

# YALE LAW JOURNAL

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At a recent meeting of the Governing Board of the Yale Law School the following minute was unanimously adopted:

*Whereas*, Professor Wayland has resigned his position as Dean of the Law Department of Yale University on account of the condition of his health, and,

*Whereas*, At the request of this department he has been appointed by the Corporation, Emeritus Professor of English Constitutional Law,

*Resolved*, That we, the Governing Board of this department, deeply regret that he finds himself unable to resume the active duties of his office which he has discharged for nearly thirty years, with a devotion, fidelity and success universally recognized by all who know the history of the Yale Law School. To him, more than to any other man, it owes its ample library and spacious building. Joining its Faculty, then composed of only three instructors, in 1871, when the graduating class numbered only twelve, and that number

had been exceeded only twice in previous years, he leaves it with a faculty of ten professors, three assistant professors and one instructor, and an enrollment of 250 students, besides nearly ninety academic seniors electing courses in law. In 1871, there were but two classes. Since then the undergraduate course has been prolonged to three years, with a corresponding increase in the instruction given, and a graduate course of one or two years more—the first established at any American or English law school—which for more than a quarter of a century has been training men in jurisprudence in the largest sense and furnishing well-equipped teachers in this and other law schools. We extend to him our sincere congratulations on these great advances in legal education at Yale, in which he has had so large a share, and are glad to feel assured that his interest in the school will continue unabated.

*Resolved*, That the Acting Dean be requested to send to Professor Wayland a copy of this minute.

## COMMENT.

### THE USE OF ORAL WILLS IN CONNECTICUT.

Oral or nuncupative wills were used in Connecticut from the settlement of the colony until as late as 1725<sup>1</sup> and perhaps later. Although there was nothing in our statute law until 1821 to prevent their use, they have been obsolete so long that they are nearly, if not quite, forgotten. Thus, the Supreme Court says in *Stone's Appeal*, 74 Conn. 301, 303:

"Prior to the Revision of 1821, it does not appear that any express statutory provision existed requiring all wills to be in writing; but from clear implication from the statutes prior to that time relating to devises of real estate, wills containing such devises were required to be in writing, just as they were in England. Although it does not appear that prior to the Revision of 1821 any statutory provision existed expressly, or by clear implication, requiring wills of personality to be in writing, yet the legislation of that period in reference to estates, executors, probate courts, and proof of wills, seems to proceed from the fact that written wills alone were used and proved. It is true that *Judge Swift* in his "System" (Vol. I. p. 420), published in 1795, gives the substance of what *Blackstone* says about nuncupative wills, as one of the common-law forms of testamentary disposition; but it does not follow from this that such wills were ever used and proved in this State. We are not aware that unwritten wills have ever been used or probated in this State, although it may have been

<sup>1</sup> See will of Abigail Bishop, New Haven Probate Records, Vol. 5, pp. 255-6.

done. In the case of *Card v. Grinman*, 5 Conn. 164, 166, counsel for the appellees, in their brief, say: "The earliest Records of the Colony show that written wills were in constant use, and there is not a suggestion in all our juridical history that there could be a valid will without writing."

In the first volume of the transcript of the Connecticut Colonial Records are found three nuncupative wills.<sup>1</sup>

An examination of two parts of the first volume of the records of the New Haven Probate District shows that, during the period it covers (1647-1687), thirty-two oral wills were probated. The word will is here used to include all declarations as to the disposition of property after death, which were given effect.

Those in part I are: Anthony Tompson, p. 33; Mathew Wood, p. 50; Henry Pecke, p. 51; Anthony Tompson, p. 55; Richard Mansfield, p. 56; Tho Mitchell, p. 90; Thomas Jeffrie, p. 102; William Potter, p. 118; Thomas Lampson, p. 130; Mathew Moulthrop, p. 143; Thomas Morris, p. 159; Mrs. Leete, p. 163; Thomas Holt, p. 173; Elizabeth Rose, p. 176; Thomas Yale, p. 198; Nathan Wheplye, p. 213.

