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Divorce - Objections to Juridiction - Is the Residence Residence Requirement Jurisdictional

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DIVORCE—OBJECTIONS TO JURISDICTION—IS THE RESIDENCE REQUIREMENT JURISDICTIONAL?

NOT INFREQUENTLY, attorneys find themselves faced with the problem of prosecuting or defending a collateral attack upon a decree of divorce in which the argument is made that the court which granted the divorce lacked jurisdiction to render it. In the great majority of these cases, the argument is based on the contention that neither of the parties was domiciled within the state where the divorce was granted. Occasionally, however, a different argument is heard: that the plaintiff in the original divorce action had failed to fulfill a period of residence set up by statute before bringing the action for divorce, and that the divorce is consequently void.

Both of these arguments are addressed to the jurisdiction of the court which granted the divorce. Domicil of at least one of the parties in the state where a divorce decree was rendered is the ultimate jurisdictional fact upon which a decree of divorce must rest in every American state.[1] The argument that such domicil was lacking, if proven, will invalidate the divorce everywhere.[2] Unless at least one of the parties to the divorce action is domiciled with it, no state may properly decree a divorce.[3] If one of the parties to the action is domiciled within it, any state may grant a divorce which, generally speaking, will be binding in every other state under the full faith and credit clause of the Constitution.[4]

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[1] Williams v. North Carolina I, 317 U. S. 287 (1942); Smith v. Smith, 7 N. D. 404, 74 N.W. 783 (1898); Graham v. Graham, 9 N.D. 88, 81 N.W. 44 (1899).

[2] Williams v. North Carolina II, 325 U.S. 226 (1944); State v. Najjar, 63 A. 2d 807 (1949 New Jersey); Caldwell v. Caldwell, 298 N. Y. 146, 81 N. E. 2d 60 (1948), 62 HARV. L. R. 131 (1949).

[3] Smith v. Smith, 7 N. D. 404, 74 N. W. 783 (1898).

[4] This statement does not apply to all phases of the marital relation. In Estin v. Estin, 334 U. S. 541 (1948), 33 MINN. L. R. 307 (1949), the United States Supreme Court held that an *ex parte* divorce granted to a husband in Nevada did not affect the obligation of the husband to pay alimony under a prior New York decree of separation, stating that while the Nevada divorce was effective to change the husband's marital status so that he could marry again, it did not end the wife's property rights under the New York separation decree, which did not fall with the breaking of the marital tie. Since the wife was not subject to the jurisdiction of the Nevada courts, her property interests could not be affected by an in personam decree. Pennoyer v. Neff, 95 U. S. 714 (1877). "The result in this situation is to make the divorce divisible—to give effect to the Nevada decree insofar as it affects marital status and to make it ineffective on the issue of alimony." 334 U. S. 541, 549. Compare Thurston v. Thurston, 58 Minn. 279, 59 N. W. 1017 (1894). It should be borne in mind that the relationship created by marriage has several aspects. Professor Bingham pungently states: "This legal relation is not a single legal tie of right and duty between the spouses, such as must be wholly severed or not severed at all, although perhaps altered somewhat,

An additional requirement to that of domicil is set up in almost every state. Statutory enactments regulate the length of time which a plaintiff must spend in residence within the state before being permitted to bring an action for divorce. The authorities are unanimous to the effect that when a plea is made that a plaintiff in a pending divorce action has not lived in the state the required length of time, such a plea, if proven, will abate the action. But another situation can arise, illustrated by a case which the North Dakota court decided. The factual situation in that case was this:

W, the wife, was a native born domiciliary of the state of North Dakota. *H*, her husband, was a native born domiciliary of Minnesota. They were married in 1938, settling in Minnesota. Matrimonial difficulties arose, causing them to separate several times, the final separation occuring in August, 1942. By operation of law, the domicil of the husband is also the domicil of the wife, so that by her marriage *W* had lost her domicil in North Dakota and become domiciled in Minnesota. Following the separation, *W* moved back to North Dakota, intending to reside in the state permanently. Two months later she filed suit for divorce in the North Dakota courts. North Dakota requires a period of twelve months "bona fide" residence in the state by the plaintiff immediately preceding the filing of any action for divorce.[5] *H* filed an answer denying that *W* had met the residence requirement but withdrew the answer after a settlement concerning details of the divorce was reached by the parties. The case thereafter was tried by default and a decree of divorce was entered only four months after *W* had returned to North Dakota. Thereafter *H* moved to have the decree set aside, contending that the court had lacked jurisdiction to render it because of *W's* failure to live in the state the required period of time preceding the commencement of the action. It was *held* that the court acquired jurisdiction when *W* reacquired a domicil in North Dakota; that failure to comply with the residence requirement was an irregularity which did not go to the court's jurisdiction; and

