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## Recognition of Foreign Divorces in New York

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ruling the court below had disregarded essential differences between a voting trust and a proxy.<sup>24</sup> Therefore if the theory that a trust is nothing more than a collective proxy and revocable as such is good, then "the many statutes limiting the effective duration of a proxy would also operate to render totally ineffective a voting trust." To this doctrine the higher court refused to adhere.

Ultimately the case will appear before the Court of Appeals and whether that court will agree with the learned opinion of the *Nisi Prius* court in holding that a bank voting trust is essentially against public interest and that therefore the statute should be interpreted as positively prohibiting such agreements or whether the Appellate Division was correct in ruling that the creation of a voting trust agreement among stockholders of a bank does not contravene public policy and therefore should be permitted except as absolutely prohibited by statute, is the precise question.

The only case holding on the subject is the case of *Bridgers v. First National Bank*,<sup>25</sup> but this case may be regarded as dubious authority inasmuch as it was decided in a state which holds such agreements void per se.

The basis for the decision of the Court of Appeals will rest upon public policy and it seems that such agreements in banks must be regarded as abhorrent to public interest and therefore void per se. Voting trust agreements in banks are to be placed in the first subdivision mentioned, and the amendment to the statute takes such agreements outside the limitations.

M. H.

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RECOGNITION OF FOREIGN DIVORCES IN NEW YORK—In a late case,<sup>1</sup> the facts were: the plaintiff and defendant were residents of, and married, in Canada. Defendant subsequently abandoned his wife in Canada and came to live in Pennsylvania, where after falsely testifying that he did not know the whereabouts of his wife and securing service of summons by publication, he obtained a decree of divorce. Subsequent to this action, the plaintiff moved to New York and established her domicile there. The defendant remarried and came to New York to live. Plaintiff thereupon sued for divorce. Defendant set up Pennsylvania decree as bar to action. Held—defense was untenable and Pennsylvania decree was not a bar to the action.

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ing point as to the constitutionality of a provision which would effect vested and inchoate rights, created by contract according to a provision in the agreement "any stockholder may become a party to this agreement."

<sup>24</sup> Cushing, *Voting Trusts* (1915) 124; 3 *Fletcher, Corporations* (1917) 2873.

<sup>25</sup> 152 N. C. 293, 67 S. E. 770 (1910). In this case a national bank was involved. The facts are on all fours with the principal case and the proxy statute in question was Rev. St. sec. 5144 (U. S. Comp. St. 1901 p. 3464).

<sup>1</sup> *Dean v. Dean*, 241 N. Y. 240 (1926).

It is well settled that a decree of divorce rendered in a foreign state will be recognized in N. Y., where the court rendering the decree had jurisdiction of the subject matter and the parties, even though the divorce was granted for a cause which is not recognized in N. Y.<sup>2</sup>

In inquiring whether or not a foreign decree will be recognized in N. Y. the question as to the domicile of the defendant at the time of the commencement of the action is a vital factor. If the defendant in the foreign action, was domiciled in N. Y. at the time that the decree was rendered, and was not personally served with process; and did not appear to defend said action, then the divorce, although it will have full force and effect in the state wherein it was decreed, will not be recognized in N. Y.<sup>3</sup> In cases of this nature, that is, where the service of process is by publication, and there is no voluntary appearance on the part of the defendant either personal, or by his lawyer, if the defendant seeks to avoid said divorce on the ground of want of jurisdiction, he must prove that he was domiciled in N. Y. at the time that the divorce was decreed.<sup>4</sup> Thus where the plaintiff and defendant had been separated by judicial decree in N. Y., and defendant after being domiciled in N. J. for 9 years obtained a divorce against him in N. J., notice of same being served by publication, there being no voluntary appearance on the part of the defendant it was held in an action brought by him in N. Y. that the Jersey divorce was a bar to his action; because he failed to prove that he was a resident of N. Y. at the time that the decree was obtained.<sup>5</sup>

Where neither party to the foreign action is domiciled in N. Y. at the time of the rendition of the decree, and the notice of the action is served by publication, N. Y. will recognize the foreign divorce if the state wherein the defendant is domiciled recognizes it, but if the latter state does not recognize the decree N. Y. will not.<sup>6</sup> Thus where the

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<sup>2</sup> *Stewart v. Stewart*, 190 N. Y. Supp. 369 (1922) (141 N. Y. Supp. 484) 2d. Dept.; *Rupp v. Rupp*, 156 N. Y. App. Div. 389 (1913); *Straus v. Straus*, 122 N. Y. App. Div. 729 (1907) 1st Dept.; *Richards v. Richards*, 87 Misc. 134 (1914) Sup. Ct.

