NOTES AND COMMENTS

CONFLICT OF LAWS

FULL FAITH AND CREDIT — JURISDICTIONAL QUESTIONS RAISED BY SPECIAL APPEARANCE — RES ADJUDICATA — FOREIGN DIVORCE DECREES

A husband secured a limited divorce in the District of Columbia on the ground of cruelty (cruelty not being a ground for absolute divorce in that jurisdiction) and was directed to pay alimony to his wife. Subsequently he changed his domicile to Virginia and while so domiciled secured an absolute divorce without alimony on the ground of desertion. In this latter action the wife was personally served with process in the District of Columbia and made a special appearance in the action to challenge the husband's jurisdictional residence in Virginia. After submission of the issues to a commissioner, the court overruled the wife's contentions and granted the divorce without her participation in the merits. Thereafter the husband sought a modification of the original District of Columbia alimony decree, presenting the Virginia decree as the ground therefor. His request was granted by the District Court and that judgment was reversed by the United States Court of Appeals for the District of Columbia. On appeal to the Supreme Court of the United States the judgment was reversed and remanded with instructions to give full faith and credit to the decree of the Virginia court.[1]

This utterance of the court is one which has long been awaited by the commentators and law review writers of the country, as well as by the drafters of the *Restatement of the Law of Conflict of Laws*, and will no doubt become the subject of general comment. At the time of this writing at least two expressions of editorial opinion have appeared to the knowledge of the writer.[2]

The principal case raises two very interesting questions, both of which relate to the attitude of the federal courts with respect to the full faith and credit clause.[3] The first involves the attitude of the federal

[1] *Davis* v. *Davis*, — U.S. —, 59 S.Ct. 3, 83 L.Ed. 52 (1938).

[2] Strahorn, "The Supreme Court Revisits Haddock," 33 Ill. L. Rev. 412 (1938); and an anonymous note in 87 U. of Pa. L. Rev. 346 (1939).

[3] Art. 4, Sec. 1.

courts toward a special appearance, made for the purpose of challenging the jurisdiction of the court, with respect to treating the matters therein disposed of as being res adjudicata for the purpose of subsequent litigation; while the second, and perhaps major point of interest, involves the much discussed question of validity of foreign divorce decrees.

I

The full faith and credit clause of the federal constitution and the act of congress in pursuance thereof[4] require that all courts of the United States accord such faith and credit to judicial proceedings "as they have by law or usage in the courts of the State from which they are taken." Notwithstanding these provisions it has become a well recognized corollary that such treatment need not be accorded the judgments or decrees of a sister state if the court rendering the same was without jurisdiction of the parties or the subject matter.[5] Thus it follows, that a person sued in one state upon a judgment or decree rendered in a court of another, is free to challenge the jurisdiction of the court of the rendering state, and the court is free to inquire into that question without fear of transgressing the constitutional mandate of full faith and credit.[6] But in recent years the Supreme Court of the United States has placed an important limitation upon that rule by holding that where a corporation has been made a party to a proceeding in a federal district court and enters a special appearance therein for the purpose of challenging the jurisdiction of the court over its "person", it is thereafter precluded from making a collateral attack upon a judgment therein rendered when sued upon the same in another district court, on the ground of *res adjudicata*.[7] In reaching its decision in that case, the court pointed out that the defendant might have remained away from the trial altogether, and that in such a case it would be entitled to litigate the question, but, having chosen to make a special appearance, in which the identical issue was determined and resolved against it, there was no reason for permitting a retrial of the same. The defendant had "had its day in court with respect to jurisdiction." In summarizing its position the court said,[8] "Public policy dictates that there be an end of litigation;

[4] 28 U.S.C.A. sec. 687.

[5] *Board of Public Works* v. *Columbia College*, 17 Wall. 521, 21 L.Ed. 687 (1873); *Pennoyer* v. *Neff*, 95 U.S. 714, 24 L.Ed. 565 (1878); *Renaud* v. *Abbott*, 116 U.S. 277, 6 S.Ct. 1194, 29 L.Ed. 629 (1886); *Reynolds* v. *Stockton*, 140 U.S. 254, 11 S.Ct. 773, 35 L.Ed. 464 (1891); *Pennywit* v. *Foote*, 27 Ohio St. 600, 22 Am. Rep. 340 (1875).

