MIGRATORY DIVORCE: CHAPTERS III AND IV

THE APPEARANCE OF SHERRER AND THE GHOST OF HADDOCK

MONRAD G. PAULSEN*

"Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."[1]

"And the said records and judicial proceedings, so authenticated, shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the State from which they are taken."[2]

The mandatory out-of-state effects of a state's divorce decree depend upon the interpretation which the Supreme Court of the United States gives to the foregoing constitutional provision and the Statute of 1790. Although the Court has had to deal with these propositions throughout its history, its contribution toward the solution of domestic relations problems arising thereunder has not been impressive. The opinions of the Supreme Court as to family law have seemed like episodes in some long judicial soap opera, each one advancing the plot to a degree, but also posing a new set of questions to be resolved upon the next occasion.

A combination of three American legal propositions has operated to make the problem of "migratory divorce" a phenomenon peculiar to the United States: a) A wife can secure a domicil[3] different from that of her husband;[4] b) A state

---

* A.B. 1940, University of Chicago; J.D. 1942, University of Chicago. Assistant Professor of Law, Indiana University School of Law.

1. U. S. CONST. Art. IV, § 1.
2. 1 STAT. 122 (1790), 28 U. S. C. § 687 (1946).
3. A definition of domicil, approved by the Supreme Court of the United States, was contained in the charge to the jury in the second *Williams* case. "Domicil . . . was that place where a person 'has voluntarily fixed his abode . . . not for a mere special or temporary purpose, but with a present intention of making it his home, either permanently or for an indefinite or unlimited length of time.' " Williams v. North Carolina, 325 U. S. 226, 236 (1945).
4. RESTATEMENT, CONFLICT OF LAWS § 28 (1934). In England a married woman retains the domicil of her husband even if she has obtained a decree of judicial separation from him. CHESIRE, PRIVATE INTERNATIONAL LAW 237 (3d ed. 1947).

which is the domicil of one of the parties to a marriage will grant a divorce;[5] and c) The divorcing state applies its own substantive law of divorce.[6] With these propositions in mind unhappily married persons who live in states which have strict policies about divorce are tempted to take advantage of the more liberal laws of another state by removing themselves briefly to the more favorable state and, in that jurisdiction, carefully building up evidence of the mental state necessary to domicil.

The earliest full faith and credit cases which involve divorce, drawing largely upon the ordinary principles of conflict of laws, have made domicil, as the jurisdictional basis for divorce, a part of the federal scheme for mandatory recognition of divorce decrees.[7] Full faith and credit need not be given to a decree of divorce unless the decree is granted by the state of domicil.[8] But whose domicil? A marriage involves two, and the parties may well be domiciled in different states. *Cheever v. Wilson*,[9] made it clear that a divorce was entitled to full faith and credit if the state granting it was the domicil of one party and the other spouse had made a personal appearance in the proceeding. According to *Andrews v. Andrews*,[10] the parties to a divorce, neither of whom is domiciled in the divorcing state, cannot by their mutual consent confer such jurisdiction on a court that the ensuing decree must be given full faith and credit. The doctrine of res judicata apparently did not prevent a party from attacking F_1's divorce decree in F_2[11] on a jurisdictional ground even though both spouses had

5. *E.g.*, "Bills for divorce may be brought against defendants residing out of the state, and service shall be effected upon them as in other cases in chancery." FLA. STAT. ANN. § 65.06 (1941). The law of the jurisdiction further provides: "In order to obtain a divorce the complainant must have resided ninety (90) days in the State of Florida before the filing of the bill of complaint." *Id.* at § 65.02.

6. RESTATEMENT, CONFLICT OF LAWS § 135 (1934).

7. *See, e.g.*, Atherton v. Atherton, 181 U. S. 155 (1901); Bell v. Bell, 181 U. S. 175 (1901); Streitwolf v. Streitwolf, 181 U. S. 179 (1901).

8. Bell v. Bell; Streitwolf v. Streitwolf, *supra* note 7.

9. 9 Wall. 108 (U. S. 1869).

10. 188 U. S. 14 (1903).

11. F_1 represents the state which has granted a decree of divorce. F_2 is the state in which the F_1 proceeding is challenged. The terminology is taken from CHEATHAM, DOWLING, GOODRICH AND GRISWOLD, CASES AND MATERIALS ON CONFLICT OF LAWS 12 (2d ed. 1942).

appeared in the divorce proceeding and could have litigated the jurisdictional question. After the famous case of *Haddock v. Haddock*,[12] if merely one party appeared before the divorcing court only the state of the "matrimonial domicil" had power to grant a divorce binding in other states. *Davis v. Davis*,[13] has modified the *Andrews* case: If the parties to a marriage appear in the divorce suit and actually litigate the jurisdictional question of domicil, they are bound by the decision. The doctrine of res judicata is applicable to litigated questions of jurisdiction of the subject matter.

In *Williams I*[14] the Supreme Court confessed the error of its opinion in *Haddock v. Haddock*. Any state in which either of the parties to a marriage is domiciled has the power to grant a divorce entitled to full faith and credit. *Williams II*[15] allows the jurisdictional question of domicil to be litigated in F_2, in the case of an ex parte decree, in spite of a formal finding as to domicil by the courts of F_1. Four cases decided by the Supreme Court during the October term, 1947,[16] have added two new chapters to the nation's oldest family serial.

CHAPTER III: THE APPEARANCE OF SHERRER

After about fourteen years of marriage to Edward G. Sherrer, Margaret E. Sherrer left Massachusetts, on April 3, 1944, for what appeared to be a vacation in Florida. Shortly after her arrival in Florida, Mrs. Sherrer informed her husband that she did not intend to return to him. She secured employment for herself, and on July 6, 1944, she filed a bill of complaint for divorce in a Florida court. Among other things, the bill alleged that Mrs. Sherrer was a bona fide resident of Florida. Mr. Sherrer received notice by mail. He retained Florida counsel who entered a general appearance and filed an answer denying the allegations of Mrs. Sherrer's complaint. Mr. Sherrer was present at the hearing and testified on the issue of the custody of his children. However, no evidence was introduced by him on the issue of Mrs. Sherrer's domicil

12. 201 U. S. 562 (1906).
13. 305 U. S. 32 (1938).
14. Williams v. North Carolina, 317 U. S. 287 (1942).
15. Williams v. North Carolina, 325 U. S. 226 (1945).
16. Sherrer v. Sherrer, 334 U. S. 343 (1948); Coe v. Coe, 334 U. S. 378 (1948); Estin v. Estin, 334 U. S. 541 (1948); Kreiger v. Kreiger, 334 U. S. 555 (1948).

in Florida. The decree of divorce was entered on November 29, 1944. Mrs. Sherrer married Henry A. Phelps two days later and returned to Massachusetts on February 5, 1945.

Later in Massachusetts, Mr. Sherrer sought a judicial declaration that while he was still married to Mrs. Sherrer he might justifiably live apart from his wife, and that he might be permitted to convey his real estate as though he were single.[17] The suit was predicated upon the asserted invalidity of the Florida divorce decree in Massachusetts. The court granted the relief sought.[18] Mrs. Sherrer had never acquired a bona fide domicil in Florida, a question which the Massachusetts court considered itself free to re-examine. The Supreme Court of the United States reversed the Massachusetts court.[19] Because Mr. Sherrer had filed an appearance in Florida and had participated in the Florida proceedings, Massachusetts was not free to re-examine the question of domicil.

The majority opinion by Mr. Chief Justice Vinson found the divorce proceedings to have been conducted in accordance with the highest procedural standards required by the Due Process Clause. Mr. Sherrer had had the opportunity to present evidence and to litigate all questions, including the issue of domicil, upon which the jurisdiction of a state to divorce is still said to depend. The divorce decree was subject to no infirmities which under the Florida law would render it subject to attack. Although the issue of domicil actually had not been litigated, Massachusetts was bound, under the full faith and credit clause, to give res judicata effect to the jurisdictional finding.

> . . . the requirements of full faith and credit bar a defendant from collaterally attacking a divorce decree on jurisdictional grounds in the courts of a sister State where there has been participation by the defendant in the divorce proceedings, where the defendant has been accorded full opportunity to contest the jurisdictional issues, and where the decree is not susceptible to

17. The action was brought pursuant to a Massachusetts statute which provides: "A probate court may upon petition of a husband . . . enter a decree that said husband has been deserted by his wife or that he is living apart from her for justifiable cause, and he may thereafter convey his real estate in the same manner and with the same effect as if he were sole. . . " MASS. GEN. LAWS c. 209, § 36 (1932).

