THE AFTERMATH OF WILLIAMS v. NORTH CAROLINA*

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There is no topic in the conflict of laws so full of legal difficulties today as the migratory divorce problem. Williams v. North Carolina I and II have not found a solution to this problem, but still insist for the recognition of interstate divorce upon the acquisition of a bona fide domicile.

Public opinion in America has always been greatly divided on the social desirability of "easy" divorces. Early in the 19th century there was a great deal of complaint in Massachusetts concerning the "easy" Vermont divorces. Massachusetts did not allow divorce at that time for extreme cruelty, whereas Vermont did. Furthermore Vermont permitted divorce without any settled domicil.

Judge Sewell of the Supreme Judicial Court of Massachusetts, referring to the lax Vermont laws of his time, said: "The operation of this assumed and extraordinary jurisdiction is an annoyance to the neighboring states, injurious to the morals and habits of their people; and

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the existence of it is, for this reason, to be reprobated in the strongest terms, and to be counteracted by legislative provisions in the offended states."

Fifty years later Chief Justice Redfield complained of the lax divorce legislation of Rhode Island, Maine, and Indiana. In an article concerning the early cases in support of the status theory of divorce, he said: "And these decisions have all come from states which have acquired an unenviable notoriety in regard to their lax views upon the law of divorce."

The two decisions of the Supreme Court of the United States in Williams v. North Carolina have again raised the legal difficulties presented by the migratory divorce. These decisions appear to rest upon the status theory of divorce and appear to hold that if the defendant has been brought before the court constructively, the validity of the divorce depends upon whether or not the plaintiff acquired a bona fide domicil in the state.

**STATUS v. CONTRACT OR PENAL THEORY — NEW YORK**

The interstate divorce problem has been judicially considered far more frequently in New York than in any other American jurisdiction. The development of this field of law in New York is valuable background for lawyers everywhere who must consider the interstate validity of divorces.

The New York courts have up to the present time declined to accept the status theory of divorce in all of its logical implications. Early in the 19th century the New York courts required jurisdiction over the parties and over the subject-matter. By subject-matter they seem to have meant either that the marriage was celebrated in New York or that the tort was committed while the parties were domiciled in that state. The first is known as the contract theory, and the latter as the penal theory re-

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1 Barber v. Root, 10 Mass. 260, 265 (1813).
2 3 Am. L. Reg. (N. S.) 193, 217 (1864).
3 317 U. S. 287 (1942), and 325 U. S. 226 (1945).
4 For fuller discussion see Howe, Recognition of Foreign Divorce Decrees in New York State (1940) 40 Col. L. Rev. 373.
Regarding divorce. In 1816, for instance, Judge Platt stated that a divorce granted in the state in which the marriage was celebrated might be entitled to recognition. That is the contract theory of divorce. As late as 1871, Judge Parker still held to the penal theory. Suit for divorce was brought in New York by the husband. The answer was that he had established a residence in Iowa and obtained a divorce there on the ground of cruel and inhuman treatment, the wife having been served constructively only. The husband demurred to the answer and the demurrer was sustained. Judge Parker said: "On no principle can the courts of Iowa have had jurisdiction of the subject-matter of the suit in this case. The act which was the cause of the action being no wrong to the plaintiff when committed, both parties being domiciled in this state, clearly, while the plaintiff remained in this state, the courts of Iowa had no jurisdiction of it. Jurisdiction was not given to such courts of such subject-matter by the subsequent removal of the parties to that state."

By 1878, however, a new conception of what constituted the subject-matter of divorce jurisdiction had arisen in New York. In that year, Judge Folger remarked: "When the statutes of a state have conferred upon any of its courts the power to act judicially upon the matrimonial status of its citizens, or of persons within its territorial limits, and to adjudge a dissolution of the relation of husband and wife; then, we take it, such court has jurisdiction of the subject-matter of divorce. . . . Power given by law to a court, to adjudge divorces from the ties of matrimony, does give jurisdiction of the subject-matter of divorce." Apparently a court was deemed to have jurisdiction over the subject-matter of divorce if it had been given the power to deal with that question by the legislature. The problem was then only whether the de-

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3 Hunt v. Hunt, 72 N.Y. 217, 228 (1878). See also Kinnier v. Kinnier, 45 N.Y. 535 (1871).
The defendant had been brought before the court in a proper manner.

