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Domicile of a Married Woman, The

James L. Parks

THE DOMICILE OF A MARRIED WOMAN

Originally the rule was that the domicile of a married woman was that of her husband.[1] It made no difference what the actual facts were, a wife would not be heard to say that she had a separate domicile. This notion was largely due to the law's conception of a married couple as one person, which idea was

1. *Warrender v. Warrender* (1835) 2 Cl. & Fin. 488, 6 Eng. Rep. 1239; *Yelverton v. Yelverton* (1859) 1 Sw. & Tr. 574, 164 Eng. Rep. 866; *Armytage v. Armytage* (1898) P. 178; *Ogden v. Ogden* (1908) 1 P. 46; *Harrison v. Harrison* (1852) 20 Ala. 629 (dictum); *Kashaw v. Kashaw* (1853) 3 Cal. 312; *Dougherty v. Snyder* (1826) 15 S. &. R. (Pa.) 84 (*dictum*); *Nichols v. Nichols* (1899) 92 Fed. 1; "Though a wife may acquire a home for herself, she can under no circumstances have any other domicile or legal home than that of her husband." Dicey, Conflict of Laws, 3rd ed. 137. See also *Greene v. Greene* (1831) 11 Pick. (Mass.) 409. In *McPherson's Administrator v. McPherson* (1897) 70 Mo. App. 330, a man domiciled in New York married a woman domiciled at the time of the marriage in Missouri. After the marriage the husband returned to New York, his wife intending to follow him as soon as her affairs would permit. Prior to his wife's going to New York, and while she still remained in Missouri, she died. It was held that the wife was domiciled in New York from the moment of her marriage, even though she had never been there to acquire settlement, the court saying (70 Mo. App. l. c. 335): "By his intermarriage his wife *eo instanti* acquired the same domicile. The fact that she—died—before her actual removal to New York in nowise affected the question of her legal domicile in that state from the time of the consummation of her marriage with one of its resident citizens." While it is true that the authorities will permit a person to retain a domicile while absent, after a settlement has been actually made with the appropriate intent (*Reed's Will* (1906) 48 Ore. 500, 87 Pac. 763; *Dupuy v. Wurtz* (1873) 53 N. Y. 556) it is usually said that a domicile cannot be acquired as a result of a mere intention to go to a place in the future and acquire a home. The decision therefore in *McPherson's* case must proceed on the theory that a husband and wife are one, and the wife for that reason domiciled with her husband. See also *Wickes' Estate* (1900) 128 Cal. 270, 60 Pac. 867 and *Bank v. Mitchell* (1860) 28 N. J. L., 516 where the courts of necessity also based their decisions on the fiction.

based on a wife's duty to be with her husband, he in turn being bound to support her.[2]

Usually, the American cases say that a person gains a domicile if he goes to a country with no intention of settling elsewhere —if he proposes to stay there indefinitely.[3] There is no mystery connected with the act of acquiring or retaining a domicile; it is a mere question whether or not these acts have been accomplished, and if it be found that a settlement has been made with the appropriate intention, a domicile has been secured. Gaining and maintaining a domicile is effected through the exercise of these human powers coupled with an existing state of mind. Undoubtedly most wives are domiciled with their husbands,[4] but now and then parties are separated, and a wife is found, rightfully or wrongfully, away from her husband, settled in a jurisdiction where she intends to remain, having no intention of going elsewhere at any definite time. Are we warranted, when such are the facts and in the face of the rule last stated, in holding that a wife has not gained a domicile in such a place? Can we state as a general proposition that she is unable to have a legal home apart from her husband with the customary domiciliary rights and privileges, regardless of where he is, or what he may be do-

2. "The law commits the power (i. e. to select a domicile) to the one on whom it casts the burden of supporting the family, and makes the husband's domicile the wife's." Bishop, Marriage, Divorce, and Separation, sec. 1714.

3. *Putnam v. Johnson* (1813) 10 Mass. 488; *Appeal of Hindman* (1877) 85 Pa. 466. The rule in England is stricter, and requires an intention to remain in the place of settlement for all time; *Winans v. Attorney General* (1904) App. Cas. 287. Such a rule is not suited to methods of living in this country; this definition (i. e. of domicile, is too limited to apply to the migratory habits of the people of this country," *Appeal of Hindman, supra,* 85 Pa. l. c. 486.

