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Conflict of Laws -- Divorce -- Collateral Attack on -- Divisibility of --

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the rules on burden of proof and procedural due process which obtain not only in the orthodox courts, but quasi-judicial, administrative proceedings as well.

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Conflict of Laws—Divorce—Collateral Attack on—Divisibility of—

The United States Supreme Court recently decided four cases which have significant bearing on the degree of credit to which a foreign decree of divorce is entitled. The legal points dealt with in the first two cases are different from those in the last two; therefore, they will be treated separately.

COLLATERAL ATTACK BY RESPONDENT WHO APPEARED IN DIVORCE ACTION

Respondent,[1] Sherrer, had appeared generally in a divorce action, brought by petitioner in Florida three months after she left respondent in Massachusetts where they had resided for twelve years. Petitioner there alleged, and the Florida court found, that she was a bona fide resident of Florida. Respondent did not challenge either the allegation or finding. The divorce was granted. Respondent brought this suit in Massachusetts in which he alleged that the petitioner was his wife and prayed that he might be allowed to convey his realty as if he were sole and living apart from her justifiably. The Probate Court granted the relief prayed for, and the Supreme Judicial Court of Massachusetts affirmed on the ground that petitioner was never domiciled in Florida. In reversing, the United States Supreme Court held that the requirements of full faith and credit bar a defendant from attacking collaterally 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, and where the defendant has been accorded full opportunity to contest the jurisdictional issues.[2]

The Supreme Court had held in *Williams v. North Carolina*[3] that while the finding of domicile by the court that granted the decree is entitled to prima facie weight, it is not conclusive in the state of matrimonial domicile but might be relitigated there, in a bigamy prosecution. In *Davis v. Davis*,[4] where the defendant had appeared and fully litigated the issue of the plaintiff's domicile, the Court held that the finding

[1] "Petitioner" and "respondent" are used throughout to refer to the petitioner and respondent in the divorce proceeding.

[2] Sherrer v. Sherrer, 68 Sup. Ct. 1087 (1948). The decision in this case applies also to the companion case of Coe v. Coe, 68 Sup. Ct. 1094 (1948), therefore the cases are treated as one. *Accord: In re* Biggers, 228 N. C. 743 (1948).

[3] 325 U. S. 226 (1945). See Baer, *So Your Client Wants a Divorce*, 24 N. C. L. REV. 1 (1945).

[4] 305 U. S. 32 (1938).

of domicile in the divorce proceeding was res judicata and binding on the defendant in all courts.[5] In the instant case, the Court held that, even though the respondent had failed to contest the jurisdiction of the court in the Florida proceeding, his appearance and participation distinguished the case from the situation presented in *Williams v. North Carolina*[6] and brought it within the rule of the *Davis* case.[7] "If respondent failed to take advantage of the opportunities afforded him, the responsibility is his own. We do not believe that the dereliction of a defendant under such circumstances should be permitted to provide a basis for subsequent attack in a sister state on a decree valid in the state in which it was rendered."[8]

In *Coe v. Coe*,[9] decided on the same day as the *Sherrer* case, the court held that the rule laid down in the latter case "is no less applicable where . . . the party initiating the collateral attack is the party in whose favor the [divorce] decree was entered."[10]

Mr. Justice Frankfurter, with whom Mr. Justice Murphy concurred, dissented.[11] The dissent was based on the contention that the decision of the majority renders possible consent divorces by sham proceedings in a foreign state, which would impair the paramount interest of the home state in the marital relations of its citizens. "That interest cannot be bartered or bargained away by the immediate parties to the controversy by a default or an arranged contest in a proceeding for divorce in a state to which the parties are strangers."[12]

The interest of Massachusetts in the *Sherrer* case was likened to that of North Carolina in the *Williams* case, the only difference being that Massachusetts asserted its interests through civil litigation between private parties, whereas North Carolina did it directly by criminal

[5] In this case the court merely applied law to findings of domicile in divorce proceedings that it had already applied in other fields of the law. Baldwin v. Iowa State Traveling Men's Ass'n, 283 U. S. 522 (1931).

[6] 325 U. S. 226 (1945).

[7] The principle that res judicata may be pleaded as a bar to jurisdictional questions which might have been litigated in the earlier proceeding was applied in Chicot County Drainage District v. Baxter State Bank, 308 U. S. 371 (1939). For a complete discussion of res judicata as applied to jurisdictional questions, see; Boskey and Braucher, *Jurisdiction and Collateral Attack*, 40 COL. L. REV. 1015 (1940).

