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ATTACK ON DECREES OF DIVORCE *

Albert C. Jacobs†

III

A SECOND SPOUSE

Hitherto we have been concerned with the extent to which a decree is impeachable at the suit of one of the so-called "contestants" to the divorce litigation. But other parties, second spouses, children, personal representatives, grantees of a divorced party, and other third persons, may be affected; they may desire to question its efficacy. Are they controlled by the same principles of attack which govern the divorce litigants? Do these third persons all stand in the same position when they seek to assail the decree?

A marriage contracted during the lifetime of a spouse from whom there has been no effective divorce or annulment is void.[274] In general the marriage has no civil effects.[275] Such being the case, the second spouse would be entitled to a decree of nullity.[276] He could not be called upon to perform any of the marital obligations. To what extent, however, can he show that a divorce purporting to dissolve the marital status of a person whom he has subsequently "married" was ineffective to do so? How effective will a divorce be against his attack?

A. *Attack in F-1*

1. *On Non-Jurisdictional Grounds*

We have seen that fraud, duress, perjury, or collusion in the procurement of the decree are not available to the divorce parties collaterally. The only remedy is a direct proceeding by the one equitably entitled. If the divorce party fails to make such an attack, the decree

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[274] Cf. N. Y. Domestic Relations Law, § 6.

[275] See, however, La. Civ. Code (Dart. 1932), arts. 117, 118, where one or both spouses contract such a marriage in good faith. In regard to presumptions in favor of the validity of the second marriage, see JACOBS, CASES AND MATERIALS ON DOMESTIC RELATIONS 271-283 (1933).

[276] N. Y. Civil Practice Act (Cahill 1931), § 1134.

should be conclusive *as to him*. A third person, however, not a party to the divorce action, who could not appeal from the rendition of the decree, in some cases is allowed to attack the judgment for non-jurisdictional fraud, duress and collusion in a collateral proceeding. Freeman says, however, that

> "It is only those strangers who, if the judgment were given full credit and effect, would be prejudiced in regard to some pre-existing right, that are permitted to impeach the judgment." [277]

When and only when the divorce injuriously affects the third party can he impeach it collaterally for fraud.

In *Ruger v. Heckel*,[278] an annulment was denied the second husband who claimed that the divorce which the defendant had obtained from her former husband had been procured by collusion, fraud, and false testimony in regard to adultery. The plaintiff was not permitted to go behind the decree which was perfectly regular and valid on its face. The court pointed out that he had not been defrauded; that he had no such interest as would enable him to attack the divorce.[279] If, however, the marriage occurred before the divorce decree became final, an annulment has been granted to the second husband, and this even though the final divorce had been entered *nunc pro tunc*, as of a date preceding the marriage.[280] The husband was allowed to show that the court had no authority to make such entry. The *nunc pro tunc* decree being void, collateral attack was clearly permissible. In an action for divorce against the second husband the latter was precluded from setting up the invalidity of a divorce obtained by the plaintiff from her former spouse, on the ground of certain alleged procedural defects.[281]

A divorce defective because of non-jurisdictional factors, is gener-

[277] 1 FREEMAN, JUDGMENTS, 5th ed., § 319, p. 636 (1925).

[278] 85 N. Y. 483 (1881), affg. 21 Hun (N. Y. Sup. Ct.) 489 (1880). Accord: Ex parte Edwards, 183 Ala. 659, 62 So. 775 (1913).

[279] 85 N. Y. 483 at 484, per Danforth, J.: "In bringing this action the plaintiff meddled with a matter that did not concern him. . . . He has had the full benefit of his bargain. No one has questioned his title, and the record which he produces shows a judgment binding on both parties. . . . In refusing to listen to him the court does not aid in giving effect to a judgment obtained by fraud. It regards him as a suitor without a cause of action and rejects his petition because he is not aggrieved. . . ."

[280] Corbett v. Corbett, 113 Cal. App. 595, 298 P. 819 (1931).

[281] Robson v. Robson, 161 Mich. 293, 126 N. W. 216 (1910). The decree had been granted in less than four months from the filing of the complaint. The second husband had known of this defect from the beginning. The doctrine of "laches" was applied.

ally voidable and not void. It can therefore be collaterally attacked by a second spouse only if he can show that it injuriously affects him. Mere marriage with one of the parties to the divorce does not clothe him with a sufficient interest. His preexisting rights have not been impaired.

2. *On Jurisdictional Grounds*

On familiar principles a party to a judgment can attack it in F-1 on jurisdictional grounds only when it is void on its face. In the divorce litigation F-1 has found either expressly or by implication that the essential jurisdictional factors were present.[282] For the second spouse effectively to attack the decree he must show that the court lacked the requisite jurisdiction. Would it be fair to subject him to the restrictions which bind a party to the judgment, or is he to be allowed to prove, even *aliunde* the record, the absence of jurisdiction? In general, a third party can, in a collateral proceeding, show the absence of jurisdictional factors if he is able to prove that he was injured by the judgment. But can a second spouse of one of the divorced parties make such a showing? It would be predicted that in the majority of cases the attack by the second spouse would be unsuccessful. Such is the situation. He has failed to have the decree set aside on jurisdictional grounds.[283] Frequently equitable factors have aided the courts in denying such relief. Again, in most cases, the second spouse has failed in his attempt to obtain an annulment of his marriage on the ground that the divorce had been rendered by a court without jurisdiction. Of course, if the divorce is clearly void on its face, the second spouse would seem to be

[282] Broduer v. Broduer, 53 R. I. 450 at 454, 167 A. 104 (1933), per Murdock, J.: "It is true that he [the trial judge] did not make a specific finding as to residence; but that he so found is implicit in his decision granting the prayer of the petition."

