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# Conflict of Laws and Jurisdiction for Divorce-- Separation of the Marital Status

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**CONFLICT OF LAWS AND JURISDICTION FOR DIVORCE—  
SEPARATION OF THE MARITAL STATUS.\***

For the purpose of this discussion, the following hypothetical case is assumed:

H and W were married in State X, where they lived as husband and wife for several years. H left W in state X and went to state Y where he established a bona fide domicile. He then sued for a divorce on the ground of desertion having service on his wife by publication. H obtained a default decree in state Y and later married W, number two. After living with W Number Two for several years, he died leaving real property in state X, state Y, and state Z. W Number Two had dower granted her in property in state Y and later W Number One brought suit to have dower granted her in the real property in state X. The court in state X granted W Number One dower holding that H was in fault in his separation from W Number One and that the divorce in state Y was invalid. Subsequently, W Number One sues to have dower allotted to her in the real property located in state Z, W Number Two being made a defendant and appearing in the action.

The question to be discussed herein is which of these two women is entitled to the real property in state Z.

The solution offered in this note is based on the decision of United States Supreme Court in *Haddock v. Haddock*.<sup>1</sup> The right to dower in the property in state Z depends on which of these two women state Z recognizes as the wife of H at his death.

The solution is:

The marriage relation is composed of a number of legal incidents. Certain of these legal incidents followed H to state Y and state Y had jurisdiction of so many of these legal incidents as were within that state. Therefore, state Y could enter a divorce decree which would prevent H's remarrying in that state, but it couldn't enter a decree that would affect the legal incidents of the marriage which remained with W in state X, such as her right to dower in her husband's property. The discussion that follows supports this solution; and follows a discussion of another angle of the same problem by Elwood Rosenbaum.†

In *Haddock v. Haddock*,<sup>2</sup> the facts were similar to the facts of our hypothetical case. Mr. and Mrs. Haddock were married in New York and lived there until Mr. Haddock left and went to Connecticut where he established a domicile and obtained a divorce from Mrs. Haddock, having served her by *publication*. Later, Mrs. Haddock instituted a divorce action in New York, having *personal* service on Mr. Haddock

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\* This note is a companion note to the one immediately preceding, and deals with the second solution of the problem as stated, *supra*, p. 248.

<sup>1</sup> 201 U.S. 562 (1905).

† See note *supra* at p. 247.

<sup>2</sup> *Supra* n. 1.

in New York. Mr. Haddock set up the Connecticut decree as a defense. On appeal the Supreme Court held that New York was not bound to extend full faith and credit to the Connecticut decree, and that the New York decree was valid.

To be able to reach the position taken in this discussion it must first be agreed that divorces are *in rem* actions and the marital status is the *res*.<sup>3</sup>

From this beginning we go to the fact that the party in fault in the separation can't take the entire matrimonial domicile with him and that the wife is entitled to set up a separate domicile.<sup>4</sup> This of course differs from the common law rule that the husband took the matrimonial domicile with him, that the wife had no control of it at all, and that the matrimonial domicile always had its situs at the domicile of the husband. The new result is logical in that it prevents a party in the wrong from thus benefiting himself.

Now we have H in state Y acquiring domicile there; there is no denial that he can acquire domicile there, the denial is that he can be granted a divorce there that will destroy all of W's property rights in the marital relation.

As we have seen, the marriage status is an *in rem* relation and involves both parties to the suit; the husband, the party at fault, can't take with him the marital status that belongs to the wife. The domicile of an innocent wife doesn't follow her husband, who deserts her and runs into another state.<sup>5</sup> H therefore can't have taken with him any part of the marital status except that part peculiar to him. Thus the Court of his new domicile, state Y, can't possibly have jurisdiction of the *res* in any other part than it is possible for H to bring with him.

