DOMESTIC RELATIONS-RECENT DEVELOPMENTS (A SERVICE FOR RETURNING VETERANS)

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DOMESTIC RELATIONS—RECENT DEVELOPMENTS (A SERVICE FOR RETURNING VETERANS)*—During the past five years family life in America has been subjected to unusual strains. The repercussions of the war, as well as the usual peacetime factors, affecting the domestic circle have received attention of sociologists and lay writers. The legal implications have not made such prompt appearance in published form.

Information as to that part of the impact of family dislocation caused by war is available in many places, none the least important being the records in the offices of legal assistance officers in the armed forces,1 of the Committees on War Work set up by the American and the various State Bar Associations,2 and, of course, of legal aid societies.3

The application of legal rules to family life in this country is complicated by a number of factors. Modern law, even with the most up to date administrative machinery, is inadequate to provide a solution

* See supra, p. 899, note *
1 War Department Circular No. 74; Navy Department Circular R1184.
2 The original Committee on National Defense was established in 1940 [65 A.B.A. Rep. 77 ff. (1940)]. Later it became the Committee on War Work [67 A.B.A. Rep. 343 (1942)]. In 1944 this committee published a Compendium of the Laws Relating to the Problems of Men in the Armed Forces—Supplement on Laws of Domestic Relations (1945).
for many human problems. Sanctions and concepts developed by the ecclesiastical courts of the middle ages are not necessarily effective tools in the present stage of civilization. The continuing ignorance on the part of many lay persons that they have problems which should receive attention of those versed in the field of law delays the search for available help until, sometimes, it is too late. Those charged with the promotion of justice may blame the lay public for failure to make greater progress in fitting law to public needs. It is easy to insist that the legal rules can hardly crystallize until public opinion is more stabilized in its attitude toward marriage and the family. We are prone to discuss who should make the first move toward reform instead of accepting the challenge of a number of interesting possibilities.

In the present comment the author has undertaken to survey a field briefly rather than to make an intensive study of any part of the field. Sample judicial decisions and legislation during the past five years are presented; some topics, some decisions and some legislation are not included. Limitations of time and space have framed the subject.

A. Divorce

During the period under consideration judicial and legislative thinking in the field of divorce has been directed largely to an increase in the variety of "grounds" for which a divorce may be granted and to the determination of certain dramatic cases in the field of conflict of laws.

1. Grounds

a. Insanity. An interesting development in the "causes" upon which a divorce may be secured is to be found in the statutes allowing the sane spouse the privilege of remarriage provided proper arrangements are made for the care of the insane partner. This suggests a

4 (The reader is cautioned that the citations to statutes are not intended to be exhaustive). Ala. Gen. Acts (1943) No. 463, p. 425 (hopelessly and incurably insane and confined for five years in an institution for the insane); Md. Laws (1941) c. 497, p. 805 (incurably insane and confined to institution for three years preceding action; fact that incurable sworn to by two or more competent physicians—one party must be a resident); Neb. Laws (1945) c. 101, p. 339 (incurably insane; legally confined to an institution for the insane for five years; testimony of three physicians); N.C. Laws (1945) c. 755, p. 1059 (authorizes divorce on the ground of incurable insanity of a spouse if insane spouse confined to institution for ten consecutive years, and proof of incurable insanity by two reputable physicians); Texas Gen. and Spec. Laws (1941) c. 214, p. 383 at 384 (incurably insane and confined to an asylum for five years), noted in 20 TEXAS L. REV. 106 (1941).

See Mohrmann v. Kob, 264 App. Div. 209, 35 N.Y.S. (2d) 1 (1942) (an incompetent was allowed to sue for a divorce under the New York statute), noted, 28 IOWA L. REV. 367 (1943); Schneider, "Unsoundness of Mind as Ground for Di-
slow change in the orthodox view that grounds for divorce must involve fault or guilt, or an innocent spouse, or an injury which, if the parties were not married, might be grounds for an action in tort or contract or for action by criminal law. Insanity of one spouse, as a ground, suggests that unavoidable misfortune to one partner should not be allowed to work a hardship on the other. Subject to the condition that the permanently incapacitated spouse is provided for and is not likely to become a public charge, the other should be free to remarry. This step would seem to be in accord with the theory that the interest of the state in marriage is based upon the desirability of protecting and encouraging stable families. Where one spouse is insane the family lacks the necessary stability.

When the bond between husband and wife is in fact permanently severed, whether the cause is fault, guilt, misfortune, or failure of affection, there is less value and more heartbreaking effort involved in attempting to hold together the empty shell; and it is possible to assume a variety of reasonable fact situations in which the same spouse, denied relief may commit any one of a number of anti-social acts. At the same time each new "ground" does make divorce easier and there will be those who will deplore these new attempts to break down the traditional American family. Those who believe that divorce, instead of being a cause of marital dissolution, is rather a symptom of a more fundamental problem will not be so alarmed.

If the law can establish a more effective working alliance with other fields of professional endeavor, a cooperative integrated approach promises more than a series of isolated efforts, no matter how gallant, to search out and find solutions to such fundamental problems.

b. Desertion. Desertion as a ground for divorce was discussed in a New Jersey case. There the alleged desertion consisted not in living in separate homes, not in refusal of sexual relations but in the husband's insistence upon the use of contraceptives.

Impossibility of intercourse is a recognized ground for divorce or annulment under some circumstances. The fact that impotency can be cured coupled with a refusal to cure it has been held grounds for

5 See the Symposium on the Law of Divorce, 28 Iowa L. Rev. 179 (1943); McCurdy, "Insanity as a Ground for Annulment or Divorce in English and American Law," 29 Va. L. Rev. 771 (1943); Schneider, "Unsoundness of Mind as Ground for Divorce: a Proposal," 1944 Wis. L. Rev. 106.

dissolution of the marriage. Refusal of sexual relations is debatable
ground with New Jersey holding it desertion.7

A more orthodox ruling is found in a North Carolina case.8 Here
the court was construing a statute allowing divorce, "On the applica-
tion of either party" where the parties "have lived separate and apart
for two years." The court refused to hold that discontinuance of sexual
relations, while the parties lived in the same house, was sufficient to
enable one of the parties to invoke the protection of the act.

The general problem of birth control would seem to be involved.
In a Virginia case9 the offer made by the plaintiff to receive back his
wife was held to lack of good faith. Here H sued W for a limited
divorce. His bill was dismissed. He then sued for absolute divorce
and again his bill was dismissed. He then wrote W stating that he
hoped she realized her mistake and would return to him. He made
no apology and presented no excuse for his own conduct. When she
did not return he sued for divorce, alleging desertion.

The House of Lords laid down the rule in England as follows:

"The question whether a deserting spouse has reasonable cause
for not trying to bring the desertion to an end, and the corre-
sponding question whether desertion without cause has existed for
the necessary period, must always be questions of fact, and their
determination must always depend upon the circumstances of the
particular case."10

A Kentucky court11 found that induction into the armed forces
within a year after wilful desertion of spouse does not necessarily pre-
clude the granting of a divorce on the ground of one year's abandon-
ment. The emphasis upon the intent of the deserting husband which
persisted even though he was in the armed forces seems a logical basis
for a divorce on the ground of desertion.

c. Habitual Drunkenness and Drug Addiction. Habitual drunk-
keness, another illustration of misfortune as a cause for divorce, re-
ceived judicial interpretation by a Minnesota court.12 The court spoke
in terms of one who by frequent periodic indulgence in intoxicating

7 Raymond v. Raymond, (N.J. Ch. 1909) 79 A. 430.
L. Rev. 246 (1940).
10 Cohen v. Cohen, 56 T.L.R. 597 at 597 (1940), noted, 4 Mod. L. Rev. 60
11 Graham v. Graham, 299 Ky. 543, 186 S.W. (2d) 186 (1945), noted, 94
Univ. Pa. L. Rev. 111 (1945). See also Davis v. Watts, 208 La. 290, 23 S. (2d) 97
(1945), noted, 6 La. L. Rev. 472 (1945).
12 Hereid v. Hereid, 209 Minn. 573, 297 N.W. 97 (1941), noted, 26 Marq.
L. Rev. 104 (1942).
liquor has lost the power or desire to resist alcoholic opportunity with the result that intoxication becomes habitual rather than occasional.

This is to be contrasted with the more general rule, defining habitual drunkenness as such a fixed, irresistible custom of frequent indulgence in intoxicating liquor with consequent drunkenness as to evidence a confirmed habit and inability to control the appetite for intoxicants, and contemplates periodic frequency of indulgence, loss of power or normal action and inability to resist temptation when opportunity offers. In the Minnesota case the defendant had occasional spells of sobriety but the court still included him in the rule laid down.

Drug addiction as a ground for divorce received legislative attention.\textsuperscript{18}

d. Cruelty. Cruelty as a ground for divorce is most difficult to define.\textsuperscript{14} A Massachusetts court recognized as cruelty, a simple beating and held that defendant’s intoxication was no defense.\textsuperscript{15} A Maryland court\textsuperscript{16} dealt with a situation where the husband brought his relatives home for prolonged visits over the objection of \(W\). The evidence also indicated abusive language, intoxication and accusations of infidelity. This was held to warrant a decree.

