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Jurisdiction in Divorce Actions--Personal Service Without Domicile--Presumption of Domicile from Residence

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Even without a pre-arranged sale, a preferred stock dividend should be classified as a cash dividend simply because it represents a sufficient realization of income to warrant it. And, even though the recipients have no present or future plans for selling, such dividend opens the way for tax avoidance. Furthermore, the sale of such a dividend does not impair control or equitable ownership of the corporation and allows realization of corporate earnings at the comparatively small capital gain tax rates.

Broadening this discussion, there is really no reason for the distinction between taxable and non-taxable stock dividends. It has been argued that (and it seems to be the best argument available) a stock dividend should not be taxed since it is represented by an investment still subject to all the hazards of a corporate enterprise. This is just as true, however, of a stock dividend which is taxable. There seems to be no realistic connection between the question of whether or not the stockholder has realized profits through the dividend so that they may effectively be taxed, and the question of whether the dividend has changed the proportional interests of the stockholders.[30]

Fred Sarkowsky.

JURISDICTION IN DIVORCE ACTIONS PERSONAL SERVICE WITHOUT DOMICILE—PRESUMPTION OF DOMICILE FROM RESIDENCE—In *Alton* v *Alton*[1] the legislature of the Virgin Islands passed a statute providing in divorce actions: (1) that six weeks residence within the Islands should be prima facie evidence of domicile and (2) that where the defendant had been personally served within the Islands or had entered a general appearance the court should have jurisdiction regardless of domicile.[2] The plaintiff after residing in the Islands for six weeks and one day filed suit for divorce. The defendant entered a general appearance. The trial judge asked for further proof of domicile which was refused, and the divorce was denied. Plaintiff appealed. On appeal the Court of Appeals for the Third Circuit held both sections of the statute unconstitutional as violating the due process clause of the Fifth Amendment to the Federal Constitution. The decision, if adopted by the Supreme Court, would have far-reaching effects, since the same result would follow in the state courts under the Fourteenth Amendment to the Federal Constitution.

Whether the presumption created by the first section of the statute is constitutional depends upon its reasonableness. The requirement is stated to be that the fact to be presumed must be reasonably related to or have a rational connection with the fact which creates the presumption.[3] Here the fact creating the presumption is residence and the fact presumed is domicile. The court first states that domicile requires (1) physical presence in the place where domicile is claimed and (2) the intent of the person whose domicile is in question to make that place his home. The court then states that residence tends to show only physical presence and does not tend to estab-

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[30]Lowndes, *The Taxation of Stock Dividends and Stock Rights*, 96 U. OF PA. L. REV. 147 (1947)

[1]207 F.2d 667 (3d Cir. 1953)

[2]Bill No. 55, 17th Legislative Assembly of the Virgin Islands, passed May 19, 1953, approved May 29, 1953, amending § 9 of the Divorce Law of 1944. The act reads: " if the plaintiff is within the district at the time of the filing of the complaint and has been continuously for six weeks immediately prior thereto, this shall be prima facie evidence of domicile, and where the defendant has been personally served within the district or enters a general appearance in the action, then the Court shall have jurisdiction of the action and of the parties thereto without further reference to domicile or to the place where the marriage was solemnized or the cause of action arose."

[3]Mobile Jackson & Kansas City Railroad Company v. Turnipseed, 209 U.S. 35 (1910)

lish the more difficult element of intent, in the absence of which the old domicile continues. Since residence does not have a reasonable relation to both requirements for domicile, the court concludes that the requirements for due process are not met.

In a vigorous dissent, Judge Hastie expressed the view that six weeks residence would, as a matter of proof, have some probative value on both requirements for domicile—that residence would show the physical element of domicile and would have some probative weight in showing intent. Therefore, he concludes that the reasonableness test is met by the statute.

