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THE RIGHT TO ALIMONY AFTER DIVORCE.

In view of the state of the authorities it is very difficult to assert a general rule governing this subject, and this difficulty has been increased instead of lessened by the courts failing to separate this question from jurisdictional questions of the domicile and of the delictum, and of the effect of an ex parte decree of divorce, as well as the failure to distinguish between the doctrine of maintenance and that of alimony.

At the bottom of this question there are three propositions: 1st, a marriage valid where it is solemnized or contracted, is valid everywhere; 2d, a divorce valid where decreed, is valid everywhere; 3d, the allowance of alimony valid where made, is valid everywhere. These propositions have not been universally approved and adopted, but they are supported by the weight of authority, and have more common sense and principle for their basis than any other view.

From the adjudications two propositions are deducible; one, that alimony is only an incident of a divorce, and not a subject matter or right grantable in an independent separate proceeding where it is the only relief sought, unless the state statute so provides and makes it an independent right. It therefore follows that the court which grants the divorce can only allow the alimony; that no court, unless expressly so empowered by the statute, has power to grant alimony alone; and that if the court which decrees the divorce fails to allow alimony, or allows inadequate alimony, no other court can act in the matter—for when any matter is deter-
RIGHT TO ALIMONY AFTER DIVORCE.

mined by a court of competent jurisdiction, that is the end of that matter, and all other matters belonging to and which might have been determined in that proceeding or litigation. The other proposition is the reverse of this, holding that alimony is not only an incident or concomitant of a divorce, but that it is the subject of an original jurisdiction, per se, and can be obtained in an independent proceeding, and that, too, before or after the divorce proceeding is ended, and for the same cause or causes for which the divorce was granted; that it is incident to a divorce only in the meaning that it may follow a divorce in the divorce proceedings, not necessarily attached to it, nor in the same proceeding or court, but obtainable after the divorce is granted either in a domestic or a foreign tribunal.

Referring to the first proposition, the reasoning would be that if alimony is only an incident of or to a divorce, it cannot be the subject-matter of original jurisdiction, because an incident of or to a matter is not the matter itself. If this is correct, then the court having jurisdiction of the divorce has ipso facto jurisdiction of the alimony, and it therefore follows that a court having jurisdiction to decree an ex parte divorce, can also decree alimony in that ex parte proceeding which would be an ex parte judgment for money, without jurisdiction in personam or in rem, a conclusion almost generally repudiated: Mills v. Duryee, 7 Cranch 481; Webster v. Reid, 11 How. (U. S.) 487; Nations v. Johnson, 24 Id. 195; Boswell v. Otis, 9 Id. 336; McElmoyle v. Cohen, 13 Pet. 312; 2 Am. L. Ca. 551; D'Arcy v. Ketchum, 11 How. (U. S.) 165. If the first proposition (that alimony is an incident of divorce) is correct, the court must have jurisdiction of the divorce or it cannot determine the alimony; hence it follows that to know what will constitute a valid decree for the latter, we must know what confers jurisdiction of divorce. If the second proposition is true this is not necessary, because proceedings for alimony alone would be governed by the law applicable to all proceedings for money only.

The first proposition is supported, I believe, by the weight of authority, yet the conclusions legitimately flowing therefrom are rejected, hence the question of jurisdiction in divorce is important.

It is settled that the law of the place of the actual bona fide domicile of the parties gives jurisdiction to the proper courts to decree a divorce for any cause allowed by the local law without
regard to the place of the marriage or place of the delictum: Story Confl. L., sect. 230; Harding v. Alden, 9 Greenl. 140; Tolen v. Tolen, 2 Blackf. 407; Wall v. Williamson, 8 Ala. 48; Harrison v. Harrison, 19 Id. 499; Hanover v. Turner, 14 Mass. 227; Barber v. Root, 10 Id. 260; Fellows v. Fellows, 8 N. H. 160; Pawling v. Bird, 13 Johns. 192; Maguire v. Maguire, 7 Dana 181. This means the domicile of both husband and wife.

This proposition is not disputed, but there are other propositions involved in or growing out of this which are disputed, such as whether the domicile of one of the parties is sufficient, and whether or not this domicile means the domicile at the time of the delictum. Domicile is the place where a person lives, and as applicable to marriage it is the place where both husband and wife live (Story Confl. L., sect. 41; Phill. Dom. 11; 2 Bish. M. & D. Ch. 8); their then permanent place of abode as to all present intents and purposes.

