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mit without incorporating any lengthy quotation or burdensome digest of the pleadings, evidence, and proceedings.¹⁴

ROBERT E. ROSENWALD, '30.

JURISDICTION TO AWARD ALIMONY IN MISSOURI WHERE DEFENDANT IS NOT PERSONALLY SERVED

In making awards for alimony courts are often faced with difficult and peculiar problems. The deserted wife, attempts of the husband to evade jurisdiction, the question of reaching property left behind him—all these are factors which the court must take into consideration. It is inevitable that occasional conflicts should result between unbending statutory regulations and the desire on the part of the court to distribute justice in extreme cases.

Prior to the case of *Chapman v. Chapman*¹ there had been no adjudication in Missouri of the question whether a deserted wife may have her absconding husband's property within the jurisdiction of the court seized and appropriated to the payment of alimony for the support and maintenance of the plaintiff. In that case the plaintiff sued for divorce, also praying that a receiver be appointed to take charge of real estate alleged to be the property of the absconding husband, and appropriate it to the payment of alimony in gross in the form of a special lien against the property. Plaintiff charged that her husband attempted to convey the property to his brother in fraud of her rights, and joined the brother as a defendant. Plaintiff had adequate grounds for divorce. Service on both defendants was by publication. Both defaulted. The trial court granted plaintiff a divorce, but declined to make any order touching the matter of alimony and dismissed the "bill" as to the brother. The Court of Appeals allowed the alimony, but the judgment of the trial court was affirmed by the Supreme Court.²

The trial court, in holding itself without jurisdiction to render any judgment for alimony without personal service on the husband, reiterated the position taken by the courts of practically all the states,³ the occasional exceptions being by virtue of statute.⁴

¹⁴ See note 1, *supra*.

¹ (1916), 194 Mo. A. 483, 185 S. W. 221.

² (1917), 269 Mo. 663, 192 S. W. 448.

³ For earlier Missouri cases to this effect, see *Ellison v. Martin* (1873), 53 Mo. 575; *Hedrix v. Hedrix* (1903), 103 Mo. A. 40, 77 S. W. 495; *Elvins v. Elvins* (1913), 176 Mo. A., 1. c. 651, 159 S. W. 746, cases cited; *Moss v. Fitch* (1908), 212 Mo. 484, 111 S. W. 475.

⁴ The New York statute is typical, and will be considered later in detail. Laws 1923, sec. 1171-a c. 51.

Of course, the fundamental distinction between a suit for divorce and a suit for alimony, as regards jurisdiction, lies in the fact that the former is an action in rem, and the latter an action in personam. In divorce proceedings the marriage status constitutes the res, but a judgment for alimony is not ordinarily regarded as an incident thereto, and so cannot be supported by constructive service upon the husband. This is on the theory that service by publication or personal service beyond the limits of the state will not support a judgment in personam.⁵

Considerations of public policy played a prominent part in forming the opinion of the Court of Appeals. The court asserted that it is the settled policy of the state to enforce the marital obligations; that courts should enforce this policy and protect the wife so far as possible without violating express statutes or overturning recognized legal principles. This court "does not agree with the trial judge—that a judgment for alimony is in the very nature of things, a personal judgment. The action for divorce is sui generis. It deals with a status, one incident of which is the husband's obligation to support and maintain the wife."

That the Missouri Supreme Court did not look upon the instant question as startling or revolutionary is shown in the earlier case of *Moss v. Fitch*.⁶ Plaintiff brought suit for divorce against her husband who was at the time in Wyoming, and he was personally served with summons in that state, but not in Missouri. It was held that the court had jurisdiction to enter a decree granting the plaintiff a divorce, but no jurisdiction to award her a general judgment for alimony even though he had property in this state. "Substituted service or service by publication only gives the court jurisdiction over the res, which, in a suit for divorce, *without asking for a special judgment against specially described property*, is the divorce, the marital relation, the status of the plaintiff in relation to the defendant." The court thus intimated that if the proper foundation were laid in the pleadings, it might have the power to subject property of the absent spouse, within the jurisdiction, to the wife's claim for alimony. *Moss v. Fitch*, however, upheld the "firmly established rule in this state that no personal judgment can be had on process of this state, executed outside of the state, or upon service by publication."

⁵ Statutes purporting to authorize the rendition of a personal judgment against a non-resident defendant upon service either by publication or personal service beyond the territorial limits of the state have consequently been held void. See *Priest v. Captain* (1911), 236 Mo. 446, 139 S. W. 204; *Moss v. Fitch* (1908), 212 Mo. 484, 111 S. W. 475; *Wilson v. Railroad* (1891), 108 Mo. 588, 18 S. W. 286. ⁶ (1908), 212 Mo. 484, 111 S. W. 475.

