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WHEN WE speak of jurisdiction for divorce, two distinct ideas are involved: First, what are the statutory requirements for the purpose of obtaining a decree of divorce in the local courts, and second, to what extent will the local courts recognize the validity of divorce decrees of other states?

The first question presents no particular difficulties. In North Carolina, if one of four causes for absolute divorce exists,[1] the injured party may apply to the Superior Court, setting forth the facts in a complaint, which must be accompanied by an affidavit that the facts are true and that the complaint is not made out of levity or collusion.[2] The same section of the Consolidated Statutes provides that the complainant must be "a resident of the state for two years next preceding the filing of the complaint." It has been held that this does not require actual physical presence for two years, but that it means merely legal residence or domicile.[3] In *Williams* v. *Williams*,[4] it is stated that the two years residence must be alleged in the complaint or in the affidavit, and that this is necessary to give the court jurisdiction. The statute also provides for service of summons on the defendant in divorce actions by publication, if the defendant cannot be found in the state.[5] Consequently, if the court has jurisdiction of the plaintiff and finds a good cause for divorce, it may grant a decree although the defendant is served only by publication. All North Carolina courts are bound, of course, to recognize the validity of such decrees of divorce, granted under the laws and by the courts of this state.

What effect will be given in the courts of other states to North Carolina decrees of divorce and what effect the North Carolina courts will give to decrees of other states, is another matter. North Carolina might recognize any foreign divorce it pleases, as a matter of comity.[6] But the North Carolina Supreme Court has consistently held in effect that it will not recognize as valid any foreign divorce, unless the decree comes within the sanction of the full faith and credit clause[7] of the Constitution of the United States, i. e. unless the court granting the divorce had jurisdiction in the sense of power. The full faith and credit clause is not mentioned in all of the decisions where this question has

[1] C. S. sec. 1659 provides for absolute divorce in the following cases: (1) adultery, (2) impotency, (3) pregnancy of the wife at the time of marriage, when the husband is ignorant of the fact and is not the father of the child, and (4) separation and living apart for ten years. By ch. 63 of the Public Laws of 1921, the period of separation was changed to five years.

[2] C. S. sec. 1661.

[3] *Moore* v. *Moore*, 130 N. C. 333, 41 S. E. 943 (1902).

[4] 180 N. C. 273, 104 S. E. 561 (1920).

[5] C. S. sec. 484-(5).

[6] See *Gildersleeve* v. *Gildersleeve*, 88 Conn. 689, 92 Atl. 684 (1916), holding that a divorce decree of a foreign state, not entitled to full faith and credit, will be recognized by comity, unless contrary to public policy and good morals. Also *Joyner* v. *Joyner*, 131 Ga. 217, 62 S. E. 182 (1908), (recognition as a matter of comity and not of necessity).

[7] U. S. Const. Art. IV, sec. 1.

arisen, but the decision in every case has been controlled by the court's idea of what constitutes jurisdiction for divorce. Questions of jurisdiction arise under the Constitution[8] rather than under any principles of comity.

It might be well to inquire briefly into the nature of divorce. Divorce is a means of destroying something,—a *res*—a status—the marriage relation. "In divorce proceedings, the marriage relation is the thing in litigation, the *res*, and each state has exclusive jurisdiction over the marriage status of its citizens."[9] "An action for divorce is *sui generis* and is to determine the status of the parties."[10] That divorce is really an action *in rem* is shown by the decisions in the great majority of the state courts which proceed on that assumption.[11]

In proceedings to obtain a decree of nullity, as compared with divorce, the proper rule seems to be that the sovereign which created the marriage is alone able to declare it a nullity.[12] For a decree of nullity says that there never was a marriage, that the law of the place of celebration never created a marriage status, and the state where the marriage is created is the only sovereign able to answer that question.