In part II: Daniel Munne, p. 6; Joseph Northrop, p. 15 (codicil); Bryan Rossiter, p. 31; Sarah Whiteman, p. 38; John Scranton, p. 41; Ann Tapp, p. 50; John Rickman, p. 59; Henry Cole, p. 60; John Fowler, p. 66 (codicil); Bristow, p. 77; Thomas Sanford (codicil) p. 98; George Hubbard, p. 97 (codicil); Elizabeth Evatts, p. 98; John Kingsnorth, p. 99; Job Everett, p. 118.

The entries as to the probate of wills in the New Haven Colonial Records show two sorts of phraseology, e. g.:

"The last will and testam't of Edwa: Wigglesworth, late of Newhaven deceased, was presented to ye court, made the 12th day of July, 1653, confirmed by his owne hand and seale, and witnessed by Mr. John Davenport, Mr. William Hooke, and M. Mathew Gilbert."<sup>2</sup>

"The last will and testam't of Henry Peck, late of Newhauen deceased, was presented to the court, made the 30th of October, 1651, witnessed by William Pecke, Jno. Moss, and Sam: Whitehead vpon their oath, at a court held at Newhauen, the 2nd day of May, 1654."<sup>3</sup>

The first is always used of written wills. In most, if not all, cases where the latter is used, the will is wholly unwritten or is unsigned.

The court, in those days, exercised supreme power, both legislative and judicial, and, to a large extent, settled estates as it thought just, unhampered by statute or common-law.

The following show how great these powers were.

<sup>1</sup> Those of William Spencer, p. 449; Tho. Scott, p. 453; and Ed. Chalkwell, p. 492.

<sup>2</sup> New Haven Colonial Records, Vol. II, p. 90.

<sup>3</sup> New Haven Colonial Records, Vol. II, p. 91.

"This court understanding that those concerned about ye estate of Mr. Thomas Yale<sup>1</sup> late of New Haven deceased (yt is the widow and children) were not come to any agreement among themselves as to distribution as they were formerly advised by the court and now moving ye court for an issue, the said court laboring much with ye said partyes to bring them to a loveing compliance, but not prevaileing, came to this conclusion as followeth; viz: That whereas Mr. Thomas Yale late of Newhaven deceased in his life time and a few years before his death declared his mind in part about his estate, what his intendm'ts were for the dispose thereof, both with respect to his wife, eldest son and other children as by testimonies given unto ye court doth and may approve; yet noe written will being made, the court haveing respect to ye last declared mind of ye said deceased, and haveing considered ye whole of the case as it now stands that ye widdow may bee comfortably and honorably provided for and ye love and peace may be continued in ye family and among ye children, doe order as followeth:" \* \* \*

"And the court doe advise all ye relations concerned to acquiesce in this distribution and to live together in love and peace with good correspondence for mutual helpfulness and all to promote the comfort and content of their aged mother."<sup>2</sup>

"A writing p'rsented for ye last will & testam' of Serg't Tho. Jeffrie late of Newhaven, deceased, but wanting due form & date, and it being alsoe ill pened & spel'd & thereby found difficult to reade, could not be legally proued, yet being written (with his owne hand) & subscribed (as was conceiued & vpon oath attested by Leiftenn't John Nash to containe ye last will of ye deceased (to ye best of his knowledge) according to ye true meaning of it, which in a writing deliuered in is by him expressed, it was ordered y't accordingly ye estate of ye deceased shalbe disposed of.

Prooued in court at Newhauen, Decemb. 3d, 1661"<sup>3</sup>

See also the entry as to the estate of Theophilus Eaton.<sup>4</sup>

Although this plenary power may explain the probate of some wills, the larger number of oral wills were probated without comment and apparently as a matter of course, thus showing that nuncupative wills must have had a recognized place in Connecticut Colonial jurisprudence.

A good example of a nuncupative will is the following:<sup>5</sup>

"The last will and testament of Anthony Tompson, late of New Haven deceased, made the 26th of December, 1654.

<sup>1</sup> Uncle of Elihu Yale.

<sup>2</sup> New Haven Probate Records, Vol. I, pp. 198-9.

<sup>3</sup> New Haven Colonial Records, Vol. II, p. 446.

