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"Confusion Now Hath Made His Masterpiece"-The Foreign Divorce Picture

"CONFUSION NOW HATH MADE HIS MASTERPIECE"— THE FOREIGN DIVORCE PICTURE

To the itinerant divorce seeker, our federal system of government offers aid in the form of many different jurisdictions in which to try the cause. Although some jurisdictions, because of short residence requirements, are more popular than others, they are all appealing. Since the divorce seeker is not so much interested in a quick divorce as he is in an uncontested one, every state is a likely forum for the settlement of his marital problems.

The divorce tourist, however, faces several formidable obstacles. First, the state which he has chosen to terminate his marriage relationship may refuse to exercise its power because of lack of jurisdiction. Second, the divorce, if granted, may not be entitled to recognition in other states. Finally, even if the divorce is recognized, it might not be final as to matters of alimony and custody.

Since the out-of-state divorce is characteristic of modern domestic relations, it is necessary for the practicing attorney to be aware of the voluminous problems which it creates and the solutions offered by the courts of the various states.

In the nineteenth century a divorce action was regarded as an in rem proceeding. Consequently, in order for a court to have jurisdiction, the situs of the res, that is the marriage itself, had to be within the state. This view was rejected in *Haddock v. Haddock,*[1] and in its place was substituted the concept that jurisdiction depended upon at least one of the parties being domiciled within the state. Under the common law the domicile of the husband became the matrimonial domicile. If he deserted or by his misconduct forced the wife to leave, the matrimonial domicile followed the wife. Consequently, the husband was deemed incapable of establishing a new and separate domicile. Similarly, if the wife deserted she too was incapable of establishing a new domicile. The difficulty with this concept was that it fused with the jurisdictional question the determination of which party was to blame for the initial separation.

In 1943 the case of *Williams (and Hendrix) v. North Carolina*[2] was decided by the United States Supreme Court. Mr. Williams and Mrs. Hendrix left North Carolina and journeyed to Nevada where they quickly divorced their respective spouses and married each other. Upon returning to North Carolina they were indicted and convicted of bigamous cohabitation. In affirm-

[1] 201 U.S. 562 (1906).
[2] 317 U.S. 287 (1943).

ing the convictions the Supreme Court of North Carolina held that since the matrimonial domiciles of the defendants were in North Carolina, they could not by desertion establish new domiciles in Nevada. However, on appeal the United States Supreme Court reversed the convictions, overruling the *Haddock* case in the process. The Court held that jurisdiction should not depend upon the fiction of matrimonial domicile but upon actual domicile. It reasoned that, "The existence of the power of a state to alter the marital status of its domiciliaries . . . is not dependent on the underlying causes of the domestic rift. . . . It is dependent on the relationship which domicile creates and the pervasive control which a state has over marriage and divorce within its own borders." [3]

North Carolina promptly retried the defendants and convicted them on the basis that they had not established actual domiciles in Nevada. The United States Supreme Court affirmed,[4] holding that although the decision of a court of a sister-state is prima facie valid, it is entitled to full faith and credit only if the court had jurisdiction. Since divorce jurisdiction depends upon domicile, another state may inquire into the fact of domicile and reach its own conclusion on that matter.

Of course, the initial question is what is domicile. Webster defines it as "A place of residence . . .; a dwelling place; an abode." [5] But in legal parlance, the word connotes more than this. Domicile is that place where a person "has voluntarily fixed his abode . . . not for a mere special or temporary purpose, but with a present intention of making it his home, either permanently or for an indefinite or unlimited length of time." [6] Thus, to be domiciled, a person must be both physically present within the state and intend to remain there indefinitely. Additionally, he must be capable of establishing a domicile.

Domicile is acquired by birth, by choice or by operation of law.[7] Although adults have the capacity to change their domiciles, the common law held that when a woman married her domicile merged with that of her husband. Thereafter, she was incapable of changing it unless the husband consented or by his conduct gave her good cause to do so.[8] The *Williams* cases in overruling the *Haddock* case, were thought to have eliminated this ancient rule, but it is still applied in some states. In Louisiana a woman who deserted her husband and secured a divorce in another state was held to be incapable of establishing

[3] *Id.* at 300.
[4] Williams v. North Carolina, 325 U.S. 226 (1945).
[5] Webster's New International Dictionary (2d ed. 1959).
[6] Charge to the jury as quoted in Williams v. North Carolina, 325 U.S. 226, 236 (1945).
[7] Story, Conflict of Laws § 49 (8th ed. 1883).
[8] Rinaldi v. Rinaldi, 94 N.J.Eq. 14, 119 Atl. 685 (1922).

