Volume 28 | Number 3 Article 2

4-1-1950

The Aftermath of Williams vs. North Carolina

Herbert R. Baer

THE AFTERMATH OF WILLIAMS VS. NORTH CAROLINA

HERBERT R. BAER*

Seven years have passed since that day in December, 1942, when the Supreme Court of the United States rendered its first decision in the celebrated case of *Williams v. North Carolina.*[1] Five years have elapsed since the Supreme Court on its return engagement with that litigation rendered its second decision.[2] During the intervals the Court has been called upon to decide several cases of major importance which have brought into play the principles announced in the two *Williams* cases. It will be the purpose of this paper to review these subsequent pronouncements of the Supreme Court. All but one of the cases deal with matrimonial and divorce law. That one, however, is in quite a different field. Nevertheless, because it has reversed previously accepted law and rendered unconstitutional statutory provisions in many states, including North Carolina, it will be considered here.

Before discussing the decisions following the *Williams* cases it will be useful to reexamine the holdings of the Supreme Court in that history making litigation and thus place ourselves on that plane of law from which the Court has proceeded in reaching its subsequent holdings. For convenience, hereafter, the first *Williams* case will be referred to as *Williams 1st* and the second as *Williams 2nd.*

Williams and his paramour, Mrs. Hendrix, had both been domiciled in North Carolina. They left their respective spouses, took up their residence in Nevada, obtained Nevada divorces, married, and then returned to North Carolina to live as man and wife. None of the divorce suit defendants had been served or appeared in the Nevada litigation. The State of North Carolina prosecuted Williams and his Nevada acquired wife for bigamy. Convictions were affirmed by the State Supreme Court. Although the state had initially challenged the validity of the Nevada divorces on two grounds: (1) lack of jurisdiction over the divorce suit defendants in Nevada, and (2) lack of domicile by the

* Professor of Law, University of North Carolina.

[1] 317 U. S. 287 (1942).

[2] 325 U. S. 226 (1945). The *Williams* litigation has provoked over three score notes and leading articles in the various law reviews. In addition it has furnished feature material for Sunday supplements and popular magazines. For the latter see Life Magazine, Vol. 19, No. 10, p. 86, issued September 3, 1945. For some of the law review articles see, Powell, *And Repent at Leisure,* 58 HARV. L. REV. 930 (1945); Corwin, *Out-Haddocking Haddock,* 93 U. OF PA. L. REV. 341 (1945); Baer, *So Your Client Wants a Divorce,* 24 N. C. L. REV. 1 (1945).

divorce suit plaintiffs in the same state, it abandoned the latter basis when appearing before the United States Supreme Court. For the purpose of the appeal in *Williams 1st,* the defendants in the criminal action were assumed to have been domiciled in Nevada when they obtained their divorces. The sole issue was whether Nevada, the state of the assumed newly acquired domicile of the spouse who had abandoned his mate in North Carolina, could grant a divorce which, under the full faith and credit provisions of the Federal Constitution, would operate as a complete defense to a bigamy prosecution in North Carolina. Justice Douglas, speaking for the majority of a sharply divided Court answered this question in the affirmative. Jurisdiction to divorce, we were told, is predicated on domicile—not fault. It exists even though the defendant has not been served with process nor entered an appearance in the divorcing state. Any prior utterances of the Supreme Court to the contrary are to be disregarded for *Haddock v. Haddock*[3] is overruled.

Although the convictions were reversed in *Williams 1st,* Justice Douglas opened the door for the return of the litigation to his Court when he said, "Nor do we reach here the question as to the power of North Carolina to refuse full faith and credit to Nevada divorce decrees because, contrary to the finding of the Nevada court, North Carolina finds that no bona fide domicile was acquired in Nevada."[4] Accordingly, the litigation was remanded to North Carolina where that state again sought to obtain convictions, this time on the sole ground that the Nevada divorces were invalid because neither Williams nor Mrs. Hendrix had been domiciled in that state. A North Carolina jury found the criminal defendants had never been domiciled in Nevada and judgments of conviction were affirmed by the state Supreme Court.

When *Williams 2nd* came to the United States Supreme Court, that tribunal, split under a new alignment, affirmed the convictions. Justice Frankfurter, for the majority, declared that the full faith and credit clause of the Constitution did not prevent North Carolina from looking into the jurisdiction of the Nevada court. Domicile of one of the parties was, as declared in *Williams 1st,* the jurisdictional keystone. North Carolina, prosecuting the defendants in the protection of its social institutions, had fairly found no domicile in Nevada. It had accorded the Nevada decrees all the respect to which they were entitled under the full faith and credit clause.

Whatever force and effect the Nevada divorce decrees might have elsewhere (they had been characterized as unassailable in Nevada by Justice Frankfurter in *Williams 1st*) they were no defense to criminal prosecutions in North Carolina. That state had not appeared in the Nevada proceedings, and ". . . those not parties to a litigation ought not

[3] 201 U. S. 562 (1906).
[4] 317 U. S. 287, 302 (1942).

to be foreclosed by the interested actions of others, especially not a State which is concerned with the vindication of its own social policy. . . ."[5]

We must continually bear in mind that, irrespective of the language used by the Supreme Court Justices who delivered their several majority, concurring, dissenting, and concurring-dissenting opinions in *Williams 1st and 2nd,* the case involved a criminal prosecution for bigamy. The private matrimonial or property rights of the individuals concerned were not adjudicated. Important questions were left undetermined by the litigation. For example:

1. Does the rule of *Williams 1st* bar the spouse left at home from obtaining support?
2. Are property rights to be determined by the Nevada decree or by a local jury reinquiring into the fact of domicile?
3. If Mr. Williams had died following his second marriage, would he leave two lawful widows—the one recognized by Nevada, and the other by North Carolina?
4. Does the rule of *Williams 2nd* permit all states to question the Nevada domicile, or is that the sole privilge of the state of the previous matrimonial domicile?
5. If there had been a contest between the spouses in Nevada on the question of jurisdiction, or no contest, but an appearance entered by the defendant, would that bar either the state of matrimonial domicile or any other state from relitigating the jurisdictional fact in either (1) a criminal or (2) a civil proceeding?

Some of these questions have been answered by the Supreme Court in litigation following the *Williams* decisions—others remain still undetermined.

While it might be desirous from the standpoint of literary unity that we consider herein only those Supreme Court decisions subsequent to the *Williams* controversy which deal with matrimonial causes, we cannot do so and truthfully record the influence of that litigation on our law. Historical accuracy compels us, therefore, to depart momentarily from the field of marriage and its frequent unhappy bedfellow—divorce.

Lawyers are accustomed to the far-reaching and unforeseen consequences that flow from the application of an old judicial precedent to a new fact situation undreamed of when the precedent was decided. We are familiar with the principle that the rights of *A* and *B* under a contract relative to a television set might be determined by the application of a judicial precedent dealing with a plow or perchance a covered wagon. But not a few of us (including four dissenting Justices of the Supreme Court) were astounded to learn that principles which in December, 1942, freed the defendants in *Williams 1st* should be used in December, 1943, to deny an injured employee compensation which had

[5] 325 U. S. 226, 230 (1945).

been accorded him by Louisiana law. Nor did we anticipate that material portions of the Workmen's Compensation statutes of several states, including North Carolina,[6] would be rendered unconstitutional because, and only because, of the decision in *Williams 1st.* But such was the unpredictable turn taken by the law in *Magnolia Petroleum Co. v. Hunt.*[7]

MAGNOLIA PETROLEUM CO. v. HUNT

Hunt, a resident of Louisiana, was employed in that state by the Magnolia Petroleum Co. In the course of his employment he was injured while working on an oil well in Texas. He was confined to a hospital in Texas where he was told he could not recover compensation unless he signed forms presented him. These forms, which he signed, were sufficient to invoke action on the part of the Industrial Accident Board of Austin, Texas. The insurer began to pay compensation pursuant to the Texas law. Hunt, in due time, returned home, found he could get more compensation under the Louisiana Act[8] than under Texas law and advised the insurer he intended to claim under the laws of his home state. The insurer then ceased payments and a short time later Hunt was notified that the Texas Board would hold a hearing in his case to determine the liability of the insurer under Texas law. Hunt did not appear at the Texas hearing. An award of compensation was made to him in his absence and the equivalent of a judgment for the amount of the award was entered against the insurer.

