

The Extraterritorial Effect of Equity Decrees--Full Faith and Credit Clause

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of personal liberty."²⁵ When the F. B. I. began tapping intrastate communications it was held that these things were within the scope of the Federal Communications Act.

The New York State Constitution permits the tapping of wires.²⁶ The question arises, whether or not this state constitutional provision violates the Federal Communications Act. There has been no decision either way but it is submitted that it would be considered violative in interstate communications.

Where federal agents placed a detectaphone against a partition wall of an office in which members of a conspiracy engaged in conversations among themselves and over the telephone, evidence of conversations obtained by the use of the detectaphone was not inadmissible on the ground that the use of the detectaphone violated the Fourth Amendment, since it was not a violation of the home, the detectaphone being placed on the outside.²⁷

In spite of the direction taken by the development of the law of search and seizure the interception of telephone and telegraphic communications should be sustained during a period of war. All measures necessary and proper to aid Congress in carrying into effect the determination of Congress to wage war would necessarily be sustained.

ROSE KRAUS.

THE EXTRATERRITORIAL EFFECT OF EQUITY DECREES—FULL FAITH AND CREDIT CLAUSE

A recent decision¹ brought into prominence the applicability of the full faith and credit clause of the Federal Constitution² to foreign decrees.³ *A* sues *B* for specific performance in State *X*, and *A* obtains therein a decree over land in State *Y*. To what extent *must* State *Y* recognize the decree rendered in State *X*?⁴ This has been the subject of much discussion and theorization among legal authori-

²⁵ *Ibid.*

²⁶ N. Y. CONST. Art. I, § 12 (1938). The Constitution of 1938 does not change the rule that even though evidence in a criminal case is obtained in violation of law, it is not thereby rendered inadmissible. *People v. La Combe*, 170 Misc. 669, 9 N. Y. S. (2d) 871 (1939).

²⁷ *Goldman v. United States*, 62 Sup. Ct. 993, *aff'g*, *United States v. Goldman*, 118 F. (2d) 310, *certiorari denied*, 61 Sup. Ct. 1109, 1111, 313 U. S. 1588, 85 L. ed. 1543 (1941).

¹ *Williams v. North Carolina*, 317 U. S. 287, 87 L. ed. 189, 63 Sup. Ct. 207 (1942).

² U. S. CONST. Art. IV, § 1.

³ An order of a court as distinguished from a common law judgment for money.

⁴ The law relating to the applicability of the full faith and credit clause as to common law judgments is well-settled.

ties.⁵ The abundant material on the subject is understandable when one realizes the mutational quality of judicial decisions pertaining to the extraterritorial recognition of equity decrees. As an integral part of this problem, the construction to be placed on the full faith and credit clause has been the object of much divergent opinion. For this discussion, decrees may be classified approximately into five main groupings: land, mortgages, money, receivership, and divorces. And upon their extraterritorial validity will depend not only determinations as to property, but also as to personal status, as in marital issues.

Land Decrees

Land decrees alone have enjoyed the enviable reputation of extreme popularity among legal analysts.⁶ Each state is reluctant to relinquish jurisdiction over property within its own territory and this aversion is indicated by a refusal to recognize a change in ownership procured by the foreign decree alone.⁷ But what recognition will such decree affecting title to real property be given? Although seven theories have been advanced, two of them seem to embrace the other five in scope. One authority expounded the proposition that foreign land decrees are recognized only as a matter of comity and that the full faith and credit clause does not apply.⁸ This position must be modified in the face of innumerable decisions on the subject. The prevailing opinion is that where the court has jurisdiction of the parties, although not of the subject matter (*i.e.*, the land), the decree there entered will be declared *res judicata* on the facts and entitled to full faith and credit as evidentiary matter by the court of the *situs*. But the limitation is that there be a pre-existing obligation between the parties.⁹ In fact, Pound, an eminent authority, even claims that it is not necessary to assert one's rights under a decree in a foreign state where there is a pre-existing right upon which the decree is based.¹⁰ In *Fall v. Eastin*, the plaintiff is suing on a Washington

⁵ But it is established law that all foreign decrees, even those for money, may be attacked collaterally on two grounds: fraud and non-jurisdiction of the court entering the decree. *Accord*, *Dobson v. Pearce*, 12 N. Y. 156 (1854).