18. The Supreme Judicial Court of Massachusetts affirmed the trial court, 320 Mass. 351, 69 N. E.2d 801 (1946).

19. Sherrer v. Sherrer, 334 U. S. 343 (1948).

> such collateral attack in the courts of the State which rendered the decree.[20]

Williams II was distinguished. There the defendant spouse did not appear before the divorcing court and consequently had no opportunity to contest the jurisdictional finding. *Andrews v. Andrews* was treated as having been drained of vitality by a line of cases, including *Davis v. Davis,* which had applied the doctrine of res judicata to questions of personal jurisdiction and jurisdiction of the subject matter.[21] Failure to litigate the jurisdictional issue is unimportant when a party personally before the court has been afforded the opportunity to do so.[22]

The Chief Justice's opinion recognizes the importance of a state's control over domestic relations. However, because the present cases involved inconsistent assertions of power by two states, the Supreme Court was required to apply the full faith and credit clause of the Constitution and the Statute of 1790 in a mechanical fashion. The Constitution and Statute give the Court no discretion to weigh policies or compare state interests. If Massachusetts policies will be subverted as a result of the *Sherrer* case, the subversion is merely "part of the price of our Federal system." The very importance of the interests involved in divorce proceedings require as much uniformity and certainty as possible.

In a vigorous dissent,[23] joined by Mr. Justice Murphy, Mr. Justice Frankfurter reaffirmed his position taken in *Williams II.* A divorce decree is entitled to full faith and credit *only* if the divorcing state was *in truth* the domicil of one of the

---

20. *Id.* at 351.

21. Jackson v. Irving Trust Co., 311 U. S. 464 (1941); Chicot County Drainage District v. Baxter State Bank, 308 U. S. 371 (1940); Sunshine Coal Co. v. Adkins, 310 U. S. 381 (1940); Treinies v. Sunshine Mining Co., 308 U. S. 66 (1939); Davis v. Davis, 305 U. S. 32 (1938); Stoll v. Gottlieb, 305 U. S. 165 (1938); American Surety Co. v. Baldwin, 287 U. S. 156 (1932); Baldwin v. Iowa State Traveling Men's Ass'n, 283 U. S. 522 (1931). See also Boskey and Braucher, *Jurisdiction and Collateral Attack: October Term, 1939,* 40 COL. L. REV. 1006 (1940); Gavit, *Jurisdiction of the Subject Matter and Res Judicata,* 80 U. OF PA. L. REV. 386 (1932).

22. *Chicot County Drainage District v. Baxter State Bank,* and *Jackson v. Irving Trust Co., supra* note 21, are two cases refusing to limit res judicata only to those issues actually litigated. It should be noted that neither is a case involving a conflict of laws problem.

23. Sherrer v. Sherrer, 334 U. S. 343, 356 (1948).

parties. The state of domicil has a special relationship to its domiciliaries in respect to matters of domestic relations. By an out-of-state law suit the parties may not foreclose re-examination of the question of domicil by the State of Massachusetts (thus undercutting important state policies) since Massachusetts was not a party to those proceedings. By permitting Mr. Sherrer to raise the jurisdictional question Massachusetts expressed its policy in regard to divorce as surely as if the state had spoken by means of criminal prosecution for bigamy.

In the view of the dissenting opinion, uniformity can be attained by the Supreme Court only by permitting states with lax laws to impose easy divorce policies on all the other states and by giving the parties an open invitation to collusion and perjury. The price is too high in view of the quantitatively insignificant number of divorces involved. If reform is needed, the job is for Congress.

Without question, the *Sherrer* case is the product of a policy designed to avoid the practical complications which result from uncertainty as to marital status.[24] The intended effect of the case and its companion, *Coe v. Coe*,[25] is to clarify the status of many divorces which have been granted in

24. See the remarks of Mr. Justice Jackson made during the course of the oral argument in the present cases: "I am not worried about the courts. At every bar meeting I've attended—and I attend a good many—this thing comes up. Lawyers don't know what in the world to advise their clients. Clients don't know how to dispose of their property; or whether they are divorced or not divorced. People—simple people—have to live by these rules. If we can't do our job there's nobody insisting on our staying here." 16 U. S. L. WEEK 3123 (Oct. 21, 1947).

25. 334 U. S. 378 (1948). Mr. and Mrs. Coe were domiciled in Massachusetts until May, 1942. In March, 1942, Mrs. Coe secured a decree of separation from her husband in Massachusetts. Thereafter in May, 1942, Mr. Coe went to Reno accompanied by his secretary, Miss Dawn Allen, and her mother. After Mr. Coe filed a suit for divorce, Mrs. Coe came to Nevada in person and filed a cross-complaint for divorce and an answer which admitted Mr. Coe's domicil in Nevada. Both Mr. and Mrs. Coe personally testified in the Nevada hearing on questions relating to the merits of the divorce but neither of them raised any objection as to the jurisdiction of the court. In September, 1942, the Nevada court entered a decree of divorce in favor of Mrs. Coe. Miss Dawn Allen and Mr. Coe were married shortly after the decree was entered and returned to Massachusetts. The first Mrs. Coe filed a petition against Mr. Coe in May, 1943, praying that he be adjudged in contempt of court for failing to abide by the terms of the separation support decree. Mr. Coe denied that the separation support decree was still in effect and pleaded the Nevada divorce. Ultimately the Massachusetts courts decided in favor of Mrs. Coe holding that the Nevada decree of divorce was rendered without jurisdiction [316 Mass. 423, 55

Nevada, Florida, or any other state in which liberal grounds for divorce are combined with a short residence requirement. In the recent emphasis which the Supreme Court has placed upon the practical effects of its decisions in divorce cases decided under the full faith and credit clause, the Court has underscored an element which has not traditionally played a large role in the theory which has grown up in regard to the problem.

As a matter of orthodox theory, jurisdiction to divorce is based on domicil, supposedly because of the peculiar interest which a state has in the marital status of its domiciliaries. Mr. Justice Douglas set forth this rationale in *Williams I*:

> Each state as a sovereign, has a rightful and legitimate concern in the marital status of the persons domiciled within its borders. The marriage relation creates problems of large social importance. Protection of offspring, property interests, and the enforcement of marital responsibilities are but a few of the commanding problems in the field of domestic relations with which the state must deal. Thus it is plain that each state, by virtue of its command over its domiciliaries and its large interest in the institution of marriage, can alter within its own borders the marriage status of the spouse domiciled there, even though the other spouse is absent.[26]

While, clearly, the chief verbal emphasis has been upon the state's interest as a source of state power,[27] the peculiar interest of the parties has been a factor which has not been ignored in the divorce recognition cases decided under the full faith and credit clause. When the leading cases are re-examined one may conclude that a regard for the interest of the parties has been a principal consideration and a key to understanding Supreme Court decisions in this area.

In *Cheever v. Wilson*,[28] one question raised was whether a

---

N. E.2d 702 (1944); 320 Mass. 295, 69 N. E.2d 793 (1946)]. On certiorari, the Supreme Court of the United States reversed the Massachusetts Supreme Judicial Court on the strength of the opinion in the *Sherrer* case.

26. 317 U. S. 287, 298 (1942).

27. In *Williams II* the power of F_2 to inquire into the *bona fides* of the plaintiff's domicil in F_1 also was said to exist for the protection of the interests of F_2: "If a finding by the Court of one State that domicil in another State has been abandoned were conclusive upon the old domiciliary State, the policy of each state in matters of most intimate concern could be subverted by the policy of every other State. This Court has long ago denied the existence of such destructive power." 325 U. S. at 231. See also *Andrews v. Andrews*, *supra* note 10.