[283] Fairclough v. St. Amand, 217 Ala. 19, 114 So. 472 (1927); James v. James, 131 Okla. 276, 268 P. 726 (1928). In the Fairclough case, while the vacation proceedings were begun by the first husband (divorce defendant) on the ground that the decree had been procured through perjured testimony as to the libellant's residence in Alabama, the court found that they were brought at the instance and instigation of the libellant's second husband. He had instigated and financed the divorce; had married the libellant; had left her and had remarried elsewhere where bigamy proceedings were pending. The court applied the doctrine of estoppel and "laches."

In Van Slyke v. Van Slyke, 186 Mich. 324, 152 N. W. 921 (1915), it was held that a man who had aided in the instigation of the defendant's divorce suit against her former husband, intending to marry her, could not, after the marriage, maintain a suit to have the decree set aside on the ground of fraud in regard to residence, especially where if such fraud existed he had participated therein.

See also Broduer v. Broduer, 53 R. I. 450, 167 A. 104 (1933).

in a position to make an effective attack.[284] But typically he has not been injured even by a "void" decree.

B. *Attack in F-2*

1. *On Non-Jurisdictional Grounds*

In theory third parties are permitted to attack a decree for fraud, but only where the judgment is injurious to their preexisting interests.[285] The second spouse of one of the divorced parties, however, would not seem to be prejudiced by non-jurisdictional fraud. Thus, in *Rupp v. Rupp*,[286] an annulment was refused a second wife who claimed that the South Dakota divorce procured by a former spouse against the defendant had been collusively obtained. No question of jurisdiction could be raised; South Dakota was the domicil of the libellant wife; the respondent had appeared. Similarly in *Bater v. Bater*,[287] an annulment was denied a second husband who claimed that the divorce granted to the defendant in New York (which had jurisdiction of the subject matter and the parties) was tainted with fraud in that she had suppressed the fact that in a prior divorce suit in England her petition had been denied because of her adultery.

2. *On Jurisdictional Grounds*

F-1 has granted a divorce which a non-appearing defendant could effectively attack in F-2 in the absence of his remarriage. This attack could be either on the ground that the F-1 court lacked jurisdiction over the subject matter or the parties, or that it was against the local policy of F-2, of which policy the libellee was in a position to take advantage. No attack, however, has been made by the respondent. The other party to the divorce has remarried. To what extent is the F-1 decree vulnerable as to the second spouse? Does the answer to this question depend upon the form of the attack or upon the character of the conduct of such spouse in regard to the divorce?

[284] In Hinkle v. Lovelace, 204 Mo. 208, 102 S. W. 1015 (1907), a second husband, defendant in an ejectment suit brought by his wife, effectively attacked a decree divorcing the plaintiff from her former husband, on the ground that she had not made the statutory affidavit annexed to her petition for divorce, but such affidavit had been made in her behalf by her next friend (as disclosed by the divorce petition, and therefore the court was without jurisdiction. The infirmity appeared on the face of the record and not extrinsically.

[285] 3 FREEMAN, JUDGMENTS, 5th ed., § 1439, p. 2966 (1925).

[286] 156 App. Div. 389, 141 N. Y. S. 484 (1913).

[287] [1906] Prob. 209.

The typical method of attack has been a suit for annulment brought by the second spouse on the ground that the divorce failed effectively to dissolve the defendant's prior marriage. In the large majority of cases such attack has failed. This has been true when the claim has been advanced that the F-1 decree was void for lack of jurisdiction over the subject matter or over the parties, or ineffective as against an F-2 resident because of the peculiar policy of such state.

In *Kaufman v. Kaufman*,[288] the New York Appellate Division held that the second husband could not obtain an annulment on the ground that the divorce by the libellant wife in Nevada was invalid under the special New York rule. The complainant in the annulment suit had financed and induced the Nevada proceedings. He was estopped from invoking the state policy of New York, even though the service of summons in the divorce case had been by publication only and the respondent had not appeared.[289] In *Kinnier v. Kinnier*,[290] the second husband sought an annulment on the ground that the defendant was still married to her first husband. The complaint alleged that the defendant had been divorced by her former spouse in Illinois in a suit in which she had appeared and answered; that the libellant had never been domiciled in Illinois, as a consequence of which the decree was a nullity. On a demurrer to the complaint the court decided that the Illinois decree could not be thus impeached.[291] These decisions, it is

[288] 177 App. Div. 162, 163 N. Y. S. 566 (1917).

[289] The Nevada court had found the wife to be a bona fide resident thereof. There was some doubt as to the New York residence of the first husband at the time of the divorce. But it was held that even if he were a resident thereof, the second husband was in no position to take advantage of the New York policy which was adopted to protect New York respondents. Per Laughlin, J., 177 App. Div. 162 at 166: "the plaintiff, who induced the defendant to obtain the foreign divorce and financed her in so doing, should be precluded from obtaining a judicial annulment of the marriage predicated on the invalidity of the divorce."

In Hubbard v. Hubbard, 228 N. Y. 81 at 87, 126 N. E. 508 (1920), in refusing an annulment, Collin, J., said by way of dicta: "A finding of the trial court was that he [second husband] instigated the procurement of the divorce." Here apparently no question of New York policy was involved.

In the following cases an annulment on the ground of the invalidity of the defendant's F-1 divorce was refused: Beischer v. Beischer, 226 App. Div. 454, 235 N. Y. S. 652 (1929), reversing 132 Misc. 576, 230 N. Y. S. 278 (Sup. Ct. 1928); Richards v. Richards, 132 Misc. 551, 230 N. Y. S. 579 (Sup. Ct. 1928).

[290] 45 N. Y. 535 (1871).

[291] Per Church, C. J., 45 N. Y. 535 at 540-541: "The *status* of all persons within a state is exclusively for that state to determine for itself. . . . A wrong decision does not impair the power to decide, or the validity of the decision when questioned collaterally." A decree had been rendered sixteen years prior to the decision.

In Hall v. Hall, 139 App. Div. 120, 123 N. Y. S. 1056 (1910), reversing

submitted, are correct. Legal theory, as well as a sense of social justice, should preclude an attack by the second spouse.[292] No one has questioned his marital status.

