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SO YOUR CLIENT WANTS A DIVorce!

WILLIAMS v. NORTH CAROLINA

HERBERT R. BAER*

One out of every five marriages in the United States during the past ten years has terminated in divorce. It has been estimated that in 1946 the proportion will be one divorce to every three marriages. Whereas in 1936 the total number of divorces in this country was 236,000 it seems fairly certain that this number will be doubled in 1946, some statisticians estimating that as many as 575,000 divorces will be granted in that year.1 Expressed in another way, the legal profession will be called upon to aid in the severance of the bonds of matrimony in twice as many cases in 1946 as in 1936. By far the greater number of the divorces will be uncontested. It is with the validity of the uncontested divorce that the attorney will be primarily concerned.

"How good will my divorce be?" in one form or another will be the question the divorce counsellor will be called upon to answer. With an increasing volume of divorce litigation assured it would be extremely desirable to find greater certainty as to the validity of the divorce itself but unfortunately it now appears that when certainty is most desired it is least to be found. In State v. Williams,2 North Carolina has given the nation the divorce case which has twice produced vigorous dissents in the United States Supreme Court and which promises to be the most influential case, be it for good or ill, that has appeared in the divorce field during the past generation. The careful practitioner will not wish to undertake divorce litigation without an appreciation of the problems passed upon by the court in the Williams case. The facts are not unusual but typical of those found in the ordinary uncontested Nevada divorce proceeding.

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1 For a detailed statistical study of the divorce rate in the United States see Davis, Sociological and Statistical Analysis (1944) 10 Law and Contemporary Problems 700 at 710 et seq. Professor Davis' article is one of several making up a symposium entitled Children of Divorced Parents.

2 It should be noted that the predictions of the statisticians did not take into account the end of World War Two in 1945. The return of veterans who married in haste before leaving for overseas will result in many marriages being disrupted through legal processes which would have continued in existence otherwise.

THE FACTUAL BACKGROUND

In 1916 Otis B. Williams and Carrie Wyke were married in Caldwell County, North Carolina. There they raised a family of four children and lived together as man and wife until May 7, 1940. Williams was the proprietor of a store at Granite Falls in that county and had in his employ one Thomas G. Hendrix. Hendrix married Lillie Shaver at Icard, North Carolina, in 1920. He and his wife made their home in Caldwell County and likewise lived there together until May 7, 1940. On that date both Mrs. Hendrix and Mr. Williams disappeared from their respective homes.

The record does not show whether they journeyed westward together but we are told that on May 15, 1940, Williams and his employee's wife, Mrs. Hendrix, "established a residence" at the Alamo Court, Las Vegas, Nevada. Exactly six weeks after their arrival in Nevada each filed a petition for divorce in that state. The same counsel represented them and each charged "extreme cruelty" as the ground for divorce.

Neither of the defendants in these divorce suits was served with process in Nevada and neither entered an appearance in the Nevada proceedings. An order providing for service by publication was made in each case. The defendant, Thomas Hendrix, had written a post card to his wife's counsel in Nevada saying, "Upon receipt of the original appearance, I will sign the same." This he never did. Service was made on him by publishing a copy of the summons in a Las Vegas newspaper and mailing to him a copy of the summons and complaint. The defendant, Mrs. Williams, was personally served in North Carolina with a copy of the summons and complaint in her husband's suit by a sheriff of Caldwell County, North Carolina. It does not appear that any publishing was had in her case.

In this situation the divorce actions proceeded as uncontested and on August 26, 1940, a decree of absolute divorce was granted by the Nevada court to Mr. Williams. Mrs. Hendrix obtained her decree of absolute divorce on October 4, 1940, and on the same day she and Williams were married in Nevada. Almost immediately after this marriage, Williams and his new "bride" made the journey back, estab-

*It appears from an affidavit of residence filed in the Nevada proceeding by Lillie Roesselet in behalf of Mrs. Hendrix that the Alamo Court was in fact an Auto Court. This circumstance is stressed here and there throughout the proceedings by those who wish to emphasize the transitory character of the residence in Nevada. See transcript of record p. 21 in 220 N. C. 445 and dissent of Justice Jackson in 317 U. S. 287, 321.

* Cruelty is not a ground for absolute divorce in North Carolina, but it is a ground for a divorce from bed and board. N. C. GEN. STAT. (1943) §§50-5, 50-6, 50-7.
lished their home at Pineola, Avery County, North Carolina, and lived together as man and wife.

These were the facts which led to an indictment for bigamous cohabitation against both Mr. Williams and Mrs. Hendrix under Section 4342 of the 1939 North Carolina Code. These were the facts which ultimately resulted in two trials in North Carolina, convictions at both trials, a reversal of the convictions by a divided United States Supreme Court after the first trial and an affirmation of the convictions by the United States Supreme Court, once again divided, after the second trial. We shall follow the course of the litigation chronologically.

THE FIRST TRIAL

The first trial was held before Judge Sink of the Caldwell Superior Court at the February-March Term, 1941. The state called six witnesses, the defendants none. In fact, neither of the defendants took the stand. For the state Mrs. Williams and Mr. Hendrix testified to their respective marriages with the defendants. Next the state introduced an exemplified copy of the marriage certificate of Mr. Williams and Mrs. Hendrix in Nevada, and lastly it called four witnesses whose testimony was to the general effect that the defendants were living together as man and wife in Pineola, North Carolina.

At the close of the state's case motions for judgments as of nonsuit were made and denied.

The defendants offered three exhibits, the card sent by Mr. Hendrix to his wife's attorney and exemplified copies of the divorce proceedings in each case. That was all. The defendants renewed their motions for judgment as of nonsuit which were again denied.

Judge Sink then charged the jury and said that the state of North Carolina attacked the validity of the Nevada divorces on two grounds, (1) that the Nevada decrees were invalid because neither of the defendants in the Nevada divorce proceedings had been served with process in Nevada or entered an appearance in the Nevada actions, and (2) that Williams and Mrs. Hendrix had not established a bona fide residence in Nevada but had gone there solely for the purpose of taking advantage of the laws of that state to obtain a divorce through fraud upon that court. He further charged that as a matter of law

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\text{Transcript of record p. 42 in 220 N. C. 445.}
\]
a Nevada divorce decree based on substituted service where the defendant made no appearance would not be recognized in North Carolina under the rule of the *Pridgen* case. In regard to the State's second contention, he charged that the defendants had the burden of satisfying the jury, but not beyond a reasonable doubt, of the bona fides of their residence in Nevada, citing *State v. Herron*. The court doubtless used the word residence here in the sense of domicile.

On these instructions the jury rendered a general verdict of guilty. It was impossible to say on which of the two theories the defendants were found guilty. There was no express finding by the jury on the question of the bona fides of the Nevada residence (domicile). The jury might have found a bona fide residence in Nevada and yet under the first portion of the court's charge returned a verdict of guilty because no personal service had been made on or appearance entered in Nevada by the defendants in the divorce suits.

Upon the rendition of the verdicts, Judge Sink imposed sentences which must surely have impressed the defendants with the verity of the old adage, "the course of true love is never smooth," and which, to say the least, should cause lawyers to be overly cautious when advising on the validity of out-of-state divorces. For Williams the penalty imposed was not less than three nor more than ten years at hard labor in State Prison. Mrs. Hendrix was ordered confined for not less than three nor more than five years in State Prison, there to perform labor as provided for women prisoners.

*Pridgen v. Pridgen*, 203 N. C. 533, 166 S. E. 591 (1932). In the *Pridgen* case an action was brought by plaintiff to annul his marriage with the defendant on the ground that the defendant had another husband living at the time she contracted the marriage with the plaintiff. It appeared that the defendant had been married to one Dowd in North Carolina in 1907, that Dowd had left North Carolina, became domiciled in Georgia and there sued his wife who remained in North Carolina for a divorce. The wife did not appear in Georgia and only constructive service was had. In the suit to annul the trial court charged that the Georgia divorce was binding and that therefore the defendant wife did not have a husband living when she contracted the marriage sought to be annulled. The Supreme Court reversed on the theory that a divorce obtained on constructive service where the defendant spouse is domiciled in North Carolina is not valid in this state and that therefore the second marriage will be declared void.

*Herron* case (supra note 8) the North Carolina Supreme Court said, "The defendant could not leave this State, go to Georgia, remaining there a few days or weeks at a time, but spending practically all of his time in this State, and thereby obtain a *bona fide* domicile in Georgia." 175 N. C. 754, 759, 94 S. E. 698, 701 (1917).

Thus in the *Herron* case (supra note 8) the North Carolina Supreme Court said, "The defendant could not leave this State, go to Georgia, remaining there a few days or weeks at a time, but spending practically all of his time in this State, and thereby obtain a *bona fide* domicile in Georgia." 175 N. C. 754, 759, 94 S. E. 698, 701 (1917).

Transcript of record p. 51 in 220 N. C. 445.
SO YOUR CLIENT WANTS A DIVORCE!

