OUT-HADDOCKING HADDOCK

By Edward S. Corwin †

In Williams and Hendrix v. North Carolina,¹ decided May 21st, the Supreme Court added another to a line of decisions reaching back nearly a century,² a series which proceeds from an unwarranted assumption of power by the Court. Seven years ago, in Erie R. R. v. Tompkins,³ it had occasion to confess a similar deviation from grace when overruling Swift v. Tyson,⁴ decided ninety-six years earlier. Justice Brandeis, speaking for the Court in the Tompkins case, quoted with approval the characterization by Justice Holmes of the Tyson decision as "an unconstitutional assumption of powers by courts of the United States which no lapse of time or respectable array of opinion should make us hesitate to correct." ⁵ It is interesting to observe incidentally that the doctrine repudiated in the Tompkins case was originally foisted on the Court by Justice Story, whose Commentaries

† Ph. B., 1900, University of Michigan; Ph. D., 1905, University of Pennsylvania; LL. D., 1925, University of Michigan; Litt. D., 1936, Harvard University. Professor of Politics, 1911-18, McCormick Professor of Jurisprudence since 1918, Princeton University. Author of numerous legal treatises and articles on Constitutional Law and other legal subjects.

1. 13 U. S. L. Week 4424 (U. S. 1945).
2. This is to reckon the series from D'Arcy v. Ketchum, 11 How. 165, 13 L. Ed. 648 (U. S. 1850), the significance of which is pointed out later in this article. But McElmoyle v. Cohen, 13 Pet. 312, 10 L. Ed. 177 (U. S. 1839), the purport of which is given in a quotation below from Justice Frankfurter's opinion in the case at bar, was decided in 1839, and while not dealing with the jurisdictional question which was the central point in the D'Arcy case, it paved the way for the result reached on that question in the latter case.
3. 304 U. S. 64, 58 Sup. Ct. 817, 82 L. Ed. 1188 (1938).
4. 10 L. Ed. 865 (U. S. 1842).
Justice Frankfurter cites as an early source of the doctrine adopted in the case which is the subject of this article.\(^6\)

The romantic aspect of *Williams v. North Carolina*, which is not glamorous, is supplied in a brief sentence in Justice Frankfurter’s opinion for the Court: “Petitioners left North Carolina for the purpose of getting divorces from their respective spouses in Nevada and as soon as each had done so and married one another they left Nevada and returned to North Carolina to live there together as man and wife.”\(^7\) Even less romantic is the rest of the story: North Carolina forthwith instituted a prosecution against the couple for bigamy; they, in reliance on the “full faith and credit” clause, offered in defense the Nevada decrees which dissolved their prior matrimonial ties; North Carolina answered with *Haddock v. Haddock*,\(^8\) the doctrine of which is set forth on a later page of this paper; defendants then appealed to the Supreme Court, which in *Williams v. North Carolina*,\(^9\) “Williams I,” overruled *Haddock v. Haddock*, Justices Murphy and Jackson dissenting. As defendants were meantime continuing to live together as man and wife, North Carolina now began a new prosecution, largely in reliance without doubt on the hint given by the dissenters, whose principal argument is set forth in Justice Murphy’s opinion:

“In recognition of the paramount interest of the state of domicile over the marital status of its citizens, this court has held that actual good faith domicile of at least one party is essential to confer authority and jurisdiction on the courts of a state to render a decree of divorce that will be entitled to extraterritorial effect under the Full Faith and Credit Clause, *Bell v. Bell*, 181 U. S. 175, even though both parties personally appear, *Andrews v. Andrews*, 188 U. S. 14. When the doctrine of those cases is applied to the facts of this one, the question becomes a simple one: Did petitioners acquire a bona fide domicile in Nevada? I agree with my brother Jackson that the only proper answer on the record is, no. North Carolina is the state in which petitioners have their roots, the state to which they immediately returned after a brief absence just sufficient to achieve their purpose under Nevada’s requirements. It follows that the Nevada decrees are entitled to no extraterritorial effect when challenged in another state. *Bell v. Bell*, *supra*, *Andrews v. Andrews, supra*.\(^10\)

In the new prosecution the trial judge charged the jury to the effect that the decisive issue before them was whether the defendants

