// YALE LAW JOURNAL

SUBSCRIPTION PRICE, $2.50 A YEAR. SINGLE COPIES, 35 CENTS.

EDITORIAL BOARD.
JOHN F. BAKER, *Chairman.*

FRANK KENNA, Graduate, *Business Manager.*
FLAVEL ROBERTSON, *Secretary.*

JOSEPH A. ALLARD, JR.,
HENRY C. CLARK,
ALEXANDER W. CREEDON,
CLEAVELAND J. RICE,
LEONARD O. RYAN,
JAMES A. STEVENSON, JR.
BUCKINGHAM P. MERRIMAN,
C. FLOYDE GRIDER,
THOMAS C. FLOOD,
IRVING M. ENGEL,

Published monthly from November to June, by students of the Yale Law School.
P. O. Address, Box 893, Yale Station, New Haven, Conn.

If a subscriber wishes his copy of the JOURNAL discontinued at the expiration of his subscription, notice to that effect should be sent; otherwise, it is assumed that a continuation of the subscription is desired.

FATHER'S DUTY AFTER DIVORCE TO SUPPORT CHILDREN IN CUSTODY OF MOTHER.[1]

SUPREME COURT OF THE YALE LAW SCHOOL

JANUARY TERM, 1912.

January 23, 1912.

BLANCHE K. HOWARD,
Plaintiff-Appellant,
vs.
JOSEPH R. HOWARD,
Defendant-Appellee.

STATEMENT OF THE CASE.

This is an appeal by Blanche K. Howard from a judgment of the Moot Court of the Yale Law School, sustaining a demurrer to the complaint in an action brought by said Blanche K. Howard against Joseph R. Howard, to recover for the support of the infant children of said Joseph R. Howard.

The plaintiff and the defendant were married in 1895, and have four minor children of said marriage. In 1906 plaintiff obtained

[1] Brief prepared in a Moot Court case by a member of the Editorial Board.

a divorce from the defendant, on the ground of habitual intemperance and intolerable cruelty. By the divorce decree she was given the custody of all the children, but no order was made in regard to their support nor in regard to alimony. At that time defendant had no property and did not earn enough to support himself, on account of his intemperate habits. In 1910 defendant inherited a considerable estate from his father. Since the divorce plaintiff has supported herself and all the children by her labor. She has expended for the support of such children $600.00, and her labor in their care is reasonably worth $400.00. On October 13, 1911, the plaintiff, Blanche K. Howard, brought her action in the Moot Court of the Yale Law School, to recover from the defendant, Joseph R. Howard, the sum of $1,100.00 damages. The defendant demurred. The demurrer was sustained, and on October 20, 1911, judgment was entered on the demurrer in favor of defendant Joseph R. Howard.

From the judgment so entered, the plaintiff, on November 9, 1911, perfected her appeal to this Court.

SPECIFICATION OF ERROR.

The Court erred in sustaining the demurrer to plaintiff's complaint, except such part of said complaint which claims recovery of $400.00 for labor in the care and maintenance of defendant's children.

POINTS.

I. The father is bound for the maintenance of his infant children.

II. When a divorce decree gives the mother the custody of the children because of the father's wrong, but makes no allowance for the support of the children, the mother may recover for such support in an action brought against the father.

III. The failure of the divorce decree to provide for the support of the children cannot preclude the plaintiff's recovery in this action.

ARGUMENT.

I.

The Father is Bound for the Maintenance of His Infant Children.

(*a*) The father is bound for the maintenance of his infant children.

"The law, following the instincts and commands of nature, imposes on the father, primarily, the duty and obligation to maintain and educate his minor children, in a manner commensurate with his means, even though they may have property of their own." *Englehardt v. Yung,* 76 Ala., 534, 539.

"A father is bound to educate and maintain his infant child, and if another person performs this natural duty for him with his knowledge and consent, the father is liable to pay a reasonable sum to such person." *Thompson & Waters v. Dorsey,* 4 Md. Chanc., 149, 151.

(*b*) On the other hand the mother is not so liable.

In *Gleason v. Boston,* 144 Mass., 25, the court holds that at common law a married woman, whose husband is living, is under no legal obligation to support their children, even if the husband is imprisoned for crime. On page 27, the Court says:

"As the personal property of the wife passed to the husband upon her marriage, at common law, she was necessarily deprived of this means of supporting her children, and all legal duties growing out of the marriage were imposed upon him (the husband)."

In *Hodgens v. Hodgens,* 4 Cl. & Fin., 323, an English decision, the Court, on page 374, said:

"The children may want even the necessities of life; they may want the means of proper education; the law does not throw on the mother the duty, the legal obligation (the moral obligation we have nothing to do with here) of maintaining, educating, or providing for the children."

(*c*) The husband remains liable for the support of his minor children, where his wife leaves him for good cause, taking their children with her.

In *Bazeley v. Forder,* 1868 L. R., 3 Q. B., 559, the plaintiff on the order of defendant's wife, supplied clothes to defendant's child. The wife was living separate from the defendant, because of defendant's misconduct. The Court in allowing plaintiff to recover, on page 563, said:

"It became a reasonable and necessary thing that she (the wife) should clothe and feed these children according to their degree.

