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Song of Sixpence Some Comments on Williams v. North Carolina

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SONG OF SIXPENCE

SOME COMMENTS ON *WILLIAMS v. NORTH CAROLINA*

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I have been requested by the editor of the QUARTERLY to comment on the decision of the Supreme Court of the United States and the opinions of the justices in the recent case of *Williams v. North Carolina, 317 U. S. 287, 63 Sup. Ct. 207 (1942)*. In answer to the first invitation of the editor, which reached me before I had seen a full report of the case, I replied that if published summaries were correct, there was no important new development involved in the decision. Indeed, on this assumption, no other decision was possible without a revolutionary departure from fundamental traditional postulates of our constitutional law. I attributed the editorial comment in the public press to laymen's mistaken notions of the meaning of the decision. The editor replied that the case had aroused great interest in professional circles and was considered an incident of epochal significance by many. It was suggested that it might be interesting to have a consideration of the case against the background of my article of 1936 [*The American Law Institute vs. The Supreme Court—In the Matter of Haddock v. Haddock* (1936) 21 CORNELL L. Q. 393] in which I protested the solution of the problem of *Haddock v. Haddock, 201 U. S. 562, 26 Sup. Ct. 525 (1906)*, suggested by the late Professor Joseph H. Beale of the Harvard Law School and backed by the potent prestige and propaganda of the American Law Institute. The editor also sent me advance sheets containing the report of the case which I had not found available in the wartime remote and fabulous province of my habitat.

The opinions in the case and the professional comment in reviews renewed my surprise at the chaos of floundering technic still characteristic of this field of divorce jurisdiction and convinced me that probably some further stones cast by me at least might enliven the mental riot. Hence this article in which I shall comment briefly not only on *Williams v. North Carolina*, but also on another case, *Davis v. Davis, 305 U. S. 32, 59 Sup. Ct. 3 (1939)*, which likewise has been a subject of bewildered discussion.

I do not purpose to explain again my views on the general problem of jurisdiction to divorce or my interpretation of the decision in *Haddock v. Had-*

dock. For convenience let us incorporate by reference my article of 1936 [*The American Law Institute vs. The Supreme Court—In the Matter of Haddock v. Haddock* (1936) 21 CORNELL L. Q. 393]. My present comments on *Williams v. North Carolina* and *Davis v. Davis* are a postscript to that article and should be read against the background of knowledge of its thesis.

I shall base my discussion of *Williams v. North Carolina* on the assumption that the record in the case justified the summary of points of fact on which Justice Douglas founded his decision. I do not intend to consult the record myself, for I am concerned with the case principally in its aspect as a precedent and its influence as such will be circumscribed by the estimate of essential facts in the opinions.

We shall assume then that the relevant facts of *Williams v. North Carolina* were as follows:

Mr. and Mrs. Williams and Mr. and Mrs. Hendrix all were domiciled in North Carolina where each couple had been married and had lived together for many years. Through one of those developments of temperament, environment, and human impulse which so often in this land of individual initiative and the profit motive disrupt the regimented arrangements of our social life, Mr. Williams and Mrs. Hendrix decided that they must leave their respective spouses and live together as husband and wife. Since the legal facilities of North Carolina were not adapted to speedy accomplishment of their purposes, they left for the more accommodating environment of Nevada. After residence in an automobile camp for the short period of legal domicil (six weeks) required by the genial laws of Nevada, each of our truant lovers obtained a divorce decree on the ground of extreme cruelty. They thereupon promptly married in Nevada and soon returned together to North Carolina and resumed residence in that state. Neither of the other spouses had appeared in the divorce suit and and neither had been subjected otherwise to the jurisdiction of the Nevada court.

As occasionally happens in such cases, the law enforcement officials of North Carolina decided that a violation of the criminal statutes of the state was involved in this sequence of events and hence our two lovers were prosecuted for bigamous cohabitation committed in North Carolina. At the trial the question of innocence or guilt turned on the validity of the Nevada divorces and marriage. The judge charged the jury in substance that the Nevada divorce decrees were not valid in North Carolina. He also charged on the state's contention that the defendants went to Nevada, not to establish bona fide residences but solely to obtain divorces through fraud on the court, that the burden of proof of the bona fides of their residences in

Nevada was on the defendants. The defendants were convicted and the conviction was sustained on appeal to the highest court of the state. The state supreme court held that, under the doctrine of *Haddock v. Haddock,* North Carolina was not bound to recognize the Nevada decrees as effective defenses. On certiorari in the Supreme Court of the United States apparently counsel for the State of North Carolina, arguing the case, did not insist on the point that defendants never acquired a domicil in Nevada, but rather emphasized that regardless of this question North Carolina, under the doctrine of *Haddock v. Haddock,* was entitled to enforce the policy of its laws against defendants by treating the Nevada divorces as legally void in North Carolina.

Justice Douglas, in his opinion justifying the decision of the Court that the judgment of the North Carolina courts must be reversed for violation of the Full Faith and Credit clause of the Constitution of the United States and the case remanded with directions, stated that counsel for North Carolina apparently had waived the question of bona fide Nevada domicils. He then emphasized that at any rate domicil of the defendants in Nevada at the time of the divorce decrees must be assumed for the purposes of the decision, since one of the charges to the jury had stated substantially that the fact of bona fide domicil in Nevada at the time of the divorce decrees would not give the divorces validity as a defense in these North Carolina proceedings and if this charge was wrong the conviction must be set aside.

Few lawyers will disagree with the Court's decision that the charge obviated all question of defendant's domicils at the time of the divorce decrees. Certainly in a criminal prosecution an instruction such as that in question is of vital importance to the defense and if it was wrong the conviction should not be sustained. Indeed it seems that the motivation of the dissents of Justices Murphy and Jackson to the disposition of this case was superfluously expended, since clearly on a retrial on proper instructions and evidence to support sufficiently the view of the facts entertained by the dissenting justices, the defendants might well be convicted again.

Before leaving this matter of domicils of defendants at the time of the divorce decrees, it should be noted that perhaps one important change in law may grow out of this case. As to the male defendant's domicil, there is no new point of law in the case; but as to the female defendant's domicil, there is this important question. Does the Court's decision imply that if Mrs. Hendrix intended bona fide to make Nevada her home during her sojourn there she thereby became domiciled in Nevada regardless of other facts? If it does, then here we have a law making precedent which

should be marked with greater emphasis than the opinions in the case accord it. Hitherto the Supreme Court has not conceded to a married woman a power of changing her domicil for purposes of divorce jurisdiction unless she was justified in separating from her husband. The traditional view is that the domicil of a wife at fault who still is legally bound to live with her husband, remains the same as her husband's. In my opinion this traditional view entails undesirable consequences in the law of divorce, and a diminution in complication, uncertainty, and injustice in the law would result if a married woman were conceded a power of changing her domicil for purposes of jurisdiction over marital suits and decrees equivalent to that possessed by married men. I therefore hope that this consequence will flow from *Williams v. North Carolina;* but I do not think it clear that it will, for the bare decision may be defined to mean on this point of Mrs. Hendrix's domicil merely that all questions of disputed fact bearing on the matter of her domicil should have been left to the jury under proper instructions. However, Justice Douglas's language certainly lends support to the view that he deliberately intended this important change in the law; for he says in criticizing the novel proposal of the American Law Institute [317 U. S. at 300, 63 Sup. Ct. at 214 (1942)]:

> ". . . And all that would flow from the legalistic notion that where one spouse is wrongfully deserted he retains power over the matrimonial domicil so that the domicil of the other spouse follows him wherever he may go, while, if he is to blame, he retains no such power. But such considerations are inapposite."