<sup>4</sup> New Haven Colonial Records, Vol. II, p. 258.

<sup>5</sup> New Haven Probate Records, Vol. I, p. 55.

Anthony Tompson of New Haven, being sick at Milford, declared his will touching his outward estate upon the six and twenty day of Decembr, in the yeare one Thousand six hundred and fifty-foure, as follows, vs. first, he gave all his Lands unto his Brother, John Tompson: also he gives a cow to his Eldest Sister, his father's daughter by his own Mother; also he gave unto his Three sisters, the daughters of his father by his Mother-in-law Goodwife Camp Twenty shillings a piece, and to his Mother-in-Law herselfe forty shillings. The rest of his estate, in what goods or chattells so-ever it be, he gave them unto his Brother John Tompson, appointing him to be executor.

Witness of this being declared in the presence of ye Executor, John Prudden. Afterwards he gave to two poore widdows sisters of the church of Newhaven, To wit: widow Holbert and widow Wilmot, ten shillings a piece.

Witness to this is his Mother-in-law."

This will shows that oral wills were used to pass real estate.

*Harrison Hewitt.*

#### CHROMO-LITHOGRAPH CIRCUS POSTERS AS SUBJECTS OF COPYRIGHT.

The Supreme Court of the United States has just passed upon the question whether chromo-lithographs are within the protection of the copyright law. The Circuit Court of Appeals had decided (44 C. C. A. 296) that they were not within the protection of the law, and this decision upon appeal was reversed.

Incidentally the opinion in the case was the first written by Mr. Justice Holmes since his elevation to the Supreme bench and has elicited no little light comment because of his citing Ruskin and discussing art, thus evincing the literary and cultured instincts of his illustrious father. However, the case is noteworthy in that it carries forward considerably certain principles of the copyright law.

It has been thought well settled that advertisements possessing little or no literary or artistic qualities are not properly subject to copyright. *Collander v. Griffeth*, 11 Blatch. (U. S.) 212; *Ehret v. Pierce*, 10 Fed. 553. In the case of *Yuenling v. Schile*, 12 Fed. 97, however, it was held that a chromo-lithographic picture used as an advertisement was properly a subject of copyright because possessing evident artistic merit. The Supreme Court in the case before us (*Bleistein v. Donaldson Lithographing Co.*, 23 Sup. Ct. 298), insists that originality is the test, and points out that "The least pretentious picture has more originality in it than directories and the like which may be copyrighted." To quote further: "A picture is none the less a picture and none the less a subject of copyright that it is used for an advertisement. And if pictures may be used to advertise soap or the theatre, or monthly magazines, as they are, they may be used to advertise a circus." Also, "It would be a

dangerous undertaking for persons trained only in the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits. At the one extreme some works of genius would be sure to miss appreciation. Their very novelty would make them repulsive until the public had learned the new language in which their author spoke. \* \* \* At the other end, copyright would be denied to pictures which appealed to a public less educated than the judge. Yet if they command the interest of any public, they have a commercial value,—it would be bold to say that they have not an æsthetic and educational value,—and the taste of any public is not to be treated with contempt.”

From this view, the effect of which, it would seem, will be to greatly increase the number of copyrights and proportionately stimulate the activity of the office of the Librarian of Congress, Justices Harlan and McKenna emphatically dissented, concurring with the Circuit Court of Appeals in the following language: “If a chromo, lithograph or other print, engraving or picture has no other use than that of a mere advertisement \* \* \* it would not be promotive of the useful arts \* \* \* and the copyright statute should not be construed to include such publication.”

Should the theory of this decision be followed out to reasonable lengths it is easily seen how it might impinge upon the territory of trade-marks. On general view, it may well be questioned whether the constitutional provision “granting for limited times to authors the exclusive rights to their writings” has not been stretched in several directions to points from which the courts will ultimately withdraw.