[8] 68 Sup. Ct. 1087, 1091 (1948).

[9] 68 Sup. Ct. 1094 (1948). The respondent filed a cross complaint in the divorce proceeding, and was granted a divorce and alimony by the Nevada Court. She then brought contempt proceedings against the petitioner in Massachusetts for violation of a Massachusetts support order which was in effect before the divorce.

[10] *Id.* at 1096.

[11] 68 Sup. Ct. 1097 (1948). The dissent applied to both cases.

[12] *Id.* at 1098. The dissenting justices do not consider Davis v. Davis, 305 U. S. 32 (1938) as contrary authority, because, by their interpretation of that case, the rule there laid down was dictum inasmuch as the Court found that the state granting the divorce was in fact that of the domicile. See Sherrer v. Sherrer, 68 Sup. Ct. 1097, 1098 n. 1 (1948).

prosecution.[13] The dissent concluded that even if the Florida decision be accorded "every weight,"[14] the evidence justified the Massachusetts court in finding no Florida domicile. It criticizes the majority for that under its decision the home state of the parties is not permitted to question the matter regardless of overwhelming evidence that the asserted domicile is a sham just as long as the parties have gone through the form of a controversy.

Assimilating the two cases, the principle evolved appears to be this: where a court of one state has personal jurisdiction over the respondent in a divorce proceeding, and that respondent has an "opportunity" to contest the issue of domicile, a decision by the court that the petitioner is domiciled within the state is res judicata and is binding on both parties in the state of last marital domicile, both as to marital capacity and the duty of support.

Several serious questions remain unanswered.[15] What effect do these decisions have on the historic principle that jurisdiction to grant a divorce is founded on domicile, and a decree granted where there is no domicile is not entitled to full faith and credit?[16] May this principle now be nullified by a feigned legal contest in a foreign state, or will the Court leave open the right, in the home state, to prove fraud,[17] i.e., that a mock contest was won by prearrangement?[18] If it does so leave it open, then the decisions render more uncertain a field of law already thoroughly unsettled.[19] If not, then the decisions encourage collusion and fraud, and make consent divorces available only to those rich enough to spend six weeks in Nevada. It would also open the door to an academic argument that divorce proceedings, where both parties appear, are strictly *in personam*.[20]

Does litigation of the question of jurisdiction by the parties, or the "opportunity" to do so, foreclose a collateral attack by the state of last marital domicile? Does it foreclose a collateral attack by interested parties not appearing in the suit? Unless we adopt the view of the

[13] Sherrer v. Sherrer, 68 Sup. Ct. 1097, 1100 (1948).
[14] *Id.* at 1107.
[15] Baer, *So Your Client Wants a Divorce*, 24 N. C. L. REV. 1, 30 (1945).
[16] Bell v. Bell, 181 U. S. 175 (1901); Williams v. North Carolina, 325 U. S. 226 (1945).
[17] *See* Sherrer v. Sherrer, 68 Sup. Ct. 1097, 1103 (1948) (dissenting opinion).
[18] One writer suggests that if the finding of domicile is "reasonable" the decision may not be collaterally attacked, but that an "unreasonable" finding would be subject to collateral attack, even though there is personal jurisdiction. Holt, *Any More Light on Haddock v. Haddock?* 39 MICH. L. REV. 689, 715 (1941).
[19] In such a case no one would know whether or not the divorce was good or not until a collateral attack had been made on it, and the issue of fraud or collusion litigated.
[20] The United States Supreme Court has already discarded the idea that the proceeding is strictly *in rem*, but recognize that a divorce decree partakes of some of the characteristics of a decree *in rem*. Williams v. North Carolina, 325 U. S. 226 (1945).

dissent that the state exerts its sovereign power in civil suits between the parties, these decisions can have no binding effect on the state. But if the rule of these cases is not applied where the state is attacking the decree, then the appearance renders the foreign decree valid as regards civil responsibility but not as to criminal liability.

Duty of Support

In *Estin v. Estin*[21] respondent was awarded a decree of separation and alimony by a New York court. The petitioner later went to Nevada and obtained an *ex parte* divorce which made no provision for alimony. Therefore, he ceased payment under the New York decree. This was a suit by the respondent for accrued alimony, in which the petitioner appeared and moved to eliminate the alimony provisions of that decree. The New York Supreme Court found that petitioner was a bona fide resident of Nevada. In spite of this finding the court denied petitioner's motion and granted respondent a judgment for the arrears which was affirmed by the Court of Appeals. In affirming, the United States Supreme Court held that Nevada had no power to adjudicate the respondent's rights in the New York judgment, and New York need not give full faith and credit to that phase of the Nevada decree. The New York judgment is an intangible property interest of respondent, which grants rights to her and imposes obligations on petitioner. The state of the domicile of a debtor has no power to determine the personal rights of the creditor in this interest, unless it has jurisdiction over his person. Nevada cannot thus exercise an *in personam* jurisdiction over a person not before the court.