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7. Id. at 4425.
8. 201 U. S. 562, 26 Sup. Ct. 525, 50 L. Ed. 867 (1906).
10. Id. at 308-9, 63 Sup. Ct. at 218, 87 L. Ed. at 291.
had ever given up their domicile in North Carolina and acquired a new one in Nevada; for if they had not, then they were never lawfully divorced from their previous spouses and their continued cohabitation in North Carolina was bigamous. "Domicile" the Court described as the place where a person "has voluntarily fixed his abode . . . not for a mere special or temporary purpose, but with a present intention of making it his home either permanently or for an indefinite or unlimited length of time." Proceeding under this instruction the jury found defendants guilty, and the latter again appealed to the Supreme Court for protection under the "full faith and credit" clause. But this time the Court failed them, Justice Frankfurter being delegated by the majority to elaborate the above paragraph from Williams I into an opinion for the Court deciding Williams II. Justices Black, Douglas, and Rutledge dissented, Justice Black presenting an opinion for himself and Justice Douglas, Justice Rutledge filing a separate opinion.

Justice Frankfurter's argument comprises the following propositions: No state is constitutionally obliged to give "full faith and credit" to a decree rendered by a court without "jurisdiction," no state court has jurisdiction to grant a divorce decree unless one of the partners is domiciled in the state. The North Carolina court has decided by a proper procedure that the defendants had no domicile in Nevada. Therefore, North Carolina need not recognize the decrees of divorce which the Nevada court granted them.

The historical and logical weakness of this argument is well exposed in the following excerpt from Justice Black's dissenting opinion, as follows:

"The Constitution provides that 'Full Faith and Credit shall be given in each State to the Public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.' (Emphasis added.) Acting pursuant to this constitutional authority, Congress in 1790, declared what law should govern and what 'Effect' should govern and what 'Effect' should be given the judgments of state courts. Its command is that they 'shall have such faith and credit given to them as they have by law or usage in the Courts of the state from which they are taken.' 28 U. S. C. 687. If, as the Court today implies, divorce decrees should be given less effect than other court judgments, Congress alone has the constitutional power to say so. We should not attempt to solve the 'divorce problem' by constitutional interpretation. At least, until Congress has commanded a different 'Effect' for divorces granted on a short sojourn within a state, we should

11 13 U. S. L. WEEK 4424, 4427 (U. S. 1945).
stay our hands. A proper respect for the Constitution and the Congress would seem to me to require that we leave this problem where the Constitution did. If we follow that course North Carolina cannot be permitted to disregard the Nevada decrees, without passing upon the 'full faith and credit' which Nevada itself would give to them under its own 'law or usage.' The Court has decided the matter as though it were a purely federal question; Congress and the Constitution declared it to be a state question. The logic of the Court does not persuade me that we should ignore these mandates of the Congress and the Constitution. Nevada's decrees purported to grant petitioners an absolute divorce with a right to remarry. No 'law or usage' of Nevada has been pointed out to us which would indicate that Nevada would, under any circumstances, consider its decrees so 'void' as to warrant imprisoning those who have remarried in reliance upon such existing and unannulled decrees." 12

Two things emerge here: first, the usurpation of power by the Court which clearly appears when this judgment is laid alongside the constitutional clause and the implementing act of Congress of 1790; 13 secondly, the fact which confirms and elucidates this usurpation—the fact, namely, that the Court does not venture to assert that Nevada's decree of divorce is not valid and binding in Nevada. "In Nevada," as Justice Black elsewhere states without being contradicted by the Court, "even the Attorney General could not have obtained a cancellation of the decree on the ground that it was rendered without jurisdiction. State v. Moore, 46 Nevada 65. This makes it clear beyond all doubt that North Carolina has not given these decrees the same effect that they would be given in the courts of Nevada." 14

But this is not to say that Justice Frankfurter has no law on his side. For as I remarked in my opening sentence, Williams II only climaxed a long course of unwarranted assumption of power by the Court—a course of decision which has gradually eroded the "full faith and credit" clause and the implementing acts of Congress.

I quote the relevant portion of Justice Frankfurter's opinion:

"The implications of the Full Faith and Credit Clause, Article IV, Section 1 of the Constitution, first received the sharp analysis of this Court in Thompson v. Whitman, 18 Wall. 457. Theretofore, uncritical notions about the scope of that Clause had been expressed in the early case of Mills v. Duryee, 7 Cranch 481. The 'doctrine' of that case, as restated in another early case, was that 'the judgment of a state court should have the same credit, validity, and effect, in every other court in the United States,

12. Ibid.
which it had in the state where it was pronounced.'  

Hampton v. M'Connell, 3 Wheat. 234, 235. This utterance, when put to the test, as it was in Thompson v. Whitman, supra, was found to be too loose.  