4. In the absence of any proof to the contrary, a wife naturally should be regarded as domiciled with her husband. See *State ex rel. v. Wurdeman* (1907) 129 Mo. App. 263, 108 S. W. 144; *Baldwin v. Flagg* (1881) 43 N. J. L. 495; *Re N. Y. etc. Co.* (1913) 139 N. Y. Supp. 695; *Howland v. Granger* (1900) 22 R. I. 1, 45 Atl. 740.

ing? In answering this question, in later times, the courts have modified the orthodox principle to some extent, and it is intended to consider the changes that have thus occurred in this branch of the law.

I

If a wife, because of her husband's wrongful conduct, is under no duty to remain with him, there should be no objection to her establishing her own independent domicile. She has the power to do so and its exercise apparently conflicts with no justifiable public policy. A decision to the contrary must be based on the fiction of unity of person and involves its application to a state of facts to which it should not be applied. The better authority, therefore, holds that she may acquire a domicile for all purposes under these conditions.[5] The question of a wife's capacity to secure her own domicile, her husband having abandoned or deserted her, has usually been presented to the courts in her action for a divorce. There is considerable authority to the effect that such an injured wife can gain an independent domicile to divorce her husband,[6] but sometimes it is

5. *Gordon v. Yost* (1905) 140 Fed. 79; *Town v. Greaves* (1901) 112 Fed. 183; *Wilcox v. Nixon* (1905) 115 La. Ann. 47; 38 So. 890; *McPherson v. Housel* (1860) 13 N. J. Eq. 35; *Shute v. Sargent* (1892) 67 N. H. 305, 36 Atl. 282; *Commissioners v. Patterson* (1918) 169 N. Y. Supp. 316; *McKay v. McKay* (1915) 192 Mo. App. 221, 182 S. W. 124. See also *Ditson v. Ditson* (1856) 4 R. I. 87, *Wacker v. Wacker* (1913) 139 N. Y. Supp. 78 (a curious decision). But see *contra Nichols v. Nichols* (1899) 92 Fed. 1; *Harrison v. Harrison* (1852) 20 Ala. 629 (*dictum*). In *Wickes' Estate* (1900) 128 Cal. 270 60 Pac. 867 a husband had an incurable disease and was placed in a hospital to remain there. The wife went elsewhere and established herself to remain indefinitely apart from her husband. It was held, contrary to her desire and intent, that she was domiciled with her husband. See further cases cited *supra,* note 1.

6. *State ex rel. v. Davis* (1918) 199 Mo. App. 439, 203 S. W. 654; *Wyrick v. Wyrick* (1912) 162 Mo. App. 723, 145 S. W. 144 (*dictum*); *Harding v. Alden* (1832) 9 Greenl. (Me.) 140; *Clark v. Clark* (1906)

intimated that her power to secure one is limited to acquiring it for divorcing her husband.[7] Under this rule for all purposes other than procuring a divorce, a wife is regarded as being domiciled with her husband. A few cases hold that a new domicile may not be secured even to divorce a defaulting husband. This line of decisions probably would not go so far as to compel a wife to follow her husband into other countries to procure a divorce; she would be allowed to bring such an action at the last matrimonial domicile. Such domicile would be regarded as hers (apart from her husband) for this one purpose, but aside from this exception it is stated in these cases that a wife is still domiciled with her husband, wherever he may be, even though

191 Mass. 129, 77 N. E. 702; *Hunt v. Hunt* (1878) 72 N. Y. 217; *Payson v. Payson* (1857) 34 N. H. 518; *Miller v. Miller* (1913) 67 Ore. 359, 136 Pac. 15; *Ditson v. Ditson, supra,* note 5. See also *Humphrey v. Humphrey* (1905) 115 Mo. App. 361, 91 S. W. 405; *Chapman v. Chapman* (1889) 129 Ill. 386; *Shaw v. Shaw* (1867) 98 Mass. 158. But see *contra Johnson v. Johnson* (1877) 75 Ky. 485, and cases cited *supra,* note 1.

