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DIVORCE PROBLEMS IN THE CONFLICT OF LAWS*

Divorce may be considered as the termination of the legal relationship between husband and wife by an act of the law. With the purely local aspect of legal questions regarding divorce, Conflict of Laws is not concerned. If a husband and wife are married and have their home in one state, legal questions concerning their divorce are local matters only. These will include the grounds for divorce, the particular court in which the action is brought, the procedure to be followed from commencement to termination of the action. In such a case it is only when some question concerning the decree comes up in another state that a Confiict of Laws question is raised. This may be the recognition of the decree freeing the parties from the bonds of matrimony, the effect to be given to an order for alimony, marital rights in foreign property, or the claim to custody of the children. The questions, especially as among the states of the United States, are many, and often difficult.

DOMICILE AS A BASIS FOR DIVORCE JURISDICTION

Our law considers the marriage relationship a matter in which the state is concerned, as well as the individual husband and wife. This is not the only possible view. It is conceivable that the relation of matrimony, like any other consensual transaction, might be considered the private affair of the parties to the agreement, to be entered and dissolved at

*This article is the basis of a chapter on Divorce in a textbook on Conflict of Laws, now in preparation by the writer, to be published by the West Publishing Company, St. Paul, Minnesota.

will.[1] But this is not our way of looking at the question and is not likely to be so long as much of our social structure, and hence our law, is built around family relationships.

Divorce, since it concerns the termination of the marital status, is a matter of state concern and an act of the law must accomplish it. What law? The natural answer would be, the law of that place with which the person is most intimately concerned, the place "where he dwelleth and hath his home," in other words, his domicile. It is the law of the domicile which determines whether or not a marriage shall be terminated by divorce.[2] In marriage cases it is held that the marriage will generally be recognized as good by the domiciliary law, if valid by the law where contracted. This is not true of divorce. Here there is no general policy favoring termination of the relation. It is only allowed if at all upon statutory grounds.[3] A divorce may be granted only for a cause recognized by the domiciliary law; furthermore only a court at the domicile has jurisdiction to grant divorce. This is true both in England[4]

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[1]That marriage relations are of consequence to the state has not always been the rule. In his interesting discussion on marriage and divorce, Lord Bryce shows how under the Roman law the entrance into and exit from the marriage relation was treated as the sole business of the parties themselves. 3 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY, 782. Another instance is the marriage and divorce customs of the American Indians.

[2]On the continent the national law governs. See LORENZEN'S CAS., 564 note. But an American court has granted a divorce to one domiciled within the state even though he had not yet become naturalized. Cohen *v.* Cohen (Del.), 84 Atl. 122.

[3]South Carolina, by constitutional provision, forbids divorce. In England absolute divorce has only been allowed, except by act of Parliament in individual cases, since the Matrimonial Causes Act of 20 and 21 VICT. c. 85. It is only as the law has departed from the view of the church that marriage constituted a union indissoluble except by death, that divorce is allowed at all. This is not true of a "limited" divorce or judicial separation, or annulment of a marriage. It has been held, too, that jurisdiction to grant divorces and annul marriages, never having been exercised by the ordinary law courts of England, could not be exercised by the courts of law in this country until vested in them by the legislature. LeBarron *v.* LeBarron, 35 Vt. 365. On the question of what courts are invested with jurisdiction, see the various statutes and 17 CENT. DIG., Divorce, §§ 198, 199.

[4]LeMesurier *v.* LeMesurier [1895], A. C. 517; Bater *v.* Bater [1906], P. 209; DICEY, CONFLICT OF LAWS, 3rd. ed., pp. 46, 285, 291. There had been some language in earlier Scottish decisions indicating that the matrimonial domicile, in the sense of "the place of residence of the

and in the United States.[5] In the language often used by courts: "This necessarily results from the right of every nation or state to determine the status of its own domiciled citizens..."[6] So it has been repeatedly held that a divorce decree rendered where neither party is domiciled is not entitled to recognition in another state.[7] The provision of the United States Constitution (Art. IV, S 1) declaring that "full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state," does not compel recognition of the decree, in the type of case under consideration, for it is well settled that the record may be contradicted as to the facts necessary to give the court jurisdiction,[8] and if the decree was not rendered at the domicile, there was no jurisdiction in the international sense even though the

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married pair for the time being" was the basis of jurisdiction. Jack *v.* Jack, 24 Ct. Sess. 2nd. Ser. 467; Pitt *v.* Pitt, 1 Ct. Sess. 3rd Ser. 106. These were disapproved in the LeMesurier case.

[5]In the following cases, neither party was domiciled where the decree was rendered and it was denied recognition in another state. It was also obtained by fraud upon the local court where it was rendered. Bell *v.* Bell, 181 U. S. 175, 21 Sup. Ct. 551; Streitwolf *v.* Streitwolf, 181 U. S. 179, 21 Sup. Ct. 553; Reed *v.* Reed, 52 Mich. 117, 17 N. W. 720; Sammons *v.* Pike (Minn.), 120 N. W. 540, 23 L.R.A. (N.S.) 1254; Carling *v.* Carling, 78 N. J. Eq. 42, 81 Atl. 565; Blondin *v.* Brooks, 83 Vt. 472, 76 Atl. 184. Accord, and exceedingly well discussed on this point, Lister *v.* Lister, 86 N. J. Eq. 30, 97 Atl. 170. To the same effect, though it did not appear whether the local rules had been complied with or not, neither party being domiciled where the decree was granted. Ger. Sav. Soc. *v.* Dormitzer, 192 U. S. 125, 24 Sup. Ct. 221; Litowich *v.* Litowich, 19 Kan. 451, 27 Am. Rep. 145; Gregory *v.* Gregory, 78 Me. 187, 3 Atl. 280; Thelan *v.* Thelan, 75 Minn. 433, 78 N. W. 108; Smith *v.* Smith, 19 Neb. 706, 28 N. W. 296; Morgan *v.* Morgan, 1 Tex. Civ. App. 315, 21 S. W. 154.

[6]Ellis *v.* Ellis, 55 Minn. 401, 56 N. W. 1056.

[7]See cases, *supra*, note 5, and *infra*, note 9. See also exhaustive note, 59 L.R.A. 135. May we expect to see it decided that such a decree is not entitled to recognition where rendered, also? Since the Fourteenth Amendment, a money judgment rendered against a defendant not before the court by virtue of allegiance, valid personal service or consent, is void even in the jurisdiction where rendered. Riverside & D. R. Cotton Mills *v.* Menefee, 237 U. S. 189, 35 Sup. Ct. 579. Could not the same argument be applied to a case where a court has attempted to adjudicate upon the status of persons domiciled elsewhere and so is without jurisdiction in the international sense?

[8]Thompson *v.* Whitman, 18 Wall. 457; Cooper *v.* Newell, 173 U. S. 555, 19 Sup. Ct. 506; Andrews *v.* Andrews, 188 U. S. 14, 23 Sup. Ct. 237, are among numerous cases so holding.

law of the state rendering the decree was complied with.[9] A person marrying again after such a "divorce" may be prosecuted for bigamy.[10] Whether both parties must have been domiciled where the decree was rendered, or whether the domicile of one is sufficient is discussed later.

The fact that both plaintiff and defendant have appeared in the divorce suit will not entitle the decree to recognition if in fact there was no domiciliary jurisdiction.[11] Divorce jurisdiction is not a personal matter, to be conferred by consent of the parties.[12] An apparent exception is found in cases holding that the party procuring a divorce, having asserted the authority of the court, cannot question the validity of the decree in another state.[13] This does not say the decree is good, however, but simply precludes the individual who obtained the divorce from taking advantage of his own wrong.

DECREE SUBJECT TO RULES OF DOMICILIARY LAW

In granting a divorce the state of the domicile exercises its power to determine the civil status of persons subject to its jurisdiction.[14] The process of divorce is provided for because the law-making body deems it for the best interests of

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[9]Where a jurisdiction by its local law purports to grant divorces to persons not domiciled therein, decrees so obtained are not entitled to recognition elsewhere. Hood *v.* State, 56 Ind. 263, 26 Am. Rep. 21; Van Fossen *v.* State, 37 Oh. St. 317, 41 Am. Rep. 507.

[10]Hood *v.* State, 56 Ind. 263, 26 Am. Rep. 21; State *v.* Fleak, 54 Iowa 429; People *v.* Dawell, 25 Mich. 247; State *v.* Armington, 25 Minn. 29; Van Fossen *v.* State, 37 Oh. St. 317, 41 Am. Rep. 507.

[11]Andrews *v.* Andrews, 188 U. S. 14, 23 Sup. Ct. 237; Lister *v.* Lister, 86 N. J. Eq. 30, 97 Atl. 170. Distinguish this situation where neither party has a domicile where the divorce is granted from that where there is domiciliary jurisdiction as to one party and personal appearance by the other. In such case, appearance is important. This point is discussed *infra*, and see authorities cited L.R.A. 1917 B 1041.

