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Nathan Greene

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The Enforcement of a Foreign Divorce Decree in New York

NATHAN GREENE*

When will a foreign divorce decree be enforced in New York? "It is not possible to name any question in our law to exceed the present one in importance." New York has answered the question after a fashion; but the apparent inconsistencies and confusion to be found in the cases, especially in the light of several recent decisions, and a startling departure from two universally accepted dogmas of the Conflict of Laws necessitate a re-examination of the reports.

While this is essentially a problem in the Conflict of Laws, in our country it has become identified with Constitutional Law. But as a problem in Constitutional Law it has been adequately dealt with.

*Of the Bar of the City of New York.

1This word is used to describe the decree of a sister-state as well as that of a foreign nation.

2Bishop—Marriage, Divorce and Separation (1891), Sec. 158, hereafter referred to as Bishop (1891).


When a judgment or a decree of a sister-state is attacked directly or collaterally in a court of one of the United States, a federal question may conceivably be raised in one of two ways. First, if the foreign judgment or decree is given effect, an appeal may be taken to the Supreme Court of the United States on the basis of the fourteenth amendment, i.e., that "life, liberty or property" has been taken without due process of law. Second, if the foreign judgment or decree is denied effect, an appeal may be taken on the basis of the "full faith and credit" clause (Art. IV. Sec. 1) and the Congressional Act passed in pursuance thereof—"and the said records and judicial proceedings authenticated as aforesaid shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the state from whence the said records are or shall be taken." 1 U. S. Stat-at-Large, p. 122 c. 11.

It was upon the latter ground that Haddock v. Haddock (see note 3 supra) came to the Supreme Court of the United States. New York had refused to give full faith and credit to a Connecticut decree of divorce. The Supreme Court held that New York might constitutionally decline to respect the Connecticut decree that was based only upon constructive service of a non-resident libellee, when Connecticut was never the matrimonial domicile. The court also held that the divorce was nevertheless effective in Connecticut. The Constitutional Law arguments that have been advanced against this decision are these: 1. It is suicidal to say that the decree has local effect and yet that it need not be respected in a sister-state. It has always been assumed that there is no distinction between the
This study is a critical inquiry into the exact status of the New York law, not in the light of what this state must do by virtue of a constitutional compulsion, but in the light of what this state should do by virtue of sound Conflict of Laws doctrine.

Let us isolate our problem.

New York will respect a foreign decree as binding upon both spouses:

1. Where both spouses were legally domiciled in the state of requirements for a divorce locally valid and one valid everywhere. Maynard v. Hill 125 U. S. 190 (1881); Cheever v. Wilson 9 Wall. 108 (1869); Atherton v. Atherton 181 U. S. 155 (1901). But see Bishop (1891) Vol. 2, Sec. 5. 2. It is a violation of the fourteenth amendment to hold that a state has power or jurisdiction to grant a divorce unless it is such a divorce that considered on the side of state jurisdiction only, each state must respect and enforce. But see Minor, Conflict of Laws p. 192 note 2. Assuredly, this comment of Bishop's can be taken to express only a "pious hope." "Happily, to prevent conflicts in jurisdiction and to prevent parties from being married persons in one state and single in another, the Constitution of the United States has made this question a federal one, forbidding the states to deal with the subject otherwise than after these principles. So that real conflicts in divorce law are impossible." Bishop (1891) Vol. 2, Sec. 190.

The full faith and credit clause of the constitution of the United States (Article 4, Section 1) does not command us to accord recognition to a judgment so procured (Haddock v. Haddock, 201 U. S. 562). The only question is whether comity or public policy, or to put it differently, our own interpretation of the conflict of laws, should prompt us to concede a recognition that we are at liberty to refuse." Cardozo, J. in Dean v. Dean 241 N.Y. 240, 243, (November 24, 1925).

It is unfortunate that Mr. Justice Gray's original view of the meaning of that much abused word, "Comity" (Hilton v. Guyot 159 U. S. 113, 1894) has so thoroughly permeated the New York court. Some sparkling examples may be found in Gould v. Gould 235 N. Y. 14 (1923). "Whether or not the operation of a foreign decree of divorce in a given case will contravene the policy of . . . the state is exclusively for its courts to determine. They are the final judges of the occasions on which the exercise of comity will or will not make for justice and morality" (p. 25). Again, "Even though it be assumed that we are not required because of the absence of domicile to give effect to their judgments, we are not prohibited from doing so where recognition in conformity to the principle of comity would not offend our public policy" (p. 29). Imagine a court saying, "Even though . . . we are not required because of the absence of consideration to give effect to this contract, we are not prohibited from doing so where recognition would not offend public policy." No, in the Law of Conflicts as in the Law of Contracts, what the court is not required to do, it cannot do. Of course, the sovereign may change his Conflict of Laws; just as he may change his Law of Contracts or Property. But it is a non sequitur to say that therefore, the courts may. The subject would lose all semblance of predicable and uniformity of application—the essence of law—and our inquiry would be reduced to guess-work, pure and simple. Fuller, C. J. in his dissent to Hilton v. Guyot, 159 U. S. 113 at p. 29, put it this way: "The application of the doctrine of res adjudicata does not rest in discretion; and it is for the government and not its courts to adopt the principle of retorsion if deemed desirable or necessary." Why shall the courts in this branch of the law have a freedom "that would be quite unthinkable in any other branch of the law to-day?" Isaacs, 38 Harv. L. Rev. 128; Lorenzen, 33 Yale L. Jour. 736 apparently approves of the Gray thesis. But see a review of Lorenzen, Cases on the Conflict of Laws 2d ed. by Prof. Isaacs in 38 Harv. L. Rev. 125; Beale, Treatise on the Conflict of Laws, Sec. 71; Beale, Summary of the Conflict of Laws, Sec. 16.
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2. Where only the libellant-spouse was domiciled in the state of forum and the libellee was served with process in that state or appeared in the action.

Where the libellant-spouse alone was domiciled in the foreign state and only constructive service was had upon the libellee-spouse who did not appear to defend, then New York will or will not respect the foreign decree depending upon extraneous circumstances. The extraneous circumstances constitute the object of our study.

II

Gould v. Gould was an action for absolute divorce upon the usual statutory ground. Defendant's answer, for a separate affirmative defense, set up a former divorce decree granted to him by a competent French court. The New York court stated the facts as to the French divorce to be these. "The legal domicile of both parties in 1913 was the state of New York. Evidently the defendant intended at all times to continue to remain a citizen of this state and eventually to dispose of his estate under the law of the state relating to the succession to his property. Nevertheless, he became a resident of France. . . . Assuming that defendant could have but one domicile, he was . . . privileged, as he did, to establish a residence in France where the contract of marriage was being performed. . . . plaintiff was personally served with process and contested so far as able to do so in the courts of France the action brought against her. . . . Under the circumstances of this case, the policy of this state is not offended by the recognition of the judgments of the courts of France."10

This case must be taken as a holding that any state may grant a valid decree of divorce if it has personal jurisdiction over the parties.11 Counsel for the appellant carefully argued that the marital status of a person can be determined only by the state wherein the person is domiciled.12 The court considered this argument12, and flatly re-

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7Gould v. Gould 235 N. Y. 14 (1923); 36 Harv. L. Rev. 880; 23 Col. L. Rev. 782.
8Ibid., p. 29.
10Ibid., p. 29.
11The court drew a distinction between residence and domicile. But it has always been held that for purposes of divorce actions, residence means domicile, i. e., residence animo manendi. Vischer v. Vischer 12 Barb. 640 (1851); DeMeli v. DeMeli 120 N. Y. 485 (1890); Winston v. Winston 165 N. Y. 553 (1901); 16 Harv. L. Rev. 448; 12 L. R. A. (N.S.) 1100; 28 L.R.A. (N.S.) 992; L. R. A. 1915D 852. See note (45) infra and also an article "Validity in the United States of French Divorce to Americans," American Bar Association Journal, April 1922, p. 223.
12235 N. Y. at p. 16.
13Ibid., p. 28.
The opinion did not cite a single authority or attempt to distinguish voluminous authorities presented by counsel for the appellant on this point. \(^{15}\) Why did the court find its decision so easy? A search through the line of New York cases may give us more than a clue. But before that,—let us understand our premises.

