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DICTA

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"Sartor Resartus"†

(The Tailor Retailored)

BY GRAHAM SUSMAN*

Otis Williams, a storekeeper in Granite Falls, North Carolina, a middle-aged father of four, fell in love with plump Lillie Hendrix, wife of the store's handyman. With romance in their hearts they drove west to Las Vegas, Nevada, where they found the housing problem to be as acute as elsewhere in the country. They settled down to a six-week vacation in a transient auto court, obtained Nevada divorces, immediately remarried in Nevada, and returned home in anticipation of a happy future. Little did they realize as they chugged their way across the continent that they were setting the wheels in motion in a legal proceeding which would twice bring their case to the North Carolina Supreme Court and twice to the United States Supreme Court. Nor did they realize that the result of their action would seriously affect the lives and the future of countless thousands who had obtained non-contested decrees—regardless of where they had been entered.

Upon their return to North Carolina, they were arrested for bigamous cohabitation,[1] and the jury found them guilty, refusing to give recognition to the Nevada decrees and their subsequent remarriage. The case was appealed to the North Carolina Supreme Court, where it was affirmed.[2] An appeal was then taken to the United States Supreme Court, which reversed the state court in Williams I.[3] It must be noted, however, that in this decision the question of residence and domicile was not raised on appeal, but was predicated upon the theory that one state was not bound to recognize a foreign divorce decree, based upon substituted service where the defendant made no appearance. Such had been the rule for many years on the authority of the Haddock case,[4] which was thereupon expressly overruled. The court held that each state must give full faith and credit to the judicial acts, records, and decrees of every

†A sequel to "So You Want a Nevada Divorce," 21 DICTA 6, June, 1944.

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[1]Sec. 14-183 Gen. Stat. of N. C. (1943).

[2]State vs. Williams, 220 N. C. 445, 17 S. E. (2d) 769 (1941).

[3]Williams vs. No. Carolina, 317 U. S. 287, 87 L. Ed. 279, 63 S. Ct. 207, 143 A. L. R. 1273 (1943).

[4]Haddock vs. Haddock, 201 U. S. 562, 26 Sup. Ct. 525, 50 L. Ed. 867 (1906).

other state, and that North Carolina must give effect to the Nevada decrees.

In its decision, however, the Supreme Court was careful to point out that no attack had been made by the State of North Carolina on the question of the bona fides of the defendants' residence in Nevada, and that "it must treat the present case * * * precisely the same as if petitioners had resided in Nevada for a term of years and had long ago acquired a permanent abode there." Under such circumstances, the court gave effect to the full faith and credit clause and held the Nevada decree to be good. It added, however, a qualifying statement, which left open the issue as to whether one state could question the bona fides of the domicile acquired in another. The court said:

> "Nor do we reach the question as to the power of North Carolina to refuse full faith and credit to Nevada divorce decrees because, contrary to findings of the Nevada Court, North Carolina finds that no bona fide domicile was acquired in Nevada."

Newspapers and lawyers throughout the country pointed to this decision as proof that Nevada divorce decrees had reached a point of legal respectability and Nevada divorce business continued to grow. In fact, the publicity was so widespread that one court[5] took judicial notice thereof and said:

> "Were it not for the misleading press notices and the generally confused discussion of the Williams case * * * it would scarcely be necessary to point out the limited effect of this decision."

But the dignity of the State of North Carolina had not yet been vindicated, and the storekeeper and his newly acquired wife were again promptly arrested, tried, and again found guilty. On appeal to the North Carolina Supreme Court, the conviction was affirmed,[6] and again it was brought to the United States Supreme Court on the precise question that the court had failed to answer in Williams I.[7]

In a six to three decision, Justice Frankfurter writing the opinion for the three justices whose views were expressed in "The opinion of the court," the court held that North Carolina could determine for itself whether the parties were so domiciled in Nevada as to confer jurisdiction there. The court pointed out that after a contest upon jurisdictional questions, these cannot be re-litigated as between the parties,[8] but those not parties, should not be so foreclosed, especially a state which is concerned with the vindication of its own policy, and has no other means to protect that interest against the selfish action of those outside its

[5]Commonwealth vs. Esenwein, 153 Pa. Supr. 69, 33 Atl. (2d) 675 (1943).
[6]State vs. Williams, 224 N. C. 183, 29 S. E. (2d) 744 (1944).
[7]Williams vs. No. Carolina, 65 Sup. Ct. Rep. 1092, 89 L. Ed. 1123 (1945).
[8]But see contra Solotoff vs. Solotoff, 53 N. Y. S. (2d) 510 (1945).

borders. If such findings were conclusive, the policy of each state in matters of most intimate concern could be subverted by the policy of every other state.

The court added that a divorce decree must be respected by all the states, provided "the conditions for the exercise of power by the divorce-decreeing court are validly established whenever that judgment is elsewhere called into question. In short, the decree of divorce is a conclusive adjudication of everything except the jurisdictional fact upon which it is founded, and domicile is a jurisdictional fact. To permit the necessary finding of domicile by one state to foreclose other states in the protection of their social institutions would be intolerable."

