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DIVORCE

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Long, a resident of Delaware, went to Arkansas to regain his health and to procure a divorce. He secured a divorce in an *ex parte* proceeding and immediately after the final award returned to Delaware where he shortly married another woman. Before remarrying he consulted three times with a lawyer as to the validity in Delaware of the Arkansas decree and was advised that his remarriage would be legal. There was no evidence that this lawyer was in the least incompetent or gave the matter insufficient consideration. Long was indicted for bigamy and was convicted in the trial court. On appeal, the Supreme Court of Delaware recognized that the lower court had properly questioned the jurisdiction of Arkansas to grant a valid divorce decree but awarded a new trial on the basis that a mistake of law is a complete defense where the accused has made a diligent effort, using the most appropriate means available, to ascertain the law and has acted in reliance on that information. The burden was placed on the accused to prove all such measures taken. *Long v. State,* 65 A.2d 489 (Del. 1949).

The patchwork development of our extra-territorial divorce law has created an anomalous situation if a man can be convicted of bigamy though he uses the most appropriate means which our legal system offers to ascertain the validity of his decree in other states. It is easy to be mistaken as to validity of a foreign divorce because of the uncertainty of recognition of the decree.[1] The full faith and credit clause[2] compels recognition of a foreign judgment if it has been based on proper jurisdiction, which for divorce is bona fide domicil.[3] However, recognition required by the full faith and credit clause has not always been the same. An early decision left open the possibility of a bigamy conviction after a foreign *ex parte* decree.[4] This possibility was later restricted to situations where the decree had been sought in an *ex parte* proceeding outside the state of matrimonial domicil.[5] *Williams*

1. *See* Mr. Justice Rutledge, dissenting in Williams v. North Carolina, 325 U. S. 226, 246-247 (1945). A jury in the old domiciliary state may find no domicil present on proof close to that which the foreign court considered when it did find domicil present.

2. U. S. CONST. Art. IV, § 1.

3. Ditson v. Ditson, 4 R. I. 87 (1856); Cheever v. Wilson, 9 Wall. 108 (U. S. 1869); Atherton v. Atherton, 181 U. S. 155 (1901).

4. Cheever v. Wilson, 9 Wall. 108 (U. S. 1869). Here, although only one party had domicil in the awarding state, the other party appeared.

5. Haddock v. Haddock, 201 U. S. 562 (1906). New York, the matrimonial domicil where the wife still resided, was not required to give full faith and credit to a Connecticut decree, since it was obtained by the husband who wrongfully left his wife in the matrimonial domicil, service on her having been made by publication and she not appearing in the action. Atherton v. Atherton, 181 U. S. 155 (1901) had directed full faith recognition where the *ex parte* decree was given by the state of matrimonial domicil and the wife did not have a right, on the facts, to acquire a separate domicil.

I,[6] reversing the matrimonial domicil rule, forced the court to give full faith and credit if the party who procured the divorce was domiciled in the awarding state and the jurisdictional fact of domicil was not attacked. *Williams II*[7] decided that the full faith and credit clause did not compel a state to recognize the finding of a foreign court on domicil as final.[8] This decision leaves doubt as to the validity of an *ex parte* decree outside the awarding state. If another state finds that domicil was lacking, the decree, having been rendered without jurisdiction, is void[9] and need not be recognized under full faith as a defense to a charge of bigamy.

Sherrer v. Sherrer[10] held that when both parties appear and could have litigated domicil, they are bound by the decree. The old domiciliary state itself *may* be bound,[11] but this is questionable since the old state was not itself a party and its interests arguably could not be foreclosed.[12] If its interests are not foreclosed, it may be able, by making its own finding on the question of foreign domicil, to convict of bigamy persons who rely on a foreign divorce. In view of *Sherrer v. Sherrer,* however, the greater danger of criminal conviction for recipients of foreign decrees appears to be to those who have received them in *ex parte* proceedings, since many of the invalidations of foreign divorces are made because one party was not there to protect his own interests.

Mistake of law has not in the past been classified as a defense[13] to bigamy.[14] An error as to recognition that will be given a foreign divorce decree in other states is termed a mistake of law,[15] therefore such an error has been no defense. The bases of the general theory on which disallowance

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6. Williams v. North Carolina, 317 U. S. 289 (1942). Any state in which either of the parties to a marriage is domiciled has the power to grant a divorce entitled to full faith and credit. The jurisdictional fact of domicil was not attacked here.

7. Williams v. North Carolina, 325 U. S. 226 (1945). Bear in mind the decree attacked was *ex parte.*

8. "Respect, and more" must be given the foreign decree. Mr. Justice Frankfurter, in Williams v. North Carolina, 325 U. S. 226, 233 (1945).

