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TEN YEARS OF DOMESTIC RELATIONS IN COLORADO—1940-1950*

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"At the foundation of Domestic Relations lies the institution of marriage," states Professor Peck.[1] We will use his statement as our excuse for starting with this topic. By statute,[2] in 1945, the Colorado legislature prohibited and declared to be *void* all marriages wherein one or both of the parties was under the age of sixteen years unless, prior to the contracting thereof, a judge of a court of record of the state shall have approved said marriage and authorized the issuance of a license therefor. This act has as yet not been construed.

It is also provided in the Colorado statutes that marriages, wherein either party is under the age of eighteen years, are declared *voidable*,[3] and actions for annulment may be maintained upon this ground, "provided the action is commenced before the party reaches the age of nineteen years." [4]

Another section [5] declares certain consanguinous and certain miscegenetic marriages to be absolutely void. Is there any difference between a marriage *absolutely void* as in the last mentioned statute, and a marriage declared to be "void" as in the 1945 statute? [6] The word *void* in other statutes has not always been given its dictionary absoluteness, but is frequently construed as meaning voidable.[7]

That courts seem sympathetic in marriage situations and endeavor to protect an unfortunate female in distress by declaring a valid marriage to exist in doubtful cases, is indicated in two late opinions. In *Moffat Coal Co. v. The Industrial Commission*,[8] a woman was, by virtue of a common-law marriage, held to be the widow of one Pete Todd, killed in an industrial accident. Thus

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[1] PECK, DOMESTIC RELATIONS, 3d ed. (1930), p. 129.

[2] COLO. LAWS, c. 177, p. 478 (1945); COLO. STAT. ANN., c. 107, §(3)1 (1935).

[3] "All marriages wherein either party is under the age of eighteen years are hereby declared to be voidable." COLO. STAT. ANN., c. 56, §33 (1935).

[4] COLO. STAT. ANN., c. 56, §34 (1935). In *Payne v. Payne*, 214 P. 2d 495 (1950), this section and that in the preceding note were held not applicable to a Texas marriage between residents of Colorado, one of whom was seventeen years old. By the law of Texas the marriage was valid, not voidable.

[5] COLO. STAT. ANN., c. 107, § 2 (1935).

[6] TIFFANY, DOMESTIC RELATIONS, 3d ed. 1921). At page 25 of this work is the the following statement: "As will be seen . . . statutes raising the age of consent, though they may declare a marriage under the age of consent to be *void*, are construed to be *voidable*, and leave the effect of the marriage as at common law."

[7] See *City and County of Denver v. Jones*, 85 Colo. 212, 224 P. 924 (1929). See also Colorado Annotations ALI, Restatement of Contracts, sec. 178. The common law note that the marriage of an insane person is *absolutely void*, was recognized as law in *Cox v. Armstrong*, Colo. Bar Ass'n, Advance Sheet, July 29, 1950, p. 363.

[8] 108 Colo. 388, 118 P. 2d 769 (1941); See parallel case Clayton Co. v. Industrial Commission, 93 Colo. 145, 25 P. 2d 170 (1933).

she was able to claim benefits under the Workmen's Compensation Act. Her testimony showed that they lived together, had two children, that they contemplated a future ceremonial marriage, that "he kept putting it off and he never did," and that she did not believe she was married, "because I wasn't." The decision emphasized the fact that she was uneducated, and her testimony was not, in words, used "with discriminating care." There was good evidence of habit and repute.

