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Bill Jones[1] was miserable. For six years he had been separated from his wife, and for some years prior to their separation, their marital relationship was far from satisfactory. Constant arguments, fighting, bickering, nagging and numerous embarrassing situations demonstrated that the parties were definitely unsuited to each other. But for some reason, Mrs. Jones wouldn't divorce Bill, nor would she give him the satisfaction of obtaining a divorce. He had filed a suit for divorce in Colorado, and she had filed a cross-complaint for separate maintenance. The jury had found both parties guilty of cruelty and decreed separate maintenance to the wife under the authority of *Vigil v. Vigil*.[2]

Thereafter, a second suit was filed in Colorado by Jones based on acts of cruelty occurring since the first trial, which resulted in the denial of a divorce. It appeared that Bill Jones was destined to remain under a rather intolerable situation, which became aggravated at the end of each month, when another payment for his wife was mailed to the clerk of the district court.

Mrs. Jones was assured of an income for the rest of her life—or for the rest of his. She had stated in no uncertain terms that she would *never* permit Bill to obtain a divorce and that she would fight him "until Hell freezes." Of course she had no intention of getting a divorce, because if her husband should remarry, it might affect his ability to continue those monthly checks.

Jones had been reading the newspapers and had noticed the ease with which many people severed their marital bonds by a short sojourn in Nevada. His friends had urged him to go to Reno, where "he could get a divorce in six weeks." Bill's mind was made up. He would go to Nevada, bring an end to this marital conflict, and perhaps find some happiness during the remaining years of his life. Perhaps he had better

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[1]Any similarity in name of persons, living or dead, is purely coincidental.

[2]49 Colo. 156, 111 Pac. 833 (1910), 31 L. R. A. (NS) 579 (1911).

see his attorney, Mr. Barrister,[3] and discuss this step with him before he left Colorado.

The next day Bill appeared at the office of his attorney. "Mr. Barrister," he said, "I thought I'd let you know that I'm going to Nevada and get a divorce there. Before going, I should like to ask you some questions that have occurred to me."

"Certainly," replied the attorney. "I'd be glad to discuss this with you. I suppose you know that there is some question as to whether or not the Nevada decree would be recognized in Colorado."

"But," interrupted Jones, "here is a clipping I cut out of the paper about a year ago, which says that the United States Supreme Court has ruled that Nevada divorces must be recognized everywhere under the full faith and credit clause of the Constitution. It gives the name of the case: *Williams v. North Carolina.*"[4]

"That case doesn't decide that," replied Barrister. "When the decision was first handed down, newspaper reports conveyed the impression to the public that all Nevada decrees will be valid everywhere, and must be recognized by the courts of every other state. This impression is not correct."

"The *Williams* case," continued Barrister, "in effect, eliminated the fiction of law known as 'matrimonial domicile.' In other words, the Court has said that the forum need no longer inquire into the question of which party is at fault to determine whether or not the matrimonial domicile has been brought within the state. However, it did not decide whether a sister state could inquire into the question of whether or not there had been a bona fide domicile in Nevada. This question was not raised in the *Williams* case, and the Court proceeded on the theory that the parties had acquired a permanent abode in Nevada. The Court specifically 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 the findings of the Nevada Court, North Carolina finds that no bona fide domicile was acquired in Nevada."

The attorney continued: "As a matter of fact, there have been many decisions which have specifically passed upon this point since the ruling in the *Williams* case. Within a month after the *Williams* decision, the supreme court of New York had this very question before it. In the case of *Jiranek v. Jiranek*,[5] the husband went to Nevada, stayed there

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[3]See note 1.

[4]317 U. S. 287, 63 Sup. Ct. 207, 87 L. ed. 189 (1942), 143 A. L. R. 1273 (1943).

