Early Statutory and Common Law of Divorce in North Carolina

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will be under the Longshoremen's and Harbor Workers' Act; and if the injury is sustained on land, the state workmen's compensation proceedings will provide the remedy.

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American courts and legislatures have for a century and a half looked with disfavor on the dissolution of marriage. In so doing they have created a fifty-headed hydra of an internecine complexity unparalleled in the law. Here we shall investigate the birth and early childhood of that great serpent in North Carolina.

At the outset it is well to agree on just what is meant by the term "divorce." Historically, it has been used to describe four distinct remedies affecting the marital status: (1) divorce a mensa et thoro, (2) divorce a vinculo matrimonii by legislative act, (3) divorce a vinculo matrimonii by judicial decree, and (4) annulment. At common law the term "divorce" properly comprehended only the divorce a mensa et thoro, commonly known as legal separation or divorce from bed and board, although annulment was often incorrectly termed "absolute divorce." In its modern sense, as a dissolution of a valid existing marriage, "divorce" means a divorce a vinculo matrimonii by judicial decree or legislative act. The latter has become obsolete.

1 "We reconcile ourselves to what is inevitable. Experience finds pain more tolerable than it was expected to be; and habit makes even fetters light. Exertion, when known to be useless, is unassayed; though the struggle might be violent, if by possibility it could be successful. A married couple thus retrained may become, if not devoted in their affections, at least discreet partners, striving together for the common good, and steady friends, ready to perform all offices of kindness required by the other—instead of the dissident heads of a distracted family, driven by inflamed passions to a degree of madness not to be satisfied with less than an entire separation, though it bring disgrace on themselves and their offspring, and deprive the latter of the greatest earthly advantage, the nurture and admonitions of a parent." Scroggins v. Scroggins, 14 N.C. 535, 542 (1832). Compare the views of South Carolina and Georgia: "The policy of this State has ever been against divorces. It is one of her boasts that no divorce has ever been granted in South Carolina." Hair v. Hair, 31 S.C. Eq. 163, 174 (1858). "In South Carolina... to her unfading honor, a divorce has not been granted since the Revolution...." Head v. Head, 2 Ga. 191, 196 (1847).

2 This convenient dichotomy caused some confusion. See, e.g., Crump v. Morgan, 38 N.C. 91 (1843).

3 Absolute divorce by judicial decree was unknown in England until the Matrimonial Causes Act of 1857, 20 & 21 Vict. ch. 85. There were a few instances of such decrees during the early years of the Reformation, but it
Before 1857 all matrimonial causes in England were within the exclusive jurisdiction of the ecclesiastical courts. Marriage, being one of the seven sacraments of the church, was absolutely insoluble if validly contracted. The common law knew no absolute divorce. However, the church could not compel two completely antipathetic persons to live together in peace. Separation was inevitable. To protect the husband from spurious heirs born to the wife during such a separation, and to provide for her support, the ecclesiastical courts would, for weighty reason, legalize the separation. But the marriage was not dissolved; in the eyes of God and the law it still existed. This legal separation, the divorce *a mensa et thoro*, could be obtained for two causes: cruelty or adultery. Basically, this was the divorce law officially received in North Carolina in 1715.

Since the colonies had no ecclesiastical courts, and neither law was definitely settled in the reign of Elizabeth I that the ecclesiastical courts could not grant absolute divorce. See SHELFORD, MARRIAGE & DIVORCE 374 (Law Lib. ed. 1841) [hereinafter cited as SHELFORD]; BISHOP, MARRIAGE & DIVORCE § 65 (6th ed. 1881) [hereinafter cited as BISHOP]; McGREGOR, DIVORCE IN ENGLAND 22 (1957).

The first recorded instance of a legislative divorce in England was that of the Marquis of Northampton in the last year of the reign of Henry VIII, but the act was repealed the very next year when the Roman Catholic Mary I succeeded her father. The second instance was in 1688 but it was with the greatest difficulty that the bill passed the House of Lords; all the Lords Spiritual voted against it. Beginning in 1715 divorce acts became common. However, they were so expensive that only the very wealthy could afford them. Parliament would grant an absolute divorce only for adultery, and then only after the petitioner had obtained both a divorce *a mensa et thoro* from the ecclesiastical courts and a verdict at law for criminal conversation. The total cost of all these proceedings has been estimated at from £600 to £800. BISHOP § 662; McGREGOR, DIVORCE IN ENGLAND 10-11, 17 (1957); NELSON, DIVORCE & SEPARATION § 400 (1895).

The Fundamental Constitutions of Carolina (1669), art. 45, provided for a Chamberlain's Court which was to have jurisdiction over all matrimonial causes. However, the constitutions were never an effectual instrument of government and there is no record that the Chamberlain's Court was ever established. 1 COLONIAL RECORDS OF NORTH CAROLINA xvii-xviii (1886); 25 STATE RECORDS OF NORTH CAROLINA 123, 128 (1906); 1 LEFLER, HISTORY OF NORTH CAROLINA 42-43 (1956).

