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Walter B. Jones

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CONFLICT OF LAWS IN DIVORCE CASES

Reasons for Importance of Subject

The subject of Conflict of Laws in Divorce Cases is becoming every day one of increasing importance.

The large number of states and foreign countries in which many of our great business corporations, employing thousands of agents and clerks, are conducted requires countless numbers of their employes to live away from their homes.

Our wealthy classes are finding an increasing pleasure in travel and temporary sojourns in different parts of the country. It is not uncommon for a wealthy person to have a winter home in one state, a summer home in another, a game preserve in yet another, perhaps a residence at a watering place abroad, and conduct his business in many states and nations.

The rapid means of transportation which we enjoy in the United States today affords our people opportunities to travel more and more, and to reside at different times during the year in several different states. Changes of residence from state to state are more frequent with us today than ever before in the history of the country.

Then, too, divorce is a prominent daily topic discussed in all the newspapers of the country. Unhappily married couples eagerly read accounts of all divorce trials and soon become familiar with the laws of the various states. If the statutes of their own state do not give a cause for divorce on the facts of their case, or there are statutory requirements regarded as burdensome, the unhappily married spouse moves to another state to get a divorce.

The rules which guide the courts of one state or nation in the enforcement of rights which have been acquired under the laws of another state or nation, sometimes called

"Private International-Law," are generally discussed under the term "Conflict of Laws."

While it is true that whatever extraterritorial force a nation's laws and court decisions may have is purely a matter of courtesy extended by another state, still this rule of international courtesy has become in many cases so habitual as to make its observance for all practical purposes a matter of international right.

Difficult Questions Presented

The consideration of the rules of Conflict of Laws in Divorce Cases presents many grave and difficult questions for solution; and the complexity of the problems laid before the courts is such as to challenge the best thought of Bench and Bar.

When matters touching a divorce decree rendered by the courts of one state come up in another state many conflict of laws questions may be raised.

The recognition of the decree may be resisted; the effect to be given an award of custody of children may come before the court; the effect of a divorce decree on property rights of the spouses may be in dispute; the meaning of the full faith and credit clause of the Federal Constitution may be under study; jurisdiction to award alimony may be questioned; marital rights in foreign property may be involved; the effect of a limited divorce may be in issue; questions involving the right of the husband to support the wife may press for decision; the criminal liability of the spouses upon remarriage may come up in the criminal courts,—these and countless other questions equally as important may present themselves for judicial determination when the subject of Conflict of Laws in Divorce Cases comes up for consideration in litigated suits in the courts of the land.

Scope of Present Article

No attempt is made in this article to enter upon a highly technical and theoretical discussion of the rules relating to Conflict of Laws in Divorce Cases, however inviting the inquiry may be; nor is it the purpose to attempt to reconcile the varied holdings of the courts of the different states, and to try to discuss each difficult and confusing question that may come up.

The sole purpose of the article is to state, as far as possible, the more important rules of law which may be reasonably regarded as settled by the weight of authority, and the rules which commonly come up for application.

The article is intended to be practical, and to give the busy lawyer engaged in every-day practice a helpful and authoritative statement of the fundamental rules governing questions of Conflict of Laws in Divorce Cases.

Jurisdiction of Courts for Divorce

It is the general rule in our courts, where the recognition of a foreign divorce decree is sought in another state, that the court making the decree shall have jurisdiction of the defendant, either by service of process, or, if the defendant be a nonresident, then some method of notification to him of the pendency of the suit must be employed which is reasonably calculated to give him knowledge of the attempted exercise of jurisdiction and an opportunity to be heard.¹

Proper notice to the defendant is a condition precedent to the exercise of judicial jurisdiction over him. The due process clause of the Fourteenth Amendment requires that there shall be a regular proceeding, in a competent court, a court which is clothed with authority to hear and determine the questions at issue, and which follows an orderly course of

¹ Cheely v. Clayton, 110 U. S. 701, 4 Sup. Ct. 328, 28 L. ed. 298 (1883); RESTATEMENT, CONFLICT OF LAWS (Am. L. Inst. 1926) §§ 82, 83, 118; DIVORCE AND SEPARATION, 9 R. C. L. § 332.

legal procedure, and gives the party affected full and fair opportunity to assert his constitutional rights and to make such defenses as may be allowed by the law of the land. A failure to give proper notice of the suit to the defendant would render any decree against him invalid.²

Uniform Divorce Jurisdiction Act

The Uniform Divorce Jurisdiction Act, which has been adopted in a few states, provides,³ with reference to jurisdiction, that

Section 1. *Jurisdiction.* "Jurisdiction for the purpose of granting a divorce shall not be exercised unless

- (a) The defendant is domiciled in this state, or this state is the state of the matrimonial domicile; or
- (b) The complainant has a separate domicile in this state (the defendant being domiciled out of the state), and by consent or owing to the conduct of the defendant such domicile is the rightful domicile of the complainant.

"If, however, only one of the parties is domiciled in this state and has acquired such domicile subsequent to the arising of the ground for divorce, such domicile must have continued uninterruptedly for the period of one year next preceding the bringing of the action."

Law of Domicile Governs

Marriage is a status. The state in which the parties to the marriage make their home is vitally interested in that status because it is the foundation for home life. And divorce, because it terminates the marital status, is a matter in which the state is interested, and only an act of the law can bring about a divorce.

So in considering what state law should govern in the granting of divorces, it has become settled that it should be the law of that state with which the spouses are most intimately concerned, the place where they dwell and have their home. Hence, the courts hold that it is the law of the domi-

² Postal Tel.-Cable Co. v. Newport, 247 U. S. 464, 38 Sup. Ct. 566, 63 L. ed. 1215 (1917); BLACK'S CONSTITUTIONAL LAW (4th ed.) 616.

³ 9 U. L. A. 134.

cile which determines whether a marriage shall be terminated by divorce, and by domicile is meant "the place with which a person has a settled connection for legal purposes; either because his home is there or because the place is assigned to him by law."⁴ The word "domicile" carries the idea of a permanent place of abode.

So it is the accepted doctrine that, as actions for divorce deal with the status of the parties, jurisdiction is dependent upon the domicile of the parties at the time the decree is rendered.⁵

Or, as the law appears in the Restatement of Conflict of Laws,⁶ "A state can exercise through its courts jurisdiction to dissolve the marriage of spouses both domiciled in the state."

Residence within the State

Some states require, in addition to a statutory ground for divorce, that the party complaining shall have resided in the state for a certain period of time, months or years.

Under Comment b., Section 117, of the Restatement of Conflict of Laws, it is said that "The requirement that the residence must have continued for a certain number of months or years is not jurisdictional, in the sense in which that word is used in the Restatement of this Subject; and the finding of the court on the length of residence is conclusive in the courts of another state, provided the jurisdictional requirement of domicile at the time suit is brought is satisfied."

Some courts, however, hold that residence within the state for the time prescribed is a jurisdictional prerequisite to a valid decree.⁷

⁴ GOODRICH, CONFLICT OF LAWS (1927) 20, 21; RESTATEMENT, CONFLICT OF LAWS, § 10.