The innocent wife retains the part of the marital status peculiar to her with her in state X, so that state Y can't, by a divorce granted to H in state Y, affect the status of W in state X when it can't possibly have any control over her part of the marital *res*. If the full faith and credit clause can force state X to recognize the decree of state Y then it follows that the court of State Y has disposed not only of a *res* within its jurisdiction but also of a state X *res*.<sup>6</sup>

Should the court of the state granting the divorce have any more rights as regards the marriage than the state where the other spouse is settled? Can we say that the state to which H removes has all the rights as regards the separation of the parties? On grounds of comity we could say that the relation should be reciprocal and that each state has a right to control of the party within its jurisdiction.

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<sup>3</sup> *Ditson v. Ditson*, 4 R.I. 87 (1856); *Andrews v. Andrews*, 184 U.S. 14 (1903); *Hughes v. Hughes*, 211 Ky. 799 (1925).

<sup>4</sup> 9 Wall. 108 (1852).

<sup>5</sup> *Perkins v. Perkins*, 225 Mass. 82 (1916). "The marriage status for jurisdictional purposes in divorce proceedings remains in the state of its origin, when the husband deserts a wife innocent of matrimonial wrong in that state and goes into another state, where he establishes a domicile."

<sup>6</sup> *Lister v. Lister*, 86 N.J. Eq. 30 (1916).

The decree of divorce in state Y affects H and allows him to remarry and be free of W Number One residing in state X. He is entirely divorced from her except in relation to her property rights in property of her husband wherever situated.

The difficulties that such a result entails—that is, that the parties are married in one state and not in another and that H would be in adultery in any other state than Y—can be handled as stated by Professor Bingham:

“The legal ties as to the New York wife were mere technical things supporting her claim to economic benefits only. The New York marriage wasn't a going concern domestically; he no longer lived with her. Socially, he had only one wife, the second; there was no polygamy here in any socially condemnable sense. No legal obligation on H to live with the first wife, nor does it imply that if they should have lived together, adultery would not have been committed.”<sup>7</sup>

State X has the right to protect the property interests of its domiciliary, state Y has no right to completely destroy all wife Number One's rights.

In suits, such as these, where the husband goes into another state, we shall assume for further discussion that the parties were married and lived together in California, and that the husband deserted her and went to New York, and instituted the divorce proceedings. Many problems arise as to the wife in California: (1) she can either go to the trouble and expense of appearing generally in New York to answer, or (2) attempt to appear specially for purpose of contesting jurisdiction. But either of these involves great labor and expense on her part. Such suits as these by the husband have not been allowed as working too great a hardship and being too inequitable in regard to the wife.<sup>8</sup>

State X here should frame its own manner of recognition of the decree of state Y.<sup>9</sup> It should determine how far the divorce granted by state Y should determine the marital status of its own resident.<sup>10</sup>

The “full faith and credit” clause isn't completely ignored in a case of this kind; it may be argued that state Y didn't have jurisdiction to render a divorce decree affecting the economic rights of a party not personally within its jurisdiction. Nor can it be argued that state Y should have the power to decree as to property in another state of a party not within its jurisdiction.

The husband has an obligation to support his wife. It is a personal legal tie between them which can't be completely dissolved by one state that doesn't have jurisdiction of both spouses.

#### CONCLUSION

The result to be reached from the above discussion would be that to prevent any injustice, the Court of state Z should inquire into the

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<sup>7</sup> 21 Cornell L. Quart. 393 (1936).

<sup>8</sup> Kempson v. Kempson, 58 N.J. Eq. 94 (1899).

<sup>9</sup> Toncray v. Toncray, 123 Tenn. 476 (1910).

<sup>10</sup> Supra n. 6.

matter of who was at fault in the separation and its holding as to W Number one's dower right should depend on the result of the inquiry; that is, if H is at fault the decree of divorce of state Y should not be recognized and dower should go to W-1; but if W-1 was at fault in causing the separation, then dower should go to W-2; for if W-1 is at fault, then H can take the entire marital status into state Y with him, state Y will thus have jurisdiction of the entire *res*, and there would be no separation of the legal incidents of the marriage status.

NATHAN ELLIOTT, JR.