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John S. Strahorn Jr.

G. Kenneth Reiblich

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Recommended Citation
John S. Strahorn Jr., & G. K. Reiblich, The Haddock Case Overruled - the Future of Interstate Divorce, 7 Md. L. Rev. 29 (1942)
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THE HADDOCK CASE OVERRULED—THE FUTURE OF INTERSTATE DIVORCE.

By JOHN S. STRAHRON, JR.,* and G. KENNETH REIBLICH**

In Williams and Hendrix v. North Carolina,¹ the opinion in which was handed down on December 21, 1942, the Supreme Court of the United States overruled the famous case of Haddock v. Haddock² and thereby took an important step toward clarifying the problem of when divorces granted by an American state are entitled to full faith and credit in other American states. As a result of the recent decision, a larger number of (although still not all) divorces granted by sister states must now be given recognition by all American states. Furthermore, the case suggests important problems still needful of future solution in the field of interstate divorce.³

I.

THE HOLDING IN THE WILLIAMS AND HENDRIX CASE

In the principal case, Mr. Williams, the first named appellant, had lived in North Carolina for twenty-four years with his first wife. Mrs. Hendrix, the other appel-

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* A.B., 1922, St. John's College; LL.B., 1925, Washington and Lee University; S.J.D., 1926, Harvard Law School; J.S.D., 1931, Yale Law School. Professor of Law, University of Maryland School of Law. Faculty Editor of the Review.

** A.B., 1925, Ph.D., 1928, Johns Hopkins University; J.D., 1929, New York University; LL.M., 1937, Columbia University. Professor of Law, University of Maryland School of Law. Assistant Editor of the Review.

¹ 63 S. Ct. 207 (U. S. 1942); Baltimore Daily Record, January 15, 1943.

² 201 U. S. 562 (1906). For previous comment on the problem of the Haddock case by one of the present writers, see Strahorn, A Rationale of the Haddock Case (1938) 32 Ill. L. Rev. 796-815; and Strahorn, The Supreme Court Revisits Haddock (1938) 33 Ill. L. Rev. 412-423.

³ The phrase "interstate divorce" subsumes three separate problems: (A) when must a sister state, as a matter of full faith and credit under the United States Constitution, grant recognition to a divorce granted by another American state; (B) when may a sister state voluntarily grant comity to a divorce granted by another American state, without being reversed by the Supreme Court under due process of law, and what are and should be the local state rules determining when such comity will be exercised; and (C) when may, will, or should an American state grant a divorce in a case having contacts with other states than itself.
lant, had lived in North Carolina for twenty years with her first husband. In May of 1940 they left their first spouses and departed for Nevada where, after complying with the Nevada requirement of six weeks' residence, each sued for and was granted a divorce from his or her spouse, without either of the respective divorce case defendants either entering an appearance or being personally served in Nevada, although actual notice reached both defendants of the pendency of the cases.

Shortly after being granted the respective divorces, and while still in Nevada, the appellants married each other. They then returned to North Carolina, where they set up housekeeping as husband and wife. They were later indicted in North Carolina for "bigamous cohabitation" (not bigamy), were convicted, and the conviction was affirmed by the Supreme Court of North Carolina. The Supreme Court of the United States granted certiorari and then reversed. Mr. Justice Douglas delivered the opinion of the Court, concurred in by Mr. Chief Justice Stone and Justices Roberts, Black, and Reed. Mr. Justice Frankfurter filed a concurring opinion. There were dissents by Justices Murphy and Jackson, the former by brief opinion, the latter by extended one.

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4 See 63 S. Ct. 207, 209, n. 2, to the effect that Mrs. Hendrix's husband had agreed to appear, but never did enter a formal appearance, and the trial court herein charged that this was not equivalent to an actual appearance.

5 See 63 S. Ct. 207, 209, to the effect that notice was given Hendrix through newspaper advertisement and mail to his last address which, as is obvious from the preceding footnote herein, must have reached him. Mrs. Williams was served with a copy of the summons and complaint in North Carolina by a North Carolina sheriff.

6 North Carolina could not have prosecuted for bigamy, as that crime may be prosecuted only in the jurisdiction where the bigamous ceremony is performed. Rather the prosecution was under N. C. Code (1939) Sec. 4342 which punished cohabitation in North Carolina under a bigamous marriage performed elsewhere. Maryland has no such statutory crime of bigamous cohabitation; although the same result might be reached by prosecuting for the statutory crime of adultery, Md. Code (1939) Art. 27, Sec. 5; or for the common law crime of open and notorious illicit cohabitation, on which see Clark and Marshall, Law of Crimes (4th ed. 1940) Sec. 465.

7 220 N. C. 445, 17 S. E. (2d) 769 (1941).

8 315 U. S. 795 (1942).

9 At the time of the argument and decision there was one vacancy on the Court, inasmuch as a successor to Mr. Justice Byrnes had not yet been appointed. The vote in the case was thus 6—2.
At the trial the State pressed its case for conviction, on a claim of the invalidity in North Carolina of the Nevada divorces, on two alternative bases: (1) that even if the plaintiffs in the Nevada cases had acquired valid Nevada domiciles, yet for lack of either personal service on defendants in Nevada or their entering appearances in the Nevada litigation, those divorces were not entitled to recognition in North Carolina; and (2) that the respective Nevada plaintiffs had never acquired valid Nevada domiciles anyhow. The trial court charged on both points, and the jury rendered a general verdict of guilty, judgment on which was affirmed by the Supreme Court of the State, although its opinion principally stressed the law concerning point (1), as to whether another state can refuse recognition to a sister state divorce granted at plaintiff's bona fide separate domicil. The North Carolina court relied on the Haddock case in affirming.

On certiorari to the Supreme Court of the United States, North Carolina apparently conceded sufficient evidence in the record to establish the plaintiffs' domiciles in Nevada, and did not seek affirmance for lack thereof, but, rather, chose to rely on the Haddock case as establishing a right to deny recognition to the single domicil divorces of Nevada. The opinion of the Supreme Court accepted that as the proper basis of determination, and proceeded to dispose of the case as if both the Nevada plaintiffs had

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10 63 S. Ct. 207, 209: "The State contended that since neither of the defendants in the Nevada actions was served in Nevada nor entered an appearance there, the Nevada decrees would not be recognized as valid in North Carolina. On this issue the court charged the jury in substance that a Nevada divorce decree based on substituted service where the defendant made no appearance would not be recognized in North Carolina under the rule of Pridgen v. Pridgen, 203 N. C. 533, 166 S. E. 591. The State further contended that petitioners went to Nevada not to establish a bona fide residence but solely for the purpose of taking advantage of the laws of that state to obtain a divorce through fraud upon that court. On that issue the court charged the jury that under the rule of State v. Herron, 175 N. C. 754, 94 S. E. 698, the defendants had the burden of satisfying the jury, but not beyond a reasonable doubt, of the bona fides of their residence in Nevada for the required time."

11 220 N. C. 445, 17 S. E. (2d) 769, 778 (1941).

12 63 S. Ct. 207, 209-10: "But there are two reasons why we do not reach that issue in this case. In the first place, North Carolina does not seek to sustain the judgment below on that ground. Moreover it admits that there probably is enough evidence in the record to require that petitioners be considered 'to have been actually domiciled in Nevada.'"
acquired valid Nevada domiciles. The Court fortified this approach by calling attention to the fact that the rule of the *Stromberg* case required them to reverse if either of the alternative grounds for the conviction's propriety was unconstitutional. For this reason, also, the Court had the opportunity (or created it) to face squarely the issue of whether to perpetuate the *Haddock* case rule as to when separate domicil divorces are entitled to full faith and credit.

It is clear that the effect of the majority opinion specifically overruling the *Haddock* case is now to entitle more sister state divorces than formerly to full faith and credit (compulsory recognition) by all other American states. But it should be made equally clear (erroneous newspaper comment to the contrary) that the principal case does not entitle all sister state divorces to full faith and credit. In order to understand the implications of the overruling of the *Haddock* case, it is necessary to state the Supreme Court law of American interstate divorce as it previously stood.

18 63 S. Ct. 207, 210: “However it might be resolved in another proceeding, we cannot evade the constitutional issue in this case on the easy assumption that petitioners' domicil in Nevada was a sham and a fraud. Rather we must treat the present case for the purpose of the limited issue before us precisely the same as if petitioners had resided in Nevada for a term of years and had long ago acquired a permanent abode there. In other words, we would reach the question whether North Carolina could refuse to recognize the Nevada decrees because in its view and contrary to the findings of the Nevada court petitioners had no actual, bona fide domicil in Nevada, if and only if we concluded that Haddock v. Haddock was correctly decided. But we do not think it was.”

14 *Stromberg* v. California, 283 U. S. 359 (1931).

15 63 S. Ct. 207, 216: “Haddock v. Haddock is overruled.”

16 The press dispatches on the day the opinion was handed down all gave to understand that the Supreme Court was compelling full faith and credit for all sister state divorces, regardless of domicil. *Time* Magazine for January 4, 1943 devoted half a column to the same thesis under the heading: “Divorce Wins a Verdict.” A syndicated columnist in a Washington newspaper achieved the remarkable juridical feat of ascribing that effect to the Court's opinion from the fact that the majority opinion did not dispute Mr. Justice Jackson's dissenting statement that the case substituted the law of Nevada for the divorce law of all other states. The Baltimore Daily Record, January 4, 1943, carried a more cautious article with a Washington date-line which was written after sober reflection of the actual impact of the case, and ended with the statement: “...persons who go to other states to obtain divorces, perhaps collusively and with no intention of establishing a domicile there, had best not place too much confidence in Williams, et al., v. State of North Carolina.”
II.

THE PREVIOUS STATE OF THE LAW

Prior to the principal case, divorces granted in a state where neither spouse had a bona fide domicil were not entitled to full faith and credit in other states (nor even local validity nor voluntary foreign recognition by comity). Thus, as was done in the Maryland Walker case, other states could allow collateral attack on the jurisdictional fact of domicile. To be sure, the use of the doctrines of estoppel and res adjudicata, later to be dealt with more extensively herein, caused certain colorable domicil divorces to be given effect they were not otherwise entitled to.

Then, too, prior to the principal case, it was most clear that if both spouses were domiciled in the granting state, other states had to give the divorce full faith and credit whether they wished to or not, whatsoever their own policies about divorce. This followed from a part of the Haddock case not now repudiated, as well as from other authority.

The real prior difficulty concerned divorces granted where one, but not both, of the spouses had a valid domicil in the granting state. In this area the Haddock case struck a compromise, now repudiated by the principal case. Prior to the recent case the following enumerated kinds of separate domicil divorces had to be given full faith and credit:

17 See text, infra, circa n. 84, et seq. for speculation concerning the possible ultimate recognition that may yet be given to the local validity (perhaps comity recognition elsewhere) of divorces granted on the basis of residence without domicil. The due process invalidity of no-domicil divorces, even for local purposes, has long been taken for granted and can be said to rest on the following quotation from a part of the Haddock case not repudiated in the principal case: "... as distinguished from legal domicil, mere residence within a particular state of the plaintiff in a divorce cause brought in a court of such state is not sufficient to confer jurisdiction upon such court to dissolve the marriage relation existing between the plaintiff and a non-resident defendant." Haddock v. Haddock, 201 U. S. 562, 583 (1906). Supporting language is found in Bell v. Bell, 181 U. S. 175, 177 (1901); and Streitwolf v. Streitwolf, 181 U. S. 179, 183 (1901).


