Volume 65
Issue 4 *Dickinson Law Review - Volume 65, 1960-1961*

6-1-1961

Pennsylvania Domestic Relations Cases of 1960

Charles E. Torcia

Samuel A. Litzenberger

James R. Dailey

JUDICIAL HIGHLIGHT

PENNSYLVANIA DOMESTIC RELATIONS CASES OF 1960

BY CHARLES E. TORCIA*

Assisted by Samuel A. Litzenberger and James R. Dailey

COMMON LAW MARRIAGES

In holding that there was inadequate support in the record for a common law marriage, especially since such a finding would have had the effect of bastardizing children of other parties, the supreme court in *In re Manfredi*,[1] adopting the language of *Baker v. Mitchell*,[2] noted that since common law marriages are a "fruitful source of perjury and fraud," they are to be "tolerated, not encouraged," and the "professed contract should be examined with great scrutiny."

In *In re Wagner's Estate*[3] the question before the court was whether the parties, divorced after a marriage of some twenty years, had thereafter entered into a valid common law remarriage. In resolving the issue in the affirmative, the court observed that in the case of a remarriage following divorce "the law's role of mere toleration of the common law relationship should be reversed and the status of remarriage favored, even if acquired with common law informality."[4] If, it was felt, "the law allows a spouse, in the generous amount of nine reasons, to establish by divorce that the marriage was a mistake, it should be at least equally eager to let both spouses discover that their divorce was also a mistake."[5]

The claimant in *Mainor v. Midvale Co.*[6] alleged that she was the common law wife and widow of the decedent. A common law marriage was asserted as of 1940, when the parties commenced to live together. However, this could only have been a meretricious relationship because decedent then had a legal wife and had not obtained a divorce until 1953. Pointing to the removal of the impediment, claimant amended her petition to claim a common law marriage as of 1953. In concluding that there was a failure of proof, the court declared: "Clear and convincing evidence" must be adduced

* Assistant Professor of Law, Dickinson School of Law; L.L.B., St. Johns University School of Law.

1. 399 Pa. 285, 159 A.2d 697 (1960).
2. 143 Pa. Super. 50, 54, 17 A.2d 738, 741 (1941).
3. 398 Pa. 531, 159 A.2d 495 (1960).
4. *Id.* at 533, 159 A.2d at 497.
5. *Id.* at 533, 534, 159 A.2d at 497.
6. 192 Pa. Super. 347, 162 A.2d 27 (1960).

to alter a relationship which was meretricious in its inception and where the sole evidence of a change in status is the testimony of the claimant—"a very much interested party"—such evidence must be viewed "with caution and scrutiny."

CUSTODY

In *Commonwealth ex rel. Willouer v. Willouer*[7] a female child, seven years of age at the time of the hearing, was the subject of a custody proceeding between her parents. It appeared that when the child was a mere babe-in-arms the parents quarreled about the mother's late hours and her neglect of the child. As a result of the bickering, she left the home, and the father and child went to live with his parents. Later the parties reconciled, but the mother left again. She visited the child very infrequently and for a period of one year no one, including her family, knew of her whereabouts. She subsequently sustained an injury and returned to the home of her parents. This custody proceeding followed. The court alluded to the well-settled principles that the paramount consideration is the welfare of the child and that usually the needs of a child of tender years are best served by her mother "unless there are compelling reasons to the contrary." In light of the attending circumstances—especially the lower court's belief that when the mother's injury was finally healed, "she would begin traveling again"—the court was of the view that "compelling reasons" did exist for a finding that the welfare of the child would best be served by awarding custody to the father. This was so even though the child indicated a preference to be with her mother. The child complained that "she was not allowed by her father to play outdoors or indoors at all the time she desired and that she was disciplined by him." The court felt that "it would be normal for a child of this age to object to discipline"; and, since "the child has been deprived of her mother's care and attention," she is "unable to make any comparison between the treatment she has received from her father and what she might receive from her mother."

