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SEPARATE MAINTENANCE IN MISSOURI

JOSEPH P. RAMSAY*

Compared with the number of divorces granted annually, the number of decrees for separate maintenance granted each year in Missouri is small. Yet, in many instances, the remedy of separate maintenance, which has long been available by statutory provision in Missouri, and before that by virtue of the general powers of the court of equity, may often be the wiser and more suitable solution to the immediate problem of providing financial support for the wife and minor children of the marriage when a disruption of the marital relationship has occurred or is impending.

While many lawyers are fully acquainted with the theory of separate maintenance, in practice they have little familiarity with its possibilities. It is fundamental that a wife and minor children, abandoned by the husband without the fault of the wife, have a right to maintenance and support by the husband in the fashion in which they were accustomed to live with the husband and according to his income. It is equally fundamental that a wife has the right to create debts for necessaries for her support and that of minor children of the marriage, chargeable to the husband even though separation has occurred. This article endeavors to set forth fully and completely the extent and scope of these fundamental rights to support, to examine them, and to analyze their possibilities as a permanent or temporary solution of the typical problem facing the conscientious lawyer who must select from the various remedies available to him that which will provide the most satisfactory solution for his client so that he may choose with intelligence whether divorce with alimony, a decree of separate maintenance, or separation agreement or a continued informal separation is the best solution under the facts of the particular case.

Due to the nature and origin of the right of separate maintenance this choice of remedy is further complicated where both parties are affluent in their own right. Since the courts frequently base their ultimate decision as to the size of the award which the wife may be entitled to receive upon it, the weight given to the value, origin and nature of the wife's separate resources in determining what relief she may be entitled to is treated at

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considerable length in this article. In addition, in order to round out the discussion, brief attention is given to recent changes in the Federal Internal Revenue Code, which has become increasingly important in determining how husband and wife can, to the best advantage to both parties, provide for her support and that of minor children of the marriage.

I. Statutory Provisions

A. The Action for Separate Maintenance

The wife's right at common law to an equity action for support is recognized by statute in Missouri; and though an action at law thereunder, it is nevertheless governed by equitable procedure. The provisions of Mo. Rev. Stat. (1939) § 3376, set forth in the margin hereafter,[1] govern the right of the wife to sue for separate maintenance in the State of Missouri. This section provides that, where the husband shall: (a) abandon his wife without good cause, and (b) refuse or neglect to maintain or provide for her, the circuit court, on her petition for that purpose, shall order and adjudge such support and maintenance to be provided and paid by the husband for the wife, and her children by that marriage, out of his property, for such time as the nature of the case and circumstances of the parties shall require. This section requires provision of security by the husband where the court shall deem such provision just. Provision is also made for enforcement of any judgment rendered under this section by means of execution, sequestration, or any other means in accordance with the lawful practice of the court.

B. *Supplemental Statutory Provisions for Relief*

Additional means for enforcement of the wife's right for support, and additional remedies for relief are provided for by other provisions of Chapter 21, "Married Women," of the Missouri Statutes.[2] Section 3377

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1. "Wife abandoned, court to adjudge maintenance—execution to enforce. —When the husband, without good cause, shall abandon his wife, and refuse or neglect to maintain and provide for her, the circuit court, on her petition for that purpose, shall order and adjudge such support and maintenance to be provided and paid by the husband for the wife and her children, or any of them, by that marriage, out of his property, and for such time as the nature of the case and the circumstances of the parties shall require, and compel the husband to give security for such maintenance, and from time to time make such further orders touching the same as shall be just, and enforce such judgment by execution, sequestration of property, or by such other lawful means as are in accordance with the practice of the court; and as long as said maintenance is continued, the husband shall not be charged with the wife's debts, contracted after the judgment for such maintenance."

2. Mo. Rev. Stat. (1939) §§ 3377-3382, 3385-3390.

provides that no property of the husband shall be exempt from attachment or execution; and all wages, whether or not due for the last 30 days' service, may be garnisheed where necessary to secure satisfaction of a judgment for maintenance. Section 3379 provides that the court may, upon petition by the wife, authorize any person holding money or other personal estate to which the husband is entitled in the wife's right to deliver such property to the wife, and may authorize her to give a valid discharge. Section 3380 provides that, during the period of the husband's failure to provide support, the wife shall be entitled to the proceeds of any earnings of her minor children, which earnings remain in her sole control and cannot be held liable for the debts of her husband. Section 3381 provides that the proceeds of any of the above sales by the wife may be used and disposed of by her for the support of herself and family. (Note, also, under the discussions below of the liability of the wife's separate estate for debts contracted by her husband for necessaries, the statutory provisions relevant thereto, contained in §§ 3389 and 3390.) The procedure and process required for the enforcement of the rights and remedies provided by § § 3377 to 3381 are prescribed by § 3382. Except for real estate acquired before 1889 by a woman married before 1889, and not stated to be for her separate use so as to create an equitable separate estate, the provisions of §§ 3378, 3386, 3387 and 3388 no longer serve any useful purpose, and are of historical interest only.[3]

3. Section 3378 provides that the wife may, upon petition to the circuit court, where the husband fails to make sufficient provision for her support, be authorized to sell and convey *her* real estate, passing perfect title thereto, notwithstanding coverture. Section 3386 permits the wife to petition the court to terminate the husband's right of courtesy in her separate real estate where the husband, by *criminal conduct* toward her, or by *ill usage* shall give her cause to live separate and apart from him. Authority and discretion, in the granting of a petition under § 3386 is, by virtue of § 3387, vested in the circuit court. Section 3388 places special restrictions upon the husband's right of appeal from a decree rendered against him upon a petition filed by the wife under § 3387, requiring him to indemnify the wife for all delays and costs occasioned thereby as the court may direct. These provisions are, primarily, of historical interest only today. Section 3385, passed in 1889, provides that a married woman shall be deemed a *femme sole* for the purpose of carrying on and transacting any business of her own account, which section, when construed together with § 3390, as amended in 1889 to include real estate as well as personal property, has been held to empower a married woman to hold title to real estate as her separate property and to convey land thus held in her separate estate by her sole deed, passing perfect title with respect thereto without regard to coverture and without requiring her husband to join therein. In the case of Travelers' Insurance Company v. Beagles, 62 S. W. (2d) 800 (Mo. 1933) the court held that a wife could transfer real estate out of her separate estate to the exclusion of her husband's present or prospective interest therein, stating that to declare that her husband had an indefeasible interest in her real estate unless he

II. Construction and Application of the Statutory Provisions

A. *The Equitable Nature of a Suit for Separate Maintenance*

The right of the wife, separated from her husband without fault, to a decree for separate maintenance has its origin in equity. Thus, in Iowa, where no comparable statute exists, the right of the wife to maintain an action for separate maintenance is bottomed upon the following statement of the equitable remedy set forth in the leading case of *Graves v. Graves*,[4] quoted and followed in the recent case of *Avery v. Avery*.[5] In the latter case the Supreme Court of Iowa held that a suit for separate maintenance in Iowa does not rest on the divorce statutes of the state, but is maintainable under the general powers of a court of equity to prevent a multiplicity of suits and to uphold a public policy. Finding that the husband is bound, in both law and in equity, for the support and maintenance of his wife, and further finding that where she is justified in separating from the husband she carries his credit with her for maintenance elsewhere, the court pointed out that each supplier, be he victualler, merchant, dressmaker, milliner, laundress, physician, lawyer, or any other dealer in the necessaries of life, might, in the absence of such a remedy, be forced to maintain respectively separate suits against the husband for the value of his services, and might in such circumstances be unwilling to supply articles or services if thus compelled to resort to litigation in order to secure payment. The violation by the husband of his legal duty to support the wife creates a situation as to which there is no adequate remedy at law, even with a multiplicity of suits. Thus, upon the ground of avoiding a multiplicity of suits, or upon the ground that no adequate remedy can be had at law, a suit for separate maintenance can be maintained under the general powers of a court of equity.

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joined her in the conveyance thereof would put restrictions on her use of her separate property that would cripple her as a *femme sole* and emasculate the purpose of § 3385 and § 3390, as amended. See also Gill on Missouri Titles (1931) § 587, *et seq.*

It is interesting to note that the effect of this is to give the wife much greater freedom in destroying her husband's dower interest in real estate held by her during coverture than is enjoyed by the husband. It will be noted that every widow by virtue of the provisions of Mo. Rev. Stat. (1939) § 318, "shall be endowed of the third part of all lands whereof her husband, or any other person to his use, was seized of an estate of inheritance, at any time during the marriage, to which she shall not have relinquished her right of dower, in the manner prescribed by law."

4. 36 Iowa 310 (1873).
5. 17 N. W. (2d) 820, 821 (Iowa 1945).

In considering the effect of the statutory provisions for such relief in Missouri, the St. Louis Court of Appeals, in the case of *Behrle v. Behrle*,[6] after considering at length the weight of American authority as to the existence of the remedy in equity, held that in the light of these authorities, our statutes should be regarded as a legislative adoption or recognition of the equity jurisdiction of the circuit court to award the wife maintenance out of her husband's estate when he has abandoned her without her fault and she is without means of support.[7]

In accordance with this historical interpretation of the Missouri statute, the modern opinions conclude that although an action for separate maintenance under Mo. Rev. Stat. (1939) § 3376 is a statutory action at law, sui generis, it is based upon equitable principles and is governed by equitable procedure.[8]

Even though governed, in general, by equitable procedure, the action is nevertheless a statutory action and, as such, the scope of the remedy must be strictly confined to its statutory limits. For this reason, it is beyond the power of the courts or of the parties, by consent or otherwise, to engraft any other action, by way of counterclaim, cross-bill for divorce, or otherwise, upon a proceeding for separate maintenance under this section.

Thus, in the case of *Sharpe v. Sharpe*,[9] in the St. Louis Court of Appeals, question was raised as to the propriety of permitting the husband's cross-bill for divorce to be heard in reply to a wife's petition for separate maintenance under the statute. In that case, the wife had brought suit for maintenance in accordance with the statute in the St. Louis Circuit Court. By his answer, the husband admitted the marriage but denied the other allegations of the petition. At the same time, he submitted a cross-action for divorce to which the wife filed a general denial. After hearing, the circuit court dismissed the wife's petition and awarded the husband a divorce. Thereafter on the wife's motion, the circuit court set aside its judgment dismissing her petition and granting the husband a divorce, on the ground that, under the pleadings, the circuit court was without jurisdiction to grant the divorce on cross-bill. On the husband's appeal, the St. Louis Court of Appeals

6. 120 Mo. App. 677, 97 S. W. 1005, 1006 (1906).
7. Dorrance v. Dorrance, 257 Mo. 317, 165 S. W. 783, 787 (1914); Klepper v. Klepper, 193 Mo. App. 46, 180 S. W. 461, 463 (1915); Meredith v. Meredith, 151 S. W. (2d) 536 (Mo. 1941).
8. Bingham v. Bingham, 325 Mo. 596, 29 S. W. (2d) 99 (1930); Glick v. Glick, 226 Mo. App. 271, 41 S. W. (2d) 624 (1931); Wright v. Wright, 350 Mo. 325, 165 S. W. (2d) 870 (1942).
9. 134 Mo. App. 278, 114 S. W. 584 (1908).

affirmed the circuit court, holding that the legislation as to both divorce and separate maintenance, being found as they are in separate chapters, is complete in itself and prescribes the mode of procedure for each separate type of action. The procedure under both chapters being special and confined to a special object, the court therefore held that it was beyond the power of either the courts or the parties, by consent or otherwise, to engraft any other action, by way of counterclaim, or otherwise, upon a proceeding under either of these chapters not specially provided for therein.

B. *Duty of Support—Nesessaries Defined*

1. In General

Since the right of the wife to bring an action for separate maintenance in Missouri, though authorized by specific statutory provisions, is bottomed upon the wife's inalienable right at common law to reasonable support and maintenance by her husband, carrying with it the right to pledge her husband's credit for those items deemed by the common law, and as measured by her husband's station in life and customary mode of living, to be "necessaries" for the support of herself and family, what is the scope of this right and what limitations are imposed upon its exercise?

The courts have expressed the fundamental basis of the husband's duty of support variously. As expressed in *Schulze v. Schulze,*[10] the welfare of society demands as one of the duties of the husband that he maintain and support his wife, and the wife will be presumed to be entitled to support until it is shown that her right has been forfeited.

In *Rutledge v. Rutledge,*[11] the St. Louis Court of Appeals states that, inasmuch as the husband's duty of support is founded upon the contract of marriage, breach of that contract by the wife will terminate his obligation. It is true that the husband at the altar agreed to support and maintain his wife, but the law modifies this obligation so that it exists only so long as the wife properly demeans herself as a wife and companion.

That the duty of support is an incident of the marriage contract is clearly expressed in *Block v. Wood,*[12] by the Supreme Court of Missouri *en banc.* In that case, the court held a separation agreement to be void for lack of consideration, where the husband merely agreed to support his wife, a promise by which the wife got no more than that to which she was

10. 212 Mo. App. 75, 251 S. W. 117 (1923).
11. 177 Mo. App. 469, 119 S. W. 489 (1909).
12. 288 Mo. 588, 232 S. W. 671 (1921).

already entitled by virtue of the marriage contract. The court said that the husband's prime and paramount duty, which begins with the marital relation and ends with its severance, is to support and maintain his wife in such a manner as is consistent with his situation and condition in life. This duty found early recognition in the common law, and has not been lessened by legislation. Married women's acts, which have empowered the wife to contract and be contracted with and to control and dispose of her property, and her investiture with the rights of a citizen were said by the supreme court not to have in any way rendered less obligatory a compliance with this duty of the husband.