**III**

"Marriage is the civil status of one man and one woman legally united for life with the rights and duties which for the establishment of the family and the multiplication and education of the species are, or from time to time may thereafter be assigned by the law to matrimony." \(^{16}\)

"Marriage is not merely a contract but an international institution of Christendom. It can not be dissolved by consent as can a contract." \(^{17}\)

"Marriage... being the all in all without which the state could not exist, it is the very highest interest." \(^{18}\)

Conceding then that the marriage relationship is of interest to the state,—which of all possible states shall be the one to govern the creation of this relationship, its course, its incidents and its dissolution? Different answers have been ventured by different writers to the first three parts of this query. \(^{19}\) But the state that governs the dissolution of the marital status, at least in the Common Law, is universally designated to be that state where the family lives *animo manendi*, the place of legal domicile. \(^{20}\) Story, writing in 1834, concluded:

"Upon the whole the doctrine now firmly established in America upon the subject of divorce is that the law of the place of the actual bona fide domicil of the parties gives jurisdiction to the proper courts to decree a divorce for any cause allowed by the local law, without any reference to the laws of the place of the original marriage, or the laws of the place where the offence... was committed." \(^{21}\)

\(^{14}\)Ibid., p. 29.

\(^{16}\)Ibid., pp. 16, 17.

\(^{18}\)Bishop (1891) Vol. 1, Sec. 11.

\(^{21}\)Wharton, Conflict of Laws, Sec. 127. Also see Story 8th Ed., ch. 5.

\(^{20}\)Robertson, C. J. in Maguire v. Maguire, 7 Dana (Ky.) 181, (1838); Also see Ames, C. J. in Ditson v. Ditson, 4 R. I. 87 (1856).

\(^{11}\)Story 8th Ed., Sec. 113; Minor, Conflict of Laws Sec. 77; Goodrich, Jurisdiction to Annul a Marriage, 32 Harv. L. Rev. 806, 812; Cleveland, Status in the Common Law, 38 Harv. L. Rev. 1074, 1076.

\(^{27}\)The divorce of *a mensa et thoro* was an ancient subject of ecclesiastical jurisdiction in England, and the divorce *a vinculo* which the church did not grant at all, was a much later remedy granted by act of Parliament. In 1858, the Episcopal Jurisdiction in matrimonial causes was transferred to the crown, the name, "divorce *a mensa et thoro*" was changed to judicial separation and the proceeding for a divorce *a vinculo* was transferred from Parliament to a regular court.

Westlake, Private International Law, 5th Ed. p. 89. We are concerned here only with the divorce *a vinculo*.

\(^{11}\)Conflict of Laws, 8th Ed. Sec. 230a.
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And Bishop writing in 1891:

"So that of necessity, domicile gives the divorce jurisdiction—a conclusion inevitable in the framework of the law.22 . . . No court of a state wherein neither of the parties has a bona fide domicile has any jurisdiction over their marriage status.22

There can be no doubt that the New York courts had always subscribed to this fundamental dogma of the Conflict of Laws.24 And Gould v. Gould consequently becomes more enigmatical.25

We turn to the New York reports.

IV

Jackson v. Jackson,26 the earliest of the New York reports on the subject, was a case where the wife left her husband in New York, went to Vermont and there obtained a divorce upon constructive service of the husband on the ground of cruelty, sufficient by the Vermont law. The husband did not appear in the divorce action. The proceeding in New York however, did not involve the question of the validity of the Vermont decree of divorce, because it was an action on the Vermont decree for alimony.27 Now it is vital to observe that a decree for alimony, as any money judgment or decree directed against a person, is a personal liability. As such it must have been based upon personal jurisdiction of the defendant in order to be effectual even in the state where granted, and, a fortiori, in any other state.28 This proposition is palpably correct; but what stumps

22Vol. 2, Sec. 42.
23Ibid., Sec. 50. There are numerous other authorities. Beale, Summary, Sec. 39; 1 Wharton, 3d. Ed. 223; Dicey, 3d. Ed. (1922) Ch. 15, Rule 98; Minor, Sec. 84; Le Mesurier v. Le Mesurier, (1805) Appeal Cases, 517; Andrews v. Andrews 138 U. S. 14 (1903); 50 L. R. A. 142. For the Continental and South American Law, see Lorenzen, Cases on the Conflict of Laws, 2d. Ed. p. 695.
25Not so, however, if we recall this thought of Bishop's: "But what is thus known and accepted may be, and it sometimes is overlooked; so that we have a few exceptional cases wherein a particular one of these doctrines is, though not denied, simply not thought of, resulting in the miscarriage of justice. This over-looking of things—not denying a doctrine which should govern a case, but simply not thinking of it—is the principal source of the blemishes appearing in our adjudged law...." Vol. 2, Sec. 28.
261 Johns. (N. Y.), 424 (1806).
27The Vermont decree read, "that said Nancy do have and recover of the said Archibald $1500, for her alimony, of which she may have execution." The present action was brought to recover on this decree.
28Buchanan v. Rucker, 9 East, 192 (1808); Pennoyer v. Neff, 95 U.S. 714 (1877); Rigney v. Rigney, 127 N.Y. 408 (1891) reversed in 160 U.S. 531 on other grounds; Burch v. Burch, 102 N.Y. Supp. 305 (1907); Edwards v. Edson, 104 N.Y. Supp. 292 (1907) where it was said, "a judgment for alimony and costs cannot be awarded against a defendant in a divorce action where he was not served with summons and did not appear in the action."
the logical mind is how it can be deduced from Jackson v. Jackson that a foreign divorce is ineffectual if obtained only upon constructive service of the non-resident libellee. Yet this unwarranted inference was soon to be taken.

_Pawling v. Bird's Executors_ is the first indication of such a notion. The court, purely _obiter_, said that it was inclined to hold the foreign divorce valid in New York because "both the parties though domiciled in the state at the time of the divorce appeared and litigated the question of divorce in Connecticut."