Suits for divorce and alimony are, strictly speaking, neither in law nor in equity, since the Missouri legislature has established the Court of Domestic Relations.⁷ However, in the Chapman case, the Missouri Supreme Court takes a definite position, as expressed in these words: "While it may be true that in a divorce case the court may be called on, incidentally, to decide collateral questions of equity jurisprudence, yet in the light of the facts as they are, we must hold that, in this state, the suit for divorce and alimony is one at law and not in equity." It has frequently been held that the jurisdiction of the courts in Missouri to hear and determine suits for divorce and alimony depends upon and is limited by statute.⁸ In adopting this view the Missouri Supreme Court held it a mistake to say that the court can require jurisdiction to render a judgment in rem as to property within the state and subject it to alimony award of the court if the proper foundation is laid by the pleadings and the process. "The foundation must be laid deeper than the pleadings and process; it must be in the law."

Quite contrary to this view was the position taken by Judge Holmes, while on the Massachusetts bench, in *Blackington v. Blackington*.⁹ The wife sued her husband for separate maintenance under statute, after he had deserted her. He was served with notice in another state. In holding that the court had jurisdiction, and could make an order which could be enforced against the husband's property in Massachusetts, Judge Holmes said: "The whole proceeding is for the regulation of a status. The incidents of that status are various—some concerning the support, of the petitioner or her child—. The status, considered as a whole, is subject to regulation here, although it involves relations with another not here, because such regulation is necessary rightly to order the daily life, and to secure the comfort and support of the party rightfully living within the jurisdiction." Though this opinion was approved by the Court of Appeals in the Chapman case, the Missouri Supreme Court, in refusing to grant the alimony, felt no hesitation in censuring the decision and in refusing to follow its rule of policy. "The judgment for alimony was upheld [in the *Blackington* case] on the ground that such alimony was a part of the res, i. e., the

⁷ Laws 1921, 225.

⁸ *Doyle v. Doyle* (1858), 26 Mo. 545; *McIntire v. McIntire* (1883), 80 Mo. 470; *State ex rel. v. Grimm* (1912), 239 Mo. 340, 143 S. W. 483; *McElvain v. McElvain* (1927), 221 Mo. A. 136, 296 S. W. 460, 463: "A suit for divorce and all subsequent proceedings relative to the modification of the original decree as recognized in this state, are purely statutory." *Robinson v. Robinson* (1916), 268 Mo. 703, 186 S. W. 1032; *Klenk v. Klenk* (Mo. A. 1926), 282 S. W. 153, 157.

⁹ (1886), 141 Mass. 432, 5 N. E. 830.

status of the marriage relation, a proposition directly opposed to the doctrine of our Missouri cases, and of the almost unanimous rule of the courts of other states."

Admitting that it has been held frequently in Missouri that no judgment for alimony can be rendered against a defendant who is brought into court by constructive service, this does not minimize the importance of the question as influenced by grounds of public policy. Why should the deserted wife be precluded from obtaining her alimony when the absconding husband leaves property behind him within the jurisdiction of the court? Earlier Missouri cases apparently give rise to the belief that proceedings in rem could be successfully instituted against the property.¹⁰ Our legal system recognizes that no sovereignty can extend its powers beyond its own territorial limits to subject either persons or property to its judicial decisions. Jurisdiction must be founded either upon the person of the defendant being within the territory of the sovereign where the court sits, or his property being within such territory; for otherwise there can be no sovereignty exerted, upon the known maxim, "Extra territorium iudicenti impune non paretur."¹¹ The question here being considered was before the court in the early case of *Ellison v. Martin*,¹² where the plaintiff sued her husband for divorce and alimony. The service was by publication. Judgment went for divorce and alimony, and under the judgment for alimony an execution was issued and the land sold to Ellison. The Supreme Court declared both the judgment and deed void, because "a judgment on order of publication can only be given in proceedings in rem." The court then distinguished between divorce, in rem; and alimony, in personam. But the real question was sidestepped in these words: "Whether property can be brought before the court by describing it in the petition and demanding a judgment in rem for alimony, is a question we are not now called upon to decide. This judgment was a general judgment in personam, and such judgments cannot be rendered in this state merely on publication of notice."

Without disturbing the holding that actions for divorce and alimony in Missouri are purely actions at law, it seems quite feasible that existing statutes could be interpreted to give the

¹⁰ *Smith v. McCutchen* (1866), 38 Mo. l. c. 417; *Latimer v. R. R.* (1868), 43 Mo. l. c. 109: "The well-established and settled principle is, that to give a court jurisdiction, a real defendant, against whom the plaintiff is entitled to a judgment, must be found and served with process within the limits of the jurisdiction; or some property or chose in action of his must be found there upon which the court can proceed in rem." Also see *Ellison v. Martin* (1873), 53 Mo. l. c. 578.