The wife's domicile is in the place where the husband lives, because the law considers husband and wife one person, and its policy is that they cohabit together: Harteau v. Harteau, 14 Pick. 181; Colvin v. Reed, 55 Penn. St. 375; Greene v. Greene, 11 Pick. 410; Hairston v. Hairston, 27 Miss. 704; Smith v. Morehead, 6 Jones Eq. 360; Williams v. Saunders, 5 Cald. 60; 2 Bish. M. & D. ch. 9. This domicile once fixed continues until changed. It can be changed by the joint removal of the domicile animus non revertendi, or by either upon the commission of the delictum against the matrimonial consortium. If the husband commits the delictum the wife can refuse cohabitation and establish a domicile of her own, separate and independent from the husband, because if she cohabit after the delictum, it will be condonation. The misconduct of the husband gives her this right: Irby v. Wilson, 1 Dev. & Bat. Eq. 568; Stevens v. Stevens, 1 Met. 279; Davis v. Davis, 30 Ill. 180; Masten v. Masten, 15 N. H. 159; Kashaw v. Kashaw, 3 Cal. 312; Harrison v. Harrison, 20 Ala. 629; Williamson v. Parisien, 1 Johns. Ch. 389; Smith v. Smith, 4 Greene (Iowa) 266; Coddington v. Coddington, 5 C. E. Greene 263; Lyon v. Lyon, 2 Gray 367. "The wife can acquire a separate domicile whenever it is necessary and proper for her to do so. The right springs from the necessity of its exercise, and endures as long as the necessity continues. The proceedings for a divorce may be instituted where the wife has her
domicile. The place of the marriage, of the offence and the domicile of the husband are of no consequence:” Cheever v. Wilson, 9 Wall. 108; Bennett v. Bennett, Deady 299. Hence, if she has the right to establish a new domicile, she can sue in the old domicile or in the new. If she can sue in the new domicile she can obtain an *ex parte* decree. But some cases have held that the wife must sue in the domicile existing at the time of the *delictum*: Hopkins v. Hopkins, 35 N. H. 474; Schonwald v. Schonwald, 2 Jones Eq. 367; Kruse v. Kruse, 25 Mo. 68; Ashbaugh v. Ashbaugh, 17 Ill. 476. This apparent conflict will be reconciled. The same rule applies to the husband; hence, if she commits the *delictum*, the husband can sue in the forum of the domicile existing at the time of the offence, or establish a new domicile and sue in that new one: Warrender v. Warrender, 2 Cl. & F. 488; Chichester v. Donegal, 1 Add. Ecc. 5; Borden v. Fitch, 15 Johns. 121; Greene v. Greene, 11 Pick. 410; Hull v. Hull, 2 Strobh. Eq. 174; Hare v. Hare, 10 Tex. 355; Hood v. Hood, 11 Allen 196.

Alimony is a provision for the support or maintenance of the wife, grantable by a court and payable by the husband: Burr v. Burr, 7 Hill 207; Wallingsford v. Wallingsford, 6 Har. & J. 485; Rogers v. Vines, 6 Ired. 293. It is 1st, temporary, and 2d, permanent. Temporary when granted: 1st, *pendente lite*, and 2d, as a separate support or maintenance. Permanent when allowed as a permanent provision for support upon a divorce *a vinculo*.

The jurisdiction of our courts over the matter of alimony is derived from the English courts, or is statutory, or both.

In England, before the Cromwellian period and after the restoration until 1858, the ecclesiastical courts had exclusive jurisdiction of divorce and alimony, and did not grant alimony but in the proceedings resulting in the divorce. During the Cromwellian period these courts did not exist. Their jurisdiction as to alimony was exercised by the judges of the chancery court but did not extend to divorces, for the reason that the then governmental policy and the express language of their commission limited the jurisdiction to causes of alimony alone: Fonb. Eq. 96, 97; Oxenden v. Oxenden, 2 Vern. 493; Head v. Head, 3 Atk. 295; Lasbrook v. Tyler, 1 Rep. Ch. 44; Ashton v. Ashton, Id. 164; Watkyns v. Watkyns, 2 Atk. 96; Duncan v. Duncan, 19 Ves. 394; Wilkes v. Wilkes,
2 Dick. 791; Nicholls v. Danvers, 2 Vern. 671; Williams v. Callow, Id. 752; 2 Bright. H. & W. 354; Shelford Mar. & Div. 598; Reeves Dom. R. 209; 2 Story Eq., sect. 1422 et seq.

The ecclesiastical courts assumed jurisdiction to decree alimony only when they decreed a separation, because 1st, from the earliest period alimony was administered as an incident to a separation, and not as an original right. 2d. It had no existence at common law or in chancery as a separate and independent right, but was recognised as an incident to a proceeding for some other purpose, such as a supplicavit or divorce, hence the ecclesiastical courts did not assume original jurisdiction of alimony alone, but only as an incident to its divorce jurisdiction. This was in harmony with the origin and history of divorce and alimony, with the chancery court's jurisdiction and with the recognition at common law. It follows that prior to the year 1858 no court in England had any power to grant alimony when that was the only relief sought. It could only be done as an incident to something else: Head v. Head, 3 Atk. 547; Ball v. Montgomery, 2 Ves. 191. In Ball v. Montgomery the court said that "no court, not even the ecclesiastical court, has any original jurisdiction to give a wife a separate maintenance. It is always as incidental to some other matter that she becomes entitled to a separate provision. If she applies in equity upon a supplicavit for security of the peace against her husband, and it is necessary that she should live apart, as incidental to that the chancellor will allow her separate maintenance. So in the ecclesiastical court if it (alimony) is necessary upon a divorce de mensa et thoro propter sauitiam." Although the writ of supplicavit has been seldom used (2 Story's Equity Jurisprud., sects. 1422, 1423, 1476; 2 Roper Husband and Wife 309, 317, 320; Clancy M. W. 453; Codd v. Codd, 2 Johns. Ch. 141), it shows how alimony is incidental to a divorce, and in a late case (Adams v. Adams, 100 Mass. 365,) the court said that alimony alone was never granted by this process. Its purpose and object was to protect the wife from violence and abuse, and to accomplish this it was necessary sometimes to direct a separation for the time being, and separate maintenance for the wife whilst the separation continued.

This doctrine in England was admitted for the reason that granting alimony or separate maintenance, without the primary and concurrent decree of divorce, was compelling the husband to
support his wife in a manner contrary to law. The husband is not compelled, under the law, to support his wife but in cohabitation, unless he consents that she shall live separate, or commits some matrimonial offence entitling her to refuse cohabitation. If he has done either of these she can pledge his credit for her temporary separate maintenance. If something more is wanted, she can obtain a permanent provision concurrent with a separation. To decree a separate provision or alimony without a separation is against public policy.

