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Notes and Comments

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NOTES AND COMMENTS

IN RE NEW TRIALS ON THE ISSUE OF DAMAGES ALONE*

In Volume 31, No. 4, the April 1954 edition of DICTA, there appeared an article by Kenneth M. Wormwood entitled "New Trials on the Issue of Damages Alone."

The viewpoints expressed by Mr. Wormwood, of course, represent one side of a controversial issue. The other side of this issue appeared in a comment upon Mr. Wormwood's article which was printed at 14 N.A.C.C.A. Law Journal, page 411, published in November, 1954. The N.A.C.C.A. Edtior's comment was as follows:

> The spirit and underlying purpose of this paper are brought out in the opening line: "Only recently has the general public awakened to a real danger affecting our economic system today." Excessive verdicts, we are told, "soon add up to a staggering total." The writer goes on: "Insurance companies are now attempting to combat this situation through an educational program such as advertisements calling the public's attention to the fact that in the long run it is the individual citizen who pays the bill through an increase in his insurance premiums. Magazines have now started to run articles attempting to educate the public along this line." In other words, the paper is part of a systematic propaganda against verdicts awarding damages to the extent of full reparation of injuries suffered. One recent practice of the courts which he considers a threat to our economic system is giving an instruction advising the jury they may take into consideration the present purchasing power of the dollar. But the supposed abuse to which the paper is chiefly directed is granting of new trials on the issue of damages alone. We are referred in particular to *Norfolk S. R. Co. v. Ferebee,* 238 U.S. 269, where Mr. Justice Lamar, in an opinion affirming a judgment of a state court under the Federal Employers' Liability Act, in which a new trial had been granted solely on the issue as to damages, held that "splitting of the issue and granting a partial new trial" did not deprive the defendant of a federal right. Defendant had contended that the courts "should not be permitted to administer the Employees' Liabliity Act in piecemeal." But at this time the movement for modernizing procedure and so, among other things, min-

* This comment is presented by Judge Omar E. Garwood, President of the Association of Colorado Claimants' Attorneys which is affiliated with the National Association of Claimants' Compensation Attorneys.

imizing the delay and expense of new trials, had little more than begun and courts were suspicious of such things, new to their experience, as new trials other than of cases as a whole.

Hence Mr. Justice Lamar said obiter that the practice of new trial on the one issue was "not to be commended." The courts in this country had begun in the present century to grant new trials on one issue, as had been done already for a generation in England. But the practice was taken over and established in America before the era of large verdicts which so disturb the writer and is part of the general simplification and improvement of procedure of which the Federal Rules and the Rules of Court in an increasing number of states today are examples. It won't do today to say that the power to limit a new trial to a particular issue is to be "exercised with great caution." It is enough that if in a particular case the court can see that the whole verdict should be overturned for some error or infirmity affecting the verdict as a whole it should set the whole verdict aside.

The writer is troubled because the trend seems to be that large verdicts by juries are generally not reversed by the appellate court, whereas verdicts awarding inadequate damages are set aside and unfortunately new trials are too often awarded on the issue of damages alone. The process of wearing out an injured plaintiff by repeated trials and appeals is to be preserved as a safeguard of our economic system. A minimum of damages to be paid by the insurer is to weigh more than the general security.

VAN SCHAACK & CO. V. PERKINS:[1] *Liability of landlord for dangerous conditions of the premises of which he had no notice.*

This is an action in tort for personal injuries suffered by a tenant resulting from the negligent act of an agent or servant of the owner and operator of the building.

Plaintiff, a woman attorney who was 73 years of age, maintained an office in a building owned and operated by the defendant. She suffered a fractured humerus and other injuries from a fall which occurred in a ladies' rest-room in the building at about 6:00 P.M. on a work day. Plaintiff brought this action claiming damages for permanent disability, loss of earnings, and other expenses.

Evidence admitted at the trial showed that the building janitor had left the ladies' rest-room to permit plaintiff to enter, and upon leaving, had left a container with rest-room supplies and an open-top can of liquid soap in the center of the floor of the room. No soap was on the floor when the janitor left the supplies,

[1] Colorado Bar Association, Adv. Sheet 17303, Page 392 (June 28, 1954).

but upon returning to aid plaintiff after her fall, he found the soap container over-turned and the soap soaking plaintiff's skirt as she lay on the floor. No person other than the plaintiff or janitor was in or near the rest-room during or immediately preceding the mishap.

