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DIVORCE IN SOUTH CAROLINA

J. NELSON FRIERSON*

The present Constitution of South Carolina, adopted in 1895, contains in Article 17, Section 3, the following brief but controlling provision concerning the subject of this paper :

“Divorces from the bonds of matrimony shall not be allowed in this State.”

In his introductory chapter to the “History of South Carolina under the Proprietary Government,” the eminent historian, Edward McCrady, who was also a prominent South Carolina lawyer, says :

“Another principle to which the people of South Carolina have been as devoted, and have clung with equal consistency as to that of the autonomy of the State, is that of the inviolability of the family relation. Nowhere has the family bond—the foundation and germ of all society and government—been more sacredly guarded and effectually preserved. It has been a part of the Constitution of the State—unwritten, it is true, until 1895, but nevertheless fully recognized and enforced—that divorce should never be allowed. There never has been a divorce in South Carolina—province, colony, or State—except during the Reconstruction period after the war between the States, under the government of strangers, adventurers, and negroes, upheld by Federal bayonets. There is but one case of divorce reported in her law books, and that was during that infamous rule. The legislature of the State has persistently refused either itself to grant divorces or to authorize its courts to do so. In conferring powers and jurisdiction upon its courts those of the ecclesiastical tribunals were purposely excluded. Whether ‘wisely or unwisely,’ said Chancellor Dunkin in a case in which an effort was made to have the court declare a marriage void, ‘the legislature has thought proper to withhold these powers. They have delegated to no court the authority to declare a marriage void, and they have never themselves exercised the authority.’ The Constitution adopted in the last year (1895) has now made the prohibition of divorce a part of the written organic law of the State. With this inexorable rule in regard to the irrevocability of marriage once entered into the family group has been at once the source of social and political strength. The people of South Carolina have recognized and acted upon the great political truth that in a republican form of government above all others is the family the strength of the State.”

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The one case of divorce mentioned by McCrady, while not named by him, is undoubtedly the case of *Grant v. Grant*.¹ Isaac Grant sued Hannah Grant in an action for divorce from the bonds of matrimony upon the ground of defendant's adultery. The parties had been married in January, 1869. In 1872 an act (15 Stat. 30) was passed permitting divorce from the bonds of matrimony on the ground of adultery. This action was commenced December 12, 1878. On December 20, 1878, an act was passed repealing all the laws of the State relating to the granting of divorces. The lower court dismissed the action on the ground that the Act of 1872 had been repealed.

Plaintiff's appeal was based on two contentions: 1. That the Act of 1878 was void as impairing the obligation of the marriage contract. 2. That he was entitled to recover under Article IV, Section 15 of the Constitution of 1868 giving the courts of Common Pleas exclusive jurisdiction in all cases of divorce. Both contentions were answered by a unanimous court adversely to the appellant. The reasoning of the court was: 1. That the impairment provision of the federal constitution has regard to questions of property and not of matrimonial status. 2. That under Article XIV, Section 5 of the State Constitution ("that divorces shall not be allowed but by the judgment of a court, as shall be prescribed by law") a specific law authorizing a judgment of divorce was necessary.

In *Mattison v. Mattison*,² the action was "A suit of nullity of marriage." The complainant alleged that, being addicted to habits of intemperance, he was married to the defendant in the spring of 1840, while in a fit of delirium tremens. By his bill filed in November, 1845, he prayed that the said marriage might be "decreed to be null, void, and of no effect whatever." The bill was dismissed and the ruling affirmed an appeal. Want of jurisdiction to declare a marriage null and void was based on the fact that in England cognizance of matrimonial causes was taken by Ecclesiastical Courts. The act creating the Chancery Court of South Carolina had conferred on it only such powers as were exercised by courts of Chancery in England.

In the above case the Court of Errors stated that "This Court has no more authority to entertain a suit for nullity of marriage than to grant a divorce." More than a half century later, however, in

¹ 12 S. C. 29 (1879).

² 1 Strob. Eq. 387 (1847).

Davis v. Whitlock,³ the Supreme Court of South Carolina, after an exhaustive investigation of the matter, held that the Courts of this State have jurisdiction of an action to have a marriage declared null and void *ab initio*.

