

## Divorce Jurisdiction and the Full Faith and Credit Clause

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DIVORCE JURISDICTION AND THE FULL FAITH AND  
CREDIT CLAUSE

Propagandists have long recognized that people will accept as truth that which is most loudly and most often expounded. Thus, that domicile is essential to divorce jurisdiction for purposes of the full faith and credit clause has been so often reiterated by lawyers and judges that there has developed a regard for that concept which can be described only by the word "reverence."<sup>1</sup> In 1954, *David-Zieseniss v. Zieseniss*<sup>2</sup> was decided and it was there held that domicile is not the sole basis of divorce jurisdiction. Immediately thereafter, the law reviews of the nation descended upon this "heretical view" and pronounced the case anathema.<sup>3</sup> Therefore, there is a current need for a re-appraisal of the requirement of domicile in divorce actions. This note is concerned with domicile only insofar as the full faith and credit clause may require it as the basis of divorce jurisdiction.

*Historical Development*

Authority to grant an absolute divorce in England belonged exclusively to Parliament until 1857,<sup>4</sup> when a statute was enacted which vested such power in the judiciary.<sup>5</sup> Accordingly, it became necessary to determine when a court might rightly exercise this power, and domicile was recognized as the only proper basis of divorce jurisdiction.<sup>6</sup> However, because a wife's domicile is determined by that of her husband,<sup>7</sup> statutes were passed which mitigated the effects of this rule by permitting a wife, in certain cases, to obtain a divorce though her husband be domiciled elsewhere.<sup>8</sup> Today the trend in

<sup>1</sup> Justice Clark has referred to domicile as "the sacred cow." See *Granville-Smith v. Granville-Smith*, 349 U.S. 1, 24 (1955) (dissenting opinion).

<sup>2</sup> 205 Misc. 836, 129 N.Y.S.2d 649 (Sup. Ct. 1954).

<sup>3</sup> See, e.g., 23 *FORDHAM L. REV.* 360 (1954); 68 *HARV. L. REV.* 543 (1955); 15 *LA. L. REV.* 809 (1955); 29 *N.Y.U.L. REV.* 1478 (1954).

<sup>4</sup> See *Alton v. Alton*, 207 F.2d 667, 681 (3d Cir. 1953) (dissenting opinion), *judgment vacated as moot*, 347 U.S. 610 (1954) (per curiam); BEALE, *SELECTIONS FROM A TREATISE ON THE CONFLICT OF LAWS* 470 (1935); 62 *HARV. L. REV.* 514, 515 (1949).

<sup>5</sup> *Matrimonial Causes Act, 1857*, 20 & 21 *VICT. c. 85*; see 62 *HARV. L. REV.* 514, 515 (1949).

<sup>6</sup> See *Le Mesurier v. Le Mesurier*, [1895] *A.C.* 517 (P.C.). This case is regarded as having established the domicile rule of jurisdiction in England. See *Alton v. Alton*, *supra* note 4. However, the question there presented involved, not British law, but the law of Ceylon. See *Cook, Is Haddock v. Haddock Overruled?*, 18 *IND. L.J.* 165, 168-69 (1943).

<sup>7</sup> See Griswold, *Divorce Jurisdiction And Recognition Of Divorce Decrees—A Comparative Study*, 65 *HARV. L. REV.* 193, 196 (1951).

<sup>8</sup> E.g., *Matrimonial Causes Act, 1944*, 7 & 8 *Geo. 6, c. 43*; *Matrimonial Causes Act, 1937*, 1 *Edw. 8 & 1 Geo. 6, c. 57, § 13*; see Griswold, *supra* note 7, at 197-200. "None of these statutes purports to affect the domicile of the wife. Under English law, the wife's domicil remains that of her husband. But the

England is away from domicile as a basis of jurisdiction.<sup>9</sup>

In the United States, the power to regulate matters of domestic relations lies exclusively with the states.<sup>10</sup> The history of the states' power to divorce parallels the development in England.<sup>11</sup> Originally the state legislatures were vested with the divorce power<sup>12</sup> in a manner similar to Parliament.<sup>13</sup> However, because of the abuses which prevailed, constitutional provisions were enacted which prohibited the exercise of the divorce power by the legislature,<sup>14</sup> and it was transferred to courts of equity.<sup>15</sup>

Domicile is recognized today as a valid basis of divorce jurisdiction.<sup>16</sup> The origin of this concept is not entirely clear, but Professor Cook has made the following observation:

It [domicile as a basis of jurisdiction] goes back at least to Story's treatise. 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. . . .<sup>17</sup>

Thus, it would appear that domicile might have become accepted as a basis of divorce jurisdiction "under the influence of the creative

effect of these statutes is to make this rule virtually inapplicable as far as jurisdiction of divorce is concerned. English courts may now grant divorces in many cases *where the parties are not domiciled in England*, and indeed, where the defendant has never been domiciled in England." Griswold, *supra* note 7, at 200 (emphasis added).

<sup>9</sup> See Cowen, *Divorce and the Domicile*, 68 L.Q. REV. 88, 89 (1952).

<sup>10</sup> See *Andrews v. Andrews*, 188 U.S. 14, 28-38 (1903); *In re Burrus*, 136 U.S. 586, 593-94 (1890) (dictum); KEEZER, MARRIAGE AND DIVORCE §4 (3d ed. 1946); 40 IOWA L. REV. 667, 669 (1955).

<sup>11</sup> "When this country was settled, the power to grant a divorce from the bonds of matrimony was exercised by the Parliament of England. . . . Naturally, the legislative assemblies of the colonies followed the example of Parliament and treated the subject as one within their province. And until a recent period legislative divorces have been granted, with few exceptions, in all the States." *Maynard v. Hill*, 125 U.S. 190, 206 (1888).

<sup>12</sup> See Pound, *Foreword—A Symposium In The Law Of Divorce*, in SELECTED ESSAYS ON FAMILY LAW 879 (1950).

