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Family Law - Survey of Illinois Law for the Year 1950-1951

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in the reformatory under the 1917 statute was a sentence to imprisonment of the kind meant by the Immigration Act. Subsequent amendments to the Illinois statute, however, have placed emphasis on the idea of reformation, rather than on punishment, of convicts so it would seem possible, if the question should arise again, that a period of imprisonment in the reformatory under the present law might be regarded as being insufficient for this purpose. Multiple sentences of an alien youth to the Illinois reformatory, even for crimes involving moral turpitude, may not, therefore, be sufficient to subject him to deportation.

V. FAMILY LAW

Most current issues relating to family law grow from attempts to enforce the obligation to pay alimony. For example, the problem of whether or not a property settlement agreement calling for the payment of a definite sum of money by installments, when incorporated into a divorce decree, amounts to a lump sum settlement or is merely a provision for periodic alimony has again come before the courts during the survey period. The first case, that of Coleman v. Coleman, decided by the Appellate Court for the Fourth District, was one in which the ex-husband petitioned for cancellation of the agreement on the ground of the remarriage of his former wife. He relied on Section 18 of the Divorce Act as it read prior to its amendment. His petition was countered with the claim that the agreement was a lump sum settlement, hence not subject to modification, or if found to be wanting as a lump sum settlement, was not affected because the 1949 amendment applied. The court ruled for the defendant, holding that

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63 Ill. Rev. Stat. 1949, Vol. 2, Ch. 118, § 13.1, establishing the Illinois State Reformatory at Sheridan, announces it to be purpose of such reformatory to provide a place for the “confinement and rehabilitation of male persons” under seventeen at the time of conviction and sentence for felonies.


3 Laws 1949, p. 729, S.B. 175; Ill. Rev. Stat. 1951, Vol. 1, Ch. 40, § 19. The amendment provided that “...a party shall not be entitled to alimony and maintenance after remarriage; but, regardless of remarriage by such party or death of either party, such party shall be entitled to receive the unpaid installments of any settlement in lieu of alimony ordered to be paid or conveyed in the decree.”
the 1949 amendment did not possess retroactive effect, that the agreement was but one for the payment of alimony,\(^4\) and that the remarriage of the alimony recipient terminated the obligation to make further payments.

The second case, that of *Walters v. Walters*,\(^5\) was one in which the facts were closely analogous to those presented in the Coleman case\(^6\) and the matter also arose before the 1949 amendment. The trial court had there granted relief to the defendant but the Appellate Court for the First District had reversed as it regarded the agreement to be one for a lump sum settlement, so not subject to modification. The opinion of the Appellate Court attracted attention not only because of the majority view as to the nature of the agreement but also for the strength of Judge Niemeyer’s concurring opinion which argued for the adoption of the view that a statute, as amended, should have been applied.

On further appeal, the Illinois Supreme Court affirmed on the ground that the nature of the contract and the intention of the parties was such as to make it a true lump sum property settlement. In an effort to distinguish the case from the rule previously announced in *Adler v. Adler*,\(^7\) and the supposed reaffirmation thereof by reason of a refusal to grant leave to appeal in *Banck v. Banck*,\(^8\) the court said the rule was one, at least in cases prior to the amendment of 1949, that where it clearly appeared the order was for support and sustenance of the spouse, and the provision therefor was plainly separable from the property provisions, “the total award, when it is so payable in installments, is modifiable at any time upon a proper showing.’’ But, where the provision for money payments was so tied in with the

\(^4\) Adler v. Adler, 373 Ill. 361, 26 N. E. (2d) 504 (1940).


\(^6\) The only apparent difference between the two agreements was that the Coleman agreement was denominated a “property settlement and alimony agreement,” while that in the Walters case was called a “lump sum property settlement and alimony in gross.”

\(^7\) 373 Ill. 361, 26 N. E. (2d) 504 (1940).

\(^8\) 322 Ill. App. 369, 54 N. E. (2d) 577 (1944), noted in 22 CHICAGO-KENT LAW REVIEW 276.
balance of the agreement that it could not be separated therefrom without doing violence "to the very terms of the agreement itself," the contract had to be construed as a whole and effect given to every word and part.\(^9\) It pointed out that specific performance had been agreed upon by the parties and that the plaintiff had executed all necessary instruments required of her. Having so performed, she was entitled to full performance from the defendant. The question of the retroactive effect of the 1949 amendment was brushed aside as being unnecessary to the decision. The important issue, therefore, still remains undetermined.

