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Indiana Law Journal

Volume 18 | Issue 3

Article 1

Spring 1943

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Walter Wheeler Cook

*Northwestern University School of Law*

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## Recommended Citation

Cook, Walter Wheeler (1943) "Is Haddock v. Haddock Overruled?," *Indiana Law Journal*: Vol. 18 : Iss. 3 , Article 1.

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# INDIANA LAW JOURNAL

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Volume XVIII

APRIL, 1943

Number 3

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## IS HADDOCK V. HADDOCK OVERRULED?

WALTER WHEELER COOK\*

In a recent law review article the present writer remarked that the decision of the United States Supreme Court in *Erie Railroad Co. v. Tompkins*<sup>1</sup> "came like a bolt from the blue."<sup>2</sup> A similar remark seems warranted with reference to the decision of that court in *Williams et al. v. State of North Carolina*, decided in December, 1942,<sup>3</sup> in which it was announced explicitly that the famous, not to say notorious, decision in *Haddock v. Haddock*<sup>4</sup> "is overruled." The *Haddock* decision, it will be recalled, had to do with the extent to which a divorce decree entered upon so-called 'constructive' service<sup>5</sup> by the court of a State in which only the plaintiff had a *bona fide* domicil must be given full faith and credit by the courts of the domicil of the other spouse, that being also the last marital domicil.<sup>6</sup>

To understand fully the character of the pronouncement that the *Haddock* case "is overruled" we need to note briefly the development of American theories as to the powers of

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\* Professor of Law, Northwestern University Law School.

1. 304 U. S. 64 (1938).

2. The Federal Courts and the Conflict of Laws (1942) 36 Ill. L. Rev. 493, reprinted as Chapter V of *The Logical and Legal Bases of the Conflict of Laws* (1942).

3. 63 Sup. Ct. 207 (1942).

4. 201 U. S. 562 (1906).

5. That is, 'personal jurisdiction' was not acquired either by service of the absent spouse in the State or by his (or her) consent or appearance.

6. This is often called the 'matrimonial domicil', and means the State in which the spouses last lived together as domiciliaries. The phrase 'last marital domicil' seems preferable.

our States to grant divorces that are both valid locally and also entitled to full faith and credit in other States under Article IV, Section 1 of the federal constitution.<sup>7</sup> According to orthodox Anglo-American legal doctrine, jurisdiction to divorce is based upon domicil. The origin of this rule is not clear and no adequate historical study seems to have been made. It goes back at least to Story's treatise.<sup>8</sup> Writing in 1834 Story relied, among other things, upon a few early American decisions, chiefly in Massachusetts. An examination of the Massachusetts cases he cites and other early cases from that State shows that the cases in question were all based upon a statute of Massachusetts passed in 1795 which took divorce out of the hands of the Governor and Council and vested it in the courts. That statute provided that a suit for divorce must be brought in the county "where the parties live," the purpose being to make it unnecessary for them to go to Boston, as had been the case when divorces were granted by the Governor and Council.<sup>9</sup> Complications arose when only one of the parties was actually living in the county where the suit was brought, or in the State, and it was not long before there developed in these cases the notion that jurisdiction to divorce was based upon *bona fide* domicil, and that a wife might perhaps remain domiciled in Massachusetts even though her husband had acquired a domicil (actual home) in another State. This development was a wholly natural one. The continental law which bases divorce upon nationality could not be applied to American citizens and between American States: there was no national divorce law; the newly-developing law of judicial divorce was wholly state law. Consequently it was not surprising that Story accepted the domicil doctrine as the basis of jurisdiction to divorce.

In England at the time of the separation of the colonies from the mother country judicial divorce (as distinguished

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

8. Story, Commentaries (1834) Sec. 228 and following sections.

9. Stat. 1795, c. 6, § 3. Some of these early cases are: Richardson v. Richardson, 2 Mass. 153 (1806); Hopkins v. Hopkins, 3 Mass. 158 (1807); Hanover v. Turner, 14 Mass. 227 (1817); Harteau v. Harteau, 14 Pick. (Mass.) 181 (1833).

from separation, i.e., so-called "divorce *a mensa et thoro*") was unknown, and this remained the case until 1857; only Parliament could grant an absolute divorce. Furthermore, no rules and principles governing recognition of divorces granted by foreign courts had been developed in England at the time of the Revolution. In 1812 the case of *Rex v. Lolley*<sup>10</sup> raised the latter problem as between England and Scotland. The law of Scotland at that time provided for judicial divorce. In that case the parties were married and domiciled in England, and a divorce was obtained in Scotland after a residence only long enough to obtain a divorce. The husband returned to England and there married a second wife. A conviction of bigamy was upheld. While the brief opinion put the decision on the broad ground that an English marriage could be dissolved only by an act of the English Parliament, on its facts the decision merely refused recognition to a divorce granted to English domiciliaries; no *bona fide* domicil in Scotland was shown. In the later case of *Warrender v. Warrender*<sup>11</sup>, the House of Lords, sitting on an appeal from a Scottish court, took the view that under the law of Scotland a *bona fide* residence amounting to domicil of the husband in that country was sufficient, the domicil of the wife being necessarily the same as that of the husband. *Lolley's* case, which was decided in 1812, was known to Story, but the *Warrender* case was not decided until a year after the appearance of Story's Treatise.

When the English Matrimonial Causes Act of 1857 was passed, vesting in the courts jurisdiction to grant absolute divorces and over "all causes and suits matrimonial," the courts were left to work out the jurisdictional basis upon which they would grant divorces, since the Act was not explicit upon that point. By that time Story's Treatise and the American cases had given currency to the domicil rule, both as a basis upon which a forum would itself grant a divorce and as a basis for the recognition of foreign divorces. In *Shaw v. Gould*<sup>12</sup>, decided in 1868, the House of Lords upheld the refusal of an English court to recognize the validity of a divorce in Scotland, in the absence of a *bona fide* domicil in that country. In that case both parties were English and

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10. 2 Russ. & Ry. 614 (1812).

11. 2 Cl. & F. 488 (1835).

12. L. R. 3 H. L. 55 (1868).

married in England. Lord Westbury in his opinion refers briefly to Story's Treatise, but does not mention Story's views that *bona fide* domicile is the proper basis for divorce jurisdiction. On the evidence, it is not possible to say how much Story's views influenced the decision; all one can say is that that is at least possible, if not probable. In any event, the English courts were confronted with the same difficulty which, it is believed, influenced Story and the American courts: there was and is for an Englishman, or indeed for any other British subject, no national law of divorce, and no national court to apply it.<sup>13</sup> English courts, confronted with divorces granted by courts in Scotland, naturally fell back upon domicile as sufficient, and had left only the question whether residence, not merely casual but short of domicile, was sufficient. The first reaction was to assume that 'residence', if not merely casual, was sufficient, even though it fell short of constituting 'domicil'. In *Niboyet v. Niboyet*,<sup>14</sup> the husband, it was admitted, was domiciled in France, but had a 'residence' in England of such a character that it would have been regarded by the Ecclesiastical courts (prior to the Act of 1857) as a sufficient basis for a separation (divorce *a mensa et thoro*). An absolute divorce was granted.

