Migratory Divorce: Sherrer v. Sherrer and the Future

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By Harry Swanson, Jr.

It is an approved rule of the law that sister states cannot be compelled under the full faith and credit clause of the United States Constitution to enforce divorce decrees of another state unless the respective court of that state entertained jurisdiction over the subject matter by virtue of being the domicile of at least one of the parties. This statement is premised on the concept that marriage is a relationship in which the state is vitally interested, as well as the individual spouses. Thus a decree of divorce which dissolves the marriage cannot be considered as a mere personal judgment; the state, too, is concerned, and since this is the situation an act of law must operate generally in the proceedings therefor.


Soon after the adoption of the Constitution, the First Congress, under the general authority of Art. IV, § 1, enacted a statute, existing today as 28 U.S.C.A. 1738:

"(The) acts, records, and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory, or Possession from which they are taken."

It has been hinted that an application of the literal language of the full faith and credit clause and the statute enacted in 1790 would have resolved all doubts; in other words, each state would be compelled to recognize a judgment of a court of another state in the same manner as it would be recognized in the courts of the state in which the judgment was originally rendered. The dubious concept of jurisdiction would not be in question. Ruymann, supra, note 1, at 10. This was further noted by Mr. Justice Frankfurter in his dissent in Sherrer v. Sherrer, 334 U.S. 343, 357-58, 68 S.Ct. 1087, 92 L.Ed. 1429 (1948), where he commented: "It would certainly have been easier if from the beginning the full faith and credit clause had been construed to mean that the assumption of jurisdiction by the courts of a state would be conclusive, so that every state would have to respect it. But such certainly has not been the law since 1873. Thompson v. Whitman, 18 Wall. 457."

In Williams v. North Carolina, 325 U.S. 226, 229, 65 S.Ct. 1092, 89 L.Ed. 1577 (1945), the Supreme Court of the United States defined domicile as "a nexus between person and place of such
to terminate the relationship.\textsuperscript{6} But what is the law that is so to operate? An action for divorce has been said to be or have the characteristics of an \textit{in rem} proceeding,\textsuperscript{7} the subject matter or "res" of the divorce proceeding being the marriage status. It follows that since a suit for divorce is in the nature of an action \textit{in rem}, and the "res" or marriage status is situated in the domicil of the parties, the only law which can truly terminate the marriage status is the law of the domicil of at least one of the parties.\textsuperscript{8}

As a natural consequence of the rule that a judgment is not entitled to obligatory enforcement by any court unless the court rendering it had jurisdiction, plus the concept that a suit for divorce is a type of \textit{in rem}

permanence as to control the creation of legal relations and responsibilities of the utmost significance." Goodrich states: "Domicil for divorce purposes is in turn dependent on two factors: a statutory period of residence within the state and the highly illusory 'intent' to make it the party's 'home'." Goodrich, \textit{Conflict of Laws} 64 (3d ed., 1949).

\textsuperscript{1} However, it would appear that this statement may well be questioned in view of the Supreme Court's decision in Sherrer v. Sherrer, 334 U.S. 343, 68 S.Ct. 1087, 92 L.Ed. 1429 (1948). \textit{Res judicata} will bar any collateral attack on the migratory divorce decree regardless of the fact that the court rendering the decree had no jurisdiction over the subject matter, so long as there is personal jurisdiction over the parties. Thus bona fide domicil is not needed.

\textsuperscript{2} Nonetheless, the law was made clear in Williams v. North Carolina, 317 U.S. 287, 63 S.Ct. 207, 87 L.Ed. 279 (1943), that if one of the parties is domiciled in the state whose court rendered the divorce decree, the full faith and credit clause compels recognition in all states of the Union. In that case, A, married to C, and B married to D, went from North Carolina to Nevada, remained in Nevada for the requisite statutory residence period, obtained divorces from their respective spouses, C and D, and thereupon married each other. On returning to North Carolina, A and B were tried and convicted of bigamy, the North Carolina court refusing to recognize the Nevada decrees. On appeal to the Supreme Court of the United States, the conviction was reversed. The prosecution, in arguing the case, had admitted that there was some evidence sufficient to find actual Nevada domicile. Thus the Supreme Court did not pass on any question of domicil, but rather decided the case on the assumption that A and B were in fact domiciled in Nevada.

This first Williams case is important since it overruled the controversial case of Haddock v. Haddock, 201 U.S. 562, 26 S.Ct. 525, 50 L.Ed. 867 (1905), which laid down the rule that although one party might secure a valid divorce in the state in which he became actually domiciled, a sister state might not be compelled to honor such decree. See \textit{Restatement, Conflict of Laws} 113, which attempted to explain the rule in this case; see, also, Lorenzen, \textit{Haddock v. Haddock Overruled}, 59 Yale L.J. 341 (1943).

It might be well to note that Williams No. 1 has been substantially limited by Estin v. Estin, 334 U.S. 541, 68 S.Ct. 1213, 92 L.Ed. 1561 (1948), and Kreiger v. Kreiger, 334 U.S. 555, 68 S.Ct. 1221, 92 L.Ed. 1572 (1948). In both of these cases, the husband and wife were domiciled in New York. The wife secured a separate maintenance decree in New York; the husband thereafter journeyed to Nevada, established a bona fide domicile in Nevada, and secured a divorce on the basis of constructive service. The Supreme Court of the United States held, in effect, that the divorce was divisible; that is, New York has an interest in the support of the wife, and the interest over such support cannot be taken away by Nevada, regardless of the fact that the husband was actually domiciled there. Nonetheless, the Nevada decree was given effect insofar as the marital status was concerned, and the parties were legally divorced in that respect. See note, 1 A.L.R.2d 1423 (1948); Recent Cases, 61 Harv. L. Rev. 1454 (1948); Comment, 22 So. Calif. L. Rev. 155 (1949); Comment, 1 Stan. L. Rev. 137 (1948).

\textsuperscript{6} Goodrich, op. cit., supra, note 2, at 396.

\textsuperscript{7} Ibid.

\textsuperscript{8} Ibid., at 411. See, also, \textit{Restatement, Conflict of Laws} 110 (1934); \textit{Restatement, Judgments} 74 (1942); Williams v. North Carolina, 325 U.S. 226, 229, 65 S.Ct. 1092, 89 L.Ed. 1577 (1945).

\textsuperscript{9} Goodrich, op. cit., supra, note 3, at 411, remarks in regard to this explanation: "Whether this figurative explanation is taken, or whether it is simply said that the court of the party's domicil has the power to control his domestic relations, the result is the same." See Williams v. North Carolina, infra, note 9.
proceeding, the courts have held that domicil is an essential requisite for jurisdiction in the matter of divorce. Thus the migrant plaintiff, not actually domiciled in the state where he obtained his *ex parte* divorce, might discover that the decree was void since the court lacked jurisdiction to grant the decree. It was so held in the case of *Williams v. North Carolina* No. 2.  