"The wife's authority in such cases is to pledge the husband's credit for her reasonable expenses, though they exceed what she is obliged to incur."

When the husband has wrongfully caused the wife to leave him, the Court, on page 564, said: "The law gives the wife in such a

case authority to pledge his credit for her reasonable expenses," taking from the husband the right to judge what is fit and proper.

In *Reynolds v. Sweetzer*, 15 Gray, 78, the wife left the husband because of his violence and cruelty, taking their child with her. The plaintiff supplied the wife and child with board, and was allowed to recover for this from the husband. On page 80 the Court said:

"In a clear and strong case of unfitness on his part (the husband's), the mother may take them (the children) into her care, and procure, at his expense and upon his credit, necessaries for maintenance."

(*d*) The father is liable to the divorced mother for the support of the children, if the decree of the divorce is silent as to the custody of the children and the mother supports them.

An action of *assumpsit* by the mother against the divorced father for the support of the children, no decree having been made for the custody of the children, was maintained on the implied promise of the defendant in *Gilley v. Gilley*, 79 Me., 292. On page 297 the Court said:

"When the divorce was decreed in behalf of the wife, the defendant thereupon ceased to be her husband, but he still remained the father of the children which had been born to him during his conjugal relation with the plaintiff, with all the father's duties and legal obligations full upon him."

This proposition seems to be without conflict:

"It is well settled that, if a decree of divorce is silent as to the custody of the children, the liability of the father to the divorced mother for the support of the children is the same as his liability to any other person who furnishes them necessaries for their support." *Spencer v. Spencer*, 97 Minn., 56, 58.

These four propositions regarding the father's liability for the maintenance of his infant children are settled practically without conflict. They are brought to the attention of the Court in the present case as introductory principles to plaintiff's contention, that the father is liable for the support of his infant children in an action by the mother, where by the decree of divorce obtained for the father's wrong the children have been put in the custody of the mother. It is but a short step from the fourth of the above propositions to plaintiff's present contention, and a step which on principle and authority, as will be shown under Point II, this Court should take.

II.

When the Divorce Decree Gives the Mother the Custody of the Children Because of the Father's Wrong, But Makes No Allowance for the Support of the Children, the Mother May Recover for Such Support in an Action Brought Against the Father.

Pretzinger v. Pretzinger, 45 Ohio St., 452; 4 Am. St. Rep., 542; 15 N. E., 471.

Spencer v. Spencer, 97 Minn., 56; 105 N. W., 483; 2 L. R. A. N. S., 851.

Alvey v. Hartwig, 106 Md., 254; 67 Atl., 132; 11 L. R. A. N. S., 678.

Zilley v. Dunwiddie, 98 Wis., 428; 40 L. R. A., 579; 74 N. W., 126; 67 Am. St. Rep., 820.

Holt v. Holt, 42 Ark., 495.

Dolloff v. Dolloff, 67 N. H., 512; 38 Atl., 19.

Gibson v. Gibson, 18 Wash., 489; 51 Pac., 1041; 40 L. R. A., 587.

(*a*) The father has the primary right to the custody of the children, and with this right goes the duty to support. Because the father, by his misconduct, has deprived himself of his right to the custody of the children, he is not to be relieved of his duty to support them. It is not the policy of the law to allow a man to profit by his own wrong, nor to relieve an unworthy parent by burdening a worthy one. By the divorce the husband and wife became, in the eyes of the law, strangers to each other. But the divorce of the husband from his wife did not destroy the relation between the father and his children. Therefore the wife as any other stranger, can recover for the support of the infant children on the contract implied by law that the father will pay for that for which he is primarily liable.

In the following cases, except as noted, this precise question was passed upon and decided in favor of the mother. Quotations are made from these cases for the purpose of showing the principles which underlie this question.

In *Pretzinger v. Pretzinger,* 45 Ohio St., 452, the Court, on page 458, said:

"The duty of the father to provide reasonably for the maintenance of his minor children, if he be of ability, is a principle of natural law. * * * This natural duty is not to be evaded by the husband's so conducting himself, as to render it necessary to dis-

solve the bonds of matrimony, and give to the mother the custody and care of the infant offspring. It is not the policy of the law to deprive children of their rights on account of the dissensions of their parents, to which they are not parties; or to enable the father to convert his own misconduct into a shield against parental liability. The divorce may deprive him of the custody and services of his children, and of the rights of guardianship against his will; but if by the judgment of the Court, and upon competent and sufficient evidence he is found to be an unfit person to exercise parental control, while the mother is in all respects the proper person to be clothed with such authority, he cannot justly complain."

And on page 459:

"If, under such circumstances, upon the allowance of alimony with custody of children, the Court omits to make an order for the childrens' maintenance, the father's natural obligation to support them is of none the less force."

