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## The Migratory Divorce

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# Note

## THE MIGRATORY DIVORCE

"If there is one thing that the people are entitled to expect from their lawmakers, it is rules of law that will enable individuals to tell whether they are married and, if so, to whom. Today many people who have simply lived in more than one state do not know, and the most learned lawyer cannot advise them with any confidence. The uncertainties that result are not merely technical, nor are they trivial; they affect fundamental rights and relations such as the lawfulness of their cohabitation, their childrens' legitimacy, their title to property, and even whether they are law-abiding persons or criminals. In a society as mobile and nomadic as ours, such uncertainties affect large numbers of people and create a social problem of some magnitude."<sup>1</sup>

This statement is not the complaint of a judge during the early common law period, but is taken from the dissent of Justice Jackson to a decision of the United States Supreme Court in the year 1947. Most persons acquainted to any degree with the laws in respect to recognition of divorce decrees know the causes of the apparent consternation alluded to here, but it might assist the consideration of the problem to outline briefly the development of the present situation.

The law as to recognition by one state of a divorce proceeding in another state (hereafter referred to as a foreign divorce, such being the term generally used) seemed fairly stable prior to the year 1900. In 1906 the Supreme Court decided the leading case of *Haddock v Haddock*,<sup>2</sup> which was regarded by many to have been the first stirring of mud into reasonably clear waters by the approval of the doctrine of jurisdictional fault. This was followed in 1938 by *Davis v Davis*,<sup>3</sup> which cleared the view somewhat. The husband sued the wife for divorce in that case and she appeared and contested jurisdiction. The Supreme Court held that where the jurisdictional basis for the decree had actually been contested in the divorce court proceeding, the finding of that court was a conclusive adjudication thereof, and entitled to recognition under the full faith and credit clause.<sup>4</sup>

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<sup>1</sup> Jackson, J., dissenting in *Estin v. Estin*, 334 U. S. 541, 553, 92 L. Ed. 1561, 68 S. Ct. 1213, 1 A.L.R. 2d 1412 (1947).

<sup>2</sup> 201 U. S. 562, 50 L. Ed. 867, 26 S. Ct. 525 (1906).

<sup>3</sup> 305 U. S. 32, 83 L. Ed. 26, 59 S. Ct. 3, 118 A.L.R. 1518 (1938).

<sup>4</sup> U. C. CONST. ART. LV sec. 1: "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."

The *Davis* decision was followed by the notorious case of *Williams v. North Carolina*.<sup>5</sup> Petitioner Williams was married in North Carolina and lived there with his wife until May, 1940. Petitioner Hendrix was married in North Carolina and lived there with her husband until the same date. At that time the petitioners went to Nevada, and each filed a divorce action there. Defendants in these actions did not appear and were not personally served in Nevada. One was served by publication and by mail; the other was served in person in North Carolina. In both cases the Nevada court found the petitioner to be a *bona fide* and continuous resident of the State of Nevada, and granted a divorce. The petitioners were married immediately thereafter, and returned to North Carolina, where they lived together until indicated for bigamous cohabitation. They were tried and convicted. Upon appeal to the Supreme court of North Carolina, the conviction was affirmed,<sup>6</sup> it being held that, by reason of the decision in *Haddock v Haddock*,<sup>7</sup> North Carolina was not required to recognize the Nevada decree under the full faith and credit clause of the Constitution. Upon appeal to the Supreme Court, a momentous decision was written. In its main points, the majority held, (1) that jurisdiction in divorce cases is partially *in rem* and partially *in personam*; (2) that "residence" requirements generally used in state statutes really require "domicile," and where the issue of domicile is not raised in a later adjudication, it must be assumed that the finding by the foreign divorce court of domicile in the plaintiff is correct; (3) that where the plaintiff is a domiciliary of the court rendering the divorce, constructive service on the defendant spouse meets the requirement of due process, where such is provided for by statute; (4) that jurisdictional fault is no longer a part of the divorce law;<sup>8</sup> and (5) that conceding that the plaintiff was a domiciliary of the divorce court, and the defendant spouse had been reached by constructive service in accordance with state statute, the court of a sister state had no alternative but to recognize the divorce as valid, since the full faith and credit clause of the Constitution applied. *Haddock v Haddock* was expressly overruled, and the case was remanded.

