DIVORCE JURISDICTION BY CONSENT OF THE PARTIES—DEVELOPMENTS SINCE "SHERRER v. SHERRER"

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In theory, as far as federal law is concerned, the divorce decree of an American state is entitled to full faith and credit only if the divorcing state had jurisdiction of the subject matter by virtue of being the domicil of at least one of the parties.[1] In practice, the decree of a state court which had personal jurisdiction over the parties to a marriage is entitled to full faith and credit so far as the couple are concerned. According to the United States Supreme Court's opinion in the *Sherrer* case,[2] if both parties to a marriage participate in a suit for a divorce they are estopped from attacking the jurisdictional basis of the decree by virtue of their participation. Both had an opportunity to contest the jurisdiction of the court on the ground that the divorcing state was not the domicil of either. The parties are bound by a kind of res judicata principle.

The decision in the *Sherrer* case seemed to leave open two important full faith and credit questions: 1) Were there still certain circumstances under which one spouse could subsequently attack the decree although he had been technically before the divorce court? 2) In the light of *Sherrer's* reliance on a doctrine of res judicata, could a third person not a party to the divorce challenge a divorce decree which the spouses themselves could not question?

The New Jersey Supreme Court has recently refused to find *Sherrer* binding in a case which raised the first of these questions. In *Staedler v. Staedler*[3] the husband, a New Jersey domiciliary, consulted a lawyer in 1946 about getting a Florida divorce. When he learned that his wife had talked to a lawyer of her own choosing, he threatened to leave New Jersey and to conceal his assets. After a discussion with the husband's lawyer the wife, no longer consulting her own counsel, signed an agreement which made certain financial provision for her and which also provided:

> ". . . [The wife] agrees promptly to execute any papers, and enter, or cause to be entered any appearance required in the divorce proceedings to be instituted by . . . [the husband], without delay. Should . . . [the wife] oppose said divorce proceedings the said trust shall become inoperative, and the monies deposited thereunder shall be returned to . . . [the husband]."[4]

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1. GOODRICH, HANDBOOK OF THE CONFLICT OF LAWS 395 (3d ed. 1941).

2. Sherrer v. Sherrer, 334 U.S. 343 (1948). Coe v. Coe, 334 U.S. 378 (1948), is a companion case. These cases are discussed in detail in Paulsen, *Migratory Divorce: Chapters III and IV*, 24 IND. L.J. 25 (1948).

3. 78 A.2d 896 (N.J. 1951).

4. *Id.* at 899.

When the husband arrived in Florida he engaged and paid for a lawyer to represent his wife in the divorce proceedings. She executed the appropriate papers to enter an appearance in the Florida hearing. By the husband's admission in the subsequent New Jersey case he did not arrive in Florida until well after the date set forth in the Florida complaint. The period immediately preceding the filing of the case in Florida included the Christmas holidays of 1947, during which time he returned to New Jersey, lived with his wife and attended a number of social functions with her. At the trial the lawyer hired to represent the wife performed a "perfunctory cross-examination . . . [and] did little more than offer and prove his power of attorney to appear for the . . . [wife]."[5] The husband broke none of his business connections in New Jersey and shortly after the Florida decree became final he returned there, remarried. When payments to his first wife under the agreement ceased seven months after they were begun, she sought a New Jersey divorce and a decree for alimony. On appeal the New Jersey Supreme Court modified the trial court's judgment by affirming the decree of divorce but reversing the denial of alimony.

The New Jersey Supreme Court limited the application of the *Sherrer* case to "a true adversary proceeding where the parties are represented by counsel of their independent choice and where there is opportunity to make voluntary decision on the question as to whether or not the case should be fully litigated either on the question of jurisdiction or the merits. . . ."[6]

In the light of the interest of New Jersey in this family situation and the fraud practiced on the Florida court, the New Jersey justices balked at embracing the result to which *Sherrer* seemed to point. The following statement shows the court's reluctance to permit the parties by mutual consent to confer jurisdiction to divorce upon the courts of another state:

> It eannot be disputed in this case that the bona fide domicile of these parties was and is in the State of New Jersey and that this state has a paramount interest in the status of its married domiciliaries. To hold that jurisdiction could be established in the Florida court or could be established there pursuant to the terms and conditions of this agreement is to reduce the marital relationship to the status of ordinary commercial transactions and to make it a matter of barter by bargain and sale in the commercial markets. It is to say that it is something that could be eancelled out by a general release in return for a monetary consideration agreed upon at arms length bargaining. No matter what others may perceive to be the recent trend in decisions of the United States Supreme Court in causes of this type we are constrained not to impute to that court an intent that would reduce the solemn relationship of husband and wife to the status just adverted to or that that court will acquiesce in a fraudulent scheme to use the principles of the Davis, Sherrer and Coe cases as

5. *Id.* at 900.
6. *Ibid.*

> a device to infuse constitutional virility into the judgment of a court of a sovereign state which has been deliberately deceived in proceeding to judgment in a cause over which in fact it had no jurisdiction.[7]

A 1948 Oklahoma decision, *Brasier v. Brasier,*[8] also refused to give conclusive effect to an Arkansas divorce obtained in a proceeding in which the defendant wife signed an entry of appearance but did not file any pleadings nor secure representation of counsel.