Thompson v. Whitman made it clear that the doctrine of Mills v. Duryee comes into operation only when, in the language of Kent, 'the jurisdiction of the court in another state is not impeached, either as to the subject matter or the person.' Only then is 'the record of the judgment . . . entitled to full faith and credit.'  

I Kent, Commentaries (2d ed., 1832)* 261 n. b.  

The essence of the matter was thus put in what Thompson v. Whitman adopted from Story: "The Constitution did not mean to confer [upon the States] a new power or jurisdiction, but simply to regulate the effect of the acknowledged jurisdiction over persons and things within their territory." 18 Wall. 457, 462. In short, the Full Faith and Credit Clause puts the Constitution behind a judgment instead of the too fluid, ill-defined concept of 'comity.'

"But the Clause does not make a sister-State judgment a judgment in another State. The proposal to do so was rejected by the Philadelphia Convention. 2 Farrand, The Records of the Federal Convention of 1787, 447-48. 'To give it the force of a judgment in another state, it must be made a judgment there.'  

M'Elmoyle v. Cohen, 13 Pet. 312, 325. It can be made a judgment there only if the court purporting to render the original judgment had power to render such a judgment. A judgment in one State is conclusive upon the merits in every other State, but only if the court of the first State had power to pass on the merits—had jurisdiction, that is, to render the judgment.

"It is too late now to deny the right collaterally to impeach a decree of divorce made in another State, by proof that the court had no jurisdiction, even when the record purports to show jurisdiction.' It was 'too late' more than forty years ago.  

German Savings Society v. Dormitzer, 192 U. S. 125, 128.

"Under our system of law, judicial power to grant a divorce—jurisdiction, strictly speaking—is founded on domicil. Bell v. Bell, 181 U. S. 175; Andrews v. Andrews, 188 U. S. 14. The framers of the Constitution were familiar with this jurisdictional prerequisite, and since 1789 neither this Court nor any other court in the English-speaking world has questioned it. Domicil implies a nexus between person and place of such permanence as to control the creation of legal relations and responsibilities of the utmost significance. The domicil of one spouse within a State gives power to that State, we have held, to dissolve a marriage wheresoever contracted. In view of Williams v. North Carolina, supra, the jurisdictional requirement of domicil is freed from confusing refinements about 'matrimonial domicil,' see Davis v. Davis, 305 U. S. 32, 41, and the like. Divorce, like marriage, is of concern not merely to the immediate parties. It affects personal rights of the deepest significance. It also touches basic interests of
society. Since divorce, like marriage, creates a new status, every consideration of policy makes it desirable that the effect should be the same wherever the question arises.” 15

A few comments are invited. To begin with, I do not find that Justice Frankfurter's reference to Farrand's Records bears him out. But suppose it did: the Convention also voted down a motion to empower Congress to create corporations; yet the final form in which the Constitution was adopted was found to confer that very power when it was “necessary and proper” for Congress to exercise it to carry out other powers. Justice Frankfurter's further statement that “the framers of the Constitution were familiar with jurisdictional prerequisites” in divorce cases is also open to challenge, as I shall show later.

As a whole, the excerpts given above from Justice Black's opinion plus the above passage from Justice Frankfurter's opinion furnish us in outline the story of the development of judicial power under the “full faith and credit” clause so far as it affects divorce, but some amplification is needed at points for present purposes. The decision in the pioneer case of Mills v. Duryee 16 proceeded simply on the theory that the Act of 1790 meant what it said. “The Constitution,” said Justice Story, who was still many years away from his Commentaries, "contemplated a power in Congress to give a conclusive effect to such judgments [those from without the state]. And we can perceive no rational interpretation of the Act of Congress, unless it declares a judgment conclusive when a Court of the particular state where it is rendered would pronounce the same decision.” 17 Justice Johnson dissented. “There are,” said he, “certain eternal principles of justice which never ought to be dispensed with, and which Courts of justice never can dispense with, but when compelled by positive statute. One of these is, that jurisdiction cannot be justly exercised by a state over property not within the reach of its process, or over persons not owing them allegiance or not subjected to their jurisdiction, by being found within their limits.” 18 Let me repeat, this doctrine—which is the doctrine of Williams II—was first stated in a dissenting opinion, and was clearly thought by its author to be in contradiction of the decision dissented from.

Moreover, the seed thus sown fell on stony soil so far as Chief Justice Marshall was concerned, as his brief opinion in Hampton v.