In a second case [9] a woman had a living husband, one Mason, when she began living with Reed. Four years later Mason divorced her. She lived eight years, thereafter, with Reed in habit, repute, and mutual recognition as husband and wife. The woman was held to be a widow entitled to claim as widow under the Compensation Act. "If there ever was a case where a relationship unlawful in its inception could be matured into a common-law marriage . . . this is that case." Continued cohabitation "after the removal [10] of the obstacle to marriage" under the circumstances raised a presumption of marriage.[11]

In a case [12] of first impression, the Colorado statute,[13] making *absolutely void* all marriages between Negroes or mulattoes of either sex and white persons, was held valid as against the objection that such statute was discriminatory against Negroes, and denied defendants equal protection of the law. The case arose out of a conviction for vagrancy under a Denver ordinance which included in one of its definitions of the word *vagrant*, "any person who shall lead an . . . immoral . . . course of life." The defendants were living together claiming to be man and wife by virtue of a common law marriage. The Supreme Court upheld the defendants' conviction under the ordinance, holding the parties could not be married either ceremonially or by common law [14] because of the statute. The court refused to discuss the effect or any uncertainty which might prevail as to the definition of a mulatto in view of defendants' admission that one was a Negro and one a white. Judicial notice was taken by the court that Denver was not within that part of the state acquired from Mexico, wherein the statute might not be applicable.[15]

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[9] Rocky Mt. Fuel Co. v. Reed, 110 Colo. 88, 130 P. 2d 1049 (1941).

[10] i.e. Mason's divorce.

[11] Cases wherein a relation was meretricious in its inception, there being an impediment to the marriage relation and the parties continued to live together as husband and wife after the removal of the impediment, have caused courts much difficulty. The Colorado case may be contra to the weight of authority. 55 C.J.S. 882-883. But there is high authority to support the Colorado decision. See *Campbell v. Campbell* (The Breadalane Case), L.R. 1 H.L. Sc. 182 (1867). See discussion, MADDEN DOMESTIC RELATIONS, (1931) pp. 73-75; PECK on DOMESTIC RELATIONS, 3rd ed., p. 145 (1930).

[12] Jackson v. City and County of Denver, 109 Colo. 196, 124 P. 2d 240 (1942).

[13] *Supra*, note 5.

[14] 109 Colo. 196, 199.

[15] Justice Bouck dissented. Recent cases in the United States Supreme Court, Sweatt v. Painter, 70 S. Ct. 848 (1950), and McLaurin v. Oklahoma State Regents, 70 S. Ct. 851 (1950), are of interest in connection with the problem involved in the Jackson case. See also, C. D. STOKES, THE SERBIAN BOG OF MISCEGENATION, 21 ROCKY MT. L. REV. 425 (1949). A recent California case held contra to the Colorado case, Perez v. Lippold, 32 Cal. 2d 711, 198 P. 2d 17 (1948).

HUSBAND AND WIFE

A wife was convicted of murder in the second degree. In a divorce action against her husband, on motion of said wife, the trial court ordered the defendant to pay into the registry of the court $300 as the docket fee in the criminal case and for a transcript of record to review such conviction in the Supreme Court. The order was affirmed by the latter court.[16] Costs, attorneys fees, and incidental expenses incurred by a wife in the defense of a criminal case, and a review of the judgment therein were held necessaries for which a husband is liable, the wife being destitute.[17]

In *Vetting v. Kefover*,[18] a widower, who paid the medical bills and funeral expenses of his deceased wife, was held entitled to recover the same through a claim filed against her estate. The wife had made no provision for funeral expenses in her will. The problem was whether the husband or the wife's estate was primarily liable for such debts. This was a case of first impression in Colorado.[19]

In *Wigchert v. Lockhart*,[20] Wigchert was arrested in Colorado in obedience to a warrant issued by the governor of Colorado in compliance with a requisition of the governor of California. He was charged with being a fugitive from justice. The crime charged was failure to support his minor children. Wigchert petitioned for release under writ of *habeas corpus*. The finding was against him in the trial court. The Supreme Court reversed the holding, and ordered Wigchert released, holding that to be a fugitive from justice, one must have been physically present within the demanding state at the time of the commission of the crime charged. It is not enough that he was only constructively within its borders. "Failure to support a wife or child, while the husband or father is in another state, is no ground for extradition." The determination of the governor that petitioner is a fugitive from justice was held not conclusive.