a domicile.[9] The New Jersey courts have used the rule to deny both their own divorce jurisdiction[10] and that of a foreign state,[11] and although they appeared to have abandoned the rule at one point,[12] they subsequently applied it to support a finding of domicile.[13]

Whether or not the divorce seeker has the intent to remain in the foreign state indefinitely must be ascertained primarily from his actions. In analyzing these actions the courts place great significance on the duration of the residence in the foreign state after the divorce is obtained. In a number of cases the fact that the divorce seeker remained in the foreign state and never returned to his former state of residence was the controlling factor in finding domicile.[14] The period of residence in the foreign state before the divorce action was commenced is also important;[15] but if this period closely coincides with the residence requirements of the foreign state it may tend to show lack of domiciliary intent.[16]

Another factor is the extent to which the alleged domiciliary has severed his ties with his former state and become attached to the foreign state. Taking a short leave of absence from employment,[17] remaining registered to vote,[18] or maintaining a residence in the former state[19] all indicate an intent not to establish a new domicile. Opening a bank account, renting an apartment, registering to vote, obtaining a driver's license,[20] securing employment,[21] or being admitted to practice medicine in the foreign state,[22] while indicating a domiciliary intent, will not be sufficient to establish it if the ties to the former state are not sufficiently dissolved.

Because of the apparent uncertainty in any finding of domicile, some states have held that it is not a jurisdictional necessity. The Florida courts have held

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[9] Juneau v. Juneau, 227 La. 921, 80 So.2d 864 (1955).
[10] Voss v. Voss, 5 N.J. 402, 75 A.2d 889 (1950).
[11] Shepherd v. Shepherd, 5 N.J. 92, 74 A.2d 279 (1950).
[12] Zieper v. Zieper, 14 N.J. 551, 103 A.2d 366 (1954).
[13] Lea v. Lea, 18 N.J. 1, 112 A.2d 540 (1955).
[14] Baldwin v. Baldwin, 28 Cal.2d 406, 170 P.2d 670 (1946); Epstein v. Epstein, 193 Md. 164, 66 A.2d 381 (1949); Heard v. Heard, 323 Mass. 357, 82 N.E.2d 219 (1948); Peff v. Peff, 2 N.J. 513, 67 A.2d 161 (1949); Rodda v. Rodda, 185 Ore. 140, 200 P.2d 616 (1949); Smith v. Smith, 364 Pa. 1, 70 A.2d 630 (1950); Lorusso v. Lorusso, 189 Pa. Super. 403, 150 A.2d 370 (1959); Ische v. Ische, 252 Wis. 250, 31 N.W.2d 607 (1948).
[15] Navarette v. Laughlin, 209 La. 417, 24 So.2d 672 (1946), 18 months; Shain v. Shain, 324 Mass. 603, 88 N.E.2d 143 (1949), 10 months; Talbot v. Talbot, 120 Mont. 167, 181 P.2d 148 (1947), 3 years; Anglin v. Anglin, 211 Miss. 405, 51 So.2d 781 (1946), 18 months; Nelson v. Nelson, 71 S.D. 342, 24 N.W.2d 327 (1946), 2 years.
[16] Achter v. Achter, 167 Pa. Super. 603, 76 A.2d 469 (1950).
[17] Cooper v. Cooper, 225 Ark. 626, 284 S.W.2d 617 (1956).
[18] Kelley v. Kelley, 183 Ore. 169, 191 P.2d 656 (1948).
[19] Lynch v. Lynch, 210 Miss. 810, 50 So.2d 378 (1951).
[20] Huntington v. Huntington, 120 Cal. App.2d 705, 262 P.2d 104 (1953).
[21] Rice v. Rice, 134 Conn. 440, 58 A.2d 523 (1948).
[22] Hall v. Hall, 199 Miss. 478, 24 So.2d 347 (1946).

that mere proof of fulfilling the residence requirements is sufficient.[23] Arkansas has accomplished the same result by statute.[24] Since each state has the power to regulate the jurisdiction of its own courts, it would appear that it can base that jurisdiction on any grounds it deems reasonable. If it conditions the granting of divorces on some jurisdictional requirement other than domicile, such divorces when granted are undoubtedly valid within the state. In light of the *Williams* cases, however, they will not be entitled to recognition in other states under the full faith and credit clause of the Constitution. Perhaps for this reason the Supreme Court of Alabama has denied the power of the legislature to confer divorce jurisdiction not based on domicile.[25] Other states have rejected this view, however, and have held that domicile is not the *sine qua non* of divorce jurisdiction. They assert that the legislature can set up some other requirement, and need not be concerned with the extraterritorial validity of divorces.[26]