An adjudication allowing the wife to live separate from the husband, is a necessary foundation for an adjudication compelling him to support her in a separate state. Cohabitation is the state and condition which the law imposes, and for which marriage was instituted. This state or condition must exist until the law allows a separation, hence the court must first adjudge a separation before it can adjudge a support during that separation. The first question is, shall cohabitation cease to exist (temporarily or permanently), and when this is determined the question of support or alimony arises. This is the first question whether the application be for alimony alone, or divorce and alimony, and it follows that if the court has no jurisdiction over the one question it can have none over the other; the one is concurrent and commensurate with the other, and neither exists without the other.

Notwithstanding the foregoing proposition and the reasons for it, there are cases holding the reverse of what has been stated. In *Oxenden v. Oxenden*, 2 Vern. 498, the chancery court, on an independent application, granted a separate maintenance, and also in *Nicholls v. Danvers*, 2 Vern. 671, decreed to the wife for her separate maintenance funds in the husband’s possession which came to her from her deceased mother’s estate. In *Williams v. Callow*, 2 Vern. 752, the chancery court, upon an application for a separate maintenance alone, decreed the interest of a trust bond given for the wife’s portion. In these cases there was neither a divorce nor an agreement to live separate.

The same rule was held in *Lasbrook v. Tyler*, 1 Cha. R. 44, and *Watkyns v. Watkyns*, 2 Atk. 96; *Duncan v. Duncan*, 19 Ves. 394; 1 Fonb. Eq. 94, 104.

On the other hand Lord Loughborough, in *Ball v. Montgomery*, 2 Ves. 195, said that he did not recollect any such cases as were cited from Vernon, and asserted the broad doctrine that a mar-
RIGHT TO ALIMONY AFTER DIVORCE.

ried woman should not be a plaintiff in a suit in equity for a separate maintenance, and no court had original jurisdiction to award it. This ruling was followed in Stones v. Cooke, 7 Sim. 22; Vandergrucht v. DeBlaquisere, 8 Id. 315.

Story's Equity Jurisprudence seems to have asserted both sides of the question. In one section (1422), it is asserted that, although it is the duty of the husband to provide a suitable maintenance for his wife, it is not a duty, to decree separate maintenance only, of which equity will assume jurisdiction: citing Ball v. Montgomery, 2 Ves. 195; Head v. Head, 3 Atk. 550; Legard v. Johnson, 3 Ves. 359; Clancy 549; Foden v. Finney, 4 Russ. 428; Galland v. Galland, 83 Cal. 265. If the husband does not provide suitable maintenance, the proper remedy is by an action against the husband by any person who has supplied her with necessaries: citing Guy v. Pearkes, 18 Ves. 196; Harris v. Morris, 4 Esp. 41; Hodges v. Hodges, 1 Id. 441; Bolton v. Prentice, 2 Stra. 1214; Hindley v. The Marguis, 6 B. & C. 200; Eames v. Sweetser, 101 Mass. 78; and if this reliance for support should be precarious, the wife may make an application to the ecclesiastical court for a decree à mensd et thoro, or for a restitution of conjugal rights upon which a suitable separate maintenance may be allowed: citing Ball v. Montgomery, supra; Clancy on H. & W. 549; 1 Fonbl. Eq., ch. 2. But in America equity will, in such cases, decree a wife a separate maintenance, upon the ground that there is no adequate or sufficient remedy at law: citing Purcell v. Purcell, 4 Hen. & Munf. 507; Patterson v. Patterson, 1 Halst. Ch. 388, which do not support the text. The remedy at law here referred to means the action by a third person against the husband for necessaries supplied to the wife; yet in the succeeding section it is asserted that equity has not general jurisdiction to decree separate maintenance out of the husband's property, except on agreement, &c., but may out of her own equitable estate.

This English doctrine of alimony or separate maintenance was limited to suppliant, agreement, and upon a divorce à mensd et thoro. It was carried into the jurisprudence of some of the states, and extended to awarding alimony upon an independent application, and without being connected with a divorce, and ultimately to granting it after a divorce a vinculo in an independent proceeding, and whether it had been previously asked or not. This jurisdiction in some states was assumed and exercised on the ground that it
belonged to the general jurisdiction of equity, although there existed no ecclesiastical courts. It can thus easily be seen how this jurisdiction originated and grew. Equity decreed the separate maintenance as an incident to some other subject-matter of which equity had original jurisdiction. The ecclesiastical courts decreed it as incident to divorce, and neither, except during the Cromwellian period, decreed it on an independent proceeding as a substantive subject of jurisdiction.

In Alabama, California, Kentucky, Maryland, Mississippi, North Carolina, Pennsylvania, South Carolina, Tennessee and Virginia, and possibly Ohio, the jurisdiction of equity to decree alimony alone has been more or less asserted and exercised. In all the other states the jurisdiction is denied. In both cases the state statutes may exercise an influence in determining the question.

