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## The Uniform Divorce Recognition Act, Sections 20 and 31 of the Divorce Act of 1949

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# WASHINGTON LAW REVIEW

## AND STATE BAR JOURNAL

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## COMMENTS

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### THE UNIFORM DIVORCE RECOGNITION ACT. SECTIONS 20 AND 21 OF THE DIVORCE ACT OF 1949

HAROLD MARSH, JR.\*

It is a trite bit of information that there exist in the United States certain jurisdictions, such as Nevada and Florida, which will grant a quick and easy decree of divorce to a person who desires to escape the more stringent requirements of his normal place of abode, as to period of residence or substantive grounds for divorce, and who is willing to travel to such jurisdictions for a few weeks vacation. This is known as a "migratory divorce"—that is, a divorce obtained by the appearance of one or both of the spouses in the courts of a state with which neither has any bona fide connection, other than the desire to utilize for this one purpose the legal machinery of that state. The fact that a certain number of persons attempt to flout the law of their domicile in this fashion and that certain states are willing to aid them in their attempt has created a situation which is not likely to be looked upon with favor by the public officials of the remaining states.

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There are two methods by which this situation could be corrected on the state level. If all states could be persuaded to adopt a uniform substantive law of divorce, there would be little incentive for a person to travel from his home to secure a dissolution of his marriage. However, this happy outcome is obviously highly improbable. The Uniform Annulment of Marriage and Divorce Act proposed by a national congress on divorce law in 1906 was adopted in only three states.<sup>1</sup> Secondly, if all states could be persuaded to adopt a uniform minimum residence requirement for the institution of a divorce action, which was a respectable period of time, the foreign divorce might still be easy but would no longer be quick, and this would be a substantial deterrent to migratory divorce. The possibility of securing such legislation in the divorce-mill jurisdictions is obviously small, however, and unless it were adopted in those jurisdictions the effect would be nil. Rather than being a solution, this proposal is more in the nature of a wish that the problem hadn't arisen, for if those jurisdictions had not lowered their residence requirements and begun offering tourist divorces in the first place the problem would not exist. The Commissioners on Uniform State Laws proposed a Uniform Divorce Jurisdiction Act in 1930, but it was adopted in only one state and was repealed two years later.<sup>2</sup> It has apparently been withdrawn at the present time.

The third possibility of action on the state level is, of course, action by the domicil of the person securing a migratory divorce, to which he normally returns once the painless operation is completed. This is the "problem" with which the states and the United States Supreme Court have been struggling for some fifty years. How can a state prevent its domiciliaries from obtaining migratory divorce decrees? What effect should be given to such a decree if, despite attempts to prevent the practice, some citizens nevertheless persist in obtaining such divorces? What effect must be given to it under the full faith and credit clause of the federal Constitution? No answer has been given to these questions which has not aroused vocal and widespread dissent.

The Commissioners on Uniform State Laws have recently promulgated a proposed Uniform Divorce Recognition Act to deal with this problem, and the state of Washington has become the first state to

<sup>1</sup> Franklin, *The Dilemma of Migratory Divorces*, 2 OKLA. L. REV. 151, 161, n. 50 (1948).

<sup>2</sup> The act was adopted in Vermont in 1931, but was repealed in 1933. 9 Unif. Laws Ann. xii (1942). The latest pocket supplement to this publication does not list the act at all.

adopt this statute. It is incorporated in the Washington Divorce Act of 1949, as Sections 20 and 21 thereof, which read as follows:

Sec. 20. A divorce obtained in another jurisdiction shall be of no force or effect in this State if both parties to the marriage were domiciled in this State at the time the proceeding for divorce was commenced.

Sec. 21. Proof that a person obtaining a divorce from the bonds of matrimony in another jurisdiction was (a) domiciled in this state within twelve months prior to the commencement of the proceeding therefor, and resumed residence in this state within eighteen months after the date of his departure therefrom, or (b) at all times after his departure from this state and until his return maintained a place of residence within this state, shall be prima facie evidence that the person was domiciled in this state when the divorce proceeding was commenced.

This statute raises numerous questions concerning its constitutionality, its interpretation, and the wisdom of its enactment, some of which I shall examine in the following comment.

