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ments can neither be modified nor enforced by contempt, whereas the majority rules refuse modification but allow contempt proceedings. It is submitted that as to contempt the majority is the better view; otherwise the judgment is of no practical value to the wife other than as a judicial affirmation of the contract existing between the parties. She would be as well off without the decree because she can enforce it only by the usual methods of enforcing contracts. By the same token, it is thought that the minority view as to modification is preferable. If a judge with veto power over the terms of the agreement approves them and sets them out in the decree, this should be sufficient adoption of the terms to make them a part of the decree.

In view of the distinction made in North Carolina between consent judgments and ordinary alimony decrees, however, it is advisable that the attorney carefully word the form of the judgment so as to preserve in the court further rights in the cause. As seen in the *Edmundson* and *Dyer* cases, the subsequent rights of the parties are materially affected by the technical form of the judgment.

HAMLIN WADE

Domestic Relations—Consequences of a Voidable Divorce Decree

In the recent case of *Harmon v. Harmon*,[1] the husband, after obtaining a decree of absoulte divorce on grounds of two years separation, remarried. Thereafter, the first wife was successful in her motion in the cause to have the divorce decree set aside, because the clerk of court had not mailed to her a copy of the notice of service by publication as required by statute.[2] The trial judge gave an order vacating the decree, but did not dismiss the action and ordered the clerk to make proper service of process on the defendant wife. Upon proper service of process, the wife filed her answer setting up as a defense to the divorce action the cohabitation arising out of the second marriage as adulterous and therefore a bar to her husband's action. The Supreme Court rejected the wife's contention and affirmed the divorce decree. The court stated that since the husband had done all that was required of him by law and there was no evidence of any intentional wrong or fraud on his part in the procurement of the divorce decree, his cohabitation with the second wife up to the time he knew the decree would be set aside was not adulterous so as to bar his right of action.

This appears to be the first case in which the Supreme Court of North Carolina has considered the effect of an error in the procedure of service of process by publication pursuant to N. C. GEN. STAT. § 1-99.2

[1] 245 N. C. 83, 95 S. E. 2d 355 (1956).

[2] N. C. GEN. STAT. § 1-99.2(c) (1953): "The clerk shall mail a copy of the notice of service of process by publication to each party whose name and residence or place of business appear in the verified pleading or complaint. . . ."

(c) as amended in 1953.[3] The statute now requires the clerk of court to mail a copy of the notice of service by publication, within five days after the issuance of the order for service, to each party whose name and address appear in the verified pleading or sworn affidavit filed pursuant to N. C. GEN. STAT. § 1-99.4. Prior to the 1953 amendment, the clerk of court was not required to mail such copies. The court overlooked or thought not significant that portion of § 1-99.2(c), which requires the clerk to make a record of mailings in accordance with N. C. GEN. STAT. § 2-42. If the clerk must make a record of these filings, it seems reasonable that the court would have required the plaintiff to have checked the records to see if it showed a proper mailing before he was relieved of the consequences of a subsequent marriage. However, the court apparently did not consider that a legal duty of the plaintiff.

The *Harmon* case illustrates that it may not be wise to use the first alternative authorized under N. C. GEN. STAT. § 1-99[4] for service of process where the defendant is out of state but his address is known. To do so may subject the plaintiff to the same danger involved in the *Harmon* case through no fault of his own. N. C. GEN. STAT. § 1-99 states a second alternative in subsection (2), which would be safer to use if the foreign address of the defendant is known. Subsection (2) provides that if this alternative is taken, the procedure set out in the N. C. GEN. STAT. § 1-104[5] must be followed. Since under this alternative the court will take jurisdiction only upon return of the statutory certificate, the chances of a court taking jurisdiction when in fact there has been no valid service is greatly reduced.

The *Harmon* case appears also to be the first case in which the Supreme Court of North Carolina considered whether marriage under the belief of a valid divorce constitutes adulterous cohabitation so as to bar another divorce action, when the first divorce decree was not valid and was later vacated. The decision is in accord with the weight of authority in this country.[6]

Note also that the court gave as one of its reasons for not finding the

[3] See Note, 31 N. C. L. REV. 391 (1953) for the changes brought about in the procedure of service of process by the 1953 amendments.

