Michigan Law Review

Volume 10 | Issue 6

1912

Note and Comment

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MICHIGAN LAW REVIEW

PUBLISHED MONTHLY DURING THE ACADEMIC YEAR, EXCLUSIVE OF OCTOBER, BY THE
LAW FACULTY OF THE UNIVERSITY OF MICHIGAN

SUBSCRIPTION PRICE $2.50 PER YEAR. 35 CENTS PER NUMBER

NOTE AND COMMENT.

PROVABILITY IN BANKRUPTCY OF CLAIMS ARISING OUT OF ALIMONY DECREES OR SEPARATION AGREEMENTS BETWEEN HUSBAND AND WIFE.—It was not until the decisions in *Audubon* v. *Shufeldt*, 181 U. S. 575, and *Wetmore* v. *Markoe*, 196 U. S. 68, that it was authoritatively determined in this country that alimony, whether in arrears at the time of filing petition, or payable in the future, was not provable in bankruptcy. In the first case it was pointed out that an alimony allowance is generally alterable in the discretion of the court entering the original order; but the real basis of the decision appears to have been that "permanent alimony is to be regarded rather as a portion of the husband's estate to which the wife is equitably entitled, than as strictly a debt." In the second case it appeared that by the law of New York in which State the alimony judgment involved had been entered, the allowance was unalterable, and it was urged that the *Audubon* case, therefore, should not be considered controlling. The court held squarely that alimony, even though evidenced by an unalterable judgment, was not a *debt* within the Bankruptcy Act. The English courts have taken the same position as to the provability of alimony claims. *Linton* v. *Linton* (1885), 15 Q. B. D. 239; *Hawkins* v.

Hawkins [1894], 1 Q. B. 25; *Watkins* v. *Watkins* [1896], Prob. 222; *Kerr* v. *Kerr* [1897], 2 Q. B. 439.

In *Dunbar* v. *Dunbar*, 190 U. S. 340, the court had under consideration the liability of the defendant to the plaintiff, his divorced wife, upon a contract entered into between them after a divorce, but pursuant to a pre-divorce agreement, by which contract the defendant obligated himself to pay the plaintiff a certain sum annually during her life or widowhood and also a certain sum for the support of their two children. The defendant had pleaded and proved in defense, his discharge in bankruptcy. It appeared that plaintiff had filed a claim for the amount due her at the time the petition was filed, but whether she had received a dividend is not clear. The court *decided* that the contract as to the plaintiff's personal claim was not provable, hence not discharged, because the contingency of her remarrying could not be accurately measured. However Mr. Justice PECKHAM, who wrote the opinion, after referring to the rule as to alimony claims as laid down in *Audubon* v. *Shufeldt, supra,* said: "We are not by any means clear that the same principle ought not to govern a contract of this nature when, although the judgment of divorce is silent upon the subject, it is plain that the contract was made with reference to the obligations of the husband to aid in the support of the wife, notwithstanding the decree." As to the sums contracted to be paid for the maintenance of the children the court held that the contract did not create or evidence a *debt,* but was merely a recognition of the father's common-law liability to support his minor children, and so that part of the claim was also held not to have been discharged.

In *Victor* v. *Victor* [1912], 1 K. B. 247, the Court of Appeal held that by the husband's discharge in bankruptcy, he was relieved of all liability, past, present, and future, for the payment of an annuity to his wife, the annuity having been provided for in a separation agreement entered into by the parties sometime prior to the husband's bankruptcy. The annuity in this case was to cease in case the parties resumed cohabitation. The court held, following the extremely liberal English doctrine as to the allowance of contingent claims, discussed in *Hardy* v. *Fothergill,* 13 App. Cas. 351, that the contingency of the parties resuming cohabitation did not render the claim incapable of estimation and proof. In the *Victor* case the judges distinguish *Linton* v. *Linton, supra,* which held an alimony order unaffected by the former husband's bankruptcy discharge, on the ground that an alimony order is subject to change at any time. It is rather odd that a court which has held that the contingency of parties resuming cohabitation, the contingency of a divorced woman remarrying, the contingency of a divorced woman not remaining chaste, (*Ex parte Neal,* L. R. 14 Ch. D. 579) are capable of measurement should balk when it comes to estimating the chances that a court will change an alimony order.