In two recent cases in the New York Court of Appeals, *Fischer v. Fischer*,[293] and *Lefferts v. Lefferts*,[294] the libellant wife, following an ex parte decree in Nevada, had remarried, and sued the second spouse in New York for separation. The second husband was allowed to invoke the special New York rule to show the invalidity of the F-1 decree. In the *Lefferts* case the second husband had advised the libellant as to procuring a Reno divorce. The court refused to raise an estoppel against the second spouse to attack the decree on the ground that the wife was not a bona fide resident of F-1.[295] In view of these cases, it is by no means clear as to whether *Kaufman v. Kaufman*,[296] is still good law.[297] The distinction drawn in regard to affirmative relief

67 Misc. 267, 122 N. Y. S. 401 (Sup. Ct. 1910), an annulment was refused the second husband. He had alleged in his complaint that the divorce obtained by the defendant in Colorado on constructive service was void because the court lacked jurisdiction over the respondent; also that the Colorado libellant had used fraud in obtaining the decree. Colorado was the matrimonial domicil. Per Laughlin, J., 139 App. Div. 120 at 125: "he [complainant] has no standing to avoid it for fraud, because he is not injuriously affected by it; but on the contrary, by virtue of it, he got just what he wanted [marriage with the defendant here]."

In Farr v. Farr, 190 Iowa 1005, 181 N. W. 268 (1921), the second husband was denied an annulment on his complaint that the Illinois court lacked jurisdiction over the defendant's first husband.

See also French v. French, 74 Misc. 626, 131 N. Y. S. 1053 (1911).

[292] Contra: Kiessenbeck v. Kiessenbeck, 145 Ore. 82, 26 P. (2d) 58 (1933), where a divorce obtained by the defendant wife in Texas was void because she had not satisfied the residence requirements; this appeared from her own testimony. Annulment granted. Per Belt, J., p. 87: "the interest of the state is paramount and, notwithstanding the laches involved, and the fact that the defendant was not the victim of any fraud, equity, even at this late day [fifteen years after the divorce], will, on the ground of public policy, terminate a social relationship polygamous in character." See also Davis v. Davis, 2 Misc. 549, 22 N. Y. S. 191 (Sup. Ct. 1893).

[293] 254 N. Y. 463, 173 N. E. 680 (1930).

[294] 263 N. Y. 131, 188 N. E. 279 (1933).

[295] O'Brien, J., in Fischer v. Fischer, 254 N. Y. 463 at 466, said, in speaking of Kaufman v. Kaufman, 177 App. Div. 162, 163 N. Y. S. 566 (1917): "There the New York citizenship and residence of the first husband were unproved. Also the complaint in that action by the second husband for an annulment demanded affirmative relief. Here the defendant does not come into court with a demand for affirmative relief. He merely alleges plaintiff's marriage with Dolinsky (first husband), denies plaintiff's allegations concerning his own marriage with her and puts her to proof to show that such allegation is correct." In Lefferts v. Lefferts, the court felt itself bound by this decision.

[296] 177 App. Div. 162, 163 N. Y. S. 566 (1917), discussed supra, note 289.

[297] See Derby, "Obligation of Invalid Divorce on Person Who Induced It and Married Party Procuring It," 12 N. Y. UNIV. L. Q. REV. 31 (1934).

is hard to justify. By denying the wife support in her separation action the court refuses to recognize the usual incidents of the marriage. The position would be the same if there had been a decree of nullity. In other jurisdictions there are decisions which would seem to be contrary to these recent New York cases.[298]

Where the second spouse knew the circumstances of the divorce and married in reliance thereon, justice would seem to demand that he be precluded from assailing the decree, whether he seeks affirmative relief or not. He has in no way been injured; his marital status has not been called in question. This position would be even stronger where he instigated or financed the divorce proceedings. Where, however, he did not know that the F-1 decree was open to attack at the suit of the respondent, on discovery thereof, strictly speaking a different rule might apply. If he can show the nullity of the divorce, he is in a technical position to attack. But even in this situation an attack by the second spouse would seem somewhat questionable. Unless an effective attack has been made by the divorce respondent, no one has questioned the marriage of the second spouse. If this has been done, he needs no court relief; his marriage is void and of no effect. If the respondent had remarried, he forfeited his right of impeachment; the marriage of the second spouse would then seem immune from attack. Factually, in seeking an annulment he avails himself of an easy means of dissolving an unsatisfactory marital relationship—a means often highly advantageous from a financial standpoint.

IV

CHILDREN

Where a parent remarries following either a decree of divorce or the death of the other spouse, the property interests of his children are necessarily curtailed by the extent to which the second spouse acquires enforcible interests. If the children, then, can show that the divorce on which the subsequent marriage is predicated is defective,

[298] Margulies v. Margulies, 109 N. J. Eq. 391, 157 A. 676 (1931), where in an application by the divorce plaintiff for alimony *pendente lite* against her second husband who had paid the expenses of her trip to Virginia to obtain the divorce, the latter was not allowed to impeach the validity of the decree; Cromarty v. Cromarty, 38 Ont. L. 481 (1917); see also Deyette v. Deyette, 92 Vt. 305, 104 A. 232 (1918). Contra: Moe v. Moe, 2 Thomp. & C. (N. Y. Sup. Ct.) 647 (1874).

In regard to the effect of a *nunc pro tunc* appearance in the Nevada divorce proceedings upon the right of the second spouse to attack the decree, see Hindermann v. Hindermann, 245 App. Div. 246, 280 N. Y. S. 449 (1935).

they are in a position to cut off the interests which might otherwise have accrued to such spouse. Such divorce may have been one purporting to sever the marriage of their parents, or if their father or mother is dead, one participated in by the second spouse of their surviving parent.

A. *Attack in F-1*

1. *On Non-Jurisdictional Grounds*

In general, children have failed in an attempt to have the divorce decree set aside because of non-jurisdictional defects. In the absence of statute, strangers to the record would seem to have no standing on which to base a petition for such vacation. Thus, children have been held to have no such interest so as to entitle them to bring a bill to vacate a divorce of their parents which had been procured by collusion, and following which one of the parents had remarried.[299] Under this rule children who could show that their property interests had been prejudiced by the divorce would be in no position to assert their rights. Some few courts have apparently recognized the interest of children in such cases.[300] Exceptional circumstances have been present, however, in each case where this has been permitted.