However, in 1948 the value of the rule in the second *Williams* case was lessened considerably by the Supreme Court’s disregard for the traditional requisite of domicil. This was accomplished in the sister cases of *Sherrer v. Sherrer* and *Coe v. Coe*. In *Sherrer v. Sherrer* the wife went from Massachusetts to Florida, suing for divorce on completion of the ninety-day statutory period of residence in Florida. The husband followed his wife to Florida, and appeared both in person and through counsel in the divorce proceeding; all allegations of the wife’s complaint, including her claim to Florida residence, were denied by the husband. However, when the wife attempted to prove her Florida residence, the husband made no endeavor to question the evidence. The Florida court, finding the wife had acquired a bona fide Florida residence, granted the divorce. No appeal was sought by the husband. Shortly thereafter, the wife remarried and returned to Massachusetts; husband No. 1, the defendant in the Florida suit, then attempted to collaterally attack the Florida decree in the Massachusetts court. The Massachusetts court allowed the attack, saying because the wife was never domiciled in Florida, the Florida court lacked the necessary jurisdiction and the resulting decree was void. On appeal to the Supreme Court of the United States, the Massachusetts judgment was reversed on the ground that it denied to the Florida decree the protection of the full faith and credit clause of the Constitution.

The fundamental concept upon which the decision of the Supreme Court in the *Sherrer* and *Coe* cases is predicated is not new with these decisions. The Court, in *Stoll v. Gottlieb*, stated:

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9 *Williams v. North Carolina*, 325 U.S. 226, 65 S.Ct. 1092, 89 L.Ed. 1577 (1945). See note 4, *supra*, for a summary of the facts involved in *Williams* No. 1—the facts in *Williams* No. 2, of course, are the same. However, in the second *Williams* case, as distinguished from the first, domicil was actively contested by the prosecution. It was held that there was no bona fide domicil; thus the Nevada decree was void, and the parties, still married to their first spouses, were guilty of bigamy. The Supreme Court held, in effect, that the courts of a sister state may examine the facts and evidence to determine if domicil actually existed.

10 334 U.S. 343, 68 S.Ct. 1087, 92 L.Ed. 1429 (1948).


12 Many cases prior to the *Sherrer* and *Coe* cases approved the rule that the appearance of the defendant in the foreign divorce suit, whether he contested the jurisdictional issue of domicil or not, would prevent any collateral attack on the decree as well as the jurisdiction by a sister state. The doctrine used in these cases is often estoppel; nonetheless, the result is the same as that obtained in the *Sherrer* and *Coe* cases. See, e.g., *Finan v. Finan*, 47 N.Y.S.2d 429 (1944); *Senor v. Senor*, 272 App.Div. 306, 70 N.Y.S.2d 909, 297 N.Y. 800, 78 N.E.2d 20 (1948); *Standish v. Standish*, 179 Misc. 554, 40 N.Y.S.2d 538 (1943); *Stone v. Stone*, 44 N.Y.S.2d 558 (1943); *In re Biggers*, 228 N.C. 743, 47 S.E.2d 32 (1948); *Knaidel's Estate*, 50 LANC. L. REV. 287 (1946).

"Courts to determine the rights of parties are an integral part of our system of government. It is just as important that there should be a place to end as that there should be a place to begin litigation. After a party has his day in court, with opportunity to present his evidence and his view of the law, a collateral attack upon the decision as to jurisdiction there rendered merely retries the issue previously determined. There is no reason to expect that the second decision will be more satisfactory than the first."14

It is likely, however, that the real foundation for the decision in the Sherrer and Coe cases can be found in Davis v. Davis.15 In the Davis case, the Virginia court held that the husband was domiciled within the state and granted an absolute divorce, this over the objections of the wife, who had appeared in the Virginia divorce proceeding for no other reason than to contest the jurisdiction of the court on the basis of lack of domicil of both of the parties. The wife thereafter attacked the Virginia decree in the courts of the District of Columbia; those courts allowed the attack, refusing to recognize the jurisdiction of the Virginina court. But, on appeal to the Supreme Court of the United States, it was held that there could be no collateral attack by the wife since she had appeared in the Virginia proceedings and fully litigated the issue of the husband's domicil. The courts of the District of Columbia, then, had denied full faith and credit to the Virginia decree.

The majority of the Court in the Sherrer and Coe cases relied heavily on the Davis case in handing down their controversial decision. Mr. Chief Justice Vinson, for the Court, stated:

"... It is clear that respondent was afforded his day in court with respect to every issue involved in the litigation, including the jurisdictional issue of petitioner's domicil. Under such circumstances, there is nothing in the concept of due process which demands that a defendant be afforded a second opportunity to litigate the existence of jurisdictional facts."16

However, it would appear that the Sherrer and Coe cases have considerably enlarged the doctrine laid down in the Davis case.17 The new concept in Sherrer v. Sherrer is satisfied by a mere appearance along with general participation in the divorce suit on the part of the defendant. The

14Id., at 172. It must be noted that this statement was made by the Supreme Court in reference to the rule as used in the federal courts. Nonetheless, this decision was used in support of the result in the Sherrer and Coe cases, the Court further stating: "This court has also held that the doctrine of res judicata must be applied to questions of jurisdiction in cases arising in state courts involving the application of the full faith and credit clause where under the law of the state in which the original judgment was rendered, such adjudications are not susceptible to collateral attack," 334 U.S. 343, 350.
15305 U.S. 32, 39 S.Ct. 3, 83 L.Ed. 26 (1918); see, also, note, 1 A.L.R.2d 1385 (1948).
16334 U.S. 343, 348.
17See note, 1 A.L.R.2d 1385, 1398 (1948).
domicil of the plaintiff, of course, may be admitted\textsuperscript{18} by the defendant, but
the circumstance that the defendant does not contest the jurisdictional ques-
tion as to domicil either in his pleadings or on the hearing is immaterial.
Consequently, as the law today exists, the plaintiff in a \textit{Sherrer v. Sherrer}
type situation is entitled to extraterritorial protection from the defendant's
collateral attack which contests the plaintiff's domicil in the forum render-
ing the decree regardless of whether the defendant actively litigates the
question of domicil or merely admits it. The doctrine of the \textit{Sherrer} case
may now be stated in these terms:

"... the requirements of full faith and credit bar a defendant from
collaterally attacking a divorce decree on jurisdictional grounds in the courts
of a sister state where there has been participation\textsuperscript{19} by the defendant in the
divorce proceedings, where the defendant has been accorded full oppor-
tunity to contest the jurisdictional issues \textsuperscript{[whether he does or not\textsuperscript{20}]} and
where the decree is not susceptible to such collateral attack in the courts
of the state which rendered the decree."

