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## Partnership Law and the Uniform Partnership Act in South Carolina-Part I

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## THE SOUTH CAROLINA DIVORCE ACT OF 1949

J. D. SUMNER, JR.\*

### HISTORICAL BACKGROUND

#### *Law in England Prior to 1857*

Until the reign of Henry VIII marriage in England was looked upon as a sacrament and therefore indissoluble.<sup>1</sup> This was because the Roman Catholic faith, which was established in England after the Norman Conquest, considered marriage as a contract of divine origin rather than one of human convention; and the essential qualities of this contract were deemed to be indissolubility and unity.<sup>2</sup> The belief that this law was promulgated by Christ and therefore inviolable is still part of Catholicism today.<sup>3</sup> Because of these religious convictions, the ecclesiastical courts, which had jurisdiction over domestic cases, did not award absolute divorces during this period of English history even though there was gross post nuptial misconduct, such as adultery, by one of the spouses.<sup>4</sup>

However, the ecclesiastical courts in England did award a divorce *a mensa et thoro* which was nothing more than a judicial separation.<sup>5</sup> Such a separation could be had at the instance of either the husband or the wife when the other party was guilty of post nuptial misbehavior which made further cohabitation impossible. Rigid proof was required in such cases and the petitioning spouse had to show that he was free from guilt. Since the divorce *a mensa et thoro* did not dissolve the marriage, but only authorized a separation, a party did not lose his marital right in the other's property. Moreover, neither could remarry to a third party. A divorce *a mensa et thoro* ended at such time as the parties were reconciled.

The ecclesiastical courts, in addition to the divorce *a mensa et thoro*, granted annulments. These decrees of nullity did not dissolve the consummated bonds of marriage. They were merely judicial declarations that the marriage was null and void *ab initio* because of some invalidating impediment which existed at the time

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1. MADDEN, PERSONS AND DOMESTIC RELATIONS 256 (1936).

2. 1 BISHOP, MARRIAGE AND DIVORCE §§ 27, 28 (5th ed. 1873).

3. 2 VIRGINIA LAW WEEKLY DIGEST 15 (1950).

4. BL. COMM. 188 (Gavit's ed. 1941).

5. *Ibid.*

that the marriage was contracted.<sup>6</sup> Actually the court in such cases decided that a valid bond of matrimony between the parties never existed. Such annulments were known as decrees *a vinculo*. Impediments which were sufficient causes for a decree *a vinculo* were: prior marriage, impotency, consanguinity in a forbidden degree and want of age.<sup>7</sup> Unless there was one of the above impediments existing at the time the marriage took place, the decree *a vinculo* was unobtainable since such annulments were not awarded for post marital difficulties. No absolute divorces were granted during this period. The decrees *a vinculo* and *a mensa et thoro* were the only forms of relief. Thus, many hardship cases existed because of no further recourse.

This situation aroused concern during the sixteenth century and there is some evidence of divorces *a vinculo matrimonii* being awarded.<sup>8</sup> However, the surge was quieted in 1601 when the Star Chamber firmly reestablished the doctrine of indissolubility in England.<sup>9</sup> But even after this decision, numerous divorces were secured by special acts of Parliament.<sup>10</sup> Close political affiliations, as well as money and time, were essential for those seeking such legislative divorces. Therefore commoners were seldom able to get the necessary act of Parliament. This inequality aroused much concern in England among the less fortunates. In addition, the Reformation wrought many changes in public opinion.<sup>11</sup> Henry VIII appointed a Commission to inquire into the possibility of revising the ecclesiastical code. The Commissioners recommended many changes including the abolition of the indissolubility doctrine, but they were not adopted.<sup>12</sup> Yielding to public pressure Parliament enacted a statute in 1857 setting up a Court of Divorce and Matrimonial Causes.<sup>13</sup> This act removed the jurisdiction of the ecclesiastical courts to the newly created court and established new divorce law in England.

#### *Law in South Carolina Prior to 1949*

The first court of chancery was established in South Carolina in 1721 by legislative act.<sup>14</sup> The tenth section of this act provided:

. . . that the said Court shall proceed, adjudge and determine in all cases brought into the said Court, as near as may be, accord-

6. MADDEN, PERSONS AND DOMESTIC RELATIONS 257.

7. BL. COMM. 185 (Gavit's ed. 1941).

8. MADDEN, PERSONS AND DOMESTIC RELATIONS 258.

9. Rye v. Fuljambe, Moore 683, 72 Eng. Rep. 638 (1601).

10. MADDEN, PERSONS AND DOMESTIC RELATIONS 259.

11. 1 BISHOP, MARRIAGE AND DIVORCE § 30.

12. *Ibid.*

13. 20 and 21 Vict. c. 85 (1857).

14. See Mattison v. Mattison, 1 Strob. Eq. 387 (S. C. 1847).

ing to the known laws, customs, statutes and usages of the Kingdom of Great Britain, and also, as near as may be, according to the known and established rules of his Majesty's High Court of Chancery in South Britain.

However, no ecclesiastical courts were ever established in South Carolina, or elsewhere in this country prior to or even after the American Revolution. As a result of this situation, it was stated at an early date that the equity courts in South Carolina did not have the power to grant divorces.<sup>15</sup> This power was never exercised by the English Chancery Courts, thus, it is not surprising to find the South Carolina courts denying that they had such an inherent power. This view has been uniformly followed throughout the United States.<sup>16</sup> Due to the lack of ecclesiastical courts and the lack of inherent power in the courts of equity, a definite grant of power was needed to confer jurisdiction on the American Courts to grant divorces. This power was not forthcoming in South Carolina until the year 1872.

As the result of no constitutional or statutory power being awarded the courts, a statement was made as early as 1833 declaring that the marriage contract in South Carolina was indissoluble and nothing short of actual or presumed death could terminate it.<sup>17</sup> The court in the *Boyce* case did, however, reiterate the old common law presumption of death where a party was missing for a period of seven years without having been heard from. In such a case the missing party was at least constructively dead, and this instance was therefore no exception to the indissoluble rule.

In 1844 the South Carolina court was confronted with a case<sup>18</sup> involving the power of the court to declare void a marriage which was entered into by one who was *non compos mentis*. This question arose as a collateral issue in connection with the distribution of property left by the decedent. The marriage was voided on the premise that a marriage is a civil contract which can only be entered into by competent persons. This action is to be distinguished from a divorce in that in the former case the court says there was never any marriage, while in the latter a valid marriage has been effected. The power of the chancery court to award a decree *a vinculo*, which was recognized by the English ecclesiastical court was apparently established. Yet some three years later in *Mattison v. Mattison*<sup>19</sup>

15. See *Rhame v. Rhame*, 1 McC. Eq. 195, 207 (S. C. 1826).

16. TIFFANY, PERSONS AND DOMESTIC RELATIONS § 97 (1896).

17. See *Boyce v. Owens*, 1 Hill L. 8, 10 (S. C. 1833).

18. *Foster v. Means*, Speers Eq. 569 (S. C. 1844).

19. 1 Strob. Eq. 387 (S. C. 1847).

the court was confronted with the sole issue as to whether a court of equity had the power to decree that a marriage was void at its inception. It was held that this power was not in the chancery courts of England, and thus our equity courts could not inherit the power, and in order for equity to have such jurisdiction statutory authority was necessary. The *Mattison* case was distinguished from the *Foster* case on the ground that the validity of the marriage in the *Foster* case had arisen as a collateral issue to a problem over which the court had jurisdiction, whereas in the *Mattison* case the validity of the marriage was the sole issue presented for litigation. The line drawn between the two cases is thin. The problem in both cases was the same — namely, did the court have the power or did it not have the power. It is difficult to reconcile the cases on the basis of the manner in which they arose. Equity frequently takes jurisdiction over a collateral issue in order that it might give complete relief to the aggrieved party. Undoubtedly this was the reason for the decision in *Foster v. Means*, but if it was, no such reason was given by the court.

In 1858 the South Carolina court was again confronted with the power of the court to void a marriage.<sup>20</sup> In this case an uncle had married his niece, and the validity of the marriage arose in connection with the settlement of the deceased husband's estate. The chancellor stated that marriage is a civil contract and can be set aside for a civil disability, but that the marriage contract is unaffected by a canonical incapacity arising from proximity of blood. It was further said that neither the chancery in England nor the law courts had cognizance of canonical disabilities, and in the absence of a statute the courts of South Carolina do not. In this case the court again distinguished between direct suits for voiding marriages and suits where the legality of the marriage was only incidentally before the court in connection with another issue.

In 1911, some 65 years after the *Mattison* case, the Supreme Court of South Carolina did hold that the State courts have jurisdiction of an action to declare a marriage null and void *ab initio*,<sup>21</sup> but prior to this case several statutes voiding certain types of marriages had been enacted. However, no court was given jurisdiction to void these marriages. The court stated that jurisdiction would be implied and there was no necessity to provide that the courts would have the required power. Thus, the court was of the opinion that the statutes

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20. *Bowers v. Bowers*, 10 Rich. Eq. 551 (S. C. 1858).

21. *Davis v. Whiltock*, 90 S. C. 233, 73 S. E. 171 (1911).

carried with them the right to have the marriage status adjudicated by a competent judicial body.

Returning to the early South Carolina divorce cases, we discover another case<sup>22</sup> decided before the Civil War where the occasion was taken to express the old view that marriage contracts are indissoluble by human means in this state.

When the Constitution of 1868 was adopted the following provision relating to divorces was inserted: "The courts of common pleas shall have exclusive jurisdiction in all cases of divorce".<sup>23</sup> And a parallel section is found in a subsequent part: "divorces . . . shall not be allowed but by the judgment of a court as shall be prescribed by law".<sup>24</sup>

Some four years later the legislature enacted the necessary statute<sup>25</sup> providing for divorces in South Carolina. This Act provided that divorces were to be granted for adultery and desertion for a period of two years.

The Act of 1872 was short-lived as it was repealed some six years after its enactment.<sup>26</sup>

There are no reported cases in South Carolina granting a divorce under the Act of 1872. As a matter of fact, the reports contain only one decision which was decided under this Act. This is the case of *Grant v. Grant*.<sup>27</sup> In this case the husband sought a divorce from his wife on the ground of adultery. The suit was commenced on December 12, 1878, and the Act of 1872 was repealed on December 20, 1878. On appeal the lower court's dismissal was upheld despite of petitioner's contentions that there was an impairment of the obligation of contract and that he was entitled to the divorce under the 1868 constitution. The court held that the contract clause of the Federal Constitution pertains to questions of property and not matrimonial status. In addition, the court held that under the phrase ". . . that divorces shall not be allowed but by judgment of a court, as shall be prescribed by law . . ." a specific law authorizing the courts to grant the divorce decree was necessary. No such law existed when the petitioner's case came up for trial.

After the repeal of the 1872 Act the State was once again without a divorce law. The constitutional provisions of 1868 were retained, but the specific law necessary under Article 14, Section 5 was

22. *McCarty v. McCarty*, 2 Strob. L. 6 (S. C. 1847).

23. S. C. CONSTIT. Art. IV, § 15 (1868).

24. S. C. CONSTIT. Art. XIV, § 5 (1868).

25. 15 S. C. STAT. AT LARGE 30 (1872).

26. 16 S. C. STAT. AT LARGE 719 (1878).

27. 12 S. C. 29 (1879).

not provided by the Legislature. When a new State Constitution was drawn in 1895 the useless divorce articles in the Constitution of 1868 were omitted, and this article adopted: "Divorces from the bonds of matrimony shall not be allowed in this State."<sup>28</sup>

In addition to refusing the right to judicial divorces, South Carolina never awarded any legislative divorces as many states in this country did.

South Carolina has been highly praised by the Court of a sister state for its refusal to grant divorces in the following quote: "In South Carolina, *to her unfading honor*, a divorce has not been granted since the Revolution."<sup>29</sup> (This statement is accurate so far as reported cases are concerned, but otherwise is incorrect.)

For over half a century the provision of the 1895 Constitution remained unaltered and divorces from the bonds of matrimony were not granted in the State. The prevailing reason for the disallowment of divorces in South Carolina was expressed by Judge O'Neill.<sup>30</sup> He was of the opinion in the year 1847 that the Legislature, Bench, Bar, and people frowned upon divorces and nobly refused to permit them because of the injunction, "Those whom God has joined together, let no man put asunder." He also believed that this stern policy had been to the good of the people and the State. The opinion of Judge O'Neill can be traced to the Roman Catholic beliefs and the views prevailing in England after the Norman Conquest and prior to 1857. And in an 1848 case<sup>31</sup> Judge O'Neill took occasion to express the thought that the law holding marriage ties indissoluble came entirely from the teachings of the New Testament. It is surprising to find such views prevailing in a State where most of its citizens were largely Protestants.

There was some feeling in the State that the practice of refusing divorces was without merit. From the bench in 1818 Nott, J. said:

Where divorces are not allowed for any cause whatever, we sometimes see men of excellent characters unfortunate in their marriages, and virtuous women abandoned or driven away houseless by their husbands, *who would be doomed to celibacy and solitude if they did not form connections which the law does not allow, and who make excellent husbands and virtuous wives still.* Yet they are considered as living in adultery, because a rigor-

28. S. C. CONST. Art. XVII, §3 (1895).

29. See *Head v. Head*, 2 Kelly 191, 196 (Ga. 1847).

30. See *McCarty v. McCarty*, 2 Strob. L. 6, 11 (S. C. 1847).

31. See *City Council of Charleston v. Benjamin*, 2 Strob. L. 508, 523 (S. C. 1848).

ous and unyielding law, from motives of policy alone, has ordained it so.<sup>32</sup>

But even so, the public policy along these lines never changed considerably until 1949 when the following constitutional amendment was adopted: "Divorces from the bonds of matrimony shall be allowed on grounds of adultery, desertion, physical cruelty, or habitual drunkenness."<sup>33</sup>

Pursuant to this constitutional power the Legislature in the same year adopted a divorce law for South Carolina<sup>34</sup>—her first since 1878—thereby South Carolina became the 48th State to award divorces *a vinculo matrimonii*.

In the subsequent pages of this article each section of the 1949 Act will be set out and discussed. As can be imagined it would be impossible to give complete treatment to each section, even though such would be highly desirable. Each section will be generally discussed with the hope that this article will be of some benefit to the lawyers of South Carolina and the students of the School of Law at the University.

The general rules on divorce that have long been established elsewhere are the ones which will receive treatment in this article. These principles have been in effect for many decades in other states, and with but few exceptions are followed in this country. It is the belief of this writer that the South Carolina Court will rely upon this well-settled body of law. This belief is supported by the decisions in *Brown v. Brown*, *Jeffords v. Jeffords* and *Thomas v. Thomas*. In those cases the Court freely quoted and cited the usual rules found in the decisions of other courts; AMERICAN JURISPRUDENCE; CORPUS JURIS SECUNDUM; NELSON, DIVORCE AND ANNULMENT (2d ed.), etc.