In *Richardson v. King*,[301] children were not permitted to avoid a divorce procured by their deceased father's second wife against her former husband for alleged defects where the court had jurisdiction of the subject matter and the parties.

> "Plaintiffs . . . are in no position to insist upon a new trial of the divorce proceeding. They are neither parties nor privies thereto. They claim nothing through either of the parties to the divorce proceeding. . . . They are seeking to avoid a decree of divorce in order to make the marriage of their deceased father unlawful. . . . In order to do this, they must show that the divorce decree, which is fair on its face, was and is absolutely void because the

[299] Baugh v. Baugh, 37 Mich. 59 (1877).

[300] Children born of a cohabitation pending proceedings for divorce and after a decree procured by the fraud of their deceased father were held, in Rawlins v. Rawlins, 18 Fla. 345 (1881), to have such an interest as entitled them to a vacation. Here the surviving widow joined in the suit.

In Mintz v. Mintz, 83 Pa. Super. Ct. 85 (1924), the son of a divorced insane woman was allowed to apply for the vacation of a divorce granted because of her lunacy, not a ground for divorce in Pennsylvania; the decree therefore was void. Because of his statutory liability for his mother's maintenance he had a contingent pecuniary interest in the decree.

[301] 157 Iowa 287, 135 N. W. 640 (1912).

court which granted it had no jurisdiction. This we think they have not done. . . ." [302]

Ordinary principles of collateral attack were held to apply. In *Begley v. Jones*,[303] on the death of their father the children of a second marriage sued for the sale and division of property owned by him at his death and alleged that a divorce which he had procured from their mother was void because she had been confined in an insane asylum; therefore, his remarriage was void. The entire record in the divorce case was not before the court, but in its absence it was presumed to be correct. Since no collateral attack was permitted, the third wife was entitled to dower.[304]

2. *On Jurisdictional Grounds*

A divorce clearly void on its face because of the absence of essential jurisdictional factors is open to impeachment at the suit of children in a collateral proceeding, if the decree injuriously affects them.[305] Where, however, the finding of the divorce court on the existence of these jurisdictional factors would seem to be final and conclusive against the collateral attack of strangers to the record, no attack by children would be permitted. Thus, in *Reger v. Reger*,[306] in an action for partition brought by the second wife of their deceased father, children by a former marriage were not allowed to attack a divorce ob-

[302] Per Deemer, J., 157 Iowa 287 at 298.

[303] 246 Ky. 135, 54 S. W. (2d) 639 (1932).

[304] Per Clay, J., 246 Ky. 135 at 138: "the case is one where the petition was merely imperfect or defective, and no rule is better stated than that a judgment based on such a petition cannot be successfully attacked in a collateral proceeding."

In Pettiford v. Zoellner, 45 Mich. 358, 8 N. W. 57 (1881), children of the first marriage brought ejectment against their deceased father's second wife to recover property in his possession at his death. They unsuccessfully questioned the validity of a divorce obtained by their father against their mother and the divorce procured by the defendant from her first spouse. Per Graves, J., 45 Mich. 358 at 361: "no objection can be noticed [collaterally] which does not go to the jurisdiction. . . . If in either of the divorce cases the decree is void, the plaintiff is entitled to recover. On the other hand, however irregular or erroneous the proceedings, if the court had jurisdictional power the defendant cannot be disturbed. . . ."

[305] See supra, note 304. In Burge v. Burge, 94 Mo. App. 15, 67 S. W. 703 (1902), in an action by an alleged widow for the administration of the estate of the defendant's deceased father, the son was permitted to show that the divorce obtained by his father from his former wife was void as shown by the record. Per Smith, P. J., p. 25: "we feel constrained to conclude that notice given by the publication to *Emma Burge* was no notice to the defendant *Emily Burge*, and therefore the judgment was without notice and void."

[306] 316 Mo. 1310, 293 S. W. 414 (1926).

tained by the plaintiff from her former husband on the ground that the decree had been procured by false allegations as to residence.[307] In an application for letters of administration on the estate of their deceased father, children claimed that a divorce procured by their mother was void because of defective service of process upon their father[308] and that they were therefore entitled to the exclusion of the person their father had married.[309] Such attack was not permitted. Thus an attack on jurisdictional grounds in a state where the divorce was granted has frequently failed, especially where to show the absence of jurisdictional facts it would be necessary for the children to go behind the divorce record.

B. *Attack in F-2*

1. *On Non-Jurisdictional Grounds*

Are children in F-2 in a position under any circumstances to avail themselves of non-jurisdictional fraud or collusion which led to the procurement of the divorce in F-1? Suppose by a father's will property had been devised to a married daughter in trust to pay her the income during her life with remainder to her children, but if her husband died or in case of her divorce from him, the principal should be paid to her absolutely. Suppose that in order to obtain the fund, the wife at the instigation of her husband obtained a collusive divorce in F-1, and she then petitioned in F-2 to procure the principal, claiming that the trust had been terminated by the divorce. Could the children show the collusive character of the decree?[310] On principle they should be permitted to attack it collaterally.[311] Otherwise children who had no

[307] Per Seddon, C., 316 Mo. 1310 at 1332-1333: "If respondents [children] herein can be said to be affected or harmed whatsoever by the rendition of the divorce decree . . . it is clear that they are not affected nor harmed in respect to any rights which they had preexisting the rendition of the divorce decree. At the time of the rendition of the divorce decree, respondents had no legal or equitable right, title or interest in the real property which is the subject of the instant partition suit. Their rights or interests in the real estate herein involved were derived by inheritance. . . . "

[308] While he was in prison in another county a copy of the process was left at the home of the divorce plaintiff.

