

form. A question arose as to the right to maintain the petition, and the present appeal is from an order on that question.

It was error to dismiss the first appeal because certain persons were not properly made parties to the proceeding in the probate court. *Adams v. Adams*, 64 N. H. 224. The rule is the same as in appeals from laying out highways. *Bickford v. Franconia*, 73 N. H. 194, and cases cited.

It is apparent that the case ought not to be sent back to the probate court. The first appeal should be brought forward upon the docket of the superior court, the order of dismissal should be stricken off, and the case should stand for trial upon its merits. It does not appear whether the defects in the original proceeding have been remedied, but apparently such is the fact. If further action to that end is necessary or advisable, it can be taken in the superior court.

It is now urged that the original petition was fatally defective because the widow was not "interested" in the will. The grounds for this contention are not disclosed, and the fact that the will contained provisions for the benefit of the wife shows that she could claim an interest under it. This was sufficient to give her a standing in the probate court.

Case discharged.

All concurred.

Coös, }
April 2, 1912. }

SHATNEY *v.* SHATNEY.

The court of this state does not have jurisdiction of an action for divorce instituted by a non-resident for a cause which arose here.

Under section 5, chapter 175, Public Statutes, a divorce may be granted to an innocent, non-resident libelee who prays for such relief in an answer and establishes the libellant's guilt.

LIBEL FOR DIVORCE. After the defendant had begun proceedings for divorce on the ground of desertion, the plaintiff filed this libel, in which she describes herself as a resident of Maine, charges her husband with extreme cruelty, and prays for a divorce, alimony, and the custody of their minor children. She admits that she left her husband, but says that he drove her away. At the September

term, 1911, of the superior court, the libel was dismissed by *Pike, J.*, for want of jurisdiction, and the plaintiff filed a bill of exceptions.

Libby & Coulombe, for the plaintiff.

Leon D. Ripley and Thomas F. Johnson, for the defendant.

YOUNG, J. The matter in issue in a cause of this kind is the *status* of the parties (*Ditson v. Ditson*, 4 R. I. 87), and the only jurisdiction the court has of such a cause is that conferred upon it by statute. *Parsons v. Parsons*, 9 N. H. 309, 317. Consequently, the test to determine whether it has jurisdiction of the plaintiff's libel is to inquire whether the allegations are sufficient to bring it within the provisions of sections 3 and 4, chapter 175, Public Statutes. As those sections have been construed, the libelant must be a resident of this state at the time the libel is filed. *Kimball v. Kimball*, 63 N. H. 598. The facts that the defendant is such a resident and that the cause of divorce arose here are not sufficient to give the court jurisdiction. *Burgess v. Burgess*, 71 N. H. 293.

Although the court did not err in dismissing the plaintiff's libel, it does not follow that it could not have given her the relief for which she prays, if her libel had been filed as an answer to the defendant's; for at the time his libel was filed he was and for more than a year had been a resident of this state. His residence gave the court jurisdiction of his *status*, notwithstanding the plaintiff was a non-resident (*Sworoski v. Sworoski*, 75 N. H. 1); and when it has such jurisdiction, the statute provides that it shall grant the divorce, not to the libelant if he is innocent, but to the innocent party. P. S., c. 175, s. 5. That is, the statute provides that the divorce shall be given to a libelee who asks for it, when the libelee is and the libelant is not an innocent party.

There is nothing to show that it would be inequitable to permit the plaintiff to file her libel as an answer to the defendant's; and if the court permits that to be done and finds that she is the innocent party within the meaning of section 5, chapter 175, Public Statutes, it will give her a divorce and make such orders in relation to alimony and the custody, maintenance, and education of the minor children as may be just. P. S., c. 175, ss. 13-18.

Case discharged.

All concurred.