¹¹ Story, *CONFLICTS OF LAWS*, sec. 539.

¹² (1873), 53 Mo. 575.

wife a right to alimony on constructive service. Our statute with regard to alimony and maintenance¹³ provides that when the wife is the plaintiff the court may grant such alimony and maintenance for the wife and children as shall be reasonable, and "order the defendant to give security for such alimony and maintenance," and should he neglect to give security, "may award an execution for the collection thereof, or enforce the performance of the judgment or order by sequestration of the property, or by such other lawful ways and means as is according to the practice of the court." The next section¹⁴ provides that when alimony is decreed in gross the decree shall be a general lien upon the realty of the party against whom the decree is rendered. However, in the fairly recent case of *Watts v. Watts*¹⁵ it was held that "nothing in these sections can be construed to give the court authority to divest the judgment defendant of his title to real or personal property, and vest the same in plaintiff. 'Sequestration,' as used in that section of the statute, means a setting apart of the property so that it may be subject to execution and payment of the judgment.¹⁶ Where decree of divorce is awarded to the wife, the court is entirely without jurisdiction to vest in her, as a part of her alimony, the title to property real and personal owned by the husband." Several prior Missouri cases were cited to support this interpretation.¹⁷ The Supreme Court's feeling as expressed in the *Chapman* case was that the writ of sequestration cannot issue until after the judgment for alimony is rendered. "Prior to such judgment the plaintiff is not entitled to any lien, nor to any lawful right, claim or demand to or against the property described in the petition. . . . The court is not authorized by the statute to make any order or decree with reference to any specific property. It can only render judgment for money as alimony." If we were to submit to this proposition, that a judgment for alimony must, in the nature of things, be a money judgment, and in order to secure a money judgment there must be personal service, then,

¹³ R. S. Mo. (1919) sec. 1806.

¹⁴ R. S. Mo. (1919) sec. 1807.

¹⁵ (1924), 304 Mo. 361, 263 S. W. 421.

¹⁶ The following interesting comment appears in 38 A. L. R. 1084. "In *Chapman v. Chapman* (1916), 269 Mo. 663, 192 S. W. 448, it was said that sequestration was an equitable remedy, and since an action for divorce and alimony was, by the law of Missouri, an action at law, it was doubtful whether there was any vitality left in the statutory provision for sequestration in divorce proceedings, which provision had been retained, probably by oversight, in the revision of the laws, in which the provision that a suit for divorce should be an equitable one, and that the court should sit therein as a court of chancery, was left out."

¹⁷ *Ecton v. Tomlinson* (1919), 278 Mo. 282, 287-288, 212 S. W. 865; *Aylor v. Aylor* (Mo. 1916), 186 S. W. 1068; *Davidson v. Davidson* (1907), 207 Mo. 702, 106 S. W. 1.

in order to get divorce and alimony together we must concede that there must be personal service.

Section 1196 of R. S. Mo., 1919, provides for constructive service by publication "in suits of partition, divorce, attachment, suits for the foreclosure of mortgages and deeds of trust, and for the enforcement of mechanic's lien and all other liens against either real or personal property, and in all actions in law or in equity, which have for their immediate object the enforcement or establishment of any lawful right, claim or demand to or against any real or personal property within the jurisdiction of the court. The Court of Appeals in the *Chapman* case interpreted this statute strongly in favor of the deserted wife. "The suit is for divorce, and proceeds, too, upon the theory that the wife, under the circumstances, has a just and lawfully enforceable claim or demand to or against the husband's real estate described in the petition." But the Supreme Court, in reversing that decision said, "There is nothing in that section in regard to the judgment for alimony which authorizes a proceeding in rem against the property of the defendant. And this is true whether the provision as to sequestration of property be considered valid or void." Any attempt to determine the justice or injustice of such a conclusion necessitates a consideration of the resulting hardship to the wife and the advantage to the delinquent husband. Should he be subjected to the provisions of law applied to the ordinary debtor, or does he stand in a better position? It is true, of course, that the judgment of the ordinary creditor does not bind his debtor for contempt, as in the case of a failure to meet stipulated provisions for alimony by the husband. But though the usual way to enforce payment of alimony is by contempt, under statute¹⁸ the plaintiff may now proceed by execution.

Other states have allowed the wife to recover her alimony by actions in rem against property within the jurisdiction of the court. In a suit for maintenance in California¹⁹ the wife sought to have fraudulent transfers of the non-resident husband's real property, within the jurisdiction, set aside, and to have the same subjected to the payment of the wife's claim. It was held the trial court had jurisdiction to afford the relief sought, upon service by publication. In an action for divorce and alimony in Kansas,²⁰ where, as in the *Chapman* case, constructive service was had upon the non-resident husband, it was held: "The court has no authority to render a judgment in personam without obtaining jurisdiction of the person of defendant. Here, however, land was brought within control of the court in what was

¹⁸ N. 13, above. ¹⁹ *Murray v. Murray* (1896), 115 Cal. 266, 47 Pac. 37.

