THE TRUE CHARACTER OF DIVORCE SUITS.

I propose to present what I understand to be the true character of divorce suits, and to account for their admitted peculiarities. I do not offer a mere theory, and seek to support it by showing that it is consonant with legal science; but, taking the law as it is settled by the great majority of decisions, and as recognized and stated by our principal text-writers on the subject in hand, I undertake to relieve it of minor difficulties, to point out some errors in conflicting decisions, and to reconcile with legal science the prevalent theory of divorce suits. In doing this I shall be obliged to expose the misuse of terms frequently found in able treatises, and in leading cases of unquestionable authority on the subjects adjudicated; and I may have to differ with a few decisions hitherto unchallenged.

I.

1. The right classification of the divorce suit is important. It is wholly personal. One party to the marriage sues the other, and all the requisites of a personal action are apparent. The action manifestly should be classified generally with personal suits.

This class, however, is divisible. The divorce suit, in common with some others, differs from ordinary personal actions in several respects. It has some features so resembling those of the proceeding *in rem* that they have caused it
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to be mistaken as a member of the latter's family. Treatise writers and courts have frequently said that the divorce suit is in rem, because of the prominent feature—the universal conclusiveness of the decrees—common to both. They have said it incidentally, however, not so as to make the assertion necessary to the argument of the treatise, or to the conclusion of the opinion. The term may have the right one substituted without doing violence to the thought either in the text-books or the decisions where it is thus employed. It is therefore not authoritatively settled that the divorce suit is in rem.

2. Believing that the misapplication of this term tends to error, I call attention to the simple fact that no thing is sued when a husband or wife is sued for divorce. Plainly the action is brought against a person and not against any thing. The true criterion is not universal conclusiveness, but that against which the suit is instituted and prosecuted.

In divorce suits, no property is seized, brought into court, held in custody till condemnation, and made necessary to the court's jurisdiction throughout all the proceedings, while there is no party defendant and not necessarily any party claimant. There is no property-right or interest constructively seized and brought into court and proceeded against in a divorce suit. How can it be said, in any rational sense, that the suit is instituted and prosecuted against any thing?

3. Mr. Bishop, in his good book on Marriage and Divorce, says repeatedly that it is the matrimonial status which gives the divorce suit its character; other text-writers on the subject are in accord; all correctly cite authorities in their support, and Mr. Bishop speaks of the plaintiff as “the proprietor of the status” (Vol. II. sec. 164); but is the status sued? Is that a thing proceeded against, in a divorce suit, like a bale of goods in the actio in rem? The bale, seized and brought into court to be condemned as forfeited, has its status judicially declared by the decree; but there can be no proceeding to declare the status of a status—as would be the case were there proceedings against the marital state of persons and not against the persons. For, all proceedings in rem are to fix status—necessarily, however, that of property actually seized, or property rights and interests constructively seized. They
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are "to determine the state or condition of the thing itself; and the judgment is a solemn declaration upon the status of the thing, and it ipso facto renders it what it declares it to be:" Woodruff v. Taylor, 20 Vt. 65. Hundreds of decisions accord with this, and none controvert it. There are those which transcend this description by Judge Hall, but none which contradict it; and they are little more than casual expressions, not essential to the decisions rendered, and not designed to settle authoritatively the use of any term. For illustration: there are many cases cited by the annotators of The Duchess of Kingston's Case, and Doe v. Oliver, in Smith's Leading Cases (Vol. II. p. 809, 7th Am. Ed.), which declare all suits to fix personal status to be in rem, when it is apparent that the right term could be substituted for the wrong one used, without changing the logical conclusion sought.

Seeing that the status of the contending parties is not the res, some have said that the bond of matrimony is the subject-matter of the suit, and that the divorce proceeding is in rem, being to dissolve the bond; but, clearly, there is no action against the bond as a fictitious defendant, nor is the subject-matter ever impleaded, condemned, or adjudged against in any way.

"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," said the Supreme Court of Maine, in the oft-approved case of Harding v. Alden, 9 Greenleaf, 140. If that "interest" was the res, it should have been seized constructively and proceeded against, as an intangible thing may be, so that it could not have been in any other court at the same time. But that a wife may sue her husband for divorce in one State, and the husband sue her for it in another, at the same time, is quite possible. The status, the bond of matrimony, the interest of both parties in their domestic relation, may be pending at once in two different courts, in two different States, so that lis pendens cannot be pleaded in either against the other. Jones, in New York, sued his wife for divorce, and she answered: Jones v. Jones, 36 Hun, 414. She, in Texas, sued him for divorce, while his suit was pending, and he answered:
Jones v. Jones, 60 Tex. 451. The status of both, the matrimonial bond, the conjugal interest, were in both courts simultaneous; but property or a property interest could not have been legally under seizure, actually or constructively, in two courts at once. This is axiomatic.