Hunt declined to accept the money under the Texas award, filed suit against his employer under the Louisiana Workmen's Compensation law and recovered a judgment substantially larger than the Texas award from which the court deducted the sum he had already received from the Texas insurer. This judgment was affirmed by the Louisiana appellate courts. The employer brought the case to the United States Supreme Court contending that the Texas award was *res judicata* and that the state courts in Louisiana had failed to give full faith and credit to the Texas award as required by the Constitution.

Majority Opinion

Chief Justice Stone, speaking for three other members of the Court, and writing what constitutes the opinion of the Court, upheld the contentions of the employer. The Texas award, he found, was a final adjudication of Hunt's rights in Texas and in that state was *res judicata.*[9]

[6] The North Carolina statutory provision is N. C. Gen. Stat. §97-36 (1943). For the text of this statute see, *infra,* note 24.
[7] 320 U. S. 430 (1943).
[8] La. Gen. Stat. Ann. §§ 4391 *et seq.* (1939).
[9] 320 U. S. 430, 435 (1943).

The full faith and credit clause requires that Louisiana give the Texas award the same recognition there that it has in Texas.[10] Since it is a final settlement of Hunt's rights in Texas, since he cannot relitigate the issue there, he cannot relitigate in Louisiana. Although Louisiana might have a state policy which accords its domiciliaries, hired within its borders, an amount of compensation higher than that allowed by Texas law, that policy is now defeated by the Texas adjudication for a lesser sum.

That Louisiana, the state of domicile, and Texas, the locus of the injury, both have governmental interests in seeing that the injured employee receive compensation had been previously recognized by the Supreme Court. Each state was warranted in protecting the employee lest he become a public charge within its borders. Neither state could by legislation deny the employee the right to receive compensation in the other. Thus, in *Pacific Employers Insurance Co. v. Commission*[11] California was permitted to award compensation to an employee injured there but hired in Massachusetts notwithstanding Massachusetts law provided the employee's exclusive remedy for compensation should be under the act of that state regardless of where the injury occurred. And in *Alaska Packers v. Commission*[12] California was again allowed to award compensation to an employee hired there but injured in Alaska although the contract of employment provided the Alaska compensation act should apply and the Alaska statute stated the exclusive remedy for injuries suffered in that territory should be under the local act.

In those two cases the Supreme Court stated that the full faith and credit clause did not necessarily preclude one state from enforcing within its own borders a statute which might conflict with that of another state. "The conflict," we were told, "is to be resolved, not by giving automatic effect to the full faith and credit clause, compelling the courts of each state to subordinate its own statutes to those of the other, but by appraising the governmental interests of each jurisdiction, and turning the scale of decision according to their weight."[13]

In reaching the majority conclusions in the *Magnolia* case, Chief Justice Stone referred to the *Alaska Packers* and *Pacific Employers* cases and, although fully aware that Louisiana's policy of allowing more compensation was being defeated by the Supreme Court on the basis of the Texas award, said, "No convincing reason is advanced for saying that Louisiana has a greater interest in awarding compensation for an injury suffered in an industrial accident than North Carolina had in determining the marital status of its domiciliary against whom a divorce decree had been rendered in another state."[14] He thereupon cited *Wil-*

[10] *Id.* at 437.
[11] 306 U. S. 493 (1939).
[12] 294 U. S. 532 (1935).
[13] *Id.* at 547.
[14] 320 U. S. 430, 440 (1943).

liams 1st (*Williams 2nd* had not yet been decided). He also referred to *Fauntleroy v. Lum*[15] and *Yarborough v. Yarborough*[16] and added, "In each of these cases the words and purpose of the full faith and credit clause were thought to demand that the interest of the state in which the judgment was obtained and was *res judicata* should override the laws and policy of the forum to which the judgment was taken."[17]

And, thus, we see that, as full faith and credit when applied to the Nevada decree in *Williams 1st* had defeated North Carolina's policy in regard to the foreign *ex parte* divorce, so did full faith and credit when applied to the Texas compensation award defeat Louisiana's policy of providing what it deemed adequate compensation for its domiciliaries. Hunt, however, fared worse than the State of North Carolina for no doorway was pointed out to him through which he might (as did North Carolina) subsequently escape the effect of the Texas judgment. While the jurisdictional requisite of domicile in Nevada had been assumed in *Williams 1st,* whether it existed in fact was left open for later decision. The jurisdictional basis of the Texas compensation award was not open to further attack. Whatever might be the conflict between the policies of Louisiana and Texas, there was no question but that Texas had jurisdiction of the parties and subject matter.

Justices Black, Douglas, Murphy, and Rutledge dissented from the majority opinion in *Magnolia v. Hunt* for reasons which we shall consider shortly. Justice Jackson held the critical vote. He had dissented in *Williams 1st.* His heart is now with the four dissenting Justices. He says,

> "I agree with the dissent that Louisiana has a legitimate interest to protect in the subject matter of this litigation, but so did North Carolina in the *Williams* case. I am unable to see how Louisiana can be constitutionally free to apply its own workmen's compensation law to its citizens despite a previous adjudication in another state if North Carolina was not free to apply its own matrimonial policy to its own citizens after judgment on the subject in Nevada."[18]

It is clear that Justice Jackson would have liked to overrule *Williams 1st,* but he felt that to do so would result in the Court itself not giving full faith and credit to its own pronouncements. Much against his will he cast the deciding vote for the side of the Court led by the Chief Justice and said, "I shall abide by the *Williams* case until it is taken off our books and for that reason concur in the decision herein."[19]

We see, therefore, that it is because of *Williams 1st,* and *only* because of that decision, that Hunt failed to receive compensation which

[15] 210 U. S. 230 (1908).
[16] 290 U. S. 202 (1933).
[17] 320 U. S. 430, 441 (1943).
[18] *Id.* at 446.
[19] *Id.* at 447.

Louisiana, the state of his domicile, wished to accord him. One may well wonder what Justice Jackson's vote would be if the *Magnolia* case were to come before him today, for we now know that the Nevada decree, which nullified North Carolina's policy in *Williams 1st,* proved impotent when North Carolina again asserted its policy in *Williams 2nd!*

Dissenting Opinions in Magnolia Case

Dissenting opinions were written by both Justice Douglas and Justice Black. Justice Murphy joined in the dissent of Justice Douglas and Justices Murphy, Rutledge, and Douglas concurred in the dissenting opinion of Justice Black.