In the early case of *Sauter v. Scrutchfield*,[13] the Kansas City Court of Appeals stated that what should be considered necessaries in the given case is generally a question for the jury. Strict necessaries of life include food, drink, clothing, washing, instruction and a suitable place of residence, but the husband may, by the mode of life which he adopts, confer upon the wife a power to pledge his credit for more than the mere necessities of life. By a change in his style or mode of life the husband may enlarge or restrict the authority of a wife to pledge his credit. As a practical matter what shall be deemed necessaries in a given case will vary with the rank, position and fortune of the husband, though it should never go to the extravagance of mere luxury.

This definition was reaffirmed by the Kansas City Court of Appeals in 1916, in the case of *Gately Outfitting Co. v. Vinson* [14] In this case the court indicated that the authority of the wife to pledge the husband's credit, where they are living together as man and wife, arises out of an implied agency or authority to purchase items suitable to the husband's means and station in life, which by the family's mode of life have been classified or treated as necessaries, though they be in excess of the strict necessaries of life.

2. Prior to Separation

When speaking of the husband's duty to supply "necessaries" for his wife and family as an adjunct of his general duty of support, the difference in the scope of the wife's authority to pledge her husband's credit where living together as man and wife from that where cohabitation has ceased, or notice to creditors not to extend credit to the wife has been given by the

13. 28 Mo. App. 150, 155 (1887).
14. 182 S. W. 133 (Mo. App. 1916).

husband, must be considered. In the leading case in Missouri on this point, *Sauter v. Scrutchfield, supra,* a merchant brought suit to recover from the husband for purchases made by the wife for their minor daughter on his credit, the husband, wife and child all living together as members of a family. Where no attempt has been made by the husband to circumscribe the wife's authority to pledge his credit, the court held that the wife has broad powers as an apparent agent to purchase articles normally required for household purposes:

> "I. In cases of this nature the plaintiffs should prove, either, that the goods were purchased by authority of defendant, expressed or implied, or, that they were necessaries and that he had neglected or refused to furnish them. If necessaries no authority is needed when not furnished by the husband, *Raynes v. Bennett,* 114 Mass. 424; *Miller v. Brown,* 47 Mo. 508. If the goods purchased extend to matters affecting the household, of which she is generally in charge, the presumption is she had authority from the husband for the purchase. . . . the purpose and comfort of married life would be defeated or obstructed if the wife had not a general authority to purchase such articles as are necessary for the use of the family. . . .
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> "This principle belongs wholly to the law of agency, and has nothing to do with the legal obligations devolving on the husband by virtue of the marriage tie. . . . if the articles purchased are such as are ordinarily used in households, such as the husband maintains, he will be liable, notwithstanding it may turn out that the articles were not necessary to the comfort of the family, or were not needed, unless it was known they were not needed. The tradesman, in such cases, will not be required to look into the state of the family larder or the condition of the family wardrobe. This upon the principle of a general agent acting within the apparent scope of his discretion and authority."[15]

If separation has occurred, or notice has been given to creditors, the wife still retains a narrower right to purchase *actual* necessaries not as an agent, but because of an original and direct liability of the husband to supply reasonable support, created by the marriage:

> ". . . This presumptive authority may be withdrawn by a cessation of cohabitation (*Reese v. Chilton,* 26 Mo. 598), or by proof that the husband had never given such authority. In either of such events, the tradesman could only supply necessaries, and these he would furnish at his peril. It would be incumbent on him

15. Sauter v. Scrutchfield, 28 Mo. App. 150, 155 (1887).

not only to show the articles furnished were necessaries, but that the husband failed or refused to supply them. *Barr v. Armstrong*, 56 Mo. 577, 588.

"... While, following the old books, it is said the wife is the agent in such cases, yet, in point of fact, his liability does not depend on the doctrine of agency, 'but is rather an authority to do for him what law and duty require him to do, and which he neglects and refuses to do for himself; and is applicable as well to supplies furnished to the wife when she is sick, insensible, or insane, and to the care of her lifeless remains, as to contracts expressly made by her.' . . . That such liability does not depend on the theory or doctrine of agency is apparent when we consider that the goods may be furnished against the husband's command, and, as was said in the case last cited, the liability may arise for supplies furnished to the insane or for the dead; two conditions in which an agency certainly could not exist. It would present the singular aspect of an agency without an agent. It would be far more reasonable to regard it as an original and direct liability in the husband, created by the marriage. 2 Smith's Lead. Cas. 512 (top page)."[16]

In the case of *Gateley Outfitting Co. v. Vinson, supra,* a merchant sought to hold the husband liable for coats furnished to his wife for their minor daughters on his credit. The Kansas City Court of Appeals found that they were living together as a family, and held the husband liable on the theory of his wife's implied agency to purchase such items as were reasonable for the support of a family in the situation of the defendant. The court clearly distinguishes between this case and one where the husband has refused reasonable support, indicating that evidence offered to show no actual need for these items would be immaterial.[17]

3. After Separation

Thus, as we have seen, so long as the husband and wife are living together, the law indulges in a presumption that the wife is authorized to

16. *Id.* at 156.

17. ". . . On the hypothesis that the coats were ordered by the wife of defendant, all of the disclosed facts and circumstances show that she had implied, if not express, authority to purchase them on the credit of her husband. The authority of the wife to purchase actual necessaries for the minor children suitable to the station in life and means of the husband need not be based upon any theory of agency express or implied. The wife and minor children are entitled by law to support from the husband, and where he fails or refuses to provide the actual necessities of life, a tradesman may supply them at his charge without his consent, and, of course, the wife may exercise the same humane right, even in the face of the husband's objection." Gateley Outfitting Co. v. Vinson, 182 S. W. 133, 137 (Mo. App. 1916).

pledge her husband's credit, which presumption can be overcome by notice to creditors, but not as to "necessaries" for which *actual* necessity can be shown. But, where separation has occurred, the basis for such presumption disappears and there remains only the wife's right to pledge his credit for items which are, *in fact*, "necessities," although the definition as to what may constitute "necessities" continues to embrace all articles and services which are suitable to the means of the parties and their condition or station in life, and is in no sense limited to those bare necessities for sustaining life.

Upon an *involuntary* separation, the question of fault or innocence becomes material. As was indicated above, by the decisions in the *Schultz, Rutledge,* and *Block* cases,[18] the duty of support arises out of a contractual obligation of marriage. Thus, as was held in *Hess v. Hess,*[19] the husband owes no duty of support to a wife who has abandoned him without cause. In that case, the court held that a second petition for divorce, on grounds of non-support, could not ben maintained when a previous petition had been dismissed with a finding that no basis in fact existed for the plaintiff's original separation from the defendant, and where it was shown that the wife did not return to the husband upon the dismissal of her original petition. It was said that by the decree in the former suit the wife stood convicted of having abandoned her husband without reasonable cause, and that, thereupon, the husband was under no obligation to support her so long as she did not return to him.

Upon any involuntary separation, therefore, it is incumbent upon third parties who seek to hold the husband liable for goods furnished a wife living separate and apart from her husband to show that the separation was on account of the husband's misconduct and not by reason of the delinquency of the wife. Nor does ignorance of the separation on the part of such creditors render the husband liable. Thus, in the case of *Audrain County v. Muir,*[20] where the county sought to charge the husband for support of a wife non compos mentis, at the state institution, upon the defendant husband's plea that at the time of such commitment they were not living together as man and wife, due to her prior delinquency while sane, the court held the burden of proof of a contrary state of facts rested upon the plaintiff county. The court said that it is well settled that the burden of proof is upon those seeking to hold the husband liable in such cases to show that

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18. *Supra* notes 10-12.
19. 232 Mo. App. 825, 113 S. W. (2d) 139 (1938).
20. 297 Mo. 499, 249 S. W. 383 (1923).

the separation was on account of his misconduct and not by reason of the delinquency of his wife, and that those furnishing the wife with such necessaries were ignorant of the separation is no excuse, for under such circumstances they must take notice of it at their peril.[21]

Where there is a *voluntary* separation, by mutual agreement of the parties, however, the husband cannot be made liable for the wife's debts for necessaries except upon proof that he did not make and regularly pay an allowance to her reasonably sufficient to supply her with *all* "necessaries." The burden of proof of such matters remains upon the creditors seeking to hold the husband liable. In the case of *McKinney v. Guhman*,[22] where the plaintiff sought to recover a board bill for defendant's wife and child and the defendant proved payment of the allowance, the court upheld an appeal from a jury verdict for the plaintiff under instructions that the defendant could not be made liable where he furnished his wife with means reasonably sufficient to provide herself and child with necessaries *including said board.* The fact of payment of an allowance was not contested, but its adequacy was in issue. In outlining the applicable principles of law, the court said:

> "The defendant's counsel seems to regard the separation of the defendant and his wife as involuntary in its character, and he seeks to apply the law applicable to such a case. Hence he argues that the instructions given by the court are faulty, because the jury was not required to find that the separation was caused by the fault of the defendant, in order to authorize a recovery against him. This is undoubtedly the law in cases of involuntary separation. In actions against the husband for necessaries purchased by the wife, while the parties are living together, the right of the wife to pledge the credit of the husband is presumed; but when there has been an involuntary separation, before the husband can be charged for necessaries furnished the wife, it must affirmatively appear that the separation was caused by the misconduct of the husband.
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> ". . . the payment of the allowance by the defendant was very strong evidence that the separation was voluntary, and that he recognized the continuation of his legal obligation to provide for his wife's support. . . .
>
> "When there has been a mutual separation between husband and wife, two things are necessary to relieve the husband from the payment of debts contracted by the wife for necessaries: *First*: The

21. See also Pfeninger v. Brevard, 129 S. W. (2d) 924 (Mo. App. 1939).
22. 38 Mo. App. 344 (1889).

> husband must make an allowance to the wife for her support, and the amount so allowed must be reasonably sufficient to furnish the wife with necessaries. The word 'necessaries' would include board, washing, suitable clothing and medical attendance. *Second*: The allowance must be regularly paid. The mere agreement of the husband to pay the allowance does not relieve him of his legal suffice. Schouler's Domestic Relations (3 Ed.) sec. 68. But in such a case, when the husband is sought to be charged with necessaries furnished to the wife, it devolves on the plaintiff to show either the inadequacy of the allowance, or a failure by the husband to pay. Schouler (3 Ed.) sec. 69."[23]

In the later case of *Cotter v. Valentine Coal Co.*,[24] the *McKinney* case is quoted from at length and with approval. In that case, the right of the wife to recover death benefits for the death of her husband under the Missouri Workman's Compensation Act depended by provision of the law on whether the husband was "legally liable for her support." The findings of the commission were to the effect that husband and wife had separated by mutual consent more than eighteen years prior to his death and there was never at any time an offer by either party to return to the other, In holding the commission and circuit court in error, reversing their opinion, and finding that the husband had been legally liable for her support, the court stated the governing principle to be that where there is a separation by mutual consent the husband is bound to support the wife, unless he makes and regularly pays a reasonable allowance to the wife for her support or has made a request to her that she return and she has refused to do so.

It is interesting to note that in both the *McKinney* case, where an actual allowance was paid, and in the *Cotter* case, where an offer of support was made but not availed of, the court gives considerable evidentiary value to this fact to establish that the separation was voluntary and not due to the wife's delinquency.

The same rules apply to allowances paid as temporary alimony *pendente lite* in cases of voluntary separation, except that the amount of the allowance can only be attacked directly. Thus, in *Bennett v. O'Fallon*,[25] and *Bondi v. Ream*,[26] involving suits by creditors to hold the husband liable

23. *Id.* at 346.
24. 14 S. W. (2d) 660, 663 (Mo. App. 1929).
25. 2 Mo. 57 (1828).
26. 281 S. W. 69 (Mo. App. 1926).

for goods and services sold to the defendant's wife and alleged to be "necescaries," the answers each established that husband and wife were living apart, that a divorce suit was pending at the time of the sales and that a court order for alimony *pendente lite* had been issued. In each case the creditor failed to recover. It was held that merchants furnishing goods to wives living apart from their husbands must ascertain at their peril whether the circumstances warrant extension of credit. In the *Bennett* case the court said that the very object of the decree for alimony is to furnish the wife with necessaries, and that it is the duty of the court to take care that the alimony decreed be sufficient to accomplish that end. And although the amount of alimony *pendente lite* awarded the wife in the *Bondi* case was clearly inadequate, being a total of only $125 to cover a period of approximately two years, contrary to the rule applicable to *voluntary* separation announced in the *McKinney* case, the court refused to permit a collateral attack by a third-party creditor upon the sufficiency of the allowance of alimony *pendente lite,* pointing out that the wife's proper remedy was an appeal therefrom in the suit for divorce.

Of course, by the specific provisions of Mo. REV. STAT. § 3376, cited *supra,* once the wife has obtained a decree pursuant to this statute, she can no longer hold the husband liable for debts created for necessaries so long as such maintenance is continued.