Disagreement seems to arise over what factors should be considered in determining the reasonableness of the presumption. The Supreme Court has indicated that it is proper to consider the circumstances of life as we know them in determining reasonableness. That Court has said:

> "Under our decisions a statutory presumption cannot be sustained if there is no rational connection between the fact proved and the ultimate fact presumed, if the inference of the one from the proof of the other is arbitrary because of lack of connection between the two *in common experience*. This is not to say that a valid presumption may not be created upon a view of relation broader than that a jury might take in a specific case. But where the inference is so strained as not to have a reasonable relation *to circumstances of life as we know them*, it is not competent for the legislature to create it as a rule governing the procedure of the courts."[4] (Emphasis added.)

Certain circumstances of life are considered by the court. These circumstances are: (1) that many people spend six weeks in a place with no intent to change domicile, (2) that only a small portion of divorces are even technically contested, (3) that the recent slight rise in technical contests is probably due to the decisions of the Supreme Court to the effect that where a divorce is technically contested the parties are thereafter estopped from collaterally attacking the decree on the basis of lack of domicile,[5] and (4) that in few cases of migratory divorce is there actual intent to change domicile. In the light of these factors the court concludes that it is unreasonable to presume intent to change domicile from a finding of residence and thus leave to a nonexistent opponent the burden of disputing the required inference.

In considering these circumstances of life the court seems to misapply the reasonableness test. The underlying basis of the court's reasoning seems to be that it is unfair to require the defendant to dispute the issue of domicile, since he will have to travel a great distance to do so. In discussing the reasonableness test, the Suprme Court seems to be saying that circumstances of life as we know them should be considered in determining the reasonableness of the relationship between the fact proved and the fact presumed, not that they are to be considered in determining the fairness or unfairness to the defendant in requiring him to dispute the presumption. The mere fact that few defendants defend a divorce action would not indicate that there is no reasonable relationship between residence and intent to change domicile.

The next question is whether the interests of any person are harmed by the presumption. As Judge Hastie, dissenting, points out, the Fifth Amendment says that: "No person shall . . . be deprived of life, liberty, or property, without due process of law; . . . " Unless someone will be harmed by the presumption due process of law is not violated. The interests of two persons might be injured by the presumption; the state of domicile and the defendant in the action.

Insofar as the interests of the defendant are concerned the operation of the presumption would seem in no way to deprive him of due process of law. As Judge

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[4]Tot v. United States, 309 U.S. 463, 467 (1942).
[5]Coe v. Coe, 334 U.S. 378 (1948); Sherrer v. Sherrer, 334 U.S. 343 (1948).

Hastie points out, the statute does not deprive him of notice and opportunity to be heard, the opportunity to examine witnesses or the opportunity to offer rebuttal evidence. Further, he may eliminate the presumption from the case merely by offering rebuttal evidence.[6]

Nor does the domiciliary state seem to be deprived of due process of law by the presumption. As Judge Hastie again points out, a state is not a person, and thus is not protected by the Fifth Amendment. Further, the rights of the domiciliary state are adequately protected under the full faith and credit clause. This clause affords protection to the state since the state may collaterally attack a divorce decree issued by a state in which neither party had domicile, at least where the defendant was not before the trial court and the issue of domicile was not actually or technically litigated.[7] This rule protecting the interest of the domiciliary state seems unmodified by the later decision in *Johnson* v *Muelberger* [8] In that case a daughter was born of a first marriage. After the decease of the first wife, the husband remarried and was later divorced, in Florida, by the second wife. The husband appeared in the divorce action. He then married a third time and subsequently died. The daughter then attempted to challenge the statutory property rights of the third wife on the ground that the husband's prior divorce was not entitled to full faith and credit in New York since there was no Florida domicile. The Supreme Court held that the daughter was barred from collateral attack in New York since she would be barred from attacking in Florida, either because she was in privity with her father or because she had no vested interest in the property at the time of the divorce decree. Under the theory that a state has an interest in the marital relationship of its domiciliaries,[9] the domiciliary state would clearly have a *present and existing* interest at the time the decree was granted. Further it seems doubtful that the doctrine of privity will be so far extended as to hold that a state is in privity with its domiciliaries in a divorce action in another state. Taking into account these distinctions, it seems probable that the rule that the domiciliary state may attack the decree where neither party is domiciled in the state issuing the decree stands unmodified.

