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Collateral Attack On Divorce By Third Parties

NOTE

COLLATERAL ATTACK ON DIVORCE BY THIRD PARTIES

The contrary results recently reached by two New York courts in cases involving substantially the same set of facts focus attention again on the problem of the validity of divorces obtained in States such as Nevada and Florida. In each case, the plaintiff sought to annul her existing marriage by attacking collaterally the earlier divorce of her spouse. The attack was based on the foreign court's lack of jurisdiction because of the invalid domicil of the earlier suit's party-plaintiff. However, in each case, the foreign court had found a valid domicil; and, furthermore, the non-domiciled party (defendant in the present action) had appeared and defended.

The court deciding the case of *deMarigny v. deMarigny*[1] allowed the collateral attack, on the basis of recent leading cases.[2] The court quoted from the second *Williams* case[3] that "those not parties to a litigation ought not to be foreclosed by the interested actions of others."

However, the case of *Bane v. Bane*[4] refused to permit the collateral attack on the foreign divorce decree, on the questionable ground that it must be accorded full faith and credit.[5] This decision was based on three assumptions: first, that divorce jurisdiction is quasi in rem and,

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[1]81 N. Y. S. (2d) 228 (1948), Supreme Court, Special Term, New York County, Part III.

[2]Sherrer v. Sherrer, 334 U. S. 343, 68 S. Ct. 1087, 92 L. ed. 1429 (1948), noted (1948) 6 Wash and Lee L. Rev. 61; Coe v. Coe, 334 U. S. 378, 68 S. Ct. 1094, 92 L. ed. 1451 (1948); Matter of Lindgren's Estate, 293 N. Y. 18, 55 N. E. (2d) 849, 153 A. L. R. 936 (1944). The holding in the Coe case was substantially as follows: "Where, after Massachusetts decree for separate support, husband instituted action for divorce in Nevada wherein wife appeared and filed a cross-complaint for divorce and Nevada court found that it had jurisdiction or parties and subject matter and granted wife divorce and alimony, divorce decree was not subject to collateral attack by former wife in Massachusetts, and attempted redetermination of jurisdiction of Nevada court by Massachusetts courts was void as a denial of full faith and credit to Nevada divorce decree." (Headnote, 69 S. Ct. 1094). The Sherrer case was similar in all essentials to the Coe case. In the Lindgren case, a child was allowed collaterally to attack the foreign divorce of its parents even though the non-domiciled parent procured an order purporting to amend, nunc pro tunc, the foreign divorce decree to include a recital of his appearance.

[3]Williams v. North Carolina, 325 U. S. 226, 230, 65 S. Ct. 1092, 1095, 89 L. ed. 1577, 157 A. L. R. 1366 (1945).

[4]80 N. Y. S. (2d) 641 (1948), Supreme Court, Trial Term, New York County, Part VII.

[5]U. S. Const. Art. IV, § 1.

as such, is binding in certain instances on the whole world;[6] second, that one of these instances is (by virtue of various decisions of the Supreme Court of the United States, including the *Sherrer* and *Coe* cases[7] principally, but also both the *Williams* cases,[8] as well as several New York decisions[9]) when both parties are before the court rendering the decree; and, third, that public policy demands the recognition of a divorce decree regularly procured.[10]

Regardless of the historical view that divorce is an in rem action,[11] the recent *Williams* cases[12] clearly indicate an intent on the part of the

[6]"Jurisdiction in divorce matters is clearly based upon something more than personal jurisdiction over the parties to the suit. The prerequisite of a domicile within the state indicates a requirement that the marital res be present and that a decree of divorce operates at least quasi in rem." 80 N. Y. S. (2d) 641, 646. "The rule is otherwise [distinguished from a judgment in personam] with reference to a judgment in rem which, it has been said, is binding upon the world when the court which purports to act has jurisdiction over the res involved." 80 N. Y. S. (2d) 641, 645 (1948).

[7]See note 2, supra.

