

## CIVIL PROCEDURE: CONNECTICUT COURT UPHOLDS CONSTRUCTIVE SERVICE OF PROCESS ON NON- RESIDENT DEFENDANT IN ANNULMENT ACTION

ACCORDING to the traditional view, an annulment proceeding is an in personam action requiring personal service of process<sup>1</sup> because of the absence of a res or status upon which a court may act in rem.<sup>2</sup> However, in *Perlstein v. Perlstein*<sup>3</sup> the Connecticut Supreme Court of Errors discarded the traditional view to allow out-of-state constructive service on a nonresident defendant in an annulment action.

In *Perlstein* the plaintiff husband, domiciled in Connecticut, sought an annulment, alleging bigamy on the part of the defendant wife at the time of the marriage celebration in Connecticut. The defendant was served by registered mail sent to her domiciliary address in New Jersey. She appeared specially<sup>4</sup> to attack the court's jurisdiction on the ground that personal service was required in annulment actions. Relying on the traditional rule, the lower court rendered judgment for the defendant.<sup>5</sup> On appeal the Supreme Court of Errors reversed and remanded in an opinion that rejected the traditional rule requiring in personam procedures.<sup>6</sup>

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<sup>1</sup> See, e.g., *Owen v. Owen*, 127 Colo. 359, 257 P.2d 581 (1953); *Gayle v. Gayle*, 301 Ky. 613, 192 S.W.2d 821 (1946). See also *Pennoyer v. Neff*, 95 U.S. 714 (1878) (personal service is prerequisite to a valid judgment which will be accorded full faith and credit).

See generally Storke, *Annulment in the Conflict of Laws*, 43 MINN. L. REV. 849 (1959); Vernon, *Labyrinthine Ways: Jurisdiction to Annul*, 10 J. PUB. L. 47 (1961). For articles dealing with annulment jurisdiction and service of process within individual states, see Anderson, *Annulment of Marriages in Missouri*, 21 MO. L. REV. 119 (1956); Clark, *A Proposal for Some Modest Changes in Colorado Divorce and Annulment Laws*, 26 ROCKY MT. L. REV. 221 (1954); Colson, *Twenty Years of West Virginia Marriage and Divorce Laws*, 58 W. VA. L. REV. 128 (1956); Specia, *The Development of Jurisdiction in Annulment of Marriage Cases*, 22 U. KAN. CITY L. REV. 109 (1954); Strahorn, *Fifteen Years of Change in Maryland Marriage and Annulment Law and Domestic Relations Procedures*, 13 MD. L. REV. 128 (1953); Vernon, *Annulment of Marriages in New Mexico, Part I.—Jurisdiction*, 1 NATURAL RES. J. 146 (1961).

<sup>2</sup> See text at notes 8-13 *infra*.

<sup>3</sup> 204 A.2d 909 (Conn. Sup. Ct. Err. 1964).

<sup>4</sup> On the validity of the device of special appearance to challenge lack of jurisdiction over the person see *Harkness v. Hyde*, 98 U.S. 476 (1878); cf. 2 MOORE, FEDERAL JURISDICTION ¶ 12.12 at 2263 (1961).

<sup>5</sup> 204 A.2d at 909.

<sup>6</sup> *Id.* at 910-12. In an earlier case, the court had stated that constructive service upon a defendant in an annulment proceeding would be invalid. *Mazzei v. Cantales*, 142 Conn. 173, 112 A.2d 205 (1955). The court in *Perlstein* distinguished the *Mazzei* decision by stating that there was no jurisdiction of the subject matter in *Mazzei* be-

The marital status may be dissolved by either annulment or divorce, but there are conceptual distinctions between the two remedies.<sup>7</sup> Historically, an annulment was granted as a consequence of a condition existing at the time of the marriage celebration, whereas a divorce was granted for reasons arising after the existence of a valid marriage.<sup>8</sup> As a result courts have held that the effect of a divorce is to terminate a pre-existing marital status,<sup>9</sup> while an annulment declares a marriage to be void ab initio pursuant to the legal fiction of "relation back."<sup>10</sup> Since a valid marriage must be proved in divorce cases,<sup>11</sup> the reification of the marital status establishes a res for purposes of in rem jurisdiction.<sup>12</sup> The traditional rule, however, notes that the effect of "relation back" in annulment cases deprives the action of a res or status upon which in rem methods of service of process can be utilized.<sup>13</sup>

Despite this relatively clear conceptual distinction, confusion has been caused by the fact that many of the grounds for annulment, such as bigamy, are also recognized by statute to be a basis for

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cause neither party was domiciled in Connecticut. Hence, the discussion of the validity of constructive service was mere dictum. 204 A.2d at 913.