[12]See the language of the court in Andrews *v.* Andrews, *supra.*

[13]*In re* Ellis' Estate, 55 Minn. 401, 56 N. W. 1056, 23 L.R.A. 287, 43 Am. St. Rep. 514; Starbuck *v.* Starbuck, 173 N. Y. 503, 66 N. E. 193, 93 Am. St. Rep. 631; Bledsoe *v.* Seaman, 77 Kan. 679, 95 Pac. 576. See Ellis *v.* White, 61 Ia. 644 (attack on decree in state where rendered).

[14]"The state has the absolute right to determine or alter the civil status of all its inhabitants, no matter where they may temporarily be, and no matter where the contracts, or acts giving rise to such a status, may have been made or done." Gregory *v.* Gregory, 78 Me. 187, 3 Atl. 280.

the parties and the state that, under certain conditions, which it sets out as grounds for divorce, individuals should not longer be compelled to maintain the relations of husband and wife. Whether divorce is to be granted depends upon the domiciliary law,[15] subject to the qualifications which follow. It will not matter whether the acts complained of were cause for divorce where they took place, for a divorce action is not simply a personal claim against the offending party, which, like a transitory cause of action for tort, may be enforced against the offender wherever he is found. Nor will it matter what the law which created the marriage says about divorce, whether it gives many causes for divorce or none.[16] The question is one of policy for the law-making body of the state where the parties now have their home. It must decide under what circumstances persons subject to its control may be released from marital obligations.

The domiciliary law may specify grounds for divorce without regard to where the acts of the wrong-doing party were done, or where the husband and wife were domiciled at the time the acts were done. It is worth repeating that the divorce suit is not the enforcing of a claim of one spouse against another, but the determination of the question whether the parties should be compelled to continue the relation of husband and wife. But the law of a state may, and sometimes does, provide that in addition to the requirement that the parties be

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[15]The court at the domicile has jurisdiction to decree divorce even though the acts were done outside the state, and the parties at that time were domiciled elsewhere. Wilcox *v.* Wilcox, 10 Ind. 436; Stewart *v.* Stewart, 32 Idaho 180, 180 Pac. 165; Rose *v.* Rose, 132 Minn. 340, 156 N. W. 664; Jones *v.* Jones, 67 Miss. 195, 6 So. 712; Ditson *v.* Ditson, 4 R. I. 87; Hubbell *v.* Hubbell, 3 Wis. 662, 62 Am. Dec. 702; STORY, CONFLICT OF LAWS, 8th ed., § 230a.

[16]A divorce granted at the domicile will be recognized at the place of marriage though given for cause not recognized by the law creating the marriage. Bater *v.* Bater, L. R. [1906] P. 209, 5 B. R. C. 717 and authorities cited in note 5 B. R. C. 747. Jurisdiction for divorce cannot be founded on the fact that the parties were married and at that time had their domicile in the state where a decree is sought. Harrison *v.* Harrison, 20 Ala. 629, 56 Am. Dec. 227; Harteau *v.* Harteau, 14 Pick. 181, 25 Am. Dec. 372. Nor does the fact that the parties were married elsewhere and at that time were domiciled elsewhere deprive the court where they are now domiciled of jurisdiction. Harteau *v.* Harteau, *supra;* Ditson *v.* Ditson, 4 R. I. 87; Hubbell *v.* Hubbell, 3 Wis. 662, 62 Am. Dec. 702.

domiciled where a decree is sought, the misconduct complained of for which divorce is to be granted, take place while parties are there domiciled,[16a] or that it be recognized as grounds for divorce by the law of their former domicile if the alleged misconduct took place when they lived elsewhere.[17]

ADDITIONAL REQUIREMENTS FOR JURISDICTION

As has been stated, a divorce decree must have been granted by a court of the domicile if it is to have recognition elsewhere. The term used in statutes prescribing requirements for divorce actions is generally "residence." This is almost uniformly interpreted as meaning domicile.[18] In addition to the requirement that one must be domiciled within a state before he can get a divorce there, statutes frequently require residence for a given period of time. Such a provision may be interpreted to mean that the individual must have been domiciled within the jurisdiction for this period,[19] or, as sometimes held, that he or she must not only have been domiciled, but have an actual residence there for the prescribed time as well.[20]

Such conditions may be enacted by the law-making body of any state as a matter of local policy. To secure a divorce a party must comply with them. They do not affect the international requirement for jurisdiction which is based on domicile, but are additions to it.

[16a]Nicholas *v.* Maddox, 52 La. Ann. 1493, 27 So. 966; Norris *v.* Norris, 64 N. H. 523, 15 Atl. 19; See Dorsey *v.* Dorsey, 7 Watts. 349, 32 Am. Dec. 767. See 59 L.R.A. 155 *et seq.* for full citations on this point.

[17]See Perzel *v.* Perzel, 91 Ky. 634, 15 S. W. 658.

[18]Hinds *v.* Hinds, 1 Iowa 36; Bechtel *v.* Bechtel, 101 Minn. 511, 112 N. W. 883, 12 L.R.A. (N.S.) 1100; Hamill *v.* Talbott, 81 Mo. App. 210; deMeli *v.* deMeli, 120 N. Y. 485, 24 N. E. 996; Graham *v.* Graham, 9 N. D. 88, 81 N. W. 44. To the same effect, on different wording of a statute, see Winans *v.* Winans, 205 Mass. 388, 91 N. E. 394. *Contra,* Wallace *v.* Wallace, 62 N. J. Eq. 509, 50 Atl. 788, and see Fleming *v.* Fleming, 36 Nev. 135, 134 Pac. 445, actual residence but not domicile required.

[19]Bechtel *v.* Bechtel, 101 Minn. 511, 112 N. W. 883; Miller *v.* Miller, 88 Vt. 134, 92 Atl. 9. See, on the question of character of residence necessary, notes in 12 L.R.A. (N.S.) 1100; 28 L.R.A. (N.S.) 992; L.R.A. 1915 D. 852.

[20]Trinchard *v.* Grace, 152 La. 942, 94 So. 856; Dickinson *v.* Dickinson (Tex. Civ. App.), 138 S. W. 205.

RECOGNITION OF DIVORCE GRANTED AT DOMICILE OF BOTH PARTIES

A divorce decree granted in accordance with the local rules of the place where given, and rendered by a court of a state where both parties are domiciled will be recognized as valid everywhere.[21] As between the states of the United States such recognition will be afforded not only by the general rule of Conflict of Laws (sometimes called "by comity") but by the compulsory force of the full faith and credit clause of the Constitution.

DECREE OF DIVORCE AT DOMICILE OF ONE PARTY ONLY

The difficult situation in Conflict of Laws arises when a decree is granted at the domicile of one party only. If a husband and wife can have, in the eyes of the law, but one domicile, the question is simple, from the standpoint of international jurisdiction. If the decree was rendered where the parties were domiciled, it is valid and entitled to recognition; if not, it will not be recognized. Determination of the domicile point may be a difficult question of fact but the legal proposition is clear enough.

While by English law there is no exception to the rule that husband and wife have the same domicile, which is fixed by the husband, American courts have gone far in recognizing the legal power of the wife to establish her own separate domicile.[22] She may for many purposes, certainly to sue for divorce, establish her separate domicile and bring her action there.[23] From

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[21]Haddock *v.* Haddock, 201 U. S. 562, 26 Sup. Ct. 525; Standridge *v.* Standridge, 31 La. 223. See Harding *v.* Harding, 198 U. S. 317, 25 Sup. Ct. 679. This is equally true in cases where the defendant, a resident of the state, but temporarily absent, is served by publication. Harrison *v.* Harrison, 19 Ala. 12; Hunt *v.* Hunt, 72 N. Y. 217, 28 Am. Rep. 129. So in Miller *v.* Miller, 128 N. Y. S. 787, the court recognized a divorce granted in Russia by a rabbi, authorized to act in the matter; and in Kapigian *v.* Der Minassian, 212 Mass. 412, 99 N. E. 264, Ann. Cas. 1913 D. 535, recognition was given to the Turkish rule terminating marriage, hoth parties being domiciled there at the time of such termination.

[22]See a collection of authorities, 20 MICH. L. REV. 86.

[23]If courts at the place where one spouse is domiciled have jurisdiction in the international sense to render a valid decree, it would not, on principle, make any difference whether the action was brought at the

this set of facts come the hard questions. What is to be the effect of such a decree in another state, on general principles of Conflict of Laws or under the full faith and credit clause of the Constitution? Does the decree free one spouse or both? Is it material whether the defendant in the action was personally served with process in the state where the decree was rendered or merely given actual notice or constructive notice by publication without the borders of the state? In the latter, is a personal judgment for alimony of any effect?