28. 9 Wall. 108 (U. S. 1869).

wife could have a different domicil from her husband so that a divorce decree based upon the domicil of the wife only would be entitled to recognition outside the divorcing state. In delivering the Court's opinion, Mr. Justice Swayne said:

> It is insisted that Cheever never resided in Indiana; that the domicil of the husband is the wife's, and that she cannot have a different one from his. The converse of the latter proposition is so well settled that it would be idle to discuss it. The rule is that she may acquire a separate domicil whenever it is necessary or proper that she should do so. *The right springs from the necessity for its exercise, and endures as long as the necessity continues.* The proceedings for a divorce may be instituted where the wife has her domicil. The place of marriage, of the offense, and the domicil of the husband are of no consequence.[29]

Some years later, in *Atherton v. Atherton*,[30] the Supreme Court decided that a divorce decree of Kentucky was entitled to full faith and credit in New York, even though the plaintiff-husband alone was domiciled in Kentucky, and the defendant-wife had not appeared personally before the Kentucky court. Mr. Justice Gray felt that the wife's establishment of a separate domicil was not morally justifiable; therefore, the ex parte decree of divorce must be given faith and credit. By way of justifying its holding that the Kentucky courts had jurisdiction to divorce in the full faith and credit sense, the Court revealed its concern for the practical consequences to the parties, saying, "To hold otherwise would make it difficult, if not impossible, for the husband to obtain a divorce for the cause alleged, if it actually existed."[31]

More recently the human problems which have engaged the Court's attention have been those which arise because some divorce decrees are not given the same effect in every state. The problems became particularly acute after the *Haddock* case and after migratory divorce had assumed the proportions of big business in some states.[32] Uncertainty as to status can create as many unjust situations as can the inability of a wronged party to obtain a divorce entitled to recognition throughout the United States. According to *Williams I*, a

29. *Id.* at 123-4 (italics supplied).
30. 181 U. S. 155 (1901).
31. *Id.* at 173.
32. Bergeson, *The Divorce Mill Advertises*, 2 LAW & CONTEM. PROB. 348 (1935).

state which is the domicil of only one spouse has jurisdiction to divorce, irrespective of the necessity or propriety of a separate domicil. Here again the Supreme Court emphasized the effect of a contrary holding on the personal interests of the parties and their offspring. The parties might be considered married in one state but divorced in another. Furthermore, the children of any second marriage might well be legitimate in one state and illegitimate in another. Such considerations were of first importance in helping the Court arrive at its decision:

> Certainly if decrees of a state altering the marital status of its domiciliaries are not valid throughout the Union even though the requirements of procedural due process are wholly met, a rule would be fostered which could not help but bring "considerable disaster to innocent persons" and "bastardize children hitherto supposed to be the offspring of lawful marriage" (Mr. Justice Holmes dissenting in *Haddock v. Haddock* . . .), or else encourage collusive divorces.[33]

The power of a state, recognized in *Williams II*, to inquire into the jurisdiction of an ex parte decree can also be justified by the proposition that the Supreme Court is moved in full faith and credit divorce cases by a regard for fairness to the parties involved. *Williams II* protects the non-resident defendant. While he must recognize his marriage as dissolved if the plaintiff was domiciled in F_1, he is entitled to an opportunity to make sure that the plaintiff really had become a member of that community at the time the divorce was granted.

Thus from the beginning, the power of a state over its domiciliaries and the special interest of the state in its citizens were not the only reasons which moved the Supreme Court in divorce cases decided under the full faith and credit clause. Fairness to a wronged spouse, who must live in a federal system with its attendant diversity of divorce policies, was also a principal consideration. Decisions in these cases were reached with due regard for the interest of the persons concerned in the stability of their marital status, and the interest of future children in the regularity of their pedigree.

Once more in the *Sherrer* and *Coe* cases the Supreme Court was moved by the individual problems which face the parties, particularly problems which arise because a decree of

33. Williams v. North Carolina, 317 U. S. 287, 301 (1942).

divorce is not given uniform treatment throughout the United States. The Court showed little concern with the interests of the states as such or with questions of special power which a home state might have. The interest of the parties to a marriage in certainty and in procedural fairness overshadowed the abstract interest of the state of Massachusetts.

Had the Supreme Court wished to recognize the importance of the interest of Massachusetts a doctrine with respect to the full faith and credit clause lay close at hand which easily could have been applied in order to reach a contrary result. Where F_2 has a special interest and relationship to a controversy, F_2 on a ground of public policy may disregard the *judicial proceedings* of F_1 even if F_1 did have personal jurisdiction of the parties. This doctrine has appeared in a few cases,[34] although in its terms the Statute of 1790 would seem to require recognition in F_2 of the judicial proceedings of the sister-state regardless of any special interests which F_2 might have in the subject matter. Whatever force it may still have, the present cases make it quite clear that this limitation of full faith and credit has no application in matters of divorce.

If certainty achieved through uniform recognition of divorce decrees is the means by which the Supreme Court is to implement a policy which has regard for the interest of individuals, the legal tools which the Court has fashioned will, themselves, be limiting factors in the attainment of that end.

Williams II remains a major road block in the path of certainty about marital status. As long as *Williams II* remains unmodified a collateral attack upon an ex parte decree is possible in F_2 on jurisdictional grounds. Divorces which are valid in one state but invalid in another are the inevitable result.

---

34. "It has often been recognized by this Court that there are some limitations upon the extent to which a state will be required by the full faith and credit clause to enforce even the *judgment* of another state, in contravention of its own statutes, or policy." Alaska Packers Ass'n v. Industrial Comm'n, 294 U. S. 532, 546 (1935) (italics supplied). This limitation on full faith and credit was discussed in *Williams I*, 317 U. S. at 294. There Hood v. McGehee, 237 U. S. 611 (1915); Olmsted v. Olmsted, 216 U. S. 386 (1910); Fall v. Eastin, 215 U. S. 1 (1909), are cited as examples of the limitation. The limitation is recognized in the *Sherrer* case: "This is not to say that in no case may an area be recognized in which reasonable accommodations of interest may properly be made." 334 U. S. at 355.

The uncertainties which must result from *Williams II* are intensified by the fact that the jurisdictional issue upon which collateral attack is based in F_2 is the issue of domicil. One's domicil can be changed by physical presence within a state plus an intention to remain there for an indefinite period. What a person intends can only be known by the statements and acts of the person involved and such statements and acts can easily be self-serving. Triers of the same fact in two states can draw contradictory but reasonable conclusions from the evidence in the great majority of cases in which domicil is the fact to be found. Of course, F_2 cannot make its own finding *de novo* on the question of domicil. F_1's decree is entitled to "respect, and more."[35] The burden of proving lack of domicil in F_1 must be placed upon the party attacking in F_2. Nevertheless, state courts have found little difficulty in giving what seems to be the required respect to the F_1 decree and still refusing recognition on jurisdictional grounds.[36]

As long as "quickie" divorces are not in all circumstances entitled to full faith and credit in every other state, and as long as the slippery concept of domicil is the jurisdictional basis for divorce under the full faith and credit clause, any gain by way of added certainty in matters of marital status must remain a relative one.

A greater degree of certainty would be possible if the Court would abandon domicil as the basis for divorce recognition under the full faith and credit clause. Residence for a definite period of time (for example, one year) has been suggested as the substitute for domicil.[37] The substitution of a fixed period of residence for domicil could be accomplished either by a congressional statute[38] or by a Supreme Court decision redefining the jurisdictional basis which will entitle divorce decrees to full faith and credit. Should the Congress or the Supreme Court accept the suggested substitu-

35. Frankfurter, J., in *Williams II*, 325 U. S. at 233.

36. Cases cited note 52 *infra*.

37. Rutledge, J., dissenting in *Williams II*, 325 U. S. 226, 244 *et seq.*, and especially 260, n.16, suggests that one year of residence as the jurisdictional requirement for divorce could be adopted by the Supreme Court, apparently without legislation by Congress. See also 1 RABEL, THE CONFLICT OF LAWS: A COMPARATIVE STUDY 460-1 (1945). Lorenzen, *Extraterritorial Divorce—Williams v. North Carolina II*, 54 YALE L. J. 799, 805 (1945).

38. Corwin, *The "Full Faith and Credit" Clause*, 81 U. OF PA. L. REV. 371, 388 (1933).

tion, presumably some states would continue to grant divorces on the basis of 42 or 90 days residence. Parties obtaining their decrees in such states would be validly divorced there as well as in any other state which would recognize the decree by virtue of the conflict of laws.[39] Nevertheless, it would be quite clear that recognition in other states would not be required by force of the Statute of 1790 and the Constitution.

In any event the certainty which is attained by requiring uniform recognition or non-recognition of divorce decrees can be only moderately successful in avoiding harsh solutions to human problems. Even were it made clear that the 42 or 90 day divorces of Nevada and Florida are entitled neither to full faith and credit nor recognition as a matter of local conflict of laws, some uncertainty is inevitable as long as those states *actually grant* the decrees on the basis of a short period of residence. The very fact that parties will obtain divorce decrees and, believing them to be valid, will begin to act under them in other states will create practical problems of property, legitimacy and status. In the course of time these problems cannot be happily solved if the decree is declared to have been invalid from the beginning.[40] They can be avoided only if no decrees are granted save those entitled to recognition outside the divorcing state.

