

MIGRATORY DIVORCE: A PROPOSED CONGRESSIONAL REMEDY

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On June 7, 1948, in the *Sherrer* case¹ the Supreme Court, speaking through Mr. Chief Justice Vinson, once again considered the perplexing question, when must one state give effect to a decree of divorce rendered by courts of a sister state; and its latest answer to that question is, in the words of Mr. Justice Frankfurter, who voiced a dissent in which the late Mr. Justice Murphy concurred, “. . . calculated, however unwittingly, to promote perjury without otherwise appreciably affecting the existing disharmonies among the forty-eight states in relation to divorce.”²

It is the thesis of this paper that a review of the procession of cases in which the Supreme Court has unsuccessfully grappled with the problems posed by “inter-state” divorce, dating back to *Cheever v. Wilson*,³ decided in 1869, and continuing up to the present decision, make manifest the inadequacy of the judiciary as the agency for resolving these problems. It is this inadequacy of the judiciary’s solution which suggests that in definitive legislation may be found a more adequate instrumentality for the elimination of many of the existing uncertainties, conflicts, and difficulties in the administration of divorce laws. The inability of the Court to satisfactorily deal with this problem is articulated by Mr. Justice Frankfurter in his concurring opinion in the first *Williams* case, where he says:

. . . these complications cannot be removed by any decisions this Court can make—neither the crudest nor the subtlest juggling of legal concepts could enable us to bring forth a uniform national law of marriage and divorce. . . . Judicial attempts to solve problems that are intrinsically legislative . . . are apt to be as futile in their achievement as they are presumptuous in their undertaking.⁴

Before the feasibility of legislation on the subject is considered, the leading cases in which the Supreme Court has dealt with the

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1. *Sherrer v. Sherrer*, 334 U.S. 343 (1948).

2. *Id.* at 356.

3. 9 Wall. 108 (U.S. 1869).

4. *Williams v. North Carolina*, 317 U.S. 287, 304 (1942).

problem of mandatory recognition by one state of a divorce decree rendered in another of the United States, under compulsion of the Full Faith and Credit Clause, will be briefly reviewed to trace the development of the law as it is today, and to define more sharply the problem for which a legislative solution is sought.

The very limited problem whether an alimony decree of the courts of State A, issued as an incident to a divorce *a mensa* or a judicial separation decreed by the State A court, survives, when one of the parties subsequently secures an absolute divorce in State B, a problem which dates back to *Barber v. Barber*,⁵ decided in 1858, and was once again before the Supreme Court in *Estin v. Estin*,⁶ will not be considered herein.

I

The Court first considered the effect in other of the United States of an absolute divorce, which is valid and effective by the laws of the state in which it was obtained, in *Cheever v. Wilson*,⁷ where reliance was placed upon Article IV, Section I of the Constitution.⁸ The Court, speaking through Mr. Justice Swayne, said:

If a judgment is conclusive in a State where it is rendered, it is equally conclusive everywhere in the courts of the United States.

. . . The only question [before us] is as to the reality of her new residence and of the change of domicil. . . . The finding [of a new domicil in Indiana for the wife] is clearly sufficient until overcome by adverse testimony. . . .

It is insisted . . . that the domicil of the husband is the wife's; and that she cannot have a different one from his. The converse of the latter proposition is so well settled that it would be idle to discuss it. The rule is that she may acquire a separate domicil whenever it is necessary or proper that she should do so. The right springs from the necessity for its exercise, and endures as long as the necessity continues. The proceeding for a divorce may be instituted where the wife has her domicil.⁹

5. *Barber v. Barber*, 21 How. 532 (U.S. 1859).

6. *Estin v. Estin*, 334 U.S. 541 (1948).

7. 9 Wall. 108 (U.S. 1869).

8. U.S. CONST. Art. IV, § 1:

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

9. 9 Wall. 108, 123 (U.S. 1869).

It is noteworthy that although the opinion creates the impression that domicil of the wife in Indiana was sufficient to confer jurisdiction to divorce the parties on the Indiana court, nevertheless Mr. Cheever not only personally appeared, but filed a cross bill, and was granted custody of the three eldest children. Moreover, the wife was ordered to pay him for the support of these children from the income of certain realty, to the rents from which she was entitled under the terms of a marriage settlement. Although the Court did not develop the point, it may also have been significant that Wilson, who tried to upset the validity of the Indiana divorce, claimed the right to the income from the realty as lessee thereof from the wife, who was the libellant in the Indiana divorce proceeding. The case adds two elements to the newly developing law on inter-state divorce decree recognition: first, that a divorce valid and conclusive in State A, where rendered, is equally valid and conclusive in all the other states; and secondly, contrary to the then prevailing English rule, a wife may obtain a domicil separate from that of her husband, at least when she is living apart from her husband for a sufficient cause. This second point leaves us with two questions: (a) what, for purposes of this rule, is a sufficient cause; and (b) by what law will the forum decide the sufficiency of a cause of living apart by the wife?

Fifteen years later in *Cheeley v. Clayton*,¹⁰ Mr. Justice Gray, after citing the *Cheever* case as authority for the proposition that the domiciliary state of one of the parties, if that party is living apart for sufficient cause, may divorce them by a decree which will be valid everywhere, added a new precaution, saying:

But in order to make the divorce valid either in the state in which it is granted or in another state, there must, unless the defendant appeared in the suit, have been such notice to her as the law of the first state required.¹¹

The next significant¹² Supreme Court decision on the question was the *Atherton* case,¹³ decided in 1901. Here the Court evidences a growing awareness that the Full Faith and Credit Clause has made it the unwilling arbiter between conflicting

10. 110 U.S. 701 (1884).

11. *Id.* at 705.

12. *Maynard v. Hill*, 125 U.S. 190 (1888) was the next case chronologically but adds nothing of significance to the development of the law on divorce decree recognition.

13. *Atherton v. Atherton*, 181 U.S. 155 (1901).

state views and laws. The Court's spokesman, Mr. Justice Gray, places the decision on an interpretation of the mandate of the Full Faith and Credit Clause. He traces the leading cases from Maine,¹⁴ Rhode Island,¹⁵ Massachusetts,¹⁶ and New Jersey¹⁷ to support the rule that domicil of one of the spouses suffices to confer jurisdiction upon the courts of that domicil to validly divorce both the spouses, and then looks at the reasoning of the leading New York case¹⁸ urging the contrary view. Proceeding cautiously, Mr. Justice Gray said:

The authorities above cited show the wide diversity of opinion existing upon this important subject, and admonish us to confine our decision to the exact case before us. . . . In this case, the divorce in Kentucky was by the court of the state which had always been the undoubted domicil of the husband, and which was the only matrimonial domicil of the husband and wife. The single question to be decided is the validity of that divorce granted after such notice had been given as was required by the statutes of Kentucky.¹⁹

Prior to having thus carefully limited the scope of the decision, Mr. Justice Gray had said:

. . . the purpose and effect of a decree of divorce from the bond of matrimony, by a court of competent jurisdiction, are to change the existing status or domestic relation of husband and wife, and to free them both from the bond. The marriage tie, when thus severed as to one party, ceases to bind either. A husband without a wife, or a wife without a husband is unknown to the law. . . . The rule as to the notice necessary to give full effect to a decree of divorce is different from that which is required in suits in personam.²⁰

The Court cites a lengthy dictum from *Pennoyer v. Neff* as buttressing this statement on the requirement of notice. The pertinent portion states:

The jurisdiction which every state possesses to determine the civil status and capacities of all its inhabitants involves authority to prescribe the conditions on which the proceedings affecting them may be commenced and carried on within its territory. The state . . . has absolute right to prescribe the conditions for which the marriage relation between its

14. *Harding v. Alden*, 9 Greenl. 140 (Me. 1832).

15. *Ditson v. Ditson*, 4 R.I. 87 (1856).

16. *Hood v. Hood*, 11 Allen 196 (Mass. 1865).

17. *Felt v. Felt*, 59 N.J. Eq. 606 (1899).

18. *People v. Baker*, 76 N.Y. 78 (1879).

19. *Atherton v. Atherton*, 181 U.S. 155, 170 (1901).

20. *Id.* at 162.

own citizens . . . may be dissolved. One of the parties, guilty of acts for which, by the law of the state, a dissolution may be granted, may have removed to a state where no dissolution is permitted. The complaining party would therefore fail if a divorce were sought in the state of the defendant; and if application could not be made to the tribunals of the complainant's domicil in such case, and proceedings be there instituted without personal service of process or personal notice to the offending party, the injured citizen would be without redress.²¹

After tracing the authorities cited above,²² Mr. Justice Gray concluded:

We are of opinion that the . . . decree of the court there, granting a divorce upon the ground that she had abandoned her husband, is as binding on her as if she had been served with notice in Kentucky, or had voluntarily appeared in the suit.²³

It is to be noted here that the Court deliberately leaves open several questions which return to plague it in cases which we shall consider later. These are principally the questions as to the validity of a divorce where only constructive service is made upon the absent and non-resident libellee, and also the more vexatious question as to the extent to which the *bona fides* of the domicil may be later inquired into by the courts of either the same or a different jurisdiction. The Court here relied heavily upon the fact that Kentucky was the only matrimonial domicil the parties ever had. This reliance appears in the opinion of Mr. Justice Gray and is more clearly apparent from the discussion of the *Atherton* case in the subsequent cases of *Haddock v. Haddock*²⁴ and *Thompson v. Thompson*.²⁵ This trend toward attaching especial significance to the validity of the decree of divorce of the state which, in addition to being the domicil of the libellant, is also the matrimonial domicil of the parties reaches its fruition in the celebrated case of *Haddock v. Haddock*,²⁶ a decision which perpetuated its own special type of confusion until

21. 95 U.S. 714, 734 (1877). Mr. Justice Field, who was the Court's spokesman in the *Pennoyer* case, relied on BISHOP, COMMENTARIES ON THE LAW OF MARRIAGE AND DIVORCE (2d ed. 1852), a work frequently cited in these earlier cases which lay the foundation of the present law. Its influence in shaping the Court's views would seem to be not inconsiderable.

22. See notes 15-18, 20 *supra*.

23. *Atherton v. Atherton*, 181 U.S. 155, 172 (1901).

24. 201 U.S. 562 (1906).

25. 226 U.S. 551 (1913).

26. 201 U.S. 562 (1906).

it was laid to rest in the first of the equally celebrated *Williams* cases.²⁷

In the same year the Court decided the *Bell*²⁸ and *Streitwolf*²⁹ cases. In the *Bell* case, Mr. Justice Gray was once again the Court's spokesman, saying:

No valid divorce from the bond of matrimony can be decreed on constructive service by the courts of a state in which neither party is domiciled . . . the court in Pennsylvania had no jurisdiction of the husband's suit for divorce, because neither party had a domicile in Pennsylvania, and the decree of divorce was entitled to no faith and credit in New York or in any other state.³⁰

The Court here makes domicile of one of the parties a *sine qua non* for jurisdiction to divorce on constructive service. The subsequent cases, especially the *Streitwolf* case, where Mr. Justice Gray followed *Bell v. Bell* explicitly, and the *Andrews case*³¹ and the majority opinion in the second *Williams* case,³² confirm the view that it is in the *Bell* case that the Court expressly adopts the English common law rule, laid down by the Privy Council in *Le Mesurier v. Le Mesurier*,³³ that domicile is a jurisdictional requisite for divorce. Even this case, which commentators and courts universally cite for this premise, has been questioned recently by Professor Walter Wheeler Cook.³⁴ Mr. Justice Black, dissenting in the second *Williams* case, protests that neither the *Bell* nor *Streitwolf* cases turned on domicile, but that both turned on a finding that the statutory residence requirements of the divorcing states were not complied with.³⁵ This difference of opinion is here noted as illustrative of the fact that the judicial development of this problem is rife with uncertainties at every step of the way, and that the opinions of the Court have not been framed in such a way as to foreclose such divergence of interpretation by later courts.

