HADDOCK v. HADDOCK OVERRULED

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SUBJECT to diversified state legislation, divorce presents a particularly difficult conflict of laws problem in this country. The foundation for this problem was laid when divorces were granted for causes recognized by local legislation (lex fori) without reference to the laws of the matrimonial domicile. And the question was further complicated when married women were allowed to acquire domiciles separate from those of their husbands.[1] Since divorce strikes deep into our social life and is basically a religious or moral issue, state laws reflecting widely divergent views on the subject extend from extreme strictness to the greatest liberality. Causes for divorce range all the way from adultery as the sole ground to "extreme" mental cruelty. Consequently, persons living in states under whose laws they cannot obtain a divorce seek to take advantage of the laws of more liberal jurisdictions.

The migratory divorce problem has become even more intensified in recent times, for several states have changed their divorce legislation with the express purpose of attracting non-residents. Nevada, the first to enter the divorce business, reduced its residence requirement, in 1927, to three months and in 1931, to six weeks. Some of the Mexican states have gone even further, granting divorces without reference to domicile or residence, and in some cases by mail. All efforts to remedy the situation have failed.[2] Even the most conspicuous, the Uniform Marriage Annulment and Divorce Act, has received the approval of only three states.[3] An amendment to the Federal Constitution giving Congress power, similar to that of the Canadian and Australian legislatures, to deal with the sub-

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1. In England, a married woman cannot acquire a domicile separate from her husband even after judicial separation. Attorney General for Alberta v. Cook [1926] A. C. 444 (P. C.). Since the marriage res is, therefore, always at the husband's domicile, the difficulties arising from different domiciles are avoided. In countries determining status with reference to the national law of the parties rather than the law of their domicile (see note 4 *infra*), a wife can have a nationality different from that of her husband. Although this presents complications, the fact that it is more difficult to change nationality than domicile renders the problem of collusive divorce less common than in this country.

2. When the American Bar Association was formed in 1878, the migratory divorce problem was regarded as such an evil that one of the Association's immediate objects was to find a remedy for it. At the Association's fifth annual meeting its Committee on Jurisprudence and Law Reform presented a symposium of the law of the several states relating to divorce with reference to the possibility of securing greater uniformity in our legislation. See (1882) 5 A. B. A. REP. 283.

3. Delaware, New Jersey, and Wisconsin.

ject of marriage and divorce is perhaps the only real solution to the problem.

I.

Although state courts are generally agreed that the grounds for divorce are governed by the law of the forum,[4] no agreement exists regarding the recognition of foreign divorces. Practically all courts have subscribed, at least in recent times, to the status theory of divorce, though it has been said that New York has never fully adopted it.[5] According to this theory there must be jurisdiction over the subject matter, the status, often called the res, which in Anglo-American law is determined by domicile. But conflicting views have arisen when only one of the parties is domiciled in the state of the forum. Many courts have concluded that in this situation the

4. The principal qualification to this statement is found in the law of the three states which have adopted the Uniform Marriage Annulment and Divorce Act. In these states a divorce will be granted to non-residents coming into the state after the cause of action arises only if the cause of action alleged was recognized as a ground for divorce in the jurisdiction in which the party resided at the time it arose.

Under the Hague Convention Relating to Divorce, of June 12, 1902, a divorce may be granted only if the national law of the parties and the lex fori allow divorce (Art. 1), and only for grounds recognized by both the national law and the lex fori (Art. 2).

Article 13 of the Convention of Montevideo on Civil Law provides that the matrimonial domicile shall determine whether the marriage can be dissolved, provided the ground for such dissolution is recognized by the law of the place where the marriage was celebrated.

Under the Bustamante Code, the right to separation and divorce is regulated by the law of the matrimonial domicile, but it cannot be founded on causes arising prior to the acquisition of such domicile unless they are authorized with equal effect by the personal law of both spouses (Art. 52). The causes for divorce and separation are subject to the law of the forum, if the spouses are domiciled there (Art. 54). Each contracting state has the power to recognize the divorce of persons obtained abroad for causes which are not admitted by their personal law (Art. 53).

In France, a divorce will be granted only if the national law of the parties at the time authorizes such divorce. App. Paris, January 30, 1908, 35 Journal du Droit International Privé 790 (1908). A divorce will be granted only upon grounds which are recognized both by the national law and French law. Trib. Civ. de Blois, May 10, 1906, 4 Revue de Droit International Privé et de Droit Pénal International 628 (1908).

