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Family Law - Survey of Illinois Law for the Year 1947-1948

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tion calling for a construction of the Parole Act.⁶⁵ In *People ex rel. Richardson v. Ragen*,⁶⁶ a paroled prisoner had been inducted into military service shortly before the time when a recommendation for his final discharge was made to the State Division of Paroles. Pursuant to this recommendation, a certificate of discharge was issued and approved by the Governor but before it could be delivered to the prisoner he was rearrested for being absent without leave, for driving a stolen car, and for carrying a loaded revolver. He was surrendered to the state authorities under a parole violation warrant and was recommitted to the state penitentiary upon revocation of the order granting him his final discharge. The prisoner contended that his recommittment as a parole violator was improper as he had, upon his induction into service, been promised his final discharge within six weeks thereafter and further that, with the issuance of his discharge certificate, the parole authorities ceased to have any jurisdiction. The court, however, construed the statute to require actual delivery and receipt of the certificate by the parolee before jurisdiction would cease.

V. FAMILY LAW

Efforts made at a prior session of the Illinois legislature to halt the growing divorce rate, as evidenced by passage of Senate Bill 415 and other measures similarly designed,¹ have gone largely for naught for the Illinois Supreme Court, in the case of *Hunt v. County of Cook*,² declared the bills unconstitutional because contrary to the prohibition against special or local laws.³ If wholesale reform is still believed necessary, it is apparent that any act passed must be state-wide in application and not limited in scope to Cook County.

At decidedly increasing intervals of time, a case comes up for appellate review which requires an interpretation of that para-

⁶⁵ The case particularly concerned Ill. Rev. Stat. 1947, Ch. 38, § 807.

⁶⁶ 400 Ill. 191, 79 N. E. (2d) 479 (1948).

¹ Laws 1947, p. 813; Ill. Rev. Stat. 1947, Ch. 37, § 105.1 et seq.

² 398 Ill. 412, 76 N. E. (2d) 48 (1947).

³ Ill. Const. 1870, Art. IV, § 22.

graph of the Divorce Act which sets forth the grounds for divorce.⁴ In *Getz v. Getz*,⁵ the question was posed as to whether or not a conviction by a military court for desertion in time of war might properly be classified as a conviction for felony or other infamous crime so as to serve as a ground for divorce. The Criminal Code defines a felony as "an offense punishable with death or by imprisonment in the penitentiary"⁶ and only indirectly designates what crimes are infamous.⁷ Conviction for desertion in time of war by a military court was held not to be included within the meaning of the Divorce Act for the reason that the punishment to be imposed upon the defendant, if found guilty by the military tribunal, is optional and not absolute.⁸ Other factors, however, also bore heavily on the decision. They were (1) the fact that the offense of desertion is unknown to the civil law of today;⁹ (2) that military courts are without the pale of the judicial department of the government;¹⁰ and (3) sharp procedural differences exist between a court-martial and a civil court.¹¹ The firm policy of the state to favor the continuance of the marital relationship and not its dissolution was also noted.¹²

The point at which a divorce decree becomes final was also made the basis of dispute. In ordinary civil actions, the plaintiff may experience considerable difficulty before having an action dismissed except with the concurrence of the defendant,¹³ particu-

⁴ Ill. Rev. Stat. 1947, Ch. 40, § 1.

⁵ 332 Ill. App. 364, 75 N. E. (2d) 530 (1947), noted in 36 Ill. B. J. 423, 23 Notre Dame Lawyer 405.

⁶ Ill. Rev. Stat. 1947, Ch. 38, § 585.

⁷ *Ibid.*, § 587.

⁸ The court found support for this view in *Lamkin v. People*, 94 Ill. 501 (1880), where it was held that where the punishment prescribed by statute was either by imprisonment in the penitentiary or by fine the rule of construction required that "unless it clearly appears the offense was intended to be denominated a felony, it shall be denominated a misdemeanor." See 94 Ill. 501 at 504.

⁹ 6 C. J. S., Army and Navy, § 54.

¹⁰ 36 Am. Jur., Military Law, § 44; 6 C. J. S., Army and Navy, § 51.

¹¹ 6 C. J. S., Army and Navy, § 57.

