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J. Westwood Smithers
University of Richmond

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Collateral Attack on Foreign, Ex Parte Divorce Decrees: A Virginia Case

J. WESTWOOD SMITHERS

Ten years ago it was reported that a bill had been introduced in the Nevada legislature to grant divorces by slot machine. "The divorce seeker would punch the machine once a day for 42 days, to establish residence, then insert 200 silver dollars. As the divorce popped out of a slot, colored lights would flash, wheels spin, and a jukebox would play *America*." *Time*, Mar. 21, 1949, p. 26, col. 2.

The bill did not pass. But the liberality of existing divorce laws of Nevada and several other "divorce-mill" States has attracted many divorce seekers from all parts of the country, including Virginia. The "migratory divorces" so obtained have given rise to difficult Conflict of Laws problems, one of which will be briefly discussed here.

When a husband and wife live in Virginia and one of them visits Nevada to obtain a decree of absolute divorce, without any service of process on the other in Nevada and without any appearance by the defendant in the divorce suit, what effect does such a decree have in Virginia? (1) Are Virginia courts required by the full faith and credit clause of the federal constitution, as interpreted by the Supreme Court, to recognize and give effect to such a decree? (2) If the constitutional mandate is not applicable, is it desirable that such a decree nevertheless be recognized and given effect under so-called principles of "comity"?

The Virginia Supreme Court of Appeals in *Evans v. Asphalt Roads & Materials Co.*, 194 Va. 165 (1952) had a case involving this problem and rendered an important decision that seems to have escaped the notice of all the law reviews. The purpose of this paper is to discuss that decision and the court's opinion in the case primarily with reference to the first of the two questions stated above.

The Case.

The case arose in this way. Roy N. Evans, an employee of the Asphalt Roads & Materials Co., was killed in 1950 in an accident arising out of and in the scope of his employment. His dependents were entitled to compensation under the Virginia Workmen's Compensation Act. A fifteen year old son, Kiah Evans, claimed to be his sole dependent, but Mae Lawson Evans, who was living with the decedent as his wife at the time of the accident, claimed a share of the compensation as his lawful wife, under Va. Code Ann. §65-63 (1950).

Whether or not she was the wife of the deceased employee at the time of the accident depended upon the validity of her Nevada marriage to him in 1946. This in turn depended upon the validity of two prior Nevada divorces: his divorce from his first wife, Sallie Evans, and her divorce from her first husband, Floyd Smith.

The facts concerning the divorces were not unique. Mr. Evans and his wife, Sallie, were living on 4th Street in Ocean View, Virginia in 1945 when he went to Radford, Virginia to work. While there he met Mrs. Mae Lawson Smith, who had separated from her husband and was living in Pulaski, Virginia. After about three months they decided to marry, and in order to free themselves of their respective spouses planned to obtain Nevada divorces. They went to Reno, Nevada (in August, 1945, according to her later testimony), employed the same lawyer, and filed their suits for divorce—one in June, 1946 and the other two weeks later, in July. With regard to whether she intended to make her home in Nevada Mrs. Smith-Evans (as she will hereinafter sometimes be referred to) later testified in a hearing before the Chairman of the Industrial Commission of Virginia: "I just meant to return as soon as possible. I did not think I would be living out there very long. We thought we might not be there a year."

In his divorce suit, Mr. Evans gave his wife's last known address as "Oceanview Drive, Norfolk, Virginia," although he knew that she had moved with their children from Ocean

View, Virginia, to Candler, North Carolina. Notice of his suit was mailed to Norfolk and was returned undelivered to Nevada. Mrs. Sallie Evans testified in the hearing referred to above that she knew nothing of this divorce suit until Mr. Evans' death in 1950.

In her divorce suit, Mrs. Smith's affidavit gave the last known address of her husband as "General Delivery, Pulaski, Virginia", although she admitted (in the same hearing referred to) that she knew that he lived at Hiwassee in Pulaski County, Virginia, and that mail intended to reach him should have been addressed to him at the Hiwassee Post Office. She explained: "I did not care whether he got it or not."

Notice of both suits was published in a Reno newspaper. Neither of the defendants entered an appearance, nor were they served with process.