19 Infra, circa n. 97 et seq.

(1) where the defendant was the one domiciled in the granting state; (2) where the plaintiff was there domiciled, and the state was the "last marital domicil" of the spouses; (3) where the plaintiff was there domiciled, and the defendant was personally served with process within the granting state; and (4) where the plaintiff was there domiciled, and the defendant entered an appearance in the case. The further contention was made by Professor Beale and the Restatement of Conflict of Laws that two additional factors should also compel the recognition of separate domicil divorces, i.e., defendant's having consented to plaintiff's having a separate home; and defendant's misconduct justifying such a separate home. The Davis case, decided by the Supreme Court four years before the principal one, hinted at the recognition of the Beale-Restatement factors as compelling the recognition of more (not all) separate domicil divorces. Beyond these, the remaining group of divorces obtained by domiciled plaintiffs against non-domiciled defendants were locally valid where rendered and could be granted comity in other states, but the other states were not required to grant full faith and credit to them, against their wishes.

III.

THE EFFECT OF THE WILLIAMS AND HENDRIX CASE

What the principal case has done, and all that it has done, is to reject the latter idea and entitle such last-named separate domicil divorces also to the same full faith and credit that the four classes enumerated above formerly received under the Haddock case. The North Carolina

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21 Atherton v. Atherton, 181 U. S. 155 (1901) had, prior to the Haddock case, compelled full faith and credit for single domicil divorces if the granting state was the "last marital domicil" of the spouses, i.e., if the defendant had lived there with the plaintiff prior to the separation and defendant's change of domicil.
22 Beale, Haddock Revisited (1926) 39 Harv. L. Rev. 417; and Beale, Treatise of the Conflict of Laws (1935) Secs. 113.9, 113.10, 113.11.
23 Restatement, Conflict of Laws (1934) Sec. 113.
24 Davis v. Davis, 305 U. S. 32 (1938); commented on by one of the present writers, with reference to the Beale-Restatement factors, in Strahorn, The Supreme Court Revisits Haddock (1938) 33 Ill. L. Rev. 412, 416-17.
Court, in affirming the conviction principally on that point, was merely following the then extant option granted other States of voluntarily choosing whether to recognize the residual separate domicil divorces. The Supreme Court of the United States, in reversing on that point alone, has squarely repudiated the Haddock option in favor of the new rule that all separate domicil divorces, not merely some, shall receive the same treatment, that of compulsory recognition under the full faith and credit clause. No longer will one and the same single domicil divorce be valid where granted and possibly in a few other states, and yet invalid in the rest, because of differing factors involved in connection with the other states’ exercising the Haddock option.

It is still open, however, to other states to re-investigate the validity of the domicil in the granting state relied on as the basis for jurisdiction. The principal case makes that clear by its emphasis on the point that there was no need to “meet the issue” of the Bell case, which allowed other states to re-open the question of jurisdictional domicil and to reject the divorce if neither spouse was domiciled there. The Walker case, the only clear cut Maryland Court of Appeals case on foreign divorce, did merely that. It rejected a Nevada divorce upon our own finding that neither spouse was domiciled there.

For that matter, depending on North Carolina criminal procedure, the appellants in the principal case may yet be tried again for bigamous cohabitation on the sole remaining basis of their never having acquired valid Nevada domiciles, and a jury conviction may well stand up, unless the Bell case is, later, itself to be overruled. It must be remembered that, in the principal case, the Supreme Court merely reversed for error in one of the two possible alter-

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26 Bell v. Bell, 181 U. S. 175 (1901), wherein the Court had ruled that other states did not have to give full faith and credit to a divorce granted on substituted service where neither spouse had a valid domicil in the granting state. Equally important is Andrews v. Andrews, 188 U. S. 14 (1903), where the Court also held that full faith and credit did not have to be given where there was domicil of neither, even if the defendant entered an appearance in the divorce case.
native grounds for the conviction. A new trial under the remaining ground would seem proper.\textsuperscript{28}

The beneficent effect of the overthrow of the \textit{Haddock} case will be a simplification of issues in the field of interstate divorce. In the normal case, the issues will be simply two: (1) was there valid domicil of at least one party in the granting state; (2) was procedural due process satisfied, or, as usually presented under this point, was there adequate notice?

There will be eliminated from significance such confusing factors, once important under the \textit{Haddock} case, as whether one or both were domiciled in the granting state, who was at fault in the separation, "last marital domicil," personal service within the granting state,\textsuperscript{29} what constitutes an appearance and whether one was entered,\textsuperscript{30} whether and under what circumstances to grant comity,\textsuperscript{31} and, to a large extent, the theoretical problem, is divorce in rem or in personam.\textsuperscript{32}

In the Maryland scene there will never have to be answered the as yet unsolved question, shall we grant comity (and, if so, under what circumstances) to those separate domicil divorces not entitled to anything more than comity under the \textit{Haddock} case?\textsuperscript{33} There can be forgotten the confusing law of certain other states (par-
particularly in New York) as to when that comity should be exercised. We and other states must now undergo the compulsion of granting full faith and credit to all those divorces formerly entitled at best to comity, and the separate class of divorces entitled to comity but not full faith and credit vanishes.

We shall be spared further speculation as to whether Professor Beale and the Restatement of Conflict of Laws were right in their contentions that the Haddock case impliedly stood for two further factors as compelling full faith and credit beyond the three it specifically recognized. To be sure, the Beale-Restatement views, as indicated in the majority opinion in the principal case, may be significant under local law in states which still choose to make those factors jurisdictional for the granting of divorces in their courts.

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5 Beale, Haddock Revisited (1926) 39 Harv. L. Rev. 417; and Beale, Treatise on the Conflict of Laws (1935) Secs. 113.9, 113.10, 113.11.

6 Restatement, Conflict of Laws (1934) Sec. 113.

7 Davis v. Davis, 305 U. S. 32 (1938) may or may not have recognized the Beale-Restatement factors as compelling full faith and credit, but that question is now moot, inasmuch as the principal case compels full faith and credit for cases coming under them, and beyond them. For treatment of the Beale-Restatement factors, see Strahorn, A Rationale of the Haddock Case (1938) 32 Ill. L. Rev. 706, 801-808; and Strahorn, The Supreme Court Revisits Haddock (1938) 33 Ill. L. Rev. 412, 416-417.

8 63 S. Ct. 207, 214.

9 At this time there will be set out a brief survey of the Maryland law as to when the Maryland courts will entertain divorce suits when there are interstate complications. Under Md. Code (1939) Art. 16, Sec. 38, as amended (on another point, concerning notice, treated herein, infra, circa n. 66, et seq.) Md. Laws 1941, C. 516, residence either of plaintiff or of defendant is sufficient to confer jurisdiction, and the suit may be filed in the county either where the plaintiff or the defendant resides.

If the residence in the State is of sufficient duration, no particular period of residence in the given county is required. For other grounds than insanity, if the ground occur in Maryland, no particular period of residence in the state is required, and only bona fide domicil is requisite, and it makes no difference that both the spouses were non-residents when the
IV.

RELATION TO OTHER RECENT REVERSALS OF DOCTRINE

One could well analogize this important reversal by the recently re-constituted Supreme Court to two other equally epochal recent reversals, viz., the overthrow of Swift v. Tyson,\(^\text{40}\) in Erie Railroad v. Tompkins,\(^\text{41}\) and the overthrow of inter-governmental tax immunity by the Graves case\(^\text{42}\) All three have in common that they make for certainty of equal determination of the consequences
ground occurred in Maryland, so long as one of them becomes a resident (however briefly) after the ground occurred in Maryland, Adams v. Adams, 101 Md. 506, 61 A. 628 (1905). For other grounds than insanity, if the ground occur outside of Maryland, wheresoever the spouses lived at the time, residence for one year prior to filing suit on the part of at least one spouse is required. Md. Code (1939) Art. 16, Sec. 43, as amended Md. Laws 1941, Ch. 90. If the ground be insanity, a special requirement of two years residence on the part of one of the spouses prior to filing suit is required under Md. Code (1939) Art. 16, Sec. 41A, as added Md. Laws 1941, Ch. 497, wheresoever the insanity occurred.

The word "residence" in the Maryland divorce jurisdiction statutes has been interpreted to mean domicil, so that in effect the requirement of a certain duration of residence is superadded to the basic requirement of domicil to obviate pretense of domicil in order to take advantage of our divorce laws in situations where that is thought likely. Harrison v. Harrison, 117 Md. 607, 84 A. 57 (1912) applied the requirement of domicil with reference to the inter-County problem; and Willingham v. Willingham, 162 Md. 539, 160 A. 280 (1932) found that the plaintiff had not accomplished a change of domicil from the District of Columbia to Maryland. For prior treatment of the problem of domicil in the Review, with reference to other than divorce problems, see (1939) 4 Md. L. Rev. 98; and (1941) 5 Md. L. Rev. 218.

Under Md. Code (1939) Art. 16, Sec. 39, residence on a Federal reservation in a Maryland county is regarded as residence in the county for divorce purposes. This statute changed the contrary rule of Lowe v. Lowe, 150 Md. 592, 133 A. 729 (1926).

The above rules apply to both a vinculo and a mensa divorce. On the other hand, the separate procedure for alimony without divorce (obtainable on the ground for either type of divorce), has different jurisdictional detail. Under Keerl v. Keerl, 34 Md. 21 (1871), domicil of at least one of the spouses is requisite, and the mere presence of the husband's property, without such domicil, is insufficient. If the defendant is amenable to personal service therein, the suit must be brought in the Maryland county where he resides or has his principal place of business, under Woodcock v. Woodcock, 169 Md. 40, 179 A. S26 (1935), noted (1936) 1 Md. L. Rev. 81; and Scarborough v. Scarborough, 170 Md. 222, 183 A. 558 (1936). Personal service must be had on the defendant husband in such a proceeding, unless his local property is attached, although, for both types of divorce, non-residents or residents against whom two non ests are returned may be proceeded against by substituted service discussed herein infra, circa n. 66, et seq.

\(^{40}\) Swift v. Tyson, 16 Pet. 1 (U. S. 1842).
\(^{41}\) Erie Railroad Co. v. Tompkins, 304 U. S. 64 (1938).
\(^{42}\) Graves v. People of State of New York, ex rel O'Keefe, 306 U. S. 466 (1939), noted (1939) 4 Md. L. Rev. 77.
of the same or exactly similar factual situations. Under the principal case, divorces are equally good or bad everywhere. Under *Erie Railroad v. Tompkins*, litigation about a single situation will be determined by the same case-law rules whether brought in State or Federal court. Under the *Graves* case, a public jobholder and a private employee who draw the same nominal salary will have the same private economy, because now they have exactly the same "income after taxes", which was not so in the days of inter-governmental tax immunity. All of this is well.