⁶ CHAFEE, SIMPSON AND MALONEY, *CASES ON EQUITY* (1939) 101.

⁷ "A court of chancery, acting *in personam*, may well decree the conveyance of land in any other State, and may enforce their decree by process against the defendant. But neither the decree itself, nor any conveyance under it, except by the person in whom the title is vested, can operate beyond the jurisdiction of the court." *Watkins v. Holman*, 16 Pet. 25, 57, 10 L. ed. 25 (U. S. 1842).

⁸ *See* WALSH, *A TREATISE ON EQUITY* (1930) 71.

⁹ *Fall v. Eastin*, 215 U. S. 1, 54 L. ed. 65 (1909); *Massie v. Watts*, 6 Cranch 148 (U. S. 1810); *Young v. Farwell*, 165 N. Y. 341, 59 N. E. 143 (1901); *Davis v. Headley*, 22 N. J. Eq. 115 (1871); *cf.* Schofield, *Full Faith and Credit v. Comity and Local Rules of Jurisdiction and Decision* (1905) 10 *ILL. L. REV.* 11.

¹⁰ "But in equity the suit is to compel defendant to do his duty, and that duty is not necessarily merged in the decree, so that if the decree fails of effect,

decree awarding her in a divorce action the title to land situated in Nebraska. The Supreme Court, in sustaining Nebraska's refusal to enforce the decree, asserted that the constitutional provision "only makes the judgment rendered conclusive on the merits of the claim or subject-matter of the suit."¹¹ Holmes concurred specially in that decision on the ground that a decree rendered in a court that has jurisdiction of the parties becomes a personal obligation of the defendant that is subject to enforcement in any other state.¹² But this is a proper subject for objection by those who declare that the courts of the *situs* would be rubber-stamping the findings of a court having no jurisdiction over the *res*.¹³ Whether or not a pre-existing obligation is necessary to apply the full faith and credit clause to the foreign land decree, a substantial number of cases hold that where there is proper jurisdiction of the parties, the foreign decree will be entered as evidence and considered as *res judicata* of the facts.¹⁴ It should be noted that in all cases reviewed, a proper jurisdiction of the parties is considered necessary. And in *Froelich v. Swafford*,¹⁵ the court declared that the decree merely established a chose in action, or personality, since it does not act on title to property directly. As a result, the court asserted that in order to acquire jurisdiction over the parties, there must be personal service on the non-resident. This proposition is established even further in *Hart v. Samson*.¹⁶

an action may still be brought upon plaintiff's legal right, if he has one. There was never any necessity for proceeding subsequently on a theory of enforcing the decree rather than the original claim." Pound, *The Progress of the Law, 1918-1919: Equity* (1920) 33 HARV. L. REV. 420, 424.

¹¹ 215 U. S. 1, 12, 54 L. ed. 65 (1909), cited *supra* note 9.

¹² See *Fall v. Eastin*, 215 U. S. 1, 14, 54 L. ed. 65 (1909). "If the defendant is personally served before a court of equity, the court has power to order him to convey foreign land. Such a decree is an effective judgment and determines conclusively his obligation to convey and this obligation remains binding upon the person of the defendant wherever found. Such a decree ought to be entitled to full faith and credit at the situs of the land. Normally the decree will be made to effectuate some antecedent equity, growing out of trust or contract. But the constitutional effect of the decree should be independent of the ground upon which it is made, for a personal decree is equally within the competence of a court which has the defendant within its power, whatever its ground, and however erroneous." Barbour, *The Extraterritorial Effect of the Equitable Decree* (1919) 17 MICH. L. REV. 527, 532; *accord*, Messner, *The Jurisdiction of a Court of Equity Over Persons to Compel the Doing of Acts Outside the Territorial Limits of the State* (1930) 14 MINN. L. REV. 494.

¹³ See WALSH, A TREATISE ON EQUITY (1930) 69.

