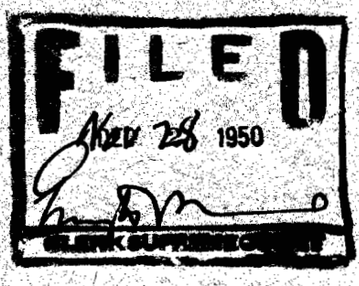
IN THE SUPREME COURT OF FLORIDA

MORRIS GORDON,	:	
Appellant,	:	ON APPEAL FROM THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT OF FLORIDA, IN AND FOR DADE COUNTY IN CHANCERY ACTION NO. 103685
vs.	:	
MIRIAM GORDON,	:	
Appellee.	:	

BRIEF OF APPELLANT



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I N D E X

AUTHORITIES CITED

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I.

HISTORY OF THE CASE

On March 9, 1941, the parties in this action were married and joined in the holy bonds of matrimony in the City of Pittsburgh, State of Pennsylvania (T.V.IV - 1). At the time of said marriage, both of said parties were residents of the City of Johnstown, in Cambria County, Pennsylvania, the wife having been such a resident from birth and the husband having been such a resident for approximately two years prior to their said marriage. The wife did then and thereafter have the right to participate, with her parents, brothers and sisters, in the profits of a bottling works in said City of Johnstown, and then and thereafter enjoyed an income from said business of approximately $1200.00 per month. After said marriage, said husband, who had been operating a service station in said city, became employed in said bottling works. Except for such times as said husband was absent from their home in the military service of the United States, the said parties resided together as husband and wife in or near said City of Johnstown until approximately January 2, 1945 (T.V.IV - 32), when the said wife refused to cohabit with her said husband and resolved to terminate the marital relation existing between them.

On January 18, 1946, said wife instituted an action for divorce, on the grounds of indignities to her person, against her said husband in the Court of Common Pleas in and for Cambria County, Pennsylvania, a court of record having jurisdiction to grant the relief sought in said suit. Thereafter, she caused process to be duly and regularly served upon her defendant husband, who did then appear in said action and did, on May 27, 1946, file his answer to her libel or bill of complaint therein

(T.V.IV - 46), and thereupon said cause was then at issue and ready for trial; that in May of 1946, said wife instituted a non-support proceeding against her husband, in Court of Quarter Sessions, Cambria County, Pennsylvania (T.V.IV - 48A8), but authorized a nol pros of said proceedings and paid the costs thereof when her husband appeared to present his defense.

On approximately June 25th, 1946, said wife journeyed to Miami Beach, Florida, where she thereafter resided in certain hotels in said city, and on September 30, 1946, notwithstanding the pendency of her aforesaid action for divorce in the Court of Common Pleas in Cambria County, Pennsylvania, she instituted this suit at bar and filed in the Circuit Court in and for Dade County, Florida, her verified bill of complaint for divorce (T.V.IV - 1-12) against her said husband, wherein and whereby she did allege that she was then a resident of the State of Florida and had been such a resident for over 90 days then last past, notwithstanding that she did during said period maintain her bank account in a bank in said city of Johnstown, was then registered on the assessment records of Cambria County, Pennsylvania, as a resident thereof and that the official records of said county show her to then be a registered voter in said county (T.V.IV - 48A20). The defendant husband, after service of process having been obtained upon him by publication, filed his appearance in this action on October 30, 1946, and thereafter, on December 4, 1946, he did file his answer to plaintiff's bill of complaint and did, in Paragraph 12 thereof (T.V.IV - 19), aver the pendency of the aforesaid action for divorce instituted in the said Court of Common Pleas of Cambria County, Pennsylvania, and attached to his said answer an exemplified copy of the record of said pending Pennsylvania action, and did further aver that his said wife should not be permitted to proceed in this suit at bar until her said Pennsylvania action had been disposed of.

The defendant husband having filed his answer in this suit at bar, and said suit being at issue, a Special Master was appointed (T.V.IV - 23) to take the testimony of the parties, and at a hearing held before the said Special Master on December 12, 1946, the plaintiff wife testified that she did not then know whether her said action instituted against her said husband in the Court of Common Pleas, in Cambria County, Pennsylvania, was still pending, but that she had never directed her attorneys in that case to dismiss said suit and that she had not proceeded with said suit because of malicious gossip in said City of Johnstown making a nervous wreck of her (T.V.IV - 139-140). At the Special Master's hearing on April 29, 1947, she testified that said action for divorce instituted by her against her husband was still pending in Cambria County, Pennsylvania (T.V.IV - 141), but that no date had been set for a hearing in said action; that there had been no discussion between her and her attorneys until just recently about the disposition of said Pennsylvania action, but that her attorneys had just recently filed a petition to discontinue said action and that she did not want to keep said action pending (T.V.IV - 143).

On May 5, 1947, the plaintiff wife filed her petition in the Common Pleas Court in and for Cambria County, Pennsylvania, for leave to discontinue her said action for divorce then pending in said court (T.V.IV - 46), and on May 13, 1947, after argument on said petition and the defendant husband's answer thereto (T.V.IV - 48A5-11), her said petition to dismiss her said Pennsylvania action was not granted but was dismissed (T.V.IV - 47), and on said date, May 13, 1947, upon the motion of her said husband filed in said Pennsylvania action, a Master was appointed by the court (T.V.IV - 48A11).

On May 28, 1947, the Special Master appointed in this suit at bar having heard the testimony and received the

evidence of the parties thereto, filed his report (T.V.IV - 23), in which he stated that although the plaintiff wife, in and by her bill of complaint, charged her said husband with extreme cruelty, habitual indulgence by him in violent and ungovernable temper and continuance of wilful, obstinate and continued desertion of her for one year, he found that the testimony of the wife and her witnesses failed to support either the charge of habitual indulgence in violent and ungovernable temper on the part of her husband or the charge of wilful, obstinate and continued desertion of her by her husband, and that the gravamen of the said wife's case rested upon her charge of extreme cruelty (T.V.IV - 26) and the Special Master recommended that the wife be awarded a decree of divorce on the last mentioned grounds.

On June 7, 1947, the said husband filed in this suit at bar his exceptions to the said Special Master's report and therein insisted (T.V.IV - 36) that the Master erred in not finding that at the time the action at bar was instituted there was then pending in the Court of Common Pleas in and for Cambria County, Pennsylvania, an action for divorce instituted by the plaintiff against the defendant on grounds like and similar to the grounds alleged in the suit at bar, and that said Pennsylvania action had not been dismissed but was then pending and progressing to final decree, and in not recommending that under such circumstances the instant action be stayed or continued by reason of the pendency of said Pennsylvania action.

On due notice given the respective parties in the said Pennsylvania action (T.V.IV - 48A12), the Master appointed in said action did, on May 27, 1947, hold a hearing in the said City of Johnstown, Pennsylvania, at which said hearing the said wife did not appear and was not represented thereat by counsel. The defendant husband and his witnesses did appear and voluminous

testimony was taken and evidence was offered and received relevant to the issues involved in said action (T.V.IV - 54-125, inc.), and upon the conclusion of said hearing, the said Master, on June 16, 1947, after due notice to counsel for the parties in said cause (T.V.IV - 48A13), filed therein his report wherein he recommended that the prayer of the said wife for a decree of divorce a.v.m. be refused and that her libel or bill of complaint be dismissed, ten days being allowed to each of said parties to file exceptions to said report (T.V. IV - 48A14-26). No exceptions to the said report being filed, the said court, on June 28, 1947, made and entered a final decree in said suit wherein and whereby the findings of fact, conclusions of law and the recommendations of the said Master were adopted by the court and the libel or bill of complaint of the wife was dismissed at her cost (T.V.IV - 47).

Thereupon the defendant husband did, on July 9, 1947, file in this suit at bar his motion to dismiss the bill of complaint of the plaintiff wife on the grounds set forth in said motion (T.V.IV - 44), and particularly on the grounds that the matters in issue in this action at bar have been adjudicated and finally determined by the said final decree made and entered in said Pennsylvania suit, and that said final decree is conclusive upon the wife in this suit at bar, and that the final decree made and entered in said Pennsylvania action is entitled to and must be given full faith and credence in conformity to the provisions of Section 1 of Article IV of the Constitution of the United States, the laws of the United States and the judicial decisions of the Supreme Court of Florida; and the defendant husband did attach to, as "Exhibit A," and make part of his said motion, an exemplified copy of the record of said Pennsylvania action, including the final decree of the said Common Pleas Court adopting the findings, conclusions and recommendations of the Master and dismissing the plaintiff wife's libel or bill of complaint filed in said action.

On July 11, 1947, the plaintiff wife filed in the suit at bar her motion to strike her said husband's motion to dismiss her bill of complaint as aforesaid (T.V.IV - 49), and thereupon her said husband did, on July 14, 1947, file in this action his motion for leave to amend Paragraph 12 of his answer filed in said cause by adding thereunto an additional unnumbered paragraph containing the allegations set forth in said motion (T.V.IV - 50-52) pleading said final decree entered in said Pennsylvania suit and facts which, if proven to be true, would require said Circuit Court to give full faith and credence to said decree of said Pennsylvania Court and dismiss the bill of complaint in this suit at bar, the exemplified copy of the record of said Pennsylvania action being by reference made a part of said motion; and on July 18, 1947, the Chancellor granted said husband leave to amend his answer as aforesaid (T.V.IV - 125), and on July 21, 1947, the husband filed his amendment of his answer in the particulars set forth in his said motion for leave to make said amendment (T.V.IV - 126-128).

On July 28, 1947, the wife filed a motion for better particulars (T.V.IV - 53), attaching thereto a transcript of the testimony taken before the Master appointed in said Pennsylvania action (T.V.IV - 54-125), requesting the court to require the husband to amend his answer by adding thereunto the said testimony.

On July 24, 1947, the wife filed in the suit at bar her motion to strike the said amendment of her husband's answer (T.V.IV - 129-30), and thereafter on July 31, 1947, the Chancellor made and entered an order in the suit at bar, denying the wife's motion for better particulars, granting the wife's motion to strike her husband's motion to dismiss her bill of complaint, and granting the wife's motion to strike the said amendment of her husband's answer (T.V.IV - 131), and upon the

same date the Chancellor entered a final decree of divorce in the said action (T.V.IV- 132-33) denying the exceptions to the Special Master's report filed by the husband, adopting the Special Master's report, findings and recommendations, and granting a final decree of absolute divorce in favor of the wife against her said husband and terminating and dissolving the bonds of matrimony theretofore existing between them.

On September 27, 1947, the husband filed his notice of appeal from the final decree and certain interlocutory orders entered in this action (T.V.IV - 133), and on October 4, 1947, the husband filed his assignments of error and directions to the Clerk for preparing transcript of record (T.V.IV - 133-38*, and on October 11, 1947, the wife filed her directions to the Clerk designating additional portions essential to be included in the record (T.V.IV - 163-164), and thereafter, on November 18, 1947, the Chancellor made final directions to the Clerk of said Circuit Court as to the preparation of the transcript of record for the purposes of this appeal (T.V.IV - 171-174). On December 15, 1947, the transcript of record was filed in the Supreme Court of Florida, and thereafter two corrections were made therein to conform said transcript to the directions to the Clerk as to showing "Exhibit A" attached to the husband's said motion to dismiss his wife's bill of complaint (T.V.IV - 44-48), said Exhibit being an exemplified copy of the record and final decree in said pennsylvania suit.

After argument by counsel for the respective parties, 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 (T.V.I - 1-8). On October 13, 1948, the defendant filed his motion for decree on Mandate (T.V.I - 9). On November 12, 1948, the defendant filed his motion for a decree for costs allowed by Mandate (T.V.I - 10). On November 10, 1948, order on Mandate was filed (T.V.I - 11-13),

denying defendant's motion for final decree on Mandate and allowing plaintiff ten days to file response to defendant's answer as amended by the amendment of said answer filed July 21, 1947 (T.V.IV - 126-128). On November 19, 1948, plaintiff filed response to defendant's amendment of his answer (T.V.I - 13-32), and on said date also filed her motion for leave to file amended bill of complaint (T.V.I - 32-38). On November 23, 1948, there was filed the stipulation of the parties in this cause for assessment of defendant's costs on appeal (T.V.I - 34), and on said date there was filed the decree of the Circuit Court of Dade County, Florida (T.V.I - 34-35), decreeing that the defendant do have and recover from the plaintiff the sum of $123.85, with interest thereon, for his costs incurred on said appeal. On November 30, 1948, the defendant filed objections to plaintiff's motion for leave to file amended bill of complaint (T.V.I - 36-37) and also filed his motion to strike parts of plaintiff's reponse to defendant's amendment of his answer (T.V.I - 38-45), and on January 11, 1949, there was filed the order of the Chancellor (T.V.I - 45-47), overruling defendant's objections to plaintiff's motion for leave to file amended bill of complaint, denying defendant's motion to strike parts of plaintiff's reponse to defendant's amendment of his answer and granting leave to plaintiff to file her amended bill of complaint.