The *Streitwolf* case will not be discussed here because it was

27. 317 U.S. 287 (1942).

28. *Bell v. Bell*, 181 U.S. 175 (1901).

29. *Streitwolf v. Streitwolf*, 181 U.S. 179 (1901).

30. 181 U.S. 175, 177 (1901).

31. *Andrews v. Andrews*, 188 U.S. 14 (1903).

32. *Williams v. North Carolina*, 325 U.S. 226 (1945).

33. [1895] A.C. 517.

34. COOK, THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS 458 *et seq.* (1942).

35. *Williams v. North Carolina*, 325 U.S. 226, 272 n. 11, 12 (1945).

merely a companion case to *Bell v. Bell* and involved merely the application of the rule of the *Bell* case.

Mr. Justice White was the Court's spokesman when it again considered the problem in the *Andrews* case after a silence of two years. That the problem's difficulty was now being realized is evidenced by the fact that the Court split five-three, Mr. Justice Holmes, who had written the opinion below as Chief Justice of the Supreme Judicial Court of Massachusetts, not participating.³⁶ The Court upheld the constitutionality of the Massachusetts version of the Uniform Marriage Evasion Act,³⁷ saying:

As the state of Massachusetts had exclusive jurisdiction over its citizens concerning the marriage tie and its dissolution, and consequently the authority to prohibit them from perpetrating a fraud upon the law of their domicile by temporarily sojourning in another state, and there, without acquiring a *bona fide* domicile, procuring a decree of divorce, it follows that the South Dakota decree relied upon was rendered by a court without jurisdiction, and hence the due faith and credit clause of the Constitution of the United States did not require the enforcement of such decree in the State of Massachusetts.

But it is said that . . . the case now under consideration is taken out of the rule announced in *Bell* and *Streitwolf*, since here the defendant appeared, and consequently became subject to the jurisdiction of the court by which the decree of divorce was rendered.

But it is obvious that the inadequacy of the appearance or consent of one person to confer jurisdiction over a subject matter not resting on consent includes, necessarily, the want of power of both parties to endow the court with jurisdiction over a subject matter, which appearance or consent could not give . . . as the appearance of one or both of the parties to a divorce proceeding could not suffice to confer jurisdiction over the subject matter, where it was wanting because of the absence of domicile within the state, we conclude that no violation of the due faith and credit clause of the Constitution of the United States arose from the action of the supreme judicial court of Massachusetts in obeying the command of the state statute, and refusing to give effect to the decree of divorce in question.³⁸

36. *Andrews v. Andrews*, 176 Mass. 92 (1900).

37. MASS. GEN. LAWS, c. 208, § 39 (1932).

38. *Andrews v. Andrews*, 188 U.S. 14, 37 (1903).

Due to the rather "fuzzy" statement of facts in the opinion it is difficult to determine what this decision adds, if anything, beyond the rule that the appearance of both parties is inadequate to confer jurisdiction to divorce upon the courts of a state which is not the domicile of at least one of the spouses. The finding was that, although the husband "remained in South Dakota a period of time longer than is necessary by the laws of said State to gain a *domicil* there," he became a "resident" thereof but did not gain a "domicil" therein. The statement just quoted was probably intended to say that the husband remained in South Dakota long enough to comply with the statutory requirement of ninety days' residence next preceding the commencement of the action,³⁹ since it is elementary that there is no minimum time requirement for presence in a state as a condition to acquiring domicile if the fact of physical presence and the requisite intent are found⁴⁰ to have combined. This ease of changing domicile is one of the points relied upon in the dissent of Mr. Justice Rutledge in the second *Williams* case, where he says:

. . . 'home' in the domiciliary sense can be changed in the twinkling of an eye, the time it takes a man to make up his mind to remain where he is when he is away from home.⁴¹

A further fact which casts doubt on the scope of this decision is the fact that, although the opinion is couched in terms of an appearance and presumably full litigation by the defendant, in fact, pursuant to a settlement between the parties, the defendant asked for and obtained leave of court to withdraw her appearance in the South Dakota action, her appearance having been made through counsel and she herself never having been within the state. That this withdrawal may have been significant is indicated in *Sherrer v. Sherrer* where it is said in the majority opinion,⁴² "On its facts the *Andrews* case presents variations from the present situation." To this statement is appended a note, "Thus in the *Andrews* case, before the divorce decree was entered by the South Dakota court, the defendant withdrew her appearance in accordance with a consent agreement."⁴³ The

39. S.D. CODE § 2578 (1939).

40. *White v. Tennant*, 31 W. Va. 790 (1888).

41. 325 U.S. 226, 257 (1945).

42. 334 U.S. 343, 353 (1948).

43. *Ibid.*

Court then at least partially overruled the *Andrews* case, using rather elusive language in so doing. It said:

But insofar as the rule of that case may be said to be inconsistent with judgment herein announced, it must be regarded as having been superseded by subsequent decision of this court.⁴⁴

Although it is not our purpose at this point to examine the scope of the *Sherrer* decision, the above passage reflects how the uncertainty of the *Andrews* case is, in effect, multiplied by being coupled with further loose language in the *Sherrer* case. An additional uncertainty created by this opinion is that it does not say which court will be the arbiter of the question of whether a change in domicile has occurred. By implication it is suggested that the state which is enforcing the Marriage Evasion Act, in refusing to recognize a foreign divorce granted to one of its citizens, may always decide for itself the question of domicile. The reason for this rule would be that since domicile is universally recognized in the United States as a jurisdictional prerequisite, the foreign divorce-decreeing state will never make a finding that a successful libellant is still domiciled in his former home state. Such a proposition seems implicit in the decision, and leaves open the question as to what effect, if any, flows from a full litigation of that question in the foreign state where both spouses appear, since this decision did not involve real litigation of the question of domicile.

Three years later the famous *Haddock* case⁴⁵ came before the Court, launching an avalanche of comment,⁴⁶ most of which seems to have been highly critical. Since the case was expressly overruled by the first *Williams* case, a detailed analysis is not necessary for our purposes; suffice it to briefly summarize the holding. The court said:

The question is this: Is a proceeding for divorce of such an exceptional character as not to come within the rule limiting the authority of a state to persons within its jurisdiction, but, on the contrary, because of the power which government may exercise over the marriage relation, constitutes an exception to that rule. . . .

. . . the denial of the power to enforce in another state a de-

44. *Ibid.*

45. 201 U.S. 562 (1906).

46. For leading articles, see STUMBERG, PRINCIPLES OF CONFLICT OF LAWS 299, n. 61 (2d ed. 1951).

decree of divorce rendered against a person who was not subject to the jurisdiction of the state in which the decree was rendered obviates all the contradictions and inconveniences which are above indicated. . . . It does not deprive a state of the power to render a decree of divorce susceptible of being enforced within its borders as to persons within the jurisdiction and does not debar other states from giving such effect to a judgment of that character as they may elect to do under mere principles of state comity. . . .

Without questioning the power of the state of Connecticut to enforce within its own borders a decree of divorce which is here in issue, and without intimating a doubt as to the power of the state of New York to give a decree of that character within the borders of the state of New York and as to its own citizens, such efficacy as it may be entitled to in view of the public policy of that state, we hold that the decree of the court of Connecticut rendered under the circumstances stated was not entitled to obligatory enforcement in the state of New York by virtue of the full faith and credit clause.⁴⁷

Mr. Justice Douglas summarizes the effect of the decision as follows:

. . . where one spouse is wrongfully deserted he retains power over the matrimonial domicile so that the domicile of the other spouse follows him wherever he may go, while if he is to blame he retains no such power. . . . Furthermore, the fault or wrong of one spouse in leaving the other becomes under that view a jurisdictional fact on which this Court would ultimately have to pass.⁴⁸

For a period of twenty-two years no major migratory divorce case came before the Court. However, *Thompson v. Thompson*⁴⁹ applied the *Haddock* rule to a state decree of divorce *a mensa* and in so doing disapproved a line of state court decisions which reasoned that, since divorces *a mensa* worked no change in the marital status, they could not be deemed to be in rem or quasi in rem judgments, and hence for such divorces personal jurisdiction over both spouses was a jurisdictional requirement. The *Thompson* case held that the court of a matrimonial domicile which was also the domicile of the plaintiff could validly enter a decree of divorce *a mensa*, though only constructive service is had upon the non-resident defendant, and that such a decree is entitled to full faith and credit.

47. 201 U.S. 562, 572, 581, 605, 606 (1906).

48. Speaking for a majority of the Court in overruling *Haddock v. Haddock*, in *Williams v. Williams*, 317 U.S. 287, 300 (1942).

49. 226 U.S. 551 (1913).

In so doing, the Court reaches a really startling result when the nature of a divorce *a mensa* (i.e., judicial separation) is considered. Such a decree has no effect on the marriage status and is an order to the defendant to do or refrain from doing certain acts with regard to the plaintiff. From the nature of such a decree it would seem incontrovertible that personal jurisdiction over the defendant was a prerequisite to procedural due process. To sustain the validity of such a decree on merely constructive service seems to violate the spirit, if not the letter, of the settled rule of *Pennoyer v. Neff*.

The Court also considered the divorce problem in *Williamson v. Osenton*,⁵⁰ although only in an incidental way, and decided that since a wife may gain a separate domicile for purposes of divorce, she may do likewise for other purposes. Mr. Justice Holmes's opinion concludes:

We see no reason why the wife who justifiably has left her husband should not have the same choice of domicile for an action of damages that she has against her husband for a divorce.⁵¹

It is to be noted that this decision adds another jurisdictional fact to diversity cases of this type, namely an inquiry into whether the wife has *justifiably* left her husband.

The next important case was *Davis v. Davis*,⁵² which represented a new departure, in that it introduced the application of *res judicata* into the divorce field with respect to the question of the divorce-decreeing court's jurisdiction over the subject matter.⁵³ Mr. Justice Butler, speaking for a unanimous court, said:

As to petitioner's domicile for divorce and his standing to invoke jurisdiction of the Virginia court, its finding that he was a *bona fide* resident of that State for the required time is binding upon respondent in the courts of the District. She may not say that he was not entitled to sue for divorce in the state court, for she appeared there and by plea put in issue his allegation as to domicile, introduced evidence to show it false, took exceptions to the commissioner's report, and sought to have the court sustain them and uphold her plea. . . . Considered in its entirety, the record shows that she sub-

50. *Williamson v. Osenton*, 232 U.S. 619 (1914).

51. *Id.* at 620.

52. 305 U.S. 32 (1938).

53. *Cf.* RESTATEMENT, JUDGMENTS § 10 (1942).

mitted herself to the jurisdiction of the Virginia court and is bound by its determination that it had jurisdiction of the subject matter and of the parties.⁵⁴

This decision did not seriously affect the rule of *Haddock v. Haddock*, but, by introducing a new element upon which finality might be rested, it did change the existing law to the extent that, in rather loosely defined⁵⁵ circumstances, it denied an opportunity for the second state to allow a relitigation of the "jurisdictional fact" of domicil. It tended to shift the emphasis from reliance upon the earlier cases in the divorce decree recognition field to a reliance on decisions in the field of *res judicata*, especially *Baldwin v. Traveling Men's Association*.⁵⁶

It should be borne in mind that the cases in this latter field were cases involving "private" litigants, chiefly disputing title to land or commercial paper, and the state was not interested in these cases, *qua* sovereign, as it is in the divorce cases, where we now find the principle of *res judicata* in a new application. This trend reached fuller fruition in the *Sherrer* case, as will be seen.