The Court referred to the case of *Mattison v. Mattison*, and pointed out that that case had been decided under the Constitution of 1790, whereas the case of *Davis v. Whitlock* arose after the Constitution of 1895 had been adopted. It further pointed out that by the Constitution of 1895, the marriage of certain persons, such as a white person and a negro, or a person having a living spouse, or a brother and sister, is declared void, and is forbidden by the public policy of the State, as expressed in its Statutes; and after exhaustive discussion of the matter, the Court concluded that there is no doubt that the Courts of this State have jurisdiction to declare such attempted marriages void.

On the merits of the case, however, the Court found that the plaintiff was not entitled to succeed and they therefore reversed the judgment of the Circuit Court and dismissed the complaint.

The Supreme Court, in this case, had to construe a law which first appeared in the revised statutes of 1873 and which it quoted from the Civil Code of 1902, wherein it appears as Section 2661 :

“All marriages contracted while either of the parties has a former husband or wife living, shall be void: Provided, that this section shall not extend to a person whose husband or wife shall be absent for the space of seven years, the one not knowing the other to be living during that time; nor to any person who shall be divorced, or whose first marriage shall be declared void by the sentence of a competent Court.”

In the course of its opinion, the Court said :

“The second marriage during the life of the first husband must under the Constitution be absolutely void. But the statute, notwithstanding, does have a very important effect on the status of the spouse who has been abandoned for seven years as indicated by the statute. He or she may marry again, and while the wife or husband remains absent the parties under the second marriage are entitled to full legal recognition as man and wife with regard to the enforcement of rights and the assumption of obligations as such; but all this must be at the risk that if it turns out that the first spouse was alive at the time the second marriage was undertaken, then the second marriage will be void, and all supposed rights acquired under it will fall to the

³90 S. C. 233, 73 S. E. 171 (1911).

ground. The second marriage in such a case is like administration on the estate of one supposed to be dead. When such a person is shown to be alive the administration is held void."

A still more recent attempt to have the court declare a marriage null and void was involved in the case of *Jakar v. Jakar*.⁴ Relief was refused on the ground that the only reasonable interpretation of the evidence showed that the marriage was consummated by cohabitation. This circumstance takes the case out of the statute granting relief in such cases.⁵

It thus appears that while the courts of South Carolina have no jurisdiction to grant divorces, they do have the power to declare marriages null and void, in proper cases, but the cases are few and far between where such relief is afforded.

Returning now to some of the earlier cases involving the question of divorce in South Carolina, we find the case of *McCarty v. McCarty*.⁶ This case was tried before Judge O'Neill, at Edgefield, in 1847. The question involved was one of title to land. The plaintiff claimed title through one Bathsheba Worthington, who, about 1800, was legally married to Robert Worthington. They lived together only a very short time and then separated, Robert, the husband, finally moving to Alabama, where he was still living at the time this action was brought. Bathsheba continued to live in Edgefield, where she acquired real and personal property over which she exercised all of the rights as of an unmarried woman. The husband had never, during all the forty years, asserted any of his marital rights to either the person or property of this wife. The land in dispute she had bought and later sold and conveyed by deed to the plaintiff in 1844. The defendant showed no title to the land in himself, but he contended that the deed from Bathsheba Worthington to the plaintiff was void because she was a married woman. The trial judge, in order that the Court of Appeals might pass on the point of law involved in the case, charged the jury, "that they might presume from the great lapse of time, that the Legislature had passed an Act, divorcing Bathsheba from her husband, Robert Worthington." When the case reached the Court of Appeals and was argued there, the Court reached the unanimous conclusion that, in this State, "An Act

⁴ 113 S. C. 295, 102 S. E. 337 (1920).

⁵ CODE (1902) §2660. See construction of this section in *Davis v. Whitlock*, *supra* note 3.

⁶ 2 Strob. Law 6 (1847).

granting a divorce can, under no circumstances be presumed from lapse of time." The reasoning by which the Court reached this conclusion was thus stated by Judge John B. O'Neill, who delivered the opinion of the Court:

"That an Act of the Legislature, after a lapse of twenty years' possession and use, may be presumed, is, I think, too clear to admit of doubt. Like a grant, it may be presumed, notwithstanding the public records show no such thing existed. This, however, is altogether confined to cases in which the Legislature might or might not act. It cannot apply where, from the Constitution or *a sort of common law of our own, the Legislature never has, and never will act.* Best, in his treatise on Presumptions, §109, p. 145, 37th No. of the Law Library, tells us there is hardly a species of Act or document, public or private, that will not be presumed in support of possession. *'Even Acts of Parliament may be thus presumed.'* Under this authority, if a divorce ever had taken place, or ever could take place, in this State, I would not hesitate to say that an Act for that purpose ought to be presumed, in this case. But, as was said in *Boyce v. Owens*, 1 Hill, 10, *'The marriage contract, in this State, is regarded as indissoluble by any human means. Nothing short of the actual or presumed death of one of the parties can have the effect of discharging its obligations and legal effect.'*