[6] *Old Wayne Mutual Life Assn.* v. *McDonough*, 204 U.S. 8, 27 S.Ct. 236, 51 L.Ed. 345 (1907); *Brown* v. *Fletcher*, 210 U.S. 82, 28 S.Ct. 702, 52 L.Ed. 966 (1908).

[7] *Baldwin* v. *Iowa State Traveling Men's Assn.*, 283 U.S. 522, 51 S.Ct. 517, 75 L.Ed. 1244 (1931).

[8] *Baldwin* v. *Iowa State Traveling Men's Assn.*, *supra*, note 7.

that those who have contested an issue shall be bound by the result of the contest, and that matters once tried shall be considered forever settled as between the parties. We see no reason why this doctrine should not apply in every case where one voluntarily appears, presents his case and is fully heard, and why he should not, in the absence of fraud, be thereafter concluded by the judgment of the tribunal to which he has submitted his cause."

The obvious result of this decision was to convert a special appearance into a general one, at least so far as the issue of jurisdiction of the person raised thereby was concerned. Following the decision in the *Baldwin* case there was some speculation among the authorities as to whether the rule therein adopted would be extended to include cases where jurisdiction of the subject matter was at issue.[9] The principal case would seem to settle conclusively all doubt in this respect in divorce

[9] For a discussion of the controversy that arose over this question, see the anonymous note in 87 U. of Pa. L. Rev. 346. Goodrich, in his second edition (1938) on *Conflict of Laws*, states as section 20: "Jurisdiction of a court over the person, once determined by a court, cannot be collaterally attacked by any proceedings involving the same parties or their privies. Jurisdiction of a court over subject matter or status is probably always open to collateral attack, though there is some authority that the principles of *res judicata* are applicable there also." And again in section 69, speaking of the jurisdiction of courts, that author says: " . . . A judgment rendered against a litigant who has either entered an appearance or formally engaged in the prosecution or defense of a cause of action cannot be collaterally attacked on the question of *personal* jurisdiction." (Italics are the writer's).

For other expressions of editorial opinion on this phase of the problem, see: Farrier, "Full Faith and Credit of Adjudication of Jurisdictional Facts," 2 U. of Chicago L. Rev. 552 (1935); Medina, "Conclusiveness of Rulings on Jurisdiction," 31 Col. L. Rev. 238 (1931); Gavit, "Jurisdiction of the Subject Matter and Res Judicata," 80 U. of Pa. L. Rev. 386 (1932); and anonymous note in 46 Yale L.J. 159 (1936).

In declining to express an opinion as to the application of the principles of *res judicata* to disputes over the jurisdiction over subject matter, the American Law Institute inserted the following *caveat* in their *Restatement, Conflict of Laws* at section 451: "A sues B in Nevada for divorce. B enters an appearance and pleads that neither A nor B is domiciled in Nevada. The court finds that A is domiciled in Nevada and renders a decree of divorce against B. Subsequently B sues A in Illinois for divorce. A pleads the Nevada decree. The *caveat* of the Restatement leaves open the effect of the Nevada decree." (Note that the principal case decides the matter by giving effect to the Virginia decree.)

It would appear that the United States Supreme Court had once previously committed itself to this doctrine in the case of *Chicago, R. I. & P. Ry. Co.* v. *Schendel*, 270 U.S. 611, 46 S.Ct. 420, 70 L.Ed. 757, 53 A.L.R. 1265 (1926). In that case there had been an action by the widow of a deceased employee of the railroad for damages under the Iowa Workmen's Compensation Act, on the theory that the decedent had been killed while employed in intrastate commerce, and a recovery was allowed on that theory. Subsequently the federal case was filed in the Minnesota District Court by the decedent's administrator, for the purpose of recovering a claim under the Federal Employers' Liability Act on the theory that the deceased was engaged in interstate commerce. The Supreme Court ruled that the finding of the Iowa State Court to the effect that the decedent was engaged in intrastate commerce was *res adjudicata* in the federal action.