<sup>13</sup> See 1 COOLEY, CONSTITUTIONAL LIMITATIONS 208 (8th ed., Carrington 1927). In *Maynard v. Hill*, *supra* note 11, the Supreme Court upheld a legislative divorce in the Territory of Oregon.

<sup>14</sup> *E.g.*, N.Y. CONST. art. I, § 9; N.J. CONST. art. 4, § 7, ¶ 1; PA. CONST. art. 3, § 7.

<sup>15</sup> See note 12 *supra*.

<sup>16</sup> See *Williams v. North Carolina (I)*, 317 U.S. 287, 298-99 (1942); BEALE, SELECTIONS FROM A TREATISE ON THE CONFLICT OF LAWS § 111.1, at 476 (1935); RESTATEMENT, CONFLICT OF LAWS § 111 (1934); Comment, 16 HARV. L. REV. 448 (1903); 12 YALE L.J. 385 (1903).

<sup>17</sup> Cook, *Is Haddock v. Haddock Overruled?*, 18 IND. L.J. 165, 166 (1943).

scholarship" of Story.<sup>18</sup> Subsequently, the domicile basis was adopted by the British courts.<sup>19</sup> Whatever the history of the domiciliary basis of jurisdiction may be, and regardless of the stability of the foundation upon which it rests, it has become firmly embedded in Anglo-American law.<sup>20</sup>

Residence requirements which have been written into state divorce laws<sup>21</sup> have been uniformly construed to mean domicile.<sup>22</sup> However, various state statutes have provided for exceptional cases in which domicile is not required.<sup>23</sup> Particular reference should be had to those states which permit servicemen to secure a divorce if they have been stationed within the state for a specified period of time.<sup>24</sup> It must be noted that according to the principles of conflict of laws, such servicemen could hardly be deemed to have established a domicile within such a state.<sup>25</sup> It would appear, therefore, that just as England has been regarded as departing from the stringent requirement of domicile,<sup>26</sup> so may the United States.<sup>27</sup>

### *Constitutional Aspects*

While the power to regulate divorce rests exclusively with the states, they must adhere to constitutional mandates in the exercise of

<sup>18</sup> *Alton v. Alton*, 207 F.2d 667, 681 (3d Cir. 1953), *judgment vacated as moot*, 347 U.S. 610 (1954) (per curiam).

<sup>19</sup> *Ibid.*

<sup>20</sup> See Stimson, *Jurisdiction in Divorce Cases: The Unsoundness of the Domiciliary Theory*, 42 A.B.A.J. 222 (1956). This author considers another possible explanation for acceptance of the domicile doctrine. He alludes to early American reliance on Scotch cases and suggests that possibly this doctrine is a product of a misunderstanding of those cases.

<sup>21</sup> *E.g.*, N.Y. CIV. PRAC. ACT § 1147(3); CAL. CIV. CODE § 128 (Deering 1949); OHIO REV. CODE ANN. § 3105.03 (Baldwin 1953); PA. STAT. ANN. tit. 23, § 16 (Purdon 1955); UTAH CODE ANN. § 30-3-1 (Supp. 1955).

<sup>22</sup> See, *e.g.*, *Clapp v. Clapp*, 272 App. Div. 378, 379, 71 N.Y.S.2d 354, 356 (1st Dep't 1947); *Ungemach v. Ungemach*, 61 Cal. App. 2d 29, 142 P.2d 99, 102 (1943); *Glassman v. Glassman*, 75 Ohio App. 47, 60 N.E.2d 716, 718 (1944); *Verbeck v. Verbeck*, 160 Pa. Super. 515, 52 A.2d 241, 243 (1947); *Weiss v. Weiss*, 111 Utah 353, 179 P.2d 1005, 1007 (1947).

<sup>23</sup> *E.g.*, N.Y. CIV. PRAC. ACT § 1147(1), (2) ("1. Where both parties were residents of the state when the offense was committed. 2. Where the parties were married within this state."); COLO. REV. STAT. ANN. § 46-1-3 (1953) (where the offense was committed within the state); MO. REV. STAT. § 452.050 (1949) (where the offense was committed within the state or while one or both of the parties resided within the state).

<sup>24</sup> *E.g.*, KAN. GEN. STAT. ANN. § 60-1502 (1949), *Craig v. Craig*, 143 Kan. 624, 56 P.2d 464 (1936); N.M. STAT. ANN. § 22-7-4 (1953), *Crownover v. Crownover*, 58 N.M. 597, 274 P.2d 127 (1954).

<sup>25</sup> "A soldier or sailor, if he is ordered to a station to which he must go and live in quarters assigned to him, cannot acquire a domicile there. . . ." RESTATEMENT, CONFLICT OF LAWS § 21, comment *c* (1934). See *Craig v. Craig*, *supra* note 24 at 466. This proposition is substantially contained in RESTATEMENT, CONFLICT OF LAWS § 21, comment *d* at 79 (Tent. Draft No. 2, 1954).

<sup>26</sup> See note 9 *supra*.

<sup>27</sup> See Stimson, *Jurisdiction in Divorce Cases: The Unsoundness of the Domiciliary Theory*, 42 A.B.A.J. 222, 224 (1956).

this power. Accordingly, they must administer their divorce laws so as to conform to the requirements of due process; failure to do so will render a decree of divorce invalid.<sup>28</sup> But beyond this, the question remains whether the decree of one state must be recognized by another. It is with this problem that we are concerned. The Federal Constitution provides that:

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.<sup>29</sup>

Acting on this constitutional authority, Congress has required that judgments “. . . shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such State . . . from which they are taken.”<sup>30</sup> Contrary to what the language of these provisions would seem to import, a judgment of one state does not become a judgment in every other state.<sup>31</sup> It is merely conclusive of the merits in the other states, *if the decreeing state had proper jurisdiction*.<sup>32</sup> These last few words create the problems surrounding migratory divorce. If the decreeing forum lacks jurisdiction, the divorce need not be recognized by a sister state. It is therefore necessary to determine what the highest judicial authority on the Constitution has declared to be essential to divorce jurisdiction.

