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INDIANA DIVORCES.

The laws of Indiana are not more favorable to *ex parte* divorces than are those of some other States. At one time probably they were;[1] and this circumstance, and the accidental notoriety of some instances in which individuals have obtained divorces in the courts of Indiana, have given rise to an impression that the marriage relation is more easily sundered in that State than elsewhere. The impression is not well founded; this much, however, is true, that Indiana is one of a number of the States of the Union in which a legal dissolution of a marriage may be obtained for a variety of causes besides absolute marital unfaithfulness, and by means of proceedings which do not always involve notice that they are in progress, to the party to be affected. We propose to take the divorce laws of Indiana as a representative or type of the systems of legislation prevailing in many jurisdictions on the subject of divorce, with a view of explaining the legal principles on which the validity and operation of a decree obtained in one State is to be determined when it is presented in the courts of another.[2]

1 There was a period during which *no previous* residence was required from a petitioner for divorce in Indiana; residence at the time of applying was enough; and this gave great facility to applicants from other States. Now, however, a previous *bona fide* residence of a year is requisite.

2 We draw most of the illustrations and citations contained in this article from Abbott's Indiana Digest, tit. Divorce, in which the author has appended a note presenting the adjudications in the other States, upon the effect of Indiana judgments, when drawn in question outside the bounds of the State.

By the present law of Indiana a petition for divorce may be filed by any person, who, at the time of filing such petition, shall have been a *bona fide* resident of the State one year previous to the filing of the same, and a resident of the county at the time of the filing such petition. Such *bona fide* residence must be duly proved to the satisfaction of the court: 2 Rev. stat. 234, sect. 6; as amended, Sess. Acts 1859, 108, sect. 1; same stat. 2 Gav. & H. 350.

Divorces may be decreed upon the application of the injured party for the following causes:

1. Adultery; with exception of cases where defense of connivance, condonation, or recrimination, is established.
2. "Impotency."
3. "Abandonment for one year."
4. "Cruel treatment of either party by the other."
5. "Habitual drunkenness of either party, or the failure of the husband to make reasonable provisions for his family."
6. Conviction of infamous crime.
7. "Any other cause for which the court shall deem it proper that a divorce should be granted": Id. sec. 7.

If it appear "by the affidavit of a disinterested person, or by the return of the officer" . . . "that the defendant is not a resident of this State," the clerk of the court is required to give notice of the pendency of the petition by publication for three weeks in a weekly newspaper, etc.: Id. sec. 11.

No decree of divorce can be rendered on default without proof: Id. sec. 13. And, whenever a petition for divorce remains undefended, it is the duty of the public prosecuting attorney to appear and resist the proceeding:[1] Id. sec. 27.

1 This provision rests upon the ground that the government of the State is interested in the proceedings, so far as to take precaution against the obtaining divorces by collusion. It can only have been passed because the State has some interest in the status of the citizen; because persons not before the court will be affected by its action in the premises; because public policy requires that government shall exercise some control in reference to this relation in life: *Scott* v. *Scott*, 17 Ind. 309.

But the omission of the prosecuting attorney to interpose a defense, is not a ground for reversing a judgment of divorce otherwise regular. The statute directs him to appear; but it does not say the court shall not proceed if he fails to appear: *Green* v. *Green*, 7 Ind. 113.

The distinction recognized in several of the States between divorces *a vinculo* and those *a mensa et thoro*, is not maintained in Indiana; nor is the restriction of the marriage relation continued as respects the party for whose fault the dissolution is decreed. But the divorce of one party fully dissolves the marriage contract as to both:[1] 2 Gav. & H. 350, sect. 23.

When a divorce has been obtained under these provisions, without other notice to the defendant than publication in a newspaper, the defendant may, for proper cause shown, have the judgment opened so far as relates to the *children* or to the allowance of *alimony* and the disposal of property; but the *dissolution of the marriage* cannot be reconsidered.

