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Jurisdiction - Annulments–Interests of Domiciliary State Do not Preclude Non-Domiciliary Forum from Entertaining Annulment Action When Both Parties Are Present Before the Court. Whealten v. Whealten (Cal. 1967).

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JURISDICTION—ANNULMENTS—INTERESTS OF DOMICILIARY STATE DO NOT PRECLUDE NON-DOMICILIARY FORUM FROM ENTERTAINING ANNULMENT ACTION WHEN BOTH PARTIES ARE PRESENT BEFORE THE COURT. *Whealton v. Whealton* (Cal. 1967).

Daniel Whealton, a petty officer in the United States Navy, and Hazel Whealton were married in Maryland and lived there for six or seven weeks, until he was assigned to the San Francisco Naval Shipyard. After arriving in California he filed an action for annulment serving her by publication at her Maryland home.[1] Although she informed the court of her intention to contest the action,[2] a default judgment was entered against her. Through her newly appointed attorney, defendant moved to set aside the judgment and requested permission to file an answer and cross-complaint for separate maintenance. Following a denial of her motion, she appealed to the California Supreme Court contending that the default judgment was prematurely entered, and further, that the court lacked the jurisdiction to enter it. *Held*, reversed: Not only was the judgment premature—the period in which defendant was allowed to answer by law had not expired[3]—but the court was without jurisdiction to enter the annulment *ex parte* since plaintiff did not plead or prove his domicile. As both parties were now voluntarily before it, the court held, for purposes of retrial, that it had jurisdiction to grant a decree of annulment. The court reasoned that the interests of the state of domicile or of celebration do not preclude a non-domiciliary forum from entertaining the action because the law of the state of celebration is applied uniformly in determining the validity of a marriage and consequent grounds for annulment. The court tempered its decision by the doctrine of *forum non conveniens*. *Whealton v. Whealton*, 67 Adv. Cal. 667, 432 P.2d 982, 63 Cal. Rptr. 291 (1967).

Exercising the discretionary power of the doctrine of *forum non conveniens*,[4] the *Whealton* court deemed it appropriate not to dismiss

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1 CAL. CIV. PRO. CODE §§ 412, 413 (West 1954).

2 Defendant replied by personal letter.

3 Defendant was not personally served. The thirty day period in which defendant could appear and answer did not begin until Sept. 25, 1965, the earliest date on which service by publication could be complete. The default was entered on Oct. 11, 1965, only sixteen days later.

4 *E.g.*, Price v. Atchison, T. & S.F. Ry. Co., 42 Cal. 2d 577, 580, 268 P.2d 457, 458-59 (1954), *quoting from* Leet v. Union Pac. R.R. Co., 25 Cal. 2d 605, 609, 155 P.2d 42, 44 (1944):

The rule of *forum nonconveniens* is an equitable one embracing the discretion-

the action. Plaintiff, because of his military service, was under a special disability and California was the only forum to which he had access. Furthermore, defendant made a voluntary appearance and sought affirmative relief.

It is not unlikely that disabilities, similar to that created by plaintiff's military service, will arise for parties seeking divorces.[5] For these parties access to their domiciliary courts may not only be inconvenient but, in some cases, practically unavailable. It seems only fair and reasonable to allow a non-domiciliary forum to entertain divorce, as well as annulment actions, if both parties are present before the court. Because situations will arise in divorce litigation similar to *Whealton*, is it foreseeable that its rule for annulment will be extended to divorce?

To anticipate extending *Whealton* to divorce, the interests of the domiciliary state must not be greater in divorce than in the annulment situation. If the interests are not similar, the reasoning supporting *Whealton* will not support its extension. A state has an interest in preserving the integrity of its citizens' marital status. The stability of the marital status is important to the stability of the entire society.[6] Thus, the state has a clear concern with actions for divorce and for annulment.

Divorce involves the dissolution of a validly existing marriage, while annulment is brought to declare the nonexistence of the marital status.[7] In the annulment situation, certain marriages are not void initially but only voidable. A voidable marriage creates a status similar to that of a valid marriage for some legal purposes.[8] Even

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ary power of a court to decline to exercise the jurisdiction it has over a transitory cause of action when it believes that the action before it may be more appropriately and justly tried elsewhere.

