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Some Problems in Jurisdiction to Divorce

James L. Parks

SOME PROBLEMS IN JURISDICTION TO DIVORCE

The American Law Institute in its Restatement of the Conflict of Laws has codified the rules governing jurisdiction of a court to grant a divorce, where no personal jurisdiction of the defendant is obtained, as follows:

"A state cannot exercise through its courts jurisdiction to dissolve the marriage of spouses of whom one is domiciled within the state and the other is domiciled outside the state, unless the spouse who is not domiciled in the state (a) has permitted the other spouse to acquire a separate home; or by his misconduct has ceased to have the right to object to the acquisition of such separate home; . . . ."[1]

It is supposed that a divorce granted under the conditions mentioned is intended to be one that will be entitled to full faith and credit in every state of the Union under the federal constitution.[2] The question, therefore, is exclusively one of federal constitutional law. It will be the purpose of this paper to consider the present state of the federal authorities and to determine whether the Restatement accurately embodies within its terms the rules of these decisions.

So far as the writer knows, there are only three federal Supreme Court decisions dealing with this important problem: *Atherton v. Atherton*,[3] *Haddock v. Haddock*,[4] and *Thompson v. Thompson*.[5]

In *Atherton v. Atherton*, the parties had been living together as husband and wife in Kentucky. The defendant, the wife, left the plaintiff domiciled there, going to New York where she purported to establish a separate and independent domicil. The plaintiff, after the defendant's departure, instituted a divorce action in Kentucky, serving the wife constructively only and got a divorce without the defendant appearing. Later the wife brought an action for divorce against the husband in New York. The husband appeared in that action and pleaded the prior Kentucky decree, but the New York court refused to accredit it upon the ground that is was not based upon proper jurisdiction over the wife.[6] The case was carried to the Supreme Court of the United States and the New York decision was reversed, it being held that the Kentucky decree was valid and should have been accredited.

While the opinion is not as clear as could be desired, the actual result of the case seems consistent only with the notion that a divorce action is a proceeding quasi in rem—an action to dissolve a relation or status. Not only did the court in one portion of its decision characterize the action as being of this nature,[7] but nowhere did they

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1. Restatement, Conflict of Laws, sec. 118.
2. Art. 4, sec. 1.
3. (1900) 181 U. S. 155, 21 Sup. Ct. 544, 45 L. Ed. 794.
4. (1906) 201 U. S. 562, 26 Sup. Ct. 525, 50 L. Ed. 867.
5. (1913) 226 U. S. 551, 33 Sup. Ct. 129, 57 L. Ed. 347.
6. (1898) 155 N. Y. 129, 49 N. E. 933, 40 L. R. A. 291. "The learned counsel for the defendant . . . argues . . . that the matrimonial domicil of the wife is that of her husband and consequently we are compelled . . . to give full faith and credit to the decree in her husband's favor. . . . In view of the fact that we have a finding fixing the wife's domicil in this state, we are of the opinion the Kentucky decree is void as to her. . . ." 155 N. Y. 129, 133. "The New York Court . . . found that she (*i. e.* the wife) 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, (1900) 181 U. S. 155, 174, 21 Sup. Ct. 544, 45 L. Ed. 794.
7. "The purpose and effect of a decree of divorce . . . are to change the existing status or domestic relation of husband and wife and to free them both from the bond." 181 U. S. 155, 162. The learned court also stated that the rule "as to notice necessary to give full

pass upon the question as to whether the wife was rightfully or wrongfully away from her husband, living in New York and claiming a domicil there. Now if the action had been regarded as being in personam, the Kentucky court could only have had jurisdiction of the wife's person, if she was under a duty to be with her husband and, as a result of such duty, constructively domiciled with the latter in Kentucky.[8] Of course, if the wife was so domiciled the Kentucky court did have jurisdiction of her person,[9] but, inasmuch as the federal Supreme Court sustained the Kentucky decree without passing on the wife's innocence or guilt, it seems necessary to interpret the decision as standing for the proposition that a divorce action is one to destroy the marriage status and can, therefore, be brought at the plaintiff's domicil without obtaining personal jurisdiction of the defendant merely upon constructive service upon the latter.[10]

In *Haddock v. Haddock*, the parties had been living together as man and wife in New York. The husband left his wife and established a domicil in Connecticut.

