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Erratum
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as an unjustified deviation from this judicial attitude, inspired by an overexuberance of the period traceable to the New Deal.[96] Whether the *Kyne* decision is viewed as a correction of an historical aberration, as a result (which it does not purport to be) dictated by a changed public policy gleaned from the Administrative Procedure Act,[97] or as simply a natural result of the frailty of the judiciary overzealously guarding its function as the final arbiter of legal disputes, it is not simply a different situation calling for different results. It should, in the future, require fundamentally different approaches than have been utilized in the past. Given reasonably close questions of law, the injunction proceeding may well be, in practical effect, a necessary step in the certification process.

WILLIAM H. GARDNER

COLLATERAL ATTACK ON FOREIGN DIVORCES: PROOF OF THE FOREIGN LAW

I

The expanding industrial complex of the United States and the rapidly growing mobility of its population, fostered by improvements in the fields of transportation and communication, have led to increasing limitations on the traditional independence of the state in areas heretofore considered local in nature. The Supreme Court, recognizing the need for developing the state court systems into an integrated judicial framework, has utilized the Full Faith and Credit Clause as one means of reaching that objective.[1]

These efforts were bound to raise new problems. Certainly one of the most sacrosanct local areas is marriage and divorce; local policy governs these institutions with zeal, and infringements by federal law naturally result in a great deal of controversy. The advent of the "divorce mill state" created new resentments which inevitably led to a tenacious grasping of divergent views. An early attempt to gain order out of the chaos and to adjust the conflicting interests of the states was doomed to failure.[2]

The controversy is largely focused on the problem of a sister state's obligation to enforce the decree of the divorcing state. Since jurisdiction, or power, is a necessary prerequisite to the giving of full faith and credit to any decree or judgment, the states searched this area for a weakness upon the basis of which

96. "This decision is in some measure, I believe, an expression of the mood of judicial self-deprecation and abdication into which the Court of that period had fallen. Haunted by a past of judicial arrogance, beguiled by the promise of administrative action, a majority of the judges who participated were easily persuaded of the irrelevance of the judicial role." *Id.* at 430.

97. Air Line Dispatchers Association v. National Mediation Board, 189 F.2d 685 (D.C.Cir. 1951), *cert. denied*, 342 U.S. 849 (1951). See *supra* note 25.

1. EHRENZWEIG, CONFLICTS OF LAWS, part one, p. 17.
2. Haddock v. Haddock, 201 U.S. 562, 26 Sup.Ct. 525 (1906).

they could deny full faith and credit and sustain their own local policy. The weakness was apparent in the very basis of divorce jurisdiction, domicile.

Domicile, an ill-defined and "elusive" concept, the sacred cow of divorce jurisdiction, is an increasingly unacceptable basis of reference. The governing standard as to, or definition of, domicile varies. The courts of one state may weigh heavily the intent stated by the person,[3] the courts of another state may place emphasis on the intent as manifested by conduct.[4] Both tests may be constitutionally acceptable but the conceptual differences vary the conclusion. A common element in the concept is some sort of intent, and the subjectivity of that intent results in additional variance.

II

The Supreme Court in a series of five cases has indicated the manner in which the local interests of the states will be reconciled with the requirements of the Full Faith and Credit Clause.

Williams v. State of North Carolina (I)[5] established conclusively that the Full Faith and Credit Clause compels recognition of valid divorce decrees between states. The basis of the compulsion is the inherent right of each state to determine the marriage status of a spouse domiciled there even though the other spouse be absent, provided the form and nature of substitued service meet due process requirements. The power of the divorcing state rests upon its control over marriage and divorce within its borders. This holding left in doubt the extent to which a sister state might avoid giving full faith and credit by finding no domicile and, hence, no jurisdiction.

