NOTES

THE DEVELOPMENT OF THE DOCTRINE OF DIVISIBLE DIVORCE

The decisions handed down by the Supreme Court of the United States in *Estin v. Estin*[1] in 1948 and *Armstrong v. Armstrong*[2] in 1956 have added considerable content to the Court's renovated interpretation of the application of the full faith and credit clause[3] to the field of interstate divorce. Six years before *Estin* the decision in *Williams v. North Carolina*[4] had marked the initial phase of the Court's modernization of the doctrine that had been established since *Haddock v. Haddock*.[5] Concepts that had served reasonably well at the turn of the century were no longer adequate for a mobile, urbanized, socially "enlightened" population. Swept away by *Williams I* was the anachronistic concept of "matrimonial domicile" and the patently unrealistic requirement of "fault" as an element of divorce jurisdiction. The Court's new attitude was to broaden the scope of constitutional protection afforded ex parte divorce decrees.[6] As a result of *Williams I*, a divorce decree obtained in a state in which one of the spouses was a bona fide domiciliary was valid and entitled to full faith and credit even though the other spouse was neither personally served with process nor appeared in the state granting the divorce.

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1. 334 U.S. 541 (1948). A companion case, Kreiger v. Kreiger, 334 U.S. 555 (1948), was decided at the same time and on the same principle as the *Estin* case. For comment on these cases, see Carey & MacChesney, *Divorces by the Consent of the Parties and Divisible Divorce Decrees*, 43 ILL. L. REV. 608 (1948); Morris, *Divisible Divorce*, 64 HARV. L. REV. 1287 (1951); Paulsen, *Support Rights and an Out-of-State Divorce*, 38 MINN. L. REV. 709 (1954); Paulsen, *Migratory Divorce*, 24 IND. L.J. 25 (1948). In connection with the *Estin* case, see also Sutton v. Lieb, 342 U.S. 402 (1952), discussed in Carnahan, *What Is Happening in the Conflict of Laws: Three Supreme Court Cases*, 6 VAND. L. REV. 607, 628 (1953).

2. 24 U.S.L. WEEK 4173 (U.S. April 9, 1956).

3. U.S. CONST. art IV, § 1 provides:

> Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

Congress has enacted legislation implementing the constitutional provision by providing that judicial proceedings "shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such State . . . from which they are taken." 28 U.S.C. § 1738 (1952).

4. 317 U.S. 287 (1942) (hereinafter cited as *Williams I*).

5. 201 U.S. 562 (1906).

6. As used in this discussion, ex parte divorce decrees are those that are granted to one spouse without personal service upon or appearance by the absent spouse.

But the problem was not merely to adjust judicial doctrine to changing social mores. Since the Supreme Court could act only upon specific factual situations as they arose, the renovation had to be piecemeal. The decisions in the few cases that did arise seemed to create more problems than they solved. The supposedly broad measure of constitutional protection achieved in *Williams I* was considerably narrowed by the second *Williams* case,[7] which allowed the court of the forum *(F-2)* to re-examine the jurisdictional basis of the divorcing state *(F-1)* and to refuse recognition to a divorce decree if it found that the plaintiff had not established a bona fide domicile in *F-1*.

The *Williams* cases were prosecutions under a North Carolina statute for bigamous cohabitation. While the result of successful prosecution in this area is certainly severe, the major social problem in the field of interstate divorce does not concern criminal prosecution of an errant spouse. Rather, the controversy has centered upon the deserted wife, who, as a result of lax divorce laws and the constitutional protection accorded ex parte divorce decrees, may be deprived not only of conjugal association but also of any claim for support from her wayward husband without ever having a reasonable opportunity to have her claim adjudicated on the merits.

To this problem the *Estin* case provided a partial solution by the formulation of the doctrine of "divisible divorce."[8] Thus, a husband securing an ex parte divorce decree that is entitled to full faith and credit under the rule of *Williams I* can remarry and procreate with impunity; he will not be guilty of bigamy, nor will the children of such a marriage live under the stigma of illegitimacy. But such a divorce will not be conclusive of the wife's right to support. The divorce is therefore "divisible." It is effective for one purpose—termination of the marital status—but ineffective for another—determination of the wife's right to support.

The *Estin* case, however, involved a wife's support rights that had been adjudicated prior to the husband's ex parte divorce. Will the theory of the *Estin* case also apply when (as in the usual case) the wife's support rights have not been formally adjudicated prior to the divorce? The recently decided case of *Armstrong v. Armstrong* involved such a situation, and four Justices expressed the opinion that

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7. Williams v. North Carolina, 325 U.S. 226 (1945) (hereinafter cited as *Williams II*). The *Williams* cases produced a wealth of comment, for the most part critical. The following articles are particularly noteworthy: Bingham, *Song of Sixpence*, 29 CORNELL L.Q. 1 (1943); Cook, *Is Haddock v. Haddock Overruled?*, 18 IND. L.J. 165 (1943); Corwin, *Out-Haddocking Haddock*, 93 U. PA. L. REV. 341 (1945); Lorenzen, *Haddock v. Haddock Overruled*, 52 YALE L.J. 341 (1943); Lorenzen, *The Aftermath of Williams v. North Carolina*, 1 MIAMI L.Q. 1 (1947); Powell, *And Repent at Leisure*, 58 HARV. L. REV. 930 (1945).

8. Estin v. Estin, 334 U.S. 541, 549 (1948).

the theory of *Estin* was applicable.[9] Justice Minton, writing for the majority of the Court, however, felt that under the particular facts of the case no full faith and credit question was presented.[10] Thus, a definite resolution of this aspect of the divisible divorce doctrine must await future decisions. Assuming, however, that full faith and credit does not preclude the wife's alimony action, her more practical (and frequently more difficult) problem is to discover a remedy under local law by which she may secure relief.

The purpose of this note is to explore these questions in terms of the constitutional law established by the Supreme Court and to examine the conflict of laws rules established in the states, in those areas in which local law controls.

I

In most of the recent analyses of the Supreme Court's interpretation of the full faith and credit clause in the area of interstate divorce, the starting points are the famous *Williams* cases. Justice Douglas' statement, "Haddock v. Haddock is overruled,"[11] generally has been accepted at its face value. Recent developments in the Court, however, indicate that some of the pre-*Williams* cases still may have considerable vitality. For purposes of this note, three cases in particular, *Atherton v. Atherton*,[12] *Haddock v. Haddock*,[13] and *Thompson v. Thompson*,[14] require special consideration.

In the *Atherton* case the parties were married in New York and subsequently established their domicile in Kentucky. After three years of residence in Kentucky, marital difficulties developed and *W* left *H*, returning to her parents' home in New York. Some two years later *H* obtained a divorce in Kentucky. *W* was not personally served with process nor did she appear in the proceedings. Subsequently, *W* brought action in New York for a divorce, custody of their child, and support for herself and the child. The New York court held that the Kentucky divorce decree was not entitled to full faith and credit and granted *W* the relief sought. The Supreme Court reversed, holding that since the divorce decree was valid in Kentucky it was also entitled to recognition in New York.[15] The Court, however, specifically limited the scope of its decision to the situation in which the divorce was obtained at the "matrimonial domicile," *i.e.*, the state where the parties last lived together as husband and wife. Thus, it

9. 24 U.S.L. WEEK 4173, 4175 (U.S. April 9, 1956).
10. 24 U.S.L. WEEK 4173 (U.S. April 9, 1956). See text supported by notes 41-42 *infra*.
11. 317 U.S. 287, 304 (1942).
12. 181 U.S. 155 (1901).
13. 201 U.S. 562 (1906).
14. 226 U.S. 551 (1913).
15. 181 U.S. 155 (1901).

was felt that a spouse should be able to terminate effectively the marital relation at the matrimonial domicile without having to pursue his partner throughout the country.