Collateral attacks upon divorce decrees more often fail than succeed. Such was the fate suffered in *Steffens v. Steffens*,\(^{11}\) wherein plaintiff had been granted a divorce in 1946 and some two years later the defendant petitioned to vacate the decree on the alleged ground that the plaintiff had not satisfied jurisdictional requirements as to residence\(^{12}\) and he and his witness had testified falsely on the point. A motion to strike the petition was sustained and the Appellate Court affirmed. The record, on leave to appeal to the Supreme Court, showed that the complaint, charging desertion, alleged a compliance with residence requirements; that defendant had been served by publication but had filed an appearance and an answer which neither admitted nor denied the allegation of residence but demanded strict proof thereof; that neither the defendant nor her attorneys were present in court at the hearing but proof was made as to the residential requirement; and that, soon thereafter, a decree was entered which recited that the plaintiff had been "an actual resident of Cook County and . . . of the State of Illinois for over one year next preceding the filing of the complaint." The upper court stated it to be clear law in Illinois that, in case of a collateral attack, "all presumptions are in favor of the validity of the judg-

\(^9\) 409 Ill. 298 at 302, 99 N. E. (2d) 342 at 344-5.

\(^{10}\) The court found the agreement to be almost analogous to the one present in *Kohl v. Kohl*, 330 Ill. App. 284, 71 N. E. (2d) 358 (1947). That agreement had been held to be a true property settlement contract, hence not subject to modification.

\(^{11}\) 408 Ill. 150, 96 N. E. (2d) 458 (1951), affirming 338 Ill. App. 599, 88 N. E. (2d) 502 (1949).

mention or decree attacked and want of jurisdiction to enter the
same must appear on the face of the record to furnish the basis
for such attack. It noted that while language of the Appel-
late Court in the case of *In re Goldberg’s Estate* seemed to
be at odds with that rule, the fact that leave to appeal as well as
certiorari had been denied was no indication that the two
high courts approved the opinion therein in its entirety. It also
noted that other cases cited by the defendant were cases which
fell within a recognized exception to the general rule. The fraud
in those cases had deprived the other party of an opportunity
to be heard. As no such fraud was present in the instant case,
the action in striking the petition to vacate the decree was
affirmed.

An unusual attempt by divorced parties to avoid the decree
and to remarry themselves was indicated under the facts of
*Meyer v. Meyer*. The case was one in which, some ten months
after an absolute divorce had been granted, the parties jointly
petitioned the court to vacate the decree on the ground they had
become reconciled. The trial court obligingly did so without
giving heed to the question as to whether it had jurisdiction to do
so or not. The parties resumed cohabitation and so continued
for approximately three years when the ex-husband died. The
alleged widow, following renunciation of the provisions of the
will, sought to partition certain land belonging to the decedent
but her action was defeated in the trial court on the ground that
she was not, at the time of decedent’s death, his lawful wife, hence
acquired no rights in the property. The Supreme Court affirmed
the holding with a note to the effect that the parties may have
conferred in personam jurisdiction on the divorce court by their

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13 See Parsons v. Lurie, 400 Ill. 498, 81 N. E. (2d) 182 (1948); Prewitt v. Prewitt, 397 Ill. 178, 73 N. E. (2d) 312 (1947); Cullen v. Stevens, 389 Ill. 35, 58 N. E. (2d) 456 (1944).
17 409 Ill. 316, 99 N. E. (2d) 137 (1951).
18 Finality to judgments, upon the expiration of thirty days after rendition, is
given by Ill. Rev. Stat. 1951, Vol. 1, Ch. 77, § 82. Proceedings to vacate, after that
time, could be conducted only pursuant to ibid., Ch. 110, § 196.
acts but lacked the ability to give it jurisdiction in law to vacate the decree of divorce. It answered an argument based on a public policy in favor of reconstituting broken homes by saying the parties could have been remarried had they wished. It also stressed a counter public policy in favor of the finality of divorce decrees.