Thus we whittle our case down to this abstraction. Defendants were domiciled in Nevada at the times of their divorce decrees and subsequent marriage. Their deserted spouses were still domiciled in North Carolina. At the time of the prosecution defendants had returned to North Carolina under a new change of desire as to where they wished to make their home. May North Carolina, now the home state of all four persons involved in this marital shuffle, punish defendants for bigamous cohabitation committed by living together as husband and wife in North Carolina, because under North Carolina law defendants are not divorced from their respective former spouses? An affirmative answer to this question would be opposed to the uniform trend of decisions of our Supreme Court as to the pertinent fundamental tenets of our constitutional law throughout its history. Always it has been held that the capacity of a person to marry in his state of domicil may be restored by a divorce granted by that state regardless of its jurisdiction over the other spouse[1] and never has there been any support given

[1]Maynard v. Hill, 125 U. S. 190, 8 Sup. Ct. 723 (1888).

by the Supreme Court to the view that such a divorce was not entitled to full faith and credit to this extent and also to the extent of freeing the divorcee from all ties of marital intercourse to his former spouse wherever in the United States that former spouse was domiciled. In the light of all the precedents bearing on the point and of common sense and sound legal policy any other decision on this question would have been revolutionary and astounding. Only befogged mechanical thinking can lead to disagreement with this statement.[2] Even the New York state court precedents before *Haddock v. Haddock,* in harmony with the theme of the decision in that case, clearly are in accord with the decision of the Supreme Court in *Williams v. North Carolina.* The leading case opinions outlining the theory of the New York traditional state law on the *Haddock v. Haddock* type of problem did not assert that New York could refuse to recognize the effect of a foreign divorce such as the Connecticut one involved in *Haddock v. Haddock* in freeing the Connecticut domiciled husband from his incapacity to remarry.

[2]This is not a criticism of the opinions of the dissenting justices in *Williams v. North Carolina.* It is not at all applicable to them. The motive of the opinions of Justices Murphy and Jackson lay in their conception of the concrete facts of the case derived from reading the record. Their concern was with the entire picture of the episode revealed by the record as interpreted by them as follows: Two citizens of North Carolina, who found its laws opposed to their desires, sought to thwart those laws, not by leaving the state and finding a new home with a more congenial social and legal atmosphere, but by feigning a change of state allegiance and then having secured divorces and a marriage through the technical agency of the laws of a foreign state of feigned domicile returning in triumph to reside in their true home state in defiance of a fundamental policy of its society and legislation. As a lawyer, interested in orderly organized government and respect for law determined by democratic processes, up to the limit of such oppressive measures against liberty and justice as impel to rebellion or evasion, I have great sympathy for the view of the dissenting justices. I also sympathize with the sound tendency of all able judges to decide their cases rather on the basis of the net impact of the facts on their sense of justice and statesmanship than on that of mechanical barren logic and an isolated professional technic.

My disagreement with Justices Murphy and Jackson may be stated as follows. I believe that on the record in this case of criminal prosecution for a serious offense, every inference of fact should be strongly in favor of the accused and the decision as to the effect of the evidence should be left to the jury—not the judge. The instruction held erroneous by the majority of the justices took away from the jury as irrelevant a decision on the question whether defendants did not bona fide intend to change their homes from North Carolina to Nevada during their sojourn in Nevada—that is whether the facts were not those assumed by Justice Douglas, *i.e.,* that defendants had established permanent homes in Nevada before their divorces and marriage there and only after remarriage decided to return to North Carolina.

A safeguard against that flouting of the law of North Carolina which troubled the dissenting justices lies in the possibility of convicting the flouters by convincing the jury against them on the evidence and proper instructions as to the law.

After all logieal legal technic is an important factor in the sound administration of justice and our traditional safeguards for the liberties of the accused individual should not be sacrificed to a natural desire to short-cut a path to the ultimate result which the recorded evidence seems clearly to indicate as desirable and proper in the interests of sound democratic government.

Indeed these opinions imply that his foreign remarriage would be held valid in New York as far as such a question as was involved in *Williams v. North Carolina* is concerned.[3]

Furthermore it is quite clear that the Supreme Court membership which decided *Haddock v. Haddock* would have decided a case like *Williams v. North Carolina* on the basis of Justice Douglas's interpretation of the record, just as the present membership decided that case, and probably would have done so unanimously. The entire framework of Justice White's logic is quite consistent with the disposition made of *Williams v. North Carolina* and is inconsistent with a contrary disposition.

This brings me to consider the discussion of *Haddock v. Haddock* in the opinion of the Court in *Williams v. North Carolina* and especially the assertion that *Haddock v. Haddock* is overruled, for here indeed we do have a revolutionary incident which is quite disturbing to an advocate of our traditional common law jurisprudence with its cautious technic and its constant awareness of the essential distinction between legislation and the judicial process. I am concerned to elaborate this point because I fear that the opinion of the Court, however inadvertently, will accelerate a trend in our professional thinking—especially in the thinking of some of our teachers of law and legal philosophers and commentators—which seems to me pernicious and symptomatic of a deterioration in professional technic and the intelligent administration of justice.

Usually most practical case lawyers do not weigh too critically the logic or language of judicial opinions. Realizing the pressures under which judges work and the inherent difficulties of precise analysis and expression throughout the wide and complicated technical fields into which their labors carry them, we old fashioned lawyers are concerned principally with the disposition of the case on the record and the essential motivation of that disposition. We realize that the judges' opinions are not an essential part of the case. They are collateral explanations of their judgments addressed to the profession and important only because they satisfy a natural curiosity of counsel and parties to know why the court has decided so and because they give some further data for estimating future governmental actions of courts and other agencies. In function and reliability they are somewhat analogous to the remarks of the President at his press conferences concerning governmental acts and purposes. The remarks may or may not be accurate in details or illuminating or logically satisfying. Events may or may not corroborate them—may or may not disappoint reliance on them. They them-

[3]See footnotes and authorities cited in my 1936 article, 21 CORNELL L. Q. 402-427.

selves are not officially operative acts of government. Consequently the trained common law investigator (like the trained newsman) always has weighed carefully the language of the opinion against the facts of the case and has been cautious not to give a wider scope of importance to the judges' remarks than the facts of the case demanded. In recent years, however, there has been a growing tendency, formerly confined to relatively unschooled lawyers, among some teachers and commentators to treat the statements in a judicial opinion as of greater importance than the case and to treat the case, a transient phenomenon, as of significance only as the occasion of the opinions. Hence a growing carelessness in appreciation of the case itself and in elaboration of the import of particular generalized postulates in the opinions—and hence such a riot of amazing comment and speculation as that which has appeared in our legal periodicals after *Davis v. Davis* and now *Williams v. North Carolina.*

A common phrase which always jars my political sensibilities because it sounds inconsistent with our traditional democratic ideas of the function of governmental officials in society, illustrates this tendency to promote a judicial opinion to oracular status—"the court handed down an opinion in *Williams v. North Carolina* today." The analogy of the Lord handing down the two tables of stone to Moses on Mount Sinai and thence to the priesthood of Israel rises in my mind when I hear a lawyer use this phrase. It is because, inadvertently, the dictum concerning *Haddock v. Haddock* lends support to this theory of the function of a judicial opinion, that I am moved to discuss it at some length. I hope that this will not be taken as mere captiousness, for aside from its humorous phases, the matter is of importance to our professional technic. Even the doubts as to the law of future cases caused by judicial utterances which are not carefully confined to the needs of the case in hand and professional resentments at later decisions which are believed to be contrary to inferences drawn from those utterances are detriments worth avoiding; and unfortunately we have many in the profession who, like Cook's tourists in foreign parts relying entirely on oracular guides and guide books, base their legal opinions principally on abstract judicial declarations.

I hasten to say that I agree entirely not only with the judgment of the court in *Williams v. North Carolina,* but with the motivation of Justice Douglas's decision as I gather it from his opinion. I even agree with the predictions of his future decisions on other problems usually discussed in connection with *Haddock v. Haddock,* so far as I can infer these predictions with reasonable certainty from his opinion. Indeed the opinion

in the abstract compares quite favorably with other judicial opinions in the field, as was to be expected from the excellent abilities and scholarship of the author. It happens, however, that the subject matter of the case falls in a field unfamiliar to Justice Douglas, and indeed to almost all judges, and also in a part of that field (judgments and jurisdiction over marital interests) in which the opinions of some "experts" are erratically floundering in a juridical chaos of dogmas and uncertainties. It is not surprising therefore to find a number of errors in details in this judicial opinion, for which Justice Douglas could cite respectable "expert" authority. I do not object to the opinion, taken by itself, but to its natural effect on lawyers, especially those who will interest themselves in it critically and seek to ascribe to it implications of collateral future effects. Therefore the reader should appreciate that in the following summary criticism I am merely trying to mirror the probable effects of the Court's opinion on the mind of the average intelligent lawyer, who is interested in the field of law into which this case falls and who will endeavor to estimate the purport for future decisions of the motivation of the judges indicated by Justice Douglas's opinion. Later in this comment I shall give my own interpretation of the opinion, which may or may not be correct.