### *Supreme Court Decisions*

Though the following are by no means all of the Supreme Court cases which deal with divorce jurisdiction, they are the ones most often relied upon for the proposition that divorce jurisdiction must be founded upon domicile. The first case to be noted is *Atherton v. Atherton*,<sup>33</sup> decided in 1901, which gave expression to the concept of matrimonial domicile. The Court there held that full faith and credit must be accorded a decree rendered by the state wherein the spouses last resided as husband and wife and the plaintiff was domiciled. In that same year, the companion cases of *Bell v. Bell*<sup>34</sup> and *Streitwolf v. Streitwolf*<sup>35</sup> were decided. Both held that a divorce obtained by a spouse who had not complied with the residence requirements of the

<sup>28</sup> See Griswold, *Divorce Jurisdiction And Recognition Of Divorce Decrees—A Comparative Study*, 65 HARV. L. REV. 193, 212 n.57 (1951).

<sup>29</sup> U.S. CONST. art. IV, § 1.

<sup>30</sup> 28 U.S.C. § 1738 (1952).

<sup>31</sup> See *Williams v. North Carolina (II)*, 325 U.S. 226 (1945); *German Sav. and Loan Soc'y v. Dormitzer*, 192 U.S. 125 (1904).

<sup>32</sup> See *Fauntleroy v. Lum*, 210 U.S. 230 (1908); *D'Arcy v. Ketchum*, 18 U.S. (11 How.) 586 (1850).

<sup>33</sup> 181 U.S. 155 (1901).

<sup>34</sup> 181 U.S. 175 (1901).

<sup>35</sup> 181 U.S. 179 (1901).

decreasing forum need not be recognized by a sister state.<sup>36</sup> Two years later, *Andrews v. Andrews*<sup>37</sup> held valid a Massachusetts statute which prohibited ". . . the enforcement in Massachusetts of a divorce obtained in another State by a citizen of Massachusetts who, in fraud of the laws of the State of Massachusetts, whilst retaining his domicile, goes into another State for the purpose of there procuring a decree of divorce."<sup>38</sup> The decree in question had been granted in South Dakota where the petitioner had never acquired a bona fide domicile.

In 1906, one of the most controversial cases in the area of divorce jurisdiction was decided; *Haddock v. Haddock*<sup>39</sup> held that an *ex parte* divorce decree, rendered by one state when the matrimonial domicile was in another, need not be accorded validity. The members of the Court, however, were not in full agreement with this position. Justice Holmes, in a dissenting opinion, stated:

. . . I can find no basis for giving a greater jurisdiction to the courts of the husband's domicile when the married pair happens to have resided there for a month, even if with an intent to make it a permanent abode, than if they had not lived there at all.<sup>40</sup>

Justice Holmes' view was adopted as law thirty-six years later when the Court, in *Williams v. North Carolina*,<sup>41</sup> held that a divorce decree rendered at the plaintiff's domicile must be given extraterritorial effect, regardless of where the matrimonial domicile was located. This decision was followed by the second *Williams* case,<sup>42</sup> which held that one state is not bound by another state's *ex parte* finding of jurisdiction.

It clearly appears from the discussion above that bona fide domicile is a proper basis of divorce jurisdiction, and when a divorce is based upon domicile it must be given full faith and credit in every other state. We shall turn next to the subject which has provided the impetus for this re-examination of domicile and divorce.

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<sup>36</sup> ". . . [B]y the law of Pennsylvania every petitioner for a divorce must have had a *bona fide* residence within the State for one year next before the filing of the petition. Penn. Stats. March 13, 1815, c. 109, § 11; May 8, 1854, c. 629, § 2. . . . Upon this record, therefore, the court in Pennsylvania had no jurisdiction of the husband's suit for divorce, because neither party had a domicile in Pennsylvania. . . ." *Bell v. Bell*, 181 U.S. 175, 177-78 (1901) (emphasis added). The *Streitwolf* case was decided wholly on the authority of the *Bell* case.

<sup>37</sup> 188 U.S. 14 (1903).

<sup>38</sup> *Id.* at 30. In *Sherrer v. Sherrer*, 334 U.S. 343 (1948), the *Andrews* case was overruled insofar as it permitted collateral attack by a spouse who had appeared in the foreign divorce action. To this extent, a statute similar to the one involved in that case is ineffective.

<sup>39</sup> 201 U.S. 562 (1906), *overruled*, *Williams v. North Carolina* (I), 317 U.S. 287 (1942).

<sup>40</sup> *Id.* at 632.

<sup>41</sup> 317 U.S. 287 (1942).

<sup>42</sup> 325 U.S. 226 (1945).

*Section 1147(2) of the New York Civil Practice Act*

The recent case of *David-Zieseniss v. Zieseniss*<sup>43</sup> considered the necessity of domicile as the basis of divorce jurisdiction. In that case, neither spouse was domiciled in New York at the time of the action, but the parties had entered into the marriage relationship in that state. The plaintiff relied on Section 1147(2) of the New York Civil Practice Act which confers divorce jurisdiction where the parties were married within the state. The court denied the defendants' motion to vacate service by publication<sup>44</sup> and to dismiss the complaint, holding that marriage within the state is sufficient for divorce jurisdiction and service by publication. It was unequivocally denied that domicile is the sole basis of divorce jurisdiction.

Judicial treatment of Section 1147(2) has varied during the ninety-four years that it has been on the statute books. Some of the New York courts have felt that, despite the clear language of this section, domicile is essential to divorce jurisdiction.<sup>45</sup> A recent case illustrative of this view is *Huneker v. Huneker*.<sup>46</sup> There the court refused to assume jurisdiction where the only ground of jurisdiction was the fact of marriage within the state. However, several cases have taken the contrary position<sup>47</sup> and, as was done in the *Zieseniss* case, have given the statute a literal interpretation.