[5]39 N. Y. Supp. (2d) 523 (Decided Jan. 22, 1943).

the required six weeks and obtained a decree in his favor on the ground of cruelty. In an action brought by his wife in New York, the record of the Nevada court was introduced as a defense to the action. The court said:

> "When a judgment rendered in one state is challenged in another, want of jurisdiction over either the person or the subject matter is open to inquiry * * * The nature of the federal union of states, to which are reserved some of the attributes of sovereignty, precludes resort to the full faith and credit clause of the federal constitution, Art. 4, Sec. 1, to compel one state to subordinate its own laws and policy concerning its domestic affairs to the laws and policy of other states. * * * The United States Supreme Court did not hold in *Williams v. North Carolina* that the bona fides of the residence or domicile in Nevada of the plaintiff in the Nevada action could not be challenged in this state because of the full faith and credit clause of the federal constitution.

"This principle of law has been followed by later decisions of the New York courts,[6] as well as in the states of Pennsylvania,[7] Ohio,[8] New Jersey,[9] Connecticut,[10] and Massachusetts,[11] but the decree of a foreign state has been upheld in Illinois[12] and Iowa.[13] And while there are no Colorado decisions on this identical point of law since the *Williams* case, *supra*, I am inclined to believe that the Colorado courts would follow the weight of authority as exemplified by the New York decisions.[14]

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[6]McKee v. McKee, 39 N. Y. Supp. (2d) 859 (Decided Feb. 20, 1943); In re Bingham's Will, 39 N. Y. Supp. (2d) 756 (Decided Feb. 1, 1943); Oberlander v. Oberlander, 39 N. Y. Supp. (2d) 139 (Decided Jan. 12, 1943); Beitch v. Beitch, 43 N. Y. Supp. (2d) 391 (Decided Mar. 16, 1943); In re Lindgren's Estate, 43 N. Y. Supp. (2d) 143 (Decided June 29, 1943); Jolby v. Jolby, 42 N. Y. Supp. (2d) 855 (Decided June 23, 1943); Buvinger v. Buvinger, 42 N. Y. Supp. (2d) 848 (Decided June 7, 1943); Fondiller v. Fondiller, 42 N. Y. Supp. (2d) 477 (Decided Apr. 22, 1943); Ammermuller v. Ammermuller, 45 N. Y. Supp. (2d) 654 (Decided Dec. 13, 1943); and many other New York cases to the same effect. But see In re Fine's Estate, 44 N. Y. Supp. (2d) 62 (Decided Sept. 29, 1943), where the decree was upheld.

[7]Commonwealth v. Esenwein, 153 Pa. Superior 69, 33 Atl. (2d) 675 (Decided July 16, 1943), where the court 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."

[8]Smith v. Smith, 72 Ohio App. 203, 50 N. E. (2d) 889 (1943).

[9]Mascola v Mascola, 134 N. J. Eq. 48, 33 Atl. (2d) 864 (Decided Sept. 17, 1943); Wolff v. Wolff, 134 N. J. Eq. 8, 34 Atl. (2d) 150 (Decided Oct. 4, 1943).

[10]Hooker v. Hooker, 130 Conn. 41, 32 Atl. (2d) 68 (Decided Apr. 20, 1943).

[11]Bowditch v. Bowditch, 314 Mass. 410, 50 N. E. (2d) 65 (Decided July 13, 1943).

[12]Stephens v. Stephens, 319 Ill. App. 292, 49 N. E. (2d) 560 (Decided Apr. 28, 1943).

[13]Hobson v. Dempsey, 7 N. W. (2d) 896 (Decided Feb. 16, 1943).

[14]Davis v. Davis, 70 Colo. 37, 197 Pac. 241 (1921).

"And it may interest you to know," said Barrister, "that the *Williams* case was sent back to the North Carolina court for further proceedings. That court has just sustained the conviction upon which the original appeal was based,[15] and the North Carolina court specifically held that it may inquire into the bona fides of the residence. This is the language of the second opinion in that case:

> "Where one's domicile is, there will his marital status be also. The marital relation is interwoven with the public policy to such an extent that it is dissolvable only by the law of the domicile. So the domiciliary state, and no other, furnishes the proper forum for valid divorce proceedings."[16]

"But my wife said she would fight me until Hell freezes over," said Jones, "and she would no doubt go to Nevada to contest the action. I understand that most of the decisions you just mentioned were those where one party went to Nevada and obtained service on the other by publication, or by personal service in the state of defendant's residence. Would it make any difference if my wife came to Nevada to contest the action there?"

