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THE EXTRATERRITORIAL DECREE OF DIVORCE

THE paramount importance of the decision of the Supreme Court of the United States in *Williams and Hendrix v. State of North Carolina,* decided on December 21st, 1942, cannot be over-estimated or over-emphasized.[1] It stamped the indicia of legality on *ex parte* migratory divorces predicated upon the domicile of one spouse, coupled with constructive service of process on the other, and compelled their recognition throughout the length and breadth of the several states of the Union.

A new formula has been formulated in place of the old to sustain the jurisdictional facts essential to grant a divorce extra-territorial effect. The establishment of a bona fide domicile by one spouse in a state other than the home state, coupled with constructive service of process, is sufficient to confer jurisdiction on a sister state and compel its recognition by the several states of the Union.

States like New York and Massachusetts will be most seriously affected by this determination. Heretofore, New York, despite the establishment of a *bona fide* domicile by the petitioner in a sister state, refused to recognize a divorce obtained in a sister state by constructive service of process against one of its citizens.[2] This rule no longer prevails.

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[1] Williams and ano. v. The State of North Carolina, 317 U. S. 287, 87 L. ed. 189 (1942).

[2] Kaiser v. Kaiser, 192 App. Div. 40, *aff'd without opinion,* 233 N. Y. 524, 135 N. E. 902 (1922).

The opinion of the Appellate Division, written by Mr. Justice Page, stated:

> "Although it is not valid and binding in other states as a matter of right, under the full faith and credit clause of the Federal Constitution (Art. 4, Sec. 1), it may be recognized in other states by Comity. This State has consistently refused to recognize such a decree as binding upon a party who, at the time of the action in a foreign State, was a citizen of this State, on the ground that it was contrary to our public policy (See cases collected in Berney v. Adriance, 157 A. D. 628, 630), and the right to refuse recognition has been sustained by the United States Supreme Court (Atherton v. Atherton, 181 U. S. 155, Haddock v. Haddock, 201 U. S. 562, Thompson v. Thompson, 226 U. S. 551, 561)."

Percival v. Percival, 106 App. Div. 111, *aff'd without opinion,* 186 N. Y. 587, 79 N. E. 1114 (1906).

The Supreme Court has overruled the New York doctrine devised to protect its citizens against *ex parte* migratory divorces. Under the law, as announced in the *Williams* case, a New York citizen is able to establish a domicile in Reno, secure a divorce there from his stay-at-home spouse, and New York would be constrained to give it full force and effect under and by virtue of the Full Faith and Credit Clause of the United States Constitution.

This decision marks a fundamental and far-reaching change in the conception of the jurisdiction of the Courts of a state to render a decree of divorce which will be entitled to extraterritorial effect under the Full Faith and Credit Clause of the Constitution. Jurisdiction is now predicated upon domicile of one spouse, coupled with constructive service upon the other. The fiction of the matrimonial *res*, which attached itself to the deserted spouse, has been discarded in favor of the simpler domicile doctrine. Fault is no longer an element of jurisdiction. The migratory spouse might be entirely at fault in the matrimonial rift. Nevertheless, this

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The Appellate Division reaffirmed the principles stated in numerous cases: "And as the Courts have said, the policy of this State is enforced for the protection of its own citizens domiciled here, whose status should not be changed by foreign degree . . . but it seems to me that when this principle of State policy is invoked, the party invoking it must bring himself within its protection. I think when he attacks a foreign decree entered against him without personal service on the ground that the foreign court was without jurisdiction he must show that he was a resident of New York State at the time the foreign decree was obtained."

The logic behind this rule, protecting spouses domiciled in this state, rests on strong, practical considerations. It prevents a spouse from even setting up a *bona fide* domicile in another state and there establish grounds, pursuant to its lax laws of divorce, against a resident of this state.

Heller v. Heller, 285 N. Y. 572, 33 N. E. (2d) 247 (1941).

An anomalous situation is presented by the Court of Appeals decision in this case. The New York Court of Appeals, for the first time, applied the doctrine of comity to a sister state decree of divorce obtained against the resident of this state. The defendant wife had secured a divorce by publication in Nevada from her "former husband", a New York resident who did not appear in the action. She had previously obtained from her "former husband" a judgment of separation in the New York courts. Her second husband sued for an annulment on the ground that she had not been legally divorced. The relief was denied. The memorandum opinion in the *Heller* case is so terse that it may be pardonable to quote it verbatim.