Justice Douglas took the position that the Texas judgment merely sought to determine the rights of Hunt under the Texas statute and did not attempt to adjudicate rights and duties under Louisiana law. Referring to *Williams 1st,* he said:

> "If the Texas award had undertaken to adjudicate the rights and duties of the parties under the Louisiana contract of employment, which we are told carries the right to compensation under the Louisiana Act . . . the result would be quite different. Then the judgment, like the divorce decree in the *Williams* case would undertake to regulate the relationship of the parties, or their rights and duties which flow from it, as respects their undertakings in another State. . . . But there is nothing in the Texas proceeding or in the Texas award to indicate that that was either intended or done. The most charitable construction is that Texas undertook to adjust the rights and duties of the parties and to regulate their relationship only so long as they remained subject to the jurisdiction of Texas."[20]

Further, Justice Douglas pointed out that if Hunt had *not* been able to recover under the Texas statute because he was unable to comply with certain of its requirements, such inability would not have prevented him from recovering in Louisiana if he could meet the demands of the statute in that state. Consequently, the Justice concludes that if a complete denial of recovery in Texas would not be a bar to recovery in Louisiana a partial recovery in Texas should not prevent a recovery for an increased amount allowed under Louisiana law.

Again referring to the *Williams* litigation, Justice Douglas said the full faith and credit clause often makes a reconciliation of conflicting policies in different states impossible. The policy of one state must give way on occasion to that of the other in the "larger interest of the federal union."[21] Such larger interest required North Carolina to recognize as valid the Nevada divorce decree predicated on Nevada domicile. Prosecution of the defendants in *Williams 1st* for bigamy was irreconcilable with the divorced status created by the Nevada courts.

[20] *Id.* at 448, 449.

[21] *Id.* at 447.

But no such irreconcilable conflict exists in the opinion of Justice Douglas in the *Hunt* case. He concludes by saying:

> "The employee is domiciled in Louisiana, the employer is authorized to do business in Louisiana. The employment is a Louisiana contract. Louisiana has such a considerable interest at stake that I would allow its policy to be obliterated or subordinated only in case what took place in Texas is irreconcilable with what Louisiana now seeks to do. I do not think it is. It is thus apparent that the decision of *Williams v. North Carolina* is no shelter in the present controversy."[22]

In his dissenting opinion Justice Black stated that the interests of Texas and Louisiana were not the same. Hunt might become a public charge in Texas after his injury while he is temporarily there. He might become a public charge in Louisiana when he returns there to resume his permanent abode. The two states were not merely vindicating a private wrong—they were endeavoring to protect the general welfare of their respective states. If in so doing Louisiana provides more compensation for the injured employee than Texas, "no Constitutional issue is presented."[23]

Interestingly enough, Justice Black refers to the statutory law of North Carolina:[24]

> "North Carolina provides by statute in cases like the present that the employee should be entitled to receive compensation provided that if he receives compensation from a state other than North Carolina, he will be given no more compensation by North Carolina than would raise the total recovery to the maximum allowed by the North Carolina law."[25]

"The effect of the [majority] decision," said Justice Black, "is to strike down as unconstitutional an important provision of the workmen's compensation laws of at least eleven states."[26] Not only does the decision render state statutory provisions unconstitutional, but "it is flatly

[22] *Id.* at 450.
[23] *Id.* at 456.
[24] N. C. GEN. STAT. §97-36 (1943). This provides: *"Accidents taking place outside state; employee receiving compensation from another state.*—Where an accident happens while the employee is employed elsewhere than in this State which would entitle him or his dependents to compensation if it had happened in this State, the employee or his dependents shall be entitled to compensation, if the contract of employment was made in this State, if the employer's place of business is in this State, and if the residence of the employee is in this State; provided his contract of employment was not expressly for service exclusively outside of the State; provided, however, if an employee shall receive compensation or damages under the laws of any other State nothing herein contained shall be construed so as to permit a total compensation for the same injury greater than is provided for in this article."
[25] 320 U. S. 430, 458 (1943).
[26] *Id.* at 462.

in conflict with accepted law and practice"[27] and directly opposed to the position taken in Section 403 of the *Restatement, Conflict of Laws.*[28]

The application by the majority of *res judicata* is said to be misconceived, for the issue in Texas was the liability of the employer to Hunt under Texas law. Texas did not attempt to adjudicate the employer's liability to Hunt under Louisiana law, and since the extent of liability under Louisiana law was not in issue in Texas, it follows, according to Justice Black, that principles of *res judicata* are not applicable.

We have seen that the first impact of the *Williams* divorce case in the Supreme Court was on an entirely unrelated branch of law. We have been reluctantly informed by Justice Jackson that only because of *Williams 1st* he concurs in denying an injured employee compensation to which he was hitherto entitled by both statutory and decisional law. But we know that as a result of *Williams 2nd* the dominating influence on local policy of a foreign *ex parte* divorce decree has been materially diminished. The devastating effect of *Williams 1st* as seen by Justice Jackson in 1943, when he concurred in *Magnolia v. Hunt,* was substantially mitigated in 1945 by *Williams 2nd.*

Let us now turn to the other opinions of the Supreme Court in which the *Williams* decisions play a major role and which, fortunately for the sake of unity, are all in the field of matrimonial law.

THE SHERRER AND COE CASES OR THE "QUICKIE" DIVORCE

It was not until June 7, 1948, that the Supreme Court again had occasion to pass upon the effect to be given a divorce decree of a sister state. On that day it decided *Sherrer v. Sherrer*[29] and *Coe v. Coe.*[30] As in the *Williams* cases, we do not find a unanimous court but this time the dissenting justices are reduced to two in number. The *Williams* litigation was, as might be expected, alluded to by both the majority and dissent. While a separate majority opinion was written in each case, the dissent wrote one opinion covering both cases.

[27] *Id.* at 457. For a collection of cases decided prior to *Magnolia v. Hunt* and upholding recovery in the state where the employee was hired although he received an award in the state where injured see GOODRICH, CONFLICT OF LAWS §97 (2d ed. 1938). It is interesting to note the comment of the author of that text on p. 244, "The action in one state cannot be res judicata in the second state, for where each state has a statute each suit is predicated upon the statute of the particular state. . . ."

[28] RESTATEMENT, CONFLICT OF LAWS §403 provides, *"Effect of Previous Award:* Award already had under the Workmen's Compensation Act of another state will not bar a proceeding under an applicable Act, but the amount paid on a prior award in another state will be credited on the second award." Justice Black is absolutely correct when he states the action of the majority is contrary to accepted law and practice.

[29] 334 U. S. 343 (1948). [30] 334 U. S. 378 (1948).

The Sherrer Case

Sherrer and his wife had been married in New Jersey in 1930. In 1932, they moved to Massachusetts where they lived together until April 3, 1944. There had been a long period of matrimonial discord and on the last mentioned date Mrs. Sherrer, accompanied by her two children, left Massachusetts for Florida. Shortly after her arrival in that state Mrs. Sherrer notified her husband that she would not return to him. She secured employment and sent her older child to school. At the end of the 90 day residence period provided by Florida law Mrs. Sherrer filed suit for divorce in that state alleging she was a bona fide resident of Florida. After receiving notice of the litigation by mail, Sherrer engaged counsel in Florida who entered a general appearance in his behalf and who, in the answer filed, denied the allegations of the petitioner, including her allegations of residence (domicile) in Florida.

In November, 1944, the case was called for hearing before the Florida court. Sherrer appeared, but although his wife introduced evidence to substantiate her allegations, including those of residence, he neither cross-examined nor introduced evidence in contradiction. A decree was entered by the Florida court granting Mrs. Sherrer the divorce and reciting that the petitioner ". . . is a bona fide resident of the State of Florida and this court has jurisdiction of the parties and the subject matter. . . ."[31] Sherrer did not appeal.

On December 1, 1944, Mrs. Sherrer, now divorced, married one Henry Phelps, a resident of Massachusetts, who had pursued her to Florida. The marriage took place in that state where the now Mr. and Mrs. Phelps lived for an additional two months until February 5, 1945, when they returned to Massachusetts.

