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MORE FAITH AND CREDIT FOR DIVORCE DECREES

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When wise men speak after a long silence, disciples listen attentively. Oracular ambiguity in the words spoken may gain for them added attention and even give lesser oracles some business as interpreters of the wise men's words.

For a quarter of a century the Supreme Court of the United States has been silent on questions of jurisdiction to grant divorces and the full faith and credit which under the Federal Constitution must be given to divorce decrees. Up to 1913, the Court had said enough about these matters[1] to make clear that whatever it might say about them would be important and that it would have more to say. Then came the silence. Finally, in 1938, the wise men spoke again.

In *Davis v. Davis*,[2] the facts were that a husband had in 1925 secured a divorce from bed and board at the matrimonial domicile in the District of Columbia, for the wife's desertion, but had been ordered to pay her $300 monthly alimony. He later moved to Virginia and sued there for absolute divorce on the same ground. The wife appeared in the Virginia action, but only for the purpose of contesting the husband's allegation that his domicile was in Virginia. This appearance was in the form of a plea to the court's jurisdiction. The Virginia court heard evidence on the issue and determined that the husband had a proper domicile in that state, then granted a stay in the proceedings for a limited time to permit the wife to take an appeal or enter other pleadings. She did nothing, however, and in due course a decree of absolute divorce was entered in the husband's favor. This was in 1929. After some intervening proceedings, the

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1. Particularly in Haddock v. Haddock, 201 U. S. 562 (1906), and Atherton v. Atherton, 181 U. S. 155 (1901). Other significant pronouncements were in Cheever v. Wilson, 9 Wall. 108 (U. S. 1869); Maynard v. Hill, 125 U. S. 190 (1888); and Andrews v. Andrews, 188 U. S. 14 (1903). The latest case decided was Thompson v. Thompson, 226 U. S. 551 (1913).

2. 59 Sup. Ct. 3 (1938).

husband in 1935 brought the present action in the District of Columbia to set aside the alimony order, relying in part upon the Virginia decree as entitling him to that relief. The Court of Appeals for the District of Columbia affirmed a denial of relief (as far as this ground was concerned) saying[3] that the Virginia decree was not entitled to full faith and credit, since the last matrimonial domicile of the parties was not in Virginia and there had been no general appearance by the wife in the Virginia suit. On appeal to the United States Supreme Court, this decision was reversed. Mr. Justice Butler, speaking for a unanimous court, held that the Virginia decree was absolutely entitled to full faith and credit. Reasons given for the result were vague and ambiguous. Thus the Delphic oracle invites lesser oracles to interpret its words, and the tacit invitation goes not unheeded.[4]

To facilitate analysis of the implications of the instant decision, its background in current authority and theory needs first to be stated in brief summary.

Domicile is, of course, the primary basis of jurisdiction to grant divorces. The marital status is deemed to be a *res* located where the parties to the status are domiciled, and the divorce proceeding is an action *in rem* directed against that *res*. If both the married parties are domiciled in the same state, no difficulty arises from this theory. That state is the only one in which a divorce action is maintainable, and a divorce decree there granted is entitled to full faith and credit in every other state. Where the parties are separated and domiciled in different states, however, the problem is less simple. Until the decision in *Haddock v. Haddock*[5] was rendered, it was generally thought that the marital *res* was such a divisible one that it was present at the domicile of either of the parties to the marriage, so that a court of either state, on petition of the spouse there domiciled, could grant a divorce by an *in rem* proceeding based on statu-

3. Davis v. Davis, 96 F. (2d) 512 (App. D. C. 1938).

4. Apart from the present comment, one full-length article and six law review notes have already come to this writer's attention. See Strahorn, *The Supreme Court Revisits Haddock* (1938) 33 ILL. L. REV. 412; Notes (1939) 24 IOWA L. REV. 365; (1939) 6 U. OF CHI. L. REV. 290; (1939) 52 HARV. L. REV. 683; (1939) 25 VA. L. REV. 487; (1939) 39 COL. L. REV. 274; (1939) 24 WASH. U. L. Q. 271. Doubtless several more will follow.