On January 17, 1949, plaintiff filed her amended bill of complaint (T.V.I - 47-64). On January 29, 1949, defendant filed a motion to strike parts of plaintiff's amended bill of complaint (T.V.I - 64-74), to dismiss said amended bill of complaint (T.V.I - 76-80) and to stay cause for failure of plaintiff to pay decree for costs (T.V.I - 74-76). On April 14, 1949, the order of the Chancellor was filed denying defendant's motions to dismiss amended bill of complaint (T.V.I - 81-82), to strike parts of amended bill

of complaint (T.V.I - 81), and to stay the cause for plaintiff's failure to pay decree for costs (T.V.I - 82-83). On May 4, 1949, defendant filed his answer to plaintiff's amended bill of complaint, attaching thereto an exemplified copy of the entire record of the Pennsylvania suit (T.V.I - 84 through T.V.II - 236). The cause then being at issue, it was, on May 19, 1949, referred to the Honorable David W. Dyer as Special Master (T.V.II - 476), who held hearings on November 21 and 22, 1949, and received the testimony and evidence adduced before him by the parties in this cause (T.V.II - 237-325), including copies of certain Acts of Assembly of the Commonwealth of Pennsylvania relating to divorce and copies of opinions of certain Pennsylvania courts relating to divorce, etc. (T.V.II - 325 through T.V.III - 466). On April 21, 1950, the said Special Master filed his report (T.V.III - 489-507).

On May 1, 1950, defendant filed exceptions to the Special Master's report (T.V.III - 489-507) and after hearing of such exceptions, the Chancellor, on June 8, 1950, entered his final decree herein (T.V.III - 508-510), overruling defendant's exceptions to said report of said Special Master and granting a divorce to plaintiff on the ground of extreme cruelty by defendant to plaintiff and on the further ground of wilful, obstinate and continued desertion of plaintiff by defendant for one year.

On August 7, 1950, defendant filed Notice of Appeal to the Supreme Court of Florida (T.V.III - 537), and on August 15, 1950, defendant filed Assignments of Error (T.V.III - 537-541) and Directions to the Clerk (T.V.III -541-547). On September 27, 1950, defendant filed in the Supreme Court of Florida, transcript of record prepared by the Clerk in accordance with the aforesaid Directions, and the cause is now on appeal before the Supreme Court of Florida upon the said Assignments of Error and for consideration of the questions stated in this, the appellant's brief thereon.

II.

STATEMENT OF QUESTIONS INVOLVED

1.

WHERE, UPON APPEAL BY THE HUSBAND FROM THE FINAL DECREE OF THE CIRCUIT COURT IN DADE COUNTY, FLORIDA, GRANTING DIVORCE TO WIFE, THE SUPREME COURT OF FLORIDA FOUND THAT ALTHOUGH THE WIFE SUED FOR DIVORCE ON THE GROUNDS OF EXTREME CRUELTY, HABITUAL INDULGENCE BY HER HUSBAND IN VIOLENT AND UNGOVERNABLE TEMPER AND WILFUL, OBSTINATE AND CONTINUED DESERTION BY HER HUSBAND FOR ONE YEAR, THE SPECIAL MASTER RECOMMENDED A DIVORCE ONLY UPON THE GROUND OF EXTREME CRUELTY AND THAT THE CHANCELLOR SHOULD HAVE ACCORDED FULL FAITH AND CREDENCE TO THE FINAL DECREE OF THE COURT OF COMMON PLEAS FOR CAMBRIA COUNTY, PENNSYLVANIA, DISMISSING THE SUIT OF SAID WIFE AGAINST HER SAID HUSBAND THERE PENDING FOR DIVORCE ON THE GROUND OF INDIGNITIES TO THE PERSON, AND REMANDED SAID SUIT TO THE TRIAL COURT FOR FURTHER PROCEEDINGS NOT INCONSISTENT WITH ITS OPINION, MAY THE CHANCELLOR REFUSE TO RECEIVE EVIDENCE OF THE RECORD AND FINAL DECREE OF THE PENNSYLVANIA SUIT AND OF RELEVANT PENNSYLVANIA STATUTES AND ACCORD FULL FAITH AND CREDENCE TO SAID PENNSYLVANIA DECREE BY DISMISSING PLAINTIFF'S BILL OF COMPLAINT, AND PERMIT THE WIFE TO PROCEED TO A TRIAL DE NOVO UPON SAID GROUNDS AND THEREAFTER ENTER A FINAL DECREE FOR DIVORCE THEREIN NOTWITHSTANDING THE LAW OF THE CASE AS FIXED BY THE OPINION AND MANDATE OF THE SUPREME COURT OF FLORIDA?

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.

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2.

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 THE 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 SAID 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 BY THE JUDGMENT OR DECREE OF THE PENNSYLVANIA COURT FROM MAINTAINING HER SUIT IN FLORIDA AND FROM ASSERTING THEREIN 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 grant appellant's motion 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 report of Special Master wherein this question was presented to the Chancellor by the appellant.

3.

WHERE A WIFE REMARRIES DURING THE PENDENCY OF AN APPEAL TO THE SUPREME COURT OF FLORIDA TAKEN BY HER HUSBAND FROM A FINAL DECREE ENTERED IN A SUIT INSTITUTED BY HER IN THE CIRCUIT COURT OF DADE COUNTY, FLORIDA, GRANTING HER A DIVORCE, AND THEREAFTER SAID FINAL DECREE IS REVERSED AND THE SUIT REMANDED TO THE TRIAL COURT FOR FURTHER PROCEEDINGS NOT INCONSISTENT WITH THE OPINION AND MANDATE OF SAID SUPREME COURT, MAY THE CHANCELLOR PERMIT THE WIFE TO FILE AN AMENDED BILL OF COMPLAINT IN HER SAID SUIT AND THEREIN

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ALLEGE HER SAID REMARRIAGE AND RESULTING PREGNANCY DURING THE PENDENCY OF SAID APPEAL AND SUBSEQUENT BIRTH OF A CHILD AND PROCEED TO A TRIAL DE NOVO ON THE ISSUES PRESENTED BY HER SAID AMENDED BILL OF COMPLAINT?

The Chancellor answered the foregoing question in the affirmative by denying 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.

4.

WHERE ON APPEAL BY THE HUSBAND FROM A FINAL DECREE GRANTING HIS WIFE A DIVORCE, THE SUPREME COURT OF FLORIDA, IN REVERSING SAID DECREE, FOUND THAT THE SPECIAL MASTER RECOMMENDED A DIVORCE ONLY UPON THE GROUND OF EXTREME CRUELTY AND THAT THE CHANCELLOR SHOULD HAVE ACCORDED FULL FAITH AND CREDENCE TO THE 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, AND REMANDED SAID FLORIDA SUIT TO THE TRIAL COURT FOR FURTHER PROCEEDINGS NOT INCONSISTENT WITH ITS OPINION, MAY THE CHANCELLOR ENTER A DECREE FOR DIVORCE ON THE GROUND OF EXTREME CRUELTY ON PROOF OF ACTS OF PHYSICAL CRUELTY TOWARD THE WIFE NOT ENDANGERING HER LIFE AND WHICH WOULD NOT JUSTIFY A DECREE FOR DIVORCE IN PENNSYLVANIA ON THE GROUND OF CRUEL AND BARBAROUS TREATMENT?

The Chancellor answered the foregoing question in the affirmative by permitting appellee to file her amended bill of complaint alleging substantially the same facts as alleged in her original bill of complaint, and by entering final decree granting a divorce to appellee in part upon the ground of extreme cruelty.

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5.

WHERE IT APPEARS FROM THE TESTIMONY OF THE WIFE IN HER SUIT FOR DIVORCE THAT HER HUSBAND BY INNUENDOS AND INSINUATIONS CHARGED HER WITH LACK OF PROPER CARE OF THEIR MINOR CHILD WHEN IT WAS DROWNED IN A FISH-POOL AND THAT SHE CHARGED HIM WITH INSISTENCE ON SEXUAL RELATIONS WITH HER WITHOUT PREVIOUS DISPLAY OF AFFECTION, AND WHEN SHE WAS NOT IN THE MOOD THEREFOR, CAUSING HER MENTAL AND PHYSICAL PAIN, BECAUSE OF WHICH SHE REFUSED TO LIVE WITH HIM FOR A PERIOD OF OVER ONE YEAR, AND WHERE IT AFFIRMATIVELY APPEARS FROM THE TESTIMONY OF THE HUSBAND THAT HE NEVER INTENDED TO DRIVE HER AWAY OR TO TERMINATE THE MARITAL RELATION WITH HER AND THAT HE REPEATEDLY SOUGHT TO MAINTAIN SUCH RELATION AND TO BECOME RECONCILED WITH HER, IS THE HUSBAND GUILTY OF WILFUL AND OBSTINATE DESERTION OF THE WIFE FOR SAID PERIOD OF 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 wilful, obstinate and continued desertion of her by appellant for one year.

6.

WHERE A WIFE SUES HER HUSBAND FOR DIVORCE ON THE GROUND THAT HE IS GUILTY OF WILFUL, OBSTINATE AND CONTINUED DESERTION OF HER FOR MORE THAN ONE YEAR AND IT AFFIRMATIVELY APPEARS THAT THE HUSBAND DURING SAID PERIOD OF ONE YEAR MADE TO THE WIFE A BONA FIDE AND UNCONDITIONAL OFFER OF RECONCILIATION, MAY THE CHANCELLOR THEN BY FINAL DECREE GRANT A DIVORCE TO THE WIFE ON THE GROUND OF DESERTION?

The Chancellor answered the foregoing question in the affirmative by overruling appellant's exception to the Special

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Master's report based on the ground that the appellant did, within the period of said alleged desertion, make a bona fide, unconditional offer of reconciliation to the appellee, and by entering the said final decree granting a divorce to appellee on the statutory ground of desertion.

7.

WHERE A WIFE, A RESIDENT OF PENNSYLVANIA AND POSSESSED OF AN INCOME OF APPROXIMATELY $1200.00 PER MONTH, INSTITUTED A SUIT FOR DIVORCE IN PENNSYLVANIA AGAINST HER HUSBAND, A RESIDENT OF MARYLAND, WHO ENJOYED AN INCOME OF APPROXIMATELY $50.00 PER WEEK AS AN AUTOMOBILE TIRE SALESMAN, AND WHEN SAID SUIT WAS AT ISSUE AND READY FOR TRIAL, SAID WIFE JOURNEYED TO MIAMI BEACH, FLORIDA, OVER 1000 MILES DISTANT FROM THE RESIDENCE OF HER HUSBAND AND HIS WITNESSES, AND AFTER 90 DAYS THEREAFTER INSTITUTED IN THE CIRCUIT COURT IN DADE COUNTY, FLORIDA, ANOTHER SUIT FOR DIVORCE AGAINST HER SAID HUSBAND AND THEREIN OBTAINED A FINAL DECREE FOR DIVORCE, WHICH, ON APPEAL TO THE SUPREME COURT OF FLORIDA, WAS REVERSED AND REMANDED TO THE TRIAL COURT AND THE HUSBAND ALLOWED HIS COSTS BY HIM EXPENDED ON SAID APPEAL AND THEREAFTER SAID COSTS WERE TAXED BY THE TRIAL COURT IN THE AMOUNT OF $123.85 AND A JUDGMENT FOR SAID COSTS WAS ENTERED AGAINST SAID WIFE BY THE TRIAL COURT, DID THE CHANCELLOR FAIL TO EXERCISE PROPER JUDICIAL DISCRETION IN PERMITTING THE WIFE TO PROGRESS HER SUIT IN FLORIDA BY AMENDED BILL OF COMPLAINT AND PROCEED TO TRIAL DE NOVO, WITHOUT FIRST REQUIRING THE WIFE TO DO EQUITY BY PAYING TO THE HUSBAND SAID JUDGMENT FOR COSTS?

The Chancellor answered the foregoing question in the affirmative by denying plaintiff's motion to stay this cause pending the payment by appellee of costs assessed against her by the Mandate of this Court upon appellant's former appeal in this cause.

III.

ARGUMENT

FIRST QUESTION

WHERE, UPON APPEAL BY THE HUSBAND FROM THE FINAL DECREE OF THE CIRCUIT COURT IN DADE COUNTY, FLORIDA, GRANTING DIVORCE TO WIFE, THE SUPREME COURT OF FLORIDA FOUND THAT ALTHOUGH THE WIFE SUED FOR DIVORCE ON THE GROUNDS OF EXTREME CRUELTY, HABITUAL INDULGENCE BY HER HUSBAND IN VIOLENT AND UNGOVERNABLE TEMPER AND WILFUL, OBSTINATE AND CONTINUED DESERTION BY HER HUSBAND FOR ONE YEAR, THE SPECIAL MASTER RECOMMENDED A DIVORCE ONLY UPON THE GROUND OF EXTREME CRUELTY AND THAT THE CHANCELLOR SHOULD HAVE ACCORDED FULL FAITH AND CREDENCE TO THE FINAL DECREE OF THE COURT OF COMMON PLEAS FOR CAMBRIA COUNTY, PENNSYLVANIA, DISMISSING THE SUIT OF SAID WIFE AGAINST HER SAID HUSBAND THERE PENDING FOR DIVORCE ON THE GROUND OF INDIGNITIES TO THE PERSON, AND REMANDED SAID SUIT TO THE TRIAL COURT FOR FURTHER PROCEEDINGS NOT INCONSISTENT WITH ITS OPINION, MAY THE CHANCELLOR REFUSE TO RECEIVE EVIDENCE OF THE RECORD AND FINAL DECREE OF THE PENNSYLVANIA SUIT AND OF RELEVANT PENNSYLVANIA STATUTES AND ACCORD FULL FAITH AND CREDENCE TO SAID PENNSYLVANIA DECREE BY DISMISSING PLAINTIFF'S BILL OF COMPLAINT, AND PERMIT THE WIFE TO PROCEED TO A TRIAL DE NOVO UPON SAID GROUNDS AND THEREAFTER

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ENTER A FINAL DECREE FOR DIVORCE THEREIN NOTWITHSTANDING THE LAW OF THE CASE AS FIXED BY THE OPINION AND MANDATE OF THE SUPREME COURT OF FLORIDA?

