

# American Law Institute vs. The Supreme Court

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## THE AMERICAN LAW INSTITUTE vs. THE SUPREME COURT

In the Matter of Haddock v. Haddock

JOSEPH W. BINGHAM\*

The problems of our law of divorce have agitated the minds of students, practitioners, and jurists for many years. Much thought and writing have been expended in critical comment, several of the typical

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\*I have written this article in commemoration of Judge Cuthbert W. Pound. I was fortunate enough in my youth to come into the circle of friendship of that fraternal quartet of staunch Cornellians, Charles Hull, Ernest Huffcut, Edwin Woodruff and Cuthbert Pound. My early, transient association with them confirmed me in some of my fundamental beliefs and my admiration and affection for them has lasted through many years of separation. I am sure that they would have been in sympathy with the motive and main theme of this article, however they might differ from some of its tenets and conclusions. I would not offend against the spirit of Judge Pound's legal and political philosophy or his staunch loyalty to American institutions and to the jurisprudence of his state by contributing a radical tract voicing "un-American" doctrines to this symposium. To combat possible hostile criticism suggesting that I have done so, I hasten, in honor of the Irish in me to traverse the complaint before it is made. I deny that any implication of communistic or even socialistic views can be derived from this article or its notes. Indeed my advocacy of reform and such impatience as I feel with respect to the opponents of change in matters of government and law is largely motivated by my abhorrence of the arrogant intolerance and doctrinairism of communism and its contempt for that personal liberty which has been laboriously won at the expense of much toil and suffering through the ages. Are not reactionaries the strongest allies of the communists? They are like Charles I. Their tactics threaten to bring on the revolution they fearfully oppose. I am not even a socialist and I yield to no one in intelligent pride in certain American institutions, in certain features of American life, and in the bright pages of American history. I admire the leadership of New York in social and legal reforms. I am proud also of the American bar and its record of cooperative efforts in recent years for improvement of law and government through various agencies, including the American Law Institute. The devoted service of certain leaders and collaborators in these efforts is beyond praise. This article is intended as a contribution to the progressive movement of which they are a part.

It is significant of the turmoil of passion and prejudice in our current debates on matters of politics and government that a credo caveat of this sort is necessary even in a studious discussion of a legal problem.

and persistent features of the law have been widely deplored, and various remedies have been proposed—all with little consequence.<sup>1</sup> No doubt many incidents of our law of divorce and its effects are inconsistent with ethical tenets of our puritanic inheritance concerning the proper regulation of the relations of the sexes; but are they inconsistent with sound tenets of good government? Do they present as much as usually is assumed for unprejudiced, intelligent students of society to deplore? I do not purpose to answer these questions in this article. I merely propose them in passing and perhaps shall have occasion to make a few stray observations pertaining to them in the course of developing my theme.<sup>2</sup>

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<sup>1</sup>See the thoughtful article by Karl Llewellyn and the numerous books and articles cited in his notes: *Behind the Law of Divorce* (1932) 32 COL. L. REV. 1281; (1933) 33 COL. L. REV. 249. See also articles by Groves, Ingram, Ballard, Summers, Bates, Brearley, Harper, Bergeson, Wainhouse, and Jacobs on *Migratory Divorce* (1935) 2 LAW AND CONTEMPORARY PROBLEMS, 289-397; LICHTENBERGER, *DIVORCE* (1931) c. VIII; II VERNIER, *AMERICAN FAMILY LAWS* (1932) § 63, p. 14; also references, *idem*, pp. 9-13; *idem*, § 89, pp. 159 *et seq.*

<sup>2</sup>See Fowler V. Harper, *The Myth of the Void Divorce* (1935) 2 LAW AND CONTEMPORARY PROBLEMS 334. I am in sympathy with much of Professor Harper's reasoning expressed in this article. I do not subscribe, however, to his opinion that the traditional legal basis of jurisdiction to dissolve a marriage is fictitious and that some divorces "void in law" according to traditional classification are not void. His point is that a dissolution decree obtained through default or without effective defense from a court of a state in which neither spouse is domiciled has some legal effects conforming pro tanto to the desires of one or both of the spouses, and that it is unrealistic and intellectually demoralizing not to recognize these effects frankly in summarizing the law of jurisdiction to divorce. He criticizes certain sections of the American Law Institute's *RESTATEMENT, CONFLICT OF LAWS* (1934) accordingly. My reply would be as follows:

The traditional legal summaries and terminology do frankly state the legal facts of jurisdiction to divorce.

Some of my fellow realists, in their zealous criticism of mechanical jurisprudence and of current legal verbal hocus pocus have gone to such extremes as to give the impression that they consider most traditional legal conceptions, terms, and formulas unscientific and prejudicial to clear practical thought. I have had occasion to protest orally against several of their arguments and assumptions as to the purport and value of certain traditional methods of classification and verbal formulation of law. The influence of unreasoned prejudices and social pressures on the law has received a new recognition and special emphasis by the present generation of teachers; but logic remains a valuable tool of thought. Mathematics, including all its artificial symbols and assumptions, is a most important implement of scientific reasoning and generalization of results. Likewise our traditional system of legal concepts, with their symbolic labels, of classification, and of general formulas, play a logical part

My present purpose is not to discuss the divorce problem in general, but to consider one very limited phase of it which for many years has plagued professional thought—especially the thought of teachers and students of law and jurists—and recently has received particular at-

in professional thought that in large measure is not defenseless against sound criticism. Should a natural scientist contemptuously banish algebra from his workshop? Of course not. Then why should a jurist consign all the painfully devised systematic logic of his profession to the limbo of futilities? Any mathematical expression of course must be accurately interpreted and understood if sound results of its use are desired. Likewise our traditional legal logic must be interpreted and used with circumspection and discretion and it should not be criticised without just appreciation of its purport.

These observations are at large and are not directed against Professor Harper's juristic views. However, in this instance I think that he has not accurately indicated the purport of traditional formulas or of the American Law Institute's rules concerning domicil as the basis of a state's jurisdiction to dissolve a marriage. These formulas and rules do not mean that a divorce suit and a resultant decree of dissolution of marriage by a court of a state other than that of domicil have no legal consequences. Certainly all intelligent lawyers would agree that they are not void in this sense.

In the cases to which Mr. Harper refers, it is true that the suits and decrees entail legal consequences which modify the marital rights, etc. of the spouses but these legal consequences are not denied when it is said that the decrees are void and do not dissolve the marriages. If a divorce is recognized as such to any extent by the state of domicil, it is of course *pro tanto* valid. *Gould v. Gould*, 235 N. Y. 14 (1923), is an illustration. See also *Armitage v. Attorney General*, [1906] P. 135 (Eng.). But *cf.* RESTATEMENT, CONFLICT OF LAWS, §§ 111 and 8, including comment d on § 8; BEALE, CONFLICT OF LAWS (1935) § 111.4. Insofar as a divorce is not recognized as such by the state of domicil, it is void in the sense that the spouses are not by force of the decree released from their marital bonds. One or both may be "estopped" to claim certain benefits that otherwise might exist because of the continued status of marriage (*Brugniere v. Bruguiere*, 172 Cal. 199 (1916); N. Y. DEC. EST. LAW (1930) § 87; but *cf.* *McCreery v. Davis*, 44 S. C. 195 (1894)), but these legal effects do not result from the decree as a governmental order but from the acts of the estopped party and their consequences. Also in some cases where a particular matter of fact or right has been submitted to the court by both parties contesting it, the decision on these particular incidental matters may be held conclusive in later suits by force of the principle of *res judicata*. *Pearson v. Pearson*, 230 N. Y. 141 (1920); *Harding v. Harding*, 198 U. S. 317 (1904). That a decree in such a suit does not have the effect of dissolving the marriage in the accepted sense of this phrase is manifested by such legal consequences as the following:—(1) The state of domicil may treat a second marriage of one of the spouses as bigamy (*State v. Armington*, 25 Minn. 29 (1878); *Andrews v. Andrews* 188 U. S. 14 (1902); *State v. Westmoreland*, 76 S. C. 145 (1906)); and other states may do likewise (*Peo. v. Shaw*, 259 Ill. 544 (1913)). See also *Fischer v. Fischer*, 254 N. Y. 463 (1930). (2) Issue of such a bigamous second marriage may be illegitimate. (3) In the absence of an appearance in the suit by defendant spouse and of later action estopping defendant spouse, the marital legal obligations in

tion and been made the target of an attempt at unofficial amelioration by the American Law Institute in its Restatement of the Conflict of Laws. This phase of the law concerns the validity of a divorce granted by a state in which only one of the spouses was domiciled at the time of the decree and involves the doctrine of *Haddock v. Haddock*, 201 U. S. 562 (1906).

The doctrine of *Haddock v. Haddock* has had a peculiar treatment at the hands of our leading authority on the Conflict of Laws, Professor Joseph H. Beale of the Harvard Law School. When the case of *Haddock v. Haddock* was decided, Professor Beale joined a chorus of criticism which condemned the decision with vehemence both on legal and on moral grounds.<sup>3</sup> As in other similar instances, however,

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his or her favor are not destroyed or impaired nor are his or her marital legal property interests detrimentally affected, except insofar as the state in which the suit is brought has power to do so under the circumstances on other grounds than that of jurisdiction to dissolve marriage. (See especially *Re Grossman's Estate*, 106 Atl. 86 (Pa. 1919). Cf. the operation of the doctrine of *Haddock v. Haddock* as outlined in the main text of this article.)

Perhaps another phrasing of the argument will help to clarify the distinctions which I am emphasizing. A divorce suit resulting in a decree of dissolution of marriage may have two distinct effects. (1) The decree is a governmental fiat which by its own force dissolves the marital relation insofar as the court has legal power to do so. The decree, in this aspect, is not a peculiarly judicial act. Such a fiat might be issued effectively by a legislature or by an executive, not denied the power by a constitution or by subordinate legislation. This is the phase of such decrees which is covered by formulas about jurisdiction to divorce. (2) In another aspect a divorce decree of a court is the end of a judicial process and from the particular official determinations of fact and right involved in that process legal consequences may result through application of the principle of *res judicata* although the decree of dissolution may be void as a fiat for lack of governmental power in that particular. *Harding v. Harding*, 198 U. S. 317 (1904). Both the cause of such consequences and their content differ importantly from those involved in jurisdiction to divorce. These distinctions, then, are not technical quibbles, but are legal facts of practical importance which must be noticed in an accurate appraisal of this part of that most complicated field of scientific study, the official governmental adjustment of human affairs.

Again without reference to Professor Harper's ideas I add the following observations at large. One does not simplify or improve understanding of the law by ignoring such technical distinctions or veiling them from perception by loose and indiscriminating language. Much as doctrinaires would like to simplify government by some Procrustean method, they cannot do so without devastating violence to the essential character of modern society—its complexity of infinite details. Likewise the Procrustean method applied to investigation and the formulation of its results, does not produce a science, however it may advantage popular exposition.

<sup>3</sup>See *inter alia*: (1906) 19 HARV. L. REV. 586 (Beale); (1906) 18 GREEN BAG 348 (H. A. Bigelow); (1906) 4 MICH. L. REV. 534; (1913) 11 MICH. L.

the course of judicial decisions has been little affected by the criticism. The doctrine found favor with the courts if not with the jurists. Not only has the Supreme Court of the United States stuck to its guns under the barrage of learned anathemas, but the effect given by the New York courts to a foreign decree of dissolution of marriage under circumstances like those of *Haddock v. Haddock* has been copied to some extent by the courts of an increased number of other states.<sup>4</sup> Even the Supreme Judicial Court of Massachusetts, Professor Beale's own commonwealth, adhered to the heterodox doctrine<sup>5</sup> and Professor Beale, after years of strenuous opposition, was faced with the dilemma of surrender or a condemnation of the jurisprudence of his own state on an important point of family law that would violate one of the deep seated loyalties which are elements of his character. But his famous ingenuity rescued him. He neither surrendered nor continued his disapproval of the decision. He retreated a step by confessing that he now discovered social merit in the results of *Haddock v. Haddock* and then returned to the attack by a definition of its doctrine and the conditions of its operation entirely his own. Thus he now at once approves of the decision in *Haddock v. Haddock* as interpreted by him, and the Massachusetts jurisprudence which has followed, and continues to condemn the legal effects which he himself and almost everyone else formerly supposed resulted from those decisions. His new interpretation has been incorporated by him in the Restatement of Conflict of Laws of the American Law Institute and has been explained in his article *Haddock Revisited*.<sup>6</sup>

I also think that the legal effects of *Haddock v. Haddock* have been generally misapprehended and that indeed there has been a great measure of confusion of thought in discussions of its doctrine, but I cannot approve Professor Beale's solution of the problem. I believe that his solution involves a misinterpretation of the doctrine of the case and proposes a serious change in the law, and that this change would be highly inexpedient—indeed pernicious. Hence this article.

My purpose, then, includes an exposition of the doctrine of *Haddock v. Haddock* and its legal effects and an argument against Pro-

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REV. 508; (1906) 15 YALE L. J. 426; (1906) 22 L. Q. REV. 237. Compare Henry Schofield's article approving the decision in *Haddock v. Haddock*, but erroneously interpreting the doctrine and estimating its legal effects: (1906) 1 ILL. L. REV. 219.

<sup>4</sup>*Olmsted v. Olmsted*, 216 U. S. 386 (1909); *Thompson v. Thompson*, 226 U. S. 551 (1913); note (1906) 11 MICH. L. REV. 508.

<sup>5</sup>*Perkins v. Perkins*, 225 Mass. 82, (1916).

<sup>6</sup>RESTATEMENT, CONFLICT OF LAWS, § 113; (1926) 39 HARV. L. REV. 417; BEALE, CONFLICT OF LAWS, §§ 113.10-113.12.

fessor Beale's solution as inconsistent with the doctrine and inexpedient as a substitute. I repeat that I do not purpose to discuss our divorce law at large or to consider it at all with a constructive idea of suggesting improvements of social advantage. Any such task would require volumes, instead of a few pages. Indeed I do not wish to complicate my purpose by including any rounded critical appreciation of even those fragmentary parts of our divorce law on which I shall touch. I shall only take these fragments of technical law as they are and try to explain them and my objections to Professor Beale's proposal. If some of my fellow realists would go further, they have my good wishes for a long life and a merry time.

The Conflict of Laws of the United States concerning the existence and endurance of a marital relation between two persons is motivated by the leading principle that the state of the domicile of the persons should have the controlling voice on the matter. Hence the rules that if persons would be deemed married by the state of their domicile, they are married under the law of other states as well, and vice versa, if they would not be deemed married by the state of their domicile, they are not married under the law of other states.<sup>7</sup> It is a corollary of these general rules that a decree of dissolution of marriage will be given that legal effect if, and only if, the state of domicile of the parties would so decide.<sup>8</sup> In general the law summarized by this corollary is not complicated when both spouses have the same domicile. Nevertheless, since domicile is the basis of jurisdiction to dissolve a marriage, a decree of dissolution always is open to collateral attack on the ground that the parties were not domiciled in the state and their state of domicile would not give validity to the decree, and this may throw a troublesome cloud on the divorce if the question of domicile is not clearly soluble on the undisputed facts.<sup>9</sup> Complication spreads over the problem like a gloomy fog, however, when the wife and the husband have separate domicils, as they may have in the United States.<sup>10</sup> There are some

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<sup>7</sup>RESTATEMENT, CONFLICT OF LAWS, § 54; § 119, comment c; § 121, comment d; § 122, comment b; § 132; BEALE, CONFLICT OF LAWS, §§54.1; 121.2; 132.6; DICEY, CONFLICT OF LAWS (3d ed. 1922) pp. 506-510. Of course there have been occasional inroads on this principle. More of these inroads can be found among English cases than among American cases, however. Indeed the English Conflict of Laws on marriage cannot be commended either for judicial technique or for justice.

