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Divorce--Collateral Attack by Subsequent Spouse

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the directors and stockholders of the new corporation are the same as those of the old. This, however, would necessitate piercing the corporate veil, which courts hesitate to do unless fraud appears. Therefore, that the court's failure to pass upon the question seems justified.[15]

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DIVORCE — COLLATERAL ATTACK BY SUBSEQUENT SPOUSE — ESTOPPEL. — *P*, inducing and aiding *D* to divorce *H*, in Tennessee, so that she might marry him, told *D* not to bother to have her attorney correct an allegation in her bill that *H* probably claimed legal residence in Massachusetts. The Tennessee court, finding *H* to be a nonresident, gave *H* notice by publication only. *H* did not appear and he never objected to the divorce decree. On the contrary he relied upon it and married another woman. *P* married *D* immediately after the divorce and lived with her for nearly seven years. He sought to annul this marriage on the ground that the divorce was invalid, first, because the Tennessee court had no jurisdiction of the subject matter, as the parties were not domiciled in that state; and second, because if *H* were domiciled in Tennessee, the divorce decree was lacking in due process for want of sufficient notice to *H*. Held, that the parties were domiciled in Tennessee, but *P* is estopped to question the validity of the notice to *H*. *Saul v. Saul*.[1]

The question as to whether a subsequent spouse of a party to a divorce may collaterally attack that divorce is one which can not be answered categorically. There is great confusion among the cases, which show a conflict in the generalities of language employed, as well as in the holdings. The answer is that the later spouse may or may not be allowed to collaterally attack the divorce depending on many varied circumstances. One observation worthy of note is the fact that in former cases no distinction had been drawn between cases involving lack of jurisdiction over the subject matter of the divorce, as when neither party has established a domicil in the divorce forum, and cases involving lack of jurisdiction over the person of the nonresident defendant. Total lack of power in a court to deal with the subject matter of a suit goes

[15] *Cf.* Southport Petroleum Co. v. N. L. R. B., 62 S. Ct. 452, 86 L. Ed. 397 (U. S. 1942).

[1] 122 F. (2d) 64 (App. D. C. 1941).

not merely to the protection of the parties in securing a fair hearing, but to the authority of the court itself. For this reason some cases take the view that considerations of estoppel, unclean hands, and unconscionable conduct, ordinarily applicable in equity, have no power to prevent one from challenging the court's power in this fundamental sense.[2] On the other hand, the opposite view is strongly supported by some courts on the grounds of estoppel.[3] The court, in the instant case, made the aforementioned distinction. The court said that an attack on the ground that notice was lacking in due process does not reach down to the fundamental authority of the court, but affects rather the personal protections which it is required to give the defendant; and that, therefore, principles of estoppel are applicable.[4] It has been said that the principle that property shall not be taken without due process of law, including notice to the owners, is evidently one for his benefit, not for the benefit of third parties.[5] The right to notice is treated as a personal right in that it may be waived by appearance,[6] whereas lack of jurisdiction over the subject matter of the suit can not be waived by appearance, nor conferred by consent.[7] Generally it is said that the owner of property may waive constitutional protections if he choose, and no one is entitled to set them up for him.[8]

Be this as it may, the court need draw no unusual distinction, if such this may be considered, in order to allow the estoppel. There is authority for estopping a subsequent spouse from challenging a divorce decree even where jurisdiction was lacking in regard to the subject matter of the suit.[9] However, it is recognized that a stranger may collaterally attack a decree of divorce for want

[2] Smith v. Foto, 285 Mich. 361, 280 N. W. 790, 120 A. L. R. 801 (1938); Fischer v. Fischer, 254 N. Y. 463, 173 N. E. 680 (1930); Kiessenbeck v. Kissenbeck, 145 Ore. 82, 26 P. (2d) 58 (1933).

