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the expiration of the three judicial days allowed for moving for a rehearing.

4. If the judgment is signed prior to the disposition of timely motions for new trial or rehearing, and these motions are not disposed of until after the third judicial day, the "effective date" of the signature is the date of the disposition of such motions.

5. With the exception of the two instances provided for in Article 543,[36] the delays allowed for motions for new trial and rehearing are computed from the date of the rendition of the judgment.[37]

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JUDICIAL ATTEMPTS AT UNIFORM DIVORCE POLICY

Divorce is an omnipresent fact which cannot be ignored. From the legal viewpoint, a problem arises when a state is forced to recognize the divorce of a sister state which contravenes the public policy of the recognizing state. At first glance it might seem that this is an unwarranted projection of the policies of one state, which has lenient divorce laws, into a sister state where divorce is virtually impossible. Yet, irrespective of the facility with which the divorce is obtained, if that divorce is not recognized everywhere, there results a dangerous instability in personal status and its incidents. In recent years the United States Supreme Court has expanded the area in which recognition of divorce decrees is required until with its latest pronouncement on the subject—that where there has been opportunity to litigate the jurisdictional issue of domicile, the recognizing state must give full faith and credit, without itself inquiring into the jurisdictional issue—it may have penetrated too deeply to extricate itself with grace.[1]

36. La. Code of Practice of 1870, as amended by La. Act 302 of 1942.

37. It has already been explained that although this article mentions only *new trial*, it is believed that it would be interpreted to include the delays for both new trial and rehearing.

1. Sherrer v. Sherrer, 334 U.S. 343, 68 S.Ct. 1087, 92 L.Ed. 1429 (1948); Coe v. Coe, 334 U.S. 378, 68 S.Ct. 1094, 92 L.Ed. 1451 (1948). For a discussion of these cases, see Carey and MacChesney, Divorces by the Consent of the Parties and Divisible Divorce Decrees (1948) 43 Ill. L. Rev. 608; Merrill, The Utility of Divorce Recognition Statutes in Dealing with the Problem of Migratory Divorce (1949) 27 Texas L. Rev. 293; Reese and Johnson, The Scope of Full Faith and Credit to Judgments (1949) 49 Col. L. Rev. 153; Notes (1948) 15 Brooklyn L. Rev. 165; (1948) 23 Tulane L. Rev. 269; (1948) 1 Okla. L. Rev. 287; (1949) 14 Mo. L. Rev. 103; Paulsen, Migratory Divorce: Chapters III and IV (1948) 24 Indiana L.J. 25.

See also Rice v. Rice, 9 C.C.H., U.S.S.C. Bull. 1253, No. 117 (April 18, 1949).

In order to arrive at a just and workable solution, it is of compelling import that there be an awareness of the interests involved. In the last analysis the interests of the individual should be in harmony with the public policies espoused by the state, for it is the state's purpose to function for the general welfare of its citizenry.

Certainly, all concerned—the individual parties, the state with the difficult divorce laws, and the state with the less stringent laws—affirm the need for uniformity in divorce status. Such uniformity would render certain the status of the children of the marriage and of the parties who remarry in reliance on the divorce.

But here the harmony ends. Parties who are seeking divorce, although desiring a valid divorce entitled to recognition, seldom have inhibitions as to its procurement. Where money is no obstacle, the speediest procedure is the most popular. If the suit is uncontested by the other spouse, a consent decree in effect is obtained.

The conflict among the states stems from the wide extremes in divorce laws,[2] which are a reflection of differences in public policy. Should a state whose public policy is opposed to granting divorces for convenience be forced to recognize a divorce granted by a sister state where the plaintiff spouse is a mere resident of ninety days? Should a state be forced to recognize a consent decree granted upon personal appearance of both parties at the domicile of neither? Should a state be precluded from collaterally attacking a divorce decree simply because the parties themselves are bound by res judicata? Should other interested third parties (e.g., a second spouse) be allowed to attack the validity of a foreign divorce judgment, which the spouses themselves would be precluded from attacking?

Marriage is more than just a civil contract. It is the marriage status more than any other that creates the basic pattern of our society. The state has an interest which is more vital than that of any single individual. For this reason laws are passed regulating marriage and divorce, just as laws are passed prohibiting any contract which violates public policy.[3]

2. South Carolina allows no absolute divorce and New York only for adultery. Most states either allow divorce only for very restricted causes or require a fairly long residence. However, Idaho and Nevada require only six weeks; Arkansas and Wyoming, sixty days; and Florida, ninety days. For more complete statistics, see Ireland and Galindez, Divorce in the Americas (1947) and Mackay, Marriage and Divorce Law Simplified (1940).

3. See the discussion of Mr. Justice Field in Maynard v. Hill, 125 U.S.

It is the aim of this comment to harmonize these superficially conflicting interests without doing violence to traditional concepts of public policy by attempting to show (1) that a divorce is an in rem and not an in personam proceeding, (2) that the doctrine of res judicata is not applicable in an in rem proceeding where the adjudicating court actually had no jurisdiction of the res, (3) that if res judicata is applied and, on the basis of that doctrine, full faith and credit required, as in the cases of *Coe v. Coe*[4] and *Sherrer v. Sherrer*,[5] the decision of the recognizing state is open to attack under the due process clause of the Fourteenth Amendment.

Divorce Is an In Rem Proceeding

In an in personam action service of process is an essential prerequisite since through such service the court acquires jurisdiction. With some few exceptions[6] personal service on the defendant is required within the state exercising jurisdiction, unless such service is waived by the express consent or appearance of the defendant.

In an in rem proceeding, it is not jurisdiction over the person which is essential but jurisdiction over the res, obtained by having the res within the control of the court. Personal service is not necessary, and as long as reasonable measures are provided through which the defendant would probably receive actual notice of the pending suit, due process is met. It is elementary that a judgment rendered by a court lacking jurisdiction is void, whether the suit be one in personam or in rem.[7]

It has long been recognized that domicile is the jurisdictional basis for a valid divorce proceeding. If the suit were strictly in personam, the mere presence of the parties would be sufficient to vest jurisdiction. Domicile would be unnecessary. Nevertheless, the Supreme Court, although sometimes wavering between the in personam and in rem theories or a rejection of both, has consistently held domicile obligatory to confer jurisdiction in divorce cases.

