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The Divorce Legislation of the U.S. with Especial Reference to N.Y.

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T H E S I S

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ON THE SUBJECT OF

DIVORCE LEGISLATION THROUGHOUT THE UNITED STATES

WITH

ESPECIAL REFERENCE TO NEW YORK STATE,

--o--

EDWARD N. JACKSON,

CORNELL UNIVERSITY LAW SCHOOL,

1893.

The various schemes of divorce legislation throughout the United States, are mostly original in the respective states. There is no uniformity in this legislation, but on the contrary, each state sets up a separate and independent system of positive rules according to its own theories. These systems differ as to the causes of divorce, and the jurisdiction of courts over suits for divorce, by or against non-residents. The result is confusion and uncertainty in this branch of the law. These differences have led to many conflicts of judicial decisions, so that a marriage is often treated at the same time, in one state as dissolved, and in another state, or country, as subsisting; and a man may be convicted of bigamy, or adultery, in one jurisdiction, upon what would be a lawful second marriage in another.

Many evils exist by reason of the fact that divorce may be obtained with ease in a number of the states. The courts are imposed upon by persons claiming a boni fide residence, and asking that the court

exercise its jurisdiction to determine their status. This abuse of the law, and imposition on the courts, can only be corrected by voluntary state action. This inconsistency grows out of the rule of private international law which recognizes the right of every sovereignty to declare the status of its citizens. This is one of the bad results of dividing sovereignty into parts, and should be met by each state conceding a little to the others, until there is but one theory. The courts are constantly asking for a greater unanimity in the statute law of the various states and territories, and until such a result is reached, in divorce legislation at least we will have confusion. . Folger J. in the *Peo. vs Baker*, 76 N. Y. p 78, in commenting on this situation says: "The consequences of such want of harmony in polity and proceeding, we have adverted to. The extent of them ought to bring in some legislative remedy. It is not for the courts to disregard general and essential principles, so as to give polliation. Indeed, it is better, by an adherence to the policy and law of our

own jurisdiction, to make the clash the more and the earlier known and felt, so that the sooner may there be an authoritative determination of the conflict."

New York State took the initiative by asking the several states and territories to send each three commissioners to meet and discuss the lack of uniformity of law in the United States with especial reference to the law of Marriage and Divorce, and such commissioners to make recommendations to their respective states legislatures. So far eight states have complied. If the movement is not successful and does not secure a voluntary co-operation of the several states, the last resort will necessitate an amendment to the United States constitution, and thereby place these cases in the United States courts. Such a course has been quite favorably thought of. If the United States courts should get jurisdiction in these cases, it would produce better results; there would be but one class of judges passing on the law applicable to the situation, and it would insure a like disposition of every similar case, whereas

if the states should agree on one uniform law, there is nothing to hold them to their agreement, and such an arrangement will naturally, after a short trial, prove it is not enforceable and the courts will gradually come to disregard it.

Marriage, though in some of its aspects resembling a contract, it is rather to be regarded as a social relation; a status with duties, and rights and obligations, established by the law of the state where the parties have their domicile, not by that of the state where the relation is formed, much less by that of their own will and pleasure. That the peculiar rights and obligations of married persons arise, not from any contract between them, but by law, is seen from the following facts: first, the obligations and rights of husband and wife are not only mutual but also to and against the community. (1 Bish. M. and D. section 4.)

2 These rights and obligations may be changed with a change of residence, or by change of law. 3. Disregard of
no
these rights and duties gives right of action for damages

for breach of contract. 4. They may be put an end to by divorce, although the contract was for life.

A marriage which is good by the laws of the country where it is entered into, is valid in any country, and although it should appear that the parties went into another state with a view to evade the laws of their own country, the marriage in the foreign state will nevertheless be valid in the country where the parties live. Story says, "Marriage being in its nature, a contract depending on the consent of the parties, it follows that it is valid everywhere, if valid at the *lex loci*."

Several of the states and territories have definitions incorporated into their statutes of marriage; in some cases conforming them to the usual and long accepted definition that it is a civil contract, while in others, evidently looking beyond the mere agreement to marry and the solemnization or other act occurring at the agreement, the more modern and apparently more accurate view of the matter has been adopted, that marriage is a status acquired by the parties thereto and

by virtue of the contract which is executed by consummation.

