Notes and Comments

VALIDITY OF FOREIGN DIVORCES UNDER PHILIPPINE LAW

By provision of our Divorce Law (Act 2710), divorce may be had for adultery on the part of the wife or concubinage on the part of the husband, and shall not be granted without the guilt of the defendant being established by final sentence in a criminal action. No wonder, with these almost prohibitive provisions, a good number of our moneyed class go abroad, especially to the United States, in order to secure divorce decrees with minimal resistance. But do these divorce decrees successfully stand the test of validity under Philippine law?

Divorce decrees procured in foreign courts, when made to run the gauntlet of Philippine courts, necessarily involve a foreign element and the question of their validity needs be analyzed from the viewpoint of private international law or conflict of laws.

A status, as distinguished from a mere personal obligation, is a thing, a res, over which, by the general consent of civilized nations, some one state has jurisdiction; formerly all nations agreed that this was the state of domicil, but since the Napoleonic legislation and its imitation in the European states it has been on the Continent the state of allegiance or nationality. (19 Harvard Law Review, Const. Protection of Decrees for Divorce, Beale, 586, 590) The marriage status is thus properly governed by the law of the domicil or the law of the nationality.

The United States recognizes the law of the domicil as the proper law to regulate said status. Each state as a sovereign has a rightful and legitimate concern in the marital status of persons domiciled within its borders. (Williams v. North Carolina, 317 U. S. 287, 63 Sup. Ct. 207) The state of domicil is most concerned with the family life of those whose home is in its territory. (Beale's Treatise on the Conflict of Laws, Vol. I, 468) Just as the marriage status and its incidents are determined by the *lex domicilii*, so also the dissolution thereof is to be regulated by the same law. (Minor's Conflict of Laws, 182) It is the province of the legislatures of the several states to regulate the subject of divorce as applied to persons domiciled within their jurisdiction. (17 Am. Jur. 150)

It is no longer open to question that, where husband and wife are domiciled in a state, there exists jurisdiction in such state to enter a decree of divorce. (Haddock v. Haddock, 201 U. S. 562, 26 Sup. Ct. 525) It has, moreover, been decided that, where a domicil has been acquired in a state by either of the parties to a marriage and a suit is brought by

the domiciled party in such state for divorce, the courts of that state, if they acquire personal jurisdiction also of the other party by his appearance, have authority to grant a decree of divorce. (Cheever v. Wilson, 9 Wall. 108, 19 L. Ed. 604) But the appearance of one or both of the parties to a divorce proceeding cannot suffice to confer jurisdiction, where it is wanting because of the absence of domicil within the state. (Andrews v. Andrews, 188 U. S. 14, 23 Sup. Ct. 237) However, where a spouse files a bill for divorce in a state which has no jurisdiction to grant the divorce, while the action of the court has of course no effect upon the status, it may nevertheless prevent the party filng the bill from thereafter disputing the validity of the divorce in any merely private claim between himslf and his spouse. (Beale's Treatise, *supra,* 479) If a defendant appears and joins issue on the jurisdictional fact of the plaintiff's residence in the foreign state, he is then precluded by an adverse finding from subsequently attacking the decree in another state on the ground that there was no juristion because the plaintiff did not establish a bona fide domicil in the divorce forum. (Davis v. Davis, 305 U. S. 32, 59 Sup. Ct. 3)

It has been said that, if a wife abandons her husband without sufficient cause, his domicil is in law her domicil; and, in the absence of any proof of fraud or misconduct on his part, a divorce obtained by him in the state of his domicil after reasonable notice to her, either by personal service or by constructive notice in acordance with its laws, is valid, although she never in fact resided in that state. (Atherton v. Atherton, 181 U. S. 155, 21 Sup. Ct. 544; Thompson v. Thompson, 226 U. S. 551, 33 Sup. Ct. 129) On the other hand, if the husband blamably abandons his wife to get rid of all those conjugal obligations which the marriage relation imposes upon him, and relinquishes altogether his marital control and protection, he yields up that power and authority over her which makes his domicil hers. Thus, if he acquires a domicil in another state and therein sues for divorce and the wife who does not follow is merely constructivly served with notice of the pendency of the action, the court of that state does not acquire jurisdiction over the wife and the divorce decree issued by it is not binding on some other state. (Facts of Haddock v. Haddock, supra)

The majority opinion in the Haddock case introduced no little ruffle on the minds of thinkers. Professor Beale declared (19 Harvard Law Review, Const. Protection of Decrees for Divorce, 586, 589, 596) that th doctrine requiring domicil of the libellant in all cases and personal jurisdiction over the libellee had been held nowhere; that the difficulty on theory with the requirement of personal jurisdiction lies in the very nature of divorce, which is not a personal right of the parties, the express assent of both parties not justifying a court in granting a divorce decree; that the jurisdiction required is merely a jurisdiction in rem, a jurisdiction over the res, the status of the plaintiff in relation to the defendant; and that, in order to satisfy the requirements of due process of law, the absent party must

be given reasonable notice and an opportunity to be heard, jurisdiction over him not being necessary. In the words of Mr. Justice Holmes, dissenting, the decision "is likely to cause considerable disaster to innocent persons and to bastardize children hitherto supposed to be the offspring of lawful marriage."