[4] "If the verified pleading or affidavit conforms to the requirements of G. S. 1-98.4, and if it appears to the satisfaction of the judge or clerk that the person to be served cannot, after due diligence, be found in the State, the judge or clerk shall, at the election of the plaintiff, either (1) Make an order for service of process by publication of the notice provided for in G. S. 1-99.2 once a week for four successive weeks in a designated newspaper . . . (2) Make an order for service of process outside the State pursuant to G. S. 1-104."

[5] This statute provides that it shall be sufficient for service of process outside the state to mail the original and a copy of the process together with a copy of such pleading or affidavit to the sheriff or other process officer of the county or corresponding governmental subdivision of the state where the party to be served is located, who shall serve the same and make his return using a form as set out in G. S. § 1-104(b).

[6] 27 C. J. S., *Divorce* § 56(b)(3) (1941).

cohabitation resulting from the second marriage adulterous the fact that the husband separated from the second wife immediately upon being advised by the court that the wife's motion to vacate the divorce decree would be granted. This may infer that the court agrees with the rule that cohabitation pursuant to the second marriage after the divorce decree has been vacated constitutes adultery, even though the second marriage was contracted in reliance on the validity of the decree.[7] However, the Supreme Court did not have to state what consideration will be given to a lapse of time in moving to have the divorce decree vacated or the intervention of innocent third parties in setting aside the decree.

The question whether the court ought to vacate or set aside a divorce decree after the remarriage of one of the parties necessarily depends upon the facts of the particular case, and the decision rests within the sound discretion of the trial court. This view is supported by some cases.[8] The *Harmon* case apparently is in accord. However, some courts have indicated that where the plaintiff has remarried and there has been a delay in seeking to vacate the decree, the courts will take into consideration the public policy to prevent bastardizing children of the second marriage and also the resulting injury to the innocent second wife, especially where there has been no fraud or bad faith on the part of the remarrying spouse and the marriage is on the faith of the divorce decree.[9] This matter of public policy takes on more significance when one considers the general rule that upon a decree of divorce being annulled or vacated, the marital rights, obligations and status of the parties are revived and restored to the status in which they were before the divorce, irrespective of a subsequent marriage or the birth of children by the second marriage.[10] So under such a rule it does harm to the innocent second spouse and bastardizes the children of the subsequent marriage.[11] The Supreme Court of North Carolina in the recent case of *Patrick v. Patrick*[12] has shown that it will not consider the lapse of time when the

[7] State v. Whitcomb, 52 Iowa 85, 2 N. W. 970 (1879); State v. Watson, 20 R. I. 354, 39 Atl. 193 (1898).

[8] See Johnson v. Johnson, 81 Cal. App. 2d 686, 185 P. 2d 49 (1947); Leathers v. Stewart, 108 Me. 96, 79 Atl. 16 (1911); Hall v. Hall, 70 Mont. 460, 226 P. 469 (1924); Paynton v. Paynton, 194 Mich. 504, 160 N. W. 837 (1916).

[9] Bussey v. Bussey, 95 N. H. 349, 64 A. 2d 4 (1949); Karren v. Karren, 25 Utah 187, 69 P. 465 (1902).

[10] 17 AM. JUR., *Divorce and Separation* § 463 (1938), which cited Gato v. Christian, 112 Me. 427, 92 Atl. 489 (1914); McKee v. Bevins, 138 Tenn. 249, 197 S. W. 563 (1917).

[11] If North Carolina follows this general rule, it would appear that the plaintiff and his second wife are no longer validly married even though the plaintiff is now validly divorced. But see Taylor v. White, 160 N. C. 38, 75 S. E. 941 (1912).

[12] 245 N. C. 195, 95 S. E. 2d 585 (1956). In the *Patrick* case, the plaintiff wife had obtained an absolute divorce on grounds of 5 years' separation in 1929 upon service by publication in accordance with the law then in effect. Subsequent thereto the husband lived with and supported the wife until her death and kept him in ignorance of such decree. Upon being appointed personal administrator of her estate, the husband acquired knowledge of such decree and made a motion in the

the plaintiff was guilty of some fraud. This case, however, does not settle the question whether the delay in time would have been considered if there had been no fraud by the plaintiff and a subsequent marriage to another after the decree.

