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# Policy Considerations in Divorce Jurisdiction and Recognition

*Joseph Dainow\**

The problem of the so-called migratory divorce has existed for a very long time in the United States, but has become more and more serious and aggravated as a result of the bargain counter divorce mills which have been operating for local profit in a few states. To some extent, the migratory divorce is inevitable in the American constitutional system under which each state has almost complete sovereignty in the field of private law; as long as there is a fairly common basis and general uniformity of social policies (and, possibly, also a consideration for national interests), there is no serious problem about migratory divorce. However, for a long time the Supreme Court of the United States has felt that certain individual states were placing their selfish profit interest so far out of proportion to the national interests that federal policy interference was both warranted and justified.

In a variety of situations the Court has taken the position that when there arises a conflict between the interest of one state and the interest of another state, or a conflict between the interest of one state and the general interest of all the states, it raises a question which is properly one for examination and determination by the Supreme Court of the United States. It was on this basis that the Court led up to the unexpected decision in *Haddock v. Haddock*,<sup>1</sup> which came in 1906 as a shock and a surprise to the legal profession.

There always were, and will continue to be, the conflicting objectives in connection with the migratory divorce problem. On the one hand, the local jurisdiction of each state in the matter of divorce and the need to permit a person to obtain a divorce in the place where he is established; on the other hand, the need for stability and certainty in the status of people who have once been married so that the same person should not be treated as married in one state but unmarried in another state (as well as all the further incidents of this kind of situation). Similarly, two conflicting policies have been motivating the United States

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1. 201 U.S. 562, 26 S.Ct. 525, 50 L.Ed. 867 (1906).

Supreme Court: one policy aiming to discourage the migratory divorce altogether; another policy seeking to maintain uniformity of status.

To discourage migratory divorce, thereby precluding so many of the problems regarding uniformity, without interfering with the local jurisdiction of the states, seems to have been the combination of policy considerations which moved the Supreme Court of the United States to render the *Haddock* decision and enter the policy field on this question. They used the "full faith and credit" clause of the Constitution, in an effort to discourage the seeking of a divorce in a state which was the domicile of one spouse with no other jurisdictional contact, hoping that the threat of withholding compulsory recognition in another state would be a sufficient deterrent to discourage migratory divorce.

The failure of this policy to accomplish the desired objective was evident long before the Supreme Court made the admission in the *Williams* cases.<sup>2</sup> However, while admitting the failure of its *Haddock* policy, it still held on to the "full faith and credit" device to support the shift in its position—giving up to some extent the objective of discouraging the migratory divorce and accepting with resignation the position which makes at least for more uniformity of status.

Meanwhile, the Court had already started to develop the policy of emphasizing uniformity (rather than discouragement) by means of the "res adjudicata" device in the *Davis* case.<sup>3</sup> From this and similar decisions,<sup>4</sup> it was but one big step further to hand down the decisions in the *Sherrer*<sup>5</sup> and *Coe*<sup>6</sup> cases, which might be taken to indicate a position of retaining at least the policy of uniformity even if the policy of discouragement has failed.

However, it can hardly be said that the Supreme Court has given up completely the *Haddock* general policy (of discouragement) in favor of the *Williams* and *Sherrer* policy (of uniformity) by reason of a changed opinion of the basic question. In view of the continuous attempts of the Supreme Court to establish national standards in certain areas of family relations, and in view of the almost universal complaints about the evil effects of migra-

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2. *Williams v. North Carolina I*, 317 U.S. 287, 63 S.Ct. 207, 87 L.Ed. 279 (1942); *Williams v. North Carolina II*, 325 U.S. 226, 65 S.Ct. 1092, 89 L.Ed. 1577 (1945).

3. *Davis v. Davis*, 305 U.S. 32, 59 S.Ct. 3, 83 L.Ed. 26, 118 A.L.R. 1518 (1938).

4. *Treinies v. Sunshine Mining Co.*, 308 U.S. 66, 60 S.Ct. 44, 84 L.Ed. 85 (1939).

5. *Sherrer v. Sherrer*, 334 U.S. 343, 68 S.Ct. 1087, 92 L.Ed. 1429 (1948).

6. *Coe v. Coe*, 334 U.S. 378, 68 S.Ct. 1094, 92 L.Ed. 1451 (1948).

tory divorce, it is not stretching the point to say that the earlier policy of discouraging migratory divorce would still be preferred over the narrower policy of uniformity. The latter encourages the easy divorces by stabilizing the status of the individuals affected thereby. The inability to achieve full results on both scores (discouragement and uniformity) does not necessarily resolve itself into an acceptance of the lesser of the two objectives.

If there is a generally desired policy of discouragement and stabilization, and if the Supreme Court's activity in this field is appropriate, then careful examination might be made of the possibility of using the "due process" clause of the Constitution to accomplish the purpose. It is conceded that the "full faith and credit" clause, in the way that it was applied, has not succeeded.

It has been recognized almost universally, and newly asserted in the *Rice* case<sup>7</sup> by the Supreme Court of the United States, that the only proper basis for the exercise of divorce jurisdiction is the *domicile* of at least one spouse. Under ordinary circumstances it would not be necessary to qualify the word "domicile" as meaning *bona fide* domicile; however, it can be very important in the present connection.