But in _Borden v. Fitch_ the erroneous interpretation of the Jackson case was definitely taken. In an action for seduction, the question turned upon whether the defendant had been validly divorced from his first wife before he married the plaintiff's daughter. The defendant produced a divorce decree granted to him by the legislature of Vermont upon constructive service of his then wife who was at that time domiciled in Connecticut. The records do not disclose whether the libellant was at the time of the divorce proceeding, domiciled in Vermont. If he was not, then the court's rejection of the Vermont decree is explicable on the common law principles already suggested. But if he was domiciled in Vermont, then what is the _ratio decidendi_ that denied effect to the Vermont decree? The argument of winning counsel was adopted by the court almost _in toto_ and bears close analysis. It ran thus:

I. "The Vermont decree would not be valid and conclusive here if it were merely a judgment for the payment of money. . . ." citing _Jackson v. Jackson_ very properly, for . . . "... to bind a defendant by a judgment when he had not been personally summoned nor had notice of the proceeding would be contrary to the first principles of justice. _Buchanan v. Rucker_," 9 East 192.

II. "If then such a judgment in a sister-state is not conclusive in the case of property, _a fortiori_ it cannot be so, where

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13 Johns. (N. Y.), 192 (1816).
2In this case the defendants, as executors of the intestate, were sued in Connecticut on a debt incurred by the intestate's alleged wife. The defendants were never served with process in Connecticut. Yet the Connecticut court gave the plaintiff judgment by default. Then the plaintiff sought to enforce the Conn. judgment in New York. There were two defences: first, that the judgment was void because defendants were not served with process, and, second, that the intestate's wife had been effectually divorced from intestate before the debts were incurred. The first defence was the basis of the court's decision.
315 Johns. (N. Y.), 121 (1818).
4An adequate discussion of the validity of legislative divorces will be found in Maynard v. Hill, 125 U. S. 190, 205-208 (1888).
5The Connecticut legislature had given the wife a divorce from bed and board and "the privileges of a femme covert." It was assumed in this case that a married woman could get a separate domicile under certain circumstances. Compare the court's understanding in Jackson v. Jackson, "a wife could not acquire a domicile distinct from that of her husband."
615 Johns. (N. Y.), 121, 132-139 (1818).
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not only property, but the most important relation in life is concerned... The doctrine for which we contend, applies with equal if not greater force to cases of divorce... Not only reason and justice, but the authorities which have been cited, are in favor of its application.” And the only case cited is Jackson v. Jackson.

But the court was of a similar mind; and the case must be taken as a square holding that assimilates an action for divorce to an action for a money judgment. In the former as well as the latter, personal jurisdiction over the defendant is of the essence of valid judicial action.38

Perhaps this grave error has become too deeply embedded in the state’s decisional doctrine to be corrected judicially. But that it is an error cannot be emphasized too much. What is the nature of a decree of divorce? Is it like a money judgment or decree in that it imposes a personal liability upon the defendant? No, a divorce decree—considered aside from the alimony decree—imposes an obligation upon nobody. Nor is it in the nature of an injunction that is a personal restriction upon the defendant, that enjoins him for example, from claiming the incidents of the marital status. A divorce action is most properly considered as one in rem.38 And the decree, a tool unique to the Common Law, acts upon the marriage status to its destruction. It must follow that the court that seeks to dissolve the marriage need not have personal jurisdiction over the defendant, but jurisdiction over the res—the marriage status, is sufficient.37 Any form of substituted service reasonably calculated to come to the defendant’s attention is sufficient in an action in rem or quasi in rem.38

38The court said, “A judgment obtained in a sister-state against a person not being within the jurisdiction of the court, nor having been served with process to appear, nor having appeared to defend the suit, will be absolutely void. This principle must apply equally to divorce as to any other judgment.”
39“A judicial decision in rem is one which declares, defines or otherwise determines the status of a person, or of a thing, that is to say the jural relations of the person or thing to the world generally, and therefore is conclusive for or against everybody, as distinct from those decisions which only purport to determine the jural relations of the parties to one another and their personal rights and equities inter se, and which, therefore are commonly termed decisions in personam.” Bower, The Doctrine of Res Judicata. “The design (of a divorce) is to affect the marital relation, not to impose a general personal liability upon either party. Hence the proceedings partake of the nature of proceedings in rem... the res being the status.” Minor, Sec. 87.
37This view is treated in 18 Harv. L. Rev. 215. It is the great weight of American authority. See a collection of the cases in 19 C. J. 372, notes 9 and 10. Minor, Sec. 88-92.
38Pennoyer v. Neff, 95 U.S. 714, 734; Mr. Justice Brown’s dissent to Haddock v. Haddock, 201 U.S. at p. 614. Mr. Justice Gray in Atherton v. Atherton said, “The rule as to notice necessary to give full effect to a decree of divorce is different from that which is required in suits in personam.” So Beale, 19 Harv. L. Rev. 596. “The decree does not operate in personam and the jurisdiction required is merely a jurisdiction in rem. In order to satisfy the requirement of due process of law the absent party must be given an opportunity to be heard; but jurisdiction over him is not necessary.” See Ditson v. Ditson 4 R.I. 87 (1856) Cooley, Consti-
The implications of the doctrine of *Borden v. Fitch* are disastrous to the basic thought that "each state . . . has the right to adjudge and declare the marital status of those residing and domiciled within it." For is not that state impotent to declare the marital status of its citizen when it cannot get personal jurisdiction over the non-resident libellee? Nor is it to be imagined that such a doctrine makes divorces harder to obtain. It does make meritorious divorces harder to obtain; but it gives an easy road to divorce where the parties are agreed in desiring it, since the libellee by appearing and suffering default can render the proceedings valid—thus giving legal sanction to collusive divorces.

It is noteworthy that at this stage of the genesis of the New York law, the requisite of domicile as a *necessary* basis for jurisdiction to give divorce was still enforced. Personal jurisdiction of the libellee was only an *additional* requirement. And that it so continued to be understood throughout the whole line of subsequent cases was made plain by Mr. Justice White in the court's opinion in *Haddock v. Haddock*. He said:

". . . as distinguished from legal domicile, mere residence within a particular State of the plaintiff in a divorce cause brought in a court of such State is not sufficient to confer jurisdiction upon such court to dissolve the marriage relation existing between the plaintiff and a non-resident defendant."
Indeed the next remarkable turn in the law may be directly traced to an emphasis upon the domicile requirement. But, as we shall see, it was a perverted emphasis.

It has been deduced from the nature of marriage and divorce that divorce is a proceeding in rem. The court acts upon the marriage status, which is the res, and destroys it. Consequently, it is a condition precedent to effective judicial action, that the res be before the court. As the marriage status is, however, intangible, and has no place in space, where can we say that the res is located? We have already seen that if both parties to the relationship are domiciled within the state, the res may be said to be within that state. If the parties have separate domiciles in different states, then where is the res—with the husband, with the wife, with neither or with both?

People v. Baker is worth careful study. The wife left the husband in New York and went to Ohio where she became domiciled. The wife obtained a divorce in Ohio upon constructive service of the husband. The husband in New York, believing himself free, married a second time. He was held guilty of bigamy. The court reasoned this way:

"Now, if the matrimonial relation of one party is a res in one State, is not the matrimonial relation of the other party a res in another State? . . . has not the State, in which the other party is domiciled, also the equal right to determine his status . . . and to declare by law what may change it and what shall not change it?" 47

Both of these queries are undoubtedly correct, and have been insisted upon as correct throughout this study. But the court took this absurd non-sequitur—therefore, though the Ohio court has effectually dissolved the marriage bond as to the wife and she is now a single woman, we nevertheless will not dissolve the bond as to the husband and he remains a married man. 47 New York gave us a new conception of a man who was married but had no wife. Naturally such a decision was harshly criticized. 48


48 It is obvious that the view of this case is a decided modification of the doctrine of Borden v. Fitch. There the divorce was held an entire nullity in New York, even as to the status of the libellant.