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as for instance by a decree of separation. It is . . . a conceptual conglomerate of a multitude of particular legal incidents, some of which may be altered or destroyed without affecting the others." Bingham, *In the Matter of Haddock v. Haddock*, 21 CORN. L. Q. 393 (1936). See 2 BISHOP, MARRIAGE, DIVORCE AND SEPARATION, Sec. 35 (1st ed. 1891). It has, however, been definitely settled that the status created by marriage is not a contractual one in the ordinary sense of the term. Maynard v. Hill, 125 U. S. 190 (1887).

[5] N. D. Rev. Code (1943) Sec. 14-0517.

that while the lower court might have erred in granting the divorce decree, the error was not one in *excess* of the court's jurisdiction but merely an error in the *exercise* of jurisdiction. Consequently, no appeal having been taken from the original decree, it could not be disturbed after the period of appeal had expired. *Schillerstrom v. Schillerstrom.*[6]

It is clear that if the lower court had lacked jurisdiction to grant the decree, as *H* contended, the divorce would have been void and could have been attacked at any time. If *W* had not been a domiciliary of North Dakota the court would have been without the necessary jurisdiction. This is because a state has no interest in the marital status of persons who are not domiciled within it. Following this general principle, in *Smith v. Smith*[7] the North Dakota court denied a decree of divorce to an employee of the United States treasury who had come to the state and established a technical residence upon which he relied to enable him to take advantage of the state's then liberal divorce laws, but who had never acquired domicil in North Dakota. The position was reiterated a year later in *Graham v. Graham,*[8] the court denying a divorce to a wife who had fulfilled the statutory period of residence but had never become domiciled here. Both of these cases, in which domicil was lacking although the residence requirement had been met, present situations precisely converse to that in *Schillerstrom v. Schillerstrom,* where domicil was present but the residence requirement had not been fulfilled.

In the federal courts domicil is something which may be acquired instantaneously.[9] " 'Home' in the domiciliary sense can be changed in the twinkling of an eye, the time it takes a man to make up his mind to remain where he is when he is away from home. He need do no more than decide, by a flash of thought, to stay 'either permanently or for an indefinite or unlimited length of time.' No other connection of perma-

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[6] — N. D. —. 32 N. W. 2d 106, 2 A.L.R. 2d 271 (1948).

[7] 7 N. D. 404, 74 N. W. 783 (1898).

[8] 9 N. D. 88, 81 N. W. 44 (1899).

[9] "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." RESTATEMENT, CONFLICT OF LAWS, Sec. 9 (1934). N. D. Rev. Code (1943) Sec. 54-0126 uses the term "residence" as synonymous with "domicil" in setting forth the rules by which domicil is to be determined by the North Dakota courts. Northwestern Mortgage & Security Co. v. Noel Construction Co. and J. A. Carter, 71 N. D. 256, 300 N. W. 28 (1941). See Gronna, *Domicile of Absent Defendant as Basis for in Personam Jurisdiction,* 24 N. D. BAR BRIEFS 4 (1948).

nence is required."[10] Taken at face value, however, the decisions of many state courts appear to apply a different criterion for determining domicil, confusing the requirement that a plaintiff acquire domicil in the state with the requirement of a specfied period of residence. Thus, the books are full of statements that residence in a state for some prescribed length of time is a prerequisite which must be fulfilled before the court has "jurisdiction" to grant a divorce. The North Dakota court is among the many which have made this statement—in *Smith v. Smith, supra,* and *Graham v. Graham, supra*—but it stated this language was subject to "construction" in the *Schillerstrom* case.

Actually, of course, the federal courts recognize that a state court has jurisdiction over a divorce action the instant that one of the parties to the action becomes domiciled within it—that is, the court acquires jurisdiction which the federal courts will recognize and respect in the instant that one of the parties to a divorce action undergoes the "flash of thought" of which Mr. Justice Rutledge spoke. But as one legal writer points out, a state court's interpretation of the word "domicil" does not need to be precisely square with the Supreme Court's interpretation of the term in all respects. "Undoubtedly a state may give a content to the concept of domicil more difficult to satisy than any minimum that would satisfy the Supreme Court."[11] It seems probable that in a number of states, domicil sufficient to give the court jurisdiction of a divorce action is acquired only after the residence requirement has been met.