5. 201 U. S. 562 (1906).

tory service, actual or constructive, on the non-domiciliary spouse. The *Haddock* case made it clear that there were some cases in which other states at least were not required to give full faith and credit to divorce decrees thus granted at a place which was the domicile of one spouse only, though it was still established by earlier decisions that such faith and credit had to be given if the state of the suing party's domicile, thus granting a decree, were also the last common matrimonial domicile of the spouses,[6] or if the defendant spouse either was served personally or entered a general appearance in the divorce suit.[7] Some authorities took the position that these United States Supreme Court holdings under the full faith and credit clause should also be considered as holdings concerning jurisdiction to grant divorces. The view taken was that if the decree were not entitled to full faith and credit, it was by the same token invalid as having been granted by a court lacking jurisdiction.[8] The very rendition of such a decree, it seems, would have been violative of the due process clause of the Federal Constitution. This was Professor Beale's view, and by his influence it was incorporated in the *Restatement of Conflict of Laws*.[9] The *Restatement's* only addition to the decided cases already referred to was the proviso that if the non-domiciliary spouse had consented to the suing spouse's acquisition of a separate domicile, or had by reason of his misconduct ceased to have the right to object to the acquisition of a separate domicile by the suing spouse, then the state of separate domicile had jurisdiction to issue a valid decree which would be absolutely entitled to full faith and credit elsewhere, just as in the already decided cases. The effect of the *Restatement* rule, apart from its identification of jurisdiction with full faith and credit on the theory that the same decisions applied equally to both, would be to set up consent to separate domicile and fault justifying a separate domicile as jurisdictional facts, so that no suit could be successfully brought for divorce in a state which was the domicile of the suing spouse only, not the last common matrimonial domicile, and in which the defendant spouse was not personally subjected to the court's

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6. Atherton v. Atherton, 181 U. S. 155 (1901).
7. Cheever v. Wilson, 9 Wall. 108 (U. S. 1869).
8. Schofield, *The Doctrine of Haddock v. Haddock* (1906) 1 ILL. L. REV. 219; Peaslee, *Ex Parte Divorce* (1915) 28 HARV. L. REV. 457; Beale, *Haddock Revisited* (1926) 39 HARV. L. REV. 417. Also see Strahorn, *A Rationale of the Haddock Case* (1938) 32 ILL. L. REV. 796.
9. RESTATEMENT, CONFLICT OF LAWS (1934) § 113, to be read in connection with § 43, comment *g*.

jurisdiction, unless such consent or fault were present. Argument for this rule was made on the ground that it would promote uniformity in the granting and recognition of divorce decrees.

Promulgation of the *Restatement* rule excited vigorous opposition. Many writers felt that the *Restatement* view would hinder rather than promote the desired uniformity.[10] Basis for this attitude lay in the fact that many American states were openly committed to the practice of granting divorces when only the suing spouse was domiciled in the state, without any consideration of the other jurisdictional facts set out in the *Restatement,* and that a majority of the states freely recognized such divorces as valid without any investigation of the presence or absence of these so-called jurisdictional facts. *Haddock v. Haddock,* the case principally relied upon as supporting the *Restatement* view, itself clearly stated that it was not laying down a rule of jurisdiction or of compulsory nonrecognition of divorce decrees, but only a rule permitting states under some circumstances to grant or deny recognition, as they pleased, to extrastate divorce decrees. It was a holding that full faith and credit need not be given, not that it could not be given, in such cases. Opponents of the *Restatement* rule felt that jurisdiction to grant divorces merely from the fact of domicile of the suing spouse was apparent from the widespread practice of granting and recognizing decrees based solely on that fact, plus the complete absence of authoritative decisions to the contrary, and that uniformity was more apt to be achieved by encouraging the accepted practice of recognition of all valid divorces once properly granted than by trying to limit the granting of divorces to the fewer instances in which extrastate recognition was compulsory.

The present writer, in the course of stating more fully in an earlier article[11] the reasons for this opposition view, pointed out what appeared to him to be a serious practical defect in the present law of jurisdiction to grant divorces. This defect lay in the lack of any genuine assurance of actual notice and opportunity to defend being given to non-resident defendants in divorce actions. It seemed to him that real notice and opportunity to defend the pending suit were of vastly greater significance to the

10. Walton, *International and Migratory Divorces* (1927) 21 ILL. L. REV. 435; McClintock, *Fault as an Element of Divorce Jurisdiction* (1928) 37 YALE L. J. 564; Bingham, *The American Law Institute v. The Supreme Court in the Matter of Haddock v. Haddock* (1936) 21 CORN. L. Q. 393.

11. Leflar, *Jurisdiction to Grant Divorces* (1935) 7 MISS. L. J. 445; 4 SELECTED ESSAYS ON CONST. LAW (Ass'n of Amer. Law Schools, 1938) 1356.

fair and decent administration of justice than was any possible rule concerning the theoretical presence or absence of a theoretical *res* and the theoretical submission to the jurisdiction of interests in that *res*. It seemed sensible to say that if suit were brought at a place which was the domicile of one spouse only, the propriety of the local court's exercise of jurisdiction should be made to depend on the notice given to the absent spouse, actual notification and real opportunity to defend being in any event sufficient to justify the exercise of jurisdiction and to require extrastate recognition of the decree granted.