49 Bishop, Sec. 181–185 (1891). In Dunham v. Dunham, 162 Ill. 589 (1896), 44 N. E. 841, Carter, J. said of the instant case: "The consequence was that the wife was, and continued to be, a single woman (even on removing to New York); 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. . . . 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."
The marriage status though present where either party is domiciled is, after all, only one res and need be destroyed only once to be completely destroyed. The first state having acted and dissolved the bond, there is nothing left for the other state to act upon. Of course, New York as always retains the sovereign power to determine the status of its own citizen; but what must New York say as to the status of a man who no longer has a wife? Does not this state call a man without a wife a single man? If it insists that such a man may nevertheless be a married man, it is the only civilized community that does so.

Again, if New York insists that Ohio can only affect the status of Ohio citizens, how can Ohio enlarge its power to include citizens of other states by merely finding them within the state? It seems inconceivable that Ohio can adjudge the status of all people no matter where they live as long as they are served with process while they are in Ohio. How is it that New York, so jealous of its control over its own citizens, surrenders so easily? Even Judge Folger who wrote the opinion felt the need of an apology for it. He said:

“It is not for the courts to disregard general and essential principles, so as to give palliation. Indeed, it is better, by an adherence to the policy and law of our own jurisdiction, to make the

49Professor Beale pointed this out long ago in a decisive answer to the dilemma put by White, J. in Haddock v. Haddock. White had suggested that the doctrine that jurisdiction over the marriage status is a jurisdiction in rem is self-destructive because if Connecticut had jurisdiction over the marriage and could dissolve it, this amounts to preventing New York, equally a state of domicile from exercising the same jurisdiction; so that giving jurisdiction to a state of domicile results in taking away the same jurisdiction from a state of domicile. Professor Beale said; “Such a criticism ignores the real meaning of the word jurisdiction. Jurisdiction does not involve the power of continuing rights in existence, but of creating rights; its operation is positive, not negative. Both New York and Connecticut, having jurisdiction over the status of marriage, can affect it by dissolving it; but once it has become dissolved, nothing is left for either to affect. The same criticism might be brought against allowing the status of a woman in New York to be affected by a marriage in Connecticut.”


80The court’s further argument that otherwise we should have the “inharmonious situation that the state in which the courts first act shall extend its laws and policies beyond its borders, and bind or loose the citizens of other sovereigns,” was given a conclusive reply in the dissent of Mr. Justice Brown in the Haddock case,—“Granting this (the race of diligence argument) to be the case, does not every plea of res adjudicata presuppose a prior judgment, and is it a defense to such plea that such judgment was obtained by superiority in a race of diligence? The whole doctrine, is founded, if not upon the doctrine of superior diligence, at least upon the theory of a prior judgment which fixes irrevocably the rights of the parties whenever and wherever their rights may come in question.” 201 U. S. pp. 616–617 (1905).

81A similar argument was suggested by Professor Schofield in 1 Ill. L. Rev. 219, 234–236.

8276 N. Y. 78, 87 (1879).
clash the more and the earlier known and felt, so that the sooner
may there be an authoritative determination of the conflict. 116

It is not strange that this version of the New York law was not
long-lived. 4 Later cases ignored the true ratio decidendi of the
Baker case and used it as an authority that a divorce so obtained was
totally ineffectual in New York, that is, that even the non-resident
libellant would be considered a married person in this state. 55

It is important to get a definite statement of the law at this point.
If the foreign divorce was to be respected in New York, the pro-
ponent had to show that at least one of the parties was domiciled in
the state that gave the decree and that there was personal jurisdic-
tion over the other. 56

Here arose the case of Atherton v. Atherton.57 The wife had left
the husband in Kentucky and moved to New York. The husband,
remaining in Kentucky, obtained a divorce on constructive service of
the wife. When the divorce was questioned in New York, the local

116 A similar sentiment was expressed In Re Caltebellotta's Will, 183 A.D. 753,
171 N. Y. Supp. 82 (1918), "...if the principle which has been established in New
York is the result of the best thought of the judiciary and the legislature, the
inconvenience and disturbing elements that may result are not too great a price
to pay in order to maintain the principle." In this connection, it may be the part
of wisdom to recall a bit from Sir William Erle. "I have known judges, bred in
the world of legal studies, who delighted in nothing so much as in a strong decision.
Now a strong decision is a decision opposed to common sense and common con-
venience... A great part of the law made by judges consists of strong decisions,
ad as one strong decision is a precedent for another a little stronger, the law at
last on some matters, becomes such a nuisance that equity intervenes or an act
of Parliament must be passed to sweep the whole away." Sir William Erle, Chief
Justice of the Common Pleas, 1859-1866, ex. rel. Senior, Conversations with
Distinguished Persons (1880 Ed.) 314. Pound, Interpretations of Legal History,
p. 44.

57 But People v. Baker was followed in O'Dea v. O'Dea, 101 N. Y. 23 (1885).
58 DeMeli v. DeMeli, 120 N. Y. 485 (1890); Rigney v. Rigney, 127 N. Y. 408,
413 (1891); Williams v. Williams, 130 N. Y. 193 (1891). In Atherton v. Atherton,
Gray J. said, "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." 181 U. S. 135, 162 (1901). Compare Matter of Kimball, 135 N. Y. 62 (1898);
People v. Baker was, of course, definitely ignored in Haddock v. Haddock. See
19 Harv. L. Rev. 586, 590. It is surprising, therefore, to note the language of
Judge Lehman in his dissenting opinion in Dean v. Dean, 241 N. Y. at pp. 247,
248 (1925). "I recognize the anomaly involved in a rule that marital status may
be so 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 rule set forth in People v. Baker has been consistently followed by our
Courts."

59 Personal jurisdiction may be acquired in one of three ways: 1. By service of
summons within the state. 2. By actual appearance. 3. By constructive service
if the defendant is domiciled within the state. Hunt v. Hunt, 72 N.Y. 217 (1878);
court found as a fact that the wife was justified in leaving her Kentucky home and therefore she could acquire a domicile in New York. It was then a foregone conclusion that this state would not respect the foreign decree, since Kentucky had not gotten personal jurisdiction over the wife. This is what the Appellate Division held. But a persistent defendant carried the case to the Supreme Court of the United States, contending that the New York decision violated the Federal Constitution, because it did not give full faith and credit to the judgment of a sister-state. Strangely enough the Supreme Court held that the New York Court of Appeals was wrong and that this defendant was right.

It would have seemed then that the indigenous Conflict of Laws doctrine in New York was definitely put in the corrective braces of the Federal Constitution. For had it not been decided that a decree of divorce granted by the state of domicile of only one of the spouses and upon constructive service of the non-resident spouse was entitled to full faith and credit? One judge was soon heard to say: "That the resulting anomaly under New York decisions of a wife without a husband, while the husband still retains the wife, will not be sustained in the court of final appeal is foreshadowed in the Atherton Case, where the court says, 'The marriage tie, when thus severed as to one party, ceases to bind either'."