See also Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 507-09 (1947) (examples of criteria to be used).

[5] *Developments in the Law—State-Court Jurisdiction*, 73 HARV. L. REV. 909, 976 (1960).

[6] *Id.* at 969-70.

Upon the integrity of the marriage depend such vital matters as the welfare of children and other dependents, the allocation and devolution of property, and, in a more general sense, much of the moral and religious fiber of the community.

[7] Comment, *Jurisdiction to Annul*, 6 STAN. L. REV. 153, 154 (1953).

[8] *See* Buzzi v. Buzzi, 91 Cal. App. 2d 823, 825, 205 P.2d 1125, 1126 (1949).

Section 82 of the Civil Code provides that a marriage may be annulled for any one of six causes, if existing at the time of the marriage. In four of the six causes named . . . the right to an annulment is lost by free cohabitation under designated circumstances. In such a case the very purpose of the action is to end an existing status which would otherwise continue, rather than to declare that no such status ever existed. Despite the legal fiction that a judg-

with a void marriage, the domiciliary state is concerned with the status of the parties, if only in a practical sense: the state has an interest in allowing its domiciliaries to remarry, but freedom to remarry may depend upon judicial action declaring the first marriage invalid.[9]

The difference between the actions relates merely to the time when the defect in the marriage occurred. In annulments the defect exists before or during the ceremony; in divorce it arises after the ceremony.[10] The state has similar interests in the divorce and annulment actions since both deal with the marital status—in the words of the California District Court of Appeal in *Bing Gee v. Chan Lai Yung Gee*:[11]

> [A]n annulment action directly affects the status of the parties, and is a matter of public interest and not one which is purely personal to the parties. In this respect it would seem that such an action is precisely similar, in its purpose and effect, to a divorce action.[12]

The *Whealton* decision to grant jurisdiction was grounded on application of the law of the state of celebration. Since the celebrating state's law is uniformly applied, assumption of jurisdiction by California was held not to be prejudicial.[13] If the law of the state of celebration is uniformly applied in determining the validity of marriages, an extension of *Whealton* to divorce appears foreclosed because there is no complementary uniform rule in the divorce situation. As parties change their domicile, the applicable substantive law changes.[14] The majority of jurisdictions agree with California on the following points: (1) a marriage valid in one state is valid in another, and consequently (2) a marriage cannot be annulled except upon grounds existing in the state of celebration.[15] There is an exception to this rule which centers on the local public policy of the forum in which the validity of the marriage is called into question. Marriages

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ment in such a case relates back to the inception of the marriage, for some purposes, such a judgment involves and vitally affects the status of the parties from a logical, legal and practical standpoint. Otherwise, the parties would be free to marry again without taking the trouble to secure such a judgment.

9 Comment, *Jurisdiction to Annul*, *supra* note 7, at 155.

10 *Id.*

11 89 Cal. App. 2d 877, 202 P.2d 360 (1949).

12 *Id.* at 882, 202 P.2d at 363.

13 Whealton v. Whealton, 67 Adv. Cal. 667, 676, 432 P.2d 979, 984, 63 Cal. Rptr 291, 296 (1967).

14 *Id.* at 675, 432 P.2d at 984, 63 Cal. Rptr. at 296.

15 *See generally* 35 AM. JUR. *Marriage* §§ 167-68 (1941); RESTATEMENT OF CONFLICT OF LAWS § 121 (1934); Storke, *Annulment in the Conflict of Laws*, 43 MINN. L. REV. 849 (1959).

valid in the celebrating state have been nullified by the domiciliary forum upon a determination that recognition of the marriage conflicts with its public policy.[16]

Section 63 of the California Civil Code provides that

> All marriages contracted without this state, which would be valid by the laws of the country in which the same were contracted, are valid in this state.[17]

The statute seems to impose on California courts a strict choice of law requirement. It is, however, the common law principles embodied in section 121[18] and not section 136[19] of the *Restatement of Conflicts*, which are present in section 63. It is arguable that the legislative intent was to recognize marriages validly formed in another state although they could not be formed under California law. Protection of children and property interests,[20] rather than the establishment of a choice of law rule—the inability of a domiciliary state to annul a marriage except upon grounds recognized in the celebrating state—was the primary purpose of the legislation.