It is important, however, to note the theory upon which *W* based her action in *Atherton*. The relief she sought was predicated on the continued existence of the marital relation after the Kentucky divorce. No contention was made that even if the divorce were valid, *W* should still be entitled to support for herself and her child. That such a contention might have met with success was indicated by the Court, for it cited authorities which recognized the distinction between the termination of the marital relation and the elimination of the wife's support rights.[16] Thus, even at this early stage, there was language which anticipated the divisible divorce doctrine to be formulated later in the *Estin* case.

The importance of the concept of "matrimonial domicile" was further emphasized in the landmark case of *Haddock v. Haddock*.[17] In this case *H* deserted *W* in the matrimonial domicile of New York, established residence in Connecticut, and there secured an ex parte divorce. Some eighteen years later *W* obtained personal jurisdiction over *H* in New York and sued for separation and alimony.[18] Evidence of *H's* Connecticut divorce secured upon the ground of fraud in the procurement of the marriage was excluded in the New York courts and the relief sought by *W* was granted. On appeal, the Supreme Court, with four justices dissenting, affirmed, holding that the Connecticut divorce was not entitled to full faith and credit. Justice White's majority opinion was inconsistent and unenlightening. In addition to limiting *Atherton* to its precise facts, *Haddock* established the element of "fault" as a factor in divorce jurisdiction. It is true, of course, that whenever a court in *F-1* grants a divorce, it is necessarily finding that the spouse obtaining the divorce was not at fault. But under the *Haddock* case the finding of fault in *F-1* could be relitigated by a court in *F-2* unless *F-1* were the matrimonial domicile. Thus, if the *F-2* court found that the spouse obtaining the divorce wrongfully deserted the other in the matrimonial domicile, the deserter could not take the marital relation with him to the divorcing state. Since a court in the divorcing state would have neither personal jurisdiction over the deserted spouse, nor jurisdiction of the res or

16. *Id.* at 162. Curiously enough, these same authorities that were cited in *Atherton* and then apparently forgotten were later used by the concurring Justices in *Armstrong* to bulwark the argument that there should be a distinction between dissolving the marital relation and terminating *W's* right to support. 24 U.S.L. WEEK 4173, 4176 n.3 (U.S. April 9, 1956).

17. 201 U.S. 562 (1906).

18. There was considerable question in *Haddock* whether *W's* claim was barred by laches. She had taken no action for twenty-six years from the time *H* left her. The Court, however, properly ruled that state law was controlling.

subject matter—the marital relation remaining in the matrimonial domicile with the deserted spouse—the court would have no "jurisdiction" to render a divorce decree entitled to extrastate recognition under the *Atherton* case.[19] Justice Holmes' dissent presented the essential problem of the case precisely: Should the *jurisdiction* of the Connecticut court to render an effective divorce decree depend upon the *merits* of the case? After answering this question in the negative, Holmes further contended that the divorce should be recognized under full faith and credit even though not obtained at the matrimonial domicile, since the effect of attaching special importance to that concept was to perpetuate a "pure fiction."[20]

As might be expected, the *Haddock* case caused no little consternation.[21] The storm of criticism eventually subsided, however, as gradual adjustment to the new concept was achieved. A fairly well-defined pattern of decisions emerged. Ex parte divorces obtained in the matrimonial domicile were entitled to recognition throughout the country; those obtained elsewhere were of a more precarious nature, but in most states were recognized under a vaguely defined "public policy" which accepted the social undesirability of attacking divorces presumed by the parties to be valid. In retrospect, the decision in the *Haddock* case, when viewed in terms of the actual *result* of the case, as distinguished from the rationale of fault and matrimonial domicile in the opinion, seems not nearly so opprobrious. There is certainly strong justification for making every reasonable attempt to protect the interest of a deserted spouse and her children against the economic and social havoc created when a ne'er-do-well husband attempts to free himself from all marital obligations by means of a six-weeks' sojourn in Nevada. Whether this protection, however, was worth the sacrifice of certainty in marital status caused by *Haddock* is open to question.

Between *Haddock* and *Williams I* only one other Supreme Court case relevant to this discussion was decided. That case, *Thompson v.*

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19. See text supported by notes 15-16 *supra*.

20. 201 U.S. 562, 630 (1906). As Justice Holmes pointed out, the only distinction between *Atherton* and *Haddock* was that the divorce in *Atherton* had been rendered at the matrimonial domicile. Moreover, the "fault" analysis of the majority opinion was itself inconsistent, since the jurisdiction of the matrimonial domicile was not dependent on the fact of *W's* desertion, but continued even if *H's* cruelty had driven her outside the state.

21. See, *e.g.*, Beale, *Constitutional Protection of Decrees of Divorce*, 19 HARV. L. REV. 586 (1906); Schofield, *The Doctrine of Haddock v. Haddock*, 1 ILL. L. REV. 219 (1906). For further comment on the problems of the *Haddock* case, see McClintock, *Fault as an Element of Divorce Jurisdiction*, 37 YALE L.J. 564 (1928); Parks, *Some Problems in Jurisdiction to Divorce*, 13 MINN. L. REV. 525 (1929). Not until twenty years later was Professor Beale able to reconcile himself with the *Haddock* case. See Beale, *Haddock Revisited*, 39 HARV. L. REV. 417 (1926).

Thompson[22] has proved to be an enigma in the later development of the divisible divorce doctrine. In the case *W* filed an action for separate maintenance in the District of Columbia; *H* evaded service of process and removed to Virginia, the parties' matrimonial domicile. In due course he obtained an ex parte divorce in Virginia, which he then pleaded in bar of *W's* action for separate maintenance. *H's* plea was sustained by the Supreme Court. Under the rule of the *Atherton* case, the court in the matrimonial domicile, in this case Virginia, had jurisdiction over the marital relation and could adjudicate the rights of both parties in respect to that relation. The Virginia decree, having been based on a finding of *W's* wrongful desertion, was entitled to full faith in the District of Columbia. The only further inquiry, therefore, was to determine whether the divorce would have barred *W's* action *in Virginia.* If so, full faith required that the decree be given the same effect in the District of Columbia. After examining Virginia law the court concluded:

> [S]ince the courts of Virginia hold upon general principles that alimony has its origin in the legal obligation of the husband to maintain his wife, and that although this is her right she may by her conduct forfeit it, and where she is the offender she cannot have alimony on a divorce decreed in favor of the husband . . . it is plain that such a decree forecloses any right of the wife to have alimony or equivalent maintenance from her husband under the law of Virginia.[23]

This language, making no distinction between the jurisdictional requisite necessary to adjudicate marital status and that required to determine *W's* support rights, has proved to be a major obstacle to the later formulation of the doctrine of divisible divorce.[24] Apparently, however, no attempt was made in *Thompson* to argue that such a distinction should be recognized. As in *Atherton, W's* theory was based on the continued existence of the marital relation. Having found that the Virginia court had jurisdiction to dissolve the marriage, the Court apparently assumed the existence of jurisdiction to sever W's support rights as a matter of course. The incipient development of the divisible divorce concept had not yet come to fruition.

