Conflict of Laws--Jurisdiction for Divorce--Extra-territorial Validity of \textit{ex parte} Divorces

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fact that negligence to be criminal must be what is classed as reckless or gross is not sufficient reason to necessitate a different standard, which measures the actor’s conduct, or even the addition of other subjective elements. Requiring negligence to be gross in order to be criminal is not requiring that the actor have a reckless, careless, or culpable state of mind. That negligence to be criminal must be gross means simply that the actor’s negligent conduct must involve such a high and patent risk of harm to others that society imposes, as an additional restraining influence, criminal liability. But having made this analysis, the question that immediately presents itself is, how does gross negligence furnish the necessary mens rea required in crimes? Gross negligence which results in homicide is said to be sufficient to supply or to substitute for intent. Mr. Justice Holmes states, “The law requires men at their peril to know the teachings of common experience, just as it requires them to know the law”. It is submitted that the objective standard for determining criminal liability is in harmony with the modern trend in criminal law to give less consideration to the criminal’s intent and to look primarily to the sociological harm threatened by his behavior.

E. PRESTON YOUNG

CONFLICT OF LAWS—JURISDICTION FOR DIVORCE—EXTRA-TERRITORIAL VALIDITY OF EX PARTE DIVORCES

For the purpose of this discussion the following hypothetical case is proposed:

H and W were married in state X where they lived as husband and wife for several years. H left W in state X and went to state Y where he established a bona fide domicile. He then sued for a divorce on the ground of desertion, having service by publication upon his wife. H obtained a default decree in state Y and later married W number two. After living with W number two for several years he died, leaving real property in state X, state Y and state Z. W number two is culpable or criminal negligence? What is the test by which criminal responsibility becomes a consequence of a negligent act? But in his excellent work, ‘Negligence in Law,’ vol. 3, p. 7, says: ‘... Between criminal negligence, however, and actionable negligence, there is no principle of discrimination, but a question of degree only’.

2 Fitzgerald v. State, 112 Ala. 34, 20 So. 366 (1895); People v. Adams, 289 Ill. 339, 124 N.E. 575 (1919); People v. Sikes, 328 Ill. 64, 159 N.E. 283 (1927); People v. Barnes, 182 Mich. 179, 148 N.W. 400 (1914).

27 Levitt, Extent and Functions of the Doctrine of Mens Rea, (1923) 17 Ill. L.R. 578: “At the present time, I think, the subjective aspect is practically eliminated as an element of any specific crime, and maintains whatever hold it has because of the idea that a crime is an act for which the offender must be punished.”

2 Id. at 578-79.


two had dower granted her in property in state Y and later W number one brought suit to have dower allotted to her in the real property in state X. The court in state X granted W number one dower holding that H was in fault in his separation from W number one and that the divorce in state Y was invalid. Subsequently W number one sues to have dower allotted in the real property in state Z, W number two being made defendant and appearing in the action. Query: Which of these two women is entitled to the real property in state Z?

There are two possible solutions to this case based on the decision of the United States Supreme Court in Haddock v. Haddock. Assuming that the right to dower depended upon which of these claimants state Z should recognize as the wife of H at the time of his death, these solutions are stated, and will be followed by discussions of the two solutions in the order in which they are stated.

1. The courts of state Y had jurisdiction to render a binding divorce if the marital status had acquired a situs in that state. The determination of whether the marriage relation had ever acquired such a situs is made dependent upon who was at fault in the separation in state X.

2. The marriage relation is composed of a number of legal incidents. Certain of these legal incidents followed H to state Y and state Y had jurisdiction of so many of these legal incidents as were within that state. Therefore, state Y could render a divorce decree which would permit H to remarry in that state, but it could not render a decree that would affect the legal incidents of the marriage which remained with W in state X, such as her right to dower in her husband's property.

The following reasoning would seem to justify the first solution: In Haddock v. Haddock, the facts were similar to the facts of our hypothetical case. Mr. and Mrs. Haddock were married in New York and lived there until Mr. Haddock left and went to Connecticut where he established a domicil and obtained a divorce from Mrs. Haddock, having service by publication upon her. Later Mrs. Haddock instituted a divorce action in New York having personal service upon Mr. Haddock in New York. Mr. Haddock set up the Connecticut decree as a defense. On appeal the Supreme Court held that New York was not bound to extend full faith and credit to the Connecticut decree, and that the New York divorce was valid.

Divorce actions were early held to be in rem actions, the marital status being the res. Consequently the court which had jurisdiction of the marital status could render a binding decree upon constructive service. As a status can have no actual situs, domicil was hit upon to

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201 U.S. 562 (1905).

This solution is based on Restatement, Conflict of Laws (1934) section 113.

This solution is discussed in the note immediately following.

