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IS "FULL FAITH" DIVORCED FROM DIVORCES?

THE Constitution of the United States requires that each state shall give full faith and credit to the judgments, public acts and records of the other states. The first occurrence of the words "full faith and credit" in our constitutional history, however, is to be found in the fourth of the Articles of the old Confederation. It declares that "full faith and credit shall be given in each of these states to the records, acts and judicial proceedings of the courts and magistrates of every other state." There never was any doubt in the minds of the delegates to the Constitutional Convention that the people whom they represented would cheerfully relinquish the sovereign right of determining as an independent question the effect to be given judgments and records of the other states. Whatever opposition might have arisen respecting the surrender of other powers and the relinquishment of rights, there was unanimity on this question. If there was to be established a more perfect union, it was realized that there must exist in the national government power to demand recognition as to judgments, records and acts of the different states. Mere comity would be too uncertain and indefinite, depending more or less on local factors of interest, prejudices and the like. Perceiving the necessity of giving control over this important subject to a single government, Congress also was authorized to prescribe the manner in which such acts, records and proceedings were to be proved and the effect thereof to be given. The Congress promptly and within one year after the ratification of the Constitution passed a statute concerning the manner of proving judgments of other states and providing that they shall have such faith and credit given to them in every court throughout the United States as they have by law or usage in the courts of the state from which they were taken. In interpreting both the Constitutional provision as well as the statute, Chief Justice Marshall stated:[1] "The judgment of a state court should have the same credit, validity and effect in every court in the United States which that judgment had in the state where it was pronounced and that whatever pleas would be good to a

[1] Hampton v. McConnel, 3 Wheat. 234, 235, 4 L. ed. 378 (U. S. 1818).

suit thereon in such state, and *none others,* could be pleaded in any other court in the United States." Thus it has been held, if a court of another state has jurisdiction, its judgment must be granted full faith and credit, although the judgment was based on a contract directly violating the public policy of the state where the suit thereon was brought. The requirement that only those defenses which would be sufficient in the state where the original action was brought has been frequently overlooked in matrimonial cases. The courts in the second state refuse to give due recognition to the judgment on the ground that the plaintiff had practiced fraud on the court where the action was originally brought. The facts constituting the fraud, however, are generally based on the brief period of residence required and the plaintiff's departure from the state immediately after the marriage is dissolved. While these facts might fully convince the court of the second state, the real question is whether the court in the state where the original action was pending would deem them sufficient to vitiate the decree. Particularly is this true when such judgment was rendered on defendant's default in appearing in the action. Unless this test satisfactorily appears, the court in the second state is failing to give that full faith and credit required by the Constitution and the statute.

In the past there have been relatively few questions arising under this provision of the Constitution. The people realized its necessity and the courts have found little difficulty in deciding cases and controversies arising thereunder. Except for the power of compulsory recognition, the effect of the Constitutional section was not to lessen or add to the sovereign powers of an independent state. Thus it has been held that the authority of every tribunal is necessarily restricted by the territorial limits of the state in which it is established. Any attempt to exercise authority beyond those limits would be deemed in every other forum an illegitimate assumption of power and be resisted as mere abuse.[2] No state can exercise direct jurisdiction and authority over persons or property without its territory. The several states are of equal dignity and authority, and the independence of one implies the exclusion of power from all others. And so it is laid down

[2] Pennoyer v. Neff, 95 U. S. 714 (1877).

by jurists, as an elementary principle, that the laws of one state have no operation outside of its territory, except so far as is allowed by comity; and that no tribunal established by it can extend its process beyond that territory so as to subject either persons or property to its decisions. "Any exertion of authority of this sort beyond this limit, is a mere nullity, and incapable of binding such persons or property in any other tribunals." [3]

In *Pennoyer v. Neff*,[4] the Court held that a judgment *in personam* rendered against a non-resident was not valid where there was no personal service of process, no voluntary general appearance and no prior attachment and levy on property owned by the non-resident defendant and located within the state. Although a state possessed the authority of an independent state over persons and property within its territory, the exercise of authority beyond this limit would be regarded as a nullity and incapable of binding persons or property in other states. The full faith and credit clause did not in any way enlarge this power. The judgment, therefore, based on such procedure was not entitled to recognition by other states.