4. Liability of Wife's Separate Estate

Even though the wife may have a separate estate, it remains the husband's duty to pay for household expenses and other necessaries. In *Reynolds v. Rice,*[27] where a surviving husband attempted to hold the estate of his wife liable for his wife's funeral expenses, it was held that the husband was not relieved of his common law duty of support, which duty includes as "necessaries" the wife's last expenses, by reason of her possession of a separate estate. And, in the case of *Pfenninger v. Brevard,*[28] a suit to recover "necessaries" for the support of the defendant's non compos mentis wife, the court, in disposing of the defendant's contention that such support should be provided from the wife's separate estate, said there was no merit in appellant's contention that the plaintiff's recourse was to file a claim against the wife's estate for the home, board, lodging, care and clothing furnished to her. The court said that the husband is

27. 224 Mo. App. 972, 27 S. W. (2d) 1059 (1930).
28. 129 S. W. (2d) 924 (Mo. App. 1939), *supra* note 17.

primarily liable to furnish the wife with the reasonable support to which she is entitled.

In the cases of *Boldwin v. Fowler*,[29] and *Woods v. Kaufman*,[30] each involving a suit for payment of servants for domestic services, it was held that the husband, as head of the household, is primarily liable for the ordinary family expenses, including domestic hire, and that, in the absence of an express promise of the wife, her separate estate should not be made liable therefor. The wife's separate estate, however, is secondarily liable for the husband's debts created for necessaries for the wife and family.

By the provisions of Mo. Rev. Stat. (1939) § 3390, the wife's separate estate, both real and personal, shall remain her separate property and will not be liable to be taken for the debts of the husband, except such personal property as the wife shall have permitted the husband, by express assent in writing, to reduce to his possession and control. The wife, however, by the terms of this section, cannot end the liability of her separate personal property for debts of the husband created for necessaries for the wife or family. Furthermore, although by the terms of § 3390 the wife's real estate cannot be taken to pay any debts of the husband by the preceding companion section (3389), the *income* from such real estate can be attached or levied upon for debts of the husband created for necessaries for the wife and family.

In considering the effect of these two statutory provisions, reference must be had to *Megraw v. Woods*.[31] There an action was brought against husband and wife for the balance due for rent of a house used as a family residence, rent for which was conceded to be a family necessity. On demurrer, judgment was had for defendants, the specific ground of the demurrer being that the particular separate property of the wife sought to be held was not described in the petition, which stated merely that the wife was the owner of certain farmland and prayed that the debt be construed to be for necessaries within the meaning of the statutory provisions set out above. In affirming the judgment of the lower court, the appellate court indicated that the final proviso of § 3390, *supra*, was added in order to reverse by legislation the decision of the Supreme Court of Missouri in *Gabriel v. Mullen*,[32] which held that, under the prior statute, a wife's

29. 217 S. W. 637 (Mo. App. 1920).
30. 115 Mo. App. 398, 91 S. W. 399 (1905).
31. 93 Mo. App. 647, 67 S. W. 709 (1902).
32. 111 Mo. 119, 19 S. W. (2d) 1099 (1892).

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separate property might be seized on execution under a judgment against the husband alone, where the judgment debt was for necessaries. The court also declared that this proviso is applicable to both §§ 3390 and 3389. In dealing with what are "necessaries" for the purpose of these sections, the court adds the requirement that they must have been necessaries at the time of the purchase. Credit will not be presumed to have been extended except in the light of such separate estate as may have existed *at the time* of the purchase.

5. Effect of Separation Agreements Upon Husband's Duty of Support

Prior to separation, an attempted waiver of the right to support by the wife will not be valid. As was held in *Cotter v. Valentine Coal Co.*,[33] the wife cannot waive her right to support by contract for such right is not dependent upon contract but is provided her by law as a matter of public policy. Separation agreements entered into without an immediate intent to separate are void as a matter of public policy. But agreements between husband and wife for separation and separate maintenance, if made in prospect of an immediate separation, and if reasonable, fair and voluntary, will be upheld. It must be noted, however, that a subsequent reconciliation will repudiate even a valid agreement, and property previously given the wife under the agreement and not returned to the husband's control will be construed as the subject of a gift.

In the case of *Johns v. Johns*,[34] the St. Louis Court of Appeals affirmed the lower court, and upheld a settlement agreement in the following circumstances. The plaintiff wife brought an action for divorce for desertion, requesting alimony *pendente lite,* suit money and permanent alimony. The defendant husband, while not contesting the right to divorce, set up a separation agreement under which the plaintiff received $700 cash and all their household possessions, he retaining only his personal clothing, the wife relinquishing all claim to alimony and maintenance. A divorce was granted in the trial court, but alimony and suit money was refused. The evidence disclosed that the parties continued to live together for five days after the agreement was signed to facilitate removal to other quarters, but there was no change in their fixed intention to separate. The appellate court stated that agreements for separation and for settlement of property interest between a discordant husband and wife, when fair and reasonable,

33. 14 S. W. (2d) 660 (Mo. App. 1929).
34. 222 S. W. 492 (Mo. App. 1920).

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are upheld by the courts, if made in prospect of an immediate separation; but that such agreements between parties living together amicably and without a present intention to separate are held to be against public policy and void for the reason that they tend to promote separation and divorce. Where the agreement of settlement is fair and reasonable, however, the court pointed out that it would be inequitable to permit the wife to bring an action for alimony seeking to repudiate the contract without first tendering back all sums received by her thereunder.

There is some question as to whether the court ruled correctly in denying the wife suit money in the light of the earlier decision of the Kansas City Court of Appeals in the case of *Banner v. Banner*.[35] In that case, a wife, being sued for divorce, filed a motion for alimony *pendente lite*, in the face of a specific provision of a separation agreement whereby she stipulated she would not, in the event of divorce proceedings, make claim for either temporary alimony or alimony in gross. That the contract was not void for fraud had been litigated previously between the parties and the contract sustained. The trial court did not allow anything for maintenance, but did allow $100 suit money, from which the husband appealed. The appellate court affirmed the judgment of the trial court, holding the contract valid to bar any claim for alimony, but holding the provision thereof in bar of suit money in violation of public policy as tending to facilitate an uncontested divorce.

The case of *Harrison v. Harrison*,[36] is illustrative of the repudiation of the agreement which results where there is a reconciliation. In that case, in the wife's action for divorce a decree was granted in her favor, but the trial court refused to grant permanent alimony. It was shown that the parties had entered into a separation agreement, dividing the husband's assets. In about six months he returned and lived again with her for several years, leaving and returning off and on, finally culminating in the wife's suit for divorce. During this time, after the first separation, the husband had returned with the understanding that the agreement should stand. The appellate court held that such a contract would be void as tending to facilitate separation where there was no present intent to separate, and the husband could not avoid the effect of reconciliation. For this reason the judgment was reversed and remanded for determination

35. 184 Mo. App. 396, 171 S. W. 2 (1914).
36. 201 Mo. App. 465, 211 S. W. 708 (1919).

of a proper allowance. It was held in this case that the husband not only consented to the annulment of the contract by the resumption of marital relations, but also by his course of conduct for several years in permitting the wife to continue to manage and dispose of the property given to her by the original separation agreement had thereby converted the property so transferred into a voluntary gift or settlement to her.

C. *Conditions Precedent to an Action for Separate Maintenance*

1. Necessity for Prior Demand for Increased Allowance

There are certain conditions precedent to the wife's right to bring an action for separate maintenance. The first of these is found in the decision of the Supreme Court of Missouri in the case of *Bingham v. Bingham.*[37] In that case, an action for maintenance was brought by the wife in which the trial court granted her $15,000 annually for herself and children, with $5000 awarded for attorney's fees. On appeal, the judgment was reversed and remanded with directions to dismiss without prejudice. From the facts it appears that the defendant, a wealthy business executive, was worth from $600,000 to $700,000, earning gross income of from $44,000 to $47,000 per annum. It had been his custom to give his wife $100 per week for certain household expenses, he paying all other expenses and bills. Upon separation, concededly not due to any delinquency on the wife's part, the husband continued to send the wife funds by check at irregular times and in irregular amounts, paid taxes on their home and such of his wife's bills as she sent to him. He also provided his two sons at Cornell with $5000 per annum. Checks for her benefit and that of their children for the 2½ years from separation to suit totaled $31,948.52. The defendant contended that where the husband has manifested no unwillingness to provide support, and in fact has furnished substantial and comfortable support, paying the wife's bills with no restrictions on credit, a demand on the husband for an increased allowance should be required as a condition precedent to her right to maintain the action. The supreme court, in dismissing the wife's petition without prejudice, did not preclude her further action, after a refused demand, for such larger allowance as she might be entitled to under the circumstances, but held that mere apprehension, without actual failure or negligence on the part of the husband to maintain or provide for his wife, does not bring into existence a cause of action for separate main-

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37. 29 S. W. (2d) 99 (Mo. 1930).

tenance. Without a complaint or demand on the wife's part for a larger allowance, so as to give the defendant husband an opportunity to increase it, where the allowance actually provided for her had permitted her a substantial living in the style to which she was accustomed, the court held that the wife had not laid a proper foundation for her suit.

On the other hand, in the case of *Carder v. Carder*,[38] the Kansas City Court of Appeals distinguished the *Bingham* case, where it was shown that the defendant husband, although a vice-president of a coal company, receiving a salary of $440 per month, furnished his wife so little that she was forced to work as a servant. The court held that where the support furnished was clearly inadequate, prior demand was not required.

2. Necessity for Court Order Awarding Custody of Children

In addition to a prior demand for an increased allowance, it is also essential, if the allowance to be requested is to cover the support and maintenance of minor children, that the court, by virtue of a separate count in the petition bringing the maintenance suit, or by prior order, judgment, or decree, take jurisdiction over the question of custody and award such custody to the plaintiff wife, before it will have any authority to make such an allowance. Thus, in *Hedrick v. Hedrick*,[39] the Kansas City Court of Appeals reversed an allowance made by the trial court for separate maintenance for the wife and two minor children abandoned by the husband, holding that until the court had in some way obtained jurisdiction over the children it had no authority whatsoever to make said allowance.

3. Effect of Pending Divorce Suit

Where a suit for divorce *brought by the husband* is pending, a separate maintenance suit cannot be brought until the husband's suit for divorce is determined. Thus, in *Weisheyer v. Weisheyer*,[40] an action for separate maintenance was brought by the wife while a suit for divorce brought by the husband was pending in the appellate court, by virtue of his appeal from a dismissal of his petition in the trial court. The husband appeared specially in the maintenance suit by a plea in abatement, challenging jurisdiction on the ground of the pendency of his divorce suit. The wife's demurrer and motion to strike this answer were overruled, but the court, over the husband's objection, elected to hear the wife's evidence in support

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38. 60 S. W. (2d) 706 (Mo. App. 1933).
39. 157 Mo. App. 633, 138 S. W. 678 (1911).
40. 14 S. W. (2d) 486 (Mo. App. 1939).

of her petition for separate maintenance before hearing any evidence as to the pending divorce suit offered by the husband. Upon a decree for the wife in the trial court, the husband again challenged the right of the court to entertain the separate maintenance suit during the pendency of the divorce suit by a motion for new trial and by motion in arrest of judgment. On appeal, the St. Louis Court of Appeals reversed the judgment of the lower court directing dismissal of the petition, holding the plea in abatement was well taken. The appellate court held that when an action for divorce has been instituted by either of the parties, the court having jurisdiction of such action is vested with the entire jurisdiction to determine, not only the question of divorce or no divorce, but also all questions relating to support and maintenance, as well as the question of care and custody of children. The right of the wife to support money was held to be a mere incident to the action for divorce, the right of the circuit court to determine this question inhering to the end of the litigation, even during the pendency of an appeal from a decree adjudging or refusing to adjudge a divorce.

So much of the St. Louis Court of Appeals opinion, however, as might be construed to be applicable to the *pendency of a wife's suit for divorce* may not be well taken. In the case of *Nolker v. Nolker*,[41] also before the St. Louis Court of Appeals, the wife brought suit for separate maintenance, obtaining a decree from the trial court for temporary maintenance of $250 per month and suit money pending final disposition of her petition for separate maintenance. From this decree, an appeal was taken. While an appeal was yet pending in the maintenance suit, the wife instituted divorce proceedings and obtained a final decree for $27,000 alimony in gross, with alimony *pendente lite* in the divorce suit of $350 per month from the commencement thereof to the final decree, the amount of $250 per month payable under the prior temporary maintenance decree on the motion of the husband being credited thereto. Upon the granting of the divorce decree, the husband obtained a temporary injunction to prevent collection of temporary maintenance accrued prior to institution of the divorce proceeding. Upon hearing, the injunction was dissolved and the husband ordered to pay all temporary maintenance accrued to the time temporary alimony, *pendente lite,* was awarded in the divorce proceding. The appellate court affirmed the judgment of the trial court, saying that inasmuch as the allowance decreed covered different periods of time, in order to avoid the paying

41. 249 S. W. 426 (Mo. App. 1923).

of a double allowance, the decree, although somewhat unusual, was valid in that it sufficiently guarded against the defendant being required to pay twice for the same thing.

It should be noted that this case does not cover a situation where an action for maintenance is brought by the wife after the institution of divorce proceedings in which temporary alimony *pendente lite* has been granted. In such a case, it seems clear that the *Weisheyer* case, *supra,* would control.

