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CONFLICTS—DIVORCE: IS AN ACTION FOR JUDICIAL SEPARATION IN REM OR IN PERSONAM?

A state of hopeless variance among the different jurisdictions exists in relation to the important question whether judicial separation is an action *in rem* or one *in personam*. The dictionary definition of judicial separation states that it is: "A form of legal separation of man and wife. It answers to and in Great Britain and most states has the same effect as the separation a mensa et thoro."¹ The most important effect of the action, whether it is *in rem* or *in personam*, is that the husband and wife are absolved from the mutual duties of living together. Under the ecclesiastical law, limited divorce did not end the marriage and such a decree of separation could be given by a court where they were merely resident, the court not requiring domicile. At that time the marriage status did not seem greatly affected by the divorce and the presence of the parties before the court was the only necessary requirement in order to grant the decree. This gave judicial separation the connotation of an action *in personam*. Today however, limited divorce law does not follow the ecclesiastical law but is almost entirely statutory. Vernier says:

"The ecclesiastical law was not taken over by the various states, and has never been in force here, save by special statute. The courts of the common law or equity never granted divorce from bed and board. Thus, express statutory authority is essential to the power to grant divorce from bed and board."²

It seems that today the tendency of the statutes is to make the proceeding one which is *in rem*, as will be shown later.

One of the greatest necessities for resolving the conflict is to gain uniformity in the decisions as to whether the decree has extra territorial validity when rendered on constructive service.

As the law stands today a person may be judicially separated in one state and the marriage may be completely unaffected in another. This is true because when a limited divorce is granted under the theory of a jurisdiction which holds that the action is *in rem*, if the court has jurisdiction over the *res* and the petitioner is domiciled in the state even if the defendant is a non-appearing non-resident the court may pronounce a decree entitled to universal recognition. However, in jurisdictions where the proceeding is considered one

¹ WEBSTER'S INTERNATIONAL DICTIONARY (2d. ed. 1944) 1344.

² GOODRICH, CONFLICTS OF LAWS (1927) Sec. 129.

³ 2 VERNIER, AMERICAN FAMILY LAWS (1932) Sec. 114.

in personam a court would not necessarily recognize such a decree because of the lack of personal service.⁴

Uniformity seems desirable to prevent such a paradox, and the *in rem* view will promote consistency in the law by sister-states' recognition. It may be argued that the fact that a person is judicially separated in one state and yet the marriage is unaffected in another can have no serious results. The pressing problems of legitimacy, bigamy and adultery which may arise if an absolute divorce decree is not recognized by sister-states, are not presented by the non-recognition of a judicial separation decree by another state, because under a decree *a mensa et thoro* neither party is permitted to marry another person so that doubt will not arise as to whether the second marriage is valid. However, it is not debatable that serious problems concerning property rights such as dower, curtesy, and right to support do arise.

Although the *in rem* view will promote uniformity, it is advisable to evaluate the conflicting views. Uniformity must not be gained by unreasonable and far-fetched premising. If judicial separation results fundamentally and primarily in a mere permissive living apart—so revocable that the parties can almost at will expunge the whole thing—then what cogency is there in giving it the full effect of an action *in rem*? If, on the other hand, it is an action which destroys the incidental personal and property rights and the obligations arising out of the marital status, thereby substantially affecting the *res*, there is little doubt that it should be treated similarly to the action of absolute divorce which is generally held to be an action *in rem*.

In presenting the cases supporting the *in personam* view our foremost authority is the famous case of *Pettis v. Pettis*. The Connecticut court in this case refused to recognize a New York decree of divorce *a mensa et thoro* against a non-appearing non-resident husband who resided in Connecticut, holding that a divorce *a mensa et thoro* does not affect status and is purely personal. In its opinion the court stated, "Independently of authority a decree that simply creates a terminable abnormal relation between husband and wife cannot be said to affect the underlying marital status."⁶

Some of the cases which seem to support the *in personam* view, point out that a divorce *a mensa et thoro* or judicial separation does not nullify the marriage bond but only allows the parties to live apart. Reconciliation alone is often enough to put an end to the

⁴ See: STUMBERG, CONFLICTS OF LAWS (1937) 291.

⁵ 91 Conn. 608, 101 Atl. 13 (1917)

⁶ *Pettis v Pettis*, 91 Conn. 608, 101 Atl. 13, 17 (1917).

Freeman v Belfer, 173 N.C. 581, 92 S.E. 486 (1917), Supreme Council American Legion of Honor v Smith, 45 N.J. 466, 17 Atl. 770 (1889)

judgment.⁸ Sometimes the judgment for judicial separation serves as a basis for an absolute divorce at the end of a year if the parties are not reconciled, but even in this case, it is stated that twelve months grace is to avoid the necessity of completely dissolving the marriage tie.⁹ The duty to support and maintain continues on the part of the husband. His duty is to provide his wife with sufficient support considering his circumstances and her needs.¹⁰ The wife can not as a *femme sole* maintain an action at law against her husband even though she had such a divorce.¹¹ It has been held that the husband is entitled to curtesy after a divorce *a mensa et thoro*, and the wife to dower, as though there had been no divorce; and on the death of the husband, the wife may claim her distributive share of his personal estate if he dies intestate.¹²

It seems also important to note that divorce *a mensa et thoro*, in some states, will be granted on grounds insufficient to authorize the *in rem* action of absolute divorce.¹³ It is plainly stated in many of the cases that the proceeding for judicial separation depending on different statutes from that of absolute divorce is an entirely different action.¹⁴ These results flow naturally from the historical fact that originally judicial separation did not affect the marriage status to any great extent, because the action was allowed at a time when the sacramental nature of marriage was recognized and there was no action for absolute divorce.¹⁵