"Without deciding whether the plaintiff is estopped from prosecuting the action for annulment, we hold that the validity of the decree of divorce granted in the State of Nevada will be recognized in this State under the rule of comity."

is immaterial to the issue, so long as the petitioner establishes a domicile and complies with one of the statutory grounds for divorce in the sister state. The matrimonial *res* of yesterday has been superseded by the domicile issue of today.[3]

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[3] Beale, *Haddock Revisited* (1926) 39 HARV. L. REV. 417; McClintock, *Fault as an Element of Divorce Jurisdiction* (1928) 36 YALE L. J. 564; Matter of Bingham's Estate, 265 App. Div. 463, 41 N. Y. S. (2d) 180 (1943).

Mr. Justice Lewis, writing for the court, in a unanimous decision, stated:

> "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."

Parenthetically, it is interesting to note that though the Appellate Division in the *Bingham* case, *supra,* denied the validity of a Nevada divorce secured by constructive service of process, it nevertheless held the petitioner estopped from questioning the validity of the illegal Nevada decree of divorce secured by his wife by reason of his remarriage following the divorce.

McCarthy v. McCarthy, 179 Misc. 623, 39 N. Y. S. (2d) 922 (1943). Mr. Justice Garvin, in that case, wrote:

> "This court has had an opportunity of observing the witnesses upon the stand and their demeanor, and has reached the conclusion that plaintiff abandoned defendant without reasonable cause. However, in the light of the prevailing opinion of the Supreme Court of the United States in Williams and ano. v. State of North Carolina, decided December 21, 1942 (N. Y. L. J., December 28, 1942, 87 Law Ed., 189). this abandonment is no longer of any importance upon the issue of domicile in deciding whether or not a valid judgment of divorce was obtained in Nevada."

As recently as October 18, 1943, the Appellate Division, Second Department, in *Gibson v. Gibson,* 44 N. Y. S. (2d) 372, turned the clock backward when it predicated its decision upon the principle of the matrimonial *res.* The court stated in a memorandum opinion:

> "The wife having prevailed in the separation action because of the husband's fault, the matrimonial res remained with the wife in New York and the wrongdoer is disabled from moving the res out of New York so as to give jurisdiction thereof in any other State, in the absence of an appearance by the wife."

The doctrine of the matrimonial *res* was disowned by the same court in an earlier decision, decided soon after the *Williams-Hendrix* case. (Matter of Bingham's Estate, *supra.*)

In each of these cases, in view of the factual situation, an equitable result was obtained, but the principle of the marital *res* is not the sole principle in the legal armory.

On November 24, 1943 the Court of Appeals in the *Matter of Holmes* by a divided court, 4 to 3, held that in the absence of affirmative proof of lack of jurisdiction a divorce secured in a sister state is stamped with a presumption of legality. It held further that a decree of divorce subsequently obtained in New York against the petitioner in the Nevada court was not conclusive evidence of the lack of domicile of the petitioner in his Nevada divorce action in litigation between the petitioner and a person not a party to the divorce. The majority opinion written by Lehman, Ch. J., specifically asserted that it will remain an

From one angle of approach, the *Williams-Hendrix* case is highly commendable. In the instant case, it may be no more than substantial justice to refuse to sustain the conviction of bigamous cohabitation in the State of North Carolina, where one sovereign state of the Union places the imprimatur of divorce on a marital relationship prior to the second marriage. Nevertheless, when the Court of Appeals of New York was faced with the converse of the situation in the *Williams* case it sustained a conviction of bigamy.[4]

The prevailing opinion in the *Williams* case, was predicated on the premise that the petitioner's lawful domicile was in Nevada at the time of the institution of the divorce action. This immediately raises the question as to the forum that would be the final arbiter of the issue of residence versus domicile.

It is unfortunate for the development of the law in this field that this issue is shrouded in doubt and it will take another Supreme Court decision to resolve it. North Carolina conceded and the Supreme Court by-passed this vital issue, which will arise to harrow matrimonial litigants in days to come.