Four years later the first⁵⁷ of the two highly controversial *Williams* cases was decided, with Mr. Justice Douglas speaking for six members of the Court, Mr. Justice Frankfurter concurring, and Mr. Justice Murphy and Mr. Justice Jackson dissenting in separate opinions. Although an avalanche of critical commentaries was occasioned thereby,⁵⁸ the commentators at least seem agreed on a few propositions: first, that the case went up to the Supreme Court on a poor record which helped in the production of an unsatisfactory opinion; second, that the case unequivocally and expressly overruled the *Haddock* case; third, that the decision was made on the assumption that the truant spouses had a bona fide domicil in Nevada. The portion of the opinion pertinent for our purposes states:

. . . divorce decrees are more than *in personam* judgments. They involve the marital status of the parties. Domicil creates a relationship to the state which is adequate for

54. 305 U.S. 32, 40 (1938).

55. That the *Coe* and *Sherrer* cases could find their respective ways to the bar of the Supreme Court on the discretionary writ of certiorari is telling evidence of the looseness with which the line of demarcation was drawn in the *Davis* case.

56. 238 U.S. 522, 525 (1931).

57. 317 U.S. 287 (1942).

58. 2 NELSON, DIVORCE AND ANNULMENT 466 (2d ed. 1945).

numerous exercises of state power . . . each state . . . can alter within its own borders the marriage status of the spouse domiciled there, even though the other spouse is absent. There is no constitutional barrier if the form and nature of the substituted service meet the requirements of due process. . . . It therefore follows that the Nevada decrees were wholly effective to change in that state the marital status of the petitioners and each of the other spouses by the North Carolina marriages. . . . But the concession that the decrees were effective in Nevada makes more compelling the reasons for rejection of the theory and result of the Haddock case. . . . So, when a court of one state alters the marital status of one domiciled in that state by granting him a divorce from his absent spouse, we cannot say its decree should be excepted from the full faith and credit clause merely because its enforcement or recognition in another state would conflict with the policy of the latter.⁵⁹

What the Court did here was first to consider the statement of Chief Justice Marshall in *Hampton v. M'Connel*⁶⁰ that:

. . . the judgment of a state court should have the same credit, validity, and effect, in every other court in the United States, which it had in the state where it was pronounced, and that whatever pleas would be good to a suit thereon in such state, and none others, could be pleaded in any other court in the United States.⁶¹

It then reflected that, although some exceptions have been engrafted judicially upon this rule, as Mr. Justice Brandeis pointed out in *Broderick v. Rosner*,⁶² “. . . the room left for the play of conflicting policies is a narrow one.” Then, upon a re-examination of the premises upon which the result of *Haddock v. Haddock* was reached, the Court here decided that the exception to the rule created by the *Haddock* case was not worthy of survival in a federal union. In brief, if one of the spouses has a domicile in State A, State B, wherein the other spouse is domiciled, may not refuse full faith and credit to a divorce decree of State A. This is true even though the spouse domiciled in State B never appeared nor was served with process in State A, and though recognition of such decree would strongly offend the policy of State B. It must be assumed, of course, that State A's substituted service met the minimum requirements of procedural due process. The

59. 317 U. S. 287, 298 (1942).

60. 3 Wheat. 234 (U.S. 1818).

61. *Id.* at 235.

62. 294 U.S. 629, 642 (1935).

Court, with its attention focused on the full faith and credit aspects of the divorce problem, has to date failed to make clear its position as to what constitutes procedural due process in the divorce decree area.⁶³

On remand the North Carolina Supreme Court relied on *Bell v. Bell* and affirmed the convictions. Certiorari was granted to review the claim that in so doing the North Carolina Supreme Court denied full faith and credit to the Nevada decrees. Mr. Justice Frankfurter wrote an opinion which reflects the utter inability of the Court to agree on the problem. Mr. Justice Frankfurter's opinion, putatively the majority opinion, was shared only by Mr. Justice Roberts and Mr. Justice Reed; the late Mr. Justice Murphy wrote a separate concurring opinion, in which he was joined by Chief Justice Stone and Mr. Justice Jackson; Mr. Justice Black wrote a dissenting opinion, in which Mr. Justice Douglas, who spoke for the majority in the first *Williams* case, joined; and the late Justice Rutledge wrote a separate dissent.⁶⁴

In the first case the Court had assumed, *arguendo*, that petitioners had a bona fide domicil in Nevada. No question was raised there as to whether the North Carolina courts could re-examine the existence of the petitioner's domicil in Nevada and refuse to recognize the Nevada decree upon a finding of no domicil. The problem now before the Court was to determine the extent to which and the circumstances under which the North Carolina courts could inquire into the validity of the finding of a Nevada domicil by the Nevada courts. Said Mr. Justice Frankfurter:

The record then before us did not present the question whether North Carolina had power 'to refuse full faith and credit to Nevada divorce decrees because, contrary to the findings of the Nevada court, North Carolina finds that no bona fide domicil was acquired in Nevada. . . .' This is the

63. The fact situations are capable of endless juxtaposition where one, both, or neither spouse was previously domiciled in the state in which the libellant has now claimed a domicil and sued for divorce, relying upon the local substituted-service statute. That the problem has not become more acute to date would seem to be due to the fact that most states, in order to ensure extra-territorial recognition for their decrees, have been fairly diligent in their requirements of notice to absent spouses.

64. Whereas Mr. Justice Frankfurter was able to deliver the majority opinion in 12 pages, his disagreeing colleagues required a total of 47 pages to press their objections to his views.

precise issue which has emerged after re-trial of the cause following our reversal.

. . . As to the truth or existence of a fact, like that of domicile, upon which depends the power to exert judicial authority, another State has a right . . . to ascertain the truth or existence of that crucial fact.

. . . What is immediately before us is the judgment of the Supreme Court of North Carolina.

. . . The conclusion it reached turns on its finding that the spouses who obtained the Nevada decrees were not domiciled there. The fact that the Nevada court found that they were domiciled there is entitled to respect, and more. . . . But simply because the Nevada court found that it had power to award a divorce decree cannot, as we have seen, foreclose re-examination by another State. . . . If this Court finds that proper weight was accorded to the claims of power by the court of one State in rendering a judgment the validity of which is pleaded in defense in another State, that the burden of overcoming such respect by disproof of the substratum of fact—here domicile—on which such power alone can rest was properly charged against the party challenging the legitimacy of the judgment, that such issue of fact was left for fair determination by appropriate procedure, and that a finding adverse to the necessary foundation for any valid sister-State judgment was amply supported in evidence, we cannot upset the judgment before us.⁶⁵

What the Court did here was reaffirm the rule of *Bell v. Bell*. This rule states that the court of State A, in which neither party is domiciled, has no jurisdiction to divorce the spouses, and that the court of State B is not prevented from investigating the existence *vel non* of domicile in State A by a recital thereof in the decree of the State A court. To this rule the Supreme Court added the requirement that “proper weight,” (whatever that might be in a particular case) must be accorded the finding of domicile by the court of State A. The dangers of generalizing much more about the scope of the decision are apparent from the words of Professor Powell. Referring to the above decision, he says:

It is certainly to the majority and not to the minority that we must go for instruction on what possibilities are not foreclosed by decree and opinion of the Court. This remains true even if the opinion seems at crucial spots to shed dark-

65. 325 U.S. 227, 230, 233, 234 (1945).

ness rather than light or if what is said at one place seems to be contradicted or blurred and confused by what is said at another. . . .⁶⁶

The *Sherrer* and *Coe* cases were the next pronouncements of the Court in this field. They represent an application of the principle of the *Davis* case to a litigation made possible by the decision in the second *Williams* case. Thus it is an instance of State B's retrying the issue of domicile, which had already been litigated in State A, where both parties were present, and the defense of *res judicata* being interposed before the court of State B. The opinion in *Sherrer v. Sherrer* will be the only one considered here since the Court considered *Coe v. Coe* as a mere companion case, involving the application of the *Sherrer* rule to a situation which differed factually from the *Sherrer* case only slightly. The Coes took their marital woes to Nevada, whereas the Sherrers litigated theirs in Florida, but both couples returned to Massachusetts. The only other factual difference is that in the *Sherrer* case it was the original defendant who subsequently contested the validity of the decree, whereas in the *Coe* case the original plaintiff was the challenger.

A consideration of the Massachusetts court's interpretation of the *Davis* case would be helpful in evaluating the impact of the *Sherrer* decision. The Massachusetts opinion reads as follows:

The respondent relies on *Davis v. Davis*, a case which we have interpreted 'as resting on a basis that the jurisdictional facts were actually litigated and determined to exist in the court granting the divorce.' The *allegation* as to residence in the bill of complaint, which was denied in the answer, *did not constitute an actual litigation* of the jurisdictional facts. . . . The ruling in *Davis v. Davis* was based chiefly upon decisions in cases not involving the marital relation and in which the paramount rights of the State were not involved. Any extension of that ruling to comprehend the facts of the present case, which disclose nothing more than an agreement as to custody and a formal uncontested hearing, must come from the court which first pronounced the doctrine.⁶⁷ [Italics ours.]

In both the above opinion and its opinion in the *Coe* case,⁶⁸ the Massachusetts court relied on *Andrews v. Andrews*. In the *Coe* case the court said:

66. Powell, *And Repent at Leisure*, 58 HARV. L. REV. 930 (1945).

67. 320 Mass. 351, 358 (1946).

68. *Coe v. Coe*, 320 Mass. 295 (1946).

What happened was no more than an attempt to confer jurisdiction by consent in disregard of the interests of this Commonwealth, where the parties were both domiciled.⁶⁹

This, the Massachusetts court felt, involved an attempt to confer by consent a jurisdiction which, as was pointed out in the *Andrews* case, is not dependent on consent.

But it is obvious that inadequacy of the appearance or consent of one person to confer jurisdiction over a subject matter not resting on consent includes necessarily the want of power of both parties to endow the court with jurisdiction over a subject matter, which appearance or consent could not give.⁷⁰

With these considerations in mind, the expansive effect of the overruling of the *Andrews* case, “. . . insofar as the rule of that case may be said to be inconsistent with judgment herein announced,”⁷¹ may better be estimated.

Chief Justice Vinson delivered the opinion. He first noted that the Florida decree complied with procedural due process and that due process, therefore, afforded no grounds for relitigation. After also noting that the parties had assumed, as did the Court, that the Florida decree was final and valid in the state which rendered it, he then continued:

The question with which we are confronted, therefore, is whether such a finding *made under the circumstances presented by this case may*, consistent with the requirements of full faith and credit, be subjected to collateral attack in the courts of a sister State in a suit brought by the defendant in the original proceedings. . . . This court has held that the doctrine of *res adjudicata* must be applied to questions of jurisdiction in cases arising in state courts involving the application of the full faith and credit clause where, under the law of the state in which the original judgment was rendered, such adjudications are not susceptible to collateral attack. . . . We believe that . . . the requirements of full faith and credit bar a defendant from collaterally attacking a divorce decree on jurisdictional grounds in the courts of a sister State where there has been participation by the defendant in the divorce proceedings, where the defendant has been accorded full opportunity to contest the jurisdictional issues, and where the decree is not susceptible to such col-

69. 320 Mass. 295, 302 (1946).