[309] McLeod v. McLeod, 144 Ga. 359, 87 S. E. 286 (1915). See also Aldrich v. Steen, 71 Neb. 33, 98 N. W. 445, 100 N. W. 311 (1904).

[310] In re Vetter's Estate, 308 Pa. 447, 162 A. 303 (1932), discussed in 19 VA. L. REV. 278 (1933). The daughter after the statutory residence in Nevada obtained a divorce for non-support, her husband having been personally served and having appeared. The Pennsylvania court held that a fraud had been practiced upon it and that such fraud and collusion could be set up by the children.

[311] 1 FREEMAN, JUDGMENTS, 5th ed., § 318, p. 634 (1925): "whenever a judgment or decree is procured through the fraud of either of the parties, or by the

standing to appeal from the decree or to petition for its vacation would be defeated by the fraud of their parents. Where innocent third persons are thus prejudiced, a collateral attack of this kind should be permitted as their sole protection, in case the F-1 judgment is sought to be enforced against them.

> "The forum court does not actually pass on the validity of the divorce decree, or in any way alter the status of the parties as determined by the foreign court of competent jurisdiction. It merely admits the evidence tending to prove collusion and, if the evidence is sufficient, exercises its inherent right to decline to entertain a suit grounded on a fraud which, although possibly not cognizable to a court of law, will nevertheless bar relief in equity." [312]

Such is the theory. In practice, however, jurisdictional problems are almost always present in the cases.[313] There would seem to be no direct decision in this field on the point, that is, on non-jurisdictional fraud.

2. *On Jurisdictional Grounds*

In general a party against whom a judgment of F-1 is attempted to be used can show by evidence other than the record, and even by evidence *aliunde* the record, that the court lacked jurisdiction either of the cause or of the parties.[314] If this is successfully done, the decree is a nullity and is subject to collateral attack in F-2; otherwise it is as final and conclusive on collateral attack as would be an F-2 judgment.[315] These principles would seem to control when children seek to impeach an F-1 decree. Their rights are concerned; they were not parties to nor entitled to be heard in the divorce suit. But the decree,

collusion of both, for the purposes of defrauding some third person, such third person may escape from the injury thus attempted by showing, even in a collateral proceeding, the fraud or collusion by which the judgment was obtained."

[312] 19 VA. L. REV. 278 at 281 (1933).

[313] In re Vetter's Estate, 308 Pa. 447, 162 A. 303 (1932). Nevada was not the matrimonial domicil nor the domicil of either spouse. Therefore, Nevada had no jurisdiction to grant the divorce. It is submitted that the court should have confined itself to an attack on jurisdictional grounds.

[314] Estate of Hancock, 156 Cal. 804, 106 P. 58 (1909).

[315] See, however, Miller v. Miller, 89 Kan. 151 at 155, 130 P. 681 (1913). Per Burch, J.: "it being settled law in this state that whenever jurisdiction depends on a fact properly litigated and determined in the action itself, the judgment rendered is conclusive of the fact, and of jurisdiction, until it is reversed or is vacated in a direct proceeding for the purpose."

in the absence of clear and satisfactory evidence of want of jurisdiction in the court to render it, should be sustained.[316]

In *Estate of Hancock*,[317] children by a prior marriage of their deceased father, in heirship proceedings, effectively showed that the Colorado divorce obtained by their father against their non-resident mother was void because the court never acquired jurisdiction over her. Thus, the second wife and children by her were excluded from the estate.[318] Similarly, in *Adams v. Adams*,[319] on a bill in equity, by a son of his deceased father's second marriage, to establish his rights under a will devising property to "the children" of the decedent, children of a prior marriage were allowed to show that the divorce procured by the deceased in California was obtained without the requisite residence, even though the record of the divorce proceedings contained a sufficient recital thereof. Therefore, the plaintiff was illegitimate and not entitled to take under the will. The children of the prior marriage were allowed to impeach the divorce because their rights were affected; they were not parties to nor entitled to be heard in the original divorce proceedings. In New York proceedings to share in the decedent's estate, children of a prior marriage have been permitted to prove the invalidity of a divorce procured by the deceased from a former wife, namely their mother.[320] In each of these cases the deceased would have been precluded, under familiar principles, from attacking the

[316] In McHenry v. Bracken, 93 Minn. 510, 101 N. W. 960 (1904), in an action for her share in the estate of her deceased husband, children of the latter by a former marriage failed to show that a divorce against the plaintiff in Wisconsin twenty years before was void for want of effective service of process. Both parties to the divorce had remarried; neither could have therefore questioned the decree. The court demanded clear and convincing proof of the lack of jurisdiction.

In Waldo v. Waldo, 52 Mich. 94, 17 N. W. 710 (1883), in a trespass action involving the question whether the plaintiff was the widow of the deceased, a son of the latter by a former marriage was not allowed to introduce new evidence to show that the plaintiff had not been domiciled in Indiana when she obtained a divorce from her first husband.

[317] 156 Cal. 804, 106 P. 58 (1909).

[318] Per Angellotti, J., 156 Cal. 804 at 812: "the service of summons by publication based on this affidavit was ineffectual for any purpose, and the Colorado court never acquired jurisdiction as to the defendant."

[319] 154 Mass. 290, 28 N. E. 260 (1891).

[320] Olmsted v. Olmsted, 190 N. Y. 458, 83 N. E. 569 (1908), affd. 216 U. S. 386, 30 S. Ct. 292 (1910); Matter of Thomann, 144 Misc. 497, 258 N. Y. S. 838 (Surr. Ct. 1932).

In Olmsted v. Olmsted, 190 N. Y. 458 at 467, and in Matter of Thomann, 144 Misc. 497 at 498-499, children of the second marriage were declared illegitimate in New York, though legitimate elsewhere. They were not allowed to share in the decedent's estate.

decree. By the same token the decree was subject to impeachment at the suit of the non-participating divorce respondent. In *Grossman's Estate*,[321] in an action by a second wife for her share in the estate of the decedent, children of a prior marriage were held not estopped to question a divorce obtained by their father in Nevada, in which their mother, the divorce respondent, was not personally before the court. Their mother had waived her claim by a separation agreement.