\textbf{What Is Participation?\textsuperscript{22}}

There are many writers, authorities, and courts who, opposing the
rule formulated in the \textit{Sherrer} and \textit{Coe} decisions, wish to narrowly confine
this concept of participation which so effectively precludes the defendant
from collaterally attacking the foreign divorce decree. These authorities
desire a retrogression to the more stringent interpretation of \textit{Davis v. Davis},
which prevailed as the law before the \textit{Sherrer} doctrine was announced. Such
a stand may be paraphrased in the words of the Massachusetts Supreme
Court in its discussion of the \textit{Sherrer} case (this before the case went up on
appeal to the Supreme Court of the United States):

"... The respondent relies on \textit{Davis v. Davis}, a case which we have
interpreted as resting on a basis that the jurisdictional facts were \textit{actually
litigated}\textsuperscript{23} and determined to exist in the court granting the divorce. The
allegation as to residence in the bill of complaint, which was denied in the
answer, did not constitute an actual litigation of the jurisdictional facts."

Thus, for those who oppose the \textit{Sherrer} doctrine, actual litigation of
the jurisdictional facts would be the criterion of that amount of participa-
tion which would bar the defendant's collateral attack on the foreign decree.

\textsuperscript{18}In \textit{Coe v. Coe}, 334 U.S. 378, 68 S.Ct. 1094, 92 L.Ed. 1451 (1948), the defendant admitted the
plaintiff's domicil, refusing even to contest that particular phase of the case. When he attempted
later to contest the decree of the Nevada court, he was held barred by the doctrine of res judicata.
\textsuperscript{19}Emphasis added.
\textsuperscript{20}The writer adds this phrase. This is reasonable in view of the decisions. See note 18, \textit{supra}.
\textsuperscript{21}334 U.S. 343, 351-352.
\textsuperscript{22}See note 21, \textit{supra}.
\textsuperscript{23}Emphasis added.
\textsuperscript{24}320 Mass. 351, 358, 69 N.E.2d 801, 805 (1946).
Of course, the Sherrer and Coe cases overruled this decision, repudiating the strict interpretation which state courts had given to the Davis case.25

Despite the express wording of Sherrer v. Sherrer and Coe v. Coe, New Jersey, Oklahoma,26 and Wisconsin27 have attempted to distinguish the decisions, an attempt which is admirable, but likely futile. The New Jersey Supreme Court, in Staedler v. Staedler,28 has endeavored to limit the application of the Sherrer case to:

"... a true adversary proceeding where the parties are represented by counsel of their independent choice and where there is opportunity to make voluntary decision on the question as to whether or not the case should be fully litigated either on the question of jurisdiction or the merits. ..."><29

This distinction is predicated on the fact that in the Sherrer and Coe cases both parties to the litigation had actually chosen their own counsel and were present in the courtroom. In Staedler v. Staedler the wife, defendant, agreed to the appearance, and the husband, plaintiff, selected her counsel for her and at no time was she present in the Florida courtroom. Herein, the New Jersey court found its distinction: since the defendant had neglected to choose her own counsel, she had not sufficiently participated in the litigation of the case. Therefore, she was not bound by the Sherrer doctrine, and could later collaterally attack the Florida decree in the New Jersey courts.

The trend which the Supreme Court of the United States has been following, however, refutes this attempted distinction. It has been argued29

25 To the extent that some of the older cases, in which the defendant entered an appearance and participated in the proceeding, have held that the validity of the foreign decree, as respects the jurisdictional fact of domicil within the divorce forum, may be inquired into and the finding of the existence of domicil may be contradicted in another state, these cases are to that extent overruled by the decision in the Sherrer and Coe cases. Note, 1 A.L.R.2d 1385, 1405. These cases are, in effect, overruled: Crouch v. Crouch, 28 Cal.2d 243, 169 P.2d 897 (1946); Paul's Estate, 77 Cal. App.2d 403, 175 P.2d 284 (1946); State v. Nixon, 4 Terry's Rep. 318, 46 A.2d 874 (1946); Lipham v. State, 68 Ga.App. 174, 22 S.E.2d 532 (1942); Cohen v. Cohen, 319 Mass. 31, 64 N.E.2d 689 (1946); Rubenstein v. Rubenstein, 319 Mass. 586, 66 N.E.2d 793 (1946); Giresi v. Giresi, 137 N.J. Eq. 336, 44 A.2d 345 (1945); Solotoff v. Solotoff, 269 App.Div. 677, 53 N.Y.S.2d 510 (1945); Lane v. Lane, 189 Misc. 435, 69 N.Y.S.2d 712 (1947).

26 In Brasier v. Brasier, 200 Okla. 689, 200 P.2d 427 (1948), the defendant wife signed an entry of appearance; however, no pleadings were filed by the wife, nor was representation of counsel secured. The Oklahoma court refused to give conclusive effect to the Arkansas divorce obtained under such circumstances.

27 The Oklahoma decision, note 26, supra, was substantially followed by the Wisconsin court in Davis v. Davis, 259 Wis. 1, 47 N.W.2d 338 (1951), wherein the defendant wife merely entered a formal appearance before the court of the sister state which granted the divorce.

28 A.2d 896, 6 N.J. 380 (1951). The wife signed an agreement providing for her financial provision; the agreement further provided that she would enter any appearance required in the divorce proceeding to be instituted by her husband. The husband journeyed to Florida, engaging an attorney to represent his wife in the divorce proceedings. She executed the appropriate papers to enter an appearance in the Florida hearing; the divorce was granted. Later when the husband failed to make payments to the wife under the original agreement, she sought a New Jersey divorce with alimony. The New Jersey court refused to give conclusive effect to the Florida divorce, granting the requested divorce with alimony.

29 Id., at 902.

30 Comment, 26 Ind. L. J. 380, 382 (1951).
that the statement of Mr. Justice Reed in the recent case of Johnson v. Muel-berger, though it is only dictum, sheds light on the question of participation, and would likely minimize any necessity for active choice of counsel and personal appearance in the courtroom by the defending party. In his critique of the holding in the Sherrer and Coe decisions, Mr. Justice Reed remarked:

“It is clear from the foregoing that under our decisions a state by virtue of the clause must give full faith and credit to an out-of-state divorce by barrng either party to that divorce who has been personally served or who has entered personal appearance from collaterally attacking the decree.”

In view of this statement, and on appraisal of the recent trend in the Supreme Court, it might be a reasonable assertion that the New Jersey distinction of Sherrer v. Sherrer would not likely be sanctioned by the Supreme Court of the United States.

