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Cover Page Footnote
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MIGRATORY ALIMONY: A CONSTITUTIONAL DILEMMA IN THE EXERCISE OF IN PERSONAM JURISDICTION

*WILFRED J. RITZ**

Obstacles to obtaining binding determinations of domicile often block the personal jurisdiction required for alimony adjudication. A way out of the impasse, Professor Ritz argues, is offered by the mechanism of removing cases to federal courts under the constitutional grant of federal jurisdiction based on diversity of citizenship.

THE entry of a judgment by a state court against a defendant who fails to make a general appearance presents this question: Does the state have a sufficient connection with the subject under consideration and the persons involved to give it jurisdiction under the due process clause of the fourteenth amendment?[1] An alimony judgment either imposes a personal duty on a defendant-husband to pay money to a former wife or declares that he is under no duty to do so.[2] It is a personal judgment,[3] within the principle of *Pennoyer v. Neff*,[4] and void unless there is personal jurisdiction over the party against whom it is entered.[5] For the parties involved, alimony litigation is one aspect of the larger family problem that includes marriage and divorce and may include the custody of children. For society, alimony litigation presents an aspect of the problem of family stability and security. Consequently, alimony litigation raises problems of in personam jurisdiction which, though not unique, are disclosed with unusual clarity.

Migratory divorce has long been a familiar feature of the American scene. In recent years, its corollary, migratory alimony, has become in-

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1. Restatement (Second), Conflict of Laws § 42 (Tent. Draft No. 3, 1956).

2. This is an over-simplified definition of alimony. Alimony can be awarded with or without a divorce, before or after a divorce, in money or property, in periodic or lump sum payments, and to husband or wife. The nature of alimony varies from state to state. Up to now, opinions of the United States Supreme Court have ignored many facets of state domestic relations laws on the subject. The opinions treat alimony and the wife's right to support as though they were hard, fast, immutable concepts, as precisely defined everywhere as a debtor's obligation to repay a loan to his creditor.

Although a precise definition of the term is unnecessary for the purposes of this paper, it will be used herein to mean, unless otherwise indicated, periodic money payments by a former husband to his former wife under a decree entered in connection with or after an absolute divorce proceeding. At this point, however, it should be noted that the alimony involved in the principal cases under discussion was not of this type.

3. Restatement, Judgments, ch. 1, Introductory Note (1942).

4. 95 U.S. 714 (1878).

5. Restatement, Judgments § 14 (1942).

creasingly significant. In *Armstrong v. Armstrong*,[6] decided in 1956, the United States Supreme Court surveyed the field of migratory alimony and temporized. Shortly thereafter, in *Vanderbilt v. Vanderbilt*,[7] the Court took the path suggested by the concurring opinion of Mr. Justice Black in *Armstrong*. When the *Armstrong-Vanderbilt*[8] judicial route, which has now been taken to resolve migratory alimony problems, is considered in relation to other decisions of the Supreme Court, a constitutional dilemma appears.

For more than a quarter century, the Supreme Court has generally sanctioned an expanding concept of the reach of a state's jurisdiction over nonresidents. Such landmark cases as *Hess v. Pawloski*[9] and *International Shoe Co. v. Washington*[10] require no discussion. Contrary to this general trend, however, the power of the states to exercise jurisdiction in the area of family law has actually been restricted and curtailed. *Williams v. North Carolina*[11] held that the exercise of jurisdiction by a Nevada court over the marital status of nonresidents was not entitled to full faith and credit. Since then, the same state twice has been denied the power, in valid divorce proceedings, to cut off the alimony claims of nonresident wives. In *Estin v. Estin*,[12] the support rights had been embodied previously in a New York court decree; in *Vanderbilt v. Vanderbilt*,[13] the claim to alimony had not been adjudicated previously. In *May v. Anderson*,[14] Wisconsin was denied the power to exercise jurisdiction over a nonresident mother's claim to the custody of her children.

Alimony litigation is the crossroads, so to speak, where the general trend of an expanding concept of jurisdiction, as exemplified by decisions such as *International Shoe*, meets a contracting concept of jurisdiction in family law, as exemplified by *Armstrong-Vanderbilt*. The common basis for the exercise of jurisdiction is "domicile," one of the bases of a

6. 350 U.S. 568 (1956).

7. 354 U.S. 416 (1957).

8. This expression will be used herein to refer to the views of Mr. Justice Black, enunciated in his Armstrong concurrence and his opinion for the Court in Vanderbilt, as applied to the factual situation presented in Armstrong.

9. 274 U.S. 352 (1927).

10. 326 U.S. 310 (1945).

11. 325 U.S. 226 (1945). This is the second case of the same name. The first was Williams v. North Carolina, 317 U.S. 287 (1942). These decisions will hereinafter be referred to as I and II. See note 19 infra. See also Granville-Smith v. Granville-Smith, 349 U.S. 1 (1955), where the Court found that Congress had not given to the Virgin Islands any power to exercise jurisdiction over the marital status of a nonresident couple, both of whom had voluntarily submitted to the jurisdiction of the Virgin Islands.

12. 334 U.S. 541 (1948).

13. 354 U.S. 416 (1957).

14. 345 U.S. 528 (1953).

general in personam jurisdiction[15] and the usual basis in family law cases.

The constitutional dilemma revealed in migratory alimony litigation relates to the source from which are derived the definitions, in this instance domicile, for the basis of the exercise of jurisdiction under the federal constitution. There are two possibilities: (1) The definition of domicile could be derived from state law, which means that it may vary from state to state, or (2) the definition could be derived from federal constitutional law, which means, in the final analysis, that the Supreme Court defines the term and supervises its application.

These are the two horns of the dilemma: (1) If state law, under which definitions vary, is employed to define domicile, due process of law will depend upon which state judgment is before the Supreme Court, rather than upon some overriding constitutional principle applicable to every case. If this situation is to be avoided by giving controlling weight to the determination of domicile in a contested proceeding over a contrary finding in an uncontested proceeding, then due process will depend upon the contest, and the usefulness of domicile as a basis for the exercise of jurisdiction will be considerably limited. (2) If the definition of domicile is found in federal constitutional law, which is ultimately fashioned and applied by the Supreme Court, then the nation's highest court will become a Supreme Court of Probate and Divorce.[16] If this situation is avoided by distinguishing between the validity of a judgment in the state where rendered, when the due process clause applies, and recognition of the judgment in other states, when the full faith and credit clause is involved, the utility of the latter clause will have been seriously impaired.

In order to support these propositions, the relevant features of the four principal cases leading into the problem will be stated briefly, followed by a clarification of the two horns of the dilemma. Finally, consideration will be given to two available escape routes, with a recommendation made as to the one which should be taken.

I. The Cases

A. *Milliken v. Meyer*[17]

Milliken sued Meyer in a Wyoming court. Meyer was personally served in Colorado, in accordance with Wyoming statutes. He made no appearance in the Wyoming cause, and an in personam default judgment

15. See Restatement (Second), Conflict of Laws § 79 (Tent. Draft No. 3, 1956); Restatement, Judgments § 16 (1942); Restatement, Conflict of Laws § 79 (1934).