#### CONSTITUTIONALITY

The statute raises serious constitutional questions in connection with both its substantive and its procedural provisions. The latter will be dealt with first. The effect of Section 21 is that proof of either of the circumstances there specified is made "prima facie evidence" of lack of domicil in the foreign jurisdiction<sup>3</sup> and, therefore, of the invalidity of the foreign decree of divorce. The meaning of this phrase "prima facie evidence" is certainly far from clear. It might mean any one of three things: Proof by the person attacking the foreign divorce decree of either of the states of fact specified in this section (1) sustains his burden of coming forward with evidence and permits him to escape a directed verdict, but does not shift to the other party either the burden of going forward or the burden of persuasion; (2) shifts to the other party the burden of going forward with evidence of domicil at the risk of a directed verdict, but does not shift the burden of persuasion; or (3) shifts to the other party both the burden of going forward and the burden of persuasion on the issue of domicil. It is fairly clear that this section was intended to accomplish at least the second of these things, and possibly the third,<sup>4</sup> although the language

<sup>3</sup> The presumption is that the person was domiciled in Washington, but this necessarily means that he was not domiciled in the foreign jurisdiction granting the divorce.

<sup>4</sup> If only the first of these three possibilities were intended, presumably the section would not alter existing law, since proof of the facts stated should be "substantial evidence" of no domicil (at least in almost all cases) under the present rules. But the

chosen seems more appropriate to the first. However, I shall assume that the apparent objective of the statute has been accomplished to shift at least the burden of going forward with some evidence of domicile to the other party under penalty of a directed verdict. The above analysis would not be applicable in terms, of course, where the subsequent suit in which the validity of the divorce was questioned was a non-jury case; but the same basic questions, as to whether the statute shifts the burden of going forward or the burden of persuasion or both, would still exist.

Although the precise effect of the section is not certain, it is clear that the intention was to place a procedural hurdle in the path of the party relying upon a foreign divorce and to weight the scales, to some extent, in favor of the party attacking it. Assuming that the section, when the required facts are shown, shifts at least the burden of going forward with evidence of domicile to the party relying on the foreign decree, is it consistent with the full faith and credit clause of the federal Constitution? No categorical answer to this question seems possible; however, there are a number of expressions in the recent divorce cases before the Supreme Court which throw some light upon it. Mr. Justice Frankfurter stated in the *Second Williams Case*: "The burden of undermining the verity which the Nevada decrees import rests heavily upon the assailant."<sup>5</sup> And again, in *Esenwein v. Pennsylvania*, the same Justice stated. "The full faith and credit clause placed the Pennsylvania courts under the duty to accord prima facie validity to the Nevada decree."<sup>6</sup> And, finally, in *Rice v. Rice* Chief Justice Vinson stated that "we have concluded that the Connecticut

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Commissioners state that the adoption of this section would "alter the law of all states." Brief of the Commissioners on Uniform State Laws, submitted to the American Bar Association meeting, September, 1948, in support of the Uniform Divorce Recognition Act, p. 10 (hereinafter cited "Brief of the Commissioners"). And all of the cases cited by the Commissioners in support of this section involved "presumptions" which shifted the burden of going forward or the burden of persuasion or both. *Id.* at p. 9; see note 11, *infra*. Also, Professor Merrill, who was apparently one of the authors of this Act, see note 28, *infra*, states "By the trend of authority the burden of showing that a particular divorce is invalid for want of jurisdiction rests upon the one attacking the decree. A properly drawn recognition statute could place the burden on the proponent of the divorce." Merrill, *Divorce Recognition Statutes*, 27 Tex. L. Rev. 291, at 306 (1949).

<sup>5</sup> *Williams v. North Carolina*, 325 U.S. 226, at 233-34 (1945). "If this court finds that proper weight was accorded to the claims of power by the court of one state in rendering a judgment the validity of which is pleaded in defense in another state, that the burden of overcoming such respect by disproof of the substratum of fact—here domicile—on which such power alone can rest was properly charged against the party challenging the legitimacy of the judgment we cannot upset the judgment before us." *Id.* at p. 234.

<sup>6</sup> *Esenwein v. Commonwealth of Pennsylvania*, 325 U.S. 279, at 280 (1945).

courts gave proper weight to the claims of power by the Nevada court, that the burden of proving that the decedent had not acquired a domicile in Nevada was placed upon respondent [the one challenging the decree],” and therefore that the judgment should be affirmed.

Of course, it is true that all of the statements quoted above are *dicta*, since in each of these cases the Supreme Court found that the state court had given proper weight to the foreign decree. But it is worthy of note that these statements were made in each instance by a justice speaking for a majority of the court, and that the dissenting justices in each case thought that greater effect should be given to the foreign decree than the majority did. Furthermore, no justice stated any disagreement with the view that the foreign decree must at least be considered *prima facie* valid.