"This was my deliberate judgment pronounced and concurred in by my brethren of the Court of Appeals, Johnson and Harper, nearly fifteen years ago. It has received the entire sanction and acquiescence of the Bench, the Bar, the Legislature, and the people, ever since. The most distressing cases, justifying divorce even upon scriptural grounds, have been again and again presented to the Legislature, and they have uniformly refused to annul the marriage tie. They have nobly adhered to the injunction, 'Those whom God has joined together, let not man put asunder.' The working of this stern policy has been to the good of the people and the State in every respect." (Italics by the Court.)

FOREIGN DIVORCES

In the opinion of the Court in the case of *McCarty v. McCarty*, from which the foregoing extensive quotation has been taken, reference is made to the earlier case of *Boyce v. Owens*.⁷ In that case the statement was made that, "The marriage contract in this State is regarded as indissoluble by any human means."

In making this statement, however, the Supreme Court of South Carolina was evidently referring only to the municipal law of the State and did not have in mind a case decided by the Courts of one

⁷ 1 Hill Law 8 (1833).

of her sister States and in connection with which the question might arise in South Carolina as to whether the judgment of that sister State was entitled to "full faith and credit" in South Carolina.

This question as to the effect in South Carolina of a divorce granted in another State of the Union, was apparently first considered by our Court in the case of *Young v. Naylor*.⁸ The bill was filed for an account and the surrender of an estate which came into the defendant's hands by virtue of a marriage with the plaintiff, which she alleged was void in consequence of a previous marriage of the defendant in Maryland to another woman who was still alive at the time of the filing of the bill in South Carolina. The defendant answered that previous to his marriage to the plaintiff, the Legislature of the State of Maryland had passed a statute dissolving the marriage there and divorcing him from his first wife. The statute was produce and read as follows:

"An Act for the benefit of Margaret W. Naylor, of Charles County."
 "Be it enacted by the General Assembly of Maryland, that Margaret W. Naylor, of Charles County, be, and she is hereby divorced *from bed and board* and *mutual cohabitation* of her husband, James Naylor, of George."

The Court stated the question to be, whether the statute of Maryland was a divorce *a mensa et thoro* or an absolute divorce *a vinculo matrimonii*? For, said the Court:

"If it was a divorce *a vinculo*, then the defendant was entitled to all the rights in his present wife's property, given by our laws to lawful husbands."

The Court decided that the statute of Maryland merely granted a legal separation to Margaret Naylor from her husband, James Naylor, the defendant in the South Carolina action.

In 1846 the question was presented before the Courts of South Carolina as to the effect of a Connecticut decree of divorce, in the case of *Hull v. Hull*.⁹

Plaintiffs, lawful children of the testator, sought to set aside his will leaving his estate to his paramour and illegitimate child to the extent that it exceeded the amount of such devise allowed by statute. With respect to the devise to the paramour, the applicability of the statute turned on whether a Connecticut divorce, testator having been

⁸ 1 Hill Eq. 383 (1833).

⁹ 2 Strob. Eq. 175 (1846).

served by publication, should be recognized by the South Carolina court. It was admitted by the Court that "few subjects are more difficult—few questions are more perplexing than the effect of a foreign divorce." The Connecticut ruling, however, was accepted as an effective dissolution.

In arriving at this decision, no mention is made by the Court, or in the argument of counsel, of the Constitutional provisions applicable, but the conclusion of the Court is rested upon the ground that the laws of Connecticut "must be regarded as part of his marriage contract," and that "it was then part of the law of his contract, to submit to a judgment thus rendered."

The Court further says :

"It was part of the law of his contract that it might be dissolved by wilful desertion of three years, or by seven years absence without being heard of. This necessarily implies that judgment may be pronounced on these facts in his absence. But *if it were necessary*, the Court is prepared to hold that Hull's (testator's) family having been always permanently resident in Connecticut, *that must be regarded as his domicile* for all the purposes of maintaining the jurisdiction of the Court and the validity of the sentence." (Italics added.)