Said case, after more than thirty years of harried existence, was expressly overruled by the case of *Williams v. North Carolina* (supra, decided on Dec. 21, 1942). It was held in the latter case that each state, by virtue of its command over its domiciliaries and its large interest in the institution of marriage, can alter within its own borders the marriage status of the spouse domiciled there, even though the other spouse is absent; that in such alteration there is no constitutional barrier if the form and nature of the substituted service meet the requirements of due process (e.g., publication and the mailing of complaint and summons to residence outside state; delivery of complaint and summons out of the state); that the difference in result between the Atherton and Haddock cases rests on immaterial distinctions, since 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 (whether it was the wife or the husband who with fault abandoned the other), but rather on the relationship which domicil creates and the pervasive control which a state has over marriage and divorce within its own borders. It must be observed that said two cases are substantially similar in that the husband had a domicil in the state where divorce was granted and there was no personal jurisdiction acquired over the non-resident wife; yet, one divorce decree was recognized as binding on another state by the Supreme Court of the United States and the other was not. Further irony is found in the fact that the Haddock case purported to uphold the Atherton case. The differentiation to the effect that if the husband is deserted, his power over the matrimonial domicil remains so that the domicil of the wife accompanies him wherever he goes, whereas if he is the deserter, he has no such power, as predicated on "pure fiction and fiction always is a poor ground for changing substantial rights." (Holmes, dissenting in Haddock case)

The states of the American Union are bound to give full faith and credit to judgments rendered in other states with jurisdiction over the parties and subject-matter, or over the res in proceedings in rem. (Thompson v. Thompson, supra; Williams v. North Carolina, supra; see Const. of the U. S. Art. IV, Sec. 1) But there is no absolute obligation on the part of Philippine courts to recognize duly entered foreign judgments. Instead, international comity comes into play in the recognition to be given in the Philippines to judgments of foreign courts. (Cousins Hix v. Fluemer, 55 Phil. 851) Comity would be refused if the judicial record is successfully impeached by evidence of a want of jurisdiction in the court or judicial officer, of collusion between the parties,or of fraud in the party offering the record, in respect to the proceedings. (Rules of Court, Rule 123, Sec.

45) Our Supreme Court has not actually recognized a divorce decree secured abroad. In three cases it rested its decision exclusively on the fact that neither of the parties had established a bona fide domicil in the divorce forum. (Ramirez v. Gmur, 42 Phil. 55; Gorayeb v. Hashim, 50 Phil. 22; Cousins Hix v. Fluemer, supra) The intention to take up a residence must be bona fide, not merely claimed, and is to be considered in connection with the acts of the party. (17 Am. Jur. 280; Bell v. Bell, 181 U.S. 175, 21 Sup. Ct. 551; Streitwolf v. Streitwolf, 181 U.S. 179, 21 Sup. Ct. 553; Andrews v. Andrews, supra; Williams v. North Carolina, 325 U.S. 226, 65 Sup. Ct. 1092) One of the essential elements which go to make up residence of a person as contemplated in the divorce laws is the intention on his part to live at the place of alleged residence permanently or indefinitely. While an intention so to reside is essential, it alone cannot retain a residence every vestige of which is gone, with no place left to which the party has the right to return. Where no period of time is specified by statute in order to fx a residence, the length of time is held not to be controlling where the plaintiff is a resident at the time the suit is brought with the fixed intention of remaining there permanently or indefinitely. (17 Am. Jur. 279-280) It is palpable, therefore, that the mere desire to procure a divorce does not provide proper foundation for a bona fide domicil.