¹⁴ *Matson v. Matson*, 186 Iowa 607, 173 N. W. 127 (1919); *Burnley v. Stevenson*, 24 Ohio St. 474 (1873) (due to the full faith and credit clause of the Federal Constitution, decrees of a foreign state are valid as a cause of action or ground of defense in the state of the *situs* and are regarded "as conclusive of all the rights and equities which were adjudicated and settled therein, unless it be impeached for fraud"); *accord*, *Redwood Investment Co. v. Exley*, 64 Cal. App. 455, 221 Pac. 973 (1923); *Mallette v. Scheerer*, 164 Wis. 415, 160 N. W. 182 (1916); Note (1912) 25 HARV. L. REV. 653.

¹⁵ 35 S. D. 35, 150 N. W. 893 (1914).

¹⁶ 110 U. S. 151, 28 L. ed. 101 (1884).

"Of course a court cannot pronounce a judgment or decree, that will be binding on the person of the non-resident defendant, or that can have

Mortgages

The law applicable to foreign mortgage decrees is well-settled.¹⁷ A foreign decree of foreclosure alone cannot bind the property situated in the state where enforcement is sought.¹⁸ As Walsh clearly states, "Such a decree undoubtedly would not be recognized or enforced by the courts of the *situs* anywhere today, as it is obvious that the action is really *in rem*, although *in personam* as a matter of mere form. Of course the court could compel the defendant to execute an instrument releasing or conveying his equity to the mortgagee, which would be valid and effective anywhere, but the mere decree would have no effect on the land by action in the courts of the *situs*."¹⁹ Courts have held that this compulsory transfer of the title must be made by the mortgagor or his agent in order to be effective in the courts of the *situs*.²⁰ Obviously, such a decree operates *in personam* and there must be a proper jurisdiction of the parties in the foreign state.²¹ But the foreign decree may be considered *res judicata* of the facts where there was no compulsory transfer by the mortgagor if

any force or effect whatever beyond the territorial jurisdiction of the court, upon other than personal service of process."

¹⁷ CHAFEE, SIMPSON AND MALONEY, *CASES ON EQUITY* (1939) 107.

¹⁸ "The courts of our state will not recognize the rights of courts in other states to affect directly the title to real estate in the former." *Farmers' Loan & Trust Co. v. Postal Tel. Co. et al.*, 55 Conn. 334, 11 Atl. 184, 185 (1887). See *Lynde v. Columbus, C. & I. C. Ry. et al.*, 57 Fed. 993 (1893); *The Eaton and Hamilton R. R. v. Hunt et al.*, 20 Ind. 457 (1863); *Lindley v. O'Reilly*, 50 N. J. L. 636, 15 Atl. 379 (1888); *Pittsburgh & St. L. R. Co.'s Appeal*, 4 Atl. 385 (Pa. 1886).

¹⁹ See WALSH, *A TREATISE ON EQUITY* (1930) 77, n.20.

²⁰ "Where, however, it is sought by the decree to effect a transfer of the title to land lying within another jurisdiction, by directing its sale by a master, who is not clothed with the title, the decree in such case operates upon the thing, and does not divest the title of the owner; the master being, as we have seen, a mere representative of the court, not under the control of either party, nor the agent of either to make the sale." *Guarantee Trust & Safe-Deposit Co. v. Delta & Pine-Land Co. et al.*, 104 Fed. 5, 10 (1900). See *Farmers' Loan & Trust Co. v. Postal Tel. Co. et al.*, 55 Conn. 334, 11 Atl. 184, 185 (1887); *Union Trust Co. v. Olmsted*, 102 N. Y. 729, 7 N. E. 872 (1886); *Mead v. Brockner*, 82 App. Div. 480, 81 N. Y. Supp. 594 (2d Dep't 1903); *People v. American Loan & T. Co.*, 62 Hun 622, 17 N. Y. Supp. 76 (1891); cf. *Muller v. Dows*, 94 U. S. 444 (1876). But cf. *Eaton v. McCall*, 86 Me. 346, 29 Atl. 1103 (1894); *Richard v. Boyd*, 124 Mich. 396, 83 N. W. 106 (1900); *Hammond v. Wall*, 51 Utah 464, 171 Pac. 148 (1918); *Widmann v. Hammock*, 110 Wash. 77, 187 Pac. 1091 (1920).

