UNC SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

Volume 35 | Number 3 Article 11

4-1-1957

Judgments -- Collateral Attack on Judgment Regular on Its Face

Henry M. Whitesides

In *Monroe Bros. & Co. v. Lewald*,[25] the Court held it error to dismiss supplemental proceedings when there was a creditor's bill (which the court assumed to be a judgment creditor's bill instead of a general creditor's bill) pending by another person and intimated that both creditor's bills and supplemental proceedings would be proper to reach some types of property interests, by saying that the two proceedings should be consolidated when they conflict, as where the same property is sought to be subjected. In *McIntosh Grocery Co. v. Newman*,[26] the Court said that both remedies were still open to claimants in proper instances.

In the recent case of *Cornelius v. Albertson*,[27] the plaintiff, a judgment creditor of defendant, had an execution issued against the trustee of a trust of which the defendant was the beneficiary. The res of the trust was personal property. The trustee was not a party to the suit. The Court said: "The plaintiff cannot reach by the execution she had issued the property held in trust for defendant, . . . but *must* endeavor to reach it, if she can, by a supplemental proceeding. . . ."[28] [Emphasis added.]

It is apparent from the foregoing cases that the Court has not always required strict compliance with the clear cut rule stated in *McCaskill v. Lancashire*. No case has been found, however, in which it was held error to allow the remedy required by that rule.

WILLIAM G. RANSDELL, JR.

Judgments—Collateral Attack on Judgment Regular on Its Face

In *Carpenter v. Carpenter*,[1] a husband sought to have his marriage annulled on the ground that a decree of divorce obtained by his spouse from her former husband was a nullity. The allegations were that the wife, having falsely sworn that she had lived separate and apart from her former husband for two years, failed to meet the statutory requirements[2] which thereby invalidated her divorce and rendered her marriage to the plaintiff without legal efficacy. The North Carolina Supreme Court reversed the trial court's denial of the wife's motion to strike the allegations. In refusing to permit the plaintiff to attack collaterally the prior decree, the Court said:

held by another person); Johnson Cotton Co., Inc. v. Reaves, 225 N. C. 436, 35 S. E. 2d 408 (1945) (an interest in a judgment recovered against another).

[25] 107 N. C. 655, 12 S. E. 287 (1890).

[26] 184 N. C. 370, 114 S. E. 535 (1922).

[27] 244 N. C. 265, 93 S. E. 2d 147 (1956).

[28] *Id.* at 268, 93 S. E. 2d at 150. At the same page the Court, when referring to the Supplemental Proceedings statute (N. C. GEN. STAT. §§ 1-352 et seq.), said, ". . . the provisions of this article are intended to supply the place of a proceeding in equity, where relief was given after a creditor has determined his debt by a judgment at law and was unable to obtain satisfaction by process of law."

[1] 244 N. C. 286, 93 S. E. 2d 617 (1956). See N. C. GEN. STAT. § 50-4 and § 51-3 as to annulment.

[2] N. C. GEN. STAT. § 50-6 (1950).

"As against challenge on the ground of false swearing, by way of pleading and of evidence, *relating to the cause* or *ground for divorce,* a divorce decree, in all respects regular on the face of the judgment roll, is at most *voidable,* not void."[3]

The *Carpenter* case involves a consideration of the following: (1) jurisdictional and non-jurisdictional factors; (2) direct and collateral attacks; and (3) void and voidable judgments.

Jurisdictional factors go to the very heart of the matter[4]—they involve the question of whether or not the court had the power to hear and determine the issue. A judgment rendered without jurisdiction is a nullity. Non-jurisdictional factors, on the other hand, involve the irregular or erroneous use of its judicial power by a court which ostensibly had jurisdictional power. A judgment rendered under such circumstances is not a nullity. It is a valid judgment until reversed.[5]

A direct attack upon a judgment is an attack made in the very proceeding in which the judgment was rendered, or on an appeal therefrom, or by some separate proceeding provided by law for that sole purpose.[6] If, on the other hand, the action or proceeding has an independent purpose and contemplates some other relief or result, although the overturning of the judgment may be important or even necessary to its success, then the attack on the judgment is said to be a collateral attack.[7]

