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Annulment of Marriages in New Mexico - Part 1 - Jurisdiction

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ANNULMENT OF MARRIAGES IN NEW MEXICO

Part I.—Jurisdiction

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Divorce jurisdiction is well-defined, nationally[1] and locally.[2] Not only have judicial conditions precedent been established, but all states have statutes detailing the local jurisdictional prerequisites for divorce. Annulment jurisdiction presents a different picture. The Supreme Court of the United States has established no constitutional guide comparable to the divorce "domicile" rule.[3] In the twenty-three states, including New Mexico, which have no statutory prerequisites to annulment actions,[4] the courts are free, within the bounds of procedural due process, to establish appropriate jurisdictional standards.

The New Mexico Supreme Court has discussed jurisdiction to annul in one case, *State ex rel. Pavlo v. Scoggin*.[5] This Comment deals with some of the problems raised by that decision, and proposes a statutory remedy.

I. New Mexico Precedent: State ex rel. Pavlo v. Scoggin

Nonresidents of New Mexico were married in Doña Ana County. A short time later, annulment was sought on the ground that the "wife" had a living husband at the time of the marriage. Personal service was had on the woman in New York. The court equated this to service by publication.[6] The "wife" sought a writ of prohibition to prevent trial of the nullity suit. Mr. Justice McGhee, for the court, set forth the two main questions:

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1. E.g., Cook v. Cook, 342 U.S. 126 (1951); Johnson v. Muelberger, 340 U.S. 581 (1951); Sherrer v. Sherrer, 334 U.S. 343 (1948); Williams v. No. Carolina, 325 U.S. 226 (1945); Williams v. No. Carolina, 317 U.S. 287 (1942).

2. E.g., Wallace v. Wallace, 63 N.M. 414, 320 P.2d 1020 (1958); Crownover v. Crownover, 58 N.M. 597, 274 P.2d 127 (1954); Wilson v. Wilson, 58 N.M. 411, 272 P.2d 319 (1954); Woollett v. Woollett, 57 N.M. 550, 260 P.2d 913 (1953); Ferret v. Ferret, 55 N.M. 565, 237 P.2d 594 (1951); Allen v. Allen, 52 N.M. 174, 194 P.2d 270 (1948); Golden v. Golden, 41 N.M. 356, 68 P.2d 928 (1937). And, of course, the New Mexico legislature has established jurisdictional standards for divorce. N.M. Stat. Ann. § 22-7-3 (1953).

3. For a general study of problems of annulment jurisdiction see Vernon, Labyrinthine Ways: Jurisdiction to Annul, 9 J. Pub. L. (1960). The United States Supreme Court, in its only decision on annulment jurisdiction, did not impose the restrictive domicile rule that prevails in the divorce area. Sutton v. Leib, 342 U.S. 402 (1952) (New York decree annulling a Nevada marriage held entitled to full faith and credit when both parties were New York domicilliaries, and the defendant personally served.) As Wallace v. Wallace, 63 N.M. 414, 320 P.2d 1060 (1958) indicates, domicile is not an *absolute* prerequisite to divorce jurisdiction. It remains, however, as the requirement in the vast bulk of cases. Domicile "is a highly technical concept depending upon the proof of the mental attitude of a person towards a place. Whether in taxation or in divorce, the use of domicil as a jurisdictional base gives trouble when it is applied to people who really have no 'home feeling' toward any place or, at the other end of the scale, to those who have more than one home." Alton v. Alton, 207 F.2d 667, 682 (3d Cir. 1953) (dissent).

4. See Appendix.

5. 60 N.M. 111, 287 P.2d 998 (1955).

6. State ex rel. Pavlo v. Scoggin, supra note 5 at 112, 287 P.2d at 999.

> Does the District Court of Doña Ana County have jurisdiction of such action where neither party ever lived in New Mexico, although the marriage license was issued and the ceremony performed in this state?
>
> If such court does have jurisdiction of the subject matter, did it acquire jurisdiction of the person of the defendant therein, or of the "res," if there be such in an annulment suit, by substituted service of process in New York?[7]

The court answered "Yes" to question 1; "No" to question 2. The court, in discussing question 1, said:

> While we recognize the question is a debatable one, we believe the incidents of the procuring of a license and the performance of the marriage ceremony in this state are sufficient to give the District Court jurisdiction of the subject matter. . . .[8]

Concerning question 2, the court said:

> We hold an action for annulment is in personam and because of lack of personal service on the defendant in the Doña Ana County case or any entry of appearance on her part in the District Court of Doña Ana County does not have jurisdiction to hear the case.[9]

The only other case in New Mexico that has a possible bearing on annulment jurisdiction is *Prince v. Freeman*,[10] which involved a New Mexico marriage between local citizens which was annulled because of an undissolved prior marriage by one of the parties. Jurisdiction was assumed without discussion.

II. THE EXISTING SITUATION

Table I, below,[11] lists all of the situations which may give rise to problems

7. Ibid.
8. Id. at 112-13, 287 P.2d at 1000.
9. Id. at 114, 287 P.2d at 1000.
10. 45 N.M. 143, 112 P.2d 821 (1941).
11.

TABLE I

Case	*Forum*	*Place of Marriage*	*Domicile–Plaintiff*	*Domicile–Defendant*	*Process Service*
1	NM	NM	NM	NM	Personal
2	NM	NM	NM	A	Personal
3	NM	NM	NM	A	Substituted
4	NM	NM	A	NM	Personal
5	NM	NM	A	A	Personal
6	NM	NM	A	A	Substituted
7	NM	A	NM	NM	Personal
8	NM	A	NM	A	Personal
9	NM	A	NM	A	Substituted
10	NM	A	A	NM	Personal
11	NM	A	A	A	Personal
12	NM	A	A	A	Substituted

The letter "A" is used to indicate some jurisdiction other than New Mexico.
In Table I, domicile at time of suit is indicated. The parties' domicile or domiciles at

of annulment jurisdiction in New Mexico.[12] In *State ex rel. Pavlo v. Scoggin*[13] a nonresident sought to annul a New Mexico marriage to a nonresident.[14] The defendant was served outside of the state. The court held that it had jurisdiction over the subject matter, but held that it had no jurisdiction over the defendant because she had not been personally served. Had the defendant submitted herself to the court's jurisdiction, the case would have been a proper one for annulment.[15]

Are annulments to be granted in New Mexico in other situations? Since the court has classified annulment actions as in personam, all cases involving substituted service are precluded.[16] Under the *Scoggin* ruling, the local celebration of the marriage is sufficient to give the district courts jurisdiction over the subject matter. This, coupled with personal jurisdiction over the defendant, is all that is required. Jurisdiction to annul, therefore, would be present whenever a New Mexico marriage is questioned and the defendant, either voluntarily or as a result of proper service, is subject to the personal jurisdiction of the court.[17]

A. *Jurisdiction to Annul a Foreign Marriage*

May a local court assume jurisdiction over the "subject matter" of an annulment action in which a non-New Mexico marriage is being challenged?[18]

A narrow reading of *Scoggin* and *Prince* might lead to the conclusion that New Mexico courts are powerless to annul foreign marriages. In *Scoggin* the

the time of marriage normally is not relevant to the jurisdictional question. Of course, it may be significant in the choice of law determination. E.g., Cunningham v. Cunningham, 206 N.Y. 341, 99 N.E. 845 (1912) (A New Jersey marriage between New York residents was annulled on the basis of New York's internal law, although the marriage was valid by the law of New Jersey.).

