Maryland Law Review

Volume 11 | Issue 2 Article 7

Res Judicata and Interstate Divorce - Sherrer v. Sherrer and Coe v. Coe

RES JUDICATA AND INTERSTATE DIVORCE

Sherrer v. Sherrer[1] *and Coe v. Coe*[2]

The Supreme Court, in two companion cases decided in June 1948, partially settled one of the points of conflict left open by both the first and second case of *Williams v. North Carolina.*[3] In the *Sherrer* case, the facts were these: Mrs. Sherrer, after twelve years of residence in Massachusetts with her husband, left that state accompanied by her children and went to Florida, ostensibly for vacation purposes. Shortly after her arrival in the state of Florida, however, she notified her husband that she did not intend to return to him. Securing housing accommodations and employment, she enrolled her older child in school. On July 6, 1944, she filed divorce proceedings, alleging cruelty, and notification of the pendency of such proceedings was sent by mail to her husband. He entered a general appearance through counsel, filing denials to all allegations of the complaint, including the allegation as to the petitioner's Florida residence. Mr. Sherrer appeared personally and testified concerning a stipulation as to the custody of the children. His counsel represented him throughout the trial, but did not cross-examine petitioner or present any rebuttal evidence. Special note should be made of the Supreme Court's expressed recognition of this fact. A divorce was granted in November, 1944, the Court finding "that the petitioner is a *bona fide* resident of the State of Florida, and that this Court has jurisdiction over the parties and the subject matter in said cause; . . ." The ex-Mrs. Sherrer then married one Phelps, and, after a short lapse of time, this couple returned to Massachusetts, apparently for the reason that Phelps' father was ill. Mr. Sherrer then instituted suit in Massachusetts, attempting to have the Florida divorce set aside. The Massachusetts Court considered itself not precluded from examining the question of the existence of a *bona fide* domicil in Florida; and, therefore, it examined the evidence bearing upon that question and concluded that there was no such domicil in Florida that could give that State's court jurisdiction for divorce. The Supreme Judicial Court of Massachusetts affirmed the action of the lower Court.

---

[1] 334 U.S. 343 (1948).
[2] 334 U.S. 378 (1948).
[3] 317 U.S. 287, 143 A.L.R. 1273 (1942); 325 U.S. 226, 157 A.L.R. 1366 (1945). For a complete discussion of the first *Williams* case, see Strahorn and Reiblich, *The Haddock Case Overruled — The Future of Interstate Divorce*, 7 Md. L. Rev. 29 (1942).

The Court dealt with the facts in the *Coe* case as though they presented substantially the same situation as those in the *Sherrer* case, although the facts in the *Coe* case were sufficiently different possibly to distinguish the holding and principles from that of the *Sherrer* case. The *Coe* case could have been disposed of on the basis of a very present estoppel contained therein. In the *Coe* case, Mrs. Coe filed a petition for separate support in a County Probate Court of the State of Massachusetts, the state of domicil of both parties. This petition was granted, and the libel for divorce which Mr. Coe filed with his answer was dismissed. Mr. Coe then went to Nevada and instituted divorce proceedings in that state, alleging he was a *bona fide* resident of that state. Upon receiving notice of this suit, Mrs. Coe went out to Nevada, filed an answer to the complaint and also a cross-complaint for divorce on the grounds of extreme cruelty. She admitted as true petitioner's allegations as to his residence. Both parties appeared personally at the hearing, petitioner testifying that he had come to Nevada with the intention of making that state his home. The Court, finding that it had jurisdiction over both the parties and the subject matter, granted a divorce in favor of Mrs. Coe as prayed for in her cross-complaint. Mr. Coe then married a second wife and that couple, shortly thereafter, returned to Massachusetts. Mrs. Coe, the first, filed a petition in Massachusetts, praying that her husband, be held in contempt for failing to abide by the terms of the Massachusetts separate support decree and also that such decree be modified so as to give her a larger allowance. The lower Court refused to question the validity of the Nevada domicil on the grounds that to allow such collateral attack on the Nevada divorce in order to sustain the continued effectiveness of the Massachusetts decree was inconsistent with the requirement of full faith and credit. The Supreme Court of Massachusetts reversed the lower Court, holding that the investigation of whether the Nevada domicil was *bona fide* was proper. Upon further proceedings, in which the lower Court examined the domicil in Nevada, as instructed, it was found that no such *bona fide* domicil existed, and, therefore, the Nevada divorce was void. The Massachusetts decree for separate support was then not only upheld, but modified in favor of the wife. The Supreme Judicial Court of Massachusetts reversed as to this modification only, and again sent the case back for further proceedings, but, as is carefully pointed out by Mr. Chief Justice Vinson, in no manner did the state Court suggest that the earlier Massa-