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effect to a decree of divorce is different from that which is required in suits in personam." (181 U. S. 155, 163) and 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 . . . as operative and binding everywhere, so far as related to the dissolution of the marriage . . ." (181 U. S. 155, 166, quoting from Kent's Commentaries). See, also, Parks, Jurisdiction to Divorce, 35 Law Ser. Univ. of Mo. Bull. 3, 9 et seq.

8. If a wife is not privileged to live apart from her husband, she is as a matter of law considered domiciled with him regardless of what the actual fact may be. See, the Institute's Restatement, Conflict of Laws, secs. 29 and 30. On the other hand, if a wife is under no duty to live with her husband, she may acquire a separate domicil and remove herself from the jurisdiction of her husband's domicil and its courts. *id.*

9. It has been said 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. Staniford, (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 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) 150 Ia. 511, 129 N. W. 494, 35 L.R. A. (N. S.) 292 and note; Scott, Fundamentals of Procedure 41, et seq., note 25, "A state can exercise through its courts jurisdiction over an individual domiciled within the state, although he is not present within the state." Sec. 84, Institute's Restatement, Conflict of Laws.

10. "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 desertion was not open but was conclusively settled by the Kentucky decree." Holmes, J., dissenting in Haddock v. Haddock, (1906) 201 U. S. 562, 629, 26 Sup. Ct. 525, 50 L. Ed. 867.

"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., ibid. The learned judge might well have added that the divorce would have been valid even though the result of the wife's acquisition of a new domicil was to effectively remove herself from the jurisdiction of the Kentucky court. This, of course, is the cleaar implication of the quoted excerpt.

He there obtained a divorce from his wife upon constructive service of her and she did not appear in the action. Later the wife brought an action for divorce against the husband in New York, where she had remained. The husband appeared in the wife's action and pleaded the Connecticut decree; it was not admitted as a defense to the action. Upon an appeal taken to the federal Supreme Court, the New York court's judgment was affirmed, the position being taken that the Connecticut divorce was not binding upon the absent wife. The matter was disposed of by the court saying, in substance, that the wife had rightfully remained in New York and, as this was the case, the Connecticut decree could not be sustained on any theory. The court was of the opinion that if a divorce decree was to be regarded as one quasi in rem the Connecticut decree could not be effective because half of the res must have been with the wife in New York.[11] On the other hand, if the decree was to be considered as one in personam, it was thought that it could not be binding for the reasons that she was neither personally served with process within the state nor constructively domiciled there.[12]

The decision in the *Atherton Case* was explained and approved in the *Haddock Case* by saying that in that case the wife was away from her husband without justifiable cause. It was stated that this fact gave the wife a constructive domicil in Kentucky and consequently the courts of that state jurisdiction of her person.[13] As already noted, the wife's innocence or guilt was not considered by the federal Court in the *Atherton Case* and, this being so, they could not have regarded the wife as being personally amenable to the jurisdiction of the Kentucky court. The decision in the *Atherton Case* must, to be consistent with fundamental principles, have proceeded upon the ground that a divorce action is not one in personam.