On September 11, 1946 the Nevada court entered decrees of absolute divorce in these companion cases. On October 19, 1946 Mr. Evans and Mrs. Smith went through a ceremony of marriage in Nevada. In March, 1947 they returned to Pulaski, Virginia (and lived together until his death in 1950.)

(It should be explained that the decedent's first wife, Mrs. Sallie Evans, did not claim compensation as a dependent. She had brought suit in North Carolina for divorce from Mr. Evans on the ground of desertion and in June, 1947 had obtained a decree of absolute divorce, upon constructive service of process; she had also been awarded custody of their children.)

In the hearing before the Chairman of the Industrial Commission of Virginia it was found as a fact that neither Mr. Evans nor Mrs. Smith ever had any intention to make a home in Nevada. The Commissioner's opinion stated: "They were sojourners for one sole purpose and that was to secure a divorce, which they knew could not otherwise be obtained." His opinion then stated, as conclusions of law, that neither of them acquired a domicil in Nevada, that Nevada courts had no jurisdiction to grant them divorces, and that the Nevada decrees were null and void. The Commissioner therefore ruled

that Mrs. Smith-Evans was not the lawful wife of Mr. Evans at the time of his accident, and entered an award in favor of the son, Kiah Evans, as sole dependent.

In a review of the case, the full Industrial Commission affirmed the findings of fact and conclusions of law reached by the hearing Commissioner and affirmed the award entered thereon.

Mrs. Smith-Evans appealed to the Supreme Court of Appeals, which reversed and remanded the case to the Industrial Commission, with direction to amend the award to include the appellant as the widow of the deceased, and to divide the compensation between her and the dependent child, Kiah Evans.

In its opinion the court stated the major question to be whether the minor son of the deceased employee

had the right to attack the validity of a divorce granted his father in the State of Nevada. The issue turns on the effect in Virginia of the Full Faith and Credit Clause of the Federal Constitution, Article IV, §1, and the Act of Congress in pursuance thereof, 28 U. S. C. §1738, 28 U. S. C. A. §1738.

If the answer is in the negative we do not reach other questions in the case. [194 Va. at 167.]

Again, the court said at page 170:

In view of the particular issue under discussion, that is, what effect we must give, under the Full Faith and Credit Clause of the Constitution, to the judicial proceedings of Nevada, it has not been necessary to set out in detail evidence of fraud in matters on which the divorce decrees were rendered. Our primary considerations are: first, whether the divorce decrees are absolutely void or merely voidable; and, second, if merely voidable, whether they are subject to collateral attack by the appellees.

It will be noted that the Supreme Court of Appeals did not

go into the factual question as to whether Mr. Evans and Mrs. Smith had the intent requisite for the acquisition of domicils in Nevada, nor did the court hold that they had acquired domicils there. Confining itself "largely to the validity of the decree granted Evans," since the contentions of the appellees were particularly directed to that decree, the court held that this decree was not void, but "at most voidable only", and that decisions of the United States Supreme Court required Virginia to give the same effect to this decree, with regard to susceptibility to collateral attack, as would be given to it by Nevada, the State of rendition. In reaching this conclusion the court relied primarily on the case of *Johnson v. Muelberger*, 340 U. S. 581, 71 S. Ct. 474 (1951), in which—they said—"the controlling issue was identical with that here." At the end of its discussion of the problem, the court's opinion stated, at page 179:

The appellees, upon whom the burden rested, have not shown that they, or either of them would be permitted to make a collateral attack on the decree in the courts of Nevada. In that situation, the decree is not susceptible to attack by them in the State of Virginia. *Johnson v. Muelberger, supra. . . .*"

In order to consider the validity of this holding, it becomes necessary to examine *Johnson v. Muelberger, supra*, and other Supreme Court decisions, as well as lesser authorities in the field of divorce jurisdiction.

Jurisdiction for Divorce and Full Faith and Credit.

In the first place it is well established that a suit for divorce is not a mere adversary or *in personam* proceeding and that personal jurisdiction over both spouses—without more—does not amount to jurisdiction to divorce them. Since divorce involves the dissolution or termination of the marriage relation, it is a matter of concern to society and to the State in which the spouses make their home, that is, the State of their domicil. If both spouses are domiciled in the same State, that

State has jurisdiction to dissolve the marriage. Furthermore, since the first of the two celebrated *Williams* cases it has been settled that a State in which one spouse has a *bona fide* domicile has jurisdiction to change his status by a decree of divorce, although the other spouse is domiciled elsewhere, and other States must give full faith and credit to such a decree. *Williams v. North Carolina*, 317 U. S. 287, 63 S. Ct. 207 (1942).