It is also interesting to note that there is a further similarity between the principal case and the *Tompkins* case in that in both of them the Court went out of its way to accomplish what it did. In the *Tompkins* case the Court overthrew *Swift v. Tyson* of its own motion, without the point having been argued by either side. In the principal case, the majority opinion took great pains to set the case up as a *Haddock* problem when, as Mr. Justice Jackson argued, they could have disposed of it by affirming on the basis of no valid domicil at all in Nevada. For that matter, all three cases also have in common that they deal with the clarification of legal doctrine as to the appropriate inter-relation of parts of the Federal system.

V.

THE CONCURRING AND DISSenting OPINIONS

A word might be said of the concurring and dissenting opinions. On the strict legal argument for the recognition of single-domicil divorces, Mr. Justice Frankfurter's concurring opinion adds nothing but the weight of its agreement. His discussion emphasizes that inter-province or interstate divorce difficulties in Canada and Australia have been treated through centralized and uniform legislation,

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43 At least, as far as the decision in the instant case is concerned. See the text discussion *infra*, *circa* n. 84, *et seq.*; and *circa* n. 94, *et seq.*, as to the possible future recognition of new "lags" between local validity and comity on the one hand and full faith and credit on the other.

44 To the effect that the Court also went out of its way in order to attack the Haddock problem in Davis v. Davis, 305 U. S. 32 (1938), see Strahorn, *The Supreme Court Revisits Haddock* (1938) 33 Ill. L. Rev. 412, 420, n. 61.

45 67 S. Ct. 207, 216. For more detailed discussion see the articles of Cook and Ross, cited herein *infra*, n. 121.
but, that in the United States, with power reserved by the Constitution to the States to deal with such matters, complications must continue, unless national uniformity is accomplished through constitutional amendment. Difficult and tempting as the solution of the complications might be, it is beyond the province of the Court to attempt it. It is hinted that Congress might exercise some power under the full-faith-and-credit clause to meet the special problems raised by divorce decrees. But until then, the sole province of the Court lies in the duty imposed by the full faith and credit clause to enforce recognition of divorces valid where rendered, including removal of the complicating factors incorrectly added by the _Haddock_ decision. His opinion seems to be a learned way of going beyond the judicial function of deciding the case in order to suggest that the amending process, or legislation may expand what the Supreme Court has here done to secure uniform divorce, but that the Court can go no further. Such a warning may or may not seem called for by the majority opinion. There is nothing in its language to indicate any intention to go further than an overruling of the _Haddock_ case; and there is much to indicate a careful attempt to confine the decision to just that.

The two dissenting opinions, despite this limitation of the majority opinion, direct their reasoning largely to condemning the compulsory recognition of no-domicil divorces. Because this is entirely consistent with what the majority opinion purported to rule (namely that single-domicil divorces must be recognized), the bulk of each dissenting opinion could be said to be in concurrence with what the majority has done. They are in disagreement only if the majority meant to include the recognition of all divorces granted after notice to the defendants and regardless of domicil. They are dissents only so far as they feel that the facts of the instant case, if inquired into, really indicated no domicil in Nevada; and hence they feel that the effect of the majority opinion is to make all such divorces good. It would seem safe to assume

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46 This point is discussed herein _infra, circa_ n. 116, _et seq._
that this was not intended by the majority and is not the result of the decision.47 The dissents might be essentially reflections of an opinion of the dissenters that this was not an appropriate case in which to re-determine the Haddock problem of single domicil divorces.

To be sure, one could characterize the Court's setting of the stage in the principal case, so as to make it a Haddock problem, as a tour de force, and so Mr. Justice Jackson's dissent seemed to argue. But it is well that the Court made or seized the opportunity to bury the Haddock compromise. The arguments of Mr. Justice Jackson and Mr. Justice Murphy of (1) the dilution of the sovereignty of other states which results, and (2) the introduction of an alleged undesirable rigidity into full faith and credit, are directed considerably at the assumption of compulsory recognition of divorces obtained without the domicil of either party.

In so far as these arguments were directed at divorces granted at the domicil of the parties plaintiff accompanied by procedural due process, the majority opinion weighed and surmounted them. As to the undue rigidity, the Court felt that the scope for the play of local policy in the recognition compelled by the full faith and credit clause for judgments had always been slight48 (if not non-existent to date except for the Haddock decision) as distinguished from that allowed in connection with the inter-state recog-

47 The question of abandoning domicil as the jurisdictional basis is discussed herein infra, circa n. 71, et seq.
48 The Court, p. 211 (63 S. Ct.), after referring to Christmas v. Russell, 5 Wall. 290 (1866); Fauntleroy v. Lum, 210 U. S. 230 (1908); Kenney v. Supreme Lodge, 252 U. S. 411 (1920); Titus v. Wallick, 306 U. S. 282, 291 (1939), quoted from Broderick v. Rosner, 204 U. S. 629, 642 (1905), "the room left for the play of conflicting policies is a narrow one.” and continued, “So far as judgments are concerned the decisions, as distinguished from dicta, show that the exceptions (to the rule of compulsory recognition) have been few and far between, apart from Haddock v. Haddock.” The Court indicated that the holding of Anglo-American Provision Co. v. Davis, 191 U. S. 376 (1903) was not an exception but only an application of the doctrine of forum non conveniens. The dicta exceptions referred to were: (1) the penal judgment exception of Huntington v. Attrill, 146 U. S. 657 (1892); Converse v. Hamilton, 224 U. S. 243 (1912); Bradford Electric Light Co. v. Clapper, 286 U. S. 145 (1932), with a broad caution to the express reservation of a ruling on this in Milwaukee County v. M. E. White Co., 296 U. S. 268, 270 (1935) and (2) the general policy exception dicta of the statute cases referred to in footnote 49 infra, and also Broderick v. Rosner, supra.
nition of statutes. As for the infringement on the sovereignty of the State compelled to recognize, the Court found such infringement to be no greater than that which occurs in many of the multiple-contact situations that have arisen in other fields of the law. Such infringement as does occur, they found to be outweighed by the greater good of securing universal validity of single-domicil divorces. Actually the Williams and Hendrix case itself does not have any substantially new impact on the sovereignty of the recognizing state. It merely dictates a consequence which formerly would have followed anyhow for separate domicil divorces from the accidental presence of one of alternative factors having nothing to do with state sovereignty. The now abandoned distinctions of the Haddock case were concerned with protecting the interests of defendants who could not feasibly defend, not those of states as sovereign entities.

The "sovereignty" of other states was already rather badly damaged by the rules as they existed prior to the principal case, which compelled other states to accept double domicil divorces and some single domicil ones. But it is hard to see how it is any further impaired by requiring them to accept the remaining single domicil ones, when previously they would have been compelled to accept

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49 At 63 S. Ct. 211 the Court said, "This Court, to be sure, has recognized that in the case of statutes . . . some 'accommodation of the conflicting interests of the two states is necessary,'" citing Bradford Electric Light Co. v. Clapper, 286 U. S. 145 (1932); Alaska Packers Ass'n v. Industrial Accident Comm., 294 U. S. 532, 547 (1935); Pacific Employers Ins. Co. v. Industrial Accident Comm., 306 U. S. 493, 502 (1938).

50 63 S. Ct. 215, saying "But such an objection goes to the application of the full faith and credit clause to many situations. It is an objection in varying degrees of intensity to the enforcement of a judgment of a sister state based on a cause of action which could not be enforced in the state of the forum. Mississippi's policy against gambling transactions was overtaken in Fauntleroy v. Lum, supra, when a Missouri judgment based on such a Mississippi contract was enforced by this Court. Such is part of the price of our federal system."

51 The essential thesis of the first of two articles about the matter by one of the present writers, Strahorn, A Rationale of the Haddock Case (1938) 32 Ill. L. Rev. 796, 797-801, was that the Haddock distinctions were to be explained in terms of the relative feasibility of defending, on the part of non-resident defendants in the various situations, against unjust accusations of marital misconduct. It was argued that the Haddock case compelled full faith and credit in situations where there was a relatively greater feasibility of defending, and merely allowed local validity and comity where that was relatively slighter.
the very same divorces merely because of the accident of something not concerned with sovereignty, i. e., local service of process, or defendant's voluntary appearance in the case, howsoever collusively given in order to escape the sovereignty of the recognizing state.

It would, of course, more impair the sovereignty of other states to do that which the minority seemed unduly to fear, i. e., to compel other states to accept the granting state's finding of domicil, or to accept divorces based only on residence.\textsuperscript{52}

VI.

REMAINING AREAS OF UNCERTAINTY

Granted that Williams and Hendrix \textit{v. North Carolina} is a desirable step in the clarification and simplification of the inter-state divorce problem, it is easy to agree with Mr. Justice Frankfurter that the millenium has not come through this judicial decision. Perhaps, it cannot come through court action alone. Although the area of uncertainty as to the universal validity of divorces is now considerably minimized, a good many factors of doubt still remain for the speculation of divorce consultants. First, if the jurisdiction basis for divorce is now settled as single domicil without the complications of the \textit{Haddock} case, will judicial attention be directed to the procedural insufficiency of notice by publication? Secondly, does domicil of one party become and will it remain the minimal contact with a state so as to satisfy the requirements of due process of law for the existence of divorce jurisdiction? Thirdly, is it possible, as the minority opinions seem to suggest, that less-than-domicil divorces may have a certain due process validity in the state where rendered and in states which choose to recognize them while being not entitled to compulsory recognition elsewhere? Fourthly, is it possible, as a footnote to the majority opinion might indicate, that the Court may eventually hold for less extensive compulsory recognition of sister-state divorces for some pur-

\textsuperscript{52} \textit{Infra, circa n. 71, et seq.}
poses than for others? Fifthly, to what extent do the recently expanded concepts of res-judicata as applied to jurisdiction and the older doctrines of estoppel have to be guarded against by divorce defendants? Finally, is there a sphere in which Congress could dictate the policy for inter-state recognition of divorce? These questions are worthy of brief speculation in the light of this recent return of the Supreme Court to the divorce problem.

VII.

NOTICE REQUIRED BY "PROCEDURAL DUE PROCESS"

With reference to the first question, reasonableness of notice, there would seem to be a fertile field for development of procedural fairness in the granting of inter-state divorce. In the principal case, it happened that there was good notice through a method reasonably calculated to reach the defendants and which actually did reach them. There was, accordingly, no need specifically to discuss the question. However, the Court stressed the idea of the need for "procedural due process" in the granting State.

