NOTES ON JURISDICTION UNDER DIVORCE ACT

I.

JURISDICTION TO AWARD ALIMONY AFTER FOREIGN DECREE OF ABSOLUTE DIVORCE

Section 25 of the Divorce Act[1] provides:

> "Pending a suit for divorce or nullity, or after decree of divorce, it shall be lawful for the Court of Chancery to make such order touching the alimony of the wife, and also touching the care, custody, education and maintenance of the children, or any of them, as the circumstances of the parties and the nature of the case shall be rendered fit, reasonable and just . . . "

Doubt has been expressed as to whether under this section the Court of Chancery has jurisdiction to award alimony to a former wife who institutes her suit after having secured a final decree of absolute divorce in a foreign jurisdiction.

That such jurisdiction cannot be found outside of section 25 is now settled. The ecclesiastical courts in England, which until their abolition in the year 1857, possessed sole jurisdiction to modify or dissolve the marital status, recognized but two kinds of divorces: (1) divorce *a mensa et thoro* (2) divorce *a vinculo matrimonii*.. A divorce *a mensa et thoro* was merelv a judicial separation of the spouses without the severance of the matrimonial status It corresponds to a divorce from bed and board under our statute.[2] A divorce *a vinculo matrimonii* in the ecclesiastical law was equivalent to an annulment under our practice[3] and was decreed only for causes antedating the marriage. Divorce from the bond of matrimony as provided for by our Divorce Act[4]—for causes postdating the marriage—was unknown to the ecclesiastical law. The church courts in Eng-

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[1] P. L. 1933 p. 296 §25; C. S. 1933 p. 124, §25 as amended.
[2] P. L. 1907 p. 476 §3; 2 C. S. 1910 p. 2028 §3.
[3] P. L. 1933 p. 1154; C. S. 1934 p. 110 c. 62-1.
[4] P. L. 1907 p. 475 §2; 2 C. S. p. 2023 §2.

land decreed alimony to the wife, but the award was made only as an incident to a decree of separation.[5]

When the American Colonies were settled the ecclesiastical courts were still in existence, but they were never a part of the judicial system of New Jersey. The Court of Chancery of New Jersey is in no wise an ecclesiastical tribunal and consequently did not inherit the power of the church courts to award alimony. Although the jurisdiction of the Court of Chancery to decree maintenance *pendente lite* is not of statutory origin,[6] its authority to grant permanent alimony or permanent maintenance is derived solely from legislative enactment. While courts of equity of some other states have reached a different conclusion,[7] the rule is now too firmly embedded in our decisions to be seriously questioned that Chancery may decree permanent alimony only in cases where the authority to do so has been delegated to the court by the legislature.[8] The only legislation which confers upon the court the power to award permanent alimony or permanent maintenance is contained in sections 25[9] and 26[10] of the Divorce Act and the inquiry as to when alimony may be decreed after the rendition of a decree of divorce must be resolved by a consideration of these sections.

It has been settled that when a decree of divorce has been granted to the wife by our own court, an award of permanent alimony may be made at any time after the entry of the final decree of divorce. Since the Divorce Act of 1902,[11] the statutory provisions of section 25 expressly so provide. The original petition for divorce need not contain a prayer for alimony, nor need the decree expressly reserve the right to apply, as a condition of such award.[12] It is also settled that where the parties

[5] See Lynde v. Lynde, 64 N. J. Eq. 736, 751, 52 Atl. 694 (E. & A. 1902).
[6] Wilson v. Wilson, 181 Atl. 257, 58 N. J. L. J. Index 348 (N. J. Ch. 1935).
[7] 1 R. C. L. p. 878 §17; 34 L. R. A. (N.S.) 954.
[8] See, for example, Yule v. Yule, 10 N. J. Eq. 138 (Ch. 1854); Hervey v. Hervey, 56 N. J. Eq. 424, 426, 39 Atl. 762 (E. & A. 1897).
[9] P. L. 1933 p. 296 §25; C. S. 1933 p. 124 §25, *supra* note 1.
[10] P. L. 1907 p. 482 §26; 2 C. S. 1910 p. 2038 §26.
[11] P. L. 1902 p. 507 §19.
[12] McKensey v. McKensey, 65 N. J. Eq. 633, 55 Atl. 1073 (Ch. 1903); Samuels v. Samuels, 114 N. J. Eq. 329, 169 Atl. 655 (E. & A. 1933); Smith v. Smith, 88 N. J. Eq. 319, 102 Atl. 381 (E. & A. 1917); Maloney v. Maloney, 12 N. J. Misc. 397, 400, 174 Atl. 28 (Ch. 1934); Swallow v. Swallow, 84 N. J. Eq. 411, 93 Atl. 885 (Ch. 1915); 83 A. L. R. 1248.

are divorced from bed and board by the decree of a foreign court, the wife may secure a decree for separate maintenance in New Jersey under section 26 of the Divorce Act.[13] Likewise, an *invalid* foreign decree of absolute divorce is no bar to the wife's application in New Jersey for separate maintenance, or for alimony in a subsequent divorce action brought in this State.[14] But where there is a valid foreign decree of absolute divorce, entitled to extra-territorial recognition in New Jersey,[15] has the Court of Chancery jurisdiction to entertain the application of a former wife for alimony under section 25 of the Divorce Act?

While alimony usually follows a decree of divorce without a specific prayer,[16] divorce and alimony are distinct remedies. The proceeding for divorce is one *in rem* or at least *quasi in rem*,[17] and involves the possible modification or dissolution of the marital status. It has for its object the judicial separation of the parties where the action is for a divorce from bed and board, or a total severance of the matrimonial union where the action is for a divorce from the bond of matrimony. The court obtains jurisdiction of the subject matter of the action by reason of the situs of the marital *res* in this state consequent upon the domicile of the parties or one of them in this state at and for the time specified by the jurisdictional sections of the Divorce Act. Where the court has jurisdiction of the marriage status it may render a decree of divorce based upon personal service of process upon the defendant or upon constructive service of process.[18] Permanent alimony, on the other hand, is decreed to a divorced wife in lieu of the support to which she would have been entitled but for the decree of divorce. The proceeding for permanent alimony, while usu-

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[13] Freund v. Freund, 71 N. J. Eq. 524, 63 Atl. 756 (Ch. 1906), *aff'd.* 72 N. J. Eq. 943, 73 Atl. 1117 (E. & A. 1907); Tehsman v. Tehsman, 93 N. J. Eq. 76, 114 Atl. 320 (Ch. 1920), *aff'd.* 93 N. J. Eq. 422, 117 Atl. 34 (E. & A. 1922).

[14] See, for example, Fried v. Fried, 99 N. J. Eq. 106, 132 Atl. 674 (Ch. 1926).