Even in cases where the parties to a marriage have been granted a divorce by a court having personal jurisdiction over them questions arise which are not disposed of by the *Sherrer* and *Coe* cases. In an article which purports to advise the alumnae of a prominent eastern school for women the author, in speaking of divorce, suggests that a binding decree is easily obtained by those who can afford to go to Reno or Miami and who can persuade their husbands merely to file an appearance by counsel.[41] Whether this is sound advice is

---

39. See discussion, pp. 43 to 46 *infra.*

40. Harper, *The Myth of Void Divorce*, 2 LAW & CONTEMP. PROB. 335 (1935).

41. "For those who can raise the ready cash, of course, no such procedure is necessary if they decide the marriage should be terminated. All they have to do is to agree which one of them is to have a pleasant sojourn in Nevada or Florida or one of the other 'easy divorce' states. Provided only that one party is there present for the requisite 6 weeks or 3 months and the other is represented by counsel there, a valid divorce will issue—which despite some waverings in the authorities, will probably be entitled to 'full faith and

not definitely clear from the *Sherrer* and *Coe* cases. In both cases, the attacking party was actually present in F_1 and litigated at least some issues with respect to the divorce, if not the issue of domicil. In the *Sherrer* opinion, Mr. Chief Justice Vinson is careful to point out the extent of the nonresident defendant's activity in the Florida proceeding.[42] He notes several times that the defendant had "participated" in the suit. Whether participation includes the mere filing of an appearance must be regarded as an open question.

Yet it is a question which will admit of only one workable solution. If spouses who are within the personal jurisdiction of F_1 are bound because of the opportunity which F_1 has given them to litigate the issue of domicil, that opportunity is afforded by an appearance by counsel as well as by the spouse's personal presence within a state. If the defendant-spouse is bound only by proceedings in which he has participated to a greater degree than the mere filing of an appearance by counsel, the Supreme Court is left with the difficult job of defining "participation." This process of definition can only introduce new uncertainties. How much participation must there be? Must some issues be contested? How long must the defendant be present in the divorcing state?

As the advice referred to above implies, the effect of the *Sherrer* and *Coe* cases is to permit the parties by mutual consent to confer jurisdiction of the subject matter upon a forum. Of course domicil must be an issue which the divorcing state has determined expressly or by implication if the parties are to be bound on a theory of res judicata. However, throughout the United States courts in granting a divorce do hold or assume one of the spouses to be a domiciliary of the state of divorce because domicil is universally the jurisdictional requirement set forth in state statutes.[43] Further, full opportunity to litigate that issue must have been afforded. Mexican divorces in which both parties have participated are still subject to collateral attack not only

---

credit' throughout the 48 states." Pilpel, *The Sex Side of the Law*, 33 VASSAR ALUMNAE MAGAZINE 3, 4 (June, 1948).

42. 334 U. S. 343, 352 (1948).

43. While most divorce statutes use the term "residence" in stating the jurisdictional requirement, "residence" has been interpreted to mean "domicil." RESTATEMENT, CONFLICT OF LAWS § 9, comment *e* (1934).

because the full faith and credit clause is inapplicable in the case of a decree granted by a foreign country but also because those divorces are not, even in theory, granted on the basis of domicil.[44]

The *Sherrer* and *Coe* cases rest squarely upon a doctrine of res judicata: Having had the opportunity to litigate the question of his wife's domicil, and having been personally before the Florida court which made a finding on the question of domicil, Mr. Sherrer will not now be heard to deny that Mrs. Sherrer's domicil was in fact in the divorcing state. The cases do not answer the question whether other interested persons who did not have the opportunity to challenge the jurisdiction of the divorcing court are bound in some manner by the finding on the jurisdictional issue. Two recent cases decided in the lower courts of the State of New York will illustrate the problem. In *deMarigny v. deMarigny*,[45] Nancy Oakes deMarigny sought an annulment of her marriage on the ground that her husband had not been properly divorced from his first wife. Allegedly, the divorce decree was a nullity because neither her husband nor his former wife had been actually domiciled in Florida. Alfred deMarigny took the position that because both he and his first wife had made a personal appearance before the Florida court the decree was immune from attack. Since the present Mrs. deMarigny had not been a party to the Florida litigation, the New York trial court permitted her to attack the validity of her husband's divorce. She was not bound by the Florida decree. On the other hand, in *Bane v. Bane*,[46] another judge of the New York Supreme Court refused, in an annulment action based upon a similar contention, to permit a present wife to question the jurisdictional basis of her husband's previous divorce. A divorce action was said to be an *in rem* proceeding. The decree is binding upon the whole world when a court has decided that the *res* is within its jurisdiction and full opportunity to litigate all issues has been

44. In Caldwell v. Caldwell, 81 N. E.2d 60 (N. Y. 1948), the Court of Appeals of New York recently allowed a participating party to attack the validity of a Mexican divorce. Other New York cases which had prevented a participating party from attacking a divorce granted by a sister state were distinguished. "Here the defendant . . .never alleged or claimed domicil in Mexico." *Id.* at 63.

45. 81 N. Y. S.2d 228 (Sup. Ct. 1948).

46. 80 N. Y. S.2d 641 (Sup. Ct. 1948).

afforded. Both judges cite and discuss the *Coe* and *Sherrer* cases although contradictory results are reached.

As a practical matter, to permit an action for annulment here would in some circumstances place it within the power of the second spouse of a divorced person to terminate a second marriage whenever it serves his interest to do so. However, *given the rationale of the Court in the Sherrer and Coe cases,* the opinion of the trial judge in *deMarigny* seems to be correct. As a matter of legal logic the *Bane* case is unsound. The conclusiveness of an *in rem* proceeding would depend upon whether the *res,* the basis for jurisdiction, was present within the state purporting to act upon it. It is difficult to see how interested parties could be foreclosed on that jurisdictional issue by the opportunity to raise the question which someone else has been given.

Nor would a theory of estoppel or res judicata bind a state which itself chose to question the validity of a divorce. While F_2 may not protect its interest by allowing a participant in a foreign proceeding to attack the foreign decree collaterally, F_2 will not be bound by the jurisdictional finding of F_1 when F_2 itself becomes a party to litigation involving those who were divorced outside its jurisdiction. For example, perhaps Massachusetts could jail either of the participants to the Florida proceedings should they take other spouses.[47] Obviously, if this is possible under the *Sherrer* case the harshest results would follow. Hence, if *H* participated as a defendant in a Nevada divorce proceeding but did not litigate the question of *W's* domicil, upon return to Massachusetts, *H,* having married *C,* might be jailed as a bigamist. Yet *H* could not obtain a judicial determination from the courts of Massachusetts to the effect that *W* was still his lawful wife. If these unfortunate practical consequences of the doctrines applied in *Sherrer* and *Coe* are to be avoided, the ordinary limitations of the res judicata principle itself must be ignored when the divorce decree is attacked by strangers to the divorce proceeding.

Legal logic can carry us only so far in the work of the

47. Mr. Justice Jackson has entertained this possibility. "*Davis v. Davis.* . . .in no way indicates that a finding of domicile after appearance of the absent spouse and litigation of the question would be conclusive upon the state of his domicile in litigation involving its interests and not merely those of the parties." Williams v. North Carolina, 317 U. S. 287, 320, n.7 (1942).

law. At some point the practical problems which the doctrines have made will reshape the doctrines according to the necessities of the matter. In the *Sherrer* case Mr. Chief Justice Vinson has used language which may foreshadow the result which the Court will reach when a stranger seeks to attack a decree which the parties may not challenge.

> 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 fact 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. We do not conceive it to be in accord with the purposes of the full faith and credit requirement to hold that a judgment rendered under the circumstances of this case may be required to run the gantlet of such collateral attack in the courts of sister States before its validity outside of the State which rendered it is established or rejected.[48]

This language is uncompromising in setting forth the duties of faith and credit which lie upon the states. The Chief Justice's remarks are not limited to cases in which a participating spouse is the litigant attacking the decree. If this dictum is a fair indication, the Court may resolve the problem when it is presented simply by laying down the flat proposition: Something less than *full* faith and credit has been given if a state has permitted a stranger to question the jurisdictional basis of a decree when, following the *Sherrer* case, the parties to the original proceeding could not do so. This position may not satisfy one's feeling for nicety in legal doctrine; indeed, it may be little more than a statement of the conclusion, but it would operate to solve some of the problems which the Supreme Court has created for itself.[49]

---

48. 334 U. S. at 356.