In this respect, the courts of California have taken a more realistic attitude toward the Sherrer and Coe decisions. Several recent California cases have followed the Sherrer doctrine, stating, in effect, that actual litigation of the question of domicil is not an essential requisite, mere participation in the divorce proceeding with opportunity to litigate being completely adequate. In fact, in the cases of Knox v. Knox and Estate of Schomaker it was held that an answer filed by a Nevada attorney acting under power of attorney given by the wife was sufficient participation, any future collateral attack on the resulting divorce decree thus being barred by the doctrine of res judicata. In Estate of Schomaker, the defendant wife in California signed

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32 Emphasis added. But see Davis v. Davis, 259 Wis. 1, 7, 47 N.W.2d 338, 341 (1951), note 27, supra. The Wisconsin court refused to follow Sherrer v. Sherrer, and in discussing this same remark by Mr. Justice Reed, stated: “We know ‘general’ and ‘special’ appearances but we have little help from the books in construing ‘personal appearance.’ We conclude that the court means that the party came into court in his or her own person, as the party had done in the Sherrer and Coe cases. . . .”
33 340 U.S. 581, 587. Mr. Justice Reed’s dictum would seem to indicate that if the defendant were personally served within the jurisdiction of the court rendering the divorce, such service would constitute sufficient participation to preclude the defendant from any collateral attack on the decree. The fact that there had been no active choice of counsel or appearance in the courtroom on the part of the defendant would be immaterial. This looks very much like in personam jurisdiction—a person voluntarily within a state is subject to the jurisdiction of its courts, whether his presence there is permanent or only temporary. Fisher v. Fielding, 67 Conn. 91, 34 Atl. 714 (1895); Darrah v. Watson, 36 Iowa 116 (1872); Reed v. Hollister, 106 Or. 407, 212 Pac. 367 (1923); Bowman v. Flint, 37 Tex.Civ.App. 28, 82 S.W. 1049 (1904). The analysis of the authorities and the courts that a divorce proceeding is in the nature of a proceeding in rem (see notes 6, 7 and 8, supra) would thus appear to be losing its force because of the doctrine announced in Sherrer v. Sherrer. This may foresee an ultimate change in the law of migratory divorce to an in personam analysis, an as yet unaccepted suggestion. See note 90, infra.
a power of attorney authorizing an appearance for her by Nevada counsel in the Nevada court in which the plaintiff husband was prosecuting his suit for divorce. The particular power of attorney was that customarily used by Nevada attorneys, and was in blank at the time the defendant signed it. In fact, the defendant expressed no preference for any individual Nevada attorney; thus there was no "independent choice" of counsel, and the attorney who ultimately represented her was chosen by the plaintiff in the Nevada action. At no time did the defendant wife appear in person in the Nevada court. In holding that the defendant wife in the Nevada proceeding could not collaterally attack the foreign divorce decree in the courts of California, the California court stated:

"... It is sufficient if the defendant has participated in the proceedings and had full opportunity to litigate the issue. If so, the decree is binding even though a relitigation of the question of jurisdictional residence requirements in another state might result in a finding that the domiciliary claim was fraudulently asserted for the purpose of obtaining a decree which as a matter of policy could not be procured in the state of actual domicil. Therefore, where, as here, the finding of requisite jurisdictional facts was made in divorce proceedings in another state in which the defendant appeared and participated, the decree has become final, it must be given full faith and credit in the courts of this state."
From the foregoing discussion, it is obvious that the definition and ultimate limitation of the concept of participation are matters of conjecture to be left to the Supreme Court of the United States. The term "participation" is used only generally and is rarely defined. Those who analyze the cases can only answer the question of what is participation in an indefinite, and certainly inadequate, manner. On close analysis, it would seem that the California interpretation is the better view; it is undoubtedly the most liberal, and the Supreme Court of the United States appears to be following the liberal, rather than the conservative, trend. Therefore, it is reasonable to conclude that if and when the Supreme Court is called upon to define the term, it will follow California's lead, and reply that mere voluntary appearance through counsel on the part of the defendant in the courts of the forum is sufficient to deny to the defendant any right to collaterally attack the resulting decree in the courts of a sister state.

Policy For and Against the Sherrer Case.

The very fact that New Jersey, Oklahoma, and Wisconsin have endeavored so strongly to distinguish Sherrer v. Sherrer demonstrates that the case is not viewed with favor by many factions. On the other hand, the Sherrer case has its just share of proponents. To those who closely apprize the case, it seems to be either good or bad, with no in-betweens—an overall dichotomous effect. The feeling concerning the whole matter of migratory divorce is often aggressively expressed. An example of the strong emotion which may be engendered in defense of the rule of nonrecognition of migratory divorces without the establishment of a bona fide domicil of at least one of the parties in the state in which the divorce is rendered, may be found in Grande v. Grande:

"The champions of those who obtain easy divorces upon perjured testimony in foreign jurisdictions overlook a class of citizens who decidedly need protection. What of the injured and innocent spouse who cannot raise sufficient funds to travel a thousand miles, employ foreign counsel, transport witnesses and maintain them a sufficient number of days to successfully defend where a divorce is fraudulently sought by a guilty spouse? What of the deserted children left behind who are most vitally concerned with the maintenance of the marriage relationship between their parents? What of the mother's right to support in order that she may maintain them under a common roof where they can bask in the light of her love and affection?"

"We do not doubt the legal or social necessity for recognizing divorces

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44This question would seem to be at least partially answered by Estin v. Estin, 334 U.S. 541, 68 S.Ct. 1213, 92 L.Ed. 1561 (1948), which pronounced the doctrine of divisible divorce. See note 4, supra.
honestly granted to bona fide residents of other states. Williams No. 1 establishes that. But there is no statutory equivalent for bona fide residence.\(^{45}\)

Mr. Justice Frankfurter’s dissent in Sherrer v. Sherrer bears out this powerful sentiment:

“If a marriage contract were no different from a contract to sell an auto, the parties thereto might well be permitted to bargain away all interests involved in or out of court. But the state has an interest in the family relations of its citizens vastly different from the interest it has in an ordinary commercial transaction. That interest cannot be bartered away by the immediate parties to the controversy by a default or an arranged contest in a proceeding for divorce in a state to which the parties are strangers. Therefore, the constitutional power of a state to determine the marriage status of two of its citizens should not be deemed foreclosed by a proceeding between the parties in another state, even though in other types of controversies considerations making it desirable to put an end to litigation might foreclose the parties themselves from reopening the dispute.\(^{46}\)

“The nub of the Williams decision was that the state of domicil has an independent interest in the marital status of its citizens that neither they nor any other state with which they may have a transitory connection may abrogate against its will. Its interest is not less because both parties to the marital relationship instead of one sought to evade its laws.”\(^{47}\)

Thus the basic argument of those who oppose the Sherrer and Coe cases is defined: those states which maintain strict divorce laws and policies should not be forced to succumb to the few states which thrive on liberal migratory divorce laws.\(^{48}\) The voice of religious authorities\(^{49}\) is quick to support this stand, and is raised constantly in opposition to more liberal divorce laws. And political forces\(^{50}\) normally ally themselves closely with the religious forces, reasoning that the state of true domicil has a basic concern in the marriage status, a concern in which it should not be deprived. It cannot be denied that there is a mercenary undercurrent which, however outwardly clothed with honesty, is premised on the basic proposition that the “divorce

\(^{46}\)334 U.S. 343, 358.
\(^{47}\)Id. at 361-362.
\(^{48}\)Merrill, The Utility of Divorce Recognition Statutes in Dealing With the Problem of Migratory Divorce, 27 Tex. L. Rev. 291, 311 (1949): “The Coe-Sherrer doctrine caters to the success of collusive fraud and deception. It should be overruled promptly, to the end that the states shall be free once more to determine the extent to which they will recognize divorces obtained in other parts by their domiciliaries.”
\(^{49}\)The nature of matrimony is entirely independent of the free will of man and subject to divinely made laws; and thus it cannot be subordinated to any human decrees or any contrary pact, even of the spouses themselves.” Malone, Divorce: Is the New Approach the Solution, 23 Okla. B. A. J. 548, 549 (1952).
\(^{50}\)The Uniform Divorce Recognition Act, a product of the Commissioners on Uniform State Laws and approved by the legislatures of a number of states (California, Nebraska, New Hampshire, Rhode Island, South Carolina, Washington, and Wisconsin), has as its underlying object the destruction of the great majority of migratory divorces. For a discussion of the act, see Work of the 1949 California Legislature, 23 So. Calif. L. Rev. 7 (1949); as to the constitutionality of the act, see Ruymann, supra, note 1, at 14-15.
business" is quite lucrative and should not be lost to those states such as Florida and Nevada, which supply a ready haven for the divorcée.

