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JURISDICTION TO DIVORCE—A STUDY IN STARE DECISIS

ORRIN B. EVANS*

The practical importance of the migratory divorce problem is probably over rated, despite the facts that legal certainty of the marital status of its members is essential to every community and that strong convictions on all phases of divorce practice are commonly, divergently, and provincially held. Except in a few localities, best known by their very peculiarity in this respect, the number of migratory divorces is too small for the really difficult questions to “pay their way” in a lawyer’s practice,¹ and the number of cases in which there is any serious question of the universal validity of the decree is even smaller. One writer has described the possibility of migratory divorce as a “sort of social safety valve” for those blocked from escape from marital frustration by the unyielding policy of the state in which they live.²

Analysis of the considerable legal literature on the subject discloses that the primary concern—not always recognized—of the eminent writers is to measure the decisions by the standards of the doctrine of *stare decisis*. In other words, because there have been apparent deviations from what might be expected by the principles of deductive logic, the effort has been (a) to point out the inconsistencies of the law or (b) to effect a reconciliation by restatement of the premise. The cases at least suggest an alternative thesis—the limited utility of *stare decisis*.

Daily we teach that the imposing edifice of the common law consists of a multitude of decisions, resting one upon the other, and each finding authority and substance from the support it derives from those beneath and beside it. The ability to ascertain “the holding” of a case is the “*sine qua non*” of the student and woe betide the simple scholar who puts his trust in *obiter*. Fortunately, few law students, and unfortunately, few lawyers, read essays in jurisprudence, so they seldom discover there is some uncertainty in defining the “holdings” so as to distinguish the dictum, even

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1. See Groves, *Migratory Divorces* (1935) 2 LAW AND CONTEMPORARY PROBLEMS 293.

2. *Ibid.*

among the initiated, nor appreciate the essential conflict between the restriction of the binding force of precedent to the precise holding of the case and a dynamic system of law, capable of embracing new situations and changing conditions. *Stare decisis* is the essence of the common law and by its application, it is said, decision of the case becomes a matter of law, not of the personal judicial opinion; the decision can be forecast in advance, which means that the law is certain; the freedom from the strangling strictures of legislation permits adaptation to new conditions; and the decision of only the issues squarely before the court directs inquiry and concentrates exhaustive argument upon the very real problem to be solved.³ These are the distinguishing advantages of the common law system and if the principles of *stare decisis* are inconsistent with the virtues claimed for it, there is reason for concern for our entire legal tradition.

Even momentary reflection discloses that judicial precedent is an illusory guide to decision of a new case—and all undecided cases are new, if for no other reason than the passing of time. By hypothesis the facts are different, which means that inquiry is focused on the question, how different, in what respect different, from the nearest analogy. The original “precedent” was necessarily decided on issues of social policy. It is not necessary, under the doctrine of *stare decisis*, to re-examine those considerations in an exact successor case, but as the facts are different, determination of whether the difference is so significant as to require re-examination of the entire question can itself only be had by passing—consciously or otherwise—on the same social factors. Precedent indicates the future path of the law only to the extent that the rationale of the opinion is broader than the decision on the precise facts before the court, and to preserve the common law from complete sterility it is necessary to include a minimum of such generalization within the definition of the holdings of the case. There is no logic which says, this abstraction is holding, all beyond is dictum. It is a matter of guessing the point at which public opinion of the particular period in history is agreed that the identity of social considerations is beyond controversy.

The history of nearly a thousand years has demonstrated that fact combinations can be classified into categories in which certain common facts will be generally accepted as primarily important in their impact upon the

3. See Oliphant, *A Return to Stare Decisis* (1928) 6 AM. LAW SCHOOL REV. 215.

approved code of conduct, so that the solution of one case is applicable to all, but logic is the hand-maiden of experience—to paraphrase the great justice—and the particular case must be brought within the premise of the syllogism by extraneous mental processes.⁴ There is a great no-man's land of the law in which it is assumed with equal unanimity that the facts of the new case are not sufficiently analogous to precedent to permit decision by *stare decisis*, but it is usually only the laymen who complain about the uncertainty of the law, and professional literature is overwhelmingly devoted to the cases where the applicability of precedent is disputed, to attempts at reclassifications, and to restatements of the generalizations on which they are based. Critics of the doctrine of *stare decisis* concede, as indeed they must, that it has furnished a workable degree of certainty of law. Their complaint is that it has induced an undue rigidity in the law, that for freedom from arbitrary and capricious judicial conduct too great a price has been paid in neglect of economic, political, and ethical objectives involved in the decision, that it has been strained to resolve cases where the difference in facts—particularly the difference involved in the passage of time from one historical period to another—from the precedents available are so great that the assumption of analogy is unjustified. When a court adopts the philosophy of these writers and evinces a willingness to re-examine the bases of the precedents cited to it, frequently overturning decisions admittedly in point—as well as distinguishing decisions rendered in another era, the legal profession is aroused by the undermining effect upon traditional legal technique—in short, *stare decisis*—more than by the new decisions themselves.

If it is a virtue of the common law that the court considers only the case before it, it is also true that the decision rendered can have dynamic effect as precedent only by rationalization to a principle broader than the facts of the case, which is the essence of legislation. Both defenders and critics of *stare decisis* are thus in a paradoxical situation, the former seeking the development of case-law by a principle legislative in character, the latter restricting judicial activity to the precise case before the court but recommending a typically legislative freedom in the solution of that case.

Only one court may speak positively on the United States Constitution. The question of the application of the full faith and credit clause⁵ to a

4. See Cook, *Scientific Method and the Law* (1927) 13 AM. B. A. J. 303.

5. U. S. CONST. Art. IV, § 1.

decree of divorce is relatively a narrow one. The total number of decisions by that tribunal on jurisdiction to divorce is neither too large to compare collectively nor too small to permit the various aspects of study. We have, then, a fair culture for laboratory examination of *stare decisis* in action.

