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FOREIGN DIVORCES, INCLUDING THOSE OBTAINED  
IN A DIFFERENT STATE OF THE UNION.

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*Of the international requisites of a divorce obtained in a state where one party only is domiciled.*

THE most important inquiry connected with this subject is now to be solved, viz., what are the requisites of a divorce, obtained in the domicile of one party only, to entitle it to be held valid in every other country, than that where rendered? Can it be obtained without any appearance by, or service of process or notice on, the non-resident respondent, save, perhaps, such publication as is required by the laws of the state granting the divorce, as Mr. Bishop holds, or is it limited by the more rigid rule laid down by Judge REDFIELD in the *Am. Law Reg.*, *supra*, and in his edition of Story's *Conf. of L.*, § 229 b, viz., that it is generally agreed that a valid judgment of divorce rendered in one state is valid in every other, "if the respondent was duly and actually served with process, or appeared voluntarily, and submitted to the jurisdiction?"

Mr. Wharton (*Conf. of L.*, § 232) takes the intermediate position, that only personal notice to the defendant, "if his whereabouts can be ascertained," is requisite.

As regards this view it is not very apparent how mere notice can avail in any way, except perhaps as a make-weight to turn the scale in a doubtful case. If Mr. Bishop is correct, it is unne-

sary. If judgments in divorce are on the footing of other foreign judgments, as Judge REDFIELD maintains, then a defendant cannot be compelled to resort to a foreign tribunal to contest his personal rights and such notice is null and void of any effect: *Bischof v. Wethered*, 9 Wall. 812; 3 Am. L. Reg. 210. Neither do the two cases in Pennsylvania support Mr. Wharton's position, though *Borden v. Fitch*, 15 Johns. 121, does. He seems to ignore the distinction between service of process and notice, two very different things.

The discussion is then narrowed down to the very opposite views of the two other eminent writers above mentioned, on a comparison of which we enter with diffidence; "*non nobis tantas componere lites.*"

Judge REDFIELD has stated with great force his principles and conclusions; they are briefly as follows:—

No foreign judgment can be valid unless the court rendering it had "complete jurisdiction, both of the subject-matter and of both the parties;" to such jurisdiction over parties their actual or constructive presence within its limits is indispensable, which last is constituted by appearance or service of process within the jurisdiction of the forum. And in these respects judgments in divorce are like other foreign judgments. The provision in the Constitution of the United States and the Act of Congress, giving judgments and judicial proceedings in one state the same force and effect in every other state as where rendered, as regards judgments rendered between party and party, applies only where there is full jurisdiction over *both parties*. Divorce proceedings are not *in rem*, but *inter partes*.

In support of these propositions numerous cases are cited, the latest of which is *Cheever v. Wilson*, 9 Wall. 108, also cited and relied on by Mr. Bishop.

This important case deserves analysis. The marriage, the marriage domicile, and the delictum were in the District of Columbia, where the husband remained; the wife went to Indiana and there instituted proceedings in divorce to which *the husband appeared*. The divorce so obtained was declared good on appeal from the Supreme Court of the District of Columbia to the Supreme Court of the United States. The court said, "The petition laid the proper foundation for the subsequent proceedings. It warranted the exercise of the authority which was invoked. The court was the

proper one before which to bring the case. It had jurisdiction of the parties and the subject-matter. The decree was valid and effectual according to the law and adjudications in Indiana. The Constitution and Laws of the United States give the decree the same effect elsewhere which it had in Indiana. If a judgment is conclusive in the state where it is rendered, it is equally conclusive everywhere in the courts of the United States."

We do not find that it is anywhere in the opinion "expressly held," as Judge REDFIELD says (Story, *supra*, § 229 b), that such judgment is valid, if the respondent was duly and actually served with process, or appeared voluntarily and submitted to the jurisdiction."

