

1940

Lena Shanko Waters v. Silvia Waters : Brief of Appellant

Utah Supreme Court

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In
The Supreme Court
of the
State of Utah

IN THE MATTER OF THE
ESTATE OF CHARLES WES-
LEY WATERS, Deceased,

LENA SHANKO WATERS,
Appellant,

vs.

SILVIA WATERS,
Respondent.

Appeal From the Third District Court of Utah,
for Salt Lake County
Honorable P. C. Evans, Judge.

APPELLANT'S BRIEF

J. PATTON NEELEY,
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APPELLANT'S BRIEF

STATEMENT

This is a proceeding begun by appellant against respondent, by a petition under Utah Rev. St. 1933, 102-6-1, to remove the latter, cancel her letters, and be substituted as administratrix of said estate. Respondent demurred. Some amendatory paragraphs were then filed. Thereafter the petition as amended and demurrer were submitted for decision upon briefs filed by the parties. The court sus-

tained the demurrer. Appellant refused to further amend, electing to stand upon her petition as amended. The court then entered judgment dismissing the petition and petitioner appeals.

The petition alleges in substance that the respondent wrongfully and surreptitiously caused and procured letters to be issued to herself by means of false and misleading statements in and omissions from her petition, and that as a consequence statutory notice of the hearing was not given to appellant.

The pertinent sections of Utah Rev. Stat. 1933 are:

102-4-1. Administration of the estate of a person dying intestate must be granted to some one or more of the persons hereinafter mentioned, the relatives of the deceased being entitled to administer only when they are entitled to succeed to his personal estate, or some portion thereof; and they are respectively entitled in the following order: (1) the surviving husband or wife; (2) the children; (3) the father or mother, . . . etc.

102-4-7. Petitions for letters of administration must be in writing, signed by the applicant or his attorney, and filed with the clerk of the court, stating the facts essential to give the court jurisdiction of the matter; and when known to the applicant, he must state the names, ages and residence of the heirs of the decedent, and the value and character of the property.

102-4-8. When a petition for letters of administration is filed, the court or clerk must set the petition for hearing and give

notice thereof by publication, or by posting and by *mailing notices to the heirs.*

102-4-9. Any person interested may contest the petition by filing an answer thereto on the ground of the incompetency of the applicant, or may assert his own rights to the administration and pray that letters be issued to himself.

102-6-1. The court may at any time suspend any administrator, executor or guardian; and may, upon citation, revoke the letters of any administrator upon the petition of a competent person having a prior right thereto who had no opportunity to apply. . . .

Thus, the District Court is required, upon notice and a hearing, to determine who are the heirs at law and widow of a decedent (1) upon the petition of a claimant of letters whose petition states the names, ages and residence of the heirs; and (2) upon the filing of a petition under Section 102-6-1 by "a competent person having a prior right thereto."

The opposing claims of the parties arise from their marriage to the same man. Appellant and Mr Waters were married at Valparaiso, Ind., on July 29, 1935. Respondent married him on September 16, 1938 while appellant was alive and in health. She relies upon an alleged divorce from appellant to validate her junior marriage. Appellant rejoins that the divorce was void for lack of jurisdiction of the subject matter and parties under the admitted facts. A brief outline of the parties and their relations and doings will be useful, in limine.

Charles Wesley Waters was a thrice married man. His first wife was divorced from him in 1933 after

the birth of their daughter Dolores, now with his relatives in Burlington, Iowa. His acquaintance with respondent Silvia began either before or very shortly after that divorce, for their son Daniel was born in 1934 and was five years old in 1939 as her petition for letters states. They did not marry until 1938. Meantime he had met, wooed and married appellant, Miss Lena Shanko in 1935, and resided with her in Chicago for over two years. Then he abandoned her in the latter part of 1937, and rejoined Silvia, and the two took up their residence in Salt Lake City. Soon afterward, in November, 1937, he commenced an action for divorce against appellant in the District Court for Salt Lake County. As both women were thereafter known as Mrs. Waters, we will, with their permission and to better distinguish them, refer to them by their first names.

