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## Family Law - Survey of Illinois Law for the Year 1946-1947

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## V. FAMILY LAW

Final nullification of the so-called "Heart Balm" Act<sup>1</sup> occurred during the past year through the decision in *Heck v. Schupp*,<sup>2</sup> an action for alienation of affections.<sup>3</sup> The primary ground relied upon was the same one previously pointed out, to-wit: the content of the statute was not fairly revealed in the title,<sup>4</sup> but the court also adverted to the fact that the statute would serve to put a premium on violations of moral law for offenders would be free to pursue a course of conduct without fear of punishment, hence also violated that part of the Bill of Rights guaranteeing a "certain remedy" in the laws for all injuries and wrongs.<sup>5</sup> Legislature response to the decision may be observed in three new statutes restricting damages in civil actions for alienation of affections,<sup>6</sup> for breach of promise to marry,<sup>7</sup> and for criminal conversation<sup>8</sup> to the actual damages sustained. No punitive, exemplary or aggravated damages are hereafter to be allowed. In the case of suits for breach of promise to marry, the plaintiff must also serve notice of intention to sue within three months of the alleged breach and then bring the action within one year.<sup>9</sup>

Paralleling the decision in the case last mentioned is the holding of the Appellate Court for the Second District in *Johnson v. Luhman*<sup>10</sup> wherein a complaint by a minor to recover damages for alienation of the parent's affections was held to state a cause of action despite the objection that the infant's claim was a novel

<sup>1</sup> Ill. Rev. Stat. 1945, Ch. 38, § 246.1 et seq.

<sup>2</sup> 394 Ill. 296, 68 N. E. (2d) 464 (1946), noted in 47 Col. L. Rev. 503, 42 Ill. L. Rev. 233.

<sup>3</sup> See also *Zaremba v. Skurdialis*, 395 Ill. 437, 70 N. E. (2d) 617 (1947). Other portions of the statute had been declared unconstitutional in *People v. Mahumed*, 381 Ill. 81, 44 N. E. (2d) 911 (1942).

<sup>4</sup> Ill. Const. 1870, Art. IV, § 13.

<sup>5</sup> *Ibid.*, Art. II, § 19.

<sup>6</sup> Laws 1947, p. 796, S. B. 562; Ill. Rev. Stat. 1947, Ch. 68, § 34 et seq.

<sup>7</sup> Laws 1947, p. 1181, S. B. 563; Ill. Rev. Stat. 1947, Ch. 89, § 25 et seq.

<sup>8</sup> Laws 1947, p. 800, S. B. 552; Ill. Rev. Stat. 1947, Ch. 68, § 41 et seq.

<sup>9</sup> The contents of the notice are specified in Ill. Rev. Stat. 1947, Ch. 89, § 28.

<sup>10</sup> 330 Ill. App. 598, 71 N. E. (2d) 810 (1947), noted in 25 CHICAGO-KENT LAW REVIEW 260 and 36 Ill. B. J. 84.

one without legal support. Justification for that holding was said to rest on the same provision of the Bill of Rights, on the decision in *Daily v. Parker*,<sup>11</sup> and on the fact that to hold otherwise would be "contrary to all sense of justice."<sup>12</sup> It should be noticed, however, that the Circuit Court of Appeals for the District of Columbia thinks differently, for it dismissed an analogous complaint in the case of *McMillan v. Taylor*<sup>13</sup> and refused to follow the *Daily* decision. The law, in this respect, is clearly in a state of flux and desperately in need of that crystallization which can be provided only by a decision of the highest court or by legislation on the point.

Several issues with regard to divorce law were passed upon. The case of *Ollman v. Ollman*<sup>14</sup> is noteworthy for the court there repudiated certain expressions found in earlier cases to the effect that the defense of condonation, being an affirmative defense, had to be specially pleaded otherwise the defendant would be precluded from urging the same even though the fact thereof be revealed in the evidence.<sup>15</sup> The former view was rejected in favor of the interest of the state in maintaining the integrity and permanence of the marriage relation and the trial judge was directed, whenever in the course of the divorce trial it appeared that the action was collusive or barred, to "inquire, of its own motion, as the representative of the State, into the facts and circumstances and to act in accordance with the facts thus developed,"<sup>16</sup> regardless of the state of the pleadings.

The question as to whether or not the remarriage of the recipient of alimony under a lump-sum alimony and property settlement terminates the right to collect the remaining installments due thereunder was again raised in *Kohl v. Kohl*.<sup>17</sup> The

<sup>11</sup> 152 F. (2d) 174 (1945). But see Heindl, "A Remedy for all Injuries?" 25 CHICAGO-KENT LAW REVIEW 90.

<sup>12</sup> 330 Ill. App. 598 at 604, 71 N. E. (2d) 810 at 813.

<sup>13</sup> 160 F. (2d) 221 (1946).