In construing section 63 the California case of *McDonald v. McDonald*[21] held that it would not recognize a marriage of California domiciliaries valid in Nevada and then subject it to the annulment grounds established in California law. The court felt that this would result in an indirect repudiation of the choice of law rule concerning application of the celebrating state's law.[22] Section 136 of the *Restatement of Conflicts* is cited by the court as supporting its interpretation of the effect of section 63.[23] It should be emphasized, however, that

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[16] *E.g.*, Catalano v. Catalano, 148 Conn. 288, 170 A.2d 726 (1961) (valid Italian marriage of uncle and neice declared invalid on basis of Connecticut's public policy against incestuous marriages); Wilkins v. Zelichowski, 26 N.J. 370, 140 A.2d 65 (1958) (valid Indiana marriage of New Jersey domiciles annulled in New Jersey because wife was under age of consent at the time of the marriage). *See also* RESTATEMENT OF CONFLICT OF LAWS § 132 (1934); UNIFORM MARRIAGE EVASION ACT §§ 1-2 (act withdrawn 1943).

[17] CAL. CIV. CODE § 63 (West 1954).

[18] RESTATEMENT OF CONFLICT OF LAWS § 121 (1934).

> [A] marriage is valid everywhere if the requirements of the marriage law of the state where the contract of marriage takes place are complied with.

[19] RESTATEMENT OF CONFLICT OF LAWS § 136 (1934).

> The law governing the right to a decree of nullity is the law which determined the validity of the marriage with respect to the matter on account of which the marriage is alleged to be null.

[20] *E.g.*, Colbert v. Colbert, 28 Cal. 2d 276, 169 P.2d 633 (1946) (code section interpreted to recognize validity of a common law marriage formed in another state).

[21] 6 Cal. 2d 457, 461-62, 58 P.2d 163, 165 (1936).

[22] *Id.* at 461, 58 P.2d at 165.

[23] *Id.* at 462, 58 P.2d at 165.

Restatement section 121, rather than section 136, expresses the ideas enacted in section 63.[24] In *McDonald* California thus refrained from recognizing that the interests of California in the marital status of its domiciliaries could serve as a basis upon which to propound an exception to the uniform rule.

In the dissent to *McDonald* Chief Justice Waste conceded that the purpose of section 63 was to recognize the validity of marriages contracted outside of California, but argued that:

> This state . . . has exercised its unquestioned prerogative to legislate concerning the marital status of its citizens domiciled here by expressly providing [in section 82 of the California Civil Code] that such marriages may be annulled when the proper ground is established.[25]

Essentially he reasons that section 82[26] complements section 63 and the validity of foreign marriages is recognized in principle. However, the foreign marriages of California domiciliaries may be nullified on grounds established by California law in section 82.

The majority acknowledges the power of the state over its domiciliaries. In the words of the court:

> Each state may follow its citizens into another state and regulate the status of its own citizens, especially such a status as the marriage relation.[27]

However, in contrast to the dissent's interpretation of the applicability of section 82, the majority finds that California has enacted no legislation regulating marriages of its citizens occurring outside of California. The determination that the law of the state of celebration governs,[28] however, is not made in derogation of the superior power of the domiciliary state.

The *McDonald* decision does not foreclose a flexible approach in choice of law. The rigid requirement that the law of the state of celebration must be applied may be avoided in favor of recognizing a potentially greater interest of the domiciliary state. The result would

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24 CAL. CIV. CODE § 63 (Deering 1960); *see also* 5 CALIF. ATT'Y GEN. 104-05 (1945).

25 6 Cal. 2d at 463-64, 58 P.2d at 166.

26 CAL. CIV. CODE § 82 (West 1954).

27 6 Cal. 2d at 459, 58 P.2d at 164.

28 *Id.* at 459-60, 58 P.2d at 164.

be a realistic, as opposed to mechanistic, evaluation of conflicts problems.[29]

In the *Whealton* fact situation Maryland was the state having the greater interest in the parties' marital status. Maryland was the marriage domicile, the domicile of the defendant, and the particular state of celebration. If the state of celebration was different from the parties' domicile a conflict not present in *Whealton* would exist. Considering the ability of California's courts to use a flexible approach in choice of law, it does not seem a foregone conclusion that a California court would take jurisdiction and automatically apply the law of the state of celebration. The court could apply the law of another state if the interests of that state in the marital status of the parties were greater than the interests of the celebrating state.