Winston v. Winston preceded the Atherton decision by several months but there was no indication of which way the wind was blowing.

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19 See n. 4, supra.
20 This decision does not mean that a finding of a jurisdictional fact by the Kentucky court is res adjudicata upon the New York court; but rather that the question whether the wife acquired a separate domicile is not a jurisdictional fact; that is, that Kentucky need only be the legal domicile of one of the spouses and the last legal domicile of both together in order to give a perfectly valid divorce. The doctrine of res adjudicata it is pertinent to remark, has this obvious limitation,—that the findings of fact upon which jurisdiction to try the case at all depends, cannot be conclusive upon any other court before whom the question arises. No court can lift itself by its own bootstraps. Beale. Summary of Conflict of Laws, Sec. 84; Beale, Cases on the Conflict of Laws, Vol. I, p. 454, note; Overby v. Gordon, 177 U. S. 214 (1899); Andrews v. Andrews, 188 U.S. 14 (1903); Bower, Doctrine of Res Judicata, Sec. 121, 229. Kerr v. Kerr, 41 N. Y. 272 (1869); Hoffman v. Hoffman, 46 N.Y. 30 (1872); Munson v. Munson, 14 N.Y. Supp. 692 (1891); Winston v. Winston, 165 N.Y. 553 (1901); Knill v. Knill, 195 N.Y. Supp. 398 (1922). But see Kinnier v. Kinnier, 45 N.Y. 555 (1877); Tiedemann v. Tiedemann, 172 App. Div. 819, 158 N.Y. Supp. 851, aff'd 225 N.Y. 709 (1919). But see Lacey v. Lacey, 77 N.Y. Supp. 235, 240 (1902).
31 Winston v. Winston, 165 N. Y. 235 (1901). In this case a divorce obtained upon constructive service by the wife in Oklahoma was rejected in New York. The court cited Atherton v. Atherton, 155 N. Y. 129 (1901). But there was a finding of the referee, affirmed by the Appellate Division that the wife had never been a bona fide resident of Oklahoma. See 15 Harv. L. Rev. 66.
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Starbuck v. Starbuck, the next year, respected a foreign decree but not on the basis of Atherton v. Atherton. At about the same time, the Appellate Division had before it this case. The husband had left his wife in New York and settled down in Connecticut. There he sued for divorce on the ground of his wife’s desertion. Constructive service only was had upon the wife who was in New York and the Connecticut court gave the husband the decree of divorce. In the present action of divorce brought by the wife, the husband sought to set up the Connecticut decree as res adjudicata. The report of the referee had rejected the foreign decree; the Appellate Division affirmed this without opinion, the Court of Appeals affirmed without an opinion. And finally the Supreme Court of the United States affirmed—but this time there was a very long opinion, two dissenting opinions and four dissenting justices.

Whether or no Haddock v. Haddock is good Constitutional Law is beyond the scope of this paper. We are concerned only with the state of the New York law after that case. Was Atherton v. Atherton reversed? Mr. Justice White said no. He believed that the decision in that case “was expressly placed upon the ground of matrimonial domicil.” He quoted this passage from Mr. Justice Gray’s opinion:

“This case does not involve the validity of a divorce granted, on constructive service, by the court of a State in which only one of the parties ever had a domicil; nor the question to what extent the good faith of the domicil may be afterwards inquired into. In this case the divorce in Kentucky was by the court of the State which had always been the undoubted domicil of the husband, and which was the only matrimonial domicil of the husband and wife.”

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173 N. Y. 503 (1903). In this case, the libellant herself sought to attack the decree in New York in order to obtain a dower interest in her husband’s realty. But the court held she was estopped to attack the decree she had herself procured. This doctrine will be discussed later.


Ibid, 178 N. Y. 557 (1904).

Ibid, 201 U. S. 562 (1906). The opinion for the court was written by Mr. Justices White. Mr. Justice Brown, with whom were the Justices Harlan, Brewer and Holmes wrote one dissenting opinion. Mr. Justice Holmes wrote a supplementary dissent.

See n. 4, supra. “The result of Haddock v. Haddock is singular. The Supreme Court determines solely that the New York court had not acted unconstitutionally. It does not, of course, vacate the Connecticut divorce and second marriage. Thus the Connecticut man has a lawful wife in New York as declared by both the Federal and the New York courts, while in Connecticut she is not his lawful wife but another woman is.” Ashley, Conflict of Law upon Marriage and Divorce, 15 Yale L. Jour. 387, 391.

Supra, n. 67 at p. 584. But Mr. Justice Brown pointed out that while the Atherton case was confined to a divorce obtained at the matrimonial domicile, nevertheless the cases cited by Gray “relate to divorces obtained in a state which was the domicile only of the complaining party and are practically the same as those cited by him in his opinion as Chief Justice of Massachusetts in Burlen v.
The point of distinction then between the **Atherton** case and the **Haddock** case is that, in the former, Kentucky was the matrimonial domicile, and in the latter, Connecticut was never the matrimonial domicile.70 And our question is—after having said that, have we said anything? Mr. Justice Holmes did not think so.

"I can see no ground for giving a less effect to the decree when the husband changes his domicil after the separation has taken place... The only reason which I have heard suggested... is that if he is deserted his power over the matrimonial domicil remains so that the domicil of the wife accompanies him wherever he goes, whereas if he is the deserter he has no such power... by the same principle, if he deserts her in the matrimonial domicil, he is equally powerless to keep her domicil there, if she moves to another State... I also repeat and emphasize that if the finding of a second court, contrary to the decree, that the husband was the deserter, destroys the jurisdiction in the later acquired domicil because the domicil of the wife does not follow his, the same fact ought to destroy the jurisdiction in the matrimonial domicil if in consequence of her husband's conduct the wife has left the state. But **Atherton v. Atherton** decides it does not.71

Yet the courts of New York took the magic words 'matrimonial domicile' to their hearts. Whenever a foreign decree that had been obtained at the last matrimonial domicile upon constructive service of the non-resident libellee was questioned, the court would respect the decree.72 But if the forum had not been the matrimonial domicile, then such a decree would be treated as a nullity.73 And so the law of New York stands to-day.

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Shannon, 115 Mass. 438 (1874). In reading the two cases together one is strongly impressed with the idea that in the **Atherton** case he had the former case in mind, and gave it such approval as the facts in the latter case would warrant." *Ibid*, pp. 613, 614.

70 'Such, then, is the sole modification of the New York rule affected by **Atherton v. Atherton**. Where the foreign state in which the decree had been obtained was the matrimonial domicile of the parties, then, even if the defendant is a resident of this state and has only been served by publication, the decree must be held valid here.' **Callahan v. Callahan**, 121 N.Y. Supp. 39, 41 (1909).

71 *Supra*, n. 67, at pp. 629-631.


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It thus becomes a vital matter to the New York lawyer to understand exactly what is meant by the term 'matrimonial domicile' as used by the courts of New York. To that end let us examine the definition and validity of the concept.