## THE DIVORCE ACT OF 1949

**SECTION 1: Bring Divorce Actions Only in Court of Common Pleas.**—Actions for divorce from the bonds of matrimony shall in all cases be only in the equity jurisdiction of the Court of Common Pleas.

In England at early common law a suit for a divorce *a mensa et thoro* was always brought in the ecclesiastical courts, and the proceeding was in the form of a civil action.<sup>35</sup> Divorce suits in this

32. See *Cusack v. White*, 2 Mill's Const. 279, 292 (S. C. 1818).

33. 46 S. C. STAT. AT LARGE 138 (1949).

34. *Id.* at 216.

35. 2 BISHOP, MARRIAGE AND DIVORCE § 232.



country, likewise, have been traditionally regarded as civil in nature rather than criminal,<sup>36</sup> although one learned judge has contended that regulations on marriage and divorce are part of the criminal rather than civil administration of justice.<sup>37</sup> If a person is guilty of an offense which is a ground for divorce and is also the basis of a criminal prosecution, a judgment in one of the cases cannot be pleaded as a defense to the other. Certainly if divorce were a criminal action one suit would be a bar to the other. A divorce suit is really an action sounding in tort for the redress of a private wrong and not an action based on the marriage contract. Therefore, the Legislature has followed the established view of the other states by providing that actions for the dissolution of a marriage shall be brought in the Court of Common Pleas.

The various issues which were raised in a matrimonial suit in the ecclesiastical courts were not tried by a jury, but rather by the Chancellor. It was he and not jurymen who decided all questions of law and fact.<sup>38</sup> Since our equity courts are an offspring of the old ecclesiastical courts, though not equivalent thereto, many of the states have provided for the hearing of divorce suits on the equity rather than the legal side of the court.<sup>39</sup> Even though this is historically sound, it is not followed in some states where such suits are handled as legal rather than equitable proceedings.<sup>40</sup> Today many states provide for jury trials. By providing for equitable proceedings in divorce suits the South Carolina Legislature has precluded the right to a trial by jury. It is the belief of this writer that Section 1 of the South Carolina Divorce Act is sound. The issues in divorce cases at times become quite intricate and bulky. It would seem that a trained judge could follow these many issues better than laymen on a jury. And due to the state's vital interest in the matrimonial status of its citizens, the Legislature has considerably lessened the chances of favoritism and bias by providing for trial in equity rather than law where a jury can be had. Many equitable issues are involved in the termination of a marriage: such as, injunctions against interference with personal liberties, custody of children, alimony, changes of names, etc. Traditionally such matters have long rested in the jurisdiction of the equity courts. Thus it would seem that divorce suits should be brought in equity because of tradition and because of the very nature of the various questions presented for determination.

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36. WARREN, SCHOULER DIVORCE MANUAL § 9 (1944).

37. See *Barber v. Barber*, 10 Mass. 260, 265 (1813).

38. 2 BISHOP, MARRIAGE AND DIVORCE § 256.

39. 2 VERNIER, AMERICAN FAMILY LAWS § 85 (1932).

40. *Ibid.*

**SECTION 2. Divorceable Grounds.**—No divorce from the bonds of matrimony shall be granted except upon one or more of the following grounds, to wit:

1. Adultery.
2. Desertion for a period of one (1) year.
3. Physical cruelty.
4. Habitual drunkenness.

We have seen that the equity courts in the United States never considered themselves as having inherent jurisdiction to grant divorces. It follows that one must look to a statutory grant of this right before he can expect relief, and further his grievance against his spouse must be covered by the grounds for divorce that are set forth in the legislation. Divorce is therefore a privilege in the United States and not a vested right. It being a mere privilege, it can be abolished at any time. This point was before the South Carolina Court at an early date in *Grant v. Grant*,<sup>41</sup> previously mentioned, which arose under the South Carolina divorce act that was enacted during the Reconstruction Era. A suit for divorce was filed some eight days before the state divorce laws were repealed by the Legislature. A divorce was denied the plaintiff over his objection that there had been a violation of Art. I, Sec. 10 of the Federal Constitution. The court's reason for this conclusion was in essence that the Contract Clause has regard to questions of property and not to a matrimonial status.

There is a total of thirty-nine grounds for divorce in the United States.<sup>42</sup> These causes are very limited in some states, *e. g.*, in New York adultery is the sole ground;<sup>43</sup> while in others there are many causes. Kentucky, where some fifteen are listed, has more than any of the other states.<sup>44</sup> The grounds in this country range from adultery and desertion to such seemingly minor offenses as public defamation of the other spouse and vagrancy on the part of the husband.<sup>45</sup> A unique feature about South Carolina is that her grounds for divorce appear in an amendment to the State Constitution as well as in the Act.

Many states have a statute of limitations relating to the time within which the divorce action must be started. No such provision has been made in the South Carolina Act. However, since the action

41. 12 S. C. 29 (1879).

42. 2 VERNIER, AMERICAN FAMILY LAWS § 62.

43. CAHILL, CIVIL PRAC. ACT § 1147 (1925).

44. 2 VERNIER, AMERICAN FAMILY LAWS § 62.

45. *Ibid.*

is brought in equity, the equitable doctrine of laches would probably be applicable where there has been a long delay in bringing the suit.

The four grounds in South Carolina will now be taken up in the order in which they are listed in the Act.

1. *Adultery*. Adultery is a ground for divorce in every state. Moreover, in New York<sup>46</sup> it is the only recognized cause. The state of New York awards 40% of the divorces secured in the United States for adultery, whereas unfaithfulness is the cause for only 4% of the total obtained elsewhere.<sup>47</sup> In 1932 only five divorces for adultery were given by the state of Nevada while some 3,987 decrees were granted for other causes.<sup>48</sup> According to a survey recently made by the writer, approximately 6% of the divorces granted in South Carolina thus far have been for adultery.

Adultery has been defined as voluntary sexual intercourse by a married person with a person other than the offender's spouse.<sup>49</sup> Excluding South Carolina, a single act of such intercourse by either the husband or wife is sufficient cause for divorce in all of the states except Kentucky and Texas. Adultery in Kentucky is described as the living in adultery by either, or a single act by the wife, or lewd conduct by the wife.<sup>50</sup> In Texas it is defined as a wife taken in adultery, or a husband who abandons his wife and lives in adultery.<sup>51</sup> For many years North Carolina discriminated against the wife, as do Kentucky and Texas, but this discrimination has now been abolished.<sup>52</sup>

Criminal adultery in South Carolina is defined by the following statute: "Adultery is the living together and carnal intercourse with each other, or habitual intercourse with each other without living together, of a man and woman, when either is lawfully married to some other person."<sup>53</sup> From this statute it is easily discernable that more than one act is required. A living together or habitual intercourse must be proved in order to make out the criminal offense.

The South Carolina Court has never prescribed its requirements for adultery as a ground for divorce. At the time that our Constitutional Amendment and Act were adopted, the Legislature knew of the requirements in the other states. It seems reasonable that

46. CAHILL, CIVIL PROC. ACT § 1147 (1925).

47. JACOBS, CASES AND MATERIALS ON DOMESTIC RELATIONS 421 (2d ed. 1939).

48. *Ibid.*

49. 1 BISHOP, MARRIAGE AND DIVORCE § 703; WARREN, SCHOULER DIVORCE MANUAL § 59.

50. *Baker v. Baker*, 136 Ky. 617, 124 S. W. 866 (1910).

51. *O'Farrell v. O'Farrell*, 56 Tex. Civ. App. 51, 119 S. W. 899 (1909).

52. 2 N. C. GEN. STAT. § 50-5 (1942).

53. S. C. CODE § 1436 (1942).

if they had deemed that more than one act was necessary, they would have made provision therefor. This they did not do. In view of the fact that all but two of the other states say one act is sufficient cause, and due to the unqualified listing of adultery in the Act, it is doubtful that the Supreme Court of South Carolina will adopt the criminal definition set forth above. It is hard to conceive of the court requiring the same quantum of infidelity for a civil divorce proceeding as it does for a criminal prosecution. Only one case<sup>54</sup> involving adultery has been before the Court since the passage of the new Act. In this case the petitioner testified that her husband had made love to her sister-in-law in her presence, and that on one occasion she found the husband in bed with the sister-in-law. The court held that the wife was not entitled to a divorce on the basis of such uncorroborated testimony. The opportunity to define adultery under the divorce law was not seized by the Justices. By implication it might be said that the Court regards one act as sufficient. If more than one act is required, the Court could certainly have so stated this fact without going into the matter of the sufficiency of the evidence.

Since adultery is generally defined as voluntary sexual intercourse, it follows that infidelity by one who is insane<sup>55</sup> or under coercion,<sup>56</sup> as in the case of rape, is not adultery, because there is no voluntary act in these situations. Moreover, intercourse by a wife with a man whom she mistakenly believes to be her husband is not an unfaithful act entitling the husband to a divorce.<sup>57</sup> Such ignorance on the part of the wife is almost unbelievable. Another instance where a mistake of fact prevents an act of intercourse from being adultery is where a woman marries a person with whom she has sexual relations under the belief that her first husband is dead.<sup>58</sup> However, infidelity by one who is intoxicated has been held to be a ground for divorce even though the person claimed he did not know what he was doing.<sup>59</sup> And the authorities agree that sexual relations with another person

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54. *Brown v. Brown*, 215 S. C. 502, 56 S. E. 2d 330 (1949) noted in 2 S. C. L. Q. 286 (1950). See the definition given by Johnston, Ch. in *Hull v. Hull*, 2 Strob. Eq. 174, 187 (1846).

55. *Wray v. Wray*, 19 Ala. 522 (1851), 33 Ala. 187 (1858); *Nichols v. Nichols*, 31 Vt. 328 (1858). *Contra*: *Matchin v. Matchin*, 6 Pa. 332 (1847).

56. *Johnson v. Johnson*, 78 N. J. Eq. 507, 80 Atl. 119 (1911).

57. TIFFANY, PERSONS AND DOMESTIC RELATIONS § 98.

58. *Valleau v. Valleau*, 6 Paige 207 (N. Y. 1836). This is not true where she continues living with him after the first husband returns. *Mathewson v. Mathewson*, 18 R. I. 456, 28 Atl. 801 (1894).

59. *Miller v. Miller*, 140 Md. 60, 116 Atl. 840 (1922).

by one who is separated from his spouse is adultery entitling the innocent party to a divorce.<sup>60</sup>

As is true in most instances, mistake of law is not allowed as a defense where adultery is alleged. Thus, an act of intercourse with a second wife by one who believes he has the right to have several wives is nonetheless adulterous;<sup>61</sup> as is intercourse after a second marriage where the divorce from the first marriage was void.<sup>62</sup> Likewise, many persons have been held guilty of unfaithfulness where a second marriage was had by a spouse who believed that he could validly remarry after having been abandoned by his first wife.<sup>63</sup>

One of the most troublesome features about adultery as a ground for divorce is the matter of proof. Testimony by eyewitnesses is very rarely obtainable, therefore such charges must be established by circumstantial evidence. This difficulty has been excellently explained in the following well-known quotation:

It is not necessary to prove the direct fact of adultery, for, being committed in secret, it is seldom susceptible of proof except by circumstances which, however, are sufficient whenever they would lead the guarded discretion of a reasonable and just man to a conclusion of guilt.<sup>64</sup>

Thirty-two states in this country have statutes which specify that a divorce for adultery cannot be awarded upon the uncorroborated testimony of the parties.<sup>65</sup> And in the other remaining jurisdictions the courts strictly weigh the evidence in such cases. The main reason for this severity is to prevent collusion between the parties. This strickness has as its origin a rule which was adopted by the English Ecclesiastical Courts.<sup>66</sup> Although there is no pertinent statute in South Carolina, it was held in the recent *Brown* case<sup>67</sup> that a divorce will not be granted in South Carolina on the uncorroborated testimony of the parties. In the *Brown* case the court stated that the evidence required to establish adultery must be clear and positive, and that it must be sufficiently definite as to time, place and circumstances. However, a clear preponderance of the evidence is sufficient and it is unnecessary to negate every reasonable hypothesis as is required in

60. *Watts v. Watts*, 160 Mass. 464, 36 N. E. 479 (1894); *Freeman v. Freeman*, 82 N. J. Eq. 360, 88 Atl. 1071 (1913).

61. 1 BISHOP, MARRIAGE AND DIVORCE § 713.

62. *Ackerman v. Ackerman*, 220 N. Y. 72, 93 N. E. 192 (1910).

63. *Dunn v. Dunn*, 156 Miss. 132, 125 So. 562 (1930); *Moors v. Moors*, 121 Mass. 232 (1876).

64. See *Loveden v. Loveden*, 2 Hagg. Constit. 2.

65. 2 VERNIER, AMERICAN FAMILY LAWS § 86.

66. See *Robinson v. Robinson*, 1 Swa. and Tr. 362 (1858).

67. 215 S. C. 502, 56 S. E. 2d 330 (1949), noted in 2 S. C. L. Q. 286 (1950).

criminal cases. New Jersey does require proof beyond a reasonable doubt.<sup>68</sup>

The birth of a child to the wife, before or after the passing of the normal period for gestation since the last access of the husband, is frequently used as evidence of adultery. The results in such cases depend on the time involved. In one case<sup>69</sup> 331 days had passed since the last access of the husband, yet the court held that this alone was insufficient to establish infidelity, and the same result was reached in another case where the first access by the husband was 7 months before the birth of the child to the wife.<sup>70</sup> In cases where there is an allegation of illegitimacy it is well to bear in mind the strong presumption that a child born to a parent in wedlock is presumed to be legitimate.

2. *Desertion for a Period of (1) Year.* Desertion is a ground for divorce in all of the states except North Carolina and New York. The statutory period of desertion required varies from one year in many states to five years in Rhode Island.<sup>71</sup> One year is the time prescribed in 21 states, two years in eleven, three years in eleven, five years in one, and no statutory period is provided for in two states (Louisiana and New Mexico). Divorces for desertion have substantially decreased in this country. It was the most popular ground until 1932, accounting for about 40% of the decrees, but in 1932 only 28% of all divorces were for desertion.<sup>72</sup> The reason for this decline is undoubtedly due to the delay brought about by the statutory periods involved. In contrast to this decline, it is interesting to note that approximately 53% of all of the divorces granted in South Carolina have been for desertion.

Desertion is the wilful and unjustifiable abandonment of one of the spouses for the statutory period by the other, without the former's consent, and with an intention of not returning.<sup>73</sup> Hence, by its very definition five elements must be present in order to make out the offense: (1) cessation of cohabitation, (2) for the statutory period, (3) intent to abandon, (4) want of consent on the part of the one abandoned and (5) unwarranted abandonment.