In 1903 § 17 of the Federal Bankruptcy Act was amended so as to except from the operation of a discharge in bankruptcy liabilities "for alimony due or to become due, or for maintenance or support of wife or child." This amendment became effective after the decision in the *Audubon* case and after the rights of the parties in the *Dunbar* and *Wetmore* cases had become fixed. So in this country, at the present time, there could be no basis for a

contention that a discharge in bankruptcy operated to relieve the bankrupt from an obligation of the sort considered in *Victor* v. *Victor, supra.* However it does not seem necessarily settled that such a contract with the element of contingency eliminated may not be made the basis of a *provable* claim. The Supreme Court, as above noted, in the *Dunbar* case suggested that perhaps such a contract should be considered as on the same basis as an alimony order, but the decision as to the non-provability of the wife's claim was based on its contingency. A case might very easily arise where it would be very unfortunate for the wife, or former wife, if she were not permitted to prove her claim, especially as to the sums in arrears. In the alimony cases the court held that such claims were not provable even as to arrearages, but in the *Dunbar* case, in which it was a contract that was the basis of the claim, that question was not passed upon. R. W. A.

THE SCOPE AND FUNCTION OF THE FEDERAL EMPLOYER'S LIABILITY ACT.—Three cases, arising under the Federal Employer's Liability Act, (35 Stat. at L. 65, chap. 149, U. S. Comp. Stat. Supp. 1909, p. 1171), and the amendment of April 5th, 1910, (36 Stat. at L. 291, chap. 143), were disposed of in a single opinion by the United States Supreme Court. In relation to the liability of interstate carriers by railroad for injuries incurred by railroad employees while engaged in interstate commerce, the statute abolishes the fellow-servant doctrine and the doctrine of assumption of risk, and it modifies the application of the doctrine of contributory negligence by the introduction of the rule of comparative negligence. The constitutionality of this statute was questioned. *Held,*—1st, that Congress, in the exercise of its power over interstate commerce, may regulate the relation of common carriers by railroad and their employees while both are engaged in such commerce; 2nd, that Congress did not exceed its power in that regard by prescribing the regulations which are embodied in the act in question; 3rd, that those regulations supersede the laws of the States in so far as the latter cover the same field; 4th, that rights arising under those regulations may be enforced, as of right, in the courts of the States, when their jurisdiction, as fixed by the local laws, is adequate to the occasion. *Mondou* v. *New York, N. H. & H. R. Co.* (1912), 32 Sup. Ct. 169.

Congress has the power to regulate the relation of master and servant as far as such relations are confined solely to interstate commerce. *Employer's Liability Cases,* 207 U. S. 463, 495; *Southern Ry. Co.* v. *United States,* 222 U. S. 20. (See note, 10 MICH. L. REV. 212.) As was said in the last above-named case, the power of Congress "to regulate interstate commerce is plenary, and competently may be exerted to secure the safety * * * of those who are employed in such transportation, no matter what may be the source of the danger which threatens it."

The doctrine of comparative negligence originated in Illinois, (see *Galena etc. R. Co.* v. *Jacobs,* 20 Ill. 478), but has since been overruled, (see *Penn. Coal Co.* v. *Kelly,* 156 Ill. 9). According to this doctrine, the employee's negligence, which contributed to his injuries, must be compared with that of his employer in determining the measure of his damages. GEORGIA CODE, 1895,

§ 2322, very closely resembles the provision of the Federal statute. See *Macon, etc. R. Co.* v. *Johnson*, 38 Ga. 409.

Among other things, it was objected that the statute, by depriving the carrier of the advantage of several of the rules of the common law, amounted to a deprivation of property "without due process of law"; but as was said in *Munn* v. *Illinois*, 94 U. S. 113, 134:—"A person has no property, no vested interest, in any rule of the common law."