But a State in which neither spouse is domiciled is without jurisdiction to dissolve their marriage by divorce. Restatement, *Conflict of Laws* §111 (1934). And a decree of divorce granted on constructive service by the courts of a State in which neither spouse is domiciled is not entitled to full faith and credit in the courts of other States. *Bell v. Bell*, 181 U. S. 175, 21 S. Ct. 551 (1901).

The Virginia court in the *Evans* case seemed to attach undue significance to the fact that the "Evans divorce decree . . . was entered in a court of general jurisdiction, which under the pleadings, the evidence and the findings of that court, had jurisdiction over the complainant and the subject matter involved." 194 Va. at 171. It cites *Esenwein v. Pennsylvania*, 325 U. S. 279, 65 S. Ct. 1118 (1945) for the proposition that the full faith and credit clause "places on us the duty to accord *prima facie* validity to the decree obtained by Evans." *Id.* at 172. But it was established in 1874 in the case of *Thompson v. Whitman*, that "the jurisdiction of the court by which a judgment is rendered in any State may be questioned in a collateral proceeding in another State, notwithstanding the [full faith and credit mandate] and notwithstanding the averments contained in the record of the judgment itself." 18 Wall. 457, 21 L. Ed. 897 (1874). And in the *Esenwein* case, cited, the Supreme Court affirmed the Pennsylvania court's refusal to accept the Nevada divorce court's finding and recital of jurisdictional facts. Speaking for the court, Mr. Justice Frankfurter said:

The Pennsylvania Supreme Court rightly indicated that if merely the Nevada decree had been in evidence, it was entitled to carry the day. But the Supreme Court [of Pennsylvania] found that on the entire showing there

was convincing countervailing evidence to disprove petitioner's intention to establish a domicile in Nevada. The Pennsylvania courts have viewed their Constitutional duty correctly. [325 U.S. at 281, 65 S. Ct. at 1119.]

In the second *Williams* case, which the Virginia court oddly failed to discuss, Mr. Justice Frankfurter, again speaking for the court, said:

'It is too late now to deny the right collaterally to impeach a decree of divorce made in another State, by proof that the court had no jurisdiction, even when the record purports to show jurisdiction. . . .' It was 'too late' more than forty years ago. *German Savings Society v. Dormitizer*, 192 U. S. 125, 128, 24 S. Ct. 221, 222. [*Williams v. North Carolina*, 325 U. S. 226, 229, 65 S. Ct. 1092, 1095 (1945).]

In this well known case, Mr. Williams had obtained a decree of divorce in an *ex parte* proceeding in Nevada on a finding by the Nevada court that he was domiciled in that State. Then, like our Mr. Evans, he married in Nevada a woman who, like our Mrs. Smith, had gone with him to Nevada to obtain a divorce from her husband. In a subsequent criminal prosecution for bigamous cohabitation in North Carolina, the North Carolina court made a fair inquiry into the facts and found that Mr. Williams had not been domiciled in Nevada—despite the Nevada court's finding to the contrary. It thereupon held that his Nevada divorce was invalid, his subsequent marriage in Nevada was invalid and bigamous, and his cohabitation in North Carolina with his second "wife" was an offense against the criminal laws of that State. The Supreme Court affirmed the conviction of Mr. Williams. For a later case holding that an *ex parte* divorce decree is not protected from collateral attack in a sister State, see *Rice v. Rice*, 336 U. S. 674, 69 S. Ct. 751 (1949).

