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Constitutional Law - Full Faith and Credit-Res Judicata Applied to Determination of Sister State Concerning Ex Parte Divorce

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CONSTITUTIONAL LAW–FULL FAITH AND CREDIT–RES JUDICATA APPLIED TO DETERMINATION OF SISTER STATE CONCERNING EX PARTE DIVORCE

The complainant filed a bill praying that his interest as surviving consort of the testatrix be established. The defendants filed a special plea alleging that the testatrix had obtained an *ex parte* Florida divorce a year before her death. Complainant in his replication challenged the jurisdictional basis of the Florida divorce. The Virginia court after a full hearing on the merits as to whether the testatrix had been domiciled in Florida and had given proper constructive notice to complainant, concluded that the requisites for jurisdiction had been met. It gave full faith and credit to the Florida divorce decree and denied complainant's claim. Appeal and supersedeas refused. *Kessler* v. *McGlone,* 187 Va. lxii, certiorari denied, 335 U.S. 860 (1948). Complainant later filed a bill in the original Florida court against the same defendants as in the Virginia action, seeking to void the divorce on the identical grounds that had been litigated in Virginia. The Florida court rejected the contention that the findings of the Virginia court were res judicata and refused to grant full faith and credit to its decision. On the same evidence and some additional evidence, the trial court reached a different conclusion than the Virginia court as to the proper constructive service on the complainant and as to the domicile of the testatrix, and declared the divorce decree null and void. Upon appeal, *held,* affirmed. *McGlone* v. *Kessler,* ..... *Fla.* ....., 55 So.2d 79 (1951). The defendants did not seek certiorari. Almost a year after the second Florida suit, complainant instituted a separate and independant suit in the original Virginia court against the same defendants alleging that the Virginia court must render full faith and credit to the second Florida decree. This the court refused to do on the grounds that the issue was res judicata in Virginia and that Florida should have given full faith and credit to the Virginia decision. Upon appeal, *held,* affirmed. *Kessler* v. *Fauquier Nat'l Bank,* 195 Va. 1095, 81 S.E. 2d 440, certiorari denied, 348 U.S. 834 (1954).

The basic issue here is whether either the Virginia or the Florida court has violated the full faith and credit clause of the

Constitution[1] and the statute[2] passed pursuant to this constitutional authority.

In considering the effect to be given the duly attested record of another state under the full faith and credit clause, the United States Supreme Court in *Adam* v. *Saenger*[3] said:

> If it appears on its face to be a record of a court of general jurisdiction, such jurisdiction, over the cause and the parties is to be presumed unless disproved by extrinsic evidence, or by the record itself. *Hanley* v. *Donohue*, 116 U. S. 1; *Knowles* v. *Gaslight & Coke Co.*, 19 Wall. 58; *Settlemier* v. *Sullivan*, 97 U.S. 444. But in a suit upon the judgment of another state the *jurisdiction* of the court which rendered it is open to judicial inquiry, *Chicago Life Insurance Company* v. *Cherry*, 244 U.S. 25, and if the *matter of fact* or law on which jurisdiction depends *was not litigated in the original suit, it is a matter to be adjudicated* in the suit founded upon the judgment. *Thompson* v. *Whitman*, 18 Wall. 457.[4] (Emphasis added)

Under the ruling of the *Haddock* case[5] a record of an *ex parte* divorce was not entitled to full faith and credit since *mere domicile* within the state of one party to the marriage did not give the courts of that state jurisdiction to render a decree of divorce enforceable in all the other states against a resident who did not appear and was only constructively served with notice of the pendency of the action. The first *Williams* case[6] expressly overruled the *Haddock* case, and under this new ruling an *ex parte* divorce with jurisdiction based on domicile of one party and constructive service upon the other is always entitled to full faith and credit as to the marital status of both parties.

In an early case, *German Savings & Loan Soc.* v. *Dortmitzer*,[7] and later in the second *Williams* case[8] the Court held

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[1] U.S. Const., Art. IV, §1: "Section 1. 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."

[2] 28 U.S.C., 1952 ed., §1738: "Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken."

[3] 303 U.S. 59 (1937).

[4] *Id.* at 62.

[5] Haddock v. Haddock, 201 U.S. 562 (1906).

[6] Williams v. North Carolina, 317 U.S. 287 (1942).

[7] German Savings & Loan Soc. v. Dortmitzer, 192 U.S. 125 (1904).

