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ECONOMIC RELATIONS BETWEEN HUSBAND AND WIFE IN NEW YORK

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I

INTRODUCTION

Among the profound changes that can be expected upon entering matrimony are economic ones. These economic changes effected by marriage may begin even before the ceremony with an antenuptial contract; and after marriage, changes are possible with respect to the parties' rights and powers over property. The right of the wife to separate property may also come into question.

Property transactions between husband and wife may be subject to special rules, especially if the relationship of agency is superimposed on that of matrimony. Suits between husband and wife may be governed by peculiar rules, and one spouse may be concerned over liability to third parties for the other spouse's transgressions. The obligations between spouses for support both during cohabitation and after an alteration in their marital status are very important. Succession to property after death is significantly affected by marital status, and rights under pension systems and workmen's compensation laws often turn on the claimant's matrimonial status.

All of these economic relations between husband and wife are prescribed by an intricate combination of statutes and decisions and while many rules of law in this field may prevail in other states, New York has its own unique combination of them all. It should be of interest, therefore, to examine the law of these economic relations in New York and then to venture some comment on the usefulness of the present rules.

* See Contributors' Section, Masthead, p. 241, for biographical data.

This study is adapted from: Dean, "Matrimonial Property Law in the State of New York" in Matrimonial Property Law (University of Toronto School of Law, Comparative Law Series, Vol. 2, ed. Prof. W. Friedmann, The Carswell Co., Toronto, 1955, pp. 315 ff.). The author is indebted to the editor and publishers of that volume for permission to use his contribution.

Because New York is well ahead of many states in regulating these economic relations between husband and wife, such an examination may also serve as a standard by which to judge progress elsewhere.

The story begins with the first constitution of the State of New York, adopted in 1777, which provided that:

> . . . such parts of the common law of England, and the statute law of England and Great-Britain, and of the acts of the legislature of the colony of New York, as together did form the law of said colony on the nineteenth day of April, in the year of our Lord, one thousand seven hundred and seventy-five, shall be and continue the law of this state, subject to such alterations and provisions as the legislature shall, from time to time, make concerning the same.[1]

A further provision included in prevailing law the resolutions of the congress of the colony and the convention of the State of New York to the extent that they might be consistent with the constitution of 1777. The two bodies, congress and convention, were the interim bodies that operated between the end of British rule and the establishment of the New York State Legislature under the first state constitution. No reference was made, however, to judicial decisions under the colony, congress, or convention.

This adoption of the common law and statute law of England as of 1775 reappeared in the succeeding constitutions[2] and in substantially the same terms in the present constitution adopted in 1938.[3]

The method by which the equity jurisdiction and rules of the English Chancellor were established in New York was somewhat different. The constitution of 1777 provided, if somewhat indirectly, for a Chancellor to exercise equity jurisdiction in addition to the jurisdiction exercised by the judges of the supreme court, which was the common-law court of general jurisdiction;[4] successive constitutions more precisely defined the respective jurisdiction of the supreme court and the courts of equity, and the present Civil Practice Act now provides:

> The general jurisdiction in law and equity which the supreme court of the state possessed under the provisions of the constitution includes all the jurisdiction which was possessed and exercised by the supreme court of the colony of New York at any time and by the court of chancery in England on the 4th day of July, 1776. . . .[5]

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1 N.Y. Const. art. XXXV (1777).

2 N.Y. Const. art. VII, § 13 (1821); N.Y. Const. art. I, § 17 (1846); N.Y. Const. art. I, § 16 (1894).

3 N.Y. Const. art. I, § 14.

4 N.Y. Const. arts. XXIV, XXXII (1777).

5 N.Y. Civ. Prac. Act § 64. See also, Pomeroy, Equity Jurisprudence § 284 (5th ed. 1941); Gould v. Gould, 118 Misc. 576, 195 N.Y. Supp. 113 (Sup. Ct. N.Y. County 1922).

It is necessary, therefore, to examine briefly the common law and statutes as well as the rules of equity governing husband and wife in England in 1775 and the authority to which to refer is, of course, Blackstone's *Commentaries on the Laws of England*:[6]

> By marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband; under whose wing, protection and *cover*, she performs everything; and is therefore called in our law-french a *feme-covert* . . . and her condition during her marriage is called her coverture. Upon this principle, of a union of person in husband and wife, depend almost all the legal rights, duties and disabilities, that either of them acquire by the marriage. . . .[7]

From this common-law fiction of the unity of husband and wife flowed the rules respecting relations between them. A husband could not grant any property to his wife or contract with her, for that would simply be a transaction with himself and therefore meaningless, and any contracts they had entered into as the sole parties prior to the marriage were voided by the marriage. Yet a man could bequeath property to his wife since she would not acquire the property until she had become single again. The husband was required to provide his wife with necessaries—food, clothing, shelter, and so on—and, if he did not do so, any debts she contracted for necessaries had to be paid by him. Should she leave him to live with another man, his obligation to support her ceased. The responsibility of the husband reached the point of making him liable for her pre-marital debts. To obtain redress for an injury to her person or property, suit had to be instituted in the names of both husband and wife and in any civil action against her the husband had to be joined as co-defendant. Only in ecclesiastical courts could a wife sue or be sued without her husband. Under circumstances in which a married woman might execute a deed, called a fine, for the transfer of real property, she had to be examined privately by a judicial officer to ascertain whether she was acting of her own free will or under her husband's coercion.

Other restrictions limited her individual liability for civil wrongs before or during marriage and for most crimes. In Blackstone's words:

> These are the chief legal effects of marriage during the coverture; upon which we may observe, that even the disabilities which the wife lies under are for the most part intended for her protection and benefit: so great a favorite is the female sex of the laws of England.[8]

Such, briefly, were what Blackstone described as the personal relations

[6] (1758). For an historical study see 3 Holdsworth, A History of English Law 185-97, 520-33, 550, 561 (5th ed. 1942).

[7] 1 Blackstone, Commentaries *442.

[8] 1 id. at *445.

of husband and wife. In somewhat greater detail he also described the property relations of husband and wife. Thus certain tenancies in real property arose out of the marriage: there was the tenancy by the curtesy of England, the estate of the husband in the real property left by his wife if both he and issue capable of inheriting from her survived her death; and then there was the tenancy in dower by which the wife received at the death of her husband a one-third interest for her life in all real property her husband had owned at any time during coverture.[9] If real property were conveyed to a husband and wife, they would hold it under a unique tenancy, called a tenancy by the entirety; both were owners of the entire estate, neither could convey it without the consent of the other, and at the death of one the survivor succeeded to the entire estate.[10]

Although the husband obtained during the marriage only the income from his wife's real estate, he became absolute owner of all of his wife's personal property upon marriage as well as of any such property she might receive during the marriage, and he could dispose of it as he alone saw fit. The wife did have one species of personal property which she owned at the death of her husband even though it had been her husband's; that was her paraphernalia, her clothing and jewels.

Not only was a married woman incapable of making a will, but any will she might have made before marriage was revoked by the marriage.[11] With the husband's consent, however, she could bequeath personal property. Only by entering into an antenuptial contract in which the prospective husband and a third party on her behalf contracted to limit the disabilities of coverture respecting property could the wife retain the freedom to devise her personal property.[12]

A husband had the right to recover damages for injuries to his wife, whether they arose out of abduction, adultery, or physical abuse, but the wife had no corresponding cause of action for injuries to her husband.[13]

It was the Chancellor, sitting for the King in the court of equity, to whom married women in England owed their first steps toward emancipation in respect to property rights. Equity by 1775 had come to recognize a gift of property to a woman, married or unmarried, as her separate estate which the court of equity would protect against the common-law claims of the husband. Where it was necessary for the husband to resort to the court of chancery to reduce to his possession choses in action

9 2 id. at *126-39.
10 2 id. at *182.
11 2 id. at *433-36.
12 2 id. at *498.
13 3 id. at *139-40.

owned by the wife, the doctrine of equity to a settlement imposed on the husband the obligation of first making suitable provision for his wife from such property.[14]

Such were the rules respecting marital property prevailing in England in 1775 under the common law and the statute law as well as the rules of equity on July 4, 1776. Since there has never been a comprehensive codification of the law of marital property in New York,[15] the old English rules lurk behind every legislative provision and each judicial decision and they are frequently the standard by which the adequacy or propriety of legislative and judge-made changes in the law are assessed. In the more detailed discussion to follow, where the numerous statutory modifications of the original rules will be discussed, recurrence to the old common law and equity will be necessary from time to time in order to explain these modifications adequately.

That the changes came in the law as slowly as they did is to be wondered at and is not entirely explained by the frontier conditions in early New York State as against Victorian England. Although in the Hudson River Valley the land holdings of the Dutch patroons offered some parallel to the feudal system in England in which the restrictions on the rights of married women had their origin, yet the law did not change very rapidly even as New York City became the center of population and the Mohawk Valley became industrialized in part. The existing studies[16] do not satisfactorily explain the lag in the law that often was more pronounced than that in England. Much research remains to be done in this area not only for New York but for the other states as well.

II

Economic Relations Before Marriage

At common law a single woman was free to contract just as a man was but the effect of coverture upon her rights made it impossible to enforce after marriage any contractual terms inconsistent with her marital status. It was only after equity recognized the separate estate of a married woman that a field was opened in which a contract before marriage could

[14] Jenks, A Short History of English Law 222 et seq. (1912); Madden, Handbook of the Law of Persons and Domestic Relations 99 et seq. (1931) (hereafter cited as Madden, Domestic Relations).

[15] The famous Field code of substantive law dealt with marital property but never became law. See Field, et al., Ninth Report of the Commissioners of the Code (1865), and David Dudley Field Centenary Essays (Reppy ed. 1949).

[16] See, e.g., Calhoun, A Social History of the American Family (1945); Howard, A History of Matrimonial Institutions (2d ed. 1904); Ironside, The Family in Colonial New York (unpublished Ph. D. thesis, Columbia Univ. 1942):

be enforced after marriage and, after statutes granted to a greater or lesser extent the right of a married woman to contract, the enforcement of a contract of a woman made before marriage became relatively simple.

An antenuptial contract[17] is an agreement entered into between a single man and a single woman respecting their property relationships after a prospective marriage and occasionally respecting certain other matters. At one time, especially under the earlier common law and equity, third parties would also join in the contract; frequently they would be chosen from the bride's family in order to protect her interests and to bring against the husband any legal actions that might be necessary. The somewhat narrower term, "marriage settlement," refers to an agreement, also in contemplation of marriage, by which title to specific property, usually real property, is to be changed. The term is not commonly used in New York and with the greater concentration of wealth in personal property such as stocks and bonds its scope is too limited to describe most agreements before marriage.

To the extent that consideration is required for an antenuptial contract it is said to be supplied by the marriage itself,[18] which is another way of saying that the primarily monetary consideration generally required for contracts in Anglo-American law is not necessary.

The use of antenuptial contracts in New York appears to be limited to persons of great wealth or else to those of recent European background. The average citizen would seldom think of using this legal device.