Petitioner attempted to show that by the law of New York its courts have no power to compel a man to support his ex-wife, and that a support order does not survive divorce. Mr. Justice Douglas, writing for the majority, had no trouble with this contention. "The difficulty with that argument is that the highest court in New York has held in this case that a support order can survive divorce . . . . That conclusion is binding on us. . . ."[22] Earlier decisions are immaterial so long as New York today says that is her policy.

Mr. Justice Frankfurter dissented.[23] He readily agreed with the proposition that New York might decline to allow any *ex parte* divorce to dissolve its prior separate maintenance decree. But he asserted that New York could not give less effect to a valid Nevada divorce than it would give a New York divorce similarly obtained. Since it was not clear whether or not the New York law discriminated against foreign

[21] Estin v. Estin, 68 Sup. Ct. 1213 (1948). The companion case of Kreiger v. Kreiger, 68 Sup. Ct. 1221 (1948) is indistinguishable, therefore the decision applies to both cases.

[22] Estin v. Estin, 68 Sup. Ct. 1213, 1216 (1948).

[23] *See, id.* at 1219 (dissenting opinion).

divorces, Mr. Justice Frankfurter would remand the case to the New York Court of Appeals for clarification on that point.

Mr. Justice Jackson wrote a separate dissent.[24] He agreed with Mr. Justice Frankfurter that the Nevada judgment should have the same effect as a similar New York judgment. He also objected to the decision on the ground that it made the Nevada decision half good and half bad, whereas the Constitution commands that it be given full faith and credit.

The majority opinion[25] frankly recognizes that the result of the decision is to make divorces divisible,[26] putting some of the elements[27] within the control of the state of the husband's domicile and leaving others in the control of the state of the wife's domicile. "It accommodates the interests of both Nevada and New York in this broken marriage by restricting each state to the matters of her dominant concern."[28]

The complexity of the American law of divorce may be attributed to the widely divergent local views with regard to divorce and the fact that a wife is allowed to maintain a domicile separate from that of her husband.[29] Since we allow separate domiciles, and it would be undesirable to override local policy with respect to divorce, a compromise seems to be the only solution for the courts.[30] This was accomplished in the instant case by apportioning to the two states jurisdiction over the legal components of the marital status in which they have a dominant interest.[31]

It was established in *Williams v. North Carolina*[32] in overruling

[24] *Id.* at 1220 (dissenting opinion).

[25] *Id.* at 1218.

[26] This principle was suggested by Mr. Justice Douglas in a footnote in Williams v. North Carolina, 317 U. S. 287 n. 4 (1942). In Esenwien v. Pennsylvania 325 U. S. 279 (1945) he was joined by Justices Black and Rutledge in a concurring opinion in which he advocated the divisible divorce and declared that there is a "basic difference between the problem of marital capacity and the problem of support."

[27] The decision only divides divorce into two elements, 1. marital capacity, and 2. duty of support. There may be additional elements such as; capacity of the wife to remarry, property rights of the husband, property rights of the wife, duty of husband to support the wife, duty of husband to support the children.

[28] Estin v. Estin, 68 Sup. Ct. at 1218 (1948).

[29] Cook, *Is Haddock v. Haddock Overruled?* 18 IND. L. J. 165 (1942).

[30] Advocacy of legislative reform is beyond the scope of this note, which is intended to be confined to the technical legal problems involved. So much has already been written on that subject that further comment would be wasted effort. Bingham, *In the Matter of Haddock v. Haddock,* 21 CORNELL L. Q. 393, 405 (1936).

Uniformity in divorce is for Congress, not the courts. *See* Mr. Justice Frankfurter, dissenting, Sherrer v. Sherrer, 68 Sup. Ct. 1097, 1101 (1948).

[31] The divisible divorce has been advocated by several imminent legal writers. Among these are: Cook, *Is Haddock v. Haddock Overruled?,* 18 IND. L. J. 165 (1942); Bingham, *In the Matter of Haddock v. Haddock,* 21 CORNELL L. Q. 393 (1936); Powell, *And Repent at Leisure,* 58 HARV. L. REV. 930 (1945); Barnhard, *Haddock Reversed—Harbinger of the Divisible Divorce,* 31 GEO. L. J. 210 (1943).