In some of the States it has been held concerning statutes of a similar nature, that they offended against the Fifth Amendment to the Constitution of the United States, by arbitrarily placing certain carriers in a disfavored class and all their employees in a favored class, unless the application of the statute is restricted to those employees who are subjected to the peculiar hazards of moving trains. *Deppe* v. *Chicago, etc. R. Co.*, 36 Ia. 52; *Beleal* v. *Northern Pac. Ry. Co.* (N. D. 1906), 108 N. W. 33; *Bain* v. *Northern Pac. Ry. Co.* (Wis.), 98 N. W. 241. But similar classifications of railroad carriers and employees for like purposes, have been sustained in the courts of last resort in most of the States and in the Supreme Court of the United States. *Missouri Pac. Ry. Co.* v. *Mackey*, 127 U. S. 205; *Louisville & Nashville R. R. Co.* v. *Melton*, 218 U. S. 36; *Mobile, Jackson & K. C. R. R. Co.* v. *Turnipseed*, 219 U. S .35.

The laws of the United States supersede the laws of the States, in so far as they cover the same field; for necessarily that which is not supreme must yield to that which is. *Gulf, Colo., & S. F. Ry. Co.* v. *Hefley*, 158 U. S. 98; *Southern Ry. Co.* v. *Reid*, (1912), 32 Sup. Ct. 140; *Northern Pac. Ry. Co.* v. *Washington* (1912), 32 Sup. Ct. 160; *Southern Ry. Co.* v. *United States*, *supra*.

One of the principal cases had been heard before the Supreme Court of Errors of the State of Connecticut, (82 Conn. 373), and that court decided, on the authority of *Hoxie* v. *N. Y., N. H. & H. R. Co.*, 82 Conn. 352, that the enforcement of rights created by congressional acts was originally intended to be restricted to the Federal courts, and that the courts of the States are free to decline jurisdiction because the act of Congress is not in harmony with the policy of the State. The Supreme Court of the United States criticises this opinion severely, and says:—"When Congress, * * * adopted that act it spoke for all the people and all the States, and thereby established a policy for all. That policy is as much the policy of Connecticut as if the act had emanated from its own legislature, and should be respected accordingly in the courts of the State." The court quoted from *Clafin* v. *Houseman*, 93 U. S. 130:—"The laws of the United States are laws in the several States, and are just as much binding on the citizens and courts thereof as the State laws are." There "is no reason why the State courts should not be open for the prosecution of rights growing out of the laws of the United States, to which their jurisdiction is competent and not denied."

In *Southern Ry. Co.* v. *United States*, 222 U. S. 20, defining the scope and effect of the Safety Appliance Act, the opinion of the court was delivered by Mr. Justice VAN DEVANTER, who also delivered the opinion in the principal case. In a comment on the former case, (10 MICH. L. REV. 212) it was remarked that possibly the position maintained in that case might be

regarded as an indication of the adoption of a correspondingly advanced general policy. The opinion in the principal case fortifies that previous comment, and seems to indicate the court's responsiveness to the advancing needs of civilization. P. P. F.

CONTROL BY THE JUDICIARY OVER THE CHIEF EXECUTIVE OF A STATE.—The jurisdiction of the courts over executive officers, including governors of States, heads of executive departments of the general government, and others of a kindred nature, has given rise to questions of much difficulty, and especially is this true with reference to the control by the courts over the official action of the governors of the various States. It is settled beyond all controversy that courts cannot, by injunction, mandamus, or other process, control or direct the head of the executive department of the State in the discharge of any executive duty involving the exercise of his discretion. This necessarily follows from the constitutional division of the State government into three coordinate, distinct, and independent branches. Neither is responsible to the other for the manner in which it exercises its discretion in the performance of duties which are governmental or political in their character. Thus far there is no conflict of judicial authority. The conflict arises upon the question whether the rule stated is subject to the qualification that where duties purely ministerial in character are conferred upon the chief executive, and he refuses to act, or when he assumes to act, acts in violation of the constitution and laws of the State, he may be compelled to act, or restrained, as the case may be, by the courts at the suit of one injured thereby in his personal or property rights. Upon the application of this qualification the authorities are in direct and irreconcilable conflict.