²¹ "It is here undoubtedly a recognized doctrine that a court of equity, sitting in a State and having jurisdiction of the person, may decree a conveyance by him of land in another State, and may enforce the decree by process against the defendant." *Muller v. Dows*, 94 U. S. 444, 449 (1876); see *Guarantee Trust & Safe-Deposit Co. v. Delta & Pine-Land Co. et al.*, 104 Fed. 5, 10 (C. C. A. 5th, 1900); *Lamkin v. Lovell*, 176 Ala. 334, 58 So. 258 (1912); *Ft. Wayne Trust Co. v. Sihler*, 34 Ind. App. 147, 72 N. E. 494 (1904); *Kirdahi v. Basha*, 36 Misc. 715, 74 N. Y. Supp. 383 (1902); *Smith v. Fletcher*, 102 Wash. 218, 173 Pac. 19 (1908). *Contra*: *Union Nat. Bank v. State Nat. Bank*, 155 Mo. 95, 55 S. W. 989 (1900).

there was jurisdiction over the parties.²² The rule as to chattel mortgages is firmly established by *Hall v. Milligan*, wherein it is stated that a chattel mortgage is a transitory cause of action within the jurisdiction of the court of any state, "when the defendant has been locally found and served, although both parties are at the time domiciliary residents of the foreign state" and the chattel is not situated in the courts of the state entering the decree.²³

Money Decrees

As for foreign money decrees and receivership, the law needs scant discussion due to its unquestionable certainty. *McKim v. Odom* renders a concise statement of the law applicable to money decrees. "If such a decree be conclusive between the parties, in the state where it was rendered, if the court had jurisdiction, the parties were heard, and nothing of irregularity or fraud appears, or is even suggested to vitiate the proceedings, it is not easy to perceive why a decree emanating from the highest tribunal in the state is not entitled to as much respect and consideration as a judgment of a subordinate court of law."²⁴ The decree is entitled to full faith and credit as conclusive proof of the amount due.²⁵ But, in order to effect execution in the state where enforcement is sought, it must be made a judgment in that state.²⁶ In order for the full faith and credit clause to operate towards recognition of the foreign decree, there must be jurisdiction over the parties in the state where it was rendered.²⁷

Receiverships

A receiver is considered an officer of the court appointing him and his powers are coextensive with those of the court making the

²² *Belmont v. Cornen*, 48 Conn. 338 (1880); *Overlander v. Overlander et al.*, 125 Kan. 386, 265 Pac. 46 (1928); *Clark v. Eltinge*, 38 Wash. 376, 80 Pac. 556 (1905); *Frank v. Snow*, 6 Wyo. 42, 42 Pac. 484 (1895).

²³ 221 Ala. 233, 128 So. 438, 439 (1930).

²⁴ 12 Me. 94 (1835). As stated also in *Pennington v. Gibson*, 16 How. 65 (U. S. 1853), "We lay it down, therefore, as the general rule, that in every instance in which an action of debt can be maintained upon a judgment at law for a sum of money awarded by such judgment, the like action can be maintained upon a decree in equity which is for an ascertained and specific amount . . ." See *Post v. Neafie*, 3 Caines 22 (N. Y. 1805).

²⁵ See *Sistare v. Sistare*, 218 U. S. 1 (1910); *Smith v. Cowell*, 41 Colo. 178, 92 Pac. 20 (1907); *Harrington v. Harrington*, 154 Mass. 517, 28 N. E. 903 (1891); cf. *Du Bois v. Seymour*, 152 Fed. 600 (C. C. A. 3d, 1907). See *Fauntleroy v. Lum*, 210 U. S. 230 (1908) (Mississippi was compelled to recognize a Missouri money judgment although it was granted on a gambling debt, an illegal and void contract in Mississippi).

²⁶ *Bennett v. Bennett*, 63 N. J. Eq. 306, 49 Atl. 501 (1901).