If Section 21 provided that the person relying upon the foreign decree must prove domicil in all cases, it seems safe to assume, from these expressions, that it would violate the full faith and credit clause, since it would make all foreign divorces *prima facie* invalid.<sup>8</sup> However, the effect of this section is not to make all such decrees presumptively invalid, but only those where the specified conditions exist. The person attacking the foreign decree would have the burden, in the first instance, of proving the existence of the facts which raise the statutory presumption of no domicil in the foreign jurisdiction (both the burden of going forward and the burden of persuasion, presumably). If it can be said that the existence of these facts, in all instances, reasonably justifies an inference of no domicil in the foreign jurisdiction, then it can be argued that the statute has merely prescribed the quantum of proof with which the person attacking the decree must come forward to disprove domicil, and has not really shifted the burden of proving domicil to the other party. This argument can be tested by assuming for each of the alternative provisions of the statute an extreme case which would suffice to raise the presumption.

Suppose *H* and *W* were domiciled in Washington on January 1, 1948, and on that date *H* left Washington and went to Reno, Nevada. Six weeks after arrival he brought suit for divorce against *W* and secured a decree. He stayed in Reno until June 29, 1949, on which date he returned to Washington. Proof of these facts would raise the presump-

<sup>7</sup> *Rice v. Rice*, 69 Sup. Ct. 751, at 752 (1949).

<sup>8</sup> See also *Adam v. Saenger*, 303 U.S. 59, at 62 (1938), *Milliken v. Meyer*, 311 U.S. 457, at 462 (1941).

tion, under Clause (a) of Section 21, that *H* was domiciled in Washington at the commencement of the divorce action.

Secondly, suppose *H* and *W* were domiciled in Washington on January 1, 1949, and on that date *H* left Washington and went to Reno, Nevada. He retained his "place of residence" in Seattle.<sup>9</sup> Two years after arrival he brought suit for divorce and secured a decree. In 1959 he returned permanently to Washington. Proof of these facts would raise the presumption, under Clause (b) of Section 21, that *H* was domiciled in Washington at the commencement of the divorce action.

It seems clear, from these examples, that it would be difficult to justify the section constitutionally, in *all* cases to which it applies, on the theory that it is a reasonable regulation of the quantum of proof required to establish lack of domicil in the foreign state. This difficulty is increased by the fact that in many cases the only evidence which could rebut this presumption and permit the other party to escape a directed verdict might be testimony by the person whose domicil is in question as to his intent, but he may be dead or otherwise unavailable at the time of suit.

Whether the section will be tested on the basis of the most extreme cases to which it applies, or on the basis of the actual facts in the particular case in which its validity is challenged, probably depends on the form in which the issue reaches the Supreme Court. If there is dispute concerning the facts and the trial judge instructs the jury generally in the words of the statute, then the Supreme Court may reverse if in its opinion the section is unconstitutional as applied to the most extreme case. On the other hand, if all other facts are admitted and the only question is that of domiciliary intent, then the Supreme Court may restrict its consideration to the constitutionality of the statute as applied to the particular facts of that case only.

Assuming that a reasonable factual inference of lack of domicil arises from the particular facts and the Supreme Court considers the constitutionality of the statute only as applied to that case, it is still by no means certain that this section will be upheld. The full faith and credit clause prescribes a uniform policy requiring the several states to respect the judgments of the courts in sister states. It is possible that

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<sup>9</sup> It is difficult to say what would constitute "maintaining a place of residence" within this state, so as to bring the case within this clause of the statute. If the person securing the divorce retained ownership of a house in Washington, but rented it out, probably the court would say that it was not his "place of residence" during that time. If he retained ownership of his house and kept it locked up and unoccupied, presumably this would be sufficient to bring the case within the statute.

the Supreme Court will say that this policy prohibits a state, in any case, from establishing a presumption which shifts to the party relying upon a foreign judgment the burden of showing jurisdiction, or, in other words, that the overriding policy of the full faith and credit clause prohibits the establishment of even a reasonable factual presumption which tends to undermine that policy.<sup>10</sup> If a state attempts to weight the scales in favor of the party attacking a foreign divorce, has it given "full" faith and credit to the foreign decree?<sup>11</sup>

Section 21 thus seems to be of doubtful constitutionality as applied to some cases within its terms, and its constitutional validity in any case is at least open to question. This section was unnecessary in Washington, since the Washington Supreme Court has shown no hesitancy in invalidating foreign divorces where it was evident that the jurisdictional requisites were lacking.<sup>12</sup> Therefore, an attorney who is attempting to establish the invalidity of a foreign divorce decree would do well to ignore this clause, and to avoid any instruction to the jury based upon it. Without the presumption, if there was in reality no domicile, he can probably succeed in establishing that fact without difficulty in view of the attitude of the Washington court. If he gets a judgment which is based in part upon Section 21, he is merely inviting a possible reversal by the United States Supreme Court.