190, 210, 8 S.Ct. 723, 729, 31 L.Ed. 654, 659 (1888). See also Mr. Justice Murphy's dissent in Williams v. North Carolina I, 317 U.S. 287, 308, 63 S.Ct. 207, 217, 87 L.Ed. 279, 291 (1942).

4. 334 U.S. 378, 68 S. Ct. 1094, 92 L.Ed. 1451 (1948).

5. 334 U.S. 343, 68 S.Ct. 1087, 92 L.Ed. 1429 (1948).

6. E.g., Hess v. Pawloski, 274 U.S. 352, 47 S. Ct. 632, 71 L. Ed. 1091 (1927); International Shoe Company v. State of Washington, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95, 161 A.L.R. 1057 (1945).

7. Pennoyer v. Neff, 95 U.S. 714, 24 L.Ed. 565 (1877); Thompson v. Whitman, 85 U.S. 457, 21 L.Ed. 897 (1873).

There must be a res for a proceeding to be in rem. In a divorce proceeding it is the marital res, the status of the marriage relation, that is before the court. In *Williams v. North Carolina II*[8] the Court flatly stated for the first time that a divorce action, although possessing some in rem characteristics, is not a proceeding in rem. Nevertheless, until the *Coe* and *Sherrer* decisions, no case was inconsistent with the view that a divorce is an in rem proceeding in which the domicile of only one of the parties places the marital res within the jurisdiction of the court. This theory has been attacked on the ground that where the parties are domiciled in separate states, each state has control over one-half of the marital res. In such a case, it is argued, the in rem theory would produce one of two undesirable results: (1) Neither state could exercise jurisdiction since the entire res is not before the court;[9] (2) actually only one state could exercise jurisdiction, which theoretically both states possess through their control of one-half the marital res.[10] Although it is true under the second argument that both states have jurisdiction over the marriage status, and, therefore, the power to dissolve it, once it has been dissolved there is nothing left for the other to affect.[11]

In *Cheever v. Wilson*[12] the wife left the matrimonial domicile in Washington and removed to Indiana, where the husband appeared personally in a divorce suit brought by her. The validity of this divorce was attacked collaterally and the Court, after announcing that a wife may acquire a separate domicile whenever necessary and proper, upheld the divorce, saying that the Indiana court had jurisdiction over the parties and the subject matter.

This holding can be rationalized either on the in rem or in personam theory. Because the husband appeared in the proceeding, he waived personal service, and so the requirements for an in personam action were met. The requirements for an in rem action were also met, if it is accepted that the domicile of only one of the parties places the marital res within the jurisdiction of the court.

In *Atherton v. Atherton*[13] the Court recognized as valid a

8. 325 U.S. 226, 232, 65 S.Ct. 1092, 1096, 89 L.Ed. 1577, 1582 (1945).

9. Vreeland, Validity of Foreign Divorces (1938) particularly at 28.

10. Mr. Justice White in Haddock v. Haddock, 201 U.S. 562, 577, 26 S.Ct. 525, 530, 50 L.Ed. 867, 872 (1906).

11. Beale, Constitutional Protection of Decrees for Divorce (1906) 19 Harv. L. Rev. 586, 591.

12. 70 U.S. 108, 19 L.Ed. 604 (1869).

13. 181 U.S. 155, 21 S. Ct. 544, 45 L.Ed. 794 (1901).

Kentucky divorce which was awarded to the domiciliary husband against the nonresident wife, who had not appeared. However, the decision was expressly restricted to the facts at issue, that is, a case in which the matrimonial domicile as well as the plaintiff's domicile is in the divorcing state. Although this suit could conceivably be construed as one in personam on the theory that the wife had not acquired a separate domicile when she was forced to leave Kentucky because of the husband's misconduct, and that service on her in New York by mail was sufficient, it would be an awkward application of the concept.[14] Apparently the Court applied the in rem theory, although expressly recognizing that it was not basing jurisdiction solely on the domicile of the husband. Thus, without taking a positive stand, the Court considered the marital res before the court of the state in which both plaintiff and defendant were theoretically domiciled under the fiction of matrimonial domicile, but where only the plaintiff was actually domiciled.

In *Bell v. Bell*[15] and *Streitwolf v. Streitwolf*,[16] where neither plaintiff nor defendant was a domiciliary of the state in which the divorce was sought, and where the defendant spouse had been served only by mail outside the state, full faith and credit was not required. These cases afford no positive support for either theory, as the divorces there granted violate both the in personam and in rem theories. There was no personal service of the defendant spouse; there was no domicile of the plaintiff.

In *Andrews v. Andrews*[17] the Court refused to uphold a divorce obtained by the husband in South Dakota, which state was neither his domicile nor the matrimonial domicile, although the wife appeared in the proceeding through counsel. Consent of both parties could not confer jurisdiction over the subject matter any more than could the consent of one party in the *Bell* and *Streitwolf* cases.[18] The basis of jurisdiction in the *Andrews* case

14. Although not expressly declaring that this was a proceeding strictly in rem, the Court did recognize that this was not a suit in personam. "The rule as to the notice necessary to give full effect to a decree of divorce is different from that which is required in suits in personam." 181 U.S. 155, 162, 21 S.Ct. 544, 547, 45 L.Ed. 794, 799.

15. 181 U.S. 175, 21 S.Ct. 551, 45 L.Ed. 804 (1901).

16. 181 U.S. 179, 21 S.Ct. 553, 45 L.Ed. 807 (1901).

17. 188 U.S. 14, 23 S. Ct. 237, 47 L.Ed. 366 (1902).

18. Although this case was questioned in Coe v. Coe, 334 U.S. 378, 68 S.Ct. 1094, 92 L.Ed. 1451 (1948) and Sherrer v. Sherrer, 334 U.S. 343, 68 S.Ct. 1087, 92 L.Ed. 1429 (1948), it was questioned not on the ground that it was an in rem proceeding, but on the theory that where the defendant appears in the proceedings, any issue upon which there is an opportunity to litigate is res adjudicata and cannot be collaterally attacked in a subsequent proceeding. This point will be discussed later.

appears to be the marital res, although again this can be deduced only negatively. However, it seems clear that if this were a suit in personam, since the defendant appeared in the proceeding, the South Dakota divorce would be valid and the question of domicile of the plaintiff would be immaterial.

