Case Western Reserve Law Review

Volume 11 | Issue 3

1960

Constitutionality of Non-Domiciliary Divorce Statutes

James Amdur

NOTES

Constitutionality of Non-Domiciliary Divorce Statutes

> Under our system of law, judicial power to grant a divorce — jurisdiction, strictly speaking — is founded on domicil. The framers of the Constitution were familiar with this jurisdictional prerequisite, and since 1789 neither this Court nor any other court in the English-speaking world has questioned it.[1]

The above statement, made by Mr. Justice Frankfurter in 1945, has been accepted as gospel by the vast majority of courts in cases dealing with the subject. The purposes of this note are to "question" this "jurisdictional prerequisite," to point out the weaknesses of the domicile theory, and to discuss the departures which have been made from it.

The Domicile Theory

An action for divorce is regarded as being in the nature of an in rem proceeding, with the marital status constituting the *res*.[2] Therefore, jurisdiction over the defendant, necessary in an in personam proceeding, is not required, since jurisdiction over the *res* gives the court power to render a decree. Since the marital status is an intangible, some fictitious basis is necessary to determine whether the *res* is properly before the court.

For purposes of divorce jurisdiction, the marital status has generally been regarded as existing at the place where the parties are domiciled,[3] *i.e.*, where they are physically present with an intent to remain indefinitely.[4] However, it is recognized that a husband and wife who are not living together may have separate domiciles, and in that situation the marital status is deemed to exist at the domicile of either spouse.[5] This concept, together with the in rem theory of jurisdiction, makes it possible for a court to render a valid *ex parte* divorce decree against a non-resident defendant, if the plaintiff is domiciled within the state.

Existing law as to interstate recognition of these *ex parte* decrees is founded upon the decisions of the United States Supreme Court in the two famous *Williams* cases.[6] That litigation arose out of the fol-

1. Williams v. North Carolina (II), 325 U.S. 226, 229 (1945).
2. Goodrich, Conflict of Laws 411 (3d ed. 1949).
3. *Ibid.*
4. Stumberg, Conflict of Laws 23 (2d ed. 1951).
5. Goodrich, Conflict of Laws 411-12 (3d ed. 1949).
6. Williams v. North Carolina (I), 317 U.S. 287 (1942); Williams v. North Carolina (II), 325 U.S. 226 (1945).

lowing facts: Mr. Williams and Mrs. Hendrix, who had lived with their respective spouses in North Carolina, went to Nevada and, after six weeks, each filed an action for divorce. The absent spouses were served by constructive process and did not appear. Upon findings that each petitioner had a bona fide domicile in Nevada, the two were granted divorces from their respective spouses. They were then married to each other and returned to North Carolina, where they lived together until prosecuted and convicted of bigamous cohabitation. The North Carolina Supreme Court affirmed the conviction, following the principle of *Haddock v. Haddock*[7] that the state of the matrimonial domicile need not give full faith and credit to an *ex parte* divorce decree obtained by one spouse who wrongfully left the other in the matrimonial domicile.

In *Williams v. North Carolina* (I)[8] the Supreme Court reversed the North Carolina court, holding that an *ex parte* divorce decree founded upon the bona fide domicile of but one of the parties must be accorded full faith and credit, thus overruling *Haddock*. Since the Nevada court's finding of domicile had not been questioned, the case was remanded to the North Carolina courts.

Upon retrial, the jury, after a proper charge by the court, found that the parties had not been bona fide domiciliaries of Nevada at the time they had obtained their divorces. They were again found guilty, and in *Williams v. North Carolina* (II),[9] the conviction was affirmed by the Supreme Court. It was held that the court of the forum could re-examine the question of domicile, and if it found that the petitioning spouse had not obtained a bona fide domicile in the divorcing state, the forum need not give full faith and credit to the *ex parte* decree.