chusetts decree could be sustained if the Nevada divorce were valid.[4]

The Supreme Court considered these two cases as presenting the very same questions: whether divorce granted in a proceeding in which both parties appeared, but made no *bona fide* dispute as to the jurisdiction of the Court, could be collaterally attacked in the non-granting state by such parties by showing that there was actually no *bona fide* domicil in the granting state so as to give that state jurisdiction over the subject matter — the marital status. The Supreme Court, by very strong and categorical language answered in the negative. In these cases, the Court invoked merely the normal application of the doctrine of *res judicata,* by which a judgment or decree of a court becomes binding upon parties to the suit who had the opportunity to contest the rendering of such judgment or decree but did not.

Prior to 1938, there was doubt whether the doctrine of *res judicata* could be applied to the question of a court's jurisdiction over the subject matter in an *in rem* proceeding. The objection to the application of *res judicata* in such a proceeding was that it would have the effect of allowing the parties by their consent to confer jurisdiction over the subject matter. When applied to divorce the use of the doctrine of *res judicata* would mean that the importance of having an end to litigation would outweigh the historic policy of confining the court's action only to subject matter before it, *viz.,* the marital status of parties domiciled within the state.

The Supreme Court, in 1938, ruled that *res judicata* is applicable to the question of the court's jurisdiction over the subject matter, a ruling that has been subsequently followed without question.[5] In the same year, the Supreme Court applied the same rule to a divorce proceeding in the case of *Davis v. Davis.*[6] In that case, however, there was a *bona fide* dispute and litigation over the question of the petitioner's domicil. Naturally, there arose the *query* of whether the *Davis* holding would be limited to the facts of the case or whether it would be extended to include any case where the parties had appeared before the court grant-

[4] See Estin v. Estin, 334 U.S. 541 (1948); Krieger v. Krieger, 334 U.S. 555 (1948), noted, *And Now That You Have Your Divorce, Where Do You Stand?,* 10 Md. L. Rev. 256 (1949).

[5] Stoll v. Gottlieb, 305 U.S. 165 (1938); Treines v. Sunshine Mining Co., 308 U.S. 66 (1939); Chicot County Drainage District v. Baxter State Bank, 308 U.S. 371 (1940). Note, *Judgment On Merits As Res Judicata of Jurisdiction Over Subject Matter,* 49 Yale L. J. 959 (1940).

[6] 305 U.S. 32, 118 A.L.R. 1518 (1938).

ing the divorce. Because of the domiciliary state's close interest in the marital status of its residents, it was thought that the *Davis* case might be limited to its facts, *viz.*, an actual dispute and litigation determining the establishment of domicil in the granting state.

