IN THE SUPREME COURT OF THE STATE OF FLORIDA

MORRIS GORDON,	)	
Appellant,	)	ON APPEAL FROM THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT OF FLORIDA, IN AND FOR DADE COUNTY.
-vs-	)	
MIRIAM GORDON,	)	IN CHANCERY NO. 103685
Appellee.	)	

BRIEF OF APPELLEE

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* * * * * * * * *

MORRIS GORDON,)
Appellant,)
-vs-)
MIRIAM GORDON,)
Appellee.)

BRIEF OF APPELLEE

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I N D E X

AUTHORITIES CITED

STATUTES

TEXTBOOKS

CASES

INTRODUCTORY STATEMENT

Appellee was plaintiff in the cause below which resulted in a final decree of divorce from which appellant appeals. This is the second appeal taken in this cause, each of the appeals being taken by the defendant below, since each decree appealed from has been in favor of this appellee, plaintiff below.

HISTORY OF CASE

A detailed history of the case is set forth in appellant's Main Brief, and, therefore, appellee will not repeat the same. The applicable facts involved in the case are discussed in appellee's arguments in support of her position under the five questions hereinafter stated.

QUESTIONS INVOLVED

I

WHEN A FINAL DECREE OF THE CIRCUIT COURT IN DADE COUNTY, FLORIDA, GRANTING AN ABSOLUTE DIVORCE TO A WIFE IS REVERSED ON APPEAL TO THE SUPREME COURT OF FLORIDA, ON THE GROUNDS THAT THE CHANCELLOR ERRED IN REFUSING TO ALLOW THE HUSBAND TO PLEAD AND PROVE A FINAL DECREE OF A FOREIGN JURISDICTION WHICH WAS ENTITLED TO FULL FAITH AND CREDIT, AND THE CAUSE IS REMANDED FOR FURTHER PROCEEDINGS NOT INCONSISTENT WITH THE OPINION OF THE SUPREME COURT, DOES THE CHANCELLOR HAVE THE POWER AND AUTHORITY, IN HIS DISCRETION, TO PERMIT THE AMENDMENT OF THE PLEADINGS BY EITHER OF THE PARTIES?

The Chancellor answered the foregoing question in the affirmative by overruling appellant's objections to appellee's motion for leave to file amended bill of complaint and by denying appellant's motion to dismiss appellee's amended bill of complaint.

II

WHERE A WIFE CHARGES THAT HER HUSBAND IS GUILTY OF EXTREME CRUELTY BY THE HUSBAND TOWARD THE WIFE, AND THE HUSBAND SETS UP AS A DEFENSE A FINAL DECREE OF THE COURT OF COMMON PLEAS OF CAMBRIA COUNTY, PENNSYLVANIA, DISMISSING A SUIT THEN PENDING, INSTITUTED IN SAID COURT BY THE WIFE FOR DIVORCE ON THE GROUND OF INDIGNITIES TO THE PERSON, WHICH SAID DECREE IS ENTITLED TO FULL FAITH AND CREDIT, AND THE WIFE PROVES ACTS OF PHYSICAL CRUELTY, AND THE SPECIAL MASTER RECOMMENDS A DIVORCE ON THE GROUND OF EXTREME CRUELTY OF A PHYSICAL NATURE, MAY THE CHANCELLOR THEN ENTER A FINAL DECREE FOR DIVORCE ON SUCH GROUND?

The Chancellor answered the foregoing question in the affirmative by entering a final decree granting divorce to appellee in part upon the ground of extreme cruelty.

III

WHERE IT APPEARS FROM THE TESTIMONY OF THE WIFE IN HER SUIT FOR DIVORCE THAT HER HUSBAND BY INNUENDOES AND INSINUATIONS CHARGED HER WITH LACK OF PROPER CARE OF THEIR MINOR CHILD IMMEDIATELY AFTER THE TRAGIC DEATH OF SAID CHILD BY ACCIDENTAL DROWNING, AND THAT HER HUSBAND, DURING THIS GRIEF STRICKEN PERIOD, INSISTED UPON SEXUAL RELATIONS WITH HER WITHOUT DISPLAY OF AFFECTION, AND WHEN SHE WAS NOT IN THE MOOD THEREFOR, CAUSING HER MENTAL AND PHYSICAL PAIN, AND THAT HER HUSBAND FAILED TO OFFER ANY APOLOGIES FOR HIS BRUTALITY OR RETRACTION OF HIS ACCUSATIONS, BECAUSE OF WHICH THE PARTIES DID NOT THEREAFTER LIVE TOGETHER FOR A PERIOD OF MORE THAN ONE YEAR, MAY THE CHANCELLOR THEN BY FINAL DECREE GRANT A DIVORCE TO THE WIFE ON THE GROUND OF WILLFUL, OBSTINATE AND CONTINUED DESERTION FOR MORE THAN ONE YEAR?

The Chancellor answered the foregoing question in the affirmative by entering his final decree granting a divorce to appellee on the ground of willful, obstinate and continued desertion of her by appellant for one year.

IV

WHERE A WIFE, BEING THEN A RESIDENT OF PENNSYLVANIA, ON JANUARY 18, 1946, INSTITUTED A SUIT FOR DIVORCE AGAINST HER HUSBAND IN THE COURT OF COMMON PLEAS IN CAMBRIA COUNTY, PENNSYLVANIA, AND SAID SUIT PROGRESSED TO FINAL DECREE ON JUNE 28, 1947, IN WHICH SAID COURT FOUND THAT SHE WAS THEN A RESIDENT OF CAMBRIA COUNTY, PENNSYLVANIA, AND NOT A RESIDENT OF FLORIDA, AND WHERE SAID WIFE, DURING THE PROGRESS OF HER PENNSYLVANIA SUIT, INSTITUTED A SUIT AGAINST HER HUSBAND IN THE CIRCUIT COURT IN AND FOR DADE COUNTY, FLORIDA, ON SEPTEMBER 30, 1946, WAS THE WIFE ESTOPPED FROM ASSERTING THAT SHE WAS AT THE TIME OF THE FILING OF HER BILL OF COMPLAINT AND THEREAFTER A BONA FIDE RESIDENT OF THE STATE OF FLORIDA?

The Chancellor answered the foregoing question in the negative by refusing to strike parts of plaintiff's response to defendant's answer and appellant's motion to dismiss plaintiff's amended bill of complaint and by denying defendant's exceptions to the report of the Special Master.

V

WHERE A FINAL DECREE OF DIVORCE IS ENTERED IN FAVOR OF A WIFE PENDING AN APPEAL BY THE HUSBAND, THE WIFE MARRIED ANOTHER MAN AND CONCEIVES A CHILD AND THEREAFTER THE SUPREME COURT REVERSES THE DECREE OF DIVORCE, DOES THE WIFE'S REMARRIAGE AND PREGNANCY ESTOP HER FROM SUCCESSFULLY PROGRESSING ORIGINAL CAUSE TO ANOTHER FINAL DECREE OF DIVORCE?

The Circuit Court answered that question in the negative.

ARGUMENT

FIRST QUESTION

WHEN A FINAL DECREE OF THE CIRCUIT COURT IN DADE COUNTY, FLORIDA, GRANTING AN ABSOLUTE DIVORCE TO A WIFE IS REVERSED ON APPEAL TO THE SUPREME COURT OF FLORIDA, ON THE GROUNDS THAT THE CHANCELLOR ERRED IN REFUSING TO ALLOW THE HUSBAND TO PLEAD AND PROVE A FINAL DECREE OF A FOREIGN JURISDICTION WHICH WAS ENTITLED TO FULL FAITH AND CREDIT, AND THE CAUSE IS REMANDED FOR FURTHER PROCEEDINGS NOT INCONSISTENT WITH THE OPINION OF THE SUPREME COURT, DOES THE CHANCELLOR HAVE THE POWER AND AUTHORITY, IN HIS DISCRETION, TO PERMIT THE AMENDMENT OF THE PLEADINGS BY EITHER OF THE PARTIES?

