March 1943

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Recommended Citation
Karl M. Rodman, The Last of Mr. and Mrs. Haddock, 31 CALIF. L. REV. 167 (1943).

Link to publisher version (DOI)
https://doi.org/10.15779/Z38BJ61

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The Last of Mr. and Mrs. Haddock1?

Karl M. Rodman*

"For of course the true meaning of a term is to be found by observing what a man does with it, not by what he says about it."

P. W. Bridgman.

"Haddock v. Haddock is overruled." This is the judgment of the United States Supreme Court in Williams v. North Carolina,2 ending thirty-seven years of some of the most heated debate the Supreme Court has engendered.3 The majority opinion was written by Mr. Justice Douglas. Mr. Justice Frankfurter added a concurring opinion. Mr. Justice Murphy and Mr. Justice Jackson wrote dissenting opinions.

The facts are these: Mr. Williams and Mrs. Hendrix left their respective spouses in North Carolina and went to Nevada. After a six weeks' stay, both of them were awarded divorce decrees based on "extreme cruelty". Service was had by publication in a Nevada paper. Thereupon they married each other and returned to North Carolina. The state brought criminal action for bigamy against Mr. Williams and Mrs. Hendrix, who pleaded not guilty and offered in evidence

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1 A portion of the material comprising this paper was prepared during the academic year 1940-41 at Northwestern University Law School, Chicago. It is the writer's intention to submit an altered version of this article as part of his dissertation for the degree of Doctor of Juridical Science at that University.


3 As will appear in comments later in this paper, the debate may be just beginning. The Supreme Court has seen fit, and very properly so, to reverse the Haddock case, but it has failed to formulate a rule of law which is an accurate description of what the lower (state trial) courts are doing. It may appear anomalous to suggest that the United States Supreme Court should follow the judgments of state trial courts. But of what value are the pronouncements of the highest tribunal of the land when they have little or no effect on the divorce courts and the litigants. This is not treason. Mr. Justice Frankfurter said the same thing in his concurring opinion in the Williams case, "... our occasional pronouncements upon the requirements of the Full Faith and Credit Clause doubtless have little effect upon divorces." Ibid. at 217, 87 L. ed. Adv. Ops. at 200. Trial courts, responding to social policy, have ignored past judgments of the Court with success, except in the rare instances where appeal was taken.
copies of the Nevada proceedings, contending that the divorce decrees were valid in North Carolina. The state contended that since neither of the defendants in the Nevada suits was served in Nevada, nor entered an appearance there, the Nevada decrees would not be recognized as valid in North Carolina. The trial court charged the jury (1) that a Nevada decree based on substituted service without an appearance by the defendant would not be recognized in North Carolina, and (2) that defendants had the burden of proving the *bona fide* character of their residence in Nevada for the required time. The defendants were convicted of bigamy. On appeal, the Supreme Court of North Carolina sustained the conviction in the lower court and held that the Nevada decree was not entitled to recognition in North Carolina under the full faith and credit clause of the federal constitution by reason of *Haddock v. Haddock*. The Supreme Court granted certiorari.

Mr. Justice Douglas' opinion rests primarily on the following grounds:

(1) The residence of the petitioners in Nevada was not collusive. The suggestion was made by the Supreme Court of North Carolina and the trial court in its charge, that the petitioners went to Nevada solely for the purpose of circumventing the divorce laws of North Carolina. However, the verdict of the jury, being a general one, was based on both parts of the trial court's charge, that is, that the divorce (even if based on *bona fide* residence) was invalid and that in addition the decree might be bad if the petitioners' residence in Nevada was fraudulent in character. The majority opinion held, on the authority of *Stromberg v. California*, that if one of the grounds for conviction is invalid under the Federal Constitution, the judgment cannot be sustained. Further, the respondent did not seek to sustain the judgment below on that ground. As a matter of fact, the state admitted that there was probably sufficient evidence in the record to require that petitioners be considered to have been actually domiciled in Nevada.

(2) The residence of the petitioners being *bona fide* and for an "indefinite permanent" period, it follows that it amounted to a domicile sufficient for the purposes of a divorce decree. Although the ma-

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4 (1905) 201 U. S. 562.
5 (1942) 315 U. S. 795.
6 (1930) 283 U. S. 359.
The majority refers to the decision in *Williamson v. Osenton*, adopting its definition of domicil, it nowhere specifically states that there was any evidence in the record which would transform the acknowledged residence of the petitioners into a true domicil.

The Court rejects the notion of fault as a basis for determining jurisdiction in divorce. Both the majority and concurring opinions hold that either spouse is entitled to secure a separate domicil and that right is not dependent upon the spouse seeking the new domicil being free from fault in leaving the marital domicil of the spouses.

(3) The divorce having been secured on the basis of a *bona fide* residence (that is, domicil), the fact that substituted service was used instead of personal service does not constitute a denial of due process.

(4) Article IV, Section 1 of the Constitution directs that "Full Faith and Credit shall be given to the Public Acts, Records and Judicial Proceedings of every other State". Therefore, since it is the duty of the Court to see that this is done within such bounds and limits as it sees fit, it may direct that this Nevada decree be recognized in North Carolina.

(5) *Haddock v. Haddock* unduly limits the scope of the full faith and credit clause in that it permits a state to disregard the judicial decrees of a sister state unless the defendant was personally served within the state granting the divorce; or unless the defendant appeared; or, if divorce was granted on substituted service, the state so granting was the last matrimonial domicil of the parties. Therefore, *Haddock v. Haddock* is overruled.

