

## RECENT DIVORCE LEGISLATION IN PENNSYLVANIA AS TESTED BY FEDERAL PRINCIPLES OF JURIS- DICTION.

It is interesting to note that the Pennsylvania Legislature, which in 1905, at the instance of Senator William C. Sproul, passed an act creating the Pennsylvania Commission on Divorce, and authorized the calling together of delegates from every other state to meet at Washington for the purpose of framing a Uniform Divorce Law, has since then refused three times to adopt the Uniform Divorce Law framed by the National Divorce Congress; approved by the Pennsylvania Divorce Commission; by the Pennsylvania State Bar Association; by the National Conference of Commissioners on Uniform State Laws, and by the American Bar Association, and adopted by three States, Delaware, New Jersey and Wisconsin.

The preamble to the act creating the Pennsylvania Divorce Commission attributed the constantly increasing number of divorces in the United States, to the lack of uniformity in the divorce laws in every part of the country, and the main efforts of each of the bodies above named, were especially directed towards the substantive, jurisdictional questions involved, in order that the anomalous situation existing in countless instances of a couple being married in one state and not married in another, might once for all be ended.

Not only has the Pennsylvania Legislature steadfastly refused to adopt this Uniform Divorce Law, but it has also, through recent legislation, opened the doors to "easy divorce," as wide as any other state, ignoring, whether intentionally or otherwise, the later decisions of the United States Supreme Court, which clearly define the conditions essential to a court's entertaining jurisdiction in divorce, if the decree to be rendered is to have any extra-territorial validity whatever, by virtue of the "full faith and credit clause" of the Constitution of the United States; and ignoring further the proper principles underlying the question of interstate comity.

This recent legislation finds expression in the following Acts of Assembly:

No. 1, Act approved June 8, 1911,<sup>1</sup> entitled:

"An act enabling the libellant in all proceedings for divorce on the ground of desertion, to testify to the fact of desertion, and to the efforts made by him or her to induce the respondent to return and resume the marital relation."

No. 2, Act approved May 9, 1913,<sup>2</sup> entitled "An act relating to divorce." This act will be quoted at length hereafter.

No. 3, Act approved April 21, 1915,<sup>3</sup> entitled:

"An act to amend the first section of an act, entitled 'An act enabling the libellant in all proceedings for divorce on the ground of desertion, to testify to the fact of desertion, and to the efforts made by him or her to induce the respondent to return and resume the marital relation,' approved June eighth, A. D. 1911, by making the libellant a competent witness generally."

All of the above mentioned acts are both jurisdictional (or substantive), and evidential (or adjective, *i. e.* procedural), in character. And they all attempt to change the law of this Commonwealth as it existed, and had been construed prior to their passage.

They are enlarging, both expressly and by implication, and may, therefore, be interpreted as remedial in purpose.

In discussing all remedial legislation, it is advisable to hark back to Lord Coke's rule, and consider, (1) What was the law before the act was passed? (2) What was the mischief or defect for which the law had not provided? (3) What remedy has the legislature appointed? (4) What is the reason of the remedy? To these, for the purpose of this article, may well be added: (5) The practical and legal effect of the foregoing remedial legislation.<sup>4</sup>

<sup>1</sup> P. L. 720.

<sup>2</sup> P. L. 191.

<sup>3</sup> P. L. 154.

<sup>4</sup> Very succinctly paraphrased by our own Supreme Court in *Cumberland County v. Boyd*, 113 Pa. 52, 57: "Keeping in mind the previous law, the supposed evil and the remedy desired, we must consider the language of the statute, and the fair and reasonable import thereof."

## I. THE EXISTING LAW.

*A. As to Jurisdiction of the Subject Matter; of the Person of the Libellant, and of the Person of the Respondent.*

For ascertainment of the powers conferred upon the courts of Pennsylvania to entertain jurisdiction in divorce proceedings, the legal profession owes a lasting indebtedness to the admirable and exhaustive analysis of our various Acts of Assembly from 1815 to 1903, made by His Honor Mayer Sulzberger, in the case of *Lyon v. Lyon*,<sup>5</sup> which (subject to one or two minor additions and corrections) may well be termed a classic. Plagiarism therefrom, may accordingly be pardoned. Summarization also is necessary. His conclusions may be postulated as follows:

*Analysis of Pennsylvania Legislation.*

(1) The Act of March 13, 1815,<sup>6</sup> Section 11,<sup>7</sup> provides:

"That no person shall be entitled to a divorce from the bonds of matrimony, by virtue of this act, who is not a citizen of this State, and who shall not have resided therein, at least one whole year previous to the filing his or her petition or libel."

This act requires both "citizenship" and "residence."

Section 3 of this act provides that if the respondent cannot, after the issuing of an alias subpoena, be found in "the proper county where the injured party resides," then notice by publication may be given.

In *Dorsey v. Dorsey*,<sup>8</sup> Chief Justice Gibson ruled that jurisdiction in divorce belongs to the court of the place of domicile; that the wife's domicile is that of her husband, which her coverture prevents her from changing; that though the *locus delicti* may not be at the place of domicile, yet the injury is suffered there, and therefore the law of the domicile, *i. e.*, the matrimonial domicile, at the time and place of the injury, is the rule for everything but the original obligation of marriage.

<sup>5</sup> 13 District Reports 623.

<sup>6</sup> 6 Sm. Laws 286.

<sup>7</sup> Which re-enacted Section 9 of the Act of September 19, 1785, 2 Sm. Laws, p. 343.

<sup>8</sup> 7 Watts, p. 349.

The reasoning of Chief Justice Gibson in this case seems to be tinged somewhat with the English doctrine that the law of the place of the marriage controls its dissolution as well, for he declines to adopt what has been termed the American Rule, as enunciated in *Harding v. Alden*,<sup>9</sup> and *Ditson v. Ditson*,<sup>10</sup> that an injured wife may acquire a domicile, or residence in another state and obtain a divorce from her husband in conformity with the procedure prescribed by the laws of her new domicile. The Chief Justice, in his opinion, discusses this question, but holds finally that although the parties in the case were married in Pennsylvania, yet, having afterwards become domiciled in Ohio, where her husband deserted her, the offence was committed there, and that although she returned to her original home and place of marriage in Pennsylvania, she was not entitled to a divorce, the proper forum being in Ohio, their common domicile, at the time the offence occurred.

(2) By the Act of April 18, 1843,<sup>11</sup> the eleventh section of the Act of 1815 was amended, by the following language

“ . . . and the word ‘citizen’ used in the eleventh Section of the Act concerning divorces, passed the thirteenth day of March, 1815, shall not be construed to apply to any woman who shall have had a *bona fide* residence in this state at least one whole year previous to filing her petition or libel.”

This act prefixes the words “*bona fide*” to the word “residence.” It is to be observed also that the *bona fides* of residence, is required only in the case of the woman. Judge Sulzberger adds that “this statute has not been expressly repealed.” In this regard, he fell into a slight error, for, by Section 2 of an Act approved April 20, 1846,<sup>12</sup> entitled “An act to annul the marriage contract between Jesse Benners and Harriet, his wife, and for other purposes,” it was enacted:

“That the provisions contained in the Act passed the eighteenth day of April, A. D. 1843, which declares that the word ‘citizen’ as

<sup>9</sup> Maine 149.