⁵ DIVORCE, 19 C. J. § 835; MADDEN, DOMESTIC RELATIONS (1931) 312.

⁶ § 117.

⁷ *Martin v. Martin*, 173 Ala. 106, 55 So. 632 (1911); *Bell v. Bell*, 181 U. S. 175, 21 Sup. Ct. 551, 45 L. ed. 804 (1900).

The same rule is laid down in *Jacobi v. Jacobi*,⁸ where it is held that a decree of divorce rendered in a state which requires a residence therein for the prescribed time by the party complainant is invalid if the party obtaining the decree was not a resident for the length of time required.

Simulated Residence for Divorce

The full faith and credit clause of the Federal Constitution is not violated by the refusal of a state court to give effect to a foreign decree of divorce obtained by one who has temporarily left the state for the purpose of obtaining a divorce for a cause which occurred in the state while the parties resided there, and which was not a ground for divorce in the home state.⁹

In Cooley's Constitutional Limitations¹⁰ that great authority says:

"We conceive the true rule to be that the actual, *bona fide* residence of either husband or wife within a state will give to that state authority to determine the status of such party, and to pass upon any question affecting his or her continuance in the marriage relation, irrespective of the locality of the marriage, or of any alleged offense; and that any such court in that state as the legislature may have authorized to take cognizance of the subject may lawfully pass upon such questions, and annul the marriage for any cause allowed by the local law. But if a party goes to a jurisdiction other than that of his domicile for the purpose of procuring a divorce, and has residence there for that purpose only, such residence is not *bona fide* and does not confer upon the courts of that state or country jurisdiction over the marriage relation, and any decree they may assume to make would be void as to the other party."

The like principle is recognized in the familiar case of *Haddock v. Haddock*,¹¹ where Mr. Justice White, speaking

⁸ 45 App. D. C. 442 (1916).

⁹ *Andrews v. Andrews*, 176 Mass. 92, 57 N. E. 333 (1900), *aff'd*, 188 U. S. 14, 23 Sup. Ct. 273, 47 L. ed. 366 (1902); *Divorce*, 19 C. J. § 836.

¹⁰ (8th ed. 1927) 848, 849.

¹¹ 201 U. S. 562, 26 Sup. Ct. 525, 50 L. ed. 867, 5 Ann. Cas. 1 (1905). See, also, *Lister v. Lister*, 86 N. J. Eq. 30, 97 Atl. 170 (1916); *Walker v. Walker*, 125 Md. 649, 94 Atl. 346, Ann. Cas. 1916B, 934 (1915); *Gettys v. Gettys*, 3 Lea (71 Tenn.) 260 (1879); *Diggs v. Diggs*, 288 Fed. 262 (1923); *Bell v. Bell*, *op. cit. supra* note 7.

for the Court, states this proposition as irrevocably concluded by the previous decisions of that Court:

"Where the domicil of matrimony was in a particular state, and the husband abandons his wife and goes into another state in order to avoid his marital obligations, such other state to which the husband has wrongfully fled does not, in the nature of things, become a new domicil of matrimony, and, therefore, is not to be treated as the actual or constructive domicil of the wife. . . . 'The general rule is, that a voluntary separation will not give to the wife a different domiciliation in law from that of her husband. But if the husband, as is the fact in this case, abandons their domicil and his wife, to get rid of all those conjugal obligations which the marriage relation imposes upon him, neither giving to her the necessities nor the comforts suitable to their condition and his fortune, and relinquishes altogether his marital control and protection, he yields up that power and authority over her which alone makes his domicil hers.'"

In Ruling Case Law¹² it is said that "a state may forbid the enforcement within its borders of a decree of divorce procured by its own citizens, who, whilst retaining their domicil in the prohibiting state, have gone into another state to procure a divorce in fraud of the laws of the domicil. Each state has exclusive jurisdiction over its citizens concerning the marriage tie and its dissolution, and consequently has authority to prohibit them from committing a fraud upon the law of their domicil by temporarily sojourning in another state, and there, without securing a bona fide domicil, procuring a decree of divorce."

Section 119, Restatement of Conflict of Laws

This view of the law on the subject is also contained in the Restatement of Conflict of Laws,¹³ where it is declared:

"A state can 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, if

- (a) the spouse who is not domiciled in the state
 - (i) has consented that the other spouse acquired a separate home; or

¹² DIVORCE AND SEPARATION, 9 R. C. L. 518.

¹³ § 119.

- (ii) by his or her misconduct has ceased to have the right to object to the acquisition of such separate home; or
- (iii) is personally subject to the jurisdiction of the state which grants the divorce;

or

- (b) the state was the last state in which the spouses were domiciled together as man and wife."

Decree on Substituted Service

In *Crimm v. Crimm*¹⁴ the court states the principles of law which are applicable where there was substituted service on the defendant and quotes approvingly from *Corpus Juris*¹⁵ as follows:

"The Supreme Court of the United States has now definitely decided that the courts of the state of the last matrimonial domicile may grant a decree of divorce without personal service of process upon, or the appearance of, defendant therein, where service of process is made in accordance with the laws of that state, and that such a decree is entitled to full faith and credit in the courts of all the states of the Union.'"

And the court then says:

"But the same text, supported by the same authority, correctly states that 'Where the state of plaintiff's domicile is not also the matrimonial domicile, a decree of divorce based upon substituted service and without personal jurisdiction over defendant, although enforceable in the jurisdiction where rendered, is not entitled to obligatory enforcement in other states in virtue of the full faith and credit clause of the Federal Constitution.'

"But, on principles of comity, such decrees are generally recognized as valid and binding in other states, when they do not contravene good morals or public policy. 19 Corp. Jur. 374 (§ 841); 9 R. C. L. 516, § 337. An excellent discussion of the rationale and practice of this comity will be found in *Joyner v. Joyner*, 131 Ga. 217, 62 S. E. 182, 18 L. R. A. (N. S.) 647, 127 Am. St. Rep. 220. In Alabama this rule of comity undoubtedly prevails, but it does not require the courts of this state to recognize as valid a judgment of a sister state on a showing of jurisdiction which would not support a domestic judgment of the same character."

¹⁴ 211 Ala. 13, 99 So. 301 (1924).

¹⁵ DIVORCE, 19 C. J. § 841.

Where Neither Party Domiciled in State

In the Restatement of Conflict of Laws¹⁶ it is declared that "A state cannot exercise through its courts jurisdiction to dissolve a marriage where neither spouse is domiciled within the state."

This is the law because the action of the court rendering the divorce decree dissolves the marital status of the parties, and is, therefore, a proceeding in rem; hence, the thing to be acted on, the marital status, must be within the jurisdiction of the court, if the decree is to be recognized under the full faith and credit clause of the Federal Constitution.¹⁷

The courts hold that jurisdiction in divorce cases is not a personal matter to be conferred by the consent of the parties.¹⁸

And even the appearance of the parties will not give the court a jurisdiction which will be recognized if neither of the parties is domiciled there.