How far this is a fair inference from the whole opinion, and the facts of the case, is doubtful. The court cited and relied on *Ditson v. Ditson*, 4 R. I. 87, a case which Judge REDFIELD strongly condemns, and Mr. Bishop as strongly approves, and which is directly contrary to Judge REDFIELD's interpretation of the opinion.

Chief Justice SHAW's opinion in *Lyon v. Lyon*, 2 Gray 369, is relied on by Judge REDFIELD as showing that a decree of divorce is void if the foreign court had not jurisdiction "of both the parties." This was a dictum, as the point did not arise, the facts being in the case that the court pronouncing the divorce had properly no jurisdiction of either party. But in *Harteau v. Harteau*, 14 Pickering 181, C. J. SHAW held that jurisdiction of both parties was not always necessary to the validity of a divorce. See also *Shaw v. Shaw*, 98 Mass. 158.

In the 5th edition (1873) of his work on Marriage and Divorce, Mr. Bishop comments with some asperity on Judge REDFIELD's opinions as stated above, and criticises very forcibly the cases on which he relies. Some of these cases, as we have pointed out, were decided prior to the adoption of the doctrine of separate domicile, and are no longer of authority.

In opposition to Judge REDFIELD Mr. Bishop holds that to entitle a court to jurisdiction, as regards the parties, it is sufficient for one of them to be domiciled in the country, nor is it necessary to serve a citation personally on the defendant, where the plaintiff is so domiciled, if such personal service cannot be made: Vol. 2, § 155. He considers that appearance by a defendant cannot give a court jurisdiction which it would not otherwise have: *Id.*, § 163.

Elsewhere he seems to think appearance by a defendant very important as regards the effect of the divorce on property, &c. : *Id.*, §§ 170, 199 c. He then proceeds to a thorough discussion of the question, which we will endeavor to state briefly.

The principle that for purposes of divorce husband and wife may have separate domiciles leads naturally to another, namely, that the domicile of either may entertain the jurisdiction. Otherwise both states would be deprived of the right to determine the status of their own subjects. Still, "probably the decree is not directly binding upon the person of such subject" (*i. e.*, of the other state), unless he *appears and answers* to the suit, or, at least, *has notice* of it served upon him within the jurisdiction of the court rendering it. "He only ceases to be a husband because he has ceased to have a wife." He is in the same position as if she were to die. It is true that a court must have jurisdiction of the person and subject-matter to make its judgment binding, but when a person is domiciled within a country its courts have jurisdiction of his person and the subject-matter, *viz.*, his status, and on this alone they act when they declare him free from the bond of matrimony with one abroad. "Courts are bound to redress the wrongs of citizens, while the right of defendants to be cited is secondary." Judgments *in rem* and *quasi in rem*, bind the property of the defendant without actual notice to him. A suit to fix the status of a citizen is in its nature a proceeding *in rem*, the thing being, not a piece of property, but a status: § 164. Where husband and wife are separated the marriage is a mere theoretical thing, an impediment to actual matrimony. Want of personal citation of defendant within the country is a mere technical objection. The separation of domiciles is the result of violation of the marriage duties, and the offender who attempts to avail himself of it endeavors to take advantage of his own wrong to protect himself from the punishment for it: §§ 167, 168.

Mr. Bishop then proceeds to examine and discuss the cases which support his views, citing largely from the opinions in them. Of these the first is *Harding v. Alden*, 9 Greenl. 140. In this case the parties were married in Massachusetts, and lived in Maine, where the husband deserted his wife and went to North Carolina, where he committed adultery. The wife went to Rhode Island, where she instituted divorce proceedings and notice was served on

the husband in North Carolina. The divorce thus obtained was held good in Maine.

The opinion in this case would seem to indicate that the court considered the proceedings *quasi in rem*. It was the "interest" of the husband in his wife, "his right to exact from her the performance of duties upon which the decree operated. She was within the jurisdiction."

The wife, it should be remembered, was the libellant. "Most of the reasons which led to the rule that a marriage valid by the law of the place where solemnized should be valid everywhere, the protection of innocent parties, and the purity of public morals, require that divorces lawfully pronounced in one jurisdiction, and the new relation thereupon formed, should be recognised as operative and binding everywhere."

