living in the Kingdom of the Serbs, Croats and Slovenes. Whether or not, when one party resides in the Kingdom of the Serbs, Croats and Slovenes, and the other resides in another foreign country, the courts of that foreign country would under any circumstances have jurisdiction to grant a divorce in a proceeding instituted by the one residing in that foreign country, would depend on the laws of that country.

3. Assuming that the court of the Kingdom of the Serbs, Croats and Slovenes has jurisdiction in a divorce case, the fact that a decree of divorce is granted on grounds sufficient under the law of the forum but not sufficient under the laws of this state would not invalidate the divorce.

Respectfully,
EDWARD C. TURNER,
Attorney General.

2913.

DIVORCE—VALIDITY OF DIVORCE GRANTED IN HUNGARY DISCUSSED.

SYLLABUS:

A divorce granted by a court of the Kingdom of Hungary having jurisdiction of the subject matter and of the parties, for causes considered sufficient under the laws of Hungary, and in accordance with the laws of that kingdom, will be considered valid by the authorities in Ohio in so far as the decree rendered in such proceedings affects the marital status of the parties.

COLUMBUS, OHIO, November 21, 1928.

HON. D. C. DE SZENT-IVANYI, *Royal Hungarian Consulate, 1529 Union Trust Building, Cleveland, Ohio.*

DEAR SIR:—This will acknowledge receipt of your request for my opinion, which reads as follows:

> "The Royal Hungarian Ministry of Justice, in order to clarify the jurisdiction of Hungarian courts in divorce proceedings affecting American citizens, requested the Ministry of Hungary at Washington to procure information on the above question.
>
> The Secretary of State, in answer to the request of the Royal Hungarian Minister at Washington for information regarding this subject, suggested that the Consular officers ascertain from the authorities of those states which come within their jurisdiction, the existing law on this subject. Therefore, I beg to ask you whether the divorce decree issued by a Hungarian court and affecting American citizens would be considered valid by Ohio authorities. In accordance with Hungarian Article of Law XXXI of 1894, Hungarian courts may act in divorce proceedings affecting foreigners only if their decree is considered valid in the country of which the foreigner is a citizen. Therefore, in order to prevent the issuance of decrees in cases where same would not be considered valid by American authorities, the Royal Hungarian Ministry of Justice is anxious to receive information on the following points:

(1) Are divorce decrees affecting American citizens, issued by Hungarian courts, considered valid by authorities of Ohio in cases where one of the parties is domiciled in Hungary and the other either in Ohio or in another country?

(2) Where the two parties are domiciled in different countries and neither one resides in Ohio, that is, for instance, where the husband resides in Hungary and the wife in Germany, which courts would have jurisdiction in divorce proceedings?

(3) In cases where the Hungarian courts would have jurisdiction to proceed in divorce matters, would a decree be considered valid by Ohio authorities if the grounds for divorce are also recognized by the courts of Ohio?

This Consulate will be exceedingly grateful if you will be so kind as to procure information on the foregoing points and forward same to this office for transmission to the Royal Hungarian Ministry of Justice."

While marriage is said to be a contract between the parties, its consummation creates a legal status, which has long been recognized in all civilized countries to be of such peculiar importance to the state that it cannot be dissolved by the mutual consent of the parties, but that the assent of the state must be obtained in order effectually to dissolve the relation. The legal dissolution of this status is what is known as divorce. Marriage, in the sense in which it is dealt with by a decree of divorce, is not a contract, but one of the domestic relations; in other words, a legal status, and it is upon this legal status that the divorce operates. An action for divorce, therefore, is an action *in rem,* operating on the legal status created by marriage, and it is this status that is the *res* of the action. In all actions in rem it is necessary, in order that the court may have jurisdiction, that the situs of the *res* or subject of the action be within the jurisdiction of the court.

According to the generally accepted view, and an examination of the Ohio cases relating to divorce clearly leads to the conclusion that this view is adhered to in Ohio, the situs of marriage, which fixes the jurisdiction of courts in divorce matters, is the domicile of the parties at the time the jurisdiction of the court is invoked, regardless of the place of celebrating the marriage, or the domicile of the parties at the time of the celebration of the marriage, or the situs of the offense on account of which the divorce is sought.

