

Domestic Relations - Husband and Wife - Husband's Duty to Support Wife

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which are not generally regarded as incestuous. Thus, although many states which forbid cousin marriages will nevertheless recognize them as valid if they were contracted in a state which allows them, *Garcia v. Garcia*, 25 S.D. 645, 127 N.W. 586, 32 L.R.A. (N.S.) 424 (1910), yet, a great many others will refuse to give recognition to such marriages especially where the parties to them marry abroad in evasion of the law of their domicile. *Johnson v. Johnson*, 57 Wash. 89, 106 Pac. 500, 26 L.R.A. (N.S.) 179 (1910).

The rule that marriages valid where contracted are valid everywhere breaks down completely when the marriage at issue is one which was contracted in evasion of the law of the state in which both parties are domiciled and if it is a marriage which the law of such domicile regards as incestuous or miscegenetic, even though it may not have been so regarded by the law of the state where the ceremony was performed. The state of the authorities with respect to incestuous marriages thus contracted is exhaustively considered in the A.L.R. annotation to the principal case. Annotation, 117 A.L.R. 186 (1938).

In the principal case the parties were not related by blood, but merely by affinity. Where the relationship of aunt and nephew is consanguineous, marriage is prohibited by statute as incestuous in most states. But where the relationship is only by affinity there is no such agreement.

At common law in England, relationship by affinity was as serious an impediment to marriage as relationship by blood. But this rule, derived from the canon law, was not generally accepted as part of the common law in America. American courts have refused to declare even a consanguineous marriage void unless the parties were so closely related as to make the marriage clearly incestuous by the natural law. *Weisberg v. Weisberg*, 112 App. Div. 231, 98 N.Y.S. 260 (1906). All states now have statutes fixing the degrees of relationship by blood within which marriage is forbidden, but only half of them have statutes forbidding marriage between persons related by affinity. 1 Vernier, *American Family Laws* 183. And these statutes have been variously interpreted.

It has been held that the affinity ends with the dissolution, either by death or divorce, of the marriage which created the relationship. *Back v. Back*, 148 Iowa 223, 125 N.W. 1009 (1910). In Alabama only a few years prior to the principal case it had been held that the relationship by affinity ends with the dissolution of the marriage which brought about the relationship unless there is surviving issue of that marriage. *Henderson v. State*, 26 Ala. App. 263, 157 So. 884 (1934). In the principal case there was issue surviving. Other states hold that the relationship survives the marriage from which it arose at all events. *Spear v. Robinson*, 29 Me. 531 (1849); *Commonwealth v. Perryman*, 2 Leigh (29 Va.) 717 (1830). In five states statutes provide that the prohibition of marriages between persons related by affinity shall continue after the dissolution of the marriage by which the affinity was created. 1 Vernier, *American Family Laws* 184.

JOHN D. KAISER.

Husband and Wife—Husband's Duty to Support Wife.—The Committee of the Estate of Martha Gray, incompetent, brought action against Martha's husband, Robert, for moneys expended by Martha for her own support prior to her being adjudicated insane and for moneys expended from her estate by the Committee for her maintenance at a hospital. Robert and Martha had separated and Martha had supported herself thereafter without manifesting any desire that Robert should provide for her.

Held, that although a husband remains under a duty to support a wife from whom he has separated and who has not been guilty of misconduct justifying separation, the wife may relieve him of that liability if she prefers to provide for herself from her own means; that in the instant case it was properly left to the jury whether Martha had waived her right to support.

However, as to the moneys expended from Martha's estate after she had been adjudicated insane it was *held* that she then was no longer able to exercise a preference to support herself, and the Committee of her Estate could not exercise a choice for her. It was *held*, accordingly, that the husband was liable for the wife's support following her adjudication of insanity, and that the Committee could recover from him the sums expended for necessaries for Martha out of her estate. *Manufacturers' Trust Co. v. Gray*, 278 N.Y. 380, 16 N.E. (2d) 373 (1938).

The husband's liability for his wife's support usually is based on a theory of agency, real or fictitious. If the spouses are living together, the husband commonly is held liable for his wife's purchases because of an actual agency, either expressed or, more frequently, implied from the fact that the wife occupies the position of household manager with presumed authority to make the purchases usually made by a housekeeper. The authority does not arise merely from the fact of marriage, or even from the cohabitation of the spouses, and being merely a presumption of fact, is rebuttable. *Debenham v. Mellon*, 6 A. C. 24 (1880); *Saks v. Huddleston*, 36 F. (2d) 537 (1929), (1930) 43 HARV. L. REV. 961.

But when the spouses separate there no longer exist the facts from which the implication of an actual agency is drawn, and the courts then speak of the wife's "agency in law" to purchase necessaries on the husband's credit. The "agency" does not depend on any authority in fact from the husband, and cannot be revoked by any word or act of his. It constitutes a power conferred by law on the wife to enforce the husband's obligation of support. *Jordan Marsh Co. v. Hedtler*, 238 Mass. 43, 130 N.E. 78 (1921). If the wife deserts, the husband is no longer obliged to support her. *Vusler v. Cox*, 53 N. J. L. 516 (1891). But if she leaves because of his misconduct, his duty to support continues, and is not lessened by the fact that the wife has independent means. She may buy on his credit even against his will. *Ott v. Hentall*, 70 N.H. 231, 47 Atl. 80 (1899).