Whether the *Sherrer* case requires the reversal of *Staedler v. Staedler* and *Brasier v. Brasier* is not certain. New Jersey's reading of the *Sherrer* case has some justification. In *Sherrer* apparently both parties had lawyers of their own choice, were physically present in the courtroom, and the respondent in the divorce case testified in respect to the issue of the custody of a child. Mr. Chief Justice Vinson's opinion in *Sherrer* repeatedly states that the Florida decision on the domicil issue was binding because both parties had "participated" in the divorce, a term which might indicate that *Sherrer* would apply only to a case which preserved some flavor of a truly adversary proceeding.[9]

However, a dictum in a 1951 United States Supreme Court opinion, *Johnson v. Muelberger,*[10] tends to minimize this factor in *Sherrer.* In his summary of the holding of *Sherrer v. Sherrer* and its companion case *Coe v. Coe,* Mr. Justice Reed said:

> It is clear from the foregoing that under our decisions a state by virtue of the clause must give full faith and credit to an out-of-state divorce by barring either party to that divorce who has been personally served or *who has entered a personal appearance* from collaterally attacking the decree.[11]

The best guess seems to be that the New Jersey and Oklahoma courts were in error.

A few state cases since *Sherrer* have been concerned with the question of what constitutes an appearance sufficient to bring a defendant spouse personally before a divorce court. The Massachusetts Supreme Judicial Court has held that Nevada did not acquire personal jurisdiction over a wife who

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7. *Id.* at 901-902.

8. 200 Okla. 689, 200 P.2d 427 (1948). On April 3, 1951, the Supreme Court of Wisconsin joined the New Jersey and Oklahoma courts in refusing to follow *Sherrer* in a case in which the defendant wife merely entered a formal appearance before the court of the divorcing state. "Under these circumstances we do not consider that the federal constitution nor the decisions interpreting it have called upon Wisconsin to surrender to the courts of another state this remnant of its historic right to determine for itself the marital status of its own residents, and we shall not surrender it until higher authority, speaking on the instant facts or on others which are indistinguishable, requires us to do so." Davis v. Davis, 47 N.W.2d 338, 341 (Wisc. 1951).

9. In the companion to *Sherrer,* Coe v. Coe, 334 U.S. 378 (1948), the divorce was actively contested.

10. 340 U.S. 581 (1951).

11. *Id.* at 587. (Emphasis added.)

filed an appearance through her attorney sometime after the date of the husband's decree.[12] Of course the Nevada appointment of a guardian *ad litem* to defend a divorce case for a New Jersey incompetent did not subject the incompetent to the jurisdiction of Nevada[13] nor was a wife brought within Nevada's power because an attorney, not authorized to do so, filed a pleading on her behalf.[14]

The *Staedler* case is typical, one suspects, of a great many out-of-state divorces carefully arranged by cooperating spouses. The *Sherrer* and *Coe* cases were, of course, open invitations to the kind of collusion and fraud practiced by the New Jersey litigants. Save for the slim chance that New Jersey could still act through its criminal process the state has no way to enforce its policy upon this couple who have lived and are still living there. A state must bend to the standards of the laxest state in the Union if the parties manipulate their affairs properly. For those who can leave their home state temporarily the *Sherrer* case transferred control over the standards for dissolution of New Jersey and New York marriages to Nevada, Florida and Arkansas. If the aim was to make divorce easy at the option of the parties, the end was effectively achieved for those who can afford the trip to the appropriate state.

Johnson v. Muelberger[15] directly involved the second of the questions posed by the *Sherrer* case. There a child sought to challenge, on jurisdictional grounds, her father's Florida divorce from his second wife. The question arose when Johnson's third wife, seeking to elect her statutory share under the law of New York, attacked Johnson's will which gave all his property to his daughter by his first marriage. After the death of Wife No. 1, Johnson had entered into a marriage which ended in a Florida divorce in 1942, a proceeding in which both Johnson and Wife No. 2 appeared. Johnson married a third time following the Florida divorce. Neither Wife No. 2 nor Johnson were bona fide domiciliaries of Florida at the time of the divorce. The only substantial question in the *Johnson* litigation was whether the daughter of Wife No. 1 and Johnson could challenge the validity of a foreign divorce between Johnson and Wife No. 2 in order to cut off Wife No. 3's share in Johnson's estate.