16. See Williams v. North Carolina II, 325 U.S. 226, 233 (1945).

17. 311 U.S. 457 (1940), reversing 105 Colo. 532, 100 P.2d 151 (1940), 101 Colo. 564, 76 P.2d 420 (1938).

was entered against him. Subsequently, in a Colorado court, Meyer sought to restrain Milliken from enforcing his Wyoming judgment. Meyer claimed that he was a resident of Colorado, not Wyoming, at the time of service. Nevertheless, the Colorado trial court found him to be domiciled in Wyoming when suit was commenced in that state, thereby giving Wyoming jurisdiction over his person. On the basis of this finding, the trial court dismissed the bill. The Supreme Court of Colorado reversed and held, without passing on the question of Wyoming's jurisdiction over the parties, that the judgment of Wyoming was void because of an irreconcilable contradiction between the findings and the decree.

Responding to Milliken's claim that Colorado had denied full faith and credit to the Wyoming judgment, the United States Supreme Court granted certiorari. Reversing the Colorado judgment, the Court noted that the Wyoming judgment was not void if rendered by a court having jurisdiction over Meyer. Obviously, Wyoming had treated Meyer as its domiciliary. Further, the Colorado trial court also had found him to be a domiciliary of Wyoming, and this finding was not impaired in the state's highest court. Therefore, Wyoming did have in personam jurisdiction over Meyer, since, as the Supreme Court said, "domicile in the state is alone sufficient to bring an absent defendant within the reach of the state's jurisdiction for purposes of a personal judgment by means of appropriate substituted service."[18]

It is important to note that in *Milliken v. Meyer* the findings of domicile were consistent. Both Wyoming and Colorado reached the same conclusion, namely, that Meyer was domiciled in Wyoming. Therefore, according to the findings of both states, Wyoming had the power to exercise in personam jurisdiction over him.

B. *Williams v. North Carolina*[19]

Mr. Williams and Mrs. Hendrix left their North Carolina homes and went to Nevada where, in accordance with Nevada law, they obtained ex parte divorces from their respective stay-at-home spouses. They immediately married and returned to North Carolina. Subsequently, North Carolina prosecuted and convicted them of bigamous cohabitation, refusing to recognize their Nevada divorces. In *Williams v. North Carolina I*, the United States Supreme Court reversed these convictions, holding that North Carolina was required to give full faith and credit to the Nevada decrees provided the parties had acquired bona fide domiciles

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18. 311 U.S. at 462.

19. Williams v. North Carolina II, 325 U.S. 226 (1945), affirming 224 N.C. 183, 29 S.E.2d 744 (1944). Williams v. North Carolina I, 317 U.S. 287 (1942), reversing 220 N.C. 445, 17 S.E.2d 769 (1941).

there.[20] On remand, the state again tried and convicted the pair of bigamous cohabitation, the jury finding as a fact that they had not acquired bona fide domiciles in Nevada. In *Williams v. North Carolina II*, the Supreme Court affirmed these convictions, declaring that North Carolina was not bound by the Nevada findings of domicile in ex parte proceedings and that North Carolina could re-examine the question and make a contrary finding of fact. If North Carolina found that Mr. Williams and Mrs. Hendrix had not acquired bona fide domiciles in Nevada, then it was not required to recognize the Nevada divorces.

This paper is concerned primarily with two aspects of the Williams litigation:

(1) After speaking of the duties of the Court with respect to the full faith and credit clause, Mr. Justice Frankfurter made the following statement in *Williams II:*

> But the discharge of this duty does not make of this Court a court of probate and divorce. Neither a rational system of law nor hard practicality calls for our independent determination, in reviewing the judgment of a State court, of that rather elusive relation between person and place which establishes domicile. "It is not for us to retry the facts," as was held in a case in which, like the present, the jurisdiction underlying a sister-State judgment was dependent on domicil.[21]

The Supreme Court did not formulate any standards for choosing between conflicting determinations of domicile by the states, nor did it offer a definition of domicile that would be binding on all states for jurisdictional purposes.

(2) The Court did not pass upon or decide whether the Williams divorce was valid in Nevada itself,[22] or in states other than North Carolina and Nevada,[23] or even in other litigation in North Carolina itself.[24]

20. For a direct result of this holding, compare Restatement, Conflict of Laws § 113 (1934), with Restatement of the Law, 1948 Supplement, Conflict of Laws § 113 (1949).

21. 325 U.S. at 233.

22. See Powell, And Repent at Leisure, 58 Harv. L. Rev. 930 (1945); Rheinstein, The Constitutional Bases of Jurisdiction, 22 U. Chi. L. Rev. 775, 821-24 (1955).

23. One court thought this question was presented. Sutton v. Leib, 188 F.2d 766 (7th Cir. 1951). However, the Supreme Court's disposition of the case shows that the doctrine of Treinies v. Sunshine Mining Co., 308 U.S. 66 (1939), provides the basis for decision, and so the question could not be reached. Sutton v. Leib, 342 U.S. 402 (1952).

24. The Williams litigation involved a criminal prosecution by North Carolina. Since the first Mrs. Williams and Mr. Hendrix were not parties to the litigation, they could not be bound by the proceeding. See Restatement, Judgments § 93 (1942). In litigation in North Carolina between Mr. Williams and the first Mrs. Williams, it is at least debatable whether either party would be bound by the outcome of the criminal prosecution against Mr. Williams.

C. *Armstrong v. Armstrong*[25]

The Armstrongs lived in Florida from the early 1920's until 1950, when the wife left their Miami home and returned to their native state, Ohio. In 1951, the husband filed suit for divorce in Florida. Service by publication was made on Mrs. Armstrong, who actually knew of the suit but did not appear in the proceeding. A divorce was granted to the husband.

In 1952, Mrs. Armstrong filed suit for divorce and alimony in Ohio, claiming that the Florida divorce had been obtained by fraud and misrepresentation. Mr. Armstrong appeared and answered. The Ohio court refused to grant a divorce on the ground that the Florida decree was conclusive; however, alimony was awarded to Mrs. Armstrong. The Supreme Court granted certiorari to consider Mr. Armstrong's claim that Ohio had denied full faith and credit to that part of the Florida decree which had denied alimony to his former wife.

The Florida court's precise adjudication with respect to alimony provided the basis for the Supreme Court's disposition of the case. The Court was unanimous in saying that the Ohio decision should be affirmed. The Justices, however, differed in their reasons. Mr. Justice Minton, speaking for four members of the Court, stated that Florida had not purported to adjudicate the absent wife's right to alimony. Mr. Justice Frankfurter, concurring, was sufficiently in accord with this construction of the Florida decree to join therein, so that the opinion of Mr. Justice Minton became the opinion of the Court. Mr. Justice Black, speaking for four Justices, declared that the Florida judgment was plainly a denial of alimony on the merits.

