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Divorce - Objections to Jurisdiction - Derivative Estoppel in Divorce Actions

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NOTES

DIVORCE — OBJECTIONS TO JURISDICTION — DERIVATIVE ESTOPPEL IN DIVORCE ACTIONS. The handing down of the decision in the case of *Johnson v. Muelberger* by the Supreme Court of the United States [1] created an immediate interest in legal circles which were following with attention the development of the law of foreign divorces.[2] Some of the law review writers welcomed, or at least accepted the decision as a further step in that development, while others subjected it to vigorous criticism. But both supporters and opponents seem to agree that the decision is another milestone on the road heretofore marked by *Haddock v. Haddock*,[3] *Williams v. North Carolina* [4] and *Sherrer v. Sherrer*.[5]

Johnson v. Muelberger involved a contest by decedent's daughter by his first marriage, of the election of the third wife to take the widow's statutory share of the estate, the whole of which had been devised to the daughter under decedent's will. The contest proceeded on the ground that a divorce, obtained in Florida by decedent's second wife while decedent and his second wife were residents of the state of New York, was invalid. In the Florida divorce action the decedent answered but did not raise the question of jurisdiction of the court, although the wife had failed to comply with the ninety day residence requirement of Florida. The validity of the decree was attacked by the daughter on the grounds of non-compliance with the residence requirement. The Supreme Court, by Mr. Justice Reed, held that since the daughter could not have challenged the validity of the decree in Florida, she was precluded by the Full Faith and Credit Clause of the United States Constitution from collaterally attacking it in the courts of New York. In arriving at this decision, the Supreme Court seems to have gone a long way since *Haddock v. Haddock*, the first important case before it dealing with foreign divorce.[6] Prior to the *Haddock* case, only three cases are deserving of mention as relevant to this question. The first interstate divorce case before the Court arose in 1869 when the Court announced, in *Cheever v. Wilson*,[7] the principle that a divorce decree rendered at the domi-

1. 340 U.S. 581 (1951).
2. Paulsen, *Divorce Jurisdiction by Consent of Parties*, 26 Ind. L.J. 380 (1951); 17 Brooklyn L. Rev. 340 (1951); 39 Geo. L.J. 658 (1951); 46 Ill. L. Rev. 307 (1951); 39 Ky. L.J. 437 (1951).
3. 201 U.S. 562 (1906).
4. 317 U.S. 287 (1942); 325 U.S. 226 (1945).
5. 334 U.S. 343 (1948).
6. 201 U.S. 562 (1906).
7. 9 Wall. 108 (U.S. 1869).

cile of the plaintiff on the appearance of the defendant is entitled to full faith and credit. Some thirty years later the much discussed doctrine of matrimonial domicile appeared for the first time in *Atherton v. Atherton.*[8] Shortly thereafter in *Andrews v. Andrews*[9] the Court took the view that appearance in a divorce proceeding before a foreign court was not a substitute for domicile, so as to demand recognition in the state of original domicile under the Full Faith and Credit Clause.[10] The case, however, is distinguishable from *Cheever v. Wilson,* the latter arising out of a divorce suit commenced in the state of original domicile of both plaintiff and defendant.

Then came *Haddock v. Haddock,*[11] which held sway for thirty-six years. It decided several important issues concerning interstate divorce, some of them left undisturbed to date, others modified, still others invalidated by later decisions. Perhaps the most characteristic feature of the case was the holding that fault was a jurisdictional fact of decisive importance.[12] The element of fault, however, cannot be understood without the underlying doctrine of matrimonial domicile. Consequently, the Court distinguished and reaffirmed the doctrine of the *Atherton* case,[13] by emphasizing the importance of matrimonial domicile as a jurisdictional fact and the question of fault of the husband in unjustifiably deserting wife, home and common domicile. The idea that the marital relation as a *res* was sufficiently present in the foreign state was rejected with the statement that if the husband took with him so much of the marriage relation as concerned his status, he left the wife an equal amount of such status in the state of matrimonial domicile, and therefore the Connecticut court could not proceed *in rem.*[14] If the suit was not *in rem,* it had to be *in personam.* Consequently the

8. 181 U.S. 155 (1901). The expression "matrimonial domicile" is used in two wholly different situations: 1. As determining the rights which are given the parties to a marriage in the movable property of the other; 2. when the question is raised to the validity of a divorce granted at the domicile of one of the parties only, without personal service on the other. We are concerned only with the second aspect in the present study. The expression "matrimonial domicile" first appeared in the Scotch case of Jack v. Jack, 24 Ct. Sess. Ser. 467 (1862) and used also in Pitt v. Pitt, 1 Ct. Sess. 3d Ser. 106 (1862), but was rejected in Le Mesurier v. Le Mesurier, (Privy Counc.) A.C. 517 (1895). Goodrich, *Matrimonial Domicile,* 27 Yale L.J. 49 (1917).