²⁰ *Mesner v. O'Brien* (1896), 56 Kan. 724, 728, 44 Pac. 1090, 1092.

substantially a proceeding in rem. The complaining wife was here; the land sought to be subjected to alimony was here." *Benner v. Benner* was an action by the wife for alimony and maintenance of a child in Ohio.²¹ The petition described the real estate of the non-resident husband. There was a decree for the plaintiff. "If the action may properly be regarded as an action in rem, the court could undoubtedly obtain jurisdiction by constructive service, to appropriate the property of the defendant, situated in the county where the action was brought, to the purposes of the action, though it could render no personal judgment on which maintained." In the *Benner* case the court relied upon a state statute. The theory on which these courts proceed is that the state, through its tribunals, may subject property situated within its limits, owned by non-residents, to the payment of the demands of its own citizens against them. Every state owes protection to its own citizens.²²

The simplest way of solving the difficulties of the deserted wife is, of course, by special statute similar to the one in effect in New York.²³ The case of *Matthews v. Matthews*²⁴ illustrates the practical benefit of such a statute. The ultimate holding was that the court may be permitted, in an action against a non-resident or concealed defendant in a divorce proceeding, where substituted service of process is effected, to sequester his property itself, if necessary, to the payment of alimony, counsel fees, and the support of children. The effect of the New York statute is this: Where in an action for divorce or separation, the defendant is not within the state so he can be personally served, the court may order his property sequestered, appoint a receiver, and apply the income to the education and support of the children, the support of the wife, and the expenses of the suit. If the rents and profits are insufficient, the court may direct a mortgage or sale of the property. The court may appoint the wife receiver or sequestrator. The phrase "In an action," as interpreted by the New York Court in the *Matthews* case, must refer to an action already pending or presently begun. After he has been served by publication, and is in default of appearance or pleading, the court can enter judgment and dispose of the sequestered property as it deems best for the interest of the wife and children. If the defendant appears, of course, there is no difficulty.

Statutes of this character have been held valid whenever attacked on constitutional grounds; at least, when provision is made for notice to the defendant before any actual disposition

²¹ (1900), 63 Ohio St. 220, 58 N. E. 569.

²² See *Pennoyer v. Neff* (1877), 95 U. S. 714, 723.

²³ Laws 1923, sec. 1171-a c. 51. ²⁴ (1925), 240 N. Y. 28, 147 N. E. 237.

of the property is made. The courts seemingly take the view that the effect of these statutes is practically the same as that of statutes providing for ordinary attachment of an absent defendant's property.²⁵ Under the construction of the *Matthews* case, *supra*, the effect of the statute is the same as though the property were attached and held subject to further order of court.

Whether the view taken by the Missouri courts up to the present time is to be deemed correct or incorrect necessarily depends on the view we take of the whole subject of divorce and alimony. Neither divorce nor alimony is a matter of right, but involves great discretion on the part of the court, particularly with regard to alimony. Before making any award, the court usually deems it incumbent upon itself to inquire into the amount of the husband's income, the amount of property held by the wife, the number of children, and into whose custody they are given. Some courts, and perhaps a majority, are inclined to regard alimony as an expression of the husband's continuous obligation of support, while other courts view it as a settlement and division of the property held by the married couple. But it is apparent that alimony is not a debt, and perhaps this is a sufficient basis for distinguishing between the right of a creditor to levy on property of his debtor without personal service, and the corresponding lack of right in the wife as regards alimony. Changes in conditions of living, however, necessarily involve changes in the law. Where the wife has adequate grounds for divorce, and in the opinion of the court has a deserving claim to alimony, it appears radically unjust to allow the husband to evade all liability of support merely by removing himself from the jurisdiction of the court. If the Missouri Court feels that it cannot grant relief to the deserted wife under any interpretation of existing Missouri statutes, and consequently that property left by the husband within the jurisdiction is immune to attack, there appears ample ground for remedy by the legislature. As divorce is coming to be recognized more and more as a necessity under existing conditions of society, it seems that the husband should not have it within his power to evade a just claim to alimony any more than he should be able to evade a just claim for divorce. The importance of this statement is emphasized when we consider that the wife may forever be barred of alimony in those states which do not recognize the right of the wife to institute a suit for alimony subsequent to a decree of divorce. The New York statute is in keeping with the times.

JOSEPH J. CHUSED, '30.

²⁵ See annotation in 38 A. L. R. 1084.