Looking at the argument from the other side, even the most ardent opponents of obligatory recognition of foreign divorce decrees will readily acknowledge the need for a rule of uniform recognition of all divorces valid in the forum where rendered. It is neither good sense, good morals, nor good law to continue the incongruous and highly inappropriate situation in which a divorce is legal in one state, and illegal in another, so that a divorcée who has remarried may become a felon by merely stepping across a state line.51 In like manner, the children of the new marriage may be legitimate in one state and illegitimate in another. These arguments, of course, favor the continuance of the doctrine laid down in Sherrer v. Sherrer.52

Further substantiating this line of reasoning, such states as Florida and Nevada have their own concept of domicile, and regard it as established and bona fide when the statutory residence requirement is satisfied.53 The divorce proceeding may be instituted after the plaintiff has completed this residence requirement. In contradistinction, other states refuse to be contained by their sister states' position in the matter, rather questioning the foreign divorce decree on jurisdictional grounds when their definition of domicile is not met. Thus it can be argued in favor of the recognition of migratory divorces that Florida and Nevada do, after all, have their own individual and unique policies concerning divorce and domicile; other states of the Union have no constitutional right to deny this policy.

Mr. Justice Rutledge recognized this argument in his dissent in Williams No. 2, where he remarked that Nevada and North Carolina had their own distinct statutory laws and policies concerning the matter of divorce. Therefore, when North Carolina sought to upset the Nevada decree, it was, in effect, denying Nevada law and policy, and thus denying full faith and credit to the Nevada decree.54 Much the same argument was employed by Mr. Chief Justice Vinson in the majority opinion in Sherrer v. Sherrer, when he said:

"... This is a . . . case involving inconsistent assertions of power by courts of two states of the Federal Union and thus presents considerations which go beyond the interests of local policy, however vital. In resolving the issues here presented, we do not conceive it to be a part of our function

51This is the very situation which occurred in Williams No. 2, where, after completing the period of time required for statutory residence in Nevada, the parties obtained default decrees by constructive service from their respective spouses, married each other, and returned to North Carolina. In North Carolina they were convicted of bigamy and such conviction was sustained by the United States Supreme Court. It will be noted that the proceedings in Nevada were ex parte, whereas under the Sherrer doctrine, the defendant is a participant in the divorce proceedings.
52See 5 FLA. STAT. AN. § 65.02 (1943), 2 NEV. COMP. L. § 9460 (Sup. 1931-41).
53325 U.S. 244, 250.
to weigh the relative merits of the policies of Florida and Massachusetts with respect to divorce and related matters.\textsuperscript{56}

"It is one thing to recognize as permissible the judicial re-examination of findings of jurisdictional fact where such findings have been made by a court of a sister state which has entered a divorce decree in an \textit{ex parte} proceeding (\textit{Williams v. North Carolina No. 2}). It is quite another thing to hold that the vital rights and interests involved in divorce litigation may be held in suspense pending the scrutiny by courts of sister states of findings of jurisdictional facts made by a competent court in proceedings conducted in a manner consistent with the highest requirements of due process and in which the defendant has participated."\textsuperscript{56}

There is always the very liberal view in support of the \textit{Sherrer} decision, and in derogation of \textit{Williams No. 2}, that American life and morals are undergoing an evolutionary change, that though it may be contrary to local public policy, it is national public policy that our interstate divorce law should be inoculated with certainty, a certainty much greater than that guaranteed by the \textit{Sherrer} case. Those who defend such a view would reason that it is an elementary proposition that a man or woman should not be a monogamist in one state and a bigamist, and felon, in another. Such a controversial future was hinted in \textit{Standish v. Standish}.\textsuperscript{57}

"Conceivably, the United States Supreme Court may ultimately determine that the first state's adjudication that the procurer of the divorce decree was a bona fide domiciliary of that state is binding on the courts of the second state, under the theory that the full faith and credit clause of the Constitution precludes any inquiry into the merits of the cause of action, the logic, or consistency of the decision, or the validity of the legal principles on which the judgment is based."\textsuperscript{58}

Essentially, this prognostication was at least partially carried out by the \textit{Sherrer} and \textit{Coe} cases.

Despite the clamoring for a more strict judicial interpretation and limitation of migratory divorce, the trend seems to be progressing in just the opposite direction, for the doctrine of \textit{Sherrer v. Sherrer} has been extended.\textsuperscript{59} Family disorganization has become so very complex in this modern day that it is virtually impossible to solve the problems that are prone to arise by application of strict divorce laws. Divorce decrees granted under laws which are becoming increasingly liberal should be accorded a

\textsuperscript{55} 334 U.S. 343, 354. It will be noted that this is essentially the same argument which Mr. Justice Rutledge used in his dissent in Williams No. 2. Nonetheless, Mr. Chief Justice Vinson and the majority of the court in \textit{Sherrer v. Sherrer} indicated that they would not go so far as to render protection to a divorce decree rendered in an \textit{ex parte} proceeding on constructive service where the requisite domicil was not present.

\textsuperscript{56} 334 U.S. 343, 355-356.

\textsuperscript{57} 179 Misc. 564, 40 N.Y.S.2d 538 (1943); see, also, 1 A.L.R.2d 1385, 1407 (1948).

\textsuperscript{58} \textit{Id.}, at 569-570, 40 N.Y.S.2d at 545.

greater stability; this would seem "an appropriate response to the changing role and function of the American family unit," a view apparently shared by the Supreme Court of the United States. It cannot be disputed that our society is changing in favor of more liberal divorce laws. Divorce has come to be almost commonplace; one scarcely loses an iota of his good standing in society merely because he or she is a divorcee. This fact hardly commends the strict divorce laws and nonrecognition of migratory divorces which some authorities so strongly indorse. It may be that education will ultimately be the answer to the deplorable divorce situation.