Analysis of the reasoning employed in *Davis v. Davis* is not easy, both because it must be attempted in the light of the remarkable jumble of theory and precedent just outlined, and because the reasoning itself is far from being clear and explicit.

In the first place, the case might conceivably have been decided without any necessity for reference to the full faith and credit clause at all. Since the case came up from the District of Columbia, and since the Supreme Court of the United States is the highest court of direct appeal in the District of Columbia, the Court might have decided the case on the theory that it was merely determining the rule of comity of the District of Columbia as to non-compulsory recognition of extrastate divorce decrees.[12] That, however, was not what the Supreme Court said that it was doing; rather, it put the decision squarely on the compulsory character of the full faith and credit clause.

One fact upon which the Supreme Court apparently placed some reliance in reaching its conclusion that the Virginia decree was absolutely entitled to full faith and credit was that the separation and acquisition of separate domicile by the husband were due to the wife's fault. *Haddock*

12. State courts have quite generally applied a rule of comity to allow recognition to extrastate divorces granted in a state which is the domicile of the suing plaintiff only, in cases in which, under *Haddock v. Haddock*, such recognition was not compulsory. See Gildersleeve v. Gildersleeve, 88 Conn. 689, 92 Atl. 684 (1914); Holdorf v. Holdorf, 198 Iowa 158, 197 N. W. 910 (1924); Miller v. Miller, 89 Kan. 151, 130 Pac. 681 (1913); Howey v. Howey, 240 S. W. 450 (Mo. 1922); Toncray v. Toncray, 123 Tenn. 476, 131 S. W. 977 (1910), 34 L. R. A. (N. S.) 1106 (1911). Even New York regularly recognizes extrastate divorce decrees in some circumstances in which the *Haddock* case itself would not require recognition. Ball v. Cross, 231 N. Y. 329, 132 N. E. 106 (1921). *Cf.* Dean v. Dean, 241 N. Y. 240, 149 N. E. 844 (1925), 42 A. L. R. 1398 (1926). See Greene, *The Enforcement of a Foreign Divorce Decree in New York* (1926) 11 CORN. L. Q. 141, 160. The Missouri cases are collected and carefully analyzed in a Comment entitled *"Validity of Foreign Divorces in Missouri"* in (1937) 2 MO. L. REV. 193.

v. Haddock was expressly distinguished on the ground that in that case the wife was wholly without fault, giving her husband no justification for abandoning her and establishing a separate domicile in Connecticut. This undoubtedly gives a strong hint of future acceptance of the Beale-Restatement view[13] that "fault" in the non-domiciliary defendant spouse is an important factor in such cases, as far as compulsory recognition is concerned. But it is not a hint that the Court is inclined to consider "fault" as a jurisdictional fact; there is nothing whatever in the decision to indicate that the Court thought the wife's fault was essential to the Virginia court's jurisdiction to hear and pass on the merits of the case, nor essential to any other court's power to grant voluntary recognition to the Virginia decree if it should choose to do so.

The other facts upon which the Court principally relied in its opinion in the *Davis* case were the wife's appearance in the Virginia proceeding for the purpose of contesting the husband's allegation of a Virginia domicile, and the subsequent stay of proceedings apparently granted to enable her to make a defense on the merits. These were treated as the equivalent of a general appearance[14] which, under the rule of an older decision,[15] sufficed to satisfy the requirements of the full faith and credit clause. If the facts were such as actually to constitute a general appearance according to the accepted meaning of the term, they would afford an easy explanation of the case, but few states other than Texas[16] would deem them to constitute anything other than a special appearance by way of plea to the jurisdiction. Perhaps the case should be taken as a holding that such a limited appearance as this, at a place found to be the domicile of the plaintiff spouse, is enough to satisfy the full faith and credit clause.

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13. *Supra,* notes 8 and 9.

14. "If the plea alone may not be held to amount to a general appearance, there arises the question whether, by her participation in the litigation and acquiescence in the orders of the court relating to merits, she submitted herself to its jurisdiction for all purposes. Her plea and conduct are to be considered together. . . . Plainly her plea and conduct in the Virginia court cannot be regarded as special appearance merely to challenge jurisdiction. Considered in its entirety, the record shows that she submitted herself to the jurisdiction of the Virginia court and is bound by its determination that it had jurisdiction of the subject matter and of the parties." Butler, J., 59 Sup. Ct. 7, 8 (1938).