It is the element of jurisdiction that differentiates a void from a voidable judgment.[8] When a jurisdictional element is missing, the court has no authority to render any judgment at all. Therefore, any judgment rendered by such court is void—a nullity which may be attacked whenever it is offered in any proceeding. A voidable judgment, however, takes effect as intended, and continues to be effectual for all intents and purposes until it is set aside or nullified by judicial decree.[9] A judgment that is irregular or voidable cannot be attacked collaterally. The remedy is by direct attack through motion in the cause.[10]

It is held that the recitation in a judgment of jurisdictional facts, if not contradicted by the record, will be presumed to be true, and cannot be denied or questioned in any collateral proceeding.[11] Under this rule

[3] 244 N. C. 286, 295, 93 S. E. 2d 617, 625 (1956).
[4] Woodside-Florence Irr. Dist., 121 Mont. 346, 194 P. 2d 241 (1948), Chase v. Christianson, 41 Cal. 253, 106 P. 2d 239 (1871).
[5] Lawson v. Moorman, 85 Va. 880, 9 S. E. 150 (1889).
[6] State *ex rel* and to Use of Coran v. Duncan, 333 Mo. 673, 63 S. W. 2d 135 (1933).
[7] Inter-River Drainage District of Missouri v. Henson, 99 S. W. 2d 865 (Mo. 1936). See also, 1 FREEMAN, JUDGMENTS, § 321 (5th ed. 1925).
[8] Johnson v. Carroll, 190 Ky. 689, 228 S. W. 412 (1921).
[9] Voorhees v. Jackson *ex dem* The Bank of the United States, 35 U. S. 449 (1836); RESTATEMENT, JUDGMENTS, § 4 (1942).
[10] Clark v. Homes, 189 N. C. 703, 128 S. E. 20 (1925).
[11] Stocks v. Stocks, 179 N. C. 285, 120 S. E. 306 (1920); Rackley v. Roberts, 147 N. C. 201, 60 S. E. 975 (1908); Rutherford v. Ray, 147 N. C. 253, 61 S. E. 57 (1908); Dunn v. Taylor, 42 Tex. Civ. App. 241, 94 S. W. 347 (1906).

any judgment which is valid on the face of the record should never be termed void. If it is necessary in attacking the judgment to present evidence aliunde, the judgment is deemed voidable.[12]

In the *Carpenter* case the ground for divorce in the wife's action was two years separation. This is a statutory ground for absolute divorce in this state.[13] Under this statute there are two requirements which the husband and wife must meet in order to obtain the absolute divorce. They are that the husband and wife shall have (1) lived separate and apart for two years; and (2) the plaintiff, husband or wife, shall have resided in this state for a period of six months. The North Carolina Supreme Court has declared these requirements to be jurisdictional.[14]

If either of these elements did not exist, the court would not have jurisdiction to try the action and to grant a divorce.[15] If the court had no jurisdiction over the subject matter of the action, the judgment in the action is void.[16]

The plaintiff in the *Carpenter* case alleged that his wife in her divorce action had only been living separate and apart from her husband for a few months. The defendant's motion to strike this allegation was denied by the trial court, but granted by the North Carolina Supreme Court. If this allegation be true, then the previously stated North Carolina holdings indicate that the element of jurisdiction was missing and that the judgment rendered by the court was void. The court in the *Carpenter* case said that since the judgment roll was regular on its face, the judgment was at most voidable, not void.

A case on all fours occurred in Mississippi.[17] There the record of the divorce proceeding was regular on its face and both parties to the action were in court. A divorce was granted and the husband remarried. The husband predeceased both his first and his second wife. Under the law of that state the surviving widow is granted certain property rights. The first wife asked the court to declare that she was the owner of all the property of which the deceased died seised on the the ground that she

[12] Pinnell v. Burroughs, 168 N. C. 315, 84 S. E. 364 (1915); Albertson v. Williams, 97 N. C. 264, 1 S. E. 841 (1887); Bushee v. Surles, 77 N. C. 62 (1877).

[13] N. C. GEN. STAT. § 50-6 (1950).

[14] Young v. Young, 225 N. C. 340, 34 S. E. 2d 154 (1945); Oliver v. Oliver, 219 N. C. 299, 13 S. E. 2d 549 (1941); see Sears v. Sears, 92 F. 2d 530 (D. C. Cir. 1937).

[15] Henderson v. Henderson, 232 N. C. 1, 59 S. E. 2d 227 (1950); Monroe v. Niven, 221 N. C. 362, 20 S. E. 2d 311 (1942); Harrell v. Welstead, 206 N. C. 817, 175 S. E. 283 (1934).