Was not this emphasis on "procedural due process" a hint that while the notice to defendant and opportunity to defend aspects of due process were here satisfied and called for no specific discussion, the Court wanted the door open for a close scrutiny of them in the future? Certainly, it takes no great stretch of the imagination to recognize the unfairness of publication alone as a means

\[\text{For an earlier treatment of the notice problem by one of the present writers, carrying acknowledgment of the assistance of the other, see Strahorn, The Supreme Court Revisits Haddock (1938) 33 Ill. L. Rev. 412, 418-423. See also to the effect that due process of law may require something better than mere newspaper publication, Leflar, Jurisdiction to Grant Divorces (1935) 7 Miss. L. J. 445; and McClintock, Fault as an Element of Divorce Jurisdiction (1928) 37 Yale L. J. 564.}

\[\text{See supra, notes 4 and 5, to the effect that Mrs. Williams was served with a copy of the summons and complaint by a North Carolina sheriff in North Carolina; and that notice was given Mr. Hendrix through newspaper advertisement and mail to his last known address, which must have reached him, inasmuch as he wrote and agreed to enter an appearance in the divorce case, although he never did.}

\[63 S. Ct. 207, 213, 214, 215.\]
of notice in the usual single-domicil divorce case.\textsuperscript{56} Certainly, also, publication has been condemned for want of due process in certain other modern specialized situations, where service by registered mail, or some other form reasonably calculated to reach the defendant, has been upheld.\textsuperscript{57} Does the historical use of, and dictum acceptance of, publication in divorce proceedings, in analogy to "in rem" procedure, free the device from modern condemnation in recognition of its inherent unfairness in situations where better forms of notice are available (and at less expense to the parties).\textsuperscript{58} Assuredly, the Supreme Court has not hesitated to condemn doctrines with more fortification in their own decisions than the device of mere publication as a means of notice in divorce litigation. As far as the Supreme Court is concerned, the doctrine has stood more by sufferance and in dictum than by express approval.\textsuperscript{59}

\textsuperscript{56} Other writers seem to have felt similarly, \textit{supra}, n. 53. For its inefficacy in another field see Gellhorn, \textit{Administrative Law, Cases and Comments} (1940) 528, quoting Byrne, \textit{Report of Investigation on Cost of Procedure of Mortage Foreclosure} (1938 W. P. A. Official Project No. 465-97-46) 11: "The average cost of the publication of such notice is between $125 and $150. It is undoubtedly a matter of general agreement among practicing attorneys that the publication of such notice benefits no one, excepting, of course, the newspapers obtaining such advertisement." This would seem to be as true, if not more true, of publication of divorce notices.

\textsuperscript{57} For several instances consider: (1) Domicil as a basis of jurisdiction, with service by publication condemned in McDonald v. Mabee, 243 U. S. 90 (1917), but with personal service outside the jurisdiction sustained in Milliken v. Meyer, 311 U. S. 454 (1940). Similar illustrations of a basis of jurisdiction standing as constitutional when accompanied by a provision for reasonable notice, although falling when coupled with inadequate notice, exist in: (1) Doherty v. Goodman, 294 U. S. 923 (1935) as against Flexner v. Farson, 248 U. S. 289 (1919); (2) Hess v. Pawsloki, 274 U. S. 351 (1927) as against Wuchter v. Pizziutti, 276 U. S. 13 (1928) -- cf. Grote v. Rogers, 158 Md. 685, 149 A. 547 (1930); and perhaps (3) Corporation cases as discussed by Reiblich, \textit{Jurisdiction of Maryland Courts Over Foreign Corporations} (1938) 3 Md. L. Rev. 35, 46, \textit{circa} n. 44.

\textsuperscript{58} See \textsuperscript{n. 56}, \textit{supra}. Marshall and May, \textit{The Divorce Court} (1932) 322 indicates usual costs of publication in a normal divorce proceeding in Baltimore City of from $20 to $22. Certainly registered mail could be less expensive. In the N. Y. Judicial Council's 4th Ann. Report and Studies (1938) 188 ff., the inexpensive character of registered mail is only one of the many arguments proposed for its general adoption as a form of notice.

\textsuperscript{59} Such dictum recognition of publication creeps into the instant opinion 63 S. Ct. 207, 210, as it did tacitly into the Haddock case, 201 U. S. 502 (1906), in the Court's recognizing at least local validity for the Connecticut decrees. \textit{Quaere} whether such statements, or even express holdings on the facts of cases where the form of notice was uncontested, can stand against the notice requirements of "procedural due process" as established by cases in other fields, and specifically directed at the notice point. See \textit{supra}, n. 57. \textit{Cf. Restatement, Conflict of Laws} (1935) Sec. 109.
It might be interesting to observe in connection with the two leading and controversial decisions of *Atherton v. Atherton* and *Haddock v. Haddock*, that there was reasonable notice to the defendant (mailed copy of the bill of complaint) in the former case where the single domicil divorce was sustained, and no reasonable notice (publication only) in the latter case which denied compulsory full-faith-and-credit under reasoning which had to be condemned in the instant decision of *Williams and Hendrix v. North Carolina*. Could it not be surmised that, of the things that seemed most distasteful about single domicil divorces, at the time of the *Haddock* case and perhaps in various state rulings, one was the possibility of their being obtained without any knowledge of the defendant? Was not the cure the requirement of adequate notice, rather than the imposition of the *Haddock* factors?

Now that the *Haddock* factors have been condemned, will not the pressure for fairness to the absentee defendant call for a better notice than publication if such better notice is feasible? It might be said that such has already been recognized as a requirement of due process by the Restatement of Conflict of Laws. Some States (perhaps many) of their own volition require better forms of notice

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60 181 U. S. 155 (1901).
61 201 U. S. 562 (1906).
62 In *Davis v. Davis*, 305 U. S. 32 (1938) the defendant actually entered (at least a special) appearance after receiving notice of the case.
63 Adequacy of notice was not quite such a pressing problem so long as the Haddock compromise lasted, because full faith and credit was dictated by the Haddock case in two situations (personal service within the granting state and appearance in the case) which involved the presence of actual notice to the defendant, and in two others (defendant domiciled in state and "last marital domicil") wherein there was an unusually high likelihood of actual notice reaching defendants through the usually followed forms of substituted or newspaper advertisement service of process. The fact of living, or having once lived in the state, would make it more plausible that friends would see the newspaper notice and forward information about it to the defendant wheresoever located. See *Strahorn, A Rationale of the Haddock Case* (1938) 32 Ill. L. Rev. 696, 799, n. 16, concerning an unpublished statement of the late Professor Beale about the significance of notice in the Haddock picture.

Of course it must be remembered that the Haddock case tolerated at least local validity and comity for divorces where the chance of actual notice was slightest, although it only dictated full faith and credit in the four situations where it would either actually or very likely be received.

Maryland, prior to 1941, allowed divorces to be obtained against non-resident defendants upon service through newspaper publication alone. In 1941, the Maryland statute was amended so as to require the published notice to be sent by registered mail to the last known address of the defendant. While it might have been simpler to have abolished the need for publication altogether (except perhaps for cases where all other forms had been tried and failed), it is submitted that requiring service by mail was a desirable addition in that it might have saved what was possibly an unconstitutional procedure as it earlier existed in cases where publication alone was used.

See II Vernier, American Family Laws (1932, and Supplement 1938) Sec. 84. Through that date, at least, there seemed to be several States, which like Maryland prior to 1941 (infra, n. 66), allowed for service by publication against non-residents, with an optional alternative of personal service outside of the state. A few, like Mississippi (C. 1930, Sec. 1417), seemed to provide only for publication against non-residents. Most of the states, more appropriately, seemed to allow for published notice as sufficient only after better forms have been proved to be unavailing.

Md. Laws 1941, Ch. 516, added to the existing Md. Code (1939) Art. 16, Sec. 38, a requirement of sending by registered mail a copy of the order of publication to the last known address of a non-resident defendant in a divorce case. As it reads, the registered mail notice is additional to the alternatives provided by Md. Code (1939) Art. 16, Sec. 149, which requires, in the alternative, newspaper advertisement against a non-resident, or proof of personal service of a copy of the order wherever he may be found, to be made either by official certificate, affidavit, or written admission of service. Under the recently enacted insanity divorce statute, Md. Laws 1941, Ch. 497, service against non-residents is had as in other suits in equity against non-residents, although local service requires serving a copy of the bill on defendant and on his Committee, or if none, on the institution having his custody.

In Harf v. Harf, Circ. Ct. for Balto. City, Baltimore Daily Record, December 29, 1942, per Niles, J., it was held that where the non-resident defendant resides at the time of trial in enemy territory to which registered mail is currently not sent, then the mailing of registered mail notice is unnecessary and mere publication is sufficient.

Senate Bill No. 35 has been introduced into the 1943 Legislature to strike out the registered mail provision and reinstate the procedure as before 1941. Should this be passed and approved, there would then arise the possibility of divorces granted under the reinstated pre-1941 procedure being held void under an eventual ruling that insufficient notice violates due process of law. Should this eventually happen, the chances are that merely those divorces granted on newspaper advertisement where a better method was feasible would be invalidated, not all those granted under the statute. For, the pre-1941 statute (as set out supra, n. 66) itself provided an alternative of serving actual notice on the defendant wherever he could be found, in lieu of mere advertisement in a newspaper. But this was a mere option, where the registered mail provision of the 1941 law is mandatory. The presence of the option making better notice possible might save the general constitutionality of the pre-1941 statute in its entirety, but still might lead to the Supreme Court's eventually holding specific divorces
The instant decision, in specifically calling for "procedural due process" before full-faith-and-credit is accorded to single-domicil divorces most assuredly leaves the way open for a "notice" ruling. Until such ruling is made by the Supreme Court, the question of whether mere newspaper advertisement is adequate (at least where better notice is feasible) contributes to the remaining uncertainty as to the universal validity of divorces (at least as long as there are states which, like Maryland prior to 1941, grant divorces upon newspaper publication as the usual form of notice).\(^6^9\) It is to be hoped that the Court will have an early opportunity (and will take it) to rule definitely on this matter and thereby further minimize the area of doubt in the field of interstate divorce.\(^7^0\)

VIII.

DOMICIL AND RESIDENCE

While the Williams and Hendrix case has reduced the area of doubt and uncertainty as to the universal validity of divorces by deleting from significance the confusing Haddock factors, yet the clear tenor of the majority opin-

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\(^6^9\) Supra, n. 66.

\(^7^0\) The validity, for lack of adequate notice, of Maryland divorces obtained on mere newspaper advertisement when a better method would have been feasible, was attacked in the District of Columbia four years ago, and almost reached the Supreme Court, but the latter Court denied certiorari, possibly for waiver of the notice point at a lower stage of the case. In Hellmuth v. Hellmuth, 98 F. (2d) 431, cert. den. 305 U. S. 673 (1938), the husband, domiciled in Maryland, and allegedly knowing his wife's address in the District of Columbia, obtained a Maryland divorce upon mere newspaper advertisement in Maryland, the validity of which divorce she later attempted to attack by a proceeding in the District. Apparently in the trial court in the District she attacked the Maryland divorce as lacking due process of law for insufficient notice, although on appeal to the Court of Appeals of the District that point was abandoned and the mere objection was made that the Maryland divorce was not entitled to full faith and credit. The Court of Appeals of the District recognized the Maryland divorce, deciding to grant comity under the Haddock case. On petition for certiorari to the Supreme Court, the wife's brief attempted to re-raise the notice point, and dealt extensively with that phase of the case. The Court's denial of certiorari can better be explained on the ground that the waiver of the notice point below made the case an inappropriate one for their consideration of that point, rather than on the ground that the then Maryland type of notice satisfied due process of law. See, for treatment of the Hellmuth case by one of the present writers, Strahorn, The Supreme Court Revisits Haddock (1938) 33 Ill. L. Rev. 412, 418-423.
ion is to continue to permit sister states to reject divorces if, on collateral attack, they find themselves unable to agree with the granting state's own finding of the presence of the jurisdictional fact of domicil of at least one spouse.\textsuperscript{71}

It is proposed now to discuss this remaining requirement for full faith and credit and to speculate concerning possible developments revolving around it, and about the possibility of a maximum of certainty concerning the presence of the necessary jurisdictional basis.

