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Current Decisions in Constitutional Law

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The 90 days that have passed since the last "Current Decisions" have not been 90 days that shook the world in the field of constitutional law. Nevertheless, at least two decisions on volatile subjects justify comment beyond a description of the judgments and facts. One of these, *Terminiello v. City of Chicago,* 69 S. Ct., 894, involving the function of "freedom of speech" will be reserved for another issue.

A Schizophrenic Marriage and a Divisible Divorce

The case of *Rice v. Rice,* 69 S. Ct. 751, is a further exploration by the court of the obligation of a state to give full faith and credit to the divorce decrees of another state. It is a smug, logical consequence of the doctrine set out in the *Williams* cases, in a context of reality where people leave their permanent residences to change their homes, spouses or both.

In the *Rice* case the following facts were before the court: After 20 years of married life in Connecticut, Herbert Rice went to Reno, Nevada and started an action for divorce. The complaint and process were handed his wife Lillian at her home in Connecticut. She neither appeared personally nor participated in the trial in Nevada and Herbert was there awarded a decree of divorce. Whereupon he wired Hermoine to join him and they immediately married in Reno, retained a room there, obtained employment in California and shortly thereafter Herbert died. Lillian then brought an action for a declaratory judgment in Connecticut to have herself declared the widow of Herbert, at least insofar as the Connecticut real estate was involved. After a full trial, judgment was entered for Lillian and the Connecticut court found that Herbert had never established a bona fide domicile in Nevada. This was affirmed by the Supreme Court of Connecticut upon the authority of *Williams v. North Carolina,* 65 S. Ct. 1092.

The Supreme Court of the United States determined but one issue: Did Connecticut discharge the duty of respect it owed the Nevada decree under the rule of the second *Williams* case? In a short detached opinion the Supreme Court concluded that the burden placed upon Lillian of proving that the decedent had not established domicile in Nevada was fairly met and was amply supported by evidence, that the court could not re-try the facts nor would it impute that the Connecticut court was unwarranted in denying full faith and credit to the Nevada decree. Thus, so far as property in Connecticut was concerned Lillian was still the widow of Herbert and entitled to inherit this property. The Court did not speak about the interest of Connecticut in pro-

tecting one of its resident citizens who may have been abandoned or left impoverished—it merely said, "this is but the Williams case." One wonders how Hermoine, who married Herbert in reliance upon the Nevada decree, accepted the decision of the omni-present umpire who hovers over these proceedings in the state courts. How "psychotic" is this marriage when the courts permit her to be Herbert's wife but she cannot be his widow!

The Williams Cases Revisited

The decision in the *Rice* case is but a logical outgrowth of the *Williams* cases. In the first *Williams* case, *Williams v. North Carolina,* 63 S. Ct. 207, a quick Nevada divorce where one of the parties has established domicile is held conclusive and entitled to full faith and credit. The wrong or fault of the person who leaves his spouse and establishes such domicile is immaterial to jurisdiction. Under the second *Williams* case, *Williams v. North Carolina,* 65 S. Ct. 1092, the decree is vulnerable to attack and the full faith and credit clause does not prevent an inquiry into the jurisdiction of the court whose judgment is relied upon in another state, even though the decree recites that there was jurisdiction. North Carolina, it is held, in protection of its institutions, may independently examine the question of Nevada's jurisdiction but its findings must be amply supported by evidence.

Many serious questions were left unanswered by these two cases: Thus, may all of the other states as well as the state of matrimonial domicile question the jurisdictional fact? Does the jurisdictional fact become conclusive for all purposes where the spouses contested the issue of jurisdiction or appeared and were afforded the opportunity to litigate such issue? What shall we say of the subsidiary rights which are usually attached to the status of a marriage—rights of property, support, custody, inheritance? Shall they be determined by the court which entered the decree of divorce as in the *Williams* case or is it open for other states upon re-examining the jurisdictional fact of domicile to decide such questions?

The connective tissues to the doctrine in the *Williams* case were soon formed in the following cases: It seemed clear from *Sherrer v. Sherrer,* 68 S. Ct. 1087 and *Coe v. Coe,* 68 S. Ct. 1094 that where both parties have participated in a divorce proceeding and were given full opportunity to contest the jurisdictional issue, the full faith and credit clause precludes the courts of a sister state from subjecting such decree to collateral attack by relitigating the question of jurisdiction. In *Esenwein v. Commonwealth,* 65 S. Ct. 1118, a Pennsylvania court refused to strike down a support order imposed upon the husband who thereafter went to Nevada and obtained a divorce. The Pennsylvania court denied the jurisdiction of the Nevada court and the Supreme Court refused to re-try the facts. In that case the court merely followed the *Williams* case but it foretold an important development. "It is not apparent", said Justice Douglas, "that the spouse who obtained the decree can defeat an action for maintenance or support in another state by showing

that he was domiciled in the state which awarded him the divorce decree . . . I am not convinced that in the absence of an appearance or personal service the decree need be given full faith and credit when it comes to maintenance or support of the other spouse or the children".