APPEAL TO STATE SUPREME COURT FOLLOWING FIRST TRIAL

An appeal was promptly taken to the State Supreme Court. That Court affirmed the convictions primarily, if not entirely, on the ground that the Nevada decrees were not entitled to full faith and credit in North Carolina because they had been obtained on constructive service and no appearance had been entered in the divorce proceedings by the defendants in those cases. Justice Clarkson wrote the opinion for the court. The bulk of his opinion is devoted to sustaining the convictions on the theory that a state in which the plaintiff alone is domiciled cannot grant a divorce which will be entitled to full faith and credit when the defendant is only served with process constructively and makes no appearance in the action. Although at the close of his opinion he says, "All the evidence indicates collusion between the defendants, and bad faith in attempting to secure decrees of divorce, contrary to the laws of this State," it is clear he would have sustained the convictions even if the defendants had obtained bona fide domiciles in Nevada. This appears from the following paragraph of his opinion:

"The sole question arising under Article IV, section 1 of the Federal Constitution in this case is whether a divorce granted in the state where the plaintiff alone is domiciled is entitled to full faith and credit when the defendant is only served with process constructively and makes no appearance in the action. This question is answered in the negative by the celebrated case of Haddock v. Haddock, 201 U. S. 562, justly recognized as a landmark in the law of foreign divorces."

Justice Barnhill wrote a concurring opinion in which Chief Justice Stacy and Justice Winborne joined. He said nothing about the bona fides of the Nevada residence but rested his opinion entirely on the theory that the Nevada decrees were not entitled to full faith and credit because of lack of personal service on or appearance by the defendants to the divorce proceedings in Nevada. He, too, cited the Haddock case as controlling authority.

Haddock v. Haddock was decided by the United States Supreme Court in 1906. It was the overruling of that case in 1942 that resulted in the United States Supreme Court reversing the judgments of conviction in the first Williams case. A brief examination of the Haddock case is therefore in order.

11 220 N. C. 445, 17 S. E. (2d) 769 (1941).
12 220 N. C. 445, 462, 17 S. E. (2d) 769, 780 (1941).
14 Justice Barnhill also cited numerous North Carolina authorities including the then recent case of Tyson v. Tyson, 219 N. C. 617, 14 S. E. (2d) 673 (1941) in which a Florida divorce was held invalid in North Carolina because it had been made on constructive service against a resident of North Carolina.
15 201 U. S. 562, 26 S. Ct. 525, 50 L. ed. 867 (1906).
Haddock and his wife were married in New York state where they both were domiciled. The parties separated shortly after the marriage and Haddock went to Connecticut where he obtained a bona fide domicile. There he sued his wife for a divorce. Service was by publication, Mrs. Haddock remaining in New York state. Haddock was granted an absolute divorce by the Connecticut court. Later, Mrs. Haddock succeeded in getting personal service on Haddock in New York in a suit brought by her for separation and alimony in which she charged abandonment. Haddock pleaded the Connecticut decree as a bar. The New York court excluded evidence of the Connecticut decree, found as a fact that Haddock had abandoned his wife and awarded a judgment for separation and alimony. The United States Supreme Court by a close margin, five to four, sustained the judgment of the New York court. In doing so it laid down the following rules as already established by Supreme Court decisions:

1. Where husband and wife are domiciled in the same state that state has jurisdiction to grant a divorce which is entitled to full faith and credit in all other states.\(^{17}\)

2. Where either the husband or wife acquires a bona fide domicile in another state a decree of divorce granted by such state is entitled to full faith and credit provided the court has obtained personal jurisdiction of the defendant who is not domiciled therein.\(^ {18}\)

3. Where the plaintiff is *merely a resident* but not *domiciled* in a state, that state may not grant a decree of divorce from the non-resident defendant which would be entitled to full faith and credit.\(^ {19}\)

The holding in the *Haddock* case resulted in a fourth rule, namely:

4. A decree of divorce rendered by a state in which the husband has a bona fide domicile is not entitled to full faith and credit in the state of matrimonial domicile where the wife still resides when it appears that the husband has abandoned his wife and that she has not been personally served.

The Court in the *Haddock* case further stated that it did not question the power of the State of Connecticut to enforce within its own borders the decree of divorce nor did it doubt that New York State could if it wished under its public policy give the decree efficacy in New York. It definitely asserted, however, that such decree was

\(^{17}\) For this statement the court did not cite any particular authority but stated that the proposition there declared "was no longer open to question." 201 U. S. 562, 570, 26 S. Ct. 525, 527, 50 L. ed. 867, 870 (1906).


not entitled to full faith and credit in New York under the constitutional provision.\textsuperscript{20}

The result of the \textit{Haddock} decision was that the parties for practical purposes were divorced in Connecticut and married in New York. Further, whether New York was required to give full faith and credit to the decree depended on the existence or non-existence of Haddock's \textit{fault}. If he had not abandoned his wife, if she had improperly refused to accompany him to Connecticut, the Connecticut domicile of Haddock would have become the domicile of his wife.\textsuperscript{21} Connecticut in such case, as the state of domicile of both parties, could give a divorce entitled to full faith and credit elsewhere. In view of such a tenuous basis for decision it is not surprising to find the voluminous dissents of Justice Holmes and Justice Brown concurred in by the two remaining minority justices.

Despite the strong dissents in the \textit{Haddock} case and criticism by able writers,\textsuperscript{22} the \textit{Haddock} case remained as "law" until some thirty-six years later when in 1942 the difficulties of Mr. Williams and Mrs. Hendrix were brought to the United States Supreme Court.

\textbf{FIRST APPEARANCE OF THE WILLIAMS CASE IN THE UNITED STATES SUPREME COURT}

Certiorari having been allowed to our now genuinely troubled defendants, the United States Supreme Court rendered its decision on December 21, 1942.\textsuperscript{23} No Christmas present could have been more welcome to Williams and Mrs. Hendrix. The stigma of bigamy and the long prison years confronting them were at least temporarily, if not permanently, removed. The last brief paragraph of the opinion carried the good news:

"\textit{Haddock v. Haddock} is overruled. The judgment is reversed and

\textsuperscript{20} It is important to note that the \textit{Haddock} case did not involve a criminal prosecution under a bigamy statute but is a suit brought by a wife for separation and alimony. The case, therefore, is not on "all fours" with the \textit{Williams} case. Because of this it has been suggested that the United States Supreme Court did in fact not overrule the \textit{Haddock} case when it decided the first \textit{Williams} case in 317 U. S. 287, 63 S. Ct. 207, 87 L. ed. 279 (1942). See note on this in 45 Col. L. Rev. 797 (1945).

\textsuperscript{21} 201 U. S. 562, 570, 26 S. Ct. 525, 527, 50 L. ed. 867, 870 (1906).

\textsuperscript{22} Professor Beale has written profusely on the \textit{Haddock} case. Originally he was against it but later saw considerable merit in the decision. Justice Jackson in his dissent in the first \textit{Williams} case, 317 U. S. 287, 316, 63 S. Ct. 207, 221, 87 L. ed. 279, 295 (1942) strenuously objected to departing from \textit{Haddock} and in referring to the academic criticism accorded the decision said:

"It was twenty years before Professor Beale could justify the decision to his satisfaction. Compare \textit{Haddock Revisited}, 39 Harvard Law Review 417, with Beale, \textit{Constitutional Protection of Decrees for Divorce}, 19 Harvard Law Review 586. Others seem to lack his capacity for quick adjustment."

the cause is remanded to the Supreme Court of North Carolina for proceedings not inconsistent with this opinion." 24

If only the paragraph had ended after the word "reversed" the jubilation of the defendants could well have been unrestrained, but there was potential danger hidden in those formal words, "remanded . . . for proceedings not inconsistent with this opinion." We pass then to the majority opinion delivered by Justice Douglas.

MAJORITY UNITED STATES SUPREME COURT OPINION—FIRST WILLIAMS CASE

Justice Douglas speaking for the majority said at the outset of his opinion that in view of the dual nature of the trial court's charge and the general verdict it was impossible to tell whether the defendants had been convicted on the theory that the Nevada decrees were invalid because no personal service had been had or because the defendants had not acquired a domicile in Nevada. 25 He also stated that North Carolina did not seek to sustain the judgments on the ground of lack of personal service but attacked their validity on the theory of the Haddock case, conceding "that there probably is enough evidence in the record to require that petitioners be considered 'to have been actually domiciled in Nevada.'" 26 Accordingly the court stated it must treat the case as if the defendants had acquired domiciles in Nevada. The precise question was therefore raised—is the Haddock case to be followed? If it is, the convictions should be sustained, for the divorce decrees, however valid in Nevada, would not be entitled to full faith and credit in North Carolina.

No sooner did the court put the question than it was answered.

"We do not agree with the theory of the Haddock case, that so far as the marital status of the parties is concerned a decree of divorce granted under such circumstances by one state need not be given full faith and credit in another." 27

Let us examine the process by which the majority concluded that Haddock must be overruled. We are told that Article IV, Section 1 of the Constitution 28 requires that "not some but full faith and credit be given judgments of a state court" that even though the cause of action "could not be entertained in the state of the forum either because it had been barred by the local statute of limitations or contravened

28 U. S. Const. Art. IV, §1 states: "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."
local policy, the judgment thereon obtained in a sister state is entitled
to full faith and credit" and that to this rule "the actual exceptions
have been few and far between apart from Haddock v. Haddock."