<sup>10</sup> 4 R. I. 87.

<sup>11</sup> P. L. 340.

<sup>12</sup> P. L. (of 1847) 500.

used in the eleventh Section of the Act concerning divorces, passed the thirteenth day of March, A. D. 1815, shall not be construed to apply to any one who shall have a *bona fide* residence in the state at least one whole year previous to filing said petition or libel, be, and the same is hereby repealed."

Thus the term "*bona fide*" as a delimitation of the word "residence," was eliminated from our Acts of Assembly, and did not re-appear until the Act of May 8, 1854.<sup>13</sup>

This Act of 1843 was passed upon by the Supreme Court in *Hollister v. Hollister*,<sup>14</sup> where the parties were married and domiciled in Pennsylvania, afterwards removed to Ohio, but owing to cruel treatment by the husband, the wife returned to her home in Pennsylvania, and instituted proceedings for divorce. The court held in effect, that as she had re-acquired a *bona fide* residence in this State, the requirement of citizenship under the Act of 1815, was fully met.

(3) Subsequently, the curative Act of February 27, 1847,<sup>15</sup> validated all divorces granted by the courts having jurisdiction of the offence *provided the offence were committed in this Commonwealth*, and the libellant had resided therein one year or more previous to the application for divorce, although, at the time of the commission of the offence, both libellant and respondent may have been residents of another state: "*Provided, That in cases where the respondents resided out of this Commonwealth at the time of the preferment of the libels, personal notice shall have been given to them.*" This statute, though curative only, departed very materially from the rule laid down in *Dorsey v. Dorsey*, and from the provisions of the Act of 1815 as to service of process: first, in making the place where the offence was committed the proper forum; and second, in recognizing extra-territorial notice as the equivalent of service within this State.

(4) By the Act of April 26, 1850,<sup>16</sup> two important jurisdictional changes were made. By Section 6 of the Act, the

<sup>13</sup> P. L. 644; see No. 5. *infra*.

<sup>14</sup> 6 Pa. 449.

<sup>15</sup> P. L. 169.

<sup>16</sup> P. L. 590.

courts were authorized "to entertain jurisdiction in divorce for the cause of desertion or adultery, notwithstanding the parties were, at the time of the occurrence of said causes, domiciled in any other state." This overturned entirely, the rule of *Dorsey v. Dorsey*, that the domicile, at the time and place of the injury, is the proper forum. And the act further provides that the applicant for divorce "shall be a citizen of this Commonwealth, or shall have resided therein for the term of one year as provided for by existing laws." This changes the Act of 1815 by omitting the word "and", and substituting the word "or"; so that the qualifications of citizenship and residence apparently became synonymous.

(5) All doubt in this regard was removed by Section 2 of the Act of May 8, 1854,<sup>17</sup> which is entitled "A further Supplement to the Act entitled 'An Act concerning divorces.'" Section 1 of this act increased the causes for divorce, and gives to the husband also, the right of divorce for cruel and barbarous treatment by the wife. Section 2 provides that the word "citizen" used in the eleventh section of the said Act (of 1815), shall not be so construed as to exclude "any party who shall, for one year, have had a *bona fide* residence within this Commonwealth, previous to the filing of his or her petition or libel." This section is practically a re-enactment of the Act of 1843, in that it restores the requirement that the residence be *bona fide*; but it goes further and gives to either party, instead of *to the wife alone*, the right to obtain a divorce upon proving an actual, *bona fide* residence for one year. Although some of the later acts omit the term "*bona fide*," yet the courts have read these words into all subsequent legislation. The jurisdictional importance of the phrase "*bona fide* residence," will be shown later in discussing the decisions of the United States Supreme Court.

(6) Next came the Act of March 9, 1855,<sup>18</sup> which extended the jurisdiction in divorce from the bonds of matrimony, to the causes of personal abuse, or such conduct on the part of

<sup>17</sup> P. L. 644.

<sup>18</sup> P. L. 68.

either husband or wife, as to render the condition of the other party intolerable and life burdensome,

“ . . . notwithstanding the parties were, at the time of the occurrence of the said causes, domiciled in another state: provided, that the applicant shall be a citizen of this Commonwealth, or shall have resided therein for a term of one year, as provided for by the existing laws of this Commonwealth.”

This proviso follows the exact language of the proviso to Section 6, of the Act of 1850; but since the term “*bona fide*” had been introduced by the Act of 1854, it would necessarily be read into the words “the existing laws of this Commonwealth.”

Both the Act of 1850 and the Act of 1855 referred, however, to causes arising while the parties might be domiciled “in any other state”; and in *Bishop v. Bishop*,<sup>19</sup> our Supreme Court held that the words “any other state” meant only one of the States of the Union, and not a foreign country.

(7) Perhaps to overcome the effect of this decision, the Legislature almost immediately passed the Act of April 22, 1858.<sup>20</sup> If such was the intention, it was very bunglingly done. *Bishop v. Bishop* was a case of alleged desertion occurring in England; but the Act of 1858 is entitled “A supplement to the Act of March 9, 1855,” and extends the jurisdiction of said latter act to all cases of divorce *for the causes therein mentioned*, wherein either of the parties were, or may be, at the time of the occurring of said cause, domiciled “in another state or country.” But the only causes mentioned in the Act of 1855 were personal abuse and conduct rendering the condition of the other parties intolerable and life burdensome. Therefore, in *McCartney v. McCartney*,<sup>21</sup> and *Lewis v. Lewis*,<sup>22</sup> it was held that the Act of 1858 did not extend to or embrace the causes for divorce specified in the Act of 1850; to wit: desertion and

<sup>19</sup> 30 Pa. 412.

<sup>20</sup> P. L. 450.

<sup>21</sup> 30 W. N. C. 132.

<sup>22</sup> 6 Kulp 429; S. C. 2 D. R. 82.

adultery. These last two decisions were rendered in 1892, at which time the state of the law was as follows:

For the causes of adultery, desertion, cruel and barbarous treatment, personal abuse, or indignities, rendering life burdensome, the law of matrimonial domicile as enunciated in *Dorsey v. Dorsey*, was entirely abolished as regards the other State of the Union, and the injured party could invoke the jurisdiction of the courts of this State upon satisfactory proof of *bona fide* residence therein for one year prior to filing his or her petition or libel. In other words, legislation up to this point gave our courts jurisdiction over the person of the libellant and the subject matter of the action, upon proof of *bona fide* residence for one year, no matter where or when the offence occurred. But the law of domicile still remained in force as regards foreign countries, except for the two causes of personal abuse, or conduct rendering life burdensome, as provided by the Act of March 9, 1855, and its supplement of April 22, 1858.

Up to this time, it had been held by our courts, almost uniformly, that even though they had jurisdiction of a libellant who had acquired a *bona fide* residence for one year, no matter when or where the cause of divorce arose, yet jurisdiction over the respondent would not be assumed unless personal service of the subpoena had been made within this State;<sup>23</sup> or the respondent had entered an appearance and defended the suit; or had been served by "publication," where this State had been the common matrimonial domicile, and the respondent, though within the State, could not be found, or else had departed its jurisdiction.<sup>24</sup>

(8) But new facts and new conditions were constantly arising, to meet which it is the custom of our Legislature to

<sup>23</sup> *Ralston's Appeal*, 93 Pa. 133 (where service was made in Delaware).