Compare this case with the case of *Marsolais v. DeAngelis*.[21] In the latter case, petitioner was convicted of nonsupport of wife and children in Massachusetts, and had violated the terms of a probation order in that state. He left immediately thereafter without permission of the probation officer. He was held extraditable in the absence of a showing that the terms of the probation had been complied with or that no terms of the probation had been broken.

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[16] Read v. Read, 119 Colo. 278, 202 P. 2d 953 (1949).
[17] Case noted, 21 ROCKY MT. L. REV. 439 (1949).
[18] 112 Colo. 53, 145 P. 2d 879 (1944). At common law, a wife's funeral expenses were the primary obligation of the husband, MADDEN, op. cit. supra note 11, pp. 198-200. Undoubtedly medical expenses were necessaries for which husband was primarily liable at common law. *Id.* 196.
[19] 112 Colo. p. 55.
[20] 114 Colo. 485, 166 P. 2d 988 (1946).
[21] 215 P. 2d 315 (1950).

ANTENUPTIAL AND POSTNUPTIAL AGREEMENTS

Husband and wife may make antenuptial [22] or postnuptial [23] agreements *inter se* barring either from inheriting under the intestacy [24] law of Colorado. Such marriage settlements may be adequate to bar all claims [25] by the survivor in the real and personal estate of the other at death. The widow's allowance is not waived by such property settlement unless in terms that do not admit of a doubt and that clearly and definitely indicate a purpose to waive this specific statutory right.[26] In a late case,[27] an antenuptial agreement, in terms barring further claims of the wife to the husband's property or estate, still left the husband free to convey or devise to the wife, property over and above what was necessary to secure the property settlement, and she was free to accept such as a gift or devise as against his heirs at law.

A situation in which payments to the wife were held contractual and not alimony was involved in *International Trust Co. v. Liebhardt*,[28] wherein, a separation agreement between the spouses provided monthly payments of $450 to the wife until her death or remarriage. Such agreement was by its terms binding on his heirs, executors, and administrators. The agreement, as was specified should be done in case of divorce, was incorporated into a later divorce decree. At the husband's death his executor claimed that liability to make further payments ceased or was subject to modification. It was held that the payments were not, by such incorporation in the decree, made alimony.[29] No Colorado case, it was stated in the opinion, definitely holds, "that a court has power to grant alimony for a period beyond the life of the husband." Nor were the payments subject to modification by the divorce court for changed circumstances as in the case with alimony.[30] The decreed liability for such payments was based on contract. Colorado courts have, by statute,[31] jurisdiction to enforce marriage settlement contracts and separate maintenance agreements whether the parties have been divorced or not.

ANNULMENT OF MARRIAGE

One case, in its different phases, appeared in the Colorado Supreme Court on four occasions. The plaintiff therein sought annulment on the ground that the defendant wife had, at the time

[22] Griffee v. Griffee, 108 Colo. 366, 117 P. 2d 823 (1941).
[23] McCutcheon v. Jordan, 112 Colo. 499, 150 P. 2d 859 (1944).
[24] COLO. STAT. ANN., c. 176, §1 (1935).
[25] In such case it has been held the widow may not breach the contract and claim one-half of the husband's estate against his will. *Remington v. Remington,* 69 Colo. 206, 193 P. 550 (1920).
[26] Bradley v. Bradley, 106 Colo. 500, 106 P. 2d 1063 (1940); Griffee v. Griffee, *supra* note 22; McLaughlin v. Craig, 117 Colo. 67, 184 P. 2d 130 (1947). Note, 13 ROCKY MT. L. REV. 260 (1941).
[27] Bartle v. Bartle, 216 P. 2d 649 (1950).
[28] International Trust Co. Ex'r. v. Liebhardt, 111 Colo. 208, 139 P 2d 264, 147 A.L.R. 700 (1943).
[29] *Ibid,* 111 Colo. 208, 218.
[30] International Trust Co. v. Liebhardt, *supra,* note 28, pp. 216, 217. See also Harris v. Harris, 113 Colo. 41, 154 P. 2d 617 (1944).
[31] COLO. STAT. ANN., c. 56, §29 (1935).