Marriage is treated both as a sacrament and as a civil contract. In Kansas the marriage sacrament may be regarded either as a civil ceremony, or as a religious sacrament, but the marriage relation shall only be entered into, maintained and abrogated, as provided by law. The New York statute provides that marriage shall be considered therein as a civil contract and that the parties must be capable of contracting, and must give their consent. That a state is not procluded from regulating the marriage institution under any constitutional interdiction of acts impairing the obligations of a contract, or interfering with private rights and immunities, the courts have frequently held. *Green vs State*, 58 Ala. 190. *Adams vs Palmer*, 51 Me. 480. *Frasher vs State*, 3 Tex. app. 263. Prohibiting marriage to a particular person, or persons, and before a certain reasonable age, or other prudential provision, looking only to the interest of the person to be benefited,

and not in general restraint of marriage, will be allowed and held valid.

Marriage is a status. Status means the legal position of a party in, or with regard to the rest of the community. A husband, or a wife, is in a special position, just as an infant is, or a felon; so that if man and woman desire to cohabit lawfully and to have lawful offspring, they can do so, only by sanction of the law. The legal conditions make up a set of special rules which are set to govern the marital relations and regulates man and woman who lawfully cohabit, and places them in a special legal position toward the community.

A marriage can only be dissolved by death, or divorce. Divorce is the dissolution by means other than death, or the partial suspension, of the marriage relation. Distinction should be made at the outset, between a divorce and an annulment of a marriage. Bishop says, "A divorce suit is a civil proceeding founded on matrimonial wrong, wherein the married parties are

plaintiff and defendant, and the public or government, occupies, without being mentioned in the pleadings, the position of a third party, resulting in a triangular and otherwise sui generis action of tort. The parties are the man, the woman, and the state. It is the duty of the court to take care of the interests of the state, to prevent decrees being granted where not permitted. In Kansas and Indiana, it is the duty of the prosecuting officer to oppose all suits for divorce, at least so far that there can be no collusion. This is done since divorces are contrary to public policy, and to protect the interests of children. A divorce is more than a Controversy between individuals, there are interests of three parties intervening."


An annulment of a marriage, is the setting aside of the marriage on account of some imperfection or illegality, which renders it void or voidable, and is retrospective in operation; while divorce is wholly prospective. Annulment of marriage is always by judicial proceedings, and although many marriages do not regard the intervention of judicial authority to set

them aside, being declared by statute to be void without legal proceedings, still such proceedings should usually be had. The court said, in *Wightman vs Wightman*, 4 Jhs. Ch. 341: "the fitness and propriety of a judicial decision pronouncing the nullity of such a marriage, is very apparent, and is merely conducive to good order and decorum, and to the peace and conscience of the parties."

When marriage is dissolved by divorce and the parties are put back in the position of single persons, except so far as their right to remarry is concerned, the divorce is termed absolute -- ie, a divorce a vinculo matrimonii, or from the bonds of marriage. When marriage is only partially suspended by divorce and the parties are separate, but still retain their legal status as married persons, the divorce is called limited -- ie, a divorce a menso et thoro -- divorce from bed and board. This divorce is granted when the marriage is just and lawful from the beginning, and therefore the law is tender of dissolving it, but for some super-venious cause it becomes improper or impossible for the

persons to live together. This divorce is unknown in some states, their statutes only providing for absolute divorces.

Marriage may be dissolved by divorce in three ways; first, by special acts of the legislature decreeing a divorce to particular individuals. This mode is, at this day, very unusual. (By act of Congress in 1886, the legislatures of the territories of the United States are prohibited from granting legislative divorces. The most of the states have a like provision, but the custom is still adhered to in Ala., Conn., N. H., and several other of the states). Second, by a court acting under a general law, this is the usual procedure. Third, by operation of law without legislative or judicial proceeding for the purpose of securing a divorce -- i. e. as in case of one imprisoned for life.