<sup>24</sup> *Colvin v. Reed*, 55 Pa. 375, where the court refused to recognize an Iowa divorce against a wife who had remained in this State,—their matrimonial domicile; *Reel v. Elder*, 62 Pa. 308, where the court refused to recognize a Tennessee divorce in favor of a husband who had left his home in this State. See also *Allison v. Allison*, 2 Pa. C. C. 671; *Night v. Night*, 2 Pa. C. C. 574; *Austin v. Austin*, 4 Pa. C. C. 368; *Davis v. Davis*, 2 D. R. 621; *Burdick v. Burdick*, 2 D. R. 622.



enact, in the guise of a general law, new provisions really intended to cover one or more particular instances.

(9) An illustration of this is found in the Act of June 20, 1893.<sup>25</sup> This act purports to extend the jurisdiction of our courts in divorce, to the causes of adultery, desertion, cruel and barbarous treatment and personal indignities (on the part of the husband only, however), to a wife who was formerly a citizen of this Commonwealth, but having removed to another state or a foreign country, has been compelled to abandon such other domicile for any of the acts aforesaid committed by her husband. The act also requires that at the time of filing her libel, the applicant *shall be* a citizen<sup>26</sup> of this Commonwealth or shall have resided therein for the term of one year prior to filing her libel as provided by the laws of this Commonwealth: *i. e.*, has a *bona fide* residence. The only change this act made in the existing laws was to combine the causes specified in the Acts of 1850 and 1855; with the limitation, however, that the wife alone, can proceed under this act, and the further limitations that she must have been a citizen of this Commonwealth, before departing its jurisdiction, and be a citizen, or have a *bona fide* residence for one year previous to filing her libel.

But the main purpose of this Act of 1893 seems to have been to put an entering wedge under the rule uniformly maintained by our courts that jurisdiction of a non-resident respondent cannot be acquired by extra-territorial service of process,

<sup>25</sup> P. L. 471.

<sup>26</sup> It would seem that the true significance of the word "citizen" has never been carefully considered by the draftsmen of our various divorce acts. As applied to a citizen of the United States, the word connotes one who is entitled to the protection of the Federal Government. But, as used in the Act of 1815, which requires that the libellant shall be a citizen of this Commonwealth, it has a very different and more limited meaning. Under this act "citizenship" means and can only mean residence "*anima manendi*." The Acts of 1843, 1847, 1854, all directed that the word "citizen" should be construed to mean any person who should have had a *bona fide* residence within this State for at least one year. But take the case of a woman, a resident from birth of this Commonwealth, who marries an English subject. By such marriage she becomes an English citizen, and her return to this country and this State cannot divest her of her English citizenship. Therefore, the clause in the proviso of this act, that, at the time of filing her application for divorce, the applicant therefor "*shall be* a citizen of this Commonwealth," is meaningless.

or by notice of the suit brought; for the first proviso to section one of this act enacts:

"That where in any such case, personal service of the subpoena cannot be made upon such husband by reason of his non-residence within this Commonwealth, the Court, before entering a decree of divorce, shall require proof that in addition to the publication now required by law, actual or constructive notice of said proceeding has been given to such non-resident husband, either by personal service or by registered letter to his last known place of residence, and that a reasonable time has thereby been afforded to him to appear and defend in said suit."

Such service or notice is futile to confer jurisdiction against a non-resident never domiciled in this State.<sup>27</sup>

It may be noted in passing that the Act of 1893 embraces both divorce from the bonds of matrimony and divorce from bed and board, while the Acts of 1850, 1854, 1855 and 1858 confer jurisdiction in cases of divorce *a vinculo*, only.

Numerous cases pro and con came before the courts during the following ten years. In a few instances the courts granted divorces where the respondent was never a resident of or subject to the jurisdiction of this State, and where service by publication only, or by actual extra-territorial service or notice was made or given; but the majority of the courts refused to entertain jurisdiction in such cases.

But, as suggested by Judge Sulzberger, in *Lyon v. Lyon*, new conditions arose after the war with Spain, and this country having established political relations with Hawaii, Porto Rico and the Philippine Islands, it became doubtful whether the terms "another state or country" (used in the Act of 1858), or the words "foreign country" (used in the Act of 1893), "could with propriety, be applied to them."

(10) Therefore, the Legislature, to cover these new conditions, passed the Act of April 28, 1903.<sup>28</sup> This act is entitled

<sup>27</sup> See *Reel v. Eider*, 62 Pa. 308; *Ralston's Appeal*, 93 Pa. 133; *Oakley v. Oakley*, 1 D. R. 779; *Burdick v. Burdick*, 2 D. R. 622, which last two cases construed a similar provision in the Act of June 8, 1891, P. L. 247, subsequently supplied and repealed by the above mentioned Act of 1893.

<sup>28</sup> P. L. 326.

"A Supplement to an Act extending the jurisdiction of the courts of this Commonwealth in cases of divorce, passed April 26, 1850."

This Act of 1903 embraces desertion by husband or wife, adultery of either husband or wife, personal abuse by either, or conduct on the part of either, such as to render life burdensome, and cruel and barbarous treatment on the part of the husband;

" . . . notwithstanding the said causes of divorce have occurred, or shall hereafter occur in a foreign country, or in a country, state or territory, subject to the jurisdiction of the United States:—and provided that no application for such divorce shall be made, unless at the time the said cause or causes of divorce occurred, the applicant therefor, was a citizen of this Commonwealth:—provided further, that the said applicant shall have resided therein for the term of one year *as provided for by the existing laws of this Commonwealth.*"

Assuming that the main purpose of this act was, as suggested in *Lyon v. Lyon*, to provide for cases arising in our territorial possessions it is to be noted first; that while the Act of 1893 applies to divorce both from the bonds of matrimony and from bed and board, the Act of 1903 applies to divorces from the bonds of matrimony only. Second, That the Act of 1903, adds to the causes mentioned in the Act of 1893, "personal abuse, *etc.*, on the part of either husband or wife," and also "cruel treatment and indignities on the part of the husband." Further, the Act of 1903 makes no reference to manner of service upon a non-resident respondent. And while the Act of 1903 contains no repealing clause, yet inasmuch as it is a "supplement" to the Act of 1850, it, in effect, goes back to the cumulative requirement of the Act of 1815, in that its provisos require not only that the applicant shall have been a citizen of this Commonwealth at the time the cause of the divorce occurred, but *also* (and) that the applicant shall have resided in this Commonwealth for the term of one year, *etc.* In other words, both citizenship *and* residence as required in the Act of 1815, but abolished by the Acts of 1843, 1847 and 1854, are restored in all cases to which the enacting clause of this act is applicable.

The case of *Lyon v. Lyon* further shows that this act can-

not apply to residents of different States of the Union, but only to residents of a "foreign country, or of a country, state or territory subject to the jurisdiction of the United States."

