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CONFLICTS OF LAW—DIVORCE—RES JUDICATA EFFECT OF DECREE AS TO THIRD PARTIES—Respondent had applied for a determination of petitioner's rights under the New York Decedent Estate Law,[1] which provides for the widow taking a statutory one-third share in her husband's estate after his decease. Respondent contended that petitioner was not a widow of decedent, as the prior divorce awarded against decedent in Florida was void because of failure to satisfy residence requirements. The evidence showed that the residence requirements had not been met, but also showed both of the parties to the divorce to have made appearances in the Florida court. The trial and intermediate courts held that respondent had no right to attack collaterally the foreign decree, but the New York Court of Appeals reversed.[2] On certiorari, *held,* reversed. The Court concluded, Justice Frankfurter dissenting, that under Florida law the respondent would have no standing to make a collateral attack on the Florida jurisdiction, and New York is obliged to act in the same manner. *Johnson v. Muelberger,* 340 U.S. 581, 71 S.Ct. 474 (1951).

The decision in the principal case settles a problem which has been the subject of intense discussion among courts and legal writers.[3] In order to appreciate the full significance of the decision, it is helpful to review briefly the developments leading up to this case. The Supreme Court, in *Davis v. Davis,*[4] clearly established that when the parties to a divorce proceeding litigate the jurisdiction of the court making the award, then that question is foreclosed from collateral attack by the parties in a subsequent action. Later, the principle of res judicata was applied against the parties in respect to jurisdictional authority even though jurisdiction was not a litigated question, providing both parties had made appearances and there had been an opportunity to question the jurisdiction of the court.[5] The decision in the principal case carries the doctrine of res judicata one step further and establishes that the full faith and credit clause, as implemented by statute,[6] requires a sister state to prevent collateral attack by third parties if such attack is not allowed in the jurisdiction where the decree was rendered. It should be noted that the role of the sister state court is different in this situation than when the sister state court is allowed to make a finding in respect to domicile when an ex parte divorce decree is in question, as here the find-

[1] 13 N.Y. Consol. Laws (McKinney, 1949) §18.

[2] Matter of Johnson, 301 N.Y. 13, 92 N.E. (2d) 44 (1950).

[3] Notes: 17 BROOKLYN L. REV. 70 (1950); 1951 WASH. UNIV. L.Q. 1 (1951); 19 FORDHAM L. REV. 327 (1950) which discusses the New York Court of Appeals decision of the principal case; 50 COL. L. REV. 833 (1950); Gaylord v. Gaylord, (Fla. 1950) 45 S. (2d) 507; Mussey v. Mussey, 251 Ala. 439, 37 S. (2d) 921 (1948); Rediker v. Rediker, 35 Cal. (2d) 796, 221 P. (2d) 1 (1950).

[4] 305 U.S. 32, 59 S.Ct. 3 (1938).

[5] Sherrer v. Sherrer, 334 U.S. 343, 68 S.Ct. 1087 (1948); Coe v. Coe, 334 U.S. 378, 68 S.Ct. 1094 (1948).

[6] Art. IV, §1, of the United States Constitution provides, "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 Effects thereof." Congress has performed this function by 62 Stat. L. 947 (1948), 28 U.S.C. (Supp. III, 1950) §1738.

ing is a matter of law and not of fact.[7] The sister state court, in allowing or refusing a subsequent collateral attack, must look to the law of the divorcing state. Although it may be said that the approach to the problem of collateral attack is now firmly established as a result of this decision, both court and counsel will be faced with a tremendous task in accurately applying it to specific cases. This very difficulty is evident in the principal case, as the error of the New York Court of Appeals was not in their approach to the problem, but rather, in their erroneous findings as to the existing law in the divorcing state.[8] Some courts refuse collateral attacks by third parties on the basis of privity with an original party who would be barred by reason of res judicata.[9] Other courts refuse collateral attack on the theory that the third party does not have sufficient interest to make such an attack, but even among these courts there is a variation of opinion as to the sufficiency of interest and the time when the interests vest.[10] It may easily be seen that a sister state court is liable to misconstrue the law of the divorcing state in extreme cases, which will require, in turn, further litigation of the issue. In the field of divorce law, where social policy calls for as much stability as possible, it is unfortunate that the state courts can not be given a more definite method of approaching the question of collateral attack by third parties. Courts and counsel alike may well recall Justice Jackson's remark: "confusion now hath made his masterpiece" in the field of divorce law.[11]

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[7] By virtue of the case of Williams v. North Carolina, 317 U.S. 287, 63 S.Ct. 207 (1942), it is established that a court may decree a binding ex parte divorce if one of the divorcing spouses has a bona fide domicile within the state. However, by the later case of Williams v. North Carolina, 325 U.S. 226, 65 S.Ct. 1092 (1945), it was held that a sister state may determine for itself whether a bona fide domicile did in fact exist in the divorcing state before giving effect to the foreign decree. This means, of course, that the finding of fact will bear materially on the recognition of the foreign decree. On the problem of domicile in general, see Frumer, "The Supreme Court and Domicile for the Purpose of Ex Parte Divorce Jurisdiction," 1 SYRACUSE L. REV. 267 (1949).

[8] State ex rel. Willys v. Chillingworth, 124 Fla. 274, 168 S. 249 (1936), was construed by the New York court as allowing third party collateral attack. The Supreme Court in the principal case disagrees with such an interpretation. A later Florida case, deMarigny v. deMarigny, (Fla. 1949) 43 S. (2d) 442, appears conclusively to express Florida law that collateral attack will not be allowed.

[9] Watson v. Watson, 172 S.C. 362, 174 S.E. 33 (1933) (holding privity); Matter of Lindgren, 293 N.Y. 18, 55 N.E. (2d) 849 (1944) (rejecting privity). Compare the seeming conflict in Estate of Davis, 38 Cal. App. (2d) 579, 101 P. (2d) 761 (1940) and Estate of Paul, 77 Cal. App. (2d) 403, 175 P. (2d) 284 (1946). Annotation of case authority in 12 A.L.R. (2d) 717 (1950).

[10] Old Colony Trust Co. v. Porter, 324 Mass. 581, 88 N.E. (2d) 135 (1949); Mumma v. Mumma, 86 Cal. App. (2d) 133, 194 P. (2d) 24 (1948); 49 C.J.S., Judgments §414 (1947). Annotation in 12 A.L.R. (2d) 717 (1950).

[11] Quoted by Justice Jackson in his dissenting opinion in Rice v. Rice, 336 U.S. 674 at 676, 69 S.Ct. 751 (1949).