Haddock v. Haddock,[19] expressly overruled in *Williams v. North Carolina I*,[20] had held invalid a divorce obtained by the husband in Connecticut against the non-domiciliary wife where there was no appearance and no personal service. The Court distinguished the *Atherton* case on the ground that there the divorcing state was also the state of matrimonial domicile. The majority in the *Haddock* case had considered divorce as an in personam proceeding. The four dissenting justices thought it an in rem proceeding.[21] Since the *Haddock* case has been overruled, the reasoning of the dissent should be re-examined.

Thompson v. Thompson,[22] like the *Atherton* case, involved a divorce obtained by the husband in the state of his domicile and the matrimonial domicile. The decree was held valid, although, again, the Court might be distinguishing this situation by holding that the state of matrimonial domicile has jurisdiction over the absent spouse, the case seems more readily explainable on the basis of the in rem theory—that the marital res was before the court of the plaintiff's domicile.

Williams v. North Carolina I held that an ex parte divorce decree granted to a Nevada domiciliary against a North Carolina defendant was entitled to full faith and credit. *Williams v. North Carolina II* made it clear that the recognizing state could itself consider the question of domicile and refuse full faith and credit where there had been no bona fide domicile. The court in the first *Williams* case recognized that divorce proceedings are not in personam,[23] and in the second *Williams* case that they are not in rem.[24]

19. 201 U.S. 562, 26 S.Ct. 525, 50 L.Ed. 867 (1906).

20. 317 U.S. 287, 304, 63 S.Ct. 207, 216, 87 L.Ed. 279, 289 (1942).

21. Mr. Justice Brown, with whom concurred Mr. Justice Harlan, Mr. Justice Brewer, and Mr. Justice Holmes, 201 U.S. 562, 614, 26 S.Ct. 525, 546, 50 L.Ed. 867, 888 (1906).

22. 226 U.S. 551, 33 S.Ct. 129, 57 L.Ed. 347 (1913).

23. 317 U.S. 287, 298, 63 S.Ct. 207, 213, 87 L.Ed. 279, 286. "Hence the decrees in this case, like other divorce decrees, are more than in personam judgments. They involve the marital status of the parties. Domicil creates a relationship to the state which is adequate for numerous exercises of state power."

24. 325 U.S. 226, 232, 65 S.Ct. 1092, 1096, 89 L.Ed. 1577, 1582 (1945). "Although it is now settled that a suit for divorce is not an ordinary adversary proceeding, it does not promote analysis, as was recently pointed out, to label divorce proceedings as actions in rem."

This would seem to relegate divorce proceedings to some sort of quasi zone, which the Court frequently employs as an escape fiction, since in the second *Williams* case it is indicated that divorce has some of the characteristics of an in rem proceeding. Since the thesis apparently has been accepted sub silentio in all prior cases, that the domicile of one spouse is sufficient to place control of the marital res in the courts of the domiciliary state, there is no difficulty or incongruity in frankly admitting that the divorce proceeding is in rem, and not in personam or quasi in rem. Such an admission would probably obviate any future difficulties arising with respect to the scope and limitations of full faith and credit and res judicata, which of late have engaged the Court in dialectical wizardry.[25]

Despite the Court's statement that the in rem label should not be applied to divorce proceedings, *Williams II* presents no inconsistency. Had there been actual domicile of the plaintiff, the divorce would probably have been entitled to full faith and credit even though there was no appearance and no personal service of the defendant.

When an In Rem Proceeding Is an Exception to Res Judicata

If the conclusion can be accepted that the divorce action is to be treated as one in rem and not in personam, the sequel question is obvious. Is the doctrine of res judicata applicable to an in rem proceeding where the court adjudicating actually had no jurisdiction of the res?[26]

25. See Coe v. Coe, 334 U.S. 378, 68 S.Ct. 1094, 92 L.Ed. 1451 (1948) and Sherrer v. Sherrer, 334 U.S. 343, 68 S.Ct. 1087, 92 L.Ed. 1429 (1948). This point is discussed infra p. 522.

26. Actually all that the Court decided in the *Coe* and *Sherrer* cases was that only the parties to the suit were bound by the res judicata doctrine. The question remains open as to whether third parties, including the state, will also be brought within this rule. The confusion in which the *Coe* and *Sherrer* decisions leaves this aspect of the problem becomes apparent from a consideration of two New York cases subsequently decided. In both deMarigny v. deMarigny, 193 Misc. 189, 81 N.Y.S.(2d) 228 (1948), and Bane v. Bane, 80 N.Y.S.(2d) 641 (1948) an out of state divorce was granted in which both parties personally appeared and had full opportunity to contest the jurisdictional issues. Upon returning to New York the divorced husband remarried, and his second wife sued to annul their marriage on the ground that the divorce obtained against him by his first wife was invalid on jurisdictional grounds. The contention was that the *Coe* and *Sherrer* cases applied res judicata only between the parties and the rule was not controlling when a collateral attack was made by a third party. The *deMarigny* case held that this action was not foreclosed on the basis of the *Coe* and *Sherrer* cases, citing a formidable list of New York cases, and the statement in the *Williams* case "that those not parties to a litigation ought not to be foreclosed by the interested actions of others." The *Bane* case, decided just thirteen days later, without referring to the *deMarigny* case, took a contrary view, also citing a long list of New York cases.

In June of 1948 the United States Supreme Court rendered its decisions in the companion cases of *Coe v. Coe* and *Sherrer v. Sherrer.* In both cases the defendant spouse personally appeared; in the *Sherrer* case the issue of domicile was raised by the pleadings; in the *Coe* case it was not; but in both there was opportunity to litigate this issue. The Court held that under such circumstances the state court's decision that it had jurisdiction was res judicata, that "the doctrine of res judicata must be applied to questions of jurisdiction in cases arising in state courts involving the application of the full faith and credit clause where, under the law of the state in which the original judgment was rendered, such adjudications are not susceptible to collateral attack."[27]

Had there been no question of res judicata the Court would probably have held, as in the *Williams II* case, that the jurisdictional issue of domicile was open to collateral attack. If the actions were in personam, then certainly the doctrine of res judicata would apply, since the court actually had jurisdiction by virtue of the consent of the parties through appearance. However, if the actions were in rem, which all prior decisions would indicate is the correct designation, then it is immaterial as far as the validity of the judgment is concerned, whether the defendants appeared, and whether they had an opportunity to litigate the question of domicile. If jurisdiction in an in rem proceeding cannot be given by the consent of the plaintiff, as in the *Williams* case, neither can it be given by the consent of both spouses, which the *Coe* and *Sherrer* cases apparently allow.