The Concept of The "Divisible Divorce"

In *Estin v. Estin,* 68 S. Ct. 1213, the concept of "divisible divorce" is clarified and the doctrine applied—a divorce may be good to end a marriage but not good when it affects dependent property rights. In that case the husband and wife resided in New York. The husband deserted her and in an action for separation she was awarded permanent alimony. The husband then moved to Nevada and later obtained a divorce there. His wife was notified by constructive service but did not appear. Having stopped his payments he was later sued in a New York court for unpaid alimony and in defense he set up his Nevada decree. The importance of the case is that New York conceded that husband had established a bona fide residence in Nevada when he procured his divorce there. It would therefore follow that so far as the marriage itself was concerned it had been dissolved and its dissolution was entitled to full faith and credit, but the New York court held that in New York the support order would survive the divorce decree. The Supreme Court agreed. It held that because the marriage relationship had ended did not mean that every other legal incident of the marriage had necessarily ended. New York had clearly an interest in the welfare of its own citizens and was rightfully concerned with the problem of the wife's livelihood and support. Nevada's dissolution of the marriage, though binding in lawfully separating the husband and wife, could not affect the support order decreed by the New York court since the wife had not been personally served in Nevada. The New York judgment for support was held an intangible property interest which could not be stricken in Nevada by a proceeding in which there had not been personal service or the appearance of the wife. The court, therefore, sanctioned the Nevada decree insofar as it affected the marital status but held it ineffective on the issue of alimony.

To return to *Rice v. Rice*—it should be noted the court does not base its decision upon its concern for the interests of Connecticut in the welfare of its citizens. The Connecticut court found that the Nevada decree was not entitled to full faith and credit because Herbert was not then domiciled there. The case is more like *Esenwein v. Commonwealth* rather than *Estin v. Estin.* What would the court have said had Herbert died intestate leaving property in California and Texas. Could these states independently inquire into the jurisdictional facts of the Nevada decree? Would they be bound by the Connecticut declaratory judgment?

Changing a Legal Concept to Match Social Realities?

The *Rice* case shows us how far we have departed from traditional concepts. In our patterns of thinking, rights to alimony or support, rights of

dower or inheritance have seemed like logical necessities and essential ingredients of marriage. But we know that these rights need not be inexorably attached to marriage and under certain circumstances, as the cases show, may not be lost though marriage has been dissolved. To many people a "divisible divorce" will not make sense. Marriage, traditionally, means not just consortium, but also all of the subsidiary rights that have always been part of the marriage institution. It is true that there are far-reaching changes in the family pattern. Changes in economic life have affected family life. Most of the traditional functions of the family have been taken over by other institutions and sociologists speak of the modern family pattern as one in which reproduction and individual personality development remain the sole functions. Perhaps the decisions discussed reflect these changes. In a society "mobile and nomadic" as Justice Jackson characterized it, where one may with ease abandon his spouse and live elsewhere, and our values of marriage and responsibility have changed, it may be realistic to regard a marriage valid for one purpose and invalid for another. At least the decision emphasizes the great need for reconsidering the basic problem. What is our objective when the state grants a divorce? Is the purpose to release one's spouse from an intolerable personal situation or are we dealing with an indivisible status involving important social factors, such as inheritance, children, property rights, etc. In the absence of a uniform divorce law, it is possible that we can judically treat these various aspects of the marriage relationship separately?

Thirteen District Judges Accept Retirement Plan

A Correction of the Judiciary Committee Report

By PHILIP S. VAN CISE, *Chairman*

In the June DICTA, page 143, I erroneously stated that the district judges at a meeting on June 4 found the retirement bill as passed by the legislature, was defective and they "repudiated it in toto". In writing this statement I carelessly relied upon a two-column article in the *Rocky Mountain News* of June 5 stating "State Judges Reject New Retirement Law." Any lawyer should know that the average reporter does not understand legal matters, and should go to the judges for the facts rather than the papers. So I apologize for the same and am sending a correction to the district judges, county judges in counties over 20,000 and the members of the General Assembly.

The facts as now obtained from the judges and Tom Trumble, the reporter at the meeting, are that the judges agreed to become subject to the act, but hoped it could be later amended in some respects so that it would more fully cover their requirements. Hu Henry reports that to date 13 district judges have sent in their acceptances to the State Employees Retirement Board and only one has rejected it.