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RECENT CASE NOTES

ALIMENTARY DUTIES—MAINTENANCE OF CHILD UPON DIVORCE—The plaintiff was granted a divorce from the defendant in 1923. In that decree the plaintiff was given custody of the minor child and $5.00 a week for his maintenance and support. The decree also made provision for the defendant's seeing the child at all reasonable times. This is an action for back payments and punishment for contempt of court because of defendant's failure to obey the first decree. The defendant pleads as a defense the fact that the child was removed from the state by the plaintiff and therefore he was denied reasonable access and chance of visiting as provided by the first decree. Held, that the removal of the child from the state does not provide a good defense to this action. *Zirkle v. Zirkle*, 1930, 172 N. E. 192, Sup. Ct. of Indiana.

In divorce proceedings, awarding the custody of minor children to one or the other of the parents, we find two kinds of decrees. In one of these the decree is silent as to maintenance but custody of the child is awarded to the mother. In such a case there is a split of authority as to whether or not the father is liable for the support of the children. Some cases hold him not liable for two reasons (1) no allowance is awarded by the court and (2) he is deprived of the child's services (*Tribolt v. Tribolt*, 158 Ind. 60, *Ramsey v. Ramsey*, 121 Ind. 215).

A majority of cases, however, seem to hold that in such a case the father is still liable for the support of his children. These cases so hold on the ground that the father owes both the children and society a certain fixed obligation and this obligation may be enforced against him, even though he doesn't have the custody of the child. (*McAllen v. McAllen*, 97 Minn. 76, *Buckmaster v. Buckmaster*, 38 Vt. 248). Where the decree either by statute, which is incorporated into the decree, or by express words in the decree itself places the burden of support on the father, the cases are unanimous in holding him liable for such specified support. (*Welch's Appeal*, 43 Conn. 342, *Boudies v. Boudies*, 39 Okla. 164).

The court in the principal case rightly holds that such a defense can't be interposed. True a decree may well include a provision for the other party having reasonable access to the child and such a provision may possibly be protected by making the child's custodian give bond to guard against the taking of the child beyond the jurisdiction of the court for any permanent period, but no case has allowed such a provision in a divorce decree to be interposed as a defense for accrued allowances. (*People v. Paulding*, 15 How. Pr. N. Y. 167; *Deringer v. Deringer*, 10 Phila. (Pa.) 190; *Zimmerman v. Zimmerman*, 242 Ill. 552; *Haley v. Haley*, 44 Ark. 429; *Oliver v. Oliver*, 151 Mass. 349.)

The court which renders the divorce decree and provides for allowance and custody has continuing jurisdiction and at any subsequent time before the child's attaining his majority may alter the decree both as to custody and the amount of the allowance (*Cox v. Cox*, 25 Ind. 303; *Hilliard v. An-*

derson, 197 Ill. 549; *Perkins v. Perkins,* 225 Mass. 392; *Getting v. Getting,* 197 Mich. 446).

The modification may be justified for various changed conditions such as the father's financial condition, inadequacy of the provision in the original decree, etc.

But payments exacted by the original divorce decree become vested as they accrue, and decrees which subsequently change the allowance cannot have a retroactive effect. Such a decree relates only to the future. *Kell v. Kell,* 179 Iowa 147; *Evans v. Evans,* 154 Cal. 644; *Dilbridge v. Seares,* 179 Iowa 526.

Thus it would seem that the court in the principal case has reached a logical result and one that is in accord with established doctrines in this field of the law. B. E. M.