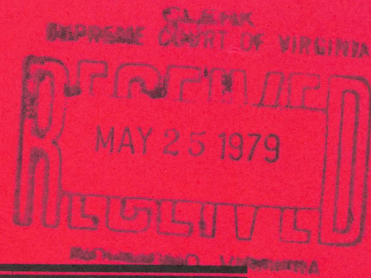


221 Va 827



IN THE
Supreme Court of Virginia

AT RICHMOND

RECORD NO. 790024

CHARLES STONE HOSIER,
Appellant

v.

PHYLLIS JEAN HOSIER,
Appellee

JOINT APPENDIX

Grover C. Outland, Jr.
Outland, Gray, O'Keefe & Hubbard
Attorneys at Law
112 Coastal Way
Post Office Box 1545
Chesapeake, Virginia 23320

Attorneys for Appellant

Lucian B. Cox, Jr., Esquire
1518 Atlantic Avenue
Virginia Beach, Virginia 23451

Attorney for Appellee

TABLE OF CONTENTS

	<u>Appendix Page</u>
Bill of Complaint in Chancery No. C78-1166, filed June 30, 1978	1,2
Statement of Facts Pursuant to Rule 5:9	3,4,5
Motion to Dismiss filed July 12, 1978, by appellants in Chancery No. C78-1166	6
Letter Opinion of July 26, 1978, of Judge Vakos, in Chancery No. C78-1166	7,8
Decree entered August 11, 1978, pursuant to hearing on Motion to Dismiss in Chancery No. C78- 1166	9
Final Decree entered November 3, 1978, in Chancery No. C78-1166	10,11
Bill of Complaint in Chancery No. C77-551, filed April 15, 1977	12,13
Motion to Dismiss filed by respondents on May 31, 1977, in Chancery No. C77-551	14
Final Divorce Decree of Circuit Court of Escambia, Florida filed May 10, 1977, in Chancery No. C77-551	15
First page of transcript of proceedings before Commissioner in Chancery filed September 13, 1977, in Chancery No. C77-551	16
First page of report of E. T. Caton, Commissioner in Chancery in C77-551, filed September 13, 1977	17

Appendix Page

Order of Dismissal dated October 31, 1977, in C77-551	18
Order overruling petition for rehearing dated November 30, 1977, in Chancery No. C77- 551	19
Assignments of Error: A. The court erred in overruling respondents plea of res judicata. B. The court erred in awarding any support payments for Charles Stone Hosier, Jr. who was born on October 22, 1957.	20

BILL OF COMPLAINT

Your Complainant, Phyllis Jean Hosier, respectfully represents:

1. That the parties hereto were married in Miami Springs, Florida, January 19, 1957, and lived together as man and wife until March 8, 1977;
2. That your Complainant herein is domiciled in and is and has been an actual bona fide resident of the State of Virginia since June of 1976, the parties hereto having last cohabited at 2524 Hood Drive, Virginia Beach, Virginia;
3. That the parties hereto are both over the age of eighteen (18) years;
4. That the Respondent is a Captain in the United States Navy;
5. That on March 8, 1977, the said Charles Stone Hosier deserted your Complainant without any or just cause;
6. That on May 6, 1977, in the Circuit Court in and for Escambia County, Florida, Charles Stone Hosier was granted an ex parte decree of divorce from Phyllis Jean Hosier in which proceeding the Complainant was not served with process and made no appearance either generally or specially; and,
7. That there are two children born of this union being Charles Stone Hosier, Jr., born October 22, 1957 and Kristin Louisa Hosier, born May 6, 1966.

WHEREFORE, your Complainant prays that this Court determine the validity of said Florida decree; that she be awarded a divorce a vinculo matrimonii

should said decree not be entitled to full faith and credit; should said decree be entitled to full faith and credit that she be granted a decree for separate maintenance both pendente lite and permanently; that she be awarded custody of said infant Kristin Louisa Hosier; that she be awarded support and maintenance for said infant child, both pendente lite and permanently together with her costs and attorney fees in this behalf; that a guardian ad litem be appointed for said Defendant should he fail to secure counsel of his own; and that she may have such other relief as the nature of her case may require.