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<sup>10</sup> Compare *Oyama v. California*, 332 U.S. 633 (1948)—validity of a presumption under the equal-protection clause.

<sup>11</sup> The Commissioners' brief contains only the following statement in support of the constitutionality of Section 21 "The reasonableness of the inference of no change of domicile under the circumstances prescribed by the statute seems clearly to render the section constitutional under such decisions as *Mobile, J. & K. C. R. R. v. Turnpseed*, 219 U.S. 35 (1910), *Yee Hem v. U.S.*, 268 U.S. 178 (1925), *Bandini Pet. Co. v. Superior Ct.*, 284 U.S. 8 (1931), *Atlantic Coast Line R.R. v. Ford*, 287 U.S. 502 (1933), *Morrison v. California*, 288 U.S. 591 (1933) (mem. op. discussed in *Morrison v. California*, 291 U.S. 82 (1934))." Brief of the Commissioners, p. 9. None of these cases cited involved a foreign divorce decree, none of them involved any question under the full faith and credit clause. All of these cases concerned the question whether a certain statutory presumption was invalid under either the due process clause or the equal protection clause. From the fact that a reasonable legislative presumption does not violate the due process clause of the Fourteenth Amendment nothing follows as to whether a statutory presumption (reasonable or unreasonable), which derogates from the potency of a foreign judgment, violates the full faith and credit clause. And, assuming that these cases indicate that Section 21 is constitutional if the inference from the facts required to be established to lack of domicile is a "reasonable" one, there is no argument in the Commissioners' brief to support the reasonableness of this inference. That is assumed as something given, but, as has been demonstrated above, the assumption is inaccurate—the inference is in fact unreasonable in some of the cases in which it would be raised.

<sup>12</sup> See *In re Medbury*, 192 Wash. 462, 73 P.(2d) 1340 (1937) ("To hold that the appellant went to Wyoming with the bona fide intention of establishing there a permanent abode, would be a very great tax upon credulity."), *Mapes v. Mapes*, 24 Wn.(2d) 743, 167 P.(2d) 405 (1946) ("Domicil has a larger meaning than an expressed desire to find work and get a divorce.").



Section 20 provides that a foreign divorce decree shall be of no force or effect in this state, if both spouses were domiciled in Washington at the time the divorce suit was commenced in the foreign state. Since under common-law theory a person can have only one domicile, this would necessarily mean that neither was domiciled in the state granting the decree. Is this section constitutional? Insofar as foreign *ex parte* divorces are concerned, it would appear to be clearly constitutional, since the United States Supreme Court held in the *Second Williams Case*<sup>13</sup> that the domicile of at least one spouse in the state granting a divorce decree was a jurisdictional prerequisite to a decree entitled to full faith and credit, and that this jurisdictional fact of domicile could be relitigated in another state upon the basis of a record made there.

Suppose, however, that *H* and *W* are both domiciled in Washington. *W* goes to Reno and files suit for divorce; *H* enters an appearance in the action and contests the suit, but a divorce is nevertheless granted to *W*. Neither spouse in fact acquired a bona fide domicile in Nevada. In subsequent litigation between *H* and *W*, one of them attempts to attack the validity of the Nevada decree, offering to prove that both were domiciled in Washington at the time the proceeding was commenced. The statute attempts to permit this attack, since this section makes no distinction between *ex parte* and contested divorces and to prohibit the attack would give the foreign decree some "force or effect" in Washington. But the United States Supreme Court held in *Sherrer v. Sherrer*<sup>14</sup> that a state could not constitutionally permit an attack by one of the spouses upon a foreign decree of divorce, where both were present before the foreign court and litigated the issue of jurisdiction, and the question arose in subsequent litigation between the same parties. Therefore, this section is to this extent unconstitutional.<sup>15</sup>

The extent of the contest which must be made in the foreign jurisdiction for the doctrine of *Sherrer v. Sherrer* to be applicable is by no means clear as yet,<sup>16</sup> nor whether that doctrine would apply in any subsequent suit except one between the spouses who appeared in the

<sup>13</sup> *Williams v. North Carolina*, 325 U.S. 226 (1945).

<sup>14</sup> 334 U.S. 343 (1948).

<sup>15</sup> The fact that Washington now has a statute expressing the state policy with respect to migratory divorces will not distinguish this case from *Sherrer v. Sherrer*, because there was a Massachusetts statute in that case which purported to permit such attack and which was held *pro tanto* unconstitutional.