An adjudication by a state court that it has jurisdiction cannot give it jurisdiction which in actuality it has not. If there is no actual domicile, the court has no jurisdiction; if the court has no jurisdiction, the judgment is void; if the judgment is void where rendered, it is not entitled to full faith and credit, irrespective of any doctrine of res judicata. And if the recognizing state is precluded from questioning the jurisdiction of the divorcing state, how can it ever be determined whether or not the judgment is void?

Article IV, Section 1, of the United States Constitution[28] requires that judicial proceedings in each state be given full

27. Sherrer v. Sherrer, 334 U.S. 343, 350, 68 S.Ct. 1087, 1090, 92 L.Ed. 1429, 1436 (1948).

28. "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."

faith and credit in the courts of every other state. The Act of May 26, 1790,[29] declares that judicial proceedings authenticated as there provided shall have such faith and credit given to them in every "court within the United States as they have by law or usage in the courts of the State from which they are taken." This statute broadened the constitutional mandate so that full faith and credit must be given to state judgments even in federal courts.[30]

Full faith and credit is predicated only upon the existence of a valid judgment. Therefore, it has been continuously recognized that a sister state may inquire into the jurisdictional bases of the court rendering the judgment, consistently with the requirements of full faith and credit.[31]

This is the point at which the res judicata principle comes into conflict with the theory of full faith and credit. Numerous cases have held that where an issue has been actually litigated, or where there has been opportunity to litigate it, that issue is res judicata in all other courts, and it is immaterial whether the issue be jurisdictional or not.[32]

The Court incorporated this general rule in the *Coe* and *Sherrer* cases and applied it to divorce cases with the result that consent decrees are condoned and encouraged. Each of the cases cited by the Court to sustain its position in the *Coe* and *Sherrer* cases is distinguishable, and a correct legal decision could have been reached, consistent with public policy and the full faith and credit clause, without going logically astray. The following cases were cited as precedent for the proposition that res judicata is applicable insofar as cases originating in the *federal* courts are concerned.

Since full faith and credit is applicable to federal as well as state court judgments,[33] no distinction can be made there.

Baldwin v. Iowa State Traveling Men's Association[34] was an action in personam, where the defendant had appeared to contest the jurisdictional issue. Surely, an in personam action, where

29. 1 Stat. 122, as amended (1790), 28 U.S.C.A. § 687.
30. Mills v. Duryee, 11 U.S. 481, 485, 3 L.Ed. 411, 413 (1813).
31. Ibid.; Thompson v. Whitman, 85 U.S. 457, 21 L.Ed. 897 (1873).
32. Baldwin v. Iowa State Traveling Men's Association, 283 U.S. 522, 51 S.Ct. 517, 75 L.Ed. 1244 (1931); Stoll v. Gottlieb, 305 U.S. 165, 59 S.Ct. 134, 83 L.Ed. 104 (1938); Treinies v. Sunshine Mining Company, 308 U.S. 66, 60 S.Ct. 44, 84 L.Ed. 85 (1939).
33. Hancock National Bank v. Farnum, 176 U.S. 640, 20 S.Ct. 506, 44 L.Ed. 619 (1899); Caterpillar Tractor Co. v. International Harvester Co., 120 F.(2d) 82, 139 A.L.R. 1 (C.C.A. 3rd, 1941).
34. 283 U.S. 522, 51 S.Ct. 517, 75 L.Ed. 1244 (1931).

the defendant has at least appeared in court, is different from an in rem proceeding where the res is not and has never been within the control of the court.

Stoll v. Gottlieb[35] was an in rem proceeding, in which the jurisdictional fact in dispute revolved around the interpretation of a statute, not the absence of the res. Can not a valid distinction be made between a fact which is strictly jurisdictional[36] and one which is only quasi-jurisdictional in nature?[37] *Chicot County Drainage District v. Baxter State Bank*[38] may be differentiated on the same point as *Stoll v. Gottlieb*.[39]

Sunshine Anthracite Coal Company v. Adkins[40] applied res judicata to a determination by a federal administrative agency, which was all that could be done under the dictates of the governing statute.[41] Certainly, this does not sustain the application of the doctrine in the *Coe* and *Sherrer* cases.

In *Jackson v. Irving Trust Company*[42] the point which was held res judicata was the definition of the word "enemy" in "The Trading with the Enemy Act,"[43] which is apparently a quasi-jurisdictional and not a purely jurisdictional determination.

35. 305 U.S. 165, 59 S.Ct. 134, 83 L.Ed. 104 (1938). This case involved the reorganization of a bankrupt in which the federal district court released a guarantor, who was present at the proceedings, from his guaranty on a bond. Later one of the bondholders, who had received notice but had not appeared, unsuccessfully petitioned the Court to set aside the order on the ground that it had not had jurisdiction under the federal bankruptcy statute.

36. As would be the case where there is no service or waiver or consent in an in personam proceeding, and no control over the res in an in rem proceeding. The Court, however, did indicate in dicta that this would be immaterial. "That determination is res judicata of that issue in this action, whether or not power to deal with the particular subject-matter was strictly or quasi-jurisdictional." 305 U.S. 165, 177, 59 S.Ct. 134, 140, 83 L.Ed. 104, 111 (1938).

37. See note 61, infra.

38. 308 U.S. 371, 60 S.Ct. 317, 84 L.Ed. 329 (1940). This case involved the reorganization of a bankrupt drainage district in the federal district court, in which proceedings the respondent bondholders had appeared and had opportunity to litigate the jurisdictional question. There was no actual litigation on the point, since at that time no part of the federal bankruptcy act had been declared unconstitutional; whereas at the time of the second suit contesting the jurisdictional point, it had; this, in fact, being the very bone of contention.