In the year 1707 this question came under consideration in Maryland in MacNamara’s Case, 2 Bland. Ch. 566, and the court allowed alimony without a divorce, asserting such jurisdiction as general and original in the absence of ecclesiastical courts. This was followed in Lynthicumb’s Case in 1738, and Scott’s Case in 1746, and Gavane’s Case in 1750 (all reported in 2 Bland. 566), and asserted in Golwith’s Case, 4 Har. & McH. 477, apparently decided in 1689. This jurisdiction was confirmed by statute in 1777, which gave the court of chancery full power to hear and determine all causes for alimony, but it was understood that the jurisdiction did not extend to granting divorce. It was said in Jamison v. Jamison, 4 Md. Ch. 289, that alimony was so granted because “it is the duty of the husband to provide a suitable maintenance for his wife, and if he will not do so some proper remedy should be provided to compel him. The action at law whereby the person who supplies her with necessaries may sue the husband is a precarious and uncertain reliance for support. It is better that some proceeding be instituted by which the husband will be compelled to pay alimony or that the wife be restored to her conjugal rights, and as we have no jurisdiction over applications of the latter kind, it is best to grant alimony. ‘This court had jurisdiction before the revolution to grant alimony independent of the application for divorce.” This is the principle or doctrine adopted and followed in this state (Helms v. Franciscus, 2 Bland. Ch. 565; Wallingsford v. Wallingsford, 6 H. & J. 485; Harding v. Harding, 22 Md. 387; Keerl v. Keerl, 34 Id. 21; J. G. v. H. G., 35 Id. 401; Schindel
v. Schindel, 12 Id. 294; Dunnock v. Dunnock, 3 Id. Chan. 140), and the courts have never gone to the extent of granting alimony in a separate proceeding after a divorce a vinculo, except in Crane v. Meginnis, 1 Gill & J. 463, which followed Richardson v. Wilson, 8 Yerg. 67, holding that in a proper case there may be a judicial decree for alimony after a legislative divorce, but this seems to be against authority and the reason and policy of the law.

In North Carolina in 1796 (Spiller v. Spiller, 1 Hayw. 482; Knight v. Knight, 2 Id. 101), bills in equity by the wife against the husband for alimony alone were sustained without question. This jurisdiction has been sustained in later cases (Schonwald v. Schonwald, Phil. Eq. 215; Hodges v. Hodges, 82 N. C. 122), but such jurisdiction has not been stretched to grant alimony after a divorce a vinculo.

This inherent jurisdiction of chancery to grant alimony has been asserted and adopted in Virginia (Purcell v. Purcell, 4 Hen. & Munf. 507; Almond v. Almond, 4 Rand. 662), approving Duncan v. Duncan, 19 Ves. 394, and rejecting Head v. Head, 3 Atk. 295, and Ball v. Montgomery, 2 Ves. Jr. 195. The cases in this state follow the reasons for asserting the chancery jurisdiction given in the Maryland cases, but did not grant it after divorce a vinculo, and do not make distinction between alimony and a separate maintenance.

In Alabama the court (Glover v. Glover, 16 Ala. 442; Wray v. Wray, 33 Id. 187; Turner v. Turner, 44 Id. 437), at an early period asserted and exercised original jurisdiction over the subject of alimony, and in Glover v. Glover, after a careful review of the English cases said, that the court was "free to adopt a rule of decision for ourselves which we conceive to be more consonant with an enlightened equity, and with the fundamental principles and maxims upon which the jurisdiction of our courts of chancery is based," and therefore the courts would in harmony with the courts of Virginia, South Carolina and Kentucky, grant alimony in a proper case on an independent application, because the husband is bound to support his wife. "If law and conscience create this obligation, and no court can enforce its performance or compensate for its violation, then this class falsifies the maxim that for every wrong there is a remedy, and for every injustice an adequate and salutary relief." CHILTON, J., in Glover v. Glover.

Vol. XXXIII.—2
RIGHT TO ALIMONY AFTER DIVORCE.

This applies to a separate maintenance, but in Turner v. Turner, the court applied the doctrine after divorce a vinculo. In that case husband and wife resided in Alabama. The husband abandoned his wife, went to Indiana and procured an ex parte decree of divorce. The wife sued in Alabama for divorce and alimony. The husband pleaded the Indiana divorce as a bar, and the court held that it was not a bar. Said Peters, J.: "The Indiana divorce cannot affect the wife's rights, except her right in the husband as husband. It unmarries him and sets him free from his marital vows to her. He is no longer the complainant's husband. But it does not settle her right to alimony. It does not settle her right to dower in his lands, and her statutory right to distribution of his property in this state in the event she should survive him, nor any other interest of a pecuniary character she may have against him." But this decision should be placed on the principle that the decree of divorce was ex parte, not obtained at the bona fide domicile or the place of the offence, the grounds upon which jurisdiction is taken, and hence could not and did not affect the wife. This will accord with Shannon v. Shannon, 4 Allen 134; Smith v. Smith, 13 Gray 209; Cox v. Cox, 19 Ohio St. 502; Leith v. Leith, 39 N. H. 20; Hoffman v. Hoffman, 46 N. Y. 30; Prosser v. Warner, 47 Vt. 667.

In California the court in Galland v. Galland, 38 Cal. 265, divided on the question, the majority sustaining the jurisdiction and the minority rejecting it. The case was an application for alimony alone, and the court held, as in Virginia, South Carolina and Kentucky, that equity had jurisdiction to decree it, whether the application is or is not coupled with a prayer for divorce, approving the reasoning of Mills, J., in Butler v. Butler, 4 Litt. 202, and stating that the husband is obliged to support his wife; that as there is no remedy at common law for the husband's violation of this obligation, equity must afford one in this as in all cases where conscience and law acknowledge a right and no remedy. Besides, as equity enforced agreements for separation and separate maintenance, it can do it when he turns her out of doors; and that there is no difference in decreeing alimony under an agreement to separate, and decreeing it when the husband forces his wife to separate: citing Lasbrook v. Tyler, 1 Ch. R. 24; Williams v. Callow, 2 Vern. 752; Watkins v. Watkyns, 2 Atk. 97; Purcell v. Purcell, 4 H. & M. 507; Almond v. Almond, 4 Rand. 662; Logan v. Logan, 2 B. Mon.
RIGHT TO ALIMONY AFTER DIVORCE.