Only the briefest legislation is found in New York to govern antenuptial contracts:

> A contract made between persons in contemplation of marriage, remains in full force after the marriage takes place.[19]

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[17] The standard work is Lindey, Separation Agreements and Ante-Nuptial Contracts (1937). Statutes of all the states on the subject are summarized in 3 Vernier, American Family Laws § 15 (1935). A supplement to Vernier's five-volume work was published in 1938, but no further supplements have been published. In citations hereafter the supplement will not be referred to specifically but should be consulted in each case. A recent statutory summary in tabular form appears in Jacobs and Goebel, Cases and Other Materials on Domestic Relations 1075-131 (3d ed. 1952). See also Madden, Domestic Relations 244, 246, 249; 1 Schouler, A Treatise on the Law of Marriage, Divorce, Separation and Domestic Relations (6th ed. 1921), the last comprehensive treatise on American family law (hereafter cited as Schouler, Domestic Relations). Discussion of the New York law of antenuptial contracts will be found in Battershall, The Law of Domestic Relations in the State of New York 264 et seq. (1910) (hereafter cited as Battershall, Domestic Relations); Bullock, A Treatise on the Law of Husband and Wife in New York §§ 57-75 (1897) (hereafter cited as Bullock, Husband and Wife); Grossman, The New York Law of Domestic Relations §§ 100-17 (1947) (hereafter cited as Grossman, Domestic Relations).

[18] Madden, Domestic Relations § 72; American Surety Co. v. Conner, 251 N.Y. 1, 166 N.E. 783 (1929).

[19] N.Y. Dom. Rel. Law § 53.

> A husband who acquires property of his wife by antenuptial contract or otherwise, is liable for her debts contracted before marriage, but only to the extent of the property so acquired.[20]
>
> If after making any will, such testator marries, and the husband or wife survives the testator, such will shall be deemed revoked as to such survivor, unless provision shall have been made for such survivor by an antenuptial agreement in writing. . . . No evidence to rebut such presumption of revocation shall be received, except to show the existence of such antenuptial agreement.[21]

There is also a requirement that except for mutual promises to marry a contract made in consideration of marriage must be in writing.[22] On this meager foundation the New York courts have erected a superstructure of case law, defining and regulating contracts in contemplation of marriage. The purpose of antenuptial contracts has been the guiding principle for courts: to protect the property interests of the parties, especially those of the wife, by making different provisions from those the law would otherwise establish after marriage. If the wife be wealthy, the antenuptial contract may be directed at protecting her wealth from the demands her husband might make on it after marriage. Or a prospective husband with property he wishes to preserve intact, whether it be an ancestral home or a closely held corporation, may provide for his wife under an antenuptial contract so that his death will not permit her to force the sale of such assets.

In general the law of contracts covers this particular variety of contract; the matter of consideration has already been mentioned. To construe an ambiguous contract the courts will examine the position of the contracting parties and the circumstances under which the contract was negotiated. The intention of the parties carries great weight and because the parties are not dealing commercially there is more scope for liberal construction than in business contracts. The wife is entitled to the benefit of any doubtful provisions, reflecting Blackstone's characterization of her as a favorite of the law. Both parties, of course, must have capacity to contract generally, and thus must be of age and sound mind.

The most important difference between ordinary contracts and antenuptial contracts is in the requirement of fairness to the wife. The parties are not considered to be dealing at arms' length as commercial contracting parties do. If the woman, for example, accepts in an antenuptial contract a smaller interest in her prospective husband's property than she would otherwise be entitled to claim if she should survive him, he must disclose

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[20] Id. § 54.

[21] N.Y. Dec. Est. Law § 35. This provision will be discussed below in connection with rights of succession.

[22] N.Y. Pers. Prop. Law §§ 31(3), 51.

to her the extent of his wealth and the provision he makes for her in lieu of her widow's share in the estate must be reasonable in relation to his wealth and the situation of the parties.

Another peculiarity of antenuptial contracts is that each party at the time of making must have capacity not only to contract generally, as has been mentioned, but also capacity to marry. If one of the parties, for example, is married to a third person when the contract is made, it will be invalid because of the lack of capacity to marry at the time of contracting as well as because of the public policy against what is essentially a contract to obtain a divorce.

Obviously, the husband may not use the device of an antenuptial contract to avoid his obligation to support his wife.

Before the substitution in New York of the spouse's elective share for curtesy and dower, the antenuptial agreement was frequently used as a method of obtaining a release in advance of the widow's dower interest. Now it is used to obtain a release of the widow's elective share by making a different but reasonable provision for her. One commonly used method is to establish a trust in favor of the wife with the income payable to her only after marriage or else after the death of the husband.

The requirement that an antenuptial contract be in writing is found in section 31(3) of the New York Personal Property Law,[23] which is the New York version of the English Statute of Frauds. This requirement is met without any necessity for a formal document or affidavit; anything in writing, be it a series of letters or a bare memorandum, will suffice if the terms of the agreement are set out. Marriage after an oral antenuptial agreement will not cure the defect; the agreement will be unenforceable. Only where the antenuptial agreement is intended to be a release of the spouse's elective share in the estate of the deceased spouse is there a rigid, formal requirement; such a release must be signed at the end by the one giving the release and the document must be acknowledged or proved like a deed for real estate.

Ordinarily the husband bears the burden of proving the validity of an antenuptial agreement on the possibly doubtful assumption that he is the stronger of the two parties, but New York courts will inquire into the circumstances of the parties and in a given case may decide that the woman was in the dominant position and should bear the burden herself. Not only may the parties to the antenuptial agreement enforce it, so also may any third-party beneficiary of the agreement who seeks to establish his rights.

It has already been pointed out that usually an antenuptial contract

[23] See Matter of Goldberg, 275 N.Y. 186, 9 N.E.2d 829 (1937).

will be limited to the property relationships of the prospective spouses. Recently a New York court enforced an antenuptial contract whereby the offspring of the proposed union were to be brought up as Catholics.[24]

The effect of an executed antenuptial contract on the creditors of the party granting property to the other spouse is illustrated in a case decided by the Court of Appeals.[25] Pursuant to an antenuptial contract the husband gave his wife jewelry and real property. Soon after, he was exposed as an embezzler and the surety on his fidelity bond sued the wife, who in the meantime had obtained an annulment for fraud, to regain the jewelry and real estate or their value. The court observed that the former husband could not have obtained the return of the property because he had been guilty of fraud in inducing the wife to marry him, and that the property bestowed was not itself taken from the employer or obtained by a fraud on the creditors at the time it was given. The surety company, therefore, obtained nothing, whether as a claimant of specific property or as a creditor of the husband.

In conclusion a word might be said about the impact on antenuptial agreements of the abolition in New York of actions for breach of promise to marry.[26] In spite of the strong language of the abolishing statute it seems certain that where a valid antenuptial contract had been made and property transferred pursuant to the contract but prior to the marriage, a wrongful refusal to marry by the party receiving the property would not prevent restitution of the property for failure of the consideration.[27] This is apparent when it is realized that one reason for abolishing the cause of action was its abuse by persons who lacked any reliable documentary evidence of an agreement to marry.

III

Matrimonial Property Relations[28]

As one of the majority of the states in the common-law tradition, New York has a system recognizing separate as against community property for husband and wife. Legislation has abolished the common-law limitations on the property rights of the wife in these terms:

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[24] Ramon v. Ramon, 34 N.Y.S.2d 100 (N.Y. Dom. Rel. Ct. Richmond County 1942) (not officially reported).

[25] American Surety Co. v. Conner, 251 N.Y. 1, 166 N.E. 783 (1929).

[26] N.Y. Civ. Prac. Act art. 2-A.

[27] Zawadzki v. Vandetti, 255 App. Div. 932, 9 N.Y.S.2d 219 (4th Dep't 1938).

[28] The law in all of the states is summarized in Long, A Treatise on Domestic Relations c. IX (3d ed. 1923) (hereafter cited as Long, Domestic Relations); Madden, Domestic Relations c. 4; Peck, The Law of Persons and Domestic Relations cs. XI-XIII, XVI (3d ed. 1930) (hereafter cited as Peck, Domestic Relations); Schouler, Domestic Relations cs. X, XI, XV, XVI; 3 Vernier, American Family Laws §§ 167, 176. The New York law is described in Battershall, Domestic Relations c. X; Bullock, Husband and Wife c. VI; Grossman, Domestic Relations c. X.

> Property, real or personal, now owned by a married woman, or hereafter owned by a married woman at the time of her marriage, or acquired by her as prescribed in this chapter, and the rents, issues, proceeds and profits thereof, shall continue to be her sole and separate property as if she were unmarried, and shall not be subject to her husband's control or disposal nor liable for his debts.[29]

It is permissible in New York, as in all other states, to treat the income of the husband as the joint income of husband and wife for state[30] and federal[31] income tax purposes, but for other purposes the income and property of each spouse belong to that spouse alone.

There is in New York, as in more than half of the other states,[32] a curious anachronism surviving from before Blackstone's time, the estate by the entirety. The common-law incidents of this estate already have been described, and for the most part it is the common-law estate by the entirety which still flourishes in New York although the occasion for this estate, the common-law unity of husband and wife, has long since disappeared.[33] A recent statutory change granted to courts hearing matrimonial actions the power to determine the occupancy of premises held by the entirety.[34] Since consent of both tenants is required for termination of the estate, husbands and wives litigating over their matrimonial status have not always been able to agree on occupancy, and heretofore the courts have been powerless to interfere.

The tenancy by the entirety is not available with respect to personalty,[35] but husband and wife may own personal property as joint tenants[36] or tenants in common.[37]

If a husband and wife by contract agree that they shall treat their respective separate incomes and property as joint rather than separate, or in other respects vary their property relationships, that is permissible in New York. Only when such an agreement is a device whereby, for example, a husband attempts to avoid such responsibility as that for support does the law step in and deny any effect to such a contract on the ground of public policy.[38]

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29 N.Y. Dom. Rel. Law § 50.

30 N.Y. Tax Law § 367(1).

31 Int. Rev. Code of 1954, § 12(d).

32 See 2 American Law of Property § 6.6 (Casner ed. 1952).

33 See Note, "Tenancies by the Entirety in New York," 1 Buffalo L. Rev. 279 (1952).

34 N.Y. Civ. Prac. Act § 1164-a. See the study by the present writer, N.Y. Leg. Doc. No. 65(L) (1953).

35 West v. McCullough, 123 App. Div. 846, 108 N.Y. Supp. 493 (2d Dep't 1908), aff'd, 194 N.Y. 518, 87 N.E. 1130 (1909).

36 Matter of Russell, 168 N.Y. 169, 61 N.E. 166 (1901).

37 Matter of Kaupper, 141 App. Div. 54, 125 N.Y. Supp. 878 (2d Dep't 1910), aff'd, 201 N.Y. 534, 94 N.E. 1095 (1911).

38 N.Y. Dom. Rel. Law § 51.

As in many other states,[39] New York has statutory provisions apparently directed toward protecting the family home. "Apparently" is used because the exemptions from the claims of creditors are limited to "a lot of land, with one or more buildings thereon, not exceeding in value one thousand dollars,"[40] or the first $1000 obtained after execution and sale of a homestead worth more than $1000,[41] a paltry amount in view of the present dollar values of homes. It is necessary for the property to have been designated as homestead property either by a conveyance describing it as such or by a similar recorded instrument.[42] Not only is the exemption available to a householder, usually considered a male, but also to a woman, married or single.[43] Upon the death of the owner of the homestead, the exemption continues until the majority of the youngest child of the owner of the property and the death of the surviving spouse of the owner.[44] It appears that homestead property can be mortgaged and conveyed by the owner without action by the other spouse.[45]

Similar provisions protect such articles of personal property as a wedding ring, mechanic's tools, etc. of specified value when owned either by a householder or non-householder.[46] No rights of spouses in such personalty as between themselves are covered by these statutes.

