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Conflict of Laws -- Domestic Relations -- Collateral Attack on Divorce Decree by Stranger to Action

poor law.[21] It is submitted that in the present case the court's holding merely perpetuated formality of procedural requirements in failing to look behind the nominal defendant to the real party in interest. In such cases, in the absence of amendments to the rules, the court should, as the dissent[22] suggests and as many federal courts have done,[23] recognize the United States as the real party in interest and not allow the action to abate for failure of proper substitution. In any event, effort should be made to alleviate a situation in which a party to an action must correct his adversary's error.

CONFLICT OF LAWS—DOMESTIC RELATIONS—COLLATERAL ATTACK ON DIVORCE DECREE BY STRANGER TO ACTION

After the death of W_1, H married W_2, and they established their residence in New York. In August 1941, W_2 obtained a divorce from H in a Florida proceeding,[1] although the undisputed facts show that she did not comply with the jurisdictional 90-day residence requirement.[2] In 1944, H married W_3, and in 1945 H died, leaving a will in which he gave his entire estate to his daughter by W_1. After probate of the will, W_3 filed notice of her election to take the statutory one-third share of the estate.[3] This election was contested by H's legatee, the daughter by W_1, who argued that W_2's Florida divorce from H was invalid and therefore W_3 could claim no status as H's surviving spouse. The New York Surrogate[4] ruled in favor of W_3, and that ruling was unanimously upheld by the Appellate Division of the New York Supreme Court. The New York Court of Appeals reversed,[5] holding that the Florida judgment finding jurisdiction to decree the divorce bound only the parties themselves and, as the court construed the Florida cases to allow the daughter to attack the decree collaterally in Florida, it decided she should be equally free to do so in New York. On certiorari, *held*, Florida divorce against husband rendered after his general appearance and contest on merits is not subject to collateral attack on jurisdictional grounds by his daughter in Florida, and is not subject to collateral

21. 4 MOORE'S FEDERAL PRACTICE 510 (The author says the rule for substitution is needless formality and substitution should be put on a flexible basis. The rule is a substantial restatement of a statute that was only partially sound in its approach to the problem.).

22. See note 17 *supra*.

23. See note 15 *supra*.

1. In this proceeding, H had appeared by attorney and interposed an answer denying the wrongful acts but not questioning the allegations as to residence in Florida.

2. FLA. STAT. § 65.02 (1949). (This has been construed to require residence for the 90 days immediately preceding the filing date.); Curley v. Curley, 144 Fla. 728, 198 So. 584 (1940). In the instant case W_2 arrived in Florida from New York in June, and filed a bill of complaint on July 29.

3. Pursuant to N.Y. DECEDENT ESTATE LAW § 18.

4. Who heard the cause under the provisions of N.Y. SURROGATE'S COURT ACT § 145-a.

5. *In re* Johnson's Estate, 301 N.Y. 13, 92 N.E.2d 44 (1950).

attack by her in New York after his death. *Johnson v. Muelberger*, 71 Sup. Ct. 474 (1951).

The celebrated case of *Sherrer v. Sherrer*[6] decided that a state, by virtue of the Full Faith and Credit Clause[7] and congressional enactment thereunder,[8] must give full faith and credit to an out-of-state divorce decree by barring either party to that divorce who has been personally served or who has entered a personal appearance[9] from collaterally attacking the decree, *where the decree cannot be so attacked in the courts of the rendering state.* The question left open in *Sherrer* is answered in the instant case by applying the rule in *Sherrer* to third persons, or strangers, to the decree. Thus, the real question at issue in the instant case is whether or not Florida law would permit the daughter in this action to collaterally attack the Florida divorce decree rendered against her father. The New York Court of Appeals realized that that was the real question at issue, although it answered the question affirmatively.[10]

It must be conceded, at the outset, that there is no Florida case directly on point. One authority on Florida divorce practice[11] anticipated the question here decided but would make no prediction as to its final solution.[12] However, the case[13] on which the U.S. Supreme Court relied most heavily in concluding that the daughter in the instant case could not collaterally attack the decree in Florida was decided too late for incorporation (even by reference) in Mr. Carson's work,[14] and probably was not before the New York court[15] either. There, a wife sought to attack collaterally the Florida divorce decree of her husband and his former wife, on the ground that, since the husband and former wife were foreign nationals and the former wife, petitioner in the divorce action, was in the U.S. on a temporary visitor's visa, the rendering court did not and could not acquire jurisdiction of the parties, it being contended that the former wife could not have acquired