The earliest expression of the court on the extrastate validity of a divorce decree may be found in *Cheever v. Wilson*,⁶ a suit by the divorced husband for a share of the rents from separate property of the divorced wife granted him in the divorce decree for the support of the children. As the validity of the divorce was not put in issue by proper pleading, the court's opinion lacks the conclusiveness which might otherwise be attributed to it. However, it was rendered as an alternative ground for decision, after full argument, and with the express purpose of avoiding future litigation on the subject. The wife's parental home was in Indiana. Her own domicile before marriage was not in evidence. Apparently the marriage was celebrated in Indiana and the parties immediately and at all times thereafter had their matrimonial domicile in Washington, D. C., where the events which were the grounds for divorce occurred. It was conceded by all parties that the husband there "abandoned" the wife, though whether or not for cause was disputed. At that time a divorce *a vinculo* was not possible in the District of Columbia. In February, 1857, she returned to her parental home in Indiana. In June of the same year she sued for divorce in the court of that state, pursuant to statute reading,

"Divorces may be decreed by the Circuit Court of this state on petition, filed by any person at the time a *bona fide* resident of the county in which the same is filed; of which *bona fide* residence the affidavit of such petition shall be *prima facie* evidence. . . ."

The husband appeared, answered, and filed a cross bill also praying for divorce. The divorce sought by both parties was granted, the wife remarried and left Indiana within the year, and her second husband died before the instant case came on for trial.

On this record, the court asserted that "if a judgment is conclusive in a State where it is rendered, it is equally conclusive everywhere;" that there was not sufficient evidence to overcome the finding of residence stated in the decree of divorce (the court expressly found it unnecessary to consider whether such finding was conclusive or only *prima facie* determinative); and that a married woman might acquire "a separate domicile whenever it

6. 9 Wall. (U. S. 108 (1869)).

is necessary or proper that she should do so. . . . The proceeding for a divorce may be instituted where the wife has her domicile. The place of the marriage, of the offence, and the domicile of the husband are of no consequence. . . ."⁷

A decade later, in *Maynard v. Hill*,⁸ the court faced the problem again. Husband and wife had intermarried in Vermont and for some years maintained a matrimonial domicile there. Shortly after they had moved to Ohio, the husband left his family to go west, promising to send for them soon and to send means of support in the meantime. He did neither. Locating in the territory of Oregon, he settled upon a tract of land which he claimed as a married man. There was presently enacted, presumably at his instigation, by the Legislative Assembly of the Territory, an act purporting to dissolve the bonds of matrimony between him and his wife. She had no notice of any of these circumstances until after they occurred and was not within the Territory at the time. He subsequently remarried.

Only one-half of the lands upon which he settled were granted to him, because of the interruption in his marital status. The other half was later patented to the defendants. The case was a suit by the heirs of the first wife to charge the defendants as trustees and to compel a conveyance.

The opinion is devoted largely to a discussion of the validity of legislative divorces in general. Concluding that they were effective in the absence of state constitutional prohibition, the court observed,

“. . . we cannot inquire into its motives in passing the act granting the divorce; its will was a sufficient reason for its action. . . . If the assembly possessed the power to grant a divorce in any case, its jurisdiction to legislate upon his status, he being a resident of the Territory, is undoubted. . . . The facts alleged in the bill of complaint, that no cause existed for the divorce, and that it was obtained without the knowledge of the wife, cannot affect the validity of the act. Knowledge or ignorance of parties of intended legislation does not affect its validity, if within the competency of the legislature. . . ."⁹

Judgment dismissing the bill was affirmed.

7. *Id.* at 124.

8. 125 U. S. 190 (1888):

9. *Id.* at 209.

October term, 1900, was studded with divorce cases. Two of them, *Bell v. Bell*¹⁰ and *Streitwolf v. Streitwolf*,¹¹ present the other side of the picture. In the former, the marriage was celebrated in Illinois and the matrimonial domicile was in New York. The husband obtained a decree of divorce in Pennsylvania, there being service upon the wife by publication and by mail. She was at no time in Pennsylvania and in the instant case it was found that the husband was never a *bona fide* resident of that state as required by its law. (The reported evidence would seem fully to sustain the finding.) In a suit by the wife for divorce in New York, it was held that the Pennsylvania divorce was void, need not be accorded faith and credit, and was not a defense. In *Streitwolf v. Streitwolf*, the parties were married and maintained their matrimonial domicile in New Jersey, where the wife instituted proceedings for divorce. While the suit was pending, the husband went to North Dakota and obtained a divorce, a summons and copy of the complaint being served on the wife in New Jersey. The recited facts show very plainly that the husband was never domiciled in North Dakota, nor a *bona fide* resident there for ninety days as required by its statute. The court held that the North Dakota divorce was void, not entitled to full faith and credit, and that it need not be considered a defense in the New Jersey proceeding. The opinion refers to *Bell v. Bell* for authority, where it was said,

"No valid divorce from the bond of matrimony can be decreed on constructive service by the courts of a State in which neither party is domiciled. And by the law of Pennsylvania every petitioner for a divorce must have had a *bona fide* residence within the State for one year next before the filing the petition. . . . The recital in the proceedings in Pennsylvania of the facts necessary to show jurisdiction may be contradicted. . . . Upon this record, therefore, the court in Pennsylvania had no jurisdiction of the husband's suit for divorce, because neither party had a domicile in Pennsylvania. . . ."¹²

*Atherton v. Atherton*¹³ was a suit for divorce in New York by a wife who had been domiciled in that state prior to her marriage there to defendant, who was at all times domiciled in Kentucky. They went at once to Kentucky, which became and remained the matrimonial domicile until

10. 181 U. S. 175 (1901).

11. 181 U. S. 179 (1900)

12. 181 U. S. at 177.

13. 181 U. S. 155 (1900).

she left him to return to New York. Whether she had cause for separating from him was, of course, a principal subject of dispute. The husband sued for divorce in Kentucky, alleging desertion, stating that she had been outside the state for more than four months, and giving her correct New York post office address. As provided for by statute in such cases, that court appointed an attorney to represent the absent spouse, who wrote her without receiving a reply or a return of the undelivered letter. A decree of divorce was rendered, which the defendant set up as a defence to the principal action. The New York court found that the wife had left her husband because of his cruel and abusive treatment, that the Kentucky divorce was void as to her, and that it was not a defence. On writ of error, the Supreme Court reversed the decision below as denying full faith and credit to the Kentucky judgment.