It is undoubtedly competent for the sovereign power of any country to confer upon its tribunals such jurisdiction in matters of divorce as it deems proper, and a decree pronounced by a proper tribunal, under authority so conferred, would necessarily be held valid and binding within the territorial limits of the state and country whose tribunal it is, but what effect, if any, would elsewhere be given to such a decree depends mainly upon whether the jurisdiction of the court pronouncing it has been conferred and exercised in accordance with the generally received principles of international law. The generally received principle of international law which fixes the situs of a marriage, to give jurisdiction to a court to dissolve that marriage, is the domicile of the parties. In Jacobs on The Law of Domicile, on page 68, it is said:

"The test, therefore, of the validity, as to jurisdiction, of a *domestic* divorce is anything which the law making power chooses to enact, while the test as to jurisdiction of the validity of a *foreign* divorce is, according to the generally received view, the domicile of the parties. The place of the celebration of the marriage is immaterial and so, according to almost all the authorities, is the place of the commission of the offense."

See also Story on Conflict of Laws, Section 229a. In Minor on Conflict of Laws, it is said on page 195:

> "Generally speaking, it is the laws and courts of the bona fide present domicile of the parties that regulate the divorce, not those of the country of residence (merely) nor of citizenship, nor of the domicile at the time of the marriage or of the offense, nor of the place of marriage, nor of the situs of the offense because of which the divorce is sought."

The law favors marriage but looks with disfavor on divorce. Because the law everywhere favors marriage, this relation, when valid by the law where it is contracted, is regarded as valid everywhere. This is not always so as to divorce. Marriage originates in the consent of the parties; but it can be legally dissolved only at the sovereign pleasure; and in this regard each state of the American Union is an independent sovereignty. For this reason, each state of the American Union is considered as being foreign to another with respect to the jurisdiction of its courts in divorce matters, and some confusion has arisen because of the fact that divorces granted in other states of the American Union are spoken of as "foreign divorces" as well as those divorces granted by the courts of a foreign country.

The validity and effect of divorces granted by another state of the American Union, and those granted by the courts of a foreign country, do not necessarily rest upon the same rules. The Constitution of the United States in Article IV, Section 1, provides that full faith and credit shall be given in each state to the judicial proceedings of every other state. The Supreme Court of the United States in *Haddock* vs. *Haddock,* 201 U. S. 562, held that this did not mean that each state must necessarily recognize a divorce granted by the courts of another state, yet it might do so if it saw fit. The courts of Ohio do give full effect and credit to divorces granted in the other states even though not required by the Constitution to do so (*Spaulding* vs. *Spaulding,* 11 O. App. 143-146), and would no doubt do so regardless of the provisions of the Federal Constitution above referred to, subject, however, to their scrutiny as to the jurisdiction of the court pronouncing the decree.

The underlying principle that prompts the Ohio courts to give validity to divorces granted by the courts of sister states is the recognition of the fact that every state has an undoubted right to determine the status or domestic and social condition of the persons domiciled within its territory, and if it appears that the divorce in the sister state was granted to persons domiciled within its territory the divorce will be considered as valid. In other words, if the court pronouncing the decree in the sister state had jurisdiction in the premises, the decree should and will be considered as valid in Ohio. The courts in Ohio, however, if the divorce granted in the sister state be questioned, will inquire into and determine the jurisdiction of the court granting the decree, and if it be found that that court did not have jurisdiction of the subject matter and of the parties at the time the decree was pronounced, it will not be recognized as valid.

Thus, in the case of *Van Fossen* vs. *The State,* 37 O. S. 317, a divorce granted by a court in Colorado for an offense committed in that state, where the husband and wife were temporarily resident although found by the jury to be legally domiciled in Ohio, was declared to have no force and effect in this state, notwithstanding its efficacy in Colorado; and the conviction of the husband of bigamy for marrying another woman here was sustained. There can be no question but that this principle would be extended in a proper case to divorces granted by the courts of a foreign country. The question of the jurisdiction of a court is always open to inquiry and a decree rendered without jurisdiction must necessarily be void.