A variety of situations called for judicial interpretation.\textsuperscript{17} But an Oregon court seems to take a logical position in holding it ground for a divorce when \(W\) had ceased to care for \(H\), was sullen and hardly spoke to him, did not want to live with him and frequently told him so.\textsuperscript{18} An Ohio court was faced with a situation where \(W\) failed or refused to perform her household tasks was ground for divorce under the statute.\textsuperscript{19} \(W\) insisted upon securing outside employment against the husband’s will and, it was alleged, became irritable and unpleasant. The court held that while the allegations set forth a cause of action, the proof fails to bear them out.

e. Separation. A further step in the liberalizing of divorce is taken when “separation” becomes a ground.\textsuperscript{20} Separation, in effect, is incom-
patibility persisted in for a statutory period. The basis of the request for divorce here appears to be not fault or misfortune of one party but the inability of the two, after a reasonable time, to develop and maintain a stable family life. As the state is interested in stable families, an unhealthy condition, it is contended, should be remedied by dissolution. Under the orthodox view of fault divorce this procedure is to be viewed with alarm—inter alia, as an encouragement to collusion. The fundamental question is how far the law can expect effectively to cope with such personal matters as the lack of affection of a man for his wife. Ecclesiastical excommunication, which weighed on the medieval conscience, and civil outlawry are not modern legal sanctions. Perhaps more intelligent legal progress could be made if the public, under the leadership of the interested professions, were to settle the question whether divorce is to be treated as a cause or a symptom of a more profound cause. In any case an inquiry into the reason for, as well as the fact of separation should be rewarding: North Carolina and Maryland cases have discussed the problem under their respective statutes.

2. The problem of divorce

The cases re-emphasize the questions—why are divorces granted; and how should that objective best be accomplished? The English system of allowing a limited judicial discretion has merit. But the


22 Young v. Young, 225 N.C. 340, 34 S.E. (2d) 154 at.157 (1945), defines the word “separation” in the North Carolina statute as “living apart for the entire period in such manner that those who come in contact with them may see that the husband and wife are not living together.” Beck v. Beck, 180 Md. 321, 24 A. (2d) 295 (1942) (divorce refused because “there is no evidence in the record that the parties mutually agreed to live apart at any time . . .” id. at 323); Nichols v. Nichols, 181 Md. 392, 30 A. (2d) 446 (1943), noted, 7 Md. L. REV. 146 (1943) (divorce refused). These two cases discuss the Maryland Statute of 1937 [Md. Laws (1937) c. 396, p. 791] allowing divorce after five years voluntary separation.

23 Andrews v. Andrews, [1940] P. 184, noted, 4 MOD. L. REV. 307 (1941). Here petitioner had engaged in adultery. Upon advice of counsel he broke it off before filing the petition. Before the final decree was granted he resumed without disclosing the fact to the court. The court granted the decree saying there is no universal rule requiring the breaking off or interruption of adulterous associations until the decree is absolute. Whereby in time of long association and the birth of children a new home has been set up there would be something unreal in such a demand, especially where the parties were too poor to provide alternative accommodation.
legislative limits upon that discretion require careful thought. If our purpose is release from an intolerable situation and the establishment of two homes instead of one, the limited divorce would appear a reasonable solution which might be freely employed. If our purpose is to censure publicly one of the spouses, our present "grounds" go at least part of the way. If our purpose is to permit the parties or one of them to remarry rather than to encourage marital misconduct perhaps there should be closer correlation between the divorce and the criminal law. Perhaps there should be a probationary period for the "guilty" spouse. But if we are here dealing with the dissolution of a status—the break up of a family—the dislocation of a unit in society which has certain important functions to perform, perhaps we should distinguish between the grievances which individual members of a family have against each other and the question of dissolution. A divorce may prevent continuance of an intolerable situation but so often it is a matter of "out of the frying pan into the fire."

3. Remarriage after divorce

The period of "cooling off" after a decree nisi, and before an absolute divorce decree is entered, has appealed to a number of legislatures as a final opportunity to encourage reconciliation.24 How useful this is in fact may be questioned. Complete statistics are not available. One wonders, however, whether the situation may not be compared to the period in the field of medical care known as convalescence. The patient usually is not left to his own devices. Adequate nursing and post operative care have come to be regarded as necessary. In the legal field, similarly, it may come to be recognized as desirable for the court to supply some sort of supervision over divorced persons, perhaps by probation officers, to see that they adjust to their new status with a minimum of complications.

In a recent Massachusetts case25 the willingness of the courts to aid the parties is illustrated. H married W1 in 1927. Before his pending Massachusetts divorce became valid, he married W2 in Rhode Island.

24 Ala. Gen. Acts (1943) No. 566, p. 569 (judge may allow or disallow the party against whom decree rendered to remarry; if disallowed the judge may later entertain a petition for permission to remarry); Idaho Laws (1943) c. 25, p. 53, amending Idaho Code Ann. (1932) § 31-207, (abolishes six-month waiting period); Mass. Acts and Resolves (1943) c. 168, p. 182 (the party against whom a decree of divorce is rendered may not remarry unless the other party is dead); Va. Laws (1944) c. 142, p. 181, amending Va. Code (Michie, 1942) § 5.113, (reduces the waiting period from six to four months). The right to marry after an Oregon divorce is considered in 23 ORE. L. REV. 132 (1944). The effect of divorce and remarriage upon separation agreements is discussed in 5 UNIV. NEWARK L. REV. 419 (1940).

The lower court found the second marriage void because $H$ intended to reside in Massachusetts. On appeal, however, the court found the marriage good for one reason—that $H$ and $W_2$ continued to live together as husband and wife beyond the two year waiting period.

B. Marriage

1. Ceremonial marriage. Recent legislation with respect to marriage has been in the direction of further regimentation: a license, a waiting period, a medical examination.

26 1 Vernier, American Family Laws, § 17 (1931). Ala. Gen. Acts (1943) No. 337, p. 318 (provided manner of making corrections on the face of a marriage license); Idaho Laws (1943), c. 50, p. 97 (authorized the issuance of a license to persons under fifteen years of age under certain safeguards); Mass. Acts & Resolves (1943) c. 408, p. 490 (authorized the granting of marriage licenses in military reservations); Neb. Laws (1945) c. 99, p. 327 (provided for issuance of marriage license to minors if parents are living separately and apart); Nev. Stat. (1943) c. 188, p. 275 (approved marriage of Indians by tribal custom if certificate of declaration was filed within thirty days following the marriage).

27 1 Vernier, American Family Law, § 16 (1931). Ark. Acts (1945), No. 112, p. 258 (requires three days notice of intention; but judge may approve a waiver of the requirement); Cal. Stat. and Amend. to the Codes (1943) c. 349, p. 1345 (provisions requiring notice of at least three days and not more than thirty days are suspended for the benefit of members of the armed forces during the national emergency); Idaho Laws (1943) c. 50, p. 97 (approves the marriage of a minor female under fifteen by court order with certain safeguards); Md. Laws (1941) c. 529, p. 906 (permits a judge to dispense with the requirement that forty-eight hours elapse between application for license and issuance); N.Y. Laws (1942) c. 731, p. 1616, § 13-c (suspends the twenty-four hour war-time period in favor of members of the armed forces); N.C. Laws (1945) c. 1046, p. 1373 (requires forty-eight hour waiting period between the filing of an application and the issuance of a marriage license where both parties are non-residents of the state: the act applies only to certain eastern counties); Wis. Laws (1941) c. 162, p. 212 (establishes a five-day waiting period but allows court to waive it in special cases).

28 1 Vernier, American Family Laws, § 43 (1931). Legislatures continued to be impressed with value of medical examinations as prerequisite to marriage: Cal. Stats. and Amend. to the Codes (1943) c. 214, p. 1113 (a medical certificate from another state or from the United States armed forces is acceptable if completed within thirty days prior to issuance of marriage license and signed by a physician or United States medical officer); Idaho Laws (1943) c. 42, p. 83 (requires certificate from a licensed physician that applicant has been examined, including standard serological tests and is not infected, or if so infected, the disease is not in a stage that is or may become communicable); Mass. Acts and Resolves (1941) c. 601, p. 808, § I (requires medical certificates of physical examinations including standard serological tests with marriage license applications); Neb. Laws (1943) c. 103, p. 344 (requires a medical examination before issuance of marriage license); N.C. Pub. Laws (1939) c. 314, p. 702 (medical certificate must be executed within thirty days), id., as amended by N.C. Pub. Laws (1943) c. 641, p. 755 (a person adjudged of unsound mind applying for a marriage license must be sterilized unless subsequently adjudged of sound mind); Ohio Laws (1941) Sen. Bill No. 141, p. 297 (requires a medical certificate within
The marriage license, as a means of recording a change of status, is an accepted device. Whether a prescribed waiting period and a medical examination accomplish what their proponents hoped, poses a more difficult question. The law deals more readily with property than with individual human emotions. It may be that a more effective solution would be widespread education for marriage. It may be that a statute making tampering with the dignity of the marriage relation a criminal offense would provide the necessary means of shunting non-conforming persons into the hands of the criminal law and thus allow the courts a greater variety of legal tools. Again it might be desirable to make the marriage license clerk a more important official with greater discretion and wider powers to keep undesirable applicants out of the circle of married people.

But one wonders whether sufficient thought has been given to those groups of persons who, with each step in the regimentation process, find it more difficult to attain the haven of matrimony. Does regimentation of the process of getting married encourage more illicit relationships than it cures? What is to be done with a person who is refused a marriage license? Will further regimentation be required to control him?

And yet on the other side of the question, should we sit idly by while divorce statistics show an increase?

Surely the law needs to work in conjunction with other professions here as elsewhere if we are to hope for improvement in our efforts to answer such questions.

2. Common law marriage: Common law marriage lost ground. In Pennsylvania, long a supporter of the values of the common law marriage, a 1939 statute prescribed a physical examination as a prerequisite to a legal union. A court construing this statute held that its provisions applied to common law marriages as well as to ceremonial unions.