It is equally clear in the converse situation that a valid divorce decree, obtained by the husband *after* a decree for separate maintenance in favor of the wife, will terminate the prior decree for her separate maintenance. In the case of *Pritchard v. Pritchard,*[42] the husband appealed from an order of the trial court denying his motion to vacate a decree of separate maintenance. Some years before, a decree of separate maintenance of $25 per month for support of wife and minor child had been granted. At the time of this action the son had died, and as a result, the trial court reduced the decree to $12.50 per month but refused to vacate the entire amount, on the theory that the judgment for maintenance was perpetual during the wife's life. The husband showed that some years after the decree for separate maintenance he had obtained a divorce from the wife, for her fault, in Oklahoma, where he resided, in which suit she personally appeared and in which no claim for alimony was made or allowed. The appellate court, in reversing the trial court and ordering the judgment for separate maintenance vacated in toto, said that in this case the defendant's marital obligation to the plaintiff was dissolved for her fault by a judgment of divorce, rendered by a court of competent jurisdiction in an action in which she appeared, and that, therefore, she was necessarily bound by that judgment, which judgment put an end to the defendant's duty to maintain her.

III Procedure

A. *Grounds Required for an Action of Separate Maintenance*

In the case of *Pickel v. Pickel,*[43] the Supreme Court of Missouri examined the historical antecedents of the present statutory provisions for an action of separate maintenance, and concluded that the legislative abolition of divorce from bed and board left surviving it one of its incidents, namely, the right to separate maintenance. By the creation of this statutory right of action

42. 189 Mo. App. 470, 176 S. W. 1124 (1915).
43. 236 S. W. 287 (Mo. 1921).

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for separate maintenance by the act of 1807, the court held that the wife was given her choice of taking a decree of divorce from bed and board, with maintenance, instead of a divorce a vinculo, to which she might, upon the same facts, be entitled. Hence the abandoned wife, in an action for separate maintenance, might sue for maintenance in lieu of the absolute divorce to which the same abandonment might entitle her.

While it is true, as indicated, that the same abandonment which would justify divorce, i.e., abandonment without reasonable cause for the space of one year,[44] will justify separate maintenance, it is not true that abandonment for one year is required before an action of separate maintenance can be maintained. The rule is often stated that the wife cannot prevail unless she proves facts which would entitle her to a divorce if that were the remedy she were seeking.[45] But in each of these cases, the wife was seeking to establish "constructive abandonment" on grounds of cruelty, abuse, ill-treatment, or general indignities. In such cases, *only*, are the grounds for separate maintenance the same as those for divorce. A more accurate statement of the rule is found in *Elsey v. Elsey*:[46]

> ". . . To warrant a recovery under this statute, the husband must both abandon and fail or refuse to support the wife. Abandonment by the husband may be actual—that is, he may absent himself and remain away with intent to discontinue the relation of husband and wife between himself and his wife—or he may, for the purposes of this statute, abandon his wife by treating her in such a way as to justify her in refusing to live with him as his wife. . . .
>
> "In the absence of actual abandonment by the husband, then the facts relied upon by the wife to justify her refusal to live and cohabit with him must be such as would, in a suit for that purpose, entitle her to a divorce upon the ground of indignities."

Consider, first, those cases which involve *actual* abandonment. The three elements which the wife must establish where she relies upon an allegation of abandonment were first announced in *Broadus v. Broadus*.[47] by the Kansas City Court of Appeals:

> "It is also true that two things must appear before this statutory action for maintenance can be upheld, viz., abandonment and

44. Mo. Rev. Stat. (1939) § 1514.
45. See Grant v. Grant, 171 Mo. App. 317, 157 S. W. 673 (1913); Elsey v. Elsey, 297 S. W. 978 (Mo. App. 1927); Glick v. Glick, 41 S. W. (2d) 624 (Mo. App. 1931); Brady v. Brady, 71 S. W. (2d) 42 (Mo. App. 1934).
46. 297 S. W. 978, 979 (Mo. App. 1927). See also Gardner v. Gardner, 60 S. W. (2d) 706, 707 (Mo. App. 1933).
47. 221 S. W. 804, 805 (Mo. App. 1920).

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> failure to support. Section 8295, R.S. 1909; Youngs v. Youngs, 78 Mo. App. 225, 228. And to show abandonment, or desertion, which is the same thing, three things must concur and be established: (1) Cessation, without good cause, from cohabitation; (2) intention on the deserter's part not to resume same; and (3) absence of complainant's consent to the separation."

This rule has been reiterated and adopted with approval in several cases.[48]

In the usual case, it will be clear from the wife's petition, where she relies upon actual abandonment, whether these three elements are sufficiently alleged. The discussion of voluntary separation, set forth above in outlining the nature and extent of the husband's duty of support, is material here, however, in considering whether or not the conduct of the parties is such as to establish the wife's consent to separation which might bar her recovery on a theory of actual abandonment.

In addition, there are three special situations which should be considered in applying the principles applicable to actual abandonment. In the case of *Brady v. Brady*,[49] an action for divorce brought by the wife in the St. Louis Circuit Court was dismissed and the husband awarded a divorce upon his cross-bill. This decree was appealed to the St. Louis Court of Appeals, where the following state of facts were shown. More than a year prior to the wife's suit for divorce, she brought an action for separate maintenance on a theory of "constructive abandonment" due to general indignities. From an adverse decree, the husband appealed and the St. Louis Court of Appeals reversed the trial court, finding the wife had failed to make a case establishing her right to separate maintenance and suggested a reconciliation. Such reconciliation the husband attempted, but the wife interposed conditions which made reconciliation impossible. Thus matters continued for over one year. No proof of new grounds for divorce was established by the wife, and matters occuring prior to the previous maintenance suit were held to be *res adjudicata* against her. For this reason, the court held that *the wife's continued refusal to return to the husband*, from whom she had separated without reasonable cause for a space of one year, he remaining willing to receive her back, *constituted statutory desertion*, entitling him to a divorce upon his cross-bill.

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48. See McPheeters v. McPheeters, 227 S. W. 872, 873 (Mo. App. 1921); Gardner v. Gardner, 60 S. W. (2d) 706 (Mo. App. 1933); Reeve v. Reeve, 160 S. W. (2d) 804, 807 (Mo. App. 1942).

49. 71 S. W. (2d) 42 (Mo. App. 1934).

The converse of this situation arose in the case of *Stauffer v. Stauffer*,[50] On the wife's appeal from a dismissal of her suit for separate maintenance by the trial court, it was shown that the husband's sole defense was his offer to receive her back, although it was admitted that for a period in excess of one year he had abandoned her and made insufficient payment for her support. The appellate court overruled the trial court and granted her separate maintenance in the amount of $60 per month, stating that the husband's offer to return, being made after the statutory period of time necessary to give the wife ground for divorce had elapsed, will not, though refused, defeat the action of the wife for separate maintenance. The court said that to hold otherwise would be to deprive an innocent and injured wife, whose right to a divorce had already accrued, of her right to separate maintenance, upon the mere repentence of the husband, thus forcing her, if she desired to insist upon her right to support, to receive her husband back and re-establish the relation of husband and wife, thereby requiring her to condone the very offense which under our statutes would entitle her to an absolute divorce.

In the case of *Doyle v. Doyle*,[51] the Supreme Court of Missouri was faced with a cross-action by the wife for separate maintenance, for abandonment by the husband during the pendency of his unsuccessful suit against the wife for divorce. In dismissing the wife's petition for separate maintenance, the court said that although the husband would not be permitted to avoid the consequence of abandonment and neglect to provide for his wife under the color of maintaining a suit for divorce, yet when his suit is prosecuted in good faith, nothing would be more unreasonable than to hold a separation from the wife during the pendency of the suit a desertion, subjecting him to a suit for alimony. The court pointed out that if the wife by her conduct has given the husband cause for divorce, she thereby has forfeited her right to support from him from the time of the commission of the offense, but that, if the suit for divorce fails, then the wife has all of her common law remedies for obtaining support while cohabiting with her husband. If the suit for divorce should show that the desertion of the husband was unwarranted, the court pointed out that any credit she may have obtained during the suit for necessaries would, of course, constitute a valid debt against her husband, unless he had otherwise suitably provided for her. In addition to the methods of avoiding hardship noted by the supreme court

50. 226 S. W. 40 (Mo. App. 1920).
51. 26 Mo. 545 (1858).

in this case, it should be noted that upon a suit for divorce, under modern practice, whether the wife be plaintiff or defendant, she can, upon a proper showing, obtain alimony *pendente lite* and suit money.

Having determined what allegations are necessary to support a petition for separate maintenance based upon *actual* abandonment, let us consider, secondly, what grounds must be alleged to support a petition based upon "constructive" abandonment. As set forth above, the rule in such cases is frequently stated to be that the wife cannot prevail unless she proves facts which would entitle her to a divorce if that were the remedy she were seeking. The most accurate statement of the rule governing the principle of "constructive" abandonment is found in *Carder v. Carder*:[52]

> ". . . However, where the husband has been guilty of such conduct as to render the wife's condition unendurable in his home, she may leave him without forfeiting her right to an action for maintenance against him, such conduct constituting abandonment on the part of the husband and not the wife. . . ."

Numerous additional cases in Missouri reiterate this rule.[53]

As in the *Carder* case, allegations of actual physical cruelty are of course sufficient grounds, if proven, to "render the wife's condition unendurable in his home." But the law will also recognize a more subtle state of facts. Thus, in the case of *Perkins v. Perkins*,[54] the wife was allowed separate maintenance where it was proven that the husband refused to request his married daughter by a previous wife, who was separated from her husband and was then living with the husband and wife, either to cease receiving men visitors in the home or to move elsewhere, although no question of immorality was involved, since the daughter's conduct reflected adversely upon the good name of the home and as such constituted a continuing series of indignities. In the case of *Girdner v. Girdner*,[55] the wife was allowed separate maintenance where it was alleged and proven that the husband, although financially able to do so, required her to live in the home of his parents, where she was required to occupy a subordinate position and in

52. 60 S. W. (2d) 706, 707 (Mo. App. 1933).
53. McGrady v. McGrady, 48 Mo. App. 668, 674 (Mo. App. 1892); Polster v. Polster, 145 Mo. App. 606, 123 S. W. 81 (1909); Grant v. Grant, 157 S. W. 673, 674 (Mo. App. 1913); Kindorf v. Kindorf, 178 Mo. App. 635, 161 S. W. 318 (1913); Girdner v. Girdner, 230 S. W. 382, 383 (Mo. App. 1921); Brady v. Brady, 253 S. W. 172 (Mo. App. 1923); Perkins v. Perkins, 157 S. W. (2d) 253, 258 (Mo. App. 1942).
54. 157 S. W. (2d) 253 (Mo. App. 1942).
55. 230 S. W. 382 (Mo. App. 1921).

which she was treated with unkindness and contempt and made to suffer unwarranted interference in the conduct of their marital relations.

It is also worth noting that, where "constructive" abandonment is alleged, based upon indignities, it is not necessary that there be an actual physical separation. In the case of *Polster v. Polster*,[56] where drunkenness, physical abuse and relationships with other women were alleged, such allegations were clearly sufficient, if proven, to establish "constructive" abandonment, and the St. Louis Court of Appeals found it "wholly immaterial" that the parties continued to reside in the same house, albeit in separate apartments, even up to and including the day on which the suit was filed.

But the courts will not countenance trivial and petty differences, for which both may be held equally to blame. Such matters are not sufficient to "render the wife's condition *intolerable*." Thus, in the cases of *Grant v. Grant*[57] and *Elsey v. Elsey*,[58] *supra*, the wives' petitions, based on "constructive" abandonment were dismissed where the gravamen of their complaints was a desire to live in town and not return to the farm. And in the case of *Brady v. Brady*,[59] where differences were largely due to the fact that the husband, "so far as money matters were concerned, had an unfortunate way of doing things," in that "the exactness and precision which he required with reference to the expenditure of any money" proved irksome.

While the discussion hereunder has been confined thus far to an examination of the grounds which the wife must allege to establish abandonment, actual or "constructive," the fact that should not be lost sight of that the wife must allege and prove that the husband both abandoned her without good cause *and* failed or refused to support her.[60] This point, however, will be reserved for discussion below, where it can be more appropriately covered in connection with a determination of the principles governing the "amount of award."