The full faith and credit clause and foreign divorce decrees may be considered under three general headings. First, there was the case of *Atherton v. Atherton*[5] where the divorce decree was obtained in the state of the parties' last matrimonial domicile. The wife, defendant, had left the state of Kentucky and returned to her parents' home in New York. The stay-at-home husband instituted the action pursuant to the laws of the state of the matrimonial domicile. Constructive service of process was made upon the absent spouse and in due time a divorce was rendered in plaintiff's favor. In a subsequent cause brought by the wife in New York, the husband appeared and as a defense interposed the divorce he had recovered in Kentucky. The United States Supreme Court held that New York must give full faith and credit to this decree, the action being treated in the nature of a *quasi in*

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[3] STORY, CONFL. LAWS § 539.

[4] See note 2 *supra*.

[5] Atherton v. Atherton, 181 U. S. 155, 21 Sup. Ct. 544, 45 L. ed. 794 (1901).

rem proceeding—the matrimonial domicile being considered the *res* in such action. The idea that the marriage relation created a *res* within the state was a fiction. It was created and existed only long enough for the court to dissolve it, but it, nevertheless, had the effect of giving the court jurisdiction and not violating the principle of public law that one state was attempting to project its laws and affect persons domiciled elsewhere.

The next phase is shown by the case of *Haddock v. Haddock.*[6] In this case, the last matrimonial domicile was the state of New York. There the husband left his wife and established his domicile in the state of Connecticut. He subsequently instituted an action for absolute divorce in that state. His wife had never left the state of their last matrimonial domicile, New York. In the Connecticut action, she was served by publication but never appeared therein and a decree of divorce was entered in the husband's favor. Later on, the wife instituted an action for separation against the husband and he relied on the Connecticut decree as a defense. The United States Supreme Court held that the judgment was not entitled to full faith and credit, the theory being that since the matrimonial domicile of the parties was never in the state of Connecticut, that state acquired jurisdiction only of the person of the plaintiff. While Connecticut did have the right to determine the status of the husband, it had no authority to project its decrees into the state of New York so as in any way to change the status of the stay-at-home wife.

In the recent case of *Williams v. North Carolina,*[7] the United States Supreme Court has overruled its former decision in the *Haddock* case so that the third phase seems at present to be that the state dissolving the marriage, assuming the personal domicile of the plaintiff has honestly been established in said state, dissolves it as to both husband and the absent wife. The Court argues that there can be no such thing as a husband without a wife, or a wife without a husband and the necessary effect of the judgment is to dissolve the relationship as to both. It is argued that there is nothing

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

[7] Williams v. State of North Carolina, 63 Sup. Ct. 207 (1942).

in the Constitution requiring as a condition precedent to the full recognition of the decree that the court must take notice as to which party is in the wrong. In other words, a spouse leaving his state of matrimonial domicile with his kit-bag full of troubles, not big enough to warrant a dissolution there, may travel to some distant state where the law does not require such a large bundle. If he in good faith establishes his personal domicile in that state, he may then begin an action for divorce and on constructive service of process obtain a decree which becomes guaranteed by the Constitution as to its validity and effect throughout the other forty-seven states.

The facts in the *Williams v. North Carolina* case warranted the following findings. The defendant, O. P. Williams, married Carrie Wyke in 1916 in North Carolina and lived with her in that state until May 1940. The defendant, Lilly Hendrix, married Thomas Hendrix in 1920 in North Carolina and lived with him in that state until May 1940. At this time, the defendants left their homes, their respective spouses and their state and appeared in the state of Nevada on May 15, 1940. On June 26, barely forty-two days after establishing their residence at the Alamo Auto Court on the Las Vegas-Los Angeles Road, both defendants filed bills of complaint for divorce through the same lawyer and alleging almost identical grounds. No personal service of summons was made on the home-staying-spouses in either case and the service was by publication and substitute service. Both obtained decrees of divorce. Nevada's policy for dissolving the bonds of matrimony may be gleaned from defendant Hendrix's case. Her grounds were: "extreme mental cruelty" and she established them by testifying that her husband was "moody"; did not talk or speak to her often; when she spoke to him, he answered most of the time by a nod or shake of the head. There was nothing cheerful about him at all. The latter of the two divorces was granted on October 4, 1940 and on that day in Nevada, a marriage was solemnized between the defendants and they shortly thereafter re-appeared in the state of North Carolina, setting up housekeeping as husband and wife. They were subsequently tried and convicted in a criminal prosecution of the crime of bigamous

co-habitation. The defendants pleaded the decrees of the Nevada court and the failure to accord the same full faith and credit resulted in a reversal of their conviction in the United States Supreme Court.