Justice Rutledge, in a strong and vigorous dissent, pointed out that the decree is valid in Nevada—based upon evidence presented to that court—and the subsequent marriage of the parties in Nevada is also valid. If it is concededly valid, then neither North Carolina nor anyone else can qualify it by saying it shall not be effective in North Carolina, while it is effective in Nevada, and stands without impeachment.

Justice Black discussed the uncertainty caused by the decision, and stated that the court's opinion "will cast a cloud over the lives of countless numbers of the multitude of divorced persons in the United States * * * it undermines and makes uncertain the validity of every uncontested divorce decree. It wipes out every semblance of their finality and decisiveness * * * the result is to classify divorced persons in a distinctive and invidious category."

Justice Murphy in a separate concurring opinion takes issue with Justice Black, and states that "there are no startling or dangerous implications in the judgment * * * all of the uncontested divorces that have ever been granted in the forty-eight states are as secure today as they were yesterday, or as they were before our previous decision in this case. Those based upon fraudulent domiciles are now and always have been subject to later re-examination with possible serious consequences."

It is apparent that this decision not only affects the finality of Nevada decrees, but opens up the right of any state to question the validity of a non-contested decree obtained in another. It weighs one state public policy against that of another. No final determination of its own jurisdiction can therefore be made by a state court in a non-contested case. And since domicile involves a mixed question of law and fact,[9] it is possible for a jury in one state to uphold the decree while a jury in another will reach an opposite conclusion, based upon the same identical evidence. Who can know, therefore, or guess what rights he may exercise upon a divorce decree obtained in another state? How far can he rely thereon?

[9] 19 Corpus Juris 441.

It is true that many of the states have followed the right to question such foreign decrees even prior to Williams II. In Colorado our Supreme Court has recently held to the same effect in denying validity to a Nevada decree.[10]

This case was decided after the decision in Williams I, but before Williams II. The husband, who had been a resident of Colorado, went to Nevada, stayed the required time, and obtained a decree of divorce in his favor. The wife was personally served with summons in Colorado, but did not appear in the suit either personally or by attorney. After he obtained the decree, the husband returned to Colorado, where he resumed his residence. The lower court found that the husband had gone to Nevada solely for the purpose of obtaining a divorce, but held with expressed reluctance that Williams I precluded any inquiry by a Colorado court into the fact findings of the Nevada court on jurisdictional matters, and compelled recognition under the full faith and credit clause. The Supreme Court ruled that it was not so precluded, and that a foreign divorce decree entered upon such service is invalid if obtained by one not bona fide domiciled within the jurisdiction of the court granting the divorce. The court held that the Williams decision "did not disturb the pre-existing rule that a court of a state within whose jurisdiction neither one of the parties to a divorce suit is a bona fide domicile has no jurisdiction to render a divorce decree which would be binding in other states under the full faith and credit clause."

If the State of Colorado may question the jurisdiction of the Nevada court or the domicile of a successful party in that court, then the Nevada court may likewise question a decree obtained in Colorado. And while the Colorado court or jury may be satisfied that it had jurisdiction to enter a decree, a Nevada court or jury may decide otherwise on the same evidence. Consider the status of a woman who marries a man who has just obtained a divorce decree and marries in reliance upon its validity. Must she be compelled to retain counsel to ascertain whether her new husband had sufficiently established his domicile in the state decreeing the divorce? And since the matter of domicile is one upon which men may reasonably differ, how certain can she be after the ascertainment of such fact? Perhaps a jury in another state may think otherwise.

The public is entitled to know once and for all whether a Nevada divorce is good or no good—without equivocation; whether a man's second marriage is valid or whether he is just living with a mistress; whether his children begotten by his second marriage are legitimate or not; whether his first wife is married to someone else, or whether her marriage is also void; whether her children are legitimate or not; whether

[10]Koscove vs. Koscove. 113 Colo. —, 156 P. (2d) 696. (Decided Feb. 26. 1945.)

his first or second wife is entitled to his estate upon his death, et cetera and ad infinitum.

It is not enough to say that it all depends on whether he intended to make his home in Nevada at the time the decree was entered, regardless of what the Nevada court found on this subject; that it depends further on what some jury in another state, even years afterwards, may determine what was in his mind when in Nevada; or what he did after he obtained his decree; that his status and that of his former spouse and even of his freedom shall depend upon the finding of a jury upon the debatable question of domicile—and which question could be raised in any and every state he might enter.

Consider the poor traveling salesman who had obtained a Nevada decree, married, and is traveling across the country with his new wife. It would be incumbent upon him to ascertain in every state he entered whether he was lawfully married therein, or whether he was a bigamist. And even if his lawyer traveled with him, he could be of little help, as the determination of that question could only be made by a local jury in every state.

The United States Supreme Court has heretofore held[11] that when the defendant enters a special appearance in a case prosecuted in a state other than that of his residence, for the sole purpose of raising a question of jurisdiction, and the decision is adverse to such contention, the question of jurisdiction becomes res adjudicata and cannot again be litigated. In fact, this is mentioned in Williams II when the court, speaking of jurisdictional questions, stated: "After a contest, these cannot be re-litigated as between the parties."

