University of Miami Law Review

Volume 6 | Number 2 Article 13

2-1-1952

Domestic Relations -- Ancillary Action for Foreign Divorce Enjoined

more recent segregation-discrimination cases and similar Virginia statutes[24] was soundly reasoned and ably supported. It is the dissent's view that though the federal courts decided certain recent cases[25] under the Interstate Commerce Act,[26] their language defined discrimination *generally*[27] to be an abuse of the right of the individual to equal protection of the laws,[28] and thus applicable to *intra*state[29] commerce. If the criterion of discrimination is to be the effect on the individual rather than the group, the distinction between interstate and intrastate traffic is immaterial. Since an interstate Negro passenger would not be refused this seat,[30] it is discrimination to this individual petitioner, an intrastate passenger, to be refused this seat.[31] Virginia has an almost similar statute[32] which regulates segregation on electric vehicles but which prohibits contiguous seating *"unless or until"*[33] all of the other seats . . . shall be occupied."[34] The dissent treats all segregation statutes as *pari materia* so that the "unless or until" limitation should apply to all.[35] As a result of this reasoning the dissent is able to hold for the petitioner, and still uphold the validity of the statute.

The dissent in setting forth the definition of discrimination as being an abuse of the rights of the individual, at the same time upholding the constitutionality of segregation statutes, creates a conflict within its own opinion, since it would seem that individual rights per se are incompatible with segregation. However, this is unimportant since the constitutionality of this statute was never questioned. Should this case come before the United States Supreme Court it would seem to present a proper opportunity for that Court to sustain the dissent concordantly with its present trend.

DOMESTIC RELATIONS — ANCILLARY ACTION FOR FOREIGN DIVORCE ENJOINED

Pending final judgment in a separation action brought by defendant's wife in a New York court, wherein defendant had appeared generally, defendant established residence in the Virgin Islands where he sued plaintiff

24. VA. CODE ANN., §§ 56-390, 56-391, 56-392 (1950) (regulating segregation on electric railways); VA. CODE ANN., §§ 56-396, 56-397 (1950) (regulating segregation on steam railroads); VA. CODE ANN., §§ 56-452, 56-453 (1950) (regulating segregation on steamship lines).

25. Henderson v. United States, *supra* note 12; Mitchell v. United States, *supra* note 7; Chance v. Lambeth, *supra* note 20.

26. 24 STAT. 380 (1887), 49 U.S.C. § 3(1) (1946).

27. Italics supplied by writer.

28. Commonwealth v. Carolina Coach Co. of Virginia, *supra* note 19 at 579.

29. Italics supplied by writer.

30. Morgan v. Commonwealth, 328 U.S. 373 (1946) (segregation statute in instant case held unconstitutional on an interstate commerce basis). In New v. Atlantic Greyhound Corp., 186 Va. 726, 43 S.E.2d 872 (1947), it was held that the Morgan case only applied to interstate passengers, not intrastate passengers.

31. Commonwealth v. Carolina Coach Co. of Virginia, *supra* note 19 at 580.

32. VA. CODE ANN., §§ 56-390, 56-391, 56-392 (1950).

33. Italics supplied by writer.

34. VA. CODE ANN., § 56-392 (1950).

35. Commonwealth v. Carolina Coach Co. of Virginia, *supra* note 19 at 581.

for divorce. Alleging the territorial residence to be sham, plaintiff moved the New York court to enjoin the divorce as harmful to her separation action because she would be burdened with proving the invalidity of the divorce, if obtained. Defendant's attorney made a special appearance contesting the New York court's jurisdiction to order injunctive relief as not being incidental to the issues in the separation action, and contended that defendant's general appearance in the separation action did not give the court jurisdiction to restrain the territorial divorce. *Held*, that the injunction should issue. *Garvin v. Garvin*, 302 N.Y. 96, N.E.2d 721 (1951).