Respectfully,

PHYLLIS JEAN HOSIER

By 

Counsel

Lucian B. Cox, Jr.
COX, COX & COX
1518 Atlantic Avenue
Virginia Beach, Virginia 23451
425-8565

Filed June 30, 1978

3

STATEMENT OF FACTS PURSUANT TO RULE 5:9

Complainant filed a Bill of Complaint for divorce against respondent alleging that on May 6, 1977, the Circuit Court of Escambia County, Florida, granted respondent an ex parte decree of divorce in which she was not served and made no appearance. In fact, complainant made no appearance in the Florida proceedings and was not served with process. She asked for the Court to determine the validity of the Florida decree and that she be awarded a divorce a vinculo matrimonii if the Florida decree was not entitled to full faith and credit, and that should said decree be entitled to full faith and credit, she be granted separate maintenance both temporary and permanent, custody of the infant children of the parties, and child support. There were two children born of the marriage, Charles Stone Hosier, Jr., born October 22, 1957, and Kristen Louisa Hosier, born May 6, 1966.

Respondent filed a motion to dismiss the Bill of Complaint on the grounds that in the case of Phyllis Jean Hosier v. Charles Stone Hosier, Chancery Number C77-551 decided in the Circuit Court of the City of Virginia Beach and which involved a Bill of Complaint for divorce, the Court dismissed the action on the grounds of lack of jurisdiction by Order entered October 31, 1977, and Order overruling a petition for rehearing on November 30, 1977, from which order no appeal was taken and consequently the previous order of the court was res judicata as to jurisdiction of the present action.

At the hearing on the motion to dismiss filed by respondent, the file of Hosier v. Hosier, Chancery Number C77-551 was introduced

4

as an exhibit, the record of which showed that the respondent obtained an ex parte divorce decree on May 6, 1977; that complainant filed her bill of complaint for divorce essentially asking for the same relief as the bill of complaint in this case; that respondent filed a motion to dismiss on the grounds of res judicata, introducing the Florida decree; that at the Commissioner's hearing held on August 1, 1977, the parties stipulated to the validity of the Florida decree and further stipulated that the only issues for the Commissioner to recommend upon were custody and visitation of infant children, spousal support, and attorneys fees and costs; that on the hearing of the exceptions to the Commissioner's report, the Court held that it did not have jurisdiction on the grounds that since the Florida decree was valid and the marriage dissolved, the question of support for the wife and children and custody of the minors were matters exclusive within the jurisdiction of the Juvenile and Domestic Relations Court, and it so ordered by Order of October 31, 1977; that complainant filed a petition for a rehearing which was overruled by order entered November 30, 1977, and that no appeal was taken of this action of the Court.

By decree entered August 11, 1978, in the present case and objected to by respondent, the Court sustained respondents plea of res judicata as it pertains to the Florida decree but overruled the plea as to all other prayers in the bill of complaint on the grounds as set forth in the decree and in the courts letter opinion of July 26, 1978.

The matter was referred to a Commissioner in Chancery who recommended the sum of \$400.00 per month spousal support, \$250.00 a month child support for the infant party, and \$500.00 attorneys fees and costs. At the hearing on the exceptions to the Commissioner's report the court, stating that since Charles Stone Hoiser, Jr., was residing with his mother during the summer months, the support would be increased \$100.00 per month for June, July and August as long as said child was in college, and accordingly, a final decree was entered by the court on November 3, 1978, pursuant to the above recommendations set forth in the Commissioner's report and increasing child support \$100.00 per month for June, July and August as long as Charles Stone Hosier, Jr., was in college, to which action respondent objected.

