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Marriage and Divorce--Wife's Right to Suit Money in Action to Modify Original Decree as to Custody of Children

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constituted positive concealment and obstruction which suspend the Statute.\textsuperscript{15}  

\textbf{MARRIAGE AND DIVORCE—WIFE'S RIGHT TO SUIT MONEY IN ACTION TO MODIFY ORIGINAL DEGREE AS TO CUSTODY OF CHILDREN.} — \(W\) obtained a divorce from \(H\) and was granted custody of their minor children, the circuit court not expressly retaining the case on its docket for further decree concerning their custody. Five years later, \(H\) petitioned for custody of the children. \(W\) appealed from the decree granting custody to \(H\), and the circuit court ordered \(H\) to pay costs of the appeal, including \(W\)'s attorney's fees, applying the code section which provides that the court may at any time after the commencement of the suit make any proper order compelling the man to pay to the woman any sum necessary "to enable her to carry on or defend the suit in the trial court or on appeal should one be taken."\textsuperscript{17} \(H\) then petitioned the supreme court for a writ of prohibition to cancel this order. Petition dismissed. \textit{Held}, that the statute\textsuperscript{2} allowing the court granting the divorce to issue its decree fixing custody of the children and later to alter such decree on petition of either party, creates in the court a continuing jurisdiction over custody of children; thus, the petition for modification of the decree is a part of the original divorce suit and the suit money statute applies, allowing costs to be assessed to \(H\). \textit{Crouch v. Easley, Judge.}\textsuperscript{3}

It was formerly settled in West Virginia that provisions in a divorce decree relating to alimony were \textit{res judicata} unless the court expressly reserved the right to alter the decree as to such provision.\textsuperscript{4} This has supposedly been changed by statute since 1931, so that now power to alter the decree as to alimony is retained in the court without any express reservation to that effect.\textsuperscript{5}

\textsuperscript{15} Thompson v. Iron Co., 41 W. Va. 574, 23 S. E. 795 (1895); Teter v. Moore, 80 W. Va. 443, 93 S. E. 343 (1917); Cameron v. Cameron, 111 W. Va. 375, 162 S. E. 173 (1931).  
\textsuperscript{16} W. VA. REV. CODE (1931) c. 48, art. 2, § 18.  
\textsuperscript{17} W. VA. REV. CODE (Michie, 1937) c. 48, art. 2, § 15.  
\textsuperscript{18} 192 S. E. 690 (W. Va. 1937).  
\textsuperscript{19} Cariens v. Cariens, 50 W. Va. 113, 40 S. E. 335 (1901); Burdette v. Burdette, 109 W. Va. 95, 163 S. E. 150 (1930).  
\textsuperscript{20} W. VA. REV. CODE (1931) c. 48, art. 2, § 15. The words "maintenance of the parties" were added to the statute in 1931, giving the court the power at any time to alter or modify the divorce decree as to such maintenance. The Reviser's note to this section states that this is intended to give to the court the right to make such alterations without expressly reserving this right in the divorce decree.
This same statutory provision has for a much longer time applied to questions of custody of minor children, the case of Settle v. Settle\(^6\) holding definitely that in such case power to modify the original decree as to custody is automatically retained in the court. In applying this holding to the principal case so that the suit money statute\(^7\) is made to cover a petition for modification of the divorce decree as to custody of children, the court reaches a conclusion which is directly in line with its liberal tendency shown in the past in its interpretation of this same provision. Long before 1931, when the words "and on appeal should one be taken" were added to this statute, our supreme court had construed it to apply to costs on appeal from the original divorce decree as well as to those incurred by the wife in defending or prosecuting the suit in the trial court,\(^8\) reasoning that the legislature did not intend to leave the wife remediless as to obtaining money to carry an appeal in a divorce case.

Courts of other states having statutes similar to that in West Virginia retaining jurisdiction over custody of children have reached the same result as that in the principal case in interpreting suit money statutes.\(^9\) Some courts, without purporting to rely on any statute have, under general equitable principles, retained jurisdiction both in cases where the court expressly reserved the right to modify the decree\(^10\) and in those where it did not do so.\(^11\) A contrary view is taken by the supreme court of Iowa. In the case of Franklin v. Bonner,\(^12\) cited by the court in the principal case, the Iowa court held that a statute similar to that in West Virginia ipso facto retained in the court jurisdiction over matters relating to custody of children. A later case in the same court,\(^13\) involving suit money to be paid to the wife by the husband in a petition for modification of a divorce decree as to custody of children, held that the jurisdiction was a continuing one only for

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\(^6\) 117 W. Va. 476, 185 S. E. 859 (1936).
\(^11\) Worthington v. Worthington, 215 Ala. 447, 111 So. 224 (1927); Haagen v. Haagen, 11 S. W. (2d) 757 (Mo. App. 1928), Missouri having statute similar to that in West Virginia retaining jurisdiction in the court, but this case not relying on such or even mentioning it.
\(^12\) 201 Iowa 516, 207 N. W. 778 (1926).
\(^13\) Hensen v. Hensen, 212 Iowa 1226, 238 N. W. 83 (1931).
some purposes, and that the wife was not entitled to attorney's fees.

In applying suit money statutes to petitions for modification of divorce decrees, courts occasionally distinguished between situations in which the change in custody is necessary to the welfare of the children, and those in which the change is not a necessary one, for example, where the change was asked entirely for the pleasure of the petitioning mother. This distinction is of little importance in a case such as the principal one where the petitioner is the father. In such case the mother is forced to defend, so the possible evil of the father's being forced to pay costs of any needless and unwarranted petition the mother might wish to bring does not here exist. The holding of the principal case would not preclude a use of this distinction in West Virginia.

A. F. G.

MUNICIPAL CORPORATIONS — LIABILITY FOR TORT — SWIMMING POOLS. — The city of Clarksburg maintained a public swimming pool just below a municipal dam. A guard, who was on duty only certain hours of the day, had orders not to permit diving from the dam or its wing wall. Plaintiff, ignorant of this prohibition and before the guard had come on duty, dived from the wing wall thereby permanently injuring his knee either on a jagged rock or on an underwater apron of the wing wall. Judgment for plaintiff affirmed. Held, that a municipality exercises a proprietary function in the maintenance of a public swimming pool, and hence is liable for injuries caused by failure to use ordinary care. Ashworth v. City of Clarksburg.

It is a well-settled rule that a municipality is liable for injuries or damages due to failure to use ordinary care in the exercise of "so-called" proprietary functions. It has been determined in West Virginia that the following activities of a municipality are proprietary: operation of a water system, maintenance of an electric plant and the maintenance of parks. The following have

1 190 S. E. 763 (W. Va. 1937).
2 Warden v. City of Grafton, 99 W. Va. 249, 128 S. E. 375 (1925); Wigal v. City of Parkersburg, 74 W. Va. 25, 81 S. E. 554 (1914).
3 Prager v. City of Wheeling, 91 W. Va. 597, 114 S. E. 155 (1922); Wigal v. City of Parkersburg, 74 W. Va. 25, 81 S. E. 554 (1914).