The jury returned a verdict for plaintiff on which judgment was entered by the trial court. Defendant brought the case to the Supreme Court for review on a writ of error, contending the evidence was insufficient to warrant submission to a jury because "it failed to establish defendant had any notice of the dangerous condition prior to the injury"; was no more consistent with negligence on defendant's part than with due care; and was as indicative of negligence on plaintiff's part as of negligence on defendant's part. Defendant also argued that the trial court erred in refusing to instruct the jury on how to determine the "present value of future decreased earning capacity" by taking into consideration the effect of any pre-existing disease and what the "effect of the natural course of such disease would have on such earning capacity." [2]

The evidence showed that plaintiff was suffering from arteriosclerosis prior to the mishap, but this was a disease common to persons over 50 years of age and not necessarily disabling. The only concrete evidence on record concerning plaintiff's physical condition prior to the mishap showed that she was in good health for a woman of her age; that she was actually engaged in the practice of law; and that she had been making her living at it. Likewise, it was undisputed that, after the accident, plaintiff went into physical and mental decline and had to retire from her profession and hadn't worked since. Defendant produced no evidence to the contrary, neither lay nor medical.

Two issues were presented for determination by the Supreme Court:

> 1. Under the circumstances present, was it necessary for plaintiff to prove the defendant, owner and operator of the building, had actual notice of the alleged dangerous condition, or that the condition existed for so long a time that they would be charged with notice?
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> 2. Did the trial court err in refusing to give an instruction tendered by counsel for defendant relative to the measure of damages recoverable by plaintiff?

The Court, by unanimous decision, answered both of these questions in the negative. It based its decision of the first question on the rule of law as found in numerous cases which state "when a landlord retains control of portions of building for the use and benefit of all the tenants, he is under a duty to exercise reasonable care to keep these portions in safe condition for use of the ten-

[2] *Supra*, note 1, P. 394.

ants." [3] The holding on the second question was an arbitrary one in which the Court said "suffice it to say that our Court, to our knowledge, never has held such an instruction executed in an action for personal injuries involving lost future earnings. The jury could only have been confused by that language." [4]

The decision of this case holds in effect that owners of a building do not need notice of an existing dangerous condition before becoming liable for injuries to a tenant when the condition was caused by the negligence of an agent. Furthermore, in an action for personal injuries involving lost future earnings, it is not essential that an instruction be given to determine the "present value of future decreased earning capacity."

There are numerous cases, in addition to those cited in the Court's decision in this case, which support the Court's holding as to the landlord's liability on varying theories.[5] However, none come clearly within the rule that "owners of a building do not need notice of an existing dangerous condition before becoming liable for injuries to a tenant when the condition was caused by the negligent act of an agent."

The Louisiana Court of Appeals (1938) held in *Thomas v. Harmon,* 178 So. 690, that unless an injured person occupies the position of lessee or is otherwise lawfully on the premises, the landlord is not liable for injuries sustained because of failure to keep the premises in a safe condition.

In *C. W. Simpson Co. v. Langley,* 76 U.S. App. D.C. 365, 131 F. (2d) 869, it was held that the owner of an apartment building owes a duty to those persons lawfully using approaches and entrances over which the owner has the right of control to exercise ordinary care, *after notice or reasonable opportunity for notice,* to keep them free from either temporary or permanent conditions of danger. In *Le Vonas v. Acme Paper Board Co.,* 148 Md. 16, 40 A. (2d) 43, it was held that a property owner must exercise care that his property is so used and managed by his own servants or by an independent contractor that the mode of conducting his work will not cause injury to servants or others.

The case of *Monsour v. Excelsior Tobacco Co.,* (Mo. Appeals), 115 S.W. (2d) 219, held that knowledge of the defect or danger is not a necessary element of negligence where the act or omission, in and of itself, involves a violation of duty where there is an absolute duty on the owner or person in charge of the property to keep it in a safe condition.

