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Domestic Relations - Recent Developments in Out of State Divorces Since the Williams Cases

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DOMESTIC RELATIONS — RECENT DEVELOPMENTS IN OUT OF STATE DIVORCES SINCE THE WILLIAMS CASES

It has long been the law that all out of state divorce decrees must be accorded full faith and credit in every state under the Federal Constitution[1] unless it can be shown that the court rendering such decree was without jurisdiction over the plaintiff. In *Williams v. North Carolina I*[2] the U.S. Supreme Court overruled the case of *Haddock v. Haddock*[3] which made the matrimonial domicile the test for jurisdiction and substituted for it the rule that the plaintiff, at least, be domiciled within the state where the decree is sought if the court is to have jurisdiction. It further ruled that a decree of divorce rendered by a court which had jurisdiction over the plaintiff must be accorded full faith and credit in every state of the Union under the Constitution even though service on the defendant was made by publication. In *Williams v. North Carolina II*[4] the Court followed the decision of *Bell v. Bell*[5] in holding that a divorce decree may be subject to reexamination on the question of the jurisdiction of the court rendering such decree, and that this could de done not only in the matrimonial domicile but in any state wherein the judgment may be called into question. Should it be shown that the court, which rendered the decree, was without jurisdiction (i.e. the plaintiff was not actually domiciled within the state and according to the state law where the court was located) the decree is invalid and as such would not need to be recognized under the full faith and credit clause of the Constitution.[6] The divorce decree could, however, be recognized as a matter of comity.[7] The fact that the decree recited a finding of the court that it had jurisdiction over the plaintiff was held not to be conclusive and therefore the decree was subject to attack either directly or collaterly.

Thus a party who had obtained a divorce in a state other than the one in which he resided or which had been his matrimonial domicile, (hereinafter called a foreign divorce) was in actual doubt as to the validity of the decree itself and therefore insecure in any future action which the decree ostensibly made possible. The state courts have however either recognized the decrees as a matter of comity[8] or have fre-

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[1] German Saving & Loan Society v. Dormitzer, 192 U.S. 125, 48 L.Ed. 373, 24 S.Ct. 221 (1904); Thompson v. Whitman, 18 Wall. 457, 21 L.Ed. 897 (1873).
[2] 317 U.S. 287, 87 L.Ed. 279, 63 S.Ct. 207, 143 ALR 1273 (1942).
[3] 201 U.S. 562, 50 L.Ed. 867, 26 S.Ct. 525 (1906).
[4] 325 U.S. 226, 89 L.Ed. 1577, 65 S.Ct. 1092, 157 ALR 1366 (1945); see also Husserl, "Some Reflections on Williams v. North Carolina II," 32 Va.L.Rev. 555 (1946).
[5] 181 U.S. 175, 45 L.Ed. 804, 21 S.Ct. 551 (1901).
[6] U.S. Constitution, Article IV, Section I.
[7] Miller v. Miller, 200 Iowa 1193, 206 N.W. 262, 43 ALR 567 (1925); Gildersleeve v. Gildersleeve, 88 Conn. 689, 92 Atl. 684 (1914).
[8] Supra, note 7.

quently applied the equitable doctrine of estoppel in order to limit the attacks upon such foreign divorce decrees.

In most states, a party who has obtained a foreign divorce decree is estopped from attacking it:[9] That this is not a true estoppel was conceeded by the New York Court in *Krause v. Krause.*[10] The court cautioned that this did not mean that the foreign decree was being recognized as valid but rather that a party would not be permitted to attack a divorce decree which he had actively and voluntarily procured.

The second wife or husband is usually allowed to attack a foreign decree as invalid on the theory that where the state is an interested party, the doctrine of pari delicto and the equitable doctrine as to "clean hands" are inapplicable.[11] If the second spouse has affirmatively aided the other in procuring the decree, that spouse will also be estopped.[12]

The spouse against whom the foreign decree was rendered can also attack it except that if he has relied and acted on the decree such as marrying a third party or some other action equally inconsistent with its invalidity, he or she will be estopped from challenging it.[13] In *Frost v. Frost*[14] the doctrine of estoppel was invoked by the New York Court against a party who appeared in the foreign divorce action and there had a decree of absolute divorce rendered against him on the theory that he had opportunity to litigate in the out-of-state court the question of jurisdiction and not having availed himself of it, could not now be heard to question the determination of the jurisdictional facts by the court which rendered the decree.

Although the application of the equitable doctrine of estoppel can silence an attack upon a foreign divorce decree, the invalidity of the

[9] Ellis v. White, 61 Iowa 644, 17 N.W. 28 (1883); Appeal of McGraw, 228 Mich. 1, 199 N.W. 686, 37 ALR 308 (1924); In Hunter v. Hunter, 70 Hun. 598, 24 N.Y.S.(2d) 76 (1940), the court said: "The very act of obtaining a decree dissolving the marriage is so inconsistent with the continued existence of the marital status as to estop one later from asserting its existence or validity."