15. Cheever v. Wilson, 9 Wall. 108 (U. S. 1869).

16. In York v. Texas, 137 U. S. 15 (1890), it was held that a Texas statute declaring that any appearance whatever, even for the purpose merely of contesting the court's jurisdiction, should have the effect of a general appearance, was valid and not violative of due process of law. It does not appear, however, that the law of Virginia gave any such effect to an appearance for purposes of pleading to the jurisdiction.

One respect in which the decision is actually illuminating is as to the conclusive effect of a court's finding of its own jurisdiction after the issue has been litigated before it. From time immemorial it has been said that a judgment rendered by a court lacking jurisdiction is a nullity, and that a court's finding of its own jurisdiction in a case before it is always open to collateral attack.[17] This statement has been made whether the jurisdiction in question was over the person of the defendant in an action *in personam,* or over the *res* proceeded against in an action *in rem,* or over the subject matter of the suit in any kind of action. But in recent years there has been an increasing tendency in the courts to apply common law principles of *res judicata,* or even the constitutional requirement of full faith and credit, to adjudications of the jurisdictional issue.[18] Thus in *Baldwin v. Iowa State Traveling Men's Ass'n,*[19] which was relied upon in *Davis v. Davis,* the United States Supreme Court held that a finding of personal jurisdiction over a defendant, after litigation of the issue, in a federal court of one state rendered the issue of jurisdiction *res judicata* so that the first court's finding was immune from collateral attack in a federal court of another state. It is true that the Supreme Court pointed out that the full faith and credit clause was "not involved, since neither of the courts concerned was a state court," but the step from *res judicata* to full faith and credit is a short one and is furthermore a step in the direction in which the Court appears inclined to travel. Certain it is that a defendant who appears even specially to contest the court's jurisdiction and for no other purpose has been held thereby to subject himself to the court's jurisdiction insofar as the due process of law requirements of the Federal Constitution are concerned,[20] so that the due process clause probably cannot be the basis of collateral attack on such judgment in any event.[21]

17. See Thompson v. Whitman, 18 Wall. 457 (U. S. 1873).
18. Discussions of the problem appear in Medina, *Conclusiveness of Rulings on Jurisdiction* (1931) 31 COL. L. REV. 238; Gavit, *Jurisdiction of the Subject Matter and Res Judicata* (1932) 80 U. OF PA. L. REV. 386; Farrier, *Full Faith and Credit of Adjudication of Jurisdictional Facts* (1935) 2 U. OF CHI. L. REV. 552. Also see Note (1939) 6 U. OF CHI. L. REV. 293.
19. 283 U. S. 522 (1931).
20. York v. Texas, 137 U. S. 15 (1890).
21. In Farrier, *loc. cit. supra,* note 18, the position is taken that if jurisdiction be present in the due process of law sense, as it is whenever there has been an appearance by the defendant even for the purpose of contesting the jurisdiction only, then a collateral attack upon the jurisdiction is bound to be unsuccessful, since there could be no lack of jurisdiction when the court acquired jurisdiction by the very fact of the admitted appearance, even though the court's finding of its own jurisdiction purported to be based on some other and possibly

Though it is undoubtedly true that the mere fact that a judgment as rendered complies with the requirements of the due process clause does not automatically entitle it to the protections of the full faith and credit clause,[22] it is also true that this fact puts the judgment in a position in which it is easily possible for the Supreme Court to hold, when the question is squarely presented, that it is entitled to full faith and credit.

In *Davis v. Davis,* the husband's domicile in Virginia was a jurisdictional fact absolutely essential to the presence in Virginia of the marital status which was the *res* against which the divorce suit, as an *in rem* proceeding, was directed. Without it, the Virginia court would simply have lacked jurisdiction even in the due process of law sense.[23] As an extrinsic fact, the husband may or may not have been domiciled in Virginia; we simply do not know. What we do know is that the United States Supreme Court said that the Virginia court, after litigation of the issue, had conclusively decided it. "Plainly, the determination of the decree upon that point is effective for all purposes in this litigation," said Mr. Justice Butler. This is not a holding that a court's finding of its own jurisdiction over the person of a defendant, or even of its own jurisdiction over a *tangible res* which is the subject of an *in rem* proceeding before it, is entitled to full faith and credit when the jurisdictional facts have been affirmatively determined after litigation, but it is a holding which furnishes ready and sensible analogy for such further holdings.[24]

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invalid ground. One possible defect in this reasoning lies in the fact that *York v. Texas,* upon which the reasoning relies, arose from Texas where a statute expressly gave general jurisdiction by reason of any appearance whatever. Under this statutory rule, defendants not previously subject to the court's jurisdiction would presumably know better than to appear. But if a state has no such rule of law concerning appearances, parties appearing specially would not properly expect to be held to be appearing generally. *York v. Texas* does not actually hold that such a result may validly be imposed upon a defendant without any warning whatever.

