



1939

Conflict of Laws--Jurisdiction to Grant Divorce--Davis v. Davis

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Recommended Citation

Schiff, Phillip (1939) "Conflict of Laws--Jurisdiction to Grant Divorce--Davis v. Davis," *Kentucky Law Journal*: Vol. 28: Iss. 1, Article 13.

Available at: <https://uknowledge.uky.edu/klj/vol28/iss1/13>

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purchaser entered into immediate possession.¹⁴ The purchaser, not the vendor, had the right to immediate possession, and is therefore the proper party to maintain this possessory action.

J. WIRT TURNER, JR.

CONFLICT OF LAWS—JURISDICTION TO GRANT DIVORCE—
DAVIS v. DAVIS.

In 1925 H. was granted a divorce *a mensa et thoro* from W. in the District of Columbia. Subsequently, H. filed a petition in the District of Columbia to have the alimony decree granted in the separation set aside, relying mainly upon a decree of absolute divorce obtained by him in the Circuit Court of Arlington County, Virginia, on grounds which did not constitute grounds for divorce in the District of Columbia. In the Virginia action W. was personally served with process in the District of Columbia. She appeared and filed a plea stating that she appeared "specially and for no other purpose than to file this plea to the jurisdiction of the court." A commissioner in chancery was appointed, and he reported that in his opinion H. was a resident of Arlington County, Virginia, and that the court had jurisdiction to hear and determine the case. After her exceptions to the commissioner's report as contrary to the evidence were overruled, W. did not plead further, and the divorce was granted. *Held*: Decree of the Virginia court must be given full faith and credit by the District of Columbia. *Davis v. Davis*. — U. S. —, 59 Sup. Ct. 3 (1938).

If the petitioner was actually domiciled in Virginia for the period required by the statute in that state, the Virginia decree is valid, and this case states the law under the "full faith and credit clause" of the Constitution.¹

Generally, it may be said that the forum which has jurisdiction to grant divorce is the forum of the matrimonial domicil.² However, it is usually held that the matrimonial domicil is separable for the purpose of divorce.³ The old principle of the law of domestic relations that the

intention of the parties. Payment of taxes and interest imply that occupancy was expected." *Sample v. Lyons*, 69 N. Y. S. 378, 59 App. Div. 456 (1901). See *Welch v. Hover Schiffner Co.*, 75 Wash. 130, 134 P. 526 (1913); *Krakow v. Wille*, 125 Wis. 284, 103 N. W. 1121 (1905).

¹⁴ *Krakow v. Wille*, *supra*, n. 12. See also: *Sample v. Lyons*, 69 N. Y. S. 378, 59 App. Div. 456 (1901).

¹ Art. VI, sec. 1.

² See *Goodrich on Conflict of Laws* (2d ed.) Discussion sec. 123 on "Basis of Jurisdiction for Divorce", (1933).

³ *Cheever v. Wilson*, 9 Wall. (U. S.) 108, 19 L. Ed. 604 (1869); *Chapman v. Chapman*, 129 Ill. 336, 21 N. E. 806 (1889); *Jenness v. Jenness*, 24 Ind. 355, 87 Am. Dec. 335 (1865); *Sworski v. Sworski*, 75 N. H. 1, 70 A. 119 (1908); *Collin v. Reed*, 55 Pa. 375 (1867); *Craven v. Craven*, 27 Wis. 418 (1871).

domicil of the husband is that of the wife⁴ has been modified, so that now a wife may acquire a residence or domicil separate from that of her husband for the purposes of jurisdiction in actions for divorce,⁵ in cases where the husband has been guilty of wrongful conduct in the marital relation,⁶ or where the marital tie has been broken by a separation agreement.⁷ The wronged spouse may acquire this separate domicil either by retaining a home in the state or country of the previous matrimonial domicil, after the other has acquired a separate home elsewhere,⁸ or by the acquisition of a new separate domicil in another state or country.⁹ In the instant case, the fault of the wife is shown by the fact that a degree of divorce *a mensa et thoro* was granted to the husband in the District of Columbia.

The principal difficulty presented by this decision is with relation to the discussion of the court as to why the Virginia court had jurisdiction over the parties so that it had power to render a valid decree. It may be said that the decision of the Virginia court as to the husband's domicil, since it was contested, was to be regarded as *res adjudicata* so that the question could not be re-litigated in a collateral attack on the Virginia decree,¹⁰ and that, therefore, Virginia had jurisdiction over the res and the right to grant the divorce. However, as was stated above, the respondent appeared *specialty* in the Virginia action. It is well settled that a special appearance for a specific pur-

⁴ Atherton v. Atherton, 181 U. S. 155, 45 L. Ed. 794 (1901); Anderson v. Watts, 138 U. S. 694, 34 L. Ed. 1078 (1891); Town of Watertown v. Greaves (C. C. A. 1st.), 112 Fed. 183 (1901); Stouse v. Leipfe, 101 Ala. 433, 14 So. 667 (1897); Minick v. Minick, 111 Fla. 469, 149 So. 483 (1933); Parrett v. Palmer, 8 Ind. App. 356, 35 N. E. 713 (1893); George v. George, 190 Ky. 706, 228 S. W. 408 (1921); Re Daggett, 255 N. Y. 243, 174 N. E. 641 (1931). See also Am. Law Inst. Restatement, Conflict of Laws, sec. 27.