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<sup>43</sup> 205 Misc. 836, 129 N.Y.S.2d 649 (Sup. Ct. 1954).

<sup>44</sup> "An order directing the service of a summons upon a defendant, by publication, may be made upon the application of the plaintiff. . . . 1. Where the complaint demands judgment annulling a marriage, or for a divorce, or a separation." N.Y. CIV. PRAC. ACT § 232.

<sup>45</sup> "The general rule to be derived from principles of universal application is that the courts of this state have no power to adjudge the status of parties residing beyond its jurisdiction. It is not likely that this rule was changed or intended to be changed by the provisions of the Code." *Gray v. Gray*, 143 N.Y. 354, 357, 38 N.E. 301, 302 (1894). See also *Powell v. Powell*, 211 App. Div. 750, 757, 208 N.Y. Supp. 153, 159 (1st Dep't 1925); *Barber v. Barber*, 89 Misc. 519, 522-23, 151 N.Y. Supp. 1064, 1066-67 (Sup. Ct. 1915). Section 1170-b of the New York Civil Practice Act provides: "In an action for divorce, . . . where the court refuses to grant such relief . . . [because of a valid foreign *ex parte* divorce procured by the husband] the court may, nevertheless, render in the same action such judgment as justice may require for the maintenance of the wife." It becomes apparent, therefore, that if Section 1147(2) be declared not effective to provide divorce jurisdiction within the meaning of the full faith and credit clause, there may be serious effects upon the right of a nonresident wife to obtain maintenance in New York. This is for the reason that the right to obtain maintenance under Section 1170-b depends on the plaintiff's standing to secure a divorce.

<sup>46</sup> 57 N.Y.S.2d 99 (Sup. Ct. 1945).

<sup>47</sup> See *Ackerman v. Ackerman*, 200 N.Y. 72, 76-77, 93 N.E. 192, 194 (1910). It was held in this case that marriage alone within the state is sufficient for the exercise of divorce jurisdiction. See also *Becker v. Becker*, 58 App. Div. 374, 376-77, 69 N.Y. Supp. 75, 77 (1st Dep't 1901); *Oettgen v. Oettgen*, 196 Misc. 937, 941, 94 N.Y.S.2d 168, 172 (Sup. Ct. 1949); cf. *Schildkraut v. Schildkraut*, 226 App. Div. 747, 233 N.Y. Supp. 585, 586 (2d Dep't 1929).

The legislative history of Section 1147(2)<sup>48</sup> leaves no doubt that the fact of marriage alone was intended to provide a basis of divorce jurisdiction. This being so, the question presents itself whether a divorce rendered upon such grounds must be given effect in other states. The answer depends on whether domicile is the *sole and exclusive* basis of divorce jurisdiction within the rules laid down by the Supreme Court.

### *Is Domicile Exclusive?*

The idol of domicile has not escaped the attacks of some learned jurists who perhaps may be considered iconoclasts by those who worship before its altar. Mr. Justice Rutledge has viewed domicile as an amorphous, highly variable common-law conception.<sup>49</sup> Indeed, Mr.

<sup>48</sup> "In 1787, it was enacted that the Chancellor might grant divorces 'where the parties are inhabitants of this State' (L. 1787, ch. 69).

"In 1813, it was enacted that the Chancellor might entertain bills for divorce, first, where the parties were inhabitants of this State at the time of the adultery, second, when the marriage was solemnized in New York and the injured party was a resident in this State both at the time of the adultery and when he or she brought the proceedings. (2 Van Ness & Woodworth, Rev. L. [1813], ch. 102, p. 197.)

"The Revised Statutes of 1830 contained the provision that a divorce might be decreed in New York 'where the marriage has been solemnized, or has taken place within this state, and the injured party, at the time of the commission of the offense, and at the time of exhibiting the bill of complaint, shall be an actual inhabitant of this state' (Rev. Stat. of N.Y., part II, ch. VIII, tit. I, art. third, § 38).

"It was then by chapter 246 of the Laws of 1862, that that provision of the Revised Statutes was amended to read 'Where the marriage has been solemnized or has taken place within this state, or where the injured party at the time of the commission of the offense and at the time of exhibiting the bill of complaint shall be an actual inhabitant of this state.'

"Marriage within the State as a fact conferring jurisdiction to grant divorce thus was not introduced into the law by chapter 246 of the Laws of 1862. Marriage within the State coupled with residence within the State was a ground for jurisdiction from 1813 to 1862, and the sole purpose of the 1862 amendment was to make marriage within the State, without the additional fact of residence within the State, a fact which in and of itself, without more, conferred jurisdiction. Chapter 69 of the Laws of 1787, and chapter 246 of the Laws of 1862 were repealed by chapter 65 of the Laws of 1909, but by that time the provision that mere marriage within the State, without residence here, gives jurisdiction to grant divorce had been carried into the Code of Civil Procedure (§ 1756), which was then carried into and is now contained in section 1147 of the Civil Practice Act.

"Continuously since 1862, therefore, it has been the statutory law of New York that marriage within the State is, in and of itself and without more, a fact which gives jurisdiction to grant divorce." David-Zieseniss v. Zieseniss, 205 Misc. 836, 839-40, 129 N.Y.S.2d 649, 651-52 (Sup. Ct. 1954).

<sup>49</sup> See *Williams v. North Carolina* (II), 325 U.S. 226, 245 (1945) (dissenting opinion). See also Reese, *Does Domicil Bear A Single Meaning?*, 55 COLUM. L. REV. 589, 595-97 (1955).