[15] For the principles governing recognition, see P. L. 1907 p. 483 §33; U. S. Const. art. IV §1; Lister v. Lister, 86 N. J. Eq. 30, 97 Atl. 170 (Ch. 1915); Hollingshead v. Hollingshead, 91 N. J. Eq. 261, 110 Atl. 19 (Ch. 1920).

[16] Maloney v. Maloney, 12 N. J. Misc. 397, 402, 174 Atl. 28 (Ch. 1934).

[17] Lister v. Lister, 86 N. J. Eq. 30, 35, 38, 97 Atl. 170 (Ch. 1915).

[18] P. L. 1907 p. 477 §§6, 7; 2 C. S. 1910 p. 2030 §§6, 7.

ally contemporaneous with the action for divorce, concerns the support of the wife after the marriage relation has been dissolved or altered. The right of a wife to permanent alimony is a cause of action separate and distinct from the cause of action upon which the decree of divorce is premised.[19] Since the Divorce Act of 1907 residence is not a jurisdictional condition precedent to the award of alimony or maintenance, whether the order be made as part of the decree of divorce or subsequently thereto.[20] The proceeding for alimony is usually one *in personam* and as such a decree may not be rendered against a husband domiciled in another state who has not been personally served with process within the state in which the action is instituted or who has not appeared generally in the action. A decree or judgment for alimony *in personam* rendered without jurisdiction of the person of the husband is void in the state where rendered and elsewhere.[21] A proper court may render a valid decree of alimony *in rem* or *quasi in rem* in cases where the husband's property within the state has been attached or sequestered by original process. Such a decree does not operate *in personam,* but is good to the extent of the property attached or sequestered.[22]

The decree for alimony liquidates the common law duty of the husband to support his wife. Upon marriage the husband is charged with the duty to maintain his wife—a duty which does not rest upon contract, but springs from the marital relation of the parties.[23] So long as the wife does not

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[19] Sutphen v. Sutphen, 103 N. J. Eq. 203, 204, 142 Atl. 817 (Ch. 1928). See Schimek v. Schimek, 109 N. J. Eq. 395, 397, 157 Atl. 649 (Ch. 1931).

[20] Dithmar v. Dithmar, 68 N. J. Eq. 533, 59 Atl. 644 (Ch. 1905) was decided under Divorce Act of 1902.

[21] Pennoyer v. Neff, 95 U. S. 714, 24 L. Ed. 565 (1878); Lynde v. Lynde, 54 N. J. Eq. 473, 35 Atl. 641 (Ch. 1896), *aff'd.* 55 N. J. Eq. 591, 39 Atl. 1114 (E. & A. 1897); McGuinness v. McGuinness, 72 N. J. Eq. 381, 68 Atl. 768 (E. & A. 1908); Elmendorf v. Elmendorf, 58 N. J. Eq. 113, 44 Atl. 164 (Ch. 1899).

[22] Pennington v. Fourth National Bank, 243 U. S. 269, 61 L. Ed. 713, 37 S. Ct. 282 (1917); Maloney v. Maloney, 12 N. J. Misc. 397, 174 Atl. 28 (Ch. 1934). The maintenance section of the Divorce Act (P. L. 1907 p. 482 §26) expressly provides for sequestration of the husband's estate, property and effects within the state. See Wood v. Price, 79 N. J. Eq. 1, 7, 81 Atl. 1093 (Ch. 1910), *aff'd.* 79 N. J. Eq. 620, 81 Atl. 983 (E. & A. 1911).

[23] Sobel v. Sobel, 99 N. J. Eq. 376, 379, 132 Atl 603 (E. & A. 1926); Maloney v. Maloney, 12 N. J. Misc. 397, 407, 174 Atl. 28 (Ch. 1934); Irvin

unjustifiably abandon her husband or is not guilty of a matrimonial offense, the duty of the husband to support his wife continues.[24] The husband cannot absolve himself of this continuing duty by committing a matrimonial offense because of which the wife obtains a decree of absolute divorce against him. His obligation to maintain his wife persists after the dissolution of the marriage at the instance of the wife. The Court of Chancery, however, would be powerless to enforce this continuing obligation by awarding alimony, without the aid of statute. Justice Pitney in *Lynde v. Lynde*,[25] observed:

> "In this state the subject-matter of divorce having been, by statute, committed to the court of chancery, and causes for absolute divorce having been allowed other than such as rendered the marriage void *ab initio,* there followed, as a logical consequence, the allowance of permanent alimony in cases of absolute divorce, as a *means of enforcing the continuing duty of support* which the husband owed to the wife, and of which he was not permitted to absolve himself by his own misconduct, *although that misconduct resulted in a dissolution of the marriage.*" (ital. mine)

Substantially the same language used by Justice Pitney was employed by Justice Trenchard in *Dietrick v. Dietrick*:[26]

> "An examination of our Divorce Act (*Comp. Stat. p.* 2035 §25) shows clearly that permanent alimony is allowed as a means of enforcing the continuing duty of support which the husband owes to the wife, and of which he is not permitted to absolve himself by his own misconduct, although that misconduct results in a dissolution of the marriage."[27]

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v. Irvin, 88 N. J. Eq. 139, 102 Atl. 440 (Ch. 1917), *aff'd.* 88 N. J. Eq. 596, 103 Atl. 1052 (E. & A 1918).

[24] Barefoot v. Barefoot, 83 N. J. Eq. 685, 93 Atl. 192 (E. & A. 1914); Furth v. Furth, 39 Atl. 128 (N. J. Ch. 1898). As to the commission of a matrimonial offense without a decree of divorce, see Piper v. Piper, 13 N. J. Misc. 68, 176 Atl. 345 (Ch. 1934), reviewed in 4 MERCER BEASLEY L. REV. 221 (1935).

[25] Lynde v. Lynde, 64 N. J. Eq. 736, 751, 52 Atl. 694 (E. & A. 1902).

[26] Dietrick v. Dietrick, 88 N. J. Eq. 560, 103 Atl. 242 (E. & A. 1917).

[27] See also Maloney v. Maloney, 12 N. J. Misc. 397, 403, 174 Atl. 28 (Ch. 1934) and cases cited *supra* note 12.

And in earlier litigation in *Lynde v. Lynde*,[28] Chancellor McGill said:

> "Consummated marriage carries with it rights and duties which, so far as a faithful wife is concerned, can morally end only with the life of one of the parties. Her right to support and maintenance continues so long as it is just that she shall retain it."