A judgment of any state presupposes jurisdiction of that state
to render such judgment. If the Nevada decrees are to be given full
faith and credit it must first be determined whether or not the Nevada
courts had jurisdiction to render the decrees. The jurisdictional basis
for divorce is said to be domicile.

"Domicil of the plaintiff ... is recognized in the Haddock case and
elsewhere ... as essential in order to give the court jurisdiction which
will entitle the divorce decree to extraterritorial effect, at least when
the defendant has neither been personally served nor entered an appear-
ance."

What about the domicile of the divorce suit plaintiffs in this case?
Had they acquired a domicile in Nevada? What did the Nevada
court find as to that question?

The Nevada statute required "residence" for a specific period.
The Nevada decrees contained a specific finding "... that the plaintiff
is now and has been a bona fide resident of the County of Clark, State
of Nevada for more than six weeks immediately preceding the com-
mencement of this action." These recitals are said by the majority
to be equivalent to a finding of domicile.

"The findings made in the divorce decrees in the instant case must
be treated on the issue before us as meeting those requirements. For
it seems clear that the provision of the Nevada statute that a plaintiff
in this type of case must 'reside' in the State for the required period
requires him to have a domicile as distinguished from a mere residence
in the state."
Having found that Nevada courts deemed Williams and Mrs. Hendrix domiciled in Nevada the majority proceeds to consider the interests of a state in its domiciliaries.

"Each state as a sovereign has a rightful and legitimate concern in the marital status of persons domiciled within its borders. The marriage relation creates problems of large social importance. . . . 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. . . . It follows that, if the Nevada decrees are taken at their full face value (as they must be on the phase of the case with which we are presently concerned), they were wholly effective to change in that state the marital status of the petitioners and each of the other spouses by the North Carolina marriages."84

To that point the court is in accord with the Haddock case. But then comes the departure.

"But the concession that the decrees were effective in Nevada makes more compelling the reason for rejection of the theory and result of the Haddock case. . . . A husband without a wife, or a wife without a husband, is unknown to the law . . . but if one is lawfully divorced and remarried in Nevada and still married to the first spouse in North Carolina, an even more complicated and serious condition would be realized. . . . Under the circumstances of this case, a man would have two wives, a wife two husbands. The reality of a sentence to prison proves that that is no mere play on words. Each would be a bigamist for living in one state with the only one with whom the other state would permit him lawfully to live. Children of the second marriage would be bastards in one state but legitimate in the other."85

All of the absurd situation depicted above flows, says the majority, from the "legalistic notion that where one spouse is wrongfully deserted he retains power over the matrimonial domicile so that the domicile of the other spouse follows him wherever he may go while if he is to blame he retains no such power . . . the fault or wrong of one spouse in leaving the other becomes under that view a jurisdictional fact on which this court would ultimately have to pass."86 The court casts out this "legalistic notion" and says, "We see no reason, and none has here been advanced for making the existence of state power depend on an inquiry as to where the fault in each domestic dispute lies."87

Domicile and not fault is the basis of jurisdiction. Assuming Williams and Mrs. Hendrix were bona fide domiciled in Nevada, as

\[84 317 U. S. 287, 298, 63 S. Ct. 207, 213, 87 L. ed. 279, 286 (1942). \text{(Italics our own.)}
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\[85 \text{Id. at } 299, 63 S. Ct. at 213, 87 L. ed. at 286 (1942).}
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\[86 \text{Id. at } 300, 63 S. Ct. at 214, 87 L. ed. at 287 (1942).}
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\[87 \text{Id. at } 301, 63 S. Ct. at 214, 87 L. ed. at 287 (1942).}
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the court does assume for the purpose of its decision, the Nevada decree must be given full faith and credit by North Carolina. "It is difficult," said the majority, "to perceive how North Carolina could be said to have an interest in Nevada's domiciliaries superior to the interest of Nevada." And further, "in the first place we repeat that in this case we must assume that petitioners had a bona fide domicil in Nevada and not that the Nevada domicil was a sham." Then the court inserted the sentence which invited the position taken by North Carolina at the second Williams trial. "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." That was to be left for later decision.

If a bona fide domicile was acquired by Williams and Mrs. Hendrix in Nevada and such bona fides is found by both Nevada and North Carolina it is clear that under the majority holding Nevada will have severed the marriage bond not only as to Nevada but as to every state in the Union, at least every state that finds the domicile in Nevada was bona fide. This being so the vice anticipated in the Haddock case is present for as the court there said, "Under the rule contended for it would follow that the states whose laws were the most lax as to length of residence required for domicile, as to causes for divorce and to speed or procedure concerning divorce, would in effect dominate all the other states."

Justice Douglas for the majority admits this is so but says, "It is an objection in varying degrees of intensity to the enforcement of a judgment of a sister state based on a cause of action which could not be enforced in the state of the forum. Mississippi's policy against gambling transactions was overridden in Fauntleroy v. Lum when a Missouri judgment based on such Mississippi contract was enforced by this court. Such is part of the price of our federal system."

Summing up the majority opinion amounts to this:

1. Domicile of one of the parties is the necessary jurisdictional element and the wrong or fault of the person establishing such domicile is immaterial to jurisdiction.

2. Nevada having found that Williams and Mrs. Hendrix were domiciled in Nevada may grant a divorce decree which in the absence

38 Id. at 296, 63 S. Ct. at 212, 87 L. ed. at 284 (1942).
39 Id. at 302, 63 S. Ct. at 215, 87 L. ed. at 288 (1942).
40 Id. at 302, 63 S. Ct. at 215, 87 L. ed. at 288 (1942).
of a contrary finding on domicile by North Carolina must be given full
faith and credit in that state.

3. Whether North Carolina may refuse to give full faith and credit
to the Nevada decree if it, contrary to Nevada, finds the parties were
not domiciled in Nevada is not now passed on by the court. That will
be decided later—meanwhile the case is remanded to the North Caro-
lina Supreme Court which presumably will direct an inquiry be made
at a new trial on the existence or non-existence of the Nevada domi-
cile.44

THE FRANKFURTER CONCURRING OPINION—FIRST WILLIAMS CASE

Justice Frankfurter filed a brief opinion in which he stated he con-
curred with the majority but deemed it appropriate to "add a few
words."45 He is well aware of the confusion existing in divorce law
but concludes that such confusion is the subject of legislative corrective
measures and is not to be completely removed by judicial decision.

"Judicial attempts to solve problems that are intrinsically legislative
—because their elements do not lend themselves to judicial judgment or
because the necessary remedies are of a sort which judges cannot pre-
scribe—are apt to be as futile in their achievement as they are pre-
sumptuous in their undertaking."46

The real remedy lies in national legislation. Perhaps, Justice
Frankfurter suggests, it is now time to amend our Constitution to
enable Congress to enact laws on marriage and divorce. He refers to
such power as now being vested in the national legislatures of Canada
and Australia. Until such powers are given he finds but one way in
which the Supreme Court can contribute uniformity to the law of
marriage and divorce and "that is to enforce respect for the judgment
of a state by its sister states when the judgment was rendered in accord-
ance with settled procedural standards . . . if a judgment is binding in
the state where it was rendered, it is binding in every other state."47

If the Nevada proceedings had not conformed with settled pro-
cedural standards, if there had in other words been no due process,
then North Carolina would not be required to respect the judgment
of Nevada,

"But in this case all talk about due process is beside the mark. . . .
It is precisely because the Nevada decrees do satisfy the requirements
of the Due Process Clause and are binding in Nevada upon the absent

44 The North Carolina Supreme Court in due course vacated the judgments of
conviction and in turn remanded the cause for a new trial in accordance with
the United States Supreme Court opinion. State v. Williams, 222 N. C. 609,
24 S. E. (2d) 256 (1943).
46 Id. at 305, 63 S. Ct. at 216, 87 L. ed. at 290 (1942).
47 Id. at 306, 63 S. Ct. at 216, 87 L. ed. at 290 (1942). (Italics our own.)
spouse that we are called upon to decide whether these judgments, *unassailable in the state which rendered them*, are, despite the commands of the Full Faith and Credit Clause, null and void elsewhere."

Further Justice Frankfurter points out that,

"... no claim was made here on behalf of North Carolina that the decrees were not valid in Nevada. It is indisputable that the Nevada decrees here, like the Connecticut decree in the *Haddock* case, were valid and binding in the state where they were rendered."

As to *Haddock* itself we are told,

"In denying constitutional sanction to such a valid judgment outside the state which rendered it, the *Haddock* decision made an arbitrary break with the past and created distinctions incompatible with the role of this Court in enforcing the Full Faith and Credit Clause."

The problem seems to be fairly simple to Justice Frankfurter at the time of his concurring opinion in the first *Williams* case for he finds that "Freed from the hopeless refinements introduced by that case (*Haddock*), the question before us is simply whether the Nevada decrees were rendered under circumstances that would make them binding against the absent spouse in the state where they were rendered."