Although it cannot be asserted with certainty, it seems that the Virginia court in the *Evans* case proceeded from a *prima facie* presumption of jurisdiction (for which it cited the *Esen-*

wein case) to an assumption that jurisdiction existed in the Nevada court. For it quoted as apposite (at pages 171 and 172 of the opinion) rules taken from *American Jurisprudence* and *Corpus Juris Secundum* precluding collateral attacks on judgments rendered by courts having jurisdiction. Whereas here the very question at issue was the jurisdiction *vel non* of the Nevada court. And at page 172 it quoted an extract from 1 Black on *Judgments*, §170, p. 249 (2 ed. 1902), discussing a "voidable" judgment and concluding: "If emanating from a court of general jurisdiction, it will be sustained by the ordinary presumptions of regularity, and it is not open to impeachment in any collateral action." But five lines later Black states that a judgment is void, and not merely voidable, "where there was a total want of jurisdiction to render it." And earlier, in the same section of his treatise, he had characterized a void judgment as a nullity which "may be impeached in any action, direct or collateral."

Furthermore, at this and other places in the opinion the Virginia court seems to fail to note the distinction between domestic and foreign judgments with regard to collateral attack and conclusiveness of the record as to jurisdiction. In the section quoted from, Black says that "in the case of a domestic judgment, it is a serious question whether the lack of jurisdiction must not appear on the face of the record in order to entitle the courts to treat it as a nullity." But in a later portion of the same treatise he discusses foreign judgments (including judgments of sister States) and declares that as to them even recitals of jurisdictional facts in the record may be contradicted on collateral attack, making specific reference to foreign divorce decrees. 2 Black on *Judgments*, §§901, 930 (2 ed. 1902). In *Thompson v. Whitman*, *supra*, Mr. Justice Bradley said:

The record of the domestic tribunals of England and some of the States, it is true, are held to import absolute verity as well in relation to jurisdictional as to other facts, in all collateral proceedings. Public policy and the dignity of the courts are supposed to require that no

avertment shall be admitted to contravert the record. But, as we have seen, that rule has no extra-territorial force. [21 L. Ed. at 901.]

Perhaps it should be said that the word "void" does not have precisely the same meaning in all contexts. If Virginia is free, under the full faith and credit clause, to treat a foreign divorce decree rendered without jurisdiction as a nullity or as "invalid" (as held in the second *Williams* case) it little matters whether such a decree be "void" in the State of its rendition as in violation of the due process clause of the Fourteenth Amendment.

In the United States, it is generally thought that a judgment rendered by the courts of a State that does not have judicial jurisdiction over the parties and the subject matter is void even in the State where rendered. *Pennoyer v. Neff*, 95 U. S. 714, 24 L. Ed. 565 (1877). Whether or not this is true of a divorce decree rendered without jurisdiction has never been decided by the Supreme Court. See *Sutton v. Leib*, 342 U. S. 402, 72 S. Ct. 398 (1951). In *Alton v. Alton*, 207 F. 2d 667 (3rd Cir. 1953) a statute of the Virgin Islands, interpreted as providing for divorce jurisdiction without either spouse being domiciled in the territory, was held unconstitutional on the ground that it conflicted with the due process clause of the Fifth Amendment. A contrary view has been urged by Rhein-stein, *The Constitutional Bases of Jurisdiction*, 22 U. Chi. L. Rev. 775 (1955).

Res Judicata: The Sherrer Doctrine

Everything that has been said up to this point has pertained to foreign *ex parte* divorce decrees, and since both divorce decrees in the *Evans* case were of this kind, one might think that this would be the end of the matter. But we have not yet reached the Supreme Court case of *Johnson v. Muelberger*, *supra*, which the Virginia court regarded as controlling. For this purpose we should go back to 1931 when the Supreme Court decided the case of *Baldwin v. Iowa State Traveling*

Mens Ass'n., 283 U. S. 522, 51 S. Ct. 517. Here it was held that the principle of *res judicata*, in the sense of collateral estoppel, applies to findings of fact on which personal jurisdiction depends, when the defendant appears, even specially, to contest the court's jurisdiction over him. Having made a special appearance in an *in personam* action and having unsuccessfully litigated the issue of jurisdiction, it was held that the defendant could not thereafter attack the judgment collaterally when an action was brought against him on that judgment. In an oft-quoted statement the court said:

Public policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest, and that matters once tried shall be considered forever settled as between the parties. [283 U. S. at 525, 51 S. Ct. at 518.]