The status theory of divorce was advocated in other New York cases, due largely to the influence of the Rhode Island leading case of Ditson v. Ditson favoring that view. The status theory, however, was never accepted in New York to the full extent suggested in the Ditson case.

The legislative history in New York regarding local jurisdiction for divorce tells the same story. The New York courts have never had jurisdiction for divorce and do not possess it now solely on the ground that both parties are domiciled in the state at the time the suit is brought. The New York statutes confer jurisdiction only:

1. Where both parties were residents of the state when the offense was committed.
2. Where the parties were married within the state.
3. Where the plaintiff was a resident of the state when the offence was committed and is a resident thereof when the action is commenced.
4. Where the offence was committed within the state and the injured party is a resident of the state when the action is commenced.

From the beginning, the New York courts have never had jurisdiction solely on the basis of the status theory of divorce. Either the adultery must have been committed in New York (and the plaintiff be a resident at the time of suit), or the parties must be domiciled in New York at the time of the adultery, or the marriage must have been celebrated in New York, or the plaintiff must have been a resident of New York both at the time of the offence and the suit.

Prior to Williams v. North Carolina, the modern New York decisions presented two characteristic trends. First, they have continued to insist upon the necessity of per-

* 4 R.I. 87 (1856). Discussed infra.
* New York Civil Practice Act, Section 1147.
personal jurisdiction over the defendant. In their latest decisions this rule is applied only to New York defendants. Where the defendant has his or her domicil in some other state, the New York courts will refer to the decisions of that state. If the divorce is recognized in that state without personal service over the defendant, the New York courts will recognize it. If they do not, the New York courts will not do so. The other peculiarity is that according to a number of decisions the New York courts will not inquire whether a bona fide domicil has been acquired in the state granting a divorce, provided the defendant appeared in the proceedings. These cases are opposed, of course, to the status theory of divorce.

THE STATUS THEORY

In 1841, Story, the great authority on the conflict of laws, wrote: “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 offence for which the divorce is allowed was committed.”

This certainly looks like the status theory as it is conceived today, but apparently it was not so understood by courts or writers at the time and later. In editing the sixth edition of Story, Chief Justice Redfield stated that the accepted rule of jurisdiction “must receive this qualification that it be not extended beyond transactions occurring while the parties had a fixed and permanent domicil within the forum.” Judge Parker of New York pointed out that Story did not mean to suggest that “the cause of action can be transferred from one jurisdiction to an-

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11 Ball v. Cross, 231 N.Y. 329 (1921); Dean v. Dean, 241 N.Y. 240 (1925).
13 Story, Conflict of Laws (2nd ed. 1841) Section 230a.
14 Story, Conflict of Laws (6th ed. by Redfield, 1865) Section 230a.
other; but it is, as therein stated, the law of the place of the actual domicil of the parties which gives jurisdiction; and the jurisdiction of the subject-matter, must, of course, exist at the time of the commission of the offense which constitutes the cause of action, or not at all. The law of the place of domicil at the time of the commission of the offense, though committed in another place, will control."

Of all the early decisions, Ditson v. Ditson," decided in 1856, sets forth the status theory of divorce in the most explicit manner. A female citizen of Rhode Island had been married in New York to an Englishman. They lived for several years abroad, and she was finally deserted by him in Massachusetts, where they were domiciled at the time. The wife thereupon returned to her father's house in Rhode Island. After residing in Rhode Island for three years she brought suit for divorce there. Regarding the jurisdiction of the Rhode Island courts Chief Justice Ames said: "It is a well-settled principle of general law upon this subject, that the tribunals of a country have no jurisdiction over a cause of divorce, wherever the offense may have occurred, if neither of the parties has a bona fide domicil within its territory; and this holds, whether one or both of the parties be temporarily residing within reach of the process of the court, or whether the defendant appears or not, and submits to the suit. This necessarily results from the right of every nation or state to determine the status of its own domiciled citizens or subjects, without interference by foreign tribunals in a matter with which they have no concern.""