The Chancellor answered the foregoing question in the affirmative by overruling appellant's objections to appellee's motion for leave to file amended bill of complaint and by denying appellant's motion to dismiss appellee's amended bill of complaint.

The history of this case is exhaustively covered by appellant (Appellant's Brief, pp 1-9). Our purpose in this question will be to point up only that part of the history raising the issues to be argued herein. After instituting an action for divorce on January 18, 1946, in the Court of Common Pleas in and for Cambria County, Pennsylvania, on the grounds of indignities to her person, the appellee removed herself from Pennsylvania to Florida, renounced her Pennsylvania residence, and, thereafter, in due time, instituted an action for divorce in the Circuit Court in and for Dade County, Florida, charging her husband with extreme cruelty, habitual indulgence in a

violent and ungovernable temper and willful, obstinate and continuous desertion for one year. The cause, in the Circuit Court of Dade County, Florida, proceeded through the taking of testimony by a Special Master in Chancery appointed by the Chancellor and the filing of a report by the Special Master. In the meantime, the Pennsylvania Court, after denying the appellee leave to discontinue her action for divorce then pending in said Court, proceeded to a final decree dismissing appellee's suit for divorce.

After the original Master's report and recommendations in the suit at bar were filed, the appellant applied for leave to file an amendment to his answer. The lower Court granted this motion, and appellant filed an amendment setting up the Pennsylvania decree as a defense on the grounds of res judicata. The appellee filed a motion to strike the amendment to the answer, and the Circuit Court, on July 31, 1947, granted appellee's motion to strike the said amendment and entered a final decree of divorce on the ground of extreme cruelty only. From this decree appellant appealed, assigning as error the striking of his answer, setting up the Pennsylvania decree as a defense of res judicata, constituting a bar to divorce on the ground of extreme cruelty.

The case was argued by counsel for respective parties before this Court, and on September 27, 1948, the Mandate and opinion of the Supreme Court of Florida was filed in the Office of the Clerk of the Circuit Court in and for Dade County, Florida. The opinion of the Supreme Court said,

> "Consequently, we hold that the learned chancellor erred in granting appellee's motion to strike the amendment to the appellant's answer and in entering a final decree of divorce in favor of appellee. Full faith and credit should have been accorded the final decree of the Pennsylvania court.
>
> "(5) The chancellor was correct in denying appellant's motion to dismiss appellee's

bill of complaint because a final decree, as well as the law of a foreign jurisdiction, must be pleaded and proved.

"The cause is reversed and remanded for further proceedings not inconsistent with this opinion." (Gordon v. Gordon, 160 Fla. 838, 36 So.(2d) 774-777)

After the Mandate was filed the lower Court entered an order rescinding the order of July 31, 1947, and entered an order denying appellee's motion to strike the amendment to appellant's answer. The lower Court allowed the appellee to respond to said amendment to appellant's answer, and later, on application, granted leave to appellee to file an amended bill of complaint to which appellant filed an amended answer. The cause was referred to a new Special Master in Chancery and proceeded to final decree from which this appeal is taken.

The question for determination here is: Did the Chancellor have the power and authority, in his discretion, to permit the amendment of the pleadings by either of the parties after the Mandate of the Supreme Court was filed in this cause?

By the decision of this Court on the first appeal, the Circuit Court was directed:

(a) To set aside it's order granting appellee's motion to strike appellant's amended answer setting up the Pennsylvania decree;

(b) To allow the appellant an opportunity to prove the Pennsylvania decree, and, if proven;

(c) To accord full faith and credit to the final decree of the Pennsylvania court; and

(d) To allow such further proceedings as may not be inconsistent with the opinion.

By setting aside the final decree and sustaining the legal sufficiency of the "amendment to defendant's answer", this Court, in effect, returned the case to Rules for further proceedings.

Almost the identical situation was encountered by the Court in the case of Federal Land Bank of Columbia v. Brooks,

132 Fla. 506, 190 So. 737, where, after lengthy pleadings, the Chancellor struck certain portions of the answers setting up the defense of non-claim and an appeal was taken from that order as well as from an order referring the cause to a Special Master to take testimony upon the issues remaining. Upon the first appeal this Court held the pleas of the statute of non-claim to be good as a matter of law and reversed the order of the lower Court striking the pleas. Upon remand of the case the lower Court refused to allow an amended bill by the plaintiffs on the ground that it was without jurisdiction to permit such a filing. As in the instant case, there was a second appeal, and the Court said that no final disposition of the cause had been made on first appeal, but that the original mandate had done nothing more than sustain the legal sufficiencies of certain pleas of the defendants. Reversing the order of the Chancellor, the Court said,

> "The cause of action was then, in legal effect, remanded to the circuit court 'for further decree in accordance with, and not inconsistent with the ruling of this court, with leave to take such further proceedings, in the cause as right and justice may require in arriving at another decree which will accord with the ruling and mandate of the appellate court'; the general rule being that an appeal in a chancery case is a 'step in the cause' . .
>
> "(2,3) The court in sustaining the legal sufficiency of a plea does not direct or award an issue . . . nor does it pass upon the facts of the case. The facts alleged in the plea, unless admitted, are to be determined after the testimony has been taken. The ruling of the court upon the legal sufficiency of a plea does not bar the taking of testimony as to matters of fact alleged in the plea where its legal sufficiency is upheld." (at pp 739-740)

and further went on to say,

> "However, the lower court does have the authority and should in its sound discretion permit either party to amend their pleadings after the case has been remanded by the Supreme Court so long as such amendments do not set up a new cause of action, and are not inconsistent with the disposition

of the cause in the Supreme Court and the holding set forth in its opinion." (at p. 740) (italics supplied)

Under the precedent established in the Brooks case, the Chancellor here would have been in error had he refused to allow the filing of the amended bill.

It is true that the appellee did not attempt to adduce facts, before the first Special Master appointed in this case, to sustain a decree on the ground of extreme cruelty of a physical nature or willful, obstinate and continuous desertion for more than one year. There is a certain reticence on the part of most people to discuss their intimate and secluded conjugal relations in public. The appellee upon the advice of counsel felt that she had made out a good case for divorce and did not feel it necessary to bare certain intimate details of her marriage which had caused her great physical pain and anguish. It finally became necessary, however, for her to swallow her pride and divulge further facts of her marriage which made it impossible for her to continue as the wife of appellant. After the case had been returned to the pleading stage, it would have been a great injustice for the lower Court to refuse to allow the appellee an opportunity to air all of the sordid details of her marriage when it was incumbent upon her to do so.

The amended bill of complaint which appellee was permitted to file in the principal cause presented the same general theory of the appellee's case for divorce and merely stated more specifically the facts upon which she relied to obtain this divorce.

In a similar case, the lower Court, after two appeals, allowed the plaintiff to file an amended bill of complaint. The challenged amendment was not inconsistent with or repugnant to the original bill, and the ultimate purpose of the original bill and the amendment was practically identical. The amendment as made and allowed simply supplied certain further

necessary elements. In holding that the amendment was permissible under our Chancery practice, this Court said,

> "A broad discretion is allowed trial courts in permitting amendments to pleadings, and where no settled rule of law or procedure is violated or judicial discretion abused, order allowing amendment will not be disturbed." (Hollingsworth v. Arcadia Citrus Growers Ass'n, 154 Fla. 399, 18 So.(2d) 159.