Examination of the residence requirement statutes of the

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[10] Mr. Justice Rutledge, dissenting in Williams v. North Carolina II, 325 U. S. 226, 257 (1944). The entire concept of domicil has been attacked by many legal writers as well as by Justice Rutledge on the ground that it does not furnish an effective basis for determining jurisdiction in divorce actions. "The requirement of domicil for the plaintiff in a divorce action is doubtless a vestige of the historic fact that divorce was the business of a special court which was distinctly not open even to all the King's subjects. . . . It has come to seem that a state has the power of granting divorce only to those who in a special way are members of the state body. It is hard to see how this can be justified under a judicial system like ours to which aliens — even aliens incapable of citizenship — have access on the same terms as citizens. Attention is called to the fact that no question is raised about the state's right to hear a divorce suit when the requirement of residence is the relatively long one of a year or more. But if it is really absence of domicil that renders a state court incompetent to hear a plaintiff in a divorce action, even a year is not enough without more." Radin, *The Authenticated Full Faith and Credit Clause,* 39 ILL. L. R. 1, 31 (1944).

[11] Holt, *Any More Light on Haddock v. Haddock?* 39 MICH. L. R. 689, 695 (1940).

various states shows that such statutes may be divided into two classifications: (1) those which simply declare that a plaintiff must reside in the state for some specified period of time in order to be entitled to maintain his action,[12] and (2) those which express a legislative intent that the court shall not have jurisdiction to hear any divorce action unless the plaintiff has fulfilled the requirement of residence within the state for some definite period of time.[13]

It is difficult to escape the conclusion that in those states having the second type of statute a result opposite to that reached in *Schillerstrom v. Schillerstrom* might be correct. It would appear that in those states the legislature has done what Professor Holt suggested might be done, and given "a content to the concept of domicil more difficult to satisfy than any minimum that would satisfy the Supreme Court."[14]

In states which have the first type of statute, however, it would seem on principle that the result reached in *Schillerstrom v. Schillerstrom* would be both logical and correct. Such statutes, similar to that in North Dakota, nowhere mention jurisdiction. On their face, they simply prescribe a condition precedent which a plaintiff must fulfill before bringing the action of divorce. Thus, in *Aucutt v. Aucutt*,[15] the Texas court construed such a statute as prescribing the qualifications of the plaintiff alone, and held that a defendant could be granted a divorce on his cross-action without having resided in the state for the statutory period of time, since the statutory qualification did not apply to him. The California court has held such a residence requirement nonjurisdictional in its nature. In *Kelsey v. Miller*[16] it was held that where a husband had obtained a Tennessee divorce without meeting Tennessee's residence requirement, his second marriage was valid, since, ap-

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[12] North Dakota's statute is typical. "A divorce must not be granted unless the plaintiff in good faith has been a resident of the state for twelve months next preceding the commencement of the action...." N. D. Rev. Code (1943) Sec. 14-0517.

[13] Among states possessing the second type of statute are Connecticut, Delaware, Mississippi, New Hampshire, New Jersey, Oregon, Virginia and Wisconsin. The Mississippi statute, the most definite of this group, provides: "Jurisdiction Limited.—The jurisdiction of the chancery court in suits for divorce shall be confined to the following cases: (a) Where one of the parties has been a bona fide resident within this state for one year next preceding the commencement of the suit." Miss. Code (1942) Sec. 2736.

[14] Note 11, supra.

[15] 122 Tex. 518, 62 S. W. 2d 77, 89 A.L.R. 1198 (1933).

[16] 203 Cal. 61, 263 P. 200 (1928); *Accord*, DeYoung v. DeYoung, 27 Cal. 2d 521, 165 P. 2d 457 (1946).

plying the presumption that Tennessee law was similar to California law, the divorce was good because failure to meet the residence requirement did not defeat the court's jurisdiction in California. In *Kern v. Field*,[17] the Minnesota court held that where a wife went to North Dakota, established a residence and obtained a divorce on constructive service, failure to reside in the state for the required period of time was an irregularity which was nonjurisdictional. This holding was based on the precedent set in *Thurston v. Thurston*,[18] which held that where a husband, domiciled with his wife in Minnesota, deserted the wife and acquired a residence in Washington where in two or three months he began an action for divorce which was granted, the divorce was to be considered valid, since the lack of residence for the prescribed length of time in Washington was an error which did not defeat the Washington court's jurisdiction.[19]