11 4 R.I. 87 (1856).
12 Id. at 93. Further at page 106, Chief Justice Ames says, "It is obvious, that marriage, as a domestic relation (emerged from the contract which created it) is known and recognized as such throughout the civilized world; that it gives rights, and imposes duties and restrictions upon the parties to it, affecting their social and moral condition, of the measure of which every civilized state, and certainly every state of this Union, is the sole judge so far as its own citizens or subjects are concerned, and should be so deemed by other civilized, and especially sister states that a state cannot be deprived, directly or indirectly, of its sov-
In 1877 the Supreme Court of the United States decided the famous case of Pennoyer v. Neff, in which it laid down the fundamental distinction between actions in personam and actions in rem. Courts accepting the reasoning of Chief Justice Ames in Ditson v. Ditson thereafter classified divorce proceedings as actions in rem which would justify the use of constructive service with respect to the absent defendant.

Toward the middle of the last century, if not before, a married woman who was justified in living apart from her husband because of his fault, was permitted to acquire a separate domicil for purposes of divorce and to bring her husband before the court by constructive service. Before long it was recognized that whenever husband and wife had separate domicils, the marriage status, i.e. the res or subject-matter of the divorce action, was at the domicil of either spouse, so as to give jurisdiction to both states to grant a valid divorce upon constructive service.

ereign power to regulate the status of its own domiciled subjects and citizens, by the fact that the subjects and citizens, of other states, as related to them, are interested in that status, and in such a matter has a right, under the general law, judicially to deal with and modify or dissolve this relation, binding both parties to it by the decree, by virtue of its inherent power over its own citizens and subjects, and to enable it to answer their obligatory demands for justice; and finally, that in the exercise of this judicial power the general law does not deprive a state of its proper jurisdiction over the condition of its own citizens, because non-residents, foreigners, or domiciled inhabitants of other states have not or will not become, and cannot be made to become, personally subject to the jurisdiction of its courts; but upon the most familiar principles, and as illustrated by the most familiar analogies of general law, its courts may and can act conclusively in such a matter upon the rights and interests of such persons, giving to them such notice, actual or constructive, as the nature of the case admits, and the practice of the courts in similar cases sanctions.

95 u.s. 714 (1877).

11 Mr. Justice Swayne makes this broad statement in Cheever v. Wilson, 9 Wall. 108, 19 L.Ed. 604, 608 (1869): "The rule is that she may acquire a separate domicil whenever it is necessary or proper that she should do so. The right springs from the necessity for its exercise, and endures as long as the necessity continues."
Professor Minor, of the University of Virginia, summarizing the state of the law in his text-book on the conflict of laws, which appeared in 1901, divides the cases into three classes. Most courts had accepted by that time the status theory of divorce so forcefully expounded by Chief Justice Ames in Ditson v. Ditson, and called by Professor Minor the in rem theory. A few states at that time would recognize a foreign divorce rendered in the state of the plaintiff's bona fide domicil only if the defendant received actual notice of the pendency of the action in time to be able to defend the suit. Professor Minor calls this the quasi-in-rem theory. The third theory he calls the in personam theory, referring to the attitude of the New York courts. By the in personam theory Professor Minor did not mean what is usually meant by that phrase, namely, that jurisdiction over the parties is sufficient, but that the foreign divorce would not be recognized, even if the plaintiff had acquired a bona fide domicil in the state of the divorce, unless the defendant was personally before the court. We have seen above that the New York courts have adhered to this rule with respect to New York defendants.

FULL FAITH AND CREDIT

Such was the general state of affairs in 1901, when Professor Minor wrote. In the same year, the question of the application of the full faith and credit clause to divorce decrees rendered by courts of sister states came for the first time before the Supreme Court of the United States. In Bell v. Bell the parties were domiciled in New York. The husband obtained a divorce in Pennsylvania on constructive service. The law of Pennsylvania required that the plaintiff be a bona fide resident of the state. The referee having found that the husband had not acquired a bona fide domicil in Pennsylvania, the Supreme Court held that the decree was not entitled to full faith and credit. Mr. Justice Gray said: "No valid divorce can be decreed on constructive service by the courts of a state in which neither party is domiciled."

" Minor, Conflict of Laws (1901).
" 181 U.S. 175 (1901).
In Streitwolf v. Streitwolf," decided by the Supreme Court at the same time as Bell v. Bell, the parties were domiciled in New Jersey. The husband obtained a divorce in North Dakota, the law of which required a domicil in good faith for ninety days as a prerequisite for jurisdiction for divorce. The husband not having obtained a bona fide domicil, the Supreme Court held on the basis of Bell v. Bell that New Jersey need not recognize the North Dakota decree. Atherton v. Atherton,decided in the same year, held that where the divorce was obtained at the matrimonial domicil upon constructive service, it must be recognized elsewhere.

