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Family Law - Survey of Illinois Law for the Year 1951-1952

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statute, when the only state remedies seemed to be the three blind alleys of habeas corpus,\textsuperscript{51} writ of error,\textsuperscript{52} and writ of error \textit{coram nobis}.\textsuperscript{53} The opinion, however, discloses two possible limitations upon the prisoner’s right to review. In the first place, the court does not foreclose consideration of a former adjudication as evidence on the question as to whether defendant’s constitutional rights have been infringed; it merely holds that the former adjudication shall not be conclusive. Secondly, the defendant may have “waived” his constitutional rights, either by failure to assert them at the trial, where opportunity was had, or by failing to seek review of a decision adverse to his claim, as where the prisoner is financially unable to obtain the transcript necessary for an effective review on writ of error. Legislation providing for a prompt, inexpensive, full and adequate review of every felony conviction might yet be the only real solution.

V. FAMILY LAW

Although there is little new in the law concerning marriage,\textsuperscript{1} some matters regarding divorce call for attention. In \textit{Elston v. Elston},\textsuperscript{2} for example, the well-established doctrine of recrimination was applied by the court, acting as representative of the state’s interest in the preservation of the marriage relation, despite the

\textsuperscript{51} That remedy, in Illinois, is appropriate only to test the jurisdiction of the court in which petitioner was tried: People v. Bradley, 391 Ill. 169, 62 N. E. (2d) 788 (1945). There is no right to an appeal and the Illinois Supreme Court will not entertain original proceedings which present a fact question: People ex rel. Jones v. Robinson, 409 Ill. 553, 101 N. E. (2d) 100 (1951), noted in 30 CHICAGO-KENT LAW REVIEW 282.

\textsuperscript{52} As an indigent defendant cannot afford to pay for a stenographic transcript of the trial proceedings, review by way of writ of error is, to all practical effect, confined to the common law record, that is to the indictment, the arraignment, the entry of the plea, the fact of a trial, and the verdict and judgment thereon. The writ of error, under such circumstance, is ineffective to review alleged violations of constitutional rights, except those which may be revealed on the face of the common law record.

\textsuperscript{53} The statutory writ of error \textit{coram nobis}, based on Ill. Rev. Stat. 1951, Vol. 2, Ch. 110, § 196, permits the presentation only of those questions of fact unknown at the time of trial. It is clearly unsuitable to fit the typical situation.

\textsuperscript{1} The case of Whelan v. Whelan, 346 Ill. App. 445, 105 N. E. (2d) 314 (1952), might be mentioned as it represents the first clear-cut application of the Uniform Marriage Evasion Act, Ill. Rev. Stat. 1951, Vol. 2, Ch. 89, § 19 et seq., to a marriage performed elsewhere, but which would have been void if performed in Illinois, between first cousins.

\textsuperscript{2} 344 Ill. App. 233, 100 N. E. (2d) 635 (1951), noted in 15 U. of Det. L. J. 156.
fact the defense had not been specially pleaded and was not being urged by the defendant.

Termination of an obligation to pay alimony was the ultimate problem involved in one notable decision achieved by the United States Supreme Court having bearing on the degree of full faith and credit due a foreign decree. As the result of its decision in *Sutton v. Lieb*,\(^3\) further construction will probably have to be given to Section 18 of the Divorce Act\(^4\) and the effect to be given to an allegedly void marriage after a decree for divorce, with alimony, had been rendered which provided that a party to the divorce should not be entitled to further alimony in the event of a remarriage.

Property rights of the spouses, or ex-spouses, also came in for consideration. In *People v. Walker*,\(^5\) a matter actually arising under a claim concerning an inheritance tax, the Supreme Court applied the well-established rule that a contract, in this case a conveyance in trust, inducing divorce and made in consideration thereof would be void and unenforceable, not only because based upon a void consideration but also because it would tend to open the door to collusion. In another case, that of *McGaughy v. McGaughy*,\(^6\) the 1949 amendment to the Divorce Act permitting a divorce court to order a conveyance of real property in lieu of alimony,\(^7\) was limited by construction to those cases in which some "special circumstance" made the conveyance equitable.\(^8\)

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\(^3\) 342 U. S. 402, 72 S. Ct. 398, 96 L. Ed. (adv.) 352 (1952), noted in 30 CHICAGO-KENT LAW REVIEW 266. The Supreme Court decision reversed the holding in 188 F. (2d) 766 (1951), which had affirmed the District Court, 91 F. Supp. 937 (1950). It is understood that, on remandment, but not within the period of this survey, the Court of Appeals for the Seventh Circuit treated the alleged marriage of the alimony recipient as totally void, hence inoperative to extinguish the alimony obligation created by the prior divorce decree: 199 F. (2d) 163 (1952).


