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JURISDICTION TO DIVORCE

It is generally conceded by American authority that a divorce granted by a court, when neither party to the marriage is domiciled within its jurisdiction, is invalid, and this is the rule even though the defendant submits himself to the court's action.[1] This proposition is said necessarily to result "from the right of every nation or state to determine the *status* of its own domiciled citizens or subjects, without interference by [other] tribunals in a matter in which they have no concern."[2] So long as the parties have a common domicile, the matter of jurisdiction to divorce is one of no difficulty, but often parties are not living together, and either the husband or the wife attempts to get a divorce at his or her place of settlement without securing personal jurisdiction of the defendant. Courts have been granting divorces in such instances, upon constructive service of the defendant, in actions that are practically *ex parte*. Are such decrees valid? Are they based upon due process so that they must be accredited in a sister state under the federal Constitution?[3]

There is no question but that in a variety of cases states, through their courts upon constructive service of process, have affected in one way or another existing relations and rights without personal jurisdiction of interested parties. In all so-called actions *in rem*, or *quasi in rem*, as they are established and recognized, it is considered due process for a court to affect such relations and rights, because it is deemed to be essential for a sovereign to have this power for the orderly regulation of its domestic affairs.[4] Perhaps the best illustration of the exercise of such power is the attachment of property, situated within a jurisdiction, where the owner thereof is absent.

1. Andrews v. Andrews (1903) 188 U.S. 14, 23 Sup. Ct. 237, 47 L. Ed. 366; see, also, Wagoner v. Wagoner (1920) 287 Mo. 567, 229 S. W. 1064; Bechtel v. Bechtel (1907) 101 Minn. 511, 112 N. W. 883, 12 L. A. R. (N. S.) 1100 and note; note (1925) 39 A. L. R. 677.
2. Ditson v. Ditson (1856) 4 R. I. 87, 93.
3. Art. 4, sec. 1.
4. ". . .probably not a day passes in which things within their [*i. e.* courts'] jurisdiction are not, by direct attachment or garnishee proceedings, seised, attached, condemned, and sold under their judgments, without other than constructive notice to the non-resident owners of them, in order that these courts may do justice to their own citizens, or even to alien friends, properly applying for their relief. Here, too, necessity requires the courts to dispense with personal notice, in order to give effect to their judicial orders, since otherwise, the state might be full of the property of non-residents and aliens, applicable to all purposes except the commanding ones of justice." Ditson v. Ditson, *supra*, note 2, 4 R. I. l. c. 100. See, also, Dillon v. Heller (1888) 39 Kan. 599. "All states, by proper statutes, authorize actions against non-residents, and service of summons therein by publication only, or service in some other form no better; and in the nature of things such must be done in every jurisdiction, in order that full and complete justice may be done." *id.* 603.

Of course, what a court does in an attachment proceeding is to destroy the owner's "bundle" of rights, powers, privileges and immunities commonly called title.[5] Without the owner ever having been personally subject to the jurisdiction of the court so acting, he is deprived of all legal power over the property, and of all privileges to enjoy the same. Now such action by a court cannot accurately be described as merely affecting a *res*, or inanimate mass, which is before it. In truth, the court does nothing to the *res* as such. The effective part of the judgment is that which deprives the owner of the legal power to assert dominion over the *res*. In other words, the judgment destroys a relation, or dissolves a *status*.[5a]

Again, take the garnishment case where A, in State 1, sues B to recover money due from B to C in order that C's obligation to A may thus be satisfied. It has been held that A may do this, upon constructive service of C, when C is not within 1, and has never come personally under the jurisdiction of 1's court.[6] Here clearly there is no *res* before the court. All that 1's court does in such a case is to destroy a relation. It finally and conclusively deprives C of a right against B, and absolves B from further duties and obligations to C.

5. Green v. Van Buskirk (1866) 5 Wall. (U. S.) 307, 18 L. Ed. 599, 7 Wall. 139, 19 L. Ed. 109; Melhop v. Doane (1871) 31 Iowa 397, 7 Am. Rep. 147. See, also, Pennoyer v. Neff (1877) 95 U. S. 714, 24 L. Ed. 565; Castrique v. Tomlinson (1870) L. R. 4 H. L. 414; Freeman, Judgments (5th ed.) sec. 1378.

5a. Probably, originally, courts thought of proceedings *in rem* as being directed against property alone, and as merely affecting a *res* within the jurisdiction. But at this day it would seem obvious that courts are not interested in "the spatial quality of property" (Carpenter, Jurisdiction over Debts, [1918] 31 Harv. L. Rev. 905, 907). The justification for a court's interfering in this type of case is the necessity of controlling and regulating a situation necessarily subject to its jurisdiction. If a situation of a like nature exists, which is unconnected with tangible property, a like jurisdiction should also exist. "All proceedings, like all rights, are really against persons." Holmes, C. J. in Tyler v. Court (1900) 175 Mass. 71, 76, 55 N. E. 812. See, also, Pennoyer v. Neff, *supra*, note 5, 95 U. S. l. c. 734.

6. Harris v. Balk (1905) 198 U. S. 215, 25 Sup. Ct. 625, 49 L. Ed. 1023; see notes L.R.A. 1915F 880; Ann. Cas. 1918C. 829. For a criticism of the rule in Harris v. Balk, see Beale, Exercise of Jurisdiction in Rem, (1913) 27 Harv. L. Rev. 107; compare Carpenter, *supra* note 5a, 31 Harv. L. Rev. 905. Professor Beale in Haddock Revisited (1926) 39 Harv. L. Rev. 417, 425 suggests that the whole basis of jurisdiction should be consent, and says that "since the decision in Harris v. Balk, the creditor submits his interest in the *chose in action* to any state into which the debtor may choose to go." *Sed qu?* It is believed that any such consent as that suggested by Professor Beale is altogether fictitious. Surely a decision by the federal Supreme Court (at least, if unknown to the creditor) could not affect his state of mind, and create a willingness on his part to submit his power to sue the garnishee to the jurisdiction of any state where the latter's whim might carry him. It is believed that the power of a court in a garnishment case to destroy the creditor's *chose in action* is to be justified, as in all cases *in rem* or *quasi in rem* because a state must have such jurisdiction for the orderly regulation of domestic affairs. It is no more an abuse of power to cut off the absent

A judgment *in rem* then may be described as one which, without personal jurisdiction of a party, often modifies or destroys his rights, powers, privileges and immunities with respect to a certain relation or *status*. If a sovereign state has a sufficient interest in the relation or *status*, which it seeks to affect, or change, its court's judicial decree in this direction should be sustained.

Certainly, a state is vitally interested in the marriage relation of its domiciled citizens. It would seem, therefore, that upon sound analogy its courts, predicating their power to act upon such interest, may enter a decree, upon the petition of one of its domiciled citizens, terminating such citizens' marriage for a cause which it deems sufficient. Such a decree should not be regarded as differing in a substantial way, or in principle from the ordinary decree *in rem*. Further than this, it might well be said that the fact that the defendant-spouse, affected by such a decree, was without and not subject to the jurisdiction of the plaintiff's domiciliary court should not deprive it of the power to end the marriage. If the marriage could be made tangible, we could say, as in all proceedings *in rem*, that the domestic relation is before the court, and, because of the sovereign's interest therein, the court can terminate the same, and, as in all other like cases, by so doing, destroy the powers and rights of the absent defendant.[7]

A possible objection to the above suggestions might be that the domicil of the absent defendant-spouse has a like interest in the marriage relation of the parties and that, for this reason, the plaintiff's domiciliary courts cannot conclusively settle the matter, and thereby oust the former's courts of their jurisdiction over the marriage. It must be conceded

creditor's power to sue and collect the debt, without personal jurisdiction of him, than it is to cut off the absent owner's power of enjoyment of tangible personal property in an attachment proceeding. See Corbett v. Littlefield (1890) 84 Mich. 30, 47 N. W. 581. Smolik v. P. & R. Coal and Iron Co. (1915) 222 Fed. 148, 151, contains a valuable discussion of the question of when jurisdiction by consent exists over a defendant.

7. Ellison v. Martin (1873) 53 Mo. 575; Gould v. Crow (1874) 57 Mo. 200; Anthony v. Rice (1892) 110 Mo. 223, 19 S. W. 423; McDermott v. Gray (1906) 198 Mo. 266, 95 S. W. 431; Lieber v. Lieber (1911) 239 Mo. 1, 143 S. W. 458; Williams v. Williams (1893) 53 Mo. App. 617; Hamill v. Talbott (1899) 81 Mo. App. 210 (*dictum*); Stone v. Stone (1908) 113 S. W. (Mo. App.) 1157. "A divorce suit is a proceeding *in rem*. The status of husband and wife is the *res* to be acted upon and dissolved by the decree. . . . . .This status or relation attaches to each party, and goes with each to their respective domiciles if they happen to have separate domiciles. . . .Every State or sovereign has the right to determine the domestic relations of all persons having their domicile within its territory; and, therefore, where a husband or wife is domiciled within a particular State, the courts of that State can take jurisdiction over the status, and for proper causes act on this *rem*, and . . . .such decrees are entitled to full faith and credit in all the States and Territories." Gould v. Crow, *supra*, 57 Mo. l. c. 203 *et seq*. See, also, (*accord*) Ditson v. Ditson (1856) 4 R. I. 87, the leading case for the view advocated. Compare Burge v. Burge (1902) 94 Mo. App. 15, 67 S. W. 703.

that the defendant's domicil's courts have a similar interest and consequently a like power to divorce the parties. At the same time, it should be noted that this jurisdiction is over the same identical and *indivisible* relation; a "husband without a wife, or a wife without a husband, is unknown to the law."[8] Each domicil is interested in one and the same marriage. It is, therefore, a case where two courts have concurrent jurisdiction over the same subject matter. Under such circumstances it is proper to hold that the court first to take the matter in hand by so doing excludes the other from the power to act.[9] It is believed that the positions suggested can be taken, consistently with established principles, and jurisdiction to divorce placed upon a workable basis. It is now proposed to examine the actual decisions, and to determine to what extent they are in *accord* with the advocated theory.

I

Suppose that Husband and Wife are living together, domiciled in State 1; that Wife leaves Husband and goes to State 2, where she establishes herself with such an intent as would, were she under no legal disability, constitute 2 her domicil; that after Wife's departure, Husband brings a divorce action upon constructive service in 1, where he has continued domiciled without gaining personal jurisdiction over Wife. Should the divorce be granted, conceding that it should not be, if it will not be based upon such due process as to entitle it to full faith and credit under the federal Constitution in all the States of the Union?