39. In order to determine whether it had jurisdiction the federal district court inquired into the scope of Section 77B of the Bankruptcy Act. 52 Stat. 840 (1938), 11 U.S.C.A. § 501 (1938).

40. 310 U.S. 381, 60 S.Ct. 907, 84 L.Ed. 1263 (1940). The Bituminous Coal Commission determined that a producer's coal was "bituminous" within the meaning of the Bituminous Coal Act, thus subjecting him to the 19½% sales tax. The producer challenged the jurisdiction of the Commission in a suit in the federal district court to enjoin collection of the tax.

41. Bituminous Coal Act of 1937, 50 Stat. 75 (1937), 15 U.S.C.A. § 828 (1937).

42. 311 U.S. 494, 61 S.Ct. 326, 85 L.Ed. 297 (1941).

43. 40 Stat. 411, 419 (1917), as amended, 42 Stat. 1511 (1923), 50 U.S.C.A. app. § 9(a).

Heiser v. Woodruff[44] was an in personam judgment in which the defendant had appeared to contest jurisdiction. This distinguishes it from the *Coe* and *Sherrer* cases.

The last case cited by the Supreme Court to sustain its proposition was *Forsyth v. Hammond.*[45] This decision is more nearly in point but is distinguishable since it does not rest solely on the doctrine of res judicata. Under an Indiana statute plaintiff's land had been annexed as part of the City of Hammond. This action was affirmed by the trial court and again upon appeal by the Indiana Supreme Court, which refused to sustain the contention of the plaintiff that this was a legislative, not a judicial matter, and that the courts had no jurisdiction to entertain the suit. When city taxes were assessed against the plaintiff, she applied to the United States District Court, on the ground of diversity of citizenship, for an injunction and again pleaded the jurisdictional question. Without any inquiry into the jurisdiction, the Court foreclosed further argument with the bar of res judicata. It should be noted that this case did not involve any fundamental jurisdictional elements but only the interpretation of a state statute. Aside from the res judicata argument, the Court's decision rested on another established rule, which was decisive. The Court said: "The matter in controversy is one peculiarly within the domain of state control. . . . The construction by the courts of a State of its constitution and statutes is, as a general rule, binding on the Federal courts. We may think that the Supreme Court of a State has misconstrued its constitution or its statutes, but we are not at liberty to therefore set aside its judgments."[46]

The preceding discussion indicates that there are differentiating factors between the cases cited and the *Coe* and *Sherrer* cases. The Court in the *Sherrer* case then proceeded to cite cases purporting to sustain the application of res judicata to *state* court judgments.[47]

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44. 327 U.S. 726, 66 S.Ct. 853, 90 L.Ed. 970 (1946). Petitioner had reduced his creditor's claim to judgment in a prior suit in the federal district court, in which suit respondent had appeared and contested the jurisdiction of the court on the ground that there had been no valid service of process. After the respondent was adjudicated bankrupt the petitioner filed suit in the federal district court to recover the debt on the basis of his judgment, and the jurisdictional question, which the respondent again attempted to raise, was declared res judicata.

45. 166 U.S. 506, 17 S.Ct. 665, 41 L.Ed. 1095 (1897).

46. 166 U.S. 506, 518, 17 S.Ct. 665, 670, 41 L.Ed. 1095, 1100.

47. Davis v. Davis, 305 U.S. 32, 59 S.Ct. 3, 83 L.Ed. 26, 118 A.L.R. 1518 (1938); American Surety Company v. Baldwin, 287 U.S. 156, 53 S.Ct. 98, 77 L.Ed. 231, 86 A.L.R. 298 (1932); Treinies v. Sunshine Mining Company, 308

Of these cases the most difficult to distinguish is *Davis v. Davis*.[48] The Court held the wife bound by the determination of the Virginia court that it had jurisdiction where the wife had personally appeared in the proceeding and challenged the domicile of the husband. The Court, however, did not specifically predicate its decision on res judicata. Furthermore, it added: "Nor can it be said that the domicile was not adequate to support, in virtue of the rule of full faith and credit established by Congress, a decree enforceable in the courts of the District of Columbia."[49] This statement recognizes that there actually was domicile, and that the decision that the wife was bound by the former adjudication in no way conflicted with the full faith and credit clause. Is not this an adequate point of distinction?

American Surety Company v. Baldwin[50] was an action in a state court against a surety on a supersedeas bond, in which the defendant appeared to contest the jurisdiction on the ground that no notice had been given him. On certiorari to the Supreme Court the jurisdictional determination was held res judicata. It is important to note that this was an in personam, not an in rem, proceeding, and one in which the defendant had actually appeared. Certainly a situation like this, in which the defendant waives notice, at least insofar as his special appearance to contest jurisdiction is concerned, is different from an in rem proceeding. Since the basis of in personam jurisdiction is valid service of process on the defendant, or an appearance which constitutes a waiver of such service, even where the defendant appears specially to contest jurisdiction it is at least a consent to have the court determine the jurisdictional question.[51] But in an in rem proceeding, jurisdiction cannot be conferred by appearance or consent of the defendant, since this does not confer jurisdiction over the res, which is essential.

Treinies v. Sunshine Mining Company[52] seems to refute more than to sustain the proposition articulated by the Court that res judicata must be applied to jurisdictional questions between the sister states. This case involved the ownership of stock belonging to the estate of the deceased. The superior court of Washing-

U.S. 66, 60 S.Ct. 44, 84 L.Ed. 85 (1939); Chicago Life Insurance Company v. Cherry, 244 U.S. 25, 37 S.Ct. 492, 61 L.Ed. 966 (1917).

48. 305 U.S. 32, 59 S.Ct. 3, 83 L.Ed. 26 (1938).

49. 305 U.S. 32, 41, 59 S.Ct. 3, 6, 83 L.Ed. 26, 30 (1938).

50. 287 U.S. 156, 53 S.Ct. 98, 77 L.Ed. 231, 86 A.L.R. 298 (1932).