For state court decisions following the same trend, see: *Chamblin* v. *Chamblin*, 362 Ill. 588, 1 N.E. (2d) 73, 104 A.L.R. 1183 (1936); and *Reid* v. *Independent Union of All Workers*, 200 Minn. 599, 275 N.W. 300 (1937).

actions[9a] for here the court ruled that the decree of the Virginia court was conclusive as to the residence requirement of the husband, thus giving it jurisdiction over the subject matter and the resultant power to decree an absolute divorce.

It might be well to insert a *caveat* at this point inasmuch as the opinion of the court is not definitely clear on this matter. In the latter part of the opinion there are passages which indicate a feeling on the part of the court that the participation of the non-resident wife in the proceedings amounted to a general appearance on the merits. If this construction is to prevail, the court might well have made such statement at the outset of the opinion and saved itself the troublesome duty of meeting and avoiding the jurisdictional question. A full consideration of the case, however, would seem to indicate that the court did respect the special appearance of such, but following the theory of the *Baldwin* case (and specifically citing that case), held that the wife had had her day in court on that issue and was now precluded from again raising the same.

In another decision, still more recent than the principal case,[10] the court has reiterated its stand. In that case there had been a proceeding in the federal court for reorganization of a corporation under Section 77B of the Bankruptcy Act, releasing certain guarantors and declaring all creditors to be bound thereby. Subsequently a creditor began an action in a state court against the guarantor and after the instigation of that proceeding, petitioned the federal court to modify its decree on the ground that it lacked jurisdiction to render the same. The federal court specifically ruled that it had such jurisdiction and thereafter the guarantors were permitted to set up the federal decree for reorganization and their release as *res judicata* in the state action, the Supreme Court of the United States saying, "After a Federal court has decided the question of the jurisdiction over the parties as a contested issue, the court in which the plea of *res judicata* is made has not the power to inquire again into that jurisdictional fact."[11]

II

That phase of the principal case which treats of the validity of foreign divorce decrees is the one most apt to become the subject of comment

[9a] It is questionable whether this doctrine will be extended to other types of cases as well. The case of *Chicago, R. I. & P. Ry. Co.* v. *Schendel*, 270 U.S. 611, 46 S.Ct. 420, 70 L.Ed. 757, 53 A.L.R. 1265 (1926), would seem to be in accord with respect to the matter of interstate commerce, but see *Baltimore Mail S.S. Co.* v. *Fawcett*, 269 N.Y. 379, 199 N.E. 628, 104 A.L.R. 1068 (1936) which is *contra* as to the matter of determination of what constitutes an undue burden on interstate commerce. The court therein said: "A court without jurisdiction of the subject-matter of an action can acquire no jurisdiction by erroneous decision that it has jurisdiction."

[10] *Stoll* v. *Gottlieb*, — U.S. —, 59 S.Ct. 134, 83 L.Ed. 116 (1938).

[11] *Stoll* v. *Gottlieb*, *supra*, note 10.

and discussion. To view the opinion on this point in its proper setting it is necessary to make a brief survey of the status of the foreign divorce decree and to bring the same down to date, considering the collateral influences which may or may not have caused the court to reach its decision. Any proper survey of this nature would go back at least as far as the case of *Atherton* v. *Atherton*.[12] In that case the husband and wife had maintained their marital domicile in Kentucky and subsequently the wife left the husband and returned to the home of her mother in the state of New York. Later, the husband brought an action for divorce in Kentucky on the ground of desertion, service upon the wife being made by mail to her New York address, in accordance with the Kentucky law. Upon her failure to appear in the cause, the Kentucky court entered a decree for the husband. Later, the wife began a proceeding in the state of New York to secure a divorce on the ground of cruelty, alleging that to be her reason for having left the husband in Kentucky. Personal service was secured on the husband, and in defense he set up the Kentucky decree. The New York court, disregarding the Kentucky proceedings, entered a decree in favor of the wife as prayed for. Upon appeal to the United States Supreme Court, the New York decree was reversed with instructions to give full faith and credit to the Kentucky judgment.

