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ERNEST G. LORENZEN

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ERNEST G. LORENZEN†

Williams v. North Carolina I [1] simplified the law on interstate divorce by compelling the recognition of foreign divorces if the petitioner was domiciled in the state granting the divorce, and without reference to which of the spouses was at fault. In doing so, it overruled the doctrine of the *Haddock* case,[2] according to which the domiciliary state of the respondent, who was not personally before the divorce court, need not recognize the foreign divorce. It also did away with the special doctrine laid down in *Atherton v. Atherton*,[3] which made the recognition of the foreign decree upon substituted service compulsory if it was rendered by the courts of the last matrimonial domicil, that is, of the state in which the parties last lived together as husband and wife.

Williams v. North Carolina I was tried on the assumption that North Carolina had the power under the *Haddock* doctrine to attack the Nevada decree because the Nevada court had no personal jurisdiction over the respondent. For that reason it did not challenge the finding of the Nevada court that the petitioners had acquired a domicil in Nevada. The Supreme Court of the United States did not find it necessary, therefore, to discuss the subject of domicil as a prerequisite for divorce jurisdiction. The existence of domicil in Nevada became the decisive issue upon review by certiorari, in *Williams v. North Carolina II*,[4] of the judgment of the Supreme Court of North Carolina which convicted the Nevada divorcees of bigamous cohabitation.[5]

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†Edward J. Phelps Professor of Law, Emeritus, Yale Law School.

1. Williams v. North Carolina, 317 U. S. 287 (1942). See Lorenzen, *Haddock v. Haddock Overruled* (1943) 52 YALE L. J. 341.

2. Haddock v. Haddock, 201 U. S. 562 (1906).

3. Atherton v. Atherton, 181 U. S. 155 (1901).

4. Williams v. North Carolina II, 65 Sup. Ct. 1092 (U. S. 1945).

5. The charge to the jury by the trial court is summarized in the opinion of the Supreme Court as follows: "The trial court charged that the State had the burden of proving beyond a reasonable doubt that (1) each petitioner was lawfully married to one person; (2) thereafter each petitioner contracted a second marriage with another person outside North Carolina; (3) the spouses of petitioners were living at the time of this second marriage; (4) petitioners cohabited with one another in North Carolina after the second marriage. The burden, it was charged, then devolved upon petitioners 'to satisfy the trial jury, not beyond a reasonable doubt nor by the greater weight of the evidence, but simply to satisfy' the jury from all the evidence that petitioners were domiciled in Nevada at the time they obtained their divorces. The court further charged that 'the recitation' of *bona fide* domicil in the Nevada decree was 'prima facie evidence' sufficient to warrant a finding of domicil in Nevada but not compelling 'such an inference.' If the jury found, as they were told, that petitioners had domicils in North Carolina and went to Nevada 'simply and solely for the purpose of obtaining' divorces, intending to return to North Carolina on

The Supreme Court of the United States affirmed the convictions, with Mr. Justice Frankfurter speaking for a majority of six. "North Carolina," he says, "did not fail in appreciation or application of federal standards of full faith and credit. Appropriate weight was given to the finding of domicil in the Nevada decrees, and that finding was allowed to be overturned only by relevant standards of proof. There is nothing to suggest that the issue was not fairly submitted to the jury and that it was not fairly assessed on cogent evidence."[6]

Mr. Justice Rutledge, dissenting, contended that domicil as a test for the recognition of judgments of sister states had been imported into the Constitution by the judges and had outlived its usefulness; that the decrees of divorce, being valid in Nevada, were entitled to full faith and credit in the courts of all sister states, but that, if *full* faith and credit were not to be accorded them, the constitutional policy should at least be approximated by not allowing a denial of full faith and credit by any standard of proof less than that generally required to overturn or disregard a judgment upon direct attack.[7]

Mr. Justice Black in a dissenting opinion, in which he was joined by Mr. Justice Douglas, charged the majority of the Court with having made domicil a purely federal question, whereas the full faith and credit clause of the Constitution and the supporting act of Congress had declared it to be a state question; he also criticized making domicil an indispensable requirement under the due process clause by regarding the Nevada divorce invalid in Nevada, and objected most vigorously to this latest expansion of federal power by adding a new content to the due process clause.