The appellant relies mainly upon the case of Martin v. Benson, 112 Fla. 364, 150 So. 603 (Appellant's Brief, p 19). In that case, it should be pointed out, the complainant filed an amended bill of complaint without leave of court. After the defendant filed a motion to strike the amended bill, the Chancellor then entered a decree dismissing the original bill, striking from the files the amended bill, and denying the complainant's petition for leave to file the proposed amended bill. In the first appeal the Supreme Court had settled the law of the case upon the basis of both pleadings and evidence, as distinguished from the case at bar in which the Court decided only that certain pleadings were sufficient. In the Martin case, the Court said,

> "In the present case the amended bill, had it been allowed, would not have changed the settled law of the case, as previously decided by a majority of this court on the former appeal, when the law of the case is applied to the facts constituting the actual controversy between the parties."

In the suit at bar the only pointsof law decided by the Court on the former appeal were that the Pennsylvania decree, if pleaded and proven, was entitled to full faith and credit and that the facts required to be proven under the charge of "indignities to the person" were res judicata. This law must then be applied to "the facts constituting the actual controversy between the parties." By permitting the appellee to file an amended bill of complaint the Chancellor did not change the settled law of the case, but merely allowed the appellee to plead and prove all of the facts constituting the actual controversy

between the parties. By so doing, the Chancellor permitted this case to proceed within the bounds of equity.

It is well settled that the Chancellor is clothed with broad discretion in the matter of allowing or refusing amendments to the pleadings, and unless there is gross and flagrant abuse of the discretion, the appellate Court will not interfere with its exercise. See Surfside Hotel v. W. E. Moorehead Co., 149 Fla. 397, 5 So.(2d) 857. This is because the lower Court must determine whether or not the amendment asked for is necessary for the purpose of determining the real question in controversy between the parties and whether or not it has been duly applied for. (Peacock v. Feaster, 51 Fla. 269, 40 So. 754.) Thus, where the application is made promptly after the necessity has been discovered and no settled rule of law or procedure is plainly invaded or a sound discretion abused, the action of the lower Court in permitting amendments will not be disturbed. (Humphreys v. Smith, 102 Fla. 667, 136 So. 694) This Supreme Court has said that more cases are reversed for refusal to permit amendments to be made than for the improvident allowance of them as not shown to have been justified.

Appellee, therefore, respectfully contends that the Chancellor was correct in granting appellee's motion to file an amended bill of complaint.

SECOND QUESTION

WHERE A WIFE CHARGES THAT HER HUSBAND IS GUILTY OF EXTREME CRUELTY BY THE HUSBAND TOWARD THE WIFE, AND THE HUSBAND SETS UP AS A DEFENSE A FINAL DECREE OF THE COURT OF COMMON PLEAS OF CAMBRIA COUNTY, PENNSYLVANIA, DISMISSING A SUIT THEN PENDING, INSTITUTED IN SAID COURT BY THE WIFE FOR DIVORCE ON THE GROUND OF INDIGNITIES TO THE PERSON, WHICH

SAID DECREE IS ENTITLED TO FULL FAITH AND CREDIT, AND THE WIFE PROVES ACTS OF PHYSICAL CRUELTY, AND THE SPECIAL MASTER RECOMMENDS A DIVORCE ON THE GROUND OF EXTREME CRUELTY OF A PHYSICAL NATURE, MAY THE CHANCELLOR THEN ENTER A FINAL DECREE FOR DIVORCE ON SUCH GROUND?

The Chancellor answered the foregoing question in the affirmative by entering a final decree granting divorce to appellee in part upon the ground of extreme cruelty.

In her amended bill of complaint the appellee charged that the appellant was guilty of extreme cruelty. In accordance with the Mandate of the Supreme Court the Chancellor permitted the appellant to set up in his answer as a defense the final decree of the Court of Common Pleas of Cambria County, Pennsylvania, dismissing the suit then pending between the parties, which suit was instituted in the Pennsylvania court by the appellee for divorce on the ground of indignities to the person. Before the Special Master the wife thereupon proceeded to prove the following major facts which, for the purpose of brevity, are only highlighted here.

After the accidental death by drowning of the minor child of the parties, the funeral was held on Thursday, September 26, 1944, and appellant arrived in Johnstown, the home of the parties, on the following Monday evening (Tr. II, p 255). The bereaved wife found it impossible to tell her husband the facts concerning the circumstances by which the child lost its life because the husband was constantly complaining of his journey home and of his shock at the death of the child, saying that he was out fighting in the war and that she was at home supposed to be taking care of the child and that he could not understand how she could neglect the child so that it could

drown the way it did (Tr. II, p. 256). Later, the parties retired to a common bedroom, and without any exhibition of tenderness or affection toward the appellee, the appellant insisted upon having sexual relations with her and so brutally used her as to inflict great physical pain, so much so that she remonstrated, saying,

> "Morrie, please leave me alone, it is paining me." (Tr. II, pp 256-257)

The parties stayed in Johnstown together for about two and one-half months and the appellant demanded sexual relations with the appellee practically every night during that time, never exhibiting any tenderness or affection toward the appellee, but on the contrary comporting himself so brutally in their sexual relations that he caused the appellee to suffer great physical pain and to protest to him,

> "Morrie, please let me alone. It is only causing me pain and will leave me more nervous." (Tr. II, p. 258)

The pain suffered by the appellee on these occasions usually left her extremely jittery and nervous. During all this period of time her husband, however, continued to remind her that while he was away fighting the war she was supposed to be home taking care of his child and that if she had been a good mother, watching the child, it could not have drowned. He also frequently chided her by saying that he did not want any children until he got out of the service so that he could take care of them and watch them himself. (Tr. II, pp 257-8)

At the end of two and one-half weeks the parties journeyed to visit appellant's mother in New York where again appellant repeated his accusations that she was responsible for the death of their child, and, continuing to demand sexual relationship with her, indulged in the same painfully brutal treatment that he had used in Johnstown. (Tr. II, p.259) After two or three weeks in New York appellant had to report back to

naval duty and appellee went to the home of a friend where she had a physical breakdown and was so weak that she required the attention of a physician for two days before she could travel back to Johnstown.

The parties saw each other at the home of appellee's parents in Johnstown on Thanksgiving 1944, but appellee refused to permit him sexual relations on that occasion. She told him in the presence of her sister that she would live with him no more because of his constant accusations that she neglected watching the child and his brutal methods of sexual relationship. The appellant failed to deny either of these accusations (Tr. II, pp 262-3). About a week later the appellee had another physical breakdown and the doctor advised her to go away for a complete rest. (Tr. II, p. 264) She traveled to New York where she had a complete physical breakdown, being under a doctor's care for a period of two weeks, and returned to Johnstown about December 29, 1944 (Tr. II, p. 265). Appellee actually feared that if she continued the marital relation with the appellant she would be constantly under a physician's care (Tr. II, p.262).

ESTHER JACOBITZ, appellee's sister, lived at the parent's home at the time the child died. She corroborated the appellee's testimony that the appellant had told the appellee upon his return that if the child had been given proper care and attention the accident would not have occurred. She testified that the plaintiff was in a very nervous state at this time and that the appellant's remarks would make the appellee's body shake and her hands tremble. Mrs. Jacobitz was also present during the Thanksgiving visit of the appellant and testified that the appellee at that time told the appellant that she could not live with him any longer because of his accusations, unsympathetic attitude towards her and brutality in sexual relations, and further testified that the appellant did

not make any attempt to deny any of these accusations. (Tr. II, pp 312 & 314).

The appellee respectfully contends that the foregoing highlights adequately show that on the authority of Walker v. Walker, 132 Fla. 681, 182 So. 274, the appellant was guilty of extreme physical cruelty toward the appellee and that this cruelty did injure her health and cause her to fear that it would be permanently impaired.

