
 Merrill v. Russell.

not embraced, and not intended to have been embraced, in the declaration in the action in favor of L. L. Merrill. It must, then, be regarded as another matter than that upon which said action was based; and the effect of the amendment asked for would be to allow a recovery for such new matter not sued for. Amendments, as we have seen, attended with such results, are not admissible within the rule of law authorizing amendments.

On the whole, the judgment of the court is, that the report of the auditor, for error in the aforesaid proceeding, be recommitted, and the action be transferred to the court of common pleas.

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A libel for a divorce, where the parties were not married within this state, must show that the husband had his domicile here at the time, or that by a subsequent removal to this state the libellant obtained a legal domicile here, and resided here at the time the right to a divorce is alleged to have occurred.

Where the libel alleges the desertion of the other party as the ground of divorce, the affidavit of the libellant must be filed, stating particularly the circumstances attending the desertion, that the court may judge how far it is without sufficient cause, and against the consent of the libellant.

LIBEL for a divorce, on account of desertion by the wife. The defendant was defaulted.

E. Carleton, for the libellant.

PARKER, C. J. The libel in this case is insufficient. It alleges the marriage of the parties to have taken place in Vermont, where the parties then resided. But it does not allege any removal to, or residence within, this state. Where the marriage was not within this jurisdiction, it should ap-

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pear upon the face of the libel that the husband had his domicile here at the time, or that by a subsequent removal to this state the libellant obtained a legal domicile here, and resided here at the time when the cause of the divorce occurred.

The proof is also insufficient. There is no affidavit of the libellant furnished. He should state particularly the circumstances attending the desertion of the wife, that the court may judge how far it is without sufficient cause, excuse, or palliation, and whether it was in fact against the consent of the libellant. It is not sufficient for the affidavit to state in general terms that the libellee unnecessarily, and without sufficient cause, abandoned the libellant.

If the desertion has been in consequence of misconduct on the part of the libellant, we may refuse to grant a divorce, the ground of which has been occasioned by the fault of the party applying. In this case, the proof of the libellant must fully show that there were no reasons for the spirit of jealousy, which one of the witnesses says the wife "commenced cultivating in 1838."