(6) This Nevada decree having been granted to a *bona fide* domiciliary of Nevada on the basis of substituted service which met the requirements of due process, the decree is entitled to full faith and credit in North Carolina.

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8 (1914) 232 U. S. 619.
9 The "essential fact that raises a change of abode to a change of domicil is the absence of any intention to live elsewhere." The intention to stay for a time to which a person "did not then contemplate an end" was held sufficient. Ibid. at 624.
10 In his dissent, Mr. Justice Jackson quoted Mrs. Hendrix's testimony to the effect that her residence in Nevada was "indefinite permanent" in character. Supra note 2, at 224, 87 L. ed. Adv. Ops. at 207, Apparently the majority held that this was sufficient to establish a domicil in Nevada. (Mr. Williams' testimony on this point was not before the Court.)
The decision in this case presents a fundamental problem which the Court must one day decide, that is, what kind of residence will satisfy the requirement of domicil.

The majority opinion goes to great lengths to avoid considering this question. But the Court cannot always evade the issue. In the Williams case the state admitted the bona fide character of the petitioners' residence in Nevada, (that is, that petitioners had established a domicil there). However, upon a retrial of this case the state may attack the good faith of the Nevada sojourn. The state will surely be able to show (as was testified to at the trial)\(^2\) that petitioners arrived in Nevada on a certain date and left a little over six weeks later—a day or so after the Nevada decrees were handed down. The state may also be able to show, by other evidence (statements to friends and so forth), that Mr. Williams and Mrs. Hendrix had no intention of residing in Nevada for an "indefinite permanent" period. Although these facts showing a lack of domicil may never appear in a retrial of the Williams case they certainly will appear in most cases of this type that will come before the Court from now on.\(^3\) What will the Court do then? It may say that since these Nevada "residents" did not intend to reside for an "indefinite permanent" period in that state, the state where recognition is sought may deny validity to the Nevada decree. Or it may say that after the plaintiff resides there for six weeks, Nevada acquires a sufficient "hold" or "jurisdiction" over him to support a divorce decree based on substituted service.

It seems that the first alternative would introduce an undesirable rigidity into the full faith and credit clause and substitute for the stringent rule of Haddock v. Haddock another equally harsh one. The problem of spouses married in one state and divorced in another which so shocked the Court, will have returned unless the Court is prepared to go further and say that the Nevada decree has no effect even in Nevada. It is difficult to imagine on what basis the Court could come to that conclusion except possibly as constituting a denial of due process (to the absent spouse). Nevada would find itself unable to grant a divorce decree which will be valid within its own borders until it is able to satisfy itself that the "indefinite permanence" of the residence of the plaintiff is bona fide. However, as we have seen, testimony by the plaintiff to that effect together with corroborating evi-


dence required by the Nevada statute\textsuperscript{14} may not be sufficient. For example, \(A\) and \(B\) marry in Virginia. \(A\) leaves \(B\) and goes to Nevada. Six weeks thereafter he files a suit for divorce in the Nevada court alleging that he has been a “resident” of the state for a period of at least six weeks. He also offers the corroborating evidence of another person as to the length of his residence. On the witness stand he testifies that he intends to say in Nevada for an “indefinite permanent” period. The Nevada court is faced with an insuperable difficulty. It cannot know whether the plaintiff really intends to stay in Nevada or not. Only time will be able to tell. Yet at that moment it must make a decision. If it decides that the plaintiff is acting in bad faith (although it will almost never have evidence of that before it) the decree of divorce will be denied. If it decides that on the basis of all the evidence before it the plaintiff really intends to stay in Nevada for an indefinite period, the divorce will be granted. If later on it turns out that the plaintiff never intended to stay in Nevada and did not in fact stay there after the decree was entered, the judgment will be denied recognition elsewhere and possibly in the state where it was granted.\textsuperscript{15}

It seems clear that the Supreme Court has retained the principle that a valid divorce must be granted at the domicil of the plaintiff. The other requirements of the \textit{Haddock} case are gone. The defendant need not be served in the state of the forum, he need not appear in the action, nor must the forum have been the matrimonial domicil of the spouses in order that full faith and credit be given to decrees based on substituted service.

There are certain objections which can be made to the continued use of domicil as a jurisdictional requirement in divorce cases. These objections will be treated under three heads: (1) Historical, (2) Legal, and (3) Social.

\textbf{HISTORICAL}

Before the days of improved transportation no question of jurisdictional conflict seems to have existed as a conscious legal problem.

\textsuperscript{14} \textit{Nev. Comp. Laws} (Hillyer, 1929) §9460, as amended.

\textsuperscript{15} Mr. Justice Frankfurter is of the opinion that the full faith and credit clause comes into play only when the requirements of “due process” have been met, \textit{i.e.}, if there were no due process, there would be no valid decree in Nevada or elsewhere, \textit{supra} note 2, at 217, 87 L. ed. Adv. Ops. at 199. Therefore, if the Supreme Court will require that the plaintiff be domiciled in the state of the forum in order that the “due process” requirement be met, most Nevada and many other divorce decrees have no validity anywhere.
The Roman Empire, existing as a unit, recognized the validity of any of its far flung tribunals. The first recognition of this jurisdictional problem appears in the structure of the Church of Rome prior to the Reformation. This basic structure of government and division of authority remains today.

The organization of the Roman Catholic Church prior to the Reformation was as follows: There were a series of subdivisions of authority, both temporal and spiritual, from the Pope as Vicar of Christ and Supreme Head of the Church, to the Cardinals, Archbishops and Bishops. As a general rule the spiritual and temporal affairs of a diocese were concentrated in the hands of the bishop. The diocese was the Church's principal geographical division.