The opinion by Mr. Justice Gray is an interesting subject of study in analysis of the doctrine of *stare decisis*. After extended quotations from opinions broadly asserting jurisdiction to divorce at the domicile of one party only, interspersed with observations and rationalizations of his own to such extent that it was difficult to determine whether or not he is adopting the quotations as his own,¹⁴ and more abbreviated reference to the opposing authority, the Justice concluded,

"The authorities above cited show the wide diversity of opinion existing upon this important subject, and admonish us to confine our decision to the exact case before us.

"This case does not involve the validity of a divorce granted on constructive notice, by the court of a State in which only one of the parties ever had a domicile; nor the question to what extent the good faith of the domicile may be afterwards inquired into. In this case, the divorce in Kentucky was by the court of the State which had always been the undoubted domicile of the husband, and which was the only matrimonial domicile of the husband and wife. . . ."¹⁵

After restating the facts, the Justice continued,

"We are of the opinion that the undisputed facts show that such efforts were required by the statutes of Kentucky, and were actually made, to give the wife actual notice of the suit in Ken-

14. It was the opinion of Mr. Justice Holmes that he did approve of that position. See *dissent, Haddock v. Haddock*, 201 U. S. 562, 631 (1906).

15. 181 U. S. at 170-171.

tucky, as to make the decree of the court there, granting a divorce upon the ground that she had abandoned her husband, as binding on her as if she had been served with notice in Kentucky, or had voluntarily appeared in the suit. Binding her to that full extent, it established, beyond contradiction, that she had abandoned her husband, and precludes her from asserting that she left him on account of his cruel treatment.

"To hold otherwise would make it difficult, if not impossible, for the husband to obtain a divorce for the cause alleged, if it actually existed . . . [otherwise] the husband could only get a divorce by suing in the State in which she was found; and by the very fact of suing her there he would admit she had acquired a separate domicil, (which he denied,) and disprove his own ground of action that she had abandoned him in Kentucky."¹⁶

Judgment was reversed, because the New York court had failed to give full faith and credit to the Kentucky decree.

If we respect the admonition of the court and look only to the portion of the opinion purporting to deal with the facts before it, it is evident the opinion sheds little light on the fundamental questions involved. The declaration that the extra-territorial service was binding on the wife was mere fiat unless she was at all times domiciled in law in Kentucky. Whether or not she was so domiciled depended upon facts which were the very essence of the dispute and were not in the record before the court. Concern for a husband, presumed to have been abandoned without cause, may be balanced by concern for a wife, who may be presumed with equal ease to have been driven from her matrimonial home by a cruel husband (as Mr. Justice Peckham and Chief Justice Fuller, dissenting, making clear.) The dilemma can only be solved by federal determination of which state has paramount interest in the status of the parties.

Let us pause here to recapitulate. Two cases, involving facts as nearly identical as are likely to occur, assert that a divorce granted in a state in which neither husband nor wife were ever domiciled (as established by inquiry *de novo*) and in which personal service is not obtained on the defendant but formally granted, nevertheless, pursuant to state law requiring the *bona fide* residence of the petitioning party, is not entitled to full faith and credit in another state. So far as the opinions show, the court was primarily influenced by the fact that the jurisdictional requirements of the

16. *Id.* at 172-173.

state divorce statutes were not satisfied,¹⁷ and there is little in either opinion to indicate that a state might not exercise conclusive jurisdiction though neither party were domiciled there. It should also be noted that the defendants were not served within the state. *Streitwolf v. Streitwolf* could be decided on the ground of *stare decisis* because all would agree that differences in the persons, habits, and particular states from those involved in *Bell v. Bell* were unimportant. But would differences in the state laws on jurisdiction to divorce lead to different results. I think not, because I feel reasonably sure that regardless of its own law, no state may exercise divorce jurisdiction if neither party to the suit is domiciled there, but so far as these cases are concerned, I can reach that conclusion only by substituting for the rationale of the court another premise, equally consistent with the result. If such a process unduly enlarges the concept of the "holding" of the case,¹⁸ then the doctrine of *stare decisis* is of little assistance in determining this phase of divorce jurisdiction.

Three cases sustain the validity of the decrees. The opinion in *Cheever v. Wilson* was written with the express purpose of guiding the future course of the law. Is it to have that effect, when the case could have been decided on rules of procedure? If it is to have any force as precedent, it must assert either (1) that domicile of either party is unnecessary or (2), what the court declared, that a wife may under proper circumstances acquire a sep-

17. The opinion in the *Streitwolf* case, after stating that the issue is the same as in *Bell v. Bell*, proceeds entirely on this ground.

18. WAMBAUGH (2d ed. 1894), *THE STUDY OF CASES*, p. 24. "A case is not precedent for any proposition that was neither consciously or unconsciously in the mind of the court. . . . Further, if it can be shown that, although there was no deliberation, a particular point was wholly absent from consideration of the court, then, even though that point is conceivably an important one, the connection of the decision with that point is not a connection of effect and cause, but is purely accidental, and as to that point the decision is no authority whatever." This statement is quoted, apparently with approval, by Goodhart, *Three Cases on Possession* (1928) 3 *CAMB. L. J.* 195.

Cf. Oliphant, *A Return to Stare Decisis* (1928), 6 *AM. L. SCHOOL REV.* 215, 226. "There are two lines of old cases involving the validity of promises not to compete. They are considered in square conflict. But when the opinions are ignored and the facts re-examined all the cases holding the promises invalid are found to be cases of employees' promises not to compete with their employers after a term of employment. Contemporary guild regulations not noticed in the opinions made these holdings eminently sound. All the cases holding the promises valid were cases of promises by those selling a business and promising not to compete with the purchasers. This distinction between these two lines of cases is not even hinted at in any of the opinions but the court's intuition of experience led them to follow it with amazing sureness and the law resulting fitted life. That is a sample of the stuff capable of scientific study."

arate domicile, and that in the instant case, she had done so, for the state of the forum was never the domicile of the husband. Why, then, did the court, in *Atherton v. Atherton*, so readily conclude that extra-territorial service on the wife precluded her from showing a justified abandonment of her husband? It could be found that she was still domiciled in the state of the forum and hence bound by the service only by assuming the very fact at issue, and which by the service she was precluded from contradicting.