Does the statute exclude from relief a former wife whose divorce happens to have been secured in a foreign state? Does the jurisdiction of one state to grant divorce prevent the exercise of jurisdiction by another state to grant permanent alimony, even though alimony jurisdiction is lacking in the state granting the divorce? The duty of a husband to support his wife is universally recognized in common law jurisdictions, and it is settled in New Jersey that such duty persists after the wife has secured a divorce because of his misconduct. How can this continuing duty of the husband to support his former wife be affected by the circumstance that she may have divorced him in a foreign jurisdiction? If the wife comes into New Jersey after having been granted a valid decree of absolute divorce elsewhere, without provision for her support included in such decree because she was unable to secure personal service of process, is she not as clearly entitled to be supported by her husband as she would have been had her divorce been decreed by our Court of Chancery? If there be no remedy open to her, her husband by his own misconduct can successfully evade his responsibility to support her, merely by becoming resident in New Jersey. Is the wife who has obtained a valid decree of divorce in a foreign jurisdiction less deserving of alimony than the wife who has secured her decree in New Jersey? If she secures an order for alimony in the same jurisdiction in which she obtains her divorce decree, our courts will at her suit enforce arrearages against her husband, if personally served here, or (*in rem*) if he have property within this state. Surely it cannot be

[28] Lynde v. Lynde, 54 N. J. Eq. 473, 477, 35 Atl. 641 (Ch. 1896), *aff'd.* 55 N. J. Eq. 591, 39 Atl. 1114 (E. & A. 1897).

argued that the legislature intended to allow a woman to become a public charge, when her ex-husband is well able to support her, merely because she has secured her divorce decree abroad instead of in New Jersey.

It is apparent that Chancery cannot assume jurisdiction under section 26 of the Divorce Act to award permanent main tenance after the rendition of a foreign decree of absolute divorce at the wife's instance, for under that section which reads "In case a *husband,* without justifiable cause, shall abandon his *wife*" etc. (ital. mine) the continuance of the relation of husband and wife is a jurisdictional requisite. For the same reason a former wife cannot sue under the Disorderly Persons Act,[29] the Settlement and Relief of Poor Act,[30] or the Juvenile and Domestic Relations Court Act.[31] The only legislative authority delegated to Chancery to award support to the wife (excepting section 26 of the Divorce Act) is contained in section 25 of the Divorce Act, and to that section therefore Chancery must turn for jurisdiction to grant alimony subsequent to the rendition of a valid foreign decree of absolute divorce decreed at the instance of the wife. Such authority exists by construing the word "divorce" in the phrase "after decree of divorce" to include foreign as well as domestic decrees. Is such a broad construction tenable? The decisions in other states are of little aid upon this question of construction, because in many jurisdictions courts of equity have inherent or fundamental jurisdiction of the subject of alimony,[32] while in states in which the court's authority is governed by statute, the statutory provisions allowing an award of alimony are quite dissimilar in phraseology to our own statue or else have been enacted under circumstances which did not exist at the time of the passage of our act.[33]

The present section 25 of the Divorce Act[34] conferring jurisdiction on the Court of Chancery to award alimony appeared, although in a different form, in the first act delegating

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[29] P. L. 1930 c. 110 §17.
[30] P. L. 1931 p. 941 §60.
[31] P. L. 1929 c. 157 §2.
[32] See *supra* note 7.
[33] The decisions of the various states are collected in 42 A. L. R. 1385, 1389.
[34] P. L. 1933 p. 296 §25; C. S. 1933 p. 124 §25.

authority to the court to dissolve or modify the marriage relation.[35] That act was entitled "An Act concerning divorce and alimony." By the act the Court of Chancery was empowered "when a divorce shall be decreed" for certain enumerated causes to make such order touching the care and maintenance of the children of the marriage, and also touching the maintenance and alimony of the wife. In 1820[36] "An Act concerning divorces, and for other purposes" was enacted by which Chancery by section 1 was given "jurisdiction of all causes of divorce, and of alimony and maintenance" provided certain domiciliary requirements were present. By section 9 of the Act of 1820 it was provided that "when a divorce shall be decreed, it shall and may be lawful for the Court of Chancery, to take such order touching the alimony and maintenance of the wife; and also touching the care and maintenance of the children, or any of them, by the said husband, as from the circumstances of the parties and the nature of the case shall be fit, reasonable and just, and in case the wife is complainant to order the defendant to give reasonable security," etc. The causes for divorces as enumerated in the alimony section 7 of the Act of December 2, 1794, were omitted in the alimony section 9 of the Act of 1820. Section 10 of the Act of 1820 was the forerunner of our present section 26 of the Divorce Act.[37] In the Revision of 1846[38] sections 1, 9, and 10 were substantially the same as the corresponding sections of the Act of 1820. In the Revision of 1877 by section 1 authority was conferred upon Chancery "of all causes of divorce and alimony and maintenance by this act directed and allowed." Section 9 of the Act of 1820 and of the Revision of 1846 appeared without material alteration as section 19 in the Revision of 1877. Section 10 of the Act of 1820 and of the Revision of 1846 became section 20 in the Revision of 1877. In subdivision V of the Divorce Act (Revision of 1877) was included legislation enacted in 1871 concerning the custody and maintenance of minor children. Under this subdivision

[35] Act of Dec. 2, 1794 (Pat. Laws 1800 p. 143 §7).
[36] Laws 1820 p. 667.
[37] P. L. 1907 p. 482 §26; 2 C. S. 1910 p. 2038 §26.
[38] ELMER, DIGEST OF LAWS OF NEW JERSEY 1868, p. 246.

section 24 provided that after a divorce decreed in any other state or country the Court of Chancery could make a decree effecting the custody and maintenance of children of the parties if the children were inhabitants of the state in the same manner as if the divorce had been obtained in this state. Undoubtedly this provision relative to the custody or mainten ance of minor children of parents divorced in a foreign state was enacted as a result of an impression that section 19 was inadequate to meet the situation, since that section read "*When a divorce shall be decreed,* it shall and may be lawful for the court of chancery to take such order * * * touching the care and maintenance of the children." The legislators then were apparently unaware that Chancery under its general jurisdiction as *parens patriae* had ample inherent authority.[39]

In the General Statutes of 1895 section 19 of the Revision of 1877 appeared without significant change as section 19 also. The separate maintenance section remained as section 20. The subdivision V of the Revision of 1877 was retained in the same order. Section 24 concerning minor children of parents divorced in another state remained within the Divorce Act.