Following the *Thompson* case, the next major developments were the *Williams* cases.[25] These cases have received extensive comment,[26]

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22. 226 U.S. 551 (1913).

23. *Id.* at 566.

24. See, *e.g.*, Justice Douglas' attempt to distinguish *Thompson* in Estin v. Estin, 334 U.S. 541, 546 n.4 (1948). For extended discussion of the current validity of *Thompson*, see text supported by notes 36-47 *infra.*

25. Williams v. North Carolina, 325 U.S. 226 (1945); Williams v. North Carolina, 317 U.S. 287 (1942). See also Esenwein v. Commonwealth *ex rel.* Esenwein, 325 U.S. 279 (1945), decided on the same principle as *Williams II.* Justice Douglas' concurring opinion in *Esenwein* anticipated the position on divisible divorce that he was later to adopt in the *Estin* case. *Id.* at 282-83.

26. See note 7 *supra.*

and extended discussion in this note of their factual situation, or of the social and moral problems involved, would serve no useful purpose. The principles of these cases are now fairly well-established law. It is important, however, to observe the precise limits of the two cases. As a result of *Williams I*, a court in a state which is the bona fide domicile of one of the spouses can render a divorce decree that, insofar as it affects the marital relation, is entitled to full faith and credit in every other state. Under *Williams II*, whether the spouse obtaining the divorce was actually domiciled in the divorcing state *(F-1)* is open to inquiry in the court of the forum *(F-2)* as part of the latter's legitimate determination of the "jurisdiction" of the court rendering the decree.[27] The jurisdictional inquiry in *F-2*, therefore, was concerned only with determining whether the petitioner acquired a bona fide domicile in the state granting the divorce. If he had done so, further inquiry into the validity of the divorce was precluded by full faith; if not, the *F-2* court could determine for itself whether to grant the relief sought. No longer was the question of full faith to turn upon the matrimonial domicile and fault aspects of *Haddock*.

But it is apparent that Justice Douglas was not strictly accurate in asserting that the *Haddock* case was overruled. True, the rationale of *Haddock* was inconsistent with the result reached in the first *Williams* case. But the *Haddock* case involved the question of the support rights of the wife and child, while the *Williams* case was a criminal prosecution. Considering the difference in the issues presented in the two cases, it would seem that their results are not irreconcilable. In fact, it is submitted that the ultimate result of the *Haddock* case, *i.e.*, that *W* can obtain alimony, would be the same were the case to be decided today.[28] The factor unifying the *Haddock* and *Williams* cases —the concept of divisible divorce—was not to become apparent, however, until the decision in *Estin v. Estin*.

In the *Estin* case, *W* obtained a separate maintenance decree in New York, the parties' domicile; the decree provided for monthly payments by *H*. Subsequently, *H* left New York, went to Nevada, and there procured an ex parte divorce decree. This decree contained no provision for alimony for *W*, and *H* thereupon ceased making the payments required under the New York decree. *W* obtained personal service of process against *H* in New York and sought judgment for the amounts

27. Since Thompson v. Whitman, 85 U.S. (18 Wall.) 457 (1873), it has been recognized in this country that a judgment is subject to collateral attack in *F-2* on the basis of lack of jurisdiction in the court granting the judgment. Like many another "leading" case, however, *Thompson v. Whitman* does not actually stand for the proposition for which it is so frequently cited. See HARPER, TAINTOR, CARNAHAN & BROWN, CONFLICT OF LAWS 796 n.8 (1950).

28. See Paulsen, *Migratory Divorce*, 24 IND. L.J. 25 (1948). See also the concurring opinion in Armstrong v. Armstrong, 24 U.S.L. WEEK 4173, 4175-76 (U.S. April 9, 1956).

due under the separate maintenance decree. Although finding that *H* had established a bona fide domicile in Nevada and that the divorce effectively terminated the marital relation, the New York court granted *W* the relief she sought. The Supreme Court of the United States upheld the action of the New York court.[29]

In his defense, *H* made two principal assertions: (1) since the bona fides of *H's* domicile in Nevada had not been impeached, the Nevada divorce effectively terminated the parties' marital status and therefore terminated any obligation of *H* incident to that status; and (2) even conceding that the Nevada decree did not terminate *H's* duty of support as a matter of full faith and credit, still, under prior New York law a separate maintenance decree could not survive a foreign ex parte divorce and thus *W's* action was precluded by local law. Neither contention was successful.

Justice Douglas' treatment of the second point was summary:

> The difficulty with that argument is that the highest court in New York has held in this case that a support order can survive divorce and that this one has survived. . . .[30]

In answer to *H's* first contention, the Court pointed out that the termination of the marital relation did not necessarily relieve *H* of all the obligations incidental to that relation. While recognizing the ever-broadening scope of the full faith clause in the field of divorce, the Court established a dual basis for according relief to *W*: (1) the interest of New York, the state of *W's* domicile, in preventing *W* from becoming a "public charge" as a result of the Nevada court's ex parte termination of the marital status; and (2) the fact that *W's* separate maintenance decree was an intangible "property interest" which could not be affected by a court not having personal jurisdiction over *W*. The result of this approach was to make the Nevada divorce decree divisible; the decree effectively terminated the marital status, but could not alter *W's* rights under the New York decree since the Nevada court lacked jurisdiction over *W*.

The *Estin* case has marked a significant development in its field. No longer will the effect to be given ex parte divorces obtained at the domicile of one of the parties depend solely upon the law of the divorcing state. When *W* asserts a prior maintenance decree as in *Estin* the survival of her decree will depend not on the law of the divorcing state but on the law of the state rendering the maintenance decree. Under the rubric of "jurisdiction" and "property rights" the constitutional question has become one of due process as well as full faith and credit. The result of *Estin* was thus to reaffirm the in rem-in

29. 334 U.S. 541 (1948).

30. *Id.* at 544. For developments in New York subsequent to *Estin*, see text supported by notes 83-85 *infra*.

personam distinction that had been established in *Pennoyer v. Neff*,[31] some seventy years before.

In evaluating the implications of *Estin* several perplexing problems are raised. The first is the inadequacy of the dual grounds offered by the Court as justification for permitting *W's* maintenance decree to survive the Nevada divorce. The asserted interest of the State of New York in preventing *W's* becoming a "public charge" is appealing, but hardly persuasive. In some instances a very real danger of economic disaster might be present. Suppose, however, that *W* were a wealthy heiress. Would her maintenance decree be terminated by an ex parte divorce merely because there was no danger of her becoming a public charge? Similarly, the "property interest" language of the opinion is not compelling. It may be doubted whether clarification is achieved by labeling a particular interest as "property." The inevitable danger is that decisions will be based merely on a labeling process, rather than on an actual analysis of the issues involved. Moreover, if the property interest language is retained, it would seem that the principle of *Estin* could not be logically extended so as to permit a wife's unadjudicated claim for support to survive a foreign ex parte divorce.[32] To characterize such a claim as a property interest would seem to distend the concept to such an extent that it would become analytically meaningless.