9. But see Harper, *The Myth of Void Divorce,* 2 LAW AND CONTEMP. PROB. 335, 339 (1935).

10. 334 U. S. 343 (1948). A companion case holding the same was Coe v. Coe, 334 U. S. 378 (1948).

11. *See* Sherrer v. Sherrer, 334 U. S. 343, 354 (1948).

12. See Paulsen, *Migratory Divorce: Chapters III and IV,* 24 IND. L. J. 25, 39 (1948).

13. Mistake of law refers to an error as to the efficacy of a known foreign decree while mistake of fact is an error going to the question of whether legal action has or has not been brought. A minority of states recognize mistake of fact as a defense to bigamy. Squire v. State, 46 Ind. 459 (1874); State v. Sparacino, 164 La. 704, 114 So. 601 (1927); Baker v. State, 86 Neb. 775, 126 N. W. 300 (1910).

14. No distinction is made here whether the charge be bigamy, adultery, or bigamous cohabitation where the basic facts leading to the charge are those discussed.

15. *See* Williams v. North Carolina, 325 U. S. 226, 238 (1945); State v. Armington, 25 Minn. 29 (1878); State v. Woods, 107 Vt. 354, 179 Atl. 1 (1935) (Charge was adultery though the situation was one in which it could have been bigamy).

of mistake of law is predicated are (1) the judges are to interpret the law and the interpretations of defendants should not be given greater weight than that of the judges,[16] (2) the maxim *ignorantia legis neminem excusat* is implied in the value-judgments in penal law, which is to say the laws themselves represent the moral convictions of the community[17] and, (3) allowance of such a defense would stultify practical enforcement of the penal law since almost every accused would raise the defense.[18] Although the above rule may be sound and is continually followed, it is improper to apply it to bigamy in certain instances when committed as a result of an invalid foreign divorce; in these cases the recognition of this defense is in line with our general principles[19] of criminal law.[20]

Ordinarily, one of these principles is that criminal intent be present, yet this is necessary for bigamy only in a few states.[21] Since bigamy is a criminal proceeding, intent should be required.[22] However, even where it is considered an essential element, mistake of law has not been a defense. In typical divorces two types of mistake of law can be involved. One is a mistake that no law exists prohibiting plural marriage. Another is a mistake of divorce law—making a wrong prediction as to whether a union has been dissolved by a known court decree. In applying the rule, mistake of law is no defense, courts have made no distinction as to which type of mistake was involved. That this lack of distinction is unreasonable can be seen by a comparison to the property crimes where definitions of intent include a correct knowledge of the related law[23] of ownership of the property.[24] If for larceny the definition of intent

16. HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 353 (1944).

17. *Id.* at 353-355.

18. *See* People v. O'Brien, 96 Cal. 171, 176, 31 Pac. 45, 47 (1892); "Without it [*ignorantia legis neminem excusat*] justice could not be administered." 1 BISHOP, CRIMINAL LAW 197 (9th ed. 1923); 1 STORY EQ. JUR. § 110 *et seq.* (1866).

19. See HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 11 (1947).

20. The problem of mistake of law, especially that relative to divorce, and that of a statute void for vagueness are very similar. In each the individual may not be able to determine what is the law as applicable to his situation. See 23 IND. L. J. 272 (1948) on the constitutionality of a statute so vague as not to be reasonably understood.

21. Martin v. State, 100 Ark. 189, 139 S. W. 1122 (1911); People v. Spoor, 235 Ill. 230, 85 N. E. 207 (1908); State v. Goonan, 89 N. H. 528, 3 A.2d 105 (1938); State v. Lindsey, 26 N. M. 526, 194 Pac. 877 (1921). The preceeding represent the view most often followed; *Contra,* see note 13 *supra.* . . . In the states where mistake of fact is recognized, mens rea also must be essential for mistake negates the criminal intent.

From the Indiana bigamy statute, IND. STAT. ANN. (Burns Repl. 1942) § 10-4204, it would appear no intent is required in Indiana. Consider, however, the effect of Squire v. State, 46 Ind. 459 (1874), in which mistake of fact was held to be a good defense.

22. HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 290-291, 371 (1947).

23. See HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 365-366 (1947); Perkins, *Ignorance and Mistake in Criminal Law,* 88 U. OF PA. L. REV. 35, 51 (1939).

