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EDITORIAL COMMENT

CONFUSION IN THE FIELD OF DIVORCE LAW

The power to grant a divorce is a statutory and not a common law power. At one time granted by the legislatures in the several states, it is now granted by the sentence of a court of justice pursuant to general law.

Each state jealously guards its own right to determine the status of its people, and the reluctance of the states to surrender any of this power, together with the consequent multitude of various state laws has made the law concerning many subjects, and particularly that pertaining to divorce, in apparent hopeless conflict. It is in this field of the law, if at all anywhere, that uniformity is to be desired.

It is fairly well settled that a decree of divorce rendered in a jurisdiction where neither party is domiciled is not entitled to recognition in another state under the full faith and credit clause of the Constitution, for the record may be contradicted as to the facts necessary to give the court jurisdiction. The fact that both plaintiff and defendant have appeared personally in the divorce suit will not supply the lack of jurisdiction. (*Andrews v. Andrews*. 188 U. S. 14.) The difficulty arises where husband and wife have separate domiciles, and this has been aggravated by the fact that some American courts have gone far in recognizing the power of the wife to establish her own separate domicile. Even in jurisdictions where the wife cannot ordinarily establish a separate domicile it is well settled that, for the purpose of divorce, an injured and innocent wife may acquire a domicile separate from that of the husband. (*Atherton v. Atherton*. 181 U. S. 155.) So, too, if the husband, for the purpose of obtaining a divorce, removes and acquires a domicile in another state, the domicile of the innocent wife will not necessarily follow his but will remain in the state where she actually resides. (*Perkins v. Perkins*. 225 Mass. 82.) When the parties are so separated a divorce may generally be secured at the domicile of either. What is to be the effect of such a decree in another

state, on general principles of Conflict of Laws or under the full faith and credit clause of the Constitution? Will it bind the absent defendant? Will it make any difference if the defendant has been personally served with process in the state where the decree was rendered, or was merely given actual or constructive notice by publication in accordance with the law of the state? It is here that the laws of the many states are widely divergent. Some hold that a decree rendered at the domicile of one of the parties should be entitled to recognition elsewhere even though the other party was not before the court rendering the decree. This view seems to be the weight of authority. The minority holding is to the effect that recognition of such a decree will not be compelled under the full faith and credit clause of the Constitution, unless the defendant was personally subjected to the jurisdiction of the court rendering the decree.

As to the question of the recognition which the Constitution demands, where the decree is rendered at the domicile of one party only, there are two leading cases. The one is *Atherton v. Atherton*, 181 U. S. 155, decided in 1901. In this case the husband was suing for divorce in Kentucky. There was no personal service on the wife, a non-resident, nor had she appeared in the action, but notice of the proceedings had been sent to her in accordance with the Kentucky statute. The New York court held that the Kentucky decree was inoperative against the wife and granted a divorce in her favor. This was reversed by the United States Supreme Court on the ground that full faith and credit had been denied the Kentucky decree. The other case is *Haddock v. Haddock*, 201 U. S. 562, decided in 1906. In this case the parties were married and lived in New York. The husband removed to Connecticut where he was granted a divorce, with service by publication on the wife. Later the wife brought a suit for separation in New York. The husband set up as a defense the decree obtained in Connecticut. The defense was rejected by the New York court. The United States Supreme Court held that this was no violation of the full faith and credit clause of the Constitution. The difference between the cases is that in the *Atherton* case the decree was rendered against a nonresident defendant at the matrimonial domicile of the husband and wife, and in the *Haddock* case it was not. Then the

question presents itself: why distinguish between the extent of the jurisdiction in the matrimonial domicile and that admitted to exist to some extent in a domicile later acquired?

Some states have held that their courts will not take jurisdiction if the offense does not constitute a ground for divorce in the state where the act was committed, although it is a ground for divorce in the state where the action was brought. (*Perzel v. Perzel*. 91 Ky. 634.) Many states hold just the contrary, that is, they will grant a divorce to anyone who establishes a domicile there for any cause recognized as a ground in the jurisdiction where the divorce is sought. (*Gregory v. Gregory*. 78 Me. 187.) (*Wilcox v. Wilcox*. 10 Ind. 436.)

It is regretted that such a condition exists and some form of uniform legislation on the matter should be sought for and is sincerely desired. Uniform marriage and divorce legislation is the only means that take the laws regulating the status of married and divorced persons out of its present chaotic condition. The desired uniform legislation would remove one cause of the present tangle by making grounds for divorce the same in each state, thus removing the inducement to migration for divorce purposes. Full faith and credit would be given to all decrees of other states where rendered in substantial conformity with the jurisdictional requirements of the uniform statute. The problem might also be solved by Constitutional amendment followed by Congressional legislation, but it seems to the writer that a uniform divorce act, when properly drawn, and given proper support by the states, would prove to be the desirable solution.

—R. A. G.