¹² *Johnson v. Johnson*, 381 Ill. 362, 45 N. E. (2d) 625 (1942); *Tripp v. Payne*, 339 Ill. 178, 171 N. E. 131 (1930).

¹³ Ill. Rev. Stat. 1947, Ch. 110, § 176. See also *Flassig v. Newman*, 317 Ill. App. 635, 47 N. E. (2d) 527 (1943), noted in 21 CHICAGO-KENT LAW REVIEW 343; *Kosmerl v. Sevin*, 295 Ill. App. 345, 15 N. E. (2d) 20 (1938); *Chicago Title & Trust Co. v. County of Cook*, 279 Ill. App. 462 (1935).

larly after trial has been had. A more lenient view would seem indicated where a divorce is involved, according to the holding in *Norwood v. Norwood*.¹⁴ Plaintiff there petitioned to dismiss her complaint after evidence had been heard, after the trial court had suggested that a decree would be forthcoming, and after plaintiff had accepted some of the benefits of the indicated decree in the form of the payment of money, part of a property settlement. Representatives of the defendant had contended that, practically speaking, final judgment had been rendered when the court pronounced the words "divorce granted" after hearing the testimony. The Appellate Court ruled, consonant with chancery practice, that the decree was not finally rendered until entered or filed of record, until which time the plaintiff retained the right to have the suit dismissed. The presence of a decree, however, is of no consequence if the court lacked jurisdiction of the subject matter because of the non-residence of plaintiff within the county where the divorce action was filed.¹⁵ Being void, the decree may be attacked collaterally despite the fact that the thirty-day period for vacating the decree has passed and rights of third persons have intervened. For that reason, in *Meyer v. Meyer*,¹⁶ the Appellate Court reversed a trial court holding which had by-passed the jurisdictional question, saying "a void judgment or order may be vacated at any time and that the doctrines of laches and estoppel do not apply."¹⁷

An important and novel question concerning alimony was presented in the case of *Arnold v. Arnold*.¹⁸ Plaintiff therein, hav-

¹⁴ 333 Ill. App. 469, 77 N. E. (2d) 552 (1948). The court not only relied on Ill. Rev. Stat. 1947, Ch. 110, § 176, but also on Section 3 of Rule 60 of the Superior Court of Cook County, where the case was heard, which provides that a divorce decree shall be entered within ten days following the hearing and that, prior to entry of the decree, a transcript of the evidence shall be presented and approved by the court.

¹⁵ Ill. Rev. Stat. 1947, Ch. 40, § 5.

¹⁶ 333 Ill. App. 450, 77 N. E. (2d) 556 (1948).

¹⁷ 333 Ill. App. 450 at 468, 77 N. E. (2d) 556 at 564. The lower court had decided that the rights of third parties, that is of the wife and child of the marriage of the defendant-husband which occurred after a divorce awarded to him on his counterclaim in the original action, overshadowed the jurisdictional question and justified dismissing the first wife's petition to vacate the decree.

¹⁸ 332 Ill. App. 586, 76 N. E. (2d) 335 (1947), noted in 26 CHICAGO-KENT LAW REVIEW 344.

ing previously been granted a divorce with alimony, petitioned the court to materially increase the amount of the award on the ground that she had a right to share in her former husband's prosperity even though the increase in wealth came to him after their divorce. The court agreed that it had the power, in view of the improved financial condition, to grant the ex-wife an increase in alimony to offset the decrease in the purchasing power of the dollar¹⁹ and to enable her to meet the burden of income tax on such alimony²⁰ but pointed out that her only right was to be maintained, so far as possible, in the station of life to which her husband had accustomed her as of the date of the original decree. As the present statute on the subject does not provide for this contingency,²¹ the court felt obliged to stay within the limits of its jurisdiction although differences existing between the instant case and the holding in *Hoover v. Hoover*²² were aptly noted.

The usual method pursued in this state for the enforcement of the payment of alimony in arrears arising under a decree of a sister state has been by first requiring reduction of the arrears to judgment by appropriate action in the sister state, thereafter to be followed by a suit in debt on such judgment here.²³ In 1942, however, the Appellate Court for the Second District, in the case of *Rule v. Rule*,²⁴ departed from this time-honored practice by granting equitable relief against the defaulting defendant under

¹⁹ *Gehlbach v. Gehlbach*, 219 Ill. App. 503 (1920). See also *Brown v. Brown*, 209 Mo. App. 416, 239 S. W. 1093 (1922).