Interestingly enough, the case which had the effect of settling that under the law of England 'domicil' is necessary, did not itself involve any question of English law. The reference is to the leading case of *Le Mesurier v. Le Mesurier*,<sup>15</sup> a decision by the Privy Council which was later treated by the English cases and writers as establishing the domicile rule as the settled law of England. As the present writer has pointed out elsewhere<sup>16</sup>, that case came to the Privy Council from the Supreme Court of Ceylon and so presented a question as to the law of Ceylon and not of England.<sup>17</sup> If

13. Compare the discussion by Falconbridge, *Renvoi and the Law of the Domicil* (1941) 19 Can. Bar. Rev. 311; Cook, *Logical and Legal Bases of the Conflict of Laws* (1942) 461.

14. L. R. 4 P. D. (1878).

15. [1895] A.C. 517.

16. Cook (1942) *Logical and Legal Bases*, 458.

17. As Falconbridge has recently pointed out, the members of the Privy Council have a tendency in their opinions to write as if the Privy Council were an English Court, instead of a court of appeal for colonial cases: (1941) 19 Can. Bar. Jour. 682. This is unfortunate, especially in conflict of laws cases, since it seems to make English law the *lex fori* and the law of the colony in question foreign law, when precisely the opposite is the case.

we ask why the *Le Mesurier* case was thought to settle the English law, the answer seems to be that this grew out of the nature of the argument of the Privy Council in that case. Finding that no special rule of the Roman-Dutch law of Ceylon applied to the case, the opinion reached the conclusion that "*according to international law, the domicile for the time being of the married pair affords the only true test of jurisdiction to dissolve their marriage.*" (Italics supplied.) If the domicile rule is one of international law, it would, of course, apply equally well in English courts.

As the present writer has elsewhere pointed out<sup>18</sup>, it seems clear that there never has been any such rule of 'international law,' if we mean by those words a rule based upon a general consensus of opinion of the civilized nations of the world: the civil law countries generally rely upon nationality. However, as pointed out above, there is for a British subject no national law of divorce. This being so, it was natural that the domicile rule embodied in Story's Treatise and American cases should have been adopted by the English courts in dealing with their jurisdiction to grant divorces under the Matrimonial Causes Act of 1857. The application of the rule to cases involving recognition of foreign divorces followed easily enough.

Whatever the truth may be as to the historical development of the domicile rule, it became firmly embedded in Anglo-American law, and, as every student of the subject knows, its application remained relatively simple in England, since the courts there held that the wife's domicile must be the same as that of the husband. The result was that only the courts of the state or country in which the husband was domiciled have been recognized by English courts as having jurisdiction to divorce.<sup>19</sup> The administration of the American law, on the other hand, has become exceedingly complex, since American courts permit a wife to acquire, under what those courts deem appropriate circumstances, a domicile sep-

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18. Logical and Legal Bases, 460.

19. This means that English courts denied 'jurisdiction' to divorce to foreign courts when the parties were not domiciled in the foreign state; and that they themselves refused to dissolve marriages unless the husband (and so the wife) was domiciled in England. See, however, the exception as to the former part of the rule made in *Armitage v. Attorney General* [1906] P. 135; and the provisions of the Matrimonial Causes Act, 1937, which slightly broaden the powers of English courts to grant divorces: Cook, Logical and Legal Bases, 461, note 13.

arate from that of the husband. As one writer has put it,

Complication spreads over the problem like a gloomy fog when the wife and husband have separate domicils, as they may have in the United States.<sup>20</sup>

These complications are, fortunately, not all-pervading. In the first place, a decree of one of our States dissolving a marriage is universally recognized as locally valid, and also as entitled to full faith and credit in other States, if it is granted in accordance with proper procedure by a court of the *defendant's* domicile. The same effect is universally given to a similar decree by a court of the *plaintiff's* domicile if the defendant was personally subject to the jurisdiction of the court by proper service of summons within the territory of the State in question or by the defendant's personal appearance in the suit or consent to the jurisdiction. Finally, the same conclusive effect is given to a similar decree by a court of the State of "last marital domicile", and this is so even though the defendant is no longer domiciled there and is not personally subject to the jurisdiction of the State (or its courts) on other grounds, always provided that the plaintiff has a *bona fide* domicile in the State.<sup>21</sup>

In the *Haddock* case, now said to be overruled, the plaintiff in a Connecticut divorce proceeding had left the last marital domicile (New York) and established a *bona fide* domicile in Connecticut. The other spouse, the wife, had not acquired a domicile in that State, did not appear in the suit, and was not in any other way personally subjected to the Connecticut court's jurisdiction. After procedure which complied with the Connecticut statutes, a default decree of divorce was rendered. Prior to the *Haddock* decision a majority of American States had recognized a decree granted in such a situation as a complete dissolution of the marital relation; and writers had stated the settled law to be in accord with those decisions. A few States dissented. Consequently the decision in the *Haddock* case holding that the State of last marital domicile need not give full faith and credit to the Connecticut decree, and so that New York (the last marital domicile) might require the husband to furnish

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20. Joseph W. Bingham, *The American Law Institute vs. The Supreme Court, In the Matter of Haddock v. Haddock* (1936), 21 *Corn. L. Q.* 393. This paper is hereafter cited as "Bingham".

21. Bingham, p. 401.

economic support to the New York wife, came as an unexpected shock to the legal profession. The decision was greeted with a storm of protest and criticism in the legal periodicals. One of the leading American writers on the conflict of laws concluded that the decision was "opposed to reason, to authority, and to morality."<sup>22</sup> English writers, especially Dicey, concurred.<sup>23</sup> What nearly all these critics failed to do was to note the precise problem before the Supreme Court in the *Haddock* case. Indeed, so far as the present writer is aware, only one writer thought it important to do so.<sup>24</sup> That problem was this and this alone: could the Connecticut decree, granted by a court of the husband's *bona fide* domicil, but without personal jurisdiction over the wife, who was not and never had been domiciled in that State, deprive her of the right under New York law to economic support? In the later suit in New York it appeared that the wife had retained her domicil in New York and had succeeded in obtaining personal service on the husband in that State, in a suit for separation from bed and board and alimony. Separation and alimony were decreed, the New York court refusing to allow the Connecticut decree to be used as a defence to such a suit. The judgment was affirmed by the New York Court of Appeals, and, in the *Haddock* decision, by the United States Supreme Court.

If, then, we look at the scope of that decision *on its precise facts*, all that was decided was that the State of the last marital domicil was not obliged to give effect to the Connecticut decree in so far as that decree purported to destroy the husband's duty under New York law to furnish economic support to the wife. On those facts it raised no question of the effect of the Connecticut decree in giving the husband a power (legal ability) to acquire another wife. The adverse critics consistently overlooked or ignored these aspects of the case. No doubt this was because they assumed that what we call the 'marital status' is a legal unit, so that a divorce decree must either destroy that status completely or be totally ineffective. That such an assumption is not a necessary one, and that divorce decrees often put an end to only a portion of the 'marital status', has been clearly pointed

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22. Beale (1906) 19 Harv. L. Rev. 586, 587.

