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Conflict of Laws--Basis for Divorce--Jurisdictional Fact Concept

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complete analogy between a director and a trustee in that a director can resign from his position while a trustee can only be relieved of his duties by the court's permission.

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CONFLICT OF LAWS—BASIS FOR DIVORCE—JURISDICTIONAL FACT CONCEPT.

Prior to the decision in the *Haddock*[1] case, the traditional theory of divorce was that the action was in rem.[2] The marital status was treated as the res,[3] thus making actual notice to non-residents unnecessary when one of the spouses was domiciled within the domiciliary forum,[4] due process being satisfied by constructive service upon a non-resident when the nature of the action is in rem.[5]

Atherton v. *Atherton*[6] is the well known example of this theory. In that case the spouses were domiciled in state X. The wife established a separate domicile in state Y. The spouse domiciled in X brought suit in X against the absent spouse, giving notice by constructive service, and the court granted a divorce to the domiciled spouse in X. Subsequently the spouse in Y brought action in Y for a divorce against the absent spouse. The absent spouse appeared and set up the decree he obtained in X, and the Supreme Court sustained the argument that state Y must give the state X decree full faith and credit in state Y.

This theory is easily applied in proceedings when a tangible asset is the res because the res remains within one jurisdiction, but when the res is changed to an intangible object such as the marriage status, then difficulties multiply rapidly. For example, the absent spouse who has part of the marital res with him may never hear of the proceedings against him, and yet if he were to appear in the suit he would easily disprove the allegations of the complaining spouse. The *Atherton* case presents many disadvantages in holding the divorce action to be in rem.[7]

The Supreme Court, in 1906, decided the *Haddock* case.[8] There one spouse was domiciled in state X, the other in Y. The spouse domiciled in X, but not the last marital domicile, obtained a divorce from the

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

[2] Atherton v. Atherton, 181 U. S. 155 (1901); See Ballard v. Hunter, 204 U. S. 241 (1907); Hughes v. Hughes, 211 Ky. 799, 275 S. W. 121 (1925); Harding v. Allen, 9 Greenl 140 (Me. 1832).

[3] Story, Conflict of Laws (1924), Secs. 229-230; Beale, Haddock Revisited (1926) 39 Harv. L. Rev. 417 at 418.

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

[5] Tibbets v. Olson, 91 Fla. 824, 108 So. 679 (1926); Axtell v. Axtell, 181 Ga. 24, 181 S. E. 295 (1935); Hinners v. Banville, 114 N. J. Eq. 348, 168 Atl. 618 (1933).

[6] 181 U. S. 155 (1901).

[7] Maynard v. Hill, 125 U. S. 100 (1887); Kempson v. Kempson, 63 N. J. Eq. 783, 52 Atl. 360 (1902).

[8] 201 U. S. 562 (1906).

state X court. The defendant spouse was not served with process in the action while personally within the X jurisdiction, nor did she appear or consent to the jurisdiction of the court. Subsequently the spouse in Y brought action for divorce and the absent spouse set up the state X decree as a bar to the action in state Y.

Now, if this divorce is not given full faith and credit in state Y, it would appear that a logical result would be reached, as the absent spouse has neither consented to the jurisdiction of the X court nor appeared. If this decision is sound, then it appears that *Haddock* v. *Haddock*[9] overrules *Atherton* v. *Atherton*;[10] however, in the *Haddock* decision the majority report expressly states that the *Atherton* case is is not overruled, but that the two cases differ, because in the former the divorce was granted in the last matrimonial domicile.[11] Mr. Justice Holmes, in his minority opinion in *Haddock* v. *Haddock*, expresses the belief that the cases are expressly contra, and that the *Atherton* case is overruled.[12] Four years later, however, *Thompson* v. *Thompson*[13] reaffirmed the *Atherton* decision.

It appears from the facts in the *Atherton* case that the husband in state X forced his wife to leave and establish a separate domicile, yet she was precluded from obtaining a divorce when the husband remained at the matrimonial domicile. But in the *Haddock* case the husband in state X was not allowed full faith and credit for the divorce he obtained while domiciled in X. Now it is a settled rule that if the court in state X had jurisdiction in the *Haddock* case, then the decree would be entitled to full faith and credit in other states.[14] If it was not entitled to full faith and credit it must be because of lack of jurisdiction.[15] The majority opinion states that the decree might be good in X but void in another jurisdiction.[16] This reasoning brings us to the conclusion that the parties might be married outside of X ,but unmarried within X.