51. See Medina, Conclusiveness of Rulings on Jurisdiction (1931) 31 Col. L. Rev. 238, 259. See also Farrier, Full Faith and Credit of Adjudication of Jurisdictional Facts (1935) 2 U. of Chi. L. Rev. 552, 571.

52. 308 U.S. 66, 60 S.Ct. 44, 84 L.Ed. 85 (1939).

ton awarded this stock to Pelkes, assignor of Treinies. The question of jurisdiction was actually litigated when Mrs. Mason, an Idaho domiciliary and the other claimant of the stock, applied to the Washington Supreme Court for a writ of prohibition to issue to the lower court for lack of jurisdiction, and was refused. Mrs. Mason had previously brought suit in the Idaho district court, which court, in proceeding to judgment after the Washington action, determined that the Washington court had not had jurisdiction and declared Mrs. Mason to be the owner of the stock. The Washington judgment was pleaded in bar. The Sunshine Mining Company, whose stock was in contest, then brought this bill of interpleader in the federal district court in Idaho, and Pelkes again pleaded the Washington judgment in bar. The United States Supreme Court held that the decree of the Idaho district court that the Washington court did not have jurisdiction was res judicata and binding on the federal court. But as to the right of the Idaho court to make this determination concerning its sister state, the Court said in dicta:

"The effectiveness of the Washington judgment as a bar depended upon whether the court which rendered it had jurisdiction after an order of distribution, to deal with settlements of distributees with respect to the assets of an estate. On consideration it was determined in the Idaho proceeding that the Washington court did not have this jurisdiction and that the stock of the mining company became the property of Mrs. Mason. In declining to give effect to the Washington decree for lack of jurisdiction over the subject matter, the Idaho court determined also the basic question raised by petitioner in the interpleader action. The contention of petitioner in the interpleader proceeding that the Idaho court did not have jurisdiction of the stock controversy because that controversy was in the exclusive jurisdiction of the Washington probate court must fall because of the Idaho decision that the Washington probate court did not have exclusive jurisdiction. *This is true even though the question of the Washington jurisdiction had been actually litigated and decided in favor of Pelkes in the Washington proceeding.*"[53] (Italics supplied.)

This declaration supports the view that even where the jurisdictional question was actually litigated a sister state may inquire into the question of jurisdiction before giving full faith and credit.

53. 308 U.S. 66, 76, 60 S.Ct. 44, 50, 84 L.Ed. 85, 92 (1939).

Nor does *Chicago Life Insurance Company v. Cherry*,[54] the last case cited by the Court in the *Sherrer* decision, sustain its statement. This was an in personam action in Tennessee to recover against an insurance company. The contention that there was no jurisdiction because there was no valid service of process was argued by the defendant in the Tennessee court. When the plaintiffs attempted to recover on this judgment in the Illinois court, the determination of this question was held res judicata. The defendant appealed to the United States Supreme Court on the ground that this was a denial of due process. It did not decide that full faith and credit must be given on the basis of the jurisdictional point being res judicata. This was not at issue, since the Illinois court had not refused to recognize the Tennessee decree. The Court said in dicta: "If the Tennessee judgment had been declared void in Illinois this court might have been called upon to decide whether it had been given due faith and credit."[55] Furthermore, this case, upon which the Supreme Court relies as precedent in the *Coe* and *Sherrer* cases, cited the *Andrews* case (which case is questioned in the *Coe* and *Sherrer* decisions) with approval.[56]

It is submitted that the considerations which are pertinent in determining the correct application of the doctrine of res judicata are the following.

(1) Is there any well established doctrine or public policy consideration other than res judicata that might carry as much or more weight with the court?[57]

(2) Is not the public policy of the state in divorce and other status cases stronger than in other types of cases?[58]

(3) Is a proceeding in personam involved, where the defendant has made a special appearance to contest the jurisdiction, or a proceeding in rem?[59]

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54. 244 U.S. 25, 37 S.Ct. 492, 61 L.Ed. 966 (1917).

55. 244 U.S. 25, 30, 37 S.Ct. 492, 493, 61 L.Ed. 966, 969 (1917).

56. 244 U.S. 25, 29, 37 S.Ct. 492, 493, 61 L.Ed. 966, 969 (1917).

57. See Forsythe v. Hammond, 166 U.S. 506, 17 S.Ct. 665, 41 L.Ed. 1095 (1897), where the Court also relied on the rule that a state court's interpretation of its statutes is binding on the federal courts. See also Davis v. Davis, 305 U.S. 32, 59 S.Ct. 3, 83 L.Ed. 26 (1938), where the Court recognized that there was sufficient domicile and no conflict with the full faith and credit clause.

58. See the discussion on public policy, supra p. 516.

59. Baldwin v. Iowa State Traveling Men's Association, 283 U.S. 522, 51 S.Ct. 417, 75 L.Ed. 1244 (1931); Heiser v. Woodruff, 327 U.S. 726, 66 S.Ct. 853, 90 L.Ed. 970 (1946); American Surety Company v. Baldwin, 287 U.S. 156, 53 S.Ct. 98, 77 L.Ed. 231 (1932); Chicago Life Insurance Company v. Cherry, 244 U.S. 25, 37 S.Ct. 492, 61 L.Ed. 966 (1917). There are several United States

(4) Is the doctrine being applied to strictly jurisdictional facts or quasi-jurisdictional facts?[60]

(5) Could these circumstances be considered an exception to the res judicata doctrine?[61]

The Due Process Whip in Divorce

When the principle of res judicata is applied to fundamental jurisdictional facts in an in rem proceeding, does this not result in a deprivation of property without due process of law under the Fourteenth Amendment? The resulting dilemma is serious—if the state refuses to recognize the judgment, it is violating the

Supreme Court cases, involving an in rem proceeding, where the defendant was either validly served or appeared, that refuse to apply the doctrine of res judicata to jurisdictional questions. See Valley v. Northern Fire & Marine Insurance Company, 254 U.S. 347, 41 S.Ct. 116, 65 L.Ed. 297 (1920), where after service of process, an insurance company was adjudged bankrupt in an involuntary proceeding in the federal district court in a default judgment. The defendant later questioned the jurisdiction of the Court in the form of a petition to revise in the circuit court of appeals. The Supreme Court said, "Courts are constituted by authority and they can not go beyond that authority, and certainly in contravention of it, their judgments and orders are regarded as nullities. They are not voidable, but simply void, and this even prior to reversal. . . . If consent can confirm jurisdiction, why not initially confer jurisdiction?" 254 U.S. 347, 353, 354, 356, 41 S.Ct. 116, 65 L.Ed. 297. See also Bank of Jasper v. First National Bank of Rome, Georgia, 258 U.S. 112, 42 S.Ct. 202, 66 L.Ed. 490 (1922), discussed infra p. 531.