There are some cases holding that when a husband abandons his wife, she may, for purposes of divorce at least, elect whether she will regard herself as domiciled either with him, or at the place where she is actually settled. See *Ensign v. Ensign* (1907) 105 N. Y. Supp. 917; *Masten v. Masten* (1844) 15 N. H. 159; *Duxstad v. Duxstad* (1909) 17 Wyo. 411, 100 Pac. 112. But see *contra Wacker v. Wacker* (1913) 139 N. Y. Supp. 78. See also *Ashbaugh v. Ashbaugh* (1856) 17 Ill. 476. The reason for affording the election is manifestly to protect a deserted wife and make jurisdiction in the case of such a divorce sure.

7. Some cases seem to intimate that the separate domicile may be taken only to secure a divorce. See *State ex rel v. Davis, Wyrick v. Wyrick,* and *Miller v. Miller, supra,* note 6 where although it was not necessary to the decisions, the courts state that the domicile is for divorce purposes alone. Compare, however, *Cheever v. Wilson* (1869) 9 Wall. (U. S.) 108, 19 L. Ed. 604 where the court said (p. 124), "The rule is that she (the wife) may acquire a separate domicile whenever it is necessary and proper that she should do so." The action was one for divorce.

she does not know his whereabouts, and may be unable to ascertain this fact.[8]

The rule that a wife, who is free to leave her husband, is unable to secure a separate domicile except to procure a divorce, and that still more rigid rule that she can be domiciled away from him only in the last matrimonial domicile, and there merely to bring a divorce action do not seem to be desirable. They deny to a married woman, who in substance has been deserted, all right to independent domiciliary privileges unless she frees her husband from the matrimonial bonds. In other words, the law is willing to sell to her the legal ability (she has, as already noted, the physical capacity) to acquire her own domicile if she will pay by giving up what is left of the matrimonial relation. Yet she is not bound to be with her husband, and ordinarily the decision as to whether or not there should be a divorce would rest with her, the innocent party. The price asked for the power is too dear, nor is any real necessity for demanding it perceived.[9]

If the last mentioned rules served to protect the marriage

8. *Hick v. Hick* (1869) 68 Ky. 670; *Johnson v. Johnson, supra,* note 6. *Harteau v. Harteau* (1833) 14 Pick. (Mass.) 181 (but see *Clark v. Clark, supra,* note 6); *Armytage v. Armytage* (1898) P. 178; *Ogden v. Ogden* (1908) 1 P. 46. There is no authoritative ruling in England to the effect that the wife may retain her domicile in the last place where the parties lived together for the purpose of divorce, but there is *dictum* to this effect. See especially *Armytage's* case, *supra.* It was proposed by statute in 1921 to give jurisdiction for divorce in favor of a wife at the last matrimonial domicile in cases where the wife was deserted, but apparently this provision has not as yet been enacted. See *Dicey, op. cit.* 836.

9. "We should hesitate long before deciding that the only exception to the rule that the domicile of the wife follows that of her husband is in judicial proceedings whose express object is to show that the relation itself ought to be dissolved . . . since there is grave danger that serious injustice might arise." *Town v. Greaves, supra, note* 5, 112 Fed. 1. c. 188. In the same case the court said (p. 187): "The wife may not desire a divorce . . . she may be ready to condone the fault of the husband . . . she may desire to avoid publicity; or she may die before she has established her rights (i. e. to a separate domicile) by a judicial decree."

status, or to prevent encroachment upon a husband's rights at a domicile other than his own (and perhaps, in effect at least, *ex parte*)[10] their application might be understandable. A policy against disturbing the marriage status away from the husband, even though he has been delinquent in the fulfilment of his obligations, might be considered desirable in many quarters. But no such policy is fully subserved. The one exception in each case is divorce. A wife, under each decision, is free to sue for divorce in a domicile apart from her husband, but denied capacity to secure any other domiciliary benefits away from him. If any limitations are to be thrust around a deserted wife in the matter of getting an independent domicile, it would be better to hold that she would be free to gain it only in such cases as would not affect her husband's marital rights. If such a rule were adopted it would protect a husband, and at the same time would give his wife some of the freedom, which she, because of his wrongful conduct, is entitled to. Possibly protection should be afforded such a husband, but it should be noted that it will be difficult to safeguard him and his abandoned or deserted wife at the same time.