1. Rights With Respect to Each Other's Property

Section 50 of the Domestic Relations Law, already quoted,[47] establishes the exclusive right of the wife to her property owned at the time of marriage or acquired later, and section 60 extends to the married woman the power to bring her own action for wages earned. The husband is therefore barred from his common-law ownership of her personal property, his former right to her wages, and his former control of her real property. New York has gone farther than a number of other states[48] in thus treating the property of both husband and wife as separate property

39 See 3 Vernier, American Family Laws § 225.

40 N.Y. Civ. Prac. Act § 671.

41 Id. § 676.

42 Id. § 672.

43 Id. § 673.

44 Id. § 674.

45 Id. § 678, describing the procedure for cancellation of exemption of homestead property, concludes: ". . . nothing herein contained shall be so construed as to prevent the husband and wife from jointly conveying or mortgaging property, so exempt." This seems to have been misconstrued to require the concurrence of husband and wife in such mortgage or conveyance even though only one party is the owner. 3 Vernier, American Family Laws § 225. No New York cases applying this provision have been found.

46 N.Y. Civ. Prac. Act §§ 665-66.

47 See note 29 supra.

48 See 3 Vernier, American Family Laws §§ 167-76.

unaffected during the lifetime of the parties by the marriage relationship. Such property relationships after the death of one spouse will be discussed below under "Succession."

If spouses hold property jointly, other than by a tenancy by the entirety, an action for partition may be brought by one spouse against the other. If they are living on the premises as man and wife, the owner may not, however, oust the other spouse,[49] since a successful ouster would amount to a separation of the parties, which can only be decreed in accordance with statutes prescribing matrimonial actions.

The legislation regulating small loan operations has a provision which grants a kind of joint interest in the property and income of a family. If a lender in the business of making loans of $500 or less obtains an assignment of wages or any kind of lien on the household furniture, it will not be valid ". . .. if the borrower is married unless it is signed in person by both husband and wife, provided that written assent of a spouse shall not be required when husband and wife have been living separate and apart for a period of at least five months. . . ."[50] The law is designed to protect wage-earners from the rapacity of some persons in the small loan business and does not give to one spouse any interest in furniture owned by the other or in wages earned by the other except with respect to the necessity of consent before either may be assigned or otherwise pledged.

The rights of creditors against the property of husbands and wives, except as such property may be homestead property, was discussed previously.

Separate Property of the Wife

New York has firmly established the right of a married woman to the ownership and control of her own property,[51] and New York has specified in some detail her powers:

> A married woman has all the rights in respect to property, real or personal, and the acquisition, use, enjoyment and disposition thereof, and to make contracts in respect thereto with any person . . . as if she were unmarried. . . . Judgment for or against a married woman, may be rendered and enforced . . . as if she was [*sic*] single. A married woman may confess a judgment. . . .[52]

> A person who holds property as trustee of a married woman, under a deed of conveyance or otherwise, may, on the written request of such married woman, accompanied by a certificate of a justice of the supreme court,

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49 Marshall v. Marshall, 116 Misc. 249, 190 N.Y. Supp. 318 (Dutchess County Ct. 1921); Cipperly v. Cipperly, 104 Misc. 434, 172 N.Y. Supp. 351 (Rensselaer County Ct. 1918).

50 N.Y. Bank. Law § 356.

51 N.Y. Dom. Rel. Law § 50.

52 Id. § 51.

> that he has examined the condition and situation of the property, and made inquiry into the capacity of such married woman to manage and control the same, convey to such married woman all or any portion of such property, or the rents, issues or profits thereof.[53]

The latter of these two statutes, in spite of its broad language, is taken to refer only to the archaic type of trust once used in order to assure a woman of her separate estate apart from her husband, a purpose for which no occasion now exists.

Married women are included by unmistakable implication in the category of "all persons, except idiots, persons of unsound mind and infants . . ."[54] who may devise property, real and personal,[55] and who may own and transfer real property.[56] The legislature has dealt specifically with the grant of powers to married women:

> A general and beneficial power may be given to a married woman, to dispose, during her marriage, and without concurrence of her husband, of real property conveyed or devised to her in fee.[57]

> A special and beneficial power may be granted,
> 1. To a married woman, to dispose, during the marriage, and without the concurrence of her husband, of any estate less than a fee, belonging to her, in the property to which the power relates.[58]

Other legislation specifies that:

> The acknowledgment or proof of a conveyance of real property, within the state, or of any other written instrument, may be made by a married woman same [*sic*] as if unmarried.[59]

A series of cases has defined what constitutes property acquired by the wife which becomes her separate property. Money or its proceeds received from her husband for household expenses, for example, will not become her separate property, but she may receive gifts from her husband, as will be discussed below.

In summary it may be said that the old doctrines of the separate estate of the married woman are no longer applicable in New York; her rights with respect to her own property are the same as those of any other person.

It is obvious that a considerable number of married women are engaged in business in New York, most of them as employees, it is true, but a

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53 Id. § 59.
54 N.Y. Dec. Est. Law § 10.
55 Id. § 15.
56 N.Y. Real Prop. Law § 11.
57 Id. § 142.
58 Id. § 143.
59 Id. § 302.

number of them as entrepreneurs and often successful ones. The laws of New York fully protect their right so to engage in business by the broad terms of section 51 of the Domestic Relations Law:

> A married woman has all the rights . . . to carry on any business, trade or occupation, and to exercise all powers and enjoy all rights in respect thereto and in respect to her contracts, and be liable on such contracts as if she were unmarried. . . .

The right of a married woman to bring her own cause of action for wages or other compensation is protected by legislation. Only if the husband and wife have agreed that the husband may bring the action—and the presumption is that no such agreement has been made—may the husband sue for the wife's compensation.[60]

Such problems as arise when the wife is in business as either a partner or agent of her husband will be discussed below.[61] Unfortunately not all of the states give a married woman untrammeled freedom to carry on a business; a number of them have various remnants of common-law restrictions.[62]

Transactions Between Husband and Wife

The change in the status of married women has eliminated most of the special rules that used to regulate gifts[63] between husband and wife. In general, if the legal requirements for a gift are complied with—donative intent, transfer of possession or its equivalent, and acceptance—the property in the article will pass just as if the parties to the transaction were not married.[64]

Because of the unusually intimate relationship of husband and wife there are some circumstances where a gift from one to the other may be subject to special rules. For example, when one spouse buys property in the name of the other without any expression of intent, a gift will be implied[65] although if the parties were not husband and wife no gift would result under the circumstances. Similarly, property purchased by one

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60 N.Y. Dom. Rel. Law § 60.

61 For the disabilities formerly attaching to a married woman in business in New York see Battershall, Domestic Relations 287 et seq.; Bullock, Husband and Wife c. VII. See also Grossman, Domestic Relations §§ 279-81.

62 See 3 Vernier, American Family Laws § 187, for a summary of the statutes. See also Long, Domestic Relations §§ 138, 175; Madden, Domestic Relations § 63; Peck, Domestic Relations §§ 72, 83, 116-18; Schouler, Domestic Relations c. XVII.

63 See Battershall, Domestic Relations 271 et seq.; Bullock, Husband and Wife 150 et seq.; Grossman, Domestic Relations c. XII.

64 N.Y. Dom. Rel. Law § 56.

65 Weigert v. Schlesinger, 150 App. Div. 765, 135 N.Y. Supp. 335 (2d Dep't 1912), aff'd, 210 N.Y. 573, 104 N.E. 1143 (1914).

spouse in the names of both of them will pass after the death of the purchaser to the surviving spouse by implied gift.[66]

There has been considerable litigation in New York with respect to joint bank accounts, and in many cases the joint depositors have been husband and wife. Section 239 of the Banking Law makes all such deposits in savings banks, whether by a spouse or anyone else, the property of both parties named as depositors with a right of survivorship giving the entire deposit to the survivor.[67] Where a deposit is made in a commercial bank by one party in the name of the depositor and another, there is merely a presumption of joint ownership, again without limitation to spouses.[68]

Although the fact that the parties to a gift transaction are husband and wife does not itself give rise to any presumption of fraud, the courts scrutinize closely a gift by one spouse to another which results in the insolvency of the donor, and unless a positive showing of good faith can be made such a gift will be set aside as fraudulent. While the Uniform Fraudulent Conveyance Act, enacted in New York by article 10 of the Debtor and Creditor Law, does not specifically refer to transfers between spouses, section 273 renders fraudulent every conveyance and obligation incurred by one who is thereby made insolvent if there is no consideration. This section has been applied to render void conveyances by husbands to wives where the wife was unable to establish that she gave consideration[69] and where the transaction was intended to be a gift.[70]

In the field of bankruptcy, although the Constitution of the United States grants to Congress the power to make uniform laws on bankruptcy,[71] Congress has made the state law test of fraud applicable in any transaction by the bankrupt,[72] so that the New York law just discussed governs New York transactions in bankruptcy cases in the federal courts.

Special attention has been given by the New York Legislature to life insurance as between spouses. A married woman by section 52 of the Domestic Relations Law is specifically authorized to insure her husband's life in her own name or in that of a third person as her trustee. A section

66 Wegmann v. Kress, 152 App. Div. 937, 137 N.Y. Supp. 1148 (3d Dep't 1912), aff'd, 208 N.Y. 622, 102 N.E. 1117 (1913).

67 The courts have nevertheless construed the clear words of the statute as establishing no more than a presumption of joint ownership, rebuttable during the lifetime of the parties (Glaser v. Glaser, 37 N.Y.S.2d 477 (Sup. Ct. Nassau Connty), aff'd, 264 App. Div. 884, 36 N.Y.S.2d 878 (2d Dep't 1942)) but conclusive thereafter.

68 Inda v. Inda, 288 N.Y. 315, 43 N.E.2d 59 (1942).

69 Banister v. Solomon, 126 F.2d 740 (2d Cir. 1942).

70 Rudin v. Steinbugler, 103 F.2d 323 (2d Cir. 1938).

71 U.S. Const. art. I, § 8.

72 52 Stat. 875 (1938), 11 U.S.C. § 110(e) (1952).

of the Insurance Law gives the right to the husband as well.[73] In the case of the wife who takes out insurance, if the proceeds of the policy are paid to her, she receives them free of any claim by her husband's creditors or personal representative. If the husband's money is used to pay for the policy, however, she may keep free of such claims only that portion of the proceeds purchased by a premium of $500 a year. The policy may be payable to the husband or to the children of the couple, if the wife predeceases him, or she can dispose of it by will or by formal assignment to take effect on her death, if she leaves no descendants. Furthermore, any life insurance policy of which a married woman is the beneficiary may be assigned and it may be surrendered with the consent of the person insured.[74]

A subsequently enacted provision of the Insurance Law,[75] dealing with exemptions of insurance proceeds generally, was held to have repealed the $500 exemption clause of section 52 of the Domestic Relations Law by implication. Section 52 is still applicable to insurance policies issued before March 31, 1927, the effective date of the implied repealer.[76] As for insurance policies issued in favor of the wife after that date, the wife gets the entire proceeds free from claims both of her husband's and her own creditors unless actual fraud on the creditors can be proved.