In the last sentence of the foregoing quotation where the Court holds that permanent residence of Hull's family in Connecticut fixed *his* domicile in that State, the Court was clearly in error, since the universally recognized rule concerning domicile is, as stated by the Court in the case of *Hair v. Hair*,¹⁰ as follows :

"The husband has the right, without the consent of the wife, to establish his domicile in any part of the world, and it is the legal duty of the wife to follow his fortunes, wheresoever he may go."

The question of foreign divorce came again before the Courts of South Carolina in 1852 in the case of *Duke v. Fulmer*.¹¹ The plaintiff, Thomas G. Duke, married Louisa Webb in Fairfield District, in South Carolina in 1820; in 1821 they moved to Georgia. In March, 1822, the wife eloped with another man and the husband never saw her afterwards. In August, 1822, he instituted proceedings for divorce in Georgia, against his absent wife. She was made a party to the action by publication and in October, 1824, he obtained a verdict from a special jury, sustaining his allegations. Afterwards, at

¹⁰ See 10 Rich. Eq. 163, 176 (1858).

¹¹ 5 Rich. Eq. 121 (1852).

his instance, the Legislature of Georgia passed an Act which was approved by the Governor and which provided for his divorce.

Soon after this divorce, the husband removed to Alabama where, at the time of the action, he was the reputed husband of another woman and the father of three children. His wife, Louisa, died in South Carolina in 1848. In 1849 the husband, Thomas G. Duke, came to South Carolina and filed his bill against the defendant in the action, in which bill he claimed, as husband of the late Louisa Duke, certain moneys alleged to have belonged to her and to have been received by the defendants in her behalf. In the Chancellor's decree, which was affirmed on appeal, it was stated that:

"The common law, as declared by the Judges of England, is clear against the recognition of foreign divorces as dissolving marriages contracted in England" (citing *Lolley's case*, 1 Russ. & Ry. Cases, 236 and other authorities).

The Court decided that neither the decree of the Georgia Courts, nor the action of the Georgia Legislature, had the effect of dissolving the bonds of matrimony between Thomas G. Duke and his wife, Louisa. In so holding it was probably in error, on the ground that the husband's domicile is the legal domicile of the wife, and that although she may be physically absent therefrom, she is nevertheless in contemplation of law, legally present there, and consequently is subject to the jurisdiction of the court in an action for divorce brought by the husband.¹² But however this may be, the decision cannot be supported today upon the ground upon which it was rested by the Court, namely: that a marriage contracted in South Carolina is "indissoluble by any human means."

In 1893, the question of the effect of a foreign divorce was again before the South Carolina courts for decision. It arose in connection with the claim of dower rights in land and was involved in the case of *McCreery v. Davis*,¹³ an action demanding the specific performance of a contract for the sale of land. The defendant refused to accept a deed to the lands in question, which was tendered to him in fulfillment of the contract, on the ground that there was no renunciation of dower endorsed on the deed by the wife of the plaintiff. The plaintiff contended that the bonds of matrimony which had formerly existed between himself and his wife had been dissolved by the decree of a Court in Cook County, in the State of Illinois.

¹² *Atherton v. Atherton*, 181 U. S. 155, 21 Sup. Ct. 544, 45 L. ed. 794 (1900).

¹³ 44 S. C. 195 (1893).

The action was tried upon an agreed state of facts, from which it appeared that the plaintiff, McCreery, who was at the time and had ever since then been a domiciled citizen of the State of South Carolina, was married in 1885 in New York to a citizen of that State. After the marriage, they returned to plaintiff's home in Columbia, South Carolina, and lived together as husband and wife until 1887 when the wife left the plaintiff and moved to Chicago, Illinois, where, in 1891, she sued for an absolute divorce on the ground of cruelty. Service was by publication, in strict accordance with the laws of Illinois, but the husband did not appear, answer, or demur to the complaint. Thereafter a decree was entered in the Illinois action, affirmatively finding the truth of the facts alleged in the wife's complaint, and ordering and adjudging that the bonds of matrimony theretofore existing between husband and wife be dissolved.

Upon this decree being properly put into evidence, the South Carolina Court, which tried the action for specific performance, held that the judgment of divorce granted in Illinois did not dissolve the matrimonial relation of the husband in South Carolina and that, therefore, the plaintiff (the husband) was not entitled to compel specific performance of the contract by the defendant. The plaintiff appealed to the Supreme Court of South Carolina upon the ground that the trial court failed to give "full faith and credit" to the Illinois decree, as required by the Constitution of the United States.