Mrs. Jones obtained judgment first, amended her pleadings in New York, and set up the Texas decree there, and it was held a bar to further proceeding. There are other like cases.

II.

1. I have said that the divorce suit, though wholly personal in character, differs from ordinary personal actions in features which resemble those of an action against a thing. The two most prominent in both are the fixing of status and the universal conclusiveness of the judgment. When both parties litigant, in a divorce suit, are in court, these two particulars are the most striking differences between such suit and an ordinary personal action; but when only the plaintiff is there, a third resemblance to a proceeding in rem, is equally remarkable: there need be only published invitation to the adverse party in interest.

In these three particulars, the divorce suit is as if against a thing. Still retaining its wholly personal character, it belongs to a sub-division of its class, which embraces many cases other than those of divorce, in which these marked characteristics appear.

2. I am not confounding terms when I say that the divorce suit is in personam yet quasi in rem. All suits quasi in rem are necessarily personal, else they would be simply in rem. We cannot say of the latter that they are like proceedings against things, for they are proceedings against things.

The distinction is not a merely fanciful bandying of terms. It points out an important difference between classes of actions that have been too often confounded to the engendering of error and the denial of justice. The books are full of loose expressions relative to these forms of action, giving abundant apology for this attempt to rectify the misuse of terms, were that the only purpose of this essay. We read of proceedings "purely" in rem, implying that there are those impurely so;
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of "proceedings in rem or quasi in rem," as though it mattered little which; of actions "strictly in rem" (the converse "loosely")] and other vague and misleading terms.

3. As it is high time that the actio quasi in rem should be defined, I venture to offer the following in the absence of a better definition: It is a proceeding to fix status to the concluding of all the world, yet not a proceeding against a thing.

Whether the profession will accept of this definition or not, I find it absolutely necessary to differentiate between suits to fix the status of property in proceedings directed against property, and those to fix that of persons and acts, in order clearly to discuss the peculiar character of divorce suits. It is not to discuss terms, but to settle principles—rather to offer suggestions to that end—that I write.

There is nothing novel in my position. The great majority of divorce decisions—those that settle the law on the most important questions of the subject—are in perfect harmony with it. It is the others that need a touchstone.

4. Of the class to which divorce suits belong I will mention several proceedings, all of which illustrate my definition: A minor suing to be emancipated, a slave suing for his freedom, suits to establish pedigree, to have a person declared legitimate, to have one pronounced a bastard, an outlaw, a pauper, or a bankrupt, and proceedings to naturalize a foreigner or appoint an administrator or guardian. In all these personal status is fixed so that not only parties and privies, but all the world are estopped from collateral attack of the decree: Ennis v. Smith, 14 How. 400; Bryant v. Allen, 6 N. H. 116; Clark v. Callaghan, 2 Watts, 259; Toebes v. Tilton, 4 Fos. 120; Regina v. Hartington, 4 Ellis & Bl. 780; Livermore v. Swasey, 7 Mass. 213; In re Bellows, 3 Story, 428; Very v. McHenry, 29 Me. 216; McCarthy v. Marsh, 1 Selden, 263; State v. Penny, 5 English, 621; Lawrence v. Englesby, 24 Vt. 42; Farrar v. Olmstead, 24 Vt. 123. The probate of a will illustrates further, but in a direction which we need not follow now.

Lord Coke says: "Where the record of the estoppel doth run to the disabilitie or legitimation of the person, there all strangers shall take benefit of that record, as outlawrie, ex-
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commengement, profession, attainer of præmunire, felonie, bastardie, muliertie, and shall conclude the parties though they be strangers to the record." 1 Inst. 352, b.

I think it will not be denied that judicial proceedings resulting in the dissolution of the marriage bond and declaring the parties free from it, belong to this class of actions. And I believe it to be settled that when both husband and wife are in court as actual parties, and the court has jurisdiction over them and the subject-matter, and it pronounces them freed from the bond of matrimony, the decree is universally binding, not only in the State where it is rendered, but in every State of the Union and every country of the world.

5. The notion that any State, by reason of its governmental authority over the status of its citizens, may hold any one of them to his marriage vows after his having appeared as defendant under another jurisdiction before a competent court there at the suit of a plaintiff resident there, and been divorced there, is no longer held by any tribunal. There are those who seem to think that a divorce may be valid where rendered, but invalid elsewhere (forgetting that universal conclusiveness is an attribute of divorce judgments as it is in decrees in rem—in other words, overlooking a trait of the actio quasi in rem); but they do not contend for such a demoralizing result when both parties to the marriage have appeared in the suit before a court having jurisdiction.