Williams v. State of North Carolina (II)[6] resolved this question in part. The Court recognized that domicile, being the basis of jurisdiction, is necessary to give a valid divorce decree, and held that the domiciliary state of the absentee spouse may apply its own test of domicile with regard to that state's interests. The Court accompanied the holding with this caveat:

> The challenged judgment must, however, satisfy our scrutiny that the reciprocal duty of respect owed by the states to one another's adjudication has been fairly discharged, and has not been evaded under the guise of finding an absence of domicile and a want of power in the court rendering the judgment.

This might have seemed at the time to be a sufficient answer to the problem. However, in the area of domestic relations the Supreme Court may well have discovered that its caveat was grossly inadequate to meet the problem. Modification would be necessary to avoid the impossible task of policing the caveat.

3. In re Dorrance's Estate, 115 N.J.Eq. 268, 170 Atl. 601 (1934).
4. In re Dorrance's Estate, 309 Pa. 151, 163 Atl. 303 (1932).
5. 317 U.S. 287, 63 Sup.Ct. 207 (1942).
6. 325 U.S. 226, 65 Sup.Ct. 1092 (1945).

In *Sherrer v. Sherrer*[7] the Supreme Court extended the reach of the Full Faith and Credit Clause by holding that it barred the defendant spouse from attacking a divorce decree on jurisdictional grounds in the courts of a sister state ". . . where the defendant has been afforded full opportunity to contest the jurisdictional issues, and where the decree is not susceptible to such collateral attack in the courts of the state which rendered the decree." The court restated the pervading policy behind the Full Faith and Credit Clause, to weld the states into a nation, and noted the hardships that unwarranted collateral attacks might inflict on a litigant.

Obviously, this case, while expanding the *res judicata* effect of a foreign divorce decree and to some extent modifying the second *Williams* case, is not inconsistent with the theory underlying domicile. The appearance and contest by the defendant may result in estoppel in the rendering state; if so, the other states must also hold the defendant estopped from attacking the decree collaterally.

However, *Johnson v. Muelberger*[8] went further. In this case a divorce granted after a purely formal appearance and contest (decrees rendered on this basis are often referred to as "consent decrees") by the defendant spouse was attacked by a stranger to the divorce action, and the Supreme Court held that such collateral attack was forbidden under the Full Faith and Credit Clause unless permitted in the rendering state. This holding was in the face of facts proving that the parties to the divorce had committed a fraud on the rendering court as to domicile. In the words of the court:

> When a divorce cannot be attacked for lack of jurisdiction by parties before the court or strangers in the rendering state, it cannot be attacked anywhere in the union. The Full Faith and Credit Clause forbids.

This extension is difficult to explain on the basis of the *res judicata* effect of a judgment and seemed to mark a departure from a strictly domicile basis of jurisdiction. Local policy again gave way before the overriding policy toward unity.

The impact of this case was heavy; husband and wife were now enabled to collaborate in committing a fraud on the court of a divorce-mill state whose laws minimized the opportunities for collateral attack and thus to secure a divorce, conceptually void but unassailable. If viewed as a departure from the traditional concept of domicile as the basis of divorce jurisdiction in the situation where both parties appear and "consent" to the divorce this result does not seem to be untenable. It tends to insure uniform treatment of the decree and to eliminate the danger of collateral attack whenever the laws of the divorcing state preclude it, ending threats of attack against the estates of the parties, of bigamy, of bastardy, etc. In effect, a few escape the consequences of failure to

7. 334 U.S. 343, 68 Sup.Ct. 1087 (1947).
8. 340 U.S. 581, 71 Sup.Ct. 474 (1951).

meet at least formal requirements, but the majority, complying with these minimal requirements, are no longer subject to harassment on the basis of domicile.