Defects of the Domicile Theory

In his vigorous dissent in *Williams II,* Mr. Justice Rutledge denounced the domicile theory as unworkable, stating:

> The Constitution does not mention domicil. Nowhere does it posit the powers of the state or the nation upon that amorphous, highly variable common-law conception. Judges have imported it. The importation, it should be clear by now, has failed in creating a workable constitutional criterion for this delicate region.[10]

As a substantive concept, domicile is inherently nebulous, since it depends partially upon a subjective mental state, namely, the intent of the person to remain. Although the term in its ordinary, non-legal sense, suggests a certain degree of permanence, a person's legal domi-

7. 201 U.S. 562 (1906).
8. 317 U.S. 287 (1942).
9. 325 U.S. 226 (1945).
10. Williams v. North Carolina (II), 325 U.S. 226, 255 (1945) (dissenting opinion).

cile "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."[11] Though instantaneous, this decision is sufficient to give the state in which he is present the power to dissolve his marriage.

> All of his belongings, his business, his family, his established interests and intimate relations may remain where they have always been. Yet if he is but physically present elsewhere, without even bag or baggage, and undergoes the mental flash, in a moment he has created a new domicil. . . .[12]

These elusive, subjective qualities of domicile as a substantive concept cause procedural weaknesses when domicile is used as a jurisdictional basis. First, this subjective factor encourages untruthful testimony on the part of the plaintiff. Every year many persons, unable to obtain divorces at home because of strict divorce laws, visit one of the states with short residence requirements, such as Nevada,[13] and obtain dissolutions of their marriages in proceedings which are often uncontested. The need for proof of domicile leads to "a mild sort of perjury . . . when the applicant mumbles, in reply to the judge's mumble, that she does intend to continue residence in Nevada."[14]

The subjective intent factor also makes jurisdiction based on domicile particularly vulnerable to collateral attack. Whether the necessary intent exists in the mind of a person must be determined by inferences from extrinsic circumstances, and often the lack of intent becomes apparent only after the court has decided the question. For example, the successful plaintiff may leave the state soon after the decree is granted. However, the prompt departure is a fact unavailable to the court granting the divorce. Although the divorce court may have reached its decision in good faith, the issue of domicile may be decided the other way when the decree is relied upon in another state, because of the additional facts.

The results which may ensue from this vulnerability to collateral attack are strikingly illustrated by the predicament of the parties in the *Williams* cases. As Mr. Williams and his second wife learned to their dismay, migratory *ex parte* divorces based upon domicile of one of the parties are not conclusive. A man may be treated as married in one state and divorced in another. Persons who remarry on the strength of *ex parte* decrees may become bigamists and the children of such marriages may be illegitimate.

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11. *Id.* at 257.

12. *Id.* at 258.

13. The residence requirement in Nevada is six weeks. NEV. REV. STAT. § 125.020 (1957). Other statutes setting up short residence requirements are: ARK. STAT. ANN. § 34-1208 (Supp. 1957) (sixty days before commencement of action and three months before judgment); IDAHO CODE ANN. § 32-701 (1948) (six weeks); UTAH CODE ANN. § 30-3-1 (Supp. 1959) (three months); WYO. COMP. STAT. ANN. § 20-48 (1957) (sixty days).

14. Granville-Smith v. Granville-Smith, 349 U.S. 1, 28 n.9 (1955) (dissenting opinion).

Mr. Justice Frankfurter's statement, quoted at the outset of this note, that the "framers of the Constitution were familiar with [domicile as a] . . . jurisdictional prerequisite,"[15] appears to be of doubtful validity. The concept of domicile in divorce jurisdiction was not a part of the common law at the time of the American Revolution and the framing of the Constitution, because dissolution of marriage had been administered in England by the ecclesiastical courts.[16]

Domicile seems to have been selected as a basis for divorce jurisdiction largely because of the erroneous interpretation of a statement made by Story in 1834.[17] But it was not until 1895 that a case arising in Ceylon, *LeMesurier v. LeMesurier,*[18] established the theory at common law.

Whatever its origin, the domicile concept of divorce jurisdiction has become outmoded in today's mobile social system.

> "[H]ome" in the modern world is often a trailer or tourist camp. Automobiles, nation-wide business and multiple family dwelling units have deprived the institution, though not the idea, of its former general fixation to soil and locality.[19]

In the area of divorce jurisdiction, as well as in other areas, domicile "tends to be a less and less useful fiction."[20]

Departures From The Domicile Theory

A statute in which divorce jurisdiction is based upon some concept other than domicile creates constitutional problems of both due process and full faith and credit. Two questions arise: (1) Is a decree based upon such a statute valid where rendered? (2) Is recognition of the decree mandatory in other jurisdictions?