Mr. Justice Jackson, in his dissenting opinion, predicted that as a necessary result of the majority opinion, the final word on the issue of domicile would vest "in the first state to pass on the facts necessary to jurisdiction."

Mr. Justice Douglas, who delivered the majority opinion for the Court, specifically stated, in reference to the effect of the lack of a bona fide domicile:

> We have no occasion to meet that issue now, and we intimate no opinion upon it.

The Court pointedly refused to consider the question of residence as distinguished from domicile, as sufficient to confer jurisdiction on the sister state to grant the divorce. Apparently, residence is insufficient as a basis of jurisdiction,

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open question until the U. S. Supreme Court passes on it whether a finding of domicile by a court of a sister state can be annulled and its decree rendered a nullity in another state court.

[4] People v. Baker, 76 N. Y. 78 (1879).

The non-consenting, non-migratory husband had been divorced by his wife by constructive service of process. He thereafter remarried. The New York courts sustained his conviction for bigamy.

inasmuch as the majority opinion cited with approval its earlier decision in *Bell v. Bell*,[5] which held that where neither spouse was domiciled in the divorcing state, the decree was not entitled to the protection of the Full Faith and Credit Clause.

In the *Williams* case, domicile was established in Nevada by residence, for about six weeks, at the Alamo Auto Court, "an address hardly suggestive of permanence," on the Las Vegas-Los Angeles Road, and despite petitioner's testimony that his residence in Nevada was "indefinite permanent" in character. The New York Courts would have held, as a matter of law, that these facts do not constitute a *bona fide* domicile.[6]

Implicit in the majority and concurring opinions is an attempt to formulate a doctrine which would prevent "the complicated and serious condition" if "one is lawfully divorced and remarried in Nevada and still married to the first spouse in North Carolina." The majority of the Court sought to avoid this anomalous situation and to give uniformity to the law of marriage and divorce, by compelling recognition of divorces granted in one state by all the states of the Union. It is a necessary corollary of this doctrine that the first state to pass on the issue of domicile would have the final and last word on that all-important issue.

The Appellate Division, Second Department, as well as many lower court decisions have refused to apply this corollary and have held that the issues of the *bona fides* of the domicile in the divorcing state was properly before them for

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[5] Bell v. Bell, 181 U. S. 175, 45 L. ed. 804 (1901).

[6] Lefferts v. Lefferts, 228 App. Div. 37, *aff'd*, 263 N. Y. 131, 188 N. E. 279 (1933).

The establishment of domicile is not so facile a task as far as the New York courts are concerned, as has been demonstrated by the *Lefferts* case. In that case, the migratory spouse not only (a) took an apartment of three rooms and kept house for herself and her two children, but (b) sent them to school, and (c) voted in the local election. Nevertheless, this was held inadequate to establish domicile in view of (1) her return to New York within a month after the decree was granted, (2) her statement in an affidavit that she was a resident of New York, two months thereafter. These facts were deemed insufficient by the Appellate Division, as a matter of law, to warrant a finding of domicile and the Court of Appeals refused to reverse this decision as contrary to the weight of evidence.

adjudication.[7] The opinion of the Appellate Division written

[7] Matter of Bingham's Estate, 265 App. Div. (2d) 463, 41 N. Y. S. (2d) 180 (1943); Selkowitz v. Selkowitz, 179 Misc. 608, 40 N. Y. S. (2d) 9 (1943); Jiranek v. Jiranek, 179 Misc. 502, 39 N. Y. S. (2d) 523 (1943); McCarthy v. McCarthy, 179 Misc. 623, 39 N. Y. S. (2d) 922 (1943); McKee v. McKee, 179 Misc. 617, 39 N. Y. S. (2d) 859 (1943); Meyers v. Meyers, 179 Misc. 680, 40 N. Y. S. (2d) 444 (1943); Baker v. Baker, 179 Misc. 1023, 40 N. Y. S. (2d) 445 (1943); Gerard v. Gerard, 179 Misc. 798, 41 N. Y. S. (2d) 77 (1943); Reese v. Reese, 179 Misc. 665, 40 N. Y. S. (2d) 468 (1943); Fondiller v. Fondiller, 179 Misc. 800, 41 N. Y. S. (2d) 124 (1943); Fondiller v. Fondiller, 42 N. Y. S. (2d) 477 (1943); "Standish" v. "Standish", 179 Misc. 564, 40 N. Y. S. (2d) 538 (1943); Buvinger v. Buvinger, 42 N. Y. S. (2d) 848 (1943); Jolby v. Jolby, 42 N. Y. S. (2d) 855 (1943).