<sup>8</sup>RESTATEMENT, CONFLICT OF LAWS, § 8 (2) (but see and cf. § 111); *Armitage v. Attorney General* [1906] P. 135; *Ball v. Cross*, 231 N. Y. 329 (1921).

<sup>9</sup>See *inter alia* comments of Professor Fowler V. Harper on this point in his article *The Myth of the Void Divorce* (1935) 2 LAW & CONTEMPORARY PROBLEMS 334.

<sup>10</sup>*Williamson v. Osenton*, 232 U. S. 619 (1913).

clear spots in the fog, even for the most dogmatic and single-track minded jurist. If the plaintiff sues in a court of the state of the defendant's domicil and is granted a decree of dissolution in accordance with proper procedure, the decree dissolves the marriage entirely under the law of all states of the Union. A decree issued by a court of the state of plaintiff's domicil will have like effect if defendant was personally subjected to the jurisdiction of the court by proper service of summons while defendant was within the territory of the state or by defendant's appearance in the suit or consent to the jurisdiction.<sup>11</sup> A decree of a court of the state of last marital domicil—*i. e.*, the state under whose domiciliary jurisdiction the parties last lived together—also will have like effect, although defendant is no longer domiciled in the state and is not personally subject to the jurisdiction of the state or its court on other grounds, provided plaintiff still is domiciled in the state.<sup>12</sup> The most disturbing case then is the following:

Plaintiff, after separation from the other spouse, establishes a new domicil and sues for a decree of dissolution in a court of the state of the new domicil. The other spouse has not established a residence in that state, does not appear in the suit and is not otherwise personally subjected to the court's jurisdiction by consent or by service in the state's territory. A default decree of dissolution is issued after proper legal procedure. What is the effect of this decree (a) in the state where it was made and (b) under the law of other states of the Union?

Again there is one spot where the gloom of the fog is not quite as thick as it is elsewhere. As a matter of law, if plaintiff is the husband, and the wife was not deserted and was not justified legally in separating from the husband, probably her domicil is perforce the same as her husband's and the case is assimilated to one of the classes previously summarized.<sup>13</sup> But there are two dismal doubts of considerable legal and practical consequence even here. (1) Query: how long will it be before we have a decision of the Supreme Court of the United States (overturning the traditional majority rule of our state courts and the

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<sup>11</sup>Cheever v. Wilson, 9 Wall. 123 (U. S. 1869); Haddock v. Haddock, 201 U. S. 562 (1906), fifth point of opinion of the Court, per White, J.

<sup>12</sup>Thompson v. Thompson, 226 U. S. 551 (1913). See the curious extension of the idea of last matrimonial domicil as a basis for jurisdiction to dissolve the marital relation completely in the opinion of Peticolas, C. J., in Montmorency v. Montmorency, 139 S. W. 1168 (Tex. Civ. App. 1911). His comments on this point are only dicta as he admits the local validity of a divorce granted by the state of domicil of one of the spouses only even though it is not the state of last matrimonial domicil.

<sup>13</sup>See the seventh point in the opinion of the court in Haddock v. Haddock, 201 U. S. 562 (1906).



apparent federal court doctrine as well) that at least for purposes of divorce a wife may acquire a separate domicile although her husband is not maritally at fault?<sup>14</sup> Such a decision, in my opinion, would be rather an improvement of our divorce law than the contrary, and it is an important possibility.<sup>15</sup> It might have the effect of assimilating this case as a matter of law to *Haddock v. Haddock* as far as the problem of state jurisdiction is concerned. At any rate the possibility raises a doubt as to the legal effects of the decree in our hypothetical case. (2) Assuming that the power of the wife to acquire a separate domicile depends on the legal justification of her separation, there is always the possibility of disputing the fact and the law as to the marital fault of

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<sup>14</sup>Cf. CAL. CIV. CODE (1931) § 129; KAN. REV. STAT. (1923) § 60-1503; N. Y. CIV. PRAC. ACT (1926) § 1166; *White v. White*, 18 R. I. 292 (1896); *Dutcher v. Dutcher*, 39 Wisc. 651 (1876); *Shute v. Sargent*, 67 N. H. 305 (1893); *Matter of Florence*, 54 Hun. 328 (N. Y. Sup. Ct. 1889); *aff'd*, 119 N. Y. 661 (1890); *Saperstone v. Saperstone*, 131 N. Y. Supp. 241 (Sup. Ct. 1911); *Re Crosby's Estate*, 85 N. Y. Misc. 679 (Surr. Ct. 1914); *Com. v. Rutherford*, 169 S. E. 909 (Va. 1933); note (1933) 47 HARV. L. REV. 348; BEALE, CONFLICT OF LAWS, § 28.5, p. 208; III VERNIER, AMERICAN FAMILY LAWS, § 164, pp. 145 *et seq.*

<sup>15</sup>If a wife, although legally at fault, could freely acquire a different domicile than her husband's, many a default divorce obtained by a woman in a home state not that of last marital domicile would be freed of doubt as to its effect on complainant's marital capacity, whereas under current orthodox doctrine, its effect dubiously depends on whether complainant was legally justified in separating from her husband. BEALE, CONFLICT OF LAWS, §§ 27.2-28.5, § 113.10, p. 499. Furthermore a divorce granted in a state where the wife was permanently residing, always would be effective in all particulars if the husband also was personally subjected to the jurisdiction of the court by appearance in the suit or service of process on him in the state, regardless of his foreign domicile (*Cheever v. Wilson*, 9 Wall. 108 (U. S. 1869)), whereas under current doctrine such a contested decree has no dissolution effect on the marriage if the husband was not domiciled in the state and the wife was not justified in separating from the husband. *Andrews v. Andrews*, 188 U. S. 14 (1902).

As a cumulative argument in the same direction it may be added that if a married woman had capacity to change her domicile at will, although at fault, one more discrimination against her interests in our traditional law would be removed. Mr. Beale assuming adoption of his suggested reformation of the doctrine of *Haddock v. Haddock* thinks that "the husband and wife are for the first time in the history of the common law put upon an absolute equality so far as a right to divorce is concerned." BEALE, CONFLICT OF LAWS, p. 504. Conceding the point, I venture to suggest that Mr. Beale would give this technical legal equality to the separated wife, not by increasing her possibilities of obtaining a desired freedom from marital bonds, but by restricting farther the possibilities of the separated husband obtaining a valid divorce from his state of domicile, and by thus increasing the number of cases where the legal effects of a divorce decree are dubious.

the absent defendant wife in a later collateral attack on the decree. It is clear from *Haddock v. Haddock* that this would be a matter of jurisdictional importance in determining the extent to which the state of defendant's home must give effect to the decree under the full faith and credit clause of the federal constitution. If defendant was in the wrong, her domicile followed her husband's and the decree is conclusive against her. If defendant was not in the wrong, she may insist on a separate domicile in her home state and the decree of the state of her husband's domicile need not be given the effect of a full dissolution of the marriage by the state of her domicile. Now this is a not uncommon type of case and yet the effect of the decree of dissolution in particulars of considerable legal and practical importance may be shrouded in doubt, because what would be decided in future litigation as to the disputed jurisdictional facts in such cases is not always predictable with reasonable certainty.

Thus we come to our problem of *Haddock v. Haddock*. One spouse was domiciled in State X. The other was domiciled in State Y. The spouse domiciled in State X obtained a decree of dissolution of marriage from a court of State X. Defendant spouse was not served with process in the suit while personally subject to the jurisdiction of X, nor did she appear in the suit or consent to the jurisdiction of the court. State X is not the state of last marital domicile. What is the effect of this decree under the law of State Y?

Before the decision of *Haddock v. Haddock* by the Supreme Court of the United States, the courts of various states had passed on this question with different results. In the majority of these states the decree of State X had been given the effect of a complete dissolution of marital relations.<sup>16</sup> In some states, however, including New York, the decree had been refused the effects of (1) restoring capacity to marry to the spouse domiciled in Y, and (2) affecting the marital rights of the spouse domiciled in Y to support as a wife.<sup>17</sup> Indeed these latter decisions were subject to an interpretation commonly placed on them that the foreign decree of dissolution would be given no effect as such

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<sup>16</sup>"It was stated without limitation in BISHOP, MARRIAGE & DIVORCE, 1st ed., Sec. 727, that to enable a court to grant a divorce 'it is sufficient that one of the parties be domiciled in the country; it is not necessary that both should be.' This was repeated in the last edition, 2 BISHOP, MARRIAGE, DIVORCE AND SEPARATION (1891), Sec. 152. There is no doubt that he was expressing the view held by the courts throughout the nineteenth century." BEALE, CONFLICT OF LAWS, p. 483, fn. 4.

<sup>17</sup>Peo. v. Baker, 76 N. Y. 78 (1879); Atherton v. Atherton, 155 N. Y. 129 (1898).

whatsoever.<sup>18</sup> Consequently when the Supreme Court of the United States in *Haddock v. Haddock* held that New York consistently with the full faith and credit clause of the federal constitution, could refuse to give a decree of dissolution of marriage granted by a court of Connecticut, the state of domicile of the plaintiff husband, the effect of destroying the rights of the wife, domiciled in New York, to separate maintenance by the divorced husband, as still his wife, a chorus of vehement criticism arose in legal periodicals both in the United States and in England. The supposed results of this decision were criticised as contrary to sound precedent, as logically inconsistent with the full faith and credit clause of the federal constitution, and as shocking to the moral sense. Precedent, it was contended, established that the state of domicile of the husband could issue a valid decree of dissolution of marriage; the constitution certainly required that a valid judgment of one state be given full faith and credit in other states of the Union; and if the decree was valid in Connecticut and not valid in New York, the result was that the husband, on remarrying, would have one wife under Connecticut law and another wife under New York law—a shocking situation both to the legal and to the moral sense.<sup>19</sup>

<sup>18</sup>See *Matter of Kimball*, 155 N. Y. 62 (1898); *O'Dea v. O'Dea*, 101 N. Y. 23 (1885). But cf. *Hubbard v. Hubbard*, 228 N. Y. 81 (1920); the opinions of Folger, J., in *Hunt v. Hunt*, 72 N. Y. 217 (1878) at pp. 232-233 and in *Peo. v. Baker*, 76 N. Y. 78 (1879); and the dissenting opinion of Danforth, J., in *O'Dea v. O'Dea*, 101 N. Y. 23 (1885). See the articles and notes cited in *supra* note 3.

<sup>19</sup>See the articles and notes cited *supra* note 3, especially the trenchant criticisms of A. V. Dicey, (1906) 22 L. Q. REV. 237 and of Mr. Beale, (1906) 19 HARV. L. REV. 586. "The decision then is opposed to reason, to authority, and to morality . . ." said Mr. Beale at p. 597.

Said Mr. Dicey, (22 L. Q. REV., at pp. 238 and 239): "2. The very idea of a divorce, which in the eyes of the Supreme Court itself is valid in Connecticut and invalid in New York, is so novel and so startling that it needs to be supported by the very strongest arguments, but a conclusion which can only with great difficulty find acceptance is unfortunately based in part upon the utterly untenable premise that a judgment of divorce is analogous to a judgment *in personam* and not, as every jurist holds, to a judgment *in rem* . . ."

"5. Englishmen may rejoice that our Courts have held almost unswervingly that divorce jurisdiction depends wholly upon the domicile of the husband at the time of the proceedings for divorce. The confused condition of the divorce law of the United States has not been created, though it has been still further complicated, by the judgment in *Haddock v. Haddock*. Its true origin is to be found in the doctrine, all but unknown to English law, that husband and wife may each have a separate domicile."

Elsewhere in the notes to this article I have paid my respects to the traditional English law of marriage. Perhaps a jurist of mechanistic persuasion could have

I always have believed that the decision in *Haddock v. Haddock* has been misinterpreted by its ardent critics, that its legal implications have been misunderstood, and that the motive and practical legal effect of the decision are socially sound. In the first place, I fail to see the moral iniquity of the situation created by the law of the decision. Even if it were granted, which it is not, that it is implicit in the decision that the man in the case, on remarriage in Connecticut, legally had two wives, one in Connecticut and the other in New York, to each of whom he was bound by full legal marital ties, it must still be evident that these legal ties as to the New York wife were merely technical things supporting her claim to economic benefits only. The New York marriage was not a going concern domestically. The man no longer lived with the New York wife. From the point of view of social life freed from legal technicalities he had only one woman whom he treated as a wife. Certainly the decision did not result in polygamy in any socially condemnable sense. But furthermore, properly interpreted, it placed no continuing legal obligation on the Connecticut husband to live with his New York "wife", nor, indeed, did it imply that if they should have thereafter lived together in New York, adultery would not have been thus committed.

It seems to me that there has been a great deal too much clamor over the morals of our divorce law. I raised the question at the outset whether the prevalence of divorces is a social evil in our modern world. Of course I would not try to argue the question against a conservative with an inheritance of puritanic religious beliefs, or against a devout Catholic; for if I entered such a debate with the object of convincing my opponent, I should be handicapped beyond hope by his settled faith in the traditional sanctity of marriage. If I should suggest that the social and legal sanctions of our traditional sex relations law have in a multitude of cases caused cruelties and injustices to men, to women, and to children (through the law of legitimacy and the laws opposing birth control) and in some respects are very bad in their social effects, no doubt I should be greeted with scornful derision. If I should add that the massed unintelligent intolerance of religious, respectable people has perhaps done much more harm than the good effects of religious instruction can balance and has been a serious, persistent,

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participated in Mr. Dicey's complacent delight in the English law of divorce; but he would have had to ignore, *e.g.*, the plight of deserted wives whose husbands have fled to foreign parts, perhaps unknown, which has so strongly influenced our more pragmatic and sentimental American judges. Compare also: *Ogden v. Ogden*, [1908] L. R. P. Div. 46; *Stathatos v. Stathatos* [1913] P. 154; DICEY, *CONFLICT OF LAWS* (3d ed. 1922) pp. 865-866.

and difficult barrier to the advancement of knowledge and the betterment of society and government, I should immediately be labeled by all "good citizens" a dangerous radical. No doubt in the sixteenth century these "good citizens" would have burned me at the stake. Today they would be reduced to other means of punishment. However, I shall not attempt to do more than to suggest these thoughts. I shall not present the mass of historical evidence available in support of them. Others have performed such service. It suffices for my present purposes to state the following points which should be conceded by all liberal, thoughtful and educated people.