The leading case on this subject is *Andrews v. Andrews*,¹⁹ where the United States Supreme Court held that a state may refuse the enforcement, within its own borders, of a decree of divorce procured by one of its own citizens, who, while retaining his domicile in one state, enters into another state to procure a divorce in fraud of the law of his domicile. In this case the husband and wife married in Massachusetts and lived there together for three years. In 1891 the husband, then domiciled in Boston, went to South Dakota to obtain a divorce for a cause which occurred in Massachusetts while the parties resided there, and which cause did not authorize a divorce in the courts of Massachusetts. The husband filed a petition for a divorce in South Dakota and stayed there, personally, the period of time necessary under the laws of South Dakota to claim a domicile. He and his wife never lived together in South Dakota. She received

¹⁶ § 118.

¹⁷ DIVORCE AND SEPARATION, 9 R. C. L. § 331.

¹⁸ *Andrews v. Andrews*, *op. cit. supra* note 9.

¹⁹ *Op. cit. supra* note 9.

notice of the suit, appeared by counsel, denied that the husband was a bona fide resident of South Dakota, denied that she had deserted him, and set up cruelty on his part towards her. The case was settled by an agreement signed by the wife and consented to by the husband, and the wife requested her counsel to withdraw her appearance in the suit. A few days later the decree was granted and the husband returned to Massachusetts. In Massachusetts the court refused to give full faith and credit to the South Dakota divorce because of a Massachusetts law which declared that "A divorce decreed in another state or country according to the laws thereof, by a court having jurisdiction of the cause and of both parties, shall be valid and effectual in this Commonwealth; but if an inhabitant of this Commonwealth goes into another state or country to obtain a divorce for a cause occurring here while the parties resided here, or for a cause which would not authorize a divorce by the laws of this Commonwealth, a divorce so obtained shall be of no force or effect in this Commonwealth."²⁰ The Supreme Court of the United States sustained this action and held that there was no violation of the full faith and credit clause of the Federal Constitution by the Massachusetts court in obeying the command of the state law copied above. And the court held that as neither of the parties resided in the state whose court granted the divorce, there was no jurisdiction, and that the parties could not confer jurisdiction by consent or even appearance so as to authorize a valid decree of divorce.

Inasmuch as the state has exclusive jurisdiction over the marital status of its citizens, the court of a foreign state has no jurisdiction to decree a divorce between parties where neither is domiciled or resides within the state of the forum.²¹ Such a decree, if granted, will not be recognized by virtue of the full faith and credit clause of the Federal Constitution.²²

²⁰ GEN. LAWS OF MASS. (Tercentenary ed. 1932) c. 208, § 39.

²¹ DIVORCE AND SEPARATION, 9 R. C. L. § 333.

²² Bell v. Bell, *op. cit. supra* note 7.

One Party Domiciled in the State

Most of the difficult questions in Conflict of Laws arise when a divorce decree is granted at the domicile of one party only.

It is held generally that a decree of divorce rendered at the domicile of one of the parties is entitled to recognition elsewhere, even though the other party was not before the court rendering the decree. But there is quite a conflict of opinion as to whether a court has such jurisdiction as will entitle its decree to be recognized in other states by the usual rules of international comity, or will compel other states to give the decree full faith and credit under the Federal Constitution.

As Professor Madden notes,²³ "The conflict in this class of cases grows out of the difference of opinion as to the nature of the proceeding for divorce, viz., whether it is a proceeding in rem or a proceeding in personam." Professor Madden makes this interesting and helpful statement:²⁴

"It is evident that, in cases where only one party is domiciled in the state where divorce is sought, there is only partial jurisdiction of the res. On the view the courts have taken of the nature of divorce proceedings as in rem or in personam depends the decision when the question of the extraterritorial effect of the decree has arisen. In some states the courts, regarding the proceeding as one in rem, have held that the court has jurisdiction of the res and that only such notice to the non-resident defendant is necessary as is required by the local law, and that the decree so rendered is entitled to recognition in all courts.

"In New Jersey and a few other states the courts have taken the position that a proceeding for divorce is quasi in rem, not requiring actual personal service within the jurisdiction of the court, and that the service is sufficient to render the decree binding extraterritorially if the best practicable service is made, such as service by mail or personal service outside the territorial jurisdiction of the court.

"The courts of New York and some other states have adopted the contrary rule, and, on the theory that the proceeding for divorce is

²³ MADDEN, *op. cit. supra* note 5, at 315.

²⁴ MADDEN, *op. cit. supra* note 5, at 315, 316, 317, 318.

in personam, have held that a divorce obtained in a state where the plaintiff alone is domiciled is of no extraterritorial effect, if the defendant was not personally served with notice within the jurisdiction of the court granting the divorce, or did not voluntarily appear and submit to the jurisdiction, unless the state of the former was the matrimonial domicile of the parties, in which case constructive service by publication is sufficient. The New York courts do not, apparently, draw their strict line except as against divorces rendered against a New York resident, or a resident of another state holding similar views.

"This conflict of view of course results in the unfortunate situation that persons may be considered husband and wife in one state, and unmarried in another, with the obvious consequences as to their rights in each other's estates, their duty and right to support, their criminal liability upon remarriage, etc.

"The only power to prevent this confusion lay in the Supreme Court of the United States, in applying the 'full faith and credit' clause of the Constitution. But any hope in that direction was disappointed by the decision in *Haddock v. Haddock*, where it was held that the New York courts could, without infringing the Constitution, refuse recognition to a Connecticut decree of divorce at the domicile of the husband alone, which was not the matrimonial domicile, the wife being domiciled in New York and served only by publication. The court did not overrule its earlier decisions that if the added elements of personal service or appearance by the defendant or the matrimonial domicile had been present, the divorce would be entitled to full faith and credit in all states, and presumably they are still law."

Mr. Justice Holmes, in *Williamson v. Osenton*,²⁵ held that a wife who has justifiably left her husband and removed to another state, with no intention of living elsewhere, thereby acquires a domicile in the latter state so that she may maintain an action in the Federal courts against a citizen of the state in which her husband resides.²⁶

Personal Appearance by Defendant

We have said that the rule is that a divorce decree rendered where neither party is domiciled will not be recognized

²⁵ 232 U. S. 619 (1913).

²⁶ See Note to the case of *Carty v. Carty*, in 38 L. R. A. (N. S.) 297, on the right of the wife to acquire a separate domicile for the purpose of a divorce suit by her.

elsewhere, even if both spouses were before the court. However, there are recent decisions to the effect that a personal appearance by the defendant will eliminate any objection against a decree rendered at the domicile of one party only.²⁷

However, personal appearance is not sufficient if it be for the sole purpose of moving to question the court's jurisdiction.²⁸

Constructive Service

In one of the volumes of the Lawyers' Reports Annotated²⁹ there is a very exhaustive annotation on the extra-territorial effect of a decree of divorce rendered upon constructive service. The case annotated is *Perkins v. Perkins*,³⁰ where the Massachusetts court held that the domicile of an innocent wife is not affected by the husband deserting her and removing to another state, and that the courts of the matrimonial domicile, which is retained by the wife, innocent of matrimonial wrong, who was deserted by her husband, will not recognize, on the principle of comity, the divorce secured by the husband in another state without notice to the wife. In this case the husband and wife were married and had their domicile in Massachusetts until 1912, when the husband deserted the wife, went to Georgia and obtained a divorce under the laws of that State by giving notice to the wife, but she never received notice of the proceedings. The wife sued the husband for divorce in 1915. He set up as a defense the decree of the Georgia court, obtained in 1914. The Massachusetts court refused to give full faith and credit to the Georgia decree because the Georgia court did not have jurisdiction over both of the parties.