I have said that the statutory scheme of original divorce in the United States, is  within the several states. An examination of the procedure in the early colonies supports this proposition. The

first act authorizing expressly the dissolution of marriage by judicial decree in any dependency of the English crown, was passed by the General court of Massachusetts in 1639; "that there be two courts of the sizes yearly kept at Boston by the Governor, or Deputy Governor, to hear and determine all causes of divorce." While the colony of New York was held by the Dutch, the liberal divorce laws of Holland, of course, prevailed. Divorces existed in New York after the English conquest 1664--1776. In 1664 a statute provides in New York "that where there is no knowledge of a husband, or a wife, absent for five years after his or her departure, nor of any that accompanied him or her in the voyage, it may be justly presumed that the ^{absent} person is dead, and after that time, the other is free to marry." This is still the law in New York. Also a statute provided that in all cases of adultery, all proceedings shall be according to the laws of England, which was by divorce from bed and board. In 1650 Rhode Island adopted a law for a divorce which was absolute, for adultery at the suit of the injured party. In 1650, Connecticut

adopted the Massachusetts law. Desertion and adultery were the recognized grounds for divorce. It is evident from these statistics that it was the practice of the first settlers of some of the early colonies to grant divorces to husbands and wives for the causes stated.

In 1773, George the Third issued instructions to the governors of Quebec, Nova Scotia, Island of St. John, New Hampshire, Massachusetts Bay, New York, New Jersey, Virginia, North Carolina, South Carolina, Georgia, and East Florida; "Whereas: we have thought fit by our Orders in Privy Counsel to disallow certain laws past in some of our colonies and plantations in America for conferring the privilege of naturalization on persons being aliens, and for divorcing persons who have been legally joined together in Holy Marriage, it is our expressed will and pleasure, that you do not upon any pretence whatsoever, give your consent to any decree or decrees that may have been, or shall hereafter be passed by the council and assembly of the provinces under your government for the naturalization of aliens, nor for the divorce of persons joined together in Holy Marriage. G.R."

These instructions were not regarded in Massachusetts, Rhode Island or Connecticut.

In *Brutus vs Brutus*, 1 Hop. Ch. 557, the court said, "Our statutes are clearly original regulations, intended to authorize divorce in cases in which no divorce could ^{before} be obtained. They define the causes for which divorces shall be granted, they give jurisdiction to those cases to this court, and they give no other jurisdiction. To consider these statutes as an adoption of the law of England, would be a violent perversion of the language and intention of the legislature."

Prior to 1787, there was no tribunal in New York authorized to grant divorces, candidates must apply to the legislature. In that year an act was passed declaring that the legislature should make general provision, and giving power to the court of Chancery to decree divorces for adultery. An act was passed in 1813 giving wife the right to limited divorce for cruel treatment. This was extended to the husband in 1824.

The Catholics who settled Maryland retained the rigid views of the Catholic church; so with the

Episcopalians who settled Virginia and South Carolina. The latter state has been especially distinguished for its rigid rule in granting divorce for no cause what-
 ever. This has produced a degrading influence ^{and} the statutes of that state now provide for the proportion of a married man's property that goes to his ~~concubine~~ after his death. On the other extreme, history shows that the loose practice of dissolving marriage in the Roman Empire, i. e. by the husband turning his wife away, did not promote a higher morality.

Excepting in New York and South Carolina, the diversity of doctrine as to the causes of divorce, are not material. Absolute divorce can be granted for the three causes; adultery, cruelty, and desertion. Many statutes gave the court power to say whether the particular divorce shall be limited or absolute to fit the particular situation; so in the states of Delaware, Kansas and Maryland. The idea being where there is any probability of a party's relenting, or where the case is not an extreme one; in case it is better in the interests of children, to place the parties in a posit-

ion where they may become reconciled; if this cannot be, the court grants an absolute divorce, separating them forever from each other.

The states of Massachusetts and Maine have an admirable statute in this regard. All decrees shall, ^{become} in the first instance, be decrees nisi to [^] absolute after the expiration of six months from the entering thereof without further notice thereof by publication, or otherwise, on the application of either party.

An interesting correspondence took place between Robert Owen of Indiana, and Horace Greeley in 1860; Horace Greeley attacking the state of Indiana for its liberality in granting divorce, and Robert Owen attacking New York on its strictness, and condemned the practice of granting limited divorce and mere separations. Mr. Greeley sustained the New York doctrine arguing that New York following the teachings of the Bible ("No man shall put away his wife except for adultery." Mat. XIX 9.) defending limited divorces and separations on the ground of humanity, that while a man and woman are not fit to cohabit, still neither one is guilty enough to

necessitate a divorce from the other.

Owen arguing that the ^{stages} stages of civilization necessitated a change in the marriage and divorce institutions, that according to the Old Testament more than three thousand years ago, a divorce law permitting a husband to put away a wife when she found no favor in his eyes prevailed, and continued long after Joseph and Mary.