⁵ Williamson v. Osenton, 232 U. S. 619, 58 L. Ed. 758 (1914); Haddock v. Haddock, 201 U. S. 562, 50 L. Ed. 867 (1909); Cheever v. Wilson, 9 Wall. (U. S.) 108, 19 L. Ed. 604 (1869).

⁶ Williamson v. Osenton, supra n. 5; Haddock v. Haddock, supra n. 5; Cheever v. Wilson, supra n. 3; Hill v. Hill, 166 Ill. 54, 46 N. E. 751 (1897); Norris v. Norris, 224 Ala. 628, 141 So. 672 (1932); Jenness v. Jenness, supra n. 3; Hall v. Hall, 102 Ky. 297, 43 S. W. 429 (1897); Colvin v. Reed, supra n. 3.

⁷ Aspinwall v. Aspinwall, 40 Nev. 55, 160 P. 253 (1916); Perrin v. Perrin, 180 Misc. 408, 250 N. Y. S. 588 (1931). In connection with footnotes (6) and (7), see also Am. Law Inst. Restatement, Conflict of Laws, sec. 113, which provides that a state where one party is domiciled has jurisdiction to grant a divorce if the spouse not domiciled in the state, "(1) has consented that the other spouse acquire a separate home, or (ii) by his or her misconduct has ceased to have the right to object to the acquisition of such a separate home.

⁸ See annotation, 39 A. L. R. 711.

⁹ Haddock v. Haddock, supra n. 5; Barber v. Barber, 21 How. (U. S.) 582, 16 L. Ed. 226 (1858); Dean v. Dean, 241 N. Y. 240, 149 N. E. 844 (1925).

¹⁰ See discussion in Comment, 6 Chicago Law Rev. 293 (1939); Rest. Conflict of Laws §451.

pose does not waive the service of process,²¹ but in the instant case, no discussion of the service of process is to be found. All that is to be found in this connection is a rather vague discussion of the effect of the respondent's special appearance. This is followed by a hasty, *non sequitur* conclusion that the special appearance was of the same effect as a general appearance, and in its decision (based on the general proposition that when a defendant in a divorce action voluntarily submits himself to the jurisdiction of the court by a general appearance, the necessity for the service of process is obviated),²² the court concludes that a valid decree was rendered by the Virginia court.

However, despite this faulty reasoning, it is submitted that a just result was reached in this case, for the reason that there was a sufficient service of process to give the Virginia court jurisdiction to grant a divorce. A divorce action is considered *quasi in rem*, and consequently the Virginia Code provides for service by publication on non-residents in divorce actions.²³ It has been held in Virginia that the real purpose to be served by process is to apprise the adverse party of the nature of the proceeding against him.²⁴ There is also authority to the effect that personal service outside the state of suit is equivalent to service by publication.²⁵ This being the law, it would seem that the Supreme Court could have applied it to the facts of the instant case and could in that way have reached a correct as well as just result. As the question of domicil has been litigated and decided in favor of the husband, and since the fault of the wife was established by the decree rendered against her in the District of Columbia, Virginia has jurisdiction over the res, and, therefore, authority to grant the divorce if the notice statute has been complied with. Since the respondent here was personally served in the District of Columbia, both the provisions of the publication statute and the policy of notice in the law have been complied with, and the Virginia court had jurisdiction to grant the divorce.

PHILLIP SCHIFF.

INSURANCE—"PARTICIPATING IN AERONAUTICS" IN AIRCRAFT CLAUSE, AS APPLICABLE TO A PASSENGER.

The insured, a farmer, was killed in the crash of an airplane in which he was a passenger. He had no control over the flight of the plane, and was not connected with aeronautics in any business way. The policy under which recovery for his death was sought provided:

²¹ Bowers, *Civil Process and Its Service*, sec. 19, et seq. (1927).

²² *In re Austin's Estate*, 173 Mich. 47, 138 N. W. 237 (1912); *Freeman v. Freeman*, 126 App. Div. 601, 110 N. Y. S. 686 (1908). However, the general rule is that there can be no waiver by appearance where neither party is domiciled in the state of the forum. *Cheever v. Wilson*, supra n. 3; *Lister v. Lister*, 88 N. J. Eq. 30, 97 Atl. 170. Some courts refuse to recognize any voluntary appearance whatever: *Gondas v. Gondas*, (N. J. Eq.) 134 Atl. 615 (1926).

²³ Va. Code 1930, sec. 6042.

²⁴ *Scott v. Scott*, 142 Va. 31, 128 S. E. 599 (1925).

²⁵ Bowers, *op. cit.*, sec. 295, 296.