The Chancellor erroneously answered the foregoing question in the affirmative and committed error by his order (T.V.I - 45-47) overruling appellant's objections (T.V.I - 36-37) to appellee's motion for leave to file amended bill of complaint and by his order (T.V.I - 81-82) denying appellant's motion (T.V.I - 76-80) to dismiss appellee's amended bill of complaint.

1. Appellee's original bill of complaint (T.V.I - 10) charged this appellant with the following statutory grounds for divorce:

(a) Extreme cruelty by the defendant to complainant.

(b) Habitual indulgence by defendant in violent and ungovernable temper.

(c) Wilful, obstinate and continuous desertion of plaintiff for one year.

The appellant, by his answer to said bill of complaint (T.V.IV - 12-22), specifically denied all of said charges. Upon this issue the cause was referred to and tried before Special Master A. Judson Hill, who, in and by his report (T.V.IV - 26), found as follows:

> "Concerning the material allegations of the Bill of Complaint and the Answer of the defendant, the testimony of the plaintiff and the defendant is hopelessly irreconcilable. Notwithstanding the fact that over twenty-five witnesses testified for either the plaintiff or the defendant, the testimony of the greater majority of these witnesses has little, if any probative value concerning the material allegations of the Bill of Complaint or the Answer. Of the three Statutory charges alleged

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in the plaintiff's Bill of Complaint, the Master finds that the testimony of the plaintiff and her witnesses has failed to support either the charge of habitual indulgence in violent and ungovernable temper on the part of the defendant toward the plaintiff, or the charge of willful, obstinate and continued desertion of the plaintiff by the defendant. The Master fails to find any credible testimony supporting in even a slight degree either of said charges.

"The gravamen of the plaintiff's case rests upon her charge of extreme cruelty evidenced by the defendant toward her."

2. Thereafter, the Chancellor, by his order of July 31, 1947 (T.V.IV - 131), struck appellant's amendment of his answer alleging the entry on June 28, 1947, of the final decree of the Court of Common Pleas of Cambria County, Pennsylvania, and praying the Court to give full faith and credence thereto, notwithstanding that he had theretofore granted appellant leave to file said amendment, and the Chancellor then, on July 31, 1947, entered his final decree (T.V.IV - 132), adopting in toto the report of said Special Master, A. Judson Hill, and granting to appellee a divorce a vinculo matrimonii from this appellant.

3. Thereafter, on appeal being taken by the appellant from said final decree of divorce, this Court, speaking through Mr. Justice Hobson, in and by its Opinion (T.V.I - 1-8), held that the character of the testimony produced by the appellee was 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, and that the Chancellor erred in striking said amendment of appellant's answer and in entering said final decree of divorce in favor of the appellee, and that "full faith and credit should have been accorded the final decree of the Pennsylvania court", and remanded the cause to the trial court for further proceedings not inconsistent with said Opinion.

4. That upon said cause being remanded to the trial court as aforesaid, it became the duty of the Chancellor to apply the law of the case as stated by this appellate court and to either dismiss appellee's bill of complaint or to permit further proceedings in the trial court for the proof of the record and final decree in said Pennsylvania suit and of the laws of Pennsylvania relating to grounds for divorce and the jurisdiction of the Court of Common Pleas in and for Cambria County, Pennsylvania, to hear and determine the issues in said Pennsylvania suit, and upon such proof having been adduced, to dismiss said bill of complaint.

5. That notwithstanding this duty, the Chancellor, in defiance of the law of this case as thus established by this appellate court, by his order of November 10, 1948 (T.V.I - 11-13), denied this appellant's motion for a decree on Mandate (T.V.I - 9) and permitted the appellee to file an amended bill of complaint containing substantially the same allegations as were contained in her original bill of complaint, and permitted the appellee to proceed to trial de novo upon said grounds, notwithstanding that as to the alleged statutory ground of desertion, that issue had been theretofore tried and adjudicated adversely to the plaintiff in the trial court, and as to the alleged statutory ground of extreme cruelty, that issue had been adjudicated by this appellate court adversely to the plaintiff by the Opinion of this Court requiring the court to give full faith and credence to said final decree in said Pennsylvania suit.

6. That the allegations of appellee's original bill of complaint (T.V.IV - 1-12) are substantially the same as those of her said amended bill of complaint (T.V.I - 47-64) may be observed by a reading and comparison of the two bills of complaint.

In the Supreme Court of Florida, in Martin vs. Benson, 112 Fla. 364, 150 So. 603, in which it appears that the Chancellor entered a decree dismissing the original bill, struck from the files the amended bill, and denied the complainant's petition for leave to file the proposed amended bill, this Court said:

> "The majority opinion of this court, when the case was here before, settled the law of the case and fixed the rights of the parties as disclosed by the pleadings then in the record and supported by the evidence that had been taken concerning the issues.
>
> "No new facts have been adduced in the amended bill which would serve to change the equitable issues heretofore decided by the Supreme Court on the record before considered. The previous holding was that complainant was not entitled to any equitable relief under the facts proved by him. An amendment of the bill, if permitted, would not alter that conclusion.
>
> "For the rules governing the right of a nisi prius court to permit amendments of pleadings after appeal to an appellate court, and remand of the cause for further proceedings below, see Palm Beach Estates v. Croker (Fla.) 143 So. 792; Webb Furniture Co. v. Everett (Fla.) 141 So. 115; State ex rel, Ulsch v. Gibbs (Fla.) 143 So. 772.
>
> "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. Therefore, the decree appealed from was such as ought to have been made to carry out the mandate of this court."

7. That the appellee is not entitled to a decree for divorce in this suit on the ground of extreme cruelty because of the acts and conduct of the appellant as alleged in her original bill of complaint, as adjudged by the Opinion of this appellate court, did become the law of this case and is no longer open for discussion or consideration.

The rule that all the points adjudicated by an appellate court upon an appeal become the law of the case and are no longer open for discussion or consideration, has been announced by this appellate court in numerous decisions reported in Vol. I, Encyclopaedic Digest of Florida Reports, 1948 Revision, page 475.

In Ball vs. Yates, 158 Fla. 521, 29 So. 2d 729, this Court held that where an appellate court passes on a question and remands the cause for further proceedings, the question then settled becomes the law of the case on a second appeal, provided the same facts and issues are involved.

In Palm Beach Estates v. Croker, 106 Fla. 617, 143 So. 792, the Court said:

> "When a party appeals from an order of the circuit court in a chancery cause and such order on appeal is affirmed by the appellate court, and the cause remanded for further proceedings consistent with the appellate court's opinion, the lower court has no authority to reopen the case, or to permit amendments to be made inconsistent with the state of the record upon which the appeal was decided, unless authority to do so be expressly or impliedly given by the appellate court."

In Bloxham v. Florida Cent. & P. R. Co., 39 Fla. 243, 22 So. 697, this Court held that when the appellate court affirms the decree of the lower court, or when such decree is modified on appeal either as to questions of law or fact necessarily involved, with directions for further proceedings consistent with the opinion, the lower court has no authority to open the case for a new trial, or to enter any other judgment than that directed to be entered, unless authority to do so be expressly

given by the appellate court. The mandate of the appellate court should be construed with reference to the opinion of the court rendered in the case in which it is issued.

8. It therefore appears that the Chancellor, upon the coming down of the said Mandate and Opinion of this Court, should have either dismissed said bill of complaint on the assumption that this appellate court had satisifed itself as to the proof of the record of the said Pennsylvania suit and as to the laws of Pennsylvania applicable to the issues here involved, as it would have done from the record and the briefs of the parties, or have taken proof of the record of said Pennsylvania suit as applicable Pennsylvania law and dismissed said bill of complaint. (This cause was not remanded with directions to the Chancellor to permit a trial de novo on issues already adjudicated adversely to appellee.)

SECOND 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 THE 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 SAID 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 BY THE JUDGMENT OR DECREE OF THE PENNSYLVANIA COURT FROM MAINTAINING HER SUIT IN FLORIDA AND FROM ASSERTING THEREIN 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 erroneously answered the foregoing question in the negative and committed error in refusing to grant appellant's motion to strike parts of plaintiff's response to defendant's answer (T.V.I - 38-45) and appellant's motion to dismiss plaintiff's amended bill of complaint (T.V.I - 76-80) and in denying defendant's exceptions to report of Special Master (T.V.III - 489-570), wherein this question was presented to the Chancellor by the appellant.

1. The record shows that appellee, upon the 18th day of January, 1946, instituted a suit against her husband, the appellant, in the Court of Common Pleas in and for Cambria County, Pennsylvania, for divorce, on the statutory ground of "indignities to her person", and in her libel for divorce, alleged that she was then a resident of said county and state (T.V.I - 111); that her husband, the appellant herein, appeared in the said suit and filed his answer therein; that when said suit was at issue and ready for trial, the appellee journeyed to Miami Beach, Florida, and after living in various hotels in said city for a short time over ninety days, instituted the suit at bar on the 30th day of September, 1946, and in her bill of complaint alleged that she was then an actual bona fide

resident of the State of Florida and had been such a resident for at least ninety days prior to the filing of said bill of complaint; that thereafter, the said Pennsylvania suit was progressed to final decree on June 28, 1947 (T.V.II - 223), in and by which the report of the Master filed in said suit was approved and made a part of said final decree; that the Master, in and by his said report, found the following:

"FINDINGS OF FACT

* * * * * * * *

". . . .The Testimony indicates that after the Respondent had filed his answer in this case, libellant left for the State of Florida. However Libellants averment in her libel, admitted by Respondent is that libellant is at present a resident of the State of Pennsylvania.

* * * * * * * *

"An action for divorce not being a local one by a transitory one may be brought in any Court of competent Jurisdiction. 27 Corpus Juris Sec. 654, Sec. 83. The Court of Common Pleas of Cambria County is a court of competent jurisdiction, and as Libellant has been a resident of the State of Pennsylvania for a period of one year previous to the filing of her Libel in Divorce, and inasmuch as Respondent entered his appearance, filed his Answer and submitted himself to the jurisdiction of said Court, the Court of Common Pleas has jurisdiction over the parties to this action. Act of May 2, 1929, P.S. 1237, Sec. 16; 23 P.S. 274, Sec. 16.

"This is further strengthened by the fact that the State of Pennsylvania was the domicile of the Libellant and the Respondent at the time of the marriage, the marriage was performed in the State of Pennsylvania, and said cause of action for divorce arose while Libellant and Respondent were domiciled in Cambria County, Pennsylvania.

"There is no doubt that the Court of Common Pleas of Cambria County has jurisdiction over the parties to this action from the facts as stated. As to whether it has jurisdiction over the cause of action, the Court of Common Pleas has original jurisdiction in cases of divorce from the bonds of matrimony. Act of May 2, 1929, P.L. 1237, 23 P.S.268, Sec. 15, as amended June 10, 1935, P.L. 294, Sec. 1. Therefore, the Court of Common Pleas of Cambria County has jurisdiction over both parties and the subject matter.

"There is evidence that sometime in June, 1946, shortly after the Respondent had filed his Answer to the Libel in Divorce, and had joined issue and submitted himself to the jurisdiction of the Court of Common Pleas of Cambria County, Libellant left the Borough of Westmont, Cambria County, Pennsylvania, and went to the State of Florida, where she instituted in the Circuit Court of the Eleventh Judicial District in and for Dade County, Florida, a divorce action on the 20th day of September, 1946. Certain it is from the facts that Libellant was seeking what we might deem a migratory divorce. The question arises as to whether there was at this time a change of residence by Libellant, if such change of residence was a bona fide change of residence, and if, in fact, the domicile of Libellant has changed. Libellant continued to live at the home of her parents, 100 Marion Street, Westmont Borough, Johnstown, Pennsylvania, up until sometime in June, 1946, and the testimony indicates that after the Respondent filed his Answer in this case, Libellant left for The State of Florida. There is some question as to whether she is domiciled at the present time in that State. The furniture of the Libellant and Respondent held in custody by Libellant still remains at the home of the Libellant's parents, 100 Marion Street, Westmont Borough, and as stated by the Answer of the Respondent to the Petition to discontinue the action in divorce, which was made part of the record in the present proceedings, Libellant has maintained as of February 27, 1947, an open bank account in the Johnstown Bank and Trust Company, Johnstown, Pennsylvania, subject to withdrawal by her. About March 7, 1947, at the time depositions were taken in the City of Johnstown, Libellant was registered as a voter in Cambria County, with her address at 100 Marion Street, Westmont Borough. Libellant was also registered on the assessment records of Cambria County, for the year 1947, and the official records show that after June 25, 1946, school and borough taxes levied and assessed against Libellant as a resident of Westmont Borough, Cambria County, had been paid to the Collector of Taxes for said Borough. Further paragraph seven of the Libel in Divorce states that the present residence of the Libellant is 100 Marion Street, Westmont Borough, Cambria County, which was undisputed at the hearing inasmuch as Libellant did not appear, nor was she represented by counsel. It is also shown that the parents of said Libellant permanently maintain their residence at 100 Marion Street, Westmont Borough, Cambria County.