The utmost certainty in this regard, of course, would follow from denying collateral attack for anything not apparent on the face of the record. This would mean requiring the dissenting party to go to the granting state and there assert the fraud as to domicil under whatever local procedures were available for undoing a judgment for improprieties in its obtaining. But this would be unduly burdensome and expensive to absent defendants. Then, too, it would impose on the Court the alternative of permitting the "tourist divorce" states too cavalierly to reject such direct attack,\textsuperscript{72} or of allowing mere fact appeals

\textsuperscript{71} It is interesting to speculate as to how far sister state divorces, granted on mere colorable domicil, and still capable of rejection by Maryland courts under the principal case and Walker v. Walker, 125 Md. 649, 94 A. 346 (1915), may be made to stand up in Maryland under local rules of presumption and burden of proof. In a typical case, say where a husband obtains a divorce on the ground of domicil, his first wife and afterwards a second, and both "wives" are claiming the property of the husband, in a Maryland court, may not the second "wife" have a better chance than otherwise of winning, and surmounting the possibility of a finding of no valid domicil of the husband in Nevada, through two local rules set out hereafter? Under Bowman v. Little, 101 Md. 273, 61 A. 223 (1905), proof of a second ceremony of marriage imposes a very difficult burden of proof of a prior marriage the existence of which undissolved by death or divorce would make the later ceremony bigamous. Under Schaffer v. Richardson, 123 Md. 88, 93 A. 391 (1915), when there has been sufficient proof of both a first and a second marriage, a rebuttable presumption arises that the first has been terminated by death or divorce. Under this latter rule, it is interesting to speculate whether the presumption of obtaining a valid divorce somewhere would remain even though the common spouse had attempted to obtain a Nevada divorce itself found to be void. The rules of these two cases at least make it relatively more difficult for a first wife to attempt to attack a divorce as against a second wife.

\textsuperscript{72} For that matter, consider Ewald v. Ewald, 167 Md. 594, 175 A. 464 (1934), where a husband sought to annul his marriage to his wife on the ground that the divorce she had obtained from her first husband twelve years before in the same Maryland court was invalid because of insufficient evidence to support her then claim to be a resident of Maryland. The annulment was denied, and the Court indicated strong reluctance to invalidate a divorce after it was obtained, for lack of jurisdictional residence, unless there was much stronger evidence against residence than would cause them to dismiss the original divorce bill for that reason.
to it much more frequently than has been the case or is either desirable or possible. Such a rule would substantially approximate permitting the easy divorce states frankly to substitute residence for domicil as a jurisdictional basis to entitle to full faith and credit. Despite the undue fears of the dissenting justices in the principal case, it is hardly thinkable that collateral attack will ever be denied.

But, granting that, it is not implausible that the Court will more closely oversee the process of making collateral attack in other states on the jurisdictional fact of domicil, particularly if the stricter states attempt to scuttle the Haddock repudiation by too readily finding the lack of jurisdictional domicil in order to reject divorces which, earlier, they would have rejected for lack of one of the Haddock factors. Will, for instance, the Court permit the stricter states to create presumptions against acquiring a valid new domicil in the divorce granting state, or, as North Carolina applied the rule in the trial of the principal case, to put the burden, even on criminal defendants, on those relying on such divorces to show a valid domicil in the granting state, where otherwise the burden of proof in the case would be elsewhere?

The stricter states may be able relatively longer to reject the same divorces, for different reasons, because of the discretionary nature of appealing such cases to the Supreme Court. However, the Court may eventually take an opportunity to increase the certainty about the

73 Practically all such appeals would be by discretionary certiorari, as it would be unlikely that the granting of a divorce would be based on a state statute the validity of which under Federal law could be drawn into question so as to give an appeal as of right to the Supreme Court. See 28 U. S. C. A. (1928) Sec. 344; and ROBERTSON AND KIRKHAM, JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES (1936) 8-24.

74 63 S. Ct. 207, 215: "In the first place, we repeat that in this case we must assume that petitioners had a bona fide domicil in Nevada, not that the Nevada domicil was a sham. We thus have no question on the present record whether a divorce decree granted by the courts of one state to a resident as distinguished from a domiciliary is entitled to full faith and credit in another state. Nor do we reach here the question as to the power of North Carolina to refuse full faith and credit to Nevada divorce decrees because, contrary to the findings of the Nevada court, North Carolina finds that no bona fide domicil was acquired in Nevada."

76 63 S. Ct. 207, 209, supra, n. 10.

See supra, n. 73.
validity of divorces by enunciating rules regulating the process of making collateral attack on the basic domicil.

A statement in the majority opinion indicates the possibility of inconsistencies in the extra-state processes of finding the presence or lack of domicil on collateral attack, and it would seem to restrict the basic issue on such collateral attack to the minimum factors of physical presence and intent to remain indefinitely as the basis of acquiring a new domicil of choice. This, now, under the Williams and Hendrix case is all that is needed to entitle a sister state divorce to full faith and credit. After its casual reference to the Beale-Restatement factors as perhaps being of significance to granting states in determining whom to allow to file suits for divorce, the Court intimates that (subject of course to its oversight as final arbiter) the granting states may follow as liberal rules as to capacity to acquire a new domicil as they may wish to provide, subject merely to re-investigation elsewhere as to the bona fides of the physical presence and intent to remain of the plaintiff. It would seem clear that the stricter states will not be allowed to reject some divorces because, by their stricter rules, a married woman lacks capacity to change her domicil, even though by the view of the granting state she does have capacity to acquire a separate domicil. Certainly the Court will permit no more than a re-investigation of the fact of change of domicil to the granting state. Otherwise the confusion and uncertainty of the abandoned Haddock factors will return in another guise, if the plaintiffs must risk not only conflicting findings as to facts, but conflicting rules as to capacity to change domicil.

The overthrow of the Haddock factors, with the retention of domicil as a requisite jurisdictional basis subject to collateral findings thereabout, might be expressed in terms of relative risk. As the law now stands, spouses who are married and living in states with stricter divorce policies

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77 63 S. Ct. 207, 214: "But where a state adopts, as it has the power to do, a less strict rule, it is quite another thing to say that its decrees affecting the marital status of its domiciliaries are not entitled to full faith and credit in sister states."
run the risk of the other spouse deserting, going to a laxer state, 78 staying there the local residence period and obtaining a divorce, and later being able to persuade any tribunal in which the problem arises of his or her "intent to remain indefinitely" in the granting state at the time of the divorce proceeding. On the other hand, the spouse who leaves and goes to the laxer state, and there obtains a divorce otherwise in compliance with local requirements, runs the risk of being unable to persuade future tribunals of the presence of that necessary intent requisite to change domicile. Of course, lifelong residents of the laxer states run somewhat the same risk, arising from suspicion on the part of the stricter ones of divorces emanating from such states. But it is a slighter risk than that run by those who have recently moved into the granting state.

Preserving domicile as the minimal jurisdictional basis (at least for compulsory extra-state recognition by full faith and credit) does recognize the considerable interest of the state of permanent location in determining the status of its domiciliaries. The equality of claim as between the state of defendant's domicile and that of plaintiff makes the desirability of uniformity throw the scales in favor of forcing the state of defendant's domicile to accept the earlier determination by that of plaintiff. But, as between the state of domicile of either or both of the spouses and that of the mere physical residence of plaintiff, even the desire for uniformity and certainty as to validity of divorces is not sufficient to weigh in the balance in favor of compulsory recognition (possibly not even of local validity) 79 for mere residence divorces. For to take the latter stand would substantially impair the sovereignty of other states and give increased recognition to that of the grant-

78 While some law has developed in a few other states about the granting of injunctions against prosecuting divorce cases in other states, for lack of bona fide domicile there, this has not yet been specifically passed on by the Maryland Court of Appeals. In Bank v. Bank, 23 A. (2d) 700, the plaintiff had sought an injunction against the defendant wife's prosecuting a Florida divorce action, but the divorce was obtained before personal service on the defendant in the injunction suit could be had.

79 See infra, circa n. 84, et seq., for treatment of the possible local validity and comity recognition of mere residence divorces.
ing state when it is much less entitled thereto than if it be the state of domicil of the plaintiff.

And yet, despite the relatively greater impact on sovereignty, and the relatively slighter claim of the granting state to the privilege of regulating status, there can be stated arguments for the highly problematical step that the Court might eventually take, of repudiating the Bell and Andrews cases and frankly substituting residence for domicil as the necessary jurisdictional basis for full faith and credit. It is here described as problematical, although the dissenting opinions and newspaper comment seemed to fear that the majority opinion was accomplishing or would accomplish just that.

One argument would be, of course, that such a step would be but a further extension of the philosophy of the Williams and Hendrix case in its step of overthrowing the Haddock compromise in favor of further release from uncertainty as to the universal validity of divorces. Such a step would remove the uncertainty due to conflicting findings as to necessary domicil, with its elusive concept “intent to remain indefinitely”, and substitute an uncertainty which is minuscule in comparison, physical presence for a certain period. By way of compromise, if the Court were willing to substitute residence for domicil, it could set up a minimum period of residence, as a reasonable period, certainly a longer one than the ridiculous six weeks of the Nevada law, perhaps even one year.

While, of course, the answer to this is that it is hardly within the purview of the judicial function of deciding cases to legislate as to the exact length of a period of residence, yet it would be but a retreat to the days when the courts of their own motion did set up periods regarded as jurally significant for needful purposes. A somewhat analogous step would be to preserve domicil as a require-

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61 Many of the common law rules fixing age periods for various purposes, such as the age of majority, the age to marry, that for criminal guilt, and others, are judge-made. To be sure, it might be answered that the Tenth Amendment to the United States Constitution makes this a matter of State action, not Federal.
ment, but to impose a presumption in its favor from residence for a certain period. Many similar presumptions are judge-made.

Stating it in terms of risk, should the Court shift from domicil to residence, it could be said that subjecting the deserted spouse to the risk that the other would leave and spend, say, a year in one of the laxer states and there get a valid divorce is not much more risk than now follows under the principal case, that the deserter will spend six weeks elsewhere and get a divorce, and then be able to persuade any future court of the elusive "intent."

Thinking in terms of realities, we should recall that many people, some prominent, are making use of these tourist divorces, remarrying in reliance on them, begetting children whose legitimacy is in doubt so long as there is a possibility of successful collateral attack on domicil, but living in a state of what the popular press delights to call "sin". Perhaps there is some social policy in accommodating the law to the realities, despite Mr. Justice Jackson's dissent (aimed at the argument for insuring legitimacy) that the Court's concern should be more for the regularity of the law than for the regularity of pedigrees.82

With reference to the impingement on the sovereignty of other states, it could be argued that there would result but more of an invasion already begun by the long-time requirement of full faith and credit for double domicil divorces and for most (now all) single domicil ones. The trend has been toward a greater certainty as to the validity of divorces actually granted, all through the undisturbed part of the Haddock case, the Davis case, and the one under discussion. While, as was pointed out, the principal case does not accomplish any substantially new invasion of sovereignty, yet it does show a desire for certainty and uniformity which may eventually prove strong enough to justify the definite invasion of other states' sovereignty which would follow from the highly problematical step of substituting residence for domicil.