70. *Andrews v. Andrews*, 188 U.S. 14, 41 (1903).

71. *Sherrer v. Sherrer*, 334 U.S. 343, 353 (1948).

lateral attack in the courts of the State which rendered the decree.⁷² [*Italics ours.*]

Because of the way the issue for decision was narrowed by Chief Justice Vinson, the *Sherrer* case decided only that the defendant in the prior litigation could not attack the earlier decree collaterally in the courts of a sister state. The *Coe* decision was likewise on narrow grounds since Mr. Justice Vinson, referring to the *Sherrer* decision, decided only that,

. . . that principle is no less applicable where, as here, the party initiating the collateral attack is the party in whose favor the decree was entered. . . .⁷³

Thus the two cases together decide only that, if the plaintiff and defendant both appeared and litigated in the first divorce action, they may not collaterally attack that first decree in the courts of another state.

This cautious restriction of the scope of the decision thus leaves the legal profession with many unanswered questions. First, what is meant by "appearance"? Will a special appearance by mail suffice⁷⁴ or must it be through counsel or in person? What is meant by "litigation"? As Mr. Justice Frankfurter asks in his dissenting opinion:

How much of a contest must it be? Must the contest be bellicose or may it be pacific? Must it be fierce or may it be tepid?⁷⁵

We might ask additional questions. What is "full opportunity to contest"? Does this mean being notified by mail of the pendency of an action in a distant state, and if so, does the defendant's ability to go personally to that distant state have any significance? Or is presence at the trial meant, and if so, does presence or absence of defense counsel make a difference as to the fullness of the opportunity? May the parties gain the benefit of this rule to sanctify prior *ex parte* divorces by now filing a general appearance for the defendant and asking leave to amend to show jurisdiction *nunc pro tunc*? What is left of the long settled rule that a divorce may later be impeached by showing fraud or collusion by the parties? How can this rule be applied when, as tellingly pointed out by Professor Powell,⁷⁶ there was

72. *Id.* at 349.

73. *Coe v. Coe*, 334 U.S. 378, 384 (1948).

74. *Cf. Rubenstein v. Rubenstein*, 324 Mass. 340 (1949).

75. 334 U.S. 343, 367 (1948).

76. *Supra* note 66, at 944-946.

no fraud on the divorcing court, since that court knew, despite its pious recitations, that the spouses were taking advantage of its "cafeteria and curb service"?⁷⁷ Another question raised by Mr. Justice Frankfurter concerns the effect of the decision on the commonly encountered injunctions against a domiciliary prosecuting an out-of-state divorce action. Since everyone is free to change his domicile at will, are these injunctions retroactively invalid because by implication they would seem to bind the respondent even after he changed domicile? What, if anything, is left of a state's control over the status of its domiciliaries, if, after making a mutually satisfactory property settlement, they go to a state with a six weeks' residence requirement and a wide choice of easily available grounds for divorce, go through the form of litigating a divorce, and return to that first state free to remarry, having gotten that divorce on grounds which at their true home may not even be deemed adequate for a judicial separation, much less a termination of the marriage status? What in substance remains of the theory that to the states was reserved power over marriage and divorce, if this easy method of circumventing one's home state law is available to all who can afford to migrate, only to litigate and then return? What of the problem of the *Williams* cases? Does the limited scope of this decision mean that only the parties who were before the Nevada court are bound by the finding of domicile?⁷⁸ And as a corollary thereto, would Massachusetts be free to punish the spouses for bigamous cohabitation upon their return with new putative spouses? Further, would Massachusetts be able to disregard the Nevada finding of domicile if one of the spouses died absolutely intestate, leaving *bona vacantia* to which Massachusetts claimed title as domicile of the intestate? How does this Nevada finding of domicile affect the spouses' domicile for state estate tax purposes? Mr. Justice Frankfurter poses the question this way:

But the real question here is whether the Full Faith and Credit Clause can be used as a limitation on the power of a State over its citizens who do not change their domicile, who

77. *Id.* at 946.

78. This problem was involved in *Johnson v. Muelberger*, 340 U.S. 581 (1951), but the Court disposed of this case on the ground that the New York Court of Appeals was in error as to Florida law. The Court found that under the law of Florida the daughter could not have questioned the validity of her late father's Florida divorce.

do not remove to another State, but who leave the State only long enough to escape the rigors of its laws, obtain a divorce, and then scurry back.⁷⁹

To the extent that the *Sherrer* decision answers the above question in the affirmative, the Court ensnares itself in the logical *circulus inextrabilis* neatly stated by Mr. Justice White in the *Andrews* case. He states it thus:

The principle dominating the subject is that the marriage relation is so interwoven with public policy that the consent of the parties is impotent to dissolve it contrary to the law of domicil. The proposition relied upon, if maintained, would involve this contradiction in terms: That marriage may not be dissolved by the consent of the parties, but that they can, by their consent accomplish the dissolution of the marriage tie by appearing in a court foreign to their domicil and wholly wanting in jurisdiction, and may subsequently compel the courts of the domicil to give effect to such judgment despite the prohibitions of the law of the domicil and the rule of public policy by which it is enforced.⁸⁰

It is submitted that the questions above listed, which merely indicate a few of the many uncertainties inherent in the judicial evolution of the law as to mandatory recognition of sister-state decrees of divorce under the aegis of the Full Faith and Credit Clause, and which make no pretense at exhausting the uncertainties inherent in the present state of the law, suggest that the course of decisions in the past seventy-nine years has made no appreciable progress in reducing or putting an end to the general doubts implicit in the present law on migratory divorces. They further suggest that it is now time to consider the feasibility of a legislative solution for the problem, inasmuch as the cases examined have indicated that the judiciary is, *ex necessitate rei*, not the proper organ of government to deal with a problem which is essentially one of reconciling conflicting state policies in a matter of deepest concern to both the state and national governments. In legislation it is believed that we may find a solution which, while not a panacea for all the ills in the present state of the law, may, nevertheless, take a long stride forward in the direction of more objectivity and certainty in the tests of the validity of divorce decrees for which recognition in sister states is sought, and which should, to the extent that it

79. 334 U.S. 343, 362 (1948).

80. *Andrews v. Andrews*, 188 U.S. 14, 41 (1903).

shifts the emphasis to objective standards, greatly reduce the volume of litigation in this field, concurrent with a reduction of the uncertainties which today are inherent in every "migratory divorce."

II

Before considering the various types of legislation available as a remedy for the present unsatisfactory state of the law, a few authorities, urging that in legislation lies a more suitable agency to cope with the problem, might be considered here to strengthen the conviction that the inadequacy of the judicial solution points to corrective legislation.

Looking first to the decided cases, we find a few dicta on the subject in three recent Supreme Court opinions.

In his concurring opinion in the first *Williams* case, Mr. Justice Frankfurter restates thoughts on the subject first expressed by him in the *Cornell Law Quarterly*⁸¹ before joining the Court. He says:

Judicial attempts to solve problems that are intrinsically legislative—because their elements do not lend themselves to judicial judgments or because the necessary remedies are of a sort which judges cannot prescribe—are apt to be as futile in their achievement as they are presumptuous in their undertaking.⁸²

In the second *Williams* case, the concurring opinion of the late Mr. Justice Murphy, joined in by the Chief Justice and Mr. Justice Jackson, makes the point that:

Until the federal government is empowered by the Constitution to deal uniformly with the divorce problem or until uniform state laws are adopted, it is essential that definite lines of demarcation be made as regards the scope and extent of the varying state practices.⁸³

Mr. Justice Black's dissenting opinion in the same case suggests less directly that legislative dealing with the problem would be preferable. It reads:

And in the absence of further federal legislation under the Full Faith and Credit Clause, I should leave the effect of divorce decrees to be determined as Congress commanded—according to the laws and usages of the state where the decrees are entered.⁸⁴

81. *Distribution of Judicial Power Between United States and State Courts*, 13 CORN. L. Q. 499, 528 (1928).

82. 317 U.S. 287, 305 (1942).

83. 325 U.S. 226, 243 (1945).

84. *Id.* at 274.

Chief Justice Stone's endorsement of the proposition was reflected in his dissenting opinion in the *Yarborough* case, joined in by Mr. Justice Cardozo, where he said:

. . . much of the confusion and procedural deficiencies which the constitutional provision alone has not avoided may be remedied by legislation. . . .⁸⁵

Mr. Justice Frankfurter rephrases his opinion on the subject while dissenting in the *Sherrer* case, with the words:

To attempt to shape policy so as to avoid disharmonies in our divorce law was not a power entrusted to us, nor is the judiciary competent to exercise it. . . . We cannot draw on the available power for social invention afforded by the Constitution for dealing adequately with the problem, because the power belongs to the Congress and not to the Court.⁸⁶

That Congress is aware of the inadequacy of the judiciary may be seen from the bill introduced by Senator McCarran, which we will consider *infra*, and from the following excerpt from the remarks of Mr. Ramey, made while introducing a proposed constitutional amendment:

But never was a matter more complicated by the see-sawing back and forth of court decisions. . . . The confusion will go on until we get a new set of laws that are uniform throughout the country. . . .⁸⁷

Turning to the legal scholars, we first find support for our thesis in the words of Mr. Justice Jackson in his address given to the City of New York Bar Association as the fourth annual Cardozo Lecture.⁸⁸ He said:

Complete integration of our separate legal systems through compulsory reciprocal recognition of process and execution of judgments of course is beyond the judicial power of innovation. But it cannot be doubted that Congress is invested with a range of power greatly exceeding that which it has seen fit to exercise.⁸⁹

Professor Edwin S. Corwin emphasizes the thought that judicial inadequacy is no bar to legislative action saying:

Nor should the limited initiative taken by the Court in this matter in recent years deter Congress from action. The little

85. *Yarborough v. Yarborough*, 290 U.S. 202, 215 n. 2 (1933).

86. 334 U.S. 343, 364 (1948).

87. 91 CONG. REC. 4171 (May 3, 1945).

88. Reprinted in 45 COL. L. REV. 1 (1945).

89. *Id.* at 21.

that can be accomplished by the judicial process of inclusion and exclusion will go neither far nor fast toward meeting present day necessities. . . .⁹⁰

Although the point could be belabored with additional excerpts from both the dicta in random cases and from comments in the law reviews,⁹¹ the above quotations, it is believed, establish the fact that the Supreme Court has only recently begun to admit its consciousness of the futility of further attempts to solve by litigation a problem which is essentially legislative in nature. In so doing, the Court is conceding the truth of the opinions shared by the commentators for some time past.

Turning to the three types of legislative solution available, let us consider: first, uniform state laws, either as to the grounds for divorce, or as to the conditions under which a state will recognize the validity of decrees of sister states; second, a constitutional amendment which would empower Congress to enact uniform laws of domestic relations throughout the entire United States; third, an act of Congress implementing the Full Faith and Credit Clause.

It is not our purpose to trace the history of previous unsuccessful attempts along all three of these diverse routes to uniformity.⁹² It is submitted that the first type of legislative attack is doomed to failure by the mores of Nevada alone, for no state in its position is likely to abandon voluntarily such a lucrative trade as has been developed there at its "divorce mill."⁹³ Apart from the self-interest of Nevada, experience shows that, despite the attendance of delegates from forty-two states at the National Congress on Uniform Divorce laws in 1906, only three states, Delaware, New Jersey and Wisconsin, ever adopted the Uniform Law there drafted.⁹⁴ The failure in this direction led to a new approach by the apostles of uniform laws on the state level; they then proposed "an act relating to divorce jurisdiction and

90. Corwin, *The Full Faith and Credit Clause*, 81 U. OF PA. L. REV. 371, 389 (1933).

91. 33 COL. L. REV. 854, 866 (1933); 1 MIAMI L. Q. 1, 18 (1917); 29 VA. L. REV. 557, 616 (1943).