Approval of the decision in *Williams v. North Carolina II* depends in the first place upon one's personal reaction to divorce in general, and to migratory divorce in particular. If one does not believe in "easy" divorce, one would readily concede that the Nevada divorce of North Carolinians after a six weeks' stay in Nevada is not entitled to recognition. On the other hand, if one feels that spouses should be allowed to terminate their marriage relationship when reasonable grounds for such desire exist and the divorce law of the state in which they live is very restrictive, one naturally sympathizes with their attempt to seek such divorce under the law of some state having a more liberal divorce policy.

Looked at solely from the standpoint of the individuals involved,

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obtaining them, they never lost their North Carolina domicils nor acquired new domicils in Nevada. Domicil, the jury were instructed, was that place where a person has voluntarily fixed his abode . . . not for a mere special or temporary purpose, but with a present intention of making it his home, either permanently or for an indefinite and unlimited length of time." *Id.* at 1097–8.

6. *Id.* at 1098.

7. *Id.* at 1109.

without regard to state and national interests, the majority view seems very severe. We have here two persons convicted of bigamy and sent to prison because they took advantage of the divorce laws of a sister state, no doubt under the advice of counsel that the Nevada divorce would be recognized as valid in North Carolina. Acting upon that advice, they went to Nevada, stayed there the requisite time of six weeks, complied with the Nevada law in all respects, obtained their divorces, married each other in Nevada in conformity with Nevada law, and then returned to North Carolina as husband and wife. One would think, then, that the parties having obtained a divorce in a sister state through regular judicial proceedings, they were free to remarry in Nevada, and that having entered into a lawful marriage in Nevada, their status should be recognized everywhere in this country. To the observation that the Nevada divorce legislation was motivated by commercial and financial considerations,[8] for the very purpose of attracting non-residents, the supporters of this view reply by calling attention to the fact that the six weeks' residence requirement is interpreted by the courts of Nevada as meaning domicil and that the establishment of such domicil has to be proved at the trial in Nevada before the divorce is granted. That being the case, the conclusion is drawn that Nevada has acquired with respect to the marital relations of the parties the interest formerly possessed by the State of North Carolina and still possessed by that state with reference to the other spouses.

Such argumentation is, however, largely fictitious. It has been estimated that 8,616 divorces were granted in Nevada in 1942 and 11,399 in 1943,[9] the great majority of which must have been obtained by non-residents who went to Nevada solely for divorce purposes, remaining there only the required six weeks. All the while they contemplated returning to their home states immediately after their divorces were secured, yet they all swore falsely that they intended to make Nevada their permanent home, having been warned by local counsel that, unless they did so, they would be out of court. On advice of counsel they also took steps which would be accepted by the Nevada courts as corroborating their sworn statement but were actually nothing more than sham and camouflage. Upon such evidence the courts find that they acquired a Nevada domicil.

The naked fact in these migratory divorce cases is that no bona fide domicil is established in Nevada. The same was true in *Williams v. North Carolina II*. That being the case, and in the absence of other bases for the jurisdiction of the Nevada courts, a divorce decree in such circumstances appears more like an interference by Nevada in the

8. In 1943 it is estimated that Nevada received more than $500,000 in divorce fees. See RABEL, THE CONFLICT OF LAWS—A COMPARATIVE STUDY (1945) 394, n. 18.

9. *Ibid.*

marital relations of North Carolinians than, as Justice Black claims, an unwarranted assumption of power on the part of North Carolina "to regulate marriages within Nevada's territorial boundaries." [10] However, the harshness of the result in such cases, leading to conviction of bigamy and bastardization of later offspring might lead one to sympathize with the minority of the Supreme Court for their efforts to find ways and means to reverse the judgment of the Supreme Court of North Carolina. They point out that, the existence of domicil having been found by the divorce court in Nevada and recited upon the record, the burden of disproving the establishment of a Nevada domicil should have been upon the State of North Carolina,[11] and that the charge to the jury had failed to impose such burden.[12]