Maynard v. Hill was perhaps broad enough to support *Atherton v. Atherton*. In fact, the discussion of any theory of jurisdiction was so brief that the case could fairly stand for any generalization which does not do violence to other and accepted legal concepts pertinent to the facts. But *Maynard v. Hill* was not even cited in the *Atherton* opinion. And that case declined to be used as a precedent for other than the precise facts involved.

So we have at this point, not one case but a line of five cases. How helpful was the doctrine of *stare decisis* in deciding them? How clearly does it indicate the path of future decisions?

In *Andrews v. Andrews*¹⁹ the husband and wife had been married and had maintained their matrimonial domicile in Massachusetts. He went to South Dakota for the purpose of obtaining a divorce, lived there for not quite a year, engaging in no other business there, and voted in a state election there. A sufficient time having elapsed to satisfy the state statute, he filed petition for divorce for a cause which would not have been ground for divorce in Massachusetts. His wife received notice of the proceeding and entered an appearance by counsel, filing an answer which controverted both the jurisdiction of the court and the merits of the suit. However, an agreement was entered into between husband and wife pursuant to which she "withdrew her appearance" and shortly thereafter the divorce was decreed. He immediately returned to Massachusetts, shortly thereafter met and married a second "wife," and had two children. The first wife made no claim upon her husband after the divorce but upon his death asserted the right to administer the estate as his lawful widow. The highest state court in Massachusetts found in her favor, deciding that the husband had never been domiciled in South Dakota and following a Massachusetts statute which provided ". . . if an inhabitant of this Commonwealth goes into another State or country to obtain a divorce . . . for a cause which would not author-

¹⁹ 188 U. S. 14 (1902).

ize a divorce by the laws of this Commonwealth, a divorce so obtained shall be of no force or effect in this Commonwealth." On writ of error, the Supreme Court affirmed the judgment by a five to three decision.

For the first time there is an extended discussion of marriage as a social institution and of the concern of a particular state over the marital status of its citizens. Concluded Mr. Justice White, "As the State of Massachusetts had exclusive jurisdiction over its citizens concerning the marriage tie and its dissolution, and consequently the authority to prohibit them from perpetrating a fraud upon the law of their domicil by temporarily sojourning in another State, and there, without acquiring a *bona fide* domicile, procuring a decree of divorce, it follows that the South Dakota . . . court [was] without jurisdiction, and hence the due faith and credit clause of the Constituion of the Unied States did not require the enforcement of such decree in the State of Massachusetts against the public policy of that State as expressed in its statutes. Indeed, this application of the general principle is not open to dispute, since it has been directly sustained by decisions of this court. *Bell v. Bell*, *Streitwolf v. Streitwolf*. . . . A like rule, by inverse reasoning, was also applied in the case of *Atherton v. Atherton*. . . . It having been established that Kentucky was the domicil of the husband and had ever been the matrimonial domicil . . . therefore, that the courts of Kentucky had jurisdiction over the subject matter. . . ." ^{19a}

I have said before that I think this proposition—that a state in which neither party is domiciled has no jurisdiction to divorce them—is good law. We are concerned here with the influence of precedent upon the decision. In the first place, it readily may be conceded that the rule announced is not inconsistent with the judgments entered in the preceding cases. In only *Bell v. Bell* and *Streitwolf v. Streitwolf* was the power of the second state to refuse recognition to the divorce sustained, as it was here. Where the "foreign" divorce was held universally effective, the facts of domicile were quite different. But it will be recalled that in those cases (*Bell v. Bell* and *Streitwolf v. Streitwolf*) the decision was assertedly rested upon failure to satisfy the jurisdictional requirements imposed upon its own courts by the state in which the decree was obtained. (It is interesting to note that this same principle could have been applied to the instant case to reach the same result.) The only general rule announced in the *Bell* case was in these

19a. *Id.* at 37, 38.

words: "No valid divorce from the bond of matrimony can be decreed *on constructive service* by the courts of a State in which neither party is domiciled."²⁰ (Italics mine).

In the *Andrews* case the wife had appeared by attorney, which would seem to take the case out of the principle just quoted. But the court here said,²¹ in reply to that contention,

"... the rulings in the cases referred to were predicated upon the proposition that jurisdiction over the subject matter depended upon domicil, and without such domicil there was no authority to decree a divorce. This becomes apparent when it is considered that the cases referred to were directly rested upon . . . *Thompson v. Whitman*."

Reference to the opinions discloses that *Thompson v. Whitman*²² was cited for the single proposition that "the recital in the proceedings in Pennsylvania of the facts necessary to show jurisdiction may be contradicted."²³

To rely on cases sustaining the validity of the decrees of divorce for the result reached in *Andrews v. Andrews* is at best *stare dictis*, not *stare decisis*. In view of the express limitation put upon the opinion in the *Atherton* case, as well as the theory of valid service and constructive domicile there adopted, it is an extraordinary extension of any previous definition of the "holding" of the case to rely upon it here. *Cheever v. Wilson* is not cited at all and *Maynard v. Hill* only for the proposition that marriage creates a problem of status as well as a civil contract. *Andrews v. Andrews* is therefore, less the inevitable consequence of prior holdings, foreseeable and predictable by their light, than a re-examination of the fundamental issues, a statement of a new principle, and a re-classification and interpretation of the precedent to conform to it. Surely there was reason thereafter to believe that *stare decisis* could guide the profession in the law of jurisdiction to divorce.

Suppose husband and wife were married in New York where they were both domiciled and that without ever establishing a matrimonial domicile there, the husband almost immediately removes to Connecticut, where he lives for the rest of his life, the wife at all times remaining in New York.