The opinion of Mr. Justice McGeehan in *Selkowitz v. Selkowitz* was the first of probably many attempts to graft exceptions to avoid the "unduly harsh" application of the principle of the *Williams-Hendrix* case to the non-consenting, non-migrating spouse.

To the same effect *Jiranek v. Jiranek,* where Mr. Justice Witshief, at Special Term, of the Supreme Court, Westchester County, held that the *Williams-Hendrix* case did not preclude the New York courts from testing the issue of the bona fideness of the domicile acquired by the petitioner in the Nevada divorce action. The reasoning of this case was subsequently followed by the Appellate Division, Second Department, and by practically all of the Justices sitting at Special Term of the Supreme Court.

In the *McKee* case, *supra,* Mr. Justice Koch properly applies the rule of *res adjudicata* as to all decrees of divorce and separation heretofore rendered. This stabilizes the matrimonial status of all litigants whose cases have heretofore been adjudicated and wherein the right to appeal has expired.

In the *Reese* case, *supra,* the opinion of Mr. Justice Hallinan contains an excellent exposition of the issue of domicile vs. residence. It goes further than any other recorded case in holding that the factual situation presented, failed to establish domicile. In that case the defendant secured his divorce in Florida, where he (a) occupied an apartment of two rooms;

(b) set up a business at Ft. Lauderdale, Florida, which he still carried on through an employee though at a loss;

(c) he remarried in Florida and went to Ohio shortly afterwards to resist his wife's claim to certain property;

(d) the defendant testified he intended to make Florida his permanent home and that he left Florida because he had been placed in 1-A by the Local Selective Service Board in Queens, New York;

(e) from Ohio he moved to Greenwich, Connecticut, where he now resides.

An apparently different view was taken by Mr. Justice Steuer in *Fondiller v. Fondiller, supra.* His opinion indicates that the logic of the decision in *Williams v. North Carolina* compels recognition of the divorce decrees of sister states where the decree of the sister state contains a fact finding of domicile. Whether this finding can be attacked and the judgment avoided because the finding of fact was predicated on perjured testimony must be resolved by the law of the state of Nevada. In New York such an attack on the judgment would not be countenanced (Arcuri v. Arcuri, 265 N. Y. 358). The court held that since a Nevada decree was involved in this suit the law of that state on this issue must govern. The *Fondiller* case was subsequently passed upon by Mr. Justice McLaughlin on defendant's motion to dismiss the complaint. The court expressly refused to follow the "persuasive" reasoning of Mr. Justice Steuer, relying on the *Bingham* case as *stare decises* of this case.

In the *"Standish"* case, *supra,* the court found as a fact that domicile in the sister state had been established and this, coupled with constructive service, was held sufficient to require the courts of this state to recognize the Florida decree of divorce.

by Mr. Justice Lewis, pointed out that *Haddock v. Haddock,* 201 U. S. 562, was overruled only in so far as it required consideration of the "subsidiary question whether the person who had removed from the matrimonial domicile had wrongfully done so."

The theory of fault is no longer a factor in divorce jurisdiction. The essential factor is domicile. The establishment of a bona fide domicile by the migratory spouse, coupled with constructive service of process on the non-migratory spouse, is sufficient to confer jurisdiction on the sister state and to compel recognition of its decree of divorce throughout the several states of the Union.