[32] 317 U. S. 287 (1942).

Haddock v. Haddock,[33] that the state of the husband's domicile has sufficient interest in his marital status to restore his marital capacity. The instant case establishes that the state where the stay-behind spouse has long been domiciled has an interest in making the husband continue a prior obligation to support her, which interest is stronger than any to be accredited to the state of the husband's new domicile.[34]

Only by refusing to recognize that the marital status is made up of several elements can it be argued that full faith and credit has been denied the Nevada decree.[35] The marital capacity of Mr. Estin was restored by the Nevada decree not only by Nevada law but under the law of New York. On the other hand, his marital duty to support was not affected because Nevada had not the legal power to decree dissolution in that particular.

The dissenting justices cited no authority[36] for their proposition that New York must give the same effect to the Nevada decree as it would a similar New York decree. Such is not required by the full faith and credit clause[37] and the statute passed pursuant thereto.[38] The requirement is that decrees "shall have such faith and credit . . . as they have by law or usage in the courts of the state from which they are taken."[39] That such is the law was dramatically shown by the case of *Roche v. McDonald*,[40] wherein Washington was required to enforce an Oregon judgment based on a Washington judgment which, by the law of Washington, was absolutely void. The proposition of those dissenting could only be sustained under some vague notion of due process or equal protection of the law. But assuming that the charge of discrimination is true, is it not reasonable that New York should provide that a New York support order does not survive a domestic decree of divorce, while it does survive a foreign decree?[41] In a domestic divorce

[33] 201 U. S. 562 (1906).

[34] Powell, *And Repent at Leisure*, 58 HARV. L. REV. 930, 954 (1945).

[35] Bingham, *In the Matter of Haddock v. Haddock*, 21 CORN. L. Q. 393, 421 (1936); Barnhard, *Haddock Reversed—Harbinger of the Divisible Divorce*, 31 GEO. L. J. 210, 222 (1943).

[36] Mr. Justice Frankfurter stated that New York could not consistently with the first Williams case discriminate against Nevada decrees. *See* Estin v. Estin, 68 Sup. Ct. at 1220 (1948) (dissenting opinion).

[37] U. S. CONST. ART. IV §1, provides: "Full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state. . . ."

[38] 1 STAT. 122 (1790), as amended, 2 STAT. 299, 28 U. S. C. §687 (1946).

[39] *Ibid.*

[40] 275 U. S. 449 (1927).

[41] The question as to domestic divorce has been answered in the affirmative by some state courts. *See, e.g.*, Toncray v. Toncray, 123 Tenn. 476, 131 S. W. 977 (1910) ("Nor is there any necessary connection between divorce and alimony; a divorce may be granted without alimony; and alimony may be granted where no divorce is decreed."). But where the wife has secured a foreign divorce the cases uniformly deny alimony on the ground that it is an incident of the marriage relation, that severance of the relation terminates the right to alimony. *See, e.g.*

proceeding, New York would have an opportunity to protect its interest in the support of its domiciliary, whereas it would have no such opportunity in a foreign proceeding.

Confined to its facts, the holding of the case is that the state of the husband's domicile has no power to adjudicate the rights of the absent wife in a prior support order, issued by the state of last marital domicile which had jurisdiction over both parties. Thus a serious question is posed. If there had been no support order, could Mrs. Estin have maintained a suit for support in New York? Language in the instant case,[42] and in the concurring opinion in the *Esenwein* case[43] would give an affirmative answer. But this language was not necessary for the holding in either case, both of which involved prior support orders. An affirmative is also indicated by the fact that the Court refused to pass on the credit due the New York decree by Nevada, but chose to put the decision on the broader ground that Nevada had no power to adjudicate rights in the New York decree.[44] But it must be noted that the Court characterized the New York decree as an intangible property right,[45] over which jurisdiction can be obtained only by personal jurisdiction over the owner. Would the mere right of the wife to receive support in New York be classed as such a property right?[46]

If the rule of the instant case applies to the duty of support, even in the absence of a domestic decree, then the case of *Haddock v. Haddock*[47] was either never overruled or has been revived. On its precise facts, all that was decided by that case was that the state of the wife's domicile need not give effect to a foreign divorce decree insofar as that decree purported to destroy the husband's duty under the domestic law to furnish economic support to his former wife, *as though she were still his wife.*[48] The case did not decide that Mr. and Mrs. Haddock were still husband and wife. Since the *Williams* case[49] was not concerned with the duty of support, the statement of Mr. Justice Douglas in that case that, "*Haddock v. Haddock* is overruled" may be classified as

McCoy v. McCoy, 191 Iowa 973, 183 N. W. 377 (1921); Schweinwald v. Schweinwald, 231 App. Div. 757, 246 N. Y. Supp. 33 (2d Dep't 1930). If the wife appears in the foreign proceeding she is bound by that decree both as to marital capacity and duty of support. Coe v. Coe, 68 Sup. Ct. 1094 (1948).