<sup>16</sup> See the discussion in the dissenting opinion of Mr. Justice Frankfurter in *Sherrer v. Sherrer*, 334 U.S. at 356-77 (1948).

foreign divorce action.<sup>17</sup> For example, if one of the parties to the foreign contested divorce purported to contract a second marriage, and later attempted to secure an annulment from his second "spouse," it is not clear whether *Sherrer v. Sherrer* will be extended to prohibit him from showing the invalidity of the foreign divorce in which he participated. The explicit rationale of that case, the doctrine of *res judicata*, would not be applicable in the assumed case. But whatever scope is given to the doctrine of *Sherrer v. Sherrer*, to that extent Section 20 is unconstitutional.<sup>18</sup>

#### INTERPRETATION

In the remainder of this paper, I shall consider only foreign *ex parte* divorces (where the divorce defendant neither enters an appearance in the action nor is personally served within the jurisdiction), with the understanding that what is said applies also to foreign contested divorces to whatever extent the statute can constitutionally be applied to such divorces. The next problem to be considered is what effect Section 20 has upon existing law in those instances in which it can constitutionally be applied. The easiest way in which to show this effect is to state a number of hypothetical cases, and to see what the result would be under the common law and under the statute.

Suppose *H* and *W* are domiciled in Washington, and *H* goes to Reno and secures a migratory divorce. After his return to Washington, *H* goes through a purported marriage ceremony with *W*<sub>2</sub>, and thereafter lives with her for twenty years. *W* dies intestate, leaving considerable separate property. *H* applies to the administrator of *W*'s estate for a share of this property under the statute of distribution as the surviving spouse of *W*. He offers to prove that he was never domiciled in Nevada, therefore, his divorce from *W* was void and his "marriage" with *W*<sub>2</sub> was also void; consequently, he was the husband of *W* at the time of her death. Can *H* succeed in this attempt? By the weight of authority,

<sup>17</sup> See the list of the situations which may possibly fall outside the scope of the *Sherrer* doctrine in Brief of the Commissioners, pp. 5-6. This list should not be accepted uncritically. The Commissioners are apparently intent upon limiting the *Sherrer* doctrine as narrowly as possible; the Supreme Court may not be.

<sup>18</sup> The Commissioners recognize in their brief that Section 20 is unconstitutional insofar as it conflicts with *Sherrer v. Sherrer*. But, since the scope of that decision is as yet uncertain, they say that "A broad phraseology of this section enables the states to maintain control over questions concerning marital status of their domiciliaries to the fullest extent that later decisions of the Supreme Court may indicate is permissible." Brief of the Commissioners, p. 6. And that "recognition to extra-state divorces obtained by domiciliaries should be refused except as specifically required by the Constitution of the United States, since any narrower policy both would be difficult to formulate and would introduce factors so complex as to endanger the goal of uniformity." *Id.* at p. 2.

he cannot at common law, on the theory that he cannot attack the validity of the decree which he himself procured.<sup>19</sup> He has made his bed, and the courts require him to lie in it. Under the statute, he can succeed, since to refuse to permit him to attack the decree would give it some "force or effect" in Washington.

Suppose *H* and *W* are domiciled in Washington, and *H* goes to Reno and secures a migratory divorce. After his return to Washington, *H* goes through a purported marriage ceremony with *W*<sub>2</sub>, and thereafter lives with her for ten years. Tiring of this arrangement, *H* deserts *W*<sub>2</sub> and refuses to support her. She sues for a decree of separate maintenance and, as a defense to this action, *H* seeks to prove that the Nevada divorce is invalid and consequently he is not married to *W*<sub>2</sub>. Will *H* be permitted to establish this defense? Under the common law, it follows from the principle referred to in the preceding case that he will not.<sup>20</sup> Under the statute, he will, since to refuse to permit him to attack the decree would give it some "force or effect" in Washington.

Suppose *H* and *W* are domiciled in Washington, and *W* goes to Reno and secures a migratory divorce. Thereafter, *H*, relying upon this Reno divorce, goes through a purported marriage ceremony with *W*<sub>2</sub>, after assuring her that he has been validly divorced from his former spouse. Later tiring of this arrangement, *H* sues *W*<sub>2</sub> for a decree of nullity of their marriage on the ground that he was never validly divorced from his former wife. Can he succeed? Under the common law, by the weight of authority, he cannot; he has elected to rely upon the validity of the foreign decree by his remarriage and he will not be permitted later to

<sup>19</sup> Jacobs, *Attack on Decrees of Divorce*, 34 Mich. L. Rev. 749, at 770-78 (1936), Harper, *The Validity of Void Divorces*, 79 U. Pa. L. Rev. 158, at 174-75, 183 (1930), Merrill, *supra* note 4, at 296-97, Restatement, Conflict of Laws § 112 (1934), Starbuck v. Starbuck, 173 N.Y. 503, 66 N.E. 193 (1903). The Washington Supreme Court this year squarely adopted the rule of the *Starbuck* case for the first time in *In re Tamke's Estate*, 133 Wash. Dec. 88, 204 P.(2d) 526 (1949), although this holding was foreshadowed in *Wampler v. Wampler*, 25 Wash.(2d) 258, 170 P.(2d) 316 (1946). The rule of the *Tamke* case is, of course, now abrogated by Section 20 of the Divorce Act.