[16] Hopkins v. Hopkins, 132 N. C. 22, 43 S. E. 508 (1903); Martin v. Martin, 130 N. C. 27, 40 S. E. 822 (1902); Nichols v. Nichols, 128 N. C. 108, 38 S. E. 296 (1901); Holloman v. Holloman, 127 N. C. 15, 37 S. E. 68 (1900).

[17] Hester v. Hester, 103 Miss. 13, 60 So. 6 (1912). In *Ex parte* Edwards, 183 Ala. 659, 62 So. 775 (1913), the court refused to allow a husband to attack his former wife's divorce decrees (the attack was, of necessity, a collateral attack) when he alleged that the former divorce had been obtained collusively. The court said that "for aught appearing, the ground of the divorce there set-up existed and was proved by trustworthy testimony."

was his lawful widow. Collaterally she made the attack on the decree claiming that it was illegally obtained. The court, in rejecting this collateral attack upon a judgment roll regular on its face, stated:

> "Whether the court had the proper evidence before it on which to base a decision cannot be inquired into collaterally. . . . The rule is absolutely essential, in order that faith and credit may be accorded by the community to the decrees and judgments of courts of record; and that parties acting in obedience to them, or acquiring rights under them, may have the confidence and repose flowing from a conviction that the solemn judgments and decisions of the higher courts, so long as they remain unreversed, will not be disregarded."[18]

In the *Carpenter* case the court was faced with the difficult problem of having to balance the apparent injustice to the plaintiff and the public policy involved as pointed out in the Mississippi case. To permit the case to be relitigated would be to cast a shadow upon all cases regular on the record. Conversely, the fraud could not be approved. This dilemma was resolved by an extremely restricted split decision. It is submitted that the majority and dissent do not disagree upon the same issue, but rather that they are taking the case from different phases. The majority are not allowing this plaintiff to bring this attack under these circumstances, whereas it is the dissent's view that the attack is proper because it raises jurisdictional questions. It is not doubted that the majority would agree with the dissent as to the jurisdictional questions if the majority allowed the case to get to that point. Apparently, therefore, the opinion says only that in this case and under this set of facts and circumstances, the jurisdictional questions may not be raised. If this is the view of the majority, there is no inconsistency with the former opinions of this Court.[19]

A consideration of divorce and jurisdiction immediately brings to mind the famous *Williams* cases.[20] Although the *Williams* cases concerned the jurisdictional question of domicile and the party attacking the jurisdiction was the State of North Carolina, the two cases do have points in common. First, the jurisdictional aspect of the divorce was attacked by one not a party to the suit; second, in each case it is contended that to recognize the divorce would result in damage to an innocent party. There is, however, one major distinguishing point in the two cases. In the *Williams* case the State of North Carolina, the party attacking collaterally, had a present interest in the litigation at the time

[18] 103 Miss. 13, 28, 60 So. 6, 21 (1912).
[19] 244 N. C. 304, 93 S. E. 2d 633 (1956).
[20] Williams v. North Carolina, 317 U. S. 287 (1942); Williams v. North Carolina, 325 U. S. 226 (1945).

of the divorce.[21] It was upon this theory that the State could prosecute the parties for adultery upon their second marriage which followed a fraudulent divorce from the first marriage. Conversely, in the *Carpenter* case the party attempting to collaterally attack had no interest in the prior divorce of his spouse at the time of the divorce. Only upon his marriage, which followed the divorce by some time, could he be called an interested party. It seems to be only in this latter type of case that the Court will allow the judgment record valid on its face to stand against a collateral attack.

Applying this same theory which seems to be borne out in the recent case of *Harmon v. Harmon*,[22] it would seem that the party obtaining the fraudulent divorce in the *Carpenter* case could be subject to prosecution for adultery by the State.[23]