<sup>14</sup> 396 Ill. 176, 71 N. E. (2d) 50 (1947).

<sup>15</sup> See, for example, *Lipe v. Lipe*, 327 Ill. 39, 158 N. E. 411 (1927), and *Klekamp v. Klekamp*, 275 Ill. 98, 113 N. E. 852 (1916).

<sup>16</sup> 396 Ill. 176 at 183, 71 N. E. (2d) 50 at 53.

<sup>17</sup> 330 Ill. App. 284, 71 N. E. (2d) 358 (1947).

original decree therein had found the existence of such a settlement but the terms thereof had not been incorporated in the decree. After certain payments had been made, the divorced wife remarried so the defendant promptly sought a modification of the decree to excuse him from the obligation of further payments. He relied on the decision in *Banck v. Banck*,<sup>18</sup> but the court distinguished the holding therein on the ground that that case dealt with a lump-sum settlement of alimony only whereas, in the instant case, the settlement covered property rights. The case of *Drangle v. Lindauer*<sup>19</sup> had offered a road by which to by-pass the ruling in the *Banck* case. The court has now seemingly improved that road.

Restraint against the threat to institute colorable divorce proceedings in a foreign state had been upheld in the separate maintenance case of *Kahn v. Kahn*<sup>20</sup> on the ground that, once jurisdiction has been acquired, the local courts are empowered to retain that jurisdiction by the use of even so stringent a remedy as injunction if that becomes necessary. The case of *Russell v. Russell*<sup>21</sup> now carries that doctrine over to cases where the defendant in the local action has actually commenced and is actively prosecuting the foreign divorce suit so long as the foreign domicile is fraudulently established and the local proceedings had been begun before the foreign suit. The efficacy of such a remedy in contrast to the doubtful one of proving the foreign decree to be null and void is obvious.

Decisions such as the one in the *Kahn* case necessarily presuppose that the local court has jurisdiction both as a matter of law and also over the parties to the litigation. Two other divorce cases, therefore, become significant for they throw light on the point of jurisdiction over divorce as a matter of law. In *Conrad v. Conrad*,<sup>22</sup> the Supreme Court held that a city court could grant

<sup>18</sup> 322 Ill. App. 369, 54 N. E. (2d) 577 (1944), noted in 22 CHICAGO-KENT LAW REVIEW 276.

<sup>19</sup> 323 Ill. App. 23, 54 N. E. (2d) 751 (1944). Leave to appeal denied.

<sup>20</sup> 325 Ill. App. 137, 59 N. E. (2d) 874 (1945), noted in 24 CHICAGO-KENT LAW REVIEW 43-4.

<sup>21</sup> 329 Ill. App. 580, 70 N. E. (2d) 70 (1946), noted in 36 Ill. B. J. 191.

<sup>22</sup> 396 Ill. 101, 71 N. E. (2d) 54 (1947).

a divorce based on a charge of desertion provided the plaintiff took up valid residence in the city after desertion had begun but before the full period of desertion had run. It indicated that it was not necessary that the original act of leaving occur within the city to bring the case within the jurisdictional factors laid down by the decision in *Werner v. Illinois Central Railroad Company*<sup>23</sup> since the cause of action did not accrue until the requisite period of time had expired. The holding in *Govan v. Govan*,<sup>24</sup> however, would indicate that suit may be maintained in a city court in the county of plaintiff's residence, at least since the 1943 amendment to the city courts statute which had deleted the phrase "arising in said city,"<sup>25</sup> even though the parties do not reside in the city and the basis for the divorce arose elsewhere, at least so long as the defendant files a written appearance in the proceeding.<sup>26</sup>

One interesting point concerning custody of children of divorced parents came up for consideration. The case of *Kulan v. Anderson*<sup>27</sup> had held that, as between the surviving parent, otherwise fit and proper, and a sister of the deceased parent, it was improper to divide the custody of children between the immediate and the collateral relatives. That decision was followed in *Lucchesi v. Lucchesi*<sup>28</sup> where the trial court was declared to have acted in error when dividing custody of a minor child between the divorced mother and the paternal grandparents, even though the latter were trustees over an estate left by the deceased parent for the benefit of the minor child. The court, however, indicated that a reasonable visitation order would have been entirely proper and could not constitute a material abridgement of the surviving parent's custodial rights.

<sup>23</sup> 379 Ill. 559, 42 N. E. (2d) 82 (1942), noted in 21 CHICAGO-KENT LAW REVIEW 116. The decision in *Riddlesbarger v. Riddlesbarger*, 324 App. 176, 57 N. E. (2d) 901 (1944), was distinguished on the ground that the parties there involved never, at any time, either jointly or separately resided in the city.

<sup>24</sup> 331 Ill. App. 372, 73 N. E. (2d) 163 (1947).

<sup>25</sup> Laws 1943, p. 578, H. B. 471. See Ill. Rev. Stat. 1941, Ch. 37, § 333.