Before setting out the results reached by the authorities, an analysis of the principles involved should be helpful. A decree of divorce (leaving out of consideration for the present the subject of alimony) is not a personal judgment secured by one person against another, but an act operating upon the marital relation between husband and wife. It is often spoken of as an action in rem, the res being the marriage status. As an action in rem it must be brought where the res is situated, that place being the domicile. Whether this figurative explanation is taken, or whether it is simply said that the court of the party's domicile has the power to control his domestic relations, the result is the same. Suppose then, the wife establishes a domicile in Michigan and the husband is domiciled in Ohio. The wife sues for divorce in Michigan and is granted a decree. Does the Michigan court have jurisdiction? There is no escape from admitting that it does, if jurisdiction for divorce depends upon domicile, and a wife may have a separate domicile. Michigan laws may free this woman from her husband in the exercise of its power to determine the status of its citizens. If Michigan law may change her status from married to single, her position as a single woman should be recognized everywhere. Further, compulsory recognition

domicile of plaintiff or defendant. The action may be brought at the domicile of either spouse. Sewall *v.* Sewall, 122 Mass. 156; Watkins *v.* Watkins, 135 Mass. 83. But statutes commonly provide that the party seeking the divorce shall be domiciled at the forum. It has been held, under such provisions, that a wife who is resident elsewhere cannot sue at the domicile of her husband. White *v.* White, 18 R. I. 292, 27 Atl. 506; Dutcher *v.* Dutcher, 39 Wis. 651. That a nonresident may have a decree on a cross bill where the plaintiff is a resident is held in Jenness *v.* Jenness, 24 Ind. 355, 87 Am. Dec. 335 and Clutton *v.* Clutton, 108 Mich. 267, 66 N. W. 52. *Contra,* Valk *v.* Valk, 18 R. I. 639, 29 Atl. 499.

should follow in sister states of the United States under the full faith and credit clause. If the state of Michigan has power to act on this woman's marriage relation because she has a domicile in the state, that jurisdiction is not affected by failure to serve process upon the husband within the state. Due process of law may require notice so as to afford reasonable opportunity for him to defend. But the action is not a personal one; it has already been shown that presence of both parties before the court does not confer jurisdiction without domicile. Service upon the defendant within the state should only be important when a personal judgment (such as an order to pay alimony) is sought.

The husband, in the hypothetical case stated, is domiciled in Ohio. What should be the effect, upon him, of the decree in Michigan dissolving the bonds of matrimony between him and the Michigan wife? There is a possible argument for saying it does not affect the husband at all. Michigan, it might be said, may change the status of its own citizens, but the very process of reasoning which gives Michigan power to act upon the status of the Michigan woman denies the power to affect the Ohio man. Therefore he is still married, and if he now marries another woman he is guilty of bigamy. In answer to such a view of the matter it may be pertinently asked, who is the wife of this married man? If Michigan could free the wife from the husband the necessary consequence is also to free the husband from her. The logically difficult step was taken when courts said the wife could have a separate domicile and sue for divorce there. This was done because of the hardship wrought by the rigid rule that the wife's domicile followed that of her husband. Having taken this step it is illogical in principle and unjust to the parties not to recognize its necessary consequences. The conception of a husband without a wife or a wife without a husband may be a metaphysical possibility, but it is a reproach to the common law whose courts and lawyers have always prided themselves upon freedom from mere theoretical speculation and boasted of actual contact with hard fact.

The only tenable doctrine, it is submitted, is to recognize fully the effects of a divorce to liberate both parties when granted at the actual domicile of either. It is better to insist

upon the unyielding doctrine that husband and wife must always have the same domicile than to adopt the rule allowing the wife to sue for divorce at a separate domicile and then to refuse to recognize the necessary consequences of such a step.

"FULL FAITH AND CREDIT" FOR DECREES OF DIVORCE RENDERED AT DOMICILE OF ONE PARTY

The recognition which the courts of one state can be compelled to afford to a divorce decree rendered by a court of a sister state depends upon what is decided upon the subject by the Supreme Court of the United States under Art. IV, Sec. 1 of the Constitution providing that "full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state." This being a constitutional question, the Supreme Court's adjudication is final and binding authority. It has already been stated that if the decree was rendered where both parties were domiciled it must be recognized in a sister state; if where neither was domiciled it need not be. On the question of the recognition which the Constitution demands where the decree is rendered at the domicile of one party only there are two leading cases. The first is *Atherton* v. *Atherton*,[24] decided in 1901. The parties were married in New York and immediately went to live in Kentucky where the husband had lived prior to his marriage. Later the wife left the husband and returned to New York to live. In that state she sued the husband for a divorce from bed and board alleging cruel and inhuman treatment. The defendant's answer set up a decree of divorce which he had obtained in Kentucky, after the wife had left him, on the ground of desertion. She was not served personally in that action in Kentucky, nor had she appeared, but notice of the proceedings had been sent her in accordance with the Kentucky statutes. The New York court held that the Kentucky decree was inoperative against the wife, and gave judgment in her favor. This judgment was reversed by the United States Supreme Court on the ground that full faith and credit had been denied the Kentucky decree. The court, in confining its decision to the facts before it,[25] mentions the fact that

[24]181 U. S. 155, 21 Sup. Ct. 544.

[25]Mr. Justice Holmes, dissenting, in Haddock *v.* Haddock, *infra*, com-

Kentucky was the only matrimonial domicile of husband and wife.

The other leading case is *Haddock* v. *Haddock*,[26] which came five years later. The parties were married in New York where both lived at the time. The husband later went to Connecticut, established his domicile there, and secured a divorce in that state, the absent wife being served by publication only. Later the wife brought a separation suit against Haddock in New York. He set up, in defense, the decree he had received in Connecticut. This was rejected by the court in New York proceedings. Upon final appeal to the United States Supreme Court it was held that there was no violation of the requirement of full faith and credit.

The decision, and the important point it involves has provoked much discussion and the result of the case has been the subject of much adverse criticism.[27] *Haddock* v. *Haddock* does not purport to overrule *Atherton* v. *Atherton*. Moreover, the latter decision has been cited and followed in a later case.[28] The difference in fact between the two cases rests upon the point that in the *Atherton Case* the decree was rendered against the absent non-resident defendant at the matrimonial domicile of the husband and wife; in the *Haddock Case* it was not. Why that makes a difference the majority opinion in the *Haddock Case* does not say. In his dissenting opinion Mr. Justice Holmes says, ". . . I cannot see any ground for distinguishing between the extent of jurisdiction in the matrimonial domicile and that, admitted to exist to some extent, in a domicile later

ments on this fact as follows: "Evidently I should say, from internal evidence, in deference to scruples which he did not share."

[26]201 U. S. 562, 26 Sup. Ct. 525, a five to four decision with dissenting opinions by Justice Brown and Justice Holmes.

[27]The subject is dicussed in the following references, by no means an exhaustive list: Articles, "Constitutional Protection of Decrees of Divorce," 19 HARV. L. REV. 586; "The Doctrine of Haddock *v.* Haddock," 1 ILL. L. REV. 219; "Foreign Divorce Decrees in New York," 10 BENCH & BAR 82; "The Full Faith and Credit Clause . . . as Applied to Suits for Divorce," 15 ILL. L. REV. 259; "Divorce and the Federal Constitution," 49 AMER. L. REV. 852; "Extraterritorial Effect of Decree for Divorce," etc., 45 AMER. L. REV. 564; "Ex parte Divorce," 28 HARV. L. REV. 457. The following notes are in point: 13 COL. L. REV. 241; 12 LAW NOTES 142; 11 MICH. L. REV. 508; 62 U. OF PA. L. REV. 298; 13 MICH. L. REV. 420.

[28]Thompson *v.* Thompson, 226 U. S. 551, 33 Sup. Ct. 129.

acquired." Whether the distinction is logical or not it is made by the court of last resort on this question and must stand until displaced. A divorce decree rendered by a court at the matrimonial domicile, in accordance with the prescribed procedure, must be recognized in another state under the full faith and credit clause of the Constitution, even as against a non-resident defendant who was not served within the state and who did not appear in the suit. But a decree rendered at the separate domicile of one party only against a non-resident under similar circumstances need not, as a matter of federal compulsion, be so recognized.

From the language used in the Supreme Court decisions mentioned it seems that "matrimonial domicile" means nothing more than the place where the parties last lived as husband and wife with the intent of making that place their home, and which was still the domicile of the one spouse when the divorce action was brought. The use of the term in several recent decisions supports this description.[29] This is the natural meaning of the term. It seems neither necessary nor desirable to make further complications in an already tangled question by ascribing to the words a more difficult meaning.