9. 188 U.S. 14 (1903).

10. U.S. Const. Art. IV §1: "Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. . . ."

11. 201 U.S. 562 (1906). The Supreme Court affirmed the judgment of the New York courts refusing to give full faith and credit to a divorce decree obtained by H in Connecticut on constructive service upon the deserted wife and held that such decree could not be set up as a defense to the wife's action for separation brought in New York.

12. 201 U.S. 562, 570 (1906).

13. Note 8, *supra.* The decision in the *Atherton* case was distinguished on the ground that Kentucky, the decreeing state, was the matrimonial domicile, which the wife had left.

14. 201 U.S. 562, 576 (1906).

Connecticut decree, rendered without personal service or appearance on the part of the wife, was not entitled to enforcement in New York by virtue of the Full Faith and Credit Clause, five justices concluded against the vigorous opposition of the remaining four.[15]

The *Haddock* case proved to be one of the most controversial ones decided by the Supreme Court.[16] Nevertheless it was not until 1942 that the Court saw fit to overrule it in *Williams v. North Carolina I*.[17] The Court seemed to proceed on the theory that the marriage relation is in the nature of a *res* after all, and, in that case, domicile of only one spouse within the foreign jurisdiction is prima facie bona fide and sufficient to enable the foreign court to render a valid divorce decree entitled to full faith and credit in every state of the Union, even if the other spouse neither has been personally served nor has entered an appearance.[18] *Haddock's* "fault as jurisdictional fact" theory disappeared with *Williams I* and has not reappeared.

Apparently this dramatic change after the Haddock hegemony in the realm of interstate divorce was too sudden and the pendulum started to fall back in the direction from where it came. *Williams I* left a loophole for those who abhorred any liberalization in the field of quick divorce, primarily for the persistent North Carolina prosecutors of Mr. and Mrs. Williams. On retrial, they seized upon the unexpressed, but intimated issue by the Supreme Court that *ex parte* decrees are only valid if based upon actual, bona fide domcile (which issue was not raised expressly in the first proceeding) and upon the jury's finding that there was no such domicile in the Nevada action, again convicted the Williamses.

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15. The five: Justices White, Fuller, Peckham, McKenna and Day; the four: Justices Brown, Harlan, Brewer and Holmes.

16. Bingham, *The American Law Institute v. The Supreme Court—In the Matter of Haddock v. Haddock* 21 Cornell L.Q. 393 (1936); Beale, *Constitutional Protection of Decrees for Divorce*, 19 Harv. L. Rev. 586 (1906); Beale, *Haddock Revisited*, 39 Harv. L. Rev. 417 (1926); Pollitt, *Quick Divorce—A Study*, 39 Ky. L.J. 289 (1951); Strahorn, *A Rationale of the Haddock Case*, 32 Ill. L. Rev. 796 (1938); Strahorn, *The Supreme Court Revisits Haddock*, 33 Ill. L. Rev. 412 (1938); Vreeland, *Mr. and Mrs. Haddock*, 20 A.B.A.J. 568 (1934); Divorce Decrees Under the Full Faith and Credit Clause, 6 Col. L. Rev. 449 (1906); Recognition of Foreign Divorce Decree, 13 Iowa L. Rev. 320; 17 Minn. L. Rev. 513 (1933); 16 Va. L. Rev. 706 (1930).

17. 317 U.S. 287 (1942). The husband of one family and the wife of another family went from North Carolina to Nevada and, after acquiring domicile there according to Nevada statute, secured divorce decrees from the Nevada court divorcing them from their respective spouses in North Carolina, the state in which they had been married and domiciled for many years. Then they married each other in Nevada, returned to North North Carolina and cohabited there as man and wife. Prosecuted in North Carolina for bigamous cohabitation they set up in defense the Nevada decree, but they were convicted and the conviction was affirmed by the North Carolina Supreme Court. Appeal to the United States Supreme Court followed.