Justice Clark has gone further to "defile" this concept in observing that "the only constitutional bugaboo is a judge-made one, domicile."<sup>50</sup>

It must be noted at this juncture that in every case in which the Supreme Court stated domicile to be essential to divorce jurisdiction, a state statute which required domicile was involved.<sup>51</sup> Thus, the Court has never been required to hold that domicile is constitutionally necessary before a divorce must be recognized in states outside the decreeing forum.<sup>52</sup> The closest that the Supreme Court has come to deciding whether domicile is necessary was when the cases of *Alton v. Alton*<sup>53</sup> and *Granville-Smith v. Granville-Smith*<sup>54</sup> came before it. In both cases the validity of a statute of the Virgin Islands was questioned. It provided that:

If the plaintiff [in an action for divorce] is within the district at the time of the filing of the complaint and has been continuously for six weeks immediately prior thereto, this shall be prima facie evidence of domicile, and where the defendant has been personally served within the district or enters a general appearance in the action, then the court shall have jurisdiction of the action and of the parties thereto without further reference to domicile. . . .<sup>55</sup>

In the *Alton* case, both parties were residents of Connecticut. The plaintiff went to the Virgin Islands and, after a six-week sojourn, commenced a suit for divorce. Although an appearance was entered by the defendant-husband, the district court ruled that it had no jurisdiction over the action since the plaintiff was unable to produce evidence of domicile. The judgment was affirmed by the Third Circuit on the ground that the statute did not require domicile, which was considered to be essential to divorce jurisdiction. This case was appealed but never considered by the Supreme Court, since the question was rendered moot by another divorce obtained by the parties.<sup>56</sup> In 1955, the statute came before the Court in the *Granville-Smith* case, which involved substantially the same material facts as the *Alton* case. However, the constitutional necessity of domicile was not discussed. The Court invalidated the statute simply on the ground that Congress had not granted power to the Virgin Islands to enact this legislation. The theory was that Congress had granted power to enact laws of local application only, while the statute in question operated to attract imported divorce suits. However, though the Court did not expressly

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<sup>50</sup> *Granville-Smith v. Granville-Smith*, 349 U.S. 1, 27 (1955) (dissenting opinion).

<sup>51</sup> See 54 COLUM. L. REV. 1165 (1954).

<sup>52</sup> See 40 IOWA L. REV. 667, 668 (1955); 15 LA. L. REV. 809 (1955).

<sup>53</sup> 207 F.2d 667 (3d Cir. 1953), judgment vacated as moot, 347 U.S. 610 (1954) (per curiam).

<sup>54</sup> 349 U.S. 1 (1955).

<sup>55</sup> Quoted in Stimson, *Jurisdiction in Divorce Cases: The Unsoundness of the Domiciliary Theory*, 42 A.B.A.J. 222, 225 (1956).

<sup>56</sup> See Stimson, *supra* note 55.

bottom its decision on domicile, this concept was the underlying *ratio decidendi*, as Mr. Justice Clark indicated in his dissent.<sup>57</sup>

Many of the Supreme Court cases do contain dicta which clearly state that domicile is a constitutionally necessary ingredient of divorce jurisdiction.<sup>58</sup> Before referring to this dicta, the following thought should be considered:

. . . [T]he trained common law investigator (like the trained newsman) always has weighed carefully the language of the opinion against the facts of the case and has been cautious not to give a wider scope of importance to the judges' remarks than the facts of the case demanded. In recent years, however, there has been a growing tendency, formerly confined to relatively unschooled lawyers, among some teachers and commentators to treat the statements in a judicial opinion as of greater importance than the case and to treat the case, a transient phenomenon, as of significance only as the occasion of the opinions. Hence a growing carelessness in appreciation of the case itself and in elaboration of the import of particular generalized postulates in the opinions. . . .<sup>59</sup>

Because of the sweeping language contained in most of the cases which deal with divorce jurisdiction, it is necessary to heed this warning. An example of such broad language is the statement of Mr. Justice Frankfurter in the second *Williams* case. There he said, "Under our system of law, judicial power to grant a divorce—jurisdiction, strictly speaking—is founded on domicile."<sup>60</sup> He cited as his authority *Bell v. Bell*<sup>61</sup> and *Andrews v. Andrews*.<sup>62</sup> No doubt those cases contain comments which tend to support the statement;<sup>63</sup> however, nothing could be clearer than that they do not hold what Mr. Justice Frankfurter would attribute to them.<sup>64</sup> Similar dogmatic

<sup>57</sup> "The majority's holding that the Islands' law is not 'of local application' can be appreciated more fully by asking the question, 'What type of a divorce law would be of local application?' The majority does not pass on this, but its whole reasoning is founded on the proposition that only domicile will suffice." *Granville-Smith v. Granville-Smith*, 349 U.S. 1, 23 (1955) (dissenting opinion).

<sup>58</sup> See, e.g., *Sherrer v. Sherrer*, 334 U.S. 343, 349 (1948); *Williams v. North Carolina* (II), 325 U.S. 226, 229, 230, 238, 239 (1945); *Williams v. North Carolina* (I), 317 U.S. 287, 308 (1942) (dissenting opinion); *Bell v. Bell*, 181 U.S. 175, 177 (1901).

<sup>59</sup> Bingham, *Song Of Sixpence—Some Comments On Williams v. North Carolina*, 29 CORNELL L.Q. 1, 7 (1943).

<sup>60</sup> *Williams v. North Carolina* (II), *supra* note 58 at 229.

<sup>61</sup> 181 U.S. 175 (1901).

<sup>62</sup> 188 U.S. 14 (1903).

<sup>63</sup> ". . . [D]omicil in that State was essential to give jurisdiction to the courts of such State to render a decree of divorce which would have extra-territorial effect." *Id.* at 41. "No valid divorce from the bond of matrimony can be decreed on constructive service by the courts of a State in which neither party is domiciled." *Bell v. Bell*, 181 U.S. 175, 177 (1901).

<sup>64</sup> The statement in the *Bell* case referred to in footnote 63 was made by the Court without benefit of authority. Actually, even a casual reading of that case brings forth the point that the divorce was struck down because of non-compliance with the statutory residence requirements of the decreeing forum. See note 36 *supra*. Slightly more persuasive is the *Andrews* case. The Court there expressly pointed out that the existence of a state statute requiring domi-

utterances may be found in other Supreme Court decisions.