In Germany, the national law of the husband at the time of divorce determines the grounds for obtaining a divorce (Intr. Law, Civ. Code, art. 17, ¶ 1). An act occurring when the husband possessed another nationality will be recognized as a ground for divorce only if it also constitutes a ground for divorce or judicial separation according to the law of such state (Intr. Law, Civ. Code, art. 17, ¶ 2). German law applies if at the time of the suit the husband has lost his German nationality, but the wife has retained hers (Intr. Law, Civ. Code, art. 17, ¶ 3). A divorce will not be granted in accordance with the national law when the cause is not recognized as a ground for divorce under German law (Intr. Law, Civ. Code, art. 17, ¶ 4).

5. See Howe, *The Recognition of Foreign Divorce Decrees in New York State* (1940) 40 COL. L. REV. 373.

status or res is in both states and that under *Pennoyer v. Neff* [6] a divorce granted in either state should be recognized if it satisfies due process requirements. The courts of one or two states have felt that this analogy to in rem proceedings should be qualified by requiring that the respondents have obtained actual knowledge of the pendency of the divorce proceedings.[7] New York courts have taken the position that a divorce should not be recognized with respect to New York respondents who were not personally before the court. And in a number of cases the New York Court of Appeals has recognized foreign divorces without reference to domicile if the respondent appeared in the proceedings.[8] According to a theory proposed by Professor Beale, if only one party is domiciled in the state granting the divorce, it should be recognized in a foreign state only when the other spouse has consented to the establishment of the domicile in the state or is precluded, because of fault, from objecting to the establishment of such domicile.[9] The American Law Institute has accepted this theory,[10] and through its influence the doctrine has been adopted in at least one state.[11]

Only a few decisions have been rendered by the United States Supreme Court on this controversial matter. Under its rulings, if at the time of the divorce neither party is domiciled in the state granting it, the decree,

6. 95 U. S. 714 (1877).

7. See Felt v. Felt, 59 N. J. Eq. 606, 45 Atl. 105 (1899). See also Corkum v. Clark, 263 Mass. 378, 161 N. E. 912 (1928); Perkins v. Perkins, 225 Mass. 82, 113 N. E. 841 (1916).

8. See Glaser v. Glaser, 276 N. Y. 296, 12 N. E. (2d) 305 (1938), *motion for reargument denied*, 277 N. Y. 652, 14 N. E. (2d) 205 (1938); Ansorge v. Armour, 267 N. Y. 492, 196 N. E. 546 (1935); Gould v. Gould, 235 N. Y. 14, 138 N. E. 490 (1923); Guggenheim v. Wahl, 203 N. Y. 390, 96 N. E. 726 (1911); Kinnier v. Kinnier, 45 N. Y. 535 (1871); Tiedemann v. Tiedemann, 172 App. Div. 819, 158 N. Y. Supp. 851 (1st Dep't 1916), *aff'd*, 225 N. Y. 709, 122 N. E. 892 (1919).

When the respondent is a domiciliary of some other state or country, the New York courts have declined to pass upon the question directly but have referred the matter to the law of the state in which the respondent was domiciled. Dean v. Dean, 241 N. Y. 240, 149 N. E. 844 (1925); Ball v. Cross, 231 N. Y. 329, 132 N. E. 106 (1921).

9. Beale, *Haddock Revisited* (1926) 39 HARV. L. REV. 417. Professor Beale's theory rests upon the presupposition that the state as well as the individual parties have interests in the marital relationship, both of which must be before the court. In Anglo-American conflict of laws, the law of the state of the domicile controls status and for that reason the law of the state of the domicile of either spouse should be regarded as having jurisdiction over the subject matter in divorce proceedings. But, according to Professor Beale, the individual interest of the absent spouse should likewise be before the court, and in the absence of personal service or appearance, jurisdiction over his interest in the marriage relation can be had by constructive service only if he has consented to the establishment of the petitioner's domicile in the state or by his wrongdoing has forfeited the right to object to the establishment of such domicile.