In June, 1945, Sherrer, pursuant to a local statute,[32] instituted an action in a Massachusetts probate court against Mrs. Sherrer in which he contended the Florida divorce was invalid and Mrs. Sherrer's marriage to Phelps void. He prayed that the court declare he was living apart from his wife for justifiable cause and that he be permitted to convey his real estate, under the applicable statute, as if he were sole. The defendant gave testimony in defense of the Florida decree, but the probate court found that Mrs. Sherrer had never been domiciled in Florida and granted the relief requested. The Supreme Judicial Court of Massachusetts affirmed on the ground that the finding of lack of domicile in Florida was supported by evidence, and that the full faith and credit clause of the Constitution did not preclude Massachusetts from re-examining the question of domicile in spite of the recital contained in the Florida decree.

[31] 334 U. S. 343, 346 (1948).
[32] MASS. GEN. LAWS c. 209, §36 (1932).

The United States Supreme Court granted certiorari on the petition of Mrs. Sherrer which alleged that Massachusetts had failed to accord full faith and credit to the decree of divorce rendered by Florida. On final hearing, that Court, by a divided vote of seven to two, reversed the judgment and declared that full faith and credit had been denied the Florida decree by the Massachusetts court.

Majority Opinion in Sherrer Case

Chief Justice Vinson, speaking for the majority, said that we are dealing here with a divorce decree ". . . valid and final in the State which rendered it; and we so assume."[33] Jurisdiction of the Florida court was, of course, dependent on domicile in that state. But that requirement had been recognized by Florida which found as a fact that the petitioner in the divorce suit was domiciled within its borders for the statutory period. This finding of domicile was not in an *ex parte* proceeding. Distinguishing *Williams 2nd* Chief Justice Vinson said,

> "But whether or not petitionar was domiciled in Florida at the time the divorce was granted was a matter to be resolved by judicial determination. Here unlike the situation presented in *Williams v. North Carolina,* [citing *Williams 2nd*] the finding of the requisite jurisdictional facts was made in proceedings in which the defendant appeared and participated."[34]

The question, therefore, was whether Mr. Sherrer, in view of his appearance and participation in the Florida divorce proceeding, would be permitted to collaterally attack the finding of domicile made by the Florida court in his home state of Massachusetts. North Carolina had been permitted to do so in *Williams 2nd,* but then North Carolina had not appeared in Nevada.

The majority answered this question in the negative. Emphasis is placed by Chief Justice Vinson on the fact that Sherrer had had his "day in court"[35] in Florida. He there put in issue the question of his wife's domicile. True, he apparently did not choose to push his attack in the Florida court. However, he had the opportunity to do so. To allow him to question the bona fides of Mrs. Sherrer's Florida domicile in the Massachusetts litigation would permit him to retry an issue previously determined. When an issue of jurisdiction has been litigated, the principle of *res judicata* applies. If the question of jurisdiction is not susceptible to collateral attack after litigation in the jurisdiction where the judgment was first rendered, it is not subject to collateral attack in another state. The full faith and credit clause forbids.[36]

[33] 334 U. S. 343, 349 (1948).
[34] *Id.* at 349.
[35] *Id.* at 350.
[36] *Id.* at 351. The Chief Justice stated in a footnote that, "We, of course, intimate no opinion as to the scope of Congressional power to legislate under

In addition to both *Williams* cases, the majority cited two earlier Supreme Court decisions on divorce: *Andrews v. Andrews*[37] and *Davis v. Davis*.[38] The *Andrews* case, decided in 1903, upheld a decision of a Massachusetts court which declared a divorce decree obtained by a husband in South Dakota void on the ground he had not been domiciled in that state. This attack on the South Dakota decree was allowed, despite the fact that the wife in that proceeding had challenged her husband's domicile in that state. However, before the decree of divorce was granted, she withdrew her appearance pursuant to a consent arrangement.

There are certain similarities between the *Andrews* and *Sherrer* cases. In each, the defendant entered his appearance, challenged the plaintiff's domicile, and failed to carry the challenge to combat. The defendant wife in *Andrews* withdrew her appearance and the defendant husband in *Sherrer* for all practical purposes withdrew his attack on the alleged Florida domicile, by neither cross-examining, nor offering evidence to overcome the testimony of his wife.

Realizing that adherence to the *Andrews* decision would reasonably require the Court to affirm the Massachusetts ruling which allowed the attack on the Florida domicile, Chief Justice Vinson said, "The *Andrews* case was decided prior to the considerable modern development of the law with respect to finality of jurisdictional findings . . . [and] . . . insofar as the rule of that case may be said to be inconsistent with the judgment herein announced, it must be regarded as having been superseded by subsequent decisions of this Court."[39]

According to Chief Justice Vinson the *Sherrer* case is more in line with *Davis v. Davis,* decided in 1938. In that litigation the Supreme Court of the United States held the courts of the District of Columbia could not in an action between the parties look into the question of the plaintiff husband's domicile in Virginia, the state which granted him his divorce, when it was shown that the wife had appeared in the Vir-

Article IV, Sec. 1 of the Constitution," (the full faith and credit clause). Justice Frankfurter in his dissenting opinion in Sherrer and Coe 334 U. S. 343, 364 (1948) n. 13, gives a detailed account of the many efforts that have been made to obtain uniformity in our divorce law. The modes suggested for achieving this have been three in number: (1) a Constitutional amendment authorizing Congress to enact national divorce laws, (2) Congressional action without the benefit of an amendment taken under the grant of power contained in the full faith and credit clause, and (3) uniform state legislation. All of these methods have been attempted and failed. Justice Frankfurter notes that since 1884 at least seventy amendments to the Constitution empowering Congress to legislate on this subject have been proposed. He points out that at the time of his opinion in the *Sherrer* and *Coe* cases Senator McCarran of Nevada was seeking legislation from the 80th Congress. He also shows by disheartening statistics that despite many efforts at uniform state legislation nothing of consequence has been accomplished in that field.

[37] 188 U. S. 14 (1903).

[38] 305 U. S. 32 (1938).

[39] 334 U. S. 343, 353 (1948).

ginia proceeding, and both by her pleadings and her evidence had sought to establish the falsity of the alleged Virginia domicile. Full faith and credit compelled the courts of the District of Columbia to abide by the finding of domicile made in Virginia.

Sherrer had, of course, relied on *Williams 2nd* as authorizing his attack on the Florida finding of domicile. The Massachusetts court re-determined the fact of the foreign domicile on the basis of the same case. But neither the litigant nor the state court was correct in assuming an attack could be made at this time by the party defeated in the Florida proceedings. *Williams 2nd* is not applicable. The difference lies in the fact that the *Williams* litigation in Nevada was entirely *ex parte* while both plaintiff wife and defendant husband participated in the Florida action. The Chief Justice says,

> "It is one thing to recognize as permissible the judicial re-examination of findings of jurisdictional fact where such findings have been made by a court of a sister State which has entered a divorce decree in *ex parte* proceedings. It is quite another 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."[40]

Finally, the majority feels strongly that there should be an end to divorce litigation. The opinion concludes,

> "And where a decree of divorce is rendered by a competent court under the circumstances of this case, the obligation of full faith and credit requires that such litigation should end in the courts of the State in which the judgment was rendered."[41]

Before taking up the dissent, we will consider the majority opinion in the companion case of *Coe v. Coe*.[42]

The Coe Case

Martin Coe and his wife Katherine were married in New York in 1934. Thereafter, they resided as husband and wife in Massachusetts. Discord developed, and in 1942, Mrs. Coe filed a petition for separate support in a Massachusetts probate court. Mr. Coe answered and filed a libel for divorce. Upon a hearing the Massachusetts court granted Mrs. Coe a support order of $35 per week and dismissed the divorce libel.