As used throughout this article, "personal" service of process is intended to embrace those situations in which the defendant is subject to the personal jurisdiction of the court, whether based on service within the state or a general appearance following out-of-state service. "Substituted" service is used to indicate any service of process beyond the borders of the forum state, whether such service is by publication, registered letter or some other means.

12. Since the 12 Cases listed in Table 1, note 11 supra, are limited to two-state situations, the list is not exhaustive. Little practical difference appears, however, in the hypotheticals listed and in multi-state situations. Thus, Cases 8 and 9 would not be varied significantly if they were changed to NM-A-NM-B or NM-B-NM-A. The same is true of the other Cases.

Cases 1, 4, 7 and 10 might be varied by including 4 additional Cases identical to them but involving substituted service. Such Cases, however, are unlikely to arise in view of N.M. Stat. Ann. § 21-1-1(4)(e)(1) (1953) which provides for personal service on absent residents of New Mexico.

13. 60 N.M. 111, 287 P.2d 998 (1955).

14. Case 6, Table I, note 11 supra.

15. Case 5, Table I, note 11 supra.

16. Cases 3, 6, 9 and 12, Table I, note 11 supra.

17. Cases 1, 2, 4 and 5, Table I, note 11 supra.

18. New Mexico courts are not specifically given jurisdiction to annul foreign marriages. Such jurisdiction is implied, however, in N.M. Stat. Ann. § 57-1-4 (1953) which establishes, as a choice of law rule, that marriages valid where contracted are valid in New Mexico.

court held that subject matter jurisdiction existed because the marriage had been celebrated locally. It did not, however, exclude other bases of subject matter jurisdiction. And in the course of its opinion, the court quoted the following language with approval: "[T]he jurisdiction of the courts of the domicil of one of the parties to render a decree of annulment of a marriage celebrated elsewhere is generally recognized."[19]

In the absence of legislation, other courts uniformly accept domicile of one of the parties as sufficient to confer jurisdiction to annul if the defendant is personally served.[20] Many states go further and hold that the courts of the place of celebration have concurrent jurisdiction with those of the domicile.[21] If the New Mexico court combines the domicile test with its view in *Scoggin,* annulment jurisdiction in this state will be concurrent.

Without a legislative directive, will the New Mexico court accept the domicile test? New Mexico's interest in the status of its citizens is identical whether the

19. State ex rel. Pavlo v. Scoggin, 60 N.M. 111, 113, 287 P.2d 998, 1000 (1955).

20. Constantine v. Constantine, 261, Ala. 40, 42, 72 So.2d § 831, 832 (1954): "This court has . . . ruled that the courts of the domicil of one of the parties, when the other party is brought into court by due and proper service, has jurisdiction to annul a marriage celerated elsewhere."; McClure v. Donovan, 33 Cal.2d 717, 738, 205 P.2d 17, 29-30 (1949): "The court had jurisdiction to declare the marriage a nullity in view of the domicile in the state of at least one of the parties thereto—the defendant. . . . Moreover, it appears that the other party to the marriage . . . was likewise a bona fide resident of the state. . . ."; Mazzei v. Cantales, 142 Conn. 173, 175, 112 A.2d 205, 206 (1955): "The rule generally accepted is that the courts of the state where one or both of the parties are domiciled has that power [to annul]."; Butters v. Gowen, 138 Fla. 250, 189 So. 278 (1939); Whelan v. Whelan, 346 Ill. App. 445, 105 N.E.2d 314 (1952) (Case 7); Gayle v. Gayle, 301 Ky. 613, 615, 192 S.W.2d 821, 822 (1946): " 'Although the jurisdiction of the courts of the domicil of one of the parties to render a decree of annulment of a marriage celebrated elsewhere is generally recognized, the view has been taken that in the absence of statute, such jurisdiction may not be exercised under a constructive service of process upon the nonresident defendant. . . .' "; Antoine v. Antoine, 132 Miss. 442, 96 So. 305 (1923) (Exclusive jurisdiction said to be in domiciliary court); Cross v. Cross, 110 Mont. 300, 302, 102 P.2d 829, 830 (1940): " 'Jurisdiction of the marriage *res* depends upon the residence or domicile of the plaintiff, and it is immaterial where the marriage was solemnized.' "; Carlton v. Carlton, 76 Ohio App. 338, 64 N.E.2d 428 (1945); Foster v. Foster, 89 N.H. 376, 199 Atl. 367 (1938) (Case 2); Everly v. Baumil, 209 S.C. 287, 289-90, 39 S.E.2d 905, 906 (1946): "The overwhelming weight of authority . . . is to the effect that the courts of the domicil of the parties have jurisdiction to annul a marriage celebrated elsewhere. . . . It is further generally held that the domicil of one of the parties within a state is sufficient to confer jurisdiction upon its courts to grant a decree of annulment where, as in the instant case, the court has jurisdiction of both parties by voluntary appearance or personal service within the state."; Fink v. Fink, 70 S.D. 366, 17 N.W.2d 717 (1945) (Case 9. The court dismissed the petition on the basis of a parent's inability to bring the action); Keith v. Pack, 182 Tenn. 420, 187 S.W.2d 618 (1945) (Case 7); Smith v. Smith, 186 S.W.2d 287 (Tex. Civ. App. 1945) (Case 9).

21. Concurrent jurisdiction is established by statute in the following jurisdictions: Colo. Rev. Stat. Ann. § 46-3-7 (Supp. 1957); Md. Ann. Code Rules of Procedure 1190(a) (2) (Supp. 1959); Nev. Rev. Stat. §§ 125.360, 125.370 (Supp. 1959); W. Va. Code Ann. § 4707 (1955); Wis. Stat. Ann. § 247.05 (Supp. 1960). See, e.g., Jordan v. Courtney, 248 Ala. 390, 27 So.2d 783 (1946); Sawyer v. Slack, 196 N.C. 697, 146 S.E. 864 (1929). See Mazzei v. Cantales, 142 Conn. 173, 112 A.2d 205 (1955).

marriage took place locally or in some other state. Its interest in the status of a resident married in Texas is greater than its interest in the status of a nonresident married locally. It is irrational to deny relief when domiciliaries married outside the state are involved and to grant it to non-domiciliaries married locally; irrational, that is, except for the out-moded technical concept denying the existence of a "res" or marriage status in annulment actions.[22] Considering the dictum in *Scoggin,* and the benefits that would accrue to New Mexico residents, it seems likely that the New Mexico court will accept domicile as a proper basis of annulment jurisdiction when the issue comes before it.