Two different Special Masters in Chancery heard testimony in this case which testimony was in many cases conflicting. Each Master, however, had the parties and the witnesses before him and was able to observe the demeanor and deportment of all and to judge the sincerity of the testimony, and each Special Master found the equities to preponderate in favor of the appellee.

The question, however, is; Although the evidence proves the charges of extreme cruelty of a physical nature, is the Pennsylvania decree a bar to a decree in appellee's favor?

The Special Master recognizes that the evidence required to sustain the charge of "indignities to the person" in Pennsylvania is exactly the same as that which would be required to prove extreme cruelty of a mental nature in Florida, and, therefore, defendant's plea is res judicata as to extreme cruelty of a mental nature (Tr. III, p. 478). The appellee, however, introduced further corroborated evidence of her charge of extreme cruelty of a physical nature. In order to determine whether the Pennsylvania decree is a bar to such charges, it is necessary to examine both the Pennsylvania and Florida law which applies.

The applicable portions of the Pennsylvania divorce statutes in force during the period of time involved in this cause are as follows:

"(e) Shall have, by a cruel and barbarous treatment, endangered the life of the injured and innocent spouse; or

"(f) Shall have offered such indignities to the person of the injured and innocent spouse, as to render his or her condition intolerable and life burdensome;"

(Purdon's Pennsylvania Statutes, Title 23, Sec.10; Acts of 1943 P. L. 21 - Act No. 10.)

Those portions of the Florida Statutes in force at the time of the commencement of the action are as follows:

"65.04 Grounds for Divorce.--(4) Extreme cruelty by defendant to complainant. . . . (7) Willful, obstinate, and continued desertion of complainant by defendant for one year."
(Florida Statutes Annotated.)

Each separate statutory ground of divorce by the weight of authority constitutes a separate cause of action and this rule has long been recognized in Florida,

"The first suit between the parties was for a divorce upon the statutory ground of 'habitual indulgence by defendant in violent and ungovernable temper' . . . .

"This second suit between the same parties as plaintiff and as defendant is for a divorce upon the statutory ground of 'extreme cruelty by the defendant to complainant' . . . It is consequently not for the same cause of action." (Prall v. Prall, 58 Fla. 496, 50 So. 867)

The Courts of Pennsylvania have distinguished the separate grounds of "indignities to the person" and "cruel and barbarous treatment" as follows:

"The act clearly distinguishes between cruel and barbarous treatment on the one hand, and indignities to the person on the other, as causes for divorce, and requires that the first shall endanger life. A single act of cruelty may be so severe and with such attending circumstances of atrocity as to justify a divorce. No single act of indignity to the person is sufficient cause for a divorce; there must be such a course of conduct or continued treatment as renders the wife's (or husband's) condition intolerable and life burdensome. The indignities need not be such as to endanger life or health; it is sufficient if the course of treatment be of such character as to render the condition of any woman (or man) of ordinary sensibility and delicacy of feeling intolerable and her (or his) life burdensome." (italics supplied) Krug v. Krug, 22 Pa. Sup. Ct. 572, Text p. 573.

The law of Pennsylvania, therefore, does not require the plaintiff to prove that the conduct of the defendant was such as to endanger plaintiff's life or health in order for plaintiff to obtain a divorce under the cause of action designated as "indignities to the person".

Pennsylvania has, by statute, divided divorces on the grounds of "cruelty" into two separate causes of action. Florida on the other hand has differentiated "cruelty" by judicial rule rather than by legislative act. The matter has been discussed by our Supreme Court as follows:

> "The rule enunciated by this Court is that a divorce on the ground of extreme cruelty will be denied where there is no actual bodily violence, unless the treatment complained of be such as damages health or renders cohabitation intolerable and unsafe, or unless there are threats of mistreatment of such kind as to cause reasonable and abiding apprehension of bodily violence so as to render it impracticable to discharge marital duties." (italics supplied) (Masilotti v. Masilotti, 7 So.(2d) 132, 150 Fla. 86.)

> "Cruelty need not be actual bodily harm, but it is enough to sustain the charge where it is established that there was a course of conduct on the part of the defendant calculated to torture 'the mental or emotional nature'and which would 'go to the extent of affecting bodily health'." (Gratz v. Gratz, 137 Fla. 709, 188 So. 580)

and the Pennsylvania and Florida causes of action were compared in the previous appeal of this case,

> "This Court has recognized two (types) of 'extreme cruelty'--one physical, the other mental. Apparently Pennsylvania, through its legislative body, has also given cognizance to this distinction by providing separate grounds for divorce, to-wit: 'indignities to the person' and 'Cruel and barbarous treatment' which endangers the life of the injured and innocent spouse. The former ground appears from the adjudications of the Pennsylvania Courts to fall into our classification of mental cruelty and the latter into the category of physical cruelty." (Gordon v. Gordon, 160 Fla. 838, 36 So.(2d) 774.)

The language in the Gordon case conclusively shows that this Court regards our "mental cruelty" and Pennsylvania's

"indignities to the person" as the same cause of action and our "extreme cruelty of a physical nature" as a distinct cause of action of a classification similar to the Pennsylvania one of "cruel and barbarous treatment". The appellee's libel for divorce in Pennsylvania charged the appellant with "indignities to the person" but did not charge the appellant with "cruel and barbarous treatment."

In the instant case, as pleaded and proven, the appellee relied on two distinct causes of action, (1) "physical" extreme cruelty by the defendant toward the plaintiff, and (2) willful, obstinate and continuous desertion of the plaintiff by the defendant for more than one year (which latter cause of action will be discussed in the next question.

As appellee has pointed out, this Court has held that extreme cruelty of a physical nature is a different cause of action from extreme cruelty of a mental nature and that appellee's Pennsylvania libel was not based on "physical cruelty". The appellant has urged that the dismissal of the Pennsylvania libel based on "indignities to the person" was a bar to the suit. A prior domestic judgment was pleaded as res judicata under almost identical circumstances, but our Supreme Court ruled:

> "The first suit between the parties was for a divorce upon the statutory ground of 'habitual indulgence by defendant in violent and ungovernable temper' . . .
>
> "This second suit between the same parties as plaintiff and as defendant is for a divorce upon the statutory grounds of 'extreme cruelty by the defendant to complainant', and of 'willful, obstinate and continued desertion of the complainant by the defendant for one year'. It is consequently not for the same cause of action.
> . . . .
>
> "By reference to the bill of complaint set out in the statement it will be seen that the facts here alleged are not in substance the same as those alleged in the first suit as above stated, and also that the decree here sought is upon grounds different from those of the first suit. This being so under the principles above stated, the plea of res adjudicata was properly overruled.

It does not now appear that the conduct of the plaintiff operated as an estoppel in pais to prevent the prosecution of this suit for divorce." (italics supplied)
Prall v. Prall, 58 Fla. 496, 50 So. 867.

Upon another occasion our Court considered the effect of a Georgia judgment and in our leading case held:

"(1,2) The record discloses that the parties were heard by the Superior Court of Fulton County, and after submitting the issues to a jury, received a verdict and entered a judgment, and we therefore conclude that the cruel treatment provided for in the Georgia Code, supra, and the extreme cruelty recognized by the Florida laws as ground for divorce are similar, and that the record of judicial proceedings of the Superior Court of Fulton County, Georgia, dated December 9, 1940, introduced in the case at bar, recognized by Section 1 of Article IV of the Federal Constitution, shall and must be recognized by the Courts of Florida and given or awarded full faith and credit . . .