[8]Williams v. North Carolina, 317 U. S. 287, 63 S. Ct. 207, 87 L. ed. 279, 143 A. L. R. 1273 (1942); 325 U. S. 226, 65 S. Ct. 1092, 89 L. ed. 1577, 157 A. L. R. 1366 (1945). In the Williams cases, a State was prosecuting the defendants on the grounds that their remarriage following foreign divorce decrees, obtained in ex parte proceedings, amounted to bigamous cohabitation. In the first Williams case, the State did not attack the domicil established by the plaintiffs in the divorce suits but instead relied on the holding in Haddock v. Haddock, 201 U. S. 562, 26 S. Ct. 525, 50 L. ed. 867 (1906), to the effect that: "... mere domicil within the state of one party to the marriage does not give the courts of that state jurisdiction to render a decree of divorce enforceable in all other states by virtue of the full faith and credit clause...." (headnote, 26 S. Ct. 525). The Supreme Court overruled the Haddock case and held that the foreign divorce decree must be accorded full faith and credit because the domiciliary finding of the foreign court had not been assailed and no allegation of denial of due process had been made. However, in the second Williams case, the State was allowed to attack the foreign divorce decree collaterally by finding it was based on an invalid domicil, and the conviction of the defendants was affirmed.

[9]Bane v. Bane, 80 N. Y. S. (2d) 641, 648 (1948) cites the following cases: Kinnier v. Kinnier, 45 N. Y. 535, 6 Am. Rep. 132 (1871); Rugel v. Heckel et al, 85 N. Y. 483 (1881); Tiedemann v. Tiedemann, 172 App. Div. 819, 158 N. Y. Supp. 851 (1916), aff'd 225 N. Y. 709, 122 N. E. 892 (1919); Frost v. Frost, 260 App. Div. 694, 23 N. Y. S. (2d) 753 (1940); Senor v. Senor, 272 App. Div. 306, 70 N. Y. S. (2d) 909 (1947), aff'd 297 N. Y. 800, 78 N. E. (2d) 20 (1948).

[10]"The combinations and permutations of inconsistencies in matrimonial status resulting from a decision contrary to the one here made would be endless, unsavory litigation brewed interminably, and the heartbreak and suffering of literally thousands of persons would be incalculable." Bane v. Bane, 80 N. Y. S. (2d) 641, 652 (1948).

[11]For a discussion of the complex situation which must necessarily arise if divorce is treated as a proceeding in rem, and a demonstration of the inconclusiveness of such a procedure see Haddock v. Haddock, 201 U. S. 562, 576-578, 26 S. Ct. 525, 530-531, 50 L. ed. 867, 872-873 (1906).

[12]See note 8, supra.

Supreme Court to avoid this easy but inflexible attitude. In the first *Williams* case, the Court said:

> "We . . . agree that it does not aid in the solution of the problem presented by this case to label these proceedings as proceedings in rem. Such a suit, however, is not a mere in personam action."[13]

The Court continues and indicates what is meant by, and what is the reason for, referring to divorce as something more than an in personam action:

> "Each state as a sovereign has a rightful and legitimate concern in the marital status of persons domiciled within its borders. . . . Thus it is plain that each state by virtue of its command over its domiciliaries . . . can alter within its own borders the marriage status of the spouse domiciled there, *even though the other spouse is absent.*"[14]

The second *Williams* case also refused to label a divorce action as in rem, and also says:

> "But insofar as a divorce decree partakes of some of the characteristics of a decree in rem, it is misleading to say that all the world is a party to a proceeding in rem . . . . All the world is not a party to a divorce proceeding."[15]

The Court immediately continues, throwing further light on the concept that divorce jurisdiction is not merely in personam, and indicating conclusively that under some conditions, at least, a foreign decree may be collaterally attacked.

> "What is true is that all the world need not be present before a court granting the decree and yet it must be respected by the other forty-seven States provided—*and it is a big proviso*—the conditions for the exercise of power by the divorce-decreeing court are validly established whenever that judgment is elsewhere called into question. In short, the decree of divorce is a conclusive adjudication of everything except the jurisdictional facts upon which it is founded, and domicil is a jurisdictional fact. To permit the necessary finding of domicil by one State to foreclose all States in the protection of their social institutions would be intolerable."[16]

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[13]317 U. S. 287, 297, 63 S. Ct. 207, 212-213, 87 L. ed. 279, 285 (1942).

[14]317 U. S. 287, 298-299, 63 S. Ct. 207, 213, 87 L. ed. 279, 286 (1942). [italics supplied]

[15]325 U. S. 226, 232, 65 S. Ct. 1092, 1096, 89 L. ed. 1577, 1583 (1945).