Since this power is one to buy necessaries on the husband's credit, and is likely to involve the merchant who extends such credit in a suit against the husband, the merchant usually refuses to furnish the necessaries. And since the power rests ultimately on the husband's duty to support, most courts have held that if the wife herself pays from her own funds for necessaries, thereby discharging the husband's duty, she can obtain reimbursement from the husband; and any one advancing funds to her for the purchase of necessaries may likewise recover from him. *DeBrauwere v. DeBrauwere*, 203 N.Y. 460, 96 N.E. 722, 38 L.R.A. (N.S.) 508 (1911).

Some courts have denied recovery to one advancing money to a needy wife for the purchase of necessaries, holding that money is not a necessary and denying the plaintiff subrogation to the right of the merchant from whom the necessaries are bought because "equity will not aid a volunteer." *Skinner v. Tirrel*, 159 Mass. 474, 34 N.E. 692, 21 L.R.A. 673 (1893). But this minority view is unsound, since it makes a trivial distinction between money and money's worth, and ignores the reason for equity's denying aid to a volunteer, to wit,

the court's unwillingness to aid an officious intermeddler. One who provides food for a starving person, thereby performing a duty which should have been performed by another, is not an officious intermeddler. Hope, *Officiousness* (1930) 15 CORN. L. Q. 205, 238. The doctrine of subrogation should be applied where it will prevent unjust enrichment. Note (1926) 39 HARV. L. REV. 381.

The principal case, in addition to holding that the wife's right to reimbursement may be exercised by her guardian if she becomes insane, continues the husband's obligation of support after the wife is committed to an institution. On the latter point the authorities are in conflict. In Wisconsin the husband's duty of support ends when the wife is committed to an asylum, even though the husband has been instrumental in obtaining such commitment. His duty is regarded as fully performed if he has not refused to support his wife in the matrimonial home. *Richardson v. Stuesser*, 125 Wis. 66, 103 N.W. 26, 69 L.R.A. 829 (1905). In Nebraska it has been held that a husband is subjected to double taxation if he must support his wife in an insane asylum, and accordingly he has been held not liable for such support. *Baldwin v. Douglas County*, 37 Neb. 283, 55 N.W. 875, 20 L.R.A. 850 (1893).

JUNE C. HEALY.

Torts—Negligence—Degree of Care Required of Operators of Elevators and Escalators.—The plaintiff alleged that an escalator on which she was riding in the defendant's store became out of order, vibrated violently, pushed her from side to side and threw her upon her back, causing injuries. The defendant contended that its duty to the plaintiff was merely that owed to a business guest, requiring it to keep its premises in a reasonably safe condition. The plaintiff insisted that the defendant was under a duty to exercise the highest practical degree of care for the safety of passengers using the store's escalators. *Held*, that operators of elevators and escalators are under the same duty as that which is required of common carriers and must exercise the highest degree of care for the safety of their passengers. *Heffernan v. Mandel Bros. Inc.*, 297 Ill. App. 272, 17 N.E. (2d) 523 (1938).

The highest degree of care must be exercised by common carriers. They are liable for the slightest neglect against which human care and foresight might have guarded. *Treadwell v. Whittier*, 80 Cal. 574, 22 Pac. 266, 5 L.R.A. 498 (1889); *Ferguson v. Truax*, 136 Wis. 637, 118 N.W. 251 (1908); *Wanzer v. Chippewa Valley E. R. Co.*, 108 Wis. 319, 84 N.W. 423 (1900).

The majority of cases hold that the law makes no distinction between an undertaking to carry passengers in buildings by means of elevators and undertaking to carry them upon streets, highways or railroads. The same obligation to exercise the highest degree of care and skill applies in each case. *Walsh v. Cullen*, 235 Ill. 91, 85 N.E. 223 (1908). This has been required where elevators have been used in buildings for business purposes, *Springer v. Ford*, 189 Ill. 430, 59 N.E. 953 (1901); or for use of tenants in office building, *Hartford Deposit Co. v. Sollitt*, 172 Ill. 222, 50 N.E. 178, 64 Am. St. Rep. 35 (1898); or in an apartment house, *Hodges v. Percival*, 132 Ill. 53, 23 N.E. 423 (1890); or in a department store, *Steiskal v. Marshall Field & Co.*, 238 Ill. 32, 87 N.E. 117 (1908). Wisconsin requires the highest degree of care that human skill and foresight could suggest. *Dibbert v. Metropolitan Investment Co.*, 158 Wis. 69, 147 N.W. 3 (1914); *Dehnel v. Smith*, 200 Wis. 292, 227 N.W. 274 (1929); *Oberndorfer v. Pabst*, 100 Wis. 505, 76 N.W. 338 (1898).