"On the basis of these facts it is felt that the Libellant is domiciled in Westmont Borough, Cambria County, Pennsylvania, and

thus is not presently domiciled in the State of Florida, as the evidence would indicate that she plans to return to Pennsylvania. If the Libellant is not domiciled in the State of Florida there, of course, comes up the question as the whether that State would have jurisdiction, but that is a matter that would be for that Court to decide and not for us to decide. It is well settled that a State cannot exercise through its courts jurisdiction to dissolve a marriage when either spouse is not domiciled in the State. Restatement of Conflict of Laws, Section. 11."(T.V.II - 213-215)

* * * * * * * * *

"Therefore, the Court of Common Please of Cambria County, having jurisdiction, and such jurisdiction being prior to the jurisdiction in any other state, and not being ousted by reason of the subsequent commencement of another action on the removal of Libellant after the Libel was filed, the Master will look to the merits of the present case.

"The requirements to substantiate the charge of indignities under the Act of Assembly were not met. The fundamental characteristics of indignities is that it must consist of a course of treatment, and whereas cruelty in extreme cases may be established by a single act sufficiently attrodious and severe to endanger life, indignities can never result from a single act. The very essence of the offense is a course of conduct or treatment which by its continuity renders the condition of the innocent party intolerable and her life burdensome. Law of Marriage and Divorce in Pa., Friedman, Sec. 308, Vol. 1.

"The express language of the statute requires that the ill conduct in order to constitute indignities to the person must be such as to render the condition of the injured spouse intolerable and life burdensome. Unless this consequence is shown to follow from the acts charged, these indignities are insufficient in gravity to amount to cause for divorce. In the present case the testimony of the witnesses was obtained under subpoena by Respondent, and was to the effect that from their observation of Libellant and Respondent together, there was husbandly consideration on the part of the Respondent towards Libellant, and also wifely consideration on the part of Libellant toward Respondent. Respondent's testimony shows that he made all possible efforts of reconciliation of Libellant's affection towards him, and was at a loss to understand the attitude which she adopted sometime after the loss of their child by a very tragic accident. The child would seem

to be the tie that was holding Libellant and Respondent together in the bonds of matrimony, and upon the child's death, Libellant's affection waivered. There was nothing from the testimony of Respondent, nor of the witnesses called, that could substantiate the allegation of libellant as to the cause she had for divorce. With the Libellant's failure to attend the hearing, the Libel must be dismissed. Libellant failed to attend the Master's hearing, nor was she represented by counsel although she had been properly notified of the hearing. If the Libellant failed to attend the Master's hearing, and Respondent has filed an Answer and testified contradicting the alleged charge, the Libel must be dismissed. Sturgeon on Divorce, 637, Sec. 1293, citing Troeger vs. Troeger, 69 Pittsburgh 208.

"From the evidence in this case the Master makes the following findings of fact on the merits:

"1. The complaint is not made out of levity.

"2. There is no fraud or collusion between the Libellant and Respondent with a view to procuring a divorce.

"3. The Respondent is not guilty of inflicting such indignities to the person of the Libellant as to render her condition intolerable and life burdensome."

(T.V.II - 219-221)

"Conclusions of Law

* * * * * * * * * *

"3. The Court of Common Pleas of Cambria County has jurisdiction of the parties and of the subject matter. As to the parties, the Libellant was a bona fide resident of the State of Pennsylvania and the County of Cambria at the time of filing her Libel, and by her own allegation is still a resident of Cambria County. The Respondent is a resident of the State of Maryland, but has voluntarily submitted to the jurisdiction of this Court."

(T.V.II - 221);

that on the 17th day of January, 1949, the Chancellor permitted appellee to file her amended bill of complaint in the suit at bar,

wherein and whereby she alleged (T.V.I - 84) that she was then a bona fide resident of Dade County, Florida, and had been such a resident for at least ninety days prior thereto, notwithstanding that by the final decree in her said Pennsylvania suit, her residence had been adjudicated to be in Cambria County, Pennsylvania.

2. That in instituting her said suit in Cambria County, Pennsylvania, the appellee submitted to the jurisdiction of said Court to adjudicate all matters and questions relevant to the issues involved in said suit, and in and by the said final decree in her said Pennsylvania suit, it was adjudicated by the Court of Common Pleas that the appellee was a resident of the State of Pennsylvania not only at the time of the institution of her said suit, but also at the time of the said final decree therein entered on June 28, 1947; that appellee took no appeal from said final decree of said Court of Common Pleas; that, therefore, she became bound by the final decree in her said Pennsylvania suit fixing and adjudicating her status as a resident of Pennsylvania at the time she was asserting and did assert in her original bill of complaint and in her amended bill of complaint in the suit at bar that she was then a bona fide resident of Florida and had been such a resident for at least ninety days prior to the filing of said bill of complaint; that accordingly, appellee became estopped by the final decree in her said Pennsylvania suit from taking a position inconsistent therewith and by averring that she was an actual bona fide resident of Florida at the time aforesaid, this question having been otherwise adjudicated by the said final decree in her said Pennsylvania suit, which said decree this appellate court has held to be res adjudicata and entitled to be given full faith and credence in the suit at bar.

Decree and other final determination of courts of record work estoppels. Coral Realty Co. vs. Peacock

Holding Company, 103 Fla. 916, 138 So. 622; Gray vs. Gray, 91 Fla. 103, 107 So. 261; Smith vs. Urquhart, 129 Fla. 742, 176 So. 787.

In Winn vs. Strickland, 34 Fla. 610, 16 So. 606, it was held that a party to a suit over whom the Court had acquired jurisdiction may be estopped by averments in pleadings filed by him.

In Schnarr & Co. vs. Virginia-Carolina Chemical Corp., 118 Fla. 258, 159 So. 39, it was held that proceedings in former suit estopped litigant from occupying inconsistent position in subsequent suit.

In Beckwith v. Bailey, 119 Fla. 316, 161 So. 576, it was held that where both parties are domiciled in state where divorce suit is brought or one party is there domiciled and other party has been personally served or has appeared in answer to suit, resultant decree is entitled to full faith and credit.

In Thomas vs. Morrisett, 76 Ga. 384, it was held that a judgment determining the domicile of a deceased person to be in that state, and probating such person's will, precludes the parties thereto from raising the issue of decedent's domicile in another state.

At 17 Am. Jur., p. 395, the following appears:

> "Judgments and decrees in divorce proceedings are within the general rule applicable to a judgment or decree that when a judgment is sought to be made available in subsequent proceedings between the same parties, it is conclusive and binding on them in regard to all matters shown to have been put in issue or to have been necessarily involved in the former suit and actually tried and determined therein, but that in regard to matters not then in controversy, and not heard and determined, although it is conclusive so far as the final disposition of that cause of action is concerned, it is not conclusive to prevent a determination of them

according to the truth, if they are subsequently controverted in a different case. As between the parties to the proceedings a valid judgment or decree is conclusive of all charges set forth and of facts found, or which might have been found, and of defenses raised at the trial." (Kellett v. Kellett - Cal. App. - , 26 P. 2d 859 (affirmed in 2 Cal. 2d 45, 39 P. 2d 203), citing R.C.L.; Gloth v. Gloth, 154 Va. 511, 153 S.E. 879, 71 A.L.R. 700)

At 28 C.J.S., p. 48, the following appears:

"The existence or non-existence of a domicile in a given locality, where the facts are conflicting, is a mixed question of law and fact; when the facts are settled, the question of domicile is one of law. Commonly, however, the question as to what shall be considered the domicile or residence of a party is said to be, or to be mainly, one of fact rather than law. So far as it involves questions of fact, including the ascertainment of the intention of the party, the question is to be determined by the verdict of the jury, under proper instructions from the court, or by the findings of the court. Such determination is conclusive, unless clearly against the weight of evidence."

At 31 C.J.S., p. 193, the following appears:

"An estoppal by matter of record is such as arises from, or is founded upon the adjudication of a competent court; more broadly, estoppal by record is the preclusion to deny the truth of matters set forth in a record, whether judicial or legislative, and also to deny the facts adjudicated by a court of competent jurisdiction."

At 50 C.J.S., p. 224, the following rule is stated:

"A judgment or decree actually or necessarily determining the personal status of an individual is equally conclusive as a decision on a right of property. This rule has been applied to questions involving the status or rights of an individual as an employer * * * and to decisions as to agency, domicile, infancy and mental condition or capacity."

In Palm Beach Co. vs. Palm Beach Estates, 110 Fla. 77, 148 So. 544, it was held that on second appeal involving same subject matter between same parties, party is generally estopped to assert position or theory inconsistent with that relied upon on first appeal.

In Lee v. Fowler, 115 Fla. 429, 155 So. 647, it was held that party who on adversary's appeal assumed certain position, held estopped to thereafter take inconsistent position in respect to same subject matter in trial court or on subsequent appeal to prejudice of adversary.

In Kaufman v. Kaufman, 120 N. J. Eq. 603, 187 A. 176, it was held that final decree of Court of Chancery in wife's maintenance suit adjudging that parties had domicile within state held to be res judicata as to domicile of husband as of such date.

At 31 C.J.S., p. 194, the following appears:

> "As a judgment, the record has the further effect of precluding a re-examination into the truth of the matters decided. This further effect of the record, considered as a judgment, is otherwise known as estoppal by judgment, the matters adjudicated being termed res judicata."

In Jamison v. Metropolitan Life Ins. Co., Mun. App., D. C., 35 A. 2d 179, it was held that where insured's domicile had been determined in a prior suit between the same parties seeking recovery on same life policy, question as to assured's domicile could not again be controverted; that once an issue of fact or law is judicially decided, it may not thereafter be controverted by the parties.

At 4 A.L.R. 2d, p. 116, the following appears:

> "Where the former defendant in a divorce suit in which a judgment denying a divorce has been rendered, subsequently sues for a divorce in a sister state, the former judgment, being entitled to full faith and credit, is conclusive as to all questions of fact essential to and litigated by the former judgment."

In Brooks v. Laurent, 98 Fed. 647, the Court said:

> "Where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position taken by him."

In Gray v. Gray, 91 Fla. 103, 107 So. 261, the court held that "there is a difference between the effect of a judgment as a bar or estoppal against the prosecution of a second action upon the same claim or demand and its effect as an estoppal in another action between the same parties upon a different claim or cause of action. In the former case, the judgment if rendered upon the merits, constitutes an absolute bar to a subsequent action; but where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppal only as to those matters in issue or points controverted upon the determination of which the finding or verdict was rendered."

In Williams v. North Carolina, 325 U.S.226 (supra), it was held that the full faith and credit clause of the Federal Constitution operates with respect to judgments rendered by a court whose jurisdiction either as to the subject matter or person is not impeached, and that once the jurisdiction has been judicially settled it cannot be relitigated as between the parties, and the court said: "It is one thing to reopen an issue that has been settled after appropriate opportunity to present their contentions has been afforded to all who had an interest in its adjudication. This applies also to jurisdictional questions. After a contest these cannot be relitigated

as between the parties." Forsyth v. Hammond, 166 U.S. 506, 517 41 L.ed.1095, 1099, 17 S. Ct. 665; Chicago L. Ins. Co. v. Cherry, 244 U.S. 25, 30, 61 L. ed. 966, 969, 37 S. Ct. 492; Davis v. Davis, supra.

In McEwen v. Growers' Loan, etc., Co., 116 Fla. 540, 156 So. 527, and McGregor v. Provident Trust Co., 119 Fla. 718, 162 So. 323, it was held that "judgment on merits constitutes bar to subsequent action on same claim or demand, but operates as estoppel only as to portions actually litigated and determined where second action is on different claim or demand.* * *"

In re Balch, 93 Misc. 419, 156 N. Y. Supp. 1006, a proceeding to have decedent's domicile at the time of her death determined, it was held that judgment in a suit brought in California by the decedent to void a deed of trust, and revived after her death, in the course of which an adjudication was made of her last domicile as being in California, was, under the full faith and credit clause, complete and final in every other court of the Union upon the question of domicile.

In Corrigan v. James, 14 Colo. 311, 23 P. 913, in which an application for ancillary probate of a will was resisted by one who had theretofore been appointed administrator of the decedent on the ground that the probate of the will by the sister state was invalid inasmuch as the decedent prior to the time of his death was in Colorado and not in the sister state, it was held that, in admitting the will to probate, the Court of the sister state must be presumed, prima facie to have based its

adjudication respecting the domicile of the decedent at the time of his decease on sufficient evidence, and that under such circumstances, the probate of the will and the record thereof can only be questioned by some appellate or direct proceeding.