<sup>3</sup> *Hunt v. Hunt*, 72 N. Y. 217 (1878); *People v. Baker*, 76 N. Y. 78 (1879); *Ackerman v. Ackerman*, 200 N. Y. 72, 93 N. E. 192 (1911); *Olmstead v. Olmstead*, 190 N. Y. 458, 83 N. E. 569 (1908). But see *Hubbard v. Hubbard*, 228 N. Y. 81, 126 N. E. 508 (1920), where a divorce granted against a resident of N. Y. was recognized on the grounds that it was not contrary to the public policy of N. Y. The court there held that the judges of the court are the ones who decide what the public policy of the state requires; and their decision is final and conclusive.

<sup>4</sup> *Percival v. Percival*, 106 N. Y. App. Div. 111, aff'd 186 N. Y. 587, 79 N. E. 1114 (1905); *Kaufman v. Kaufman*, 160 N. Y. Supp. 19 (Sup. Ct. 1916).

<sup>5</sup> *Percival v. Percival*, supra, note 4.

<sup>6</sup> *Ball v. Cross*, 231 N. Y. 329, 132 N. E. 106 (1921).

parties lived in Texas, and the husband abandoned his wife going to Nevada where with neither personal service upon her, nor her voluntary appearance, to defend the action, he obtained a divorce against her, it was held that since Texas, which the court found was the wife's domicile, did not recognize the divorce, N. Y., would not; but the court intimated that had the wife's domicile been Missouri where she lived for a time, the result might have been different because Missouri might recognize the divorce.<sup>7</sup>

When the question of jurisdiction is discussed, the question as to whether or not a wife may acquire a domicile separate from that of her husband is also of vital importance. The general rule is that the wife's domicile is prima facie that of the husband's.<sup>8</sup> However, where the parties have been separated by judicial decree, the wife may acquire a domicile of her own.<sup>9</sup> She may also acquire a domicile of her own when she has sufficient cause for leaving her husband; namely the cruelty of her husband; his excluding her from the home; or his adultery.<sup>10</sup> Her right to acquire a separate domicile, is also recognized when she and her husband agree to separate.<sup>11</sup> It seems that from the above-mentioned rules that if the wife for no cause whatever, leaves the husband's domicile coming to N. Y., and the husband obtains a divorce against her in the state of his domicile without personal service upon her; but by publication of same, the divorce will be valid and effectual in N. Y. in the absence of any fraud or misconduct on the part of the husband; the reason therefor being that the husband's domicile is in law the wife's domicile.<sup>12</sup> But on the other hand, if the wife is justified in leaving or is abandoned by the husband, and acquires a separate domicile in N. Y., a foreign divorce if granted against her where the service of process has been constructive, will not be recognized in N. Y.<sup>13</sup> Thus where the husband, after abandoning his wife in N. Y., and domiciling in Florida, procured a divorce against her on the grounds of desertion, his wife not being personally served with process; nor voluntarily appearing in the action, it was held that the

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<sup>7</sup> *Ball v. Cross*, supra, note 6.

<sup>8</sup> *Wacker v. Wacker*, 154 N. Y. App. Div. 495, 1st Dept. (1913); *White v. Glover*, 116 N. Y. Supp. 1059 Sup. Ct. (1909); *Hunt v. Hunt*, supra, note 3.

<sup>9</sup> *Hunt v. Hunt*, supra, note 3; *Percival v. Percival*, supra, note 4.

<sup>10</sup> *Brownrigg v. Brownrigg*, 80 Misc. 108, 140 N. Y. Supp. 778 (Sup. Ct. 1913); *Hunt v. Hunt*, supra, note 3; *Atherton v. Atherton*, 155 N. Y. 129, 49 N. E. 933; *Wacker v. Wacker*, supra, note 8; *Elwell v. Elwell*, 128 N. Y. Supp. 495, 70 Misc. 61 (Sup. Ct. 1911).

<sup>11</sup> *Lyon v. Lyon*, 30 Hun. (N. Y.) 455 (1880); *Matter of Florence* 54 Hun. (N. Y.) 328.

