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CONFLICTS: JURISDICTION TO DIVORCE. CRITICISM OF JURISTIONAL FACT THEORY.

There are three leading Supreme Court cases raising the problem of jurisdiction to divorce where one of the parties at the time of bringing the action was domiciled outside the state of the forum.

In the first, *Atherton* v. *Atherton*,[1] the parties were married in New York and went to Kentucky, where they resided for several years. The wife returned to New York due to the husband's cruelty and the husband later obtained a divorce in Kentucky on the ground of abandonment. The wife was not personally served, but a warning order was sent to the postoffice nearest her last address, pursuant to statute. The Kentucky action was not contested but later the wife sued for divorce in New York.

The Supreme Court held that the Kentucky decree was entitled to full faith and credit under the Constitution[2] and was a bar to the New York action, saying that the purpose of divorce was "to change the existing status or domestic relation of the husband and wife and to free them both from the bond".[3] It was further stated that the rule as to the notice necessary to give full effect to a decree of divorce is different from that which is required in suits in personam and that since a reasonable effort was made to notify the wife she was precluded from asserting that she left on account of the husband's cruelty.[4] Mr. Justice Peckham dissented (the chief justice concurring in the dissent) on the ground that if the husband was at fault the wife acquired a separate domicil and that the New York court had the right to go into the question of fault.[5]

In *Haddock* v. *Haddock*,[6] decided a few years later, the parties were married and lived in New York. The husband went to Connecticut, established a domicil, and sued for divorce on the ground of abandonment, process being constructively served. Later the wife sued for divorce in New York. The court held that the Connecticut decree was not entitled to full faith and credit and therefore was not a bar to the New York action. The *Atherton* case was cited with approval but distinguished on the ground that the matrimonial domicil remained in New York in the *Haddock* case, since the husband left without cause. The argument was that the Connecticut decree was not binding outside the state if the action was in rem because one-half of the res must be with the wife in New York, and was not entitled to recognition if in personam because there was no personal service and the wife was not constructively domiciled with the husband. The decision was by a court divided five to four, Mr. Justice Holmes holding in a strong dis-

[1] 181 U. S. 155, 21 Sup. Ct. 544, 45 L. Ed. 794 (1901).
[2] U. S. Constitution, Art. 4, Sec. 1.
[3] 181 U. S. 155, 162 (1901).
[4] 181 U. S. 155, 173 (1901).
[5] 181 U. S. 155, 174.
[6] 201 U. S. 562, 26 Sup. Ct. 525, 50 L. Ed. 867 (1906).

senting opinion that the case was in square conflict with *Atherton* v. *Atherton.*

In the third case, *Thompson* v. *Thompson,*[7] the Virginia court granted a decree of separation to the husband, the parties having last lived there as husband and wife. The wife had left the husband and settled elsewhere and the only service was by publication. Later the wife sued for divorce in the District of Columbia, but the court held that the Virginia decree was entitled to full faith and credit citing with approval both *Atherton* v. *Atherton* and *Haddock* v. *Haddock.* These three cases were reconciled on the ground that in the *Haddock* case the forum was not that of the last matrimonial domicil,[8] whereas in the other two cases the action was brought at the last matrimonial domicil.

Logically it would seem that the Supreme Court has reached the correct result since the state of the last matrimonial domicil should be better able to pass on the question of fault, due to the fact that the pertinent information would be more readly available.

A different view is embodied in the Restatement[9] to the effect that a divorce granted at the domicil of one of the spouses is entitled to full faith and credit where:

> (1) The spouse not domiciled in the state consented that the other spouse acquire a separate home.
> (2) By misconduct the other spouse has ceased to have the right to object to the acquisition of a separate home.

It is suggested that this would be a panacea for our present ills in that it would secure uniformity and eliminate the situation that arises where one state holds the parties married and another holds them divorced.[10]

There is some authority to support this position, several state courts having held that a divorce granted at the domicil of one of the parties without personal jurisdiction of the other will be given full faith and credit only if the divorce is granted at the domicil of the party without fault.[11]

The writer is of the opinion, however, that the "jurisdictional fact" theory as laid down by the Restatement would cause more harm than good. In the first place it is difficult to follow the language used. What is meant by "consent to acquire a separate home"? What constitutes consent? Need it be express or may it be implied? Need it

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[7] 226 U. S. 551, 33 Sup. Ct. 129, 57 L. Ed. 347 (1913).

[8] Callaghan v. Callaghan, 65 Misc. Rep. 172, 121 N. Y. S. 39 (1909). ". . . matrimonial domicil would seem to be the place where the parties last lived together as husband and wife with the intention of making that place their home".

[9] Restatement Conflict of Laws, Sec. 113.

[10] Haddock v. Haddock, 201 U. S. 562, 605 (1906).

[11] Delanoy v. Delanoy, 216 Cal. 27, 13 P. (2d) 719 (1932); Perkins v. Perkins, 225 Mass. 82, 113 N. E. 841, L. R. A. 1917B, 1028 (1916); Montmorency v. Montmorency, 139 S. W. 1168 (Tex. 1911).

be affirmative or would passive acquiescence with knowledge of the facts bind the other spouse?

Then too suppose the following factual situation in the *Haddock* case:

The wife sues in state X for separate maintenance and later the husband sues in state Y for a divorce *a vinculo*. The husband gets a decree in state Y never having been personally served in state X. Can the wife now secure the relief sought in state X? It would appear that she could not since by asking for separate maintenance she seemingly consents that the husband acquire a separate home and yet this result is at variance with the *Haddock* case.

Moreover in the above case, state X may give full faith and credit to the decree of state Y on the basis of comity[12] regardless of the consent or non-consent of the domiciliary wife to the establishment of a separate home by the husband. Yet the Restatement holds that unless the wife consents to the husband's acquisition of a new home, or loses her right to object, the Y decree is void for any purpose because of lack of jurisdiction and only state X can issue a valid decree of dissolution without personal jurisdiction of both parties.

In addition, the uniformity claimed becomes illusory when it is considered that two jurisdictions have the right to pass on the question of fault and thus a cloud is placed on any subsequent marriage which can only be removed by the Supreme Court. It should be noted that in many cases this is not feasible since the complaining party is in no position to complain of an ajudication in his favor and the other party may not decide to carry the case up to the highest court for several years.

In conclusion it is submitted that the Restatement is of little if any real help in that it introduces greater factors of uncertainty than those already existing and that therefore a divorce is entitled to full faith and credit:

(1) If granted at the domicil of both parties.

(2) If granted at the domicil of either spouse with personal jurisdiction of the other through service or appearance.

(3) If granted at the last matrimonial domicil even though there was no actual service within the state and no appearance, so long as there was such constructive notice as is required by the law of the state.[13]

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JURISDICTIONS ADOPTING THE TORT STANDARD OF CARE IN CRIMINAL NEGLIGENCE.

It is the purpose of this note to discuss the degree of negligence necessary to constitute manslaughter in those jurisdictions which have adopted the negligence rule used in civil cases.

This rule, although the minority one, is rather definite and readily

[12] Haddock v. Haddock, 201 U. S. 562, 581 (1906).

[13] Cheely v. Clayton, 110 U. S. 701, 4 Sup. Ct. 328, 28 L. Ed. 298 (1884); Atherton v. Atherton, 181 U. S. 155, 171, 172 (1901).