<sup>26</sup> See Ill. Rev. Stat. 1947, Ch. 40, § 6.

<sup>27</sup> 300 Ill. App. 267, 20 N. E. (2d) 987 (1939), noted in 18 CHICAGO-KENT LAW REVIEW 17-8.

<sup>28</sup> 330 Ill. App. 506, 71 N. E. (2d) 920 (1947).

An appalling increase in the divorce rate observed in recent years, particularly in metropolitan centers, together with the multiplication of problems growing out of such broken marriages led to a sincere movement to remedy conditions through legislation designed to guarantee a more deep-sighted investigation in the genuineness of suits for divorce, the promotion of reconciliation, and the enforcement of decrees for alimony and support money. The key measure was Senate Bill 415 but a number of other statutes were also passed to amended other statutes to produce conformity in the operation of the plan.<sup>29</sup> Unfortunately, the entire series of bills was designed to have operative effect only in Cook County and for this reason the entire structure was exposed to attack on constitutional grounds. It should be noted that the entire reform fell, not in the period of this survey, when the Supreme Court found a violation of the constitutional prohibition against special or local laws.<sup>30</sup> One of these measures, probably a casualty by implication, was designed to overcome a present defect in alimony awards. If personal jurisdiction of the defendant can be acquired, an order for periodic alimony is valid and, on proper showing, can be modified from time to time. In the absence of personal jurisdiction, any alimony order would be void hence it has become the practice to grant divorce on default based on publication without alimony if the plaintiff elects to take such a decree. Any attempt to reopen such a decree, if personal jurisdiction can later be acquired, would generally be a nullity for alimony must rest upon the idea that it is a substitute for the duty to support, hence can only be granted as an incident to the termination of the relationship of husband and wife. As that relationship has been abrogated by the default decree, the court is powerless to grant alimony at some later occasion. The measure in question was designed to cure that fault by making every such decree merely a conditional one as to the alimony feature, thereby per-

<sup>29</sup> Laws 1947, p. 813, S. B. 415; Ill. Rev. Stat. 1947, Ch. 37, § 105.1 et seq. See also Laws 1947, p. 818, S. B. 417; p. 1093, S. B. 418; p. 1184, S. B. 416; p. 989, S. B. 419, and p. 1700, S. B. 420. These measures appeared in Ill. Rev. Stat. 1947 as Ch. 40, §§ 6, 14, 16 and 19; Ch. 68, §§ 22 and 23.1; Ch. 90, §§ 1, 2, 6, 7 and 9; Ch. 53, § 38, and Ch. 127, § 168-1, respectively.

<sup>30</sup> See *Hunt v. County of Cook*, 398 Ill. 412, 76 N. E. (2d) 48 (1947), wherein the court found a violation of Ill. Const. 1870, Art. IV, § 22.

mitting the exercise of jurisdiction if and when it could be acquired.<sup>31</sup> The net result would have been that "no decree would ever be final on the question of alimony short of an express waiver, a denial of alimony, or a recital of alimony or property settlement."<sup>32</sup> The entire series of bills did contain many desirable features beside the one mentioned, so it is to be hoped that they will be re-enacted after elimination of the unconstitutional features. One measure which appears to have survived grants to the court the power to restrain any third person, party to the suit, from doing or threatening any act calculated to obstruct a reconciliation of the parties to the marriage.<sup>33</sup>

## VI. PROPERTY

### REAL AND PERSONAL PROPERTY

By far the most important contribution to the law of real property was made by legislative action in adopting a new act dealing with rights of entry and possibilities of reverter such as arise after conveyance of a fee simple on condition subsequent.<sup>1</sup> The general purpose of that statute is to provide a means by which such rights may be released or destroyed, a purpose the desirability of which cannot be questioned, particularly by any practitioner who has been faced with passing upon the validity of a title encumbered thereby. Issues will undoubtedly arise as to the constitutionality of such statute insofar as it may be applied to deeds executed before the enactment thereof. In that respect, reference is made to an excellent discussion on the subject appearing elsewhere which contains so complete a treatment of the entire subject that repetition would be pure superfluity.<sup>2</sup>

Except for that statute, debatable legal questions growing out of ownership of land or rights therein have been relatively

<sup>31</sup> Laws 1947, p. 818, S. B. 417; Ill. Rev. Stat. 1947, Ch. 40, § 19.

<sup>32</sup> See Goldblatt, "Matrimonial Law," 36 Ill. B. J. 104 at 105. A reading of this article is recommended.

<sup>33</sup> Laws 1947, p. 817, S. B. 421; Ill. Rev. Stat. 1947, Ch. 40, § 13.

<sup>1</sup> Laws 1947, p. 659, S. B. 347; Ill. Rev. Stat. 1947, Ch. 30, § 37b et seq.

<sup>2</sup> See Denissen, "The Illinois Reverter Act," 36 Ill. B. J. 263-71.