My criticism of the opinion will be confined to the following points:

(1) Whittled down to the abstract facts to which the majority justices and we preliminarily have reduced *Williams v. North Carolina,* the case could not have been decided otherwise than the Court decided it without a revolutionary overturning of precedents and commonly accepted pertinent principles of our constitutional law. It would have been decided the same way by the justices who disposed of *Haddock v. Haddock* and the judges who elaborated the New York doctrine which brought *Haddock v. Haddock* to the Supreme Court of the United States. In fact the precise problem presented in *Haddock v. Haddock* is not presented or involved in *Williams v. North Carolina* and the differing problems in the two cases include quite diverse social considerations of justice. It therefore seems to me to be unwise —and indeed almost unprecedented in all the history of Anglo-American jurisprudence—for the justices to say that *"Haddock* v. *Haddock* is overruled." There have been a few instances in our jurisprudential history where judges have departed deliberately from their traditional cautious technic of confining their authoritative declarations to the necessities of the case in hand. Of course also judges often have announced in their opinions that previous decisions of their court "are overruled"—that is, have given notice to the profession that they propose to treat these decisions as no longer

persuasive precedents. But usually they have taken care to confine such warnings to precedents which have so close a similarity to the case in hand as to make the two decisions logically inconsistent. The deliberate exceptions have been extraordinary in circumstances. For instance, one of these exceptions in the jurisprudence of my home state marked a striking departure from a trend of many years on a basic problem of riparian rights and was one item in a determined change in attitude and technic with respect to the water law of the state of which the court wisely thought it best to inform the profession.[4] We have no such revolutionary change in fundamental judicial technic in the field of Conflict of Laws involved in our principal case; and indeed the Court's opinion serves rather to cloud than to enlighten the critical professional mind as to the course of future decisions on phases of our problem collateral to the precise question in *Williams v. North Carolina.*

(2) It is this clouding of professional understanding on an important social as well as legal problem that will prove most annoying to many of my colleagues, and therefore I propose to take up the dubious items in brief summary.

(3) In the opinion there are several mistaken statements about *Haddock v. Haddock* and the law pertaining to the general field of this case which should be mentioned. Ordinarily I do not consider it a valuable use of time or an interesting or commendable occupation for a commentator to criticize the minutiae of a judicial opinion. Judges are not expected to be accurate in their general statements of law. To demand entirely sound general premises or unassailable logic from busy men in the collateral perfunctory explanations of their official acts—explanations which in themselves are not governmental acts and have no direct practical analogous force—is futile. In this case, however, I am concerned to point out errors in detail—not as a criticism of the Court's argument, but because through careless repetition in these active, revolutionary, emotional and not very deeply thoughtful times, these errors of statement may ripen into very potent seeds of future professional trouble and deterioration in technic and justice. The majority of the present members of the Court has been responsible for a revolutionary change in the course of decisions in the field of Conflict of Laws which threatens havoc to the previous long laborious trend towards coherence, certainty, and uniformity, which entails consequences that do not appeal to the practical views of justice of the majority of the members

[4]Peabody v. City of Vallejo, 2 Cal. (2d) 351, 40 P. (2d) 486 (1935). Bingham, *Some Suggestions Concerning the California Law of Riparian Rights* (1934) 22 CALIF. L. REV. 251, LEGAL ESSAYS IN TRIBUTE TO ORRIN KIP MCMURRAY (1935) 7.

of the profession who are interested in the matter, which was founded entirely on an academic, doctrinaire premise and supported by a mechanical logic, and which, I believe, ultimately will result in a technical muddle from which the Court can extricate itself only by another revolution in fundamental premises.[5] I am interested in opposing a similar development in this

[5]One of the most startling changes of a fundamental rule of decisions which the Supreme Court of the United States ever has made was that involved in *Erie R.R. Co. v. Tompkins,* 304 U. S. 64, 58 Sup. Ct. 817 (1938), overruling *Swift v. Tyson,* 16 Pet. 1 (U. S. 1842). This is so because the doctrine of *Swift v. Tyson* was not an anachronistic doctrine of federal constitutional law, but one of construction of a federal statute in accordance with a policy of juridical expediency and because that construction had persisted through frequent decisions for almost a hundred years, although vigorous protests against the policy had been uttered in dissenting opinions of distinguished members of the Court many times. I believe that *Erie R.R. Co. v. Tompkins* was wisely decided for the reasons of expediency mentioned in the able opinion of Justice Brandeis. Indeed I had predicted such a decision to my classes with confidence for many years before it occurred.

Nevertheless I cannot agree to certain familiar artificial doctrines concerning the nature of state common law and the true oracles of its determination which have enshrouded the controversy over *Swift v. Tyson* and slightly tinged the opinion of Justice Brandeis. These doctrines have threatened to destroy all appreciation of the live body of the problem which is that complex of historical fact and consideration of juridical policy so excellently summarized by Justice Brandeis. Furthermore, I do not believe that any case is made against the original propriety of the doctrine of *Swift v. Tyson* by announcement of a principle that the same justice should be afforded suitors in the federal courts in diversity of citizenship cases as they would obtain in the courts of the state in whose territory the federal court is sitting. (Of course the purpose of diversity of citizenship jurisdiction was to insure the contrary in some cases.) After all the state territory is federal government territory also—part of the territory of the United States in which the federal government operates and the federal courts sit under federal authority under the Constitution as domestic and not foreign and not subordinate agencies. It is true that there should be the same justice in substance obtainable from either state or federal court, so far as practicable. This is sound jurisprudence. A similar foundation tenet runs throughout the field of Conflict of Laws. But thus far the argument does not establish that the desired uniformity should be obtained by the federal courts following the lead of the state courts rather than by the state courts following the lead of the federal courts on common law points. Indeed the purpose of the doctrine of *Swift v. Tyson* was to carry through this sound foundation tenet of "Conflicts" jurisprudence over a wider range than is covered by the doctrine of *Erie R.R. v. Tompkins.* It was a noble experiment, similar in motive to that of the American Law Institute, which failed for the reasons of human nature set forth in the Court's opinion in *Erie R.R. Co. v. Tompkins.* If the experiment had succeeded, there could have been no sound objection to the doctrine. The only reasonable argument against the doctrine is that events had established that its purpose could not be accomplished and its effects were practically pernicious.

Certainly the doctrine was not unconstitutional, although the legitimate policies of state governments with respect to local affairs were in many cases thwarted or embarrassed by designing use of it by private persons. It is difficult to find any other sensible meaning than this for the dictum of Justice Holmes that the doctrine offended against the Constitution or for the similar, but not so vigorous assertion of Justice Brandeis. Furthermore, the arguments against this phase of the opinion of Justice Brandeis in the dissenting opinion of Justice Butler and in the concurring opinion of Justice Reed seem to me convincing.