6. It is essential to the jurisdiction of the court that one of the parties be a resident, subject to the governmental power of the State, and that the subject-matter of the suit be legally before the court. If these essentials are wanting, the decree of divorce would be coram non judice, concluding no one, without the State, or within it. The jurisdiction may be collaterally assailed, in this class of cases as in any other. I will limit myself to a single case, among many that might be adduced, in illustration: A Mr. Dawell was prosecuted in Michigan for bigamy. In defence, he pleaded "not guilty," and that he had been divorced from his former wife; and he introduced the record of a suit in Indiana, by which it appeared that his wife, resident there, had sued him there for divorce, that he had answered, and that the marriage had been
dissolved. This record was met by evidence in the criminal case that neither party to the divorce proceedings was resident in Indiana when the suit was conducted there to judgment, but both resided in Michigan. It was held, therefore, on appeal, that only Michigan had governmental authority over the status of the parties, that the decree of divorce was void, and that Dawell was amenable to the charge of bigamy for taking a second wife after the divorce had been pronounced: *The People v. Dawell*, 25 Mich. 247.

III.

1. When the plaintiff is a resident of the State where the suit is brought and fails to get the summons served, and resorts to published notice to the person sought to be made a party (who does not respond to the invitation by appearance), the suit may go on and result in valid judgment. This is well settled. Numerous cases are cited, in works on divorce, to this effect.

In *Pennoyer v. Neff*, 95 U. S. 714, the U. S. Supreme Court very pointedly denied the efficacy of so-called “substituted service” by publication notice to defendants, or by attempts to have them served beyond the territorial jurisdiction of the States in which the courts issue such mis-named “process;” but exception was made in favor of publication in proceedings to fix the status of persons and property; that is, there may be valid judgment in them after such advertised invitation to interested parties. Many prior cases of that tribunal were adduced. And this decision has been repeatedly cited by that court, since, with approval: *County of Livingston v. Darlington*, 101 U. S. 407, 413; *Mohr v. Manierre*, Id. 422; *Ins. Co. v. Bangs*, 103 Id. 435, 441; *St. Clare v. Cox*, 106 Id. 350; *Hart v. Sansom*, 110 Id. 151, 155–6; *Heidritter v. Elizabeth Oil Co.*, 112 Id. 294, 300; *Smith v. Woolfolk*, 115 Id. 143, 149.

In the States generally, publication notice is held effectual in divorce suits. Many favor it as “substituted service” in other personal actions. It is not necessary to stop now to combat that practice: it is sufficient for my purpose that published invitation is almost universally held effectual in a divorce suit otherwise regular.
Why is this? Why is it true that, as in the proceeding *in rem*, there need be only published invitation to the person of adverse interest? Why is this feature common to both classes of actions, when only the plaintiff is in court, like the other two features already stated?

2. To answer, I must recur to the illustrations given above (Cap. II, § 4). The proceedings there instanced: to emancipate a minor, establish legitimacy or bastardy, settle a matter of pedigree, declare a person to be a pauper, a bankrupt or an outlaw, to naturalize a foreigner, to appoint an administrator, and other like proceedings to fix personal status, are usually *ex parte*. Some of them are always so; others may be *inter partes*, or may be either.

In all these, when the proceedings are *ex parte*, notice is, or should be given, offering all the world their day in court, as all are to be bound by the decree. There ought to be such notice when a foreigner is to be naturalized. In all the rest, notice is given, either to the whole public or to interested persons; not that the notice makes them parties—it offers them the opportunity of becoming parties.

After such advertised invitation, the proceedings go on to judgment on the personal status, so like those to fix property status, that they have been erroneously said to be *in rem*, as above remarked. They are, then, as the latter *always* are, *ex parte*.

Were the applicant for divorce to be authorized by statute to petition the court for adjudication upon his status without the form of a suit against his wife (or *vice versa*, as the case may be), with advertised invitation to her (the only person who could oppose), to come and defend, the *ex parte* character of the proceeding would be readily admitted by all. It would be precisely like the proceedings given in the illustration immediately above.

Wherein is the difference where the form is as though between parties, yet only the complainant is in court? Practically, there is none. Legally speaking, there is none. It is true that the decree is written as though the case were *inter partes*, but that is true also in attachment proceedings *in rem*
when the debtor has been merely notified by publication and has not responded.

3. My answer to the question (Why published invitation will suffice in a divorce suit with only the complainant in court, as in the *actio in rem*?) is, that it is a *quasi in rem* proceeding. The only person in the world whom the complainant can have divorced from him or her is not in court by reason of the invitation to come, any more than "all persons having right, title and interest" are there when smuggled goods are to be declared forfeit, if they have failed to respond to this usual invitation.

As courts say, with respect to proceedings to declare the status of property, "All the world are parties," and yet say, "There is no party defendant," so we may say of the divorce suit that the person complained of, and all others, are parties in the sense that they are to be concluded by the judgment, yet there is no actual party defendant in court as a litigant.