To refuse effect to such decrees is also productive of great inconvenience and even of denial of justice unless the injured party can follow the offender and acquire domicile in the same state. A decree in divorce does not fall within the rule that a judgment against one not within a state, nor bound by its laws, nor amenable to its jurisdiction, is not entitled to credit in another state. See 2 Kent 110, note b, where this decision is mentioned and approved by the great jurist.

*Ditson v. Ditson*, 4 R. I. 87, is the next case taken up. In this case the libellant, a citizen of Rhode Island, married in New York an Englishman. He deserted her in Massachusetts, and never was in Rhode Island; he had no notice of the proceedings, his abode being unknown. The jurisdiction was entertained on the ground that it was enough to have jurisdiction over the petitioner alone to decree a divorce, upon such "personal or constructive" notice to the other party, "whether in or out of the state," as is possible or customary.

The decision was grounded both on the statute law of Rhode Island and the general law. AMES, J., delivering the opinion, said, "The right to govern and control persons and things within the state supposes the right in a just and proper manner to fix and alter the status of the one, and to regulate and control the disposition of the other, nor is this sovereign power over persons and things placed within the jurisdiction of the state diminished by the fact that there are other parties interested through some relation in the status of these persons, or by some claim or right in those things, who are out of the jurisdiction, and cannot be reached by

its process. No one doubts this as a matter of general law with regard to the other domestic relations, and what special reason is there to doubt it as to the relation of husband and wife?" The learned judge illustrates this by the effect on the status of a slave produced by his escape to another country. A state should give to non-residents and foreigners, parties to a marriage, or interested in property within its territory, such judicial notice as can be given consistently with effective judicial action.

"To say that the general law inexorably demands personal notice in order to such action, or, still worse, demands that all parties interested in a relation, or in property subject to a jurisdiction, should be physically within that jurisdiction, is to lay down a rule of law incapable of execution, or to make the execution of laws dependent, not upon the claims of justice, but upon the chance locality, or, what is worse, upon the will of those most interested to defeat it."

A number of other cases are cited and commented on by Mr. Bishop, §§ 163 a, note 1, 164, &c., chief of which is *Cheever v. Wilson*, 9 Wall. 108, which we have already examined. In this case there was an appearance by the defendant, which Mr. Bishop (§ 163 a) thinks not material, as appearance, he holds, could not give the court a jurisdiction which it had not without appearance. "On the other hand," he says, "the court refer merely to the discussions of the present work, and to *Ditson v. Ditson*, in which appearance, or even notice, except the constructive notice by publication, was expressly held to be unnecessary."

In regard to this point it seems to us that both Mr. Bishop's and Judge REDFIELD's interpretations of the opinion in *Cheever v. Wilson* are unwarranted by the language of it and the facts of the case. The point whether appearance or summons was necessary did not arise, and it is open to argument how far the fact of appearance by the defendant was a material element in the decision. Certainly it was not "expressly held" to be so, as Judge REDFIELD asserts, nor, on the other hand, does Mr. Bishop point out *why* it was not "deemed material," or where.

*Criticism of Mr. Bishop's views, on general principles.*

Notwithstanding the strength of Mr. Bishop's arguments, well sustained as they are by his authorities, his views seem open to criticism. Whatever force such criticism may have will depend

on principles elaborated at the outset of this discussion, to which it will therefore be needful to recur briefly.

Dissolution of a marriage is a matter which vitally concerns the state, and of which therefore it takes sole and entire control. While the marriage could be dissolved but in one domicile, that of the husband, such abrogation of it could seldom give rise to questions elsewhere; but the operation of this principle in many cases was productive of great injustice to wives, to remedy which the doctrine of separate domicile of parties in divorce proceedings was introduced. Instantly there arose the conflict of jurisdiction between the domiciles of the two parties of such frequent occurrence in foreign divorces, and whose absurd and shocking results have been fully set forth. The welfare of all civilized communities demands that this should cease as far as possible, and it is well established that the rights of the state in which the divorce suit is *not* carried on must be disregarded, if the party to the marriage resident in that state has either voluntarily submitted his cause to the foreign tribunal where the divorce is sought, or, while within the territorial limits of its jurisdiction, has been legally called before such tribunal.