²⁰ *Jacobs v. Jacobs*, 328 Ill. App. 133, 65 N. E. (2d) 588 (1946).

²¹ Ill. Rev. Stat. 1947, Ch. 40, § 18. On the power of the court to modify alimony awards under the statute, see *Recklein v. Recklein*, 327 Ill. App. 641 at 644, 64 N. E. (2d) 787 at 789 (1946).

²² 307 Ill. App. 590, 30 N. E. (2d) 940 (1940). The wife there petitioned for a large increase in support money payable under a separate maintenance decree, prosperity having caught up with her husband. The court allowed the prayer of the petition. It must be remembered that, after a separate maintenance decree, the parties remain married and the wife, although living apart from her husband, may properly share in his good fortune. Absolute divorce, in contrast, terminates the marriage status; the alimony award being viewed as a substitute for the duty of support which had existed prior to the decree. See *Herrick v. Herrick*, 319 Ill. 146, 149 N. E. 820 (1925).

²³ *Paulin v. Paulin*, 195 Ill. App. 350 (1915).

²⁴ 313 Ill. App. 108, 39 N. E. (2d) 379 (1942), noted in 21 CHICAGO-KENT LAW REVIEW 46-7.

an alimony decree of a sister state. The Appellate Court for the First District, in the case of *Clubb v. Clubb*,²⁵ appears to have carried that concept even farther by first adopting it for use to secure payment of alimony awarded by a decree of an English court and second, to hold the obligated person in contempt for non-compliance of the Illinois decree based thereon. The practice, if upheld, recommends itself as being not only a less expensive but also a far more effective weapon than is the older view on the subject.

Independently of divorce and the incidents thereof, other questions concerning the law regarding husband and wife require attention. The case of *Olmsted v. Olmsted*²⁶ discusses anew the power of a court of equity, acting in a suit for separate maintenance, to adjudicate property rights as between the litigants. In that action, the trial court had entered a decree for separate maintenance and, *inter alia*, had ordered that plaintiff be awarded a sum of money "from the monies on deposit in a certain vault." Defendant appealed from that part of the decree which contained the property adjudication, asserting that, in a separate maintenance suit, the trial court had no jurisdiction to determine property rights. Because of the existence of certain prior cases adjudicated in the appellate courts of this state,²⁷ some doubt had been introduced into the law on that subject. In the instant case, however, it was pointed out that any uncertainty as to the correct rule to be applied had its origin in dicta²⁸ rather than in any authoritative ruling by the Supreme Court. The court found that the validity of the rule argued for by defendant had been affirmed in *Petta v. Petta*,²⁹ the most recent case on the subject, so it adopted the holding therein as indicative of the weight of authority

²⁵ 334 Ill. App. 599, 80 N. E. (2d) 94 (1948). Leave to appeal was allowed and it is understood that the Illinois Supreme Court later reversed the holding therein.

²⁶ 332 Ill. App. 454, 75 N. E. (2d) 774 (1947), noted in 36 Ill. B. J. 492.

²⁷ *Grossman v. Grossman*, 304 Ill. App. 507, 26 N. E. (2d) 678 (1940); *Glennon v. Glennon*, 299 Ill. App. 13, 19 N. E. (2d) 412 (1939).

²⁸ *Decker v. Decker*, 279 Ill. 300, 116 N. E. 688 (1917).