B. *Burden of Proof, Burden of Going Forward With Evidence*

The wife, in order to maintain an action for separate maintenance, must

56. 145 Mo. App. 606, 123 S. W. 81 (1909).
57. 157 S. W. 673 (Mo. App. 1913).
58. 297 S. W. 978 (Mo. App. 1927).
59. 253 S. W. 172 (Mo. App. 1923).
60. Youngs v. Youngs, 78 Mo. App. 225 (1899); Elsey v. Elsey, *supra* note 58; Perkins v. Perkins, *supra* note 54; Broadus v. Broadus, *supra* note 47; Polster v. Polster, *supra* note 56.

prove the allegations of her petition by a clear preponderance of the evidence.[61]

Even though the ultimate burden of proof is imposed upon the wife, she is required, in the first instance, merely to establish a *prima facie* case by a negative averment to the effect that abandonment was not due to her fault, and by a showing that she at all times prior to separation faithfully performed her duties as a wife, whereupon the burden of going forward with the evidence necessarily shifts to the husband to show her fault, if that is his defense. In addition, if the husband intends to rely upon specific indignities justifying his abandonment of the wife, a simple general denial will not be sufficient to present this issue. He must allege in his answer those facts upon which he relies in support of his contention that he had good cause for separation. Thus, in the case of *Farley v. Farley*,[62] the wife brought suit for separate maintenance, alleging abandonment without reasonable cause and failure of support, specifying that she had at all times faithfully discharged her duties as a kind and affectionate wife, to which the husband responded by general denial. Over the wife's objection, the trial court admitted evidence of specific indignities relied upon by the husband in support of his contention that he had good cause for leaving her. From a judgment for the husband, the wife appealed. The judgment was reversed by the St. Louis Court of Appeals, which held that the most the wife can be expected to show in the first instance is that she had at all times faithfully performed her duties as a wife, whereupon the duty of going forward with the evidence must necessarily shift to the husband to show such fault on her part as would have justified him in leaving her and in failing and refusing to provide for her, if that is to be his defense. The court pointed out that even though the statute does impose the ultimate burden upon the wife in showing that her husband's action in leaving her was without good cause, she is not required, as a part of her case, to anticipate and deny the particular matters upon which he may rely in justification. The court said that issue must be joined upon the question of whether the abandonment was without good cause, but that a simple denial on the husband's part would not present such issue. It was concluded that this could only be done by an allegation in his answer of the facts upon which he intends to rely in support of his

61. See Esworthy v. Esworthy, 223 Mo. App. 171, 11 S. W. (2d) 1078 (1928); Glick v. Glick, 41 S. W. (2d) 624 (Mo. App. 1931); Farley v. Farley, 181 S. W. (2d) 671 (Mo. App. 1944).

62. 181 S. W. (2d) 675 (Mo. App. 1944).

contention that he had good cause for the separation. For this reason the court held that if the husband fails to plead such special facts, which are not necessary allegations to make the plaintiff's case, he may not, as a matter of right, be allowed to offer evidence thereof for the purpose of defeating the plaintiff's action.

C. *Defenses*

In addition to the usual right to denial of the truth of the wife's allegations and of counter-charge of fault on her part, as indicated in the *Farley* case, *supra*, there is the special defense of admission of error and offer of reconciliation which, if made in good faith, will bar any further action for separate maintenance. Thus, in the case of *Creasey v. Creasey*,[63] a suit for separate maintenance was brought by the wife and was met by a general denial coupled with a plea that the husband offered to receive his wife again into his home and to afford her suitable maintenance. Upon appeal by the wife from a dismissal of the case by the trial court, the St. Louis Court of Appeals affirmed the action of the trial court, holding that a sincere offer on the husband's part to take back and maintain the wife and treat her with conjugal kindness and affection will generally defeat her right to a separate allowance. The wife was said to have no vested right to separate maintenance by reason of her husband's wrongful conduct, and such right ceases if he does not persist therein and sincerely offers to resume his marital relations and obligations. Specifically the court pointed out that the husband's offer was no less defective to defeat his wife's right to separate maintenance because made after being sued for separate maintenance, or even after judgment in such suit, but that, of course, the lateness of his repentence might be considered by the trial court in adjudging the question of his sincerity. The court further pointed out, however, that if, after the plaintiff returns to her husband, he should again ill treat her to such an extent as to justify her living apart from him, an earlier decree barring her suit for separate maintenance because of the husband's repentance would not bar her remedy against him in a subsequent suit.

Of course, the wife is not required to return to the husband where she cannot reasonably expect the promise to treat her with conjugal affection and kindness to be kept. In *Broadus v. Broadus*,[64] the Kansas City Court of Appeals distinguished the *Creasey* case, where it felt, from the evidence,

63. 168 Mo. App. 98, 151 S. W. 215 (1912).
64. 221 S. W. 804 (Mo. App. 1920).

that the wife was justified in distrusting the sincerity of the offer. The court affirmed a judgment in her favor, holding that the plaintiff's refusal to accept the tardy offer of the husband to return to her, based solely on her lack of confidence in its sincerity, cannot conclusively bar her right to recover, the sincerity of such an offer being a matter for the court to believe or disbelieve. And in *Kindorf v. Kindorf*,[65] the mere statement of the husband in testimony that he would support his wife only in the home, with neither a request for her return, nor assurance as to his future conduct, where he had struck her and driven her from the home, was held not sufficient.

The discussion of the case of *Stauffer v. Stauffer*,[66] appearing above in connection with a determination of the allegations to be contained in the wife's petition charging abandonment, is also applicable here. If abandonment shall continue for a period of one year, *the special defense of repentance will no longer obtain,* her right to separate maintenance or divorce being irrevocably established by desertion for the statutory period of time required for divorce.

IV. Amount of Award

A. *In General*

The fundamental considerations which will govern the determination of the amount of separate maintenance which will be granted a wife in Missouri were announced in the early cases of *McGrady v. McGrady*,[67] and *Youngs v. Youngs*.[68] The amount to be awarded will vary with the circumstances of each case, taking into consideration the age, health, condition and situation in life of the parties, their social and financial standing, their mode and style of living, and their wants and necessities as evidenced by their past life to the point of separation.

As the Supreme Court of Missouri announced in *Bingham v. Bingham*:[69]

> ". . . the purpose of separate maintenance, under the statute, is not to enrich the wife, for by the action and an award of maintenance she loses none of her marital rights to his property. The purpose of the statute is to give her a reasonable and comfortable living according to the station in life of the parties and according to the style in which they have been accustomed to live, taking into consideration the property and income of the husband."

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65. 178 Mo. App. 635, 161 S. W. 318 (1913).
66. 226 S. W. 40 (Mo. App. 1920).
67. 48 Mo. App. 668 (1892).
68. 78 Mo. App. 225 (1899).
69. 29 S. W. (2d) 99, 102 (Mo. App. 1930).

And, in determining the husband's financial ability to support his wife in the style to which the parties have been accustomed to live, the Kansas City Court of Appeals, in the *McGrady* case, *supra*, held that "his entire means and income, from whatever source, should be considered. Property of every description, which is the husband's alone, and which is at his free disposal, should constitute a fund to be used by him for the necessary support of his family, ..."[70]

With the exception of the cases cited, however, although most of the Missouri decisions cited in previous portions of this opinion make some passing reference to the rules controlling a determination of the amount of the award, as set out above, there are no Missouri cases in which the issue as to amount was in serious contest, or in which the amounts involved were substantial. Accordingly, the discussion following is based upon the decisions of other jurisdictions.

B. *Wife's Separate Estate*

There is a discernable tendency to liberalize the amounts granted, although some early decisions held that, where the wife has a separate estate, sufficient for her subsistence in comfort and adequate for her maintenance, no judgment for separate maintenance would be granted. Thus, in the case of *Wright v. Wright*,[71] the Supreme Court of Texas, in affirming a judgment dismissing a wife's suit to compel by execution the payment of arrearages of alimony *pendente lite*, brought after dismissal of her suit for divorce, pointed out that no hardship would result from a creditor's furnishing necessaries to the wife based on the anticipation of the payment of such alimony, since the husband's liability to pay for necessaries was extinguished only by actual payment of alimony and not by the decree. As dicta, in discussing the historical foundation of alimony, the court said: "The husband's liability for necessaries furnished the wife, and the foundation of decrees for alimony, depend to a great extent on the now-antiquated rule of the Common Law, that the wife has no separate property, but, that, by marriage, the whole is vested in the husband. *Where the wife has a separate income adequate to her maintenance, the husband is not liable for alimony either under the Common Law or our Statute Law*."[72] (Emphasis ours.)

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70. *Supra* note 67 at 678.
71. 6 Tex. 29 (1851).
72. *Id.* at 33.

This concept of alimony as a species of equitable relief designed to prevent unjust enrichment where her property has been merged with that of the husband due to cohabitation, or otherwise, is also found in the case of *Converse v. Converse.*[73] It was carried to an even more severe conclusion in that case—particularly in view of the fact that the wife in that state could not obtain a final divorce for any cause, justifying a division of property according to the equities between the parties normally incident to divorce even at that time in other states. The husband, an impecunious preacher, married a wealthy lady who controlled, as her separate estate, through powers of appointment, the uses of two substantial plantations and their accompanying slaves. To save her husband's pride, she exercised a power of appointment covering one plantation, granting the income therefrom to herself and husband jointly for life. Later, as admitted in the record, he increased his demands for more of her property in order to become in fact the head of the house. These demands she resisted, resulting in difference and altercations which the court held justified her "to be protected by the court in living apart." Her plea for rescission of her exercise of the power of appointment in favor of her husband, however, was not only rejected, but in addition she was denied all alimony, although the husband's only income was from the interest granted by her to him by way of gift. The court held:

> "*Alimony* means an allowance from the husband's estate for the maintenance of the wife during separation, and *is never given where she has sufficient means of subsistence in comfort.* Without elaborating the point, I refer to Bishop on Mar. and Div. § 549, and the note, and to § 562, as fully sustaining this doctrine."[74] (Emphasis ours.)

Similarly in the early case of *Logan v. Logan*[75] where the wife had a separation income of $250 per annum, and the husband $2500 per annum, it was held that she was entitled only to a decree of $300 per annum. The court said: "Under all the circumstances . . . (the husband) should not be required to contribute to his wife's maintenance if her own means be ample, and that, if he be liable to any contribution, the established principles of equity and of public policy will entitle her to only so much, in addition to her own

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73. 9 Rich. Eq. 535 (S. C. 1856).
74. *Id.* at 570.
75. Logan v. Logan, 2 B. Mon. 142 (Ky. 1841).

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resources, as may be *barely* enough to maintain her, during separation, in decency and comfort.[76] (Emphasis ours.)

As late as 1880, the Supreme Court of Georgia, in the case of *Hawes v. Hawes*,[77] reversed a decree for separate maintenance because the record did not show that due consideration had been given to the wife's separate estate where the decree put the entire burden for the wife's support on the husband.

In an edition of Bishop on MARRIAGE, DIVORCE AND SEPARATION, later than that relied upon by the *Converse* case, supra, the law of that date is still announced as set forth in these early cases.[78] In Vol. II, the following sections are found:

> § 830—"A decree for separation in favor of the wife, where the funds which in cohabitation should support the husband and her are vested in him, must, if she so prays, be attended by a decree for alimony.
>
> § 831—"But where, in consequence of a settlement, or otherwise, the wife's property has been kept in her hands, and has not vested in the husband, and it is fully equal to what she can justly demand from the common fund, the reason for allowing her this support fails, and she is not entitled to it. If her estate is inadequate, it goes so far to reduce her claim.
>
> § 832—"Or, if the husband has voluntarily conveyed to the wife property equivalent to what the law entitles her to, she cannot demand alimony. And whatever his provision for her maintenance, she can have nothing further if it is adequate, otherwise she may have such alimony as will make up the deficiency."

Bishop, however, recognized the possibility that some third person, by will, gift or otherwise, might add to her separate estate amounts which should not be considered a part of the common fund which during cohabitation should be utilized for the support of the family. The emancipation of women by modern married women's statutes had not been developed in the '90's. Women were not yet engaging in business and investing funds independent of the husband. Bishop, in 1891, saw the fundamental error in which the doctrine of these early cases labors, *i.e.*, such cases to the contrary notwithstanding, a wife might properly hold funds in her own right which were not intended to be used as a part of the common fund supporting the

76. *Id.* at 149.
77. 66 Ga. 142 (1880).
78. 2 BISHOP ON MARRIAGE, DIVORCE AND SEPARATION (1891 ed.) § § 830-833.

spouses during cohabitation. Thus, he says: "It would seem possible for a third person to settle property on a married woman in a way to make it a special provision over and above, and added to, what the law permits her to claim of her husband; so that it should not be taken into account in estimating her alimony."[79] Mr. Bishop, at that date, found himself without cases to support this proposition, relying solely upon an ancient English case which held that the £500 paid annually to a lady-in-waiting to the queen were in defrayment of the expenses of her position. Yet, even in that case the court held that a pension of £400 per annum settled upon the lady by the king during pendency of the suit was to be deducted from the obligation of the husband to pay alimony.

Faced with this solid body of decision, it was natural that any tendency to liberalize the provision of alimony to a wife possessed of a separate estate should first be noticeable in actions for divorce where it could be clearly seen that fundamental property rights of the wife were divested by the decree when dower was relinquished and no provision made for alimony. This not being true in a suit for separate maintenance, inasmuch as the wife's property rights in her husband's estate remain untouched and unmodified by a separate maintenance decree, the courts have been more reluctant in such cases to depart from the early decisions at common law. Thus, in *Clisby v. Clisby*,[80] the Supreme Court of Alabama, in a suit for separate maintenance, altered an excessive decree, holding:

> "The object or purpose of such a bill, as to this, is not to sever the ties of matrimony, but to provide for the wife during separation. The parties still remain husband and wife, with the rights and disabilities of the husband and wife continuing. . . . Courts in this proceeding cannot take property from one and give it to the other. The only duty which the court can enforce is maintenance, and for this purpose *can only deal with incomes of the parties*, having no power to compel either to labor for the other; *nor should the court divest either of the corpus of his estate*."[81] (Emphasis ours.)