Up to this time, our courts had been quite chary of assuming jurisdiction over a non-resident respondent, without personal service of process within this State, or by constructive service where such respondent had departed this jurisdiction; obeying very generally the dictum of Chief Justice Gibson, in *Dorsey v. Dorsey*,<sup>29</sup> that an attempt to bind a party not subject to the jurisdiction of our courts, without hearing or notice, would be extravagant, and contrary to the nature of our political system.

### *The Subject Matter in Divorce Proceedings.*

The question of the effect and validity of what have been termed "migratory divorces," where service, "by publication only," was made, according to the laws of the State granting the divorce, was passed upon by the Supreme Court of the United States in several cases between the years 1901 and 1906;<sup>30</sup> and the final conclusion arrived at was that a decree in divorce granted by any State which had jurisdiction of the person of the libellant only, was not entitled to "full faith and credit" in any other State, unless personal service had been made upon the respondent within the State issuing the process, or unless the respondent had left the common matrimonial domicile, or had appeared and defended the suit.

Three vital principles are involved in these United States Supreme Court decisions.

First: Is the law of the common matrimonial domicile the controlling factor?

<sup>29</sup> 7 Watts 352.

<sup>30</sup> *Atherton v. Atherton*, 181 U. S. 155; *Bell v. Bell*, 181 U. S. 175; *Streitwolf v. Streitwolf*, 181 U. S. 179; *Lynde v. Lynde*, 181 U. S. 183; *Andrews v. Andrews*, 188 U. S. 14; *German Savings Bank v. Dormitzer*, 192 U. S. 125; *Harding v. Harding*, 198 U. S. 317; *Haddock v. Haddock*, 201 U. S. 562. The jurisdictional principle laid down in *Atherton v. Atherton*, that the proper forum in divorce proceedings is the forum of the common matrimonial domicile, has percolated very slowly through the professional and legislative mind.

Second: Is the matrimonial status divisible or indivisible? In other words, does each party to the marriage relation take with him or her, the matrimonial status wherever either may go, so as to authorize the courts of the newly acquired residence to assume jurisdiction of the marital status, simply because either has become a resident of such other State?

Third: Is, therefore, the matrimonial status of one of the parties to the marriage such a "*res*" as to warrant the assumption of jurisdiction by the court of any State (to which either party may migrate), over the matrimonial status of such "new citizens," and grant a decree in divorce binding upon the other party to the marriage, even though such other party may have had no notice of the divorce proceedings other than "by publication" within the state where the libellant happens to be residing?

That not a little confusion exists as to what is the true *res*, or subject matter, in cases for divorce is very apparent from even the most superficial examination of the cases which have been decided by the courts of nearly every state and by the Supreme Court of the United States. This confusion arises largely from the divergence of perspectives focussing upon the central thought of what will confer jurisdiction in divorce proceedings. One line of reasoning lays chief stress upon the rights of the individual, treating the marriage relation as a matter of contract only. The opposite line of reasoning has greater regard for the interests of society, and views the marriage relation as an institution, "in the maintenance of which in its purity the public is deeply interested, for it is the foundation of the family and of society, without which there would be neither civilization nor progress."<sup>31</sup>

Marriage of course has its origin in contract, founded upon the agreement of the parties, but that contract once executed, a matrimonial relation, or status, is created which the parties of themselves cannot change. "This matrimonial status is subject to the control of the Legislature, which defines its mode of

<sup>31</sup> Maynard v. Hill, 125 U. S. 210.

inception, its duties and obligations, its effects upon the property rights of both parties, and the conditions upon which it may be dissolved." <sup>32</sup>

The subject matter in divorce proceedings therefore, is the *matrimonial status*, and not the person alone of either party to the marriage. The jurisdiction of the courts over such status depends primarily upon the *locus in quo* of that status, *i. e.*, upon the domicile of both parties to the marriage relation.

#### *Ways of Affecting the Matrimonial Status.*

But the matrimonial status may be affected in the following different ways:

(a) Both parties may remove to another jurisdiction and acquire a new *bona fide* domicile. If so, it makes no difference where the cause of divorce arises; the courts of the new domicile have jurisdiction of the status because they have jurisdiction of both of the parties.

(b) The husband may, in good faith remove to another state *animo manendi*. In such case his new domicile by force of legal presumption—legal fiction—becomes the domicile of the wife.<sup>33</sup> In such case also it makes no difference where the cause of divorce arises. The courts of the new State will have jurisdiction of the status, and constructively of the person of the wife.<sup>34</sup>

(c) The husband may, *mala fide*, remove to another State. This was the case in *Haddock v. Haddock*. How can it be said that he took the matrimonial status with him? His very wrong, his offense against the status of the parties, destroyed his right to enforce the legal fiction that his new domicile became his wife's, and she, *eo instanti*, acquired the right to retain a separate domicile in New York, the State where they were married. That

<sup>32</sup> *Ibid.*

<sup>33</sup> 2 Bishop on Divorce: Sections 125, 128; *Haddock v. Haddock*, 201 U. S. 562, 591.

<sup>34</sup> *Burien v. Shannon*, 115 Mass. 439; *Haddock v. Haddock*, 201 U. S. 591, 619.

was their *de facto* matrimonial domicile, and had her husband's offense been the cause for which alone divorce *a vinculo* is recognized in New York she could have obtained such a divorce by constructive service.<sup>85</sup>

(d) Both parties may remove *bona fide* to another State, the husband then become the offending party, and the wife for his fault return to the former matrimonial domicile. In such case the courts of many States recognize her right to a divorce, she having returned to their former matrimonial domicile.

(e) If under "d", *supra*, the wife becomes the offending party the husband can bring suit either in their new domicile or can acquire another domicile and bring suit there, because of the legal fiction that the husband's domicile is the wife's, until a wrongful act on his part.

(f) The wife may, *without* cause on the part of the husband, remove to her former or a new domicile. In such case he can sue in the jurisdiction which she has left; but she cannot sue in their new domicile, because her husband's domicile is still hers.<sup>86</sup>

(g) The wife may, for cause on the part of the husband, leave their matrimonial domicile and remove to her former or even to a new domicile. In such case the husband *can* sue in the jurisdiction which she has left.<sup>87</sup> And it is claimed that she should be allowed to sue in the domicile to which she has removed on the ground that through her husband's fault the legal fiction that the husband's domicile is that of the wife no longer obtains. But this state of facts has not been passed upon as yet by the United States Supreme Court. The nearest approach is found in the case of *Shaw v. Shaw*,<sup>88</sup> where the parties were married in Massachusetts, lived there and left together for the purpose of settling in Colorado. On the journey, at Philadelphia, the wife was forced by the cruelty of her husband

<sup>85</sup> *Shaw v. Shaw*, 98 Mass. 158.

<sup>86</sup> *Burien v. Shannon*, 115 Mass. 439; *Hood v. Hood*, 110 Mass. 463; *Cheely v. Clayton*, 110 U. S. 701; *Atherton v. Atherton*, 181 U. S. 155.

<sup>87</sup> *Atherton v. Atherton*, *supra*.

<sup>88</sup> 98 Mass. 158.

to leave him. She returned to Massachusetts, while he went on to Colorado. She instituted divorce proceedings in Massachusetts, the husband being brought in by substituted service only. The court recognized that a decree of divorce to have extra-territorial effect must be based upon jurisdiction of both parties; but they held that at the time of the commission of the cruelty in Philadelphia the domicile of the parties in Massachusetts had not been lost, and that she was justified in returning to Massachusetts, and that the courts of that State, it being still the matrimonial domicile, could acquire jurisdiction over the person of the respondent by substituted service.