" . . . The test of the identity of the causes of action, for the purpose of determining the question of res adjudicata, is the identity of the facts essential to the maintenance of the actions. It is the essence of estoppel by judgment that it be made certain that the precise facts were determined by the former judgment . . . .

"(7) The case at bar is a second suit between the same parties and predicated not only on the ground of extreme cruelty (cruel treatment), but the additional statutory grounds of habitual indulgence of an ungovernable temper and desertion. The judgment entered in the Superior Court of Fulton County, Georgia, against the appellee (J. C. Bagwell, Jr.) and in favor of the appellant, operates as an estoppel in the second suit only as to every point and question that was actually litigated and determined in the Superior Court of Fulton County, and the judgment of the Superior Court of Fulton County is not conclusive as to other matters that might have been, but were not, litigated or decided. See Prall v. Prall, supra.

"(8) The rule enunciated in Prall v. Prall, supra, placed the burden of proof on the appellant (defendant below) of establishing, for the purpose of determining the question of res adjudicata, that the precise facts offered by the plaintiff below were heard and determined by the Superior Court of Fulton County, Georgia. Our study of the testimony discloses that only some three or four witnesses appeared and testified in the Superior Court of Fulton County, but a transcript of the testimony so given does not

> appear in the record. It was, no doubt, the view of the Chancellor below that the appellant failed to carry the burden of proof required by law and for this reason entered the decree here assailed." (italics supplied)
> Bagwell v. Bagwell, 14 So.(2d) 841, 153 Fla. 471.

In the first appeal of the instant case the Court also considered the effect of the Pennsylvania decree on a divorce granted upon the grounds of "mental cruelty" and said,

> "The character of testimony produced by appellee in the instant case is essentially the same as that which she would have been required to present to establish her charge of 'indignities to the person' had she pursued her action in Pennsylvania. . . . . Consequently, we held that the learned Chancellor erred in granting appellee's motion to strike the amendment to the appellant's answer and in entering a final decree of divorce in favor of appellee. Full faith and credit should have been accorded the final decree of the Pennsylvania Court." (italics supplied)
> Gordon v. Gordon, 160 Fla. 838, 36 So.(2d) 774.

Since the character of the proof necessary to establish extreme cruelty of a physical nature is essentially different from that the appellee would have been required to present to establish her charge of indignities to the person had she pursued her action in Pennsylvania, the Pennsylvania decree should not be res judicata of the causes of action relied upon by the appellee in the instant case. Appellee respectfully contends that having met the burden of proving extreme cruelty of a physical nature to the satisfaction of the Special Master and the Chancellor, she is entitled to a final decree of divorce upon the ground of extreme cruelty.

THIRD QUESTION

WHERE IT APPEARS FROM THE TESTIMONY OF THE WIFE IN HER SUIT FOR DIVORCE THAT HER HUSBAND BY INNUENDOES AND INSINUATIONS CHARGED HER WITH LACK OF PROPER CARE OF THEIR MINOR CHILD IMMEDIATELY AFTER THE TRAGIC DEATH OF SAID CHILD BY ACCIDENTAL DROWNING,

AND THAT HER HUSBAND, DURING THIS GRIEF STRICKEN PERIOD, INSISTED UPON SEXUAL RELATIONS WITH HER WITHOUT DISPLAY OF AFFECTION, AND WHEN SHE WAS NOT IN THE MOOD THEREFOR, CAUSING HER MENTAL AND PHYSICAL PAIN, AND THAT HER HUSBAND FAILED TO OFFER ANY APOLOGIES FOR HIS BRUTALITY OR RETRACTION OF HIS ACCUSATIONS, BECAUSE OF WHICH THE PARTIES DID NOT THEREAFTER LIVE TOGETHER FOR A PERIOD OF MORE THAN ONE YEAR, MAY THE CHANCELLOR THEN BY FINAL DECREE GRANT A DIVORCE TO THE WIFE ON THE GROUND OF WILLFUL, OBSTINATE AND CONTINUED DESERTION FOR MORE THAN ONE YEAR?

The Chancellor answered the foregoing question in the affirmative by entering his final decree granting a divorce to appellee on the ground of willful, obstinate and continued desertion of her by appellant for one year.

In the instant case the appellee contended, and the appellant admitted that the parties did not live together as man and wife at any time after January 2, 1945. The appellee filed her libel for divorce in Pennsylvania on January 28, 1946, at which time the parties had not lived together as man and wife for a continuous period of one year and twenty-four days. No cause of action for divorce on the ground of desertion had matured in Pennsylvania at the time of the filing of the libel, because the desertion must have continued for a term and space of two years before Pennsylvania recognizes desertion as a cause of action for divorce. The Pennsylvania statute says:

> "(d) Shall have committed willful and malicious desertion, and absence from the habitation of the injured and innocent spouse, without a reasonable cause, for and during the term and space of two years;"
>
> (Purdon's Pennsylvania Statutes, Title 23, Sec.10; Acts of 1943, P. L. 21 - Act No. 10)

On the other hand the desertion complained of had continued for a period of more than one year and, therefore, was recognized in Florida as a cause of action for divorce.

> "Once statutory ground for divorce because of desertion has occurred, right to divorce becomes 'vested' and cannot be taken away from the injured party except by his own act." (Anders v. Anders, 153 Fla. 54, 13 So.(2d) 603.)
>
> "By a decree which is now challenged the appellee was awarded a divorce from the appellant on the ground of desertion.
>
> "The bill of complaint was filed on September 23, 1940, averring that the appellant left the appellee on March 28, 1939. It is shown in the record that meanwhile, on April 14, 1939, appellee entered suit against appellant charging extreme cruelty and this suit terminated in a decree, October 11, 1939, dismissing his bill of complaint.
>
> " . . . The intervening litigation pended 181 days from April 14, 1949, when the bill was filed, to and including October 11, 1939, when it was dismissed. . .
>
> ". . . but 544 days elapsed between the act of desertion and the filing of the bill of complaint charging it. The remainder, after deducting 181 days that the intermediate litigation pended, is 363, therefore, the bill lodged September 23, 1940, was premature by three days and the decree is reversed with instructions to dismiss the cause." (Young v. Young, 152 Fla. 712, 12 So.(2d) 885).

In the Young case, supra, the Court held that the filing and prosecution of the extreme cruelty suit "tolled" the lapse of time which would bring into being a cause of action under the desertion statute, and that the plaintiff husband should have waited an additional three days before filing his bill so that the full year of "untolled" time should have elapsed before bringing his bill for desertion. In the instant case, however, more than a year had elapsed before the appellee brought her libel for divorce in Pennsylvania, and as a result a cause of action for desertion became vested in her and could not be taken away by a second suit based on another cause of action.