According to Mr. Justice Black the judgment might have been reversed also on the ground that under the particular circumstances of the case North Carolina had no longer a sufficient interest in the marital relation to be allowed to question the validity of the Nevada divorces in a criminal proceeding for bigamous cohabitation.[13] But such an argument is difficult to sustain. Says Mr. Justice White, "The principle dominating the subject is that the marriage relation is so interwoven with public policy that the consent of the parties is impotent to dissolve it contrary to the law of the domicil." [14] The state is vitally interested in the marriage relation because it affects society as a whole, its welfare and continued well-being. This interest is based upon a general public order and sound public policy, in pursuance whereof conditions are prescribed upon which persons may enter into and then dissolve the marital relation. To enforce such policy the state provides penalties for the violation of its marriage laws. As the majority of the Court assert, the state interest is not identical with that of the parties to the marital relation. The fact that in the instant case the other spouses did not object to the divorce, that one of them had died and the other remarried, would, therefore, be immaterial. Were the marriage relation not interwoven with public policy the parties would be free to terminate it at will.

The minority of the Court contend that even in the absence of the special facts referred to by Mr. Justice Black the full faith and credit clause of the Federal Constitution should prevent the State of North Carolina from challenging the Nevada divorces in a criminal proceeding. On the other hand, if the suit is one to terminate maintenance and support on account of the dissolution of the marriage, as in the case of

10. 65 Sup. Ct. at 1111.
11. See Justice Black's dissent, 65 Sup. Ct. at 1116.
12. See note 5 *supra.*
13. 65 Sup. Ct. at 1109.
14. Andrews v. Andrews, 188 U. S. 14, 41 (1903).

Esenwein v. Commonwealth of Pennsylvania,[15] decided contemporaneously with the *Williams* case, the same minority are ready to admit that the Nevada divorce decrees may be challenged on the ground that the parties had not acquired a bona fide domicil in Nevada.[16] According to this view, North Carolina must recognize migratory Nevada divorces if their non-recognition would make bigamists of the parties obtaining them if they remarry, and bastards of the offspring of their second marriage, but would allow them to be attacked on the issue of domicil where maintenance and support of the other spouse or the children are involved.

The ultimate question, therefore, is what are the respective rights,

15. 65 Sup. Ct. 1118 (U. S. 1945).

16. Mr. Justice Douglas seeks to justify this distinction in the following manner:

"I think it is important to keep in mind a basic difference between the problem of marital capacity and the problem of support.

"We held in Williams v. North Carolina, 317 U. S. 287, 63 Sup. Ct. 207, 87 L. Ed. 279, 143 A. L. R. 1273, that a Nevada divorce decree granted to a spouse domiciled there was entitled to full faith and credit in North Carolina. That case involved the question of marital capacity. The spouse who obtained the Nevada decree was being prosecuted in North Carolina for living with the one woman whom Nevada recognized as his lawful wife. Quite different considerations would have been presented if North Carolina had merely sought to compel the husband to support his deserted wife and children, whether the Nevada decree had made no provision for the support of the former wife and children or had provided an amount deemed insufficient by North Carolina. In other words, it is not apparent that the spouse who obtained the decree can defeat an action for maintenance or support in another State by showing that he was domiciled in the State which awarded him the divorce decree. It is one thing if the spouse from whom the decree of divorce is obtained appears or is personally served. See Yarborough v. Yarborough, 290 U. S. 202, 54 Sup. Ct. 181, 78 L. Ed. 269, 90 A.L.R. 924; Davis v. Davis, 305 U. S. 32, 59 Sup. Ct. 3, 83 L. Ed. 26, 118 A.L.R. 1518. 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. See Pennoyer v. Neff, 95 U. S. 714, 24 L. Ed. 565. The problem under the full faith and credit clause is to accommodate as fully as possible the conflicting interests of the two States. See Magnolia Petroleum Co. v. Hunt, 320 U. S. 430, 447, 64 Sup. Ct. 208, 217, 88 L. Ed. 149, 150 A.L.R. 413 (dissenting opinion). The question of marital capacity will often raise an irreconcilable conflict between the policies of the two States. See Williams v. North Carolina, *supra*. One must give way in the larger interest of the federal union. But the same conflict is not necessarily present when it comes to maintenance or support. The State where the deserted wife is domiciled has a deep concern in the welfare of the family deserted by the head of the household. If he is required to support his former wife, he is not made a bigamist and the offspring of his second marriage are not bastardized. In that view Pennsylvania in this case might refuse to alter its former order of support or might enlarge it, even though Nevada in which the other spouse was domiciled and obtained his divorce made a different provision for support or none at all. See Radin, The Authenticated Full Faith and Credit Clause, 39 Ill. L. Rev. 1, 28." Esenwein v. Commonwealth of Pennsylvania, 65 Sup. Ct. 1119-20 (U. S. 1945).