10. RESTATEMENT, CONFLICT OF LAWS (1934) § 113.

11. See Delanoy v. Delanoy, 216 Cal. 27, 13 P. (2d) 719 (1932).

whether entered upon constructive service [12] or by a court with personal jurisdiction over both parties,[13] is not entitled to full faith and credit. If, on the other hand, one spouse is domiciled in the state and there is personal jurisdiction over the other,[14] or if the divorce is obtained upon constructive service at the matrimonial domicile,[15] all other states must recognize the decree. But it was once held, in *Haddock v. Haddock*,[16] that although one spouse was domiciled in the granting state, the decree was not entitled to full faith and credit if there was no personal jurisdiction over the other but merely constructive service.[17]

In the recent case of *Williams v. North Carolina*,[18] the Supreme Court overruled *Haddock v. Haddock* and held that North Carolina must recognize a Nevada decree of divorce granted upon constructive service, it being assumed in the case that a bona fide domicile by one spouse had been acquired in Nevada. The Williams's and Hendrix's were both married in North Carolina and had been domiciled and made their home there for many years. Mr. Williams and Mrs. Hendrix went to Nevada and after six weeks' residence obtained divorces. They then married in Nevada and returned to North Carolina, where they were convicted of bigamy. The Supreme Court of the United States, with two Justices dissenting, reversed the decision of the Supreme Court of North Carolina, which had upheld the conviction.

According to the majority opinion, written by Mr. Justice Douglas, the issue of domicile was not before the Court. The only question, therefore, was whether a divorce granted in Nevada upon constructive service to a person admittedly domiciled in the state could be denied recognition by North Carolina.[19] Answering the question in the negative, the Court

12. Bell v. Bell, 181 U. S. 175 (1901).

13. Andrews v. Andrews, 188 U. S. 14 (1903).

14. Cheever v. Wilson, 9 Wall. 108 (U. S. 1869).

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

16. 201 U. S. 562 (1906).

17. There are only three other Supreme Court decisions concerning divorce. In Maynard v. Hill, 125 U. S. 190 (1888), the legislature of the Territory of Oregon was sustained in granting a divorce to a husband domiciled there, without notice to or knowledge of his wife whom he had wrongfully left; but the validity of the dvorce under the full faith and credit clause was not determined. In Davis v. Davis, 305 U. S. 32 (1938), parties who had litigated the subject of domicile before the divorce court were held to be precluded on grounds of res judicata from relitigating the same issue in another state. And in Thompson v. Thompson, 226 U. S. 551 (1913), the doctrine of the *Atherton* case was extended to limited divorces.

18. 63 Sup. Ct. 207 (U. S. 1942).

19. The Supreme Court was not concerned, therefore, with questions of estoppel which may preclude certain parties, especially those who have invoked the jurisdiction of the foreign divorce court, from subsequently denying the jurisdiction of the court. See Harper, *The Myth of The Void Divorce* (1935) 2 LAW & CONTEMP. PROB. 335 and *The Validity of Void Divorces* (1930) 79 U. OF PA. L. REV. 158; Jacobs, *Attack on De-*

reasoned that a divorce proceeding is not in personam but involves status and is controlled by domicile, "at least when the defendant has neither been personally served nor entered an appearance." [20] Because Nevada had an interest in the institution of marriage, it could alter within its borders the marriage status of a spouse domiciled there, even though the other spouse was absent; and constructive service could be used with respect to the absent person provided its form and nature met the requirements of due process. Since the divorce decree was thus binding upon both spouses in Nevada, the majority concluded that it was entitled to full faith and credit in the courts of all other states.

Professor Beale's views,[21] designed to restate the *Haddock* doctrine, were brushed aside, Mr. Justice Douglas stating that the power of the state of Nevada was not dependent upon an inquiry as to which party was at fault. "It is dependent," he said, "on the relationship which domicil creates and the pervasive control which a state has over marriage and divorce within its own borders." [22] That compulsory recognition of this power would deprive North Carolina of its control over the status of its citizens and its policy regarding divorce was regarded as "part of the price of our federal system." [23] If the policy of North Carolina is infringed, it is sacrificed in support of the national policy, expressed in the full faith and credit clause, that judgments of sister states should find uniform recognition throughout the land. There were, furthermore, in the opinion of the majority intensely practical considerations requiring the nationwide recognition of divorce decrees altering the marital status of a state's domi-

crees of Divorce (1936) 34 MICH. L. REV. 749, 959. Nor was it concerned with the doctrine of Davis v. Davis, 305 U. S. 32 (1938), according to which parties who have litigated the question of domicile in a divorce proceeding may not, on principles of res judicata, later relitigate the issue.