82 63 S. Ct. 207, 225.
The most cogent argument against that, of course, was brought out in the dissenting opinions, that to compel universal validity for all actually granted divorces would make the national level that of the laxest state, and force the states with stricter attitudes toward marriage and divorce to bow to the more lax rules of the others, a step undesirable in our Federal system. Of course, some thought should be given to whether, perhaps, the strict states have been too strict, just as the lax states have been too lax, and whether, within the limits of the judicial power (doubted by Mr. Justice Frankfurter’s concurring opinion) the Supreme Court can strike a balance whereby it can keep the laxer states from being too lax and, at the same time, by forcing the stricter states to accept some divorces they do not like, suggest to them that they might as well not be so strict.

The making of predictions in the matter is dangerous and no attempt is here made to predict that the Court will ever substitute residence for domicil, or make the granting state’s findings conclusive. It would be safer, perhaps, to suggest that if this ever does happen, the sequence will more than likely be similar to that of the recognition of single domicil divorces, viz., first, mere local validity and perhaps voluntary comity elsewhere for such less attractive divorces, and then, much later, the compulsion of full faith and credit. It may be that history will repeat itself. But, it is only a matter of speculation now whether the Court is yet ready even to concede mere local validity for residence divorces granted without domicil. Whether so is the subject of the discussion immediately following.

IX.

A Future "Lag" for Residence Divorces?

Certain hints in the dissenting opinions in the principal case tend to suggest that divorces granted on the basis of mere colorable domicil or upon residence alone may be allowed a quantum of validity by the Supreme

\[^{82}\text{Particularly under the Tenth Amendment to the United States Constitution.}\]
even though it is not ready (the fears of the minority of the justices to the contrary) to compel recognition under full faith and credit for such least attractive foreign divorces.

These hints are to the effect that mere colorable domicil or residence divorces granted in the laxer states although not entitled to full faith and credit, may, nevertheless, be valid in the states where granted for purely local purposes, on the theory that it is within the powers of a state to deal as it sees fit with such residents for purely domestic purposes, so long as it satisfies procedural due process. To be sure, the majority opinion apparently adhered to the traditional view that a divorce granted without domicil of either party was void, even where rendered, and it particularly seemed to emphasize that the desideratum was to make divorces either valid everywhere or valid nowhere. The traditional view has been that it would violate due process of law to enforce, even in the granting state, a divorce granted without domicil of either party and, of course, such divorces have been entailed in the past neither to comity nor to full faith and credit. The question of the local enforceability of an actually granted, although questionable domicil divorce, is a rather

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84 Mr. Justice Murphy, 63 S. Ct. 207, 218: "This is not to say that the Nevada decrees are without any legal effect in the State of Nevada. That question is not before us. It may be that for the purposes of that state the petitioners have been released from their marital vows, consistently with the procedural requirements of the Fourteenth Amendment, on the basis of compliance with its residential requirements and constructive service of process on the non-resident spouses." Mr. Justice Jackson, 63 S. Ct. 207, 223: "To hold that the Nevada judgments were not binding in North Carolina because they were rendered without jurisdiction over the North Carolina spouses, it is not necessary to hold that they were without any conceivable validity. It may be, and probably is, true that Nevada has sufficient interest in the lives of those who sojourn there to free them and their spouses to take new spouses without incurring criminal penalties under Nevada law. I know of nothing in our Constitution that requires Nevada to adhere to traditional concepts of bigamous unions or the legitimacy of the fruit thereof. And the control of a state over property within its borders is so complete that I suppose that Nevada could effectively deal with it in the name of divorce as completely as in any other."

These would seem to indicate that the dissenting justices were willing to pay the price of broadening the “lag” of the Haddock case, rather than to have full faith and credit compelled for the residue of the single domicil divorces already within that lag between local validity-voluntary recognition and compulsory full faith and credit. 85

85 63 S. Ct. 207, 214-16.

86 See supra, n. 17.
abstract one, anyhow, for the reason that collateral attack on it in the courts of the granting state is relatively difficult, as against such attack elsewhere. There is always the possibility that the local rule will deny collateral attack in the same state and force a re-litigation of the problem in the very court granting the divorce, by way of reopening the divorce decree, a path fraught with dangers, as anyone familiar with the Maryland detail in that field can testify. Or there is the possibility that, on reopening the question, any court of the divorce granting state will be as reluctant to find no domicil as was the particular court which granted it.

If the tribunal of the granting state too readily rejects proof of no domicil on re-opening of the divorce case or collateral attack, it might be said that there is always the possibility of appeal to the Supreme Court on the due process point, the only way the question could ultimately determined. But, aside from the fact that such appeals are by discretionary certiorari and none has recently come to decision, it is, after all, a fact problem and the Court will probably be reluctant to entertain mere fact appeals. Then, too, the administrative agencies of the granting state will accept the divorce as valid until set aside in the courts. Thus, divorces granted by the laxer states on the basis of mere colorable domicil already have a rather substantial, if not constitutional local validity.

On the other hand, if the Court should ever definitely rule that colorable domicil divorces are invalid and not capable of enforcement even in the state where rendered, as a matter of due process of law, the basic authority for accomplishing this would be Pennoyer v. Neff, which held that a state could not exercise jurisdiction over property within its borders, which it could affect by a proper in rem proceeding, through the medium of a personal judg-

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87 Simms v. Simms, 178 Md. 350, 13 A. (2d) 326 (1940), is the latest Maryland case on the complications incidental to reopening a Maryland divorce case because of fraud in the obtention of the divorce.

88 See Ewald v. Ewald, 167 Md. 594, 175 A. 464 (1934), discussed supra, n. 72, as indicative of a relative reluctance on the part of the Maryland Court to make a later finding of no domicil after a local divorce has once been granted.

89 95 U. S. 714 (1877).
ment invalid for want of a sufficient jurisdictional contact. A void judgment cannot be enforced, even against persons and things subject to the state’s power at the time of attempted enforcement.

But if local validity for mere residence decrees eventually obtains the sanction of the Court’s decision, then there will be recreated a “lag” between local validity as a matter of due process, and compulsory recognition as a matter of full faith and credit, similar to the lag which survived for 37 years under the Haddock case. But it will be another kind of lag, different in detail and in its raison d’être. Under the Haddock case the lag, now abolished, was considered to exist as to certain (the less attractive of the) single domicil divorces. Under the possible implications of the hint given by the minority, it will be a lag solely with reference to no-domicil divorces. This lag, of course, existed prior to the present decision, if it exists at all, but was not previously brought into sharp focus. It is also interesting to speculate whether, if there is going to be a new and different kind of lag, as to how different it will be in inner detail. Will, for instance, other states also be permitted to grant comity to these least desirable divorces granted on mere residence without domicil, as was done under the Haddock lag for the less desirable group of the single domicil ones?

It was previously rationalized that the Haddock case struck a compromise (now repudiated) between the more attractive ones and the less attractive of the single domicil divorces, on the basis of the defendant’s feasibility of defending against unjust accusations of marital misconduct. The possible new lag, if it ever is fully recognized, will strike a compromise between all the more attractive

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90 An interesting aspect of the literature of the Haddock case was the reluctance of certain writers to admit that a divorce could be valid where granted and entitled to comity elsewhere without being entitled to full faith and credit. See, for a treatment of Professor Beale’s views about this, Strahorn, A Rationale of the Haddock Case (1938) 32 Ill. L. Rev. 796, 808-815. A similar reluctance to believe in the “lag” of the Haddock case was evinced in Vreeland, Validity of Foreign Divorces (1938) 76-80, where the author described as “revolutionary” what was nothing more than the grant of comity under the Haddock case by the courts of the District of Columbia in Atkinson v. Atkinson, 82 F. (2d) 847 (C. A. D. C. 1936).

91 Strahorn, A Rationale of the Haddock Case (1938) 32 Ill. L. Rev. 796.
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domicil divorces and the less attractive residence ones, in terms of the relative claims of the state of residence and the state of domicil to determine the marital affairs of the particular individual. The Haddock distinction was, while it lasted, essentially a compromise; and any granting of constitutional local validity to mere residence divorces will be that, too. Such a move would as much attempt to strike a middle ground between the competing claimants as did the older case in another connection.

The Haddock compromise was, after all, a "Judgment of Solomon," and its consequences of uncertainty as to the universal validity of single domicil divorces from sister states seem to have been recognized by the Court now as almost as drastic as Solomon's order to carve the baby into two pieces. The Haddock case emulated the mighty Solomon's judgment by giving each of the spouses partial relief or protection in a situation where the particular type of separate domicil divorce put at a minimum the defendant's "feasibility of defending" against trumped up charges. It felt that it would be unfair to plaintiffs to require complete personal jurisdiction before such a divorce could have even local validity, and yet, without that, it would be unfair to defendants to force universal extra-state validity for such divorce. Thus, plaintiffs got the solace of locally valid relief and the possibility of extra-state recognition, and defendants were permitted the sanctuary of locating or continuing domiciles in states choosing not to recognize such divorces.

The later possible creation of an analogous "lag" for residence divorces would, of course, tend more to resolve competing claims between the states of domicil and of residence, but it would also do somewhat the same things as the Haddock compromise did for the parties, for the plaintiff would be secure if he and his property remained in the granting state, and the defendant would be secure in person by remaining in, and in property by keeping it in, the stricter state. Each spouse would get a certain limited benefit from the situation if mere residence di-

92 I Kings III—16, 25.
Families are allowed constitutional local validity (perhaps comity elsewhere) by the Supreme Court.93 If, despite that the Court in the principal case has rejected compromise and lag for the single domicil situations, it ever reinstates another kind of a lag for the residence divorces, such a move might indicate that while residence divorces are not as attractive as single domicil ones, and hence not entitled to quite as much recognition, yet they have enough in their favor to receive the same halting recognition that, 37 years ago, an earlier Court was willing to accord the less attractive among the single domicil ones. Persons who rely on residence have less to commend them to the Court than those who rely on domicil and yet, considering the interests of the state of residence, they may thereby eventually be held to be entitled to a limited recognition of the compromise and lag nature.