These cases establish the precedent that liability exists for not keeping the premises in safe condition, and that notice or

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[3] Robinson v. Belmont-Buckingham Holding Co., 94 Colo. 534, 31 P. (2d) 918; Frazier v. Edwards, 117 Colo. 502, 190 P. (2d) 126; Reiman v. Moore, 30 Cal. App. (2d) 306, 86 P. (2d) 156; Simmons v. Pagones, 66 So. Dak. 296, 282 N.W. 257; Scibek v. O'Connell, 131 Conn. 557, 41 A. (2d) 251; Henry v. First Nat. Bank of Kansas City, (Mo. Appeals), 115 S.W. (2d) 121; Butler v. Maney, 146 Fla. 33, 200 S. 226.

[4] *Supra,* note 1, P. 395.

[5] 29 Boston Law Review 423-6 (1949).

knowledge are not necessary where an absolute duty is owed to keep premises in a safe condition. No case prior to the principal case appears to involve a situation with the additional element of negligence on the part of an agent or servant. It would appear that this point might have been argued on the basis of the doctrine of respondeat superior since "a master is subject to liability for physical harm caused by the negligent conduct of servants within the scope of employment," [6] and "janitors whose jobs are confined to the performance of manual acts on the premises under the owner's supervision come within the definition of a servant." [7]

A number of cases appear to hold contra to the principal case, although they are distinguishable. In those cases the obstruction or element of danger does not appear to have been created or caused by an agent or servant. For example, the case of *Laflin v. Lomas & Nettleton Co.*, 127 Conn. 61, 13 A. (2d) 760, held that the owner of an apartment building was not liable for injuries allegedly received by a tenant falling over a toy automobile on a step at the outer entrance of the building, where there was no basis for finding that the automobile had been in the position that it was in at the time of the accident for sufficient time that the owner should have had notice of it. There was no evidence to show that the dangerous condition was caused by a servant or agent.

In *McGrew v. Thompson,* 353 Mo. 856, 184 S.W. (2d) 994, it was held that one is not chargeable with negligence in failing to discover or remedy a defect or danger in his property which has not existed for a sufficient time to charge him with the duty of discovering it. And *McKellar v. Pendergast,* 68 Cal. App. (2d) 485, 156 P. (2d) 950, held that a landlord is only responsible for not removing a dangerous foreign substance brought upon the premises by *others* if the landlord actually knew of the presence of such substance, or if it had been present for a sufficient length of time that he should have known thereof.

Also as to transitory dangers created by the tenants or *others* such as articles left on the stairs, it was held that the lessor is liable only where he has notice of the condition, or where it has continued for so long that he is chargeable with negligence in failing to remove it. *Inglehardt v. Mueller*, 156 Wis. 609, 146 N. W. 808 (1914).

These latter two cases would only be applicable if the word "others" could be construed to include a servant or agent. However, from the cases it is not clear that the word could be interpreted or extended since under the doctrine of respondeat superior it would then be the equivalent of the lessor or landlord having created the dangerous condition himself. Since the rules of these cases include "the lessor is liable only where he has notice," it would appear quite obvious that it would not apply to an agent or servant since there would then be no question of the lessor being charged with notice.

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[6] Restatement of Agency, Section 243.
[7] *Ibid*, Section 1c.

This holding appears to be consistent with the current trend of broadening insurance and security programs. And on the basis of public policy it would appear that this decision is sound. The law as developed in this case will tend to lessen the number of such incidents and accidents by inducing employers to better choose, instruct, and supervise their employees in performance of their duties and obligations so as to safeguard the public as well as to secure their own purses.

RUSSELL C. GUMMIN.

TAXATION: *The Use of the Net Worth Theory in Criminal Prosecutions for Income Tax Evasion.*—Recently, on December 6, 1954, the United States Supreme Court announced its decisions in four companion cases, all of them involving prosecutions for evasion of Federal income taxes. Notably, there was a dissent (without opinion) in only one of the four decisions, the other three were unanimous; in each instance the taxpayer's conviction was affirmed; and, most important, the net worth approach, when properly substantiated, was confirmed as a method of proof.

