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Development of the Concept of Divisible Divorce--Ex Parte Divorce and Right to Alimony in Kentucky

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Notes

DEVELOPMENT OF THE CONCEPT OF DIVISIBLE DIVORCE—EX PARTE DIVORCE AND RIGHT TO ALIMONY IN KENTUCKY

Introduction

The Full Faith and Credit Clause of the United States Constitution[1] as effectuated by Congress provides that:

> [R]ecords and judicial proceedings . . . shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.[2]

This provision has led to a great mass of litigation. Especially is this true in those areas of the law which reflect state policy concerning matters of morality. Here, a judgment of a sister-state is likely to run counter to some deeply entrenched public conviction, preference or prejudice of the state asked to recognize or enforce it. It often provokes the use of practically every conceivable procedure for evasion. Nowhere is this more true than in the field of domestic relations.

The Supreme Court, of course, has often had to struggle with these problems in an effort to balance the interests of various states. The problem of reaching a satisfactory solution of these conflicts in the divorce situation has been greatly intensified by the ever-increasing mobility of our population, the acceptance of women into the labor force, the emancipation of women from their dependency on the male, the growth of public assistance, and the lessening of the social stigma attached to divorce. The easy divorce laws of states other than the marital domicile are increasingly available to both spouses wherever located. The wife can now more easily endure being divorced and is therefore less likely to go to very great trouble and expense to resist the husband's obtaining a divorce even when he is not entitled to it.

But for one reason or another the wife frequently attempts to re-litigate, in another jurisdiction, some aspect of a divorce obtained by the husband. Most often the wife's interest is that of obtaining alimony or property from her husband after he has obtained a divorce. The purpose of this note is to discuss the efforts of the Supreme

[1] Art. IV, § 1.
[2] 28 U.S.C. 1738 (1952).

Court to find its way out of the maze of conflicts thereby created and consider the effects of these cases upon Kentucky law as it exists.

The Development of the Divisible Divorce

It was early held[3] that a state having jurisdiction can grant a divorce entitled to full faith and credit in other states even though the grounds on which the divorce was granted are not recognized as adequate in the state wherein the decree is questioned. This jurisdiction may be based upon bona fide residence of only one of the parties to the marriage, the non-resident party being served by publication.[4]

Then came the now-famous case of *Haddock v. Haddock*[5] in which the Supreme Court upheld the New York Court's refusal to admit a Connecticut decree into evidence on the grounds that the court rendering it lacked jurisdiction. It was here that the Court formulated a concept of divisibility; viz., divisibility of the res. Under this theory, the *marital status* itself was divided so that part of it followed the husband into Connecticut, part remained in New York. That part which followed the husband was a sufficient basis for the Connecticut court's jurisdiction to terminate the marital status there. That which remained with the wife in New York was sufficient to maintain the relationship in that state, even as to the husband. Under this theory, jurisdiction to render a divorce decree entitled to full faith and credit everywhere, came to depend upon marital domicile. The location of the marital domicile depended upon which party was at fault. The court could determine who was at fault if it had jurisdiction.[6]

The failure of this attempted solution was made quite clear in *Williams v. North Carolina* (1).[7] The Supreme Court denounced the

[3] Cheever v. Wilson, 76 U.S. (9 Wall) 108 (1869).

[4] In Atherton v. Atherton, 181 U.S. 155 (1901), the husband, having obtained constructive service on his wife, obtained a divorce on grounds that she had deserted him by leaving Kentucky and returning to her former home in New York. When the New York court subsequently granted the wife a divorce from bed and board and alimony in a suit instituted there by the wife, the Supreme Court reversed saying, at page 173, that the Kentucky divorce was "*as binding* as if she had been served with notice in Kentucky, or had voluntarily appeared in the suit." (Emphasis supplied.)

But in Bell v. Bell, 181 U.S. 175 (1901), decided the same day, the opposite result was reached where it clearly appeared that the husband was not a bona fide resident of the state in which he procured the divorce.

It is significant that in these cases the court treated the termination of the status and termination of the right to alimony as standing or falling together.