II

It will sometimes happen that a wife will leave her husband illegally and go to another state, where she will live with the intention of staying indefinitely. Under these circumstances one would be tempted to hold that her domiciliary privileges should be controlled by the law of her husband's domicile, and not by that of her new home; yet that latter country according to ordinary legal principles might logically be considered as her domicile. Most courts, however, hold that such a wife is domiciled

10. It is customary to grant divorces at the domicile of one of the parties upon constructive service. Such divorces, it would seem, are conceded by the United States Supreme Court to be valid within the jurisdiction where rendered in any event (*Haddock v. Haddock*) (1905) 201 U. S. 562,569) and frequently the defendant is unable to or does not defend.

with her husband; that she being the delinquent party, is unable to secure a domicile away from her husband.[11] These authorities, in reality, merely establish and enforce a policy against a guilty wife being afforded any independent domiciliary rights, and entrench themselves in their position behind the fiction of the unity of person of a married couple.[12] Is such an attitude desirable, and if it is, must it be based on a fiction?

When all other means of reaching a preferable end fail, setting up a fiction to accomplish this should be permissible. In the absence, however, of such an impelling cause, a fiction ought not to be assumed, for there is always danger that the false assumption will be regarded as a fact in other like situations ,when uncalled for, and when it may lead to a wrong and unjust conclusion.[13] Naturally, there is sympathy in the assumed case for the husband, and it can be asserted with some degree of justice that his rights as the injured party should be protected, if possible. If the independent domiciliary rights, which his wife contends for will disturb the marriage, or his marital rights in any way contrary to the law of his domicile, she might well be precluded from insisting upon them.

To illustrate the above statements, let it be supposed that the divorce law of a wife's new home is more liberal than her husband's; that there is no cause for divorce at his domicile,

11. *Looker v. Gerald* (1892) 157 Mass. 42, 31 N. E. 709; *Re Bushbey* (1908) 112 N. Y. Supp. 262; *Dutcher v. Dutcher* (1876) 39 Wis. 651. See *contra Irby v. Wilson* (1837) 21 N. C. 568; *Re Walker* (1907) 105 N. Y. Supp. 890; *Saperstone v. Saperstone* (1911) 131 N. Y. Supp. 241; *Re Crosbey's Estate* (1914) 148 N. Y. Supp. 1045; *Prater v. Prater* (1888) 87 Tenn. 78. See also *Ware v. Elory* (1917) 199 Mo. App. 60, 201 S. W. 593.
12. "Of course this is a pure fiction, and fiction always is a poor ground for changing substantial right." Per Holmes, J., dissenting in *Haddock v. Haddock, supra,* note 10, 201 U. S. l. c. 630. *Sed qu?*
13. For example, there is grave danger of the doctrine of estoppel by deed to deny title being carried, in some jurisdictions, to the extent of blocking the title of a *bona fide* purchaser for value, and this even when the deed raising the estoppel is out of the record chain of title. See *Tefft v. Munson* (1875) 57 N. Y. 97.

but there is at her new place of settlement. Many people might, not without reason, consider it quite improper for her to obtain a divorce in the state where she is on grounds not recognized by his law. It might quite reasonably be asked, in view of the wife's admitted duty to be with her husband and subject to his law, why should another jurisdiction make her way easy as a deserter, by freeing her from her husband? Again, assume that the law of intestate succession at a wife's separate residence gives her surviving husband less of her personal property than he would have gotten under the law of his domicile (the jurisdiction which the wife should also have been subject to). It might plausibly be said in this case that it would be unjust to deny to the husband such share of his deceased wife's property as he would have received had she fulfilled her duties and remained with him. It is not therefore surprising to find many courts denying a wife the *power* to bring about these results, and accomplishing this in an easy and effective way by saying that she is not domiciled where she is living, and this in spite of the truth of the case. She is domiciled there because she has exercised human powers of which no law can deprive her.[14] Nevertheless, if we are able to conclusively assert and finally determine that a guilty wife's domicile is with her husband, the state where she is living will have no jurisdiction over her, and her husband's interests will be fully protected. Is the fiction the only means of accomplishing the end? Is a disposition of this type of case pursuant to the fiction the one which the best policy demands?[15]