VI

Numerous meanings have been hung upon the words 'matrimonial domicile.' At one time several Scotch decisions had defined the expression as 'that place of residence of the married pair for the time.' But this was definitely repudiated in the LeMesurier case. Another suggestion found in the cases and more recently advanced again is, 'the residence where... they live... or ought to live and co-habit as man and wife.' It is a third view that is adopted in the Supreme Court cases and in the New York decisions, namely, that place where the spouses have their common domicile. And where the spouses have definitely separated, the matrimonial domicile is that place where they last lived together as man and wife with the intent of making that place their home.

It is a futile business—quarreling with definitions. But when the magician begins to draw out of an apparently empty hat, animals


Goodrich, Matrimonial Domicile 27 Yale L. Jour. 49, 52; 2 CORNELL LAW QUARTERLY, 335; 5 CORNELL LAW QUARTERLY 174.


Thompson v. Thompson, 226 U.S. 551 (1913); Callahan v. Callahan, 121, N.Y. Supp. 39 (1909), Andrews, J. said (p. 41), "And that (matrimonial domicil) in view of the circumstances of the case, must mean the last joint domicile of the parties before Mrs. Atherton left her husband and acquired a separate domicil in New York... Where the wife has acquired a separate domicil, it (the matrimonial domicil) is the place where they last lived together as husband and wife with the intent of making that place their fixed home." See cases in note (72).

Licht v. Licht, 150 N.Y. Supp. 643 (1914). It will be obvious that by such a definition, the matrimonial domicile cannot be moved by the act of one of the spouses alone. Ransom v. Ransom, 109 N.Y. Supp. 1143; aff'g 104 Supp. 198 (1907). But Montmorency v. Montmorency, 139 S.W. (Tex) 1168 (1911) contra., North v. North, 93 N.Y. Supp. 512 (1905) and Hatch v. Hatch, 187 N.Y. Supp. 568 (1921) are distinguishable in that the New York Court found for itself that the plaintiff in the foreign divorce action had really been the wronged spouse.
that bite, it is well to seek whether he did not put those things into the hat in the first place. Why attach any special significance to matrimonial domicile as distinguished from the domicile of an individual? Why should a divorce upon constructive service of the libellee given there be entitled to respect, and one given elsewhere (but in a state that is the actual domicile of the libellant-spouse) be not entitled to full credit? A good reason has never been suggested. But a very bad reason has been suggested.

In a carefully written opinion, Judge McLaughlin said this:

"It is settled that a wife may acquire a domicile separate from her husband where his conduct justifies her in leaving him or where he deserts her without just cause. Hunt v. Hunt."

"In cases where the defendant is not personally served within the State and does not appear in the action, the jurisdiction of the court over the person of the defendant depends upon whether or not the defendant is domiciled within the state.

"It logically follows therefore, that where a husband and wife have separated and he sues for divorce in the State where he resides without personal service and without her appearing in the action, then the question whether the court obtains jurisdiction or not depends upon whether she has acquired a separate domicile, that is, whether she was or was not justified in separating from him. That in turn presents the further question whether without personal service upon her or her voluntary appearance the courts of the State of his domicile can make a determination that she was or was not justified in leaving him, which will be binding upon her and entitled to recognition in all the other States under the full faith and credit clause of the Federal Constitution. That question was settled by the Supreme Court (Atherton v. Atherton) when it held that where the husband remained in the matrimonial domicile the courts of that State had the power to determine under reasonable requirements as to notice whether or not her absence was justifiable and that

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8Andrews, J. early expressed a similar doubt. "Just why the former matrimonial domicile of the parties in Kentucky should have this effect may not be clear, but that it has is evident from the opinion of the court in Haddock v. Haddock." 127 N. Y. Supp. 39, 40 (1900).

9It may be "that what in the Atherton case was referred to out of abundant caution... was later seized upon in the Haddock case... and... invested with magical qualities it did not and does not possess." 2 Bench and Bar 37, 41.

10Hunt v. Hunt, 72 N.Y. 217 (1878). The husband, after his wife's desertion, obtained a divorce upon constructive service of the wife at the matrimonial domicile. The New York court, upon examination of all the facts for itself, agreed with the Louisiana court that the circumstances that justify a separate domicile for a married woman were not present in this case; that the wife, therefore, still remained domiciled in Louisiana and consequently that constructive service of process (upon a resident of the state) was sufficient to confer personal jurisdiction over the wife. This case, of course, in its ratio decidendi is overruled by the Atherton case. After the Atherton case, New York must accept the findings of the court of the last matrimonial domicile as res adjudicata.
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such determination is entitled to full faith and credit in other States.”

What have we here but an attempt to show that the matrimonial domicile is but another way of putting the personal jurisdiction requirement? Does this hold water? Here is the critical test—suppose it was the wife who remained at the last matrimonial domicile and the husband who moved. The question of justifiable cause, vital in the case of a married woman, is absolutely impertinent in the case of a married man who seeks to establish a separate domicile. No court has ever denied that a married man, no matter how guilty of the gravest of marital offences, can always get a new domicile of choice for himself. The matrimonial domicile, therefore, can under no circumstances get personal jurisdiction over the husband by constructive service once the husband has moved to another state. It follows that if Judge McLaughlin is right, New York should not respect a divorce given at the last matrimonial domicile upon constructive service of the husband, if the wife was the libellant. But it does! In Schenker v. Schenker, the last matrimonial domicile was Alabama. The husband left that state and the wife on constructive service obtained a divorce there. New York respected the Alabama decree on the basis of the matrimonial domicile doctrine. Does it need further demonstration that the concept of 'matrimonial domicile,' far from being another face of the personal jurisdiction requirement, is really a side-door entrance to the 'in rem' view of divorce jurisdiction? Mr. Justice Pitney, in discussing the Haddock case, rather assumed that such was the truth. He said that New York was justified in denying full faith and credit to the Connecticut decree 'because there was not at any time a matrimonial domicile in the State of Connecticut, and therefore the res, the marriage status, was not within the sweep of the judicial power of that State.' The magic potion that the New York courts find in the matrimonial domicile concept is, it is submitted, due to an inexcusable confusion of these two ideas: 1, that a married woman can obtain a separate domicile only under certain circumstances, 2, that a married man can

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Footnotes:

82 181 App. Div. 621, aff'd 228 N. Y. 600 (1918).
83 It is true the court suggested another possible basis for the decision, but the case was decided expressly upon this ground.
84 Thompson v. Thompson, 226 U. S. 551, 562 (1913). And so Judge Collin unwittingly admitted as much in Hubbard v. Hubbard, 228 N. Y. 81 (1920) when he said, ‘Had there been at any time a matrimonial domicile in the State of Massachusetts on the part of defendant or her husband . . ., the constitutional provision would probably have been applicable and controlling, because the res—the marriage status—would have been within the realm of the judicial power of that state.'
acquire a separate domicile under any circumstances. New York has assimilated the position of the man to that of the woman at least to the extent that his new domicile is of no earthly use to him for purposes of divorce. For purposes of divorce, he cannot change his domicile from that last shared by him and his wife, unless the wife was in fault. And the question of fault is not res adjudicata by the finding of the first court. The second court may examine it anew.