Included within the temporal jurisdiction of the Church, through its ecclesiastical courts (generally under the supervision of the archbishops and bishops) was the matter of marriage and divorce. The Canon Law of Rome was, of course, based on the essential principle that there could be no divorce a vincula but only a mensa et thoro.

After the Reformation and the establishment of the Church of England the principal political, geographical and spiritual subdivision of the Church remained the diocese still under the control of a bishop. Except for those matters reserved to the Crown, the Anglican Bishop controlled all of the affairs of the inhabitants of the diocese, including the matter of marriage and divorce. The jurisdiction (that is, power) of the bishop and the ecclesiastical courts to grant divorces seems to have depended upon the actual residence of the spouses in the diocese, provided that it was neither casual nor for the purposes of travel.

Ecclesiastical courts established within a diocese, or for the use of a particular diocese, applied a rule of customary law to the effect

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16 ii Digest I, 20: "Extra territorium jus dicenti imprime non paretur. Idem est, et si supra jurisdictionem suam velit jus dicere." The jurisdictional limits referred to were merely territorial.
18 Ibid., Canon 1018 et seq.
19 WHITEHEAD, CHURCH LAW (3d ed., 1911) 45 et seq.
20 COOTE, ECCLESIASTICAL PRACTICE (1846) 313-335.
22 Ibid., op. cit. supra note 20, at 103. Ecclesiastical court jurisdiction (geographical) was separated into the two provinces of the Archbishops of Canterbury and York, and these again were subdivided into the dioceses of the respective bishops. In addition to the latter, there were numerous other tribunals. The court of "general jurisdiction" was the consistorial court of the archbishops and bishops.
that the parties would not be permitted to seek a limited decree of divorce or any other relief unless they were resident within the particular diocese wherein the relief was sought. This rule, an outgrowth of the custom of the Church (as stated in Niboyet v. Niboyet) was not definitely formulated as a rule of jurisdiction covering matrimonial matters until the promulgation of the Canons of 1603. Canon No. 106 reads as follows,

"No sentence shall be given either for separation, a thoro et mensa or for the annulling of pretended matrimony, but in open court and in the seat of justice and that with the knowledge and consent either of the archbishop within his province: or of the bishop within his diocese: or of the dean of arches, the judge . . . or other ordinaries to whom of right it appertaineth, in their several jurisdictions and courts concerning them only that are then dwelling under their jurisdictions."

It seems clear that residence rather than domicil was intended as a jurisdictional test in matrimonial matters, particularly in the light of the actions of the various Church courts after the passage of this canon. 24

23 Supra note 21.
24 Carden v. Carden (1837) 1 Curt. 558; Ratcliff v. Ratcliff (1859) 1 Swa. & Tr. 467; Yelverton v. Yelverton (1859) 1 Swa. & Tr. 574; Deck v. Deck (1860) 2 Swa. & Tr. 90; Brodie v. Brodie (1861) 2 Swa. & Tr. 259; Firebrace v. Firebrace (1862) 47 L., P. D. & A. 41; Manning v. Manning (1871) L. R. 2 P. & D. 223; Corre, op. cit. supra note 20.

In the case of Yelverton v. Yelverton, the respondent was not domiciled in England or resident there; and the decision in effect was that the court had no jurisdiction to cite him (that is, no jurisdiction over him personally, as he was not resident there); and that the fact of his not being resident there was pointedly before the learned judge when he gave his judgment appears from a passage of the report, "Major Yelverton is not an Englishman, he never had a residence in England, nor was he ever guilty of any misconduct towards the plaintiff in England; and from the passage which I have read from the report of Carden v. Carden (1837) [1 Curt. 558], I infer that Dr. Lushington would have held that there was no jurisdiction unless evidence had been given of some residence in England. That foundation was laid in every case that was cited, and I cannot treat any one of them as an authority for overruling Major Yelverton's protest." Supra at 590.

Scottish cases: Although the matrimonial courts of Scotland had rather consistently held that residence bona fide was sufficient to give them jurisdiction to grant complete divorces in cases in which the parties had their domicil elsewhere, it was not until the year 1862 that the idea of a matrimonial domicil other than true domicil, and resting upon the kind of residence described previously, which had been foreshadowed in Shields v. Shields (1852) 15 Court Sess. Cas. 2nd Ser. 142, was first formulated and applied in Jack v. Jack (1862) 24 Court Sess. 2nd Ser. 467, and in Pitt v. Pitt (1862) 1 Court Sess. Cas. 3rd Ser. 106.
As has already been noted, the ecclesiastical courts in England had complete control over all matters pertaining to marriage and divorce until 1857.\(^2\) In that year all jurisdiction over divorce and over "all causes and suits and matters matrimonial" was taken from the church and vested in a court called the Divorce Court.\(^2\) This court was vested with the jurisdiction and powers of the ecclesiastical courts, the powers of the legislature to grant an absolute divorce and the powers of the common-law courts to award damages in an action for criminal conversation.\(^2\)

The language of the Matrimonial Causes Act of 1857, which cre-

\(^2\) This jurisdiction comprised suits for the restitution of conjugal rights; suits for nullity, either when the marriage was void \textit{ab initio} or when it was voidable; and suits for divorce \textit{a mens\`e et thoro} by reason of adultery or cruelty. The ecclesiastical courts could pronounce a marriage void \textit{ab initio}, and in that case the parties were said to be divorced \textit{a vinculo matrimonii}. But apparently they had no power to pronounce a divorce \textit{a vinculo} if there had been a valid marriage. (Ecclesiastical Commission 1832, 43.)