49. The state courts have used various means of preventing attacks by strangers to the original decree. Before the decisions in the *Sherrer* and *Coe* cases, the courts of New York had refused, as a matter of New York law, to allow appearing spouses to attack decrees of divorce in the procurement of which they had participated. In Shea v. Shea, 270 App. Div. 527, 60 N. Y. S.2d 823 (2d Dep't 1946), the Appellate Division dealt with the question of whether a stranger to the foreign divorce could attack it on jurisdictional grounds in an action against a spouse who was estopped by appearance and participation. The attack was not permitted. The court placed its decision upon a New York public policy which would forbid the collateral attack of a third person when the parties to the original proceeding might not do so. In recognizing this policy the New

The net result of the *Sherrer* and *Coe* cases may be a real gain in the matter of certainty and uniformity of recognition throughout the United States. Yet mandatory recognition of a divorce granted by one of the typical divorce-mill states, such as Nevada and Florida, will purchase the gain at a price. Any decision which requires the giving of full faith and credit to a divorce granted in a state which combines a liberal substantive law of divorce with brief residence requirements makes it very difficult for other states to maintain strict divorce policies. *Sherrer* and *Coe* make it possible for domiciliaries to take up residence in a liberal jurisdiction for a brief period and then to return home—having been divorced in the meantime. Those who can afford to take the journey can undercut any policy which is more strict than that of the most liberal state.

Cases like *Sherrer v. Sherrer* and *Coe v. Coe* are bound to encourage collusion and fraud.[50] One fact should be squarely faced: The great majority of divorces granted in Nevada and Florida, to parties who have resided in those states for the minimum time required, are the product of perjury, pure and simple. It should be remembered that even in these jurisdictions the plaintiff must allege that he is domiciled in the state. He must allege physical presence plus the intention to remain in the jurisdiction indefinitely. He must allege that Nevada or Florida is his home; his "technically preëminent headquarters."[51] Of course, the overwhelming majority of persons who come to Nevada and Florida and are divorced after the minimum residence period in those states are not bona fide domiciliaries. The typical fact situation is that in which a litigant leaves the state where the divorce laws are tough; stays in Nevada or Florida for the minimum period required by statute; obtains a di-

---

York court was undoubtedly influenced by the unhappy situations which would result from a decision to the contrary. *Id.* at 827.

The Montana Supreme Court did not allow strangers to attack a Nevada decree, in part, on the ground that they were in privity with a person who was estopped. *In re* Anderson's Estate, 194 P.2d 621 (Mont. 1948).

50. One of my more easily satisfied colleagues has passed the following judgment on the *Sherrer* and *Coe* cases: "Among the most satisfying accomplishments of the Court at the 1947 term is clarification of the divorce muddle." Frank, *The United States Supreme Court: 1947-48*, 16 U. OF CHI. L. REV. 1, 43 (1948).

51. Holmes, J., so defines domicil in Williamson v. Osenton, 232 U. S. 619, 625 (1913).

vorce; and immediately departs for the state of his origin.[52] No domicil is acquired in the ordinary sense. The *Sherrer* and *Coe* cases apparently make collusion foolproof. Whether the resultant clarity as to the status of a person's marriage is worth the price in fraud, collusion, and false allegations may well be doubted.

This is not to say, as some have,[53] that any position in regard to the migratory divorce cases depends upon an attitude toward the ease or difficulty of obtaining a divorce. Rather one's position depends upon his feeling about the integrity of the legal process. Whether divorces are easy or difficult to obtain, the writer cannot agree that litigants should be encouraged to falsify their pleadings and to connive with others in avoiding the laws of the place where they really make their home.

Lawyers will learn quickly how to advise clients who wish to arrange an effective divorce. But there remains the problem of what advice can be given a client who wants to fight. If a spouse appears in a divorce action what action can he take to contest the jurisdiction of the court? Clearly, he may seek to persuade the trial court that his spouse is not domiciled in the divorcing state and he may introduce evidence in support of his contention. If he fails, a measure of appellate review is possible within the state court system.[54] In the appellate court the issue will probably be: Is the trial court's finding on the question of domicil supported by such evidence that a reasonable man could arrive at the trial court's conclusion?

Can the decision of the state supreme court on this question be reviewed by the Supreme Court of the United

---

52. Fact situations of this sort have appeared in many reported cases throughout the United States: Wilkes v. Wilkes, 245 Ala. 54, 16 So.2d 15 (1943); Crouch v. Crouch, 28 Cal.2d 243, 169 P.2d 897 (1946); Koscove v. Koscove, 113 Colo. 317, 156 P.2d 696 (1945); Ainscow v. Alexander, 39 A.2d 54 (Del. 1944); Atkins v. Atkins, 393 Ill. 202, 65 N. E.2d 801 (1946); Coe v. Coe, 316 Mass. 423, 55 N. E.2d 702 (1944); Gray v. Gray, 320 Mich. 49, 30 N. W.2d 426 (1948); Wolff v. Wolff, 134 N. J. Eq. 8, 34 A.2d 150 (Ch. 1943); Kurski v. Kurski, 185 Misc. 97, 55 N. Y. S.2d 748 (Dom. Rel. Ct. N. Y. City 1945); Slapp v. Slapp, 143 Ohio St. 105, 54 N. E.2d 153 (1944); Esenwein v. Esenwein, 348 Pa. 455, 35 A.2d 335 (1944).

53. Lorenzen, *Extraterritorial Divorce—Williams v. North Carolina II*, 54 YALE L. J. 799, 800 (1945).

54. We are assured by the majority opinion in *Sherrer v. Sherrer:* "Appeals lie to the Florida Supreme Court from final decrees of divorce. Fla. Const. Art. V, § 5." 334 U. S. at 346, n.7.

States? There would seem to be only two possibilities for considering the state court finding as to domicil a federal question in the state court: (1) To *grant* a divorce to persons not really domiciled in the State may be a denial of due process of law; (2) To apply the substantive divorce law of the forum in granting a divorce to non-domiciliaries may be a denial of full faith and credit to the public acts of a sister state.

Jurisdiction to divorce is still supposedly based on the domicil of at least one spouse. In the case of an *in personam* judgment, the entry of the judgment without proper jurisdiction *is* a denial of due process.[55] Perhaps in a like manner, the Due Process Clause of the Fourteenth Amendment has been violated when a state grants a divorce in a case where neither party is really a domiciliary of the state. The Supreme Court has never passed directly upon the question. Mr. Justice Frankfurter, writing the opinion for the Court in *Williams II*, did not have this quesion before him. He did state, however:

> In seeking a decree of divorce outside the State in which he has theretofore maintained his marriage, a person is necessarily involved in the legal situation created by our federal system, whereby one State can grant a *divorce of validity in other States* only if the applicant has a *bona fide* domicil in the State of the court purporting to dissolve a prior legal marriage.[56]

It should be noted here that the Justice does not say that the divorces are void everywhere (as would be the case had due process been violated) unless there is a bona fide domicil in the state purporting to dissolve the marriage. He says merely that a divorce without domicil is not entitled to extra-state effect. However, other language in *Williams II* is more revealing upon this point. Mr. Justice Murphy tells us:

> The State of Nevada has unquestioned authority, consistent with procedural due process, to grant divorces on whatever basis it sees fit to all who meet its statutory requirements. It is entitled, moreover, to give to its divorce decrees absolute and binding finality within the confines of its borders.
>
> But if Nevada's divorce decrees are to be accorded full faith and credit in the courts of her sister states it is essential

55. Pennoyer v. Neff, 95 U. S. 714 (1877); RESTATEMENT, CONFLICT OF LAWS § 74 (1934).

56. 325 U. S. 226, 238 (1945) (italics supplied).

> that Nevada have proper jurisdiction over the divorce proceedings. This means that at least one of the parties to each ex parte proceeding must have a bona fide domicil within Nevada for whatever length of time Nevada may prescribe.[57]

According to Mr. Justice Murphy then (and presumably he spoke, as well, for Mr. Chief Justice Stone and Mr. Justice Jackson, who concurred with him) a state is perfectly free to dissolve a marriage on any statutory jurisdictional basis. The ensuing decree may not be entitled to full faith and credit but yet the due process clause has not been violated.[58] If these dicta are correctly interpreted and if they indicate how the Court would decide the question today, the fact that Florida or Nevada enters a divorce decree without the proper jurisdictional basis is not of itself a federal question. Apparently, the appearing spouse has no due process question in Florida.