²⁷ *Rupp v. Rupp*, 156 App. Div. 389, 141 N. Y. S. 484 (1913); *Richards v. Richards*, 87 Misc. Rep. 134, 149 N. Y. S. 1028 (1914); *Pearson v. Pearson*, 107 Misc. Rep. 19, 176 N. Y. S. 626 (1919); *Bidwell v. Bidwell*, 139 N. C. 402, 52 S. E. 55, 2 L. R. A. (N. S.) 324, 111 Am. St. Rep. 797 (1905).

²⁸ *Weaver v. Weaver*, 160 N. Y. S. 642 (1916).

²⁹ 1917B, 1028.

³⁰ 113 N. E. 841 (Mass. 1916).

Nevada Divorces

In the recent case of *Di Brigida v. Di Brigida*³¹ it was held by the Court of Errors and Appeals of New Jersey that the validity of a divorce decree granted to the husband in Nevada depends upon whether the husband went to Nevada for the purpose of evading the divorce statutes of New Jersey; and that if a divorce decree was procured by fraud upon the Nevada court, the New Jersey court could inquire whether the husband was in fact a resident of Nevada at the time he brought suit for divorce there. In that case the Nevada decree was held void as a fraud on the Nevada court, the defendant not disclosing to that court that he was a resident of New Jersey, with no intention of acquiring a domicile in Nevada.

Mexican Divorces

The validity of a divorce secured in Mexico came up before the Supreme Court of Albany County, New York, in the case of *Richman v. Richman*,³² where the wife, suing the husband for separation, moved for an injunction to restrain him from procuring a divorce in Mexico. The court held that a divorce obtained by the husband in Mexico, on a ground not recognized in New York, would not affect the wife, who did not submit to the jurisdiction of the Mexican court, was never served with process, and never appeared in that action.

Judge Sibley's Summarization

In the following paragraphs, Judge Sibley, of Georgia, in the case of *De Bouchel v. Candler*,³³ has sought to summarize the rules of law upon the subject. He says:

"1. A decree of divorce, void under the laws of the state where granted, is void everywhere, and is subject to collateral attack.

³¹ 172 Atl. 505 (N. J. 1934).

³² 148 Misc. Rep. 387, 266 N. Y. S. 513 (1933)

³³ 296 Fed. 482, 485, 486 (D. C. Ga. 1924)

"2. The state of the domicile of the married pair at the time of their separation is the 'matrimonial domicile.' That state has first and full jurisdiction over the question of divorce and its incidents. A decree there rendered, on regular service therein of the defendant, fixes the personal rights and the matrimonial status of both parties, and must have full faith and credit in all other states.

"3. Should one party depart from the state of the matrimonial domicile, whether it be the party at fault or not, the jurisdiction of that state to decree a divorce and fix the status of the party remaining there is unaffected; though the only service be substituted service, and such a decree regularly granted there is entitled to full faith and credit in all other states.

"4. Should both parties permanently remove from the matrimonial domicile, that domicile perishes, and the jurisdiction peculiar thereto lapses. It accompanies neither spouse. The state of the matrimonial domicile no longer has any concern or jurisdiction in the premises. No other state succeeds to its rights.

"5. If either spouse remove to another state, *animo manendi*, and acquires there a domicile, a jurisdiction arises in such state, based on its interest in, and the right to fix, the matrimonial status of its new inhabitant, in virtue of which it may decree such status. After such length of residence as it may fix, and for such causes as it may allow, a divorce may be granted effective within such state; but, if made on substituted service, and perhaps when on personal service if in evasion of the laws of another state, it is not entitled to full faith and credit in other states, but will by comity be recognized, if not detrimental to their policy or interests.

"6. A state in which an applicant for divorce is mere sojourner and in which the other party is not domiciled, has no jurisdiction to grant a decree on substituted service, but is a mere meddler; and such a decree, even authorized by its own laws, is not entitled to full faith and credit elsewhere as a matter of right, and should not be recognized by comity because directly tending to overthrow the power of every state to deal with the matrimonial status of its own citizens.

"7. The actual domicile of one party or the other in the state in which a decree of divorce is granted being thus essential to the jurisdiction to make it, whether such domicile in fact exists may be collaterally inquired into when the decree is sought to be used in another state. If it clearly appears that such domicile was lacking, the decree will be treated as a nullity, and the status of the parties unaffected thereby.

"8. The finding of the fact of domicile by the court making the decree raises a presumption that it existed. After a lapse of time, and

especially after the rights of other parties have intervened on the faith of the decree, the clearest and most satisfactory proof should be required to overcome the presumption. In other circumstances less convincing evidence may suffice."

Impeaching Foreign Decree

A foreign decree of divorce may be collaterally impeached if it was procured by fraud upon the legal rights of the party against whom it was rendered.³⁴ For instance, where the acknowledgment of service of process in a suit in one state against a resident of another was insufficient to confer jurisdiction, because such acknowledgment was made in ignorance of its real meaning and was obtained by fraud and deception, the court allowed the decree to be collaterally attacked by the defendant when questioned in another state.³⁵

It is also held that if the court granting the divorce decree erroneously finds that one of the parties was domiciled in the state, this will not prevent the court of another state from reviewing the facts, since it is jurisdictional.³⁶

Wherever there is want of jurisdiction because the court is without jurisdiction, either of the subject matter of the suit, or of the person of the defendant, the decree in another state may be collaterally attacked, and this without violating the full faith and credit clause of the Federal Constitution.³⁷

The rule is well expressed in *Corpus Juris*,³⁸ where it is stated:

"In fact it has been said that courts generally have permitted foreign divorce decrees to be impeached 'for want of jurisdiction,' when other judgments could not have been similarly attacked, because of reluctance to permit foreign courts to fix the marital status of resident citizens, and because of the peculiar character of the marriage rela-

³⁴ DIVORCE AND SEPARATION, 9 R. C. L. § 340.

³⁵ *Ingram v. Ingram*, 143 Ala. 124, 42 So. 24 (1905).

³⁶ *MADDEN*, *op. cit. supra* note 5, at 312; *Andrews v. Andrews*, *op. cit. supra* note 9.

³⁷ *German Savings & Loan Society v. Dormitzer*, 192 U. S. 125, 24 Sup. Ct. 221, 48 L. ed. 373 (1903).