This point has been labored because it is believed that if the New York courts agree that the idea of matrimonial domicile makes a distinction without a difference,7 they will stop making it. And after looking long and far for another base upon which both the Atherton and Haddock cases can stand together, they will be compelled to accept the logical implications of the former. Mr. Justice Holmes pressed the issue eloquently in his dissent to the Haddock case:

"It is true that in Atherton v. Atherton Mr. Justice Gray confined the decision to the case before the court. . . But a court by announcing that its decision is confined to the facts before it does not decide in advance that logic will not drive it further when new facts arise. New facts have arisen. I state what logic seems to me to require if that case is to stand, and I think it reasonable to ask for an articulate indication of how it is to be distinguished."87a

VII

Haddock v. Haddock, be it noticed, changed New York law not a whittle.8 It just put the Supreme Court's guinea-stamp of approval

87A true example of a Darwinian sport in legal philology is the startling suggestion made by the Appellate Division in Gould v. Gould, 194 N. Y. Supp. 745, 747, 748 (1922). "While it is true that a man can have only one domicile, it does not necessarily follow that a husband and wife may not establish a separate domicile different from that of the husband. This is recognized in those cases where the husband has abandoned the matrimonial domicile and gone to another state and there established his domicile. . . ." (Citing Atherton v. Atherton and Thompson v. Thompson) and going on to say that, "they (these cases) demonstrate that there can be a personal domicile distinct from the matrimonial domicile." There can be no doubt of this at this late day. But what this court completely overlooked—and no court ever before overlooked it—was that in no case did the matrimonial domicile ever give a divorce unless one of the spouses was also personally domiciled in that state. The concept of marital domicile was referred to in the Atherton case and in the Haddock case as a requisite that New York could insist upon, in addition to the universally demanded requisite of personal domicile. Lord Deas said, "Neither can I solve this case by what has sometimes been called the domicile of the marriage. The phraseology appears to me to be calculated to mislead. It is figurative, and wants judicial precision. There is no third domicile apart from the domicile of the husband and the domicile of the wife. Domicile belongs exclusively to persons. Having ascertained the domicile of the husband and the domicile of the wife, the inquiry as to domicile is exhausted."

87a 201 U. S. 562, 631

88 That it did not change the law of any other state is indicated in a note in 11 Mich. L. Rev. 510. The states which gave credit to such divorces before continued to do so. See the Uniform Divorce Law, Sec. 22.
upon the notion that the local court had long entertained. A foreign divorce obtained by the spouse domiciled in that state, upon constructive service of the non-resident spouse, is in New York a brutum fulmen for purposes of ascertaining the status either of that spouse or, a fortiori, of the libellee spouse—unless that divorce was obtained at a certain place, called the matrimonial domicile. The fundamental theoretical objections to this doctrine have already been indicated. Its insistence upon the element of personal jurisdiction is altogether out of line with unquestioned dogma as to the nature of divorce. Its half-hearted reiteration of the Common Law requisite of domicile for divorce jurisdiction casts aspersion even upon this basic Conflict of Laws premise. Indeed, and here we return to the case we began with, Gould v. Gould definitely took the hint of the Haddock case when it held that legal domicile is not essential to jurisdiction for divorce and that the appearance of the parties alone is sufficient. Would that Mr. Justice White had re-emphasized in the Haddock opinion what he earlier had said in Andrews v. Andrews:

"The principle dominating the subject is that the marriage relation is so interwoven with public policy that the consent of the parties is impotent to dissolve it contrary to the law of the domicil . . . It is obvious that the inadequacy of the appearance or consent of one person to confer jurisdiction over a subject matter not resting on consent includes necessarily the want of power of both parties to endow the court with jurisdiction over a subject matter, which appearance or consent could not give."

The course of the New York decisions is an embodiment of that oft-committed logical fallacy of confusing the necessary with the sufficient. The Court first assumed that personal jurisdiction was necessary; it deduced that personal jurisdiction was sufficient. Both the assumption and deduction are truly novel and a tribute to the procreative power that lies in an error.

VIII

It is good evidence that the doctrine of Haddock v. Haddock is far from a healthy growth that the courts have busied themselves with carving exceptions. One may now point to two distinct situations:

88 U. S. 14, 41.
89 "In all the region of the law there is no such thing as a jurisdiction by reason of a control over both the parties, where there is none over the subject matter." Bishop (1891) Sec. 157.
92 Such is the conceded weight of the American authority; see supra, n. 37; 11 Mich. L. Rev. 508; Minor, Conflict of Laws, Sec. 92.
93 That this is the true rationale of the next group of cases is frankly indicated by the language of Judge Lehman in the recent Dean case, 241 N. Y. 240, 251
where the doctrine will not be applied and there are suggestions of a third to be found in the cases.

_Ball v. Cross_ is the most recent illustration of the first instance. An action for nullity was brought by a resident of New York on the ground that his wife’s divorce from her first husband was void in New York. The wife and first husband had lived in Texas. This husband moved to Nevada alone and there, upon constructive service of his wife, procured a divorce. Upon these facts the New York court held that the law to determine the validity of the Nevada decree was the law of the state wherein the wife was domiciled at the time the decree was procured by the first husband. If that law respected the decree, New York would too. If it is sought to nullify a foreign divorce decree by virtue of the _Haddock_ doctrine, then it is of the essence to show that the libellee was domiciled in New York at the time of the foreign divorce proceeding. The rule is

>When we decided that our public policy compelled our denial of effect to such a decree against one of our own residents, we recognized that ‘it will prove awkward, and worse than that, afflicting and demoralizing, for a man to be a husband in name and under disabilities or ties in one jurisdiction, and single and marriageable in another.’ (People v. Baker, p. 86). It seems to me that we should refrain from making such a situation more difficult by enforcing in this State the public policy of another jurisdiction.” (Italics are the author’s.)

None of the early cases as much as indicated such a distinction. See _Bordon v. Fitch, supra_, note 91; _Kinnier v. Kinnier_, 45 N. Y. 535; _Hunt v. Hunt_, 72 N. Y. 217 (1878). But in _People v. Baker_, Folger, J. began his opinion with this statement, “Can a court in another state adjudge to be dissolved and at an end the matrimonial relation of a citizen of this state. . .” Thereafter, such a distinction seems to have been taken for granted. Thus in _Percival v. Percival_, 106 App. Div. 111, aff’d 186 N. Y. 587 (1906) the court said, “The plaintiff in order to claim the benefit of the policy of the state of New York relating to foreign judgments of divorce rendered against residents of New York was bound to show affirmatively that in 1896, at the time the New Jersey decree was rendered, he was a bona fide resident of New York.” A mere allegation to this effect was deemed insufficient. An apparently inconsistent decision is _In re Caltebellotta’s_
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sometimes stated unhappily, "...this rule of public policy (Haddock v. Haddock) is enforceable only for the protection of the citizens of this state." But this is inaccurate, for too often are foreign divorces upset to the inconvenience and grievous injury of citizens of New York. The second situation where the foreign decree (in a Haddock v. Haddock situation) will be respected is where the divorce is being attacked by the very person who obtained the decree. The theory is one of estoppel. But as it has been pointed out, "...no element of true estoppel is present, for there is neither representation nor reliance by nor injury to the defendant; nor does the assertion of a continued marital relation attack the jurisdiction of the state rendering the decree but merely seeks to put upon the divorce the same interpretation and the same limitations which the New York courts put upon it." So that we have the dismal situation that parties are married or divorced depending upon the purely fortuitous circumstance of who is the plaintiff.