Thereupon, in May, 1942, Mr. Coe left Massachusetts in the company of his secretary Dawn Allen and made the trip to Reno. Shortly

[40] *Id.* at 355, 356.
[41] *Id.* at 356.
[42] 334 U. S. 378 (1948).

after the six weeks' period required by Nevada law had elapsed, Coe filed an action for divorce in that state. Mrs. Coe received notice of the proceedings and promptly set out for Reno on her own account, hired attorneys, and duly filed an answer together with a cross complaint in which she sought a divorce on the grounds of extreme cruelty. Her answer admitted as true the allegations of residence (domicile) in Nevada contained in Mr. Coe's petition. Both parties personally appeared before the Nevada court. There seems to have been no actual contest on any issue, agreement having been reached in advance. Mr. Coe testified to his residence in Nevada and Mrs. Coe gave testimony relative to Coe's cruelty to her. The Nevada judge entered a decree of divorce in favor of Mrs. Coe on September 19, 1942, reciting in his findings that the court had ". . . jurisdiction of the plaintiff and defendant and of the subject matter involved."[43] The decree incorporated a financial settlement under which Mr. Coe paid his wife $7,500 forthwith and agreed to pay her $35 weekly thereafter as long as she should remain single.

On the day of the entry of the divorce decree, Mr. Coe and Dawn Allen were married in Nevada. Two days later, they left Reno and returned to Massachusetts. In May or June of 1943, they again went out to Nevada where they stayed until August, 1943, when they returned for the second time to Massachusetts.

The present litigation arose by reason of the fact that Coe failed to carry out his agreement to pay Mrs. Coe $35 weekly, although he did make the lump sum payment of $7,500 as provided in the Nevada decree. In May, 1943 (a date which closely coincides with Coe's second trip to Reno), Mrs. Coe instituted a contempt proceeding against her husband in Massachusetts praying he be adjudged in contempt for failing to comply with the $35 per week order contained in the Massachusetts support decree rendered in 1942, prior to any Nevada excursions. By way of defense, Coe pleaded that the Massachusetts support decree was no longer effective because of the Nevada divorce. The probate court sustained Coe's defense and refused to allow the introduction of evidence which placed in issue Coe's domicile in Nevada and thereby the jurisdiction of the Nevada court. The contempt proceeding was accordingly dismissed.

The Massachusetts Supreme Judicial Court reversed the probate court. It held that evidence tending to attack the alleged domicile in Nevada should have been admitted. On remand the probate court found that Coe had gone to Nevada to seek a divorce, that he had never acquired a domicile in that state, and that, therefore, the Nevada court had no jurisdiction to dissolve the marriage. The motion to dismiss the

[43] *Id.* at 381.

contempt proceeding was now denied and ironically enough the probate court ordered the support allowance for Mrs. Coe increased.[44]

Majority Opinion in Coe Case

The majority of the United States Supreme Court reversed the Massachusetts court which had permitted the collateral attack on the Nevada decree. The opinion was very brief. Chief Justice Vinson, for the Court, said,

> ". . . here, as in the *Sherrer* case, the decree of divorce is one which was entered after proceedings in which there was participation by both plaintiff and defendant and in which both parties were given full opportunity to contest the jurisdictional issues. It is a decree not susceptible to collateral attack in the courts of the State in which it was rendered. In the *Sherrer* case we concluded that the requirements of full faith and credit preclude the court of a sister State from subjecting such decree to collateral attack by readjudicating the existence of jurisdictional facts."[45]

It is of interest to note that here the party who sought to attack the jurisdictional basis of the Nevada decree was the person who had prevailed in that state. The Supreme Court does not invoke the principles of estoppel[46] against Mrs. Coe, who had sought and obtained relief in the Nevada court, but proceeds on the theory of the *Sherrer* case, namely, that where both parties appear in the foreign divorce proceeding neither may attack the decree in another state.

Dissent in Sherrer and Coe Cases

Justice Frankfurter wrote the dissenting opinion covering both the *Sherrer* and *Coe* cases. He was joined by Justice Murphy. As Justice Frankfurter construes the action of the majority, its application of the full faith and credit clause gives to the few states ". . . which offer bargain-counter divorces constitutional power to control social policy governing domestic relations of many States which do not."[47] To him it is immaterial that the defendants in the divorce actions did not assert their opportunity to contest the Florida or Nevada domicile, or even chose to admit a domicile in those states, which in fact did not exist.

[44] That part of the probate court's order was reversed by the Massachusetts Supreme Judicial Court pending further hearings on Coe's financial condition, Coe v. Coe, 320 Mass. 295, 69 N. E. 2d 793 (1946).

[45] 334 U. S. 378, 384 (1948).

[46] Prior to the *Sherrer* and *Coe* litigation several state courts had ruled that if one spouse obtained an outstate divorce, said spouse would be estopped from attacking its validity. See cases collected in Goodrich, Conflict of Laws 350 (2d ed. 1938) and annotation in 1 A. L. R. 2d 1437 *et seq.* (1948). The Restatement, Conflict of Laws, §112 provides, *"Estoppel to Deny Jurisdiction:* The validity of a divorce decree cannot be questioned in a proceeding concerning any right or other interest arising out of the marital relation, either by a spouse who has obtained such decree of divorce from a court which had no jurisdiction, or by a spouse who takes advantage of such decree by remarrying."

[47] 334 U. S. 343, 377 (1948).

Such lack of action or false swearing cannot deprive the true domiciliary state of power to control the marital relations and obligations of the parties. Referring to the *Williams* litigation he said,

> "The nub of the *Williams* decision was that the State of domicile has an independent interest in the marital status of its citizens that neither they nor any other State with which they may have a transitory connection may abrogate against its will. Its interest is not less because both parties to the marital relationship instead of one sought to evade its laws. In the *Williams* case, it was not the interest of Mrs. Williams, or that of Mr. Hendrix, that North Carolina asserted. It was the interest of the people of North Carolina. The same is true here of the interest of Mascsachusetts."[48]

The interest of a state, Justice Frankfurter avers, is expressed when it speaks through its court in a civil litigation between private parties as well as when it speaks by way of a criminal prosecution.[49]

To him the real question before the Court is whether the full faith and credit clause can be used as a means of limiting the power of a state over its domiciliaries, who, possessed of the necessary finances, travel to the bargain-counter divorce states, obtain their decrees, but never change their domiciles. Under the majority decision, if both parties appeared in the foreign court, the home state (state of actual domicile of the parties) would be deprived of the right to question the foreign divorce no matter how overwhelming the proof may be that the jurisdictional keystone of domicile had not been shifted to the divorcing state. Without domicile of at least one of the parties Nevada had no jurisdiction to divorce. Under the rule established by *Thompson v. Whitman*[50] in 1873, and adhered to ever since, full faith and credit does not compel one state to honor a judgment of a sister state which was rendered without jurisdiction. Nor may jurisdiction be conferred on a state by way of a weak defense, a feeble contest or a fraudulent agreement *re* domicile. Massachusetts had accorded the Nevada decree all the respect to which it was entitled and had fully satisfied the requirements of *Williams 2nd.*

Judges cannot, insists Justice Frankfurter, close their eyes ". . . to the fact that certain States make an industry of their easy divorce laws, and encourage inhabitants of other States to obtain *'quickie'* divorces which their home States deny them."[51] The practical result of the majority decisions ". . . will be to offer new inducements for conduct by parties and counsel, which, in any other type of litigation, would be regarded as perjury, but which is not so regarded where divorce is involved because ladies and gentlemen indulge in it."[52] The vice of the

[48] *Id.* at 361, 362.
[49] *Id.* at 362.
[50] 18 Wall. 457 (1873).
[51] 334 U. S. 343, 366 (1948).
[52] *Id.* at 367.

majority opinion is that a policy vital to the domiciliary states is ". . . defied with the sanction of this Court"[53] through the means of a consent decree or feigned legal contest.