Professor Beale, realizing the disadvantages and injustices of a situation such as this, has undertaken to explain the *Haddock* case under a new theory.[17] He says that the court in state X was without jurisdiction to grant the decree because of the fault of the domiciled plaintiff in deserting the absent spouse. This interpretation makes fault a jurisdictional fact, and in order for the domiciled plaintiff to

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

[10] 181 U. S. 155 (1901).

[11] 201 U. S. 562 at 584-585 (1906).

[12] 201 U. S. 562 at 629 (1906).

[13] 226 U. S. 551 (1913).

[14] 201 U. S. 562 at 572 (1906).

[15] Dean v. Dean, 241 N. Y. 240, 149 N. E. 844 (1925).

[16] 201 U. S. 562 at 573 (1906).

[17] Beale, Conflict of Laws, pp. 483-484; Beale, Constitutional Protection of Decrees for Divorce (1906), 19 Harv. L. Rev. 586; Beale, Haddock Revisited (1926), 39 Harv. L. Rev. 417.

have a valid claim for divorce, he must be without fault.[18] This position of Mr. Beale, adopted by the Restatement of Conflicts,[19] is taken to reconciliate the two extremes: on the one side—those who considered the marital status as indivisible and capable of being present at only the place,[20] and those who considered the marriage res as divisible and following both spouses to their separate domiciles.[21] The Restatement cites three instances where the res is present:

> 1. The absent spouse has consented that the other spouse acquires a separate home.
> 2. Is personally subject to the jurisdiction of the domiciled spouse's state.
> 3. By his or the absent spouse's misconduct or fault has ceased to have the right to the acquisition of such separate home.[22]

Now an obvious objection to such a theory is the fact that courts in states X and Y will decide differently upon the jurisdictional facts involved. This is true, and Professor Beale attempts to answer this by saying:

> "Since the question involves giving full faith and credit to the decree of the first court, there will always be an appeal to the Supreme Court of the United States if the second court finds the jurisdictional facts differently from the first; and the question can therefore be definitely settled.[23]

There appears to be a better solution to this problem, and that is for all states to adopt a uniform act to define and explain jurisdictional facts involved.[24] But considering the probability that neither will be adopted, it would appear to be a much better situation to have the courts differ upon a finding of fact than to face the certainty that in one state spouses will be married, while in another they will be single.[25]

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[18] Very few courts have adopted this theory. However, in Delanoy v. Delanoy, 216 Cal. 27, 13 P. (2d) 719 (1932) the opinion uses the arguments and theories of Mr. Beale and cites what is now Restatement, Conflict of Laws, Sec. 113. See Miller v. Miller, 201 Iowa 1193, 206 N. W. 262 (1925) which gives its interpretation of the New York attitude that approaches the jurisdictional fact concept.

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

[20] Le Mesurier v. Le Mesurier, Privy Council (1895) A. C. 517; Alberta v. Cook, (1926) A. C. 444.

[21] Cheever v. Wilson, 76 U. S. 604 (1870); Williamson v. Osenton, 252 U. S. 619 (1914); People v. Baker, 76 N. Y. 78 (1879); Ditson v. Ditson, 4 R. I. 87 (1856); See Gould v. Gould, 235 N. Y. 14, 138 N. E. 490 (1923) where the court apparently proceeded on an in personam theory altogether.

[22] The writer presumes that home is used to mean domicile.

[23] Haddock Revisited (1926), 39 Harv. L. Rev. 417 at 428.

[24] Revised Statutes of Kansas (1923) Sec. 60-5; Perkins v. Perkins, 225 Mass. 82 at 87, 113 N. E. 841 at 843 (1916); See The Uniform Jurisdiction Act, which was adopted by Vermont in 1931 and repealed in 1933. Laws of Vermont (1933) No. 37, page 67.

[25] Dunham v. Dunham, 162 Ill. 589, 44 N. E. 841 (1896); Hunt v. Hunt, 72 N. Y. 217 (1878).