20. 181 U. S. at 177.

21. 188 U. S. at 39.

22. 18 Wall. (U. S.) 457 (1873).

23. 181 U. S. at 178.

The reason for the separation—whether there was abandonment or desertion by either party—is, of course, bitterly disputed. Many years after the separation, the husband obtains a divorce in Connecticut on the ground of desertion, the wife being served only by publication and by letter mailed to her in New York. Must such a divorce be granted full faith and credit so as to be a conclusive defense to a subsequent suit in New York brought by the “wife” for limited divorce and alimony, personal service being obtained on the “husband?” Those were the facts and that the issue of the celebrated case of *Haddock v. Haddock*.²⁴

The facts differ from the cases which have gone before in some ways we can at once dismiss as immaterial. All will agree that whether the divorce were granted in Indiana, Oregon, Kentucky, or Connecticut, for example, should not affect the result; perhaps, also, the particular misconduct for which divorce is permitted by state law. The only significant factual difference from *Maynard v. Hill* is that in that case it was a legislative divorce whose validity was in question, but the legal issue was perhaps distinguishable. *Maynard v. Hill* was a suit involving title to land in the very state which granted the divorce, so the only constitutional grounds upon which the decree could be collaterally attacked was that of lack of “due process.” Is jurisdiction which satisfies the due process clause the same jurisdiction which entitles a decree to full faith and credit?

In *Atherton v. Atherton*, it will be recalled, the divorce was obtained at the last (in fact, the only) matrimonial domicile, which the *wife* had left. In *Wilson v. Cheevers* the defendant had been served in the jurisdiction and had appeared in court. The court was of the opinion, in *Haddock v. Haddock*, that these differences justified the different result, and held—five justices to four—that the New York court was not Constitutionally bound to recognize the divorced status of the parties. It also asserted that the Connecticut divorce did not deny the wife due process of law and was valid in that state. The decision incited a barrage of criticism, long sustained and of multi-calibred artillery.²⁵ It was argued that as an original

24. 201 U. S. 562 (1906).

25. A partial list of articles includes: Herbert, *Foreign Divorce Jurisdiction—Full Faith and Credit* (1936) 8 MISS. L. J. 397; Leflar, *Jurisdiction to Grant Divorces* (1935) 7 MISS. L. J. 445; Vreeland, *Mr. and Mrs. Haddock* (1934) 20 A. B. A. J. 568; Parks, *Some Problems in Jurisdiction to Divorce* (1929) 13 MINN. L. REV. 525; Parks, *Jurisdiction to Divorce* (1927) 35 MO. BUL., LAW SERIES 3; Beale, *Constitutional Protection of Decrees for Divorce* (1906) 19 HARV. L. REV. 586; Beale, *Haddock Revisited* (1926) 39 HARV. L. REV. 417; Schofield, *The Doc-*

question, jurisdiction to divorce could not be predicated in part upon jurisdiction of the person and part upon jurisdiction of the subject matter, but must rest entirely upon one or the other; that the proposition that a divorce was valid in one state and not entitled to the same credit in another was self contradictory; and that the result was undesirable from every social standpoint. It was asserted that the *Haddock* decision could not be reconciled with its predecessors, and that the court misread its own opinions.

It is unlikely that I could present an original interpretation of the decision or a thought on its merits not already exposed by the ingenuity and industry of the commentators. The point of my paper, is, not the law of jurisdiction to divorce, but the influence of *stare decisis* in its development. I think it is immediately apparent that when the court was confronted with the facts of *Haddock v. Haddock*, inquiry into the differences between them and the facts of the foregoing cases raised questions quite as profound as those of a decision *de novo*; that determination that the differences were fundamental required re-determination and appraisal of the social, political, economic and ethical factors upon which jurisdiction to divorce must hinge; and that this would have been equally true had the court held in favor of the extra-territorial conclusiveness of the divorce, as in *Atherton v. Atherton*. Said Holmes, dissenting, "It is true that in *Atherton v. Atherton*. Mr. Justice Gray confined the decision to the case before the court. . . . But a court by announcing that its decision is confined to the facts before it does not decide in advance that logic will not drive it further when new facts arise. . . ." ²⁶ The point is, that it does not decide *in advance* what facts will make the logic applicable.

Foremost among the critics of *Haddock v. Haddock* was the pre-eminent authority on Conflict of Laws, the late Professor Joseph H. Beale.²⁷ Twenty years later Professor Beale reconsidered his position²⁸ and approved the

trine of Haddock v. Haddock (1906) 1 ILL. L. REV. 219; Richards, *The Full Faith and Credit Clause of the Federal Constitution as Applied to Suits for Divorce* (1920) 15 ILL. L. REV. 259; Lewis, *Divorce and the Federal Constitution* (1915) 49 AM. L. REV. 852; Berger, *Extra-territorial Effect of Decree for Divorce on Constructive Service* (1911) 45 AM. L. REV. 564; Peaslee, *Ex parte Divorce* (1915) 28 HARV. L. REV. 457; Strahorn, *A Rationale of the Haddock Case* (1938) 32 ILL. L. REV. 796; Bingham, *The American Law Institute v. The Supreme Court in the Matter of Haddock v. Haddock* (1936) 21 CORN. L. Q. 393.

26. 201 U. S. at 631.