Mr. Justice Black, therefore, reached the constitutional question of whether Ohio had denied full faith and credit to a Florida judgment denying alimony. He thought it had not, because "a State where one of the parties to a marriage is domiciled can dissolve the marriage without personal service but . . . it cannot render a personal decree granting or denying alimony."[26]

The husband, relying on *Milliken v. Meyer*, contended that personal service on Mrs. Armstrong in Florida was unnecessary because she was actually domiciled there at the time of the action. Justice Black answered this argument thusly:

> The Florida court did find she was domiciled there, but that was in an uncontested proceeding. This finding was open to challenge in Ohio. . . . The issue was tried in

25. 350 U.S. 568 (1956), affirming 162 Ohio St. 406, 123 N.E.2d 267 (1954). This proceeding originated in the Court of Common Pleas and was appealed to the Ohio Court of Appeals, which affirmed. 99 Ohio App. 7, 130 N.E.2d 710 (1954). An appeal to the Supreme Court of Ohio was dismissed. 161 Ohio St. 390, 119 N.E.2d 72 (1954).

26. 350 U.S. at 578.

Ohio with both parties present, and the trial court expressly found that Mrs. Armstrong had returned to Ohio and was a "resident" there within the meaning of the Ohio divorce statute at the time the Florida divorce proceedings were instituted. . . . This statute has been uniformly interpreted by the Ohio courts to require residence accompanied by an intention to make the State of Ohio a permanent home. . . . We would accept the Ohio court's finding that Mrs. Armstrong was such a resident of Ohio when the Florida suit was brought as amply supported by evidence in the record. Consequently the husband's reliance on *Milliken v. Meyer* is misplaced.[27]

D. *Vanderbilt v. Vanderbilt*[28]

The significance of *Vanderbilt* lies in the acceptance, at least by six Justices,[29] of the views expressed by Mr. Justice Black in *Armstrong*. The Vanderbilts lived in California at the time Mrs. Vanderbilt moved to New York. She took up residence there in February 1953. In March 1953, Mr. Vanderbilt filed suit for divorce in Nevada. Mrs. Vanderbilt was not served in Nevada and did not appear in the proceeding. Mr. Vanderbilt was granted a divorce, thereby ending his duty under Nevada law to support his wife. Thereafter, the wife sought a decree of separation and alimony from a New York court, which, on the basis of a New York statute,[30] entered a support order in favor of the wife. The United States Supreme Court affirmed. Speaking for the Court, Mr. Justice Black reiterated the views he had expressed in his concurring opinion in *Armstrong*, that is to say, Nevada, not having personal jurisdiction over the wife, could not terminate her right to support.

II. The Constitutional Dilemma

A. *The First Horn–Domicile Defined by State Law*

1. *Due Process Depends Upon Which State Judgment is Before the Supreme Court.* Mr. Justice Black said in *Armstrong* that he would accept the Ohio finding of domicile in Ohio because it was "amply supported by evidence in the record."[31] When domicile is in issue, the evidence may support findings of domicile in more than one state. Conflicting conclusions as to the place of a person's domicile may be reached, either because the states involved have different rules or because the courts, using the same rules, draw different inferences from the same facts.[32]

27. Ibid.

28. 354 U.S. 416 (1957), affirming 1 N.Y.2d 342, 135 N.E.2d 553, 153 N.Y.S.2d 1 (1956), affirming 1 App. Div. 2d 3, 147 N.Y.S.2d 125 (1st Dep't), affirming 207 Misc. 291, 138 N.Y.S.2d 222 (Sup. Ct. 1955).

29. Justices Frankfurter and Harlan dissented. Mr. Chief Justice Warren did not participate in the consideration or decision of the case.

30. See N.Y. Civ. Prac. Act § 1170-b.

31. See text accompanying note 27 supra.

32. Restatement of the Law Continued, Conflict of Laws § 11, comment c (Tent. Draft No. 2, 1954). A graphic example is found in the Dorrance litigation, wherein

This appears to have been the situation in *Armstrong*, where the evidence would have supported findings that Mrs. Armstrong was domiciled in either Florida or Ohio. Certainly, this was the situation if Florida was still free to follow the rule that a married woman who wrongfully leaves her husband cannot acquire a separate domicile.[33] On the issue of fault, the Ohio Court of Appeals indicated that the evidence introduced at the trial would have supported a finding that either the husband or wife had been "guilty of gross neglect of duty and extreme cruelty . . . ."[34]

In one sense, the issue in *Armstrong* went deeper than domicile. Marital fault was involved. It was relevant not only to the question of Mrs. Armstrong's domicile, but also to her very right to alimony. In Florida's view, Mrs. Armstrong had no right to support because she had wrongfully left her husband.[35] Ohio law is similar in that a wife who wrongfully leaves her husband generally is not entitled to alimony.[36] Therefore, a finding that Mrs. Armstrong committed the marital wrong would

both Pennsylvania and New Jersey claimed Dorrance as a domiciliary. Compare In re Dorrance's Estate, 309 Pa. 151, 163 Atl. 303 (1932), with In re Dorrance's Estate, 115 N.J. Eq. 268, 170 Atl. 601 (Prerogative Ct. 1934).

33. Armstrong v. Armstrong, 350 U.S. 568, 577 (1956). The English rule precludes a wife from acquiring a domicile separate from that of her husband. Attorney General for Alberta v. Cook, [1926] A.C. 444 (Alberta). In 1913, the United States Supreme Court carefully limited a holding that a married woman can have a domicile separate from that of her husband to those situations in which she has "justifiably" left her husband. Williamson v. Osenton, 232 U.S. 619 (1914). The original Restatement limited a wife's power to acquire a separate domicile to situations where she lawfully lived apart from her husband without being guilty of desertion under the law of their domicile at the time of the separation. Restatement, Conflict of Laws § 28 (1934). Under the current revision, a wife can acquire a separate domicile in the same way as any other person. Restatement of the Law Continued, Conflict of Laws § 28 (Tent. Draft No. 2, 1954). One case has permitted a separate domicile where both parties were living together. Commonwealth v. Rutherfoord, 160 Va. 524, 169 S.E. 909 (1933).

34. Armstrong v. Armstrong, 99 Ohio App. 7, 10, 130 N.E.2d 710, 713 (1954).

35. The Florida court clearly found that Mrs. Armstrong was at fault since it awarded the divorce to the husband and also stated that the wife "has not come into this court in good faith or made any claim to the equitable conscience of the court. . . ." 350 U.S. at 569. In proper circumstances, Florida law does permit the award of alimony to a wife against whom a divorce is decreed, unless the ground of divorce is adultery. Fla. Stat. Ann. § 65.08 (Supp. 1959). See Brunner v. Brunner, 159 Fla. 762, 32 So. 2d 736 (1947), rehearing denied, 160 Fla. 860, 36 So. 2d 827 (1948). See also Cowan v. Cowan, 147 Fla. 473, 2 So. 2d 869 (1941).