20. 63 Sup. Ct. at 213. These words remind one of the position of the New York Court of Appeals, which has recognized foreign divorces when both parties were before the court, although neither party was domiciled in the state. Such a position cannot be reconciled, of course, with the status theory of divorce.

21. See note 9 *supra*.

22. 63 Sup. Ct. at 214. As Beale's theory makes fault a jurisdictional fact, which would permit the decree of divorce to be challenged on that ground in any state, it has met with little favor. See Bingham, *The American Law Institute v. The Supreme Court in Haddock v. Haddock* (1936) 21 CORN. L. Q. 393; McClintock, *Fault As An Element of Divorce Jurisdiction* (1928) 37 YALE L. J. 564.

23. 63 Sup. Ct. at 215. In a separate concurring opinion, Mr. Justice Frankfurter even stated that North Carolina should not be allowed to impose its policy of divorce upon Nevada.

The Supreme Court in Fauntleroy v. Lum, 210 U. S. 230 (1908), had already held with respect to personal actions that the public policy of a state could not be invoked as a defense in an action upon the judgment of a sister state. The majority were of the opinion that this same principle should be extended to divorce proceedings in which the spouses have different domiciles and where there is a fundamental difference of policy between the states regarding the subject of divorce.

ciliaries; for it was felt that a contrary holding would do nothing less than bring "considerable disaster to innocent persons," "bastardize children hitherto supposed to be the children of lawful marriage," "or else encourage collusive divorces." [24]

Unconvinced by the majority's reasons for overruling the *Haddock* case, Mr. Justice Jackson, in a strong dissenting opinion, attacked the concept of the marriage relation as a res which "follows a fugitive from matrimony into a state of easy divorce, although the other party to it remains at home where the res was contracted and where years of cohabitation would seem to give it local situs." [25] He deemed it inconsistent with our legal system that a person should be summoned by mail or publication to a remote jurisdiction "to submit marital rights to adjudication under a state policy at odds with that of the state under which the marriage was contracted and the matrimonial domicile was established." [26] In addition, he contended not only that the issue of domicile was before the Court, but also that no bona fide domicile had been acquired in Nevada, and that without such domicile the decree was not entitled to recognition by North Carolina under the full faith and credit clause.[27] Mr. Justice Murphy, in a separate dissent, similarly questioned the Court's assumption of a bona fide domicile. Moreover, he maintained that the majority had introduced an undesirable rigidity into the application of the full faith and credit clause, since the interests of both Nevada and North Carolina in the marriage relations of their citizens were entitled to recognition.

II.

Since all the Justices accepted the status theory of divorce, let us first consider the problem from that point of view. In the last analysis, the answer to the question whether North Carolina must recognize Nevada divorces depends upon whether the policy of North Carolina with respect to divorce should prevail or whether its interest in the status of its citizens (domiciliaries) should give way to the national policy in favor of the uniform operation throughout the country of judgments of sister states. As we have seen, the majority of the Court adopted the second view. Mr.

24. The first two quoted phrases are from Mr. Justice Holmes's dissenting opinion in Haddock v. Haddock, 201 U. S. 562, 628 (1906). The last phrase is from Mr. Justice Douglas's opinion, 63 Sup. Ct. at 214.

25. 63 Sup. Ct. at 221.

26. 63 Sup. Ct. at 222.

27. Mr. Justice Jackson admitted that mere sojourn in Nevada might and probably would confer power upon the state "to free them and their spouses to take new spouses without incurring criminal penalties under Nevada law," and added that "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." 63 Sup. Ct. at 223.

Justice Murphy, on the other hand, felt that this attitude involved too rigid an application of the full faith and credit clause. He pointed out that the Supreme Court had held, in a series of cases relating to workmen's compensation acts,[28] that the courts of one state were not bound by the statutes of another, but were privileged to apply their own statutes if the state had a sufficient interest in the subject. None of these cases, however, involved the recognition of judgments of sister states, and so they manifestly have no direct bearing upon the divorce problem.[29]