92. Sherrer v. Sherrer, 334 U.S. 343, 364 n. 13 (1948), summarizes briefly the history of past failures of three different modes of securing uniform legislation. For a fuller treatment from the viewpoint of the sociologist see LIGHTENBERGER, *DIVORCE* c. 8.

93. Ingram and Ballard, *The Business of Migratory Divorce in Nevada*, 2 LAW AND CONTEMP. PROB. 302, 348 (1935).

94. For full text of the proposed Uniform Statute see The Report from the Pennsylvania Commission on Divorce.

to make uniform the law relating thereto." This proved an even more dismal failure than its predecessor, being adopted by Vermont only, in 1931,⁹⁵ and repealed two years later.⁹⁶ The complete lack of uniformity existent in state law today as to not only grounds for divorce,⁹⁷ but also residence requirements, procedure, alimony and custody provisions, when considered together with the admitted failure⁹⁸ of all attempts at uniform state laws, seems to definitely foreclose any hopes of legislative solution on this level in the reasonably foreseeable future.

Attempts at a constitutional amendment have met with an even more signal failure. Mr. Justice Frankfurter points out⁹⁹ that since 1884 over seventy proposals for such an amendment have been unsuccessfully made. These proposals have never been favorably acted upon, and as far back as 1892, the thought that an amendment was constitutionally unnecessary was phrased in these words by an adverse report of a majority of the House Judiciary Committee of the Fifty-Second Congress:

The committee suggests that Congress already has power under Article IV, Section 1 of the Constitution to prescribe the effect to be given in all other states to divorces granted in any state.¹⁰⁰

The most recent protagonists of an amendment were Senator Capper and Representative Ramey, and it is interesting to note that the amendment is gradually dwindling in size from the original wording¹⁰¹ of the one introduced by Senator Capper in 1923,¹⁰² at the urging of the General Federation of Women's Clubs, to the very briefly worded joint resolution, "The Congress shall have power to establish uniform laws with respect to marriage and divorce."¹⁰³

95. Vt. Laws 1931, No. 45.

96. Vt. Laws 1933, No. 38.

97. See 2 NELSON *op. cit. supra* note 58, at 612, for a chart graphically illustrating the tremendous spread in the distribution and incidence of the various grounds for divorce in the several states.

98. "Slight progress has been made in twenty years in the direction of uniformity in divorce legislation by the action of individual States." LIGHTENBERGER, *op. cit. supra* note 92, at 197.

99. Sherrer v. Sherrer, 334 U. S. 343, 364, n. 13 (1948).

100. H.R. Rep. No. 1290, 52nd Cong., 1st Sess. 2 (1892).

101. "The Congress shall have power to make laws, which shall be uniform throughout the United States, on marriage and divorce, the legitimation of children, and the care and custody of children affected by annulment of marriage and by divorce."

102. LIGHTENBERGER, *op. cit. supra* note 92, at 198, 199.

103. See note 87 *supra*.

There is no indication on today's legal horizon that the long history of abortive attempts at amendment will reach a change of fortune for the better. A brief review of state residence-requirement statutes will demonstrate that thirty-three states require one year's residence and nine others have longer "waiting periods."¹⁰⁴ It seems that more than twelve of these forty-two states would be reluctant to give up their control over domestic relations, at least when asked to abdicate their control in deference to a vaguely worded statute under which Congress is given *carte blanche* to write a new national law of divorce, a law under which the lax requirements of Nevada could conceivably be made to look puritanical. Thus a constitutional amendment is too remote a possibility to be of any present value as a vehicle for carrying the legislative remedy from potentiality into actuality.

The remaining avenue of legislative approach to the problem is immediately distinguished from the two methods discussed above in that it has no history of unsuccessful attempts to prejudice its chances for popular and legislative acceptance. Prior to Senator McCarran's bill no such attempt at a congressional statute, as distinguished from a constitutional amendment, had been made, at least since the Seventy-Fifth Congress convened on January 5, 1937,¹⁰⁵ and probably Senator McCarran's bill is the first such bill introduced before Congress.¹⁰⁶

In the past, the focal point of attempts at legislative solution has been to try to unify the grounds for divorce. Since "the Constitution of the United States . . . reserves authority over marriage and divorce to each of the forty-eight states. . . ."¹⁰⁷ previously proposed legislation, being cast in the form of a law taking control over the substantive law of marriage and divorce, has necessarily been submitted in the form of a constitutional amendment. This being so, the fact that an amendment has always been suggested in the past is no argument against our

104. WARREN, SCHOULER DIVORCE MANUAL, 705-720 (1944).

105. CCH CONG. INDEX covering from the 75th through the present session of Congress.

106. The writer relies on LIGHTENBERGER, *op cit. supra* note 92 for the accuracy of this statement, which can be definitely ascertained only by a complete examination of the indexes of each separate Congressional Record from the 74th Congress back, since the CCH service begins with the 75th Congress.

107. *Williams v. North Carolina*, 317 U.S. 287, 304 (1942).

contemplated statute. We do not propose to deal with the substantive law of divorce nor the several states' control over the grounds therefor, but we plan merely to exercise the power conferred upon Congress by Article IV, Section 1 of the Constitution to "prescribe" the "effect" of one type of "judicial proceedings of every other State."

A review of the dicta of the Supreme Court and the writings of some of the most learned legal and constitutional commentators makes a strong argument for the constitutionality of such a statute. Having thus established a *prima facie* case for the constitutionality of such legislation, we shall then proceed to consider the problems to be dealt with in drafting such a statute.

Mr. Justice Stone, dissenting in the *Yarborough* case, asserted that in migratory divorce cases, "... there is often an inescapable conflict of interest of the two states," and that in attempting to resolve such conflicts there necessarily comes a point beyond which:

. . . the imposition of the will of one state beyond its own borders involves a forbidden infringement of some legitimate domestic interest of the other.¹⁰⁸

He then makes the point that the Court must decide for itself the extent to which, in such a situation, one state may qualify or deny rights claimed under proceedings of other states, in the absence of provisions of Congress more specific than the general terms of the Act of May 26, 1790. Referring to the desirability and constitutionality of such a further enactment, he states:

The mandatory force of the full faith and credit clause as defined by this Court may be, in some degree not yet fully defined, expanded or contracted by Congress. . . . The constitutional provision giving Congress power to prescribe the effect to be given to acts, records and proceedings would have been quite unnecessary had it not been intended that Congress should have a latitude broader than that given the courts by the full faith and credit clause alone.¹⁰⁹

The majority opinion in the first *Williams* case, while it did not adopt this argument, at least refrained from questioning its validity. Mr. Justice Douglas stated:

Whether Congress has the power to create exceptions [citing the above dissent] is a question on which we express no

108. *Yarborough v. Yarborough*, 290 U.S. 202, 215 (1933).

109. *Id.* at 215, n. 2.

view. It is sufficient here to note that Congress . . . has not done so. . . .¹¹⁰

In his concurring opinion in the same case Mr. Justice Frankfurter likewise left the question open, saying, "There will be time enough to consider the scope of its power in this regard when Congress chooses to exercise it."¹¹¹

Speaking for the majority in the second *Williams* case, Mr. Justice Frankfurter again pointed out that the Court did not intimate its opinion on this subject when he said, ". . . The reach of Congressional power given by Article IV, Section 1 is not before us" (citing articles by Mr. Justice Jackson and Professor Cook, noted *infra*).¹¹²

Mr. Justice Black's dissenting opinion in the same case, joined in by Mr. Justice Douglas, goes further in supporting the existence of such a power in Congress, saying:

But, while Congress might, under the Full Faith and Credit Clause, prescribe the 'effect' in other states of decrees based on the finding, I do not think the federal courts can, by their mere label, attach jurisdictional consequences to the state's requirement of domicile.¹¹³

The same opinion again suggests the Congressional power in the phrase, "And in the absence of further federal legislation under the Full Faith and Credit Clause. . . ."¹¹⁴

In the *Sherrer* case, Mr. Chief Justice Vinson, speaking for the majority, says:

We, of course, intimate no opinion as to the scope of Congressional power to legislate under Article IV, Section 1, of the Constitution.¹¹⁵

It is noteworthy that the context in which these words are used in fact argues for the existence of such a power. They are appended as a note to a statement saying that the decisions in the *Davis* and related cases are "clearly indicative of the result to be reached here." The implication in the addition of the quoted note is that such a result is to be reached unless Congress otherwise provides, by using the power as to which the Court "intimates no opinion." Hence, "intimating no opinion," in the set-

110. *Williams v. North Carolina*, 317 U.S. 287, 303 (1942).

111. *Id.* at 306.

112. *Williams v. North Carolina*, 325 U.S. 226, 229, n. 5 (1948).

113. *Id.* at 270, n. 10.

114. *Id.* at 274.

115. *Sherrer v. Sherrer*, 334 U.S. 343, 352, n. 18 (1948).

ting of this case, paradoxically enough, seems to suggest the existence of such a power.

In his dissenting opinion in the *Sherrer* case, Mr. Justice Frankfurter takes a view more positive than those expressed by him in the *Williams* case, saying:

And so long as the Congress had not exercised its powers under the Full Faith and Credit Clause to meet the special problems raised by divorce decrees. . . .¹¹⁶

Thus Mr. Justice Frankfurter's position has evolved from a cautious intimation of no opinion to a positive assumption that Congress does possess the power to legislate on the divorce problem under the Full Faith and Credit Clause.

Although these dicta make a reasonable argument for the existence in Congress of a power to handle the problem of divorce decree recognition under the power given it to "prescribe" the "effects" of "judicial proceedings," the existence of such a power *in vacuo* or as a matter of argumentation is not enough. Our statute must be found to be constitutionally warranted in the opinion of at least five members of the Court. Therefore, it is interesting to note that Justices Jackson,¹¹⁷ Black and Douglas,¹¹⁸ Frankfurter, and the late Mr. Justice Murphy,¹¹⁹ have expressly affirmed the existence of such a power, and Chief Justice Vinson may have done so in the *Sherrer* opinion. If this be true, the *prima facie* case we attempted to work out would, perforce, seem to be established, both in theory, and in "the intensely practical consideration" of finding five sympathetic members of the Court.¹²⁰

The law review articles on this subject are more positive in their assertions of the feasibility and constitutionality of the type of statute under consideration. The three legal essays which, it is felt, were the most influential in molding current legal thought into a favorable disposition toward Congressional implementation of the Full Faith and Credit Clause will be sum-

116. *Id.* at 364.

117. Jackson, *Full Faith and Credit*, 45 COL. L. REV. 1 (1945).

118. *Williams v. North Carolina*, 325 U.S. 226, 274 (1945).

119. *Sherrer v. Sherrer*, 334 U.S. 343, 364 (1948).

120. The remaining members of the Court have not availed themselves of several opportunities to express their disapproval of the theory that Congress has such a power. Query, whether the extremely unsatisfactory condition of the case law has begotten that *rara avis*, a proposition of law as to which the present Court is in unanimous agreement.

marized in concluding our prima facie argument for the validity of the statutory solution.

The first article, chronologically, was that of Professor Cook which originally appeared in the *Yale Law Journal*,¹²¹ in 1919, and then was incorporated into his treatise on the conflict of laws.¹²² He states:

In spite of all the doubt and confusion no attempt has been made by Congress to 'prescribe' more clearly the 'effect' of state judgments in other states. . . .