36. Ohio Rev. Code Ann. § 3105.17 (Baldwin Supp. 1958) lists the grounds for alimony. Since these are all based on the commission of a marital fault by the party ordered to pay alimony, the concept of marital fault is the basis of a claim to alimony in Ohio. Mrs. Armstrong commenced her Ohio action in 1952. The Ohio statutes had been amended in 1951. See Ohio Rev. Code Ann. §§ 3105.18, 3105.20 (Baldwin Supp. 1958). As a result of these amendments, Ohio will sometimes award alimony to a wife who has committed a marital fault. De Milo v. Watson, 166 Ohio St. 433, 143 N.E.2d 707 (1957); Gage v. Gage, 165 Ohio St. 462, 136 N.E.2d 56 (1956).

probably bar her claim to alimony under the law of either state. A Florida finding of fault which was binding on Mrs. Armstrong would bar her claim to alimony under Ohio as well as Florida law. Such a Florida finding would be binding if the Florida court had personal jurisdiction over her.[37] This leads back to the crucial question as to where she was domiciled. *Williams I*, overruling *Haddock v. Haddock*,[38] purported to abolish marital fault as a jurisdictional fact. Mr. Justice Douglas stated that "the question as to where the fault lies has no relevancy to the existence of state power . . . ."[39] Yet, if the states are free to consider marital fault when determining domicile, marital fault is still a jurisdictional fact, albeit one step removed from where it was under *Haddock v. Haddock*.

Suppose Mrs. Armstrong had appeared specially in the Florida proceeding in order to contest the issue of domicile and had lost. The Florida court then entered a divorce decree in favor of her husband and denied her alimony. Suppose further she had obtained review by the Supreme Court, contending that Florida had lacked personal jurisdiction over her and therefore had deprived her of due process.[40] Presumably, Mrs. Armstrong's contention would be rejected by the Court and the Florida action affirmed. If Florida can consider marital fault when determining domicile, the evidence in *Armstrong* would clearly support a finding that Mrs. Armstrong retained a Florida domicile. After all, even Ohio admitted the evidence would support a finding that she committed a marital wrong. Aside from marital fault, the evidence still seems to support a finding that she was domiciled in Florida. If this is true, the courts of Florida could acquire personal jurisdiction over her even while she was outside the territorial limits of the state. Therefore, the Florida judgment would not deprive Mrs. Armstrong of due process of law under the fourteenth amendment.

In the actual litigation, Mrs. Armstrong did not appear in the Florida proceeding to contest the issue of domicile. Mr. Justice Black said that he would accept the Ohio court's finding that she was not domiciled in Florida. Therefore, the Florida judgment did deprive her of due process and was void.[41]

Thus, if the states are free to make conflicting determinations as to

37. Milliken v. Meyer would require that Ohio give full faith and credit to the Florida judgment. See Harding v. Harding, 198 U.S. 317 (1905). This is clearly Florida law, so far as further litigation in that state is concerned. Field v. Field, 91 So. 2d 640 (Fla. 1956); Anders v. Anders, 153 Fla. 54, 13 So. 2d 603 (1943).

38. 201 U.S. 562 (1906).

39. Williams v. North Carolina I, 317 U.S. 287, 300 (1942).

40. See the procedure followed in International Shoe Co. v. Washington, 326 U.S. 310 (1945).

41. See Vanderbilt v. Vanderbilt, 354 U.S. 416, 419 (1957).

where a person is domiciled, due process of law will depend upon which state judgment is before the Supreme Court. If the Florida judgment is reviewed directly, there is no denial of due process. If the Ohio judgment which refuses to accord full faith and credit to the Florida judgment is the subject of review, then the Florida judgment denies due process.

2. *Due Process Depends Upon a Contest.* A defendant within the territorial limits of a state can be personally served, his presence within the state serving as a basis for jurisdiction. If the defendant is outside the state, he may voluntarily appear, thereby giving the court jurisdiction. Only when he is outside the state and refuses to come within its territorial limits does domicile become important, because it may be the only basis upon which jurisdiction can be exercised.

The value of *Milliken v. Meyer* lies in the power it gives a state to bind an absent defendant who refuses to appear and contest the proceeding. Historically, as Mr. Chief Justice Stone pointed out in *International Shoe Co. v. Washington,*[42] the jurisdiction of a state to render in personam judgments was grounded on a court's de facto power over the person of the defendant.[43] The Chief Justice continued:

> But now that the *capias ad respondendum* has given way to personal service of summons or other form of notice, due process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice."[44]

In *Armstrong,* Mr. Justice Black accepted the Ohio finding of domicile over the contrary Florida finding because

> the Florida court did find she was domiciled there, but that was in an uncontested proceeding. This finding was open to challenge in Ohio. . . . The issue was tried in Ohio with both parties present, and the trial court expressly found that Mrs. Armstrong had returned to Ohio and was a "resident" there within the meaning of the Ohio divorce statute at the time the Florida divorce proceedings were instituted.[45]

There is an important distinction between the *Williams* and *Armstrong* litigations which Mr. Justice Black either overlooked or ignored. In *Williams,* the defendant-wife had never been domiciled in Nevada; in *Armstrong,* the evidence was virtually conclusive that Mrs. Armstrong,

42. 326 U.S. 310 (1945).

43. Id. at 316.

44. Ibid.

45. 350 U.S. at 578. The Justice never categorically states that Ohio found Mrs. Armstrong to have been domiciled in Ohio when the Florida divorce proceeding was instituted. He only says that Ohio found Mrs. Armstrong to be a "resident" and that the Ohio divorce statute had been uniformly interpreted "to require residence accompanied by an intention to make the State of Ohio a permanent home." Ibid.

under any tenable test, had been domiciled in Florida. The basic question in *Armstrong*, therefore, was whether Mrs. Armstrong was still domiciled in Florida at the time her husband sued for divorce, or whether she had changed her domicile to Ohio. If Mrs. Armstrong were domiciled in Florida at this critical time, then Florida would have personal jurisdiction over her, and matters litigated in that proceeding, under principles of res judicata, would not be "open to challenge in Ohio."

Mr. Justice Black said that Mr. Armstrong's reliance on *Milliken v. Meyer* was misplaced. Although the case was basic to the husband's position, something the Supreme Court seems not to have fully appreciated, it does not provide an answer to the *Armstrong* litigation, since both Wyoming and Colorado had found that Meyer was domiciled in Wyoming at the time of the proceeding there. Yet, it is also true that *Williams II*, upon which Mr. Justice Black relied, does not provide the answer, since both Nevada and North Carolina had taken for granted that the defendant-wife was domiciled in North Carolina. In *Armstrong*, unlike either of these cases, the two states made inconsistent findings as to where the defendant-wife in the original divorce proceedings was domiciled. Florida found that, at the time her husband sued for divorce, Mrs. Armstrong was domiciled in that state, whereas Ohio found that she was domiciled in Ohio.

Mr. Justice Black accepted the Ohio finding because it was made in a proceeding "with both parties present," while the Florida finding was made in "an uncontested proceeding." However, these findings are not opposites as implied by Mr. Justice Black. If the court has personal jurisdiction over a defendant, then both parties are "present," even though the defendant allows a default judgment to be entered against him in an "uncontested" proceeding.