In his complaint for divorce Mr. Waters alleged that he had been an actual and bona fide resident of the State of Utah for more than one year next prior thereto. This statement was false and fraudulent because he well knew that he had deserted appellant in Chicago only a short time before. Under

Utah Rev. St. 1933, 40-3-1,

and similar statutes in nearly all the states, statutory residence is jurisdictional and must be strictly alleged and proved. If untruthfully alleged it defeats jurisdiction and voids the decree. Neither the subject matter nor the parties are before the court. If the court, deceived and misled by the plaintiff, finds the fact of residence, or recites it in its decree, yet the contrary can always be shown by the defendant, or by any other person against whom the decree is offered, in any court, action or

defense, whether by parties, privies or strangers. It is simply no judgment, no record, and may be contradicted anywhere by any one on jurisdictional grounds. Jurisdiction cannot even be acquired or conferred by consent, by joining issue, by assuming to exercise it, or by a finding that the court has it.

O'Dell v. Goff, (Mich.), 117 N. W. 59, 61.

Field v. Field, 215 Ill. 496; 74 N. E. 443.

Neff v. Beauchamp, 74 Iowa 92.

Cheeley v. Clayton, 110 U. S. 701.

Parish v. Parish, 32 Ga. 653.

Holmes v. Holmes, 63 Me. 420.

Edson v. Edson, 108 Mass. 590.

Sewall v. Sewall, 122 Mass. 156, 161.

Crouch v. Crouch, 30 Wis. 667.

15 Am. Jur., P. 277-8 and cases.

The decisions are very numerous. Exhaustive citation would defeat its purpose. Cumulative citations will however be found in classified arrangement on later pages of this brief (post pp. ~~20-21~~) **19-22**. Many of the cases contain a discussion of the full faith and credit clause of the Federal Constitution, a point not pertinent here. That was because the divorce plaintiff left his wife and went to another State and sued for divorce by publication without acquiring statutory residence there. The decree was always rejected on jurisdictional grounds. The full faith and credit clause was invoked to sustain it, but without avail. It is well settled that the full faith and credit clause accords to foreign judgments only the weight and credit to which it is entitled in the State where it was rendered. If void there it is void everywhere else, and usually vice versa. That is, the judgment becomes practically a domestic judgment in every State, everywhere.

McDonald v. Mabree 243 U. S. 90; 37 Sup.
Court 343.

Haddock v. Haddock, 201 U. S. 562; 26 Sup.
Court 535-6 citing

Harding v. Harding, 198 U. S. 317; 25 Sup.
Court 679; 48 L. Ed. 1026.

Ferguson v. Crawford, 70 N. Y. 253; Syl. 3.

At bar, the divorce judgment and the proceeding in which it is relied on are both domestic, hence the full faith and credit clause has no bearing. But the jurisdictional feature of the cited cases ~~are~~ *is* ~~opposite.~~ *in point*

In this case, the facts as to Mr. Waters' residence in Illinois, not in Utah, during the year next before his divorce action are alleged in Lena's petition to remove Silvia, and are admitted by Silvia's demurrer. In like manner it is alleged and admitted that at all times during the divorce action, and at the time the affidavit for an order for publication of summons was made and filed, Mr. Waters well knew that the exact residence street address of his wife was No. 7516 Cornell Avenue in Chicago, Ill. Hence it was his duty to put that information on the records of the court so that she might receive notice of the action and appear and defend the same. Instead he concealed it. He sought publication to satisfy appearances while contriving to defeat the purpose thereof. With the knowledge he had he should have filed any affidavit the occasion called for. Instead he caused his attorney to file an affidavit that he had searched and inquired for the defendant Lena in Utah, could not find her therein, and that from his best knowledge and information she resides "in Chicago, Ill." — a city of millions of people. There was no reasonable ground for supposing that an envelope mailed by

the clerk to that address would ever be received by the defendant Lena, as in fact it was not.

This procedure was adjudged by this court to be utterly insufficient to confer jurisdiction and the judgment based thereon was rejected as void, in

Liebhart v. Lawrence, 40 Utah 243; 120
Pac. 215.

It was ruled that the intent of the statute requires a showing of facts from which the court or clerk would be justified in concluding that due diligence had been exercised to ascertain defendant's correct address where the summons would be received when mailed, by inquiry from persons and sources most likely to result in knowledge thereof. The affidavit must disclose the steps taken, from whom inquiry was made, how followed up, etc., so that the court or clerk may judge whether due diligence has been exercised, rather than that the affiant himself decide that matter by a recital of diligence in his affidavit. That a "bald statement" of diligent search and inquiry in the affidavit in the words of the statute is a bare conclusion and insufficient.