Bishop on "Marriage and Divorce" has been recognized very generally as an authority to the point that, where the court had jurisdiction of the person of the libellant, it also had jurisdiction of the subject matter, so that it is very difficult for lawyers or legislators to get away from his reasoning, which, in substance, amounts to the assertion that the *res* in divorce proceedings is the status of the libellant in relation to the respondent, which relation being before the court in the person of the libellant the court has jurisdiction of the matrimonial status of both. Mr. Justice Brown in his dissenting opinion in *Haddock v. Haddock*,<sup>39</sup> adopts, *cum favore*, this point of view. But it is rather difficult to reconcile his recognition of the rightfulness of the decisions of the same court in *Bell v. Bell*,<sup>40</sup> and *Streitwolf v. Streitwolf*,<sup>41</sup> where the *bona fides* of the residence of the libellant was attacked, and it was held that the decree of the State granting the divorce was not entitled to any force or validity in another State, under Article IV of the United States Constitution.

The very fact that these two cases assert the right of any court to attack the *bona fides* of the residence of the libellant, (or of any other jurisdictional fact), seems a most clear and conclusive adoption of the principle that the common matri-

<sup>39</sup> 201 U. S. 562, 624.

<sup>40</sup> 181 U. S. 175.

<sup>41</sup> 181 U. S. 179.



monial domicile, as declared in *Atherton v. Atherton*, is the proper forum in divorce proceedings. *Andrews v. Andrews*,<sup>42</sup> goes even further, and holds not only that the *bona fides* of residence may be inquired into a collateral proceeding, but also that where the libellant had plainly acquired a new residence for the purpose of evading the law of his matrimonial domicile, an appearance by attorney for the respondent did not estop her from attacking the validity of the decree in divorce granted in another State.

*Haddock v. Haddock*<sup>43</sup> gathers up all the arguments, pro and con, upon the question of the true *res* in divorce proceedings; and it may now be quite safely asserted that decrees in divorce, where the court had jurisdiction of the person of the libellant only, and where service "by publication only," or even by registered letter, was made upon the respondent, will not and cannot affect the marital or property rights of the respondent, or of the children to the marriage outside of the State where the divorce is granted; that a decree so obtained can have no force or effect beyond the boundaries of the State granting the same; that it may be attacked directly or collaterally; that if the libellant obtaining such a decree, marries again in another State, he may be indicted for bigamy should he return to the former matrimonial domicile; his children by the second marriage be declared illegitimate; and that he can retain property rights against his divorced wife only in the State granting the divorce.

#### B. As to Evidence.

Under the common law neither husband nor wife could testify against each other. Even the Act of April 15, 1869, did not change the law in this respect. But the Act of March 4, 1870,<sup>44</sup> permitted:

"The testimony of either husband or wife to be given in his or her own behalf in any proceeding for a divorce, in every case where

<sup>42</sup> 188 U. S. 14.

<sup>43</sup> 201 U. S. 562.

<sup>44</sup> P. L. 36.

*personal service of the subpoena is made on the opposite party, or said party appears and defends."*

The provisions of this Act of 1870, were re-enacted and enlarged by the Act of May 23, 1887,<sup>45</sup> by the following language,

"Except in those proceedings for divorce in which personal service of the subpoena, or of a rule to take depositions has been made upon the opposite party, or in which the opposite party appears and defends, in which case either may testify fully against the other; and except also that in any proceeding for divorce either party may be called merely to prove the fact of marriage."

## II. THE SUPPOSED MISCHIEF OR DEFECT.

Much has been written concerning the causes that prompt the constantly increasing number of applications for divorce. Revolt against Ecclesiasticism, says one: Assertion of the Spirit of the Protestant Right of Individual Judgment, says another: The question is purely Economic, says a third. Someone has very naively argued that the right of divorce (marriage being purely a matter of contract), is secured by that provision of the Constitution which defines as one of the "certain inherent and inalienable rights," secured to all, that "of pursuing their own happiness." The state of social unrest concerning the marriage relation may perhaps be attributed to failure of respect for authority, whether of church or state; to loss of the ideals of duty and obedience; in other words, to the insistence by both youths and their elders upon "being a law unto themselves"; not having learned that no one has the right to do a thing that, if everybody did, would make the world worse not better.

But, psychology aside, the trend of subsequent divorce legislation in Pennsylvania indicates very strongly a desire to escape from the ruling in *Atherton v. Atherton*, and *Haddock v. Haddock*; First, that the common matrimonial domicile is the proper forum in divorce proceedings, and: Second, that no respondent in divorce can be bound by the decree of a State of which he was never a resident without personal service within that State, or unless he appears and defends the action.

<sup>45</sup> P. L. 158, Sec. 5.

Formerly too, there were many instances where residents of Pennsylvania, for one reason and another, resorted to the courts of Delaware and New Jersey and obtained divorces which they would not or could not have obtained in Pennsylvania. But after the adoption by New Jersey in 1907, and by Delaware in 1908 of the Uniform Divorce Act, with its stricter jurisdictional provisions,<sup>46</sup> these States ceased to be a Mecca for divorce litigants.

\* These jurisdictional provisions were as follows:

*Jurisdiction of the Courts.*

Section 7. For purposes of annulment of marriage, jurisdiction may be acquired by personal service upon the respondent within this Commonwealth when either party is a *bona-fide* resident of this Commonwealth at the time of the commencement of the action.

Section 8. For purposes of divorce, either absolute or from bed and board, jurisdiction may be acquired by personal service upon the respondent within this Commonwealth, under the following conditions:

a. When, at the time the cause of action arose, either party was a *bona fide* resident of this Commonwealth, and has continued so to be down to the time of the commencement of the action; except that no action for absolute divorce shall be commenced for any cause other than adultery or bigamy, unless one of the parties has been for the two years next preceding the commencement of the action a *bona fide* resident of this Commonwealth.

b. When, since the cause of action arose, either party has become, and for at least two years next preceding the commencement of the action has continued to be, a *bona fide* resident of this Commonwealth: Provided, The cause of action alleged was recognized in the jurisdiction in which such party resided at the time the cause of action arose, as a ground for the same relief asked for in the action in this Commonwealth.

Section 9. When the respondent cannot be served personally within this Commonwealth, and when at the time of the commencement of the action the libellant is a *bona fide* resident of this Commonwealth, jurisdiction for the purpose of Annulment of Marriage may be acquired by publication, to be followed where practicable by service upon or notice to the respondent without this Commonwealth, or by additional substituted service upon the respondent within this Commonwealth, as prescribed by section 28 of this act.