In summation of this side of the question, it would seem that the decree merely affects the reciprocal rights and duties of cohabitation without affecting the marital relation materially in any other way. It is of course argued that the right to and the duty of cohabitation are substantially the essence of the marital status. However, in jurisdictions taking the view that reconciliation is enough to put an end to the judgment, it seems that the right of cohabitation is merely suspended and not destroyed. The fact that such a divorce differs by statute from absolute divorce, and is of the two the less destructive is an additional reason for calling it an *in personam* action. It seems reasonable to believe that one applying for judicial separation in a state where absolute divorce is also granted desires something less

⁸ *In re Rudolph's Estate*, 128 Pa. Super. 459, 194 Atl. 311 (1937)
See: *Miller v Clark*, 23 Ind. 370, 373 (1864)

⁹ See: *State ex rel. Stuart v Ellis*, 50 La. Ann. 559, 23 So. 445 (1898)

¹⁰ See: *Gloth v Gloth*, 154 Va. 511, 153 S.E. 879, 887 (1930)

¹¹ *Drum v Drum*, 69 N.J. 557, 55 Atl. 86 (1889).

¹² See: *Supreme Council American Legion of Honor v. Smith*, 45 N.J. 466, 17 Atl. 770, 771 (1889).

¹³ *McClintock v. McClintock*, 147 Ky 409, 144 S.W. 68, 72 (1912).

¹⁴ *Stewart v Stewart*, 105 Md. 297, 66 Atl. 16, 17 (1907) *Schwab v Schwab*, 93 Md. 385, 49 Atl. 331 (1901).

¹⁵ *Pettis v. Pettis*, 91 Conn. 608, 101 Atl. 13 (1917).

than complete separation of marriage ties, whether this be a religious or a social wish.

The attack of those who argue that an action for divorce *a mensa et thoro* is an action *in rem* must necessarily begin with an agreement as to the definition of the marital status or *res*. It is, of course, not a physical thing but rather a position in society plus certain definite rights. These are personal rights, mainly that of consortium, and property rights. Whether it is an *in rem* action or not seems more or less a problem of how complete is the destruction of these rights.

The Supreme Court of the United States seems to give full support to the *in rem* view in *Thompson v. Thompson*.¹⁶ This case holds that a decree for judicial separation granted at the matrimonial domicile on constructive service is entitled to full faith and credit.

The trend of the statutes seems to give the limited divorce the wider effects of the absolute divorce. Statutes in this country often provide the same requirements for limited as for absolute divorce both as to requirements for bringing the suit and as to procedure.¹⁷ It is provided by statute that the decree will operate as a decree for a divorce from the bonds of matrimony except that neither party may marry again during the life of the other.¹⁸ Examples of other extensive effects of the statutes are as follows: in Georgia the wife becomes a *femme sole* as to her earnings, property and liberty; Georgia also provides that the husband does not have to support the wife, if the jury has provided for her sufficiently.¹⁹ Minnesota gives to the wife immediate possession of her real estate;²⁰ statutes in North Carolina provide that when a limited divorce is granted the rights of the husband to curtesy and the wife to dower are barred;²¹ Indiana makes a resumption of marital relations criminal, during the period of the limited divorce.²² The statutes are so varied that a thorough examination proves nothing concrete, except the fact that modern limited divorce statutes do have a tendency to follow those of absolute divorce. It is, of course, definitely established that the right of cohabitation is lost. So, it is quite plausible to conclude from this fact that the husband has lost his right to an action for alienation of affections and also the right to an action for loss of consortium since the actions are based in part on the right of cohabitation. From these facts it would appear that the marital status is so seriously affected that the action should be considered to be *in rem*.

¹⁶ 226 U.S. 551, 57 L. Ed. 347 (1913) 32 Sup. Ct. 127.

¹⁷ GOODRICH, *op. cit. supra* note 2, Sec. 128.

¹⁸ KY. R. S. (1946) Sec. 403.050.

¹⁹ 2 ANN. CODE OF GA. (Parks, 1922) Sec. 2970.

²⁰ 2 MINN. ST. (1941) Sec. 518-19.

²¹ GEN. ST. OF N. C. (1943) Ch. 52-20, 52-21.

²² 2 IND. ST. ANN (Burns, 1933) Sec. 3-1234.

In conclusion the answer to the problem is one of addition rather than one of evaluation. It seems that where most of the marriage ties are preserved except for the suspension of cohabitation which may be resumed upon reconciliation, the action is without doubt *in personam*, in jurisdictions where a great many of the marriage ties are destroyed and the causes and proceedings are the same as in absolute divorce it is logical to say that the action is *in rem*. If the action had remained of as little effect as originally then it would without doubt be an action *in personam*. However, addition of the effects by modern statute to the marriage status categorizes the action as one *in rem*. This is probably the most desirable place for limited divorce in modern law since the historical fear of destroying the marriage ties is rapidly decreasing as evidenced by our increased absolute divorce rate. It is evident that as the limited divorce parallels the action of absolute divorce it becomes more and more an action *in rem*. It is reasonable to suppose that judicial separation will soon duplicate absolute divorce in such a way that it will no longer be needed in the law as a separate action.

The marital status is certainly more than the mere legal relationship of the husband and wife. The personal rights of consortium disappear with the enforced suspension of cohabitation. It is indeed arguable that the destruction of the right to cohabitation alone has such a dire effect on the marital status that fundamentally the marriage fails to exist. We find under modern statutes that most of the property rights such as dower, curtesy and right to support are either seriously affected or completely destroyed. It is evident that the duty the parties have to each other not to remarry is too shallow a link to give to it alone the strength to perpetuate the marriage status. Since the modern limited divorce statutes do so much to destroy the marriage, it is reasonable to say that the status is affected in such a way as to place the action in the *in rem* category.

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