18. 317 U.S. 287 (1942).

The North Carolina Supreme Court again affirmed and this time the conviction was sustained by the United States Supreme Court.[19] *Williams v. North Carolina II* greatly blunted the edge of the doctrine expounded by Mr. Justice Douglas in the first *Williams* case. While conceding the correctness of the principle that there is no constitutional barrier to giving full faith and credit to an *ex parte* divorce decree obtained in another state if the form and nature of the substituted service meet the requirements of due process, Mr. Justice Frankfurter, speaking for the majority of the Court, inserted a caveat into the doctrine, which practically took its whole force and rendered its application illusory: "The State of domiciliary origin should not be bound by an unfounded, even if not collusive, recital in the record of a court of another State."[20] Thereby the door was opened to an independent investigation by the state of "domiciliary origin" of the actual bona (or mala) fides of the person availing himself of the advantages of a foreign jurisdiction. Of course, the "domiciliary origin" is nothing else but the modern version of "matrimonial domicile," a concept which made *Atherton v. Atherton*[21] famous. However, in speaking of an "independent" determination of the genuineness of domicile, "independence" in that connection means simply the freedom of the state of "domiciliary origin" – and for that matter of any state – to measure the jurisdictional facts by its own standards, which logically will be stricter than those of the state in which the decree was procured. As dissenting Mr. Justice Rutledge wrote, such difference in the statutory laws and policies is the only distinguishing feature between the Nevada and the North Carolina proceedings.[22] Consequently the North Carolina action amounted to a denial of Nevada law and policy, although the enforcement of such recognition is the object of the Full Faith and Credit Clause.[23] Thus the two *Williams* decisions did not change substantially the law established by *Haddock v. Haddock*. What the two decisions, the second modifying the first, announced is simply this: an *ex parte* divorce decree, rendered in a state other than the ordinary domicile of the spouses, is *prima facie* entitled to full faith and credit in all other states, although obtained upon constructive service only; nevertheless it may be attacked for jurisdictional facts de-

19. 325 U.S. 226 (1945).
20. *Id.* at 230.
21. See Note 8, *supra*.
22. See 325 U.S. 226, 252 (1945).
23. *Id.* at 254.

fective under the law and policy standards of the state in which such attack is made.[24]

The next important decision dealing with interstate divorces was *Sherrer v. Sherrer*.[25] In that case the Supreme Court held that a defendant spouse who had appeared and participated in a divorce action brought by the other spouse in one of the states permitting quick divorces could not afterwards collaterally attack the decree on the issue of domicile, although such issue had not been raised in the divorce suit. Here, no question of substituted service arose, since both spouses appeared before the court of the foreign state and actively participated in the litigation. Emphasis was placed therefore on the theory of res judicata, as precluding a relitigation of the same cause of action on the ground that one of its incidents was not made an issue in the original proceeding.[26] The Court cited *Davis v. Davis*[27] as an indication that the present decision was foreshadowed as far back as 1938; *Williams v. North Carolina II* was distinguished on the ground that in that case there was no appearance by one of the spouses before the foreign court.[28] *Andrews v. Andrews*[29] was regarded as superseded by later decisions.[30] The sister-case of *Coe v. Coe*[31] was handed down at the same time. *Sherrer v. Sherrer* was the logical first step leading to *Johnson v. Muelberger*[32] and its possible ramifications no doubt to follow. While the decisions of the pre-*Haddock* period, the *Haddock* case and *Williams v. North Carolina I* and *II* serve as the doctrinal introduction to the present law governing interstate divorces, the *Sherrer* case and *Johnson v. Muelberger* introduce a new element into that extensive body of law, namely the idea of estoppel. The use of the term in this connection is somewhat ques-

24. See Pollitt, *Quick Divorce—A Study*, 39 Ky. L.J. 289, 308 (1951). For the necessity of pleading by the plaintiff that the defendant spouse in the foreign divorce proceeding had neither been served nor appeared, see Cook v. Cook, 20 U.S.L.Week. 4033 (1951).

25. 334 U.S. 343 (1948).

26. *Id.* at 348.

