St. John's Law Review

Volume 17
Number 2 *Volume 17, April 1943, Number 2*

Article 8

Constitutional Law--Extraterritorial Validity of Divorces--Full Faith and Credit Doctrine (Williams and Hendrix v. North Carolina, 63 Sup. Ct. 207 (1942))

St. John's Law Review

Attorney, 63 Sup. Ct. 493 (1943).

It is a well established principle of constitutional law that, in conformity with the separation of the powers of the Government under the Constitution, the judicial branch will not usurp the powers of the legislature by expressing an opinion as to what the law either is, or ought to be, unless, in addition to the court acquiring original or appellate jurisdiction in the manner provided for by the Constitution, the expression of such opinion is actually necessary to the adjudication of the *bona fide* litigation of a personal or property right, protected by the Constitution, and which right is possessed by one of the parties to the proceeding.[7] Statutes prohibiting the use of contraceptives have been held [8] to be constitutionally within the police power of state sovereignty to prevent immorality,[9] and have been held not to violate the due process clause of the Fourteenth Amendment prohibiting the deprivation of personal or property rights. And neither do they constitute class legislation, nor do they violate the right to enjoyment, pursuit of happiness, or freedom of conscience guaranteed by the Constitution.[10] It has been further intimated that where the advice of physicians was included in the prohibition of the statute such statutes would be constitutional.[11] Federal statutes prohibit transmission and receipt of contraceptives through the mail, in either export, import, or interstate commerce.[12] This prohibition also applies to transmission by or through public carriers.[13]

H. P. W.

CONSTITUTIONAL LAW—EXTRATERRITORIAL VALIDITY OF DIVORCES—FULL FAITH AND CREDIT DOCTRINE.—Petitioners Williams and Hendrix, domiciled in the state of North Carolina with their spouses for more than twenty-four years and twenty years respectively, went to Nevada, and having satisfied the six-weeks' statutory residence requirement period were granted decrees of divorce based

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U. S. 354, 360, 27 Sup. Ct. 509, 511, 51 L. ed. 836, 840 (1907); Cronin v. Adams, 192 U. S. 108, 114, 24 Sup. Ct. 219, 220, 48 L. ed. 365, 368 (1904); Davis & Farnum Mfg. Co. v. Los Angeles, 189 U. S. 207, 220, 23 Sup. Ct. 498, 501, 47 L. ed. 778, 782 (1903).

[7] Ashwander v. Tennessee Valley Authority, 297 U. S. 288, 56 Sup. Ct. 466, 80 L. ed. 688 (1936). "The court will not pass upon the validity of a statute upon the complaint of one who fails to show that he is injured by its operation. Among the many applications of this rule, none is more striking than the denial of the right to challenge, to one who lacks a personal or property right."

[8] (1941) 50 YALE L. J. 682.

[9] People v. Sanger, 222 N. Y. 192, 194, 118 N. E. 637 (1918); People v. Byrne, 99 Misc. 1, 163 N. Y. Supp. 682 (1917).

[10] People v. Byrne, cited *supra* note 9.

[11] (1939) 6 U. OF CHI. L. REV. 261.

[12] 18 U. S. C. § 334, c. 8 (1942).

[13] 18 U. S. C. § 396, c. 9 (1942).

on constructive service. Petitioners married each other in Nevada and returned to North Carolina where they were indicted and convicted of bigamous cohabitation. *Held,* reversed. The full faith and credit clause of the Constitution makes it mandatory upon a state to recognize a valid divorce decree granted in another state to a person domiciled therein even though defendant was not personally served. *Haddock v. Haddock* [1] is overruled. *Williams and Hendrix v. North Carolina,* 63 Sup. Ct. 207 (1942), *rev'g,* 220 N. C. 445, 17 S. E. (2d) 769 (1941).