In *Davis v. Davis*, 305 U. S. 32, 59 S. Ct. 3 (1938) this principle was extended to the question of jurisdiction over the subject matter. A husband having brought suit for divorce in Virginia, his wife, who was domiciled in the District of Columbia, appeared in the Virginia proceeding to contest the husband's allegations of Virginia domicile. The Virginia court found that the husband was domiciled in Virginia and granted the divorce. The Supreme Court held that the wife was precluded by the principle of *res judicata* from collaterally attacking the Virginia decree in a later proceeding in the District of Columbia. Both parties having appeared and the issue having actually been litigated, the question of the husband's domicile was thereafter closed.

In *Sherrer v. Sherrer*, 334 U. S. 343, 68 S. Ct. 1087 (1948), a wife left her husband in Massachusetts and brought suit for divorce in Florida. The defendant appeared in the suit and filed an answer in which he denied that his wife was domiciled in Florida, but failed to support his denial either by introducing any evidence on the issue or by cross-examining his wife when she testified. He limited his own testimony to matters pertaining to the custody of their children. The divorce

having been granted, the husband later sought to attack it collaterally in a proceeding in a State court in Massachusetts. The Supreme Court held that full faith and credit required Massachusetts to recognize the Florida decree as *res judicata* with respect to the jurisdictional fact of domicile, even though the issue had not actually been litigated, since both parties had been before the Florida court. In the Supreme Court's opinion Mr. Chief Justice Vinson said:

It is one thing to recognize as permissible the judicial re-examination of findings of jurisdictional fact where such findings have been made by a court of a sister State which has entered a divorce decree *in ex parte proceedings*. It is quite another thing to hold that the vital rights and interests involved in divorce litigation may be held in suspense pending the scrutiny by courts of sister States of findings of jurisdictional facts made by a competent court in proceedings conducted in a manner consistent with the highest requirements of due process and *in which the defendant has participated*. [334 U. S. at 355, 68 S. Ct. at 1093. (Emphasis added.)]

And in *Coe v. Coe*, 334 U. S. 378, 68 S. Ct. 1094 (1948), decided the same day as the *Sherrer* case, the same principle was applied to a decree rendered in a Nevada divorce suit in which the defendant appeared but raised no question in relation to the plaintiff's domicile. Indeed the defendant in her answer admitted as true the allegations of the plaintiff's complaint relating to his Nevada residence, but filed a cross-complaint for divorce, which she succeeded in obtaining. Later she sought to attack the decree collaterally in Massachusetts on the ground that neither she nor her husband had been domiciled in Nevada. The Supreme Court held that the Nevada decree was entitled to recognition under the full faith and credit clause as *res judicata* on the issue of domicile and thereby on the issue of jurisdiction of the Nevada court.

In *Johnson v. Muelberger*, 340 U. S. 581, 71 S. Ct. 474 (1951), which the Virginia court regarded as governing its

decision in the *Evans* case, the Supreme Court again was dealing not with an *ex parte* proceeding but with a Florida divorce suit in which the defendant spouse had appeared by attorney and interposed an answer, without questioning the plaintiff's allegations as to residence in Florida. Later the defendant husband re-married and still later died, survived by the latest wife and a daughter of an earlier marriage which had been terminated by death. By his will he left his entire estate to the daughter, but the wife of his last marriage filed notice of her election to take the statutory one-third share of the estate under the New York Decedents' Estate Law. The daughter contested this election on the ground that her father's divorce was invalid and hence his subsequent marriage was also invalid. The New York Surrogate determined that since the Florida divorce proceeding had been a contested proceeding and since it was valid and final in Florida it was not subject to collateral attack in New York. It was agreed in all the courts through which this case traveled that the *Sherrer* doctrine required New York to accord the Florida decree the effect of *res judicata* and to bar from attacking it collaterally anyone who would be so barred in the courts of Florida, the granting State.

It should be noted that it is only after the foreign divorce decree has qualified for full faith and credit under the *Sherrer* doctrine that it becomes necessary to inquire what effect would be given to the decree in the original forum under its doctrine of *res judicata*. The New York Court of Appeals investigated the law of Florida and concluded that the courts of that State would not bar the daughter from collaterally attacking the divorce decree that had been entered against her father. The Supreme Court reversed the New York court because it differed in its interpretation of Florida law, saying: "No Florida case has come to our attention holding that a child may contest in Florida its parent's divorce *where the parent was barred from contesting, as here by res judicata.*" 340 U. S. at 587, 71 S. Ct. at 478. (Emphasis added.)