But what do these cases say is constitutionally necessary before a decree need be accorded full faith and credit in all the states? It is not simply the factual elements that go to make up domicile—an individual's physical presence and his intent to remain within a state.<sup>65</sup> The constitutional requirement goes beyond that. Perhaps the clearest statement of the jurisdictional basis required by the Supreme Court for full faith and credit is that:

The state is vitally interested in the marriage relation because it affects society as a whole, its welfare and continued well-being. *This interest is based upon a general public order and sound public policy, in pursuance whereof conditions are prescribed upon which persons may enter into and then dissolve the marital relation.* To enforce such policy the state provides penalties for the violation of its marriage laws. As the majority of the Court assert, the state interest is not identical with that of the parties to the marital relation. . . . Were the marriage relation not interwoven with public policy the parties would be free to terminate it at will.<sup>66</sup>

This thought permeates the Court's decisions on the subject. In the first *Williams* case, Mr. Justice Douglas announced that "*Domicile creates a relationship to the state which is adequate for numerous exercises of state power.*"<sup>67</sup> He further noted that:

It [the existence of the power of a state to alter the marital status of its domiciliaries] *is dependent on the relationship which domicil creates.* . . .<sup>68</sup>

It becomes clear that domicile is merely a *cause* of a particular result; it is this result, *viz.*, the state's relation of interest to marriage as a matter of public concern, which is the basis of jurisdiction for the purpose of the full faith and credit clause. Since domicile is mere matter of form it should be given commensurate significance and not

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cile was not essential to the efficacy of that fact as prerequisite to divorce jurisdiction. Of course, the point may be made that a court's denial of a fact does not serve to negative the existence of that fact, and its subsequent use as a distinguishing element remains. But prescinding from that point, stress should be placed on the fact that in the *Andrews* case there was no possible basis of jurisdiction other than domicile. The spouses had never cohabited in the decreeing forum; the petitioner had never been there prior to his abortive attempt to establish *divorce domicile*, nor does it appear from the opinion that that state recognized another basis of jurisdiction. Indeed, any statement that domicile was essential, *when considered under these circumstances*, seems perfectly proper. But it may not go further than that.

<sup>65</sup> "To acquire a domicil of choice, a person must establish a dwelling-place with the intention of making it his home." RESTATEMENT, CONFLICT OF LAWS § 15(2) (1934). See Stimson, *Jurisdiction in Divorce Cases: The Unsoundness of the Domiciliary Theory*, 42 A.B.A.J. 222, 294 (1956); Lindey, *Foreign Divorce: Where Do We Go From Here?*, 17 U. PITT. L. REV. 125, 139 (1956).

<sup>66</sup> Lorenzen, *Extraterritorial Divorce—Williams v. North Carolina II*, 54 YALE L.J. 799, 802 (1945) (emphasis added).

<sup>67</sup> *Williams v. North Carolina (I)*, 317 U.S. 287, 298 (1942) (emphasis added).

<sup>68</sup> *Id.* at 300 (emphasis added).

confused with substance. If another form may be substituted for that of domicile, without essentially altering the substance, then that other form also may be set up as a constitutional basis of divorce jurisdiction. Thus, the question arises as to whether the sole fact that the marriage was created within the state is such a form. Is not this fact in and of itself, causative of ". . . a relationship to the state which is adequate for numerous exercises of state power"?<sup>69</sup>

### *Jurisdiction of the Marriage Forum*

Marriage and the family constitute the foundation of the whole social structure.<sup>70</sup> Mutual privileges and responsibilities arise solely from the fact of marriage.<sup>71</sup> Although the right to marry finds its basis in natural law,<sup>72</sup> the state is empowered to regulate it.<sup>73</sup> It makes its laws available to those who would assume the profound relationship of man and wife. When two persons avail themselves of these laws, the state aids in launching the relationship which was referred to above as the "foundation" of society. These factors have evoked references to the state as the "third party" to the marriage contract.<sup>74</sup> Such an allusion serves well to point up the great interest which a state has in marriages which are contracted within its borders.

It is one postulate of this Note that the state, having once aided so substantially in the formation of the marital relationship in pursuance of its declared and rightful interest, does not cease to be interested upon the conclusion of the marriage ceremony. Its interest continues so long as the parties remain married, whether or not they continue to reside within that state. The validity of this position reveals itself with far greater force when the contrary position is asserted—that as soon as the spouses depart from its territorial borders, the state, having launched them on "the most important relation in life,"<sup>75</sup> disclaims any and all responsibility for them. Indeed, such a position relegates marriage and the state to the same echelon of causal responsibility as the candy bar and the vending machine. Further, the sovereign state of New York has expressly declared its continuing

<sup>69</sup> *Id.* at 298.

<sup>70</sup> *Maynard v. Hill*, 125 U.S. 190, 211 (1888) (dictum); see McCarran, *Full Faith . . .*, in 2 *DIVORCE AND FAMILY RELATIONS* 109 (1950); Walsh, *Marriage And Civil Law*, 23 *ST. JOHN'S L. REV.* 209, 210-11 (1949).

<sup>71</sup> For example, the right to consortium, the wife's right to support and the husband's corresponding duty to support the wife.

<sup>72</sup> See Encyclical, Pope Pius XI, *On Christian Marriage*, translated in *FIVE GREAT ENCYCLICALS* 77, 78 (1939).

<sup>73</sup> See *KEEZER, MARRIAGE AND DIVORCE* §§ 4-6 (3d ed. 1946); 2 *SCHOULER, MARRIAGE, DIVORCE, SEPARATION AND DOMESTIC RELATIONS* § 1074 (6th ed. 1921).

<sup>74</sup> See *MACKAY, MARRIAGE AND DIVORCE* 7 (2d ed. 1951); 2 *SCHOULER, op. cit. supra* note 73, § 1073.

<sup>75</sup> *Maynard v. Hill*, 125 U.S. 190, 205 (1888).

interest.<sup>76</sup> Thus, it is submitted that the state of marriage has an interest in the relationship which is a continuing one.