In *Thompson v. Thompson*, a decree of separation was granted to the husband in Virginia, the place where the parties had last lived together as man and wife, and where the husband continued domiciled at all times. The wife was not personally served and she had left her husband and settled elsewhere. It was held that this decree was entitled to full faith and credit. The court followed the *Atherton Case* and again did not inquire into the question of whether or not the wife was rightfully away from her husband. In other words, the court must have regarded the decree as proper even though the wife might not have been constructively domiciled with her husband and, therefore, personally amenable to the jurisdiction of the Virginia

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11. "Conceding, however, that he (*i. e.* the husband) took with him to Connecticut so much of the marital relation as concerned his individual status, it cannot in reason be said that he did not leave in New York so much of the relation as pertained to the status of the wife. From any point of view, then . . . if the marriage relation be treated as the res, it follows that it was divisible, and therefore there was a res in the state of New York and one in the state of Connecticut. Thus considered, it is clear that the power of the state did not extend to affecting the thing situated in another state." 201 U. S. 562, 577, 26 Sup. Ct. 525, 50 L. Ed. 867.

12. "As New York was the domicil of the wife and the domicil of matrimony, from which the husband fled is disregard of his duty . . . the domicil of the wife continued in New York. . . . As then there can be no question that the wife was not constructively present in Connecticut . . . and was not there individually domiciled and did not appear in the divorce cause and was only constructively served with notice of the pendency of that action, it is apparent that the Connecticut court did not acquire jurisdiction over the wife . . ." 201 U. S. 562, 572, 26 Sup. Ct. 525, 50 L. Ed. 867.

13. (1906) 201 U. S. 562, 571 et seq., 584, 26 Sup. Ct. 525, 50 L. Ed. 867.

court.[14] One would think that this decision would have involved at least a tacit repudiation of *Haddock v. Haddock*, because it requires the recognition of a divorce granted by a court, which may not have jurisdiction of the person of the defendant-wife, and consequently—according to the *Haddock Case*—of her half of the res or marriage relation. But strangely enough the learned court cites the *Haddock Case* with apparent approval and distinguishes it from the *Atherton Case*. It is said in the *Thompson Case* that the reason why the decision in that case and that in the *Atherton Case* is correct is because in each instance the action was brought at the matrimonial domicil of the parties. On the other hand, the *Thompson Case* justified and explained the *Haddock Case*, holding it to be correct, because there was not at any time "a matrimonial domicil in the state of Connecticut (*i. e.* the state where the divorce was procured) and therefore the res—the marriage status—was not within the sweep of the judicial power of that state."[15]

The situation is indeed peculiar. The *Atherton Case* seems to regard a divorce action as an out and out proceeding against a relation—to dissolve the same. The *Haddock Decision* explains the *Atherton Case* so as to make that decision's conception of a divorce proceeding as one in personam, and holds itself that a divorce decree will not be good unless the defendant is constructively domiciled within the state whose court grants the divorce, or subject personally to that tribunal's jurisdiction. Finally, comes the *Thompson Case*, approving the actual decision in the *Atherton Case*, and attempting to reconcile the *Haddock Case* with *Atherton v. Atherton* by saying that the action there was not brought at the matrimonial domicil as it was in the *Atherton Case*. Of course, there is this distinguishing fact between the two cases, but this difference will not reconcile the theories of the two opinions and make one consistent with the other. The *Haddock Case* tolerated and was willing to approve the *Atherton Case* not because the husband brought his action at the last matrimonial domicil as such but, because it said the wife was constructively domiciled there and, for that reason, the courts at such domicil had jurisdiction of both the wife and her half of the marriage relation. It seems quite clear that if the court in the *Haddock Case* had believed that the wife had been rightfully away and, consequently not constructively domiciled at the last matrimonial domicil in the *Atherton Case*, they would not have considered the divorce properly granted. The opinion is ventured that the *Haddock Case* does not lay down the rule that the last matrimonial domicil as such has jurisdiction to divorce upon constructive service, but rather that the decision holds that such domiciliary court will have jurisdiction when the defendant wife is still constructively domiciled there, but not otherwise.