A more plausible foundation for *Estin* can be achieved by less tenuous reasoning. To deprive a wife of her right to support without allowing her to have her day in court does not accord with fundamental principles of due process. Though in most instances she will receive mailed notice of the foreign divorce proceedings, it would seem to be an intolerable burden for her to bear the expense of travel, witnesses' and attorney's fees in order for her to defend the action in a

31. 95 U.S. 714 (1877). The *Pennoyer* case involved an action by plaintiff to recover possession of a tract of land located in the state of Oregon. Defendant claimed that he had acquired the premises by virtue of having executed upon a judgment recovered against plaintiff in Oregon. The question concerned the validity of that judgment. Plaintiff was not a resident of Oregon, was not personally served with process, and did not appear in the proceedings. Plaintiff was served constructively under the provisions of an Oregon statute. Defendant, in the prior action, had not attached the property of plaintiff in Oregon until after judgment was rendered. The Supreme Court of the United States held that the Oregon judgment was invalid, stating:

> [S]uch [constructive] service may answer in all actions which are substantially proceedings *in rem*. But where the entire object of the action is to determine the personal rights and obligations of the defendants, that is, where the suit is merely *in personam*, constructive service in this form upon a non-resident is ineffectual for any purpose.

Id. at 727. Although the case arose before the fourteenth amendment, it is commonly cited as having been based on the due process clause of that amendment. For an excellent analysis of the problems raised by the case, see Sunderland, *The Problem of Jurisdiction*, 4 TEXAS L. REV. 429 (1926). An extended evaluation of the implications of *Pennoyer v. Neff* is beyond the scope of this note.

32. *But see* Armstrong v. Armstrong, 24 U.S.L. WEEK 4173, 4175 (U.S. April 9, 1956).

distant forum. Moreover, since a court lacking personal jurisdiction over *H* cannot validly grant alimony to *W*,[33] why should a court without personal jurisdiction of *W* be entitled to render a decree denying alimony to her? In sum, she has never had a reasonable opportunity to have her claim for support adjudicated *on the merits*. Admittedly, objection could be made that the same process of reasoning could be used to determine that an ex parte divorce could not terminate the marital relation. But there are intervening equities which dictate recognition of the validity of such divorces to dissolve a marriage. People do in fact remarry and beget children in reliance on such divorces. When their validity is impeached, bigamous marriages and illegitimate children are the inevitable result. No such dire consequences follow when the husband procuring the divorce is merely compelled to furnish support to his deserted spouse.

A further problem in the *Estin* case was raised in Justice Frankfurter's dissent. Since there was considerable doubt as to the survival of *W's* maintenance decree under prior New York decisions, Justice Frankfurter pointed out that New York courts could not, consistently with full faith and credit, hold that an ex parte divorce *in New York* terminated *W's* right of action, but that a similar divorce procured elsewhere would not preclude survival of her maintenance decree. It does not seem, however, that the Justice's point is well taken. The full faith clause, together with its legislative implementation, requires only that *F-2* courts give the same effect to an *F-1* decree as a court in *F-1* would give. *F-2* is not prohibited by full faith and credit from treating foreign ex parte divorce decrees differently from domestic decrees of a similar nature. It has been suggested that instead of the full faith clause the Justice was referring to the privileges and immunities clause.[34] In view of the narrow scope which the latter clause has received historically, however, it is doubtful whether it would be invoked to prevent such discrimination against foreign divorce decrees. It would seem, though, that if a party could prove that a particular state consistently discriminated against foreign ex parte divorces a case could be made that such a course of action would be a violation of the equal protection clause.[35]

Possibly the most important problem raised by the *Estin* case con-

33. De la Montanya v. De la Montanya, 112 Cal. 101, 44 Pac. 345 (1896); Ellison v. Martin, 53 Mo. 575 (1873).

34. Carey & MacChesney, *Divorce by the Consent of the Parties and Divisible Divorce Decrees*, 43 ILL. L. REV. 608, 619-20 (1948). That such discrimination would not violate any constitutional provision, see Morris, *Divisible Divorce*, 64 HARV. L. REV. 1287 (1951).

35. Thus, if such proof could be established, the situation would be one in which one class of persons—those obtaining foreign ex parte divorces—are uniformly denied advantages given to another class of persons—those obtaining domestic ex parte divorces. See generally, Yick Wo v. Hopkins, 118 U.S. 356 (1886).

cerned the current validity of the *Thompson* case,[36] and what the Court's future attitude would be toward cases involving similar factual situations. Under *Thompson,* the survival of *W's* unadjudicated support rights depended solely on the law of the divorcing state; if barred there, full faith required her action to be denied elsewhere. Problems of jurisdiction, due process, and in personam rights were not material. In *Estin,* Justice Douglas purported to distinguish *Thompson* in a perplexing footnote:

> The [*Estin*] case is unlike *Thompson v. Thompson* . . . where the wife by her conduct forfeited her right to alimony under the laws of the State of the matrimonial domicile where her husband obtained the divorce, and hence could not retain a judgement for maintenance subsequently obtained in another jurisdiction.[37]

In this one sentence are gathered at least four distinct aspects of the *Thompson* case: (1) the wife's rights to alimony would not have survived under the law of the state where the divorce was granted; (2) the reason her right to alimony was terminated was that her own misconduct forfeited that right; (3) the divorce decree was obtained at the matrimonial domicile; and (4) *W's* action for maintenance was first pursued subsequent to the divorce decree.

Until the recent decision in the *Armstrong* case, it was extremely difficult to determine which one (or what combination) of these grounds was to be considered the essential distinguishing feature and which ones were to be treated as mere makeweights. On closer analysis, it will be seen that the second and third grounds were nothing more than the "fault" and "matrimonial domicile" elements of *Haddock,* which were supposedly overruled by *Williams I.*[38] If these elements were to become predominant again, then the *Haddock* case not only would not be overruled but would be the controlling authority. That such an approach might be taken by the Court, however, seems inconceivable in view of indications given in the *Armstrong* case that *Thompson v. Thompson* is no longer valid.