This is the universal rule, in the United States at least: Redfield, *supra*; Wharton Conf. of L., § 232, &c. Mr. Bishop goes farther, and lays down that even though the party respondent have notice only, out of the jurisdiction, or even have no notice at all, of the proceedings in divorce, such divorce, if good in the state where obtained, is good as regards the party in whose favor it was given everywhere, even though other states may properly decline to recognise it as to the person of the other party, and as to property within their limits: 2 Bishop, &c., § 199 c.

Now it would seem, if the rights of the state in which a respondent lives are put in abeyance by a divorce proceeding elsewhere, as is now agreed, that as regards the respondent such proceeding is on the footing of any other personal action, for, as we have seen, the chief distinction between divorce causes and most others is, that the state is a party interested in the former, while the others are purely matters of private concern. Evidently this is so.

But it is an elementary principle of law that no judgment *in personam* can bind in any way a person not a party to the suit, nor within the jurisdiction of the court: 2 Bishop, &c., § 159; *D'Arcy v. Ketchum*, 11 How. 165. Further, how can such judg-

ment have any effect at all? As regards the absent party it is given in violation of the clearest principles of justice: 2 Kent 109; nor will it be helped by saying that the state in which such judgment is rendered has rights to be vindicated in the person of its inhabitant. So also the state where the other party of the marriage resides has equal and similar rights, nor is there any reason why these should be disregarded on account of those of another state. If the judgment affects one, it must affect the other party.

The insuperable difficulty, as it appears to us, in giving effect on principle and reason to such *ex parte* divorces as those under discussion, is, that from the very nature of the marriage tie it is a matter of joint, not single, personal status. If unloosed as to one it must be so as to the other, and therefore, as a rule, it cannot be justly done on the application of one party without hearing the other. The hardship which may be thus caused to a party anxious and entitled to be freed from a marriage whose vows have been broken by the other, is no better ground for violating this principle than would be the mutual disgust of married persons, which often leads to a separation *a mensa et thoro*, for setting aside the invariable rule that marriage is indissoluble by consent of parties, and permitting such persons to obtain, for such reasons only, a divorce *a vinculo*.

The proposition which Mr. Bishop and some of the cases he cites maintain, viz., that "a proceeding to fix the status of a citizen does not differ from one *in rem*," is questionable. Judge REDFIELD denies it: 3 Am. L. Reg. 206. By nature the rights of persons and the rights of things are very dissimilar. Nor does the analogy which Mr. Bishop draws between a *status* and a *rem*, show any points of resemblance.

Mr. Wharton's rule, that "proceedings" (in foreign divorce suits) "must be according to the rules of international law prescribed as to foreign judgments," § 231 (which is entirely inconsistent, as we have shown, with what he holds in regard to notice—see § 232), seems to us both logical and reasonable. As authorities elsewhere cited prove, to the validity of such a judgment *in personam*, appearance by, or service of process on, the defendant, is essential.

*The Pennsylvania rule as to the forum of a divorce suit.*

In some cases the strict application of the rule laid down by Judge REDFIELD and Mr. Wharton, and which, as we have labored