The law cannot successfully impose a standard of social conduct that runs contrary to the inveterate habits of the people. So-called purity of sexual relations has never been characteristic of all our people. Indeed there has been much hypocrisy in the attitude of many on sex questions. It would be better from the viewpoint of the interests of society and of government to face these facts frankly and to mold our moral and legal ideas into accordance with the social conditions of the time in the interest of the advancement of happiness and the diminution of tragic discontent and suffering of individuals. If we lay aside inherited prejudices and the personal bias of one happily married, what argument can convince us that it is for the good of society or of individuals to compel people to live together who can find no pleasure, comfort, inspiration or other advantage in doing so? What justice is there in refusing release to a man or a woman who is the victim of a marital tyranny, which may be none the less galling though it is not characterized by physical cruelty or economic neglect or marital infidelity? Protection and welfare of children always should be a prime care of society, of course; but our present law does not always operate for the best interests of children and certain of our traditional social and moral ideas have resulted in cruel injustices to many children. Do strict divorce laws make for the welfare of children?<sup>20</sup> I should like to see a careful study made of this problem. My own considered unscientific opinion is that a liberal divorce law is rather to the advantage of children than otherwise, if the economic support of children is carefully provided. At any rate the prevalence of divorces in America is too great to justify a belief that a stiffening of the barriers to divorce would be in the interest of morals or would result in a decrease of illegitimacy in births or sex relations. Finally, the course of modern intelligent opinion is too clearly away from our ancient beliefs in the essential sanctity of the single marriage. In short,

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<sup>20</sup>See and compare the comments of Karl Llewellyn on the effects of divorce on children of the marriage (1933) 33 *COL. L. REV.* at pp. 266 *et seq.*

if we test the liberal phases of our divorce laws and their administration in general or the facts of *Haddock v. Haddock* in particular by the only intelligent standard of morality, the happiness and welfare of human beings, there is a lack of cogent evidence that either are morally deplorable. I have known a number of divorced people, some of whom chose the Nevada route, and I have not seen the traits of moral depravity in any of them. Indeed in kindness, in social helpfulness, and in efficiency they are superior to many sedate, self-centered, complacently righteous people whom I have known as friends and liked. Intolerance, characteristic as it is of human society, is a bad guide to correct judgments on matters of human conduct and measures of government. It blinds one to the great differences in human nature and circumstances. Men differ as goats from sheep; and what is good for the sheep, may not be good for the goat. It will serve to clear our understanding of *Haddock v. Haddock* if we leave out of reckoning our moral prejudices and consider the problem in its proper light as only one of intelligent adjustment of governmental power in the interests of practical justice. It is a technical legal problem, not one of social morals.<sup>21</sup>

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<sup>21</sup>I have interpolated this short digression on the morality and public policy of a liberal law of divorce because, strange as it may seem to some of my readers, current assumptions and prejudices within the scope of the digression have clouded thinking about the doctrine of *Haddock v. Haddock* and have not been without influence on the conclusions of the American Law Institute. Among the characteristics of government, law, and society which are natural but disturb a humanist are carelessness and an occasional intolerance concerning the peculiar interests of small unorganized minorities. Those who run with the herd derive the maximum benefits of the herd life. The deviator, and, especially, the rebel may become outcasts and be ignored or persecuted as such. Troubles and needs which correspond to something in the experiences, prejudices, or interests of members of society in general and therefore arouse their sympathies, meet with a response which may be helpful. If the needs are sufficiently prevalent they speak with sounding brass. But not even a tinkling cymbal conveys to the ears of the millions the vivid knowledge that is necessary to arouse their sympathetic interest and to dissipate their blind, intolerant, careless contempt for the peculiar needs of a few thousand fellow citizens which lie beyond the range of their experience and their expectations and therefore are beyond the jurisdiction of their imaginations.

If one wishes to study phenomena which illustrate strikingly this characteristic of society, I suggest the detailed history of the law of marriage in England, especially through the nineteenth century, the stubborn resistance to reforms, the complacent satisfaction of dominant opinion with the hypocritical respectability of the English law of divorce and sex relations, and the arrogant intolerance of the needs and claims of a few thousand unhappily married persons. See A. P. HERBERT, *HOLY DEADLOCK* (Doubleday 1934). I suggest as a flagrant piece of judicial lawmaking in this field the case of *Simonin v. Mallac*, 2 Sw. & Tr. 67, 29

The development of my theme now demands that I state my understanding of the doctrine of *Haddock v. Haddock* and then compare it with Mr. Beale's interpretation and his solution of this phase of the divorce law problem expressed in Section 113 of the American Law

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L. J. Prob. 97 (1860), (see Dicey's mild criticism of the decision in the third edition of his *CONFLICT OF LAWS*, pp. 28-29, the opinion in which I commend to my fellow realists as a horrible example of the sort of mechanical legal logic which they condemn. And from our home fires I offer in evidence the similarly stupid, intolerant, and socially vicious law of New York operating in such cases as *Peo. v. Baker*, 76 N. Y. 78 (1879); and *O'Dea v. O'Dea*, 101 N. Y. 23 (1885) (see also the dissenting opinion of Danforth, J., in this case).

Of course it was to be expected that many able lawyers, living in the social atmosphere and under the legal traditions which were responsible for this New York law, or under similar conditions in other states, would be prejudiced by them in their reactions to problems of our divorce law. The potency of such influences is not limited to the unintelligent and uninformed. There seems to be something in the nature of political, religious, and related legal matters that makes reason a blind hand-maid to traditional error. Consequently it was a cumulative and convincing argument with some members of the Institute that adoption of Mr. Beale's suggestion concerning the problem of *Haddock v. Haddock* would at least diminish the number of valid divorces and perhaps discourage to some extent attempts to secure divorces outside the state of last marital domicile. This appealed to these members as a gain for public morality. A similar gain from the adoption of Mr. Beale's rule was imagined by some members who were disturbed by the thought that legal bigamy was possible under the doctrine of *Haddock v. Haddock*, or that at any rate the consequences of the doctrine were scandalous.

The truths of politics, of religion, and of law have this in common with "the facts of life". Intelligent recognition and frank public acknowledgment of them commonly have been evaded. In the Victorian age we introduced to the children as convenient fictions those amiable collaborators in baby distribution, storks and doctors. "The facts of life" were left discreetly out of polite conversation and in public expression were decently clothed in respectable evasions and allusions. At stork or doctor one might take a pot shot without serious danger to real institutions. Similarly those who debate in the field of politics, or of religion, or of law often avoid fundamental issues and rage about fictions or casual incidentals. Hence today in a political battle involving a major crisis in the progress of public ideas concerning social responsibility and intelligent governmental control in the interests of 80% of the population, we find the attacking forces rallied under such dubious or irrelevant slogans as "Save the Constitution," "Preservation of Liberty," "American Ideals vs. Communistic and European Ideas," "Regimentation," "Rugged Individualism," while the leaders shy away from a frank discussion of the fundamental issues over which an intelligent debate could be waged with much to be said on each side because they fear the consequences of complete enlightenment of the multitude on those issues. What churchman wishes a public debate over the basis of his religion? From time immemorial religious controversies have raged disgracefully over formalities, rituals, and fictional dogmas, which should have been despised by common sense, and fundamental questions have been tabooed. And so our legal problems — problems of government — have too often been debated by lawyers and jurists in terms of mechanistic legal rea-

Institute's Restatement of the Conflict of Laws. The doctrine, as outlined by Justice White in the majority opinion in *Haddock v. Haddock*, starts from the traditional premise that in our law domicile is the basis of jurisdiction over marital status and in particular over the granting or refusal of the legal effects of dissolution of marriage. But in *Haddock v. Haddock* we have a diversity of domicils. At the time of the Connecticut decree, the husband was domiciled in Connecticut and the wife was domiciled in New York. How under the federal constitution should the governmental powers over the marital relation be distributed between these two states? Justice White did not deny to Connecticut all power to change the husband's marital status. Indeed his opinion seems to concede that the husband, as to his personal status, was unmarried by the decree. But he argued that similarly New York had exclusive jurisdiction over the marital status of the wife, since she was domiciled in New York and was not personally subjected to Connecticut jurisdiction for the purposes of the Connecticut decree.<sup>22</sup> This part of the doctrine, although only dictum, is a logical

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soning and artificial issues have been substituted for the intense investigation, the intelligent appreciation of facts and the sympathetic understanding and weighing of interests which a scientific spirit demands but which are extremely disturbing to conservative routine. Often lawyers have been too much concerned with the sort of changes which facilitate their private professional interests and too little with those which promise social betterment, but may make the practice of their profession more laborious and the attainment of their private professional ends more uncertain.

<sup>22</sup>In any precise estimate of the purport of Justice White's opinion, it must be conceded at the outset that the opinion is not clear on various points. One may offer two reasons of probable validity for this.

(1) It was natural for Justice White not to hazard definite answers to the several puzzling questions which might be raised hypothetically concerning the legal effects of the Connecticut decree on collateral phases of the marital relation and on interests not directly involved in the decision of *Haddock v. Haddock*.

(2) Lack of clarity was a recurrent characteristic of Justice White's opinions. They often contained a heavy style, labored logic, and mist-spotted exposition.

In *Haddock v. Haddock* he does not unequivocally state (1) that the Connecticut decree was valid for all purposes in Connecticut law, nor (2) that under the federal constitution it was invalid to some extent at least in Connecticut, nor (3) that if valid to some extent in Connecticut, it was by force of the full faith and credit clause of the constitution valid also to some extent under the law of other states of the Union. However, after careful study one may draw the following inferences from his opinion.

1. Connecticut had jurisdiction to free its domiciliary from his incapacity to marry again at least under Connecticut law. Indeed this probably is in accord with New York state court doctrine. See for instance the opinion of the court, per Folger, J., in the leading case of *Peo. v. Baker*, 76 N. Y. 78 (1879), which in part is similar to that of Justice White in *Haddock v. Haddock*, and compare



foundation for the decision of the case since it implies the severability for purposes of dissolution of the multiple incidents of the marriage relation. The precise problem for decision may be placed in its prac-

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the cases cited *supra* note 18. Of course *Maynard v. Hill*, 125 U. S. 190 (1888) also directly supports the proposition. The following quotations from Justice White's opinion (201 U. S. pp. 567, 569, 574-575, 577, 578-579, 581) seem to justify this inference:

"Second. Where a personal judgment has been rendered in the courts of a State against a non-resident merely upon constructive service and, therefore, without acquiring jurisdiction over the person of the defendant, such judgment may not be enforced in another State in virtue of the full faith and credit clause. Indeed, a personal judgment so rendered is by operation of the due process clause of the Fourteenth Amendment void as against the non-resident, even in the State where rendered, and, therefore, such non-resident in virtue of rights granted by the Constitution of the United States may successfully resist even in the State where rendered, the enforcement of such a judgment. *Pennoyer v. Neff*, 95 U. S. 714 . . .

"Fourth. The general rule stated in the second proposition is, moreover, limited by the inherent power which all governments must possess over the marriage relation, its formation and dissolution, as regards their own citizens. From this exception it results that where a court of one State, conformably to the laws of such State, or the State through its legislative department, has acted concerning the dissolution of the marriage tie, as to a citizen of that State, such action is binding in that State as to such citizen, and the validity of the judgment may not therein be questioned on the ground that the action of the State in dealing with its own citizen concerning the marriage relation was repugnant to the due process clause of the Constitution. *Maynard v. Hill*, 125 U. S. 190 . . .

"And the considerations just stated serve to dispose of the argument that the contention relied on finds support in the ruling made in *Maynard v. Hill*, referred to in the fourth proposition, which was at the outset stated. For in that case the sole question was the effect within the Territory of Washington of a legislative divorce granted in the Territory to a citizen thereof. The upholding of the divorce within the Territory was, therefore, but a recognition of the power of the territorial government, in virtue of its authority over marriage, to deal with a person domiciled within its jurisdiction. The case, therefore, did not concern the extra-territorial efficacy of the legislative divorce. In other words, whilst the ruling recognized the ample powers which government possesses over marriage as to one within its jurisdiction, it did not purport to hold that such ample powers might be exercised and enforced by virtue of the Constitution of the United States in another jurisdiction as to citizens of other States to whom the jurisdiction of the Territory did not extend . . .

"Nor has the conclusive force of the view which we have stated been met by the suggestion that the *res* was indivisible, and therefore was wholly in Connecticut and wholly in New York, for this amounts but to saying that the same thing can be at one and the same time in different places. Further, the reasoning above expressed disposes of the contention that, as the suit in Connecticut involved the status of the husband, therefore the courts of that State had the power to determine the status of the non-resident wife by a decree which had obligatory force outside of the State of Connecticut. Here, again, the argument comes to this, that, because the State of Connecticut had jurisdiction to fix the status of one domiciled within its borders, that State also had the authority to oust the State of New York of the power to fix the status of a person who was undeniably subject to the jurisdiction of that State . . .

"Nor is the contention aided by the proposition that because it is impossible to conceive of the dissolution of the marriage as to one of the parties in one jurisdiction without at the same time saying that the marriage is dissolved as to both in every other jurisdiction, therefore the Connecticut decree should have obligatory effect in New York as to the citizen of that State. For, again, by a change of form of statement, the same contention which we have disposed of is reiterated.

tical social light as follows: Should New York, under the constitution, be conceded governmental power to protect its domiciliary, the deserted wife, against destruction of her marital economic rights by the Connecticut decree? It is evident a negative answer would work great

Besides, the proposition presupposes that, because in the exercise of its power over its own citizens, a State may determine to dissolve the marriage tie by a decree which is efficacious within its borders, therefore such decree is in all cases binding in every other jurisdiction. As we have pointed out at the outset, it does not follow that a State may not exert its power as to one within its jurisdiction simply because such exercise of authority may not be extended beyond its borders into the jurisdiction and authority of another State. The distinction was clearly pointed out in *Blackinton v. Blackinton*, 141 Mass. 432 . . .

"On the other hand, the denial of the power to enforce in another State a decree of divorce rendered against a person who was not subject to the jurisdiction of the State in which the decree was rendered obviates all the contradictions and inconveniences which are above indicated. It leaves uncurtailed the legitimate power of all the States over a subject peculiarly within their authority, and thus not only enables them to maintain their public policy but also to protect the individual rights of their citizens. It does not deprive a State of the power to render a decree of divorce susceptible of being enforced within its borders as to the person within the jurisdiction and does not debar other States from giving such effect to a judgment of that character as they may elect to do under mere principles of state comity."

2. Connecticut had no jurisdiction to affect the marital capacity of the spouse domiciled in New York against the will of New York.

3. The obligation of the husband to support the wife as such was a personal legal tie between them that could not be dissolved completely by any one state which at the time did not have jurisdiction over the persons of both spouses. In this respect then, the Connecticut decree had no force in New York law without the consent of New York. See the passages of the opinion quoted above. Of course this is precisely the sole point of the decision.

Compare the doctrine of *Pennoyer v. Neff*, 95 U. S. 714 (1877) (which is summarized in Justice White's opinion in *Haddock v. Haddock*); BEALE, CONFLICT OF LAWS, §§ 104.2, 51.1-53.3; RESTATEMENT, CONFLICT OF LAWS, §§ 51-53. Note also Justice White's citation of *Haddock v. Haddock* in the footnote to his opinion in *Riverside & Dan River Cotton Mills v. Menefee*, 237 U. S. 189 (1915), at 194, and Justice Hughes' citation of the case in his opinion in *Spokane Inland R. R. v. Whitley*, 237 U. S. 487 (1915), at 496.