The affidavit in this case was deceptive and misleading in stating merely that search and inquiry had been made in Utah for the defendant Lena without stating any facts justifying a search for her in this State. Also in stating merely that the affiant believes she resides "in Chicago, Ill.," without any showing of facts justifying an inference that her street address there, of No. 7516 Cornell Ave. was unknown to plaintiff or his attorney, or that it could not be ascertained by diligent inquiry, setting out the facts constituting such inquiry. Clearly, both plaintiff and his attorney desired a pro forma publication only, and one that would not come to the defendant's knowledge or

attention, lest she might appear and defend. And it resulted as desired. The wife received no notice of the action and she knew nothing of it until in June, 1940.

Where false, misleading or deceptive statements are made in an affidavit for an order for publication of summons in an action, or where a false return of service is made by an officer caused or procured by the plaintiff, or where by any other contrivance the defendant is deprived of her chance to appear and defend, the result will be that no jurisdiction is acquired and the resulting judgment is void.

Atkinson v. Atkinson, 43 Utah 253; 134 Pac. 595.

Cavanaugh v. Smith, 84 Ind. 380.

Holmes v. Holmes, 63 Me. 420.

Edson v. Edson, 108 Mass. 590.

It is further alleged in Lena's petition, and admitted by the demurrer, that no summons was in fact ever issued in the divorce actions of Waters v. Waters.

Section 104-5-2, R. S. 1933, requires the issuance of a summons in statutory form *signed by the plaintiff or his attorney*. If no such summons was ever issued, how could it be served in any event. And Section 104-5-11 requires service of summons, when one has been issued, by delivering a copy thereof to the defendant if personally served, or by publication thereof if served that way (104-5-12). Where no original summons exists there cannot possibly be a copy thereof, hence no service by delivery or publication of what does not and cannot exist.

Further, it is alleged and admitted that the complaint, affidavit for publication and order for pub-

lication of a theoretical but non-existent summons were all filed in the clerk's office at the same time on November 24, 1937, without any showing of diligent but fruitless effort to serve a summons. If there had been an actual summons issued, there was no showing of due diligence (104-5-12) to serve it, and none could have been shown in so short an interim, or no interim, between the substantially instantaneous filings. In such case the ensuing judgments were held void in

Clayton v. Clayton, 4 Colo. 410.

Israel v. Arthur, 7 Colo. 5.

Other jurisdictional defects are alleged and admitted by demurrer, which we pass by for the present.

It is further alleged and admitted that the defendant in the divorce action, appellant here, had no knowledge, notice or information of the action, nor of Silvia's application for letters upon the estate until during a chance visit to Salt Lake City, Utah in June, 1940, whereupon she at once employed counsel and filed her petition to oust Silvia. Also admitted by demurrer that Silvia had full knowledge of all the matters of fact alleged as invalidating the divorce decree, at the time thereof, and that she connived and colluded with Mr. Waters in his steps and proceedings for divorce; that she well knew Mr. Waters was not thereby divorced from appellant; that she could not lawfully marry him when she did; that she did not become his wife thereby and was not his widow when he died in August, 1939, and that she has no right to letters upon his estate and no right to inherit as widow. That in her petition for such letters she falsely and fraudulently claimed to be his widow, knowing that she was not, thereby deceiving the clerk and court

as to who was entitled to notice of the hearing, and who might be interested in contesting the petition. As a consequence, the record shows (Ab. pp. 3-20) that notices of the hearing were mailed only to the persons named in Silvia's petition, viz: to Silvia herself, and to the two young children, Dolores and Daniel, and not to the true wife at her residence street address in Chicago, which was well known to Silvia. Result: appellant obtained no notice of the hearing, did not appear, and letters to Silvia were granted without appellant's knowledge. Also alleged and admitted that Silvia well knew appellant was the wife and widow of the deceased, and that had notice been given her she would have appeared and contested the petition. That she has taken possession of the assets, filed an incomplete inventory, is appropriating the assets to her own use; is insolvent, has given bond with inadequate surety, and cannot respond in damages.

POINTS

Under the admitted facts Silvia has no legal kinship to the deceased and no qualifying interest in his estate as required by the Statute 102-4-1 to entitle her to administer. In the recent case of

In re Cloward's (Searle's) Estate, 95
Utah 453,

this Court held that such qualifying interest and kinship are jurisdictional requirements and that letters issued in violation thereof are void, Justices Wolfe and Folland dissented on that point. But all agree that the statute should be enforced as a matter of obeying the law in a matter within the competency of the legislature to enact. The administration of the estate is still pending. Hence we did

not have to wait and test jurisdiction after the estate is closed. Section 104-6-1 provides the remedy at hand. Hence Silvia is not entrenched in the fruits of her wrong doing. She can no more acquire a status as wife, widow and heir, an interest in the estate, or a right to administer it, by swearing in her petition that she has them, than could Mr. Waters acquire a residence in Utah by swearing in his divorce complaint that he had it. Neither could either of them deprive this appellant of her rights by misstating the facts and by depriving her of statutory notice of their proceedings.