#### JURISDICTION IN DIVORCE PROCEEDINGS.

Owing to the fact that the States have the sole power to regulate the domestic relations of its citizens, the subject of divorce has reached the United States Supreme Court only when there has been involved some constitutional question. This question has generally been the meaning and application of the “full faith and credit” clause, and it is held that that clause does not apply to the matter of jurisdiction. The jurisdiction of a court in one State may be inquired into in a collateral proceeding in another State. *Thompson v. Whitman*, 18 Wall. 457; *Wisconsin v. Pelican Ins. Co.*, 127 U. S. 265.

In this country it has been held universally that the true test of jurisdiction in divorce proceedings is domicile. *Smith v. Smith*, 13 Gray 209; *People v. Dowell*, 25 Mich. 247; *Hoffman v. Hoffman*, 40 N. Y. 30. It follows, then, that where neither party has a bona fide domicile within the State where the decree of divorce is granted, and where service is made by publication only, upon the defendant in another State, such decree is entitled to no faith and credit in that other State. *Seavall v. Seavall*, 122 Mass. 156; *Litorwitch v.*

*Litowitch*, 19 Kan. 451; *Van Fossen v. State*, 37 Ohio St. 317; *Thelen v. Thelen*, 75 Minn. 433; and two cases recently decided in the Supreme Court have approved and adopted this view. *Bell v. Bell*, 181 U. S. 175; *Streitwolf v. Streitwolf*, 181 U. S. 179.

The serious disagreement arises over the question whether a bona fide domicile by the plaintiff only, together with mere constructive service upon the defendant, is sufficient to give a State such jurisdiction in divorce proceedings as to require the recognition of the decree granted by other States. Most of the State courts have answered this question in the affirmative as regards the status of both parties. *Harding v. Alden*, 9 Me. 140; *Hood v. Hood*, 11 Allen 106; *Ditson v. Ditson*, 4 R. I. 87; *Felt v. Felt*, 59 N. J. Eq. 606. A contrary view is taken by the courts of New York and one or two other States. They refuse to recognize that the matrimonial relation of a party domiciled within its territory may be changed by an adjudication in another State, unless there has been actual notice to, or personal appearance entered by such party; but they admit that the status of a party domiciled in another State may be altered in accordance with the law of that other State. *People v. Baker*, 76 N. Y. 78; *In re Kimball*, 155 N. Y. 162; *McCreery v. Davis*, 44 So. Car. 195. Most courts recognize the distinction between the proceeding *in rem* which determines the status and that *in personam* which settles the personal rights of the parties in such matters as relate to alimony, the custody of children located in another State, and prohibitions against marriage. *Turner v. Turner*, 44 Ala. 450; *Kline v. Kline*, 57 Ia. 386; *Garner v. Garner*, 56 Md. 128. This much mooted question the Supreme Court has not as yet directly passed upon, but it has drawn a distinction, not made in the decisions of the State courts. Thus, it was held in *Atherton v. Atherton*, 181 U. S. 155, that where the plaintiff has a bona fide domicile in the State of the matrimonial domicile, that State has such jurisdiction of the subject matter,—though the defendant is served with constructive notice only,—as to require other States to recognize the divorce granted, as valid and binding on both parties. Whether the bona fide domicile of the plaintiff in a State other than that of the matrimonial domicile would alone be sufficient to give jurisdiction, was left an open question.

A phase of this subject, not before passed upon by the Supreme Court, was presented to that tribunal in the recent case of *Andrews v. Andrews*, 23 Sup. Ct. 237, in which it was held that the appearance of the non-resident defendant could not invest a court with jurisdiction of a suit for divorce, instituted by a person who had no bona fide domicile within the State. This question has arisen a few times in the State courts, and has been decided in each case in accord with the present decision. *People v. Dawell*, 25 Mich. 247; *Maguire v. Maguire*, 7 Dana (Ky.) 183; *Harrison v. Harrison*, 20 Ala. 629; *dictum* in *Chase v. Chase*, 6 Gray 161. The question, which was above mentioned as being left undecided in *Atherton v. Atherton*, was also left open in this case. The discussion has now narrowed down to that one point, and the decision of the Supreme Court as

to that is awaited with interest. If anything can be inferred from the court's reasoning in *Atherton v. Atherton* and in the present case, it would seem that a bona fide domicil by a party plaintiff in any State would of itself confer jurisdiction. Public policy would seem to require that it should not be necessary for a plaintiff to continue or acquire a domicil in the State of the matrimonial domicil, in order to obtain a divorce that would be recognized in other States.