This decision met with the approval of most writers and was in accord with the weight of judicial authority as understood at that time,[13] namely, that the action for a divorce could be instituted in the state of the plaintiff's residence, and so long as the laws of that state as to residence, notice to the non-resident defendant, *etc.*,[14] were observed, the decree of the court dissolving the marriage was everywhere valid and entitled to recognition. This right of a state to decree divorces for its own citizens was recognized in the case of *Pennoyer* v. *Neff*[15] and was expressly distinguished from the issue therein decided[16] where the court said, "The jurisdiction which every state possesses to determine the civil status and capacities of all its inhabitants involves authority to prescribe the conditions on which the proceedings affecting them may be commenced and carried on within its territory. The State, for example, has absolute right to prescribe the conditions upon which the marriage rela-

[12] 181 U.S. 155, 21 S.Ct. 544, 45 L.Ed. 794 (1901).

[13] BISHOP, MARRIAGE AND DIVORCE. To entitle the court to take jurisdiction, however, it is sufficient that one of the parties be domiciled in the country; it is not necessary that both should be.

[14] See *Cheeley* v. *Clayton*, 110 U.S. 701, 4 S.Ct. 328, 28 L.Ed. 298 (1884).

[15] 95 U.S. 714, 24 L.Ed. 565 (1878).

[16] *i.e.*, That in an action for a personal judgment against a non-resident, service of process cannot be made across state lines so as to bind the non-resident's property located within the state.

tion between its own citizens shall be created, and the causes for which it may be dissolved. One of the parties, guilty of acts for which, by the law of the state, a dissolution may be granted, may have removed to a state where no dissolution is permitted. The complaining party would therefore fail if a divorce were sought in the state of the defendant; and if application could not be made to the tribunals of the complainant's domicile in such case, and the proceedings be there instituted without personal service of process or personal notice to the offending party, the injured citizen would be without redress."[17]

Notwithstanding this general rule which was followed by a majority of the states, a definite minority, including some of the more important states,[18] came to adopt a different rule, prompted to a great extent by public policy as dictated by their own strict laws concerning divorce. In these states, a great reluctance was indicated on the part of their courts to give effect to foreign divorce decrees which involved a disturbance of the marital status of their own citizens.

With the state of the law on this point in such a condition came the next, and probably most important, decision of the United States Supreme Court on the matter of validity of foreign divorce decrees.[19] In the *Haddock* case a husband and wife had been married in New York and the husband immediately left that state, subsequently establishing a residence in Connecticut where he secured a divorce on the ground of desertion, service on the wife being had by publication through mail to her last known New York address. Some years later the wife sued for separation and alimony in New York in which action the husband was personally served in that state, and as a defense to which he set up the Connecticut decree. Again as in the *Atherton* case,[20] the New York court denied validity of the foreign decree and entered a decree for the wife. On appeal to the Supreme Court of the United States, the judgment of the New York court was affirmed by a five to four decision. The court accepted as conclusive the finding of the New York court that the husband had been guilty of desertion, and held that the Connecticut decree, although valid in the state where rendered, need not be given effect elsewhere except by comity.

This ruling of the court at once aroused a flood of protest throughout the country and was made the subject of widespread editorial criti-

[17] For other authority asserting the right of a state through its courts to determine the marital status of its own citizens, see: *Ditson* v. *Ditson*, 4 R.I. 87 (1856) and *Harding* v *Allen*, 9 Greenl. 140 (Me. 1832).

[18] New York, New Jersey, Pennsylvania, and North Carolina.

[19] *Haddock* v. *Haddock*, 201 U.S. 562, 26 S.Ct. 525, 50 L.Ed. 867, 5 Ann. Cas. 1 (1906).