In *Commonwealth ex rel. Horan v. Horan*[8] the parties, married in 1942, had four children. In March 1959, the wife left her husband and, without his knowledge, took the children with her to her brother's home in Detroit, Michigan. In April 1959, the husband went to Detroit and, without his wife's knowledge, took the two younger children (aged 11 and 8) back to Pennsylvania. This custody proceeding followed involving only the latter two children. The father was employed as an engineer and the mother managed their "gift shop." It seems that the latter enterprise demanded the employment of a male helper since most of the inventory consisted of fire-

7. 192 Pa. Super. 265, 162 A.2d 56 (1960).
8. 193 Pa. Super. 193, 163 A.2d 673 (1960).

place accessories requiring installation. The father became jealous of the employee's relationship with his wife and went to great ends to spy upon them. On the basis of his testimony, the court concluded: "Possibly, both of the parties to this action were guilty of indiscretions, but there is nothing from which it could be concluded either committed adultery." Nevertheless, the mother made a "favorable impression" upon the hearing judge; the father did not. The appellate court described the father as a "suspicious, self-righteous, deceitful, selfish, mean man" and alluded to the following incident: The father, fearing his wife had served him poisoned food, would trade plates with one of his children. The court noted that if his fear was not genuine, "it was contemptible for him to suggest to the children of tender age that their mother was a potential murderer"; and, if genuine, "what manner of man is he who would give food he thought tainted to his children and risk their eating it in order to assure his personal safety?"[9] Feeling that such was an "exhibition of lack of love and consideration for a child," a majority of the court found no reason to conclude, in light of the children's welfare, that the lower court erred in awarding custody to the mother. The father, however, was given the right to have the children during July, August, and part of the Christmas holidays.

In *Commonwealth ex rel. Bailey v. Sumner*,[10] Patricia, 13 years of age at the time of the hearing, was the subject of this custody proceeding. Both of her parents, after a divorce, had remarried and the child had been living with her paternal grandmother and stepgrandfather. After the father's death, the mother sought custody of the child. The court noted: The child is "happy and contented in her grandmother's home"; the grandparents provide the child "with a good home in all respects and are financially able to care for her"; there was no evidence of the "financial circumstances" of the mother's husband; for a period of almost three years, "the mother has not visited her daughter or communicated with her in any way, although she lived only a few miles away"; the child is "not of tender years"; and, the child's preference is that "she be allowed to continue her home with her grandparents." The appellate court agreed with the lower court "that all considerations of the welfare of the child dictate that she should remain with her grandparents." However, visitation, originally limited to the summer months, was modified to provide for the right of week-end visitation throughout the year. The court did so for the following reasons: "If a mother desires to win back the love of a child she has lost temporarily by her inaction or indifference, we should not stand in the way"; and, the child "has reached an age in life where the advice of a mother would be

9. *Id.* at 198, 163 A.2d at 676.
10. 193 Pa. Super. 79, 163 A.2d 677 (1960).

most beneficial to her as she grows from childhood to womanhood and some of these problems can be better handled by a mother rather than the grandmother."[11]

The custody proceeding in *Commonwealth ex rel. Wagner v. Wagner*[12] involved a three year old boy whose father and mother were living in the homes of their respective parents. While it appeared that the living quarters of the mother "are more satisfactory for the rearing of the child," the lower court entertained no doubt "that the welfare of the child would be best served by permitting him to remain with the father." It was noted: The mother had no real affection for her husband; "he is in better balance, emotionally and morally, and possesses a greater amount of common sense"; she made threats to commit suicide and "take the baby with her"; she was interested in another man and frequently the child was "moved about in automobiles" with the mother "to facilitate clandestine meetings"; also, while driving, she had been involved in several automobile accidents which "posed an additional threat to the child's safety." The appellate court agreed with the lower court's finding and permitted custody to remain in the father.