Spouses are entitled to each other's companionship and cohabita-

68. *Gray v. Gray*, 100 N. J. Eq. 71, 135 Atl. 54 (1926). Other courts require a higher standard of proof in divorce cases than in other civil cases. JACOBS, CASES AND MATERIALS ON DOMESTIC RELATIONS 424.

69. *Gaskill v. Gaskill*, [1921] P. 425.

70. *Taylor v. Taylor*, 123 App. Div. 220, 108 N. Y. Supp. 428 (1908). See Annotation 21 A. L. R. 1457.

71. 2 VERNIER, AMERICAN FAMILY LAWS § 67.

72. JACOBS, CASES AND MATERIALS ON DOMESTIC RELATIONS 429.

73. WARREN, SCHOULER DIVORCE MANUAL § 112.

tion because of their marriage. To cohabit is to live together as husband and wife. Therefore, when they live apart from each other there is no cohabitation, even though the husband continues to support his wife. When the parties cease to cohabit the first requirement of desertion is established.

The cessation of cohabitation must be for the required statutory period before there is desertion under divorce laws. The separation has to continue for the whole time that is necessary and it must be continuous. No tacking on is allowed. If cohabitation is resumed for the briefest period, desertion ceases to exist because the statutory period is calculated from the last abandonment.<sup>74</sup>

Intent to abandon is an indispensable part of desertion. A mere severance or absence from each other is insufficient. The cessation of cohabitation and the intent to abandon do not always coincide. So even though there might be a separation, desertion does not start until that time when the intent is formed or manifested by the abandoning spouse.<sup>75</sup> The formation of this intent is a question of fact which can be proved by direct or circumstantial evidence. Oftentimes parties temporarily live apart from each other because of differences that have come between them, sickness, business or for other reasons. In such cases there is no desertion until one of the parties has formed an intent to desert and this state of mind is seldom formed at the time of separation in the listed instances. Where one leaves his spouse with the intent to abandon and he thereafter becomes insane, but before an absence for the statutory period, no divorce is obtainable by the non-consenting party because the insane spouse did not have the necessary capacity during his absence.<sup>76</sup> However, if he becomes insane after having been absent for the specified time and with the intent of abandoning, a divorce can be had because the offense was established before the insanity had commenced.<sup>77</sup> On the other hand, where there is desertion for less than the statutory period by one who is imprisoned<sup>78</sup> or drafted into the military service,<sup>79</sup> he is not excused, unless there is strong evidence of a change of mind before the running of the time prescribed.

Nothing is better settled than the rule that an abandonment by mutual consent cannot be relied upon as a ground for divorce. Hence,

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74. *La Flamme v. La Flamme*, 210 Mass. 156, 96 N. E. 62 (1911).

75. *Sheehan v. Sheehan*, 156 Md. 656, 145 Atl. 180 (1929); *TIFFANY, PERSONS AND DOMESTIC RELATIONS* § 102.

76. *Carr v. Carr*, 209 Iowa 160, 225 N. W. 948 (1929). But see VA. CODE 20-93 (1950).

77. *Fisher v. Fisher*, 54 W. Va. 146, 46 S. E. 118 (1903).

78. *Davis v. Davis*, 102 Ky. 402, 43 S. W. 168 (1897).

79. *Margulies v. Margulies*, 92 N. J. Eq. 322, 112 Atl. 484 (1921).

if there is a legal separation or separate support order obtained by the parties by mutual agreement, divorce is not available because there is consent rather than a want of it.<sup>80</sup> Desertion can be complained of only when it is without the consent of the abandoned party. However, where there is a mutual separation and one declines to renew cohabitation in response to an offer by the other, there is desertion as of then by the one refraining.<sup>81</sup> If one of the spouses abandons the other against the other's will, but he thereafter makes an offer to return which is refused, the abandoning party is no longer a deserter.<sup>82</sup> At the same time though, the one who rejects the offer to return is guilty of desertion as of the time of the rejection. In such situations the offer to return must be made in good faith.<sup>83</sup> Occasionally no offer to return is made because of some manifestation by the abandoned party that the other would not be taken back. If such manifestation is made, the abandoned one can't rely upon the other's continuing away.<sup>84</sup> Nevertheless, mere silence by the originally abandoned spouse is insufficient.

In order for the abandonment to constitute desertion it must be unjustifiable, that is to say without cause. The other party must not be guilty of such misconduct as to justify the other in leaving.<sup>85</sup> Traditionally, the husband has the right to establish the home of the family. This privilege must rest in one of the family, and the chosen one is the husband. This is because the husband and wife were considered to have been united into one at common law and the merger left only the husband in the eyes of the law. Hence, a wife's refusal to accompany her husband to a new home is unwarranted.<sup>86</sup> However, the husband on such an occasion must act in good faith and in a reasonable manner.<sup>87</sup> The courts in the United States are split on whether a husband is justified in leaving his wife when she refuses to have intercourse with him.<sup>88</sup> Where there is no real

80. MADDEN, PERSONS AND DOMESTIC RELATIONS § 86.  
 81. *Boyd v. Boyd*, 177 Md. 687, 11 A. 2d 461 (1940); *Carroll v. Carroll*, 68 N. J. Eq. 727, 61 Atl. 383 (1905).  
 82. *Cusick v. Cusick*, 129 N. J. Eq. 82, 18 A. 2d 292 (1941); *Kline v. Kline*, 179 Md. 10, 16 A. 2d 924 (1940).  
 83. *Kohler v. Kohler*, 94 N. J. Eq. 474, 120 Atl. 34 (1923). For a good discussion of this point see *Bohmert v. Bohmert*, 241 N. Y. 446, 150 N. E. 511 (1926).  
 84. *Underwood v. Underwood*, 271 Fed. 553, 50 App. D. C. 323 (1921).  
 85. WARREN, SCHOULER DIVORCE MANUAL § 120.  
 86. *Hoffhimes v. Hoffhimes*, 146 Md. 350, 126 Atl. 112 (1924); *Franklin v. Franklin*, 190 Mass. 349, 77 N. E. 48 (1906).  
 87. *Watkins v. Watkins*, 202 Ky. 141, 259 S. W. 20 (1923); *Bibb v. Bibb*, 39 Cal. App. 406, 179 Pac. 214 (1919).  
 88. WARREN, SCHOULER DIVORCE MANUAL § 120; 1 BISHOP, MARRIAGE AND DIVORCE 778.



basis for this refusal it seems that the husband should be justified in leaving. Here there is no cohabitation in that there is no intercourse and one of the principal reasons for, and privileges of, marriage has been lost. Some authorities, though they are few, say that in order to make out a case of constructive desertion there must be such misconduct on the part of the other spouse as would enable him or her to obtain a divorce.<sup>89</sup>

3. *Physical Cruelty.* Cruelty is a ground for divorce in forty-four states. Of these states only two, other than South Carolina, specifically limit it to physical cruelty so as to prevent giving it a broader definition. While there are just seven states which expressly list mental cruelty as a ground, the majority of the states do grant divorces for mental cruelty.<sup>90</sup> Four states discriminate against the husband and one against the wife. In 1932, 42.7% of the divorces obtained in the United States were for cruelty,<sup>91</sup> while the figures in South Carolina show that physical cruelty has accounted for approximately 24% of the decrees granted. The phraseology of the various statutes in this country differs so much that generalizations are difficult, if not almost impossible.

Physical cruelty is generally said to be actual personal violence, or such a course of physical treatment as endangers life, limb or health and renders cohabitation unsafe.<sup>92</sup> In deciding what is physical cruelty the court considers the parties' station in life as well as the attending circumstances of the alleged act.<sup>93</sup> Usually one act is insufficient, but it can be, where it is a result of a deliberately fixed intention to abuse.<sup>94</sup> The kind of cruelty is immaterial as long as it is bodily, as distinguished from mental injury. Several jurisdictions have awarded divorces on the basis of physical cruelty where the husband compelled the wife against her wishes and remonstrances to submit to excessive sexual intercourse, the effect of which was to endanger her life.<sup>95</sup> These cases seem correct. Granted the injury might not be readily apparent, still the woman is physically injured as much as she would have been with an injury made by a knife. Another question along this line is the one of venereal diseases. If one

89. *Holmstedt v. Holmstedt*, 383 Ill. 290, 49 N. E. 2d 25 (1943); *Craig v. Craig*, 89 Ark. 40, 117 S. W. 765 (1909); *ibid.*

90. 2 VERNIER, *AMERICAN FAMILY LAWS* § 66.

91. JACOBS, *CASES AND MATERIALS ON DOMESTIC RELATIONS* 416.

92. See *Brown v. Brown*, 215 S. C. 502, 508, 56 S. E. 2d 330, 333 (1949).

93. MADDEN, *PERSONS AND DOMESTIC RELATIONS* §§ 84, 85; WARREN, *SCHOUER DIVORCE MANUAL* § 68.

94. *Hastings v. Hastings*, 147 Md. 177, 127 Atl. 743 (1925); WARREN, *SCHOUER DIVORCE MANUAL* § 71. See *Brown v. Brown*, 215 S. C. 502, 509, 56 S. E. 2d 330, 333 (1949).

95. WARREN, *SCHOUER DIVORCE MANUAL* § 89.

of the parties is responsible for communicating a venereal disease to the other, is this physical cruelty? The courts which have been confronted with such cases have held that it is.<sup>96</sup>

In the United States there is no right to chastize a wife. Provocation should be given consideration though.

The fact that the attacking party was intoxicated is no defense to a suit for divorce based on physical cruelty.<sup>97</sup> However, insanity at the time of the cruelty is a bar.<sup>98</sup> But if the insanity occurs after the commission of the act, it has no effect.<sup>99</sup>

The South Carolina Court has had one case<sup>100</sup> involving physical cruelty. The petitioner alleged that her husband had slapped her twice and pinched her. She stated that as a result of the pinch she suffered some pain. In this case the Court described physical cruelty as actual personal violence, or such a course of physical treatment as endangers life, limb or health, and renders cohabitation unsafe. The court also stated that a continuing course of personal violence producing physical pain or bodily injury and a fear of future danger are recognized as sufficient cause for a divorce for physical cruelty. However, it was pointed out that not every slight violence, even though in anger, authorized a divorce. In the *Brown* case the court also took the opportunity to say that one act is not sufficient unless it is so severe and atrocious as to endanger life, or unless the act indicates an intention to do severe bodily harm, or causes reasonable apprehension of serious danger in the future. A single act of aggravated cruelty may, however, warrant a divorce if accompanied with such attending circumstances as to satisfy the court that the acts are likely to be repeated.

Most states today allow divorces on the ground of mental cruelty even though the cruelty required in those jurisdictions must be extreme, severe or violent.<sup>101</sup> Due to the specification of physical cruelty in the constitutional amendment and the definition given it by the Court, no divorce will probably be allowed in this state for mental cruelty. It is possible to visualize a course of mental cruelty that would result in injury to the innocent spouse's health or mind, and for which a divorce should be granted. But even so, *this is not ac-*

96. *Kline v. Kline*, 179 Md. 10, 16 A. 2d 924 (1940); *Campbell v. Campbell*, 129 Pa. Super. 106, 194 Atl. 760 (1937).

97. *Maxwell v. Maxwell*, 69 W. Va. 414, 71 S. E. 571 (1911); WARREN, SCHOULER DIVORCE MANUAL § 93.

98. *Kunz v. Kunz*, 171 Minn. 258, 213 N. W. 906 (1927); *Walker v. Walker*, 140 Miss. 340, 105 So. 753 (1925).

99. *Jordan v. Jordan*, 257 S. W. 569 (Tex. Civ. App. 1923); *Steed v. Steed*, 54 Utah 244, 181 Pac. 445 (1919).

100. *Brown v. Brown*, 215 S. C. 502, 56 S. E. 2d 330 (1949).

101. 2 VERNIER, AMERICAN FAMILY LAWS § 66.

*tual personal violence or a course of physical treatment as endangers life, limb or health.* If the Court once allowed a divorce for the type of mental cruelty described above, the door would be opened for further leniencies. This writer does not believe that physical cruelty should be broadened so as to include mental cruelty, though it be of a severe nature. Neither does he believe that the Court will ever adopt such a principle because of the Court's expressed intent to be strict in construing and administering our divorce law.

4. *Habitual Drunkenness.* Intoxication is a ground for divorce in thirty-nine states. Of these jurisdictions only two discriminate between the spouses.<sup>102</sup> The statutes in eighteen states set forth a time that the offense must endure, and in the others the required time is a matter of judicial inference from such words as habitual, addicted to, continued, etc. In 1932 only 1.4% of all of the divorces granted in the United States were for intoxication.<sup>103</sup> Approximately 17% of the divorces obtained in this state have been for habitual drunkenness.

Habitual drunkenness is the frequent indulgence in the use of alcohol that leads to a fixed and irresistible habit of drunkenness whereby the accused loses all of his power or will to control his appetite for intoxicating liquors.<sup>104</sup> It is not the ordinary or occasional use of alcohol, but the habitual use of it, that gives rise to habitual drunkenness. However, there is no requirement of showing that the defendant remains drunk all of the time. It is sufficient to show that he had the fixed habit of frequently getting drunk which made it impossible for him to resist when the opportunity and temptation were presented.

According to most of the courts in this country, the excessive use of drugs or narcotics is not habitual drunkenness notwithstanding the fact that the effects are the same.<sup>105</sup> Even though this view is oftentimes called the better view on this point, it does not seem right. People can get just as intoxicated from using drugs as from using of alcohol. And many persons become addicted to the use of drugs and narcotics as some do with alcohol. If this use of drugs or narcotics leads to habitual drunkenness it should be a ground for divorce. The sale and use of narcotics are regulated more closely by law than are the use and sale of alcohol. Our drug laws are very

102. 2 VERNIER, AMERICAN FAMILY LAWS § 70.

103. JACOBS, CASES AND MATERIALS ON DOMESTIC RELATIONS 459.

104. See *Lecates v. Lecates*, 190 Atl. 294, 296 (Del. 1937); WARREN, SCHOUL-ER DIVORCE MANUAL § 54.

105. E. g., *Hayes v. Hayes*, 86 Fla. 350, 98 So. 66 (1923); *Smith v. Smith*, 7 Boyce 283, 105 Atl. 833 (Del. 1919); *Youngs v. Youngs*, 130 Ill. 230, 22 N. E. 806 (1889).

stringent. Isn't this an indication that the constant use of them is worse than the habitual use of alcohol? If so, the excessive use of drugs should be a ground for divorce under the habitual drunkenness provision. The courts have often stated that the purpose of allowing divorces for habitual drunkenness is not to reform or to promote temperance, but to preserve the peace, comfort, safety, happiness and prosperity of the home.<sup>106</sup> Would not the awarding of a divorce for the habitual use of drugs be just as noteworthy for this purpose as habitual drunkenness caused by over indulgence in the use of alcohol?