The present case is important in that it so clearly brings out the fact that in divorce proceedings domicil is the inherent element upon which jurisdiction must rest, whether the action is *ex parte* or *inter partes*. The authority of a court does not in such case depend on its jurisdiction over the parties, but on its jurisdiction over the subject matter, viz.: bona fide domicil. Domicil is the primary consideration; jurisdiction of the parties is only secondary. In matters of private concern, if both parties are willing to submit to a State's jurisdiction, its decree or judgment is binding and must be recognized as valid in all the States. But in divorce the State is an interested third party, being bound to guard the morals of its citizens. Consequently a State must waive its rights by some legislative enactment, in order to be concluded by the judgment of another State, which had no jurisdiction of the subject matter—domicil.

The English decisions, though in themselves they are not entirely harmonious, seem to be in conflict with the principal case. *Calwell v. Calwell*, 3 Swab. & T. 259-61; *Niboyet v. Niboyet*, 3 P. D. 52.

#### VESTED RIGHTS AS CONFERRED BY A FINAL DECREE FOR ALIMONY.

The nature of a decree for divorce and a permanent allowance of alimony is presented and conflicting opinions put forth in the case of *Livingston v. Livingston*, 66 N. E. 123, recently decided by the New York Court of Appeals. The case arose upon the following facts. In 1892 the wife obtained judgment of absolute divorce, including a permanent allowance of money to be paid in installments. No appeal was taken by the defendant from the decree; it reserved no power in the court to alter it; and no such power was conferred by the statute then in force. In 1901 the husband obtained from the same court an order reducing the alimony, on proof of a substantial change of circumstances. The order was granted under the supposed authority of c. 742, N. Y. Laws of 1900, amending Code Civ. Proc., sec. 1759, by allowing the court "at any time after final judgment, *whether heretofore or hereafter rendered*, to annul, vary or modify" the order of alimony. This statute, in so far as it applies to judgments entered before its enactment, the Appellate Division held to be unconstitutional, and reversed the order of reduction. By a majority of one, the Court of Appeals has sustained the ruling of the Appellate Division.

The constitutional provision said to be violated is that no person shall be deprived of property without due process of law. (N. Y. Const., art. 1, sec. 6.) The decision therefore involves the proposi-



tion that a final decree of divorce awarding alimony establishes vested property rights, and is so far like an ordinary final judgment or decree as to be beyond the reach of direct legislative power.

Just how far rights under an ordinary judgment may be affected by the legislature is not clearly settled. That judgments, as such, are not within the prohibition of the Federal Constitution against impairing the obligation of contracts has been determined by the final interpreter of that instrument. *Louisiana v. Mayor of New Orleans*, 109 U. S. 285; *Morley v. Lake Shore Ry.*, 146 U. S. 162. But they are protected by another clause of the Federal and State Constitutions, i. e., that citizens shall not be deprived of property without due process of law. Judgments ordinarily are property. In *Gilman v. Tucker*, 128 N. Y. 190, which involved a judgment declaring void the title to certain real estate purchased at execution sale, the court said, "We must bear in mind that a judgment has been rendered, and the rights flowing from it have passed beyond the legislative power, either directly or indirectly, to reach or destroy. After adjudication the fruits of the judgment become rights of property, vested and beyond the reach of legislative power." It is sometimes said that the legislature may interfere with the judgment by statutes affecting the remedy. But this is true only with important qualifications. For example, statutes of limitation may be changed at will, but a bar already complete cannot be removed, and no existing claims can be affected unless a reasonable time is allowed for bringing actions on them. *Bigelow v. Bemis*, 2 Allen 496; *Wheeler v. Jackson*, 137 U. S. 245. The right of appeal may be altered, but an act conferring a right of appeal from a judgment which, by existing law, has become final, is unconstitutional. *Germ. Sav. Bank v. Village of Suspension Bridge*, 159 N. Y. 362. The general rule as to vacating judgments is that a statute may declare what judgments shall in future be subject to be vacated, or when, or how long, or for what causes, but it cannot apply retrospectively to a judgment already rendered and which had become final and unalterable by the court before its passage. Such an act would be unconstitutional both as impairing vested rights and as an unwarranted invasion of the province of the judicial department. *Black on Judgments* (2d ed.) sec. 298; *Bronson v. Schulten*, 104 U. S. 410.