[16]325 U. S. 226, 232, 65 S. Ct. 1092, 1096, 89 L. ed. 1577, 1583 (1945). [italics supplied].

An examination of the *Sherrer* decision[17] will disclose that it constitutes no authority for the proposition that divorce jurisdiction should be treated as in rem, because that concept is not even mentioned in the case; and, furthermore, such an examination impels the conclusion that it cannot necessarily be said on the basis of this case that a divorce is binding on the whole world merely because both parties were before the court.

In the *Sherrer* case, as in the two recent New York cases, both parties to the divorce action were before the foreign court, but in the *Sherrer* case the *party defendant in the earlier adjudication* was attacking collaterally the foreign divorce decree, whereas in the New York cases *a person not a party to the earlier action* was doing so. The importance of this distinction becomes apparent when it is noted that the principle of res judicata—which, as an elementary matter, binds only the parties to a suit—as applied in the case of *Baldwin v. Iowa State Traveling Men's Association*,[18] was brought into the *Sherrer* case through the case of *Davis v. Davis*.[19] The Court said:

> "We believe that the decision of this Court in the Davis case and those in related situations ... are clearly indicative of the result to be reached here. Those cases stand for the proposition that the requirements of full faith and credit bar a *defendant* from collaterally attacking a divorce decree on jurisdictional grounds in the courts of a sister State where there has been participation by the defendant in the divorce proceedings, where the defendant has been accorded full opportunity to contest the jurisdictional issues, and where the decree is not susceptible to such collateral attack in the courts of the State which rendered the decree."[20]

It would appear to be an unwarranted extension of the res judicata

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[17]See note 2, supra.

[18]283 U. S. 522, 51 S. Ct. 517, 75 L. ed. 1244 (1931). The case concerned relitigation of an issue in a *Federal* court when it had previously been settled, with defendant contesting this issue, in another *Federal* court.

[19]305 U. S. 32, 59 S. Ct. 3, 83 L. ed. 26 (1938). Here the wife was not allowed to relitigate in a *Federal* court the issue of domicil of her husband when it had been previously settled in a divorce action in a *State* court, where the wife had appeared in the State court and had contested the domicil issue. The Court said:

"She may not say that he was not entitled to sue for divorce in the State court, for she appeared there and by plea put in issue his allegation as to domicil .... Plainly the determination of the decree upon that point is effective for all purposes in this litigation." 305 U. S. 32, 40, 59 S. Ct. 3, 6, 83 L. ed. 26, 29-30 (1938).

The Court then cited the Baldwin case, see note 18, supra.

[20]Sherrer v. Sherrer, 334 U. S. 343, 351-352, 68 S. Ct. 1087, 1091, 92 L. ed. 1429, 1436 (1948). [italics supplied].

doctrine to treat as controlling, in a case where parties are not the same, a decision which was ultimately based on that doctrine.

This perusal of the recent decisions indicates that when the Supreme Court refers to divorce as being something more than a mere in personam action, such reference, so far as the decided cases *affirmatively* show, means nothing more than that where a divorce decree is founded on a *valid* domicil, it—as distinguished from an in personam judgment—is valid under the full faith and credit clause anywhere in the United States, even though the court did not have jurisdiction over the person of the defendant. But, any labeling of divorce as in the nature of an in rem action results in confusion, and literally begs the question. The question in such controversies as the recent New York cases would seem to be: What is necessary for a State to have such control of a divorce case that even the jurisdictional facts may not be collaterally attacked by an interested third party? To say that when both parties are before the State court, it controls the "marital res" and thus binds the whole world, assumes that there is such a thing as a "marital res," as well as that the mere presence of both parties places that res before the court. The *Sherrer* case justifies no such assumptions; instead it simply prevents, by indirectly applying the doctrine of res judicata, a defendant who appears in a foreign divorce action from later collaterally attacking the divorce decree, regardless of whether the judgment is considered as in rem or in personam or something else. The same would be true in regard to an ordinary in personam judgment.[21] In view of the lack of usefulness, so far as the *Bane* and *deMarigny* cases are concerned, in calling divorce an in rem action, and in view of the Supreme Court's reluctance to label it as such, it would seem more in keeping with reality to treat divorce jurisdiction as sui generis, a thing apart.