Compare also *Harris v. Balk*, 198 U. S. 215 (1905); *Ruff v. Ruff*, 85 Pa. 333 (1877); *SHINN ON ATTACHMENT AND GARNISHMENT* (1896) § 725; *N. Y. Life Insurance Co. v. Dunlevy*, 241 U. S. 518 (1916); *Corn Exchange Bank v. Coler*, 280 U. S. 218 (1930); *Great Western Telegraph Co. v. Purdy*, 162 U. S. 329 (1896); *Harding v. Harding*, 198 U. S. 317 (1905); *Thompson v. Thompson*, 226 U. S. 551 (1913).

As to the legal effects of the Connecticut decree under the full faith and credit clause with respect to phases of the marital relation collateral to those directly involved in the New York case, Justice White did not clearly commit himself. There are passages in the opinion which literally seem to imply that the Connecticut decree was valid in Connecticut law, but not in the law of other states except so far as those other states chose to give it effect in pursuance of "policy" and "comity". But such a proposition is untenable. It is inconsistent with the whole current of decisions of the United States Supreme Court on the full faith

injustice to wives thus deserted, who through lack of information or of financial resources or because of physical barriers or pride may not have taken steps to prevent the decree.<sup>23</sup> Mr. Beale, in his later ap-

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and credit clause. If a state has jurisdiction, to the extent it exercises that jurisdiction its action is binding on its sister states of the Union; but, of course, insofar as the jurisdiction of the state is limited absolutely or with respect to the jurisdictions of other states, the action of the state is not binding on other states. Compare *Huntington v. Attrill*, 146 U. S. 657 (1892); *Roche v. McDonald*, 275 U. S. 449 (1928); *Kenney v. Loyal Order of Moose*, 252 U. S. 411 (1920); *Fauntleroy v. Lum*, 210 U. S. 230 (1908); *Broderick v. Rosner*, 294 U. S. 629 (1935); *Great Western Telegraph Co. v. Purdy*, 162 U. S. 329 (1896); *Clarke v. Clarke*, 178 U. S. 186 (1900); *Union Trust Co. v. Grossman*, 245 U. S. 412 (1918); *Home Insurance Co. v. Dick*, 281 U. S. 397 (1930); *Alaska Packers Association v. Industrial Accident Commission of California*, 294 U. S. 532 (1935); *Bradford Electric Light & Power Co. v. Clapper*, 286 U. S. 145 (1932); dissenting opinion of Stone, J., in *Yarborough v. Yarborough*, 290 U. S. 202 (1933), at 213 *et seq.*

Indeed Mr. Beale now agrees that under the doctrine of *Haddock v. Haddock* a Connecticut decree valid to some extent in Connecticut law could not be denied all validity by the New York courts in spite of the full faith and credit clause. This is apparent from his text book, § 135.2, pp. 702-703. His present view, of course, is that the Connecticut decree was absolutely void. The first paragraph of the section of his text book cited *supra* reads as follows:

"In the case of *Haddock v. Haddock* Mr. Justice White said that 'without questioning the power of the State of Connecticut to enforce within its own borders the decree of divorce which is here in issue, and without intimating a doubt as to the power of the State of New York to give to a decree of that character rendered in Connecticut, within the borders of the State of New York and as to its own citizens, such efficacy as it may be entitled to in view of the public policy of that State, we hold that the decree of the court of Connecticut rendered under the circumstances stated was not entitled to obligatory enforcement in the State of New York by virtue of the full faith and credit clause.' This language of the learned justice has given rise to doubt whether it may not be possible even in the United States to refuse to give effect to a foreign decree of divorce. It is believed that this interpretation is not in accordance with the meaning of the learned justice. The case was in the Supreme Court on an appeal from a New York court on the ground that the latter court had not given full faith and credit to a Connecticut decree, and this was the only question which the court felt called upon to decide. The phrase, 'without questioning the power' used by the learned judge, in an opinion not marked throughout by the utmost clearness of thought and expression, must be taken simply to express the feeling of the court that it could not concern itself with that question and was not expressing an opinion upon it even *obiter*. It seems perfectly clear that a decree of a State of the United States which is not entitled to full faith and credit is in every particular void."

<sup>23</sup>The situation in which the deserted wife finds herself when she receives notice of her husband's foreign divorce suit is described as follows by Pitney, V. C., in *Kempson v. Kempson*, 58 N. J. Eq. 94, 95, 43 Atl. 97 (1899): "She is in this predicament—she must either (1) go to the trouble and expense of appearing generally in the Dakota court to resist her husband's claim, or (2) she must attempt to appear specially for the purpose of contesting the jurisdiction of the court by showing his real domicile to be in New Jersey. Either of these

praisal of *Haddock v. Haddock* recognized this and made it the basis of his revised judgment of approval of the case. I agree with him thus

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defences involves great labor and expense on her part. The only other course open to her is, in substance, to allow judgment by default to go against her there, and attack the decree when attempted to be enforced in this state. Now, if she adopts the first remedy and appears in that court, it will, by that appearance, have obtained jurisdiction of her person and undoubted jurisdiction of the subject-matter of the suit, and the case then will be brought within the authority of the case of *Fairchild v. Fairchild*, 8 Dick. Ch. Rep. 678, and the decree of that court will be binding upon her. As to the second course, namely, a special appearance for the purpose of attacking the jurisdiction, it is common knowledge that the courts of Dakota assume jurisdiction of non-resident defendants based on a residence on the part of the plaintiff which falls far short of amounting to an actual domicile. In fact, they are satisfied with a mere temporary residence adopted for the purpose of obtaining a divorce, and without any *animus manendi*; so that, if she should appear specially, the task of satisfying the court that her husband was not a *bona fide* domiciled resident of the state would be well-nigh hopeless. If she takes the remaining course, and fails entirely to appear, and allows a decree to go against her, she will be in the situation of a divorced wife, who must bring a suit to set aside the decree of divorce and enforce her rights against her husband, who may avoid a personal service in this jurisdiction. This is a hardship to which it seems to me the husband has no right in equity to subject her."

In *Kittle v. Kittle*, 8 Daly 72 (N. Y. 1878), Daly, C. J., said in part: "The plaintiff swears that it is the intention of the defendant to bring the action in Connecticut to trial before it will be possible for the cause to be tried over again in this court, and that it will not be in her power to give evidence in defense of that action, as all her witnesses reside in this state, except two, who reside at Hoboken in New Jersey, and that being wholly without means, she can neither pay the expense that would be incurred by having their testimony taken by a commission in this state, nor pay their expenses in going from this state to Connecticut, as witnesses to testify in her behalf . . .

"The plaintiff is helpless as respects the suit in Connecticut. It is not in her power to defend it, and judgment may be there rendered against her through her inability to make any defense from want of testimony."

"In the large cities the legal aid societies have undertaken to protect the interests of indigents whose interests are involved in divorce questions. These societies are usually concerned with obtaining support for children and deserted wives. In New York there are also frequent inquiries as to the right of either spouse to remarry. Where the interests of children are involved the legal aid agencies are anxious to insure the benefit of the law of the domicil to the children. The special principle of estoppel in this phase of divorce law often confronts a wife who once joined in the proceedings for the foreign divorce but who later seeks to assert her marital rights at the domicil.

"Reno and Mexican divorces appear fairly frequently in these charity cases. The legal method employed in protecting the interests of the defendant spouse in Reno or Mexican divorce suits is calculated to disappoint many of those who have relied blindly on the sanguine claims of agents for the divorce mills. No appearance is entered in the foreign proceedings. However, in a race against the entry of a default decree, suit is promptly brought in a court of the domicil for a

far and hence my opinion that the decision is sound.<sup>24</sup>

But, it may be argued, could not the New York court have protected the wife's economic interests and yet held that the marriage had been wholly dissolved by the Connecticut decree? There are two answers to this—or rather a double answer. First: the protection which New York should be empowered to give the wife should not be

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decree of separate support or divorce.

"Still more common are the cases in which the husband's purpose in leaving home is connected with his employment. Relishing the freedom of new surroundings, or seeking to clear the way for new alliances, these migrants apply to the courts of their new homes for divorce. Usually notice is served on the wife by mail. When such a wife comes to a legal aid society for advice or service, cooperation is solicited from an allied agency or voluntary counsel in the locality of the suit in the contest of the case. In this situation also, a suit for divorce or separate maintenance is brought at the marriage domicile or the wife's domicile in attempt to obtain a decree before the husband's suit is concluded." Rollo Bergeson, of Duke University, *The Divorce Mill Advertises*, (1935) 2 LAW & CONTEMPORARY PROBLEMS 348, at 358.

See also opinion of Shaw, C. J., in *Hartau v. Hartau*, 14 Pick. 181 (Mass. 1833). Recognition of the marital interests of a deserted wife and protection for them against foreign law and decrees is not peculiar to our law. A similar motive is implicated in such English cases as *Sottomayer v. De Barros*, [1879] 5 L. R. P. Div. 94; *Chetti v. Chetti*, [1909] P. 67 at 81-88. See DICEY, *CONFLICT OF LAWS* (3d ed.), Rules 182 and Exception 1 thereto, pp. 661-663, 683.

*Cf.* also dicta that perhaps English courts have jurisdiction to decree a divorce to an English wife whose husband has abandoned her and their English domicile and acquired a new domicile elsewhere, although the general rule of English law is that divorce jurisdiction of English courts depends on the domicile of husband: *Armytage v. Armytage*, [1898] P. 178; *Le Sueur v. Le Sueur*, [1876] 1 L. R. P. Div. 139; *Lord Advocate v. Jaffrey*, [1921] 1 App. Cas. 146. Also *cf.*: *De Montaign v. De Montaign*, [1913] L. R. P. Div. 154; DICEY, *CONFLICT OF LAWS* (3d ed.) 294-295. See also in accord with *Haddock v. Haddock*, the opinions in *Monette v. Lariviere*, 40 Quebec L. R. (K. B.) 350 (1926).

<sup>24</sup>BEALE, *CONFLICT OF LAWS*, § 113.1, pp. 483-484: ". . . Finally, without limitation, as will be seen, the abandoned wife was allowed to acquire and there secure a divorce.

"This view prevailed through the nineteenth century; but it soon became a cause of abuse. The husband abandoning the wife went to another state and acquired a divorce without her knowledge of it; or the wife did the same. The theory was that the domicile of each party to the marriage had such an interest in the marriage status that it could grant a divorce. This theory, however, left entirely out of account the interest of each party in the other, and if unlimited permitted the domicile of one party to put an end to the status without having before it the claims of the other party. It was for this reason that a growing injustice led to a feeling that the divorce situation was wrong.

"Meanwhile, some of the states felt so strongly in the matter as to protect their own citizens against any such divorce. This in turn had its unfortunate results in that it led to a difference between states as to the existence of marriage, and the possibility therefore of a man being married to one wife in one state and to another in another. Each of the prevailing theories was emphasizing one feature only of the composite situation. It remained for the twentieth century as the result of a decision of the Supreme Court of the United States to correct the

limited to the attenuated and precarious matter of alimony of a divorcee, but should include continuing rights of support and of other economic treatment as though she was still a wife in the full sense. Second: New York also is conceded by the doctrine outlined by White the power to refuse capacity to remarry to the wife (though this point was not directly presented for decision in the case).<sup>25</sup>

And here, we have a feature of the doctrine that has plagued the logic of critics of the case. How can the wife be married if the husband is not, clamor the critics. Is it not absurd that there should be a wife without a husband?<sup>26</sup> Is it not absurd that a man should be unmarried

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injustice of each of the nineteenth-century doctrines and to reach a result which protected both the interested state and the interested parties."

*Idem*, § 113.10, p. 500: "The Haddock case, therefore, while contrary to the generally received doctrine, was not in conflict with the actual decisions of courts which accept the orthodox view. On the other hand, it effectually and greatly limited the exceptional doctrines of New York, Pennsylvania, and New Jersey by compelling their acceptance of foreign divorces which affect their own domiciliaries in cases where the divorce is held everywhere entitled to credit. The competing doctrines were at least brought closer together by the Haddock decision."

See also *idem*, § 113.11.

<sup>25</sup>201 U. S. 578: "Here, again, the argument comes to this, that, because the State of Connecticut had jurisdiction to fix the status of one domiciled within its borders, that State also had the authority to oust the State of New York of the power to fix the status of a person who was undeniably subject to the jurisdiction of that State."

See also: *Peo. v. Baker*, 76 N. Y. 78 (1879); *Hubbard v. Hubbard*, 228 N. Y. 81 (1920); *Ball v. Cross*, 231 N. Y. 329 (1921); *Folger, J.*, in *Hunt v. Hunt*, 72 N. Y. 217, 232-233 (1878); dissenting opinion of *Lehman, J.*, in *Dean v. Dean*, 241 N. Y. 240, 247-248 (1925): "I recognize the anomaly involved in a rule that marital status may be divided so that one party to the marriage is free while the other party is bound; that a wife may be said to have a living husband, while the husband has no living wife. The anomaly is due to the fact that a State may adjudicate the marital status of one party to a marriage if domiciled there, though such adjudication may have no extraterritorial effect if the other party is domiciled elsewhere. So long as that is the law its results may be disturbing, yet we have recognized that that is the law." But see *Matter of Kimball*, 155 N. Y. 62 (1898).

<sup>26</sup>BEALE, *CONFLICT OF LAWS*, § 113.4, p. 488: "The doctrine came soon to be accepted that jurisdiction was lacking because the marriage status of the New York party was out of control of the other state; so that while that other state had power to destroy the status of its citizens, the status of the New York citizen remained. The doctrine was fully developed in *People v. Baker*."

"One of the decisions following this doctrine was reversed in the Supreme Court of the United States on the ground that it did not allow full faith and credit to the foreign decree of divorce. Mr. Justice Gray criticised the doctrine of the divided status, saying: 'The purpose and effect of a decree of divorce from the bond of matrimony by a court of competent jurisdiction, are to change the existing status or domestic relation of husband and wife, and to free them both from the bond. The marriage tie, when thus severed as to one party, ceases to bind either. A husband without a wife, or a wife without a husband, is unknown to the law.' No less forcible, though less concise, is Mr. Justice Carter's comment on the same doctrine." Opinion of Gray, J., in *Atherton v. Atherton*, 181 U. S. 155, at 162 (1901).

Carter, J., in *Dunham v. Dunham*, 162 Ill. 589, 605-607 (1896): "... It is not doubted in any of these cases, or by any one, that each State has the exclusive

and yet have a wife? In these criticisms is manifested the tyranny which words exercise over logic and the sophistry to which a narrow interpretation of our forms of expression lead us. The solution of the puzzle and the dissipation of the mists of absurdity are easy if we consider analytically the legal relation which we call marriage instead of closing our mental eyes and confining critical discussion to a game of logomachy. It is necessary to emphasize two facts which such an analysis will disclose speedily: (1) Clear thinking must distinguish carefully the non-legal phenomena of married life—*e. g.*, the actual

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right to determine by its own adjudication the status of its own citizens domiciled within its own jurisdiction. It would seem to follow, therefore, that if the appellant, on a separation from appellee, her husband, for adequate cause, in good faith removed to South Dakota with the intention of permanently residing there, and did become a *bona fide* resident there, the courts of that State had jurisdiction to adjudicate upon her status as a married woman, and, for any cause sufficient under the laws of that State for the purpose, could change her status to that of a single woman. This cannot be admitted without conceding also that a suit for divorce, so far as it seeks to dissolve the marriage relation merely, is a proceeding *in rem*, and that the thing proceeded against is the status of marriage.