In all of the cases coming before the United States Supreme Court on the question of the recognition to be given to foreign divorce decrees, the Court has never considered the question of its own jurisdiction. Whether or not there is a case or controversy presented and arising under the Constitution of the United States and the laws made pursuant thereto, apparently has never been raised nor has the Court *in limine* considered this objection. In these actions, it is true there are adverse parties, there are pleadings, infrequently facts in issue and terminating by a final decree or judgment. In raising this query, there is an appreciation that the judgments provided for under Article IV, Subd. 1, were never limited to the proceedings in law or equity that prevailed only in 1789; that forms of action might change is recognized as was the case of declaratory judgments. Whenever the judicial power of the federal court is invoked to review a judgment of a state court, the ultimate Constitutional purpose is the protection of rights arising under the Constitution and laws of the United States.[8] This can and must be done by the exercise of the judicial function. Hence, changes merely in form of procedure by which *federal rights* are brought to final adjudication in the state courts are not enough to preclude review of the adjudication by the Supreme Court. The converse is true, to wit: If the protection of rights under the Constitution and laws of the United States does not appear, jurisdiction is not acquired although the case retains the essentials of adversary proceeding involving a real controversy, that is finally determined by the judgment of the state court.

It is submitted that neither under the Articles of Confederation nor the Constitution did the people of the United States intend to vest in the national government supervisory powers over the dissolution of the marital relation and to find that it was the price the people paid for surrendering to

[8] Nashville, Chattanooga & St. Louis Ry. v. Wallace, 288 U. S. 249, 53 Sup. Ct. 345, 77 L. ed. 730 (1933).

the federal government compulsory recognition of judgments, public acts and records cannot be sustained.[9] When the Constitution was adopted and ratified, courts possessed no jurisdiction over the subject matter of divorce. Cooley, in his *Treatise on Constitutional Limitations,* says:

The granting of divorces from the bonds of matrimony was not confided to the courts in England, and, from the earliest days, the colonial and state legislatures in this country have assumed to possess the same power over the subject which was possessed by the parliament, and from time to time they have passed special laws declaring a dissolution of the bonds of matrimony in special cases.

Kent, in his *Commentaries,* says:

During the period of our colonial government, for more than a hundred years preceding the revolution, no divorce took place in the colony of New York, and for many years after New York became an independent state there was not any lawful mode of dissolving a marriage in the life-time of the parties but by a special act of the legislature.[10]

When, therefore, the people surrendered their rights as to the effect to be given a judgment of one of the states, it could not be construed to include the dissolution of the marital relation. Courts lacked jurisdiction over the subject matter and there could exist no justiciable issue. Judgments covered controversies in law or equity which were known to the framers at that time. On the other hand, this was a constitution and not a code of laws that the people were ratifying and it must have been understood that changes in form as well as subject matter might be expected. The people did not anticipate that the judicial branch would be crystalized into the forms of procedure or even subject matter that existed in 1789. Growth was expected here as well as in the other two departments of government. So when states provided new

[9] Since the adoption of the Fourteenth Amendment, parties to a divorce action do not have to rely on the full faith and credit clause in those cases where the court rendering the decree has jurisdiction of the parties or jurisdiction of the matrimonial domicile. This amendment nullifies and makes void state action of every kind which impairs the privileges and immunities of the parties and deprives the parties of liberty and property without due process of law. If a court of another state refused to recognize such decree, the injured party would be entitled to protection by the federal government.

[10] Maynard v. Hill, 125 U. S. 190 (1888).

types of actions or different procedure, full faith and credit would be required as to the new judgments. This construction, however, does not justify the assumption of power over divorces. Divorces existed at the time the clause was adopted and if federal control were intended, provision must be found at that time. If no control existed in 1789, then justification for the exercise thereof can only be predicated by reason of subsequent amendment conferring such authority.

This may be illustrated by the "privileges and immunities" clause which like the "full faith and credit" clause appeared in the Articles of Confederation and was incorporated in the Constitution under Article IV, Section 2, as follows:

> The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states.

The constitutional provision did not create those rights which it called privileges and immunities nor did it profess to control the power of the state governments over the rights of its own citizens. Its sole purpose was to declare to the several states that whatever rights as you grant or establish them to your own citizens or as you limit or qualify, or impose restrictions on their exercise, the same, neither more nor less, shall be the measure of the rights of citizens of other states within your jurisdiction. There could be no claim or pretense that those rights depended on the federal government for their existence or protection.[11] So, if at the time of the adoption of the Constitution there were no such thing as a judgment of divorce, it would be the vainest show of learning to attempt to prove by citation of authority, that in the absence of amendment, rights might subsequently arise and depending on the federal government for their existence or protection.