During the argument in the trial of the case in the Court below, it was contended that the doctrine of the *Pretzinger case, supra,* had been limited by a subsequent Ohio case, *Fulton v. Fulton,* 52 Ohio St., 229. But in this subsequent case the divorce had been granted to the husband for the wife's misconduct, and it was held that the wife could not recover against her former husband on an implied promise for the support of the children, the children having been put in the custody of the wife by the divorce decree. The cases are clearly distinguishable, and the Court in the *Fulton case* recognizes this on page 236:

"In the case before the court, however, the wife was the aggressor, and it is this feature by which it is to be distinguished from the *Pretzinger case, supra,* for in that case the husband was in fault."

Therefore the doctrine of the *Pretzinger case* remains in full force in Ohio.

In Minnesota, in *Spencer v. Spencer,* 97 Minn., 56, 59, the Court speaks as follows:

"If the divorce is granted for the father's misconduct, it is his wrongful act that deprives him of their services, and not the Court, which interferes for the protection of the children."

And on page 60:

"Upon principle, and the weight of judicial authority, we hold that the legal obligation of a father for the support of his minor children is not impaired by a decree of divorce at the

suit of his wife for his misconduct, which gives the custody of the children to her, but is silent as to their support. If, under such circumstances, he refuses or neglects to support them, the mother may recover from him in an original action a reasonable sum for necessaries furnished for their support after such decree. The law implies a promise on his part to pay for such necessaries."

In *Alvey v. Hartwig,* 106 Md., 254, 261 and 262, the Court said:

"Many courts of high authority have declared most emphatically that it is the duty of the father to provide reasonably for the maintenance of his minor children, and that this liability is in nowise affected by the fact that the custody of said children may have been taken away from him by a decree of a Court of competent jurisdiction. This primary obligation arises not alone from the husband's common law right to his wife's estate, but rather from his natural headship of the family, and upon his being by nature and the present constitution of society the bread-winner and provider. The law also gives him the primary right to his children's services and earnings, which it could not in fairness do if the mother were in the first place equally bound for their support. There may be and doubtless are many cases where the right to the custody and services of the children are taken away from the father because of his misconduct. His natural right to this custody and these services is forfeited by his own misconduct, and surely if his misconduct works a forfeiture of his rights to custody and earnings, he ought not to be absolved from his natural and usual duty of supporting them. To allow it to bring about any such result, would simply be allowing the father to take advantage of his own wrong, for all a father would have to do to avoid his natural obligation to his children would be desert his family, conduct himself in such a way as to show that he is an unfit person to have the custody of his children, and then, when on account of his own wrongful doings and unfitness, the Court takes the custody of the children away from him, and awards it to the mother, it relieves him of the obligation which the law of nature and the law of the land places upon him."

In *Zilley v. Dunwiddie,* 98 Wis., 428, 432, the Court said:

"At the common law the husband was primarily liable for the support of his minor children. * * * When the marriage is dissolved by the divorce, the duty of the parents to maintain their children remains as before, for the children are not parties to the divorce suit, and do not lose any rights thereby. Hence the father's duty to maintain them after divorce, where there is no decree of the Court relating therto, especially if their custody is not taken from him, remains as before. After the parents were divorced all duties and obligations to each other ceased, and they became as strangers to each other."

And on page 437:

"We consider it against the policy of the law to encourage a father thus obligated to attempt to ignore or evade his parental duty, or to cast it upon any other party, so as to enable him to convert such parental neglect and misconduct into a shield against parental liability."

Holt v. Holt, 42 Ark., 495, was an original action in equity, by petition to recover for the support of the children, and the mother was allowed to recover. The Court, on page 499, said:

"The dissolution of the marriage tie and decreeing the custody of the children, either permanently or temporarily to the mother, do not relieve the father of his obligation to support them."

In *Dolloff v. Dolloff,* 67 N. H., 512, 513, the Court said:

"While the divorce destroyed the relation of husband and wife and made them as strangers to each other, it did not destroy the relation between the father and his child. As to her, his duty and liability remained the same, except in so far as he was incapacitated or discharged by the decree, which simply took from him her custody. This did not release him from any pre-existing natural, legal, or statutory duty to support her. Guardians, or other persons invested with similar powers, are under no personal obligation to maintain their wards, whatever may be the relationship between them; and the plaintiff's acceptance of the custody and guardianship did not subject her to the maintenance of the child, any more than a stranger would have been subjected to such maintenance by the acceptance of a like decree and appointment."

In *Gibson v. Bibson,* 18 Wash., 489, 493, the Court said:

"It violates our sense of justice to allow a father to plead his own wrong as an excuse for relieving himself from an obligation. Presumably the custody of the child is taken from him because he is not worthy of its care and custody, and this doctrine (of not allowing the mother to recover) in effect releases from an obligation an unworthy parent and imposes an additional burden upon the worthy one."

The foregoing extracts are sufficient to clearly indicate the principles which underlie the question now before the Court. The cases from which these extracts are taken are all carefully considered and well reasoned cases, and it is contended that they lay down what on principle is the true rule.