The theory thereunder is to give the opposite party an opportunity to present his contentions, and a recital of the jurisdiction in such a divorce decree is not subject to attack anywhere.[12] Why could not this theory, or principle, be extended to default cases where the defendant has been properly served with process, and is given an opportunity to present his evidence, but chooses not to do so? Must the validity of a jurisdictional recital in a decree be based upon whether or not there had been a contest? This is not the test used in other types of civil proceedings.

The right of a state to collaterally attack decrees entered in another, casts doubt upon the validity of all divorces which have been obtained by resort to the courts of another state. Lawyers and judges have been seeking a way out of the confusion. In Colorado two bills were passed by the 1945 Legislature on the subject. Senate Bill 57 provided in effect that no decree of divorce entered by a court of this state, or another state,

[11]Davis vs. Davis, 305 U. S. 32, 83 L. Ed. 26, 59 Sup. Ct. 3.
[12]See Note 8.

shall indefinitely remain subject to impeachment here, provided it appears that (1) the court which entered the decree was vested with jurisdiction to grant divorce decrees and (2) that such court determined that it had jurisdiction to grant said decree. It provided further for a one year limitation on impeachment if the defendant was personally served with process, or accepted, or waived service, or otherwise entered his appearance, and a two year limitation on impeachment in all other cases. Section 3 of the bill outlines its purpose in the following language:

> "In order to foster and preserve the integrity of conjugal relations, and the stability of family ties, and to protect children born to parents one or both of whom may previously have been married and divorced, and other innocent persons affected thereby, from the turmoil, indignity, and notoriety attendant upon proceedings, the purpose of which is to inquire into the regularity of divorce proceedings to invalidate the same, and in order to render definite and certain the status of divorced persons, the General Assembly hereby finds, determines, and declares the public policy of this state to be that decrees of divorce, regular on their face, whether entered by the courts of this state, or of any other state, territory, or commonwealth within the United States, should not be questioned for any cause whatsoever after the lapse of a reasonable time as in this Act is provided; and to effectuate this policy, this Act shall be liberally construed."

Senate Bill 58 provided, inter alia, that when a final decree of divorce of this state, or any other state, is attacked, a certified copy of such decree shall be admitted in evidence without further proof of its genuineness, and when so admitted, shall be prima facie proof (1) that said decree of divorce was duly made and entered, (2) that the court, if it be a foreign court, was vested with jurisdiction to grant decrees of divorce by the laws of the state wherein it was entered, and (3) that the court which entered the decree determined that it had jurisdiction to grant the decree, and that it had jurisdiction of the parties and the subject matter of the cause.

The two bills were vetoed on March 1, 1945, by Governor Vivian, who doubted their constitutionality and who asserted that the bills would "certainly furnish ample opportunity of committing fraud in divorce actions."

The State of Delaware recently passed a bill allowing recognition by Delaware courts to divorces or annulments granted in other states and foreign countries. Bills to broaden the grounds for divorces have been introduced in various states by proponents who contend that out-

of-state divorces of questionable validity should be averted by relaxing and unifying the divorce laws of all states.[13]

Justice Rutledge believes that the courts should avoid the tremendous confusion resulting from its decision by definitely adopting one of two policies: first, by ruling that transient divorces, founded on fly-by-night residence, are invalid where rendered, as well as elsewhere, and second, an opposite policy frankly conceding state power to grant transient or short term divorces, provided due process requirements for giving notice to the other spouse were complied with. In his view, the opinion in Williams II gives effect to neither one of these theories. It is a compromise which vitiates both "and does so in a manner wholly capricious alike for the institutional and the individual aspects of the problem."

There is considerable merit to both of these suggestions. By the adoption of either of them, objective standards of proof would apply instead of the highly variable common law conception of domicile. The trouble with domicile, says Justice Rutledge, is its dependence upon a state of mind. "It can be changed in a twinkling of an eye—the time it takes a man to make up his mind to remain where he is when he is away from home. He need do no more than decide, by a flash of thought, to stay either permanently, or for an indefinite or unlimited length of time. No legal conception, save possibly 'jurisdiction' * * * affords such possibilities for uncertain application."

While the difficulty of working out any system is apparent—so long as each of the forty-eight states can now determine their own policies and laws, still some solution to the problem must be found. The importance of the question should stimulate profound thought and study by serious-minded judges, lawyers and legislators, who appreciate that in our social structure certainty must be substituted for doubt in the matter of marriage, divorce and legitimacy of children.

And what about Otis Williams and Lillie Hendrix, who still languish in jail, despite the fact that Williams' first wife has since died and Lillie's former husband has since remarried?

Colorado Bar Association ANNUAL MEETING

It has just been definitely decided that the annual meeting will be held October 18, 19 and 20 at the Broadmoor Hotel. It is suggested that you write immediately for reservations, which will be limited to 150 in the hotel. Further announcement of the program will be made through the Public Ledger or the next issue of DICTA.

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[13]Legislation which would have required Florida to recognize divorces obtained "in other jurisdictions" was vetoed by Governor Caldwell on the grounds that it was too broad and might result in validating decrees outside the United States.