Although there have been numerous statements to the effect that domicile of at least one of the parties is the only possible jurisdictional basis for divorce,[21] the United States Supreme Court has never expressly so held. In practically every case in which domicile has been said to be a jurisdictional necessity, it was required by the divorce statutes of the forum state. Of course, where domicile is a *statutory* jurisdictional prerequisite it is correct to say that jurisdiction for divorce is founded upon this concept. But it is another mat-

15. Williams v. North Carolina (II), 325 U.S. 226, 229 (1945).

16. Madden, Domestic Relations 256-60 (1931).

17. See Crownover v. Crownover, 58 N.M. 597, 615-16, 274 P.2d 127, 138-39 (1954) (concurring opinion), citing Story, Conflict of Laws § 230(a) (1841).

18. [1895] A.C. 517 (Ceylon).

19. Williams v. North Carolina (II), 325 U.S. 226, 257 (1945) (dissenting opinion).

20. Texas v. Florida, 306 U.S. 398, 429 (1939) (concurring opinion of Frankfurter, J.).

21. *E.g.,* Sherrer v. Sherrer, 334 U.S. 343, 349 (1948); Williams v. North Carolina (II), 325 U.S. 226, 229 (1945); Williams v. North Carolina (I), 317 U.S. 287, 297 (1942).

ter to flatly declare that no other relationship between a state and an individual can create a sufficient interest to give the state power to grant divorces.

The Virgin Islands Statute

The Supreme Court has never ruled on the validity, under the due process clause, of a non-domiciliary divorce statute. It had an opportunity to do so in connection with a statute passed by the legislature of the Virgin Islands, but the Court avoided the issue. The Virgin Islands statute[22] provided that: (1) six weeks residence by a plaintiff prior to filing for a divorce was prima facie evidence of domicile; and (2) if the defendant were personally served within the district or entered an appearance in the action, then the court would have jurisdiction without further reference to domicile.

In *Alton v. Alton,*[23] the plaintiff-wife left her home in Connecticut and went to the Virgin Islands. After residing there for the necessary six weeks she filed suit for divorce. Defendant waived service of summons and appeared generally, but made no defense. Plaintiff introduced evidence to establish her residence, but the court asked for further proof of domicile. When no such evidence was introduced, the action was dismissed for want of jurisdiction. The court of appeals affirmed the dismissal, four to three, the majority holding that a court of a state in which neither party is domiciled has no jurisdiction to grant a divorce. It found the presumption in the first part of the statute to be unreasonable and held that the second portion of the statute, empowering the court to grant a divorce decree without reference to domicile, violated the due process clause of the fifth amendment. The basis of the holding was that the domiciliary state has so great an interest in the marital status of its inhabitants that it should have exclusive power to dissolve that status.

In a strong dissent, Judge Hastie maintained that domicile was not an invariable Constitutional principle, and that the legislature had not acted arbitrarily in adopting personal jurisdiction over both parties as a basis of jurisdiction.

The Supreme Court granted certiorari in the *Alton* case, but dismissed the proceeding as moot upon learning that in the meantime the parties had procured a valid divorce in Connecticut.[24]

The issue of the validity of the Virgin Islands statute finally came before the Supreme Court in *Granville-Smith v. Granville-Smith.*[25] On substantially the same facts as the *Alton* case, the Court, in a five to three decision, held the statute invalid, but did not pass upon the due process question. Instead, the decision was based upon the

22. V.I. Laws 3d Sess. 1953, No. 55.

23. 207 F.2d 667 (3d Cir. 1953), *vacated as moot,* 347 U.S. 911 (1954).

24. 347 U.S. 911 (1954).

25. 349 U.S. 1 (1955).

ground that the statute was beyond the power delegated by Congress to the Virgin Islands legislature, in that it did not deal with a subject "of local application," but rather was designed to attract divorce-seekers.