The *Restatement* expresses no opinion as to whether the children of a prior marriage may be precluded from questioning the validity of a divorce decree. In a number of cases collateral attack has been permitted.[322] The children would seem to be parties in interest whose rights are vitally affected. Their chances of adequate protection at the hands of the F-1 court are not great. In general, children have not been held to stand in the shoes of their parents in regard to estoppel. In one recent South Carolina case,[323] however, the estoppel of the libellant father was carried over to the children.[324] In this case some elements of a true estoppel were present.[325]

V

OTHER THIRD PARTIES

The possibility of attack by a second spouse and by children has been considered. To what extent and in what ways is a decree of divorce impeachable at the suit of other third persons? Do the same general principles apply to them as to subsequent spouses and children?

A. *Attack in F-1*

1. *On Non-Jurisdictional Grounds*

In general such persons have no standing on which to base a petition for the vacation of the decree because of non-jurisdictional defects unless expressly so authorized by statute. Thus relatives of a deceased

[321] 67 Pa. Super. Ct. 367 (1917), affd. on opinion below, 263 Pa. 139, 106 A. 86 (1919).

[322] RESTATEMENT, § 112, *caveat*.

[323] Watson v. Watson, 172 S. C. 362, 174 S. E. 33 (1933).

[324] Per Stabler, J., 172 S. C. 362 at 370: "I hold, therefore, that Mr. J. A. Watson, if alive, would be estopped from disputing the validity of the marriage insofar as it relates to property rights involved, and that binds the heirs at law. . . ."

[325] A South Carolina husband obtained an ex parte Nevada divorce against a resident of South Carolina. Prior to his remarriage he told his bride-to-be that he was free to marry and that he had a valid divorce. On his death, children of the prior marriage were held estopped from questioning the dower rights of the second wife.

spouse have not been allowed to show, in an action to vacate the divorce, that the decree procured by the surviving spouse purporting to dissolve her prior marriage had been obtained due to fraud or perjury.[326] By the death of her second husband the defendant had become entitled to a large share of his estate which would otherwise have gone to the plaintiffs.

> "If such a judgment can, under any circumstances, be reopened at the suit of a stranger, this judgment cannot be reopened at the suit of the plaintiffs. Its consequences, if harmful to them, are of too remote and indirect a character to give them any cause of action. . . ." [327]

The heirs of an insane wife against whom a divorce had been rendered have failed to have the decree vacated; the proceedings were in all respects regular.[328]

It has been intimated that in certain exceptional cases, third persons, where otherwise their interests would be adversely affected, have been allowed in a collateral proceeding to attack a judgment for non-jurisdictional fraud.[329] But due to the very nature of a divorce decree, strangers to the record have seldom been in a position to invoke this exception. Thus, relatives of the deceased husband have not been allowed, in a suit involving widow's rights, to show that the divorce procured by the decedent from his first wife had been collusive,[330] nor, in administration proceedings to show that the decree obtained by the decedent's second wife from her former spouse had been vitiated by perjury.[331] The mother of the deceased spouse has been held to have

[326] Tyler v. Aspinwall, 73 Conn. 493, 43 A. 755, 54 L. R. A. 758 (1901). The defendant wife who had obtained a Connecticut divorce from her first husband married during his lifetime a relative of the plaintiffs.

[327] Per Torrence, J., 73 Conn. 493 at 498.

[328] Cain v. Milburn, 192 Iowa 705, 185 N. W. 478 (1921). See, however, State ex rel. Happel v. District Court, 38 Mont. 166, 99 P. 291 (1909).

[329] See 1 FREEMAN, JUDGMENTS, 5th ed., § 331 (1925).

[330] Sykes v. Sykes, 162 Miss. 487, 139 So. 853 (1932). It was pointed out that a stranger may not attack a divorce on the ground of fraud or collusion.

In Friebe v. Elder, 181 Ind. 597, 105 N. E. 151 (1914), devisees of the libellant wife were not allowed in a partition suit to attack a divorce on the ground of collusion.

[331] Kirby v. Kent, 172 Miss. 457, 160 So. 569 (1935). See also Arcuri v. Arcuri, 265 N. Y. 358, 193 N. E. 174 (1934).

In Wottrich v. Freeman, 71 N. Y. 601 (1877), a defendant in a suit for criminal conversation was not permitted to attack a divorce obtained by the plaintiff from his wife on the ground that the decree had been procured on improper and illegal testimony.

no standing to show, in a suit involving widow's rights, some procedural defect which did not render the decree void.[332]

2. *On Jurisdictional Grounds*

A decree clearly void for want of jurisdiction would be ineffective even against third parties where it adversely affected their interests. But to make an effective attack on the divorce to which they were in no way parties, lack of jurisdiction must appear clearly and unmistakably.[333] Relatives of a deceased spouse have been held not to have such an interest in a divorce procured by the surviving spouse from a former husband, as to obtain a vacation of the decree on the ground that the divorce had been obtained without the court acquiring jurisdiction over the person of the respondent.[334] Similarly, relatives of a deceased wife have failed to procure a vacation of a divorce obtained by the surviving spouse from a former wife on the ground that the libellant had not been a resident of F-1 at the time of the decree.[335] The general rule that third parties cannot obtain a vacation of a judgment applies with peculiar force to divorce decrees.

> "Every presumption is in favor of the jurisdiction of a court of general jurisdiction, and anyone attacking the jurisdiction is required to show clearly and affirmatively the fact which overcame the presumption and establish the lack of power in the court." [336]

In *Roy v. Upton*,[337] a claim by a mortgagee that a divorce, by which the mortgaged premises had been subjected to a lien for alimony, was void because the decree did not contain a finding that the libellant had resided in the state for one year, was held ineffectual on collateral attack.[338]

Where the libellant [339] would be precluded from making an attack on the decree on the ground of invocation of jurisdiction or the re-

[332] McDonald's Estate, 268 Pa. 486, 112 A. 98 (1920). The defendant had procured a divorce from her former husband. The alleged defect was that the court had fixed too early a return day for the original subpoena.