In effect *Erie R.R. Co. v. Tompkins* expediently changed the interpretation of the Judiciary Act and that is all. The catastrophic trend to which I refer in the text of

field of divorce jurisdiction. I do not believe that the present justices would

this article, *supra,* came later when the Supreme Court "extending" the doctrine of *Erie R.R. Co. v. Tompkins* beyond the perfectly sound expedient of Mahomet going to the mountain because the mountain would not come to Mahomet on the matter of determination of state common law (whether the common law of the state in whose territory the federal court was sitting or the common law of some other of the United States was involved), directed abdication of the authority of a federal court to determine substantive common law independently in diversity of citizenship cases and, no matter where the facts of the case arose, compelled instead submission to the dictation of precedents of the courts of the state in whose territory (under federal statutory direction) the *nisi-prius* federal court happens to be sitting. Especially unfortunate was this strange extension of doctrine in matters within the field of Conflict of Laws, since the federal courts had accomplished a great deal for uniformity of doctrine through persuasive guidance of state courts away from unenlightened provincialism into desirable paths of decision through the complicated jurisprudential and technical mazes of Conflicts problems. Indeed in later years there had been a gradual enlargement of the part of this field brought into the province of federal constitutional law by court decision and it was the hope of students of the subject that as a consequence of these beneficent trends much of the unfortunate aberration of court decisions on choice of law ultimately might be eliminated. Now some of the gains are thrown to the winds and in addition apparently we are in for an extended series of puzzles with complicating solutions as to when in this field *Erie R.R. Co. v. Tompkins* does apply and when it does not. Furthermore, there has been created the unjust situation that on a wholly Maine transaction, a Maine plaintiff whose only chance of service of summons on his adversary is in Massachusetts, sometimes cannot get a fair decision according to Maine law either in a Massachusetts state court or in a federal court sitting in Massachusetts although one naturally would think that assurance of the application of Maine law to such a case would be a practical jurisprudential advantage of the availability of the federal court in Massachusetts and some justification of the diversity of citizenship jurisdiction.

See Sampson v. Channell, 110 F. (2d) 754 (C. C. A. 1st, 1940), *cert. den.* 310 U. S. 650, 60 Sup. Ct. 1099 (1940); Klaxon Co. v. Stentor Electric Mfg. Co., 313 U. S. 487, 61 Sup. Ct. 1020 (1941); Griffin v. McCoach, 313 U. S. 498, 61 Sup. Ct. 1023 (1941). The decision and opinion in this last case adds other disturbing indications of deteriorating technic in the field of Conflict of Laws.

Not the least astounding feature of this mechanical "extension" of the doctrine of *Erie R.R. Co. v. Tompkins* is its sabotaging of that doctrine itself, which apparently the justices of the Supreme Court have not yet perceived. In *Erie R.R. Co. v. Tompkins* the Court held that the federal court sitting in New York on a case which factually was wholly a Pennsylvania case, must determine the substantive common law of the case in accordance with Pennsylvania state court decisions. The "extension" of the doctrine now has prescribed that the federal court sitting in New York must follow New York state court decisions as to the substantive common law applicable to such a Pennsylvania case (*i.e.,* must decide the common law points as the New York state courts would decide them if it was sitting on the same case) although Pennsylvania state court decisions are *contra. See* the cases cited, *supra;* Slaton v. Hall, 168 Ga. 710, 148 S. E. 741 (1929); Nathan v. Lee, 152 Ind. 232, 52 N. E. 987 (1899); Edgerly v. Bush, 81 N. Y. 199 (1880); St. Nicholas Bank v. State National Bank, 128 N. Y. 26, 27 N. E. 849 (1891).

Thus the sound practical considerations of Justice Brandeis's opinion in *Erie R.R. Co. v. Tompkins* become in large part inapplicable and there is substituted a purely academic, dogmatic premise of mechanical jurisprudence which militates to some extent against obliteration of the evil of private use of the diversity of law in two jurisdictions to thwart the legitimate polices of the state in whose territory the facts of the case arose—that evil consequence of *Swift v. Tyson* which impressed Justice Brandeis's judicial sense and also that of Justice Holmes.

The Supreme Court apparently has abandoned the authority of the federal courts

design any such disastrous result in this field; but the growing potency of judicial utterances independent of their soundness, the chaotic arguments of commentators, the possibilities of frequent changes in the composition of the Court, and the rarity of judicial expertness in the field of Conflict of Laws convince me that this unconventional criticism of incidental details of a judicial opinion should not be avoided.

Let us examine then some of the dubious possible inferences from the Court's criticism and denunciation of *Haddock v. Haddock.*

(1) If the essential facts all are found in favor of defendants in *Williams v. North Carolina,* the defendants have been validly divorced and remarried under Nevada law and because of the potency of the Full Faith and Credit clause of the Federal Constitution, under North Carolina law also.[6] This is the effect of the decision of the case and accords with the precedents and pertinent principles of our previous jurisprudence. But how about the deserted North Carolina spouses? Suppose that they also should remarry in North Carolina and then should be prosecuted and convicted of bigamy in the North Carolina courts. Would such a conviction be unconstitutional? As I understand the previous precedents bearing on this problem their answer clearly is "no." The traditional view is that the marital capacity of these North Carolina domiciliaries under the stated facts is a matter of North Carolina policy and legal power. Of course under the Fourteenth Amendment to the Federal Constitution, North Carolina could not refuse these persons marital capacity out of pure caprice nor without sufficient reasons of governmental policy; but in our juridical tradition we have had some severe restrictions on remarriage of divorcees and there are still

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to prevent this evil in diversity of citizenship cases before these courts by submitting them to aberrant precedents of the courts of the state in whose territory the federal court happens to be sitting. When this misfortune becomes evident in a striking case, the Supreme Court may invent a new technical artifice of distinction to take it out of the "extension" doctrine; but this would be one of those irritating complexities which already are beginning to grow out of that doctrine and ultimately will damn it.

Of course, if the overriding, practical motive of the out-of-bounds extension of *Erie R.R. Co. v. Tompkins* is opposition to diversity of citizenship jurisdiction, in accordance with a growing propaganda of late years in legal periodicals, my argument has missed the bull's eye. If this is the case let us at once unite to get rid of diversity of citizenship jurisdiction by act of Congress before this new doctrine breeds more professional troubles than *Swift v. Tyson.*

The new doctrine has caused professional consternation, for reasons similar to those which influence my judgment, as far south as the Argentine.

[6]Would the decision in *Williams v. North Carolina* have been different if defendants had married in North Carolina instead of Nevada after their valid Nevada divorces had been obtained? I believe that the decision should not have been different and I infer from the Court's opinion that its decision would have accorded with this answer; but I am not certain of this and the previous authorities leave the question in considerable doubt.

potent religious prejudices operative in this field which our courts have not yet seen fit to condemn as insufficient bases for legislative restrictions. If North Carolina should pass a law making a divorcee domiciled in North Carolina (or such a divorcee against whom the divorce has been granted) guilty of bigamy for remarrying in North Carolina, does the Supreme Court now propose to hold that law unconstitutional under the Fourteenth Amendment? If not, how logically could it hold a conviction of defendants *in our hypothetical case* under the existing North Carolina statutes unconstitutional? Does the Supreme Court intend a partial return to a primitive legal technic under which the precise rubric, incantation, and routine apart from practical substance and effect was a distinct essence of the administration of justice?[7] Certainly we have supposed hitherto that in general the Constitution does not prohibit a state from moulding its law by judicial decision of particular cases as effectively as through the dictates of formal legislation, and certainly words are only words and in a piece of legislation may be given by judicial decision what legal effect the courts of the state deem appropriate. Legal fictions have played a potent part in technic, often with good effects on the law. They still are widely used by judges. Why should not the fiction (if it helps the argument to deem it such) of continued marriage of a foreign divorcee to his domiciliary former spouse be used to carry out the policies of the forum within its constitutional powers?

(2) And then we have such a problem as that involved in *Haddock v. Haddock*. Does the Court's dictum mean that under the Federal Constitution the state of a deserted wife's domicil cannot protect her economic interests in the marriage against the effect of a foreign divorce granted the husband by his new state of domicil when she did not appear and was not otherwise subjected personally to the jurisdiction of the foreign state and its court? This would be indeed a startling change in our constitutional law and a very undesirable one; for our American judges, as well as our social workers, long have appreciated sympathetically the plight of deserted wives, including the frequent impossibility of adequate defense of their interests in the foreign courts of the wayward husband's state of new domicil. Or would the Court concede the heavy arguments of justice in favor of the deserted wife, but insist, in the interest of a primitive formalism, that her state of domicil must afford its protection through properly worded legislation framed for that end and cannot do so as a matter of common law

[7]But see my further comment, *post*, on the variations of this general problem of governmental control over the marital capacity of domiciliaries against whom a valid decree of dissolution of marriage has been issued by a foreign state.

decision limiting (through a legal fiction, if your please) the "divorcing" effect of the foreign decree?