Frequently domiciliary rights are afforded a party by a positive statutory provision. Usually, if not invariably, divorce law is statutory, and demands that a domiciled citizen shall be allowed a divorce on the establishment of stated grounds. As a

14. See, *supra,* note 3 and text in connection therewith.

15. Jurisdiction has been based on a fiction before this. In the case of transitory actions it was originally conclusively asserted that the act complained of occurred within the realm. The defendant was not permitted to deny this fact. See Marshall, C. J. in *Livingston v. Hall* (1811) Fed. Cas No. 8,411, Vol. 15 p. 660, 663.

rule also, a statute enacts that in the event of intestacy, a domiciled citizen's personal property shall descend to certain designated persons in a manner specifically directed.[16] Now, if a deserting wife is really domiciled apart from her husband, and a statute such as described above is in force at her new home, courts there will be compelled to grant her a divorce even on grounds not recognized at her husband's domicile because the statute so provides. So too, her courts would be compelled to distribute her personalty according to their law, if she died intestate, even at the expense of her surviving husband's rights under the law of his domicile, the place where she likewise should have been domiciled at the time of her death. The matter of policy in the assumed cases has been settled in favor of the wife through the enactment of the statutes. In all cases similar to those supposed, therefore, the courts of a wife's new settlement, in order to prevent her affecting her husband's domiciliary privileges, *must* find that she is domiciled with him; this is essential to escape the statutory provisions. Of course, if such courts do so decide, they will be "judicially repealing" the provisions of a perfectly clear and unequivocal statute.

In cases where there are no statutory provisions, such as those last assumed, perhaps a court at a wife's new home would be free to deny her, when she has illegally left her husband, rights in conflict with privileges afforded her husband by his domiciliary law without saying that she was domiciled with him. In such case, a wife's domiciliary court might say that it had a choice of available law in the matter. It might hold that it would not necessarily be bound to measure such a domiciled wife's rights by the law it customarily applied to like cases, but rather by some other law more appropriate to the particular situation, i. e., the law best calculated to mete out justice in the case at hand. If a court is able to choose its law in this way, it could choose the law of a husband's domicile as best meeting

16. See, for example, sec. 1802 R. S. Mo. 1919 (divorce) and sec. 7787 Iowa Code 1919 (intestate succession).

the needs of the case. No real objection is seen to following this suggestion, if a court is not required by virtue of a statute to do otherwise. After all, the law which a court ought to apply in a given case is that best suited to the situation before it. But the obstacle in the way of always carrying out this suggestion is the one already mentioned, namely that often a court at a wife's new domicile has no discretion, but is positively required by statute to afford to her, as a domiciled citizen, certain expressly mentioned privileges and immunities, which will affect her husband. Accordingly, it can be said that only in a very limited class of cases can courts of a guilty wife's separate home protect her husband according to his domiciliary law without invoking the aid of the fiction of unity of person.

There is no difficulty in carrying out the policy against a wife's state interfering with the rights of an innocent husband, as recognized by his domiciliary law, so long as her jurisdiction favors such a course. If the question is presented in such courts they may deny any privileges inconsistent with her husband's legitimate interests on one or the other of the theories heretofore discussed. But what is there to make it certain that, as a matter of conflict of laws, a wife's jurisdiction will be so liberally disposed? Comity may lead a wife's state to do so, but comity is merely international courtesy, and states are not always courteous. It can be argued that from the very nature of things and people, a wife can not be compelled to remain with her husband; that she can establish herself elsewhere, and a state whither she has removed is actually her sovereign; that if a wife's jurisdiction denies her husband any rights inconsistent with its law, it may be characterized as illiberal and selfish, but nevertheless it acts in so doing within its own legitimate power as an independent government.[17]

17. Take the case of ancillary administration. As a rule the funds will be remitted to the domicile of a decendent, but prior to this, the claims of domestic creditors must be settled. Some jurisdictions even go so far as to prefer their own creditors when the estate is insolvent. See Wharton, Conflicts of Law, 3rd. ed. sec. 640. See also *Lawrence v. Kitteridge* (1852) 21 Conn. 577.