There have been several cases where the defendants were habitual drunkards when they married the petitioners. In these cases no divorces have been given because the courts felt that the petitioners assumed the risk of such misconduct.<sup>107</sup>

**SECTION 3. Plaintiff Must Reside in State 1 Year.**— In order to institute an action for divorce from the bonds of matrimony, the plaintiff must have resided in the State of South Carolina at least one year prior to the commencement of the action.

Residence, as used in divorce laws, is uniformly interpreted to mean domicile, or, as it is sometimes called, legal residence.<sup>108</sup>

The matrimonial relationship is a matter with which the state, as well as the husband and wife, is vitally concerned because our society and its laws are built around family unity. Since divorce involves the termination of the bonds of matrimony, a positive law of some state is necessary. The state which is most closely tied with the husband and wife is the state of domicile. It is this state that is intrinsically concerned and for this reason jurisdiction to award a divorce in the United States is based on domicile.<sup>109</sup> A divorce action is not an *in personam* proceeding instituted by the husband or the wife, but it is a law operating upon the marital relationship, thus making it an action *in rem*. The *res* is the marriage status.<sup>110</sup> As in all *in rem* actions the suit must be brought in the state where the *res* is situated. With divorce proceedings this is the state of domicile. Thus a divorce by a state court is in reality nothing more than the exercising of the power of the state to determine the civil status of its citizens.

106. See *Dennis v. Dennis*, 68 Conn. 186, 36 Atl. 34 (1896).

107. E. g., *McNabb v. McNabb*, 182 Iowa 1143, 166 N. W. 457 (1918).

108. GOODRICH, *CONFLICT OF LAWS* § 20 (3d ed. 1949).

109. *Id.* § 127.

110. *Williams v. North Carolina*, 317 U. S. 287 (1942); WARREN, *SCHOULER DIVORCE MANUAL* § 10.

The various divorce acts in the United States only grant courts the power to award a divorce when one or both parties have been domiciled in the state for the prescribed statutory period of time. In thirty-four, a one year residence is required; in nine, two years; in two, three years; in one, six months; and in one, six weeks. No period is specified in New York. Of these jurisdictions thirty-eight states require that the plaintiff must have been the one residing in the state for the stated time. In ten states the residence requirement is satisfied by either party residing in the state for the named period.<sup>111</sup> The most important question that arises in connection with Section 3 is what constitutes domicile.

Domicile means living in a place with the intent of making it a permanent home. It is to be distinguished from residence which denotes a temporary place of abode.<sup>112</sup> Every person has a place of domicile, but he can have only one at a given time. A domicile is imposed on one at his birth by operation of law.<sup>113</sup> He takes the domicile of his father, and it changes with his father's until he arrives at legal age or is emancipated. Thereafter, domicile becomes a matter of choice. Often times people die at an old age without ever having established a domicile of choice. If this be true, they retained their domicile of origin throughout life because one maintains his old domicile until a new one is acquired.<sup>114</sup> In order to maintain a domicile one does not have to actually reside in the state. He can have several residences elsewhere and this absence will have no effect. In South Carolina the Constitution of 1895 provides: "Temporary absence from the state shall not forfeit a residence once obtained."<sup>115</sup> This result is reached in other states even in the absence of such a Constitutional provision.

A person can change his domicile of origin or one of choice if he goes to another place and then decides to remain at the new location permanently. Thus, there are two essentials for a change of domicile: (1) physical presence in the new place plus (2) an intention to make it a permanent home.<sup>116</sup> The motive for changing domicile is not important.<sup>117</sup> Therefore, a person can acquire one in a state solely

111. 2 VERNIER, AMERICAN FAMILY LAWS § 82.

112. GOODRICH, CONFLICT OF LAWS § 17.

113. *Udny v. Udny*, L. R. (Sc.) 446 (1869); RESTATEMENT, CONFLICT OF LAWS § 14(1) (1934).

114. *Ayer v. Weeks*, 65 N. H. 248, 18 Atl. 1108 (1880); *Littlefield v. Brooks*, 50 Me. 475 (1862).

115. S. C. CONSTIT. Art. 1, § 12 (1895).

116. GOODRICH, CONFLICT OF LAWS § 26; WARREN, SCHOULER DIVORCE MANUAL § 27; RESTATEMENT, CONFLICT OF LAWS § 15.

117. *Williamson v. Osenton*, 232 U. S. 619 (1913); *McConnell v. Kelly*, 138 Mass. 372 (1885); RESTATEMENT, CONFLICT OF LAWS § 22.

in order to obtain a divorce so long as the acquisition is in good faith.

It is usually held that the wife takes the domicile of the husband at marriage.<sup>118</sup> The right to determine domicile must be exercised by one of the parties and this duty has been placed on the husband. The husband makes this determination because of the common law view of the oneness of the husband and wife. Blackstone said the reason was because the wife's very being was considered suspended during marriage, or at least in that of the husband.<sup>119</sup> After marriage the wife's domicile changes with any move made by the husband so long as no domestic friction arises. In such an instance it is not necessary for the wife to be physically present in the state for the acquisition. She acquires the new one by operation of law. In most jurisdictions today a wife with a cause for divorce can acquire a new domicile in a state apart from that of her husband's.<sup>120</sup> This privilege has been given a wife because otherwise she might never be able to obtain a divorce. The husband could defeat an action by merely moving from one state to another so as to defeat the residence requirement or by moving to a state where the ground was not recognized. There are some authorities that state that a wife should be able to obtain a separate domicile even if she has no ground for a divorce if she is living apart from her husband.<sup>121</sup> This does not appear to be a sound rule because it would seem to discourage family unity.

One other question might be raised in connection with Section 3 of the Act. Need the plaintiff have been a domiciliary of the state for one year and in addition have actually resided, that is to say, been physically present in the state for one year preceding the action? Probably this wasn't intended by the Legislature. It certainly is not spelled out in the Act. Therefore, physical presence probably isn't necessary, although an extended absence would be strong evidence against one's being domiciled in the state.

**SECTION 4. Place of Trial.**—Actions for divorce from the bonds of matrimony shall be tried in the county in which the defendant resides at the time of the commencement of the ac-

118. *Parrett v. Palmer*, 8 Ind. App. 356, 35 N. E. 713 (1893); *Hackettstown Bank v. Mitchell*, 28 N. J. L. 516 (1860); *RESTATEMENT, CONFLICT OF LAWS* § 27.

119. 1 BL. COMM. \*442.

120. *Cheever v. Wilson*, 9 Wall. 108 (U. S. 1869); *Dunn v. Dunn*, 59 Kan. 773, 52 Pac. 69 (1898); *WARREN, SCHOULER DIVORCE MANUAL* § 32; *RESTATEMENT, CONFLICT OF LAWS* § 28.

121. *Commonwealth v. Rutherford*, 160 Va. 524, 169 S. E. 909 (1933) (leading case on this point).

tion, or in the county where the plaintiff resides if the defendant is a non-resident or after due diligence cannot be found, or in the county in which the parties last resided as husband and wife.

The question of venue in divorce suits has been handled in many different ways in the United States. Considering minor variations there are some seventeen different requirements among the states. It is obviously impossible to reach many definite conclusions on the matter of where the divorce suit is to be brought. Some fourteen states require that the suit be brought in the county where the plaintiff resides, while in twelve jurisdictions it can be filed in the county where either the plaintiff or the defendant resides. The matter of venue is generally covered by a statutory provision and hence it is necessary to consult the code of the state wherein the action is being brought.

Considerable difficulty has been encountered with the venue provision of our Divorce Act. The lawyers and judges have been unable to agree on whether the last clause is a qualification of the part pertaining to non-resident defendants or whether it was the intent of the Legislature to provide for suits in the county wherein the parties last lived as husband and wife irrespective of whether the defendant be a resident of the state. Since the last clause is set off by a comma it appears to be an alternative venue because such punctuation marks are frequently used to divide parts of sentences. Five states specifically authorize the bringing of the suit in the county where the parties had their last matrimonial domicile. This county actually is the best one for the suit. The chances are that most of the witnesses live in this county and are therefore easily accessible. It would be unfair to require the suit to be brought in a county where the defendant might have recently established a residence because of the difficulty of getting the witnesses in court and because of the possibility of prejudice.

Therefore, it is believed by the writer to be an alternative choice rather than a qualification, because of the punctuation, and the desirability of bringing the suit at the place of the last matrimonial domicile.

This same issue was before the South Carolina Supreme Court in the recent case of *Thomas v. Thomas*.<sup>122</sup> It appears that the plaintiff and defendant last resided together as husband and wife in Richland County. Prior to the commencement of the action the defendant acquired a residence in Chesterfield County and was residing there

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122. 62 S. E. 2d 307 (S. C. 1950).

at the time of the commencement of the suit. Subsequently the defendant filed an unqualified answer to the complaint. A motion by the defendant for a change of venue was refused by the Circuit Judge because of his construction of Section 4 of the Statute. On appeal the Supreme Court affirmed the ruling of the Circuit Judge but did so on the basis that the defendant waived jurisdiction when he answered the complaint without reserving the right to move for a change of venue. The Court did not rule on the interpretation to be given the section under consideration. However, in a concurring opinion Justice Oxner had the following to say:

Under the general venue statute, Section 422 of the 1942 Code, any action other than those specified in the preceding sections must be tried in the county in which the defendant resides at the time of the commencement of the action or if the defendant is a non-resident, the action may be tried in any county which the plaintiff shall designate in his complaint. There would have been no purpose in the insertion of Section 4 of the divorce statute, 46 St. at L. 216, unless the Legislature intended to make special provisions in actions for divorce. The statutes of a number of states allow such an action to be brought in the county in which the parties last resided together as husband and wife. This is a reasonable provision. The witnesses to any divorce controversy would ordinarily reside where the parties last lived together. Where one spouse deserts the other or does some other act warranting a divorce and leaves the county of the marriage domicile, it might be essentially unfair to force the innocent party to sue for divorce in the county where the guilty party had recently acquired a residence.<sup>123</sup>

The judges in South Carolina are given the power to change the venue where such a change would be convenient for the witnesses and for the promotion of the ends of justice.<sup>124</sup> However, in view of the use of the words "shall be tried" it seems that the Legislature intended that the suit had to be tried in one of the prescribed counties. Since there is no limitation on changing venue, it would seem that the judge can order such a change pursuant to his discretionary power so long as the suit is actually tried in one of the counties provided for in the Act.

There are several decisions in the United States holding that in a divorce action the question of venue can be waived by a failure to

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123. *Id.* at 310.

124. S. C. CODE §§ 35, 420, 426 (1942).



plead it.<sup>125</sup> These decisions are based on the premise that the statutory provisions relating to venue are merely for the benefit of the parties and that any irregularity can be waived. On the other hand, some courts have held that if a suit is instituted in the wrong county it will be dismissed even though the defendant consents to the trial.<sup>126</sup> Our Supreme Court has had one occasion to apply estoppel or waiver in such an instance. Query: Would the same result be reached if the suit were originally brought in a county which had no relationship to the parties and which was not the last matrimonial domicile? Would not the words "shall be tried" require suit in one of the counties listed in Section 4 irrespective of a waiver by the defendant?

**SECTION 5. Service of Summons on Non-resident.**—Where the person on whom the service of the summons in an action for divorce from the bonds of matrimony is to be made cannot, after due diligence, be found within the State, and the fact appears to the satisfaction of the court, or judge thereof, the clerk of the court, of common pleas, master, or the probate judge of the county in which the cause is pending, and it in like manner appears that a cause of action exists against the defendant in respect to whom the service is to be made, such court, judge, clerk, master or judge of probate, may grant an order that the service be made by the publication of the summons in the manner and with the effect provided for in sub-section (1) of Section 436 of the Code of Laws of South Carolina, 1942. In lieu of publication of summons as provided in paragraph 1, Section 436, Code of 1942, plaintiff may cause such process to be served personally upon any non-resident and the service so made shall be sufficient.

Ordinarily in civil suits in South Carolina the summons must be served on the defendant personally, or on some person of discretion residing at the residence, or employed at the place of business of said defendant.<sup>127</sup> Since a divorce action is a civil proceeding it follows that whenever possible the service must be had on the defendant in the state. In divorce cases the defendant has often times established a residence in another state, concealed himself within the state or else he has merely left the state without having established a new

125. *Gallagher v. Gallagher*, 214 S. W. 516 (Tex. Civ. App. 1919); *Watts v. Watts*, 130 Ga. 683, 61 S. E. 593 (1908).

126. *Haygood v. Haygood*, 190 Ga. 445, 9 S. E. 2d 834 (1940); Annotation, 130 A. L. R. 95.

127. S. C. Code § 434 (1942).

residence. In these instances it is not possible to meet the requirements of § 434. Recognizing this difficulty, the Legislature has made provision for substituted service where necessary. Section 5 is thus placed in the Act to take care of the situations where the defendant cannot be personally served within the state. It should be noted that there must be a due diligent search for the defendant, and the proof of such a search must be to the satisfaction of either the court, judge, clerk, master or probate judge of the county in which the cause is pending trial.

As was pointed out in connection with Section 3 of the Act, a divorce action is not a personal judgment by one against another, but rather one similar to an *in rem* proceeding. Thus, the court is concerned with a *res* which is within its jurisdiction. This being true it is not necessary to have personal service of process on the defendant within the jurisdiction. Where the court has jurisdiction over the *res* it is only necessary to give the defendant notice in order that he may reasonably have the opportunity to be heard. This right is granted by the Federal Constitution.<sup>128</sup> This is why constructive service of process by way of publication is sufficient where the defendant cannot be personally served in the state. It has been held that the notice required by our Constitution must be "of such a character that it will have a tendency, in a reasonable degree, to convey information to interested parties that the action affects their rights."<sup>129</sup> Of course if the defendant is personally served with the process in a divorce action, even though it is out of the state, the requirements of the 14th Amendment are met. Hence, the provision allowing service out of the state which appears in Section 5 is constitutional.

The statutory notice which is usually given pursuant to Sections 5 of the Act and 436(1) of the Code is:

#### SUMMONS

STATE OF SOUTH CAROLINA, COUNTY OF.....  
in the.....  
Court.

Mary Smith, Plaintiff,

v.

John Smith, Defendant.

To the Defendant above named:

You are hereby summoned and required to answer the com-

128. U. S. CONST. AMEND. XIV.

129. See *Fenton v. Minnesota Title Ins. & Trust Co.*, 15 N. D. 365, 372, 109 N. W. 363, 366 (1906); *Goodrich*, CONFLICT OF LAWS § 69.

plaint herein, a copy of which has been filed in the Office of the Clerk of .....County, and to serve a copy of your answer to said complaint upon the subscriber, Jack Johnson, No. 210 Lawyers Building.....S. C., within twenty (20) days after service hereof, exclusive of the date of such service and if you fail to answer the complaint within the time aforesaid plaintiff will apply to the Court for the relief demanded in the complaint.

Jack Johnson,  
Attorney for Plaintiff.