In Andrews v. Andrews," which came before the Supreme Court in 1903, the parties had their domicil in Massachusetts. The husband went to South Dakota for the purpose of getting a divorce and the wife consented to the granting of the decree. The courts of Massachusetts declined to recognize the decree and the Supreme Court held that they were justified in their attitude, in view of the fact that neither party was domiciled in South Dakota.

In 1906 the Supreme Court decided the famous case of Haddock v. Haddock." The parties were domiciled in New York. The husband abandoned his wife and established a bona fide domicil in Connecticut, where he obtained a divorce on constructive service. The New York courts declined to recognize the divorce because the New York defendant was not personally before the Connecticut court. The Supreme Court held that the New York courts were under no constitutional duty to recognize the divorce with respect to the New York defendant,"

181 U.S. 177 (1901).
181 U.S. 185 (1901).
188 U.S. 14 (1903).
201 U.S. 525 (1906).

This decision met with a great deal of disapproval. See Beale, Constitutional Protection of Decrees for Divorce (1906). 19 Harv. L. Rev. 586. In 1926 Professor Beale wrote another article on the subject, Haddock Revisited, 39 Harv. L. Rev. 417. This article was written in support of Professor Beale's new theory on interstate recognition of divorce which was accepted by the American Law Institute. This theory was incorporated in Section 113: "A state can exercise through its courts..."
although it was admitted that Connecticut had jurisdiction over the status of the husband so as to be able to grant him a valid divorce, at least a divorce valid in Connecticut.

No other case came before the Supreme Court until 1938, when in Davis v. Davis" the Supreme Court held that the parties litigating the issue of domicile were precluded on grounds of res judicata from raising the question again in another suit."

jurisdiction to dissolve the marriage of spouses of whom one is domiciled within the state and the other is domiciled outside the state if

a. the spouse who is not domiciled in the state
   (i) has consented that the other spouse acquire a separate home; or
   (ii) by his or her misconduct has ceased to have the right to object to the acquisition of such separate home: . . . " Restatement of The Law of Conflict of Laws (1934) Section 113.

Under this new theory "fault" becomes a jurisdictional fact in connection with the recognition of foreign divorce, and much objection has been raised against the theory. See Bingham, The American Law Institute v. The Supreme Court — in the Matter of Haddock v. Haddock (1936) 21 Corn. L.Q. 393; McClintock, Fault as an Element of Divorce Jurisdiction (1928) 37 Yale L.J. 564. As the Haddock case was overruled in Williams v. North Carolina I, the theory underlining the Restatement has ceased to be of practical importance.

"” 305 U.S. 32 (1938).

"” This was one of the earlier cases in which the Supreme Court extended the bounds of res adjudicata to the subject-matter of a suit. See also Treinies v. Sunshine Mining Co., 308 U.S. 66 (1939). In an earlier decision it had applied res adjudicata to jurisdiction over the person. See Baldwin v. Iowa State Travelling Men’s Association, 283 U.S. 522 (1931). See also Restatement of the Law of Judgments, American Law Institute (1942) Section 10, which reads:

“(1) Where a court has jurisdiction over the parties and determines that it has jurisdiction over the subject matter, the parties cannot collaterally attack the judgment on the ground that the court did not have jurisdiction over the subject matter, unless the policy underlying the doctrine of res judicata is outweighed by the policy against permitting a court to act beyond its jurisdiction. (2) Among the factors appropriate to be considered in determining that collateral attack should be permitted are that

(a) the lack of jurisdiction over the subject matter was clear;
(b) the determination as to jurisdiction depended upon a question of law rather than of fact;
(c) the court was one of limited and not of general jurisdiction;
(d) the question of jurisdiction was not actually litigated;
THE WILLIAMS CASES

In 1942 the case of Williams v. North Carolina raised once more the status of migratory divorce decrees under the Full Faith and Credit Clause. In that case both Williams and Mrs. Hendrix had been married and domiciled for many years in North Carolina. They went to Nevada for purposes of divorce, which they obtained after six weeks residence. They thereupon married in Nevada and returned immediately to North Carolina, where they were indicted for bigamous cohabitation. Relying on the decision of the Haddock case, the state did not challenge the acquisition of a bona fide domicil by the defendants in Nevada, but tried the case on the theory that North Carolina did not have to recognize the Nevada decree because the defendants in the Nevada proceedings had been served only constructively. In the Haddock case it had been decided, as we have seen, that New York did not have to recognize the Connecticut decree with respect to the New York spouse, because of the lack of personal jurisdiction, although it was conceded that the husband had acquired a bona fide domicil in Connecticut. The parties were convicted, and upon appeal to the Supreme Court of the United States this conviction was reversed, the Haddock case being expressly overruled.