Thus, in a recent case, we find the Supreme Court of Minnesota, after a gradual change of policy in regard to other executive officers, when called upon to decide the question of its power to grant a writ of certiorari to review the decision of the governor in removing a county official from office, holding that when duties are imposed by law upon the chief executive, purely ministerial in their nature, which do not necessarily pertain to the functions of the office, but which might have been imposed upon any other State officer, they are subject to judicial control. *State ex rel. Kinsella* v. *Eberhart* (Minn. 1911), 133 N. W. 857.

The history of the complete reversal of policy in that State is interesting as an exemplification of the present spirit of extensive judicial control. In *Rice* v. *Austin*, 19 Minn. 103, mandamus against the Governor was refused upon the ground that there was no distinction between ministerial and other duties imposed upon the chief executive, the departments of the State government being made separate, distinct, and independent by reason of the constitution. Upon the authority of this case, the court in *State* v. *Dyke*, 20 Minn. 363, where mandamus was sought against the State Treasurer and Secretary of State, extended the doctrine and held that the court could not control the actions of *any* member of the executive department. This was accepted as the law of the State in various decisions dating from 1874 until 1897, no distinction being made between the governor and other members of

the executive branch of the government. All stood upon the same ground, and were considered absolutely immune from judicial control. In 1897, the case of *Hayne* v. *Metropolitan Trust Co.*, 67 Minn. 245, presented a peculiar situation, and marks a radical departure from the broad principle upon which the previous decisions were based. The State Auditor declined to turn over to the court certain funds which he held in trust for private parties. Justice MITCHELL after calling attention to the previous cases, stated that this court had undoubtedly gone further than any other in holding executive officers of the State exempt from judicial control in the performance of their official duties, especially as to executive officers other than the Governor. It was therefore held that the State Auditor was subject to the jurisdiction of the courts. Finally in the case of *Cooke* v. *Iverson*, 108 Minn. 388, after a complete review of the Minnesota decisions, it was decided that the performance of duties, purely ministerial in character, conferred upon executive officers may be controlled by the judiciary, and though it was not necessary to the decision, the court said that the same rule would apply to the chief executive. It is now seen by the principal case that after a complete change of front and reversal of former policy, this dictum has been accepted and confirmed. The decisions of the courts of last resort in the following States: *Tennessee & Coosa R. Co.* v. *Moore*, 36 Ala. 371; *Harpending* v. *Haight*, 39 Cal. 189; *Greenwood Cemetery Land Co.* v. *Routt*, 17 Colo. 156; *Martin* v. *Ingham*, 38 Kan. 641; *Traynor* v. *Beckham*, 116 Ky. 13; *Magruder* v. *Swann*, 25 Md. 173; *Groome* v. *Gwinn*, 43 Md. 572; *Chumasero* v. *Potts*, 2 Mont. 242; *State* v. *Thayer*, 31 Neb. 82; *Laughton* v. *Adams*, 19 Nev. 370; *Cotten* v. *Ellis*, 52 N. C. 545; *State* v. *Chase*, 5 Ohio St. 528; *State ex rel Irvine* v. *Brooks*, 14 Wyo. 393; are in accord with this view.

The following decisions however cannot be classified as they do not squarely meet the question of control of the governor as to a purely ministerial duty. *Insane Asylum* v. *Wolfly*, 3 Ariz. 132; *State ex rel. Lockwood* v. *Kirkwood*, 14 Iowa 162; *Mott* v. *Penn. R. Co.*, 30 Pa. St. 33; but see *Hartranft's Appeal*, 85 Pa. St. 433; and *Com.* v. *Wickersham*, 90 Pa. St. 311; *Mauran* v. *Smith*, 8 R. I. 192; *Woods* v. *Sheldon*, 9 S. D. 392; *Houston Tap & B. R. Co.* v. *Randolph*, 24 Tex. 317; *Goff* v. *Wilson*, 32 W. Va. 393.