In order for a court to render a valid personal judgment, jurisdiction must be obtained over the defendant's person.[1] A general appearance brings the defendant before the court for all proceedings incidental to the suit.[2] He is then bound by every subsequent order in the cause[3] and cannot make a special appearance thereafter to question the court's jurisdiction over him.[4] A court of equity having once assumed jurisdiction may retain it generally,[5] and such jurisdiction will not be defeated by subsequent events, even though they are of such a character as would have prevented jurisdiction from originally attaching.[6] So, where jurisdiction of the person is obtained, it is not defeated by a subsequent removal of the person beyond the jurisdiction of the court.[7]

It is well recognized that a court of equity has the power to restrain persons within its jurisdiction from prosecuting a foreign suit.[8] This is derived from its more general authority to restrain its citizens from doing any act contrary to equity and good conscience.[9] The decree of the court is not directed to the foreign court but proceeds *in personam* against the defendant to enjoin him from carrying on an inequitable, harassing and vexatious suit

1. Mexican Cent. Ry. v. Pinkney, 149 U.S. 194 (1893); Noxon Chemical Products Co. v. Leckie 39 F.2d 318 (3rd Cir.) (notification by lawful process, or by voluntary appearance), *cert. denied sub nom.* Robb v. Noxon Chemical Products Co., 282 U.S. 84 (1930).

2. Nations v. Johnson, 24 How. 195 (U.S. 1860); Durabilt Steel Locker Co. v. Berger Mfg. Co., 21 F.2d 139 (N.D. Ohio 1927).

3. Michigan Trust Co. v. Ferry, 228 U.S. 346 (1913); Ridder v. Ridder, 175 Misc. 84, 22 N.Y.S.2d 749 (Sup. Ct. 1940).

4. Karpf v. Karpf, 260 App. Div. 701, 23 N.Y.S.2d 745 (1st Dep't 1940); see Woodside v. United States, 60 F.2d 823, 825 (4th Cir. 1932).

5. See Alexander v. Hillman, 296 U.S. 222, 242 (1935); Camp v. Boyd, 229 U.S. 530, 552 (1913); United States v. Union Pac. Ry., 160 U.S. 1, 52 (1895).

6. See Highway Const. Co. v. McClelland, 15 F.2d 187, 188 (8th Cir. 1926); Wright v. Price, 226 Ala. 468, 470, 147 So. 675, 676 (1933).

7. Ridder v. Ridder, *supra* note 3; Lassiter v. Wilson, 207 Ala. 669, 93 So. 598 (1922).

8. Moran v. Sturges, 154 U.S. 256 (1894); Cole v. Cunningham, 133 U.S. 107 (1890); Ippolito v. Ippolito, 3 N.J. 561, 71 A.2d 196 (1950); *see* Royal League v. Kavanaugh, 231 Ill. 175, 183, 84 N.E. 178, 180 (1908); Notes, 13 BROOKLYN L. REV. 148, 149 (1947), *When Courts of Equity Will Enjoin Foreign Suits*, 27 IOWA L. REV. 76 (1941).

9. O'Haire v. Burns, 45 Colo. 432, 101 Pac. 755 (1909); *see* Royal League v. Kavanaugh, *supra* note 8.

in another jurisdiction.[10] Inequitable circumstances such as hardship, fraud, or oppression create a probability of irreparable injury warranting an injunction once the foreign suit has been instituted.[11] Injunctions have been issued as a matter of public policy,[12] upon false statements of residence in another state,[13] to protect substantive rights of one domiciled in the state in which the injunction is sought,[14] and to avoid the annoyance and expense made necessary by defending the foreign action.[15]

A migratory spouse may be enjoined from prosecuting a foreign divorce,[16] particularly when ancillary to a suit for alimony or separation.[17] Injunctive relief protects the marital rights of the would-be divorcee,[18] inasmuch as an *ex parte* foreign divorce decree is *prima facie* valid[19] and is entitled to full faith and credit[20] in other jurisdictions.[21] However such a decree may be

10. See Adams v. Adams, 180 Misc. 578, 579, 42 N.Y.S.2d 266, 267 (Sup. Ct. 1943); Gwathmey v. Gwathmey, 116 Misc. 85, 88, 190 N.Y. Supp. 199, 201 (Sup. Ct. 1921).