[42] 68 Sup. Ct. 1213, 1218 (1948).

[43] 325 U. S. 279, 282 (1945).

[44] Estin v. Estin, 68 Sup. Ct. 1213, 1218 (1948).

[45] *Ibid.*

[46] It may be easier for Nevada to refuse to enforce a foreign cause of action than it would be to refuse to enforce a foreign judgment. *Compare* Roche v. McDonald, 275 U. S. 449 (1927), *with* Union Trust Co. v. Grosman, 245 U. S. 412 (1918).

[47] 201 U. S. 562 (1906).

[48] Cook, *Is Haddock v. Haddock Overruled?* 18 IND. L. J. 165 (1942); Bingham, *In the Matter of Haddock v. Haddock*, 21 CORN. L. Q. 393 (1936); Powell, *And Repent at Leisure*, 58 HARV. L. REV. 930 (1945).

[49] 317 U. S. at 304 (1942).

dictum.[50] Due to the logical and verbal difficulty of granting the wife separation and alimony if the marriage relation still existed, the case was interpreted by many as holding that the foreign divorce was good for no purpose.[51] But this difficulty is obviated by recognizing the marital status as being composed of separate elements.

In 1943, Professor Holt made a prediction that seems to have come true: "Yet the bones of *Haddock v. Haddock* remain—unbleached and unpulverized . . . courts in states that do not favor free and easy termination of marriage may still find in the osseous remains of *Haddock v. Haddock* material to fashion some puzzles for the Supreme Court of the United States to solve. . . ."[52]

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Courts—Federal Jurisdiction—State Court to Be Followed in Diversity Cases under the Erie Rule

Prior to *Erie Railroad Co. v. Tompkins*[1] federal courts in diversity of citizenship cases were bound to follow statutes of a state in determining the state law under the doctrine of *Swift v. Tyson*.[2] The *Erie* case, interpreting the Rules of Decision Act,[3] held that federal courts must also follow the case law of the state as announced by its highest court. "The Erie R. Co. case left open, however, the more difficult question of the effect to be given to decisions by the lower state courts on points never passed on by the highest state court."[4] The Supreme Court of the United States has, since the *Erie* case, held that a federal court is not free to disregard the law of the state merely because it has not been announced by the highest court of the state, but that, in the absence of more persuasive data of what the state law is, they must follow the decision of an intermediate state court.[5]

[50] Cook, *Is Haddock v. Haddock Overruled?*, 18 IND. L. J. 165 (1942); Powell, *And Repent at Leisure*, 58 HARV. L. REV. 930 (1945).
[51] *See e.g.*, BEALE, CONFLICTS OF LAWS §§113.10-113.12.
[52] Holt, *The Bones of Haddock v. Haddock*, 41 MICH. L. REV. 1013, 1036 (1943).

[1] 304 U. S. 64 (1938).
[2] 16 Pet. 1 (U. S. 1842).
[3] Judiciary Act of (Sept. 24) 1789, §34, REV. STAT. §721, 28 U.S.C. §725 (1946).
[4] King v. Order of United Commercial Travelers of America, 68 Sup. Ct. 488, 491 (1948).
[5] Six Companies of Calif. v. Joint Hy. Dist., 311 U. S. 180 (1940); West v. American T. & T. Co., 311 U. S. 223 (1940); Stoner v. New York Life Ins. Co., 311 U. S. 464 (1940). Accordingly, federal courts have followed decisions of intermediate courts in the following states:
California—Six Companies of Calif. v. Joint Hy. Dist., 311 U. S. 180 (1940).
Delaware—United Automatic Rifles Corp. v. Johnson, 41 F. Supp. 86 (D. Mass. 1941.
Illinois—Pullman Std. Can Mfg. Co. v. Local Union U.S.W., 152 F. 2d 493 (C.C.A. 7th 1945).
Missouri—Stoner v. New York Life Ins. Co., 311 U. S. 464 (1940).