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John Sikes Johnston

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Foreign Divorce—Fraudulent Domicile—Full Faith and Credit

In *Donnell v. Howell*¹ the North Carolina Supreme Court held that the full faith and credit clause² did not apply to a foreign divorce decree obtained through fraudulent allegations of domicile in an Alabama court. A brief review of prior decisions seems appropriate in order to put this case in context.

The first of the celebrated *Williams v. North Carolina*³ decisions involved a criminal prosecution for bigamous cohabitation. The United States Supreme Court held that for a state to have jurisdiction to grant a divorce, at least one of the parties must be domiciled in the state which awards the decree. The second *Williams* decision⁴ held that full faith and credit need not be accorded to a foreign divorce decree obtained in an *ex parte* proceeding where neither party was domiciled in the awarding state. This blow to the efficacy of the full faith and credit doctrine was somewhat softened by the subsequent decisions of *Sherrer v. Sherrer*⁵ and *Coe v. Coe*.⁶ In these two decisions, the Court held that decrees obtained by fraudulent

due for services rendered in a prior action, and *B* alleged negligence on the part of *A* in the management and conduct of that action. In the prior litigation the court ruled that *A* had not been negligent in discovering after the trial that a certain decree upon which the opposing party based his claim had been rendered in vacation time, and was, therefore, void, and ruled that *B* was entitled to a bill of review. This finding was held conclusive in the *A-B* suit, with no discussion of party or privity requirements.

In the principal case the clients alleged that they had been damaged in the sum of \$4203.54. Subsequent to the reported opinion the case was settled for \$2200.00. Letter From Rodman & Rodman, Attorneys For Plaintiffs, to Sam S. Woodley Jr., December 6, 1962. While it would have been difficult for plaintiffs to prove there was a meritorious defense, the court having ruled as a matter of law, taking the evidence in a light most favorable to plaintiffs, that there was none; still defendant was undoubtedly reluctant to have the case go to trial.

¹ 257 N.C. 175, 125 S.E.2d 448 (1962).

² U.S. Const. art. IV, § 1.

³ 317 U.S. 287 (1942).

⁴ *Williams v. North Carolina*, 325 U.S. 226 (1945). For excellent discussions of the total effect of *Williams* and subsequent litigation, see Baer, *So Your Client Wants a Divorce!*, 24 N.C.L. Rev. 1 (1945); Baer, *The Aftermath of Williams v. North Carolina*, 28 N.C.L. Rev. 265 (1950); Baer, *The Law of Divorce Fifteen Years After Williams v. North Carolina*, 36 N.C.L. Rev. 265 (1958).

⁵ 334 U.S. 343 (1948). In *Sherrer* the defendant's attorney denied the allegations of the plaintiff's domicile in the Florida divorce proceedings. However, there was no subsequent attempt to disprove the domicile.

⁶ 334 U.S. 378 (1948). *Coe* was a companion case to *Sherrer* and involved a Nevada proceeding wherein the allegations of domicile were admitted by the defendant.

jurisdiction in a sister state could not be collaterally attacked and were entitled to full faith and credit where: (1) there was participation in the divorce action by the defendant, (2) full opportunity to contest the jurisdictional issue of domicile was afforded the defendant, and (3) where the decree would not be subject to collateral attack in the awarding state. When these requirements have been met, *res judicata* applies to the jurisdictional issue of domicile. Regardless of whether the issue of domicile was actually litigated, the decree is entitled to full faith and credit.⁷

In the principal case, the plaintiff-wife brought a partition proceeding⁸ concerning certain real property. She alleged that the property was held with the defendant-husband as tenants in common as a result of an Alabama divorce. The defendant answered that the divorce was null and void because plaintiff was a bona fide resident of North Carolina at the time of the divorce. Therefore they still held the property as tenants by the entirety, and no partition proceedings could be enforced.⁹ The defendant had entered a general and personal appearance in the Alabama proceedings by signing a notice of waiver and answer to the complaint. By this instrument, the defendant waived all service of process, submitted himself to the jurisdiction of that court, and admitted that the plaintiff was a bona fide resident of Alabama. The plaintiff replied that the effect of the defendant's having signed the instrument was: (1) to estop the defendant from attacking the decree, and (2) to entitle the decree to full faith and credit.¹⁰

It was clear from the facts that neither the plaintiff nor the defendant had ever been domiciled in Alabama. The court found that there was no estoppel.¹¹ The court then held that the decree

⁷ 334 U.S. at 351-52.

⁸ N.C. GEN. STAT. § 46-3 (1950) allows such special proceedings for joint tenants or tenants in common. When the parties are divorced, they become tenants in common rather than remaining tenants by the entirety. *McKinnon, Currie & Co. v. Caulk*, 167 N.C. 411, 83 S.E. 559 (1914).