Section 166 (3) of the Insurance Law, granting as to annuity benefits a $400 monthly exemption from creditors' claims, impliedly protects a wife or dependent husband of an annuitant by giving the court discretion as to how much creditors may take over the $400 exemption ". . . after due regard for the reasonable requirements of the judgment debtor and his family."[77]

The policy which this legislation expresses is to give the wife for her own protection an insurable interest in her husband's life free from creditors' claims, provided only that fraud is not practiced. The rules apply as well to policies taken out by a husband and payable to the wife. A wife can acquire a vested interest even in a policy taken out by her husband if she shares in the payment of premiums.[78] An irrevocable designation of the wife as beneficiary of her husband's policy makes her consent necessary before a loan may be obtained on the policy.[79]

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[73] N.Y. Ins. Law § 146(3).

[74] N.Y. Dom. Rel. Law § 52. N.Y. Pers. Prop. Law § 15, making life insurance proceeds and certain other personal property unassignable, expressly exempts the rights of creditors granted in § 52 of the Dom. Rel. Law.

[75] N.Y. Ins. Law § 166.

[76] Holmes v. John Hancock Mut. Life Ins. Co., 288 N.Y. 106, 41 N.E. 909 (1942).

[77] Anderson v. Northwestern Mut. Life Ins. Co., 261 N.Y. 450, 185 N.E. 696 (1933).

[78] Re Wainman, 121 Misc. 318, 200 N.Y. Supp. 893 (Sup. Ct. Oneida County 1923).

[79] Levy v. Commissioner, 65 F.2d 412 (2d Cir. 1933). See also N.Y. Ins. Law § 101.

Mention has already been made of the broad powers a married woman possesses in New York to convey property of all kinds to her husband as a gift. Specific legislation, in effect supplementary to the statutes already discussed, is broad enough to cover all transfers between spouses:

> Husband and wife may convey or transfer real or personal property directly, the one to the other, without the intervention of a third person; and may make partition or division of any real property held by them as tenants in common, joint tenants or tenants by the entireties.[80]

This provision was designed to lay at rest the old common-law rules limiting transactions, especially conveyances of real property, between husband and wife and later permitting such transactions through a third party as a dummy.[81]

There are wide variations among the other states in the extent to which the husband and wife are free of common-law restrictions in their transactions with each other. While no state retains all of the old limitations, many still have at least some of them.[82]

The only remaining restriction on contractual relations between husband and wife is found in section 51 of the Domestic Relations Law where, after stating the plenary powers of a married woman to contract with anyone, including her husband, it goes on: ". . . but a husband and wife cannot contract to alter or dissolve the marriage or to relieve the husband from liability to support his wife."

Other property transactions between husband and wife are examined elsewhere in this paper.

Agency of Husband and Wife[83]

The broad powers of husbands and wives to transact business with each other, which has been described in the preceding pages, permit either spouse to enter into a principal-agent relationship with the other in New York. The legal problems presently arising from husband-and-wife agency relationships are principally those of taxation, federal taxation for the most part, those of the scope of authority of agents, and problems where the agency relationship is implied.

As for taxation it is federal income taxation which is, of course, of the greatest financial significance, and the federal tax authorities are free to make their own determination of legal relationships as they affect tax

80 N.Y. Dom. Rel. Law § 56.

81 See 3 Vernier, American Family Laws § 182.

82 Id. §§ 155, 156, 182, 225.

83 On New York law see Battershall, Domestic Relations 297 et seq.; Bullock, Husband and Wife §§ 233-35; Grossman, Domestic Relations §§ 265-69, 329-31, 368. For the law generally see Long, Domestic Relations §§ 154-56; Madden, Domestic Relations §§ 59, 60; Peck, Domestic Relations §§ 77, 87; Schouler, Domestic Relations §§ 93, 135-44.

liability. It is possible to summarize national as against merely New York rules with respect to tax consequences of husband-and-wife agencies.[84] The principal objective, tax-wise, in establishing a husband-and-wife agency formerly was to split the income of the husband by creating a partnership in which the wife would be designated as receiving half of the husband's income, thus placing them in a lower tax bracket than if the husband's entire income were attributed to him. Since it is now permissible, even in separate property states such as New York, for spouses to file joint federal income tax returns, much of the attraction of this variety of family partnership has been lost. Other tax advantages may still be obtainable, however, where other members of the family join the partnership or where the family partnership is one element in a complex of tax avoidance devices.[85]

As to the scope of authority of one spouse acting as agent for the other, the trend of the cases is to treat such agency relationships exactly like an agency between strangers.[86] Despite the appearance of a broad agency where the wife, for example, is active in her husband's business, her authority to act for him in a given transaction must be clearly shown.

Although it might be argned that an agency relationship implied by law cannot accurately be described as one of agency, because it lacks the voluntary character of a true agency, nevertheless it has become customary to describe the power of the wife to bind her husband for the purchase of necessaries as that of an implied agent. The rule, which essentially gives a needy wife the power to hawk a lawsuit among merchants, makes a husband, who wrongfully neglects to support his wife, liable to persons who furnish her with necessaries, these being interpreted by the courts as such services and commodities as are appropriate to the income and station in life of the parties. New York recognizes the common-law cause of action for necessaries,[87] but much of the more recent litigation seems to have involved efforts by merchants to make husbands pay for lavish credit inadvertently extended to wives on bad terms with them.[88] As will be explained below, more modern devices are now available for the genuinely neglected wife.

The New York courts have accepted the implied agency of the wife to

84 Commissioner v. Tower, 327 U.S. 280 (1946).

85 For a discussion of the tax cases see 6 Mertens, Federal Income Taxation §§ 35.09-35.09g (Henderson ed. 1949).

86 See Mechem, Outlines of Agency c. IX (3d ed. 1923); Tiffany, Handbook of the Law of Principal and Agent cs. III, IV (Powell ed. 1924).

87 Wanamaker v. Weaver, 176 N.Y. 75, 68 N.E. 135 (1903).

88 See, e.g., Bloomingdale Bros. v. Benjamin, 200 Misc. 1108, 112 N.Y.S.2d 33 (N.Y. City Ct. 1951) (caviar and whalemeat held necessaries).

purchase food for her husband and do not require proof in each case that the particular purchase of food, for example, was actually authorized by the husband.[89] A few states have gone farther and simply omit the requirement of privity of contract from an action for breach of warranty.[90] The Uniform Commercial Code, now under study by the New York State Law Revision Commission, provides that:

> A seller's warranty . . . extends to any natural person who is in the family or household of his buyer . . . if it is reasonable to expect that such person may use, consume or be affected by the goods. . . .[91]

The only legislation in New York dealing with husband-and-wife agencies is the law defining mechanic's liens, which provides for a lien on real property in favor of one hired to improve it:

> Where the contract for an improvement is made with a husband or wife and the property belongs to the other or both, the husband or wife contracting shall also be presumed to be the agent of the other, unless such other having knowledge of the improvement shall, within ten days after learning of the contract give to the contractor written notice of his or her refusal to consent to the improvement.[92]

2. *Economic Litigation Between Husband and Wife*

Modern statutes in New York have swept away the common-law effluvia limiting suits between spouses,[93] remnants of which persist in other states as they did in New York[94] for many years. This was accomplished by the terms of the Domestic Relations Law:

> A married woman has a right of action against her husband for his wrongful or tortious acts resulting to her in any personal injury . . . or resulting in injury to her property, as if they were unmarried, and she is liable to her husband . . . [similarly].[95]
>
> A married woman has all the rights . . . to make contracts . . . with any person, including her husband . . . and be liable on such contracts, as if she were unmarried. . . .[96]

If the inter-spousal action is for damages for injuries or wrongful death suffered in a motor vehicle accident, the negligent spouse's insurer, however, will not be liable unless such liability to a spouse has been expressly

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89 Ryan v. Progressive Grocery Stores, 255 N.Y. 388, 175 N.E. 105 (1931).

90 See Dickerson, Products Liability and the Food Consumer 63 et seq. (1951).

91 Uniform Commercial Code § 2-318 (Official Draft 1952).

92 N.Y. Lien Law § 3.

93 See Long, Domestic Relations §§ 157, 158; Madden, Domestic Relations § 69; Peck, Domestic Relations § 89; Schouler, Domestic Relations §§ 54, 627-39; 3 Vernier, American Family Laws § 180.

94 See Battershall, Domestic Relations 310, 316; Bullock, Husband and Wife c. XIX; Grossman, Domestic Relations §§ 245-55.

95 N.Y. Dom. Rel. Law § 57.

96 Id. § 51.

assumed in the policy.[97] This legislation was sponsored by the liability insurance companies, alarmed over the opportunities for fraud by collusion between husbands and wives in automobile cases.

A single relic of the common-law bar to tort actions between spouses persists in New York, however. A communication from one spouse to another will not be treated as the publication of a libel to a third person because of the peculiarly intimate relationship of husband and wife.[98]

Mention has already been made of the statute authorizing partition or division of real property held by spouses in any form of tenancy,[99] which includes the power to bring a cause of action to compel partition. Of course, in the case of property held by the entirety, partition other than by mutual consent can only be effected after a dissolution of the marriage although it is now possible for a court hearing a matrimonial action to make directions as to the occupancy of such property.[100]

3. *Actions by Third Parties Against Husband and Wife*[101]

All of the old common-law limitations on the liability of a married woman to third parties in contract have been eliminated in New York by the forthright words of the statute:[102]

> A married woman has all the rights in respect to property, real or personal, and the acquisition, use, enjoyment and disposition thereof, and to make contracts in respect thereto with any person . . . and to carry on any business, trade or occupation, and to exercise all powers and enjoy all rights in respect thereto and in respect to her contracts, and be liable on such contracts as if she were unmarried. . . . Judgment for or against a married woman, may be rendered and enforced, in a court of record, or not of record, as if she was [*sic*] single. A married woman may confess a judgment. . . .[103]

With the exception of the husband's liability to third persons for necessaries furnished to the wife, which has already been discussed,[104] and the spouse's statutory liability to the public authorities who have supported

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97 N.Y. Ins. Law § 167(3); N.Y. Vehicle & T. Law § 59(2).

98 Lawler v. Merritt, 182 Misc. 648, 48 N.Y.S.2d 843 (Sup. Ct. Bronx County 1944), aff'd, 269 App. Div. 662, 53 N.Y.S.2d 465 (1st Dep't 1945).

99 N.Y. Dom. Rel. Law § 56.

100 N.Y. Civ. Prac. Act § 1164-a.

101 The common law rules and the varying degrees of their modification in other states are discussed in Long, Domestic Relations c. XIII; Madden, Domestic Relations §§ 35, 39-41, 47, 48, 54, 63; Peck, Domestic Relations §§ 82-84, 87, 90; Schouler, Domestic Relations cs. VI, XII, XIII, XX, XXI, XXII; 3 Vernier, American Family Laws §§ 151-54, 159, 160, 183-85, 224, 225.

102 The New York rules are discussed in Battershall, Domestic Relations 279 et seq.; Bullock, Husband and Wife cs. VI, VII, VIII, IX; Grossman, Domestic Relations §§ 279-81, 326.