The Court fully discussed the defendant's contention that marriage constitutes a "status" and that the marriage relationship is a "res," and in disposing of this contention adversely, the Court says:

"If Mrs. McCreery could carry that *res* in the State of Illinois, then Mr. McCreery had the same *res* in the State of South Carolina, at the same time. In other words, the same thing could be in two distinct places at one and the same time, of which *res* the courts of Illinois would have the power to control as if it were a physical entity, and of which *res* the courts of South Carolina would have the power, at the same moment of time, to control as if it were a physical entity. Such a conclusion would be absurd."

The Court preferred the view, expressed in the earlier case of *Bowers v. Bowers*,¹⁴ that "Marriage in the State of South Carolina, has always been regarded as a merely civil contract."

Moreover, the Court pointed out that "Neither the constitutional provision that full faith and credit shall be given in each State to the

¹⁴ 10 Rich. Eq. 551 (1858).

public acts, records, and judicial proceedings of every other State, nor the acts of Congress passed in pursuance thereof, prevent an inquiry into the jurisdiction of the Court by which a judgment offered in evidence was rendered." It then pointed out that the husband had at all times been domiciled in South Carolina and that the Illinois Court had never obtained jurisdiction over him. It therefore held that the Illinois judgment of divorce would not be recognized in the Courts of South Carolina.

Eleven years after the decision in the above case, the Supreme Court of the United States handed down a decision of far reaching importance in the celebrated case of *Haddock v. Haddock*.¹⁵ The federal question involved in the case was, whether the Court of Appeals of New York had denied to a divorce decree rendered by a Court of the State of Connecticut the full faith and credit to which it was claimed to be entitled under the Constitution of the United States. The facts were, that the parties were married in New York where both resided at the time. After the marriage they never lived together, and shortly thereafter the husband without justifiable cause abandoned the wife and removed to Connecticut, where he obtained a divorce several years later. The wife, who had continued to reside in New York, was served only by publication in the Connecticut suit and she did not appear in the action. Many years later, the wife sued the husband in New York (where she still resided) for a legal separation and for alimony and in this action she obtained personal service upon him in New York. The husband offered in evidence, as a defense to the action, the judgment roll in the Connecticut suit for divorce, but, upon the wife's objection, it was excluded, on the ground that the Connecticut Court had not obtained jurisdiction over the person of the wife. This ruling of the New York Court presented the federal question which was decided by the Supreme Court of the United States in favor of the wife. That Court stated the rule that, when a husband abandons his wife and goes into another State in order to avoid his marital obligations, the wife's domicile does not follow him, but the place where she was domiciled when abandoned by the husband constitutes her legal domicile until she acquires another elsewhere. It therefore found that the wife's domicile continued in New York. It recognized the husband's right, however, to establish his own domicile in the State of Connecticut and found that he was domiciled in that State at the time that he obtained

¹⁵ 201 U. S. 562, 26 Sup. Ct. 525, 50 L. ed. 867 (1905).

his decree of divorce. It thus appears that the husband and the wife had legally separate and distinct domiciles—the husband's was in Connecticut and the wife's was in New York. Neither State had any jurisdiction over the person of the nonresident spouse. The Supreme Court, in concluding its opinion, said:

“Without questioning the power of the State of Connecticut to enforce within its own borders the decree of divorce which is here in issue, and without intimating a doubt as to the power of the state of New York to give to a decree of that character rendered in Connecticut, within the borders of the State of New York and as to its own citizens, such efficacy as it may be entitled to in view of the public policy of that state, we hold that the decree of the Court of Connecticut rendered under the circumstances stated was not entitled to obligatory enforcement in the State of New York by virtue of the full faith and credit clause. It therefore follows that the court below did not violate the full faith and credit clause of the Constitution in refusing to admit the Connecticut decree in evidence; and its judgment is, therefore, *affirmed*.”

In the twenty odd years which have elapsed since *Haddock v. Haddock* was decided, the question as to the effect to be given to foreign divorces by the Courts of South Carolina has arisen with increasing frequency. Often the question involved relates to the matter of dower, or to the right to share in the estate of a deceased person. In *Shirley v. Parris*,¹⁶ the point involved was whether a wife, who had been divorced from her husband in Alabama, had an inchoate right of dower in lands afterwards acquired by him in South Carolina. The Alabama decree was rendered in favor of the wife, who was domiciled in that State, upon the personal appearance and answer of the husband in the action (he being also apparently domiciled in Alabama) and the South Carolina Court held that:

“The Alabama decree dissolving the Alabama marriage completely destroyed the status out of which a wife's inchoate right of dower springs, and no such right could attach to lands afterwards acquired in this State by the divorced husband.”