A case on its facts much like the present was that in
Weyant v. Utah Savings & Trust Co., 54

Utah 181; 182 Pac. 189,

in which a husband abandoned his family in the east, eloped with a young girl to Utah where they lived for some years under an assumed name. He acquired property and died. The girl, then a mature woman, took out letters, wound up and closed the estate, taking distribution to herself. Thereafter the true wife and widow learned the facts, came to Utah, sued the "strange woman" and the surety on her bond, and recovered the value of the dissipated estate. The "assumed name" in that case was but an additional means of concealment from the wife and of cheating her of her rights in the estate. But it was not the only means employed, nor was the relief given based on that alone. The falsification of facts as to heirship and widowhood in the petition for letters, the prevention thereby of notice to the wife and heirs, are common to that case and this one. We shall have occasion to cite this Weyant case again at a later place in this brief in answer to the suggestion that we should have sued in equity rather than follow our statutory remedy under 102-6-1. We shall now take up

the grounds of Silvia's demurrer to appellant's petition for her removal.

1.

The first ground of demurrer was that our petition does not state sufficient facts. We say that no further facts are required under Section 102-6-1 that such as will show that appellant Lena is "a competent person" to receive letters, and that she has "a prior right" thereto, and had "no previous opportunity to apply." This she showed by alleging that she married Mr. Waters in 1935, and that Silvia married him in 1938 during appellant's lifetime. This was enough to state a cause of action and put Silvia upon her defense. Likewise her artifice and deceit in omitting from her petition appellant's name as wife and widow and substituting her own name, and so causing that appellant should not receive a copy of the notice of hearing which the clerk mailed to each of the heirs named in the petition. Section 102-4-7 requires that a petition for letters must state the names, ages and residences of the heirs, when known, hence must truthfully state them. A petition for letters is an adversary proceeding, and the true widow and heirs are adverse parties in interest and necessary parties defendant, hence must be joined as defendants by naming them in the petition, so that they may receive at least statutory notice by posting or publication and mailing of the notice of hearing which stands in the relation of process or summons to the petition. If omitted, they can not be said to be bound. While the proceeding is in rem, yet all interested claimants are entitled to such notice as the statute prescribes for their protection. Otherwise, they are deprived of their right under 102-4-9 as an "inter-

Since printing this brief our attention has been drawn to the facts that the demurrer does not claim insufficient facts. Instead its ground 1 says that the petition does state facts sufficient to constitute a cause of action. (abs.p.17)

ested person" to come in and "contest the petition by filing an answer thereto on the ground of incompetency of the applicant" and to "assert their own rights to the administration and pray that letters be issued to himself."

The result of Silvia's suppressing appellant's name from her petition for letters and thereby causing that no notice should be given her of the proceeding is no different from what the result would be in any other action or proceeding. Thus, where a plaintiff claiming a tract of land sues to quiet his alleged title thereto, and in his complaint omits the known owner of the legal title, or any other claimant of an interest therein, from his complaint, and causes no summons to issue or be served naming such owner or adverse claimant, the decree that he may obtain will bind only those actually named in his complaint as defendants adversely claiming. No one else. In like manner, the object of a petition for letters of administration, is to get possession of the decedent's estate and shut out all adverse claimants and creditors, and take distribution. It will not work as against those entitled to be joined as defendants, entitled to notice, and who by their omission from the petition do not get notice of the hearing. Hence the above facts in appellant's petition showed her interest, her right to administer, her lack of notice of Silvia's petition, and hence that she had no previous opportunity to file an answer to Silvia's petition, contest the same, and show her own right as allowed by 102-4-9. Silvia was bound to answer and show cause why her letters be not cancelled.

If, in answering, she wished to confess and avoid Lena's petition by alleging and proving a valid divorce of the latter from Mr. Waters, justifying her later marriage to him, that would be an affirm-

ative defense for Silvia. And in reply, Lena could object to the introduction of the supposed divorce decree by showing that it was void on jurisdictional grounds, as our citations show. This is perhaps the usual order of procedure, but it is not the only way.