"It is, however, insisted, and is sometimes said, that there is a status of the wife as a married woman and a status of the husband as a married man, and that each may proceed in different jurisdictions to change, and may thereby change, his or her own status without affecting that of the other,—and this is the practical effect of the doctrine as laid down by the courts of New York, although, as before stated, it seems that proceedings for divorce are there regarded as being *in personam*, rather than as *in rem*. In *People v. Baker*, 76 N. Y. 78, the Court of Appeals, by a divided court, affirmed a conviction of bigamy against a man, a citizen of that State, who married again in New York after his wife, domiciled in Ohio, had procured a divorce from him valid under the laws of Ohio, though based upon substituted service only. By the laws of Ohio the wife was lawfully divorced. By section 1, article 4, of the Constitution of the United States, and the legislation of Congress thereunder, the decree was entitled to the same full faith and credit in New York as, by law and usage, it was entitled to in Ohio. The consequence was, that the wife was, and on removing to New York would continue to be, a single woman who might lawfully marry, while the husband was a married man, having for his wife one who might at the same time become or be the lawful wife of another man. We cannot regard as sound a doctrine leading to such results. We are unable to see the force of the reasoning which is used to support judicial conclusions that one of the married pair may in one jurisdiction, by virtue of its laws and in honest compliance with them, obtain a valid decree of divorce which, as to the one obtaining it, is valid and binding in every State in the Union, leaving such a one single and free to re-marry in any State, while the matrimonial bonds are still unsevered as to the other party, making him a bigamist should he re-marry, and his children, the fruit of such re-marriage, illegitimate. It would seem to be as logical to say that one of the Siamese twins might have been severed from the other without that other being severed from the one.

"It should not be forgotten that it is the policy of a great majority of the States, and of our own State as well, as established by legislative enactments, to grant judicial decrees of divorce to *bona fide* residents who comply with the statutory requirements, where substituted service merely is had upon the non-resident party. To hold such decrees valid only within the jurisdiction granting them, or valid only as to those in whose favor they are granted, leaving the non-resident parties still bound, would not only be inconsistent with the policy of our own laws and in violation of inter-State comity, but would, when it is considered how great is the number of such decrees entered every year, eventually lead to the most perplexing and distressing complications in the domestic relations of many citizens in the different States."

living together as husband and wife—and the traditional religious and social ideas associated with this factual relation from the technical law-created incidents which constitute the *legal* relation of marriage—*i. e.*, that conglomerate of legal rights, duties, privileges, powers, etc. which taken together constitute the marital relation between the spouses. (2) This legal relation is not a single legal tie of right and duty between the spouses, such as must be wholly severed or not severed at all, although perhaps altered somewhat as, for instance, by a decree of separation. It is, as I have just said, a conceptual conglomerate of a multitude of particular legal incidents, some of which may be altered or destroyed without affecting the others. In particular, it is possible to wholly dissolve all the incidents of the marital relation except the incapacity of one of the spouses to remarry.<sup>27</sup> Indeed legis-

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<sup>27</sup>II VERNIER, AMERICAN FAMILY LAWS, § 92; BEALE, CONFLICT OF LAWS, § 130.1 and notes thereto.

Dissenting opinion of Danforth, J., in *O'Dea v. O'Dea*, 101 N. Y. 23 (1885), at pp. 40-41: "The Baker Case (*supra*), however much or little it may be regarded as differing in principle from the one before us, brought before the court a very different case, arising under a different statute. His conviction for bigamy was upheld because he contracted a marriage in this State in violation of the act concerning divorces, and for the purposes of that act, and proceedings for its violation, and the punishment of bigamy, it was evidently thought immaterial whether his first marriage was 'in force' or not . . . Under those laws a person whose guilty act has made divorce possible cannot marry a second time, if merely the former wife or husband is living. (2 R. S. 139, secs. 5, 6) . . . (*Cropsey v. Ogden*, 11 N. Y. 233) . . . This construction has recently been approved by us with great significance in overruling *Hovey's Case* (5 Barb. 117), where it was held by the Supreme Court that after the dissolution of a marriage for adultery, the marriage contract was at an end and the relation of husband and wife no longer existed between the parties, and if the guilty party marries again he is not within the penalty of the act against bigamy, but in *Faver's Case* (92 N. Y. 146) we held that for the purpose of enforcing the statutory prohibition, a person against whom a divorce had been obtained is regarded by the statute as having a husband or wife living so long as the party obtaining the divorce lives and that a conviction could be had, although the former marriage had been dissolved. Whether the former marriage was in force or not at the time of the offense was entirely immaterial. The statute (Code of Procedure, Sec. 1742), brought before us by this appeal, permits no such construction . . ."

See also *cf.*: CAL. CIV. CODE (1872) § 61, par. 2; *Est. of Harrington*, 140 Calif. 244 (1903); *Est. of Harrington*, 140 Calif. 294 (1903); *Est. of Newman*, 124 Calif. 688 (1899).

Mr. Beale, somewhat cavalierly disposes of the idea that the marital status is composed of discrete elements and incidents which may be separately extinguished. The following is his cursory rejection of the notion that a wife's marital status may continue after her husband's marital capacity has been restored by a foreign divorce:

"This notion of the domicile as the actual physical situs of the marriage *res*, while of course plainly fictitious, does no harm in cases where only one domicile is concerned. If, however, the wife is allowed to have a domicile apart from her husband, the fiction, logically carried out, involves the existence of two marriage *res*, one with the husband, the other with the wife; each *res* may then be regarded as capable of being destroyed while the other remains intact;



lation in some states provides for this exception as to the guilty party to a divorce suit. For our present purpose we may roughly classify the multiple incidents of the legal marriage relation into the following sorts: (1) The personal marital status of the husband—*e. g.*, his incapacity to marry; (2) the personal marital status of the wife—*e. g.*, her incapacity to marry; (3) the legal economic interests (except marital property) of the wife vs. the husband; (4) the legal economic interests (except marital property) of the husband vs. the wife; (5) marital property interests of the wife; (6) marital property interests of the husband; (7) reciprocal rights and duties of the wife and the husband to live together as husband and wife.

The effect of the doctrine of *Haddock v. Haddock* upon some of these distinct incidents of the marital relation in a case of that type is clear. (1) As to the divorced husband's marital capacity: that the doctrine leaves to the law of Connecticut, his state of domicil.<sup>28</sup> (2) As to the divorced wife's marital capacity: that the doctrine leaves to the law of New York, her state of domicil, and according to that law, she would apparently remain in this particular "married"—*i. e.*, still in-

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and we finally reach the absurdity of one party being unmarried, while the other is married still. The doctrine was criticised by Judge Carter in *Dunham v. Dunham*, who said that 'It would seem to be as logical to say that one of the Siamese twins might have been severed from the other without that other being severed from the one.' I BEALE, *CONFLICT OF LAWS*, p. 486.

But elsewhere in his text, and in the American Law Institute's *RESTATEMENT, CONFLICT OF LAWS*, he asserts that certain "incidents" of a marital status initiated abroad which are against the policy of the law of the forum may be refused recognition and the related conduct may be made illegal. BEALE, *CONFLICT OF LAWS*, § 134.1; *RESTATEMENT, CONFLICT OF LAWS*, §§ 133 and 134 and comments to these sections. How does this doctrine differ substantially from the doctrine of *Peo. v. Baker*, 76 N. Y. 78 (1879), either in motivation or practical effect? For Mr. Beale's answer, see his textbook, Vol. I, p. 70.

Notice also Mr. Beale's approval of the decision in *Ogden v. Ogden*, [1908] L. R. P. Div. 46, which decision entrained a paradox concerning the diversities of the English law and the French law of the situation similar to the paradox which Mr. Beale sees in the orthodox doctrine of *Haddock v. Haddock*, and compare his disapproval of the decision in *Roth v. Roth*, 104 Ill. 35 (1882), which avoided such a paradox. BEALE, *CONFLICT OF LAWS*, § 115.1, pp. 509-512. Also compare *Pemberton v. Hughes*, L. R. [1899] 1 Ch. 781, literally interpreted and defended by Mr. Beale, though with diminished enthusiasm. BEALE, *CONFLICT OF LAWS*, §§ 432.1-432.2.

<sup>28</sup>See the quotations from the opinion of Justice White, *supra* note 22; *Maynard v. Hill*, 125 U. S. 190 (1888); and note 25, *supra*.

*Cf. Lariviere v. Lariviere*, 102 Vt. 278 (1929). In this last case, the husband's second marriage was celebrated in Quebec, the state of last matrimonial domicil of his first marriage where his first wife, protected against his Massachusetts divorce by Quebec law, was still domiciled. The second wife also was domiciled in Quebec at the time of her marriage.

capable of marrying because not released by New York from the incapacity incident to her first marriage.<sup>29</sup> (3) The economic interests of the wife, are effectively within the protecting power of her state of domicil as far as that state has jurisdiction over the property or the person of the divorced husband to furnish a fulcrum for exercise of its legal power. Thus far the marriage relation continues in spite of the Connecticut decree of dissolution. (4) Of course the decree of dissolution prevents the husband from claiming successfully rights of an economic character against the wife, so far as these rights depend on a continuance of the marriage.<sup>30</sup> (5) and (6) As to marital property interests, no doubt each state has power to determine these as to property which is given a situs for the purpose under its jurisdiction.<sup>31</sup> (7) The rights and duties of marital intercourse and social life no doubt were severed by the Connecticut decree. Certainly under our system of monogamy, it is implicit in the conceded power of Connecticut to restore capacity to marry to the husband that it should have the power also to terminate these personal intercourse incidents of the marital relation under the law of all states. Consequently the husband and his second wife could legally cohabit in New York and cohabitation between him and his first wife in New York should be illegitimate. Also children of the second marriage should be held legitimate under New York law.<sup>32</sup>

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<sup>29</sup>See *supra* note 25.

<sup>30</sup>*Brugiere v. Brugiere*, 172 Cal. 199 (1916); *Starbuck v. Starbuck*, 173 N. Y. 503 (1903); N. Y. DEC. EST. LAW (1930) § 87.

<sup>31</sup>*Olmsted v. Olmsted*, 216 U. S. 386 (1909).

<sup>32</sup>See quotations and citations, *supra* notes 25 and 26.

As to the legitimacy of children of a second marriage of the husband in a case like *Haddock v. Haddock*: their personal status should be that of legitimate children in all states, since the husband had capacity to remarry and therefore his personal relations to his second wife were legitimate. RESTATEMENT, CONFLICT OF LAWS, §§ 137-138, 141, and Comments on these sections. It is my opinion that New York should treat the children as legitimate for all purposes. However, New York apparently would not do so in the matter of testate and intestate succession to New York property, at least in competition with the first wife and children of the first marriage. New York has power under the federal constitution to refuse recognition of the legitimacy of the children of the husband's second marriage thus far. *Olmsted v. Olmsted*, 216 U. S. 386 (1909). *Sed quare* as to a refusal of New York to concede that the personal rights, powers, etc., between the father and the children, and the father and their mother with respect to the children, were those of legitimate parents and child.

On the distinction between the "legitimacy" of children for the purposes of succession to property and legitimacy in the primary sense of personal relations with respect to parents, see and compare: RESTATEMENT, CONFLICT OF LAWS, §§ 137, 138, 141, 245, 246, and Comments on these sections; BEALE, CONFLICT OF

In all this constitutional law I see no legal or moral confusion, and no injustice. Indeed, considered piece by piece, or fitted together into a coherent whole the effects of the doctrine seem to me to accord with common sense and justice as to the several personal interests involved, if the two states use their respective legislative and judicial powers wisely.<sup>33</sup> Of course, our law on the subject-matter under discussion might be simplified with or without injustice. Simplification could be accomplished without injustice—if it were not for political difficulties probably insurmountable—*e. g.*, by making divorce a matter of exclusive federal legislative and judicial jurisdiction; or by carefully devised uniform legislation, uniformly enforced by the courts.<sup>34</sup> Sim-

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LAWs, §§ 137.1, 138.1, 141.1, 245.1, 246.1. See DICEY, *CONFLICT OF LAWS*, (3d ed.) pp. 850-851.

On the legal effects of a decree of dissolution of marriage in general, see II VERNIER, *AMERICAN FAMILY LAWS*, §§ 91-104.

<sup>33</sup>As I have elsewhere intimated, it is my opinion that New York in some particulars has used its constitutional powers under the doctrine of *Haddock v. Haddock* unwisely. I have instanced *Peo. v. Baker*, 76 N. Y. 78 (1879), and *O'Dea v. O'Dea*, 101 N. Y. 23 (1885). I recognize that the decision in *Peo. v. Baker* was motivated by a strong policy as to marital relations which according to dominant New York opinion was in the interest of traditional morals; but at least as applied to *Peo. v. Baker* it was a cruel policy, and in general it is a futile, if not a socially vicious policy. The legislation voicing the policy was not necessarily applicable to the facts of *Peo. v. Baker*. In other particulars also New York has been harsh and unwise in the use of its power under the doctrine of *Haddock v. Haddock*; and it must be admitted by all that the record of *Haddock v. Haddock* itself does not present a strong case for protecting the complainant wife's interest against the Connecticut divorce. (See *infra* note 43). But all this is aside from the problem which we are discussing. New York may use this power and other governmental powers, unwisely, but nevertheless under our constitutional system I see no reason for concluding that by the doctrine of *Haddock v. Haddock* the Supreme Court has not apportioned governmental powers over marital relations judiciously.

<sup>34</sup>If Mr. Beale's theory and the sections of the American Law Institute's *RESTATEMENT, CONFLICT OF LAWS on Jurisdiction to Divorce* were adopted by the Supreme Court of the United States, provisions of a uniform act like those of the original *UNIFORM ANNULMENT OF MARRIAGE AND DIVORCE ACT* (1907), §§ 10 (b), 22, would be unconstitutional beyond the limits of *RESTATEMENT* § 113. (See *TERRY'S UNIFORM STATE LAWS* (1920) pp. 297-298, 300-301, 303-304.)

*KANSAS REV. STAT.* (1923) Sec. 60-65, construed as intended to avoid the assumed evils of the New York doctrine of *Haddock v. Haddock*, also would be *pro tanto* unconstitutional. See *RESTATEMENT, CONFLICT OF LAWS*, §§ 43, 113, and Comment g to § 113. Cf. *McCormack v. McCormack*, 82 Kan. 31 (1910).

As approved by the National Conference of Commissioners on Uniform State Laws in 1930, the *UNIFORM DIVORCE JURISDICTION ACT* (9 U. L. A. pp. 133-134) evidently still pursues the purpose to counteract the tendency of state courts to follow the New York doctrine. One may infer, however, that the wording of § 1,

plification with injustice could be accomplished by making a decree of dissolution by a state of domicile of either spouse conclusive against collateral attack and effective as a dissolution in all respects. The results would be quite satisfactory as to plaintiff's interests, but often very unjust to the absentee defendant. Nevertheless I should much prefer this solution to Mr. Beale's and that of the American Law Institute.