However, for a short time after the Reformation the ecclesiastic courts seemed to consider that they had this power (Marquis of Northampton's Case, Ed. VI) where the delegates pronounced in favor of a second marriage after a decree of divorce \textit{a mens\`e et thoro}; and in the Reformatio Legum the power to grant a complete divorce was recommended. Thus the Marquis of Northampton considered that the fact that his wife had committed adultery entitled him to marry again (Dasent ii 164). This opinion was, however, overruled in 1602 in Foljambe's case and Porter's case (3 Cro. 461). The latter case held that although the defendant's wife had received a divorce \textit{a mens\`e et thoro} (cause not stated in the report), this did not entitle her to marry again during the lifetime of her husband Porter.

A valid marriage, it seems, was indissoluble, except with the aid of the legislature. At the end of the seventeenth century a practice sprang up of procuring divorces by private act of Parliament (1669 Lord de Ross, 1692 Duke of Norfolk; see House of Lords MSS. 1699-1702 xii, xiii; before 1715 only five such bills were known, between 1715 and 1775 there were 60, between 1775 and 1800 there were 74, between 1800 and 1850 there were 90; in 1690 a bill was passed to annul a marriage celebrated under duress, Hist. MSS. Com. Thirteenth Rep. App. Pt. V, 217, no. 361). The bill was introduced into the House of Lords, which strictly examined the circumstances of the case. As conditions precedent, it was necessary to have obtained a divorce \textit{a mens\`e et thoro} from the ecclesiastical court, and to have recovered damages against the adulterer in an action at common law for criminal conversation.

\(^2\) 20, 21 Vict. c. 85. The Lord Chancellor, the chief justices, and the senior puisne judges of the courts of common law, and the judge of the court of probate were made the judges of the court; and the judge of the court of probate was made the judge ordinary of the court (nos. 8, 9). In some cases he could sit alone, in others he must sit with one of the other judges of the court. When he sat alone, there was an appeal to the full court (nos. 6, 7, 27, 31, 33). An appeal to the House of Lords from decisions upon petitions for dissolution or nullity of marriage was provided in (1868) 31, 32 Vict. c. 77.

The court was also vested with the powers of the common law courts to award damages in an action for criminal conversation (20, 21 Vict. c. 85 nos. 31, 33).

\(^2\) 20, 21 Vict. c. 85, nos. 6, 7, 27, 31, 33.
ated the existing courts, illustrates the previous independent jurisdiction of the ecclesiastical courts when it enacts that:

"All jurisdictions vested in or exercised by any ecclesiastical court or any person in England, etc., shall belong to and be vested in Her Majesty."

This can leave no doubt, it is felt, that the new court was in possession of the same powers formerly exercised by the ecclesiastical courts in addition to certain new ones from other sources. With the new power of complete dissolution of marriage there seems to be no reason why the new divorce court could not grant a divorce *a vinculo* to persons merely resident within their territorial jurisdiction (that is, England).

But Dr. Cheshire's view is that the Matrimonial Causes Act of 1857 established an entirely new power and jurisdiction unknown to the old ecclesiastical courts. It is his opinion apparently that the new court took nothing from the old ecclesiastical tribunal or practice which it replaced. This position, it is felt, is not in accord with the most reasonable interpretation of the facts.

The opinion of Lord Justice James in the case of *Niboyet v. Niboyet* comments with considerable force and authority on the precise proposition which confronts us. In this case a Frenchman, who was married to an English woman, had resided for one year in Newcastle-on-Tyne in his capacity as French Consul. He therefore retained a French domicil in the strict sense. Nevertheless, the English Court of Appeal held that it had jurisdiction to dissolve the marriage, on the ground that the old ecclesiastical courts, whose jurisdiction had been transferred to the civil courts by the Act of 1857, were competent to entertain suits for the restitution of conjugal rights or for divorce *a mensâ et thoro* in the case of spouses resident, though not domiciled, within the diocese. The court stated in part as follows:

"Can there be any doubt that before the English Act of Parliament transferring the jurisdiction in matrimonial causes, from the Church and her Courts to the sovereign and her Court, the injured wife could have cited the adulterous husband before the bishop, [of the diocese of her residence although she was domiciled elsewhere] and have asked either for a restitution of conjugal rights or for a divorce *a mensâ et thoro*, and in either case for proper alimony? The jurisdiction of the Court Christian was a jurisdiction over Christians,"

who, in theory, by virtue of their baptism, became members of the one Catholic and Apostolic Church. The Church and its jurisdiction had nothing to do with the original nationality or acquired domicils of the parties, using the word domicil in the sense of the secular domicil. . . .

"It seems clear that persons resident in England, if such residence was not casual, were permitted to present to the proper ecclesiastical court for such matrimonial relief as the Court Christian was then competent to give (citations supra). Therefore it would follow that if such a person could present a petition upon the basis of residence for a divorce a mensa et thoro, such a petition might be presented to the new court which, according to the very wording of the act quoted above [Matrimonial Causes Act] takes over the entire jurisdiction and procedure of the old ecclesiastical court with respect to matters matrimonial." 29

Dr. Cheshire, as we have noted above, does not follow this line of argument. He says, "However, the doctrine that residence short of domicil suffices to render an English court competent to decree divorce was definitely and finally exploded by the decision of the Privy Council in Le Mesurier v. Le Mesurier. This case decided that domicil, in the true and full sense of the term, of the husband at the time of the suit is the sole test of jurisdiction." 30

What then is the origin of this doctrine of domicil? In the Le Mesurier case the court cited as authority for its decision Huber, 31 Rodenburg, 32 and Von Bar. 33 The latter states "... that in actions of divorce—unless there is some express enactment to the contrary—the judge of the domicil or nationality is the only competent judge."