Mr. Justice Frankfurter, speaking for the court in the second *Williams* case, stated that since 1789 no English-speaking court has questioned the requirement of domicile.[27] Mr. Justice Rutledge, dissenting in the same case, however, argued that full faith and credit should not be conditioned upon domicile. He said:

> The Constitution does not mention domicile. Nowhere does it posit the powers of the states or the nation upon that amorphous, highly variable common-law conception. Judges have imported it. The importation, it should be clear by now, has failed in creating a workable constitutional criterion for this delicate region.[28]

The view of those who propose abandoning domicile for some more certain requirement has merit in that it bases the jurisdictional question on a fairly simple factual determination. Moreover, it would undoubtedly reduce the amount of fraud and perjury currently relied upon to establish domicile. The difficulty with this view, however, is that it does not solve the basic problem of protecting the stay-at-home spouse from having a final uncontested decree of divorce rendered against her. Although the desire to obtain a quick divorce is a factor which prompts many persons to go out-of-state, the most compelling factor is the desire to get an uncontested divorce or one on grounds not recognized in the home state. If domicile is required before such divorces are entitled

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[23] Fowler v. Fowler, 156 Fla. 316, 22 So.2d 817 (1945).
[24] Held valid in Wheat v. Wheat, —— Ark. ——, 318 S.W.2d 793 (1958).
[25] Jennings v. Jennings, 251 Ala. 73, 36 So.2d 236 (1948).
[26] Crownover v. Crownover, 58 N.M. 597, 274 P.2d 127 (1954); Wallace v. Wallace, 63 N.M. 414, 320 P.2d 1020 (1958); Wood v. Wood, —— Tex. ——, 320 S.W.2d 807 (1959).
[27] 325 U.S. 226 at 229.
[28] 325 U.S. 226 at 255.

to full faith and credit, there is always an opportunity for the respondent spouse to relitigate the action in the home state where she has easy access to the courts. Although replacing domicile with some more definite requirement would simplify the determination of the jurisdictional question, it would also render these out-of-state divorces final. The Supreme Court has not squarely faced the question since the *Williams* cases, but the Court of Appeals for the Third Circuit refused to eliminate the domicile requirement in *Alton v. Alton.*[29] Consequently, it must still be assumed that domicile is necessary for full faith and credit.

To what extent the divorce seeker will be required to prove his domicile in those foreign states which require domicile as a prerequisite to granting relief depends upon the state involved and whether the action in contested. Unless the action is contested, it is ordinarily sufficient merely to allege domicile. This is a dangerous practice, however, for even if the respondent does not appear in the action, she may subsequently appeal the decision. The appellate court may then vacate the decree for failure to allege facts sufficient to show domicile[30] or, if the facts are alleged, for failure to have them corroborated[31] or for fraudulently asserting them.[32]

Regardless of whether or how fully he must prove domicile in a foreign state, the divorce seeker must be prepared to prove it convincingly in his home state or in any other state where the decree may be attacked. While the foreign decree is prima facie valid and the burden of disproving jurisdiction is on the assailant,[33] the long list of cases nullifying foreign divorces indicates that domicile is easier disproved than proved.[34]

Whether or not the divorced spouse *will* attack the decree is a matter of conjecture. Whether or not she *can* attack the decree is a matter of law. By her actions she may have put herself in a position from which she is unable

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[29] 207 F.2d 667 (1953). Although the Supreme Court granted certiorari in this case, it declined to hear it because of intervening mootness.

[30] Phelps v. Phelps, 241 Mo.App. 1202, 246 S.W.2d 838 (1952).

[31] Hemphill v. Hemphill, 84 Ariz. 95, 324 P.2d 225 (1958).

[32] Meyers v. Meyers, 200 Okla. 683, 199 P.2d 225 (1948).

[33] Esenwein v. Esenwein, 325 U.S. 279 (1945).