VOLUNTARY RECOGNITION OF DECREE IN SECOND STATE

The decision in *Haddock* v. *Haddock* did not decide that New York, or any other state could not recognize the Connecticut decree. It was expressly said that Connecticut could divorce the husband, a citizen of Connecticut, and that the decree could be effective in that state. What the court did hold was that the full faith and credit clause did not compel recognition by New York. Recognition could be afforded this decree, however, under general rules applicable in all Conflict of Laws cases. The second state should give full recognition to the

[29]Perkins *v.* Perkins, 225 Mass. 82, 113 N. E. 841; Callahan *v.* Callahan, 121 N. Y. S. 39; Hall *v.* Hall, 123 N. Y. S. 1056; Benham *v.* Benham, 125 N. Y. S. 923; People *v.* Catlin, 126 N. Y. S. 350; Post *v.* Post, 129 N. Y. S. 754; State *ex rel* Aldrach *v.* Morse, 31 Utah 213, 87 Pac. 705, 7 L.R.A. (N.S.) 1127. See also "Matrimonial Domicile," 27 YALE L. JOUR. 49, 59-65. Other decisions in lower courts in New York have said that there is no matrimonial domicile in New York if one spouse has deserted the other in that state, prior to the latter's removal from the state. North *v.* North, 93 N. Y. S. 512; Hatch *v.* Hatch, 187 N. Y. S. 568.

divorce decree rendered as the one in the Haddock case was, because international requirements of jurisdiction have been met. That the decree should be recognized was the majority view of state courts prior to the decision in the *Haddock Case*,[30] and has continued to be the prevailing doctrine since.[31] The unfortunate thing about the present state of the law is the uncertainty which is created in the legal status of families involved. Certainty in domestic relations is as surely imperatively demanded as it is in commercial transactions. The minority of states which refuses to recognize the foreign decree given under the same circumstances as that in the Haddock case continues to do so[32] and the high authority of the Supreme Court may influence other state courts to follow the line of

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[30]Thompson *v.* State, 28 Ala. 12; Hood *v.* State, 56 Ind. 263, 26 Am. Rep. 21; Van Orsdal *v.* Van Orsdal, 67 Ia. 35, 24 N. W. 579; Ditson *v.* Ditson, 4 R. I. 87; Shafer *v.* Bushnell, 24 Wis. 372 (but see Cook *v.* Cook, 56 Wis. 195, 14 N. W. 33, 443). Authorities on the subject are collected in notes in 59 L.R.A. 135, 167; 18 L.R.A. (N.S.) 647; L.R.A. 1917 B. 1032. Of the states refusing to acknowledge the foreign decree, the most conspicuous is New York. See People *v.* Baker, 76 N. Y. 78, 32 Am. Rep. 274. Other states where the minority rule is followed, or which are in the doubtful group are the District of Columbia, Massachusetts, North Carolina, Pennsylvania, South Carolina, Vermont, and Wisconsin. New Jersey, prior to adoption of the Uniform Act, made recognition depend upon whether the absent defendant was given actual notice of the pending suit. Felt *v.* Felt, 59 N. J. Eq. 606, 45 Atl. 105, 49 Atl. 1071, 83 Am. St. Rep. 612; Davenport *v.* Davenport, 67 N. J. Eq. 320, 58 Atl. 535. See also Solomon *v.* Solomon, 140 Ga. 379, 78 S. E. 1079. While requiring notice of the suit to be brought to the opposing party seems good legislative policy, it confers "no higher or greater authority on the court to hear and determine the cause than service by publication." McCormick *v.* McCormick, 82 Kan. 31, 41. See Smith *v.* Smith, 43 La. Ann. 1140, 10 So. 248.

[31]Gildesleeve *v.* Gildersleeve, 88 Conn. 689, 92 Atl. 684; Joyner *v.* Joyner, 131 Ga. 217, 62 S. E. 182 (but see Solomon *v.* Solomon, 140 Ga. 379, 78 S. E. 1079, no recognition if there had been no actual knowledge of suit by absent defendant); Howard *v.* Strole, 242 Mo. 210, 146 S. W. 792; Toncray *v.* Toncray, 123 Tenn. 476, 131 S. W. 977; Douglas *v.* Teller, 53 Wash. 695, 102 Pac. 761. Statutes in Kansas and Indiana provide for recognition. See Hilbish *v.* Hattel, 145 Ind. 59, 44 N. E. 20; McCormick *v.* McCormick, 82 Kan. 31, 107 Pac. 546.

[32]Baylis *v.* Baylis, 207 N. Y. 446, 101 N. E. 176; Kaiser *v.* Kaiser, 233 N. Y. 524, 135 N. E. 902. Recent New York cases have held, seemingly cutting down the effect of earlier decisions, that the policy of that state does not preclude the recognition of a foreign decree, based on constructive service against a non-resident, where the defendant in such suit was not a resident of New York. Hubbard *v.* Hubbard, 228 N. Y. 81, 126 N. E. 508; Schenker *v.* Schenker, 228 N. Y. 600, 127 N. E. 921. But such decree must be valid by the law of the

reasoning by which recognition was refused.[33] We are left in the most unfortunate situation in which a man and woman may be considered husband and wife in one state and not in another.

EFFECT OF PERSONAL JURISDICTION OVER DEFENDANT

Authorities have already been cited to the effect that a divorce decree rendered where neither party is domiciled will not be recognized elsewhere, even though both spouses were before the court rendering the decree. Suppose, however, that the plaintiff is domiciled where divorce is sought, and there has been a decree rendered against the defendant following personal service upon him within the state, or his voluntary appearance in the action. The court in *Haddock* v. *Haddock* cites and certainly does not disapprove of an earlier decision,[35]

absentee defendant's domicile. Ball *v.* Cross, 231 N. Y. 329, 132 N. E. 106. See interesting comment on this case anent the renvoi doctrine by Lorenzen, 31 YALE L. JOUR. 191. The large number of cases in the lower New York courts are cited in the L.R.A. notes *supra.* In Grossman's Estate, 263 Pa. 139, 106 Atl. 86, where the foreign decree was refused recognition, it seems doubtful whether there was domiciliary jurisdiction of either party to the divorce action.

[33]Parker *v.* Parker, 222 Fed. 186. This was a case in a federal court in Texas. In a later Texas case, Richmond *v.* Sangster, 217 S. W. 723, the court expressly disclaims intention to hold that a foreign decree of divorce, rendered upon substituted service, is void. In Perkins *v.* Perkins, 225 Mass. 82, 113 N. E. 841, the court refused to recognize a Georgia decree given against a nonresident wife. She had not had knowledge of the proceedings in Georgia. The court does not pass upon the question whether the decree would have been recognized if she had had such knowledge.

[34]The following comment by the annotator in 18 L.R.A. (N.S.) 647, 655, seems a sound and sane statement of the point. ". . . The United States Supreme Court should definitely and finally decide whether a divorce suit is governed by the principles applicable to a suit *in personam* or a suit *in rem;* and, if they take the former view . . . they should, as logical consistency and practical morality require, refrain from considering the validity of the decree in the state where rendered, or, if the occasion arises, affirmatively declare the decree invalid in that state. If, upon the other hand . . . the validity of such a decree in the state where rendered is so thoroughly established . . . that it can no longer be questioned, then that court should hold that the decree is entitled to recognition under the full faith and credit provision, and no longer leave it optional with the court of other states to recognize or refuse to recognize it upon general principles of comity. Either alternative would have the inestimable advantage over the present condition of giving the parties the same status in all the states . . ."

[35]Cheever *v.* Wilson, 9 Wall. 108.

holding that a decree rendered under such circumstances is entitled to recognition in other states under the "full faith and credit" clause. It may perhaps be urged that the personal appearance of the defendant cannot add to the efficacy of the decree. Divorce jurisdiction cannot be conferred by mere presence of the parties. This is shown by the cases refusing recognition to decrees rendered where both parties appeared but where neither was domiciled at the forum. If jurisdiction depends upon the fact of domicile, why should the personal appearance of the defendant matter? Whether logical or not, there should be no quarrel with a rule that tends to make for uniformity in recognition in matters of domestic relations. Recent cases indicate that a personal appearance by the defendant will eliminate any objection to a decree rendered at the domicile of one party only.[36]

UNIFORM STATUTE

A uniform statute upon the subject of divorce has carried the recommendation of the National Conference on Uniform State Laws since 1907, though very few states have adopted it.[37] The general adoption of this legislation would remove one cause of the present tangle by making causes for divorce the same in each state, thus removing the inducement to migration for divorce purposes. It continues the present practice of service by publication in case of non-resident defendants though it also provides for a personal notice in addition where practicable. The statute also contains a provision for giving full faith and credit to decrees of other states where rendered in substantial conformity with the jurisdictional requirements of the uniform statute.[38] General adoption of this act would do

[36]Rupp *v.* Rupp, 141 N. Y. S. 484; Richards *v.* Richards, 149 N. Y. S. 1028; Pearson *v.* Pearson, 176 N. Y. S. 626; Bidwell *v.* Bidwell, 139 N. C. 402, 52 S. E. 55; Comm. *v.* Parker, 59 Pa. (Super Ct.(74. But not where the only appearance was a motion to vacate for irregularities and defects and want of jurisdiction. Weaver *v.* Weaver, 160 N. Y. S. 642.

[37]The statute is set out in TERRY, UNIFORM STATE LAWS, p. 291 *et seq.*

[38]The statute does not leave everything sun-clear, however. It is provided that a divorce decree is not to be recognized when an inhabitant of the state goes elsewhere to get a divorce for acts which occurred while he was such inhabitant. This comes from a Massachusetts statute, under which it was held that the effect was but to enact the common law rule that a divorce granted where the party was not domiciled

much to remove the confusion and conflict of authority now existing. But such general adoption seems, at the present rate of progress, a matter for the indefinite future. Congressional legislation has also been advocated. Whether this is desirable, if authorized by constitutional amendment, involves a question of policy beyond the scope of this discussion.