\(^5\) 409 Ill. 413, 100 N. E. (2d) 621 (1951), noted in 15 U. of Det. L. J. 152.

\(^6\) 410 Ill. 596, 102 N. E. (2d) 806 (1952), noted in 30 CHICAGO-KENT LAW REVIEW 280. The decision may, to some extent, have been dictated by the fact that most of the property came to the husband by inheritance and was not susceptible of division.


\(^8\) Ibid., Ch. 40, § 18, empowers the divorce court to compel a conveyance when either party holds title to property equitably belonging to the other. To support action under this section, special circumstances and equities must be alleged and proved: Insoda v. Insoda, 400 Ill. 596, 81 N. E. (2d) 473 (1948).
Despite a recent Supreme Court statement that "special circumstance" need not be shown in order to justify such an order, the construction so placed apparently limits the statute in question to a simple codification of the former law. An oral property settlement intended to bar dower rights was held binding and enforceable in *Parker v. Ter Bush.* The terms of the agreement had been set out in the verified complaint for divorce, but a detailed recitation of the agreement was omitted from the decree. Eight years later, in a suit to quiet title, the ex-wife claimed her oral promise to surrender dower was within the statute of frauds but the court held the agreement to be so well supported by evidence that it would be inequitable to deny the relief sought.

Several custodial and other related cases, although not new, are worth observing for their effect in crystallizing the rules which they apply. The mere status of godparent, for example, is not enough, according to *People ex rel. Smilga v. Hoyer,* to entitle one to notice of adoption proceedings but might be if actual custody in fact should be present. A parent may not, on religious grounds, prevent the administration of a vitally needed blood transfusion to his child and, if he should attempt so to do, under the holding in *People ex rel. Wallace v. Labrenz,* a guardian may be appointed to provide the necessary consent on behalf of the child. The power of a chancery court to permit a divorced parent who has been awarded custody of a child to establish a home for

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9 In *Persico v. Persico*, 409 Ill. 413, 100 N. E. (2d) 904 (1951), the court carefully distinguished between a proceeding under the section mentioned in the preceding footnote and one under Section 18, as amended in 1949, authorizing the divorce court to order a conveyance of real property by way of settlement in lieu of alimony.

10 344 Ill. App. 354, 100 N. E. (2d) 810 (1951). Leave to appeal has been denied.

11 The case appears to be the first in Illinois to uphold an oral property settlement. Written separation agreements have often been said to be valid: *Kohler v. Kohler*, 316 Ill. 33, 146 N. E. 276 (1925), and cases there cited.

12 Sub nom. *Klabis v. Hoyer*, 345 Ill. App. 365, 103 N. E. (2d) 378 (1952), noted in 30 *Chicago-Kent Law Review* 380. In another adoption case, that of *Stalder v. Stone*, 344 Ill. App. 266, 100 N. E. (2d) 497 (1951), the Appellate Court for the Second District concluded the evidence was insufficient to terminate the right of the natural parent to her child. The Supreme Court, however, on leave to appeal, came to an opposite conclusion: 412 Ill. 488, 107 N. E. (2d) 696 (1952). Crampton, J., wrote a dissenting opinion in which he differentiated conduct sufficient to warrant termination of custodial rights from that necessary to justify an adoption over parental protest.

13 411 Ill. 618, 104 N. E. (2d) 769 (1952).
such child in another jurisdiction has been clarified by the Appellate Court for the Second District through its determination in *Schmidt v. Schmidt.*\(^{14}\) Pointing to the fact that there is no fixed rule of law prohibiting removal of the child from the jurisdiction, the court there distinguished cases apparently to the contrary\(^{15}\) either because the terms of the decree barred removal\(^{16}\) or upon the consideration that the best interests of the child would suffer by such removal. The court noted that where, as in the case before it, a bond had been given to secure visitation rights and the decree awarding custody contained no geographical limitations on the exercise of custodial rights, a strict rule of law on the point would not only be unrealistic but might be detrimental to the welfare of the child.

In *Nye v. Nye,*\(^{17}\) the defendant, contrary to the terms of an agreement and decree, removed the child from plaintiff's custody. In answer to plaintiff's petition to compel surrender of the child, defendant counter-petitioned for a modification of the custody order, asserting the plaintiff to be an unfit person by reason of her illicit relationship with another man prior to and since the divorce. The Appellate Court for the First District had reversed a modification order, holding that plaintiff's immoral conduct did not represent a material change in circumstance affecting the welfare of the child. This view was affirmed by the Supreme Court but not without a vigorous dissent by Judge Bristow who critically observed that the court had adopted "the unique position that since


15 The same court, in the earlier case of *Wade v. Wade,* 345 Ill. App. 170 at 177, 102 N. E. (2d) 356 at 360 (1951), had said: "It is true our courts have stated that it is against the policy of our laws to permit children to be taken outside of the jurisdiction of the court where their custody has been given to one parent under a divorce decree, the reason being that in doing this the court is prevented from carrying out the mandates of its decrees." It was held, however, that the defendant, father of the child and an Illinois resident, in legal custody under a divorce decree, was not in contempt of court merely because he had permitted the child to live in Iowa with the family of the defendant's cousin.