[34] See, e.g., Turner v. Turner, 261 Ala. 129, 73 So.2d 549 (1954); Crouch v. Crouch, 28 Cal.2d 243, 169 P.2d 897 (1946); Santangelo v. Santangelo, 137 Conn. 404, 78 A.2d 245 (1951); Lanigan v. Lanigan, (Fla.) 78 So.2d 92 (1955); Atkins v. Atkins, 393 Ill. 202, 65 N.E.2d 801 (1946); Wiczas v. Wiczas, 330 Ill. App. 226, 71 N.E.2d 380 (1947); Ludwig v. Ludwig, 413 Ill. 44, 107 N.E.2d 848 (1952); Ulrey v. Ulrey, 231 Ind. 63, 106 N.E.2d 793 (1952); Taylor v. Taylor, (Ky.) 242 S.W.2d 747 (1951); Brewster v. Brewster, 204 Md. 501, 105 A.2d 232 (1954); Colby v. Colby, 217 Md. 35, 141 A.2d 506 (1958); Welker v. Welker, 325 Mass. 738, 92 N.E.2d 373 (1950); Gray v. Gray, 320 Mich. 49, 30 N.W.2d 426 (1948); Yost v. Yost, 161 Neb. 164, 72 N.W.2d 689 (1955); Cox v. Cox, 137 N.J.Eq. 241, 44 A.2d 92 (1954); Mapes v. Mapes, 24 Wash.2d 743, 167 P.2d 405 (1946).

to contest the validity of the divorce. The Supreme Court intimated this in the second *Williams* case when it said:

> It is one thing to reopen an issue that has been settled after appropriate opportunity to present their contentions has been afforded to all who had an interest in its adjudication. This applies to jurisdictional questions. After a contest these cannot be relitigated as between the parties. . . . But those not parties to a litigation ought not to be foreclosed by the interested actions of others. . . .[35]

This was essentially the holding of an earlier case, *Davis v. Davis*.[36] Although the Supreme Court apparently regarded this as settled law, some states did not. Consequently, several courts held that even though the opportunity was present, if the divorced spouse did not contest the jurisdictional question the decision was not final.[37] Other courts preferred to reach the same result by reasoning that since the *Williams* case held that the state can reopen the question of jurisdiction it is immaterial that it does so on the petition of one who was a party to the action.[38] Other courts followed the *Davis* case and ruled that the matter was res judicata.[39]

The issue was settled by the Supreme Court in the companion cases of *Sherrer v. Sherrer*[40] and *Coe v. Coe*.[41] In the *Sherrer* case the court said:

> [T]he 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, where the defendant has been accorded full opportunity to contest the jurisdictional issues, and where the decree is not susceptible to such collateral attack in the courts of the state which rendered the decree.[42]

Despite the fact that the decision made participation in the foreign action a bar to future litigation, the question of what constitutes participation was left for the state courts. Consequently, few definite answers are available. Of course, if the respondent actually appears and contests the action herself or by her attorney, there is little doubt that there is participation, but if she does something less than this the result is not so predictable. It has been held that

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[35] 325 U.S. 226 at 230.
[36] 305 U.S. 32 (1938).
[37] Cohen v. Cohen, 319 Mass. 31, 64 N.E.2d 689 (1946); Giresi v. Giresi, 137 N.J.Eq. 336, 44 A.2d 345 (1945).
[38] Isserman v. Isserman, 138 N.J.Eq. 140, 46 A.2d 799 (1946); Brasier v. Brasier, 200 Okla. 689, 200 P.2d 427 (1948).
[39] *Ex Parte* Jones, 249 Ala. 386, 31 So.2d 314 (1947); Hamilton v. Hamilton, 81 Ohio App. 330, 73 N.E.2d 820 (1947).
[40] 334 U.S. 343 (1948).
[41] 334 U.S. 378 (1948).
[42] 334 U.S. 343 at 351.

a letter in which the respondent denied jurisdiction and which she sent to the judge of the foreign court did not constitute participation.[43] It has also been held that an appearance entered after the final hearing has been concluded does not amount to participation.[44]

A more difficult question arises when the respondent is represented by someone appointed by the foreign court. In a New York case an incompetent who had been represented before the foreign court by a guardian was held to have participated.[45] A contrary result was reached on almost identical facts in an Illinois case.[46] The latter court felt that public policy required the matter of jurisdiction to be relitigated. This view would seem desirable since the guardian is probably chosen by the other spouse and is likely to be more concerned with satisfying the desires of the plaintiff than with protecting the interests of the ward.