In the first case of *Williams v. North Carolina*[7] reversing the *Haddock* case, the Supreme Court, by declaring that all single-domicil divorces must be given recognition under the full faith and credit clause, started a new trend towards certainty as to the extraterritorial validity and effect of divorces granted by one of the several states where something less than the domicil of both spouses was present. The next question was how far the Court would (or could) go toward the compulsory universal acceptance of divorces. It was confronted with the problem of balancing the desire and need for uniformity in the recognition of divorces (a need recognized by Mr. Justice Frankfurter in his concurring opinion in that case) against the detriment to the sovereignty of the non-granting states caused by the imposition upon them of the obligation to accept the laxer divorce laws and policies of the granting state. The second *Williams* case explicitly left to the states the power to reinvestigate the fact of the existence of a *bona fide* domicil which was the basis of jurisdiction of the granting state over the marital status. The *Sherrer* and *Coe* cases do not necessarily limit such power of a state, as in the *Williams'* situation, to collaterally attack the Nevada divorce in a prosecution of a bigamous subsequent marriage. Strictly speaking, the doctrine of *res judicata* cannot be applied as a bar against it and it is still undetermined whether the non-granting state which claims to be the matrimonial domicil of the parties may itself re-investigate jurisdiction of the decree granting state. However, as between the parties to the original suit, it is clear that the Court is leaving little (or even no) opportunity for re-litigation.

There is no doubt that the rule of the *Davis* case has been enlarged; the question is merely one of how great has the expansion been. It is true that in the *Sherrer* case there was a general appearance by the defendant therein. Even so, the Court recognized the fact that such appearance was not for the purpose of testing the jurisdiction of the Florida court, and that there was no *bona fide* dispute over the issue of jurisdiction of that court. The commentators agree that it seems to be settled that where the defendant has appeared for any purpose, the doctrine of *res*

[7] *Supra*, n. 3.

judicata is applicable and precludes both parties from relitigating the issue of the validity of the decree granted, even though there was no *bona fide* dispute over the issue of the jurisdiction of the granting court.[8] Furthermore, the fact that the defendant in his pleadings made a denial of every allegation contained in the complaint seems to be irrelevant, for such a denial alone would not seem to constitute a *bona fide* contest under the *Davis* case. The importance of the general denial vanishes completely, for in the companion *Coe* case, the Court founded its decision on the same ground on which the *Sherrer* case was based, *viz.*, *res judicata.*

In the *Coe* case, aside from the fact that jurisdiction of the Court was admitted, the Court ignored another distinguishing factor and, therefore, such factor loses its significance as a possible basis for any distinction between the two cases and further extends the holding of the *Sherrer* case. In the *Coe* case, the party in whose favor the Nevada divorce was given sought to attack it collaterally in Massachusetts. In general, one who has obtained a divorce or who acts in reliance upon such decree, as by remarrying, is estopped from collaterally attacking such divorce decree, even though the granting court had no jurisdiction.[9] Hence the Supreme Court could have based its decision in the *Coe* case on the grounds of estoppel, but instead it rested its holding squarely on *res judicata.* By linking the *Coe* case with the *Sherrer* case and putting the two cases on the same ground as far as principle is concerned, the Court indicates that its holdings apply to any case where the parties actually appear for any reason, even though there is no dispute even in the pleadings as to the jurisdiction of the Court. In such case, a decree, as far as the parties to the suit are concerned, must be given recognition for all intents and purposes under the full faith and credit clause,[10] and both parties are precluded from collaterally attacking the divorce by challenging the jurisdiction of the granting court.

According to techniques taught by the science of jurisprudence, there is ample justification for accepting the

[8] GOODRICH: CONFLICT OF LAWS (3d Ed. 1949), Sec. 23; Holt, *The Conflict of Laws in Divorce*, 1949 Ill. Law Forum, 625, 633-634; Paulsen, *Migratory Divorce — Chaps. III and IV.*, 24 Ind. L. Rev. 27, 36-41 (1948).

[9] See Strahorn and Reiblich, *supra*, n. 3, p. 62, and f.n. 98.