That although Christ taught the doctrine referred to, yet the change in civilization does not warrant this strict doctrine and that if two people are not properly mated, it is inhuman and ^{produces} immorality to bind them together by a bond of matrimony when they are unable to enjoy the fruits of a marriage.

I believe Mr. Owen had the better side of the argument. Bills of separation and limited divorce in effect, separate the parties from cohabitation, but do not lessen the marital duties and obligations. Such a doctrine cannot help but produce immorality and is depriving the individual of all chances of a natural existence. In any light you are binding down the

innocent. When a marriage does not result in its primary object, mutual happiness and welfare of the parties, then the law should dissolve the relation absolutely, if at all.

Divorces are granted for adultery, cruelty, and desertion. These are essentially the only causes entertained, but are known by different terms under the several statutes. Desertion comprehends willful and utter desertion and abandonment. Cruelty comprehends habitual intemperance, drunkenness, extreme cruelty, cruel and barbarous treatment; including mental and physical cruelty.

Adultery is a voluntary sexual intercourse of a married person with another not his, or her, wife or husband. The belief of a married man that there exists a divorce between him and his wife when such is not the case will not excuse his adultery, 103 Mass. 572, 31, Barb ~~Barb~~. 70; but if a husband believes his wife dead and has subsequent intercourse, it will not be adultery, 1 Bish. M and D sec. 710.

Desertion is the wrongful determination by one

party to a marriage of the cohabitation. There must be an intention to cease cohabitation and an entire absence of consent on the part of the innocent party. One not can be deserted while she or he consents to the desertion, Crowley vs Crowley 23 Ala 582. The period of absence from cohabitation varies in the different jurisdictions from one to seven years. Statistics show that more divorces were granted for desertion than for any other cause.

Cruelty is the willful and persistent infliction of unnecessary pain and suffering, either in mind or body, in such a way as to render cohabitation dangerous and undesirable. Bishop says, "Cruelty is such conduct in one of the married parties as, to the reasonable apprehension of the other, or in fact, renders cohabitation physically unsafe to a degree justifying a withdrawal therefrom." Mere mental anguish not enough unless occasioned by apprehension of bodily harm. Ruckman vs Ruckman 58 How. pr 278. Henderson vs Henderson 88 Ill 248. But it has been held that a single false accusation of unchastity warrants a divorce for

cruel treatment; 62 Tex., Avery vs Avery 35 Kan., 1 Friend vs Friend 55 Mich 543. A single act of harsh treatment does not constitute cruelty; Hoshall vs Hoshall 51 Md 72. A reasonable apprehension of injury is sufficient, not necessary that the injury shall have been accomplished; Gibbs vs Gibbs 18 Kan 419. The courts in the various jurisdictions are by no means uniform on their acceptance of the term cruelty. In Pennsylvania and North Carolina there must be a cruel and barbarous treatment endangering the life of the wife, or such as to force her to leave her husband. In new York there must be such conduct as to render it unsafe and improper for the parties to cohabit. In Michigan extreme cruelty, whether practiced by using personal violence, or by other means. In Massachusetts and Maine cruel and abusive treatment. Many jurisdictions do not allow a divorce to a husband for cruel treatment by the wife.

Besides the denial of the acts complained of and consistent with such denial, there are five defenses to an action for divorce:

First, Connivance or the complaintant's consent to the acts complained of;

Second, Collusion, or the party's agreement to make up the case for the purpose of obtaining a divorce;

Third, Condonation, or the complaintant's forgiveness of the acts complained of on conditions performed by the defendant;

Fourth, Recrimination, or a cause for divorce against the complaintant;

Fifth, Delay or limitation, or that the complainant has suffered a reasonable limited time to elapse since the commission of the acts complained of.

These defenses existed under the old ecclesiastical law and are recognized in the divorce courts of the United States independently of statute. The Court of Appeals in New York has held that the defendant may set up a counter claim of cruelty and inhuman treatment, as against a complaint alleging adultery, also that the defendant may allege adultery by way of counter claim where the divorce is sued for on the grounds of cruel and inhuman treatment. This is an unusual

doctrine.