The final case in the series, *Cook v. Cook*,[9] reinforced the policy underlying the *Johnson* case by establishing that a divorce decree gives rise to a presumption of jurisdiction over both parties. The language of the case hints at what is apparently a compromise between the trend toward national uniformity on the one hand, and respect for local interests, on the other. When an *ex parte* divorce comes under judicial scrutiny in the domicile of the absentee spouse, the jurisdictional finding of domicile may be re-examined within the limits laid down by *Williams II*. Thus, the innocent spouse is protected from a sister state's divorce decree which fails to satisfy the domiciliary standards of his or her home state. However, where both parties have appeared, domicile as a jurisdictional fact is completely withdrawn from re-examination if the law of the rendering state insulates the decree from such attack, and further, the "burden of undermining the decree rests heavily upon the assailant."[10] Realistically, this is the substitution of personal jurisdiction for domicile as a jurisdictional prerequisite and an implied recognition that marriage, at least in this situation, may be treated as a personal relationship which is beyond the control of the domiciliary state or states.[11]

In view of this extraordinary protection given to "consent decrees" it is particularly appropriate to examine the limitation on this protection and the conditions under which it will be afforded. It will be recalled that, according to the *Johnson* case, a stranger's right collaterally to attack is determined by the law of the divorcing court. In many cases this right may clearly appear from the divorcing State's law; the determination of the sister state's law becomes a problem when it is not clearly established in the sister state. In dealing with this right to assail the decree, it is appropriate to note that the reference to the "heavy burden on the assailant" in *Williams II* was concerned with the quantum of proof necessary to upset the decree of a sister state and not with the status of the attacking party.

III

In a court's search for the divorcing state's law on the subject of a stranger's standing to attack its divorce, the re-examining court may follow one of two alternatives. First, it may treat the problem as it would any other problem involving the proof of foreign law. Second, it may, in view of the sensitivity of the subject, treat the problem as sui generis.

If treated as problem of proof of foreign law three methods may be employed with varying results. First, the examining state may take judicial notice

9. 342 U.S. 126, 72 Sup.Ct. 157 (1951).
10. Williams v. North Carolina (II), *supra* note 6.
11. See EHRENZWEIG, *op. cit. supra* note 1 at 247; see also, Stimson's *Jurisdiction in Divorce Cases: The Unsoundness of the Domiciliary Theory*, 42 A.B.A.J. 222 (March 1956).

of the sister state's law. Second, the examining state in absence of contrary proof may presume the sister state's law to be the same as her own common law. Third, the examining state may place the burden of proving his standing upon the assailant.

Many states by statute require or at least authorize judicial notice of the divorcing sister state's law.[12] Unfortunately, judicial notice does not provide an answer where an assailant's standing to attack the decree is not clear. Any attempted resolution would have to be justified on other principles.

Under the general rule of conflicts that in the absence of proof of a sister state's common law it will be presumed to be the same as the forum's own common law, the decision is in effect determined by local law.[13] As a result a divorce decree rendered in a state whose law as to attack by third parties is unclear may be assailable in one sister state but free from attack in another. This undesirable result is avoided, of course, if the assailant predicates his right upon a foreign statute.[14] He bears the burden of proving his right under that statute; if proof of that statute fails no alternative reference is available.

It is submitted that by placing the burden of proof on the assailant whenever his standing is in doubt the result could be made to conform more closely to the policy underlying the Full Faith and Credit Clause and at the same time prevent inconsistent rulings based on variance in local law. In other words, an attack would be limited to a situation where the plaintiff can clearly establish his right to assail the decree; this right would not vary from state to state and the parties would be less subject to harassment.

Professor Ehrenzweig[15] suggests that the general attitude of the forum as to "consent divorce decrees" will govern the result. He does not think the principle that the burden "rests heavily on the assailant" to be applicable, nor does he believe on the other hand that the defendant should necessarily bear the affirmative on this issue. Apparently it is Professor Ehrenzweig's view that the general principles concerning proof of sister state law will not be followed, but that the dilemma will be resolved ad hoc on the basis of the forum's attitudes toward divorce. It is suggested, however, that such a result would seem to undermine the trend of the Supreme Court decisions toward uniformity of result and finality of decrees.

IV

The states have not as yet had the opportunity to develop a significant body of law with respect to the problem of determination of an assailant's right under

12. Cf. Uniform Judicial Notice of Foreign Law Act, 9A U.L.A. (1957) 318; Uniform Proof of Statutes Act, 9B U.L.A. (1957) 399.