There were no bishops in America even though the Church of England was established fairly early in most of the Southern Colonies, and eventually
nor equity could decree divorces at common law, no type of divorce, as such, was known in the colonial courts until requisite jurisdiction was conferred by statute. Until the courts were granted divorce jurisdiction legislative divorce was quite common in New England. However, no record exists of a legislative divorce in the southern colonies until after the Revolution. What transpired in North Carolina during these hundred years? There is no reason to believe that domestic tranquility was any more pronounced here than in New England.

In the early years the answer lies most probably in the relatively primitive state of society. The evidence indicates that most marital difficulties were settled privately with little or no interference from the state. A dissentient couple simply separated and dissolved their marriage by mutual consent. One or both might migrate to another colony, or to the western territories, to begin life anew with another mate. It is not improbable that in some cases both remained in the same general vicinity. Certainly desertion of wives was a very common occurrence, as is evidenced by the large number of private acts passed for their relief. There is at least one documented instance of a formal contract, the language of which bears the clear mark of a lawyer, in which the parties agreed to dissolve their marriage and bound themselves to refrain from prosecuting each other should either remarry.

in all of the colonies. No bishop, no court. The Church was established in North Carolina in 1703. N.C. Sess. Laws 1703, ch. 1, as amended, 1720, ch. 2; 25 State Records of North Carolina 166.

11 Bishop § 69. After the passage of the divorce acts in the several states a lively dispute arose over whether the ecclesiastical law is part of the common law, or whether divorce is purely statutory. The best theory holds that ecclesiastical law is properly part of the common law, but is in abeyance or vested solely in the legislature until courts competent to administer it are established. Le Barron v. Le Barron, 35 Vt. 365 (1862). New York early held the opposite view. Burtis v. Burtis, 1 Hopk. Ch. 557, 14 Am. Dec. 563 (N.Y. Ch. 1825). Accord, Chisholm v. Chisholm, 98 Fla. 1196, 125 So. 694 (1929); Short v. Stotts, 58 Ind. 29 (1877); Hodges v. Hodges, 22 N.M. 192, 159 Pac. 1007 (1916). Contra, Chapman v. Chapman, 269 Mo. 663, 192 S.W. 448 (1917); Fowler v. Moore, 46 Nev. 65, 207 Pac. 75 (1922); Crump v. Morgan, 38 N.C. 91 (1843); Le Barron v. Le Barron, supra. See also Bishop §§ 56, 57, 69; Nelson, Divorce & Separation § 10.

12 Especially in Massachusetts. 2 Howard, History of Matrimonial Institutions 330-66 (1904).

13 Id. at 367.


15 See text at note 35, infra.

16 Quoted in Johnson, Ante-Bellum North Carolina at 220. The cited source is a MS among Legislative Papers 1807 in the North Carolina State Archives. See Appendix III.
As the state became more settled and property rights more important such primitive solutions became unfeasible. Soon after the Revolution petitions for divorce began to pour into the legislature, a body neither suited for nor sympathetic to such matters. Agitation for a general divorce statute was begun as early as 1790 but it took the legislature twenty-four years to respond. It was in such a situation of stress that equity invented the action of alimony without divorce as a partial solution to an intolerable situation.

It is not certain just when the action of alimony without divorce first began; certainly it was unknown to the common law. However, by 1796 the action was firmly imbedded in the equity jurisprudence of North Carolina. The earliest reported cases indicate that it had been known for some years. From 1796 to 1800 there were at least four such suits from which the records have survived.

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17 At least as soon as 1779. "Read the Petition of Alexander Dickson of Duplin County, praying a Divorce from Elizabeth his wife. Passed and sent to the Senate." House Journal, 22 October 1779, 13 State Records of North Carolina 932 (1896). "Received from Commons a Bill for the separation and divorcement of Alexander Dixon and Elizabeth Dixon, formerly Elizabeth Molton, as man and wife, which was read for the first time and Rejected." Senate Journal, 22 October 1779, 13 State Records of North Carolina 843 (1896).

Applications for divorce were numerous. Mrs. Johnson found 266 such petitions in the State Archives for the period between 1800 and 1835 (ten years' petitions have not survived). In 1813 there were 22 applications for divorce but only four were granted. In 1810 there were twenty petitions and one granted. For the period surveyed by Mrs. Johnson 52 divorces were granted out of 266 petitions, or roughly one out of five. The causes most frequently alleged in the petitions were, in order: desertion to live with another, desertion, cohabitation with a Negro, adultery, separation, cruelty, prostitution, and wasting property. Johnson, Ante-Bellum North Carolina 217, 221. See also 2 Lefler, History of North Carolina 418-19.