³⁸ DIVORCE, 19 C. J. § 845.

tion. Thus the validity of the decree may be overcome by proof that the parties were not domiciled within the territorial jurisdiction of the foreign court; and a foreign divorce may be attacked by showing that it was granted to a nonresident plaintiff, but there are cases to the contrary, the rule being laid down that, where the jurisdictional facts with respect to residence are litigated in the court of the state in which the decree of divorce is rendered, with both parties before the court, the decree cannot be questioned collaterally in another jurisdiction with respect to such jurisdictional facts, unless the decree was obtained by fraud."

Decrees of Limited Divorce

With reference to decrees of limited divorce, sometimes called judicial separation, or divorce *a mensa et thoro*, the rule is that such a decree does not dissolve the marriage bond, but makes important changes with respect to the rights and obligations of the parties. The courts hold that a decree of judicial separation rendered by the courts of one state must be given full faith and credit in the courts of another state under the same circumstances in which a decree of absolute divorce must be so recognized.³⁹

If a decree of judicial separation is rendered at the matrimonial domicile, it must be given full faith and credit elsewhere.⁴⁰

There is, however, the case of *Pettis v. Pettis*,⁴¹ where it was held that as a decree of divorce *a mensa et thoro* does not affect the status of the parties, it cannot be regarded as a decree in rem, but must be regarded as personal action which cannot be recognized in another state, even as a matter of comity. The decree was based on the personal jurisdiction over the defendant. The court, therefore, as against a nonresident, nonappearing defendant, denied extraterritorial effect to the decree.

³⁹ GOODRICH, *op. cit. supra* note 4, at 299, 300, 301.

⁴⁰ Thompson v. Thompson, 226 U. S. 551, 33 Sup. Ct. 129, 57 L. ed. 347 (1912).

⁴¹ 91 Conn. 608, 101 Atl. 13, 4 A. L. R. 852 (1917).

Full Faith and Credit Clause

Article IV, Section 1, of the Federal Constitution, declares that "full faith and credit shall be given in each state to the . . . judicial proceedings of every other state." In considering this requirement, which establishes a rule of evidence rather than of jurisdiction,⁴² we must remember that it is necessarily to be interpreted along with other provisions of the Federal Constitution; and, therefore, no state can obtain in the tribunals of other jurisdictions full faith and credit for its judicial proceedings if these are wanting in the due process of law enjoined by the fundamental law.⁴³

The effect of this requirement of full faith and credit by the Federal Constitution is that when a court of a sister state has rendered a judgment with jurisdiction over the person of the defendant, such judgment, when duly pleaded and proved, is conclusive proof of the rights thereby adjudicated.⁴⁴

It is conclusive on the merits in the courts of every other state, when made the basis of an action, and in such action the merits can not be inquired into.⁴⁵

And the recognition which the courts of one state give to the judgments of a court of a sister state in divorce proceedings depends upon the rulings of the Supreme Court of the United States, whose construction of the United States Constitution is final and binding.⁴⁶

There are two leading cases on the question of recognition which the Federal Constitution demands, when the de-

⁴² *Wisconsin v. Pelican Ins. Co. of New Orleans*, 127 U. S. 291, 8 Sup. Ct. 1370, 32 L. ed. 239 (1887).

⁴³ *Old Wayne Mut. L. Asso. v. McDonough*, 204 U. S. 8, 27 Sup. Ct. 236, 51 L. ed. 345 (1906); *Wetmore v. Karrick*, 205 U. S. 141, 27 Sup. Ct. 434, 51 L. ed. 745 (1906); *International L. Ins. Co. v. Sherman*, 262 U. S. 346, 43 Sup. Ct. 574, 67 L. ed. 1018 (1922).

⁴⁴ *Huntington v. Attrill*, 146 U. S. 657, 685, 36 L. ed. 1123, 1134 (1892); *Everett v. Everett*, 215 U. S. 203, 30 Sup. Ct. 70, 54 L. ed. 158 (1909); *D'Arcy v. Ketchum*, 11 How. 165, 13 L. ed. 648 (1850).

⁴⁵ *Sistare v. Sistare*, 218 U. S. 1, 30 Sup. Ct. 682, 54 L. ed. 905 (1909).

⁴⁶ *GOODRICH, op. cit. supra* note 4, at 293, 294.

cree is rendered at the domicile of one party only, and Professor Goodrich, in his text,⁴⁷ states their holdings admirably in these words:

"The first is *Atherton v. Atherton* [181 U. S. 155, 21 Sup. Ct. 544, 45 L. ed. 794], decided in 1901. The parties were married in New York and immediately went to live in Kentucky, where the husband had lived prior to his marriage. Later the wife left the husband and returned to New York to live. In that state she sued the husband for a divorce from bed and board, alleging cruel and inhuman treatment. The defendant's answer set up a decree of divorce which he had obtained in Kentucky, after the wife had left him, on the grounds of desertion. She was not served personally in that action in Kentucky, nor had she appeared, but notice of the proceedings had been sent her in accordance with the Kentucky statute. The New York court held that the Kentucky decree was inoperative against the wife and gave judgment in her favor. The judgment was reversed by the United States Supreme Court on the ground that full faith and credit had been denied the Kentucky decree.

"The court, in confining its decision to the facts before it, mentions the fact that Kentucky was the only matrimonial domicile of husband and wife.

"The other leading case is *Haddock v. Haddock* [201 U. S. 562, 26 Sup. Ct. 525, 50 L. ed. 867], which came five years later. The parties were married in New York, where both lived at the time. The husband went to Connecticut, established his domicile there, and secured a divorce in that state, the absent wife being served by publication only. Later the wife brought a separation suit, against Haddock in New York. He set up, in defense, the decree he had received in Connecticut. This was rejected by the court in the New York proceedings. Upon final appeal to the United States Supreme Court, it was held that there was no violation of the requirement of full faith and credit."⁴⁸

The Uniform Divorce Jurisdiction Act⁴⁹ provides, with reference to the decrees of the courts of another state, that "Full faith and credit shall be given in all the courts of this state to a decree of divorce by a court of competent jurisdiction in another state, territory or possession of the United

⁴⁷ GOODRICH, *op. cit. supra* note 4, at 293, 294.

⁴⁸ A very interesting discussion and analysis of the *Haddock* case is contained in an article entitled "Mr. and Mrs. Haddock," by Hamilton Vreeland, Jr., in 22 A. B. A. J. 568 (September, 1934).

⁴⁹ 9 U. L. A. 134, §§ 2, 3.

States when the jurisdiction of such court was based upon provisions not inconsistent with the conditions prescribed in this act, even though such decree is not entitled to full faith and credit under the constitution of the United States." It is provided further that "Nothing in this Act contained shall affect existing rules of law as to obtaining jurisdiction over the person of the defendant."

This Act does not conflict with the decision in *Haddock v. Haddock*,⁵⁰ which it recognizes. But the Act goes further and provides that a state, after substituted service on a person, may authorize a decree of divorce which will be good within the state; and by comity may recognize decrees of other states granted in like manner.