Andrews v. Andrews, 188 U.S. 14 (1903); Hughes v. Hughes, 211 Ky. 799, 278 S.W. 121 (1925); Ditson v. Ditson, 4 R.I. 87 (1856).
determine the *situs* of the marital *status*. Since at common law the wife took the domicil of the husband, the marital *status* was considered as having its *situs* at the domicil of the husband. But the United States Supreme Court decided in *Cheever v. Wilson* that if the husband was at fault in the marital separation, then the wife was under no duty to be with him and she could establish a separate domicil for the purpose of obtaining a divorce. This case reached a common sense result. When a husband has given cause for divorce, then the wife is certainly under no duty to be at his domicil, and may keep sufficient of the marital *status* with her to give to the court where she is domiciled jurisdiction of that *res*.

If *Haddock v. Haddock* decided anything it decided that the New York Court had jurisdiction to pass upon the fault of the parties and to render a valid divorce. That being so, as the New York Court had both parties before it, personal service having been had upon the husband in New York, the determination of the New York Court as to the fault of the parties was conclusive upon both parties.

*Haddock v. Haddock* decided, then, that a husband who was at fault could not take sufficient of the marital *status* with him into another state to give that other state jurisdiction *in rem* of the marriage relation. The rule earlier applied to the wife was applied by the Supreme Court to the husband in *Haddock v. Haddock*, which held that the marital *status* stayed with the party not in fault in the marital separation.

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*Y*  Wall. 108 (1852).

"Where the domicile of matrimony is in a particular state, and the husband, abandoning the wife, wrongfully goes into another state in order to avoid his marital obligation, such other state does not become a new domicile of matrimony, nor the actual or constructive domicile of the wife. That (the matrimonial domicile and that of the wife) continues in the original state until she actually acquires a new one."  Barber v. Barber, 21 How. 582 (1858).

It is important to note that the husband was personally served in New York.

The mere fact that Mr. Haddock appeared in the New York action did not give the New York Court jurisdiction of the divorce action, but if his fault in his separation from Mrs. Haddock was a jurisdictional fact, the New York Court could pass upon this question of fact and determine it finally. Evidence will always be admitted to disprove a jurisdictional fact upon which the judgment of a foreign court was based. Thompson v. Whitman, 18 Wall. 457 (1873). And if the jurisdictional fact is once litigated by the defendant the question of jurisdiction becomes *res adjudicata*. Hanna v. Stedman, 230 N.Y. 326, 130 N.E. 666 (1921); 2 Beale, Conflict of Laws, (1935) section 450.9.

As the husband, after wrongfully abandoning the wife in New York, never established a matrimonial domicile in Connecticut, it cannot be said that he took with him the marital relation from which he fled to Connecticut." Justice White in *Haddock v. Haddock*, 201 U.S. 562, 577 (1905).

The Texas court in speaking of *Haddock v. Haddock* in Montmorency v. Montmorency, 139 S.W. (Tex. 1911) 1168, 1171 said: "The decision impresses us with the belief that the reasoning of that decision gives the court of the domicile of the innocent party jurisdiction to
In our hypothetical case there had never been a determination of the fault of the parties by a court which was capable of binding both the parties upon the question of fault. If H was not in fault in his separation from his first wife in state X, W number one was under a duty to follow him to state Y. If she failed to follow him under those circumstances, the marital status was legally with the husband in state Y. But if H was at fault, then Haddock v. Haddock is authority for the proposition that the marital status had never acquired a situs in state Y and that that court was without jurisdiction in rem. Such a result is desirable in that it prevents one spouse from deserting the other and going to a distant state and there bringing an action for divorce which will cut off the economic rights of the other spouse without an adequate opportunity to be heard, regardless of who was at fault in the marital separation.

The determination of whether H was at fault when he left W in state X, then, is a jurisdictional fact. Where a court's jurisdiction depends upon the determination of a fact, this fact may be inquired into by the courts of other states when a judgment so obtained is sought to be enforced in a foreign state; and the finding of any court is not res adjudicata unless both parties are personally before the court making the determination.

The court in state Z should hear evidence with regard to who was at fault in the separation in state X, and if according to the evidence this court finds that H was at fault, then the divorce decree rendered in state Y is not binding upon the courts of state Z, but if it finds that W number one was at fault in the separation, then the court should recognize the validity of the decree rendered in state Y and grant dower to W number two.

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render a judgment binding everywhere, and deprives the court of the domicile of the guilty party of jurisdiction to render a judgment binding save in the state where rendered." This statement is quoted with approval in Parker v. Parker, 222 Fed. 186, 189 (1915).

13 In Parker v. Parker, 222 Fed. 186 (1915) [Certiorari denied 239 U.S. 643 (1915)]. H and W were married and lived as husband and wife in California. H left and went to Missouri where he established a domicile and obtained a divorce from W, having service by publication on W. Thirty-one years later, after H had remarried and moved to Texas and died in that state, W number one sued for dower in property which H left in Texas. The court made a thorough examination into the fact of who was at fault in the California separation and finding that H was at fault granted dower to W number one, the court saying at page 190: "Ascertaining, moreover, from the evidence the motive and reasons for his desertion of the complainant the chancellor summarizes the proof fairly borne out by the record: "That Walter M. Parker did not take the matrimonial domicile of himself and complainant to the state of Missouri, and the complainant was never actually or constructively within the territorial limits of that state."

13 Supra n. 11.
14 Supra n. 9.
15 Ibid.