⁹ The rule in North Carolina appears to be that a tenant by the entirety cannot force partition without the consent of the spouse. See, *e.g.*, *Davis v. Bass*, 188 N.C. 200, 208, 124 S.E. 566, 570 (1924) (dictum); *Jones v. W. A. Smith & Co.*, 149 N.C. 318, 319, 62 S.E. 1092, 1093 (1908) (dictum).

¹⁰ 257 N.C. at 177, 125 S.E.2d at 450.

¹¹ There could be no true estoppel. The plaintiff knew all of the material facts and had not been misled. She was actively trying to enjoy the benefits of her fraudulent act. The defendant was merely trying to resist. Although the defendant had participated with her in the fraud, to estop him

was subject to collateral attack and that full faith and credit did not apply. The *Sherrer* and *Coe* cases were distinguished on the grounds that in the *Donnell* case: (1) the defendant was not at the trial, (2) the defendant did not participate in the trial, and (3) the defendant was not represented by counsel at the trial.¹² The first two reasons given for refusing to invoke the *Sherrer* doctrine seem clearly insufficient. In a United States Supreme Court decision,¹³ the defendant's sole participation in the divorce action was by attorney, and the Court held the decree was not subject to collateral attack. The *Sherrer* and *Coe* cases were cited as controlling. The third reason given would seem equally insufficient because the only requirement laid down by the *Sherrer* case is that there be participation by the defendant. There appears to be no requirement of a certain degree of participation. There was participation in *Donnell*. By his answer and waiver, the defendant entered a general and personal appearance and became a party to the suit.¹⁴ The defendant clearly participated, but failed to take advantage of his opportunity to contest the issue of domicile.¹⁵

Perhaps a better attempt at evading the effect of the *Sherrer* doctrine could have been made. It could have been argued that the failure of the defendant to be at the trial, or to have a lawyer, may have resulted in there not having been a full opportunity to contest the issue of domicile.¹⁶ Still another device would be that the decree would be subject to collateral attack in the awarding state, Alabama,

"would be [productive of] an offense against public morals and good conscience, a reflection upon the integrity of the court, and productive of perjury." *Id.* at 185, 125 S.E.2d at 455. For comprehensive treatments of the doctrine of estoppel with respect to the validity of foreign divorce decrees, see, e.g., Annots., 175 A.L.R. 538 (1948), 153 A.L.R. 941 (1944), 140 A.L.R. 914 (1942), 122 A.L.R. 1321 (1939), 109 A.L.R. 1018 (1937).

¹² *Id.* at 187, 125 S.E.2d at 457.

¹³ *Johnson v. Muelberger*, 340 U.S. 581 (1951).

¹⁴ In order to overcome the validity of a foreign decree, it would seem that the attacking party has the burden of showing that the defendant never made an appearance in the divorce action. *Cook v. Cook*, 342 U.S. 126, 128 (1951) (dictum).

¹⁵ "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 [to litigate the issue of domicile] under such circumstances should be permitted to provide a basis for subsequent attack in the court of a sister State on a decree valid in the State in which it was rendered." *Sherrer v. Sherrer*, 334 U.S. 343, 352 (1948).

¹⁶ See Note, *Participation by Defendant Spouse in a Foreign Divorce Action: State Court Interpretation of the "Sherrer Doctrine,"* 34 IND. L.J. 592, 597 (1959).

and hence not subject to full faith and credit under the *Sherrer-Coe* decisions.¹⁷

It should not be overlooked that the exact fact situation in *Donnell* has not been before the United States Supreme Court, *i.e.* where the sole participation by the defendant was the signing of a written instrument.¹⁸ In this fact situation, the states have reached different results. Some states grant full faith and credit,¹⁹ while others, like North Carolina have refused to extend full faith and credit to this fact situation.²⁰ And still other courts may or may not give full faith and credit, depending on the circumstances of the case.²¹

¹⁷ In *Hartigan v. Hartigan*, 272 Ala. 67, 128 So. 2d 725 (1961), the parties appeared in an action to modify a decree which had been effective for six years. When the trial judge found that both parties admitted that neither had ever been domiciled, and that they had consequently worked a fraud on the awarding court, he vacated the decree. The Supreme Court of Alabama affirmed. The requirement of the full faith and credit doctrine is that a sister state give the decree as much effect as it would be given in the awarding state. When Alabama vacates its decrees, why not let North Carolina do the same to an Alabama decree on an identical fact situation?

In *Hudson v. Hudson*, 69 N.J. Super. 128, 173 A.2d 721 (Super. Ct. Ch. 1961), the court refused to examine a decree on the basis of *Hartigan*. For discussions concluding that this approach would be impermissible, see Comment, 47 CORNELL L.Q. 459, 468-69 (1962); Ross & Crawford, *Gresham's Law of Domestic Relations: The Alabama Quickie*, 27 BROOKLYN L. REV. 224, 246 (1961). See also, Note, 36 TUL. L. REV. 154 (1961). *But cf.* *Rosenbluth v. Rosenbluth*, 34 Misc. 2d 290, 228 N.Y.S.2d 613 (Sup. Ct. 1962) which held that a third party could attack an Alabama divorce decree on this basis and was not precluded by full faith and credit.