²⁹ 321 Ill. App. 512, 53 N. E. (2d) 324 (1944), noted in 22 CHICAGO-KENT LAW REVIEW 281.

in this state. Without question the court may, in a case where an absolute divorce is granted, adjudicate the property rights of the parties,³⁰ but no similar power is conferred by the statute governing separate maintenance. There is occasion to believe, however, that the provisions of the Civil Practice Act³¹ and of Rule 12 of the Illinois Supreme Court,³² dealing with joinder of causes, would permit a plaintiff to join a suit for separate maintenance with one seeking an adjudication of property rights provided the complaint definitely avers the several claims as separate and distinct causes of action. If the question of settlement of property rights is presented simply as an incident to a single cause of action in separate maintenance, the court would be without power to determine the respective property rights of the litigants.³³

The situation concerned in the federal case of *Daily v. Parker*³⁴ has, as could be expected, found a counterpart in Illinois in the form of two cases entitled *Johnson v. Luhman* which have led to a similar result. The suit of the Johnson children against Mrs. Luhman for the alienation of their father's affections was noted in a prior survey.³⁵ In the second case, that of the wife for the alienation of her husband's affections,³⁶ the court answered defendant's argument, to the effect that the maintenance of such a suit was contrary to the public policy of Illinois, by citing *Heck v. Schupp*³⁷ as the last word on suits of this character. The complaint of the wife having been filed prior to the effective date of the statutes designed to restrict the scope of suits of that character,

³⁰ Ill. Rev. Stat. 1947, Ch. 40, § 18.

³¹ *Ibid.*, Ch. 110, § 167, declares that parties "may plead as many causes of action, counterclaims, defenses and matters in reply and rejoinder as they may have, and each shall be separately designated and numbered."

³² *Ibid.*, Ch. 110, § 259.12.

³³ A worthwhile discussion of property rights in family law will be found in Goldblatt, "Joint Tenancies and Estates in Matrimonial Law," 36 Ill. B. J. 377.

³⁴ 152 F. (2d) 174 (1945). A list of articles and case comments on this decision appears in Heindl, "A Remedy for All Injuries?," 25 CHICAGO-KENT LAW REVIEW 90.

³⁵ 330 Ill. App. 598, 71 N. E. (2d) 810 (1947), noted in 25 CHICAGO-KENT LAW REVIEW 260 and 26 CHICAGO-KENT LAW REVIEW 62-3.

³⁶ 333 Ill. App. 418, 78 N. E. (2d) 107 (1948).

³⁷ 394 Ill. 296, 68 N. E. (2d) 464 (1946).

it is too early as yet to learn what effect such statutes will have on litigation of this character.³⁸

A logical application of Section 8 of the Husband and Wife Act,³⁹ dealing with rights between the spouses arising from services performed by one for the other, was made in *Wilhelm v. Industrial Commission*⁴⁰ where, in reversing the decision of a circuit court and reinstating the original finding of the industrial commission, the Supreme Court ruled that a husband was not entitled to collect compensation for injuries resulting from labor performed as an "employee" of the wife. The plaintiff contended that the Workman's Compensation Act,⁴¹ being a later enactment, had operated to repeal Section 8 by implication at least as it might have bearing in compensation cases. Repeal by implication not being favored,⁴² and the Husband and Wife Act having been amended on several occasions,⁴³ the last time being in 1947, the court felt that no change had been made in the law. There being no express provision in the Workmen's Compensation Act to support any theory of liability as between husband and wife, the court was held to the conclusion that the statute was not intended to make any change in the existing status of husband and wife.

The question as to whether or not an allowance for attorneys fees and expense money might be made to the "wife" in a suit to annul a marriage had never before been presented to an Illinois

³⁸ Laws 1947, pp. 796, 800, and 1181; Ill. Rev. Stat. 1947, Ch. 68, § 34 and § 41, and Ch. 89, § 25 et seq. Comment on the constitutionality of these statutes appears in 30 Chicago Bar Rec. 127-33.

³⁹ Ill. Rev. Stat. 1947, Ch. 60, § 8.

⁴⁰ 399 Ill. 80, 77 N. E. (2d) 174 (1948).

⁴¹ Ill. Rev. Stat. 1947, Ch. 48, § 138 et seq.

⁴² *Seagram-Distillers Corp. v. Old Dearborn Distribution Co.*, 363 Ill. 610, 2 N. E. (2d) 940 (1936); *Kizer v. City of Mattoon*, 332 Ill. 545, 164 N. E. 20 (1928).