MOTION TO DISMISS

The Respondent, Charles Stone Hosier, moves the court to dismiss the bill of complaint filed herein on the following grounds:

1. All matters alleged in the bill of complaint have been previously adjudicated by this court, specifically, the question of jurisdiction, in the case of Phyllis Jean Hosier v. Charles Stone Hosier, Chancery No. C-77-551, a final order being entered on October 31, 1977, dismissing the bill of complaint, and under the doctrine of res judicata, complainant cannot raise these issues in a subsequent proceeding.

2. Jurisdiction lies exclusively with the Juvenile and Domestic Relations Court.

CHARLES STONE HOSIER

By _____

Of Counsel

Grover C. Outland, Jr.
Outland, Gray, O'Keefe & Hubbard
112 Coastal Way, P. O. Box 1545
Chesapeake, Virginia 23320

Filed July 12, 1978

Commonwealth of Virginia



ROBERT S. WAHAB, JR.
PHILIP L. RUSSO
AUSTIN E. OWEN
HENRY L. LAM
GEORGE W. VAKOS
RESIDENT JUDGES
CIRCUIT COURT
CITY OF VIRGINIA BEACH
PRINCESS ANNE
VIRGINIA BEACH, VIRGINIA 23456

SECOND JUDICIAL CIRCUIT

N. WESCOTT JACOB
RESIDENT JUDGE
CIRCUIT COURTS
ACCOMACK COUNTY
NORTHAMPTON COUNTY
ONANCOCK, VIRGINIA 23417

July 26, 1978

Grover C. Outland, Esquire
Post Office Box 1545
Chesapeake, Virginia 23320

Lucian B. Cox, Jr., Esquire
1518 Atlantic Avenue
Virginia Beach, Virginia 23451

Re: Hosier v. Hosier
Chancery No. C-78-1166

Gentlemen:

The Court has reviewed both memoranda heretofore filed in the above case concerning the defendant's motion to dismiss, wherein he alleges that this Court is without jurisdiction to hear this matter under the doctrine of res judicata. Presented with the motion was chancery file number C-77-551 between the same parties where a final judgment was entered on October 31, 1977. In that case the Court found that it did not have jurisdiction apparently on the basis that a Florida divorce decree entered in May, 1977 was valid as between the parties and that this Court's jurisdiction to dissolve a marriage was purely statutory and there being no marriage to dissolve the Court was without jurisdiction. Judge Owen's notes indicate that he was of the opinion that since the marriage was dissolved, the question of support and custody were matters exclusively within the jurisdiction of the Juvenile and Domestic Relations District Court.

According to the decision handed down on June 9, 1978 in the case of Newport v. Newport, Record No. 761489, the Supreme Court of Virginia has indicated that this Court's earlier decision was incorrect and now, unless the foreign court had personal jurisdiction over the parties, full faith and credit will only be given the foreign decree only so far as it terminates the marital status of the parties.

Grover C. Outland, Esquire
Lucian B. Cox, Jr., Esquire
July 26, 1978
Page 2

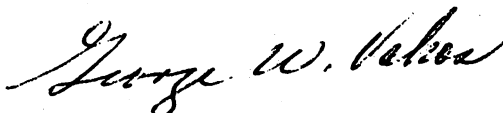
This Court is of the opinion that the doctrine of res judicata does not apply here. The final judgment entered in the former case between the parties only dealt with a decision pertaining to the jurisdiction of the Court over the marriage, that subsequently was found to be erroneous. Just as a void judgment is in effect no judgment, one that erroneously divests the parties of their right to be heard, should also be no judgment.

The doctrine of res judicata is based on the general premise that one trial on the merits by a court of competent jurisdiction is all that any litigant can expect and is a bar to a second action between the same parties over the same subject matter. Here this Court erroneously denied the wife a trial on the merits of her claim for support for herself and support and custody of the minor children. Therefore the doctrine of res judicata as to these issues does not apply. It does however apply as to her request that this Court determine the validity of the Florida decree as it pertains to the marriage. The record in the earlier case indicates that the parties stipulated the validity of the Florida decree and as to this fact this earlier finding is binding on the parties under the doctrine of res judicata.