So far as I know, the question of the validity of a divorce granted in a foreign country has never been passed upon by any court in Ohio; at least there are no official reported decisions of any court in this state touching upon the question. The cases involving the validity of divorces granted in other states of the American Union are not numerous. An examination of these few cases clearly shows that a divorce granted in a sister state having jurisdiction of the situs of the matrimonial union upon which the decree of divorce operated, and of the parties, will be considered valid in Ohio in so far as it relates to the marital relation of the parties, and that the situs of that matrimonial union is the domicile of at least one of the parties, and further, that the jurisdiction of the parties to the suit is determined by the law of the state wherein the decree was rendered.

In an early case, *Cox* vs. *Cox*, 19 O. S. page 502, wherein the question of the validity of a divorce granted in the State of Indiana was considered, it is said:

> "It is not necessary in this case to examine the decisions favoring the doctrine that a foreign decree of divorce is void, where the defendant was non-resident, and there was no jurisdiction of his person except by constructive service; nor those which make the validity of such decree depend upon the place of the marriage, or of the offense. * * * .
>
> The ground upon which the validity of these decrees is maintained is, that marriage, being a relation involving the social status of a party to it, the State of which the complaining party is a *bona fide* resident has the right to determine his matrimonial status; and, in view of the new relations that may be formed in consequence of the dissolution of the marriage, in the State where the decree is pronounced, that public policy requires the recognition of the validity of such decrees in other states.
>
> But the principle upon which the validity of such decrees rests does not require that they should be allowed to operate in the foreign jurisdiction beyond the dissolution of the marriage."

It has also been generally considered that, other considerations being present, the fact that the divorce may have been granted for causes not recognized as sufficient in Ohio, does not serve to invalidate the divorce. This is noted by the court in the case of *Doerr* vs. *Forsythe, Adm'x.*, 50 O. S. 726, 730, where the court said in commenting on the effect of the divorce granted in Indiana:

> "The decree of divorce granted the husband in the state of Indiana, acted only on the marital relation between the parties, and did not affect, nor purport to affect, the property rights of the wife in the State of Ohio. For aught that appears, the divorce may have been granted on some ground not recognized as a ground of divorce by the laws of this state; * * * ."

It was held in an early case in Ohio, *Cooper* vs. *Cooper*, 7 Ohio, part 2, page 238, that a decree of divorce rendered by a court of another state, unless void for want of jurisdiction or obtained by fraud as to proof of plaintiff's domicile, is a bar to a subsequent suit by the defendant for the same relief.

Although we do not have the benefit of any decided case directly in point, it is my opinion, upon consideration of the underlying principles which have prompted the courts of Ohio to recognize as valid divorces granted by the courts in other states of the American Union, that a divorce granted by a court in the Kingdom of Hungary, which had jurisdiction of the subject matter and of the parties, would be recognized as valid in Ohio, in so far as it would affect the marital relation of the parties. I am also of the opinion that the test of that jurisdiction, so far as it relates to the subject

matter of the controversy, is the domicile of the parties to the marriage at the time the jurisdiction of the court is invoked. If the validity of such a divorce were questioned in our courts, the only issue involved in such an inquiry would be whether or not the foreign court had jurisdiction in the premises, and if it were found by our court that the foreign court did not have proper jurisdiction the divorce would be declared invalid for all purposes.

I am also of the opinion that before a court in Hungary may grant a divorce which will be recognized as valid in Ohio, that court must have jurisdiction of both the subject matter of the controversy and of the parties. By the subject matter of the controversy, I mean the marital status of the parties, which is dependent upon the domicile of the parties at the time the decree is rendered. At least one of the parties must be domiciled in Hungary, otherwise the courts of that country have no jurisdiction and the decree will not be considered valid in Ohio. Otherwise stated, no valid divorce may be decreed in Hungary upon constructive service, if neither party to the controversy is there domiciled.