[10] See note, *General Appearance in Foreign Divorce Held to Preclude Collateral Attack on Unlitigated Facts*, 54 Harv. L. Rev. 1060 (1941), to the effect that in Frost v. Frost, 23 N.Y.S. 2d 753 (1940), a case very similar to the *Coe* case, the New York Court, though talking estoppel, further bases its holding on *res judicata* in order to give the earlier out-of-state decree recognition under the full faith and credit clause.

theory that the Court in these two cases laid down as a categorical proposition that any appearance before the granting court of the parties prevents them from re-litigating the issue, and the effect of the decree upon their marital status is binding upon them. As was seen, such justification lies in the fact that the Court in the *Sherrer* case rendered its decision after expressly accepting the fact that the general appearances and pleadings of Mr. Sherrer did not constitute a *bona fide* dispute and then dismissing these factors as irrelevant. In effect, the Court is saying that these factors are totally immaterial and that the appearance of the party seeking to attack collaterally the decree is the controlling element of the case. The *Coe* case supplements this argument. But there is a note of caution to be added in light of the fact that the Supreme Court in recent years has often departed from a strict application of *stare decisis*. Such departures may more readily occur when there has been a strong dissent from the earlier opinion.

A basis for limiting these cases may be laid as follows: The language of the *Coe* case can be disregarded completely, for there is the estoppel, an element upon which the case could have been disposed; in the *Sherrer* case, though Mr. Sherrer appeared generally, he, in his pleading, denied his wife's Florida domicil and the jurisdiction of the Court. Though this is not a true litigation of the jurisdiction of the Florida Court, it, at least, presented the jurisdictional question. Let us pose a hypothetical case in which the respondent does not, as in the *Sherrer* case, file a general denial to the complaint or, as in *Coe,* file a cross bill for divorce but only attacks the merits of the case, *e.g.*, he denies commission of adultery or alleged desertion. It may be argued that the fact that the court has personal jurisdiction over the parties by virtue of their consent has no effect since divorce proceedings are *in rem* or, at least *quasi in rem.* The *Sherrer* case precludes one from collaterally attacking jurisdiction over the *res* after he has made a denial thereof in his pleading; the *Coe* case, after one files a successful cross-bill for divorce, in the granting court. But in the hypothetical case, no such denial was made, no such cross-bill has been granted, and the Supreme Court might seize upon this to say that the issue of the jurisdiction of the granting court was never before that court, was never litigated before that court, and further, to permit the defendant in the divorce suit to collaterally attack it would be conferring jurisdiction on the granting court by mere consent. In view of the specific language of the court as applied

to the actual situation out of which the *Sherrer* and *Coe* cases arose, this argument is nebulus. But a distinction, as above described, if made when the occasion arose, might not be too surprising to students of modern jurisprudence nor would it be unwelcome to those holding sacred the rights of the states over the marital status of those living therein.

It seems beyond doubt that the present position of the Court is that where there is an actual appearance of the parties before the court, for any purpose, in divorce proceedings, the matter decided or which might have been litigated by it becomes *res judicata* as to those parties. Will the same be true where there is something less than an actual appearance of the party himself throughout the hearing? In *Andrews v. Andrews,*[11] the defendant withdrew her appearance before the decree was granted, pursuant to a consent agreement between the parties. The Supreme Court sustained the Massachusetts Court in holding this out-of-state divorce void for lack of domicil. Now, under *Sherrer* and *Coe,* the doctrine is laid down that an opportunity to defend measured by an appearance gives rise to *res judicata.* Thus, these two cases read together seem to require recognition of a divorce of the *Andrews* type, for the appearance of the parties was sufficient to give the defendant an opportunity to defend. Indeed, the Court said that the principles of the *Andrews* case are overruled if inconsistent with those of the present companion cases. Although the Maryland Court of Appeals has said the *Andrews* case is overruled,[12] the rationale of the *Andrews* case was recognized as the controlling law by the Circuit Court of Baltimore City in July, 1945,[13] in upholding the principle that parties to an action could not give the court jurisdiction of the subject matter by their consent alone. But the Supreme Court, proceeds on the assumption that if the granting court,[14] being a competent court, decides that it has jurisdiction over the subject matter, arising from contacts other than consent of the parties and independent of the consent of the parties, the application of *res judicata* precludes further litigation on this point. Jurisdiction then, is deemed not to arise from consent of the parties, merely because it cannot further be questioned. It arises from the determination of the Court.