<sup>20</sup> *Krause v. Krause*, 282 N.Y. 355, 26 N.E.(2d) 290 (1940) "We cannot lose sight of the fact that the present defendant was himself the party who had obtained the decree of divorce which he now asserts to be invalid and repudiates in order that he may now disown any legal obligation to support the plaintiff, whom he purported to marry." Also "it is not open to defendant in these proceedings to avoid the responsibility which he voluntarily incurred." This precise situation has not arisen in Washington, but it seems probable that the Washington court would have reached the same conclusion as the New York court in *Krause v. Krause*, had it not been for the intervention of the statute under discussion, in view of the broad ground upon which the court rested its holding in the *Tamke* case, *supra* note 19. "we think the opinion in this case should rest, and we do rest our holding, on the general rule hereinbefore stated, that although a decree or judgment is invalid in another state as an independent proposition, its invalidity may not be raised in this state by the party at whose instance and in whose favor it was rendered, under conditions such as those shown to exist in this case." 133 Wash. Dec. at 103, 204 P.(2d) at 534 (1949).

repudiate it.<sup>21</sup> Under the statute, he can succeed, since to refuse to permit him to attack the decree would give it some "force or effect" in Washington.<sup>22</sup>

Suppose *H* and *W* are domiciled in Washington, and *W* goes to Reno and secures a migratory divorce. *H* and *W* had no children. Thereafter, *H* goes through a purported marriage ceremony with *W*<sub>2</sub>, and they live together for twenty years and have three children, *X*, *Y*, and *Z*. *W*<sub>2</sub> dies. Thereafter, *H* dies intestate, leaving a considerable estate, and *X*, *Y*, and *Z* are his only relatives. *W* files a claim in the administration of *H*'s estate, not merely for a surviving wife's share where there are children, but for all of the estate. She claims this on the ground that she was never validly divorced from *H*, and therefore is his surviving wife; that consequently he was never married to *W*<sub>2</sub> and therefore *X*, *Y*, and *Z* are bastards and cannot inherit from *H*, since he never acknowledged them in writing as required by the Washington statute of distribution.<sup>23</sup> Can she succeed in this attempt? Under the common law, upon the grounds previously pointed out, she cannot. Under the statute, she can succeed, because not to permit her to prove the invalidity of the foreign decree would give it some "force or effect" in Washington. Nor would Section 6 of the Washington Divorce Act of 1949 apparently be of assistance to *X*, *Y*, and *Z*. That section provides that "children conceived or born during the existence of a marriage of record which is later *declared void*, shall be legitimate children of both parents notwithstanding *the annulment* of such marriage." (Italics added) That section seems to refer to voidable, not void, marriages; to annulment, not decree of nullity—concepts which are clearly differentiated in other sections of the same Act and elsewhere in the Washington statutes.

<sup>21</sup> Jacobs, *supra* note 19, at 799-800; Harper, *supra* note 19, at 174, 183, Merrill, *supra* note 4, at 297, Restatement, Conflict of Laws § 112 (1934), *see also* Restatement, Conflict of Laws, 1948 Supplement, p. 110. In a situation like this, where the non-appearing divorce defendant who had remarried was attempting to claim part of his first wife's estate, the Minnesota court said: "He may publish his own shame to the world for a money consideration, but this court will not aid him to stigmatize his second wife as living an adulterous life, nor hold her child is a bastard." *Marvin v. Foster*, 61 Minn. 154, 160, 63 N.W. 484, 486 (1895).

<sup>22</sup> The New Jersey court has stated with respect to a similar statute: "But in this case, the answer to the claim of estoppel is not that the estoppel *does not exist*, but that it *cannot exist*. Is it not clear, therefore, that there *cannot* be any estoppel against the contention of complainant that the Nevada decree is, as the legislature has said, 'of no force or effect in this state'?" *Hollingshead v. Hollingshead*, 91 N.J. Eq. 261, 267, 110 A. 19, 22 (N.J. Ch. 1920). And the Massachusetts court remarked: "It is settled that in a case within the statute the divorce is to be treated here as void for all purposes." *Andrews v. Andrews*, 176 Mass. 92, 96, 57 N.E. 333, 335 (1900).

<sup>23</sup> REM. REV. STAT. § 1345 [P.P.C. § 199-13].