The Divorce Act of 1902[40] made substantial changes with reference to the award of alimony and the custody and maintenance of children. The act was entitled "An Act providing for divorces and for decrees of nullity of marriage and for alimony and maintenance of children." By section 4 of the act Chancery was given jurisdiction "of all causes of divorce or nullity and of alimony and maintenance, by this act directed and allowed." By section 19 of the act it was lawful for the court to make such order touching the alimony of the wife, and also touching the care, custody, education and maintenance of the children either "pending a suit for divorce or nullity or *after* decree of divorce." (ital. mine.) The maintenance section remained as section 20. The provisions relative to the custody and maintenance of children appearing in subdivision V of the Revision of 1877 and in the General Statutes of 1895 were transposed with some exceptions to an

[39] *In re* Erving, 109 N. J. Eq. 294, 297, 157 Atl. 161 (Ch. 1931).
[40] P. L. 1902 p. 502.

act concerning minors.[41] Sections 22 and 23 of the Divorce Act appearing in the Revision of 1877 and in the General Statutes of 1895 relative to the care and custody of minor children pending a suit for divorce and upon a decree of nullity or divorce were dropped for the reason that section 19 of the Divorce Act of 1902 sufficiently embraced the two provisions. What was formerly section 24 of the Divorce Act concerning the custody and maintenance of minor children of parents divorced in another state or country was retained, but placed within the Minors' Act of 1902 as section 6.[42]

In the Divorce Act of 1907[43] were adopted the jurisdictional sections recommended by the Congress on Uniform Divorce Laws, but insofar as the jurisdiction of Chancery over the subject matter of alimony is concerned there is not any noticeable alteration of the Act of 1902. Section 19 of the Act of 1902 became section 25 in the Divorce Act of 1907. The amendment of section 25 in the year 1933 concerned merely the effect of a remarriage of the wife on existing orders for alimony.[44]

At the time of the enactment of the Divorce Act of 1902 the legislature had before it for consideration the alimony section 19 (now section 25) and the statutes (section 22 and 23 of the General Statutes of 1895) concerning the custody and maintenance of minor children pending a suit for divorce and upon a decree of divorce or nullity which had been enacted in 1871. Likewise, it had before it the section (section 24 of the General Statutes of 1895) relative to the custody and maintenance of minor children of parents divorced in a foreign state. It substantially incorporated sections 22 and 23 into section 19 of the Divorce Act of 1902 and placed section 24 in the Minors' Act of 1902 as section 6.

The basis of the doubt expressed as to the jurisdiction of Chancery to award alimony to a former wife who has secured a valid foreign decree of absolute divorce is that the legislature in 1902 must have had in mind the distinction between

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[41] P. L. 1902 p. 263.
[42] P. L. 1902 p. 263 §6.
[43] P. L. 1907 p. 476; 2 C. S. 1910 p. 2028.
[44] P. L. 1933 p. 296 §25; C. S. 1933 p. 124 §25.

orders following a decree of divorce granted in New Jersey and those following decrees of divorce granted in other states, and that the retention by the legislature of the old section 24 and its re-enactment in the Minors' Act of 1902 indicates an intention to withhold from the court jurisdiction to make orders following such foreign decrees; that had the legislature been minded to grant such jurisdiction it would have enacted that "pending a suit for divorce or nullity or after decree of divorce *in this or some other state or country,* etc.," or words to that effect, and that its omission to do so indicates that it never intended to confer upon the court the authority to decree alimony to a woman after the rendition of a valid foreign decree of absolute divorce; that if we were to construe the phrase "after decree of divorce" as the words are used in section 19 (now section 25) of the Divorce Act of 1902 as including a foreign as well as a domestic decree of divorce, by the same token it might be said that the legislature has authorized Chancery to order temporary alimony "pending a suit for divorce or nullity" in a foreign jurisdiction; that the court has inherent or fundamental jurisdiction to make *pendente lite* provision for the wife in an action for divorce or annulment pending in the court, but that it has never been adjudged that this inherent power extends to the award of temporary alimony pending a suit for divorce or nullity instituted in a foreign jurisdiction; that the legislature by section 19 of the Divorce Act of 1902 (or section 25 of the Divorce Act of 1907 and 1933) has not conferred upon Chancery any power to award temporary alimony in suits for divorce and annulment which the court did not already possess but that the authority granted by the legislature to order temporary alimony pending a suit for divorce or nullity is merely an affirmance of the already existing inherent jurisdiction of the court; that there is no reason to suppose that the legislature intended to grant further power to the court to the extent of permitting the award of alimony during the pendency of a suit for divorce or nullity in a foreign state; and that the word "divorce" in the phrase "after decree of divorce" cannot be given a broader meaning than the same word in the preceding phrase "Pending a suit for divorce," without doing

violence to well recognized rules of construction.

So far as the reported decisions are concerned, there has been no case up to the present time in which the court has been called upon to determine whether it possesses jurisdiction to award alimony following a valid foreign decree of absolute divorce. In *Kossower v. Kossower*,[45] the Court of Errors and Appeals affirmed Vice Chancellor Fielder in a case where relief was denied a woman divorced absolutely from her husband by a decree of a New York court. The former wife sought to collect arrears accrued under a valid decree *in personam* rendered by the New York court and she also prayed that our court grant to her a decree for alimony at the sum fixed by the New York court. Both prayers were denied. As to the prayer of the complainant for a new decree for alimony the court stated that her claim was vexatious and unnecessary in that she could sue in New Jersey for arrears as they became due under the foreign alimony decree. Vice Chancellor Fielder observed:

> "In the instant case the complainant does not, apparently, base her claim to maintenance on the provisions of our act, and, since the parties are no longer husband and wife, the right of the complainant to demand alimony from her former husband is not by reason of an existing matrimonial status, but arises out of and is determined and fixed by the New York decree. All that the courts of this state can do to aid the complainant to obtain future alimony is to enforce that decree (and not enter a new decree), under the full faith and credit clause of the Constitution."

It would seem that the arguments giving rise to the doubt as to the court's jurisdiction in such cases fail to give due weight to the fact that in New Jersey the husband's duty to support his wife is recognized as arising from the marriage relation itself, and as continuing in spite of a divorce because of his misconduct. It is therefore quite immaterial under what jurisdiction a decree of divorce is granted. The legis-

[45] Kossower v. Kossower, 142 Atl. 30 (N. J. E. & A. 1928).

lature must be presumed to have realized that divorced wives might apply for support here whether their divorces had been secured here or elsewhere. Divorce and alimony being separate causes of action, each depending upon different principles of jurisdiction, the legislature must have been aware that one state will sometimes have exclusive jurisdiction to grant a decree of divorce and at the same time lack jurisdiction to grant alimony. It must have appreciated the fact that no valid distinction can be made between the status of wives divorced here and those divorced elsewhere. In enacting the statute it intended to establish a comprehensive act covering all cases in which support as well as divorce or annulment might be awarded.

In construing a remedial statute, the court will always consider the mischief sought to be remedied in order to ascertain the legislative intent.[46] "It is the business of the judges to so construe such statutes as to suppress the mischief and advance the remedy." The mischief was the husband's immunity from the obligation to support his wife who had been or might be divorced because of his misconduct. The statutory provision was obviously passed by the legislature as a corrective. That being so, the act should be liberally construed to effect its full object.[47] When words are not explicit the intention is to be collected from the context and the occasion and the necessity of the law and from the mischief felt, and the remedy in view, and the intention is to be taken or presumed according to what is consonant to reason and good discretion.[48] It will not be intended that the legislature designed to produce an inequality unless the terms used are so plain and explicit as not to be misunderstood.[49]

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[46] Board of Conservation & Development v. Veeder, 89 N. J. Law 561, 99 Atl. 335 (E. & A. 1916); Flaherty Contracting Co. v. Kearny, 107 N. J. Law 45, 150 Atl. 676 (Sup. Ct. 1930), *aff'd.* 107 N. J. Law 518, 154 Atl. 627 (E. & A. 1931).