B. *Annulment: In Rem or In Personam*

If Table II,[23] drawn on the assumption that domicile is a proper basis for annulment jurisdiction, accurately reflects the current state of the law in New Mexico, cases requiring substituted service,[24] and those involving nonresidents married elsewhere, are excluded.[25] To grant relief where nonresidents married elsewhere are before the court would require a holding that annulment jurisdiction is transitory. This rule is not without merit, but in view of the decided cases, its adoption is unlikely.[26]

Why should relief be denied where all elements of jurisdiction are present except that substituted service has been used?[27] In *Scoggin,* the court categorized

22. For a defense of this older view, see Goodrich, Jurisdiction to Annul a Marriage, 32 Harv. L. Rev. 806 (1919); 1 Beale, Conflict of Laws §115.1 (1935).

23. TABLE II

Case	*Forum*	*Place of Marriage*	*Domicile–Plaintiff*	*Domicile–Defendant*	*Process Service*
1	NM	NM	NM	NM	Personal
2	NM	NM	NM	A	Personal
4	NM	NM	A	NM	Personal
5	NM	NM	A	A	Personal
7	NM	A	NM	NM	Personal
8	NM	A	NM	A	Personal
10	NM	A	A	NM	Personal

The concurrent jurisdiction approach has been accepted by the New Mexico court in child custody cases. Wallace v. Wallace, 63 N.M. 414, 420, 320 P.2d 1020, 1024 (1958).

24. Cases 3, 6, 9 and 12, Table I, note 11 supra.

25. Cases 11 and 12, Table I, note 11 supra.

26. For a discussion of annulment as a transistory action, see Vernon, supra note 3 at .

27. For convenience of reference, Table III sets forth the substituted service cases excluded from Table II, note 23 supra.

TABLE III

Case	*Forum*	*Place of Marriage*	*Domicile–Plaintiff*	*Domicile–Defendant*	*Process Service*
3	NM	NM	NM	A	Substituted
6	NM	NM	A	A	Substituted
9	NM	A	NM	A	Substituted

annulment actions as in personam, and thus ruled out substituted service. In support of this view, the court relied on authorities from other states holding annulment actions in personam, and indicated that the substituted service statute must be narrowly construed.

New Mexico's substituted service statute makes no specific reference either to divorce or annulment.[28] Such service, of course, is proper in divorce suits where other jurisdictional requirements are met. Why should annulment be treated differently? In *Scoggin,* the court referred to the Kentucky case of *Gayle v. Gayle*[29] as containing "an excellent discussion of the difference between divorce and annulment"[30]—apparently as the difference relates to substituted service. In refusing to grant the requested annulment because defendant was not personally served, the Kentucky court said:

> In the case of divorce, the marriage status is the thing or res upon which the Court may act. In an action for annulment on the ground the marriage ceremony was void, the very allegations of the petition preclude the existence of the thing or res. . . . Moreover, it seems absurd to speak of that state [marriage] as having created the res or the status, when the very issue in the annulment suit is whether a status was created. . . . If the court should find the ceremony effected a valid marriage, while the jurisdictional requirement that the locus celebrationis must have created a res or a status is satisfied by retroactive operation of the court's finding, the purpose of the annulment suit is thereby defeated; but if the court decides that a ceremony did not effect a valid marriage, such a decision is an implied admission by the court that it acted without jurisdiction to begin with. . . . Such is not the situation in divorce cases which presuppose that a status was validly created and was in existence at the commencement of the divorce suit.[31]

The sentiments expressed by the Kentucky court, and apparently approved by the New Mexico court, are valid only if the practicalities are ignored. It does seem ridiculous to find a res created by the "marriage status" arising from a void marriage. But, as one California court has said:

> As an actual and practical matter of fact an annulment action involves and affects the status of the parties, as does a divorce action, and in the absence of direct statutory provision in either case the same rule should be applied with respect to constructive service. No good

28. N.M. Stat. Ann. § 21-1-1(4)(g) (1953).
29. 301 Ky. 613, 192 S.W.2d 821 (1946).
30. State ex rel. Pavlo v. Scoggin, 60 N.M. 111, 113, 287 P.2d 998, 1000 (1955).
31. Gayle v. Gayle, 301 Ky. 613, 615-16, 192 S.W.2d 821, 822 (1946). See Mazzei v. Cantales, 142 Conn. 173, 112 A.2d 205 (1955).

> reason appears for resorting to hair-splitting technicalities in deciding this question. . . .[32]

A voidable marriage, such as one annullable because of the age of the parties, obviously creates a legal status. In the absence of judicial decree, a valid marriage relationship is established.[33] The children of the marriage are legitimate and have full rights of inheritance.[34]

In a void marriage, on the other hand, no comparable *legal* status is created. But a void marriage does create a relationship or status from which the parties often may be extricated only by judicial decree. A Virginia court recognized this factual status, saying:

> Although there may be no doubt in the minds of the parties, it is often desirable and sometimes of highest importance, both to individuals and to the community, that there should be a judicial decision in reference to a void marriage, for then the status of the parties and their children is set at rest, and the parties are justified in the eyes of the public in entering into a second marriage.[35]

As the court points out, the uncertainty as to the state of the relationship, in the eyes of the parties and the community is itself a status, albeit not a marriage status. It is the type of status, however, which would justify a court in assuming jurisdiction where the parties are wise enough to seek a judicial determination of the relationship.

Whether a marriage is void or voidable, a "res" exists upon which a court can act. By following the overly-technical Kentucky approach, the New Mexico court is forcing New Mexico residents to seek annulments in foreign states unless the defendant submits to the jurisdiction of the New Mexico courts. New Mexico citizens should not be denied relief in their own courts because of a technical determination, without basis in fact, that no "res" exists upon which the court can act. As a minimum, substituted service should be as available in annulment suits as it is in divorce.