In view of these decisions it is difficult to say just what the rule of the federal Supreme Court is ultimately going to be. It is assumed that since the decision in the *Thompson Case*, that a divorce granted to a husband at the last matrimonial domicil,

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14. 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 Atl. 13, 4 A. L. R. 852 and note. This possible distinction between the two types of action, however, was not considered in the Thompson Case, and apparently was not insisted upon in argument before the Court.

"In the present case, it appears that the parties were married in the state of Virginia and had a matrimonial domicil there. . . . The husband had his actual domicil in that state at all times. . . . It is clear, therefore, under the decision in the Atherton Case and the principles upon which it rests, that the state of Virginia had jurisdiction over the marriage relation. . . ." 226 U. S. 551, 562, 33 Sup. Ct. 129, 57 L. Ed. 347.

15. (1913) 226 U. S. 557, 562, 33 Sup. Ct. 129, 57 L. Ed. 347.

constructive service of the wife alone being had, will always be entitled to full faith and credit. Apparently the *Thompson Case* did not adopt or notice the incorrect explanation of the *Atherton Case* which appeared in the *Haddock Case*. It seems safe to say that it is not essential to the validity of such a divorce that the wife be wrongfully away from her husband. But it is not safe to assume, merely because the *Thompson Case* was decided as it was, that all that was said by the court in the *Haddock Case* can be disregarded; that divorces granted upon constructive service of the absent spouse under different states of facts than those existing in the *Atherton Case* will be sustained, where half of the res is with the absent spouse and the absent spouse as will always be the case when half of the res is with him or her, is not subject personally to the jurisdiction of the court which attempts to dissolve the marriage, because *Haddock v. Haddock* was approved in *Thompson v. Thompson* and an effort made to explain it. There is, however, no reason for assuming that this fallacious explanation of the *Haddock Case* will be accepted hereafter. It may be repudiated just as *Haddock Case's* fallacious explanation of the *Atherton Case* was tacitly repudiated in the *Thompson Case*.

To the writer it seems evident from what has been written above that there is an irreconcilable conflict between the results reached in *Atherton v. Atherton* and *Thompson v. Thompson* on the one hand and *Haddock v. Haddock* on the other. In the first cases mentioned the theory of the decisions, regardless of what the court may have said, must have been that a divorce action is one in rem, and a divorce decree will be valid in spite of the fact that the defendant was served only constructively. On the other hand, it seems equally obvious that the end reached by the *Haddock Case* is consistent only with the notion that a divorce action is in effect one in personam. If the foregoing analysis of these three controlling decisions be accurate and until the Supreme Court has dealt further with this question, how can the law concerning accrediting foreign divorce decrees be formulated so as to embody accurately the results of these cases? The word "results" is used advisedly because obviously no rule can embody inconsistent lines of reasoning and be intelligible.

It seems that no divorce can surely be said to be entitled to full faith and credit under the present authorities when the action is brought by the husband unless the decree is entered, either (1) at the last matrimonial domicil, or (2) at some other domicil of the husband when the wife is wrongfully away and thus constructively domiciled with the husband. The first assumed case is clearly within both the *Atherton* and the *Thompson Cases*. In the second case, if the wife is rightfully away, we have a situation exactly such as we had in *Haddock v. Haddock* which opinion so far as can be discovered was not overruled by, but approved in *Thompson v. Thompson*. On the other hand, if in the last case the wife was not privileged to be living apart from her husband, she would be constructively domiciled with her husband and a divorce granted to him upon constructive service upon her would seem to meet all the requirements prescribed by the *Haddock Case*.[16]

Turning to the cases where the wife brings the action without the court getting personal jurisdiction of the husband, the action might be brought either at the last matrimonial domicil, where the wife might have remained, as if domiciled there, or in some other jurisdiction where she might have attempted to have established a

16. "If the wife did not 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, 201 U. S. 562, 628, 26 Sup. Ct. 525, 50 L. Ed. 867.