103 N.Y. Dom. Rel. Law § 51.

104 See note 87 supra.

an indigent or sick spouse, which will be discussed below, the husband is not liable in New York for the wife's contractual or quasi-contractual obligations either before or after marriage except where he has acquired liability under the general law of contracts quite aside from the marital relationship of the parties. Two statutes make this clear:

> A contract made by a married woman does not bind her husband or his property.[105]

> A husband who acquires property of his wife by ante-nuptial contract or otherwise, is liable for her debts contracted before marriage, but only to the extent of the property so acquired.[106]

Section 50 of the Domestic Relations Law, already mentioned,[107] protects the wife's separate property from any liability under her husband's contracts, although she does retain liability to the public authorities under circumstances to be discussed below.

It has already been pointed out that the married woman has her own cause of action for wages and other compensation due to her.[108]

Just as in the field of contracts, the emancipation of the married woman has brought to an end in New York the ancient distinctions with respect to the liability of the husband for the torts of his wife.[109] Since the wife was not liable at common law for the torts of her husband, no change has been necessary on that matter. The statute provides:

> A married woman has a right of action for an injury to her person, property or character or for an injury arising out of the marital relation, as if unmarried. She is liable for her wrongful or tortious acts; her husband is not liable for such acts, unless they were done by his actual coercion or instigation; and such coercion or instigation shall not be presumed, but must be proved. . . .[110]

The spouse of a decedent is included with the next-of-kin as a person permitted to bring a wrongful death action in New York,[111] and a spouse can be sued as legatee to enforce liability for a decedent's debt.[112]

Not only is the liability of a married woman in both tort and contract

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105 N.Y. Dom. Rel. Law § 55.

106 Id. § 54.

107 See note 29 supra.

108 See note 60 supra.

109 The common law rules and their survival in other states are discussed in Long, Domestic Relations c. XIV; Madden, Domestic Relations §§ 64-67; Peck, Domestic Relations §§ 86, 88, 89B, 90; Schouler, Domestic Relations cs. VIII, XVI; 3 Vernier, American Family Law § 157. For the New York Law see Battershall, Domestic Relations 311 et seq.; Bullock, Husband and Wife c. XV; Grossman, Domestic Relations §§ 174-76.

110 N.Y. Dom. Rel. Law § 57.

111 N.Y. Dec. Est. Law § 130.

112 Id. §§ 170, 183, 188.

clearly established, but her capacity as an individual party has been made plain:

> A married woman may be a party in the same manner as if she were single. Her husband is not a necessary or proper party solely because of his relationship as such husband.[113]

4. *Liability Between Spouses for Support*

Liability Without Change in Marital Status

New York,[114] like all of the states,[115] requires a husband to support his wife during the marriage. So stringent is this requirement that the legislature has forbidden any contract between husband and wife to relieve the husband from this responsibility.[116] The fact that the wife has sufficient property of her own to support her does not alter the obligation of the husband.[117]

The obligation to support the wife is principally statutory in New York and the statutes are scattered confusingly and illogically in the Civil Practice Act, in various of the Consolidated Laws, and in the Unconsolidated Laws. The husband's obligation to support is not uniformly determined throughout the state and its enforcement must be sought sometimes in a variety of courts, some of them peculiar to only certain portions of the state.

The only limitation on this broad duty to support is that the wife, in order to receive the support, must cohabit with the husband and avoid such misconduct as would constitute grounds for a divorce or separation by the husband, and even where the wife's conduct is thus reprehensible the husband will still be responsible to the extent necessary to prevent her from becoming a public charge.[118] Of course, if the wife ceases to cohabit with the husband because of his misconduct, his obligation to support her continues.

The obligation to support as it is enforced without effecting any change in matrimonial status will first be considered, and maintenance in connection with matrimonial actions will then be discussed.

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113 N.Y. Civ. Prac. Act § 200.

114 See Battershall, Domestic Relations 277 et seq.; Bullock, Husband and Wife c. XIV; Grossman, Domestic Relations §§ 136-54, 177-219.

115 See Keezer, The Law of Marriage and Divorce §§ 261, 270-92 (3d ed. 1946); Long, Domestic Relations §§ 106-09; Madden, Domestic Relations §§ 58, 61, 62; 1 Nelson, Divorce and Annulment c. 13 (2d ed. 1945); 3 id. c. 32; Peck, Domestic Relations §§ 78-81; Schouler, Domestic Relations §§ 45, 46, 54, 83-121.

116 N.Y. Dom. Rel. Law § 51.

117 Manufacturers Trust Co. v. Gray, 278 N.Y. 380, 16 N.E.2d 373 (1938).

118 People v. Schenkel, 258 N.Y. 224, 179 N.E. 474 (1932).

What might be termed the minimal requirement for support of the wife, and of the husband as well, is found in the Social Welfare Law:

> The husband, wife . . . [etc.] of a recipient of public assistance or care or of a person liable to become in need thereof shall, if of sufficient ability, be responsible for the support of such person.[119]

Only the most extreme misconduct has been held to relieve a spouse of this obligation,[120] and it is even doubtful whether the statute supports such cases. The cause of action belongs not to the spouse requiring support but to the officials responsible for granting public assistance;[121] the property of persons liable may be seized,[122] and recovery for public grants in the past may be had when a person liable or his estate, or the person assisted or his estate, acquires property or is found to have had any.[123]

If one spouse is maintained other than on commitment as a criminal by the New York State Department of Mental Hygiene, which is primarily responsible for the care and treatment of indigent persons who are mentally ill, mentally defective, or epileptic, nevertheless, the other spouse as well as named relatives, if able to do so, must pay for the cost of such maintenance.[124] The Commissioner of Mental Hygiene has powers similar to but not identical with or as broad as those of the public welfare officials under the Social Welfare Law: the Commissioner may request the law department of the state government to sue for the maintenance furnished,[125] he himself may institute a criminal proceeding against the spouse or relative,[126] or he may discharge the patient if that will not be contrary to the public interest. Suit is authorized where property is discovered later as well as suit against the estate of a person who is liable.

Other provisions of the Mental Hygiene Law establish the obligation of a spouse of a mentally-ill person to "cause him or her to be properly and suitably cared for and maintained,"[127] and specified public officials may inquire into the support being furnished and commit the patient to a state hospital if necessary. The statute implies that the spouse or relative must support the patient outside of a state institution if the public

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119 N.Y. Soc. Wel. Law § 101.

120 Matter of Garrison, 171 Misc. 893, 14 N.Y.S.2d 803 (Columbia County Ct. 1939) (needy husband had abandoned wife 23 years before); Hough v. Hough, 159 Misc. 894, 289 N.Y. Supp. 27 (N.Y. Dom. Rel. Ct. Manhattan 1936) (Needy wife guilty of prostitution, had contracted venereal disease, been convicted of bigamy).

121 N.Y. Soc. Wel. Law § 102.

122 Id. § 103.

123 Id. § 104.

124 N.Y. Ment. Hy. Law § 24(2).

125 Id. §§ 24(3)-(8).

126 See N.Y. Code Crim. Proc. § 926-c.

127 N.Y. Ment. Hy. Law § 80. See also id. § 79.

safety permits,[128] and machinery exists to compel support where the patient is placed with another family by the authorities.

The obligation of a spouse as well as of relatives for the maintenance of a mentally defective spouse is provided for specifically by additional legislation[129] but in this case again there is no machinery for enforcing the obligation as far as maintenance outside of the state institution in the home of the person liable is concerned.

The Code of Criminal Procedure establishes the procedure whereby the Commissioner of Mental Hygiene can force a spouse or relative of a patient to pay for or contribute toward his maintenance either in a state institution or in a private family where he has been placed for room and board by the public authorities.[130] The Commissioner may file a petition in a county court or its equivalent for a support order running against the person liable; if the order is granted, the court may require a bond for payment of the amount due from time to time; a judgment for amounts already due is enforceable like any civil judgment and in addition the person liable who fails to pay may be punished for contempt or found guilty of a misdemeanor.

Criminal and civil sanctions are also provided by the Code of Criminal Procedure to compel the support of poor persons by spouses or relatives,[131] supplementary to the purely civil remedies of the Social Welfare Law. The public welfare authorities may apply to a number of named courts for a support order against the spouse or relative.

A husband who abandons his wife, leaving her a public charge, may have his property seized and sold by order of a magistrate on application of the welfare authorities.[132] Still another criminal sanction to compel support is found in the proceedings respecting disorderly persons.[133] Among the various types of disorderly persons named in the statute are those who

> . . . actually abandon their wives . . . without adequate support, or leave them in danger of becoming a burden upon the public, or who neglect to provide for them according to their means . . . and persons who threaten to run away and leave their wives or children a burden upon the public. . . .[134]

If found to be a disorderly person of this kind, the neglectful husband can be required to give security that he will furnish support to his wife,

128 See Ops. N.Y. Att'y Gen. 37 (1912).
129 N.Y. Ment. Hy. Law §§ 128, 129.
130 N.Y. Code Crim. Proc. pt. VI, tit. 8-A.
131 Id. §§ 921, 925.
132 Ibid.
133 Id. pt. VI, tit. 7.
134 Id. §§ 899(1),(2).

payable through the public welfare authorities.[135] If the undertaking is not given, the husband can be convicted of disorderly conduct and sentenced to jail for as much as six months or placed on probation and required to pay for his wife's support through the probation officer.[136] If the security is forfeited, the husband may be jailed and the security goes to the wife.[137]

New York has adopted what is known as the Uniform Support of Dependents Law,[138] reciprocal legislation adopted by five other states and the Virgin Islands, and "sufficiently similar to the Uniform Reciprocal Enforcement of Support Act to permit reciprocity"[139] with the sixteen states and Puerto Rico, which have adopted the latter act. The purpose of both acts is to secure support in civil proceedings for wives, children, and, in New York by a recent amendment,[139a] any dependent person where the individual responsible for support is in a different state from that of the dependent. The standard of support established for the person liable is a ". . . fair and reasonable sum according to his means. . . ."[140] or ". . . such sum as the court shall determine, having due regard to the parties' means and circumstances."[141] The purpose of the legislation is to make more effective the enforcement of the obligation of the husband to support his wife and children which has not been easy where the husband moves to another state.

With some attention to the need of wives for support three different courts of limited jurisdiction have been set up in New York and to some extent they have been specially staffed to that end: the Domestic Relations Court, Family Division, in New York City only; the children's court in most of the rest of the counties in the state, and the old Children's Courts of Chautauqua and Ontario Counties. A Family Part of the Supreme Court has recently been established in New York City to concentrate the domestic relations matters brought in this court of general jurisdiction. Two scholarly studies and the report of the Temporary Commission on the Courts of the State of New York, as well as other

135 Id. § 901.

136 Id. § 902.

137 Id. § 906.

138 N.Y. Unconsol. Laws §§ 2111-20.

139 9A Uniform Laws Annotated 58 (Supp. 1954). See N.Y., Fifteenth Annual Report of the Judicial Council 22 (1929); Note, "Uniform Support of Dependents Law," 16 Brooklyn L. Rev. 104 (1949); Sager, "New York Uniform Support of Dependents Law," 1 Syracuse L. Rev. 300 (1949); Note, "Uniform Support of Dependents Law," 24 St. John's L. Rev. 162 (1949).

139a N.Y. Laws 1955, c. 289.