But that question was already answered by him in the affirmative, "It is indisputable that the Nevada decrees here ... were valid and binding in the state where they were rendered." He then concludes that North Carolina has failed to "respect" the consequences of Nevada exerting her power to declare the marital status of one of its domiciliaries.

One further reference to Justice Frankfurter's opinion. Speaking of Congress he said, "[But] Congress has not exercised its power under the Full Faith and Credit Clause to meet the special problems raised by divorce decrees. There will be time enough to consider the scope of its power in this regard when Congress chooses to exercise it." Is this a suggestion that Congress attempt divorce legislation without a Constitutional amendment?

**THE MURPHY DISSENT—FIRST WILLIAMS CASE**

Justice Murphy filed a dissent, the main theme of which was that each state should be free to apply its own policies within its own area as regards its own citizens. "Both Nevada and North Carolina have

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18 *Id.* at 306, 63 S. Ct. at 217, 87 L. ed. at 290 (1942). (Italics our own.)
19 *Id.* at 306, 63 S. Ct. at 217, 87 L. ed. at 290 (1942).
20 *Id.* at 307, 63 S. Ct. at 217, 87 L. ed. at 290 (1942).
21 *Id.* at 307, 63 S. Ct. at 217, 87 L. ed. at 290 (1942). (Italics our own.)
22 *Id.* at 307, 63 S. Ct. at 217, 87 L. ed. at 290 (1942). (Italics our own.)
23 *Id.* at 306, 63 S. Ct. at 217, 87 L. ed. at 290 (1942).
rights” with regard to the marriage relations of their citizens. The conflict between those rights “should not be resolved by extending into North Carolina the effects of Nevada’s action through a perfunctory application of the literal language of the Full Faith and Credit Clause with the result that measures which North Carolina has adopted to safeguard the welfare of her citizens in this area of legitimate governmental concern are undermined.”

The application of the Full Faith and Credit Clause has not prevented two states claiming domicile in taxation cases; and Justice Murphy sees no more incongruity in holding the parties validly divorced in Nevada and not divorced in North Carolina than appears where a person who admittedly can have but one domicile is taxed in two jurisdictions, each of which prevails against the harassed taxpayer who is denied relief by the Supreme Court. “The fair result,” concludes Justice Murphy, “is to leave each [state] free to regulate within its own area the rights of its own citizens.”

Justice Murphy admits that a divorce decree rendered by the state of bona fide domicile of one of the parties has heretofore been entitled to recognition in sister states under the Full Faith and Credit Clause. But even if that be so the answer to the Williams case is simple to the Justice for to him it is clear that Williams and Mrs. Hendrix had not acquired a bona fide domicile in Nevada.

“Did petitioners acquire a bona fide domicile in Nevada? I agree with my brother Jackson that the only proper answer on the record is, no. North Carolina is the state in which petitioners have their roots, the state to which they immediately returned after a brief absence just sufficient to achieve their purpose under Nevada’s requirements. It follows that the Nevada decrees are entitled to no extra-territorial effect when challenged in another state.”

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4 Id. at 310, 63 S. Ct. at 218, 87 L. ed. at 292 (1942).
5 Justice Murphy here cites Worcester County Trust Co. v. Riley, 302 U. S. 292, 58 S. Ct. 185, 82 L. ed. 268 (1937). In the Dorrance Estate litigation the estate was required to pay inheritance taxes of approximately $17,000,000 to both the states of New Jersey and Pennsylvania each of which claimed and found the deceased was domiciled within its borders. The Supreme Court of the United States denied relief to the doubly harassed taxpayer. See In re Dorrance’s Estate, 115 N. J. Eq. 268, 170 A. 601 (1934), affirmed Dorrance v. Martin, 13 N. J. Misc. 168, 176 A. 902 (1935), certiorari denied Dorrance v. Martin, 298 U. S. 678, 56 S. Ct. 949, 80 L. ed. 1399 (1936), rehearing denied 298 U. S. 692, 56 S. Ct. 957, 80 L. ed. 1410 (1936); Dorrance’s Estate, 309 Pa. 151, 163 A. 303 (1932), certiorari denied 287 U. S. 660, 53 S. Ct. 222, 77 L. ed. 570 (1932).

If the deceased taxpayer acquired a sufficient number of “domiciles” so that taxes by all states claiming domicile would wipe out the estate there is apparently chance for relief providing one of the states wishes to interplead the others. See Texas v. Florida, 306 U. S. 398, 59 S. Ct. 563, 83 L. ed. 817 (1937).

See also Tweed and Sargent, Death and Taxes Are Certain—But What of Domicile (1939) 53 Harv. L. Rev. 68.
6 Id. at 317 U. S. 287, 311, 63 S. Ct. 207, 219, 87 L. ed. 279, 293 (1942).
7 Id. at 309, 63 S. Ct. at 218, 87 L. ed. at 291 (1942).
Presumably Justice Murphy is satisfied as a matter of law that no bona fide domicile was acquired in Nevada, that the facts relating thereto permit of only one construction, and that therefore there was no issue of domicile to be left to a jury. When it is perceived that domicile is necessarily predicated on intent and when it is further acknowledged that intent is a matter of fact to be determined from all the surrounding circumstances one may well question the soundness of Justice Murphy's conclusion as a matter of law although agreeing with it as a matter of fact. Further, the intent required is not the intent the parties had on their return to North Carolina but the intent they had before they ever did return, the intent on arrival in Nevada. The fact that the parties returned after accomplishing their purpose is merely some evidence to be considered with other circumstances by a fact finding body to aid it in determining the intent the parties had on arrival in Nevada. It is by no means conclusive and certainly it is possible, even though it may be improbable, that there was the intent to remain indefinitely in Nevada on arrival there which was departed from at the end of the six-week period.

THE JACKSON DISSENT—FIRST WILLIAMS CASE

Before considering the objections of Justice Jackson to the majority opinion it is well to note what he believes the Court's decision does.

"It nullifies the power of each state to protect its own citizens against dissolution of their marriages by the courts of other states which have an easier system of divorce. It subjects every marriage to a new infirmity, in that one dissatisfied spouse may choose a state of easy divorce, in which neither party has ever lived, and there commence proceedings without personal service of process. The spouse remaining within the state of domicile need never know of the proceedings. . . . It is not an exaggeration to say that this decision repeals the divorce laws of all the states and substitutes the law of Nevada as to all marriages one of the parties to which can afford a short trip there."

Apparently Justice Jackson did not anticipate the second Williams case. The matter to him seems to have been concluded by the majority decision once and for all in favor of the dominance of the Nevada decrees.

It is because the majority in the Haddock case rebelled against any theory which would permit the divorce laws of one state to "repeal" the laws of another that the Court held New York was not bound to admit evidence of the Connecticut decree. It is because Justice Jackson is in sympathy with the majority view in Haddock that he dissents here. In fact he makes a considerable brief for the Haddock case. He admits it first met disfavor among the legal scholars but

68 *Id.* at 311, 63 S. Ct. at 219, 87 L. ed. at 293 (1942). (Italics our own.)
contends that the decision has stood as law for thirty-seven years and that there is now no sound basis for overruling it. "The theoretical reasons for the change are not convincing." 5

But, it is not only the interest of the state of matrimonial domicile which concerns Justice Jackson. There are two individual parties to the marriage "contract." The rights of one should not be frittered away by the action of a state having no personal jurisdiction over that party. A personal judgment cannot be rendered against an absent party on a cause of action arising out of an ordinary commercial contract without personal service of process. Why should Nevada be permitted to destroy the matrimonial rights of the spouse remaining in North Carolina without acquiring personal jurisdiction over that spouse?

"I see no reason why the marriage contract, if such it be considered, should be discriminated against, nor why a party to a marriage contract should be more vulnerable to a foreign judgment without process than a party to any other contract. I agree that the marriage contract is different, but I should think the difference would be in its favor." 6

Although Justice Jackson does not predicate his dissent on lack of domicile in Nevada, it is clear that he finds no domicile. In fact he states the Nevada court only found residence and that residence is not domicile. 61 As to the argument that North Carolina must recognize the Nevada decree as a part of the price of our Federal system he says, "It is a price that we did not have to pay yesterday and that we will have to pay tomorrow only because this Court has willed it to be so today." 62 Departure from the application of stare decisis is deplored. For the departure now, "Little justification is offered." 63

Finally in answer to the intensely practical consideration urged by the majority, the possibility that failure to recognize the Nevada decrees may lead to the bastardizing of children, Justice Jackson closes with the curt statement, "In any event, I had supposed that our judicial responsibility is for the regularity of the law, not for the regularity of pedigrees." 64

However conclusive Justice Jackson may have thought the majority opinion to be it did carry within it a remand to the North Carolina Supreme Court for proceedings not inconsistent therewith. Those proceedings were clearly indicated. If the state of North Carolina wished to continue its prosecution of the defendants it could not rely

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5 Id. at 316, 63 S. Ct. at 221, 87 L. ed. at 295 (1942). See supra note 22.
61 See supra p. 8 for majority view.
63 Id. at 324, 63 S. Ct. at 225, 87 L. ed. at 299 (1942).
64 Id. at 324, 63 S. Ct. at 225, 87 L. ed. at 300 (1942). (Italics added.)
on the Haddock case. Domicile of the divorce suit plaintiffs in Nevada would be sufficient to give them protection under the Nevada decrees. On the basis of the record Nevada had found domicile, North Carolina had made no finding one way or the other. What the position of the defendants would be if “contrary to the findings of the Nevada court, North Carolina finds that no bona fide domicil was acquired in Nevada” is left by the majority for determination when that situation is presented to it. The second trial resulted in passing on that very question to the Supreme Court for decision.