15. Id. at 4425.
16. 7 Cranch 481, 3 L. Ed. 411 (U. S. 1813).
17. Id. at 485, 3 L. Ed. at 413.
18. Id. at 486, 3 L. Ed. at 414.
McConnell, quoted by Justice Frankfurter, was to show a few years later. But Kent and Story were fundamentally of a different school of jurisprudence; both were convinced believers in natural law principles and of the right and duty of courts of justice to enforce them in proper cases. Accordingly, in the Commentaries of both, while the doctrine of Mills v. Duryee is reiterated, it is curiously accompanied by the doctrine of Johnson's dissent. Nevertheless, it was not till 1850, in the case of D'Arcy v. Ketchum, that Johnson's erosive gloss on the Act of 1790 was adopted by the Court, in a case involving a judgment for debt in which one of the debtors pleaded that he had not been personally served; and not till 1873 was it that similar treatment was administered the act in a case involving a judgment in rem. This was in the case of Thompson v. Whitman, which Justice Frankfurter takes as his point of departure. Indeed, if one regard a suit for divorce as being in rem (and it is so regarded in the precedents upon which Justice Frankfurter relies), Williams II is on all fours with the Thompson case, save in one respect. In the latter case the "jurisdictional fact" was the location of a certain vessel at a certain time, and Justice Bradley adopts without qualm or qualification a New Jersey jury's finding that the vessel was not at that time within the territorial jurisdiction of the court which had rendered judgment against it. In Williams II the "jurisdictional fact" was in the "intent" of defendants regarding their presence in Nevada, whether it was such as to effect a change in their domicile from North Carolina to the former State. In other words, the North Carolina jury was asked to psychoanalyze defendants, roughly speaking. So, while accepting the North Carolina jury's verdict as decisive of the "jurisdictional fact," Justice Frankfurter finds it fitting to add these words of caution for the benefit of future juries undertaking a like task:

"The scales of justice must not be unfairly weighted by a State when full faith and credit is claimed for a sister-State judgment. But North Carolina has not so dealt with the Nevada decrees. She has not raised unfair barriers to their recognition. North Carolina did not fail in appreciation or application of federal standards of full faith and credit. Appropriate weight was given to the finding of domicil in the Nevada decrees, and that finding was allowed to be overturned only by relevant standards of proof. There is nothing to suggest that the issue was not fairly submitted to the jury and that it was not fairly assessed on cogent evidence."
The doctrine of the Thompson case is sicklied o'er with a pale cast of conjecture; to what purpose future cases may show.

For the rest, the crux of the Thompson case for its bearing on Williams II comprises the following passage from Justice Bradley's opinion for the Court, in which it is virtually admitted that new law was being made. I quote:

"But it must be admitted that no decision has ever been made on the precise point involved in the case before us, in which evidence was admitted to contradict the record as to jurisdictional facts asserted therein, and especially as to facts stated to have been passed upon by the court.

"But if it is once conceded that the validity of a judgment may be attacked collaterally by evidence showing that the court had no jurisdiction, it is not perceived how any allegation contained in the record itself, however strongly made, can affect the right so to question it. The very object of the evidence is to invalidate the paper as a record. . . . The records of the domestic tribunals of England and some of the States, it is true, are held to import absolute verity as well in relation to jurisdictional as to other facts, in all collateral proceedings. Public policy and the dignity of the courts are supposed to require that no averment shall be admitted to contradict the record. But, as we have seen, that rule has no extra-territorial force. . . .

"On the whole, we think it clear that the jurisdiction of the court by which a judgment is rendered in any State may be questioned in a collateral proceeding in another State, notwithstanding the provision of the fourth article of the Constitution and the law of 1790, and notwithstanding the averments contained in the record of the judgment itself.

"This is decisive of the case; for, according to the findings of the jury, the justices of Monmouth County could not have had any jurisdiction to condemn the sloop in question. It is true she was seized in the waters of New Jersey; but the express finding is, that the seizure was not made within the limits of the county of Monmouth, and that no clams were raked within the county on that day." 23

The comment provoked is that it was originally believed that the Act of 1790 gave the rule just such extraterritorial effect, and that the only plea admissible against an out-of-state judgment was "nul tiel record" (no such record).

Justice Frankfurter's citation of Bell v. Bell 24 and Andrews v. Andrews 25 brings at last his argument squarely into the field of divorce.

