St. John's Law Review

Volume 43
Number 1 *Volume 43, July 1968, Number 1*

Article 26

Res Judicata: Collateral Attack on Mexican Divorce

St. John's Law Review

sive effect in later actions involving the same parties concerning the same issues. Therefore, an attorney who desires to concede an insignificant property damage claim should strive for a settlement and discontinuance of the action lest he endanger a subsequent personal injury defense.[109]

Res Judicata: Collateral attack on Mexican divorce.

In *Schoenbrod v. Siegler*,[110] the parties to the dispute had been married in the British West Indies. They subsequently entered into a separation agreement in New York, and a month later were divorced in Mexico, the husband appearing personally and the wife by attorney. The separation agreement was incorporated into the Mexican decree. Later, the husband discovered that the marriage had been performed illegally and instituted an action in the Mexican court to vacate the judgment of divorce; but he failed because Mexico does not allow a divorce decree to be reopened for the admission of new evidence. In the meantime the wife had instituted a suit against the husband for arrears due under the separation agreement, and the husband in turn instituted the instant action to have the separation agreement declared null and void. Evidence was introduced to show that while Mexico would not permit a direct attack on its divorce decree, it would allow a collateral attack on the separation agreement incorporated into the decree. The wife's motion to dismiss was ultimately denied by the Court of Appeals which held that the Mexican divorce was not res judicata as to the validity of the marriage.

The Court of Appeals had previously held in *Statter v. Statter*[111] that a separation decree conclusively established the existence of a valid marriage and therefore barred a subsequent action for annulment. The Court in that case stressed the need for stability and security in judgments and, therefore, if new evidence were discovered, the proper procedure would be to vacate the original decree.

The Court in the instant case, while recognizing that the conclusive effect on the validity of a marriage is the same when the first judgment is for divorce rather than separation,[112] and while recognizing that it made no difference, because of comity, that the

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[109] *See* Schenker v. Bourne, 278 App. Div. 699, 102 N.Y.S.2d 928 (2d Dep't 1951); Johnson v. Tyler, 275 App. Div. 726, 87 N.Y.S.2d 177 (3d Dep't 1949).

[110] 20 N.Y.2d 403, 230 N.E.2d 638, 283 N.Y.S.2d 881 (1967).

[111] 2 N.Y.2d 668, 143 N.E.2d 10, 163 N.Y.S.2d 13 (1957).

[112] *See* Frost v. Frost, 260 App. Div. 694, 23 N.Y.S.2d 754 (1st Dep't 1940), where a Nevada divorce was held to conclusively establish the existence of the marriage, thus barring a subsequent action to declare the marriage void.

earlier judgment was rendered by a Mexican court,[113] nevertheless distinguished this case from *Statter*. While the litigant in *Statter* could directly attack the first judgment, the plaintiff here had already tried and failed to vacate the Mexican decree. Thus, his only remedy was collateral attack in New York. Furthermore, the Court noted that since Mexico would have permitted a collateral attack on the decree our courts should permit such an attack.

Judge Burke, dissenting,[114] agreed with the majority in principle but thought that the Mexican lawyer's affidavit, submitted to show that collateral attack was possible in Mexico, was too flimsy to allow the Court to take judicial notice of that fact.

Since *Rosenstiel v. Rosenstiel* [115] recognized the validity of the bilateral Mexican divorce, the problem has arisen as to when such a decree could be attacked. In determining what effect a foreign judgment will have here,[116] resort usually is made to the law of res judicata in the foreign forum. In fact, New York now appears to compare the decree of Mexico with that of a sister state and applies the same rules as to res judicata.[117] Thus, for the purpose of collateral attack of a Mexican decree, it need only be established that the decree could be collaterally attacked there. From the Court's treatment of the *Statter* case, the fact that Mexico does or does not allow direct attack does not appear to be operative, so long as collateral attack is permitted. The Court's basic position appears to be that, "[g]enerally, there is no reason to give more conclusive effect to a foreign judgment than it would be accorded by the courts of the jurisdiction that rendered it." [118]

ARTICLE 51 — ENFORCEMENT OF JUDGMENTS AND ORDERS GENERALLY

Civil Contempt: Defendant may immediately allege ill-health or inability to pay.

In *In re Hildreth*,[119] the appellate division, first department, held that on application to punish for civil contempt, it is within

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[113] Rosenstiel v. Rosenstiel, 16 N.Y.2d 64, 209 N.E.2d 709, 262 N.Y.S.2d 86 (1965).

[114] 20 N.Y.2d at 886, 230 N.E.2d at 642, 283 N.Y.S.2d at 886.

[115] 16 N.Y.2d 64, 209 N.E.2d 709, 262 N.Y.S.2d 86 (1965).

[116] Smit, *International Res Judicata and Collateral Estoppel in the United States*, 9 U.C.L.A.L. REV. 44, 63 (1962).

[117] Both the majority and the dissents cited, with approval, Magowan v. Magowan, 19 N.Y.2d 296, 226 N.E.2d 304, 279 N.Y.S.2d 513 (1967), which held that a party could collaterally attack a sister state's decree only if the sister state would allow it.

[118] Schoenbrod v. Siegler, 20 N.Y.2d 403, 409, 230 N.E.2d 638, 641, 283 N.Y.S.2d 881, 885 (1967).

[119] 28 App. Div. 2d 290, 284 N.Y.S.2d 755 (1st Dep't 1967).