27. 305 U.S. 32 (1938), cited in 334 U.S. 343, 351 (1948). In that case H, who was previously awarded separation in the District of Columbia, went to Virginia and, after meeting the residence requirement of that state, commenced a suit for absolute divorce. W appeared specially to contest jurisdiction over H. In the course of the proceeding this was the only issue litigated and finally the Virginia court found that H had valid domicile and rendered divorce decree. This decree was denied Full Faith and Credit in the District of Columbia. On appeal the United States Supreme Court reversed on the ground that the appearance of W in the Virginia suit was unlimited, and, by failing to appeal, the matter became res judiciata, entitled to full faith and credit everywhere.

28. 334 U.S. 343, 349 (1948). However, Mr. Justice Frankfurter, dissenting, thought that the interest of the state of original domicile was "not less because both parties to the marital relationship instead of one sought to evade its laws." *Supra* at 362.

29. 188 U.S. 14 (1903).

30. 334 U.S. 343, 353 (1948).

31. 334 U.S. 378 (1948).

32. See note 1, *supra*.

tionable, since in most cases the classical elements of the doctrine are missing [33] and the purpose would be better served by some expression making reference to the *estoppel-effect* rather than the estoppel itself. The New York courts recognized this defect of terminology by calling it "equitable principles of estoppel," "so-called estoppel," "quasi-estoppel," "somewhat similar to estoppel," and "res judicata." [34]

Proceeding first upon the question of applicability of the estoppel doctrine to suits by parties whose rights have been determined by the foreign divorce decree, the doctrine may be applicable in two basic situations. In the first, it says that the spouse who procured the foreign divorce decree will not be heard to repudiate the judgment which that court entered in his favor.[35] If the foreign decree was obtained without personal service upon, appearance, or participation of the other spouse, the decree can be attacked by such other spouse.[36] Yet, and this is the other characteristic situation, if such other spouse, in reliance on the foreign decree, remarries, he or she is estopped from collaterally attacking the decree.[37] The *Sherrer* case goes only one step further: it says that if both parties submit themselves to the jurisdiction of the foreign court, both are estopped from asserting the invalidity of its decree. Logically the question arises whether a *Sherrer*-type divorce is valid or only immune from attack by the parties to it. The answer must depend on the determination of two sub-questions relating

33. "Equitable estoppel is the effect of the voluntary conduct of a party whereby he is absolutely precluded, both at law and in equity, from asserting rights which might perhaps have otherwise existed, either of property, of contract, or of remedy, as against another person, who has in good faith relied upon such conduct, and has been led thereby to change his position for the worse, and who on his part acquires some corresponding right, either of property, of contract, or of remedy." 3 Pomeroy, Equity Jurisprudence, §804 p. 189 (5th ed. 1941) and cases cited.

34. See Weiss, *A Flight on the Fantasy of Estoppel in Foreign Divorce*, 50 Col. L. Rev. 409 (1950), at 414 and cases cited.

35. See 1 Freeman on Judgments, §320, p. 640 (5th ed. 1925) and cases cited. In Krause v. Krause, 282 N.Y. 355, 26 N.E.2d 290 (1940) the action was brought by W2 for separation. The court held that H's Nevada divorce decree could not be set up in a suit where property rights arising out of marriage were involved. The dissent, at p. 294, classifies similar cases as to whether they are purely matrimonial actions in which invalidity of the foreign decree might be set up in the interest of the public policy of the state, and "private suits" predicated on marriage, where it would be unavailable.

36. McCarthy v. McCarthy, 179 Misc. 623, 39 N.Y.S.2d 922, *affirmed*, 268 App. Div. 1070, 52 N.Y.S.2d 817 (1945). *But cf.* Sheard v. Green, 219 La. 199, 52 So.2d 714 (1951).

37. Carbulon v. Carbulon, 293 N.Y. 375, 57 N.E.2d 59 (1944); Matter of Bingham, 265 App. Div. 463, 39 N.Y.S.2d 756 (1943); Restatement. Conflict of Laws §112. The great majority of cases involving interstate divorce arose before the various New York courts. Between 1909 and 1935 the states of New York and New Jersey were the origin of 60% of the divorce business in Nevada. Ingram and Ballard, *The Business of Migratory Divorce in Nevada*, 2 Law and Contemporary Problems 302 (1935). It is assumed that the proportion after 1935 approximates that which had prevailed before. Although only a certain percentage of such Nevada divorces will be collaterally attacked, their number, together with the number of divorces obtained in Florida and other "quickie" states, accounts for the extensive interstate divorce litigation in the New York courts.