With few exceptions a state which grants a divorce applies its own substantive rules of divorce without regard to the law of the place where the grounds for divorce occurred or the law of the domicil of the parties at the time of those acts.[59] Perhaps the application of Florida divorce law to persons not *actually* domiciled in Florida is a denial of full faith and credit to the "public Acts" of the state in which the parties have their true domicil. The Supreme Court has not been faced with this contention in divorce cases. However, as a general matter in determining the faith and credit to be given the *statutes* of sister states the Court in a few cases has purported to be "appraising the governmental interests of each jurisdiction, and turning the scale of decision according to their weight."[60] Thus conceiv-

---

57. *Id.* at 239.

58. It is further made clear that Mr. Justice Black, dissenting for himself and Mr. Justice Douglas in *Williams II*, takes the same view. In interpreting the opinion of the court in *Williams II* (an interpretation not necessarily correct) Mr. Justice Black says, "The Court today, however, seems to place its holding that the Nevada decrees are void on the basis that the Due Process Clause makes domicil an indispensable prerequisite to a state court's 'jurisdiction' to grant divorce. . . . I cannot agree to this latest expansion of federal power and the consequent diminution of state power over marriage and marriage dissolution which the Court derives from adding a new content to the Due Process Clause." *Id.* at 271.

59. RESTATEMENT, CONFLICT OF LAWS § 135 (1934).

60. Alaska Packers Ass'n v. Industrial Comm'n, 294 U. S. 532, 547 (1935). See also Pacific Employers Ins. Co. v. Industrial Comm'n, 306 U. S. 493 (1939).

ably, the faith and credit to be given the statutes of sister states in divorce matters could be made to turn upon whether one party was truly domiciled in the divorcing state. The interests of the state of bona fide domicil would seem to be considerably greater than those of the state wherein one party to a marriage has been residing for a few weeks. If the Supreme Court would agree, the appearing spouse would have a way of obtaining federal review of the state court's finding on domicil. However, in view of the dicta referred to above it seems highly unlikely that the Court would be willing to supervise the jurisdictional bases for granting divorces in the states. The use of the full faith and credit clause for this purpose would be no more attractive than due process.

Unless the Supreme Court of the United States is willing to make the jurisdictional basis of divorce a question either of due process or full faith and credit, the litigant who appears in the divorcing state is bound by the state court finding on the domicil issue.[61] If he really wants to challenge the divorce, he would do well to stay out of a state in which those who apply the law are easily convinced that a new domicil has been obtained.[62] The vague character of the rules on domicil and the limited review which will be given on issues of "fact" make the law-in-action of first im-

61. A question may be raised whether the res judicata doctrine was correctly applied in the *Sherrer* and *Coe* cases. The doctrine is properly applicable to bind Mr. Sherrer in Massachusetts by the Florida finding as to domicil, only if the issue is the same in Massachusetts as it was in Florida. However, "domicil$_1$" may not be identical with "domicil$_2$". The definition of a legal concept will depend upon the purpose which it is called to serve. It must be clear that in Massachusetts the question of domicil is a federal matter. The circumstances under which a divorce decree is entitled to full faith and credit (the jurisdiction to divorce under the full faith and credit clause) is certainly a federal question which ought to be reviewable by the Supreme Court of the United States. Mr. Sherrer could, indeed, have litigated a question labeled "domicil," but was it "domicil" within the meaning of the Florida divorce statutes or was it "domicil," a jurisdictional issue under the Constitution of the United States?

If there is neither a due process nor a full faith and credit question in Florida, then Mr. Sherrer finds himself bound by failing to litigate a federal question in Florida (the jurisdictional basis of a divorce decree which is entitled to full faith and credit) which was not before the Florida court.

62. In some places the rules on the subject of domicil cannot be honestly applied because of the commercial pressures from the business community. See Ingram and Ballard, *The Business of Migratory Divorce in Nevada*, 2 LAW & CONTEMP. PROB. 302 (1935).

portance to counsel. The spouse who wants to challenge a Florida or Nevada decree will probably be well advised to litigate the domicil question by way of a collateral attack in the normally friendly courts of his home state.[63]

CHAPTER IV: THE GHOST OF HADDOCK

It would be easy to make the assumption that while a person may be considered married in one state and not in another, at least he would either be definitely married or single within the borders of a single state. However, the result in *Estin v. Estin*[64] and *Kreiger v. Kreiger*[65] can be stated in such a way that the contrary is true. A person who has obtained a divorce decree must ask the question: "For what purpose am I divorced?" The Supreme Court, by its own admission, has adopted the doctrine of "divisible divorce."[66]

Mr. Estin and his wife lived together in New York until 1942. In 1943, Mrs. Estin was granted a decree of separation and $180 per month as permanent alimony in a proceeding in which Mr. Estin had entered a general appearance. In January, 1944, Mr. Estin went to Nevada and in May, 1945, a Nevada court, having found that Mr. Estin

---

63. One further proposition should be remembered when the client who wants to fight is given counsel. A decree is only entitled to such credit in F_2 as it would be given in F_1. If the decree is subject to attack on a ground such as fraud in the state which grants it, the divorce can be attacked on that ground in any other state without violating the full faith and credit clause. The Statute of 1790 only requires judicial proceedings to be given such faith and credit "as they have by law or usage in the courts of the State from which they are taken." *See* Levin v. Gladstein, 142 N. C. 482, 55 S. E. 371 (1906).

64. 334 U. S. 541 (1948).

65. 334 U. S. 555 (1948). The *Kreiger* case, a companion to *Estin v. Estin*, involved a New York support order against the husband and a subsequent ex parte Nevada divorce obtained by him. After the Nevada decree was granted, Mr. Kreiger ceased payment of the support money under the New York decree. Mrs. Krieger sought a judgment for back alimony in the New York courts. Her husband appeared and unsuccessfully pleaded the Nevada divorce as a defense. The trial court was affirmed by the New York Court of Appeals. 297 N. Y. 530, 74 N. E.2d 468 (1947). On certiorari, the Supreme Court affirmed the New York court. While the Nevada divorce was pending, Mrs. Kreiger obtained a New York injunction purporting to restrain her husband from seeking the divorce. Whether the Nevada court denied full faith and credit to this injunction in granting a divorce with knowledge of it is a question reserved by the Court for a later episode.

66. *See* Estin v. Estin, 334 U. S. 541, 549 (1948).

had been a bona fide resident of Nevada since January, 1944, granted him an ex parte divorce.[67]

After the entry of the Nevada divorce decree Mr. Estin ceased paying installments falling due under the terms of the New York separation decree. Mrs. Estin brought an action in the New York courts asking for accrued alimony. Her husband appeared and, contending that his duty to support her was terminated by the Nevada divorce, moved to strike out the alimony provisions of the separation decree. This motion was denied by the courts of the State of New York even though Mr. Estin was admitted to be a bona fide domiciliary of Nevada.[68] On certiorari, the New York courts were affirmed by the Supreme Court of the United States.

Mr. Justice Douglas' majority opinion distinguishes between different aspects of the marriage relationship. However exacting the requirements of full faith and credit may be they do not require that the state of the domicil of one spouse may enter a decree that changes *every* legal incident of marriage. The state of either party's domicil may grant a divorce entitled to full faith and credit as to questions of marital status and legitimacy. Yet on the matter of support the state in which the abandoned spouse is domiciled has an important interest which that state may protect.[69]

Nevada divorces may well put an end to a Nevada support order. However, the New York alimony decree was granted by a court having personal jurisdiction over the parties. The alimony decree is a property interest of Mrs. Estin which cannot be taken from her by a court which does not have jurisdiction over her person. Nevada is without power to terminate Mrs. Estin's rights in the New York decree.

In a dissent Mr. Justice Frankfurter perceives the crucial issue to be whether New York "has held that *no* "ex parte"

67. The divorce court in Nevada knew of the New York support order yet made no provision for alimony. The court reserved the question whether Nevada had thus denied full faith and credit to the New York support order. *Ibid.*

68. Estin v. Estin, 63 N. Y. S.2d 476 (1946), *aff'd*, 271 App. Div. 829, 66 N. Y. S.2d 421 (1946), *aff'd*, 296 N. Y. 308, 73 N. E.2d 113 (1947).

69. In the *Estin* case Mr. Justice Douglas only has occasion to distinguish between support and status as separable incidents of marriage. Presumably other aspects of marriage (*e.g.*, marital property rights, inheritance) could also be distinguished for jurisdictional purposes. However, this paper does not purport to treat more than the distinction between support and status.

divorce decree could terminate a prior New York separate maintenance decree, or whether it has decided merely that no "ex parte" divorce decree of another State could."[70] The majority of the Court incorrectly assumed that the Court of Appeals clearly stated the New York rule on this question. Mr. Justice Frankfurter would remand the case to the New York courts for clarification of its rationale.[71]

The problem of whether a foreign ex parte divorce decree will terminate an *existing* order for support and maintenance first poses a question to be solved by the conflict of laws of the state in which the support order is challenged.