8. Gray, J., in Atherton v. Atherton (1900) 181 U. S. 155, 162, 21 Sup. Ct. 544, 45 L. Ed. 794.

9. See quotation from Gould v. Crow, *supra*, note 7. "If one sovereign has power to decree a divorce to its own inhabitant, the other has the same power as a necessary incident of its sovereignty. From the very nature of the case, there can be no such thing as a dissolution of the marriage as to one spouse and a preservation of it as to the other. One cannot be deemed married and the other unmarried. It is the union of the two spouses that constitutes the status. When the union is made twain by a divorce in one state, the status has lost one of its essential supports, and necessarily falls." Miller v. Miller (1925) 206 N. W. (Iowa) 262, 264. "The conclusion of the argument is that, the courts of New York [*i. e.* of the wife's domicil] having the same power to decree a dissolution of the marriage at the suit of the wife, that the courts of Connecticut [*i. e.* of the husband's domicil] would have to make a similar decree at the suit of the husband, it would become a mere race of diligence between the parties in seeking different forums in other States; or the celerity by which in such States judgments of divorce might be procured, would have to be considered in order to decide which forum was controlling. Granting this to be the case, does not every plea of *res adjudicata* presuppose a prior judgment, and is it a defense to such a plea that such judgment was obtained by superiority in a race of diligence? The whole doctrine is founded, if not upon the doctrine of superior diligence, at least upon the theory of a prior judgment, which fixes irrevocably the rights of the parties, whenever and wherever these rights may come in question." Brown, J., dissenting in Haddock v. Haddock (1905) 201 U. S. 562, 616 *et seq.*, 26 Sup. Ct. 525, 50 L. Ed. 867.

If a divorce action is one solely *in rem*, a decree granted the husband in the assumed case in 1 would be valid and would have to be credited in all the States of the Union under the federal Constitution. As already suggested, we would not have to concern ourselves with the matter of the absent wife's domicil, or the question of 1's court's personal jurisdiction over her. While the marriage relation might well be under the control of the wife's domiciliary court, it would be equally under that of 1's court. 1's court, by first taking jurisdiction, and granting the divorce, would dissolve the whole of the marriage, destroy the wife's powers, privileges and immunities as such, and preclude her and all courts from thereafter interfering with or questioning 1's decree. To take this position in regard to 1's judgment would be merely giving it the attributes required to be given to any decree *in rem*, and would be entirely proper.

On the other hand, if a divorce decree is to be characterized as one *in personam*, the validity of a decree granted the husband in 1, without 1's court having personal jurisdiction of the wife, gained by having served her with process in 1, would be very questionable. If a wife is free to acquire a separate domicil, apart from her husband, whether he has given her cause to leave him or not, it is certain that the decree of 1's court, under the assumed facts, would not be based upon due process and would not be binding outside of 1. Indeed, it seems that it should not be binding within 1.[10] That court had not actually gained jurisdiction of the wife's person, and, as she was not a domiciled citizen of 1, it had no inherent personal jurisdiction over her so as to bind her by substituted service.[11]

The rule generally recognized is that a married woman is not free to gain a separate domicile unless she, because of her husband's violation of his marital duties, is privileged to be living apart from him. This

10. "If, without personal service, judgments *in personam*, obtained *ex parte* against non-resident and absent parties, upon mere publication of process, which, in the great majority of cases, would never be seen by the parties interested, could be upheld and enforced, they would be the constant instruments of fraud and oppression." Pennoyer v. Neff, *supra* note 5, 95 U.S. l. c. 726. See, also, Beale, Constitutional Protection of Decrees, (1906) 19 Harv. L. Rev. 586, 594.

11. It has been held that a citizen of a state is "upon principles of international right, subject to the laws, and the jurisdiction of the courts of that state" without personal service of process upon him within the boundaries of such sovereign. Henderson v. Stamford (1870) 105 Mass. 504, 505; Bimeler v. Dawson (1843) 5 Ill. 536, 39 Am. Dec. 430; Sturgis v. Fay (1861) 16 Ind. 429, 79 Am. Dec. 440. See, also, Scott. Fundamentals of Procedure (1922) 41. While the rule as stated is generally conceded, there is a difference of opinion as to what kind of notice such a judgment must be predicated upon. See Raher v. Raher (1911) 129 N. W. (Iowa) 494, 35 L. R. A. (N. S.) 292 and note; Scott *op. cit.* 41 *et seq.* note 25.

principle is based upon a fiction, it being said that whenever it is the duty of a wife to be with her husband, she will be taken as being constructively domiciled with him, and will not be heard to assert the contrary.[12] If this rule of law is accepted, and made controlling in the assumed case, 1's court could have granted the husband a divorce, which would have been conclusive in all other states, if it was the fact that the wife was away from her husband without justifiable cause. Under such conditions, the wife would have been constructively domiciled with her husband, and thus subject to the latter's domiciliary court's personal jurisdiction without service of that court's process upon her within its domain. On the other hand, if the fact was that the wife was under no duty to be with her husband, she could not be considered domiciled with him, and, upon principles already discussed, the decree of 1's court would not bind her personally.

It should be noted also that, if the theory of a divorce action is that it is *in personam* and if the further proposition is that a wife is domiciled with her husband unless she is free, consistently with her wifely duties, to leave him, 1's court, if it were to grant the husband a divorce, could not finally settle the matter. Suppose that 1's court, proceeding in conformity with the suggested propositions, should decide that the wife was a deserter, and consequently domiciled constructively with her husband, and granted a divorce upon that basis; its findings to this effect would be as to jurisdictional facts, and facts of this nature may be inquired into whenever the validity of a judgment based thereon is called into question.[13] It follows inevitably, therefore, that whenever 1's decree affected the wife's rights before the tribunal of another state, she would be free to raise the question of 1's court's jurisdiction over her, and if the other state's court found that she was privileged to leave her husband, and had not been delinquent in going to another state and establishing a domicil there, 1's decree could be discredited and the divorce held invalid. It is believed, however, that this finding could be reviewed by the Supreme Court of the United States, because, if 1's court's finding as to the wife's

12. Loker v. Gerald (1892) 157 Mass. 42, 31 N.E. 709; Prater v. Prater (1888) 87 Tenn. 78. See Ware v. Flory (1917) 199 Mo. App. 60, 201 S. W. 593; Beale, The Domicile of a Married Woman (1917) 2 South L. Quart. 93; Parks, The Domicile of a Married Woman (1923) 29 L. Ser. Univ. of Mo. Bul. 14; note (1925) 39 A. L. R. 710.

13. Thompson v. Whitman (1873) 18 Wall. (U. S.) 457, 21 L. Ed. 897; Hall v. Lanning (1875) 91 U.S. 160, 23 L. Ed. 271; Fisher v. Fielding (1895) 67 Conn. 91, 34 A. 714. Compare Howey v. Howey (1922) 240 S. W. (Mo) 450 where it is said that a judgment may not be collaterally attacked for want of jurisdiction. ". . . if the judgment is to be attacked for infirmities not apparent upon the face of the record, then it must be reached by some direct action." Graves, J. *ibid* 456. But this is not the generally prevailing rule when it comes to the validity of a foreign judgment under the Full Faith and Credit Clause of the federal Constitution. See Haddock v. Haddock (1906) 201 U. S. 562, 26 Sup. Ct. 525, 50 L. Ed. 867.

guilt was correct, its divorce was entitled to full faith and credit under the federal Constitution. But, short of such a finding by the federal Court, the court of any sister state would not be bound to respect 1's decree, but could examine the jurisdictional fact anew, and if it believed that the wife was not guilty in leaving her husband and withdrawing from 1, and 1's court's power, it could with impunity disregard 1's decree.

The New York Court of Appeals and the Supreme Court of the United States had the question raised by the assumed case before them in *Atherton* v. *Atherton*.[14] In that case the husband brought suit for divorce in Kentucky, his domicil at that time and the parties' last and only matrimonial domicil,[15] after his wife had left him and established her home in New York. The Kentucky statute provided that "petitions for divorce must be brought in the county where the wife usually resides, if she has an actual residence in the state; if not, then in the county of the husband's residence. . . ."[16] Pursuant to this statute, the action had been brought in the county of the husband's domicil, service being made upon the wife by publication only. After the husband had commenced his divorce action in Kentucky, and while it was pending, his wife sued him in New York, which she claimed as her domicil, for divorce on the grounds of cruel treatment. Before the New York action came on for trial, the Kentucky court granted the husband a divorce because it found that his wife had deserted him, and he, having appeared in the New York action, pleaded the Kentucky decree and claimed that that judgment bound the wife, conclusively settling the matter in litigation. The New York Court, however, refused to accredit the Kentucky decree, and granted the wife a divorce as prayed for.

The New York Court held that the Kentucky Court did not have jurisdiction of the wife and, therefore, its decree did not have to be recognized under the Constitution. The Court apparently regarded a divorce action as one *in personam*[17] and stated that, as the wife was rightfully away from her husband, she was not domiciled in Kentucky and, for this reason, was not bound by the Kentucky Court's decree unless served with process within that State.[18] The husband appealed from this judgment to the federal Supreme Court and secured a reversal,

14. (1898) 155 N. Y. 129, 49 N. E. 933; (1900) 181 U. S. 155, 21 Sup. Ct. 544, 45 L. Ed. 794.

15. By matrimonial domicil is meant a place where the parties were living together domiciled as man and wife.

16. 181 U.S. l. c. 160.

17. 155 N. Y. l. c. 133.

18. "The New York Court . . . found that she was justified by her husband's acts in leaving his home and in acquiring a new domicil for herself, and that the Kentucky court therefore obtained no jurisdiction over her." Peckham, J. dissenting in Atherton v. Atherton, *supra* note 14, 181 U. S. l. c. 174.

that Court requiring the New York Court to accredit the Kentucky decree and dismiss the wife's action. The opinion of the learned Court possibly is not as clear as might be desired, and it appears to be a matter of some speculation as to what were the exact grounds upon which the New York decree was reversed.[19] It is certain, though, that the Supreme Court thought that the Kentucky Court had the legal power to grant the husband a divorce, which would bind the absent wife under the Full Faith and Credit Clause everywhere in the United States.