privileges and powers of the states of North Carolina and Nevada with respect to the marital relations of the parties before the court. Under the facts of the case, has Nevada the power to divorce the parties? Has it the power to do so, under the due process clause of the Federal Constitution, so far as the status of the parties in Nevada is concerned? Has it this power, under the full faith and credit clause, so far as the recognition of the divorce by other states is concerned? Or does the power under the latter clause depend upon who seeks to attack the divorce, the power being recognized, as the minority of the Supreme Court would have it, if the State of North Carolina challenges the validity of the decree in a criminal proceeding, but denied if the action is for support and maintenance by the other spouse or children? The Supreme Court of the United States as interpreter of the Federal Constitution being the ultimate judicial arbiter in these matters, where shall the line be drawn?

Our law is extremely liberal in providing access to our courts. Generally speaking, they are open to all, residents and non-residents, citizens and aliens. In transitory actions jurisdiction will be taken although the cause of action has no connection with the state. All that is required is personal jurisdiction over the defendant. But jurisdiction for divorce is generally regarded as requiring some close connection between the individuals involved and the state of divorce, the connecting link being either domicil or nationality.[17] In Anglo-American law domicil has been commonly adopted as the jurisdictional test.[18] It has seemed best to the English and American judges that family relations should be changed only by the courts of the state in which the parties had their home (domicil), such state having the principal interest in those relations.

But, says Mr. Justice Rutledge, the concept of domicil is too vague, for it depends upon a mental condition, which can afford no stable

17. Nationality is frequently the test in continental countries. See RABEL, THE CONFLICT OF LAWS—A COMPARATIVE STUDY (1945) 397.

18. The relinquishment of domicil or long continued residence as a requirement for jurisdiction for divorce would lead to a serious dilemma in the matter of substituted service. Under the existing order such service is permitted in actions in rem or quasi in rem because the property or status is or is deemed to be within the state. In actions in personam it is allowed where the defendant has his domicil within the state [Milliken v. Meyer, 311 U. S. 457 (1940)], (perhaps) where a non-resident conducts a business within the state, as regards causes of action arising out of that business [see Henry L. Doherty & Co. v. Goodman, 294 U. S. 623 (1935)], and under the auto statutes, where a nonresident owner of an automobile causes injury to person or property within the state [Hess v. Pawloski, 274 U. S. 352 (1927)]. Substituted service in a divorce proceeding, when the defendant is not domiciled within the state, has been justified in the past on the ground that such a proceeding relates to status, which is deemed to have a situs in the state in which either the petitioner or the respondent has his home, that is, his *fixed* connection with the state. With the abandonment of such connection there remains no basis upon which substituted service would meet our conceptions of due process of law.

test; it has been introduced into the Constitution by the judges and it is time that it should be eliminated as impractical and useless. True, domicil in this country has lost much of the stability it possessed in earlier times, and especially in England. People are in the habit of changing their homes frequently from state to state. In many cases they have homes in several states. Again, married women are permitted to have domicils different from their husbands'. Under present conditions, therefore, it is frequently difficult, if not impossible, to ascertain where the domicil of a person is. Furthermore, as the primary test of domicil is the intention to remain in the state permanently or for an indefinite and unlimited time, there is the possibility that the parties may for certain purposes claim a fictitious domicil in a state. This is especially true in matters of divorce.

What other test besides domicil could the Supreme Court adopt for jurisdiction for divorce? At this late date it could not say very well that a suit for divorce is an ordinary adversary proceeding which requires only jurisdiction over the parties. In a divorce proceeding there must be something more than mere personal jurisdiction.[19] Moreover, regarding the proceeding as one in personam would not solve the migratory divorce problem except in the cases in which the respondent is willing to appear, for under the accepted doctrines an unwilling respondent cannot be brought before the court by substituted service.