If divorce jurisdiction is regarded as sui generis, the foregoing cases have indicated the test, or guide, that the Supreme Court would use to answer the question presented in the *Bane* and *deMarigny* cases. The fundamental basis for such a test or guide is indicated by the attitude and ultimate intentions displayed by the Supreme Court in the second *Williams* case, in which a State in a criminal action was allowed to make a collateral attack upon the finding of domicil behind a foreign divorce decree, where the non-domiliced party did not appear, and thus did not defend the State's own interests and institutions. The Court said:

"To permit the necessary findings of domicil by one State to

[21]See generally Pennoyer v. Neff, 95 U. S. 714, 24 L. ed. 565 (1877).

foreclose all States in the protection of their social institutions would be intolerable.

"But to endow each State with controlling authority to nullify the power of a sister State to grant a divorce based upon a finding that one spouse had acquired a new domicil within the divorcing State would, in the proper functioning of our federal system, be equally indefensible. *No State court can assume comprehensive attention to the various and potentially conflicting interests that several States may have in the institutional aspects of marriage.* The necessary accommodation between the right of one State to safeguard its interest in the family relation of its own people and the power of another State to grant divorces can be left to neither State."[22]

The Court then announced its own role. The States were to be left their divorce and probate jurisdiction,[23] while the Supreme Court was merely to reconcile the full faith and credit clause with the acknowledged principle that "the domestic relations of husband and wife and parent and child were matters [to be] reserved to the States...."[24]

To give effect to the foregoing fundamental aims, the test as to application of the full faith and credit clause appears, on the basis of the statements from the *Williams* cases quoted near the outset of this discussion, to be whether or not there is a valid domicil behind the decree. A valid domicil entitles a decree of divorce to full faith and credit; but a decree rendered on an invalid domicil is a mere usurpation of jurisdiction. In event of such usurpation, the true State of domicil may either directly, in its own name, or indirectly, in the name of an interested person coming into its courts, assert, and is expected to assert, its acknowledged power to control its domiciliaries. No State or interested person is intended to be disarmed, through use of the full faith and credit clause, of all protection against the effects of a divorce decree entered on an invalid domicil. That a party submitting himself to the foreign court's jurisdiction, as in the *Sherrer* case, will be prevented, basically by the doctrine of res judicata, from collaterally attacking the decree, is scarcely authority for the proposition that a State or other interested party cannot do so. Even the *Sherrer* case

[22]325 U. S. 226, 232, 65 S. Ct. 1092, 1096, 89 L. ed. 1577, 1583 (1945). [italics supplied].

[23]Williams v. North Carolina, 325 U. S. 226, 233, 65 S. Ct. 1092, 1097, 89 L. ed. 1577, 1583 (1945): "But the discharge of this duty does not make of this court a court of probate and divorce."

[24]State of Ohio ex rel Popovici v. Agler, 280 U. S. 379, 384, 50 S. Ct. 154, 155, 74 L. ed 489, 498 (1930), cited in Williams v. North Carolina, 325 U. S. 226, 233, 65 S. Ct. 1092, 1096, 89 L. ed. 1577, 1583 (1945).

recognizes "the importance of a State's power to determine the incidents of basic social relationships into which its domiciliaries enter."[25]

This power was recognized and availed of by the New York court in *Matter of Lindgren's Estate*,[26] in which the importance of the power was demonstrated. Under the facts very similar to the main cases, a child was allowed to attack collaterally the foreign divorce decree of its parents, thus determining certain property rights. Furthermore, the same court in *Swanston v. Swanston*[27] exerted this power to ascertain whether a prior foreign divorce of petitioner's wife was valid, thus settling petitioner's status, even though petitioner's wife had appeared in the earlier action. Adopting and applying a principle announced in the case of *Senor v. Senor*,[28] the court said:

> "Where persons having no complicity in the divorce proceedings have legitimate interests in a determination of the validity of the divorce, they may arouse the state's interest and institute an inquiry, which our courts will entertain, to ascertain the validity of a divorce decree by a foreign state as to persons alleged to have been at the time residents of this State."[29]

Thus, at least some of the New York courts have recognized the interest that a third party may have in the validity or invalidity of a divorce decree affecting other parties as principals. It would appear that under facts similar to those of the *Bane* and *deMarigny* cases, the New

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[25]334 U. S. 343, 354, 68 S. Ct. 1087, 1092, 92 L. ed. 1429, 1438 (1948).