To effect a change in domicile, there must be actual presence in a new locality and the intention to remain there permanently. Until these two elements concur, a domicile previously acquired continues. Thus, one may sever all physical connection with a state for an indefinite period of time and yet continue to be a domiciliary. Being such a domiciliary, one could return to that state and obtain a valid divorce decree which would be binding in other states under the rule discussed above. If in such a case the severance of the physical ties between state and person does not operate to discontinue the incorporeal relationship of interest, it is difficult to see why a different result should be reached when the spouses leave the marrying state.

It is the second postulate of this Note that the marital forum's interest continues in the relationship of marriage because of the state's great and direct interest in the institution of marriage within its own borders and the regard which its own domiciliaries hold for that institution.

The state is vitally interested in the marital relationship of its own domiciliaries.<sup>77</sup> The stability of this relationship depends upon the degree of esteem in which the people hold the institution of marriage. Ready availability of divorce tends to undermine the foundation of the marital relationship.<sup>78</sup> The attitude of the several states on the subject of the permanence and indissolubility of marriage varies widely; this is evidenced by the great diversity in the divorce laws of the states.<sup>79</sup> Whereas in some states a divorce may be obtained for relatively insignificant reasons,<sup>80</sup> others require serious grounds.<sup>81</sup> New York is a jurisdiction which has stringent laws, the only ground for divorce being adultery.<sup>82</sup> Thus, we have a state which has a declared policy in respect to marriage and divorce. This policy it is entitled to

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<sup>76</sup> N.Y. CIV. PRAC. ACT § 1147(2).

<sup>77</sup> See *Williams v. North Carolina* (I), 317 U.S. 287 (1942) (passim); 2 SCHOULER, *op. cit. supra* note 73, § 1478.

<sup>78</sup> Justice Jackson, in his dissent, indicated that permitting a petitioner to establish a new domicile and obtain a divorce has the effect of ushering in "a new order of matrimonial confusion and irresponsibility." *Williams v. North Carolina* (I), 317 U.S. 287, 324 (1942).

<sup>79</sup> *Sherrer v. Sherrer*, 334 U.S. 343, 369 (1948) (dissenting opinion).

<sup>80</sup> (a) *Refusal by wife to move to new residence* [TENN. CODE ANN. § 8426(8) (*Williams* 1934)]; (b) *Violent temper* [FLA. STAT. ANN. § 65.04(5) (1943)]; (c) *Indignities* [ARIZ. CODE ANN. § 27-802(5) (1939); PA. STAT. ANN. tit. 23, § 10(f) (*Purdon* 1930); WYO. COMP. STAT. ANN. § 3-5905(8) (1945)]; (d) *Incompatibility* [N.M. STAT. ANN. § 22-7-1(8) (1953)].

<sup>81</sup> (a) *New York*—adultery only. N.Y. CIV. PRAC. ACT § 1147; (b) *New Jersey*—adultery, desertion and extreme cruelty. N.J. STAT. ANN. § 2:50-2 (1939); (c) *South Carolina*—adultery, desertion (1 year), physical cruelty and habitual drunkenness. S.C. CODE § 20-101 (1952); (d) *Virginia*—adultery, impotency, conviction, fugitive, incarceration, desertion (2 years), pre-marital conception and prostitution. VA. CODE ANN. § 20-91 (1950).

<sup>82</sup> N.Y. CIV. PRAC. ACT § 1147.

have. However, if parties who marry there may proceed to other jurisdictions and make what New York would consider a mockery of marital bonds, it has an effect upon the dignity of the institution of marriage within that state. It follows then that such a state has a sufficient interest in preserving the relationship of the absent spouses.

Both postulates one and two have demonstrated an interest on the part of the marrying forum in *preserving* the marriage which was created within its borders. This being so, it follows that the marrying state has the power and the right to exercise divorce jurisdiction. For marriage is a permanent relationship; the state's right to divorce is derived from its interest to preserve that institution.<sup>83</sup>

It is true that there may be a jurisdiction which has a greater interest in the marital status of the parties than the marrying forum. A prime example would be the jurisdiction wherein both spouses are domiciled, which, as the cases recognize, has a deep and pervading interest in their status. However, the existence of a greater interest does not deny the presence or efficacy of a lesser one. This is easily proven by the fact that existing law permits a plaintiff to obtain a divorce in a jurisdiction wherein the spouses never cohabited, in derogation of the interest of the state of the marital domicile.<sup>84</sup> Once the cloak of fiction is lifted from the interest of the state wherein the plaintiff alone is domiciled, it will be seen that in many cases the marriage forum has a greater interest. The instances of fraudulent acquisition of domicile by plaintiffs are innumerable.<sup>85</sup> Indeed jurisdictions like Nevada do a "thriving business" in divorcing out-of-staters.<sup>86</sup> It should be noted that the Court in *Haddock v. Haddock*<sup>87</sup> was fearful of the very abuses that have arisen since the first *Williams* case. Furthermore, the state of the plaintiff's domicile does not have within its

<sup>83</sup> See I BISHOP, MARRIAGE, DIVORCE AND SEPARATION §§ 38, 39 (1891).

<sup>84</sup> See *Williams v. North Carolina (I)*, 317 U.S. 287 (1942). North Carolina, the state of the matrimonial domicile, was compelled to recognize a Nevada decree. Neither of the respondents in that divorce action had ever been in Nevada.

<sup>85</sup> . . . [T]he Nevada divorce machinery has become so smooth that the husband-to-be often flies out to be present at the divorce, gets married at the church next door, and then accompanies his new wife to their 'new' domicile." *Granville-Smith v. Granville-Smith*, 349 U.S. 1, 23 (1954) (dissenting opinion). Indeed, the divorcee never intended to remain in that state. *Id.* at 27.

<sup>86</sup> *Id.* at 23.