"Most assuredly, it would," replied Barrister. "Even if she were to appear specially for the purpose of attacking the jurisdiction only, your Nevada divorce, if one were subsequently entered, would be good anywhere. This was decided by the United States Supreme Court in the case of *Davis v. Davis*,[17] decided in 1938. There a resident of the District of Columbia moved across the Potomac and established his residence in Virginia. After the required residence period, he filed suit for divorce and his wife entered a special appearance to contest the jurisdiction. This contest having been held adversely to her, she refused to proceed further in the case, and a decree was entered in favor of the husband. In contesting the validity of the decree in the District of Columbia, the Supreme Court upheld it, saying:

> "She may not say that he was not entitled to sue for a divorce in the state court, for she appeared there and by plea put in issue his allegations as to domicile, introduced evidence to prove it false, etc. * * * Plainly, the determination of the decree upon that point is effective for all purposes in this litigation."

Barrister continued: "A recent New York decision is to the same effect.[18] This case held that when a wife sued for divorce in Nevada,

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[15]Williams v. North Carolina, 223 N. C. Supp. 141, 29 S. E. (2d) Adv. Sh. 744 (1944).

[16]See Bell v. Bell, 181 U. S. 175, 21 Sup. Ct. 551, 45 L. ed. 804 (1901).

[17]305 U. S. 32, 83 L. ed. 26, 59 Sup. Ct. 3.

[18]In re Adams Estate, 45 N. Y. Supp. (2d) 494 (Decided Dec. 16, 1943).

and the husband residing in New York entered a voluntary appearance in the Nevada court, the divorce decree would be recognized as valid in New York, and the court cited numerous decisions in support of this holding. In view of these holdings, it might be well if you could get your wife to go to Nevada to attack the validity of your domicile there."[19]

"But," persisted Jones, "there is something else that bothers me."

"What is that?" replied the attorney.

"Well, you know, I was licked in two trials in Colorado, and I haven't any new evidence other than that which was presented here. If we go to Nevada, it will be necessary that we present the same evidence. Isn't there some principle of law which bars the use of this evidence, once the case has been adjudicated?"

"Not at all," promptly responded the attorney. "That point has been adjudicated several times by the Nevada supreme court. Let us suppose, for instance, that you bring an action on the ground that you and your wife have lived separate and apart for more than three years without cohabitation,[20] which gives the court discretion to grant a divorce, and your wife defended on the grounds of cruelty, desertion, nonsupport, and res adjudicata. The action would come squarely within the decisions of *Herrick v. Herrick*,[21] *George v. George*,[22] and *Jeffers v. Jeffers*.[23]

"In the *Herrick* case, the wife defended on the grounds of cruelty, desertion, and the fact that the case had been tried three times in the California courts, in two of which the court had found both parties guilty of cruelty. A divorce granted to the husband was upheld by the Nevada supreme court. The court said:

> "The idea of a divorce on the ground stated is an idea of recent origin. The legislative concept embodied in the statute is that when the conduct of parties in living apart over a long lapse of time without cohabitation has made it probable that they cannot live together in happiness, the best interests of the parties and of the state will be promoted by a divorce. * * * This is a comparatively new idea in the law of domestic relations and divorce.

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[19]See also Durlacher v. Durlacher, 35 F. Supp. 1005 (D. Nev. 1940), where the court said: "The law appears to be well settled that where a defendant enters a special appearance in a case prosecuted in a state other than that of his residence for the purpose solely of raising a question of jurisdiction, and the decision is adverse to such contention, and no appeal therefrom is taken, the question of jurisdiction becomes res adjudicata, and cannot as to such action again be litigated."

[20]NEV. COMP. LAWS 1929, SUPP. 1931-1941, §9467.06.

[21]55 Nev. 59, 25 Pac. (2d) 378 (1933).