The majority and dissent also disagree as to the degree of reasonableness required to sustain the presumption. The court states that a presumption lifting a court into jurisdiction which it would not otherwise have requires a higher degree of support in common experience to comply with due process than an ordinary presumption such as negligence. As the dissenting opinion states, there is apparently no precedent supporting such a distinction. At least as applied to the facts of this case this distinction seems untenable. As already indicated, the rights of both the defendant and the state of domicile are fully protected under the presumption. Further, the procedural rights of the defendant required by due process are not infringed by the statutory presumption. This being true there seems to be no reason to draw such a distinction.

It should thus be concluded that since there is no person who would be deprived of any procedural right by the presumption the court was in error in its decision.

The second major question before the court was whether a state has power to grant a divorce where neither party is domiciled within the state. Research discloses no other Federal cases in which this question has arisen. Apparently, in only one state

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[6]Western & Atlantic Railroad v. Henderson, 279 U.S. 639 (1929) The Supreme Court was discussing a presumption arising in a tort action, but the reasoning and language of the court support the rule in whatever type of action the presumption arises.

[7]Williams v. North Carolina (II), 325 U.S. 226 (1945).

[8]340 U.S. 581 (1951)

[9]Williams v. North Carolnia (II), 325 U.S. 226, 229-230 (1945)

case has the issue been raised.[10] Little help is to be had from that case. Alabama has passed a statute the same in substance as the one in the *Alton* case. The Alabama supreme court held that statute unconstitutional under the due process clause. The court merely said that courts must have jurisdiction of the marital status through domicile to grant a divorce, and that an enactment which attempts to grant jurisdiction where neither party is domiciled within the state is an interference with the sovereignty of another sovereign state. Therefore, the court concluded that the statute was not within the legislative jurisdiction since it sought to act on a status which was beyond the state boundaries.

In the *Alton* case the court states that domicile is the only proper basis for divorce jurisdiction, since the public through the state of domicile has an interest in the formation and dissolution of marriage; that so strong is this interest that divorce has even been called an action in rem.

While it is probably true that divorce has never been considered a transitory personal action, at least two state courts take issue with the premise that domicile is the only basis for jurisdiction in divorce actions. In both Illinois[11] and Washington[12] divorce actions by wives arose where the wives had long been resident domiciliaries of those states prior to their marriages. Plaintiffs had both married men who were technically domiciled elsewhere, but who had for many years traveled extensively without permanent residence. Each state had a statute providing for *residence* as the basis of jurisdiction in divorce actions. It was contended that the word residence in each statute meant domicile and since the women had married their domicile was that of their husbands.[13] In each case the state supreme court rejected the contention and held that residence was used in its natural and usual meaning; that conceding that the women were technically domiciled elsewhere, the courts nonetheless had jurisdiction in the divorce actions. Neither of these decisions have been overruled.

While the court relies on the full faith and credit cases in reaching its decision, it may be doubted that domicile is an absolute requirement even for full faith and credit. The statement of the Supreme Court in *Williams* v. *North Carolina* (I)[14] is typical of the full faith and credit cases. There the Supreme Court said that a suit for divorce, although not a proceeding in rem, is not a mere in personam action in which the domicile of the plaintiff is immaterial. The domicile of the plaintiff in the state of the forum is essential to give the court jurisdiction which will entitle the decree to full faith and credit, *at least* where the defendant has neither been personally served or entered an appearance. The statute involved in the principal case expressly requires that the defendant either be personally served within the jurisdiction or enter a general appearance. Further doubt about the requirement of domicile for full faith and credit is raised by the *Johnson* case which is discussed above. In that case even the lesser basis of residence was not present, yet the Supreme Court held a Florida divorce decree entitled to full faith and credit in New York. Finally it should be noted that all of the full faith and credit cases arose in states requiring domicile as the basis of jurisdiction. Thus in none of those cases was the issue here involved before the Supreme Court.