III. LEGISLATIVE CHANGE

It is clear that legislative action is needed to clarify and expand annulment jurisdiction in New Mexico. The pattern remains to be chosen. Several states have identified annulment with divorce and have enacted statutes establishing

32. Buzzi v. Buzzi, 91 Cal. App. 2d 823, 826, 205 P.2d 1125, 1126 (Dist. Ct. App. 1949).
33. N.M. Stat. Ann. § 57-1-9 (1953).
34. N.M. Stat. Ann. § 57-1-9 (1953).
35. Henderson v. Henderson, 187 Va. 121, 126, 46 S.E.2d 10, 12 (1948). See Gearllach v. Odom, 200 Ga. 350, 353-54, 37 S.E.2d 184, 187 (1946): "Such a decree [annulment] is essential to the full protection of this petitioner from injury that is and well may be anticipated as a result of the void marriage ceremony."

identical or similar requirements for both.[36] Assuming such a course of action in New Mexico, it would be necessary to provide for substituted service in annulment cases[37] and to enact a statute which, in part, would read as follows:

> The plaintiff in an action for annulment of marriage must have been an actual resident, in good faith, of the state for one (1) year next preceding the filing of his or her complaint. . . .[38]

This statute applies the divorce residence requirements to nullity suits. Under such legislation, assuming the one-year time requirement is satisfied, jurisdiction to annul will be found in those Cases listed in Table IV, below.[39] It will be noted that jurisdiction currently exists in four of the six Cases listed.[40] Three Cases involving suits by nonresident plaintiffs,[41] currently cognizable by the New Mexico courts, would be excluded, and two Cases involving substituted service added. Table V[42] lists the Cases excluded from the courts' consideration by the divorce-type statute suggested.

Little is gained by the application of New Mexico's divorce pattern to annulments. New Mexico's interest is the same whether it is the plaintiff or the

36. See Appendix.

37. N.M. Stat. Ann. § 21-1-1(4)(g) (1953) could be amended to provide for such service.

38. N.M. Stat. Ann. § 22-7-4 (1953) provides the pattern for the annulment statute. For convenience, the portion of the divorce residence statute copied does not include reference to the wife being able to bring suit on the basis of the husband's residence; nor does it include reference to servicemen stationed in New Mexico.

39. TABLE IV

Case	*Forum*	*Place of Marriage*	*Domicile–Plaintiff*	*Domicile–Defendant*	*Process Service*
1	NM	NM	NM	NM	Personal
2	NM	NM	NM	A	Personal
3	NM	NM	NM	A	Substituted
7	NM	A	NM	NM	Personal
8	NM	A	NM	A	Personal
9	NM	A	NM	A	Substituted

40. Cases 1, 2, 7 and 8, Table I, note 11 supra.

41. Cases 4, 5 and 10, Table I, note 11 supra.

42. TABLE V

Case	*Forum*	*Place of Marriage*	*Domicile–Plaintiff*	*Domicile–Defendant*	*Process Service*
4	NM	NM	A	NM	Personal
5	NM	NM	A	A	Personal
6	NM	NM	A	A	Substituted
10	NM	A	A	NM	Personal
11	NM	A	A	A	Personal
12	NM	A	A	A	Substituted

If the complete divorce residence statute were used as a model for annulment legislation, a wife could bring suit in Cases 4 and 10 if her husband satisfied the residence requirements. N.M. Stat. Ann. § 22-7-4 (1953).

defendant who is the local resident. Under the divorce pattern, however, these Cases would not be treated equally.[43] And in view of the fact that New Mexico law determines the validity of New Mexico marriages, no good reason exists for excluding from consideration annulment suits involving local marriages, whatever the residence of the parties.[44]

Further, if New Mexico imitated its divorce statute in establishing jurisdictional prerequisites for annulment, the legislation might operate to prevent the nonresident party from obtaining an annulment unless he changed his residence. If the nonresident lived in a state which classifies annulment actions "in personam,"[45] as New Mexico now does, he would be unable to obtain relief in his home state unless the New Mexico party submitted to the jurisdiction of the courts there. And New Mexico would deny the nonresident relief, since, using the divorce pattern, only local plaintiffs would be entitled to obtain annulments. The only choice left the nonresident would be to move.

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43. Cases 4 and 10 are excluded, while 3 and 9 are included.

44. Whatever the forum in annulment actions, the normal choice-of-law rule calls for the application of the law of the place of celebration. E.g., Colbert v. Colbert, 28 Cal.2d 276, 280, 169 P.2d 633, 635 (1946); Payne v. Payne, 121 Colo. 212, 217, 214 P.2d 495, 497 (1950); Riedl v. Riedl, 153 A.2d 639, 640 (D.C.Mun.Ct.App. 1959); Linneman v. Linneman, 1 Ill.App.2d 48, 50-51, 116 N.E.2d 182, 183 (1953); Wilkins v. Zelichowski, 43 N.J. Super. 598, 601, 129 A.2d 459, 461 (1957); Henderson v. Henderson, 199 Md. 449, 458, 87 A.2d 403, 408 (1952); Damaskinos v. Damaskinos, 325 Mass. 217, 219, 89 A.2d 766, 767 (1950); Miller v. Lucks, 203 Miss. 824, 831, 36 So.2d 140, 141 (1948): "[T]his marriage [between a white and a negro] being valid in Illinois, where contracted, must be recognized and given effect as such unless so to do violates . . . the state's public policy. . . ." p. 141; "What we are requested to do is simply to recognize this marriage to the extent only of permitting one of the parties thereto to inherit from the other property in Mississippi, and to that extent it must and will be recognized." Id. at 832, 36 So.2d 142; Bourelle v. Sou-Crete, Inc., 165 Neb. 731, 741, 87 N.W.2d 371, 377 (1958); Shippee v. Shippee, 95 N.H. 450, 451, 66 A.2d 77, 78 (1949); Ferret v. Ferret, 55 N.M. 565, 579, 237 P.2d 594, 602 (1951); Apelbaum v. Apelbaum, 7 A.D.2d 911, , 183 N.Y.S.2d 54, 56 (1959); Mazzolini v. Mazzolini, 168 Ohio St. 357, 358, 155 N.E.2d 206, 207 (1958); Cahoon v. Pelton, 9 Utah 2d 224, 229, 342 P.2d 94, 96 (1959). There are, of course, exceptions to the general rule. Restatement, Conflict of Laws § 132 (1934). Since the courts at the place of celebration will apply local law in determining the validity of the marriage without regard to the domicile of the parties, it seems logical to permit such courts to grant nullity decrees in Cases 5 and 6.

45. E.g., Mazzei v. Cantales, 142 Conn. 173, 112 A.2d 205 (1955) (Relief denied in a Case 6 situation because of lack of jurisdiction over the person of the defendant); Shafe v. Shafe, 101 Ind. App. 200, 198 N.E. 826 (1935) (Jurisdiction absent in Case 9); Gayle v. Gayle, 301 Ky. 613, 615, 192 S.W.2d 821, 822 (1946) (Jurisdiction absent in Case 9: "Since, as we have seen, this is an action for a personal judgment, and the defendant personally has neither been served within the territorial limits of the court, nor entered his apparance, the Chancellor correctly refused to entertain the action.") See Owen v. Owen, 127 Colo. 359, 257 P.2d 581 (1953) (Jurisdiction denied in a Case 9 situation on the basis of lack of jurisdiction over the defendant. The result in the Owen case was reversed by the legislature which enacted a statute permitting substituted service and specifically stating that annulment actions were deemed to be in rem. Colo. Rev. Stat. Ann. § 46-3-8 (Supp. 1957)); Pepper v. Shearer, 48 S.C. 492, 26 S.E. 797 (1897) (Case 2 or Case 9, holding that annulment actions were in personam; the legislature reversed the holding, at least in the Case 2 situation, and substituted service is permitted where the marriage was local.) S.C. Code § 20-45 (1952).