Justice Frankfurter is particularly disturbed by the majority opinions because they seem to him to create one law for the rich (those able to afford a trip to Reno or Florida) and another for the poor (those who being unable to finance such an excursion must remain bound in discordant wedlock) ![54]

Summary of Sherrer and Coe Cases

One of the questions left open following the *Williams* decisions was whether the rule of *Williams 2nd,* which permitted North Carolina to determine independently the existence of the Nevada domicile in a bigamy prosecution, would also apply in private litigation between the parties. That question is now answered in the negative as to all cases where the divorce suit defendant appeared in the proceedings and had an opportunity to contest the foreign domicile. It is immaterial whether or not such contest actually took place.

However vulnerable *ex parte* divorces may be, the *Sherrer* and *Coe* cases have rendered immune from attack *by the spouses who appeared in the litigation* the "quickie" decrees of our divorce mill states.

A word of caution is in order. Although the foreign divorce is unassailable as between the parties, that does not necessarily mean the home state cannot prosecute for bigamy should one of the divorcees remarry and come back to live in the state of his true domicile. It will be recalled that Justice Frankfurter speaking for the majority in *Williams 2nd,* had said,

> "But those not parties to a litigation ought not to be foreclosed by the interested actions of others; especially not a *State* which is concerned with the vindication of its own social policy and has no means . . . to protect that interest against the selfish action of those outside its borders."[55]

If this statement of the majority in *Williams 2nd* is still law—and it has not been refuted in either *Sherrer* or *Coe*—we have a divorce which is good as between the spouses who appeared in the divorcing state but which may prove to be no defense to a prosecution for bigamy in the state of actual domicile. In short, in the litigation of *Sherrer v. Sherrer* the Massachusetts court must find Sherrer is unmarried. Mrs. Sherrer is no longer his wife. But should the Commonwealth of Massachusetts wish to prosecute her for bigamy, then Mrs. Sherrer may dis-

[53] *Id.* at 368.
[54] *Id.* at 370. In a footnote Justice Frankfurter says, "For comparable instances, in the past, of discrimination against the poor in the actual application of divorce laws, cf. Dickens, *Hard Times,* c. 11. . . ."
[55] 325 U. S. 226, 230 (1945).

cover that although she has lost the advantages of marital union with Sherrer, she has retained its disadvantages and is in fact too much a wife . . . a bigamist!

THE ESTIN AND KREIGER CASES OR THE "DIVISIBLE" DIVORCE

On the same day the Supreme Court announced its decisions in the *Sherrer* and *Coe* cases it also decided *Estin v. Estin*[56] and *Kreiger v. Kreiger*.[57] Once again the *Williams* litigation is relied on by both the majority and dissenting Justices.

The Estin Case

Estin and his first wife were married in New York in 1937. They lived there together until 1942, when Estin left his wife. In 1943, Mrs. Estin brought an action in New York against her husband for separation and alimony. Estin entered a general appearance. The New York court found he had abandoned his wife, granted the separation sought and ordered Estin to pay $180 per month alimony.

The following year, 1944, Estin made the journey to Nevada. In May, 1945, he was granted a divorce by the Nevada court which found he had been a bona fide resident of that state since January, 1944. No provision was made in the Nevada decree as to alimony although the court had been advised of the New York decree. The only service on Mrs. Estin was by publication and she did not appear in the litigation.

Having obtained his Nevada decree, Estin ceased making payments called for by the New York alimony order. Thereupon, Mrs. Estin sued him in New York for a supplementary judgment for the amount of the alimony in arrears. Estin appeared in the suit and moved to eliminate the alimony provisions of the New York decree basing his claim for relief on the Nevada divorce. The New York court denied his motion and entered judgment for the arrears. Before doing so, it looked into the question of Estin's domicile in Nevada and found, in accord with the Nevada court, that Estin was a bona fide resident in that state and had been such since January, 1944. It, therefore, recognized the validity of his divorce predicated on his Nevada domicile. That being so, Estin argued that "the tail must go with the hide"[58]—that since by the Nevada decree, recognized in New York, he and Mrs. Estin were no longer husband and wife, no legal incidence of the marriage remained. He cited New York authorities to show that under the law of that state alimony is payable only so long as the relation of husband and wife exists, and that in New York a support order does not

[56] 334 U. S. 541 (1948).
[57] 334 U. S. 555 (1948).
[58] 334 U. S. 541, 544 (1948).

survive divorce. Having lost in the state courts, Estin brought the matter to the United States Supreme Court by certiorari.

Majority Opinion in Estin Case

The Supreme Court again divided seven to two.[59] Justice Douglas speaking for the majority said that both Nevada, the domicile of the husband, and New York, the domicile of the wife, have vital interests. Nevada has a "legitimate concern"[60] over the marital status of its domiciliaries. It should be free to bring to an end a prior existing marriage relation of one domiciled within its borders. This, he said, we have recognized when we permitted the state of domicile of one party to bring in the absent spouse by constructive service. It is fundamental, since the *Williams* litigation, that domicile of one of the parties is sufficient to give the state jurisdiction to divorce. The requirements of procedural due process are satisfied by the constructive service.[61] Since Nevada was the state of Estin's domicile, as found by both Nevada and New York, the validity of the divorce must be conceded.

But New York also has an interest in its domiciliaries. Mrs. Estin is one of them. Conceivably, New York would like to consider her as married to Estin. After all, it too is concerned with her matrimonial status. But in this regard New York must succumb to the exercise of power by Nevada. In view of *Williams 1st,* Mrs. Estin is no longer married either in Nevada or New York.[62] However, New York has still another interest. It may wish to protect itself against the possibility that Mrs. Estin might become a public charge.[63] It has already sought to do so by the $180 per month alimony order issued prior to the Nevada divorce.

Under Nevada law, dissolution of the marriage terminates the obligation to support. Under New York law, as declared by its highest court in this *very case,*[64] *ex parte* divorce granted in another state does not. The question is: whose policy shall prevail at this point? New York is the victor by vote of the majority. In reaching this conclusion the court turns to the interest of Mrs. Estin as the holder of a New York judgment for support. That was a property interest created in a proceeding to which both the Estins were parties. An obligation was imposed on Estin by a court that had personal jurisdiction over him. Shall we permit another court which has no jurisdiction over the judgment creditor to wipe out that obligation? No such power has hereto-

[59] Although the numerical division of the Justices is the same as in the *Sherrer* and *Coe* cases, the line-up is different. In *Sherrer* and *Coe* the two dissenters were Justice Frankfurter and Justice Murphy. In *Estin* and *Kreiger* they are Justice Frankfurter and Justice Jackson.

[60] 334 U. S. 541, 547 (1948).

[61] *Id.* at 544.

[62] *Ibid.*

[63] *Id.* at 547.