In the *Armstrong* case, the parties were married in Ohio and subsequently moved to Florida, where they lived for many years. In 1950, *W* left *H* and returned to Ohio. In October 1951, *H* procured a divorce in Florida on constructive service to *W,* who did not appear in the proceedings. The Florida decree made no award of alimony to *W.* In February 1952, *W* sued in Ohio for a divorce and alimony. *H* appeared and contested *W's* action. The lower court held that the divorce was valid and entitled to full faith and credit, but that it did not preclude *W* from obtaining alimony. The Ohio Supreme Court af-

36. 226 U.S. 551 (1913).
37. 334 U.S. 541, 546 n.4 (1948).
38. See text supported by notes 25-28 *supra.*

firmed,[39] basing its opinion upon an extension of the divisible divorce doctrine enunciated in *Estin* and applied in prior Ohio cases.[40]

H's principal contention in *Armstrong* was that the *Thompson* case was conclusive of *W's* right to relief.[41] Further, he contended that there must be some limit placed on the "divisible divorce" doctrine so that at least the court of the matrimonial domicile should be able to determine the previously unadjudicated support rights of a spouse who had chosen to leave the parties' domicile. Thus, on the surface, it appeared that *Armstrong* directly presented the question whether, under the full faith clause, a wife's unadjudicated claim for support could survive a valid ex parte divorce procured in another state. On closer inspection of the case on oral argument, however, the majority of the court concluded that the constitutional question did not have to be met. Writing for the majority, Justice Minton based his opinion on the view that the Florida court granting the divorce did not purport to deny alimony to *W*. This, despite the fact that the Florida court, after hearing *H's* evidence and granting the divorce, explicitly stated: "It is, therefore, specifically decreed that no award of alimony be made to the defendant . . . ."[42] Accepting Justice Minton's interpretation of the Florida divorce decree, the majority concluded that since Florida had not purported to deny alimony to *W*, the Ohio court was free to grant or deny her alimony without the restriction of the full faith clause. Even under the majority opinion, one significant factor emerged: A valid foreign ex parte divorce cannot, *ex proprio vigore*, preclude *W* from obtaining alimony. The divorce court must at least purport to adjudicate *W's* right to alimony; otherwise, *F-2* is free to do as it pleases, so far as the question of full faith is concerned.

In the concurring opinion, Justice Black, with Chief Justice Warren and Justices Douglas and Clark concurring, stated that the constitutional question was squarely presented. These Justices interpreted the Florida court's divorce decree as having purported to deny alimony to *W*. The question, therefore, was whether the Ohio court was precluded by full faith and credit from awarding *W* alimony. These Justices, basing their decision on an extension of the logic of *Estin*, felt that the Ohio court was not so precluded. Thus, the fact that *W* in *Armstrong* had not reduced to judgment her claim for support prior to the divorce (as *W* had done in *Estin*) was considered as not a

39. 162 Ohio St. 406, 123 N.E.2d 267 (1954).

40. Slapp v. Slapp, 143 Ohio St. 105, 54 N.E.2d 153 (1944); Cox v. Cox, 19 Ohio St. 502 (1869).

41. Brief for Petitioner, pp. 8-13, Armstrong v. Armstrong, 24 U.S.L. WEEK 4173 (U.S. April 9, 1956).

42. *Id.* at 6a.

"meaningful distinction."[43] The ultimate foundation for the concurring opinion, however, was an old stand-by:

> It has been the constitutional rule in this country at least since *Pennoyer v. Neff* . . . that nonresidents cannot be subjected to personal judgments without such [personal] service or appearance. We held in *Estin v. Estin* . . . that an alimony judgment was this kind of "personal judgment."[44]

In answer to *H's* contention that the *Armstrong* case was controlled by the *Thompson* case, Justice Black pointed out that *Thompson* was decided long before the *Williams* cases, the *Estin* case, and other developments in the field.[45] Moreover, it was recognized that no contention for a divisible divorce doctrine had been made in *Thompson,* since *W's* theory there was based solely on the continued existence of the marital relation. The concurring opinion concluded that in any event, to the extent that the *Thompson* case was inconsistent with *Pennoyer v. Neff* and the *Estin* case, it should no longer be considered authoritative.

While the theory upon which the majority opinion in *Armstrong* skirted the constitutional issue seems highly questionable, it is possible that there was, in fact, no question of full faith presented. Though not discussed in the majority or concurring opinions, nor apparently argued by counsel, there was no showing that *under Florida law W's* right to alimony would have been barred by *H's* ex parte divorce. In fact, the Florida Supreme Court has recently held that a wife's action for alimony in Florida is not barred by a valid foreign ex parte divorce.[46] If it had been shown that *H's* Florida divorce would not have precluded *W's* subsequent action for alimony *in Florida,* then seemingly no full faith question would have been present, since the Ohio court was only required by full faith to give the same effect to the Florida divorce decree as would have been given by the Florida courts.[47]

The *Armstrong* case is not definite authority that a court in *F-2* is free, so far as full faith is concerned, to grant or deny alimony to *W* after a valid ex parte divorce in *F-1.* At least four Justices, however, have revealed their positions. To these four, the divisible divorce doctrine of *Estin* also applies when a wife's support rights have not been adjudicated prior to the divorce. Also, by their calculations, the *Thompson* case is no longer a case to be seriously reckoned

43. 24 U.S.L. WEEK at 4175.
44. *Ibid.*
45. In addition to the *Williams* and *Estin* cases, see, *e.g.,* May v. Anderson, 345 U.S. 528 (1953); Sherrer v. Sherrer, 334 U.S. 343 (1948).
46. Pawley v. Pawley, 46 So. 2d 464 (Fla. 1950), *cert. denied,* 340 U.S. 866 (1950). Of course, the further question is whether Florida would be compelled to give the same effect to domestic ex parte divorce decrees. See discussion in text supported by notes 34-35 *supra.*
47. 28 U.S.C. § 1738 (1952).

with. It seems quite likely that this position will be accepted in the future by a majority of the Court, when the question is squarely presented for decision.

If the extension of the *Estin* case indicated by the concurring opinion in *Armstrong* is accepted, a further problem arises. Many state cases have held that *W* is precluded from obtaining alimony or support subsequent to *H's* valid ex parte divorce because of the lack of any available remedy under local law, or for various other considerations of "public policy," rather than full faith and credit.[48] Since the basis for *Estin* (and presumably for any extension of *Estin*) is the lack of jurisdiction of the divorcing state to adjudicate *W's* support rights without in personam jurisdiction, could *W* validly argue that due process would prevent a court in *F-2* from denying her claim for alimony because of any of these reasons established under local law? Further, suppose *W* were able to secure service of process on *H* only in *F-1*, the state where the divorce decree was granted. Could *W* successfully contend that under the principles of *Pennoyer v. Neff* a personal judgment procured against a nonresident, nonappearing defendant is wanting in due process and is invalid for any purpose, even in the state where rendered?[49]

While these consequences might appear to be the ultimate result of importing the in rem-in personam doctrine of *Pennoyer v. Neff* into the area of alimony claims, such a result would appear to unduly extend the divisible divorce concept. The fact that the court in the divorcing state could not affect *W's* support rights without personal jurisdiction does not necessarily mean that *F-2* cannot adopt local rules of law that would bar *W's* action. Obviously, of course, *W* could be denied relief because of defenses to the merits of her action (her own misconduct, or lack of need, for example) or because of other equitable defenses, e.g., estoppel or laches. Similarly, there would seem to be no constitutional limitation to prevent *F-2* from establishing local rules or statutes which would permit an action for alimony or support only during the continued existence of the marital relation. The only restriction on *F-2*, therefore, would be that it could not deny *W's* action because of full faith and credit. Likewise, if *W* were forced to bring her action for alimony in *F-1* it would appear that she could be denied relief under the local law of that state. To the extent, therefore, that states are permitted freedom in adopting local rules of law which either grant or deny alimony after a valid ex parte divorce, the theory of *Pennoyer*, that personal judgments based only upon con-

48. See, *e.g.*, Calhoun v. Calhoun, 70 Cal. App. 2d 233, 160 P.2d 923 (1945); Peff v. Peff, 2 N.J. 513, 67 A.2d 161 (1949); Loeb v. Loeb, 118 Vt. 472, 114 A.2d 518 (1955).