<sup>7</sup> The relief now known as annulment was historically a type of divorce granted by the ecclesiastical courts, and it is said at times that the term "divorce" includes annulment actions. See *Eisenberg v. Eisenberg*, 105 Pa. Super. 30, 160 Atl. 228 (1932); 3 NELSON, *DIVORCE AND ANNULMENT* § 31.02 (2d ed. 1945) [hereinafter cited as NELSON]. Properly speaking, however, such is not generally true in modern law. See, e.g., *Maduro v. Maduro*, 62 Cal. App. 2d 776, 145 P.2d 683 (Dist. Ct. App. 1944).

Historically courts have not favored annulment. See, e.g., *Keller v. Linsenmyer*, 101 N.J. Eq. 664, 674, 139 Atl. 33, 38 (Ch. 1927). Courts have noted that more serious consequences, of a social and pecuniary nature, may result from annulment than from divorce, see *Johnson County Nat'l Bank & Trust v. Bach*, 189 Kan. 291, 369 P.2d 231 (1961), and that the vigilance with which the law guards the marital status should be intensified when an attack is made against the initial validity of the marriage. See *Mace v. Mace*, 67 R.I. 301, 304, 23 A.2d 185, 186 (1947).

<sup>8</sup> See 1 NELSON § 1.08; 2 SCHOULER, *MARRIAGE, DIVORCE, SEPARATION AND DOMESTIC RELATIONS* § 1153 (6th ed. 1921) [hereinafter cited as SCHOULER].

<sup>9</sup> See, e.g., *Petry v. Petry*, 47 Cal. App. 2d 594, 118 P.2d 498 (Dist. Ct. App. 1941); *Smith v. Smith*, 350 Mo. App. 104, 164 S.W.2d 921 (1942); *D'Auria v. D'Auria*, 200 Misc. 939, 103 N.Y.S.2d 741 (Sup. Ct. 1951).

<sup>10</sup> See, e.g., *Steerman v. Snow*, 94 N.J. Eq. 9, 118 Atl. 696 (Ch. 1922); *Eisenberg v. Eisenberg*, 105 Pa. Super. 30, 160 Atl. 228 (1932); *Lindsay v. Lindsay*, 148 Wash. 31, 267 Pac. 777 (1928); 3 NELSON §§ 31.07; 2 SCHOULER § 1081.

<sup>11</sup> See, e.g., *Sclamberg v. Sclamberg*, 220 Ind. 209, 41 N.E.2d 801 (1942); *Riehl v. Riehl*, 101 N.J. Eq. 15, 137 Atl. 787 (Ch. 1927); *Bannon v. Bannon*, 270 N.Y. 484, 1 N.E.2d 975 (1936); *Lariviere v. Lariviere*, 102 Vt. 278, 147 Atl. 700 (1929); *Kisla v. Kisla*, 124 W. Va. 220, 19 S.E.2d 609 (1942).

<sup>12</sup> See *Delanoy v. Delanoy*, 216 Cal. 27, 32, 13 P.2d 719, 720 (1932); *Gayle v. Gayle*, 301 Ky. 613, 615, 192 S.W.2d 821, 822 (1946). See generally 2a NELSON §§ 21.01-11 (2d rev. 1961).

