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Custody--Jurisdictional Requirements for Full Faith and Credit (May v. Anderson, 345 U.S. 528 (1953))

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any other criminal act connected with the management of a corporation, may not look to the corporation for recovery of his litigation expenses.²⁰ In a divided court, the majority was of the opinion that inasmuch as the statute is in derogation of the common law it should be strictly construed.²¹ The dissenting judges, in sharp contrast, contended that compensation for criminal proceedings was within the intention of the legislators²² as manifested, among other things, by the ". . . broad and . . . all-inclusive . . ." ²³ wording of the statute.

The court, in denying reimbursement, stated that "[i]t would be a very strange public policy, indeed, which would set up legal machinery whereby one *charged with*, or convicted of, a crime, of whatever kind, could require the corporation . . . to pay his legal expenses."²⁴ Where guilt is established, the statement appears to be correct.



CUSTODY—JURISDICTIONAL REQUIREMENTS FOR FULL FAITH AND CREDIT.—In a habeas corpus proceeding to regain custody of three children, Ohio courts felt bound under the full faith and credit clause of the Constitution¹ to recognize a Wisconsin decree, rendered in an *ex parte* divorce action, granting custody of the children to their father.² The United States Supreme Court reversed and *held* that full faith and credit need not be given to a custody decree where the court awarding the decree lacked in personam jurisdiction over the mother. *May v. Anderson*, 345 U. S. 528 (1953).

The purpose of the full faith and credit clause of the Constitution as declared by the United States Supreme Court is that ". . . litigation once pursued to judgment shall be as conclusive of the rights of the parties in every other court as in that where the judgment was rendered so that a cause of action merged in a judg-

²⁰ In the event of a conviction, the official cannot be held personally liable to the corporation for losses caused by his acts if it can be shown that he acted in good faith and with the intention of benefiting the corporation. *Simon v. Socony-Vacuum Oil Co.*, 179 Misc. 202, 38 N. Y. S. 2d 270 (Sup. Ct. 1942), *aff'd mem.*, 267 App. Div. 890, 47 N. Y. S. 2d 589 (1st Dep't 1944).

²¹ See *Matter of Schwarz v. General Aniline & Film Corp.*, 305 N. Y. 395, 404-406, 113 N. E. 2d 533, 537-538 (1953) (concurring opinion).

²² *Id.* at 407-409, 113 N. E. 2d at 538-540 (dissenting opinion).

²³ *Id.* at 407, 113 N. E. 2d at 539.

²⁴ *Id.* at 402, 113 N. E. 2d at 536 (emphasis added).

¹ "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State." U. S. CONST. Art. IV, § 1.

² *Anderson v. May*, 91 Ohio App. 557, 107 N. E. 2d 358, *appeal dismissed*, 157 Ohio St. 436, 105 N. E. 2d 648 (1952).

ment in one state is likewise merged in every other.”³ However commanding this clause may seem, not all judgments of one jurisdiction must be recognized by every other jurisdiction. Thus, where a decree is issued by a court lacking proper jurisdiction, that decree is not entitled to full faith and credit.⁴ Furthermore, the Supreme Court has indicated that full faith and credit need not be given to a decree of a state where the interests of the second state are paramount to those of the decreeing forum.⁵ These principles have been recently applied by the Court in formulating the “divisible divorce” doctrine.⁶ Under this doctrine, one state need not recognize an *ex parte* decree of another state as dissolving all the incidents of marriage, but only as dissolving the *vinculum* of marriage.⁷ The present case has extended this doctrine to include matters of custody.

As the Court based its decision of the present case solely on the lack of in personam jurisdiction over one of the parents, it is necessary to determine just what constitutes jurisdiction in custody actions.⁸ Many authorities maintain that because a change in status⁹ between parent and child is involved, only the state in which the child is domiciled has jurisdiction;¹⁰ others hold that mere residence of the child within the state is sufficient.¹¹ It has also been held that where a court has in personam jurisdiction over both parents, the court may adjudicate the custody of the child as between the parties to the action.¹² Where, however, only one parent is before the court, not of the child’s domicile or residence, jurisdiction will not lie.¹³ On the other hand, nowhere can there be found authority to

³ *Magnolia Petroleum Co. v. Hunt*, 320 U. S. 430 (1943).