23. Dicey (1906) 22 L. Q. Rev. 237.

24. Bingham, in the paper cited in note 20.



out by Bingham in the discussion already referred to above. As that author points out, the so-called 'marital status' is not a 'single legal tie'; it is a complex of legal relations which may roughly be classified as follows:

(1) The personal marital status of the husband—e.g., his incapacity to marry; (2) the personal marital status of the wife—e.g., her incapacity to marry; (3) the legal economic interests (except marital property) of the wife vs. the husband; (4) the legal economic interests (except marital property) of the husband vs. the wife; (5) marital property interests of the wife; (6) marital property interests of the husband; (7) reciprocal rights and duties of the wife and the husband to live together as husband and wife.<sup>25</sup>

The same author goes on to point out that we are all familiar with statutes in some States which forbid the guilty party to a divorce proceeding to marry again. In such cases the legal disability of that spouse to marry which is one of the legal components of the 'marital status' remains, while others are destroyed. There is therefore no logical difficulty in the way of holding that a given divorce decree may destroy some but not all of the legal relations symbolized by the words 'marital status'. While the lengthy opinion of Mr. Justice White in the *Haddock* case exhibits the lack of clarity often found in what he wrote, it is clear that his view was that Connecticut had power to free its own domiciliary from his disability to acquire another wife, at least within the borders of Connecticut. He does not tell us whether he would have gone farther and held that if the husband had *in Connecticut* married another woman, New York would have been required to recognize the new marriage as valid, at least to the extent of not holding the husband guilty of illicit relations with the new wife if they had subsequently lived together in New York. That question was not before him. The only question was: Had the Connecticut default decree deprived the New York wife of her right under New York law to economic support? The decision was that New York was entitled to hold that that right of the wife remained, as Bingham puts it,

effectively within the protecting power of her state of domicile as far as that state has jurisdiction over the property or the

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25. Bingham, 416.

person of the divorced husband to furnish a fulcrum for exercise of its legal power.<sup>26</sup>

The foregoing is, as stated above, not the interpretation usually given to the *Haddock* case, but seems the one most consistent with its actual facts. That is to say, the Supreme Court in reaching its conclusions had no problem before it as to whether, if Mr. Haddock had married again in Connecticut, he could be punished by New York if he lived with the new wife in that State, or whether New York could treat the children of such a second marriage as illegitimate. The only problem was: Could the New York courts, without violating the Full Faith and Credit clause, hold that the husband, according to New York law, was still under a duty to the wife to furnish her with economic power? Stated in this way, much can be said for the social desirability of the decision, even though the opinion of White, J., left much to be desired in the way of clarity. The question of the desirability of the result is left for discussion at a later point.

Before examining in detail the decision which is the occasion of the present discussion, we may note that during the years since the *Haddock* decision little additional light has been thrown upon the matter by later decisions. The only important case seems to be *Davis v. Davis*<sup>27</sup>, in which the wife appeared as defendant in order to contest the jurisdiction of the court of the plaintiff's alleged domicile, on the ground that he had not acquired a *bona fide* domicile in that State. It was held that as the wife had appeared and been heard on the matter, she could not later attack collaterally a finding of *bona fide* domicile in favor of the husband. The opinion in the *Davis* case again was not a masterpiece of clarity, and commentators found it difficult to decide just what the basis of the decision was intended to be.<sup>28</sup> Such substantially was the situation in December, 1942, when the Supreme Court was once again faced with the problem of the extent to which a court of the State of 'last marital domicile' must give effect to a divorce decree of another State, in a case in which the absent spouse was not and never had been domiciled in the latter State and was not subject per-

26. Bingham, 417.

27. 305 U. S. 32 (1938).

28. See Strahorn (1938) 412, suggesting four possible interpretations of the decision.

sonally to its jurisdiction. The facts were in substance as follows:

Mr. Williams and Mrs. Hendrix had each married in North Carolina and lived (been domiciled) there for many years with their respective spouses. In May, 1940, they went to Las Vegas, Nevada, and on June 26, 1940, each filed a divorce action in the Nevada court. The defendants in the divorce actions entered no appearance, and were not served with process in Nevada; but both had actual notice of the proceedings.<sup>29</sup> Petitioner Williams was granted a divorce decree on August 26, 1940; petitioner Hendrix, a similar decree on October 4, 1940. On this latter date the petitioners were married to each other in Nevada, and at once thereafter<sup>30</sup> returned to North Carolina, where they lived together as husband and wife. They were arrested, tried, and convicted of "bigamous cohabitation" under a North Carolina statute.<sup>31</sup> Each was sentenced to imprisonment in a state prison for a term of years. The judgment of conviction was affirmed by the Supreme Court of North Carolina.<sup>32</sup> In its opinion that court said:

The sole question arising under Article IV, Section 1, of the Federal Constitution is *whether a divorce granted in the State where the plaintiff alone is domiciled is entitled to full faith and credit when the defendant is only served with process constructively and makes no appearance in the action. . . .* The divorces obtained by the defendants in actions in Nevada against North Carolina citizens, with service by publication in

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29. In one case a North Carolina sheriff served the absent spouse in that State; in the other, the absent spouse had received a copy of the summons by mail and had offered to appear in the case, but never did so.
30. The precise date of this return is not given in the report of the case, but Mr. Justice Jackson's opinion uses the words "at once", and Mr. Justice Murphy the word "immediately".
31. In *State v. Cutshall*, 110 N. C. 538, 15 S. E. 281 (1892) the Supreme Court of North Carolina held that under their statute a conviction of bigamy could not be had where the marriage ceremony had been performed in another State. Thereafter the "bigamous cohabitation statute" was passed. It reads: "If any person, being married, shall contract a marriage with any other person outside of this state, which marriage would be punishable as bigamous if contracted within this state, and shall thereafter cohabit with such person in this state, he shall be guilty of a felony and shall be punished as in cases of bigamy. Nothing contained in this section shall extend . . . . to any person who at the time of such second marriage shall have been lawfully divorced from the bond of the first marriage. . . ." Nor. Car. Code, 1939, § 4342.
32. (1941) 220 N. C. 445.

one case and personal service outside the State in the other, clearly come within the scope of the decision in *Haddock v. Haddock*, and recognition is not required by the Federal Constitution.<sup>33</sup> (Italics supplied.)

Apparently the record in the trial court involved a charge to the jury in accord with the *Haddock* case, and also one based upon the possibility that the defendants (present petitioners) never obtained *bona fide* domicils in Nevada; but since the general verdict of guilty found by the jury might have been based upon the proposition that even a *bona fide* domicil in Nevada was insufficient as a defence, the opinion of Mr. Justice Douglas (who spoke for the majority of the Supreme Court) is based upon the assumption that the plaintiffs in the Nevada divorce proceedings had acquired *bona fide* domicils in that State. Thus he wrote:

We must treat the present case for the purpose of the limited issue before us, precisely the same as if the petitioners had resided in Nevada for a term of years and had long acquired a permanent abode there.<sup>34</sup>

Starting with this assumption, the opinion of the majority proceeds to ask: Was *Haddock v. Haddock* "correctly decided?" It answers: "We do not think it was." Accordingly, as already stated, the opinion ends with the explicit statement: "*Haddock v. Haddock* is overruled." Furthermore, Mr. Justice Douglas carefully pointed out that no opinion was intimated on the issues which would have been raised if the case had been tried and submitted on the question of a lack of *bona fide* domicil in Nevada. As to that he said explicitly:

We have no question on the present record whether a divorce decree granted by the courts of one state to a resident as distinguished from a domiciliary is entitled to full faith and credit. Nor do we here reach the question as to the power of North Carolina to refuse full faith and credit to Nevada divorce decrees because, contrary to the findings of the Nevada court, North Carolina finds that no *bona fide* domicil was acquired in Nevada.<sup>35</sup>

Clearly, then, the scope of the decision is not so broad

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33. 220 N. C. 449.