These examples could be multiplied. But it should be sufficiently clear that, if effect is given to the plain meaning of the statute, anyone at any time can now attack the validity of a foreign decree of divorce in Washington, insofar as he is not prohibited from doing so by the full faith and credit clause of the federal Constitution. It may be objected, however, that the statute was not intended to accomplish the results stated above, despite the fact that an argument can be made that they follow from a literal reading of its language. On the contrary, it seems that these were precisely the results which were intended. In their brief submitted to the American Bar Association in support of this statute, the Commissioners on Uniform State Laws say: "A number of decisions refuse to allow attack upon the validity of a foreign divorce by one who obtained it, or who has appeared in the proceedings brought against him, with or without contesting the foreign court's jurisdiction, or who has assented to the divorce or has neglected to attack it for a considerable time [cases cited] The enunciation of policy proposed by this section will close, to the extent permitted under the *Coe* and *Sherrer* cases, *supra*, the door to evading the [in]validity of the tourist divorce which the decisions first cited above leave ajar."<sup>24</sup> The meaning of this statement is fairly apparent upon close examination. It means simply this: This statute permits any person to attack a migratory divorce at any time, regardless of how inequitable it may be to permit him to do so.<sup>25</sup>

It may also be objected that the illustrations selected above give a distorted picture of the effect of the statute. Under the statute it would also be possible for persons to attack the validity of a migratory divorce who had not participated in obtaining it and who had not relied upon it or induced others to do so. For example, the state could prosecute either of the parties to such a divorce for bigamy if they attempted to remarry; a spouse who in no way participated in the obtaining of the decree nor relied upon it could still assert his or her legal rights as spouse; etc. This is true. But it was also true in Washington before the

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<sup>24</sup> Brief of the Commissioners, pp. 7-8. It is apparent that the word "validity" is a typist's error for "invalidity." The statement is meaningless if the word "validity" is allowed to stand.

<sup>25</sup> The Commissioners at one point make the statement that "Of course, even under a nonrecognition statute, exceptions may be made in proper cases," citing a Massachusetts case which held that where the wife entered into a collusive agreement with her husband to procure a foreign divorce, she "connived" at his subsequent "adultery" with his second "wife" and could not allege it as a ground for divorce. *Langewald v. Langewald*, 234 Mass. 269, 125 N.E. 566 (1920) But this statement is contrary to the whole tenor of their argument, and it is certainly clear that any "exception" could only be made, under this statute, in the teeth of the statutory language.

enactment of this statute.<sup>26</sup> The only change in the law which Section 20 makes, if it makes any at all, is in those cases discussed above and other similar cases. Therefore, the statute must be judged, in this state at any rate, as though it applied specifically to such cases and *only* to them.

#### THE WISDOM OF THE STATUTE

Most discussion of migratory divorce seems to start off with an assumption that divorces are desirable or undesirable, and proceeds from there without questioning that basic assumption. This situation is probably inevitable; the problem impinges so directly upon basic religious, ethical, and political beliefs that the basic attitude of most persons toward it probably rests more on emotional conviction than rational justification, and could not be changed by argument. I shall assume, in evaluating this statute, that migratory divorce is an "evil," since that is apparently the position of the Commissioners on Uniform State Laws and the Washington legislature. In fact, I think most persons would agree that, if one could by an exercise of will prevent any person in the future from attempting to secure a migratory divorce, it should be done.

Acceptance of this premise does not by any means require approval of Section 20, however. It is assumed, apparently, that a person who secures a migratory divorce is antisocial and deserving of punishment. Therefore, a statute is passed permitting anyone at any time to question the validity of his migratory divorce. But how is he "punished" by permitting him to return to the state, remarry and later escape his second "marital" obligations, and to share in the estate of the first wife whom he has abandoned? It may be objected, however, that under the statute the state can prosecute him for bigamy if he returns and remarries. This is true, but it also could before the statute was enacted.<sup>27</sup> The only change made in the law by the statute, it must be repeated, is to permit persons to challenge the validity of migratory divorces in

<sup>26</sup> *Dormitzer v. German Savings & Loan Soc.*, 23 Wash. 132, 62 P. 862 (1900), *aff'd*, 192 U.S. 125 (1904), *Dailey v. Dailey*, 154 Wash. 499, 282 P. 830 (1929), *In re Medbury*, 192 Wash. 462, 73 P. (2d) 1340 (1937), *Mapes v. Mapes*, 24 Wn. (2d) 743, 167 P. (2d) 405 (1946), *Maple v. Maple*, 29 Wn. (2d) 858, 189 P. (2d) 976 (1948).