to domicile. It seems that in a factual situation exactly analogous to that in the *Sherrer* case, and where the divorce decree was procured in a state having essentially the same domicile requirement as Florida,[38] the divorce decree would be valid, since the plaintiff has complied with such requirement and therefore he or she must be regarded as domiciled in that state and the state in which one of the spouses is domiciled may effectively dissolve the marriage of such domiciliary although the finding of jurisdictional facts is open to the inquiry of the courts of another state.[39] If, on the other hand, the plaintiff has failed to comply with the domicile requirement, the court could not have jurisdiction and the decree rendered would be invalid, in spite of the fact that none of the parties could attack it collaterally either in the rendering state or elsewhere.[40]

In *Sherrer*-type divorces another distinction can be made. It rests on the fact that while some of the states regard domicile as established when the residence requirement is satisfied, thus requiring plaintiff to be in residence for a specific length of time before instituting the divorce proceeding, other states are not satisfied by a mere presence of the plaintiff in the state for the requisite period, but have added a concept of domicile to it, making the residence requirement jurisdictional in character.[41] It can be argued that in a state belonging to the first category, residence, however short, may not be questioned after the suit has been filed and full faith and credit must be given to the decree in every state. On the other hand, if the state rendering the decree is one which requires the suitor to comply with the *domicile*-residence requirement, failure to comply can subject the jurisdiction of the court to collateral attack both within and outside the state.[42] Both Florida and Nevada have statutes classifiable under the first group.[43] It would seem, therefore, that non-compliance with the domicile requirement in those states could not invalidate a divorce decree

38. Florida Stat. Ann. §65.02: "In order to obtain a divorce the complainant must have resided ninety days in the State of Florida before the filing of the bill of complaint."

39. Williams v. North Carolina I, 317 U.S. 287 (1942); Williams v. North Carolina II, 325 U.S. 226 (1945); Bell v. Bell, 181 U.S. 175 (1901); Restatement, Conflict of Laws §113 (1948 Supp.) and comments.

40. Johnson v. Muelberger, 340 U.S. 581 (1951); DeMarigny v. DeMarigny, 43 So. 2d 442 (Fla. 1949); Hall v. Hall, 93 Fla. 709, 112 So. 622 (1927). *Cf.* Holt v. Parmer, 235 P.2d 43 (Cal. App. 1951).

41. See Bozeman, *The Supreme Court* and *Migratory Divorce*, 37 A.B.A.J. 107 (1951); 25 N.D. Bar Briefs 262 (1949).

42. See note 41, *supra*.

43. See note 38, *supra*; Rev. Laws of Nevada, §3609. *But cf.* Fleming v. Fleming, 36 Nev. 136, 134 Pac. 445 (1913).

rendered; a fortiori it could not be attacked collaterally by either party elsewhere.

Johnson v. Muelberger[44] extends the doctrine of the *Sherrer* case to third parties, so as to preclude challenge by them of a foreign divorce decree which could not be attacked by the parties whose rights have been conclusively adjudicated in the foreign court. Although the problem is not new,[45] it was the first time that it reached the United States Supreme Court, involving the present, perhaps most common, fact situation.[46] In the cases dealing with derivative estoppel before the *Johnson* case, the party seeking to attack interstate divorce decree obtained by third parties was often the second husband or wife[47] or a child.[48] It is an open question whether third persons other than a second spouse or a child of the dissolved marriage could maintain such an attack upon the foreign decree. Mr. Justice Reed in the *Johnson* case seems to intimate that the decisive factor in this regard is whether or not the right of such attacking third party was pre-existing, in which case attack would be permissible.[49] The doctrine of *Johnson v. Muelberger* was followed in a New York case where W2 sought annulment of her marriage to H on the ground that the divorce decree obtained by W1 in Florida was obtained fraudulently, though H appeared therein and did not contest the fraudulent representations of W1 as to her Florida domicile.[50] The court without hesitation extended the scope of the doctrine to W2, and decided the case squarely on the authority of the *Johnson* case.[51]

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44. 340 U.S. 581 (1951).

45. Kinnier v. Kinnier, 45 N.Y. Rep. 535, 6 Am. Rep. 132 (1871).

46. In Yarborough v. Yarborough, 290 U.S. 202 (1933) the Court held that an action by a child domiciled in South Carolina for education and maintenance against the father who was domiciled in Georgia could not be maintained, on the ground that in a divorce decree obtained by the father in Georgia upon the appearance of the mother a lump sum payment was awarded to the mother for the benefit of the child.