[20] *Supra*, note 12.

cism,[21] particularly at the hands of Professor Beale.[22] Perhaps the most serious ground for criticism of the *Haddock* case is that it resulted in the "dual-status" theory of matrimony. Under this theory, a person securing a divorce under any circumstance not recognized by the decision,[23] would be held to be a single person in the state which had granted the decree, free to remarry and bear legitimate children who would be entitled to inherit his property upon his death, while in other states, the decree being recognized through comity only, he might still retain his marital status and consequently be guilty of bigamy under their laws upon a second marriage, and the children of such marriage, being illegitimate, would be deprived of the right to inhert the guilty parent's property.[23a]

In making its decision in the *Haddock* case, however, the court did not close all the doors to extraterritorial validity of divorce decrees. There still remained the situation presented in the *Atherton* case,[24] namely, a decree secured by one of the parties at their last marital domicile. Such a decree continued to command full faith and credit, as the *Atherton* case was affirmed on that specific ground.

Notwithstanding the prediction on the part of one writer[25] that the court would soon have another opportunity to reconsider this subject, over 30 years elapsed between the decision in the *Haddock* case and that of the principal case.

The only case decided by the court during that interval which in-

[21] See: Sale, "The *Haddock* Case—Decrees for Divorce on Substituted Service Not Protected by Full Faith and Credit Clause of Constitution," 62 Cent. L. Journ. 333 (1906); Anonymous notes, 22 Law Quart. Rev. 237; 40 Am. L. Rev. 580; and 4 Mich. L. Rev. 534 (1906). For an article in support of the decision in the *Haddock* case, see: Schofield, "The Doctrine of Haddock v. Haddock," 1 Ill. L. Rev. 219 (1906).

[22] Beale, "Constitutional Protection of Decrees for Divorce," 19 Harv. L. Rev. 586 (1906). However, Professor Beale has substantially modified his views with respect to *Haddock* v. *Haddock* as therein set forth in a later article, "Haddock Revisited," 39 Harv. L. Rev. 417 (1926) see *infra*, note 31.

[23] The *Haddock* case recognized three general situations in which a divorce, secured in a state other than that of the residence of the defendant spouse would be valid and entitled to full faith and credit:

(a) Where the defendant appeared voluntarily in the suit,

(b) Where the defendant was personally served with process in the granting state,

(c) Where the granting state was the last matrimonial domicile of the parties.

And in addition to these, all foreign divorces *could* be given extraterritorial effect through comity.

[23a] The last mentioned evil has been nullified in many states through the enactment of remedial legislation similar to that contained in Ohio G. C. sec. 10503-15 which provides: " . . . The issue of parents whose marriage is null in law, shall nevertheless be legitimate."

[24] *Supra*, note 12.

[25] Sale, *supra*, note 21: "It is safe to predict that not many years will elapse before the same question will again be argued before the Supreme Court of the United States in an effort to convince the court of its error."

volved the question of validity of foreign divorce decrees was that of *Thompson* v. *Thompson*.[26] That case involved a suit by the wife in the District of Columbia to secure a decree of separation and alimony. During the pendency of the action, the husband secured a divorce *a mensa et thoro* on the ground of desertion in the state of Virginia where the parties had been married, and had continued to reside after marriage, and in which state the husband had continued to reside until the time of the proceedings. Service on the non-resident wife was had by publication. The Supreme Court held that the District of Columbia court was bound to give full faith and credit to the Virginia court's decree, relying on the *Atherton* case, and accepting, or seeming to accept, as conclusive, the findings of the Virginia court as to the wife's desertion.[26a]

During the 30 year period between the *Haddock* case and the *Davis* case, still more articles appeared on the subject, most of which were directed toward a reconciliation of the doctrine set forth in the former case in an effort to devise possible extensions thereto, or to evolve a plausible explanation of that case to serve as a basis for the disposition of future cases.[27]

One of the first of such articles was written by Professor Beale,[28] in which he compromised his position first taken with respect to this case,[29] making certain modifications in his earlier views. In that article he saw some benefit to be achieved from the *Haddock* case, in that it imposed certain limitations upon the minority doctrine which had theretofore refused to give any effect to foreign decrees. Under the principle thus established they were compelled to give such decrees full faith and credit when rendered at the marital domicile. The author also saw an additional benefit in the rule so established wherein the court was beginning to limit the emphasis of the interest of the state in the marital

[26] 226 U.S. 551, 33 S.Ct. 129, 57 L.Ed. 347 (1913).