49. See the discussion of *Pennoyer v. Neff* in note 31 *supra*.

structive service are totally ineffectual, will not be applicable in its entirety in the field of interstate divorce.

Regardless of whether the divisible divorce principles of the concurring opinion in the *Armstrong* case are accepted in future decisions, many problems remain to be solved before the divisible divorce doctrine becomes a complete pattern of law. At least one of them deserves special mention. In many ex parte divorces the wife is the party who procures the divorce. Aside from the question of possible estoppel,[50] should the fact that the wife obtained the divorce be *constitutionally* material insofar as her right subsequently to obtain alimony is concerned?

In general, so far as the problem of choice of laws has been considered,[51] it is recognized that whether *W* can obtain alimony or support following an ex parte divorce decree depends upon the law of her domicile at the time of the divorce.[52] For example, under Pennsylvania law *W* cannot obtain alimony after the marital relation is terminated. Thus, if *W* is domiciled in Pennsylvania at the time her husband procures a valid divorce in Nevada, she would be barred from subsequently obtaining alimony under Pennsylvania law.[53] Nor could she migrate to a state like Ohio, where a wife may procure alimony subsequent to such a divorce,[54] and assert that she should be able to obtain relief under Ohio law.

This choice of laws factor is basic in the determination of the question of the survival of *W's* support rights after she obtains the divorce. Of course, if by the law of the state where *W* obtained the divorce her support rights were not terminated by the divorce, then she would not be barred from obtaining alimony or support in *F-2* either by the full faith clause or by the above choice of laws rule. However, if *W* obtains a divorce in a state where her support rights did not survive a divorce, it would seem that she would not be able later to obtain alimony in another state. A serious question, however, is whether she would be barred as a matter of full faith and credit[55] or merely as a matter of the proper application of a choice of laws rule. If the "jurisdictional" approach suggested by *Estin* and *Armstrong* is followed, the divorcing state would have no jurisdiction to adjudicate *W's* alimony rights, absent personal jurisdiction of *H*. Thus, any attempt by the court in the divorcing state to determine *W's* support rights would

50. See text supported by note 77 *infra*.

51. Many courts apparently apply forum law without considering the question. See, *e.g.*, Hopson v. Hopson, 221 F.2d 839 (D.C. Cir. 1955).

52. Dimon v. Dimon, 40 Cal. 2d 516, 254 P.2d 528 (1953); Morris, *Divisible Divorce*, 64 HARV. L. REV. 1287 (1951).

53. Commonwealth v. Petrosky, 168 Pa. Super. 232, 77 A.2d 647 (1951).

54. Slapp v. Slapp, 143 Ohio St. 105, 54 N.E.2d 153 (1944).

55. Judge Traynor, concurring in part and dissenting in part, in Dimon v. Dimon, 40 Cal. 2d 516, 540, 254 P.2d 528, 541 (1953), expressed the opinion that *W* would be precluded by full faith and credit.

be a nullity. Since the *F-1* court lacked jurisdiction to award her support, it would seem that full faith would not preclude *F-2* from awarding her support, even though she would have been barred according to the law of *F-1*.[56] Concededly, *W* would be barred if *F-2* applied the choice of laws rule previously suggested.[57] But suppose *F-2* chose instead to hold that *W's* right to support was governed by its law rather than the law of *W's* domicile at the time of the divorce. Would *F-2* be free to so choose? While it was formerly recognized by the Supreme Court that an erroneous application of a choice of laws rule did not raise a constitutional question,[58] more recent decisions indicate that the Court is severely limiting the traditional freedom of the states in the area of choice of laws.[59]

So far has the concept of "divisible divorce" progressed. Since the doctrine is relatively new and still in the process of development, results will be obtained which appear at first glance to be anomalous. Indeed, the doctrine would not meet the absolutist's ideal. Many areas remain unexplored. That the doctrine has developed at all, however, is a tribute to a Court which is beginning to move away from the traditionally rigid, formalistic approach which has too often in the past restricted the decisions in the area of conflicts of law to a purely mechanistic application of certain "established" first principles. Within the constitutional framework, there is no inherent limitation in the area of interstate divorce to prevent a court from adopting any set of rules which it feels best serves the interest of justice.

To conclude that a wife's support rights subsequent to an ex parte divorce should not be barred by full faith and credit, however, is to answer only part of her problem. Certainly, a more immediate and practical problem for her is to discover a remedy under the law of the state in which she seeks relief. To this problem the remainder of this note will be devoted.[60]

II

Some preliminary observations should be made before examining local law relative to the survival of a wife's support action after a foreign ex parte divorce. Of course, if the Supreme Court should rule that full faith requires that a valid foreign divorce terminate *W's*

56. See Armstrong v. Armstrong, 24 U.S.L. WEEK 4173, 4175 (U.S. April 9, 1956).

57. See text supported by note 52 *supra*.

58. Kryger v. Wilson, 242 U.S. 171 (1916).

59. See, *e.g.*, Bradford Elec. Co. v. Clapper 286 U.S. 145 (1932); Home Ins. Co. v. Dick, 281 U.S. 397 (1930). The Supreme Court's approach to the problem of requiring uniformity in the application of state choice of laws rules has been on a two-fold basis: due process and full faith and credit. For a comprehensive discussion of the problem, see Hilpert & Cooley, *The Federal Constitution and the Choice of Laws*, 1939 WASH. U.L.Q. 27.

60. This discussion will consider only the question of *W's* support rights following a valid ex parte divorce. Problems regarding her rights of inheritance and rights in specific property are beyond the scope of this treatment.

right to obtain alimony, then local law to the contrary would no longer be controlling. Local law will be important, therefore, only so long as the Court does not so interpret the full faith requirement. Even a Supreme Court ruling as indicated by the *Armstrong* case that under the divisible divorce doctrine *W's* right of action is not barred by full faith would not fully answer her problem. A confusing variety of local rules and statutes may still bar her recovery.

In analyzing the state cases it is important at the outset to place them in their proper context. Several factors indicate that many of these cases are of extremely doubtful validity at the present time. The first is the almost complete renovation which has taken place in the field of conflict of laws in recent times. Many of the state cases were decided prior to the *Williams* cases, and involved divorces that were recognized only under principles of comity and public policy. Whether similar decisions would be reached in these cases under the mandatory full faith recognition policy established by *Williams I* is at least questionable. Further, the divisible divorce concept of the *Estin* and *Armstrong* cases, while not *commanding* that a state permit *W's* action for support, may well have established a rationale which will stimulate re-evaluation of many prior state cases. Finally, the judicial opinions on the state court level, and the contentions of counsel as revealed in the opinions, are something less than noteworthy.[61] The temptation to court and counsel to indulge in vague and fanciful generalities in this area seems irresistible. The enterprising practitioner should not be dismayed, therefore, if he finds a leading case in his jurisdiction which appears to bar his client's action.