13. Cherwein v. Cherwein, 272 N.Y. 165, 5 N.E.2d 185 (1936); Davis v. Davis, 119 Conn. 194, 175 Atl. 574 (1934); Miller v. United States Fidelity and Casualty Co., 291 Mass. 445, 197 N.E. 75 (1935); see also, 3 BEAL, THE CONFLICT OF LAWS 1682 (1935).

14. Venner v. N.Y. Central & Hudson R.R. Co., 160 App.Div. 127, 145 N.Y.S. 725 (3d Dep't 1914), *aff'd*, 217 N.Y. 615, 111 N.E. 487 (1916) (decided prior to the enactment of §344 of the Civil Practice Act).

15. EHRENZWEIG, *op. cit. supra* note 1 at 248.

the law of the rendering state collaterally to attack a divorce decree. In one New York and two Illinois cases however, the courts have faced the problem and have reached different conclusions. In a recent New York case a woman's divorce was attacked by her second husband by way of defense to her separation suit.[16] The parties to the first divorce, in procuring a Georgia divorce decree, had fraudulently misrepresented their domicile. New York has a statute authorizing its courts to take judicial notice of a sister state's law.[17] Each party had a Georgia lawyer testify as to the Georgia law on collateral attack, but their testimony was conflicting; and the judge was unable to resolve this conflict by his own analysis of the available Georgia decisions. The court described its dilemma and its resolution in these terms:

> In the circumstances, I am driven to making a choice between virtually negating the *Johnson* ruling by holding that the instant attack is permissible, for it has not been clearly established that the divorce state would prohibit it, or of broadening the scope of the Johnson case by requiring the assailant to prove that the state which rendered the decree would permit the attack by him. I see no middle or other ground. I have come to the conclusion that the proper view is the latter—*that the burden should be placed upon one who would assail the decree of* a sister state to prove that, under the laws of that state, he would be permitted to attack the decree. That view, I think, is more in keeping with the command of the constitution, and it finds support in the language of the opinions—albeit not in the definitive decisions of the United States Supreme Court. (Emphasis added.)

Professor Ehrenzweig might well point to this holding as suggesting New York's inclination toward accepting "consent" as a sufficient basis for divorce jurisdiction.[18] However, whatever support he may derive from this decision, recent Illinois decisions do not seem to bear him out. They hold without further discussion, that the law of the divorcing state concerning the right to attack collaterally will be presumed, in absence of contrary proof, to be the same as that of Illinois.[19] In other words, they simply treated the problem as one of proof of foreign law. As it happened, Illinois law foreclosed such an attack. It can hardly be argued that had Illinois law allowed such collateral attack the court's approach to the solution of the problem would have been different.

Is a policy of the individual states to look to their own common law to determine standing to attack a consent decree, consistent with the trend established by the Supreme Court decisions?

> The faith and credit is not to be niggardly but generous, full. Local policy must at times be required to give way, such is part of the price of our federal system.[20]

16. Phillips v. Phillips, ——Misc.2d——, 180 N.Y.S.2d 475 (Sup.Ct. 1958).
17. N.Y. Civ. Prac. Act §344a, subdv.B.
18. New York Courts by statutory authority grant divorces regardless of place of domicile if the marriage was solemnized in New York. N.Y. Civ. Prac. Act §1147.
19. In re Day's Estate, 7 Ill.2d 350, 131 N.E.2d 50 (1956); Jamison v. Jamison, 14 Ill.App.2d 233, 144 N.E.2d 540 (1957).
20. Johnson v. Muelberger, *supra* note 8.

Uniformity of result is achieved by avoiding auxiliary reference to domestic law in this situation, and harassment is less likely as the divorcing court's decree gains stability. It is submitted that the Supreme Court may find these considerations of sufficient weight to justify placing on the assailant the burden of proving his right collaterally to attack a divorce decree.

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