27. Beale, *Constitutional Protection of Decrees for Divorce* (1906) 19 HARV. L. REV. 586.

28. Beale, *Haddock Revisited* (1926) 39 HARV. L. REV. 417.

decision, but not all the reasoning. Propounding a rationalization which nowhere appears in the opinions, majority or minority, he observed, "It usually takes the bar at least twenty years to appreciate the real reasons for a novel decision that maintains itself."²⁹ In the meantime, itself in apparent ignorance of the real reason for its decision, the court was proceeding along the traditional lines of judicial technique. In the extended opinion in the *Haddock* cases, seven propositions were stated as settled by precedent, but no attempt was made to summarize a single principle into which it and they might be fitted. The *Haddock* case was simply distinguished from the *Atherton* case on the absence of matrimonial domicile in Connecticut and the lack of constructive domicile of the wife in the state, so that New York might not be precluded from adjudicating the marital status of its own citizen. When *Thompson v. Thompson*³⁰ came before the Court, with facts strongly reminiscent of *Atherton v. Atherton*, the opinion read, "In the *Haddock* case . . . this court held that there was no violation of the full faith and credit clause . . . because there was not at any time a matrimonial domicile in the State of Connecticut, and therefore the *res*—the marriage status—was not within the sweep of the judicial power of that State. In the present case it appears that the parties were married in the State of Virginia, and had a matrimonial domicile there, and not in the District of Columbia or elsewhere. The husband had his actual domicile in that State at all times until and after the conclusion of the litigation. It is clear, therefore, under the decision in the *Atherton* case and the principles upon which it rests, that the State of Virginia had jurisdiction over the marriage relation, and the proper courts of that State could proceed to adjudicate respecting it upon grounds recognized by the laws of that State, although the wife had left the jurisdiction and could not be reached by formal process. . . ."³¹

No inconsistency is admitted; the attempted synthesis of *Andrews v. Andrews* is again ignored; the case is fortunately capable of decision by almost exact precedent; matrimonial domicile is the decisive fact.

Haddock v. Haddock may have been inconsistent with the cases which went before it, which necessarily means, even to the most ardent defenders of the doctrine, that the principles of *stare decisis* were of little utility in

29. *Id.* at 426.

30. 226 U. S. 551 (1913).

31. *Id.* at 562.

forecasting that decision, but with the *Thompson* case the line of cleavage was definitely marked out, and the sense of certainty re-established on the basis of a new classification. (Certainty, be it remarked, of compulsory recognition of the foreign decree in very limited circumstances; hence no certainty of recognition as a matter of comity.) But a classification bearing no demonstrable relation to the underlying considerations which must determine jurisdiction to divorce is bound to present difficulties of pigeon-holing when a new combination of facts arises.

Under the influence of Professor Beale, the American Law Institute restated the governing law. It is perhaps unfair to illustrate the limitations of the doctrine of *stare decisis*, or even the difficulty of defining the "holding" of a case, by comparing the decisions with the Restatement, for the latter does not purport to follow the courts at all times and "the accuracy of the statements of law made rests on the authority of the Institute,"³² which has never disclosed the exact recipe by which judicial authority was seasoned with its own pre-science and the proportions in which judicial "have-done," "will-do," and "should-do" were blended; and the very project of restating the law is a commentary on the inadequacy of "our common law system of expressing and developing law through judicial application of existing rules to new fact combinations."³³ In the present instance, record of what was done is very clear. Professor Beale had concluded (a bit prematurely, we know today) that the *Haddock* decision would "stick."³⁴ He had known dislike for loose ends and unreconcilable doctrines, and a positively "Blackstonian" penchant for synthesis of legal decisions. A devout Episcopalian,³⁵ and highly appreciative of the sanctity of the marriage ties, it was not difficult for him to rationalize the decision upon principles not argued by counsel or hinted at by court in any decision to date. There are frequent examples of this technique in legal history—indeed, its disclosure is one of the advantages of a study of the subject. But until adopted judicially, what authority supports the principle so put forward? When

32. American Law Institute, *RESTATEMENT, CONFLICT OF LAWS* (1934) Introduction, p. iii.

33. *Ibid.*

34. Beale, *op. cit. supra*, note 28.

35. It has been frequently remarked that Justice White, who delivered the opinion of the court in the *Haddock* case, was a Catholic. It will also undoubtedly be pointed out that Justices Murphy and Jackson, dissenting in *Williams v. North Carolina* (see *infra* at note 43), are respectively Catholic and Episcopalian. The argument cannot be pressed too far. Justice White was with the majority in *Atherton v. Atherton*.

adopted, upon what precedent does it rest? Is the holding of any case any *ratio decidendi* not inconsistent with its particular judgment?³⁶ How many cases must not be in conflict? What is the law during the "at least twenty years" it may take the profession to appreciate the real decision of the case?

The Restatement took the position that a state might exercise jurisdiction to dissolve the marriage of spouses one of whom is domiciled in the state if (1) the other is also domiciled in the state, or (2) the other has consented that the first spouse acquire a separate home, or (3) the other has by misconduct lost the right to object to the acquisition of a separate home by the first spouse, or (4) if the other spouse is personally subject to the jurisdiction of the state, or (5) if the state is the last state in which both spouse had their matrimonial domicile.³⁷ The fifth alternative is an obvious concession to the *Haddock* and *Thompson* cases. The second and third alternatives are really attempts at rationalizing the fifth and Professor Beale's intention was to substitute them for it.³⁸ It is implicit in this formula that *Maynard v. Hill* was wrongly decided, and the proposition that a divorce may be good where rendered but need not be accorded the same recognition in other states is rejected.³⁹ *Davis v. Davis*⁴⁰ seemed to give some judicial sanction to the Restatement thesis. Husband and wife had maintained their matrimonial domicile in the District of Columbia, where he obtained a divorce *a menso et thoro*. He subsequently sued for a divorce *a vinculo* in the State of Virginia, the wife appearing specially to plead to the jurisdiction only. The husband's domicile was found to be in Virginia and the divorce was granted upon the same grounds as was the limited divorce in the District of Columbia. The husband then sought relief from the alimony and maintenance provisions of the District decree. The Supreme Court held that the Virginia divorce was entitled to the same credit in the District of Columbia that it had in Virginia, reversing the Court of Appeals which had relied on *Haddock v. Haddock*. It first took the position that as the decree could be attacked collaterally only for lack of jurisdiction, and

36. See note 18, *supra*.

37. American Law Institute, *RESTATEMENT, CONFLICTS OF LAWS* (1934) § § 110, 111, 113.

38. See Beale, *op. cit. supra*, note 28.

39. *RESTATEMENT, CONFLICTS OF LAWS* (1934) § 113, comment g.