A Texas court added the element of a ceremony to the requirements of a valid putative marriage. The woman could not be regarded thirty days of the application for marriage license); Ore. Laws (1943) c. 218, p. 268 (certificates from the United States armed forces commissioned medical officers are acceptable); Va. Acts (1940) c. 102, p. 152, § 5073a (requires serological test as prerequisite to marriage license).


as a common law wife because $H$ had a former wife living and undivorced. She could not be a putative wife because there had been no ceremony of marriage. A similar result was reached in a Georgia case,\textsuperscript{32} by a federal court in Pennsylvania\textsuperscript{33} and by an Indiana court.\textsuperscript{34}

Several cases presented interstate problems: A New York court\textsuperscript{35} held that no common law marriage was created when $H$ and $W$, New York residents, lived together from 1935 to 1940 even though they made frequent trips to jurisdictions in which common law marriage was recognized as valid and, while there, satisfied the local requirements for the creation of such marriages.

A federal court sitting in New Jersey allowed $W$ to claim Workmen’s Compensation for a death occurring in Louisiana on the basis of a relationship begun in New Jersey in 1937. Louisiana did not recognize common law marriages: New Jersey did, provided, says the court, there is “an agreement entered into between the man and the woman,” in words of the present tense, to live together as husband and wife.\textsuperscript{36}

Illinois was called upon to consider a Nevada common law marriage by Illinois citizens. The court\textsuperscript{37} declined recognition of the status because it found that the parties lacked the necessary intent to acquire a domicil in Nevada.

The creation of a common law marriage after the removal of an impediment was also discussed. The District of Columbia\textsuperscript{38} dealt with the question of legitimacy of a child. The child’s parents cohabited while $H$ had another wife living. The child was born during this period of cohabitation. $W$ divorced $H$ and $H$ subsequently acknowledged the child as his. The court found an intent to create a common law marriage. Upon the removal of the impediment continued cohabitation of the parties was enough to constitute a valid common law marriage.

\textsuperscript{32} Roberts v. Wilkerson, 70 Ga. App. 245, 28 S.E. (2d) 174 (1943).
\textsuperscript{33} In re Walsh, (D.C. Pa. 1944) 54 F. Supp. 769.
\textsuperscript{34} Schilling v. Parsons, 110 Ind. App. 52, 36 N.E. (2d) 958 (1941), noted, 11 Fordham L. Rev. 90 (1942). See also Jones v. Kemp, (C.C.A. 10th, 1944) 144 F. (2d) 478.
\textsuperscript{37} Peirce v. Peirce, 310 Ill. App. 481, 34 N.E. (2d) 564 (1941); 30 Ill. B.J. 165 (1941).
Similarly, a Wisconsin court\(^3\) dealt with \(H_2\) who married in good faith and in full belief that the former marriage of \(W\) had been dissolved by a divorce. After removal of the impediment the parties continued to live together and the court held they must be considered to be legally married from and after the time of the removal of the impediment.

In another federal case\(^4\) the Minnesota law, prior to the act of 1941, was examined. The court was satisfied that a common law marriage, entered into prior to that time, was valid. “If persons were competent to enter into a marriage contract and agreed between themselves in the present tense to become husband and wife, the marriage was complete. Cohabitation added nothing to the marriage contract, except that it might constitute evidence of the contract.”\(^5\)

An examination of the cases in which common law marriages have been allowed suggests that there is often merit in the concept. It is possible that the pendulum which now seems to be swinging in favor of ceremonial marriages may ultimately, by necessity, come nearer to something like the putative marriage of the civil law.

3. Abolished remedies. The legislative drive against suit for alienation of affections and similar matters continued.\(^6\) The courts in jurisdictions which had previously outlawed such suits were required to determine various questions. In one case\(^7\) a resident of Pennsylvania sued a resident of Illinois for criminal conversation and alienation of affections. The defense was an Illinois statute providing a criminal penalty for persons filing such a suit. The court held that the act was contrary to the Illinois constitution—which provides “every person ought to find a certain remedy in the laws for all injuries and wrongs which he may receive in his person, property, or reputation.”\(^8\)

The statute apparently attempts to prohibit or intimidate parties from invoking the aid of the federal courts.

A New York court\(^9\) under a different type of statute, providing that actions for “breach of promise to marry” are against public policy,
dealt with a peculiar problem. $H_1$ and $W_1$ were married. $H_2$ and $W_2$ were married. $H_1$ and $W_2$ went to Reno with the understanding that each was to secure a divorce. $W_2$ got her divorce but $H_1$ did not. On the way home $H_1$ offered $W_2$ $75 a week while she remained ready to marry him. She rejected one other suitor. $H_1$ paid only the first two installments: $W_2$ sued for breach of the agreement. The court found her suit in violation of the act.

In another New York case 46 plaintiff sued to recover real property which he alleged he had given defendant in reliance upon defendant's fraudulent representations and promise of marriage. The court dismissed the complaint since it was in reality one based upon an alleged breach of promise to marry and so outlawed by the New York statute.

A federal court 47 gave similar construction to a Pennsylvania statute in a suit for $10,000 damages for gifts and expenditures in contemplation of marriage. Here plaintiff alleged that defendant "wilfully and knowingly made false and fraudulent promises of marriage."

Instead of the present choice in breach of promise actions between a dramatic court room demonstration and no right of action at all, some compromise may be discovered which will, perhaps, provide pretrial probationary investigation of some similar process, as a means of protecting both parties from undesired publicity until "probable cause" or actual damages can be proven. Granting the excesses in these causes of action, a lawyer with his traditional conservatism tends to feel that there must have been a real justification or the right would never have been recognized.

C. Domicil

1. In general. The problem of domicil as between married persons developed further complexities during the period 1940-1945, especially with respect to the separate domicil of married women and the domicil (or residence) prerequisite for a divorce.

With respect to the wife's authority to acquire a separate domicil: The English rule generally holds the wife to her husband's domicil. The orthodox American rule 48 allows the wife, for purposes of divorce, to acquire a separate domicil. More recently the courts have permitted the wife, who is still on friendly terms with her husband, a separate domicil for tax purposes. 49


48 Ditson v. Ditson, 4 R. I. 87 (1856); Cheever v. Wilson, 9 Wall. (76 U.S.) 1089 (1869).

But in a Tennessee case the court allowed the wife a separate domicile with respect to the descent of property. The wife living amicably with her husband in Nebraska removed to Tennessee without fault by the husband and with a fixed intention of making Tennessee her permanent address. She lived twenty-one years in the latter state with her husband's acquiescence. The distribution of her personal property was allowed to follow Tennessee law.

This ruling seems a logical development in the process by which the legal identity of the wife is emerging from its common law eclipse.

2. Servicemen's domicile. War conditions naturally raised questions as to the domicile of servicemen for purposes of divorce. The Soldiers and Sailor's Civil Relief Act protected the rights of servicemen as defendants. When they were plaintiffs, a different problem was presented. In general, physical presence and intent are necessary to constitute domicile.

The domicile of persons in the Armed Forces has been the subject of decision in a number of cases. Recently a court held that a soldier stationed in Virginia who married in South Carolina could acquire an
Idaho domicil for the purpose of procuring a divorce. Here the soldier received permission to live outside the barracks and rented a room. With what the court found was bona fide intent, he registered as a voter and remained for the statutory period.

In another case the court found that a serviceman, a resident of Virginia who was stationed in Louisiana and married there, had a matrimonial domicil in Louisiana. The parties rented a room in a rooming house which they occupied for about a week. The court accepted the testimony of the plaintiff-husband that he intended to establish a matrimonial domicil in Louisiana, in spite of the fact that he was subject to military service and might be transferred at any time. It seems that practical considerations may have been given considerable weight.

In a third case the problem was not of acquiring a domicil, but whether one had been lost. An Illinois court found that a naval officer still was a "bona fide resident" of Illinois for the purpose of a divorce even though for a period of over twenty years he had made but a few brief visits to his original home. His testimony as to intent plus a provision of the Illinois constitution, to the effect that no person in the military or naval service of the United States shall lose his residence by reason of absence from the state because of such service, were factors.

Lack of adequate statistics as to divorce makes it impossible even to approximate the number of cases in which divorces were refused servicemen in the state trial courts because they were stationed on a military post. Nor can one estimate the number granted where, as in the Idaho case, residence off the post plus a statement of intention were held sufficient. It may have been that trial courts adopted some general policy on such matters in view of the disturbed condition of the times.

Examples of the statutes dealing with the subject are noted.


57 Del. Laws (1945) c. 225, p. 906 (attempts to bring its law into conformity with this decision in the first Williams case by eliminating certain jurisdictional requirements); Amendment proposed to Constitution of Ga. by legislative resolution, Ga. Laws (1943) No. 63, p. 68 (makes special permission for residents of military reservations to prosecute divorce in an adjacent county); Mo. Laws (1943) S.B. 153, p. 398 (one year's residence pre-requisite to suit for divorce); Mich. Pub. and Local Acts (1941) No. 2, p. 4 (plaintiff must have resided continuously for one year); Pa. Laws (1943) No. 25, p. 46 (spouse in the armed forces in time of war may make an affidavit in a divorce libel before commissioned officer in the armed forces authorized to take affidavits).
3. *The Williams cases*. So much has been written about the two *Williams* cases that there is no occasion here to do more than refer to some of the conclusions about them. An able and recent analysis of the

A succession of decisions led up to the Williams case: Cheever *v.* Wilson, 9 Wall. (76 U.S.) 108 (1869), held substantially that a divorce decree granted at the domicile of one spouse is entitled to full faith and credit in another state if personal service in the first state has been made upon the other within that state.

Maynard *v.* Hill, 125 U.S. 190, 8 S.Ct. 723 (1888), held that an Oregon divorce granted to the husband who was domiciled there was valid in Oregon as against the wife who was domiciled in the east.