If New Mexico patterned its annulment legislation after its divorce statute it would reflect a failure on the part of the Legislature to recognize the basic differences between the two types of proceedings.[46] On a national basis, a multiple approach is found in the annulment area.[47] Our divorce system, on the other hand, is unitary. All states operate with domicile as the primary jurisdictional prerequisite;[48] and all permit ex parte actions. The problem of a party being denied access to a court is not present in divorce.[49] At a minimum, the nonresident of New Mexico may file for divorce in the courts of his domicile. He may be unable to obtain an annulment there, however. As applied to annulment, the divorce-type statute set forth above, would be incomplete.

And while favoring the resident in enabling him to prevent New Mexico annulments by inaction when the other party is a nonresident, the proposed statute also might operate to the detriment of local residents. The nonresident party, barred from action in New Mexico, would be forced to assert his nullity action elsewhere. If the claim were asserted in a state which permits substituted service in annulment suits,[50] the New Mexico citizen, if he wished to oppose

46. A fundamental distinction between annulment and divorce, not discussed here, is the choice-of-law rules applicable. In divorce, local law is always applied. In annulment, the general rule calls for the application of the law of the place of celebration. For a discussion of the significance of this difference in establishing jurisdiction to annul, see Vernon, supra note 3 at .

47. See Appendix.

48. Ala. Code tit. 34, § 29 (Supp. 1953); Alaska Comp. Laws Ann. § 56-5-9 (Supp. 1959); Ariz. Rev. Stat. Ann. § 25-311 (Supp. 1959); Ark. Stat. Ann. § 34-1208 (Supp. 1959); Cal. Civ. Code § 128; Colo. Rev. Stat. Ann. § 46-1-3 (1953); Conn. Gen. Stat. Rev. § 46-15 (1958); Del. Code Ann. tit. 13, § 1525 (1953); Fla. Stat. Ann. § 65.02 (Supp. 1959); Ga. Code Ann. § 30-107 (1952); Hawaii Rev. Laws § 324.21 (Supp. 1957); Idaho Code Ann. 32-701 (1948); Ill. Ann. Stat. ch. 40 § 3 (1956); Ind. Ann. Stat. § 3-1203 (Supp. 1960); Iowa Code Ann. § 598.3 (1950); Kan. Gen. Stat. Ann. § 60-1502 (1949); Ky. Rev. Stat. § 403.035 (1955); La. Rev. Stat. Ann. § 9:301 (1950); Me. Rev. Stat. Ann. ch. 166, § 55 (Supp. 1959); Md. Ann. Code art. 16, § 30 (1957); Mass. Ann. Laws ch. 208, § 5 (1955); Mich. Stat. Ann. § 25.89 (Supp. 1959); Minn. Stat. Ann. § 518.07 (1947); Miss. Code Ann. § 2736 (1957); Mo. Ann. Stat. § 452.050 (1952); Mont. Rev. Code Ann. § 21-134 (1955); Neb. Rev. Stat. § 42-303 (Supp. 1959); Nev. Rev. Stat. § 125.020 (1957); N.H. Rev. Stat. Ann. § 458:5 (1955); N.J. Stat. Ann. § 2A:34-10 (1952); N.M. Stat. Ann. § 22-7-4 (1953); N.Y. Civ. Prac. Act § 1147; N.C. Gen. Stat. § 50-8 (Supp. 1959); N.D. Rev. Code § 14-0517 (1943); Ohio Rev. Code Ann. § 3105.03 (1954); Okla. Stat. Ann. tit. 12, § 1272 (Supp. 1959); Ore. Rev. Stat. § 107.060 (1959); Pa. Stat. Ann. tit. 23, § 16 (Supp. 1959); R.I. Gen. Laws Ann. § 15-5-12 (1956); S.C. Code § 20-103 (1952); S.D. Code § 14.0720 (1939); Tenn. Code Ann. § 36-803 (Supp. 1959); Tex. Rev. Civ. Stat. Ann. art. 4631 (Supp. 1960); Utah Code Ann. § 30-3-1 (Supp. 1959); Vt. Stat. Ann. tit. 15, § 592 (1958); Va. Code Ann. § 20-97 (Supp. 1960); Wash. Rev. Code § 26.08.030 (1951); W.Va. Code Ann. § 4708 (1955); Wis. Stat. Ann. § 247.06 (Supp. 1960); Wyo. Stat. Ann. § 20-48 (1957).

49. N.M. Stat. Ann. § 22-7-4 (1953). See also Alaska Comp. Laws Ann. § 56-5-10 (Supp. 1959); Ga. Code Ann. § 30-107 (1952); Kan. Gen. Stat. Ann. § 60-1502 (1949); Ky. Rev. Stat. Ann. § 403.035 (1955); Okla. Stat. Ann. tit. 12, § 1272 (Supp. 1959); Tex. Rev. Civ. Stat. Ann. art. 4631 (Supp. 1960). There has been some doubt where servicemen are involved, and special legislation has been enacted in New Mexico to settle their status.

50. See Appendix.

the petition, would be compelled to make his defense in the forum chosen by the other party. If the nonresident were permitted to sue in New Mexico, he might ask for relief locally. This would permit the resident to oppose it locally.

Before finally disposing of the divorce pattern for annulment, inquiry should be made into the validity of time-residence tests in the annulment area. The divorce-type statute contains a one-year requirement. The question arises whether annulment legislation should contain a similar time test. Time tests were developed to meet the specific needs of the divorce area. The rationale completely disappears when annulment is involved. The Tennessee Supreme Court has pointed out the difference between the two problems as follows:

> The two-years residence requirement was designed to discourage hasty divorces and a resort to this state by non-residents having no intention of becoming domiciled here but coming only for the purpose of using our courts to get relief which they could not get at their place of domicile. The statute is in aid of the public policy which is concerned with the maintenance of the marriage relation. To this end a waiting period is appropriate because the law always envisions the possibility of a reconciliation.
>
> But this policy presupposes a valid marriage. Public policy can have no concern in perpetuating an ostensible marriage which is void ab initio and as a result of which the parties by a public record appear to be married, whereas as a fact they are not married at all. . . . Upon the contrary, the state is interested always in removing any uncertainty as to the marital status of its citizens.[51]

The bulk of the courts which have faced the question have concluded along with the Tennessee court that time tests have no place in annulment.[52]

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51. Estes v. Estes, 194 Tenn. 96, 100-01, 250 S.W.2d 32-33-34 (1952).