140 N.Y. Unconsol. Laws § 2113(a).

141 Id. § 2116(k).

comment, have agreed upon the necessity of adequate judicial machinery for dealing with the specialized problems of domestic relations, including support for wives.[142]

The three different domestic relations courts now in existence have been established by separate legislative enactments; the Domestic Relations Court Act of New York City, which codified a series of enactments beginning with the New York City Charter of 1898,[143] and the Children's Court Act of 1922[144] for the counties outside of New York City, except for Ontario and Chautauqua Counties which retain children's courts established prior to the statewide system.[145]

Both the children's courts in the counties outside of New York City and the Domestic Relations Court of New York City are courts of limited jurisdiction and the New York Constitution further limits their potential jurisdiction to that possessed by the county courts.[146] These children's courts are not courts of record,[147] which raises certain possible problems with respect to recognition of their judgments in other states, but which also excludes them from the procedural nightmares of the New York Civil Practice Act, a complicated and rigid procedural system.

Support proceedings in the children's court are governed by article III-A of the Children's Court Act; in the domestic relations court by title III of the Domestic Relations Court Act, which establishes the Family Court Division of the Domestic Relations Court of New York City. In some important respects the powers of the two courts, New York City and upstate, are not the same. Thus the children's court in each county has jurisdiction each within its own county,[148] whereas the domestic relations court in New York City has jurisdiction ". . . within the city," comprising five counties,[149] but the process of both extends to the entire state. The support of a wife is within the jurisdiction of the

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142 See Kahn, A Court for Children (1953), and Dean, Book Review, 39 Cornell L.Q. 778 (1954); Gellhorn, Children and Families in the Courts of New York City (1954); Loeb, "A Proposal for a Simplified Court Structure [by the Temporary Commission on the Courts]," 27 N.Y.S. Bar Bull. 266 (1955); Lukas, "New York City Children's Court and Cognate Matters," 3 Record of the Ass'n of the Bar of the City of New York 331 (1948); Lynn, "The Children's Court of the City of New York," 3 Record 60 (1948); Notes, 3 Record 346 (1948), 36 Cornell L.Q. 156 (1950).

143 N.Y. Crim. Code (Domestic Relations Court Act), hereafter cited as "N.Y. Dom. Rel. Court Act."

144 N.Y. Crim. Code (Children's Court Act), hereafter cited as "N.Y. Child. Court Act."

145 N.Y. Laws 1913, c. 269; N.Y. Laws 1918, c. 464; N.Y. Child. Court Act §§ 1, 46.

146 N.Y. Const. art. VI, § 18.

147 N.Y. Judic. Law § 2(10).

148 N.Y. Child. Court Act § 30(1).

149 N.Y. Dom. Rel. Court Act § 91(1).

children's courts upstate only if she is pregnant or has a child or stepchild requiring support,[150] but the domestic relations court may entertain support proceedings for a wife alone;[151] even a wife may be compelled by the domestic relations court to support her husband if he is likely to become a public charge.[152] Both courts are empowered to order support for a "wife and child" (children's court)[153] or a "wife or child" (domestic relations court),[154] irrespective of whether either is likely to become a public charge and having due regard for the circumstances of the respective parties. Neither court is limited in the judgments it may render for the support of wives to that necessary to prevent destitution.

Both courts have ample powers to insure compliance with support orders, such as power to require security by written undertaking for the payment of sums ordered, or in lieu of an undertaking, to suspend sentence and place on probation one who has failed to support a dependent as ordered. While the children's court can commit to jail for a maximum of six months at a time a person who fails to obey its orders,[155] the Domestic Relations Court of New York City can commit for a maximum of twelve months.[156] In giving both courts broad powers to alter support orders, including cancelling or reducing arrears, the legislature has severely limited the recognition the judgments of these courts can obtain in other states. Both courts have full power to punish civil and criminal contempts.[157]

Residential jurisdiction of both courts is founded upon residence or domicile in the county or city, respectively, where the petition for support is filed, or merely on the presence of the individual liable when the person for whom support is sought is domiciled or residing there. The Children's Court Act goes on to extend jurisdiction to order a person found in the county to support a pregnant wife, wherever she may be, and to exercise jurisdiction wherever the person liable may be, if he and the person seeking support were either domiciled or residing in the county when the failure to support occurred.[158] The domestic relations court, on the other hand, extends no privileges to pregnant women and, in reference to absent persons who are domiciled or residing in the city along with the persons seeking support—wife and children—at the time the failure

150 N.Y. Child. Court Act § 30(1).
151 N.Y. Dom. Rel. Court Act § 91(1).
152 Id. §§ 92(6-a), 92(a).
153 N.Y. Child. Court Act § 30-a(1).
154 N.Y. Dom. Rel. Court Act § 92(1).
155 N.Y. Child. Court Act § 30-a(11).
156 N.Y. Dom. Rel. Court Act § 31-b(c).
157 Id. § 57; N.Y. Child. Court Act §§ 12, 30-a(20).
158 N.Y. Child. Court Act § 31-b(c).

to support occurred, there is an added requirement that the person seeking support must be domiciled or residing in the city when the petition is filed.[159]

Both courts have similar powers to issue warrants for arrest under specified conditions.[160] Each has power to reach salary and pension payments due to a person failing to obey a support order, where such person is employed by the county or city authorities. Both courts may issue writs of seizure of property of a person who has failed to obey a support order, where he has left or threatens to leave the jurisdiction of the court; under appropriate circumstances such a writ may even precede the issuance of a support order.[161] Provisions in both acts cover bonds for persons with suspended sentences and bonds to insure the appearance of persons released on bail. There are some minor variations with respect to undertakings for support in the two courts.

The statutes governing each of the two courts contain an important section governing the effect of divorces, separations, and annulments,[162] and although these were amended only three years apart, they are not uniform. The Children's Court Act[163] states that when a divorce, separation, or annulment has been granted by the supreme court, the court of general jurisdiction, or a suit is pending and alimony or maintenance has been granted, a petition can nevertheless be filed in the children's court for support, provided the person liable is not already in jail for failure to obey an order of the supreme court. No greater sum can be sought in the children's court than may have been granted previously in the supreme court, however. If the petitioner is likely to become a public charge, a pending action in the supreme court is no bar to a suit in the children's court. Even if alimony be denied in the supreme court in a separation action, support can be ordered by the children's court if the dependent is likely to become a public charge.

Unaccountably, the corresponding provision of the Domestic Relations Court Act is different in important respects. In the first place if the marriage relationship has been terminated by the supreme court "or by judgment of any other court of competent jurisdiction, when valid in the state of New York,"[164] support is available only for a child and not for the wife in the domestic relations court. If a separation has been granted by the supreme court or an action for divorce, separation,

159 N.Y. Dom. Rel. Court Act § 103(1)(c).

160 N.Y. Child. Court Act § 32-a; N.Y. Dom. Rel. Ct. Act § 123.

161 Id. §§ 33-e, 123; N.Y. Dom. Rel. Court Act § 133.

162 N.Y. Child. Court Act § 33-i; N.Y. Dom. Rel. Court Act § 137.

163 N.Y. Child. Court Act § 33-1.

164 N.Y. Dom. Rel. Court Act § 137(1).

annulment, or dissolution of the marriage is pending and a support order has been entered in such action, a petition for support consistent with the supreme court order can be filed in the domestic relations court if the supreme court order has not been obeyed and the other party is not already in jail as a result. Failure to grant alimony in the supreme court will not preclude an order for support of a child or for a wife who is likely to become a public charge.

The Children's Courts of Chautauqua and Ontario Counties were established prior to the passage of the Children's and Domestic Relations Court Acts and, as already mentioned, were expressly excluded from their scope. The Children's Court of Ontario County is governed by a statute passed in 1913,[165] and the only provision it contains with respect to support deals with the expenses of children committed to institutions. The Chautauqua County Children's Court was constituted in 1918,[166] and contains no provisions regarding support. A search of the Consolidated Laws and the Session Laws of New York State has not revealed any amendments to either act regarding support for wives, so in these two counties these specialized courts are without the powers of the corresponding courts in New York City and in the other upstate counties.

It sometimes happens that a husband and wife, though living together, enter into an agreement regarding the support of the wife, which is to be distinguished from a separation agreement whereby the parties agree to live apart and also includes provision for the support of the wife. If the support agreement purports to relieve the husband of his obligation to support his wife, it is clearly unenforceable,[167] although if it has been executed the courts will not interfere.[168] Even where the agreement obligates the husband to pay a given amount of money at periodic intervals and the wife agrees to accept that amount as sufficient for her support, the wife's action to collect an installment has been dismissed.[169] If the husband pays the wife a lump sum for her maintenance for the rest of her life, the same will be true, and in any case the husband will always retain responsibility if his wife becomes a public charge.

In a category by itself is a rule that a transfer of property by a husband who, in anticipation of marriage and in order to defraud his prospective wife, disposes of it in such a way that he continues to enjoy it for his lifetime but on his death it goes to a third party, may be set aside on suit by the wife.[170]

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165 N.Y. Laws 1913, cs. 269, 270.

166 N.Y. Laws 1918, c. 464.

167 N.Y. Dom. Rel. Law § 51.

168 Dworkin v. Dworkin, 247 App. Div. 213, 286 N.Y. Supp. 982 (1st Dep't 1936).

169 Garlock v. Garlock, 279 N.Y. 337, 18 N.E.2d 521 (1939).

170 Rubin v. Mynart Realty Co., 244 App. Div. 541, 279 N.Y. Supp. 867 (1st Dep't 1935).

Mention has already been made of the liability a neglectful husband may incur to third parties who furnish necessaries to his wife. In addition the husband must pay her funeral expenses but only if she does not leave any estate from which they can be paid.[171]

Liability After Change in Marital Status[172]

In the previous pages the discussion was limited to the maintenance obligations of spouses where their matrimonial status has remained unaltered in a legal sense, except that some of the explanation of the children's and domestic relations courts dealt with wives who had been separated or divorced. If the parties to a marriage have themselves entered into a separation agreement with support provisions, relieving both of them of the marital obligation of cohabitation, their marital status has been altered. This will also be true where the parties are living apart pursuant to a court order, or where they have been divorced.

There is no public policy in New York against a husband and wife agreeing to live apart and defining their remaining obligations by a contract known as a separation agreement.[173] There is no longer any necessity, as there was at common law, for the agreement to be entered into with a third party as trustee for the wife's interest, since the wife is now empowered to contract directly with her husband.[174] Of course, as already pointed out, a separation agreement purporting to relieve a husband of any obligation to support his wife would be unenforceable, but if the husband has fairly informed the wife as to his property and income and she has had an opportunity to obtain disinterested advice, an agreement under which the wife receives support on a reasonable relationship with the standard of living the husband enjoys will be upheld in the courts. For example, a separation agreement whereby the wife was to receive one-fourth of the husband's income was approved,[175] but at the other extreme 36 cents a day for the wife was found to be unreasonable.[176]

171 N.Y. Surr. Court Act § 216.

172 On the law generally see Keezer, Law of Marriage and Divorce cs. 17, 36-41 (3d ed. 1946); Long, Domestic Relations §§ 214, 238, 247; Madden, Domestic Relations §§ 97-99; 1 Nelson, Divorce and Annulment c. 12; 2 id. cs. 13, 14, 16, 17; 3 id. cs. 29, 32 (2d ed. 1945); Peck, Domestic Relations § 93; 1 Schouler, Domestic Relations §§ 1069, 1070; 2 id. cs. 2, 28-38; 2 Vernier, American Family Laws §§ 96-111, 128, 129, 132-35, 139, 140, 147. The New York law is discussed in Battershall, Domestic Relations c. VIII; Bullock, Husband and Wife §§ 285a-305; Grossman, Domestic Relations cs. 21-23.