[333] Hamblin v. Superior Court, 195 Cal. 364, 233 P. 337 (1925).

[334] Brokaw v. Brokaw, 99 Ind. App. 385, 192 N. E. 728 (1934); Tomlinson v. Tomlinson, 121 Kan. 206, 246 P. 980 (1926).

[335] Tomlinson v. Tomlinson, 121 Kan. 206, 246 P. 980 (1926).

[336] Per Johnston, C. J., 121 Kan. 206 at 207-208.

[337] 234 Ill. App. 53 (1924).

[338] See also Jeffries v. Alexander, 188 Ill. App. 310 (1914), affd. 266 Ill. 49, 107 N. E. 146 (1914).

[339] Edgar v. Richardson, 33 Ohio St. 581 (1878).

spondent because of his remarriage, persons deriving title through them have been held to be in the same position.

B. *Attack in F-2*

1. *On Non-Jurisdictional Grounds*

It has been stated that

> "third persons should be permitted to attack a divorce decree for fraud, but only where it is injurious to their interests." [340]

To what extent does this apply to non-jurisdictional fraud and collusion in the procurement of the F-1 decree? Most of the cases involve fraud of a jurisdictional character and therefore are not in point.[341] Seldom does a case arise where the fraud is entirely non-jurisdictional. But in theory the right to make such an attack is established because

> "Were it otherwise, fraud could be freely introduced into a court of justice and a decree or judgment procured from which the defendant would have no standing to appeal or to require that it be vacated or disregarded. It seems, therefore, well settled that a third person may collaterally attack the fraudulently procured judgment or decree of a sister state when his sole protection lies in doing so." [342]

The difficulty lies, however, in showing that some preexisting right would be prejudiced if effect is given to the F-1 divorce.[343] In *Dow v. Blake*,[344] in an action on a Wisconsin divorce brought by the libellant wife in Illinois, the administrator of the respondent was not permitted to show that the divorce had been procured by the collusion of the parties. The deceased respondent could not have attacked the decree; the administrator stood in his shoes.[345] This case points out that the

[340] 3 FREEMAN, JUDGMENTS, 5th ed., § 1439, p. 2966 (1925).

[341] In re Vetter's Estate, 308 Pa. 447, 162 A. 303 (1932); Blondin v. Brooks, 83 Vt. 472, 76 A. 184 (1910).

[342] 19 VA. L. REV. 279 at 281 (1933).

[343] Such a showing was made by the children, in In re Vetter's Estate, 308 Pa. 477, 162 A. 303 (1932), but not in Rupp v. Rupp, 156 App. Div. 389, 141 N. Y. S. 484 (1913).

[344] 148 Ill. 76, 35 N. E. 761 (1893).

[345] Per Magruder, J., 148 Ill. 76 at 88: "The general rule is, that the judgment of a State court may not be impeached collaterally in a court of another State on the ground of fraud, unless fraud in procuring it could be set up as a defense in the State where it was rendered." The court held that the deceased respondent could not have done so in F-1; therefore his administrator was in no better a position.

possible exception in regard to collateral attack by third persons does not extend to the privies of one of the divorced parties.

2. On Jurisdictional Grounds

Where a person is estopped, under principles already discussed, from questioning the validity of a divorce procured by him in F-1, his personal representatives have been held to be in the same position.[346] A similar principle has been invoked in regard to the grantees of the libellant.[347] The grantees or personal representatives of a deceased respondent who had remarried in reliance upon the void F-1 decree would seem to be in the same position; they would be estopped to question the validity of the divorce.[348] By familiar principles, privies can obtain no rights not held by the one they represent.

On the other hand, if the respondent had not been subject to the process of the F-1 court and had not remarried, her heirs would be allowed to show that the decree had been rendered by a court lacking in the jurisdictional requirements. In *Sammons v. Pike*,[349] the heirs of the respondent wife who had no notice of the divorce proceedings and who had not remarried, were not estopped, in an ejectment action against the grantees of the deceased libellant, to show that the South Dakota court had lacked jurisdiction over the subject matter and over

[346] Matter of Morrison, 52 Hun 102, 5 N. Y. S. 90 (Sup. Ct. 1889), affd. 117 N. Y. 638, 22 N. E. 1130 (1889). The deceased husband had procured an ex parte Ohio divorce against his New York wife. He had remarried. After the death of the respondent, intestate and childless, the personal representatives of the deceased husband claimed her personal estate on the ground that the Ohio divorce was void and therefore the marriage remained intact. Per Van Brunt, P. J., p. 108: "the claimants here occupy precisely the same position that Feyh (libellant) would have occupied had he been living."

[347] Elliott v. Wohlfrom, 55 Cal. 384 (1880). Grantees of the libellant husband in an ejectment action against grantees of the respondent wife were not allowed to attack a divorce procured by the husband in Indiana on the ground that the alleged appearance of the respondent, shown on the record, had been obtained by fraud.

Melchers v. Bertolido, 118 Misc. 196, 192 N. Y. S. 781 (Sup. Ct. 1922). Per Cropsey, J., p. 197: "[The husband] invoked the jurisdiction of the California court, and having in the suit brought by him obtained a judgment divorcing his wife he could not thereafter question the court's jurisdiction [on the ground of lack of jurisdiction over the respondent]. And [he] could not confer upon his grantees, or their successors, a right which he did not possess."

[348] See Grimm v. Grimm, 62 Pittsb. Leg. J. 487 (Pa. 1914), where it was pointed out that the executor of the deceased respondent who had remarried could not attack the divorce, but could impeach the alimony decree.

[349] 108 Minn. 291, 120 N. W. 540 (1909), affd. on rehearing, 108 Minn. 291, 122 N. W. 168, 23 L. R. A. (N. S.) 1254 (1909).

the libellee.[350] The respondent herself could have assailed the divorce.