to show, is perfectly logical, is very severe. Hence has resulted, in some states, the allowance of certain exceptions to it in the direction, but stopping far short, of Mr. Bishop's departure. In Pennsylvania it has been established that "the injured party must seek redress in the forum of the defendant, unless where the defendant has removed from what was before the common domicile of both:" SHARSWOOD, J., in *Reel v. Elder*, 62 Penna. St. 308; or, as stated by the same judge in a later case, "the rule is that suit must be brought either in the jurisdiction in which the injured party resided at the time of the injury, or in the actual domicile of the other party at the time of suit:" *Platt's Appeal*, 2 Weekly Notes 501. Similar views were advanced by Judge SHAW, in *Harteau v. Harteau*, *supra*. See also *Turner v. Turner*, 44 Ala. 437. In the *opinion* in *Platt's Appeal* it is further said: "The cause of divorce did not arise in the state of Michigan, neither did the parties reside therein. Mrs. Platt was not served with process, neither did she appear to answer the libel." The divorce in Michigan, where the husband resided, was held void, at least in Pennsylvania.

These later enunciations of the law in Pennsylvania have somewhat modified the earlier one, as is evident from a comparison of them. From the last case it would seem that appearance by, or service of process on, a non-resident respondent, would give a court of the libellant's domicile jurisdiction to decree a divorce binding on both parties, and everywhere; but the earlier case, and Judge SHARSWOOD'S statement of the law in the later one, would lead us to infer not only that such appearance and service are not always necessary, but that they are not the proper criterion of a valid divorce obtained in the *libellant's* domicile. The law as laid down by GIBSON, C. J., in *Dorsey v. Dorsey*, 7 Watts 349, is still the law of Pennsylvania. "Jurisdiction once vested is not lost by the departure" of the offending party: AGNEW, J., in *Colvin v. Reed*, 55 Penna. St. 381.

*The question still unsettled.*

Despite the reasoning to the contrary, the weight of authority in later cases inclines rather to Mr. Bishop's side. If his interpretation of *Cheever v. Wilson*, is the correct one, the matter is beyond dispute, but this seems to us more than doubtful.

Until some further decision of the Supreme Court of the United

States shall establish this point, whether or not an appearance by, or service of process on, the respondent, is essential to the international validity of a divorce granted in the domicile of one party only, the conflict of laws and decisions in the courts of the several states will still continue, for it will be uncertain what are the requisites to enable courts to take jurisdiction of such cases, so that their judgments shall be within the clause in the Constitution of the United States giving them "full faith and credit" in other states: 2 Bishop, § 199 a, &c.; 3 Am. Law Reg. 210; 2 Kent 110. So thorough has been Mr. Bishop's examination of the authorities opposed to him, cited by Judge REDFIELD and others, that it would be a work of supererogation to go over the ground he has traversed. His own authorities will be found in the sections cited from his work. See also *Standridge v. Standridge*, 31 Geo. 223; *Shaw v. Shaw*, 98 Mass. 158.

There are still a number of minor, but not unimportant questions, connected with this subject which deserve mention.

1. *As to the distinction between the effect of a foreign divorce on personal status and rights of property.*

In *Harding v. Alden*, 9 Greenl. 140 (A. D. 1832), this distinction appears to have been first promulgated, and it is approved by Kent (2 Comm. 110, note b), by Bishop (2, § 169, &c.). Judge REDFIELD repudiates it (3 Am. L. Reg. 215).

According to Mr. Bishop and those who think with him, a divorce may be effectual to release the parties from the bonds of matrimony and entitle them to remarry, but still leave untouched their rights in property in other states than that in which it was rendered.

Of course if the defendant has appeared or been served with process, a judgment against him will bind his estate wherever situated: 2 Bishop, § 170. In connection with this point no one seems to have adverted to the well-established principle, that the transmission and title of real estate are regulated wholly by the *lex rei sitæ*, those of personal property almost equally by the *lex domicilii* of the owner: Story Confl. of L., §§ 364-7, 376, 424, &c. So that a proceeding to enforce a decree of a foreign court for alimony and a suit for dower stand on a very different footing.

It is noticeable that in the two Pennsylvania cases (*Colvin v. Reed*, 55 Penna. St. 375, and *Reel v. Elder*, 62 Id. 308), criticised by

Mr. Bishop in his discussion of this theory, the existence of this distinction was not recognised. The divorces were held wholly invalid in Pennsylvania, and therefore not to affect rights of dower to land therein.