[47] Horner v. Webster, 33 N. J. Law 387, 405 (E. & A. 1867); Holt v. Akarman, 84 N. J. Law 371, 86 Atl. 408 (E. & A. 1912).

[48] *In re* Merrill, 88 N. J. Eq. 261, 273, 102 Atl. 400 (Prerog. Ct. 1917); Lynch v. Long Branch, 111 N. J. Law 148, 151, 167 Atl. 664 (Sup. Ct. 1933); Etz v. Weinmann, 106 N. J. Eq. 209, 150 Atl. 436 (Ch. 1930).

[49] State v. Mills, 34 N. J. Law 177, 180 (Sup. Ct. 1870); Etz v. Weinmann, 106 N. J. Eq. 209, 220, 150 Atl. 436 (Ch. 1930).

Prior to the 1902 Act, the language of this section (then section 19) was "that when a divorce shall be decreed" it should be lawful for the Court of Chancery to order alimony, etc. It was said in *McKensey v. McKensey*,[50] that the legislative purpose in making the 1902 change of language to "Pending a suit for divorce or nullity or after decree of divorce" etc., was to enlarge the power of the court to decree permanent alimony after decree as well as at the time of the entry of the decree, but the court there had before it a petition for alimony following final decree. Its attention was not called to the addition of the first phrase "pending a suit for divorce," etc., and it cannot fairly be said that the court meant by its definition of the legislative intent to limit the effect of the statute to the case then before it.[51]

Against the objection that the legislature must be presumed to have used the word "divorce" in the phrase "or after decree of divorce" in the same sense as it is used in the phrase "pending a suit for divorce or nullity" and that it had in mind only domestic decrees, it may be argued with some weight that the legislature intended the word to include foreign suits in both of the phrases used. The legislature must be presumed to have known that the Court of Chancery already possessed the undoubted inherent power to order alimony *pendente lite* in domestic suits for divorce and nullity,[52] and it must also be presumed that when in 1902 it added the phrase "pending a suit for divorce or nullity" it intended to add something to the court's jurisdiction, since otherwise the enactment would have been unnecessary.[53] Now it has never been determined, so far as the writer is aware, whether our Court of Chancery has inherent jurisdiction to entertain an alimony proceeding pending a foreign matrimonial suit. Here, if at

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[50] McKensey v. McKensey, 65 N. J. Eq. 633, 635, 55 Atl. 1073 (Ch. 1903).

[51] See Renwick v. Hay, 90 N. J. Eq. 148, 106 Atl. 547 (Ch. 1919).

[52] Wilson v. Wilson, 181 Atl. 257, 58 N. J. L. J. Index 348 (N. J. Ch. 1935). As to the presumption of knowledge of existing law, see *In re* Sifola, 101 N. J. Eq. 540, 138 Atl. 369 (Ch. 1927); Little v. Bowers, 46 N. J. Law 300 (Sup. Ct. 1884), *aff'd.* 48 N. J. Law 370, 5 Atl. 178 (E. & A. 1886); 59 C. J. p. 1038, §616.

[53] Steel v. Freeholders of Passaic, 89 N. J. Law 609, 612, 99 Atl. 318 (E. & A. 1916); James v. Dubois, 16 N. J. Law 286 (Sup. Ct. 1837); State v. City of Paterson, 34 N. J. Law 163 (Sup. Ct. 1870).

all, was jurisdiction lacking prior to the 1902 amendment. Is it an unreasonable construction of that amendment to read into it an intent to extend, or at least to confirm the court's jurisdiction over such matters? Cases may readily be supposed in which such ancillary relief would be just and proper. And if such was the legislative intent then obviously the word "divorce" was used in both phrases in the same broad sense.

At any rate, is the objection not fairly outweighed by the considerations above suggested calling for a liberal construction of the statute? Otherwise there would be a right without a remedy, a situation which would tend to establish New Jersey as a haven for ex-husbands seeking immunity from their just obligations. Can an intent to countenance such a situation be imputed to the legislature simply because it did not explicitly define the word "divorce" to include foreign as well as domestic decrees?

II

Separate Domicile of Wife in Actions for Annulment

Originally the jurisdiction to dissolve marriages in New Jersey was vested in the legislative branch of the government. During the colonial period the legislature endeavored to exercise this power by special act, but the King effectively curtailed these attempts. After the Revolution the state legislature granted divorces without constitutional authority. In 1794 by a general act[1] the state legislature conferred upon the Court of Chancery authority to grant divorces, but it was not until the adoption of the Constitution of 1844 that Chancery was possessed of exclusive jurisdiction over the marriage relation.[2]

Prior to the Divorce Act of 1902[3] the legislature had failed properly to distinguish between divorce and annulment.

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[1] Act of Dec. 2, 1794 (Pat. Laws 143). See McClurg v. Terry, 21 N. J. Eq. 225, 228 (Ch. 1870).

[2] For a brief historical review, see 46 N. J. L. J. 354, 355 (1923).

[3] P. L. 1902, p. 502.

Causes for what is now termed "annulment" were then grounds for divorce.[4] The difference between divorce and annulment noted in the Act of 1902 was retained in the Divorce Act of 1907.[5]

While the authority of the Court of Chancery to grant divorces emanates solely from the Divorce Act, its jurisdiction in matters of annulment is not exclusively statutory. The Divorce Act enumerates certain grounds for annulment, but in addition to the causes specified by statute the Court has inherent jurisdiction to annul marriages for fraud, duress, mistake and want of consent.[6]

A marriage may be void or voidable. The distinction between void and voidable marriage was a historical accident in the English common law and such distinction was transplanted to this country as a part of the unwritten law.[7] This unwritten law governs as to whether a particular marriage is void or voidable except as it has been superseded by statutory regulation.[8] Bigamous marriages,[9] marriages within the prohibited degrees,[10] and marriages lacking in matrimonial consent[11] are absolutely void. The canonical impediment of impotence renders the marriage merely voidable.[12] Although fraud and duress were not canonical defects, they have been considered as rendering a marriage merely voidable.[13] A marriage is merely voidable by reason of nonage unless one of the parties is under the age of seven years.[14]

[4] See Rooney v. Rooney, 54 N. J. Eq. 231, 241 (Ch. 1896).

[5] P. L. 1907, p. 475; 2 C. S. 1910, p. 2021.

[6] See *The Inherent Jurisdiction of Equity To Nullify Marriage,* 2 MERCER BEASLEY L. REV. 47 (1933).