On the other hand the opposite doctrine is held in *Hawkins* v. *Governor*, 1 Ark. 570; *State ex rel. Bisbee* v. *Drew*, 17 Fla. 67; *State ex rel. Low* v. *Towns*, 8 Ga. 360; *People ex. rel. Bacon* v. *Cullom*, 100 Ill. 472; *Hovey* v. *State*, 127 Ind. 588; *In re Dennett*, 32 Me. 508; *People ex rel. Sutherland* v. *Governor*, 29 Mich. 320; *Vicksburg & M. R. Co.* v. *Lowry*, 61 Miss. 102; *State ex rel. Robb* v. *Stone*, 120 Mo. 428; *State, (Gledhill, Prosecutor)* v. *The Governor*, 25 N. J. L. 331; *Jonesboro F. B. & B. Gap. Turnp. Co.* v. *Brown*, 8 Baxt. 490; *Oliver* v. *Warmoth*, 22 La. Ann. 1; *People ex rel. Broderick* v. *Morton*, 156 N. Y. 136. In these States the courts are unanimous in denying all judicial control of the chief executive, regardless of whether the act whose compulsory performance is sought be merely a ministerial one, involving the exercise of no judgment or discretion whatever. The fundamental principle underlying these decisions, is drawn from those provisions found in the constitutions of the several States, that the executive, judicial, and legislative departments into which the government is divided shall be distinct and inde-

pendent of one another, and that the officers of one shall discharge none of the functions of either of the others. It being considered that the executive and judiciary are absolutely independent of each other within the sphere of their respective powers, it is said that neither can be subject to the control of the other in any way. Judge COOLEY thus states the principle: "Our government is one whose powers have been carefully apportioned between three distinct departments, which emanate alike from the people, have their powers alike limited and defined by the constitution, are of equal dignity, and within their respective spheres of action equally independent. One makes the law, another applies the laws in contested cases, while the third must see that the laws are executed. This is a necessity in all free governments, and the very apportionment of power to one department is understood to be a prohibition of its exercise by either of the others. The executive is forbidden to exercise judicial power by the same implication which forbids the courts to take upon themselves his duties." *People ex rel. Sutherland* v. *Governor,* 29 Mich. 320, 324. This argument has been met and answered by the authorities which maintain that only in a restricted sense are the separate departments of the government independent of one another as follows: "There is no such thing as absolute independence. Where discretion is vested in terms, or necessarily implied from the nature of the duties to be performed, they (the departments) are independent of each other, but in no other case. Where discretion exists, the power of each is absolute, but there is no discretion where rights have vested, under the constitution or by existing laws." *People ex rel. McCauley* v. *Brooks,* 16 Cal. 11, 40.

To the same effect, in *Martin* v. *Ingham,* 38 Kan. 641, 656, the court while recognizing the supremacy of each department within its respective sphere says: "But the executive department can enforce the statutory laws only as the legislature has enacted them; and, where the courts have construed the laws (statutory or constitutional) in the determination of controversies, the executive department can enforce them only as thus construed, and is bound to see that the laws are thus construed, and the judgments and orders of the courts rendered or made in the determination of controversies, are respected and obeyed. Thus while each of the different departments of the government is superior to the others in some respects, yet each is inferior in other respects. Each in its own sphere is supreme. But each outside of its own sphere is weak and must obey."

Another argument is founded upon the governor's control of the military arm of the State, and upon the lack of physical power in the court to enforce its decrees against that officer, should he refuse to obey. This argument has been met by saying that: "the jurisdiction of a court does not depend upon its physical ability to enforce its judgments." *State ex rel. Irvine* v. *Brooks,* 14 Wyo. 393. The opposite view would prevent the issuing of any subpoenas or other writ or process from any court to the governor, or from ever arresting him for anything whatever, because, "he might in any such case refuse to obey the writ or order of the court, and might call on the militia to assist him in his resistance." *Martin* v *Ingham, supra.* "A Court should not anticipate that the governor will not obey its judgment." *Traynor* v. *Beckham,* 116 Ky. 13.