The evidence is of two sorts. In the case Anonymous, 2 N.C. 347 (1796), plaintiff's counsel refers to a similar case at Halifax "some years ago" and says that "this is no new action." (No reference to the Halifax case, given in Anonymous as Barrow v. Barrow, could be found in the incomplete records of the Halifax District Court in the State Archives.) Second, all three of the reported cases, Anonymous, supra, Spiller v. Spiller, 2 N.C. 482 (1797), and Knight v. Knight, 1 N.C. 163 (1799), involve only ancillary issues, such as the power of equity to sequester the husband's property prior to the decree, and whether the wife may sue for alimony without a next friend. If the cases were novel we should expect from the reporter some treatment of the substantive law of the action. Also, the appearance of a similar case in 1823 indicates that the action survived well past the enactment of the divorce statute. Harrel v. Harrel, Pasquotank County Minutes in Equity 1822-1850, Fall Term 1823, at 27-31.

22 Spiller v. Spiller, supra note 19; Knight v. Knight, supra note 19; Anonymous, supra note 19; Short v. Short, Equity Minute Docket, Halifax
The original decree in the case of *Spiller v. Spiller*, decided in 1796, sheds much light on the nature of the action. Three issues were submitted to the jury: (1) are the parties lawfully married, (2) was the petitioner driven from her husband's home against her will by his cruel conduct, (3) what property did the husband own during the marriage.

These are exactly the issues which would have been decided by the English ecclesiastical courts in a suit for divorce *a mensa et thoro* for cruelty. If the action were intended merely as a remedy for the duty of the husband to support the wife it is difficult to explain the form of the second issue. A more probable form, if such were the case, would have been "did the husband wilfully fail and refuse to support the wife."

At common law alimony had no independent existence; it could be granted only incidentally to the main relief sought by the petitioner. The main relief was invariably a divorce *a mensa et thoro*. In order to obtain that relief the petitioner had to prove either cruelty or adultery. Therefore, the petitioner in a suit for alimony without divorce in North Carolina had to prove that she was entitled to what would have been a divorce *a mensa et thoro* in England.

The court's decree in *Spiller v. Spiller* was that (1) the wife's separate property of which she was possessed prior to her marriage was confirmed to her, (2) the husband was to pay the wife two hundred pounds for her support from the time of the separation to

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Dist. Super. Ct., 6 November 1800, at 80-83; Mulford v. Mulford, Equity Trial Docket, Wilmington Dist. Super Ct., May Term 1797.

The latter case is probably the case reported in 2 N.C. as *Anonymous*. At May Term 1796 for the Wilmington District, "Ordered Deft give security in the sum of £1000 to perform the decree of the court—that if he does not give security within one month—a write of sequestration to issue." Mulford v. Mulford, Wilmington Dist. Equity Trial Docket No. 65, May Term 1796. The cryptic report in 2 N.C. refers to the right of equity to order sequestration in alimony without divorce actions. No other such case was found in the docket book for the year 1796. The Equity Minute Book for the Wilmington District has not survived.

1 See SHELFORD, MARRIAGE & DIVORCE 427-28.


22 See 2 N.C. 483 on an ancillary issue. The full text of the decree is set out in Appendix I.

24 Ball v. Montgomery, supra note 23.
the date of the decree, and (3) the husband was to pay the wife fifty pounds semi-annually "during the term of her natural life." This goes substantially farther than an English court could have gone. As tenant by the curtesy a husband held absolute control over his wife's property during their marriage, and after her death if a child had been born alive of the union. The Spiller decree destroyed that curtesy. The common law courts would never have tolerated interference with property rights by the ecclesiastical courts. The English divorce a mensa et thoro, being only a temporary suspension of marital duties, had no effect on property rights.

In addition the alimony payments in Spiller v. Spiller were clearly intended to be permanent. By contrast the English divorce was nearly always temporary in nature, looking toward reconciliation.

**Legislative Divorce**

The most serious defect of the divorce a mensa et thoro and the action of alimony without divorce was they did not end the marriage. Neither party was free to remarry. The English remedy for this harsh circumstance was absolute divorce by legislative act.

A private divorce bill did not pass both houses of the North Carolina General Assembly until 1794. From then until 1835 at least sixty-two absolute divorces were obtained from the legislature by special act. There is no record of a legislative divorce a mensa et thoro as such.

Twenty-three petitioners were successful in obtaining legislative divorces in the twenty year period between 1794 and the passage of the first general divorce statute in 1814. The latter statute ended the practice for seven years, although petitions continued to come before the assembly. In 1821 the legislature resumed the granting of divorces and passed fifteen such acts until 1827. The preamble to the general statute of 1827, attempting to halt legislative divorces

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26 Kriger v. Day, 19 Mass. (2 Pick.) 316 (1824); Dean v. Richmond, 22 Mass. (5 Pick.) 461 (1827); Clark v. Clark, 6 W. & S. 85 (Pa. 1843).
27 POYNTER, *MARRIAGE & DIVORCE* 168.
28 See note 4, supra.
29 N.C. Sess. Laws 1794, ch. 81. See note 17, supra.
30 See Appendix II for a table showing the number of divorces for the years 1794-1835, and Appendix III for typical forms.
and conferring the total legislative power over divorce actions on the courts, complains that:

The numerous applications for divorce and alimony annually presented to the General Assembly, consume a considerable portion of time in their examination, and consequently retard the investigation of more important subjects of legislation; such applications might be adjudicated by other tribunals with less expenditure to the State, and more impartial justice to individuals.\(^2\)

The 1827 attempt to bind future assemblies was doomed to failure. Only five years later the pressure on the legislators from constituents not willing to undergo the long and expensive process of obtaining a judicial divorce, or unable to bring their case within the narrow confines of the statutes, proved too strong. Private divorce acts reappeared in 1832, culminating in fifteen in the session of 1835. A constitutional amendment in the Constitutional Convention of 1835 permanently ended legislative divorce in North Carolina by providing that "The General Assembly shall have power to pass general laws regulating divorce and alimony, but shall not have power to grant a divorce or secure alimony in any individual case."\(^3\) The amendment was incorporated into the new Constitution of 1868 \textit{in haec verba} and has not been subsequently altered.

During its reign over matrimonial affairs, the legislature in some cases, while declining to divorce the petitioner, granted other relief. In 1803 the legislature began to confirm separation agreements relieving the husband of all duty to support the wife, all liability for her debts, and destroying the marital estates of dower and curtesy. The parties regained all the rights of unmarried persons except the right to remarry.\(^4\)

Nearly every session of the legislature from 1797 to 1835 saw the passage of omnibus bills confirming to married women their separate property, or property they might thereafter acquire.\(^5\) The

\(^3\) N.C. Sess. Laws 1827, ch. 19, § 1.
\(^4\) The only instances of such acts are N.C. Sess. Laws 1803, ch. 116; 1806, ch. 111, 114; 1807, ch. 108-110. See Appendix III.
\(^5\) See Appendix III. The first of these acts was passed in 1794, N.C. Sess. Laws 1794, ch. 101. It recited that the husband had deserted the wife and was living in adultery. From 1794 to 1816 every legislature except two (1801 and 1815) passed similar acts affecting the rights of from one to

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most popular private method of resolving marital difficulties was, as we have seen, desertion or mutual separation. However, so long as the husband lived the wife could not deal with her property in any manner without his consent. Should the husband return to claim his rights he was entitled to possession and all the rents and profits earned in his absence as tenant by the curtesy. The wife's only remedy was by special act of the legislature.

JUDICIAL DIVORCE

Statutory law

After abortive attempts in 1799 and 1808 the legislature passed the first general divorce statute in 1814. The statute of 1814 authorized the Superior Courts of Law to grant either a divorce from bed and board or an absolute divorce, in their discretion, for natural impotency or adultery. The right of a jury trial on all issues of fact was guaranteed. Condonation, recrimination, and the fact that the husband "allowed of the wife's prostitution or exposed her to lewd company whereby she became ensnared to the crime," were express bars to relief. Abandonment, cruel treatment, "such indignities to her person as to render her condition intolerable or life burthensome," and a malicious turning out of doors were additional grounds for which the wife might obtain a divorce from bed and board. The court might award alimony not to exceed one-third of the husband's estate incident to a divorce from bed and board.

The legislature, however, was not ready to make divorces easy to obtain. In addition to the severely limited grounds for divorce provided, it was required that the judgment of the court be con-

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20 women. After an absence of six years they re-appear in 1823 and persist until the amendments of 1835 to the constitution. See, e.g., N.C. Sess. Laws 1808, ch. 115 (twenty-two women named); 1823, ch. 160-63; 1825, ch. 44; 1826, ch. 143; 1827, ch. 71, 86, 117, 123, 125, 145, 147; 1834, ch. 105, 106; 1835, ch. 82.

JOHNSON, ANTE-BELLUM NORTH CAROLINA 218. The act failed by only seven votes in 1808. Ibid.

N.C. Sess. Laws 1814, ch. *869. (The chapter numbers of all Public Laws through the session of 1820 are those assigned in Potter's Revisal, in conformity with the practice of the North Carolina General Statutes Commission. Potter omitted all the private laws and re-numbered the session laws consecutively. An asterisk (*) placed before a chapter number herein denotes the number assigned in Potter's Revisal. All other references are to the original numbering.)