Could not mere residence on the part of the petitioner be regarded as a sufficient basis of jurisdiction for divorce, and substituted service upon the respondent be allowed? From a technical point of view the answer is probably "yes," but in my opinion the Supreme Court wisely refrained from taking this step. If the residence were for a reasonable period (in my former article [20] I suggested six months; Rabel feels that a year should be the minimum [21]), it would seem that the respondent might properly be brought into court by substituted service, in view of the fact that the petitioner would then have established a connection with the state sufficient to justify its changing his family relations. But if residence were accepted as a substitute for domicil, a state might reduce the requirement of residence to one or two days. That being the

19. Mr. Justice Douglas in Williams v. North Carolina I, 317 U. S. 287, 297 (1942), said, "We likewise agree that it does not aid in the solution of the problem presented by this case to label these proceedings as proceedings *in rem*. Such a suit, however, is not a mere *in personam* action."

Mr. Justice Frankfurter in Williams v. North Carolina II, 65 Sup. Ct. 1092, 1096 (U. S. 1945), said, "Although it is now settled that a suit for divorce is not an ordinary adversary proceeding, it does not promote analysis, as was recently pointed out, to label divorce proceedings as actions in rem."

Rabel says, "The fact is that American divorce law has outgrown the doctrine of jurisdiction *in rem*." *Op. cit. supra* note 17, at 404.

20. Lorenzen, *Haddock v. Haddock Overruled* (1943) 52 YALE L. J. 341, 352.

21. RABEL, *op. cit. supra* note 17, at 460-1.

case, the Supreme Court as arbiter between the conflicting claims of North Carolina and Nevada could not very well adopt residence as a test for the determination of the power of Nevada to grant divorces which must be accepted as binding everywhere. If the Supreme Court as such arbiter had the power to fix a period of residence sufficient to establish a serious connection between the petitioner and the state of divorce, all would be well, but this involves a legislative rather than a judicial function and is thus not available to the courts.

Depending as it does upon a state of mind, domicil admittedly does not furnish a satisfactory basis for our interstate divorce law because different courts and juries may draw different conclusions from the same facts, with the result that the divorce may be recognized in one state and not in another. The remedy, however, it would seem, does not lie with the courts, but with Congress, which can specify a period of residence which shall satisfy the full faith and credit requirements of the Federal Constitution.[22]

Mr. Justice Black strenuously objects to the expansion of federal power by the majority of the Court in making domicil the test of the validity of the Nevada divorce decrees in Nevada under the due process clause.[23] His contention is not, of course, that there should be different jurisdictional requirements for the validity of divorces under the due process clause and the full faith and credit clause; he insists, rather, that the divorce and subsequent marriage are valid under the law of Nevada and for that reason must be recognized by North Carolina under the full faith and credit clause. As the majority of the Court have held in *Williams v. North Carolina II* that domicil is the jurisdictional test for the compulsory recognition of the Nevada decrees by North Carolina, the same test should determine the validity of the divorce in Nevada under the due process clause, for under the supporting act of Congress with respect to the former clause the Nevada decrees are entitled elsewhere to the same faith and credit as they have in Nevada.

Whereas the Supreme Court of the United States has had little occasion to discuss the validity of divorces from the standpoint of due process, it has pronounced itself in a number of cases on the validity of foreign divorce decrees under the full faith and credit clause.[24] Its

22. Until Congress acts, it would seem, therefore, that the existence of a bona fide domicil in the state must remain an indispensable requisite for divorce jurisdiction. "Under our system of law," says Mr. Justice Frankfurter, "judicial power to grant a divorce—jurisdiction, strictly speaking—is founded on domicil." Williams v. North Carolina II, 65 Sup. Ct. 1092, 1095 (U. S. 1945).

23. *Id.* at 1114–6.

24. In Bell v. Bell, 181 U. S. 175 (1901), the New York courts declined to recognize a Pennsylvania divorce obtained by the husband from his New York wife, the Pennsylvania law requiring bona fide residence (domicil) for one year. The respondent was served only constructively. It was found by the Pennsylvania court that the petitioner had not acquired

latest interpretation leads to the conclusion that a divorce decree must be recognized by all other states if the petitioner has acquired a bona fide domicil in the state of divorce, even though the respondent was brought before the court only by substituted service, but that without a bona fide domicil in the state the decree need not be recognized.