²⁷ See *Michigan Trust Co. v. Ferry*, 228 U. S. 346 (1913). As for foreign alimony decrees, see CHAFEE, SIMPSON AND MALONEY, CASES ON EQUITY (1939) 89.

appointment.²⁸ He is not entitled to recognition in the courts of other states under the full faith and credit clause of the Federal Constitution, but may be so recognized as a matter of comity, provided it does not contravene the public policy of the state where recognition is sought, nor operate to the injury of its citizens.²⁹ Such a receiver has no enforceable right to property in another state on the basis of his appointment alone,³⁰ but by principles of comity, he may be permitted to acquire jurisdiction over the property, subject to the rights of domestic creditors and to the public policy of the state of the forum.³¹

Divorces

The issues involved in other foreign equity decrees are present in the problem of the extraterritorial validity of foreign divorces. To exhaust all these phases of the subject is not within the purview of this article. But due to the decision of the Supreme Court in *Williams v. North Carolina*, the applicability of the full faith and credit clause to divorces has assumed importance as a controversial issue. The *Williams* case involves four parties: *A* married to *B*; *C* married to *D*. The two couples were married and domiciled in North Carolina until May, 1940, when *A* and *D* went to Reno and procured divorces from their respective spouses after establishing a six-weeks

²⁸ "A receiver is an officer of the court that appoints him. His power does not extend beyond that of the court which gives him his official character." *Choctaw Coal & Mining Co. et al. v. Williams-Echols Dry Goods Co.*, 75 Ark. 365, 87 S. W. 632 (1905). See *Great Western Mining & Manufacturing Co. v. Harris*, 198 U. S. 561 (1905); *Booth v. Clark*, 17 How. 322 (U. S. 1854) (a receiver is not an agent of the plaintiff or the defendant, but of the court); *Chapman v. First Nat. Bank of Seattle et al.*, 37 F. (2d) 105 (S. D. N. Y. 1929); *Hirning v. Hamlin*, 200 Iowa 1322, 206 N. W. 617 (1925); *Oklahoma Sheep, etc., Co. v. Hastings*, 80 Okla. 109, 194 Pac. 223 (1920).

²⁹ See *Mahon v. Ongley Electric Co.*, 156 N. Y. 196, 50 N. E. 805 (1898); *Dyer v. Power*, 60 Hun 583, 14 N. Y. Supp. 873 (1891); *Choctaw Coal & Mining Co. et al. v. Williams-Echols Dry Goods Co.*, 75 Ark. 365, 87 S. W. 632 (1905).

³⁰ "He has no extra-territorial power of official action; none which the court appointing him can confer, with authority to enable him to go into a foreign jurisdiction to take possession of the debtor's property . . ." *Booth v. Clark*, 17 How. 322 (U. S. 1854). See *Abm. S. See & Depew, Inc. v. Fisheries Products Co. et al.*, 9 F. (2d) 235 (C. C. A. 2d, 1925); *Bullock v. Oliver*, 155 Ga. 151, 116 S. E. 293 (1923).

³¹ "A receiver, therefore, appointed in one state, though he has no title to property located in another state simply by virtue of his appointment, may by comity be permitted to take or recover the possession of property in another state, provided no citizen or suitor of the latter state is thereby prejudiced or ignored, and no public policy of the latter state is violated." *Continental Oil Co. v. American Co-Op. Ass'n et al.*, 31 Wyo. 433, 228 Pac. 503 (1924). See *Wheeler et al. v. Badenhausen Co.*, 260 Fed. 991 (E. D. Pa. 1919); *Lewis et al. v. American Naval Stores Co.*, 119 Fed. 391 (E. D. La. 1902); *Mahon v. The Ongley Electric Co.*, 156 N. Y. 196, 50 N. E. 805 (1898); *Seaboard Air Line Ry. v. Burns*, 17 Ga. App. 1, 86 S. E. 270 (1915).

residence as required by Nevada law. *A* and *D* married each other after obtaining the divorces and returned to North Carolina, which state instituted bigamy proceedings against them on the ground that the Nevada divorces were invalid and not entitled to recognition in North Carolina. North Carolina convicted the defendant on the basis of *Haddock v. Haddock*.³² But the Supreme Court, in reversing the North Carolina decision, overruled *Haddock v. Haddock*. In the latter case, the New York court refused to recognize a decree obtained by the husband in Connecticut on the ground that there was no personal service on the defendant wife in New York, nor did she enter an appearance in the divorce proceedings. A further reason for refusing recognition of the Connecticut decree was founded on the fact that the husband had wrongfully left the marital domicile established in New York, and as the court stated, "Where the domicile of matrimony was in a particular state, and the husband abandons his wife and goes into another state, in order to avoid his marital obligations, such other state to which the husband has wrongfully fled does not, in the nature of things, become a new domicile of matrimony, and therefore, is not to be treated as the actual or constructive domicile of the wife; hence the place where the wife was domiciled when so abandoned constitutes her legal domicile until a new domicile be by her elsewhere acquired."³³ In effect, the *Williams* case is not as far-reaching or as innovating as one might suspect by a cursory reading. At least the New York courts have limited it to deciding that a wrongfully absent spouse may establish a *bona fide* domicile in another state than the matrimonial one sufficient to give the foreign state the right to enter a decree entitled to full faith and credit in other states.³⁴ In a leading article on the subject,³⁵ the author expounded the theory that it was entirely unnecessary for the Supreme Court to overrule the *Haddock* case, since there was fraudulent intent in establishing the domicile in Nevada. But an objection to this contention is that the Attorney-General of North Carolina admitted that there was enough evidence to indicate that the defendant in the bigamy action had prob-