The reasoning of *Whealton* requiring application of the law of the state of celebration seems to justify the court's conclusion that the interests of other states would not be prejudiced if California were to entertain the action. Basically, it is not this rigid requirement which justifies their conclusion. In this case the rigid requirement expressed the correct solution to the actual conflict of interests present. It is this correct solution of actual conflicts which should be taken from the *Whealton* decision. If a fact situation were to involve not only the interests of the celebrating state and the forum but those of another state, California should seek the correct and enlightened solution rather than adhere to an inflexible rule.

It should be noted that a technical domicile does not always have the greatest interest in the marital status of particular parties: parties may reside in one state for the entirety of their marriage; and their property and children may be located in that state. Nevertheless, during the pendency of an action concerning their marital status, the parties may have established domicile elsewhere. As Justice Rutledge points out in his dissent to *Williams v. North Carolina* (*Williams II*):[30]

> "home" in the domiciliary sense can be changed in the twinkling of an eye, the time it takes a man to make up his mind to remain where

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[29] *See* Traynor, *Is This Conflict Really Necessary?*, 37 TEXAS L. REV. 657, 660 (1959).

> Why should they [judges] not be free to consider jurisdiction at the outset in the complex of the parties' contacts with the forum state, the interests of the state concerned in in [*sic*] the outcome, and a prevading [*sic*] concept of fair play to all parties?

[30] 325 U.S. 226 (1945).

> he is when he is away from home. He need to no more than decide, by a flash of thought, to stay "either permanently or for an indefinite or unlimited length of time." No other connection of permanence is required.[31]

When referring to the greater interests of the state of domicile, a court is usually acknowledging the greater interests of that state, not the importance of domicile. The decision as to which state has the greatest interest should not be based, in all cases, on technical domicile.[32] A non-domiciliary state may have by far the greater interest in the marital status of the particular parties and it is this state's interest which the forum should recognize.[33]

The concept of domicile in the area of marital actions was important as the basis upon which to constitutionally allow annulments and divorces *ex parte*.[34] The importance to a state of its ability to protect its domiciliaries was considered sufficient to subdue contentions that an absent defendant was being unduly prejudiced.[35] However, where both parties are voluntarily before the court the importance of domicile in this context fades. In *Williams II*[36] the Supreme Court made the statement that "[u]nder our system of law, judicial power to grant a divorce—jurisdiction, strictly speaking—is founded on domicile."[37] The statement was made in dealing with an *ex parte* divorce situation. Should it also be interpreted to require domicile as a constitutional prerequisite to jurisdiction in divorce actions where both parties are before the court? The Supreme Court has not answered this question.[38]

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31 *Id.* at 257.

32 Alton v. Alton, 207 F.2d 667, 683 (3rd Cir. 1953) (J. Hastie dissenting).

> Thus, when a court is asked to grant a divorce it very often finds that not one domicil but at least two—potentially more through refinements of the "marital domicil" concept—may be interested in the parties and their relationship. In these all too familiar situations of divided domicil, the jurisdictional requirement which the majority regards as so essential to fairness that it can not be changed is a troublemaker and a potential source of injustice.

33 *See* D. Currie, *Suitcase Divorce in the Conflict of Laws: Simons, Rosenstiel and Borax*, 34 U. CHI. L. REV. 26, 48 (1966).

34 *E.g.*, Williams v. North Carolina, 317 U.S. 287, 298-99 (1942). *See also* 39 CORNELL L.Q. 293, 299 (1954).

> Domicile is essential to due process where the suit is based on constructive service, because without it the court has no jurisdiction whatever—neither *in personam* or *in rem*.

35 The divorce action has been considered an action in rem, the marital status being the "res" which was present in the state of domicile. *See* Comment, *Jurisdiction to Annul*, *supra* note 7, at 161.

36 325 U.S. 226 (1945).

37 *Id.* at 229.