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[10]Jennings v. Jennings, 251 Ala. 73, 36 So.2d 236 (1948).

[11]Berlingieri v. Berlingieri, 372 Ill. 60, 22 N.E.2d 675 (1939)

[12]Spielman v. Spielman, 144 Wash. 421, 258 Pac. 37 (1927)

[13]It should be noted that in Williams v. North Carolina (I), 317 U.S. 287 (1942), in overruling Haddock v. Haddock, 201 U.S. 562 (1906), the Supreme Court held that marital domicile no longer governs full faith and credit but that domicile of either marital partner is sufficient for divorce jurisdiction.

[14]317 U.S. 287 (1942).

Assuming, however, that domicile is required for full faith and credit, the requirements for due process differ from those required for full faith and credit. This distinction is pointed out by dictum of the Supreme Court in *Sherrer* v *Sherrer* [15] There the Supreme Court stated that the issue on due process is whether the defendant had a chance to appear, to introduce evidence and witnesses in his defense and the right to appeal. But the issue in full faith and credit cases is whether the domicile of a party is within the state of the forum and whether the issue of domicile is actually or technically litigated. Thus the full faith and credit cases are of little help in solving the issue presented here.

The argument that domicile is required as the basis of divorce jurisdiction since the domiciliary state has an interest in the formation and dissolution of the marriage which needs protection also lacks force. The Supreme Court in the *Williams* (I) case held that for full faith and credit the domicile of *either* marital partner is sufficient to give a court jurisdiction. Since usually in migratory divorce actions today either the husband or the wife establishes an independent domicile there are often two domiciliary states. Since the requirements for divorce vary among the several states, in such a case the second domiciliary state could not be expected to protect fully the interests of the first domiciliary state. Therefore, as Judge Hastie points out, there is no basis for arguing that domicile is required as the basis of jurisdiction to protect the first domiciliary state. That state would in no case receive protection. The result is that if we concede that the second state may act without protecting the first state there is no reason to require domicile.

The court next argues that with regard to the requirement of domicile, due process at home and full faith and credit in another state are correlative. The argument is as follows: With regard to jurisdiction to grant a money judgment personal service is required. Here personal service is required for both due process and full faith and credit.[16] The requirement of domicile is as fundamental to a divorce action as personal service is in an action for a money judgment. Therefore the one being a violation of due process the other is also.

This argument seems unsound. As has been indicated, there is authority for the position that the traditional requisites of due process are notice and opportunity to defend. These requisites were not present in the money judgment cases. Therefore the court had no power to act in those cases. But under the statute in question the requisites of due process are present, since the statute expressly provides that only when *both* parties are before the court or have been served within the jurisdiction will the court have jurisdiction.

Finally the court points out that the Supreme Court has several times used the due process clause to correct states which have passed beyond what the Supreme Court considers the proper choice-of-law rules. Such cases seem to offer proper ground for sustaining the present decision.

The Supreme Court has held that where an insurance contract is made in one state containing a clause limiting the time for notification (or suit) after a loss, the second state (forum) cannot extend that time, although a statute of the forum provides such clauses are illegal.[17] The reasoning is that these are attempts to curtail rights

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[15]334 U.S. 343 (1948)

[16]Baker v. Baker, Eccles & Company, 242 U.S. 394 (1917), Riverside & Dan River Cotton Mills v. Menefee, 237 U.S. 189 (1915)

[17]Hartford Accident & Indemnity Company v. Delta Pine Land Company, 292 U.S. 143 (1934), Home Insurance Company v. Dick, 281 U.S. 397 (1930)