RECENT CASES

EQUITY — JURISDICTION — REVISION OF CUSTODY DECREE AND MODIFICATION OF ALIMONY—DECREE—Defendant successfully counterclaimed a divorce suit, and a decree *nisi*, followed by a final decree, custody of the infant child was awarded to the petitioner subject to certain provisions for visitation, and provided that defendant should pay $8.00 per week to the petitioner for support and maintenance of the child. Defendant claimed that the petitioner kept the child out of New Jersey, and substantially deprived him of his rights of visitation, that she alienated the child's affections from him and that the welfare of the child as well as his own rights as parent require that he now be awarded her custody. All the parties are now residents of New York. Petitioner sued in New York for unpaid installments under the maintenance provisions. Defendant prays that order be modified to eliminate the provision for past due and future installments, claiming under these circumstances it is inequitable to require him to pay for maintenance beyond what he has already paid. He prays also for order revising the original order by awarding the child's custody to him, and for an order enjoining petitioner from further prosecution of her New York action. *Held*—1. The Court of Chancery has jurisdiction to revise custody order so as to effect change of custody of the infant, although parties and infant have become domiciled and resident in another state, but will decline to exercise such reserved jurisdiction in the absence of special circumstances. 2. The right to installments of alimony and maintenance under permanent order become vested as such installments accrue, and subsequent order of modification cannot operate retroactively to disturb such vested right. *Ethel Hatch v. Herbert H. Hatch,* 192 Atl. 241, 15 Misc 461 (Chan. 1937).

Provision for the custody and support of the infant children of the marriage in divorce suits, comes under a statutory right of the Court of Chancery.[1] Such children are and continue to be virtually

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1. NEW JERSEY DIVORCE ACT, PART III, Sec. 4—The Court of Chancery shall have jurisdiction of all causes of divorce or nullity and alimony and maintenance by this act directed and allowed. Davis v. Davis, 75 N.Y. 221, 150

wards of the court.[2] It is the duty of the court to look after their welfare when the matter is properly brought to its attention.[3] The statutes usually require the authority conferred to be exercised by the court in which the divorce proceedings were instituted.[4] In the absence of a controlling statute, and subject to express rules as to the welfare of the child and the rights of the parents, it is wholly within the discretion of the court to determine to whom the custody of the child should be awarded,[5] and unless such discretion is abused, the judgment will not be disturbed; but the court should be guided by the evidence produced in open court.[6] The right of custody of children granted by a divorce decree does not deprive the other party of access to the children in the absence of an express provision to the contrary.[7] An award of the custody of the child to the mother operates to divest the father of all right of control over the child, notwithstanding the fact that the award is subject to the father's right to visit the child.[8] It is well settled that courts will not deprive the mother of custody of her child unless it is shown clearly that she is so unfit a person as to endanger the child's welfare.[9]

It is established by the great weight of authority that in the absence of fraud, or want of jurisdiction affecting its validity, a decree of divorce awarding the custody of the child of a marriage must be given full force and effect in other states as to the right to the custody of

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N.Y.S. 636 (1914); Pearson v. Pearson, 179 Ill. A. 127 (1912); Matter of De Saulles, 101 Misc. (N.Y.) 447, 167 N.Y.S. 445 (1917). "The power to provide for the control of infants in divorce action is wholly statutory."

2. Miner v. Miner, 11 Ill. 43 (1849); *In re* Krauthoff, 191 Mo. A. 149, 177 S.W. 1112 (1915).

3. Stone v. Stone, 158 Ind. 628, 64 N.E. 86 (1902); Houghton v. Houghton, 37 S.D. 184, 157 N.W. 316 (1916).

4. Davis v. Davis, *supra* note 1; Price v. Price, 55 N.Y. 656 (1873); Bennett v. Southard, 35 Cal. 688 (1868).

5. Welcher v. Baker, 83 N.J.Eq. 330, 90 Atl. 1122 (1914).

6. Scott v. Cohm, 231 Ill. 556, 83 N.E. 191, *aff'd*, 134 Ill. A. 195 (1907).

7. Burge v. Burge, 88 Ill. 164 (1878); Phipps v. Phipps, 168 Mo. A. 697, 154 S.W. 825 (1913).

8. Wilkenson v. Deming, 80 Ill. 342, 22 Am. R. 192 (1875).

9. Bryan v. Lyon, 104 Ind. 227, 3 N.E. 880, 54 Am. R. 309 (1885); Reitmann v. Reitmann, 168 Ky. 330, 183 S.W. 215 (1916).

the child at the time and under the circumstances of its rendition. The decrees carry with them the continuing jurisdiction of the court issuing them, but the exercise of the jurisdiction lies in the discretion of the court. Such decrees have no controlling effect in another state as to facts and conditions arising subsequently to the date of the decree, and the courts of the latter state may, in proper proceedings, award the custody otherwise upon proof of matters subsequent to the decree which justify the change in the interest of the child.[10]

In the principal case the child was awarded to the mother, and the defendant has not succeeded in proving her unfit. All parties concerned in the action are now residents of New York. The decree of New Jersey has continuing jurisdiction, but its practical application may prove difficult. New Jersey's decree would be effectual upon the parties, but Equity cannot go into New York to enforce its decree. Such actions are *in personam,* and the decree acts upon the parties. New Jersey cannot go into New York and force the petitioner to give up the child to the defendant. This is now New York's domestic relation problem. Full faith and effect is given to the New Jersey decree, under the Federal Constitution, in New York. It is rather useless to frame an ineffective decree in New Jersey when New York is perfectly capable and willing to preside over the matter, and in a position to see that their decree is carried out. In *Newman v. Newman,*[11] the court held that where all the parties had left the state, a modification of the decree should be refused. No special circumstances indicate that the domestic relations of the parties can be dealt with more effectively here than by the courts of New York.