On the other hand, many of the courts having the first type of statute—that is, the type not mentioning jurisdiction—have construed the residence requirement to be jurisdictional in its nature by a line of decisions using language so explicit that it is difficult to see how they could consistently reach the result of *Schillerstrom v. Schillerstrom*. In *Fleming v. Fleming*,[20] P brought an action of divorce without having fulfilled the six-month residence requirement within the county where the divorce was sought required by Nevada statutes of that time. In holding that P was required to be physically present in the county during the six months, the Nevada court said: ". . . By the provisions of this statute, actual residence, as distinguished from domicil or legal residence, was made the basis upon which

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[17] 68 Minn. 317, 71 N. W. 393, 64 Am. St. Rep. 479 (1897).

[18] 58 Minn. 279, 59 N. W. 1017 (1894).

[19] Commenting on this type of case, Professor Goodrich states: "As has been stated, a divorce decree must have been granted by the court of the jurisdiction if it is to have recognition elsewhere. The term used in statutes prescribing requirements for divorce actions is generally 'residence.' This is almost uniformly interpreted as meaning 'domicil.' In addition to the requirement that one must be domiciled within a state before he can get a divorce there, statutes frequently require residence for a given period of time. Such a provision may be interpreted to mean that the individual must have been domiciled within the jurisdiction for this period or as sometimes held, that he or she must not only have been domiciled but must have an actual residence there for the prescribed time as well.

"Such conditions may be enacted by the lawmaking body of any state as a matter of local policy. To secure a divorce, a party must comply with them. They do not affect the international requirement for jurisdiction, which is based on domicil, but are additions to it." GOODRICH, CONFLICT OF LAWS, (1926), Sec. 124.

[20] 36 Nev. 135, 134 P. 445 (1913).

courts would determine the status of the party litigant and acquire jurisdiction. In this respect, residence must be distinguished from domicil."[21] Likewise, in *Glassman v. Glassman*,[22] the Ohio court stated: "Such residential requirements in state statutes have been almost universally held to be jurisdictional in character. If the plaintiff in a divorce action has not been a resident of the state for the period prescribed by statute, the trial court has no jurisdiction to consider the action and any judgment rendered in such a proceeding is absolutely void, in the state of trial and elsewhere." Such dicta, though arising in cases in which a direct appeal was made from the decree of divorce, clearly cover the situation presented by a collateral attack such as was made in *Schillerstrom v. Schillerstrom*.

A result precisely opposite to the holding of the *Schillerstrom* case was reached in *Martin v. Martin*,[23] an Alabama decision. A divorce decree granted by one county was held void when attacked in a collateral suit on the ground the residence requirement within the county had not been met. Since the residence requirement was jurisdictional in its nature, the court stated, failure to meet it deprived the court of jurisdiction and made the divorce decree entirely void.

The most interesting case holding contra to *Schillerstrom v. Schillerstrom* is *Adams v. Adams*,[24] decided by the Massachusetts court. In that case, P, an illegitimate child, sued to recover inheritance rights in his father's Massachusetts estate, claiming that he had been legitimized by the subsequent marriage of his parents in California after his father had obtained a divorce from his first wife in California though he had not complied with the California residence requirement. Justice Holmes, at that time a member of the Massachusetts court, held that the requirement of residence went to the court's jurisdiction and that the divorce was therefore invalid. The decision was based on the assumption that in California the requirement of length of residence went to the court's power to deal with a divorce case and that failure to comply with the residence requirement made the divorce void *ab initio* for lack of jurisdiction. It is interesting to note that California courts subsequently held precisely the opposite—that

[21] 134 P. 446.
[22] 75 Ohio App. 47, 60 N. E. 2d 716 (1944).
[23] 173 Ala. 106, 55 So. 632 (1911).
[24] 154 Mass. 290, 28 N. E. 260, 13 L.R.A. 275 (1891).

is, that failure to reside in the state for the period set up by statute was not a defect which deprived the court of jurisdiction.[25]

The question of whether a divorce obtained on residence insufficient to satisfy the statutory requirement of the state wherein granted is entitled to full faith and credit in other states is still an open one so far as most courts are concerned, despite the cases just cited. However, the majority of the courts which have considered this problem have arrived at the conclusion that a divorce granted on such insufficient residence is valid as against collateral attack.