The power of the legislature of the State to prescribe these grounds and methods of divorce has been seriously and candidly considered, so far as respects the validity and operation of the judgment within the State, in a number of cases. One objection urged has been that marriage is a contract, and as such is protected against State legislation by the Constitution of the United States. But it is held that the prohibition of laws impairing the obligation of contracts does not prohibit the States from passing general laws authorizing divorces, if they do not pass beyond the rights of their own citizens and act upon the rights of citizens of other States: *Tolen* v. *Tolen* 2 Blackf. 407. Clearly, the marriage relation ought to be distinguished from ordinary contracts. Some confusion has arisen from confounding the contract to marry with the marriage relation itself. And still more is engendered by regarding husband and wife as strictly parties to a subsisting contract. At common law, marriage, as a *status*, had few elements of contract about it. For instance, no other contract merged the existence of the parties into one. Other distinctive elements

1 This statute has abolished, for Indiana, the common law divorce *a mensa et thoro*, and has substituted therefor a total dissolution of the marriage contract, and a restoration of the parties to their respective rights, at least as to their future conduct and relations, as though the marriage had never existed. It is, in legal effect, a divorce *a vinculo matrimonii*, and either party, upon its rendition, is at liberty to enter into a new marriage contract. the statute has thus radically changed the whole policy of the law in regard to divorces: *Miller* v. *Clark*, 23 Ind. 370.

will readily suggest themselves, which rob it of most of its characteristics as a contract, and leave it simply as a *status* or institution. As such it is not so much the result of private agreement as of public ordination. In this light, marriage is more than a contract; it is a great public institution, giving character to the whole civil polity. Hence, as between husband and wife, there is no constitutional provision protecting the marriage from legislative control, by general laws, upon such terms as public policy may require. The sovereign power may, by general enactment, regulate and mould their relative rights and duties at pleasure. Moreover, the practice of the country has determined that marriage is not a contract within the provision of the national Constitution. The power to authorize divorces, by either general or special laws, has been exercised by nearly all the States too extensively to allow that it should now be questioned: *Noel* v. *Ewing* 9 Ind. 37.

These views correspond with those which have been taken by the courts of other States upon the same question. The general power of a State to legislate upon the subject of divorce within its own borders, to prescribe grounds upon which a divorce may be granted, and proceedings by which it may be obtained, is firmly settled.

Nor can it well be denied that this power may be exercised within the discretion of the legislature as toward persons who come to reside in the State from abroad. The power to grant a divorce cannot be confined to persons whose marriages were solemnized in the State. The right to a divorce, both as respects the grounds and the modes of procedure, is governed by the law of the domicil, and not by that of the place of the contract. To redress the violation of the duties of the marriage state belongs to the laws of the country where the parties reside. There is nothing in the will of the parties that gives the *lex loci* any particular force over the marriage contract, or that impedes the course of the *jus publicum* in relation to it. Other contracts are modified by the will of the parties, and the *lex loci* becomes essential; but not so with matrimonial rights and duties. They cannot be dissolved by the will of the parties. Hence it is not necessary that a foreigner should have ac-

quired a domicil *animo remanendi;* the law of the country at once applies its own rules to all domestic relations, otherwise a numerous description of persons would be permitted to violate with impunity the obligations of domestic life: *Tolen* v. *Tolen*, 2 Blackf. 407; 2 Kent's Comm. 115. Hence it is competent to a State to authorize its courts to entertain the petition of one who, in good faith, removes his residence within the State. The desire to avail oneself of the benefits of the law of the jurisdiction is often a leading motive in inducing a change of residence; and no State would concede that such motive should be condemned. A fraudulent, pretended or collusive change of residence will always be detected, if practicable; and when detected, the party will not be permitted to gain advantage by the removal. But one who removes, in good faith, into a State, for the purpose of taking the benefit of its laws adapted to promote his interest, cannot very well be debarred *by that State* from the benefits of them on any such ground as that he came with that intention.

But the question—what effect must be given in *other jurisdictions* to a divorce granted under such a system of provsions as is above described, involves new considerations. In New York an absolute divorce is obtainable for adultery only. In Indiana, it may be obtained *for any cause which the court may deem proper;* upon a year's residence only; and by means of a brief and obscure publication of summons. Granting that the courts of Indiana may, and must decree a divorce to a citizen of New York, who acquires the residence, shows the cause, and takes the proceedings prescribed by the statute, and that such divorce must determine the *status* of the parties to the marriage everywhere within *Indiana*, does it follow that the courts of *New York*, upon a subsequent return of the petitioner within their jurisdiction, must yield to and enforce within that State a decree which never could have been obtained by original proceedings within those courts? Does the comity of States require this? Does the constitutional provision in favor of the judgments of other States impose such an obligation?