Discussion as to this point concerned itself primarily with fundamental legal concepts, without considering the human realities behind the doctrines. Do the two square with each other? While it may be justice to Mr. Williams and Mrs. Hendrix to obtain their divorces so that they could marry each other, what of the position and condition of Mrs. Williams and the four children of the marriage, and of Mr. Hendrix? These spouses did not enter an appearance in the Nevada actions, nor were they served with process in Nevada. Mr. Hendrix was served by publication in a Las Vegas newspaper, and by mailing a copy of the summons and complaint to his last post office address. Mrs. Williams

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The learned and exhaustive opinion of Mr. Justice Sicher takes issue with Mr. Justice Steuer on the issue as to which forum, the divorce state or the home state, should determine the factum of the bona fideness of the domicile. Mr. Justice Sicher stated:

> "Want of jurisdiction over the person or subject matter is always open to inquiry (Milliken v. Meyer, 311 U. S., 457), notwithstanding the recital of jurisdictional facts in the sister state decree, which may be questioned collaterally also for fraud (Hunt v. Hunt, 72 N. Y., 217; Kerr v. Kerr, 41 N. Y., 472; *cf.* Watters v. Watters, 259 App. Div. 611, 613). . . .
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> "Conceivably, the United States Supreme Court may ultimately determine that the first state's adjudication that the procurer of the divorce decree was a bona fide domiciliary of that state is binding on the courts of the second state, under the theory that 'the full faith and credit clause of the Constitution precludes any inquiry into the merits of the cause of action, the logic or consistency of the decision or the validity of the legal principle on which it was based' (Milliken v. Meyer, *supra,* at p. 462; Fauntleroy v. Lum, 210 U. S., 230)."

In all of the cases cited, domicile, as distinguished from residence, it was held, must be established. The difference of opinion rests in the divergent views respecting the forum that should be the final arbiter of the issue of residence vs. domicile.

was served personally in North Carolina. It requires no argument at all to point out that publication in a local newspaper is no actual notice at all and that mailing to the last known address of the defendant is often a perfunctory gesture. The Supreme Court would have reached the same decision had neither Mrs. Williams nor Mr. Hendrix had actual notice of a divorce until after it was a fait accompli.

Are the issue of marriages to be the children of divorce on the application of one parent in a remote jurisdiction, and under lax divorce laws? [8] It would appear as if the majority of the Supreme Court focused all of its attention on the spouses before the Court, and entirely forgot about the spouses and the children who remained at home.

Small wonder that Mr. Justice Jackson asserted that it was easier and simpler to obtain a judgment of divorce that was entitled to extraterritorial effect than it was to obtain a judgment on a grocer's bill, that would be entitled to the protection of the Full Faith and Credit Clause of the Constitution. In the suit on the grocer's bill, the complainant could not pick out the jurisdiction of his choice for suit, but would be confined to the jurisdiction where the customer resided. The complainant in a divorce suit, however, can pick and choose a remote state of lax divorce laws to bring his action.

In the divorce action, there is good reason to believe that the defendant may not learn of the divorce until after the decree is signed, sealed and delivered. This situation is hardly conceivable in an ordinary commercial action. Assuming even that the defendant in the matrimonial action gains knowledge of the commencement of the suit, and is destitute and without means to travel to another state and defend the action, the law affords no relief. Apparently, spouses, who are being divorced, have no right to be indigent.

Mr. Justice Frankfurter, in his concurring opinion, states that this decision would

[8] In the *Hendrix* case, the extreme mental cruelty sufficient to sustain the divorce, consisted of the following facts: The complainant testified the husband was "moody" and did not speak to her "often." When she spoke to him, he answered, most of the time, with a nod or shake of the head, and "there was nothing cheerful about him at all."

contribute uniformity to the law of marriage and divorce, and that is to enforce respect for the judgment of a state by its sister states.

By compelling North Carolina to grant extraterritorial effect to the judgment of divorce of Nevada, uniformity is served, but is it worth the price? Did not the late lamented Mr. Justice Cardozo teach us that at times we could pay too high a price for uniformity and that the judicial process must not lose sight of the method of sociology in rendering its decision? [9]

Mr. Justice Frankfurter, towards the close of his opinion, further stated:

For all, but a small fraction of the community, the niceties of resolving such conflicts among the laws of the state are, in all likelihood, matters of complete indifference. Our occasional pronouncements upon the requirements upon the Full Faith and Credit Clause doubtless have little effect upon divorces.

This statement is open to serious dispute. This decision of the Court will open the door and pave the way to a flood of divorce litigation in sister states. An avenue has been opened that was heretofore closed. Dissatisfied spouses will not hesitate to jump state lines and terminate an unsatisfactory marital alliance.[10]

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[9] BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS, 98.