THE SECOND TRIAL

November 29, 1943 sees the opening of the second trial. Almost a year has gone by since the Supreme Court reversal and somewhat less than three years since the original trial. The cast of characters is not quite the same—Judge Ervin sits in place of Judge Sink, Mrs. Williams has passed on to the Great Beyond and Mr. Hendrix, apparently still an optimist, has taken to himself another wife.

As at the first trial, the state again produced the only witnesses. The defendants did not take the stand. By stipulation the evidence of Mrs. Williams given at the former trial was read into the record. Mr. Hendrix testified to his marriage to Mrs. Hendrix and also that he had remarried about four months before the second trial. The marriage certificate of Williams and Mrs. Hendrix in Nevada was introduced in evidence and lastly five witnesses were called who testified generally to the fact that in the fall of 1940 the defendants were living together as man and wife at Pineola, North Carolina.

Upon the conclusion of the state's case the defendants moved for judgment as of nonsuit. The motions were denied. Defendants again introduced the exemplified copies of the Nevada divorce proceedings and the post card sent by Hendrix to his wife's attorney in Nevada. Defendants' attorney then renewed his motion for judgment as of nonsuit and specifically relied on the overruling of the Haddock decision by the United States Supreme Court in the first Williams case.

The motion was denied and Judge Ervin in a thirty-five page charge in substance instructed the jury that the validity of the Nevada divorce was dependent on whether or not the defendants had obtained a domi-

65 Supra note 40.
66 The transcript of record p. 7 in 224 N. C. 183 shows that Hendrix testified, “I brought a divorce action against the present Mrs. Williams since the first trial of this case.” The transcript doesn't show whether Hendrix actually obtained a divorce but independent investigation reveals that Hendrix was granted a divorce in May 1941 on the ground of adultery.

The marital difficulties of Mr. Hendrix might well make the subject of another paper for it appears that since his divorce from the first Mrs. Hendrix in 1941 he has twice remarried and as many times divorced. (Letter of Attorney William H. Strickland, December 7, 1945.)
"Domicil," he said, "is that place in which [a person] has voluntarily fixed his abode or habitation 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." The question of domicile in Nevada was squarely left to the jury. If the defendants were domiciled there a verdict of not guilty was called for, if not so domiciled a verdict of guilty was in order. The jury found the defendants guilty.

Perhaps it was the change in judges, perhaps the United States Supreme Court reversal of the earlier convictions was exerting an indirect influence, or maybe time alone had softened the heart of the law. Whatever be the reason the sentences imposed were considerably less severe—one to three years for Williams and eight to twenty-four months for Mrs. Hendrix.

APPEAL TO STATE SUPREME COURT FOLLOWING SECOND TRIAL

On appeal to the State Supreme Court the convictions were affirmed. Chief Justice Stacy wrote the opinion for an unanimous court. He declared that the former decision of the North Carolina Supreme Court affirming the convictions following the first trial was "predicated primarily" on the theory that the Nevada decrees were not entitled to full faith and credit because neither of the divorce suit defendants had been served or entered an appearance in Nevada. "For this position we relied upon the celebrated case of Haddock v. Haddock." "Secondarily," continued Chief Justice Stacy, "it was suggested that the evidence tended to show the defendants were not bona fide residents of the State of Nevada." However, this secondary reason he concedes was abandoned by the State on appeal to the United States Supreme Court. In addition, he agrees that in view of the general verdict at the first trial we do not know if the jury found the defendants had acquired a bona fide domicile or not.

"Even if the jury had found the defendants were domiciled in Nevada, still under the doctrine of Haddock the divorce decrees, since they were entered on constructive service might have been, and in fact for this very reason were, held for naught in North Carolina. . . . To sustain the conviction and the judgment upholding it, the State was compelled to rely on the principle of the Haddock decision because it was the main theory of the trial."

From this comment by Chief Justice Stacy any possible doubt as to the theory relied upon by the North Carolina Supreme Court at

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67 Transcript of record p. 63 in 224 N. C. 183.
68 224 N. C. 183, 29 S. E. (2d) 744 (1944).
69 Id. at 187, 29 S. E. (2d) 747 (1944).
70 Id. at 187, 29 S. E. (2d) 747 (1944).
71 Id. at 188, 29 S. E. (2d) 748 (1944).
the time of the first appeal to it is entirely dispelled. Domicile, or no
domicile in Nevada, the result would have been the same in the State
Court for lack of personal service was then the basis of decision. Now
that is abandoned perforce as a result of the overruling of the Haddock
case. Domicile is the sole bone of contention. The fact of domicile
has now been tried out by the North Carolina trial court. The jury
by its verdict has found no domicile in Nevada. We are therefore
faced with the very “different problem” which the United States
Supreme Court foresaw but refused to solve in the first appeal of it.73

Chief Justice Stacy sees no difficulty in the solution. Bell v. Bell74
had been relied on by the State. That case he finds is adequate authority
on which to support the convictions. He quotes therefrom, “No valid
divorce from the bond of matrimony can be decreed on constructive
service by the courts of a state in which neither party is domiciled.”75
But what about the finding of “residence” (domicile) by the Nevada
court? That finding says Chief Justice Stacy is not conclusive. Thus
in the Bell case a husband had obtained a divorce in Pennsylvania.
The divorce proceedings contained a recital that the plaintiff was domi-
ciled in that state. The wife then sued the husband for divorce and
alimony in New York and was permitted to show lack of jurisdiction
in Pennsylvania by proof that the husband was in fact domiciled in
New York.

The Bell case was predicated on Thompson v. Whitman76 and
Chief Justice Stacy in turn relies on the Thompson case.

“It was held in Thompson v. Whitman . . . that the full faith and
credit clause did not prevent an inquiry into the jurisdiction of the court
by which a judgment offered in evidence was rendered; that the record
of a judgment rendered in another state might be contradicted as to
the facts necessary to give the court jurisdiction, and, that if it should
appear such facts did not exist, the record would be a nullity, notwith-
standing a recital in the judgment that such facts did exist.”77

We shall have occasion later to consider the Thompson case in
detail in connection with the second opinion of the United States
Supreme Court. It is enough at this point to note the basis for the
affirmance of the convictions by the North Carolina Supreme Court
on the second appeal to it. Chief Justice Stacy concludes:

72 317 U. S. 287, 292, 63 S. Ct. 207, 210, 87 L. ed. 279, 282 (1942): “If the
case had been tried and submitted on that issue (domicile) only, we would have
quite a different problem. . . .” See also supra p. 11.
74 181 U. S. 175, 21 S. Ct. 551, 45 L. ed. 804 (1901).
75 224 N. C. 183, 192, 29 S. E. (2d) 744, 750 (1944).
76 18 Wall. (U. S.) 457, 21 L. ed. 897 (1873).
77 224 N. C. 183, 193, 29 S. E. (2d) 744, 751 (1944).
"From a legal standpoint, it all comes to this: On the first appeal the State relied on the case of Haddock v. Haddock. We were minded to follow that case. It was overruled by the Supreme Court of the United States. The State now relies on the case of Bell v. Bell. We are disposed to follow this case." \textsuperscript{78}

SECOND APPEARANCE OF THE WILLIAMS CASE IN THE UNITED STATES SUPREME COURT

A writ of certiorari having been again allowed, the United States Supreme Court for a second time had the fate of Williams and Mrs. Hendrix before it. This time, however, fortune did not smile favorably on the defendants. Not that there was uniformity of judicial opinion—far from it, simply that the dissenting voices of three Justices were unable to deter a majority of six from affirming the convictions. Justice Frankfurter speaks for the Court.\textsuperscript{79} It will be recalled Justice Douglas had written the majority opinion in the first case and that Justice Frankfurter had concurred in a separate opinion. Now there is a parting of the ways. Instead of returning the compliment and concurring with his brother Justice Frankfurter, Justice Douglas joins in the dissent of Justice Black. Justice Rutledge files a separate dissent.

MAJORITY UNITED STATES SUPREME COURT OPINION—SECOND WILLIAMS CASE

In the first Williams case Justice Frankfurter stated the Nevada decrees satisfied the requirements of the due process clause, that they were "binding in Nevada upon the absent spouse" and that the question was whether those judgments "unassailable in the state which rendered them" were "despite the demands of the full faith and credit clause null and void elsewhere."\textsuperscript{80} North Carolina, he then told us, had not challenged the power of Nevada to declare the marital status of its residents but instead had chosen to "disrespect"\textsuperscript{81} Nevada's exertion of such power. What "respect" North Carolina would be called upon to give to the Nevada decrees if North Carolina found the defendants had not been domiciled in Nevada was left undetermined.\textsuperscript{82} Would the "respect" called for in that case require North Carolina to give

\textsuperscript{78}Id. at 193, 29 S. E. (2d) at 751 (1944).