<sup>13</sup> See, e.g., *Owen v. Owen*, 127 Colo. 359, 257 P.2d 581 (1953); *Gayle v. Gayle*, *supra* note 12.

divorce.<sup>14</sup> Moreover, some courts appear to have ignored the effect of "relation back" by distinguishing actions based on voidable rather than void grounds,<sup>15</sup> and holding in the former cases that the marriage status persists until a decree of annulment is rendered.<sup>16</sup> And in one case the court without explanation required personal service only in cases where annulment is based upon insanity.<sup>17</sup>

The Connecticut court's decision in *Perlstein* is representative of the dissatisfaction with the traditional rule of annulment jurisdiction, as is evidenced by the liberalization of annulment procedures in other states.<sup>18</sup> The rule was overcome by finding an intangible res despite the plaintiff's allegation that the marriage was void from its inception because of the defendant's bigamous conduct.<sup>19</sup> Stemming from what was presumptively a legal marriage ceremony and

<sup>14</sup> Ten states by statute allow divorce if the marriage is bigamous. ARK. STAT. ANN. § 34-1202 (Supp. 1963); DEL. CODE ANN. tit. 13, § 1522 (2) (1953); FLA. STAT. ANN. § 65.04 (9) (1943); ILL. ANN. STAT. ch. 40, § 1 (Smith-Hurd 1956); KAN. GEN. STAT. ANN. § 60-1501 (Supp. 1961); MISS. CODE ANN. § 2753 (1956); MO. ANN. STAT. § 452.010 (1949); OHIO REV. CODE ANN. § 3105.01 (A) (Page 1960); PA. STAT. ANN. tit. 23, § 10 (b) (1955); TENN. CODE ANN. § 36-801 (2) (1955).

Other grounds historically restricted to annulment have been made applicable to divorce actions by statute. See, e.g., ARIZ. REV. STAT. ANN. § 25-312 (10) (1956) (party incapable of performing sex act at time of marriage); GA. CODE ANN. § 30-102 (1) (1952) (incestuous marriage); KY. REV. STAT. § 403.020 (2) (e) (1960) (fraud in obtaining the marriage); NEB. REV. STAT. § 42-301 (2) (1960) (impotency); N.M. STAT. ANN. § 22-7-1 (4) (1953) (wife pregnant by another at the time of marriage).

Maryland and Rhode Island permit divorce for any reason which renders the marriage null and void ab initio. MD. ANN. CODE art. 16, § 24 (1957); R.I. GEN. LAWS ANN. § 15-5-1 (1956). In Delaware and Washington divorce is allowed if one of the parties was incapable of consent to the marriage contract because of age. DEL. CODE ANN. tit. 13, §§ 1522 (7), (8) (1953); WASH. REV. CODE ANN. § 26.08.020 (1) (1963).

Only New York permits annulment for reasons arising after marriage. N.Y. DOM. REL. LAWS § 7 (5), providing that an annulment may be obtained when one of the spouses becomes insane and remains in an institution for a designated time. This may, perhaps, be explained in part as a result of the restrictive nature of New York's limiting the divorce remedy for all practical purposes to cases involving adultery. See N.Y. DOM. REL. LAWS § 8.

<sup>15</sup> *Owen v. Owen*, 127 Colo. 359, 257 P.2d 581 (1953); *Gayle v. Gayle*, 301 Ky. 613, 192 S.W.2d 821 (1946); see 2 SCHOULER § 1081, discussing the historical differences between void and voidable marriages.

<sup>16</sup> E.g., *State v. Yoder*, 113 Minn. 503, 130 N.W. 10 (1911); *Christensen v. Christensen*, 144 Neb. 763, 14 N.W.2d 613 (1944).

<sup>17</sup> *Shafe v. Shafe*, 101 Ind. App. 200, 198 N.E. 826 (1935).

<sup>18</sup> See *Buzzi v. Buzzi*, 91 Cal. App. 2d 823, 205 P.2d 1125 (Dist. Ct. App.), cert. denied, 338 U.S. 894 (1949); *Bing Che v. Chan Lai Yung Gee*, 89 Cal. App. 2d 877, 202 P.2d 360 (Dist. Ct. App. 1949). In *Owen v. Owen*, 127 Colo. 359, 257 P.2d 581 (1953), the Colorado court held annulment actions to be in personam. The legislature responded by statute declaring annulment proceedings to be in rem. COLO. REV. STAT. ANN. § 46-3-8 (Supp. 1960).