THIRD QUESTION

WHERE A WIFE REMARRIES DURING THE PENDENCY OF AN APPEAL TO THE SUPREME COURT OF FLORIDA TAKEN BY HER HUSBAND FROM A FINAL DECREE ENTERED IN A SUIT INSTITUTED BY HER IN THE CIRCUIT COURT OF DADE COUNTY, FLORIDA, GRANTING HER A DIVORCE, AND THEREAFTER SAID FINAL DECREE IS REVERSED AND THE SUIT REMANDED TO THE TRIAL COURT FOR FURTHER PROCEEDINGS NOT INCONSISTENT WITH THE OPINION AND MANDATE OF SAID SUPREME COURT, MAY THE CHANCELLOR PERMIT THE WIFE TO FILE AN AMENDED BILL OF COMPLAINT IN HER SAID SUIT AND THEREIN ALLEGE HER SAID REMARRIAGE AND RESULTING PREGNANCY DURING THE PENDENCY OF SAID APPEAL AND SUBSEQUENT BIRTH OF A CHILD AND PROCEED TO A TRIAL DE NOVO ON THE ISSUES PRESENTED BY HER SAID AMENDED BILL OF COMPLAINT?

The Chancellor erroneously answered the foregoing question in the affirmative and committed error by denying appellant's objections (T.V.I - 36-37) to appellee's motion for leave to file amended bill of complaint and by his order (T.V.I - 81-82) denying appellant's motion (T.V.I - 76-80) to dismiss appellee's amended bill of complaint.

BLACKWELL, WALKER & GRAY, MIAMI, FLORIDA

1. After this cause was remanded to the trial court, and after the Chancellor denied appellant's motion for decree on mandate in accordance with the law of this case as settled by the Opinion of the Supreme Court, the Chancellor permitted appellee to file her amended bill of complaint wherein she alleged that on May 19, 1948, she was married to one Wilfred J. Cohen and that during the first week of September, 1948, as a result of her marriage to the said Wilfred J. Cohen, she conceived a child (T.V.I - 63). In other words, after appellant had filed in this cause his notice of appeal from the final decree of July 31, 1947, and while this cause was then pending in the Supreme Court by virtue of the filing of said notice of appeal, and at approximately the time counsel for the parties in this cause was before this Supreme Court presenting their arguments on said appeal, the appellee, who was then the wife of this appellant, married the said Wilfred J. Cohen and thereafter cohabited with him and became pregnant and conceived a child, the issue of her cohabitation with the said Wilfred J. Cohen. At the time of her marriage to and cohabitation with the said Wilfred J. Cohen, appellee knew or should have known that her said suit for divorce against appellant was still pending and that the final decree therein was not final and conclusive as to her marital status. The appellee by her conduct aforesaid, did not only show disrespect and contempt of the courts of the State of Florida, but did commit a serious offense under the laws of the said State and was guilty of such conduct as to deprive her of the right to again come into the Circuit Court in and for Dade County, Florida, a court of equity, to seek further relief by her said amended bill of complaint. Under the circumstances aforesaid, the Chancellor of said Court should have found that her hands were unclean, that she was not entitled to seek relief in a court of equity, and should have dismissed her bill of complaint, as urged so to do by appellant.

In Branch v. Branch (Colo.) 71 P. 632, it was held that a plaintiff in a divorce suit having married pending the appeal from the decree granting the divorce is not entitled to be heard on appeal or to have the case remanded for a new trial, the decree being reversed. The Court said:

> "Counsel have suggested that the opinion be modified and that the case be remanded, with directions for another trial, and not with directions to dismiss the cause. There is no reason for prolonging this litigation. The cause, if remanded, must be dismissed by the Court because of the fact that during the pendency of the case here the appellee remarried; and, having remarried before her judgment of divorce became final, she has violated the marriage obligation, and is not entitled to a divorce. Counsel stated in open court that the appellee married more than a year after the granting of the decree from which an appeal was taken, but the fact that a year elapsed before she was married does not affect her status. The appeal suspended the judgment to all purposes, and she could not lawfully marry again during the pendency of the appeal. We are not unmindful of the fact that the result of this judgment is of serious consequence to the appellee and the man she married, but they should have thought of the consequences before taking the step. We are of opinion that the court has the right, in divorce proceedings, as representing the people, to take notice of the change of status of the parties, or either of them, and that, when one of the parties to a suit for divorce remarries pending an appeal in this court, that party has not the right either to prosecute or defend in this court and cannot be heard to question the correctness of the decision of the court in a petition for rehearing."

In Womack v. Womack, _____ Ark. _____, 83 S.W. 1136, the Court said:

> "In the statement of the case the court that, as there was no evidence of a change in the status of the property or parties after the divorce suit and prior to the bringing of this suit to vacate it, the court would not consider that such delay (something over a year) estopped appellant from prosecuting the action to vacate the judgment of divorce as fraudulently obtained. Since the decision here appellee files a motion to modify the decree, and sets forth that he was married in

Oklahoma on July 15, 1903, that a child was born of such marriage, which has since died, and that he contracted the marriage with the lady who married him in good faith, having no idea that there was or would be any attack on the decree of divorce, and praying a modification to the extent that the cause be remanded, and evidence adduced of these facts, to the end that this marriage be protected. The record shows this suit was commenced December 17, 1900, decree was rendered June 23, 1901, appeal then prayed and granted, and transcript filed in this court October 8, 1901, where it has been pending since. These suits to vacate decrees on ground of fraud are maintained even when the party committing the fraud has remarried before the institution of the suit. Bishop on Marriage & Divorce, Secs. 1550, 1552. Delay, however, will operate to the prejudice of the party applying, and, if unreasonably continued, bar the right. The delay in this case in bringing the suit did not work any prejudice to third persons. Had the party remarried while there was considerable delay, that would be a circumstance strongly tending against sustaining the action. No such considerations are in this case. The marriage occurred in the face of an appeal pending here in a case directly seeking to annul the divorce.

"The modification is refused."

At 7 Am. Jur. p. 765, the following appears:

"According to the weight of authority in this country, the fact that one charged with bigamy believed in good faith that he had been lawfully divorced from his first wife, constitutes no defense. The theory seems to be that the statutes are so drafted as to cause persons about to marry to take no chance on the question. The statute requires them to know the fact. This view excludes the care and diligence of the defendant in ascertaining whether the former marriage has in fact been dissolved by divorce and the reasonableness of his mistaken belief. Such care and diligence do not make his belief a defense. The statutes usually contain an express grant of immunity where a divorce has been obtained, and this of itself is evidence that the lawmakers intended to insist on the divorce itself as a defense and that no further exception should be engrafted on it by the courts. The opposite view has, however, found favor on the general theory that when a man is misled concerning facts, without his own fault or carelessness and, when so misled, acts as he would be justified in doing were the facts as he believes them to be, he is legally and morally innocent. This is, however, predicated on the greatest

care in ascertaining the facts in regard to the divorce. Rumors or statements of persons having no special means of knowledge are insufficient. This is true where the defendant gets expert though mistaken advice of counsel that the divorce is legal and then proceeds to act upon it. Hardships may well result from this doctrine, but the pardoning power is always in existence ready to intervene in a proper case. In those courts which hold to the stricter view, even a certificate by a clerk of court of a decree of divorce is insufficient where the divorce was really void. Some courts base their holding upon the principle that ignorance of the law excuses no one, while others do not stress the point that the mistake is one of law, but place their decision upon the same principle of statutory construction under which the courts refuse the defense of mistake as to the existence of a divorce on the ground that the statute having fixed the exceptions, the courts cannot extend it to persons who have not been, but in good faith believe they have been lawfully divorced."

To the same effect, see annotation at 57 A.L.R. 792.

In Tampa & J. Ry. Co. v. Catts, 79 Fla. 235, 85 So. 364, the Supreme Court of Florida quoted with approval Paragraph 385, Vol. 1, third edition of Pomeroy on Equity, as follows:

"The meaning is that, whatever be the nature of the remedy demanded, the court will not confer its equitable relief upon the party seeking its interposition and aid, unless he has acknowledged and conceded, or will admit and provide for, all the equitable rights, claims, and demands justly belonging to the adversary party, and growing out of or necessarily involved in the subject-matter of the controversy. It says, in effect, that the court will give the plaintiff the relief to which he is entitled only upon condition that he has given, or consents to give, the defendant such corresponding rights as he also may be entitled to in respect of the subject matter of the suit."

"He who comes into equity must come with clean hands.

"It (the maxim) assumes that the suit, asking the aid of a court of equity, has himself been guilty of conduct in violation of the fundamental conceptions of equity, and therefore refuses him all recognition and relief with reference to the subject-matter or transaction in question. It says that whenever a party, who, as actor, seeks to set the judicial machinery in motion and obtain some remedy, has

violated conscience, or good faith, or other equitable principle, in his prior conduct, then the doors of the court will be shut against him in imine; the court will refuse to interfere on his behalf to acknowledge his right or award any remedy."

At 30 C.J.S., pp. 475-477, the following principle is stated.

"The clean hands maxim bars relief to those guilty of improper conduct in the matter as to which they seek relief. It is invoked to protect the integrity of the court. * * * It means that equity refuses to lend its aid in any manner to one seeking its active interposition, who has been guilty of unlawful or inequitable conduct in the matter with relation to which he seeks relief. * * * The maxim is based on conscience and good faith. It is not strictly or primarily a matter of defense, but is invoked on grounds of public policy and for the protection of the integrity of the court.

"Whenever a party seeking to set the judicial machinery in motion and obtain some remedy has violated conscience, or good faith, or other equitable principle, in his prior conduct, the doors of the court will be shut against him in limine, and the court will refuse to interfere on his behalf, to acknowledge his right, or to award him any remedy.

"U.S. - Keystone Driller Co. v. General Excavator Co., Ohio, 54 S. Ct. 146, 290 U.S. 240, 78 L. Ed. 293, affirming, C.C.A., General Excavator Co. v. Keystone Driller Co. 62 F.2d 48, rehearing denied 64 F. 2d 39, certiorari granted Keystone Driller Co. v. General Excavator Co., 53 S. Ct. 791, 289 U.S.721, 77 L.Ed. 1472, and mandate denied 54 S. Ct. 556, two cases, 291 U.S. 651, 78 L. Ed. 1045, Keystone Driller Co. v. Osgood Co., 54 S. Ct. 556, 291 U.S.651, 78 L. Ed. 1045, and 54 S. Ct. 557, 291 U.S. 651, 78 L. Ed. 1045 - Goodyear Tire & Rubber Co. v. Overman Cushion Tire Co., C.C.A., Ohio 95 F. 2d, certiorari dismissed 59 S. Ct. 459, 306 U.S. 665, 83 L. Ed. 1061, and Overman Cushion Tire Co. v. Goodyear Tire & Rubber Co., 59 S. Ct. 460, 306 U.S. 665, 83 L. Ed. 1061.

Ariz. - Smith v. Brimson, 80 P.2d 968, 52 Ariz. 360
Ark. - Barton v. Hardin, 10 S.W.2d 878, 178 Ark.432
D.C. - Cochran v. Burdick, 89 F.2d 831, 67 Appl.D.C.87
Fla. - Tampa & J. Ry. Co. v. Catts, 85 So. 364,79 Fla. 235
Md. - Schaeffer v. Sterling, 6 A.2d 254, 176 Md. 553
N.J. - Piper v. Piper, 176 A. 345, 13 N.J.Misc. 68
N.Y. - Bayer v. Bayer, 214 N.Y.S. 322, 215 App. Div 454, reversing 202 N.Y.S. 890, 122 Misc. 7
Or. - Slovanian Literary & Social Ass'n v. City of Portland, 224 P. 1098, 111 Or. 335 - Reid v. Multinomah County, 196 P. 394, 100 Or. 310."

At 17 Am. Jur. 270, the following appears:

"There appears to be little dissent from the general proposition that adultery is a good recriminatory defense to an action for divorce upon any sufficient ground. It is fundamental that the efficacy of this defense is based, not upon the theory that the plaintiff's conduct is deemed to justify or excuse that of the defendant, but upon the theory that inasmuch as the plaintiff has not performed his marital duty, he is not entitled to complaint of the defendant's dereliction. This being so, it would seem that the mere fact that the plaintiff's adultery occurred after the defendant's ill conduct should in no way affect the force of the defense of adultery. As a general rule, for example, adultery after desertion may be set up as a recriminatory defense by the deserting spouse, although this rule has not been adopted by the authorities in all jurisdictions. It is quite possible that the particular facts of an individual case may make it seem equitable to deny effect to the defense. But this view points more to justification and provocation, which depend upon considerations which are foreign to the doctrine of recrimination.

"It is a rule of universal application that in reply to an application for divorce on the ground of the adultery of the defendant, he or she may allege, by way of either recrimination or cross-petition, the commission of adultery by the plaintiff; and generally if the charge is sustained as to both of the parties, the suit must be dismissed, provided, of course, there has been no condonation. Under some statutes, however, it is within the discretion of the court to grant a divorce where it appears that the parties are in equal guilt. Thus, adultery is available in defense of a charge of cruelty or desertion."

At 17 Am. Jur. 268, the following appears:

"It is well settled in this country under the doctrine of recrimination that the defendant to an action for divorce may set up as a defense in bar that the plaintiff was guilty of misconduct which in itself would be a ground for divorce. This right to set up one matrimonial offense in bar of another is an application of the equitable rule that one who invokes the aid of a court must come into it with a clear conscience and clean hands, and although the misconduct of the plaintiff occurs after the commencement of his or her suit, it is as fully effective to bar the right to a divorce therein as if it had occurred previous to the commencement of the suit."