In the long-standing case of *Pennoyer v. Neff*,<sup>8</sup> the Supreme Court established the due process device to protect non-residents from an improper exercise of authority by the courts of one state. A state statute conferring jurisdiction upon its courts was unavailing to create jurisdiction where none existed, and that kind of a judgment was therefore null and void, even in the state which rendered it.

If *bona fide* domicile of the plaintiff spouse is considered a minimum jurisdictional fact for the entertaining of a divorce suit against the nonresident defendant, in accordance with the *Williams* cases and the *Rice* case, then the divorce rendered in a state which is not the *bona fide* domicile of one spouse might be considered null and void as violative of due process. The fact that a local statute purports to confer jurisdiction on the basis of a few weeks residence would then be unavailing to give even local validity to a judgment rendered in violation of this interpretation of the due process clause.<sup>9</sup>

When the selfish interests of a few divorce-mill states conflict so seriously with the general governmental interests of so many

7. *Rice v. Rice*, 336 U.S. 674, 69 S.Ct. 751, 93 L.Ed. 770 (1949).

8. 95 U.S. 714, 24 L.Ed. 565 (1877).

9. There would still be the problem of estoppel against the defendant who made a general appearance.

other states, as well as with the general welfare of the whole country, it must needs be a proper subject for the Supreme Court's examination and determination. The Court's latest decision in the *Rice* case picks up where the *Williams* cases left off, and now brings in the emphasis on "bona fide domicile" for full faith and credit purposes. With the further development of this concept as a necessary jurisdictional fact, the Court might consider the *res adjudicata* idea of the *Sherrer* and *Coe* cases as yielding to the still later developments on the essentials for jurisdiction—just as the *Andrews* case<sup>10</sup> yielded to subsequent collateral developments of the law on finality of jurisdictional findings.<sup>11</sup> The jurisdictional fact of bona fide domicile might thus become a requirement for due process in a divorce suit against a nonresident spouse who could allege deprivation of his or her rights by reason of the forced change in marital status (personal, financial, social, and so forth). Further, and in due time, children and other third persons could complain about the deprivation of their property rights.

Thus, if a court in State F-2 denied recognition to a divorce rendered in State F-1 on the ground that jurisdiction was lacking because there was no bona fide domicile, or conversely, if the court in State F-2 did recognize the decree of F-1 whose jurisdiction was predicated upon a questionable domicile, the matter would then have to be taken to the Supreme Court of the United States on the issue of bona fide domicile. There are certain undisputed minimum and universal tests of domicile which would be utilized by the Court as a starting point, and in its decisions it could develop a pattern of standards for domicile which would necessarily have to be observed by the state courts in their subsequent treatment of such problems. This would not be unlike the way in which the Supreme Court has established standards for the determination of questions (for example, what constitutes "doing business") under the due process clause regarding jurisdiction over nonresidents in a variety of other kinds of cases.

Proposals for the better stabilization of the institution of marriage and the discouragement of easy divorce have ranged over a wide variety of devices, from federal legislation fixing universal bases for divorce jurisdiction in all states, to international treaties establishing bases for reciprocal recognition of foreign-country divorces. The possibility of uniform legislation being adopted in all the states is out of the question by reason of

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10. 188 U.S. 14, 23 S.Ct. 237, 47 L.Ed. 366 (1902).

11. In the case of *Sherrer v. Sherrer*, 324 U.S. 343, 353, 68 S.Ct. 1087, 1902, 92 L.Ed. 1429, 1437 (1948).

the selfish and inconsiderate attitude of some few states. Accordingly, federal action, legislative or judicial, is the only possible means for achieving adequate results; and the realistic chance of such federal legislation at the present time is just about nil. There remains only the realm of federal judicial action, and here it must be recognized that the way in which the Supreme Court used the full faith and credit clause has resulted in an admitted failure.<sup>12</sup> Their manipulation of the *res adjudicata* device indicates their continued interest in this field but seems to be headed in the wrong direction.

The due process device has proved satisfactory in a wide range of problems concerning jurisdiction over nonresidents in so many other situations that one cannot but wonder whether it might not be a basis of solution for the migratory divorce problem in the United States.

As an alternative, a sort of middle ground for a compromise solution, to effect some measure of discouragement together with greater uniformity, might be found in the vitalization of the full faith and credit clause (as perhaps hinted at in the *Rice* case) by (1) the establishment in a series of decisions of some general standards for "bona fide domicile" and (2) placing the burden of proof of this jurisdictional fact on the party invoking the foreign decree.

There are of course those who assert that artificial rules and principles cannot prevent or change the direction of development of the inherent mores of the American people, and that the only solution is in a restabilization of their social attitudes and family institutions. There is no denying such optimum results, but in their absence, it has always been a function of law to use restraints and curbs as molding influences and as a means of necessarily guiding direction within certain limits.

In the absence of uniform state legislation (which is unthinkable at the present time), and in the absence of appropriate federal legislation or constitutional amendment (which is virtually impossible), and in view of the continuing national interest in the increasing problems of migratory divorce, the only avenue—if any—of making progress towards effectuating the desired policies, is in the United States Supreme Court. This body is wrestling with a mighty problem; perhaps a more constructive direction will still emerge.

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12. For description of a different situation in Australia, see Cowen, *The Recognition of Foreign Judgments under a Full Faith and Credit Clause* (1948) 2 *Int. L. Q.*21.