142; Prather v. Prather, 4 Dessaus. 33; Rhame v. Rhame, 1 McCord Ch. 197; Glover v. Glover, 16 Ala. 446. The dissenting opinion held that equity had no such jurisdiction, because the statute only allows alimony upon and in connection with divorce, hence alimony is dependent upon and incidental or auxiliary to an action pending for divorce, and there is no independent jurisdiction to grant it alone, and, because, on reason and authority English and American courts of equity have no original jurisdiction of this subject, and can only grant alimony as derivative from and incidental to some other original subject of jurisdiction: citing Clancy 549; 2 Bishop, sect. 351; 2 Story Eq., sect. 1422; Chapman v. Chapman, 13 Ind. 397; Shannon v. Shannon, 2 Gray 285; Sheafe v. Sheafe, 4 Post. 567; Parsons v. Parsons, 9 N. H. 309; Doyle v. Doyle, 26 Mo. 549. But this court has not gone so far as to decree alimony after a divorce.

It should be kept in view that from the ruling of granting alimony as a separate maintenance, developed the doctrine of granting it as an independent proceeding after divorce, hence, if the premises in the former are not correct the latter doctrine is not correct. In no state is this view presented better than in Kentucky. The courts in this state assumed original equity jurisdiction, (Lockridge v. Lockridge, 3 Dana 28; Boggess v. Boggess, 4 Id. 307; Woolridge v. Lucas, 7 B. Mon. 49; Butler v. Butler, 4 Littell 205; Rogers v. Rogers, 15 B. Mon. 364; Hulett v. Hulett, 80 Ky. 856), and for a long time confined the doctrine to separate maintenance—that is, to granting alimony as a separate maintenance—leaving the marriage still existing, and afterwards extended it to alimony after a divorce. In Butler v. Butler, the court held that equity had jurisdiction, regardless of the statute, to decree alimony, leaving the matrimonial chain untouched, because the husband is bound to support his wife. If he fail, it is a wrong acknowledged at law, but for which the law provides no remedy, and therefore equity must furnish the remedy where law and conscience acknowledge the right but give no remedy for its violation. The contrary doctrine “arose in England for fear of intruding upon the ground occupied by the ecclesiastical courts. These courts were incorporated with and composed a part of their government, and their sentence was as obligatory and as much noticed in their civil courts as the decisions of other courts, and it became necessary to restrain other courts from occupying the same ground. But in this
country there are no such courts or boundaries. The reasons for refusing jurisdiction here have ceased and do not exist.” If our chancery courts would not assume such jurisdiction “grievous wrongs might exist without remedies until the legislature interfered, which is against a well-known principle ripened into a maxim.” The court in this case reviewed the English cases and deemed them conflicting. But in none of these cases can it be found that the reason for the doctrine was that equity refused jurisdiction because the ecclesiastical courts possessed it. On the contrary, it is distinctly asserted that the reason was that no court had original jurisdiction of this matter alone, but had it as incidental to other subjects of jurisdiction. Subsequently this court, in Rogers v. Rogers, applied this rule to alimony after divorce. In that case husband and wife were domiciled in Kentucky, and the husband sued in this domicile for divorce on the ground of abandonment and obtained it. The wife appeared and defended, but did not ask and was not given alimony. Some years thereafter both became residents of Ohio, and the wife commenced in the Ohio court a suit for divorce and alimony, alleging fraud in the Kentucky proceedings, to which the husband pleaded the Kentucky divorce as a bar. The Ohio Common Pleas Court held the divorce in Kentucky valid, but as that court made no support or provision for the wife, and the propriety of doing so was not adjudicated, a decree for alimony was granted. Suit was brought in Kentucky on this judgment for alimony, to which was pleaded the Kentucky divorce, and also that the Ohio court had no jurisdiction to decree alimony, and hence the judgment upon which the suit was brought is null and void. Upon this question the Kentucky Supreme Court held that the Ohio decree for alimony was valid, because it was not shown that it was void for want of jurisdiction over the subject-matter or the person, or void because it was fraudulently procured, or that the same matter had been previously litigated between the same parties in a court of this state. In explanation of this the court said, “If the Kentucky decree of divorce had the effect of absolving the husband and his estate from all liability no alimony can in this case be allowed. But the right to alimony did not depend upon the granting of the divorce; it depended on various other matters, such as the nature of the cause for divorce, the husband’s estate, &c. None of these were presented or considered in that proceeding. After that divorce was granted the wife could
have presented her claim for alimony, which the court would still have the power to decide, notwithstanding a divorce had been granted. It was the decree for divorce which created a cause for the alimony. That the wife failed to present her claim for alimony in the Kentucky divorce proceeding made no difference. That matter was not rendered res adjudicata by the failure, and consequently the Ohio court did not undertake to re-try any question involved in the Kentucky proceeding. "If it be conceded that by the wife's failure to claim and obtain a decree for alimony in the divorce proceeding she is precluded from asserting it in another action, this would not make the Ohio decree for alimony invalid. It could only be erroneous, and until reversed, it would have the same effect as any other decree." The grounds upon which this decision is based, and the reasons for it, are not satisfactory, and seem to be in contravention of the current of authority and principle.