At 35 Am. Jur. 272, the following appears:

"The general rule is that a marriage between two persons one of whom is married at the time to another is void although they act in good faith and honest belief in their right to marry, as where they believe that one of them has obtained a valid divorce which is not in fact the case. It is the duty of a person once married to know, before entering again into the marriage relation, that the previous marriage has been dissolved. The fact that he or she relies on the advice of an attorney that the previous marriage has been dissolved, when in fact it has not been, does not alter the invalidity of the second marriage.

"Good faith will not be presumed on the part of a mature woman who enters into a marriage with a man whom she knows to be already married, when she has no evidence of a divorce beyond the assertion of the man whom she says she has married."

In Ellison v. State (Fla.), 129 So. 887, the Court held that honest and reasonably entertained belief that a valid divorce has been granted is no defense to bigamy prosecution.

At 2 C.J.S., p. 476, the following appears:

"Where one of the parties entering into a marriage has been previously married, they are bound to know or ascertain the law and the facts of the right to remarry for themselves at their peril, and a sufficient criminal intent to commit adultery is conclusively presumed against them, in their failure to do so."

Citing State v. Goodenow, 65 Me. 30, in which the Court said that ignorance of law excuses no one. "Respondents say that they were misled by the advice of the magistrate, of whom they took counsel concerning their marital relations. But the gross ignorance of the magistrate cannot excuse them. They were guilty of negligence and fault, to take his advice."

At 10. C.J.S., p. 368, the following appears:

"Advice of counsel that there is no impediment to a second marriage is no defense to a prosecution for bigamy. This principle has been applied where accused was advised by counsel that a decree of divorce had dissolved the prior marriage, or that the prior marriage was void."

In Amend v. Amend, 135 Or. 550, 296 P. 875, it was held that a divorce could not be granted to a wife who has been guilty of misconduct even though such conduct was not such as would entitle her husband to a divorce.

At L.R.A. 1916C, 750, the following appears:

> "And a distinction has been made between marriages entered into in violation of the statutes which prohibit remarriage within a certain time after divorce and marriages contracted within the time allowed for an appeal from or review of the decree of divorce, the general rule being that, in the former cases, the marriages, as before shown, are voidable only, and that, in the latter cases, the marriages are void because the divorce is not effective until the expiration of the time for review, wherefor during such time the marriage remains intact, and the party to the second marriage has a former husband or wife living."

In State v. Yoder, 113 Minn. 503, 130 N. W. 10, it was held that a marriage of a divorced person within the prohibited period after the divorce was valid and sufficient upon which to base a charge of bigamy.

At 35 Am. Jur. 272, the following appears:

> "A husband and wife are still married where a divorce between them is void, and a marriage by either of them with another is void and of no effect, and this is the rule with respect to void foreign divorces. The fact that a marriage has taken place on the faith of a previous divorce does not preclude inquiry by the court into the capacity of the divorced party, and thus into the validity of the divorce; and the marriage may be declared invalid if the divorce is one which would be decreed void if directly in issue."

2. The allegations contained in appellee's amended bill of complaint of the facts of her marriage during the pendency of this suit, her pregnancy and birth of a child, should have been stricken therefrom by the Chancellor as this appellant requested him so do to (T.V.I - 64-74), for that by no flight of the imagination, may it be said that these facts were relative or had any probative force upon

the issues presented by the said bill of complaint. It is apparent that these allegations were asserted in the said bill of complaint to appeal to the sympathy of the Chancellor. It must be remembered that this appellee remarried while her suit at bar was pending by an appeal timely taken to this appellate court and that she knew or should have known of the pendency of her su t at bar and that notwithstanding her knowledge thereof, she did, at her own risk and on her own responsibility, so remarry and become pregnant while she was in fact and in law the wife of this appellant, and in so doing she did commit a serious offense not only against the appellant but also against the courts and morals of the citizens of Florida.

FOURTH QUESTION

WHERE ON APPEAL BY THE HUSBAND FROM A FINAL DECREE GRANTING HIS WIFE A DIVORCE, THE SUPREME COURT OF FLORIDA, IN REVERSING SAID DECREE, FOUND THAT THE SPECIAL MASTER RECOMMENDED A DIVORCE ONLY UPON THE GROUND OF EXTREME CRUELTY AND THAT THE CHANCELLOR SHOULD HAVE ACCORDED FULL FAITH AND CREDENCE TO THE 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, AND REMANDED SAID FLORIDA SUIT TO THE TRIAL COURT FOR FURTHER PROCEEDINGS NOT INCONSISTENT WITH ITS OPINION, MAY THE CHANCELLOR ENTER A DECREE FOR DIVORCE ON THE GROUND OF EXTREME

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CRUELTY ON PROOF OF ACTS OF PHYSICAL CRUELTY TOWARD THE WIFE NOT ENDANGERING HER LIFE AND WHICH WOULD NOT JUSTIFY A DECREE FOR DIVORCE IN PENNSYLVANIA ON THE GROUND OF CRUEL AND BARBAROUS TREATMENT?

The Chancellor erroneously answered the foregoing question in the affirmative and committed error by permitting appellee to file her amended bill of complaint alleging substantially the same facts as alleged in her original bill of complaint, and by entering final decree (T.VIII- 508-510), granting a divorce to appellee in part upon the ground of extreme cruelty.

1. The gravamen of appellee's complaint against the appellant is that by innuendo, by insinuations and otherwise, he charged her with lack of proper care of their minor son at the time of his death by drowning, and that he was inconsiderate in his sexual relations with her (T.V.II - 307). It is her testimony (T.V.II - 256, 268, 263) that he by innuendo and by insinuations blamed her for the death of their son, thereby causing her mental pain and suffering. This testimony, if true, showed conduct on the part of appellant which might enable her to procure a divorce in Florida on the ground of extreme cruelty of a mental type or in Pennsylvania on the ground of "indignities to the person," but would not enable her to procure a divorce in Pennsylvania on the ground of "cruel and barbarous treatment which endangered her life." It does not appear from appellee's said testimony that appellant's said course of conduct, i.e., the blaming of her for the death of said son, showed the perpetration by appellant of any act of violence upon her or any act which did endanger her life, nor is it so alleged by her in her amended bill of complaint. Therefore, insofar as appellee did charge appellant with such

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conduct which constituted cruelty of a mental type, her amended bill for divorce was founded upon a ground identical with that of the ground alleged by her in her Pennsylvania suit on the ground of "indignities to the person" and the Chancellor was bound to give full faith and credence to the final decree in her said Pennsylvania suit, dismissing her libel filed therein, and therefore, could not by his final decree (T.V.III - 508-510) grant a divorce to appellee by reason of said conduct of appellant, this question having become res adjudicata. The facts essential to the maintenance of the Pennsylvania action and the Florida action are identical.

> The test of the identity of 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. Bagwell v. Bagwell, 153 Fla. 471, 14 So. 2d 843; Gordon v. Gordon, 160 Fla. 838, 36 So. 2d 774.

2. It is appellee's testimony that appellant was inconsiderate in his sexual relations with her (T.V.II - 253-254, 256-257, 259, 262-263, 266, T.V.III - 510) in that he persisted in desiring to have sexual intercourse with her, which she permitted "rather than argue and fuss" (T.V.II - 253) and which caused her unusual pain at the menstrual period, and in that he insisted upon the sexual relationship without any tenderness or affection when she was mentally disturbed and upset and not in the mood and which was painful (T.V.II - 256-257) and in that his sexual relations caused her pain (T.V.II-259). However, it is also noted that (T.V.III - 510) in response to her counsel's question as to whether appellant's sexual relations with her caused her physical pain, she testified, "It wasn't very pleasant" and "I would say it did

not cause me any physical pain but it caused me to become worse." It is also noted that said testimony of appellee does not show that she refused appellant's advances for the sexual relationship or that he by any force caused her to submit to the sexual relationship, nor does it appear either from any allegation of appellee's amended bill of complaint or from her testimony that appellant's conduct toward her, in the matter of his sexual relations with her, in any way endangered her life. Therefore, it does not affirmatively appear, either from her amended bill of complaint or from her testimony as to appellant's sexual relations with her, that his conduct did constitute a ground for divorce in Pennsylvania for cruel and barbarous treatment which endangered her life. This being the case, the facts of the appellant's conduct toward appellee in the matter of their sexual relationship are facts which in Pennsylvania might constitute a ground for divorce on the ground of indignities to the person but would not constitute a ground for divorce for cruel and barbarous treatment which endangered appellee's life. Such facts are identical in character with those required to establish a suit for divorce in Florida on the ground of extreme cruelty. It follows, therefore, that the Chancellor erred in entering his said final decree (T.V.III - 508-510) granting a divorce to appellee on the grounds of extreme cruelty, of a physical type, this issue having theretofore been adjudicated adversely to the appellee by the final decree in her pennsylvania suit.

A reference is made to Bagwell v. Bagwell and Gordon v. Gordon (supra).

Reference is made to Acts of Assembly (Pennsylvania, May 2, 1949) providing that it shall be lawful for the innocent spouse to obtain a divorce whenever it shall be judged that the other spouse (e) shall have by cruel and barbarous treatment endangered the life of the injured and innocent spouse.

Reference is made to brief of Pennsylvania decisions construing and distinguishing the grounds of "indignities to the person" and "cruel and barbarous treatment" under the law of Pennsylvania and indicating the facts essential to the proof of such grounds (T.V. II - 326 through T.V.III - 467).

Reference is also made to authorities cited in appellant's reply brief filed in former appeal in this cause, pages 1 - 12.

3. Appellee would have the Court believe that by her amended bill of complaint and by her testimony, she has alleged and established a cause of action for cruelty, of a physical type, which is identical with the Pennsylvania cause of action for divorce on the ground of cruel and barbarous treatment which endangered her life. However, it is obvious that this contention is fallacious since the facts essential to the establishment of these two grounds are not identical, in that to establish a cause of action for divorce on the ground of "cruel and barbarous treatment", under the law of Pennsylvania, it is necessary to prove an act of violence and to prove that the act did endanger the life of the injured spouse. It is not alleged by the appellee, nor has it been proven by her testimony, that the appellant's acts, either in his alleged sexual relations with the appellee or in his alleged conduct of blaming the appellee for carelessness at the time of the death of their child, were acts of violence and did endanger the life of the appellee. Upon the other hand, the allegations of appellee's amended bill of complaint and her testimony given in this cause, show alleged facts which are identical with the facts required to establish "indignities to the person" as a ground for divorce under the law of Pennsylvania.

It is evident, therefore, that the Chancellor erred in granting to appellee, by his final decree (T.V.III - 508-510) a divorce from appellant on the ground of extreme cruelty, the Pennsylvania decree being res adjudicata on said issue.

Gordon v. Gordon (supra).

4. It is to be observed that the said testimony of appellee as to appellant's conduct with reference to blaming her for carelessness at the time of the death of their child and with reference to their sexual relationships is uncorroborated by any other creditable testimony. It is significant that the appellee has adduced no testimony from physicians, friends, relatives or acquaintances in corroboration of her charges as to appellant's conduct toward her. The Supreme Court of Florida has held in numerous cases that a divorce may not be granted on the uncorroborated testimony of the plaintiff alone. Morgan v. Morgan, _____ Fla. _____, 40 So. 2d 778.

5. It appears therefore that this question was adjudicated in appellee's said Pennsylvania suit adversely to her contentions here and the final decree in said Pennsylvania suit is res adjudicata upon said question as presented here.

At 27 C.J.S. 829, the rule is stated as follows:

> ". . . A judgment on the merits in an action for divorce, when rendered by a court of competent jurisdiction, is a bar, as to every issue which in fact was or in law might have been litigated therein, to a later proceeding upon the same cause between the same parties. Thus such a judgment is ordinarily a bar to a subsequent divorce action based upon acts or misconduct which were known, or should have been known, to exist at the time of the commencement of the first action, and which should have been presented therein. So, where the ground of divorce in the second action is the same as in the first, although based on different acts, but no new acts occurring subsequent to the first case are alleged, the subsequent action is barred."

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FIFTH QUESTION

WHERE IT APPEARS FROM THE TESTIMONY OF THE WIFE IN HER SUIT FOR DIVORCE THAT HER HUSBAND BY INNUENDOS AND INSINUATIONS CHARGED HER WITH LACK OF PROPER CARE OF THEIR MINOR CHILD WHEN IT WAS DROWNED IN A FISH-POOL AND THAT SHE CHARGED HIM WITH INSISTENCE ON SEXUAL RELATIONS WITH HER WITHOUT PREVIOUS DISPLAY OF AFFECTION, AND WHEN SHE WAS NOT IN THE MOOD THEREFOR, CAUSING HER MENTAL AND PHYSICAL PAIN, BECAUSE OF WHICH SHE REFUSED TO LIVE WITH HIM FOR A PERIOD OF OVER ONE YEAR, AND WHERE IT AFFIRMATIVELY APPEARS FROM THE TESTIMONY OF THE HUSBAND THAT HE NEVER INTENDED TO DRIVE HER AWAY OR TO TERMINATE THE MARITAL RELATION WITH HER AND THAT HE REPEATEDLY SOUGHT TO MAINTAIN SUCH RELATION AND TO BECOME RECONCILED WITH HER, IS THE HUSBAND GUILTY OF WILFUL AND OBSTINATE DESERTION OF THE WIFE FOR SAID PERIOD OF ONE YEAR?