23. 18 Wall. 457, 468, 469, 21 L. Ed. 897, 901-2 (U. S. 1873).
25. 188 U. S. 14, 23 Sup. Ct. 237, 47 L. Ed. 366 (1903).
These holdings, added to the doctrine of the Thompson case as to evidence, undoubtedly furnish ample basis for the Court's holding in Williams II. But what had happened in the interval between Mills v. Duryee and the Thompson case to the Act of 1790 is clearly evident. The Act had been subjected to the Court's theories respecting jurisdiction, and in the field of divorce to its theories of "domicile." (It should be noted in passing that the Justices do not agree even as to the proper spelling of the word!) And furthermore, as was pointed out earlier, this development is signaled after 1850 by the appearance of a fundamental self-contradiction in the Court's treatment of the Act of 1790.

The inescapable implication of Mills v. Duryee was that, to quote Kent's exposition of that holding, "A judgment is . . . conclusive in every other state if a court of the particular state where it was rendered would hold it conclusive. *Nil debet* is not a good plea in a suit on a judgment in another state, because not a good plea in such state." But in permitting a judgment seeking enforcement under the "full faith and credit" clause to be attacked for wanting jurisdiction in the court which rendered it, the Court created a disparity between the local effect of the judgment—unless, indeed, it was subject to attack in the state of its origin—and its interstate effect. And it is on this disparity that the effectiveness of Justice Black's attack on Justice Frankfurter's opinion largely depends. To be sure, there is a way, inferentially pointed out in Pennoyer v. Neff, to remove this disparity, and that is to hold that the judgment denied extra-state enforcement is violative of the "due process" clause of Amendment XIV, and hence void even locally. But the Court does not avail itself of that way out in Williams II, and could not in harmony with the Bell and Andrews cases.

Indeed, in Haddock v. Haddock the logical incongruity in question was brought to a great pitch, thanks to a newly contrived variation on the domicile theme, which its inventor, Justice White, termed the "matrimonial domicile." Applying this novel device to relieve the New York courts from recognizing a divorce granted in Connecticut to a husband domiciled there, who had abandoned his wife in New York, where they were married—the "matrimonial domicile"—the Court created a situation in which a man and woman, when both were in Connecticut, were divorced; when both were in New York, were still married; and when either one was in Connecticut and the other in New York, the former was divorced and the latter married. To be sure, the Court pronounced the Haddock decision overruled.

27. 95 U. S. 714, 24 L. Ed. 565 (1878).
liams I; but Williams II nevertheless perpetuates the logical paradox which the former holding so strikingly advertised.

But why should not Justice Frankfurter invoke the "due process" clause in Williams II? One answer is that in this respect he was only following the pattern set in the precedents he relies on, Bell v. Bell and Andrews v. Andrews. But there is also a more fundamental answer, to arrive at which we must first ask and answer another question: What was the Court's objective in this case?—What considerations of public policy did it have at heart?—for I deny that even the precedents cited by Justice Frankfurter were so compulsive upon the Court as to foreclose to it on this occasion its frequently available choice between "yes" and "no." The dissenting Justices insinuate that the Court is doing again what it obviously did do in the Haddock case—and to a lesser extent in the Andrews case—to wit, engage in a tilt against easy divorces, and indeed one or two of the majority may have been moved by some such impulse. But Justice Frankfurter's opinion lends little support to the theory. Clearly what he thinks he, at least, is doing is to make it more difficult for any state to "improperly intrude into domestic relations subject to the authority of other states," the "regulation of domestic relations" having been "left with the states and not given to the national authority." But this being so, two things result: first, Nevada must not be permitted to deprive her sister states of their constitutional right to deal with the domestic relations of those "domiciled" within their borders; secondly, Nevada must not be deprived of the same right either, which however she would be if "national authority" were to thrust upon her its conception of "domicile" to be applied to persons within her own borders.

In short, the Court is intervening in behalf of the "federal system." The fact is, of course, that the Constitution says nothing about "domestic relations"—unless forsooth, the subject falls somewhere between the "domestic tranquility" of the Preamble and the "domestic violence" of Article IV, section IV. That is to say, the power of the states over domestic relations is a reserved power, and hence contingent on any exercise thereof not coming into collision with the constitutional powers of the National Government or with any of the prohibitions which the Constitution lays on the states. It is indeed a difficult dichotomy which the Court is endeavoring to maintain in this field of "domicile" as an indispensable element of jurisdiction when the application of the "full faith and credit" clause is in question, versus "domicile" as a dispensable element thereof when the application of the "due process" clause is in question. Yet this dichotomy is the

chief logical prop today of the disparity between the literal requirements of the Act of 1790 and that series of decisions of which Williams II is to date the final term.

I now wish to turn for a moment to Justice Rutledge's dissenting opinion. The following passage is quoted both for its bearing on the point just under discussion, and for its effective comments on the elusive subject of "domicile."