[64] *Id.* at 544.

fore been recognized. In fact ". . . the existence of any such power has been repeatedly denied."[65]

If then, the Nevada divorce is capable of dissolving the marriage but is not capable of destroying a right of support which was predicated on the marriage relation, just what is the nature of the divorce in question? The answer is—the divorce is "divisible"—effective in some respects and impotent in others. Concluding the opinion for the majority, Justice Douglas says,

> "The result in this situation is to make the divorce *divisible*—to give effect to the Nevada decree insofar as it effects marital status and to make it ineffective on the issue of alimony. It accommodates the interests of both Nevada and New York in this broken marriage by restricting each State to the matters of her dominant concern."[66]

The Kreiger Case

The facts in the *Kreiger* case are very similar to those in *Estin.* The Kreigers were married in New York in 1933, and separated at the end of two years. In 1940, Mrs. Kreiger obtained a judicial separation in New York and an order that Kreiger pay her alimony of $60 per week for herself and child. Kreiger had appeared in the separation proceeding. Later, Kreiger went to Nevada, became a domiciliary of that state, and instituted divorce proceedings there in 1944. Constructive service was made on Mrs. Kreiger who did not appear in the divorce action. Following the divorce, Kreiger ceased making payments under the New York judgment. Mrs. Kreiger brought suit for the arrearages in New York. Kreiger appeared and pleaded the Nevada divorce as a defense. The New York courts, on the authority of their own decision in the *Estin* case, gave judgment for the amount of alimony in arrears.

On certiorari, the United States Supreme Court, by the same division of seven to two, affirmed the New York judgment on the basis of *Estin v. Estin* decided the same day. Justice Douglas, for the court, said.

> "For the reasons stated in *Estin v. Estin* . . . we hold that Nevada had no power to adjudicate respondent's rights in the New York judgment. . . ."[67]

DISSENTING OPINIONS IN ESTIN AND KREIGER CASES

Justices Frankfurter and Jackson each filed a dissenting opinion covering the *Estin* and *Kreiger* cases. Justice Frankfurter is troubled as to the actual state of the New York law. He is not certain what

[65] *Id.* at 548, citing Pennoyer v. Neff, 95 U. S. 714 (1877); Hart v. Sansom, 110 U. S. 151 (1884) and N. Y. Life Ins. Co. v. Dunlevy, 241 U. S. 518 (1916).
[66] 334 U. S. 541, 549 (1948).
[67] 334 U. S. 555, 557 (1948).

that law is in regard to the effect of an *ex parte* divorce on a pre-existing support order. He would remand the case to the Court of Appeals of New York for clarification on this matter.

The question to Justice Frankfurter appears to be this: If New York courts hold that a New York *ex parte* divorce cuts off a prior support order then its decision in the *Estin* and *Kreiger* cases must be reversed for it would be giving less faith and credit to an outstate *ex parte* divorce than it gives to its own. If, on the other hand, New York courts hold that a support order survives an *ex parte* New York divorce, then they may properly hold that the support orders in question survived the Nevada decrees. He suspects that New York may be applying a different rule of law to its own *ex parte* divorces and wishes to be enlightened on that point.[68]

Justice Jackson, who, incidentally, is a New York lawyer and the Justice assigned to the Second Circuit, has no doubts as to the state of the New York law. He writes,

> "As I understand New York law, if, after a decree of separation and alimony, the husband had obtained a New York divorce against his wife, it would terminate her right to alimony. If the Nevada judgment is to have full faith and credit, I think it must have the same effect that a similar New York decree would have."[69]

The Supreme Court, says Justice Jackson, has reached ". . . the Solomon-like conclusion that the Nevada decree is half good and half bad under the full faith and credit clause."[70] He concludes his disapproval as follows:

> "I do not see how we can hold that it [the Nevada decree] must be accepted for some purposes and not for others, that he is free of his former marriage but still may be jailed, as he may in New York, for not paying the maintenance of a woman the Court is compelled to consider as no longer his wife."[71]

Summary of Estin and Kreiger Cases

Another question left unsolved by the *Williams* litigation was whether the rule of *Williams 1st* which required the home state to recognize as valid a Nevada divorce predicated on domicile of one of the parties would result in terminating the right to support of the spouse who was left at home and never appeared in the Nevada litigation. That question has now been answered, at least in part, by the *Estin* and *Kreiger* cases.

Whatever may be the law of the divorcing state, if under the law of the original home state an *ex parte* decree does not terminate a prior

[68] 334 U. S. 541, 552 (1948).
[69] *Id.* at 554.
[70] *Ibid.*
[71] *Ibid.*

support order that order remains effective despite the foreign divorce. Whether or not the home state may accord its own *ex parte* divorce decrees such vitality that they terminate existing support orders and yet deny the same virility to outstate *ex parte* divorces remains to be seen. The concluding sentence of Justice Douglas' majority opinion was, "And it will be time enough to consider the effect of any discrimination shown to out-of-state ex parte divorces when a State makes that its policy."[72]

One thing is certain—we now have recognition given to the *"divisible divorce"* both in fact and in name by the United States Supreme Court.[73]

RICE v. RICE[74] OR WIDOW, WIDOW—WHO IS THE WIDOW?

It was inevitable that some day the Supreme Court would be confronted with the problem of two contesting females each claiming to be the widow of a twice-loved male. And it was with Hermoine and Lillian that the Supreme Court had to contend in April, 1949. Lillian had married Rice in the early nineteen-twenties. They lived together for a score of years in Connecticut when, in 1944, Rice took the well-beaten trail to Reno. There he rented a furnished room. The usual constructive service was made on Lillian and in a few months Rice obtained his Nevada divorce. Lillian did not appear in the proceedings but remained in Connecticut where she was teaching school.

Divorce in hand, Rice wired Hermoine to come out, all was now in order. On her arrival in Reno they were united in marriage. Rice and his new bride never returned to Connecticut but they both went further west to California where they obtained war employment. Rice, however, retained the room in Reno and visited there occasionally. Within six months Rice died intestate. He was possessed of real property in his old home state of Connecticut at the time of his death.

[72] *Id.* at 549.

[73] That Justice Douglas would decide the question presented in the *Estin* and *Kreiger* cases as he did was strongly suggested by his concurring opinion in Essenwein v. Commonwealth *ex rel.* Essenwein, 325 U. S. 279, 282 (1945). In that case, which was decided the same day as *Williams 2nd* (May 21, 1945), the Supreme Court affirmed a Pennsylvania court which had refused to revoke its prior support order when the petitioning husband presented his Nevada divorce decree. As in *Williams 2nd* the Pennsylvania court found the petitioner had not been domiciled in Nevada. While concurring on the theory of the majority Justice Douglas stated that even if the husband had acquired a domicile in Nevada he was ". . . 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."

[74] 336 U. S. 674 (1949).

The present litigation was instituted by Lillian in the Connecticut Superior Court. She sought a declaratory judgment[75] that the Nevada decree was not entitled to full faith and credit, that Rice had never been domiciled in that state, and that she, Lillian, was his lawful widow entitled to inherit the Connecticut real estate. Rice's administrator and Hermoine were made parties defendant.

The Connecticut court found that Rice had not acquired a domicile in Nevada and that consequently Lillian was his widow. This finding was affirmed by the state appellate court. On certiorari the United States Supreme Court likewise affirmed.

Interestingly enough, we have a majority opinion for which no single Justice takes credit—the anonymous *per curiam*. Of greater significance is the fact that *four* of the nine Justices dissented, namely, Justices Black, Douglas, Rutledge and Jackson. Only Justice Jackson, however, saw fit to write an opinion which reaches the acme in caustic comment.