The legal writers who have considered this subject all appear to have reached the conclusion that the residence requirement is not jurisdictional in its nature. "It is sometimes held that the divorce is invalid although the court granting the divorce found that the required length of residence had been fulfilled if it can be shown to another court that the statutory period of residence was lacking. But the better view and the one more generally held is that this, not being a matter of international jurisdiction, and the court therefore acting within its jurisdiction in the international sense, had power to find the fact, and, finding the fact, to grant the divorce," states Professor Beale.[26]

It seems clear that the result reached in *Schillerstrom v. Schillerstrom* states the correct rule for those states having the type of residence statute which does not in terms purport to be jurisdictional. This, however, is no guarantee that the correct result will be reached in every case. If the residence requirement is construed by the courts of the state where recognition is sought for the divorce as being an addition to the concept of domicil—that is, as a refusal to accept the plaintiff as a domiciliary of the state where the divorce was granted until the residence requirement has been met—then the result that the divorce was invalid could be reached consistently with constitutional principles.

No case involving such an interpretation of the residence requirements has ever been passed upon by the Supreme Court of the United States. The question of how far, if at all, a state will be permitted to incorporate a residence requirement into

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[25] See note 16, supra.

[26] 1 BEALE, CONFLICT OF LAWS, Sec. 110.5.

tne concept of domicil as a part of its local policy has therefore never been settled.

Since decrees of divorce, especially those granted by default,[27] are open to collateral attack of such a wide range anyway, it would seem wiser not to allow a new avenue of assault upon them to be opened. The obtaining of default divorces has become such an unsatisfactory procedure, involving the risk of prosecution for bigamy if the divorce is attacked successfully after a remarriage,[28] and possibly finally leaving the litigants half married and half divorced,[29] that a definite rule in this regard would inject a welcomed area of certainty into a field of law which has become sadly confused.[30]

Precisely the same objections can be made to setting aside a decree of divorce on the ground the residence requirement was not complied with as can be made to setting aside a divorce on the ground that domicil within the state where the divorce was granted was lacking. Undoubtedly if a person married again in reliance upon a divorce which was later set aside because of failure to meet the residence requirement of the state which granted the divorce, he would be subject to prosecution for bigamy just as he would be if he married again in reliance upon a divorce later set aside for lack of domicil. The confusion of the law relating to this subject

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[27] Where the defendant in an action of divorce goes to the state where the divorce is sought, or otherwise appears in the action, the divorce cannot later be questioned by the defendant on the ground that the plaintiff was not domiciled within the state which granted the divorce, since the doctrine of res judicata applies. ". . . The requirements of full faith and credit bar a defendant from collaterally attacking a divorce decree on jurisdictional grounds in the courts of a sister state where there has been participation by the defendant in the divorce proceedings. . . " stated Chief Justice Vinson in Sherrer v. Sherrer, 334 U. S. 343. 351 (1948), 33 MINN. L. R. 317 (1949). See Coe v. Coe, 334 U. S. 378 (1948).

[28] Williams v. North Carolina I, 317 U. S. 287 (1942); Williams v. North Carolina II, 325 U. S. 226 (1944)

[29] See footnote 4, supra.

[30] Rice v. Rice, 335 U. S. 842 (1949), held that where a husband left his wife, moved to Nevada, obtained a divorce on constructive service and married another woman, the divorce could be attacked on jurisdictional grounds in Connecticut, the state of matrimonial domicil, thus opening the way to a finding that P, the first wife, was the husband's legal heir to certain real estate in Connecticut. Justice Jackson, dissenting, pointed out what he termed a "study in contrasts." Nevada had power to dissolve the marriage of a woman who never went there, never invoked its law or courts, and never submitted herself to its jurisdiction. On the other hand, the courts of any other state had power to find that Nevada never had jurisdiction of a man who went into that state, invoked its law and submitted himself to its courts. Jackson began his dissent by quoting Shakespeare: "Confusion now hath made his masterpiece."

makes a divorced person's liberty hinge "upon his ability to 'guess' at what may ultimately be the legal and factual conclusion resulting from a consideration of two of the most uncertain word symbols in all the judicial lexicon, 'jurisdiction' and 'domicil.' "[31]

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[31] Justice Black, dissenting in Williams v. North Carolina II, 325 U. S. 226 (1944).