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# Divorce -- Direct and Collateral Attack -- Suit by Strangers

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In Florida it is said that the causes which create the necessity must fall under one of three distinct categories.[14] Generally, as to the problem of what constitutes an extreme and absolute necessity, there is no acceptable categorical answer, as indicated.[15] It may be determined by the discretion of the trial judge, and may range from what the judge thinks are prejudicial remarks on the part of the defendant's attorney,[16] to a dismissal of a jury which could not agree after long deliberation.[17] In considering this aspect of what is an absolute necessity, we should be careful not to become over-zealous in our protection of the rights of the accused,[18] but we should equally bear in mind the protection of the public represented by the state. In the absence of any concrete principle, it appears that jeopardy will attach unless there arises some reason why the court cannot function.[19]

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## DIVORCE—DIRECT AND COLLATERAL ATTACK—SUIT BY STRANGERS

Strangers to a divorce decree sought to attack it directly by a bill in the nature of a bill of review on the ground that the decree was obtained by fraud. Except for such divorce decree, appellants would be the sole heirs of the deceased. *Held,* such an attack may be made by a stranger to a decree when his interests are substantially affected thereby, but the decree will be set aside only insofar as his interests are concerned. *Jones v. Goolsby,* 68 So.2d 89 (Miss. 1953).

Subject to certain limitations, a court having jurisdiction of divorce cases may, for good cause shown and upon due proceedings, seasonably set aside or modify its own judgments or decrees of divorce on its own motion or on the application of one of the parties.[1] Whether a particular decree should or should not be opened,[2] modified,[3] or annulled,[4] rests largely within the discretion of the court.[5]

14. State *ex rel.* Alcala v. Grayson, 156 Fla. 435, 436, 23 So.2d 484, 485 (1945) (The causes which create the necessity must fall under one of three heads, namely: "(1) where the court is compelled by law to be adjourned before the jury can agree upon a verdict; (2) where the prisoner by his own misconduct places it out of the power of the jury to investigate his case correctly, thereby obtaining an unfair advantage of the state, or is himself . . . prevented from being able to attend to his trial; (3) where there is no possibility for the jury to agree upon and return a verdict.").

15. See note 7 *supra.*

16. Mack v. Comm., 177 Va. 921, 15 S.E.2d 78 (1941).

17. Smith v. State, 135 Fla. 835, 186 So. 203 (1939).

18. Kepner v. U.S., 195 U.S. 100, 136 (1904).

19. State *ex rel.* Alcala v. Grayson, *supra* note 14.

1. Ex *parte* Favors, 225 Ala. 675, 145 So. 146 (1932); Brook v. Baker, 208 Ark. 654, 187 S.W.2d 169 (1945); Reimers v. McElree, 238 Iowa 791, 28 N.W.2d 569 (1947).

2. Mitchell v. Mitchell, 97 N.J.Eq. 298, 127 Atl. 185 (Ct. Err. & App. 1925), *reversing,* 96 N.J.Eq. 29, 125 Atl. 490 (Ch. 1924).

3. Kunker v. Kunker, 230 App. Div. 641, 246 N.Y.Supp. 118 (3d Dep't 1930).

4. Walker v. Walker, 198 Wash. 150, 87 P.2d 479 (1939).

5. Keller v. Keller, 139 Ind. 38, 38 N.E. 337 (1894).

It is well established by the decisions and the text-writers[6] that when relief is sought against a decree which has been obtained by fraud, the same may be granted under the following circumstances:

(1) Any *party* to a decree that has been obtained by fraud may attack it by motion, petition or bill of review, and may have the decree vacated and set aside for all purposes.[7]

(2) *One who is not a party* to the decree, but a stranger thereto, may not, in a *collateral* proceeding, attack a decree that is valid on its face, even though it has been obtained by fraud, nor may he maintain an ordinary bill of review. Such a stranger's exclusive right and remedy is to attack the fraudulent decree by a bill in the nature of a bill of review.[8]

At the outset it is necessary to distinguish between a "direct" and a "collateral" attack on a decree. If an action or proceeding is brought for the purpose of impeaching or overturning the decree, it is a "direct" attack upon it;[9] but if the action or proceeding has an independent purpose and contemplates some other relief or result, although the overturning of the decree may be important or even necessary to its success, then the attack is "collateral."[10]

Ordinarily, the right to have an invalid divorce decree set aside existed only in favor of the injured spouse,[11] and does not exist in a person who is a stranger to the suit.[12] This ancient rule is now relaxed, and those who were not parties but who may be affected by decrees, may file such a bill. They are then properly termed supplemental bills in the nature of bills of review.[13] Bills of review are still confined to parties to the original cause, whereas a bill having the same general purpose but filed by or against a stranger to the decree is considered as a bill in the nature of a bill of