Upon retrial,<sup>9</sup> it was decided by the North Carolina court that no *bona fide* domicile was acquired in Nevada. On appeal,<sup>10</sup> the Supreme

<sup>5</sup> 317 U. S. 287, 63 S. Ct. 207, 87 L. Ed. 279, 143 A.L.R. 1273 (1942).

<sup>6</sup> *State v. Williams*, 220 N. C. 445, 17 S. E. 2d 769 (1941).

<sup>7</sup> See note 2, *supra*.

<sup>8</sup> 317 U. S. 287, 301: " 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."

<sup>9</sup> *State v. Williams*, 224 N. C. 183, 29 S. E. 2d 744 (1944).

<sup>10</sup> 325 U. S. 226, 89 L. Ed. 1577, 65 S. Ct. 1092, 157 A.L.R. 1366 (1944).

Court held that the decree of the divorce was " a conclusive adjudication of everything except the jurisdictional facts upon which it is founded, and domicile is a jurisdictional fact "11 and that the sister state, in the interest of protecting its own domiciliaries, can ascertain for itself the truth or existence of that crucial fact.

Justices Douglas, Black and Rutledge dissented. However, *all* of the justices concurred in a subsequent case involving many of the same factors—that of *Esenwein v Pennsylvania*.<sup>12</sup> There the wife, after a separation, secured a separate maintenance decree in Pennsylvania. Later the husband went to Nevada and filed suit for divorce upon the expiration of six weeks' residence. After a Nevada divorce was granted the husband moved to Ohio, and subsequently petitioned the Pennsylvania court to vacate the prior separate maintenance decree, alleging his Nevada divorce and relying upon the first *Williams* case. Jurisdiction of the Nevada court to grant the divorce was questioned by the wife and it was held by the Pennsylvania court that the husband was not domiciled in the divorce court's jurisdiction when the divorce was rendered, and therefore full faith and credit need not be given.<sup>13</sup> Upon appeal, the Supreme Court unanimously affirmed.<sup>14</sup> Accounting for their concurrence in this decision, as contrasted with their dissent in the second *Williams* case, Rutledge agreed with Black and Douglas that " the jurisdictional foundation for a decree in one state capable of foreclosing an action for maintenance or support in another may be different from that required to alter marital status with extra-territorial effect."<sup>15</sup> Such a distinction is unsound on its face, since the same rule should govern both civil and criminal case.

Shortly after this, two companion cases, *Sherrer v Sherrer*<sup>16</sup> and *Coe v. Coe*,<sup>17</sup> reached the Supreme Court. The facts in these two cases were substantially the same, involving an appearance by the contesting party and an adjudication of jurisdictional domicile, but with no contest thereof. The only substantial distinction between the two cases was that in the latter the question of jurisdiction was later raised by the party who secured the divorce on a counter-claim. The Supreme Court held in both actions that there is nothing in the con-

<sup>11</sup> *Id.* or 232, 89 L. Ed. at 1583, 65 S. Ct. at 1096, 157 A.L.R. at 1371.

<sup>12</sup> 325 U. S. 279, 89 L. Ed. 1608, 65 S. Ct. 1118, 157 A.L.R. 1396 (1945).

<sup>13</sup> 348 Pa. 455, 35 A. 2d 335 (1944).

<sup>14</sup> See note 12, *supra*.

<sup>15</sup> 325 U. S. 279, 283, 89 L. Ed. 1608, 1611, 65 S. Ct. 1118, 1120, 157 A.L.R. 1396, 1399 (1945).

<sup>16</sup> 334 U. S. 343, 92 L. Ed. 1429, 68 S. Ct. 1087, 1 A.L.R. 2d 1355 (1947).

<sup>17</sup> 334 U. S. 378, 92 L. Ed. 1451, 68 S. Ct. 1094, 1 A.L.R. 2d 1376 (1947).

cept of due process which demands that a defendant be afforded a second opportunity to litigate the existence of jurisdictional facts, and therefore jurisdictional domicile could not be denied once an opportunity had been offered and the defendant had appeared in the proceedings.<sup>18</sup> Dissent in both cases was to the effect that an appearance is not necessarily an adjudication of jurisdictional facts, and that such a decision as was here rendered would throw open the doors for collusion.