Thus, the Supreme Court left undecided the question of whether such a statute would be valid if adopted by a state, rather than a territory. How the Court would rule if faced with this issue is, of course, a matter of conjecture, but several state courts have felt there was ample justification for holding non-domiciliary divorce statutes valid.

State Departures From Domicile

While the vast majority of divorce statutes base jurisdiction upon domicile, there have been a few non-domicile statutes. Of these, only one has been struck down by the state courts. In *Jennings v. Jennings*,[26] an Alabama statute[27] dispensing with the residence requirement in cases in which the court has jurisdiction over both parties was held not applicable unless one of the parties was domiciled in Alabama.

On the other hand, a number of state court decisions have upheld statutes which departed from the domicile theory.

Several states have passed statutes authorizing the granting of divorces to military personnel stationed there for a certain period, usually one year.[28] The rationale is that servicemen are often incapable of acquiring a domicile, since they usually do not intend to remain indefinitely where they are stationed. Such a statute was held valid in Kansas as early as 1936.[29]

A New Mexico statute,[30] providing that a member of the armed forces is "deemed" to be domiciled in the state after one year's presence, was held valid in *Crownover v. Crownover*.[31] However, the court in that case held that, while domicile was still required, it was achieved by means of the conclusive presumption. In a well-reasoned concurring opinion, Judge McGee recognized that there was actually no domicile here, but maintained that due process did not require domicile. In a more recent case,[32] the court again upheld the statute, this time following Judge McGee's reasoning.

26. 251 Ala. 73, 36 So. 2d 236 (1948).

27. ALA. CODE tit. 34, § 29 (Supp. 1955).

28. KAN. GEN. STAT. ANN. § 60-1502 (1949); KY. REV. STAT. § 403.035 (1955); NEB. REV. STAT. § 42-303 (Supp. 1957); N.M. STAT. ANN. § 22-7-4 (1953); OKLA. STAT. ANN. tit. 12, § 1272 (Supp. 1958); TEX. REV. CIV. STAT. ANN. art. 4631 (Supp. 1958); VA. CODE ANN. § 20-97 (Supp. 1958).

29. Craig v. Craig, 143 Kan. 624, 56 P.2d 464 (1936).

30. N.M. STAT. ANN. § 22-7-4 (1953).

31. 58 N.M. 597, 274 P.2d 127 (1954).

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

A New York statute[33] basing divorce jurisdiction solely upon marriage within the state was upheld in *David-Ziesniss v. Ziesniss*.[34] In *Wheat v. Wheat*,[35] the Arkansas Supreme Court upheld the validity of a statute[36] which substituted three months residence for domicile as a jurisdictional requirement in divorce cases.

Although still small in number, these cases indicate the beginnings of a trend away from the conventional domicile concept of divorce jurisdiction.

Supreme Court Departures

The Supreme Court itself seems to have departed from the domicile theory in cases in which the defendant was present and had an opportunity to defend. To illustrate this, two cases decided on the same day in 1948 must be examined. In *Sherrer v. Sherrer*,[37] the wife left Massachusetts, the couple's home, and departed for Florida, where, after fulfilling the residence requirement, she filed suit for divorce. The husband, served by mail, retained Florida counsel who entered a general appearance and filed an answer denying the wife's allegations. While the husband appeared personally to testify, he did not controvert the wife's evidence of domicile. The divorce decree granted was subsequently attacked in Massachusetts. Finding that there had been no bona fide domicile in Florida, the Massachusetts court refused to grant the decree full faith and credit, but the Supreme Court reversed, holding that since the husband had been afforded his day in court in Florida with respect to every issue, including that of jurisdiction, he would not be afforded a second opportunity.

The Court applied the same rule in the companion case, *Coe v. Coe*,[38] which involved substantially the same facts, except that there the respondent had appeared personally and filed an answer, *admitting* the petitioner's allegations of domicile.

These two decisions are extensions of the principle set forth in *Davis v. Davis*,[39] that a spouse who has appeared and litigated the question of domicile is prevented by the doctrine of res judicata from collaterally attacking the decree on jurisdictional grounds in a second state. *Sherrer* and *Coe* extended the doctrine to situations in which the defendant had an opportunity to litigate the issue, but did not choose to do so.