This is of the greatest importance. Let the true character of the divorce suit, when only the complainant is in court, be admitted to be that of an *ex parte* proceeding, and many of the difficulties that have surrounded the subject heretofore will disappear. Therefore, because of the vital importance of this proposition, I shall discuss it, though briefly, owing to my limited space. I may do it freely, as I know of no authoritative decision against it—*obiter dicta* excluded.

The popular impression among lawyers is that notice by publication brings the defendant into court in divorce cases, if not in ordinary actions. Text-writers, judges, and advocates have gone on this assumption. The reader may have thought that the writer favored this view when pointing out the distinction made in *Pennoyer v. Neff*, supra, between ordinary personal actions and those to fix status; but the point was that while the former could not proceed upon publication only, the latter could, like those to fix property status, which were also excepted from the rule of exclusion laid down by the court.

4. The argument of that case, based on the lack of extra-territorial jurisdiction, in a State and its courts, to command a person beyond their borders to come in and plead, is as
applicable to proceedings to declare personal or property status as to any other. In all cases, they may be notified and invited; in none can they be made parties litigant—and the reason is the same in all—the lack of extra-territorial jurisdiction. And there are many decisions, State and Federal, to the same effect.

Everybody admits that no judgment for alimony and costs can be rendered against an unserved, non-appearing, merely notified person. Why not? If he is in court constructively by reason of the advertised invitation, why cannot a moneyed judgment be rendered against him, just as logically as a judgment destroying his marital relation? Were he in court as a party litigant in any sense that would justify a personal judgment against him with reference to the divorce, he would also be there to be condemned to pay alimony and costs. As it is well settled that he is not there for the latter purpose, the conclusion is irresistible that the publication has not brought him there at all.

Of course, one may be in court for one purpose but not another, as when he makes special appearance to object to the jurisdiction, but not to answer to the merits; but it is never true that publication notice makes him constructively a party on the merits of the litigation in one respect and not in another. Even the many decisions of State courts which favor "substituted service" (which I purposely avoid here for want of space, and because I have combated them elsewhere), do not hold to such partial constructive presence.

How then can there be judgment in a divorce suit, fixing the status of the complainant, when the defendant is not in court actually or constructively? There could be none were not the suit ex parte and quasi in rem, and therefore subject to the Law of Nations, which broadly applies to all proceedings to fix status, whether of a person or of property.

5. The advertised invitation is none the less important because it is not constructive service and brings nobody into court unless he choose to accept the call. It is indispensable. There is close analogy as to notice, between divorce proceedings as if against a thing and those really against a thing. Some have thought notice not absolutely essential to the
validity of the decree, in the latter. The U. S. Supreme Court itself has vacillated. But it has settled the matter soundly. It holds to the necessity of offering the day in court to all persons interested, and says that even an enemy may respond (McVeigh v. U. S., 11 Wall. 259), though this latter delivery can hardly amend the Law of Nations which forbids an enemy, while still such, from entering a court which he is fighting to destroy. But this aside—the case is strong on the necessity of notice when the proceeding is against property to fix its status. That notice is also essential in a divorce suit as if against a thing, has always been held and never questioned.

In general proceedings in rem, notice is given “to all persons having, or pretending to have, any right, title or interest, in or to” the property seized and proceeded against, to come into court and assert their claims; and yet the disinterested are concluded by the decree. In limited proceedings in rem, such as those by the attachment of the property or credits of a non-resident, only the owner-debtor is notified, and consequently the judgment is conclusive only upon him and his privies. In an ex parte divorce proceeding, only the party complained of is invited to court by publication notice, though all the world are to be concluded by the decree: the reason being (as before mentioned) that he only can oppose the rendering of the decree, and therefore the notice is equivalent to the general one above quoted. This is analogous to other proceedings quasi in rem, in which only those entitled to make opposition are notified, though general estoppel is one of the effects of the decree fixing the status—for instance, of an administrator, guardian, etc.

IV.

1. In an ex parte divorce proceeding, in which the court’s jurisdiction is limited to the determination of the status of the only party which is in court, how is the other party to the marriage affected by the decree of divorce?

If we except some counter decisions in New York, the general doctrine is well established, throughout the Union, that both husband and wife are freed from the bond of matrimony
by such decree. The ground of this doctrine is much misun-
derstood, I think; and I shall attempt to relieve it of diffi-
culty, after first noticing some opposing deliverances of courts
to the doctrine itself, in the exceptional State mentioned.