The parties to a valid marriage cannot destroy their own status. Some sovereign, however, must have that power. By the common law, that sovereign is the one which has the greatest interest in the marriage relations of its citizens, namely, the sovereign of the parties' domicile. "All states and governments possess inherent power over the marriage relation, its formation and dissolution, as regards its own citizens."[13] "Jurisdiction in divorce is dependent upon the domicile of the parties at the time the decree is rendered."[14] Although, under the common law rule that the domicile of the husband is the wife's domicile, the husband has the advantage, there is little difficulty in determining whether a court has jurisdiction for divorce.[15]

But in the United States, it is admitted that the wife may acquire a separate domicile for divorce.[16] And there is some authority that, if the wife has grounds for divorce and the obligation to live with the husband has ended, she may acquire a separate domicile for any purpose.[17] The difficulties involved in any dis-

[8] *Miller* v. *Leach*, 95 N. C. 229 (1886), where it is held that by virtue of the full faith and credit clause, "judgments of the several states are put upon the same footing as domestic judgments, so as to make them conclusive as to the merits of the subject matter, but leaving the question of jurisdiction, fraud in the procurement, and whether the parties were properly brought before the court, open to objection."

[9] *State* v. *Herron*, 175 N. C. 754, 760, 94 S. E. 698 (1918); per Allen J., concurring.

[10] *Cooke* v. *Cooke*, 159 N. C. 46, 52, 74 S. E. 639 (1912).

[11] *Ditson* v. *Ditson*, 4 R. I. 87 (1856); *Thompson* v. *Thompson*, 91 Ala. 591, 8 So. 419 (1890); *Dunham* v. *Dunham*, 162 Ill. 589, 44 N. E. 841 (1896); *Felt* v. *Felt*, 59 N. J. Eq. 606, 45 Atl. 105 (1899); *In re James Estate*, 99 Cal. 374, 33 Pac. 1122 (1893); *Loker* v. *Gerald*, 157 Mass. 42, 31 N. E. 709 (1892). For a general discussion of the subject, see *Constitutional Protection of Decrees of Divorce* by Joseph H. Beale, Jr., 19 Harv. L. Rev. 586.

[12] *Cummington* v. *Belchertown*, 149 Mass. 223, 21 N. E. 435 (1889); *Levy* v. *Downing*, 213 Mass. 334, 100 N. E. 638 (1913). For argument *contra*, see *Jurisdiction to Annul a Marriage*, by Herbert F. Goodrich, 32 Harv. L. Rev. 806.

[13] *In re Alderman*, 157 N. C. 507, 73 S. E. 126 (1911).

[14] *Bidwell* v. *Bidwell*, 139 N. C. 402, 52 S. E. 55, 111 Am. St. Rep. 797 (1905).

[15] In England, jurisdiction for divorce depends solely upon the domicile of the husband. *Le Mesurier* v. *Le Mesurier*, [1895] App. Cas. 517; *Shaw* v. *Attorney General*, L. R. 2 Prob. Div. 156.

[16] *Ditson* v. *Ditson*, 4 R. I. 87 (1856); *Harteau* v. *Harteau*, 14 Pick. (Mass.) 181, 25 Am. Dec. 372 (1833); *Arrington* v. *Arrington*, 102 N. C. 491, 9 S. E. 200 (1889); *In re Means*, 176 N. C. 307, 97 S. E. 39 (1918).

[17] *Williamson* v. *Osenton*, 232 U. S. 619 (1913).

cussion of jurisdiction for divorce are closely connected with the problem of the wife's separate domicile. The purpose of this discussion is not to offer any solution,[18] but merely to point out the development of the North Carolina doctrine.

Let us suppose a few typical situations:

1. Both plaintiff and defendant are residents of the state of the forum and the defendant is served by publication.

2. The plaintiff is a resident of the state of the forum. The defendant is a non-resident, but enters an appearance in the divorce proceedings.

3. The plaintiff is a resident of the state of the forum, which happens to be the last marital domicile. The defendant, a non-resident, is served by publication.