The court laid down the broad propositions that the "purpose and effect of a decree of divorce....by a court of competent jurisdiction, are to change the existing *status* or domestic relation of husband and wife, and to free them both. . ." That "the marriage tie, when thus severed as to one party," ceased "to bind either." That "a husband without a wife, or a wife without a husband, is unknown to the law."[20] That the rule "as to the notice necessary to give full effect to a decree of divorce is different from that which is required in suits *in personam*."[21] That a decree of divorce does not fall "within the rule that a judgment rendered against one not within the state, or amendable [amenable?] to its jurisdiction, was not entitled to credit against a defendant in another state; and that divorces pronounced according to the law of one jurisdiction. . . ought to be recognized, in the absence of all fraud, as operative and binding everywhere, *so far as related to the dissolution of the marriage*. . . "[22]

Finally, the Court said that the *Atherton* case only involved the validity of a divorce granted upon constructive service by a court "of the state which had always been the undoubted domicil of the husband, and which was the only matrimonial domicil of the husband and wife."[23] It was then held that the decree granted the husband by the Kentucky Court on grounds of desertion was binding upon the wife, and established "beyond contradiction that she had abandoned her husband" and "precluded her from asserting that she had left him on account of his cruel treatment."[24]

Disregarding, for the moment, the reasons which the Court supplies for its actual decision, the result of its action is to give to a divorce the attributes of an action *in rem* and not of one *in personam*. The Court must have considered the Kentucky Court as clothed with jurisdiction over

19. See White, J. in Haddock v. Haddock, *supra*, note 13, 201 U. S. l. c. 571, 584, and dissenting opinion of Holmes, J. in same case 201 U. S. l. c. 629. See, also, *infra* note 51 and text in connection therewith.
20. 181 U. S. l. c. 162.
21. 181 U. S. l. c. 163.
22. 181 U. S. l. c. 166, quoting from Kent's Commentaries.
23. 181 U. S. l. c. 171.
24. 181 U. S. l. c. 173.

the *whole of the marriage relation*. If this had not been thought to have been the situation, the Kentucky Court could not have settled the matter conclusively unless the wife was amenable to its personal jurisdiction because, otherwise, the whole of the subject matter of the controversy would not have been before it. Now jurisdiction of the wife would have been contingent upon her having been constructively domiciled within the State, and this domicil, in turn, would have existed only if the wife had left her husband and gone to New York without cause. But the Supreme Court did not inquire into the jurisdictional fact of the wife's innocence or guilt in this matter. Without giving this question any consideration whatever, it held that the Kentucky decree bound the wife in all respects and she was not privileged to show that she had been guiltless as a wife in leaving her husband and going to New York. The writer, therefore, believes that the result of the *Atherton* case is only consistent with the theory that a divorce proceeding is *in rem*. If the wife was innocent in going to New York (which she may well have been as a matter of fact) she was not subject to the Kentucky Court's personal jurisdiction; under such a state of facts, what could the Kentucky Court have had before it other than the domestic relation in its entirety? It is only by assuming that the Kentucky Court did have power over this *status* that its decree can be regarded (as the federal Supreme Court did regard it) as effective and conclusive.[25]

The Court justified its decision that the Kentucky divorce bound the absent wife by saying that if it were held otherwise it would be next to impossible for the husband to have obtained a divorce. It was said that if constructive service would not have bound the wife in the Kentucky action, the husband could only have obtained relief by going to New York and "by the very fact of suing there" he would have admitted that "she had acquired a separate domicil, (which he denied,)" and would have disproved "his own ground of action that she had abandoned him in Kentucky."[26] It is believed that the learned Court's process of reasoning at this point must have been somewhat to the following effect: "Divorce can only be gained at the domicil of one of the parties; the wife, in the

25. "Of course, if the wife left her husband because of his cruelty and without fault on her part, as found by the New York court, she was not guilty of desertion. Yet this court [*i. e.* the federal Supreme Court] held that the question of her desertion was not open but was conclusively settled by the Kentucky decree." Holmes J. dissenting in Haddock v. Haddock, *supra*, note 13, 201 U. S. l. c. 629.

"Moreover, *Atherton v. Atherton* decides that the jurisdiction of the matrimonial domicil, at least, to grant a divorce for the wife's desertion without personal service, does not depend upon the fact of her desertion, but continues even if the husband's cruelty has driven her out of the State and she has acquired a separate domicil elsewhere. . . " Holmes, J. dissenting in Haddock v. Haddock, *ibid.*

26. 181 U.S. l. c. 173.

principal case, could not be domiciled in New York unless she was not a deserter; therefore, if the husband sued in New York as his wife's domiciliary jurisdiction, he would have been compelled to have admitted (to have given such court jurisdiction) that his wife was rightfully away from him and by virtue of such an admission, he would have lost his case.

The Court's statements, above quoted, indicate that it felt that *ex parte* divorces frequently serve a useful purpose, and also involve the further rule that a guilty wife is domiciled constructively with her husband. This reasoning, however, is not inconsistent with the proposition that a divorce proceeding is one *in rem* to dissolve the marriage. The wife may well have been domiciled with her husband in Kentucky, but even if she had not been, as already indicated, the Supreme Court could have held, and did hold the Kentucky decree conclusive upon the wife and the New York Court.

In the course of its opinion in the *Atherton* case, the Supreme Court said that "if a wife is living apart from her husband, without sufficient cause, his domicil is in law her domicil and in the absence of any proof of fraud or misconduct on his part, a divorce obtained by him in the state of his domicil, after reasonable notice to her. . . .is valid although she never in fact resided within the state."[27] If this part of the decision were taken alone, it would lead one to believe that unless the wife were constructively domiciled with her husband, a divorce granted at his domicil, without personal jurisdiction of his wife, would not bind the latter, because she would not be subject under such conditions to the personal jurisdiction of the court issuing the divorce. This suggestion would seem to be a corollary necessarily implied and involved in the quoted statement. The proposition is that the divorce is good because the wife is subject to the jurisdiction of the husband's domiciliary court. The only reasonable deduction to make from this is that, if the wife was not so domiciled, the divorce would be futile and ineffective. Such a rule would have to proceed on the basis that a divorce action is one *in personam*; that, absent power over the wife, the court would have no sufficient jurisidction over the marriage relation so as to be able to finally dissolve the same.

But, as has already been pointed out, the Court in the *Atherton* case never did pass upon the wife's innocence or guilt, and consequently could not have regarded the Kentucky Court as having juridiction because the wife was constructively domiciled there. It must have decided, therefore, that jurisdiction of the *status* existed, and that that alone was sufficient. It is, accordingly, urged that this portion of the opinion should be considered as *obiter* and, if the writer has correctly stated the rule of

27. 181 U. S. l. c. 164

law which it seems to involve, the entire statement seems to be inconsistent with the result which the Court finally reached.

In *Thompson* v. *Thompson*[28] the federal Supreme Court had before it a case which it apparently regarded as being an "all fours" with the *Atherton* case[29]. There, the husband had procured a divorce *a mensa et thoro* in Virginia, the domicil of the husband and the last matrimonial domicil of the parties, after his wife had left him. Constructive service of process alone was made upon the wife. The Supreme Court held that the Virginia decree was valid and should be accredited under the federal Constitution. It was said that the *Atherton* case was controlling authority and that "the State of Virginia had jurisdiction over the marriage relation, and the proper courts of that State could proceed to adjudicate respecting it upon grounds recognized by the laws of that State, although the wife had left the jurisdiction and could not be reached by formal process."[30]

It should be noticed that the Supreme Court said that the Virginia Court had *jurisdiction over the domestic relation*, and that again the Court did not go into the question of the wife's innocence or guilt in being away from her husband. It was assumed that the Virginia Court could finally and effectively deal with the marriage *status* and conclude the wife from questioning the propriety of its decree. It is proper, therefore, to say, that a husband, who remains domiciled in the last matrimonial domicil after his wife has left him, may procure a valid and effective decree of divorce there; that the courts of such domiciliary state have jurisdiction of the marriage *status*; that they may affect the same to the point of dissolution upon merely constructive service of the absent wife, and that their adjudication that the husband is innocent and the wife delinquent in her marital duties may not be attacked in any other state of the Union.[31] In view of the decision in the *Thompson* case, as a matter of authority as well as principle, the statements in the *Atherton* case, here-

28. (1913) 226 U. S. 551, 33 Sup. Ct. 129, 57 L. Ed. 347.

29. It has sometimes been said that a divorce *a mensa et thoro* differs in its nature from an action for absolute divorce, and must be characterized in every event as an action *in personam*. See Pettis v. Pettis (1917) 91 Conn. 608, 101 A. 13, 4 A. L. R. 852 and note. "A decree of judicial separation does not affect status;. . . .it is not a final decree, but is terminable at any time by the reconciliation of the parties;. . .it rests upon the jurisdiction of equity to control the conduct of the parties before it. . . Such a decree has no resemblance to a judgment *in rem*." *id.* 91 Conn. l. c. 619. This possible distinction between a divorce *a vinculo* and one *a mensa et thoro* was not considered in the Thompson case, *supra* note 28, and apparently was not insisted upon in argument before the court.

30. 226 U. S. l. c. 562.

31. Gould v. Crow (1874) 57 Mo. 200; Hughes v. Hughes (1925) 278 S. W. (Ky.) 121; Post v. Post (1912) 133 N.Y.Supp. 1057 (affirmed without further opinion [1914] 210 N.Y. 607, 104 N. E. 1139) *accord*. "That question [*i.e.* that involved in the assumed

tofore noted, which seem to be inconsistent with the theory that a divorce action is one *in rem* should be disregarded.

II

Suppose that Husband and Wife have been living together, domiciled in State 1; that Husband leaves Wife there, going to State 2, where he establishes a *bona fide* domicil, and after so doing sues for divorce; may 2's court without gaining personal jurisdiction of Wife, grant him a divorce valid under the Full Faith and Credit Clause? If other states need not recognize the decree would it be valid and effective in 2 so as to bind Wife there?

If the law is that a married woman is constructively domiciled with her husband whenever she is under a duty to be with him, but not otherwise, and, if in the assumed case the wife was violating her duties by remaining in 1, a divorce granted in 2 would be valid even though we regard a divorce action as one *in personam*. The wife, under such conditions would be domiciled in 2, and accordingly amenable to the personal jurisdiction of its courts based upon substituted service.[32] But if a divorce

case] was settled by the Supreme Court of the United States (Atherton v. Atherton, *supra*), when it held that, where the husband remained in the state of the matrimonial domicile, the courts of that state had the power to determine, under reasonable requirements as to notice, whether or not her [*i. e.* the wife's] absence was justifiable, and that such determination is entitled to full faith and credit in other states. . . ." 133 N. Y. Supp. l. c. 1069. Irby v. Wilson (1837) 1 Dev. & Batt (N. C.) 568, *contra*, must be disregarded because inconsistent with the established interpretation of the Atherton case.