The parties in *Commonwealth ex rel. McLeod v. Seiple*[13] were married in 1951 and had, in 1954, a female child who was five years of age at the time of the hearing. In 1956 the husband obtained a divorce and custody of the child was awarded to the wife. Upon her remarriage later in the same year, she transferred custody to the father. A second divorce transpired within two years and she wed, for the third time, in 1959. The child's father had also remarried in 1957. The custody proceeding was between the child's parents. Both the child's father and stepmother were employed and the child lived part of the time each day in the nearby home of her great grandmother. The arrangement seemed quite satisfactory and the child was "well developed, healthy and well adjusted." While the court took cognizance of the principle that a child of tender years should ordinarily be placed with her mother, it felt that the mother's "marital history tends to disclose an instability of personality which speaks for itself," and that "the best interest and permanent welfare" of the child "will be best served if she remains in her father's care."

In *Commonwealth ex rel. McKee v. Reity*,[14] the parties were married in 1944 and had three children. In 1950, the husband obtained a divorce on the ground of indignities. After a second marriage ended in divorce in 1956, the wife again married in 1957. Two of the three children have continuously resided with her. The husband remarried in 1952 and it

11. *Id.* at 84, 163 A.2d at 680.
12. 193 Pa. Super. 40, 163 A.2d 708 (1960).
13. 193 Pa. Super. 131, 163 A.2d 912 (1960).
14. 193 Pa. Super. 125, 163 A.2d 908 (1960).

appears that "it has been a happy marriage." The subject of the proceeding is the third child, a male, fourteen years of age, whose first two and one-half years of life were spent with his mother. Thereafter, the child lived "continuously and without interruption" with his paternal grandparents, during which time, "he had little or no contact with his mother." The child's father, his wife and family live within a short distance of "the grandparents' home and visit back and forth daily." The custody proceeding was between the child's mother and his paternal grandparents—the latter's claim being supported by the child's father. The mother urged that a natural parent has a superior "right" to custody, and that "the children should be together." These factors, the court observed, are entitled to considerable weight, but must yield to the best interests and welfare of the child. Thus, the court ruled that the boy should remain with his grandparents inasmuch as he "has known no other home since he was two and one-half years old," and has himself "expressed an emphatic desire to remain with his grandparents." It was also emphasized by the court that the child was not actually being "separated entirely from parents and family. He associates constantly with his father, and with the father's children by his second wife."

The parties in *Commonwealth ex rel. Logue v. Logue*[15] were married in 1950 and had three children. In 1959 the wife obtained a divorce and custody of the children. Subsequently, the father remarried. In this custody proceeding (involving only two of the children, two boys, aged 9 and 7), the lower court, "Being convinced of the superior home life the children would enjoy in their father's household," transferred custody of the two children to the father. As the appellate court viewed it, two "diametrically opposed" doctrines—"tender years" and "economic benefit"—would have to be weighed to determine which was "the most beneficial to the welfare of the children."[16] It appeared that the mother was employed, but her working hours "very closely" approximated the school hours of the two boys with the result that she was "with these children as much as a normal non-working mother would be." Although the mother had given birth to an illegitimate child, the court observed that "A lapse from moral standards is not a controlling factor where the parent is not otherwise at fault."[17] There was no improper behavior after this lapse, and no attack had been made "upon the mother's present moral qualifications as a parent." According to the appellate court, the court below awarded custody of the children to the father not for any "neglect, misconduct, incompetence" or other fault of the mother, but rather because of the "relative economic advantages and

15. 194 Pa. Super. 210, 166 A.2d 60 (1960).
16. *Id.* at 212, 166 A.2d at 62.
17. *Id.* at 213, 166 A.2d at 63.

superior environment of the father's home."[18] This, reasoned the court, was an insufficient motive to deprive a mother of the custody of children of tender years. Accordingly, it felt that the children should remain with the mother "until such time as they are no longer covered by the 'tender years' doctrine and can reasonably express a preference of their own."[19]

VISITATION

Michael Dratch, six years of age, was the subject of the proceeding in *Commonwealth ex rel. Goodman v. Dratch*.[20] Subsequent to the death of his mother, the child lived with his maternal grandparents, but upon the father's remarriage about a year later, he moved into the home of his father. Michael was "forbidden the sight or sound of his grandparents—even their gifts." The grandparents obtained an order providing for visitation "between the hours of 2:00 p.m. and 4:00 p.m. every third Saturday." On appeal, the order was sustained on the theory that it "will be a help and not a hindrance in the development of Michael's promising personality." The court cautioned the grandparents, however, "that they must not say or do anything which might be considered by the child as detrimental to his father and stepmother."