For evidence that Alabama is concerned with the fraudulent domicile problem, see Ross & Crawford, *supra* at 241-42.

¹⁸ In both *Sherrer* and *Coe* the parties were both present at the proceedings and represented by counsel. In *Johnson v. Muelberger*, 340 U.S. 581 (1951), the defendant was represented by counsel. In *Cook v. Cook*, 342 U.S. 126 (1951), there was no determination of the extent of the defendant's participation.

¹⁹ *In re Raynor's Estate*, 220 Cal. App. 2d 715, 332 P.2d 416 (3d Dist. 1958) (defendant's sole participation was by signing a notice and waiver); *In re Day's Estate*, 7 Ill. 2d 348, 131 N.E.2d 50 (1956); *Boxer v. Boxer*, 12 Misc. 2d 205, 177 N.Y.S.2d 85 (Supp. Ct. 1958), *aff'd*, 7 App. Div. 2d 1001, 184 N.Y.S.2d 303 (1959), *aff'd mem.*, 7 N.Y.2d 781, 163 N.E.2d 149 (1959) (defendant signed a power of attorney); *Chittick v. Chittick*, 332 Mass. 554, 126 N.E.2d 495 (1955) (sole participation was having lawyer at the proceedings).

²⁰ *Gherardi De Parata v. Gherardi De Parata*, 179 A.2d 723 (D.C. Munic. Ct. App. 1962); *Eaton v. Eaton*, 227 La. 992, 81 So. 2d 371 (1955); *Pelle v. Pelle*, 229 Md. 160, 182 A.2d 37 (1962); *Brasier v. Brasier*, 200 Okla. 689, 200 P.2d 427 (1948). *Cf.* *Davis v. Davis*, 259 Wis. 1, 47 N.W.2d 338 (1951) where the court required physical participation by the defendant and refused to grant full faith to the decree, even though the defendant was represented by counsel at the trial.

²¹ In New Jersey full faith was denied where the plaintiff obtained a power of attorney from the defendant and obtained a foreign divorce.

In *Sherrer* and *Coe* there were indications that the decisions would add certainty to the marital status.²² As the above cases bear witness, certainty has not resulted. The courts are seizing on insignificant factual variations to avoid *Sherrer* and to prevent their own divorce laws from becoming ineffective.

The *Sherrer* case and other related decisions by the United States Supreme Court may be beneficial in that their effect is to allow quicker divorces which are needed in our modern society.²³ Perhaps the Constitution demands that the full faith and credit doctrine be upheld.²⁴ However it seems that the merits lie elsewhere. It is questionable that the full faith and credit clause should be used to defeat a state's divorce laws. The marriage relation is a basic institution of our society, and a state should be able to prescribe its own laws reflecting this relationship. Other states, for monetary or other considerations, should not be able to defeat the laws of sister states in proceedings tainted with fraud. Although the court's reasoning in *Donnell* may be faulty, the result nevertheless seems desirable because such a fraudulent proceeding was nullified. But the practical effect of *Donnell* is only that the parties now have to either hire a lawyer, or be at the trial personally, to be protected by full faith and credit.

What is needed to remedy this situation is clear. The United States Supreme Court should re-examine and overrule the *Sherrer* and *Coe* cases and return to the *Williams* decision in order to prevent this fraudulent circumvention of the individual state's divorce law. The integrity of our divorce laws should not be defeated by a twisted and hollow use of the full faith and credit doctrine.

JOHN SIKES JOHNSTON

Staedler v. Staedler, 6 N.J. 380, 78 A.2d 896 (1951). But where the defendant got his own attorney, full faith was granted. *Hudson v. Hudson*, 69 N.J. Super. 128, 173 A.2d 721 (Super. Ct. Ch. 1961), *Schlemm v. Schlemm*, 31 N.J. 557, 158 A.2d 508 (1960).

In the District of Columbia, full faith was denied where the defendant, in a distraught condition, signed a power of attorney. *Ryan v. Ryan*, 139 F. Supp. 98 (D.D.C. 1954), *aff'd*, 230 F.2d 838 (D.C. Cir. 1956). But full faith was granted when the defendant signed a notice of waiver and entry of appearance. *Drinkwater v. Drinkwater*, 111 F. Supp. 559 (D.D.C. 1953).

²² For a discussion of the merits of this "certainty," see 334 U.S. at 363, 368-69 (dissenting opinion).

²³ See generally Sumner, *Full Faith and Credit for Divorce Decrees—Present Doctrine and Possible Changes*, 9 VAND. L. REV. 1-4 (1955).

²⁴ 334 U.S. at 355.