If it is the contest which makes conclusive the finding of domicile, the appearance for the contest, and not the contest itself, will be of primary significance. The defendant who appears to contest a court's exercise of jurisdiction over him thereby subjects himself to that court's jurisdiction, making the place of his domicile irrelevant. At any rate, it is within the constitutional power of a state to have such a rule.[46]

Under the approach of Mr. Justice Black, the defendant is encouraged to postpone the contest until the lists are more to his liking. The contest thereby gains new significance. The defendant runs the risk, it is true, of being foreclosed on the merits. If he fails to appear and contest the first proceeding, as in *Milliken v. Meyer*, he will be bound by the first judgment, provided the finding of domicile by the second state is con-

46. See York v. Texas, 137 U.S. 15 (1890), which recognized the constitutional power of Texas to abolish the special appearance. See also Johnson v. Di Giovanni, 347 Mich. 118, 78 N.W.2d 560 (1956); Burger v. Burger, 156 Tex. 584, 298 S.W.2d 119 (1957).

sistent with that of the first. Balanced against this risk, however, is the possibility that only in the second state can he win on the merits. For example, under present day domestic relations law the first state may be one of those that does not award alimony in connection with absolute divorce,[47] or to the party against whom the divorce is granted.[48] The second state may permit an award of alimony under these circumstances.[49] If the wife is at fault, or if her fault is fairly debatable, and if she has an alternative, she certainly will not appear to contest either the issue of domicile or of fault. So far as the plaintiff-husband is concerned, he would like to revive and find a way to use the *capias ad respondendum* so as to compel the contest in the forum of his choice.

If due process requires a contest in order to obtain a binding determination of domicile, *Milliken v. Meyer* has been so limited that, whenever the state of domicile is fairly debatable, domicile has become an insubstantial basis for the exercise of jurisdiction.

B. *The Second Horn–Domicile Defined by Federal Constitutional Law*

1. *A United States Supreme Court of Probate and Divorce.* The current revision of the *Restatement of the Conflict of Laws* equivocates as to the source of the definition of domicile, but it appears to accept a constitutional concept. The black-letter rule of section 10, entitled "Domicil by What Law Determined," is: "The forum uses its own rules of domicil except when applying the Conflict of Laws rules of another

47. The general rule is that the power to grant permanent alimony in a divorce action is entirely statutory. Nolen v. Nolen, 121 Fla. 130, 163 So. 401 (1935); Stanley v. Stanley, 226 N.C. 129, 37 S.E.2d 118 (1946). Two states, because there is no statutory authority for doing so, award no permanent alimony in connection with absolute divorce. Yow v. Yow, 243 N.C. 79, 89 S.E.2d 867 (1955); Hooks v. Hooks, 123 Pa. Super. 507, 187 Atl. 245 (1936). See Note, 31 N.C.L. Rev. 482 (1953).

48. The general view is that, in the absence of statutory authority, alimony cannot be awarded to a wife against whom a divorce is granted. Quarles v. Quarles, 179 F.2d 57 (D.C. Cir. 1949); Lofvander v. Lofvander, 146 Mich. 370, 109 N.W. 662 (1906); O'Loughlin v. O'Loughlin, 12 N.J. 222, 96 Atl. 2d 410 (1953). Some state statutes expressly prohibit the award of alimony to the defendant. See, e.g., Tenn. Code Ann. § 36-826 (1955), which provides: "If the bonds of matrimony be dissolved at the suit of the husband, the defendant shall not be entitled . . . to alimony." See Brown v. Brown, 198 Tenn. 600, 281 S.W.2d 492 (1955). Other state statutes have been similarly interpreted. See, e.g., Luques v. Luques, 127 Me. 356, 143 Atl. 263 (1928); Gibson v. Gibson, 193 Ore. 139, 237 P.2d 498 (1951). Other statutes provide that only the party against whom the decree is granted can be compelled to pay alimony. See, e.g., Cal. Civ. Code § 139.

49. Alimony statutes in some states have been construed to authorize the award of permanent alimony to the wife against whom the divorce is granted. See, e.g., Dunham v. Dunham, 244 Iowa 214, 56 N.W.2d 606 (1953); Graves v. Graves, 108 Mass. 314 (1871). In other states, the courts appear to have assumed this power without reference to any particular statutory basis. Flaxman v. Flaxman, 177 Okla. 28, 57 P.2d 819 (1936); MacDonald v. MacDonald, 120 Utah 573, 236 P.2d 1066 (1951).

state."[50] However, comment *b* says the rule is "subject to constitutional limitations." Comment *e* is as follows:

> *Effect of Constitution.* Whether a State of the United States has jurisdiction in a given case is a question of constitutional law. . . . Where such jurisdiction depends upon domicil, a State court's finding on this question is therefore subject to review by the Supreme Court of the United States. If a case should arise where the full faith and credit clause of the Constitution requires that the law of the State of domicil be applied, a State court's finding on the question of domicil would likewise be subject to review by the Supreme Court.

Dissenting in *Armstrong,* Mr. Justice Black lends support to the view that the definition of domicile is to be found in federal constitutional law. Referring to the Florida rule, he said, "The fiction that a woman cannot have a separate 'domicile' from that of her husband is a relic of the old discredited idea that women must always play a subordinate role in society; it does not justify a departure from settled constitutional principles."[51] Such a criticism hardly comports with the Court's acceptance of, and respect for, a controlling state law rule.

Although the subject is not discussed, it seems clear in the Supreme Court opinions involving other bases of jurisdiction that a federal constitutional rule or definition is being used. In *McGee v. International Life Ins. Co.,*[52] the Court held that Texas was required to give full faith and credit to a California in personam judgment entered against a foreign corporation which, so far as the record indicated, never did business in California, except for taking over a life insurance policy issued by another company to a resident of California. The Court reaffirmed the rule of *International Shoe* that the test of "due process requires only that in order to subject a defendant to a judgment *in personam,* if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' "[53]

Now, it seems obvious that the test of "traditional notions of fair play and substantial justice" is not a state law test. If it were, a bona fide decision of a state court that its own exercise of jurisdiction did not offend "traditional notions of fair play and substantial justice" would end the matter and leave nothing for the Supreme Court to review. There is a basis for Supreme Court review only if the Court is fashioning a rule which is applicable to all states and which may be different from any particular state's own notion of "fair play and substantial justice." It is,

50. Restatement of the Law Continued, Conflict of Laws § 10 (Tent. Draft No. 2, 1954).

51. 350 U.S. at 577. Page v. Page, 19 Misc. 2d 291, 163 N.Y.S.2d 70 (Sup. Ct. 1957), indicates that New York follows the Florida rule.

52. 355 U.S. 220 (1957).

53. Id. at 222, quoting International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).

therefore, implicit in both *McGee* and *International Shoe* that the rule applied is a constitutional one and not derived from state law.[54]

If the test of "doing business" is a constitutional rule,[55] then is not the test of domicile as a basis for exercising jurisdiction also a constitutional one?

To give domicile a constitutional content different from the meaning to be found in the varying rules of the states means an abandonment of the approach set forth by Mr. Justice Frankfurter in *Williams II,* wherein he declared that "neither a rational system of law nor hard practicality calls for our independent determination, in reviewing the judgment of a State court, of that rather elusive relation between person and place which establishes domicil."[56] But then, after all, the concept of domicile is no more elusive than that of "traditional notions of fair play and substantial justice." If jurisdiction in probate and divorce matters rests on domicile, there is no escape from the nation's highest court becoming, as Mr. Justice Frankfurter expressed it, a "court of probate and divorce."[57]

2. *Due Process Preserved and Full Faith and Credit Abandoned.* The Supreme Court avoided the task of defining and applying a constitutional rule of domicile in *Williams II* by leaving uncertain the validity of the Williams divorce in Nevada itself. Since the decision, arguments have been advanced both for the validity and the invalidity of the divorce in Nevada.