In *Commonwealth ex rel. English v. English*,[21] the parties were married in 1948 and had three male children (nine, seven, and four years of age, respectively, at the time of the hearing). Since 1957 the parties had been separated. Various proceedings culminated in the order in question: The mother was awarded custody of the children, with "visitation privileges or temporary custody" to the father every weekend (on Saturday from 9 a.m. to Sunday at 7 p.m.). The mother challenged the visitation right. The lower court, in refusing to modify the weekend visitation rights of the father, was apparently influenced by the "mother's apparent refusal to abide by a premarital agreement that the children be raised in the Roman Catholic faith and her apparent wish that they be raised in the Methodist faith."[22] The lower court indicated that it would have modified "except that it felt that the religious training of the children should be entrusted to the father." The appellate court felt that the lower court "gave undue weight to the antinuptial contract as to religious unbringing." Religion, the court observed, is an "important matter," but it should not be determinative. The children, the court added, "will not lack religious training under the general custody granted the mother"; and the "welfare of the children plainly is

18. *Id.* at 216, 166 A.2d at 64.
19. *Id.* at 217, 166 A.2d at 64.
20. 192 Pa. Super. 1, 159 A.2d 70 (1960).
21. 194 Pa. Super. 25, 166 A.2d 92 (1960).
22. *Id.* at 27, 166 A.2d at 93.

not served where custody is substantially divided, under the circumstances, between two incompatible parents."[23] Another serious problem was pointed up: The father, each weekend, had to "travel by bus from New York City to Wilkinsburg, Pennsylvania, pick up the children and transport them about forty miles to his sister's home in Ambridge." According to the mother, when the children return to her after two days with the father, "they cannot sleep or eat properly." Hence, the court reduced the visitation rights of the father to only one weekend a month.

SUPPORT

A father, who was ordered to pay $50 per month for the support of his two children, contended, in *Commonwealth ex rel. Spitzer v. Spitzer*,[24] that there was no authority for the order in that "the record is devoid of evidence as to defendant's earnings and earning ability." The father, "arguing that an order will hamper and hinder him in his profession as a real estate broker," sought to avoid any order of support "by refusing to testify or give any information concerning his income or his estate." In answering the father's argument, the court declared: "detailed evidence of the earnings of an uncooperative self-employed parent attempting to avoid an order of support for his children is neither possible nor required."[25] The law never intended, the court added, "to establish such technical roadblocks in the enforcement of so basic a natural law as the duty of a father to support his children."[26] Accordingly, although the evidence of the father's earning capacity was meager, there was enough evidence for the court to conclude "that this defendant was of sufficent means and ability to support his children to the extent of the order."

In sustaining an order for the support of defendant's wife, the court, in *Commonwealth ex rel. Taylor v. Taylor*,[27] saw fit to explain: "No hard and fast rule can be enunciated which will apply in all cases. The one-third rule is to be used only to determine the ceiling or lawful maximum of support for a wife but is not intended as a measure of what will furnish adequate support and maintenance."[28] Within the one-third limit, "the court has wide discretion so long as the amount awarded is not grossly inadequate under all the circumstances."

---

23. *Id.* at 28, 166 A.2d at 93, 94.
24. 192 Pa. Super. 441, 161 A.2d 632 (1960).
25. *Id.* at 444, 161 A.2d at 633.
26. *Ibid.*
27. 193 Pa. Super. 519, 165 A.2d 394 (1960).
28. *Id.* at 523, 165 A.2d at 396.