"Alimony" is a technical term having no common-law existence, and in New Jersey it is an incident to a suit for divorce, is of statutory origin, and is modeled after the practice of English ecclesiastical courts.[12] It is the common-law duty on the part of the father to support his child, but the court has no inherent jurisdiction to compel a

10. Dixon v. Dixon, 76 N.J.Eq. 364, 73 Atl. 995 (1909); *Re* Stewart, 77 Misc. (N.Y.) 524, 137 N.Y.S. 202 (1912); People *ex rel.* Hickey v. Hickey, 86 Ill. A. 20 (1899); *Re* Leete, 205 Mo. A. 225, 223 S.W. 962 (1920).

11. 105 App. Div. (N.Y.) 63, 93 N.Y.S. 847 (1905).

12. Cohen v. Cohen, 121 N.J.Eq. 299, 188 Atl. 244 (1937).

parent to provide for the maintenance of his child beyond the pendency of matrimonial litigation. The amount allowed for the support of the child is subject to subsequent modification, where the changed conditions of the parties require it.[13] In determining the amount of alimony, the husband's income and property holdings are material circumstances and must be established by competent evidence.[14] The statute authorizing revision of alimony orders as circumstances may require, authorizes the husband as well as the wife to apply for modification of alimony order, regardless of contrary provision of order.[15] A husband's duty to support the wife does not rest on contract, but springs from the matrimonial relation, and is based on consideration of public policy.[16]

Where alimony is directed to be paid periodically, the wife acquires a vested right to each installment as it becomes due.[17] A decree for divorce with an allowance for alimony in equity is as much a judgment as if obtained in a common-law court.[18] The absence of the wife from the jurisdiction does not excuse the husband from payments of installments of alimony falling due during her absence.[19] A decree for permanent alimony may properly impose reasonable conditions and penalties upon one or the other of the parties;[20] and it is conclusive against all parties[21] as to all matters in issue that were presented and adjudicated,[22] unless an appeal is taken, or an application is made for its recision or modification.[23] The arrearages cannot be tampered with

13. White v. White, 65 N.J.Eq. 741, 55 Atl. 739 (1903).
14. Grobart v. Grobart, 119 N.J.Eq. 565, 182 Atl. 630 (1936).
15. Williams v. Williams, 12 N.J.Misc. 641, 174 Atl. 423 (1935).
16. Rich v. Rich, 12 N.J.Misc. 310, 171 Atl. 515 (1934).
17. Krauss v. Krauss, 127 App. Div. (N.Y.) 740, 111 N.Y.S. 788 (1908). *Cf.* 3 UNIV. NEWARK LAW REVIEW 33, *Accrued Alimony—Not a Vested Right.*
18. Bennett v. Bennett, 63 N.J.Eq. 306, 49 Atl. 501 (1901).
19. Stanfield p. Stanfield, 168 Pa. 912 (1917).
20. Mostoller p. Liver, 201 Ill. A. 52 (1915).
21. Patton v. Patton, 67 Misc. (N.Y.) 404, 123 N.Y.S. 329 (1910); Goodsell v. Goodsell, 46 Misc. (N.Y.) 158, 93 N.Y.S. 1038 (1905); Karcher v. Karcher, 204 Ill. Atl. 210 (1917); Pool v. Tucker, 36 All. A. 377 (1889).
22. Wood v. Wood, 7 Lans. 204 (1872); Janvrin v. Janvrin, 60 N.H. 169 (1880).
23. Griffith v. Griffith, 180 S.W. 411 (1915); McBee v. McBee, 1 Heisk. (Tenn.) 558 (1870)

by this court. In *Bennett v. Bennett,*[24] the court held that Equity will not take jurisdiction to enforce a decree for alimony rendered on a divorce granted in a foreign state, there being a full and adequate remedy at law.[24]

The defendant claims that the paying of the alimony was conditioned upon his visiting the child. This seems to be a baseless supposition. The court decided in *Feinberg v. Feinberg,*[25] that though the removal from the state, by the defendant in a divorce suit, without consent of the petitioner or order of the court, of the minor child, custody of which was awarded defendant, with right of visitation to petitioner, was contrary to P.L. 1902, P259, Par. 7,[26] petitioner cannot be relieved from making payments for maintenance of such child, which have accrued under the order of the court, without complaint touching such removal. In *Williams v. Williams,*[27] the petition for modification of decree for permanent alimony was held entitled to consideration resulting in modification of decree, if circumstances warranted, notwithstanding petitioner was in arrears. No circumstances warranted it here.

It is submitted that the decision of the Court of Chancery in denying the defendants requests *in toto* was rightfully reached and is supported by the clear weight of authority. To quote the court in its decision "Practical considerations, as well as principles of propriety and comity, require that this court keep hands off."

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24. 63 N.J.Eq. 306, 49 Atl. 501 (1901).

25. 73 N.J.Eq. 810, 66 Atl. 610 (1907).

26. P.L. 1902, P. 259, Par. 7—A party may not remove the minor from the jurisdiction of this court, without first obtaining the consent of the other party, or an order of this court for that purpose.

27. 12N.J.Misc. 641, 174 Atl. 423 (1935).