Appellant desired and chose to get the whole matter up for decision upon her petition, if demurred to, and so avoid the delay and expense of a trial of the facts, with witnesses from afar and depositions. And so she anticipated the only defense Silvia had, by alleging in her petition that Silvia claims, in justification of her junior marriage to Mr. Waters, that the latter had been divorced from Lena on February 18, 1938 in case No. 60289 in the District Court for Salt Lake County, but that such proceeding and decree was void for lack of jurisdiction of the court over the subject matter and parties, specifying the facts which made it void. Silvia did not object to this anticipation of her defense, but admitted it by joining issue by demurrer. This was a logical and legitimate course, saving expense to both parties in getting the case up for decision upon what was in effect an agreed statement of facts by petition and demurrer. Thus the issues are precisely the same as if the same facts had been presented by petition, answer and reply. But the petition is not deficient in facts because it states all the matters underlying the claims of both parties in one pleading.

2.

The second ground of demurrer was that the District Court does not have jurisdiction of the subject matter of appellant's petition to remove Silvia and revoke her letters. We just do not "get" this contention, in view of Section 102-6-1 expressly conferring jurisdiction thereof, and in view of the re-

peated decisions of this Court that jurisdiction of subject matter refers to the Court's power and authority by law to try and determine the class of cases to which the one in question belongs.

Snyder v. Pike, 30 Utah 102; 83 Pac. 692.

Sanipoli v. Coal Co., 31 Utah 114; 86 Pac. 865.

Kramer v. Pixton, 72 Utah 1; 268 Pac. 1029.

But we are apprised by the demurrer itself that it does not really mean what it says in this respect, because it specifies as reasons for the supposed lack of subject matter jurisdiction that:

A. The matters alleged in the petition are a collateral attack on the default divorce obtained by the deceased Charles Wesley Waters.

B. The petitioner does not pray that the default divorce proceedings of Charles Wesley Waters be set aside, — etc.

These "reasons" are in fact and law no reasons to support the conclusion reached of no subject matter jurisdiction, by the test of the above cited cases. The question whether the matters alleged in the petition constitute a collateral attack, or not, upon a judgment, is one which the Court itself decides in the exercise of its power and authority by law to try the class of cases to which the one in question belongs. In the exercise of that jurisdiction Courts may be called on to decide whether, in a given case, an objection made to a supposed judgment is a direct or a collateral attack, and whether in a given case, a direct or collateral attack, or both, is permissible.

Such questions may arise in almost every class of cases. And when encountered Courts decide them.

They do not adjourn or throw a case out of the window, because such a procedural matter as that is encountered. Nor do they do so because, forsoothe, a pleading does not contain the kind of a prayer that the opponent thinks is appropriate. The objection that the attack was collateral was made in many of the cases cited herein, but the Courts encountered no difficulty in ruling on the objections, nor did they imagine that their right to do so was in doubt. The objection that an attack is collateral does not touch jurisdiction or the right to decide the question.

We are not called upon, by the demurrer, to enter into an extended discussion of when an attack is direct and when collateral. The facts are stipulated, and the legal conclusion therefrom is for the Court. In general it may be said that whenever lack of jurisdiction appears on the face of the record of a judgment, it may be objected to upon either direct or collateral attack whenever produced. When the lack of jurisdiction does not appear on the face of the record there is a difference, depending on the nature of the case. This grows out of the fact that not all objections to judgments rest upon jurisdictional grounds. Judgments may be cancelled, stayed, or their enforcement enjoined in equity for many reasons, not touching jurisdiction. Where jurisdiction is not in question, the complaint must allege the specific grounds relied on for cancellation, staying or enjoining the judgment, and the attack must be direct. This is because of the presumptions in favor of the proceedings of courts of general jurisdiction, that they correctly and properly perform their legal functions. But where the jurisdiction is lacking, their right to function ceases and no judgment on the merits can be entered, — only dismissal. And the objection may be made at

any time, by any person, in any court, in any manner, direct or collateral. The party is not then fighting a judgment but a nullity. Of this class is all divorce actions in which the statutory residence of the plaintiff is lacking, or the facts as to defendant's residence are mis-stated, as we shall see a few pages later on.

“When any court is called upon to receive in evidence the record of a judgment, foreign or domestic, its form and substance must necessarily be examined. Not, it is true, as a court of errors, but to see that it is what it purports to be, the record of a judgment.”

Lincoln v. Tower, 2 McLean 473; Fed. Case No. 8,355.