2. In The People v. Baker, 76 N. Y. 78, the question was
whether Baker could be convicted of bigamy in New York,
the place of his residence, for having married another woman
in New York, after a divorce obtained in Ohio, by his wife,
who resided there. The court did not deny the jurisdiction
of the Ohio court over the applicant for divorce, and over the
subject-matter of her suit, nor that Baker had been notified
by publication; but it held that as he had not responded by
appearance there, and was not a party to the suit, he was not
divorced, though his wife was—his status as a married person
was not changed, though hers was—and that he was therefore
amenable to the charge of bigamy for marrying again.

Conceding the jurisdiction of the court in Ohio, to declare
Mrs. Baker freed from matrimony, and respecting her status
thus changed, the Court of Appeals of New York said that
the status of Baker could not be changed by the proceeding
there, in which he did not appear, and that only his own State
had governmental jurisdiction over his marital condition.
Several prior decisions were cited to sustain the position that
this was settled doctrine in New York.

3. Hunt v. Hunt, 72 N. Y. 217, was said to be in accord.
Mr. Hunt, a resident of Louisiana, having filed his petition
for divorce there, and the court having appointed an attorney
ad hoc to communicate the fact of the institution of the suit
to the wife, who lived in New York, obtained a decree of
divorce. She did not appear in the suit, nor authorize the
attorney ad hoc to represent her, and it does not clearly appear
in the report of the case that the attorney ever informed her
of the suit. If not, the whole proceeding was manifestly
null; but, assuming that he did, her position would be simi-
lar to that of a person notified by publication. Mr. Hunt
married and lived with another woman, after the divorce had
been pronounced. Then his former wife, charging adultery
because of this, brought the above entitled suit for divorce
against him. Mr. Hunt set up the Louisiana divorce in defence.

Of this suit, it was said in *The People v. Baker*, by Judge Folger (who wrote the opinions in both): “That case was close. It went on the ground, built up with elaboration, that both parties to the judgment were domiciled in Louisiana when the judicial proceedings were there begun and continued and the judgment was rendered, and were subject to its laws, including those of the substituted service of process.” The “elaboration” is apparent, when we turn to the argument therein, to prove that the Louisiana case was *inter partes*. The labor would have been saved, had the judge confined himself to the point that Mr. Hunt’s status had been declared that of a single man by the decree, and therefore he could not be guilty, as charged, because of his subsequent marriage. That is all that was necessary to sustain his defence. Even the principle of the case against Baker would have allowed Mrs. Baker to marry again without criminality. The implication in the Hunt case is that if Mrs. Hunt had not been a party, constructively, to the Louisiana proceeding, his defence to her subsequent suit would have failed. I think this goes farther in the wrong direction than the Baker decision.

4. Had Mrs. Hunt’s separate domicile in New York at the time of the Louisiana divorce been recognized by the Court of Appeals, would that have so altered her case that she could have maintained her action against Mr. Hunt as that of a married woman asking divorce, even though the legality of his divorce against her in Louisiana had been admitted? In other words, illustrating by the later case, could Mr. Baker maintain an action of divorce, on any legal ground, against Mrs. Baker, who is admitted by that court to have had her marital status legally changed in Ohio?

In *Hunt v. Hunt* the court held that the status of both parties had been changed in Louisiana, because the case there was *inter partes*. In *People v. Baker* it held that the status of one only of the marital couple was changed in Ohio, because the case there had been *ex parte*. “Substituted service” did not bring Baker into the Ohio court, but did bring Mrs. Hunt into the Louisiana court because her citizenship was in
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Louisiana: for Judge Folger says, by way of summing up the Hunt case: "It is our conclusion that a valid judgment in personam, so as to affect the marriage contract, which shall be prevalent everywhere, may be rendered against a defendant not within the territorial jurisdiction during the progress of the suit, if that be the place of his citizenship and domicile, though process be served upon him only in some method prescribed by the laws of that jurisdiction as a substitute for personal service, and though he has not voluntarily appeared." The idea is that an invitation to come to court makes citizens parties whether they respond or not, but does not make non-residents parties without response—which seems untenable.

5. In O'Dea v. O'Dea, 101 N. Y. 23, the facts were that the defendant, when living in Canada, married a Mr. K. He moved to Ohio, gained residence there, sued her there for divorce, had her notified in Canada—she received the notice, but did not answer—and the divorce was granted. She afterwards married Mr. O'Dea; and he brought the above entitled suit to annul the marriage on the ground that she had a husband living—Mr. K. It was held, on the authority of People v. Baker, supra, that the Ohio decree of divorce was inoperative as to her; that she had not been freed from her marital obligations to Mr. K., and that consequently her second marriage was void. The jurisdiction of the Ohio court over the status of Mr. K. was not denied; the divorce was deemed valid as to him, but void as to her.