The motion to dismiss therefore will be sustained as it pertains to the validity of the Florida decree, however, the complainant should be allowed an opportunity to amend her Bill of Complaint as it pertains to her request for spousal support, child support and custody in light of the decision handed down by our Supreme Court on June 9, 1978 in the Newport case.

Counsel are requested to present an appropriate decree properly endorsed.

Very truly yours,



George W. Vakos

D E C R E E

This cause came on this day to be heard upon the bill of complaint, upon the motion to dismiss the bill of complaint under the doctrine of res judicata, and was argued by counsel.

And it appearing to the court that the order of October 31, 1977, entered in Chancery File No. C-77-551, dismissing the action for lack of jurisdiction, was so entered because the court was of the opinion that since the Florida divorce decree was valid, and the marriage dissolved, the question of support for wife and child and custody of the minor child, were matters exclusively within the jurisdiction of the Juvenile and Domestic Relations District Court, but in light of the decision of the Supreme Court of Virginia in Newport v. Newport Record No. 761489, said order of October 31, 1977, was erroneous and deprived complainant of a trial on the merits of her claim for support for herself and support and custody of the minor child, and that the record in Chancery File No. C-77-551 indicates that the parties stipulated the validity of the Florida divorce decree; it is ADJUDGED, ORDERED and DECREED that the motion to dismiss is, and hereby is, sustained in so far as it pertains to the validity of the Florida divorce decree, but said motion is overruled as to all other prayers set forth in the bill of complaint.

~~It is further ORDERED that complainant be permitted to amend her bill of complaint as it pertains to spousal support, child support and custody.~~

Enter 8/11/78

D E C R E E

THIS CAUSE came on this day to be heard upon the Bill of Complaint; upon the Report of the Commissioner filed herein; upon the depositions duly taken and filed on behalf of the Complainant; upon the exceptions filed to said report; and was argued by counsel.

UPON CONSIDERATION WHEREOF, it appearing to the Court that the parties hereto were lawfully married in Miami Springs, Florida, January 19, 1957; that Charles Stone Hosier was granted an ex parte divorce in the Circuit Court in and for Escambia County, Florida, on May 6, 1977; and that Phyllis Jean Hosier is entitled to separate maintenance and support for herself and Kristen Louisa Hosier, infant daughter of the parties hereto; it is,

ADJUDGED, ORDERED and DECREED, that Charles Stone Hosier shall pay to Phyllis Jean Hosier as spousal support the sum of \$400.00 on the first day of each month, commencing on the first day of November, 1978.

It is further ORDERED that Phyllis Jean Hosier is awarded custody of Kristen Louisa Hosier, infant daughter of the parties hereto, with reasonable rights of visitation reserved to Charles Stone Hosier.

It is further ORDERED that Charles Stone Hosier shall pay to Phyllis Jean Hosier the sum of \$250.00 on the first day of each month for the support and maintenance of Kristen Louisa Hosier, commencing on the first day of November, 1978; provided that, during

Filed November 3, 1978

the period of time that Charles Stone Hosier, Jr., is in college, the monthly payment for child support shall be in the sum of \$350.00 each month for the months of June, July and August of each year. Charles Stone Hosier shall further pay all reasonable orthodontal expenses for Kristen Louisa Hosier.

The visitation rights of Charles Stone Hosier shall include the right to have Kristen Louisa Hosier visit with him in Germany for a period of six weeks during the summer school vacation of the year 1979 at his sole expense and provided he furnishes round trip airline accomodations.

It is further ORDERED that pursuant to Section 20-113 Code of Virginia 1950, all future questions pertaining to custody, visitation and support of the child are transferred to the Juvenile and Domestic Relations Court for the enforcement of this Decree or for the modification or revision thereof as the circumstances may require.

It is further ORDERED that Charles Stone Hosier shall pay to Lucian B. Cox, Jr., counsel for the complainant, the sum of \$500.00 on account of her attorneys fees.