60. See Noble v. Union River Logging Railroad, 147 U.S. 165, 13 S.Ct. 271, 37 L.Ed. 123 (1892), which makes this distinction. Strictly jurisdictional facts are those whose existence is necessary to the validity of the proceedings and without which the act of the court is null, for example, service of process on the defendant in an in personam proceeding (where there is no waiver or consent) or control of the res in proceedings in rem. Quasi jurisdictional facts are those "which are necessary to be alleged and proved in order to set the machinery of the law in motion, but which, when properly alleged and established to the satisfaction of the court, cannot be attacked collaterally. With respect to these facts, the finding of the court is as conclusively presumed to be correct as its findings with respect to any other matter in issue between the parties. Examples of these are the allegations and proof of the requisite diversity of citizenship, or the amount in controversy in a federal court, which, when found by such court, cannot be questioned collaterally; the existence and amount of the debt of a petitioning debtor in an involuntary bankruptcy. . . ." 147 U.S. 165, 173, 13 S.Ct. 271, 273, 37 L.Ed. 123, 126.

61. For example the exception of governmental immunity from suit. See United States v. United States Fidelity & Guaranty Company, 309 U.S. 506, 60 S.Ct. 653, 84 L.Ed. 894 (1940), where the following question was at issue: "Is a former judgment against the United States on a cross-claim in the United States District Court, which was entered without statutory authority and therefore without consent of the sovereign to be sued, fixing a balance of indebtedness to be collected as provided by law, res judicata in this litigation for the collection of the balance?" The Court refused to apply res judicata, saying, "The reasons for the conclusion that this immunity may not be waived govern likewise the question of res judicata. . . . Public policy forbids the suit unless consent is given, as clearly as public policy makes jurisdiction exclusive by declaration of legislative policy." 309 U.S. 506, 514, 60 S.Ct. 653, 657, 84 L.Ed. 894, 899.

full faith and credit clause; whereas if it recognizes the judgment, it is violating the due process clause. Certainly the two should not be at odds.

It has long been settled that where there has been no contestation of the jurisdictional question, even though a recital of jurisdiction is made in the record, a sister state may inquire into the jurisdiction of the court rendering judgment without thereby denying full faith and credit to that judgment.[62]

It is also apparently established that where there has been an appearance in an in personam proceeding, the jurisdictional determination is res judicata and the courts of a sister state must give full faith and credit without inquiring into the jurisdiction.[63] However, as explained earlier in this comment,[64] the result in these cases could never be a denial of due process, since in an in personam proceeding, any appearance by the defendant, though it be a special appearance, is at least a consent to the jurisdiction of the court for determining the special plea.

It is yet more firmly embedded in our law that an in personam judgment rendered without valid service of process on the defendant, or appearance of the defendant, is a violation of due process of law and is null from its rendition.[65]

The theory and public policy underlying the *Pennoyer*[66] decision are elementary. A court without jurisdiction cannot render a valid judgment, even though it declares that it does have jurisdiction. If such were not the rule, our system of justice would be paradoxical.

Whether the judgment be in personam or in rem, the underlying theory and public policy are the same. Jurisdiction in an in personam proceeding is based on valid service of process or appearance of the defendant; jurisdiction in an in rem proceeding is based on control of the res by the court. If a judgment rendered without jurisdiction in an in personam proceeding violates due process, why does not a judgment rendered without jurisdiction in an in rem proceeding violate due process? The reply is as elementary as the question. It does. It did, that is, until

62. Thompson v. Whitman, 85 U.S. 457, 21 L.Ed. 897 (1873); Williams v. North Carolina I, 317 U.S. 287, 63 S.Ct. 207, 87 L.Ed. 279 (1942); Williams v. North Carolina II, 325 U.S. 226, 65 S.Ct. 1092, 89 L.Ed. 1577 (1945).

63. Baldwin v. Iowa State Traveling Men's Association, 283 U.S. 522, 51 S.Ct. 417, 75 L.Ed. 1244 (1931); Heiser v. Woodruff, 327 U.S. 726, 66 S.Ct. 853, 90 L.Ed. 970 (1946).

64. Supra p. 522 et seq.

65. Pennoyer v. Neff, 95 U.S. 714, 24 L.Ed. 565 (1877).

66. Ibid.

the *Coe* and *Sherrer* decisions. This is precisely the approach adopted by Mr. Justice Frankfurter's dissent.[67]

It has been concluded that a divorce is an in rem proceeding, that the marital res is the thing involved, and that the court obtains control over this res through domicile of at least one of the parties. Thus, domicile is an essential jurisdictional fact. The appearance of the defendant cannot cure the absence of the marital res. It seems, therefore, that res judicata was mistakenly applied in the *Coe* and *Sherrer* cases and that consent of the parties is not sufficient to bring the marital res before the court.

It would be appropriate at this point to re-emphasize the distinction made between strictly jurisdictional and quasi-jurisdictional facts.[68] Without the former, the constitutional mandate of due process is violated, and res judicata, a creature of the common law, is no defense. Without the latter, due process is not violated; and, therefore, res judicata is properly applied.

It was recognized in *Bank of Jasper v. First National Bank of Rome, Ga.*[69] that where the res is not within the control of the court the judgment is void, and the special appearance of the parties to contest jurisdiction does not make it valid. Res judicata was not applied. This was an action in a federal district court by the indorsee of certificates of deposit, who was a Georgia domiciliary, against the maker bank at its domicile in Florida. The defendant pleaded res judicata on the basis of a prior Florida judgment declaring the certificate void. In the state court the indorsee had appeared specially to contest the validity of the constructive service. The United States Supreme Court refused to apply res judicata: (1) since there was no general appearance, there was no jurisdiction in personam; (2) since the res or certificates of deposit were not within the control of the Florida court, there was no jurisdiction in rem.