The leading case of the four was *Holland v. United States*, ... U.S. ....., 99 L. ed. (Advance p. 127), 75 S.Ct. 127. In it, Mr. Justice Clark, who wrote all four of the opinions, took the occasion to discuss the net worth method, and to define the limits of its use. The prosecution was, of course, the United States; the defendants, husband and wife, were the proprietors of a restaurant in Golden, Colorado. The defendant taxpayers were convicted of evading taxes on their 1948 income. The charge was under Section 145 (b) of the Internal Revenue Code then in effect which provided penalties for any person who wilfully failed to account truthfully for and pay taxes due. This section is carried over into the 1954 Code as Section 7202. Specifically, the charge was that while the taxpayers reported a tax liability of $1,532.52 on income of $11,211.42, in truth and in fact, their actual taxable income was $29,948.16 upon which the tax liability was $7,518.88. The Government sustained the burden of proof necessary to convict by showing that the taxpayers' net worth resulting from taxable income had increased in amounts greater than those reflected in their tax returns.

Net worth, in a deceptively simple definition, is net assets, i.e., excess of assets over liabilities. The Government, in tax evasion prosecutions, endeavors to establish a definite net worth of the taxpayer at a certain date, the date being the beginning of the prosecution period. Similarly, a net worth figure must be established at the end of the prosecution period. To the difference between these two amounts is added the taxpayer's nondeductible expenses. If this sum is greater than the taxable income reported by the taxpayer, the Government will contend that the excess is unreported taxable income. That is, it will so contend if the excess is not explainable otherwise. The brevity of the foregoing is dissembling, and will be expanded upon later.

This method proof is not new, and first came into prominence in *Capone v. United States,* 51 F. (2d) 609. The story is told that then-President Hoover was outraged by the continued existence-at-large of notorious gangsters, and was insistent that these men be brought to account in some manner. As a result of its seeming inability to succeed with criminal prosecution in any other manner, the Government fell back upon income tax evasion with the resultant well-known success. The fact that gangsters of that era did not keep accounting records plus the taciturnity of available witnesses forced the prosecution to proceed on the basis that the defendant was living in a manner not consistent with his reported means. Thus, the net worth theory.

For a number of years, it was used only in cases where the deficiencies were obviously large, and where no records were kept. Coincident, however, with the increased tax rates of recent years was the increase in tax evasion. This dissonant concomitant was met, naturally, with increased governmental activity against the evaders, and with an increased use of the net worth method as a basis of proof. Because of this increased use even where the alleged deficiency was comparatively small and where accounting records had been maintained, the Supreme Court utilized the *Holland* case for "a consideration of the entire theory."

The starting point in the *Holland* case was the Government computation of the taxpayers' net worth to be some $19,000 on January 1, 1946. Three years later, the Government computed their net worth, based on proven purchases and investments of record, to be $142,300, an increase of $113,300. For the same period of time, the taxpayers reported only $31,300 on their tax returns. The indictment contained three counts of evasion, one for each of the three years from 1946 to 1948; the jury acquitted on the first two, and convicted on the third. In answer to the contention that the excess was unreported taxable income, defendants replied that the Government's net worth statement was inaccurate, that it failed to include an accumulation of cash of $113,000, that it failed to include all of the taxpayers' stockholdings, and that the taxpayers' actual opening net worth was $157,000. Clearly enough, if the taxpayer cannot show that increases in net worth are from nontaxable sources such as gifts, loans or inheritances, then it must be shown that the Government's opening net worth figure is far too low.

The defense with respect to the stockholdings was disposed of easily enough. Stock valued at $29,650 had been included in gross assets and stock of that same value was reported sold on the 1946 return; thereafter, no other stock transactions nor dividend receipts were shown on any returns. In addition, the defendant-husband had told an agent that he had not dealt in stocks since 1946. The accumulation of cash was a different matter, however, and a summary of the Government's proof is some indication of the tremendous amount of work necessary in the preparation of these cases. First, a review of the defendants' income tax

records back to 1913 showed either no taxable income or nominal amounts during the period over which the accumulation of cash was claimed to have been made. Second, an extensive survey was made of the defendants' business record. This survey showed an unsuccessful business experience: taxpayers had failed in the cafe business at least once, had never paid $35,000 of debts, had suffered a default judgment at one time, and for one period of eight years had separated because it was to their "economical advantage." All this had happened during the supposed building up of the cash hoard, and, of course, was completely at variance with that claim.