\textsuperscript{79}324 U. S. \rightarrow, 65 S. Ct. 1092, 89 L. ed. 1123 (1945). [Ed. Note: All L. ed. citations on the second Williams case are for the Advanced Opinions.]


\textsuperscript{82}It is noteworthy that in both his concurring opinion in the first Williams case and in his opinion for the Court in the second case Justice Frankfurter emphasizes "respect" for a sister state's decisions. Justice Rutledge comments on what he terms the shift in emphasis from "full faith and credit" to "respect" in his dissent in the second Williams case, 65 S. Ct. 1092, 1106, 89 L. ed. 1123, 1138 (1945).
full faith and credit to the decrees? That question now squarely con-fronts the court.

The full faith and credit clause was implemented by an Act of Congress in 1790. The statute provided that the records and judicial proceedings of one state properly authenticated "shall have such faith and credit given 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."

In 1813 both the Constitutional provision and the statute were construed in Mills v. Duryea. The Supreme Court then declared that the statute requires one state to give the "same faith and credit" to a judgment of a sister state as it is given in the state where rendered. The action in the Mills case was brought in the District of Columbia to recover the amount of a money judgment obtained in a New York state court. A plea of "nil debet" was held bad on demurrer. Justice Story speaking for the Court expressly rejected the defendant's contention that the New York judgment was only "prima facie" evidence of liability.

Sixty years later in Thompson v. Whitman the Supreme Court said that the full faith and credit clause together with the statute of 1790 did not prevent the second state from looking into the jurisdiction of the first state which rendered the judgment. Jurisdiction of a New Jersey court in the Thompson case depended on the location of the plaintiff's sloop when seized by a New Jersey sheriff. If the sloop was then in waters of Monmouth County, New Jersey, the court had jurisdiction to condemn, if not, no jurisdiction existed. The New Jersey court found as a fact that the sloop had been seized in Monmouth County waters and condemned it under a local statute. The plaintiff then sued the sheriff for trespass to the sloop in a federal court in New

1 Supra note 28.
2 28 USCA §687. The full text of the statute is: "The acts of the legislature of any State or Territory, or of any country subject to the jurisdiction of the United States shall be authenticated by having the seals of such State, Territory, or country affixed thereto. The records and judicial proceedings of the courts of any State or Territory, or of any such country, shall be proved or admitted in any other court within the United States, by the attestation of the clerk, and the seal of the court annexed, if there be a seal, together with a certificate of the judge, chief justice, or presiding magistrate, that the said attestation is in due form. 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."
3 7 Cranch (U. S.) 481, 3 L. ed. 411 (1813).
4 Id. at 484, 3 L. ed. at 413 (1813).
5 Compare the charge of Judge Ervin at the second trial in the Williams case in which he stated that the recitation in the Nevada record that the parties had been bona fide residents in that state for the six weeks preceding the institution of the divorce suits was "prima facie" evidence of domicile in that state but was not binding on the jury. Transcript of record pp. 72-73 in 224 N. C. 183.
6 18 Wall. (U. S.) 457, 21 L. ed. 897 (1873).
York contending that the sloop was not in Monmouth County waters when seized. The sheriff in defense offered in evidence the findings and proceedings of the New Jersey court and claimed that they were binding on the federal court in New York under the full faith and credit clause of the Constitution. The United States Supreme Court affirmed a judgment of the federal court which had permitted the plaintiff to contest the location of the vessel as found by the New Jersey court and which had charged the jury that the New Jersey record was “only prima facie evidence of the facts therein stated.”

It is apparent that the decision in the second Williams case will depend on whether the doctrine of Mills v. Duryea is to be applied as stated therein or as materially modified by Thompson v. Whitman. If the divorce decrees are to be given the “same faith and credit” in North Carolina as in Nevada where they are “unassailable” they would be valid defenses. If on the other hand North Carolina is to be free to question Nevada’s jurisdiction, then irrespective of the effect the judgments have in Nevada they may be found not entitled to full faith and credit in North Carolina under the Thompson rule.

Justice Frankfurter approves of the Thompson case which he says was the first to make a “sharp analysis” of the full faith and credit clause. Before the Thompson decision he declared “uncritical notions about the scope of the clause had been expressed” in Mills v. Duryea. However, the doctrine of the latter case giving to a judgment of one state “the same credit, validity and effect” in every other state “which it had in the state where it was pronounced . . . when put to the test . . . was found to be too loose.” Only if the state rendering the judgment had jurisdiction did the full faith and credit clause become operative. A judgment not founded on valid jurisdiction could not demand “full faith and credit” in a sister state.

Whether the Thompson case expresses the correct rule, whether or not judgments of sister states may be collaterally attacked for lack of jurisdiction is to Justice Frankfurter no longer an open question. It is now “too late” to “deny the right” to impeach divorce decrees of sister states by proof the court had no jurisdiction. “It was too late more than forty years ago.”

—9 Id. at 459, 21 L. ed. at 898 (1873).
90 7 Cranch (U. S.) 481, 3 L. ed. 411 (1813).
91 18 Wall. (U. S.) 457, 21 L. ed. 897 (1873).
92 65 S. Ct. 1092 at 1094, 89 L. ed. 1123 at 1125 (1945).
93 Id. at 1094, 89 L. ed. at 1125 (1945).
94 Ibid.
95 Ibid.
96 Ibid.
97 Id. at 1095, 89 L. ed. at 1126. The right to impeach collaterally decrees of sister states for lack of jurisdiction is currently being seriously questioned and not without considerable force. See Corwin, Out-Haddocking Haddock (1945) 93 Pa. L. Rev. 341 where the author describes the action of the majority in the
Having determined that the Nevada decrees may be collaterally attacked if Nevada had no jurisdiction Justice Frankfurter then declares the jurisdictional requirement, . . . "judicial power to grant a divorce—jurisdiction strictly speaking—is founded on domicil. . . . The domicil of one spouse within a state gives power to that state, we have held, to dissolve a marriage wheresoever contracted." 97

So far the going is fairly easy. But now comes the real problem. Assuming a judgment need not be given full faith and credit unless rendered by a court having jurisdiction and assuming further that jurisdiction in divorce cases depends on domicile of one of the spouses, which tribunal has the power to finally adjudicate the question of domicile? In fact, may any tribunal finally adjudicate that question? Nevada has found the necessary domicile. Is that finding now to be impeached by North Carolina? Should the Nevada finding of domicile be entitled to full faith and credit in North Carolina?

Justice Frankfurter readily concedes that a jurisdictional question, domicile here, cannot after a contest regarding the same be litigated as between the parties. 98 Here, however, there was not only no contest in Nevada, but North Carolina which seeks to enforce its law of bigamy was not even a party to the Nevada proceedings. Therefore, Justice Frankfurter concludes North Carolina should not be bound by a Nevada finding of a jurisdictional fact.

"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, certainly no effective means, to protect that interest against the selfish action of those outside its borders. The State of domiciliary origin should not be bound by an unfounded, even if not collusive, recital in the record of a court of another State. As to the truth or existence of a fact, like that of domicil, upon which depends the power to exert judicial authority, a State not a party to the exertion of such judicial authority in another State but seriously affected by it has a right when asserting its own unquestioned authority, to ascertain the truth or existence of that crucial fact." 99

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Footnoting his opinion at this point Justice Frankfurter said, "We have not here a situation where a
That the rule so declared may result in contradictory findings in our various states is recognized by the court. However, we are told, "...such conflict is inherent in the practical application of the concept of domicil in the context of our federal system." Justice Frankfurter (as did Justice Murphy dissenting in the first Williams case) here refers to those regrettable decisions which have resulted in certain persons being obliged to pay taxes in more than one state because the taxing states each found the taxpayer domiciled within its borders although each admitted their victims could have but one domicile. In fact he states that what was said in Worcester County Trust Co. v. Riley "is pertinent here." He quotes:

"Neither the Fourteenth Amendment nor the full faith and credit clause requires uniformity in the decisions of the courts of different states as to the place of domicil, where the exertion of state power is dependent upon domicil within its boundaries."

As to everything else but "the jurisdictional facts" on which the divorce decree is founded the decree is conclusive, but to permit the necessary finding of domicile by one state to foreclose all states in the protection of their social institutions "would be intolerable."