The Master had held that the Alabama decree was entitled to “full faith and credit,” under the provisions of the Constitution of the United States as construed in *Haddock v. Haddock*, but the State Supreme Court does not mention this ground in its opinion, but states

¹⁶ 121 S. C. 260, 113 S. E. 788 (1922).

that the case was ruled by its recent decision in the case of *Dawson v. Della Torre*.¹⁷

In the *Dawson case*, it appeared that the husband, domiciled in South Carolina, married in Maryland a citizen of that state and afterwards the parties resided in Charleston, S. C., until 1903, "at which time the plaintiff and Dr. Dawson separated and lived apart." The wife returned to Maryland and three years later was granted, by a Maryland Court, a divorce *a vinculo matrimonii*, the process in the action having been served upon the husband in a railroad station in Baltimore while he was passing through the city. Several years later the husband died at his domicile in South Carolina, leaving real property located there. The divorced wife claimed dower in the property. The Circuit Court of the State, in refusing to allow her claim, held that the Maryland decree, granted in that state, "where one of the parties is domiciled," "and the other party is personally served, the judgment of that Court is binding not only on the parties, but on every Court in every State of the Union where that judgment is properly pleaded or admitted by the adverse party." The State Supreme Court, however, instead of resting its affirmance of the judgment upon the same ground, injects another element into its decision where it says:

"The marriage was contracted in Maryland under the laws of that State. In Maryland marriages are contracted in contemplation of their possible dissolution for certain causes. The Maryland Court, after personal service on the deceased in Maryland, and upon what we must assume a proper showing that a cause existed, dissolved the marriage relation. While this was contracted in view of a possible dissolution, the South Carolina Court could not have dissolved it for any cause. The South Carolina courts must, however, under the full faith and credit doctrine, recognize the dissolution affected by the same authority that made it. It is hard to imagine a clearer case for the operation of the full faith and credit doctrine than this."

This would appear to indicate that the South Carolina Court would conclude that a South Carolina marriage having been contracted under the laws of that State, which do not allow divorce for any cause, could not be dissolved by the decree of any Court of competent jurisdiction in any State where the married couple might subsequently be domiciled. This is the old notion expressed in the

¹⁷ 116 S. C. 338, 108 S. E. 101 (1921).

early case of *Duke v. Fulmer*,¹⁸ where the Chancellor stated in his decree that:

“the common law, as declared by the judges of England, is clear against the recognition of foreign divorces as dissolving marriages contracted in England.”

This old notion, however, was based upon the supposed doctrine of the judges in *Lolley's case*, which has long been exploded in England.

In the case of *Scheper v. Scheper*,¹⁹ the question was presented as to whether the claimant was entitled to take a husband's distributive share in the property of his former wife, who had died intestate. The parties were married in South Carolina and after living there several years had moved to North Carolina where the husband's employment took him. They lived there together as man and wife for three years, when the wife brought suit and procured a divorce *a mensa et thoro*, with alimony and the custody of her minor daughter. She then returned to her old home in South Carolina and remained here until she died three years later. Meanwhile the husband removed from North Carolina to Georgia and there married another woman, before the death of his first wife. After the first wife's death, the husband claimed his share in her property, taking the grounds that the South Carolina marriage between them had never been dissolved and that, therefore, he was her lawful husband at the time of her death and was entitled to share in her estate.

The South Carolina Supreme Court, speaking through Mr. Justice Marion, held that the claimant was the husband *de jure* of the deceased wife at the time of her death; that by the law of North Carolina, however, where the limited divorce was granted, the effect of a decree of divorce *a mensa et thoro*, was to deprive the husband of all his marital rights in and to his wife's property; and that the South Carolina Court would extend to the North Carolina judgment “such faith and credit,” “as will bar the appellant's claim.”

Two recent decisions of the Supreme Court of South Carolina are very unsatisfactory in their bearing upon this matter of the recognition of foreign divorces by the Courts of that State. The cases referred to are *Way v. Way*²⁰ and *Goodyear v. Reynolds*.²¹

¹⁸ 5 Rich. Eq. 121 (1852).

¹⁹ 125 S. C. 89, 118 S. E. 178 (1923).

²⁰ 132 S. C. 288, 128 S. E. 705 (1925).

²¹ 124 S. C. 288, 117 S. E. 538 (1923).