Another question arises when the actions of the respondent constitute an appearance under the law of the foreign state, but not of the home state. If such is the case, the divorce decree will probably state that the respondent has entered an appearance. Since this is not an element of jurisdiction, it would seem that other states must give full faith and credit to this determination. This view was upheld by the courts of Georgia in *Cherry v. Cherry.*[47] The wife in that case had instituted suit for divorce in Georgia, and the husband filed a similar suit in Texas. A plea of *aliter lis pendens* was entered by the wife in the Texas action, but the husband was able to get the divorce despite the plea. Returning to Georgia, the husband pleaded the Texas divorce in bar and asserted that since the wife had participated in the action she could not contest it. The court held that since the wife's plea in the Texas action amounted to an appearance under Texas law, she was unable to attack the decree.

Because of the finality of divorce decrees rendered after the respondent has participated, regardless of the extent or the nature of the participation, the modern tendency is toward more, rather than less, uncontested divorces. Consequently, although the theory of the *Sherrer* and *Coe* cases was to decrease litigation of the validity of foreign divorces, as a practical matter it has had quite the opposite effect.

The doctrine of estoppel may also bar the divorced spouse from attacking the validity of the foreign decree. If she has accepted the benefits of the decree

[43] Collins v. Collins, 175 Pa. Super. 214, 103 A.2d 494 (1954).
[44] Rubinstein v. Rubenstein, 324 Mass. 340, 86 N.E.2d 654 (1949).
[45] Breen v. Breen, 199 Misc. 366, 103 N.Y.Supp.2d 554 (1951).
[46] *In re* Rush's Estate, 350 Ill. App. 120, 111 N.E.2d 854 (1953).
[47] 208 Ga. 726, 69 S.E.2d 252 (1952).

by receiving a property settlement[48] or by remarrying[49] she can no longer demand the sympathies of the court. Similarly, if she comes into court with unclean hands she will not be heard to complain of the actions of her former spouse.[50] Merely allowing the decree to stand uncontested over a long period of time may or may not bar an attack. Some courts hold that laches is not a bar regardless of the reasons for the delay or the effects of it on others, because mere lapse of time will not cure a defect in jurisdiction.[51] Other courts hold that if the divorced spouse by her laches has induced others to change their positions in reliance on the validity of the divorce she will be estopped to contest it.[52] The majority of courts stand between these positions and decide the question on the merits and whether or not it is equitable to permit the attack.[53]

Estoppel also prevents the spouse who obtained the divorce from subsequently attacking it.[54] Although this rule is recognized in all jurisdictions, it is not without exceptions. Since estoppel is an equitable defense, the facts may be such that it would be inequitable to allow the defense. Thus, if the divorcee was fraudulently induced by the other spouse to obtain the divorce or if the divorce was obtained by collusion the attack may be permitted.[55] Similarly, if the other spouse comes into court with unclean hands estoppel will not be recognized.[56] Since the marital status of a person is a matter of public interest, the divorcee may be permitted to attack his divorce in order to clarify the matter.[57]

Whether a third person not a party to the foreign action can attack the validity of the divorce is a question which has engendered some difference of opinion. In the *Williams* cases the State of North Carolina was allowed to attack the decree and the language of the court could be construed to mean that anyone not a party to the action could do so. Of course, in order for anyone to launch the attack it would be necessary for him to have the requisite interest. The definition of that interest varies from state to state. Some states, undoubtedly trying to protect a divorce which neither party has seen fit to attack,

[48] Anderson v. Anderson, 223 Ark. 571, 267 S.W.2d 316 (1954).
[49] Union Bank & Trust Co. v. Gordon, 116 Cal.App.2d 681, 254 P.2d 644 (1953).
[50] Untermann v. Untermann, 19 N.J. 507, 117 A.2d 599 (1955).
[51] Ludwig v. Ludwig, 413 Ill. 44, 107 N.E.2d 848 (1952); Lawler v. Lawler, 2 N.J. 527, 66 A.2d 855 (1949).
[52] Lanigan v. Lanigan, (Fla.) 78 So.2d 92 (1955); Schuman v. Schuman, —— Misc. ——, 137 N.Y.Supp.2d 485 (1954).
[53] Santangelo v. Santangelo, 137 Conn. 404, 78 A.2d 245 (1951); Peoples Nat. Bank of Greenville v. Manos Brothers, 226 S.C. 257, 84 S.E.2d 857 (1954).
[54] Starbuck v. Starbuck, 173 N.Y. 503, 66 N.E. 193 (1903); Rediker v. Rediker, 35 Cal.2d 796, 221 P.2d 1 (1950); Atlantic Refining Co. v. Jones, 63 N.M. 236, 316 P.2d 557 (1957); *In re* Rathscheck's Estate, 300 N.Y. 346, 90 N.E.2d 887 (1950).
[55] Roberts v. Roberts, 81 Cal.App.2d 871, 185 P.2d 381 (1947); Caldwell v. Caldwell, 298 N.Y. 146, 81 N.E.2d 60 (1948).
[56] Wampler v. Wampler, 25 Wash.2d 258, 170 P.2d 316 (1946).
[57] Hamm v. Hamm, 30 Tenn.App. 122, 204 S.W.2d 113 (1947).