The doctrine was extended to third persons in privity with the

33. N.Y. CIV. PRAC. ACT § 1147(2).
34. 205 Misc. 836, 129 N.Y.S.2d 649 (Sup. Ct. 1954).
35. 318 S.W.2d 793 (Ark. 1958).
36. ARK. STAT. ANN. § 34-1208.1 (Supp. 1957).
37. 334 U.S. 343 (1948).
38. 334 U.S. 378 (1948).
39. 305 U.S. 32 (1938).

parties by *Johnson v. Muelberger*.[40] That case held that an appearance by the husband in a Florida divorce action brought by his second wife barred an attack in New York, after the husband's death, by his daughter.

Thus, if the defendant has merely entered an appearance, the decree is binding, even if he did not contest the allegations of domicile. This is not based upon a determination that the plaintiff had in fact been domiciled in the state, but rather upon a doctrine — res judicata — which precludes a participating spouse and those in privity with him from questioning the court's jurisdiction.

Even if additional facts are available to prove that the plaintiff had *not* in fact been domiciled in the granting state, such facts cannot be the basis of a collateral attack. As Mr. Justice Clark pointed out:

> [A]fter divorce, though the divorcee immediately leaves Nevada, as was always intended, [and] . . . regardless of how evident it is that there was no domicile in the divorcing state, no other state can question the validity of the divorce so long as both parties appeared in the action.[41]

In effect, the result of these cases is the compulsory recognition of divorces obtained by *mutual consent*. If one of the spouses sets up residence in an easy-divorce state and the other makes an appearance, which may be through an attorney, the validity of the decree cannot be questioned.

This departure from the domicile theory is further illustrated by a case in which the res judicata doctrine was applied to a person who was neither party nor privy to the original decree. In *Cook v. Cook*,[42] *H* had married *W* and was living with her in Vermont when he discovered that she was still the lawful wife of one Mann. *W* secured a Florida divorce from Mann and returned to Vermont, where she remarried *H*. Subsequently, *H* brought action in Vermont to have the marriage annulled. Finding that the divorce from Mann was invalid because *W* had not been domiciled in Florida, the Vermont court annulled the remarriage to *H*.

The Supreme Court reversed the Vermont decision, saying that the record did not show whether Mann had entered an appearance in the Florida action. The Court stated that if Mann had appeared in the proceedings or had been personally served in Florida, he would be barred by res judicata from attacking collaterally, and so would *H* — a stranger to the Florida proceedings. Therefore, until it was known what had transpired in Florida, Vermont could not relitigate the issue of domicile.

The *Cook* case does not fall within the classical principles of res judicata. Ordinarily, a judgment is res judicata only as to the parties

40. 340 U.S. 581 (1951).

41. Granville-Smith v. Granville-Smith, 349 U.S. 1, 27 (1955) (dissenting opinion).

42. 342 U.S. 126 (1951).

and those in privity with them.[43] Instead of distorting the res judicata doctrine in order to reconcile these cases with the domicile concept, the Court could have explained the results more easily by accepting personal jurisdiction over both parties as an independent jurisdictional basis.

An Alternative to Domicile

Suppose State *X* passes a statute in which jurisdiction to grant a divorce is based upon a reasonable period of residence by the plaintiff plus personal jurisdiction over the defendant. It is urged that such a statute would not violate the mandates of either the due process clause or the full faith and credit clause.

Due Process

The main difficulty in the due process issue is caused by the legal fiction that the marital status is a *res* which always remains at the common domicile of the parties, or at the separate domicile of each, and is, therefore, beyond the reach of the courts in other jurisdictions. Thus, it is reasoned, if the forum state is not the domicile of one of the parties, there is no *res* upon which the court can act, and if it attempts to do so, due process is denied to the parties.

However, where the parties have separate domiciles, a court granting an *ex parte* divorce does not consider the marital policies of the state of domicile of the absent party, although the policies of the two states may differ radically. As long as fictions must be employed, is it not far more logical to say that the marital status may exist at a place where both parties are present? In that situation, the court could consider the interests of both parties and the policies of both of the domiciliary states.