Of course, New York first had to determine whether the daughter's attack was possible under its own state law. In general, it is difficult to see why a child should be permitted to raise doubts, in a collateral proceeding, about the validity of his parent's divorces.[16] In a few comparatively rare

12. Rubinstein v. Rubinstein, 324 Mass. 340, 86 N.E.2d 654 (1949).
13. Glickenhaus v. Bradley, 63 A.2d 281 (Sup. Ct. N.J. 1949).
14. Commonwealth v. Bowser, 163 Pa. Super. 494, 63 A.2d 117 (1949).
15. 340 U.S. 581 (1951).
16. This is the conclusion reached in a Note, *Standing of Children to Attack Their Parents' Divorce Decree*, 50 COL. L. REV. 833 (1950).

instances invalidation of a divorce will save a child from the stigma of illegitimacy. But cases of a child's collateral attack generally arise from the child's attempt to secure a larger inheritance at the expense of a supposed wife. In the typical case the struggle is between an adult child and a post divorced wife of a husband over the property in an estate. In spite of the great hardship in many cases on the part of a deceased's most recent apparent spouse, New York permits the collateral attack by the child at least as to the decrees of other states.[17]

In the *Johnson* case, therefore, the daughter would succeed unless prevented by force of the federal full faith and credit requirement. The opinion in the New York Court of Appeals failed to deal with the issue sharply.[18] Although that court selected and quoted statements from the *Sherrer* case which seemed to limit its application to situations in which the spouses themselves attempted to secure invalidation of their divorce, the New York opinion fell short of saying flatly that the daughter could attack the jurisdictional basis of the Florida divorce because she had not been a party and had had no opportunity to contest the issue of domicil. Instead, the court fell back to another line: New York could permit the daughter's attack because Florida also would permit it.

This tack of the New York opinion may help to explain the direction of Mr. Justice Reed's Supreme Court essay. The greater portion of it is devoted to a concise restatement of the full faith and credit clause's impact on divorce recognition law and to a correction of New York's estimate of the Florida law. As the Supreme Court read the Florida cases a stranger could not impeach a Florida decree of divorce there even on the ground that the jurisdiction over the subject matter was lacking. What of it? Admitting the daughter could not challenge the jurisdiction of the Florida divorce in a Florida court, why is she bound by the Florida law in a New York court? Mr. Justice Reed's opinion answered the question only with an assertion:

> We conclude that Florida would not permit Mrs. Muelberger to attack the Florida decree of divorce between her father and his second wife as beyond the jurisdiction of the rendering court. In that case New York cannot permit such an attack by reason of the Full Faith and Credit Clause. When a divorce cannot be attacked for lack of jurisdiction by parties actually before the court or strangers in the rendering state, it cannot be attacked by them anywhere in the Union. The Full Faith and Credit Clause forbids.[19]

This conclusion, however, is not self-evident. True, the statute passed pursuant to the full faith and credit clause requires a state to give a judg-

17. *E.g.*, Urquhart v. Urquhart, 272 App. Div. 60, 69 N.Y.S.2d 57 (1st Dep't 1947), *aff'd*, 297 N.Y. 689, 77 N.E.2d 7 (1947).

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

19. Johnson v. Muelberger, 340 U.S. 581, 589 (1951).

ment or decree the same effect as it has in the state from which it is taken.[20] The Florida rule on a child's standing to challenge a parents' divorce must be applied in New York if it is considered one of the effects of a valid Florida judicial proceeding. Yet, the full faith and credit requirement has never been imposed in the case of a judgment or decree entered without jurisdiction.[21] Unless the *Johnson* case has changed matters, a divorce is not entitled to full faith and credit unless it is based on the domicil of one of the parties. Under the doctrine of the *Sherrer* case parties who were personally subject to the divorcing court may not question the decree's basis because each of them could have raised and contested the jurisdictional issue of domicil at the time of the divorce. The daughter contended: the Florida decree was granted by a court lacking power to do so and hence was void; the Court answered: one of the effects of the decree was to bind strangers who had no economic or personal interest in the marriage status at the time of the divorce. The answer is something less than satisfying as a matter of doctrinal nicety.

It would make explanation no easier for the Court to have labeled the divorce an *in rem* proceeding and to have recalled that an *in rem* judgment "binds the whole world."[22] Surely any person having an interest (even a later-acquired interest) can challenge an *in rem* decree on the ground that the *res* was not within the jurisdiction of the state purporting to act upon it.[23] Perhaps it would have been possible to work out a thesis under which the daughter is bound by Florida's finding on the domicil question because her father was bound and she stands in no better position than he.[24] The Court could have taken the position that, when both spouses have appeared, the subject matter of the action, their status, is within the power of the divorce court. The Supreme Court's opinion, however, does not rest on these grounds. Florida does not permit the daughter's attack; therefore, New York may not.