"Stripped of its common-law gloss, the basic constitutional issue inherent in the problem is whether the states shall have power to adopt so-called 'liberal' divorce policies and grant divorces to persons coming from other states while there transiently or for only short periods not sufficient in themselves, absent other objective criteria, to establish more than casual relations with the community. One could understand and apply, without decades of confusion, a ruling that transient divorces, founded on fly-by-night 'residence,' are invalid where rendered as well as elsewhere; in other words, that a decent respect for sister states and their interests requires that each, to validly decree divorce, do so only after the person seeking it has established connections which give evidence substantially and objectively that he has become more than casually affiliated with the community. Until then the newcomer would be treated as retaining his roots, for this purpose, as so often happens for others, at his former place of residence. One equally could understand and apply with fair certainty an opposite policy frankly conceding state power to grant transient or short-term divorces, provided due process requirements for giving notice to the other spouse were complied with.

"Either solution would entail some attenuation of state power. But that would be true of any other, which would not altogether leave the matter to the states and thus nullify the constitutional command. Strong considerations could be stated for either choice. The one would give emphasis to the interests of the states in maintaining locally prevailing sentiment concerning familial and social institutions. The other would regard the matter as more important from the standpoint of individual than of institutional relations and significance. But either choice would be preferable to the prevailing attempt at compromise founded upon the 'unitary domicil-jurisdictional fact-permissible inference' rule.

"That compromise gives effect to neither policy. It vitiates both; and does so in a manner wholly capricious alike for the institutional and the individual aspects of the problem. The element of caprice lies in the substantive domiciliary concept itself and also in the mode of its application.

"Domicil, as a substantive concept, steadily reflects neither a policy of permanence nor one of transiency. It rather reflects both inconstantly. The very name gives forth the idea of home with all its ancient associations of permanence. But 'home' in the modern world is often a trailer or a tourist camp. Automobiles, nationwide business and multiple family dwelling units have deprived the
institution, though not the idea, of its former general fixation to
soil and locality. But, beyond this, 'home' in the domiciliary sense
can be changed in the twinkling of an eye, the time it takes a man
to make up his mind to remain where he is when he is away from
home. He need do no more than decide, by a flash of thought, to
stay 'either permanently or for an indefinite or unlimited length of
time.' No other connection of permanence is required. All of
his belongings, his business, his family, his established interests
and intimate relations may remain where they have always been.
Yet if he is but physically present elsewhere, without even bag or
baggage, and undergoes the mental flash, in a moment he has
created a new domicil though hardly a new home.

"Domicil thus combines the essentially contradictory ele-
ments of permanence and instantaneous change. No legal con-
ception, save possibly 'jurisdiction,' of which it is an elusive sub-
stratum, affords such possibilities for uncertain application. The
only thing certain about it, beyond its uncertainty, is that one
must travel to change his domicil. But he may travel without
changing it, even remain for a lifetime in his new place of abode
without doing so. Apart from the necessity for travel, hardly
evidentiary of stabilized relationship in a transient age, the cri-
terion comes down to a purely subjective mental state, related
to remaining for a length of time never yet defined with clarity." 29

Yes, indeed; "domicile" is a frail thing to suspend a constitutional pro-
vision from in an age when "home is where the garage is." Moreover,
this thought suggests itself: to what jurisdiction, under Williams II,
would John Steinbeck's "Okies" and other wanderers resort for needed
divorces? Or again, suppose the hero and heroine of the drama which
we have titled "Williams II" had gone to a state which required a
six-month residence before they could enter its divorce courts, would
their "intent" have been so obvious to the North Carolina jury? In
more than two-thirds of the states, to be sure, the length of residence
required before filing suit for divorce is one year, and that perhaps
establishes something like a consensus as to what is requisite evidence
of "domiciliary intention," and to exact more is to set up a test not of
"domicile" but of fortitude. Yet if we are to take seriously what is
sometimes said about "intent" in this connection—animus manendi—
Jacob, who took service with Laban with the "special purpose" in mind
of acquiring the beauteous Rachel, and expecting to quit at the end
of seven years, although his expectation was defeated by Laban's craft,
still retained his "domicile of origin" after twelve sons had been born
to him! 29a

Which brings me back for a moment to Justice Frankfurter's
words on the subject of "domicile" as an ingredient of jurisdiction.