of their purported marriage, another spouse living. At the first appearance of the case,[32] the Supreme Court held that in an annulment suit where the wife appears and defends the validity of the marriage, she is, on proper showing, in a position to claim alimony *pendente lite* and counsel fees. At the second,[33] the court held that the fact that defendant wife had, after her purported marriage to plaintiff, brought a successful divorce action against the other man, being induced to do so by the plaintiff (in this annulment action), did not estop her in the annulment proceeding from testifying that the so-called marriage to the purported first husband was in fact no marriage at all. In the fourth appearance of the case it was held that because plaintiff had lived with the defendant six months after knowing of prior marriage, he was not entitled to relief in equity.[34] Also he had not shown that he did not have an adequate remedy at law.[35] In the very recent case of *Cox v. Armstrong,* it was held that where the wife commenced a divorce action and was lated adjudged insane, a conservator, appointed for her estate and directed to represent her interests in the divorce action, could properly file an amended petition in the divorce action praying for annulment.

DIVORCE

It is not intended in this review to discuss anything but matters of substantive law. However, it is deemed proper to call attention to certain late statutes affecting procedure.

By statute,[36] in 1945, it was enacted that procedure in actions of divorce, annulment, and separate maintenance, unless otherwise expressly provided, "shall be . . . as provided for by the Rules of Civil Procedure . . . for civil actions." The trial[37] of such actions shall not be had until after the expiration of thirty days from filing of the complaint, and any party to a divorce action, "may demand or waive a trial by jury[38] in the manner and method" provided by the Rules of Civil Procedure. The act also repealed sections 4, 5, 9, 10, and 12 of chapter 56, '35 C.S.A.

It is of interest to note that in 1947 an act[39] was passed giving Colorado courts of competent jurisdiction in this state powers to

[32] Pierce v. Otte, 111 Colo. 374, 142 P. 2d 283 (1943).

[33] Otte v. Pierce, 111 Colo. 386, 142 P. 2d 280 (1943). The third appearance of the case involved no question of significance. Otte v. Pierce, 116 Colo. 77, 178 P. 2d 676 (1947).

[34] Otte v. Pierce, 118 Colo. 123, 194 P. 2d 331 (1948). The more approved rule seems contra. "Where it appears to the court that a marriage is an absolute nullity the duty. . . is to decree such a marriage void and prevent any further criminal union of the parties." Simmons v. Simmons, 19 Fed. 2d 690, 54 A.L.R. 75 (1927). See also, 41 HARV. LAW REV. 1059 (1928).

[35] One wonders whether plaintiff would get his remedy at law. See Garver v. Garver, 52 Colo. 227, 127 P. 165 (1912).

[36] COLO. LAWS, §1, p. 316 (1945); COLO. STAT. ANN., c. 56, §5 (1) (Supp. 1949).

[37] COLO. LAWS, §2, p. 316 (1945); COLO. STAT. ANN., c. 56, §10 (1) (Supp. 1949).

[38] COLO. LAWS, §4, p. 316 (1945); COLO. STAT. ANN., c. 56, §9 (1) (Supp. 1949). Prior to this statute, it had been held under sec. 10, c. 56, '35 C.S.A., that in a contested case the verdict of a jury was absolutely essential as a prerequisite for a decree in divorce. Simmons v. Simmons, 107 Colo. 78, 108 P. 2d 871 (1941); Johnson v. Johnson, 22 Colo. 20, 43 P. 130, 55 Am. St. Rep. 113 (1895).

[39] COLO. LAWS, §1, 2, p. 398 (1947); COLO. STAT. ANN., c. 56, §39 (Supp. 1949). See *Unused Colorado Enforcement Statute,* by Robert P. Davison and Houston G. Williams, 21 ROCKY MT. L. REV. 385 (1949).

enforce orders, judgments, and decrees of other states on proper docketing of exemplified copies thereof, providing such other jurisdictions shall have reciprocal provisions for enforcing like orders entered in the state of Colorado. A second paragraph of this statute covers somewhat similar matters. The author of this article knows of no other state having reciprocal provisions.