ADOPTION

Where the father persistently disclaimed the child's paternity and repeatedly declared his reluctance to have her care, his consent to the child's adoption was held unnecessary in *In re Adoption of Crozer*.[29]

In *In re Adoption of Johnson*,[30] Mark, a nine year old male, was the subject of an adoption to which his father refused to consent. It appeared that Mark, born in 1950, was one of nine children. In 1953, the mother charged her husband with "neglect and refusal to support their children." A support order followed. In 1955, the father abandoned his wife and children. Subsequently, because living conditions in the Johnson home were unbearable, the Juvenile Court placed the children in the custody of their paternal grandmother with whom the father had been living. The task of caring for nine children was well-nigh insuperable for the grandmother who was seventy years of age. The father did not assist in any manner and later vacated the home. In June 1956 the grandmother was forced to make arrangements to place her son's children with various families. Mark thus found his way into the home of the Greens, who adopted him in 1959. At no time did the father support Mark: Indeed, he was $6,464 in arrearages on the order to support all his children. Rarely had the father "stopped by the Green home to talk to Mark" and on only two occasions did he bring gifts. In sustaining the decree of adoption, the court declared: "It would probably not be impossible, but it would require a rather fertile imagination to conjure up a case where the facts of abandonment are more clearly and decisively established than they are in this case."[31] Hence, the father's consent to the adoption was held unnecessary.

LOSS OF CONSORTIUM

In *Nauberg v. Babowicz*,[32] the supreme court, for the first time, was confronted with the question whether a wife has a cause of action for the loss of her husband's "society, service, and sexual companionship" where the husband's injuries have been occasioned by the negligence of a third party. A majority of the court answered the question in the negative. Its reasoning may best be pointed up by the language of the court in *Mlynek v. Yarnall*,[33] to which the supreme court alluded with approval:[34]

> If, as contended, the husband's right to recover for loss of consortium is based upon the wife's lowly status as a servant or as a chattel,

29. 394 Pa. 493, 161 A.2d 17 (1960).
30. 399 Pa. 624, 161 A.2d 368 (1960).
31. *Id.* at 627, 161 A.2d at 361.
32. 401 Pa. 146, 162 A.2d 662 (1960).
33. 19 D.&C.2d 333 (Pa. 1959).
34. *Id.* at 335.

> then to grant the wife a right to so recover does not lift the wife to the status of her husband, but it reduces the husband to the outworn concept of the wife's lowly status. Rather than grant to the wife the right to damages for loss of consortium, the logical solution would be to terminate the husband's claim on the theory that the wife is no longer the servant and chattel.

The dissenting justice felt that the majority decision "has taken all the romance out of married life; it has made of a married couple a simple business partnership. It says in effect that companionship means nothing, love is of no value, society is not recognized, the tender affection between husband and wife has no place in the chronicles of the law."[35]

DIVORCE

Adultery—Defense of Insanity

The husband, in *Manley v. Manley*,[36] had obtained a divorce on the ground of adultery. On appeal, the question presented was whether the wife's insanity could be a defense. The superior court noted that *Matchin v. Matchin*,[37] decided by the supreme court in 1847, was authority for the proposition that "a wife's insanity is not a defense to an action against her for divorce on the ground of adultery"—although "insanity *might* be a bar to divorce at the suit of the wife." The reason for the distinction, as pointed up in *Matchin*, was that the husband's "transgression cannot impose a supposititious offspring on the wife"—it is otherwise where the wife is the offender. After noting that the *Matchin* rule has, through the years, been subjected to severe criticism, the superior court declared that it will not "blindly follow a rule which has failed to withstand the light of judicial and scholarly examination. If there was any reason for the rule in the light of the customs and thoughts of 1847, it is no longer evident in the light of 1960 thinking."[38] As the court viewed it, "the gist of the offense of adultery is not the possibility of illegitimate children but the unfaithfulness to the marriage vow."[39] If, then, "the wife does not voluntarily indulge in sexual intercourse," but it occurs rather "by advantage of her insanity," she cannot be said "to be guilty of any violation of her marital obligation."[40] Accordingly, the court related that insanity "is a defense to an action for divorce brought against a wife on the ground of adultery" if it appears that "she did not know the nature and consequences of her acts, or have the ability to