If the United States Supreme Court really means to approach divorce cases by adhering to the literal terms of the full faith and credit statute, the doctrine of the second *Williams*[25] case is now unsound. In Nevada an *ex parte* divorce granted after sixty days of residence is apparently immune there from collateral attack on jurisdictional grounds by the non-appearing spouse. If so, then how is it possible for North Carolina to permit the attack? Does not the full faith and credit clause forbid? *Williams II,* it should be re-

20. "Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken." 28 U.S.C. § 1738 (1948).

21. Jackson, *Full Faith and Credit—The Lawyer's Clause of the Constitution,* 45 COL. L. REV. 1, 8-9 (1945).

22. *Cf.* Bane v. Bane, 80 N.Y.S.2d 641 (Sup. Ct. 1948).

23. RESTATEMENT, JUDGMENTS § 73, comment *a* and § 74, comment *a* (1942).

24. *Cf. In re* Anderson's Estate, 121 Mont. 515, 194 P.2d 621 (1948).

25. Williams v. North Carolina, 325 U.S. 226 (1945).

membered, has never received the unanimous approval of the Court. Of the Court's present members, two, Justices Black and Douglas, were in dissent. In the most recent Supreme Court application and extension of *Williams II*, *Rice v. Rice*,[26] the Court split five to four. The new Justices, Clark and Minton, have not had occasion to vote on the question. The *Johnson* case may foreshadow the demise of *Williams II* by no longer permitting a spouse to attack a decree if it cannot be challenged in the state where the divorce was granted.

It seems more probable that the Court will adhere to *Williams II* to protect the abandoned spouse from an *ex parte* decree obtained in one of the easy divorce states without a bona fide change in the domicil of the plaintiff. The practical result of the *Johnson* case then will be to round out the *Sherrer* development in the full faith and credit law of divorce. The parties to a marriage, it seems, now have the power to confer jurisdiction over their status upon any state whose divorce laws are expedient. The decree can be attacked neither by the spouses nor by third persons unless the state in which the decree was granted would permit an attack in its own courts.

When the actual operation of the *Williams, Sherrer* and *Johnson* line of cases is considered perhaps the theory of divorce jurisdiction for full faith and credit purposes should be recast. Are there not, in fact, two jurisdictional bases for divorces which are entitled to full faith and credit; the domicil of either spouse or personal jurisdiction over both? As the matter now stands, *ex parte* divorces are entitled to full faith and credit only when the divorcing state has jurisdiction over the subject matter by virtue of being the domiciliary state of at least one party. But when the divorcing court has *in personam* jurisdiction over both spouses, whether that court *really* has jurisdiction of the subject matter may no longer be important for constitutional purposes. The recent federal cases have permitted a court having personal jurisdiction over the couple to enter a decree which the parties and even strangers to the divorce proceeding are barred from questioning. Therefore, when a court has personal jurisdiction over both parties to a divorce, does not that court have a completely sufficient basis on which to grant a decree entitled to full faith and credit?[27]

The test whether jurisdiction over both persons is now an adequate basis for the divorces which must be accorded federally required recognition could come if a state, having jurisdiction over both spouses, would grant a divorce in a proceeding which did not, expressly or impliedly, put the question of domicil in issue. For example, a state might, under its local law, grant a di-

26. 336 U.S. 674 (1949).

27. To these speculations a *caveat* must be added. The *Johnson* case was not a bigamy prosecution and it still may be possible that the state of New York could have prosecuted Mr. Johnson for bigamy during his marriage to Wife No. 3 on the grounds that his divorce from Wife No. 2 was invalid.

vorce on the basis of residence rather than domicil.[28] Even if both parties made an appearance in a case in that state, the fact of domicil would not be determined. Presumably either party as well as others could raise the issue later. If personal jurisdiction over the couple is now a sufficient basis for a divorce, the domicil question would, of course, prove to be irrelevant.

Irrespective whether new full faith and credit jurisdiction rules can be stated, after the *Sherrer* and *Coe* cases were decided the outcome of *Johnson v. Muelberger* was inevitable. The certainty about status to which the parties are entitled demands the result. If the couple are bound to respect a divorce decree, their marital status should be determined equally for others. It is enough they may be divorced for some purposes but not for others.[29] It is too much they should be married when the interests of strangers are in question but divorced when either of them raises the matter of status.

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28. Apparently a state may divorce on any jurisdictional basis it chooses without violating the due process clause. See the discussion in Paulsen, *Migratory Divorce: Chapters III and IV*, 24 IND. L.J. 25, 43-44 (1948).

29. See Estin v. Estin, 334 U.S. 541 (1948).