The courts of Mississippi have taken both sides of this question. In Shotwell v. Shotwell, 1 Smedes & Marshall, ch. 51, decided in 1843, the Circuit Court, on the wife's application, decreed a divorce. Alimony was not asked, because of the statute limiting jurisdiction of Circuit Courts to $500. Subsequently the wife sued in the Superior Court of Chancery for alimony alone, alleging the previous proceedings in and the decree of the Circuit Court. The husband demurred on the ground, that upon principle and under the statute, alimony is incident to and dependent upon the decree of divorce, and as no decree for alimony was made in that proceeding a separate bill therefor cannot be maintained. The statute provided that, when divorce is granted the court may grant such alimony as is just and proper. The court overruled the demurrer, stating that whilst it is usual to make the decree for alimony concurrent with the divorce or in the same proceeding, yet the omission cannot affect the wife's right to seek alimony at a subsequent time, by a separate and distinct proceeding and in another court of competent jurisdiction; that alimony is a separate and distinct right resulting from a decree of divorce, but not identical with it, nor necessarily constituting one proceeding. "I am of opinion (said the court) that a separate suit may be maintained for alimony after a decree for a divorce in which such claim was omitted, if there was no express act of the wife waiving her right thereto. If, therefore, a separate bill can be maintained, I can see no reason why it may
not be brought in any court having jurisdiction without regard to the court which granted the divorce, there is nothing in the nature of the proceedings which would limit it to the latter court; because "the wife's right to alimony proceeds upon the moral and legal obligation of the husband to furnish her with a competent support, and does not depend upon the point of time at which she attempts to assert it. The right is founded in the very nature and legal incidents of the marriage contract, hence it is if the husband, by cruelty or misconduct, compels the wife to force herself from him, the courts will enforce this obligation by compelling him to set apart a portion of his estate for her support."

This decision was reversed by the Court of Errors and Appeals (Lawson v. Shotwell, 27 Miss. 630 (1854)), the court stating that, "the authorities, almost without exception, agree that alimony is allowed only as an incident to some other proceedings which may be legally instituted by the wife against the husband, such, for instance, as an action for the restitution of conjugal rights, divorce, &c." But, said the court, "we do not intend to intimate that there may not be cases in which an original bill, after a decree for a divorce, could not be maintained for alimony, but only that the present bill shows no sufficient reason for not taking or asking for alimony in the Circuit Court. A good reason must be alleged why the alimony was not at the proper time allowed. What will be a good reason must depend upon the facts of the case when presented." This last statement was made in consequence of misconstruing the jurisdiction of the Circuit Court, intimating that if the plaintiff had not purposely omitted the application for alimony in the divorce proceeding, another construction might be made. This was followed by Bankston v. Bankston, 27 Miss. 692, affirming the doctrine that chancery had no original jurisdiction, holding that the court decreeing the divorce had the only power, and as it did not decree final alimony a separate suit for alimony was not maintainable. And this appears to be consistent with the Mississippi statute (Code sect. 1159), providing that when the divorce is decreed, the court shall then make the orders concerning alimony.

The Pennsylvania courts (McKarracher v. McKarracher, 3 Yeates 56), held the reverse of Lawson v. Shotwell, holding that the failure of the wife to claim alimony in the proceedings for divorce was no bar to a further application for that purpose.
RIGHT TO ALIMONY AFTER DIVORCE.

In South Carolina (Jelineau v. Jelineau, 2 Dessausseur 45; Prather v. Prather, 4 Id. 33; Threewits v. Threewits, Id. 560; Prince v. Prince, 1 Rich. Eq. 282) the courts exercise the jurisdiction to grant a separate maintenance but term it alimony. The decisions have not gone so far as to decree alimony after a divorce a vinculo, probably because divorces of this character are unknown there, yet the decisions granting separate maintenance intimate that the same rule would be applicable in all cases. In Tennessee alimony was granted after a legislative divorce: Richardson v. Wilson, 8 Yerg. 67. In that case the legislature granted the divorce a vinculo, but reserved to the wife all right to alimony if, by law, she should be entitled. The wife filed her petition for alimony, and the court granted it, stating that it had power to take up the question where the legislature left it; that alimony would have been granted if the bill had not contained this reservation; and that the right of the wife to a support from her husband was a constitutional right which the legislature could not take away by a divorce bill, passed ex parte and without notice to her. This case decided the point that alimony would be allowed after a legislative divorce with a reservation as to alimony. The balance was dictum. This case can be supported on two grounds: 1st, that the reservation in the act is the same as a reservation in a decree of divorce, and the granting of the alimony, in such case is allowing it in the same proceeding; 2d, that the husband's ex parte divorce cannot destroy the wife's right to alimony, because it would be perpetrating a fraud, and because such decrees are not jurisdictional under the laws giving credit to foreign decrees: Prosser v. Warner, 47 Vt. 667; Hoffman v. Hoffman, 46 N. Y. 30; Shannon v. Shannon, 4 Allen 134; Smith v. Smith, 13 Gray 209; Leith v. Leith, 89 N. H. 20.

In Ohio (Cooper v. Cooper, 7 Ohio, 2 pt. 594; Mansfield v. McIntyre, 10 Ohio 30; Cox v. Cox, 19 Ohio St. 502; 20 Id. 439,) the question has not been settled. In the latest case, Cox v. Cox, the husband and wife were domiciled in Ohio. The husband deserted his wife, went to Indiana and obtained a divorce. Some time after the desertion the wife applied in the place of her domicile, Ohio, for divorce and alimony. The husband pleaded the Indiana divorce as a bar. On appeal the court held that the domicile of the wife remained unaffected by the desertion of the husband, and that the Indiana decree of divorce was no de-
fence to her petition for alimony. The court followed Richardson v. Wilson, Crane v. Meginnis and Shotwell v. Shotwell; but as heretofore discussed none of these support it. This case held that jurisdiction of divorce is based on the domicile of the applicant, not on the place of the marriage, nor the place of the offence, nor the domicile of the defendant, because marriage is a social status, and the state in which the applicant resides has the jurisdiction to terminate this status *ex parte*, but nothing else, which decree public policy requires to be elsewhere recognised, hence such decree is not a bar to a proceeding for alimony in a court of another jurisdiction. This case is in harmony with the doctrine herein discussed applicable to the effect of *ex parte* divorce in a foreign jurisdiction, but is not, perhaps, authority on the question whether alimony is incidental to divorce.