The only intervening factor in the *Harmon* case which might have prevented the court from granting the vacation of the decree was the remarriage by the plaintiff husband to an innocent third person. The court apparently adopted the rule that the marriage is not itself a sufficient reason for refusing to vacate or set aside the decree. This is almost universally held by other jurisdictions.[13] Some courts, however, state that great caution should be exercised before it vacates or sets aside a divorce decree where one of the parties has married again.[14] The other extreme from the majority view is the rule in Kentucky that the court cannot vacate a decree of divorce, even though the motion to vacate is made during the term at which the decree was entered, if either of the parties has married, provided there was no fraudulent acts by the successful party.[15] This problem is handled in a unique way in New York. Where a defaulting defendant in a divorce case seeks to have the judgment or decree set aside so that he may defend on the merits, the trial court's order permits the defense but allows the judgment of divorce to stand until the trial of the issues in the divorce action, with a proviso that if the defense is sustained the judgment should be set aside; but if the defendant is unsuccessful the judgment should remain in full force.[16] If the Supreme Court of North Carolina adopted either the Kentucky or New York rule, it would be clear that the plaintiff in the *Harmon* case is still married to his second wife.

The *Harmon* situation raises the problem of whether the plaintiff husband may be guilty of bigamy[17] by his subsequent marriage. It is usually held that the fact that one charged with bigamy believed in good faith that he had been lawfully divorced from his first wife constitutes no

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cause to have it vacated, which the trial court granted and the Supreme Court of North Carolina affirmed. The court vacated the divorce decree on the grounds that the wife by means of false allegations contained in her complaint perpetrated a fraud upon the court thereby causing the court to assume jurisdiction.

[13] Murphy v. Murphy, 200 Ark. 458, 140 S. W. 2d 416 (1940); Nelson v. Nelson, 7 Cal. 2d 449, 60 P. 2d 982 (1936); Croyle v. Croyle, 184 Md. 126, 40 A. 2d 374 (1944); Zirkalos v. Zirkalos, 326 Mich. 420, 40 N. W. 2d 313 (1949); Meyers v. Meyers, 200 Okla. 683, 199 P. 2d 819 (1948); Tarr v. Tarr, 184 Va. 443, 35 S. E. 2d 401 (1945).

[14] Day v. Nothingham, 160 Ind. 408, 66 N. E. 998 (1903); Bussey v. Bussey, 95 N. H. 349, 64 A. 2d 4 (1949); Walker v. Walker, 151 Wash. 480, 276 P. 300 (1929).

[15] Moran v. Moran, 281 Ky. 739, 137 S. W. 2d 418 (1940); Bushong v. Bushong, 283 Ky. 36, 140 S. W. 2d 610 (1940).

[16] Fuchs v. Fuchs, 64 N. Y. S. 2d 487 (1946).

[17] See N. C. GEN. STAT. § 14-183 (1953).

[18] Witt v. State, 5 Ala. App. 137, 59 So. 715 (1912); People v. Hartman, 130 Cal. 487, 62 Pac. 823 (1900); State v. Long, 44 Del. 251, 59 A. 2d 545 (1948); Jackson v. State, 21 Ga. App. 823, 95 S. E. 631 (1918); State v. Najjar, 1 N. J. Super. 208, 63 A. 2d 807 (1949).

defense.[18] Some of the cases have stated that the bigamy statutes do not require any intent and that the statute puts on the defendant the duty to be absolutely sure that his divorce decree was valid before contracting such marriage and if he does not do so, it is a crime in the public interest.[19] The court of Arkansas in a similar situation[20] to the one in the *Harmon* case held that even a certificate by a clerk of court of a decree of divorce is insufficient where the divorce decree was really void. The probability of bigamy is strengthened by the fact that the Supreme Court in the *Harmon* case cited *Chisholm v. Chisholm,*[21] a Florida case, in which the wife, after obtaining a divorce decree, married and cohabited with another, but separated from the second husband before her first husband obtained a vacation of the original decree. The court held that her cohabitation with her second husband may technically be regarded as bigamy but did not constitute adultery such as would preclude her from obtaining a divorce. Although the court was talking of different things, there is some basis for the inference that the Supreme Court of North Carolina might hold that the defendant could be guilty of bigamy, but not of adultery so as to bar his divorce action. In *State v. Nichols,*[22] the Supreme Court held that evidence that the defendant had employed a lawyer to obtain a divorce from his first wife and had been informed that it would require about thirty days to do so, and that he had waited thirty days and then married the second wife, believing he was divorced, was properly excluded. It has also been held apparently without exception in North Carolina that a bona fide belief in the invalidity of a first marriage is not a defense to a prosecution for bigamy when in fact that marriage was valid and subsisting.[23] Following this reasoning the plaintiff would be guilty of bigamy. It has also been held that when the statute fixes the exceptions, the courts cannot extend it.[24] Since the North Carolina statute for bigamy lists the exceptions[25] and the *Harmon* situation is not within the statutory list, it would follow that the husband would be guilty of bigamy.