24. See HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 365 (1947); Perkins, *Ignorance and Mistake in Criminal Law,* 88 U. OF PA. L. REV. 35, 46 (1939).

includes knowing the property not to be the taker's,[25] it seems highly proper that the intent to commit bigamy should be defined to include knowledge that the previous union is undissolved by divorce.[26] By so defining intent to commit bigamy, the application of the *ignorantia legis* rule is properly confined to mistakes as to substantive criminal offenses,[27] the only field in which there are good grounds for use of such a categorical rule. Upon this rationale of expanded definition of intent the Delaware Court could have built its opinion; however, they chose to speak in terms of mistake of law. The court may have been thinking in terms of the above reasoning since the exculpatory mistake was of the divorce law rather than of the substantive criminal prohibition.[28]

To determine the relevance of the *Long* decision to the law on recognition of foreign divorces it must first be determined what policy considerations lie behind the invalidation of a foreign divorce, and second, the effect of these policy considerations on the foreign divorce. Each state has certain interests.[29] to protect in order to maintain stability of legal relations and good moral order in the community. To effectuate this protection it occasionally finds it necessary to discredit a foreign divorce when to hold it valid would adversely affect the domiciliary's marital interest in support, alimony or property. *Estin v. Estin*[30] ushered in the doctrine of divisible divorce[31] by means of which a state can protect its citizens' interests without completely nullifying a foreign decree. For purposes of ending a prior New York alimony decree the Nevada divorce was invalid, but for purposes of changing marital capacity it was

25. IND. STAT. ANN. (Burns Repl. 1942) § 10-3001, 10-3002; Robinson v. State, 113 Ind. 510, 16 N. E. 184 (1887); People v. Brown, 105 Cal. 69, 38 Pac. 519 (1894); *cf.* also the definition of receiving stolen goods, IND. STAT. ANN. (Burns Repl. 1942) § 10-3017: Watts v. People, 204 Ill. 233, 68 N. E. 563 (1903); 2 WHARTON, CRIMINAL LAW 1542 (12th ed. 1932).

26. Suppose a mistake of ownership were made because a foreign judgment deciding title to a chattel (*e.g.*, replevin action or declaratory judgment) was invalid because the court of the foreign state lacked jurisdiction. This is analogous to mistake of validity of a foreign divorce decree because of failure to recognize it for lack of jurisdiction.

27. *Cf.* HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 370 (1947), and footnotes there.

28. Another indication that the court was reasoning in terms of definition of intent can be derived from the fact that the court considered briefly the intent required for the property crimes.

29. *See* Estin v. Estin, 334 U. S. 541-549 (1948); Williams v. North Carolina, 325 U. S. 226, 230 (1945).

30. 334 U. S. 541 (1948).

31. Estin v. Estin, 334 U. S. 541, 549 (1948):

> The result in this situation is to make the divorce divisible—to give effect to the Nevada decree insofar as it affects marital status and to make it ineffective on the issue of alimony. It accommodates the interests of both Nevada and New York in this broken marriage by restricting each State to the matters of her dominant concern.

For a comprehensive article on the possibilities of this problem, see Paulsen, *Migratory Divorce: Chapters III and IV*, 24 IND. L. J. 25, 46 (1948).

valid.[32] The *Long* case is another application of this doctrine. In effect, the Arkansas decree[33] is valid (since obtained and relied on in good faith) for purposes of defense to a subsequent bigamy charge though it can hardly be said to reinstate marital capacity, because Long now knows that the state will not recognize the decree as effective to change his marital status.[34]

Probably many persons who take advantage of more liberal divorce policies of other states sincerely believe that foreign decrees are as valid as any. Counsel cannot be sure whether other states can successfully attack the foreign decree. Individuals who, after diligent inquiry, remarry in reliance on a foreign divorce decree should not be penalized because a state gives less recognition to it than is given by the awarding state. Applying the divisible divorce doctrine, hardships from these criminal penalties can be avoided. The rule of the *Long* case will probably not appreciably affect the migratory divorce rate, because an exacting standard of due diligence must have been met by the defendant before the foreign decree can be valid for the limited purpose of a defense to bigamy. If followed, this rule will result in alleviating some of the hardships to individuals who otherwise would be victims of the foreign divorce law muddle.

32. Mr. Justice Jackson, dissenting in Rice v. Rice, 335 U. S. 842 (1949), charged that the court in the *Rice* case was extending the application of the divisible divorce doctrine. It appears, however, that the majority relied strictly on Williams v. North Carolina, 325 U. S. 226 (1945), and Esenwein v. Esenwein, 325 U. S. 279 (1945).

33. Although *ex parte* foreign divorces have been most considered here in the application of the rule of the *Long* case, it must be remembered that if a state can make its own finding on the question of existence of domicil in a foreign state and thereby be able to convict for bigamy a person who was relying on a foreign divorce where both parties appeared, the mistake allowed in the *Long* case should exculpate here also, because the fact, in itself, that two appeared is not determinative of *mens rea*.

34. It is not certain whether Long's marital capacity was reinstated until the Delaware Supreme Court decision or never reinstated at all. If the former is true, not only may one incident of divorce be divided from another but also an incident may itself be split (in point of time).