A variety of reasons have been advanced in many state cases for denying *W* alimony after *H* has procured a valid ex parte divorce in another state. Some decisions, of course, have been rested upon the full faith clause.[62] To the extent that the concurring opinion in *Armstrong* is indicative of the future attitude of the remainder of the Court, these cases will be overturned. In addition, *W* has often been denied relief because she sought to recover under a local statute which the court interpreted as requiring the existence of the marital relation as a prerequisite to recovery.[63] Thus, in a leading New Jersey case, *Peff v. Peff*,[64] after *H* obtained a Nevada divorce *W* sought relief under a New Jersey statute whose provisions are typical:

61. A typical example is Pawley v. Pawley, 46 So. 2d 464 (Fla. 1950), a veritable masterpiece of confusion.

62. See, *e.g.*, Anglin v. Anglin, 211 Miss. 405, 51 So. 2d 781 (1951); Commonwealth v. Petrosky, 168 Pa. Super. 232, 77 A.2d 647 (1951).

63. Meredith v. Meredith, 204 F.2d 64 (D.C. Cir. 1953), *overruled by* Hopson v. Hopson, 221 F.2d 839 (D.C. Cir. 1955); Shain v. Shain, 324 Mass. 603, 88 N.E.2d 143 (1949), *cert. denied*, 338 U.S. 954 (1950); Peff v. Peff, 2 N.J. 513, 67 A.2d 161 (1949); Loeb v. Loeb, 118 Vt. 472, 114 A.2d 518 (1955).

64. 2 N.J. 513, 67 A.2d 161 (1949).

> If a husband, without justifiable cause, shall abandon his wife or separate himself from her and refuse or neglect to maintain and provide for her, the court may order suitable support and maintenance to be paid and provided by the husband for the wife. . . .[65]

The court found that the divorce had effectively terminated the marital relation and consequently precluded *W's* action, since the statute required the continued existence of the marital relation in order for her to recover. An ex-wife, therefore, could not qualify as a "wife" within the meaning of the statute.

Other courts, when confronted by similar statutes, have used two different approaches to avoid an impasse such as the *Peff* case. Under one view, the term "wife" in the statute refers only to the person, not to the relation. An ex-wife has been granted relief under such an interpretation.[66] Another approach is to consider that an ex-wife may be a "wife" for the purpose of bringing her action for alimony.[67] It would seem that both of these approaches are rather obvious attempts at judicial legislation. When read in context, there is little doubt that the statutes contemplate the existence of the marital relation as a prerequisite to relief. If it is felt that *W* should be allowed to recover in these situations, there are less blatant methods of achieving that result. Primarily, of course, attempt should be made to amend the statute. Failing this, it is possible that *W* may proceed in an independent action for alimony, relying on the inherent power of a court of equity to grant her relief, rather than on statutory authorization.[68]

The *Peff* case is further illustrative of the failure of *W* to seek the proper remedy under local law. Instead of seeking relief as a "wife" under the above statute, she might well have proceeded under a New Jersey statute providing that a court may order alimony or maintenance either pending or after a divorce decree, whether obtained in New Jersey or elsewhere.[69] This statute appears to be a definite legislative recognition of the divisible divorce doctrine and could seemingly have offered *W* a chance to litigate her claim on the merits.[70] At least

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65. N.J. STAT. ANN. § 2:50-39 (1939).

66. Cox v. Cox, 19 Ohio St. 502 (1869).

67. See, *e.g.*, Melnyk v. Melnyk, 49 Ohio App. 22, 107 N.E.2d 549 (C.P. 1952).

68. This approach was successful in an important recent case in the District of Columbia. Hopson v. Hopson, 221 F.2d 839 (D.C. Cir. 1955). On the strength of this case attempts no doubt will be made in the future to contend for the inherent power of a court of equity to award alimony, especially when the particular claim does not meet the conditions of a local statute.

69. N.J. STAT. ANN. § 2A:34-23 (1952). For similar statutes, see ILL. REV. STAT. c. 40, § 21 (1955); KAN. GEN. STATS. § 60-1518 (1949); MASS. ANN. LAWS c. 208 § 34 (1955); N.Y. CIV. PRAC. ACT § 1170-b; OKLA. STAT. ANN. tit. 12, § 1284 (1937).

70. The *Peff* case is not unique in presenting a situation in which *W* apparently sought relief under the wrong local statute. See also Calhoun v. Calhoun, 70 Cal. App. 2d 233, 160 P.2d 923 (1945); Shain v. Shain, 324 Mass. 603, 88 N.E.2d 143 (1949), *cert. denied*, 338 U.S. 954 (1950).

it seems that *W* should have tried to join the two causes of action, proceeding on the theory that either the divorce was invalid, or, even if valid, that she should still be entitled to alimony.

In addition to utilizing a statutory basis for denying relief to *W*, several states have relied on long-established common-law grounds for denying relief. Thus, it is frequently asserted that alimony may be granted only as an incident to a divorce proceeding.[71] Since by hypothesis *H's* valid foreign divorce precludes *W* from subsequently maintaining a divorce action,[72] her action for alimony also fails. This approach is subject to attack in two respects. First, there is no necessary limitation, either historical or rational, to prevent the allowance of alimony unconnected with a divorce action.[73] Few proceedings savor more of broad, equitable principles than actions for alimony. If alimony is to be allowed only as an incident to a divorce action, it should be recognized as a rule of *choice* rather than of *necessity*. Second, even though, as a matter of expediency, a court might choose to require *W* to seek alimony at the time of a divorce in an action wherein both parties were present, quite different considerations apply to ex parte divorces. It is impossible for *W* to present her claim for alimony in a divorce action of which she was totally unaware, and practically so in one in which she had no reasonable opportunity to appear.

The well-worn term "jurisdiction" has also been used as a basis for denying relief to *W* in some cases. Thus, it is asserted that since the marital relation has been terminated in *F-1*, the *F-2* court lacks jurisdiction to decide *W's* alimony claim.[74] The complete pliability of the jurisdictional approach is exemplified by several other decisions in which courts concluded that the failure of jurisdiction was in the *F-1* court (wherein personal service upon *W* was lacking) rather than in *F-2*.[75] The latter view, recognizing the distinction between in personam and in rem rights is, of course, the theory of the *Estin* and *Armstrong* cases, and may well be the approach of future cases.

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71. Shaw v. Shaw, 92 Iowa 722, 61 N.W. 368 (1894); Loeb v. Loeb, 118 Vt. 472, 114 A.2d 518 (1955).

72. A few states, however, provide that one of the causes for which a spouse can maintain a divorce action is that his or her spouse obtained a divorce outside the state. FLA. STATS. ANN. § 65.04 (8) (1943); MICH. STAT. ANN. § 25.86 (1937). As an incident of this divorce action, *W* may obtain alimony. See Van Inwagen v. Van Inwagen, 86 Mich. 333, 49 N.W. 154 (1891). The operation of these statutes would seem to be severely restricted as a result of the *Williams* cases.

73. Hopson v. Hopson, 221 F.2d 839 (D.C. Cir. 1955).

74. Chirgwin v. Chirgwin, 26 Cal. App. 2d 506, 79 P.2d 772 (1938); Staub v. Staub, 170 Md. 202, 183 Atl. 605 (1936).

75. Sheridan v. Sheridan, 213 Minn. 24, 4 N.W.2d 785 (1942); Melnyk v. Melnyk, 49 Ohio App. 22, 107 N.E.2d 549 (C.P. 1952); West v. West, 114 Okla. 279, 246 Pac. 599 (1926).