The argument that it was valid in Nevada is based on the proposition crystallized by Mr. Justice Stone, dissenting in *Yarborough v. Yarborough:*[58]

Between the prohibition of the due process clause, acting upon the courts of the state from which such proceedings may be taken, and the mandate of the full faith and credit clause, acting upon the state to which they may be taken, there is an area which federal authority has not occupied.

Under this reasoning, a judgment may be valid where rendered because due process has been complied with and yet not entitled to full faith and

54. In McGee, the Texas Court of Civil Appeals cited only cases from the United States Supreme Court and the Court of Appeals for the Fifth Circuit. McGee v. International Life Ins. Co., 288 S.W.2d 579 (Tex. Civ. App. 1956). There is not the faintest suggestion in the opinion of the Supreme Court that there could be a Texas rule, different from the constitutional rule, of what constitutes "traditional notions of fair play and substantial justice."

55. The basis for exercising jurisdiction may be differently phrased. The Court said that the test of "doing business" had been accepted and abandoned in the evolution of the standard used for measuring the extent of state judicial power over foreign corporations. "It is sufficient for purposes of due process that the suit was based on a contract which had a substantial connection with that State [i.e., California]." 355 U.S. at 223.

56. 325 U.S. at 233.

57. Ibid.

58. 290 U.S. 202, 214 (1933).

credit in another state which, for some policy reason, may wish to deny such credit.[59] As applied to the divorce field, this line of reasoning permits what the Supreme Court in *Williams I* eschewed, a situation in which a person is "a bigamist for living in one state with the only one with whom the other state would permit him lawfully to live."[60]

The argument that the Williams divorce was invalid in Nevada is based on the proposition that due process and full faith and credit are opposite sides of the same coin. A divorce valid where rendered is automatically entitled to full faith and credit in other states. Since the Williams divorce was invalid in North Carolina, it must also have been invalid in Nevada. A man cannot be divorced from a woman in one state and still married to her in another.

Under a constitutional rule of domicile, the Williams divorce was invalid both in Nevada and in North Carolina. The Florida divorce decree in *Armstrong*, which denied the wife alimony, was invalid both in Florida and in Ohio. These decrees were invalid in the state of rendition because the rendering courts did not have jurisdiction under the due process clause of the fourteenth amendment. In each case, the non-appearing party was not domiciled within the territorial jurisdiction of the state rendering the judgment. The opinions of Mr. Justice Black in the *Armstrong* and *Vanderbilt* cases support these conclusions.

The same fundamental question is presented in *Armstrong* and *Vanderbilt* as in *Williams*. Because personal judgments are involved in *Armstrong* and *Vanderbilt*, these two cases make clear what was not clear in *Williams II*, which involved only marital status. The solution under which a decree is valid where rendered and yet denied recognition in other states is more illusory than real. The facade of due process is preserved by abandoning the demands of full faith and credit. By the same logic, the Washington judgment in *International Shoe* was not necessarily entitled to full faith and credit in Missouri. For sufficient policy reasons, Missouri should be permitted to refuse to enforce the Washington judgment. Further, the decision in *McGee* should have been to the contrary. In truth, an in personam money judgment, whether for alimony or something else, which is valid where rendered but not entitled to recognition in other states,[61] is virtually a contradiction in terms. There is no reason for treating divorce decrees differently.

59. For strong authority against this proposition, see Fauntleroy v. Lum, 210 U.S. 230 (1908).

60. 317 U.S. at 300.

61. This assumes that the judgment has all the other characteristics, such as finality, which must be present before it is entitled to out-of-state recognition. See, e.g., Barber v. Barber, 323 U.S. 77 (1944).

III. ESCAPE FROM CONSTITUTIONAL DILEMMA

McGee v. International Life Ins. Co. permits what *Armstrong-Vanderbilt* denies in the exercise of jurisdiction over nonresidents. *McGee* accords to California a jurisdictional interest in an insurance company which never did business there. *Armstrong-Vanderbilt* denies to Florida a similar jurisdictional interest in the economic affairs of a married couple who for a quarter of a century made their home in that state.[62]

If there is reason for taking different approaches to questions of status in family law from problems in areas marked by arms-length dealing, such as commercial law,[63] the reason does not apply to alimony litigation, since it contains elements of both. Conceivably, a distinct alimony jurisprudence could be developed, but the necessity for it is not apparent. There are two other avenues of escape from the constitutional dilemma. One leads to the fragmentation of alimony litigation, while the other leads to the settlement of all alimony questions in a single judicial proceeding.

A. *Fragmentation of Alimony Litigation*

Divorce and alimony do not present the first instance in which the Supreme Court has found the concept of domicile difficult to manage. A similar situation arose in the endeavor to apportion jurisdiction to tax intangibles among the states. At first, the Court sought to allocate the inheritance taxation of intangibles among the states on the basis of the owner's domicile.[64] The effort began breaking down when the Court was faced with difficult problems involving trusts,[65] and was finally abandoned.[66]

62. In McGee, Mr. Justice Black, speaking for the Supreme Court, looked at the history of the exercise of jurisdiction since Pennoyer v. Neff, 95 U.S. 714 (1878), and said: "Looking back over this long history of litigation a trend is clearly discernible toward expanding the permissible scope of state jurisdiction over foreign corporations and other nonresidents." 355 U.S. at 222. In Armstrong v. Armstrong, 350 U.S. at 576, the same Justice, looking at the same history, had said: "Our view is based on the absence of power in the Florida court to render a personal judgment against Mrs. Armstrong depriving her of all right to alimony although she was a nonresident of Florida, had not been personally served with process in that State, and had not appeared as a party. It has been the constitutional rule in this country at least since Pennoyer v. Neff . . . that nonresidents cannot be subjected to personal judgments without such service or appearance."

See also Kurland, The Supreme Court, the Due Process Clause and the In Personam Jurisdiction of State Courts, 25 U. Chi. L. Rev. 569, 608-09 (1958), where a comparison is drawn between the McGee and Vanderbilt cases.

63. Cf. Watson v. Employers Liab. Assur. Corp., 348 U.S. 66, 74 (1954) (Frankfurter, J., concurring); Hughes v. Fetter, 341 U.S. 609, 614 (1951) (Frankfurter, J., dissenting).

64. First Nat'l Bank v. Maine, 284 U.S. 312 (1932); Farmers Loan & Trust Co. v. Minnesota, 280 U.S. 204 (1930).

65. Curry v. McCanless, 307 U.S. 357 (1939); Graves v. Elliott, 307 U.S. 383 (1939).

66. State Tax Comm'n v. Aldrich, 316 U.S. 174 (1942).

The present constitutional rule that domicile is a necessary jurisdictional basis for divorce may also be on the road to oblivion. In *Granville-Smith v. Granville-Smith*,[67] the court temporized on the question of whether domicile is necessary for the exercise of divorce jurisdiction by a court having personal jurisdiction over both spouses.[68] Three Justices favored the abandonment of the rule.[69] A state court, moreover, has flatly denied its existence.[70]

As has already been done with respect to the taxation of intangibles, and as may be in the offing for divorce, the Supreme Court could abandon the present effort to allocate alimony litigation to a single state. This development might be based on a synthesis of the viewpoints of Mr. Justice Frankfurter, concurring in *Armstrong*, and Mr. Justice Harlan, dissenting in *Vanderbilt*.