The State of North Carolina did not rest at that point, but tried the parties again, this time challenging the acquisition of a bona fide domicil in Nevada. It having been found that such a domicil had not been acquired, the parties were again convicted. Once more the cases were carried to the Supreme Court, which sustained the convictions, holding that the courts of North Carolina could inquire into the bona fide character of the Nevada decree. The policy against the court's acting beyond its jurisdiction is strong."

* 317 U.S. 287 (1942).
domicil and could decline to recognize the divorces in case no such domicil had been established."

Mr. Justice Frankfurter, speaking for the majority of the court said: "Under our system of law, judicial power to grant a divorce—jurisdiction, strictly speaking—is founded on domicil. . . . The framers of the Constitution were familiar with this jurisdictional prerequisite, and since 1789 neither this Court nor any other court in the English-speaking world has questioned it. Domicil implies a nexus between person and place of such permanence as to control the creation of legal relations and responsibilities of the utmost significance. The domicil of one spouse within a State gives power to that State, we have held, to dissolve a marriage wheresoever contracted. . . . Divorce, like marriage, is of concern not merely to the immediate parties. It affects personal rights of the deepest significance. It also touches basic interests of society. Since divorce, like marriage, creates a new status, every consideration of policy makes it desirable that the effect should be the same wherever the question arises."

Mr. Justice Rutledge wrote a dissenting opinion and so did Mr. Justice Black, in whose opinion Mr. Justice Douglas joined.

Mr. Justice Rutledge contended that the test of domicil was not contained in the Constitution of the United States but constituted a judicial importation which "has outlived its jurisdictional usefulness unless caprice, confusion and contradiction are desirable criteria of jurisdictional conceptions." Since, in the estimation of Mr. Justice Rutledge, according to the majority of the court the divorce decrees were valid in Nevada, he contends that the Full Faith and Credit Clause demanded that they be recognized as valid everywhere. If full faith and credit were not to be given to the Nevada decrees, argues Mr.

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Justice Rutledge, the constitutional policy should at least be approximated by not allowing other states to deny them full faith and credit “by any standard of proof which is less than generally required to overturn or disregard a judgment upon direct attack.”

Mr. Justice Black assumed that in the opinion of the majority, the Nevada decrees, without bona fide domicil in the state, were invalid in Nevada, and he objected to the introduction of the test of domicil as a prerequisite to the validity of divorce under the Due Process Clause as an unwarranted expansion of federal power.

In the case of Esenwein v. Commonwealth of Pennsylvania, decided at the same time as Williams v. North Carolina II, the dissenting justices in the latter case agreed with the majority on the ground that a distinction existed between the cases in which the marital capacity of the divorced persons was challenged, which might lead to criminal convictions and the bastardization of children, and cases of marital support, which do not necessarily raise irreconcilable conflicts between the policies of two states. In the Esenwein case, the wife had obtained an order for support in Pennsylvania. The husband later obtained a divorce in Nevada and thereupon filed a petition in Pennsylvania for total relief from the support order. The application was denied on the ground that he had not acquired a bona fide domicil in Nevada. The decision was affirmed by the Supreme Court unanimously.

As long as the Supreme Court adheres to the views expressed in the two cases of Williams v. North Carolina, it would seem that whenever Nevada divorces are obtained upon constructive service the other states are not bound by the Full Faith and Credit Clause to recognize those decrees if neither spouse had a bona fide domicil in Nevada, and that any finding of domicil by the divorce court may be challenged by evidence showing that the plaintiff in the divorce suit had no intention to establish a bona fide domicil in the state, in the sense of

**Id. at 244.**
**325 U.S. 279 (1946).**
**317 U.S. 287 (1942) and 325 U.S. 226 (1945).**
intending to make it his or her permanent home, or at least, his or her home for an indefinite period of time."