173 See Lindey, Separation Agreements and Ante-Nuptial Contracts (1937); Feld, "Appraisal of the Separation Agreement in New York," 15 Brooklyn L. Rev. 210 (1949); Roberts, "Validity and Utility of Separation Agreements in New York Law," 16 St. John's L. Rev. 185 (1942).

174 N.Y. Dom. Rel. Law § 51.

175 Sears v. Sears, 259 App. Div. 1113, 21 N.Y.S.2d 278 (3d Dep't 1940).

176 Kloek v. Kloek, 54 N.Y.S.2d 543 (Sup. Ct. Kings County 1945).

If the agreement was fairly negotiated and the wife is receiving reasonable support either in periodic payments or after an ample lump sum payment, the agreement cannot be modified merely because one party wishes to do so. The agreement itself may provide for the effect a matrimonial judgment will have upon it, although a separation agreement calling for the institution of divorce proceedings by either party will be void as against public policy. If a matrimonial action is instituted by a wife in which she applies for alimony, her application will constitute a rescission of the support provision of the separation agreement.

If a divorce is granted in proceedings in which both parties participate or in a state in which the adversary was personally served, the separation agreement will be terminated unless it specifically provides for obligations to survive that event. Since it is possible in the United States for one spouse to obtain in an *ex parte* proceeding a divorce which must be recognized in all of the states,[177] a special problem arises after a divorce. The Supreme Court of the United States has developed the doctrine that an *ex parte* dissolution of the marriage need not terminate the obligation to support where the applicable state law lays down such a continuing obligation,[178] so it would seem that under such circumstances a valid separation agreement would continue to be enforceable in New York against the former husband.

The Civil Practice Act defines the wife's cause of action for a separation in these terms:

> . . . an action may be maintained . . . to procure a judgment separating the parties from bed and board, forever, or for a limited time, for any of the following causes:
>
> . . .
>
> 4. Where the wife is plaintiff, the neglect or refusal of the defendant to provide for her.[179]

If the wife is successful, the court may order the defendant to provide for her ". . . having regard to the circumstances of the respective parties. . . ."[180]

The action of separation is available only where both parties are residents of New York State or where they were married in the state and one party is a resident or where they were married elsewhere and one party has been a resident for at least one year.[181]

In New York there is, of course, only one ground for divorce:

177 Williams v. North Carolina, 317 U.S. 287 (1942).
178 Estin v. Estin, 334 U.S. 541 (1948).
179 N.Y. Civ. Prac. Act § 1161.
180 Id. § 1164.
181 Id. § 1165-a.

adultery.[182] Jurisdiction to grant a divorce is similar to, but not identical with, that for granting a separation: where both parties were New York residents when the adultery was committed, where the parties were married in New York even though neither is presently domiciled in New York, where the plaintiff was a New York resident when the offense was committed and when the action is commenced, or when the offense was committed in New York and the injured party resided in New York when the action is commenced.[183] Power is given to the court in the final judgment in a divorce action brought by the wife to:

> . . . require the defendant to provide suitably . . . for the support of plaintiff, as justice requires, having regard to the circumstances of the respective parties; and . . . to annul, vary or modify such a direction.[184]

The inequality of the sexes is preserved in that New York courts lack jurisdiction to award support to the husband in a matrimonial action, whatever the circumstances may be.

Special attention is given to the property rights of the successful plaintiff-wife:

> If . . . the plaintiff [wife] is the owner of any real property, or has in her possession or under her control any personal property or thing in action which was left with her by the defendant or acquired by her own industry or given her by bequest or otherwise, or if she is or thereafter may become entitled to any property by the decease of a relative intestate, the defendant shall not have any interest therein, absolute or contingent, before or after her death.[185]

Whatever the sex of a successful plaintiff in a divorce action, the defendant loses any interest in life insurance policies on the plaintiff's life in which the defendant was a named beneficiary, although any premiums paid by the defendant on the policy will be taken into account.[186]

Annulment represents another type of alteration of marital status and under annulment will be considered actions of annulment and actions to declare the nullity of a void marriage based variously on specified grounds[187] in which "the court may give such direction for support of the wife by the husband as justice requires"[188] contrary to the practice in most of the other states. Jurisdiction to annul a marriage is identical with jurisdiction to grant a separation, discussed above.[189]

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182 Id. § 1147.
183 Ibid.
184 Id. § 1155.
185 Id. § 1156.
186 Id. § 1160.
187 Id. §§ 1132-34; 1136-39; 1141.
188 Id. § 1140-a.
189 See note 181 supra.

Provision is also made for dissolution of marriage on the ground of the absence of a spouse for five years without any trace of the missing spouse, the Enoch Arden situation, but no authority is given to the court granting the dissolution over any property left by the absent spouse.

Under another statute, imprisonment of one spouse for life permits the other to remarry[190] but, whether the other remarries or not, the imprisoned spouse loses all rights to the estate of the other spouse unless included by will.[191]

In an action for divorce, separation, or annulment the court may require the husband to pay the wife's litigation expense and "for the support of the wife, having regards to the circumstances of the respective parties," and a wife defending an annulment action after the death of her husband may be awarded suit money also.[192] A wife attacking either as plaintiff or defendant an out-of-state divorce decree granted in proceedings in which she did not appear may also be awarded litigation expense.[193]

Where the wife is plaintiff in an action for separation or divorce, temporary and permanent alimony may be awarded to her.[194]

Support of the wife is deeply involved in one of the most troublesome legal problems in the United States, that of migratory divorce. The problem is illustrated by such a typical fact-pattern as this: the husband and wife live in New York and become estranged. The strictness of the divorce law in New York makes a divorce there impossible, so the husband goes to Nevada, where a six weeks residence evidences domiciliary intent and divorce requirements are liberal. He files suit for divorce; his wife may be served personally or by publication in New York and she may choose not to appear in Nevada. On these facts the United States Supreme Court has held[195] that, if the husband established a bona fide domicile in Nevada, his *ex parte* divorce must be accorded full faith and credit in all of the other states under the United States Constitution.[196]

If the wife, however, at the initial estrangement had filed a separation action in New York, obtained service of process on her husband in New York and had been granted a separation with alimony, the United States

190 N.Y. Dom. Rel. Law § 7-a.

191 Matter of Lindewall, 287 N.Y. 347, 39 N.E.2d 907 (1942).

192 N.Y. Civ. Prac. Act § 1169.

193 Id. § 1169-a.

194 Id. § 1170. Cf. id. § 1164, covering permanent alimony in separation actions alone. Powerful sanctions are available to assist the wife to enforce the right to support in matrimonial actions: under various conditions the husband may be required to post security, his property may be sequestered, execution may be had on a judgment for sums of money due, and contempt proceedings may result in fine or imprisonment. N.Y. Civ. Prac. Act §§ 1171-73.

195 Williams v. North Carolina, 317 U.S. 287 (1942).

196 U.S. Const. art. IV, § 1.

Supreme Court has held that if the local law provides that alimony in a separation action survives an *ex parte* divorce, the wife will continue to receive her alimony even though the Nevada decree has ended the marriage of the parties.[197]

The next step in New York, where the law was taken to mean that alimony provisions of a separation order survive a divorce decree, was to provide that even after an *ex parte* divorce a wife in New York can obtain alimony in a new proceeding although she cannot successfully attack the out-of-state divorce decree.[198]

5. *Succession to Property as Between Husband and Wife*[199]

The law of succession in New York is unusually complex; there is a great deal of litigation. Each county has one or more surrogates whose decisions are published which, with the opinions in appellate tribunals, has produced a staggering volume of reported cases. There are elaborate treatises on the New York law of succession as well as briefer discussions in texts on domestic relations;[200] articles on New York law appear frequently in legal periodicals.[201] The legislature is constantly amending the Decedent Estate Law and the Surrogate's Court Act. Under these circumstances it is necessary to condense ruthlessly in order to summarize even so limited an area of succession as the rights of a surviving spouse.

The initial right of a surviving spouse is to obtain letters of administration on the estate of a spouse dying intestate, leaving personal property,[202] but this right will be lost if the surviving spouse abandoned or, if a

197 Estin v. Estin, 334 U.S. 541 (1948).

198 N.Y. Civ. Prac. Act § 1170-b. The same power in the wife exists after an ex parte annulment, "ex parte" meaning in this case an action in which the wife was not served personally within the state granting the decree. The statute was recommended by the N.Y. State Law Revision Commission; see the study by the present writer: N.Y. Leg. Doc. No. 65(K) (1953). Applied in Vanderbilt v. Vanderbilt, 147 N.Y.S.2d 125 (1st Dep't 1955).

199 On the law generally see Long, Domestic Relations § 127; Peck, Domestic Relations c. 14; 3 Vernier, American Family Laws §§ 170, 188-223, 227. Among the useful treatises devoted exclusively to wills and administration are Atkinson, Wills and Administration (2d ed. 1954); Page, A Treatise on the Law of Wills and Administration (1924); Thompson, Wills (3d ed. 1947).

200 On the New York law see Battershall, Domestic Relations cs. 11, 12; Bullock, Husband and Wife cs. 24, 25. See also Beechler, Elections Against Wills: Section 18, Decedent Estate Law of New York (1940): Davids, New York Law of Wills (1924); Central Hanover Bank and Trust Co., Laws Affecting New York Decedents' Estates (2d ed. 1949).

201 Each year there are articles on Succession, Future Interests, and Trusts and Administration in the Survey of New York Law, published as the December issue of the New York University Law Review. See also Note, "New Methods for Creating a 'Poor Man's' Will in New York," 53 Colum. L. Rev. 132 (1953); Note, "Illusory Transfers, etc.," 1 N.Y.L.S. Student L. Rev. 77 (1952).

202 N.Y. Surr. Court Act §§ 87, 118.

husband, failed to support the decedent. Not only will a divorce bar the right of administration but so will an invalid divorce decree obtained outside of New York.[203] Ordinarily a separation judgment will not bar this right, provided the judgment was not granted for abandonment; other judgments, such as one by the domestic relations court for non-support, may bar the right even though not adjudications of "abandonment."[204] A separation agreement may bar the right if it granted the surviving spouse some consideration for a release of claims to the decedent's estate.

The Decedent Estate Law provides rules for intestate succession in New York which give one-third of the real and personal property, after payment of all debts, to the surviving spouse, the rest to any descendants. If there are no descendants, but both of the decedent's parents survive, the spouse takes $5,000 and one-half of the residue, while the parents divide the other half of the residue. If one parent survives but no descendants, again the surviving spouse takes $5,000 and divides the residue with the parent. If there are no brothers or sisters, nephews or nieces, the surviving spouse takes the whole estate but, if any of the foregoing survive, the spouse takes $10,000 and one-half of the residue with the remainder going to the other survivors.[205]

No intestate share, however, goes to a former spouse validly divorced from the decedent:

> . . . or to a spouse who has procured without the state of New York a final decree or judgment dissolving the marriage with the decedent, where such decree or judgment is not recognized as valid by the law of this state . . . .[206]

or to a husband who has neglected to provide for his wife or to a spouse who had abandoned the decedent.