\* \* \* \*

....., S. C.  
1951

To the Defendant Above Named:

Take notice that the summons in the above entitled action, of which the foregoing is a copy, together with the complaint therein, was filed in the Office of the Clerk of Court for.....County on the .....day of....., 1951, the object and prayer of which is to obtain a decree of divorce, *a vinculo matrimonii*, and certain other relief on the grounds of .....

Jack Johnson,  
Attorney for Plaintiff.

....., S. C.  
1951

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**SECTION 6. Must Attempt to Reconcile Parties—Reference—Decree.** — In all cases referred to a Master or Special Referee, such Master, or Special Referee, shall summon the party or parties within the jurisdiction of the court before him, and it shall be the duty of such officer to make an earnest effort to bring about a reconciliation between the parties to such cause, if the parties appear before the Master or Special Referee, *Provided, however,* that in default cases the Master or Special Referee shall not be required to summon the party before him, but at the time of reference shall effect a reconciliation if possible. No judgment of divorce shall be granted in such case unless the Master, or Special Referee to whom such cause may be referred, shall certify in his report, or if said cause has not been referred then the trial judge shall state in the Decree in said

cause, that he has attempted to reconcile the parties to such action, and that such efforts were unavailing. No reference shall be had before two months after the filing of the complaint in the office of the Clerk of Court, nor shall a final decree be granted before three months after such filing.<sup>130</sup>

Various tactics are used in the United States as last efforts to prevent divorce. As has been previously pointed out a state is interested in preserving the marital status of its citizens because our society is formed around the family. In order to save the marriage some states have "cooling off" periods such as the one mentioned in the latter part of Section 6 of our Act. Other states grant interlocutory decrees which do not become final until the expiration of a given period of time. And some states have enacted a system of compulsory counseling as a means of reconciling the parties. Criticisms, both favorable and unfavorable, can be lodged against these various attempts to prevent the dissolution of the marriage. Section 6 is really a combination of all of these things. For those who believe in maintaining the marriage status, if at all possible, it must be admitted that the efforts towards reconciliation required of the Master, Special Referee or Judge are worthy of praise. Many marriages can be saved through such attempts. As evidence of this note the following incident.<sup>131</sup> Judge Thomas J. Cunningham of the Superior Court of Los Angeles County, California, has stated that in January 1949 he began the practice of asking, before calling his calendar, if there were any parties in the court room or any attorneys who felt that a reconciliation might be effected. As a result of this practice there were 175 requests in 26 court days for cases to be heard in chambers on reconciliation. Out of these 175 cases came 59 complete reconciliations, 35 temporary continuances so that the parties could have another try, and 80 failures. In none of these cases had there been voluntary petitions for reconciliation filed. This experience shows conclusively that many divorces can be prevented by cool, deliberate and persuasive efforts on the part of some able person. Unfortunately very few dissolutions have been prevented under Section 6. On the basis of a check made by this writer there appear to have been reconciliations in only approximately 2.5% of the cases filed. The reason for this low percentage might be attributed to two things. First, the proper officials may not be making bona fide efforts to reunite the parties. It could be that only one side of the story is being heard, or if both sides are heard,

130. As amended by 46 S. C. STAT. AT LARGE 2363 (1950).

131. 2 VIRGINIA LAW WEEKLY DICTA 47.

too much weight is given to one of them. Let us hope that the failure of the proper officials to perform their statutory duty is not the cause for our poor results along these lines. Secondly, it might be suggested that most of our divorce cases have involved parties who completely abandoned each other for some reason some time ago, and thus the opportunities for reconciliation are not as great as they would be where the ground alleged occurred in the immediate past. Undoubtedly we have had many people who wanted divorces, but who could not get them due to the lack of a divorce law. For this reason the ground for divorce might have occurred many years ago and as a result the parties have been hopelessly split. After these cases have been cleared up maybe we will begin to see more parties reconciled by the relentless efforts of our court officials. Let us hope so.

Over and above the requirements of Section 6 it should be borne in mind that the first duty a lawyer owes to his client in a divorce case is that of reconciliation. The lawyer should not feel that such efforts might result in losing fees. Even if they are, they are well lost in the cause of justice and truth. However, such fees need not be lost. A lawyer who has prevented a divorce has rendered his client a far greater service than he would have by obtaining it. Therefore, he should not hesitate to ask for compensation for the services rendered. A lawyer can do more towards saving the marriage than any other person because he is in a closer relationship with his client. He should bear in mind, though, that he is not always advising a client in his normal mind, but rather one whose blood is often charged with anger, jealousy, hurt pride, hatred and malice. Thus, what is said should be done in an atmosphere of cool comprehension.

In addition to the efforts for reconciliation, the Legislature has provided for a "cooling off" period by specifying that no reference shall be had until two months after the filing of the complaint, and by further providing that no final decree shall be granted sooner than three months after the filing. These provisions should also prevent many divorces. Time cures many evils. Therefore, if the parties are given the opportunity to cool off and contemplate what they have done, they frequently decide that the steps taken have been too drastic.

**SECTION 7. Judgment Not Render Illegitimate Children Begotten of the Marriage.**—No judgment of divorce from the bonds of matrimony shall render illegitimate the children begotten of the marriage.

An annulment of a marriage has the effect of declaring that the marriage was null and void *ab initio*.<sup>132</sup> Since this is true, the children begotten during such a marriage are illegitimate because they are borne out of wedlock,<sup>133</sup> unless there be statutory authority declaring them legitimate. On the other hand, an absolute divorce does not render the marriage void from its inception, but instead dissolves the marriage contract as of the date of the divorce decree. For this reason the decree itself does not affect the legitimacy of children born or begotten during the marriage.<sup>134</sup> This is the universal rule followed even in the absence of statutory authority. However, the Legislature has seen fit to incorporate this rule into the South Carolina Act. It was apparently done to assure the protection of the children of divorcees.

**SECTION 8. Alimony — Suit Money.** — In every action for divorce from the bonds of matrimony, the wife, whether she be plaintiff or defendant, may in her complaint or answer or by petition pray for the allowance to her of alimony and suit money, and for the allowance of such alimony and suit money pendente lite and, if such claim shall appear well founded, the court shall allow a reasonable sum therefor.

At common law the husband became entitled upon marriage to absolute ownership of his wife's chattels. Moreover, he had the right to collect her choses in action and earnings as well as the sole right to use her lands during coverture.<sup>135</sup> As a result of these rights vesting in the husband, the wife became penniless and there was certainly a practical and not just a fictitious economic disappearance of the woman in the eyes of the law whenever she was married. As has previously been pointed out, no absolute divorces were awarded in England for many years with the exception of those few given by way of Special Acts of Parliament. The only divorce granted was the decree *a mensa et thoro*, which was not actually a divorce, but a mere legal separation. A decree *a mensa et thoro* in no way affected the rights that the husband obtained in his wife's property at marriage.<sup>136</sup> Only death or an absolute divorce could revert title to property in the wife. This being true a wife had no property or means of support when the parties were legally authorized to live

132. 2 BISHOP, MARRIAGE AND DIVORCE § 690.

133. *Ibid.*

134. WARREN, SCHOULER DIVORCE MANUAL § 201; 2 VERNIER, AMERICAN FAMILY LAWS § 94.

135. MADDEN, PERSONS AND DOMESTIC RELATIONS §§ 28-33; Prince v. Prince, 1 Rich. Eq. 282 (S. C. 1845).

136. 2 BISHOP, MARRIAGE AND DIVORCE § 730.

apart from each other. In order to keep the wife from remaining in this destitute state, the ecclesiastical courts upon granting a limited divorce would order the husband to provide a certain amount of money for his wife's maintenance.<sup>137</sup> This maintenance was not given to the wife in order to penalize the husband, but rather because of necessity due to the wife's economic position. The term which the courts gave this nourishment or sustenance that the husband was required to furnish his wife who was living apart from him was alimony.<sup>138</sup> The word alimony is derived from the word alimentum of the Civil Law and literally means nourishment or sustenance. This alimony which the husband paid to his wife was in reality a substitute for the legal duty which the husband had to support his wife.<sup>139</sup> The amount which was decreed to be paid varied according to the circumstances of the case. Generally though the provision amounted to about 1/3 of the husband's income.<sup>140</sup> With this background we can define the alimony awarded by the ecclesiastical courts as the allowance which a husband, by order of court, paid his wife for her support while living separate from her.

That which was granted the wife by the final decree allowing the parties to live apart from each other was referred to as permanent alimony because it was provided for in the final decree.

In the United States an award similar to the provision established by the ecclesiastical courts is made to the wife where there is an absolute divorce, as well as in connection with legal separations or limited divorces. These awards are called alimony, but in theory they are not alimony when given to the wife upon the dissolution of the marriage. Where the marriage contract is dissolved there is no longer any duty on the part of the man to support and maintain his former wife.<sup>141</sup> This duty was removed when the marriage ended. Therefore, we must arrive at a broader definition of alimony when the award is made in conjunction with an absolute divorce. The following would seem to fit the situation: Alimony is a judgment for the loss which the wife sustains in losing her husband and his support, and not a judicial determination of the husband's duty to the wife. Though this definition appears adequate, it should be said that one South Carolina Judge has stated that the amount of the

137. MADDEN, PERSONS AND DOMESTIC RELATIONS § 97; *Matheson v. McCormac*, 186 S. C. 93, 195 S. E. 122 (1938).

138. See *Matheson v. McCormac*, 186 S. C. 93, 99, 195 S. E. 122, 125 (1938); 2 BISHOP, MARRIAGE AND DIVORCE § 352.

139. *Rollins v. Gould*, 244 Mass. 270, 138 N. E. 815 (1923); *Toncray v. Toncray*, 123 Tenn. 476, 131 S. W. 497 (1910).

140. MADDEN, PERSONS AND DOMESTIC RELATIONS § 97.

141. 2 VERNIER, AMERICAN FAMILY LAWS § 104.

alimony to be given the wife depends on the fault of the husband.<sup>142</sup> Similar statements have been found among the decisions of other states.<sup>143</sup> Does this mean that alimony as we know it today is, in addition to the above, a penalty being imposed on the husband because of a breach of the marriage contract? It would appear to be. If alimony is a judgment for the loss of the husband and his support, isn't the loss just as great in the case where the husband is faultless as in the instance where he is primarily to blame?

Alimony is not an estate which is granted the wife, nor is it a portion of the husband's estate which is assigned to the wife as her own; but it is merely an allowance out of the husband's estate for the nourishment of his wife.<sup>144</sup> The only time that alimony approaches the status of an estate or portion which is carved out of the husband's property is when the husband cannot be served with process in the jurisdiction because of a residence elsewhere, or when he has absconded and cannot be given notice of the pendency of the suit.<sup>145</sup> Here the suit is in the nature of a proceeding *in rem* in that the husband's property is proceeded against.

How much of an allowance is the wife entitled to get where there is a permanent alimony award? The courts have wisely never adopted any definite rules by which to determine the amount of alimony. They usually state that the amount depends on the wife's needs, as determined by her station in life, and the estate of the husband and his ability to earn.<sup>146</sup> The awards vary from 1/3 to 1/2 of the husband's estate.<sup>147</sup> Some states have prescribed the proportion to be given by statute.<sup>148</sup> Beyond these rules the courts state that each case must be decided on its own circumstances by the trial judge exercising a wise and just discretion. This discretion refers to judicial rather than an arbitrary discretion.<sup>149</sup> Over and above the previously mentioned tests the courts consider the following factors in arriving at the amount of the allowance granted to the wife: fault of the respective parties,<sup>150</sup> the wife's contribution to the husband's pro-

142. See *Thompson v. Thompson*, 10 Rich. Eq. 416, 424 (S. C. 1859).

143. *Muir v. Muir*, 133 Ky. 125, 95 S. W. 314 ( ); *Pinion v. Pinion*, 92 Utah 255, 67 P. 2d 265 (1937). Cf. *Loth v. Loth*, 227 Minn. 387, 35 N. W. 2d 542 ( ).

144. *Matheson v. McCormac*, 186 S. C. 93, 195 S. E. 122 (1938).

145. *Ibid.*

146. WARREN, SCHOULER DIVORCE MANUAL § 258; MADDEN, PERSONS AND DOMESTIC RELATIONS § 97.

147. WARREN, SCHOULER DIVORCE MANUAL § 262.

148. 2 VERNIER, AMERICAN FAMILY LAWS § 107; *Ibid.*

149. *Hornsby v. Hornsby*, 187 S. C. 463, 198 S. E. 29 (1938).

150. *Thompson v. Thompson*, 10 Rich. Eq. 416 (S. C. 1859); *Lewis v. Lewis*, 202 Ark. 740, 151 S. W. 2d 998 (1941); *Bielan v. Bielan*, 135 Conn. 163, 62 A. 2d 664 (1948); 2 BISHOP, MARRIAGE AND DIVORCE § 457.



party,<sup>151</sup> age of the parties,<sup>152</sup> health of the husband and wife,<sup>153</sup> the wife's earning capacity,<sup>154</sup> husband's debts,<sup>155</sup> property owned by the wife,<sup>156</sup> duration of the marriage, and the religion of the parties. From this it can be seen that the courts will not allow a husband to support himself in luxury and his wife in squalor.<sup>157</sup> Since alimony was originally granted to the wife as a form of nourishment or sustenance, there are cases to be found indicating that a wife with property or income of her own should not be entitled to permanent alimony because she is able to support herself.<sup>158</sup> Such statements as these would appear to be accurate if alimony were still as restricted in its scope as it was in early England. It is not so confined today and if the wife is to get it as an offset for the loss of her husband and his support, her financial worth should not *ipso facto* deprive her of the award, although the court should consider this fact in arriving at the amount she is to obtain from her husband.

In the discussion of Section 3, *supra*, it was pointed out that divorce actions are proceedings *in rem* and do not require personal jurisdiction over the defendant. This is not the case with alimony requests. An alimony award is a proceeding that requires personal jurisdiction over the defendant because the action is *in personam*.<sup>159</sup> Therefore, some basis for personal jurisdiction over the defendant must be established in order for the court to be able to decree the payment of such a provision. In many instances it is impossible to find a basis for personal jurisdiction and yet some method should be prescribed so as to permit the allocation. The courts have made an exception to the general rule requiring jurisdiction over the person to cover such hardship cases. If jurisdiction cannot be had of the defendant and if the defendant has property which is situated in the state, such property can be appropriated by the court and decreed to the wife in satisfaction of her alimony claim.<sup>160</sup> Such an action

151. *Burns v. Burns*, 173 Ky. 105, 190 S. W. 683 (1917); *Skinner v. Skinner*, 47 Ind. App. 670, 95 N. E. 128 (1911); 2 BISHOP, MARRIAGE AND DIVORCE § 457.

152. *Lovett v. Lovett*, 11 Ala. 763 (1847); 2 BISHOP, MARRIAGE AND DIVORCE § 457.