[11] 188 U.S. 14 (1903).
[12] Epstein v. Epstein, 66 A. 2d 381 (Md. 1949).
[13] Schwartz v. Schwartz, Daily Record, June 21, 1945 (Cir. Ct. Balto. City).
[14] *Supra,* n. 1, 355-356.

The supposition that a competent court decides the question of its jurisdiction over the subject matter in the first instance is the basis of the composite dissent by Mr. Justice Frankfurter (Mr. Justice Murphy concurring) to the two companion cases now being reviewed.[15] The dissent labors the fact that, as a practical matter, there are four or five states carrying on the industry of granting "bargain-counter" divorces and that divorce proceedings in such states are nothing but a sham. To require compulsory recognition of these divorces is to encourage perjury and to compel the sister states to accept a contravention of their social policy regarding the marital status, by means of a constitutionally required projection of the laws of a state having no actual interest in the marital status which it attempted to dissolve. Further, it is argued that the legislature, alone, has the power to change the policy in this country in regards to divorce laws and to effect uniformity thereof[16] And no power lies in the courts to bring about such uniformity, no matter how desirous they are in reaching such a result. The dissenting opinion feels that the holding of the majority has gone far in opening the way to uniformity by court action. The next step is to prevent re-litigation of fraud in the original proceedings. This recognition by the dissent of the great step that the majority has taken is justification for accepting the holding of the Court to be as broad as to the rights of the parties before it as the language in the majority opinion indicates.

The Court recognizes as permissible the subsequent questioning of domicil in the case of *ex parte* divorces. Hence *Walker v. Walker*[17] remains controlling in Maryland, and mere notice of the pending suit in a foreign jurisdiction does not preclude the defendant from collaterally attacking the decree on the basis of lack of jurisdiction of the granting court. Evidently, it feels the "due process" requirement is not sufficiently satisfied to warrant the extension of the present holdings to *ex parte* divorces. However, what if there is merely an appearance through counsel? In *Schwartz v. Schwartz*[18] the Circuit Court of Baltimore City, relying on those cases following the *Andrews*

[15] *Supra*, n. 1, 356.

[16] This is no way inconsistent with the concurring opinion in the first Williams case, in which Justice Frankfurter recognized the desirability of uniformity in the divorce laws of several states, but also recognized that such uniformity can only be brought about ultimately by a constitutional amendment and partially by congressional action.

[17] 125 Md. 649, 94 A. 346 (1915).

[18] *Supra*, n. 13. But is case overruled by Maryland Court of Appeals? See, *supra*, n. 12.

case, held that in such case, the fact of a *bona fide* domicil in Nevada could be questioned. Now, since the states feel that their interests in the marital status of the residents should be protected, they will probably try to distinguish such cases from the *Sherrer* and *Coe* situation. But, as counsel will more likely protect his absent client's interest just as well, if not better, than if the latter were present, the Supreme Court can logically only hold the doctrine of the *Sherrer* and *Coe* cases to be applicable, since it feels that "vital rights and interests involved in divorce litigation" may not be "held in suspense pending the scrutiny by courts of sister states of findings of jurisdictional fact made by a competent court. . . ."[19] However, the Court has not gone so far as to say that a mere opportunity to appear will suffice for *res judicata* to apply, and it is extremely doubtful that the Court will ever go that far.

Before concluding this discussion, a brief consideration must be had of the effect of the *Sherrer* and *Coe* doctrine upon the right of the sister states themselves collaterally to attack the validity of a Nevada and Florida decree granted in the situation present in the cases before us. Do these decisions preclude Massachusetts from now prosecuting Mr. Sherrer and Mr. Coe for bigamy? The very words of these cases speak in terms of the parties to the original suit being barred from instituting further litigation, although, at the same time, broader language was used indicating that the original decree might stand for all purposes under the full faith and credit clause. The principle applied in the *Sherrer* case was ". . . the proposition that the requirements of full faith and credit bar a defendant from collaterally attacking a divorce decree on jurisdictional grounds in the courts of sister states where there has been participation by the defendant in the divorce proceeding, where the defendant has been accorded full opportunity to contest the jurisdiction issues. . . ."[20] The *res judicata* doctrine definitely binds the parties to the original suit. They, by the conduct in such suit, have put themselves and those in privity with them in such a position as to be unable to show the truth or what might be the truth. This is the essence of *res judicata,* as well as the estoppel doctrine. But the State of Massachusetts was not a party to the original suit. Hence, there is nothing in legal theory precluding it from showing the truth, *viz.,* no valid domicil. The cases before us do not say that the out-of-state divorces are valid. Rather,