X.
A FUTURE "LAG" AS TO EFFECT OF DIVORCE ON PROPERTY?
Furthermore, a casual footnote in the majority opinion suggests that there may be with us a different kind of a lag, namely, that a state might be able the more readily to disregard a foreign divorce for purposes of property interests than for other, more personal aspects of the marital relation.94 If this hint should ever be carried out,

93It is not so conceivable that the Court will ever adopt the "lag" technique as the way of solving the problem of adequacy of notice, although it would be one way of handling the matter, viz., by granting local validity (possibly comity) where the notice is merely constructive, and compelling full faith and credit where it is actual (or the best possible means were used). See supra, n. 63, to the effect that the very "lag" of the Haddock case itself could have been explained on the ground that notice was actual or very probable under the Haddock factors and not so likely for those divorces entitled only to local validity and comity.
9463 S. Ct. 207, 210-11, ns. 4 and 5: "4. Thus we have here no question as to extraterritorial effect of a divorce decree insofar as it affects property in another state. See the cases cited, infra, note 5.
there would then result a rather slight (but far from complete) recognition of Professor Bingham's views as to the "discrete" elements of the marital relation with reference to interstate jurisdiction, although the action of the Court in the principal case definitely destroys his main thesis as to which states have what jurisdiction over the various personal aspects of a given marital relation. For, had Professor Bingham's thesis been completely correct then, without overruling the Haddock case, and merely within its import as interpreted by him, the Court could have forced North Carolina to recognize a divorce granted one (assumed to be) separately domiciled in the granting state, with reference to his capacity to remarry. But they did overrule the Haddock case in order to compel extra-state recognition for that purpose.

Such a rule as hinted at by the majority footnote might be analogized to that of Whittington v. McCaskill, where the Florida court recognized a foreign miscegenous marriage for purposes of the devolution of property, although

the state where the land is located is 'sole mistress' of its rules of real property. See Hood v. McGehee, supra, 237 U. S. at page 615, 35 S. Ct. at page 719, 59 L. Ed. 1144; and the concurring opinion of Mr. Justice Holmes in Fall v. Eastin, supra, 215 U. S. at page 14, 30 S. Ct. at page 9, 54 L. Ed. 65, 23 L. R. A., N. S., 924, 17 Ann. Cas. 853."

Bingham, _The American Law Institute v. The Supreme Court_ (1936) 21 Corn. L. Q. 393. Mr. Bingham's explanation is that the marital relation involves seven "discrete" elements, viz., the respective rights of the spouses to remarry, the respective claims of each on the other for support; the respective claims of each on the other's property; and (seventh) the reciprocal rights and duties of living together. His thesis is that, when the spouses have separate domiciles, the state of husband's domicil determines his right to remarry, but the state of wife's domicil determines hers. But even under the Haddock case, insofar as full faith and credit was compelled, and now even further because it is compelled more extensively, this thesis fails, because the Court in the principal case emphasizes the desideratum of insuring the certainty of the validity of remarriages in reliance on single domicil divorces. The hint as to a property "lag" in the majority opinion footnote does suggest a partial recognition of his thesis in that limited respect, but the combination of the principal case and that of Yarbrough v. Yarbrough, 290 U. S. 202 (1933) would seem to indicate that the state of one spouse's domicil can bind that of the other's domicil with reference to the personal and support aspects of the marital relation. For comment on Professor Bingham's views, see Strahorn, _A Rationale of the Haddock Case_ (1938) 32 Ill. L. Rev. 796, 813-815.

In _Cook, The Logical and Legal Bases of the Conflict of Laws_ (1942) 462, n. 14, published before the Williams and Hendrix case was decided, enthusiasm for Professor Bingham's views is indicated. _Ibid,_ 467 mentions the Haddock factors.

**65 Fla. 162, 61 So. 236, 44 L. R. A. (N. S.) 690, Ann. Cas. 1915B, 1001 (1913).**
they might not have done so had it been a matter of allowing the spouses to live together in Florida.

To have a divorce valid (or recognition compellable) for some purposes but not for others, if substantial reasons supported such a compromise between conflicting claims, would be no more unthinkable than to have recognition compellable in the presence of certain facts and not in their absence, as existed at one level for 37 years with reference to some single domicil divorces, and might exist at another level in the future with reference to mere residence ones. This vertical type of compromise might even be a more justifiable one than the other, horizontal type of the Haddock case and the hint of the minority opinions.

XI.

ESTOPPEL AND RES JUDICATA

The next point of uncertainty, and one that may have considerable significance, is the extent to which the doctrines of res judicata and estoppel may apply to give an effect to divorces otherwise invalid where rendered, or at least incapable of securing compulsory full faith and credit, for lack of domicil.

Considering first the older doctrine of estoppel, it needs merely to be observed that the doctrine had been applied sufficiently in the divorce field for the Restatement of Conflict of Laws to state the law to be that "The validity of a divorce decree cannot be questioned in a proceeding concerning any right or other interest arising out of the marital relation, either by a spouse who has obtained such decree of divorce from a court which had no jurisdiction or by a spouse who takes advantage of such decree by remarrying."97 While applied in only a limited number of states to date, this doctrine has had interesting development not calling for discussion here.98 Suffice it to say that it must be reckoned with in those states where it has

97 See, 112.
been highly developed, and might well be a source of new decision in any state where not yet applied. Nothing in the instant decision would seem to affect its operation, except that the field of its possible application is curtailed to that of divorce based on less-than-domicil.

The correctness of the application of doctrines of estoppel to parties obtaining or acting upon otherwise invalid divorces receives a certain sanction from the fairly recent application of res judicata to the fact of domicil as a basis for jurisdiction. In Davis v. Davis,\textsuperscript{100} the only real treatment of the Haddock problem in the Supreme Court in the interval between that case and the principal one,\textsuperscript{101} the Court held that if the non-resident defendant appeared and contested the validity of the plaintiff's domicil and lost on that issue, the matter became res judicata between the parties and could not be made the subject of later collateral attack by the defendant. This was an unheralded, and by many unexpected,\textsuperscript{102} application of the res judicata doctrine to a court's jurisdiction over status. Since Baldwin v. Iowa Traveling Men's

\textsuperscript{99}No Maryland case has specifically ruled on the application of the doctrine of estoppel in so many words, although Staub v. Staub, 170 Md. 202, 183 A. 605 (1936) could have been handled on that basis. In that case the spouses both resided in Maryland at the time of the marriage and up to their separation, at which time the wife went to Arkansas and there obtained a divorce upon order of publication within four months of the time of the separation. She later filed a Maryland proceeding against the husband seeking alimony without divorce, and this proceeding was dismissed on the ground that only a wife can file such a proceeding, and through the Arkansas proceeding she had ceased to be defendant's wife. There was no specific mention of the possible invalidity of the Arkansas divorce but, in substance at least, the Court recognized an estoppel against her to contest it, she having obtained it, even if there could have been raised any question of the sufficiency of her Arkansas residence.

\textsuperscript{100}Davis v. Davis, 305 U. S. 32 (1938), discussed in Strahorn, The Supreme Court Revisits Haddock (1938) 33 Ill. L. Rev. 412, 414-418. This treatment of the Davis case was entirely from the angle of its possible extension of the Haddock factors, a matter now moot since the Williams and Hendrix case has gone the whole way with respect to single domicil divorces. The only mention of the res judicata aspect of the Davis case, now its principal angle, was in n. 33.

\textsuperscript{101}The only case reaching the Supreme Court in the interval between the Haddock case and the Davis case was Thompson v. Thompson, 226 U. S. 551 (1913) which, on its facts, without discussion of any difference, applied the rule of the Atherton case, to the recognition of partial divorces.

\textsuperscript{102}GOODRICH, CONFLICT OF LAWS (2d ed. 1938) p. 555. RESTATEMENT, CONFLICT OF LAWS (1934) Sec. 451, caveat. See also: Medina, Conclusiveness of Rulings on Jurisdiction (1931) 31 Col. L. Rev. 238; Gavit, Jurisdiction of the Subject Matter and Res Judicata (1932) 80 U. of P. L. Rev. 386.
Assn., it had been conceded that a losing contest of a court's assertion of personal jurisdiction would preclude later collateral attack. But many felt that the policy in favor of prompt and final settlement of disputes could not be extended to include the application of doctrines of res judicata to the court's power over the subject matter in a proceeding in rem, or over the analogous "status" in a divorce proceeding, considerably on the theory that it would be allowing the parties by their consent to confer jurisdiction. Such theories received a rude shock on the day of the Davis decision, for the opinion was then filed in a companion case, Stoll v. Gottlieb, which applied the doctrine of res judicata to support in rem jurisdiction. This plus the Davis case's citation of the Baldwin v. Iowa Traveling Men's Assn. case as authority for its action could leave little doubt but that the Supreme Court of the United States had incorporated the doctrines of res judicata as to jurisdiction into the matter of compulsory recognition of judgments whether personal jurisdiction, jurisdiction in rem, or jurisdiction over status be involved.

The significance for the instant discussion is the need for speculation as to how broadly these doctrines may operate to secure greater uniformity of inter-state recognition for divorces. Clearly on the facts of the Davis case, some facts to support domicile plus contest of domicile will preclude later collateral attack. Will appearance and contest of domicile, regardless of the facts have the same effect? What of appearance of the party defendant without any contest? Does the earlier Andrews case, which denied validity to a no-domicil divorce, despite the appearance of the defendant, preclude this, or is it overruled in effect by the recent res judicata decisions? If appear-

102 Baldwin v. Iowa State Traveling Men's Ass'n., 283 U.S. 522 (1931). See also references n. 102, supra.
104 See RESTATEMENT, JUDGMENTS (1942) Sec. 10, infra, circa n. 113. See articles supra, n. 102; also, Boskey and Braucher, Jurisdiction and Collateral Attack: October Term, 1939 (1940) 40 Col. L. Rev. 1006; Comment, Judgment on Merits as Res Judicata of Jurisdiction Over Subject Matter (1940) 49 Yale L. J. 959; Comment, The Effect of Extra-Jurisdictional Decisions (1940) 54 Ill. L. Rev. 567.
ance could be sufficient to establish res judicata, would personal jurisdiction of the defendant, regardless of appearance or contest be sufficient? If the law goes that far, what would prevent binding a defendant who merely had adequate notice of the proceedings (particularly if there were some facts to support domicil—but perhaps even regardless of this)? Will the doctrine ever be carried so far as to hold that any divorce of record based on allegations of jurisdiction and proper procedural protections to defendant will be capable of only direct attack? Unquestionably, a line is to be drawn short of this extreme. But, outside the sphere of interstate recognition, certain decisions as to res judicata over subject-matter have bound the parties even though they had not contested jurisdiction, but because they might have contested it. Such holdings would seem to raise a flag of caution to the lawyer in this field. Certainly, if a defendant spouse has notice of a suit’s pendency, careful thought must be given to the choice between appearing and contesting both domicil and merits, in which event he may lose on both and be forever precluded, or staying away in the hope of attacking the necessary domicil for the first time collaterally.