As if to emphasize that the decision in the *Johnson* case

would not control a problem such as that in the Virginia *Evans* case, Mr. Justice Reed, speaking for the court, said: "The later *Williams* case left a sister State free to determine whether there was domicile of one party in an '*ex parte*' proceeding so as to give the court jurisdiction to enter a decree." 340 U. S. at 585, 71 S. Ct. at 477.

In *Cook v. Cook*, 342 U. S. 126, 72 S. Ct. 157 (1951) the distinction between an *ex parte* divorce decree and a divorce decree rendered by a court having jurisdiction over both parties was responsible for the addition of a new wrinkle to the *Sherrer* doctrine. The record before the Supreme Court showed that a wife had obtained a decree of divorce in Florida, but did not reveal whether or not the defendant husband had appeared in the suit or had been personally served in the divorce State. Under such circumstances the court held that there was a presumption that the defendant was personally subject to the jurisdiction of the divorce court. "That presumption", said Mr. Justice Douglas, in the court's majority opinion, "may of course be overcome by showing, for example, that Mann [the defendant husband] never was served in Florida nor made an appearance in the case either generally or specially to contest the jurisdictional issues." 342 U. S. at 128, 72 S. Ct. at 159.

It should be stated that in this case the party attacking the divorce decree was not the divorced husband but a second husband, Cook, who was living under an invalid marriage with Mrs. Mann at the time of her Florida divorce, which he encouraged and assisted her to obtain. Having re-married her after her divorce from Mann, he sought to attack the decree collaterally in a suit in Vermont to annul both of his marriages to her. All members of the Supreme Court agreed that if the Florida divorce suit was an *ex parte* proceeding, Vermont was free to re-open the issue of domicile upon a collateral attack by a third party and, if domicile were found lacking, to deny recognition to the Florida decree. Mr. Justice Frankfurter, dissenting only because he interpreted the Vermont Su-

preme Court's opinion as obliquely indicating such a finding, said:

If Mrs. Mann did not have a Florida domicile and her husband did not submit, under the Sherrer doctrine . . . to the State's jurisdiction, Florida had no power to terminate the marriage. If there was no jurisdiction to grant a divorce, there was no divorce. The sham divorce was a nullity, no more binding on the Vermont courts than would have been a private letter to the lady by the local Florida judge. And while Vermont could, if that State chose, deny relief to Cook because of his 'unclean hands,' the Constitution of the United States has nothing to do with that defense. [342 U. S. at 130, 72 S. Ct. at 160.]

It is believed that the Virginia court in the *Evans* case erred in holding that the *Sherrer* doctrine, as applied in *Johnson v. Muelberger, supra*, was applicable to the *ex parte* divorce decrees which it was considering. Annot., 28 A. L. R. 2d 1303, 1330 (1953). If it had followed the decisions of the Supreme Court as here interpreted it would have held that the two Nevada divorce decrees, as Mr. Justice Frankfurter put it, were no more binding on the Industrial Commission of Virginia than private letters to Mr. Evans and Mrs. Smith by the local Nevada judge. And the fifteen year old son of the deceased workman might well have received the entire compensation for his father's death, instead of being required to share it with the woman who participated, with the father, in obtaining the sham divorces in Nevada.

Estoppel

With regard to the second question stated at the beginning of this discussion, brief mention may be made of the doctrine of estoppel as it might affect the *Evans* case, although limitations of space will not permit an adequate discussion here. The doctrine is referred to in the court's opinion, but it is not clear whether the court considers significant in this respect the law of Nevada or the law of Virginia or both. It cites *McNeir v.*

McNeir, 178 Va. 285 (1941) for the proposition that "one who has participated in the obtaining of a fraudulent divorce is estopped to deny its invalidity [sic.]. The bar of estoppel is as effective as to parties and their privies as that of *res judicata* when the latter doctrine is applicable." 194 Va. at 172. (It could hardly be held that a minor son seeking compensation for his father's death is privy to his father's divorce, and certainly he is not in privity with his father's second wife with respect to her divorce from a former husband.) Later the court says that "no Nevada case has been called to our attention holding that a child may contest in Nevada its parents' divorce, where the parent was barred from contesting, as here, by estoppel." But in the same paragraph it says that "it has been held in Nevada that fraud in alleging or establishing required residence in a divorce action is a jurisdictional fact and not available as a ground to annul the decree. *Confer v. Second Judicial District Court*, 49 Nev. 18, 234 Pac. 688, 236 Pac. 1097 [1925]." *Id.* at 177. It happens that both the *McNeir* and *Confer* cases, unlike the case at bar, were not *ex parte* proceedings, and the Nevada case seems to involve the doctrine of *res judicata* rather than that of estoppel.