The opinion of Mr. Justice Frankfurter looks to an allocation of alimony litigation among the states on the basis of the situs of the property which is the subject of controversy. The litigation in *Armstrong* involved certificates of stock in the wife's possession, issued in the name of the husband but not indorsed by him; jewelry in the wife's possession; and money withdrawn by the wife from a joint bank account.[71] Mr. Justice Frankfurter stated:

> A study of the Florida decree . . . demonstrates, I believe, that Florida expressly disavowed any adjudication regarding claims to and in property situated in Ohio, the very properties which are the subject matter of the challenged Ohio decree.
>
> Thus, the sole question that survives is the power of Ohio, as a matter of its own policy, to define rights in property situated in Ohio in the circumstances of this case. A question of due process might be raised, though not successfully.[72]

Under this view, each state is accorded the power to adjudicate alimony rights with respect to property within its own borders. When, as in *Armstrong*, the subject of alimony litigation involves existing property, this approach is possible, but it is plainly inadequate when the alimony sought is of the more traditional type, *i.e.*, an in personam obligation on the part of the husband to make periodic money payments for an indefinite period.

Under the approach of Mr. Justice Harlan, dissenting in *Vanderbilt*, alimony litigation would be allocated among the states on the basis of the states' interest in alimony as an incident of the marital relation. Mr. Justice Harlan says:

67. 349 U.S. 1 (1955). See note 11 supra.

68. Here, the Virgin Islands was denied the power to exercise a divorce jurisdiction on the basis of residence, specifically because Congress had not given this power to it.

69. Justices Clark, Black, and Reed.

70. Wallace v. Wallace, 63 N.M. 414, 320 P.2d 1020 (1958).

71. 99 Ohio App. 7, 130 N.E.2d 710 (1954).

72. 350 U.S. at 573-74.

If it is due process for Nevada to adjudicate the marriage status of a domiciliary without personal service over the absent spouse (as it clearly is, see Williams v North Carolina, I . . .), I see no reason why Nevada cannot, at least for the purposes of her own law, also adjudicate the incidents of that status.[73]

Under this view, each state in which one of the spouses has been domiciled during the existence of the marital relation has an alimony interest[74] which that state would have the exclusive power of adjudicating for purposes of its own law.[75]

Thus, one escape route from the constitutional dilemma could be taken by abandoning domicile as a jurisdictional basis for the *exclusive* allocation of alimony jurisdiction among the states. As with the taxation of intangibles, this abandonment is made easier by the fact that there is no suggestion in the federal constitution that a state's power of adjudication for any purpose is based on domicile.

The implications of this escape route can be fully explored only in connection with a comprehensive analysis of state laws on alimony. Before this viewpoint is adopted, adequate consideration must be given to the many problems arising from the varieties of alimony which exist in the United States and the vagaries of state law on the subject. Some consideration ought to be given to the nature of this right of a wife to alimony. The Supreme Court opinions refer to it almost glibly. After all, *Armstrong* and *Vanderbilt* did not involve husbands and wives. Under these decisions, ex-husbands were compelled to support ex-wives. What is the source, the rationale, and even the merit of the ex-husband's duty to support his former wife? Even if these matters can be successfully disposed of, the objection remains that this route leads to the fragmentation of alimony litigation, *i.e.*, to a multiplicity of forums, of suits, and of applicable laws.

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73. 354 U.S. at 430.

74. It is not clear from Mr. Justice Harlan's opinion how many states might have an alimony interest. He indicates that at least there is such an interest in the states of domicile "at the time of the divorce." 354 U.S. at 430, 434. Even here there is ambiguity, since this may mean either when the suit is brought or when the decree is granted. Further, if momentary domicile at the time of the divorce is sufficient to give the state an alimony interest, it would seem that a "long-time" domicile prior to the time of divorce would also be sufficient.

Actually, the view of Mr. Justice Harlan does not get beyond the threshold problem in Armstrong, that is to say, where was Mrs. Armstrong domiciled at the time of the divorce?

75. Mr. Justice Harlan accepts the view that a judgment may satisfy due process, being valid where rendered, and yet not be entitled to full faith and credit in other states. For development of this thesis he relies heavily on Powell, And Repent at Leisure, 58 Harv. L. Rev. 930 (1945).

B. *Unification of Alimony Litigation Through Binding Domicile Determinations*

Although the federal constitution does not refer to domicile, it does recognize "citizenship" as a basis for the exercise of jurisdiction by the federal courts. Article III gives the federal government jurisdiction over controversies "between citizens of different States . . . ."[76] In the course of time, the concepts of state citizenship and domicile have coalesced to such a degree that state citizenship has come to mean state domicile.[77] Therefore, if Mrs. Armstrong was domiciled in Ohio, she was also a citizen of Ohio. Mr. Armstrong was a domiciliary and a citizen of Florida. Hence, there was a controversy respecting divorce and alimony between citizens of different states, and so literally within the constitutional jurisdiction of the federal courts.

Over a century ago the Supreme Court, in dictum, disclaimed "altogether any jurisdiction in the courts of the United States upon the subject of divorce, or for the allowance of alimony . . . ."[78] In 1890, the Court said, "The whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States."[79] In *De la Rama v. De la Rama*,[80] the Court gave the following reasons for the supposed rule:

> It has been a long established rule that the courts of the United States have no jurisdiction upon the subject of divorce, or for the allowance of alimony, either as an original proceeding in chancery, or an incident of a divorce or separation, both by reason of fact that the husband and wife cannot usually be citizens of different States, so long as the marriage relation continues (a rule which has been somewhat relaxed in recent cases), and for the further reason that a suit for divorce in itself involves no pecuniary value.[81]

These are hardly valid reasons. An exclusive domestic relations jurisdiction is no more reserved to the states in the federal constitution than is an exclusive jurisdiction over the ordinary tort or contract litigation handled by the federal courts. Moreover, under *Erie R.R. v. Tompkins*,[82]

76. U.S. Const. art. III, § 2.

77. Morris v. Gilmer, 129 U.S. 315 (1889); Stine v. Moore, 213 F.2d 446 (5th Cir. 1954); Bjornquist v. Boston & A.R.R., 250 Fed. 929 (1st Cir.), cert. denied, 243 U.S. 573 (1918). See also Restatement (Second), Conflict of Laws § 80, comment a (Tent. Draft No. 4, 1957).

78. Barber v. Barber, 62 U.S. (21 How.) 582, 584 (1859). This disclaimer does not extend to alimony judgments. The federal courts will enforce an allowance for alimony which has accrued as a debt. Sutton v. Leib, 342 U.S. 402 (1952); Barber v. Barber, supra; Howard v. Jennings, 141 F.2d 193 (8th Cir. 1944); Bosworth v. Bosworth, 118 F. Supp. 267 (D. La. 1954).