If justification for compulsory recognition of divorces is not found under the "judgment" provision may it, nevertheless, exist under the "public act"? In this connection one must note an important change that was made between the clause in the Articles of Confederation and the Constitution. The former provided that full faith and credit shall be given

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[11] Slaughter-House Cases, 16 Wall. 36, 21 L. ed. 394 (U. S. 1872).

to the "acts" of the states. Under the Constitution the indefinite term was made more concise and specific and limited to "public acts". Divorces were never granted by public acts but required special acts. Therefore, when the Constitution was adopted the people expressly reserved to themselves the recognition of acts of other states, enacted by special laws and this included absolute divorces.

The marital status, therefore, since it was not surrendered to the national government, vested in the states. The states were supreme in determining the conditions under which marriages might be contracted and under what circumstance they might be dissolved. Any attempt by one of the states to change the status of a citizen of another state, would constitute a gratuitous assumption of power which did not exist. If the people of the respective states subsequently vested the right to dissolve the relationship in the judicial branch of the state government, their acts could not vest a right in the national government which heretofore did not exist. If this were the case, then the supremacy of the people as to this subject would terminate and be acquired by the national government. But, rights are not acquired under the Constitution in such ways and a sovereign does not become divested by a change in the manner of enforcing the same. This principle has been demonstrated frequently in respect to the exercise of federal powers. It would seem that a judgment of one state purporting to change the marital status of a person domiciled elsewhere does not present a "right" arising under the Constitution of the United States and the laws made pursuant thereto. Recognition is entirely a matter of comity and not Constitutional compulsion.

The framers of the Constitution must have realized that by permitting the states the right to exercise sovereign power over the marital relation conflicts would frequently result among the states. The people living in one state might favor strict grounds for divorce whereas other states might favor liberal laws. With the vast territory to be developed into new states, they were definitely aware that the differences would increase.

To appreciate this situation in these modern days one need only note the differences existing between the two states

involved in the *Williams* case, to wit: North Carolina and Nevada. Comparing those outstanding events which are proudly emblazoned on the banner of the people of the one state with the events justly boasted of by the people of the other leaves no doubt in the mind of the uninformed person where the "easy" divorce might be obtained. These are some of the outstanding facts about North Carolina:[12] It is one of the thirteen original states; it is primarily an agricultural state; in the St. James Episcopal church is a 450-year-old painting of Christ taken from a pirate ship in the old town of Brunswick across South River; it was next to the last of the thirteen original colonies (1789) to enter the Union, demanding a clause guaranteeing religious freedom before ratifying the Constitution; the Roanoke Island Settlement became the "Lost Colony" of the Roanoke; Virginia Dare was born there (August 18, 1587), the first white child of English parentage born in the New World; the first Christian baptismal sacrament known to have been administered in America took place on Roanoke Island with the baptism of the friendly Indian chief Manteo.

Nevada is the least populous of all the states. Until the discovery of the famous Comstock Lode (1859) the inhabitants of Nevada numbered only about 1,000, chiefly Mormons and California gold seekers who had tarried on the way. After the discovery, there was a stampede of fortune hunters from all over the country. The population of Virginia City spurted from a few hundred to 30,000. Bonanzas were struck and developed, men became wealthy beyond dreams over night. By reason of the short period of residence required for divorce suits, Nevada has become a popular resort and the city of Reno has become the center of that activity. Games of chance have been legalized.

The framers of the Constitution neither expected nor hoped for uniformity. They realized the type of people with whom they were dealing, a type of people so fittingly characterized by the Honorable Winston Churchill in his radio address of March 21, 1943:

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[12] The facts as to North Carolina and Nevada are taken from "The World Almanac", pages 361 and 358, 1942.

We must beware of trying to build a society in which nobody counts for anything except the politician or official; a society where enterprise gains no headway and thrift no privileges. I say "try to build" because of all the races in the world, our people would be the last to consent to be governed by bureaucracy. Freedom is their life-blood.[13]

Predictions of dire results to follow the *Williams* case will not be wanting. They were also made after the decision in *Haddock v. Haddock* and in both cases they were in the first instance voiced by the dissenting members of the Court. However disappointing it may seem, the average citizen will fail to grasp the "intensely practical considerations" involved in these matrimonial mix-ups. So long as the golden wedding anniversary is "featured" as an incident of the obituary notice, our society is safe and cannot be expected to manifest much concern over the transient matrimonial members thereof and their offspring, if they have any. The jurisdictional question is important if it results in the denial of one of the few remaining state sovereign rights.

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[13] New York Herald Tribune, March 22, 1943.