Some courts have permitted a foreign ex parte divorce decree to terminate a support order entered against a husband.[72] Others have taken the position that because alimony is a personal right which can be granted only after personal service upon a husband, the wife's right to support under an alimony decree is also an *in personam* right which cannot be terminated by an ex parte divorce.[73] This view creates a full faith and credit problem in states which embrace it only if the *divorcing* state would consider a support order terminated by its own ex parte divorce. Judicial proceedings are entitled to no greater effect in New York than in Nevada. The present cases arise under the full faith and

---

70. Mr. Justice Frankfurter believes that New York would deny full faith and credit to a Nevada ex parte divorce if the foreign decree should be given an effect in New York different from the effect given there to a New York ex parte divorce. *Id.* at 549. In this view the faith and credit which must be given would depend upon the effect in New York of a New York ex parte decree—a proposition of the New York internal law. The Statute of 1790 defines the recognition required of foreign judicial proceedings as that which ". . .they have by law or usage in the courts of the State *from which they are taken.*" (Italics supplied.) For some purposes the Court has permitted a state to treat a foreign judgment less favorably than its own. *See* M'Elmoyle v. Cohen, 13 Pet. 312 (U. S. 1839). *Cf.* Hood v. McGehee, 237 U. S. 611 (1915).

71. Mr. Justice Jackson in a separate dissent assumes that under the New York law a New York divorce would have terminated a wife's right to support. In accordance with Mr. Justice Frankfurter he believes full faith and credit requires a Nevada decree to be given similar effect. 334 U. S. 541, 553 (1948). Mr. Justice Jackson's estimate of the New York law is not without substance, 53 DICK. L. REV. 72 (1948).

72. Cardinale v. Cardinale, 8 Cal.2d 762, 68 P.2d 351 (1937); Durlacher v. Durlacher, 35 F.Supp. 1005 (D. Nev. 1940); McCullough v. McCullough, 203 Mich. 288, 168 N. W. 929 (1918) *semble.*

73. *E. g.*, Miller v. Miller, 200 Iowa 1193, 206 N. W. 262 (1925); Simonton v. Simonton, 40 Idaho 751, 236 Pac. 863 (1925).

credit clause because, although in Nevada a divorce decree would terminate a support order,[74] the New York courts nevertheless refuse to give the divorce such effect in New York.

The *Estin* case makes it clear that F_2 may adopt either conflict of laws rule it chooses. If F_2 wishes to treat the ex parte foreign divorce as ending a support decree, it may do so. But F_2 may also, if it wishes, ignore the F_1 decree so far as the termination of a support order is concerned. F_1 does not possess the power to extinguish a wife's right under a support order of F_2 by force of F_1's ex parte divorce decree. By making a separation between matters of support and other incidents of marriage the Supreme Court has limited the extent to which a state with easy divorce policies may thwart the family law policies of a sister state. At least in cases where a husband's duty to support has been defined by the support order of one state he may not be relieved of that duty by another state unless the wife is personally within its jurisdiction.[75]

In the case of many family serials a character long thought to be dead reappears to take his place in the ever unfolding plot. So also in the lawyers' edition of the daytime serial, we may witness the revival of an old friend. It is clear that he was dead. The very Justice who brings news of resurrection told us: "*Haddock v. Haddock* is overruled."[76]

In *Haddock v. Haddock*[77] the wife, a resident of the State of New York, sued her husband in New York for a limited divorce and a decree of alimony. According to the complaint the parties had been married in New York wherein they were both domiciled. The husband had abandoned the wife immediately after the marriage. It appeared that the husband had obtained a decree of divorce in his new domicil, Connecticut, some years before the wife's suit was commenced. Mr.

74. Mr. Justice Douglas, citing Herrick v. Herrick, 55 Nev. 59, 68, 25 P.2d 378, 380 (1933), assumes this to be true. The citation is to a rather unsatisfactory dictum.

75. Where both parties of a marriage are personally before the divorcing court and a decree is entered which purports to be a final adjudication of a wife's right to alimony, the resulting decree is a bar to further provisions for support. Bates v. Bodie, 245 U. S. 520 (1918); *cf.* Yarborough v. Yarborough, 290 U. S. 202 (1933).

76. Mr. Justice Douglas in *Williams I*, 317 U. S. 287, 304 (1942).

77. 201 U. S. 562 (1906).

Haddock contended that the Connecticut decree terminated his liability for support by virtue of the full faith and credit clause. The New York court chose to ignore the Connecticut decree and granted the relief sought by the wife. On certiorari a majority of the Supreme Court affirmed on the ground that the Connecticut decree was not entitled to full faith and credit.

Of course, the majority opinion in the *Haddock* case treated the Connecticut decree, an ex parte decree entered in a state other than the "matrimonial domicil," as not entitled to full faith and credit for *any purpose*. *Williams I* corrects *Haddock* on that score. Yet the result in the *Haddock* case on its facts would be duplicated today if the distinction between support and capacity made in the *Estin* case is extended to situations in which a support decree is entered subsequent to a valid foreign divorce.[78]

Whether a foreign ex parte decree will operate to bar a suit for alimony after the decree is granted again raises a conflict of laws question to be solved by the law of the forum.[79] American jurisdictions have answered the question in many different ways. In some states alimony cannot be granted at all after a divorce even though the decree was ex parte and was granted in a foreign state. Various reasons

78. Some thirty years after *Haddock v. Haddock*, Professor Joseph W. Bingham contended that the *Haddock* case did not leave Connecticut completely powerless to deal with Mr. Haddock's marriage. Professor Bingham distinguished between the various incidents of marriage and came to the conclusion: ". . .the husband's marital capacity was restored not only under Connecticut law, but under New York law. . . . On the other hand, his marital duty to support his New York spouse, *as though still his wife* insofar as New York law was concerned was not dissolved because Connecticut under the circumstances of the case had not the legal power to decree dissolution in this particular." *The American Law Institute v. The Supreme Court*, 21 CORN. L. Q. 393, 421 (1936). After *Williams I* a few commentators, notably Walter Wheeler Cook writing in the INDIANA LAW JOURNAL, doubted whether the *Haddock* case was really overruled. Their caution was based upon the Bingham analysis. See Barnhard, *Haddock Reversed—Harbinger of Divisible Divorce*, 31 GEO. L. J. 210 (1943); Radin, *The Authenticated Full Faith and Credit Clause*, 39 ILL. L. REV. 1 (1944); Cook, *Is Haddock v. Haddock Overruled?*, 18 IND. L. J. 165 (1943); Holt, *The Bones of Haddock v. Haddock*, 41 MICH. L. REV. 1013 (1943). The point is also made in an excellent discussion written after *Williams II:* Powell, *And Repent At Leisure*, 58 HARV. L. REV. 930, 953 (1945).

79. Notes, *Alimony after Foreign Decrees of Divorce*, 53 HARV. L. REV. 1180 (1940); *Award of Alimony Subsequent to a Decree of Divorce*, 34 KY. L. J. 149 (1946). The cases are collected in Note, 42 A. L. R. 1385 (1926).

are given: Alimony depends upon the marriage relationship which is destroyed by a valid divorce;[80] courts have jurisdiction to grant a decree for alimony only as an incident to a divorce proceeding and where the parties are already divorced no second action is possible;[81] or the divorce judgment is res judicata on the question of alimony.[82] However, in many states alimony may be obtained even after a decree of divorce.[83] In those states an action for alimony is allowed apart from divorce proceedings. In them a wife may not be deprived of her right to alimony by a court which lacks personal jurisdiction over her.

If *any* divorce will bar alimony in a forum no full faith and credit problem will arise there. A state may give a divorce decree greater recognition than the Constitution requires. Again, no full faith and credit problem is presented if the state which grants the divorce also permits a suit for alimony after the decree. A full faith and credit problem similar to that of the *Estin* and *Haddock* cases arises only where F_2 *permits* a suit for support after a divorce decree has been entered in F_1, and where F_1 is a state in which no alimony may be given after the entry of the divorce decree.