[26a] The ruling of the court in that respect seems to contravene the usually accepted doctrine that a divorce *a mensa et thoro*, like judicial separation, is a proceeding *in personam*. That doctrine is based on the theory that since such a divorce does not dissolve the marriage ties, but justifies the parties' living apart, there is no action upon status or *res* and consequently jurisdiction must be *in personam*. For criticism of the *Thompson* case on this ground, see 13 Col. L. Rev. 241 (1913) and 23 Yale L.J. 88 (1913). See also *Restatement, Conflict of Laws*, sec. 114, which provides that both parties must be subject to the court which renders a decree of judicial separation. In *Pettis* v. *Pettis*, 91 Conn. 608, 101 Atl. 13, 4 A.L.R. 852 (1917), the Connecticut court refused to give full faith and credit to a New York decree of judicial separation, where the New York court did not have jurisdiction over both of the parties. The latter case is noted in 17 Col. L. Rev. 639 (1917) and 27 Yale L.J. 117 (1917).

[27] See: Beale, "Haddock Revisited," 39 Harv. L. Rev. 417 (1926); Strahorn, "A Rationale of the Haddock Case," 32 Ill. L. Rev. 796 (1938); McClintock, "Fault as an Element of Divorce Jurisdiction," 37 Yale L. J. 564 (1928); Anonymous note in 44 Yale L. J. 488 (1935).

[28] Beale, *supra*, note 27.

[29] Beale, *supra*, note 22.

status and domestic relations of its citizens, and was beginning to give effect to the personal interest of the parties concerned therein. Under the rule as set forth, a certain amount of "fair play" or, as stated by another writer[30] "feasibility of defending," was accorded the non-resi- a proceeding. But in making these observations, Professor Beale adds a qualification, namely, that the absent spouse may, in some manner, waive this right to have his interests protected by a foreign court, either by his own misconduct which has justified the other spouse in seeking a foreign domicile, or by consenting to the establishment of such separate domicile.[31] These qualifications set forth by Professor Beale have found their way into the *Restatement of Conflict of Laws*,[32] and have been referred to[33] as the "Beale-Restatement addenda."

The principal case indicates a favorable attitude toward this "addenda" wherein it distinguishes the facts from those of the *Haddock* case by saying of the latter case, "There was no suggestion that she was at fault or did anything to disrupt the marital relation." And again in the opinion, speaking of the wife's conduct in the principal case as justifying the husband's acquisition of a separate domicile in Virginia, "In view of these facts and of her conduct adjudged repugnant to the marital relation, it would be unreasonable to hold that his domicile in Virginia was not sufficient to entitle him to obtain a divorce having the same force in the District as in that state." Thus, it would appear that the

[30] Strahorn, "The Supreme Court Revisits Haddock," 33 Ill. L. Rev. 412 (1938).

dent defendant, who, it must be conceded, has a definite interest in such

[31] Beale, *supra*, note 27, at page 426. At this point Professor Beale sets forth what the writer chooses to term the "shifting matrimonial domicile theory," and which is a separate branch of the subject, in no way related to the problems of the principal case. While matrimonial domicile is a term receiving constant use in the decisions, it is not one to be found often defined. For the purpose of this note it may be said to be that place at which the husband and wife last lived, or are living together as such. A question then arises where there is a separation and subsequently both parties leave that domicile, taking up new domiciles in separate and different states: Where is the "matrimonial domicile" in such a case? According to Professor Beale, it must be at the domicile of the innocent party. This doctrine was invoked in the case of *Montmorency* v. *Montmorency*, 139 S.W. 1168 (Tex. Civ. App. 1911), wherein it was held that the innocent spouse carried the matrimonial domicile with her. That case has been approved in a *dictum* in *Parker* v. *Parker*, 222 Fed. 186 at 190 (1915).