35. Nauberg v. Babowicz, *supra* note 32 at 172, 162 A.2d at 674.
36. 193 Pa. Super. 252, 164 A.2d 113 (1960).
37. 6 Pa. 265, 97 Am. Dec. 466 (1847).
38. Manley v. Manley, *supra* note 36 at 263, 164 A.2d at 119.
39. Manley v. Manley, *supra* note 36 at 264, 164 A.2d at 120.
40. *Ibid.*

distinguish between right and wrong."[41] The court, however, said there was "insufficient evidence from which to find that she was insane when she committed adultery"—and it affirmed the decree of divorce. It should also be noted that the superior court, after admitting that "we are required to follow the pronouncements of our highest court," observed that it "has had jurisdiction over divorce appeals for 65 years." It added that the *Matchin* rule "was pronounced many years ago, and there is authority for our ignoring an ancient higher court rule which is unreasonable and unjust by all known standards, and which has frequently been examined and universally rejected by legal authorities and by courts in other jurisdictions."[42]

Condonation

A husband, whose wife had obtained a decree of divorce, objected to the "final rule" in *Schwartz v. Schwartz*[43] on the ground that the parties had become reconciled after the master's hearing and remained reconciled until the parties again separated without the husband's fault. The court was of the view that the case should be remanded to determine whether the husband had been guilty of any conduct after the reconciliation "which revealed actual mistreatment of the plaintiff or caused a reasonable apprehension thereof." The court took occasion to repeat what it said in *Greer v. Greer*[44] that "condonation" is conditioned "on the future good conduct of the offending spouse," and a subsequent offense on his part "revokes or nullifies the condonation and revives the original offense as a cause for divorce."[45] And, in order to have such effect, it is not necessary that the "fresh acts of ill-treatment" themselves constitute a ground for divorce.

Desertion

In *Rhine v. Rhine*,[46] the husband obtained a divorce on the ground of desertion. He demonstrated (and his story was believed) that the parties were married in 1918; that when the parties were living in Baltimore, Maryland, in June 1941, he was offered a position in Coatesville, Pennsylvania "in a capacity which would represent a substantial promotion and which held out prospects of future advancement, not attainable in Baltimore." His wife refused to accompany him. He, nevertheless, accepted the position and moved to Coatesville. On weekend visits to Baltimore, he tried to persuade his wife to join him but she "remained steadfast in her refusal to leave Baltimore." He arranged for an apartment in Coatesville "to accommodate

41. *Ibid.*
42. *Ibid.*
43. 193 Pa. Super. 628, 165 A.2d 127 (1960).
44. 178 Pa. Super. 643, 115 A.2d 794 (1955).
45. Schwartz v. Schwartz, *supra* note 43 at 630, 165 A.2d 128.
46. 192 Pa. Super. 146, 159 A.2d 544 (1960).

himself, his wife and son," and, in September 1941, again asked her to come with him. She said: "I'll leave you before I move to Coatesville or any other city other than Baltimore, Maryland." The date of this conversation was fixed—and the court accepted it—"as the inception of the statutory period of desertion." The advancement that he hoped for in Coatesville did not materialize, and he assigned as a reason "his inability to establish his family home" there. His employment then carried him to different places until eventually he came to live in Philadelphia. His wife during this time persisted in her refusal to leave Baltimore. The court held, adopting the conclusion of the master below, that the husband had a right, "for business reasons," to move to Coatesville in 1941, and it was the "duty of the defendant to abide by the decision." This, the defendant, "without cause or consent, failed to do and thereby deserted the plaintiff in 1941." The record, it was noted, disclosed "no reason or justification for her action." Hence, the court upon appeal concluded, "the husband had little choice as to the location of his home because of the nature of his employment and the wife was appraised of the situation."[47] This "refusal of the wife to join her husband," persisted in "for the statutory period," amounted to desertion.[48]