<sup>19</sup> 204 A.2d at 911-12.

the domicile of one of the parties in the state, the court held that this res could not be obviated by a party's mere allegations.<sup>20</sup> This view appears consistent with the conceptual approach to annulment because a marriage cannot be said to be "void" or "void ab initio" in the absence of final adjudication.<sup>21</sup>

By finding an intangible res, the *Perlstein* decision may be construed as treating annulment within the usual confines of the in rem—in personam distinction for purposes of authorizing constructive, out-of-state service of process. However, the Connecticut court also indicated dissatisfaction with the classification of annulment as either in rem or in personam, and there is language in the court's opinion implying that annulment jurisdiction may be sui generis.<sup>22</sup> Such an approach would appear consistent with the United States Supreme Court's treatment of the distinction in other situations, where the Court has demonstrated a growing reluctance to determine the validity of service of process on the basis of the orthodox in rem-in personam distinction.<sup>23</sup> The validity of service of process, therefore, does not hinge upon a characterization of the legal proceeding as in rem, in personam, or sui generis, but rather upon questions of due process.

Due process requires compliance with a state statute authorizing service of process,<sup>24</sup> and sufficient notice under the circumstances of the case.<sup>25</sup> It was clear in *Perlstein* that the plaintiff had com-

<sup>20</sup> *Ibid.*

<sup>21</sup> Some courts have found a basis for jurisdiction to exist in the very need for a judicial determination to clarify the parties' relationship. See *Johnson v. Johnson*, 245 Ala. 145, 16 So. 2d 401 (1944); *Henderson v. Henderson*, 187 Va. 121, 46 S.E.2d 10 (1948); cf. *Williams v. Williams*, 83 Colo. 180, 263 Pac. 725 (1927).

The Connecticut court also noted that the effect of "relation back" in annulment cases may be set aside in the interests of justice. 204 A.2d at 912; see *Gaines v. Jacobsen*, 308 N.Y. 218, 225, 124 N.E.2d 290, 294 (1954). This attitude is evidenced by statutes providing that issue of annulled marriages are not bastardized by the rendition of the decree. *E.g.*, CAL. CIV. CODE § 85.

<sup>22</sup> 204 A.2d at 911. See *Williams v. North Carolina*, 317 U.S. 287, 297-302 (1942); *Storke*, *supra* note 1, at 855. Originally annulment suits were sui generis proceedings in the ecclesiastical courts. See *Eisenberg v. Eisenberg*, 105 Pa. Super. 30, 160 Atl. 228 (1932); 3 NELSON § 31.02.

<sup>23</sup> "[T]he requirements of the Fourteenth Amendment to the Federal Constitution do not depend upon a classification [in rem-in personam] for which the standards are so elusive and confused generally and which, being primarily for state courts to define, may and do vary from state to state." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 312 (1950).

<sup>24</sup> "Constructive notice" can only exist in cases coming fairly within provisions of the statutes authorizing courts to use constructive service. *Nations v. Johnson*, 65 U.S. (24 How.) 195 (1860).

<sup>25</sup> The method of notice should be reasonably calculated to appraise the parties of

plied with a Connecticut statute authorizing service by registered mail,<sup>26</sup> and the defendant's special appearance established the fact actual notice had been received. Although the line between jurisdiction over the person and jurisdiction over the subject matter is somewhat unclear,<sup>27</sup> due process also requires a state interest in adjudicating the plaintiff's claim.<sup>28</sup> Furthermore, in those cases where a court is not adjudicating rights to tangible property within the jurisdiction of a state, the Supreme Court now appears to insist that the defendant have sufficient minimal contacts with the forum state to empower that state to exercise jurisdiction over nonresident defendants.<sup>29</sup>

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the pendency of the action, and afford a reasonable opportunity to be heard. See, e.g., *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950); *Milliken v. Meyer*, 311 U.S. 457, 463 (1940); *Grannis v. Ordean*, 234 U.S. 385, 394 (1914).

<sup>26</sup> CONN. GEN. STAT. ANN. § 52-68 (1960).