47. Goodloe v. Hawk, 72 App. D.C. 287, 113 F.2d 753 (1940) Devette v. Devette, 92 Vt. 305, 104 Atl. 232 (1918); Hall v. Hall, 139 App. Div. 120, 123 N.Y. Supp. 1056 (1910).

48. *In re* Niles' Will, 99 N.Y.S.2d 238 (1950); *In re* Lindgren's Estate, 293 N.Y. 18, 55 N.E.2d 849 (1944).

49. 340 U.S. 581, 588 (1951), where the Court adopts the decision of DeMarigny v. DeMarigny, 43 So.2d 442 (Fla. 1949), and, like the Florida court in that case, recites 1 Freeman, Judgments, §319 (5th ed. 1925), at p. 636: "It is only those strangers who, if the judgment were given full credit and effect, would be prejudiced in regard to some pre-existing right, that are permitted to impeach the judgment. Being neither parties to the action, nor entitled to manage the cause nor appeal from the judgment, they are by law allowed to impeach it whenever it is attempted to be enforced against them so as to affect rights or interests acquired prior to its rendition."

50. Kienle v. Kienle, 107 N.Y.S.2d 239 (1951).

51. *But cf. In re* Torkkila's Estate, 198 Misc. 265, 98 N.Y.S.2d 460 (1950). In that case a New York Surrogate's Court held that the son of the previous marriage of W could successfully attack the Nevada decree divorcing W and H_1, on the ground that neither W nor H_1 were bona fide residents of Nevada at the time the decree was rendered, although H_1 appeared in the suit and both he and W were bound by the decree under Sherrer v. Sherrer.

The analogy seems to be logical and the position of W2 (or H2) can be compared to that of W who remarried in reliance of an interstate divorce decree obtained by H without her appearance or participation, and is consequently estopped from collaterally challenging the foreign decree. Thus the decision seems to negative the proposition that when H and W1, domiciled in State A, went to the "quickie" State B and obtained a divorce wherein both of them appeared, then immediately returned to State A where H married W2, W2 could not challenge the validity of the divorce decree in order to rid herself from H.[52] Conversely, H is similarly estopped from asserting the invalidity of the "quickie" divorce under the holding of *Sherrer v. Sherrer.*

Another interesting situation can arise when H and W, both former parties to *Sherrer*-type divorces, marry each other and later try to obtain a divorce. Of course, no difficulty arises if the plaintiff alleges a cause recognized by the *lex fori.* The problem becomes increasingly complicated if it is assumed that no such cause exists. In that case the party seeking the dissolution of the matrimonial tie is forced to resort to annulment instead of divorce, by waging a collateral attack against the other party's foreign divorce. May he do so? It is recalled that *Sherrer v. Sherrer* stood for the proposition that parties participating in a foreign divorce proceeding are not permitted to attack the foreign decree rendered in such proceeding either in the rendering state or, by virtue of the Full Faith and Credit Clause, in any other state, at least when the rendering state is one which regards the residence requirement as non-jurisdictional.[53] Consequently, each party is estopped to base his petition for annulment on the fact that his first marriage was not validly dissolved. The dissatisfied party must therefore attempt to challenge the divorce decree of the other spouse. But *Johnson v. Muelberger* decided that a third party may not question the validity of a foreign divorce decree wherein both spouses appeared and which is not subject to attack in the state in which it was rendered. The conclusion is inescapable that the plaintiff in our hypothetical case is nothing more than such a third party and the fact that he was once a party to a *Sherrer*-divorce is immaterial in this connection. Therefore he should be regarded as estopped from setting up the invalidity of

52. Hall v. Hall, 139 App. Div. 120, 123 N.Y. Supp. 1056 (1910); *cf.* Goodloe v. Hawk, 72 App. D.C. 287, 113 F.2d 753 (1940).

53. The latter qualification would be decisive only if, in the foreign suit, the domicile requirement was not met by either party. See note 41, *supra.*

his spouse's prior divorce. Logically, the same consideration applies to the other spouse.