In the United States there is one way in which the above contention may be met successfully and that is by holding, as a matter of due process under the federal constitution, that a state to which a wife, in violation of her duties to her husband, has removed has not jurisdiction of domiciliary matters because she is not domiciled there. This decision would be based on the same fiction, that is that the wife is domiciled with her husband. It is not proposed at this time to discuss in detail the constitutional question, nor the extent to which a wife's state has been denied jurisdiction under federal decisions, but obviously if such a rule were adopted any adjudication by a wife's court could be discredited with impunity by any other court if it were found that the jurisdictional fact (*i. e.* the wife's being away from her husband for cause) did not exist. Moreover, such fact could always be inquired into by any other court, which might be asked to recognize such a judgment.[18] On the other hand, it would follow from this proposition just as easily that if a wife did have cause to leave her husband that her place of residence would have jurisdiction over domiciliary matters, and an adjudication by a court of such state would be predicated upon due process and would be entitled to full faith and credit in all others.[19]

If a husband's domiciliary court (he living apart from his wife) adjudges that his wife is domiciled with him because of her duty to be there, and otherwise duly proceeds to settle domiciliary rights in a way in conflict with the law of his wife's place of residence, such settlement might be accredited on grounds of comity, but comity alone would not require its recognition.[20] However, if the law of the federal constitution (which question

18. *Pennoyer v. Neff* (1877) 95 U. S. 714, 24 L. Ed. 565; *Haddock v. Haddock* (1906) 201 U. S. 562, 50 L. Ed. 867; *Fisher v. Fielding* (1895) 67 Conn. 91, 34 Atl. 714.

19. *Haddock v. Haddock, supra,* note 18.

20. "And as a corollary of the recognized power of a government thus to deal with its own citizens by a decree which would be operative within its own borders, irrespective of any extra territorial efficacy, it follows that the right of another sovereignty exists, under principles of comity, to give to a decree so rendered such efficacy as to

is not here discussed) should be that a wife is domiciled with her husband when she is wrongfully away from him, then such judgment would have to be accredited under the full faith and credit provision of the constitution, *if it was found as a matter of fact* that she was wrongfully away from him. The recognition of the judgment would be compulsory.[21] Conversely, if she was at liberty to be away from him, unless the fiction of unity of person of married people is to be pushed to an extreme point, the judgment would not be based on proper domiciliary jurisdiction, and would not have to be sanctioned by any other court.

Conceding that there is a policy against granting a guilty wife privileges pursuant to an independent domiciliary law, to what extent should it be pushed either as a matter of comity, or as a matter of constitutional right? How far, for example, would it be proper for federal constitutional law, proceeding on a fiction, to go in denying jurisdiction in domiciliary matters to a state where a wife is residing? How far should it go in insisting that a decree of a husband's domicile affecting his defaulting wife should be binding and effective? Does a proper policy demand, for instance, that she shall be denied all rights, because of lack of jurisdiction, even though their exercise will not injure her husband in any possible way? A court could say that a wife should be penalized to this extent, and that she should not be aided in any degree in gaining rights which must be based

that government may seem to be justified by its conception of duties and public policy." White, C. J. in *Haddock v. Haddock, supra,* note 19, 201 U. S. l. c. 570.

21. "Where the domicile of a husband is in a particular state . . . the courts of such state, having jurisdiction over the husband, may, in virtue of the duty of the wife to be at the matrimonial domicile disregard an unjustifiable absence therefrom, and treat the wife as having her domicile in the state of the matrimonial domicile for the purposes of the dissolution of the marriage, and as a result have power to render a judgment dissolving the marriage which will be binding upon both parties and entitled to recognition in all other states . . . ." White, C. J., in *Haddock v. Haddock, supra,* note 18, 201 U. S. l. c. 571.

on a violation of her duty. If a court's attitude were this strict, the fiction should be applied in all events, and any judgment rendered by courts of a wife's residence should be denied recognition, and, as a matter of constitutional law, when questioned, held to be lacking in due process. Under such rulings, the domicile of her husband would have exclusive jurisdiction in all matters of this nature, and its decrees would always have to be accredited.