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6. STORY'S EQUITY PLEADINGS § 424 (9th ed. 1879).
7. GRIFFITH'S CHANCERY PRACTICE § 644, p. 708 (2d ed. 1872).
8. Kirby v. Kent, 172 Miss. 457, 160 So. 569 (1935); Sykes v. Sykes, 162 Miss. 487, 139 So. 853 (1932).
9. Hall v. Huff, 122 Ark. 67, 182 S.W. 535 (1916); Howard v. Howard, 27 Cal.2d 319, 163 P.2d 439 (1945); Bowers v. Brazell, 27 N.M. 685, 205 Pac. 715 (1922); Bragdon v. Wright, 142 S.W.2d 703 (Tex. Civ. App. 1940).
10. Lieber v. Lieber, 239 Mo. 1, 143 S.W. 458 (1911); Lough v. Taylor, 97 W. Va. 180, 124 S.E. 585 (1924).
11. *In re* Newman, 75 Cal. 213, 16 Pac. 887 (1888)(in which the court held that the party aggrieved by a divorce decree is the only party who can attack it in any way, thereby holding that a third person seeking letters of administration on the estate of an adopting father could not attack the validity of the divorce of the adopted child's mother); Tyler v. Aspinwall, 73 Conn. 493, 47 Atl. 755 (1932); Sykes v. Sykes, 162 Miss. 487, 139 So. 853 (1932).
12. Schuster v. Schuster, 51 Ariz. 1, 73 P.2d 1345 (1937); Long v. Stratton, 50 Ariz. 427, P.2d 939 (1937); Thomas v. Lambert, 187 Ga. 616, 1 S.E.2d 443 (1939); Waldo v. Waldo, 52 Mich. 94, 17 N.W. 710 (1883). *Contra*: Rawlins v. Rawlins, 18 Fla. 345 (1881)(child born after divorce decree was granted is a proper party plaintiff to have it set aside).
13. Wynn v. First National Bank of Dothan, 229 Ala. 639, 159 So. 58 (1934); Cunningham v. Ward, 224 Ala. 288, 140 So. 351 (1932); Golden Gate Development Co. v. Ritchie, 140 Fla. 103, 191 So. 202 (1939); People v. Sterling, 357 Ill. 354, 192 N.E. 229 (1934); Singleton v. Singleton, 47 Ky. 340 at 344 (1843).

review,[14] and may be brought without leave of court.[15] In those jurisdictions where the rule has been relaxed, it has been held that relief can be granted on application of a parent[16] or child[17] of one of the parties.[18] The more generally accepted rule is that an exception exists for the purpose of establishing property rights[19] or to purge the court records of decrees which it had wrongfully been misled into making.[20] In these cases of affected interests, a stranger who had no standing to appeal from the rendition of the decree, is allowed to attack the decree collaterally for fraud.[21]

The courts do not agree as to when or under what circumstances and conditions a decree adversely affects the rights of a stranger to the decree so as to enable him to attack it. They do not agree as to whether the right or interest adversely affected must have accrued prior to the time when the decree was rendered,[22] or whether it is sufficient that such interest accrued thereafter, but prior to the institution of the suit in which the validity of the divorce decree is impeached.[23] While some jurisdictions hold that the right must have existed prior to rendition of the decree,[24] others hold that it does not depend upon injury at the time of its entry, but prevails where interests are subsequently adversely affected by the decree.[25] Still other jurisdictions hold that the proceeding is maintainable only in the county where the divorce was granted;[26] others hold that it

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14. United States v. Kunz, 5 F.R.D. 391 (S.D.N.Y. 1946); Andrew v. Heckler, 132 Fla. 759, 182 So. 251 (1938); Thomas v. Lambert, 187 Ga. 616, 1 S.E.2d 443 (1939); Columbia Casualty Co. v. Mitchell, 329 Ill. App. 325, 68 N.E.2d 208 (1946).

15. Miller v. Miller, 234 Ala. 453, 175 So. 284 (1937); Nation v. Nation, 206 Ala. 397, 90 So. 494 (1921); Koberlein v. First National Bank of St. Elmo, 376 Ill. 450, 34 N.E.2d 388 (1941); STORY'S EQUITY PLEADINGS, § 426 p. 400.

16. Phillips v. Phillips, 6 Pa. D. & C. 81 (1925).

17. Mintz v. Mintz, 83 Pa. Super. 85 (1924).

18. Lipham v. State, 62 Ga. App. 174, 22 S.E.2d 532 (1942) (Florida decree subject to attack by state of Georgia); Adams v. Adams, 152 Mass. 290, 28 N.E. 260 (1891); Deyette v. Deyette, 92 Vt. 305, 104 Atl. 232 (1918).