“It must be regarded as settled by previous decisions of this Court that where recovery is sought upon a judgment, the jurisdiction of the court rendering the judgment is open to inquiry

Old Wayne M. L. Assn. v. McDonald, 27 Sup. Ct. 236; 204 U.S. 8,

“It is well settled that the jurisdiction of any court may be inquired into in every other court where the proceedings in the former are relied upon and brought before the latter court by a party claiming the benefit of such proceeding.”

Williamson v. Berry 8 How. (U.S.) 495, 540

“If it once be conceded that the validity of a judgment may be attacked collaterally by evidence showing that the court had no jurisdiction, it is not perceived how any allegation contained in the record itself, how-

ever strongly made, can affect the right to so question it. The very object of the evidence is to invalidate the paper as a record. If that can be done, no statements therein can have any force. A slight form of words could always be adopted so as to effectually nullify the right of inquiry. Recitals of this kind must be regarded like asseverations of good faith in a deed, which can avail nothing if the instrument is shown to be fraudulent.”

Old Wayne M. L. Assn. v. McDonald, 27
Sup. Ct. 236; 204 U.S. 8.

Thompson v. Whitman, 18 Wall. (U.S.) 457
21 L.Ed. 897, 901.

Ferguson v. Crawford, 70 N.Y. 253, 264;
Syllabus 4.

This exact question was raised in

Clawson v. Acme Mines Dev. Co. 72 Utah
137; 269 Pac. 147,

in which the District Court speaking by Judge Marks of Tooele ruled that “it would be an unwarrantable assumption of authority” for that court to look and see if another court had jurisdiction to render the judgment offered in evidence. His decision was reversed by this Court on appeal.

The divorce judgment in Waters v. Waters, No. 60289 was void for lack of jurisdiction, and its invalidity may be shown by appellant whenever and wherever she is confronted with it. She brought it to the court’s attention as the void thing that it is, on which her adversary seeks to take away her property rights in the estate of her husband. Jurisdiction both of subject matter and parties was lack.

ing and it is not a judgment. The same identical objection has arisen and been decided in every conceivable manner as the following citations show.

In the following cases the objection was made in the divorce action itself at the trial or by later motion to set the judgment aside, and by appeal from the trial court's ruling.

Calef v. Calef, 54 Me. 365.

Jenness v. Jenness, 24 Ind. 355.

Cross v. Cross, 108 N. Y. 628.

George v. George, 228 S. W. 408 (Ky.)

Turner v. Turner, 88 Atl. 3 (Vt.)

Graves v. Graves, 36 Iowa 310.

Powell v. Powell, 53 Ind. 513-5.

Rumping v. Rumping, 91 Pac. 1057 (Mont.)

In the following cases the divorce defendants brought an independent action in equity to vacate and set aside the divorce judgment on like jurisdictional grounds against the plaintiff in divorce for lack of his statutory residence in the State before suing for the divorce. In these cases, both plaintiff and defendant in divorce were still alive, which distinguishes those cases from the case at bar in which it is urged that this petitioner, Lena Waters, should have pursued the same remedy, by action in equity, but against whom is not stated.

Atkinson v. Atkinson, 43 Utah 253; 134 Pac. 595.

Holmes v. Holmes, 63 Me. 420.

Edson v. Edson, 108 Mass. 590.

Sewall v. Sewall, 122 Mass 156, 161.

Crouch v. Crouch, 30 Wis. 667.

Everett v. Everett, 60 Wis. 200.

Potts v. Potts, 45 Atl. (N. J. Eq.) 701.

Rush v. Rush, 48 Iowa 701.

The following cases were prosecutions for crime, such as bigamy, or other sexual crimes in which the defendant's status as a previously married man was an element in the case, and defendant relied upon a previous divorce. His offer of the divorce decree was rejected on proof of his lack of statutory residence defeating the court's jurisdiction to render it.

People v. Dawell, 25 Mich. 247.

Van Fossen v. State, 37 Ohio St. 371.

Hood v. State, 56 Ind. 263.

The following cases were proceedings in probate to administer a decedent's estate in which a decree divorcing his then wife was offered by one of the contending claimants against the other. In the Field case the question was, like the case at bar, between two women each claiming the widow's award or interest in the estate.

Field v. Field, 215 Ill. 496; 74 N. E. 443.

O'Dell v. Goff, 117 N. W., 59, 61.

Neff v. Beauchamp, 74 Iowa 92.