153. 2 BISHOP, MARRIAGE AND DIVORCE § 457.

154. *Ibid.*

155. *Cf. Thomas v. Thomas*, 182 S. C. 16, 188 S. E. 367 (1937).

156. *Huff v. Huff*, 73 W. Va. 330, 80 S. E. 846 (1913); *Romaine v. Chauncey*, 129 N. Y. 566, 29 N. E. 826 (1892); MADDEN, PERSONS AND DOMESTIC RELATIONS § 97.

157. See *Matheson v. McCormac*, 186 S. C. 93, 99, 195 S. E. 122, 125 (1938).

158. *Roberts v. Roberts*, 160 Md. 513, 154 Atl. 95 (1931); *Wilkins v. Wilkins*, 84 Neb. 206, 120 N. W. 907 (1909); *Huff v. Huff*, 73 W. Va. 330, 80 S. E. 846 (1913); *Cf. Ring v. Ring*, 185 Va. 269, 38 S. E. 2d 471 (1946).

159. *Matheson v. McCormac*, 186 S. C. 93, 195 S. E. 122 (1938); GOODRICH, CONFLICT OF LAWS § 138.

160. *Ibid.*

is in the nature of a proceeding *in rem* under the now famous doctrine of *Pennoyer v. Neff*.<sup>161</sup>

Since alimony is awarded in conjunction with a decree dissolving the marriage, the interesting question arises as to whether there can be a decree for such an allotment in a subsequent action where there was no provision for it in the divorce decree itself. The question of alimony being an issue which could have been litigated in the original action, the decree renders the question *res adjudicata*, and thus a subsequent request is usually denied even though it was sought but not granted, or even where no request was made;<sup>162</sup> unless there is a reason for the failure to make the award such as gross negligence on the part of counsel. Some states now have statutes which permit and award after the final decree.<sup>163</sup> But even in the absence of such a statute there are two recognized exceptions to the general rule. They relate to the situation where there is an *ex parte* decree. Frequently, where the wife brings suit it is impossible to obtain jurisdiction over the husband and in such a case the husband often times does not have property in the state which can be proceeded against.<sup>164</sup> At other times the husband goes to a foreign state and there seeks a divorce, serving the wife by way of constructive service.<sup>165</sup> In these instances the right to alimony was not and could not have been adjudicated and can thus be litigated in a subsequent suit. There is authority to the contrary, however, where the wife proceeds in a court which does not have jurisdiction over the husband.<sup>166</sup> These authorities hold that the wife surrendered her right to alimony by having elected to obtain a decree of divorce from a court having no jurisdiction over the husband. The writer does not favor this view because it means that a wife would have to forget the divorce, or take it without any support thereafter from her husband. This is a difficult decision for a wife to make when her husband has absconded to another state without leaving property behind.

161. 95 U. S. 714 (1877).

162. *Schnerr v. Schnerr*, 128 Cal. App. 363, 17 P. 2d 749 (1932); *Astall v. Astall*, 283 S. W. 564 (Tex. Civ. App. 1926); *Nelson v. Nelson*, 146 Ark. 362, 225 S. W. 619 (1920); WARREN, *SCHOULER DIVORCE MANUAL* § 256.

163. MASS. GEN. LAWS c. 208, § 34 (1932); NEW JERSEY REV. STAT. §2:50-37 (1937); R. I. GEN. LAWS § 4216 (1923).

164. *Wagster v. Wagster*, 193 Ark. 902, 103 S. W. 2d 638 (1937); *West v. West*, 114 Okla. 279, 246 Pac. 599 (1926); *Weidman v. Weidman*, 57 Ohio St. 101, 48 N. E. 506 (1897); WARREN, *SCHOULER DIVORCE MANUAL* § 256.

165. *Honaker v. Honaker*, 218 Ky. 212, 291 S. W. 42 (1927); *Toncray v. Toncray*, 123 Tenn. 476, 131 S. W. 977 (1910); *Cochran v. Cochran*, 42 Neb. 612, 60 N. W. 942 (1894).

166. *Staub v. Staub*, 170 Md. 202, 183 Atl. 605 (1936); *Kelley v. Kelley*, 317 Ill. 104, 147 N. E. 659 (1925); *McCoy v. McCoy*, 191 Iowa 973, 183 N. W. 377 (1921).

A decree for alimony can be enforced in several different ways. One of the most common methods used is imprisonment for contempt of court for failure to pay pursuant to the court order.<sup>167</sup> Such imprisonment is not a violation of a constitutional prohibition against imprisonment for debt since the confinement is made because of the husband's failure to abide by the court order, unless there is a statute to the contrary. The husband would be excused from paying, of course, if he had no property and had earned no income out of which to satisfy the claim. However, a present inability to pay is no defense for a previous failure to meet the obligation when the husband had the financial means. Imposing a fine on the husband is another way to insure the payment of the provision made for the wife.<sup>168</sup> This method would not be appropriate if the husband did not have any property. Attachment of property belonging to the husband or of funds due him by third persons, commonly called garnishment elsewhere, can be employed by the wife to satisfy the husband's obligation.<sup>169</sup> Also the court can require the husband to furnish security at the time that the decree is rendered. This authority is specifically conferred on the South Carolina Courts in Section 9 of the Act. In line with this it would seem that the court, in accordance with its inherent power, could declare the decree for alimony a lien upon the real property of the husband. This power has been generally exercised by the courts in other states in the absence of statutory warrant. In many states an action at law can be brought on the alimony decree and the judgment can then be enforced in the same manner as other law judgments.<sup>170</sup> Such a remedy is not available where the decree is subject to modification as in South Carolina.<sup>171</sup> Where the court has the power to modify the alimony provision there is no final judgment and this is the reason no action at law can be brought thereon.

What is the duration of alimony? Since it is awarded by the court in its discretion, the court can determine the time for which the payments will continue. Therefore, one way in which alimony payments can be terminated is by court order. Also they are *ipso*

167. *Adams v. Adams*, 80 N. J. Eq. 175, 83 Atl. 190 (1912); 2 BISHOP, MARRIAGE AND DIVORCE § 498; *Hornsby v. Hornsby*, 187 S. C. 463, 198 S. E. 29 (1938).

168. *Mayer v. Mayer*, 154 Mich. 386, 117 N. W. 890 (1908); *Welty v. Welty*, 195 Ill. 335, 63 N. E. 161 (1902); *Ramsay v. Ramsay*, 125 Miss. 185, 87 So. 491 (1921).

169. 2 VERNIER, AMERICAN FAMILY LAWS § 108.

170. 2 BISHOP, MARRIAGE AND DIVORCE § 499.

171. *Toth v. Toth*, 242 Mich. 23, 217 N. W. 913 (1928); *Dickey v. Dickey*, 154 Md. 675, 141 Atl. 387 (1928).

*facto* put to an end whenever one of the parties dies.<sup>172</sup> If it is the husband, his obligation passed upon his death; if the wife, then there is no longer one whom the husband must support. Alimony is payable only during the joint lives of the parties, unless there is a statute or a provision by the husband to the contrary. Since alimony is historically and basically a substitute for the husband's duty to support, the duty to pay alimony ceases where the wife is imprisoned or confined to a state institution.<sup>173</sup> The wife has no needs where there is such a confinement because her requirements are furnished by the state, and therefore the husband's obligation is terminated for this period. In South Carolina allotments for the wife are terminated whenever the wife remarries. This stipulation is found in Section 9, *infra*. However, the remarriage of the wife does not put an end to the allocations made for children who are in the custody of the wife.

While on the subject of the duration of alimony one more point might be made. Suppose that a husband and wife are living apart from each other and the husband is paying alimony pursuant to a court decree, what effect does an absolute divorce have on the prior award? The husband's obligation to pay where there is a legal separation is terminated by absolute divorce.<sup>174</sup> Therefore, any provision made by a court in an absolute divorce decree would supersede the old allotment. And if there is no award to the wife at the time of the divorce she is not entitled to any further payments after the marriage is dissolved.

A debt for "alimony due or to become due, or for maintenance or support of wife or child" is not affected by a discharge in bankruptcy.<sup>175</sup> Moreover, the courts generally hold that alimony which is to be paid in installments in the future is not susceptible of assignment by the wife to another.<sup>176</sup> However, past due sums or installments are usually recognized as assignable.<sup>176a</sup>

Because alimony is historically a substitute for the husband's duty to support the wife, a husband is not entitled to alimony. At common law the wife had no duty to support the husband. Therefore,

172. WARREN, SCHOULER DIVORCE MANUAL § 280; MADDEN, PERSONS AND DOMESTIC RELATIONS §§ 97, 98.

173. Cf. *Leslie v. Leslie*, [1908], Prob. 99, 13 Ann. Cos. 750.

174. WARREN, SCHOULER DIVORCE MANUAL § 281.

175. FEDERAL BANKRUPTCY ACT § 17(2), 11 U. S. C. A. § 35(2). See *In re Ridder*, 79 F. 2d 524 (1935); *Heimberger v. Joseph*, 53 F. 2d 171 (1931).

176. *O'Hara v. O'Hara*, 137 N. J. Eq. 369, 44 A. 2d 169 (1945); *Fournier v. Clutton*, 146 Mich. 298, 109 N. W. 425 (1906). There is a split of authority on the assignability of an allowance in gross. See cases in Annotation, 97 A. L. R. 211.

176a. *Cederberg v. Gunstrom*, 193 Minn. 421, 258 N. W. 574 (1935); Annotation, 97 A. L. R. 212.

—unless there be a statutory grant, the husband is not entitled to an award of alimony.<sup>177</sup> No such sanction has been given by the South Carolina Legislature.

*Temporary alimony and suit money.* The ecclesiastical courts gave a wife an award for her maintenance during the pendency of the suit.<sup>178</sup> This provision for the wife's support was called alimony *pendente lite* or alimony *ad interim*. As was true with permanent alimony, alimony *pendente lite* was given the wife because of necessity and not as a form of punishment against the husband.<sup>179</sup> The allowance was a temporary or mere provisional remedy. This view was followed in the American courts until the adoption of the married women's property acts.<sup>180</sup> Since that time our courts have allowed such temporary allotments only when the wife does not have the means to support herself.<sup>181</sup> When allowed it is because alimony *pendente lite* is the enforcement of the duty to support while permanent alimony is a substitute for the duty. It is not necessary for the wife to establish the merits of her suit or defense in order for her to get temporary alimony.<sup>182</sup> However, she must show a *prima facie* case or defense.<sup>183</sup> The award is made on the basis of the wife's necessities and her income and the husband's earnings. If the wife has sufficient means with which to maintain herself during the time that the suit is pending, then she is not entitled to temporary alimony. Yet if she has some income, but not enough for her requirements, the court will order the husband to pay an amount which will provide those things which the wife cannot obtain from her income. The courts are more inclined to grant temporary alimony than permanent, but do not show as much liberality in fixing the amount.<sup>184</sup> Suit money was allowed the wife in the ecclesiastical courts on the same basis as temporary alimony. This is likewise done today.<sup>185</sup>

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177. 2 VERNIER, AMERICAN FAMILY LAWS § 109.

178. *Id.* § 110.

179. MADDEN, PERSONS AND DOMESTIC RELATIONS § 98.

180. *Ibid.*

181. Jeffords v. Jeffords, 216 S. C. 451, 58 S. E. 2d 731 (1950); Armstrong v. Armstrong, 185 S. C. 518, 194 S. E. 640 (1938).

182. Hornsby v. Hornsby, 187 S. C. 463, 198 S. E. 29 (1938).

183. Jeffords v. Jeffords, 216 S. C. 451, 58 S. E. 2d 731 (1950); Hornsby v. Hornsby, 187 S. C. 463, 198 S. E. 29 (1938); 2 VERNIER, AMERICAN FAMILY LAWS § 110.

184. 2 VERNIER, AMERICAN FAMILY LAWS § 110.

185. MADDEN, PERSONS AND DOMESTIC RELATIONS § 98.

**SECTION 9. Judgment in Action by Wife May Provide for Maintenance, Alimony and Suit Money of Wife — Payment of Permanent Alimony — Support of Children — Remarriage by Wife Cancel Alimony.**—In every judgment of divorce from the bonds of matrimony in suit by the wife, the court shall make such orders touching the maintenance, alimony and suit money of the wife, or any allowance to be made to her, and, if any, the security to be given for the same, as from the circumstances of the parties and nature of the case may be fit, equitable and just; but no alimony shall be granted to an adulterous wife. In any award of permanent alimony, the court shall have jurisdiction to order periodic payments or payment in a lump sum; PROVIDED, that in any award for permanent alimony and support, in the event the Court shall award the custody of the children to the wife, the court shall in its decree allocate the same between the children and the wife, and in the event of the remarriage of the wife the amount fixed in such decree for the support of such wife shall forthwith cease and no further payments shall be required from such divorced husband.

In the ecclesiastical courts in England there was no alimony given to a guilty wife.<sup>186</sup> Apparently this refusal was based on the old maxim that a person seeking relief had to come into the court with clean hands or else aid would not be given. This premise has generally been followed in the United States.<sup>187</sup> However, some seven jurisdictions now have statutes which allow alimony for a wife guilty of misconduct.<sup>188</sup> Two states, other than South Carolina, expressly forbid an allowance to an adulterous wife. Is this a change in the old rule or does the Legislature mean that a wife shall be entitled to alimony except when she be an adulteress? The latter possibility is the better interpretation. Seldom is only one of the parties at fault in a divorce action. One is usually as guilty as the other. Moreover, a guilty wife must eat just as an innocent one. If alimony is not provided the chances are greater that these women are going to starve or become charges of the state. The misconduct of the wife should not be a bar to alimony, but it should properly be considered in determining the amount to be decreed. But even in this connection the wife's needs and the husband's ability should receive primary consideration in fixing the amount of the provision.

186. JACOBS, CASES AND MATERIALS ON DOMESTIC RELATIONS 793; 2 VERNIER, AMERICAN FAMILY LAWS § 105.

187. MADDEN, PERSONS AND DOMESTIC RELATIONS § 97.

188. 2 VERNIER, AMERICAN FAMILY LAWS § 105.

*Periodic Payments.* Alimony, as it was originally developed, was an allowance which the court gave the wife after a divorce *a mensa et thoro* for her support and maintenance. Accordingly it was always given in the form of continuous payments of money at regular intervals.<sup>189</sup> This mode of payment was prescribed in lieu of a lump sum or alimony in gross because the husband was only liable for his wife's sustenance and nourishment as these needs arose. The English rule has generally prevailed in the United States,<sup>190</sup> although it has been changed by statute in many states as in South Carolina.<sup>191</sup> But even in the absence of legislative authority to grant alimony in gross, some courts have done it where there is an exceptional case presented or where the parties consent.<sup>192</sup> Probably because of historical reasons and the old legal theory of the incapacity of women, courts hesitate to grant alimony in a lump sum. With these historical reasons removed it is difficult to understand why a court should favor one form more than another today. The very connotation of alimony has changed because it now means more than just maintenance and support, and also women have been almost completely emancipated. Why should an intelligent woman be bound to a meager life or long struggle because of the form of alimony awarded her? If she were given enough with which to start a business enterprise she could be more helpful to herself and the community. Of course there are many instances where women would squander a lump sum and thereafter be without support and they would become destitute. This writer thinks that it would be desirable for the court to have an open mind about the mode of payment and for it to prescribe payment in the manner called for in each case. Certainly an inflexible rule on the form the alimony is to take would be unwise.