[10] 282 N.Y. 355, 26 N.E.(2d) 290 (1940)—Action brought by second wife for separation. Defendant attempted to avoid liability because of the alleged invalidity of a Nevada decree which he procurred from his first wife.

[11] Simmons v. Simmons, 57 App.D.C. 216, 19 F.(2d) 690, 54 ALR 75 (1927); Frey v. Frey, 61 App.D.C. 232, 59 F.(2d) 1046 (1932).

[12] Re Davis, 38 Cal.App.(2d) 579, 101 Pac.(2d) 761 (1940); Goodloe v. Hawk, 72 App.D.C. 287, 113 F.(2d) 753 (1940); Oldham v. Oldham, 174 Misc. 22, 19 N.Y.S.(2d) 667 (1940); In Heller v. Heller, 172 Misc. 875, 15 N.Y.S.(2d) 469 (1939), estoppel was invoked even though challenging spouse did not participate in the divorce but did cohabit with the other spouse after the invalidity of the foreign divorce decree was discovered. But in Illinois, the court refused to invoke the equitable doctrine of estoppel even though the challenging party did affirmatively aid the other spouse in procurring the challenged decree. The court based its refusal on the same theory as in the Simmons case and the Frey case, supra note 11. Jardine v. Jardine, 291 Ill. App. 152, 9 N.E.(2d) 645 (1937).

[13] Carbone v. Carbone, 166 Misc. 924, 2 N.Y.S.(2d) (1938); Marvin v. Foster, 61 Minn. 154, 63 N.W. 484 (1895); Arthur v. Israel, 15 Colo. 147, 25 Pac. 81, 10 A.L.R. 693 (1890).

[14] 260 App.Div.694, 23 N.Y.S.(2d) 754 (1940).

decree itself is not changed. It can be subsequently attacked by any party competent to do so.[15] It is thus possible for a party with a foreign divorce decree to be married in one state and divorced in another, or if he has married a third party, to be guilty of bigamy in one state and not in another. Therefore the application of the doctrine of estoppel does not solve the situation in which a party holding a foreign divorce decree finds himself.

It is this contradictory situation which has been so often criticized. In June, 1948, the United States Supreme Court rendered a decision, which, to a certain degree, has placed some of the foreign divorce decrees on a more secure footing. It decided in *Sherrer v. Sherrer*[16] and its companion case of *Coe v. Coe*,[17] that where the defendant appears in a divorce action with full opportunity to litigate the question of jurisdiction and the court before which he makes his appearance makes a determination that it has jurisdiction over the plaintiff because he has a bona fide domicile within the state, and subsequently renders a decree of divorce, that decree must be accorded full faith and credit under the Federal Constitution and the finding of the jurisdictional fact is conclusive and res adjudicata. This adjudication of the jurisdictional question being conclusive on the parties and res adjudicata, bars in any of the other states all subsequent attacks on the decree because of the lack of jurisdiction.

In the *Sherrer* case[18] the husband and wife were domiciled in Massachusetts. The wife left for Florida ostensibly for a vacation and took with her their two children. Having arrived there, she informed the husband by letter of her intention not to return. After residing in Florida for ninety-three days, she filed her petition for divorce. The Florida law requires at least ninety days of bona fide residence in the state before the institution of a divorce action. The husband who was notified by mail of the action, retained Florida counsel who not only entered a general appearance but also filed an answer denying Mrs. Sherrer's allegation of bona fide residence. Mr. Sherrer subsequently arrived in Florida and with his wife executed a stipulation in regard to the custody of the children. At the hearing, the husband's attorney made no cross-examination or offered any evidence as to the jurisdiction of the court or as to the merits of the action. A decree was entered for Mrs. Sherrer and Mr. Sherrer did not prosecute any appeal.

The husband, subsequent to the Florida divorce decree, sought an adjudication in Massachusetts that he be permitted to sell his real estate as if he were sole and that he was living apart from his wife for justifi-

[15] Matter of Thomann's Estate, 144 Misc. 497, 285 N.Y.S.(2d) 838 (1932).
[16] 333 U.S. ____, 68 S.Ct. 1087 (1948).
[17] 333 U.S. ____, 68 S.Ct. 1094 (1948).
[18] Supra, note 16.

able cause. Thus the validity of the Florida decree was attacked. The trial court on the direction of the Massuchusetts Supreme Court, found on the evidence that the Florida court never had jurisdiction over the plaintiff and consequently the decree was invalid and not entitled to full faith and credit as a judgment of a sister state.