hold that before a stranger can attack the decree he must show that the divorce affected some pre-existing right.[58] Although this rule does substantial justice in many cases, it would do substantial injustice if applied in all cases. Frequently, the rights of the third party arise long after the divorce has been granted. To deny him the opportunity to attack the decree may result in prejudicing his rights just as much as if they existed prior to the divorce. In *Meade v. Mueller*[59] plaintiffs sought specific performance of a contract according to which defendant was to purchase certain lands of the plaintiffs. The plaintiff wife had acquired her interest in the land prior to the time she had divorced her former husband and married the other plaintiff. Defendant refused to purchase the land on the basis that since the divorce was invalid it did not extinguish the former husband's curtesy rights in the land. Although the New Jersey court held that the divorce was valid, it recognized the defendant's standing to attack it. Since defendant had no rights at the time of the divorce which could have been affected thereby, the predicament in which he would have found himself in those states applying the general rule is apparent.

Divorced parties frequently re-marry, and their subsequent spouses may wish to attack the divorce decree. In most cases these persons are not attempting to protect a pre-existing right, but are seeking to have the subsequent marriage annulled. Consequently, these attacks generally are not permitted. The courts base their decisions on the grounds of estoppel. Since the person who obtains the divorce in most situations is estopped to attack the decree, a subsequent spouse who knew at the time of the marriage of the doubtful validity of the divorce is also estopped.[60] If, on the other hand, the subsequent spouse was induced to marry by false assurances of the validity of the divorce the attack may be permitted.[61] The same result is reached where the assailant is married to the respondent in the prior divorce action. As noted above, the respondent spouse is estopped to attack the decree if she accepts the benefits of it by re-marrying. Since this is true, the person she marries is also estopped unless there was fraudulent inducement or other unfairness that necessitates the doing of equity.[62] Aside from estoppel, the doctrine of res judicata may prevent subsequent spouses from attacking the divorce. Thus, if both parties appear in the divorce action so that there is participation which prevents them from re-litigating the matter, strangers to the action are likewise prevented.[63]

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[58] deMarigny v. deMarigny, (Fla.) 43 So.2d 442 (1949); Evans v. Asphalt Road & Materials Co., 194 Va. 165, 72 S.E.2d 321 (1952).

[59] 139 N.J.Eq. 491, 52 A. 2d 157 (1947).

[60] Judkins v. Judkins, 22 N.J.Super. 516, 92 A.2d 120 (1952).

[61] Everly v. Baumil, 209 S.C. 287, 39 S.E.2d 905 (1946).

[62] Tonti v. Chadwick, 1 N.J. 531, 64 A.2d 436 (1949).

[63] Taylor v. Taylor, 229 S.C. 92, 91 S.E.2d 876 (1956).

Frequently the heirs or personal representatives of the divorced parties attempt to attack the validity of the divorce. Some courts hold that since these persons are in privity with the parties to the action, if estoppel or res judicata would bar an attack by the latter it will also prevent an attack by the former. Thus, where the decedent had appeared and contested the divorce his sole legatee was unable to attack it.[64] Similarly, where the decedent was the one who obtained the divorce his executrix was estopped to assail it.[65] The New York courts have taken a contrary view on this latter situation, and have held that heirs and legatees may attack the divorce even if it was obtained by the decedent.[66] Although it is not stated in the opinions, the reason for this probably stems from the liberal attitude of these courts toward allowing strangers to attack foreign divorces.

Occasionally the heirs of a later spouse of one of the divorced parties wish to have the divorce and subsequent marriage declared invalid. Here again the courts will generally prevent the attack if the decedent would have been estopped. Accordingly, if the decedent induced a person to obtain a divorce and later married her, his heirs cannot attack the validity of the decree.[67] In a proper case, however, the courts may refuse to find estoppel on the part of the decedent. In a Massachusetts case decedent's heirs attempted to attack a decree of divorce obtained by decedent's spouse from a prior wife.[68] The court held that since the decedent had not induced her husband to obtain the divorce and since she had married him in reliance on the validity of the divorce she would not have been estopped to contest it. Consequently, her heirs would not be estopped.