[8] Williams v. North Carolina, 325 U.S. 226 (1945).

that a decree of 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 lack of domicile. Both decisions contemplate extrinsic evidence to show there was no jurisdictional basis, and the second *Williams* case[9] goes so far as to say:

> In short the decree of divorce is a conclusive adjudication of everything except the jurisdictional facts upon which it is founded and domicile is a jurisdictional fact.[10]

With this array of authority before it, the Virginia court in its first determination correctly went into the *jurisdictional facts* of the *ex parte* divorce rendered in Florida since those facts had not been litigated in Florida. In fact, there was no contention that the Virginia court did not have the right to litigate the matters before it, and it had personal jurisdiction of all the interested parties. The rule is that such a determination is res judicata in Virginia. The Supreme Court of Appeals in *Patterson* v. *Saunders*[11] said.

> A fact necessarily involved in an issue, on which there has been a judgment, is thereby conclusively settled in any suit thereafter between the same parties and their privies.[12]

. . . . .

Mr. Justice Eggleston, speaking for the court in *Ward* v. *Charlton,* 177 Va. 101, 12 S.E.2d 791 (1941), said: "The doctrine of *res judicata* or estoppel by judgment is based on public policy. 2 Freeman on Judgments, 5th Ed., §626, p. 1318; 30 Am.Jur., Judgments, §165, pp. 910, 911. It proceeds upon the principle that one person shall not the second time litigate, with the same person or with another so identified in interest with such person that he represents the same legal right, precisely the same question, particular controvery, or issue, which has been necessarily tried and finally determined, upon the merits by a court of competent jurisdiction, in a judgment *in personam* in a former suit.' *United States* v. *California Bridge & Construction Co.,* 245 U.S. 337, 341, 38 Sup.Ct. 91, 93, 62 L.Ed. 332.

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[9] 325 U.S. 226 (1945).
[10] *Id.* at 232.
[11] 194 Va. 607, 74 S.E.2d 204 (1953).
[12] *Id.* at 612, 74 S.E.2d 204, 208.

"The doctrine is firmly established in our jurisprudence and *should be maintained where applicable.*"[13] (Emphasis added)

We have learned from *Adam* v. *Saenger*[14] that if the matter of *fact on which jurisdiction depends* was not litigated in the original suit, *it is a matter to be adjudicated* in the suit founded upon the judgment. The Virginia court in the case under discussion decided the *jurisdictional facts*[15] upon which the Florida divorce decree was founded, and thus determined all the facts necessary for a valid divorce decree under the ruling of the first *Williams* v. *North Carolina* case.[16] Further, on the basis of res judicata the Virginia determination could not be attacked in Virginia.[17]

At this point it might be argued that the Virginia decision should have been held to preclude Florida from going into the issue of jurisdiction again since the full faith and credit clause and the statute passed pursuant thereto require that a judgment be given the same effect in every other state as it is given in the state from which it is taken. The Florida Supreme Court apparently answered such an argument with its *Mabson* v. *Mabson* decision[18] in which it had said:

The right of the Florida court to determine whether or not its own jurisdiction has been properly invoked and exercised cannot be barred by what has been determined by the courts of any other state. The courts of this state retain at all times jurisdiction to entertain a bill or other proceeding making a *direct* attack upon the validity of decrees rendered here, so whateveh may have been decided in some other state in a collateral proceeding, whatever between the same parties or not, would constitute no bar to a proceeding in the courts of this state in which the courts of this state are called upon to determine for themselves their own jurisdiction and the regularity of their own judgments.[19] (Emphasis added)

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[13] *Id.* at 614, 74 S.E.2d 204, 209.
[14] 303 U.S. 59 (1937).
[15] It should be noted that the jurisdictional facts were not litigated in the Florida *ex parte* divorce case and that they were thus *originally* adjudicated in Virginia.
[16] 317 U.S. 287 (1942).
[17] Patterson v. Saunders, 194 Va. 607, 612, 74 S.E.2d 204, 208 (1953). See p. 165 *supra.*
[18] 104 Fla. 162, 140 So. 801 (1932).
[19] 104 Fla. 162, ..., 140 So. 801, 803.
[20] ..... Fla. ....., 55 So.2d 79 (1951).