A divorce granted under the laws and by the constitutional authorities of the government, or the state where the parties are domiciled and where the marriage contract was entered into, is valid and binding everywhere. *Cheever vs Willson* 9 Wal 108. As to this proposition there is no question, and it arises out of the constitutional provision that each state shall give faith to the acts, records and judicial proceedings of the several other states, but this does not go so far as to mean that any divorce one state chooses to grant must be held valid in all states; it only applies when the court of the state had jurisdiction over the subject matter, and the parties as well. A divorce to have effect everywhere, must be one where the court has had jurisdiction of the parties and their marriage status. For instance, if the parties to a marriage go to a foreign state and one applies for a divorce and the other makes only a pretence of defense, the judgement would not be binding at the domicile of the parties. In such an instance it is only the community where the parties

live that have an interest in their status, and that is the only jurisdiction that can divorce them.

Hanover vs Turner 14 Mass 227, "If a citizen of this country removes into another state for the purpose of obtaining divorce from his wife on a ground which would not justify a divorce, in this state a divorce so decreed is wholly void in this common wealth."

This doctrine is differently expressed in 127 New York 413, wherein the court says, "The courts of the United States and those of most of the several states including New York and New Jersey, hold a divorce to be valid so far as it effects marital status of the plaintiff, which is granted by the courts of a state pursuant to its statutes to one of its resident citizens in an action brought by such citizen, against a citizen resident in another state, though the defendant neither appears in the action nor is personally served with process in the state wherein the divorce is granted." Williams vs Williams 130 N. Y. 199.

In Delaware, Maine, and Massachusetts, it is provided that when an inhabitant of the state shall go

into any other jurisdiction to obtain a divorce for any cause occurring within the state, or if a cause which would not authorize a divorce by the laws of the state, a divorce so obtained shall be of no effect in the state. In all other cases, a divorce decreed in any other state or country according to the laws thereof by a court having jurisdiction of the case and of the parties, is valid in said states.

In Indiana it is declared without qualification, "A divorce decreed in any other state by a court having jurisdiction thereof, shall have full effect in this state."

We do not find much difference in the statutes as to the causes of divorce, but we do find courts in the jurisdictions ruling as to whether specified acts are cruelty, or whether there is a desertion or not, and this is one great factor that has produced such inharmonious results. Some of the most ridiculous causes are sustained by the courts under the head of desertion. In the report of the Commissioner of Labor 1889, which contains an investigation made by that department into

the marriage and divorce legislation of the United States, there are a number of examples given where the court has granted a divorce such as:

"Because husband entered the navy."

"Because defendant treats this plaintiff with great and unmerited contempt having said to her, he did not care whether she left him or not."

"During our whole married life my husband has never offered to take me out riding; this has been a source of great mental suffering and injury."

"Defendant uses such abusive language that it makes the plaintiff sick and unable to attend to domestic duties."

"Defendant violently upbraided plaintiff and said to him 'You are no man at all,' thus causing him mental suffering and anguish."

"Defendant Said to plaintiff, 'I care more for ----'s little finger than for your whole body,' thereby causing this plaintiff mental anguish and suffering."

"Defendant has been guilty of extreme cruelty in that she has habitually neglected and refused to cook

for plaintiff and has several times spat in his face."

"Defendant made plaintiff climb a ladder to drive nails in the wood shed, not liking the way she drove them, he lassoed her, on coming down from the ladder tied her fast to the gate post, then stuck sticks and stones in her nose and eyes and ears, gouged his knuckles in her eyes, and said he wanted to see if she was Dutch. On untieing her he threw or shoved her into a nest of bees, all of which sorely grieved the plaintiff in body and mind." "

Thus the ruling of the courts as to just what constitutes cruelty, and just when desertion will be presumed and the different spaces of absence required by statute to constitute desertion, make the only material differences between the laws. This is one of the strongest argument for placing these matters in the jurisdiction of the United States courts. State courts will never be in harmony on this matter. This variance in the laws of the states as to just what constitutes cruelty and desertion gives rise to the greatest confusion.

A suit for divorce is a proceeding sui generis

partly in personam and partly in rem. Rigley vs Rigley 127 N. Y., 127412, the court said " A suit for divorce though not strictly a proceeding in rem is of the nature of such a proceeding, or Quasi in Rem in so far as it effects the marital status of the parties, and as to the alimony cost, it is a proceeding in personam. Turner vs Turner 44 Ala 437; Harding vs Allen 9 Me 140.