[26]See note 2, supra. See also Urquhart v. Urquhart, 272 App. Div. 60, 69 N. Y. S. (2d) 57 (1947): "A child conceived after his mother had obtained a divorce from his alleged father in Arkansas was not precluded from attacking validity of the divorce decree on ground that Arkansas court did not have jurisdiction to enter decree because neither of parties was domiciled therein, for purpose of establishing that he was a legitimate son, even though the decree would have been binding on the parties themselves." [headnote, 69 N. Y. S. (2d) 57]. In the opinion the court said: "The federal Constitution does not compel recognition of judgments that would not have been rendered in other states unless the parties had stipulated, in effect, that the court of the other state had jurisdiction of the subject matter which it did not possess." 272 App. Div. 60, 69 N. Y. S. (2d) 57, 59 (1947).

[27]76 N. Y. S. (2d) 175 (1947). In the opinion, it was pointed out that to allow third parties to attack collaterally a foreign divorce decree, while disallowing such attack by the principal parties themselves where they had both appeared before the foreign court, was "both logical and reasonable," and that the logic of such a policy could be attacked only by arguing that a divorce decree acts in rem. The court answered this argument by stressing the refusal of the Supreme Court to label such a decree as in rem, and by repeating its statement in the second Williams case that, "All the world is not a party to a divorce proceeding." (See note 15, supra).

[28]272 App. Div. 306, 312, 70 N. Y. S. (2d) 909, 913 (1947), noted (1948) 5 Wash. and Lee L. Rev. 114.

[29]Swanston v. Swanston, 76 N. Y. S. (2d) 175, 176 (1947). See also Lane v. Lane, 188 Misc. 435, 68 N. Y. S. (2d) 712 (1947).

York courts are allowed by the United States Supreme Court to protect the interests of its citizens—as for example, by verifying such citizen's status—and are constrained by New York decisions to do so.

In the only similar case found in other jurisdictions, one distinguishing factor appeared which provided the court with a different approach to the problem of collateral attack. In *Mussey v. Mussey*[30] the facts substantially paralleled those of the main cases, in that a husband sought to annul an existing marriage alleging that his wife's foreign divorce from a former husband was invalidly rendered because of lack of domicil of either of the parties. The earlier divorce had been obtained in Nevada, and both parties had been before the Nevada court. However, in the *Mussey* case it was shown in evidence, and accepted as proved, that the second husband, the party now seeking the annulment, had been the *principal movant* in the Nevada divorce proceeding. The court said:

> "In the second place,[31] complainant is estopped to deny the validity of the Nevada decree, even though it was fraudulently obtained.... Whatever may be the rule in other jurisdictions, this Court is committed to the proposition that one in privity with a person who by fraudulent conduct procures a divorce decree is estopped to question its validity."[32]

While it does not appear in the opinions of the New York cases whether this factor was there involved, it is common knowledge that many divorces are obtained with the intention of remarrying immediately, and that the prospective spouse often has an active part in prosecuting the divorce proceedings. The courts should be alerted against the possibility of this second spouse's later asserting the rights of a "third person" to attack the validity of the divorce to which he was not a technical "party." The possibility of such an unjustifiable pose of third party status being advanced, however, should not prevent the courts from extending protection to the interests of bona fide strangers to the previous action.

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[30] 7 Div. 943, 37 S. (2d) 921 (Ala. 1948). This is one of the very few cases substantially similar to the Bane and deMarigny cases arising outside the State of New York, since the decision in the Sherrer and Coe cases.

[31] The court placed the decision on alternative grounds, the first being that, "...the Nevada decree... is res adjudicata between the parties, and under the full faith and credit clause... must be respected in this State." No further discussion was attempted by the court on this ground. Mussey v. Mussey, 7 Div. 943, 37 S. (2d) 921, 922 (Ala. 1948).

[32] 7 Div. 943, 37 S. (2d) 921, 922 (Ala. 1948).