There are many practical reasons which might prompt a state to recognize a wife's right to support (thus raising a full faith and credit question in some instances) although the marriage has been dissolved for other purposes. A regard for her husband's interest and the interest of his children may require a deserted wife to suffer her husband's desertion, his divorce in another state, and his subsequent marriage without requiring her to relinquish financial support as well. Without financial assistance from her former husband a wife may easily be reduced to poverty or to the indignity of becoming a public charge. Furthermore, the actual suit for divorce may be granted on service of the wife

80. *E.g.*, Calhoun v. Calhoun, 70 Cal. App.2d 233, 160 P.2d 923 (1945); Patterson v. Patterson, 187 P.2d 113 (Cal. App. 1947); McCoy v. McCoy, 191 Iowa 973, 183 N. W. 377 (1921).

81. Bowman v. Worthington, 24 Ark. 522 (1866); *but see* Wood v. Wood, 54 Ark. 172, 15 S. W. 459 (1891) (modifying Bowman v. Worthington).

82. *E.g.*, McCormick v. McCormick, 82 Kan. 31, 107 Pac. 546 (1910); Eldred v. Eldred, 62 Neb. 613, 87 N. W. 340 (1901).

83. *E.g.*, Davis v. Davis, 70 Colo. 37, 197 Pac. 241 (1921); Searles v. Searles, 140 Minn. 382, 168 N. W. 133 (1918).

by publication. With such service, the wife may have no actual knowledge of the pendency of the suit. Even if actual notice should reach the wife it may be a great practical inconvenience for her to travel the distance to the divorcing state.

There are no compelling reasons why there should be a federal impediment if a state, in the light of these considerations, should seek to protect a wife by permitting her to obtain a decree of alimony after her husband's foreign ex parte divorce. In working out, under the full faith and credit clause, a policy which has regard for the respective interests of the parties to a marriage, the Supreme Court would do well to embrace the ghost of *Haddock* and to permit the various states an independent judgment on the question.

In 1945, *Esenwein v. Esenwein*[84] seemed to foretell that the stone would be rolled from the tomb of *Haddock*. The *Esenwein* case, handed down on the same day as *Williams II*, merely decided that a previously existing order of support in Pennsylvania could survive a Nevada divorce which was invalid because Nevada was not the state of bona fide domicil. However, in a concurring opinion,[85] Mr. Justice Douglas suggested another ground upon which the decision could be placed. He used broad language to mark a separation between problems of support and those of marital capacity and legitimacy:

> I think it is important to keep in mind a basic difference between the problem of marital capacity and the problem of support .... In other words, it is not apparent that the spouse who obtained the decree can defeat an action for maintenance or support in another State by showing that he was domiciled in the State which awarded him the divorce decree .... But I am not convinced that in absence of an appearance or personal service the decree need be given full faith and credit when it comes to maintenance or support of the other spouse or the children.[86]

However, in making the distinction between status and support, Mr. Justice Douglas failed to discuss *Thompson v. Thompson*,[87] a case which seems to stand directly in the way

84. 325 U. S. 279 (1945).
85. *Id.* at 281.
86. *Id.* at 281-2.
87. 226 U. S. 551 (1913).

of any attempt by the Court to adopt fully the doctrine of "divisible divorce."[88] In the *Thompson* case, a wife sued her husband in the District of Columbia for a decree of maintenance as authorized by a statute applicable in the District. Before the maintenance decree was entered, the husband secured a decree of judicial separation from a Virginia court. The wife was served by publication. The District of Columbia trial court refused to recognize the Virginia decree as valid and allowed the wife to obtain the relief sought. The Court of Appeals' reversal was affirmed by the Supreme Court, which held that Virginia was the state of the "matrimonial domicil," and as such had jurisdiction to enter the separation decree. The Virginia decree granted upon proper jurisdiction is entitled to the same faith and credit as the decree would have by law or usage in the courts of Virginia,[89] *i.e.*, a decree of judicial separation bars a later suit for maintenance or support. The Court noted no distinction between status and support in discussing the jurisdiction of Virginia.

If the Court is to make the distinction of the *Esenwein* concurrence, two ways of dealing with the *Thompson* case seem possible: (a) to overrule it (it should be remembered that the case is based upon the law as it was before *Williams I*) or (b) to regard it as a case which decides what effect a Virginia decree will have in the District of Columbia as a matter of the conflict of laws of the District. In the latter event the Supreme Court would be regarded as having acted in its capacity as the highest court for the District of Columbia, rather than as the supreme authority in respect to the

88. In his opinion in the *Estin* case Mr. Justice Douglas distinguishes the *Thompson* case: "The case is unlike *Thompson v. Thompson*, 226 U. S. 551, where the wife by her conduct forfeited her right to alimony under the laws of the State of the matrimonial domicile where her husband obtained the divorce, and hence could not retain a judgment for maintenance subsequently obtained in another jurisdiction." 334 U. S. 541, 546 note 4 (1948). If the Justice means that the mandatory faith and credit of a divorce decree as to matters of support will depend upon the conduct of the parties, or if he means that the state of the "matrimonial domicil" has peculiar power to act in respect to rights of support, *Haddock* will indeed have returned with a vengeance. See RESTATEMENT, CONFLICT OF LAWS § 113 (1934) (this section is based on an interpretation of Haddock v. Haddock); McClintock, *Fault as an Element of Divorce Jurisdiction*, 37 YALE L. J. 564 (1928).

89. The courts of the District of Columbia must give full faith and credit to judicial proceedings of the states. The Statute of 1790 prescribes the effect which state court judgments are to have ". . .in every court within the United States. . . ."

full faith and credit clause of the Constitution and the Statute of 1790.

The promise of a complete separation between problems of support and capacity to remarry, which was adumbrated by Mr. Justice Douglas in *Esenwein*, is not fulfilled in the present cases of *Estin* and *Kreiger*. While the *Estin* case makes it clear that an ex parte decree granted in a foreign state will not operate by virtue of the full faith and credit clause to end an existing support order, the reasoning of the opinion does not easily lend itself to support a sharp dichotomy beween problems of support and status. The opinion stresses the outstanding decree of support, which is labeled a property interest of the wife, and therefore something not to be taken from her by a court lacking personal jurisdiction over her. If the doctrine of "divisible divorce" really is adopted, whether an alimony decree gives rise to a property interest is an irrelevant consideration. In comparison with Mr. Justice Douglas' approach in the *Esenwein* case, the *Estin* opinion is narrow indeed.

A wife's right to alimony, not previously reduced to a support order, will be difficult to characterize as property. Yet should the Court prevent a state from giving an alimony decree after an ex parte foreign divorce on the ground that the possibility of support, undefined by a court order, is not "property," an unfortunate and unnecessary limitation will be placed upon the *Estin* case. It is the whole problem of support, not merely a wife's right under an existing support order, which requires separate treatment. As to support, a court which has only the husband before it should be unable, so far as full faith and credit is concerned, to relieve him of his duty to provide for his wife.

Acceptable legal theory under the full faith and credit clause easily could give each state freedom to determine the effect of an ex parte foreign divorce decree. Judicial proceedings are entitled to full faith and credit in other states only if the state in which they take place has the jurisdiction to act. To accomplish the desired result the rule on jurisdiction to divorce under the full faith and credit clause might be stated: The state which is the domicil of only one spouse has jurisdiction to dissolve a marriage so that every other state must recognize the capacity of the spouses to remarry and the legitimacy of the children of a second marriage.

However, a state which is the domicil of only one spouse does not have jurisdiction to end a wife's claim for support in another state unless the wife is personally before the court in the divorcing state.

Whether the Supreme Court ultimately adopts such a theory of jurisdiction, at the moment the advantages of obtaining a support decree as quickly as possible after the break-up of a home should be apparent to practicing lawyers. In addition, they will surely recognize the importance of an appearance in the strategy of litigating support cases. A defendant wife should be advised to avoid making a personal appearance in the divorcing state if she wishes either to safeguard her present rights under an alimony decree, or to retain the possibility of obtaining one in the first instance after a foreign divorce has been secured by her spouse. If she does appear in the divorce proceeding, wise counsel will dictate that she litigate the question of support in the divorcing forum, for that divorce decree will probably be a bar to a suit for alimony in another state by virtue of the full faith and credit clause.[90]

The four cases of *Sherrer*, *Coe*, *Estin* and *Kreiger* operate to give the parties to a marriage a choice in the effectiveness of their divorce. If both appear the divorce will be binding on the parties as to status but the opportunity to obtain subsequent support may be lost. If only one party is personally before the court the proceeding may be challenged in other states on the ground that the divorcing court had no power to dissolve the marriage for any purpose. However, rights of support may still exist even though the divorce should otherwise prove to be valid.

---

90. This assumes the decree is a bar in the divorcing state. See note 75 *supra*.