34. 63 Sup. Ct. 210. The brief for the State argued entirely on the basis that a *bona fide* domicil in Nevada was not sufficient to require full faith and credit by North Carolina.

35. 63 Sup. Ct. 215.

as newspaper headlines and accounts may have led the public to believe. The Supreme Court did not hold that mere temporary residence of a plaintiff in a State is a sufficient basis upon which a court there can grant a valid divorce; nor did it decide that the State of the defendant's domicil may not go behind findings of *bona fide* domicil made by the courts of the plaintiff's alleged domicil in a divorce proceeding in which personal jurisdiction over the defendant does not exist.<sup>36</sup>

What, then, does this latest decision tell us? The opinion explicitly says that "*Haddock v. Haddock* is overruled," and that that case was not correctly decided. It does not say merely that the *Haddock case* is "overruled so far as it is inconsistent with the present decision." The present writer believes the latter form of statement would have been preferable for the following reasons, which have already been suggested by the early part of the present discussion. As we have seen, the *Haddock case* on its facts raised only a question of the husband's duty, under New York law, of economic support of the abandoned wife. The present case raises no such question, but simply whether a State in which a plaintiff in divorce has a *bona fide* domicil can restore that plaintiff's capacity to marry which he lost when he married the defendant in the divorce proceeding; restore it, that is, so that not only will that capacity exist under the law of the State in which the decree is entered but also in all other American States. The answer now is: an American State has such a power, and, it is submitted, that is not only good sense; it is also consistent with the *actual decision* in the *Haddock case*, as well as with the general trend of Mr. Justice White's opinion.<sup>37</sup>

First, as to the good sense of the decision: at the outset of any discussion of this, we need to note that a problem of judicial statesmanship, so to speak, is involved. We have

36. See below for discussion of these questions.

37. It is assumed in the text that a fair inference from the present decision is that North Carolina would—in the case of a divorce granted where there was a *bona fide* domicil in Nevada—have to recognize that the plaintiff in the Nevada case could remarry in any other American State or even in North Carolina itself. On the precise facts, of course, it could be argued that all that has been decided is that North Carolina can not prosecute the Nevada plaintiff in divorce for a criminal offence because of his cohabitation in North Carolina with a 'wife' acquired *under a marriage ceremony in Nevada*.

based jurisdiction to divorce upon domicile, and in doing so have permitted a State which has power to divorce to apply *its own grounds* for divorce, no matter where the alleged misconduct occurred or where the parties were domiciled at the time of the occurrence of that conduct. We have also allowed married persons to acquire separate domicils. This being so, when the husband is domiciled in good faith in one State and the wife in another, we may find it wise to apportion between the two States jurisdiction over the legal components of the marital status in such a manner as to reach a reasonable compromise between conflicting policies of the two States as to the dissolution of that status. One State allows no divorce; another, only for adultery; a third physical cruelty, but not 'mental cruelty'; a fourth 'mental cruelty'; and so on. One spouse has a *bona fide* domicile in one State; the other, in another State. To keep our thinking straight, we need to note the social realities, namely, that in the cases under consideration a family unit no longer exists as a going concern. Prior to the decision we are discussing it was settled that if the other spouse was personally served in that State (even while only casually there), or if that spouse appeared or consented to the exercise of jurisdiction, the plaintiff's domicile could not only enable its domiciliary to acquire a new wife but also destroy all the other incidents of the 'marital status.' Our question is: What apportionment of power shall we make when only so-called 'constructive service' on the defendant is had?<sup>38</sup> The answer of the new decision on its precise facts is that the State of the plaintiff's *bona fide* domicile can upon constructive service confer upon its own domiciliary the privilege and power to acquire a new spouse, and that other States must recognize this power. A contrary decision would mean that because the other spouse lived in a State with a less liberal divorce law, the latter State could prevent the plaintiff, domiciled in the more liberal State, from forming a new family unit if he (or she) so wished, without, of course, thereby restoring the broken family unit as a going concern. It is not satisfactory to answer, as the dissenting members of the Supreme Court appear to do, that perhaps the Nevada plaintiff could lawfully set up a new family unit in Nevada, but

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38. Of course, the requirements of procedural due process must be satisfied.

yet be held guilty of bigamous cohabitation if he and the new wife went to North Carolina and lived together there. What is needed is a set of rules governing marriage and divorce of such a character that the legal relations of a man and woman do not depend upon which American State they happen to be in at the moment. Granted that the complete accomplishment of such an end is a legislative task, as Mr. Justice Frankfurter suggests in his concurring opinion, there is no reason why the Supreme Court should not do what it can to contribute to such a result. That the decision in the present case does so contribute is obvious, and it is therefore to be welcomed.

It is unfortunate that the two dissenting members of the Court—Justices Jackson and Murphy—ignore the legal issue actually presented by the record and discuss the case on the theory that the Nevada plaintiffs never acquired *bona fide* domicils in that State. It is difficult to see why the dissenting justices dealt with the case as they did, for the issue of *bona fide* domicil had not on the record been determined or relied upon in the North Carolina courts. Had the North Carolina trial court submitted the case to the jury on the issue of *bona fide* domicil in Nevada, and the jury had found that no such domicil had been acquired in Nevada, the dissenting opinions would have been relevant to the issues. As they stand, they discuss issues not dealt with by the opinion of the majority and not raised by the record.

In spite of this, it will be worth while to examine the opinions of the dissenting members of the Court, in order to see how they would apportion power over divorce between our American States. Assuming that a plaintiff in divorce has not acquired a *bona fide* domicil, in, say, Nevada, but is there merely long enough to get a divorce: what, according to the dissenting members of the Court, is the validity of the divorce *in Nevada*? And what must other States do? It will be well to present their views on this matter in their own words. Mr. Justice Murphy, after first stating that in the case before him the petitioners (Nevada plaintiffs in divorce) obviously did not acquire a *bona fide* domicil in Nevada, and so that North Carolina need give no effect to the Nevada divorce decrees, wrote as follows:

This is not to say that the Nevada decrees are without any legal effect in the State of Nevada. That question is not

before us. It may be that for the purposes of that state the petitioners have been released from their marital vows, consistently with the procedural requirements of the Fourteenth Amendment, on the basis of compliance with its residential requirements and constructive service of process on the non-resident spouses. But conceding the validity in Nevada of its decrees dissolving the marriages, it does not mechanically follow that the Full Faith and Credit Clause compels North Carolina to accept them.<sup>39</sup>

If we turn to Mr. Justice Jackson's dissenting opinion, we find that he also begins by finding that *bona fide* domicils in Nevada were not shown, and then proceeds as follows:

To hold that the Nevada judgments were not binding in North Carolina because they were rendered without jurisdiction over the North Carolina spouses, it is not necessary to hold that they were without any conceivable validity. *It may be, and probably is, true that Nevada has sufficient interest in the lives of those who sojourn there to free them and their spouses to take new spouses without incurring criminal penalties under Nevada law.* I know of nothing in our Constitution that requires Nevada to adhere to traditional concepts of bigamous unions or the legitimacy of the fruit thereof. And the control of a state over property within its borders is so complete that I suppose that Nevada could effectively deal with it in the name of divorce as completely as in any other.<sup>40</sup> (Italics supplied.)