<sup>12</sup> *Hunt v. Hunt*, supra, note 3; *Atherton v. Atherton*, 181 U. S. 155 (1898).

<sup>13</sup> *Ackerman v. Ackerman*, supra, note 3; *Olmstead v. Olmstead*, supra, note 3.

divorce had no effect in N. Y. and was not a bar to an action brought by the wife for an absolute divorce.<sup>14</sup>

When the state wherein the plaintiff brings the action is that of the matrimonial domicile of the parties (the last state of matrimonial residence); and there has been constructive service of process without the voluntary appearance on the part of the defendant, to defend the action, then, although the defendant is a bona fide resident of N. Y., the divorce if granted will be given full force and effect in N. Y., and this is true not only in N. Y., but in every other state.<sup>15</sup> In the Atherton Case,<sup>16</sup> when it was tried in N. Y., the Court of Appeals held that since the defendant had acquired a domicile in N. Y., the divorce was ineffectual and void for want of jurisdiction, but when the case was tried in the Supreme Court of the U. S., the latter court reversed the Court of Appeals. The effect of this decision seems to be that the validity of a divorce obtained without personal service of process, depends upon whether or not the divorce was procured in the state of matrimonial domicile.<sup>17</sup>

A judgment of divorce of another state may also be questioned collaterally for fraud, but to authorize a disregard of the judgment, there must be fraudulent allegations and representations, designed and intended to mislead and resulting in damaging deception.<sup>18</sup> Thus where the plaintiff in the foreign action, in order to obtain constructive service of process, falsely swore that he did not know the whereabouts of the defendant; and did receive permission so to serve the defendant; the divorce had no effect in N. Y., inasmuch as the court had no jurisdiction of the defendant due to the fraud of the plaintiff.<sup>19</sup> There are instances in which the parties in order to avoid the law of their own state go into another state for the purpose of obtaining a divorce, and obtain the divorce without establishing a domicile. In such cases, neither party may come into a N. Y. court to set aside the decree on the ground

<sup>14</sup> *Ackerman v. Ackerman*, supra, note 3.

<sup>15</sup> *Atherton v. Atherton*, 181 U. S. 155 (1898); *Haddock v. Haddock*, 201 U. S. 562 (1905); *Harry v. Dodge*, 123 N. Y. Supp. 37, 66 Misc. 302 Sup. Ct. (1910); *Callahan v. Callahan*, 65 Misc. 172 Sup. Ct. (1909), aff'd 137 N. Y. App. Div. 882, 2d Dept.

<sup>16</sup> The facts were that plff. due to the def.'s cruelty, abandoned him, came to live in N. Y. Def. who still remained in Kentucky, the state of matrimonial domicile, procured a divorce against her without personal service upon her, or her appearance to defend the action. The plff. brought this action in N. Y. for a limited divorce and the defense set up was the Kentucky decree.

<sup>17</sup> *Thompson v. Thompson*, 226 U. S. 551.

<sup>18</sup> *Hunt v. Hunt*, supra, note 3; *Kinner v. Kinner*, 45 N. Y. 535 (1871).

<sup>19</sup> *Stanton v. Crosby*, 9 Hun. (N. Y.) 370 (1879); *Dean v. Dean*, supra, note 1.

of fraud because where there has been collusion in obtaining a divorce, the parties to the action may not subsequently attack it,<sup>20</sup> unless there are facts to show it to be against conscience to execute the judgment.<sup>21</sup> But on the other hand if only one of the parties goes into another state for the express purpose of obtaining the divorce; and without any intention of becoming domiciled therein, then the divorce if granted, will be invalid in N. Y.<sup>22</sup> and may be attacked by the defendant.

A. M. L.

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<sup>20</sup> *Starbuck v. Starbuck*, 173 N. Y. 503, 66 N. E. 193 (1903); *Gugenheim v. Wahl*, 203 N. Y. 390 (96 N. E. 726) (1911); *Gibson v. Gibson*, 81 Misc. 508 (1913) Sup. Ct.

<sup>21</sup> *Kinner v. Kinner*, *supra*, note 18.

<sup>22</sup> *Knill v. Knill*, 195 N. Y. Supp. 398, 119 Misc. 186 (1922); *Baylis v. Baylis*, 207 N. Y. 446 (1913) (101 N. E. 176); *Andrews v. Andrews*, 188 U. S. 446 (1902).