A divorce seeker generally leaves his home state to obtain a decree that will relieve him of all the duties imposed by his marital status. He frequently leaves behind him the record of a divorce action in which he was nonsuited. He is likely to be under an order of court to pay his wife temporary alimony or support. He may have some minor children, the complete custody of which he may or may not want. In any event, he carries with him the fervent belief that the foreign court will settle all of these problems in his favor. The advice of competent counsel would soon dispel many of these beliefs.

A decree of support or temporary alimony generally can be enforced by the wife only so long as the marriage relation exists. Once a valid divorce is granted to the husband the right of support ceases. Since the wife can contest

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[64] Johnson v. Muelberger, 340 U.S. 581 (1951).
[65] *In re* Brandt's Estate, 67 Ariz. 42, 190 P.2d 497 (1948).
[66] *In re* Bourne's Estate, 2 App.Div.2d 896, 157 N.Y.Supp.2d 189 (1956).
[67] *In re* Anderson's Estate, 121 Mont. 515, 194 P.2d 621 (1948).
[68] Old Colony Trust Co. v. Porter, 324 Mass. 581, 88 N.E.2d 135 (1949).

the divorce action or obtain either by order of court or by agreement an award of permanent alimony, the equitable nature of this rule cannot be seriously questioned. But when the husband obtains the divorce without the wife's knowledge and in a foreign state, the equitable color of the rule assumes a paler cast. Since the wife did not have an opportunity to litigate the question of alimony in the foreign state the divorce should not be final on that matter. In *Estin v. Estin*[69] the wife had obtained an order of support in New York. Subsequently the husband obtained a divorce in Nevada. The New York Court of Appeals held that although the divorce was valid, it would not terminate the support order. Reasoning that the support order was a property right of the wife, the court held that the Nevada court could not affect this property right because it did not have in personam jurisdiction over her. The United States Supreme Court affirmed on the basis that whether or not a decree of support can survive a valid divorce is a matter of local law which each state can decide for itself.[70] Many states have refused to adopt the New York view of divisible divorce decrees. Georgia,[71] Maryland,[72] Oregon[73] and Pennsylvania,[74] for example, hold that since the legislature intended the right to support to exist only during marriage, a valid divorce wherever obtained terminates that right even though the court did not have personal jurisdiction over the wife. Arizona[75] and New Jersey,[76] however, align themselves with New York and allow the support order to survive. If the wife is able to get a judgment for arrearages in one of these states she can enforce it against her husband in any state wherein he can be found,[77] even in the state where he obtained the divorce.[78] A step further than the *Estin* case was made in *Vanderbilt v. Vanderbilt* [79] where a wife was able to get a decree of support after her husband had obtained a divorce. Since the wife did not have the support decree at the time of the divorce, the reasoning of the *Estin* case would lead to the conclusion that she had no property right to survive the divorce. The court, however, stated that the divorce decree could not prejudice any rights of the wife to support and that the fact that the support order did not pre-date the divorce decree was immaterial.

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[69] 296 N.Y. 308, 73 N.E.2d 113 (1947).
[70] 334 U.S. 541 (1948).
[71] Meeks v. Meeks, 209 Ga. 588, 74 S.E.2d 861 (1953).
[72] Brewster v. Brewster, 204 Md. 501, 105 A.2d 232 (1954).
[73] Rodda v. Rodda, 185 Ore. 140, 200 P.2d 616 (1949).
[74] McCormack v. McCormack, 164 Pa. Super. 553, 67 A.2d 603 (1949).
[75] White v. White, 83 Ariz. 305, 320 P.2d 702 (1958).
[76] Brown v. Brown, 19 N.J.Super. 431, 88 A.2d 650 (1952).
[77] Worthley v. Worthley, 44 Cal.2d 465, 283 P.2d 19 (1955).
[78] Rice v. Rice, 213 Ark. 981, 214 S.W.2d 235 (1948).
[79] 354 U.S. 416 (1957).

After viewing the holding in the *Vanderbilt* case, it would seem to follow that an *ex parte* divorce decree is not res judicata on the matter of permanent alimony. An early Supreme Court case, *Thompson v. Thompson,*[80] appears to be contrary. Although the case has never been expressly overruled, it must be viewed with doubt since the Supreme Court decided *Armstrong v. Armstrong.*[81] In that case an Ohio court awarded alimony to a wife after Florida had given the husband a divorce. Although affirming the award of alimony, the court held that Florida never passed on the matter. Consequently, the full faith and credit question was not involved. Four concurring justices felt that Florida had passed on the alimony question and that the constitutional issue was involved. On this basis they proceeded to discuss whether Ohio had to give effect to a Florida decree denying alimony to the wife. They concluded that Florida's lack of jurisdiction over the wife prevented it from making the alimony portion of the decree binding on other states. Referring to the decision in the *Thompson* case, they stated that it should no longer be considered the law.