(3) Justice Douglas does suggest that perhaps some limitation may be put by the state of the deserted spouse's domicil on the effect of the foreign divorce as to property subject to its jurisdiction [Footnote 4, 317 U. S. at 293, 63 Sup. Ct. at 210 (1942)]; but why confine this limiting power to property interests? Why not extend it to the obligation to support the deserted wife, which has been a matter of more important social concern than marital property since laborers who desert their wives and migrate often have no property?

In the appreciation of the meaning and motive of the decision in *Haddock v. Haddock* it should be remembered that Justice White's opinion strikingly emphasized that the particular interest involved in that case was a personal obligation only, although it arose out of a marital status and was founded thereon. This has troubled many undiscriminating critics of *Haddock v. Haddock,* but it should not have done so. They have jumped to the conclusion that Justice White believed that divorce suits were suits *in personam* and not *quasi-in-rem* and they have taken exception to this idea. It seems to me that this interpretation is an injustice to White. He would have conceded that a suit for a decree of dissolution of marriage is a suit *quasi-in-rem* in that it concerns a definite legal *res* and, although it is not a suit directed against the world at large, it does seek to terminate the essence of that *res* with effects good not merely against the other spouse. [See, for instance, his opinion in *Andrews v. Andrews,* 188 U. S. 14, 23 Sup. Ct. 237 (1903), as well as his summary of postulates in *Haddock v. Haddock,* 201 U. S. at 566-572, 26 Sup. Ct. at 526-528 (1906).] Indeed the traditional jurisdictional requirements for suits for dissolution of marriage are not like those for suits strictly *in personam,* but are like those for suits *quasi-in-rem* as Justice White implies in his summary of precedents in *Haddock v. Haddock.* Furthermore, historically and under *Maynard v. Hill, 125 U. S. 190, 8 Sup. Ct. 723 (1888),* a divorce decree is not necessarily a judicial act. It may be a legislative act and need not be founded on judicial process. All this seems to me admitted in Justice White's opinion.

However, Justice White did hold that as far as a marital suit sought to terminate the legal obligation of one spouse to support the other, it concerned a personal obligation and therefore was strictly *in personam.* Consequently to give a foreign decree compulsive force in such a suit under the Full Faith and Credit clause, the foreign state must have had personal jurisdiction over defendant at the time of the decree.[8]

[8] *See* RESTATEMENT, CONFLICT OF LAWS (1934) § 116, *Comment c*: "The decree for

Hence Justice White's emphasis on *Pennoyer v. Neff, 95 U. S. 714 (1878),* as an authority. *Pennoyer v. Neff* is not a precedent on divorce jurisdiction, but it is a leading case on jurisdiction *in personam* and on the technical distinction between procedure *in personam* and procedure *quasi-in-rem.* Similarly it is to be noted that *Haddock v. Haddock* has been cited as a precedent both by Justice White and by Justice Hughes in later cases which had nothing to do with marital relations or divorce or procedure *quasi-in-rem* but which did concern strictly personal obligations and judgments *in personam* thereon.[9]

The arguments of men in controversies involving their emotional prejudices always are interesting to a student of society. The tendency to lose the balance of careful judicial appreciation of the opposing point of view, to become irritated by its persuasive features and driven to primitive, child-like false assertions of the opposing motivation, to twist the opposing argument into an absurd array of mechanical premises and deductions, to seize upon words and phrases and read into them something not intended, to ignore patent elements of common sense in the criticized position or to embroider them with invented nonsense so as to discredit them—these have been common features of religious and political controversies involving strong personal or group emotional prejudices. We see instances of such primitive technic in our current bitter political arguments—especially concerning social and commercial reforms—in the attribution of utterly absurd motives and purposes to the President and his administration not only without evidence to support the charges but even against patent facts. [See footnote 21 to my 1936 article, 21 CORNELL L. Q. 405-407.]

The governmental and legal problems of marital cases have been affected similarly by emotional prejudices, some of them deep traditions of our social history, and our law and our legal arguments sometimes have been affected accordingly. Even within the formal decorum of judicial argument and unofficial professional commentary the tendency to depreciate and dilute with fiction the opposing position has been evident. A similar effect has been produced by other critics through simple ineptitude and carelessness. Thus Justice White, his concurring colleagues, and judges of the highest court of the State of New York have been accused of the following pro-

alimony being the means of enforcing *the purely personal duty of the spouse,* there must either be jurisdiction over the person or jurisdiction over a thing to apply it to the payment of a claim for alimony." (Italics added.) See also my comment, *post,* on Davis v. Davis.

[9] *See* Riverside and Dan River Cotton Mills v. Menefee, 237 U. S. 189, 194, 35 Sup. Ct. 579, 580 (1915) (footnote); Spokane Inland R.R. v. Whitley, 237 U. S. 487, 496, 35 Sup. Ct. 655, 657 (1915).

fessional views concerning *Haddock v. Haddock* and collateral legal phases of the *Haddock v. Haddock* type of facts:

1. That Connecticut had power by a divorce decree to restore capacity to its domiciliary, the husband, to marry in Connecticut, but that New York is not bound to recognize this restored capacity.

2. That Connecticut had power to validate a new marriage of its divorced domiciliary and thus raise a legal obligation of cohabitation between these spouses, but that this obligation need not be recognized by New York or any other state than Connecticut.

3. That consequently New York could insist on a continuing legal obligation of cohabitation of the divorced husband with the former New York domiciled wife and that the man had two wives in the cohabitation sense—one under New York law and another under Connecticut law.

Now, of course, any constitutional lawyer who would propose such a solution of our marital and divorce jurisdictional problems under the Fourteenth Amendment and the Full Faith and Credit clause should at once be classified as a professional and political incompetent—indeed a logical jackass—and this idea clearly is implied although decorously camouflaged in the prevalent criticism of *Haddock v. Haddock*. But a reasonable measure of Christian charity should prevent the attribution of such views to an opponent without conclusive evidence that he entertained them. Every presumption should be indulged that his language, however unclear it may be, or however his logical expression may falter at points, means something more sensible. Especially should this be done with respect to a lawyer as distinguished and as carefully—even laboriously—logical and orthodox and religious as Justice White. However one may differ with some of his judicial decisions, one should concede that he was a man of too much professional ability and learning to be guilty of the absurd views attributed to him by the ardent critics of *Haddock v. Haddock*. I am sure that every present member of the Supreme Court of the United States will agree with me in these statements and that each of them would resent any suggestion that he shares the careless prevalent opinion of the doctrine of *Haddock v. Haddock* or would support its necessarily implied concomitant slur upon the abilities of this former Chief Justice of the United States and his concurring colleagnes. No doubt if it had occurred to any of the present justices that the opinion of the Court in *Williams v. North Carolina* was open to such an interpretation he would have taken care to make it clear that the interpretation would be erroneous. However, it is one of the unfortunate incidents of the dubious dictum in the court's opinion that "*Haddock* v. *Haddock* is

overruled" together with the context of that dictum that it lends color to such an interpretation by an uncharitable critic.

Indeed I do not know of any lawyer, past or present, who would entertain or defend the professional views concerning these problems of divorce jurisdiction under the Constitution of the United States which have been attributed to Justice White and his concurring colleagues.