The husband was granted a divorce by the court below in *Decker v. Decker*[49] on the ground of constructive desertion. The court upon appeal—two judges dissenting—affirmed. It was shown that "the husband was driven by force and violence from the matrimonial abode by the wife and her mother." And, "he was also prevented from returning to that abode and this course of conduct was persisted in for a period exceeding two years." Noting that desertion may ensue, not only for an abandonment of the common home, but also "constructively," the court concluded that a case of "constructive desertion" was made out here, based upon two facts: "(1) that he was put out of the common abode by justifiable fear of immediate harm, and (2) that he was locked out against his will."[50]

In *Young v. Young*,[51] the husband, married in 1930 and the father of six daughters, was denied a divorce on the ground of desertion. Although he was "employed as a pipefitter making $4.15 per hour," the plaintiff gave his wife "only $20 per week for groceries," provided nothing for clothing, furniture and linens, and failed to arrange for necessary repairs to their dwelling. The home was in a "terrible" state of disrepair. Also, it was shown, he "devoted no time whatever to his wife and children, but admittedly spent his evenings" at a "club and in taverns." The wife testified that she "stuck

47. *Id.* at 151, 159 A.2d at 547.
48. *Ibid.*
49. 192 Pa. Super. 234, 160 A.2d 242 (1960).
50. *Id.* at 242, 160 A.2d at 247.
51. 192 Pa. Super. 484, 162 A.2d 45 (1960).

it out until my girls got old enough." In 1957, she and the three remaining unmarried daughters moved out and lived in the home of the husband's sister. The husband claims that his wife deserted in that he did not ask her to leave and that "the home is still open for her to return." The court, placing credence in the testimony offered by the wife and her witnesses found, in the words of the hearing judge, that "it was sufficient to warrant her setting up a home of her own." The court took occasion to observe that the burden is not upon the spouse who has left the marital domicile to prove consent, but rather the burden is upon the plaintiff-spouse to show that the withdrawal was wilful and malicious—i.e., without reasonable cause. Here, the court held—agreeing with the lower court—the wife would have been entitled to a divorce on the ground of indignities. In any event, the court declared, the husband failed to prove that he was an "innocent and injured spouse."

Indignities

The wife successfully made out a case of indignities under the head of "studied neglect" in *Schware v. Schware.*[52] The wife testified, and this was corroborated: "That her husband constantly ignored her and excluded her from his life, that he was in effect merely a 'roomer' in the house, that he would come home quite late at night or stay out all night," that "he drank to excess, and that his course of conduct throughout the marriage was a constant source of embarrassment and humiliation."[53] The failure of the marriage, according to the court, could be summarized in an excerpt from an autobiography written by their daughter as one of her high school assignments: "My Daddy and Mother should never have gotten married. They don't belong with each other. They have nothing in common and there is nothing there."[54] Indeed, the husband himself admitted that he "wasn't fair to her." His only contention was that his "admitted neglect" was not "so gross that an inference of settled hate and estrangement may be drawn." He argued that he was not guilty of indignities, but merely of "thoughtlessness and inattention to the needs of his wife." The court, alluding to the conduct complained of by the wife, rejected his plaint with the observation that his "actions speak more convincingly than his words," and demonstrated the requisite course of conduct "from which may properly be drawn an inference of settled hate and estrangement." The court agreed with the lower court that the neglect was not "casual," but the product of "deliberate choice," and hence the wife was the victim of the husband's "studied neglect" over a long period of years.

52. 192 Pa. Super. 166, 159 A.2d 568 (1960).
53. *Id.* at 168, 159 A.2d at 570.
54. *Id.* at 169, 159 A.2d at 570.