11. *Ex parte* Crandall, 52 F.2d 650 (S.D. Ind.), *aff'd*, 53 F.2d 969 (7th Cir. 1931), *cert. denied*, 285 U.S. 540 (1932).

12. Chicago, M. & St. P. Ry. v. Schendel, 292 Fed. 326 (8th Cir. 1923).

13. Carr v. Carr, 5 N.Y.S.2d 386 (Sup. Ct.), *aff'd*, 267 App. Div. 980, 48 N.Y.S.2d 691 (1st Dep't 1944); *see* McDonald v. McDonald, 182 Misc. 1006, 1007, 52 N.Y.S.2d 385 (Sup. Ct. 1944); Smith v. Smith, 364 Pa. 1, 70 A.2d 630, 632 (1950) ("Since equity has no power to restrain a person from obtaining a lawful divorce, it follows that an injunction may only be granted where the spouse has not established a bona fide domicile in the state in which the divorce is sought").

14. N.Y. CIV. PRAC. ACT § 878, sub. 1 (1920) ("Where it appears that the defendant, during the pendency of the action is doing . . . an act in violation of the plaintiff's rights respecting the subject of the action, and tending to render the judgment ineffectual, an injunction order may be granted to restrain him therefrom"); Barzilay v. Barzilay, 75 N.Y.S.2d 428 (Sup. Ct. 1947); Pereira v. Pereira, 272 App. Div. 281, 70 N.Y.S.2d 763 (1st Dept. 1947); Allan v. Allan, 63 N.Y.S.2d 924 (Sup. Ct. 1946); Kempson v. Kempson, 58 N.J.Eq. 94, 43 Atl. 97 (1899); *see* Wehrhane v. Peyton, 134 Conn. 486, 493, 58 A.2d 698, 702 (1948); Ippolito v. Ippolito, *supra* note 8, 71 A.2d at 198.

15. Greenberg v. Greenberg, 18 App. Div. 104, 218 N.Y. Supp. 87 (1st Dep't 1926); see Note, 36 ILL. B.J. 191, 192 (1947). *But see* Chicago, M. & St. P. Ry. v. Schendel, *supra* note 1 at 334.

16. Pereira v. Pereira, *supra* note 14, Ciacco v. Ciacco, 50 N.Y.S.2d 398 (Sup. Ct. 1944); Holmes v. Holmes, 46 N.Y.S.2d 628 (Sup. Ct. 1944); Oltarsh v. Oltarsh, 181 Misc. 255, 43 N.Y.S.2d 901 (Sup. Ct. 1943); Selkowitz v. Selkowitz, 179 Misc. 608, 40 N.Y.S.2d 9 (Sup. Ct. 1943); Greenberg v. Greenberg, *supra* note 15; Ippolito v. Ippolito, *supra* note 8. *But see McDonald v. McDonald*, *supra* note 13 (where residence in the divorce state appears bona fide, the injunction will be denied).

17. Lawrence v. Lawrence, 184 Misc. 515, 53 N.Y.S.2d 288 (Sup. Ct. 1945); Maloney v. Maloney, 51 N.Y.S.2d 4 (Sup. Ct. 1944); Palmer v. Palmer, 268 App. Div. 1010, 52 N.Y.S.2d 383 (3rd Dep't 1944); Adams v. Adams, 180 Misc. 578, 42 N.Y.S.2d 266 (1943).

18. N.Y. CIV. PRAC. ACT § 878 (1920), Palmer v. Palmer, *supra* note 17 (tends to render ineffective any forthcoming judgment in the pending separation proceeding).