40. 305 U. S. 32 (1938), discussed at length by Leflar, *More Faith and Credit for Divorce Decrees* (1939) 4 *Mo. L. Rev.* 268.

as the wife had appeared in Virginia to contest that point, the Virginia court's ruling on its jurisdiction was *res adjudicata* and binding upon her. The opinion is exceedingly indefinite on just what appearance is sufficient to have this effect, and various circumstances were recited from which an inference might be drawn that the proceedings were also contested on the merits. Both as a guide for future litigation as well as a logical extension of precedent, the case is not helpful, for *Andrews v. Andrews*, which also involved an appearance by the wife in the divorce proceeding denied extra-territorial recognition, was distinguished by the simple expedient of prefixing the citation by "*cf.*" In Reno, it is common to have the absent spouse enter an appearance by attorney to feign a contest over jurisdiction. This may assist in the subsequent development of an estoppel,⁴¹ but I doubt if the validity of the divorce is thereby conclusively established.

However, in the *Davis* case, the court did not distinguish *Haddock v. Haddock* on that ground. Instead, it recited the facts to establish the difference in fault of the litigants, leading some to believe that the court might be approaching the view of the Restatement. It has been pointed out before that "fault" is likely to be a disputed question, and in no case has the court indicated why the conclusion of the second court—denying full faith and credit to the foreign decree—should be more persuasive on that issue than the determination of the first court which granted the decree, or *vice-versa*, but so far the Supreme Court has not investigated the facts independently.

We are approaching the end of the journey. In December of this year, the newspapers reported, "*Haddock v. Haddock* overruled," and many added gratuitously, "Reno divorces upheld."⁴² Just where the Williamses and Hendrixes came from originally or where they were married, does not appear, and so far as our precedents would indicate, it makes no difference to us. Both families were domiciled in North Carolina when marital relationships reached the breaking point. Mr. Williams and Mrs. Hendrix went to Nevada, stayed there six weeks, and each obtained a decree of divorce for cruelty in which it was recited that the petitioner was a *bona fide* resident of the state. The absent spouses were served by publication, were never within the state, and made no appearance by attorney. In the words of Mr. Justice Jackson, promptly on the granting of the second divorce,

41. See Harper, *The Validity of Void Divorces* (1930) 79 U. OF PA. L. REV. 158. *Cf.* the cases collected, Note (1936) 105 A. L. R. 817.

42. *E.g.*, TIME MAGAZINE, Jan. 4, 1943, p. 20.

Mr. Williams and Mrs. Hendrix "had benefit of clergy and emerged as man and wife," immediately returning to North Carolina, where they lived together until the institution of the instant prosecution for bigamy.

At the trial, the judges charged the jury that the defendants had the burden of proving, though not beyond a reasonable doubt, a *bona fide* domicile in Nevada, and that a Nevada divorce based on substituted service on the absent spouses would not be recognized in North Carolina. To both charges, defendants excepted. The jury returned a general verdict of guilty, and the sentence thereon was affirmed by the North Carolina Supreme Court. The United States Supreme Court granted *certiorari*.⁴³

It is immediately apparent that in all probability neither defendant was ever domiciled in Nevada. On its face, it would seem like a typical and flagrant case of Nevada divorce (this time, Las Vegas rather than Reno), a circumstance which caused the newspaper outbursts referred to. However, it is not a legal impossibility to acquire a domicile which is shortly abandoned by reason of a *bona fide* change of mind and on the facts recited by the court, conviction might have been rested on the charge requiring, in addition to domicile, intra-state service on the defendant spouse.

If as a matter of law and upon the evidence, the jury could not have found any party to have been domiciled in Nevada, the instruction, even if erroneous, might not have been reversible error and the case disposed of by a slight extension of the doctrine of *Andrews v. Andrews*. Whether this was a possibility would depend upon the particular form of appeal originally taken in the North Carolina courts and the state of the record before the Supreme Court. Justice Douglas, speaking for the majority, asserted there was *concededly* sufficient evidence to sustain a possible finding of domicile. The dissenting justices, although directing their entire argument against compulsory recognition of a divorce granted in a state in which neither petitioner nor respondent were domiciled, seem largely to have assumed the lack of domicile. At any rate, there was no compelling necessity to decide the case upon that issue, and the constitutional validity of the charge, denying credit to the Nevada decree under the conditions enumerated, was fairly put in question.

To the latter point the prevailing opinion was addressed exclusively, with the express conclusion that *Haddock v. Haddock* should be and was

43. *Williams v. North Carolina*, 63 S. Ct. 207 (1942).

overruled. The first premise of Justice Douglas' able opinion is that the Constitution enjoins full, not some, credit to the judicial proceedings of the sister state, which could only mean that a judgment should be accorded elsewhere the same effect as it has in the state in which it is rendered.⁴⁴ The proposition is one not easily attacked and the failure to observe it in *Haddock v. Haddock* made that opinion particularly vulnerable. When Professor Beale and the American Law Institute sought to justify the *Haddock* decision, they rejected the position that a man and woman might be divorced in one state but married in another, but in *Williams v. North Carolina*, Justice Murphy, dissenting, contended that there was no Constitutional obligation upon Nevada to enforce the bigamy laws of North Carolina and the former might, if it chose, treat the parties as divorced for the purpose of its own laws, without requiring North Carolina to do the same. In this the Justice was confusing two distinct matters and "begging the question" of them both. Nevada is free to disregard bigamy if it chooses, but whether it (or North Carolina) may enact or enforce bigamy laws discriminating against individuals because their marital status has been fixed by another state, or whether Nevada (or North Carolina) may affect the rights of an absent spouse in Nevada property without acquiring domiciliary jurisdiction over the plaintiff in court, were the very questions at bar. Justice Douglas reverted to *Atherton v. Atherton* for the statement that a wife without a husband, or a husband without a wife, were unknown in the law, an eminently sensible observation.