On the other hand all lawyers and judges use legal fictions in their arguments. Legal fictions and similar metaphors are valuable implements of jurisprudence which render traditional procedures available for new purposes of justice, which ease the path of progress for less agile and more conservative minds, and which speed the persuasion of mechanical, phrase bound logicians. Those lawyers who know the history of the action of assumpsit with its common counts, often alleging wholly fictitious promises, who know the theories of "constructive" trusts, "constructive" frauds, and "constructive" possession, where the evidence fails to establish the existence of an actual trust, or deceit, or an actual physical occupation or control; who know the operation of the idea of "estoppel" in all its various phases, especially in suits over marital affairs, should find no serious technical difficulty with the New York theories of jurisdiction to divorce or with the doctrine of *Haddock v. Haddock.*

Consider, for instance, the recent case of *Krause v. Krause, 282 N. Y. 355, 26 N. E. (2d) 290 (1940).* The facts of the case and decision are stated by Judge Finch in part as follows:

> "This is an action for separation brought by a wife in which she seeks support. The husband seeks to avoid liability to plaintiff by alleging the invalidity of a Nevada divorce which he obtained from his first wife. May he avail himself of such a defense?
>
> "The answer interposes two separate and distinct defenses. It is only the second defense with which we are concerned.
>
> "The facts presented by the defense are as follows: Defendant and his first wife domiciled in this State, were married here in 1905. There are two children by that marriage. In 1932 the present defendant, while retaining his residence in this State, made a visit to Reno, Nev., where he invoked the jurisdiction of the courts of that State and obtained a decree of divorce from his first wife, who neither entered an appearance nor was personally served in that action, and who at all times has remained a resident of this State. Cf. Glaser v. Glaser, 276 N. Y. 296, 12 N. E. 2d 305. Consequently this divorce against the first wife is not recognized by the courts of this State. Winston v. Winston, 165 N. Y. 553, 59 N. E. 273; Hubbard v. Hubbard, 228 N. Y. 81, 126 N. E. 508; Lefferts v. Lefferts, 263 N. Y. 131, 188 N. E. 279. The subsequent marriage between plaintiff and defendant, therefore, was

void for the incapacity of the defendant to marry. But none the less plaintiff and defendant participated in a complete marriage ceremony and did live together as man and wife for six years pursuant thereto, after which time defendant abandoned plaintiff, who now brings this action. Defendant entered the defense already noted, viz., that he lacked capacity to marry plaintiff because the court, which upon his petition purported to accord him a divorce from his first wife, lacked jurisdiction to act in the premises. Upon motion of plaintiff Special Term struck out the defense as insufficient in law and cited Starbuck v. Starbuck, 173 N. Y. 503, 66 N. E. 193, 93 Am. St. Rep. 631, in support of its decision. The Appellate Division affirmed by a divided court, the majority citing Brown v. Brown, 242 App. Div. 33, 272 N. Y. S. 877; affirmed 266 N. Y. 532, 195 N. E. 186, and the minority citing Stevens v. Stevens, 273 N. Y. 157, 7 N. E. 2d 26, 109 A. L. R. 1016. Defendant appeals upon the following question, certified by the Appellate Division to this court: 'Is the second, separate and distinct defense in the amended answer, sufficient in law on the face thereof?'

"The question upon this appeal, therefore, depends upon whether defendant husband may now be heard to assert in this action, brought by his second 'wife,' that the judgment of divorce which he sought and obtained failed of its purpose and thereby did not give to the defendant that freedom to remarry which he appeared to possess by virtue of said judgment.

"In general, a person who invokes the jurisdiction of a court will not be heard to repudiate the judgment which that court entered upon his seeking and in his favor. . . .

"It is conceded that the estoppel which is invoked against the present defendant is not a true estoppel as that term is ordinarily understood, although the effect is the same in the case at bar.

"But it is urged that even though the prior authorities in this State do not compel a contrary result, a different conclusion should be reached as a matter of principle. It is said that public policy requires that the interest of the State in the first marriage be protected even though that may also give to the individual defendant an incidental advantage to which he is not entitled in his private right. Thus defendant seeks to avoid the obligation which he has purported to undertake to support his second wife, upon the pretext that such is inconsistent with his obligations toward his first wife. Objection upon this score is fully met by the fact that the needs of the first wife are to be taken into account in arriving at the ability of defendant to support plaintiff in the case at bar. Defendant would altogether disavow any obligation toward this plaintiff because of his obligation to his first wife. The result which we reach here is the only one which awards justice to this plaintiff, prevents her from becoming a public charge if she should be impecunious and at the same time protects the first wife in adequate degree. Thus there is complete observance of not only the interest of the State in the protection of the first marriage, but also of the other interest of the

State that marriage obligations shall not be lightly undertaken and lightly discarded.

"Nothing in this decision should be taken to mean that because the defendant may not in these proceedings avail himself of the invalidity of his Nevada decree he is not the husband of his first wife. On the contrary, the very theory that defendant is precluded in these proceedings presupposes that the true situation is the contrary of that which he may show in the case at bar.

"It follows, therefore, that the order appealed from should be affirmed, with costs, and the question certified answered in the negatives."

[*See also Bell v. Bell,* 181 U. S. 175, 21 Sup. Ct. 551 (1901).]

If the opinion of the court in *Williams v. North Carolina* condemns *in toto* the technic of *Haddock v. Haddock* (which I very much doubt is its intent, but which will be its meaning to most lawyers) would the same justices condemn (unofficially of course) the similar technic in *Krause v. Krause?* What is the essential difference between the judicial technic of *Krause v. Krause* and that of the courts in *Haddock v. Haddock?* Of course, each case is part of one coherent pattern of New York jurisprudence.

[*See also* BEALE, CONFLICT OF LAWS (1935) §§ 113.4 *et seq.*; *Haddock v. Haddock,* 201 U. S. 562, 626, 26 Sup. Ct. 525, 550 (1906) (dissenting opinion of Justice Brown); *People v. Baker,* 76 N. Y. 78 (1879); footnotes 2, 18, 21, 22, 23, 24, 25, 26, 27, 43 (last paragraph) to my 1936 article, 21 CORNELL L. Q. 394 *et seq.,* 402-403, 405-416; and especially *Turner v. Turner,* 44 Ala. 437 (1870) (abstracted in Justice White's opinion in *Haddock v. Haddock* at 599, 26 Sup. Ct. at 539-540). Also see my discussion of *Davis v. Davis, post.*]

Why throw all this accumulated jurisprudence with its advantage to the cause of justice incontinently out the window? Or does the Court's dictum promise to do so? It is a tantalizing characteristic of this dictum that no one can make more than a hopeful guess as to what it really means. Before I give my guess at its purport, I wish to call attention briefly to a few incidental points in the Court's opinion, for which respectable authority doubtless could be cited, but which should be recognized easily as errors on careful reconsideration. I repeat that I do this only because cumulative judicial reiterations of such errors in this complicated field are precedents dangerous to our professional technic.

(1) My previous comments and my 1936 article sufficiently cover such statements in the Court's opinion as the following [317 U. S. at 293, 63 Sup. Ct. at 210 (1942)]: "But we do not agree with the theory of the *Haddock* case that, so far as the marital status of the parties is concerned, a

decree of divorce granted under such circumstances by one state need not be given full faith and credit in another."

Of course my interpretation of the decision in *Haddock v. Haddock* is that it did not refuse full faith and credit to the Connecticut adjudication and decree and did not continue the "marital status" of the husband in any other than a legal fictional sense. Certainly the New York suit in form was a suit founded on a continuing marital relation between the parties, but in purpose and substance it was a suit for alimony only, and therefore really touched only the support obligation incident of the dissolved marriage. The decree for separation was of course wholly superfluous and, except as a fictional procedural device, ridiculous. [See dissenting opinion of Justice Brown in *Haddock v. Haddock,* 201 U. S. at 625-626, 26 Sup. Ct. at 550 (1906); also footnote 43 to my 1936 article, 21 CORNELL L. Q. 429-430.]

(2) It has not been the traditional view nor did the Supreme Court hold in *Williamson v. Osenton*[10] that "a married woman may acquire in this country a domicil separate from her husband"—except in a case where she was justified legally in separating from her husband. [Footnote 9, 317 U. S. at 298, 63 Sup. Ct. at 224 (1942).] I have suggested, *supra,* that if the Court now is enlarging the legal power of Mrs. Hendrix in this particular, it should have emphasized this novel development.