As early as the case of *Marbury* v. *Madison*, 1 Cranch 170, Chief Justice MARSHALL said: "It is not by the office of the person to whom the writ is directed, but by the nature of the thing to be done, that the propriety or impropriety of issuing a mandamus is to be determined." Every officer is amenable to the laws, and if the legislature sees fit to impose purely ministerial duties, involving no discretion, upon the chief executive, why should he be immune from their performance? As to such duties it seems that the general principle of allowing relief against ministerial officers should apply, and the mere fact that it is the governor against whom the relief is sought, should not deter the courts from the exercise of their jurisdiction. The authority of the courts is supreme in the determination of all legal questions judicially submitted to them within their jurisdiction and no one is exempted from the operation of the law. Moreover the duty of faithfully executing the laws is solemnly enjoined upon the governor by his oath of office. If the relief sought were refused, those persons whose rights had been invaded by executive neglect or refusal to act, would very often be altogether without redress. No one desires an unwarrantable encroachment or interference by the courts with acts of the executive within his proper sphere of duty, but, when duties are imposed upon the governor in regard to which he has no discretion and in the execution of which individuals have a direct pecuniary interest, and there is no other adequate remedy, they should have protection and an enforcement of justice.

The danger in the application of the rule lies in the difficulty of distinguishing between so-called political or executive duties, and those which are definitely defined to be performed in some particular manner. That the delicacy of the task presented to the courts might, in a close case, cause them to overstep the limits of their power seems to be the only valid objection of the courts holding this view. Large discretion in determining the character of all acts to be performed by the governor might, it is said, infringe upon the right of that executive to use *his* discretion in determining the same question. But is it to be supposed that the courts, any more than the governor, will overstep the limit of the powers conferred or will exercise an unwarranted jurisdiction? Possibly there would be a tendency that the courts, in determining what is a ministerial duty, might exert a control over the executive department, and might in a way deprive it of its right of discretion. Is this a sufficient reason for giving an absolute immunity to the governor from all control, even in a clear case where the duty is plainly ministerial, and has so been held as regards other executive officers? To the writer it seems not. The legislature could readily obviate all difficulty in the matter by conferring upon the governor only such duties as are *clearly* executive and political in their nature. N. K. F.

WHAT CONSTITUTES AN APPEARANCE IN AN ACTION FOR DIVORCE.—Petition for divorce by a resident of New Jersey. The divorce act of 1907 of that State provides that a defendant is to be brought under the jurisdiction of the court by personal service or if a non-resident by publication. Defendant was a resident of New York. Neither of these methods was employed, but in-

stead defendant's solicitor endorsed an acknowledgment of service on a citation issued to plaintiff's attorney which was returned into court and entered a formal appearance with the clerk of the court and filed an answer. *Held*, the court had no jurisdiction of the person of the defendant and the petition was dismissed. *Henry* v. *Henry* (N. J. Eq. 1912) 82 Atl. 47.

As a general rule jurisdiction may be acquired of the person of a defendant in a civil action by his voluntary appearance in court, either by attorney or in person, and submission to the court's authority; *Meyers* v. *American Locomotive Co.*, 201 N. Y. 163, 94 N. E. 605; *Flint* v. *Comly et al.*, 49 Atl. (Me.) 1044; *Multnomah Lumber Co.* v. *Basket Co.* (Ore.) 99 Pac. 1046; *Mahoney* v. *Middleton*, 41 Cal. 41; *Cal. etc. Lumber Co.* v. *Mogan*, 108 Pac. (Cal.) 882; *Blair* v. *Sennott*, 35 Ill. App. 368; *Sunier* v .*Miller*, 105 Ind. 393; *Freeman* v. *Waynant*, 25 Kan. 279; *Hunt* v. *Ellison*, 32 Ala. 173; *Bowdoin College* v. *Merritt*, 59 Fed. 6; *McCullough* v. *Ry. Ass'n.*, 73 Atl. (Pa.) 1007. But the court in the principal case, though admitting the above to be the general rule, said: "In divorce cases another rule prevails. There the statute must be strictly followed, for the reason that the issue does not alone concern the parties to the cause. It concerns organized society, which is based upon the settled and orderly customs and obligations attendant upon the marriage status. It will not permit that status to be changed or modified except in the manner pointed out by the laws which it has sanctioned. Parties cannot be permitted to become divorced by any sort of consent. The proceeding in all its parts must be strictly adverse and in accordance with the statute."