[7] See Elliott v. Gurr, 2 Phillim 16, 19, 161 Eng. Rep. 1064 (1812); 1 BISHOP, MARR., DIV. & SEP. (1891), §253 *et. seq.;* L. R. A. 1916 C 690.

[8] *In re* De Conza's Estate, 13 N. J. Misc. 281, 177 Atl. 847 (Orphans Ct. 1935).

[9] P. L. 1933, c. 431; C. S. 1934, p. 110, c. 62-1; Rooney v. Rooney, 54 N. J. Eq. 231, 241, 34 Atl. 682 (Ch. 1896).

[10] P. L. 1912, p. 306, c. 199; C. S. 1924, p. 1827, c. 123-19. Boylan v. Deinzer, 45 N. J. Eq. 485, 489, 18 Atl. 199 (Ch. 1889) was decided under Rev. 1877, p. 631, §1 which did not specify that the marriage was void.

[11] Daniele v. Margulies, 95 N. J. Eq. 9, 11, 121 Atl. 772 (Ch. 1923).

[12] Kirschbaum v. Kirschbaum, 92 N. J. Eq. 7, 14, 111 Atl. 697 (Ch. 1920).

[13] Ysern v. Horter, 94 N. J. Eq. 135, 141, 118 Atl. 774 (Ch. 1922); Doscher v. Schroeder, 105 N. J. Eq. 315, 147 Atl. 781 (Ch. 1929). But duress may negative any consent; see State v. Gordon, 46 N. J. Law 432, 435 (Sup. Ct. 1884).

[14] Palmer v. Palmer, 80 Atl. 486 (N. J. Ch. 1911); Sculareke s v. Gullett, 106 N. J. Eq. 369, 371, 150 Atl. 826 (Ch. 1930).

Where a marriage is absolutely void, no marital status is created. There is merely a jactitation of marriage—a marriage in masquerade.[15] A voidable marriage, on the other hand, creates a marital status good for all purposes until such marriage is annulled in a direct proceeding.[16] As an incident to the status springing from a voidable marriage the domicile of the wife is that of her husband.[17] Should a wife be accorded the *right* to establish a domicile separate from that of her husband for the purpose of bringing an action to annul a *voidable* marriage?

Section Five of the Divorce Act[18] prescribes the jurisdictional requirements in suits for annulment:

> "5. For purposes of annulment of marriage jurisdiction may be acquired * * *
>
> "I. By personal service of process upon the defendant within this State when either party is a bona fide resident of this State at the time of the commencement of the action;
>
> "II. When the defendant cannot be served personally with process within this State, and when at the time of the commencement of the action the petitioner is a bona fide resident of this State, jurisdiction for the purpose of annulment of marriage may be acquired by publication, to be followed, where practicable, by service upon or notice to the defendant without this State, or by additional substituted service upon the defendant within this State, as prescribed by law or by rules of court."

The provision that either party (I) or petitioner (II) shall be a "bona fide resident of this State" requires that either party, or the petitioner in the case of substituted service of process by publication, must be *domiciled* in this state at the time of the commencement of the action.[19]

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[15] Doughty v. Doughty, 28 N. J. Eq. 581, 588 (E. & A. 1877).
[16] Steerman v. Snow, 94 N. J. Eq. 9, 118 Atl. 696 (Ch. 1922); Ysern v. Horter, 94 N. J. Eq. 135, 118 Atl. 774 (Ch. 1922).
[17] Pennello v. Pennello, 97 N. J. Eq. 421, 128 Atl. 596 (Ch. 1925).
[18] P. L. 1907, p. 476, §5; C. S. 1910, p. 2029, §5.
[19] Hess v. Kimble, 79 N. J. Eq. 454, 81 Atl. 363 (Ch. 1911).

The domicile of one of the parties in this state is also a jurisdictional requirement in actions for the annulment of a marriage under the general equity jurisdiction of the Court of Chancery for fraud, duress, etc.[20]

As a well recognized exception to the general rule that the wife's domicile is that of her husband, the law sustains the right of a wife to select a separate domicile for the purpose of instituting an action for divorce.[21] Why then should it not accord to the wife the same *right* to select a separate domicile for the purpose of instituting suit for the annulment of a *voidable* marriage irrespective of the situs of the matrimonial domicile?

The *Avakian*[22] case, which was decided prior to the Divorce Act of 1907, appears to have been the first reported case to dwell on the question. In that case the husband, domiciled in Boston, married the petitioner in England. The marriage was consummated. After the marriage the parties spent a short period of time in Boston until the petitioner was taken by her aunt to New Jersey without her husband's consent. The husband's domicile remained in Boston. The petition for annulment alleged that the marriage was voidable by reason of duress practiced by the husband. The husband appeared in the action. The decree was granted. In the *Jimenez,*[23] *Rinaldi*[24] and *Pennello*[25] decisions the marriage and cohabitation took place in New York. The wife, in each of these cases, quit the matrimonial domicile in New York without the husband's consent or because of his misconduct. The petition in each case relied upon the nonage of the wife as the ground for annulment. Jurisdiction was declined or questioned in each case.

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[20] Blumenthal v. Tannenholz, 31 N. J. Eq. 194 (Ch. 1879). See Bolmer v. Edsall, 90 N. J. Eq. 299, 311, 106 Atl. 646 (Ch. 1919). But see Avakian v. Avakian, 69 N. J. Eq. 89, 99, 60 Atl. 521 (Ch. 1905), *aff'd.* 69 N. J. Eq. 834, 66 Atl. 1133 (E. & A. 1906).

[21] Tracy v. Tracy, 62 N. J. Eq. 807, 48 Atl. 533 (E. & A. 1901); Starkey v. Starkey, 2 N. J. Misc. 1123 (Ch. 1924).

[22] Avakian v. Avakian, 69 N. J. Eq. 89, 60 Atl. 521 (Ch. 1905), *aff'd.* 69 N. J. Eq. 834, 66 Atl. 1133 (E. & A. 1906).

[23] Jimenez v. Jimenez, 93 N. J. Eq. 257, 116 Atl. 788 (Ch. 1922).

[24] Rinaldi v. Rinaldi, 94 N. J. Eq. 14, 118 Atl. 695 (Ch. 1922).

[25] Pennello v. Pennello, 97 N. J. Eq. 421, 128 Atl. 596 (Ch. 1925).

In the *Avakian*[26] case Vice-Chancellor Pitney in conceding that the wife might select an independent domicile in this state, (at p. 99) said:

> "The notion that the domicile of the wife follows that of her husband has little or no practical application to suits between husband and wife, since, *if the wife was justified* in leaving her husband, she thereby became entitled to adopt a new domicile, and if she was not so justified she will fail in her suit on the merits." (ital. mine)

In the *Jimenez*[27] case the question under consideration was left undecided, but the language of Chancellor Walker is of interest. He (at p. 261) said:

> "The wife's leaving the husband and coming here to her parents was an actual desertion, and the question arises, Could she in doing this, *even if her marriage was voidable,* obtain an independent domicile herself in this state to *enable her to bring a nullity suit here?*" (ital. mine).