A judgment must be made, of course, as to the extent to which the Supreme Court would support a due process appeal for want of jurisdiction on the fact of domicil in

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109 Some consideration might also be given to the implications in the divorce field of Treniess v. Sunshine Mining Co., 308 U. S. 66 (1939) which applied the principle of res judicata to an Idaho district court’s determination that a Washington probate court lacked jurisdiction to determine ownership of certain stock, even though the jurisdiction point had been raised and determined in the prior Washington proceedings contrary to the Idaho court’s determination and even though Idaho’s action might have been a denial of full faith and credit to the Washington action. The same situation might occur as to two inconsistent judgments determining power to adjudicate marital rights.
110 Now that an “appearance” is no longer a significant alternative factor to compel full faith and credit, the Haddock case having been overruled, it ceases to be a matter of moment whether the appearance be special or general, and the speculation as to that aspect of the Davis case, found in Strahorn, The Supreme Court Revisits Haddock (1938) 33 Ill. L. Rev. 412, 415-416 is no longer relevant.
the granting state if the chance is taken of entering an appearance there.\textsuperscript{111} As against this, one must weigh the possibilities of being bound by res judicata as to jurisdiction even without appearance in the granting state (as through notice and opportunity to contest—coupled with whatever facts the Court might deem sufficient to establish it). How probable the latter is, it is beyond the purpose of this article to predict except through weighing the questions above raised against the cases above referred to.\textsuperscript{112} Off-hand, the \textit{Davis} case seems to have gone far enough in this field with the doctrine of res judicata applied in the event of actual appearance by the defendant and contest of the domicil point.

Perhaps one could obtain some guidance from glancing at the Restatement of Judgments and its recently projected description of the law of res judicata and jurisdiction over the subject-matter as a purely intra-state proposition. Section 10 reads:\textsuperscript{113}

"(1) Where a court has jurisdiction over the parties and determines that it has jurisdiction over the subject-matter, the parties cannot collaterally attack the judgment on the ground that the court did not have jurisdiction over the subject-matter, unless the policy underlying the doctrine of res judicata is outweighed by the policy against permitting the court to act beyond its jurisdiction.

"(2) Among the factors appropriate to be considered in determining that collateral attack should be permitted are that

"(a) the lack of jurisdiction over the subject matter was clear;

"(b) the determination as to jurisdiction depended upon a question of law rather than of fact;

"(c) the court was one of limited and not of general jurisdiction;

"(d) the question of jurisdiction was not actually litigated;"

\textsuperscript{111} See \textit{supra}, n. 72, as to the relative difficulty of appealing divorce cases to the Supreme Court of the United States.

\textsuperscript{112} \textit{Supra}, circa notes 100-109.

\textsuperscript{113} Cited \textit{supra}, n. 105.
“(e) the policy against the court’s acting beyond its jurisdiction is strong.”

Granted similar tests will apply in the field of full faith and credit (and this merely suggests the possibility of a res judicata lag, without more discussion of it), how will the Supreme Court balance the “policy underlying the doctrine of res judicata” and the “policy against permitting the state divorce court to act beyond its jurisdiction?”

XII.

THE POWER OF CONGRESS

The final question, that of the power of Congress in the matter of interstate divorce, was hinted at in the majority opinion and raised specifically in two sentences of Mr. Justice Frankfurter’s concurring opinion, saying:

“Congress has not exercised its power under the Full Faith and Credit Clause to meet the special problems raised by divorce decrees. There will be time enough to consider the scope of its power in this regard when Congress chooses to exercise it.”

As earlier indicated, Justice Frankfurter had referred to the power over divorce granted to the national legislatures of Canada and Australia, and to the movement sporadically arising in this country for a similar authority for Congress over national divorce through constitutional amendment. Although recognizing the legal certainty of such a method of securing uniformity, it is not the purpose

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114 By res judicata “lag” is meant the possibility that the Supreme Court will more readily tolerate the granting state’s holding that domicile of the plaintiff is res judicata than it will compel other states to recognize the divorce on the same basis. For discussion of other possible “lags”, see infra, supra n. 84, et seq.; infra, supra n. 94, et seq.; and infra, n. 93.

115 This includes what will the Supreme Court think is beyond a State’s power to confer on its courts by way of divorce jurisdiction. See supra, part VIII.

116 63 S. Ct. 207, 215: “Whether Congress has the power to create exceptions (see Yarborough v. Yarborough, 290 U. S. 202, 215, 54 S. Ct. 181, 186, 78 L. Ed. 269, 90 A. L. R. 924, note 2, dissenting opinion) is a question on which we express no view. It is sufficient here to note that Congress in its sweeping requirement that judgments of the courts of one state be given full faith and credit in the courts of another has not done so.”

117 63 S. Ct. 207, 217.
of this article to go into the desirability of a constitutional amendment giving Congress power over marriage and divorce.\textsuperscript{118} Nor is it the purpose to go into the constitutionality of such legislation without amendment, nor into the desirability of uniformly enacted legislation by the several state legislatures.\textsuperscript{118a}

The opinion references above, however, do suggest a more immediately relevant problem, which can only be treated by speculation. Could Congress, under its power to enforce the full faith and credit clause of the Constitution, do anything specific about the problem of the interstate recognition of sister state divorces? Would a Federal statute be constitutional which purported to overrule the Williams and Hendrix case in order to reinstate that of the Haddock case, or even a stricter rule, say to require domicil of both spouses, or a re-finding of the fault of the absent spouse in the separation? Could Congress legislate as to when a married woman might acquire a separate domicil for divorce purposes? Could it, say, take a more liberal slant and substitute residence for domicil as the basis of divorce jurisdiction and also fix the minimum period of residence for the states to require before entertaining suits? Could it settle the notice question? All these are interesting possibilities of a latent source of Congressional power, namely that to implement by appropriate legislation the full faith and credit clause.

The constitutional provision is brief, saying:\textsuperscript{119}

"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."

\textsuperscript{118} See Ross, "Full Faith and Credit" in a Federal System (1936) 20 Minn. L. Rev. 140, 183, n. 133, suggesting the need for nationally controlling legislation on the Haddock problem, but saying "amendment to federalize the whole regulation of marriage and divorce would be better."

\textsuperscript{118a} Compare the Uniform Annulment of Marriage and Divorce Act (adopted in Delaware, New Jersey, and Wisconsin) as discussed (1923) 36 Mich. L. Rev. 922 and the Uniform Divorce Jurisdiction Act, 9 Uniform Laws Ann. (1932) 133.

\textsuperscript{119} U. S. Const., Art. IV, Sec. 1.
Until now, under the authority as given, Congress has merely prescribed by statute the method of authentication and proof of records and judicial proceedings and provided that "the said records and judicial proceedings, so authenticated, shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the State from which they are taken."\textsuperscript{120}

There has been some discussion in legal literature about the failure of the courts to apply literally this implementing act in the field of interstate recognition of money judgments, and equitable decrees other than divorce decrees.\textsuperscript{121} The consensus of opinion would seem to be that Congress could do much by further legislation to simplify the problem of inter-state enforcement in those fields and to clarify the complications that have been raised by judicial construction. But, little seems to have been said specifically of the power of Congress in the divorce field.\textsuperscript{122} The reasoning applicable to the direct execution of a money judgment, or even of an equitable decree for money or for specific performance, would not carry over so readily to the doubtful matters here discussed which may still cause uncertainty, or which have caused uncertainty in the past with reference to divorce decrees. What, if any, power lies here?

Perhaps it is safer to wait with Mr. Justice Frankfurter for Congress to interpret its powers before attempting to speculate in detail what they might be. There is an old maxim about fools and angels that comes to mind as a warning. Also, the probability is slight that Congress is

\textsuperscript{120} 28 U. S. C. A. (1928) Sec. 687.


\textsuperscript{122} The only references found were those of Ross, supra, n. 121, and of Cook, The Logical and Legal Bases of the Conflict of Laws (1942) 98 et seq., 467-8, concerning whether Congress could provide for the service and execution of state process in other states. Professor Cook argues, Ibid, 467-8, that provision for such extra-state service and execution would ameliorate some of the present difficulties of interstate divorce.
going to spend much thought on interstate divorce in the perilous times that witness the appearance of this article.  

However, the authors do feel that to the extent to which the compulsory recognition of a divorce granted in one state intrudes into the right of the recognizing state to set its own domestic relations policy for its own domiciliaries, any congressional action in the field would have to run the gauntlet of Tenth Amendment scrutiny. The full faith and credit clause enabling phrase would not be so likely to be construed as giving Congress carte-blanc to establish a uniform domestic relations policy for the nation. This much would seem to be safe statement with a Supreme Court which has already so repeatedly emphasized its close attention to any legislation that goes beyond the appropriate spheres of action of any of the various parts of our federalism.

XIII.
CONCLUSION

Turning away from speculation about the future to return to the case under review, the fact remains that the total effect of the decision in the Williams and Hendrix case is merely to compel full faith and credit for that small group of separate domicil divorces which, up to then under the Haddock compromise, were entitled only to local validity and voluntary foreign recognition by comity, because of lack of defendant's domicil or last marital domicil or service within the state or appearance in the case. As far as the actual decision goes, all those divorces which were good nowhere continue to be good nowhere, and all those which were good everywhere continue to be so.

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122a On January 21, 1943, Senator Arthur Capper, of Kansas, long an advocate of Federal control over marriage and divorce, introduced into Congress a proposed constitutional amendment providing for this. The proposal covers marriage, divorce, and custody of children affected by divorce or annulment.  

123 U. S. Const., Amendment X: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."  

124 Nothing can be found in the expressed powers of Congress in Art. 1, Sec. 8 of the Constitution suggesting such a right to clarify the rules of divorce jurisdiction in any particular State. Quaere as to whether any argument could be built up under the 14th Amendment, Sec. 5?  

125 I. e., as far as the decision in the principal case goes. See supra, circa n. 84, et seq.; and supra, circa n. 94, et seq., for speculation as to whether this will continue to be so.
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As a result now, when other states wish to reject sister state divorces, they must do so on a specific finding either of lack of procedural due process\(^{126}\) or that neither of the spouses was bona fide domiciled in the granting state.\(^{127}\) No longer can those issues be dodged by finding mere absence of personal jurisdiction over the non-resident defendant spouse. The *Walker* case continues to be good law in Maryland, but now it is the only law in Maryland on the subject. There is no longer a problem of whether and how we shall exercise the (now defunct) *Haddock* option.

The *Williams and Hendrix* case has validated very few, if any, "tourist divorces," because almost all of them are granted on the basis of mere colorable domicil which cannot withstand collateral attack in the courts of other states, and which, for that matter, may probably be unenforceable where rendered, as the law now stands.\(^{128}\)

What the case has done is to validate completely those divorces secured at the unquestionable domicil of the plaintiff where it was not possible to obtain personal jurisdiction over the defendant. Those divorces, heretofore under the *Haddock* case, might have been rejected by other states under local rules primarily motivated by fear of the much less worthy "tourist divorces". Even here, because the majority of the states which had faced the question had ruled in favor of voluntary recognition of such divorces,\(^{129}\) the decision in its immediate effect is limited to a few jurisdictions which, like New York and North Carolina, chose to rely on the *Haddock* case as a basis for denying recognition.

But, in ruling unlawful the actions of such states, the opinion stimulates anew speculation on the other problems which have been surveyed here, which problems are needful of further solution by the Court if uncertainty about divorces shall reach the irreducible minimum.

\(^{126}\) See *supra*, circa n. 53, et seq., for treatment of this.
\(^{127}\) See *supra*, circa n. 71, et seq., for treatment of this.
\(^{128}\) See *supra*, circa n. 84, et seq., for treatment about this.
\(^{129}\) See *supra*, n. 34 for some mention of certain of the state rules about the exercise of comity.