Mr. Justice Jackson's objection that it is inconsistent with our legal system that a spouse in one state who has continuing rights there derived from the marriage relationship should be deprived of them upon constructive service by proceedings in a state having a different divorce policy goes, of course, to the very root of the whole question. His statement is based, no doubt, upon his conclusion that Williams and Mrs. Hendrix had not established a bona fide domicile in Nevada. On the assumption of the majority of the Court, however, that they were domiciled in the state, it seems clear that the Nevada spouses were entitled to have the marriage relationship controlled by Nevada law. The national policy expressed in the full faith and credit clause requires that the judicial decrees of sister states be recognized uniformly throughout the country. In deference to this national policy North Carolina would lose its control over the status of Hendrix and Mrs. Williams if they were personally before the Nevada Court.[30] And the same policy requires that the Nevada decrees should be respected when Hendrix and Mrs. Williams have been brought before the Nevada court by constructive service in accordance with the due process requirements which make these decrees valid in Nevada. For if constructive service is the only practical means by which Nevada can exercise its power to control the status of its own domiciliaries, jurisdiction under it is as "fair" for purposes of full faith and credit as that obtained by personal service. As the dissenting opinion in *Yarborough v. Yarborough*[31] insisted, some flexibility may be proper in certain situations even under the full faith and credit clause applicable to judicial proceedings. But the propriety of extending it to the divorce situation seems doubtful.

28. See Alaska Packers Ass'n v. Industrial Accident Comm., 294 U. S. 532 (1935).

29. The workmen's compensation cases involved the full faith and credit clause with respect to "public acts" and not with respect to judicial proceedings. The question in Alaska Packers Ass'n v. Industrial Accident Comm., 294 U. S. 532 (1935) was whether the injured person could recover under the workmen's compensation act of the state in which he lived and in which he was employed or whether the courts of that state had to respect the workmen's compensation legislation of the state in which the person was injured.

30. See Cheever v. Wilson, 9 Wall. 108 (U. S. 1869).

31. 290 U. S. 202 (1933).

In the *Haddock* case the husband had wrongfully left his New York wife and had acquired a domicile in Connecticut, the bona fide nature of which was not disputed. Thus Connecticut had power to dissolve his marriage bonds in Connecticut, and it seems sound policy, in the interest of uniformity, to require compulsory recognition of the divorce everywhere under the full faith and credit clause. The overruling of *Haddock v. Haddock* was therefore most desirable.

III.

The problem becomes more complicated if we abandon the majority's assumption of a bona fide domicile in Nevada and face the facts in the *Williams* case as they actually existed. Williams and Mrs. Hendrix were married in North Carolina, were domiciled there and had lived there for many years. They went to Nevada for six weeks and, after obtaining their divorces, married and returned to North Carolina. Several different courses are open to the courts in dealing with such migratory divorces.[32]

They may decline to recognize them by invoking a strict application of the status theory of divorce. In this event the courts would insist upon the acquisition of a bona fide domicile in Nevada in the sense in which the term "domicile" has heretofore been accepted in the Anglo-American conflict of laws, namely, the establishment of a permanent home.[33] Thus divorces granted to non-residents who go to Nevada for the sole purpose of obtaining divorces and have no intention of making a permanent home there would not be recognized in other states either under the compulsion of the full faith and credit clause or under the conflict of laws. If they leave Nevada shortly after obtaining their divorces, a presumption that they never intended to establish a bona fide domicile in the state would be in order.

The courts might subscribe to the status theory on principle and yet circumvent it by recognizing Nevada divorces obtained without the establishment of an actual bona fide domicile, in the sense of a permanent home, within the state. This device has frequently been used by courts which have thought that the recognition of migratory divorces is in the interest of sound national policy, but have not felt free to depart openly from the traditional status theory. These courts have preferred to close their eyes

32. French, German, and Italian writers on the conflict of laws have developed general theories regarding "fraud upon the law." See 1 ARMINJON, PRÉCIS DE DROIT INTERNATIONAL PRIVÉ (2d ed. 1927) 226-262; NIBOYET, MANUEL DE DROIT INTERNATIONAL PRIVÉ (1928) 571 *et seq.;* Legeropoulo and Aulagueon, *Fraude à la Loi,* in 8 RÉPERTOIRE DE DROIT INTERNATIONAL (1930) 439-487, in which a bibliography of the extensive literature may be found.