19. Williams v. North Carolina, 325 U.S. 226, *rehearing denied*, 325 U.S. 895 (1945); Esenwein v. Pa. *ex rel.* Esenwein, 325 U.S. 279 (1945); Zekowski v. Zekowski, 191 Misc. 914, 80 N.Y.S.2d 579 (Sup. Ct. 1948); Dalton v. Dalton, 270 App. Div. 69, 59 N.Y.S.2d 68 (1st Dep't 1945); Herman v. Herman, 57 N.Y.S.2d 614 (Sup. Ct. 1945).

20. U.S. CONST. Art. IV, § 1; see U.S.C. § 1738 (1948) [formerly 2 STAT. 298 (1804), U.S.C. §§ 687, 688 (1940)] where the rights given to the states by the full faith and credit clause were extended to territories of the United States), Butler v. Butler, 179 Misc. 651, 40 N.Y.S.2d 353 (Sup. Ct. 1943) (Hawaiian divorce given full faith and credit in New York).

21. Williams v. North Carolina, 317 U.S. 287 (1942).

later reexamined in the courts of a sister state on the jurisdictional fact of domicile.[22] The burden is cast upon the party challenging the decree to show that the divorcing spouse was not a bona fide resident[23] of the state in which the divorce was granted.[24] Cognizant of the aforementioned burden the court granted the injunction in the instant case[25] as an incident to the separation action.

The decision apears to be a natural outgrowth of *Williams v. North Carolina*,[26] inasmuch as a foreign divorce if granted would adversely affect the wife's marital status and tend to render ineffectual a separation judgment in the wife's favor. Therefore it would seem that the migratory spouse is deprived of a forum to test the question of his bona fide residence in another jurisdiction. However, after *final* judgment in the separation suit *Garvin v. Garvin*[27] does *not* preclude the husband from proving a bona fide domicile in the Virgin Islands or elsewhere, and subsequently instituting a divorce action.

EQUITY — INJUNCTION AGAINST CRIMINAL PROSECUTION PROPER WHERE STATUTE ALLEGEDLY VIOLATED FOUND INAPPLICABLE

Plaintiff sought an injunction to restrain the sheriff from confiscating a miniature bowling alley as a gambling device containing an "element of chance or unpredictable outcome."[1] The chancellor's refusal to grant an injunction was reversed. *Held*, equity will enjoin a criminal prosecution interfering with a machine where its chance or unpredictability is predicated on the player's skill instead of its mechanism, rather than undermine the purpose of a statute by drastically construing it. *Deeb v. Stoutamire*, 53 So.2d 873 (Fla. 1951).

Traditionally, it has been stated that equity has no jurisdiction to enjoin prosecutions under statutes defining criminal offenses.[2] The rationale for this doctrine has been that the enforcement of the criminal law is a

22. Williams v. North Carolina, *supra* note 19.

23. See the definition of "bona fide resident" in Sneed v. Sneed, 14 Ariz. 17, 22, 123 Pac. 312, 314 (1912) (". . . one who is in the state to reside permanently, and who, at least for the time being, entertains no idea of having or seeking a permanent home elsewhere"); see also Caheen v. Caheen, 233 Ala. 495, 496, 172 So. 618, 619 (1937) ("domicile" and "residence" are used interchangeably in divorce statutes); Williams v. North Carolina, *supra* note 19 at 229 (where 'domicile" was defined as a "nexus between person and place of such permanence as to control the creation of legal relations and responsibilities of the utmost significance").

24. See note 19 *supra*.

25. Garvin v. Garvin, 302 N.Y. 96, 96 N.E.2d 721 (1951); Notes, 25 ST. JOHN'S L. REV. 364, 15 ALBANY L. REV. 29 (1951).

26. 317 U.S. 287 (1942).

27. 302 N.Y. 96, 96 N.E.2d (1951).

1. FLA. STAT. § 849.16 (1949).

2. CHAFEE, SOME PROBLEMS OF EQUITY 143 (1950); MCCLINTOCK, EQUITY 469-470 (2d ed. 1948); 4 POMEROY, EQUITY JURISDICTION 978 (5th ed., Symons, 1941).