Appellee's cause of action for divorce on the ground of willful, obstinate and continuous desertion for more than one year is based upon the following proven and corroborated facts:

MIRIAM GOLDHABER, a twenty-one year old girl, financially independent in her own right, married MORRIS GORDON, an employee in her family's business establishment of which she was part owner, on March 9, 1941 (Tr. II, pp 246 & 248). Between the time of marriage and January 10, 1944, at which time the husband was inducted into the U. S. Navy, MORRIS GORDON, by complaints to his wife and quarrels with members of her family about his salary and working conditions, had created a condition of turmoil which placed the appellee under a condition of considerable nervous strain. One child, a boy, had been born issue of the marriage on July 24, 1942. On September 24, 1944, this child lost its life by accidental drowning and was buried on Thursday, September 26, 1944 (Tr. II, p. 255). The appellant was able to secure emergency leave and travel from his duty station as instructor at Pearl Harbor to the home of the parties in Johnstown, arriving there on the Monday following the funeral. Upon his arrival, instead of treating the child's death as a mutual unavoidable misfortune, he told his wife and her family and his mother that his wife was responsible for the death of the child and that he wanted no more children until he was able to be at home and watch over them. These accusations were first made upon the day of his arrival at home and were repeated by him many times thereafter during the period of approximately one month during which his naval leave extended. In addition to this, he changed his physical treatment of her from that he had formerly accorded, and after subjecting her to mentally torturing accusations by day, demanded his marital sexual rights by night, and in the exercise of these rights comported himself

in such a brutal manner toward his wife that he caused her extreme physical pain. The appellant knew that he was causing her pain because her suffering was so intense that on every occasion she remonstrated and complained that he was causing her physical pain which would leave her in a distressed and nervous condition. But despite his wife's protests he did not desist from causing her pain, and upon his departure and return to Naval duty the appellee, as a result of his treatment of her, required the care of a physician. The appellee had come to fear that a continuance of the marital relation between them would subject her to continued mental torture by day and physical torture by night and that under these circumstances her health would be permanently impaired. He secured an emergency leave and returned to their home in Johnstown on Thanksgiving 1944. On that occasion, in the presence of her sister whose corroboration is in the record, she told her husband his continual accusations that she was responsible for the death of their child and his brutal treatment of her in their sexual relations convinced her that if she continued to live with him she would always be under the care of a physician. MORRIS GORDON did not deny these accusations and offered no apologies, did not ask for any forgiveness and made no promises of reform or better treatment in the future. A few days later she again suffered a physical breakdown and was sent by her family to New York for rest and medical care, returning to Johnstown on December 29, 1944 (Tr. II, pp 255-265).

The husband, MORRIS GORDON, again on leave, had been at the home of the parties on about Christmas 1944, but the day before her return removed himself from that home and went to live with his sister who resided in Johnstown. At the plaintiff's request the parties had a conference on January 2, 1945, in the marital home at appellee's request, and the appellee

again told the appellant that she could no longer live with him as his wife, because she feared a repetition of his past misconduct, more accusations that she was responsible for the death of their child and increasingly brutal and painful mistreatment of her in their sexual relations. Again the appellant failed to offer any apologies for his brutality or retraction of his accusations, and the parties discussed a divorce, the husband making certain financial demands to which the wife responded that she would rather discuss them in the presence of the family attorney. The parties made an appointment to meet in that lawyer's office the following day, but the defendant did not appear and never returned to the parties' home (Tr. II, pp 265-267).

Appellant respectfully contends that these facts make out a clear case of desertion of the wife by the husband. Such a case falls under the general classification of "constructive desertion". Our Court has said,

> "In a suit for divorce on the ground of willful, obstinate, and continued desertion for the statutory period, it is immaterial which of the married parties leave the marital home, the one who intends bringing the cohabitation to an end commits the desertion." Hudson v. Hudson, 59 Fla. 529, 51 So. 857.

The proof leaves no doubt that after the death of the child, MORRIS GORDON indulged in a course of conduct which was calculated to and did cause his wife, MIRIAM GORDON, to suffer mental anguish and physical pain, resulting in an illness which the appellee described as a "breakdown" during which she required the services of a physician. Her fear that she would be subjected to the same treatment by him in the future and that this would result in permanent injury to her health caused her to tell him on Thanksgiving 1944 that she could no longer live with him as his wife because of what he had done and her fear of a continuation of his wrongdoing. Her sister testified that she was under such a nervous tension because of the treatment of her

by her husband that she reached a point where even her hands and body would tremble when he made these remarks to her (Tr. II, p. 312).

In cases of constructive desertion it is not necessary that the wrongful conduct of the offending spouse, which is the motivating cause for the termination of conjugal relations, be in itself of such gravity as to constitute a separate cause of action for divorce.

> "Where a wife severs the conjugal relation and separates from her husband, a very strong case of willful and determined effort to force her to leave him, or by wrongdoing . . . to make life so unbearable that she cannot continue to live with him, is necessary to be established in order to justify a divorce." (Stevenson v. Stevenson, 84 Fla. 678, 94 So. 860.)

It is hard to imagine any course of conduct by a husband which would make his wife's life more unbearable than that indulged in by MORRIS GORDON toward his wife after the death of their child. And it must be presumed that this conduct was willful because it extended over a period of at least a month and was persisted in despite the pleadings and protests of his wife. After weighing the evidence the Special Master reported as follows:

> "As may always be expected in cases of this character, which involve respectable people and where the grounds for divorce are predicated upon the intimate relationship of the parties, corroboration of the manner in which the physical acts complained of occurred is impossible. Likewise, the motives of the parties in either seeking to dissolve the marital relation or to continue it, as a means of weighing the truthfulness of their testimony is in most instances unreliable. That the plaintiff on January 2, 1945, no longer felt any love toward the defendant seems self-evident. That the defendant today possesses no desire for a reconciliation, although he does not wish to have the bonds of matrimony dissolved would also seem obvious.
>
> "There seems to the Special Master to be convincing evidence that after the unfortunate demise of the infant child, the plaintiff quite naturally was emotionally prostrate with grief. The death of a small loved one creates a heavy cross to bear under any circumstances and the

accidental drowning of the child under the facts presented in this case was a misfortune and tragedy, burdensome beyond belief. Accusations by the husband of negligence and lack of care and attention, particularly when made soon after the incident, would visit upon the wife and mother immeasurable mental anguish. The Special Master finds that after weighing all of the evidence it preponderates in plaintiff's favor that this situation confronted her immediately after the death of the child and continued until the separation of the parties.

"Such cruel treatment is, however, not a sufficient ground in this case to dissolve the marriage since that issue has already been decided adversely to the plaintiff by a Pennsylvania Court (even though plaintiff did not appear and present her evidence in that cause although she had the opportunity to do so.) The Special Master further finds, however, that while the plaintiff was distraught, suffering from frayed nerves and emotional instability, the defendant persisted in his demands for sexual relations over the plaintiff's protests and that they were carried on without any showing of affection or consideration but only to the end of satisfying his desires. Plaintiff remonstrated and told the defendant that under the circumstances, it would only result in a painful experience to her and further aggravate her nervous condition. While this may not have amounted to compulsion by actual physical force, it was a continuing harrowing experience, the escape from which could only be a separation of the parties." (Tr. III, pp 485-486)

The Florida rule under such circumstances is in accord with the weight of authority as shown by a decision of the Supreme Court of Alabama which read,

"But courts will not justify such withdrawals except for the gravest and most compelling reasons--reasons which involve the fundamental happiness or self-respect of the withdrawing spouse, and the vicious and unjustifiable conduct of the other. And the provoking misconduct should not be occasional or transient only, but continuous or persistent, and apparently irremediable." (italics supplied) (Higgins v. Higgins, 130 So. 677 (Ala.).)

The fact that the appellee refused to continue conjugal relations and was mentally relieved by appellant's desertion on January 2, 1945, is no bar to the maintenance of an action by her for this desertion, because our Court has said,

"This is an appeal from a decree denying the prayer of the bill for divorce and dismissing the bill. The divorce was sought on the

grounds of the willful, obstinate, and continued desertion for period of one year . . .

"(3) The decree in this case is predicated upon the erroneous doctrine that if a husband or wife deserts the other there must be no willingness or acquiescence in such desertion on the part of the deserted spouse. We know of no such rule, and there is nothing in the statute to warrant grafting that doctrine upon it.

"A drunken husband may make his wife's life so wretched that his desertion may come as a relief, and it would be a strange and harsh doctrine if, in order to procure a divorce on the ground of willful, obstinate, and continued desertion for a year, she would have to establish, in addition to the desertion, the fact that she had grieved her heart out at the loss of her drunken husband.