It seems clear that procedural due process is satisfied if both parties are personally subject to the jurisdiction of the court and are actively litigating the issues of the divorce. Therefore, unless the substantive mandates of the due process clause are being violated, the decree should be valid.

The decision in *Alton v. Alton*[44] was based upon the reasoning that it is a "lack of due process for one state to take to itself the readjustment of domestic relations between those domiciled elsewhere."[45] But who was being deprived of due process in the *Alton* case? The defendant was present and had ample opportunity to defend. Although he alone could have complained of a denial of due process, he did not choose to do so. If domicile serves merely to

43. Riley v. New York Trust Co., 315 U.S. 343 (1942); Bigelow v. Old Dominion Copper Mining & Smelting Co., 225 U.S. 111 (1912).

44. 207 F.2d 667 (3d Cir. 1953), *vacated as moot*, 347 U.S. 911 (1954).

45. 207 F.2d 667, 677 (3d Cir. 1953).

protect the interest of the *state* where the couple regularly lives, then it is not required by the due process clause, which only protects *persons*. As Mr. Justice Clark observed in his dissent in the *Granville-Smith* case:

> [N]either of the Granville-Smiths claims to have been deprived of life, liberty, or property without due process of law. While the State has an interest in the marital relationship, certainly this interest does not come within the protection of the Due Process Clause.[46]

In *Williams II,* the three concurring justices felt that a state has authority, so far as validity within its own borders is concerned, to grant divorces upon whatever basis it sees fit, consistent with procedural due process.[47]

The Arkansas Supreme Court has followed this view. In *Wheat v. Wheat*[48] that court upheld the validity of a statute[49] which, in effect, substitutes three months residence for domicile as a jurisdictional fact. The husband, having resided in Arkansas for the required period, filed suit for divorce. The wife, a resident of California, was served by constructive process. She filed a cross-complaint asking for separate maintenance, but denied the court's jurisdiction to grant a divorce. The trial court found that the husband had not in fact established domicile in Arkansas, and, holding that the statute was unconstitutional, dismissed the suit.

The Arkansas Supreme Court reversed the trial court, holding that the court had jurisdiction by virtue of the statute to grant a decree which would be valid, at least within Arkansas. The court stated that the possible requirements for external recognition do not affect the validity of the decree in the state where rendered.

Although the defendant entered an appearance in the *Wheat* case, the Arkansas statute permits a court to exercise jurisdiction solely upon the basis of three months residence by the plaintiff, and to grant an *ex parte* decree against an absent spouse. If the court lacks personal jurisdiction over the defendant, mere residence of the plaintiff for so short a period does not appear to give Arkansas a sufficiently close relationship to the marital status to justify an *ex parte* adjudication. So while the reasoning of *Wheat v. Wheat* may have been justifiable according to the facts before the court, the validity of an *ex parte* decree rendered under the statute would seem doubtful.

The crux of the due process issue is whether the statutory requirements for jurisdiction are based upon sufficient contacts between the state and the spouses to justify exercise of the state's power to dissolve the marriage. A statutory provision requiring a period of residence sufficient to establish a reasonable connection between the

46. Granville-Smith v. Granville-Smith, 349 U.S. 1, 26-27 (1955) (dissenting opinion).
47. Williams v. North Carolina (II), 325 U.S. 226, 239 (1945) (concurring opinion).
48. 318 S.W.2d 793 (Ark. 1958).
49. ARK. STAT. ANN. § 34-1208.1 (Supp. 1957).

state and the parties, and containing the essential safeguard that both parties be before the court, would provide a substantial basis for jurisdiction — a basis free from the uncertainties and the invitation to perjury inherent in the domicile concept.

Full Faith and Credit

Once it is recognized that a decree granted under a non-domiciliary statute is valid where rendered, there is nothing to preclude its recognition as valid everywhere. Under the full faith and credit clause, a state can refuse to recognize the judgment of a sister state only if the jurisdiction of the court rendering that judgment is impeached, the judgment was obtained by fraud, or it was penal in nature.[50] Therefore, if it is determined that the statutory basis of jurisdiction for a divorce decree is valid and the statute has been followed, there are no grounds for denying the decree full faith and credit.