4. The plaintiff is a resident of the state of the forum, which is not the last marital domicile. The defendant is a non-resident and is served by publication.

In the first situation, where the decree is granted at the domicile of both husband and wife, there is no doubt about the jurisdiction. There is jurisdiction in this case whether the defendant is served personally or by publication.[19] In the case of *In re Alderman*,[20] both parties resided in Florida, and the wife obtained a divorce there on grounds of desertion. The decree also gave the wife custody of the minor child. The decree as to the custody of the child was held to have no extra-territorial effect, and the North Carolina court felt that it could decide the question of the child's custody independently and according to the child's best interests. But the court held that it must give full faith and credit to the decree of divorce, as both the husband and wife were residents of Florida and properly before the court.

The second situation is illustrated by *Arrington* v. *Arrington*.[21] The wife left the husband in North Carolina and went to Illinois, where she obtained a divorce after a year's residence. The husband authorized an attorney by letter to appear for him in the Illinois divorce. The *bona fides* of the wife's removal to Illinois was correctly inquired into as an essential element in giving jurisdiction to the Illinois court. The wife's *bona fide* domicile in Illinois, however, plus the appearance of the husband in the suit by attorney, clearly gave the court jurisdiction of the subject matter and of the parties, and the North Carolina court held that it was bound to recognize the decree as a conclusive judgment, both as to the dissolution of the marriage and the decree for alimony. However, the court added that it was not disposed to concede validity to a proceed-

[18] In an article entitled *Ex parte Divorce*, 28 Harv. L. Rev. 457, Robert H. Peaslee suggests that in cases of *ex parte* divorce, i. e. where a non-resident defendant is not personally served and does not appear, the merits of the desertion from the last marital domicile should be made a jurisdictional fact, which may be inquired into. The *Haddock* case seems to support this view, for the Connecticut court found that the wife was in the wrong and granted a divorce to the husband, while the New York court found that the husband was in the wrong and so refused to recognize as valid the Connecticut divorce.

[19] On the other hand, when neither party has a domicile in the state of the forum, that court has no jurisdiction of the subject matter and a decree of divorce is void, although both parties may have appeared and voluntarily submitted to the jurisdiction of the court: *Bell* v. *Bell*, 181 U. S. 175, 21 Sup. Ct. 551, 45 L. Ed. 804 (1901); *Andrews* v. *Andrews*, 188 U. S. 14, 23 Sup. Ct. 237, 47 L. Ed. 366 (1903). In *Streitwolf* v. *Streitwolf*, 181 U. S. 179 (1901), the Supreme Court held that a residence for the statutory period, where the party has no occasion for the residence except to procure a divorce and the evidence shows that the intention was to remain only until the divorce was obtained, was not a *bona fide* residence so as to give the court jurisdiction for divorce.

[20] 157 N. C. 507, 73 S. E. 126 (1911).

[21] 102 N. C. 491, 9 S. E. 200 (1889). See also *Arrington* v. *Arrington*, 127 N. C. 190, 37 S. E. 212 (1900), upholding the validity of the decree of alimony in the same divorce.

ing wholly *ex parte,* where service on a non-resident defendant is obtained only by publication.

The leading case of *Irby* v. *Wilson*[22] illustrates the third situation. The parties were resident in South Carolina and were married there. Five years later they moved to Tennessee, establishing their domicile there. After a year in Tennessee, the wife left the husband and came to North Carolina. Six years after the separation, the husband obtained a divorce in Tennessee on the ground of the wife's desertion, service being obtained by publication. The wife later remarried in North Carolina. In a suit in this state, brought after the death of the husband in Tennessee, it was held that the second marriage was void. The opinion by Chief Justice Ruffin argues as if divorce were an action *in personam:*

"The decree of the court of Tennessee is altogether inoperative and null, because it was not an adjudication between any parties; since the wife did not appear in the suit, nor was served with process and was not a subject of Tennessee, but a citizen of this state, and therefore not subject to the jurisdiction of Tennessee. Every person who is to be affected by an adjudication should have opportunity of being heard in defense. . . . The wife was not bound to appear in the courts of Tennessee, nor is she concluded by a sentence in a cause to which she was not a party. . . . There can be no valid adjudication unless there be a thing or persons before the court. . . . The United States Constitution does not make it imperative for the courts of a state to recognize and enforce judicial sentences of other states against persons who were not parties to the proceedings."