32. "If the wife did desert her husband in fact. . . .I understand it not to be disputed that a decree of divorce in the case supposed would be conclusive, and so I understand it to be admitted that if the court of another State on a retrial of the merits finds them to have been decided rightly its duty will be to declare the decree a bar to its inquiry." Holmes, J. dissenting in Haddock v. Haddock, *supra*, note 13, 201 U. S. l. c. 628. North v. North (1905) 93 N. Y. Supp. 512, same case, (1906) 96 N. Y. Supp. 1138, 192 N. Y. 563, 85 N. E. 1113 (service by publication); Hatch v. Hatch (1921) 187 N. Y. Supp. 568 (service without the state); Burlen v. Shannon (1874) 115 Mass. 438 (service without the state), *accord*. See Kendrick v. Kendrick (1905) 188 Mass. 550, 75 N. E. 151. Compare Rontey v. Rontey (1917) 166 N. Y. Supp. 818. "The decisions of the United States Supreme Court established the principle that a decree rendered by a court of the matrimonial domicil upon constructive service is binding on the defendant therein, but a decree rendered upon like service by a court of the husband's domicile, acquired after deserting his wife, is without jurisdiction. It does not follow conversely that if a husband be justified in separating from his wife he may leave her and acquire a new domicile which will become the constructive domicile of the wife as well as a new matrimonial domicile." 166 N. Y. Supp. l. c. 820.

While the authorities seem to establish the proposition that a divorce at a husband's new domicile can be sustained as an action *in personam* when the wife is constructively domiciled with her husband within such jurisdiction, it should be noted that the cases are not in absolute *accord* as to what notice is required to bind a domiciled citizen by a judgment *in personam* when service of process cannot be secured within the jurisdiction. See *supra* note 11. Of course, if a divorce action is to be regarded as

action is as narrow as this, 2's courts' jurisdiction would always depend upon the wife's being wrongfully away from her husband, and this question would be open to inquiry in any court where 2's decree might be presented for recognition. If such court found that the wife was free to remain in 1, the decree could be discredited. Obviously, under such a theory 2's decree would be of little value to the husband, and the matter in litigation could not be conclusively settled by 2's courts' decisions.

In the light of the result reached by the *Atherton* case, however, there should be no reason for considering a divorce action as being one merely *in personam*. Taking into consideration the only portions of the opinion in that case, which are consistent with the Court's sustention of the Kentucky decree, a divorce action was characterized there as being different from one *in personam*, and it was stated, in substance, that a decree by the plaintiff's domiciliary court should bind the absent defendant although the latter was not "within the state nor bound by its laws"[33] and effectively dissolved the marriage. It has already been pointed out[34] that such a theory requires one to think of a divorce action as one brought in the plaintiff's domicil to dissolve a relation over which such domicil necessarily has jurisdiction and power for the purpose of regulating the domestic relations of its own citizens. Carrying this doctrine to its logical conclusion, the proposition would be that the domicil of either spouse should have such power, because of the interest already mentioned, and that, therefore, a decree granted in 2 to the husband in the assumed case would be binding everywhere and entitled to full faith and credit. The entire relation should be considered as within 2's jurisdiction, concurrently with 1, and 2's court's decree should settle the matter, and preclude 1's court as well as all other courts from again examining the question.[35]

In *Haddock* v. *Haddock*[36] the federal Supreme Court was called upon to decide a case involving the same facts as those stated in the last supposititious case. A husband had left his wife in New York, there last matrimonial domicil, gained a domicil in Connecticut, and their obtained *ex parte* a divorce upon constructive service of his wife. Later this decree was pleaded in a New York action, brought by the wife to divorce her husband, but it was not accredited. Upon an appeal to the United States Supreme Court it was held that the Connecticut decree

an action *in personam*, and the wife personally amenable to the jurisdiction of the husband's domiciliary court, because she is likewise domiciled there, the divorce decree will be effective only as a personal decree, if requisite notice of the divorce action is given her.

33. 181 U. S. l. c. 162.
34. See *supra* note 25 and text in connection therewith.
35. See Miller v. Miller, *supra*, note 9.
36. (1906) 201 U. S. 562, 26 Sup. Ct. 525, 50 L. Ed. 867.

was not binding upon the New York Court because the former Court did not have jurisdiction to dissolve the marriage.

The opinion in the *Haddock* case is elaborate, and attempts to make an exhaustive study of the constitutional phase of the question of jurisdiction to divorce. To commence with, the Court lays down some propositions which it considered well settled and fundamental. It then bases its own decision on these rules and on corollaries which it believed could be properly deduced from its premises. The rules stated at the outset were as follows: (1) If a judgment is based upon proper jurisdiction, it must be fully accredited in all the states of the Union.[37] (2) A personal judgment rendered by a court against a non-domiciled citizen upon merely constructive or substituted service is not binding because no jurisdiction is thus acquired of the defendant's person.[38] (3) If a judgment is *in rem*, a court has jurisdiction over "things within its border" to affect the same even though jurisdiction is not directly had over the person of the owner of the thing."[39] (4) States have, of necessity, power over the marriage of their own domiciled citizens, and, if the marriage of a citizen is dissolved by his or her domiciliary court, such "action is binding in that state as to such citizen, and the validity of the judgment may not therein be questioned" on the ground that it was not the exercise of due process.[40] (5) A divorce obtained at a plaintiff's *bona fide* domicil upon actual service of process within such state upon a non-domiciled defendant is valid everywhere.[41] (6) Where a husband wrongfully leaves his wife and acquires a separate domicil, she is not constructively domiciled with him.[42] (7) Where a wife deserts her husband and he remains in the matrimonial domicil, "the courts of such state having jurisdiction of the husband may, in virtue of the duty of the wife to be at the matrimonial domicil, disregard an unjustifiable absence therefrom, and treat the wife as having a domicil in that state. . . . .and as a result have power to render a judgment dissolving the marriage which will be binding upon both parties, and will be entitled to recognition in all other states by virtue of the full faith and credit clause."[43]

From these propositions the Court was able to conclude that, although the divorce was valid in Connecticut, because that State had authority to control the marriage relation of the plaintiff within its bound-

37. 201 U. S. l. c. 567.
38. 201 U. S. l. c. 567.
39. 201 U. S. l. c. 569.
40. 201 U. S. l. c. 569.
41. 201 U. S. l. c. 570.
42. 201 U. S. l. c. 570.
43. 201 U. S. l. c. 571 *et seq.*

aries,[44] still the divorce decree could not be operative as a personal judgment against the wife, because she was neither served with process within Connecticut, nor was she (her husband having deserted her) constructively domiciled in Connecticut.[45] Having thus held that the Connecticut decree could not be sustained as a decree *in personam*, and did not have to be accredited by the New York Court on such a basis the Court inquired: Is a proceeding for divorce of such an exceptional character as not to come within the rule limiting the authority of a state to persons within its jurisdiction, but on the contrary, because of the power which government may exercise over the marriage relation, is it "an exception to that rule," and, therefore, "embraced within the letter or the spirit of the doctrines" which control in actions *in rem*, and dispense with the necessity of a court having personal jurisdiction over a defendant to affect his or her *status* and rights.?[46]

This query is disposed of by saying that if a divorce action is one *in rem*, the *res* would have to consist of the marriage relation, and "as the marriage was celebrated in New York between citizens of that State, it must be admitted. . . .that before the husband deserted the wife in New York, the *res* was in New York and not in Connecticut" and "as the husband, after wrongfully abandoning the wife in New York, never established a matrimonial domicil in Connecticut" it could not be said that "he took with him the marital relation from which he fled to Connecticut."[47] It was further said that the husband could have taken with him only so much of the domestic relation "as concerned his individual *status*" and that, therefore, he must have left in New York "so much of the relation as pertained to the *status* of the wife" and as to this portion of the *status*, which was still rightfully in New York, the Connecticut Court had no jurisdiction.[48] It was accordingly held that the New York Court was not compelled to recognize the Connecticut decree, but was free to entertain the wife's action.

The *Haddock* case was decided after *Atherton* v. *Atherton*.[49] It has already been pointed out that the latter case could not have been based on the ground that the court, which granted the divorce, had power over the marriage relation by reason of the fact that the defendant was domi-

44. This proposition seems open to serious question, as a matter of principle. Unless a court has jurisdiction of the subject matter of an action (whether it be either the person of the defendant, or the relation or *status*) its judgment rendered therein is not predicated upon due process. This proposition is elementary. See Pennoyer v. Neff, *supra* note 5.

45. 201 U. S. l. c. 572.

46. 201 U. S. l. c. 572 *et seq.*

47. 201 U. S. l. c. 577.

48. 201 U. S. l. c. 577.

49. *Supra*, note 14.

ciled within its juridsiction;[50] that the Supreme Court of the United States must have decided in that case, to be consistent with the result that it reached, that one spouse's domiciliary court had complete jurisdiction of the whole *status*, so as to be able to destroy the same, even though such destruction would affect an absent defendant not subject to the court's personal jurisdiction. It seems, therefore, that the actual fact is that the *Haddock* case is not in *accord* with the principles established in the *Atherton* case, which were later followed in *Thompson* v. *Thompson*.[51] But the Court found itself able to reconcile its decision with *Atherton* v. *Atherton* by saying that the divorce in that case was granted at the matrimonial domicil against a wife, who was wrongfully away from her husband, and for that reason constructively domiciled with him.[52] Of course, no such finding was made in the *Atherton* case,[53] and in *Thompson* v. *Thompson* a divorce was again sustained against an absent wife without the Court's considering, much less passing upon, the innocence or guilt of the wife in having left her husband. In spite of this misinterpretation of the facts in the *Atherton* case, both cases today stand as authority in their respective fields. This means that until either one or the other of the decisions is overruled, under one state of facts the federal Supreme Court is committed to the doctrine that a divorce action is one *in rem*, while, under different conditions, it regards the identical action as one *in personam*.[54]

So long as the *Haddock* case represents the last word of the Supreme Court it must be concluded that a divorce granted to a husband at his domicil, which was not the last matrimonial domicil, will not be binding upon any other state court unless either (1) the decree is based upon personal service of process upon the wife within the domain of such domicil-

50. *Supra*, note 25 and text in connection therewith.

51. "There is no difference, so far as I can see, between *Atherton v. Atherton* and the present case, except that in *Atherton* v. *Atherton* the forum of the first decree was that of the matrimonial domicil, whereas in this the court was that of a domicil afterwards acquired . . . . . . I can see no ground for giving a less effect to the decree when the husband changes his domicil after the separation has taken place. . . ." Holmes, J. dissenting in Haddock v. Haddock, 201 U. S. l. c. 629 *et seq.*

52. 201 U. S. l. c. 571 and 614.

53. "Of course, if the wife in the *Atherton* case left her husband because of his cruelty and without fault on her part, as found by the New York court, she was not guilty of desertion. Yet this court held that the question of her desertion was not open but was conclusively settled by the Kentucky decree." Holmes, J. dissenting 201 U. S. l. c. 629.