In the companion case of *Coe v. Coe*[19] the facts were very similar. The wife brought action for separate support in the marital domicile of Massachusetts. The husband filed a cross-complaint for divorce which was later dismissed. The court awarded separate support to Mrs. Coe who appealed, not being satisfied as to the amount awarded. Pending the appeal, Mr. Coe left for Nevada. After the requisite time of six week's had lapsed, he filed a complaint for divorce. Mrs. Coe received notice by mail and immediately went to Nevada, retained an attorney and demurred to the complaint. Then after making a written agreement with Mr. Coe providing for a lump sum payment and alimony, she filed an answer admitting the plaintiff's residence in Nevada and a cross-complaint for an absolute divorce. The divorce was granted to Mrs. Coe and the agreement adopted by the court. Mr. Coe then married in Reno and returned to Massachusetts.

About five months after the culmination of the Reno action, the Massachusetts Supreme Court affirmed the separate support order and Mrs. Coe petitioned the Massachusetts court to have her husband cited for contempt for refusing to pay as per the court order for separate support. Mr. Coe introduced the Nevada decree as defense. The trial court, at the direction of the Supreme Court, found on the evidence submitted that neither party were ever domiciled in Nevada and the divorce decree therefore invalid.

The two cases presented to the U.S. Supreme Court the following question: ". . .what effect is to be given to an adjudication by a court that it possesses requisite jurisdiction in a case, [both parties appearing,] where the judgment of that court is subsequently subjected to collateral attack on jurisdictional grounds."[20]

The Court reversed both cases and answered the question thus: ". . . The requirements of full faith and credit bar a defendant from collaterly 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 defendent has been accorded full opportunity to contest the jurisdictiontl issues, and where the decree is not suscepitable to such collateral attack in the courts of the state which rendered the decree."

[19] Supra, note 17.
[20] 68 S.Ct. 1087 at page 1090.

The Court points out the *Stoll v. Gottlieb*[21] case and the *Davis v. Davis*[22] case as indicating the result of the question before the court. It says that those cases stand for the application, to the facts before it, of the rule in Federal Courts that where either jurisdiction or subject matter are adjudicated in actions where that question was in issue and the parties had full opportunity to litigate, the determinations of the court are res adjudicata.

The *Stoll* case was an action in a State court on a guarantee by the holder of a guaranteed bond, to set aside a previous Federal District Court order on the grounds that the Federal court did not have jurisdiction. On certiorari to the U.S. Supreme Court it was held that a previous determination of the matter adversely to the respondent in the Federal District Court, was res adjudicata since the actual controversy over the jurisdiction of the court was raised and decided in that proceeding and therefore the validity of the court order could not be challenged in the state court on the grounds of jurisdiction.

In the *Davis* case, the wife challenged the validity of a Virginia divorce decree in the District of Columbia on the ground that the Virginia court lacked jurisdiction. During the suit in Virginia, she appeared and actively litigated there the question of jurisdiction which was determined adversely to her. The District of Columbia court found, on duly presented evidence, that the Virginia court lacked jurisdiction and so refused to accord to the Virginia decree full faith and credit. The U.S. Supreme Court with no dissenting opinion, reversed the lower court and said that the Virginia decree deserved recognition under the full faith and credit clause because that court actually had jurisdiction. Nothing is said in the decision that the finding of the Virginia court was res adjudicata; on the contrary, the Supreme Court found on the evidence that the District of Columbia court was in error and that Virginia did have jurisdiction when the decree was rendered. Mr. Justice Frankfurter, with Mr. Justice Murphy concurring, notes in his dissenting opinion to the *Sherrer* and the *Coe* cases, that in the *Davis* case, the Supreme Court" . . .found that the state granting a divorce was in fact that of the domicile."[23]

It is to be noted that in both the *Stoll* case and the *Davis* case, cited by the Supreme Court as indicating the result to be reached in the *Sherrer* and the *Coe* cases, the question of the jurisdiction of the court rendering the decree was fully and thoroughly litigated in that court before it rendered the challenged judgment. In the *Sherrer* case, although the question of jurisdiction was raised in the answer, the mat-

[21] 305 U.S. 165, 83 L.Ed. 104, 59 S.Ct. 134 (1938).
[22] 305 U.S. 32, 83 L.Ed. 26, 59 S.Ct. 3, 118 A.L.R. 1518 (1938).
[23] 68 S.Ct. 1097 at page 1098.

ter was not actually litigated at the hearing. In the *Coe* case, the defendant admitted the residence of the plaintiff and so never even raised the question. Mr. Justice Vinson in rendering the decision, stated that in the action brought in the state which granted the divorce, the defendant had full opportunity to litigate there the question of judrisdiction and having failed to avail himself of it, the affirmative decision on that subject was res adjudicata and entitled to full faith and credit in every other state.