38 39 CORNELL L.Q., *supra* note 34, at 297. *See also* Comment, *Recognition of Foreign Country Divorces: Is Domicile Really Necessary?*, 40 CALIF. L. REV. 93, 96 (1952).

Seemingly the requirements of due process are met if the defendant is personally served or enters a general appearance.[39] Supreme Court decisions foreclosing attack upon divorce decrees on the basis of domicile where both parties are voluntarily before the court lend support to the contention that no denial of due process exists.[40]

There remains the opinion of the Third Circuit Court of Appeals in *Alton v. Alton*[41] which held that failure of the Virgin Islands to require domicile as a basis for divorce jurisdiction was unconstitutional. The court concluded that the statute violated the due process clause of the fifth amendment. The question of whom is being denied due process is not directly answered by the court. The parties were voluntarily present and each had the opportunity to be heard. Certainly they were not being denied the safeguards inherent in the concept of due process. The court states:

> Nevertheless, if the jurisdiction for divorce continues to be based on domicile, as we think it does, we believe it to be lack of due process for one state to take to itself the readjustment of domestic relations between those domiciled elsewhere.[42]

Is it then the domiciliary state which is being denied due process? This necessitates construing the state as a "person" under the amendment and its interest in the marital status as "property." Certainly, this is an unusual construction and one which does not seem constitutionally sound.

The *Alton* decision has been interpreted as concluding that a decree is in denial of due process if not entitled to full faith and credit. However, the Supreme Court has never decided that full faith and credit and due process are the same.[43] Domicile as a prerequisite to jurisdiction in divorce actions was merely a result of judicial discretion.[44] The vague reasoning of *Alton* should not continue to create a constitutional requirement of domicile where both parties are be-

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[39] 39 CORNELL L.Q., *supra* note 34, at 299.

[40] Sutton v. Leib, 342 U.S. 402 (1952); Cook v. Cook, 342 U.S. 126 (1951); Johnson v. Muelberger, 340 U.S. 581 (1951); Sherrer v. Sherrer, 334 U.S. 343 (1948).

[41] 207 F.2d 667, 677, (3rd Cir. 1953). *Alton v. Alton* was granted certiorari, 347 U.S. 911 (1954), but dismissed by the Supreme Court, 347 U.S. 610 (1954), as moot after the parties procured a divorce in another jurisdiction. The statute in question in *Alton* was held invalid in a later opinion, Granville-Smith v. Granville-Smith, 349 U.S. 1 (1955). In this case the Court did not pass upon the constitutional issue presented by the opinion of the Third Circuit Court of Appeals.

[42] 207 F.2d at 677.

[43] 39 CORNELL L.Q., *supra* note 34, at 300.

[44] *Developments in the Law—State-Court Jurisdiction, supra* note 5, at 968.

fore the court. A non-domiciliary forum should be able to take jurisdiction, at least in the absence of an expression of policy by the domiciliary state that jurisdiction should be limited to its courts.[45]

The importance of the domiciliary state's interests recognized by *Alton* should not be discounted. In that case, the domiciliary state was the state with the greater interest in the marital status. The interests of the state of domicile, however, do not require a foreclosure of jurisdiction to another state where both parties are present. The interests of the state with the greater involvement, whether it be the state of technical domicile or another, can be protected by a requirement that its law be applied.[46] Allowing a non-domiciliary forum to take jurisdiction of divorce actions, as the *Whealton* court has done in annulment actions, would enable parties who have no convenient access to the domiciliary forum to receive a judicial determination of their marital status.[47]

Whealton is a step toward a more enlightened and realistic approach to the law of conflicts and it need not be limited to annulments. There is great similarity in the annulment and divorce situations; the flexibility in choice of law required to deal adequately with divorce is inherently present in the annulment situation; and there should be no due process barriers prohibiting a non-domiciliary forum from entertaining divorce actions where both parties are present. An extension of *Whealton* to divorce is justifiable as well as foreseeable.

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45 *Id.* at 975.

46 *Id.* at 975-76.

47 The discretionary power of the court to dismiss, under the doctrine of *forum non conveniens*, eliminates the problem of "forum-shopping." *Cf., Developments in the Law—State-Court Jurisdiction, supra* note 5, at 976.