As is true with every other legal problem today, some thought must be given to federal taxation. Therefore, the writer urges that the current tax provisions be studied before deciding upon the form of alimony to be recommended to a client.<sup>193</sup>

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189. 2 BISHOP, MARRIAGE AND DIVORCE § 427; 2 VERNIER, AMERICAN FAMILY LAWS § 107.

190. *Heckes v. Heckes*, 129 Fla. 653, 176 So. 541 (1937); *Roberts v. Roberts*, 160 Md. 513, 154 Atl. 95 (1931); MADDEN, PERSONS AND DOMESTIC RELATIONS § 98.

191. 2 VERNIER, AMERICAN FAMILY LAWS § 107.

192. *Matheson v. McCormac*, 186 S. C. 93, 195 S. E. 122 (1938); WARREN, SCHOULER DIVORCE MANUAL § 257.

193. I. R. C. § 22(k).

## SECTION 10. Care, Custody and Maintenance of Children.—

In any action for divorce from the bonds of matrimony, the court shall have power at any stage of the cause, or from time to time after final judgment, to make such orders touching the care, custody and maintenance of the children of the marriage; and what, if any, security shall be given for the same, as from the circumstances of the parties and the nature of the case and the best spiritual as well as other interests of the children may be fit, equitable and just.

By the common law in England a father had the paramount right to the control and custody of his minor children.<sup>194</sup> As a matter of fact this right was almost absolute and there were, as can be imagined, many instances where hardships were rendered because of the forcefulness of this rule. The rule had as its basis the fact that custody and support are almost inseparable.<sup>195</sup> Therefore, since the wife was deprived of her property during marriage there was nothing for the court to do but grant to the husband the control of his children. This hardship was subsequently changed in England by statutory provisions.<sup>196</sup> The English view never gained a foothold in the United States.<sup>197</sup> The courts in this country have always primarily considered the welfare of the child, irrespective of the common law views.<sup>198</sup> All jurisdictions now have statutes on the custody and support of children.<sup>199</sup> Generally they are similar to Section 10. In making an award of the children the court makes an order that provides for the best interests of the children, irrespective of the gratification of the parents.<sup>200</sup> The power is discretionary with the court.<sup>201</sup> Certainly Section 10 gives the court the power to determine in its wise discretion what provisions should be made for the care of the children, since there are no limitations placed on the court's power. This section is an indication of serious thought on the part of the Legislature, and it is submitted that it covers the matter most adequately.

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194. 2 VERNIER, AMERICAN FAMILY LAWS § 195; MADDEN, PERSONS AND DOMESTIC RELATIONS § 107.

195. *Ibid.*; 2 BISHOP, MARRIAGE AND DIVORCE §§ 526, 528.

196. 2 and 3 Vict. c. 54 (1839); 49 and 50 Vict. c. 27, § 5 (1886).

197. MADDEN, PERSONS AND DOMESTIC RELATIONS §§ 107, 109.

198. WARREN, SCHOULER DIVORCE MANUAL § 296.

199. 2 VERNIER, AMERICAN FAMILY LAWS § 95.

200. *Ibid.*

201. *Ibid.*; WARREN, SCHOULER DIVORCE MANUAL § 295.



**SECTION 11. Change, Confirm or Terminate Alimony.**—Whenever any husband, pursuant to a judgment of divorce from the bonds of matrimony, has been required to make to his wife any periodic payments of alimony, and the circumstances of the parties or the financial ability of the husband shall have been changed since the rendition of such judgment, either party may apply to the court which rendered the said judgment for an order and judgment decreasing or increasing the amount of such alimony payments or terminating such payments, and the court, after giving both parties an opportunity to be heard, and to introduce evidence relevant to the issue, shall make such order and judgment as justice and equity shall require, with due regard to the changed circumstances and the financial ability of the husband, decreasing or increasing or confirming the amount of alimony provided for in such original judgment, or terminating such payments. Thereafter the husband shall pay and be liable to pay the amount of alimony payments directed in such order and judgment, and no other or further amount; and such original judgment, for the purpose of all actions or proceedings of every nature and wherever instituted, whether within or without this State, shall be deemed to be, and shall be, modified accordingly; subject in every case to a further proceeding or proceedings under the provisions of this section in relation to such modified judgment.

The ecclesiastical courts modified alimony awards which were made in limited divorce cases according to changes in the needs of the wife and in the ability of the husband to pay.<sup>202</sup> These changes were allowed because alimony was merely the enforcement of the husband's duty to support his wife, and the courts held that the scope of this duty varied with the circumstances of the parties from time to time. Most of the American courts have refused to alter decrees unless power to do so was reserved therein, or unless there is statutory sanction.<sup>203</sup> This rule is apparently predicated on the theory that the decree is *res adjudicata* as to alimony. Approximately one-half of the American jurisdictions are still without statutes which permit modifications.<sup>204</sup> Section 11 eliminates the possibility of such a problem in South Carolina because it authorizes changes in the

202. 2 VERNIER, AMERICAN FAMILY LAWS § 106; MADDEN, PERSONS AND DOMESTIC RELATIONS §§ 97, 98.

203. *Banda v. Banda*, 192 Ga. 5, 14 S. E. 2d 479 (1941); *Fisch v. Marler*, 1 Wash. 2d 698, 97 P. 2d 147 (1939); WARREN, SCHOULER DIVORCE MANUAL § 271.

204. 2 VERNIER, AMERICAN FAMILY LAWS § 106.

award. Factors which the court might properly consider when being petitioned for a modification are: changes in the financial status of the husband and wife,<sup>205</sup> the needs of the wife,<sup>206</sup> remarriage of the husband,<sup>207</sup> diligence of the husband in paying,<sup>208</sup> prevailing economic conditions, number of children begotten by the husband by the second wife,<sup>209</sup> and the spouses' conduct.<sup>210</sup>

Most of the states which permit revision of alimony awards hold that past due payments are not subject to change because they become vested when due and payable.<sup>211</sup> Other courts hold that the power to revise extends to past due as well as to future installments.<sup>212</sup> The tenor of Section 11 indicates that it was the intent of the Legislature to permit the court to modify as to past due installments. This statement is supported by the following sentence which appears in Section 11:

Thereafter the husband shall pay and be liable to pay the amount of alimony payments directed in such order and judgment and no other or further amount; and such original judgment, for the purpose of all actions or proceedings of every nature and wherever instituted, whether within or without this state, shall be deemed to be, and shall be, modified accordingly; . . . .

It is the general rule, in the absence of an express statute, that alimony in gross is not subject to revision.<sup>213</sup> Apparently the Legislature has provided for this view in South Carolina by its silence in respect to the modification of lump sum allotments. Section 11 by its wording, is applicable only to periodic payments of alimony.

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205. *Handsaker v. Handsaker*, 223 Iowa 462, 272 N. W. 609 (1937); *Schwein v. Schwein*, 233 Mich. 67, 206 N. W. 353 (1925); *Smith v. Smith*, 50 R. I. 278, 146 Atl. 626 (1920); *Matzke v. Matzke*, 185 App. Div. 533, 173 N. Y. Supp. 244 (1918).

206. *Jones v. Jones*, 199 Ark. 1000, 137 S. W. 2d 238 (1940); *Rood v. Rood*, 280 Mich. 33, 273 N. W. 337 (1937); *Parker v. Parker*, 189 App. Div. 603, 179 N. Y. Supp. 51 (1919).

207. *Morris v. Morris*, 240 Ala. 399, 199 So. 803 (1941); *Lamborn v. Lamborn*, 80 Cal. App. 494, 251 Pac. 943 (1926); *Dietrick v. Dietrick*, 99 N. J. Eq. 711, 134 Atl. 338 (1926).

208. *Richman v. Richman*, 246 App. Div. 885, 285 N. Y. Supp. 26 (1936); *Rigney v. Rigney*, 62 N. J. Eq. 8, 49 Atl. 460 (1901).

209. MADDEN, PERSONS AND DOMESTIC RELATIONS §§ 97, 98.

210. WARREN, SCHOULER DIVORCE MANUAL §§ 283, 284.

211. *Beers v. Beers*, 74 Wash. 458, 133 Pac. 605 (1913); *McGregor v. McGregor*, 52 Colo. 292, 122 Pac. 39 (1912).

212. *Hartigan v. Hartigan*, 171 N. W. 925 (Minn. 1919); *Linton v. Linton*, 89 Misc. 560, 149 N. Y. Supp. 385 (1914); WARREN, SCHOULER DIVORCE MANUAL § 273.

213. *Martin v. Martin*, 195 Ill. App. 32 (1915); WARREN, SCHOULER DIVORCE MANUAL § 273.

**SECTION 12. Wife Barred of Dower in Husband's Land After Final Decree.**—On the granting of any final decree of divorce, the wife shall thereafter be barred of dower in lands formerly owned, then owned, or thereafter acquired by her former husband.<sup>214</sup>

At an early date Lord Coke made the following statement on dower : Concerning the seisin, it is not necessary that the same should continue during coverture; for, albeit the husband aliens the lands or tenements, or extinguishes the rents or commons, and, yet the woman shall be endowed. But it is not necessary that the marriage do continue; for if that be dissolved, the dower ceases *ubi nullum matrimonium, ibi nulla dos*.<sup>215</sup>

At the time that Coke made this statement there was no divorce dissolving a valid marriage. Nevertheless, the doctrine stated by Lord Coke is the well-established rule in this country in the absence of a statute to the contrary.<sup>216</sup> The reason for this rule is that the common law never recognized any dower right unless the woman were covert at the time her husband died. Since a divorce *a vincula matrimonii* puts an end to the marriage, whatever hangs on the marriage falls with it. Also, it can be said that a wife does not have a vested interest in her husband's real property, but only the possibility of an interest, contingent on surviving him. There can be no survivorship without death, and the death of a man not her husband (because of the divorce) cannot make her a survivor so as to entitle her to dower. Section 12 is merely a reiteration of the established common law rule on this point. This rule which is generally followed has been changed by statute in many states.<sup>217</sup>

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**SECTION 13. Not Grant Divorce Where Parties Colluded or Act Complained of Did with Knowledge or Assent of Plaintiff to Obtain Divorce.**—If it shall appear, to the satisfaction of the Court, that the parties to said divorce proceedings colluded or that the act complained of was done with the knowledge or assent of the plaintiff for the purpose of obtaining a divorce, then the Court shall not grant such divorce.

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214. As amended by 46 S. C. STAT. AT LARGE (1950).

215. COKE LIT. 32a.

216. 2 BISHOP, MARRIAGE AND DIVORCE §§ 705-711.

217. 2 VERNIER, AMERICAN FAMILY LAWS § 99.

There were four general defenses which were allowed to be pleaded in divorce actions in the ecclesiastical courts. They were: condonation, connivance, recrimination and collusion. These general defenses were so firmly established in England that they were recognized by the English Chancery Courts upon their creation and thereafter became imbedded in the common law. They have been recognized in this country since the American courts first started granting divorces. It is true that these defenses were a bar to divorces *a menso et thoro* which were awarded by the ecclesiastical courts, and not a bar to absolute divorces because no such dissolutions were given by those courts. Even so, they have always been used in connection with divorces *a vinculo matrimonii* because of their having been crystalized into the common law. Many states have codified the principles of these defenses into statutes, while others have no legislative acts on them. But the legislative deficiency has not prevented the courts from recognizing them in divorce actions. Collusion and connivance are prescribed as barriers to divorce actions in South Carolina. However, unless the South Carolina Supreme Court should depart from the practices of the other courts in this country, it will still deny relief where there has been condonation or recrimination even though the Divorce Act is silent as to these two principles. The fact that the South Carolina Court will recognize these other two defenses is evidenced by the decision in the recent case of *Jeffords v. Jeffords*.<sup>218</sup> In that case the Court discussed recrimination at length, but did not decide whether it is a good defense to a divorce action in this state. By this discussion, wasn't the Court paving the way for the embodiment of this principle into our divorce law? A definition and discussion of these four general defenses will now be undertaken.

*Condonation.* Condonation is the conditional forgiveness or remission by one spouse of some matrimonial offense of which he or she knows the other to be guilty.<sup>219</sup> The act of forgiveness is based upon the implied condition that the guilty party will thereafter treat the pardoning spouse with conjugal kindness. This pardon can be either expressed or implied. However, the act of forgiving must be done after the innocent party has acquired knowledge of the wrongful offense committed by the wrongdoer.<sup>220</sup> There can be no remis-

218. 216 S. C. 451, 58 S. E. 2d 731 (1950).

219. WARREN, SCHOULER DIVORCE MANUAL § 154; MADDEN, PERSONS AND DOMESTIC RELATIONS § 90.

220. 2 BISHOP, MARRIAGE AND DIVORCE § 38; WARREN, SCHOULER DIVORCE MANUAL § 156.

sion unless there be knowledge of some wrong having been committed. A mere suspicion or even proof that the innocent spouse has heard rumors of the other spouse's wrongdoing are held not to be sufficient notice so as to make out condonation.<sup>221</sup> And some courts have gone so far as to hold that a sincere belief in the innocence of the other spouse is enough to obviate the finding of condonation.<sup>222</sup> As was pointed out above, condonation can be expressed or implied. Thus, it can take the form of express words, although such an expression is not required. Forgiveness is conclusively implied where the innocent spouse cohabits with the other after having acquired the necessary knowledge.<sup>223</sup> And sexual intercourse with knowledge of the wrong, but without cohabitation, amounts to condonation.<sup>224</sup> However, letters of affection, though written in endearing terms, are not alone proof of remission.<sup>225</sup> The pardon must be voluntary in order to be a bar to a divorce action. If it is brought about by force, fraud or fear, then the forgiveness is not valid as a defense.<sup>226</sup>

The remission is conditional and if the forgiven spouse is thereafter guilty of marital misconduct the forgiveness is blotted out and the old act is revived.<sup>227</sup> Once the act is revived it can thereafter be used as a ground for a divorce action.<sup>228</sup> It is to be noted that any marital misconduct and not just a repetition of the original offense nullifies condonation. The marital misconduct which can revive a condoned offense need not be a ground for divorce, *i. e.*, mere lack of conjugal kindness is sufficient.<sup>229</sup> Where there is condonation it is an absolute barrier to all divorce actions founded on that particular grievance unless the condition is broken. And condonation is a defense even though it occurs after the action has been filed and started. The courts favor condonation and will always refuse relief upon a proper showing of it. Such favoritism is another in-

221. *Michler v. Duckman*, 159 La. 478, 105 So. 559 (1925); *Gosser v. Gosser*, 183 Pa. 499, 38 Atl. 1014 (1898).