³² 201 U. S. 562, 50 L. ed. 867 (1905).

³³ *Id.* at 570.

³⁴ "The policy enumerated in *Lefferts v. Lefferts* (263 N. Y. 131) requires the courts of this state to pass upon the *bona fides* of the residence of divorcees. That policy was not impaired in the *Williams* case, which expressly reserved the question whether the courts of one state might refuse to recognize the findings of the courts of another state as to domicile. All that the majority purported to do in the *Williams* case was to overrule *Haddock v. Haddock* (201 U. S. 562) and to remove from the question of full faith and credit consideration of the subsidiary question whether the person who had removed from the matrimonial domicile had wrongfully done so. The Supreme Court in the *Williams* case did not eliminate domicile as a foundation for jurisdiction." Matter of Brogan, App. Div., 2d Dep't, N. Y. L. J., Feb. 4, 1943. See McCarthy v. McCarthy, Kings County Supreme Court, N. Y. L. J., Feb. 4, 1943; Jiranek v. Jiranek, Westchester Supreme Court, N. Y. L. J., Jan. 28, 1943; Schnabel v. Schnabel, New York County Supreme Court, N. Y. L. J., Feb. 10, 1943.

³⁵ Burns, *Two Nevada Divorces Get Full Faith and Credit* (1943) 29 A. B. A. J. 125 *passim*.

ably been domiciled in Nevada.³⁶ If North Carolina had submitted the question of intent, a contrary finding by the Supreme Court might have been reached.³⁷

Let us assume that the errant husband honestly intended to establish a domicile in Nevada and could legally do so. How can we overcome the objection to the full faith and credit clause applying to the divorce decree when there was merely service by publication on the defendant who had remained in the marital domicile? A divorce action has both *in rem* and *in personam* characteristics.³⁸ In the former, the question of marital domicile is involved and jurisdiction of the *res* becomes the problem. In the latter, there is the question of jurisdiction over the parties. It has been held that where the court of the state granting the divorce does not have jurisdiction over the *res*, in order that the full faith and credit clause apply to the decree, there must be personal service or appearance by the defendant to establish jurisdiction over the nonresident defendant.³⁹ It is true that the court of the state of marital *situs* may recognize a decree involving constructive service on the defendant by principles of comity.⁴⁰ But this has not been held a compulsory obligation.

It seems that the most fault-finding error lies in the admission by the Attorney-General of North Carolina in the *Williams* case that

³⁶ *Williams v. North Carolina*, 317 U. S. 287, 87 L. ed. 189, 63 Sup. Ct. 207, 209 (1942).

³⁷ *Id.* at 210.

³⁸ "The subject of jurisdiction in divorce proceedings is *sui generis*, and partakes of the characteristics both of actions *in personam* and actions *in rem*, more closely resembling the latter than the former." *In re Bennett's Estate*, 135 Misc. 486, 238 N. Y. Supp. 723, 732 (1929).

³⁹ "A divorce decree rendered in a state where the plaintiff in the case is domiciled, but the defendant is not, where the defendant is not personally served with process and does not appear, is not entitled to extraterritorial recognition under the full faith and credit clause of the Constitution of the United States." *Beckwith v. Bailey*, 119 Fla. 316, 161 So. 576, 580 (1935). See *Davis v. Davis*, 305 U. S. 32 (1938); *Maloney v. Maloney*, 22 N. Y. S. (2d) 334 (1924); *Krause v. Krause*, 282 N. Y. 355, 26 N. E. (2d) 290 (1940); *Ackerman v. Ackerman*, 200 N. Y. 72, 93 N. E. 192 (1910); *Olmsted v. Olmsted*, 190 N. Y. 458, 83 N. E. 569 (1908).