The question of applying this rule in alimony cases does not frequently arise, for a number of reasons. The whole subject of divorce in this country is minutely regulated by statutes and the courts have no common law jurisdiction. These statutes usually provide that the amount of alimony may be changed from time to time after the term, and such statutes, of course, in effect enter into the decree. In the absence of statute the decree may, and probably usually does, reserve the right to re-adjust the alimony at any time to changed circumstances. Where there is neither a statute conferring the power nor a reservation in the decree it is generally held that an award of permanent alimony in a decree *a vinculo* cannot be altered after the term or the time in which a new trial may be had.

2 *Am. & Eng. Enc. Law*, 2d ed., 136. But these considerations go to the power of the court or the construction of a statute rather than to the power of the legislature.

It would seem that upon its face a decree awarding alimony, which had passed beyond the power of the courts, was also beyond the power of the legislature as much as is an ordinary judgment. It is the judicial determination of the amount required to be paid each year by a person upon whom there is by law a liability and in discharge of that liability. *Walker v. Walker*, 155 N. Y. 77. While the analogy cannot be pressed too far, there is a striking similarity between it and an obligation to pay a sum of money each year in consideration of the transfer to the obligor of a piece of property. It is difficult to see why both do not equally vest property rights. During the existence of the marriage relation the wife had an absolute right to support, and the husband was under a corresponding obligation. The State prescribes that certain misconduct of the husband is a sufficiently serious breach of the marriage contract to entitle the wife to a divorce, i. e., a rescission. And, as the injured party, entitled not only to release from the relation but to such compensation as the law can practicably give, she receives instead of her prior right to support as a wife, which is now wholly cut off, the right to a liquidated amount payable according to the decree. The objection urged by the dissenting judges that this provision is not property because it lacks such incidents as capacity to be sold or transferred or bequeathed by will or pass by intestacy is partly unfounded and partly no objection at all. "The now discover *feme* may make contracts relating to her alimony the same as to any other property interest." *Preston v. Williams*, 81 Ill. 176; *Blake v. Blake*, 7 Iowa 46. In these cases contracts providing for the release of the husband from the obligation fixed in the judgment, were enforced. A life estate in real property cannot pass by will, intestacy, etc., but no one would deny that it is a property right. So, too, alimony, even in arrears, is not a debt provable under the Bankruptcy Act, or barred by a discharge. *Audubon v. Shufeldt*, 181 U. S. 575. But neither are judgments based on rights arising from malicious torts, but such judgments none the less are evidence of rights of property.

A more serious objection is that the decision seems to deny the plenary power of the legislature with respect to marriage, divorce and alimony. But it is believed that nothing within the proper and natural scope of this power is called in question at all. The legislature may prescribe how the marriage contract may be made, may regulate the relation while it exists and the conditions on which it may be dissolved. Outside of these limits its power does not extend. It cannot compel parties to enter the marriage relation in the first place, or to apply for a divorce however outrageous the conduct of either, or to return to that relation after a full, fair trial on the merits and final judgment of absolute divorce. The difference in the power of the legislature to confer authority upon the courts where alimony is decreed with power reserved in the decree or by statute,

and where there is no reservation, is parallel to the difference between its power in the case of a separation, where a relation still exists over which jurisdiction may be assumed, and the case of an absolute divorce, where the relation which has conferred jurisdiction disappears entirely.

The circumstance that apparent injustice is wrought in this case (the woman has remarried, and her husband is able and willing to support her, while her former husband's present income barely exceeds the amount of alimony he has to pay to her) is merely another instance of what must sometimes occur in the application of principles established for the general good, and affords no argument against the conclusion reached by the court, which is believed to be sound.