LIMITED DIVORCE

Limited divorce, or divorce *a mensa et thoro*, differs enough from the now more common absolute divorce to require separate discussion. A divorce from bed and board could be granted by an ecclesiastical court in England at a time when no court there could decree a dissolution of a valid marriage. Such a decree did not sever the marriage bonds, though it made important changes with respect to the rights of the spouses against and obligations to each other. But, as Coke says of the wife's position after such a decree, "the overture continueth."[39]

In England a suit for judicial separation, the statutory successor to the divorce from bed and board, need not be brought at the domicile of the parties, but can be maintained in England if they are resident there.[40] Residence is necessary because the courts in this matter act upon the same rules as did their predecessors, the ecclesiastical courts, which prior to the Act of 1857 dealt with cases involving marital difficulties. The jurisdiction of these courts did not depend upon na-

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would not be recognized. Gregory *v.* Gregory, 76 Me. 535. See also Andrews *v.* Andrews, 188 U. S. 14, 23 Sup. Ct. 237. But New Jersey, under the Uniform Statute, has said the rule against recognition applies, even though a bona fide domicile was in fact acquired in the other state. Sechler *v.* Sechler (N. J. Eq.), 118 Atl. 629; and further, even though the defendant has appeared in the action or been personally served within the state. Lister *v.* Lister, 86 N. J. Eq. 30, 97 Atl. 170. Either this construction of the statute is wrong, or the statute, in this respect is unconstitutional unless the Supreme Court changes its view on full faith and credit. See authorities, notes 35 and 36. See also discussion in 21 MICH. L. REV. 922.

[39]COKE ON LITTLETON, 235a. The effect of limited divorce on various marital relations is set out in a note in 65 Am. Dec. 359. In England it is doubtful whether after such a decree a woman can even acquire a separate domicile. Lord Advocate *v.* Jaffrey [1921], 1 A. C. 146.

[40]Armytage *v.* Armytage [1898], P. 178; Anghinelli *v.* Anghinelli [1918], P. 247. For fuller statement of the English authorities, see DICEY, CONFLICT OF LAWS, 3rd ed. p. 296.

tionality or domicile of the parties. Residence within a parish was enough to place one's soul under the care of the parish priest, and to give the ecclesiastical court authority to deal with him "pro salute animæ."[41]

Statutes in this country in states where limited divorces are granted frequently make the same requirements for bringing the suit and for the procedure therein for limited as for absolute divorce.[42] What recognition should or must be given a divorce *a mensa* granted by a court of another state? A decree rendered at the domicile, with the defendant before the court by valid personal service or appearance must be given full faith and credit.[43] Suppose such a decree rendered against an absent non-resident, who does not appear. A recent decision in Connecticut holds that the decree rendered on such facts will not be given effect in that state.[44] Had this been an absolute divorce decree Connecticut would have recognized it as valid, even though not compelled by the Constitution to do so.[45] But a decree of judicial separation was said not to affect status; it is a personal action, not one in rem, and hence entitled to no recognition against a non-resident, non-appearing defendant. Whether recognition of foreign limited divorce cases may be withheld on this broad ground is doubtful. The United States Supreme Court has held that such a decree, rendered at the "matrimonial domicile" must be given full faith and credit.[46] There is little authority to rely upon.[47] It seems a fair statement from the cases cited to say a limited divorce decree must be given faith and credit when an abso-

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[41]See James, L. J. in Niboyet *v.* Niboyet, 4 P. D. 1.

[42]For examples, see MICH. COMP. LAWS, 1915, ch. 217; MINN. REV. LAWS, 1905, § 3601. The Uniform Statute makes the same procedural and jurisdictional requirements.

[43]Harding *v.* Harding, 198 U. S. 317, 25 Sup. Ct. 679 (Illinois decree authorizing wife to live apart conclusive upon husband suing for divorce in California); Slade *v.* Slade, 58 Me. 157.

[44]Pettis *v.* Pettis, 91 Conn. 608, 101 Atl. 13, 4 A.L.R. 852; reviewed in 17 COL. L. REV. 639 and 27 YALE L. JOUR. 117.

[45]Gildersleeve *v.* Gildersleeve, 88 Conn. 692, 92 Atl. 684.

[46]Thompson *v.* Thompson, 226 U. S. 551, 33 Sup. Ct. 129. This decision followed Atherton *v.* Atherton, 181 U. S. 155, 21 Sup. Ct. 544, on its facts and does not discuss nor apparently notice the possibility of a difference between absolute and limited divorce as concerns its character as a decree in *rem* or the recognition required for "full faith and credit."

[47]See note in 4 A.L.R. 858.

lute decree rendered under the same circumstances is within the constitutional protection. But if not protected by the full faith and credit clause, a court may, as the Connecticut court has done, give effect to an absolute decree, while refusing it to a divorce from bed and board.

ANNULMENT OF MARRIAGE

It has been stated by an eminent authority that a suit to annul a marriage concerns the marriage status precisely like one to break the marriage bond for post nuptial wrongdoing and should therefore be carried on in the courts of the domicile.[48] But there is an important difference between divorce and annulment. A decree of divorce dissolves the marriage and relieves the parties from their obligations as husband and wife; but it recognizes that the relation had a lawful existence, of which the consequences continue, even though the relation has terminated.[49] This a nullity decree does not do. It is granted for causes antedating the marriage and its legal effect is to say that the marriage never existed.[50] The ecclesiastical law did not permit a valid marriage to be dissolved in the life time of the parties. But it did allow annulment decrees; these did not purport to end a marriage but declared that one had never come into being. Coke and Blackstone both speak of divorce *a vinculo*, but it is clear that they are referring to annulment.[51]

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[48]BISHOP ON MARRIAGE, DIVORCE AND SEPARATION, § 73. An attempt to differentiate has been called a mere juggling with terms, Mitchell *v.* Mitchell, 117 N. Y. S. 671; and a "mere difference in form," Turner *v.* Thompson, 13 P. D. 37.

[49]Thus, the offspring born or conceived during the wedlock are legitimate, Wait v. Wait, 4 N. Y. 95; personal choses of the wife, reduced to possession by the husband, remain his, Lawson *v.* Shotwell, 27 Miss. 630; confidential communications between them during the marriage are not admissible in evidence, Griffeth *v.* Griffeth, 162 Ill. 368, 44 N. E. 820.

[50]Thus, communication between the parties prior to the decree are not "privileged" as are those between husband and wife, Wells *v.* Fletcher, 5 Car and P. 12; the husband acquires no right in the wife's property, Aughtie *v.* Aughtie, 1 Phill. Ecc. 201; the woman may maintain an action against the man for wrongful cohabitation, Blossom *v.* Barrett, 37 N. Y. 434; unless a statute protects the children they are illegitimate. 1 BISHOP, § 277, 2 same § 1602. Of course all of these consequences are subject to modification by statute.

[51]COKE ON LITTLETON, 235a; 1 BLACKSTONE COM. 440 *et seq.* "When such expressions as divorce *a vinculo* occur, they always refer to cases

Does the wide difference between annulment and divorce decrees necessitate a rule of jurisdiction to annul a marriage which differs from that for divorce? The difficulties inherent in the problem can be shown by supposing an entirely possible case.[52] Suppose cousins, domiciled in state A, marry there and live successively in states B. C, and D. Assume that by A law the marriage is valid but that by the law of D such a marriage is incestuous. Granted that a court in D could divorce these people, thus ending the marriage, could it grant a nullity decree and thus declare all their prior cohabitation illicit and the children bastards? Would a court in A, B, or C give credit to such a decree? On principle, it could well be maintained that since a nullity decree declares that no marriage ever existed, such a decree can only be rendered by the court of a state whose law created the marriage relation.[53]

Authorities upon the point are lacking in clarity and consistency. English writers state that the English courts may declare a marriage a nullity in two situations: first where the marriage was celebrated in England;[54] and second where the respondent is resident in England at the date of the petition.[55] But English courts have refused to recognize foreign nullity decrees rendered upon the same jurisdictional facts as those upon which an English court will act when nullity is asked for in England. In *Ogden* v. *Ogden*[56] the Court of Appeal held

where there never existed a *vinculum,* and the so-called marriage was never a marriage at all." Wilkinson *v.* Gibson, L. R. 4 Eq. Co. S, 162, 166.

[52]Garcia *v.* Garcia, 25 S. D. 645, 127 N. W. 586 is nearly like it.

[53]See "Jurisdiction to Annul a Marriage," 32 HARV. L. REV. 806.

[54]Linke *v.* Van Aerde, 10 T. L. R. 426; Sottomayer *v.* DeBarros, 3 P. D. 1; Simonin *v.* Mallac, 2 Sw. & Tr. 67.

[55]WESTLAKE, PRIV. INT. LAW, 5th ed., art. 49; FOOTE'S PRIV. INT. JURIS., 4th ed., 123; HALSBURY'S LAWS OF ENGLAND, 265; DICEY, CONFLICT OF LAWS, 3rd ed., 300. This last edition of Dicey suggests an additional basis, where the parties are domiciled in England. On suit for annulment in England where parties are domiciled there though married elsewhere, see Bonaparte *v.* Bonaparte [1892], P. 402; Johnson v. Cook [1898], 2 I. R. 130; Bater *v.* Bater [1906], P. 209. In the cases cited by Westlake for the point that residence is sufficient (Niboyet *v.* Niboyet, 4 P. D. 1; Roberts *v.* Brennan [1902], P. 143) the judges were trying to establish that under ecclesiastical law, residence as something less than domicile, was sufficient. The question of jurisdiction was being considered in its local and not its international aspect.