In *Dodge* v. *Dodge*, 90 N. Y. Supp. 438 and in *Freeman* v. *Freeman*, 110 N. Y. Supp. 686 it was held that appearance by attorney acting under direction of the defendant in divorce proceedings gave the court jurisdiction, though the defendant had not been personally served with summons. In the latter case KELLOG, J., dissenting, conceded the rule, but looked upon a voluntary appearance by the defendant with suspicion, as tending to prove collusion. In Pennsylvania, in an action for divorce, the respondent residing in New Jersey entered an appearance by attorney. It was objected that respondent had not been served and that the proper course of procedure was by publication, but the court held that an appearance cured any defect in the process and that there was no presumption of collusion from such an entry of appearance; *Renz* v. *Renz*, 22 Wkly Notes of Cas. (Pa.) 226. The Pennsylvania court in the later case of *English* v. *English*, 19 Pa. Super. 586, said: "The commonwealth is always the unnamed third party to the (divorce) proceeding. Divorces are granted on public grounds, and not to suit the mere desires of the parties. Hence suspicious circumstances tending to show collusion will be closely scrutinized by the courts. An acceptance of service after it is too late to make a valid service, or an appearance notwithstanding a fatal defect in the service of the writ, or in the publication, it may be conceded is a circumstance suggestive of collusion, which may be taken into consideration in connection with other circumstances in determining that question of fact * * * (but) * * * the public cannot be interested in technical objections, and being always present in court by the judge it cannot be taken by surprise for want of notice," and the court held that the same rules, therefore, may govern as in other causes, and that neither on principle nor on

authority could it be declared as an unvarying rule that an appearance, in the absence of due legal service of the subpoena, is conclusive evidence of collusion.

In Delaware, the case of *Wood* v. *Wood* (1909) 74 Atl. 376, is directly in point as supporting the decision of the principal case. The prior divorce act in Delaware provided that a summons shall issue for the defendant's appearance, *and upon such appearance*, or upon proof of the service of summons, or upon proof of substituted service, the cause shall proceed to trial. The laws of 1907 provide that a summons shall issue for the defendant's appearance, and upon proof of the service of summons or of substituted service the cause shall proceed to trial. The clause in the former act, "and upon such appearance," was omitted. The court held that it was perfectly clear that under the old act there were two means of obtaining jurisdiction, one, by appearance, the other, by proof of service, while the new act prescribed only one method, to-wit, by service; and said: "We think this new act contemplates an adverse proceeding, and the proceedings throughout must be free from taint or color of collusion. * * * The defendant voluntarily comes into court (she appeared by attorney) and attempts to assist by appearance in having the charge that she has violated her marriage vow determined against her as speedily as possible, all of which we think is against the clear intent of the act, and especially against public policy." The court believed the omission of the clause, *supra*, was a sufficient indication of the legislative intent that voluntary appearances should not be allowed in divorce proceedings.

And in the principal case we find that the court rested its decision very largely upon the ground that the legislature must have intended the new divorce act to be mandatory and expressive of a public policy to be strictly enforced. The court held that inasmuch as the act of 1907 prescribed the same procedure in divorce actions as in other cases in chancery *except so far as other process and procedure was prescribed by or under the authority of this act*, and then proceeded to prescribe a method of obtaining jurisdiction, it was clear that a voluntary appearance, as under the old act according to the rules of chancery, was no longer permissible.

The decision of the principal case can hardly be said to be judicial legislation, but it is certainly indicative of the present tendency of the courts and legislatures to tighten up on our divorce laws in response to the continual outcry against them. The mere fact, however, that the pendulum has already swung so far in one direction ought not to be a ground for swinging it too far in the other. L. F. M.

THE QUESTION OF THE VALIDITY OF A STIPULATION FOR ATTORNEY'S FEES UNDER THE NEGOTIABLE INSTRUMENTS LAW.—Does the provision of the Negotiable Instruments Law, that "the sum payable is a sum certain within the meaning of this chapter, although it is to be paid: * * * (5) With costs of collection or an attorney's fee in case payment shall not be made at maturity," give validity to such a stipulation? The question is answered in the negative by a recent case, *Miller* v. *Kyle* (Ohio 1911), 97 N. E. 372.