We come now to the decisions holding the other side of this question. In England, since the Divorce Act, 20 & 21 Vict., sect. 32, the courts have held in conformity with the history of the subject, and on the principle involved, that permanent alimony is the creature of the Divorce Act, and cannot be allowed but in the same proceedings granting the divorce: Winscome v. Winscome, 3 Swabey & Tristam R. 380.

In Arkansas the courts hold that alimony is incident to a divorce, and cannot be granted in an independent proceeding unless the statute expressly so provides. In Bowman v. Worthington, 24 Ark. 529, the facts were: The marriage took place in Kentucky. Husband and wife then moved to Arkansas. Wife left her husband on account of alleged adultery, went to Kentucky, obtained a legislative divorce *ex parte*, and then commenced suit in the Arkansas court for alimony. The demurrer to this application was sustained. The court said that alimony is an incident of the divorce, grantable in connection with it, and there is no jurisdiction to entertain a separate application therefor. In this case the court reviews many of the authorities, and holds that this is the only correct position to be taken, and that Shotwell v. Shotwell, in Mississippi, was overruled, and Richardson v. Wilson is contrary to the weight of authority. The statute (ch. 59) in this state is substantially like the statutes in most of the states, and provides that, "when a decree of divorce shall be entered" the court shall provide for the alimony.

The Georgia courts adopted the same principle, and in explana-
tion of it, after reviewing the cases said, in McGee v. McGee, 10 Ga. 477, followed in Goss v. Goss, 29 Ga. 109, that no court has original jurisdiction to grant separate maintenance (alimony) whilst the marriage exists. It is incidental to some other power having jurisdiction to decree specific performance. Chancery can decree a separate maintenance on an agreement for that purpose, and can do it in other matters of which it has jurisdiction, such as supplicavit for surety of the peace. But equity has no power to decree alimony alone, on the ground of desertion, cruel treatment, failure to maintain the wife, &c. Alimony is incident to divorce, to be obtained in the same proceeding, and not after the divorce in an independent proceeding.

In Fischli v. Fischli, 1 Blackf. (Ind.) 360, the wife obtained a decree of divorce a vinculo, and allowance of alimony in Kentucky. Subsequently she commenced proceedings in Indiana for additional alimony, alleging the inadequacy of the amount granted in Kentucky. The court said that alimony "is incidental to divorce, the court that decrees the divorce is to make the provision, and if that court fails to provide for the wife by a division of the property or makes an inadequate division, we know of no authority, either from the act of the assembly (of Indiana) or the English books, for any other court to remedy the evil or extend the provision," because there is no precedent except a few extreme cases, the weight of authority being the other way, the Kentucky court could have decreed the necessary maintenance, and because alimony is an incident of a divorce; hence, "when a matter is adjudicated by a court of competent jurisdiction it is forever at rest, not only what was actually determined, but every other matter which the parties might have litigated in the cause." Hence, in divorce proceedings the matter to be litigated is "the separate maintenance (alimony), the wife's condition in life, the fortune she brought in marriage, and her husband's circumstances." These were the subjects of the litigation in Kentucky, and as that court had ample power to do justice between the parties but failed to do it, no other court can supply the deficiency. This was a case of inadequate alimony.

In Muckenbarg v. Holler, 29 Ind. 139, the court stated that "alimony is an incident of a suit for divorce, and is not a matter which can constitute the subject of an independent suit. It must be adjudged in the divorce proceeding or not at all. All questions
of property are litigated in a suit for divorce, and must there be settled. The complaint here shows that the parties have been divorced, and the legal inference is that the subject-matter of the suit was there settled and put at rest.” This is the doctrine in this state: Moon v. Baum, 58 Ind. 194; Middleworth v. McDowell, 49 Id. 386. In Middleworth v. McDowell the wife obtained divorce and alimony in Iowa. Constructive service on the husband, who did not appear and who was not a resident of Iowa. Subsequently she commenced suit in Indiana for the alimony so decreed in Iowa. The court held the decree for alimony of no force in Indiana, because a personal judgment for money cannot be made against a non-resident founded on publication. Following Beard v. Beard, 21 Ind. 321; Lytle v. Lytle, 48 Id. 200; D'Arcy v. Ketcham, 11 How. (U. S.) 165; Board of Pub. Works v. Columbia College, 17 Wall. 521.

This doctrine is followed in Illinois: Chestnut v. Chestnut, 77 Ill. 346. In Iowa the courts are on both sides of this question. In Blythe v. Blythe, 25 Iowa 266, the wife obtained a divorce, but did not ask and did not receive alimony in the divorce proceeding. To an application for alimony alone, the court said that no alimony can be allowed. “The relation of husband and wife must exist either de jure or de facto in order to justify an order for alimony.” In Harshberger v. Harshberger, 26 Iowa 503; (Cole v. Cole, 23 Id. 493; McEwen v. McEwen, 26 Id. 375), the court said, “no independent action for alimony can be brought, it must be connected with and follow a divorce.” But in Graves v. Graves, 36 Iowa 310 (14 Am. R. 525), a different view was taken, holding that a court of equity has jurisdiction to entertain a suit for and to grant alimony where no divorce or other relief is sought, that the husband is bound to support his wife, hence, if he makes it unsafe or immoral for his wife to remain with him, or he forces her to leave, she carries his credit for support, and those who furnish necessaries can sue at law; second, equity, can take jurisdiction on the ground of avoiding multiplicity of suits, or on the ground that there is no adequate remedy at law; third, on well-settled equity principles as well as upon considerations of public policy. Citing Jones v. Jones, 19 Iowa; O'Hagan v. O'Hagan, 4 Id. 509; McMullen v. McMullen, 10 Id. 412; Galland v. Galland, 38 Cal. 265.