⁴³ The statute, since its original adoption, has been amended in other respects in 1877, 1915 and 1947. On the particular problem, the court said, in 399 Ill. 80 at 88, 77 N. E. (2d) 174 at 178, that in view of the fact that the Workmen's Compensation Act was substituted as a "new remedy in lieu of common-law rights and liabilities in case of injuries to employees, we are of the opinion the legislature never intended the act to be applied to injuries sustained by husbands while performing services for their wives for which there was no right of action at common law or by statute and thus open the field of liability, the extent of which cannot be calculated."

reviewing tribunal prior to the case of *Arndt v. Arndt*.⁴⁴ The plaintiff there had filed suit for the annulment of his marriage. The trial court ruled against him. When plaintiff appealed, the defendant petitioned for an order on plaintiff to pay attorneys fees and expense money to enable her to defend the appeal. The Appellate Court upheld the lower court both as to its dismissal of plaintiff's complaint and its order for money payment.⁴⁵ Plaintiff thereupon appealed to the Illinois Supreme Court. That court reversed the holding on the ground that a court of equity, in the absence of statute, has no power "to compel the support of a wife, this being the husband's common law obligation."⁴⁶ While that power is vested in the courts where the money payment is sought as an incident to a divorce⁴⁷ or to a separate maintenance action,⁴⁸ the legislature has adopted no statute governing annulment actions. No amount of legerdemain can change the character of an annulment proceeding so as to bring it within the comprehension of Section 15 of the Divorce Act for, as the court clearly indicated, an annulment proceeding is designed to have a marriage allegedly void judicially so declared, whereas a divorce action seeks to dissolve a marriage admittedly valid. If no marriage exists, no marital obligations can arise and, absent a statute so compelling, there can be "no duty to pay support money or attorney's fees."⁴⁹ The court, naturally, did not indicate what the result would be if annulment was denied, thereby recognizing that a marriage did exist between the parties. It can only be supposed that such a holding would then open the door to a decree for divorce or separate maintenance, if cause existed.

⁴⁴ 399 Ill. 490, 78 N. E. (2d) 272 (1948).

⁴⁵ 331 Ill. App. 85, 72 N. E. (2d) 718 (1947).

⁴⁶ 399 Ill. 490 at 495, 78 N. E. (2d) 272 at 275.

⁴⁷ Ill. Rev. Stat. 1947, Ch. 40, § 16.

⁴⁸ *Ibid.*, Ch. 68, § 22.

⁴⁹ 399 Ill. 490 at 496, 78 N. E. (2d) 272 at 276.

VI. PROPERTY

REAL AND PERSONAL PROPERTY

A tangled story of a little-used country graveyard appears in the report of the case of *Smith v. Ladage*.¹ Land had there been conveyed to named grantees as "Trustees of the Brush Creek Burying Ground," and to their successors, without any limitation or restriction other than might be inferred from the descriptive words attached to the grantees' names. Occasional burials occurred from 1848 to 1922, subsequent to which time the cemetery fell into disrepair and became overgrown with weeds, vines and brush. In 1940, the defendants acquired title to the quarter-section of land from which the cemetery had been carved and thereafter, dealing with the township officials, obtained passage of a vacation ordinance on condition the defendants would remove all bodies and provide for the re-interment thereof in a nearby cemetery at their own expense. Upon completion of these conditions, a quit-claim deed covering the cemetery site was given to defendants and was duly recorded. Thereafter suit was brought by persons who claimed an interest in the property, either by quit-claim from the heirs of one of the original grantees² or as relatives of persons buried in the cemetery, to prevent desecration of the burial ground. A decree dismissing the suit was reversed because the court failed to find proper compliance with the provisions of Section 1 of an "Act to provide for the removal of cemeteries,"³ in that (1) the assent of the trustees or persons controlling the cemetery had not been obtained, and (2) there was no showing of "good cause" for the removal as the evidence failed to indicate any danger to public health or welfare. Mere neglect was not regarded sufficient to constitute either abandonment or justification for the vacation ordinance.

¹ 397 Ill. 336, 74 N. E. (2d) 497 (1947).

² The court decided the conveyance vested no title since the estate of the deceased trustee, he being one of joint trustees, passed to the survivor of the grantees rather than to the heirs applying the rule laid down in *Reichert v. Missouri & Illinois Coal Co.*, 231 Ill. 238, 83 N. E. 166, 121 Am. St. Rept. 307 (1907).

³ Ill. Rev. Stat. 1947, Ch. 21, § 2.