That Congress has the power to do far more than it has thus far done seems clear, both from the words of the clause itself and from the history of that clause in the convention which framed the present Constitution.¹²³

In 1933, shortly before the *Yarborough* decision, Professor Corwin wrote:

Indeed there are few clauses of the Constitution, the merely literal possibilities of which have been so little developed as the "full faith and credit" clause . . . it does not seem extravagant to argue that Congress may under the clause describe a certain type of divorce and say that it shall be granted recognition throughout the Union, and that no other kind shall.¹²⁴

Mr. Justice Jackson added impetus to the argument by stating:

It is also suggested that Congress has power to prescribe the type of divorce judgment that is entitled to extraterritorial recognition. The Court has had no occasion to decide such questions, but I should say it has been fairly ostentatious in leaving the way open to sustain such enactments without embarrassment.¹²⁵

Other law review articles favoring this type of legislation might be cited.¹²⁶ These three are quoted here because various members of the Court have consistently relied on them in their discussions of the subject.

Against this background of Supreme Court dicta and law review articles, which, it is submitted, make out a prima facie

121. Cook, *The Powers of Congress under the Full Faith and Credit Clause* 28 *YALE L. J.* 421 (1919).

122. COOK, *op. cit. supra*, note 34.

123. *Id.* at 91.

124. Corwin, *supra* note 90, at 388.

125. Lecture delivered Dec. 7, 1944 under the auspices of the Committee on Post-Admission Legal Education, of the Association of the Bar of the City of New York.

126. Moore and Oglebay, *The Supreme Court and Full Faith and Credit*, 29 *VA. L. REV.* 557, 598 (1943).

case for the constitutional validity of a statute passed as an exercise of what we might call the "prescribing power," let us now turn to a consideration of the problems involved in the drafting of such a statute.

III

The statute proposed will express national policy, and we must consciously advert to this policy in drafting the legislation. This thought is expressed by Mr. Justice Jackson in the words:

Always to be kept in mind in dealing with these problems is that the policy ultimately to be served in application of the clause is the federal policy of 'a more perfect union' of our legal systems. No local interest and no balance of local interests can rise above this consideration.¹²⁷

The federal interest lies not in determining which of the varying and competing views of the several states as to substantive grounds for divorce is, or would be, if adopted on a national scale, the more socially desirable because the better adapted to protect and encourage the unity of the family, and hence, to lessen the incidence of divorce and the evils attributed thereto. Rather the federal interest rests in promulgating a rule which will narrow the area wherein the policies of the several states may clash and deadlock over a matter in which each claims paramount and exclusive rights of adjudication. Choices in the realm of morals rest with the state legislatures. Hence, the statute must continue to leave each of the states as free as possible to follow its own bent with regard to the marriage institution.

It is to be noted parenthetically that the statute contemplates no limitation on the power of the states to recognize as valid, decrees which fail to meet its test for mandatory recognition, if the local conflict of laws rule so indicates. The statutory aim is a more orderly functioning of our federal constitutional system, and to secure this we must, "find some way of confining each state's authority to matters and persons that are by some standard its own."¹²⁸

What is sought is a rule whereby State B need recognize divorce decrees of State A only when those decrees are given to spouses in whose marital status State A has an abiding and legitimate interest. This interest need not necessarily be perma-

127. Jackson, *supra* note 117, at 27.

128. Williams v. North Carolina, 317 U.S. 287, 315 (1942).

ment, but it should be of such a nature that, in the light of the mobile state of our present civilization, it is not unreasonable to compel State B to recognize this decree. If this interest exist in State A, then compulsory recognition by State B will not be *pro tanto* an intrusion into a matter in which State B has a paramount interest, albeit State B still may have some, or even great, concern in the status of the spouses whose divorce by State A it must recognize. Such a rule would reflect a considerable improvement over the situation resulting from the *Sherrer* decision where State A, with in fact no interest, can impose its decree on State B, which has a paramount and seemingly exclusive interest as the real home of the spouses.

It is this lack of an objective standard that has been the source in a large degree of the conflicting claims of the states. Each state, using different standards or a standard such as domicile, which because of its subjective elements can be variously applied by two or more courts looking at the same factual situation, has been able to arrive at directly opposite findings as to which state has jurisdiction to divorce a given married couple. Indeed, the subjectivity implicit in the common law concept of domicile, embodying as it does the two components of physical presence coinciding with an *animus manendi*, has given rise to one school of thought, headed by Professor Cook¹²⁹ and the late Mr. Justice Rutledge,¹³⁰ which would entirely eliminate domicile as the basis of jurisdiction of a state court to decree divorces. Professor Cook urges that the test be:

. . . a sufficiently substantial contact by way of residence to make it not unreasonable for that State to hold that the person in question is domiciled there: this even though the person also has a sufficiently substantial contact with another State to make it not unreasonable for that State also to find that the domicile is there.¹³¹

Little practical assistance is found in this suggestion. "A sufficiently substantial contact" is an expression of uncertain content, in the never-never land with other elusives like "fraud," "negligence," and "reasonableness." Professor Cook offers no guideposts which will direct us to the concrete contacts for which he would have the court look. Unless we supply the state courts

129. COOK, *op. cit. supra* note 34.

130. *Williams v. North Carolina*, 325 U.S. 226, 255-261 (1945).

131. COOK, *op. cit. supra* note 34, at 467.

with a fairly well-defined objective test, we will be confronted with an endless series of cases from State B being taken to the Supreme Court because State B found (a) that the contacts relied upon by State A were not substantial at all, or else (b) not so substantial as to make it "not unreasonable" for State A to assume jurisdiction for divorce. Professor Cook here seems to be guilty of the epistemological failing of trying to define a concept in terms more vague than that which is being defined, *ignotum per ignotius*. Nor is Mr. Justice Rutledge's opinion any more enlightening to one who is trying to spell out a simple straight-forward test, which will not be a Pandora's box of further legal problems. The late Justice stated:

This [domicil] discarded, choice then would be forced between the ideas of transiency with due process safeguards and some minimal establishment of more than casual or transitory relations in the new community giving the newcomer something of objective substance identifying him with its life.¹³²

Mr. Justice Rutledge then extols this suggested test as being an improvement over the "inconstant and capricious" effects of domicil as a yardstick. It is submitted that a mere reading of this formulation of the measure of jurisdiction should convince us that there is no room for "some minimal establishment of more than casual relations in the new community" in a statute, the avowed purpose of which is to lessen the intensity of the interstate strife by supplying more workable norms as to the when and the whence of full faith and credit.¹³³

The suggestions just considered do serve one useful function; they focus our attention on the inadequacy of the concept of domicil as the jurisdictional *sine qua non*. Being cognizant of this fact, which may well be the fundamental difficulty in the entire problem, we must realize that we may either (a) continue domicil as the test, in which case no betterment is made; or (b) drop domicil altogether; or (c), while retaining domicil to satisfy the Court's long-settled requirement thereof, add some additional factor of an objective nature, such as a minimum fixed period of residence in the divorce-decreeing state. Under alternative (c) these two requirements would be coupled in the statute as two of the elements which must be found to exist before the

132. *Id.* at 259.

133. Powell, *supra* note 66, at 1009.

State A decree is entitled to mandatory recognition in State B. Of the above three alternatives, the first is of little value because it does not improve upon the present law. The second, although it may be within the constitutional power of Congress, flies so directly in the face of a long line of dicta, reiterated in all the Supreme Court cases reviewing the divorce problem,¹³⁴ that its constitutionality is extremely dubious. The dictum of Chief Justice Vinson in the *Sherrer* case is the most recent authoritative pronouncement on the subject, and it shows no retreat from the long-settled position of the Court, nor does it lend any encouragement to those who share the views of Professor Cook and Mr. Justice Rutledge. The opinion reads:

That the jurisdiction of the Florida court to enter a valid decree of divorce was dependent upon petitioner's domicile in that State is not disputed.¹³⁵

There would seem to be no need to run the constitutional risk in the light of the third alternative available.

The elimination of the first two alternatives necessitates our framing a requirement that State A must find the divorce plaintiff is (a) domiciled in, and (b) has actually resided in State A for the selected period. The length of the residence required should reflect the fact that the plaintiff has dwelt in State A long enough for him to have become a member of its community for a period which reasonably could be said to justify State A in taking an interest in his status. More importantly, he should be in State A for a sufficiently long period to make it not unreasonable for Congress to order, in effect, that all states must recognize the legitimacy of State A's interest in his status, to the extent of giving full faith and credit to the divorce decree of State A.

Selecting any minimum period involves, in effect, if not in form, a mandatory surrender by some of the states of their control over residence requirements. This is true at least as to divorces of the affected states for which extraterritorial faith and credit is demanded. Present requirements vary from Nevada's prerequisite of six weeks' residence¹³⁶ to as long as

134. See *Williams v. North Carolina*, 325 U.S. 226, 229 (1945); *Williams v. North Carolina*, 317 U.S. 287, 297 (1942); *Davis v. Davis*, 305 U.S. 32, 41 (1938); *Haddock v. Haddock*, 201 U.S. 562, 570 (1906); *Andrews v. Andrews*, 183 U.S. 14, 41 (1903); *Bell v. Bell*, 181 U.S. 175, 177 (1901).

135. *Sherrer v. Sherrer*, 334 U.S. 343, 349 (1948).

136. *NEV. COMP. LAWS ANN.*, § 9460 (Supp. 1941).

five years' residence required in certain circumstances by Massachusetts¹³⁷ and Indiana.¹³⁸ Indeed, until 1949 South Carolina did not allow divorces at all.¹³⁹ Approximately thirty-three states now use one year for the residence requirement in most of the divorce actions allowed in those states, whereas nine others require a longer period.¹⁴⁰ The exact period chosen is not so important as the fact that an objective standard is set out. Moreover, it is felt that, in view of the expected added certainty to be gained from the federal statute, some sacrifice by the various states as to their views on residence requirements is not an unreasonable price to demand. For this reason, it is suggested that the statute adopt twelve months' residence, plus domicil in State A, as a prerequisite to full faith and credit for its decrees of divorce. It is believed that this period would tend greatly to reduce the number of persons able to leave home for a migratory divorce which would be enforceable in their home states, and that this reduction in the number of migratory divorces would greatly lessen the importance of the problem. Furthermore, a residence of twelve months in the divorce-decreeing state is, in view of the increasingly migratory character of our populace, a sufficiently durable minimum contact to give the decreeing state an interest in the status of the spouse which Congress can with a good degree of fairness call upon other states to respect.

Our next task is to transform this double standard, with its subjective test of domicil and its objective test of twelve months' residence, into an objective, easily understood and easily workable test. To do this we might use the conclusive presumption. The statute would then provide that State A must find both domicil and the twelve months' residence before its divorce decree is entitled to mandatory credit. But it would further provide that review by State B, when examining the record of State A to determine whether State A had jurisdiction, should be limited to an inquiry to see whether State A made a warranted finding of the twelve months' residence, and that upon this being found by State B, domicil in State A should be conclusively presumed.