**Sherrer's Restrictive Scope.**

In 1948 Mr. Chief Justice Vinson in *Sherrer v. Sherrer*, speaking for the majority, showed a clear disposition to confine the scope of the doctrine announced in the case. If the defendant has appeared and participated in the suit for divorce, he cannot thereafter collaterally attack the resultant decree in the courts of a sister state. Thus, the *Sherrer* and *Coe* cases went no further than to pronounce the concept that the defendant (and, of course, the plaintiff) is the only party bound by the prior litigation in the foreign court.\(^1\)

In view of this hesitancy on the part of the Supreme Court to announce a more comprehensive doctrine, the lawyer may well be justifiably confused; he has found few of his most pertinent questions answered.\(^2\) To those questions which have been answered, the reply has been incomplete. Perhaps two of the most important questions which have arisen out of the *Sherrer* and *Coe* decisions are these: (1) In view of the restrictive scope with which the Court has stigmatized the *Sherrer* and *Coe* cases, will the finding of domicil made by the Florida or Nevada court bind only the parties who were before the court, or will it be extended so as to bind others? This has been partially answered by *Johnson v. Muelberger*.\(^3\) And (2) regardless of the fact that the parties to the divorce could not attack the decree, might the state of the true domicil refuse to recognize the divorce and prosecute the supposed divorcee for bigamy upon his or her return with a new spouse? This question has not as yet been answered but there are undertones which may lead us to anticipate the Court's future decision if and when the matter is presented to it.

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\(^1^\) Note, 61 Yale L.J. 238, 245 (1952).
\(^2^\) For a statement of the doctrine of the Sherrer case, see note 21, supra.
\(^3^\) Caffrey, supra, note 1, at 70-71.
\(^4^\) See note 59, supra.

The full faith and credit clause provides that each and every state in the Union shall give uniform effect to the decrees of her sister states. Under the Sherrer doctrine, which is predicated upon the full faith and credit clause and the concept of res judicata, a divorce decree rendered by the court before which each of the parties appears and participates, must be recognized, regardless of the absence of bona fide domicil. This applies only to the plaintiff and defendant, neither being permitted to attack the decree in the courts of a sister state. But what is the effect of an attack by a third party challenger? Will the full faith and credit clause render ineffectual his collateral questioning of the foreign decree? In other words, is the law of the state which granted the divorce to govern the standing of the potential challenger, or is the law of the state in which the decree is attacked to control the standing of the third party? Formerly, the constitutional necessity of full faith and credit has not been considered to enter into the question, and the third party, upon his collateral-attack of the decree in the courts of a sister state, has not been confined by the laws of the granting state.

A case decided in 1951, Johnson v. Muelberger, has evidently altered the law in this respect. In that case, the husband had a child by wife No. 1; wife No. 1 died. The father married wife No. 2, and subsequently she divorced him in Florida, the father in that proceeding entering a general appearance. The father then remarried a third time. The action in this case was between the daughter, plaintiff, and the father's third wife, defendant. The father had died, willing all his property to his daughter; the daughter, as sole legatee under the will, was trying to prevent her deceased father's third wife from claiming her widow's statutory share of the estate. The daughter's strategy was to collaterally attack the decree which divorced her father from his second wife, this on the ground of lack of jurisdiction of the Florida court through noncompliance on the part of the second wife with the 90-day residence requirement. The effect of such collateral attack, if allowed, would be to invalidate the Florida divorce, and thus render the subsequent marriage to wife No. 3 void. Wife No. 3 would have no legal

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64See note 2, supra.

65It is obvious that if it is the law of the granting state which is to govern, the decree could not likely be attacked, since a finding of domicil has already been made and, in the absence of fraud, such finding would probably be honored.


67See note 59, supra.

68Under the doctrine of the Sherrer case, note 21, supra, by his general appearance in the Florida court, the husband thus barred himself from collaterally attacking the decree at any later time.
right to claim a widow’s share of the estate. The New York Court of Appeals, arguing that the plaintiff daughter was not, according to New York law, in privity with her father, allowed the attack. But the Supreme Court of the United States reversed the decision, holding, in effect, that the Florida law was controlling. Since the Florida law would bar the plaintiff daughter’s collateral attack, the New York court could not, without denying full faith and credit to the Florida decree, allow the plaintiff to prosecute her attack in the courts of New York State. The result, then, of this decision is that the law of the state which grants the decree governs the right of collateral attack in the courts of sister states.

This case extends the doctrine of the Sherrer rule. Certain classes of third parties may not now challenge a foreign divorce decree which could not be attacked by the parties whose rights have already been conclusively

66The Supreme Court of the United States in Bigelow v. Old Dominion Mining and Smelting Co., 225 U.S. 111, 129, 32 S.Ct. 641, 56 L.Ed. 1009 (1912), defined “privity” as “mutual or successive relationship to the same right of property.”


However, other courts refuse to recognize this, and limit the third party attack to those parties whose interests existed previous to the questioned judgment and was injured at the time the decree was rendered. See 1 Freeman, Judgments, §§ 319, 636 (5th ed. 1925); de Marigny v. de Marigny, 43 So.2d 442, 447 (Fla. 1949); Gaylord v. Gaylord, 45 So.2d 507, 509 (Fla. 1950); State ex rel. Van Hafften v. Ellison, 285 Mo. 301, 316, 226 S.W. 559, 563 (1920).

67 Construing the Florida cases, the Supreme Court stated: “If the laws of Florida should be that a surviving child is in privity with its parent as to that parent's estate, surely the Florida doctrine of res judicata would apply to the child's collateral attack as it would to the father’s. If, on the other hand, Florida holds, as New York does in this case, that the child of a former marriage is a stranger to the divorce proceedings, late opinions of Florida indicate that the child would not be permitted to attack the divorce, since the child had a mere expectancy at the time of the divorce.” 340 U.S. 581, 588; see, also, note, 50 Col. L. Rev. 833 (1950).


Note that this statement would seem to be contrary to Williams No. 2 where North Carolina applied its own test for jurisdiction on the collateral attack of the Nevada decree. Could it not be argued on this basis that Williams No. 2 is outmoded, that perhaps even an ex parte default decree which the Nevada courts recognize as valid must be recognized by sister states? It is, after all, according to Johnson v. Muelberger, the law of the state which grants the decree that governs the right of collateral attack in the courts of the sister states.

However, it is likely that this argument would be refuted. Williams No. 2 was decided upon the theory that the Nevada court had no jurisdiction over the parties or the subject matter. On the other hand, in Sherrer v. Sherrer and Johnson v. Muelberger the Court which handed down the decree had jurisdiction based upon the participation of the defendant. The doctrine of res judicata, combined with the operation of the full faith and credit clause, precluded any future collateral attack. Thus the distinction to refute the above argument that Williams No. 2 is outmoded, would turn on the fact that there is no basis for jurisdiction in the Williams No. 2 type case, whereas there is a basis for jurisdiction in the Sherrer v. Sherrer or Johnson v. Muelberger type case. Before the doctrine of the Johnson case would operate, there would have to be participation by the defendant in the divorce suit, an element notably absent from the Williams No. 2 type case.

69See notes 80, 81 and 82, infra.
adjudicated in the foreign court. The divorced couple, by looking to the law of the state whose courts rendered the divorce, may now reasonably forecast the result of a third party challenger's attack on the decree—thus the divorced parties may feel comparatively sure that their marital obligations which had previously existed one to the other may not be reestablished. Further, they need not live in dread of an upheaval which would render nugatory their new marriages and illegitimate the children born of new marriages.