Atherton *v.* Atherton, 181 U.S. 155, 21 S.Ct. 544 (1901), held that a divorce granted to the husband at the matrimonial domicile was entitled to full faith and credit in the state of the wife’s separate domicile even though she had not been personally served and had not appeared. Up to this time the courts had tended to regard divorce as a proceeding in rem and paid much attention to the marriage status.

Bell *v.* Bell, 181 U.S. 175, 21 S.Ct. 551 (1901); Streitwolf *v.* Streitwolf, 181 U.S. 179, 21 S.Ct. 553 (1901), where neither spouse was domiciled in the state granting the decree and the defendant was reached only by constructive service even though the procedure amounted to due process, the decree was not entitled to full faith.

Andrews *v.* Andrews, 188 U.S. 14, 23 S.Ct. 237 (1903), where neither party was domiciled in the state granting the divorce even though defendant personally appeared and consented to the jurisdiction the decree was not entitled to full faith and credit.

These cases indicate that application of the “full faith and credit” clause does not prevent the court of the instant forum from inquiring into the jurisdiction of the court granting the decree.

In Haddock *v.* Haddock, 201 U.S. 562, 26 S.Ct. 525 (1906), the court held that the domicile of the wife and domicile of marriage from which the husband fled in disregard of his duty had remained in New York. New York was warranted in refusing recognition to a Connecticut divorce decree even though the husband was domiciled in Connecticut and the divorce was valid there. The question of fault as between the spouses became more significant. Certain states, among them North Carolina, were enabled to give effect to their policy of protecting their own domiciled spouses as against foreign divorce decrees.

During the years since the Haddock case, various applications of the rule were made. For example: Davis *v.* Davis, 305 U.S. 32, 59 S.Ct. 3 (1938).

Where the plaintiff is probably domiciled in the state which granted the decree; and where this probability turns out to be justified; where the defendant appears and litigates the issue the decree is entitled to full faith and credit. Again it is noted that where the issue in the present forum is the enforcement of one of the incidents of the domestic relation such as a request for support, the urge to require application of the “full faith and credit” clause appears stronger than in cases of capacity to remarry.

Notes and articles on the first Williams case (not intended to be exhaustive):

decisions is made by Professor Herbert H. Baer. He sums up the effect of the majority opinion in the first case in the following words:

"Summing up the majority opinion amounts to this:

1. Domicile of one of the parties is the necessary jurisdictional element and the wrong or fault of the person establishing such domicile is immaterial to jurisdiction.

2. Nevada having found that Williams and Mrs. Hendrix were domiciled in Nevada may grant a divorce decree which in the absence of a contrary finding on domicile by North Carolina must be given full faith and credit in that state.

3. Whether North Carolina may refuse to give full faith and credit to the Nevada decree if it, contrary to Nevada, finds the parties were not domiciled in Nevada is not now passed on by the court. That will be decided later—meanwhile the case is remanded to the North Carolina Supreme Court which presumably will direct an inquiry be made at a new trial on the existence or non-existence of the Nevada domicile."

In the interval between the two Williams decisions the appellate courts in various states sought to adjust their rulings to a field of law from which the Haddock case had been eliminated. For example, in Illinois the court, in 1943, held that a Nevada divorce decree that is
valid in Nevada is entitled to full faith and credit in Illinois. In 1944 the same court held in a similar case that the use of the word "residence" in the Nevada law does not lessen the requirement that there be an established domicile in Nevada if the decree is to receive full faith and credit in Illinois. Illinois may determine for itself whether there was a bona fide domicile in Nevada. Colorado also held that a decree of divorce is not entitled to full faith and credit where it is granted on constructive service by a court of a state in which neither spouse is domiciled even though the spouse against whom the divorce was obtained was personally served at her residence.

New York held that a divorce decree granted by another state is open to collateral attack on ground that the court which granted the divorce lacked jurisdiction. At least one of the parties must be domiciled in the granting state.

Massachusetts also refused recognition of an Idaho divorce where neither party was found to be domiciled in Idaho. Pennsylvania made a similar ruling sustained by the United State Supreme Court. And the Circuit Court of Appeals for the Ninth Circuit held that the first Williams case did not apply.

The second Williams case, in a sense, was given direction from a sentence in the opinion of the Court in the first case: "Nor do we reach here the question as to the power of North Carolina to refuse full faith and credit to Nevada divorce decrees."

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60 Stephens v. Stephens, 319 Ill. App. 92, 49 N.E. (2d) 560 (1943), noted, 32 ILL. B.J. 275 (1944); 22 Chi.-Kent L. Rev. 77 (1943).
61 Atkins v. Atkins, 386 Ill. 345, 54 N.E. (2d) 488 (1944), noted, 33 ILL. B.J. 164 (1945); 39 ILL. L. Rev. 191 (1944); 23 Chi.-Kent L. Rev. 90 (1944).
65 Commonwealth ex rel. Esenwein v. Esenwein, 153 Pa. Super. 69, 33 A. (2d) 675 (1943), affd., 325 U.S. 279, 65 S.Ct. 1118 (1945), wherein Justice Frankfurter for the Court said in part, at p. 281: "The Full Faith and Credit Clause [Const. Art. 4, Sec. 1] placed the Pennsylvania courts under duty to accord prima facie validity to the Nevada decree. The burden is on the litigant who would escape the operation of a judgment decreed in another State. Pennsylvania recognized that burden, but its courts were warranted in finding that the respondent sustained her burden of impeaching the foundation of the Nevada decree on the jurisdictional prerequisite of bona fide domicile." See 17 Temple L.Q. 466 (1943); 92 Univ. Pa. L. Rev. 421 (1944); 48 Dick. L. Rev. 112 (1944).
because, contrary to the finding of the Nevada court, North Carolina finds that no *bona fide* domicil was acquired in Nevada."\(^{68}\)

Professor Baer sums up the majority opinion in this second case as follows: \(^{69}\)

"Summing up the majority opinion in the second *Williams* case it appears that:

1. As in the first *Williams* case, domicile of one of the parties is the necessary jurisdictional element and the wrong or fault of the person establishing such domicile is immaterial to jurisdiction.

2. The Full Faith and Credit Clause does not prevent an inquiry into the jurisdiction of the court whose judgment is relied on in another state even though the record purports to show jurisdiction.

3. Although Nevada found that Williams and Mrs. Hendrix were domiciled in Nevada and in the light thereof could grant a decree of divorce "unassailable" in that state such finding of domicile was not conclusive on North Carolina.

4. North Carolina, in the protection of its social institutions, may independently examine into the question of the Nevada court's jurisdiction, that is, it may for itself determine if the parties obtaining the divorce decrees were domiciled in Nevada. In doing so, however, it may not disregard the Nevada decrees but must accord them 'respect.'

5. The duty of 'respect' is satisfied where the fact finding body in North Carolina is instructed that the Nevada decrees are *prima facie* evidence of domicile in that state and where the finding of lack of domicile by the North Carolina jury is 'amply supported by evidence' and the result of 'fair determination.'"

Professor Baer suggests some of the serious questions which remain: \(^{70}\)

"1. Does the rule of the first *Williams* case apply when the spouse left at home seeks support?

2. Does the rule of the second *Williams* case permitting the state of matrimonial domicile to question the jurisdictional fact apply to the other forty-six states as well?

3. Could the spouse left at home rely on the Nevada divorce if he did not contest it and remarry on the faith of it, or would he then too be guilty of bigamy?

\(^{68}\) 317 U.S. 287 at 302, 63 S.Ct. 207 (1942).

\(^{69}\) Baer, "So Your Client Wants a Divorce," 24 N.C. L. Rev. 1 at 25 (1945).

\(^{70}\) Id. at 30.
4. Are property rights to be determined by the Nevada decree or by a local jury reinquiring into the fact of domicile?

5. If there had been a contest between the spouses in Nevada on the question of jurisdiction, would that bar either the state of matrimonial domicile or any other state from relitigating the jurisdictional fact? Would it bar some other person claiming property interests?"

By way of comparison the action of Argentina in recognizing a Uruguay divorce may be mentioned.71

D. Attacks upon Foreign Divorce Decrees

A variety of devices is available for attacking a foreign divorce decree. In addition to the orthodox methods of estoppel, a declaratory judgment and an injunction have been tried.

A New York court 72 was faced with the following problem: The parties were domiciled in Connecticut. The wife went to Nevada for a divorce which she obtained by default. The husband in Connecticut secured a declaratory judgment that the wife's residence in Nevada was merely for the purpose of the divorce. The wife returned with her divorce to New York. The husband sued her for malicious prosecution. The court dismissed the suit. The case is interesting as an illustration of the ineffectiveness of the law in preventing a spouse from procuring a foreign divorce even on colorable grounds.

In respect to injunctive relief it appears 73 that there are three major grounds for granting an injunction to restrain a foreign divorce proceedings: an evasion of the laws of the domicil or of a strong public policy; undue hardship; fraud.

71 Divorce in Matrimonial Domicil Held Entitled to Recognition in Argentina Where Divorce is Not Granted. In Matter of U.I.T., (2d Civil Chamber of the Capitol 1940) 21 La Ley 440, H married in Delaware, which grants divorce, obtained a divorce in Uruguay, the matrimonial domicil. H then became a resident of Argentina and was refused a permit to marry on the ground that the divorce was invalid. Argentina law provides that no marriage even though contracted in a country granting divorce can be dissolved except by death. A treaty between Argentina, Uruguay, and others provides that the law of the matrimonial domicil shall govern the dissolubility of a marriage provided the ground for dissolution is admitted by the place where the marriage was contracted. Although the treaty applies only where the marriage was contracted in a signatory state the divorce should be recognized since Uruguay was the bona fide matrimonial domicil. 55 Harv. L. Rev. 1377 (1942).