The emancipation of married women under modern statutes has exerted some influence in causing the present-day decisions to relax the harshness of this early common-law doctrine. Nelson, in his text, DIVORCE AND ANNULMENT,[82] has written the most recent work on the subject. After indicat-

79. *Ibid.* § 833.
80. 160 Ala. 572 (1909).
81. *Id.* at 575.
82. NELSON ON DIVORCE AND ANNULMENT (2d ed. 1945) § 14.45.

ing that, with certain exceptions, the principles governing the amount of an award for separate maintenance are today the same as those applicable in a divorce proceeding (§ 14.52), and after setting forth the factors of age, physical condition and health, social rank and position, and the husband's financial position including the value of his property, his income, and his earnings, actual and potential (§ § 14.38 to 14.44) (all of which are set forth in the Missouri cases cited), and certain additional considerations concerning the marriage relationship itself, such as the conduct of the spouses toward each other during the marriage, the frugality or wastefulness of either or both spouses, the nature of the husband's misconduct and the relative responsibility of the spouses therefor, and whether the marriage was one of love or convenience (some of which appear in cited Missouri cases from time to time); a special section (14.45) is devoted to factors relating solely to the wife which the modern decisions consider in determining the amount of award to which the wife may be entitled. He says:

> ". . . The necessities of the wife are of prime importance in determining the amount of her alimony, but her needs are not necessarily controlling as to the amount of the alimony. *Her financial condition should be considered, including the value of property owned by her, her income and earnings, and also her earning capacity.* The wife's ability to contribute to her own support is to be considered, as is the relative financial condition of both spouses. However, while the fact that the wife has a separate estate more than sufficient to provide for her suitable support should be considered, it has been held that *such fact does not require the allowance to her to be so reduced as to entirely free the husband from contributing to her support,* where a divorce is granted her. So the fact that the wife has some property does not preclude a liberal allowance where the husband has far superior resources. Moreover, the wife should not be required to assume the risks of illness and unemployment, so far as future earnings are concerned. The rule in at least one state (West Virginia) that where the income of the husband is shown to be ample and sufficient to make provision for the wife, her estate and earning capacity are not to be considered in fixing the amount of alimony, has been changed by statute."[83] (Emphasis ours.)

So, in the last fifty years, the courts have moved away from the position that the possession of a separate estate by the wife, ample to supply her all of the necessities of life, should bar her recovery of any alimony, to

83. *Ibid.* § 14.45.

a more tenable position, where the wife's resources are considered an important moderating factor but not one of controlling importance.

But, in an excess of enthusiasm, the West Virginia courts had proceeded so far from the original principles of the common law that a statute was required in 1933 to reestablish in any degree the relevancy of the financial condition of the wife in that state. In the case of *Sutherland v. Sutherland*,[84] a decree for separate maintenance was abated where the wife was shown to have earnings in the amount of $60 per month, plus other assets ample for her support, and where the husband had just completed passing through bankruptcy though currently earning about $200 per month. The court felt itself constrained to do so because of the statute.[85]

The courts of equity jurisdiction in New Jersey have found more occasion than any other to determine, in recent years, this issue as to the amount of the award to be made to the wife for separate maintenance. In *O'Neil v. O'Neil*,[86] in connection with an appeal of the wife as to the amount of the award granted by the New Jersey Court of Chancery, the advisory master was called upon to set forth his reasons in support of his opinion, in accordance with which the order of the court had been issued. In an exhaustive opinion, the advisory master advances the various factors and sociological reasons which guide modern tribunals in determining this question. His report can be divided roughly into four main heads: (a) the collectibility of the award, (b) culpability and punishment as a factor in setting the amount, (c) the early common-law doctrine of pooling of joint resources discussed above, and (d) the role of judicial discretion in the application of relevant factors in each case. This division will be followed in treating his remarks below.

After pointing out at some length the financial straits of the husband, the advisory master stated that an order for the payment of money should not be a futile one, but should be made for amounts that are collectible with reasonable promptness.

84. 120 W. Va. 359, 198 S. E. 140 (1938).

85. "The former rule in West Virginia was that where the husband's income is shown to be ample and sufficient to make provision for the wife, the wife's estate and earning capacity were not to be taken into consideration in fixing the amount of alimony. (Citing cases.) However this rule has been altered and clarified by chapter 27 of the Acts of Legislature of 1933 (code, 48-2-15a), so that now in considering an award of alimony the court shall take into consideration among other things, the financial needs of the wife, the earnings and earning ability of the husband and wife, the estate, real and personal, and the extent thereof as well as the income derived therefrom of both the husband and wife. . . ." *Id.* at 363, 198 S. E. 141 (1938).

86. 18 N. J. Misc. 82, 11 A. (2d) 128, 132, 133, 134, 136 (Ch. 1939).

The advisory master next pointed to the fact that the increase demanded by the wife was not required to supply any actual need of the wife, inasmuch as she had certain independent means and was employed at a good salary. Rather, the theory of the wife was that, inasmuch as the husband was the guilty party, her income should not be considered, since that would reward the husband for misconduct; in short, that the order for support should be in the nature of a punishing order. The advisory master held that the court had no jurisdiction to give anything by way of punishment. He pointed out that the amount of alimony could not be made to depend on the degree of guilt of the husband, but that the endeavor of the court should be only to provide for the wife's needs to the extent of the husband's ability.

The master next turned to the common law doctrine of pooling of joint resources. Though he quotes at length from Bishop's treatise,[87] referred to above, the advisory master indicates that current New Jersey appellate decisions hold that the wife's separate resources are only one factor to be considered.[88] He gives greater weight to the interest of society in the encouragement of self-support, than to the common law practice of pooling assets:

> ". . . When a wife is gainfully employed, as complainant is, and is apparently in good health, and is to continue in her employment with apparently a pension in prospect, . . . she should be held to a continuance of her employment, in any estimation of alimony or support. Society is interested in her thus continuing, and the public of the community in which she lives is immediately so interested. . . Self-support, whether of men or women, is to be encouraged and anything that makes for self-support and is against dependence on the public, presently or prospectively, is not only to be encouraged, but is to have affirmative force in estimating and coming to a judgment on alimony or support. . . ."[89]

But it also indicated that, as a matter of judicial discretion, the court will not estimate the potential earning capacity of a wife not previously self-supporting.[90]

In the fourth portion of his opinion, the advisory master discusses the

87. *Supra* note 78.

88. "Our Court of Errors and Appeals has held that one of the elements in estimating alimony is the 'separate property and income of the wife,' and in its decision it added that 'any other factors bearing upon the question' are to be considered." O'Neil v. O'Neil, 18 N. J. Misc. 82, 91, 11 A. (2d) 128, 133 (Ch. 1939).

89. *Ibid.*

90. "But, usually where a wife is not self-supporting, her potential earning power is not counted upon." *Id.* at 96, 11 A. (2d) at 136.

effect of various guides and precedents in setting the amount of the award, concluding that the judicial discretion of the court will not be limited thereby in determining what will be a just amount under the varying circumstances of each case. (Similar discretion is granted to the circuit court under the broad provision of the Missouri statute.) The advisory master discards the "guide" or "precedent" often laid down in establishing the amount of alimony granted in divorce proceedings, that of granting to the wife one-third of the husband's current income, even as a "guide," stating that it is not applicable to suits for separate maintenance.

> "There is a persistent attraction for the bar to the notion that permanent alimony in a divorce suit, and also support in a maintenance suit, should be settled at 'one-third of the husband's income,' to the entire obliteration and indiscriminating exclusion of the many other factors that should be considered and which have more or less importance depending on the circumstances of particular cases. Always, 'the circumstances of the particular cases' are the bases, so to speak, of an alimony or a support estimation . . . of course this one-third notion has never been more than a guide. It is not a rule, even in a loose sense. . . ."[91]

The advisory master also discards the doctrine that less should be awarded for separate maintenance than in divorce, except in unusual cases.[92]

While the *O'Neil* decision indicates a more liberal attitude toward the wife in determining the amount to be awarded to her for separate maintenance than that prevailing at the early common law, the case makes clear that her separate resources, including her earning capacity, will count heavily against her. In an earlier opinion and master's report in the case of *Flavell v. Flavell*,[93] the New Jersey Court of Chancery followed a very strict application of the principle that the standard of living of the spouses, *while cohabitation continued*, should be applied, and refused to consider after-acquired inheritance of the husband which had completely altered his financial condition. Though the early Missouri cases do refer to the mode of

91. *Id.* at 82, 11 A. (2d) at 134.

92. "I think that, usually, there should be no difference between an estimation in a divorce suit and one in a maintenance suit, despite an old decision in this court which was approved by our Court of Error and Appeals, which decision, if completely followed, would always probably result in a less amount being allowed in a maintenance suit than in a divorce suit. That decision might have influence in exceptional maintenance cases, that is, cases where it appears likely that the parties may live together again if the court does not make the amount allowed for support 'attractive' to the wife. And in a divorce suit, the concrete effect of the decree on property is to be considered." *Id.* at 92, 11 A. (2d) 134.

93. 178 Atl. 69 (N. J. Ch. 1935).

living of the spouses "to the point of separation," the provisions of Mo. Rev. Stat. (1939) § 3376 contemplate further orders from time to time as circumstances may require. Whether so strict an interpretation would apply in Missouri is conjectural. In the *Flavell* case, the report of the first master to whom the case was assigned indicated that the wife should recover $2200 per annum. Both wife and husband excepted thereto, and on reconsideration, the exceptions of the wife were overruled and the defendant sustained to the extent of reducing the decree to $700 per annum. The facts indicated that, while living as man and wife, the couple lived on the modest sum of $30 per week, but that since separation, the husband had inherited $110,000, from which he received income of $6,000 per annum. The wife is shown to have had an independent income of $800 per annum. The basis of the wife's complaint was that she required $44 per week; that of the husband that her separate estate had not been given due consideration. This opinion applies a rather strict application of the common-law principle, allowing the wife $30 per week, the standard of their prior life when living together, deducting from the total required her entire separate estate. The court's reasoning was:

> ". . . On an issue of this nature, the husband's faculties are not the sole criterion for the fixing of an allowance. We must necessarily take into consideration the wife's requirements as indicated by her style of living prior to the separation. . . . True, in this case, we have the added factor that, since the separation, the husband has come into an inheritance, but there is nothing in the law which requires that a husband, who finds himself unable to live harmoniously with his wife, and separates, is to be treated as a vanquished foe and stripped of his possessions. Consideration will, of course, be given to the husband's present financial worth, but not to the degree contended for by the complainant. . . . She is entitled merely to a sum sufficient to presently maintain and support her in the manner which for the eleven years of her married life satisfied her, plus a modest added allowance based on the husband's increased affluence. . . ."[94]

As in the *O'Neil* case, in the *Flavell* opinion, as a matter of judicial discretion, the "guides" of granting one-third of the husband's income to the wife and consideration of his potential earning capacity are discarded under the facts of the case. The *Flavell* case, however, runs contra to the *O'Neil* case with respect to the practice of granting less for separate maintenance than

94. *Id.* at 70.

for divorce, following the precept of an early New Jersey case, *Walsh v. Walsh*[95] expressly discarded by the *O'Neil* decision.

From these two cases, it should not be concluded that the courts of New Jersey would not, in a proper case, make a substantial award to the wife for separate maintenance. In the recent case of *Wilkinson v. Wilkinson*[96] the Court of Errors and Appeals in New Jersey affirmed an award of separate maintenance made by the court of chancery exceeding 40% of the husband's income, even though a lump sum provision had been made for the wife in another proceeding and such moneys lost by the wife under circumstances indicating gross carelessness, and even though the husband was retired and too old to seek gainful employment. (In the earlier case,[97] it was held that the lump sum settlement made in New York had been invalid by the laws of that state.)

The application of the principles announced in the *O'Neil* and *Flavell* cases to two recent cases in New Jersey involving quite substantial sums of money, *Adams v. Adams,*[98] *and Armour v. Armour,*[99] indicates the complete willingness of these courts, in a proper case, where the mode of living and social position of the parties concerned justify it, to require the husband to contribute, where fully able to do so, substantial sums of money to the wife for separate maintenance in order to maintain that standard to which she was accustomed prior to separation.

Thus, in the *Adams* case, where a suit for separate maintenance was brought, no contest developed except over the amount of compensation to be made. The wife had no means or income of her own. There were four minor children, all of whom were in the custody of the wife. The husband had, during their life together, provided lavishly for his family, giving his wife $200 per week and paying in addition taxes on the home, insurance, automobile expense, costs of vacations, and tuition fees at various schools for the children. Upon separation, the defendant husband began a series of transfers of his assets to his brother, held by the court to have been in fraud of his wife's rights, and retired from business, pleading ill health. The master's report recommends separate maintenance of $200 per week.[100]

95. 88 N. J. Eq. 368, 104 Atl. 821 (1917).
96. 131 N. J. Eq. 467, 25 A. (2d) 891 (1942).
97. 130 N. J. Eq. 65, 20 A. (2d) 417 (Ch. 1941).
98. 17 N. J. Misc. 234, 8 A (2d) 214, 219 (Ch. 1939).
99. 135 N. J. Eq. 47, 37 A. (2d) 29 (1944).
100. The report states: "In determining the matter of alimony to be awarded the court may take into consideration not only the husband's property and income,

In the *Armour* case, an appeal was taken by the wife from a decree of the court of chancery awarding her only $5700 per annum. The husband cross-appealed on the ground that she had not established her substantive right to separate maintenance. It is worth noting in connection with other phases of this problem, that evidence of a settlement agreement, whereby he had previously agreed to pay her $18,600 per annum, free of taxes, for herself and two minor children, plus necessary medical and educational expenses, which both parties claimed had been violated and the specific performance of which in an earlier case[101] the court declared itself to be without jurisdiction to enforce, was utilized by the court to decide that the separation had been voluntary entitling the wife to an allowance for separate maintenance. Custody of the two minor children was, by this case, transferred to the husband, thus reducing her claim for support. But it was uncontested that the husband's income exceeded $220,000 per annum. It was also shown that the wife received an annual income of $1500 from a trust fund created *by her husband* for her benefit. In addition, evidence was admitted showing that of the $18,600 previously agreed to, $12,250 per annum was required for the maintenance of the home. In increasing the award to $10,000 per annum exclusive of the income from the trust, it is interesting, in the light of the discussion of the tax problem below, to note that the court took specific cognizance of the altered tax position of the wife under the provision made by the court's decree as compared with the original tax free agreement.