[56][1908] P. 46. See also Simonin *v.* Mallac. 2 Sw. & Tr. 67. The French court had the same basis for jurisdiction as in Bater *v.* Bater, or Johnson *v.* Cook, *supra.*

that a decree of a French court annulling a marriage between a Frenchman and an Englishwoman, contracted in England, was not entitled to recognition. It is stated as English law that a decree of nullity of a foreign court is not conclusive in England.[57]

Among the American authorities general statements may be found to the effect that in annulment, as in divorce, jurisdiction depends on domicile.[58] Cases may be found where a marriage is annulled when the parties were domiciled at the time of marriage in the state where action is brought though the ceremony took place elsewhere; other decisions refuse annulment on such facts.[60] A foreign nullity decree based on domicile has been accorded[61] and refused[62] recognition. Statutes in some states make requirements for annulment and divorce actions the same both as to jurisdiction and procedure.[63] The Uniform Divorce and Annulment statute also makes provision for bringing the action where either party is a resident, and allows service by publication upon absent defendants.[64] This method is certainly the convenient one and follows the well settled rules in divorce actions. It is to be hoped that some one rule governing both jurisdiction for actions and recognition of foreign decrees will be settled upon soon. If not, confusion worse than that existing in the divorce situation may be expected.

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[57]HALSBURY'S LAWS OF ENG. 271; FOOTE'S PRIV. INT. JURIS., 4th ed. 114.

[58]BISHOP, *supra*, note 48; KEEZER ON MARRIAGE AND DIVORCE, § 56; 26 CYC. 908.

[59]Cunningham *v.* Cunningham, 206 N. Y. 341, 99 N. E. 845; Mitchell *v.* Mitchell, 117 N. Y. S. 671; Barney *v.* Cuness, 68 Vt. 51, 33 Atl. 897; Kitzman *v.* Kitzman, 167 Wis. 308, 166 N. W. 789.

[60]Levy *v.* Downing, 213 Mass. 334, 100 N. E. 638. In Garcia *v.* Garcia, 25 S. D. 645, 127 N. W. 546 annulment was refused where the marriage was valid by the *lex loci contractus* and the law of the domicile of the parties at the time it was celebrated. New Jersey has refused to annul a marriage contracted within the state, Blumenthal *v.* Tannenholz, 31 N. J. Eq. 194; and has granted it when neither party was domiciled within the state and the marriage did not take place there. Avakian *v.* Avakian, 69 N. J. Eq. 89, 60 Atl. 521.

[61]Roth *v.* Roth, 104 Ill. 35, a very hard case.

[62]Cummington *v.* Belchertown, 149 Mass. 223, 21 N. E. 435.

[63]IOWA CODE [1897], § 3183 and SUPP., § 3187a; NEB. COMP. STAT. 1903, § 3167; VA. CODE [1904], § 2259.

[64]See § 6 *et seq.* of the statute; TERRY, UNIFORM STATE LAWS, p. 299.

CUSTODY OF CHILDREN

Conflict of Laws decisions regarding orders for the custody of the children of parties to a divorce suit present interesting questions and have developed a fair sized body of authority. The two main questions are: (1) What constitutes jurisdiction, in the international sense, to render a decree awarding custody of a minor child; (2) What effect is to be given such an award in another state?

A neglected child may be protected even against a parent or duly appointed guardian, irrespective of residence;[65] but such procedure is a police measure for the protection of the child and does not work a change in the parent-child relation. But a decree awarding custody to one parent and excluding the other deprives the latter of the society, services, and control of the education of the child; his consent is not required even for its adoption by another.[66] Such an important change in the relation between parent and child is one which should be made only at the domicile and this seems the view of the majority of cases. Thus it has been held that the decree should not be made when the domicile is elsewhere.[67] Decrees for custody of children made when the child's domicile was not in the state at the time have been denied recognition.[68] At common law the domicile of the minor child followed the father but an increasing number of statutes gives the mother equal control over the children. This change in the law must be considered in determining where the child whose custody is in question is domiciled.[69]

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[65]Hartman *v.* Henry, 280 Mo. 478, 217 S. W. 987. Statutes on this subject are common.

[66]See ANN. CASES, 1914 A, 223.

[67]People *v.* Winston, 52 N. Y. S. 814; Harris *v.* Harris, 115 N. C. 587, 20 S. E. 187; Vetterlein, Petitioner, 14 R. I. 378; Lanning *v.* Gregory, 100 Tex. 310, 99 S. W. 542. But see De la Montanya *v.* De la Montanya, 112 Cal. 101, 44 Pac. 345. See, for additional authorities, 10 L.R.A. (N.S.) 690 note. If the child is domiciled in the state where the cause is pending, the jurisdiction of the court is not defeated because the children are not in court, whether their removal was to frustrate the effect of the decree or any other purpose. Bennett *v.* Bennett, 1 Deady 299; Avery *v.* Avery, 33 Kan. 1; White *v.* White, 77 N. H. 26, 86 Atl. 353; Anderson *v.* Anderson, 74 W. Va. 124, 81 S. E. 706.

[68]Kline *v.* Kline, 57 Ia. 386; People *v.* Dewey, 50 N. Y. S. 1013. See Rodgers *v.* Rodgers, 56 Kan. 483, 43 Pac. 779.

[69]See 7 CORNELL L. QUAR., note on page 5, for some of these statutes.

If the question of custody is passed upon by a court having jurisdiction, the great weight of authority holds that the decree is conclusive as to all matters up to the time of its rendition, and will be recognized and given effect in another state.[70] This seems entirely sound. To allow relitigation of the question involves an unfortunate lack of confidence in the competence of the judicial officers of a sister state, and an unduly narrow interpretation of the full faith and credit clause of the Constitution. But the custody decree is conclusive only as to matters prior to its promulgation, and does not govern when a change of circumstances can be shown. As such a finding is one which can easily be made and plausibly supported, "it follows that the recognition extra-territorially which custody orders receive or can command is liable to be more theoretical than of great practical consequence."[71]

Is a modification of the custody order by the court rendering it to be recognized elsewhere? Difficulty is presented when parent and child have established a new domicile in another state. The second state is now the one concerned with the domestic relations of the parties; yet it is difficult to see how the first court's power is lost as long as the question of custody remains to be passed upon.[72] Authority is divided upon the question whether a modification of the decree is entitled to recognition when a new domicile has been established.[73]

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[70]Bennett *v.* Bennett, 1 Deady 299; Milner *v.* Gatlin, 139 Ga. 109, 76 S. E. 860; Hardin *v.* Hardin, 168 Ind. 352, 81 N. E. 60; State *v.* District Court, 46 Mont. 425, 218 Pac. 590; Mylius *v.* Cargill, 19 N. Mex. 278, 142 Pac. 918; *Contra,* People *v.* Hickey, 86 Ill. App. 20; *In re* Bort, 25 Kan. 308; *In re* Alderman, 157 N. C. 507, 73 S. E. 126. See "Custody of Children in Divorce Suits," 7 CORNELL L. QUAR., 1. Authorities on this point, and other matters involving custody of children are collected in the following notes: 20 A.L.R. 815; L.R.A. 1915 B 154; 39 L.R.A. (N.S.) 988.

[71]Morrill *v.* Morrill, 83 Conn. 479, 77 Atl. 1. See, illustrating this statement, Mylinus *v.* Cargill, 19 N. M. 278, 142 Pac. 918; *Ex parte* Boyd (Tex. Ct. App.), 157 S. W. 254. For additional authorities, see 20 A.L.R. 822 note.

[72]It is ended by the death of the spouse to whom custody was awarded, Pinney *v.* Sulzen, 91 Kan. 407, 137 Pac. 987; Clarke *v.* Lyon, 82 Neb. 625, 118 N. W. 472, and of course by the child becoming of age.