That *Irby* v. *Wilson* treats divorce as a proceeding operating *in personam* is shown by the cases where it is cited as authority.[23] It is submitted that the decision would not be sustained today.. The facts are identical with those in the famous case of *Atherton* v. *Atherton.*[24] In each case, the divorce was secured by the husband at the last marital domicile, which the wife had left.[25] The dissenting judges in the later and equally famous *Haddock* case[26] thought that the *Atherton* case was practically overruled, but it has since been followed in *Thompson* v. *Thompson.*[27] In that case, the parties married and had their domicile is Virginia. The husband procured a divorce there after the wife had abandoned him. Service was by publication. The wife sued in the District of Columbia for separate maintenance, and it was held that the Virginia decree of divorce was a bar to her action. When a divorce is obtained at the last marital domicile, it seems to have a special validity, and under the full faith and

[22] 21 N. C. 568 (1837).

[23] *Davidson* v. *Sharpe,* 28 N. C. 14, 16 (1845), judgment on a bond; *Burke* v. *Elliott,* 26 N. C. 355, 358, 42 Am. Dec. 142 (1844), judgment on a debt; *Charleton* v. *Sloan,* 64 N. C. 702, 704 (1870), suit on a bail bond against a non-resident defendant; *Battle* v. *Jones,* 41 N. C. 567, 572 (1860), attachment, where the court speaks of the propriety of the rule laid down in *Irby* v. *Wilson* that an *ex parte* judgment against a person not a citizen of a country, has no extra-territorial obligation and ought not to be respected by courts of other countries further than it may be made to appear right.

[24] 181 U. S. 155, 21 Sup. Ct. 544, 45 L. Ed. 794 (1901).

[25] The court in *Irby* v. *Wilson,* 21 N. C. 568, 581, (1837), said, "The wife obtained a domicile, home and citizenship in North Carolina by removing and living here continuously. It may be true that for some purposes, the matrimonial domicile of this female would be deemed to be in Tennessee, as to determine her share of his estate in case of intestacy. But for the purpose of jurisdiction over her person and especially in a suit between the husband and herself, she was not domiciled in Tennessee." This is a rather startling argument for the separate domicile of a married woman who leaves her husband without cause, and is not supported. The use of the term "matrimonial domicile" in 1837 is interesting in view of the *Haddock* case, which made it a controlling factor in jurisdiction for divorce in 1906.

[26] *Haddock* v. *Haddock,* 201 U. S. 562, 26 Sup. Ct. 525, 50 L. Ed. 867 (1906).

[27] 226 U. S. 551, 33 Sup. Ct. 129, 57 L. Ed. 347 (1912).

credit clause, such a decree must be recognized everywhere. *Irby* v. *Wilson* should have been so decided.

The fourth situation is illustrated by several North Carolina cases. In *State* v. *Herron*,[28] the husband and wife resided and were married in this state. The husband went to Georgia and obtained a divorce there, service being obtained by publication. He remarried in Georgia and later returned to North Carolina with his second wife. A conviction of bigamous cohabitation was sustained on the ground that the Georgia divorce was void. This is clearly correct, because the jury found that the defendant was not a *bona fide* resident of Georgia. He remained practically all the time in North Carolina, but at intervals spent a few days or weeks in Georgia. The essentials of domicile, i. e. the intention to make Georgia his home, combined with actual residence there, did not exist. Therefore his domicile remained in North Carolina. Under the rule in *Bell* v. *Bell*,[29] the Georgia court would have been without jurisdiction for divorce even if the wife had appeared in the suit. Much less was there jurisdiction when the wife was a non-resident and was served only by publication. Such a decree, obtained without jurisdiction, is invalid, not only in North Carolina, but in Georgia and everywhere else.