The cases above stated are all that need be particularized for the purpose of this argument, though the following favor the same doctrine: Bordan v. Fitch, 15 Johns. 121; Vischer v. Vischer, 12 Barb. 640; Bradshaw v. Heath, 13 Wend. 407; Kerr v. Kerr, 41 N. Y. 272; Hoffman v. Hoffman, 46 Id. 30, and several others.

6. On the other hand, the opposite doctrine—that divorce frees both husband and wife from the bond of matrimony, whether the defendant responds to publication notice or not—prevails in all the States except New York; and the decisions to that effect are too numerous to be cited, and the rule too well established to need any citation of authority. Here and there, deliverances to the contrary may have appeared, but
they have been subsequently overruled, or they have been rendered under exceptional circumstances, and they do not support the New York doctrine. For instance, in *Stilphen v. Stilphen*, 58 Me. 508, where the wife sued the husband for divorce and alimony, after he had previously obtained a valid divorce *a vinculo* against her, the court granted her prayer, and said the two judgments were not inconsistent. In *People v. Dawell*, above cited, the defendant was held liable to prosecution for bigamy, in Michigan, on the ground that the Indiana court had had no jurisdiction, and therefore neither he nor his wife had been freed from the bond of matrimony. (See *Reed v. Reed*, 52 Mich. 117, and compare *Waldo v. Waldo*, 52 Id. 94.)

Cases may be found, in the reports of several States, in which divorces are held void for want of jurisdiction, or because of fraud. But it generally may be said that New York holds that a divorce may be good as to one party only, while the rest of the States hold to the contrary.

7. Briefly stated, the position of New York is that a defendant residing in New York cannot be divorced in another State unless the court has obtained jurisdiction over his person, which cannot be done by publication; while the other States mostly hold that a non-resident, under the circumstances, can be, because publication does give such jurisdiction for the purpose of the divorce, though not for costs and alimony.

Both these positions are erroneous, I venture to suggest, if my foregoing propositions are established: the former in doctrine, though right as to publication; the latter, with respect to publication, though right in doctrine. If so, what is the true rule?

It is this, I think: When the plaintiff is divorced, the defendant is divorced also, *ex necessitate rei*. He is not a party because of the published invitation, but the effect of the *ex parte* proceedings resulting in the fixing of the status of his matrimonial partner (over whom, and the subject-matter, the court has jurisdiction) as that of a single person, necessarily leaves him single. It is an incidental effect of the decree.

As in a proceeding to fix the pedigree of an applicant, the decree declaring the status of the son incidentally passes
upon that of the father, though he be not a party to the proceeding; and as in judicial declarations of legitimacy, bastardy, bankruptcy, and the like, others than those in court are necessarily affected; and as when a slave is decreed to be free, the master is no longer his master, so it is with respect to the declaring of the status of a woman to be no longer that of a wife: the husband instantly ceases to be such, and the contrary is simply impossible.

He cannot, thereafter, claim any marital rights, on the plea that he was not a party to the divorce proceedings, as will be admitted everywhere—even in New York. Why not? Because the decree, fixing his wife's status as that of a single woman, is res adjudicata as to him, being quasi in rem, and therefore not limited to parties and privies.

On the other hand, can his State, by reason of its governmental jurisdiction over him, so far disregard the incidental effect of his wife's change of status as to hold him still subject to the marriage vows? No—because her judgment is res adjudicata quoad omnes. His State is estopped, as well as himself and all the rest of the world, from questioning the status of the wife, and estopped also from questioning the necessary effect, of the decree establishing it, upon him. To hold him guilty of bigamy for marrying thereafter is manifestly in contempt of the decree—a decree which, though rendered elsewhere, is as sacred as if rendered in his own State, because all nations recognize the universality of such judgments.

8. The form of the decree is not usually confined, in terms, to the status of the applicant, but embraces both husband and wife, and declares their marriage dissolved. This the court may consistently do, though but one of the pair be in court, because of the nature of matrimony. Manifestly, the judgment is the same, whether the applicant be adjudged free from the bonds, or both be so adjudged. The form does not enter into the question as passed upon in the New York decisions. In O'Dea v. O'Dea, supra, the judgment of the Ohio court, that each party be restored to the rights and privileges of unmarried persons, "was disregarded in New
York, so far as the defendant was concerned, though treated as valid with respect to the plaintiff."

The judgment may rightfully name only the applicant; or it may include the pair—not on the assumption of jurisdiction over one not in court, but because the two forms are virtually the same.

9. The erroneous notion that the cause must be *inter partes* in order to make the decree binding on both, has led to the inconsistent position in several States, that publication gives jurisdiction over the defendant in a divorce case, though not in an ordinary personal action—just as though extra-territorial jurisdiction could exist in the one case and not in the other. And to the position in Hunt's case, that "substituted service" on a wife in New York, gave the Louisiana court jurisdiction over her personally because she had a legal domicile in the latter State—just as though citizens need not be in court to have valid judgments rendered against them in ordinary personal action. And to the equally untenable claim that if a non-resident has property in the State where the published invitation to him is ordered, he may be made a party without appearance and without any connection between that property and the suit.