"The process of courts run only within the jurisdiction which issued them. They cannot be served without the jurisdiction, and courts of one state cannot acquire jurisdiction over the citizens of another state under statutes which authorize a substituted service . . . as to authorize a judgment *in personam* against the party proceeded against." *Jones v. Jones*, 108 N. Y. 415, 424, 15 N. E. 707 (1888).

⁴⁰ "The constructive service of process pursuant to the laws of the state of Nevada conferred jurisdiction on the courts of that state to dissolve the marriage contract at the instance of the husband, who was then lawfully domiciled within that state, and the decree became valid and binding within that state, and although it is not binding and valid in other states as a matter of right, under the full faith and credit clause of the federal Constitution, still it may be recognized in other states by comity." *Ball v. Cross*, 190 App. Div. 711, 180 N. Y. Supp. 434, 435 (1st Dep't 1920). See *Kraskin v. Kraskin*, 104 F. (2d) 218 (D. C. 1939); *Hubbard v. Hubbard*, 228 N. Y. 81, 126 N. E. 508 (1920); *In re Caltabellotta's Will*, 183 App. Div. 753, 171 N. Y. Supp. 82 (4th Dep't 1918); *Beckwith v. Bailey*, 119 Fla. 316, 161 So. 576 (1935).

there may be sufficient evidence of an established domicile in Nevada by the husband. Whether the Supreme Court should have taken this statement as conclusive proof of established domicile is itself questionable.⁴¹ Certainly, in the case, the least that can be said is that the intent of the husband to establish the Nevada domicile is colorable, if not fraudulent. And previous decisions on this issue establish the law unquestionably to be that the court of the matrimonial *situs* may enter into this question of intent⁴² and if there is fraud therein established, the full faith and credit clause will not apply to decrees so obtained.⁴³ But the full faith and credit clause will compel recognition of the foreign divorce where there was jurisdiction of the parties and the subject matter.⁴⁴ And it is the party who contests the validity of the decree who has the burden of overcoming the presumption of its validity.⁴⁵ It is established even further that in the state of marital domicile, service by publication on the absent spouse in a divorce action there brought will be sufficient to create jurisdiction over the parties if in accordance with the laws of that state.⁴⁶

It is evident that the underlying cause for the attempt on the part of states to limit the applicability of the full faith and credit clause is the desire to maintain their individual sovereignty. The *Williams* case took a step forward in extending the constitutional clause to a number of cases never before encompassed within its mandatory provision. Whether this is the best method of obtaining uniformity in divorce laws is questionable. The Supreme Court itself recognized a strong objection to its decision.⁴⁷ The rebuttal of the Court to the

⁴¹ Burns, *supra* note 35, at 126.

⁴² "It is firmly established that, where the full faith and credit clause is relied upon to compel the enforcement in one state of a decree rendered in another, the facts essential to the jurisdiction of the court granting the decree may be contradicted." *Commonwealth v. Cronhardt*, 127 Pa. Super. 269, 193 Atl. 484, 486 (1937).

⁴³ See *Campbell v. Campbell*, 164 Misc. 647, 1 N. Y. S. (2d) 619 (1937); *Parnham v. Parnham*, 32 Cal. App. (2d) 93, 89 P. (2d) 189 (1939); *Cardinale v. Cardinale*, 68 P. (2d) 351 (Cal. 1937); *Perlman v. Perlman*, 113 N. J. Eq. 3, 165 Atl. 646 (1933); *Feickert v. Feickert*, 98 N. J. Eq. 444, 131 Atl. 576 (1926).

⁴⁴ See *Drummond v. Lynch*, 82 F. (2d) 806 (C. C. A. 5th, 1936); *Hall v. Hall*, 139 App. Div. 120, 123 N. Y. Supp. 1056 (1st Dep't 1910); *Guggenheim v. Wahl*, 138 App. Div. 269, 122 N. Y. Supp. 941 (1st Dep't 1910); *Strauss v. Strauss*, 122 App. Div. 729, 107 N. Y. Supp. 842 (1st Dep't 1907); *Commonwealth v. Cronhardt*, 127 Pa. Super. 269, 193 Atl. 484, 488 (1937).