19. McGuiness v. Superior Court of San Francisco, 196 Cal. 2220, 237 Pac. 42 (1925); Russell v. Russell, 129 Fla. 866, 177 So. 280 (1937); Richardson v. King, 157 Iowa 287, 135 N.W. 640 (1912); *In re* Lindgren's Estate, 293 N.Y. 18, 55 N.E.2d 849 (1944) (regardless of validity of decree between parties thereto, minor child could challenge validity of Florida divorce decree). *But see*, Baugh v. Baugh, 38 Mich. 59, 26 Am. Rep. 495 (1877).

20. Cohn v. Stanford, 131 Cal. App. 463, 21 P.2d 464 (1933); *In re* Newman, 75 Cal. 213, 16 Pac. 887 (1888); Smith v. Smith, 173 Ga. 718, 161 S.E. 254 (1931); *In re* Goldberg's Estate, 288 Ill. App. 203, 5 N.E.2d 863 (1937), *cert. denied*, 303 U.S. 693 (1937); Kirby v. Kent, 172 Miss. 457, 160 So. 569 (1935) (holding that perjury is not ground for a collateral attack); Owens v. Owens, 32 N.M. 445, 259 Pac. 822 (1927).

21. Pinkston v. Schuman, 210 Ark. 896, 198 S.W.2d 66 (1946); Senor v. Senor, 272 App. Div. 306, 70 N.Y.S.2d 909 (1st Dep't 1947), aff'd, 297 N.Y. 800, 78 N.E.2d 20 (1948); Conklin v. Conklin, 179 Misc. 766, 39 N.Y.S.2d 825 (Sup. Ct. 1943); Lough v. Taylor, 97 W.Va. 180, 124 S.E. 585 (1924); 1 FREEMAN, JUDGEMENTS 636 (5th ed. 1925).

22. Kirby v. Kent, 172 Miss. 457, 160 So. 569 (1935).

23. deMarigny v. deMarigny, 43 So.2d 442 (Fla. 1949).

24. See note 22 *supra*.

25. Old Colony Trust Co. v. Porter, 324 Mass. 581, 88 N.E.2d 135 (1949).

26. Michael v. Post, 21 Wall. 398 (U.S. 1874); State *ex rel.* Willys v. Chillingworth, 124 Fla. 288, 168 So. 249 (1936).

may be attacked outside the jurisdiction of its rendition:[27] The jurisdictions split as to whether the alleged defect must appear on the face of the record;[28] some allow extrinsic evidence to be introduced.[29] The majority of jurisdictions hold that the decree may be set aside after the death of one of the parties.[30] Two states have held otherwise; that an action for divorce is purely personal, and that upon the death of either party the subject matter of the action is eliminated and the decree cannot be thereafter set aside.[31]

There is authority that holds that distribution of property is merely incidental to and is not sufficient interest to allow for a collateral attack upon a divorce decree.[32]

In the principal case, the court had no precedent decision of its own courts to follow. The nearest similar case[33] involved a *collateral* attack and so was distinguishable. So the court followed the law as set out in a Massachusetts[34] and in a Florida case[35] wherein it was held that a stranger to a fraudulent decree may attack the same and have it set aside. However, the procedure followed must be a direct attack and by a bill in the nature of a bill of review. Also that the stranger can only seek to have the decree so restrained as to be inoperative with respect to his own interests only,[36] and even then he cannot have the decree vacated if another remedy is available to meet his needs without disturbing the status apparently established by the decree.[37] Also that it is immaterial

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27. Adams v. Adams, 154 Mass. 290, 28 N.E. 260 (1891).

28. Rich v. Mentz Township, 134 U.S. 632 (1890); *in re* McNeil's Estate, 155 Cal. 333, 100 Pac. 1086 (1909); Crossman v. Vivienda Water Co., 150 Cal. 575, 89 Pac. 335 (1907); *accord*, State *ex rel.* Friedrich v. Howell, 156 Fla. 163, 23 So.2d 153 (1945); Ennis v. Giblin, 147 Fla. 113, 2 So.2d 382 (1941); Fiehe v. R. E. Householder Co., 98 Fla. 627, 125 So. 2 (1929); Lucy v. Deas, 59 Fla. 552, 52 So. 515 (1910); Salt Lake City v. Industrial Comm'n, 82 Utah 179, 22 P.2d 1046 (1933).

29. Crouch v. H. L. Miller & Co., 169 Cal. 341, 146 Pac. 880 (1915); Sache v. Gillette, 101 Minn. 169, 112 N.W. 386 (1907); Ferguson v. Crawford, 70 N.Y. 253, 26 Am. Rep. 589 (1877).