The question remains whether approval should be given to Mr. Justice Rutledge's suggestion that if the test of domicil must be retained by the courts until Congress brings order into the divorce situation, the Supreme Court should not allow the Nevada divorce decrees to be attacked in other states by standards of proof other than those available in the case of direct attack.[25] If as between North Carolina and Nevada

a bona fide domicil in Pennsylvania. Under these circumstances the Supreme Court of the United States held that the divorce need not be recognized in New York.

The same conclusion was reached in Streitwolf v. Streitwolf, 181 U. S. 179 (1901); in this case the husband obtained a North Dakota divorce from his New Jersey wife. North Dakota required residence (domicil) for ninety days as a prerequisite to jurisdiction for divorce.

Andrews v. Andrews, 188 U. S. 14 (1903), held that Massachusetts was not bound by the full faith and credit clause to recognize a divorce which the husband had obtained in South Dakota, in which state neither party was domiciled, notwithstanding the fact that the wife, through her attorney, had consented to the granting of the decree.

In Atherton v. Atherton, 181 U. S. 155 (1901), the New York courts were held bound to recognize a divorce granted at the matrimonial domicil (Kentucky), in which state alone the spouses had lived as husband and wife, although the wife had left the state and resumed her former New York domicil and was served only constructively.

Haddock v. Haddock, 201 U. S. 562 (1906), decided that the New York courts need not recognize a Connecticut divorce obtained upon substituted service by the husband who had wrongfully left his New York wife but had acquired a bona fide domicil in Connecticut.

Davis v. Davis, 305 U. S. 32 (1938), held that the parties litigating the issue of domicil in the divorce court are precluded from raising the question again in another suit.

In Williams v. North Carolina I, 317 U. S. 287 (1942), the doctrine of the *Haddock* case was overruled. The establishment of a bona fide domicil in Nevada not having been challenged in North Carolina, the courts of that state were held bound to recognize the Nevada decrees, although jurisdiction over the respondents had been obtained only by substitutive service.

In Williams v. North Carolina II, 65 Sup. Ct. 1092 (U. S. 1945), North Carolina challenged the acquisition of bona fide domicil in Nevada, and the Supreme Court held that it could do so notwithstanding a finding of domicil by the Nevada courts and a recital to that effect upon the record.

25. The Nevada divorces probably can withstand a direct attack. Says Mr. Justice Black, "As I read that evidence, it would have been sufficient to support the findings had the case been reviewed by us." Williams v. North Carolina II, 65 Sup. Ct. 1092, 1114 (U. S. 1945). Indeed there is evidence in the record (though false) that the parties intended to make Nevada their permanent home, together with other fictitious corroborative testimony. Such false or fictitious testimony, however, cannot be challenged in a direct attack, the only question being whether the finding of domicil can be reasonably sustained on the evidence.

Nor can the Attorney General of Nevada bring an independent action to set aside Nevada divorce decrees for fraud or collusion. The Supreme Court of Nevada has held that the interests of the state in divorce proceedings are represented by the courts exclusively, and that the Attorney General has no power to intervene. State v. Moore, 46 Nev. 65, 207 Pac. 75 (1922).

the latter has the constitutional power to change the marital relations of the spouses through divorce *only* if the petitioner has acquired a bona fide domicil in the state, the suggestion can hardly be accepted, for it would set the seal of approval by the Supreme Court of this country upon the commercialized divorce legislation, such as obtains in Nevada. If the requirement of a bona fide domicil cannot be attacked collaterally by proof of facts occurring subsequently to the granting of the divorce, such as the fact that the party left the state immediately after obtaining the divorce, it is tantamount to holding that a residence of six weeks is sufficient without domicil, for in the great majority of cases the finding of domicil by the Nevada courts in these migratory divorces is based upon perjury and fictitious testimony. The Supreme Court certainly cannot afford to lend its hand in support of such practice. Its judicial conscience is charged with knowledge of the fact that the parties going to Nevada for a divorce intend to stay there only six weeks and then return to their former homes. That does not constitute domicil as understood in Anglo-American conflict of laws, vague and shadowy as the term may be.