[73]That it is entitled; Wakefield *v.* Ives, 35 Ia. 238; Stetson *v.* Stetson, 80 Me. 483; State *v.* District Court, 46 Mont. 425, 128 Pac. 590; *Contra,* Milner *v.* Gatlin, 139 Ga. 109, 76 S. E. 860; Griffin *v.* Griffin, 95 Ore. 78, 187 Pac. 598; Groves *v.* Barto, 109 Wash. 112, 186 Pac. 300. See 20 A.L.R. 820 note. On securing obedience to the modified order by

EFFECT OF FOREIGN DIVORCE DECREE ON DOWER AND OTHER PROPERTY RIGHTS

For a divorce decree rendered in one state to affect property rights in another, it must be assumed that the decree is recognized in the second state as terminating the husband and wife relationship of the parties. If the decree is ineffective to divorce them, incidental property questions do not require consideration.[74] The effect of a divorce on dower, affecting as it does an interest in land, is necessarily governed by the *lex rei sitae.* The general rule is said to be that a valid divorce cuts off the wife's right of dower and the husband's tenancy by curtesy, unless preserved by statute.[75] This rule seems equally applicable to a divorce secured either within or without the state, unless changed by statute, and it has been so held,[76] even when rendered against a non-resident, non-appearing defendant.[77] Respectable courts have refused to apply the rule to the latter type of case, however, especially when no actual notice of the action was given defendant, even though the decree is recognized as effective in ending the marital relation.[78] In New York dower is regarded as a vested right, of which the wife can be deprived only by a decree of divorce obtained by the husband for her misconduct. Misconduct, in

requiring a bond, see L.R.A. 1915 A, 576 note. If the custody of the child is awarded to the mother, with no provision made for its support, may she sue the father to compel such support in a second state where the parties are now domiciled? Geary *v.* Geary, 102 Neb. 511, 167 N. W. 778 says yes; see other citations, 20 A.L.R. 826.

[74]Subject to the exception discussed *supra* (see note 13 for authorities) where a plaintiff who has procured a decree is precluded from questioning it.

[75]Barrett *v.* Failing, 111 U. S. 523, 4 Sup. Ct. 598.

[76]Barrett *v.* Failing, *supra* (local statute preserving dower in certain cases inapplicable to foreign divorce); Hawkins *v.* Ragsdale, 80 Ky. 353, 43 Am. Rep. 483; Gould *v.* Crow, 57 Mo. 200; Thoms *v.* King, 95 Tenn. 60, 31 S. W. 983. Acc. Boyles *v.* Latham, 61 Ia. 174, 16 N. W. 68, statutory substitute for dower. Applied to homestead, Gummison *v.* Johnson, 149 Minn. 329, 183 N. W. 515.

[77]Hilbish *v.* Hattel, 145 Ind. 59, 44 N. E. 20; Hawkins *v.* Ragsdale, *supra;* Gould *v.* Crow, *supra;* Thoms *v.* King, *supra.*

[78]Doerr *v.* Forsythe, 50 Oh. St. 726, 35 H. E. 1055. See Toncray *v.* Toncray, 123 Tenn. 476, 131 S. W. 977 (partially overruling Thoms *v.* King, *supra*). Accord, as applied to homestead rights, Lynn *v.* Sentel, 183 Ill. 383, 55 N. E. 838; Gooch *v.* Gooch, 38 Okla. 300, 133 Pac. 242. McCreery *v.* Davis, 44 S. C. 195, 22 S. E. 178, reaches the same result but does not admit the validity of the divorce.

this sense, means that which is sufficient for an absolute divorce in New York—adultery; hence a divorce procured in another state for another cause will not deprive the wife of dower in New York land, owned by the husband during the marriage. A wife, after having obtained a decree of divorce in another state, may claim dower in New York land owned by the husband prior to the decree,[80] but not that which he subsequently acquired.[81]

JURISDICTION TO AWARD ALIMONY

Unlike a decree of divorce which purports only to affect only the marital status of the parties who prior to its rendition have been husband and wife, an order to pay money (or convey property) as alimony is a personal judgment. To be effective, it must be rendered by a court having personal jurisdiction over the defendant, in addition to authority under the local law to make such an order. Against a non-resident, non-appearing defendant, who was not personally served within the state, the order to pay alimony is void, both in the state where rendered[82] and elsewhere.[83] This is but an application to alimony cases of the general rule with regard to personal

[79]Van Cleaf *v.* Burns, 118 N. Y. 549, 23 N. E. 881; S. C., 133 N. Y. 540, 30 N. E. 661.

[80]Van Blaricum *v.* Larson, 205 N. Y. 355, 98 N. E. 488, 41 L.R.A. (N.S.) 219. But see, on basis of "quasi-estoppel" to claim the right, Monroe, etc. Bank *v.* Yoeman, 195 N. Y. S. 531, reviewed in 23 COL. L. REV. 188.

[81]Van Blaricum *v.* Larson, *supra;* Starbuck v. Starbuck, 173 N. Y. 503, 66 N. E. 193.

[82]Fleming *v.* West, 98 Ga. 778, 27 S. E. 157; Proctor *v.* Proctor, 215 Ill. 275, 74 N. E. 145, 69 L.R.A. 673 (here the decree in addition to an order to pay money, adjudged the plaintiff entitled to an interest in land in another state); Johnson v. Matthews, 124 Iowa 255, 99 N. W. 1064; Sowders *v.* Edmunds, 76 Ind. 123; Edwards *v.* Edson, 104 N. Y. S. 292. Blackinton *v.* Blackinton, 141 Mass. 432, 5 N. E. 830 which seems to recognize the validity of such an order in the state where rendered, is commented upon by Mr. Justice Holmes, in his opinion in Haddock *v.* Haddock, 201 U. S. 562, 26 Sup. Ct. 525, and see McGuinness *v.* McGuinness, 72 N. J. Eq. 381, 68 Atl. 768.

[83]Middleworth *v.* McDowell, 49 Ind. 386; Rodgers *v.* Rodgers, 56 Kan. 483, 43 Pac. 779 (foreign decree purported to settle interest in Kansas land); Rigney *v.* Rigney, 127 N. Y. 408, 28 N. E. 405; Prosser *v.* Warner, 47 Vt. 667, 19 Am. Rep. 132. For collections of authorities on these points see notes in 59 L.R.A. 178; 9 L.R.A. (N.S.) 593; L.R.A. 1917 F 1161.

judgments against a non-resident, non-appearing absentee. Appearance by the defendant gives the court power to render a valid personal judgment against him.[84] Further, if the defendant is a resident of the state it is held in this situation, as in other cases involving personal judgments, that the alimony order is valid, even though the defendant is not served within the state.[85] If the defendant, though an absent non-resident, has property within the jurisdiction, the local law may authorize proceedings for seizing it for a claim for alimony. The state has jurisdiction over the property within its borders regardless of the residence or presence of the owner. The personal decree for alimony based on constructive service is valid against the property of the non-resident husband which may be found within the jurisdiction of the court and specifically proceeded against.[86] This part of the action may be regarded as a proceeding quasi in rem against the property. Such seizure must, obviously, be authorized by the local law.[87]

SUIT TO RECOVER ALIMONY GRANTED BY FOREIGN COURT

Assuming a court rendering a decree for alimony had the

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[84]Austin *v.* Austin, 173 Mich. 47, 138 N. W. 237.

[85]Beard *v.* Beard, 21 Ind. 321; Fleming *v.* West, 98 Ga. 778, 27 S. E. 157; Hamill *v.* Talbott, 72 Mo. App. 22, 81 Mo. App. 210; Roberts *v.* Roberts, 135 Minn. 397, 161 N. W. 148; *Contra,* De la Montanya *v.* De la Montanya, 112 Cal. 101, 44 Pac. 345. The mode of service must conform to the local statutes, and must meet the requirements of due process. The questions arising concerning the validity of a judgment against a resident rendered without personal service within the state are not peculiar to those for alimony, but apply to all personal judgments.

[86]Pennington *v.* Fourth Nat. Bank, 243 U. S. 269, 37 Sup. Ct. 282, L.R.A. 1917 F 1159 (bank deposit, court at time suit was filed issued order enjoining bank from paying out any part of deposit); Holmes *v.* Holmes, 283 Fed. 453 (land described in bill, notice of *lis pendens* filed, and decree declared a lien on local land as authorized by statute), noted in 21 MICH. L. REV. 460; somewhat similar on facts is Wesner *v.* O'Brien, 56 Kan. 724, 44 Pac. 1090. Further applications are found in Rhoades *v.* Rhoades, 78 Neb. 495, 111 N. W. 122; Murray *v.* Murray, 115 Cal. 266, 47 Pac. 37; Benner *v.* Benner, 63 Oh. St. 220, 58 N. E. 569. But if the property itself is in no way proceeded against, it cannot thereafter be seized to satisfy the personal judgment for alimony which is void for want of jurisdiction over the defendant. Bunnell *v.* Bunnell, 25 Fed. 214 (*Cf.* Holmes *v.* Holmes, *supra*); Hood *v.* Hood, 130 Ga. 610, 61 S. E. 471; McGuinness *v.* McGuinness, 72 N. J. Eq. 381, 68 Atl. 768; Edwards *v.* Edson, 104 N. Y. S. 292.

