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EXTRA-TERRITORIAL EFFECT OF DIVORCE JUDGMENTS IN RELATION TO THE FEDERAL CONSTITUTION.

A contribution to a contemporary, in speaking of the decision in the famous case of *Haddock v. Haddock,* 201 U. S., 562, concludes with the statement that the decision is opposed to reason, to authority, and to morality, but that it will stand until the question is raised again. This remark expressed the thought that was uppermost in the mind of the legal profession generally. And so it is with the deepest interest that the decision of the Supreme Court of the United States in the case of *Thompson v. Thompson* has been received. 33 Sup. Ct. Reptr., 129.

The plaintiff and defendant were married in Virginia and established the matrimonial domicile in that state. Thereafter the wife left home and took up her abode in the District of Columbia, where in November, 1907, she commenced a suit for maintenance, charging the husband with cruel treatment of such a character as to compel her to leave him. The husband was served with process. But meanwhile, before this, in September, 1907, he had brought an action for divorce *a mensa et thoro* on the ground of desertion without cause. An order of publication

having been made, and the wife failing to appear and defend, the Virginia court granted the divorce in October, 1907. The husband set up this decree in bar of the wife's suit for maintenance. On appeal to the Supreme Court of the United States it was held that the courts of the state which is the domicile of the husband, and the only matrimonial domicile, have jurisdiction to render a decree of divorce in his favor, although the wife has left that jurisdiction and service has been made upon her only by publication, and such a decree, under the "full faith and credit" clause of the Federal Constitution, is entitled to recognition in another state.

Without devoting too much time to reviewing the Haddock case and that of *Atherton v. Atherton,* 181 U. S., 155, the principles of which the Haddock case was supposed to have overthrown, it is desirable to have before us a brief summary of the reasoning employed in reaching the decision in the Haddock case. First, it was held that for a divorce to be valid the libellant must be domiciled in the state wherein the divorce is sought; second, that there must be personal jurisdiction over the libellee, in order for the decree to be entitled to full faith and credit in the courts of the state wherein the libellee resides; third, that failure to obtain such personal jurisdiction over the libellee will not deprive the decree of its validity in the state where rendered.

The facts and the conclusion of the court in the Atherton case are precisely the same as in the principal case, and it will be remembered that in the former it was held that a Kentucky decree of divorce in favor of a husband there domiciled, was entitled to full faith and credit under the Constitution, although the wife was domiciled in New York and was never served with process. To quote from the opinion: "The rule as to the notice necessary to give full effect to a decree of divorce is different from that which is required in suits *in personam.*" This was in fact a finding that a divorce suit is a proceeding *in rem,* and that the *res* was an indivisible *res* over which the Kentucky courts, by reason of their finding that the wife had wrongfully left the matrimonial domicile therein situated, had retained complete jurisdiction.

Now while the circumstances in the Haddock case were somewhat different from those in the Atherton case, the court proceeded along entirely different lines in reaching its conclusion, holding that a suit for divorce brought in a state other than that

of the domicile of matrimony, against a wife who is still domiciled therein, is not a proceeding *in rem* justifying the court in entering a decree as to the *res,* or marriage relation, that is entitled to recognition in other jurisdictions. This necessarily means that the court understands the proceedings to be *in personam,* and that inasmuch as the husband had wrongfully left the matrimonial domicile he could not establish it in another state and by divorce proceedings commenced there, bind the wife without her actual appearance. Had the court stopped with this statement the decision would have been a long step toward solving the difficulties attendant upon divorce litigation. But the morally uplifting effect of this part of the decision was nullified by the further observation that the decree was valid in the state where rendered. Perhaps this is the natural consequence of holding that divorce proceedings are *in personam,* and hence are analogous to proceedings in debt against a person outside of the jurisdiction. In such cases, of course, it is elementary that property of the debtor within the jurisdiction of the court rendering the decree may be subjected to execution on a judgment against the debtor, even if he fails to appear and defend. But we submit that the cases are too widely different to admit of such an analogy.

Inasmuch as the decision in the principal case is based upon the two cases herein discussed, our remarks concerning them may be considered as directly applying to the principal case as well. Considering the views expressed in both decisions, the one that the proceedings are strictly *in personam,* the other that they are *in rem,* we reach equally unsatisfactory results. If *in rem* the decision can be justified only on the ground that the *res,* the marriage status, remained in the state with the wrongfully abandoned spouse, while the one who wrongfully leaves takes with him none of the incidents of marriage. This is absurd from a logical standpoint.

Can we justify a decree on the ground that the proceedings are *in personam?* We think not. For in that event the validity of the decree in the state where rendered rests upon the fact that the requirement of personal appearance is satisfied by substituted service or service by publication. Let us suppose that instead of obtaining service in either of these forms the court had issued a writ commanding an officer of the court to go into the state where the other party to the proceedings was domiciled,

seize him, and bring the body before the court. A decree based upon such proceedings would be absolutely void. And yet by allowing service by publication does not the court do indirectly what it cannot do directly?

Throughout this whole line of decisions the object of the courts has been a most commendable one, viz., to check the lamentable increase in divorces where the principles of jurisdiction have been so loosely applied. But it is to be regretted that in so doing the courts could not feel free to meet the situation as it actually is, and declare once and for all time that a suit for divorce is a proceeding *in rem* that can be prosecuted only in the state of the matrimonial domicile; and further, that the relation of husband and wife can be dissolved only when both parties are actually before the court. And by matrimonial domicile we mean that place wherein both parties to the nuptial contract reside as husband and wife, or in cases of desertion, the domicile of the wrongfully abandoned spouse. We are aware that this would necessarily result in the dismissal of many suits that are otherwise meritoriously brought and where perhaps the person seeking the decree has ample grounds for desiring a legal separation, but we submit that only in some such manner as has been suggested can the courts escape the maze of intricacies that entangles them and reach a solution of the difficulties that these recent decisions have raised.