30. Savage v. Olson, 9 So.2d 363 (Fla. 1942); Baugh v. Baugh, 38 Mich. 59, 26 Am. Rep. 495 (1877). See, Urquhart v. Urquhart, 272 App. Div. 60, 69 N.Y.S.2d 57 (1st Dep't 1947) (conclusion justified on ground that state's interest in preserving the legitimacy of a child was a circumstance paramount to other considerations); Fowler v. Fowler, 190 N.C. 536, 130 S.E. 315 (1925).

31. Richardson v. King, 157 Iowa 287, 135 N.W. 640 (1912); Ruger v. Heckel, 85 N.Y. 483 (1881); Lloyd v. Lloyd, 40 Pa. Co. 595 (1912); Stuart v. Cole, 42 Tex. Civ. App. 478, 92 S.W. 1040 (1906); Bater v. Bater, 5 B.R.C. 717, 4 Ann. Cases 854 (1906). *But see*, Williams v. North Carolina, 317 U.S. 287 (1942).

32. Ford v. Ford, 218 Ala. 15, 117 So. 462 (1928); Tyler v. Aspinwall, 73 Conn. 493, 47 Atl. 755 (1932); Lieber v. Lieber, 239 Mo. 1, 143 S.W. 458 (1911); Dwyer v. Nolan, 40 Wash. 459, 82 Pac. 746 (1905).

33. Kirby v. Kent, 172 Miss. 457, 160 So. 569 (1935); Sykes v. Sykes, 162 Miss. 487, 139 So. 853 (1932).

34. Old Colony Trust Co. v. Porter, 324 Mass. 581, 88 N.E.2d 135 (1949).

35. Michael v. Post, 21 Wall. 398 (U.S. 1874); State *ex rel.* Willys v. Chillingworth, 124 Fla. 288, 168 So. 249 (1936).

36. Old Colony Trust Co. v. Porter, 324 Mass. 581, 88 N.E.2d 135 (1949). *But see* Tucker v. Fisk, 154 Mass. 574 at 576, 577, 28 N.E. 1051 (1891); Jones v. Davenport, 46 N.J.Eq. 237, 19 Atl. 22 (Ct. Err. & App. 1890).

37. Old Colony Trust Co. v. Porter, 324 Mass. 581, 88 N.E.2d 135 (1949).

whether his right existed, either before, at the time of, or after rendition of the decree. The reason such attack is permitted is not because interested persons were injured in any property rights at the time the decree was rendered; it is simply because, if the decree is void, they are not bound by it and someone is attempting to use it against their present interests.[38]

There is a vast difference between the available remedies against invalid decrees, depending upon who the parties are that desire to attack the decree. The mode of procedure in such cases and circumstances under which the exercise of such power can be invoked successfully, varies in the different jurisdictions. For these reasons the decisions in one state afford but little aid in determining matters of this kind in another jurisdiction.

Since in a great majority of divorces neither party wishes to disturb the decree, if their acquiescence should be allowed to have the effect supposed, third persons may be affected in their property and in their sacred personal rights without ever having had an opportunity to be heard. Therefore, although "all the world is not a party to a divorce proceeding,"[39] those whose interests may be affected thereby should be allowed their day in court.

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## EQUITY—MASTERS—OBJECTION TO REFERENCE

Over objection, a chancellor ordered a reference to a master to report findings of fact and conclusions relative to applicable law. On petition for writ of certiorari to quash the reference, *held*, the chancellor was in effect delegating the *decision* of the case to the master, and this could not be done over the objection of a party. Slatcoff v. Dezen, 74 So.2d 59 (Fla. 1954).

A reference to a master is an equity proceeding which has for its purpose the determination of disputed issues.[1] An order of reference may be made at any stage of a suit,[2] and all persons in interest are entitled to attend and be notified thereof.[3] A master is an assistant of the chancellor;[4] his function is the performance of acts, either judicial or ministerial in nature, which the chancellor, in accordance with equity practice, may require of him.[5] Reference is to be distinguished from arbitration in that the latter allows the substitution of a decision by an

38. *Ibid.*
39. Williams v. State of North Carolina, 325 U.S. 226 at 231 (1945).
1. 19 AM. JUR., *Equity* § 364 (1952); 23 R. C. L. 284 (1929).
2. Field v. Holland, 6 Cranch 8 (U.S. 1810); *accord*, Pepper v. Addicks, 153 Fed. 383 (E.D. Pa. 1907); Briggs v. Neal, 120 Fed. 224 (4th Cir. 1903).
3. Williams v. Morgan, 111 U.S. 684 (1884); Eslava v. Lepretre, 21 Ala. 504, 56 Am. Dec. 266 (1852).
4. Richardson v. Frazier, 247 Litt. (Ky.) 59, 56 S.W.2d 708 (1933).
5. Schuchardt v. People, 99 Ill. 501, 39 Am. Rep. 34 (1881).