If the Nevada court's finding on the question of domicile is not entitled to full faith and credit elsewhere is it entitled to anything? This question Justice Frankfurter answers in the affirmative. North Carolina owes a "duty of respect" to the adjudication of Nevada. In fact Justice Frankfurter goes even further and says:

"The fact that the Nevada Court found that they were domiciled there is entitled to respect and more." Was that respect and whatever in addition to respect must be given the Nevada decree accorded it by North Carolina? Justice Frankfurter finds that it was. The trial judge had told the jury the Nevada decree was "prima facie evidence"; the issue of fact, domicile or no domicile, was "left for fair determination" and the finding ad-

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100 65 S. Ct. 1092, 1095, 89 L. ed. 1123, 1127 (1945).
101 See supra note 55.
103 Ibid.
104 65 S. Ct. 1092 at 1097, 89 L. ed. 1123 at 1128 (1945). (Italics our own.)
105 What Justice Frankfurter meant to include in the word "more" is not declared. We can only say that apparently he is satisfied North Carolina gave "respect and more."
106 65 S. Ct. 1092, 1098, 89 L. ed. 1123, 1129 (1945).
107 Id. at 1097, 89 L. ed. at 1128 (1945).
verse to that of Nevada was "amply supported in evidence." North Carolina, we are told, had given "appropriate weight ... to the finding of domicil in the Nevada decrees."109

As to Williams and Mrs. Hendrix ... well, it is indeed too bad that they now face a jail sentence, but Justice Frankfurter concludes that after all "they assumed the risk that this Court would find that North Carolina justifiably concluded they had not been domiciled in Nevada."110

Summing up the majority opinion in the second Williams case it appears that:

1. As in the first Williams case, domicile of one of the parties is the necessary jurisdictional element and the wrong or fault of the person establishing such domicile is immaterial to jurisdiction.

2. The Full Faith and Credit Clause does not prevent an inquiry into the jurisdiction of the court whose judgment is relied on in another state even though the record purports to show jurisdiction.

3. Although Nevada found that Williams and Mrs. Hendrix were domiciled in Nevada and in the light thereof could grant a decree of divorce "unassailable" in that state such finding of domicile was not conclusive on North Carolina.

4. North Carolina, in the protection of its social institutions, may independently examine into the question of the Nevada court's jurisdiction, that is, it may for itself determine if the parties obtaining the divorce decrees were domiciled in Nevada. In doing so, however, it may not disregard the Nevada decrees but must accord them "respect.”

5. The duty of "respect” is satisfied where the fact finding body in North Carolina is instructed that the Nevada decrees are “prima facie” evidence of domicile in that state and where the finding of lack of domicile by the North Carolina jury is “amply supported by evidence” and the result of “fair determination.”

THE MURPHY CONCURRING OPINION—SECOND WILLIAMS CASE

Justice Murphy in a short concurring opinion joined in by the Chief Justice and Justice Jackson is apparently firmly convinced that the alleged domicile in Nevada was acquired fraudulently, deceitfully or in bad faith. Such, in any event, is the interpretation he gives to

108 Ibid.
109 65 S. Ct. 1092, 1098, 89 L. ed. 1123, 1129 (1945). (Italics our own.)
110 Id. at 1099, 89 L. ed. at 1130 (1945). (Italics our own.)
111 The Nevada decrees were characterized as "unassailable" in that state by Justice Frankfurter in his concurring opinion in the first Williams case. See supra p. 13. That adjective is not used by the Justice in his opinion for the majority of the Court in the second case. There is no indication in the opinion, however, that the decrees could be assailed in Nevada which state he reiterates "found that petitioners were domiciled" within its borders. 65 S. Ct. 1092, 1099, 89 L. ed. 1123, 1131 (1945). The result in the second Williams case will be the same even though the Court should find enough in the Nevada record to support the jurisdictional finding of domicile by that state. 65 S. Ct. 1092, 1097, 89 L. ed. 1123, 1128 (1945).
the finding of the North Carolina jury which conclusion he says is supported by "overwhelming evidence satisfying whatever standard of proof may be propounded."112

He finds no "startling or dangerous implications in the judgment."113

"All of the uncontested divorces that have ever been granted in the forty-eight states are as secure today as they were yesterday or as they were before our previous decision in this case. Those based upon fraudulent domicils are now and always have been subject to later reexamination with possible serious consequences."114

Justice Murphy says it is "unfortunate" that Williams and Mrs. Hendrix are to be imprisoned for acts done doubtless under advice of council, but after all, he concludes, they had been duly warned by North Carolina's own judicial pronouncements in State v. Herron.115

THE RUTLEDGE DISSERT—SECOND WILLIAMS CASE

Justice Rutledge filed a very vigorous dissent. His primary complaint is that the majority decision makes the stability of the marriage relation depend on "caprice of juries."116 In fact, he says, under the majority view the same jury could have found one defendant guilty and the other innocent or if the cases had been tried separately two North Carolina juries could pronounce opposite results upon "evidence unvaried by a hair."117 If so, he concludes, "by the court's test we could do nothing but sustain the contradictory findings."118

Admittedly, Justice Rutledge says, under the majority decision the parties are divorced in Nevada and married in North Carolina. What about the other forty-six states? The majority did not say whether the other forty-six were obliged to give full faith and credit to the Nevada decree. It only determined that "The state of domiciliary origin should not be bound."119 If and when questions relating to the validity of the Nevada divorce should arise in states other than North Carolina are those states to be free to reexamine the matter of domicile in Nevada?

Justice Rutledge resents the suggestion made especially by Justice Murphy that the Nevada decrees were obtained by fraud. "The North Carolina verdict and judgment do not purport to rest on any finding

113 Id. at 1101, 89 L. ed. at 1133 (1945).
114 Id. at 1101, 89 L. ed. at 1133 (1945).
115 Id. See supra note 8. One may seriously doubt that either of the defendants ever heard of State v. Herron. The Justice's presumption is probably contrary to the fact.
116 65 S. Ct. 1092, 1102, 89 L. ed. 1123, 1134 (1945).
117 Ibid.
118 Ibid.
What the North Carolina jury did was to find as a fact that there was no domicile in Nevada. This it determined after having the benefit of a circumstance that Nevada did not have, namely the return of the parties to North Carolina. This proof of return was not, Justice Rutledge states, admitted to attack the Nevada decree but admitted solely for the purpose of relitigating "the same issue that decree had determined upon adequate evidence."

As Justice Rutledge sees the case, "North Carolina's action comes down to sheer denial of faith and credit to Nevada's law and policy, not merely to her judgment" and the decision of the majority as "approval of this denial." He finds no basis for excluding marriage and divorce matters from the operation of the full faith and credit clause. He concludes, however, that under the majority opinion the full faith and credit clause no longer applies as to such matters but that it is now sufficient merely to "compel 'respect' or something less than faith and credit whenever a jury concludes 'not unreasonably' by ultimate inference from the always conflicting circumstantial evidence that it should not apply."

Justice Rutledge discusses at considerable length the transitory nature of domicile, how in the time it takes a person to think he may acquire a new domicile in the place he then is by merely determining then to make it his home either permanently or for an indefinite time in the future.

"No other connection of permanence is required. All of his belongings, his business, his family, his established interests and intimate relations may remain where they have always been. Yet if he is but physically present elsewhere, without even bag or baggage and undergoes the mental flash, in a moment he has created a new domicil though hardly a new home."

To Justice Rutledge there is no greater "legal gamble" than betting on the outcome of a jury finding a domicile. Conflicting circumstances from which accordingly conflicting inferences of fact may be drawn are rarely absent in cases of importance. The majority,

120 Id. at 1104, 89 L. ed. at 1136 (1945). Domicile having as an essential element the intent of the party, it is apparent that a jury in North Carolina would be influenced by the fact of return as bearing on the nature of the original intent. Theoretically, no such influence would be exercised on a fact finding body in Nevada which is called upon to decide the question of domicile before the return takes place. Nevertheless, one may properly ask if there are any Judges in Nevada so naive as to believe that the thousands who file their petitions after six weeks of residence in that state really intend to stay there! If there are such, those Judges truly lack the art of "judicial notice."

121 Id. at 1105, 89 L. ed. at 1138 (1945).
122 Id. at 1105, 89 L. ed. at 1137 (1945).
123 Id. at 1106, 89 L. ed. at 1137 (1945).
124 Id. at 1108, 89 L. ed. at 1141 (1945).
125 Ibid.
while knowing how uncertain the determination of domicile is, how varied the opinion of juries may be as to the subjective intent necessary to acquire domicile, nevertheless, accepts this, to Justice Rutledge, most undesirable test as the basis for permitting North Carolina to refuse full faith and credit to Nevada's decrees. One thing as to divorce is now made certain, namely its uncertainty.