[3] Goodloe v. Hawk, 113 F. (2d) 753 (App. D. C. 1940); Fairclough v. St. Amand, 217 Ala. 19, 114 So. 472 (1927); Van Slyke v. Van Slyke, 186 Mich. 324, 152 N. W. 921 (1915); Margulies v. Margulies, 109 N. J. Eq. 391, 157 Atl. 676 (1931).

[4] See Saul v. Saul, 122 F. (2d) 64, 70 (App. D. C. 1941).

[5] See People v. Turner, 2 N. Y. Supp. 253, 255 (1888), *aff'd*, 117 N. Y. 227, 22 N. E. 1022 (1889).

[6] See Kendall v. United States, 12 Pet. 524, 623, 9 L. Ed. 1181 (U. S. 1838); Pennoyer v. Neff, 95 U. S. 714, 733, 24 L. Ed. 565 (1877); Scott v. McNeal, 154 U. S. 34, 46, 14 S. Ct. 1108, 38 L. Ed. 896 (1894).

[7] Holton v. Holton, 64 Ore. 290, 129 Pac. 532 (1913); 17 AM. JUR. 301.

[8] See People v. Turner, 117 N. Y. 227, 234, 22 N. E. 1022 (1889); Detmold v. Drake, 46 N. Y. 318, 325 (1871).

[9] Goodloe v. Hawk, 113 F. (2d) 753 (App. D. C. 1940); Kaufman v. Kaufman, 177 App. Div. 162, 163 N. Y. Supp. 566 (1917); Van Slyke v. Van Slyke, 186 Mich. 324, 152 N. W. 921 (1915); Notes (1935) 99 A. L. R. 1309, 1316, (1939) 120 A. L. R. 815, 826; 17 AM. JUR. 395.

of jurisdiction of the court entering it where his property rights are injuriously affected.[10] Courts have denied collateral attack by a subsequent spouse upon grounds of their participation in procuring the divorce, or estoppel generally.[11] The doctrine of laches has also been applied.[12]

It is therefore apparent that the instant case is supported by authority, as well as by reason and justice. The equitable principles of clean hands and estoppel, once admitted, apply to bar this suit. Here the plaintiff participated in procuring the divorce; he has waited an unreasonable time to complain; and he was principally responsible for the error of pleading that led to the improper notice.

It is not contended that subsequent spouses, or third parties generally, can not, or should not, be allowed to collaterally attack divorces. The purpose of the writer is to point out that no broad generalization can be formed, but that "circumstances alter cases", sometimes forbidding, sometimes demanding the application of the equitable principles of estoppel.

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Equity—Clean Hands—Iniquity of One Plaintiff Bars All. — A group of persons sued to enforce a deed of trust given as security for the unpaid purchase price of shares of stock which plaintiffs sold defendants. Two of the plaintiffs had been guilty of such fraudulent conduct in regard to the sale as to be barred from equity, but others were innocent of any misconduct. *Held,* that the innocent plaintiffs could not claim the benefit of a fraud perpetrated by their coplaintiffs. *Ford v. Buffalo Eagle Colliery Co.*[1]

The court stated that "the bar of the clean-hands maxim is not employed for the punishment of wrongdoers; rather, it is introduced to protect the court of equity and the party defendant from having the powers of the court used in bringing about an inequitable result in the particular litigation before it."[2] There is substantial authority to support such a principle as the basis

[10] Adams v. Adams, 154 Mass. 290, 28 N. E. 260 (1891); Sammons v. Pike, 108 Minn. 291, 120 N. W. 540 (1909); 17 Am. Jur. 395; Note (1935) 99 A. L. R. 1309, 1316.

[11] Van Slyke v. Van Slyke, Margulies v. Margulies, both *supra* n. 3; Notes (1937) 109 A. L. R. 1018, 1026, (1939) 120 A. L. R. 815, 826.

[12] Goodloe v. Hawk, 113 F. (2d) 753 (App. D. C. 1940).

[1] 122 F. (2d) 555 (C. C. A. 4th, 1941).

[2] *Id.* at 563.