In the *Way case*, the parties were (apparently) citizens of this State and were married and lived together here for several years and then separated. The wife then "became a *bona fide* resident of the State of Georgia," and after becoming so, commenced an action in 1920, in a Georgia Court for an absolute divorce, "and the defendant not being a resident of the State of Georgia was duly served . . . by publication in a newspaper." The defendant did not appear in the action.

The wife, Mrs. Way, intermarried with one Cochran on the 16th of May, 1921. The judgment of final divorce (*a vinculo*) was not rendered in her favor until June 25, 1921, and her former husband, Way, died on July 15, 1921. The wife then made her claim in the county where her former husband had lived in South Carolina at the time of his death, for her share of his estate. This claim was refused and disallowed by the Lower Court and this judgment was affirmed by the Supreme Court. The reasoning, however, by which this result was arrived at is not convincing or satisfying. The Master, whose report had been confirmed by the Circuit Judge, had found that the claimant was, "Estopped to question the validity of the said judgment of divorce," and that she was, therefore, "Estopped to claim any share in the estate of the intestate" (her first husband). His report continued, however, as follows:

"I further find that the said judgment of divorce, being legal, valid, and binding in the State of Georgia, where granted, that under the full faith and credit doctrine it is legal, valid, and binding here under the laws of the State of South Carolina, and should be given the same force and effect here in the State of South Carolina that it has in the State of Georgia."

Three of the five Justices of the Supreme Court concurred in affirming the judgment of the Lower Court, "For the reasons assigned by the Master." The other two Justices concurred in the result. One of these two Justices stated, in a short opinion, that the "judgment of divorce procured by the wife . . . was properly held to estop her in this action from claiming as the widow of Way a distributive share in the personal estate of the deceased, Way." (Citing *Scheper v. Scheper, supra.*) "But," said the learned Justice, "Further than that I am not prepared to go." It is respectfully submitted that Mr. Justice Marion was right in refusing to go the full length that the majority of the Court went, for the reason that the

decree of divorce granted by the Georgia Court was not entitled to recognition in South Carolina under the full faith and credit clause of the Federal Constitution, as construed in the case of *Haddock v. Haddock*.²² As the Connecticut Court had no jurisdiction over the person of the wife in New York, in the *Haddock case*, so the Georgia Court had no jurisdiction over the South Carolina husband in the *Way case*.

The other recent case mentioned above is *Goodyear v. Reynolds*. The action was for the annulment of a marriage, and was brought by the husband against the wife on the ground that she had a living husband at the time of the marriage which the action sought to annul. The facts showed that Mrs. Goodyear had formerly been Mrs. Reynolds and had obtained a divorce from Reynolds in Georgia, the State wherein they both were domiciled at the time of the marriage and which was also the State of the matrimonial domicile, *i.e.*, the State of his domicile where he and she lived together as husband and wife. When she sued for divorce, in Georgia, "Reynolds was presumably in Oklahoma," says the Court in its opinion. The process was served upon Reynolds by publication and he did not appear in the action. Upon this showing, the Lower Court held that the subsequent marriage between Mrs. Reynolds and the plaintiff Goodyear should be annulled, because the Georgia Court had not obtained jurisdiction over Reynolds, the absent husband, and that, therefore, the Georgia decree of divorce should not be recognized by South Carolina as valid. The South Carolina Supreme Court reversed this judgment, and held that Mrs. Reynolds having "properly procured a divorce there" (*i.e.*, in Georgia), was free to marry again, and that her marriage to Goodyear in South Carolina was "a valid and legal marriage." The only authority cited in the entire opinion is the celebrated case of *Haddock v. Haddock*, above referred to, and yet, *mirabile dictu!* the decision is in the very teeth of the *Haddock* decision, which it professes to follow! How the court went wrong will appear from the following quotation from its opinion, which, in turn, quotes two propositions of law laid down by the Supreme Court of the United States in the *Haddock case*, as having been "Irrevocably concluded by previous decisions of this Court." Says the South Carolina Supreme Court:

²² *Supra* note 15.

"A man who has a matrimonial domicile cannot by a *personal change of his domicile* change his *matrimonial domicile*. In *Haddock v. Haddock*, 201 U. S. 562, 26 Sup. Ct. 525, 50 L. ed. 867, 5 Ann. Cas. 1, the court says :

'Sixth. Where the domicile of matrimony was in a particular state, and the *husband abandons his wife* and goes into another State in order to avoid his marital obligations, such other state to which the husband has wrongfully fled does not, in the nature of things, become a new domicile of matrimony, and therefore *is not to be treated as the actual or constructive domicile of the wife*; hence the place where the wife was domiciled, when so abandoned, constitutes *her legal domicile* until a new actual domicile be by her elsewhere acquired. . . .