Here too, however, are found both advocates and opponents of this new decision. There are those who believe that "regardless of the theoretical basis of decision, the result of these cases" seems commendable. It is reasonable and proper that there should be some method left open to the parties to a marriage to assure themselves of a divorce good as against the entire world, a divorce which is not "subject to attack on the issues such as intent which are implicit in domicil." On the other hand, there are those who deplore the result as one which will deprive parties of property which is rightfully theirs. It has thus been argued that by analogy to the doctrine of divisible divorce pronounced in Estin v. Estin there should be a division of the foreign divorce decree into a "status" aspect which could not be collaterally attacked by anyone (the parties are divorced, the full faith and credit clause precluding any attack on the decree separating the parties from the bonds of matrimony), and a "property" aspect. Only those collateral attacks directed toward property would be allowed. The end result would be that the law of the forum which rendered the decree would bar any collateral attack which would destroy the divorcée's status as a divorcée. This, in effect, would provide the requisite certainty for the divorced parties as to their status in society; yet, as to their property interests, third parties would be free from the burden of the foreign law in their attack on the property effect of the divorce decree.

The Supreme Court, it must be admitted, has indicated only to a very limited extent that category of "third persons" who are barred from collaterally attacking a foreign divorce decree. The Court has gone no further than to bar from attacking the foreign decree both the spouses, plaintiff and defendant, who participated in obtaining the decree, third parties such as

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75Note, 52 Col. L. Rev. 282, 283 (1952); see, also, Note, 50 Col. L. Rev. 833, 840 (1950); 1951 Wash. U. L. Q. 94, 116.
76Note, 52 Col. L. Rev. 282, 283 (1952).
77See note 4, supra.
79See note 6, supra.
second spouses, and children of the dissolved marriage. The question as to whether third persons other than those aforesaid mentioned may collaterally attack the foreign decree remains conjectural.

The State as Third Party Challenger.

That a state in the Sherrer v. Sherrer type situation may be regarded as such a third party and thus prevented from contesting the decree of the sister state has not yet been decided. Advocates of a policy of containing the Sherrer and Johnson doctrines would not permit the states to be included in the as yet incompletely defined term, "third persons," since "Each state as a sovereign has a rightful and legitimate concern in the marital status of persons domiciled within its border." If this argument should be followed

**Notes and Queries**

64 Cook v. Cook, 342 U.S. 126, 72 S.Ct. 157, 96 L.Ed. 94 (1951). Husband No. 2 was attempting in a Vermont court to annul his marriage to his wife on the ground that the Florida court which granted his wife a divorce from her first husband lacked jurisdiction. This collateral attack on the Florida decree was held barred by the Supreme Court of the United States; the Supreme Court presumed, in the absence of contrary showing, that the Florida court had jurisdiction over the first husband, and that a valid divorce was thus decreed.

65 Johnson v. Muelberger.

66 It has been suggested by a writer in 28 N. Dak. L. Rev. 27, 34 (1952), that the decisive factor in this regard is whether or not the right of such attacking third party was pre-existing, in which case attack would be permissible. This was discerned from the fact that Mr. Justice Reed in his majority opinion cites de Marigny v. de Marigny, 43 So.2d 442 (Fla. 1949), and like the Florida court in that case, cites 1 Freeman, Judgments, §§ 319, 636 (5th ed., 1925): "It is only those strangers who, if the judgment were given full faith and credit, would be prejudiced in regard to some pre-existing right, that are permitted to impeach the judgment. Being neither parties to the action, nor entitled to manage the cause nor appeal from the judgment, they are by law allowed to impeach it whenever it is attempted to be enforced against them so as to affect rights or interests acquired prior to its rendition." Johnson v. Muelberger, 340 U.S. 581, 588-589. See note 69, supra.

67 Williams v. North Carolina, 317 U.S. 287, 63 S.Ct. 207, 87 L.Ed. 279 (1942); see, also, note, 12 A.L.R.2d 717, 754 (1950): "It is well settled that in a criminal prosecution, such as for bigamy, adultery, or fornication, the state has a right to impeach the validity of a foreign decree divorcing the defendant from a former spouse, where such decree is relied upon by the defendant as a matter of defense."

68 In Williams v. North Carolina, 325 U.S. 226 (1945), the State of North Carolina was allowed to impeach the validity of the Nevada divorce decree on the basis of lack of jurisdiction of the Nevada court. See note 9, supra. (However, the Nevada decree was an ex parte, default decree, rendered upon constructive service; in Sherrer the court had jurisdiction over the parties, the defendant having participated in the litigation.)

69 And in State v. Long, 5 Terry's Rep. 262, 65 A.2d 489 (1948), it was stated that since a divorce is analogous to an action in rem, a court may, in a prosecution for bigamy, inquire into the validity of a foreign divorce decree upon which the defendant relied in defense. (However, this too was an ex parte default decree handed down by an Arkansas court. The defendant did not participate in the Arkansas litigation.)

70 In State v. Nixon, 43 Del. 318, 46 A.2d 874 (1946), the defendant had appeared in the Florida divorce proceeding. Despite this, the State of Delaware was permitted to prosecute for desertion and nonsupport of the defendant's wife, thus impeaching the validity of the defendant's divorce. Relying upon Andrews v. Andrews, 185 U.S. 14, 23 S.Ct. 237, 47 L.Ed. 366 (1903), the court remarked that the defendant's appearance constituted no estoppel against her, and that there could be no estoppel against the state in a criminal action. (But Andrews v. Andrews was overruled by Sherrer v. Sherrer in 1948.) Likewise Lipham v. State, 68 Ga.App. 174, 22 S.E.2d 532 (1942). See, also, People v. Dawell, 25 Mich 247, 12 Am.Rep. 260 (1872).

71 In Taffel's Petition, 49 F.Supp. 109 (1941, D.C. N.Y.), the parties collusively arranged to be divorced in Mexico, both plaintiff and defendant appearing through counsel before the Mexican
in any future Supreme Court decision, the state, as an entity, would be excepted from the operation of the Sherrer-Johnson doctrine. The result of this would be to lead a state interested in preventing its domiciliaries from leaving its boundaries to obtain so-called “quickie” divorces down the path to destruction of the migratory divorce exemplified in Sherrer v. Sherrer. The respective state could protect its local policy by a prosecution for bigamy as in Williams No. 2 (if and when the supposed divorced remarries and returns to the state of his or her true domicile). In effect, the state, exempted from the doctrine of the Sherrer and Johnson cases, would itself collaterally attack the foreign decree on the basis of lack of jurisdiction of the foreign court.