(*b*) A careful analysis of those authorities which refuse the mother recovery from the father for the children's support where she was given the custody of the children by the divorce decree,

and no allowance was made for the support of the children, will show that they are largely involved with statutes, which destroy their value in a purely common law action; or that in a few cases the Court cannot rid itself of the idea that the father's right to custody and his duty to support are inseparably bound together, and completely overlooks the father's wrong and evil doing.

To illustrate how many of the leading cases *contra* to plaintiff's contention are involved with statutes, we cite from the following:

In *Husband v. Husband,* 67 Ind., 583, 585, the Court said:

"The statute in force at the time the divorce in question was granted provided that 'the Court in decreeing a divorce shall make provision for the guardianship, custody, and support and education of the minor children of such marriage.' 2 G. & H., p. 353, §21. The same provision is contained in the present statute. 2 R. S. 1876, p. 331, §21.

"It seems to us to have been clearly intended that the rights of the parties in a proceeding for a divorce, as to the custody and support of the minor children of the marriage, should be settled and determined in that proceeding, and not be left open to further independent litigation."

Harris v. Harris, 5 Kan., 46, was brought in a state having the following statute, which is cited on page 47 of the report:

"The Court, rendering a decree of divorce, 'shall make such order for the disposition, care and maintenance of the children of such marriage, if any there be, as shall be just and reasonable.'"

In *McNees v. McNees,* 97 Ky., 152, 153, the Court said:

"Section 7 of article 3, chapter 52, of the General Statutes provides in substance that pending an application for divorce or on final hearing the Court may make orders for the care and maintenance of the minor children, and at any time afterwards, upon the petition of either parent, revise and alter the same."

In *Brow v. Brightman,* 136 Mass., 187, 188, the Court said:

"If this case depended upon the common law liability of the defendant, under the facts found by the auditor, the plaintiff would doubtless be entitled to maintain her action."

In *Brown v. Smith,* 19 R. I., 319, 320, the Court said:

"At the time when said divorce was granted, the Supreme Court had the authority, under *Pub. Stat. R. I.,* cap. 167, §23, * * * to regulate the custody and provide for the education, maintenance and support of the children of all persons by them divorced; to make all necessary orders and decrees concerning the same, and

the same at any time to alter, amend or annul for sufficient cause after notice to the parties interested therein. * * * This statute is presumably based upon the theory that the rights of the parties in a proceeding for divorce, as to the custody and support of the minor children of the marriage, can be best determined in connection with the said proceeding."

Hence we see that many of the leading cases *contra* are based on statutes, as expressly stated by the courts. From the study of the law involved in the case now before the Court, counsel for plaintiff are of the opinion that, roughly speaking, two-thirds of the cases which refuse the mother recovery were decided in states having statutes similar to those above cited. In view of this fact, the greater portion of the cases apparently *contra* to plaintiff's present contention are really decisions based on statutes, and are therefore not common law authorities.

(*c*) We respectfully submit, that the Court below, in preparing its decision, did not have before it all the phases of the law on this question. For the learned judge, in his decision, says, "Apparently the first Court to pass upon this precise question was the Supreme Court of Indiana in *Husband v. Husband,* 67 Ind., 583." *Husband v. Husband* was decided in the year 1879. Now this precise question has had an interesting and instructive history in Connecticut, dating back to the case of *Stanton v. Willson,* 3 Day, 37, which was decided in 1808. This case held that the duty of a father to support his minor children was not destroyed by a decree of divorce granted to the wife by which she was made the sole guardian of the children, and enforced the duty in favor of the mother. In *Finch v. Finch,* 22 Conn., 411, decided in 1853, the Court disapproved the holding in *Stanton v. Willson, supra,* and denied the mother recovery, but two out of the five judges dissented. The holding of this case was evidently not satisfactory, however, for in the following year, 1854, the legislature passed a statute providing that after a divorce the parents of the minor child of the marriage shall contribute to its maintenance according to their respective ability. *Gen. Stat. of Conn.,* Rev. of 1902, §4561. The case of *Welch's Appeal,* 43 Conn., 342, was decided in 1876, after the passage of the above statute, and the mother was allowed to recover a fair proportion of the expense of supporting the child of the marriage.

We call attention to the history of this question in Connecticut for the purpose of showing that when the Court swung round

from its older doctrine of enforcing the father's liability, to the mother's non-recovery doctrine, the change was met with disfavor, and the legislature immediately stepped in and modified the law.

(*d*) The last state to accept the mother's non-recovery doctrine was Rhode Island, which, in *Brown v. Smith,* 19 R. I., 319, decided in 1895, refused to allow the mother to recover. Counsel for plaintiff have gone through the digests of the *American Digest System* from 1895 to the present time, and have failed to find a single state which has had to pass on this question *de novo* since 1895, that has adopted the mother's non-recovery doctrine. While on the other hand, cases were found in which, since 1895, four states passed on the question for the first time, and enforced the father's liability. These cases follow:

Zilley v. Dunwiddie, (Wis.) *supra,* decided in 1898.
Eldred v. Eldred, 62 Neb., 613, decided in 1901.
Spencer v. Spencer, (Minn.) *supra,* decided in 1906.
Alvey v. Hartwig, (Md.) *supra,* decided in 1907.