In the *Rinaldi*[28] case an affidavit was filed by the petitioner setting forth certain facts as justification for leaving her husband. Chancellor Walker in commenting on the *Avakian* case (at p. 17) observed:

> "Vice-Chancellor Pitney in his assertion in *Avakian v. Avakian* that a wife could acquire a domicile independent of her husband, if she is *justified in leaving him* could not have meant she could leave him for any cause sufficient unto herself not affording legal justification. The fact in the case before him was that a marriage contract * * * was procured through duress by the man practiced on the girl. *This, of course, was an offense which justified her leaving.*" (ital. mine.)

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[26] Avakian v. Avakian, 69 N. J. Eq. 89, 60 Atl. 521 (Ch. 1905), *aff'd.* 69 N. J. Eq. 834, 66 Atl. 1133 (E. & A. 1906) *supra* note 22.

[27] Jimenez v. Jimenez, 93 N. J. Eq. 257, 116 Atl. 788 (Ch. 1922) *supra* note 23.

[28] Rinaldi v. Rinaldi, 94 N. J. Eq. 14, 118 Atl. 695 (Ch. 1922), *supra* note 24.

And (at p. 19) the Court continued:

> "A cause sufficient to justify a wife in leaving the *matrimonial domicile* of her husband and herself and acquiring an independent domicile of her own, is such *cause only* as would entitle her to a *decree of divorce or a judicial separation from him under the statute.*" (ital. mine.)

The Court (at p. 22) further said:

> "To prove her residence in this state she is entitled to show that the defendant committed a marital offense against her entitling her to a decree of divorce *a mensa et thoro* for extreme cruelty, or for a divorce *a vinculo matrimonii* for desertion—constructive desertion."

It is difficult to reconcile the conclusions in the *Rinaldi* and *Pennello* decisions with that in the *Avakian* case. In both the *Rinaldi* and *Pennello* cases the wife departed from her husband in a foreign state to come to this state. In the *Avakian* case it appears that the husband was domiciled in Boston before and after the marriage, and that for at least a brief period of time the parties cohabited there. The matrimonial domicile, if any ever did exist, was in Boston. And yet the wife departed from the matrimonial domicile without her husband's consent in much the same way that the wife in the *Rinaldi* and *Pennello* cases left the husband. Some differences do exist between the *Avakian* case and the *Rinaldi* and *Pennello* decisions: in the *Avakian* case the ground alleged was duress, which is cognizable under the general equity jurisdiction of the Court of Chancery,[29] whereas the ground of nonage relied upon by the petitioner in the *Rinaldi* and *Pennello* decisions is a statutory ground.[30]

While duress by the husband in procuring the marriage implies some affirmative misconduct on his part, it is not a ground for divorce under the statute, or a statutory ground for annulment. It is obvious, then, that the duress practiced

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[29] Doscher v. Schoeder, 105 N. J. Eq. 315, 147 Atl. 781 (Ch. 1929).
[30] P. L. 1907, p. 475 §1; C. S. 1910, p. 2022 §1.

by the husband in the *Avakian* case was not an offense justifying the wife in leaving her husband if the test of justification is that there must exist "such cause only as would entitle her to a *decree of divorce or a judicial separation from him under the statute.*"

If the Court is to adhere to the rule that a wife coming into this state from the matrimonial domicile must have "such cause only as would entitle her to a decree of divorce or a judicial separation from him under the statute," before she is entitled to an independent domicile upon which to premise her suit to annul a *voidable* marriage, it follows that she must show that one of the three grounds for divorce under our statute exists. If the cause for divorce arose while the wife was residing in the matrimonial domicile in a foreign state she may be denied the right to a separate domicile on the ground that under subdivision (b) of sections six and seven of the Divorce Act the cause for divorce was not recognized in the state in which she was domiciled when the cause of action arose.[31] If the cause for divorce relied upon is desertion, the wife may be compelled to show two years of willful, continued and obstinate desertion. The application of the rule is without much difficulty where it clearly appears that the wife deserted the husband, but as soon as the wife sets up a cause for divorce as justification for acquiring a separate domicile the Court is compelled to inquire into the merits of a divorce action before it may consider the pending suit for annulment.

While the effect of a decree annulling a voidable marriage is different from the consequences of a decree of divorce, both proceedings are for the purpose of dissolving the matrimonial status. In both proceedings the petitioner is seeking to disrupt the very relation by reason of which her domicile became that of her husband. It was said in the divorce case of *Harteau v. Harteau*[32] in discussing the right of a wife to a separate domicile:

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[31] P. L. 1907, p. 476, §§6, 7; C. S. 1910, p. 2030 §§6, 7.

[32] Harteau v. Harteau, 14 Pick. (Mass.) 181 quoted in Anderson v. Watts, 138 U. S. 694, 34 L. Ed. 1078, 1082, 11 S. Ct. 449 (1891).

> "But the law will recognize a wife as having a separate existence and separate rights in those cases where the express object of all proceedings is to show that the relation itself ought to be dissolved, or so modified as to establish separate interests."

Where the wife has established a residence separate from her husband, upon the institution of a suit by the wife for the annulment of the voidable marriage the wife's domicile can hardly be considered that of her husband in fact.

The exception to the general rule permitting a wife to select an independent domicile for the purpose of suing for divorce arises out of the necessity of the situation. As was said by Justice Swayne in *Cheever v. Wilson*:[33]

> "The rule is that she may acquire a separate domicile whenever it is necessary or proper that she should do so. The right springs from the necessity for its exercise, and endures as long as the necessity continues."

The reason for the exception to the general rule in divorce suits is aptly put by Professor Goodrich:[34]

> "To adhere to the orthodox rule would require a wife to follow all over the earth in order that she could sue, should her husband desire to change his home from place to place. Further, since statutes often require actual residence for a specified time as well as domicile, the husband could, by timely changes, defeat jurisdiction altogether. By establishing himself in a place where the wife's ground for divorce was not recognized he could deprive her of her action."