Again, suppose the plaintiff in an action of nullity had instigated his wife (the defendant) to get the foreign divorce from her first husband who was, let us assume, a citizen of New York at the time. Then that plaintiff cannot attack the foreign decree either, for "as to her and as to all claiming under her the divorce must be conclusively presumed to be valid when, as here, brought in question collaterally." "Of course," adds the Court, "her former husband is at

Will, 171 N. Y. Supp. 82 (1918) where the court said, "I am not willing to concede that the courts of New York have committed themselves to a position so selfish, so far losing sight of the principle involved." But that case may be rested on the court's suggestion—"In this connection we must bear in mind that the State of Pennsylvania has refused to give validity to such judgments by comity." Pennsylvania was the State where the liberee lived. See supra, note 95. Schenker v. Schenker, 181 App. Div. 621, aff'd 228 N. Y. 600 (1918); Kaufman v. Kaufman, 177 App. Div. 162, 163 N. Y. Supp. 566 (1917). But see O'Dea v. O'Dea, 101 N. Y. 23 (1885).

"Ball v. Cross, 190 App. Div. 711, 712 (1920) (Italics author's)." "People v. Baker, 76 N. Y. 78 (1879)."


"It 'rests upon the principle that where a party has gone into court and invoked its jurisdiction, he cannot subsequently attack the decree of the court obtained at his instance, because of want of jurisdiction of somebody else.' Matter of Swales, 60 App. Div. 599 (1902)."

123 Col. L. Rev. 242. Kaufman v. Kaufman, 177 App. Div. 162, 165; 163 N. Y. Supp. 566 (1917). The court in arguendo said, "If she would not be heard to question the validity of the divorce and could not have her marriage with the plaintiff annulled on the ground that the divorce was invalid, why should he, who induced her to obtain it and then to marry him on the assumption that she was freed so to do, be heard to question its validity?" See Hubbard v. Hubbard, 228 N. Y. 81 (1920).
liberty to contest the validity of the divorce." So, if the petitioner in our case lives with the woman, he is liable criminally for adultery and civilly to her first husband for criminal conversation. If the petitioner leaves the woman, he is a deserting husband and may be sued for non-support or put in jail. And for good measure, whether he live with her or not, she is a bigamist.

This is what happens when good judges try to reach sound results but give bad reasons for them.

Another possible limitation upon the Haddock doctrine is to be found only in veiled insinuations, of which these are typical:

"The ground upon which the divorce was sought was not recognized by the laws of this state as a ground for divorce." Public policy will not permit us to give effect, as against our own citizens, of a judgment affecting their marital status, so obtained (i. e. as in Haddock v. Haddock) on grounds thought by us to be insufficient.

Does this mean that if in the Haddock case the foreign court had found the absent libellee-spouse guilty of adultery, New York would respect the foreign decree as res adjudicata? Unfortunately there is

105 People v. Baker, 76 N. Y. 78 (1879).
106 Harv. L. Rev. 82. A peculiar variant of this motion is French v. French, 131 N. Y. Supp. 1053 (1911), where in an action of annulment brought by the wife, she tried to show that the divorce a former wife had obtained from the defendant was invalid. The former wife was called as a witness to testify that she was not a bona fide resident of the state that granted her the decree; but this testimony was excluded on the ground that she was estopped to so testify. Hubbard v. Hubbard, 228 N. Y. 81 (1920) must also be understood as a case within this exception. The husband left the matrimonial domicile in Pennsylvania and went to New York. The wife later moved to Massachusetts where she obtained a divorce upon constructive service of her husband. She then married the plaintiff in Massachusetts and this couple later moved to New York where the plaintiff brought this action of annulment. The decree was denied. This case cannot be rested on the exception illustrated in Ball v. Cross, because the first husband was a resident of New York at the time of the foreign divorce proceedings. The court said: "the plaintiff assuredly is not entitled to protection against the marriage at the hands of our courts. A finding of the trial court was that he instigated the procurement of the divorce." Compare Kaufman v. Kaufman, note 102 supra. A learned note in 23 Col. L. Rev. 469 understands this case to be a much broader limitation of Haddock v. Haddock, namely that the doctrine will be applied only where the couple at one time or another had a matrimonial domicile in New York. But such a limitation has never been suggested in the cases.
108 Ball v. Cross, 231 N. Y. 329, 331 (1920).
109 However Ransom v. Ransom, 104 N. Y. Supp. 198, aff'd 109 N. Y. Supp. 1143 (1908), was exactly such a case, and yet the result was the same as in Haddock v. Haddock. But in the early case of Matter of Morrison, 52 Hun. 102 (1889) a contrary result was reached. The court said: "By the allegations in the decree which are found to be true by the court of Ohio, which court had the right to adjudicate upon this question, having jurisdiction of the subject matter, it was adjudged that while the plaintiff and defendant were residents of the State of Ohio, the defendant had committed adultery. Under our laws this would have been sufficient to procure a decree of divorce, and in recognition of the Ohio decree we do not run counter to our own public policy or abstract justice or pure morals, but simply recognize the principle
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IX

We are now in a position to restate the problem put at the beginning of this study and to answer it somewhat categorically.

When the libellant-spouse alone was domiciled in the foreign State and only constructive service was had upon the libellee who did not appear in the action, New York will respect the foreign decree or not, depending upon circumstances.

Under these circumstances New York will respect the foreign decree as res adjudicata:

1. If it was obtained at the last matrimonial domicile, or
2. If the libellee-spouse was not domiciled in New York at the time of the foreign divorce proceeding and the state in which such spouse was domiciled did respect such a decree, or
3. If it is being attacked by the very person who obtained the decree or by some one "claiming under" that person.

Under these circumstances New York will not respect the foreign decree as res adjudicata:

1. If it was obtained at a place other than the last matrimonial domicile and if the libellee was domiciled in New York at the time. Quaere whether there would be any difference in result if the foreign court had found the libellee-spouse guilty of adultery.
2. If it was obtained at a place other than the last matrimonial domicile and if the libellee-spouse, though a non-resident of New York at the time of the foreign divorce proceeding, was nevertheless domiciled in a state or country that by its own law denied effect to such a decree.

And now, in view of Gould v. Gould, we must add that the decree of a foreign state will be recognized in New York even if neither of the parties was domiciled in that state, only so long as the foreign court had personal jurisdiction over both the spouses.

Thus were People v. Baker and O'Dea v. O'Dea distinguished. The foreign decree might have been respected on two other grounds however. The first is that the estoppel feature was present; and the second is that the divorce was procured at the last matrimonial domicile (of course, this notion was not developed until some time after the Morrison case).

Here again it is important to separate in one's mind the distinct problem of a suit on a foreign decree of alimony. If the plaintiff seeks to enforce that as to future payments, then New York will give such equitable remedies only where the foreign divorce was obtained upon the ground of adultery. The right to relief other than by execution to foreign judgments of divorce or separation is confined only to such decrees as are obtained on grounds of adultery. Beeck v. Beeck, 208 N. Y. Supp. 98 (1925) Civil Practice Act, Sec. 1171. See Lynde v. Lynde, 162 N. Y. 405 (1900) aff'd 181 U. S. 183.