Therefore it would seem very improbable that a court which to-day had to pass on the question for the first time, would withstand the strong tendency of our law to development along equitable lines, and refuse the mother recovery.

To show the modern tendency of the law on this question, we quote from a note in L. R. A. N. S., and from the YALE LAW JOURNAL:

"The effect, on a father's liability for the support of his minor children, of a decree of divorce at the suit of the wife for his misconduct, which gives the custody of the children to the wife, but makes no provision for their maintenance, is a much mooted question, upon which the courts of last resort are pretty evenly balanced, though the weight of the more recent authorities seems to sustain the obligation of the father." *Case Note,* 2 L. R. A. N. S., 851.

"The question as to the liability of the father for the support of the children in the absence of a provision therefore in the decree which awards their custody to the divorced wife, has given rise to one of the sharpest conflicts of authority known to the realm of law. * * * The most that can be said is that the oldest doctrine holds that the husband is not liable in such cases and that the trend of the decisions is toward the later doctrine which holds to the contrary." 17 *Yale Law Journal,* 284.

Cyc lays down the general common law rule thus:

"At common law the father remains primarily liable for the support of the children of the marriage, as well after as before a divorce; and the rule is the same where the custody of the children has been awarded to the mother, unless the divorce was granted for her fault." 14 *Cyc,* 812.

The older or mother's non-recovery doctrine is losing weight. The clear weight of the modern authority is in favor of enforcing the father's liability, and this is especially true when the number of cases *contra* in which statutes are involved are considered. It is therefore urged that this Court which has to pass on the question for the first time should follow the more modern and equitable doctrine, which does "not enable the father to convert his own wrong into a shield against parental liability."

III.

The Failure of the Divorce Decree to Provide for the Support of the Children Cannot Preclude the Plaintiff's Recovery in This Action.

(*a*) A judgment is *res judicata* in respect to any conclusion which the Court must have arrived at in order to reach the judgment rendered.

To illustrate:

A decree of divorce necessarily affirms the validity of the marriage. *Walker v. Walker,* 150 Ind., 317.

A decree of partition is *res judicata* that the parties thereto were cotenants in the whole of the land involved in the decree. *Irvin v. Buckles,* 148 Ind., 389.

A judgment against a corporation upon a contract necessarily adjudicates the power of the corporation to make the contract. *Lake County v. Platt,* (C. C. A.) 79 Fed., 567.

A decree foreclosing a mortgage is necessarily an adjudication of the validity of the mortgage. *Finley v. Houser,* 22 Ore., 562.

But this rule extends only to those matters which must have been determined for the disposal of the matter involved.

(*b*) A judgment cannot be pleaded in respect to matters only collaterally or incidentally considered.

To illustrate:

An order of the Probate Court granting leave to sue a guardian's bond is not *res judicata* of the surety's liability, even though

the surety voluntarily became a party to the proceedings upon an accounting to determine the amount due from the guardian to his ward. *Perkins v. Cheney,* 114 Mich., 567.

A verdict and judgment in an action *de bonis asportatis,* where the plea was not guilty, and the ownership of the goods depended upon the title to land, is no estoppel to an action for the possession of the same land between the same parties and their privies. *Potter v. Baker,* 19 N. H., 166.

In a former action, *A.* recovered judgment by default against *B.,* upon an account annexed to his writ; in which account *B.* is credited for certain goods. Such judgment is no bar to an action of *assumpsit* by *B.* against *A.* for the same goods, if they were not credited at their full value by *A.* in the first suit. *Minor v. Walter,* 17 Mass., 237.

In an action of *assumpsit* against a husband for boarding and lodging his wife and child during a specified period, the record of a former action of *assumpsit* between the same parties for necessaries furnished, and for the use of the wife alone, during a part of the period embraced in the suit at bar, and a recovery and satisfaction therein, is not conclusive evidence for the plaintiff of its having proved in the former suit that the husband had turned his wife out of doors. *Lentz v. Wallace,* 17 Pa. St., 412.

In rendering a divorce decree, the Court need not necessarily pass upon the question of the support of the children. Such a question is altogether collateral to the granting of the divorce. Therefore when the divorce decree fails to provide for the support of the children and is silent on the question, it cannot be set up in bar of an action to recover for the support of the children. To quote from *Spencer v. Spencer,* 97 Minn., 56, 59:

"It would seem, if the Court omits to make in its decree (of divorce) any provision for the support of the children, that the presumption would be that the Court deemed it best to leave the matter of the support of the children to rest upon the father's legal liability to support them until its further order in the premises."