The Chancellor erroneously answered the foregoing question in the affirmative and committed error by entering his final decree (T.V.III - 508) granting a divorce to appellee on the ground of wilful, obstinate and continued desertion of her by appellant for one year.

1. The appellee testified before A. Judson Hill, the Special Master first appointed in this cause, that after the birth of their child, the appellant insisted upon his rights as a husband and that this was not pleasant but did not cause her physical

pain (T.V.III - 510) and at a much later date, before the Special Master David W. Dyer, she testified that the appellant made frequent demands for sexual relations with her during the period following the birth of her child which caused her cramps at her menstrual periods (T.V.II - 253); that appellant failed to show her due consideration on his return from overseas after the death of their child and insisted upon sexual relations with her without any display of tenderness or affection and when she was physically and mentally disturbed and not in the mood for such relations and that the relationship caused her pain (T.V.II - 256-258) and insinuated that she was careless in watching the child at the time it was drowned in the fish-pool (T.V.II - 258) and that he continued to insist upon sexual relations with her when they visited his parents in New York City (T.V.II - 259) and did not object when his mother intimated in his presence that she was careless at the time the child was drowned (T.V.II - 260), but it nowhere appears in her testimony that she refused to have sexual relations with appellant at the times mentioned by her or that he exercised any violence toward her or compelled her to have sexual relations with him. It is to be remembered that the parties in this suit cohabited for a period only approximately six weeks after appellant returned from military service overseas on the occasion of the drowning of their child. It is his uncontested testimony that he was shocked and upset by the death of the child. The testimony of appellee with respect to appellant's conduct in blaming her for the death of the child and in his sexual relations with her is positively denied by appellant in his testimony in the hearings before the Special Masters appointed in this cause. Even if appellant's denial of said accusations is disregarded and if appellee's charges are considered as true, for the purposes of this appeal, nevertheless, it does not appear that the said conduct

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of the appellant, in view of the wartime circumstances surrounding the parties, was such, as a matter of law, as would justify appellee in refusing to live with appellant as his wife.

2. Notwithstanding the testimony of the appellee as to the conduct of the appellant toward her, both at the time of and after the birth of their child and at the time of and after the death of said child, there is no testimony in the record that appellant ever intended to drive appellee away or to terminate the marital relation or in any way to cause her to refuse to cohabit with him. To the contrary, the record is replete with the testimony of both parties that appellant at all times sought to maintain the marital relation and sought to have the appellee with him and to provide a home for her and that he did everything within his power to appease her and to become reconciled with her (T.V.IV - 83, 84, 87, 88, 103; T.V.I - 160-161, 166; T.V.II - 262, 265, 266, 277-279, 282, 284-286, 287, 289, 290, 293, 294-298, 299, 300, 314-315). He has resisted her attempts by her suits, both in Pennsylvania and in Florida, to dissolve the marital relation. Considering the contradictory testimony of the parties with reference to the alleged conduct of the appellant toward the appellee, after the death of their child, the fact that the appellant had been many months overseas prior to the death of his child and his return to Johnstown, Pennsylvania, the grief and shock which both parties sustained by reason of the death of the child, the fact that they cohabited only approximately six weeks after the death of the child under unusual, disturbing and wartime conditions then existing, it is submitted that the appellee by her testimony did fail to make out such a strong case of constructive desertion against her husband, the appellant, as the Supreme Court of Florida has declared to be requisite and necessary to entitle her to a divorce for constructive desertion. She has failed to prove that his alleged conduct or that his alleged desertion was wilful and obstinate. It is to be remembered that Special Master A. Judson Hill, in his report (T.V.IV-26) reported that he found no credible testimony supporting"in even a slight degree" the appellee's charge that appellant was guilty of desertion of appellee and that the subsequent

testimony of the appellee before the Special Master David W. Dyer added no important or substantial matter which was not before Special Master A. Judson Hill at the time of his hearing of appellee's testimony and evidence.

In Stevenson v. Stevenson, 84 Fla. 678, 94 So. 860, this Court said:

> "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 wrong-doing, rather than poverty, to make life so unbearable that she cannot continue to live with him, is necessary to be established in order to justify a divorce. No such case appears here, and no case of desertion is made against the defendant."

In Hudson v. Hudson, 59 Fla. 529, 51 So. 857, it was held that it is immaterial which of the parties leaves the marital home; the one who intends bringing the cohabitation to an end commits the desertion. The party who drives the other away is the deserter, and either may drive the other away.

As used in our statute defining the grounds for divorce the word "wilful" means on purpose, intentional; "obstinate" mesnd determined, fixed, persistent. Mitchell v. Mitchell, 91 Fla. 427, 107 So. 630; Hudson v. Hudson, 59 Fla. 529, 51 So. 857, 138 Am. St. Rep. 141, 29 L.R.A. (N.S.) 614, 21 Ann. Cas. 278.

At 17 Am. Jur. 194, the following appears:

> "In the determination of what constitutes desertion as a ground for divorce, one of the first matters for consideration is the intent of the offending party; there must be, in addition to a separation or withdrawal from cohabitation, even though it is for an extended period, an intent on the part of the withdrawing party not to return or to resume cohabitation. The wrongful intent to desert is indispensable. A mere severance of the relation is not sufficient, since there may be a separation without desertion and desertion without separation. A fortiori, it is essential to prove an intention to desert where the ground upon which a divorce is sought is wilful, obstinate, and continued desertion. Continued separation of husband and wife, which may be consistent under the proofs with no intention wilfully and obstinately to desert, is not a desertion within the meaning of the statute."

In Moser v. Moser, 125 Pa. Super. 180, 189 A. 506, it was held that husband's refusal to support or keep in home child born before marriage and repeated requests that wife leave home, pursuant to which wife returned to her family, held not "willful and malicious desertion" by husband within statute which would entitle wife to divorce on that ground.

At 17 Am. Jur. 195, the following appears:

> "In some of the statutes the desertion is required to be 'wilful' and 'obstinate'. The term 'wilful' as so used has been held to mean 'on purpose, intentional', and the term 'obstinate' to mean 'determined, fixed, persistent'. The word 'wilful' does not imply any malice or wrong toward the other party. Used in this connection, it means absenting oneself from the society of the other spouse with the intention to continue to live apart in spite of the wishes of such other spouse and without any intention to return to cohabitation."

At 27 C.J.S. 579, the following appears:

> "The intention of the guilty party to abandon the other and permanently renounce the obligations of the marriage is a necessary element of desertion as ground for divorce. The desertion must be willful. Under some statutes, the desertion must be willful and obstinate; under others, willful and malicious; and under still other, willful or malicious. The requisite intention may be inferred from voluntary separation, without justification or consent, especially when coupled with withdrawal of support. When a separation and intent to desert are once shown, the same intent will be presumed to continue until the contrary appears."

3. Appellant's alleged conduct toward the appellee was considered by Master and the Court in her Pennsylvania suit which was a trial upon the merits and was there adjudicated as insufficient to establish "indignities to the person" as a ground for divorce in said suit and her libel was dismissed (T.V.II - 222).

If appellant's alleged conduct toward appellee was found to be insufficient to warrant a decree for divorce upon the ground of "indignities to the person", it is apparent that appellant's said alleged conduct would be insufficient to justify appellee in refusing to live with appellant and insufficient to warrant the Chancellor in the suit at bar to decree a divorce for appellee on the ground of wilful and obstinate desertion, and the Chancellor erred in so doing.

SIXTH QUESTION

WHERE A WIFE SUES HER HUSBAND FOR DIVORCE ON THE GROUND THAT HE IS GUILTY OF WILFUL, OBSTINATE AND CONTINUED DESERTION OF HER FOR MORE THAN ONE YEAR AND IT AFFIRMATIVELY APPEARS THAT THE HUSBAND DURING SAID PERIOD OF ONE YEAR MADE TO THE WIFE A BONA FIDE AND UNCONDITIONAL OFFER OF RECONCILIATION, MAY THE CHANCELLOR THEN BY FINAL DECREE GRANT A DIVORCE TO THE WIFE ON THE GROUND OF DESERTION?

The Chancellor erroneously answered the foregoing question in the affirmative and committed error by overruling appellant's exception to the Special Master's report based on the ground that the appellant did, within the period of said alleged desertion, make a bona fide, unconditional offer of reconciliation to the appellee, and by entering the said final decree (T.V.III - 508) granting a divorce to appellee on the statutory ground of desertion.

1. The testimony of the parties in this cause shows that in November, 1944, after the appellant had returned to his military duties in Norfolk, Virginia, the appellee telephoned him that she

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desired a divorce from him and would no longer live with him, but did not inform him of her grounds for complaint or her reasons for her decision to obtain a divorce and her refusal to cohabit with him; that this decision on the part of appellee caused appellant so great worry and uncertainty that he procured an emergency leave on or about November 23, 1944, and journeyed to the City of Johnstown, Pennsylvania, where he conferred with appellee, at which time their marital relations were discussed. According to the testimony of the appellant, he did at said conference with appellee, amicably settle and adjust the grounds for her complaint against him and did become reconciled with her and it was then agreed that he would return to Norfolk, Virginia, and there obtain living accommodations and that she would then join him in Norfolk and resume cohabitation with him and that they would make a new start in their marital relations; that he did return to Norfolk where he did obtain living accommodations, and that it was then arranged that he would meet appellee in Philadelphia and from there return with her to Norfolk; that he journeyed to Philadelphia to keep this appointment but that the appellee did not appear and thereafter refused to cohabit with him, either at Norfolk or elsewhere (T.V.IV - 83, 88, 104; T.V.III - 522-533; T.V. II - 285-286, 290, 293-299, 309, 314-316); that it is the testimony of both parties that upon appellant's return to Norfolk and upon his there procuring living accommodations for himself and appellee, pursuant to the arrangement made with her as aforesaid, he wrote a letter to her which she received and which is admitted in evidence as appellee's Exhibit 8 (T.V.III -527), which said letter is as follows:

"FLEET SERVICE SCHOOL
VIRGINIA BEACH
VIRGINIA

Sunday

"My Darling:

"I've just arrived and it sure was some trip. I got here about 6 P.M. I made a mistake instead

of buying the ticket thru Washington. I should have gotten it thru Phil. It was an hour shorter this way, but I had a lot of changing to do. It wasn't to bad a trip. It was just the time I had to start. I changed trains in Harrisburg, then in Washington & then again in Richmond, Va. Remember Richmond honey, we went thru there on our honeymoon. It's a beautiful city. I ended up the trip with a ferry ride across the bay to Norfolk. The sandwiches you made for me were delicious sweetheart. Gee I'm all excited now that you may come down here to live with me. Honestly darling all I want to do for the rest of my life is just make you happy, and give you & show you all the consideration & love in the world. As soon as I got back here I called the U.S.O. They help us find places for our wifes & ourselves. They have lots of rooms, but just now didn't know any with cooking facilities, but said that by the time that you get here, they'll have something. I was thinking honey it would be swell if we could spend your birthday here. Maybe we can arrange to get settled here by then. You could still go into Phila, before you came here. Catch a night train from Phila, and you wouldn't mind the trip if you got a berth. How does that sound to you honey. Or if you want to you could fly here by plane. I'm a changed man darling. Anything in the world you want me to do I will. I've made mistakes & lacked consideration to you, but never again. You just watch what a gentleman your hubby will be after the war. I'll dress like a million dollars. We'll get our little home & raise our family & be glouriously happy. I'm waiting impatiently for your letter so I'll know when & how you're coming. If we are settled here by your birthday I'm going to have a surprise for you. My classes start at 6 A.M. so I'm going to mail this & shower & shave and hit the bed. Again I say I love you with all my heart & from now on it will be nothing but happiness & consideration. With our precious one gone there can't be much happiness for us, but we must be together darling here, & then you'll realize how comforting we'll be for each other. My love to Mom, Dad & Esther. As I write I think of Mom. How is my darling Mom in law?

Yours Ever Loving Hubby

Morris."

2. Although it is the appellee's testimony that she pretended to become reconciled with appellant upon the occasion of their conference at Johnstown, Pennsylvania, in November, 1944, so as not to create any fuss or disturbance in her father's home

(T.V.III - 501-503, 514), she in fact had then no intention of becoming reconciled with appellant or of cohabiting with him in Norfolk and that for this reason she did not join him in Philadelphia but went to New York City, New York. Notwithstanding this testimony of appellee, the appellant did, by his said letter, set forth in the preceding paragraph hereof, make unto appellee a bona fide, unconditional offer of reconciliation. It would be difficult to conceive of a more complete and unconditional offer of reconciliation than is presented by said letter and by the circumstances of the parties at the time the said letter was written and received. Therefore, if the appellant was at the time said letter was written, guilty of any conduct which could be construed as desertion or constructive desertion by him of the appellee, and he denies that he was guilty of such conduct, his said bona fide, unconditional offer of reconciliation terminated any desertion of appellee of which he was then guilty.

3. The facts as to the efforts made by the appellant to effect a reconciliation with the appellee were considered by the Master and by the Court in appellee's Pennsylvania suit in which a trial on the merits was had, and the Master found as a fact as follows (T.V.II - 220):

> "Respondent's testimony shows that he made <u>all possible efforts</u> of reconciliation of Libellant's affection towards him, and was at a loss to understand the attitude which she adopted sometime after the loss of their child by a very tragic accident."