[87]This seems the reason for the denial of relief in Chapman *v.* Chapman, 269 Mo. 663, 192 S. W. 448.

defendant before it, either by valid personal service or voluntary appearance, can a suit be maintained for unpaid alimony in another state? The chief difficulty here is in determining whether the order for alimony is a final one, or is provisional merely and subject to modification. An order rendered in one state for payment of a sum of money for alimony past due is entitled to enforcement[88] in another state under the full faith and credit clause.[89] The rule for recovery in another state of installments which become due subsequent to the rendition of the decree may be stated by paraphrasing the authoritative statement of the United States Supreme Court[90] on the point: the right to such instalments becomes vested upon becoming due, and is therefor protected by the full faith and credit clause, provided no modification of the decree has been made prior to the maturity of the instalments. This rule, however, does not obtain where, by the law of the state in which a judgment for future alimony is rendered, the right to demand such future alimony is discretionary with the court which rendered the decree, to such an extent that no vested right to receive the instalments attaches.[91] The question to be determined in a suit in one state for unpaid instalments of alimony under a decree of a court from another state, is then, whether, by the law of the state where the decree was rendered, the right was vested to the overdue payments or was still subject to modification. If the former, recovery may be had;[92] if

[88]It has been held that the action cannot be brought in equity because the remedy at law is adequate. Bennett *v.* Bennett, 63 N. J. Eq. 306, 49 Atl. 501. In Barber *v.* Barber, 21 How. 582, the plaintiff recovered in an action in equity brought in a federal court in Wisconsin upon an order rendered by the court of another state. See, on the point, 9 L.R.A. (N.S.) 1071.

[89]Lynde *v.* Lynde, 181 U. S. 183, 21 Sup. Ct. 555.

[90]In Sistare *v.* Sistare, 218 U. S. 1, 30 Sup. Ct. 682, 28 L.R.A. (N.S.) 1068.

[91]The cases decided between the time of Lynde *v.* Lynde, *supra,* and Sistare *v.* Sistare, *supra,* show some uncertainty on the subject. The latter case clears up points left uncertain in the first. See notes, 9 L.R.A. (N.S.) 1168; 28 L.R.A. (N.S.) 1068.

[92]McGregor *v.* McGregor, 52 Colo. 292, 122 Pac. 390; Paulin *v.* Paulin, 195 Ill. App. 350, citing Illinois cases; Taylor *v.* Stowe, 218 Mass. 248, 105 N. E. 890; Mayer *v.* Mayer, 154 Mich. 386, 117 N. W. 890; Bolton *v.* Bolton, 86 N. J. L. 622, 92 Atl. 389; Williamson *v.* Williamson, 155 N. Y. S. 423; Campbell *v.* Campbell, 28 Okla. 838, 115 Pac. 1111.

the latter, it may not.[93] This may, in cases where the decree in the state where rendered is still subject to modification even as to past due instalments, result in permitting a defendant undeservedly to escape payment of his obligations by crossing a state line. The source of the trouble lies in the rule allowing modification of over due instalments rather than that governing the enforcement of the order elsewhere.

An interesting question, upon which the law is not so clear, is raised by a case where the defendant in the divorce suit, being personally before the court, is ordered to convey land in another state to the plaintiff. Suppose he leaves the state before he can be compelled to execute the conveyance. Will a court at the situs of the land enforce the foreign decree by compelling the defendant to execute the conveyance? The problem is not peculiar to divorce cases though it has been presented several times in such litigation. Against allowing the relief it has been urged that the decree ordering the defendant to convey creates only a duty to the court pronouncing it; further, that to enforce such a decree is to allow one state to create rights in land of another. For the plaintiff it may be urged that the decree rendered with full opportunity for the defendant to be heard is conclusive of the plaintiff's right and defendant's obligation just as it would be had payment of money ordered; that there is no more interference by the court rendering the decree with foreign land then there is in any case where the conveyance made under compulsion is recognized at the situs of the land as conveying good title; that to decide against the plaintiff is to allow defendant to profit by his own wrong and perhaps in effect to deprive plaintiff of all effective relief.[94] Respectable authority, both in decisions and the opinions of legal writers, may be found for either view.[95]

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[93]Page *v.* Page, 189 Mass. 85, 75 N. E. 92; Blever *v.* Blever, 27 Okla. 25, 110 Pac. 736; Levine *v.* Levine, 95 Ore. 94, 187 Pac. 609; Hunt *v.* Monroe, 32 Utah 428, 91 Pac. 269; Henry *v.* Henry, 74 W. Va. 563, 82 S. E. 522.

[94]The problem is discussed at length in "The Extra-Territorial Effect of the Equitable Decree," 17 MICH. L. REV. 527; "Enforcement of a Foreign Equitable Decree," 5 IOWA L. BULL. 230.

[95]Against allowing relief: Fall *v.* Fall, 75 Neb. 104, 113 N. W. 175; Bullock *v.* Bullock, 52 N. J. Eq. 561, 30 Atl. 676. Fall *v.* Fall went to the Supreme Court of the United States, as Fall *v.* Eastin, 215 U. S.

SUIT FOR ALIMONY AFTER FOREIGN DIVORCE

A suit for alimony begun after a decree divorcing the parties has been entered may involve two classes of cases. The first is where both parties were before the court which granted the divorce decree. It is held that alimony will not subsequently be granted in the courts of the state where the decree was rendered, when it was in issue and not ordered.[96] Where a divorce suit in one state ended with a decree and a award of alimony, the United States Supreme Court has held under the full faith and credit clause that a further suit for alimony could not be maintained in another state, on the principle of the estoppel of judgments, defined as follows: "If the second action is upon the same claim or demand as that upon which the judgment pleaded was rendered, the judgment is an absolute bar not only of what was decided but of what might have been decided."[97]

The second class of cases is that in which the decree is secured at the domicile of one spouse only, the other not present either through personal service within the state or voluntary appearance. If the decree is not recognized in the second state as terminating the marriage relation, no question of its effect as precluding a suit for divorce and alimony or separate support is raised. But if the decree is recognized as divorcing the parties from the bonds of matrimony does it prevent a subsequent action for alimony? Two reasons are advanced for so holding. (1) That the right to alimony is *res judicata* by the foreign decree. (2) That the dissolution of the mar-

1, 30 Sup. Ct. 3, where it was held that on the facts there was no violation of full faith and credit. The rights of a third party transferee were involved. See the concurring opinion by Holmes, J. Relief was given in Mallette *v.* Scheerer, 164 Wis. 415, 160 N. W. 182 and the recent case of Matson *v.* Matson, 186 Ia. 607, 173 N. W. 127, noted in 29 YALE L. JOUR. 119, 18 MICH. L. REV. 142, 33 HARV. L. REV. 420, 423. See also the authorities referred to in discussions cited in note 94.

[96]The authorities on this point are set out in the annotation to Spain *v.* Spain, 177 Ia. 249, 158 N. W. 529, L.R.A. 1917 D 319.

[97]Bates *v.* Bodie, 245 U. S. 520, 38 Sup. Ct. 182, reversing Bodie *v.* Bates, 95 Neb. 757, 146 N. W. 1002, L.R.A. 1915 E 421. To the same effect see Fischli *v.* Fischli, 1 Blackf. 360, 12 Am. Dec. 251 (while not expressly stated that both parties appeared in the first suit, such must have been the case for the decree was appealed from); Phillips *v.* Phillips, 69 Kan. 324, 76 Pac. 842; Gilbert *v.* Gilbert, 83 Oh. St. 265, 94 N. E. 421.

riage relation destroys the foundation of an independent action for alimony. Refusal to allow the subsequent action may result in great hardship. The husband may procure the divorce at his separate domicile, and if the local law permits service by publication only, the wife may not even know of the suit. If she does have notice of it she has, theoretically, a chance to appear and defend. Practically this may be not worth much, if the distance is great and she is without means. If the wife brings the action at her separate domicile, an order against the non-resident absentee husband directing him to pay alimony is void, as the cases cited above show. If he has no property within the state, there is no way in which she can secure alimony in the divorce action. It is hard to see how the matter can be *res judicata* as to the personal claim for alimony, where the court has no power to give a binding judgment on the merits of the claim. To say the decree is res adjudicata as to the claim for alimony is to extinguish the claim without opportunity for its presentation.[98] Authorities are divided, but there is adequate support for the view that a subsequent action for alimony may be maintained, whether the "ex parte" devorce decree was procured either by the husband[99] or the wife.[100]

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[98]See Thurston *v.* Thurston, 58 Minn. 279, 59 N. W. 1017 and discussion in 10 COL. L. REV. 555.

[99]Turner *v.* Turner, 44 Ala. 437; Thurston *v.* Thurston, *supra;* Cox *v.* Cox, 19 Oh. St. 502, 2 Am. Rep. 415; Toncray *v.* Toncray, 123 Tenn. 476, 131 S. W. 977. *Contra,* Joyner *v.* Joyner, 131 Ga. 217, 62 S. E. 182; Knowlton *v.* Knowlton, 155 Ill. 158, 39 N. E. 595; McCormick *v.* McCormick, 82 Kan. 31, 107 Pac. 546; Thompson *v.* Thompson, 226 U. S. 551, 33 Sup. Ct. 129.

[100]Woods *v.* Waddle, 44 Oh. St. 449, 8 N. E. 297; Adams *v.* Abbott, 21 Wash. 29, 56 Pac. 931; *Cf.* Buckley *v.* Buckley, 50 Wash. 213, 96 Pac. 1079 (division of property). *Contra,* McCoy *v.* McCoy, 191 Ia. 973, 183 N. W. 377. See further for authorities the following notes, 59 L.R.A. 180; 34 L.R.A. (N.S.) 1106; L.R.A. 1915 E 421.