LAW AND CONTEMPORARY PROBLEMS

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FOREWORD

Bouvier's *Law Dictionary* defines alimony as, "the allowance which a husband, by order of court, pays to his wife, being separate from him, for her maintenance. . . . It is also commonly used as equally applicable to all allowances, whether annual or in gross, made to a wife upon a decree of divorce." In general there are four conditions which must be satisfied before an order for permanent alimony is granted: a legally valid marriage; the legal continuance of that marriage; a separation between the spouses, not on a voluntary basis, but by judicial decree; the legal innocence of the petitioning wife. These and related rules of law are found in the compiled statutes of the various states and the published opinions of the respective appellate courts which interpret the legislative intent and apply the principles derived therefrom in the solution of specific cases.

The real forum in which the facts of the cases are fought out is the trial court. The records of such controversies are to be found in the files of the clerk of court, the law offices, and the social agencies of the community. The entire problem cannot be studied with a view to evaluating the present substantive rules and procedure until all the necessary facts are available. Efforts to secure the details of cases from lawyers and social workers are made difficult by the confidential nature of the information and the scattered condition of the records. A monumental study of the data in the office of the clerk of court is contained in two volumes by Marshall and May prepared under the auspices of the Johns Hopkins Institute of Law and entitled respectively, *The Divorce Court—Maryland* (1932), and *The Divorce Court—Ohio* (1933). The figures compiled in this study serve both to dispel some erroneous conceptions concerning alimony and to reveal the seriousness to the community of the problems its administration presents. For example, it is shown that, of 2,500 cases in Ohio between July 1, 1930, and December 31, 1930, in which the wife sought financial relief results were obtained on the basis of the following percentages: property adjustments, 18.6%; awards of gross amounts, 10.5%; awards of counsel fees, 10.9%; awards of periodic payments, 23.0%. Women with children were successful in securing money or property awards much more frequently than those who were childless. However, the average weekly award to the childless wife was $11.66 while that for the support of wives and children was only $9.04 per family. Of the lump sum awards of known amount only twenty-five were large enough to provide, at 5% interest, a continuing income of $4.00 per week; and only four produced $10.00 per week. The statistical

data do not show any extensive tendency to foster an "alimony racket." It is clear from the volumes from which these excerpts are taken that the entire problem is substantial; that it reaches many social and economic classes; that, in addition to a comparatively few cases where the accusation of a "racket" may be made, there are many in which the funds provide only a meagre basis for support of wife and children.

As the symposium is addressed to both a legal and non-legal audience it seems appropriate to provide, in the two opening articles, a sociological, as well as a legal, background. Mr. Kelso, under the title *The Changing Social Setting of Alimony Law,* has considered the philosophy of alimony in the light of altered domestic and economic conditions. Mr. Vernier and Mr. Hurlbut perform a somewhat similar service on the legal side in *The Historical Background of Alimony Law and Its Present Statutory Structure.* After sketching the ecclesiastical origin of many of the concepts now in use by the courts, they summarize the contributions which have been made by legislatures in the United States.

If one, *de novo,* were creating a system of alimony law, it would be necessary to determine whether the theory of administration should be based on either of the two extremes of unrestrained judicial discretion or rigid legislative limitation or upon some compromise set of rules which might be described as "loose" or "elastic" depending upon the bias of the observer. In evaluating the sociological worth to the community of the present system one cannot escape the challenge of the prevailing system of judicial discretion and the next three articles accept it.

Mr. Cooey, in *The Exercise of Judicial Discretion in the Award of Alimony,* has inspected a cross section of the reported decisions of appellate courts which were called upon to determine whether the trial judge in making an alimony award had abused his discretion. The result is a disclosure of the legal guide posts which trial courts accept as significant factual points of departure in the making of decisions or as self-imposed restraints to prevent abuse of this judicial power. It is interesting to consider realistically how far such considerations do or should control.

Mrs. Daggett's paper is entitled *Division of Property upon Dissolution of Marriage.* In it she compares the rules for division of marital property upon divorce as they have developed under the common law system of marital property with those in force in Louisiana and in those western states which, like Louisiana, have borrowed the community property system from the civil law. She condemns that dependency of property rights on judicial discretion which the common law system permits and deplores the infiltration of common principles in the western community property states, finding the most satisfactory solution in Louisiana's combination of rigid rules for property settlements with judicial discretion in the award of periodic alimony payments.

Mr. Desvernine, writing on *Grounds for the Modification of Alimony Awards,* reports on his study of cases in which appellate courts have reviewed the action of trial courts in passing upon applications for modifications in alimony awards already

in existence. Again the query is presented as to how far such "Grounds" do or should affect the untrammeled personal reaction of the judge.

Mr. Jacobs, in *The Enforcement of Foreign Decrees for Alimony,* discusses and analyzes the difficult problems presented by the cases in which the courts of one jurisdiction have been called upon to decide to what extent they would—and, under the Full Faith and Credit Clause, must—give effect to an alimony award rendered by the court of another state.

Mr. Pokorny, under the title *Practical Problems in the Enforcement of Alimony Decrees,* illustrates the operation of an important innovation in the handling of alimony cases: the supplementation of the machinery of the trial courts by an administrative agency investigating the condition of the parties and supervising compliance with the judicial orders. His office, Friend of the Court, in Detroit, is another source of realistic material as to the nature and extent of such problems.

Mrs. Peele, in *Social and Psychological Effects of the Availability and Granting of Alimony on the Spouses,* draws her examples from still another factual background: the records of legal aid societies and social agencies.

A word should be said in explanation of the inclusion of two articles which provide a basis for the comparative study of our alimony law. Alimony problems examined solely against a background of the American family tend to give the reader a one-dimensional approach. By considering corresponding legislative enactments and judicial pronouncements in relation to the modern family in France and Germany two additional dimensions are added and a fundamental conflict in the nature of alimony as a juristic concept, more clearly perceived. Miss Mitchell describes *Alimony in French Law;* Mr. Mankiewicz, *The German Law of Alimony Before and Under National Socialism.* With that interest in basic jurisprudential problems common to continental legal writers, both devote attention to the question whether alimony is grounded in fault or in status, a matter which the new German law places in special relief. If the innocent wife is entitled to damages from the guilty husband, the question of fault becomes significant. If, on the other hand, it is regarded as sociologically wise that the state should require members of the family, even in the event of its dissolution, to support one another rather than permit them to become dependent upon public charity, a different set of issues is raised. Such problems cannot be disregarded by those seeking a better system of alimony law.

No special consideration has been given in this symposium to the problems relating to the custody and support of children of divorced parents. These matters will constitute the subject of some future issue of this quarterly.

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