The Supreme Court's decision in the instant case condoning "quickie" divorces has been the subject of much controversy and criticism,[2] notwithstanding that the law propounded is not so revolutionary as the dicta.[3] The law declared in the present case is limited to this: when plaintiff only is domiciled in state granting decree, and constructive service effected on defendant, then full faith and credit is to be accorded. This conclusion operates as a necessary result if the form and substance of the service meets the requirements of due process under the Fourteenth Amendment.[4] But although the evidence clearly negatives the conclusion that the petitioners were domiciled in the granting state,[5] that proposition was resolved by the Court with alarming alacrity,[6] and contrary to salutary precepts of constitutional interpretation.[7] Insofar as the prosecution proceeded on two theories [8] and the jury rendered a general verdict thereon, the Court

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[1] 201 U. S. 562, 26 Sup. Ct. 525, 50 L. ed. 867 (1906). This was a civil action instituted in the state of New York, by an abandoned wife, for separation and alimony. Husband's defense was a divorce decree obtained by him in the state of Connecticut. The validity of the husband's new domicile was not denied, but the court asserted that the state of Connecticut could acquire no jurisdicion over other spouse by constructive service, in view of libellant's wrongful departure from state of matrimonial domicile.

[2] *See* Burns, writing on *Two Nevada Divorce Decrees Get Full Faith and Credit* (Mar. 1943) A. B. A. J. 125; *Editorial Comment from Lay Press* (Feb. 1943) A. B. A. J. 78; N. Y. Times, Jan. 13, 1943, p. 19, col. 8; N. Y. Sun, Dec. 21, 1943, p. 1, col. 6.

[3] *See* our principal case p. 215, col. 1, "Nor do we reach here the question as to the power of North Carolina to refuse full faith and credit to Nevada divorce decrees, because contrary to the findings of the Nevada court, North Carolina finds that no *bona fide* domicile was acquired in Nevada."

[4] *See* Milliken v. Meyer, 311 U. S. 457, 463, 85 L. ed. 278, 283, 61 Sup. Ct. 339 (1940).

[5] *See* Jackson, J., dissenting in our principal case, p. 219.

[6] *See* Burns, cited *supra* note 2, p. 78, "Collusiveness of proceedings so obvious that one suspects that Supreme Court was prepared in any event to give its assent to notorious practise of obtaining quickie divorces."

[7] *See* Justice Brandeis in *Ashwander v. Tennessee Valley Authority,* 297 U. S. 288, 58 Sup. Ct. 466, 80 L. ed. 688 (1936) Rule No. 4: "The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of." *But see* Burns, cited *supra* note 2, p. 78, suggests remanding case to state court for special findings of facts.

[8] *See* our principal case, p. 210.

was compelled to invoke the doctrine of *Stromberg v. California,*[9] that if one of the grounds for conviction is invalid under the Federal Constitution, the judgment cannot be sustained. The majority insist that we treat the case before us precisely as if the petitioners had resided in Nevada for a term of years and had acquired permanent abode there, and presuming *bona fide* residence of petitioners, the Court was then confronted with substantially the same issue as existed in *Haddock v. Haddock.*[10]

To ascertain whether or not a state has jurisdiction Justice Douglas urges us to dismiss the notion that an action for divorce is either an *in personam* proceeding or an action *in rem.* Rather, we are to consider the problem in the light of domicile[11] which creates a subsisting relationship between a state and its citizens. Since it is sufficient for the exercise of many state powers,[12] it should be equally true with regard to marriage and divorce. The exercise of the power is not contingent on the causes of marital rift but dependent solely upon the relationship of a state to its *bona fide* residents. If the laxity of the laws of one state conflict with the severe limitations of a sister state, wherein the valid decree of the former is subject to enforceability in the latter, thus resulting in an appreciable diminution of state sovereignty, such is a "part of the price of our federal system."[13]

Whatever may be said as to the merits of this case, New York's disposition of the matter has been confined to a most strict construc-

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[9] 283 U. S. 359, 368, 51 Sup. Ct. 532, 535, 75 L. ed. 1117 (1930).

[10] Cited *supra* note 1. Case provoked considerable criticism. *See* Beale, *Constitutional Protection of Decrees for Divorce* (1906) 19 HARV. L. REV. 586, 591, wherein this observation is made: ". . . *res*—status of parties—not corporeal, and if doctrine of jurisdiction *in rem* is to be confined to tangible things there can be no jurisdiction *in rem* over a personal status."; McClintock, *Fault as an Element of Divorce Jurisdiction* (1928) 37 YALE L. J. 564; Strathorn, *Rationale of the Haddock Case* (1938) 32 ILL. L. REV. 796, 809. *But see* Beale, *Haddock Revisited* (1926) 39 HARV. L. REV. 417, wherein author reverses previous position and accepts decision as a necessary compromise.