Jurisdiction is not dependent upon citizenship but upon domicile, and this should not be confused with mere residence. Domicile imports something more than mere residence or abode. There must be an intention upon the part of the person to make a place his place of residence, without any present intention of removing therefrom. The residence must be actual and genuine, coupled with *animus manendi,* or intent to remain. Mere temporary residence will not confer jurisdiction. If one or the other of the parties to a divorce suit possesses the necessary domiciliary status within the jurisdiction of the courts of Hungary, those courts may be invested with the necessary jurisdiction of the subject matter to grant valid divorces recognized as such in Ohio. When vested with jurisdiction of the subject matter, and jurisdiction of the parties is acquired in accordance with the laws of Hungary, a divorce thereupon granted will be recognized as valid in Ohio, in so far as that divorce affects the marital status of the parties to the marriage. A divorce so granted need not necessarily be granted for causes recognized in Ohio as sufficient for the granting of a divorce, but may be granted upon grounds recognized by the law of the forum as proper and sufficient grounds for the granting of the divorce.

Any orders of the court made at the time of granting such divorce, with reference to alimony or the custody of children, will be judged in Ohio by the laws relating to foreign judgments and will be given such force and effect in Ohio as are given to foreign judgments generally, in accordance with laws relating thereto, and are beyond the scope of this opinion. It may be noted, however, that a foreign court does not have the power to render judgments affecting the title to property located in Ohio, nor will a divorce obtained by one spouse in a foreign court, without service upon the other who resides in Ohio, other than by publication, in any way affect the property rights of the resident of Ohio or bar him from dower in lands lying in the State of Ohio. *Mansfield* vs. *McIntyre et al.,* 10 Ohio, 27; *Bay* vs. *Bay,* 85 O. S. 417.

It may be questioned whether or not the effect of divorces granted in a foreign country is in anywise controlled by the terms of treaties existing between the foreign country and the United States of America. In view of the fact that each state of the American Union is an independent sovereignty with respect to divorce matters, there is some doubt in my mind whether or not the terms of any treaty could fix the obligation of a constituent state of the American Union with respect to its recognition of a divorce granted in the courts of the foreign country. At any rate, I do not have before me the existing treaties between Hungary and the United States of America, and whether or not the terms of any such treaty

might affect the question before us has not been considered in this opinion, and I do not pass upon the same.

It should also be noted that it is very difficult, within the limits of an opinion of this kind, to touch upon all the questions which may arise in matters of this kind or to cover all possible phases of the subject even in a general way. To a great extent each case must be considered as it arises, in the light of the facts peculiar to it. Also, while in some respects I have in the course of this opinion spoken of foreign countries generally, I do not wish to be understood as saying that the principles hereinbefore referred to would be given application in cases where relations with a foreign nation, whose standard of civilization did not merit it, were involved.

In answer to your specific questions, I am of the opinion:

1. A divorce granted by a court of the Kingdom of Hungary, whether to persons who are American citizens or not, when one of the parties is domiciled in Hungary and jurisdiction of the other, regardless of where he resides, is acquired by the service of process in accordance with the laws of Hungary, will be considered valid by the authorities in Ohio, in so far as the decree affects the marital relation of the parties.

2. When one of the parties to a matrimonial union is domiciled, as distinguished from merely residing in or having a place of abode in Hungary, and the other is domiciled in Germany, the courts of Hungary might lawfully be vested with jurisdiction to grant a divorce, as noted in the answer to your first question. A divorce so granted would be considered valid in Ohio. Whether or not the courts of Germany might acquire jurisdiction over the parties and grant a divorce under such circumstances, would depend to a great extent on the laws of Germany.

3. Assuming that the courts of Hungary had jurisdiction of both the subject matter and the parties, and granted a divorce to such parties, the fact that the divorce was granted upon grounds not recognized as sufficient in similar cases in Ohio would not serve to render the divorce invalid in Ohio.

Respectfully,
EDWARD C. TURNER,
Attorney General.

2914.

APPROVAL, BONDS OF TUSCARAWAS COUNTY—$52,000.00

COLUMBUS, OHIO, November 22, 1928.

Retirement Board, State Teachers Retirement System, Columbus, Ohio.