137. MASS. GEN. LAWS, c. 208, §§ 4, 5 (1932).

138. IND. ANN. STATS., § 3-1201 (Burns 1933).

139. S.C. CONST. Art. 17, § 3 (1895), amended 1949, S.C. Laws 1949, No. 95.

140. WARREN, *op. cit.*, *supra* note 104, at 705-720.

If it be objected that one state is always free to examine the existence of jurisdiction over the subject matter of the court for whose decree recognition is sought, we are able to reply that such is the law, *absent a statement of Congress* that such a review will not be allowed to defeat full faith and credit upon the finding designated by Congress as sufficient therefor. This can be demonstrated by directing attention to the opinion of Mr. Justice Bradley in *Thompson v. Whitman*,¹⁴¹ the case in which, according to Mr. Justice Frankfurter, the implications of Article IV, Section 1, of the Constitution “. . . first received the sharp analysis of this Court. . . .”¹⁴² The doctrine of the *Thompson* case is taken to be that only when the jurisdiction of the court of the first state is not impeached, either as to the subject matter or the person, is the record of that judgment entitled to full faith and credit. This concededly is the law today as pointed out in the majority opinion in the second *Williams* case.¹⁴³ But, *and this is the crucial point for our purposes*, *Thompson v. Whitman* does not declare that State B is always free to re-examine the existence of jurisdiction of the court of State A by reason of any provision of the *Constitution alone*. Rather, it so states as a matter of interpretation of the constitutional provision together with the Act of May 26, 1790. This, therefore, does not make this case, nor any of its successors, authority for the proposition that there is a constitutional right in State B to look at the jurisdiction of the court in State A. The case only decides that the Act of 1790, when construed with Article IV, Section 1, did not take away that right which each colony formerly had to treat the judgments of the other colonies as foreign judgments. This, it is submitted, leaves unprejudiced the power of Congress to suspend this power as to our type of judgments, namely divorce decrees.

In *Thompson v. Whitman*, the Court said:

Without that provision of the Constitution [Article IV, Section 1] . . . and the act of Congress passed to carry it into effect, it is clear that the record in question would not be conclusive as to the facts necessary to give the justices of Monmouth County jurisdiction. . . . It has been supposed that this act, in connection with the constitutional provision . . . had the effect of rendering the judgments of each State

141. 18 Wall. 457 (U.S. 1873).

142. *Williams v. North Carolina*, 325 U.S. 226, 227 (1945).

143. *Id.* at 228.

equivalent to domestic judgments in every other State. . . . It must be admitted that no decision has ever been made on the precise point. . . . On the whole, we think it clear that the jurisdiction of the Court by which a judgment is rendered in any State may be questioned in a collateral proceeding in another State, *notwithstanding* the provision of the fourth article of the Constitution and the law of 1790. [Italics ours.]¹⁴⁴

That the Supreme Court considered this question to be within the legislative power of Congress appears even more clearly from the earlier case of *D'Arcy v. Ketchum*,¹⁴⁵ decided in 1850. There Mr. Justice Catron said:

In construing the act of 1790, the law as it stood when the act was passed must enter into that construction; so that the existing defect in the old law may be seen, and its remedy by the act of Congress comprehended the question is, whether it . . . intended . . . to declare a new rule, which would bind the citizens of one state to the laws of another in our opinion *Congress did not intend* to overthrow the old rule by the enactment that such faith and credit should be given to the records of judgments as they had in the State where made . . . we concur with the various decisions made by State courts in holding that *Congress did not intend* to embrace judicial records of this description. [Italics ours.]¹⁴⁶

That subsequent decisions have lost sight of the distinction between what is required by the constitutional provisions of Article IV, Section 1, on the one hand, and what is required by the Act of 1790, on the other, is demonstrated by the opinion of Mr. Justice White in the *Andrews* case. There, with reference to the decision in *Wisconsin v. Pelican Insurance Company*,¹⁴⁷ a case in which Mr. Justice Gray rested the decision on the fourth article of the Constitution and the Act of 1790, Mr. Justice White said:

Yet it was held that, in so far as the extra-territorial effect of the judgment was concerned, the jurisdiction over the subject matter of the State and its courts was open to inquiry, and if jurisdiction did not exist the enforcement of the judgment was not compelled by reason of *the due faith and credit clause* of the Constitution. [Italics ours.]¹⁴⁸

144. 18 Wall. 457, 461 (U.S. 1873).

145. 11 How. 165, 174 (U.S. 1850).

146. *Ibid.*

147. 127 U.S. 265 (1888).

148. *Andrews v. Andrews*, 188 U.S. 14, 39 (1903).

This indicates that the Court lost sight of the fact that the *Pelican* case rested on the combination of Article IV and the Act of Congress. The Court still talks loosely on this point, as may be seen from the words of Mr. Justice Douglas in the majority opinion in the first *Williams* case. There he said:

This Court accordingly classified *Haddock v. Haddock* with that group of cases which hold that when the courts of one state do not have jurisdiction either of the subject matter or of the person of the defendant, the courts of another state are not required *by virtue of the full faith and credit clause* to enforce the judgment. [Italics ours.]¹⁴⁹

It is believed that this examination of these early cases shows that there is no constitutional barrier, absent due process objections to be considered *infra*, to Congress's providing that the finding of the facts it designates as conditions precedent to the securing of full faith and credit shall be conclusive upon all other courts in the United States. It is with this thought in mind that we might decide that the first statute on the subject of mandatory recognition of divorce decrees should not, as a matter of wise legislative discretion, seek to exhaust the power of Congress in this direction. Rather it should use only so much of that power as is necessary to accomplish the legislative purpose, keeping the closest ties with past practice that may be retained consistently with the objective of reducing uncertainties and needless litigation. For this reason the statute allows State B to review the record of the proceedings of State A to search for a finding of the twelve months' residence. This permits the states to retain some power to inquire into the jurisdictional facts, yet so restricts this power, by confining it to reviewing for the easily identifiable twelve months' residence, that the area for dispute is, for practical purposes, as effectively curtailed as if the statute had made the bare finding thereof conclusive. At the same time the break with the past will not be so complete as if the record's recital of the findings of the jurisdictional facts were made conclusive, as is done in the statute proposed by Senator McCarran.¹⁵⁰

149. *Williams v. North Carolina*, 317 U.S. 287, 297 (1942).

150. The text of the statute proposed by Senator McCarran reads: Be it enacted . . . [etc.] That where a state has exercised through its courts jurisdiction to dissolve the marriage of spouses, the decree of divorce thus rendered must be given full faith and credit in every other state as a dissolution of such marriage provided (1) the decree is final; (2) the decree is valid in the state where rendered; (3) the

Our task involves more than the technical limits upon the power of Congress. A bill which seems not to depart too radically from the present law and procedure has better chances for enactment and popular acceptance than does one which on its face contains a radical departure from the accepted procedure. The success of this technique of leaving what appears to be a free choice to the states may be appreciated by considering the practical result of the eighty per cent state death tax credit on the federal estate tax,¹⁵¹ and the credit used in the federal social security statutes.¹⁵²

The due process objection must also be considered. Here again, as in the argument for the existence of the power of Congress to legislate on the subject, we shall confine our efforts to establishing a prima facie case for the proposition that the due process clauses of the Constitution do not invalidate such a statute. It is the due process requirement of the Fifth Amendment which the statute must satisfy, because if the divorce defendant were to claim in State B that the effect of State B's mandatory recognition of the State A decree of divorce was to deny him due process, it would not be the law of State A or State B which would be of operative effect, but rather the federal statute which imposed the duty on State B to accord faith and credit to the decree of State A upon finding it measures up to the federal norm. This point is noted, not to suggest that there are different tests as to what satisfies due process under the Fifth and Fourteenth Amendments, but to add weight to the argumentative value of cases to be discussed. These cases were decided after the enactment of the Fifth, but before the adoption of the Fourteenth Amendment.

The early cases considered above, notably *D'Arcy v. Ketchum*, and the older cases upon which it rested, *Mills v. Duryee*¹⁵³ and

decree contains recitals setting forth that the jurisdictional prerequisites of the State to the granting of the divorce have been met; and (4) the State wherein the decree was rendered was the last state wherein the spouses were domiciled together as husband and wife, or the defendant in the proceeding for divorce was personally subject to the jurisdiction of the State wherein the decree was rendered or appeared generally in the proceedings therefor. In all such cases except cases involving intrinsic fraud the recitals of the decree of divorce shall constitute a conclusive determination of the jurisdictional facts necessary to the decree.

151. INT. REV. CODE, § 813 (b).

152. 49 STAT. 620 (1935), 42 U.S.C., §§ 301, 302 (1946).

153. 7 Cranch 481 (U.S. 1813).

*Hampton v. M'Connel*¹⁵⁴ fall in this category. Nevertheless, these cases contain no suggestion that the power of Congress, discussed in *D'Arcy v. Ketchum* with regard to the Act of 1790, would have violated the due process clause had it been exercised in the manner we now propose.

The discussion in *Thompson v. Whitman* took place after the adoption of the Fourteenth Amendment in 1868, and again no suggestion that due process was involved appears in this opinion.

The discussion of due process in *Pennoyer v. Neff* might be urged as an argument against our position, but we might well distinguish away the force of such an argument on several grounds. First, the *Pennoyer* case talks about the Act of 1790, not the constitutional provision, as the basis of its statements. That appears from these words:

In the earlier cases, it was supposed that the act gave to all judgments the same effect in other States which they had by law in the State where rendered. But this view was afterwards qualified so as to make the act applicable only when the court rendering the judgment had jurisdiction of the parties and of the subject matter.¹⁵⁵

There are two other passages in the opinion where the Court discusses the effect of the Act of 1790, as distinguished from that of the Constitution itself.¹⁵⁶ Second, the *Pennoyer* case was explicitly limited to strictly in personam judgments. This fact alone makes it distinguishable. A decree of divorce is universally recognized not to be a purely in personam decree, although it is true that its exact nature has never been accurately defined.¹⁵⁷ Third, the *Pennoyer* case explicitly excepts status and divorce cases from its scope.¹⁵⁸

To bolster our case we might quote a dictum of Mr. Justice Holmes in *McDonald v. Mabee*.¹⁵⁹ This passage in its context indicates that divorce decrees are to be treated differently from other judgments jurisdiction-wise. It reads:

Whatever may be the rule with regard to decrees concerning status or its incidents, . . . an ordinary personal judgment

154. 3 Wheat. 234 (U.S. 1818).

155. *Pennoyer v. Neff*, 95 U.S. 714, 729 (1877).

156. *Id.* at 730, 731.

157. *Williams v. North Carolina*, 317 U.S. 287, 316 (1942).

158. *Pennoyer v. Neff*, 95 U.S. 714, 733, 734 (1877).

159. 243 U.S. 90 (1917).

for money, invalid for want of service amounting to due process of law, is as ineffective in the state as it is outside of it.¹⁶⁰

The suggested distinction is based on the following analysis: first, in personam judgments, if void where decreed due to lack of due process in a failure of service, are void everywhere; second, status decrees, though (under the law as it was when Mr. Justice Holmes spoke) invalid outside of the state where decreed, were valid where rendered; hence with a different congressional enactment status decrees might be valid everywhere.

We might also buttress our position with two early cases decided before *Thompson v. Whitman* by the Supreme Judicial Court of Massachusetts¹⁶¹ and the Supreme Court of Illinois.¹⁶² Both cases held that the Act of 1790 did make recitals of the finding of jurisdictional facts conclusive. In *Hall v. Williams*,¹⁶³ the Massachusetts decision, Chief Justice Parker stated:

The full faith and credit required to be given in each State to the judicial proceedings of other states, will prevent any evidence to contradict the facts which show a jurisdiction, if such appear on the record.¹⁶⁴

The Illinois Supreme Court in a pre-*Thompson v. Whitman* interpretation of the Act of 1790 expressed a similar view. In *Zepp v. Hager*,¹⁶⁵ it said:

The general doctrine, no doubt, is, where it appears, from the record, the court which pronounced the judgment, had jurisdiction by service of process or the personal appearance of the defendant, it will, under the constitution and the act of Congress, be deemed conclusive of the rights of the parties, and no evidence can be heard to impeach it.¹⁶⁶

These cases are noted to suggest that it was not thought shocking by some state courts that Congress might provide that a finding of jurisdiction by a court of record might be deemed conclusive as to the jurisdictional facts. The rationale of such a belief is as follows: first, practice of the courts in England and some of the American Colonies was to hold that the records of domestic tribunals import absolute verity in relation to juris-

160. *Id.* at 92.