An Ohio court issued an injunction against a Mexican divorce on the ground that the defendant had not established a bona fide residence in Mexico. Later, when the present plaintiff sought a divorce in Ohio and the defendant pleaded the Mexican decree, the court refused to recognize it because jurisdiction could not be conferred by the consent of the parties.

On the other hand, a New York court declined to enjoin a husband from proceeding with a Florida divorce because the divorce, if granted, would be void and therefore there would be no injury to the plaintiff.

The orthodox methods of attacking foreign divorces have provided a basis for employing equitable devices such as estoppel. The cases may be classified depending upon whether the attack is made by a first spouse, a second spouse, or some other person.

1. Attack by first spouse. Where a first spouse attacks a foreign divorce decree, his ability to succeed may be affected by a variety of factors. One of them may be whether the object of the proceeding is support rather than some of the incidents of marriage. A Pennsylvania court in response to an application for relief from a support order refused to recognize a Nevada divorce, thus apparently holding that the element of support makes no difference.

Another possible factor is fraud on the court granting the foreign divorce. This fraud is frequently failure of the foreign divorce plaintiff to acquire proper domicil in the foreign state. But such defects may be rendered of no effect if the opposite spouse so conducts himself as to waive his right to object or otherwise estops himself. The New York courts have been particularly active in the development of such principles of estoppel. In one case secured a Nevada divorce.

75 Goldstein v. Goldstein, 283 N.Y. 146, 27 N.E. (2d) 969 (1940), noted, 40 Col. L. Rev. 1255 (1940); 8 Univ. Chi. L. Rev. 141 (1940); 18 N.Y. Univ. L.Q. 94, (1940).
77 Vernon v. Vernon, 262 App. Div. 431, 29 N.Y.S. (2d) 736 (1941), noted, 41 Col. L. Rev. 1436 (1941). In Frost v. Frost, 260 App. Div. 694, 23 N.Y.S. (2d) 754 (1940), the court also held that a general appearance by in the Nevada proceeding precluded his later attacking a property settlement embodied in it. Noted, 54 Harv. L. Rev. 1060 (1941). In Krause v. Krause, 282 N.Y. 355, 26 N.E. (2d) 290 (1940), procured a foreign divorce and married W. While the decree was void for lack of jurisdiction, nevertheless it was held was estopped to deny its validity. See notes, 15 St. John's L. Rev. 107 (1940); 27 Va. L. Rev. 118 (1940); 20 Bost. Univ. L. Rev. 563 (1940); 9 Fordham L. Rev. 242 (1940); 10 Brooklyn L. Rev. 108 (1940). The majority of the court in this case did not expressly overrule the decision of Stevens v. Stevens, 273 N.Y. 157, 7 N.E. (2d) 26 (1937),
appeared after judgment and secured a modification of the decree with respect to alimony and custody of the child. The court held that although the original Nevada decree was invalid in New York, the modified decree was entitled to recognition.

But appearance in the foreign jurisdiction is not the only pitfall for the spouse who appears as defendant in the original divorce action. He may marry again. A New York court dealing with this situation held that the first *Williams* case did not apply and that the foreign plaintiff was not properly domiciled for purposes of a divorce but the subsequent marriage of the defendant spouse estopped him to succeed in a claim for a share in the estate of the other.

Similar problems of recognition of foreign divorces arise in criminal cases. A Pennsylvania court dealt with such a case in which the defendant, indicted for adultery, pleaded an Illinois divorce. The court recognized the validity of the divorce even though service was only by publication. In a similar case a federal court in Massachusetts had to deal with a woman who, accused of "fornication," pleaded a Mexican divorce. The court found the spouses domiciled in Massachusetts and refused to recognize the divorce.

The New York courts and those of other states which in the past have shown a reluctance to recognize certain foreign divorces granted under conditions contrary to the public policy of the forum are not the only ones faced with problems of decision.

A federal court held that estoppel did not prevent one of the spouses from contesting the validity of a Mexican divorce decree procured with the consent and cooperation of both parties. Another court, after the lapse of eleven years allowed a wife to assert fraud in the execution of a separation agreement. After execution of the agreement, procured a Mexican divorce in which neither H nor W appeared; he then married W and later died. A California court held the first spouse not estopped to attack a Mexican divorce even though both par-

where the judgment was directly on the marital status. In the *Krause* case the court held the matter involves a right or interest arising out of the marriage. In *Oldham v. Oldham*, 174 Misc. 22, 19 N.Y.S. (2d) 667 (1940), W with the aid of H secured a foreign divorce and then married him.


82 *In re Estate of McNutt*, 36 Cal. App. (2d) 542, 98 P. (2d) 253 (1940), noted, 25 Iowa L. Rev. 818 (1940); 25 Minn. L. Rev. 111 (1940).

ties had submitted themselves to the jurisdiction in a confession of judgment.

The underlying principle that a court of the forum is not required to afford full faith and credit to a foreign divorce decree where one party does not personally appear and is brought into the picture only by constructive service is emphasized by a Virginia court.84

2. Attack by second spouse. Where the attack upon the foreign divorce decree is made by the second spouse somewhat similar conditions prevail. The basic principles have been the subject of legal research.85 A second husband was permitted by a California court to attack a Nevada divorce decree.86 A Georgia court at the request of a second spouse refused to recognize a Mexican divorce.87

But, on the other hand, principles of estoppel or other equitable rules were invoked to prevent successful attacks upon certain other divorces. A federal court prevented a second spouse who had promised to pay for the divorce from urging its invalidity.88 Another federal court would not permit a second spouse, who had participated in a plan to secure the divorce by misdirecting the attorney as to the address of the defendant spouse, to attack the decree.89 A New York court in dealing with a Mexican "mail order" divorce, a second marriage, a subsequent Nevada divorce, and a property settlement, in the order named, held a second spouse estopped to attack the divorce.90 He had appeared without contest by a duly authorized attorney. Since the Nevada divorce established the validity of the previous marriage, the second spouse failed to secure his objective. In another New York case the court spoke in terms of "clean hands" with respect to an attack by the second spouse of a Nevada divorce and refused his request.91

3. Attack by third parties. As to attacks by third parties, a child was permitted to attack a Florida decree.92 The Florida decree was invalid for lack of jurisdiction. Neither spouse was domiciled there and

87 Christopher v. Christopher, 198 Ga. 361, 31 S.E. (2d) 818 (1944), noted, 7 Ga. B.J. 360 (1945).
92 In re Lindgren's Estate, 293 N.Y. 18, 55 N.E. (2d) 849 (1944), noted, 93 UNIV. PA. L. Rev. 215 (1944).
the judgment was not entitled to full faith and credit in New York. The husband, and father, was estopped to deny the validity of the Florida decree because he invoked the aid of the Florida courts. But the majority of the court held that the father's disability did not attach to the child, nor was it an answer that \( W_2 \) had by her marriage obtained marital property rights. The child here was not seeking to reestablish the marriage relation of \( H \) and \( W \), but to secure the estate. By the decree \( W_2 \) is denied a widow's share. The case is an illustration of the reluctance of the New York courts to recognize a Florida divorce.

In another case \( H \) secured a Nevada decree from \( W_1 \) and married \( W_2 \). \( W_1 \) then secured a New York divorce from \( H \) on the ground he had always been domiciled in New York and that no prior valid divorce had been obtained. Upon the death of \( W_2 \) both \( H \) and a sister of \( W_2 \) applied for letters of administration. The court held that the effect of the New York divorce decree bound \( H \) and \( W_1 \) and that it might declare invalid the Nevada divorce decree; but that the effect of the New York decree did not extend to a sister of \( W_2 \) who was a stranger to that suit. Since no evidence was introduced in the present situation to the effect that \( H \) had not been a bona fide domiciliary of Nevada, the Nevada decree in the present action is entitled to full faith and credit. It should be noted that this case was decided after the first Williams case.

It is too soon to risk much of a prediction as to how far the principles underlying these cases are affected by the decisions in the two Williams cases. As matters stand, it seems justifiable to refer to them here.

E. Alimony

The legislatures were not as concerned with alimony as with other problems in the domestic relations field. But there was, nevertheless, considerable activity among the text writers.

1. General nature. The general nature of alimony—whether it is a debt, an obligation arising out of a status or something \textit{sui generis} is a major question. Contributions to the thinking on the subject have been made by the courts.

\footnotesize
\begin{itemize}
  \item \footnotesize In re Holmes Estate, 291 N.Y. 261, 52 N.E. (2d) 424 (1943).
  \item \footnotesize Cal. Stats. (1943) c. 912, p. 2770 (a divorced spouse is not entitled to alimony from the estate of the other party if he or she has sufficient funds); N.M. Laws (1943) c. 46, p. 66 (court authorized to modify an alimony order); N.Y. Laws (1940) c. 226, §§ 2, 3, p. 821 amending N.Y. Civ. Prac. Act (1941) § 1169, and inserting new § 1140(a), 10 FORDHAM L. REV. 119 (1941).
  \item \footnotesize A symposium on alimony appears in 6 L. & CONTEM. PROB. 183 (1939); 27 VA. L. REV. 914 (1941); 28 KY. L.J. 233 (1940); 5 MONT. L. REV. 71 (1944); 30 IOWA L. REV. 275 (1945); 88 UNIV. PA. L. REV. 880 (1940).
\end{itemize}
A New York court dealt with a statute which gave the court discretion as to alimony in situations where the wife is living habitually with another man.\(^6\) In the instant case the alimony decree was entered ten years before the statute was adopted. The court held that alimony allowed by a final judgment is a vested property right and not affected by a subsequent statute. It further affirmed the position that absolute divorces and the rights incident to them are purely statutory.