The doctrine heretofore stated that alimony is an incident of
RIGHT TO ALIMONY AFTER DIVORCE.

divorce and not the subject-matter of an independent proceeding, is adopted in Maine (Jones v. Jones, 18 Me. 311; Henderson v. Henderson, 64 Id. 419; Littlefield v. Paul, 69 Id. 533), and in Massachusetts (Shannon v. Shannon, 2 Gray 287; Baldwin v. Baldwin, 6 Id. 342; Coffin v. Dunham, 8 Cush. 405), and in Michigan (Peltier v. Peltier, Har. Ch. 19; Perkins v. Perkins, 16 Mich. 167; Wright v. Wright, 24 Id. 180.) In Peltier v. Peltier the court said: "I am satisfied that exclusive of any statutory provision, chancery has no jurisdiction to entertain an application for alimony alone. The whole current of authority goes to show that courts of chancery have never entertained jurisdiction in cases of this kind, except in aid of some other court or to carry into effect a marriage contract, or in execution of a trust." Citing Head v. Head, 3 Atk. 551; Watkins v. Watkins, 2 Id. 98; Fonbl. Eq. 98; Codd v. Codd, 2 Johns. Ch. 141; Lewis v. Lewis, 3 Id. 519; Mix v. Mix, 1 Id. 108; Bullock v. Menzies, 4 Ves. Jr. 799; Legard v. Johnson, 3 Id. 351. The same doctrine is followed in Missouri: Doyle v. Doyle, 26 Mo. 545, 549; Simpson v. Simpson, 31 Id. 24. In Doyle v. Doyle the court said: "A court has no authority to grant alimony but as an incident to a divorce, except where it is conferred by statute. Our statute allows alimony where the husband, without just cause, abandons his wife. Without such a statute the courts cannot grant alimony but as an incident to a divorce."

The same principle is adopted in New Hampshire (Parsons v. Parsons, 9 N. H. 317; Sheafe v. Sheafe, 24 Id. 569), and in New Jersey (Kerrigan v. Kerrigan, 2 McCart. 146; Nichols v. Nichols, 10 C. E. Green 60; Yule v. Yule, 2 Stock. 138; Rockwell v. Morgan, 2 Beas. 119; Anshutz v. Anshutz, 1 O. E. Green 162; Cory v. Cory, 3 Stock. 400), and also in New York (Atwater v. Atwater, 53 Barb. 621; Codd v. Codd, 2 Johns. Ch. 141; Lewis v. Lewis, 3 Id. 519; Mix v. Mix, 1 Id. 108; Perry v. Perry, 2 Paige 501), and in Vermont (Harrington v. Harrington, 10 Vt. 505; Prosser v. Warner, 47 Id. 667). In Hoffman v. Hoffman, 46 N. Y. 30, the husband and wife were residents of and domiciled in New York; the husband left the domicile, went to Indiana and obtained a divorce, the service being by publication. The wife had no knowledge of and did not appear in the proceeding. Subsequently the wife sued in New York (the place of the domicile and place where the cause for divorce was committed) for divorce
and alimony, to which was pleaded the Indiana divorce as a bar. The court held that it was not a bar, because the Indiana court had no jurisdiction, as the husband was a resident of New York, and went only to Indiana to get the divorce, and because the wife was not served with process or appeared. The judgment was obtained by fraud and obtained ex parte. This case was really decided on the doctrine of the effect of an ex parte judgment.

In Prosser v. Warner, 47 Vt. 667, the husband and wife were domiciled in Vermont. The husband abandoned the wife. She thereupon returned to New York, the place of the marriage, and obtained a divorce and alimony by ex parte proceedings, for adultery of the husband in Vermont. Upon this judgment for alimony she commenced an action for debt in Vermont. The court held that this New York decree was not binding in Vermont. The decree was not obtained at the place of the domicile nor the place of the offence. Although these, and some other cases heretofore mentioned, were applications for alimony alone, the decisions were based on the doctrine of the effect of an ex parte decree, and not on the principle that alimony is an incident of a divorce, hence this is a connecting question with the one under discussion.

This appears to be the state of the decisions upon this question.

Alimony either is or is not incident to a divorce. If it is, it must be obtained in the divorce proceeding, because the substantive carries with it all its incidents. If this is true, a decree for alimony will be valid if the decree for divorce is valid; hence, if an ex parte decree for divorce is valid, an ex parte decree for alimony in the same proceeding should also be valid. On the other hand, if alimony is not incident to divorce, it should be a substantive matter of jurisdiction like any claim or demand for money. But whilst the authorities hold that alimony is incident to divorce, they also hold that an ex parte decree for alimony is not valid. Either one or the other of these positions is incorrect, or there must be a principle upon which both can be reconciled. Perhaps this apparent conflict can be reconciled if it can be established that marriage is a status, and that an ex parte divorce only acts upon and dissolves this status. If so, it is a separate and distinct subject-matter from the matter of alimony. Here another question enters, namely, will the dissolution of this status in one state have the effect of dissolving it in another state, and can such a divorce carry alimony with it. If it is a status it must be a something—a substan-