A distinguishing feature of tax evasion cases based on changes in net worth is that the evidence is indirect, inferential. This is not surprising when it is realized that the most likely and direct source of information is the reluctant taxpayer himself. In the trial court, Judge Ritter aptly characterized these prosecutions when he informed the jury that the Government's case was made up of "little bits of circumstantial evidence." Successful prosecution is predicated on presenting sufficient of these "little bits" which, when logically connected, will permit the jury to draw but one inference.

The Government's case is basically proving that some tax was due but that the liability was not reported nor was the tax paid.[1] It needn't prove the exact sum of tax evaded, only that a substantial portion was evaded.[2] Fraud is not an element of the crime; it is not necessary for the Government to show that it has been misled or that it has relied on some affirmative act of the taxpayer.[3] It is the taxpayers' duty to refrain from affirmative evasive acts; the breach of that duty results in the felony. However, the statute refers to a "wilful attempt" which must be proved by showing that the taxpayer was aware of his legal duty when he committed the act of evasion. In an earlier case, *United States v. Murdock,* (1933)[4] the Supreme Court denoted a wilful act as an act done with bad purpose, perversely. More recently, in *Spies v. United States,* (1943)[5] a wilful attempt was said to be one resulting from conduct the likely effect of which was to mislead or to conceal. Circumstantial evidence of wilfullness has been held to suffice.[6]

It was against this background of indirection and inference that the Supreme Court discussed the *Holland* case. Reiterating that "the prosecution must always prove the criminal charge beyond a reasonable doubt," the Court proceeded to point out "pitfalls" which required "the exercise of great care and restraint" on the Government's part. These pitfalls were, in essence, guides to be used for the protection of innocent taxpayers as well as for

[1] U.S. v. Schenck, 126 F. (2d) 702, cert. denied, 316 U.S. 705.
[2] U.S. v. Johnson, 319 U.S. 503.
[3] U.S. v. Scharton, 285 U.S. 518.
[4] 290 U.S. 389.
[5] 317 U.S. 492.
[6] Battjes v. U.S., 172 F. (2d) 1.

the prosecution of evaders. The Government was cautioned to present a case based on detailed examination, one which would not, even in the least particular, cause the burden of proof to be shifted to the taxpayer. It is up to the prosecution to negate effectively the taxpayer's explanations. Further, the Court counseled trial courts that "charges should be especially clear," and asserted that "appellate courts should review the cases bearing constantly in mind the difficulties that arise when circumstantial evidence as to guilt is the chief weapon of a method that is itself only an approximation." Even so, taxpayers would do well to remember Mr. Micawber's reminder that when annual expenditure exceeds annual income the result is misery, especially if the excess is unreported income.

ALEXANDER N. DAVIDSON.

NEED EITHER SPOUSE BE DOMICILED WITHIN A STATE FOR THE STATE COURT TO ASSUME JURISDICTION IN DIVORCE PROCEEDINGS?—It is a generally conceded principle of our law that a court may not assume jurisdiction, unless both the plaintiff and the defendant are either residents, or within the boundaries of, that state. An exception to this general principle has arisen in the case of divorces: here, if one spouse is domiciled within the state, courts have concluded that this domicile of one spouse constitutes enough of a "res" for the courts to assert jurisdiction, regardless of the residence of the other spouse.[1]

The New York court in the recent case of *Zieseniss v. Zieseniss* [2] interpreted a statute of that state in such a way to extend this exception to cases where *neither* spouse is a resident of the state. The statute involved is § 1147 of New York's Civil Practice Act,[3] which provides:

> . . . a husband or a wife may maintain an action against the other party to the marriage to procure a judgment divorcing the parties and dissolving the marriage by reason of the defendant's adultery:
> . . . 2. *Where the parties were married within the state.*

In her complaint, the plaintiff alleged that she and her husband, the defendant, were married in the State of New York in 1940, and that they had resided therein for a number of years. In the years of 1948, 1949, 1950, and 1951, however, the husband ceased to be a resident of New York. There was an entire absence of any allegation of either the plaintiff's or the defendant's residence or domicile in New York. Nevertheless, the plaintiff sought to have the court assume jurisdiction by virtue of subsection two of the above-quoted statute, since the marriage ceremony had been performed within the State of New York.