The divorce and alimony laws were codified from time to time as follows: N.C. Revised Statutes of 1837, ch. 39; N.C. Revised Code of 1854, ch. 39; Battle's Revisal of the Laws of N.C., ch. 37 (1873).

firmed by the General Assembly before the decree might become effective. The petitioner had to allege and prove that the cause had existed for at least six months prior to the filing of the petition to discourage hasty action. The final decree could not issue until at least twelve months had elapsed to encourage reconciliation. A tax of ten pounds was exacted from the defendant. It was also provided that the innocent party might marry again.\(^3\)

Two years later, in 1816, the legislature provided that the divorce from bed and board should automatically secure to the wife any property she might subsequently obtain, unless the court specifically decreed otherwise.\(^4\) The reason given in the preamble to the act was that “cases of great hardship often occur, the husband being at liberty to return and squander away the estate of the wife, subsequently obtained.”\(^5\)

From 1814 to 1818 the legislature confirmed seven divorces granted under the statute of 1814.\(^6\) In the latter year the judgments of the courts in divorce matters were made conclusive.\(^7\) The twelve month waiting period was repealed in 1824 as well as the ten pound tax.\(^8\)

The statute of 1827 was apparently an attempt to settle the matter of divorce, so far as the legislature was concerned, for by that act the Superior Courts of Law were given absolute discretion to decree divorces “whenever they may be satisfied . . . of the justice of such application.”\(^9\) A right of appeal to the supreme court was conferred and it was expressly provided that the guilty party might never marry again during the lifetime of the petitioner on pain of conviction for bigamy, which at that time was punishable by death.\(^10\)

\(\text{\textsuperscript{4}}\) The positive form proved ambiguous and was clarified in 1827. N.C. Sess. Laws 1827, ch. 19.
\(\text{\textsuperscript{6}}\) Ibid.
\(\text{\textsuperscript{7}}\) N.C. Sess. Laws 1816, ch. 68, 119, 124; 1817, ch. 37, 64; 1818, ch. 38 (two divorces in one act). Whether these acts are technically legislative divorces is arguable. We may assume that confirmation of the judicial decrees was perfunctory. In view of the personal opinions of the supreme court justices it is certain there were no rash decisions in divorce matters there. See note 1, supra.
\(\text{\textsuperscript{9}}\) N.C. Sess. Laws 1824, ch. 18. The section reference to the session laws to this statute in the Revised Statutes of 1837 is in error.
\(\text{\textsuperscript{10}}\) N.C. Sess. Laws 1827, ch. 19, § 1.

If the defendant were a woman she might be branded instead. The bigamy act was first passed in 1790. N.C. Sess. Laws 1790, ch. 11, 25 State Records of North Carolina 74. This statute contained a peculiar proviso...
The divorce statutes were further clarified in 1828 by specifically giving the law courts jurisdiction over alimony without divorce, which until then had been exclusively an equitable remedy. The statute appears to have been declaratory of the equity practice for the remedy was allowed wherever a wife could show grounds for a divorce from bed and board. It was broadened a little to include the additional grounds that the husband was an habitual drunkard or a spendthrift. The statute provided that a decree of alimony without divorce should secure to the wife any property she might subsequently acquire, and the next year the law courts were given power to allow a woman to sue in her own name for alimony without divorce, both of which had been equity practice from the beginning.

By 1852 the substantive statutory law of divorce was rounded out by specific conferral of concurrent jurisdiction over all divorce and alimony causes on the equity courts, provision for removal of divorce suits to the supreme court as in suits in equity, and the...

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that it should not extend to any "persons... who are or shall be at the time of such after marriage divorced according to the mode established..." There was no "mode established" until 1814. The author of the bill probably was in sympathy with the agitation for a divorce law which Mrs. Johnson states began that year. JOHNSON, ANTE-BELLUM NORTH CAROLINA 217.

The bigamy statute, as amended in 1809 and 1823, was codified in the Revised Statutes of 1837, ch. 34, § 14. By 1854 the punishment had been reduced to a fine, imprisonment, one or more public whippings, and a branding on the cheek with the letter B. Revised Code of 1854, ch. 34, § 15.

See note 19, supra, and accompanying text.

This statute, much amended, is still in effect. N.C. GEN. STAT. § 50-16 (1950). It is a curious fossil but still used, primarily because under it there is no limit on the amount of alimony which may be awarded. If the wife obtains a divorce from bed and board under N.C. GEN. STAT. § 50-14, the amount of alimony may not exceed one-third of the net annual income of the defendant. The limitation dates from the act of 1814 and has been carried forward ever since.


This was an extension of section 2 of the act of 1819 which gave the same result in suits for divorce. N.C. Sess. Laws 1819, ch. *1007.


N.C. Sess. Laws 1834, ch. 15.

N.C. Sess. Laws 1842, ch. 43. This statute was a result of the decision in Holloman v. Holloman, 22 N.C. 270 (1839), which held that the supreme court had only appellate jurisdiction over actions for divorce even though the suit was brought in equity. Construing the statutes conferring jurisdiction concurrently on the law and equity sides of the courts in pari materia, it was held that a jury trial was required in divorce suits whether brought at law or in equity. Therefore, there was no right of removal to the supreme court for trial. North Carolina had traditionally been chary of equity procedure...
allowance of alimony pendente lite. It remained in this state until the complete revisions of 1868 (procedural) and 1872 (substantive) when the basic statutes constituting the present North Carolina divorce law were enacted.