[11] Texas v. Florida, 306 U. S. 398, 59 Sup. Ct. 563, 83 L. ed. 817 (1938), "Residence in fact coupled with the purpose to make the place of residence one's home, are essential elements of domicile; a person may have several residences but only one domicile." *Accord,* DICEY, CONFLICTS OF LAWS (1896 ed.) 95; *see* Matter of Newcomb, 192 N. Y. 238 (1908); 1 RESTATEMENT CONFLICTS OF LAW (1934) § 22, p. 43; 1 BEALE, CONFLICTS OF LAW (1935) § 10.8, p. 116, "It is often required in status regulating divorce proceedings that in order to obtain a divorce a libellant must reside in the state. It will be seen later that domicile in the state is required by law in order to give a court jurisdiction for divorce. Since the court lacks jurisdiction unless there is a domicil within the state, the proper interpretation of the statute is that the residence required by it is domicil."

[12] *Cf.* Skiriotes v. Florida, 313 U. S. 69, 61 Sup. Ct. 924, 85 L. ed. 1193 (1941); Milliken v. Meyer, cited *supra* note 4; Lawrence v. State Tax Commission, 286 U. S. 276, 52 Sup. Ct. 556, 76 L. ed. 1102 (1932).

[13] *See* majority opinion in our principal case, p. 214, col. 2.

tion thereof.[14] In the *Matter of Brogan*[15] it was held that a defendant in a Nevada divorce action was precluded from impeaching the validity of the decree in order to assert a claim under New York's Decedent Estate Law § 18 because of his subsequent remarriage. The Court, however, reaffirmed that all the *Williams* case did was to remove from the question of "full faith and credit" the subsidiary question of fault. *McCarty v. McCarty*,[16] following this, avers that plaintiff can challenge validity of defendant's decree despite the fact that the court found that he abandoned her without reasonable cause. The judgment of a sister state must be given full faith and credit but the findings are not conclusive when domicile was fraudulent and ineffectual to confer jurisdiction.

H. C. W.

CONTRACT FOR SALE OF GOODS—CONTRACT FRUSTRATED BY WAR —TOTAL FAILURE OF CONSIDERATION—RECOVERY OF MONEY PREVIOUSLY PAID.—Appellant company was incorporated in Poland and had its head and seat at Wilno. The defendant was registered and carried on business in the United Kingdom. By a c.i.f. contract in writing dated July 12, 1939, defendant agreed to sell and plaintiff to purchase certain machinery for £4,800, of which £1,000 was in fact paid. Delivery was to be three or four months from settlement of final details at Gdynia in Poland, and the place of erection of the machinery, though unmentioned in the contract, was agreed to be in Wilno. The contract contained a clause to the effect that, "in the event of war, a reasonable extension of time shall be granted". On September 1, 1939, war broke out between Poland and Germany and on September 3, 1939, Great Britain declared war on Germany. About September 23, 1939, Gdynia was occupied by the enemy. Respondents did not deliver the machinery and appellants claim the return of the £1,000 paid on account. Tucker, J., dismissed the action, and the Court of Appeal affirmed his decision. In view of the fact that all Poland was then occupied by the enemy, appellants obtained from the Board of Trade a license to proceed with the appeal. *Held,* that the clause, providing for a "reasonable extension of time" in event of war, could not prevent frustration of the contract by the

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[14] *Cf.* Matter of Brogan, 265 App. Div. 463 (2d Dep't), *aff'g,* 178 Misc. 801 (1943); Oberlander v. Oberlander, 179 Misc. 459 (1943); Reese v. Reese, Queens Co. Sup. Ct., N. Y. L. J., March 13, 1943, p. 999; McCarty v. McCarty, Kings Co. Sup. Ct., N. Y. L. J., Feb. 28, 1943, p. 478; Baker v. Baker, N. Y. Co. Sup. Ct., N. Y. L. J., Feb. 24, 1943, p. 740; Jiranek v. Jiranek, Westchester Co. Sup. Ct., N. Y. L. J., Jan. 28, 1943, p. 385

[15] Cited *supra* note 14, 265 App. Div. 463 (2d Dep't), *aff'g,* 178 Misc. 801 (1943).

[16] Cited *supra* note 14, N. Y. L. J., Feb. 28, 1943, p. 478.