The next two companion cases to be brought before the Supreme Court which merit attention were *Estin v Estin*<sup>19</sup> and *Kreiger v Kreiger*,<sup>20</sup> the decisions of which have been vigorously criticized by many writers. Both cases involved decrees of separate maintenance followed by *ex parte* foreign divorces. It was held that the prior decrees survived the divorces. This was in the face of the fact that in the first case the decision was that of a New York court which had consistently held that a separate maintenance decree did not survive an absolute divorce granted in New York.<sup>21</sup> In the latter case the wife did not in any manner contest the validity of the foreign decree, nor did she question the husband's jurisdictional domicile.

In a forceful dissent, in the *Estin* case, Justice Jackson said,<sup>22</sup>

"The Court reaches the Solomon-like conclusion that the Nevada decree is half good and half bad under the full faith and credit clause. It is good to free the husband from the marriage; it is not good to free him from incidental obligations. Assuming the judgment to be one which the constitution requires to be recognized at all, I do not see how we can square this decision with the command that it be given *full* faith and credit."

The only other case which merits consideration in viewing the problem is that of *Rice v Rice*.<sup>23</sup> There the husband secured a foreign divorce with service by publication, remarried, and moved to a third state. Following his death shortly thereafter, both his former wife and the woman he subsequently married claimed the rights of widow in his property. The court held for his former wife, on the ground that he had not acquired a domicile in the foreign state to give the divorce court jurisdiction. The Supreme Court held in a *Per Curiam* opinion

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<sup>18</sup> This represents a tendency toward liberalization. The former decision on this point—*Davis v. Davis*, *supra*, note 4—was interpreted as holding that such was conclusive, but *only* if there was an actual contest of such facts in the divorce proceedings.

<sup>19</sup> See note 1, *supra*.

<sup>20</sup> 334 U. S. 555, 92 L. Ed. 1572, 68 S. Ct. 1221 (1947).

<sup>21</sup> 296 N. Y. 308, 73 N. E. 2d 113 (1947).

<sup>22</sup> 334 U. S. 541, 554, 92 L. Ed. 1561, 1571, 68 S. Ct. 1213, 1221 (1947).

<sup>23</sup> 335 U. S. 842, 93 L. Ed. 770, 69 S. Ct. 751 (1948).

(five to four) that the full faith and credit clause did not preclude the court from making this determination.

Although he did not like the manner by which the divorce was reached, Justice Jackson dissented on the basis of the first Williams case, saying,

"This Court is not responsible for all the contradictions and conflicts resulting from our federal system or from our crazy quilt of divorce laws, but we are certainly compounding those difficulties by repudiating the usual requirements of procedural due process in divorce cases and compensating for it by repudiating the Full Faith and Credit Clause."<sup>24</sup>

To summarize, a divorce proceeding is still considered to be *quasi in rem*. It may be brought by either spouse, irrespective of whose fault occasioned the marital rift, in a jurisdiction where he or she has a bona fide "domicil." It is not requisite that the defendant spouse appear in the proceedings in order to entitle the decree to recognition and effect in another state under the full faith and credit clause, since constructive service in accordance with state statute is regarded as sufficient to satisfy the requirement of due process. The finding of the jurisdictional fact of bona fide domicil by the divorce court is *prima facie* evidence of such fact in any subsequent proceedings, and the burden is on the contesting party to overcome such evidence. The jurisdictional fact of bona fide domicile *can* be questioned by the defendant spouse, however, unless jurisdiction was secured of his or her person by the divorce court. In the event that it was, the adjudication of these jurisdictional facts is a bar to attack except on appeal, even though no issue was raised thereon by the pleadings or the evidence.<sup>25</sup> Further, the marital status is regarded as separable from the property rights arising out of the marriage, and a decree which effectively dissolves the marriage does not necessarily destroy these property rights.

Is the present state of the law as to migratory divorce sufficient motivation for a change, or should the law remain in its present condition, to be changed only by subsequent decisions in the due course of time? The argument most often offered for a change in the law is that such anomalous phenomena as a man with two wives, or a woman with two husbands—one relationship valid here, and the other valid

<sup>24</sup> 335 U. S. 842, 93 L. Ed. 770, 774 (1948).

<sup>25</sup> *Sherrer v. Sherrer*, 334 U. S. 343, 351 (1948): "the requirements of full faith and credit bar a defendant from collaterally attacking a divorce decree on jurisdictional grounds in the courts of a sister State where there has been participation by the defendant in the divorce proceedings, where the defendant has been accorded full opportunity to contest the jurisdictional issues, and where the decree is not susceptible to such collateral attack in the courts of the State which rendered the decree."

there—must be removed from the law. Also, it has been suggested that the treatment presently given occasions bickering and bad feeling between the state courts, and between the states. Another contention often advanced is that the unusual holding that property rights and marital rights may be separated, the former being permitted to exist without the latter, has no sound basis in logic of law.