Case law

As might have been expected, suits for divorce were from the beginning looked upon with judicial disfavor in the supreme court. The statute of 1814 had required that "when either has separated himself from the other and is living in adultery," the court might grant a divorce if it chose to do so. It was soon held that the phrase did not embrace the case of adultery by one, who against his will, had been abandoned by the other, nor where the act of adultery had occurred during a separation by mutual consent. The cruelty required by the court was physical violence, or at the very least extreme indignities coupled with threats to the wife's life.

and from the beginning had required jury trials there. For a brief period, 1823 to 1873, no jury was required, although an advisory jury was frequently employed. See Van Hecke, Trial by Jury in Equity Cases, 31 N.C.L. Rev. 157, 159-60 (1953).

8 N.C. Sess. Laws 1814, ch. 869, § 1. This was also the result of a judicial decision. In Wilson v. Wilson, 19 N.C. 377 (1837), the court had held that alimony pendente lite could not be given without a statute.

9 See note 1, supra.

10 These statutes, as amended, are codified in N.C. Gen. Stat. ch. 50.

11 See note 1, supra.


13 Whittington v. Whittington, 19 N.C. 64 (1836); Moss v. Moss, 24 N.C. 55 (1841); Wood v. Wood, 27 N.C. 674 (1845); Foy v. Foy, 35 N.C. 98 (1851). In Wood v. Wood, supra, the court in a dictum stated that even though the parties were living in a state of voluntary separation, and the party suing was not entitled to an absolute divorce, the court might in some cases decree a divorce from bed and board to prevent spurious heirs being forced on the husband. The same case modified the stringency of the rule somewhat by providing that where the husband's outrageous conduct forced the wife to flee his house, the separation would be deemed his, and not hers.

In Dickinson v. Dickinson, 7 N.C. 327 (1819), the court refused to grant a divorce for adultery committed before the passage of the act of 1814, on grounds that a retroactive application of the act would be ex post facto. The court reasoned that adultery had been made a crime in 1805. N.C. Sess. Laws 1805, ch. 684. To allow a divorce for adultery retroactively would be to increase the punishment of a crime after the fact. Barden v. Barden, 14 N.C. 548 (1832) held that the act of 1827 was retroactive and neither cited the Dickinson case nor discussed ex post facto.

14 Hansley v. Hansley, 32 N.C. 506 (1849); Coble v. Coble, 55 N.C. 392 (1856); Everton v. Everton, 50 N.C. 202 (1857); Erwin v. Erwin, 57 N.C. 82 (1858); Joyner v. Joyner, 59 N.C. 322 (1862). The latter case held that a husband might prudently chastise his wife with a horse-whip so long as the beating was not unjustified or unduly harsh.

The supreme court did not hear a case of alimony without divorce on appeal until after the Civil War, nor did it consider the other statutory ground
The absolute discretion over the causes for which divorce might be granted conferred on the courts by the statute of 1827 went un-
tapped. The 1827 act was construed as being in addition to the statute of 1814, not as abrogating its restrictions on the cause of adultery. Nor was it utilized to create new causes. Even so heinous an offense, to a nineteenth century Southerner, as the birth to his wife of a mulatto child sired before the marriage, did not move the justices. So far from delighting in his unlimited freedom, the great Chief Justice Ruffin was profoundly disturbed. He felt the legislature surely could not have intended the court to allow their personal opinions to determine whether the parties should be freed from their bond. In the absence of any expression of legislative intent to guide them the justices were loathe to undertake independently the task of molding new substantive law.

The sole use made of the discretionary power was the curious bringing of annulment actions under the divorce statutes. It was reasoned that the complete delegation of legislative power to the courts in divorce matters was an incorporation into the law of North Carolina of the entire English law of matrimonial causes, so far as it was suited to the conditions of this country. Thus, instead of annulling the marriages of idiots and lunatics on common law
grounds that they lack contractual capacity, the court decreed "divorce" under the act of 1827.69

CONCLUSION

Thus we have seen that extrication from an unhappy union was no easy task in ante-bellum North Carolina.70 Although the courts were given a rare opportunity, to build the substantive law of divorce unhampered by statute or stare decisis, the invitation was declined. Had there been judicial sympathy with the action of divorce, North Carolina might have escaped the stultifying technicalities of divorce law which have plagued litigants to the present day. We may lament the loss.

JOSEPH S. FERRELL
Associate Editor

69 The court never had occasion to determine whether denominating the action a "divorce" invoked the statutory prohibition against the guilty party's remarriage. This certainly would not have been the English rule, since annulment is a declaration that the marriage has never had any legal existence.