Of course the basic difficulties of the legal problem are: (1) The varied predominant social ideas and religious beliefs on marriage and divorce problems among the peoples of our different states.<sup>35</sup> If we

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clause (b) was influenced slightly by the deliberations of the American Law Institute over § 113 of RESTATEMENT, CONFLICT OF LAWS, with some resulting dubiety as to what "rightful domicile" in this clause of the Act means. On the other hand it is clear from § 2 of the Uniform Act that the Commissioners were not confident of the correctness of the Institute's conclusions as to the effect of the federal constitution on matters of jurisdiction to divorce. Indeed the following excerpt from the Commissioner's *Prefatory Note* (9 U. L. A. p. 133) in part runs contrary to the tenets of the RESTATEMENT and Mr. Beale's theory on which those tenets are based:

"Jurisdiction in divorce cases depends upon the domicile of the parties. It is held in *Haddock v. Haddock*, 201 U. S. 581, that a state as a matter of comity may as regards its own citizens recognize a divorce granted in a state where the complainant only was domiciled and the service of process was only by publication. In other words, each state may determine the status of persons who are domiciled therein.

"Under the full faith and credit clause of the United States Constitution, a decree of divorce is valid and binding in all the states in the following cases:

"(1) If it is obtained by the complainant in the state where the parties were married and lived together (i.e., the matrimonial domicile), the complainant at the time of the divorce being there domiciled. This is true even though service upon the defendant is only by publication;

"(2) If it is obtained in the state where the husband and wife are both domiciled even though service is only by publication;

"(3) If it is obtained in the state where the complainant only is domiciled if the defendant is personally served within the state or appears. (See *Haddock v. Haddock*, 201 U. S. 581.)

"The present Uniform Divorce Jurisdiction Act is not in conflict with *Haddock v. Haddock*. It recognizes that law but goes further and holds that a state after substituted service of process may authorize decrees of divorce which will be good within the state; and by comity may recognize decrees of other states granted in like manner."

<sup>35</sup>II VERNIER, AMERICAN FAMILY LAWS, § 62, pp. 3 *et seq.* *Id.* pp. 6, 7, 8, 9: "As shown in Section 89, only eight jurisdictions have attempted to settle by statute the difficult issues raised by foreign divorces. Uniformity can be obtained here only by an amendment to the federal Constitution or by all jurisdictions adopting a uniform act . . .

"Divorce statutes are not a product of logic alone. They are a resultant of many mixed elements. Religion, sentiment, logic, historical accident, commercialism, and other matters—all have combined to form an inharmonious and incongruous whole. Anyone making a comparative reading of our American divorce statutes for the first time is astounded by the unnecessary variation and vagueness of this legislative output.

"From a purely theoretical standpoint we need a simple, uniform law. But our present divorce statutes represent such divergent views upon fundamental points

compare these predominant ideas and beliefs as reflected in the different state laws, we find a striking range from the case of South Carolina, which denies dissolution decrees entirely, and New York which recognizes only one cause, to Nevada, which benevolently and profitably dispenses releases from undesired ties on various grounds alike to its permanent residents and the stranger within its gates who transiently adopts the guise of domiciliary. (2) The distribution of governmental powers by the federal constitution between the federal government and the states and between the states *inter se*. The doctrine of *Haddock v. Haddock* essentially is a device of judicial statesmanship—an adjustment of the governmental powers of the two states, Connecticut and New York, so as to avoid a clash in the legal effects of their exercise impinging on the important marital interests of the spouses diversely domiciled under the two states.

But is there not such a clash involved in the doctrine? Is it not true that the doctrine raises an exception to the rule of Article IV, Section 1 of the Federal Constitution which requires each state to give full faith and credit to the public acts and records and judicial proceedings

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that agreement does not seem attainable except in the distant future. However, a comparative study of our statutes does disclose many unnecessary variations, gaps, and weaknesses, and it is believed that without striving for the difficult goal of immediate unification much improvement can readily be obtained in many states without great effort . . .

"In a dozen jurisdictions there remain discriminations of various kinds between the sexes. It seems clear that no argument is needed to show the desirability of abolishing these inequalities in the law.

"In the fifth place the law of many states would be improved by giving the court broader discretion in the disposition of the property of divorced parties. In view of the infinite and unforeseeable variety of circumstances which may arise in divorce actions, it would seem that such statutes, already existing in many jurisdictions, are most likely to promote justice by enabling the court to protect an impoverished wife or husband, to provide for the children, or to penalize the guilty party, as the particular case seems to require (see Sec. 96).

"There are a number of other changes in the divorce laws which we would advocate, but which to many would seem more debatable. It is sufficient to list these changes here with a reference to the sections where arguments favoring them may be found. These changes are, in addition to the five listed above:

- (6) allow divorce for insanity under reasonable safeguards (see Sec. 72);
- (7) permit the court to grant alimony to the guilty wife (see Secs. 104, 105);
- (8) permit the court to grant alimony to the husband (see Secs. 104, 109);
- (9) repeal the statutes existing in some states which unduly prohibit remarriage, especially those which prohibit the remarriage of the guilty party for life (see Sec. 92); (10) adopt a divorce evasion act (see Sec. 89).

"Many of the foregoing changes are at variance with the fundamental conception of divorce as worked out in the ecclesiastical courts and still reflected in much of our legislation, viz., that divorce is a remedy given only to an innocent person against a guilty person. In truth, as is probably known to most people as well as to the courts, it requires two persons to make a marital dispute and only rarely is one spouse wholly good and the other wholly bad. The divorce problem should be approached from the practical standpoint of what is best for both parties, their children, and the state, and not from an unsound theoretical view of granting relief to a supposedly wholly innocent spouse."

of every other state? Was not New York permitted to refuse full faith and credit to the Connecticut decree? If my analysis of the doctrine is correct and has been understood it should be clear that New York could not refuse full legal effect to the Connecticut decree under the Constitution. The doctrine does not raise an exception to this constitutional rule as Mr. Beale formerly asserted, and it is inconceivable that the judges of the Supreme Court of the United States would authorize any such exception resting on their fiat alone. The doctrine merely partially defines the jurisdictional scope of the Connecticut decree and judicial proceedings. Within that scope the decree was binding on New York and other states of the Union. Beyond its jurisdictional scope, it was not binding even under Connecticut law. (See Restatement, Conflict of Laws, section 43.) Thus, as I have explained above, the husband's marital capacity was restored not only under Connecticut law, but under New York law (because of the full faith and credit clause and, alternatively, the Fourteenth Amendment of the Federal Constitution). On the other hand, his marital duty to support his New York spouse, *as though still his wife*, insofar as New York law was concerned was not dissolved because Connecticut under the circumstances of the case had not the legal power to decree dissolution in this particular.<sup>36</sup>

Now let us examine the solution of the problem of *Haddock v. Haddock* proposed by the American Law Institute and Mr. Beale. The problem repeated involves this situation. One spouse has left the other and acquired a new domicile in State *Y*. The other spouse continues to reside in State *X* and under the circumstances has a separate domicile in State *X*. The spouse domiciled in State *Y* obtains a decree of dissolution from State *Y*. The spouse domiciled (and resident) in State *X* does not appear in the suit and has not been otherwise personally

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<sup>36</sup>See *supra* note 22. BEALE, CONFLICT OF LAWS, § 113.10, p. 498: "Mr. Justice White laid down several propositions not necessary for the decision. The most striking was the statement that 'no question can arise on this record concerning the right of the State of Connecticut within its borders to give effect to the decree of divorce . . . .' Other parts of the opinion show that he thought Connecticut had that right. But surely to allow such a right to Connecticut involves an acceptance of the decree as locally affecting rights; and if it had local efficacy (even though that effect was confined to the husband's status alone), it must, it would seem, under the full faith and credit clause of the Constitution, have been given as much effect in New York as New York gave to similar decrees, that is, to her own decrees operating on a New York spouse, the other being absent. Yet the Haddock case itself involved a finding that the husband still occupied the relation of husband to the wife; for the suit was by the wife for judicial separation and alimony. She was entitled to a decree only if the man was still her husband. A decree by the New York court was affirmed by the Supreme Court. The actual judgment of the court is therefore inconsistent with the husband's having been validly divorced at his domicile. It is submitted that this dictum of Mr. Justice White cannot be accepted as part of the doctrine of the Haddock case."

subjected to the jurisdiction of the governmental organ of State *Y* which issues the decree. In other particulars there is "due process of law." What are the legal effects of this decree? Mr. Beale's solution is as follows. If the spouse domiciled in *X* has consented "that the other spouse acquire a separate home" or "by his or her misconduct has ceased to have the right to object to the acquisition of such separate home," the *Y* decree is completely effective as a dissolution under the law of all states including *X*. If, on the other hand, the *X* domiciliary has neither consented to a separate home for the other spouse nor lost the right to object to such a separate home, the *Y* decree is not effective as a dissolution in any respect even under the law of *Y*.<sup>37</sup>

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<sup>37</sup>RESTATEMENT, CONFLICT OF LAWS, § 113 and Comment; BEALE, CONFLICT OF LAWS, § 113.11, pp. 500-505.

A reading of Mr. Beale's theoretical explanation of his proposed doctrine in his textbook, § 113.11, discloses a similarity to his famous justification of the decision in *Edgerly v. Bush*, 81 N. Y. 199 (1880). In this well-known case, the New York Court of Appeals had to decide between the claims of a mortgagee of chattels and a subsequent purchaser in Lower Canada. The mortgage had been made in New York while the chattels were there, but they were subsequently removed to Lower Canada, without the consent of the mortgagee. Both claimants were residents of New York. Under the law of Lower Canada, the purchaser acquired indefeasible title. Under the local law of New York, the mortgagee's claim would have been superior. The Court decided in favor of the mortgagee. Generally the decision has been deemed provincial in spirit and against sound principle. Mr. Beale, however, approves the decision on a theory of his own, supported by some incidental expressions in the opinion of Chief Justice Folger. He contends that no state can acquire jurisdiction over the title to a chattel which is brought into the state without the owner's consent or fault, and that therefore Canada had no jurisdiction to affect the title of the mortgagee by its law. Similarly he argues that each spouse has an interest in the other spouse, and that without personal jurisdiction over both spouses, no state has power to dissolve a marriage in any particular without the absent spouse's consent to the other spouse's acquisition of a separate home in the state, or loss of right to object to such a separate home. The American Law Institute did not adopt Mr. Beale's theory of *Edgerly v. Bush*; but it did adopt his similar theory of *Haddock v. Haddock*. Neither theory is one which has been accepted by the courts. Indeed each runs in opposition to general professional opinion and to judicial precedents. Most of the precedents Mr. Beale valiantly tries to distinguish through the exercise of his well-known ingenuity, but his efforts are unconvincing. I do not understand that Mr. Beale's academic dogma was the moving cause of adoption of his doctrine of *Haddock v. Haddock* by the Institute. The Institute's motives are intimated elsewhere in this article and its notes. Mr. Beale's theory and his reconciliation of precedents are to him and the Institute only mechanistic devices for clearing the path to adoption of his doctrine and abolition of the fancied juristic troubles raised by *Haddock v. Haddock*.

There is a dash of realism in Mr. Beale's doctrine, of course. He now asserts the justice of supporting the interest of the deserted wife against the foreign

I have several objections to this proposal. First, what is meant by the phrases "has consented that the other spouse acquire a separate home" and "has ceased to have the right to object to the acquisition of such separate home"? ("Home," it may be said in passing, does not mean "legal domicil," but means approximately factual residence.) Is there not here room for a diversity of interpretation which tends to prevent accomplishment of the Institute's purpose of uniformity of judicial decisions? What would constitute consent? Need it be express? If tacit consent is enough, need it be affirmative or is lack of dissent sufficient? Would passivity with knowledge of the facts bind the X spouse? What misconduct would suffice to destroy the right to object? Would consent to a separation be consent to acquisition of the other spouse's separate home? Is there not here a wide field of choice opened to the courts? Mr. Beale's personal construction applied to particular cases might serve to resolve all doubts which these phrases raise, but the courts are not to have the aid of his interpretations as a commentary equally authoritative with the Restatement itself.

Secondly, passing over this difficulty of interpretation, I object that this section of the Restatement manifestly does not formulate the doctrine of *Haddock v. Haddock*, but proposes a radical departure from that now well-aged doctrine without the least authority by way of judicial expression of the United States Supreme Court, or (as far as I know) of any other court, in support of it.<sup>38</sup> The doctrine stated in

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default divorce. But this motive logically should not carry farther than its target. It does not justify denying all validity to the Connecticut divorce in *Haddock v. Haddock*. Furthermore it does not justify depriving the state of the wife's domicil of power to protect her economic interests in the marriage against the foreign default divorce even though she has acquiesced in the separation and therefore consented to the separate home of the husband; nor even if she was at fault, were she conceded a separate domicil by the law in such a case.

<sup>38</sup>The opinion of the Court in *Delanoy v. Delanoy*, 216 Cal. 27 (1932), uses some of the language and argument of Mr. Beale and cites Mr. Beale's late article and the tentative draft of what is now RESTATEMENT, CONFLICT OF LAWS, § 113, but the decision only adopts the New York doctrine of *Haddock v. Haddock* (traditionally interpreted) as against the decision of the lower court in favor of the older doctrine. "Until 1905 the overwhelming weight of authority was to the effect that if the petitioning party was domiciled in good faith in any state, that state could render a divorce decree on constructive service valid not only in the state of its rendition, but which would be recognized everywhere . . . Then in 1905, the United States Supreme Court decided the *Haddock* case, *supra*." (216 Cal. 32-33.) Quite contrary to the doctrine of Mr. Beale and the American Law Institute, is the view voiced by the Court that recognition of the foreign decree would be granted or refused in accordance with California policy ("comity"). This appears clearly from the following (and other) passages in the opinion, which distinguishes the earlier leading case, *Estate of James*, 99



the opinion of *Haddock v. Haddock* and followed in other cases, certainly does not confine the power of State X to refuse effect to the decree of State Y as a complete dissolution of the marital relation to cases where the deserted spouse *still domiciled in X* has not "ceased to have the right to object to the acquisition of such separate home" by the other spouse, whatever that may mean. Suppose, for instance, that H, the husband, has been deserted for good legal cause by his wife, W. He remains domiciled in X and she establishes a separate domicile in Y. She obtains a default decree of dissolution of marriage from Y which has no personal jurisdiction over H. The doctrine of *Haddock v. Haddock* does not deny to X the power to refuse the Y decree the effect of restoring marital capacity to H, *i. e.*, the power to hold him still married as to this phase of the problem and guilty of bigamy if he remarries in X.<sup>39</sup> Likewise, if H became incapable of supporting him-

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Cal. 374 (1893), and quotes from *Bruguiere v. Bruguiere*, 172 Cal. 199 (1916) :

"In the second place the Missouri decree did not affect the status of a California citizen. When the Missouri decree was rendered the wife was a citizen of New York. It is readily conceivable that California might recognize a foreign divorce decree when such decree only affects the status of foreign citizens, but might refuse to recognize such foreign decree when it affects the status of a California citizen. California has no particular interest in the status of foreign citizens. This distinction is well recognized. (19 Cor. Jur., p. 373, sec. 841.) . . .