10. All these untenable contrivances to overcome difficulties in divorce suits are seen to be unnecessary, when the true character of these suits is considered. As a proceeding *ex parte* to fix status, there is no more need of a defendant in court than there is of a claimant in the *actio in rem*. And yet there is precisely the same need that the interested be invited so that they may take their day in court if they choose. Coming, or staying away, they do not hinder the decree binding on them and all the world.

V.

1. Recurring to the New York cases which teach the doctrine that that State has exclusive jurisdiction over the status of its citizens, so that they, when not parties, cannot be subjected to the incidental effect of divorces legally granted elsewhere, by which they lose their wives as effectually as if by death, I propose to inquire briefly whether it is admissible.
There is no difference between the status of a married man and that of a single one; or of a father, or of a son, or of any citizen in any respect, so far as concerns governmental authority over it. Just as plausibly then it might be contended by the New York courts that the changing of the status of a New Yorker by marriage in another State is not to be respected at home; or that one of her citizens who becomes a father in another State, ought not to be judicially recognized as such on his return to his domicile. To make the analogy more apparent, take the case of judicial proceedings in another State, admitted to be legal there, in which status other than that of married persons is changed so as to affect New York citizens incidentally: cases of bastardy, outlawry, etc., of which Coke says, "all strangers shall take the benefit of the record:" can the courts of New York rightly hold that its citizens are not bound by the record when not actual parties? Surely it would not be denied that a citizen of another State may adopt a New York boy as his son, by legal proceedings in the jurisdiction of his domicile, so as to change the status of the boy. Nor will it be questioned that a citizen of New York may be declared judicially to be an heir or legatee by a foreign tribunal, and be entitled to have his changed status respected at home, though he be not a party to the proceedings.

2. No doubt the State, by statute, may control its citizens, when legislating within the bounds of constitutional and international law, of juridical morals and of its own governmental limitations; and therefore it might inhibit re-marriage after divorce granted against a citizen because of his crime, were not such inhibition immoral and demoralizing (of the immorality, the State is the judge, however); but the position of the New York courts is that the State may control the status in the absence of statutes, and despite the incidental effect of a legal decree by which, according to accepted international law, his marriage has been dissolved; that a citizen may be punished for bigamy, if he marry again after having legally lost his first wife. I believe there are statutes in New York on the general subject, but the cases of Baker and the like were put on the general ground of exclusive jurisdiction
over the marital state of citizens to the extent of denying their susceptibility of being affected by valid duress elsewhere.

If every State should adopt this doctrine, what confusion would ensue! Any person could prevent thoroughly effective divorce by living in a jurisdiction other than that of the plaintiff, and failing to respond to publication. The country would abound with wives without husbands and husbands without wives. Important questions of property would be inextricably involved. The nuptial vinculum be only half broken.

If that doctrine is sound, it should preclude the New York citizen from voluntarily submitting his marital status to a foreign tribunal: yet the Court of Appeals countenanced such submission in Jones v. Jones, supra, and recognized the right of Texas to fix the status of a citizen of New York.

3. The claim of New York to exclusive jurisdiction over the status of its citizens to the denial of the incidental effects of valid decrees in other States, is repugnant to the settled rule of international law that decrees fixing status are universally binding. This has been sufficiently shown already. In People v. Baker, supra, the New York Court of Appeals denied that the divorce suit is "a proceeding in rem, or, more gingerly, quasi in rem." The two kinds of suit were confounded. Evidently, only the former was in the mind of the organ of the court (Judge Folger), when, rightly assuming that such suit is not against any thing, and wrongly inferring that only parties and privies are bound by a decree pronouncing divorce therein. If that court, in its attitude antagonistic to that of the other courts of the country, is in error, the mistake is attributable, not to its difference on the subject of notice, nor to its denial that the divorce suit is in rem, but to its disregard of the "more gingerly" proceeding.

VI.

To sum up: I think the following has been shown:—

I. That the divorce suit is not in rem, since it is not against any res;
II. That it is always in personam; but, as it is to fix status,
and may be maintained without a defendant in court, and re-
sults in a universally conclusive decree, it is quasi in rem;

III. That in *ex parte* divorce proceedings, publication notice
is sufficient for the same reason that it is so in an action
against property;

IV. That when only the complainant is in court, the decree
fixing his status as that of a single person, incidentally changes
that of the other marital partner, *ex necessitate rei*;

V. That the governmental jurisdiction of a State over the
status of its own citizens is not such as to defeat this in-
cidental effect of divorces granted against them by *ex parte*
proceedings in foreign jurisdictions.