The effect to be given to provisions of a foreign divorce decree determining the custody of children is a problem which has caused a great deal of concern. Of course, if the divorce is invalid so are the custody provisions it contains.[82] But if the divorce is valid or if the divorced spouse is unable to attack it, innumerable rounds of litigation may ensue before the matter of custody is settled. Formerly, jurisdiction to determine custody was based on the domicile of the child, which is deemed to be that of the father. Many states still adhere to this rule. Consequently, if a wife leaves her home and takes her children to another state where she obtains a decree of divorce and sole custody, the home state will not recognize the custody provisions.[83] Some states, however, have abandoned the domicile requirement. They hold that since the welfare of the child is paramount, custody orders are always open and any state in which the child is residing, though not domiciled, may determine custody.[84] Regardless of its basis for jurisdiction, the custody orders of a state will generally not be recognized by other states unless the child was physically present within the state at the time the order was made.[85] One exception has been established to this rule, however. If both parents were before the foreign court so that the question of custody could have been fully

[80] 226 U.S. 551 (1913).

[81] 350 U.S. 568 (1956).

[82] Welker v. Welker, 325 Mass. 738, 92 N.E.2d 373 (1950).

[83] Heard v. Heard, 323 Mass. 357, 82 N.E.2d 219 (1948); *In re* Francis, 37 Ohio Op. 342, 75 N.E.2d 700 (1947).

[84] Girtman v. Girtman, 221 La. 691, 60 So.2d 88 (1952); Eddy v. Staufer, (Fla.) 37 So.2d 417 (1948). See also May v. Anderson, 345 U.S. 528 (1953).

[85] Graham v. Graham, 367 Pa. 553, 80 A.2d 829 (1951); Bush v. Bush, (Okla.) 299 P.2d 155 (1956).

litigated, the court will be deemed to have had jurisdiction even though the child was not in the state.[86]

Where custody is divided between parents each of whom is desirous of obtaining sole custody, future litigation is almost a certainty. When the parents live in different states the results of the litigation are quite likely to be conflicting. This is pointed out graphically in the case of *McKee v. McKee*.[87] In that case the wife had obtained a divorce from her husband in Iowa. The decree gave her custody of their child for eleven months out of the year. The decree of divorce was not attacked, but when the husband obtained the child for his one month of custody, he took him to Texas and instituted proceedings for sole custody. Before this suit was decided, the wife succeeded in taking the child back to Iowa where she instituted similar proceedings for sole custody. The Texas suit resulted in a decree of sole custody in favor of the husband, but since the child was no longer in that state it became necessary for the husband to plead his decree in the pending Iowa case. The matter was finally put to rest when the Iowa court upheld the validity of the Texas decree; but although it refused to modify that decree, the court held that it had the power to do so. With a multitude of jurisdictions to choose from, the number of rival custody decrees which determined parents could obtain is almost unbelievable.

This discussion does not, of course, cover all the possible problems which the out-of-state divorce can create, but it indicates the extreme complexity of the situation. In no other field of law do the individual states assert so strongly their independent sovereignties. There are those who maintain that all out-of-state divorces should be recognized, while others contend that none of them should be. Somewhere between these two poles lies the present state of the law. The difficulty with this position is the tragic lack of certainty and definiteness which is so necessary in domestic relations. Although solutions in the form of uniform or federal legislation have been proposed, the unhappiest thought is the realization that the law is not likely to improve very much in the near future. Perhaps no one regrets this or deplores it more keenly than the lawyers and judges who must face these problems day after day. Mr. Justice Jackson expressed the views of the profession when he said:

> If there is one thing that the people are entitled to expect from their lawmakers, it is rules of law that will enable individuals to tell whether they are married and, if so, to whom. Today many people who have simply lived in more than one state do not know, and the most learned lawyer cannot advise them with confidence. . . . It is therefore important that whatever we do, we shall not add to the confusion.[88]

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[86] Talbot v. Talbot, 120 Mont. 167, 181 P.2d 148 (1947).
[87] 239 Iowa 1093, 32 N.W.2d 379 (1948).
[88] Dissenting opinion, Estin v. Estin, 334 U.S. 541 (1948).