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Divorce Jurisdiction—Marriage Performed within State Held Sufficient to Confer Jurisdiction on New York Courts

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DIVORCE JURISDICTION — MARRIAGE PERFORMED WITHIN STATE HELD SUFFICIENT TO CONFER JURISDICTION ON NEW YORK COURTS

Husband, served by publication in a divorce action in which neither party was a resident or domiciliary of New York, moved to set aside service of process. *Held:* Motion denied. C. P. A. § 1147(2) gives courts jurisdiction in divorce action where parties were married within the state. *David-Zieseniss v. Zieseniss,* 205 Misc. 836, 129 N. Y. S. 2d. 649 (Sup. Ct. 1954).

It is generally held that a valid divorce cannot be decreed on constructive service by the courts of a state in which neither party is domiciled. *Bell v. Bell,* 181 U. S. 175 (1901); *Restatement of Conflict of Laws,* § 111 (1934). Although in most cases where the question arises there is no statutory authority similar to C. P. A. § 1147(2), it has been said that a statute conferring divorce jurisdiction where neither party is domiciled cannot be complied with. *See Jennings v. Jennings,* 251 Ala. 73, 36 So. 2d. 236 (1948); *Harteau v. Harteau,* 14 Pick. 181 (Mass. 1833).

In New York, the rule concerning jurisdiction for divorce is unsettled. The Court of Appeals has stated by way of dicta that domicil is necessary for jurisdiction. *See Gray v. Gray,* 143 N. Y. 354, 357, 38 N. E. 301, 302 (1894). This has been followed in the holdings of lower courts. *Barber v. Barber,* 89 Misc. 519, 151 N. Y. Supp. 1064 (Sup. Ct. 1915); *England v. England,* 129 N. Y. S. 2d 167 (N. Y. Dom. Rel. Ct. 1954). Mere marriage within New York, irrespective of the residence of the parties, has been held insufficient to grant jurisdiction under C. P. A. § 1147(2). *Huneker v. Huneker,* 57 N. Y. S. 2d. 99 (Sup. Ct. 1945).

Dicta in other cases recognize divorce jurisdiction where a marriage is performed within the state. See *Becker v. Becker,* 58 App. Div. 374, 376, 69 N. Y. Supp. 75, 77 (1st Dep't 1901); *Oettgen v. Oettgen,* 196 Misc. 937, 941, 94 N. Y. S. 2d. 168, 172 (Sup. Ct. 1949).

In the principal case the court finds that marriage in the state makes the marital status of the parties a *res* under the jurisdiction of the court even though neither spouse is domiciled in the state. This would seem to conflict with *Rosenblum v. Rosenblum,* 181 Misc. 78, 42 N. Y. S. 2d 626 (Sup. Ct. 1943), which held that the *res* is the marital status of a *resident* of the state.

Even if the plaintiff in this case is successful in the New York courts, it is doubtful whether a New York decree based solely on marriage within the state would be entitled to full faith and credit

from a sister state. *Williams v. North Carolina,* 325 U. S. 226 (1945). The reluctance of other states to recognize divorce decrees where there is no domicil, even when a statute of the forum authorizes such a decree, is manifested by numerous cases. *E. g., Van Fossen v. State,* 37 Ohio St. 317, 41 Am. Rep. 507 (1881).

The court in the principal case relied heavily on *Gould v. Gould,* 235 N. Y. 14, 138 N. E. 490 (1923), in which the Court of Appeals recognized a divorce decree from a French court even though the parties were domiciled in New York. The parties were residents of France, however, and the French court had personal jurisdiction over the defendant. Recognition of the French divorce was apparently by grace of the New York court and the case does not stand as a precedent in the area of full faith and credit. *Cf.* In re *Lindgren's Estate,* 293 N. Y. 18, 55 N. E. 2d 849 (1944).

The language of C. P. A. § 1147 (2) certainly indicates a decision such as that in the instant case. However, the questionable validity in other jurisdictions of a New York decree based solely on Section 1147 (2) may cause this statute to act as a trap for the unwary plaintiff.

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EVIDENCE — EFFECT OF FEDERAL IMMUNITY STATUTE ON STATE PROCEEDINGS

Defendant's conviction for a violation of Maryland's gambling law was based on self-incriminating evidence given by him before a congressional committee, although the federal immunity statute provided that no testimony given by a witness in congressional inquiries "shall be used as evidence in any criminal proceeding against him *in any court.*" 18 U. S. C. § 3486 (1952). *Held:* The immunity statute precludes the use of such testimony by the states. *Adams v. Maryland,* 347 U. S. 179 (1954).

Statutes granting witnesses immunity against prosecution have been enacted in order to obtain needed testimony without violating the privilege against self-incrimination guaranteed by the 5th Amendment of the Federal Constitution. WIGMORE, EVIDENCE, § 2281 (3d ed. 1940). To be granted immunity, the witness must claim the privilege only if the statute so requires, *United States v. Monia,* 317 U. S. 424 (1943), and must be appearing in response to a subpoena. *United States v. May,* 175 F. 2d 994 (D. C. Cir. 1949).