222. *Phillips v. Phillips*, 221 Ala. 455, 129 So. 3 (1930).

223. *Pepin v. Pepin*, 123 Misc. 888, 206 N. Y. Supp. 732 (1924); *Stanley v. Stanley*, 115 Ga. 99, 42 S. E. 374 (1902).

224. *Rogers v. Rogers*, 67 N. J. Eq. 534, 58 Atl. 822 (1904); *Need v. Need*, 62 Ark. 611, 37 S. W. 230 (1896). *Contra*: *Weber v. Weber*, 195 Mo. App. 126, 189 S. W. 577 (1916).

225. *Hunter v. Hunter*, 132 Cal. 473, 64 Pac. 772 (1901).

226. *Farley v. Farley*, 278 Mich. 361, 270 N. W. 711 (1936); *McGovern v. McGovern*, 111 N. J. Eq. 18, 160 Atl. 822 (1932); *Rex v. Rex*, 39 Ohio App. 295, 177 N. E. 527 (1930).

227. WARREN, *SCHOULER DIVORCE MANUAL* § 154; 2 BISHOP, *MARRIAGE AND DIVORCE* § 33.

228. WARREN, *SCHOULER DIVORCE MANUAL* § 163.

229. *Hilbert v. Hilbert*, 168 Md. 364, 177 Atl. 914 (1935); 2 BISHOP, *MARRIAGE AND DIVORCE* § 53.

dication of the state's vital interest in the matrimonial status of its citizens.

*Connivance.* Connivance is the corrupt consent of a married party to the conduct of the other and of which he afterwards complains.<sup>230</sup> It bars the right to a divorce because no injury has been received; for what a man has consented to, he cannot thereafter set up as an injury. In speaking of connivance Lord Stowell once said, "In that case, the general rule of law comes in, that *volenti non fit injuria*, no injury has been done, and therefore, there is nothing to redress."<sup>231</sup> Connivance is closely kin to collusion but differs therefrom in one large measure. Collusion is actual or attempted fraud on the court because the parties agree for one of them to commit, or appear to commit, a certain act or else they agree to represent to the court that one of them has committed an act which is ground for divorce.<sup>232</sup> There is no agreement with connivance. As a matter of fact the defendant need not have known of the connivance of the plaintiff at the time of the act.<sup>233</sup> Thus, there can be connivance without collusion, but where there is collusion there is generally connivance. Connivance is available as a defense in all types of divorce cases, but it is largely used in suits where the defendant has been guilty of committing adultery.<sup>234</sup> It can take the form of active procuring or of passive permitting,<sup>235</sup> and is comparable to entrapment in criminal law.

*Recrimination.* Recrimination is a countercharge in a suit for divorce that the complainant has been guilty of an offense constituting a ground for divorce in the jurisdiction in which the action has been brought.<sup>236</sup> The doctrine has as its foundation the old equitable principle that one who asks relief must come into court with a clear conscience and with clean hands. It is also allowed as a defense to a divorce action on the theory that divorce is a remedy for an innocent and injured spouse and not for a guilty one. In the ecclesiastical courts only adultery could be set up by way of recrimination. However, today any act can be set up so long as it is one that the law

230. 2 BISHOP, MARRIAGE AND DIVORCE § 5; WARREN, SCHOULER DIVORCE MANUAL § 164.

231. See 2 BISHOP, MARRIAGE AND DIVORCE § 5.

232. See Collusion, *infra*.

233. Noyes v. Noyes, 194 Mass. 20, 79 N. E. 814 (1907).

234. 2 BISHOP, MARRIAGE AND DIVORCE § 5.

235. Morrison v. Morrison, 142 Mass. 361, 8 N. E. 59 (1886); WARREN, SCHOULER DIVORCE MANUAL § 164.

236. 2 BISHOP, MARRIAGE AND DIVORCE § 78.

declares sufficient for divorce.<sup>237</sup> It need not even be a charge of the same nature as that alleged in the complaint.<sup>238</sup>

In the very recent South Carolina case of *Jeffords v. Jeffords*,<sup>239</sup> the defendant amended her answer and inserted the following: "That on information and belief the conduct of the plaintiff with a woman or women other than his lawful wife has been such that would deprive him of a divorce on his own volition". The court held that this allegation was insufficient to set up the defense of recrimination. Though the court did not expressly so state, it implied that this allegation did not spell out an offense which was a ground for divorce in South Carolina. However, the case was remanded and the defendant was given another opportunity to amend.

The order in time of the offenses of the defendant and plaintiff are unimportant. The act by the plaintiff can be committed subsequent to the one alleged against the defendant. Moreover, the countercharge by the defendant can even be made when the act of the plaintiff occurs during the pendency of the case.<sup>240</sup> An act by the plaintiff prior to the one alleged against the defendant usually could not be set up because of condonation. However, if there has been no condonation because of a lack of knowledge, etc., then it could be used. The courts have had some trouble in determining whether an offense by the plaintiff, which has been condoned by the defendant, can be set up by way of recrimination. Under the better and prevailing view the courts say it cannot.<sup>241</sup> If condonation blots out a wrong (unless there is a broken condition), it should be forgiven for all purposes. Condonation is an absolute bar to a divorce action, and, therefore, the remission of an act should preclude the setting up of the act by way of recrimination.

Some courts, though they are few in number, have established a doctrine of comparative rectitude to be used with recrimination.<sup>242</sup> These courts do not hold that recrimination is an absolute defense to a divorce action, but rather they look to the degree of fault of each of the parties. The spouse who is less at fault is awarded a divorce. The only difficult feature of comparative rectitude is deciding where

237. *Karpantry v. Karpantry*, 39 Ohio App. 194, 177 N. E. 521 (1926); *Jones v. Jones*, 71 Colo. 420, 207 Pac. 596 (1922); WARREN, SCHOULER DIVORCE MANUAL § 181.

238. *Ibid.*

239. 216 S. C. 451, 58 S. E. 2d 731 (1950).

240. *Von Bernuth v. Von Bernuth*, 76 N. J. Eq. 487, 74 Atl. 700 (1909); *Heinemann v. Heinemann*, 202 Wis. 639, 233 N. W. 552 (1930).

241. *Souther v. Souther*, 103 Vt. 48, 151 Atl. 504 (1930); *Jones v. Jones*, 71 Colo. 420, 207 Pac. 500 (1922); WARREN, SCHOULER DIVORCE MANUAL § 186.

242. MADDEN, PERSONS AND DOMESTIC RELATIONS § 92. Annotation 63 A. L. R. 1132.

the line is to be drawn. As can be imagined, the scales are difficult to read in such cases. Most of the courts have renounced this theory and hold that recrimination is an absolute defense and neither party is given relief.<sup>243</sup> In so doing the judges seem to stick their tongues in their cheeks for such conduct. Other courts manage to find exceptional circumstances which warrant relief in many cases and thus they follow their consciences, though there may be some evasion of the law. There are many cases where the parties are so hopelessly split that they will never be reconciled. Hatred for each other has caused a permanent barrier to come between them as man and wife. If relief is refused such people, has justice been rendered? In too many of these cases there are children in the family. A new home could in many instances be established for these children if the parent, in whose custody they are placed, could remarry. However, the defense of recrimination prevents this. Cases involving these points are the ones which give rise to the so-called exceptions to the doctrine of recrimination.<sup>244</sup> These exceptions actually amount to nothing more than a weighing of the equities and circumstances involved in such cases. Though the doctrine of comparative rectitude be difficult to administer in some cases, it at least renders justice often times where without it injustice would be promoted. It might be that all courts in effect apply the doctrine of comparative rectitude where there is recrimination, though such an admission is never made. The South Carolina Court discussed the general principles of recrimination in the *Jeffords* case, without affirmatively deciding whether it is a defense in this state. In this case recognition was also given to the exceptions which exist under the modern decisions.

*Collusion.* Collusion is a corrupt agreement between the husband and wife for the doing of certain acts for the purpose of enabling one of them to obtain a divorce that could not otherwise be obtained.<sup>245</sup> Collusion implies action in concert and is in effect conspiracy between the parties to impose fraud on the court. Under these meanings there is collusion where the spouses agree to present untrue facts to the court,<sup>246</sup> agree to do acts which will constitute a ground for divorce<sup>247</sup> or where they agree to suppress material evidence.<sup>248</sup> In recent months

243. WARREN, SCHOULER DIVORCE MANUAL § 180.

244. See *Jeffords v. Jeffords*, 216 S. C. 451, 455, 58 S. E. 2d 731, 733 (1950); Annotation 170 A. L. R. 1076.

245. WARREN, SCHOULER DIVORCE MANUAL § 168; 2 BISHOP, MARRIAGE AND DIVORCE § 28.

246. *Ibid.*

247. 2 BISHOP, MARRIAGE AND DIVORCE § 29; MADDEN, PERSONS AND DOMESTIC RELATIONS § 89.

248. *Edleson v. Edleson*, 179 Ky. 300, 200 S. W. 625 (1918); *Ibid.*



there has been much publicity concerning the vacation of a large number of divorce decrees in New York where adultery is the only ground for divorce. Not being able to obtain a dissolution of the marriage, many spouses have fraudulently agreed to testify that one of them has committed adultery so as to be able to obtain a divorce. Others have created sham scenes with paid witnesses being present. These are typical examples of collusion. Where there is such a corrupt agreement the courts will refuse to grant a divorce to either of the spouses. If the divorce has been awarded before the conspiracy is learned of, the court may in its discretion vacate the decree.<sup>249</sup>

Collusion is specifically stated in Section 13 as a defense in South Carolina.

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**SECTION 14. Enjoin Parties.**—The Court, pending the termination of the action, or by final order, may restrain or enjoin either party to the case, from in any manner interposing any restraint upon the personal liberty of, or from harming, interfering with, or molesting the other party to said cause during the pendency of said suit, or after final judgment. It may also, during the pendency of such action, restrain or enjoin any other person who is made a party to the action from doing or threatening to do any act calculated to prevent or interfere with a reconciliation of the husband and wife, or other amicable adjustment of the action.

This section is self explanatory and no extensive comment will be made on it. Actually we cannot say that the injunctions mentioned in this section are ones which are usually issued by a court of equity. Equity, for historical reasons, mostly seeks to protect property rights rather than personal rights. However, there is certainly a modern tendency by the courts in this country to extend protection to personal rights. Section 14 is in accord with this new tendency. The section is highly desirable and gives the court ample power to deal with nagging wives, bullying husbands and intermeddlers. This is another section that is probably superfluous due to the court's inherent power, if it chose to exercise it, to give protection along these lines. However, the Legislature has seen fit to expressly grant such power to the courts.

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<sup>249</sup> *Singer v. Singer*, 41 Barb. 139 (N. Y. Sup. Ct. 1863); *Fleming v. Fleming*, 83 Pa. Super. Ct. 554 (1924); *MADDEN, PERSONS AND DOMESTIC RELATIONS* § 89.

**SECTION 15. Name of Wife Divorced.**—The Court may, upon granting of final judgment, allow a wife to resume her maiden name or the name of any former husband.

It is to be noted that the right of the wife to change her name is a matter which rests entirely in the discretion of the Court. Unless the rights of third parties would be affected, or unless there would be a danger of embarrassing children the Court should grant any change of name requested by the wife. The statutes in other states on this matter vary greatly. However, there are four other states which have broad provisions similar to South Carolina's.<sup>250</sup> It would seem that the grant of a broad discretionary power to the Court is desirable. The Judge is familiar with the facts and can, therefore, make a proper decision. The Judges of the Circuit Courts of this state have been given great latitude by statute to change names.<sup>251</sup> Therefore, this section was probably not needed. However, it does expressly settle the question of whether the wife is entitled to take certain names.

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**SECTION 16. Married Person Deemed of Age.**—Any married person shall, for the purpose of maintaining or defending an action for divorce and settlement of property rights arising thereunder, be deemed of age.

It is a general principle of law that a person under age, an infant in the law, can sue or defend in Court only with the aid of a guardian or friend.<sup>252</sup> This rule has been applied to divorce suits and allied matters in some jurisdictions.<sup>253</sup> The reason for this rule appears to be that the infant is not deemed competent to manage his own affairs and should therefore be protected in such matters by a guardian or friend. It would seem that this argument, even assuming that it is correct and in line with public policy, should not be applicable to married infants. If a person under legal age is permitted by law to marry and to shoulder the responsibilities attached thereto, reason would seem to dictate that such a person would be able to seek or defend a divorce suit without the assistance of a friend or guardian. As has been pointed out by one authority, no friend was needed for the courtship or marriage, so why should there be a need of one when a divorce is at stake. This same reasoning would also

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250. 2 VERNIER, AMERICAN FAMILY LAWS § 93.

251. S. C. CODE §§ 8674, 8675 (1942).

252. 2 BISHOP, MARRIAGE AND DIVORCE § 303.

253. *Ibid.*

appear to be true of property questions and other allied matters which arise in conjunction with the suit for dissolution of the marriage. Such thoughts were evidently in the minds of the members of the Legislature when Section 16 was enacted. It is a good section and is a good exception to the law on infants.

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**SECTION 17. Not Advertise, Print, Distribute or Circulate Paper to Procure or to Aid in Procuring a Divorce.**—It shall be unlawful for any person, firm or corporation to advertise, print, publish, distribute, circulate or cause to be advertised, printed, published, distributed, or circulated, any card, handbill, advertisement, printed paper, book, newspaper, or notice of any kind with an attempt to procure or to aid in procuring any divorce either in the State of South Carolina, or elsewhere; *Provided, However*, that this section shall not apply to the printing or publishing of any notice or advertisement required or authorized by the laws of South Carolina.

We are all too familiar with the Mexican divorce mills that aid in the procuring of divorces. As a matter of fact these concerns widely advertise the availability of their services in such matters. Without such a provision as Section 17, individuals or firms would undoubtedly try to traffic in this trade in South Carolina. Since the state is vitally interested in the marital status of its citizens, public policy frowns upon the practices prohibited by Section 17. It should be noted that this section is applicable to individuals, firms and corporations.

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**SECTION 18. Penalties Violate § 17.**—Any person, firm or corporation violating any of the provisions of Section 17 shall, upon conviction, be punished for each offense by a fine of not less than One Hundred (\$100.00) Dollars, and not more than One Thousand (\$1,000.00) Dollars, or imprisonment for not less than one (1) month or more than one (1) year, or both such fine and such imprisonment, at the discretion of the Court.

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Sections 19, 20 and 21 pertain to the repeal of inconsistent Acts, the separability of the Act and the time the Act is to become effective.