The second premise was that every state has jurisdiction to determine the status of its own domiciliaries, and *Maynard v. Hill* was again restored to favor. While none of the previous decisions involving the recognition of a foreign decree have laid down this doctrine, as we have seen, yet many state courts whose opinions were favorably cited therein had acted upon it in determining their own jurisdiction, and until *Haddock v. Haddock* it was generally accepted among the legal profession. As that decision expressly recognized that a divorce not within the scope of the full faith and credit provision of the Constitution was not necessarily void under the due process clause, the great majority of states have continued to accord decrees rendered at the domicile of either party full credit as a matter of

44. This premise was elaborated by the concurring opinion of Justice Frankfurter.

comity.⁴⁵ Consequently, it is believed only a few states will be compelled, by *Williams v. North Carolina*, to recognize decrees they would not previously.

Divorce is an unhappy solution of marital difficulties at best, and it is quite obvious that legalistic problems in jurisdiction to divorce are incapable of satisfactory determination. The conflict between consideration for the individuals involved and recognition of the interest of government has already been mentioned. The divorce action is neither completely personal nor altogether *in rem*. Three further factors complicate the matter in this country, (a) the modern and wholly desirable emancipation of the married woman, who is increasingly competent to establish a separate domicile, (b) the size of the nation, and (c) the federal character of the union. In England, the domicile of a married woman is that of her husband; the split domicile problems cannot arise; but who would pay their price for such peace? If the nation were not so large, there would be less chance of injustice to the spouse who remained at home, either in a divorce without notice or in hardship in travelling to defend unjustified suits. If we were but one sovereignty, jurisdiction would be unquestioned (Mexican and Parisian divorces have raised only the issues of "no domicile," not "single domicile") and the most acute question would be that of venue. The philosophy of the *Williams* case, enlarging the operation of the full faith and credit clause, plainly tends toward greater unification of the states. To let the merits of the divorce controversy be settled by the first domiciliary state to exercise jurisdiction is part of the price we pay for a federal union, though it means that the status of the absent spouse is determined without the participation and perhaps against the policy of the state of his or her domicile. The sovereignty of every state is not absolute; it was the purpose of Article IV to make us a single nation.

Adherents to the Restatement seem less jealous for the interest of the state of the absent spouse's domicile than fairness to the spouse personally. Presence or absence of fault in any party can not affect the concern which a state has in his status. The court was reluctant to require investigation of the merits of the divorce controversy, so transforming itself into a divorce court, in order to test the jurisdiction of the court originally entering the decree, but the argument is not sufficient justification in itself for re-

45. See GOODRICH, *CONFLICT OF LAWS* (2 ed. 1938) p. 348, n. 40, 41, 42.

jecting a proposition presented as essential to the administration of justice. But there must be an end to controversy, and unless a divorce action is so far *in personam* as to require personal service on the defendant, recognition of the integrity and interest of the first domiciliary court to pass on the merits would seem to obviate necessity for reconsideration of them.

Justice Jackson's earnest and at times biting dissent never came to grips with majority argument. In attacking the judgment for recognizing a decree rendered in a state where neither party was domiciled, he struck down a straw man. The prevailing opinion simply refused to argue the question⁴⁶ and the dissent did not establish that it was in issue.

Hence we have no holding that divorce actions are perfectly transitory, or that a recital of domicile in the decree of divorce itself is conclusive.⁴⁷ A few weeks before *Williams v. North Carolina* was decided, the Supreme Court of Missouri refused credit to a Nevada divorce on the ground that no party had been domiciled there.⁴⁸ No precedent of the Supreme Court controverts that, and there is much dictum (possibly the holding) of *Andrews v. Andrews* to support it.

Indeed, a most interesting implication of the *Williams* case is that such a decree must not be recognized.⁴⁹ The test of jurisdiction, either for due

46. "Accordingly, we cannot avoid meeting the Haddock v. Haddock issue in this case by saying that the petitioners acquired no bona fide domicile in Nevada. If the case had been tried and submitted on that issue only, we would have had quite a different problem, as *Bell v. Bell* indicates. We have no occasion to meet that issue now and we intimate no opinions on it. . . . 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." Douglas, J., 63 S. Ct. at 210.

47. The dictum of the Douglas opinion would seem as much opposed to divorce without domicile as the argument of the dissenters.

"The historical view that a proceeding for divorce was a proceeding in rem . . . was rejected by the *Haddock* case. We likewise agree that it does not aid in the solution of the problem presented by this case to label these proceedings as proceedings in rem. Such a suit, however, is not a mere in personam action. Domicil of the plaintiff, immaterial to jurisdiction in a personal action, is recognized in the *Haddock* case and elsewhere (Beale, *Conflict of Laws*, § 110.1) as essential in order to give the court jurisdiction which will entitle the divorce decree to extra-territorial effect, at least when the defendant has neither been personally served nor entered an appearance. . . . Hence the decrees in this case like other divorce decrees are more than in personam judgments. They involve the marital status of the parties. . . ." 63 S. Ct. at 212, 213.

48. *Wright v. Wright*, 165 S. W. (2d) 870 (Mo. 1942).

49. What is the effect of the decision upon a statute like the following "Any judgment or decree of divorce rendered upon service by publication in any state of the United States in conformity with the law thereof shall be given full faith and credit. . . ." KAN. LAWS (1907) ch. 184 § 1.

process or full faith and credit, is the same; if the decree is not entitled to the latter, it is everywhere void. But the point was not before the court; the proposition suggested is but the conclusion of a syllogism premised on the generalized abstractions propounded as the *ratio decidendi* of another case. The record of *stare decisis* in jurisdiction to divorce would not justify too much confidence on abstract logic if a different case—let us put that of the gratuitous desire of a state to legitimize the children of a subsequent marriage of a party to such “void” divorce—came to the Supreme Court.

Too many lawyers have been educated to criticize *Haddock v. Haddock* for there to be much indignation at its overthrow. And in the frank disregard for the sanctity of precedent there was too much honest discussion of the realities of the decision to justify any objection to the judicial technique. Here Justice Jackson did join issue with his brethren. Discussing the effect of the decision on the legitimacy of children, he remarked, “In any event I had supposed that our judicial responsibility is for the regularity of the law, not for the regularity of pedigrees.” I would have supposed just the opposite.