We have seen that the position of a husband and wife ~~as~~ such towards the community in which they live is called their status. An action brought by either party to change this status is an action in rem and is to be distinguished from an action against the parties; this change would be an action in personam. A judgment in personam is one decreeing alimony costs and probably the custody of children. Every state has the unqualified right to control the domestic status of those who reside therein. Strader vs Graham 10 Howard 829. Now if husband and wife yhave domiciles in separate states there are two res. Each state would have exclusive jurisdiction of the status of its own citizen. "Jurisdiction to pass decree in rem exists over anything

fixed in the state." Story Conf. L. sec. 549--592.

Thus one gaining a residence in a state has a right to have the courts thereof declare his status and this right gives rise to a situation that is the greatest stain on the legislation of the United States. What an easy matter for a dissatisfied party to a marriage, who has no grounds for a divorce under the laws of his own domicile, to step into a state having less stringent rules, claim a residence and gain a divorce. It is done every day and is in direct violation of the law of the real domicile.

In such cases an action amounts to no more or less than an ex-parte application for divorce. The attempted service of process on the defendant without the jurisdiction, is a mere farce, the court compelling the complainant to publish a summons, and a few jurisdictions require a copy mailed to the defendant.

Presence or absence of the defendant is of no moment, and the court proceeds with the apology that it is merely declaring the status of one of its citizens. Very true, but is not the result to determine the ^{status of a} citizen of another

state also? Is not this court taking a right from a person without its jurisdiction, without due process of law? It would seem not from the decisions, but good common sense suggests that the custom is contrary to justice and in direct violation of the constitution of the United States. How does the situation of the party who is thus unknowingly divorced differ from one who is divorced after being heard? If it be a wife she is deprived of support while yet a wife. If the husband returns he may marry and has all right to cohabit with the second wife, while the first wife must proceed in court to obtain a regular divorce from her husband before remarrying, otherwise she is guilty of adultery and bigamy. The People vs Baker 76 N. Y., 78. "The indictment charged, and the evidence on the part of the prosecution tended to show, that in the year 1871 defendant in error was married to one Sallie West, in the State of Ohio, and that in November, 1874, while she was still living, he married one Eunice Nelson, at Auburn, this State.

The defendant in error offered in evidence an

exemplified copy of the record of a judgement in the Court of Common Pleas, of the County of Seneca, State of Ohio, in an action by said Sallie against him for divorce. The record showed proof of service of process on defendant by publication; there was no personal appearance by him. The judgement purported to dissolve the marriage on the ground of 'gross neglect of duty,' on his part". The defendant was held to be guilty of bigamy and was imprisoned for the crime. This opinion has cost considerable comment, but has been upheld by several of the states. In Jackson vs Jackson 1 Jhs 424, the wife obtained ex-party divorce in Vermont, on the ground of ill treatment and severe temper, from her husband then a resident of New York. Then she returned to New York, ~~bro~~ brought action on the judgement obtained in Vermont for alimony adjudged her by the court in Vermont. The court held that the domicile of the party was not changed by her going and residing in Vermont, that such conduct was an ^einvasion of the law of the state which does not allow a divorce except for adultery, and that no action could be maintained on such a decree.

A nice argument arises in this connection as to the domicile of the wife when the husband has gone to another state. The old common law rule says that the husband could fix the domicile of the wife, that his domicile was hers; he might move as often as he pleased and his wife must follow. Whether she actually followed, or not, did not matter since her domicile necessarily followed. This is still the law, the domicile of the husband is the domicile of the wife. The courts get around this by saying the identity of the wife's domicile with her husband's is, after all, but a legal fiction. Hunt vs Hunt 72 N. Y. 217; Colvin vs Reed 55 Pa., St., 375. the wronged wife who is without fault may proceed against her husband where she is in fact, domiciled. California, Dakota, Idaho, Nebraska, Kansas, New York, Ohio and Wyoming provide by statute in effect that if a married woman dwells in a state at the time of bringing an action for divorce, she is declared a resident thereof for the purpose of such action regardless of her husband's residence. The court in Hunt vs Hunt 72 N. Y. 218 said, "The domicile of a

husband is prima facie with that of a wife, she may acquire a separate domicile whenever it is necessary for her to do so, as where the parties are living apart under a judicial decree of separation, or when the conduct of the husband has been such as to entitle her to a divorce absolute or limited by the necessity of its exercise." Burlen vs Shannon 115 Mass. 438. Stuart M and D 221. Cheever vs Wilson 9 Wal 103.