⁴⁵ "However, the foreign decree, regular on its face is entitled to a presumption of validity, and the burden is upon the party attacking it." *Cardinale v. Cardinale*, 68 P. (2d) 351, 353 (1937). See *Feickert v. Feickert*, 98 N. J. Eq. 444, 451, 131 Atl. 576 (1926).

⁴⁶ "But in order to make a divorce valid even when granted by the courts of the State of the matrimonial domicile, there must be notice to the defendant, either by service of process, or (if the defendant be a non-resident) by such publication or other constructive notice as is required by the law of the State." *Thompson v. Thompson*, 226 U. S. 551, 562 (1913). See *Atherton v. Atherton*, 181 U. S. 155 (1900); *Hammond v. Hammond*, 103 App. Div. 437, 93 N. Y. Supp. 1 (1st Dep't 1905).

⁴⁷ "It is objected, however, that if such divorces must be given full faith

effect that "such an objection goes to the application of the full faith and credit clause to many situations"⁴⁸ assumes doubtful conviction in the face of attack on the ground that marriage and divorce have been the subject of special scrutiny and care by states due to the particular relationships therein involved.

HELEN DANUFF.

THE NEW INTERPRETATION OF RES IPSA LOQUITUR

The phrase *res ipsa loquitur*—the thing speaks for itself—was used for the first time in the English Court of Exchequer in 1863.¹ In the case of *Byrne v. Boadle*² the plaintiff, while walking along a public street, was struck by a barrel of flour falling from a window above. Said Pollock, C. B.: ". . . there are many accidents from which no presumption of negligence can arise." But on the facts the court held the occurrence would afford "*prima facie* evidence of negligence". Thereafter a number of cases under the rule came up in England and Canada.³ The doctrine was adopted and spread in the United States in the beginning of the 19th century, where it expanded in most jurisdictions. The first *res ipsa* case in New York was *Hogan v. Manhattan Ry.*⁴ This rule now plays an important role in the law of torts and evidence.⁵ However, it has been the source of much confusion in the courts as well as in the writings on the subject.⁶

The situation is, as follows: An instrumentality, in the exclusive possession and management of the defendant or his servants, produces harm to the plaintiff. Furthermore, such an accident would not

and credit, a substantial dilution of the sovereignty of other states will be effected, for it is pointed out that under such a rule one state's policy of strict control over the institution of marriage could be thwarted by the decree of a more lax state." *Williams v. North Carolina*, 317 U. S. 287, 87 L. ed. 189, 63 Sup. Ct. 207, 215 (1942).

⁴⁸ *Ibid.*

¹ HARPER, *TORTS* (1937) 182; PROSSER, *TORTS* (1941) 293.

² H. & C. 722, 159 Eng. Rep. 299 (Exch. 1863). See also *Scott v. London and St. Katherine Docks Co.*, 3 H. & C. 596 (Exch. Chamb. 1865), 159 Eng. Rep. 665 (a classic) (Plaintiff, an officer of the Customs, whilst in the discharge of his duty, was passing in front of defendant's warehouse; six bags of sugar fell upon him).

³ 9 WIGMORE, *EVIDENCE* (3d ed. 1940) § 2509.

⁴ 149 N. Y. 23, 43 N. E. 403 (1896) (An iron bar from defendant's structure hurt the plaintiff while driving along defendant's elevated railway). See also *Griffin v. Manice*, 166 N. Y. 188, 59 N. E. 925 (1901) (Passenger rode on elevator and was killed by falling weights).

⁵ WIGMORE, *op. cit. supra* note 3, at 378.

⁶ Heckel and Harper, *Effect of the Doctrine of Res Ipsa Loquitur* (1928) 22 ILL. L. REV. 724; Carpenter, *The Doctrine of Res Ipsa Loquitur* (1934) 1 U. OF CHI. L. REV. 519; Prosser, *The Procedural Effect of Res Ipsa Loquitur* (1936) 20 MINN. L. REV. 241.