new domicil. In neither of these situations would the divorce seem to comply with the requirements stated in the opinion in the *Haddock Case*. Certain it is that the husband is not amenable personally to the jurisdiction of the court; a husband is never constructively domiciled with his wife and is always privileged to establish a new domiciliary relationship and allegiance at pleasure. It would seem to follow from this last proposition perfectly clearly that whenever the husband is domiciled apart from his wife, his half of the marriage status must be regarded as being with him at his new domicil. Accordingly, if the *Haddock Case* has not been overruled and controls in all cases other than those that fall squarely within the facts of the *Atherton Case*, a divorce granted to a wife, her husband being domiciled elsewhere, would never be entitled to full faith and credit, unless the husband was duly served personally with the process of the divorce court.

It will be remembered, however, that the Supreme Court in the *Thompson Case*, while it apparently approved the decision in the *Haddock Case*, interpreted that decision as standing for the proposition that the Connecticut divorce was invalid because the action was not brought at the matrimonial domicil, which fact resulted in the court not having the marriage relation within its jurisdiction.[17] Of course, this is an accurate description of the facts in the *Haddock Case* but it hardly seems to follow that the court in the latter case meant to establish a rule to the effect that the status of the parties will *always* be within the jurisdiction of the court of the last matrimonial domicil. In the *Haddock Case* the matter of finding a matrimonial domicil in Connecticut was important in the court's eye because if that state was not such a domicil, then the courts there would not have had jurisdiction of the wife's person and, in consequence of that fact, her half of the marriage relation would have also been without the jurisdiction and would have remained unaffected by any decree that the Connecticut court might have entered.[18] It is believed that so far as the reasoning of the *Haddock Case* is concerned that the only time the question of matrimonial domicil is of any importance or significance is in determining whether or not the divorce court has jurisdiction of a defendant-wife when the action is *brought by the husband*. If the action is brought in the matrimonial domicil, then the court has such jurisdiction because the wife, by virtue of her duty to be with her husband, is constructively domiciled there; on the other hand, if she is rightfully away, living elsewhere, the court has no jurisdiction of the wife and, according to the reasoning of the *Haddock Case*, no jurisdiction of her portion of the marriage.

In spite of the foregoing suggestions, however, some courts have seized upon the phrase "matrimonial domicil" and the statement quoted above from the *Thompson Case* and have laid down the broad proposition that a divorce decree, entered at the last matrimonial domicil at the instance of either spouse upon merely constructive service of the other, will be valid and must be accredited in all other states.[19] Such conclusions seem entirely unwarranted and inconsistent with the reasoning in the *Haddock Case*.

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17. (1913) 226 U. S. 551, 562, 33 Sup. Ct. 129, 57 L. Ed. 347.

18. See supra, notes 11 and 12.

19. "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 . . . 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 that fiction, the domicil of the wife; but the matrimonial—that is, the jurisdictional—domicil remains with the wife and within the state

Does the Restatement reflect accurately the federal decisions heretofore discussed? The first proposition is that a divorce granted to a plaintiff-spouse at his or her domicil upon constructive service upon a non-domiciled defendant will be valid, if the defendant has permitted the plaintiff to acquire a separate home.[20] If the action is by the husband at the last matrimonial domicil, the decree should be regarded as valid under the *Atherton Case*. So, also, if the action is by the wife at the matrimonial domicil, if the dictum in the *Thompson Case* is adopted, the divorce would have to be regarded as valid and binding. In all other cases, however, it seems that the Restatement's rule goes far beyond and is not sustained by the federal cases. As has been already intimated, the whole theory of the *Haddock Case* was that either