No other case that has directly passed on the same question has been

found. In view of this decision it must be acknowledged that the statement made on page 323, 10 MICH. L. REV., that "the Negotiable Instruments Law, now adopted by many of the States in this country, makes such a stipulation valid and enforceable," requires modification. But it does not appear that the decision of *Miller* v. *Kyle* is in accord with the spirit of the Negotiable Instruments Law nor founded on good reason. The purpose of the Negotiable Instruments Law is to secure uniformity of the rules of law on the subject as is clearly shown by the title, "An act to establish a law uniform with the laws of other states on negotiable instruments." It is but reasonable to infer that the views adopted by the legislature are those supported by the weight of authority. For a classification of the different conflicting decisions on the effect of a stipulation for attorney's fees in a promissory note see 10 MICH. L. REV. 323. The weight of authority sustains both the validity of the stipulation and the negotiability of the instrument. *Second Nat. Bank* v. *Auglin*, 6 Wash. 403, 33 Pac. 1056; *Salisbury* v. *Stewart*, 15 Utah 308, 49 Pac. 777, 62 Am. St. Rep. 934; *Bank of Commerce* v. *Fuqua*, 11 Mont. 285, 28 Pac. 291, 28 Am. St. Rep. 461; *Ramsey* v. *Thomas*, 14 Tex. Civ. App. 431, 38 S. W. 259; *Farmers' Nat. Bank* v. *Rasmussen*, 1 Dak. 60; *Wilson Sewing-Mach. Co.* v. *Moreno*, 7 Fed. 806; *Oppenheimer* v. *Farmers etc. Bank*, 97 Tenn. 19, 36 S. W. 705; *Farmers' Nat. Bank* v. *Sutton Mfg. Co.*, 6 U. S. App. 312; 52 Fed. 191; *Dorsey* v. *Wolff*, 142 Ill. 589; *Tyler* v. *Walker*, 101 Tenn. 306, 47 S. W. 424; *Benn* v. *Kutzschan*, 24 Ore. 28, 32 Pac. 763; *Shenandoah Nat. Bank* v. *Marsh*, 89 Iowa 273, 56 N. W. 458; *First Nat. Bank* v. *Slaughter*, 98 Ala. 602, 14 South. 545; *Stark* v. *Olsen*, 44 Neb. 646, 63 N. W. 37; *Clifton* v. *Bank of Aberdeen*, 75 Miss. 929, 23 South. 394; *Exchange Bank* v. *Tuttle*, 5 N. M. 427, 7 L. R. A. 445; *Smith* v. *Muncie Nat. Bank*, 29 Ind. 159; *Smith* v. *Silvers*, 32 Ind. 321; *Wood* v. *Winship Mach. Co.*, 83 Ala. 424, 3 South. 757, 3 Am. St. Rep. 754; *Campbell* v. *Worman*, 58 Minn. 561, 60 N. W. 668; *Miner* v. *Paris Exch. Bank*, 53 Tex. 559; *Bowie* v. *Hall*, 69 Md. 433, 16 Atl. 64, 9 Am. St. Rep. 433, 1 L. R. A. 546. The fact that the legislature made provision for stipulation for attorney's fees shows that it legalized the existence of such a stipulation on a note. If it had been the intent of the legislature to consider it void, it would have declared so, or omitted to mention it altogether. If the stipulation was void, it would be mere surplusage, and could not in any way effect the certainty of the amount to be paid, and so it would not only be superfluous but absurd for the legislature to define what should constitute certainty by saying that "the sum payable is a sum certain within the meaning of this chapter, although it is to be paid with costs of collection or an attorney's fee in case payment shall not be made at maturity." It is true that the statute does not in express terms declare that a stipulation for attorney's fee shall be valid, but its language and spirit clearly recognize its validity. The decision of *Miller* v. *Kyle* is certainly a manifestation of the tendency of the courts to adhere to what is ancient without paying due regard to the change of conditions, and to use every effort to evade statutory provisions that are enacted to remedy existing evils. A. Z. S.