A sharp distinction is to be drawn between the granting of alimony and making an allowance for the support of children. A husband's duty to support his wife may be terminated by a divorce in which alimony is not granted. But a divorce of the husband and wife is not a divorce of the father and his children, and the father is not to be relieved of the support of his children merely because an allowance is not made therefore in the divorce decree. It would be strange, indeed, if a natural duty from *A.* to *B.* should be discharged by dissolving a civil relation between *A.* and *C.*

(*c*) If this action cannot be maintained, a father in defendant's position, in order to profit by his own misconduct, need only go to another jurisdiction from that granting the divorce, where he would be out of the reach of the service of process and any order of the divorce court. This is opposed to a fundamental principle of our law, that no man shall be allowed to profit by his own wrong.

In *Spencer v. Spencer,* 97 Minn., 56, 59, the Court said:

"In cases where the husband deserts his family in one state and becomes a resident of another state, leaving no property in the state where he left his wife and children, and where she commences an action against him for a divorce for his wrong, the Court would have jurisdiction of the wife, of the marriage status, and of the custody of the children, but not of the husband or his property. It would be impracticable to make and impossible to enforce any decree as to the support of the children in such a case. *Thurston v. Thurston,* 58 Minn., 279; 59 N. W., 1017. If in such a case the decree awards the custody of the children to the mother, but is silent as to their support, can it be presumed, in favor of the recreant husband, that the Court determined that no order as to maintenance was necessary, and that it was intended to free the husband from his natural and legal obligation to support his children? We cannot concur in the doctrine of the cases which so hold."

In *Alvey v. Hartwig,* 106 Md., 254, 267, the Court said:

"If a husband has deserted his wife and gone to live in a foreign jurisdiction she may be unable to follow him, or be ignorant of his whereabouts, or she may have no rights for some years in a foreign *forum* by which time a husband might again depart. In the meantime she is entitled, as best she may, to rid herself of the bond of marriage, and to have the children protected by having someone in legal control of them. To hold that under such circumstances a woman is helpless, and that an effort to protect herself and children will result in freeing a husband forever from legal obligations to support his children, would be putting a premium upon wrong, and is unnecessary, unwise, and not supported by authority."

It is therefore earnestly contended that the lower court was in error in holding that the plaintiff had no cause of action, and it is believed that this Court will not do otherwise than to reverse the judgment of the lower Court.

CONCLUSION.

In conclusion, the attention of the Court is called to the three main points hereinbefore laid down. In brief these points are:

I. The father is bound for the maintenance of his infant children, while, on the other hand the mother is not so liable. The father is liable for the support of his infant children where his wife leaves him for good cause, taking their children with her. And further, the father is liable to the divorced wife for the support of the children, if the decree of the divorce is silent as to the custody of the children, and the mother supports them. These propositions are settled practically without conflict, and logically lead up to plaintiff's contention, that the father is liable for the support of his infant children in an action by the mother, where by the decree of divorce obtained for the father's wrong the children have been put in the custody of the mother.

II. When a divorce decree gives the mother the custody of the children because of the father's wrong, but makes no allowance for the support of the children, the mother may recover for such support in an action brought against the father.

The Court below erred both on principle and on authority in refusing the plaintiff recovery. By its decision, the father, by his own misconduct, is relieved of his duty to support his children. This is opposed to a fundamental principle of law, that no man is to be allowed to profit by his own wrong. The result of the holding of the Court below is to relieve an unworthy parent by burdening a worthy one. It ignores the tendency of our law to develop along lines of equity and natural justice. The decision of the Court below should therefore, on principle, be reversed.

From the standpoint of authorities, the decision of the Court below is erroneous. The clear weight of the modern authorities supports plaintiff's contention. Since 1895 four states have passed on the question for the first time, and enforced the father's liability, while since 1895 no state has passed on the question *de novo* and refused the mother recovery. And the weight of the authorities is especially in support of plaintiff's contention, when it is considered that the greater proportion of the cases *contra* to plaintiff's contention are based on statutes, which destroy their authority in a purely common law action. The decision of the lower Court should therefore, in view of the preponderance of authority against it, be reversed.

III. The failure of the divorce decree to provide for the support of the children cannot preclude the plaintiff's recovery in this action. A judgment is *res judicata* in respect to any conclusion which the Court must have arrived at in order to reach

the judgment rendered. But a judgment cannot be pleaded in respect to matters only collaterally or incidentally involved. The providing for the support of children is altogether collateral to a divorce decree, and is to be sharply distinguished from alimony. Therefore when the divorce decree is silent as to the question of support of the children, it cannot be set up in bar of an action to recover for the support of the children. The Court below erred in declaring that the plaintiff, by being given the custody of the children, impliedly agreed to support them, and its decision should be reversed.

If this action cannot be maintained, a father in defendant's position, in order to profit by his own misconduct, need only go to another jurisdiction from that granting the divorce, where he would be out of the reach of the service of process and any order of the divorce court. This is opposed to a fundamental principle of our law, that no man shall be allowed to profit by his own wrong. Therefore the decision of the Court below, declaring that the plaintiff had no cause of action, should be reversed.

It is therefore most earnestly urged by counsel for appellant that in the light of both principle and authority this Court will reverse the judgment of the lower Court.