No attempt will be made to interpret these passages, beyond noting that if the suggestions made in these opinions are accepted, apparently a Nevada plaintiff in divorce, with no *bona fide* domicil there, can 'marry' (go through a marriage ceremony with) a new 'wife', and live with her lawfully in that State, but can not venture with her into other States, more especially into the State which was his domicil and that of the other spouse at the time of the divorce, without running the risk of being punished criminally or having children of the 'marriage' held illegitimate. One is reminded of the story of the man and woman who were traveling together across the continent in a Pullman car. Asked if the woman who was with him was his wife, the man replied: "I must look out of the window and see what State we are in before I can give you an answer." Obviously allocation to our States of power over divorce in such a way that a

39. 63 Sup. Ct. 218.

40. 63 Sup. Ct. 223.



person is 'married' in one State and not in another, is not entirely satisfactory. As Mr. Justice Frankfurter pointed out in his concurring opinion,<sup>41</sup> it is desirable to interpret the Full Faith and Credit clause so that whatever legal consequences are produced by valid divorce proceedings in one State must be given equal validity in other States.

Presumably one's judgment as to the wisdom of the solution now reached by the majority of the Supreme Court will be influenced by his views as to the social desirability of divorce. This much should be kept in mind: the fact that the organized political community, the state, has divorce laws of a certain type does not compel those who disapprove of them to resort to them. Furthermore, and more important, our laws allow free play for religious organizations which disapprove of divorce to apply such sanctions as they please to their own members in order to induce them to refrain from using the state's divorce machinery. It would seem that these organizations are hardly entitled to ask organized society, the state, to add its sanctions to their views on divorce which, very obviously, a majority of the community in many States do not share.

There remains for discussion the desirability of the result actually reached in the *Haddock* case. The question is: Shall we include in a State's legal power over the marital status of its own domiciliary the power on constructive service to destroy the legal duty of that domiciliary to furnish economic support to an abandoned spouse who is still domiciled in the last marital domicile?<sup>42</sup> Destroy it, that is, not only under its own law but also under the law of the domicile of the absent spouse? If the language of Mr. Justice Douglas is taken literally, i.e., if the actual *decision* in "*Haddock v. Haddock* is overruled," the answer is, "Yes"; and, of course, that would be an orthodox answer; a divorce proceeding is either totally ineffective or it must destroy the whole 'marital status' as a unit. As already pointed out, there is no compelling logic to support this assumption. The question is simply one of good sense or social wisdom: ought we to allow the court of the plaintiff's *bona fide* domicile, on

41. 63 Sup. Ct. 216.

42. The language in the text is not confined to an abandoned wife's right to economic support, although usually under our economic and social organization it is the abandoned wife (often with children) who is the one who may need protection.

constructive service, i.e., with no personal jurisdiction over the other spouse, not merely to confer on the spouse who is present the ability to remarry, as the Supreme Court has now held,<sup>43</sup> but also to free that spouse from the duty of economic support of the absent spouse, so that the domicile of that spouse must recognize under the *Full Faith and Credit* clause, that that duty no longer exists.<sup>44</sup> The social desirability of ascribing so wide a power to the State in which one spouse is domiciled certainly needs to be discussed separately and on its merits. The problem becomes acute when the other spouse is a wife who has been abandoned by the husband on grounds not recognized as the basis for divorce by the last marital domicile. In cases of this kind the wife is often without adequate means to appear in the other State and defend the action; if she does do so and the court there finds that the husband has acquired a *bona fide* domicile in that State, that finding will be conclusive on her.<sup>45</sup> The question reduces itself to this: shall the social policy of the last marital domicile yield to that of the husband's new domicile, not only on the question of the husband's ability to acquire a new wife but also on that of the cessation of a duty of economic support? Or shall we, by a suitable allocation of power between the States, protect the social policy of the last marital domicile to the extent of denying to the husband's new domicile the power on constructive service to do away with the deserted wife's economic interests (except marital property)? The answer of the *Haddock* case was a denial of this power to the husband's *bona fide* domicile. Since the facts of the *Williams* case presented no such problem, it seems regrettable that the majority of the Court did not point out the precise character of the problem before them and content themselves with "overruling" *Haddock v. Haddock* only in so far as it might be thought inconsistent with the decision

43. As to whether the absent spouse is also enabled to remarry, query? New York has consistently held that when the defendant spouse is domiciled in New York, ability of that spouse to remarry is not conferred by the decree of the other State: Bingham, 413. In a dictum in his opinion White, J. recognized that New York had power to decide as it did. The wisdom of this policy of New York may well be questioned.
44. Very possibly the State granting the divorce is entitled to regard the duty as no longer in existence.
45. See Bingham, 410 for a discussion of the situation in which an abandoned wife finds herself. A vivid picture of that situation is presented by Pitney, V.C., in *Kempson v. Kempson*, 59 N.J. Eq. 94, 43 Atl. 97 (1899).

in the case before them. As matters stand, the sweeping dicta of Mr. Justice Douglas seem to indicate that the last marital domicile, which is still the domicile of the wife, is without power to protect the right to economic support of a deserted wife who does not appear in the divorce proceeding in question. To be sure, the sweeping statement in question can later be treated as "only a dictum", since obviously the case before the Court presented no such issue.<sup>46</sup> Apparently we can not predict with complete certainty what the decision of the Supreme Court will be when the precise question involved in the *Haddock* case is once again presented to it. If the problem is adequately argued, it is still possible that the precise allocation of power made in the *Haddock* case will be upheld on the ground that it is socially desirable and not inconsistent with the decision now under discussion. No prophecy that this will happen is ventured; but that such an outcome would be socially desirable seems reasonably clear to the present writer.

Another question which the *Williams* case on its precise facts does not settle relates to the legitimacy of children of a second marriage. The opinion taken at its face value seems to say that the State of last marital domicile must treat them as legitimate: they are the product of a marriage which that State may not treat as illegitimate. Certainly that State ought so to hold: since it (and other States) must recognize that the divorce at the *bona fide* domicile of the plaintiff confers capacity to remarry and that the relations with the new spouse are legitimate, it would seem to follow that the children of such a union should be recognized as legitimate in all States.<sup>47</sup> However, we must note that it was held in *Olmsted v. Olmsted*<sup>48</sup> that a State had power in such a case to refuse recognition of legitimacy in the matter of testate and intestate succession to land situated within its borders. The opinion in the *Williams* case explicitly states

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46. The attempt of Mr. Justice Brandeis to determine the unconstitutionality of a federal declaratory judgment statute when no such question was raised is well-known; that the contrary view prevailed when the issue was squarely raised, is also well known: see *Logical and Legal Bases*, 137. It remains to be seen whether his attempt to decide that the "doctrine of *Swift v. Tyson*" was an unconstitutional usurpation of power, when no such pronouncement was called for on the facts of the case before him, will be equally unsuccessful: see *Logical and Legal Bases*, 136-143.