52. E.g., Jordan v. Courtney, 248 Ala. 390, 27 So.2d 783 (1946) (Case 5). In Gordon v. Gordon, 35 Ariz. 357, 278 Pac. 375 (1929) the lower court dismissed the annulment action on the grounds that the plaintiff had not satisfied the divorce residence requirements. On appeal, the court pointed out the difference between divorce and annulment, saying: "It being true that the best interests of the state demand that marriage ties lawfully formed be maintained so far as possible, and that those entered into under such circumstances that the law declares them null and void should not, the reason for the residence requirement in divorce suits is not present in annulment actions." Id. at 361, 278 Pac. at 376. Bramble v. Kemper, 227 Ark. 186, 297 S.W.2d 104 (1957) (Case 5); Mazzei v. Cantales, 142 Conn. 173, 112 A.2d 205 (1955) (Case 5 with jurisdiction being rejected, but with the court stating: "But the statutory provisions concerning residence and domicil and service by order of note pertain, by their terms, only to actions for divorce. The legislature has manifested no intention that they shall apply to actions for annulment.") Id. at 176, 112 A.2d at 107; Hill v. Hill, 354 Mich. 475, 93 N.W.2d 157 (1958): "Authorities from other states are divided as to whether statutory requirements of a term of residence as a condition to the maintenance of a proceeding for divorce are applicable to actions for annulment.

"The weight of authority supports the conclusion that divorce residence requirements are not applicable to annulment proceedings because such requirements were designed

It is obvious that the New Mexico divorce statute, or for that matter, any other divorce statute, has little to offer as a constructive pattern for an annulment jurisdiction statute. The solution to the nullity problem must proceed independently. At a minimum, the draftsmen should recognize that concurrent jurisdiction properly exists—that the courts of the place of celebration and the courts of the domicile of one of the parties may have jurisdiction to annul the same marriage. Such a statute should also permit substituted service in annulment cases, at least to the same extent as it is permitted in divorce. And no time-residence test should be included.

A simple solution to the New Mexico problem might be to amend the substituted service statute to provide for such service in annulment cases. With such an amendment, assuming that annulment jurisdiction would currently exist in those Cases listed in Table II,[53] New Mexico would join the most liberal states in granting concurrent annulment jurisdiction.

Providing for substituted service in annulment cases may give rise to a constitutional problem. If the court persists in regarding annulment actions as "in personam," it may find that the issuance of decree based upon substituted service violates procedural due process.[54] It is to be hoped that the court will recognize

to discourage hasty divorces and this reason would not apply to the continuance of a marriage which was void from its beginning. Id. at 477, 93 N.W.2d at 158; State ex rel. Pavlo v. Scoggin, 60 N.M. 111, 287 P.2d 998 (1955) (By implication); Sawyer v. Slack, 196 N.C. 697, 146 S.E. 864 (1929) (Case 5); Estes v. Estes, 194 Tenn. 96, 250 S.W.2d 32 (1952); Smith v. Smith, 186 S.W.2d 287 (Tex. Civ. App. 1945). See also, Saville v. Saville, 44 Wash. 2d 793, 271 P.2d 432, 433 (1954). In that case the lower court granted an annulment. The state appealed on the grounds that the facts called for the entry of a divorce decree. The court said: "It is the appellant's position that the grounds alleged and concededly proven warrant the entry of a decree of divorce, but not a decree of annulment. The public importance which appellant prosecuting attorney attaches to the case is apparently due to the fact that the ninety-day waiting period which is required in divorce actions . . . is not required in the case of annulment. . . . The ninety-day waiting period was not complied with in this case." In Ross, Survey of Ohio Law—1956: Domestic Relations, 8 W. Res. L. Rev. 308, 310 (1957), Lampe v. Lampe, 136 N.E.2d 470 (Ohio C.P. 1954) was discussed as follows: "In Lampe v. Lampe, a case of first impression in Ohio, a common pleas court held that the defendant in an annulment action can cross-petition for a divorce, even though he is a nonresident of Ohio. The one year residence requirement is not a prerequisite to an annulment action, and under the rationale of this case, a plaintiff could establish residence in Ohio today, sue for annulment tomorrow, and the nonresident defendant could cross-petition for a divorce, thus completely avoiding the one year residence statute. The court was careful to point out that the decision did not go this far, because in this case the plaintiff had been an Ohio resident for a year."

53. See note 23 supra.

54. "[T]he requirements of the Fourteenth Amendment to the Federal Constitution do not depend upon a classification [in rem—in personam] for which the standards are so elusive and confused generally and which, being primarily for state courts to define, may and do vary from state to state." Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 312 (1950). "[F]airness to the parties has increasingly become the determining factor in the development of the law of jurisdiction." Ehrenzweig, Conflict of Laws pt. 1, at 79 (1959). Professor Ehrenzweig has pointed out that the "in rem—in personam" dichotomy has not been treated as being " 'incapable of change by statute.' " Id. at 78.

the need for substituted service in annulment cases, and that it will recognize the existence of a "factual status" resulting from void marriages, if such a finding is necessary to permit substituted service. Approximately one-half of the states provide for substituted service in annulment cases.[55] No court has found such legislation to violate due process.[56]

A more detailed statute would be preferable. Several states have legislation spelling out the courts' annulment jurisdiction in Cases 1 through 10.[57] The Colorado statute is, perhaps, the most comprehensive.[58] It was enacted after the Colorado court, in *Owen v. Owen*[59] held annulment actions to be in personam. The Colorado law specifically states that annulment actions are to be deemed in rem.

New Mexico legislation should follow the Colorado pattern and (1) classify annulment actions in rem; (2) make specific provision for substituted service; and (3) detail the cases in which the courts have jurisdiction.

The statute should confer jurisdiction on the courts in all cases where one party to the marriage is a New Mexico domiciliary at the time suit is brought. Further, it should permit the annulment of New Mexico marriages whether or not the parties are domiciliaries of the state. Since New Mexico's interest in the status of nonresidents whose only contact with the state is that they were married here decreases with the passage of time, a relatively short time limitation should be imposed on such nonresident actions.

(Part II of this Comment will deal with the substantive law of annulment in New Mexico and with applicable choice-of-law rules. It will also deal with recent New Mexico legislation.)

APPENDIX[60]

Group I: Requiring that Plaintiff be a Domiciliary of the Forum at the Time

55. See Appendix.

56. E.g., Chapman v. Chapman, 11 Alaska 316 (1947); Piper v. Piper, 46 Wash. 671, 91 Pac. 189 (1907) (Applying the divorce service rules to annulment). General constructive service legislation has been held applicable to annulment suits. E.g., Buzzi v. Buzzi, 91 Cal.App.2d 823, 205 P.2d 1125 (Dist. Ct. App.), cert. denied 338 U.S. 894 (1949); Smith v. Smith, 186 S.W.2d 287 (Tex.Civ.App. 1944). Gordon v. Gordon, 35 Ariz. 357, 278 Pac. 375 (1929) (Implying that substituted service was proper in annulment actions, but refusing to grant relief because of the failure to follow the statutory standards for such service); Shafe v. Shafe, 101 Ind.App. 200, 198 N.E. 826 (1935) (Dismissing annulment suit based on insanity on the ground that substituted service was improper; on pages 827, 828, however, the court implied that substituted service would confer jurisdiction to annul in suits based on other grounds); Cohn v. Cohn, 310 Mass. 126, 37 N.E.2d 260 (1941) (No objection being made to substituted service, the court held the objection to have been waived).