'Seventh. So also it is settled that, where the domicile of a husband is in a particular state, and that state is also the domicile of matrimony, the courts of such state *having jurisdiction over the husband may*, in virtue of the *duty of the wife to be at the matrimonial domicile, disregard an unjustifiable absence therefrom, and treat the wife as having her domicile in the state of the matrimonial domicile for the purpose of the dissolution of the marriage*, and as a result have the power to render a judgment dissolving the marriage which will be binding upon both parties, and will be entitled to recognition in all other states by virtue of the full faith and credit clause.' (Italics added.)

The South Carolina Supreme Court failed to recognize and apply the well established rule concerning domicile that, while a husband may desert his wife, and flee away to another State and there establish his valid domicile of choice (leaving the wife, of course, domiciled in the State from which he has fled); yet the wife, on the other hand, *has no such right*, as most distinctly appears from the "Seventh" proposition of law laid down in the *Haddock case* and cited in the above quoted portion of the opinion of the South Carolina Supreme Court. When a wife deserts her husband and goes to another state, *she does not acquire a new domicile there*, but is treated, for the purpose of jurisdiction for divorce, as if she were *personally present at the matrimonial domicile*,²³ (*i.e.*, her husband's home), and this because of her wifely *duty* to be there. On the contrary, where the husband deserts the wife and goes to another State and there establishes his new domicile (as he legally may), the result is *two domiciles*. The wife's domicile remains at the home where they were living when he deserted her, while the husband's domicile is the new one which he adopted in the State to which he has fled. This

²³ *Supra* note 12.

was the situation in the *Haddock case* and it was the identical situation in the case of Mr. and Mrs. Reynolds. In each case the husband deserted the wife and established a new domicile in another State. Mr. Haddock sued for divorce in Connecticut and served his wife by publication of the summons only. Mrs. Reynolds sued her husband for divorce in Georgia and likewise served the summons by publication. In neither case did the absent spouse appear in the action, and in neither case did the Court obtain jurisdiction over the absent defendant whose domicile was in another State from that in which the action was pending. In both cases decrees of divorce were granted in favor of the plaintiff in the action. The Supreme Court of the United States held that the Connecticut judgment was *not* entitled to full faith and credit, while the South Carolina Supreme Court, citing the *Haddock case* as the sole authority for its decision and evidently thinking that it was following that great land mark, arrived at a *diametrically opposite result* and held that the Georgia divorce obtained by Mrs. Reynolds was legal and valid and that, "we are bound to give full faith and credit to the divorce properly obtained by a Court of competent jurisdiction in a sister State." It seems impossible that the decision can stand when the question shall again be squarely presented for adjudication.

Mention must be made of the serious criminal consequences which sometimes follow the obtaining, by citizens of South Carolina, of illegal divorces in other states, followed by attempted second marriages in South Carolina. In such cases, where the marriage tie has not been legally unloosed in the sister State, in such a way as to be protected by the full faith and credit clause of the Federal Constitution, the criminal arm of the law may fall heavily upon the man or woman who seeks to be united to a second spouse in this state. A conviction of the crime of adultery may bring the second honeymoon to a sad termination, as in the cases of *State v. Westmoreland*,²⁴ and *State v. Duncan*.²⁵ In both of these cases, citizens of South Carolina attempted, without establishing a *bona fide* domicile in the State of Georgia, to have the bonds of matrimony which bound them to their South Carolina wives, dissolved and unloosed by the courts of the sister State. In both cases they returned to South Carolina and went through the form of a second marriage and lived with the alleged second wife, but the State intervened and they were indicted

²⁴ 76 S. C. 145, 56 S. E. 673 (1905).

²⁵ 110 S. C. 253, 96 S. E. 294 (1918).

and convicted of the crime of living in adultery with the alleged wife number two; and this in spite of the fact that, in the *Westmoreland* case, the first wife actually appeared in person in the Georgia Court and (apparently) was entirely willing for the divorce to be granted. The Supreme Court of South Carolina, speaking through the late lamented Justice Woods, held that the Georgia Court had no jurisdiction to render the decree of divorce and that said decree was an absolute nullity in South Carolina and afforded the defendant no protection against the indictment.