(3) The proposition that federal law compels a state against its legal policies of social importance to give a larger measure of faith and credit to judgments of sister states than to legislation or other "public acts" of sister states because the Congress has specifically enjoined full faith and credit as to judgments by the Judiciary Act, is untenable. I never have been able to see that the Judiciary Act added to the jurisdictional effectiveness of the judgments of state courts in other states as to substance. Of course, in the nature of judgments and the practical considerations which make their recognition important, there are some peculiarities which do not apply to legislation; but the fundamental problem as to full faith and credit is the same—one of statesmanlike adjustment of the competing jurisdictions, judicial or legislative or administrative, of the states *inter se.*[11]

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[10]232 U. S. 619, 34 Sup. Ct. 442 (1914).

[11]Perhaps it is necessary to warn some of my friends of the mechanical school of jurisprudence that the opinion of the Court by its emphasis on the difference in the effect of *judgments* as compared with the effect of legislation under the Full Faith and Credit clause and the Judiciary Act, probably does not intend to imply that if defendants instead of obtaining their Nevada decrees had obtained valid divorces by special legislation from one of the few states which still permit this [Maynard v. Hill, 125 U. S. 190, 8 Sup. Ct. 723 (1888)] the decision of *Williams v. North Carolina* would have been different.

Fall v. Eastin,[12] *Olmsted v. Olmsted,*[13] and other cases cited by Justice Douglas in the text of his opinion and his footnotes [317 U. S. at 294-295, 63 Sup. Ct. at 211-212 (1942)] as strange exceptions to his thesis are not all as dubious as he implies; nor are the decisions cited in footnote 5 [at 294, 63 Sup. Ct. at 211] properly rested "on the doctrine that the state where the land is located is 'sole mistress' of its rules of real property," as should be clear to Justice Douglas's research assistant through consideration of *Baker v. Baker, Eccles & Co., 242 U. S. 394, 37 Sup. Ct. 152 (1917),* cited in footnote 7 [at 297, 63 Sup. Ct. at 212]. The principle of these "exceptional" cases is applied also to property interests in chattels and intangibles subject to the exclusive or overriding legal jurisdiction of the state refusing to give effect to the foreign judgment.

As to *Fauntleroy v. Lum, 210 U. S. 230, 28 Sup. Ct. 641 (1908),* the wisdom of the decision in that case is doubtful and it is not impossible that it may sometime be overruled or limited in effective scope as a precedent. The practical problem in that case was this. The argument in favor of the Missouri judgment did not lie in any governmental interest of Missouri. It consisted in the jurisprudential principles of economy of use of the time of courts for litigation and justice to parties in fortifying adjudications in their favor against the frustration of continual relitigation. Opposing these sound traditional principles in *Fauntleroy v. Lum,* we find arrayed the legal prohibition of Mississippi against that conduct of plaintiff and defendant in Mississippi on which the cause of action was founded, and the sanction of the Mississippi law prohibiting recovery on the invalidated transactions. Why should the governmental interest of the State of Mississippi in discouraging the prohibited type of conduct in Mississippi for reasons of social policy have been thwarted in this suit in the Mississippi courts by the fact that plaintiff previously had recovered a judgment in Missouri in a suit to which the State of Mississippi was not a party? This was the motivation of the vigorous opinion (*per* White, J.) of the four dissenting justices in *Fauntleroy v. Lum* and I have not been able to convince myself that it was sufficiently countered by the mechanical reasoning of the majority opinion in spite of its closing suggestion that mistakes of law such as that committed by the Missouri courts would be rare and that generally other states would cooperate through their courts with Mississippi in enforcement of its legitimate governmental policy. [*Compare Buttron v. El Paso Northeastern Ry. Co.,* 93 S. W. 676 (Tex. Civ. App. 1906);

[12]215 U. S. 1, 30 Sup. Ct. 3 (1909).
[13]216 U. S. 386, 30 Sup. Ct. 292 (1910).

Tennessee Coal, Iron & R. Co. v. George, 233 U. S. 354, 34 Sup. Ct. 587 (1914); *Converse v. Hamilton,* 224 U. S. 243, 32 Sup. Ct. 415 (1912); *Atchison Ry. Co. v. Wells,* 265 U. S. 101, 44 Sup. Ct. 469 (1924); *Broderick v. Rosner,* 294 U. S. 629, 55 Sup. Ct. 589 (1935); and see also my discussion of *Davis v. Davis, post,* and compare especially *Andrews v. Andrews,* 188 U. S. 14, 23 Sup. Ct. 237 (1903); *Harding v. Harding,* 198 U. S. 317, 25 Sup. Ct. 679 (1905); and *Davis v. Davis,* 305 U. S. 32, 59 Sup. Ct. 3 (1938).]

I proceed now to venture my guess as to the predictions implied in the Court's dictum concerning *Haddock v. Haddock.*

1. I cannot believe that if and when the sort of question involved in *Haddock v. Haddock* arises again in the Supreme Court (but with stronger circumstances of fact in favor of the deserted wife) it will decide the case *contra* to *Haddock v. Haddock.* Either such a decision would be a piece of mechanical formalism unworthy of twentieth-century judges and deserving of the scornful reforming frenzy of a Dickens against "the circumlocution office" or it would be a prohibition against the traditional power of the state of domicil of a deserted wife to protect her right of support from utter destruction by the deserting husband's use of the legal machinery of a foreign state without fair practical opportunity to the wife for defense. [See footnote 23 to my 1936 article, 21 CORNELL L. Q. 407-413; BEALE, CONFLICT OF LAWS (1935) § 113.1.] Of course, if social developments make obsolete the legal right of married women to support from their husbands, this argument of mine will die at its root. Until then, however, I infer that when the opinion of the Court limits the criticism of "the theory of the *Haddock* case" to the purport of that theory "so far as the marital status of the parties is concerned" there is no indication intended that New York cannot protect the right to support of its deserted wives against foreign divorces granted by states without personal jurisdiction over the wives. In common sense, therefore, it should follow that New York can still exercise such a protecting power through the mechanism of the legal fiction of *Haddock v. Haddock.*

2. Property interests are excluded expressly from the scope of the Court's unfortunate dictum. Therefore I shall not discuss them here—not even certain unfair features of New York law which have been held constitutional.

3. There is left, then, the effect of the Nevada divorces on the "status" (*i.e.,* marriage capacity and cohabitation rights) of the deserted North Carolina spouses. It seems to me that the Court's opinion sufficiently indicates

that the Nevada divorce decrees must be given at least the same effect in these particulars as though they were valid North Carolina decrees. I heartily approve of this. Independently of my strong prejudice against futile legal restrictions on natural human impulses, inspired by traditional religious and social beliefs which now are held only by certain minority groups with considerable political influence, I can advance a supporting technical argument. What is the justifying policy which North Carolina could suggest for refusing in favor of the deserted North Carolina spouses (if it chose to do so) the same restoration of marital capacity as a consequence of the valid Nevada decrees which would have resulted from valid North Carolina decrees? The only answer that I can think of is this. Traditionally states at times have insisted on independent control of restoration of marital capacity to their domiciliaries. In exercise of this traditional legal power North Carolina then may insist on passing on the question of restoration of marital capacity, even in this case, through the formalities of its own governmental agencies. But is there any legitimate practical purpose which could be served by this governmental formalism? I think that there is not. Therefore it seems to me that there is no such North Carolina governmental interest to be served as would justify excluding from the scope of the Full Faith and Credit clause this particular consequence of the Nevada decrees. As for the mutual obligations of cohabitation, unquestionably they are terminated by the Nevada decree. Any other decision would be absurd. [See 21 CORNELL L. Q. 417.]

But what of *People v. Baker, 76 N. Y. 78 (1879)*? I have paid my respects to *People v. Baker* and the sadistic New York social policy and law reflected in that case, as well as to the similar intolerant, unfair, unprogressive policy of traditional English law on marital problems which had a related social and religious background. [21 CORNELL L. Q. 402-407, especially footnotes.] *People v. Baker,* however, would be consistent with the Full Faith and Credit clause if the defendant could have been convicted of bigamy under the New York law if the wife's divorce had been granted by a New York court instead of the court of her state of domicil, Ohio. [See dissenting opinion of Danforth, J., in *O'Dea v. O'Dea,* 101 N. Y. 23, 30, 4 N. E. 110, 112 commenting on *People v. Baker* at 40 *et seq.*, 4 N. E. at 118 *et seq.*] On the other hand if, as stated in the opinion of *People v. Baker,* the New York statutory penalty against this divorcee at fault who remarried would have been less than that for bigamy if the divorce had been granted by New York, the decision in *People v. Baker* is subject to the technical objection that it denied to the Ohio

decree an equivalent effect in this particular to that which would have resulted from a valid New York decree in favor of the wife. [See as to the present New York law, N. Y. DOM. REL. LAW §§ 6, 8; N. Y. PENAL LAW § 341; N. Y. CIV. PRAC. ACT §§ 1175, 1176.]