The report of the Master and his findings were adopted by the Pennsylvania court and thereby were made a part of its final decree (T.V.II - 223). Therefore, the fact of the efforts of the appellant to effect a bona fide reconciliation with appellee has been

adjudicated and said decree is entitled to full faith and credence in this appellate court, and appellee is estopped by said decree in her Pennsylvania suit from here denying that appellant has made all possible efforts to effect a reconciliation with her.

In Hunt v. Hunt, 61 Fla. 630, 54 So. 390, this Court said:

> "It is true that the husband, without the wife's consent, has the right to establish the family domicile, and that it is her duty to live with him at his domicile, if it is reasonably possible for her to do so. But if the husband by his own acts intentionally brings the cohabitation to an end, and by his own acts keeps it at an end for the statutory period, showing no evidence of a reasonable purpose to renew his marital relations, he is guilty of desertion. He had no right whatever to make it a condition of reconciliation with her, and of renewed marital relations, that she should convey her property to him. An offer of reconciliation must be made in good faith, and free from improper qualifications and conditions. 14 Cyc. 619, and cases cited in note 89."

At 17 Am. Jur., 210, the following appears:

> "Although one spouse has separated from the other without excuse, if he or she in good faith seeks a reconciliation, offers to return, and the latter refuses such overtures, the former is not, as a general rule, to be deemed thereafter guilty of desertion. It seems that after such overtures for a reconciliation have been made in good faith by the spouse offending in the first instance, the other spouse's refusal to accept them and to resume the marital cohabitation may constitute desertion on the latter's part. The spouse offending in the first instance must, however, exercise all reasonable efforts in good faith to right his or her wrong, and the other spouse is entitled to a reasonable time for a consideration of the overtures for reconciliation in order to convert his or her refusal to resume the marital cohabitation into a desertion by the spouse so refusing."

At 17 Am. Jur 211, the following appears:

> "There is an extreme view that a request to a spouse who has been living apart from the other that they again live together must be unconditional - that is, any condition in a request for resumption of marital relations will

vitiate such request. However, it may be noted that in some of the cases supporting this view, directly or by implication, the request was coupled with an alternative suggestion designed to cover the situation in the event a reconciliation did not result, although a few cases indicate that the request will be ineffective unless absolutely unconditional.

"The rule generally recognized is that a request or demand for the resumption of marital relations must be free from improper conditions, although in some cases the court has held a condition to be proper or improper without stating any general rule regarding the inclusion of conditions. As to the propriety of such conditions, it cannot be said that there has been unanimity among the courts in the adoption of rules relative thereto."

In Sevil v. Sevil, _____ Del. _____, 43 A. 2d 253, the following appears:

"(1) The word 'wilful' as associated with the word 'desertion', as employed in Paragraph 3500 aforesaid, does not mean a desertion predicated upon an agreement between the parties; rather, the words imply a determined or intentional desertion without any acquiescence on the part of the party deserted.

"(2, 3) Of course, the mere offer on the part of the defendant in this case to resume cohabitation with the plaintiff, even though refused by him, would not of necessity interrupt the continuity of the operation of the statute - more is needed - but the law does not exact an agreement between the parties nor a resumption of their marital relationship by cohabitation; rather, it merely imposes upon the offender nothing more than a clear manifestation to return and resume cohabitation based upon a sincerity of purpose which is real, honest, and bona fide in all its aspects, and if such is shown and if the plaintiff refused to take the defendant back, the subsequent wilfulness will be found to be wanting and the right to a divorce on the ground of wilful desertion defeated. 27 C.J.S., Divorce, Sec. 38pp. 576, 577, Rich v. Rich 109 N.E.Eq. 216, 156 A. 442; Helm v. Helm 143 Pa. Super. 22, 17 A. 2d 758."

At 27 C.J.S. 576, the following appears:

"If before the expiration of the statutory period of desertion a spouse, otherwise guilty of desertion, makes a sufficient offer to resume the marriage relationship, the continuity of the period of duration is interrupted and there can be no divorce."

SEVENTH QUESTION

WHERE A WIFE, A RESIDENT OF PENNSYLVANIA AND POSSESSED OF AN INCOME OF APPROXIMATELY $1200.00 PER MONTH, INSTITUTED A SUIT FOR DIVORCE IN PENNSYLVANIA AGAINST HER HUSBAND, A RESIDENT OF MARYLAND, WHO ENJOYED AN INCOME OF APPROXIMATELY $50.00 PER WEEK AS AN AUTOMOBILE TIRE SALESMAN, AND WHEN SAID SUIT WAS AT ISSUE AND READY FOR TRIAL, SAID WIFE JOURNEYED TO MIAMI BEACH, FLORIDA, OVER 1000 MILES DISTANT FROM THE RESIDENCE OF HER HUSBAND AND HIS WITNESSES, AND AFTER 90 DAYS THEREAFTER INSTITUTED IN THE CIRCUIT COURT IN DADE COUNTY, FLORIDA, ANOTHER SUIT FOR DIVORCE AGAINST HER SAID HUSBAND AND THEREIN OBTAINED A FINAL DECREE FOR DIVORCE, WHICH, ON APPEAL TO THE SUPREME COURT OF FLORIDA, WAS REVERSED AND REMANDED TO THE TRIAL COURT AND THE HUSBAND ALLOWED HIS COSTS BY HIM EXPENDED ON SAID APPEAL AND THEREAFTER SAID COSTS WERE TAXED BY THE TRIAL COURT IN THE AMOUNT OF $123.85 AND A JUDGMENT FOR SAID COSTS WAS ENTERED AGAINST SAID WIFE BY THE TRIAL COURT, DID THE CHANCELLOR FAIL TO EXERCISE PROPER JUDICIAL DISCRETION IN PERMITTING THE WIFE TO PROGRESS HER SUIT IN FLORIDA BY AMENDED BILL OF COMPLAINT AND PROCEED TO TRIAL DE NOVO, WITHOUT FIRST REQUIRING THE WIFE TO DO EQUITY BY PAYING TO THE HUSBAND SAID JUDGMENT FOR COSTS?

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The Chancellor erroneously answered the foregoing question in the affirmative and committed error by the entry of his order (T.V.I - 82-83) denying plaintiff's motion (T.V.I - 74-76) to stay this cause pending the payment by appellee of costs assessed against her by the Mandate of this Court (T.V.I - 2) upon appellant's former appeal in this cause.

1. In the Mandate of this Court upon appellant's former appeal in this cause, it was ordered by this Court that the appellant do have and recover of and from the appellee his costs by him in said appeal expended. Pursuant to stipulation of the parties, the Chancellor on November 23, 1948, entered his decree (T.V.I - 34-35) for appellant's said costs in the amount of $123.85. Said decree for costs being unpaid and unsatisfied by appellee who had then, by the permission of the Chancellor, filed her amended bill of complaint in this cause seeking further relief in equity, the appellant filed his motion requesting the Chancellor to stay the further progress of the cause until appellee did pay said decree for costs. Upon the hearing of the aforesaid motion, the Chancellor denied the same and permitted appellee to progress this cause under her amended bill of complaint seeking further equitable relief therein.

2. The Chancellor had before him the record in this cause, from which it appeared that the parties in this cause were born in the State of Pennsylvania and were residents of said state at the time of their marriage and at the time the marital difficulties arose and continued between them; that the appellee had instituted a suit for divorce against the appellant in Cambria County, which said suit was pending at the time the suit at bar was instituted; that the appellee, under the law of Pennsylvania, could have instituted a suit for divorce against the appellant on the grounds

of "indignities to the person", "cruel and barbarous treatment" and "desertion", and could have there obtained all the remedy and relief which she might have been entitled to receive under the facts of her marital relations with the appellant as fully and completely as she could obtain such relief in the State of Florida; that all the witnesses and evidence relevant to the alleged conduct of the appellant toward her, was situated in the State of Pennsylvania and could conveniently have been adduced in a court of competent jurisdiction in said state; that the appellee enjoyed an income of approximately $1,000.00 a month (T.V.III - 513) from an interest in a bottling plant; that the appellant enjoyed a take-home wage of $44.70 per week (T.V. III - 516) from his employment as a tire salesman; that instead of pursuing her remedies against the appellant in a competent court in the State of Pennsylvania, and upon the excuse that her health was impaired by the climate of the City of Johnstown, Pennsylvania, where, according to the record, she lived in a fashionable suburb upon a mountain top over a thousand feet above sea level and had always been in good health, she elected to journey to Miami Beach, Florida, and after remaining in said city for shortly over ninety days, she instituted the suit at bar in the Circuit Court in Dade County, Florida, thereby causing the appellant, who had filed an answer in her pending suit in Pennsylvania and was ready to proceed to trial therein, to defend himself in the suit at bar more than a thousand miles away from his home and from his witnesses and other evidence there available to him; that in defending himself in the suit at bar, it has been necessary for him to spend large sums of money in employing counsel in Dade County, Florida, in journeying to and from the City of Miami, Florida, and in taking depositions from his many witnesses in the State of Pennsylvania for use in

the said suit at bar. It is submitted that under the foregoing condition of said parties, the Chancellor, as a Court in equity, did abuse his judicial discretion in permitting the appellee to progress this cause pursuant to her amended bill of complaint without first doing equity by paying the decree for costs which the Chancellor had entered in said cause as aforesaid.

At 30 C.J.S., 458-460, the following appears:

> "He who seeks equity must do equity. This maxim expresses a cardinal principle. It is one of the oldest and most familiar in equity jurisprudence, and has been considered the source of every doctrine and rule of equity jurisdiction. It is a favorite maxim with a court of equity, and is of extensive application, being applicable to all classes of cases whenever necessary to promote justice. The maxim is, however, a general guiding principle in the administration of equity rather than an exact rule governing specific and well-defined cases. Except where the maxim has been given force through statutory enactment, which has occurred in some jurisdictions, the power of the court to enforce the maxim is not conferred by statute, nor is it exercised for the purpose of enforcing any contractual rights; it is the invention of a court of chancery for regulating its own procedure, in the application of which the court, not as an inflexible rule, exercises discretion in the interest of equity and justice."

3. Under the circumstances aforesaid, the filing by the appellee of her amended bill of complaint in this cause, after the Mandate of this Court and after it had been remanded to the trial court for further proceedings not inconsistent with the Opinion of this Court, was, in effect, comparable to the institution of a new suit by the appellee on the same grounds specified in her original bill of complaint, and the Chancellor should, in the exercise of sound judicial discretion and in consideration of equitable principles, have stayed said cause until appellee did pay said decree for costs theretofore by him incurred in his former appeal to this Court.

In State vs. Bird, 145 Fla. 477, 199 So. 758, it was held that an order staying a second action on the same cause of action until payment of a judgment for costs in the first action is within the trial court's discretion and will not be disturbed except for abuse thereof.

At 20 C.J.S. 654, the following appears:

> "A court of equity has the power to make any necessary and proper order for the payment of costs." Citing Novy v. Novy (Pa.) 188 A. 328.

At 20 C.J.S., 656, Sec. 418, the following appears:

> "Under the common law, it was within the authority of the courts to require the payment of judgment costs awarded against an unsuccessful party to an action as a condition precedent to his institution of another action based on the same subject matter, and while a measure of judicial discretion rests on the court to decide whether the circumstances render the application of the rule inequitable."

CONCLUSION

From the record in this cause and from the reasonable inferences which may be drawn therefrom, there is revealed the sordid story of a wife of abundant financial means, who, for reasons best known to her, did cease to love her husband, a man of small financial means and position, at the time of the birth of their child, and whose love had, according to her own testimony (T.V.III - 501-503, 515) turned to hate, and who, after the death of their child and the removal of that remaining tie which bound them together, did determine to sever the marital relation with her husband by whatever means she might find necessary to that end. She first instituted a suit for divorce against her husband in the Court of Common Pleas in Cambria County, Pennsylvania where the parties and their witnesses resided and in which her husband

appeared, answered and was ready to defend himself, and while said suit was pending, did, in May of 1946, appear before an Alderman in the City of Johnstown, Cambria County, Pennsylvania, and there make information against appellant, charging him with the offense of non-support, and when said non-support proceeding was set for hearing before the Court of Quarter Sessions in Cambria County, Pennsylvania, on May 27, 1946, and when appellant was then and there present to present his defense to said charge, assisted by counsel, appellee did not appear, but authorized her attorney to file a nol pros (T.V.IV - 48A8) of said proceeding, and did remove herself and certain of her personal effects to the City of Miami Beach, Florida, where, after residing in several hotels for a period of over ninety days and claiming to be a resident of Florida, she instituted the suit at bar for divorce against her husband in the Circuit Court in Dade County, Florida, well knowing that he would find it most expensive, inconvenient and vexatious to defend himself in said jurisdiction more than a thousand miles away from his home and his witnesses. Thereafter, the said wife, after obtaining a decree for divorce against her said husband and while his appeal from said decree was pending in this Court, and without regard to her marital vows, and thinking of her own selfish interests, did remarry, become pregnant and give birth to a child, and did thereby give offense not only to her husband, but to Courts and morals of the State of Florida, and then had the effrontery to file in said suit her amended bill of complaint, charging her husband with extreme cruelty and desertion, notwithstanding his repeated and bona fide, unconditional efforts to appease her and become reconciled with her.

Respectfully submitted,

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By _____
Of Counsel

RECEIVED a copy of the above and foregoing brief this 27th. day of November, 1950.

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