33. In *In re* Newcomb's Estate, 192 N. Y. 238, 250, 84 N. E. 950 (1908) the court says: "Residence means living in a particular locality, but domicile means living in that locality with intent to make it a fixed and permanent home."

to the actualities of the situation and to allow juries to find the existence of a bona fide domicile in the state of divorce on technical grounds. For example, in many cases much weight has been accorded the Nevada divorce record, reciting as it does a finding of "residence" (in the sense of "domicile") in the state for the statutory period. The unrealistic character of this finding is indicated by well-known facts concerning Nevada divorces. In Nevada, the residence requirements for divorce have been reduced to six weeks; in order to give Nevada divorces the color of regularity, the supreme court of that state, aware that domicile is required for interstate recognition of divorce, has held that the term "residence" in the statute means "domicile;" and trial courts, cooperating to the same end, require a person to declare that he intends to remain in Nevada permanently before granting him a divorce. Moreover, evidence of an intention to establish a domicile, such as opening a bank account or joining a political club, is manufactured on the advice of local counsel in a maneuver to establish a proper record. In this manner all the legal requirements for the interstate recognition of Nevada divorce decrees are technically satisfied.

Thus failure to distinguish between domicile in a local Nevada sense and domicile from the traditional standpoint of the conflict of laws and the full faith and credit clause has been a convenient means of circumventing the status theory of divorce.[34] But if courts come to the conclusion that migratory divorce decrees should be sustained, they should frankly invoke some other theory or combination of theories instead of continuing to render lip service to the status theory. It is an unbecoming spectacle for them to insist that domicile is the basis of jurisdiction in divorce and then to hold that a migratory Nevada divorce satisfies this requirement.

Before considering possible doctrinal bases for judicial recognition of migratory divorces, it may be of interest to examine the attitude of the courts towards migratory marriages. Marriage creates a status, and since status is determined by the law of domicile, it would seem that parties not allowed to marry under the law of their domicile should not be permitted to evade that law by having the ceremony performed in another jurisdiction and then immediately returning to their home state. And yet, instead of holding that such evasions constitute a fraud upon the law of the domi-

34. For merely local or intrastate purposes, Nevada may call residence "domicile" if it cares to do so, or give a lesser meaning to the term "domicile" than it has in the conflict of laws and under the full faith and credit clause. But it cannot impose its definition of domicile upon other courts, especially the Supreme Court, when the validity of its judgments is attacked. For example, the Supreme Court allows constructive service in a personal action where the defendant is domiciled in the state. Milliken v. Meyer, 311 U. S. 457 (1940). If it should disallow constructive service on the basis of mere residence, the validity of the judgment would depend upon the existence of domicile as defined by the Supreme Court. The fact that residence and domicile had an identical meaning in the state would be immaterial.

cile, most courts have sustained these marriages,[35] feeling that the general interest of society in upholding marriages should outweigh local state policies. This result has been accomplished by the simple expedient of dealing with marriage as a contract governed by the law of the place of contracting. There is, of course, a vast difference between an evasion of laws pertaining to marriage and an evasion of those pertaining to divorce; for while there is general agreement that marriage should be encouraged, there is a wide discrepancy of opinion regarding divorce. Assuming, however, that in view of the existing situation it is desirable to legalize migratory divorces, how can this be done by the courts consistently with legal doctrine?

New York Theory. Although during the last century the New York courts have made increasing use of the status theory of divorce, there is a line of cases [36] which recognizes foreign divorces without reference to domicile when the respondent has entered a general appearance. The author of a recent article [37] is of the opinion that these cases may eventually be explained in terms of estoppel; "or possibly the courts, under the pressure of a realistic jurisprudence, will someday acknowledge that in some circumstances the domicile of the parties is an irrelevant consideration." [38] The *Williams* case now compels the New York courts to recognize foreign divorces without personal jurisdiction over the respondent, if the petitioner had a bona fide domicile in the state of divorce; but the New York cases referred to above would go further and extend them recognition if the petitioner was a mere resident of the state of divorce and the respondent entered a general appearance. This view, however, solves the problem of migratory divorces only when the parties are agreed upon a divorce. If a juristic basis is to be found for the recognition of migratory divorces in general, particularly those obtained without the consent of the absent spouse, another theory must be advanced.