Respectfully submitted,

H. C. C.,
A. J. A.,
Attorneys for Appellant.

SUPREME COURT OF THE YALE LAW SCHOOL.

JANUARY TERM, 1912.
January 23, 1912.

BLANCHE K. HOWARD,
Plaintiff-Appellant,
vs.
JOSEPH R. HOWARD,
Defendant-Appellee.

SUPPLEMENTAL BRIEF FOR PLAINTIFF-APPELLANT.

Since the main brief for Appellant was drawn up, a very recent case has come to the attention of counsel for the plaintiff, which thoroughly substantiates plaintiff's present contention. This is the case of *Evans v. Evans,* 140 S. W., 745, which was decided

Nov. 18, 1911, by the Supreme Court of Tennessee, and which can be found in the advance sheets of the *Southwestern Reporter*. The precise question in the present case was passed upon in the *Evans case*. The *Evans case* went through two lower courts, both of which decided against the mother. But the Supreme Court of Tennessee reversed the holding of the lower courts, and enforced the father's liability. In the decision of the case, the Court, on page 746, said:

"We are of opinion that the father is so liable, and unquestionably this view is taken in the majority of the recent decisions upon the subject, although some courts of high repute have reached the opposite conclusion.

"A convincing case adopting the former position is *Spencer v. Spencer*, 97 Minn., 56; 105 N. W., 483. This case is reported and annotated in 2 L. R. A. (N. S.), 851, and also reported and more exhaustively annotated in 7 Am. & Eng. Ann. Cas., 901. In the latter volume cases are collected in a note from fourteen states, supporting the case reported. Both annotators find that the weight of modern authority imposes upon the father the obligation of the child's support, and to this effect is the later case of *Alvey v. Hartwig*, 106 Md., 254; 67 Atl., 132; 11 L. R. A. (N. S.), 678, also reported in 14 Am. & Eng. Ann. Cas., 250, with a note containing other cases upon the subject."

"The reasons favoring the majority view are that the law of nature and the law of the land require of the father the support of his minor children."

This case makes the fifth since 1895 which has been decided in favor of enforcing the father's liability by Courts which have passed upon the question for the first time. And since no case has been decided *contra* during this period by a Court passing on the question *de novo*, the sharp conflict and even balance of the authorities which it is claimed at one time existed, has resolved itself, as the principles involved have been maturely investigated, to a decided balance in favor of allowing the mother to recover. We find no conflict whatever as to this in the cases decided since 1895 in courts which have been presented with the question for the first time.

Counsel for appellant urge that this Court will not establish in this jurisdiction an old and fast weakening doctrine, and that it will reverse the judgment of the lower Court.

Respectfully submitted,

H. C. C.,
A. J. A.,
Attorneys for Appellant.

WHEN EQUITY WILL ENJOIN A SPORT AS A PRIVATE NUISANCE.

In *Bispham's Principles of Equity,* §438, a nuisance is defined to be, "an act unaccompanied by an act of trespass, which causes a substantial injury to the corporeal or incorporeal hereditaments of another." And in the same section, distinguishing between a public and a private nuisance, the learned author says, "A private nuisance is an injury to the property of an individual." These definitions, comprehensive in their terms, constantly present to Courts of modern equity jurisprudence the question, what act constitutes such an injury to the property of an individual as to invoke the enjoining power of a Court of equity? This proposition opens for investigation a broad and extensive field and gives rise to a considerable diversity of opinion.

A recent case, *Foor v. Edwards,* 90 N. E., (Ind.), 785, held that a roller skating rink, wherein those who participate in the sport pay admission, is not a nuisance *per se,* but under the circumstances of the case, where the tenant on the floor beneath the skating rink was engaged in the retail clothing, furnishings, and shoe business, an injunction would issue to prevent the loss of customers and profits, such injury being irreparable.

Closely following the rule laid down in *Foor v. Edwards, supra,* the Pennsylvania Courts, in a similar case, hold that a laundry is not a nuisance *per se,* but when operated in the basement of a building, the first floor of which is occupied by a vendor of soft drinks, it may become a nuisance by emitting steam, heat, and stench which causes a loss of customers, injury to the soda fountain and other fixtures, and sickness to the employes of the plaintiff who occupied the first floor. *Warwick v. Wah Lee & Co.,* 10 Phila. (Penn.), 160. Many Courts recognize the doctrine that a business lawful in itself may be conducted in such a manner as to become a nuisance. So in *Boston Ferrule Co. v. Hills,* 159 Mass., 147, complainants were manufacturers of ferrules on the third floor, defendants manufacturers of glass on the fourth floor of a building. Sands, acids, and fumes passed through unprotected holes in defendants' floor and injured complainants' machinery on the floor beneath. Failing to abate the nuisance upon request, a bill of relief was filed, whereupon the Court enjoined such use of defendant's property as to injure the property of complainant. But an injunction was refused in *Medford v. Levy,*

rented rooms from plaintiff and lived on the same hall way, 31 W. Va., 649, where plaintiff alleged that defendant's wife, who maliciously and intentionally swept trash and dirt into the hall; let fumes and odors escape from the kitchen into the hall; and so conducted herself as to injure the health of plaintiff's wife. Relief was refused, it appearing that plaintiff's wife was also guilty of misconduct.