If the allegations made by the plaintiff in the *Carpenter* case are true, it would appear that the wife in the divorce action was a party to a fraud upon a Superior Court of North Carolina. Through this fraud, she was able to obtain a decree of absolute divorce. With this decree she was legally married to the plaintiff. Now she and her second husband (the plaintiff) are living separate and apart. As she is the wife of her second husband in the eyes of the law, she stands in a potential position of being able to obtain suport and maintenance from him. This she may do by virtue of the fraud she perpetrated upon the Superior Court. The husband, on the other hand, is not able to attack the decree and to protect himself by any legal means. In the *Carpenter* case he was denied the right to make a collateral attack. In the cases of *Shaver v. Shaver*[24] he was denied the right to make a direct attack by a motion in the cause because he had not been a party thereto. The court itself has the power *ex mero motu* to reopen the original divorce case by reason of the fraud, but this must be done upon the motion of the court and is solely in the court's discretion.[25] Perhaps by appearing as a friend of the court in

[21] In the second *Williams* case Justice Frankfurter in the majority opinion said: "But those not parties to a litigation ought not to be foreclosed by the interested actions of others; especially not a state which is concerned with the vindication of its own social policy and has no means, certainly no effective means, to protect that interest against the selfish action of those outside its borders. . . . As to the truth or existence of a fact, like that of domicil, a State not a party to the exertion of such judicial authority in another State but seriously affected by it has a right when asserting its own unquestioned authority, to ascertain the truth or existence of that crucial fact." 325 U. S. 226, 230 (1945).

[22] Harmon v. Harmon, 245 N. C. 83, 95 S. E. 2d 355 (1956).

[23] In the *Harmon* case the court says, "Since an absolute divorce dissolves the marriage tie, . . . subsequent intercourse between a former spouse and a third person does not constitute adultery, provided a final decree has been rendered, and no fraud was practiced to obtain it." It follows that cohabitation pursuant to second marriage would constitute adultery if parties to second marriage obtained divorce decree through collusion and in bad faith or by fraud.

[24] 244 N. C. 309, 93 S. E. 2d 614 (1956); 244 N. C. 311, 93 S. E. 2d 615 (1956).

[25] State v. Davis, 203 N. C. 35, 164 S. E. 737 (1932); Mann v. Mann, 176 N. C. 353, 97 S. E. 175 (1918); Durham v. Cotton Mills, 144 N. C. 705, 57 S. E. 465 (1907); Summerlin v. Cowles, 107 N. C. 459, 12 S. E. 234 (1890).

the original divorce proceeding, the husband might induce the court to exercise its discretion, to reinvestigate the facts *ex mero motu*, and to declare the original divorce void by reason of the fraud. Clearly the plaintiff is in need of judicial aid and his "hands are tied."[26]

HENRY M. WHITESIDES

Search Warrants—Requisites for a Valid Warrant to Search for Unlawfully Possessed Liquor

In a recent decision of the North Carolina Supreme Court, *State v. White*,[1] it was held that a search warrant, obtained from a justice of the peace by a constable upon the latter's oral testimony under oath that he had reason to believe that defendant had intoxicating liquor in her home, and giving a description thereof, was invalid and the evidence obtained under the warrant incompetent because the requisite provisions of G. S. § 15-27[2] had not been complied with. Specifically the court found the warrant defective because the issuing officer had not required the constable to sign an affidavit under oath to support the issuance of the warrant as required by G. S. § 15-27,[3] which provides as follows:

> Warrant issued without affidavit and examination of complainant or other person; evidence discovered thereunder incompetent.—Any officer who shall sign and issue or cause to be signed and issued a search warrant without first requiring the complainant or other person to sign an affidavit under oath and examining said person or complainant in regard thereto shall be guilty of a misdemeanor; and no facts discovered by reason of the issuance of such illegal search warrant shall be competent as evidence in the trial of any action: Provided, no facts discovered or any evidence obtained without a legal search warrant in the course of any search, made under conditions requiring the issuance of a search warrant, shall be competent as evidence in the trial of any action.

The application of this statute to determine the validity of a warrant authorizing a search for unlawfully possessed liquor conflicts with several earlier decisions of the Supreme Court. In *State v. McLamb*,[4] in dismissing defendant's contention that the trial court erred in admitting

[26] In Patrick v. Patrick, 245 N. C. 195, 95 S. E. 2d 585 (1956), which was decided after this case, the court allowed a party not served but who was interested at the time of the divorce to attack the prior divorce. It was clear that the party making the attack was an interested party at the time of the divorce and that the point upon which he based his attack had not been part of the controversy and adjudicated at the previous trial.

[1] 244 N. C. 73 (1956). [2] N. C. GEN. STAT. § 15-27 (1953).
[3] *Ibid.*
[4] 235 N. C. 251, 69 S. E. 2d 537 (1952).