How about other third persons in no way connected with one of the divorce litigants? In general they can effectively attack the divorce on jurisdictional grounds only where it is clear that such factors were wanting in F-1,[351] or that the decree was void under the local policy of F-2. In *Bell v. Little*,[352] the heirs of the deceased second husband were allowed to show, in a dower action brought by the wife, that the divorce procured by the plaintiff in Pennsylvania was void under the New York rule. The deceased had known of the divorce proceedings and had married the plaintiff in F-1 shortly thereafter.[353] A decree sought to be used against a third party can be impeached collaterally for jurisdictional fraud if it is for their interest to impeach it at all.[354]

That all divorces which do not comply with the legal pattern are void or subject to attack is a myth and nothing more. Decrees obtained under conditions deviating from the jurisdictional scheme or from the rules of substantive law are effective for many purposes. In spite of their defects, as to persons in certain positions, they are just about as effective as a divorce rendered at the matrimonial domicil. True, in

[350] Per Jaggard, J., 108 Minn. 291 at 294: "A divorce may be impeached collaterally in the courts of another state by proof that the court granting it had no jurisdiction 'because of the plaintiff's want of domicil,' even when the record purports to show such domicil." The court refused to invoke an estoppel due to acquiescence.

[351] MacArthur v. Industrial Accident Commission, (Cal. App. 1933) 20 P. (2d) 70. In proceedings by the surviving wife for compensation for the death of her husband, the commission was not allowed to attack a divorce she had procured from her former husband sixteen years before in Arizona, the attack being based on the testimony the plaintiff gave on cross-examination to the effect that she had resided only three or four out of the requisite six months in F-1.

[352] 204 App. Div. 235, 197 N. Y. S. 674 (1922), affd. 237 N. Y. 519, 143 N. E. 726 (1923). See Kelsey v. Kelsey, 204 App. Div. 116, 197 N. Y. S. 371 (1922).

[353] The court, in trying to distinguish Kaufman v. Kaufman, 177 App. Div. 162, 163 N. Y. S. 566 (1917), said that the evidence here showed no persuasion or inducement on the part of the second husband. Cf. Matter of Briggs, 138 Misc. 136, 245 N. Y. S. 600 (Surr. Ct. 1930), affd. 232 App. Div. 666, 247 N. Y. S. 1007 (1931).

[354] Blondin v. Brooks, 83 Vt. 472, 76 A. 184 (1910), bill in chancery by the grantee of the libellant wife who had procured an ex parte divorce in New Mexico and then conveyed the land in question without her husband's joinder, to quiet title to such land. The defendants were allowed to impeach the decree collaterally for fraud. Per Rowell, C. J., p. 486: "But it is objected that the decree in question cannot be collaterally impeached. This, however, is not so, for the defendants are strangers to it, and strangers can impeach a judgment collaterally when it is for their interest to impeach it at all."

certain rare cases an energetic prosecutor may bring bigamy proceedings against one remarrying in reliance on such divorces; but because of them the civil incidents of marriage are terminated as to certain persons. Just as we have in the law of property a doctrine of the relativity of estates, which is coming more and more in vogue in current legal thought, so we suggest a doctrine of the relativity of divorces. Frequently the decree is good as against some persons, a nullity when attacked by others. At the peak of this divorce hierarchy are the decrees rendered at the matrimonial domicil which even the state cannot impeach. Next come those divorces, in theory defective, which the spouses cannot attack, the libellant due to the invocation of jurisdiction, the respondent because of appearance or reliance upon the divorce. Then come the decrees unimpeachable by the divorce plaintiff, but vulnerable as to the respondent who was not "in court" and who has not remarried. Many divorces which the libellee could effectively impeach are not subject to attack at the suit of a second spouse of one of the divorced parties or other third persons. The purpose of this paper has been to illustrate this divorce hierarchy and to show how vulnerable divorces are to attack by various persons in F-1 and in F-2.

The theory of divorce has "lagged" behind the practice of the times in an astounding fashion. Daily we have been becoming more and more divorce conscious, more willing to face the reality of the problem quite apart from ecclesiastical ideology.

> "Thus, divorce, first to the non-participant almost a crime, moves through the stage of social outrage, of terrible misfortune, of regrettable necessity (and in the large, a menace), of a something better not alluded to, of a 'that's too bad'—till it becomes an event not too greatly different from another."[355]

Divorce theory has not kept pace with the "mores" and prevalent social practices of today. Courts have recognized that the scheme of divorce machinery is totally inadequate to meet the needs of current society. Something had to be done; some protection had to be given the decrees condemned under ecclesiastical theory. Divorce deals with human relations of a complex character; in regard to them the law can exercise little deterrent force. Persons will divorce and will purport to create further family relationships founded on decrees which theory abhors.

[355] Llewellyn, "Behind the Law of Divorce," 33 COL. L. REV. 249 at 294 (1933).

Hence under different theories and in varying degrees protection has been given to "void" divorces in a piece-meal fashion. Estoppel, invocation of jurisdiction, and analogous doctrines have been employed. In but few cases do the real elements of an estoppel exist; it is just one of many devices to aid the court machinery, an equitable doctrine whose shoulders are broad. Persons who obtain divorces should not be allowed to question them. Collusive and free consent divorces should be immune from attack. Free consent divorce exists in this country as a fact. A defendant who has relied upon the decree should not in fairness be allowed to impeach it. If he has appeared and has been defeated, he has had his day in court; in any event even before the divorce the real foundation of the marriage was gone forever; an attack would be prompted by selfish motives alone. A second spouse should not be allowed to question the divorce, certainly where he married in reliance thereon and where neither party to the decree has questioned it. Children, in some cases, should be heard; they have not been in court; they have had no chance to speak. The preclusion of the divorce litigants should be carried over to their privies. Largely this is what the courts have tried to do and have partially succeeded. The protection should continue even in its present *sub rosa* form. The protecting veil will be justified until there is some material change in the whole divorce picture.