Custody of Children

It is the general rule that jurisdiction to award the custody of children in a divorce suit lies with the court at the domicile of the children, and the great weight of authority holds that the decree is conclusive as to all matters up to the time of its rendition, and will be recognized and given effect in another state.⁵¹

A very complete discussion of the effect in one state of the decree of a foreign court awarding the custody of children in a divorce action is found in *Corpus Juris*,⁵² where it is stated, in substance, that jurisdiction in such cases is with the courts at the domicile of the children, and that decrees by such courts should be considered as conclusive in other courts as to all matters up to the time of the rendition of the decrees.

The Restatement of Conflict of Laws⁵³ states the rule to be that in any state into which the child comes, upon proof that the custodian of the child is unfit to have control

⁵⁰ *Op. cit. supra* note 11.

⁵¹ GOODRICH, *op. cit. supra* note 4, at 306.

⁵² DIVORCE, 19 C. J. § 831.

⁵³ §§ 155, 156.

of the child, the child may be taken from him or her and given while in the state to another person. Except as thus stated, when the custody of a child has been awarded by the proper court to either parent, the rights of that parent to the custody of the child will be enforced in other states. The courts hold that the decree awarding custody of children is conclusive only as to matters which happened prior to the rendition of the decree, and would not govern when a change of circumstances could be shown the court.

Professor Goodrich, noting this rule, says that as the finding of changed circumstances is one that "can easily be made and plausibly supported, 'it follows that the recognition extraterritorially which custody orders receive or can command is liable to be more theoretical than of great practical importance.' " ⁵⁴

Change of Domicile

A statement of another reason for the rule as to how the full faith and credit clause affects a decree, made in a divorce proceeding, as to custody of children is found in this quotation from Ruling Case Law,⁵⁵ where it is stated:

"Nor is a decree of a court of one state awarding the custody of a child binding upon the courts of another state under the full faith and credit clause of the federal constitution after the child has become domiciled in the latter state. Such a decree as to a child has no extraterritorial effect beyond the boundaries of the state where it is rendered, and the courts of the second state will not remand the child to the jurisdiction of another state, especially where it is against the true interests of the child. The reason for this rule is found in the fact that children are the wards of the court and the right of the state rises superior to that of the parents. Therefore, when a child changes his domicil and becomes a citizen of a second state, he is no longer subject to the control of the courts of the first state."

⁵⁴ GOODRICH, *op. cit. supra* note 4, at 306, quoting from *Morrill v. Morrill*, 83 Conn. 479, 77 Atl. 1 (1910), and citing *Mylius v. Cargill*, 19 N. M. 278, 142 Pac. 918, L. R. A. 1915B, 154, Ann. Cas. 1916B, 941 (1914).

⁵⁵ JUDGMENTS, 15 R. C. L. § 417. Accord: *Re Alderman*, 157 N. C. 507, 73 S. E. 126, 39 L. R. A. (N. S.) 988 (1911).

In *Ex parte Alderman*⁵⁶ there was a contest between the father and mother to determine the custody of an infant son. The parties were divorced while residents of the State of Florida, and the mother was given the custody of the minor, with permission to the father to visit the child. Subsequent to the granting of this divorce the mother removed to North Carolina with the child. It was contended by the father that under the Florida decree he had a vested right in the partial custody of the child which the court of North Carolina should respect. In its opinion in this case the court said:

"The custody of children in cases of the divorce and separation of their parents is a subject as delicate as any with which the courts have to deal. The good of the child should be, and always is, the chief thing to be regarded and the governing principle which guides the judge. All other considerations sink into insignificance. Many cases and text-writers can be cited where the principle is announced that the physical, moral and spiritual welfare of the child is the only safe guide in cases of this kind; and the courts will be guided by those surroundings. . . . But the infant child of their union is not property, and the father can have no vested right in the child or its services under a decree divorcing the parents. Such decree as to the child has no extraterritorial effect beyond the boundaries of the state where it was rendered. The child is now a citizen of North Carolina, and, as such, peculiarly under its guardianship, and the courts of this state will not remand it to the jurisdiction of another state, especially where, as in this case, it is so manifestly against the true interest of the child. . . . The supreme right of the state to the guardianship of children controls the natural rights of the parent when the welfare of society or of the children themselves conflicts with parental rights."

In the case of *People v. Johnson*⁵⁷ the court had this to say:

"The state is interested to protect the child, and the foreign divorce ought not to preclude the courts of this state from protecting a child from the influence of a mother whose actions since her divorce was obtained show her to be unfit to care for and rear a young girl. . . .

"The Supreme Court of this state, as guardian of all infants within its jurisdiction, has inherent power in a proper case to take the custody of a child from either of its parents, if such a course is for the best

⁵⁶ *Op. cit. supra* note 55.

⁵⁷ 205 App. Div. 190, 199 N. Y. S. 695, 697, 698 (1923).

interest of the child. . . . It is the duty of the court in a proceeding involving the care and custody of a child to look solely to its welfare. . . .

"The Florida divorce obtained by relator was based on facts then existing and brought to the attention of the court, and the awarding of the custody of the child to the relator was undoubtedly based on the idea that she was a person fit to have such custody, and that her conduct in the future would be exemplary. If, since that decree was obtained, as was established by the evidence here, she has conducted herself in such a way as to show her morally unfit to care for a little girl of tender years, then the court, whose jurisdiction she invoked to get possession of the child, has a right to act on the facts brought out at the hearing in her proceeding, and be governed accordingly."

Where the state rendering the divorce and awarding custody of the children was the domicile of the children and only one of the parents, service being had on the nonresident party by publication, while not entitled to obligatory enforcement, its decree will be respected, in the absence of fraud, under the rule of comity.⁵⁸

In the interesting case of *Keener v. Keener*⁵⁹ the facts were that both complainant and defendant were born and reared in Hawkins County, Tennessee, were married in January, 1913, making their home in Hawkins County; in December, 1913, a daughter was born to them. In March, 1914, Mrs. Keener was forced to leave her husband, due to his cruel and inhumane treatment. She at first made her home with her father, in Hawkins County, Tennessee, but the attentions of her husband so annoyed her that she moved to Birmingham, Alabama, for the double purpose of escaping her husband and to make her permanent home, and to obtain a divorce after residing one year as required by the Alabama statutes. In due time she filed her bill for divorce in Jefferson County, Alabama, her husband being served by publication. He refused to appear and contest the

⁵⁸ *Keener v. Keener*, 139 Tenn. 211, 201 S. W. 779 (1918); *Kline v. Kline*, 7 Iowa 386, 10 N. W. 825 (1881); *Rodgers v. Rodgers*, 56 Kan. 483, 43 Pac. 779 (1896); *Harris v. Harris*, 115 N. C. 587, 20 S. E. 187 (1894); *People v. Hickey*, 85 Ill. App. 20 (1899).