Further complications are added when *W* is the party procuring the divorce. In this situation it is also frequently contended[76] that *W* "voluntarily" chose to obtain the divorce, and having done so, is estopped from later asserting a claim for alimony.[77] Again, relief has been denied on the theory that *W* has "waived" her right to alimony by obtaining the ex parte divorce.[78]

Thus, in many states, the outlook for the alimony-seeking ex-wife is dismal. In others, however, her prospects are considerably brighter. Recently, many courts have begun to realize that an action for alimony subsequent to a divorce is not a conceptual impossibility.[79] Where the wife is afforded relief, the result is generally based on the jurisdictional, in rem-in personam approach suggested in *Estin* and *Armstrong*.[80] The same approach may be used, of course, to allow *W* alimony after she herself has procured the divorce.[81]

The eventual solution to this phase of the problem, however, may well rest with state legislatures. A few states have enacted statutes expressly allowing an ex-wife to obtain alimony from her former spouse.[82] The post-*Estin* developments in New York are particularly revealing. The New York courts, limiting *Estin* to its precise facts, held that an ex-wife could not obtain alimony subsequent to a valid foreign divorce unless, prior to the divorce, she had obtained a judgment for support.[83] Then, in 1953, the state legislature, on the rec-

76. Of course, some of the reasons for denying *W* relief when *H* procures the the divorce (*e.g.*, alimony is only allowable as an incident of divorce, or lack of jurisdiction) could also be used to deny *W* relief when she obtained the divorce.

77. Doeksen v. Doeksen, 202 Iowa 489, 210 N.W. 545 (1926); Staub v. Staub, 170 Md. 202, 183 Atl. 605 (1936); Hunter v. Hunter, 24 N.Y.S.2d 76 (Sup. Ct. 1940). The estoppel rationale is based on the theory that *W* should not be allowed to attack a judgment (the divorce decree) which she herself procured. But it is clear that under the divisible divorce approach, *W* would not be impeaching the validity of the divorce in any respect in seeking to obtain alimony. Similarly, the contention that *W* voluntarily chose the forum and thus should not be heard to complain fails in the frequently occurring situation in which *H's* whereabouts are unknown and *W* has no real choice as to where to bring the action.

78. See, *e.g.*, Dimon v. Dimon, 40 Cal. 2d 516, 254 P.2d 528 (1953). The "waiver" theory is a unique one. In the usual case, *W* has to choose between retaining her rights to support under a disagreeable marital relation and obtaining a divorce with the consequent loss of support. Neither of the two alternatives offers much of a choice to *W*. Nevertheless, the theory is that she has elected to obtain the divorce and thus has waived her right to support.

79. Hopson v. Hopson, 221 F.2d 839 (D.C. Cir. 1955); Gray v. Gray, 61 F. Supp. 367 (E.D. Mich. 1945); Pawley v. Pawley, 46 So. 2d 464 (Fla. 1950); Taylor v. Taylor, 242 S.W.2d 747 (Ky. 1951); Sheridan v. Sheridan, 213 Minn. 24, 4 N.W.2d 785 (1942); Vanderbilt v. Vanderbilt, 147 N.Y.S.2d 125 (1st Dep't 1955).

80. See text supported by notes 31, 44 *supra*.

81. Stephenson v. Stephenson, 54 Ohio App. 239, 6 N.E.2d 1005 (1936); West v. West, 114 Okla. 279, 246 Pac. 599 (1926); Nelson v. Nelson, 71 S.D. 342, 24 N.W.2d 327 (1946).

82. See statutes cited in note 69 *supra*.

83. Harris v. Harris, 279 App. Div. 542, 110 N.Y.S.2d 824 (4th Dep't 1952); Adler v. Adler, 192 Misc. 953, 81 N.Y.S.2d 797 (Dom. Rel. Ct. 1948).

ommendation of the New York Law Revision Commission, adopted the following statute:

> In an action for divorce, separation or annulment . . . where the court refuses to grant such relief by reason of a finding by the court that a divorce, annulment or judgment declaring the marriage a nullity had previously been granted to the husband in an action in which jurisdiction over the person of the wife was not obtained, the court may, nevertheless, render . . . such judgment as justice may require for the maintenance of the wife.[84]

While the statute was less than perfect from a standpoint of draftsmanship, its import was clear. The statute was sustained against an asserted violation of due process in a recent case, *Vanderbilt v. Vanderbilt*.[85] After reviewing the divisible divorce doctrine of the *Estin* case, and its subsequent restriction in New York, the court concluded that the statute was nothing more than a permissible legislative extension of the judicial concept that a divorce based only upon constructive service is divisible.

That legislative action in many states may be needed if *W* is to be accorded relief seems certain in view of two factors. As aforementioned, courts have often precluded *W's* action because she failed to qualify as a "wife" under the local statute.[86] Since the statutory provision is frequently considered the sole remedy, to the exclusion of equitable relief,[87] it would seem that only legislative action would accord *W* relief. Similarly, judicial inertia resulting from the long-established rule in some states that an action for alimony can be maintained only as an incident to a divorce is unlikely to be shaken without definite legislative intervention. A simple, clear-cut expression of legislative policy should effectively obviate any judicial doubt on the subject.

CONCLUSION

Under the state of the law prior to the *Williams* cases a spouse against whom a divorce proceeding was brought could in many cases frustrate the other spouse's divorce action if he was sufficiently mobile to be able to evade service of process and to establish domicile elsewhere. The focus was reversed in the *Williams* cases, which enabled the divorce-seeking spouse to terminate effectively the marital relation provided he could afford the expense of a relatively short stay in Nevada or Florida. The constitutional protection afforded such divorces opened wide the avenue of escape for husbands seeking to relieve themselves of burdensome marital obligations.

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84. N.Y. CIV. PRAC. ACT § 1170-b.

85. 147 N.Y.S.2d 125 (1st Dep't 1955).

86. See text supported by notes 65, 70 *supra*.

87. Loeb v. Loeb, 118 Vt. 472, 114 A.2d 518 (1955). *Contra*, Hopson v. Hopson, 221 F.2d 839 (D.C. Cir. 1955).

In order to relieve such a situation, the doctrine of divisible divorce was formulated. It is obviously an attempted compromise. As such, it has met with criticism from both extremes. It is not, of course, a cure-all. Where *W* is barred from obtaining relief under local law, the fact that the divorce decree is divisible will offer little solace. In this area legislative action may be needed to supplement the divisible divorce concept.[88] Further, the doctrine itself may create difficulties by postponing indefinitely the time at which the validity of the divorce will be determined.[89] But these problems are not insurmountable; further development of the doctrine, therefore, is both to be expected and desired.

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88. See text supported by notes 85-87 *supra*.

89. Thus, since *W* could obtain the relief she seeks without attacking the divorce, the validity of the divorce might not be determined until *H's* death, when rival claimants might attempt to share as a "wife" in *H's* estate. To avoid this result, it is possible to adopt a rule requiring *W* to attack the divorce within a specified period of time, or at the time she seeks alimony. Failing to do so, she could be considered to be precluded from later attacking the divorce. Query, however, whether this approach could prevent children of the marriage or other interested parties from later impeaching the validity of the divorce. See Note, 1951 WASH. U.L.Q. 94.