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6. 334 U.S. 343 (1949). See Coe v. Coe, 334 U.S. 378 (1948).
7. U.S. CONST. Art. IV, § 1.
8. 28 U.S.C. § 1738 (1946).
9. Where these conditions are not met, as, for example, where the defendant in a divorce action has not been personally served or has not entered a personal appearance, the decree *is* subject to collateral attack elsewhere. See, *e.g.*, *Williams v. North Carolina*, 325 U.S. 226 (1945) (Sometimes referred to as Williams II).
10. *In re* Johnson's Estate, *supra* note 5, at 48: ". . . the petitioner, a stranger to the Florida divorce action and decree, could successfully challenge the validity of that decree in collateral proceedings in the courts of Florida by producing proof of fraudulent circumstances under which it was obtained. See State *ex rel.* Willys v. Chillingsworth, 124 Fla. 274, 278-279, 168 So. 249. To hold that she could not do likewise in this state would be to give to the Florida decree a more conclusive effect here that it would have in Florida."
11. CARSON, FLORIDA LAW OF THE FAMILY, MARRIAGE AND DIVORCE (1950).
12. *Id.* at 625: ". . . the question not decided is whether the estoppel of the parties would be held thereafter to be binding upon their heirs or the heirs of either of them. The question may become important by reason of the fact that almost all divorces nowadays are by agreement."
13. de Marigny v. de Marigny, 43 So.2d 442 (Dec. 1949).
14. See note 11 *supra*.
15. See note 5 *supra*.

a legally sufficient residence in Florida for the purpose of securing a divorce. The Florida Supreme Court held that where a final divorce decree was rendered by a court of competent jurisdiction, and it appeared on the record to be valid in every respect, one who had not been a party to the divorce action could not maintain an independent bill in equity to have it adjudicated that the decree was invalid on jurisdictional grounds dehors the record, nor could such a person be permitted to represent the state in an effort to redress an alleged fraud on the court.[16] The court quoted[17] with approval the excerpt set out below from the pages of a well-known authority on judgments.[18]

The New York Court[19] relied essentially on *State ex rel. Willys v. Chillingsworth*[20] in arriving at the conclusion that the daughter here could collaterally attack the divorce decree in Florida. But that case was a suggestion for writ of prohibition filed in the Florida Supreme Court to prohibit a lower court of record proceeding on a complaint filed by Willys' daughter that her stepmother's divorce from a former husband was fraudulently obtained. Therefore, it was alleged, her stepmother's marriage to Willys was void and the stepmother had no right or interest as widow in Willys' estate. The writ of prohibition was granted because of improper venue of the complaint, but the opinion intimated that a daughter, as heir, could represent a deceased father in an attack on a stepmother's former divorce.[21] However, the U.S. Supreme Court, in the instant case, correctly pointed out that this observation was not directed at circumstances where *res judicata* could bind the parent. That is, neither Willys nor his daughter was a party to the stepmother's divorce proceedings. The concurring opinion in the *Willys* case highlights the true significance of that decision.[22]

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16. de Marigny v. de Marigny, *supra* note 13, at 445.

17. *Id.* at 447.

18. 1 FREEMAN ON JUDGMENTS § 319 (1925): "It is only those strangers who, if the judgment were given full credit and effect would be prejudiced in regard to *some pre-existing right*, that are permitted to impeach the judgment. Being neither parties to the action, nor entitled to manage the cause, nor appeal from the judgment, they are by law allowed to impeach it *whenever it is attempted to be enforced against them* so as to effect *rights or interests acquired prior* to its rendition." (Italics by court).

19. See note 5 *supra*.

20. 124 Fla. 274, 168 So. 249 (1936).

21. *Id.* at 278, 168 So. at 251: "The rule is settled in this state that respondent, being heir to her father's estate, has a right to question the validity of his marriage to petitioner."