Considering the impact of *Johnson v. Muelberger* upon older members of the *Haddock–Williams I–Williams II–Sherrer* family, a literal interpretation of the principles announced therein would suggest that the doctrine of *Williams II* does not any longer represent the law as applied to interstate divorces rendered in a state where the domicile requirement has been fulfilled by one of the parties and therefore the decree is there immune from collateral attack by the spouse who failed to appear in the proceeding, or was not personally served.[54] In view of the fact that the Supreme Court has failed to make any indication as to who may be included in the category of "third persons" disqualified to attack the foreign decree, except on a general basis,[55] it can be argued that a state may be regarded as such a third party and thus is barred from contesting the decree. This conclusion could be escaped only by expressly exempting the state from the operation of the rule because it has "a rightful and legitimate concern in the marital status of persons domiciled within its border." [56] But this is only a suggestion, in the absence of a ruling on the matter by the Supreme Court. In the meantime, as Paulsen suggests, the Court will probably leave the doctrine of *Williams II* undisturbed for the protection of the spouse who was not within the jurisdiction of the foreign court, even to the extent of creating the concept of "divisible" divorce, thereby preserving the power of the state of matrimonial domicile to enforce matrimonial property rights by disregarding the effect of the *ex parte* decree upon such rights.[57]

Sherrer v. Sherrer and *Johnson v. Muelberger* seem to affect substantially the federal concept of jurisdiction. The issue of jurisdiction based on domicile appears to be losing importance by virtue of the growing influence of estoppel. Those cases propose to ignore completely the question of jurisdiction based upon domicile, which concept used to be indispensable to enabling the court

54. Paulsen, *Divorce Jurisdiction by Consent of the Parties–Developments Since "Sherrer v. Sherrer"*, 26 Ind. L.J. 380, 385 (1951); What Therefore Florida Hath Put Asunder, 46 Ill. L. Rev. 307, 312 (1951). This is true only upon the assumption that such a decree cannot be attacked in Nevada. See note 43, *supra.*

55. See note 49, *supra.*

56. Williams v. North Carolina I, 317 U.S. 287, 298 (1942).

57. Estin v. Estin, 334 U.S. 541 (1948). There the Supreme Court held that an *ex parte* divorce decree obtained by H did not terminate W's right to alimony decreed in a prior New York separation proceeding. The Court distinguished between rights relating to marital status and those concerning property rights arising out of the marriage and held that while the former were conclusively decided by the foreign court, the latter were subject to the determination of the New York court. See Paulsen, *supra,* note 54, at 386.

to decide over the subject matter – the marital relation–if both of the spouses voluntarily confer *in personam* jurisdiction upon the court. It does not matter that the court *in fact* lacks jurisdiction over the subject matter because it is dependent upon at least one spouse's being domiciled in the state,[58] since the decree will be nevertheless "airtight" whether against an attack within the rendering state or in any other state by virtue of the Full Faith and Credit Clause, whether against an attack by one of the spouses or by third persons. This development would indicate a growing tendency toward the liberalization of divorces based upon mutual consent of the spouses at the cost of states whose laws and public policy are more conservative in this regard. Whether or not the United States Supreme Court will sanction such a development remains to be seen.

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UNFAIR COMPETITION – COMMON LAW LIABILITY FOR INTERFERENCE WITH PROSPECTIVE BUSINESS RELATIONS. The common law of unfair competition involves the judicially developed morals of the market place, founded on the almost Biblical precept: No man shall reap where he has not sown. Unfair competition is an abuse of the privilege of free competition, constituting a tort [1] or an equitable injury [2] against which an injured competitor can obtain legal or equitable relief.

TORT THEORY OF ACTION

Tort liability for unfair competition is imposed on the theory that unfair interference with a competitor's prospective business relations is an abuse of the privilege of competition.[3] This privilege, based on the public policy in favor of free competition, is an exemption from the general principle that intentional interference with the interests of another is a tort. It "rests on the economic postulate that free competition is worth more to society than it costs." [4]

The privilege of compeittion was established at common law.

58. Bell v. Bell, 181 U.S. 175 (1901).

1. Prosser, Torts §105, pp. 1013-1029 (1941).
2. McClintock, Equity §151, pp. 402-405 (2d ed. 1948).
3. Temperton v. Russell (1893) 1 Q.B. 715, 62 L.J.Q.B. 412, is the leading case. Prosser, Torts 1014 (1941).
4. Holmes, *Privilege, Malice, and Intent*, 8 Harv. L. Rev. 1, 3 (1894).