The court in the above case might well have stopped at this point, but some explanation was needed for the cases where the plaintiff had a *bona fide* domicile in the state of the divorce proceedings and the defendant was served by publication. Chief Justice White in the *Haddock* case,[30] in classifying the states with respect to the degree of credit which they accord to decrees of divorce in other states, had said that but for a doubt derived from a suggestion in *Bidwell* v. *Bidwell*,[31], he would classify North Carolina among the states "which decline, even upon principles of comity, to recognize and enforce as to their own citizens within their own borders decrees of divorce rendered in other states when the court rendering the same had jurisdiction over only one of the parties." The suggestion referred to follows:

> "Where the plaintiff only is domiciled in the state of the forum and has obtained a decree of divorce for a cause recognized as valid in such state, after constructive service on defendant,—North Carolina has heretofore held against the validity of such a decree by courts of other states, as affecting the status of her own citizens. The better doctrine now seems to be that where the domicile of the plaintiff has been acquired in good faith and not in fraud or violation of some law of a former domicile, a divorce of this kind should be recognized as binding everywhere, certainly within the jurisdiction of the United States or any one of them."[32]

After considering the above, Chief Justice Clark remarks, in *State v. Herron*,[33] that an examination of the *Bidwell* case does not show that North Carolina

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[28] 175 N. C. 754, 94 S. E. 698 (1918).
[29] See n. 19, *supra*.
[30] See n. 26, *supra*.
[31] See n. 14, *supra*.
[32] 139 N. C. 402, 409, citing *Atherton* v. *Atherton*, 181 U. S. 155 and *Andrews* v. *Andrews*, 188 U. S. 14.
[33] 175 N. C. 754, 756.

should be taken out of the class of states which decline to recognize the validity of a divorce rendered in a court which had jurisdiction over only one of the parties. In the *Bidwell* case, the wife had already sued in Massachusetts, where she was domiciled, for a limited divorce from bed and board, the same action as the one she brought in this state. The husband had appeared in the Massachusetts case and had set up as a defense a decree of absolute divorce, obtained in North Dakota. This was held to bar the wife's Massachusetts action. Consequently the North Carolina court held that the wife was estopped from raising questions as to the jurisdiction of the North Dakota court. If there had been no such intervening decision in Massachusetts, the North Carolina court might have inquired whether the husband in the North Dakota case had a *bona fide* domicile for divorce in that state. So *State* v. *Herron* does not conflict with the *Bidwell* case, for Herron was proved not to have had a domicile in good faith in Georgia. As to the dictum in the *Bidwell* case, quoted above, it is plainly contradicted in *State* v. *Herron,* where there are strong statements to the effect that a decree of divorce rendered in another state on substituted process by publication, is invalid in North Carolina. Consequently, it may be inferred that even if Herron had acquired a *bona fide* domicile in Georgia, the divorce would have been held invalid in North Carolina, for the reason that the wife was served only by publication. Conviction under the bigamy laws probably would have resulted just the same.[34]

Harris v. *Harris* [35] illustrates the strict North Carolina doctrine on the fourth situation. In that case, the parties were both domiciled in North Carolina. The wife went to Colorado and, after a residence there for the statutory period, obtained a divorce. The husband, who remained here, was served by publication and by a summons sent through the mails. The court did not consider the *bona fides* of the wife's residence in Colorado, which we can presume was good, but decided squarely that a decree of divorce, obtained in Colorado upon constructive service, has no validity in this state, either as to the relation of the parties or as to the custody of a minor child remaining with the husband. The court admitted that the divorce would be valid in Colorado, but contended that it had no extra-territorial validity. The truth is that there are only a few states, principally North and South Carolina, Pennsylvania and New York, which refuse recognition to *"ex parte* divorces." The *Haddock* case simply says that these states cannot be compelled to recognize such divorces, unless the facts come within those of the *Atherton* case.