[22]56 Nev. 12, 41 Pac. (2d) 1059, 97 A. L. R. 983 (1935).

[23]55 Nev. 201, 29 Pac. (2d) 351 (1934).

"In other words, the granting of a divorce under this statute does not depend upon the previous conduct of the petitioning party. It is easy to conceive that the trial court under the circumstances of some particular case, might find it for the best interests of both parties and of society that a divorce should be decreed irrespective of the earlier behavior of the petitioner.

"* * * It is unnecessary for us to determine if in any of the California decrees the husband is adjudged to have been to blame in causing the separation, and therefore estopped to maintain the suit for divorce as contended by appellant. This contention is disposed of by our ruling that it is not an essential element of the statute that a party be without fault to maintain an action for divorce on the ground of separation for five[24] years without cohabitation."

Barrister continued: "In the *George* case,[25] the wife defended by showing a decree obtained in Ohio declaring her husband to be guilty of cruelty and awarding her separate maintenance. The court made an interesting social observation in this case when it said:

"It is evident that the conjugal life and the family life of the parties are permanently disrupted. There is no inclination for and no prospect of a reconciliation. Nothing is left of the marriage relation but the legal tie. Respondent contends that, regardless of these facts, petitioner should be punished for his misconduct by a refusal of the trial justice to dissolve the marriage. If it appeared that there was any advantage to the family, or to the state in continuing the marital status, the divorce might well be denied. But no such advantage is apparent. On the contrary, it is plain that to compel the parties to continue in their present status would be prejudicial to the parties and to their children. Such being the situation, we are of the opinion that there was no abuse of judicial discretion by the trial justice in granting the petitioner's prayer for divorce.

"From these quotations, it is clear that the discretion which the trial court is called upon to exercise depends not so much upon the comparative rectitude of conduct of the spouses as upon the probability of their being able to live together in such a manner as to be for their best interest and the best interest of society. * * *

"In the *Jeffers* case[26] the wife set up four affirmative defenses, but the lower court overruled them and was sustained. The court held that the defendant was entitled to introduce evidence of the husband's faulty

[24]Later changed to three years.
[25]*Supra* note 22.
[26]*Supra* note 23.

conduct only for the purpose of influencing the discretion of the court by the statute.

"The point is," added Barrister, "that the more evidence the wife introduces as to the guilty conduct of her husband, the more likely the court would be influenced in its discretion to grant a divorce, because such evidence would demonstrate to the court that the parties should not be bound to each other in marriage, and that a divorce should be granted."[27]

"Well, that sounds fine," said Jones, "but there is one other matter that occurs to me. Suppose my wife doesn't want to go to Nevada, and decides she wants to take some steps in Colorado to prevent me from proceeding in Nevada? Could she do this?"

"There are a number of decisions which hold that courts have a right to enjoin an absent spouse from proceeding with an action for divorce in a foreign state," answered the attorney. "Of course, the local court does not attempt to interfere directly with the courts of a sister state, but acts in personam upon the spouse herself. There are three principal reasons why courts of equity will issue such an injunction: the foreign residence is not bona fide and is obtained for the purpose of the divorce only, which is in fraud of the foreign court and the deserted spouse; it is an attempt to evade the laws of their common domicile; and it would result in expense, inconvenience and hardship to cause the deserted spouse to travel to Nevada to defend the action there.

"One of the leading cases on this subject is *Usen v. Usen*,[28] where the court said:

> "Since the courts of this state alone can dissolve a marriage of its citizens dwelling within its borders, it follows that a divorce proceeding brought by one of its citizens against another, in a sister state, is contrary to law, and so an infringement not only on the rights of the spouse who has been sued, but also an infringement on the right of the state to determine the matrimonial status of its own citizens."

"The *Williams* case," continued the lawyer, "has raised an interesting question even on this subject. The New York courts had refused to issue an injunction to restrain an absent spouse from obtaining a foreign divorce[29] on the ground that the plaintiff in the equity suit had

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[27]See also Parks v. Parks, 116 Fed. (2d) 556 (Ct. of App. D. C. 1940), and Bassett v. Bassett, 51 Fed. Supp. 545 (D. Nev. 1943).