47. Bingham, 417.

48. 216 U. S. 386 (1909).

that the question raised in the *Olmsted* case is not before the Court,<sup>49</sup> so that it affords no evidence as to whether that case will be followed or overruled when the question again presents itself. Even if it is not overruled, we need to note the distinction between refusing to permit the children of the new marriage to inherit property<sup>50</sup> and "legitimacy in the primary sense of personal relations with respect to parents."<sup>51</sup> It may fairly be inferred as to the latter that all our States must treat the children as legitimate.

The judgment in the *Williams* case was "reversed and the cause remanded to the Supreme Court of North Carolina for proceedings *not inconsistent with this opinion.*"<sup>52</sup> (Italics supplied.) Suppose now that on a new trial the North Carolina court instructs the jury to acquit the prisoners if they (the jury) on the evidence are satisfied that the parties acquired *bona fide* domicils in Nevada; but to convict them if they find no such domicils were acquired; and that the case is once more presented to the United States Supreme Court after a verdict and sentence of the parties for bigamous cohabitation: what answer may we expect? The questions thus raised would, of course, be those which the opinion of Mr. Justice Douglas explicitly said were not involved in the *Williams* case. These questions are two in number: (1) Is the divorce decree granted by the courts of one State to a *resident as distinguished from a domiciliary* entitled to full faith and credit in another State? (2) May one State refuse full faith and credit to a divorce decree of another State because, contrary to the findings of this latter State, the former finds that no *bona fide* domicil was acquired in the State granting the divorce decree? In a number of cases the first question has been answered in the negative, in situations in which it was obvious on the facts as they appeared

49. 63 Sup. Ct. 211, note 4: "We have here no question as to the extraterritorial effect of a divorce decree in so far as it affects property in another state."

50. The power of the situs of land to determine who has a valid legal interest in it is so clearly recognized that it seems unlikely that the *Olmsted* case will be departed from on the constitutional question. However, the courts in some of our States hold that the situs rule does not require them to apply to the question of inheritance their own domestic rules as to legitimacy; they refer that question to the domicil: see Beale, *Conflict of Laws*, §§ 137.1, 138.1, 141.1, 245.1, 246.1.

51. Bingham, 417.

52. 63 Sup. Ct. 216.

in the second court that the 'residence' of the plaintiff in divorce was only long enough to secure the divorce decree. Thus in *Andrews v. Andrews*<sup>53</sup> the facts as proved in the courts of the second State (Massachusetts) were that both parties had been domiciled in Massachusetts; that the husband went to South Dakota solely in order to get a divorce and with the intention to return to Massachusetts as soon as the divorce had been procured. The wife appeared in the proceeding and consented to the decree. The husband at once returned to Massachusetts. The Supreme Court upheld Massachusetts in refusing to recognize the South Dakota decree as valid. A similar view was taken in earlier cases.<sup>54</sup>

Does the fact that a divorce decree contains a finding that the plaintiff had a *bona fide* domicil in the State alter the result? That is, is the State of last marital domicil compelled to accept such a finding as conclusive? The cases already referred to seem to say very clearly that the State of last marital domicil may go behind the first State's finding, at least where the evidence is clear that in no sense did the divorce plaintiff acquire a home and so a domicil in the State granting the divorce. In one of the cases referred to, the State granting the divorce was North Dakota; its law theoretically required *bona fide* domicil. On proof of facts clearly showing no more than temporary residence for divorce purposes, the other State was allowed to refuse full faith and credit.<sup>55</sup> In another, the divorce decree which had been denied full faith and credit recited that the court found that the plaintiff "had been a resident in good faith for more than 90 days prior to the commencement" of the action. In spite of this, denial of full faith and credit by the court of the last marital domicil was upheld.<sup>56</sup> In this case the Supreme Court said: "The recital in the proceedings in Pennsylvania necessary to show jurisdiction may be contradicted."

53. 188 U.S. 14 (1903).

54. *Bell v. Bell*, 181 U.S. 175 (1901); *Streitwolf v. Streitwolf*, 181 U.S. 179 (1901). In both these cases, service on the other spouse was by publication only. The Court in the *Andrews* case held that the wife's appearance and consent to the decree made no difference: the State of a merely casual residence had no 'jurisdiction' over the status of the parties so as to bind the courts of the actual domicil (home).

55. The *Streitwolf* case, cited in note 53.

56. The *Bell* case, cited in note 53.

Will it make a difference if the other spouse appears? Apparently the answer is that if the other spouse appears and contests in good faith the jurisdiction of the court of the alleged domicil on the ground that no *bona fide* domicil exists, and that court finds that a *bona fide* domicil exists, the spouse so contesting the existence of a *bona fide* domicil is precluded from raising the question later in another proceeding.<sup>57</sup> Since, however, the Massachusetts court was permitted to refuse full faith and credit to the decree of South Dakota in the *Andrews* case, in which the wife appeared but consented to the decree, it would seem that, unless prior decisions are overruled, the State of last marital domicil can, in spite of the *Davis* case, go behind the first State's finding, and on clear evidence that no more than casual residence for divorce purposes was acquired, refuse full faith and credit, and so punish its domiciliary for 'bigamous cohabitation' under an appropriate statute.

If we look at the problem from the point of view of social policy, we must first of all keep in mind that our present system is based upon the fundamental notion that each of our States is given power to determine the marital status of its own 'domiciliaries' because those persons, in the language of the *Le Mesurier* case, "belong" to the community in which they have their 'domicils' in the sense of 'homes.' Under that system, it would seem fairly clear that we can not permit one of our States, merely by making a finding of *bona fide* domicil, to tie the hands of the State in which a person actually has his home, when the evidence is clear that in no sense of the word 'domicil' as used in our law did either of the parties acquire a *bona fide* 'domicil' (in the sense of home) in the State asserting jurisdiction to divorce. If such a power were to be recognized, a single State would be able to nullify completely the divorce policies of the other States in which the married persons involved have their homes.

To be emphasized at this point is that what has just been said by way of approval of decisions like that in the *Andrews* case and similar cases applies only to situations in which on the evidence it is clearly unreasonable for the State granting the divorce to assert that a *bona fide* 'domicil' was acquired within its borders, since the residence of the divorcee

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57. *Davis v. Davis*, 305 U. S. 32 (1898).

plaintiff was purely casual and merely for the purpose of obtaining a divorce. Note that we are speaking now of 'domicil' in its primary meaning of 'home': the place in which a person normally lives, moves, and has his being. From this point of view it is hoped that the Supreme Court, and all other American courts, will soon recognize that the capacity of a married woman to acquire a 'domicil' of her own for divorce purposes is precisely equal to that of her husband, and that the question of whose fault it was that the family unit was broken up is irrelevant. To decide otherwise is to ignore the social realities upon which the domicil rule in divorce is based, namely, that the community to which a person belongs should have the power to determine matrimonial status. If we had a national law of divorce, we might use nationality as the test; as it is, we have decided that for divorce purposes a person 'belongs' to the community in which he is domiciled in the sense of having a home there.