However, there are cases in this country holding that an honest but erroneous belief, reasonably entertained, that a valid divorce has been granted will constitute a defense to a prosecution for bigamy.[26] The

[19] See footnote 17 *supra.*
[20] Russell v. State, 66 Ark. 185, 49 S. W. 821 (1899).
[21] Chisholm v. Chisholm, 105 Fla. 402, 141 So. 302 (1932).
[22] 241 N. C. 615, 86 S. E. 2d 202 (1955).
[23] State v. Robbins, 28 N. C. 23 (1845); State v. Williams, 220 N. C. 445, 17 S. E. 2d 769 (1941).
[24] State v. Zichfeld, 23 Nev. 304, 46 P. 802 (1896); State v. Hendrickson, 67 Utah 15, 245 P. 375 (1926).
[25] See N. C. GEN. STAT. § 14-183 (1953).
[26] Robinson v. State, 6 Ga. App. 696, 65 S. E. 792 (1909); Lesueur v. State, 176 Ind. 448, 95 N. E. 239 (1911); State v. Sparacino, 164 La. 704, 114 So. 601 (1927); Turner v. State, 212 Miss. 590, 55 So. 2d 228 (1951); Baker v. State, 86 Neb. 775, 126 N. W. 300 (1910).

court in the *Harmon* case cited with approval the quotation in *State v. Cutshall*[27] from *Alonzo v. The State*[28] which explains the reason for such a holding. That is, if one of the parties after exercising due care, was mistaken as to a matter of fact which, had it been true, would have rendered the alleged criminal act legal and innocent, the party so acting under such mistake of fact would be innocent of crime. So there is some basis for the inference that the Supreme Court might not find a person in the situation of the husband in the *Harmon* case guilty of bigamy. It certainly seems that this rule is the more logical and reasonable. To prosecute a man for bigamy who has done all that is legally required to get a valid divorce, and is acting in reliance upon an order of the court granting the divorce at the time he remarries, is not reasonable or just. It seems that a person who has acted in good faith should be entitled to rely upon a supposedly valid divorce decree without fear of criminal prosecution.

PARKS ALLEN ROBERTS

Execution—Supplemental Proceedings or Creditor's Bill in North Carolina

Under the dual system of courts of law and equity that existed in North Carolina prior to 1868, the judgment creditor had to resort to his bill in equity[1] to reach property of the judgment debtor that was not liable to execution at law. All the debtor's property was liable for his debts except his legal exemptions.[2] But only legal interests in tangible personalty and realty, equities of redemption, and interests under a passive trust could be reached by execution at law.[3] Legal interests in intangibles and equitable interests other than those pointed out above had to be reached by a creditor's bill in equity. The remedy in equity was not available to a creditor who had not exhausted his legal remedies.[4]

In 1868, a statutory procedure known as supplemental proceedings was adopted whereby the judgment creditor could subject to sale certain of the judgment debtor's property which could not be reached under execution at law.[5] Although ostensibly this statute was intended to completely replace the creditor's bill, the question arose as to whether

[27] 109 N. C. 764, 14 S. E. 107 (1891).
[28] 15 Tex. App. 378 (1910).

[1] Also called creditor's suit, creditor's bill, and judgment creditor's bill (to distinguish it from general creditor's bills with which we are not here concerned). Since the fusion of courts of law and equity, the courts frequently call this proceeding an *action*.
[2] N. C. GEN. STAT. §§ 1-369 et seq. (1953).
[3] N. C. GEN. STAT. § 1-315 lists property that is subject to levy and sale under execution. Here we are concerned only with property not so subject.
[4] Wheeler v. Taylor, 41 N. C. 225 (1849).
[5] CODE OF CIV. PROC. §§ 264 et seq. (1868). Now N. C. GEN. STAT. §§ 1-352—1-368 (1953).