⁵⁹ *Op. cit. supra* note 58.

divorce, but did employ an attorney to watch the proceeding and make report to him. He forbade the counsel to enter his appearance in the case. A decree was awarded, in accordance with Alabama law, and the custody of the child was awarded to the mother. The child was then but a little over a year old, and in delicate health, needing the constant attention of a physician. The decree of the Alabama court did not give the husband the right to see the child, but he went to Alabama after the divorce had been granted, and was granted permission by the mother, on two occasions, to see the child. On advice of a physician, Mrs. Keener returned temporarily to the home of her father, it being the opinion of the physician that a change of climate would be beneficial to the health of the child. While Mrs. Keener was on this visit, the complainant, her former husband, filed the bill in this case for the purpose of setting aside the decree of the Alabama court, on the ground that it was obtained by fraud, and also for the purpose of obtaining custody of the child, or at least the opportunity of having custody for a part of the time. The chancellor before whom the case was tried declined to interfere with the divorce, but did decree to the complainant the right to see the child at intervals, and required the placing of a bond that neither party should remove the child from the jurisdiction of the court. An appeal was taken to the higher court, which held that, while the decree of the Alabama court was not entitled to obligatory enforcement under the full faith and credit clause of the Federal Constitution, the decree would be respected, in the absence of fraud, under the rule of comity; and that the complainant would have to look to the Alabama court for any modification of its decree.

In the case of *Brandon v. Brandon*⁶⁰ the court held that a decree of the court of Common Pleas of the state of Ohio, granting to the wife a divorce from her husband and awarding the custody of their child to the mother, the husband

⁶⁰ 154 Ga. 661, 115 S. E. 115 (1922).

residing, at the time of the institution of divorce proceedings and at the time of the rendition of the decree, in the state of Georgia, is not entitled to obligatory enforcement in Georgia under the full faith and credit clause of the Federal Constitution. As a general rule, the general law governing the comity of states, the judicial proceedings of another state will be enforced in Georgia, if they do not involve anything immoral, or are not contrary to public policy, or are not violative of the conscience of the state of Georgia. But where the child was living with the father in the state of Georgia at the time of the rendition of the decree granting the mother a divorce and awarding her custody of the child, such decree, being had in the court of another state and being based on service on the father by publication alone, was void for lack of jurisdiction, so far as it undertook to take said child from the father and award it to the mother, and the decree can be attacked on this ground by the father in habeas corpus proceedings brought by the divorced wife against him in Georgia, for the custody of the child.

It was held in *Mollring v. Mollring*⁶¹ that a foreign decree of divorce awarding the husband custody of the child, entered when neither he nor the child was within the jurisdiction of the court, so far as award of custody is concerned, is of no effect for want of jurisdiction.

Effect of Divorce Decree on Dower

If the divorce decree rendered in the courts of one state absolutely terminates the marriage relation, then the effect of a divorce on dower, affecting, as it does, an interest in land, is necessarily governed by the *lex rei sitae*.⁶²

In *Barrett v. Failing*⁶³ it was held that generally a valid divorce from the bonds of matrimony bars the wife's right

⁶¹ 184 Iowa 464, 167 N. W. 524 (1918).

⁶² GOODRICH, *op. cit. supra* note 4, at 304.

⁶³ 111 U. S. 523, 4 Sup. Ct. 598, 28 L. ed. 505 (1883).

of dower, unless the same is preserved by the *lex rei sitae*. Mr. Justice Gray said:

"Unless otherwise provided by local law, a decree of divorce by a court having jurisdiction of the cause and of the parties, dissolving the bond of matrimony, puts an end to all obligations of either party to the other and to any right which either has acquired by the marriage in the other's property, except so far as the court granting the divorce, in the exercise of an authority vested in it by the legislature, orders property to be transferred or alimony to be paid by one party to the other."

The general rule is that a foreign divorce decree is void so far as it attempts to affect the title to lands within the state.⁶⁴

Since dower in land is governed by the law of the place where the land lies, the question whether a valid divorce granted by the court of a state other than that in which the land of the husband is situated shall bar dower rights of the divorced wife, depends exclusively on the law of the latter state, and a decree for divorce granted in one state will cut off the right of dower in the husband's land in another state unless the statutes of that state expressly or impliedly preserve the right.⁶⁵

"If the statutes of the state where the land is situated provide that a divorce shall bar dower, a valid foreign divorce will bar a divorced wife's claim for dower in land situated in that state, provided it was rendered for the wife's fault, or upon some other enumerated ground, where that is required by the local law to constitute a bar."⁶⁶

⁶⁴ Williams v. Williams, 83 Ore. 59, 162 Pac. 834 (1917).

⁶⁵ Chapman v. Chapman, 48 Kan. 636, 29 Pac. 1071 (1892); Hood v. Hood, 110 Mass. 463 (1872); DOWER, 19 C. J. § 141.

"Under what circumstances an interest in land within a state shall be allowed a wife by way of dower is a question of policy which the state alone has power to decide, and no judgment of a foreign tribunal in and of itself can in any wise affect the question." Van Cleef v. Burns, 133 N. Y. 540, 30 N. E. 661, 662, 5 L. R. A. 542 (1892).

⁶⁶ DOWER, 19 C. J. § 141.

In *Gould v. Gould*,⁶⁷ a Missouri case, it was held that a statute barring the wife's claim to dower after divorce granted by reason of the wife's fault applies to all divorces, whether obtained in Missouri or in any other state, and whether obtained on personal service or by order of publication. In *Hawkins v. Ragsdale*,⁶⁸ a Kentucky decision, it was held that a statute providing that a divorce bars all claims to dower applies to all valid divorces wherever obtained. But "a foreign decree of divorce which is void for want of jurisdiction does not affect the right of dower."⁶⁹

In *Colvin v. Reed*⁷⁰ two citizens of Pennsylvania married. Soon thereafter they made a visit to Iowa, staying there for a short time and then returning to Pennsylvania. After their return, the wife declared her intention not to live with the husband, and he went into another county in the State. Subsequently he sold his farm to the defendant and went back to Iowa, where, being a *bona fide* citizen, he obtained a divorce *a vinculo* on the ground of desertion alleged to have taken place in Pennsylvania. The wife had no actual notice of the divorce proceedings. It was held that the divorce did not extinguish her right of dower in the Pennsylvania farm.

The following cases support the doctrine that the effect of a divorce on dower is governed by the *lex rei sitae*:

*Mansfield v. McIntire*⁷¹ (A decree of divorce in Ky. is not a bar to dower in Ohio.).

*McGill v. Deming*⁷² (A wife obtained a divorce in California for the husband's intemperance and cruel treatment for more than two years. Held, that the wife was divorced by reason of the aggression of her husband, within the meaning of the statute providing that when a divorce is granted by reason of the aggression of the husband, the wife, if she survive her husband, shall also be entitled to dower.).

⁶⁷ 57 Mo. 200 (1874).

⁶⁸ 80 Ky. 353 (1882).

⁶⁹ *Loc. cit. supra* note 66.

⁷⁰ 55 Pa. St. 375 (1867).

⁷¹ 10 Ohio 28 (1840).

⁷² 44 Ohio St. 645, 11 N. E. 118 (1887).

*Thomas v. King*⁷³ (Under statute providing that, if the bonds of matrimony be dissolved at the suit of the husband, the wife shall not be entitled to dower, a divorce obtained by the husband in a foreign state bars dower in Tennessee.).