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of that domicil." State v. Morse, (1906) 31 Utah 213, 217, 87 Pac. 705, 7 L. R. A. (N. S.) 1127. If one could disregard all that was said in Haddock v. Haddock, the results reached by the proposition above quoted would be quite proper. But as already intimated, Haddock v. Haddock has not been overruled and the Supreme Court is free to follow its reasoning in all cases that are not "on all fours" with the Atherton Case—*i. e.* in all cases where the *husband* is not suing at the last matrimonial domicil. One may and should concede the proposition advanced in State v. Morse, namely that where the wife remains at the last matrimonial domicil after being deserted by her husband, she is not constructively domiciled with him. But it is not a question of where she may be domiciled, it is a question of *where the husband is domiciled.* Now a husband, regardless of his marital delinquencies, is never constructively domiciled with his wife. It may be his duty to make a place for his wife at a newly acquired domicil, but his failure to carry out this duty does not make him domiciled with his wife, where he left her, perhaps by the route of desertion. If the husband is not domiciled where the wife sues, the court where the divorce action is instituted has no jurisdiction over the husband. The Haddock Case states unequivocally that if a court has no jurisdiction over a defendant, the divorce is invalid. As already stated, we are not free to assume that Haddock v. Haddock will not be followed in cases that do not fall within the actual facts of the Atherton Case.

"The state having jurisdiction of the matrimonial domicil and one spouse, innocent according to the decisions of the courts of that state of matrimonial wrong, has jurisdiction 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, Montmorency v. Montmorency, (Tex. Civ. App. 1911) 139 S. W. 1168. "As we have said, to our minds the case of Haddock v. Haddock is based on the fiction that the matrimonial domicil stays with and follows the innocent party, whether husband or wife, and that, no matter where the innocent party may be, the matrimonial domicil is there, and the guilty party is always constructively present, and, therefore, the court of the state has constructively both parties before it." Id. 1172.

In the case last cited, the Texas court granted a wife a divorce upon constructive service of her husband. Texas was not the last matrimonial domicil of the parties. The court believed that it could render a divorce that would be binding in all the states of the Union because it was 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 new domicil. Professor Beale, Haddock Revisited, 39 Harv. L. Rev. 417, 426, characterizes the Montmorency Case as "an excellent statement of the meaning of the decision" in Haddock v. Haddock. The writer ventures the opinion that the meaning attributed to the case by the learned professor is not justified. The Haddock Case insists upon personal jurisdiction being had of the defendant as already explained.

20. Restatement, Conflict of Laws, sec. 118.

the defendant's person or his or her half of the marriage status must be within the jurisdiction of the court which grants the divorce. We cannot say as yet that the *Haddock Case* has been nullified and its rules made inoperative except in the situation that is covered by the *Atherton Case*. This being the case, the question would seem to be, does the fact that the defendant has permitted the plaintiff "to acquire a separate home" bring the defendant's person or his or her half of the marriage relation within the jurisdiction of the plaintiff's domiciliary court in the absence of proper personal service of the defendant?

To the writer the answer to this question seems clearly to be No. It is entirely thinkable that a defendant may agree to live apart from the plaintiff-spouse and still be rightfully in a home beyond the jurisdiction of the court where the plaintiff is suing. In fact, this would seem always to be the case, so far as the acquisition of domiciliary privileges are concerned, when the defendant is the husband. Nor can the fact that the defendant has agreed to a separation be regarded as consent on his or her part to the submission of the matter of dissolving the marriage to the jurisdiction of a court where the plaintiff might establish a separate home. Any such construction as this seems altogether unjustifiable.[21]

The Restatement's second rule is that a domiciled plaintiff may get a divorce against a non-domiciled defendant, without due personal service of process, where the defendant by misconduct has ceased to have the right to object to the plaintiff's acquiring a separate home.[22] Under this rule it would seem that either the husband or the wife could get a divorce at the last matrimonial domicil or any other domicil subsequently acquired upon constructive service of process.