The husband in *Lombard v. Lombard*[55] attempted to show indignities by the following *inter alia*: His wife "ran up bills"; she borrowed money from the neighbors; he gave her his pay check and from it she gave him "enough money to pay for cigarettes, union dues and gas for his car." The wife denied the charges. The "main cause of their trouble," as the court viewed it, was "arguments about finances" and, apparently, the wife's extravagance. Although the husband's testimony was not corroborated, the court noted, "a decree may be supported by the testimony of the plaintiff alone."[56] Where, however, such testimony has been "contradicted and shaken by the defendant," a case "has not been made out."[57] In light of the fact that the wife caused some of her denials to be corroborated, the court apparently was of the view that the plaintiff had not sufficiently established his action. In any event, the court declared, "even assuming that the husband is correct, extravagance, unrelated to a wilful intention to humiliate," does not constitute "indignities."[58] In addition, the record disclosed that the husband was "highly excitable and of quick temper." Indeed, the wife testified, "on numerous occasions the husband beat her, strapped her and blackened her eyes"—this was corroborated by the testimony of a neighbor. Since the husband did not even deny the charges, the court therefore believed them to be the truth. On this basis, he was denied a divorce—he was not "an innocent spouse."

In *Reddick v. Reddick*,[59] the wife sought a divorce a mensa et thoro on the ground of indignities. According to her testimony, the indignities consisted of the following, *inter alia*: "She worked for 5 years; she lived with the husband's family for 13 years"; "he compared the wife unfavorably to other women"; "he called the wife vile, indecent and insulting names";[60] he "displayed a jealous disposition"; he "tortured their dog"; and he "was not sociable when the parties went out together."[61] The theory of the husband's case was that the wife's testimony "created a completely misleading picture of their marriage" and that "it related to incidents of a trivial nature." The court took occasion to note that the continued existence of the remedy of divorce a mensa et thoro "has been severely criticized," but that the burden of proof is the "same as that in an action for absolute divorce."[62] Based upon its review of the record, the court felt that there was little in the way of corroboration of the wife's testimony and that, as the court below

55. 194 Pa. Super. 162, 166 A.2d 98 (1960).
56. *Id.* at 164, 166 A.2d at 98.
57. *Ibid.*
58. *Id.* at 166, 166 A.2d at 99.
59. 194 Pa. Super. 257, 166 A.2d 553 (1960).
60. *Id.* at 259, 166 A.2d at 553.
61. *Id.* at 260, 166 A.2d at 554.
62. *Id.* at 261, 166 A.2d at 554.

observed, she herself was "vague, evasive, indifferent and unimpressive." Her story was "strongly shaken" on cross-examination: Indeed, she admitted that "she was as guilty as her husband of name-calling during the heat of argument." The appellate court, in agreement with the hearing judge that the testimony of the husband and his six witnesses was entitled to more credit, concluded that the wife had not made out a case of indignities. The court was not persuaded that "the cumulative effect of all the incidents of this long-continued union exhibits settled hate and estrangement on the husband's part, or demonstrates a cause of conduct which made the wife's life burdensome and her condition intolerable."[63]

The husband, in *Carle v. Carle*,[64] brought an action for divorce on the ground of indignities. The findings of fact by the lower court (with which the appellate court agreed) were *inter alia*: After an argument, she struck him with a deer rifle; after another argument, while he was taking a bath, she went in and "hammered him over the head with a shoe"; on one occasion, she took his employer's money from his wallet and, when he took it from her, "she struck him with a wrought iron table, scratched him violently and told him, among other things, that she hoped he would die of cancer of the throat"; she "continuously degraded and belittled" him in front of others; she used "obscene language toward him in the presence of their son and others." Although the wife and their 11 year old child "offered testimony contradictory to that of the plaintiff and his witnesses," the appellate court found (as did the master and the court below) that the "plaintiff's testimony, corroborated by witnesses who had no stake in the outcome," was "more worthy of belief." Accordingly, the superior court, under the view that the wife's conduct indicated "a settled hate and estrangement on her part," held, in affirming, that a case of indignities had been made out.

63. *Id.* at 262, 263, 166 A.2d at 555.
64. 192 Pa. Super. 490, 162 A.2d 38 (1960).