70 In 1822 the court had held that divorce might be granted only for grounds enumerated in the statute of 1814. Long v. Long, 9 N.C. 189 (1822). There the defendant had communicated venereal disease to the petitioner. From the beginning a strict correspondence between allegation and proof was required. See, e.g., Foy v. Foy, 35 N.C. 90 (1851).
Appendix I*

Decree

Court met according to Adjournment
present the Honourable

Samuel Ashe &
John Williams, Esquires

Margaret Spiller
vs.
James Spiller

The cause being heard by the Jury their verdict was as follows: James Spiller, and Margaret Spiller, formerly Marg't Stuart, are lawfully married and that said Margaret was driven and forced away from her Husband's house by her Husband, said James Spiller, and not by her own accord; and that James Spiller was possessed of Property to the following amounts at those several times, Viz:

In the year 1784, in Lands 2,341 acres valued at £1,150
   In Negroes 12 in number, valued at £1,200
   Total £2,350

In the year 1789, In Land 5,342 acres valued at £2,671
   In Negroes 18 in numb. val'd at £1,800
   Total £4,471

In the year 1792, In Land 1,439 acres valued at £ 719
   In Negroes 8 in numb. val'd at £ 800
   Total £1,519

And that the said Spiller in the year 1791 conveyed to Elizabeth Spiller 1,200 acres of Land valued at £900, also ten Negroes valued at £1,000.

Also that he conveyed to Ellen Spiller in the year —— 2,000 acres of Land valued at £1,500 and ten Negroes val'd at £1,000.

DECREED that Margaret Spiller retain as her own absolute right and property all the Estate which she was possessed of prior to her intermarriage with the said James Spiller, and which she

*Equity Minutes, Fayetteville Dist. Super. Ct., April term 1797. Punctuation has in some instances been modernized. The manuscript is in the North Carolina State Archives and may be found in the Equity Minute Book above cited. The suit began 23 April 1791 and took six years.
now holds by virtue of the Articles of their Intermarriage, and by the delivery of the said James to her. And that said James pay to her, the said Margaret his wife, the sum of two hundred pounds currency to enable her to pay and discharge the expense of her maintenance and support which has accrued from the —— day of—— to the present time, which said two hundred pounds to be paid in payments as follows:

(to wit) £50 to be paid on the 1st day of December next following the date hereof, the residue of the said £200 to be paid in half yearly payments, from the 1st day of December—to wit—£50 on the 1st day of June 1795, £50 on the 1st day of December 1795, and the remainder on the 1st day of June, 1796.

AND IT IS FURTHER DECREED that the said James pay to the said Margaret £100 per annum for and during the term of her natural life, and for her sole and separate use, and as her alimony, to be paid to her in half yearly payments—that is to say, £50 to be paid on the 6th day of April next following the date hereof, £50 the residue of the said £100 on the sixth day of October next following, and so to continue to make such payments and at such stated times as above directed during the Term of her natural life aforesaid, the payments to be made at the usual place of residence or dwelling of the said Margaret, or at the Office of the Clerk and Master in Equity for the District of Fayetteville, and that all the Estate Real and personal of the said James are bound and made subject to pay and satisfy the said several sums of money above expressed and directed to be paid, and on failure of any of said payments, the said Margaret, may, after the expiration of ten days after such failure, take out Execution against the Goods and Chattels, Land & Tenements of the said James, in the same manner as is directed by the Act of Assembly passed at Tarborough on the 18th day of November, 1787—Unless said James shall give good and suf’t Security in the sum of £2,000 currency with two or more sufficient Freeholders before the Master in Equity, subject to the exception of the Court, for the faithful and perpetual payment of the Said Annuity of £100, at the time and places above stated, after such security being given and approved of by the Court, or said Margaret, then the Estate of the said James to be released and discharged.
Appendix II

**LEGISLATIVE DIVORCES, 1794-1835**

<table>
<thead>
<tr>
<th>Year</th>
<th>No. of divorces</th>
<th>Statutory reference*</th>
</tr>
</thead>
<tbody>
<tr>
<td>1794</td>
<td>1</td>
<td>81</td>
</tr>
<tr>
<td>1796</td>
<td>1</td>
<td>99</td>
</tr>
<tr>
<td>1798</td>
<td>1</td>
<td>106</td>
</tr>
<tr>
<td>1802</td>
<td>2</td>
<td>114, 115</td>
</tr>
<tr>
<td>1804</td>
<td>2</td>
<td>123, 124</td>
</tr>
<tr>
<td>1806</td>
<td>2</td>
<td>104, 105</td>
</tr>
<tr>
<td>1808</td>
<td>1</td>
<td>78</td>
</tr>
<tr>
<td>1810</td>
<td>1</td>
<td>130</td>
</tr>
<tr>
<td>1811</td>
<td>3</td>
<td>98-100</td>
</tr>
<tr>
<td>1812</td>
<td>5</td>
<td>37-41</td>
</tr>
<tr>
<td>1813</td>
<td>4</td>
<td>41, 84, 92, 95</td>
</tr>
<tr>
<td>1821</td>
<td>2</td>
<td>104, 106</td>
</tr>
<tr>
<td>1822</td>
<td>1</td>
<td>68</td>
</tr>
<tr>
<td>1823</td>
<td>2</td>
<td>141, 142</td>
</tr>
<tr>
<td>1824</td>
<td>3</td>
<td>135-137</td>
</tr>
<tr>
<td>1825</td>
<td>4</td>
<td>90, 102, 109, 139</td>
</tr>
<tr>
<td>1826</td>
<td>3</td>
<td>134</td>
</tr>
<tr>
<td>1832</td>
<td>1</td>
<td>106</td>
</tr>
<tr>
<td>1833</td>
<td>2</td>
<td>104, 107</td>
</tr>
<tr>
<td>1834</td>
<td>6</td>
<td>76-81</td>
</tr>
<tr>
<td>1835</td>
<td>15</td>
<td>62-77</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>62</strong></td>
<td></td>
</tr>
</tbody>
</table>