[28]136 Me. 480, 13 Atl. (2d) 738, 128 A. L. R. 1449 (1940), and an extensive annotation in 128 A. L. R. 1467. See also Kempson v. Kempson, 58 N. J. Eq. 94, 43 Atl. 97 (1899), *aff.* 63 N. J. Eq. 783, 52 Atl. 625 (1902), 58 L. R. A. 484 (1903).

[29]Goldstein v. Goldstein, 283 N. Y. 146, 27 N. E. (2d) 969 (1940).

nothing to fear, since under the doctrine of *Haddock v. Haddock*,[30] the courts of the foreign state had no jurisdiction to render a valid decree against plaintiff, and therefore that judgment would be a nullity. Then the *Williams* case expressly overruled the *Haddock* case. Would the New York courts still follow this earlier decision? This point seems to be clarified by a recent New York decision[31] which granted an injunction to restrain the absent spouse where he had not even commenced an action, but merely threatened to do so. The court said:

> "Inasmuch as the Williams case has overruled the jurisdictional principles laid down in the Haddock case, the threatened injury is no longer illusory. *Equity may fashion its remedy to guard against the reality of harm.*"

"I understood you to say," interrupted Jones, "that the court acts in personam, so that I would have to be served with the injunction—or at least notice of it. Now, if I'm in Nevada, how could the Colorado court have power to serve me with an injunction order outside this state? And even if they did, I understand that a personam order is not effective unless served on me within the borders of this state."

"That may have been the law at one time," replied the attorney, "but not now. While it is true that service must be obtained, it seems that state boundary lines have been practically dissolved for this purpose by a recent decision of the United States Supreme Court.[32] This was a case that went up from Colorado,[33] where our supreme court held void a judgment in personam obtained in Wyoming on service in Colorado. The Supreme Court of the United States reversed the case, and used this language:

> " * * * The authority of a state over one of its citizens is not terminated by the mere fact of his absence from the state. The state which accords him privileges and affords protection to him and his property by virtue of his domicile may also exact reciprocal duties.
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> "* * * The responsibilities of that citizenship arise out of the relationship to the state which domicile creates. That relationship is not dissolved by mere absence from the state. The attendant duties, like the rights and privileges incident to domicile, are not dependent upon continuous presence in the state. One such incident of domicile is amenability to suit within the state even during sojourns without the state, where the state has provided and em-

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[30]201 U. S. 562, 26 Sup. Ct. 525, 50 L. ed. 867 (1906).

[31]Oltarsh v. Oltarsh, 43 N. Y. Supp. (2d) 901 (Decided Sept. 7, 1943).

[32]Milliken v. Meyer, 311 U. S. 457, 85 L. ed. 278, 61 Sup. Ct. 339, 132 A. L. R. 1357 (1941).

[33]Meyer v. Milliken, 101 Colo. 564, 76 Pac. (2d) 420 (1938), and Meyer v. Milliken, 105 Colo. 532, 100 Pac. (2d) 151 (1940).

ployed a reasonable method for apprising such an absent party of the proceedings against him. * * *"

Barrister continued: "Even before the decision in the *Milliken v. Meyer* case, many courts upheld the right to restrain an absent spouse, based upon service outside the state, on the ground that a suit for an injunction aimed to preserve a status in the state is a proceeding in rem, even though it operates upon the person of the absent resident.[34] It would appear, therefore, that service of a Colorado restraining order on you in Nevada, would be effective and may subject you to a contempt proceeding in Colorado, if you persist in proceeding with the suit in that state, and then return to Colorado to resume your residence here.

"Well," continued Barrister, "is there anything else you'd like to ask about?"

"No," replied Jones, "I've heard enough."

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[34]Kempson v. Kempson, *supra* note 28; Knapp v. Knapp, 12 N. J. Misc. 599, 173 Atl. 343 (1934). See also annotation in 128 A. L. R. 1467, 1477 (1940).