[19] *Supra,* n. 1, 356.
[20] *Supra,* n. 1, 351.

they merely hold that the parties before the court are precluded from raising the "jurisdictional issues" again. It is true that in case of jurisdiction being had over the *res* in an *in rem* proceeding, full faith and credit must be given to the decree of the court. But for full faith and credit to operate on a particular decree, it must first be determined if the court rendering the questionable decree had the proper jurisdiction over the subject matter. And, on the holding of these cases, nothing prevents the sister state from raising the jurisdictional issue and showing the invalidity of the out-of-state decree. What might stand as a bar would be the strong language of the Court in denying to the recognizing state the right to assert its clearly expressed statutory policy with reference to out-of-state divorces obtained by its domiciliaries. After saying that this case involves an "inconsistent assertion of power by courts of two states of the Federal Union and thus presents considerations which go beyond the interests of local policy, however vital", and that it is not the function of the Court to weigh the merits of the policies of the states, the Court says full faith and credit does not amount to "something less than the duty to accord *full* faith and credit to decrees of divorce entered by courts of sister States". Going further, the Court again said, "If in its *(full faith and credit clause)* application, local policy must be required to give way, such 'is part of the price of our federal system'."[21] The Court concludes by pointing out that the nature of the personal interests involved require that the litigation should terminate in the courts of the state in which judgment was rendered. Such language indicates that the majority of the present Court is balancing the scales heavily in favor of rendering one's personal status certain, and, therefore, there is a possibility that the Court will find a means of preventing the sister states from prosecuting for bigamy in the *Sherrer-Coe* situation, if such an issue be presented.

In the dissenting opinion, there are a few words substantiating the view that these cases do not in any way prevent the state from prosecuting for bigamy, and that the 2nd *Williams* case remains law in that respect. Mr. Justice Frankfurter asserts that in situations like herein present, the state is expressing its sovereign power when it speaks through the courts, although the litigation is between private parties.[22] Such interest of the state is expressed the same as if it had instituted criminal prosecution. By setting

[21] *Ibid*, 354-356. Italics supplied.
[22] *Ibid*, 360-364.

forth this idea, the dissent impliedly indicates that the majority of the Court was not concerned with safeguarding the interests of the states and did not consider itself faced with a determination of the rights of the states as regards the subsequent prosecution for bigamy, (if another marriage ensues), but was merely determining the right of the parties in a civil action tainted with a public interest that was insufficient to have a bearing on the outcome of the case.

Conceding that the parties appearing in the original suit are forever precluded from collaterally attacking the decree rendered, there is left the uncertainty as to the ability of the parties to validly remarry and return to the state that contends it still is the domicil of the purportedly dissolved marriage.[23] Thus, it seems that while the Court clarifies one issue, it casts doubts upon others. This further indicates that certainty as to the extraterritorial effect of the foreign divorce is difficult of achievement by the Judiciary. It can be more easily obtained through Congressional legislation (pursuant to a constitutional amendment, if necessary).

[23] The Court of Appeals of New York has recently ruled that a New York resident's appearance in his wife's Florida divorce action does not bar his daughter's collateral attack on the Florida decree in the New York courts, relying on language in Williams v. North Carolina, 325 U.S. 226 (1945), to support the restriction of the doctrine of Sherrer v. Sherrer. In Re Estate of Johnson, 18 L. W. 2490 (N.Y. Ct. App., Apr. 13, 1950).