We ask for this:

.....
Lucian B. Cox, Jr., p.q.

Seen and objected to:

Filed November 3, 1978

BILL OF COMPLAINT

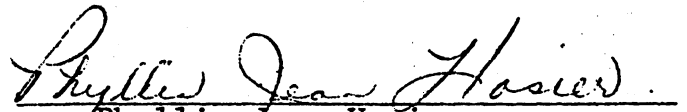
Your Complainant, Phyllis Jean Hosier, respectfully represents:

1. That the parties hereto were married in Miami Springs, Florida, January 19, 1957, and lived together as man and wife until March 8, 1977;
2. That the parties hereto are domiciled in and are and have been actual bona fide residents of the State of Virginia for more than six months next preceding the commencing of this suit, they having last cohabited at 2524 Hood Drive, Virginia Beach, Virginia;
3. That the parties hereto are both over the age of eighteen (18) years;
4. That the Respondent is a Captain in the United States Navy;
5. That on March 8, 1977, the said Charles Stone Hosier deserted your Complainant without any or just cause;
6. That there are two children born of this union being Charles Stone Hosier, Jr., born October 22, 1957 and Kristin Louisa Hosier, born May 6, 1966.

WHEREFORE, your Complainant prays that she be granted

a divorce a mensa et thoro to be later merged into a final decree as provided by law; that she be awarded custody of said infant children; that she be awarded support and maintenance for herself and said infant children, both pendente lite and permanently and her costs and attorney fees in this behalf; that a guardian ad litem be appointed for said Defendant should he fail to secure counsel of his own; and that she may have such other relief as the nature of her case may require..

Respectfully,


Phyllis Jean Hosier

COX, COX & COX
1518 Atlantic Avenue
Virginia Beach, Virginia 23451
425-8565

Filed April 15, 1977

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF VIRGINIA BEACH

PHYLLIS JEAN HOSIER,

Complainant

vs.

CHARLES STONE HOSIER,

Respondent

IN CHANCERY
DOCKET NO. C77-551

MOTION TO DISMISS

Now comes the respondent, Charles Stone Hosier, and moves the Court to dismiss the Bill of ~~Complaint~~ Complaint for divorce filed by the complainant on the grounds that the matter is res judicata as shown by final decree in the file dissolving the marriage in Escambia County, Florida, dated May 6, 1977.

CHARLES STONE HOSIER

By _____
Of Counsel

Grover C. Outland, Jr.
Outland, Gray, O'Keefe & Hubbard
Attorneys at Law
812 United Virginia Bank Building
Norfolk, Virginia 23510

Filed May 31, 1977

IN THE CIRCUIT COURT IN AND FOR ESCAMBIA COUNTY, FLORIDA

IN RE: The Marriage of Charles)
 Stone Hosier, Husband and)
 Phyllis Jean Hosier, Wife.)
 -----)

Case No. 77-904-CA-01

FINAL JUDGMENT

This action was heard before the Court on the evidence presented.

IT IS ADJUDGED THAT:

1. The bonds of the marriage between petitioner, Charles Stone Hosier and respondent, Phyllis Jean Hosier, are dissolved because the marriage is irretrievably broken.
2. This Court does not have jurisdiction as to any special equity respondent may have to the Florida property owned by the parties.

ORDERED at Pensacola, Florida, on May 6, 1977.

(SIGNED) M. C. BLANCHARD

 Circuit Judge

 Filed May 10, 1977

THE COMMISSIONER: This is the matter of Hosier vs. Hosier. I notice in the file that there is a certified copy of a final divorce decree from the State of Florida. and, I understand from the parties that they are stipulating that this is a valid divorce decree, that the parties are, in fact, divorced. However, they desire that I proceed to hear the matter, and it's further stipulated that the issues that they desire that I recommend upon are the question of custody and visitation of any infant children, a question of spousal support and the question of attorneys' fees and costs, is that correct, gentlemen?