79. In re Burrus, 136 U.S. 586, 593-94 (1890).

80. 201 U.S. 303 (1906).

81. Id. at 307.

82. 304 U.S. 64 (1938).

the federal courts would apply state and not federal law in diversity cases involving domestic relations.

It was clearly recognized in *Williamson v. Osenton*,[83] decided in 1913, that, for purposes of maintaining a diversity action in the federal courts, a married woman may have a domicile and, therefore, a state citizenship which is separate and distinct from that of her husband. *De la Rama* was decided seven years earlier. Even if there had been universal acceptance of the theory that the wife always must have the same domicile as her husband, and the *De la Rama* opinion itself indicates the rule was not so well established, the doctrine can no longer be accepted. In fact, Mr. Justice Black believes the doctrine is based on a fiction and is a relic of an old discredited idea.[84]

In alimony litigation, the amount in controversy frequently exceeds $10,000.[85] Hence, when alimony is claimed, the *De la Rama* objection that a suit for divorce involves no pecuniary value is inapplicable. Further, since the monetary jurisdictional requirement is only statutory and not based upon the Constitution, it has nothing to do with the power of the federal courts to exercise a jurisdiction authorized by Congress.

It seems evident, therefore, that the federal courts do have the constitutional power to exercise a domestic relations jurisdiction in diversity cases. It is only necessary, however, to recognize something in the nature of a "fringe" jurisdiction in order to deal adequately with the specific problem under consideration.

In the *Armstrong* situation, the constitutional dilemma in the exercise of in personam jurisdiction arises because a state court, under present law, cannot make a determination of domicile that conclusively binds a party who does not appear. Such a conclusive determination could be obtained under the following rule:

> A party with actual notice of a state court proceeding in which his domicile is a jurisdictional fact will be conclusively bound by the state court's determination of this issue, unless the party by a special appearance removes the case to the federal court on the ground of diversity of citizenship.[86]

This rule rests upon the recognition of the possibility that the federal courts may exercise a domestic relations jurisdiction, rather than on any requirement that they will or must do so.

Upon removal, the federal court will have personal jurisdiction over both parties for the purpose of determining whether there is a diversity of citizenship. This will require a determination as to the defendant's

83. 232 U.S. 619 (1914).

84. See note 51 supra and accompanying text.

85. 28 U.S.C. § 1332(a) (1958).

86. See U.S. Const. art. III, § 2. Of course, it is assumed that the necessary judicial and legislative steps will have been taken so that a party can follow the outlined procedure.

domicile. The significant feature of the procedure is that the determination of the federal court will be conclusive and binding on both parties.

If the federal court decides that the defendant is a domiciliary of the forum state, the case will be remanded to the state court.[87] Ordinarily, this will be done because diversity does not exist, since, in domestic relations cases, the probabilities are that the plaintiff will also be a domiciliary of the forum. If the plaintiff is not a domiciliary of the forum, the case still will be remanded, since a defendant who is a citizen of the forum state cannot remove the case to a federal court under the present statute.[88] However, the important fact is that the judgment of the state court on remand will no longer be open to the *Armstrong-Vanderbilt* objection that there was no in personam jurisdiction over the defendant. The judgment of the federal court will be res judicata that the state court did have personal jurisdiction, based on the defendant's domicile within the forum state.

If the federal court finds that the defendant is not a domiciliary of the forum state, the state court cannot exercise in personam jurisdiction over him. There are then two possibilities, both depending upon whether the federal courts exercise a domestic relations jurisdiction:

(1) If the present view is retained under which the federal courts refuse jurisdiction over domestic relations cases, the case will be dismissed on that ground. However, on the issue of diversity of citizenship, the case will be within federal jurisdiction. Consequently, the judgment of the federal court on this issue will bind both parties, that is to say, the federal court's determination that the defendant is not a domiciliary of the forum state is conclusive. Thereafter, the state court cannot purport to exercise in personam jurisdiction over him.[89]

(2) If the federal courts should recognize that their jurisdiction in diversity cases extends to domestic relations just as to torts, contracts and property, the case will be heard and decided along the lines of other diversity litigation.

It is worth noting in this connection that section 1404(a) of Title 28 authorizes the transfer of a case to another federal district "where it might have been brought."[90] Under *Williams I*, a divorce action may be instituted in the domiciliary state of either spouse. Hence, there is some scope, once a domestic relations jurisdiction is recognized, for transfer

87. 28 U.S.C. § 1447(c) (1958).

88. 28 U.S.C. § 1441(b) (1958).

89. A special appearance may be used to remove a case to a federal court without submitting generally to the jurisdiction of the state court. Cain v. Commercial Publishing Co., 232 U.S. 124 (1914); Goldey v. Morning News, 156 U.S. 518 (1895). See Developments in the Law—State-Court Jurisdiction, 73 Harv. L. Rev. 909, 992 (1960).

90. 28 U.S.C. § 1404(a) (1958).

under present legislation. Since alimony legislation requires in personam jurisdiction over both parties, some cases could not be transferred under present law. Even so, it is within the power of Congress to enact a statute similar to interpleader,[91] under which process would run throughout the nation in order that the most appropriate federal forum for alimony litigation may be secured.

If it is preferable for state courts to decide domestic relations cases, a procedure can be developed whereby these cases would be transferred from one federal court to another and then remanded to the appropriate state court of the latter federal district.

Application of this rule to the facts in *Armstrong*, as understood by Mr. Justice Black, gives us the following results: Since Mrs. Armstrong, with actual notice of the Florida proceeding, did not seek removal of the case to the federal court, the determination of the Florida court that it had in personam jurisdiction over her on grounds of domicile is res judicata. The consequent Florida judgment denying alimony is entitled to full faith and credit in Ohio. Therefore, Ohio cannot award alimony, Mrs. Armstrong's claims having been litigated and decided against her by a Florida court having personal jurisdiction over both parties.

If Mrs. Armstrong had removed the case to the appropriate Florida federal court, that court would have decided whether she was domiciled in Florida, and the judgment would have been conclusive. If she were found to be a domiciliary of Florida, the case would have been remanded to the Florida state court, and its adjudication would have been entitled to full faith and credit. Subsequent proceedings in Ohio would be barred. On the other hand, if she were found not to be a domiciliary of Florida, a number of possibilities would be presented, depending upon the extent to which a federal domestic relations jurisdiction is recognized. Under present law, the case would be dismissed. This judgment would be res judicata that Mrs. Armstrong was not domiciled in Florida and, therefore, that a Florida court could not exercise in personam jurisdiction over her. Under the fourteenth amendment, Florida could not enter a valid judgment concerning alimony. Thus, Ohio would be free to adjudicate her claim to alimony.

The need for a procedure giving binding and conclusive determinations of domicile is clear. The mechanism of removal from state to federal courts under the constitutional grant of a federal jurisdiction in diversity of citizenship cases offers a solution. Legal imagination exercised by either the judiciary or by Congress, or both, to utilize this procedure can resolve the constitutional dilemma in personal jurisdiction which is made evident by litigation involving migratory alimony.

91. See 28 U.S.C. §§ 1335, 1397, 2361 (1958).