Section 10. When the respondent cannot be served personally within this Commonwealth, and when at the time of the commencement of the action the libellant is a *bona fide* resident of this Commonwealth, jurisdiction for the purpose of divorce, whether absolute or from bed and board, may be acquired by publication, to be followed where practicable by service upon or notice to the respondent without this Commonwealth, or by additional substituted service upon the respondent within this Commonwealth as prescribed by section 28 of this act, under the following conditions:

a. When, at the time the cause of action arose, the libellant was a *bona fide* resident of this Commonwealth, and has continued so to be down to the time of the commencement of the action; except that no action for absolute divorce shall be commenced for any cause other than adultery or bigamy, unless the libellant has been for the two years next preceding the commencement of the action a *bona fide* resident of this Commonwealth.

b. When, since the cause of action arose, the libellant has become, and for at least two years next preceding the commencement of the action has

continued to be a *bona fide* resident of this Commonwealth: Provided, The cause of action alleged was recognized in the jurisdiction in which the libellant resided at the time the cause of action arose, as a ground for the same relief asked for in the action in this Commonwealth.

*Service of Process.*

Section 27. If upon the return of the alias or any pluries subpoena or subpoenas it appears that the respondent cannot be found within this Commonwealth to be served with process, then the court or judge awarding the subpoena may order the sheriff to cause notice to be published in one or more newspapers, if any, of general circulation published in the city or county of this Commonwealth wherein the libellant resides, and also in the city or county where the respondent had his or her last known residence; or if no newspaper be published in such city or county, then in such newspaper or newspapers nearest thereto, as the court may direct, once each week for six successive weeks prior to the first day of the next or any succeeding term of court, requiring the said respondent to enter an appearance on or before said day, and to file an answer within thirty days thereafter.

Section 28. If the place of residence of the respondent is within this Commonwealth, and is known to or can be ascertained by the libellant, but the respondent cannot be found within this Commonwealth to be served with process, then and in that case, in addition to the publication provided for by section 27 of this act, the court shall order a copy of the subpoena and libel, with the notice prescribed by section 23 of this act endorsed thereon, to be served by the proper official, in any one of the following methods:

a. By handing a true and attested copy thereof to an adult member of the respondent's family, at his or her dwelling house; or,

b. To an adult member of the family with which the respondent resides; or,

c. At the respondent's place of residence, to the manager or clerk of the hotel, apartment house, boarding house, or other place of lodging at which the respondent resides; or,

d. At the respondent's place of business, to his or her agent, partner, or the person for the time being in charge thereof, if for any cause an attempt to serve at the respondent's residence has failed.

Section 29. If the place of residence of the respondent is out of this Commonwealth, and is known to or can be ascertained by the libellant, then and in that case, in addition to the publication hereinbefore provided for, the court shall order notice to be served upon the respondent, either by personal service of a copy of the libel, within a time to be fixed by the order, or by registered letter containing a copy of the same, in case such personal service cannot be made; or in case the exact address of the respondent cannot be ascertained, then by publication in a newspaper of general circulation printed in the county and State where such respondent is known to reside, or if a foreign country, in the nearest center of population to the residence of the respondent, once each week for six successive weeks prior to the first day of the next or any succeeding term of court, with the same requirements as to appearance and filing of an answer as hereinbefore prescribed.

*Full Faith and Credit Clause, etc.*

Section 81. Full faith and credit shall be given in all the courts of this State to a decree of annulment of marriage or divorce by a court of competent jurisdiction in another State, territory or possession of the United States when the jurisdiction of such court was obtained in the manner and in substantial conformity with the conditions prescribed in sections 7, 8, 9, and 10. of this act. Nothing herein contained shall be construed to limit the power of any court to give such effect to a decree of annulment or divorce by a court of a foreign country as may be justified by the rules of international comity: Provided, That if any inhabitant of this Commonwealth shall go into another State, territory or country in order to obtain a decree

Then too, the rule laid down by the Pennsylvania Supreme Court in *Middleton v. Middleton*,<sup>47</sup> and by the Superior Court in *Howe v. Howe*,<sup>48</sup> *English v. English*,<sup>49</sup> and *Edgar v. Edgar*,<sup>50</sup> that not only must the lower courts carefully scrutinize the testimony on the part of a libellant as to the facts constituting the cause of divorce, but also that the higher courts would themselves examine into the sufficiency of such testimony, notwithstanding the findings of the master and of the court below, made it much more difficult than before to "slip a divorce case through." There had been numerous violations of the requirements of the Act of May 23, 1887, which permitted a libellant to testify only where jurisdiction had been acquired of the respondent by personal service of the subpoena, or of a rule to take depositions, or where the opposite party appeared and defended. These limitations in the Act of 1887 were jurisdictional in character and utterly precluded anything but common law proof on the part of the libellant where service had been made "by publication only." At the threshold of each divorce case lies the jurisdictional fact of the *bona fide* residence of the libellant within this State for the prescribed period. Under the Act of 1887 the libellant was not a competent witness to prove even his period of residence, much less his *bona fides* or *animus manendi*, unless the conditions prescribed by that act had been fulfilled. This is shown in *Lyon v. Lyon*,<sup>51</sup> which case is a pregnant illustration of the countless attempts made to evade the various legislative restrictions in divorce procedure, and the decisions of the higher courts.

Therefore, to overcome these jurisdictional and evidential obstacles, resort was had to the legislature; so that we shall now consider:

of divorce for a cause which occurred while the parties resided in this Commonwealth, or for a cause which is not ground for divorce under the laws of this Commonwealth a decree so obtained shall be of no force or effect in this Commonwealth.

<sup>47</sup> 187 Pa. 612.

<sup>48</sup> 16 Pa. Super. Ct. 193.

<sup>49</sup> 19 Pa. Super. Ct. 526.

<sup>50</sup> 23 Pa. Super. Ct. 230.

<sup>51</sup> 13 D. R. 623.

## III. THE REMEDY AND ITS EFFECT.

(1) The first act to be considered is that of June 8, 1911,<sup>52</sup> which reads as follows:

"An act enabling the libellant in all proceedings for divorce on the ground of desertion to testify to the fact of desertion, and to the efforts made by him or her to induce the respondent to return and resume the marital relation.

"Section 1. Be it enacted, &c., That in all proceedings for divorce on the ground of desertion, the libellant shall be fully competent to prove the fact of desertion, and the efforts, if any, made by him or her to induce the respondent to return and resume the marital relation, though the respondent may not have been personally served with the subpoena or with a rule to take depositions, and may not be residing within this Commonwealth, but has been served by publication only.

"Section 2. All acts or parts of acts inconsistent herewith be and the same are hereby repealed."

From the face of the title this act appears to be very innocuous, in that, *prima facie*, it relates solely to "the law of evidence." But the enacting clause of the act involves not only the rules of evidence, but also the jurisdiction of the courts; in this, that the act authorizes the testimony of the libellant to be given to prove the "*fact of desertion,*" etc., even "*though the respondent may not have been personally served with the subpoena or with a rule to take depositions, and may not be residing within this Commonwealth, but has been served by publication only.*"

This Act of 1911 was evidently passed to overcome the decision in *Davenport v. Davenport*,<sup>53</sup> where the testimony of the libellant as to the desertion complained of, was rejected, as there had been "no personal service of the subpoena or a rule to take depositions upon the opposite party nor had the opposite party appeared and defended" as required by the Act of May 23, 1887, P. L. 158.

The act is uncertain in that it uses the phrase "though the respondent . . . may not be residing within this Commonwealth." If this means that he must have been a former

<sup>52</sup> P. L. 720.