And, he adds, "A decree of divorce, therefore, pronounced by any other judge than the judge of the domicil or nationality, is to be regarded in all other countries as inoperative." 34

This latter quotation is nothing more than a description of the then prevailing legal practice. It expounds no legal concept 35 or au-

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31 DE confl. LEG. Lib. 1, tit. 3, § 2.
32 DE STAT. DIVERS. tit. 1, c. 3, § 4.
33 INTERNATIONAL LAW, PRIVATE AND CRIMINAL (Gillespie's transl. 2d ed. 1892) 382.
34 Ibid.
35 In using the word "concept," the present writer wishes to make it abundantly clear that nothing metaphysical is intended. "Notion," or "idea" might well have been used to convey the same thought. "Concept" is, or at least was, a perfectly good word until it came to signify some "vague" or "floating" collection of rules of universal application because of the "truth" of the "self-evident" proposition it expresses. The present writer is inclined to follow the lead of John Dewey and either drop the word
thority which of its own weight or inherent virtue supports the doctrine of domicil against all others. Von Bar and others do not tell us why competence in divorce jurisdiction must be confined to the judge of the nationality of the domicil; he merely states the proposition. Surely this doctrine cannot be appealed to on the ground that it dispenses social justice or solves any economic problem. Lord Penzance in Wilson v. Wilson stated,

"Different communities have different views and laws respecting matrimonial obligations, and a different estimate of the causes which should justify divorce. It is both just and reasonable, therefore, that the differences of married people should be adjusted in accordance with the laws of the community to which they belong, and dealt with by the tribunals which alone can administer those laws. An honest adherence to this principle [domicil], moreover, will preclude the scandal which arises when a man and wife are held to be man and wife in one country and strangers in another."

This statement of policy is without doubt a salutary one despite the fact that it deems the "scandal" of parties married in one country and unmarried in another much to be preferred over the "scandal" of the deserted wife who must follow her fleeing husband to his domicil in an effort to secure relief. The statement also makes the unwarranted assumption that the "scandal" referred to by His Lordship is the direct result of a lack of adherence or a dishonest adherence to the principle of domicil.

But does this reasoning by Lord Penzance preclude the assumption of jurisdiction on the basis of residence of the spouses? Parties are certainly part of a community in fact, when their residence within that community is neither casual nor merely for the purposes of travel. The actual fact of continued residence fuses them into the community of the moment far more than does some vague "floating" subjective intent to return to a formal locale at some future time.

The English courts which adopted domicil as the jurisdictional test appear to rely for their authority on certain alleged controlling

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36 The terms "competence" and "jurisdiction" have sometimes been used interchangeably. This is rarely a correct usage. What Von Bar means here is that the court of the nationality of the domicil is the only one which can give a decree validity everywhere including the state of the forum.

37 Cook, LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS (1942) 200-206, discusses social objections to use of domicil as a basis for jurisdiction in divorce.

38 (1819) L. R. 2 P. & D. 442.

39 See Cook, op. cit. supra note 37, at 455-56.
and accepted principles of International Law, the precedents of the American courts, and text writers.

It does not appear, however, that the courts have anywhere produced an established rule of International Law which would demand the use of domicil or nationality as a test of self-competence in all matrimonial matters to the exclusion of all others.

Bishop argues that only domicil or nationality are proper jurisdictional bases in matters of this class. He relies for his authority on the following language of Chief Justice Taney of the United States Supreme Court:

“Every State has an undoubted right to determine the status, or domestic and social condition of the persons domiciled within its territory.”

Bishop admits that the proposition as laid down by the Court was applied only between the states of the Federal Union and to the single issue of slavery but feels that it admits equally of the broader application he gives it. Assuming that proposition for the sake of the discussion here, it still does not follow that residence is not a possible ground for determining domestic and social conditions.

Burge, also cited by Bishop for this rule of jurisdiction, leads us to the end of the trail, the discovery of the original proponent of this domicil doctrine, Justice Story. In his writings is found the rule upon which most of the cases and writers cited above ultimately rest their stand.

The word “ultimately” in the preceding sentence is used advisedly for the reason that Justice Story himself asserts as his authority for the use of domicil one of his postulates that it is “... the familiar and well settled principle of International Law, that each nation has an exclusive sovereignty within its own territory...”

The logical inconsistencies and inarticulate assumptions of

40 Bishop, Marriage and Divorce (5th ed. 1873) 125.
41 Burge, Colonial and Foreign Law (1907) 57, 58.
42 Story, Conflict of Laws (1852) § 230a. “Upon the whole, the doctrine now firmly established in America upon the subject of divorce is, that the law of the place of the actual bona fide domicil of the parties gives jurisdiction to the proper courts to decree a divorce for any cause, allowed by the local law without any reference to the law of the place of the original marriage, or the place, where the offense, for which the divorce is allowed, was committed.”
Justice Story's postulates have been graphically demonstrated by Professor Cook. 43

LEGAL

Has a state the power within its own borders to divorce a couple, only one of whom is physically present within the state? The question answers itself—a state has the power (subject to constitutional limitations) to do anything it pleases within its own borders. It can successfully tax people who are merely residents; 44 it can convict for crime or give judgment for torts although the act which caused the injury was performed in another state; 45 it will permit the maintenance of an action, all the facts and deeds concerning which occurred in another state or states. 46 It seems futile to argue that a state does not have "legal power" to do that which it has successfully done. 47 Of course, as has been stated above, the granting of a divorce to a person admittedly only resident in a state where the defendant has not appeared or been served personally within the jurisdiction might be considered a denial of due process. 48 But since the Supreme Court has many times held that "true domicil" 49 is not essential before a state may tax, 50 it is difficult to see how a divorce granted on the basis of residence alone would constitute a denial of due process insofar as

43 Cook, op. cit. supra note 37, at 48. In this chapter, Professor Cook demonstrates the inadequacies of Story's postulates as a comprehensive description of what courts actually do and the dangers of "logical deduction" from those postulates.