Another case bearing the same name, but involving different parties, that of Meyer v. Meyer,\textsuperscript{19} was concerned with the question as to whether or not cohabitation under a purported second marriage, rendered void by the vacation of an earlier divorce decree, was adulterous in character so as to permit the originally unsuccessful spouse to sue for divorce on that ground. The Appellate Court for the First District held that such was not the case as there was no intent, during the period while the earlier divorce decree remained in existence, to commit adultery and that cohabitation ceased as soon as the earlier decree was vacated. It drew a distinction between the case before it and the situation presented in Gordon v. Gordon\textsuperscript{20} on the basis that the cohabitation there found to be adultery had occurred under a marriage contracted prior to the rendition of, but on a false belief of the entry of, the divorce decree. The court preferred, instead, the views expressed in the New York case of Bailey v. Bailey.\textsuperscript{21}

The degree of full faith and credit to be given to a divorce decree still remains a problem according to the case of Sutton v. Lieb.\textsuperscript{22} An ex-wife there sued to recover unpaid installments of alimony under a 1939 Illinois divorce decree which directed that such payments were to continue "for so long as the plaintiff shall remain unmarried." The defendant relied on the fact that, in July, 1944, plaintiff had married one Walter Henzel in Reno, Nevada, immediately following the entry of a Nevada decree divorcing Henzel from his wife Dorothy, a New York resident. It further appeared that, not long after that divorce,

\textsuperscript{19}343 Ill. App. 554, 99 N. E. (2d) 706 (1951).
\textsuperscript{20}141 Ill. 160, 30 N. E. 446, 21 L. R. A. 387 (1892).
\textsuperscript{21}45 Hun 278 (1887), affirmed in 142 N. Y. 632, 37 N. E. 566 (1894).
\textsuperscript{22}188 F. (2d) 766 (1951), affirming 91 F. Supp. 937 (1951). It is understood that certiorari has been granted.
Dorothy Henzel sued Walter in New York for separate maintenance and obtained a decree on the basis that the Nevada divorce was void. The plaintiff, in the meantime, had left Henzel promptly on learning of Dorothy's suit and had also sued Henzel, in New York, for an annulment. She also received a favorable decree which she followed up with a demand on the defendant here to pay back alimony from 1944 to the date of her valid remarriage to still another in 1947. The lower federal court, in a suit based on diversity of citizenship, decided for defendant because of an alleged settlement and release. The Court of Appeals for the Seventh Circuit, rejecting the theory of a release, went to the heart of the issue as to the effect to be given to the Nevada marriage.

Whether or not the plaintiff was entitled to recover the back alimony was said to depend upon the validity of the Nevada marriage which, in turn, depended upon the validity of the Henzel divorce decree rendered by that state. The court was unable to find any case wherein the Supreme Court of the United States had laid down a precise and definite rule as to the status to be given a decree in the state of its rendition following a successful attack upon that decree in a sister state. It professed, however, an ability to see, from remarks of the various justices concerned with the two Williams cases, a basis of authority for the assumption that such a decree remains in full force and effect in the state of its rendition until it has been successfully attacked there. As the Nevada decree had not been overthrown in Nevada, the court had no difficulty in finding that plaintiff's marriage was valid in that state and, therefore, effective to discharge the alimony obligation set forth in the earlier Illinois decree, notwithstanding the annulment of that marriage by a decree of a New York court. It, of course, did not decide what the consequence would have been if the alimony recipient had, in fact, contracted

23 It was said that, in truth, there had been no compromise as the defendant had merely paid an amount then due. In that regard, see San Fillippo v. San Fillippo, 340 Ill. App. 353, 92 N. E. (2d) 201 (1950).

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no more than a void marriage. That issue, therefore, remains to be settled in Illinois.25

Another aspect of full faith and credit arose, in Tailby v. Tailby,26 over an issue as to whether or not an Illinois court would have the power to enforce a foreign decree for alimony by punishing the recalcitrant party for contempt. The trial court had there permitted the plaintiff to set up the unpaid installments of a New York alimony decree as a foreign judgment, and authorized recovery of the same as in a suit in debt on a judgment, but denied that it had the power to enforce the foreign decree by means of contempt process. On appeal by plaintiff, the Appellate Court for the Third District affirmed. It chose the position it did in reliance on language of the Illinois Supreme Court, in Clubb v. Clubb,27 wherein it was pointed out that the jurisdiction of Illinois courts, in divorce cases and all matters relating thereto, was purely statutory and did not rest upon general equity powers. The ruling, however, is in direct conflict with the one handed down by the Appellate Court for the Second District in Rule v. Rule.28 It should be noted that the Clubb case involved the attempted enforcement of an English divorce decree which would not, as such, be entitled to full faith and credit, whereas the Rule case dealt with a decree from an American state. Only a decision by the Illinois Supreme Court in a case dealing squarely with the issue in the Rule and Tailby cases will set the matter to rest. Until it is so settled, it would seem as if the holding in the Rule case is the more desirable one, particularly since the problem is not the narrow one of local enforcement of a foreign divorce decree but part of a much larger one of the right of a court of equity to aid in the enforcement of any equitable decree of a sister state.