<sup>27</sup> The right of a court to decide an annulment case—jurisdiction of the subject matter—has now been set out by statute in most states, but has been the subject of a mild controversy. Because of the supposed similarity between divorce and annulment many courts in determining annulment jurisdiction have adhered to the "domicile" doctrine as defined by the Supreme Court for divorce actions in *Williams v. North Carolina*, 317 U.S. 287 (1942). However, the Supreme Court in its only decision on annulment jurisdiction did not impose the restrictive domicile rule of divorce, but did recognize it as a sufficient base for jurisdiction of the subject matter in annulment cases. *Sutton v. Lieb*, 342 U.S. 402, 406 (1952). As a result jurisdiction has been upheld in cases where either the plaintiff or defendant is domiciled within the forum state. See Annot., 128 A.L.R. 61, 64 (1940).

The current controversy is between the state of domicile and the state of celebration—whether the two states should exercise concurrent jurisdiction. Most courts would accept jurisdiction of the subject matter if the purported marriage took place in the forum state, irrespective of the parties' domicile or residence at the time of the suit. See, e.g., *Feigenbaum v. Feigenbaum*, 210 Ark. 186, 194 S.W.2d 1012 (1946); *Becker v. Becker*, 58 App. Div. 374, 69 N.Y. Supp. 75 (1901); *Sawyer v. Slack*, 196 N.C. 697, 146 S.E. 864 (1929); *McDade v. McDade*, 16 S.W.2d 304 (Tex. Civ. App. 1929). *Contra*, *Antoine v. Antoine*, 132 Miss. 442, 96 So. 305 (1923) (only the state of domicile may have jurisdiction); *Turner v. Turner*, 85 N.H. 249, 157 Atl. 532 (1931) (must have at least residence of one of the parties). At one time it was argued that *only* the state of celebration should have jurisdiction, based on the now discredited "vested rights theory" which held that only a state which "creates" a status can dissolve it. Compare *Goodrich, Jurisdiction to Annul A Marriage*, 32 HARV. L. REV. 806 (1919), with *Goodrich, Conflicts* 269 (4th ed. Scoles 1964) and *McMurray & Cunningham, Jurisdiction to Pronounce Null a Marriage Celebrated in Another State or Foreign Country*, 18 CALIF. L. REV. 105 (1930).

There is a lack of authority as to the sufficiency of residency short of domicile to allow a court to have jurisdiction of the subject matter in an annulment proceeding. See *Vernon, Labyrinthine Ways: Jurisdiction to Annul*, 10 J. PUB. L. 47, 75-77 (1961) wherein the author argues that annulment should be considered a transitory action, but requiring personal service if not brought within the state of domicile or celebration. See note 6 *supra*.

<sup>28</sup> See *McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957); *Hess v. Pawloski*, 274 U.S. 352 (1927).

<sup>29</sup> See *Hess v. Pawloski*, 274 U.S. 352 (1927); *cf. International Shoe Co. v. Washington*, 326 U.S. 310 (1945). Many states, in light of these cases, have promulgated statutes

Since the *Perlstein* court required one of the parties to be domiciled within the state,<sup>30</sup> it would appear that the state of Connecticut had a sufficient interest in the marital status of its domiciliary to entertain an action determining the validity of the status.<sup>31</sup> Otherwise, legal rights of the domiciliary would remain uncertain as, for example, in applying the state's laws of intestate succession and freedom to marry.<sup>32</sup> The court intimated, however, that if neither party was a domiciliary, the place of marriage celebration would afford an insufficient basis for jurisdiction over the subject matter.<sup>33</sup> This is seemingly inconsistent with its finding of an intangible res, unless the court meant to imply that the res accompanies the parties.<sup>34</sup> It is arguable that even as a disinterested third state, Connecticut would still have an interest in adjudicating the validity of a marriage to which its laws had accorded legal sanction.