<sup>53</sup> 17 D. R. 1005.

resident but "may not be residing" therein at the time of suit brought, then service by publication would be authorized, and the privilege of testifying to the fact of desertion is in such a case properly extended to the libellant as against the respondent, who had once been subject to the jurisdiction of this State, but had departed therefrom.

But the phrase "may not be residing within this Commonwealth" is capable of being so construed as to permit a libellant to testify against the respondent, even though the respondent had never been a resident of this State, and therefore never subject to the jurisdiction of its courts.

The act is also misleading in its use of the phrase, "but has been served by publication only." The Act of March 13, 1815, authorizes publication, only where the respondent cannot be found within the county where suit is brought; but our courts have extended this not only to cases where the respondent could not be found within the county, yet still might be residing within the State, but also to cases where the respondent had formerly been subject to the jurisdiction of the State courts and had departed to another State. Beyond this, under the Act of 1815, the courts had never gone, refused always to recognize the validity of service by publication where the respondent had never been subject to the jurisdiction of this State.<sup>54</sup> But the Act of May 9, 1913,<sup>55</sup> which will be discussed later, has been construed to change the law relating to jurisdiction over the respondent, so that it is more than probable that our courts, first assuming jurisdiction in any and all cases over an absent respondent, will permit the libellant to testify against the respondent though he has never had his day in court, or any notice whatever of the proceeding, whereby he might have the opportunity to appear and defend. Such right is secured to a defendant in all personal actions relating to his property or his person, and it seems a strange perversion of right and justice that so far as concerns the most intimate of personal relations

<sup>54</sup> See *Beckett v. Beckett*, 24 D. R. 37.

<sup>55</sup> P. L. 191.

this right of self-protection should be denied. This Act of 1911 has been construed in a number of cases.<sup>56</sup>

(2) The next act in order of time is that of May 9, 1913,<sup>57</sup> which is as follows:

"An act relating to divorce:

"Section 1. Be it enacted, &c., That the several courts of common pleas shall have jurisdiction in any action in divorce, for any cause now or hereafter allowed by law, notwithstanding the fact that the marriage of the parties and the cause for divorce occurred outside of this Commonwealth, and that both parties were at the time of the occurrence of said cause domiciled without this Commonwealth, and that the respondent has been served with the subpoena only by publication as required by law. In such cases the libellant shall be a competent witness to prove his or her residence within this Commonwealth.

"Section 2. The said courts shall also entertain jurisdiction of all cases of divorce from the bonds of matrimony, for any cause now or hereafter provided for by law, when the libellant or applicant for such divorce shall, at the time of filing the petition or libel in divorce, have been a resident of this Commonwealth for one year previous to the filing of the petition or libel in divorce."

<sup>56</sup> (1) *Klinger v. Klinger*, 22 D. R. 297, where the parties were married and lived for some time in this State, then went to California where after a month the husband deserted his wife and she returned to this State, the former matrimonial domicile (service "by publication only"), being fully warranted in such a case. Judge Endlich held that the Act of 1911, being remedial, was entitled to a liberal construction, and therefore permitted the wife to testify fully as to all facts tending to prove a legal desertion, as well as to the fact of desertion itself.

(2) *Wilson v. Wilson*, 22 D. R. 769. The matrimonial domicile was in Philadelphia, and the desertion occurred there, so service by publication was the proper procedure. But the court, Barrett, J., restricted the testimony of the wife, the libellant, to the facts relating to the desertion and excluded her testimony as to cruel treatment, indignities, etc.

(3) *Collacott v. Collacott*, 24 D. R. 926. The matrimonial domicile was in Luzerne County. The husband went to Australia. There was no service by publication after the return of the alias subpoena; but only a letter mailed to the husband in Australia two weeks before the date of hearing. The court held that the testimony of the libellant as to the fact of desertion was too meager; that since the Act of 1911 makes the libellant a competent witness as to the cause of divorce, much fuller and more explicit proof should be required than before its passage.

(4) *Buys v. Buys*, 56 Pa. Super. Court 338. The matrimonial domicile was in Brooklyn. The husband brought suit in Philadelphia. The court held that under the Act of 1911 the courts will scrutinize with great care the uncorroborated testimony of the libellant as to the facts constituting desertion. The question of jurisdiction was not raised in this case, though it might well have been, since the respondent had never been a resident of this State.

<sup>57</sup> P. L. 191.



This act is both jurisdictional and evidential. In so far as it affects the rules of evidence, it goes a step further than the preceding Act of June 8, 1911, in that it permits the libellant, *in all cases*, to testify against the respondent not only to prove the fact of marriage or of desertion, but also to prove the libellant's residence within this Commonwealth. While, of course, such residence must be for the prescribed period of one year before instituting suit, yet it is to be noted that the limiting phrase *bona fide* is omitted. Prior to this act proof of a *bona fide* residence could be made only through the testimony of other witnesses, except where jurisdiction of the person of the respondent had been obtained.<sup>58</sup> But this act permits the testimony of the libellant to be given even though the respondent had never resided within this State, or been subject to its jurisdiction, but had been served "by publication only." Therefore, there is no limit to the right of the libellant to testify against an absent respondent who has never had any notice whatever of the proceedings against him.

*Residence* of the libellant is a jurisdictional fact. It had proved difficult in many cases for a libellant to prove *bona fides* of his or her residence, *i. e., animum manendi*. The *bona fides* was, therefore, largely a matter of inference for the court. But this act opens the door for a libellant to testify not only to overt acts from which the inference of a *bona fide* residence might irresistibly be drawn, but also to testify to motives and purposes.

If this evidential clause were the only feature of the act, little harm might result, since our higher courts, as stated above, will examine and scrutinize with great care the testimony of any libellant as to any jurisdictional fact, especially where the respondent had no opportunity to appear and defend. But this clause permitting the libellant to testify as to the fact of residence is the least objectionable feature of the act, for the first section of the act expressly confers jurisdiction upon the court

" . . . in any action in divorce, for any cause now or here-

<sup>58</sup> See *Lyon v. Lyon*, 13 D. R. 623.

after allowed at law, notwithstanding the fact that the marriage of the parties and the cause for divorce occurred outside of this Commonwealth, and that both parties were at the time of the occurrence of said cause domiciled without this Commonwealth, and that the respondent has been served with the subpoena only by publication, as required by law."

This language, literally construed, is capable of but one interpretation, namely, that it was the purpose of the legislature, as suggested in *Christmas v. Christmas*,<sup>59</sup> to confer jurisdiction upon our courts in all cases where the court has neither jurisdiction of the subject-matter, because the marital domicile of the parties at the time the cause of divorce arose was without the State, nor of the person of the respondent, for the reason that no personal service had been made upon the respondent. The phrase "publication as required by law" would formerly have been construed as permitting publication only where the respondent had departed from the matrimonial domicile in this State. But the positive provision of the preceding part of the section conferring jurisdiction where the parties were married outside of the State, the cause of divorce occurred outside of the State, and both parties at the time were domiciled without this State, seems to indicate clearly the legislative intent to overturn the principle of matrimonial domicile laid down in *Ather-ton v. Atherton*,<sup>60</sup> and *Haddock v. Haddock*.<sup>61</sup> The act has been so construed by our lower courts in *Driver v. Driver*,<sup>62</sup> *Christmas v. Christmas*,<sup>63</sup> and *Clark v. Clark*,<sup>64</sup> but has not been passed upon as yet by either the Superior Court or the Supreme Court.