[32] Sec. 113 provides: "A state can exercise through its courts jurisdiction to dissolve the marriage of spouses of whom one is domiciled within the state and the other is domiciled outside the state, if

(a) the spouse who is not domiciled within the state
  (i) has consented that the other spouse acquire a separate home; or
  (ii) by his or her misconduct has ceased to have the right to object to the acquisition of such separate home; or
  (iii) is personally subject to the jurisdiction of the state which grants the divorce;
  or
(b) the state is the last state in which the spouses were domiciled together as man and wife."

[33] Strahorn, *supra*, note 30 at page 416.

court has added a new ground to the recognition of foreign divorce decrees in addition to those set forth in the *Haddock* case, by the adoption of the Beale-Restatement addenda." Consequently, a foreign divorce decree, acquired in a state other than that of the last marital domicile must be accorded full faith and credit if the element of fault is found to have justified the establishment of a separate domicile.[33a].

Still another article,[34] appearing during the 30 year interval between the *Haddock* and the *Davis* cases, has considered the factor of fault as an element of jurisdiction and has subjected that test to criticism.[35] The basis for such criticism lies in the fact that no final adjudication of fault can be made except by the Supreme Court of the United States, since fault would become a jurisdictional fact to be determined by each court on its own initiative, independent of the findings of the court rendering a previous decision, and only by appeal to that court could the matter be finally resolved.

This criticism has been made the subject of further comment[36] wherein it is indicated that the court has never made an independent finding of fact as to the fault of the parties in such cases. In the *Atherton* case, the court accepted the findings of the Kentucky court to the effect that the wife was guilty of desertion, notwithstanding that the New York court had found that she left the matrimonial domicile because of the cruelty of the husband. In the *Haddock* case, the court accepted the finding of the New York court to the effect that the husband had been guilty of desertion, in spite of the fact that the Connecticut court, in rendering the earlier decree, had found the wife to have been guilty of such an act. So also in the *Thompson* case, the court accepted the finding of the Virginia court as to the wife's fault in deserting the husband. In none of these cases does it appear the the court conducted an independent investigation of its own on the matter of fault, nor is it plausible to see how such an investigation can be made with any degree of reliability. As is stated by the writer in 37 Yale Law Journal,[37] "As an issue of fact, the question of fault is one difficult to determine. It is probable that the case does not often arise where the

[33a] In requiring full faith and credit to be accorded a decree of divorce granted at the domicile of an innocent spouse, which is not the matrimonial domicile, the court appears to have gone beyond the point intended by the American Law Institute in their drafting of sec. 113 of the *Restatement, Conflict of Laws*. Goodrich, *supra*, note 9, at sec. 128 indicates that the purpose of sec. 113 was to set forth the situations for proper venue, and did not bear on full faith and credit, but that writers have construed it as covering the constitutional question as well. Se also in this connection, BEALE, CONFLICT OF LAWS (1935), sec. 113.11.

[34] McClintock, *supra*, note 27.

[35] McClintock, *supra*, note 27 at page 572.

[36] Anonymous note in Yale L.J., *supra*, note 27.

[37] McClintock, *supra*, note 27 at page 572.

fault is all on one side. In many cases it is almost impossible to say who is most at fault even if all the acts of the parties are known. It would not be surprising to find that the courts will differ as to this question of fault. They did differ in *Atherton* v. *Atherton*, *Haddock* v. *Haddock*, and *Thompson* v. *Thompson*."

Another explanation of the principal case is to be found in Professor Strahorn's article,[38] under what he styles, "The 'individualized approach' explanation." It is the opinion of that writer that due to the indiscriminate method in which the court discussed the various issues involved in the case, the court is indicating a desire to refrain from committing itself to definite rules concerning full faith and credit, and is adopting a policy of granting or refusing *certiorari* in future cases not coming squarely within the doctrine of *Haddock* v. *Haddock* on an individualized approach theory considering the subjective factors involved. Professor Strahorn also points out that it may be significant that actual notice was given the non-resident spouse in the *Davis* case, while in the *Haddock* case, notice was attempted to be given by publication and mail only.