In the following diversified cases the judgment in a former divorce action affecting the marriage status of one of the parties was relied on by one of the parties, objected to and excluded for the same reasons, viz: lack of statutory residence requirement to show jurisdiction, and false swearing of the plaintiff as to his own or his wife's residence, or both.

Reed v. Reed, 52 Mich. 117, action by wife to compel her husband to support her.

Gregory v. Gregory, 78 Me. 187, action by wife against husband for dower.

Leith v. Leith, 39 N. H. 20 and

Hoffman v. Hoffman, 46 N. Y. 30, actions by wife against husband for divorce, defended by husband on ground of prior divorce from wife.

Worthington v. District Court and Judge Thereof, 142 Pac. 230 (Nev.), mandamus to compel court to grant an order for publication of summons against absent defendant, defended on ground that plaintiff's residence was lacking or insufficient under statute.

Cavanaugh v. Smith, 84 Ind. 380, action by wife against husband for alimony allowed by former divorce decree, defended by husband on same ground of insufficient residence of wife in divorce action.

Cheeley v. Clayton, 110 U. S. 701, 28 L. Ed. 298, action in U. S. Court to recover widow's share in deceased husband's estate, defended by another woman claiming also as widow by later marriage preceded by divorce of decedent from first wife.

Parrish v. Parrish, 32 Ga. 653, proceeding to probate a will where wife's right to object depended on validity of former divorce decree obtained against her by deceased husband.

In strict analogy are the following cases on somewhat variant facts, but in which the locus of the transaction controlled the jurisdiction of the court

to adjudicate the controversy consequent thereon, viz:

Thompson v. Whitman, 85 U. S.; 18 Wall.
457; 21 L. Ed. 897,

in which seizure of a ship for illegal dredging of oysters and clams was by the statute to be adjudicated in the township or precinct where the seizure occurred, not elsewhere.

Hall v. Lanning, 91 U. S. 160; 21 L. Ed.
271 and

Knowles v. Gaslight Co., 86 U. S., 19 Wall.
58; 22 L. Ed. 70,

actions on former judgments, defeated by showing lack of service of summons, or insufficient service upon the defendant in the action.

In the court below it was argued, and the court apparently decided that our statutory remedy under 102-6-1 was naught, and that we should have sued in equity to set aside the divorce judgment. But against whom, we inquire, should or could such an action be brought by appellant? Every action must be brought by a party aggrieved against the party committing the grievance. And there must be a bone of contention, a controversy with that party, for decision by the court. There must be a res, a subject matter of the controversy. Where would appellant have found these several factors on which to build a suit in equity? Would her suit be brought against Charles Wesley Waters, now deceased? And what would be her quarrel with him, now that he is dead? What would be her legal controversy with him, — what her cause of action, and for what relief? If he were still alive, she might

sue him to set aside the judgment (though void) which seemed to stand in the way of her right to continued support from him: She might, in connection therewith, sue him for a divorce and alimony on her own account. Or she might ignore it and wait until he pleaded or produced it in evidence against her, and then have it rejected as void. She could select her remedies, and construct her pleadings to suit. But all these remedies depend on continued marriage relationship. When Mr. Waters died, no one else was bound in his place to support her, pay alimony, reside with her, furnish marital rights and privileges, or restore to her marriage status that was dissolved by his death. So who would appellant sue, and for what cause of action in equity?

If a cause of action could be imagined, she cannot sue and get service on a dead man. Hence the case is not ruled by the second group of cases mentioned supra (ante pp. ¹⁹⁻²⁰~~6-9~~) where the wife sued her husband in equity while he was yet alive to have his divorce decree set aside and her marriage rights restored, enforced and protected.

A case illustrating these considerations was that of

Dwyer v. Nolan, 82 Pac. 746; 40 Wash. 459.

In that case the plaintiff husband sued the wife for a divorce and obtained judgment on November 20, 1899. On April 6, 1905 the wife filed a motion in the divorce action to set the decree aside, supported by affidavits, on the ground that the court had not obtained jurisdiction of her person, for lack of adequate legal service of summons upon her. The

plaintiff husband having died before the wife appeared and filed her motion attacking the judgment, she caused his executors to be substituted as parties plaintiff, to defend against her motion. The trial court entered judgment denying the motion, which was affirmed on appeal, the Supreme Court holding:

“We will not enter into the question of whether or not the service in the divorce proceeding was sufficient to give the court jurisdiction of the person of defendant, for the reason that there are no proper parties to this proceeding. In the nature of things, the plaintiff having died, the question of divorce cannot be relitigated.