54. "This [The Haddock case] was a five to four decision. . . .but the majority ruling, to those of us who can well recall, was a shock to the bar of the nation. As Mr. Justice Holmes justly remarks in his dissent, there is no difference between Haddock v. Haddock and Atherton v. Atherton. . . .yet exactly opposite rulings are made. Graves, J. in Howey v. Howey (1922) 240 S. W. (Mo.) 450, 453.

iary court,[55] or (2) it is determined, in favor of the husband, that the wife was unjustified in being away from him. As to this last situation, any court to which such a decree is presented will be free to examine into the question of the wife's innocence, and if it should find this fact against the husband, it may disregard the divorce.[56] But under such conditions the federal Supreme Court will be obliged to also examine the question. The matter involves accrediting a foreign judgment under the federal Constitution, and that Court must, therefore, decide whether or not the judgment was based upon proper jurisdiction. If the wife was guilty, the decree was predicated upon due process and the Constitution requires its recognition, and it is for the Supreme Court to finally determine this question.[57]

While it was held in the *Haddock* case that a divorce granted a husband at his separate domicil other than that where the parties were last living together as husband and wife need not be accredited in other states, the Supreme Court stated that such a divorce would be valid within the state where rendered, and effectively terminate the marriage as to both the parties there.[58] The Court concedes the husband's domiciliary court this inherent power over the dissolution of the marriage relation so far as its own citizens are concerned. It is only in other jurisdictions that the validity of the divorce may be questioned. Moreover, the Supreme Court stated in the *Haddock* case that any state may, if

55. "Where a *bona fide* domicil has been acquired in a State by either of the parties to a marriage, and a suit is brought by the domiciled party in such State for a divorce, the courts of that State, if they acquire personal jurisdiction also of the other party, have authority to enter a decree of divorce, entitled to be enforced in every State by the full faith and credit clause." 201 U. S. l. c. 570. Compare Jones v. Jones (1888) 108 N. Y. 415, 15 N. E. 707. But see *dictum* in Lister v. Lister (1916) 86 N. J. Eq. 30, 44, 97 A. 170.

56. This is what the New York Court did in the Haddock case, and its position was sustained by the Supreme Court.

57. "Furthermore, since the question involves giving full faith and credit to the decree of the first court, there will always be an appeal to the Supreme Court of the United States if the second court finds the jurisdictional facts differently from the first; and the question there can be definitely settled." Beale, Haddock Revisited (1926) 39 Harv. L. Rev. 417, 428.

58. "Where a court of one State. . . .has acted concerning the dissolution of the marriage tie, as to a citizen of that State, such action is binding in that State as to such citizen, and the validity of the judgment may not therein be questioned on the ground that the actions of the State in dealing with its own citizen concerning the marriage relation was repugnant to the due process clause of the Constitution." 201 U. S. l. c. 569. See, also, Davis v. Davis (1893) 22 N. Y. Supp. 191; Ransom v. Ransom (1908) 109 N. Y. Supp. 1143; Atkinson v. Atkinson (1912) 43 Utah 53, 134 P. 595, *accord*. See (*accord* on the general proposition) Lepenser v. Griffin (1920) 146 La. 583, 83 So. 839; Barber v. Barber (1915) 151 N. Y. Supp. 1064.

it so desires, accredit the divorce upon principles of comity.[59] The rule accordingly is that while a husband, having such a divorce, may not insist upon its recognition by other courts in the Union, he may throw himself upon the mercy of a foreign jurisdiction, and his divorce can be recognized there if the courts are so disposed. The tendency of most courts in the United States is to hold such divorces binding and conclusive.[60]

III

Assume that the facts are the same as in the last supposititious case, except that the action for divorce is brought by the wife at the last matrimonial domicil, instead of by the husband at his new domicil, and that the husband is only served with process constructively. Will such a divorce bind the husband in other states? It is assumed that under the decision in the *Haddock* case that the divorce will be effective within the state where rendered.[61]

So far as the writer knows, this question has never been passed upon by the federal Supreme Court, and the entire matter is open to speculation. Even if we are free to consider a divorce action as being *in rem* within what seems to be the principle of the *Atherton* case,[62] a decree rendered in favor of the wife at the last matrimonial domicil of the parties would

59. "And as a corollary of the recognized power of a government thus to deal with its own citizen by a decree which would be operative within its own border, irrespective of any extraterritorial 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 that government may seem to be justified by its conceptions of duty and public policy." 201 U. S. l. c. 570.

60. Anthony v. Rice (1892) 110 Mo. 223, 19 S. W. 423; Lieber v. Lieber (1911) 239 Mo. 1, 143 S. W. 458; Howard v. Strode (1912) 242 Mo. 210, 146 S. W. 792, 146 S. W. 799; Silvey v. Silvey (1915) 192 Mo. App. 179, 180 S. W. 1071; Howey v. Howey (1922) 240 S. W. (Mo) 450; Holdorf v. Holdorf (1924) 197 N. W. (Iowa) 910; Searles v. Searles (1918) 140 Minn. 385, 168 N. W. 133; see, also, Felt v. Felt (1899) 59 N. J. Eq. 606, 45 A. 105, 49 A. 1071. "It is our policy to recognize the validity in this State of such foreign divorces. There is nothing in the Haddock case which in the slightest degree seeks to control our policy in this regard. This policy violates no rights under either the State or Federal Constitution." Ferriss, P. J. in Howard v. Strode, *supra* 242 Mo. l. c. 225. *Contra*: Colvin v. Reed (1867) 55 Pa. 375; compare Davis v. Davis (1921) 70 Colo. 37, 197 P. 241.

In Wagoner v. Wagoner (1920) 287 Mo. 567, 229 S. W. 1064, a divorce granted to the husband without personal service upon the wife was denied validity because the husband did not have a *bona fide* domicil within the jurisdiction granting the divorce. In the course of its opinion the Court apparently expresses unqualified approval of the decision in Haddock v. Haddock (187 Mo. 597 *et seq.*) This portion of the decision may be taken as *obiter*, and, in any event, in view of the later decision in Howey v. Howey, *supra*, can not be regarded as controlling in Missouri.

61. See *supra*, note 58.

62. See *supra*, note 25 and text in connection therewith.

not be conclusive upon the husband unless the wife retained her domicil in that state at the time that she brought her action. Giving a divorce action the widest possible scope, it must be brought at the domicil of at least one of the parties.[63] Obviously, this divorce action is not brought at the domicil of the husband; the court's jurisdiction, therefore, must depend upon the wife's being a domiciled citizen; absent such fact, the court has no power to act and terminate the marriage.

Jurisdiction to divorce in the assumed case, then, will depend upon the wife's legal ability to continue domiciled at the last matrimonial domicil, apart from her husband, after he had left her. If the law is that a wife is competent in every event to maintain a separate domicil, the case would be clear and the divorce would be valid as a decree *in rem* and should be accredited in every state in the Union just as the decree in the *Atherton* case was sustained. But most authority is to the effect that a wife may only acquire a separate domicil, when she is under no duty to be with her husband, and the federal Supreme Court seems committed to this view.[64] If this rule, limiting the wife's capacity to gain a domicil, is to prevail, the court of the last matrimonial domicil of the parties would not have jurisdiction to grant a divorce, if the wife was absent from her husband without cause. Again, this matter is a jurisdictional fact; accordingly, as above stated, every court which is asked to recognize the decree may examine the question of the propriety of the wife's conduct in absenting herself from her husband, and a finding that the wife was not free from guilt in this direction would warrant the decree's being discredited unless such finding were ultimately reversed by Supreme Court of the United States.. Upon principle, therefore, it is believed that a divorce rendered, under the assumed facts, at the matrimonial domicil in favor of the wife can not be said to be conclusive so long as the proposition is that a wife, who is delinquent in her marital duties, is constructively domiciled with her husband, even though one is warranted in saying that a divorce action is one *in rem.*

In view of the opinion in *Haddock* v. *Haddock,* however, it seems impossible to characterize a divorce action as one *in rem,* and to take the decision in *Atherton* v. *Atherton* literally. It may be, and since the decision in *Thompson v. Thompson,* is highly probable that the *Atherton* case will continue to control in cases that are actually on "all fours with it". Still at the same time, the writer does not feel that we are free to ignore the sweeping statements of the late Chief Justice in the *Haddock* case in substance to the effect that a divorce action, when it comes to the mat-

63. See *supra,* note 1.

64. Haddock v. Haddock (1906) 201 U. S. 562, 26 Sup. Ct. 525, 50 L. Ed. 867; see, also, *supra,* note 12 and cases there cited.

ter of accrediting a decree rendered therein, is not an action *in rem*, but one *in personam*, and his further statement that the *Atherton* case was properly decided because the defendant wife there, although absent from her husband's domicil, was constructively domiciled with him, and, for that reason, personally amenable to the jurisdiction of the court that rendered the divorce decree. The *Haddock* case made an exhaustive study of the nature of a divorce action, and the Court approved the proposition that normally a divorce decree, absent personal jurisdiction over the defendant, does not have to be recognized in a sister state. There is no reason, so far as the writer can see, to believe that this rule will not be applied to all divorce decrees rendered in actions where the situation is not the same as that in the *Atherton* case, and consequently not controlled by that authority. Of course, if the principles approved in the *Haddock* case are adopted in the assumed case, a divorce rendered in favor of the wife at the last matrimonial domicil of the parties upon merely constructive service of a non-domiciled husband will not have to be recognized in sister states. Under such conditions, no personal jurisdiction of the husband will have been gained and he will not be bound by the decree. Any court may, however, if it is so inclined, on principles of comity, heretofore discussed, recognized such a divorce, but the wife may not insist as a matter of right that it is binding.

Occasionally the decision in the *Haddock* case has been construed to mean that the court of the last matrimonial domicil of the parties, so long at least as one of the parties remains there, has power to grant an effective divorce even though the defendant is not subject to the jurisdiction of such court personally.[65] Sometimes this position is assumed without any discussion or argument. Sometimes, however, it is said that this proposition is a corollary, necessarily resulting from the actual decision in that case. The argument to this effect is somewhat along the following lines: "It was decided in the *Haddock* case that a deserting husband could not take the matrimonial domicil with him from New York to Connecticut so as to clothe the courts of the latter State with power over the marriage relation as it affected the wife in New York. If the husband could not do this, then the matrimonial relation must have remained with the wife in New York and, therefore, the courts of this State must have retained power and jurisdiction to entirely terminate the mar-

65. Schenker v. Schenker (1918) 169 N. Y. Supp. 35; Griffin v. Griffin (1909) 54 Tex. Civ. App. 619, 117 S. W. 910. See, also, Goodyear v. Reynolds (1922) 134 S. C. 228, 117 S. E. 538. The cases generally concede this. See note (1925) 39 A. L. R. l. c. 634.

riage."[66] These suggestions do not seem to be convincing and indicate, it is believed, a misunderstanding of the learned Court's meaning in the *Haddock* case.