44 Cal. Stats. 1935, p. 1090, §2K, as amended. Provisions for taxing persons merely resident within a state, similar to the California statute, may be found in almost every other state.


47 The "legal power" of a state is nothing more than a description of what the courts and legislature of that state do without their acts being rendered void by the United States Supreme Court. The existence of "legal power" may be discovered by its exercise by a court or legislature.

48 See note 15, supra.

49 The words "true domicil" are enclosed in quotes for the reason that the classical definition of the term by Story, Beale, and others does not permit a person to have more than one domicil at the same time. The word "true" is used advisedly.

the validity of the divorce within the state of the forum is concerned.51

Professor Walter Wheeler Cook in his book on Conflicts discusses this question of legal power and, pursuing a completely functional approach, concludes that a state has legal power to do that which it has done without successful contest—a conclusion arrived at by going through certain operational steps, that is, the examination of judgments of courts rather than the reasons courts sometimes give for the things they do.52

SOCIAL

In his dissent in the Williams case, Mr. Justice Jackson objects to the Court's decision on the ground that it has the effect of repealing the divorce laws of every state in the Union except Nevada. This objection can only be regarded as a social one, since the Court has never before expressed any doubt of or concern with varying state laws or people who go from state to state to evade the harsh provisions of the statutes of their state of origin. Corporations have been known to incorporate in states other than that in which they propose to do business. Why? To avoid the undesirable features of the incorporating laws of the state where the business is to be performed. Yet no charge has been made that the incorporating statutes of every state except Delaware have been repealed. Many people have established residences in the community property states solely for tax purposes.53 The fact is that under our federal system people may move around from state to state and subject themselves to different laws merely because they have changed their residence. Erie Railroad v. Tompkins54 recognized the fact that persons suing on identical facts in federal courts located in different states may receive different judgments.

It has been considered socially and economically proper for a state to legislate concerning the things with which it has some contact. By insisting on domicile as a jurisdictional requirement to full faith

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51 Assuming of course that the statute of the state required the giving of notice to the defendant and that such notice, or at least a reasonable opportunity to learn about the action and to defend it, was given.
52 Cook, op. cit. supra note 37, at 71.
54 (1937) 304 U. S. 64.
and credit, the Court continues adherence to a standard which often results in fraudulent or perjured testimony. To come within the test of domicil, a plaintiff must swear that his residence within the state of the forum is for an "indefinite period". No rule so artificial in character and so productive of disrespect for the law is proper from a social point of view.

It is undoubtedly true that the state is interested in the maintenance of the marriage relationship. But it is certainly not within the function of the United States Supreme Court to raise the divorce requirements of the nation by refusing to grant full faith and credit to the divorce decrees of a state where divorce is easy of access.

It is the duty of the individual state to see that its own standards are high if it believes that difficult divorce procedures will improve the marital standards of the state. Although the present writer is now well beyond his depth, he feels that improvement and maintenance of marriage is a far too difficult and fundamental matter to be solved by legislation making divorces difficult to obtain.

Whether divorces are desirable or not is strictly beside the point. The question is whether there is any social objection to permitting Nevada to grant a decree of divorce solely on the basis of residence of the plaintiff. Both dissents in the Williams case make the point that a "North Carolina" marriage has been destroyed; that a North Carolina home has been broken up, and so on. In answer, the majority opinion pointed out that the purpose of our constitutional system and particularly the full faith and credit clause was intended to make one nation and to reduce the heretofore sovereign states to a lesser position within the framework of the general union with each "state" recognizing the acts of a sister state. The language of the full faith and credit clause is broad: "Full Faith and Credit shall be given in each State to the Public Acts, Records and Judicial Proceedings of every other State." It is not qualified. How can it be said that the marriage in the Williams case was a North Carolina marriage without giving North Carolina a degree of sovereignty over that marriage relationship that antedates the Constitution? There are certain

55 "State" is used here in the broad sense meaning an organized community or section of that community having control of marriage and divorce.

56 Of course this sentence is nothing more than convenient "shorthand". The decree of divorce under discussion must have been granted after the usual hearing on the merits, notice to defendant and all the other requirements of "due process".

fields of legislative activity which have been reserved to the states, but the present writer does not believe that it was ever intended that one state should retain so much of its "sovereignty" as to be able to completely control a marriage to the extent of preventing another state from dissolving the marriage merely because the spouses lived in the first state for a longer period of time without any specific intent (if they even thought about it at all) to move elsewhere.