In the *O'Neil* case, as dicta, it was said that potential earning capacity of the wife would not be counted upon. This should be compared with the decision of the Supreme Court of Oklahoma in the case of *Branson v. Branson*.[102] There, on the appeal of the defendant husband from a decree of $3000 per annum out of his $6000 per annum, the court reduced the amount awarded to $1200 per annum, noting the wife's pre-marital earning capacity of $1800 per annum as a skilled private secretary. The court indicated that where the wife previously was self-supporting, where minor children do not require her attention and where the marriage was of short duration, her potential earning capacity, as measured by past performance,

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but also his capacity to earn money from personal attention to business. If this were otherwise a husband, by deliberate intent or disinclination to work, might avoid his marital obligation of support." Adams v. Adams, 17 N. J. Misc. 234, 241, 8 A. (2d) 214, 219 (Ch. 1939).

101. Armour v. Armour, 131 N. J. Eq. 110, 24 A. (2d) 177 (Ch. 1942).

102. 123 P. (2d) 643, 652 (Okla. 1942).

is counted against her although she was not self-supporting during cohabitation. It seems clear, however, that an estimate of the potential earning capacity of a wife who had never been self-supporting would be disregarded as pure conjecture.

The doctrine of the *Flavell* case with particular reference to (a) refusal to consider the inherited wealth of the husband which the wife did not help create and in which she never shared, (b) strict application of the standard of living existing at the time of separation, and (c) the principle of providing less upon separate maintenance than upon divorce on the ground that no property rights are thereby divested, finds support outside of New Jersey in the Supreme Judicial Court of Massachusetts in a well-documented opinion prepared by Chief Justice Field, in the case of *Coe v. Coe.*[103] In that case, the wife appealed from a decree of separate maintenance handed down by the probate court. It was shown that the marriage was of short duration, the parties having little in common, having gone their separate ways, she not at any time sharing in his wealth, but living on the allowance of $35 per week. The husband was not employed, but lived solely from the income of inherited wealth. The modest award of $35 per week made by the trial court was affirmed.

The doctrine of the *Clisby* case *supra,* in Alabama, the *Flavell* and *Walsh* cases, *supra,* in New Jersey, and the *Coe* case in Massachusetts, to the effect that smaller amounts should be awarded in suits for separate maintenance than as permanent alimony for divorce, resting on the ground that property rights are not disturbed in suits for separate maintenance, is, however, attacked at its foundation by the line of decisions in Illinois.

It is the rule in Illinois that a complete settlement of "existing" equities in property between the parties will be made in suits for separate maintenance, though the wife's right of dower in her husband's estate will not be disturbed except when granting an absolute decree for divorce.

In *Decker v. Decker*[104] the court considered the appeal of a wife in a suit for separate maintenance based upon her petition for the return of certain personal property and shares of stock purchased with her funds but given as a gift to the husband and certain real estate inherited from her father but deeded voluntarily to her husband. The decision was directly contra to the early South Carolina case of *Converse v. Converse,*[105] discussed

103. 46 N. E. (2d) 1017 (Mass. 1943).
104. 279 Ill. 300, 116 N. E. 688 (1917).
105. *Supra* note 73.

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above. Here the court held that title to the stock and personal property, though voluntary gifts to the husband at the time, had been forfeited by him by reason of his wrongful abandonment. The equitable title to the reality, however, was held to remain in the husband where it was shown to have been transferred for a valid consideration, *i.e.*, an investment of $13,000 by the husband in the wife's father's estate and the husband's services to the father-in-law in connection therein, which claims against the father-in-law's estate were settled by the wife's transfer. After settling the equities in property in dispute between the parties, the supreme court affirmed the trial court's decision that by reason of the property settlement so accomplished, the wife had by far the superior financial position and, by reason of such separate estate, was not entitled to a further specific monetary allowance for her maintenance and support. The statement of governing principles of law announced by the Illinois Supreme Court were as follows:

> ". . . The method of computation of a proper allowance for her support and maintenance is to add the wife's annual income to her husband's, consider what, under all the circumstances, should be allowed her out of the aggregate, then from the sum so determined deduct her separate income, and the remainder will be her proper annual allowance. Harding v. Harding, 144 Ill. 588, 32 N.E. 206, 21 L.R.A. 310. It is also a rule of equity in such cases that the wife shall not be put in a worse condition by reason of her marriage, the dissolution of which has been caused by her husband's willful misconduct. 'Equity and good conscience require that the husband shall not profit by his own wrong, and that restitution shall be made to the wife of the property which she brought to the husband, or a suitable sum in lieu thereof be allowed out of his estate, so far as may be done consistently with the preservation of the rights of each, and also that a fair division shall be made, taking into consideration the relative wants, circumstances and necessities of each, of the property accumulated by their joint efforts and savings.' The sum and substance of the various holdings is that the wife shall not merely have what necessity demands, but what complete justice requires, and that both the husband and the wife are first entitled to have their equities settled in the property held by both, jointly and separately. If all the property, or any part thereof, came to them by the sole efforts of the one or the other, then such party is entitled to have that property by the decree of the court, or some property the equivalent thereof, or money of the value thereof. After the equities of the parties in the property are adjusted, then the husband should be caused to pay or not to pay a further sum for support and maintenance

in money payments at stated intervals, according to whether or not the wife is equitably entitled to further payment after a consideration of all the facts that enter into a proper solution of that question."[106]

The *Harding* case referred to by the court in the *Decker* case is a leading case in Illinois, and was before the Illinois Supreme Court on two occasions, the earlier case being concerned with provision for temporary maintenance, *pendente lite,* the later case with the determination of the final award.

When the first *Harding* case came up in 1892, the husband was concededly a millionaire, with gross income of $120,000 per annum, net from $15,000 to $30,000. The only issue in the first case was whether, in view of the wife's separate estate, the husband should pay temporary maintenance, *pendente lite.* The court found that the payments of $300 per month, when added to her separate income, was still less than one-sixth of the husband's net income and accordingly affirmed the judgment of the lower court. The language used therein, especially that dealing with what may be allowed in diminution of the *corpus* of the husband's estate, is of considerable interest:

> "The principal question discussed by counsel is whether, under these circumstances, the wife having property in her own right, the court could, or, if it could it ought, in the exercise of sound discretion, make the wife an allowance out of the husband's estate *pendente lite.* . . . Some adjudged cases are to be found going to the extent of holding, with more or less directness, that no allowance will be made from the income of the husband, while the wife has property remaining which she may subject to the payment of the expenses of the litigation, and to her support. They are, however, opposed to the great weight of authority, and cannot be considered authority in this State. 'Alimony' in its technical sense, related to the income, a sum to be paid from the income of the husband, not by exhaustion of the *corpus* of his estate. And it is undoubtedly the rule that when there is no income, and the payment of the allowance will result in diminishing the estate from which the income is derived, it will not ordinarily be permitted to extend beyond providing for the actual wants and necessities of the wife. . . ."
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> ". . . If the income of the wife be sufficient to suitably support her, there will ordinarily exist no reason for making an allowance

106. Decker v. Decker, 279 Ill. 300, 308, 116 N. E. 688, 692 (1917).

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for that purpose. But if the income of the wife be insufficient, and that of the husband be ample, equitable considerations and the weight of authority requires, as we think, that such sum should be allowed from the husband's income as will, when added to her own, enable the wife to live comfortably, pending the litigation, in the station and life to which he has accustomed her."[107]

When the *Harding* case[108] reached the supreme court, in 1899, after seven years of legal strife, the husband was in extremely tight circumstances, having increased his indebtedness through speculation in real estate and experiencing in many years an actual net deficit in income. The supreme court agreed with him that only by the exercise of diligent attention to the management of his affairs could he hope to avoid financial ruin. The court discarded what it termed mere theories and enthusiastic anticipations of the lower court as to what might potentially be done with the husband's assets, and, upon the appeal of the husband for that purpose, reduced the award of the lower court from $6400 per annum to $3600. The fact that the wife had been content during all this litigation with temporary maintenance, *pendente lite,* of $300 per month, at no time making a motion, as was her right, for an increase weighed most heavily with the court. It is evident from the opinion, however, that the principle of "collectibility," as in the *O'Neil* case in New Jersey, *supra,* was the controlling factor. The lower court awarded custody of the children to the wife, and, in spite of the fact that the wife at the time of separation had saved out of funds given her by the husband for household expenses between $20,000 and $30,000 which she had expended for her support and that of the children since separation, it was decreed that he reimburse the wife for $8,156.61 spent for the minor children and $11,716 accrued temporary maintenance still due. Although these decrees of the lower court, totaling $19,000, were allowed to stand, the supreme court felt that to add greater burdens by increased provision for separate maintenance would be futile, although it left the door open for further increase if the husband's financial position would permit it.

No dower rights of the wife in her husband's property are disturbed by a final decree in Illinois. The doctrine of the *Decker* case, that of an accounting between the parties on separation as to the equitable interests they may have in property, insofar as the Illinois courts are concerned rests upon the equitable doctrine of rescission and restoration of the wife's

107. 144 Ill. 588, 598, 600, 601, 32 N. E. 206, 207 (1892).
108. 54 N. E. 587, 602 (Ill. 1892).

independent status as to her existing equitable property interests, and not, as other states have rather superficially supposed, upon any theory of final determination and settlement of her dower rights in the husband's property by virtue of the marriage. The distinction of the *Decker* case by the Ohio court in *Coleman v. Coleman*[109] was apparently based upon such misconception of the Illinois doctrine. The result in the *Coleman* case, however, was exactly *contra* to the New Jersey decisions. In New Jersey, after determining that no division of the existing equities should be made between husband and wife as an incident to a decree for separate maintenance on the grounds that (a) the action being temporary, the door to reconciliation should not be closed, and that (b) separation should not be made attractive to the wife, the decisions state that generally smaller amounts should be granted for separate maintenance than for permanent alimony incident to divorce, and that full credit should be given the husband for any separate income or earning power of the wife.[110]

In the *Coleman* case the lower court found that the wife was employed as a school-teacher, receiving ample income therefrom for her support, and for this reason refused to award her any separate maintenance. There were no children, she was in good health, earning $138 per month as against the husband's salary of $275. On appeal, the judgment was reversed and remanded, the court stating that she was entitled to something, in order to prevent the husband from profiting by his own wrong, although her income should exert a moderating influence.

In Missouri, these questions have not been litigated. The Missouri statutes[111] go far to provide the wife a remedy to obtain an accounting and division of her "existing equities" by statute, though the statutory provisions are not as broad as the equity powers of the Illinois courts under the *Decker* case *supra*. The early Missouri case of *McGrady v. McGrady*[112] certainly indicates that Missouri at that time was in accord with the early common law, inasmuch as the wife's allowance was reduced as excessive in view of her good health and the fact that she had been accustomed to labor, and that she should not be maintained in idleness. Whether Missouri courts will give full weight to a wife's separate income, or treat it only as a moderating factor, whether a division of "existing" equities in her husband's

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109. 37 Ohio App. 474, 175 N. E. 38 (1930).
110. See also Clisby v. Clisby, *supra* note 80; Coe v. Coe, *supra* note 103.
111. Mo. Rev. Stat. (1939) § 3376-3390, *supra* note 3.
112. 48 Mo. App. 668 (1892) *supra* note 67.

property would be granted in the absence of specific statutory provision, solely by virtue of the wide discretionary provisions of § 3376, or as a "collect" from all the provisions of Chapter 21, whether the standard of living existing at the time of separation would be strictly applied as in New Jersey and Massachusetts or modified to permit increases as indicated in Illinois, whether potential earning capacity of both husband and wife would be freely recognized, or restricted, are all questions which will depend in large measure upon the individual circumstances of the case of first impression which requires a decision in Missouri.

C. *Lump Sum Maintenance*

The fixing of a lump sum for separate maintenance, of course, runs into the objection with renewed force and vigor that no final settlement of property rights between the parties is accomplished thereby. Only in exceptional circumstances will the courts even consider such relief. In Missouri, *Wagoner v. Wagoner*,[113] is the leading decision granting such relief. Lump sum maintenance has been awarded in Missouri on only one prior occasion (*Pickel v. Pickel*[114]). In the *Wagoner* case there was an involved and tangled history of litigation between the parties. Both spouses had reached an advanced age. Both parties admitted there was no hope of reconciliation.