Obviously, a somewhat different problem of social policy is presented when a person actually has a home in the State granting the divorce, and also a home in a second State, these homes being of such a character that each of the States might reasonably hold the plaintiff (or both spouses) to be domiciled within its borders. In cases of this kind a decision that what we call the technical 'domicil' is in one rather than the other of the two States must be to a large extent arbitrary. As a matter of fact, the actual physical connections with the two States may be nearly equal, and the person involved 'belongs' about as much to one community as to the other. More concretely: suppose that in a factual situation like that in the well-known *Dorrance* case<sup>58</sup> one of the spouses after a disagreement and separation begins divorce proceedings in the State in which one of the homes is located. Suppose further that he (or she) is at the moment living at that home, and that the other spouse is actually living in the other home; also that the plaintiff is able to get only constructive service on the other spouse. If in such a case (the other spouse not appearing) the court of the State in which the plaintiff has an actual home finds that the plaintiff has a *bona fide* domicil there, and grants a divorce, should the other State be compelled to give the

58. *In re Dorrance*, 309 Pa. 151, 167 Atl. 303 (1932); *New Jersey v. Pa.*, 287 U. S. 580 (1933); *In re Dorrance*, 115 N.J.Eq. 268, 170 Atl. 601 (1934).

finding full faith and credit? On the facts, the interests of the two States in the marital status of the parties are about equal. Would it be socially wise to permit the other State later to decide, not that no real home in the first State existed, but merely no technical domicil, and so deny full faith and credit to the decree? It would seem that in such a case it might well be held that all other States, including the State in which the other home exists, must give full faith and credit to a finding of *bona fide* domicil.

At this point we may recall that the Supreme Court has recognized that more than one State may constitutionally find that a person is (or was) domiciled within its borders for purposes of taxation.<sup>59</sup> To be sure, these decisions did not involve the Full Faith and Credit clause, but the general notion underlying them may well be held applicable. The present writer has elsewhere suggested that the 'multiple domicil' idea<sup>60</sup> ought to be applied in other fields than in taxation, e.g., in determining a State's jurisdiction to enter a valid personal judgment on constructive service against a 'domiciliary'.<sup>61</sup> And in his recent book on "*The Logical and Legal Bases of the Conflict of Laws*" he has expressed the view that in the problem we are now considering the Supreme Court might well

uphold as locally valid and also as entitled to full faith and credit the divorce decree of any State with which one of the parties has a sufficiently substantial contact by way of residence to make it not unreasonable for that State to hold that the person in question is domiciled there: this, even though the person also has a sufficiently substantial contact with another State to make it not unreasonable for that State also to find that the domicil is there.<sup>62</sup>

If such a result is not reached, a married person who obtained a divorce decree in good faith in a State in which he had an actual home and resided not merely casually but for a substantial period each year might be penalized for

59. See *Worcester Co. v. Reilly*, 302 U. S. 292 (1937); and note that certiorari was refused in the Dorrance litigation.

60. See Farage, *Multiple Domicils and Multiple Inheritance Taxes—A Possible Solution* (1941) 9 *Geo. Wah. L. Rev.* 375.

61. *Logical and Legal Bases*, 199.

62. *Logical and Legal Bases*, 467. It is not meant here to assert that if only constructive service is had on the absent spouse, the last marital domicil should be precluded from doing what the New York court actually did in the Haddock case.



not being able to determine in an ambiguous situation which of his 'homes' was to be regarded as his technical 'domicil.'

Another argument in support of such a result can be made. There is some authority for the proposition that in ambiguous situations of the kind under discussion the person concerned may choose his domicil, at least for some purposes.<sup>63</sup> If this is accepted as a sound view, it would follow that the plaintiff in divorce, in the hypothetical case of the two homes, may well be recognized as having the power to select one rather than the other as his domicil for divorce. To be emphasized is that this choice should be permitted only in cases in which the unavoidable ambiguity of the word 'domicil' results in a situation such that it would be reasonable for each of the States concerned to find a domicil within its borders.<sup>64</sup>

A similar situation presents itself when the boundary line between two States runs through the one home in which the spouses live. In such cases any attempt to locate the technical 'domicil' in one rather than in the other State necessarily must be arbitrary: the parties are actually physically living and carrying on their activities about as much in one State as in the other.<sup>65</sup> This being so, it would seem that we ought to recognize that either State has jurisdiction to divorce, or, if we prefer to put it that way, that the plaintiff in a divorce proceeding can choose either of the States as his domicil for that purpose.

In "*The Logical and Legal Bases of the Conflict of Laws*" the present writer has suggested<sup>66</sup> that *any State which has personal jurisdiction over both parties* ought to be recognized as having power to divorce if that State applies the appropriate law, namely, the law of the State of the domicil of

63. Logical and Legal Bases, 203; Matter of Newcomb, 192 N.Y. 238, 84 N.E. 950 (1908). The Restatement and Professor Beale regard the suggestion in the text as rank heresy: Beale, Treatise on the Conflict of Laws, Sec. 23.3; Restatement, Sec. 23.

64. We might of course reach the same result if we were to ascribe jurisdiction to divorce to a State of which the plaintiff is an actual 'resident', not merely casually (e.g., as a traveller, or for divorce purposes), even though the 'residence' falls short of 'domicil'. However, the 'domicil' rule is so firmly established in our law of divorce that the 'multiple domicil' rule, or the 'choice of domicil' rule, may offer the easiest approach to what seems a socially wise solution.

65. See the discussion of the highly arbitrary provisions of Sec. 25 of the Restatement in Logical and Legal Bases, 206.

66. Logical and Legal Bases, 463.

the parties, or of the *bona fide* domicil of one of them. This seems to be the simplest justification of the decision in *Gould v. Gould*.<sup>67</sup> However, it is obvious that some more radical step is necessary if we are to reach an adequate solution of our complex divorce problem. Too few cases reach the Supreme Court to enable it to do much;<sup>68</sup> legislation seems to be necessary. In saying this it is not suggested that Congress ought to be given power to pass a uniform national divorce law, as has recently been proposed by a member of the United States Senate. This has often been proposed in the past, but it has not commended itself to those who have power to amend the Constitution.<sup>69</sup> Indeed, in the opinion of the present writer we are not yet ready for national uniformity of divorce law: our States differ widely in their divorce policies, which vary all the way from no divorce at all, or only for adultery, to the free and easy system of Nevada and some other States. Social experimentation is being carried on in forty-eight state laboratories, and as yet studies of the results are almost non-existent.<sup>70</sup> A uniform law would necessarily be based upon a compromise between the two extremes, and if adopted would be likely to lead to the kind of abuses and evasions of the law which arise when the law of divorce is out of touch with the prevailing sentiment in the community at large. Under such circumstances it is not uncommon for bootleg divorces to become as common as bootleg liquor was under national prohibition.<sup>71</sup>

Obviously any legislation to be fully effective must be national in scope. In the opinion of the present writer, the needed legislative power is conferred upon Congress by the

67. 235 N.Y. 14, 138 N.E. 490 (1923).