*Smith v. Woodworth*⁷⁴ (Under a statute providing that no second or subsequent marriage shall be contracted by a person during the lifetime of any former spouse, unless the marriage shall have been annulled or dissolved for some cause other than the adultery of such person, it is not material on the question of dower that the former marriage should have taken place or been dissolved within this state.).

*Todd v. Keer*⁷⁵ (An act of the legislature, procured by a wife in the state in which she resides, dissolving the marriage contract between herself and her husband, who is a resident of a foreign state, does not operate to debar the wife of dower in lands owned by her husband in such foreign state.).

*Hawkins v. Ragsdale*⁷⁶ (In the absence of statute, a divorce obtained by a husband in another state, though it determines the status of the parties, does not, by its own force, affect the wife's right of dower in his real estate in Kentucky.).

*Van Cleaf v. Burns*⁷⁷ (A statute provides that, in case of divorce dissolving the marriage contract for the "misconduct of the wife, she shall not be endowed." The statute provides that, where final judgment is rendered dissolving a marriage in an action brought by the husband, the wife shall not be entitled to dower in any of his real estate. Held, that as nothing except adultery is regarded as misconduct with reference to the subject of absolute divorce, no other misconduct will deprive a wife of dower, even if it is the basis of a judgment of divorce lawfully rendered in another state, unless it expressly appears that such judgment has that effect in the jurisdiction where it was rendered.).

*Van Cleaf v. Burns*⁷⁸ (A foreign judgment of divorce for cause other than adultery, which has the effect to deprive the wife of dower in the state where it is rendered, will not have such effect in New York. The provisions of the full faith and credit clause of the United States Constitution, while they make such foreign judgment conclusive of the fact that the divorce was granted as therein stated, give it no extra-territorial effect on land of the husband.).

⁷³ 95 Tenn. 60, 31 S. W. 983 (1895).

⁷⁴ 44 Barb. 198 (1865).

⁷⁵ 42 Barb. 317 (1864).

⁷⁶ *Op. cit. supra* note 68.

⁷⁷ 118 N. Y. 549, 23 N. E. 881 (1890).

⁷⁸ *Op. cit. supra* note 65.

Questions of Alimony

When questions of jurisdiction to award alimony come up in Conflict of Laws, the general rules are that for an award of alimony to be effective, it must be rendered by a court having personal jurisdiction over the defendant, in addition to authority to make the order, this on the theory that alimony is a personal judgment against the defendant.

In the Comment to Section 124 of the Restatement of Conflict of Laws it is stated that the decree for alimony being the creation of a purely personal duty of the spouse, like a judgment for damages, there must either be jurisdiction over the person himself to create the duty, or jurisdiction over the thing to apply it to the payment of the claim for alimony. And then the Restatement provides:⁷⁹

"A state can exercise through its courts jurisdiction to grant alimony to one spouse if it has jurisdiction over the other spouse; or, if it has jurisdiction over his property, to the extent of such property."

In *Paulin v. Paulin*⁸⁰ it is held that a decree for alimony rendered by the courts of a foreign state is within the application of the full faith and credit clause of the Federal Constitution, which confers jurisdiction to enforce such decree upon the courts of the states other than that by whose courts the decree was rendered, provided the decree sought so to be enforced is final, and not temporary in its nature.

In *Rogers v. Rogers*⁸¹ the Indiana court gave full faith and credit to a decree made by an Ohio court requiring the husband to pay alimony at a stipulated sum per week, until the further order of the court. It appeared that the judgment sued upon was final and that the alimony was past due when the suit was begun.

There are decisions, however, to the effect that if the alimony decree is capable of modification it is not, even as to

⁷⁹ RESTATEMENT, CONFLICT OF LAWS (Student ed.) § 116.

⁸⁰ 195 Ill. App. 350 (1915).

⁸¹ 46 Ind. App. 506 (1909). See, also, *Lape v. Miller*, 203 Ky. 742, 263 S. W. 22 (1924).

past due installments, a judgment within the full faith and credit clause of the Federal Constitution.⁸²

In *Morris v. Morris*⁸³ it is held that a divorce decree of a foreign state, where procured by false testimony of jurisdictional facts, was no protection to the party guilty of that fraud against a charge of adultery growing out of cohabitation with a woman, with whom the guilty party, subsequently to the decree, went through a marriage ceremony otherwise valid.

If the husband remove from the state of the matrimonial domicile to another state for the purpose of obtaining a divorce, and with no intention of remaining in the state, but intending to remain there no longer than was necessary to get a divorce, then such a decree so obtained would be void, and the husband, upon his return to the matrimonial domicile of the first marriage, would be subject to a prosecution for bigamy.⁸⁴

Restrictions on Right to Remarry

In some states of the Union there are certain restrictions upon the right of the divorced parties to remarry, and in many of the states the consent of some court is requisite for the guilty party to remarry, either in the decree granting the divorce, or in a subsequent decree. In other states the parties are not permitted to remarry until the lapse of a certain time after the signing of the decree. In Alabama⁸⁵

⁸² *Gaffey v. Criteser*, 195 S. W. 1166 (Tex. 1917).

A very good discussion of the precedents involving attempts to enforce in one state decrees for alimony rendered in another state is contained in *Levine v. Levine*, 95 Ore. 94, 187 Pac. 609 (1920).

⁸³ 169 S. E. 475 (W. Va. 1933).

⁸⁴ *Thompson v. The State*, 28 Ala. 12 (1856).

As to whether divorce is a defense in a prosecution for bigamy, see *State v. Herren*, 175 N. C. 754, 94 S. E. 698 (1917).

⁸⁵ ALA. CODE (1923) § 7425. For statutes of other states, see MADDEN, *op. cit.* *supra* note 5, at 42, note 2.

the parties are not permitted to again contract marriage except to each other until sixty days after the decree is rendered.

Marriages made in violation of these restrictions are generally held to be void, and the party remarrying may be prosecuted for bigamy.⁸⁶

There are cases holding, however, that where a party, in order to evade the restrictions as to remarriage, leaves the state and goes to another state and is there married, his marriage, being lawful in that state, is lawful in the state where he was divorced. This, on the theory of the courts that the inhibition of such a state statute was not intended to have extraterritorial operation.⁸⁷

And where a party obtains a divorce in one state, which by its terms does not become absolute or take effect until the passage of a certain time (six months in some states), and then goes into another state, and, before the expiration of the time prescribed in the decree, remarries, he is guilty of bigamy in the latter state, and the second marriage is void.⁸⁸

Walter B. Jones.

Montgomery, Alabama.

⁸⁶ Ex parte State ex rel. Atty. Gen Vance v. State, 210 Ala. 9, 97 So. 230 (1923).

⁸⁷ Griswold v. Griswold, 23 Colo. App. 365, 129 Pac. 560, 566 (1913); Smith v. Goldsmith, 223 Ala. 155, 134 So. 651 (1931).

⁸⁸ Warter v. Warter, 15 P. D. 152 (1890); Witt v. State, 5 Ala. App. 137, 59 So. 715 (1912).