29. Id. at 4434-5.
29a. Genesis, Chap. 29, 30.
He says, it will be recalled, that "under our system of law, judicial power to grant a divorce . . . is founded on domicil. *Bell v. Bell* . . . *Andrews v. Andrews* . . . The framers of the Constitution were familiar with this jurisdictional prerequisite. . . ." 30 Whatever other learning Justice Frankfurter may have had at hand I cannot say, but certainly his citations do not bear him out. In neither the *Bell* nor the *Andrews* case is a divorce case cited of earlier date than 1859. On the other hand, in *Cheever v. Wilson*, 31 decided in 1870, the Court had expressed itself on the precise point at issue in *Williams II* as follows:

“It is said the petitioner went to Indiana to procure the divorce, and that she never resided there. The only question is as to the reality of her new residence and of the change of domicil. That she did reside in the county where the petition was filed is expressly found by the decree. Whether this finding is conclusive, or only *prima facie* sufficient, is a point on which the authorities are not in harmony. We do not deem it necessary to express any opinion upon the point. The finding is clearly sufficient until overcome by adverse testimony. None adequate to that result is found in the record. Giving to what there is the fullest effect it only raises a suspicion that the *animus manendi* may have been wanting.” 32

It is true that *Cheever v. Wilson* was inferentially overruled on this point by the *Bell* and *Andrews* cases. But that fact hardly proves that the framers of the “full faith and credit” clause and of the Act of 1790 held the views now imputed to them.

What is likely to be the practical effect of *Williams II*? Justice Black is pretty despondent. He writes:

“Statistics indicate that approximately five million divorced persons are scattered throughout the forty-eight states. More than 85% of these divorces were granted in uncontested proceedings. Not one of this latter group can now retain any feeling of security in his divorce decree. Ever present will be the danger of criminal prosecution and harassment.” 33

This is to exaggerate. Most of these uncontested divorces were, I suspect, granted in states where both parties were domiciled—even in the “matrimonial domicile” of *Haddock v. Haddock*. Similar alarms were raised about the *Haddock* decision, but failed for the most part to materialize for the simple reason that the state courts generally con-

30. *Id.* at 4425.
31. 9 Wall. 108, 19 L. Ed. 604 (U. S. 1870).
32. *Id.* at 123, 19 L. Ed. at 608.
33. 13 U. S. L. *WEEK* 4424, 4428 (U. S. 1945).
tinued with undisturbed phlegm or good sense to give "full faith and credit" to out-of-state divorces on the principles they had followed previously; and it is altogether likely that the same thing will happen this time. Nor, as I indicated before, do I read Justice Frankfurter's opinion as proclaiming an out-and-out crusade against lax divorce laws, but as a gesture in defense of what is left of the "federal system"—the Court having perhaps a case of conscience at there not being more of it to defend. So—although I admit that Justice Frankfurter is not clear on the point—I doubt very much whether the Court would have supported any other state except North Carolina in prosecuting Williams and his companion for bigamy. For obviously it is not the "fraud" to Nevada's jurisdiction that the Court is avenging, but the "fraud" to North Carolina's power over domestic relations; and no other state would have been in a position to raise that precise cry of "fraud."

In conclusion let us consider these cases for a moment for their primary purpose, namely, to determine whether the defendants ought to go to prison. Regarded from this angle the performance of the Court seems to me open to severe criticism. What I have especially in mind is the encouragement which the Court gave the defendants by its opinion in *Williams I* to continue their "bigamous" relationship. The very sentence which Justice Frankfurter quotes from *Hampton v. McConnell* and characterizes as "too loose" is followed in Justice Douglas' opinion for the Court in *Williams I* with the statement, "That view has survived substantially intact." 34 Relevant too in this connection are the following passages from this same opinion:

"This Court, of course, is the final arbiter when the question is raised as to what is a permissible limitation on the full faith and credit clause. *Alaska Packers Ass'n v. Industrial Accident Commission*, 294 U. S. 532, 547 (1935); *Milwaukee County v. M. E. White Co.*, 296 U. S. 268, 274 (1935). But the question for us is a limited one. In the first place, we repeat that in this case we must assume that petitioners had a *bona fide* domicil in Nevada, not that the Nevada domicil was a sham. We thus have no question on the present record whether a divorce decree granted by the courts of one state to a resident as distinguished from a domiciliary is entitled to full faith and credit in another state. Nor do we reach here 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* domicil was acquired in Nevada." 35

34. 317 U. S. 287, 294, 63 Sup. Ct. 207, 211, 87 L. Ed. 279, 283 (1942).
35. Id. at 302, 63 Sup. Ct. at 215, 87 L. Ed. at 288.
Here, unquestionably, is language which standing by itself should, and
probably would, have warned defendants of their risk. Unfortunately
for them, Justice Douglas was permitted to continue in the following
strain:

“In the second place, the question as to what is a permissible
limitation on the full faith and credit clause does not involve a de-
cision on our part as to which state policy on divorce is the most
desirable one. It does not involve selection of a rule which will
encourage on the one hand or discourage on the other the practice
of divorce. That choice in the realm of morals and religion rests
with the legislatures of the states. Our own views as to the mar-
riage institution and the avenues of escape which some states have
created are immaterial. It is a Constitution which we are ex-
pounding—a Constitution which in no small measure brings sepa-
rate sovereign states into an integrated whole through the medium
of the full faith and credit clause. Within the limits of her politi-
cal power North Carolina may, of course, enforce her own policy
regarding the marriage relation—an institution more basic in our
civilization than any other. But society also has an interest in
the avoidance of polygamous marriages (Loughran v. Loughran,
292 U. S. 216, 223) and in the protection of innocent offspring
of marriages deemed legitimate in other jurisdictions. And other
states have an equally legitimate concern in the status of persons
domiciled there as respects the institution of marriage. So when
a court of one state acting in accord with the requirements of pro-
cedural due process alters the marital status of one domiciled in
that state by granting him a divorce from his absent spouse, we
cannot say its decree should be excepted from the full faith and
credit clause merely because its enforcement or recognition in an-
other state would conflict with the policy of the latter. Whether
Congress has the power to create exceptions (see Yarborough v.
Yarborough, 290 U. S. 202, 215, n. 2, dissenting opinion) is a
question on which we express no view. It is sufficient here to note
that Congress, in its sweeping requirement that judgments of the
courts of one state be given full faith and credit in the courts of
another, has not done so. And the considerable interests involved
and the substantial and far-reaching effects which the allowance
of an exception would have on innocent persons indicate that the
purpose of the full faith and credit clause and of the supporting
legislation would be thwarted to a substantial degree if the rule
of Haddock v. Haddock were perpetuated.” 36

Confronted with this “double talk,” defendants placed themselves—or
rather remained—in a situation which, as Justice Frankfurter blandly
puts it, created “unhappy consequences for them” 37—consequences in-
deed which now appear grotesque from the fact that since these pro-

36. Id. at 302-4, 63 Sup. Ct. at 215-6, 87 L. Ed. at 288-9.
37. 13 U. S. L. Week 4424, 4427 (U. S. 1945).
ceedings were started the abandoned spouse of one of the defendants has died, while the other has remarried! (By the way, what is the status of that marriage under *Williams II*)? The long and short of it is that the Court ought to have pruned Justice Douglas' opinion of some of its apparent commitments if it could not make up its mind that it would back them up when the time came. Justice Douglas himself, as was noted earlier, is one of the three dissenters in *Williams II*.

The question naturally suggests itself, What steps should be taken to avoid another *Williams II*, or something like it? I suggest four:

1. The dismissal of the concept of "domicile" from this class of cases, thus leaving a state free to open its courts to anybody who wishes to enter them for the purpose of filing a suit for divorce. 2. Recognition by the Supreme Court that divorce proceedings are *in personam*, which in truth they are, for their primary impact is upon the defendant. The concept of the marriage status as a *res* which, the moment a divorce suit is brought, splits into two parts like a peapod, is even more absurd than the concept of "domicile," of which the essential element is an unprovable "intent." 3. The enforcement of the "due process of law" requirement in all divorce cases in the general sense which it is given in *Pennoyer v. Neff*, that is, as requiring personal service of defendant in all *in personam* actions. 4. The abandonment by Congress of the irrational assumption that the broad term "judicial proceedings" of the "full faith and credit" clause refers only to final judgments and does not include intermediate processes and writs, and the enactment by it of a law providing for the service and execution throughout the United States of the judicial processes of the several states. Good logic, good sense, and good authority support Congress' constitutional power thus to act.

Yet should Congress nevertheless refuse to act, then let the Court recognize properly authenticated service by mail as meeting the "due process" requirement in divorce cases—a development for which it has paved the way. Or should the majority in *Williams II*, on the other hand, still insist on some sort of "domicile," at least they ought to be content to substitute the easily provable "matrimonial domicile" of the *Haddock* case for the highly conjectural "domicile" of *Williams II*—in short, to overturn both *Williams I* and *Williams II*!

38. 95 U. S. 714, 24 L. Ed. 565 (1878).