A case which appears to bear out Professor Strahorn's theory with regard to the court's policy of granting and withholding *certiorari* in this respect, is *Hellmuth v. Hellmuth*,[39] wherein the parties had entered into a formal separation agreement in the District of Columbia and thereafter the husband moved to Maryland and subsequently secured a divorce without giving notice to the wife, except by publication. Later the wife sought a declaratory ruling contending that the Maryland decree was not entitled to full faith and credit. The decree was upheld and the Court of Appeals of the District affirmed the ruling, not only on the point of full faith and credit, but as a matter of comity as permitted by *dictum* in the *Haddock* case. In denying *certiorari*, the Supreme Court evidenced a willingness to "go along" with the court in this respect. Speaking also of this case, Professor Strahorn says,[40] "On the point of the present standing of the *Haddock dictum* for local validity and voluntary recognition by comity, we have the denial of *certiorari* in the *Hellmuth* case as a mute tolerance of that situation and so we can say that the court approves it by not disapproving it when opportunity afforded."

In terminating this discussion, the writer feels that two rather defi-

[38] Strahorn, *supra*, note 30 at page 417. Professor Strahorn has subdivided his article into the following four divisions or explanations of the principal case:
(1) The "Joint Domicile" explanation.
(2) The "General Appearance" explanation. (Treated in Part I *supra*.)
(3) The "Beale-Restatement addenda" explanation.
(4) The "individualized approach" explanation.

[39] 98 Fed. (2d) 431, *cert. denied*, 59 S.Ct. 92 (1938).

[40] Strahorn, *supra*, note 30 at page 422.

nite conclusions may be drawn as a result of the decision in the principal case. The first is that, where matters are contested in a special appearance relating to jurisdiction, both of the person and of the subject matter,[41] and the court makes a specific ruling on these matters, they become *res judicata* for the purpose of future litigation in foreign courts. If this first conclusion be sound, and the decision in the principal case is not construed as having been founded on a general appearance of the defendant spouse, then there has been a definite extension of the doctrine of *Haddock* v. *Haddock*. That extension consists of permitting one spouse to obtain a divorce in a state wherein the other is neither domiciled, residenced, nor personally served, even though that state is not the matrimonial domicile,[42] if it be found that the plaintiff in such an action established such a separate domicile as a result of the fault of the other; and such a decree, when rendered, will be entitled to full faith and credit. How this matter of fault will be determined seems to be an open question. It is submitted that the only method by which it may be finally adjudicated is by an appeal to the United States Supreme Court in those instances in which a divorce is subsequently sought by the other spouse at his or her domicile and in which the decree of the first court is denied full faith and credit. Since such an appeal is not a question of right,[43] it may well be that the extension of the *Haddock* case will not have great practical significance. The result may be, as indicated by Professor Strahorn,[44] that in the future the court will pick and choose the cases by granting or denying *certiorari*.

CHARLES A. REYNARD.

CONSTITUTIONAL LAW

FINALITY OF LEGISLATIVE RECORDS

On July 22, 1936, the General Assembly of the State of Ohio voted to take a five minute recess and thereupon disbanded to their respective homes. On December 8, 1936, the General Assembly convened and adopted a motion that entries be made in the respective journals of the House and the Senate to show the convening in session of

[41] In stating that the extension covers both jurisdiction of the person and subject matter, it must be remembered that the court has only committed itself to this doctrine with respect to actions for divorce, and may not hold to the same views in other types of actions. See notes 9 and 9a, *supra*.

[42] The term "matrimonial domicile" is here used in the same sense as defined in note 31, *supra*.

[43] 28 U.S.C.A. (Judicial Code) sec. 344; FOSTER, "FEDERAL PRACTICE," 6th ed., sec. 692c.

[44] Strahorn, *supra*, note 40.