"So far as the courts of this state are concerned this state has sole and exclusive jurisdiction over the status of those domiciled within its borders. Assuming that the wife can prove the allegations of her complaint, as she offered to do, and can show that she was deserted by her husband, and that he was the one that was guilty of cruelty and that she was innocent of wrongdoing, if, under such circumstances, this state enforces as against her the Pennsylvania decree, this state will be recognizing a foreign decree secured without the presence of one of its own citizens, affecting the status of one of its own citizens, when such decree was obtained on false testimony. This state would be thus placing its sanction on a fraud committed in the Pennsylvania court. On the other hand, if the evidence shows that the husband left California and went to Pennsylvania due to the wife's fault, and that she was the wrongdoer and that he was innocent of wrongdoing, then we think the true rule to be that this state should, as a matter of comity, recognize the Pennsylvania decree. We think this rule will result in no hardship." 216 Cal. at pp. 35, 37.

See also note in (1933), 21 CALIF. L. REV. 504 on this case. The decision and opinion in *Montmorency v. Montmorency*, 139 S. W. 1168 (Tex. 1911) also gives no real support to Mr. Beale and the Institute. Indeed the opinion contains an admission contrary to their doctrine. See *supra* note 12.

<sup>39</sup>See *supra* note 22; *Peo. v. Baker*, 76 N. Y. 78 (1879); *supra* note 25. It is to be noticed that acceptance of Mr. Beale's doctrine would not improve the law on points like that involved in *Peo. v. Baker*. Indeed it would make it worse. It is true that if the wife in *Peo. v. Baker* was justified in acquiring a separate home in Ohio and therefore acquired a separate Ohio domicile, as the New York Court of Appeals assumed, Mr. Beale's doctrine would have made the Ohio divorce effective as a dissolution of marriage in all particulars against the will of New York. Therefore without additional specific legislation to cover the case perhaps the New York courts could not properly have held defendant guilty of bigamy; but the New York legislature could have prohibited his remarriage as

self, he might be entitled under the statutory law of *X* to support by *W* as still, as to this phase, the husband of *W*.<sup>40</sup> Of course, if *H* brought a suit in the courts of *X* for the purpose of enforcing a claim of this sort, *W* might have a defense on the merits, but the decree of *Y* is not conclusive against *H* on any of the issues in such a suit. Yet I take it, if *H* legally was in the wrong as to the separation, he "by his misconduct has ceased to have the right to object to the acquisition of such separate home" by *W*. If we interchange the parties throughout this case, so that *H* deserts *W*, without cause and acquires a new domicile in *Y*, leaving *W* still domiciled in *X* (the situation involved in *Haddock v. Haddock*) the legal effects are similar and perhaps easier to demonstrate, because what is said in *Haddock v. Haddock* is incontrovertibly applicable to this case. Suppose that in *Haddock v. Haddock* the wife had filed a complaint in her New York suit for separate maintenance before the husband started his Connecticut suit for dissolution of marriage, but personal jurisdiction over the husband had not been obtained by the New York court before the Connecticut decree was issued. Would the Connecticut decree then have deprived the New York court

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long as he remained domiciled in New York and provided a criminal penalty.

Let us now turn to facts like those in *Haddock v. Haddock* and apply Mr. Beale's doctrine. The Connecticut divorce becomes wholly void for all purposes even in Connecticut for lack of jurisdiction. Consequently if the husband, domiciled in Connecticut for twenty years, took a second wife, married in Connecticut, into New York and cohabited with her there, New York could convict him of bigamy and also punish criminally the second wife. New York would not have this power because of any legitimate governmental interest of its own. What legitimate policy could it have with respect to the marital status of a man domiciled and resident in Connecticut for twenty years? How would his remarriage affect New York public morals? New York's power under Mr. Beale's doctrine depends on the purely private emotions and wishes of the deserted New York wife. If she has refused continuously to consent to the separate home of the husband up to the time of the Connecticut decree, New York has this remarkable legislative jurisdiction with respect to the foreign husband's marital affairs against the will of Connecticut. If she consents to the separate home the subsequent Connecticut decree completely dissolves the marriage and New York's powers are limited accordingly.

Under the interpretation of the doctrine of *Haddock v. Haddock* for which I am arguing the following would be the results of the Connecticut divorce. New York without violating the federal constitution could punish the wife, still domiciled in New York, for remarrying contrary to the policy of New York law; but could not punish the husband, domiciled in Connecticut, for remarrying and living with his second wife in New York; and these powers and disabilities are independent of the mental reactions of the deserted wife. See the opinion of Folger, J., in *Peo. v. Baker*, *supra*.

<sup>40</sup>See III VERNIER, AMERICAN FAMILY LAWS, §§ 161-162, pp. 108 *et seq.*; II *id.*, § 109, pp. 303 *et seq.*

of jurisdiction to give its domiciliary, the wife, the relief she asked in *Haddock v. Haddock*? Mr. Beale seems to say that this would be fatal to New York jurisdiction, for certainly by asking for separate maintenance, the wife consents to a separate home for her erring husband, but I find nothing in the doctrine announced in *Haddock v. Haddock* to justify Mr. Beale's opinion on this point. Is it not true that the New York jurisdiction conceded by the Supreme Court of the United States in *Haddock v. Haddock* depended on the continued domicile of the deserted wife in New York and the non-existence of traditional grounds of Connecticut jurisdiction over her personalty and not at all on the casual circumstance (if such was the fact in *Haddock v. Haddock*) that at the time of the Connecticut decree she continued to refuse to accept the realities of the situation—*i. e.*, that the husband's desertion was permanent and that therefore she was confined practically to insistence on separate maintenance?

If the deserted wife does not sue for separate maintenance and keeps her counsel and stays at home, does she thereby prevent the husband from getting a valid decree in any state except that of her domicile? If, on the other hand, she is driven by pride and inclination to obtain a decree of separation and of separate maintenance out of New York property, does she thereby lose her power to limit on collateral attack the effect of the later foreign decree of her husband's new state of domicile? Does her state of domicile thereby lose all power to decree her continued support as a wife and to treat her as still married as to her capacity to remarry? I cannot believe that these matters, which properly are matters of state power under our federal constitution, should be made to depend on such a wholly private circumstance as the deserted wife's acquiescence or non-acquiescence in the acquisition of a new home by the other spouse. Legal domicile, the traditional basis of state power, is not a wholly private fact. It is a public legal relation. At any rate, Mr. Beale must admit that his suggestion is novel and not based upon express judicial opinion by way of precedent.

Furthermore, I do not understand that the doctrine of *Haddock v. Haddock* prevents State *X* from giving full effect to the *Y* decree for all purposes if it chooses to do so, regardless of the consent or non-consent of its domiciliary *W* to the establishment of a separate home by *H* and of *W*'s maintenance or loss of a right to object at the time of the *Y* decree.<sup>41</sup> Yet, unless I am mistaken, Mr. Beale's suggestion, incor-

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<sup>41</sup>White, J., in *Haddock v. Haddock*, 201 U. S. at 581: "On the other hand, the denial of the power to enforce in another State a decree of divorce rendered against a person who was not subject to the jurisdiction of the State in which the decree was rendered obviates all the contradictions and inconveniences which

porated in the Restatement, is that unless *W* consents to *H*'s new home, or loses her right to dissent, the *Y* decree for any purpose is wholly void because of lack of jurisdiction and only *X* can issue a valid decree of dissolution without personal jurisdiction over both spouses. This may appeal to an academic prejudice in the profession at large for simple arrangement of legal technicalities but it seems to me highly inexpedient as a matter of practical human affairs. If *X* is willing by its law to accept the *Y* decree as effective for all purposes, why should it not be able to do so without any further ukase of its own agencies? Why should the power to deny or grant dissolution *in toto* depend on the temperamental reactions of *W*, a private individual, instead of being divided between States *X* and *Y* as I have indicated in my analysis of the doctrine of *Haddock v. Haddock*?

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are above indicated. It leaves uncurtailed the legitimate power of all the States over a subject peculiarly within their authority, and thus not only enables them to maintain their public policy but also to protect the individual rights of their citizens. It does not deprive a State of the power to render a decree of divorce susceptible of being enforced within its borders as to the person within the jurisdiction and does not debar other States from giving such effect to a judgment of that character as they may elect to do under mere principles of state comity."

II VERNIER, AMERICAN FAMILY LAWS, § 89, at p. 160: "In the famous case of *Haddock v. Haddock*, 201 U. S. 562, the United States Supreme Court in 1906 held that New York was not bound to recognize a Connecticut divorce granted to a husband domiciled in Connecticut but who had deserted his wife in New York, the wife having had no actual notice of the suit and remaining domiciled in New York. In other words, though the husband was lawfully divorced in Connecticut and might marry again in that state, he was undivorced in New York and still married to his first wife. This novel decision, rendered by a vote of five judges to four, was widely criticized (see references at end of this section), and many persons expected that it would soon be reversed in subsequent cases. However, time has served only to strengthen it and even to convert some of its bitterest critics. Whatever one may think of this decision as a matter of legal logic, it cannot be gainsaid that it has had the beneficial effect of strengthening the position of the more conservative states. While this decision upholds the stricter states in their refusal to recognize *ex parte* divorces granted by the more liberal states, it does not impair the validity of such divorces within the liberal states, nor prevent the other states from giving them recognition if desired."

Mr. Beale admits that default divorces are quite commonly granted by the state of complainant's domicil against a spouse domiciled in another state (see BEALE, CONFLICT OF LAWS, § 114.1, p. 508) and that as a general rule throughout the nineteenth century such divorces were recognized and effective in other states. (See *supra* note 16.) Now he proposes under his doctrine of *Haddock v. Haddock Revisited*, (1926) 39 HARV. L. REV. 417, that such recognition be held unconstitutional except in certain cases defined in § 113 of the RESTATEMENT. Compare also *Gould v. Gould*, 235 N. Y. 14 (1923), which also is disapproved by the Institute and Mr. Beale (see RESTATEMENT, CONFLICT OF LAWS, § 111; BEALE, CONFLICT OF LAWS, § 111.4, pp. 480-482).

Mr. Beale's doctrine and the RESTATEMENT are also opposed to the principle of *Maynard v. Hill*, 125 U. S. 190 (1888).

But there remains one further even more serious objection to Mr. Beale's novel proposal. If my understanding of the doctrine of *Haddock v. Haddock* is correct, the Connecticut decree involved in that case was valid to restore marital capacity to the husband domiciled in Connecticut at the time of the decree, and consequently his second marriage would have been valid and issue of the second marriage legitimate regardless of legislation specifically legitimizing issue of marriages void in law. Furthermore the Connecticut decree as to these matters was protected by Article IV of the Federal Constitution against collateral attack in other states of the Union, except on the ground that the husband was not domiciled in Connecticut at the time of the decree, or that some jurisdictional requirement of local Connecticut law was not satisfied. Of course it is inconvenient that the validity of a divorce decree should depend on matters of fact which may be differently determined by different tribunals, but to the extent that domicile is a necessary basis of jurisdiction, this is a common weakness of all divorce decrees. However, in many cases, indeed in almost all cases where there is no attempt to fabricate a residence for temporary purposes of divorce jurisdiction, the complainant husband who obtains a divorce may rest comfortably on the abundant evidence of the essential elements of acquisition of a domicile of choice furnished by his domestic and business activities.<sup>42</sup> Mr. Beale's suggestion threatens this feeling of security in every case where the husband obtains a divorce in a state of new domicile (other than that of last marital domicile), and the wife is not personally served with process within the state of the forum and does not enter appearance in the suit. His solution of the problem makes the validity of the decree in such a case depend for any dissolution effect at all upon other matters of fact than those establishing the domicile of complainant husband and these other matters may be differently determined by other tribunals than that issuing the decree of dissolution. Indeed they are of a character essentially more difficult to clear of doubt and more subject to conflicting evidence than those involved in the usual case of acquisition of domicile

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<sup>42</sup>Mr. Beale suggests that a default divorce obtained by a wife in the state of her separate domicile is always open to collateral attack on the ground that she was at fault in the separation and therefore did not acquire a separate domicile and that his doctrine by subjecting a husband's divorce to collateral attack on similar grounds makes only a slight addition to the uncertainties of divorce decrees. But the "slight" increase would be of very grave importance to the few thousand divorced men involved; and further it is to be hoped that the Supreme Court will soon free a default decree in favor of a wife of this undesirable cloud by conceding to a married woman the power to acquire a separate domicile although she is at fault in her marital relations. See *supra* note 15.

by bona fide settlement in a new home place. Consent by *W* to the acquisition of a separate home by *H* may be express and unambiguous and in writing, in which case there will be no great difficulty if the writing is preserved. But in most cases of this type this clear evidence of consent will be lacking, and a dubious contest on conflicting evidence over the question of tacit or implied consent or lack of consent and the question of loss of "the right to object" will hang like a cloud over the decree. Yet it seems to me clear that in the interests of good government the decree should be freed from such a cloud. If *H* has become domiciled in *Y*, *Y* should have power to free him from his previous unsatisfactory marital entanglement if it so chooses, at least to the extent of restoring his marital capacity;<sup>43</sup> and the exercise of this power

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<sup>43</sup>Indeed *Haddock v. Haddock* itself is a case excellently illustrating this point. Mr. Justice White stated the facts as follows (201 U. S. at 564-566): "The wife, a resident of the State of New York, sued the husband in that State in 1899, and there obtained personal service upon him. The complaint charged that the parties had been married in New York in 1868, where they both resided and where the wife continued to reside, and it was averred that the husband, immediately following the marriage, abandoned the wife, and thereafter failed to support her, and that he was the owner of property. A decree of separation from bed and board and for alimony was prayed. The answer admitted the marriage, but averred that its celebration was procured by the fraud of the wife, and that immediately after the marriage the parties had separated by mutual consent. It was also alleged that during the long period between the celebration and the bringing of this action the wife had in no manner asserted her rights and was barred by her laches from doing so. Besides, the answer alleged that the husband had, in 1881, obtained in a court of the State of Connecticut a divorce which was conclusive. At the trial before a referee the judgment roll in the suit for divorce in Connecticut was offered by the husband and was objected to, first, because the Connecticut court had not obtained jurisdiction over the person of the defendant wife, as the notice of the pendency of the petition was by publication and she had not appeared in the action; and, second, because the ground upon which the divorce was granted, viz., desertion by the wife, was false. The referee sustained the objections and an exception was noted. The judgment roll in question was then marked for identification and forms a part of the record before us.

"Having thus excluded the proceedings in the Connecticut court, the referee found that the parties were married in New York in 1868, that the wife was a resident of the State of New York, that after the marriage the parties never lived together, and shortly thereafter that the husband without justifiable cause abandoned the wife, and has since neglected to provide for her. The legal conclusion was that the wife was entitled to a separation from bed and board and alimony in the sum of \$780 a year from the date of the judgment . . .

"As the averments concerning the alleged fraud in contracting the marriage and the subsequent laches of the wife are solely matters of state cognizance, we may not allow them to even indirectly influence our judgment upon the Federal question to which we are confined, and we, therefore, put these subjects entirely out of view."