It is conceivable, however, that this policy need not be carried to this extreme; that the jurisdictional fiction should be said to exist only to protect a husband. If this is the case, then it should be applied only where its repudiation will injure a husband. Obviously this will result in a wife's being held to be domiciled in two places (for different purposes, however) at the same time. Why not? There is no reason why a wife should not be said to be domiciled where she is for purposes of voting (if a statute requires domicile as distinguished from residence), or for suing in the federal courts on grounds of diversity of citizenship, and at the same moment of time with her husband for purposes of divorce, or intestate succession. There should be no requirement of rigid consistency in the application of a fiction, especially when it is used to acquire jurisdiction. In truth the very fact that it is a fiction ought to lead us to say that it is an exception to the general rule.

III

The problem still remains of disposing of cases where the parties are separated by agreement. Occasionally a husband and wife agree to separate, and the wife pursuant to such agreement, establishes herself in a state under such conditions as would normally constitute it her domicile. It has been held that a wife, pursuant to such an agreement, is unable to acquire a domicile of her own,[22] but there are decisions that she may do so, and that

22. *Warrender v. Warrender* (1835) 2 Cl. & Fin. 448, 6 Eng. Rep. 1239; *Jones v. Jones* (1894) 30 N. Y. Supp. 177; *McClellan v. Carroll* (1897) 42 S. W. 185 (Tenn.). See *Comerford v. Coulter* (1899) 82

her domiciliary affairs will be governed by the law of the state to which she has gone.[23]

Which way such a case should be decided is again a question of policy. If separation agreements are to be discountenanced then as a matter of comity a wife should be denied separate privileges and immunities, and the federal decisions under the constitution could deny jurisdiction to a wife's domicile on the same old fiction. However, if there is no policy to be subserved by vitiating the agreement to this extent, all courts could recognize the facts as they actually are, leaving the courts of a wife's domicile free to regulate and order her domiciliary rights. In this country such freedom could be assured by a federal decision to the effect that a husband's domicile had no jurisdiction over his wife, because she was domiciled elsewhere in furtherance of the agreement.

IV

Finally, and at the risk of repetition, it is desired again to suggest that the entire question of a married woman being accorded a separate domicile with the usual legal consequences is only a question of policy, and in the absence of any controlling principle of constitutional law, agreement as to a proper policy among the several states of the Union cannot be assured. There is no way by which we can control the action of the courts of the domicile of either party—short of such a ruling. If a wife's residence, upon appropriate facts, chooses to assert that she is domiciled there, and to rule her accordingly, unless the United States Supreme Court decides that such decision is binding, her husband's domicile is free to disregard the decision, and to settle

Mo. App. 362 and *White v. Glover* (1909) 116 N. Y. Supp. 1059 Compare *Pate v. Pate* (1878) 6 Mo. App. 49.

23. *Smith v. Smith* (1886) 19 Neb. 706 (*dictum*); *Re Geiser's Will* (1913) 82 N. J. Eq. 311, 87 Atl. 628; *Re Florance's Will* (1889) 7 N. Y. Supp. 578; *Colburn v. Holland* (1868) 14 Rich. Eq. (S. C.) 176; *Buchholz v. Buchholz* (1911) 63 Wash. 213, 115 Pac. 88; see *Crosby's Estate* (1914) 148 N. Y. Supp. 1045.

the matter anew and differently. Conversely if a husband's domiciliary court decides to hold that his wife is domiciled there, his wife's domiciliary court may, with equal impunity, consider the former court's adjudication of no effect.

Perhaps such a situation is the most desirable. Perhaps each court ought to be free to handle the problem in this way. But if we do not consider this a proper condition of affairs, the United States Supreme Court appears to be free to make its mind up as what is the proper policy, and to compel recognition of a judgment in any case where it believes that a wife should be subject to her husband's domiciliary jurisdiction by invoking a fiction. The fiction also will effect her inability to submit herself to the jurisdiction of any other state or court.

University of Missouri School of Law. James Lewis Parks