The court clearly recognized the problem presented and ad-

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[1] Restatement, Conflict of Laws, § 110 and 111.
[2] 205 Misc. 836, 129 NYS 2d 659 (1954).
[3] Thompson's Laws of New York, 1939, Part II, pg. 1770.

mitted that "jurisdiction rests solely upon the fact that the parties were married in New York and lived here together for several years."[4] Realizing this, it decided:

1—The statute does in fact mean what it says, and as long as the parties are married within the state, the court has jurisdiction even though neither is a resident at the time of the suit.

2—The statute is not unconstitutional. Not only has it remained upon the statute books for over ninety years without attack, but it tends to discourage migratory divorces, a goal which public policy favors. Moreover, the state where the marriage took place is as interested in the relationship of the husband and the wife as is the state of their domicile.

3—The marriage alone, without domicile, constitutes a "res" sufficient to support service by publication upon a non-resident defendant.

The statute, being unique as it is, has been before the New York courts five times previously. In the first case,[5] the court sidestepped the question by assuming, without deciding, that domicile was needed even in face of the statute. The second case [6] took the same stand that the principal case takes, concluding that the statute gives the court jurisdiction to annul marriages, regardless of whether there is domicile or not, and regardless of what legal force the annulment might have in other states.

The three most recent decisions,[7] however, have held that domicile of one spouse is a necessity for jurisdiction, § 1147 to the contrary notwithstanding. In fact, "it would seem contrary to the public policy of this state as it now exists in matrimonial matters to allow one of the spouses at some future date to come into the state and obtain a divorce, merely because the marriage was performed here.[8]

The court in the principal case took notice of these contrary decisions, but held them to be of little weight since they are, in the court's opinion, merely statements from judges of what the legislature *should* have enacted, not what it in fact *did* enact.

Of more import to the court were several decisions previously handed down by the United States Supreme Court.

In *Atherton v. Atherton* [9] the couple was married in New York, but took up residence in Kentucky. The wife later returned to New York and filed for divorce, which the husband contested on the grounds of a previous divorce granted by a Kentucky court. On appeal from the New York court which granted the divorce, the United States Supreme Court reversed, deciding that the wife's domicile was actually in Kentucky at the time of the Kentucky

[4] Zieseniss v. Zieseniss, *supra*, pg. 650.
[5] Gray v. Gray, 38 N.E. 301.
[6] Becker v. Becker, 58 App. Div. 374, 69 NYS 75 (1901).
[7] Barber v. Barber, 89 Misc. 519, 151 NYS 1064 (1915); Powell v. Powell, 211 App. Div. 750, 208 NYS 153 (1925); Huneker v. Huneker, 57 NYS 2d 99 (1945).
[8] Huneker v. Huneker, *supra*, pg. 100.
[9] 181 U.S. 155 (1901).

divorce and, quoting *Cheeley v. Clatyon*,[10] that "the courts of the State of the domicile doubtless have jurisdiction to decree a divorce in accordance with its laws, for any cause allowed by those laws, *without regard to the place of the marriage.*"[11]

Bell v. Bell [12] also involved a decree from the New York court. In this case, the parties were married in Illinois and took up residence in New York. In defense to a suit brought by the wife in New York, the husband set up a decree of divorce rendered by a Pennsylvania court. Both the New York court and the Supreme Court refused to recognize the Pennsylvania divorce, the Supreme Court saying, "No valid divorce from the bonds of matrimony can be decreed on constructive service by the courts of a State in which neither party is domiciled."[13] However, this statement was not necessary to the decision, since a Pennsylvania statute [14] required a person to be a bona fide resident before the court could assume jurisdiction.