"The frame of mind of the deserted spouse in no way lessens the gravity of the offense of a willful, obstinate, and continued desertion." (italics supplied) Wright v. Wright, 81 Fla. 456, 87 So. 156.

It is respectfully submitted that the conduct of the appellant made life so unbearable for his wife that she could not continue to live with him, and his misconduct caused her fundamental unhappiness involving her self-respect. The appellee on two occasions told him in plain words that she regarded this misconduct as making their future together impossible, but on neither of these occasions did the appellant offer any apologies or retraction of his accusations, but on the contrary on the last occasion discussed his financial demands in case she entered suit against him for divorce. He left their home on the 2nd of January, 1945, never to return. A right of action for divorce on the ground of desertion matured insofar as the Florida statute is concerned on January 3, 1946. The appellee did nothing which would cause her to lose her right of action. Under the facts and the law, the appellant was guilty of willful, obstinate and continuous desertion of the appellee by the appellant for one year, and, therefore, appellee respectfully contends that the Chancellor below was correct in entering a final decree granting a divorce to appellee on the ground of

willful, obstinate and continued desertion of her by appellant for one year.

FOURTH QUESTION

WHERE A WIFE, BEING THEN A RESIDENT OF PENNSYLVANIA, ON JANUARY 18, 1946, INSTITUTED A SUIT FOR DIVORCE AGAINST HER HUSBAND IN THE COURT OF COMMON PLEAS IN CAMBRIA COUNTY, PENNSYLVANIA, AND SAID SUIT PROGRESSED TO FINAL DECREE ON JUNE 28, 1947, IN WHICH SAID COURT FOUND THAT SHE WAS THEN A RESIDENT OF CAMBRIA COUNTY, PENNSYLVANIA, AND NOT A RESIDENT OF FLORIDA AND WHERE SAID WIFE, DURING THE PROGRESS OF HER PENNSYLVANIA SUIT, INSTITUTED A SUIT AGAINST HER HUSBAND IN THE CIRCUIT COURT IN AND FOR DADE COUNTY, FLORIDA, ON SEPTEMBER 30, 1946, WAS THE WIFE ESTOPPED FROM ASSERTING THAT SHE WAS AT THE TIME OF THE FILING OF HER BILL OF COMPLAINT AND THEREAFTER A BONA FIDE RESIDENT OF THE STATE OF FLORIDA?

The Chancellor answered the foregoing question in the negative by refusing to strike parts of plaintiff's response to defendant's answer and appellant's motion to dismiss plaintiff's amended bill of complaint and by denying defendant's exceptions to the report of the Special Master.

The appellee on January 18, 1946, instituted a libel for divorce against the appellant in the Court of Common Pleas, in and for Cambria County, Pennsylvania. In that libel for divorce the appellant alleged that she had been a citizen and resident of the State of Pennsylvania for more than one whole year previous to the filing of her libel and charged that the appellant was guilty of "indignities to her person", a statutory

ground for divorce in Pennsylvania (Tr. I, pp 110-111). On June 25, 1946, the appellee moved to Miami Beach, Florida, and there established her legal residence. Later, on September 30, 1946, appellee instituted the suit at bar and filed in the Circuit Court of Dade County, Florida, her verified bill of complaint for divorce. In this bill of complaint appellee alleged that she was then a resident of the State of Florida and had been such a resident for more than ninety days preceding the filing of the bill and charging her husband with extreme cruelty, indulgence in a violent and ungovernable temper and willful and obstinate desertion for more than one year (Tr. IV, p. 1-12).

The appellant contends that the decree of the Pennsylvania Court (entered prior to the decree of the Florida Court) dismissing the appellee's libel for divorce in Pennsylvania, acted as an estoppel preventing the appellee from asserting in her suit in Florida that she was at the time of the filing of her bill of complaint and thereafter a bona fide resident of the State of Florida.

There were only two issues raised by the pleading in the Pennsylvania suit, i.e., (1) was the appellee a resident of Pennsylvania at the time of the filing of her libel, and (2) was the appellant guilty of the charge of "indignities to the person".

It is the fundamental principle of jurisprudence that material facts or questions which were in issue in a former action, and were there admitted or judicially determined, are conclusively settled by a judgment therein, and that such facts or questions become res judicata and may not again be litigated in a subsequent action. However, the general rule is also that a judgment is not conclusive in regard to a question which, from the nature of the case, may or should not be adjudicated in the action in which it is rendered.

"On the ground that a judgment rendered

by a court on matters outside the issues submitted for its determination stands upon the same footing as one dealing with a subject matter entirely foreign to its jurisdiction, it has been held that the doctrine of res judicata operates only as to questions within the issues as they were made or tendered by the pleadings, and does not extend to matters which might have been litigated under issues formed by additional pleadings. Frequently, it is also declared that in order that a judgment may operate as res judicata and be conclusive evidence of a fact sought to be established by it, it must appear that the fact was a material one in the former action, that the determination of facts which were not necessary to uphold the former judgment does not conclude the parties, and that even though a judgment in express terms professes to affirm a particular fact, yet if such fact was immaterial, and the controversy did not turn upon it, the judgment does not conclude the parties in reference to that fact." (italics supplied) 30 Am. Jur. Sec. 182, p. 927.

The Pennsylvania statute requires, as a jurisdictional prerequisite, that the libelant must have resided within the state for at least one year prior to filing of the libel. (Purdon's Pennsylvania Statutes, Annotated, Title 23, Para. 16; Acts of 1929, P.L. 1237, Para. 16). The only jurisdictional fact, therefore, which had to be decided by the Special Master appointed in Pennsylvania was whether or not appellee, at the time of the institution of her libel, was a bona fide resident of Pennsylvania. The Pennsylvania Master nevertheless went further and volunteered the opinion, in his findings, that the appellee was domiciled in Pennsylvania, and that at the time of the hearing, was not domiciled in the State of Florida (Tr. II, p. 215). This finding of fact was not necessary to the determination of the issues presented in the Pennsylvania libel, and, therefore, does not conclude the parties in reference thereto.

This Court has had occasion to define the limits beyond which the doctrine of res judicata does not extend:

"When the second suit is between the same parties as the first, and on the same cause of action, the judgment in the former is conclusive in the latter not only as to every question which was decided, but also as to every

> other matter which the parties might have litigated and had determined, within the issues as they were made or tendered by the pleadings or as incident to or essentially connected with the subject-matter of the litigation, whether the same, as a matter of fact, were or were not considered. As to such matters a new suit on the same cause of action cannot be maintained between the same parties. This rule applies to every question falling within the purview of the original action, both in respect to matters of claim and defense, which could have been presented by the exercise of due diligence." (italics supplied) Hay v. Salisbury, 92 Fla. 446, 109 So. 617, 621.

Two Special Masters appointed by the Court in Florida found that the appellee had in good faith changed her legal residence from Pennsylvania to Florida. The Special Master in Pennsylvania found that both the Pennsylvania Courts and the Florida Courts could have concurrent jurisdiction, inasmuch as an action for divorce not being a local one, but being a transitory action, may be brought in any Court of competent jurisdiction. (Tr. II, p. 216) The fact that our Circuit Court is one of competent jurisdiction has not been denied. The Pennsylvania Master reported as follows:

> "As stated in 21 CJS 855, 856, Sec. 548, in the rule of comity, a Court of concurrent jurisdiction may refuse to take jurisdiction while a similar suit is pending between the same parties in another jurisdiction. The pendency of an action in a Court of one State or county is not a bar to the institution of another action between the same parties and for the same cause of action in a Court of another State or county, nor is it the duty of the Court in which the latter action is brought to stay the same, pending determination of the earlier action, even though the Court in which the earlier action is brought has jurisdiction sufficient to dispose of the entire controversy." (Tr. II, p. 217)

It follows, therefore, that the grant of jurisdiction to the Pennsylvania Court, based upon the finding of fact of the Special Master that appellee was domiciled in Pennsylvania at the time of the institution of her libel there, cannot and does not oust the Florida Court of the jurisdiction which it had in

good faith acquired nor of any of the powers which it before possessed. The Pennsylvania decree, having been entered prior to the Florida decree, is admittedly a bar with respect to the material and essential facts therein adjudicated. Appellee respectfully contends, however, that the question of residence at the time of the hearing in Pennsylvania was not in issue in the Pennsylvania case and, therefore, a gratuitous finding on the part of the Pennsylvania Master cannot preclude a finding by the Florida Court that the appellee was domiciled in Florida at the time of the institution of her bill for divorce in this state, and that perforce, the Florida Court had jurisdiction of the cause.