The opponents of change are not without arguments to support their view. They maintain that blanket recognition of all divorces would entail the undesirable consequences of a divorce practically at will, and in particular that fair and substantial opportunity would not be given to the defendant spouse to litigate the merits or the jurisdiction of the court to grant the divorce. They further allege that the result of many of the modifications suggested would impair the fundamental concept of marriage as something more than a mere contract. They also avow that protection should be afforded to those who remain at *home* at least as much, if not more, than it is to those who *leave*.

It is doubtful that any solution to the problem of migratory divorce is readily available, though several have been suggested.<sup>26</sup> In 1948 the McCarran bill<sup>27</sup> was proposed by its author "to further implement the full faith and credit clause of the Constitution." In effect, this requires that full faith and credit be given to a divorce decree, provided: (1) the decree is final; (2) the decree is valid in the state where rendered; (3) the decree contains recitals setting forth that the jurisdictional prerequisites of the state to the granting of the divorce have been met; and (4) the state where the decree was rendered was the last marital domicile of the spouses, or the defendant was personally subject to the jurisdiction or appeared generally in the proceedings. In all such cases except cases involving intrinsic fraud in the recitals of the decree of divorce, the decree shall constitute a conclusive determination of the jurisdictional facts necessary to the decree. Although this would increase the certainty of recognition of divorce decrees where the standard of the McCarran bill is met, it merely establishes a standard. Where this standard is met, complete recognition is insured. Compliance is not required, however, and where the standard is not met, the

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<sup>26</sup> For a discussion of procedural changes advocated for divorce in general, see *New Procedures and Attitudes Suggested Toward Marriage and Divorce*, 32 JOURNAL OF THE AM. JUDICATURE SOCIETY 38 (August, 1948). In regard to the much discussed migratory divorce problem, Judge Alexander says: "when it is considered that migratory divorces constitute only a small fraction of the grand total one wonders if it isn't a case of the tail trying to wag the dog." He sums up the present state of divorce law under the sub-title "Utter Imbecility of Present Law," a designation with which this writer wholly agrees.

<sup>27</sup> As cited in 1 OKLA. L. REV. 151, 162, n. 51 (1948).

existing law presumably will apply. Alteration of existing state law as to grounds for divorce or residence requirements is not essential. Further, it is not certain that the Supreme Court would recognize the act as constitutional. It might also be noted that the act reintroduces the concept of "marital domicile."

Another type of federal legislation has been suggested by Professor Franklin,<sup>28</sup> although this is admittedly a partial solution only. It would (1) change the requirement of domicile to residence, (2) require a minimum residence of six months or a year for full faith and credit divorces (although it would not affect "local" or "intrastate" divorces), and (3) would require only residence of the plaintiff plus the "best possible notice to the defendant under the circumstances"—in accord with the principles laid down in the first Williams case—rather than marital domicile or personal jurisdiction as required by the McCarran bill. The author of this bill admits that its constitutionality is open to question.<sup>29</sup>

It would seem that no completely satisfactory solution to the problem can be achieved without at least the assistance of a constitutional amendment. The difficulty of securing the adoption of such an amendment is illustrated by the fact that such an amendment has been periodically proposed since 1923 by the late Senator Arthur Capper of Kansas. The proposed amendment states that "the Congress shall have power to make laws, which shall be uniform throughout the United States, on marriage and divorce, the legitimation of children, and the care and custody of children affected by annulment of marriage or by divorce."<sup>30</sup>

Although this amendment is enthusiastically approved by this writer, the bill which was introduced to secure the solution of the problem,<sup>31</sup> if and when the amendment was ratified by the legislatures of three-fourths of the states, is not regarded as a solution to the problem. In that bill, six grounds for divorce are provided, but there is no requirement that either plaintiff or defendant be a resident of the state in which the divorce is sought. If the defendant is not a resident and does not appear, the prosecuting attorney of the judicial district is required to appear and defend on behalf of the state. If successful, the plaintiff is granted an interlocutory decree which becomes final only after the lapse of one year.

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<sup>28</sup> *The Dilemma of Migratory Divorces: A Partial Solution Through Federal Legislation*, 1 OKLA. L. REV. 151 (1948).

<sup>29</sup> *Id.* at 170.