Mr. Justice Pitney's opinion in the principal case is probably supported by the weight of authority, but in its attempt to explain the questions left open by the former decisions, it is a disappointment.

MAY A PATENTEE LIMIT BY NOTICE THE PRICE AT WHICH FUTURE RETAILERS MUST SELL AN ARTICLE?

In the recent case of *Bauer & Cie v. O'Donnell*, 33 Sup. Ct. Rep., 616, the United States Supreme Court was called upon to determine the extent of a patentee's rights in an article which he had sold. In that case, the appellees owned letters patent covering 'Sanatogen' which was sold in packages each bearing a notice to the effect that anyone who sold the package for less than $1.00, or used it when so sold, would be dealt with as an infringer of the patentee's rights. The appellee, proprietor of a retail drug store, purchased 'Sanatogen' from brokers who had pur-

chased of appellant's sole licensee, and sold same for less than $1.00. The appellants seek to restrain him from continuing such sales. The court held that the remedy should not be allowed. Mr. Justice McKenna, Mr. Justice Holmes, Mr. Justice Lurton, and Mr. Justice Van Devanter dissented.

The right to make, use, and vend an invention always belonged to the inventor and was never dependent upon statute. But the exclusive right to make, use, and vend, upon which the appellant relies was conferred by statute. U. S. Comp. Stat. 1901, p. 3381. *Bloomer v. McQuewan,* 14 Howard, 539. In this case Chief Justice Taney said: "The franchise which the patent grants consists altogether in the right to exclude everyone from making, using, or vending the thing patented." In *Patterson v. Kentucky,* 97 U. S., 501, it is said: "The sole operation of the statute is to enable him (the patentee) to prevent others from using the products of his labor except with his consent. But his own right of using is not enlarged or affected."

That the inventor of an article not patented cannot, by agreement obtain the object sought by the appellant in the principal case has been decided by the United States Supreme Court. *Dr. Miles Medical Co. v. John D. Park & Sons Co.,* 220 U. S., 373. But the rights secured by the statute to a patentee are property rights and entitled to the same sanctions as other property. *Continental Paper Bag Co. v. Eastern Paper Bag Co.,* 210 U. S., 405.

The precise question presented by the principal case had not arisen before under the patent act, but a simlar question had been adjudicated under the copyright act, which secures to a holder of a copyright the sole liberty of printing, reprinting, publishing, completing, copying, executing, finishing, and vending the article copyrighted. *Bobbs-Merrill Co. v. Straus,* 210 U. S., 339. In that case it was sought to limit by a notice, substantially the same as that in the principal case, the price at which books must be sold at retail. Mr. Justice Day, delivering the unanimous opinion of the Court, said: "The owner of the copyright in this case did sell copies of the book in quantities and at a price satisfactory to it. What the complainant contends for embraces not only the right to sell the copies, but to qualify the title of a future purchaser by the reservation of the right to have the remedies of the statute against an infringer because of the printed notice of its purpose to do so unless the purchaser sells at a price fixed in the notice. To add to the right of exclusive sale, the authority to

control all future retail sales, by a notice that such sales must be made at a fixed sum, would give a right not included in the terms of the statute, and, in our view, extend its operation, by construction, beyond its meaning, when interpreted with a view to ascertaining the legislative intent in its enactment."

There is a necessary difference between the copyright act and the patent act, because of the difference in the subject matter to be protected, the most striking difference being the omission of the word 'use' in the former. Nevertheless there is a strong similarity, due to the identity of intention in the legislature enacting, namely, to promote the progress of science and the useful arts.

As regards the position of a seller of a book and a seller of a package of "Sanatogen", where each has sought by notice in substantially the same terms to impose a limitation, and where neither has any interest in the proceeds of subsequent sales, it cannot be reasonably maintained that there is any substantial difference so far as interest is concerned, or that the legislature intended to confer rights differing in nature or extent, when in the copyright act it gave to the former the exclusive right of 'vending' and when in the patent act it gave to the latter the exclusive right to "vend." Nor does it seem reasonable that the intention of the seller differs in the two cases. In each case he intends to part with the thing for a consideration. He has then exercised the right to vend, and having exercised it, the additional restriction sought to be imposed is not within the right which the legislature intended to confer.

The United States Supreme Court has held, in a line of unbroken decisions, that a patentee who had parted with a patented article by passing title to a purchaser, has placed the article beyond the limits of the monopoly. *Bloomer v. McQuewan, supra; Goodyear v. Beverly Rubber Co.,* 1 Cliff., 348, 354; *Chafee v. Boston Belting Co.,* 22 Howard, 217, 223; *Adams v. Burke,* 17 Wall., 453; *Keeler v. Standard Folding Bed Co.,* 157 U. S., 659. Expressing an opinion representative of this group of cases, the Court in the *Goodyear Case* says: "Having manufactured the material and sold it for a satisfactory compensation, whether as material, or in the form of a manufactured article, the patentee, so far as that quantity of his invention is concerned, has enjoyed all the rights secured to him under his letters patent, and the manufactured article and the material of which it is composed,

go to the purchaser for a valuable consideration, discharged of all the rights previously attached to it, or impressed upon it, by the act of Congress under which the patent was granted."

There being no dissenting opinions written by the dissenting judges, it is not easy to discover the ground upon which they base their dissent. An examination of the authorities, however, convinces that the decision of the majority gives effect to the intention of the legislature which enacted the patent law.