It will be observed that the Supreme Court in the two Williams cases adopts the status theory of divorce set forth in Ditson v. Ditson ninety years ago."

If this position leads to most undesirable results, namely, the invalidation of many divorces and the possible bastardization of children, it may be asked what alternatives were open to the Supreme Court. Mr. Justice Rutledge suggests that the Supreme Court should abandon the requirement of domicil altogether, or at least allow it to be challenged only by a standard of proof required for a direct attack. If the latter course were adopted it would be very difficult indeed to challenge the Nevada

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"This test of domicil is the one universally adopted in this country. See Dupuy v. Wurtz, 55 N.Y. 556 (1873). It might be called "domicil" in the international sense as contrasted with domicil in the local sense. In Huntington v. Attrill, 146 U.S. 657 (1892), the Supreme Court drew a similar distinction between a "penal" law in the conflict of laws sense (for purposes of the enforcement of judgments of sister states and foreign countries) and "penal" law for local purposes. It was there stated that "the question whether a statute of one state which in some aspects may be called penal, is a penal law, in the international sense, so that it cannot be enforced in the courts of another state, depends upon the question whether its purpose is to punish an offense against the public justice of the state, or to afford a private remedy to a person injured by the wrongful act..."

For local purposes "domicil" may be defined by a state as requiring something less than for conflict of laws purposes. In connection with the Full Faith and Credit Clause, the Supreme Court naturally and correctly applied the traditional conflict of laws concept of domicil.

divorce, and for all practical purposes it would validate the migratory divorce. And what is the objection to such a change of attitude by the Supreme Court? The objection is that it fails to consider the rights of defendants and of the state in which they are domiciled.

Take the Williams cases. Here the parties had their domicils for many years in North Carolina. Williams and Mrs. Hendrix go to Nevada and remain there only six weeks. Mrs. Williams No. 1 and Hendrix continue to reside in North Carolina. The question presented is one of balancing the rights of Nevada against those of North Carolina and the rights of the respective spouses. North Carolina has a deep interest in its citizens and their status and Nevada has a like interest in its citizens and their status. After all, the character of a state is determined by the people domiciled therein and not by those who are merely temporary residents. The Supreme Court under the Constitution is the final arbiter of these conflicting claims. If it holds that Nevada has the power to divorce the parties in the Williams cases, it means that Nevada has not only the power to undermine the divorce legislation of North Carolina, but that it has the power also to compel the other spouses that remained in North Carolina to litigate their marital relations in Nevada when they are unwilling to submit to the jurisdiction of the courts and the divorce policies of that state. Is it fair to hold that they may be brought before the courts of Nevada by constructive service when they are unwilling to submit to the lax divorce laws of Nevada? If this were an action on a contract, this could not be done without violating the Due Process Clause. Why should it be allowed in a suit for divorce where the plaintiffs have been in the state only six weeks and intend to return to North Carolina immediately? If constructive service were allowed under such circumstances could it not be contended that it would be valid likewise if Nevada reduced the residence requirement to a single week or a single day? It is extremely difficult, therefore, to accept the suggestion of Mr. Justice Rutledge.
Let us see now where Mr. Justice Black's suggestion leads to. He puts forth the argument that under the Act of Congress the judgments and decrees of sister states are entitled to the same faith and credit as they have by law or usage in the state where they have been rendered, and that a divorce which is valid in Nevada is therefore valid everywhere. The question thus becomes whether the Nevada divorces are valid in Nevada. Mr. Justice Jackson in his dissenting opinion in Williams v. North Carolina I admits that the Nevada divorces without bona fide domicil may be valid in Nevada for some limited purposes, but not beyond. He says: "To hold that the Nevada judgments were not binding in North Carolina because they were rendered without jurisdiction over the North Carolina spouses, it is not necessary to hold that they were without any conceivable validity. It may be, and probably is, true that Nevada has sufficient interest in the lives of those who sojourn there to free them and their spouses to take new spouses without incurring criminal penalties under Nevada law. I know of nothing in our Constitution that requires Nevada to adhere to the traditional concepts of bigamous unions or the legitimacy of the fruit thereof. And the control of a state over property within its borders is so complete that I suppose that Nevada could effectively deal with it in the name of divorce as completely as in any other. But it is quite a different thing to say that Nevada can dissolve the marriages of North Carolinians and dictate the incidence of the bigamy statutes of North Carolina by which North Carolina has sought to protect her own interests as well as theirs. In this case there is no conceivable basis of jurisdiction in the Nevada court over the absent spouses, and, a fortiori, over North Carolina herself."** The ultimate question is whether Nevada shall be regarded as having the constitutional power to divorce anybody actually within the state, even upon constructive service, without any requirement of domicil or residence? If the answer is in the affirmative, why require any physical presence? Why could not the divorce legislation be carried as far as in

some parts of Mexico, where jurisdiction will be taken upon the basis of mere consent? We would then be in a position to recognize divorce by mail.