<sup>27</sup> There does not appear to be any case in Washington involving a prosecution for bigamy, but it necessarily follows, from the decisions cited in note 26, *supra*, and the *Second Williams Case*, that the state could prosecute. It may be objected that a prosecution for bigamy could easily be avoided by having the marriage ceremony performed in another state. The remedy for this situation, if one is desired, is to pass a statute punishing "bigamous cohabitation" as well as bigamy, as has North Carolina (this was the statute under which the ill-fated Mr. Williams was indicted).

circumstances where the courts have previously held that it was inequitable for them to do so.

Professor Merrill, who was apparently one of the principal authors of the statute,<sup>28</sup> makes the following comment in this connection. "A statute, phrased with proper breadth, may be used to close the loopholes in the wall of state control which have been bored by the various doctrines, already reviewed, of disqualification and estoppel to question the validity of divorcements decreed without jurisdiction."<sup>29</sup> This statement is hardly convincing, to say the least. He brands as "loopholes" these doctrines, which are merely rules worked out by the courts over a long period of years in an attempt to do elementary justice between the parties. From there on everything is clear sailing. What does one do with a "loophole"? Why, one plugs it, of course. Therefore, let's pass a statute "plugging" these "loopholes." But Professor Merrill does not demonstrate that the results reached by these rules are unjust or socially undesirable. They are condemned with a word—"loopholes."

A final argument made by the Commissioners in support of this statute is that its sweeping declaration of invalidity will prevent persons from even attempting to secure migratory divorces, and that henceforward no "respectable lawyer" will advise his clients to go to Reno for a divorce.<sup>30</sup> This argument raises a number of interesting questions. How many "respectable lawyers" before this statute was enacted advised their clients to get migratory divorces? If the threat of punishment of the person desiring the migratory divorce (e.g., by a prosecution for bigamy if he remarries) has not prevented him from securing the decree, why is there reason to think that a threat to punish innocent third parties (perhaps to his advantage) will do so? Do the Commissioners have any reliable statistics which indicate that fewer New Yorkers per year went to Nevada or Florida to get divorces during the reign of *Haddock v. Haddock* than before or since? Do they have any reliable statistics that more residents of Kansas (where even

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<sup>28</sup> See Merrill, *supra* note 4, at 291, footnote to the title. The author acknowledges assistance in research "upon which both this article and the drafting of the Uniform Divorce Recognition Act were founded."

<sup>29</sup> *Id.* at 307

<sup>30</sup> Brief of the Commissioners, p. 9. "A further effect upon the existing law 'in action' is that the legislative declaration of policy specifically denying recognition to 'tourist divorces' may cause seekers after freedom to consider seriously whether they can acquire a valid divorce before setting out on their journey. Certainly, it will prevent any respectable lawyer from advising that they invoke the jurisdiction of an extrastate court without change of domicil."

the question of domicil cannot be relitigated<sup>81</sup>) per thousand population have, through the years, gone to Reno for a divorce than have residents of Massachusetts (which has a "non-recognition" statute similar to the one they are proposing)? So far as I know, no rational basis exists for believing that the rules of law of a state concerning the "faith and credit" to be given to a foreign divorce decree have any effect in encouraging or discouraging its domiciliaries from securing migratory divorces. Surely, it would have been wise to make a careful study of the effect, if any, which the "nonrecognition" statutes of Massachusetts and a few other states have had in discouraging migratory divorces, before proposing such a statute for nationwide adoption.<sup>82</sup> Perhaps such a study was made; if so, the Commissioners do not advert to it.

No valid excuse can be found for the enactment of this statute in Washington. There was no reason to be dissatisfied with the manner in which the Washington Supreme Court was handling this problem, whereas the statute will frequently be unjust in its application—it will punish innocent third parties and bastardize children in order to express disapproval of persons who secure migratory divorces. The legislature should repeal Sections 20 and 21 of the Divorce Act at its next session and permit the court to handle this problem until such time as a demonstrable need for legislative intervention arises.

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<sup>81</sup> Merrill, *supra* note 4, at 300-301.

<sup>82</sup> Professor Merrill says, of the existing "non-recognition" statutes in Maine, Massachusetts, New Jersey, and Wisconsin: "The record of the administration of these statutes, contained in the adjudicated and reported cases, indicates that they have been effectively used to the extent that their terms make them applicable. Thus the cases are numerous in which divorces have been invalidated." Merrill, *supra* note 4, at 302. These two statements, that the statutes are effective and that the cases "are numerous," seem to me to be contradictory assertions. He cites twenty-five or thirty cases from Massachusetts and New Jersey, in which the existence of such a statute has apparently not prevented residents of those two states from securing migratory divorces.