To provide a permanent solution to this unhappy and vexatious litigation (more than nineteen suits had been filed at various times between the parties during the past ten years), the trial court granted lump sum maintenance to the wife in the amount of $15,000. This amount, giving the wife the benefit of much disputed testimony, equalled approximately half the husband's net worth. Although this amount was tendered into court by the husband, the wife, on appeal, contested the jurisdiction of the court under the Missouri statutes to grant such relief. The supreme court, *en banc*, affirmed the judgment under the particular facts of this case, saying:

> ". . . In this case we have a broad discretionary statute pertaining to maintenance, which in law is but a divorce from bed and board. The age of the parties, their financial conditions, and the reiterated fact from the wife, as well as the husband, that there could be no reconciliation, presents a state of facts authorizing a judgment in gross, such as was entered here. It is not necessary to discuss what would be the effect of this decree should the

113. 287 S. W. 654 (Mo. 1924).
114. 291 Mo. 180, 236 S. W. 287 (1921).

husband predecease the wife. He has accepted the decree, and, so far as the wife is concerned it should be and is affirmed, . . ."[115]

In considering the advisability of such a decree, from the wife's point of view, recent changes in the provisions of the federal income tax must be considered.

D. *Relevant Provisions of the Federal Internal Revenue Code*

1. Statutory Provisions

It is provided by § 22(k), Internal Revenue Code, that a wife who is legally separated from her husband must include in her gross income periodic payments received from her husband under a decree of separate maintenance imposed upon him in discharge of his general obligation to support by such decree, or under a written instrument incident to such decree of separation. If the periodic payments are made by the husband out of income, they are deductible from his gross income by virtue of § 23(u).[116] If periodic payments are made by the husband by virtue of property transferred in trust, or otherwise, the amounts received by the wife are not included in the husband's gross income in the first instance; and thus deduction need be permitted. If, however, the decree of separate maintenance provides for a lump sum settlement, payable in one amount, such payment is not included in the wife's gross income. If paid in installments, the period for payment must exceed 10 years, and no more than 10% of the principal sum can be included in the wife's gross income or deducted from gross income by the husband, in any one taxable year. Also the amounts so included, and/or deducted, must actually be paid within the taxable year concerned. Section 22(k) also provides that the amount of such payments specified in the decree to be for support of minor children shall not be taxable to the wife. The regulations indicate that in the absence of such specific provision in the decree, the whole amount paid will be included in the wife's gross income. When less than the amount due is paid, where a specific amount is prescribed for support of minor children, the amount paid will be presumed, for income tax purposes, to be a payment for support of minor children.

2. Interpretation and Analysis

There are, therefore, at least four distinct income tax problems which must be borne in mind in considering the terms to be included in any ar-

115. Wagoner v. Wagoner, 267 S. W. 654, 658 (Mo. 1924).
116. INT. REV. CODE § 23 (u).

rangement for separate maintenance: (a) A mutual and voluntary separation, even though accompanied by a written agreement under which periodic payments in satisfaction of the husband's general obligation to support are made, where no decree of court for legal separation has been obtained, will not invoke § 22(k). Such payments remain taxable income to the husband and must be included in his gross income period. (b) A lump sum settlement, arising pursuant to a decree, unless payable in installments over a period exceeding ten years, will not invoke § 22(k). Such payments also remain taxable income to the husband and must be included in his gross income. Where unequal amounts are involved, even though installments are to be paid over a period exceeding 10 years, only an amount (actually paid during the year) not exceeding 10 per cent of the total principal sum can be made taxable to the wife in any one taxable year. (c) Where the decree for legal separation and separate maintenance specifies that a specific sum or portion (of either periodic payment or installment payments on a fixed principal sum) be made for the support of minor children, such amounts are not taxable to the wife; and where any portion of payments due are in default, amounts paid, for income tax purposes, will be presumed to be paid first for support of such minor children. Thus such amounts will not be taxable to the wife. Where the decree is silent as to the portion of such payments attributable to the support of minor children, although the total is said to be for support of both wife and minor children, the whole amount received will be taxable to the wife. (d) Where a written agreement is entered into incident to a decree of separate maintenance, if no provision for separate maintenance is, for that reason, included in the decree, in order to invoke the provisions of § 22(k), reference must be made by the court to the provisions of such written agreement in its decree of separate maintenance. Whether, in a case involving a husband in the high income tax brackets, it would be advisable for the wife to undertake responsibility for income tax payment on payments made for her support, is a question which must be reviewed in the light of all the other considerations surrounding the situation of the parties.

E. *Temporary Maintenance*

The wife, in an action for separate maintenance, will be entitled to a reasonable allowance for attorney's fees, suit money, and support during the pendency of the action, by reason of the trial court's inherent equity power to award temporary support, notwithstanding the fact that there is no

statutory authority therefor; provided the action is brought in good faith, and she can make out a *prima facie* case showing the essential elements of her cause of action.

In the early case of *Long v. Long*,[117] the Kansas City Court of Appeals, on an appeal from an order granting temporary support to the wife during the pendency of her suit for separate maintenance, overruled the contention that temporary relief could be granted only incident to a divorce, holding that the court had the inherent power, even without statute, to force the husband to provide the wife with temporary support and means to prosecute her suit. The court said that the same reasons which require the husband to pay for the support and maintenance of the wife during the pendency of a suit for divorce and to provide her the means with which to conduct it apply equally to a suit for separate maintenance. It was said that to refuse to allow the wife reasonable support *pendente lite* would, in many cases, be to deny her the right to prosecute her suit altogether. The court added that the wife will be presumed to be entitled to support until it is shown by the result of the trial that her claim has been forfeited.

To the same effect is the ruling in the recent case of *Meredith v. Meredith*.[118] There the court said that although there is no express statutory authorization for the court, in a separate maintenance action, to award the wife temporary support, suit money, and the like as in the case of a divorce action, such authority nevertheless exists, being inherent in the equity powers of the court with respect to such a proceeding.[119]

But in any case, her action must be brought in good faith, and the wife must, at the hearing on her motion, be able to at least make out a *prima facie* case. Thus, in the case of *McPheeters v. McPheeters*,[120] the Springfield Court of Appeals reversed the trial court's order for temporary maintenance, *pendente lite*, on the ground that the wife's evidence did not establish a *prima facie* case. The court stated that although the wife was required, on a motion for temporary maintenance and suit money, to do no more than establish a *prima facie* showing that she was entitled to the relief asked in her petition, yet it must at least be shown upon hearing for such

117. 78 Mo. App. 32 (1899).
118. 151 S. W. (2d) 536 (Mo. App. 1941).
119. See also: Behrle v. Behrle, 120 Mo. App. 677, 97 S. W. 1005 (1906); Dorrance v. Dorrance, 257 Mo. 317, 165 S. W. 783 (1914); Klepper v. Klepper, 193 Mo. App. 46, 180 S. W. 461 (1915); Sams v. Sams, 232 Mo. App., 106 S. W. (2d) 524 (1937).
120. 227 S. W. 872 (Mo. App. 1921).

relief that there is probable cause for the bringing of suit and that the husband has sufficient means to furnish support.

It has been held, however, in the case of *Nolker v. Nolker*,[121] that in the absence of affirmative proof to the contrary, the wife will be entitled to a *prima facie* presumption of good faith in bringing the suit. The court pointed out that the proceeding on a motion for temporary maintenance and suit money is entirely separate from the controversy on the merits.

The allowance or disallowance of temporary maintenance, *pendente lite*, and the amount of the award, is a matter which rests very largely in the sound discretion of the court, and where it is shown that the wife has substantial means of her own, it has been held that she is not entitled to such relief. In *Robertson v. Robertson*[122] the Kansas City Court of Appeals said that where it appears that the wife has sufficient means of her own, it would be an abuse of discretion for the court to allow the wife such alimony. In that case, however, although the wife did have some income, her resources were by far inferior to those of her husband. For this reason, the court affirmed an allowance made by the trial court, holding that the wife should not be required to dispose of all her available personal property for the temporary purpose in view. The court said that if the defendant had been a man of small means, and required by reason of the allowance of alimony *pendente lite* to economize in order to support himself, the wife's motion would have been denied.

The most accurate statement of the rule is found in the leading Missouri case of *Penningroth v. Penningroth*[123] in which the St. Louis Court of Appeals, after pointing out that the financial emancipation of women under modern statutes had removed the basis on which the absolute right of the wife to such relief had rested at the early common law, held: "Hence the right of the wife to alimony pending an action for divorce is no longer absolute. If she has sufficient property in her own right to conduct or defend the action and to support herself during its pendency, there can be no reason for imposing this burden on her husband." This case has been followed and reaffirmed in Missouri in numerous cases.[124]

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121. 226 S. W. 304 (Mo. App. 1920).
122. 137 Mo. App. 93, 119 S. W. 533 (1909).
123. 71 Mo. App. 438 (Mo. App. 1897).
124. Lambert v. Lambert, 109 Mo. App. 19, 84 S. W. 203 (1904); Stark v. Stark, 115 Mo. App. 436, 91 S. W. 413 (1905); Rutledge v. Rutledge, 177 Mo. App. 469, 119 S. W. 489 (1909); Hedrick v. Hedrick, 157 Mo. App. 633, 138 S. W. 678 (1911).

V. Penal Statutes

There are two statutes in Missouri which prescribe punishment of wife desertion combined with failure to support as a criminal offense. As in the case with all such statutes, they are strictly construed, and their application closely limited.

A. *Abandonment of Wife and Children as a Criminal Offense*

The provisions of Mo. Rev. Stat. (1939) § 4420 set out in the margin hereinafter[125] provide that a husband who shall abandon his wife, and/or minor children, leaving them in the State of Missouri, and shall fail, neglect or refuse to provide them with proper food, clothing or shelter, shall be punished by imprisonment in the county jail for not more than one year, or by a fine not exceeding $1,000, or both. To authorize a conviction for wife desertion, the state must show every constituent element of the offense: Criminal intent, willful desertion and failure of support, absence of good cause, defendant's ability to provide, and that the wife was left destitute without means of support.[126] It is particularly important that the state show that the wife and/or minor children are actually in need of necessary food, clothing and lodging.[127] The husband will not be punished if these things are actually received, regardless of the source of supply although supplied through the efforts of the wife, or by relatives.[128]

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125. "If any man, shall, without good cause, abandon or desert his wife or shall fail, neglect or refuse to maintain and provide for such wife, or if any man or woman shall, without good cause, abandon or desert or shall, without good cause, fail, neglect or refuse to provide the necessary food, clothing or lodging for his or her child or children born in or out of wedlock, under the age of sixteen years, or if any other person having the legal care or custody of such minor child, shall without good cause, fail, refuse or neglect to provide the necessary food, clothing or lodging for such child, or if any man shall leave the state of Missouri and shall take up his abode in some other state, and shall leave his wife, child or children, in the state of Missouri, and shall, without just cause or excuse, fail, neglect or refuse to provide said wife, child or children with proper food, clothing or shelter, then such person shall be deemed to have abandoned said wife, child or children, within the state of Missouri, he or she shall, upon conviction, be punished by imprisonment in the county jail not more than one year, or by fine not exceeding one thousand dollars ($1,000) or by both such fine and imprisonment. No other evidence shall be required to prove that such man was married to such wife than would be necessary to prove such fact in a civil action."

126. State v. Kahlert, 260 S. W. 519 (Mo. App. 1924).

127. State v. Russell, 102 S. W. (2d) 727 (Mo. App. 1937); State v. Higbee, 110 S. W. (2d) 789 (Mo. App. 1937); State v. Ball, 157 S. W. (2d) 262 (Mo. App. 1942).

128. See State v. Vogel, 51 S. W. (2d) 123 (1932); State v. Thornton, 232 Mo. 298, 134 S. W. 519, 32 L. R. A. (NS) 841 (1911).

B. *Husbands Not Supporting Families as Vagrants*

Section 4723 of the Missouri statutes, quoted below,[129] provides that every able-bodied married man who shall neglect or refuse to provide for the support of his family, shall be deemed a vagrant, and shall be punished by imprisonment in the county jail for not less than twenty days, or by a fine not less than $20 or both. It has been held that this statute, proclaiming an able-bodied husband who fails to support his family a vagrant, must be construed in the light of the clauses with which it is associated, *i.e.*, the punishment of loiterers without visible means of support, gamblers, and persons found tramping or wandering from place to place.[130]

From these authorities, it would appear that no husband can be prosecuted for wife desertion under § 4420 where the wife has substantial means of her own. Nor could a husband failing to support his family be convicted as a vagrant, under § 4723, where possessed of substantial means for his own support.

129. "Every person who may be found loitering around houses of ill-fame, gambling houses, or places where liquors are sold or drank, without any visible means of support, or shall attend or operate any gambling device or apparatus, or be engaged in practicing any trick or device to procure money or other thing in value, or shall be engaged in any unlawful calling whatever, and every able-bodied married man who shall neglect or refuse to provide for the support of his family, and every person found tramping or wandering around from place to place without any visible means of support, shall be deemed a vagrant, and, upon conviction thereof, shall be punished by imprisonment in the county jail not less than twenty days, or by fine not less than twenty dollars, or by both such fine and imprisonment." Mo. Rev. Stat. (1939) § 4723.

130. State v. Hagen, 130 S. W. (2d) 250 (Mo. App. 1939); State v. Padberg, 115 S. W. (2d) 72 (Mo. App. 1938).