On the other hand, the court apparently felt that classification of the marital status as an "intangible res" precluded the necessity of evaluating the defendant's contacts with the forum. It is notable, however, that the Supreme Court's concern with convenience and fairness,<sup>35</sup> combined with the apparent dissatisfaction for evaluating due process in terms of the in rem-in personam distinction,<sup>36</sup> might dictate another result. When a court is adjudicating the rights of all parties to a tangible res found within the jurisdiction, it is reasonable to hold that contacts with the state of those interested in the property are unnecessary purely for purposes of establishing ownership of the res. Where an intangible res is created, however, the location of that res for purposes of ascertaining jurisdiction thereover is more uncertain.<sup>37</sup> Without addressing itself to the ques-

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allowing personal service made outside of the state to be effective. See, e.g., ILL. ANN. STAT. ch. 110, § 17 (Smith-Hurd 1956).

<sup>30</sup> See 204 A.2d at 913; note 6 *supra*.

<sup>31</sup> In *Sutton v. Lieb*, 342 U.S. 402, 406 (1952) the Supreme Court implicitly recognized that the domicile of one of the parties would be sufficient for a court to have subject matter jurisdiction in annulment proceedings.

<sup>32</sup> See, e.g., CAL. CIV. CODE § 61 (no remarriage without previous marriage being annulled or dissolved); cf. ILL. ANN. STAT. ch. 3, § 11 (Smith-Hurd 1961) (rules of intestate succession assume decedent to have been legally married).

<sup>33</sup> See 204 A.2d at 913.

<sup>34</sup> This would be in accord with the rule governing jurisdiction in garnishment cases. See *Harris v. Balk*, 198 U.S. 215 (1905).

<sup>35</sup> *McGee v. International Life Ins. Co.*, 355 U.S. 220, 223-24 (1957); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314-15, 319 (1950).

<sup>36</sup> See note 23 *supra* and accompanying text.

<sup>37</sup> Unlike the tangible res cases in which only one state may have jurisdiction in rem, the concept of an intangible res may allow jurisdiction to be found in many states, or at least wherever the parties are domiciled or residents.

tion, the *effect* of the *Perlstein* decision is that celebration of a marriage within the forum constitutes a sufficient contact to enable a court to exercise jurisdiction over a nonresident defendant.<sup>38</sup> Although defensible, this rule might violate fundamental concepts of fairness and convenience if, for example, the defendant was a minor rushed in and out of the state to take advantage of a liberal marriage law. There may be other factors which the court should have evaluated to ascertain sufficient minimal contacts: these might include the forum in which the parties had consummated their marriage, the forum in which the parties had spent most of their married life, or the forum in which the parties resided immediately prior to separation.

The fact that the court in *Perlstein* did not clearly articulate whether its jurisdiction was in rem as opposed to a sui generis form, moreover, leaves uncertain the ability of the court to render a money judgment. Although in rem jurisdiction is sufficient to terminate a marriage, Connecticut classifies a decree for support as a judgment in personam requiring personal service.<sup>39</sup>

The *Perlstein* decision, therefore, appears satisfactory, but leaves several questions unanswered. In light of the general confusion surrounding an action to annul a marriage, the best solution would be enlightened legislative action<sup>40</sup> declaring the requirements to be met for jurisdiction over both the person and the subject matter, as well as the appropriate method of service.<sup>41</sup>

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<sup>38</sup> Cf. ILL. ANN. STAT. ch. 110, § 17 (Smith-Hurd 1956).

<sup>39</sup> *Carter v. Carter*, 147 Conn. 238, 159 A.2d 173 (1960). The same rule applies to divorce actions, where the marriage may be terminated by in rem jurisdiction, but personal service is required for alimony. *Ibid.* *Parker v. Parker*, 335 Ill. App. 293, 81 N.E.2d 745 (1948); *Beckmann v. Beckmann*, 358 Mo. 1029, 218 S.W.2d 566 (1949); *Emmons v. Emmons*, 124 Vt. 107, 197 A.2d 812 (1964).

<sup>40</sup> Liberalization of rules for annulment if desirable should come from the legislature, rather than by loose interpretations by the courts. See *Woodworth v. Woodworth*, 64 N.Y.S.2d 606, 611 (Sup. Ct. 1946).

<sup>41</sup> See Vernon, *Annulment of Marriage: A Proposed Model Act*, 12 J. Pub. L. 143, 183 (1963).