Apparently as part of the same general idea, the court states: "Under the common law of England, the right to collaterally attack the validity of a judgment is restricted to persons having a pre-existing interest at the time the judgment was rendered. *Upton v. Basset*, Vol. 1, C[r]oke's Rep., Eliz. 445, [78 Eng. Rep. 685.]" And since Nevada has adopted the common law, the Virginia court presumes that the *Upton* case is law in Nevada. *Id.* at 175. The writer has been unable to find anything in the *Upton* case remotely resembling a judgment. The issue in that case can best be stated by quoting from the report:

Trespass. Upon demurrer the case was, that the plaintiff and defendant claimed by several leases from one and the same person. The plaintiff in his replication avers that the defendant's lease was made upon fraud, but shows not any fine by himself paid for his lease nor any

rent reserved thereupon, nor any other valuable consideration wherefore it was made. Whereupon the defendant demurred thereto.

It seems that most, if not all, authorities accepting this requirement of a pre-existing interest do so with respect to domestic judgments which are valid, (i.e., not void for want of jurisdiction) but which allegedly were procured by fraud. See *Black on Judgments* §289 (2 ed. 1902) and Restatement, *Judgments* §93, Com. b. (1942). See also Annot., 12 A. L. R. 2d 718 (1950). It is not believed that such a requirement is an established rule of the common law applicable to foreign judgments rendered by the courts of a state that is devoid of jurisdiction over the parties and the subject matter.

The court quotes with approval the gist of a paragraph from an unsigned note in 50 Colum. L. Rev. 833 (1950), whose author "decries the wisdom of allowing a child to make a collateral attack upon his parents' divorce as a means of enforcing state policy." 194 Va. at 175. In one of the two footnotes appended to that paragraph the author cites the Restatement, *Conflict of Laws* §112, caveat (1934). Insofar as applicable here, the *caveat* states that the American Law Institute refrains from expressing an opinion as to whether the children of a prior marriage may be precluded from questioning the validity of a divorce decree when the party obtaining it is estopped to do so. The author fails to note, however, that at the time he cited it the *caveat* had been deleted by the American Law Institute and the following statement had been substituted for it: "Any person may be precluded from questioning the validity of a divorce decree if, under all the circumstances, his conduct has led to the obtaining of the divorce decree, or for any other reason has been such as to make it inequitable to permit him to deny the validity of the divorce decree." Restatement, *Conflict of Laws*, 1948 Supp., §112, Com. c. See also Restatement, (Second) *Conflict of Laws* §112 (Tentative Draft No. 1, 1953). And one of the most respected authorities in the field states that, while a party procuring an invalid divorce will be estopped from later asserting any

rights as spouse, "there is no estoppel present to prevent the state or children of the first marriage from setting up the invalidity of the divorce decree." Goodrich, *Conflict of Laws* §127, p. 402 (3 ed. 1949).

In any event, as Mr. Justice Frankfurter said in his opinion in the *Cook* case, quoted above, the Constitution of the United States has nothing to do with that defense. Full faith and credit does not require a second State to consult the estoppel doctrines of the State in which an *ex parte* divorce decree is entered without jurisdiction. "The doctrine [of estoppel] is determined in each case, not by the law of the state which granted the divorce, but by the law of the state in which the divorce is questioned. Each State of the United States is therefore free, at least within broad limits, to determine the doctrine's scope and range of effect." Restatement, (Second) *Conflict of Laws* §112, Com. a. (Tentative Draft No. 1, 1953). It is hoped that the Virginia court will ponder long before adopting, as a precept of Virginia law, a rule that a minor child is per se estopped to challenge the validity of his parent's sham divorce, obtained by fraud without participation by his other parent, and granted by a divorce-mill State without any jurisdiction in the premises.