In *Driver v. Driver*,<sup>65</sup> the court granted a divorce to a wife who had been deserted by her husband in New York State (where desertion is not a cause for absolute divorce), and came to Philadelphia to live. The husband was never within the

<sup>59</sup> 24 D. R. 349, 352.

<sup>60</sup> 181 U. S. 155.

<sup>61</sup> 201 U. S. 562.

<sup>62</sup> 24 D. R. 250.

<sup>63</sup> 24 D. R. 349.

<sup>64</sup> 24 D. R. 475.

<sup>65</sup> Note 62, *supra*.

jurisdiction of this State. Service was made by publication only.

In *Christmas v. Christmas*,<sup>66</sup> the parties were married and lived in Virginia. The husband was guilty of adultery. The wife came to Pittsburgh and, after the required time of residence, instituted proceedings in divorce. A decree was granted on the strength of this Act of 1913. The court in its opinion uses the following language:

"This divorce will not be effective beyond the limits of the State of Pennsylvania. If this libellant should marry again and return to Virginia, she is subject to criminal prosecution in that State, if the authorities desire to prosecute her. Any children which she may have as the result of any subsequent marriage would be illegitimate in any other State of the union except in Pennsylvania. These are circumstances which it is not pleasant to contemplate by any court as probable results of its decree, but the responsibility for that situation is not with this court, but with the legislature. The legislature has directed this court to take jurisdiction of this case and the responsibility for that act is with the legislature. The voice of the legislature announces the public policy of the State."

In *Clark v. Clark*,<sup>67</sup> the court goes even farther. The parties lived in New York. The cruel treatment by the husband compelled the wife to leave him, whereupon she came to Pennsylvania. The court granted her a decree in divorce, largely upon the merits it is true, but expressly held that jurisdiction had been conferred by this Act of 1913, and says in its opinion:

"Even if it be true that a divorce granted under these circumstances will be of no validity beyond the limits of Pennsylvania, that is a matter *more for the contemplation of the parties than for the consideration of the court*. The legislature has enacted the law, and the duty of the court is to administer it."

In the light of the fundamental principles established by the decisions of the United States Courts as to the proper *res* or subject-matter in divorce proceedings, the proper forum in such cases, the right of defendant, in divorce proceedings as well as in personal actions, to be served personally, or to have notice of the suit so that he may appear and defend (substituted

<sup>66</sup> Note 63, *supra*.

<sup>67</sup> Note 64, *supra*.

service by publication being permissible only where the respondent has left the matrimonial domicile), all of which are jurisdictional factors, this Act of 1913, has two aspects that "leap to the eye." It is either a trap for the innocent and unwary, or it is an open door to that "easy divorce," for which there has of recent years been so great a demand. It is a blot upon our laws. One result will be to make Pennsylvania, formerly one of the most conservative of states, a second Reno.

One voice alone has been raised in protest. The court in *Beckett v. Beckett*,<sup>68</sup> held:

"This enactment adds nothing to existing law. Whenever the courts now have jurisdiction they will continue to have jurisdiction. Nothing more and nothing less. They acquire no jurisdiction by virtue of this statute. Former statutes permitted jurisdiction to be acquired by publication only under certain conditions. This new law is plainly not intended to make publication the only form of service. The statute must therefore be construed to mean that whenever personal service of the subpoena or *alias* cannot be had, service may be made by publication as prescribed by former statutes upon any one who, *by reason of previous domicile*, is subject to the laws of the Commonwealth in matters relating to his marriage or divorce. As the respondent was never personally domiciled in Pennsylvania, the Act of 1913 does not apply to him."

This language is in consonance with the United States Supreme Court decisions.

(3) Then followed, as a natural corollary, the Act of April 21, 1915,<sup>69</sup> which reads as follows:

"An act to amend the first section of an act, entitled 'An act enabling the libellant in all proceedings for divorce on the ground of desertion to testify to the fact of desertion, and to the efforts made by him or her to induce the respondent to return and resume the marital relation,' approved June eighth, Anno Domini one thousand nine hundred and eleven, by making the libellant a competent witness generally.

"Section 1. Be it enacted, &c., That section one of an act, entitled 'An act enabling the libellant in all proceedings for divorce on the ground of desertion to testify to the fact of desertion, and to the efforts made by him or her to induce the respondent to return and resume the marital relation,' approved the eighth day of June,

<sup>68</sup> 24 D. R. 37.

<sup>69</sup> P. L. 154.

Anno Domini one thousand nine hundred and eleven, which reads as follows:

“Section 1. That in all proceedings for divorce on the ground of desertion, the libellant shall be fully competent to prove the fact of desertion, and the efforts, if any, made by him or her to induce the respondent to return and resume the marital relation, though the respondent may not have been personally served with the subpoena or with a rule to take depositions, and may not be residing within this Commonwealth, but has been served by publication only, be so amended as to read:

“Section 1. That in all proceedings for divorce the libellant shall be fully competent to prove all the facts, though the respondent may not have been personally served with a libel, subpoena, or rule to take depositions, and may not be residing within the Commonwealth, but has been served by publication only.”

This act lowers almost completely the bars of that policy of the law which prevented husband and wife from testifying against each other. But since questions of evidence, like questions of procedure, limitations, usury, &c., are matters of public policy to be determined by the legislature, so long as no constitutional rights are violated, any criticism of this act could be academic only, were it not for the fact that it again repeats the jurisdictional phrase appearing in the Act of June 8, 1911, and the Act of May 9, 1913; to wit, “May not be residing within the Commonwealth, but has been served by publication only.” Therefore, since the courts in construing the Act of May 9, 1913, seem inclined to follow the dictates of the legislature rather than the principles relating to jurisdiction over a non-resident, as defined by the United States Supreme Court, it is more than probable that in all future cases they will first assume jurisdiction in all cases to which the Act of May 9, 1913, seems applicable, and then admit testimony *ad libitum* by the libellant against the absent respondent, except in so far as restrained by the decisions of the Superior Court and of the Supreme Court above referred to, with respect to careful scrutiny of the testimony of the libellant as to the facts constituting the cause of divorce.

There seems to be as yet no reported case involving a construction of this Act of 1915. It is to be hoped that both the Act of 1913, and this later Act of 1915 may soon be put to the acid test of a careful consideration by our appellate courts.

Were it not for the Act of 1913, which apparently confers unlimited jurisdiction upon our courts in divorce proceedings, against respondents who never were in any way subject to their jurisdiction, this Act of 1915, would be comparatively harmless, for then our courts undoubtedly would hold, as was held in *Beckett v. Beckett*,<sup>70</sup> that service by publication is permissible only where the respondent is, or had at one time been, subject to the jurisdiction of this State.

The proper remedy for the unfortunate situation at present existing would be to repeal the Act of May 9, 1913; but such consummation devoutly to be wished will hardly be attained save through a determination of the questions involved by our own Supreme Court, and perhaps the Supreme Court of the United States.

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<sup>70</sup> Note 68, *supra*.