In order to obtain alimony it is generally necessary to prove a marriage. A Georgia court was faced with a demand for alimony to be paid by a husband under the age of seventeen years.\(^7\) A marriage by a person of such age is voidable; but the court held that it “must be treated as void so far as alimony is concerned, unless and until it is ratified by him after reaching such age” even though the alimony “is claimed only support of a child.”

The need for a valid marriage as a basis for the alimony action is further emphasized in a Kentucky case.\(^8\) There the wife was married to another man at the time of her marriage to H. The court held the second marriage void and refused an allowance of alimony. This would appear the usual procedure in the absence of a statute.\(^9\)

Fault of the wife is also generally grounds for refusing requests for alimony; but even there the courts sometimes make an allowance to the wife but hesitate to call it alimony.\(^10\) A California court refused to grant alimony to a wife whom the husband had divorced for cruelty—treating the divorce decree as final.\(^11\) But a federal court, under a statute, allowed alimony and custody of children to an adulterous wife.\(^12\)

The nature of alimony also is considered in situations where creditors or others seek to reach the source from which it comes. Bankruptcy cases afford an illustration. A federal court dealt with a bankrupt wife and held that the divorce decree awarding her a lump sum payable in monthly installments was a final property settlement.\(^13\) Consequently, the judgment passed to the trustee. It was not a decree for payments of future alimony.

\(^6\) Waddey v. Waddey, 290 N.Y. 251, 49 N.E. (2d) 8 (1943), noted, 19 Ind. L.J. 162 (1944).
\(^7\) Eskew v. Eskew, (Ga. 1945) 34 S.E. (2d) 697.
\(^8\) Rose v. Rose, 274 Ky. 208, 118 S.W. (id) 529 (1938), noted, 23 Minn. L. Rev. 387 (1939).
\(^9\) See Bell v. Bell, 122 W.Va. 223, 8 S.E. (2d) 183 (1940), noted, 47 W. Va. L.Q. 343 (1941).
\(^10\) 28 Ky. L.J. 233 (1940).
\(^13\) In re Fiorio, (C.C.A. 7th, 1942) 128 F. (2d) 562.
But it is in the field of spendthrift trusts that recent activity is noticeable. The general policy regarding spendthrift trusts has in some states been modified by statute: for example allowing a divorced wife to reach that part of the income of a spendthrift trust over and above the amount necessary to support the beneficiary. The subject received consideration if not final determination in a Maryland case. The more conservative point of view was taken by a federal court in refusing to allow the wife to share in the income of the trust. The case arose in Wisconsin, and, there being no statute and no decision on the point in that state, the court followed the weight of authority.

In two other cases the question was presented of taxation of the income of alimony trusts. In the first case obtained a Nevada divorce incorporating an agreement which provided an irrevocable alimony trust with as beneficiary. The corpus later was to become hers absolutely. The court held the trust income not taxable to .

In the other case obtained a New York divorce incorporating an agreement providing for an irrevocable trust composed in part of bonds. guaranteed principal and interest. Because of this and the fact that he was a party to the New York divorce the court held the income taxable to him.

As to the factors which the court may take into account in determining the amount of alimony, a Georgia court, having regard to the context, sustained the words "such alimony should be awarded as to secure to her the same social standing, the same comforts and luxuries of life, which she probably would have enjoyed but for the enforced separation."

Matters of procedure are so largely of local concern as scarcely to warrant inclusion in such a general note as this, but reference to a decision may serve as a reminder of this aspect of the law of alimony.

A California court heard a divorce action in which there was a property settlement but no prayer for alimony. 's attorney did not formally appear. The lower court refused to recognize the property

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settlement agreement but awarded alimony. The court considered a
statute providing in part that the "relief granted to the plaintiff if
there be no answer, cannot exceed that which he shall have demanded
in his complaint" and found that it did apply to divorce proceedings.
Consequently, an award of alimony under the present circumstances
was improper.

A North Carolina court decided a question in the field of contempt.
A consent judgment without pleadings was entered providing for in­
stallment payments. The order contained, inter alia, the following
provision: "The money payments provided herein shall be more than
a simple judgment for debt. They shall be as effectively binding upon
the plaintiff \[H\] as if rendered under and by virtue of the authority
of Section 1667, Consolidated Statutes...." 110 The question was
whether the judgment was in reality a judgment for alimony or
whether it was merely an order to pay a debt. If it was the latter the
constitutional provision against imprisonment for debt would prevent
carrying through the punishment for contempt. The majority held
this was a judgment for alimony which in the majority of jurisdictions
in this country may be enforced by contempt.

2. Modification of alimony award. A second major problem in
the field of alimony relates to the principles upon which alimony de­
crees will be subject to judicial modification.111

The difficulties encountered by the courts in finding the power to
modify have been lessened in some jurisdictions by statute. A Virginia
court had occasion to assess the significance of that statute.112 The stat­
ute adopted ten years ?fter the decree awarding the alimony purported
to allow modification of alimony "whether the same has been hereto­
fore or hereafter awarded." The court held the act constitutional on
the theory that even a final award of alimony does not create a vested
property right but is merely a perpetuation of \[H\]’s duty to support \[W\].

Requests for modification, usually based on changed circumstances
are made by both parties. An unusual request appears in a federal
case.113 The wife asked for an increase, claiming that a federal tax
statute had shifted the burden of the tax from \[H\] to \[W\], and that her
request was to be put back in the position she previously occupied. The
court declined, saying that a court of equity does not have power to
adjust tax burdens in a way other than intended by Congress.

110 Edmundson v. Edmundson, 222 N.C. 181 at 182, 22 S.E. (2d) 576 (1942),
noted, 21 N.C. L. Rev. 307 (1943).
111 For a general discussion of the topic see 30 Iowa L. Rev. 275 (1945); 88
Univ. Pa. L. Rev. 880 (1940); 6 Md. L. Rev. 238 (1942).
112 Eaton v. Davis, 176 Va. 330, 10 S.E. (2d) 893 (1940), noted, 27 Va. L.
Rev. 415 (1941); 19 N.C. L. Rev. 388 (1941).
Detroit L.J. 38 (1944).
An Illinois court dealt with a settlement providing for install­ments. 114 H petitioned for modification when W remarried. The court expanded the original definition of alimony to include this settlement in full of all property rights and found that W's remarriage was a ground for modification.

Alimony in annulment actions has received attention of legal writ­ers in New York. 115

Where the parties have made an agreement regarding support, alimony or property, the question of modification and the rights of the wife are worthy of attention. In a Massachusetts case 116 the divorce decree did not mention alimony or incorporate the agreement. The court later declined to modify, saying that its power in this respect was limited to instances where the agreement is held to be superseded by the decree of the court. This represents the orthodox reluctance of courts to disturb an existing decree especially in cases where it is a gross sum settlement and fair to the wife.

A much more liberal if not extreme view is observable in a New York case 117 where a lump sum agreement was accepted by W, in the course of a separation action which was abandoned. She spent the money, and ten years later, under the New York statute, asked for support. The court held that the husband's duty to support is a con­tinuing one so that the court at any time may grant alimony where the consideration for release has been exhausted. Under this holding it would appear extremely difficult, if not impossible, for a husband to be released from the duty to support.

Still another substantial step was taken in giving the court power to modify their decrees in divorce actions when these decrees are based on agreements between the parties. One separation agreement was adopted by a California court 118 in its decree. H later secured a modi­fication. Still later W sued for the difference between $200 per month, as provided in the agreement, and $100 per month, as required of H under the modification order. The court held that the agreement, upon approval and adoption by the court, merged in the decree and lost its identity. So the modification order is conclusive and W has only one remedy—under the modification order. Previously the courts generally allowed W alternate remedies—and of course she naturally

115 10 FORDHAM L. REV. 119 (1941); 15 ST. JOHN'S L. REV. 338 (1941).
117 Kyff v. Kyff, 286 N.Y. 71, 35 N.E. (2d) 655 (1941), noted, 11 BROOKLYN L. REV. 106 (1941); 8 CURRENT LEGAL THOUGHT 107 (1941).
took the one which promised her the greater return. The holding appears logical.

A different judicial approach to the same type of problem, though one far more orthodox, is illustrated by a New York case. Here, also, the separation agreement was embodied in the divorce decree. H now asks modification. The court held that under the New York statute it had the power to modify decrees even though the decree adopted the agreement. If the agreement stood alone the consent of the parties would be necessary to change it. This appears to coincide with the majority rule.

One may argue that the emancipation of woman, thanks to legislation and improved social and economic conditions, has advanced to the point at which the husband's duty to support the wife is no longer necessary. Following that line of reasoning it would be proper to require the husband to support his minor or disabled children but not the wife. She in turn might make pre-marital demands for a condition of economic security by ante-nuptial agreement, by insurance or in other ways. Once admitting the institution of alimony, however, it seems clear that behind the rules of law and decisions of the courts some wives who deserve such aid fail to receive it. Others use the machinery to annoy their husbands. The idea of an insurance fund for the purpose, perhaps as part of a social security program, might result in more money to the wife, less controversy between husband and wife and less expense to the taxpayer. How husbands, freed from this age old legal duty would react is anyone's guess.

F. Property Rights in the Domestic Relations Field

It is impracticable even to attempt a survey of the progress in this field of property rights. The laws in the various states differ substantially and each jurisdiction deserves a survey of its own. The subject, however, requires some comment if only to suggest the need for a more intensive treatment.

1. In common law jurisdictions. Those states which take their concepts in this field from the common law are still engaged in breaking down one of its fundamental concepts—that husband and wife are one person. Some of this tendency is indicated in the statutes of which illustrations are noted.