It will not be gainsaid that an action for divorce is a purely personal action. Nothing is sought to be affected but the marital status of the husband and wife. The distribution of property in such an action is incidental, and it is clearly incontestable that upon the death of either party, whether before or after the decree, the subject of the controversy is eliminated.

If the plaintiff's death had occurred before judgment of divorce, his executors could not have been substituted to represent him in prosecuting the action to judgment. No more can they be substituted for him after judgment. They cannot stipulate with reference to the decree, nor consent to its being set aside. There is no conceivable particular in which they represent the deceased or the heirs with reference to the subject matter of the divorce

action in the slightest degree. Service of the motion to vacate the judgment upon them was farcical.”

We forbear to quote further and refer the Court to the opinion for its further reasoning in point here. In closing, the opinion says:

“So far as property rights are concerned, if there are any, if the (divorce) judgment is void, such rights are in no way affected by it, and all avenues are open for the determination of such rights where the parties affected can be heard.”

82 Pac. 746, 747 .

So say we here, and appellant resorts to her statutory remedy under 102-6-1 where the parties affected can be heard.

In actions in equity to set aside a judgment on other than jurisdictional grounds, or in motions under

R. S. U. 1933, 104-14-4

for relief against judgments, it is required that defendant tender an answer showing merits and a good defense, and ask to litigate the matter if let in to defend. But how could appellant here do that, when her opponent is dead and the subject matter or res no longer in existence — i.e., the marriage status?

In hearings under Section 102-6 1, like our petition here, the court may be called upon, as in any other action, to pass upon a judgment, deed, bond or other written instrument in issue or in evidence, and determine whether it is in fact what the party offering it claims it to be, that is, whether it is admis-

sible in evidence. If genuine and within the issues, it is admitted, otherwise rejected.

Let us assume now, to further test the demurrer, that appellant had or has an available remedy in equity against somebody or other to vacate and set aside the divorce decree, and be restored to her marital rights and status with Mr. Waters, now deceased. Then what? It would not follow that she was bound to employ that remedy, or that she was excluded thereby from the statutory remedy provided by the legislature for that purpose. The case of

In re Thompson's Estate, 72 Utah 17; 269
Pac. 103,

is in point on this. In that case as in the Weyant case (cited ante page 11), the probate proceedings were not attacked until after the estate was closed. Then the State came in with its petition to reopen the estate proceedings in order to levy an inheritance tax. This was done and the tax claimed was allowed in part. On appeal it seems to have been contended that the District Court in probate had no jurisdiction, and that resort should have been had to an independent suit in equity for the relief sought. On that point our Supreme Court held:

“Let it be conceded that where, as here, an estate has been fully closed and settled and the administrator discharged, an independent action is maintainable. Yet, it does not necessarily follow, because of our statute relating to inheritance taxes, that such an action is the exclusive and only remedy. . . . We, in this State, have no independent probate or surrogate court. Our dis-

strict courts are courts of general jurisdiction clothed with power to exercise, and do exercise under our probate code, all probate powers and judicial functions. Whether the district court sitting in probate has power to hear and determine the controversy here presented is dependent upon the statute.

From a consideration of the whole statute relating to inheritance taxes, as well as the probate code, we think the subject matter was within the jurisdiction of the court sitting in probate, especially in view of Utah Comp. Laws, 1917, Secs. 3191, 3200, 3199, etc., (conferring the relief which the petition invoked).

Thus, while an independent action might have been brought, still we think the petition could have been, as it was, filed in the cause in the matter of the estate of the deceased, in the district court in probate." 72 Utah 17; 269 Pac. 103.

To like effect see

Weyant v. Utah Savings & Trust Co., 54 Utah 181; 182 Pac. 189, cited ante p. 11.

In view that this Waters Estate case has not been closed, as had the Thompson Estate case and the Weyant case, there is no reason at all why appellant should forbear to pursue her statutory remedy under Section 102-6-1 in order to skirmish around in a separate action in equity.

The foregoing disposes of all the grounds of demurrer argued or ruled upon below. There were

(For margin, top half page 27)
 To like effect see In Re McLaren, 106 Pac.2d, 766, 99 Utah

several grounds of special demurrer but they are fully answered by the petition and the amendatory paragraphs that were filed before the submission of the demurrer on the briefs, and were not discussed in the briefs. They are without merit, and in view of the dismissal on grounds heretofore discussed, require no attention here.

We respectfully submit that the judgment of the court below should be reversed with directions to overrule the demurrer, and with costs to appellant.

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