Divorce cases discussed herein are a few of the great number appearing in the Supreme Court of Colorado in the past decade.[40]

Two cases were concerned with the problem of whether the necessary residence requirements were satisfied to give the court jurisdiction under the Colorado statute.[41] In *Simmons v. Simmons*,[42] a wife had left the matrimonial domicile in Kansas to return to her parents home in Colorado because of alleged cruelty. The husband followed her, to persuade her to return and she agreed to do so. Before she left Colorado, the husband violated terms of the agreement. The court held that the wife had a right to renew her expressed intention to remain in Colorado for at least a year. In *Harms v. Harms*,[43] plaintiff, seeking a divorce on the ground of cruelty, alleged and proved more than the necessary residence before commencement of the action. Defendant, who had resided in Colorado for less than one year, filed a cross-complaint on the same grounds, and was granted a divorce thereon. It was held that plaintiff's allegations and proof vested the court with jurisdiction of the plaintiff and the subject matter, and that the court could retain jurisdiction until the equities were settled. Defendant husband under such circumstances was not limited to acts of cruelty committed by the plaintiff wife in Colorado, if confined to acts of cruelty subsequent to date of marriage but prior to date of filing of plaintiff's complaint. The case was reversed on the ground that defendant should not have been permitted to put in evidence acts of cruelty committed subsequent to filing of complaint and up to the date of trial without supplemental pleadings as to such acts.

The effect of the death of a party to a divorce suit was the problem involved in *McLaughlin v. Craig*.[44] The defendant husband died within six months after an interlocutory decree had been entered in favor of the plaintiff. It was held that the action abated and that plaintiff became defendant's widow entitled to the widow's allowance.[45]

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[40] An interesting article is *Divorce Practice in Colorado* by Stevens Park Kinney, 21 ROCKY MT. L. REV. 358 (1949).

[41] COLO. STAT. ANN., c. 56, §6 (1935), provides: "No person shall be granted a divorce unless such person has been a bona fide resident and citizen of this state during the one year next prior to the commencement of the action . . . provided, this section shall not affect applications for a divorce upon the grounds of adultery or extreme cruelty, where the offense was committed within this state."

[42] *Supra* note 38.

[43] 120 Colo. 212, 209 P. 2d 552 (1949). See, *Residence of Plaintiff in Colorado Necessary to Support a Divorce Action*, etc., Edwin M. Sears, 24 *Dicta* 110 (1947).

[44] 117 Colo. 67, 184 P. 2d 130 (1917). Cf. Parsons v. Parsons, 70 Colo. 154, 198 P. 156 (1921), construing a statute now repealed.

[45] A prior property settlement evidently was not affected, but as plaintiff had not waived the widow's allowance, she was entitled thereto. See *supra*, note 26; also Morris v. Probst, 98 Colo. 213, 55 P 2d 944, 104 A.L.R. 650 (1936).

ALIMONY

There is reiteration of established propositions concerning alimony, such as, that the statute [46] does not compel a court to grant alimony,[47] that an award of alimony, "rests in the sound discretion of the trial court . . . and what is, and what is not, reasonable and where a reasonable discretion ends and arbitrary action begins are not susceptible of mathematical demonstration." [48]

A divorce court may properly award alimony in a lump sum.[49] The award of a lump sum as alimony for the purchase of a home in addition to periodic payments for alimony and support for a minor child was approved in one case,[50] but in a later case was refused on the basis that no award of custody of a minor was involved.[51] The continuing authority of the trial court to modify alimony awards is reiterated.[52]