In the first place, the Court in the *Haddock* case considered a divorce action, normally, as being one *in personam*. In order to demonstrate that the Connecticut Court did not have personal jurisdiction over the wife, it showed that that State was not the matrimonial domicil of the parties, and that the wife, for this reason, was not constructively domiciled there. If Connecticut had been the matrimonial domicil of the parties, that fact would have determined the case in favor of the husband, because, according to the Court's notion, it would have brought the wife personally within the power of the Connecticut Court. It is believed that this was the only reason for the Court's emphasizing the fact that Connecticut was not the matrimonial domicil of the parties, and there seems to be no justification for assuming that the Court meant to lay down a rule, even by way of *dictum*, that a court of the last matrimonial domicil of the parties, as such, has jurisdiction *in rem* to dissolve the marriage relation. Finally, it must be said against any such construction, as that last mentioned, of the *Haddock* case that the Court specifically held that the husband did carry with him so much of the marriage relation as affected his own individual *status*, and did subject that much of the marriage relation to the jurisdiction of the Connecticut Court. This holding, precludes any assumption to the effect that the court of the last matrimonial domicil of the parties could, absent personal jurisdiction over the husband, render a valid decree of divorce in favor of the wife. Nevertheless, such a notion prevails in several quarters, and there are several decisions sustaining divorces of this kind, and doing so, not as a matter of comity, but under the belief that they must be accredited under the Full Faith and Credit Clause of the Constitution. It is ventured to suggest that there is no real basis for believ-

66. "Can it reasonably be contended that the husband may obtain a dissolution at the matrimonial domicil binding upon all in a case where the wife deserts him, but the wife may not do so when the husband abandons the wife?. . . . .The Supreme Court of the United States . . . .clearly points out that the fiction that the domicil of the husband is that of the wife does not apply where, as in this case, the husband has wrongfully abandoned the wife. In such a case the husband cannot draw to himself by virtue of the fiction the domicil of the wife; but the matrimonial—that is, the jurisdictional—domicil remains with the wife and within the state of that domicil." State v. Morse (1906) 31 Utah 213, 217, 87 P. 705. "The state having jurisdiction of the matrimonial domicil and of one spouse, innocent according to the decisions of the courts of that State of matrimonial wrong, has juridiction of the matrimonial *status* and is clothed with power, after reasonable *ex rei* notice, to enter judgments concerning it, which must be recognized by courts of the jurisdiction of the other spouse." Perkins v. Perkins (1916) 225 Mass. 82, 87, 113 N. E. 841 (*dictum*). See, also *dictum* in Thompson v. Thompson, *supra*, note 30.

ing that such a divorce is valid everywhere, as a matter of federal Constitutional law; that until there is an authoritative ruling on this question by the Supreme Court it is an unwarranted assumption to say that such a divorce will be good in states other than that where it is rendered.

IV

The last possible situation, where the validity of a foreign divorce decree may be questioned, is where the parties have separated, and the wife seeks a divorce upon constructive service of her husband at her alleged domicil, which is not, however, the last matrimonial domicil of the couple. It may be that in this case the husband has remained at the last matrimonial domicil, or established a new home elsewhere, but it is not perceived how this fact could affect the question of the wife's domiciliary court's power to conclusively terminate the marriage.

All the difficulties against sustaining such a divorce under the Full Faith and Credit Clause are met with here that were encountered in the case where the wife sought a divorce at the last matrimonial domicil. Unless a divorce action is one entirely *in rem* and the wife is also legally capable of establishing her own separate domicil in every event, it is believed that such a divorce may not be conclusive.

Such a decree could not be sustained as one *in personam* because the husband was not domiciled within the state where it was rendered. He is always privileged to settle where he sees fit, and is never constructively domiciled with his wife. It follows, therefore, that if the holding in the *Haddock* case that a divorce action is usually one *in personam* controls (and it must be considered as controlling) a divorce granted by the wife's new domiciliary court will not be binding in another jurisdiction. But even were the federal Supreme Court to disregard the *Haddock* case and return to the broad principle, which the writer believes that the *Atherton* case must have stood for, namely, that a divorce action is one directed against the marriage relation, which is subject in its entirety to the jurisdiction of the domiciliary court of either spouse, a divorce granted to the wife in the assumed case would not necessarily be conclusive in other jurisdictions. If the fiction that a guilty wife is constructively domiciled with her husband is to prevail, the wife will have no domicil where she brings her action unless it is her legal privilege to be living there. This is the same old jurisdictional fact, which may always be inquired into by any court that is asked to accredit the decree. If the latter court finds that the wife is guilty in being away from her husband, the divorce can be disregarded unless the federal Supreme Court should reverse such a finding, thereby making the court which gave the divorce

a domiciliary court and clothing it with jurisdiction over the marriage relation.

It is believed, therefore, that it is proper to say that a divorce granted in the assumed case, in the face of existing authority, cannot be regarded as binding,[67] and will never be so unless the Supreme Court is willing to reverse itself and hold (1) that a divorce action is one *in rem*, and (2) that a married woman has the *legal* power to acquire a domicil apart from her husband whenever she is living away from him with appropriate intentions. Of course, under the *Haddock* case, the divorce will be valid where granted, if the wife was actually domiciled there, and as a matter of comity may be accredited by any other state court that desires to do so.[68]

It has already been pointed out that there is a disposition upon the part of some courts to say that the *Haddock* case requires a divorce granted to either spouse by a court of the last matrimonial domicil to be accredited under the federal Constitution. Conceding that this is a proper interpretation of that decision, it will not aid in the sustention of a divorce granted under the assumed facts. The jurisdiction to which the wife removed, even though she were free from guilt in being away from her husband, did not become a matrimonial domicil, because the husband had never settled there, nor been under a duty so to do.[69]

67. Thompson v. Thompson (1918) 89 N.J. Eq. 70, 103 A. 856 (statute); Re Kimball's Estate (1898) 155 N.Y. 62, 49 N.E. 331; Baylis v. Baylis (1913) 207 N.Y. 446, 101 N.E. 176. See, also, McCreery v. Davis (1894) 44 S.C. 195, 22 S.E. 178.

68. In Williams v. Williams (1893) 53 Mo. App. 617, such a divorce was recognized, the court erroneously holding that it was binding under the Full Faith and Credit Clause of the federal Constitution. See, *accord* with the text, Buckley v. Buckley (1908) 50 Wash. 213, 96 P. 1079; Shafer v. Bushnell (1869) 24 Wis. 372. See, also, Anthony v. Rice (1892) 110 Mo. 223, 19 S.W. 423; Taylor v. Taylor (1912) 64 Fla. 521, 60 So. 116. If personal service is made upon the husband, the divorce is binding under the Full Faith and Credit Clause, Dawson v. Torre (1921) 116 S.C. 338, 108 S.E. 101.

69. But see, Montmorency v. Montmorency (1911) 139 S.W. (Tex. Civ. App.) 1168; Parker v. Parker (1915) 222 Fed. 186 (*dictum*). "As we have said, to our minds the case of Haddock v. Haddock is based on the fiction that the matrimonial domicile stays with and follows the innocent party, whether husband or wife, and that, no matter where the innocent party may be, the matrimonial domicile is there, and the guilty party is always constructively present, and therefore the court of that state has constructively both parties before it." 139 S.W. l. c. 1172.

In Montmorency's case, the Texas Court granted the wife a divorce upon constructive service of the husband. Texas was not the matrimonial domicil in the sense that the parties had lived there as man and wife. The Court believed that it could render a divorce that would be binding in all the States of the Union, because it thought that the wife, when wrongfully abandoned by her husband, retained the marriage relation and could take it with her to a new domicil and subject it to the jurisdiction of the courts of such a new domicil. Professor Beale (Haddock Revisited, (1926) 39 Harv. L. Rev. 417, 426) characterizes the Montmorency case as "as excellent statement of the meaning of the decision in the Haddock case." The writer ventures the opinion that the meaning attributed to Haddock v. Haddock in Montmo-

V

As a result of the foregoing analysis of the federal authorities, it is believed that there are only three situations, where it can be said with any degree of certainty that a foreign divorce must be held binding under the federal Constitution in all the States of the Union, namely, (1) where the husband obtains it at his own domicil, which was also the last matrimonial domicil of the parties upon constructive service of his wife;[70] (2) where he obtains it at his domicil, which he has established after leaving his wife upon constructive service of the latter, but in order that such divorce may be binding elsewhere, it must be proved to the satisfaction of the court, which is asked to recognize the divorce, or to the federal Supreme Court, upon a review of the former court's decision, that the wife was under a duty to be with her husband;[71] and (3) where the divorce is obtained by either spouse at the domicil of one of the parties after personal service of process upon the defendant within the jurisdiction.[72]

rency's case is not justified. The majority opinion in the Haddock case regarded a divorce action as one *in personam.* It attemped to explain Atherton v. Atherton on that basis by saying that the wife in that case was unjustifiably absent from her husband, and was, therefore, subject to the matrimonial domicil's court's jurisdiction. See *supra,* note 53 and text in connection therewith. Obviously under the theory adopted in Montmorency's case a divorce action must be regarded as one *in rem.* A divorce was granted in that case to the wife at her separate domicil, without the court's having gained personal jurisdiction of the husband, a non-domiciled party. The court thought itself able to do this because it said that the wife as an innocent party could carry the matrimonial *res* from the matrimonial domicil to her afteracquired domicil. It is submitted that such a notion of the Haddock case does not even approximate the actual decision; nor can the writer find any *dicta* therein upon which to base such a rule.

In Ditson v. Ditson (1856) 4 R. I. 87, a divorce was granted a wife at her separate domicil (because she was rightfully away from her husband) upon constructive service of the husband. The basis of that decision was not that the court which granted the divorce became a matrimonial domiciliary court. The broad rule was there stated to be that *any* domiciliary court has power to grant a divorce, because the action was one *in rem.* The *entire res* was regarded as being before any domiciliary tribunal.

70. Thompson v. Thompson, *supra,* note 28.

71. See *supra,* note 32 and cases there cited.

72. See *supra,* note 41. Suppose that one spouse goes to the domicil of the other, this latter jurisdiction not being his or her own domicil, and there sues for a divorce, (the local statute so permitting) upon actual service of process upon the defendant; would such a divorce be valid everywhere within the Full Faith and Credit Clause? It is to be noted that White, J. in the Haddock case (201 U. S. l. c. 570) says that the divorce must be brought in a domiciliary court by the "domiciled party." This statement was *dictum* and, therefore, carries with it no controlling implication that a divorce, under the assumed facts, would be invalid. It would seem that such a divorce would be proper. Haddock's case merely involves the proposition that normally a divorce action is to be regarded as one *in personam,* and that a divorce, granted at a domiciliary court of merely one of the spouses, without jurisdiction of the defendant's person, is not predicated upon due process. But the Haddock case concedes

Perhaps decrees granted under different facts and conditions will ultimately be sustained by the United States Supreme Court. But, as the writer has endeavored to point out, it seems that to do so will involve a repudiation of most if not all of the doctrines announced in the *Haddock* case and a return to the principles upon which the *Atherton* case must have been based to the effect that a divorce action is one *in rem* in the fullest sense of that term.