Another case of the fourth type is *State* v. *Schlachter.*[36] A couple domiciled in New York, married there and later came to North Carolina and established a domicile here. After several years, the wife returned to New York, where she obtained a divorce on the ground of the husband's adultery. Soon thereafter, she remarried in New York and later came to North Carolina with her second

[34] This result is reached in New York. See *People* v. *Baker,* 76 N. Y. 78, 32 Am. Rep. 274 (1879).
[35] 115 N. C. 587, 20 S. E. 187, 44 Am. St. Rep. 471 (1894).
[36] 61 N. C. 520 (1867).

husband. There was an indictment against the wife and her second husband for fornication and adultery. The court pointed out that the marriage, the divorce, and the second marriage, all occurred in New York and in conformity with New York law. A concession in *Irby* v. *Wilson,* that even the divorce in that case was valid where it was made, relieved the court of the necessity of making an issue, since the second marriage would be valid in New York. The court held that its validity should not be drawn in question by the courts of another state.[37] But this reasoning is not the basis of the decision. The court refused to question the validity of this second marriage upon an indictment for fornication and adultery, because a judgment against the parties would fix nothing, but would on the other hand cause great uncertainty as to their status and the legitimacy of the children. It did not hold that the second New York marriage was valid in North Carolina, but simply that the criminal proceeding was not a proper proceeding in which to question it. Consequently this case decides nothing about jurisdiction for divorce.

The North Carolina doctrine seems to be this: If the plaintiff and defendant in a divorce suit are domiciled at the forum, or if the plaintiff is so domiciled and the defendant, a non-resident, enters an appearance, the decree of divorce will be recognized as valid and binding. But if the plaintiff is domiciled at the forum and the defendant, a non-resident, is served only by publication, then the decree of divorce will not be recognized as valid, unless the forum is also the last marital domicile. Under this doctrine, a divorce may be valid in the state where it is granted and be void in North Carolina. A divorced defendant, resident in North Carolina, and served only by publication, would still be bound by the marriage tie, while the plaintiff in the state of the forum and in the rest of the United States would be unmarried. The divorced plaintiff is free to marry again, but if he comes into North Carolina, he is a bigamist. Thus a man might have one wife in North Carolina and another outside of the state. This is neither logically right nor morally desirable. If one of the Siamese twins is severed from the other, that other is severed from the one. "The marriage tie, when severed as to one party, ceases to bind either. A husband without a wife or a wife without a husband, is unknown to the law."[38] Granted a separate domicile to a married woman for purposes of divorce and granted that the plaintiff in the particular case has a *bona fide* domicile at the forum, then a decree of divorce, if valid where granted, should be recognized as valid everywhere. This is the dictum of the *Bidwell* case. The problem is stated by the North Carolina Supreme Court in the following language:

"There are admitted difficulties in reconciling the rulings which determine the status of a resident plaintiff, without determining at the same time, that of a non-resident defendant,

[37] See attempt to distinguish the case on this ground in *State* v. *Herron,* 175 N. C. 754, 756; see also comment of Allen, J. concurring in same case, 175 N. C. 754, 760. The correct distinction is found in *Harris* v. *Harris,* 115 N. C. 587, 588, that the validity of the latter marriage cannot be questioned in an indictment for fornication and adultery in this state.

[38] *Atherton* v. *Atherton,* 181 U. S. 155.

where the relation subsists between the two, and what disunites the one, fails to disunite the other; and on the other hand, to take from one, who has never been served with personal process, by a foreign judgment, not only personal, but property rights possessed beyond the jurisdictional limits. These difficulties may be removed by harmonious and consistent legislation, which they seem to invite. But our province is to interpret not to make the law, and we must abide by that of our own state."[39]

[39] *Arrington* v. *Arrington*, 102 N. C. 491, 513.