22. *Id.* at 279, 168 So. at 251, per Davis, J.: "In this case the record shows that the challenged divorce decree of the Dade county circuit court was rendered on personal service, with both parties before the court, and upon proper allegations and proof showing the jurisdiction of that court to proceed and to grant a decree of divorce.

"The premise upon which suit attacking that decree in Palm Beach county circuit court has been filed is that the resultant decree of the circuit court of Dade County is void, as distinguished from voidable, because of perjured testimony offered before the Dade county circuit court on the subject of its jurisdiction.

"However, that premise is fallacious, as a decree rendered by a court of chancery in this state, which is a court of general jurisdiction, cannot be collaterally attacked as void when the allegations of the pleadings and the proof offered and accepted by such chancery

Although the statement of Mr. Justice Holmes in *Haddock v. Haddock*[23] ("I do not suppose that civilization will come to an end whichever way this case is decided."), is not without applicability here,[24] it is rather undeniable that the decision in the instant case does reflect a public policy based upon the broad premise that decisions of proper courts in one state shall not be challenged lightly in courts of a sister state. Although the layman cannot ordinarily appreciate the significance of legal terminology, such as *res judicata*, it is no doubt true that he subscribes to the fundamental concept that what has once been decided should be laid at rest. In the field of divorce law particularly, our standards of public morality demand that a court shall not declare a marital relationship meretricious *ab initio* merely because it finds a sister state court's finding on jurisdiction erroneous, under circumstances such as are presented in the instant case.[25]

CONSTITUTIONAL LAW — LIBEL — PUBLICATION OF SUBVERSIVE LIST — DAMAGE: DIRECT OR INDIRECT?*

Pursuant to an Executive Order,[1] the Attorney General compiled a list of organizations that he found to be subversive. This list was distributed to the heads of all executive departments and subsequently released to the

court is sufficient, on the face of the record, to support the jurisdictional finding upon which the final decree was rendered.

"In Bryant v. Bryant, 101 Fla. 179, 133 So. 635, 636, cited with approval and followed in Cone v. Cone, 102 Fla. 793, 136 So. 466, this proposition was distinctly held: 'Where the jurisdiction of a court of equity has been wrongfully invoked and a final decree obtained upon false allegations of jurisdictional facts * * * the decree was voidable but not void, because the lack of jurisdiction only appears from matters dehors the record [when] alleged by the defendant, * * * [but] not on the fact of the record of the original proceeding when final decree was entered.'

"In Florida, divorce cases are chancery cases the same as foreclosure cases and the like. Ecclesiastical court doctrines which sustain almost any kind of an excuse to uproot a divorce decree because of moral, as distinguished from legal, considerations, have no place in Florida law, in my judgment."

23. 201 U.S. 562, 628 (1906).

24. Nor did Mr. Justice Frankfurter think it inapplicable in the *Sherrer* case, as witness his reference thereto in his dissenting opinion, *supra* note 6, at 356.

25. "If the appellant-petitioner may maintain the instant suit it would be possible for any party to a fraudulent divorce decree, which is valid on the face of the record, to conspire with another person to enter into a marriage with him or her with the sole purpose in mind of having said spouse thereafter bring a proceeding to impeach the divorce decree and thus accomplish indirectly, by means of such conspiracy and fraud, that which could not be accomplished directly. It is our conclusion that the lesser evil would result from a judgment unfavorable to the appellant-petitioner's position and that decency, good morals and the welfare of society would be more nearly satisfied by such ruling. Certainly, such a decision would be less inimicable to the interests of our citizens as a whole than one favorable to the appellant-petitioner for the latter, in our opinion, could lead to 'widespread social disorder.' See Shea v. Shea, 270 App. Div. 527, 60 N.Y.S.2d 823, at page 827." de Marigny v. de Marigny, *supra*, note 13, at 446-447.

*Editor's note: Since this casenote went to press, the instant case was reversed and remanded by the Sup. Ct. to allow the plaintiff the constitutional right of its day in court. 19 U. S. LAW WEEK.

1. Exec. Order No. 9835, 12 FED. REG. 1935 (1947); 53 STAT. 1148 (1939), 5 U.S.C.A. § 118j (Supp. 1950) (Hatch Political Activity Act).

For collateral readings on the Hatch Act see: Donovan and Jones, *Program for a*