It is clear, however, that under the federal authorities every state has the power to grant its own citizens a divorce upon constructive service, which will be effective as due process within its own jurisdiction even against a non-domiciled spouse, who has never come within its domain and, therefore, has not become subject in any way to the jurisdiction of such state's court. The opinion in the *Haddock* case concedes such authority to every domiciliary court, and perhaps implies that such control over a marriage is essential for orderly regulation of domestic affairs.[73] While such a decree, unless it falls within one of the three mentioned situations, need not be recognized under the federal Constitution by other state courts, such courts are free to accredit it if so disposed.

There is no legal impediment in the way of a husband abandoning one domicil and establishing another; he may gain a new domicil even though he may not at the time of so doing make proper provision for his wife; nor is there anything to prevent a wife gaining a new domicil away from her husband, at least if she is under no duty to be with him. It is apparent, therefore, that cases are sure to occur where either a husband or a wife will be found, legally established in a separate *bona fide* domicil, seeking a divorce there without the court of such a state being able to acquire personal jurisdiction of the other party to the marriage. It will also be inevitable that such domiciliary court, under such facts, will grant a divorce.[74]. Domiciliary jurisdictions will free their own citizens

that either domiciliary court may grant a divorce, because it is sufficiently interested in the domestic relation. If, then, such a court has jurisdiction of the defendant's person, no more should be needed to make a divorce, granted under such conditions, valid everywhere. So far as the writer knows this case has never been before the federal Supreme Court. See Cole v. Cole (1924) 96 N. J. Eq. 206, 124 A. 359. Compare Lister v. Lister (1916) 86 N. J. Eq. 30, 40, 97 A. 170. But the statutory remedy is usually confined to residents. See, Pate v. Pate (1878) 6 Mo. App. 79; note (1925) 39 A. L. R. l. c. 717.

73. 201 U. S. l. c. 569. The Court says that every government "must" have "inherent" power over the marriage relation of its own domiciled citizens, regardless of whether or not the other spouse has the same domicil.

74. Curiously enough courts which have been unwilling to recognize foreign divorce decrees under the doctrine of Haddock v. Haddock have been compelled, pursuant to mandatory legislation, to grant divorces to their own domiciled citizens of the same kind as the foreign divorces which they refuse to recognize. See Ransom v. Ransom (1908) 125 App. Div. 915, 109 N. Y. Supp. 1143.

from the bonds of matrimony, pursuant to their own policies, regardless of what may be the views of other states concerning divorce and the grounds upon which it should be granted. It is also certain that there never will be unanimity of opinion in the various states as to what should constitute grounds for divorce. Some jurisdictions, in the eyes of others, will be too liberal, and some too strict. What then should be the attitude of a court with respect to a foreign decree, granted at the separate domicil of one of the parties without personal jurisdiction of the other, which it is not constitutionally bound to recognize?

If a foreign decree of divorce is not recognized, we shall always have the curious and unnatural result of a man and woman being unmarried in one state but married in another. So long as the parties remain in this position, it is perhaps not an impossible situation, but it hardly seems a desirable one. But often parties do not continue in the condition that existed immediately following the divorce; frequently remarriage occurs and as likely as not children are born of the second marriage. Under such conditions, if the divorce is not recognized as effective, the unfortunate situation will be that a man or a woman will be living in adultery in one state, and that children born of the union will be illegitimate. Such a condition of affairs, from a practical as well as from a moral point of view, must be regarded as intolerable. It would, therefore, seem that the very much lesser of two evils would be for a court which is asked to recognize the foreign decree to do so and, as a result, avoid rendering adulterous such subsequent marriages and bastardizing children born thereof. Some courts, recognizing these unfortunate consequences, which may result from a refusal to accredit foreign decrees, have been liberal enough to so do regardless of any interest they may have had in the marriage relation thus affected. The position taken is that it is better policy, in the long run, to consider the marriage terminated by the decree, even though in the first instance, had the matter been presented to them, they would not have granted a divorce upon the grounds upon which it was entered.[75]

75. "From our point of view, the operation of such a doctrine [*i. e.* the doctrine of Haddock v. Haddock] results in much practical injustice to innocent parties, and is repugnant to the larger public policy which should govern the states in their mutual relations. If it were adopted by all of the states, it could hardly fail to result in bedlam and confusion. It would become a veritable trap for the innocent victims of second marriages. . . . .

"A repudiation by the courts of one state of the decrees entered in another on a subject which so permeates the domestic life and the status of innocent persons must ultimately result in a new and exceptional status, that of the half-divorced and half-bigamous, and that of contingent legitimacy. A child of the new status could maintain his legitimacy only so long as he remained within the confines of one state." Miller v. Miller (1925) 200 Ia. 1193, 206 N. W. 262, 265.

"(1) A divorce suit is a proceeding in rem; (2) the status of husband and wife is

At the same time other courts, while admitting the desirability of accrediting foreign divorce decrees, have been unwilling to do so unless the defendant-spouse received actual notice of the pendency of the divorce action. Under such a line of reasoning, it is said that the divorce will be recognized if the defendant had an opportunity to defend against the action, but not otherwise. These courts think that it is essentially unfair to bind a non-domiciled defendant, not subject to the personal jurisdiction of the court which grants the divorce, unless an opportunity has been afforded to him or her to defend upon the merits. They are willing to recognize the decree although not constitutionally required to do so, if notice has been brought home to the absent party of the fact of the pendency of the action.[76] Such a requirement would seem to go further than actual "due process" often demands. Notice of the pendency of an action has not by any means always been held essential to bind an absent defendant. The usual rule is that merely the best means under the particular circumstances of a given case must be used to bring notice of the action home to the defendant.[77] It would seem, therefore, that the position that these courts take is rather extreme, and goes further than analogous cases have as a rule required. Of course, if the absence of personal notice to the defendant-spouse is a valid objection to the sustention of the decree, it should serve to prevent the recognition of the same by any tribunal, even though such court has no especial interest in the defendant or the

the res; (3) the status attaches to each of the parties; (4) such status (the res) goes with each of the parties to their respective domiciles; (5) the wife can have a separate domicile from the husband; (6) every state has the sovereign right to determine the domestic relations of all persons having their domicile within its territory; (7) where either husband or wife has a domicile in the state, the courts of the state have jurisdiction over the status (the res), and for proper causes can dissolve the marriage relation; and (8) the decree so pronounced is a judgment in rem." Graves, J. in Howey v. Howey, 240 S. W. (Mo.) 450, 454. The foregoing excerpt illustrates admirably the attitude of the Missouri Courts with respect to a foreign divorce decree. If a decree is granted by a domiciliary court that ends the matter. Perhaps the learned Judge overstates the law in Missouri in proposition 5, quoted above. The writer doubts whether it is proper under the authorities to say that a wife may in every event acquire a domicil apart from her husband. Whether a wife may do so when it is her duty to be with him, *qu*? See *supra*, note 12, and authorities there cited.

Apparently, under the Missouri authorities, a foreign divorce decree may not be collaterally attacked; Howey v. Howey, *supra*. But, see, Wagoner v. Wagoner (1920) 287 Mo. 567, 229 S. W. 1064.

76. Joyner v. Joyner (1908) 131 Ga. 217, 62 S. E. 182; Solomon v. Solomon (1913) 140 Ga. 379, 78 S. E. 1079; Felt v. Felt (1899) 59 N. J. Eq. 606, 45 A. 105; Flower v. Flower (1886) 42 N. J. Eq. 152, 7 A. 669. See, also, Wand v. Wand (1924) 155 La. 257, 99 So. 211; Perkins v. Perkins (1916) 225 Mass. 82, 113 N. E. 841.

77. "No doubt there may be some extension of the means of acquiring jurisdiction beyond service or appearance. . . . ." McDonald v. Mabee (1916) 243 U. S. 90, 91, 37 Sup. Ct. 343, 61 L. Ed. 608. See Scott, Fundamentals of Procedure (1922) 41 *et seq.* It is certainly true that in actions *in rem* actual notice of the tendency of the action is not essential to the entry of a valid judgment.

marriage relation. The objection is that the decree is inherently unjust, because it bears no semblance to due process.

Assuming that absence of notice to the defendant of the pendency of the divorce action is not a valid objection to the recognition of a decree rendered therein, or, if it is, that such notice has been given, what further objection can be advanced to the sustention of the decree when it need not be recognized under the Full Faith and Credit Clause, and what courts are in a position to make such objection? Suppose that the parties have been living together as man and wife in State 1; that the plaintiff procures a divorce in State 2, a newly acquired domicil, upon constructive service of the defendant, the latter having remained domiciled in State 1. Why should 1's court refuse to recognize 2's decree?

Some courts have taken the extreme position that under no circumstances would the divorce granted in 2 be recognized in 1 because it is an unwarrantable interference with a domestic relation which is subject to its exclusive jurisdiction. It is said that, so far as defendant's *status* is concerned, it is for 1's court to control the same, absent personal jurisdiction over him or her acquired by 2's court. Under such decisions jurisdiction is absolutely denied 2's court, and the merits of the case will not be considered to any extent. The proposition is rigidly maintained that no court can affect the *status* of 1's domiciled citizen of whom it has no personal jurisdiction. Protection of a domiciled citizen's *status* is made all important, and the fact that 2 has jurisdiction to free the plaintiff as its citizen is ignored so far as the federal authorities make this possible.[78]

While there are decisions that go this far, others take a midway position and hold that the divorce granted by 2's court will be recognized if it was rendered upon grounds that would have been recognized as proper for divorce in 1, and no fraud was practiced by the plaintiff in procuring the decree.[79] Courts which adhere to this rule feel that a domestic policy demands that the marriage relation of its domiciled citizens be maintained unless its dissolution be sanctioned by their own law; that a plaintiff-spouse may not circumvent this policy by going elewhere and procuring a divorce. These courts are willing to permit another tribunal

78. "The injured party in the married relation must seek redress in the *forum* of the defendant. . . .'in proceeding to dissolve a marriage'. . .'the parties stand upon a level of rights; when the injured party seeks a new domicil, and the domicils are, therefore, actually different, there is no greater reason why the husband's new domicil should prevail over the wife's than that hers should prevail over his. In this aspect, justice requires that neither should draw the other within the folds of a foreign jurisdiction'. . . ." Reel v. Elder (1869) 62 Pa. 308, 314. See, also, People v. Shaw (1913) 259 Ill. 544, 102 N. E. 1031; People v. Baker (1879) 76 N. Y. 78.