The cases already decided by the Supreme Court present no barrier to this conclusion. In a dictum in *Williams I,* the Court stated:

> Domicil of the plaintiff . . . is recognized . . . as essential in order to give the court jurisdiction which will entitle the divorce decree to extra-territorial effect, *at least when defendant has neither been personally served nor entered an appearance.*[51] (Emphasis added.)

Thus, there is the inference that domicile would not be necessary if one of the latter two conditions were met.

All that *Williams II*[52] held was that an *ex parte* divorce decree, granted under a statute requiring domicile, need not be recognized if the plaintiff was not in fact domiciled in the granting state. This in no way precludes a holding that a decree granted under a valid non-domiciliary statute is entitled to full faith and credit.

English courts, faced with a problem similar to full faith and credit, that is, recognition of divorce decrees among members of the Commonwealth, have reached the conclusion that extra-territorial recognition must be afforded in certain circumstances, even in the absence of domicile.[53]

In *Sherrer v. Sherrer*[54] and the cases which followed it, the Supreme Court held that where both parties are personally before the court, a divorce decree must be recognized as between the parties and those in privity with them.[55] Although those decrees were granted under conventional statutes requiring proof of domicile, a defendant

50. STUMBERG, CONFLICT OF LAWS 111-20 (2d ed. 1951).

51. Williams v. North Carolina (I), 317 U.S. 287, 297 (1942).

52. Williams v. North Carolina (II), 325 U.S. 226 (1945).

53. See Travers v. Holly, [1953] 2 All.E.R. 794; Griswold, *The Reciprocal Recognition of Divorce Decrees,* 67 HARV. L. REV. 823 (1954).

54. 334 U.S. 343 (1948).

55. See *supra* notes 37-43 and accompanying text.

under the suggested non-domiciliary statute would be in substantially the same position. The decree could not be collaterally attacked because it could not be entered in the first place unless the defendant had been served within the granting state or had entered an appearance.

When an *ex parte* decree is in question, the rights of the defendant and the lack of the safeguards afforded by personal jurisdiction are strong factors to be considered. It would be anomalous to require full faith and credit for *ex parte* decrees despite the absence of personal jurisdiction over the defendant, and withhold recognition where both parties had been present before the court and had fully complied with the jurisdictional requirements of the granting state.

Choice of Law

The adoption of a concept other than domicile as a basis for divorce jurisdiction gives rise to the problem of the choice of the proper substantive law. Where jurisdiction is based upon domicile, the fact that one of the spouses is domiciled in the forum state has been regarded as a sufficient connection with the subject matter of the action to enable the forum state not only to exercise jurisdiction, but also to apply its own substantive divorce law. In other words, the rule of jurisdiction and the rule of reference have been the same.[56]

However, these are two distinct problems, and if jurisdiction is based upon something other than the traditional domicile concept, the court must decide as an independent issue whether the forum state has a sufficient connection with the marriage relationship to justify applying its own substantive law.[57]

The problem of the choice of law is beyond the scope of this note. However, it should be noted that such problem does exist in addition to the jurisdictional issue.

Conclusion

In maintaining the requirement of proof of domicile for divorce jurisdiction, courts are permitting the law to fall behind the demands of society. The real hindrance to a more sensible approach is not the common-law tradition, but rather the policy question involved — "liberal" v. "strict" divorce laws. Hiding behind the textbook concept of domicile will not solve this problem.

Perhaps nothing short of a Uniform Divorce Law,[58] adopted by

56. Stumberg, Conflict of Laws 294 (2d ed. 1951).

57. See Alton v. Alton, 207 F.2d 667, 684-85 (3d Cir. 1953) (dissenting opinion). Discussing this problem, Judge Hastie suggests that under the facts of that case, if the Virgin Islands statute were held valid, it might be necessary to apply the law of the matrimonial domicile, Connecticut.

58. See Fenberg, *Toward Uniform Divorce Laws*, 41 Ill. B.J. 568 (1953) for a draft of such a bill, as proposed by the National Association of Women Lawyers.