The principles enunciated in the foregoing decisions are followed in a series of interesting cases in which the cause of the injury is more remote and the damage more consequential.

The Court in *Barfield v. Putzel,* 92 Ga., 442, held that a licensed saloon is a legal business and not a nuisance *per se.* Accordingly, the Court refused to issue an injunction to prevent defendant from establishing a saloon under the offices of a dentist, who for thirteen years had practiced in the offices, and whose patients consisted largely of women and children. But the New Jersey court, appreciating the nature of such a business, places limitations upon the rights of the proprietor of a saloon. Thus, *Feeney v. Bartoldo,* 30 Atl. (N. J.), 1101, concurring with the essential principles in *Warwick v. Wah Lee & Co. supra,* and *Boston Ferrule Co. v. Hills supra,* declares that a lawful business may become a nuisance. And where the proprietor of a saloon next to plaintiff's residence keeps a piano which is played every night until eleven o'clock, and the crowd assembled dance and sing, rendering it impossible for plaintiff to sleep, an injunction will issue to prevent the use of the piano after nine o'clock. But the Kentucky Court in *Pfingst v. Senn,* 94 Ky., 556, at the petition of twenty-five property owners refused an injunction where defendant purchased a lot in the neighborhood and proposed to re-open an old beer garden on which stood a dance-hall, band-stand and ten-pin alley, as such business was not in itself a nuisance. Yet where defendants conducted a beer garden in violation of state laws, and permitted persons of both sexes to gather on Sunday and other days, creating disorderly, indecent, and lascivious conduct, an adjoining property owner may be relieved against such misconduct by injunction. *Kissel v. Lewis,* 156 Ind., 233.

The diversification of modern social conditions has resulted in many decisions which demonstrate the apparently unlimited power of equity Courts in preventing by injunction mischief calculated

to produce irreparable mischief to an individual property owner. Thus games and sports which in themselves are forms of recreation and amusement to all who participate therein, may, when conducted in a disorderly and unlawful manner, necessitate the intervention of a Court of equity.

In *Thompson v. Behrman,* 37 N. J. Eq., 345, the court enjoined the defendant from keeping a shooting gallery open to the public until late at night, the smoke making it necessary for the plaintiffs to close the windows to their house, and the noise preventing them from sleeping. But plaintiff's bill for injunction was dismissed when the evidence showed that defendants played croquet by torch light in a vacant lot near plaintiff's residence, although the games lasted until eleven o'clock at night, and plaintiff's wife was pregnant and nervous and could not sleep on account of the noise and smoke without. *Akers v. Marsh,* 19 App. D. C., 28. But *Billington v. Miller,* 75 N. J. L., 415, presents an extreme illustration of the limit of equity jurisdiction. Under a city ordinance in Jersey City prohibiting the *sport* of roller skating on the streets, the Court held that merely travelling along the streets on skates was not prohibited under this ordinance, but where it was indulged in as a *sport* the Court would grant relief. So in *Harrison v. The People,* 101 Ill. App., 224, the mayor refused to grant a license to a person who intended opening a bowling alley in a section of town reserved almost exclusively for residence purposes, and where it appeared that such bowling alley would be operated with only a door between it and a saloon, both of which were in close proximity to churches, schools and residences. A petition for mandamus to compel the mayor to issue the license resulted in his action being upheld by the Court.

The great American sport, baseball, cannot be objected to ordinarily for gathering together hundreds and thousands of people whose cheers and yells during the game disturb the peace of the adjoining land owners. The Kentucky court in *Alexander v. Tabeau,* 24 Ky. L. R., 1305, dismissed plaintiff's bill for injunction where it appeared defendant had purchased land, erected stands and other conveniences for spectators, and proposed to have games of baseball played upon such land. It further held that baseball was not a nuisance *per se.* This doctrine finds application in practically every state. But if baseball games are conducted in such a manner that balls are batted into plaintiff's

yard, and there is riotous and indecent conduct accompanied by profanity on the part of players and spectators, the Court will enjoin such improper practices. *Cronin v. Bloemeche,* 58 N. J. Eq., 313. And the same Court in *Seastream v. The New Jersey Exhibition Co.,* 67 N. J. Eq., 178, extending the doctrine laid down in *Cronin v. Bloemeche supra,* held that Sunday games of baseball were detrimental to the value of real estate and a nuisance *per se.* Thereupon a preliminary injunction was issued against Sunday games until final hearing.

From the authorities cited it is evident that the Courts with practical unanimity are in accord with the principal case in holding that although the act complained of is not a nuisance *per se,* the circumstances under which it is done may necessitate the intervention of a Court of equity to prevent irreparable injury to the property rights of an individual. And if the act sought to be prohibited is in itself a nuisance, not dependent upon uncertainty, indefiniteness, and contingency, the Court exercising its discretionary power will grant an injunction.