68. The Haddock case was decided in 1906; no other cases raised the problem in the Supreme Court until the Davis case presented itself in 1938, i.e. 32 years later.

69. See the remarks of Frankfurter, J., in his concurring opinion in the Williams case, 63 Sup. Ct. 216.

70. Studies have been made of the actual working of the divorce laws of Maryland and Ohio: (1932) *The Divorce Court: Volume I, Maryland*; (1933) *The Divorce Court: Volume II, Ohio*. Both studies were made at The Institute of Law of the Johns Hopkins University.

71. For example, the Maryland study referred to in the preceding note shows that what is on the statute books has little relation to what happens in the divorce court: nearly all divorce 'litigation' is not really litigation, but a rubber-stamp administrative proceeding.

Full Faith and Credit clause of the federal constitution. It is not usually recognized that that clause confers substantial legislative powers upon Congress. The relevant portion of the clause reads:

Congress may by general Laws prescribe the manner in which such Acts, Records and Proceedings shall be proved, and *the Effect thereof*. (Italics supplied.)

A careful study of the history of the formulation of the clause in the Constitutional Convention shows clearly that the words "and the Effect thereof" refer to the effect of "the public Acts, Records, and judicial Proceedings" of other States.<sup>72</sup> Thus far Congress has not exercised to any extent the powers conferred by this part of the clause; it has confined its legislation primarily to the manner in which the acts, records, and judicial proceedings of other States are to be proved. That the unexercised power exists is recognized by Mr. Justice Frankfurter in his concurring opinion in the *Williams* case. He says: "Congress has not exercised its power under the Full Faith and Credit Clause *to meet the special problems raised by divorce decrees*."<sup>73</sup> (Italics supplied.) If we ask what powers Congress does have to meet the special problems we are considering, they seem to the present writer to include: (a) power to determine, to some extent at least, the effect one State must give to the divorce statutes of another State;<sup>74</sup> (b) power to determine the effect to be given to divorce decrees of other States; (c) power to provide for the nation-wide service of the judicial process of the States in divorce proceedings.<sup>75</sup>

72. See Cook, *The Powers of Congress Under the Full Faith and Credit Clause*, 28 Yale L. Jour. 421 (1919), reprinted as Chapter IV of *Logical and Legal Bases*.

73. 63 Sup. Ct. 217. Congress has legislated as to the effect of records and judicial proceedings: *Logical and Legal Bases*, 91.

74. Note the language of Stone, J., in *Pacific Employers Insurance Co. v. Industrial Accident Commission*, 306 U. S. 493 (1939): "And in the case of [state] statutes, *the extra-state effect of which Congress has not prescribed, as it may under the constitutional provision, we think the conclusion unavoidable*," etc. (Italics supplied.)

75. "Whether Congress has power under the Full Faith and Credit Clause to provide for the direct service in other States of either the civil or criminal process of a State depends upon whether a law so providing would 'prescribe' the 'effect' in other states of a state 'judicial proceeding.' Is a writ of summons a 'judicial proceeding' within the meaning of the constitution? It is at least a part of a judicial proceeding or a step in one. It can not, of course, be known what the men who framed the clause in ques-

It is believed that many of the difficulties with which lawyers and courts now have to deal would disappear if Congress were to provide for nation-wide service of the judicial process of the States in divorce cases, so that both parties would be personally subject to the jurisdiction of the court of the plaintiff's *bona fide* domicile if the defendant were personally served within the borders of the United States. It would of course be necessary to draw such a statute with great care, so that it would apply only in appropriate cases and with adequate safeguards to protect the defendant, especially when the latter is an abandoned wife who may be without means to appear and defend the suit in some distant State. If, for example, the judicial process of the State of the plaintiff's domicile (and actual, *bona fide* residence) could be served in divorce cases on the other spouse anywhere in the United States, and Congress were to provide in addition that a divorce decree rendered in such a State suit should be entitled to full faith and credit, many legal problems would be settled. Furthermore, provision could be made to insure that this nation-wide service of process should be allowed only in the case of plaintiff's who are actual, *bona fide* residents and domiciliaries of the States in question, with provisions for appeal to an appropriate federal tribunal to ensure enforcement of this limitation. Consideration should be given to the question whether Congress should also enact that no State need give full faith and credit to a divorce decree of a State in which neither party has a *bona fide* residence of such a kind that it might reasonably be regarded as domiciliary in character.

It is believed that if the details of such a federal statute were carefully worked out, much progress could and would be made toward a simplification of the legal problems involved in our complex divorce situation. This could be done without infringing upon the fundamental policy of our present system, which leaves to the States the determination of

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tion really had in mind; but after all that is not the question, but rather the fair meaning of the words they did use. In passing upon the question we must not overlook the words of Chief Justice Marshall: 'We must never forget that it is a constitution that we are expounding.' . . . Can we not, taking into consideration present day needs, say that the fair meaning, or a fair meaning, of the words used in the clause under consideration includes a power in Congress to provide for the service of state process throughout the States?" *Logical and Legal Bases*. pp. 99-100.

social policy as to marriage and divorce. The statute would, of course, have to allocate between the States concerned power over the marital status when the spouses are in good faith domiciled in different States, but this must be done if we are to reach a rational solution of the perplexities which now confront us.<sup>76</sup>

If it should ultimately be decided that the language of the Full Faith and Credit clause is not broad enough to confer upon Congress the power to provide for nation-wide service of the judicial process of the States—and it may be that such service will seem so contrary to our traditional ideas as to be unacceptable<sup>77</sup>—much could still be done under the other powers which are clearly granted by the clause in question. That is to say, Congress has power within reasonable limits, to determine by “general laws” what effect shall be given to the statutes and judgments of one State in other States. This being so, it can, again within reasonable limits, deal with the effects of the divorce statutes and divorce decrees of one State in other States. In doing so it can settle by general law many of the unsolved problems which the slow process of judicial inclusion and exclusion has left open, and in that way enable lawyers to determine with reasonable certainty when and to what extent a divorce decree of one State must be recognized as effective in other States. Obviously a statute of this kind will need to be drafted with great care and in the light of the social policies involved. It is not within the purview of the present discussion to outline in detail the provisions of such a statute. It is hoped, however, that what has here been said has indicated the general lines along which an adequate solution of the problem can be worked out.

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76. No attempt has been made in the text to go into the details of the proposed statute. Much care would be necessary in its formulation.

77. When the Australians, after many years of study of our federal constitution, framed and adopted a somewhat similar form of federal organization, they explicitly conferred power on their federal Parliament to make laws with respect to “the service and execution throughout the Commonwealth of the civil and criminal process and the judgments of the Courts of the States” as well as of “the recognition of the laws, the public Acts, and records, and the judicial proceedings of the States”: Sec. 51 of the Australian Constitution. At its first session the Commonwealth Parliament enacted comprehensive legislation on the subject, and later amended it: see *Logical and Legal Bases*, 96, for a summary of this legislation.