In the dissenting opinion,[24] Mr. Justice Frankfurter points out that a marriage contract is different from any other contract and that society and the state are both vitaly interested in it. The majority decision makes it possible for both spouses to evade the laws of their domicile and to encourage perjury. It forecloses the state from inquiring into the dissolution of that marriage contract in which it has an interest. It makes it possible for the parties by an arranged litigation to foreclose the interest of the state in their marriage contract. It in effect applies the law of private interests to the marital relationship.

The decision in the two cases to treat a divorce decree in the same manner as a judgment in a private controversy, and to render a finding of jurisdiction as res adjudicata where both parties appear and have available ample opportunity to litigate the jurisdictional question, seems broad enough to foreclose action by third parties attacking the decree on the ground of jurisdiction.

The decision is not entirely without precedent. In 1919, the Illinois court in *Blakeslee v. Blakeslee*[25] decided that ". . . where the question of jurisdiction has been raised in the proceedings in the sister state and is there adjudicated, such decision becomes res adjudicata." On the basis of the *Davis* case[26] the Michigan court in *Pratt v. Miedema*[27] decided that the finding of the Nevada court, that the plaintiff had Nevada domicile where the defendant raised that question, was res adjudicata. A petition for certiorari to the U.S. Supreme Court was denied.[28] The New York Court in April, 1947, in the case of *Sullivan v. Sullivan*[29] indicated that it believed that the finding of the Florida court that it had jurisdiction after that question was raised by the defendant, was entitled to recognition under the full faith and credit

[24] Supra, note 23.
[25] 213 Ill.App.168 (1919), Defendant appeared and filed answer in Nevada court action for divorce. Defendant questioned jurisdiction of foreign court which decided adversely to her and on appeal was affirmed. Defendant then sought separate maintenance in Illinois and questioned the decree on jurisdictional grounds. Illinois court decided the question of jurisdiction was res adjudicata.
[26] Supra, note 22.
[27] 311 Mich. 64, 18 N.W.(2d) 279 (1945).
[28] 326 U.S. 739, 90 L.Ed. 441, 66 S.Ct. 49 (1945).
[29] 62 App.Div. 624, 71 N.Y.S.(2d) 120 (1947).

clause of the Federal Constitution and therefore could not be attacked collaterally.

It thus appears that the U.S. Supreme Court is following the trend in its latest effort to make more certain and to restrict the uncertainty of the validity of the foreign divorce decrees. If one takes divorce decrees and eliminates the interest of the state, then these latest Supreme Court decisions follow logically. If one remembers the prime and vital interest which the state and society have in the continuance or in the dissolution of the marriages of its residents, then the decision makes it possible for the residents to evade the law of their domicile and for states with lax divorce laws to impress their policy on states where divorces are tightly regulated.

It is to be noted that Senator McCarran of Nevada has introduced a bill in the Senate with the purpose of making foreign divorce decrees more certain. It is intended that the bill be enacted under the power conferred on the Congress by the full faith and credit clause[30] of the U.S. Constitution. The bill is as follows:

> "Where a State has exercised through its courts jurisdiction to dissolve the marriage of spouses, the decree of divorce thus rendered must be given full faith and credit in every other State as a dissolution of such marriage, provided (1) the decree is final; (2) the decree is valid in the State where rendered; (3) the decree contains recitals setting forth the jurisdictional prerequisites of the State to the granting of the divorce have been met; and (4) the state wherein the divorce was rendered was the last State wherein the spouses were domiciled together as husband and wife, or the defendant in the proceeding for divorce was personally subject to the jurisdiction of the State wherein the decree was rendered or appeared generally in the proceedings therefor. In all such cases except cases involving intrinsic fraud the recitals of the decree of divorce shall constitute a conclusive determination of the jurisdictional facts necessary to the decree."[31]

That a divorce decree in the state wherein the plaintiff was domiciled and the defendant was personally subject to the jurisdiction of the state rendering it, is conclusive and must be accorded full faith and credit in every state whether that defendant appears or not, has long been the law.[32] The *Sherrer* and the *Coe* cases now make a divorce decree wherein the defendant appears generally, conclusive and also entitled to recognition under the full faith and credit clause. It appears that the Supreme Court has now accomplished to a great extent the purpose desired by Senate Bill 1960.

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[30] Supra, note 6.
[31] S. 1960, 80th Congress, 2d Session (January, 1948).
[32] Cheever v. Wilson, 9 Wall. 108, 19 L.Ed. 604 (1869).

Under the rulings of the *Sherrer* and the *Coe* cases, persons who would be unable to obtain a divorce in the state of their residence, will be able to do so in another state without a change of domicile by the simple expedient of consent and connivance.[33]

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[33] The effect of the *Sherrer* and the *Coe* cases on the numerous court actions for injunctions against a domiciliary prosecuting a divorce action outside of that state, as raised by Mr. Justice Frankfurter in the note to his dissenting opinion, supra note 23, has not been considered.