FIFTH QUESTION

WHERE A FINAL DECREE OF DIVORCE IS ENTERED IN FAVOR OF A WIFE PENDING AN APPEAL BY THE HUSBAND, THE WIFE MARRIES ANOTHER MAN AND CONCEIVES A CHILD AND THEREAFTER THE SUPREME COURT REVERSES THE DECREE OF DIVORCE, DOES THE WIFE'S REMARRIAGE AND PREGNANCY ESTOP HER FROM SUCCESSFULLY PROGRESSING ORIGINAL CAUSE TO ANOTHER FINAL DECREE OF DIVORCE?

The Circuit Court answered that question in the negative.

MORRIS GORDON, the defendant, appealed from the original final decree but did not choose to supersede its effect.

The appeal, itself, does not operate as a supersedeas, of course, and the final decree, during the period between the notice of entry of appeal and the handing down of the mandate, remains as effective as if no appeal had ever been taken.

> "At common law a writ of error did not vacate or annul this judgment sought to be reviewed. And under modern statutes, where the

appeal or error proceeding is in the nature of a writ of error, the judgment is not vacated or annulled by the taking of the review proceeding. So long as the judgment remains unreversed, its conclusiveness as res judicata, as between the parties, is not affected."
3 Am. Jur. 189, Sec. 521

"Furthermore, in the absence of statute to the contrary, a judgment of divorce has been considered as rendered and fixes the rights of the parties when the court pronounces its decision . . . ."
17 Am. Jur. 358, Sec. 428.

"The judgment does not relate back, but takes effect as a dissolution of the marriage relation from the date of its entry only."
17 Am. Jur 359, Sec. 430.

"The entry of a final decree on a decision granting a divorce is equivalent to the entry of a judgment."
Sahler v. Sahler, 154 Fla. 206, 17 So.(2d) 105.

"The final decree of divorce closed the divorce suit, and as jurisdiction was not therein retained for any purpose, that decree became absolute before petition was filed praying modification thereof."
Norton v. Norton, 131 Fla. 219, 179 So. 414.

From the foregoing it seems evident that by the entry of the original final decree of divorce the marriage was dissolved and the parties, plaintiff and defendant, occupied the status of single persons.

If the defendant had desired to set aside the effectiveness of the decree pending appeal he could have superseded the decree and set its effectiveness aside.

"(1) Motion and order for.--Every appeal shall operate as a stay or supersedeas under the following conditions. The appellant shall, at any time prior to filing his record on appeal, apply to the trial court for a good and sufficient bond payable to the adverse party, the amount and conditions of which shall be fixed by the trial court. If the appeal is from a money judgment or decree, the stay or supersedeas shall be as of right on posting the bond . . . . .

"(5) Other than for money.--If the judgment or decree is, in whole or in part, other than a money judgment, the amount and condition of the bond shall be determined by the trial

> court, and the elements to be considered in fixing the amount and conditions of such bonds shall be the costs of the action, costs of the appeal, interest (if chargeable), damages for delay, use, detention, and depreciation of any property involved."
> Florida Statutes Annotated, Sec. 59.13

He failed to take advantage of the remedy, and, therefore, until reversed, each of the parties occupied the status of single, i.e., divorced, persons with the ability to contract marriage with another.

This Court itself has recognized that an unsuperseded decree of divorce is fully effective during the period prior to its reversal and has said,

> "While both parties to a divorce decree live, an appeal from it lies in this court to reverse an erroneous decree of divorce; the effect of such reversal being to restore both parties to their former status as husband and wife in law." (italics supplied)
> Price v. Price, 114 Fla. 233, 153 So. 904.

During the months following the entry of the original decree, MIRIAM GORDON remained a resident of Florida and during that period met and fell in love with Mr. Cohen and desired to marry him. With advice of counsel (Tr. I, pp 30,31) and in the full belief that she was within her rights, she did marry him and conceived a child, and, thereafter, this Court reversed the final decree which she had believed terminated her former marriage relation and restored her to the position she formerly occupied in law, i.e., to the status of being the wife of MORRIS GORDON.

The lower Court in accordance with the Mandate set aside its final decree and its order striking amendment to defendant's answer and allowed the plaintiff "to file such response as she may be advised to defendant's answer as amended" (Tr. I, p. 12), and, thereafter, in accordance with permission of the Court plaintiff did file her response (Tr. I, pp 13-32), and in that response on pages 30 and 31 she informed the Court

of her intervening marriage and of the fact that there was a child in gestation as a result of the intervening marriage. The defendant moved to strike the response, and the Court, stating that the matter contained in Paragraphs 3 through 12 should more properly be pleaded by an amended bill, struck those paragraphs without prejudice and granted leave to the plaintiff to assert those matters by an amended bill. The Court denied the defendant's motion to strike Paragraph 13 of the response and granted the plaintiff leave to include those matters in the amended bill (Tr. I, p. 46).

Appellant in his argument under his Third Question, on the one hand says that plaintiff alleged her intervening marriage solely for the purpose of obtaining the sympathy of the Court and that the allegations are improper, and on the other hand says that she should not be permitted to have a divorce because she comes into the Court with unclean hands. If the plaintiff had sought to conceal the intervening marriage and child conception, then defendant's contention of unclean hands might have some force and effect, but plaintiff's honesty and straightforwardness is apparent from the record because she fully informed the Court of the intervening marriage and conception of the child at the first opportunity subsequent to the Mandate. The Court did not feel that the intervening marriage constituted misconduct and the attempt on the part of the defendant to take advantage of plaintiff's admission of the intervening marriage by charging that she was guilty of adultery with the intervening husband was disregarded by the Master and the Chancellor as being a specious issue. This Court has already answered the defendant's contention by saying:

> "(2) The application of the doctrine of recrimination in divorce cases is an outgrowth of the equity maxim that 'he who comes into equity must come with clean hands'.
> (3) It is not an absolute but a qualifying doctrine. If it were to be applied strictly

great inequity would be done, for it so often happens that neither party to a suit has been free from fault. This is especially true in divorce matters generally, and in this case in particular."
Stewart v. Stewart, 158 Fla. 326, 29 So. (2d) 247.

"While it was highly imprudent for her to marry again while the appeal was pending, she doubtless relied upon the opinion of her counsel, whom she married, and whose importunity probably outweighed his legal acumen, and there was therefore nothing of a metricious character in her act so far as the moral aspect of it is involved.

"We do not regard her act, therefore, as constituting adultery such as would preclude her from maintaining a suit for divorce upon statutory grounds against her husband whose status as such is purely technical."
Chisholm v. Chisholm, 105 Fla. 402, 141 So. 302.

CONCLUSION

By reason of the foregoing, appellee respectfully contends that the Circuit Court committed no error, and its final decree should be affirmed.

Respectfully submitted,

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By _____

RECEIVED a copy of the above and foregoing Brief this 3rd day of April, 1951.

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