25 The closest case would seem to be People ex rel. Byrnes v. Retirement Board, 272 Ill. App. 59 (1933), wherein a pension in favor of a fireman's widow was ordered restored after a purported remarriage had been annulled by judicial decree which treated the supposed remarriage as being void ab initio. But see Schleicher v. Schleicher, 251 N.Y. 366, 167 N.E. 501 (1929), to the effect that the alimony obligation is merely suspended by the presence of a voidable marriage.
26 342 Ill. App. 664, 97 N.E. (2d) 611 (1951), noted in 1 DePaul L. Rev. 147.
27 402 Ill. 390, 84 N.E. (2d) 366 (1949).
Inter-family matters beside divorce and alimony were also considered. An attempt was made, in the wrongful death action entitled *Welch v. Davis*, to break through the generally accepted doctrine that no civil suit, other than one for divorce or separate maintenance, will lie in favor of one spouse against the other on the basis of physical harm inflicted during coverture. The case was one in which a husband had shot his wife to death and thereafter killed himself. The wife left a minor dependent daughter by a former marriage to survive her and a wrongful death suit was instituted by the wife’s administrator against the executor of the husband’s estate to recover damages for the benefit of the dependent child. A verdict was reached in favor of the plaintiff but the trial court granted defendant’s motion for judgment notwithstanding the verdict. The Appellate Court for the Third District, on appeal by the wife’s administrator, affirmed the holding on the ground that no damage suit could have been maintained by the wife if she had survived, hence none could be brought on behalf of the child as the claim was essentially derivative in nature.

Issues concerning parental rights in relation to adoption were involved in the case of *Dickholtz v. Littfin*. It became necessary there to decide whether a consent to adoption given by a natural parent, in conformity with statutory requirements, could be revoked at the wish of the consenting party prior to the time when court action had been taken thereon. The Appellate Court for the First District approved the trial court’s action in permitting the withdrawal of the consent as a matter of sound judicial discretion, thereby removing the foundation to the adoption

30 The court relied on language in the Injuries Act, Ill. Rev. Stat. 1951, Vol. 1, Ch. 70, § 1, to the effect that liability for wrongful death attaches only when the “act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action.” It distinguished the case of Kaczorowski v. Kalkosinski, 321 Pa. 438, 184 A. 663, 104 A. L. R. 1267 (1936), on the basis of a difference in the two statutes, and preferred to rest its holding on views expressed in Hovey v. Dolmage, 203 Iowa 231, 212 N. W. 553 (1927), and in Demos v. Freemas, 43 Ohio App. 426, 183 N. E. 395 (1931).
31 341 Ill. App. 400, 94 N. E. (2d) 89 (1950), noted in 29 CHICAGO-KENT LAW REVIEW 183.
proceeding. It did note, however, that there was no positive right to revoke a consent which had once been given.\textsuperscript{38} The case is significant, therefore, in that a decision on that point would place Illinois in line with the majority view on the subject.\textsuperscript{34}

Questions involving the law applicable to the contractual relationships of infants seldom reach reviewing courts today. Exceptions do crop up, however, and the case of \textit{Shepherd v. Shepherd}\textsuperscript{35} is such a case. The suit was one to rescind a deed given by a minor. It was filed about seven months after the minor became of age. The relief sought was denied by the trial court and, a freehold being involved, the case went on direct appeal to the Illinois Supreme Court. The decree was there affirmed on the basis that the plaintiff had ratified his deed because he had failed to act promptly to disaffirm on reaching his majority. The law is that a minor’s deed is not void but voidable, hence will become valid and binding if ratified by the minor on coming of age.\textsuperscript{36} It is also the general rule that, on the attainment of majority, a party is allowed a reasonable time in which to disaffirm.\textsuperscript{37} The duration of that period has been said to be one resting on the particular facts.\textsuperscript{38} In the instant case, the period elapsing between plaintiff’s majority and the attempt to disaffirm was but seven months and, in truth, it could be said he had done little, if anything, after reaching twenty-one to establish an intent to ratify. In fact, the Illinois cases cited by the court in support of its decision certainly show acts of affirmance far stronger than those relied on in the instant case.\textsuperscript{39} It remains to be seen whether or not the applicable law has been modified by this decision, but it would seem as if adults who wish to disaffirm contracts entered into during minority will have to act

\textsuperscript{33} To that extent, it rejected dicta in Petition of Thompson, 337 Ill. App. 354, 86 N. E. (2d) 155 (1949), noted in 27 \textsc{Chicago-Kent Law Review} 308.