A careful reading will show that *Mabson* v. *Mabson* was not even in point on the issue involved in *McGlone* v. *Kessler*[20] in as much as the Florida court in the *Mabson* case was not asked to decide anything that had already been decided in New York. However, even if we concede that the *Mabson* case was in point, it was superseded in 1939 by *Treinies* v. *Sunshine Mining Co.*[21] In that case the United States Supreme Court, considering what matters might be litigated by courts of one state in regard to decisions of another state and the applicability of res judicata to the matter thus litigated, said:

> As the Idaho District Court was a court of general jurisdiction, its conclusions are unassailable collaterally except for fraud or lack of jurisdiction. The holding by the Idaho court of no jurisdiction in Washington necessarily determined the question raised here as to the Idaho jurisdiction against Miss Treinies' contention. She is bound by that judgment.
>
> The power of the Idaho court to examine into the jurisdiction of the Washington court is beyond question. *Even where the decision against the validity of the original judgment is erroneous,* it is a valid exercise of judicial power by the second court.
>
> One trial of an issue is enough. "The principles of *res judicata* apply to questions of jurisdiction as well as to other issues," as well to jurisdiction of the subject matter as of the parties.[22] (Emphasis added)

The Court reiterated the same idea, based however on the full faith and credit clause, in later cases[23] that were decided before the Virginia decision was pleaded as res judicata in Florida. In the same year that *McGlone* v. *Kessler*[24] was before the Florida court, the Supreme Court in two more important decisions[25] made even stronger statements to the same effect in reaffirming the *Treinies* doctrine. Thus it becomes apparent that the Florida court failed to render full faith and credit to the Virginia decree.

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[21] 308 U.S. 66 (1939).
[22] *Id.* at 78.
[23] Sherrer v. Sherrer, 334 U.S. 343 (1948); Coe v. Coe, 334 U.S. 378 (1948).
[24] ..... Fla. ..... 55 So.2d 79 (1951).
[25] Johnson v. Muelberger, 340 U.S. 581, 583 (1951); Sutton v. Lieb, 342 U.S. 402, 408, *rehearing denied,* 343 U.S. 921 (1951).

The remaining question to be considered is whether the second Florida decree was entitled to full faith and credit. Does the full faith and credit clause contemplate giving full faith and credit to a determination which was already foreclosed due to the full faith and credit clause? Surely not. If this were true, instead of having the uniformity that the full faith and credit clause does contemplate, we would have repeated litigation merely because the courts of one state refuse to recognize the decisions of a sister state. The writer feels that such a contention is untenable and that *any decision which has failed to render full faith and credit is not itself entitled to full faith and credit.*

It is submitted that the United States Supreme Court should have granted certiorari in the case under comment and then stated directly what was said so succinctly by way of dictum in *Sutton* v. *Lieb*.[26] This was in effect that if an *ex parte* divorce is rendered and later contested in a court of general jurisdiction with all parties before it, the second court's finding that there *was* or *was not* jurisdiction to render the divorce decree is entitled to full faith and credit throughout the Nation, in the state which has granted the divorce as well as in all others.[27]

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[26] "If the Nevada court had had jurisdiction by personal service in the state or appearance in the case of Henzel and the first Mrs. Henzel its decree of divorce would have been unassailable in other states. So as to the New York decree annulling the marriage, New York had such jurisdiction of the parties and its decree is entitled to full faith throughout the Nation, in Nevada as well as in Illinois. *The New York invalidation of the Nevada divorce of the Henzels stands in the same position.* As Mrs. Henzel was neither personally served in Nevada nor entered her appearance, the Nevada divorce decree was subject to attack and nullification in New York for lack of jurisdiction over the parties *in a contested action.*" [Emphasis added] 342 U.S. 402, 408 (1951).

[27] It would seem that the result reached by the Virginia Court can be justified upon another line of reasoning, without regard to the propriety of the second Florida decision. The first Virginia decision was in an *in rem* proceeding to dispose of the title to property situated in this state. In disposing of that property the Court was required, as to the status of parties involved, to recognize foreign divorce decrees based upon adequate jurisdiction within the meaning of the full faith and credit clause. The Virginia Court painstakingly did its full duty. Thereafter, later decisions of other states as to such status cannot have any effect as to *property* already disposed of. A state which has disposed of property with due regard to the full faith and credit clause, as applied to the situation then existing, should not be required to start all over again with a new property distribution. For another discussion of Kessler v. Fauquier Nat'l Bank, see Recent Decisions, 68 Harv.L.Rev. 719 (1955).