Mr. Williams and Mrs. Hendrix went to Nevada and lived there for six weeks. In that time they gained a certain familiarity with Nevada life, customs, and so on. They retained counsel and were advised concerning the Nevada law. Through their attorneys they filed process in the Nevada courts and took the necessary steps, under Nevada law, to communicate that fact to their respective spouses in North Carolina. No charge has been made that they attempted to conceal this action from their spouses. They had a trial, during which they made showings to the Nevada court concerning their respective petitions for divorce. The court heard the evidence, considered it, and granted the decrees. It is no argument to say that the defendants were unable to defend these actions. They could have retained counsel in Nevada (as they would have had to do in North Carolina). They could have appeared specially and objected to the jurisdiction of the court or generally on the merits. Their evidence could have been introduced by way of deposition without coming to Nevada.8 (This latter point is always raised to show the unfair character of Nevada divorces.) All this seems to the present writer to constitute sufficient contact with Nevada to validate its decrees.

Have any other solutions to this problem of the interstate recognition of divorce decrees been proposed? Professor Cook has suggested two.9

The first proposal involves the case of Gould v. Gould.60 There the parties had their domicil in New York. They resided in France for a period of five years without surrendering their intention to return to the New York home. The French court, having jurisdiction over the person of both parties, granted a divorce for adultery, a ground for divorce which is recognized in New York. The New York court held that although the divorce was granted at a place other than the domicil of the planitiff, and even though it might not be

58 Supra note 14, §9001-9005.
59 Cook, op. cit. supra note 37, at 463.
60 (1923) 235 N. Y. 14, 138 N. E. 490.
required to recognize the decree (for that reason), the recognition
would be granted on the ground of comity since the parties had re-
sided in France for a period of years and the decree of the French
court was based on New York law for a cause recognized by that
law.61

Professor Cook arrives at the following propositions: "[The
court] will recognize that a valid divorce, that is, one not only locally
valid but also entitled to recognition by another state, can be granted
by the courts of a state in which the parties are not domiciled, at least
if they are actual 'residents' (and not there casually or as travelers)
and the tribunal granting the divorce does so when (1) it has per-
sonal jurisdiction of both parties and (2) it finds that the evidence
establishes a ground for divorce recognized by the domicil of both
parties." Professor Cook then adds, "If there is any reason of com-
mon sense or social policy for not recognizing such a decree as valid,
the present writer has thus far failed to discover it."

The difficulty with this solution is that (1) it introduces a new
and undesirable element into the divorce recognition question—
namely, that the evidence upon which the court grants the decree of
divorce must establish a ground for divorce recognized by the domi-
cil of both parties, or (2) it is too limited in scope to be of much
value in solving the problem. These objections will be taken up in
order.

Professor Dicey once said, "Englishmen may rejoice that our
courts have held almost unswervingly that divorce jurisdiction de-
pends wholly upon the domicil of the husband at the time of the pro-
ceedings for divorce. The confused condition of the divorce law of
the United States has not been created, though it has been still fur-
ther complicated, by the judgment in Haddock v. Haddock. Its true
origin is to be found in the doctrine, all but unknown to English law,
that husband and wife may each have a separate domicil.762"

To this Professor Bingham replied,63 "... Perhaps a jurist of
mechanistic persuasion could have participated in Mr. Dicey's com-

61 Professor Beale says the French decree was void because the parties were domi-
ciled in the United States. Void in what sense? Certainly under French law the French
court had power to divorce parties within its jurisdiction and therefore the decree must
have been valid in France at least. BEALE, TREATISE ON THE CONFLICT OF LAWS (1935)
481-482.
62 Note (1906) 22 L. Q. REV. 237, 239.
63 Bingham, The American Law Institute vs. The Supreme Court: In the Matter
placent delight in the English law of divorce; but he would have to
ignore, that is, the plight of deserted wives whose husbands have fled
to foreign parts, perhaps unknown, which has so profoundly influ-
enced our more pragmatic and sentimental American judges..."

Now Professor Cook does not propose anything as rigid as the
single domicil of husband and wife, but his insistence that the forum
have personal jurisdiction of both the spouses starts us back on the
road to the English rule. Of course, personal jurisdiction may be
secured over the defendant without his being resident in the state
of the forum, but it does require that the defendant be personally
served within the forum or that the defendant appear personally or
by counsel. The Supreme Court in the Williams case held that sub-
stituted service had fulfilled the requirements of due process where
the plaintiff was domiciled in the state of the forum. The Court's view
seems less rigid and more desirable from a social point of view than
does Professor Cook's.

Professor Cook's suggestion, if intended as all inclusive, that is,
the only situation in which a divorce can be granted which would be
entitled to recognition elsewhere, warrants criticism in that its social
effect would be bad. It would be necessary for the deserted spouse to
somehow enable some forum to get personal jurisdiction over the
deserting spouse—a situation similar to that rejoiced in by Dicey
and condemned by Bingham.

If his suggestion is limited by the proposition that when a forum
secures personal jurisdiction over both parties, its decree of divorce
should be entitled to full faith and credit (if the grounds are recog-
nized by the domicils of both parties), no objection can be made to
his conclusion. But the situation he describes is rare. Both parties
(in the cases which come before courts) are not before the court, nor
does the court often get jurisdiction over the person of the defendant.
Then Professor Cook's proposal, while having merit, would not be
applicable to many situations coming before the courts.