There is no doubt that in an action for divorce for desertion instituted by the husband the wife may justify the separation by proof of a matrimonial offense committed by the husband. The offense offered in justification must be of such a nature as would entitle the wife at her instance to a decree

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[33] Cheever v. Wilson, 9 Wall (U. S.) 108, 19 L. Ed. 604 (1870).
[34] GOODRICH, CONFL. OF LAWS (Hornbook) §32.

of divorce.[35] The offense may be adultery committed by the husband within or without the marital abode,[36] desertion based upon the denial of sexual relations for the statutory period,[37] or extreme cruelty of such a degree as is sufficient to sustain successfully at the wife's instance an action for divorce for extreme cruelty.[38] The time during which an action for divorce has been pending in good faith at the wife's instance cannot be computed as a part of a desertion period.[39] Where the wife sues for divorce for constructive desertion, however, she is confined to extreme cruelty to justify the separation.[40] But from the authorities it is equally clear that the wife may justify a separation on grounds other than extreme cruelty, adultery, desertion and the pendency of an action for divorce. It is apparent that the wife may justify a separation from her husband to the extent that she may not be charged with desertion in cases where she prosecutes an action for annulment and this without respect to whether she also has grounds for divorce or judicial separation.[41]

So long as the unity of domicile theory is retained in the law, some test must be framed to determine as to when a wife is entitled to acquire a domicile separate from that of her husband. In ordinary cases the rule that in the absence of expressed consent a wife is not entitled to select a separate domicile unless the husband is guilty of a matrimonial offense may be quite logical.[42] But it is of doubtful applicability where the wife seeks an annulment of the marriage in a direct proceeding. It is to be remembered that the rule permitting the wife the right to establish a separate domicile for the pur-

[35] Rogers v. Rogers, 81 N. J. Eq. 479, 483, 86 Atl. 935 (E. & A. 1913).

[36] Johnson v. Johnson, 102 N. J. Eq. 550, 141 Atl. 807 (E. & A. 1928); Howey v. Howey, 77 N. J. Eq. 591, 78 Atl. 696 (E. & A. 1910).

[37] See Pierson v. Pierson, 119 N. J. Eq. 19, 23 (E. & A. 1935); Lammertz v. Lammertz, 59 N. J. Eq. 649, 45 Atl. 271 (E. & A. 1899).

[38] Dinnebeil v. Dinnebeil, 109 N. J. Eq. 594, 596, 158 Atl. 475 (E. & A. 1932).

[39] McKee v. McKee, 101 N. J. Eq. 1, 151 Atl. 620 (Ch. 1930).

[40] Taylor v. Taylor, 73 N. J. Eq. 745, 746, 70 Atl. 323 (E. & A. 1908); Lake v. Lake, 65 N. J. Eq. 544, 56 Atl. 296 (Ch. 1903). But *cf.* Suydam v. Suydam, 79 N. J. Eq. 144, 146, 80 Atl. 1057 (Ch. 1911) where the action is for separate maintenance.

[41] See Barbour v. Barbour, 94 N. J. Eq. 7, 118 Atl. 778 (Ch. 1922); Riehl v. Riehl, 101 N. J. Eq. 15, 137 Atl. 787 (Ch. 1927).

[42] Floyd v. Floyd, 95 N. J. Eq. 661, 124 Atl. 525 (E. & A. 1924); Brown v. Brown, 112 N. J. Eq. 600, 165 Atl. 643 (Ch. 1933).

pose of suing for divorce was an affirmative exception to the theory of the unity of domicile. The exception was formulated to assist a married woman in obtaining a divorce. It was not, as some of the cases seem to regard it, devised for the purpose of marking out a limitation as to when a married woman may have an independent domicile.

In the *Avakian, Rinaldi* and *Pennello* decisions the wife left the matrimonial domicile in a foreign state to come to this state. While it may be true that a wife coming into this state from the matrimonial domicile creates for herself the necessity for an independent domicile, the Court has not hesitated to accord her a separate domicile in divorce actions where she has left the matrimonial domicile in a foreign state.[43]

In no reported decision coming to the writer's attention has the Court either assumed or declined to exercise jurisdiction where the wife having cause for the annulment of the marriage, but not having grounds for divorce, has refused to accompany her husband to a new domicile in another state. In *Scularekes v. Gullett,*[44] where an annulment on the ground of nonage was decreed to the wife, the husband deserted. An unjustified refusal on the part of the wife to accompany her husband to a new domicile would constitute desertion,[45] and unless she is to be permitted a separate domicile for the purpose of suing to annul the voidable marriage, her domicile would follow that of her husband.[46] A husband by removing his domicile from this state to another may well defeat a suit for annulment if the wife does not also have cause for divorce under our statute.

There is nothing in section five of the Divorce Act[47] which is opposed to granting a wife the right to a separate domicile for the purpose of instituting a suit to annul a voidable marriage. The restriction on "migratory divorces" found in sub-

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[43] Starkey v. Starkey, 2 N. J. Misc. 1123 (Ch. 1924). See also 39 A. L. R. 712.

[44] Scularekes v. Gullett, 106 N. J. Eq. 369, 150 Atl. 826 (Ch. 1930).

[45] Calichio v. Calichio, 85 N. J. Eq. 213, 96 Atl. 658 (E. & A. 1915); Hunt v. Hunt, 29 N. J. Eq. 96 (Ch. 1878).

[46] Webb v. Webb, 13 N. J. Misc. 439, 178 Atl. 282 (Ch. 1934); McCormack v. McCormack, 3 N. J. Misc. 624, 129 Atl. 212 (Ch. 1925).

[47] P. L. 1907, p. 476, §5; C. S. 1910, p. 2029, §5 *supra* note 18.

division (b) of sections six and seven of the Divorce Act[48] has no counterpart in section five relating to jurisdiction in actions for annulment.

In view of the modification of the common law status of married women in respect to their capacity to contract, to hold property and to sue and be sued,[49] the present trend of the law is to accord them a separate domicile when the circumstances justify it.[50] Indeed, for certain purposes our legislature has modified the common law rule of unity of domicile.[51]

Would it not be consonant with this general tendency of the law, as well as clearly in the interest of justice, to recognize the right of a married woman to establish a separate domicile for the purpose of maintaining a proceeding to annul a voidable marriage, whether or not she may have a cause of action for divorce? The common law fiction which denied to married women the right to establish a separate domicile has been outgrown and discarded in most, if not all, other situations save in matrimonial litigation. There, it has been retained, in modified form, and deserves to be retained, solely as a convenient means of determining the situs of the marital res for the purpose of fixing jurisdiction. Such purpose is not furthered by denying to a married woman the right of establishing a separate domicile when her cause of action is for the annulment of a voidable marriage, notwithstanding that she may not have a cause of action for divorce.

WILLIAM A. KAUFMANN.

HOBOKEN, N. J.

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[48] P. L. 1907, p. 476, §§6, 7; C. S. 1910, p. 2030, §§6, 7.

[49] See C. S. 1910, p. 3222.

[50] GOODRICH, CONFLICT OF LAWS (Hornbook) §32.

[51] See P. L. 1927, c. 168, p. 325; C. S. 1930, c. 124-19 wherein the legislature has enacted that "The domicile of a married woman shall be established by the same facts and rules of law as that of any other person for the purposes of voting, office-holding, testacy, intestacy, jury service, taxation."