It is apparent from the above that it is extremely difficult to recognize the migratory divorce in the absence of a substantial period of residence. It must be admitted that under modern conditions the test of domicile is frequently most unsatisfactory," but in Anglo-American law many rights are determined on that basis. We have been unable to find a better criterion. In the conflict of laws domicile governs many rights in the law of family—for example, legitimacy, legitimation and adoption. Can we dispense with it in the law of divorce? The migratory divorce problem cannot be solved on the theory that the proceeding is one in personam," for that theory would not take care of divorces where the defendant does not appear. The defendant could not be served constructively without violating the Due Process Clause. Residence might be substituted for domicile, but the question would be how long should that residence be in order to make it seem fair to have the defendant brought in constructively. I suggested in an article that six months might be enough;" other students of the conflict of laws feel that one year should be a minimum.

If the defendant appears, the Supreme Court might follow the New York law and recognize the foreign divorce without regard to the existence of a bona fide domicile. It would be difficult to reconcile this with any consistent theory concerning the nature of a divorce proceeding and it would not solve the migratory divorce problem where the defendant does not agree to the divorce, and therefore declines to appear.

** As the establishment of domicile depends upon a person's intention to make it his home for an indefinite period of time, it is often difficult to know where a person is actually domiciled. See In re Dorrance's Estate, 170 Atl. 601 (1934).

** In support of the in personam theory, see Ashley, *Conflict of Laws Upon the Subject of Marriage and Divorce* (1906), 15 Yale L.J. 387.

What is the solution of this divorce problem? A sensible way out would be an Act of Congress indicating the terms under which divorce decrees of sister states shall be recognized. If it said that a residence of six weeks is sufficient our troubles with the Nevada divorces would be over. Unfortunately for the migratory divorce, Congress is not likely to pass such legislation. An amendment to the Constitution of the United States conferring jurisdiction upon the federal government in matters of divorce is still more unlikely.

CONCLUSION

The migratory divorce problem arose early in our law when some states took a more liberal view regarding divorce than others. People naturally tried to take advantage of the more liberal laws, and at once the problem arose as to the validity of these migratory divorces. By the middle of the last century the views on the subject had not yet crystalized. The earlier point of view appeared to be that only the courts of the domicil of the parties at the time the offence was committed had jurisdiction, for the reason that the parties were citizens of that state, which on that account controlled their marriage relationship. It was insisted also that there must be jurisdiction over the parties. To what extent constructive service was permissible does not clearly appear. Special stress upon the necessity of personal jurisdiction over the defendant was laid in New York.

When our courts began to recognize that for purposes of divorce a married woman could acquire a separate domicil, the courts were presented with an even more difficult problem. Ditson v. Ditson resolved the difficulty by boldly proclaiming the status theory of divorce, according to which each state in which a spouse is domiciled has jurisdiction over the entire subject-matter, so as to be able to divorce its citizens or persons domiciled therein upon grounds of its own choosing, and if the other party does not appear, he or she can be brought in by constructive service. When Pennoyer v. Neff was decided

\[\text{** 4 R.I. 87 (1856).} \]

\[\text{** 95 U.S. 714 (1877).}\]
in 1877—the case that laid down the fundamentals of jurisdiction in our modern law, drawing a distinction between actions in personam and actions in rem, the latter permitting the defendant to be brought before the court by constructive service—the question naturally arose of the classification of divorce suits. The majority of courts accepted the reasoning of Chief Justice Ames in Ditson v. Ditson, holding that the res, the status, was in the state of the domicil of either party,—hence that either state had the power to terminate the marriage relationship through divorce, and that the defendant, if need be, could be brought before the court on constructive service.