⁴ *Williams v. North Carolina*, 325 U. S. 226 (1945); see *Pennoyer v. Neff*, 95 U. S. 714, 729 (1877).

⁵ See Reese and Johnson, *The Scope of Full Faith and Credit to Judgments*, 49 *Col. L. Rev.* 153, 161 (1949).

⁶ *Id.* at 167.

⁷ *Estin v. Estin*, 334 U. S. 541 (1948); *Kreiger v. Kreiger*, 334 U. S. 555 (1948).

⁸ “A distinction must be sharply drawn between jurisdiction, that is, the power of a state to create rights that will be recognized abroad, and its power to act as it pleases within its own territory.” 1 BEALE, *CONFLICT OF LAWS* § 42.2 (1935). Here we are concerned only with the former.

⁹ Status means a legal personal relationship, not temporary in its nature nor terminable at the mere will of the parties, with which third persons and the state are concerned. *RESTATEMENT, CONFLICT OF LAWS* § 119 (1934).

¹⁰ *Boardman v. Boardman*, 135 Conn. 124, 62 A. 2d 521 (1948); *Kruse v. Kruse*, 130 Kan. 946, 96 P. 2d 849 (1939); see 2 BEALE, *CONFLICT OF LAWS* § 144.3 (1935); *RESTATEMENT, CONFLICT OF LAWS* § 117 (1934); Goodrich, *Custody of Children in Divorce Suits*, 7 *CORNELL L. Q.* 1, 2 (1921).

¹¹ *Sheehy v. Sheehy*, 88 N. H. 223, 186 Atl. 1 (1936); see *Finlay v. Finlay*, 240 N. Y. 429, 431, 148 N. E. 624, 625 (1925); see Note, 24 *HARV. L. REV.* 142, 143 (1910).

¹² *Wilson v. Wilson*, 66 Nev. 405, 212 P. 2d 1066 (1949); *Anderson v. Anderson*, 74 W. Va. 124, 81 S. E. 706 (1914); see Note, 53 *HARV. L. REV.* 1024, 1026 (1940).

¹³ *Weber v. Redding*, 200 Ind. 448, 163 N. E. 269 (1928); *Callahan v.*

support the proposition that both parents need be present where the child is a domiciliary of the adjudicating forum.

In the instant case, however, where the proceeding was brought in the child's domicile, the Court decided that both parents must be present to entitle the decree to full faith and credit. The Court, it should be noted, does not hold that the decree is void in Wisconsin as a violation of due process;¹⁴ on the contrary, it infers that it is valid.¹⁵ This presents a disturbing situation wherein the father has legal custody in one state, and the mother may have legal custody in another. This result is similar to the situation following the decision of *Haddock v. Haddock*.¹⁶ In that case the Supreme Court held that the state of the matrimonial domicile was not bound under the full faith and credit clause to recognize a sister state's valid *ex parte* divorce decree if it appeared that the spouse left unjustly. As a result of that decision a person could be divorced in one state and married in another, a child could be legitimate in one state and illegitimate in another—a situation that contributed to its express overruling in a later case.¹⁷

While the possible results of the present case do not have the legal significance of those following the *Haddock* case,¹⁸ the decision overlooks the primary consideration of all custody cases, namely, the welfare of the child.¹⁹ The child is made the subject of relitigation of the same facts and issues, and, more dangerous, he may be clandestinely removed from one state to another.

The Supreme Court, in its eagerness to protect a mother from the loss of her children, has apparently made the adjudication of the parent's right to the child a more important consideration than the welfare of the child. The better approach to the problem would be to give the decree binding effect under the full faith and credit clause, subject always to the parent's right to petition for a change of custody under the "change of circumstances" rule.²⁰ In such a case,

Callahan, 296 Ky. 444, 177 S. W. 2d 565 (1944); *Steele v. Steele*, 152 Miss. 365, 118 So. 721 (1928).

