. J. Eq. 70, 103 Atl. 856 (1918); Kenner v. Kenner, 139 Tenn. 211, 201 S.W. 779 (1918). Missouri has held throughout to the policy of recognition. Howey v. Howey, 240 S.W. 450 (1922).

own citizens." [19] The Georgia court, in *Joyner v. Joyner*,[20] explained that recognition on the basis of comity was limited by well-defined rules and precedents; that such decrees would be recognized only where the plaintiff was a bona fide resident of the other state, where the cause did not violate the public policy of this state, and where defendant had actual notice and an opportunity to be heard.[21] If the cases were phrased in the language of the more modern conflict of laws theory, they would be less confused and confusing. Some few states, in the effort to clarify their positions, have passed statutes patterned after the proposed Uniform Divorce Act.[22] The Kansas statute[23] goes even further in recognition: "Any judgment rendered on service of publication in any state in conformity with the law *thereof* shall be given full faith and credit and have the same force as if rendered here." New York, at the other extreme, most consistently refuses recognition on the ground that it would be against a strong public policy to recognize a foreign divorce, for a cause other than adultery, if at the time of suit the defendant was domiciled in New York, or if New York was the matrimonial domicil.[24] Before the *Haddock* case, the conflict of laws rule was that there was jurisdiction at the domicil of either party,[25] at least over the subject matter, the res being the marriage status which every state has a social interest to preserve or destroy. On principle it would seem best, for the sake of uniformity and stability, for the states to concede jurisdiction if the parties were also within the jurisdiction of the court. A court at the domicil of one party can properly grant a decree against a non-domiciled spouse if (1) he has consented that the other spouse acquire a separate home, or (2) by his misconduct has ceased to have the right to object to the acquisition of such separate home, or (3) if he is personally subject to the jurisdiction of the state granting the di-

[19] Justice Gray, in Hilton v. Guyot, 159 U. S. 113, at 163, 16 Sup. Ct. 139, at 143, 40 L. ed. 95 (1895).

[20] 131 Ga. 217, 62 S.E. 182 (1908).

[21] See also Perkins v. Perkins, 225 Mass. 82, 113 N.E. 841 (1916).

[22] The provision runs substantially as follows: Full faith and credit shall be given . . . to a decree of divorce by a court of competent jurisdiction in another state . . . when the jurisdiction was obtained in the manner and in substantial conformity with the conditions prescribed in sections . . . of this act. Nothing contained herein shall be construed to limit the power of any court to give effect to a decree of annulment or divorce of a court of a foreign country as may be justified by the rules of international comity. Provided, that if any inhabitant, etc. This is found in N. J. Comp. Stat. (1910) 2041; Del. Rev. Code (1915) 3032; Wis. Stat. (1927) c. 247, sec. 21.

[23] Kan. Rev. Stat. (1923) 60-1518; McCormick v. McCormick, 82 Kan. 31, 107 Pac. 546 (1910); See also Hilbish v. Hattle, 145 Ind. 59, 44 N.E. 20 (1896).

[24] 35 YALE L. J. 372 (1926).

[25] 39 HARV. L. REV. 417 (1926).

vorce.[26] It will be seen from clause (2) that "fault" is a jurisdictional fact which, from its very nature, is disputable; the second court may and has the power to differ from the first court on this finding or fact.[27] If jurisdiction be admitted, the only other prerequisite to recognition of a foreign divorce decree would be conformity with the constitutional requirements of "due process" in the matter of service of process, reasonable notice to the defendant, and the opportunity to be heard.[28]

FLORENCE K. FRANKEL

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[26] A. L. I. Restatement, Conflict of Laws, sec. 119 (1930).

[27] Prof. Beale suggests that the Haddock case increased the list of jurisdictional facts by this element of "fault." 39 HARV. L. REV. 417 (1926). See also, "Fault as an Element of Divorce Jurisdiction," 37 YALE L. J. 564 (1928).

[28] GOODRICH, CONFLICT OF LAWS 292 (1927). On notice, see Thompson v. Thompson, 262 U. S. 551, 33 Sup. Ct. 129 (1913). Cheely v. Clayton, 110 U. S. 701, 4 Sup. Ct. 328 (1884).