57. See Group IV, Appendix.

58. Colo. Rev. Stat. Ann. §§ 46-3-7, 46-3-8 (Supp. 1957).

59. 127 Colo. 359, 257 P.2d 581 (1953).

60. An asterisk following a state name indicates that specific statutory authority permits constructive service on out-of-state defendant in annulment actions. A double asterisk indicates that case law in the jurisdiction permits such service on the basis of more

Annulment Action Asserted[61]

a. Alaska*—No time requirement if local marriage
One year requirement if foreign marriage
b. District of Columbia*—One year requirement
c. Georgia*—Six month requirement
d. Massachusetts*—No time requirement if plaintiff a domiciliary at time of marriage and at time suit filed; five year requirement in other cases
e. Minnesota*—One year requirement
f. Nevada*—Six week requirement if foreign marriage
g. Oklahoma*—No time requirement
h. Oregon*—No time requirement if local marriage
One year requirement if foreign marriage
i. Vermont—Six month requirement
j. Washington**—No time requirement

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general legislation. Several states appear in more than one grouping, their statutes establishing different rules in varying situations.

The Louisiana legislation dealing with jurisdiction to annul completely departs from the patterns established in other states. Its legislation has not been included in the grouping of states. See La. Civ. Code Ann. arts. 113, 114, 116 (West 1952).

The categories used are those established in Vernon, supra note 3.

61. Alaska Comp. Laws Ann. § 56-5-8 (Supp. 1959) (Residence requirements), § 55-4-8 (1949) (Substituted service); D. C. Code Ann. § 16-401 (1951) (Resident requirements), § 13-108 (1951) (Substituted service); Ga. Code Ann. § 53-604 (Supp. 1955) states that the divorce residence and service provision apply to annulment actions. These divorce requirements are found in Ga. Code Ann. § 30-107 (1952) (Residence requirements), §§ 81-206, 81-207 (1956) (Substituted service); Mass. Gen. Laws Ann. ch. 207, § 14 (1955) (Establishing residence requirements and stating that the provisions of Chapter 208 relating to divorce are applicable to annulment actions in the absence of a specific provision to the contrary. Mass. Gen. Laws Ann. ch. 208, § 8 (1955) provides for substituted service in divorce cases and would appear to be applicable to annulments); In Wilson v. Wilson, 95 Minn. 464, 104 N.W. 300 (1905), it was held that the divorce residence requirements were applicable to annulment actions. Such requirement is found in Minn. Stat. Ann. § 518.07 (1947). Minn. Rules Civ. Pro. 4.04(3) (Supp. 1959) provides for substituted service in divorce cases. In view of the identification of annulment and divorce in the Wilson case, it would appear that rule 4.04(3) is applicable in annulment suits; Nev. Rev. Stat. § 125.370 (Supp. 1959) (Residence requirement where foreign marriage), § 125.400 (1959) (Substituted service). Nevada has no residence requirement if the marriage was performed locally. Nev. Rev. Stat. § 125.360 (Supp. 1959). Nev. Rev. Stat. § 125.370 (Supp. 1959), in addition to establishing residence requirements for the annulment of foreign marriages, sets forth various venue provisions in such actions; Okla. Stat. tit. 12 § 138 (1937) (Residence requirement in the form of a venue statute stating: "An action for . . . annulment of marriage may be brought in the county of which the plaintiff is an actual resident at the time of filing the petition."), tit. 12 § 170 (Supp. 1959) (Substituted service); Ore. Rev. Stat. § 107.050 (1959) (Residence requirement), § 15.130 (1959) (Substituted service); Vt. Stat. Ann. tit. 15 § 592 (1958) (Residence requirement). Vt. Stat. Ann. tit. 15, § 597 (1958) provides for substituted service. It refers generally to "libels" without specifying whether it includes both divorce and annulment. Vt. Stat. Ann. tit. 15, § 596 (1958) refers to "libels for divorce," and the reference to "libel" in § 597 may be limited to divorce libels. Wash. Rev. Code § 26.08.050 (1952) (Residence requirement). In Piper v. Piper, 46 Wash. 671, 91 Pac. 189 (1907) it was held that the

Group II. Requiring that One of the Parties be a Domiciliary of the Forum at the Time Annulment Action Asserted[62]

a. Colorado*—No time requirement; applicable only to foreign marriages
b. Delaware*—No time requirement
c. Iowa*—No time requirement if defendant local resident personally served; one year requirement otherwise
d. Maryland*—No time requirement; applicable only to foreign marriages
e. New Jersey*—No time requirement
f. New York*—No time requirement if local marriage or if both parties are residents; one year requirement otherwise
g. Virginia*—One year requirement
h. West Virginia*—No time requirement; inapplicable to local marriages if the parties have not established a marital domicile elsewhere
i. Wisconsin*—No time requirement; inapplicable to local marriages for a period of one year after celebration

Group III: "Venue" Statutes Requiring that Suit be Brought in the County in which one of Parties Resides[63]

a. Arkansas—No time requirement
b. Kansas*—No time requirement
c. Michigan—No time requirement
d. Nebraska*—No time requirement
e. Pennsylvania*—No time requirement
f. Wyoming*—No time requirement

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substituted service provision relating to divorce was applicable to annulment actions. See Wash. Rev. Code § 4.28.100(4) (1957).

62. Colo. Rev. Stat. Ann. § 46-3-7 (Supp. 1957) (Residence requirement), § 46-3-8 (Supp. 1957) (Substituted service); Del. Code Ann. tit. 13, § 1552 (Supp. 1958) (Residence and substituted service provisions); Iowa Code §598.20 (1958) provides that annulment petitions are to be filed as in divorce cases and that all provisions of Chapter 598 are applicable to annulment actions unless otherwise provided. Iowa Code § 598.3 (1958) establishes divorce residence requirements and seems applicable to annulments. Iowa Rules Civ. Pro. 60 (1958) provides for substituted service; Md. Ann. Code Rules of Pro. 1190(a)(2) (Supp. 1959) (Residence requirement), 1190(d)(2) (Supp. 1959) (Substituted service); N.J. Stat. Ann. § 2a:34-9 (1952) (Residence requirement), N.J. Rules of Court 4:96-3 (Supp. 1959) (Substituted service); N.Y. Civ. Prac. Act § 1165-a (Residence requirment), § 1167 (Substituted service); Va. Code Ann. § 20-97 (Supp. 1960) (Residence requirement with dual standards: "No suit for annulling a marriage . . . shall be maintainable, unless one of the parties is domiciled in, and is and has been an actual bona fide resident of this State for at least one year preceding commencement of the suit. . . ."), § 20-104 (Supp. 1960) (Substituted service); W.Va. Code Ann. § 4707 (1955) (Residence requirement), § 4710 (Substituted service); Wis. Stat. Ann. § 247.05 (Supp. 1960) (Residence and substituted service provision).