It is true that there was no general appearance by the defendant as in the *Coe* and *Sherrer* cases. It is also true that the special appearance was for the purpose of contesting in personam jurisdiction over the defendant, and not in rem jurisdiction. However, the opportunity to litigate all jurisdictional elements was present here just as in the *Coe* and *Sherrer* cases.

67. 334 U.S. 343, 356, 68 S.Ct. 1087, 1097, 92 L.Ed. 1429, 1439 (1948).

68. See note 60, supra.

69. 258 U.S. 112, 42 S.Ct. 202, 66 L.Ed. 490 (1922). For considerations of the possible conflict between res judicata as applied in the *Coe* and *Sherrer* decisions and the due process clause of the Fourteenth Amendment, see the following comments (1947) 18 Rocky Mt. L. Rev. 101, (1948) 36 Geo. L. J. 154, (1931) 31 Col. L. Rev. 238, (1935) 2 U. of Chi. L. Rev. 552, (1925) 24 Yale L.J. 886.

The *Coe* and *Sherrer* decisions have been relied upon in a number of state cases.[70] However, in only one such case, *Jennings v. Jennings*,[71] is the due process limitation expressly recognized. This case, involving only an intrastate divorce, raised no problem of conflict of laws or full faith and credit. But if the question of domicile is approached through the due process channel, it should be immaterial whether the divorce is purely intrastate or interstate. In this case neither the husband nor the wife was a domiciliary of Alabama. Nevertheless, the wife was suing the husband for divorce on the basis of an Alabama statute[72] which apparently allowed the suit. There was personal appearance of both parties and submission by defendant to the jurisdiction of the court. Despite this, the Alabama Supreme Court declared that there was no jurisdiction, since there was no domicile, saying, "domicile in the State gives the court jurisdiction of the marital status or res which the court must have in order to act. . . . Jurisdiction of the res is essential because the object of a divorce action is to sever the bonds of matrimony, and unless the marital status is before the court, the court cannot act on that status. . . . Furthermore it is recognized that unless one of the parties has a residence or domicile within the state, the parties cannot even by consent confer jurisdiction on the courts of that state to grant a divorce."[73] Insofar as the statute affected divorces it was held void, since the legislature cannot confer power on the courts which the state cannot confer on the legislature.

The court in the *Jennings* case cited *Williams v. North Carolina, Bell v. Bell, Andrews v. Andrews,* and *Sherrer v. Sherrer.* The *Sherrer* case would seem to indicate, however, that under these particular facts a consent decree would be valid (unless a distinction can be drawn between a case where there is clearly

70. Ross v. Ross, 79 Fed. Supp. 716 (N.D. Cal. 1948); Jennings v. Jennings, 36 So.(2d) 236 (Ala. 1948); Vickers v. State Bar of California, 196 P.(2d) 10 (Calif. 1948); Keller v. Keller, 212 S.W.(2d) 789 (Mo. 1948); Lagemann v. Lagemann, 196 P.(2d) 1018 (Nev. 1948); Jackson v. Jackson, 79 N.Y.S.(2d) 736, 274 App. Div. 43 (1948); Lynn v. Lynn, 82 N.Y.S.(2d) 397, 192 Misc. 720 (1948); Bane v. Bane, 80 N.Y.S.(2d) 641 (1948); deMarigny v. deMarigny, 193 Misc. 189, 81 N.Y.S.(2d) 228 (1948); Kahn v. Kahn, 49 S.E. (2d) 570 (S.C. 1948); Knox v. Knox, 199 P.(2d) 766 (Calif. 1948); Heard v. Heard, 82 N.E.(2d) 219 (Mass. 1948); Lilienthal v. Lilienthal, 192 Misc. 1022, 83 N.Y.S. (2d) 71 (1948).

71. 36 So. (2d) 236 (Ala. 1948).

72. This statute required a bona fide residence by plaintiff of one year where defendant was a non-resident, "provided, however, the provisions of this section shall not be of force and effect when the court has jurisdiction of both parties to the cause of action." Ala. Code (Supp. 1946) tit. 34, § 29.

73. Jennings v. Jennings, 36 So.(2d) 236, 237 (Ala. 1948).

no domicile and one where it is questionable) even where there was no actual domicile by either spouse. The Alabama court went deeper than the *Sherrer* case. It looked to the jurisdiction of the res and decided on the basis of due process (although due process was not expressly mentioned) that the court did not have jurisdiction over the intrastate divorce.

The decision in the *Jennings* case brings the problem, in its most extreme form, into bold relief. Will the Supreme Court follow the *Coe* and *Sherrer* decisions; will it expand them to include a situation like the *Jennings* case; or will it with the aid of the due process clause draw the states into line in molding a uniform divorce jurisprudence?

Conclusion

It is submitted that the utilization of the due process clause would serve the interests of all parties with a minimum of friction. Under this theory, the states with more narrow divorce laws could attack decrees granted in the "easy divorce states" on strictly jurisdictional grounds, whether or not the issues had been contested or adjudicated by the sister court. This should be a satisfactory adjustment, since it partakes little of compromise. It would only preclude a state from attacking quasi-jurisdictional facts which had been adjudicated. This apparently has been the law for a long time. Logically, the state not only could but must attack a decree where there is no jurisdiction. If it does not, due process will be violated.

The states with lenient divorce laws might voice vehement opposition to this theory initially. But their position is none the worse. It had always been the law, prior to the *Coe* and *Sherrer* decisions, that domicile is essential to give jurisdiction to grant a divorce. The states recognize this fundamental principle in their statutes.

The individuals immediately concerned would profit. Although the plaintiff in the divorce suit might be inconvenienced somewhat if he were forced to establish an actual domicile, he could nevertheless acquire it in the same short period, if he had bona fide intention. The defendant would always be protected by the due process remedy. Since this remedy is available in every kind of state action, and since all else must bow to the supremacy of the Constitution, the plaintiff is being deprived of nothing that is his due.

The federal government, together with the states and the individuals, would be accomplishing through jurisprudence what has heretofore been impossible to achieve through legislation—greater uniformity in divorce recognition, and greater certainty in divorced marital status.

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