To the second part of Professor Cook's proposal there are a num-
ber of objections. To begin with, he sets up as a requirement for the
recognition of a divorce decree the principle that the decree must be

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64 Nor does the present writer think that Professor Bingham would call Professor
Cook a "jurist of mechanistic persuasion"; to the contrary see Bingham, supra note 63,
at 434, n. 46.
65Cheever v. Wilson (1869) 76 U. S. (9 Wall.) 108; Pennoyer v. Neff (1877) 95
granted on evidence which would constitute grounds for divorce recognized by the domicil of both parties. It has always been the present writer's understanding that one of the aims of the members of the "current but ephemeral school" who have concerned themselves with this problem was to dispense with rules for which no reason or social policy or common sense could be found. It is therefore difficult to understand why Professor Cook, one of the leading exponents of that "school" should suggest this limitation on the power of a court to grant a divorce which will be valid throughout the nation. He has elsewhere properly suggested that the ideas underlying the domicil rules are erroneous because they are based on the theory that "the differences of married people should be adjusted in accordance with the community to which they belong" and that a person's domicil may not necessarily be the "community to which he belongs". What reason exists, therefore, to insist that the grounds for divorce shall be recognized by the domicils of both parties?

On the other hand, Professor Cook may intend that decrees which were granted on grounds recognized by the domicils of both parties should be granted recognition. Then of course, the second objection noted to the first part of the proposal becomes applicable, that is, situations when a decree has been granted with both parties personally subject to the forum upon grounds recognized by the domicils of both parties will not often occur.

Professor Cook's second proposal is to the effect that many of the difficulties in this branch of the law would be eradicated if, in appropriate cases and with adequate safeguards, provisions were made for the service and execution throughout the United States of the judicial process of the states in matrimonial causes. This is an admirable suggestion. He is of the opinion that under the full faith and credit clause Congress has the constitutional power to enact such provi-

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66 The title "Current but Ephemeral School" was conceived by Beale but it has never had its principles fully expounded or its complete membership list made public. Cook and Bingham have admitted membership. Green, Llewellyn, Dewey, Radin, Cohen, Patterson and Powell (T.R.) would probably not deny it. For the views of these various scholars, see My Philosophy of Law: Credos of Sixteen American Scholars (1941).

67 Cook, op. cit. supra note 37, at 194.

68 CONFLICT OF LAWS RESTATEMENT (Am. L. Inst. 1934) §113, Com. 9.

69 The Supreme Court in the Williams case said this was unnecessary. Supra note 2, at 211, 87 L. ed. Adv. Ops. at 193.

70 Cook, op. cit. supra note 37, at 467.
visions. In this conclusion the present writer concurs. The only difficulty which can now be foreseen is the apparent unwillingness of past Congresses to legislate on matters affecting marriage and divorce.

Other proposals for the solution of this vexing problem of divorce recognition have been considered elsewhere. The present writer's position in this paper, which has been outlined at various points above, represents a shift from his previous statements on the subject. For this no apology is offered nor credit claimed.

CONCLUSION

Recognizing that "domicil" is a word to which the courts and the profession have become much attached and that the word "residence" seems to have acquired a collusive sound when used in connection with jurisdiction in divorce, and also being cognizant of the unwillingness of the bench and bar to change its semantic habits, the following suggestion is proffered. Concede that a divorce must be secured at the domicil of the plaintiff, but hold that domicil means a domicil for the purpose of divorce. This domicil for the purpose of divorce will in fact be actual residence within a state if not casual or for traveling purposes. As has been noted above, this con-

71 Ibid. at 90-107.
72 (1935) 2 Law and Contemp. Prob. 290 et seq.
73 Bingham, op. cit. supra note 63; Strahorn, A Rationale of the Haddock Case (1938) 32 Ill. L. Rev. 76; Strahorn, The Supreme Court Revisits Haddock (1938) 33 Ill. L. Rev. 412.
74 Recognition of Divorce Decrees (1939) 12 Rocky Mt. L. Rev. 16.
75 Hayakawa, Language in Action (1941) 91.
76 Dean John Henry Wigmore has long advocated the use of certain words in the law of evidence which, through careful definition, are intended to clarify the transmission of meaning in that branch of the law. Such phrases as "autoptic preference", "factum probandum", etc., have been devised and used by Dean Wigmore in the various editions of his monumental treatise. Considering the influence that Wigmore, Evidence has had upon the Anglo-American common law, it is amazing to the present writer to find that the only reference by a court, to his knowledge, to the new words and phrases quoted above reads as follows:

"While 'autoptic' is a good word, with a pride of ancestry, though perhaps no hope of posterity, the word 'preference' is a glossological illegitimate, a neological love-child, of which a great law writer confesses himself to be the father." 4 Wigmore, Evidence (3d ed. 1940) §1150, citing Morse v. Tate (1911) 10 Ga. App. 61, 72 S.E. 534.
77 The present writer has no intention of advocating the recognition of decrees secured on the basis of fraudulent residence or no residence at all. Mr. Justice Jackson goes too far when he suggests that the Supreme Court is now committed to a course of action, the logical result of which will be the recognition of decrees based on no residence at all. The Court is not and should not be so committed. The question of what
cept is not new. Multiple domicil for tax and other purposes has been recognized as meeting constitutional requirements. Then it would follow that the domicil (for the purpose of divorce) of the plaintiff would be sufficient to enable a court to grant a decree of divorce valid throughout the United States, provided of course that the substituted service on the defendant met the requirements of due process (as it did in the Williams case).

constitutes a fraudulent residence is intentionally omitted from all discussion, since it was felt that no intelligent consideration of the problem was possible in the abstract.

78 See note 35, supra; see also Cook, op. cit. supra note 37, at 196.

79 See note 50, supra; also In re Jones' Estate (1921) 192 Iowa 78. For an illuminating discussion of the question of domicil and multiple domicil, see Cook, op. cit. supra note 37, at 202-203, and Farange, Multiple Domicils and Multiple Inheritance Taxes—A Possible Solution (1940) 9 Geo. Wash. L. Rev. 375.