"But the truth is that there is no branch where the method is not fruitful. Even when it does not seem to dominate, it is always in reserve. It is the arbiter between other methods, determining in the last analysis the choice of each, weighing their competing claims, setting bounds to their pretensions, balancing and moderating and harmonizing them all. Few rules in our time are so well established that they may not be called upon any day to justify their existence as means adapted to an end. If they do not function, they are diseased. If they are diseased, they must not propagate their kind. Sometimes they are cut out and extirpated altogether. Sometimes they are left with the shadow of continued life but sterilized, truncated, impotent for harm."

[10] There is a line of matrimonial cases represented by *Davis v. Davis*, 279 N. Y. 87, 17 N. E. (2d) 779 (1938) and *Schein v. Schein*, 169 Misc. 608 (1938) that is a blot on our jurisprudence.

In the *Davis* case, the Court of Appeals held that a "husband" is entitled to an annulment of his marriage, when his "wife" had been divorced by publication. And this, despite a child by this marriage. In the *Schein* case, the plaintiff had been previously married to one Williams. Desirous of a divorce from him, she was advised by her present husband, who was incidentally an attorney, to secure a divorce in the State of Illinois. He assured her that the divorce there obtained would be valid in New York. It was held that the

This decision should bring to the fore the urgency of granting to Congress power to legislate in the field of marriage and divorce. Forty-eight sovereign states, with their forty-eight varieties on the theme, are not a salutory condition of affairs. It has created the paradoxical situation of a person being married in one state, divorced in another and in a dilemma in a third.

The Full Faith and Credit Clause *per se* is the heart of the Constitution. On the anvil of this clause the several states are forged into a nation. The fault is not with the clause, or its interpretation, but with the basic jurisdictional procedural standards that have been formulated by the courts, applicable solely to the dissolution of marriages. In matrimonial litigation exclusively, the Full Faith and Credit Clause has been circumscribed by procedural requirements that render the clause inadvertently into an instrument of inequity.

Mr. Justice Frankfurter, nevertheless, illuminated the way to a solution of the matrimonial labyrinth. Since 1884, he explained, numerous attempts were made to amend the Constitution to confer authority on Congress to enact legis-

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Illinois decree of divorce, secured by constructive service of process, was absolutely void and, therefore, the plaintiff could not have legally remarried.

An equitable result is attained in these cases if a *bona fide* domicile is established in the divorcing state but this was of rare occurrence.

Mr. Justice Collins, conscious of the injustice that was legally being perpetrated on the wife, stated:

> "And were this a matter of chivalry, I would be disposed to censure the defendant's conduct in asserting the invalidity of the Illinois divorce after his marriage to the plaintiff with knowledge of the circumstances attending the divorce and after living with her as husband and wife for about seven years. But the concern here is with the law and not with the proper conduct that befits a gentleman. The case is controlled by rules of law, not those of knighthood."

The Court took further occasion to declare:

> "This result, to be sure, permits the defendant to profit by his own wrong. Unfortunately, however, the law as presently fixed forbids a contrary holding."

The challenge of the court in this case should not go unheeded. When law and justice travel in opposite paths, and the judges themselves are cognizant of the wrong that is being committed in the name of the law, it is high time to mould the law into the grooves of justice.

Slater v. Kenny, 265 App. Div. 963, 38 N. Y. S. (2d) 595 (1942); Heusner v. Heusner, 42 N. Y. S. (2d) 850 (1943). *Contra* and in accord with the equities of the situation: Honig v. Honig, 43 N. Y. S. (2d) 219 (1943), following Kaufman v. Kaufman, 177 App. Div. 162, 163 N. Y. Supp. 566 (1917) and Oldham v. Oldham, 174 Misc. 22, 19 N. Y. S. (2d) 667 (1940).

lation to govern the entire field of marriage and divorce in the United States.

The need for securing national uniformity in dealing with divorce, either through Constitutional amendment or by some other means, has long been the concern of the Conference of Governors . . .

The urgency, now that the floodgates of interstate ex parte migratory divorce have been thrown open, is imminent. In the absence of "other means," a Constitutional amendment must be passed to grant to Congress exclusive jurisdiction to govern and control the entire field of marriage and divorce.

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