MR. OUTLAND: That's correct.

MR. COX: That's correct.

THE COMMISSIONER: Anything else?

MR. OUTLAND: No, Sir.

MR. COX: No, Sir.

THE COMMISSIONER: Call your first witness.

PHYLLIS JEAN HOSIER, called as a witness on her own behalf, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. COX:

Q Mrs. Hosier, are you the plaintiff in the

Filed 9/13/77

25 ~~suit which we are hearing today which is Phyllis Jean Hosier vs.~~

REPORT OF E. T. CATON
COMMISSIONER IN CHANCERY

To the Honorable Judges of said Court:

The undersigned Commissioner in Chancery to whom the above-styled cause was referred by a Decree of Reference was entered herein on June 28, 1977, respectfully reports pursuant to Notice, the undersigned, did on August 1, 1977, proceed to take the testimony and to make the inquiries ordered by said decree.

Your Commissioner attaches hereto the depositions taken at said hearing, and together with the exhibits filed in evidence, the depositions were received by your Commissioner on September 12, 1977.

All witnesses who testified at said hearing, did personally appear before your Commissioner at the time they testified. At said hearing, the plaintiff appeared in person, Lucian B. Cox, Jr., Esquire, appeared as counsel for the plaintiff. The defendant appeared in person and was represented by Grover C. Outland, Jr., Esquire.

Your Commissioner now proceeds to report to the Court as follows:

The parties agreed and stipulated before your Commissioner that they were finally divorced on May 6, 1977, in the Circuit Court in Escambia County, Florida, and that the only issues the parties desired the Commissioner to recommend upon were custody, visitation, and support of the children, spousal support, attorney's fees and costs for the plaintiff.

The testimony before the Commissioner showed two children born of this marriage, Charles Stone Hosier, aged 19, and Kristin Louisa Hosier, aged 11. Kristin resides with the plaintiff where she is receiving proper care. It is recommended that custody of Kristin be with the plaintiff, subject to reasonable visitation rights at all

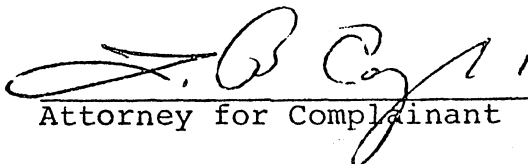
*Filed
9.13.77
B.K.*

O R D E R

THIS CAUSE came on this 21st day of October, 1977, to be heard upon the papers formerly read; upon the report of E. T. Caton, Commissioner in Chancery to whom this cause was referred by decree of reference entered on June 28, 1977, said report having been filed in the Clerk's Office on September 12, 1977, upon the depositions taken on August 1, 1977, and upon the exceptions to said report filed on behalf of complainant and respondent; and was argued by counsel.

AND IT APPEARING TO THE Court that the Circuit Court of the City of Virginia Beach does not have jurisdiction in the matter, it is ADJUDGED and DECREED that this cause is hereby dismissed from the docket, to which action of the Court the complainant excepts and objects.

SEEN AND OBJECTED TO:


Attorney for Complainant

Sntsr
10/31/77
JH Low

SEEN:


Attorney for Respondent

Defendant

O R D E R

This cause came on this 15th day of November, 1977, to be heard upon the papers formerly read; and upon the petition for re-hearing filed herein on behalf of the complainant; and was argued by counsel.

And it appearing to the Court that the validity of the Florida decree of divorce was admitted and that the petition for re-hearing should be overruled, it is therefore ADJUDGED, ORDERED and DECREED the the said petition^{be,} and it hereby is, overruled, to which action of the Court the complainant excepts and objects.

SEEN AND OBJECTED TO:

Entered this 30th day of Nov. ,197


Attorney for Complainant



SEEN:


Attorney for Respondant

ASSIGNMENTS OF ERROR

A. The court erred in overruling respondents plea of res judicata.

B. The court erred in awarding any support payments for Charles Stone Hosier, Jr., who was born on October 22, 1957.