Twelve years elapsed between the separation of the spouses and the Connecticut divorce and over seventeen years more elapsed before the wife, learning that the husband had inherited property, started the New York suit. Under such circumstances would it not be absurd if Connecticut during all those years could not have issued a divorce decree which as far as its effect on the husband's marital capacity was concerned, was free of doubt? Doubt as to his economic obligations to the absentee New York wife was another matter not fairly justi-

should not be so dubious in any case as to make the validity of a second marriage and the legitimacy of issue of that marriage depend on such a casual collateral circumstance as the consent or lack of consent of an absent defendant to the acquisition of the new home by the husband. Under Mr. Beale's solution such a cloud may hang over the decree interminably and there is no way to clear it from the cloud once for all against the will of the divorced wife except through a suit by the divorced husband against her in a state which has personal jurisdiction over her and whose procedural law provides for a suit for such a purpose (a sort of suit for a declaratory decree); and this would be as difficult as a new divorce suit. It has been suggested that the proceedings in the divorce suit might be carried on up to the Supreme Court of the United States and thus the question be conclusively settled. I submit that this is not feasible. In the first place the husband has his decree and is in no position to appeal from it; and the defaulting absentee wife is not interested in aiding the husband to establish the validity of his decree. In the second place, even if the husband were permitted to carry the case up and secured an affirmance of the decree

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cialable in the absence of personal jurisdiction over the wife but not as embarrassing to readjustment of his personal relations in particulars of the utmost importance to his peace of mind and happiness.

It should be noticed also that Justice White expressly ignored matters in the record which he said fell under the exclusive jurisdiction of New York and raised no federal question, but which under Mr. Beale's doctrine and theory of the case would be of decisive importance on the question of Connecticut jurisdiction—i.e., questions of the fault and laches of the wife. Undoubtedly, if the point had been raised, Justice White would have placed questions of consent or non-consent to the separate home in the same class. Is it conceivable that the wife passively continued to refuse consent to her husband's Connecticut home during the twelve years of separation? Isn't it more probable that she ceased to care, if she ever did care? At any rate it never occurred to Justice White that this question had any bearing on the federal constitutional law problem involved in the case.

"It seems quite well settled that where the husband has brought the foreign action for divorce and the wife has not appeared, that the latter can obtain alimony at home, though the theories on which this is done vary. See *Thurston v. Thurston*, 58 Minn. 279, 59 N. W. 1017 (1894); *Toncray v. Toncray*, 123 Tenn. 476, 131 S. W. 977 (1910); cf. *Joyner v. Joyner*, 131 Ga. 217, 62 S. E. 182 (1902); see JACOBS, *CASES AND MATERIALS ON DOMESTIC RELATIONS* (1933) 990, n. 4. After the death of the spouse who has procured the foreign *ex parte* divorce, as to whether the other party may claim rights of dower or of curtesy or the statutory substitute therefor in the property of the deceased, see Wheeler, *The Effect of Foreign Divorce upon Dower and Curtesy* (1927) 25 Mich. L. Rev. 487 (1927); also N. Y. DECEDENT ESTATE LAW, N. Y. CONS. LAWS (Cahill 1930) c. 13, sec. 87 . . ." Albert C. Jacobs, Assoc. Prof. of Law, Columbia Univ., *The Utility of Injunctions and Declaratory Judgments in Migratory Divorce* (1935) 2 LAW & CONTEMPORARY PROBLEMS, 370, 372, fn. 17.

by the Supreme Court of the United States, would this add to the security of the decree against collateral attack? The wife still would not have been personally subject to the jurisdiction of the courts passing on the case and therefore would not be personally estopped from contesting collaterally the findings of fact in the record on which the Supreme Court passed judgment.<sup>44</sup> Mr. Beale's suggestion in his

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"In the RESTATEMENT, CONFLICT OF LAWS, *Jurisdiction for Divorce*, §§ 111 and 113 (including Comment), the American Law Institute has overruled the doctrines of three leading cases, although each of these three doctrines has considerable social and legal merit. This is a remarkable achievement by a conservative, unofficial body of lawyers, associated to formulate an exposition of the common law, especially since an endorsement of their action by the Supreme Court of the United States would involve a serious restriction of the powers of the states over dissolution of marriage and a use of the federal constitution as an instrument of devastation against interests of great importance to a few thousand individuals, spouses and children, caught in the web of an unhappy marriage, diverse domicils of the spouses, a default decree of divorce, and a second marriage of complainant spouse. There would be some slight gain, of course—the simplification of the lawyer's and the judge's tasks. Less mental effort would be required to solve the legal puzzles in this field, at present apparently so complicated. This would be a purely professional gain, however, and should be given no controlling weight against counter considerations of social advantage and justice by such a body as the American Law Institute.

The three cases are: *Haddock v. Haddock*, 201 U. S. 562 (1906); *Maynard v. Hill*, 125 U. S. 190 (1888); (see RESTATEMENT, CONFLICT OF LAWS, § 113, Comment g); and *Gould v. Gould*, 235 N. Y. 14 (1923); (see RESTATEMENT, CONFLICT OF LAWS, § 111; BEALE, CONFLICT OF LAWS, § III.4, pp. 480-482).

Mr. Beale has tried to rescue two of these cases from the carnage by discriminating criticism and rehabilitation, but the doctrine of each case certainly is not the doctrine of Mr. Beale or of the Institute. As to the third case, *Maynard v. Hill*, on one point only perhaps it should be overruled—the point that a decree of divorce granted by a legislature in the United States is valid although not preceded by notice to the absentee non-petitioning spouse (BEALE, CONFLICT OF LAWS, § 110.2, p. 471); but this point is outside the range of the present debate.

As to *Haddock v. Haddock*, it is to be noticed that the Institute and Mr. Beale do not adopt the doctrine of the opinion of the court nor do they adopt the doctrine of the dissenting opinions which Mr. Beale formerly approved.

Perhaps I had better add a few words to meet the possible objection that I have not fairly stated in this note the advantages of the Institute's proposed substitute for the rule of *Haddock v. Haddock*. How about the gain to public morals and respect for the law? How about reducing the number of divorces? Of course I have expressed my argument on these points already in the main text of the article, but it may be of use to put the following questions to the objector. Let him carefully consider the matter and then answer them. Does any member of the Institute believe that adoption of the rule would improve public morals or increase respect for the law? Precisely how would it do either? Would it reduce the number of migratory divorces? What would be its effect upon the bootleg divorce evil—the arranged divorce on manufactured evidence—which New



textbook that the wife's suit attacking the decree may be carried to the Supreme Court of the United States by the husband does not satisfy my objection. The wife may not choose to sue for years. Meanwhile the husband cannot remarry with confidence that he will not be guilty of bigamy, that his relations with his second wife will be legally proper, and that children of the second marriage will be legitimate.

In short, both in the matter of apportionment of governmental power between the states and in the matter of consideration for the various private interests involved Mr. Beale's ingenious device for short-circuiting the doctrine of *Haddock v. Haddock* should seem far worse than that doctrine's legal effects can seem even to its most stubborn critics. Mr. Beale's formulation in print wears a specious aspect of simplicity and thus may offer thought balm for those who believe that *Haddock v. Haddock* led this phase of our divorce law into a logical jungle where legal bigamy absurdly flourishes; but the simplicity is wholly in the academic formulation and disappears when actual application to the tangled web of case evidence begins, while the logical jungle is a mirage which vanishes as soon as a careful appraisal of the separate particular legal effects of the doctrine is made.<sup>45</sup>

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York lawyers deplore? Of course it would encourage a feeling of vindictive and righteous satisfaction in the intolerant, but this is beyond the purposes of the Institute.

<sup>45</sup>A cumulative point against the proposal of Mr. Beale and the American Law Institute (RESTATEMENT, CONFLICT OF LAWS, § 113) should be mentioned. In most of our states, the procedural law is keyed to the belief that the state of domicile of a complainant has jurisdiction to restore his or her marital capacity by a default divorce decree against a foreign defendant spouse, and in many no provision is made for an original suit by a non-resident. II VERNIER, AMERICAN FAMILY LAWS, § 81.

"In most American States jurisdiction is allowed by statute only when the petitioner is domiciled in the state." BEALE, CONFLICT OF LAWS, § 114.1, p. 508.

"In some cases it has been held that a wife may file her bill at the domicile of her husband. If she has not actually acquired a separate home, *animo et facto*, this she must of course do. If she has in fact acquired a separate home, some cases allow her to file at her husband's domicile; but the better view is that if she has established a separate domicile she must file her bill there." *Id.* § 113.2, p. 485.

Therefore it would be a corollary of adoption of Mr. Beale's doctrine by the Supreme Court of the United States that a husband who left his wife and acquired a new domicile often could not get a divorce free from doubt unless the wife was personally subjected to the jurisdiction of his new state of domicile. A divorce granted by that state without personal jurisdiction over the wife would depend for validity on the fault of the wife or her consent to the husband's new home—and this would cloud the decree. The husband could not sue in the state of the wife's domicile, if its procedural law did not permit a non-resident to sue. If the state of the deserted wife's domicile was New York, in most cases the non-existence of this added procedural obstacle would not be important, because the

Here then is one phase of the law on which the federal Supreme Court should not accept the advice of the American Law Institute, for if it does, bad government with serious hardship to many individual interests will result; and since the bad government would be guaranteed sturdy vitality by the Constitution of the United States beyond change by either state or federal legislative power, it would be difficult to amend it. Only a federal constitutional amendment would avail to wholly repair the damage. Fortunately our Supreme Court acts with an insistent consciousness of the practical problems involved in the cases it decides and of its responsibility for legal consequences. There is no like potent influence on the mental processes of members of a private organization, however equipped with learning, who are harassed by the prime necessity of common agreement on an abstract formulation of the law that will appeal to the prejudices and professional beliefs of the members, especially that strong natural human

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husband could not establish a ground for divorce under the narrow New York law anyway.

The following facts should be emphasized again here, because they slip easily from perception and apparently have been ignored in the Institute's consideration of § 113 of the RESTATEMENT. The embarrassment of the unhappy husband in our problem would depend on the legal power of a deserted wife. She could at will give or refuse authority to the husband's new state of domicile to divorce him by consenting to his new home or by refusing consent. This power which the RESTATEMENT would concede her, is not necessary to protect any of her economic or other legitimate interests. It serves only her vindictive resentment. In the *Haddock v. Haddock* type of case, the cohabitation incidents of the marriage are definitely at an end. Neither Mr. Beale, nor the American Law Institute, nor all the courts in Christendom could revive them. An erring husband may not be an object for sympathetic consideration to many of our legal cogitators. That is due perhaps to the seductive quality of symbolic thought. A husband technically at legal fault, is not always a bad fellow, nor is he always solely or even mainly responsible for the marital rift. In most unhappy marriages, the disrupting elements are reciprocally irritating characteristics and habits for which both spouses — or perhaps neither — should be blamed. The symbolic melodramatic situation of the faithful, wronged wife and the villain husband is not usual in real life.

If the American Law Institute believes that it could reform men and women in matters affecting their intimate emotions by erecting irritating legal barriers to escape, if it believes that these barriers to natural courses of human conduct would not be evaded, or if it believes that the net result would be a gain for public morality and the purposes of good government, its philosophy of law, morals and government differ fundamentally from mine. Be that as it may, to one of my convictions it would seem passing strange if an organized effort on the part of the leaders of the bench, bar, and legal learning in this country should result, however unintentionally, in fortifying public intolerance and private feminine resentment against the exercise of what hitherto has been regarded as legitimate state power, by the Constitution of the United States, beyond any legislative remedy except a constitutional amendment.

prejudice for simplicity. If there is a danger inherent in an undertaking such as that of the American Law Institute it is that the patient study of multitudinous details incident to good government will be submerged by a hurried desire to accomplish simplicity and a broad sweeping appearance of harmonious uniformity. This is the peculiar vice of the *a priori* jurist. The ardent strife of conflicting interests which cannot entirely escape the notice of a competent judge preserves our law from the atrophy of theory. In no instance has the dominant influence of practical considerations been more apparent than it was in the decision of *Haddock v. Haddock*. Even Mr. Beale has been converted to a similar opinion of the decision. It would be a pity if the motivation of the decision were now to be carried beyond its goal and the denial of the categorical quality to one *a priori* rule in the interest of practical expediency should be turned to setting up another artificial rule which would create greater injustice and inconvenience than those which the doctrine of *Haddock v. Haddock* was devised to prevent.<sup>46</sup>

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<sup>46</sup>A disagreement with Mr. Beale on an important question of law in his peculiar province always causes me great regret. Indeed to most informed lawyers, and to myself were I not certain of my grounds, I must appear guilty of temerity in questioning his judgment. I have the highest regard for his ingenuity, his mental agility and his entangling logic, for his great capacity as a teacher, his industry in research, and his knowledge of case law and text authorities, for his practical judgment of men and their abilities, for his common sense, and for the moral and social qualities which influence his legal views. He has the affectionate good wishes of all his students, past and present. It is the mark of a great teacher in a field where the essential objectives are independence and maturity of judgment, an assured technique in the reasoned management of data, and skill in argument, that many of his able students do not subscribe to some of his tenaciously defended conclusions. I am recurrently despondent of my own pedagogical qualifications when I observe the placid acceptance of my ideas by some of my classes and remember the ardent debates, joyfully pursued, without quarter asked or given, between Mr. Beale and his classes.

Among the many men with whom I have worked or have discussed legal problems, there have been only three who have contributed anything peculiarly important to my education as a lawyer and legal critic, who have inspired me or imparted or suggested to me anything that I had not before or could not easily have obtained from books of reference, the common tools of the profession. All these three teachers were members of the first faculty of the Law School of the University of Chicago, and one of them is Mr. Beale, its first Dean.

Unfortunately I happen to belong to that "current but ephemeral school of legal philosophy" to which Mr. Beale refers in one of the characteristically original fore-notes to his textbook on CONFLICT OF LAWS. (See I BEALE, CONFLICT OF LAWS, xiii.) Unfortunately our philosophies of law and our views on the purposes and principles of a formulation of generalizations such as those of the RESTATEMENTS differ. Certainly also our theories and opinions concerning

many important questions of the Conflict of Laws differ irreconcilably. The ideas of Mr. Walter Wheeler Cook on the fundamental problems of the Conflict of Laws are very like those which I have taught in that field and others for over a quarter of a century. Indeed much of his writing is almost word for word as I would have phrased my own views on the subject. Anyone who will compare Mr. Cook's writings with Mr. Beale's textbook and articles will not deny that they evidence a basic disagreement which indeed goes beyond the field of Conflict of Laws. On matters of politics, religion, and government probably Mr. Beale and I would differ as radically. On more fundamental and important matters we should doubtless reach a happy concordance. However, I cannot concur in the extreme opinions of those of my fellow realists who find little to applaud and much to deplore in the traditional case method as it was practiced by the earlier Harvard Law School teachers and have singled out Mr. Beale as a bright target for their criticisms. Although Mr. Beale's opinions differ greatly from those of "the current but ephemeral school" of realists, there is no one among the older members of the Harvard Law School faculty who naturally would have taken a greater interest in the new movement or given it more friendly encouragement, even if only by spirited counter arguments, than Mr. Beale, had not some of its protagonists chosen to attack not only Mr. Beale, but certain traditions and institutions to which he is attached by the fundamental loyalty of his character. There is no greater justice than justice to an opponent, but it is a difficult art.