63. Ark. Stat. Ann. § 55-107 (1947) (Venue provision as follows: "The action shall be by equitable proceedings in the county where the . . . complainant or complainants reside, and the process may be directed in the first instance to any county in the state where the defendant may then reside or be found."); Kan. Gen. Stat. Ann. § 60-508

Group IV: Permitting Annulment of Local Marriages Without Regard to the Residence of Parties[64]

a. Colorado*
b. Maryland*
c. Nevada*
d. New Hampshire
e. West Virginia*—Only if the parties have not established a matrimonial domicile elsewhere
f. Wisconsin*—Only if suit is brought within one year of marriage

Group V: No Statutory Residence Requirements

a. Alabama
b. Arizona**[65]
c. California**[66]
d. Connecticut
e. Florida**[67]
f. Hawaii*[68]
g. Idaho
h. Illinois
i. Indiana*[69]

(1949) (Venue provision as follows: "An action . . . to annul a contract of marriage . . . may be brought in the county of which the plaintiff is an actual resident at the time of filing the petition or where the defendant resides or may be summoned."), § 60-2525 (Supp. 1957) (Substituted service); Mich. Stat. Ann. § 25.83 (1957) (Venue provision); Neb. Rev. Stat. § 42-119 (1952) (Venue provision), §§ 42-305, 42-305.01 (1952) (Substituted service provision with specific reference only to divorce, but probably applicable to annulment proceedings under Neb. Rev. Stat. § 42-119 (1952) which provides that the annulment "petition or bill shall be filed, and proceedings shall be had thereon, as in the case of a petition or bill filed . . . for a divorce. . . ."); Pa. Rules Civ. Pro. 1122 (1960) (Venue provision), 1124 (1960) (Substituted service); Wyo. Stat. Ann. § 20-34 (1957) (Venue provision), Wyo. Rules Civ. Pro. 4(e)(9) (1957) (Substituted service.)

64. Colo. Rev. Stat. Ann. § 46-3-7(1) (Supp. 1957) (Permitting suits by nonresidents), § 46-3-8 (Supp. 1957) (Substituted service); Md. Ann. Code Rules of Procedure 1190(a)(2) (Supp. 1959) (Permitting suits by nonresidents), 1190(d)(2) (Supp. 1959) (Substituted service); Nev. Rev. Stat. § 125.360 (1959) (Permitting suits by nonresidents), § 125.400 (Substituted service); N.H. Rev. Stat. Ann. § 458:3 (1955) (Permitting suits by non-residents); W.Va. Code Ann. § 4707 (1955) (Nonresident suits), § 4710 (1955) (Substituted service); Wis. Stat. Ann. § 247.05 (Supp. 1960) (Nonresident suits and service by publication).

65. See Gordon v. Gordon, 35 Ariz. 357, 278 Pac. 375 (1929) (Implying that substituted service permissible in annulment actions).

66. E.g., Buzzi v. Buzzi, 91 Cal.App.2d 823, 205 P.2d 1125 (Dist.Ct.App. 1949) (Sustaining the use of substituted service in annulment actions); Bing Gee v. Chan Lai Yung Gee, 89 Cal.App.2d 877, 202 P.2d 360 (Dist.Ct.App. 1959).

67. Fla. Stat. Ann. § 48.01 (1943) (Substituted service provision).

68. Hawaii Rev. Laws § 324-23 (Supp. 1957) (Substituted service provision).

69. Ind. Ann. Stat. § 3-1206 (Supp. 1960) provides for service by publication in divorce cases. In Shafe v. Shafe, 101 Ind.App. 200, 198 N.E. 826 (1935) an effort was made to invoke a prior version of the divorce substituted service provision, the action

j. Kentucky
k. Maine
l. Mississippi
m. Missouri
n. Montana
o. New Hampshire[70]
p. New Mexico
q. North Carolina[71]
r. North Dakota*[72]
s. Ohio
t. South Carolina*[73]
u. South Dakota
v. Tennessee*[74]
w. Texas
x. Utah

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being one to annul on grounds of insanity. In rejecting the plaintiff's argument, the court implied that the divorce provision would be applicable in some annulment actions, saying:

> Appellee contends that our statutory law provides for notice such as is here given in actions for divorce, and that under the provisions of section 25, chapter 43 of the Acts of 1873 (Acts 1873, p. 107), notice by publication is authorized in this case. Our attention is called to the title of said act, which is as follows: 'An act regulating the granting of divorces, nullification of marriages, and decrees and orders of courts incident thereto, and repealing all laws conflicting with this act, and declaring an emergency.' The section of this act relied upon by appellee as authorizing service on nonresident defendants in actions for annulment of marriage contracts in the same manner as in actions for divorces, is as follows: 'When either of the parties to a marriage shall be incapable, from want of age or understanding, of contracting such marriage, the same may be declared void, on application of the incapable party, by any court having jurisdiction to decree divorces; but the children of such marriage, begotten before the same is annulled, shall be legitimate; and, in such cases, the same proceedings shall be had as provided in applications for divorce.' Burns 1933, § 44-106.
>
> We are of the opinion that the section of our statutory law above quoted does not authorize service of process as in divorce cases, in actions for the annulment of marriage contracts on account of insanity or unsoundness of mind of one of the parties to said purported contract. It is held that the Legislature in using the words 'incapable, from want of age or understanding' in such statute had reference to something other than insanity. Wiley v. Wiley 75 Ind.App. 456, 123 N.E. 252 (1919). Therefore, that part of said section which provides that 'in such cases, the same proceedings shall be had as provided in applications for divorce' is not applicable to the instant case.

Id. at 204-05, 198 N.E. at 827-28.

70. The only reference to residence or nonresidence in the New Hampshire statutes relates to the right of nonresidents to obtain annulments of New Hampshire marriages. N.H. Rev. Stat. Ann. § 458:3 (1955).

71. N.C. Gen. Stat. § 1-98.2 (Supp. 1959) (Substituted service).

72. N.D. Rules Civ. Pro. 4(g)(2) (Supp. 1957) permits substituted service in annulment actions. N.D. Rev. Code § 14-05081 (Supp. 1957) establishes domicile as a jurisdiction prerequisite to the recognition of foreign nullity decrees. Since domicile is required for foreign decrees, I assume that the same requirement would be applied locally.

73. S.C. Code § 20-45 (1952) (Substituted service permitted in suits to annul local marriages).

74. Tenn. Code Ann. § 36-834 (Supp. 1959) (Service by publication).