<sup>30</sup> As cited in 1 OKLA. L. REV. 151, 153, n. 7 (1948).

<sup>31</sup> *Ibid.*



It seems unlikely that an attack on any single phase of the problem will present an acceptable solution. The solution here advocated, though admittedly difficult of attainment, involves: (1) recognition of divorce as *in personam*, rather than *quasi in rem*; (2) constitutional amendment in order to permit federal control; and (3) establishment by federal legislation of divorce laws uniform throughout the United States. It is submitted that by this process, and only by this process, can the Gordian Knot of our present divorce law be cut.

It is an established fact that marriage is the foundation of society. As such, its consummation and its dissolution are of concern to the state, and equally so to the nation. It is a *personal* relation, however. The concept of such a bond resulting in the creation of a *res* separate and distinct from the parties is a holdover from former eras when much attention was given to intangible concepts which had little, if any, relationship to reality. Many of these remain in the law, although the needs of society for which they were created have long since vanished. In an excellent article on the subject, Professor Corwin said:<sup>32</sup> "The concept of the marriage status as a *res* which, the moment a divorce suit is brought, splits into two parts like a peapod, is even more absurd than the concept of 'domicile,' of which the essential element is an unprovable 'intent.'" It is not contended that marriage is a mere contract; it is indeed something more. It is, however, primarily a *personal relationship*, and it seems illogical that the state should be regarded more essential to the divorce proceedings than the defendant spouse. It is therefore advocated that the Supreme Court regard an action of divorce as being *in personam*. There has been some trend in the Supreme Court toward such a holding, and it is possible that it may yet come to pass. The concept of divisible divorce will pass with it, since the rights of both parties will be adjudicated in the single proceeding.

This alone would be wholly inadequate to solve the problem. In the absence of federal legislation, the so-called "strict" states would become refuges for stubborn and unprincipled spouses. And in order to secure federal legislation of unquestioned constitutionality, constitutional amendment is indispensable.

What should constitute grounds for divorce under this federal legislation has been the subject of much discussion. In this writer's opinion, the most reasonable suggestion is that there be only one ground—separation of the parties for a specific period with intent to

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<sup>32</sup> *Out-Haddocking Haddock*, 93 PA. L. REV. 341, 356 (1945).

abandon marital relations. The advisability of this proposed legislation has been lucidly enunciated in a recent article by a practicing attorney who speaks with the voice of experience.<sup>33</sup> In advocating such a course, Mr. Walker says:<sup>34</sup> "This is no device for making divorce easy. Neither is it a road block in the way of divorce. Present divorce laws are brutal and filthy. They also lend aid to impetuosity. Divorce, it seems, should be based on a general principle. Marriage is." He concludes by maintaining that the *right* to separate should be of equal dignity with the *right* to marry.

Separation for a period of years has been adopted as a ground for divorce in sixteen states and the district of Columbia, adoption having increased in recent years. The period required varies; it is ten years in two states and two to five years in others.<sup>35</sup> A shorter period than that required by most states having such laws would seem warranted; two years of separation should be a sufficient requirement. Few couples who have separated are reconciled after such a period, unless a divorce "clears the marital air," as it sometimes does. At the expiration of such a period both parties have had adequate time to reach a choice between continuance or dissolution of the relationship. Since no other grounds will be available, impetuosity is quashed. Further, affianced couples are notified in advance that a two-year period of adjustment is in prospect; they can no longer rush into marriage with the expectation of securing a "quickie" divorce and moving on to greener pastures if their marital relationship should falter in the early stages. As was previously stated, this suggested federal legislation is not a "road block," neither is it a "device for making divorce easy."

It is contended that such changes will answer the arguments both *pro* and *con* regarding modification of the present migratory divorce law.<sup>36</sup> Though arduous, such a solution is far from impossible. The United States is in the throes of a social awakening, where social customs and mores no longer adequate are being discarded, and adjustment of social usage to basic needs and the realities of life is in progress. We must not be content to alter the surface and leave untouched our outmoded laws in regard to the family.

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<sup>33</sup> Walker, *Our Present Divorce Muddle: A Suggested Solution*, 35 A.B.A.J. 457 (June, 1949).

<sup>34</sup> *Id.* at 457.

<sup>35</sup> See Note, 97 PA. L. REV. 705 (1949), for a discussion of the present state of separation laws.

<sup>36</sup> In this respect, it might be helpful to reread the arguments as set forth *supra*.