In Personam Theory. Ashley, Dean of the New York University Law School, has suggested that the status theory of divorce, requiring jurisdiction over the subject matter based on domicile, be abandoned in favor of the in personam theory, based solely on jurisdiction over the parties.[39] If this action were taken, jurisdiction over divorce would exist in any state chosen by the plaintiff, provided the defendant could be served in the state or entered a general appearance. Under the decision of the Supreme Court in *Milliken v. Meyer,*[40] suit could also be brought in the state of the de-

35. See, for example, *In re* Miller's Estate, 239 Mich. 455, 214 N. W. 428 (1927).

36. See note 8 *supra.*

37. Howe, *loc. cit. supra* note 5.

38. Howe, *op. cit. supra* note 5, at 403.

39. Ashley, *Conflict of Laws Upon the Subject of Marriage and Divorce* (1906) 15 YALE L. J. 387.

40. 311 U. S. 457 (1940).

fendant's domicile. Since judgments rendered in such suits would be entitled to full faith and credit and the defense of public policy would be unavailing in any state,[41] this theory would have the undeniable merit of creating uniformity in the recognition of foreign divorces. If both parties were agreed upon a divorce, the suit could be brought in any state chosen by them; but if they were not agreed, the party desiring a divorce could bring suit only in a state in which the respondent could be personally served or was domiciled. This doctrine, therefore, would not legalize the migratory divorce if the defendant spouse were unwilling to cooperate by appearing in the suit. A logical extension of the theory would lead to the recognition of divorces by mail, now countenanced in some parts of Mexico. Because this doctrine would go beyond all reasonable bounds, a modification of the in personam theory, requiring the petitioner's personal presence within the state, would seem to be necessary.

Residence Theory. The residence theory appears to provide the most promising juristic basis for recognizing migratory divorces obtained without the consent or cooperation of the absent spouse. If residence in a state, as distinguished from domicile, were sufficient to permit the use of constructive service upon the respondent, and thus to validate the divorce in all respects[42] within the state, a jurisdictional basis for the uniform recognition of migratory divorces under the full faith and credit clause would be provided. The Supreme Court, in interpreting the Federal Constitution, may someday tell us whether residence can or should fulfill this function. But even if we assume that under the facts in the *Williams* case local state policies regarding divorce should yield to the national policy expressed in the full faith and credit clause, so that the question is reduced to one of fairness to the respondent, the residence theory still raises thorny problems. According to *Williams v. North Carolina* the petitioner's domicile in the state justifies constructive service upon the absent party. This, in effect, means that citing such a party before the divorce court by mere notification is deemed "fair." When, because of the petitioner's domicile, the state of divorce has power over the marriage status equal to that of the state of the absent party's domicile, it seems reasonable to permit it to exercise control over the marriage relation through constructive service, the only effective means available. When, on the other hand, the petitioner's connection with the state of divorce consists of a scant sixty-day residence, as in the *Williams* case, and the respondent has had his permanent home in another state for twenty years, the interest of the two states in the marriage relation is not equal and the fairness of constructive service is not so clear. Why should one state, solely by virtue of a petitioner's sixty-day residence there, be regarded as having the power to cite

41. See Fauntleroy v. Lum, 210 U. S. 230 (1908).

42. Mr. Justice Jackson, in his dissenting opinion in the *Williams* case, admitted that it would be valid today for some purposes. 63 Sup. Ct. at 223.

a domiciliary of another state before its courts by mere notification and to terminate, against his will, his interest in a marriage relation which was created by the law of that other state and is, because of his domicile there, still subject to that law? The answer might be that migratory divorces cannot be stopped by the refusal of other courts to recognize them; the consequences of these refusals lead to such socially undesirable results that a way must be found to legalize such divorces, and this can be done only by permitting constructive service.[43] This argument, however, would legalize all migratory divorces, even if the period of residence were reduced to thirty days or less; for the term "residence" has no technical meaning other than that given it by statute. The Supreme Court must, therefore, retain some degree of control over divorce legislation by requiring that residence extend over a reasonable period—say six months—in order to meet the due process requirements within the state of divorce and those of the full faith and credit clause in other states. On this condition only could residence, as such, become a proper and fair basis for jurisdiction in divorce.[44]

Other theories have been used as a basis for divorce jurisdiction, but none of them is calculated to solve the migratory divorce problem. Thus jurisdiction might be based upon the fact that the marriage was celebrated within the state or that the marital offense was committed there.[45] In either case, if the defendant spouse were before the court, it might be impossible to successfully challenge the divorce decree for lack of due process in the state in which it was rendered. If the absent spouse were not before the court, constructive service could not be properly used; and if it were used, the decree would not only be invalid in the state in which it was rendered for failure to comply with the due process clause, but woud not be entitled to recognition in other states under the full faith and credit clause.