There are no limitations in New York on the power of a married woman to bequeath and inherit real and personal property; the law gives the power to make a will to all adults of sound mind.[207]

To protect a surviving spouse and specified relatives no more than one-half of a decedent's estate may be willed for a charitable or similar purpose and if a will purports to do so, the surviving spouse may claim the partial invalidity of the will.[208]

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203 Id. § 87; N.Y. Dec. Est. Law § 87. The right to letters depends upon the right to share in the distribution of the decedent's personal property which is barred by the latter statute as far as a spouse who obtained an invalid decree is concerned.

204 Matter of Rechtschaffen, 278 N.Y. 336, 16 N.E.2d 357 (1938).

205 N.Y. Dec. Est. Law § 83.

206 Id. § 87. A surviving spouse who obtained a void Mexican divorce by mail has been barred from an intestate share under this rule. In re Rathscheck's Estate, 192 Misc. 446, 80 N.Y.S.2d 622 (Surr. Ct. N.Y. County 1948).

207 N.Y. Dec. Est. Law §§ 12, 15.

208 Id. § 17.

Where a will was made prior to September 1, 1930, and the testator subsequently married and left a surviving spouse, the will is deemed revoked unless the spouse is provided for by an antenuptial agreement.[209] A surviving spouse of a testator who made a will and died after that date has a personal right to take an intestate share, as will be explained below.

If a husband and wife are separated or divorced or their marriage is annulled and yet the other party is named personally in the decedent's will by name, the survivor will take[210] unless in a separation agreement the survivor had renounced any share in the decedent's estate.[211]

A good deal of complexity surrounds the right of the surviving spouse to elect an intestate share in place of taking under the will.[212] The present provisions of the law were enacted to extend protection to surviving spouses in lieu of dower and curtesy, which were prospectively abolished as will be explained below. The ingenuity of counsel in developing trust devices to circumvent the elective share accounts for much of the trouble.

The condition giving rise to an election is the death of the decedent after August 31, 1930, leaving a will executed after that date. If the surviving spouse elects to take an intestate share rather than whatever was given in the will, the most that can be obtained is one-half of the net estate. If the intestate share is over $2,500 and the testator has left in trust or under a similar arrangement an equivalent or larger amount with the income payable to the surviving spouse for life, the latter may take $2,500 which shall be deducted from the principal of the trust. Where the intestate share is no more than $2,500 the surviving spouse may elect to take that sum rather than to take under the will.

If the will leaves the surviving spouse $2,500 or more and also a life interest in a trust with a principal as large as the difference between the intestate share and the devise, there is no right of election.

Should less than $2,500 and a life interest in a trust equal to the excess between the devise and the intestate share be left by will for the spouse, the election is limited to $2,500; and the difference between the devise and $2,500 shall be deducted from the principal of the trust.

Where all provisions under the will give a total less than the intestate share, the spouse can take the difference between the total and the intestate share in addition to taking under the will.

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209 Id. § 35.

210 Matter of De Nardo, 268 App. Div. 865, 50 N.Y.S.2d 561 (2d Dep't 1944).

211 Matter of Wallace, 184 Misc. 448, 56 N.Y.S.2d 43 (Surr. Ct. N.Y. County 1944), aff'd, 268 App. Div. 1029, 52 N.Y.S.2d 940 (1st Dep't 1945).

212 N.Y. Dec. Est. Law § 18. See Broughton, "Amendment to the Decedent Estate Law Clarifying Waiver of the Spouse's Right of Election Against a Will," 22 St. John's L. Rev. 170 (1947); Vaughan, Address, 65 N.Y.S. Bar Ass'n Rep. 70 (1942).

In every case the spouse can take $2,500 from the will or from the trust fund, if the intestate share is that much, and that sum will be deducted from any devise.

Much litigation has arisen under the elective share law, which has had the effect of limiting the surviving spouse's share to less than granted by the system of dower and curtesy. A recent case limited the scope of "estate" as used in the elective share statute so that savings accounts in trust for a daughter were excluded from the estate, and a widow named in the will as sole beneficiary could only elect to take against an "estate" which would not include the trust.[213] That such savings accounts in trust would be illusory as against the widow's claim was denied.[214]

The occasion for enacting the elective share law was the outright abolition of curtesy and the prospective abolition in New York of dower.[215] As the law stands, however, where the two parties were married prior to September 1, 1930, the widow still is entitled to one-third of all real property in which the husband had an inheritable interest at any time during the marriage.[216] There are enough wives still possessing an inchoate right of dower to make it worthwhile to outline the incidents of this estate in New York.

Of course the wife must survive the husband if the inchoate right of dower is to ripen into an estate. She may relinquish the right by joining with the husband in a conveyance of real property or by executing a release.[217] Since the inchoate right of dower is established as soon as the husband is seized of real property, it is not lost with respect to property acquired during a marriage by a divorce obtained by the wife. A statute, however, denies dower to a wife against whom a divorce is granted for her misconduct.[218] An annulment or a dissolution of a marriage because of five years' unexplained absence by the wife cuts off dower.

Even where the wife is still entitled to dower, she may elect between dower and any provision made in its place by will.[219] If a devise in the will is not specifically in lieu of dower, she may take both dower and devise. If a widow of a decedent dying intestate elects to take her intestate share of his real property, she must relinquish her dower interest.[220]

A widow entitled to dower has also the right of quarantine, permitting

213 Matter of Halpern, 303 N.Y. 33, 100 N.E.2d 120 (1951). See Note, "—Aftermath of Halpern—," 27 N.Y.U.L. Rev. 306 (1952).

214 Apparently reversing Newman v. Dore, 275 N.Y. 371, 9 N.E.2d 966 (1937).

215 N.Y. Real Prop. Law § 189.

216 Id. § 190.

217 Witthaus v. Schack, 105 N.Y. 332, 11 N.E. 649 (1887).

218 N.Y. Real Prop. Law § 196.

219 Id. §§ 199-201.

220 N.Y. Dec. Est. Law § 82.

her to remain for forty days in the home of the deceased husband with her upkeep provided from his estate.[221]

To protect not merely the surviving spouse but also any children, statutes provide certain exemptions for the decedent's estate from the claims of creditors.[222] In the light of current prices as well as the increasingly urban life in New York State these exemptions have an archaic ring; in specific articles, $1,000 worth of furniture and the clothing of decedent are exempt; $50 worth of books and the family Bible, farm animals and machinery to the value of $450, and $300 in cash or personal property. These items belong to the surviving spouse, or to the children if no spouse survives. Since a surviving spouse who had abandoned the decedent is unable to take an intestate share, such a spouse is barred from taking under the exemption provision.

A cause of action for the wrongful death of the decedent is given to the executor or administrator where the spouse or next of kin survive.[223] Included in any recovery will be the reasonable funeral expense paid by the spouse or next of kin.[224] If only a spouse survives, the entire recovery after funeral expenses goes to the spouse, but nothing can go to a husband who did not provide for the deceased wife or to any spouse who had abandoned the decedent.[225]

6. Pension Rights

Civil service employees of the State of New York are covered by a series of actuarial retirement plans, most of them by the New York State Employees' Retirement System.[226] It includes retirement benefits for both old age and disability with benefits payable to the widow of the assured.

The local government employees in some cases are covered by a state pension plan; the teachers in all public schools have a separate, statewide retirement system, and the counties and municipalities have one or more retirement plans, some of them, such as a series for New York City, of vast scope and involving millions of dollars. All of these plans provide for death benefits of various amounts to surviving widows of persons covered.

In addition to the coverage of the public plans in New York State,

221 N.Y. Real Prop. Law § 204.
222 N.Y. Surr. Court Act §§ 200 et seq.
223 N.Y. Dec. Est. Law § 130.
224 Id. § 132.
225 Id. § 133.
226 N.Y. Civ. S. Law pt. 4.

not to mention various pension systems which are federally sponsored,[227] an undetermined number of state residents are beneficiaries of various private pension plans, many of them established after the war in response to the demands of organized labor; these private plans provide benefits for surviving widows.

7. *Workmen's Compensation*[228]

New York has a statewide workmen's compensation system to protect employees and their dependent survivors from losses due to injury or accidental death while working for New York employers.[229] The system is actuarial in principle and the employers may either purchase insurance against liability to their employees from commercial carriers or from a state insurance fund. Awards to injured workers or to their survivors are made by the Workmen's Compensation Board, an administrative body, with appeal available to the Appellate Division, Third Department.

In the case of accidental death in the scope of employment reasonable funeral expenses up to $400 are paid. In addition, benefits are payable to a surviving wife or dependent husband as well as to other surviving dependents.[230]

IV

Conclusion

It may be concluded that vast strides have been taken in New York to remove the economic inequality between husband and wife. Yet some questions can properly be raised as to the effectiveness of the implementing legislation; and some fragments of medieval law survive.

It has already been suggested,[231] for example, that the estate by the entirety is an archaic relic of the common-law unity of husband and wife, which has no place in the modern world where husband and wife are distinct legal persons.

Another example of outmoded legislation is the New York version of the homestead laws.[232] If the family home requires protection by statute from the claims of creditors, such protection is certainly not afforded by the $1,000 maximum presently allowed. No wife or children in New York

227 In addition to the broad coverage of the Social Security Act there are various other pension systems, ranging from different ones for the various armed services to those for federal employees.

228 The best study of workmen's compensation is Larson, The Law of Workmen's Compensation (1952).

229 N.Y. Work. Comp. Law.

230 Id. § 16.

231 See note 32 supra.

232 See note 40 supra.

today will be safeguarded by this neglected legislation. The same is true of the statute purporting to protect certain essential articles of personal property from creditors,[233] and the corresponding legislation for trivial exemptions of a decedent's estate from the claims of creditors.[234]

Now that the right of the wife to her separate property is well established in New York, the provision for dissolution of a trust for a married woman[235] is no longer necessary for the purpose for which it was passed and is confusing in the light of the present development of the law of trusts.

The rule of the Uniform Commercial Code, extending the seller's warranty to persons in the household of the buyer who might reasonably expect to be affected by the goods,[236] is a rational restatement of the clumsy judge-made contraption of the implied agency of the wife.

While it is probably true that there are sufficient remedies available to a wife in New York to obtain support from her husband, they are scattered over a series of unrelated civil and criminal statutes; much of the substantive law of support is mingled with the procedural law in the monstrous New York Civil Practice Act.[237] The provisions for the support of a wife in the Children's Court Act and Domestic Relations Court Act[238] should be uniform throughout the state, and Ontario and Chautauqua Counties should be incorporated into the State of New York in this connection. A single court to administer these provisions is a natural consequence of uniform rules of law.

Where one spouse becomes a ward of the state, whether because of indigence, mental illness, mental defectiveness, or epilepsy, there should be a single set of uniform rules requiring the other spouse to meet the expense.[239]

The legislation providing for the spouse's elective share at the death of the other spouse seems ready for careful legislative reexamination if the original purpose of the innovation is to be preserved from judicial onslaught.

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233 See note 46 supra.

234 See note 222 supra.

235 See note 53 supra.

236 See note 91 supra.

237 See, in contrast, the flexible system of the Federal Rules of Civil Procedure and the Rules Governing the Courts of the State of New Jersey.

238 See notes 148 et seq. supra.

239 See notes 119, 124, 127, 129 supra.