17 411 Ill. 408, 105 N. E. (2d) 300 (1952), affirming 343 Ill. App. 477, 99 N. E. (2d) 574 (1951). An identical report of the majority opinion, minus the dissenting opinion, originally appeared in the advance sheet at 104 N. E. (2d) 283, but was withdrawn by order of the court: 104 N. E. (2d), p. xii.
they simply continued their clandestine relationship there was no change in conditions."

By far the most significant developments in family law came in relation to tort liability between the spouses arising from acts committed during coverture. The Illinois Supreme Court decision in Welch v. Davis¹⁸ not only settled the question as to whether or not an action might be maintained against the estate of a husband responsible for the wrongful death of his wife but also appears to have opened the door to even more startling developments. The holding therein was soon followed by the decision in Tallios v. Tallios²⁰ wherein the Appellate Court for the First District similarly permitted a recovery based upon a wrong between husband and wife. The plaintiff there had been injured by the negligence of her husband while he was driving a truck in furtherance of his employer's business. Her suit to recover damages from the husband's employer had been dismissed in the trial court but that judgment was reversed when the Appellate Court held that any immunity given to a spouse operated merely to deny the remedy but did not affect the right of action.²¹ The New York case of Schubert v. August Schubert Wagon Company²² was approved and relied upon.

Direct attack upon inter-spousal immunity for tortious acts did not come, however, until the plaintiff, in Brandt v. Keller,²³

¹⁸ 411 Ill. 408 at 419, 105 N. E. (2d) 300 at 306.
²⁰ 345 Ill. App. 387, 103 N. E. (2d) 507 (1952), noted in 30 CHICAGO-KENT LAW REVIEW 343 and 40 Ill. B. J. 585. See also the later case of Kitch v. Adkins, 346 Ill. App. 342, 105 N. E. (2d) 527 (1952), where the court decided a similar fact situation without discussion of the marital immunity.
²¹ The court cited, with approval, Restatement, Agency, Vol. 1, § 217(2), comment (b), p. 480, for the rule that the principal does not share in an immunity personal to the agent.
²² 249 N. Y. 253, 164 N. E. 42 (1928).
²³ 347 Ill. App. 18, 105 N. E. (2d) 796 (1952), noted in 30 CHICAGO-KENT LAW REVIEW 343. It is understood that the Illinois Supreme Court, on leave to appeal, reversed the decision of the Appellate Court, but no opinion has yet been released for publication in case No. 32484.
having sustained personal injuries by reason of her husband’s negligent operation of an automobile, sought to recover damages from him on the basis that the several Married Women’s Acts\textsuperscript{24} had removed the common-law rule. The Appellate Court for the First District found difficulties with this argument which it considered to be insuperable. In the first place, the acts do not purport to remove the husband’s common law disability from suing his wife in tort so a construction thereof which would permit a suit by the wife would create an inequality between the sexes contrary to the policy contemplated by the legislature.\textsuperscript{25} Secondly, the Married Women’s Acts were said to have expressly removed only those disabilities peculiar to married women, giving such persons the right to sue separately in only a limited group of cases, hence were inadequate to remove common law disabilities between the spouses. A forthright decision by the Supreme Court or substantial statutory revision by the legislature would now seem to be in the offing.

VI. PROPERTY

REAL AND PERSONAL PROPERTY

Little has been said concerning the acquisition of present rights by way of title to land in Illinois, for most cases involving aspects of real property law were of a stereotyped nature. One significant point was made, however, in the case of \textit{Miner v. Yantis}.\textsuperscript{1} The plaintiffs there concerned, who owned the record title to the land involved, sought to have a deed to the realty and a bill of sale for the school house erected thereon, purchased by the defendants from the school trustees, set aside. The suit presented three technically novel questions. The first challenged the power of school trustees to acquire title to realty in fee simple absolute except in those cases where the title was taken either in satisfaction of a judgment or in settlement of a debt. The second posed a question

\textsuperscript{24} Ill. Rev. Stat. 1951, Vol. 1, Ch. 68, §§ 1-21.

\textsuperscript{25} Evidence of a design to provide equality of rights appears in Ill. Rev. Stat. 1951, Vol. 1, Ch. 68, §§ 3, 5, 8, and 11.

\textsuperscript{1} 410 Ill. 401, 102 N. E. (2d) 524 (1951).