Certainly the husband could obtain such a divorce if it was procured at the matrimonial domicil; so, also, he could at a newly acquired domicil, within the principles of the *Haddock Case*, if it was the duty of the wife to be with him at such new home.[23]

But suppose the action is by the wife; if she sues at the last matrimonial domicil, the divorce would be binding within the dictum heretofore referred to in the *Thompson Case*,[24] but it would not be if the *Haddock Case* is to be adhered to. The husband, by going elsewhere, has removed both his person and his half of the marriage res beyond the jurisdiction of the court where the wife is suing. If the action were brought by the wife at a domicil other than the last matrimonial domicil, the case is even clearer. Here a divorce is not even supported by the dictum in the *Thompson Case*, and the decree is equally obnoxious to the notions that prevailed in the opinion in the *Haddock Case*.[25]

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21. The Institute's Commentaries on Restatement No. 2 of the Conflict of Laws (p. 31) cites Fosdick v. Fosdick, (1885) 15 R. I. 130 to sustain the proposition that "if the parties have been separated by mutual consent, a divorce at the domicil of either is valid." The husband *appeared* in that action and *defended*, which fact would seem to render the case of no assistance in the solution of the problem at hand.

The only federal decision cited in the Commentaries, other than those herein discussed, is Cheever v. Wilson, [1869] 9 Wall. 108, 19 L. Ed. 604. It is stated that that case holds that "if a wife is deserted or given other cause for divorce by her husband, she may acquire a domicil in another state and obtain a valid divorce there." But in that case also, the defendant *appeared, answered* and *defended*.

22. Restatement, Conflict of Laws, sec. 118.

23. See, supra, note 16.

24. See, supra, note 17 and text in connection therewith.

25. But see, contra, Montmorency v. Montmorency, (Tex. Civ. App. 1911) 139 S. W. 1168; Beale, Haddock Revisited. 39 Harv. L. Rev. 417.

It is wondered whether the second proposition of the Restatement does not, by implication, provide that a divorce granted at the plaintiff's domiciliary court upon constructive service will be invalid if the defendant is rightfully away? It would seem that such an implication would be present. Certainly, if the defendant is the husband, the implied provision would seem to be correct unless we are going to follow the dictum in the *Thompson Case*, which seems to indicate that a divorce granted at the last matrimonial domicil to either spouse will always be good.

When the action is brought by the husband it is clear that the divorce will be good if granted at the last matrimonial domicil regardless of whether or not the wife is rightfully away, domiciled elsewhere. This is the *Atherton Case*, which, as already noted, has been approved by the *Thompson Case*. Therefore, in this situation the suggested implied proposition runs counter to established law. On the other hand, if the husband is suing at a domicil other than the last matrimonial domicil and the wife is under no duty to be with her husband, the case is the same as the *Haddock Case* and the implied proposition accurately states the law.

If the foregoing analysis of the federal cases be sound and accurate, and the purpose of the Restatement is to codify the federal case law as it is, it would seem that in many respects the accuracy of the Restatement can be questioned. On the other hand, if the purpose of the Restatement is to formulate a body of rules that will be socially desirable and workable, it is believed that many persons, qualified to speak, would question the wisdom of the adopted code. The writer suspects that in some quarters the proposition would be advanced that a divorce action should be regarded as wholly within the jurisdiction of the domicil of either party and that a married woman should not be under any legal disability to acquire a separate domicil. A great number of people would probably prefer the dissenting opinion of Mr. Justice Holmes in the *Haddock Case* and would hold to the view that that dissent, carried to its logical end, would work better from a social point of view and prevent injustice more than either the law as it actually is or as it is advocated that it should be in the Institute's Restatement.[26]

UNIVERSITY OF MISSOURI
SCHOOL OF LAW

JAMES LEWIS PARKS

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26. It is not the purpose of this paper to discuss the whole problem of ex parte divorces, but merely to attempt to analyze the Restatement's codification of the rules embodied in the federal cases. But see, in addition to Mr. Justice Holmes' dissenting opinion in Haddock v. Haddock, (1906) 201 U. S. 562, 628 et seq. Ditson v. Ditson, (1856) 4 R. I. 87; Miller v. Miller, (1925) 200 Ia. 1193, 206 N. W. 262, 264.