*Reference is to chapter number of the session laws for the year indicated.

‡ From 1816 to 1818 the legislature confirmed 7 divorces granted by the Superior Courts. N.C. Sess. Laws 1816, ch. 68, 119, 124; 1817, ch. 37, 64; 1818, ch. 38.
Appendix III

Typical Forms

I. Private Divorce.

"This indenture made this 24 Day of May 1803...Between John Farrow...and Rebekah Farrow his wife...witnesseth, that whereas some unhappy differences have arisen Between them in consequence of which they have mutually agreed to separate themselves...John and Rebekah do firmly agree with Each Other to finally Desolve the Marriage Contract once made between us and that Either of us may and Shall have Free and undenied Liberty to Live Single or to Entermarry again with any other person...and we do further agree...that we will not carry on any prosecution against the other so marrying..."¹

This agreement was confirmed by the legislature: "Whereas the said John Farrow...and Rebekah his wife, from the most imperious necessity, in its nature insurmountable, have mutually agreed to live separate and apart from each other forever...

"Be it enacted...that...the said Rebecca Farrow shall have, hold, possess, and enjoy, all such property as she now possesses, or that she may hereafter acquire...and not subject to the control...of her husband, nor liable to any of his debts or contracts.

"And be it further enacted...that...John Farrow shall not be liable or subject to pay any debts of his said wife Rebekah, whether the same be for necessities or otherwise; nor shall he be liable or subject to any demand...for alimony...nor shall the said Rebecca hereafter claim or have dower...or be entitled to any distributive share of his estate."²

II. Legislative Divorce.³

"Be it enacted...that A. B. of the county of Wake, and wife of C. D. be, and she is hereby declared to be separated and divorced fully and absolutely from her husband C. D., and that she be restored to all the privileges and immunities of a feme sole, and enjoy the same, as amply and entirely, as if she had never been connected by the bonds of matrimony, with her husband the said C. D.

¹ Quoted in Johnson, ante-bellum North Carolina 220 from a MS in Legislative Papers, 1807, in the North Carolina State Archives.
III. Acts Confirming Property to Married Women.¹

Be it enacted that A. B. of Wilkes County, wife of C. D., be, and she is hereby entitled to hold, possess and enjoy, in her sole right, any estate, either real or personal, which she [now has or] may hereafter acquire, by her own industry, purchase, gift or otherwise, in as full and ample a manner as if she had never been married to her said husband; and she is hereby authorized to prosecute or defend any suit in her own name, in any court within this State, in the same manner as if she had never been married.

Evidence—Hearsay—Admissibility of Hospital Records

In *Sims v. Charlotte Liberty Mut. Ins. Co.*¹ the defendant sought to introduce in evidence its insured's hospital record in an attempt to show that she had made certain misrepresentations about her health when applying for a life insurance policy. The North Carolina Supreme Court held that although records of this type are hearsay, they are generally admissible, being within the business records exception to the hearsay rule. However, admission of the particular record involved was denied on the grounds that it contained privileged communications between physician and patient.²

At common law, business records offered to prove the facts recorded therein were admissible upon a showing that the records were made in the regular course of business, with the personal knowledge of the entrant, at or near the time of the transaction.

¹ See, e.g., N.C. Sess. Laws 1827, ch. 71. The bracketed words in this form were not always present. The first of these acts was passed in 1794. It recited that the husband had deserted the wife and was living in adultery. N.C. Sess. Laws 1794, ch. 101. The number of women named in the acts varied from one to twenty-two. In at least one a man was included. N.C. Sess. Laws 1808, ch. 115.

² 257 N.C. 32, 125 S.E.2d 326 (1962).

² N.C. GEN. STAT. § 8-53 (1953), provides "no person, duly authorized to practice physic or surgery, shall be required to disclose any information which he may have acquired in attending a patient in a professional character, and which information was necessary to enable him to prescribe for such patient as a physician or to do any act for him as a surgeon: Provided, that the presiding judge of a superior court may compel such disclosure, if in his opinion the same is necessary to a proper administration of justice." The court in the instant case held that this privilege extends to hospital records which contain entries made by physicians, or under their direction, pertaining to information obtained while treating the patient in a professional capacity. 257 N.C. at 38, 125 S.E.2d at 331 (1962).