79. Joyner v. Joyner (1908) 131 Ga. 217, 62 S. E. 182; Humphreys v. Humphreys (1924) 139 Va. 146, 123 S. E. 554; Corvin v. Commonwealth (1921) 131 Va. 649, 108 S. E. 651. See, also, Gildersleeve v. Gildersleeve (1914) 88 Conn. 689, 92 A. 684.

to terminate the marriage, but only upon grounds that are in *accord* with their own policy. These cases are obviously less severe than those which deny all power to 2's court to affect the marriage relation beyond 2's jurisdiction, but they fail to consider and weigh in the balance the possible undesirable consequences already noted, which may result from refusing to recognize the decree. The domestic policy of 1 is vindicated at all cost.

Let it be assumed that the facts are the same as in the last case except that, at the time that the plaintiff procured a divorce in 2, the defendant had become domiciled in State 3. Should this fact change 1's court's attitude towards 2's decree, assuming that the general policy of 1 is against the sustension of divorce decrees for the reasons last given? The proposition firmly embedded in the law of domestic relations is that power to dissolve a marriage is vested exclusively in the domiciliary courts of the parties.[80] 1's court, by the removal of both the plaintiff and the defendant from its jurisdiction, before the divorce action was begun in 2, ceased to be a domiciliary tribunal of either party. 1's court could no longer say that it should refuse to accredit the decree to protect its domiciled citizen, or to maintain its policy against the dissolution of marriages subject to its jurisdiction. It cannot reasonably be asserted that after 1 ceased to be the matrimonial domicil, and the domicil of the defendant that it had any policy of its own to protect or vindicate, which required it to repudiate the decree of 2. This being the case, 1's court might hold that it had no concern in the marriage at all, and accordingly, as a matter of comity, recognize 2's divorce. The mere fact that 1 formerly was the matrimonial domicil of the defendant should make no difference. 1's interest in the entire matter ceased when the parties moved beyond its jurisdiction. It is not perceived how the fact that 1 formerly was a domiciliary jurisdiction has any bearing upon this suggestion. When that relation ceased 1's interest of necessity ended.[81]

It follows also logically enough from the foregoing discussion that where a foreign divorce decree is presented to any court which was not a domiciliary court of the defendant at the time that the divorce was granted, such court can not be moved properly to repudiate the decree by reason of the fact that it had any policy to further, or any citizen to protect, and

80. See *supra*, note 1.

81. "But it seems to me that when this principle of state policy is invoked the party invoking it must bring himself within its protection. I think, when he attacks a foreign decree entered against him without personal service on the ground that the foreign court was without jurisdiction, he must show that he was a resident of the state of New York at the time that the foreign decree was obtained." Percival v. Percival (1905) 106 App. Div. 111, 94 N. Y. Supp. 909, affirmed without further opinion (1906) 186 N. Y. 587, 79 N. E. 1114. See, also, Hubbard v. Hubbard (1920) 228 N. Y. 81, 126 N. E. 508.

such court might for these reasons, regardless of how it might be disposed to act in cases affecting its own citizens, accredit the decree upon principles of comity.

If the law of a given state is, however, that a foreign divorce decree, not entitled to recognition under the federal Constitution, should not be accredited either (1) because it usurps authority over defendants subject exclusively to its domiciliary jurisdiction, or (2) because it violates its policy concerning the dissolution of the marriage *status*, it might well be said that the general principle back of and underlying such a rule is that no state which has personal jurisdiction merely of the plaintiff may interfere (except where authorized under federal decisions) with the *status* of the defendant unless such defendant's domiciliary courts permitted such interference. The proposition would be that it is improper for a court to attempt to affect the domestic relation of an absent non-domiciled citizen of whom no personal jurisdiction has been gained unless the latter's domicil permitted such interference. If such a principle were adopted the validity of a foreign divorce decree should always be determined by the law of the defendant's domicil at the time that the divorce was rendered. If such a divorce is presented to a non-domiciliary court it should be guided in the matter of recognizing or repudiating the same by the law of the defendant's domicil at the time that the divorce was granted. There are decisions to this effect.[82] Certainly, there would seem to be no justification for a court, which was not that of the domicil of the defendant, when the divorce was granted, to refuse to recognize the divorce just because that was its attitude with respect to foreign decrees affecting its own citizens, if the defendant's domiciliary law at the time of the divorce recognized the same as binding. If this were done, the court would be enforcing its own domestic policy with respect to a foreign relation with which its policy had no legitimate or reasonable connection.[83]

82. "Whether it [*i. e.* the foreign divorce decree] is valid depends upon the status of the defendant when it occurred. If the state of which she was then a citizen recognizes such a decree. . .and gives it full force and effect then it is not for us to say that it is void as to her." Ball v. Cross (1921) 231 N. Y. 329, 332, 132 N. E. 106, Dean v. Dean (1925) 241 N. Y. 249, 149 N. E. 844. See, also, People v. Shaw (1913) 259 Ill. 544, 102 N. E. 1031.

83. In Parker v. Parker (1915) 222 Fed. 186, A married B in California. Thereafter A deserted B in California, removing to Missouri, where he divorced B upon constructive service. After this divorce, A married C in Iowa with whom he removed to Texas where they established a domicil, raised a family of nine children, and accumulated a substantial fortune. Some thirty years after the Missouri divorce A died, domiciled in Texas, leaving C and his children by C him surviving. B, who had remained in California, brought an action in Texas, claiming to be the lawful widow of A, and rights as such in A's estate. The Circuit Court of Appeals decided in favor of A, thereby determining that C was an adulteress and that the children, born to A and C, were illegitimate, although such children were and always had been domiciled citizens of Texas. The court did not consider the law of California in reaching its de-

VI

Whenever a court takes the position that a foreign divorce decree should not be recognized, the question may be asked, who is free to question the validity of the same, and under what conditions may such person question it?

It would seem, if the federal authorities do not require the recognition of the decree, that the domiciliary state of the defendant, at the time that the divorce was granted, could always question the decree's validity, and could, if either party remarried prosecute for bigamy.[84] It would seem also that, if the divorce was invalid according to the law of defendant's domicil at that time, any other state (other than that which rendered the decree) would be equally free to question the validity of the divorce[85]. However, if the divorce was valid according to the law of the defendant's domicil at that time, it would seem upon principles heretofore discussed that no state should be in a position to question the same.[86]

It is usually held that a plaintiff, who has procured a divorce, may not dispute its effectiveness; he is said to be "estopped".[87] From a practical point of view this is desirable. But is such estoppel consistent with the proposition advanced by some courts that a foreign divorce, granted upon grounds other than those allowed by the defendant's domiciliary court at the time of the decree, is objectionable, unless accreditable under the Constitution, because it violates its policies concerning the dissolution of the marriage relation? As already noted,[88] some courts hold

cision, but contented itself with saying that the public policy of Texas denied recognition to decrees rendered under the conditions that the Missouri decree was rendered. In other words, the public policy of Texas required the court to bastardize citizens of Texas. It is difficult to see what useful policy is subserved by such a decision. It should be noted that the Circuit Court of Appeals assumed that A's divorce was valid in Missouri, where rendered. 222 Fed. l. c. 189.

84. Corvin v. Commonwealth (1921) 131 Va. 649, 108 S. E. 651. See, also, People v. Baker (1879) 76 N. Y. 78, 32 Am Rep. 274; People v. Karlsioe (1896) 1 App. Div. 571, 37 N. Y. Supp. 481. Compare State v. Schlachter (1861) 61 N. C. 520.

85. But see Parker v. Parker, *supra*, note 85. In that case there was no criminal proceeding, but the federal Court, sitting in Texas, held that a Missouri divorce granted against a California citizen would not be valid in Texas to the detriment of innocent citizens of Texas. Under such a holding it would be entirely possible to prosecute either divorced party in Texas if he or she remarried and were living there.

86. People v. Shaw (1913) 259 Ill. 544, 102 N. E. 1031. See, also, Dean v. Dean and Ball v. Cross, *supra*, note 84. Compare State v. Schlachter, *supra*, note 86.

87. Starbuck v. Starbuck (1903) 173 N. Y. 503, 66 N. E. 193; People *ex rel* v. Shrader (1905) 47 Misc. Rep. 333, 95 N. Y. Supp. 991. Compare Kelsey v. Kelsey (1922) 204 App. Div. 116, 197 N. Y. Supp. 371.

88. In Grossman's Estate (1917) 67 Pa. Super. Ct. 367, 372, (1919) 263 Pa. 139, 106 A. 86, a husband procured a divorce, which was not binding within the federal authorities in Pennsylvania, and thereafter married again. It was held that his recognition of his second wife as such did not make his foreign divorce decree binding

the view that marriages subject to a defendant's domiciliary court can be dissolved only for grounds authorized by such jurisdiction's law. Wherever this opinion prevails, it might well be said that, in the face of such a policy, there is no room for an estoppel. That no one under the guise of an estoppel should be permitted to nullify an existing marriage and the prevailing law of domestic relation.

When it comes to the defendant's attacking such a foreign decree, this action should be permissible, at least in every case where he or she has not by implication acquiesced in the decree.[89] But suppose that the defendant has remarried, can the decree then be repudiated and the second marriage avoided? If the rule which discredits the divorce is one for the protection of the defendant alone, an estoppel should be invoked and the decree considered valid. But again the divorce may be discredited on grounds of policy. It may be that the divorce is considered invalid because it violates the law of the defendant's domicil concerning marage. If this is the reason for discrediting the divorce, again, the position might be taken that no one should be permitted to nullify a marriage, which according to proper domiciliary law actually existed.[90]

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the court rendering the same not having jurisdiction. Apparently in this case the second wife was a Pennsylvania citizen.

89. In People v. Baker, *supra*, note 80, 76 N.Y. 78, it was the defendant mentioned in the foreign divorce decree, who was a citizen of New York, who remarried, and a conviction for bigamy was sustained. But such a decision is justifiable on grounds of public policy. In Kelsey v. Kelsey, (1922) 204 App. Div. 116, 197 N. Y. Supp. 371, the defendant remarried and then sued his first wife, who had procured the foreign divorce, for a divorce. It was held that the husband could not succeed in his action, because by remarrying he had entered into an adulterous relation with his second "wife." Such a holding does not render the foreign decree valid, it merely means that the defendant is not in a position to raise the question of its validity.

90. The entire question of foreign divorce decrees is treated in notes to be found in L. R. A. 1917B 1032; (1925) 39 A. L. R. 603; (1926) 42 A. L. R. 1405. Mr. George H. Parmele, the author of these annotations, has done an admirable piece of research work, and the writer is indebted to him in no small degree.