161. *Hall v. Williams*, 6 Pick. 232 (Mass. 1828).

162. *Zepp v. Hager*, 70 Ill. 223 (1873).

163. 6 Pick. 232 (Mass. 1828).

164. *Id.* at 247.

165. 70 Ill. 223 (1873).

166. *Id.* at 226.

dictional as well as to other facts in all collateral proceedings; second, it would be but a slight extension of such practice to hold that on a national plane, Congress could consider the state courts as "domestic" in terms of national unity; third, in view of this Congress could declare that the findings of any state court as to facts, jurisdictional or otherwise, will be conclusive. It is submitted that the cases discussed do not disclose a constitutional barrier to the enactment of such a statute by Congress.

Choice of language for the statute is the next task. Our primary audience (after the legislators who must vote on it and to whom it must be, perforce, intelligible) will be the judiciary of the several states and the members of the bars thereof who seek to advise clients "irked by its laws concerning the severance of the marriage tie."¹⁶⁷ Since the rule of conduct is one directed at the conduct of state courts in deciding whether or not to recognize a foreign decree, the language used need not be that on the level of the layman. At the same time we should try to exclude handy, but elastic, legal catch-all phrases, such as those complained of in the criticisms of the language used in the court decisions on this subject.

As to the form of the statute, since it deals with the action of state courts, some type of the "direct control of conduct" technique of dealing with the problem seems called for. A generalized advance statement of the powers and duties of the reviewing court when the decree of another state is proffered for recognition appears to be best adapted to the job to be done. *Simpliciter*, the statute merely aims to tell the state courts ahead of time what they must, and what they may, do in deciding whether to recognize a sister state's decree of divorce. Our choice is fairly easy here since the principal alternative to a statutory scheme of control, namely, case-to-case development of the generalized advanced statement, has already failed in practical operation.

How far to particularize and how much to leave in generalized terms to be filled in by interpretation is indeed a problem. But we approach it with a prejudice against a too generalized statement of the selected rule, because this generalization has been one of the chief factors contributing to the failure of the case-to-case solution of the problem.

167. *Sherrer v. Sherrer*, 334 U.S. 343, 361 (1948).

Also to be considered is whether we must define words in the statute. This turns on whether the words selected are of sufficiently uncertain content as to be open to conflicting interpretations on the state court level.

The statute suggested by Senator McCarran, noted above,¹⁶⁸ might be examined at this point. The introductory sentence wisely limits the effect of the decree to the "dissolution of such marriage," and does not purport to deal with alimony, custody, support and the like. The statute also limits the scope of its operation to divorces granted by courts, thus obviating the question posed by Warren¹⁶⁹ as to whether the Fourteenth Amendment has taken such a power away from the state legislatures. The first two clauses require that the decree be (1) final and (2) valid where rendered, thus making no change from the case law. The third provision requires that the decree contain a recital that jurisdictional prerequisites of the decreeing state have been met. This would seem to make no change in the law, for a decree which did not satisfy the requirement for validity locally would hardly be more valid elsewhere. There is a conflict here between clause two and clause three. Clause two requires that the decree in fact be valid, whereas clause three requires only a recital that it be valid. If clause three were to be given effect, a state would be powerless to examine to see if clause two were complied with. Clause four requires either that the divorce-decreeing state be the last matrimonial domicile, or that the defendant have appeared or have been personally served in the proceeding. This does not commend itself to us, for it seems to be a step backward.

The unsatisfactory nature of this part of the statute can be shown by the following hypothetical case. Suppose: W, a wife who was married at her home in Massachusetts, went to live in California with her husband. W was then deserted by her husband who went to parts unknown. W returned to her family home in Massachusetts, being unable to support herself in California. Under clause four W would be unable to divorce the deserting husband, upon whom she could not make personal service, in any state except California. This would be true even though by today's case law she is free to establish her own domicile in any state she chooses and then divorce H on constructive

168. See note 150 *supra*.

169. WARREN, *op. cit.* *supra* note 104.

service. Assuming that she lived for five or ten years in Massachusetts, clause four would still deprive Massachusetts of power over the status of W, who, by every test, would be a citizen, resident, and domiciliary of Massachusetts, and a person over whose status Massachusetts should have control.

The concluding sentence first excepts from its scope cases involving "intrinsic fraud," which is not defined in the statute. It then states that a recital of the four findings enumerated above shall constitute a conclusive determination of the jurisdictional facts necessary to the decree. The memorandum attached to this tentative draft by Senator McCarran does not treat the scope of congressional power or the validity of the precise exercise of that power under the statute as offered. It consists merely of an argument that Congress does have power to legislate on this subject.

In summary, Senator McCarran's statute does not by its terms apply at all to those divorces in which only one spouse is domiciled in the decreeing state and before the court, and the other spouse is only constructively served. Hence it does not touch the largest problem in the migratory divorce field. As to the cases it purports to cover, in requiring either matrimonial domicile or personal jurisdiction, it seems to retrogress to the oft-criticized *Haddock* rule. Hence it does not recommend itself as an acceptable solution.

After considering some of the main problems with which we are faced, and having examined the draft of Senator McCarran's bill, we now turn our attention to the actual preparation of our statute. In so doing, we can use either a brief statement of legislative purpose or a short title which will indicate this aim. Such a title might read as follows: "An Act to provide for uniformity in the recognition of divorce decrees of the Courts of the several States."

We should bear in mind that paragraph headings or subtitles are useful to the reader and to courts trying to construe either the meaning or scope of the various parts. Thus, inasmuch as the subject dealt with will require several paragraphs, selection of an appropriate heading for each section is a part of the proper preparation of the statute.

Since "coverage" of the statute is invariably the first question to arise in connection with any statute containing directions of

the "thou shalt or shalt not" type, the initial part of our statute should indicate the decrees covered by the act. In this same portion, before prescribing what are the conditions which must be met by a decree in order to entitle it to mandatory credit, it seems desirable to state what is the effect of such credit. This done, the balance of the initial section can state the general rule promulgated. The succeeding sections will state the limitations or qualifications which must be added thereto for the sake of feasibility and compliance with due process requirements. Noting in the first section that limitations are to follow in a later portion will obviate the seeming conflict that would appear on the face of the statute if a categorical general statement were made in the first section and modifiers added later to derogate from this seemingly universal rule with which the statute commenced. With these thoughts in mind, the first section might read as follows:

General Provisions—Subject to the provisions of sections two and three hereof, whenever any state has undertaken through its courts to enter a decree of divorce, such decree must be recognized in every other state as a valid dissolution of the marriage status of the plaintiff and defendant in such divorce action; provided that the record of the court issuing the decree contains a finding that (a) the divorce is final, and (b) the divorce plaintiff was domiciled in the state whose court issues the decree, and (c) the divorce plaintiff was resident in such state for at least twelve months next preceding the filing of the petition for divorce.

The first group of qualifications which must be applied to the general rule stated in the first section are those which apply only to *ex parte*¹⁷⁰ divorce proceedings. The first of such limitations would go to insuring such notice to the absent defendant as would pass muster due-processwise. The second and third would be directed toward requiring more objectivity than the *ipse dixit* of the divorce plaintiff's allegations, and affording the defendant an opportunity to defeat recognition of the decree if perjury was used in its procurement. This proviso is inserted because the opportunity for cross-examination, which in legal contemplation is ample to expose perjured testimony in a contested action, is not present in an *ex parte* proceeding. If it were not present

170. Strictly speaking *ex parte* actions are only those in which there was no notice to or appearance by the defendant. In current divorce literature the term is commonly used in reference to cases wherein the defendant does not appear or contest the action, but does have that minimum notice which satisfies the test of procedural due process.

plaintiffs might fairly easily secure valid divorces based on purely fictitious testimony as to their twelve months' residence. These safety precautions referring to *ex parte* actions might be phrased as follows:

Ex Parte Proceedings—Recognition of any decree of divorce in the litigation of which the divorce defendant neither appeared personally, nor was personally served with process, may be refused in another of the United States if the divorce defendant proves in such other state that (a) no notice reasonably calculated to apprise him of the pendency of the action was given, or (b) no evidence was introduced in the proceeding to prove any one or more of the facts alleged in the complaint, or (c) perjured testimony was offered at the trial thereof.

The final portion of the statute should describe the extent to which State B may examine into the correctness of the finding by State A of the jurisdictional facts. It is in this section that review by State B will be limited to a testing for the objective factor of twelve months' residence. Confining State B's review to determining the correctness of State A's finding of this objective fact should greatly reduce the occurrence of what seemed to be an inevitable conflict of result when State B tested the correctness of the finding of domicile by State A. The section would provide:

Scope of Review—Recognition of a decree of divorce granted in another state may be refused in any state wherein recognition of the validity thereof is sought, upon proof that the finding that the divorce plaintiff was resident twelve months in the divorce-decreeing state was erroneously made. If the party seeking to defeat recognition of the divorce decree is unable to prove error in the finding of the twelve months' residence, then, for the purpose of determining the divorce-decreeing court's jurisdiction to dissolve the marriage status, the correctness of the finding of domicile by the divorce-decreeing court shall be conclusively presumed.

Finally, we might reflect on the words of Mr. Justice Jackson as he sounds the warning:

The whole issue of faith and credit as applied to domestic relations is difficult, and the *books of the Court will not be closed on it for a long time*, if ever. [Italics ours.]¹⁷¹

The proposed statute, although it may not slam shut the books of the Court, will at least be the first stride down the road to that now all too distant goal.

171. Jackson, *supra* note 117, at 14.

TEXT OF SUGGESTED STATUTE

*An Act to Provide for Uniformity in the Recognition of
Divorce Decrees of the Courts of the Several States*

(1) *General Provisions*—Subject to the provisions of sections two and three hereof, whenever any state has undertaken through its courts to enter a decree of divorce, such decree must be recognized in every other state as a valid dissolution of the marriage status of the plaintiff and defendant in such divorce action; provided that the record of the court issuing the decree contains a finding that (a) the divorce is final, and (b) the divorce plaintiff was domiciled in the state whose court issued the decree, and (c) the divorce plaintiff was resident in such state for at least twelve months next preceding the filing of the petition for divorce.

(2) *Ex Parte Proceedings*—Recognition of any decree of divorce in the litigation of which the divorce defendant neither appeared personally, nor was personally served with process, may be refused in another of the United States if the divorce defendant proves in such other state that (a) no notice reasonably calculated to apprise him of the pendency of the action was given, or (b) no evidence was introduced in the proceeding to prove any one or more of the facts alleged in the complaint, or (c) perjured testimony was offered at the trial thereof.

(3) *Scope of Review*—Recognition of a decree of divorce granted in another state may be refused in any state wherein recognition of the validity thereof is sought upon proof that the finding that the divorce plaintiff was resident twelve months in the divorce-decreeing state was erroneously made. If the party seeking to defeat recognition of the divorce decree is unable to prove error in the finding of the twelve months' residence, then, for the purpose of determining the divorce-decreeing court's jurisdiction to dissolve the marriage status, the correctness of the finding of domicile by the divorce-decreeing court shall be conclusively presumed.

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