Granted, however, that a divorce decree was entered in a foreign court with jurisdiction over the res and after reasonable notice to the defendant, there are still provisions of our Civil Code to contend with, which provisions were first brought into notice by our highest judicial tribunal in the case of *Barretto Gonzalez v. Gonzalez*, 58 Phil. 67. There are:

I. ART. 9: "The laws relating to family rights and duties, or to the status, condition, and legal capacity of persons, are binding upon Filipinos even though they reside in a foreign country." The Divorce Law relates to the marriage status as it governs the dissolution of such status. Under the quoted provision said law is made to follow a Filipino citizen wherever he goes. (See Concurring Opinion of Justice Torres, Ibañez v. Hongkong & Shanghai Bank, 30 Phil. 228) Manresa, construing a similar provision of the Spanish Civil Code, opined that with respect to the requirements necessary to obtain divorce, Spaniards in a foreign country should be governed by their national law. (1 Manresa, 5th Ed. 99) The provision is a negation of the common-law principle, hitherto expounded, that divorce is properly regulated by the law of the domicil. It is an exposition of the civil-law principle that the proper law to govern divorce is the law of nationality. The Gonzalez case injected a new idea into local divorce jurisprudence with this statement: "It is, therefore, a serious question whether any foreign divorce relating to citizens of the Philippines will be recognized in this jurisdiction, except it be for a cause and under conditions for which the courts of the Philippines would grant a divorce."

II. ART. 11, 3RD PAR.: "* * * the prohibitive laws concerning persons,

their acts and their property, and those intended to promote public order and good morals, shall not be rendered without effect by any foreign laws or judgments or by anything done or any agreements entered into in a foreign country." Is the Divorce Law one "intended to promote public order and good morals?" It is conceded in all jurisdictions that public policy, good morals, and the interests of society require that the marriage relation should be surrounded with every safeguard. (People v. Bitdu, 58 Phil. 817, citing 19 C. J. 20) The public policy relating to marriage is to foster and protect it, to make it a permanent and public institution, to encourage the parties to live together, and to prevent separation. (17 Am. Jur. 154) Marriage is an institution in the maintenance of which in its purity the public is deeply interested, for it is the foundation of the family and of society, without which there would be neither civilization nor progress. (Maynard v. Hill, 125 U. S. 190, 8 Sup. Ct. 23)

If the Divorce Law, therefore, is one intended to promote public order and good morals, it shall not be rendered without effect by any foreign divorce decree. But it shall be illustrated that the recognition by Philippine courts of a foreign divorce does not necessarily render said law of no effect. Article 9 of the Civil Code makes such law cleave to migratory Filipino citizens, causing it *to have effect abroad* and to be controlling on the grounds for a foreign divorce between them. If they obtain a foreign divorce decree on a ground not recognized by said law, Philippine courts, passing on the question of the decree's validity in this jurisdiction, shall render such law without effect by upholding the decree. To uphold the decree, therefore, would be to violate the third paragraph of Article 11, not to say Article 9. On the other hand, in regard to foreigners out of the country, our Divorce Law is inoperative. A foreign divorce decree procured by them for a cause unencompassed by said law and in a jurisdiction where either or both were domiciled, will be countenanced by Philippine courts without rendering the law of no effect, as in the first place such law had no effect on them when they secured the decree. In this instance there is no contravention of Article 9 and the third paragraph of Article 11. If there were no Article 9, the Divorce Law would be of territorial application only and would not cling to the apron-strings of Filipinos abroad. Said law having then no effect at all in a foreign country, recogtion by Philippine courts of a foreign divorce would not involve the question of rendering the law without effect. *That of no effect cannot be rendered without effect.* It is consequently believed that Article 9 is the condition precedent for the operation of the third paragraph aforestated in so far as the Divorce Law is concerned. A violation of Article 9 is a violation of said paragraph; likewise, a violation of the latter is a violation of the former. Even if there were no such paragraph, Filipinos would not be able still to evade the stringent provisions of our Divorce Law by going abroad on account of the hampering effect of Ar-

ticle 9, provided of course that the question be passed upon by Philippine courts.

On the whole, it is concluded that:

1. If both spouses are foreigners and as such they secured a divorce decree in a foreign country where either or both were domiciled, for a cause encompassed or not by our Divorce Law, and the question of the validity of the decree is submitted to Philippine courts, said courts should recognize it in virtue of comity.

2. If both spouses are Filipinos and as such they obtained a divorce decree on a basis not sanctioned by our Divorce Law in a foreign country, whether or not they were domiciled therein, and the question of the validity of the decree is aired before Philippine courts, said courts should not accord validity to it because Article 9 of the Civil Code in effect provides that the Divorce Law is binding upon Filipinos even though they reside in a foreign country. Here, the law makes a case where a man and woman are held to be man and wife in the Philippines and strangers in another country.

3. If the spouses, a Filipino and an alien, as such procured a divorce decree on a ground not recognized by our Divorce Law in a foreign country, whether or not they were domiciled therein, and the question of the validity of the decree is laid before Philippine courts, said courts should not infuse validity into it. The Filipino should be governed by our Divorce Law. Since he cannot have a divorce on a basis not provided for in said law, the alien cannot at the same time have a divorce. Otherwise, we would have a husband or wife without a wife or husband, respectively.

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