DIVISION OF PROPERTY IN DIVORCE

A number of recent cases distinguish a division of property from alimony. Very recently the Colorado Supreme Court [53] in construing Kansas Law quoted a Kansas decision: "Alimony has as its basis the right to maintenance only. Division of property has as its basis the right to a just and equitable share of the property." The Colorado theory is stated in *Schreyer v. Schreyer:*[54] "The property recovery that Mrs. Schreyer enjoyed was not based on her right as a wife or Schreyer's responsibilities as a husband. The property award was made on the basis that it was jointly accumulated and owned by the parties." The court decreed the division of a taxi business created by their joint efforts. See also, *Shapiro v. Shapiro,*[55] in which it was held that services rendered outside the wife's duties as a wife entitled her to property division as well as alimony, although the statute [56] provides in terms that the court may, on granting the divorce, provide for reasonable alimony, *or* may decree a division of property. The word *or* was construed as synonymous with *and.* In a proper case,[57] the facts may be such as to require a transfer from the wife to the husband.

A divorce court has no continuing power to modify its division of property orders.[58] This is so whether the settlement was

[46] COLO. STAT. ANN., c. 56, §8 (1935).
[47] Liebhardt Case, *supra* note 28.
[48] Urling v. Urling, 107 Colo. 186, 109 P. 2d 1060 (1941); Zook v. Zook, 118 Colo. 299, 304, 195 P. 2d 387 (1948).
[49] Fifer v. Fifer, 119 Colo. 239, 202 P. 2d 945 (1949). In this case, the divorce decree ordered defendant to make certain regular payments on a note secured by a trust deed on real estate jointly owned by the parties. On default, the husband being outside the jurisdiction of the court, trial court's order divesting the defendant of his interest in the property and vesting it in the wife was approved.
[50] Urling v. Urling, *supra* note 48.
[51] Zook v. Zook, *supra* note 48.
[52] *Ibid,* p. 302; Fifer v. Fifer, *supra* note 49.
[53] United States National Bank v. Bartges, 120 Colo. 317, 210 P 2d 600 (1949).
[54] 113 Colo. 219, 155 P. 2d 990 (1945).
[55] 115 Colo. 505, 176 P. 2d 363 (1947).
[56] COLO. STAT. ANN., c. 56, §8 (1935).
[57] Bieber v. Bieber, 112 Colo. 229, 148 P. 2d 369 (1944). In this case the husband furnished all the consideration for a house title to which was placed in the wife's name. See also, *Enforcement of Divorce in Colorado,* by William Hedges Robinson, Jr., 21 ROCKY MT. L. REV. 364, 369 (1949).
[58] Zlaten v. Zlaten, 117 Colo. 296, 186 P. 2d 583 (1947).

by contract, approved by the court and made part of its decree, or whether it was a "determination of the property rights of the parties by the court itself." [59] In a recent case,[60] the former wife was held entitled to damages against the husband for his fraud in obtaining a property settlement based on a financial statement in which he concealed assets.

MERGER OF PROPERTY SETTLEMENTS IN DIVORCE DECREE

Four cases [61] discussed the problem of how a property settlement between spouses becomes merged in the divorce decree. The cases unanimously held that mere reference and approval by the court is not sufficient. To be enforceable as a decree of court the rights and obligations of the settlement should be specifically set forth in its decree so that the rights and duties may be ascertained from the decree itself. In *McWilliams v. McWilliams,*[62] there was mere reference to, and approval of, the property and financial settlement in the interlocutory decree of the county court so the settlement was not enforceable as part of the decree. Therefore, the obligation to pay $50 per month to the divorced wife as part of the contract still subsisted, and, although the husband had already paid $2,000 into the registry of the county court, he was liable on the unmerged contract in a district court action for delinquent payments. In the *Campbell* case,[63] the contract was also merely referred to with approval. The defendant became delinquent in his payments, but enforcement could not be had by means of contempt proceedings. There was no order of court upon which such proceedings could be based. In the *Edwards* [64] and *Bartges* [65] cases, liability was for a like reason based on the contract and not the decree.