How far this discrimination as to the effects of a divorce is beneficial does not appear; it is certainly illogical. Nothing said in the various authorities which support it at all weakens the force of Judge REDFIELD'S remark (3 Am. L. Reg. 215), that it is absurd to deny the validity of a divorce "upon the mere incident of alimony, while attempting to maintain it upon the principal cause of action." However, there is but one case cited by Judge REDFIELD (*Jackson v. Jackson*, 4 Johns. 432) where this distinction has been repudiated.

### 2. *Divorce proceeding by a non-resident plaintiff.*

Such a divorce on principle stands on rather better ground than one where the non-resident defendant has appeared or been brought into court. Such cases can occur but seldom, however, as most of the states of this country require that the plaintiff should have a residence in the state as an essential preliminary to bringing suit for divorce: 2 Bishop, § 166.

### 3. *Fraudulent seeking of another domicile for the purpose of obtaining a divorce.*

A judgment obtained by fraud is always invalid, and any judgment may be examined on this ground, even in a collateral proceeding: Story Conf. of L., §§ 597-608. But an investigation into motives is always difficult, and its results apt to be vague and indefinite. In the parallel case of parties going abroad to marry, in order to avoid the requirements of the laws of their own country, where such absence was but temporary, and the intent of the parties plain, like the so-called Gretna Green marriages, certainly a much stronger case, the English courts have uniformly held such marriages good for all purposes. See Lord BROUGHAM'S judgment in *Warrender v. Warrenæer*, cited in Story, &c., § 226 c. Some of the Continental jurists hold otherwise: 2 Kent 91.

Where the statutory period of residence has been fulfilled, it may be strongly questioned whether a court will or ought to inquire further. Undoubtedly there may arise cases where circumstances create so strong a suspicion of bad faith as to induce a court to receive proof of other facts and of declarations tending to the same

conclusion. Any evidence of collusion, for instance, would be of great weight: 2 Bishop, §§ 121, and cases cited, 191 a; *Williams v. Williams*, 3 R. I. 185; *Brown v. Brown*, 1 McCarter (N. J.) 78; *Lyon v. Lyon*, 2 Gray 367; *Vischer v. Vischer*, 12 Barb. 640. Whether the fact of residence, as found by the decree, is *prima facie* or conclusive, is not settled: *Cheever v. Wilson*, 9 Wall. 123. Mr. Wharton says that courts "require proof of a *bona fide* change of domicile somewhat higher than that of mere removal and declaration:" Conf. of L., §§ 228-30. Domicile must of course be *bona fide*: Story, &c., §§ 230, 230 a; the only question is how far the courts will investigate the motives with which such domicile was acquired, supposing the term of residence required by the laws of the state in which domicile is claimed, and all other legal requisites, to have been fulfilled. Judge REDFIELD says that a "fraudulent or pretended residence" will not give jurisdiction, and that the "*bona fide* character" of residence in another state may be disproved, and that it may be shown to be "fraudulent and simulated:" Story Conf. of L., § 229 a.

This seems to leave untouched the question above suggested, how far a residence can be "fraudulent or pretended" which has all the legal qualifications of one. The case where the question of the acquirement of a new domicile is purely a matter of intention, which often occurs in the distribution of the personal estate of a decedent, is different. Here the intent of the party is evidenced by his bringing suit as a resident.

In Massachusetts it is declared by statute (Rev. Stats. 1835, ch. 76, § 39) that divorces obtained by citizens thereof in another state, who have resorted there for that purpose, "for any cause occurring here, and whilst the parties resided here, or for any cause which would not authorize a divorce by the laws of this state, shall be of no force or effect in this state." See also Story Conf. of L., §§ 228-30.

The foregoing discussion has been followed out with the wish to set forth as clearly as may be, and harmonize, if in any degree possible, the differences of opinion and decision which exist on this important topic, and which only the adoption of an International Code of Divorce will entirely remove.

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