On the other hand, it may very well be submitted that a state, by an extension of the rule in Johnson v. Muelberger, will be barred from collaterally attacking the foreign decree by the full faith and credit clause. In the Johnson case, the Supreme Court laid down the rule that the law of the state which granted the divorce should decide the question of whether a third party could collaterally attack the decree, not the law of the sister state in whose courts the decree is attacked. Assuming that the granting state should desire to attack the divorce decree handed down by its own courts, would such attack be allowed? It is not likely, once a bona fide domicil or residence has been found, such finding would in all probability be honored by the court in which the state’s collateral attack is brought. Thus, following the reasoning of the Johnson decision, since the state where the decree had been granted could not attack the decree, her sister states would have no standing to do so without violating the full faith and credit clause of the Constitution.

The supposed second wife of the divorced plaintiff endeavored to secure naturalization in the United States on the grounds that she was the wife of an American citizen. This argument was denied, the court stating that though the parties to the divorce action in Mexico were estopped to contest the divorce because of their collusion, the Federal Government, not a party to the collusive arrangement, was not so estopped. The court reasoned that though the Mexican court may have had jurisdiction over the parties by virtue of their voluntary appearance by attorneys, there was no jurisdiction over the subject matter, the matrimonial status. Thus the court lacked the judicial power to dissolve that status. (The court relied heavily on Haddock v. Haddock, 201 U.S. 562, 26 S.Ct. 525, 50 L.Ed. 867 (1906), which has since been overruled. See note 4, supra. Note also that this case involved a divorce granted in a foreign country, not a state of the Union; consequently, there is no question concerning the application of the full faith and credit clause of the Constitution.) See, also, State v. Majjar, 1 N.J.Supp. 208, 63 A.2d 807, affd. 2 N.J. 208, 66 A.2d 37 (1949).

In Baltimore & O. R. Co. v. Freeze, 169 Ind. 370, 374-375, 82 N.E. 761, 763 (1907), it was said: “It is well settled that, when an inferior tribunal is required to ascertain and decide upon facts essential to its jurisdiction, its judgment thereon is conclusive against collateral attack, unless the want of jurisdiction is apparent on the face of the proceedings.” See, also, People v. Harmor, 185 Misc. 596, 57 N.Y.S.2d 402 (1945); Farmer’s National Bank of Stephensville v. Daggett, 2 S.W.2d 834 (1928); Kiser v. W. M. Ritter Lumber Co., 179 Va. 128, 18 S.E.2d 319 (1942).
Another hint, perhaps, of what is to come may be premised from Mr. Justice Frankfurter's dissent in *Sherrer v. Sherrer*:

"... While the state's interest may be expressed in criminal prosecution, with itself formally a party as in the *Williams* case, the state also expresses its sovereign power when it speaks through the courts in a civil litigation between private parties. *Cf. Shelley v. Kraemer*, 334 U.S. 1."

Mr. Justice Frankfurter thus argued that since Massachusetts had its own separate and distinct policy concerning the termination of marriage by its citizens, the state could express such sovereign policy in a civil litigation, thereby denying the validity of the Florida divorce. But the majority of the court would not sanction this view and the validity of the Florida divorce was upheld. Therefore, it is submitted that since the state in *Sherrer v. Sherrer* was not allowed to express its sovereign policy through its courts in a civil litigation, the Supreme Court may follow the same line of reasoning and, in the future, refuse to permit the state to express such policy through its criminal processes.

An additional argument in favor of upholding the *Sherrer v. Sherrer* type case against a criminal prosecution by a sister state lies in the fact that the federal concept of jurisdiction in the matter of divorce may well be undergoing an evolutionary change. The recent cases of *Sherrer v. Sherrer* and *Johnson v. Muelberger* exemplify this proposition, for in those cases the plaintiff in the divorce action never acquired a bona fide domicile; the Supreme Court was content to base its decision upholding the foreign divorce decree upon the doctrine of *res judicata* supported by the full faith and credit clause of the Constitution. Thus the influence of *res judicata* is obvious and increasing, whereas the concept of jurisdiction in divorce matters predicated on domicile appears to be taking a more secondary position, perhaps to be eventually ignored altogether. Once the Court has acquired voluntary *in personam* jurisdiction over both of the spouses, the fact that it has no actual jurisdiction over the marital status, the subject matter, is now immaterial. Nor is it necessary under these circumstances that one of the parties has acquired that magic domicile in the state rendering the decree of which the courts have so often spoken. The resulting decree cannot be attacked collaterally in the rendering state, nor will the full faith and credit clause permit

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**334 U.S. 343, 362.**

Mr. Justice Frankfurter's argument was predicated upon the case of *Shelley v. Kraemer*, 334 U.S. 1, 68 S.Ct. 836, 92 L.Ed. 1161 (1947). The doctrine of the case is this: "... judicial enforcement by a state court of a discriminatory private covenant or agreement excluding persons from occupying or purchasing real property because of their race or color constitutes state action (emphasis added) within the prohibition of the Fourteenth Amendment and violates a so excluded person's right under that constitutional provision to the equal protection of the laws." Note, 3 A.L.R.2d 466, 470 (1949).

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**See note 3, supra.**

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**See note, 28 N. Dak. L. Rev. 27, 36-37 (1952); see note 33, supra.**
one of the spouses or third persons to attack the decree in the courts of a 
sister state. Could it not be argued, upon authority of these liberal recent 
decisions of the Supreme Court, that the full faith and credit clause may also 
bar the states from any attack, even as to their prosecutions for bigamy, this 
same in personam jurisdiction supplanting the traditional type based on 
domicil?

Whatever the reasoning followed, it would appear to be the better view 
that the Supreme Court would not go so far as to allow the interested states 
to upset the Sherrer, Coe, and Johnson cases by prosecutions for bigamy. 
The spouses, in a situation as is presented by the Sherrer case, will ordinarily 
remarry, relying, in effect (and likely on advice of counsel), on these deci-
sions to protect the new marriage. Should the Supreme Court in any future 
decision, decide that the respective sister states may attack these divorce 
decrees, a great degree of uncertainty would be inserted into the law of migra-
tory divorce. Many thousands of new marriages might be termed "bigamous" 
with the accompanying chaos and embarrassment seriously affecting these 
new family relationships into which the parties so honestly entered; and the 
issue of these marriages would be transformed from legitimate to illegiti-
mate. These facts, in themselves, may forecast the future decision.

Conclusion.

Whatever view the individual adopts, whether in favor of recognition or 
nonrecognition of migratory divorce, it is obvious that the two views are 
virtually irreconcilable, neither giving way to the other. The court is con-
fronted on the one side by arguments as to the predominating interest of the 
state of the true domicil and the accompanying sociological interest in dis-
couraging easy divorces. In contradistinction to the latter, there is the 
predominant interest in favor of certainty in the matter of marriage, legiti-
macy of children, and divorce.

At the present time, the trend in the Supreme Court is definitely in favor 
of liberalization and a greater degree of certainty in the field of migratory 
divorce. One may reasonably predict that the Court is not likely to retreat 
to a more conservative position, one which would impede the certainty which 
has already been achieved by the decisions of Sherrer v. Sherrer and John-
son v. Muelberger. If anything, the Sherrer and Johnson cases will be 
extended, greater effect being given to the full faith and credit clause in the 
matter of additional recognition of migratory divorce.