But I should be quite satisfied if the Supreme Court freed deserted New York spouses against whom valid foreign divorce decrees have been obtained from the incapacities of their previous marriages regardless of New York law and policy, for I fail to see any social advantage in denying marital capacity to a divorcee. Technically the Court would have to rest such a judgment, not on the Full Faith and Credit clause alone, but on the Fourteenth Amendment and thus invalidate all such unprofitable, sadistic legal prohibitions wholesale; but this I fear outruns the march of time and I cannot predict with assurance that the Court's dictum in *Williams v. North Carolina* forecasts this much of legal revolution and, if it pleases you, progress.

DAVIS V. DAVIS

My comment on the decision in *Davis v. Davis* will be brief. I shall not take space or time to state the facts of the case, but shall assume that you have read it.

Davis v. Davis has been discussed extensively and great novelty has been attributed to the decision. It has been interpreted variously, but in most startling particulars, (1) as giving support to the proposals of the American Law Institute concerning *Haddock v. Haddock,* [RESTATEMENT, CONFLICT OF LAWS (1934) § 113] and (2) as changing the rule which formerly permitted successful collateral attack on a decree of dissolution of marriage where neither person was domiciled in the state although both parties were subject personally to the jurisdiction of the court and the court found that one or both of them was domiciled in the state.

On the first point it is sufficient to say that I cannot see the slightest support for Section 113 of the *Restatement* in the decision of the case or in the Court's opinion, and that if any loyal brother of the Order of the Law Institute can whittle such a peg out of it, he has my blessing to do so. Of course, the facts of the case put it into a very different class than that of *Haddock v. Haddock* because (a) both parties in *Davis v. Davis* were subject personally to the jurisdiction of the State of Virginia and its court at the time of the divorce, and (b) the main contention of the wife in *Davis v. Davis* was that the husband as well as the wife was not domiciled in Virginia at the time of the divorce. If the husband was domiciled in Vir-

ginia and the wife personally was subject to the court's jurisdiction, then the decree clearly was effective and conclusive for all purposes as a complete dissolution of the marriage under *Cheever v. Wilson, 9 Wall. 108 (U. S. 1869).*

This carries us to point (2), *supra.* The Supreme Court in deciding that the Virginia divorce decree and the incidental decision of the Virginia court were conclusive and entitled to full faith and credit in the later litigation over alimony in the courts of the District of Columbia, had every natural impulse of common sense to decide against the wife. The wife's case on the record, if the statement of facts in the report is a fair reflection of the record, was weak. While technically the evidence offered by her to show lack of domicile in Virginia was relevant and material, the impression remains that if it had been admitted it would not have been sufficient to overcome the presumption raised by the findings in the Virginia trial. While this fact is not pertinent technically to the announced ground of the decision of the Supreme Court, it should be noted that it is a sort of collateral influence that not infrequently eases progress to a technical decision that otherwise might be more difficult to fabricate. Furthermore, the decision of the district court of appeals against the husband was based on the idea that although he was domiciled in Virginia, the wife was not and was not subject to the court's jurisdiction and that therefore under *Haddock v. Haddock* the Virginia proceedings need not be given effect in the District alimony suit. However, I believe that even on the assumption that neither party was ever domiciled in Virginia, the decision of the Supreme Court in *Davis v. Davis* is sound unquestionably and is not revolutionary.

It is true that case precedents have been consistent for many years to the effect that if the state of domicil of the parties will not give validity to a decree of dissolution of marriage granted by another state, it cannot be compelled to do so through application of the Full Faith and Credit clause of the Federal Constitution although the state which granted the decree found on evidence through its court which had personal jurisdiction over both spouses, that one or both of them were domiciled in the state. [*See People v. Dowell,* 25 Mich. 247 (1872); *State v. Armington,* 25 Minn. 29 (1878); *Andrews v. Andrews,* 188 U. S. 14, 23 Sup. Ct. 237 (1903).] These precedents have been interpreted by some members of the mechanical school of jurisprudence to mean that the decree and adjudication were open to successful attack collaterally for all purposes. Yet we have plenty of evidence to the contrary. [*See inter alia Smith v. Smith,* 43 La. Ann. 1140, 10 So. 248 (1891); *Waldo v. Waldo,* 52 Mich. 94, 17 N. W. 710 (1883); In re

Ellis' Estate, 55 Minn. 401, 56 N. W. 1056 (1893); *Starbuck v. Starbuck,* 173 N. Y. 503, 66 N. E. 193 (1903); *Krause v. Krause,* 282 N. Y. 355, 26 N. E. (2d) 290 (1940); *Harding v. Harding,* 198 U. S. 317, 25 Sup. Ct. 679 (1905); and now *Davis v. Davis. Compare Hollingshead v. Hollingshead,* 91 N. J. Eq. 261, 110 Atl. 19 (1920); *Stevens v. Stevens,* 273 N. Y. 157, 7 N. E. (2d) 26 (1937).]

For the important distinction between a foreign decree of divorce (1) as a state order dissolving the marital status, which historically needs no judicial process for its constitutional validity, and (2) as a judicial decision of litigation (*res judicata*) entailing collateral legal effects, see footnote 2 to my 1936 article. [21 CORNELL L. Q. 394-396.]

It must be acknowledged that the opinion of the Court in *Davis v. Davis* is not as informative as might be desired, but if it is read in the light of its careful recitation of facts and its distinguishing of *Haddock v. Haddock,* and its citation of authorities, and its omission of all evidence of awareness that novel law is involved in the decision, there should be no difficulty in appreciating its import. *Davis v. Davis* falls in the class of cases among which I have included it, *supra.* Indeed *Harding v. Harding, 198 U. S. 317, 25 Sup. Ct. 679 (1905),* is cited by Justice Butler as a similar case to be compared with *Davis v. Davis.* In *Harding v. Harding* also the foreign court had no full jurisdiction to dissolve the marriage because the state was not the state of domicil of either party, although both parties had appeared in the suit and the foreign court had found that it was the state of plaintiff's domicil. Nevertheless the Supreme Court held that under the Full Faith and Credit clause this foreign adjudication of facts and right as to marital fault was conclusive in the later marital suit in the state of domicil. In *Davis v. Davis* as in *Harding v. Harding* the foreign (Virginia) adjudication was offered as conclusive in litigation concerning the economic rights of support of the wife growing out of the marriage—a purely private matter between the spouses. The litigation had nothing to do with the public interest of the state of domicil in determining continuance or dissolution of the marriage in its "status" aspects. Hence the citation by Justice Butler of *Andrews v. Andrews, 188 U. S. 14, 23 Sup. Ct. 237 (1903),* as an authority apparently not disapproved, but to be compared and distinguished. [305 U. S. at 41-43, 59 Sup. Ct. at 7-8 (1938).]

In my opinion there is nothing novel in the decision of *Davis v. Davis.*[14] The doctrine of the opinion only echoes well known precedents and familiar

[14]After all why jump to the conclusion that Justice Butler had developed revolutionary ideas?

distinctions. To understand these precedents and distinctions it is necessary to separate in thought the various different phases and incidents of the marital bond which I catalogued in my 1936 article. [21 CORNELL L. Q. 413-421.]

The furor of professional excitement which *Davis v. Davis* and *Williams v. North Carolina* have caused, seems to me further evidence of the deterioration in our professional technic and education to which I referred earlier in this article. The main motive of these transient wayward remarks is a desire to protest against continuance of this unpromising trend.