¹⁴ ". . . [N]or shall any State deprive any person of life, liberty, or property, without due process of law. . . ." U. S. CONST. AMEND. XIV, § 1. See Justice Jackson's dissent in the instant case, 345 U. S. at 536, wherein he states that only on the ground that due process was violated can the Wisconsin custody decree be denied full faith and credit. *Id.* at 537.

¹⁵ This inference is supported by the concurring opinion of Justice Frankfurter. See *May v. Anderson*, 345 U. S. 528, 535 (1953) (concurring opinion).

¹⁶ 201 U. S. 562 (1906).

¹⁷ See *Williams v. North Carolina*, 317 U. S. 287 (1942).

¹⁸ As, for example, property rights, inheritance rights, dower, or, more seriously, possible convictions for bigamy.

¹⁹ See, e.g., *Green v. Green*, 137 Fla. 359, 188 So. 355 (1939); *Chadwick v. Chadwick*, 275 Mich. 226, 266 N. W. 331 (1936); *Polzin v. Polzin*, 54 N. W. 2d 143 (Minn. 1952); *Campbell v. Campbell*, 245 P. 2d 847 (Mont. 1952).

²⁰ See, e.g., *Bowers v. Bowers*, 205 Ga. 761, 55 S. E. 2d 152 (1949); *Burke v. Burke*, 267 Ky. 734, 103 S. W. 2d 291 (1927); *Wolz v. Wolz*, 110 Mont.

there would be no relitigation of the same facts and issues and it would be more in keeping with the stated purpose of the full faith and credit clause.²¹ More important, the child's welfare would be of first importance. It is feared that this decision will introduce greater confusion and uncertainty into the already complicated field of custody.



DOMESTIC RELATIONS — COMMON-LAW MARRIAGES — SUFFICIENCY OF EVIDENCE.— In a proceeding before the Workmen's Compensation Board, claimant sought benefits as the widow of decedent-employee, alleging a valid common-law marriage.¹ In reversing the Appellate Division² which had affirmed an award, the court held that a valid common-law marriage was not established since the probative evidence was insufficient to overcome the presumption that the relationship, meretricious at inception, continued as such after the impediment of the claimant's prior subsisting marriage was removed. *Matter of Akeson v. Salvage Process Corp.*, 305 N. Y. 438, 113 N. E. 2d 788 (1953).

The concept of common-law marriage is of ecclesiastical origin.³ Such marriages were recognized in England until Lord Hardwicke's Act of 1753, at which time they were abolished by the establishment of statutory regulation of marriage.⁴ Although this Act did not pertain to the American colonies,⁵ the majority of states have adopted its policy and today refuse to recognize common-law marriages contracted within their borders.⁶ In 1901, New York first prohibited

458, 102 P. 2d 22 (1940); *Wilcox v. Wilcox*, 32 Wash. 2d 633, 203 P. 2d 328 (1949).

²¹ See *Magnolia Petroleum Co. v. Hunt*, 320 U. S. 430, 439 (1943).

¹ The record showed that claimant married Carl Akeson about 1890 and left Akeson in 1918 to cohabit meretriciously with the decedent-employee until his death in 1944. Akeson died on April 17, 1933, thus removing the impediment to the common-law marriage of his wife and the decedent-employee twelve days prior to the effective date of the law of 1933, which abolished such marriages (Laws of N. Y. 1933, c. 606).

² 280 App. Div. 841, 113 N. Y. S. 2d 400 (3d Dep't 1952).

³ See KEEZER, MARRIAGE AND DIVORCE § 28 (3d ed. 1946).

⁴ Law of Marriage, 1753, 26 GEO. II, c. 33, repealed by 4 GEO. IV, c. 76 (1823); see KEEZER, *op. cit. supra* note 3; EVERSLEY, LAW OF DOMESTIC RELATIONS 15 (6th ed. 1951).

⁵ See DILLON, COMMON LAW MARRIAGE 4, 5 (1942).

⁶ See JACOBS AND GOEBEL, CASES AND OTHER MATERIALS ON DOMESTIC RELATIONS 115 (3d ed. 1952). However, the states do recognize common-law marriages if they are valid where contracted. See Note, 133 A. L. R. 765 (1941), and cases collected therein.