<sup>87</sup> "Under the rule contended for [recognition of decree rendered at forum of petitioner's domicile only] it would follow that the States whose laws were the most lax as to length of residence required for domicil, as to causes for divorce and to speed of procedure concerning divorce, would in effect dominate all the other States. In other words, any person who was married in one State and who wished to violate the marital obligations would be able, by following the lines of least resistance, to go into the State whose laws were the most lax, and there avail of them for the purpose of the severance of the marriage tie and the destruction of the right of the other party to the marriage contract, *to the overthrow of the laws and public policy of the other States.*" *Haddock v. Haddock*, 201 U.S. 562, 574 (1906), *overruled*, *Williams v. North Carolina (I)*, 317 U.S. 287 (1942) (emphasis added).

borders the marital relationship in as full a form as does the marriage forum.

One wonders how serious the Court in the first *Williams* case was when it gave expression to the thought that the plaintiff's state of domicile had an interest in the marriage as great as the state of the matrimonial domicile. It would appear from the opinion that the Court decided as it did more out of a fear of the possibility of an increase in bastards and bigamy.<sup>88</sup>

#### *Denial of Domicile in State Courts*

Though state endorsement of the domicile concept is widespread, that theory has been denied exclusiveness in some cases. The primary occasion of such an approach has been statutes which provide for the maintenance of divorce actions by servicemen in the state wherein they are stationed. In *Craig v. Craig*,<sup>89</sup> a Kansas court sustained such a statute,<sup>90</sup> although it noted that "persons residing . . . [on a military reservation] could not establish an actual permanent residence or domicile [there] . . ." <sup>91</sup> In *Crownover v. Crownover*,<sup>92</sup> the court expressly refused to follow the *Alton* case. The statute provided that continuous residence on a military post for one year would confer divorce jurisdiction.<sup>93</sup> The court sustained the statute on the rather novel ground that "military domicile" would be acquired by such a plaintiff. It would seem that such a position is untenable and flies in the face of the honest observation of the court in the *Craig* case. Although the attempt to sustain the statute on the ground of domicile seems abortive, it would appear equally clear that residence for one year does supply a sufficient *nexus* between the person and the state to justify the exercise of jurisdiction. As a last example, there is the case of *Gould v. Gould*.<sup>94</sup> There the New York Court of Appeals recognized, on principles of comity, a divorce decree rendered in France, although both parties were domiciled in New York.

These cases, and the *Zieseniss* case,<sup>95</sup> did not deal directly with the compulsory extraterritorial effect to be given these decrees. However, they did recognize that domicile was not a *sine qua non* to divorce jurisdiction. If, then, a basis other than domicile was found to be present, one wonders what magic there is in the full faith and credit clause which causes these bases to disintegrate. The full faith and credit clause is not operative in determining jurisdiction, but is merely an *ex post facto* consideration in determining the extraterritorial effect that need be given decrees. Jurisdiction either exists or

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<sup>88</sup> See *Williams v. North Carolina (I)*, *supra* note 84 at 299-300.

<sup>89</sup> 143 Kan. 624, 56 P.2d 464 (1936).

<sup>90</sup> KAN. GEN. STAT. ANN. § 60-1502 (1949).

<sup>91</sup> *Craig v. Craig*, 143 Kan. 624, 56 P.2d 464, 466 (1936).

<sup>92</sup> 58 N.M. 597, 274 P.2d 127 (1954).

<sup>93</sup> N.M. STAT. ANN. § 22-7-4 (1953).

<sup>94</sup> 235 N.Y. 14, 138 N.E. 490 (1923).

<sup>95</sup> 205 Misc. 836, 129 N.Y.S.2d 649 (Sup. Ct. 1954).

it does not, irrespective of the full faith and credit clause. To deny the validity of anything but domicile as a constitutional basis of jurisdiction is to accuse these states of gross usurpation of power. This, it is submitted, is difficult to accept and is made less and less palatable by each state decision which predicates divorce jurisdiction on something other than domicile.

#### *Effect of Marriage as Basis of Jurisdiction*

Recognizing marriage within the state as a constitutional basis of jurisdiction produces at least two effects which might possibly be open to criticism: (a) increase in the availability of divorces; and (b) deprivation of the right of the domiciliary state to manage the domestic relations of its citizens.

A satisfactory answer to the first may be readily found by the simple expedient of considering the effects of the *Williams* case. In that decision, one more divorce jurisdiction was added to those already existing.<sup>96</sup> Since the Supreme Court did not consider such an addition ill-advised in that case, there is no reason to consider the addition herein suggested as catastrophic. In answer to the second point, let it suffice to say that recognition of the jurisdiction of the marrying forum does not necessarily deprive the true domiciliary state of its rights. There is nothing mandatory about such jurisdiction. Further, although the dissolution of marriages is not a purely private matter,<sup>97</sup> the parties should have a right to bring a divorce action *in any court of competent jurisdiction*. Even under the law today, more than one state may have divorce jurisdiction and the interest of one may be greater than the other; yet no priority exists as between the competitors.

#### *Conclusion*

No attempt has been made in the foregoing discussion to predicate divorce jurisdiction on a basis foreign to the decisions of the United States Supreme Court. Rather, extreme care has been exercised in determining whether the fact of marriage creates such a relationship of interest between the state and the spouses as to warrant the exercise of jurisdiction within the principles set out by the Court. The cases require only an interest in the marital relationship on the part of the state. That interest, it is submitted, exists where the parties were married within the state. The wisdom of recognizing such jurisdiction may be questioned in some quarters. However, we are not here concerned with policy matters, but with jurisdiction—the right and power of a sovereign to adjudicate rights. While perhaps the state of domicile *should* have exclusive jurisdiction, the existing law does not require such a conclusion.

<sup>96</sup> That is, the state wherein the plaintiff alone establishes bona fide domicile. Prior to the *Williams* case, the rule of *Haddock v. Haddock* precluded full faith and credit being given a decree of a court having only such jurisdiction.

<sup>97</sup> See 2 SCHOULER, MARRIAGE, DIVORCE, SEPARATION AND DOMESTIC RELATIONS § 1478 (6th ed. 1921).