CUSTODY OF CHILDREN

A divorce court, of course, has jurisdiction to award custody of children as part of the decree.[66] Custody may also be awarded in a controversy between the parents, or between one or both and a third person through *habeas corpus* proceedings. However, the decree of the divorce court awarding custody is *res adjudicata* unless there is a later change of conditions.[67]

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[59] *Ibid,* 299.

[60] United States National Bank v. Bartges, *supra,* note 53.

[61] McWilliams v. McWilliams, 110 Colo. 173, 132 P. 2d 966 (1942); Campbell v. Goodbar, 110 Colo. 403, 134 P. 2d 1060 (1943); Edwards v. Edwards, 113 Colo. 390, 157 P. 2d 616; United States National Bank v. Bartges, *supra,* note 53. See also *Incorporation by Reference in Colorado,* by John Barnard, Jr., 21 ROCKY MT. L. REV. 420 (1949); *Enforcement of Divorce Decrees in Colorado. supra,* note 56, pp. 365, 367.

[62] Cited last note.

[63] *Supra,* note 61.

[64] *Supra,* note 61.

[65] *Supra,* note 61.

[66] Peterson v. Schwartzmann, 116 Colo. 235, 179 P. 2d 662 (1947).

[67] Snyder v. Schmoyer, 106 Colo. 295, 104 P. 2d 612 (1940); McMillin v. McMillin, 114 Colo. 247, 158 P. 2d 444, 160 A.L.R. 396 (1945); Crocker v. Crocker, Advance Sheet, Colo. Bar Ass'n, June 10, 1950. The divorce court seems the proper court to modify the award of custody when there is a change of conditions, Searle v. Searle, 115 Colo. 266, 172 P. 2d 837 (1946); Emerson v. Emerson, 117 Colo. 384, 188 P. 2d 252 (1948). Except if the state of domicile of the child has been changed, McMillin v. McMillin, *supra.*

A number of cases considered problems of conflict of jurisdiction between a divorce court and a court exercising juvenile jurisdiction. In a late case, it was held that the fact that the best interests of a child might be bettered will not permit a court exercising juvenile court jurisdiction to take control and declare the child a dependent as against a divorce court's award unless dependency, such as neglect, improper conditions, etc., actually exists.[68] If dependency actually exists, the juvenile court is not bound by the prior award.[69]

In a recent article [70] by two leading Colorado authorities [71] on such matters, it is stated:

> It seems clear upon reflection of the cases in this jurisdiction that although the juvenile court, or the county court as the case may be, has jurisdiction upon a dependency issue to reaward the custody of a child despite a divorce court's decree, that the Supreme Court, understandably, shows considerable reluctance to permit the divorced parents to parade the children from court room to court room unless a new ground for dependency exists. It would seem further that either the juvenile court for the best interests of the child, or the divorce court, becaused of changed conditions could, if necessary, reaward custody. Ultimately the question resolves into unnecessary duplication of jurisdiction.

ILLEGITIMACY

Nuiman v. Cooper [72] involved a dependency proceeding in which a woman charged respondent with being the father of her child. The woman's husband had obtained a divorce from her in New York on the ground of adultery. The divorce action was uncontested. In that action the plaintiff's husband was permitted to testify as to nonaccess for the period of conception to prove the child's illegitimacy, and therefore, the wife's adultery. In the dependency action in Colorado, testimony by her of such nonaccess was held properly admitted to prove the child was not her ex-husband's. A transcript of the husband's testimony in the divorce case was, however, improperly admitted, the husband not having been subjected to cross-examination.

ADOPTION

In a proceeding to determine heirship,[73] the validity of the

[68] Peterson v. Schwartzmann, *supra*, note 66, at p. 241; Snyder v. Schmoyer, *supra*, note 67, at p. 296; Arnett v. Northern, 118 Colo. 307, 194 P. 2d 909 (1948).