The numerous decisions upon this vexed and difficult ques

tion will be found upon the whole, to sustain the following rules:

1. Where the defendant appears or is personally served with process for the commencement of a suit, a judgment of divorce granted by the courts of one State, and valid upon its face according to the local law, is operative in every other State of the Union.[1] It cannot be gainsaid in another State on the ground that the cause of divorce assigned is not sufficient; that the charges against the defendant were not proved; or can be disproved; or that the decree was improperly granted. The Constitution obliges the courts of each State to give "full faith and credit," to a judgment of divorce predicated upon appearance or actual service.

This is indeed the general rule as to judgments of other descriptions. And it is specifically sustained and applied to divorces, in the recent decision of the United States Supreme Court in *Cherner* v. *Wilson*, 9 Wall. 108. The facts in that case were, that a husband and wife, not residing in Indiana, separated, being unable to agree; and some years after the separation the wife went to Indiana, where in a few months she obtained a divorce, in an action in which the husband appeared, and soon after left the State. The decree of divorce adjudged that a portion of the rents of certain real estate in the city of Washington, district of Columbia, should be paid to the husband for the support of two of the children, who were assigned to his care. The wife entered into an agreement to perform this provision of the decree, but subsequently refused to do so, and the husband filed a bill in the Circuit Court of the district to enforce it. The Circuit Court dismissed the bill holding the decree of divorce was "wholly void as to each of the subjects of which it claimed to dispose—the divorce, the children, and the property." On appeal to the Supreme Court of the United States, that tribunal held that the decree was valid. The court granting it, acquired jurisdiction of the parties by the husband's appearing without raising the ques-

[1] We speak throughout of the effect of the divorce upon the personal *status* of the parties. Marital rights in real property may be dependent upon the law of the place where the property lies, so as to call for a different rule.

tion of residence. The decree was, therefore, conclusive upon the parties to the suit; and as it was valid by the laws of Indiana, and had never been questioned there, it must, under the Constitution of the United States, prevail in every other portion of the country.

This decision may not, indeed, in express terms, cover cases in which the judgment is predicated upon personal service of process, not on voluntary appearance, but the general course of decision upon the effect, under the Constitution, of State judgments, irrespective of the nature of the cause of action, together with the language of many of the decisions upon the effect of divorces, authorize that description of cases be included in the rule in the text. See *Ditson* v. *Ditson*, 4 R. I. 87. Compare also, *Chase* v. *Chase*, 6 Gray 157; in which it was held, that a decree of divorce *a vinculo*, obtained in another State, between parties residing in Massachusetts, for a cause which would not have been cause for such a divorce in Massachusetts, and by a party who went to another State for the purpose of obtaining it, is void in Massachusetts, even if the other party appear and answer.

2. Where, however, a citizen of one State resorts to another State for the purpose of obtaining a divorce, upon grounds for which it would not be granted in the State of original residence, bringing himself within the new jurisdiction by a fraudulent or simulated residence, and institutes proceedings by mere publication of process, no personal service or actual appearance being made, the courts of the State of original residence are at liberty to disregard the judgment as obtained in fraud of their laws, and void: *Borden* v. *Fitch*, 15 Johns. 121; *Bradshaw* v. *Heath*, 13 Wend. 407; *McGiffert* v. *McGiffert*, 31 Barb. 69; 17 How. Pr. 18; *Hanover* v. *Turner*, 14 Mass. 227; *Chase* v. *Chase*, 6 Gray 157. The courts are at *liberty* to disregard it; they are not bound to do so. See *Thompson* v. *State*, 28 Ala. 12. It does not dissolve the marriage, nor authorize the plaintiff to remarry in the latter State: *Vischer* v. *Vischer*, 12 Barb. 640; even so far as to render the spouse in the second marriage an incompetent witness for such plaintiff. *People* v. *McCraney*, 6 Park. Cr. 49; nor form a defense