IV.

As long as individual states are deemed to have a paramount interest in the marriage relation of their citizens (domiciliaries) which should be protected against evasion, the status theory of divorce furnishes an accredited basis for a refusal to recognize the migratory divorce. Under this theory, only when a bona fide domicile, in the sense of a permanent

43. All attempts to seek relief through state legislation have been in vain, and an amendment to the Federal Constitution removing the subject of marriage and divorce from state control is as yet out of the question.

44. The same end could be attained, of course, by Congressional legislation under the full faith and credit clause defining "residence" for purposes of divorce. See COOK, THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS (1942) 90 and *The Power of Congress Under the Full Faith and Credit Clause* (1919) 28 YALE L. J. 421.

45. See Howe, *op. cit. supra* note 5, at 390-395.

home, has in fact been established in the state of divorce, will the demand for interstate uniformity require that a decree of divorce upon constructive service be recognized by all other states. In this situation the Supreme Court was fully justified in overruling the *Haddock* case and making such recognition mandatory under the full faith and credit clause. A bona fide domicile being a jurisdictional fact, its existence is subject to challenge before the courts of other states, notwithstanding a finding of "residence" or "domicile" upon the divorce record. If it appears from the facts that the petitioner left the state shortly after the decree of divorce was granted, a presumption might well be created that no bona fide intention to establish a permanent home existed. In this event the decree could be regarded by the courts of other states as invalid in the absence of clear and convincing evidence that at the time of the divorce proceedings the petitioner had a bona fide intention to make his permanent home in the state but was subsequently compelled by unforeseen circumstances to change his mind. Moreover, a party invoking the jurisdiction of a foreign court may be precluded from questioning it,[46] and if the parties to a foreign divorce proceeding actually litigate the question of domicile in the sense of a permanent home, it is res judicata.[47]

Although the status theory of divorce may furnish in the abstract a satisfactory legal basis for the determination of the rights of individual states in the marriage relation of persons having different domiciles, its requirement of a bona fide domicile has not in fact prevented people from going to Nevada, in ever increasing numbers, without the slightest intention of making their permanent home in the state, and obtaining a divorce after a residence of six weeks. They have remarried and sent new offspring into the world. Although children born of void marriages are declared legitimate in most states by statute,[48] courts have regarded the consequences resulting from the invalidity of the migratory divorce as such a social evil that many of them have tried to sustain these marriages

46. See note 19 *supra*. The question of estopping parties from questioning a divorce decree when they have appeared in the action, although neither spouse was domiciled in the state, was presented in the *Andrews* case. In the state court it was held that the estoppel doctrine could not be invoked against the appearing spouse in view of a Massachusetts statute expressly providing that a divorce should be of no force and effect in the state if an inhabitant went into another state to obtain it for a cause of action which occurred in Massachusetts while the parties resided there or for a cause which would not be authorized by Massachusetts law. Andrews v. Andrews, 176 Mass. 92, 57 N. E. 333 (1900). The Supreme Court affirmed the decision, holding that Massachusetts, as the domiciliary state, was not required by the full faith and credit clause to recognize the foreign decree by reason of an estoppel. Andrews v. Andrews, 188 U. S. 14 (1903). But there is nothing in the case to indicate that state courts may not apply the estoppel doctrine on grounds of comity.

47. See note 19 *supra*.

48. See 1 VERNIER, AMERICAN FAMILY LAWS (1931) § 48; 4 *id.* § 247.

in one fashion or another. The foregoing analysis has revealed the extreme difficulty of finding a proper juristic basis for legalizing migratory divorces. The only theory which would validate such divorces upon constructive service is the residence theory. In view of the fact, however, that the term "residence" has no fixed meaning and may be reduced by legislation to a nominal period, it is not possible to accept this theory unless the Supreme Court is willing to insist that residence extend over a reasonable period and determine what is meant by "reasonable." The Supreme Court must ultimately decide when the use of constructive service can be regarded under our system of law as "fair" to the absent spouse and the state in which he is domiciled, so that the sacrifice of his interest in the marriage relation may be justified in view of the social benefits to be derived from the uniform operation throughout the land of divorce decrees of sister states.