THE BLACK DISSENT, DOUGLAS CONCURRING—SECOND WILLIAMS CASE

Justice Black emphasizes the Nevada marriage. In Nevada the marriage was legal. How then can North Carolina hold the defendants guilty of bigamy if they are living together in accordance with a valid marriage in Nevada? What basis, asks Justice Black, is there for North Carolina not giving full faith and credit to what is a legal marriage in Nevada? To permit such action is to go contra to the established rule that the legality of a marriage is determined by the law of the place of contracting. But the validity of the marriage depends on capacity of the parties, hence Justice Black says we must go back to the divorce decrees in Nevada to determine whether they were such as would give capacity to the parties to marry in Nevada. Those decrees he finds were valid in Nevada. Consequently, as to Nevada, the decrees had the effect of giving the parties capacity to remarry there which they did. Now North Carolina is permitted to disregard Nevada's findings simply because a North Carolina jury does not agree that domicile existed in Nevada. Justice Black concludes that the majority by sustaining North Carolina's judgment has in effect declared the Nevada decree "void." Not only does Justice Black object to permitting a North Carolina jury to find no domicile when Nevada had found domicile but he cannot approve that portion of the trial court's charge which placed upon the defendants the burden of proving their domicile in Nevada. "The burden of proving the single issue upon which petitioner's liberty depended was cast upon them."
The defendant in a bigamy action must now, says Justice Black, prove that the court which divorced him was not mistaken in "resolving facts as to domicile."128

Under the majority decision no "final determination" can be made by any court as to its own "jurisdiction" in an uncontested divorce case. "And so far as I can tell, no other court can ever finally determine this question."129 In truth, adds the Justice, "A man might be tried for bigamy in two or more states. He might be convicted in one or both or all I suppose."130 Whether or not there will be a conviction will depend on the ability of the party involved to "guess" at what "may ultimately be the legal and factual conclusion resulting from a consideration of two of the most uncertain word symbols in all the judicial lexicon, 'jurisdiction' and 'domicil.'"131 It is to Justice Black the equivalent of sending people "to prison for lacking the clairvoyant gift of prophesying when one judge or jury will upset the findings of fact made by another."132

Justice Black further objects to the conviction of the defendants for the reason that at the time of the second trial it appeared that the first Mrs. Williams had died and Mr. Hendrix had remarried. This being so, Justice Black finds no substantial interest of the state of North Carolina at stake which warrants sending the defendants to jail. The argument amounts to this, since Mrs. Williams No. 1 is dead she cannot object to Mrs. Williams No. 2, and since Mr. Hendrix has himself remarried he cannot object to the remarriage of the first Mrs. Hendrix.133 Therefore, Justice Black concludes the criminal proceedings brought by the state of North Carolina are out of order.

It is apparent throughout the reading of Justice Black's opinion that he is a proponent of easy divorce. In fact he implies that the Court has sustained the convictions because the majority looks upon divorces as an "unmitigated evil."134 His dissent has been the subject of relentless criticism at the hands of one reviewer135 and has been hailed

the duty to support. The decision in the Pennsylvania state court went against the husband, the court finding that there had been no domicile acquired by him in Nevada.136 65 S. Ct. 1092, 1116, 89 L. ed. 1123, 1159 (1945). 137 Id. at 1117, 89 L. ed. at 1151 (1945). 138 Ibid. 139 Ibid.

65 S. Ct. 1092, 1117, 89 L. ed. 1123, 1152 (1945). 135 Id. at 1112, 89 L. ed. at 1145 (1945). 136 Id. at 1116, 89 L. ed. at 1150 (1945). "Implicit in the majority of the opinions rendered by this and other courts, which whether designedly or not, have set up obstacles to the procurement of divorces, is the assumption that divorces are an unmitigated evil, and that the law can and should force unwilling persons to live with each other."

See Powell, And Repent at Leisure (1945) 58 HARV. L. REV. 930.
as effectively exposing the "historical and logical weakness" of Justice Frankfurter's majority opinion by another.186

**SERIOUS QUESTIONS REMAIN**

Every attorney is familiar with the judicial technique of restricting a former decision "to its own peculiar facts." This process so conveniently engaged in by judges when they find it desirable to escape the effect of their earlier broad declarations of law has more than once confounded lawyers who have endeavored logically to forecast the course of future decision. Whether the Williams cases will receive such treatment at a later date remains to be seen.

We do know, however, both from past experience and the Williams litigation that attorneys cannot be too cautious when called upon to predict court action in the field of divorce. Whether we approve or disapprove the Williams decisions one thing is certain—they have not simplified the lawyer's task.187 The path ahead is far from clear. One can conceive of numerous situations not "on all fours" with either the first or second Williams case that must await solution. For example:

1. Does the rule of the first Williams case apply when the spouse left at home seeks support?188
2. Does the rule of the second Williams case permitting the state of matrimonial domicile to question the jurisdictional fact apply to the other forty-six states as well?
3. Could the spouse left at home rely on the Nevada divorce if he did not contest it and remarry on the faith of it, or would he then too be guilty of bigamy?
4. Are property rights to be determined by the Nevada decree or by a local jury reinquiring into the fact or domicile?
5. If there had been a contest between the spouses in Nevada on the question of jurisdiction, would that bar the state of matrimonial domicile or any other state from relitigating the jurisdictional fact? Would it bar some other person claiming property interests?

187 It has not been the purpose of the author to "take sides" but rather to tell the story for the benefit of those who have not had the time or opportunity to read the hundreds of pages making up the trial and appellate records of this most celebrated case.

Those who are in favor of the majority opinion will find pleasant reading in Professor Thomas Reed Powell's article, *And Repent at Leisure*, *supra* note 135. A brief review of that article will be found in (1945) 31 AMERICAN BAR ASSOCIATION JOURNAL 599. Readers who are in sympathy with the dissenting Justices will find solace in Professor Edward S. Corwin's article, *Out-Haddocking Haddock*, *supra* note 136. Of course one would expect the Nevada State Bar Journal to find fault with the majority opinion. See Platt, *Nevada Divorces and the Supreme Court* (1945) 10 NEVADA STATE BAR JOURNAL 170.

188 Justice Douglas in his concurring opinion in the Essenwein case (supra note 127) decided the day of the second Williams decision raises a doubt as to this and says (65 S. Ct. 1118, 1120, 89 L. ed. 1152, 1154 (1945)), "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."
These and other questions will have to await later decisions of the Supreme Court. Whether or not those decisions will result in clearing up the crystal maze of divorce law we cannot say, but if the future is to be judged by the past the hope of attaining reasonable certainty in this most vital field of human relations is indeed very, very dim.

The nation will owe a debt of gratitude to both Mr. Williams and Mrs. Hendrix if as a result of their protracted litigation public interest is aroused sufficiently to bring about the adoption of uniform divorce legislation buttressed if necessary by Constitutional Amendment.

Meanwhile the United States Supreme Court has in effect served notice that divorces obtained in states operating what are commonly termed “divorce mills” are of little value. Persons wishing to be certain of their marital status will shy away from Nevada decrees. Those who now have them are searching about for ways to secure their “divorced” status.

The public interest aroused by the Williams case has been tremendous. Sunday newspaper supplements have carried column after column depicting the confused state of our divorce law. For a graphic and pictorial account see Life Magazine, Vol. 19, No. 10, p. 86, issue of September 3, 1945.

Consider for example the situation depicted in the following news item taken from the December 9, 1945 issue of the Charlotte Observer of Charlotte, North Carolina.

**COURT RULING**

ASKED, SO VISIT MAY BE MADE

WASHINGTON, Dec. 7.—(AP) Mr. and Mrs. Guy Dixon Waters wish to visit relatives in North Carolina so they went to court about it yesterday.

They asked the District court to declare valid the divorces they received from their respective previous spouses in Reno, Nev., in September, 1943, or to issue new divorce decrees.

Otherwise, they said, they feared they might be arrested in North Carolina on bigamy charges in view of the Supreme court's decision last May upholding conviction on bigamy charges of a North Carolina couple who obtained Reno divorces, married each other and returned to the state.

They said they had relatives in North Carolina they had not seen for two years.
Whatever else may be said about the *Williams* case it is sure to delight the dramatist. Let us pull aside the curtain for the Epilogue and look in on Mr. Williams and Mrs. Hendrix. We should expect to find them solemnly repenting their transgressions surrounded by gray prison walls. But this does not look like a prison—it is a comfortable home in Pineola, North Carolina, and there seated by the fireside are none other than Mr. Williams and his Las Vegas bride. We cannot call her Mrs. Hendrix for she is now not only Mrs. Williams in Nevada but Mrs. Williams in North Carolina as well, a second marriage ceremony having taken place at Lenoir, North Carolina, in August 1945.\(^{142}\)

And what has become of the jail sentences? Our actors show no signs of palor from confinement, and for good reason, for not a single day of the sentences was ever served. North Carolina's dignity had been vindicated by the United States Supreme Court and North Carolina, with all the grace that becomes that State, thereupon released our friends on parole! Perhaps at some later date a writer on the *Williams* cases will entitle his paper—"And They Lived Happily Ever After."

\(^{142}\) For the factual information contained in this Epilogue the author acknowledges his indebtedness to Mr. William H. Strickland, attorney for Mr. Williams and Mrs. Hendrix, Mr. Foil Essick, Chief of Supervision of the Office of Commissioner of Paroles, Raleigh, North Carolina, and Mr. J. E. Tucker, Assistant Attorney General of North Carolina, Department of Justice, Raleigh, North Carolina.

\(^{143}\) The jail sentences of the defendants were to begin on September 20, 1945. Upon the recommendation of the Office of Commissioner of Paroles, Raleigh, North Carolina the parties married on August 18, 1945. Following the marriage the paroles were granted.