\textsuperscript{34} See annotations in 156 A. L. R. 1011 and 138 A. L. R. 1058.

\textsuperscript{35} 408 Ill. 364, 97 N. E. (2d) 273 (1951), noted in 29 \textsc{Chicago-Kent Law Review} 361.

\textsuperscript{36} Schlig v. Spear, 345 Ill. 219, 177 N. E. 730 (1931); Barlow v. Robinson, 174 Ill. 317, 51 N. E. 1045 (1898).

\textsuperscript{37} 43 C. J. S., Infants, § 40.

\textsuperscript{38} Rubin v. Strandberg, 288 Ill. 64, 122 N. E. 808, 5 A. L. R. 133 (1919).

\textsuperscript{39} See cases cited in notes 36 and 38, ante.
with lightning speed and, having attained majority, must avoid the slightest conduct which could be construed as to show ratification.

Significant changes have been made in the field by legislative enactments. One such would eliminate the rule laid down in *Floberg v. Floberg.* It had there been held that time spent apart during the pendency of an earlier divorce or separate maintenance action was not to be counted toward the fulfillment of the statutory requirement of a full year of desertion for the purpose of obtaining a divorce on that ground. The law would appear to be that such time of enforced separation is not to be subtracted in the computation of the desertion period. A change has also been made in the requirement relating to residence for divorce purposes. Prior to the amendment, it was possible to obtain a divorce in Illinois, even though both parties to the action were non-residents and without any period of residence whatever, provided that the act charged was committed within the state. It will no longer be possible to do so as a residence of at least six months by one or the other of the parties is now required. Perhaps of more consequence, however, is the legislative action in amending that portion of the statute relating to the support and maintenance of a wife or children. By making the act apply in cases of need rather than destitution, by putting teeth in the provisions covering the temporary support order, by extending the possible duration of the final support order to three years instead of one, and by vesting the court with power to require an assignment of wages or salary in excess of $20 per week if other satisfactory security is not offered, the law makers have immeasurably increased the effectiveness of the statute.

40 358 Ill. 626, 193 N. E. 456 (1934).
44 Ill. Rev. Stat. 1951, Vol. 1, Ch. 68, § 1 et seq.
VI. PROPERTY

REAL AND PERSONAL PROPERTY

Without doubt, the most noteworthy development in the law of real property is the action taken by the legislature with regard to methods of conveyancing. By the deletion of a few words from the Conveyances Act, the legislature has brought an end to ancient doctrines relating to the use of private seals in the case of such instruments as contracts, deeds, mortgages and the like. While the use of a private seal is not forbidden, and will probably continue to be so used by lawyers who slavishly follow older forms or who have established almost automatic habits of dictation, seals are no longer necessary nor will the presence thereof in any way change the construction to be given to legal instruments. It would appear, therefore, that subterfuge of the type previously practiced should no longer be necessary. It yet remains to be seen, however, whether common law doctrines relating to procedural distinctions between sealed and unsealed contracts will follow in the train of the changes so made with relation to deeds.

Lesser questions of real property law have been settled by the courts. Two oil and gas cases, for example, might be said to possess significance. In one of them, that of United States v. Illinois Central Railroad Company, the Court of Appeals for the Seventh Circuit affirmed a decision of a federal district court which had held that the nature of the grant of public lands to the railroad company was such as to permit it to extract oil and gas

1 Laws 1951, p. 1297, H.B. 923; Ill. Rev. Stat. 1951, Vol. 1, Ch. 30, §§ 1, 9, 10, 11 and 26. A companion measure, Laws 1951, p. 1299, H.B. 924, adds Section 153b to Ill. Rev. Stat. 1951, Vol. 1, Ch. 30, although, in scope, it may have been intended to have more direct bearing in relation to contracts.

2 See Laws 1941, Vol. 1, p. 416, S.B. 450, same as Ill. Rev. Stat. 1951, Vol. 1, Ch. 30, § 34a, which enacted the fiction that a recital of sealing, in the body or in the acknowledgment of any deed, resulted in the adoption of any seal appearing thereon, including that of the notary public! The reason for this queer provision is explained in 30 Ill. B. J. 20, at p. 21, discussing S.B. 450.

3 It has been permissible for many years, in Illinois, to disregard the seal and to sue as in special assumpsit, even though, in the old days, an action of covenant would have been more proper: Dean v. Walker, 107 Ill. 540 (1883).