Majority Opinion in Rice Case

There is, indeed, little in the majority opinion. It is sufficient for the majority to note that the Connecticut court gave proper weight to the Nevada decree; that its finding of no domicile in Nevada is predicated on the evidence; and that hence, under *Williams 2nd* the Nevada decree is not destructive of the marriage relationship. Nor, says the Court, are we here concerned with the *Sherrer* and *Coe* cases for Lillian had not appeared in the Nevada proceedings. The result is that Lillian inherits the Connecticut real estate as Rice's widow. Which lady would inherit real estate that Rice might have owned in Nevada or California did not have to be decided but one may venture a guess as to what would happen should the question be raised in a Nevada court and concern Nevada realty.

Dissent in the Rice Case

It is Justice Jackson's dissent that make interesting reading in the *Rice* case. Fundamentally, his quarrel is with the *ex parte* divorce which was given approval in *Williams 1st*. Note for example the following:

> "To me *ex parte* divorce is a concept as perverse and unrealistic as an *ex parte* marriage. The vice of the system sanctioned in

[75] The declaratory judgment procedure has been resorted to in several cases for the purpose of establishing the invalidity of the foreign divorce. See Baumann v. Baumann, 226 N. Y. Supp. 576, *aff'd*, 250 N. Y. 382, 165 N. E. 819 (1929); Henry v. Henry, 104 N. J. Eq. 21, 144 Atl. 18 (1928); Perrin v. Perrin, 250 N. Y. Supp. 588 (1931); Mills v. Mills, 119 Conn. 612, 179 Atl. 5 (1935); and Gold v. Gold, 275 N. Y. Supp. 506 (1934). See in general, Jacobs, *The Utility of Injunction and Declaratory Judgments in Migratory Divorce* (1935), 2 Law and Contemp. Prob. 370 at pp. 391-2 and Borchard, Declaratory Judgments 478 *et seq.* (2d ed. 1941).

> *Williams v. North Carolina* [citing *Williams 1st*], is that one of the parties may leave the state where both for years have made their home, seek a forum of his choice, and pretty much on his own terms alter the pattern of two lives without affording the other even a decent chance to be heard—as this case illustrates."[76]

He then points up the fact that Lillian either had to leave her teaching in Connecticut and follow her husband 2,000 miles or let her marriage collapse by default. (Note: Of course even under *Williams 1st* there would be no loss of the marriage if Rice was not domiciled in Nevada.)

In this matter of divorce law Justice Jackson says, "Confusion now hath made his masterpiece."[77] Under the law of Nevada Rice was divorced from Lillian and married to Hermoine. Under the law of Connecticut Lillian is still Rice's wife and Hermoine occupies the unsavory position of a paramour. The present divorce law as promulgated by the majority of the Supreme Court "presents a study in contrasts,"[78] continues Justice Jackson for,

> "We have said that Nevada does have power to dissolve the marriage of a woman who never was there in her life, never invoked its law or its courts, did not submit herself to its jurisdiction, refused to answer its summons and took no benefits from its judgments. On the other hand we say that the courts of any state may find that Nevada does not get power to dissolve the marriage of a man who went to that State and never came back, who invoked its law, went into its court and submitted to its jurisdiction, testified he was domiciled there, and during the rest of his life held quarters in that State."[79]

Justice Jackson then attacks the "divisible divorce" which he says was "improvised"[80] in the *Estin* case. He feels strongly that the Nevada divorce is void only because it purported to affect the interests of Lillian who was never subject to Nevada's jurisdiction. He is satisfied that Rice had acquired a domicile in that state. If the Supreme Court is to adhere to the rule of *Williams 1st* and recognize *ex parte* divorces, then he says,

> "I do not see the justice of inventing a compensating confusion in the device of a divisible divorce by which the parties are half-bound and half-free and which permits Rice to have *a wife who cannot become his widow and to leave a widow who was no longer his wife.*"[81]

Summary of Rice Case

A still further question left unsolved by the *Williams* litigation was whether property rights are to be determined by the foreign decree or by a local fact finding body reinquiring into the existence of domicile

[76] 336 U. S. 674, 678 (1949).
[77] *Id.* at 676.
[78] *Id.* at 679.
[79] *Ibid.*
[80] *Ibid.*
[81] *Id.* at 680.

in the divorcing state. That question is now given an answer in the *Rice* case. Lillian's property interest, her right of inheritance, was determined not by the Nevada decree but by the finding of the Connecticut court that Rice had never acquired a domicile in Nevada. We must note, however, that the property involved was in Connecticut. The question remains as to which "widow" is entitled to any property elsewhere. Would Nevada now be obliged to concede the rights of widowhood to Lillian who by its court decree was declared no longer Rice's wife?

Full faith and credit did not require that Connecticut accede to the finding of domicile made by Nevada. Will full faith and credit when accorded the Connecticut judgment compel Nevada to admit against its own prior finding that Rice was never domiciled within its borders? This interesting problem will, doubtless, on some future date bring forth another split decision from our Supreme Court. Till then we can hardly, with any great degree of confidence, predict the result.

CONCLUSION

WHERE DO WE STAND TODAY?

In this field of matrimonial law where, as Justice Jackson remarked, "Confusion now hath made his masterpiece,"[82] one would indeed be foolhardy if he were to attempt to give a categorical statement as to the validity and effect of foreign divorce decrees in problems which have not fairly recently been specifically passed upon by the Supreme Court. Indeed, even if we were to duplicate fact situations on all fours, one would still need an abundance of optimism to believe that the Supreme Court which has suffered personnel changes of late would necessarily adhere to the precedents of the last few years. Recent replacements[83] may have already, without our knowledge, shifted the delicate majority of five to four that appeared in the *Rice* case. In addition, the *Williams* litigation is ample proof that we cannot with certainty catalog the Justices on the basis of their previously expressed views. All that we can do is to attempt to formulate rules of law as they would appear to have been made by the majority of the Supreme Court since the *Williams* case.

Those rules, when summarized, must be closely tied up with the fact situation and we will so treat them here:

1. Domicile of one spouse is the necessary jurisdictional element in an *ex parte* divorce and the wrong or fault of the person establishing such domicile is immaterial to jurisdiction. *(Williams 1st)*

[82] *Id.* at 676.

[83] Since *Williams 2nd* the Court has suffered the loss of Chief Justice Stone and Justices Roberts, Murphy and Rutledge. They have been succeeded by Chief Justice Vinson and Justices Burton, Clark and Minton.

2. The full faith and credit clause does not prevent an inquiry into the jurisdiction of the court whose judgment in an *ex parte* divorce is relied on in another state. This is so even though the record of the divorcing state purports to show jurisdiction. *(Williams 2nd)*

3. When both parties have appeared in the divorcing state and that state makes a judicial finding of domicile, the divorce granted is not subject to attack in the courts of any other state when the litigation is *between the parties* to the divorce proceedings. And this is true although actually there may have been no domicile in the divorcing state. (The *"quickie"* divorce of *Sherrer v. Sherrer* and *Coe v. Coe*)

4. A valid *ex parte* divorce, such as recognized in *Williams 1st,* while it disrupts the marriage relationship does not deprive the spouse who was left at home from obtaining the benefits of a pre-existing support order rendered by the "home" state if under the laws of that state an *ex parte* divorce does not terminate a support order. (The *"divisible"* divorce of *Estin v. Estin* and *Kreiger v. Kreiger*)

5. Property interests of successive spouses are not necessarily determined by the foreign *ex parte* decree, but the home state, in conformity with Rule 2, *supra,* may inquire into the jurisdictional prerequisite of domicile in the divorcing state and if it is found nonexistent the property rights of the spouses—at least in the home state—are determined as if no divorce decree had been rendered. *(Rice v. Rice)*

WHITHER ARE WE BOUND?

Only the Nine on high Olympus know, for this is *their own* Masterpiece!