120 Ala. Gen. Acts (1943) No. 445, p. 408 (wife may lease her lands and tenements without assent and concurrence of her husband); Ark. Acts (1943) No. 69 § 2, p. 100 (married woman may dispose of any property she may own in her own name and of her own separate estate; sales and conveyances are validated); Fla. Gen. Laws (1943) vol. I, c. 21696, p. 82 (wife may become a partner or contract with her husband or another; may give and receive power of attorney to and from her husband,
The duty of a husband to support his wife and the circumstances under which he is relieved of that duty appear in several cases. In Virginia H and W had H’s mother in the home. W sued for separate maintenance on the ground that H was too devoted to his mother and that the mother exercised constant supervision over W in the home. The court, confronted with a conflict of temperaments, declined to order H to pay alimony and stated a general rule that:

“The marital duties of a husband do not require him under any and all circumstances to support and maintain his wife in a home separate and apart from other members of his family whom he is under obligation to support and maintain. ... a husband does owe the wife the duty of protection from cruelty and wrong, and from whatever other danger may threaten her. ...”

At common law a married woman’s contract of suretyship was void. Under the statutes giving W a more independent status the common law has been changed. As an example, a Kentucky statute read:

“No part of a married woman’s estate shall be subjected to the payment or satisfaction of any liability upon a contract made after marriage to answer for the debt, default or misdoing of another, including her husband, unless the estate has been set apart for that purpose by mortgage or other conveyance. ...”

including power to execute and acknowledge deeds owned by her or jointly with husband. Powers of attorney—wife to husband and vice versa—are validated; Fla. Gen. Laws (1943) vol. I, c. 21932, p. 484 (wife has contractual powers over her separate property or estate as if unmarried); Idaho Laws (1941) c. 62, p. 123 (the law gives some comfort to husbands by allowing them to exercise sovereign contractual authority over their separate property); La. Acts (1944) No. 286, p. 836 (wife by written instrument may declare that she reserves all the fruits of paraphernal property for her own separate use and benefit and her intention to administer such property separately and alone; instrument to be executed before a notary public and recorded); Minn. Laws (1943) c. 26, p. 37 (legalizes retroactively all conveyances of real property made by one spouse to the other); Neb. Laws (1945) c. 110, p. 328 (property of a married woman, with certain exceptions, is made liable for necessaries of life furnished to her or her husband or family); R. I. Acts & Resolves (1944) c. 1397, p. 27 (permits husband and wife to engage in business partnership); Tenn. Pub. Acts (1943) c. 131, p. 358 (a homestead or real estate when owned by a married woman may be sold and conveyed by her sole act and deed); Wis. Laws (1944) c. 195, p. 303 (recognizes the creation of a joint tenancy in real or personal property by deed, transfer, or assignment from husband to wife or wife to husband). See also, Neuner, “Marital Property and the Conflict of Laws,” 5 La. L. Rev. 167 (1943); Oliver, “Community Property and the Taxation of Family Income,” 20 Texas L. Rev. 532 (1942).

This statute obviously provides a method by which \( W \) may become surety.\(^{128}\)

In Florida a 1943 statute empowered a married woman to contract, to sue, to manage her property, sell and mortgage her property, and to execute any kind of instrument without joinder by her husband, and act “in all respects as fully as if she were unmarried.”

Until this statute was passed, the promissory notes of married women executed in Florida were void in Florida. A case involving a note signed by \( H \) and \( W \) came up in the federal court.\(^{124}\) It held the statute not retroactive.

The statutory obligation of \( W \) to support \( H \) is a further step in the direction of separation of identity. A New York court refused to apply the statutory duty because of the conduct of \( H \).\(^{125}\)

A federal court in Michigan\(^{126}\) dealt with an agreement between \( H \) and \( W \) by which she was to pay him $500 a month until the parties no longer desired the agreement. After divorce, \( H \) sued \( W \) for back payments. He had given up his employment in order to accompany her on her travels. The court, applying the more orthodox rule, held that there was no consideration for the promise by \( W \) and, even if there were, it was contrary to public policy.

2. \textit{In community property jurisdictions}. In the field of community property since the statutes vary considerably the most promising approach appears to be to take a few illustrations from each jurisdiction.

\textit{California}. Under the California statute the courts considered cases on problems such as the following:

Determining the character of acquired property. \( H \) and \( W \) owned land stated in the deeds to be held in joint tenancy. Upon a divorce the lower court considered the land to be community property, but on appeal it was held that the only intention showed it to be a joint tenancy.\(^{127}\)

In another case\(^{128}\) \( W \) borrowed money from her brother upon her unsecured note and purchased land with it. In a divorce suit the note was overdue. \( H \) maintained that the property belonged to the community because of the presumption that attaches to property purchased with borrowed funds. \( W \) contended that the property was conveyed to her by an instrument in writing which, under the statute, raises a

\(^{128}\) See 33 \textit{Ky. L.J.} 66 (1944).
presumption that it was her separate property. The court held that the presumption from the written instrument is not overcome by evidence that the funds were borrowed. $H$ must also show that there is no intention to make a gift.

In still another case the problem was to divide expectancies of community property at the time of the divorce. The item causing the major question was compensation not yet, but to be, received by $H$ as a member of the Fleet Reserve, U.S.N. The court held it was not subject to division because it was an expectancy.

Again the liability of $H$ to support $W$'s indigent parents was considered. Here plaintiff sued her married daughter for support. The daughter, as a housewife, had no separate property; but depended solely for support upon $H$. The court found that the statute imposes no duty on $H$ in such a case and it would not require a division of the community property for the purpose.

Finally came the matter of testamentary disposition by $W$. The money was secured from the operation by $H$ and $W$ of a candy store. $W$ by will, left her money to a sister. By statute, one-half of the community property is subject to testamentary disposition. The money was collected prior to 1920 and the statute passed in 1923. The court held the act not retroactive with respect to rents, issues and profits acquired prior to its passage.

Louisiana. In Louisiana a similar variety of matters required judicial determination. The right of an injured wife to sue for Workmen's Compensation under the statute was upheld on the theory that Workmen's Compensation is personal to and for the benefit of the worker so long as he is living. It is not like $W$'s wages—a community asset for which $H$ must sue.

In another case the right of $W$ to sue in her own name for personal injuries was not questioned but when she sued for loss of salary sustained as result of an accident the court held the salary was community property for which $H$ must sue.

Rights of action between $H$ and $W$, forbidden at common law, are permitted under certain circumstances in community property jurisdictions.

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129 French v. French, 17 Cal. (2d) 775, 112 P. (2d) 235 (1941), noted, 30 Cal. L. Rev. 469 (1942).
132 Brownfield v. Southern Amusement Co., 196 La. 73, 198 S. 656 (1940), noted, 3 La. L. Rev. 641 (1941).
A Louisiana court permitted $H$ during marriage to sue $W$ for restitution or value of his property wrongfully taken by her.\textsuperscript{184} The action was in "quasi" contract.

In a somewhat similar situation $H$ sued $W$'s employer for an injury sustained in an automobile accident. It was objected that any recovery would fall into the community, half of which is $W$'s property, and that thus she would benefit from her own negligence. The court, however, held that the recovery merely reimburses the community for a loss it has sustained.

In another case the contest was between $W$ and a creditor of $H$ for a debt arising before marriage. Land which was community property had been seized and sold in execution against $H$, and $W$ was attempting to recover. The court held that even though the land was community property its creditors before marriage could seize it.\textsuperscript{135}

In a tax case it was held that the entire cost of settling a decedent's estate is deductible from it. One-half is not chargeable to the surviving spouse because the community terminated at the death of decedent and was no longer capable of being charged with such expenses.\textsuperscript{136}

\textit{Oklahoma}. In this state one of the features was the adoption in 1939 of a community property law.\textsuperscript{187} This act came before the courts in a tax case\textsuperscript{138} and it was held that it was not effective as a means of dividing the federal income tax liability of $H$ and $W$. The court concluded that Oklahoma was originally a common law state—that the community property act represents a present but not fundamental policy of the state "to permit spouses, by contract, to alter the status which they would otherwise have under the prevailing property system in the State. Such legislative permission cannot alter the true nature of what is done when husband and wife, after marriage, alter certain of the incidents of that relation by mutual contract."\textsuperscript{139}

\textit{New Mexico}. The court, following a rule in effect in the majority of community property states, held that the decedent's estate or his share of the community must bear the expenses of the funeral.\textsuperscript{140}

\textit{Oregon}. Legislative attention was given to the subject of community property.\textsuperscript{141}

\textsuperscript{184} Kramer v. Freeman, 198 La. 244, 3 S. (2d) 609 (1941), noted, 16 Tulane L. Rev. 149 (1941).
\textsuperscript{136} Vaccaro v. United States, 4 P.H., 1944 Fed. Tax Serv. ¶ 62,646, noted, 6 La. L. Rev. 106 (1944).
\textsuperscript{187} Daggett, "The Oklahoma Community Act," 2 La. L. Rev. 575 (1940).
\textsuperscript{139} Id. at 46.
\textsuperscript{140} Langhurst v. Langhurst, 49 N.M. 329, 164 P. (2d) 204 (1945).
\textsuperscript{141} Ore. Laws (1943) c. 440, p. 656 (providing for the community ownership of property by husband and wife).
Texas. The power of $W$ to convey her separate property to the community was the subject of litigation. $H$ conveyed community real property to $W$, as her own separate property. Later $W$ deeded the property to a third person who on the same day deeded it to $H$ and $W$ as community property. $W$ became insane and the property was sold at trustees' sale. $W$ protested the property was hers but the court found that it was community property.\footnote{Taylor v. Hollingsworth, (Texas 1943) 176 S.W. (2d) 733, noted, 22 Texas L. Rev. 507 (1944).}

The general rule is that $W$'s statutory rights in the community estate cannot be altered by an agreement between herself and $H$ to convert the property into separate property. An attempted gift of community property, then, is ineffectual because only separate property is the subject of gift.