22. This is the case of so-called "non-conclusive jurisdiction". Leflar, *Jurisdiction to Grant Divorces* (1935) 7 MISS. L. J. 445, 464; 4 SELECTED ESSAYS ON CONST. LAW (Ass'n of Amer. Law Schools, 1938) 1356, 1375. Also see Medina, *Conclusiveness of Rulings on Jurisdiction* (1931) 31 COL. L. REV. 238, 241.

23. Andrews v. Andrews, 188 U. S. 14 (1903).

24. In Stoll v. Gottlieb, 59 Sup. Ct. 134 (1938), which was decided just two weeks after the *Davis* case, the decision in *Davis v. Davis* itself was cited in support of a holding that a court's finding of its own jurisdiction over subject matter, after litigation of the point, was conclusive as against collateral attack. See case notes in (1939) 6 U. OF CHI. L. REV. 293; (1939) 39 COL. L. REV. 274.

The background for such ultimate holdings has at least been well laid.[25]

The *Davis* case, taken by itself, is certainly an inconclusive decision. It may be taken as marking a trend toward either or all of the theories that are set out in it, or merely an unwillingness to extend the rigorously harsh rule of *Haddock v. Haddock* beyond the fact situations actually covered by it, or it may mark the beginning of a re-examination of the whole basis for divorce jurisdiction in the states. The latter possibility is one which social-minded lawyers and laymen alike should be happy to see pursued, since there are few important areas of the law more thoroughly confused, both in respect to what the law is and in respect to divergence between theory and practice in the courts, than that which deals with jurisdiction to grant divorces and the extrastate recognition of divorces once granted. If such a complete re-examination of basic principles should be in the offing, it may be sincerely hoped that greater weight than heretofore will be accorded to assurance to non-domiciliary spouses of notice and fair opportunity to defend suits brought against them. Judges and authors may write learned page on page till tomes are filled with pure theory concerning the situs of an imagined *res,* yet say not one word about those substantial interests which the due process clause is designed to defend. All the nice philosophizing ever penned concerning acts and non-acts which unwittingly submit a spouse's interests in a technical *res* to the jurisdiction of this state or that contain not one whit of assurance that the spouse will know about a divorce suit when it is brought and have a fair chance to protect himself against the judicial destruction of those substantial interests which most spouses have in their own marital relationships. Whatever may be said in abstract theory, the clear fact remains that the marital status which is said to be a *res* present, at least sometimes, where either spouse is domiciled, is not like a cow or a tract of land or even a *chose in action.* Each of these is of such a nature that the bringing of suit against the *res,* without more, has some tendency toward notification. If there be garnishment of a *chose in action,* the garnishee as a disinterested party is almost certain to notify the defendant; if the proceeding be against

25. Intermittently, over a period of several years, Professor T. E. Atkinson, now of the law faculty of the University of Missouri, has urged upon this writer a view favoring finality for adjudications of jurisdiction as for adjudications of other litigated issues. Blind adherence to the dogma that jurisdictional findings are always subject to collateral attack induced opposition to Professor Atkinson's intelligent attitude. But the force of reason and authority combined now promises soon to become overwhelming.

a tangible *res* the very seizure of the thing itself serves to give notice. But when the action is against the marital *res* there is no disinterested third party under a substantial obligation to see that real notice is given nor is there any tangible thing to be seized. Too often in fact it is the design of the suing spouse to prevent the absent spouse from having an actual opportunity to defend on the merits. It seems that the requirements of due process of law might better be stated in terms of affording good notice and substantial opportunity to defend rather than in terms of prior conduct or misconduct deemed to constitute submission of interests in the marital *res* to an as yet unselected jurisdiction.

The decision in *Davis v. Davis* is definitely in keeping with this possibility. In this case the defendant wife did actually appear in the Virginia suit, a suit brought in a forum only a few miles from her own home, and in which she was given every opportunity, even to the extent of a stay in the proceedings, to make her defense on the merits. The guaranty of protection against unfair deprivations which the due process clause is supposed to assure was amply enforced. If any usual element in such cases was lacking it was unsubstantial. All this assurance in the first suit of protection to every substantial interest of the defendant simply leaves no excuse whatever for trying the case over again. Explanation of the decision in these terms makes it appear to be an eminently fair and sensible one.