[69] Orebaugh v. People, 120 Colo. 377, 209 P. 2d 922 (1949). In Phillips v. Christensen, (Colo.) 216 P. 2d 659 (1950), a dependency court's award to maternal grandparents was held to be invalid where the father was given no notice of such proceeding. The divorce court modified its original decree of divided custody to parents, to an award to the father alone despite the intervening dependency order. The primary right of the natural parent to custody was emphasized and changed circumstances justified the change in its own original decree.

[70] *The State as Parens Patriae*, 21 ROCKY MT. L. REV. 375, 383 (1949).

[71] Judge Philip B. Gilliam, Judge of the Juvenile Court of the City and County of Denver; and Thomas A. Gilliam of the Denver Bar.

[72] 120 Colo. 98, 207 P. 2d 814 (1949).

[73] Zupancis v. Zupancis, 107 Colo. 323, 111 P. 2d 1063 (1941).

adoption of a child by an intestate was questioned by the latter's widow. The basis of the attack was that the material facts stated in the adoption petition, which were necessary to give the county court jurisdiction, were untrue. It was held that in a collateral attack on an adoption, as in this heirship proceeding, extrinsic evidence could not be introduced to show the alleged falsity, the adoption record being regular on its face. Such extrinsic evidence may be introduced only in a proceeding directly attacking the adoption. In this case there were also facts which may have operated as an estoppel against the widow.

Two cases reaffirmed the accepted construction of the 1931 statute [74] that an adopted child inherits from an adoptive parent but not through such parent. In the first case,[75] intestate's brother had adopted a child. The brother died before the intestate. In a determination of heirship proceeding, certain cousins of the intestate were declared her heirs at law. The deceased brother's adopted child got nothing. A similar case was *Coffman v. Howell.*[76] Both cases mentioned the 1941 amendment [77] to the intestacy law. The court conceded in the latter case, that its holding in the particular case being considered, would have favored the adopted child, had the 1941 amendment been in effect at intestate's death.

In a case [78] involving the construction of a trust instrument, the court, in effect, ruled that if in a will or trust the testator makes provision for his own "child or children," there is a presumption that the adopted child is included in the class with children of the blood. A presumption prevails against the inclusion of the foster child as beneficiary where the instrument is executed by one person in favor of the "child and children" of another.

Another late case [79] dealt with an amendment to the inheritance tax law, placing persons over the age of twenty-one when adopted in a higher tax bracket than persons under the age of twenty-one years when adopted. This discrimination was held unconstitutional on the facts appearing in the record.

It is to be noted that a new act [80] governing adoption procedure and the status of adopted children went into effect in 1949.

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[74] COLO. STAT. ANN., c. 176, §4 (1935). See Smith v. Greenburg, 218 P. 2d 514 (1950). Man murdered wife and adoptive daughter in that order, then killed self. Daughter was held to have inherited one half mother's property, and on her death, the murderer inherited adopted daughter's property. See statutes cited under note 77.

[75] Rogers v. Green, 111 Colo. 85, 137 P. 2d 408 (1943).

[76] 111 Colo. 359, 141 P. 2d 1017 (1943).

[77] COLO. LAWS, c. 235, §16, p. 908 (1941); COLO. STAT. ANN., c. 176, §4 (1935). Compare also, COLO. LAW, §11, p. 210 (1949); COLO. STAT. ANN., c. 4, §17 (Supp. 1949), with Sec. 5, Ch. 4, '35 C.S.A. repealed by the 1949 act.

[78] Brunton v. International Trust Co., 114 Colo. 298, 164 P. 2d 472 (1945). In this case it was stated that its results were not inconsistent with the holdings of the last two cited cases, *supra*, notes 75 and 76, although the statutes construed therein govern only intestacy cases and cannot be applied to the provisions of a will or trust. What effect, if any, will the 1941 amendments, *supra*, note 77, have on will and trust cases?

[79] Hogan v. People, 120 Colo. 581, 212 P. 2d 863 (1949).

[80] COLO. LAWS, p. 206 (1949).