But if she is in fault, her domicile remains his and the court of his domicile may dissolve the marriage status as to both of them.

There is some justice in the rule which permits a state to divorce one party and not the other, for instance, if the husband deserts the wife and goes into another state solely to procure a divorce, his divorce when obtained will not operate to defeat the rights of the wife, if the court had no jurisdiction over her. Ex-party divorces ~~and~~ those in which absentee may be served with process by publication are advantageous only to secure rights of boni fide residence in the state in which both parties are domiciled and continues in good

faith to reside until one of the parties absents himself not for the purpose of obtaining a new residence, but for the sole purpose of obtaining a divorce.

Since ex-party divorces are ~~not~~ in some cases, just and proper, it would not do for a state to refuse to entertain them, but each state can adopt statutes that will prevent abuse and imposition in such suits. New York and Vermont are the only states which have statutes protecting the courts in such respects.

New York.-- "In an action for absolute divorce, both parties must have been residents of the state when the offense was committed; or must have been married in the state; or the plaintiff must have been a resident when the offence was committed, and also when the action was commenced; or the offence must have been committed within the state, and the paintiff must be a resident of the state when the action is commenced. In actions for limited divorce, both parties must be residents when the action is commenced; or must have been married in the state; or, if married out of the state, they must have become residents thereof and continued to be such

at least one year, and the plaintiff must be a resident when the action is commenced."

Vermont.-- "No divorce shall be decreed for any cause if the parties never lived together as husband and wife in this state; nor for a cause which accrued in another state or country unless the parties, before such cause accrued, ~~ih~~lived together as husband and wife in this state ; nor for a cause which accrued in another state or country, unless one of the parties then lived in this state."

The statute provides in Dakota that the plaintiff must have resided in the state ninty (90) days before institution of suit. This being the shortest residence actually required in any jurisdiction, the state has become famous for its divorce colonies from the East. Statutes in Arizona, Idaho, Nebraska, nevada, New Mexico and Wyoming require a boni fide residence of six months before suit. Other states vary from one to five years. It is noticed that the Western states and territories have the most lax laws as to resident qualifications.

The danger which may arise under a lax law especially so far as residence and causes are concerned, is well illustrated by the divorce legislation in Utah, as will be seen by its history. The first divorce law of Utah was passed by the legislature March 6, 1852. It vested the jurisdiction in all matters pertaining to divorces and alimony in the Probate Courts. This law of 1852 contained ^{two} glaring defects, the first regarding the residence of the parties seeking a divorce, and the second relative to the insufficiency of the alleged causes of action. The complainant in a divorce need not have been a boni fide resident of the territory. The formal expression of an intention to become a resident was all that was required. The plea of a citizen of any part of the United States that he intended to become a citizen of Utah was entertained equally with that of a regularly domiciled resident. In general the grounds upon which a decree of divorce could be made were the same as in other parts of the Union, but it was enacted that when it could be made to appear to the satisfaction and conviction of the court that the parties

can not live together in peace and union, and that their welfare and happiness require a separation, a decree might be rendered. The probate courts of three counties became almost literally bureaus of divorce. They were the dumping ground for fraudulent suits from the East. The returns from one county show a total of 691 divorce decrees during twenty years. Of these 619 cases, less than 75 belonged to the county itself. The remaining 600 and more were from all parts of the country, and came to this particular court through attorneys in Chicago, Cincinnati, and New York, whose offices were so flooded with business for the the Utah courts that they made use of printed forms for both petition and decree. The petition had a blank space for names, dates, and localities, and the recital of special grievances, while the items of a general nature were in print as, for instance, "Plaintiff wishes to become a resident of Utah;" but is so situated that he cannot at present carry his desire in this respect into effect. "The parties can not live together in peace and union, and their welfare and happiness require a

separation." In order to avoid suspicion, the county newspaper in which publication of notice was ordered to be made published a special edition, containing one or more sheets of notices of suits pending and summoning the defendant to appear. This special edition, it is needless to remark, never got into circulation in the community.

The divorce laws of this state were amended in 1878, providing that plaintiff must have resided one year in state before institution of suit. By the Edmunds -- Tucker law, which went into effect in 1887, the jurisdiction in divorce cases was removed from the probate courts in Utah and vested in the United States district courts.