This was the situation when the first cases came before the Supreme Court in 1901. The question before the Court was under what circumstances a divorce decree of a sister state must be recognized by the other states. The Supreme Court might have taken the view, expressed by Mr. Justice Black in Williams v. North Carolina II, that the Constitution and the supporting Act of Congress have left this matter to the states and that a divorce is valid whenever it complies with the legislation of the state where it was rendered. The Supreme Court felt, however, that the power of the respective states regarding the status of their own citizens was involved and that it was its duty under the Constitution to be the arbiter. As marriage is the bulwark of society and its dissolution is of great concern to the state, what if the states involved have fundamentally different policies regarding dissolution of marriage! Should the states having the more conservative attitude be without power to enforce their policies

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4 R.I. 87 (1856).

"For a critical examination of Pennoyer v. Neff, see Carey, A Suggested Fundamental Basis of Jurisdiction with Special Emphasis on Judicial Proceedings Affecting Decedents' Estates (1929), 24 Ill. L. Rev. 44, 170. To the effect that considering a divorce proceeding as a proceeding in rem does not help the solution of the problem, see Williams v. North Carolina I, 317 U.S. 287, 317, where Mr. Justice Jackson says, "I doubt that it promotes clarity of thinking to deal with marriage in the terms of a res, like a piece of land or a chattel. It might be more helpful to think of marriage as just a marriage—a relationship out of which spring duties to both spouse and society and from which are derived rights . . . ."
with respect to their own citizens? Should they be obliged to recognize even ex parte divorces with respect to their own citizens where the plaintiff spouse has gone to another state for purposes of divorce only and returns immediately afterwards to his former state, having been absent perhaps only six weeks or so?

The Supreme Court felt that the state having the laxest laws should not be allowed to impose its views upon all sister states and that it should have the power to divorce non-residents only when the plaintiff had become a local citizen by having established a bona fide domicil within the state. In the Haddock case the question arose whether even then such divorce need be recognized with respect to the other spouse that was not personally before the divorce court. Its answer in that case was that it need not be recognized. This doctrine was overruled in the first Williams case, so that today the recognition of the foreign divorce depends solely—we are assuming that there was no personal jurisdiction over the defendant—upon whether or not the plaintiff had established a bona fide domicil within the state of divorce. In other words, the view of the Supreme Court today is, as it has been from the beginning, that the ultimate question involves the rights of states over their citizens and their status, and not merely the rights of individuals, and for that reason it is unable to let go of domicil as the determining factor.

In the nature of things the Supreme Court has insisted that the test of domicil means domicil in the international or conflict of laws sense and not in the local sense. If it allowed the question to be determined by the states in accordance with their own solutions, the state having the laxest divorce laws would be able to undermine the policies regarding divorce of all other states. In adjusting the conflicting policies of the individual states, the Supreme Court has been unwilling to give the predominating power to the state that will go farthest in its divorce legislation.

As long as we are convinced that the well-being of a state rests upon the family, we must also admit that the state should be able to control the status of its citizens
or domiciliaries, for it is upon the marriage status of its citizens that the welfare of society rests. When our courts recognized that a married woman could have a separate domicil, it became necessary to admit that each state had jurisdiction over the entire status, so that the state of divorce, provided the plaintiff had obtained a bona fide domicil in such state, could change also the status of the other spouse. Any other conclusion, namely, that where the parties have different domicils each state can divorce only the party domiciled in the state but not the other, whose status is controlled by the law of his or her domicil, would lead to such absurdities as to be inadmissible. For that reason, and to that extent, the policy of the state of the defendant must yield to the policy of the divorcing state.

The above are the fundamental considerations, and as long as they are kept in view it is difficult to dispense with domicil as the jurisdictional test.

In order to recognize migratory divorces, we must abandon all idea that a state has a special interest in the marital relationship of its citizens or persons domiciled in the state. If this can be done, there is no difficulty in holding that under the Full Faith and Credit Clause we simply have to look to the law of the state of divorce. Even then the Due Process Clause stares us in the face. How far can the state of divorce go if the defendant does not appear? Shall Nevada be allowed to cite the defendant, who is domiciled and living in North Carolina, before its courts by constructive service, if the plaintiff has lived in Nevada only six weeks, or a single week, or a single day, or who has not been in the state at all? These are grave questions and they are still unanswered.

"It would seem clear that a negative answer must be given to all of these questions."