The parties in *Streitwolf v. Streitwolf* [15] were married in New Jersey, where the wife resided and where she filed for divorce. The husband pleaded in defense a decree of divorce granted by the North Dakota court. The New York court refused to recognize the North Dakota divorce on the grounds that the laws of North Dakota required bona fide domicile as a prerequisite to jurisdiction. The Supreme Court affirmed.

Neither party was a resident of Virginia in *Davis v. Davis*.[16] However, the divorce granted by the Virginia court was affirmed by the Supreme Court as both parties submitted themselves to the jurisdiction of that court.

Perhaps the most important of these decisions has been the one in *Williams v. North Carolina*.[17] The defendant was married in North Carolina, but went to Nevada to obtain his divorce. While in Nevada, he remarried and returned to North Carolina. Upon his return to that state, he was prosecuted for bigamous cohabitation. As a defense, he maintained that by giving full faith and credit to the divorce decree rendered in Nevada, his cohabitation was neither unlawful nor bigamous. The defendant could get neither the North Carolina nor the Supreme Court to recognize the validity of this defense.

The Supreme Court, using language much broader than was necessary to a decision on the facts stated:

> Under our system of law, judicial power to grant a divorce—jurisdiction, strictly speaking—is founded on

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[10] 110 U.S. 701 (1884).
[11] *Supra*, pg. 705.
[12] 181 U.S. 175 (1901).
[13] Bell v. Bell, *supra*, pg. 177.
[14] Pennsylvania Statutes; March 13, 1815, c. 109, § 11; May 8, 1854, c. 629, § 2.
[15] 181 U.S. 179 (1901).
[16] 305 U.S. 32 (1938).
[17] 325 U.S. 226 (1945).

> domicile . . . and since 1789 neither this court nor any other court in the English-speaking world [18] has questioned it.[19]
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> And, again:
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> . . . one State can grant a divorce of validity in other states only if the applicant has a bona fide domicile in the State of the court purporting to dissolve a prior legal marriage.[20]

Justice Murphy in a concurring opinion expressed his opinion that the requirement of domicile is not merely a matter of state law.[21] It is to be observed, however, that the State of Nevada this time *did* have a law requiring bona fide domicile as a prerequisite for the Nevada courts' jurisdiction in such matters.

The New York court in the principal case drew a distinction between these cases, and the one which was before it, which bounds on the ingenious. The court pointed out that in all cases where domicile was said to be a necessity, a statute was involved which granted jurisdiction only in the cases where this element was present. Moreover, the court could find no case where a statute, granting jurisdiction in absence of domicile, had been declared invalid for this reason.

While it is possible to find cases which have ruled statutes similar to the one here involved invalid,[22] nevertheless, the importance of the distinction should not be underrated. If the distinction is declared valid, and domicile will be needed only if a state statute calls for it, one cannot help but imagine the more "competitive" states vying for the "trade" of divorces by passing more and more lenient statutes. If this should be the result, migratory divorces would seem to be encouraged, contrary to the result wished for by the court in the present case.

If the distinction is declared to be invalid, persons divorced by the New York courts under this sub-section may today still be married to their former spouses, at least as far as the other forty-seven states are concerned. This being so, the questions of the legitimacy of children, bigamy, settlement of estates, revocation of wills, and a number of others may be decided entirely contrary to the wishes or the intentions of the parties concerned.

It would seem that neither of these results should be fostered.

JOHN CRISWELL

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[18] Cf. Besker v. Besker, *supra*, note 6.

[19] *Supra*, note 17, pg. 229.

[20] *Supra*, note 17, pg. 238.

[21] *Supra*, Note 17, pg. 240 *et seq.* See also, Andrews v. Andrews, 188 U.S. 14 (1903), which Murphy uses as the foundation for his concurrence.

[22] Jennings v. Jennings, 251 Ala. 73, 36 So. 2d 236, 3 ALR 2d 662, (1948). See also, People v. Dawell, 25 Mich. 247, 12 Am. Rep. 260 (1872); Kegley v. Kegley, 16 Cal. App. 2d 216, 60 P. 2d 482 (1936); Ainscow v. Alexander, 28 Del. Ch. 545, 39 A. 2d 54 (1944); Worthington v. Dist. Court, 37 Nev. 212, 142 P. 230 (1914).