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Divorce--Finality of Alimony Decree

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DIVORCE—FINALITY OF ALIMONY DECREE.—In the recent case of *Burdette v. Burdette*[1], the West Virginia Supreme Court of Appeals, of its own accord, made a reservation in the decree of divorce from bed and board, providing for a change of the allowance for alimony, if the changed future circumstances of the parties should warrant it, stating that without such reservation the decree is *res judicata*. The court cites as authority for such statement the West Virginia case of *Cariens v. Cariens*[2]. That case supports the court's conclusion, and West Virginia in adopting such rule is supported by some authority[3]. Courts upholding this view base their decisions upon the ground that divorce was not known at common law and is of statutory creation, and jurisdiction is determined entirely by the statute[4].

The weight of authority, however, adopts the view that while jurisdiction over divorce from bed and board is obtained by statute, the court is to act in such matter in accordance with the rules of the ecclesiastical courts.[5] It was early determined in Parliament and by the courts of England that the ecclesiastical law is part of the law of the land and is sometimes denominated a branch of the common law.[6] The courts of this country adopting the majority view recognize the ecclesiastical law as part of the common law and interpret the statute to mean that what was formerly the function of the ecclesiastical court shall now be the function of the chancellor, and the existing rules of law upon the subject shall be followed unless changed by statute.[7]

Divorce from bed and board was the only form of divorce grant-

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[1] 153 S. E. 150 (1930).
[2] 50 W. Va. 113, 40 S. E. 335 (1901).
[3] Wilkins v. Wilkins, 146 Ga. 382, 91 S. E. 977 (1917). See Parsons v. Parsons, 9 N. H. 309, 319 (1838); Peugnat v. Phelps, 48 Barb. 566 (N. Y. 1867).
[4] Cariens v. Cariens, *supra* n. 2; see Burtis v. Burtis, 2 N. Y. Ch. Rep. 522, 525 (1825).
[5] Bursler v. Bursler, 5 Pick. 427 (Mass. 1827); Lockridge v. Lockridge, 2 B. Mon. 258 (Ky. 1842); Wheeler v. Wheeler, 18 Ill. 39 (1857); Taylor v. Taylor, 93 N. C. 418 (1885); 1 BISHOP MARRIAGE AND DIV. (5th ed. 1873) 57, § 71.
[6] Catteral v. Catteral, 1 Rob. Ecc. 580 (1847); 1 BISHOP MARRIAGE AND DIV. (5th ed. 1873) 45, § 58; 1 Harg. Law Tracts (1787) 445 and note.
[7] *Supra* n. 5. See Ruge v. Ruge, 97 Wash. 51, 54, 165 Pac. 1063, 1065 (1917).

ed at ecclesiastical law[8], and the decree for alimony was subject to change from time to time. if the changed circumstances of the parties should warrant it.[9]

The nature of alimony would seem to support an interpretation of the statute in accord with the general weight of authority. After the decree of divorce from bed and board, the parties are still husband and wife, with all the duties and obligations of each to the other[10], and the court in its decree for alimony undertakes to state the extent of the duty of financial support of one spouse to the other. Such decree is based upon the present social and financial situations of the parties.[11] But these situations are subject to change, frequently a very remarkable change, and it is obvious that in such case the extent of the obligation of support has changed and the decree, if final, is erroneous. Since the rule of the minority would, when the circumstances of the parties change, operate to defeat the purpose of alimony, and the rule of the majority would operate to fulfill the purpose of the alimony decree, it would seem to be the better rule.

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[8] In the case of an absolute divorce, the decree for alimony is generally regarded as final. The reasons generally assigned are, first, that absoluto divorce did not exist at ecclesiastical law and the statute governs and second, the obligation arises not from the marriage relation, but wholly from the decree, because the relation between the parties has ceased, and the decree is final. Livingston v. Livingston, 173 N. Y. 377, 66 N. E. 123 (1903); Ruge v. Ruge, 97 Wash. 51, 165 Pac. 1063 (1917); see Spain v. Spain, 177 Iowa 249, 251, 158 N. W. 529, 530 (1916).

It is true the marriage *status* has ceased, but the duty of support has continued by reason of the decree. Andrew v. Andrew, 62 Vt. 495, 20 Atl. 819 (1890); Alexander v. Alexander, 13 App. D. C. 334 (1898). The decree is simply a means of compelling "the husband to fulfill his martial obligations—*viz.*, support his wife,—although the material bond has been served." Field v. Field, 15 Abb. N. C. 434, 435 (N. Y. 1885). The conditions out of which the obligation arises are subject to change to the same extent as if the martial bond had not been severed.

The legislature has not seen fit to make any distinction in the classes of divorce with respect to alimony, and it seems strange why the court in granting the same kind of alimony in one case as in the other, should lose jurisdiction as to one and not as to the other. It would seem that the rules of the ecclesiastical courts with regard to alimony should, by interpretation, be incorporated in the statute.

[9] Note (1854) 60 Am. Dec. 667; see Alexander v. Alexander, 13 App. D. C. 334, 344 (1899); Ruge v. Ruge, *supra* n. 7.

[10] Freeman v. Belfar, 173 N. C. 581, 92 S. E. 486 (1917).

[11] Kamp v. Kamp, 59 N. Y. 212 (1874); Cralle v. Cralle, 79 Va. 182 (1884).

The injustice of the rule in *Cariens v. Cariens, supra,* will terminate in West Virginia probably without the necessity of the court reversing itself. Under the code of West Virginia[12], which takes effect January 1, 1931, the state has fallen in line with a great number of the states, and has by statute given the court power to revise the decree for alimony, whether for divorce from bed and board or absolute divorce, "as the altered circumstances or needs of the parties may render necessary to meet the ends of justice".

—JOHN HAMPTON HOGE.

EASEMENTS OF NECESSITY—INCREASING THE SERVITUDE.—It appeared in a recent decision that one of the defendants had an easement of necessity from his 95-acre tract across the plaintiff's land to a nearby road and became owner of an adjoining tract of 31 acres. He sold the timber on the 31-acre tract to the other defendants. The trial court denied the plaintiff an injunction to restrain the transportation of this timber across his land. On appeal, reversed. *Held,* that an owner having an easement of necessity as to one tract of land, cannot as a matter of right extend such easement to other lands he may subsequently acquire. *Dorsey v. Dorsey.*[1]

The Court followed the old English case, *Howell v. King,*[2] holding that one having a right of way to Blackacre over the land of another has no right to drive his cattle to land beyond Blackacre. The doctrine that a way to a tract of land cannot be used as a way to additional land adjoining is settled in West Virginia.[3]

The Ohio case of *Remington v. Fireproof Warehouse Company,*[4] suggests a variation. The right of way was extended to the use of a subsequently-purchased 10-foot strip of ground and the court held that a driveway could be used to the benefit of newly ac-

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[12] Ch. 48, art. 2, § 15.

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[1] 153 S. E. 146 (W. Va. 1930). See generally JONES ON EASEMENTS (1898) § 360.

[2] 1 Mod. 190 (1674).

[3] Shaver v. Edgell, 48 W. Va. 502, 37 S. E. 664 (1900); McNeil v. Kennedy, 88 W. Va. 524, 107 S. E. 203 (1920); Bennett v. Booth, 70 W. Va. 264, 73 S. E. 909, (1912); see Springer v. McIntyre, 9 W. Va. 196 (1876); Powell v. Simms, 5 W. Va. 1 (1871); Standiford v. Goudy, 6 W. Va. 364 (1873).

[4] 17 Ohio Cir. Ct. (N. S.) 301, 87 Ohio St. 523 (aff'd).