Washington. In two cases life insurance was involved. In one,\footnote{Metropolitan Life Ins. Co. v. Skov, (D.C. Ore. 1943) 51 F. Supp. 470, noted, 18 Tulane L. Rev. 487 (1944).} policy on the life of $H$, $W$ was named beneficiary but the right to change beneficiary was reserved. $W$ delivered both policies to $H$ before the divorce. $H$ then married $W_2$ and named her as beneficiary. The company made disability payments under the policy to $W_2$. $W_2$ then divorced $H$ and $H$ changed the beneficiary again. The contest was among the three persons who had been named as beneficiary. The court favored the third beneficiary. $W$ consented to change of beneficiary by delivery of property. $W_2$ was reimbursed by disability payment and after the divorce had no further interest. Since the policy was property of the community of $H$ and $W$, it was held, after the dissolution of the marriage, by $H$ and $W$ as tenants in common; $W$ was therefore entitled to a share to reimburse her.

Another case\footnote{In re Towey's Estate, 22 Wash. (2d) 212, 155 P. (2d) 273 (1945), noted, 20 Wash. L. Rev. 167 (1945).} also involved a change of beneficiary from $W$ to his estate. The court held that $H$ as manager of the community may change beneficiary but that the whole of the proceeds are subject as community property to the community debts.

G. Custody of Children

Two major positions are presented in cases involving the custody of children—what the parent thinks is for the best interest of the child; and what the court thinks on the same subject.\footnote{Parental Authority and the Law, 200 L.T. 129 (1945). See also the Symposium, "Children of Divorced Parents," 10 Law and Contem. Prob. 697 (1944).} Those who read the opinions in the appellate courts have difficulty in visualizing the background facts from which the judges have made selection of those
deemed significant. It is possible that another judge faced with the same background material would select other facts or place a different emphasis on them. Consequently, while there is much said judicially about the principles which should limit the discretion of the court, one should remember that it is only the trial judge who actually sees the parties. The appellate court tries the case on the record. The legal scholar or other observer who reads the appellate opinion is even further removed from reality. In cases dealing with the welfare of children this inability to secure first hand information makes it difficult to discuss the application and effectiveness of the general principles. Consider the following cases:

In the District of Columbia court the court found W guilty of adultery but gave her custody of two of the three children. In California the holding was that before the court can deprive a mother of her right to the minor's custody and give the child to strangers there must be a finding that the mother is an unfit person. These two tests—the unrestricted discretion of court as to what is for the best interests of the child and the necessity for making a court record of unfitness against the mother with its consequent effect upon the mind of the child—present difficult alternatives. "Unfitness" suggests moral unfitness and this may be a factor but not necessarily the only one. Perhaps the answer lies, not so much in the choice of words with which to inscribe the record—a practice dear to the heart of everyone with legal training,—but rather a more careful selection and more adequate training of those judges who must exercise the discretion. A government of laws and not of men may have been a traditional goal of our system of jurisprudence. But, where, as here, discretion is inescapable from an administrative viewpoint, and where every case differs from every other case, and the facts of no case are likely to be quite the same two days in succession, rules without the most sensitive discrimination in the application may create lasting injury or hardship to the child.

The problem is not simply where the request to the court is for modification of a previous order. Here the orthodox rule is that a change from that existing at the time of the original order is necessary to warrant the court in acting. In one case Fuller v. Fuller, 197 Ga. 719, 30 S.E. (2d) 600 (1944), noted, 7 Ga. B.J. 357 (1945).
poisoning was not in progress before or at the time of the divorce decree. It seems that there may have been other considerations in the mind of the court but if the welfare of the child is the major objective it is not necessary to make it dependent upon the sufficiency of a pleading.

When the contending parties are the parents and a third person the essential problem remains the same. In a Louisiana case the child was being cared for properly by his grandparents. The court placed the burden upon the father of showing the need for the change. This is somewhat different from the traditional common law rule which gave the father substantial control over the person of the child.

A ruling more favorable to the rights of the parent is invoked in another Louisiana case. Here the paternal grandmother instituted proceedings in the juvenile court charging that the child was neglected. The child’s sixteen year old mother produced as a defense a decree of the civil court, which also has jurisdiction over children, giving her custody. The appellate court dismissed the grandmother’s claim.

Still another case—this one in Florida—gave the child to the maternal grandparents who had reared him from infancy. The language of the court summarizing the environment provided by the grandparents for the boy has a literary quality.

When the contention is between the natural and adopting parents the same fundamental issue is presented. In a Pennsylvania case the natural parents, who married shortly before the child was born, signed a contract allowing adopting parents to have custody of the child for a year and providing that, at any time during the year, they could adopt the child. The court found that it was for the child’s best interest to be with his natural mother.

Presumptions that the child is better off with his natural parents and that the best interests of the child are to be sought provide a basis for a decree or order. But the process of finding, or perhaps selecting, the legally significant facts in cases of this sort is not quite the same as that employed where property matters are before the court. The report of the probation officer or social case worker reveals more than the traditional statement of facts in an opinion. Perhaps more cases should be taken up on appeal so that additional material would be available for attempts at prediction by a harassed bar.

150 In re Sherrill, 206 La. 457, 19 S. (2d) 203 (1944), noted, 19 Tulane L. REV. 404 (1945).
Where the controversy involves domicil of a minor as between two counties in the same state the same problem arises. In a California case, following a divorce in county A, the child was awarded to the mother. The father tried without success to have the decree modified in the same county. Later, while the son was visiting him in county B, the father started the present case. The county B court was held to have jurisdiction to deal with the matter. The court interpreted the statute as conferring jurisdiction upon the court of the county where the minor is temporarily domiciled or residing. The statute in question made no reference to jurisdiction, so interpretation was necessary. That the interpretation followed the traditional view of the welfare of the child is not surprising, but one wonders at the possibility of two courts in different counties viewing the facts in different ways.

When the problem is broadened to include conflicts between the courts of various states this possibility of disagreement is always present. In a Kentucky case a West Virginia decree gave custody to W. H took the children to Kentucky before the decree was granted. The court enforced the foreign decree.

In a Tennessee case an Ohio decree gave custody to W. H fled to Tennessee with the child before the custody decree in the divorce action was granted. This decree also gave final custody to W. W, in Tennessee, brought habeas corpus proceedings to enforce her right to custody. H contended circumstances had changed and the child’s best interests would be served by allowing him to remain in Tennessee. The court held that the foreign decree was res judicata as between the parties, subject only to modification by the court granting the decree. A qualification of this rule is that if the child is in a new state the courts of that state, upon a showing of a change of circumstances affecting the best interest of the child, may act. This is the general view. A minority viewpoint considers that custody decrees are based upon local concern and are not affected by principles of comity. Perhaps in an actual case much the same result would be accomplished under either rule.

A further example of the broad interpretation upon these rules is in a District of Columbia case. Here a California decree awarded custody to W. H again fled with the child to the District of Columbia. There the court held that a custody decree of a foreign jurisdiction

158 In re Burket’s Guardianship, 58 Cal. App. (2d) 726, 137 P. (2d) 475 (1943), noted, 17 So. CAL. L. Rev. 73 (1943).
154 See 53 HARV. L. Rev. 1024 (1940); 29 Ky. L.J. 101 (1940).
156 State ex rel. French v. French, (Tenn. 1945) 188 S.W. (2d) 603, noted, 19 TENN. L. Rev. 90 (1945).
which is subject to modification at any time during the child's minority
and a custody decree of another foreign jurisdiction based solely on
technical, unlawful detention are not entitled to full faith and credit
in the District of Columbia. The child's interest is the major consider-

One wonders at the effect of this dramatic litigation upon the chil-
dren themselves. Are they settled when the final decree is signed?

H. Miscellaneous

Two additional decisions are of interest though not readily classi-
fied under the foregoing heading.

A California court construed its legitimation statute in such a way
that it operated even though neither parent nor child was domiciled
in the state at the time of the legitimating acts.158

A federal court held that a child had sufficient interest in the main-
tenance of the family to support an action for alienation of affections
against a woman who had enticed away the father.159 This decision
suggests a reaction against the recently marked legislative policy of
abolishing the right of action for alienation.

I. Conclusion

Since it appears unlikely that the American Law Institute will
undertake a Restatement of Laws relating to the Family, the next
question is what else can be done. A model code might produce satis-
factory minimum standards and serve as a rallying center for discus-
sion and a point of departure. Perhaps even more useful would be a
statement of some of the underlying principles. If we could agree
upon the point at which the law alone can do a satisfactory piece of
work on behalf of the family and its members we could tell more
clearly when and where interprofessional cooperation should begin. If
we could also ascertain the point at which the law, because of its dimin-
ishing effectiveness, should cease to concern itself with the case, the
sister professions might understand when and where they should as-
sume complete responsibility. The problem of the family is wider
than the law.

Principles of law in this field require a degree of certainty or no
attorney would venture to predict a course of conduct for his client.
But flexibility in administration is also necessary because of the infinite
variety of individual characteristics in the families and their members
with whom the law deals. To attain and continue to hold this balance
it appears that our objectives, administrative procedure and sanctions

158 In re Lund's Estate, 26 Cal. (2d) 472, 159 P. (2d) 643 (1945), noted, 59
Harv. L. Rev. 128 (1945).
need continuing impersonal re-examination in a rapidly and perennially changing world. The law in the field of domestic relations is behind the times. Granting that it may never successfully keep quite abreast of informed public opinion, too much lag is a factor to be avoided. Some permanent legislative commission in each state composed of representatives from all groups interested in the subject would appear to be indicated.

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