VII.

I conclude by answering objections. As it will be most
likely to arise in the minds of some readers, I will answer
the question:

*First.* How is the divorce decree attended by general
estoppel, if it is not *in rem*, but only *as if so*?

Misunderstanding has arisen from remarks by the annota-
tors of Smith's Leading Cases, on the *Duchess of Kingston's*
and other cases, involving the law of estoppel, and by text-
writers and courts; and I think there is a vague impression
upon many legal minds that only in proceedings *in rem* the
decree concludes the world, and that when other decrees have
that effect, we must hold that they, too, are *in rem*.

The rule of universal conclusiveness is broader than those
writers assume it to be. It covers all decrees fixing status,
whether that of things or of persons. Suits *quasi in rem*, to
fix personal status, come under the rule. This I need not
argue, for it will be recognized as true upon statement. Both
the bench and the bar of the country have constantly acted
upon it, generally speaking. This, however, answers the ob-
jection.

*Secondly.* Attachment suits *ex parte* have been called *quasi
in rem*: why are they not universally conclusive, if a divorce
is so even when only the complainant is in court?

It matters little what name one gives to an attachment suit,
if error is not consequent. Courts have sometimes said that
it is quasi in rem, while they have rightly given it its true significance in the decree, and no error has resulted. But, to meet this objection, it becomes necessary to show the true character of the attachment suit. When the debtor's property is in court, but he is not, though he has been invited thither, the case proceeds against it, and there can be no judgment, independent of the res, against him—not even for costs. Nominally, however, the suit is against him and the judgment against him. The suit is as if against him;—not is if against a thing.

Really, then, the ex parte attachment suit is quasi in personam. It is the reverse of the divorce suit. It is really in rem, but limited in the effect of the decree, because only the debtor is notified by publication. Others may be interested in the property attached, and they may attack the judgment collaterally, because, as they were interested, yet not notified, their interests are not cut off or affected by the decree in rem in such limited proceedings. The status of the property, as a thing indebted, is fixed only with reference to the notified debtor. On the other hand, the status of the person, in a divorce proceeding, is fixed, not with reference only to the complainant's marital partner—(the only person interested to oppose, and therefore the only one notified)—but to all persons.

Overlooking the limited character of the attachment suit against property, and seeing that the judgment is not conclusive against the world, the court said in Magee v. Beirne, 39 Pa. St. 62, that the suit is not in rem; and yet it went to the opposite extreme of declaring suits to fix personal status to be in rem, because the judgments possess the quality of conclusiveness on all the world.

Thirdly. It is said that States are parties to divorce suits involving the status of their citizens; and it may be objected, that they cannot be concluded by divorce decrees against their citizens in the absence of notification. In The People v. Dawell, supra, the interest of the State, and its third-party relation to the divorce litigation of its citizens is more strongly put than in any case which I now recall. It is not contended, however, that the State should be cited or notified to appear as an actual party litigant. Of course, a State, as a corporation,
might intervene in a divorce suit; but so it might in any other. In a sense, it has governmental interest in all litigated questions involving either persons or property within its jurisdiction. But the courts themselves are supposed to take care of such general, governmental interests. They are created by the State, and oath-bound to observe its constitution and laws. There is no difference between that general interest in divorce suits, and in other kinds of actions. The State is estopped from denying that her citizens were divorced in a competent foreign jurisdiction, just as all other persons, artificial or natural, are thus estopped, though the notice was confined to the complainant's marital partner. Though, without notice or knowledge, the State could not intervene in a cause pending against one of her citizens for divorce, in a foreign jurisdiction (just as other persons could not); and though the foreign tribunal is not presumed to represent her interests, yet the rule of international law, which holds all persons bound by the decree fixing status, is applicable to her, and would be almost nugatory, were it not. Besides, comity requires that the decrees of such tribunal should be respected by all States asking and needing such respect paid to their own decrees; and while this law of comity is applied to all cases not in conflict with the juridical morals of the State, it includes the recognition of that prominent feature of decrees fixing personal or property status—universal conclusiveness.

Fourthly. It may be said by those who read the foregoing cursorily, that I have presented a mere theory, and have disregarded stare decisis. I claim to have kept within the settled doctrine of divorce so far as it is settled by decisions, and to have been in accord with the best text-books. The substitution of one term for another does not disturb the arguments of either the decisions or the books, but tends to clear them of difficulties. Bishop qualifies by saying that the divorce suit is not, in all respects, a proceeding in rem; and I have shown that it is, in some of its features, as if so. Yet I consider the right use of terms very important to a proper understanding of this suit. It leads to the legitimate treatment of the notice without recourse to the hypothesis that the suit is against a thing. And here, while I do not disagree with