[5] 201 U.S. 562 (1906).

[6] When the marital domicile was with the husband, he could obtain a divorce which would cut off his absent wife's right to alimony. Thompson v. Thompson, 226 U.S. 551 (1912). But in any event, the Haddock case permitted the jurisdiction in which the wife sought alimony to re-litigate the question of fault.

[7] 317 U.S. 287 (1942).

circuitous reasoning of, and expressly overruled, the *Haddock* case, stating:

> The existence of the *power* of a state to alter the marital status of its domiciliaries, as distinguished from the wisdom of its exercise, is not dependent on the underlying causes of the domestice rift. As we have said, it is dependent on the relationship which domicile creates and the pervasive control which a state has over marriage and divorce within its borders.[8]

As the second *Williams* case[9] illustrates, the decree may still be attacked on grounds of lack of jurisdiction or fraud. But jurisdiction ceased to depend upon the merits of the plaintiff's case in the original divorce action.[10]

The net result was that the Court, while insisting that full faith and credit must be given to a sister-state ex parte divorce, could not escape the conclusion that the state of the wife's domicile had a serious and valid concern with the domestic relationship. The *Haddock* case had been an attempt to give effect to the full faith and credit requirement in such a way that it would allow for balancing the interest of the state of the wife's domicile in providing for her support, and the interest of the state of the husband's residence in having his status determined with finality. But the rationalization used, the divisible res, led to the practical destruction of the full faith and credit requirement. So the Court abandoned that rationale and reverted, in *Williams*, to the rule as it existed before the *Haddock* case.[11] Both positions were extreme and neither solved the basic problem.[12]

In *Estin v. Estin*,[13] the Court was again confronted with the conflict between the interests of the state of the wife's residence and the interests of the state of the husband's residence. The Court there realized that the state of the wife's domicile had no valid concern whether the marital status was continued or terminated. Its interest was not in keeping the wife married. Rather, it was in having her supported by her ex-spouse so as to prevent her from becoming morally or financially destitute and a ward of the state. The wife in that case had obtained an alimony judgment in New York while

[8] Id. at 300.
[9] 325 U.S. 226 (1945).
[10] But if the wife appeared even specially and contested the jurisdiction of the court, then even that question could not be raised in the collateral attack. Coe v. Coe, 334 U.S. 378 (1948); Shearer v. Shearer, 334 U.S.343 (1948).
[11] Atherton v. Atherton, 181 U.S. 155 (1901). For a discussion see note 4 supra.
[12] For a very thorough analysis of the development (up through the overruling of the Haddock case by the first Williams case) see, Strahorn and Reiblich, The Haddock Case Overruled—The Future of Interstate Divorce, 7 Md. L. Rev. 29 (1942).
[13] 334 U.S. 541 (1948). See annot., 1 A.L.R. 2d 1412 (1948).

the marriage status still existed. The husband, who was personally before the court in that action, left the state and obtained a Nevada divorce based upon constructive service on the wife. When the wife later brought an action to enforce the prior judgment, the husband interposed his Nevada divorce. The New York court rejected this defense and gave the wife relief. In affirming, the Supreme Court said that the pre-existing judgment gave the wife *personal* rights which, under New York law, survived the termination of the marital status. It reasoned that the Nevada court could not terminate these rights unless the wife were personally served in the action or appeared therein.

The *Estin* case introduced the modern concept of divisibility. Instead of dividing the res which formed the basis of a state's jurisdiction to terminate or give effect to the marriage so that the divorce was either wholly valid or wholly invalid, depending upon which state was attempting to question it, the Court divided the divorce action itself. This gave recognition to the basically dual nature of the divorce action. First, it ends the marital status itself and, secondly, it adjudicates the wife's rights to alimony. But the Court recognized that at common law these latter rights, though *in personam* in nature, exist only so long as the status continues, unless reduced to a judgment at the time of divorce. Thus, if the common law prevails in the granting state so that the right to alimony terminates with the marriage, then the full faith and credit provision would normally seem to require that it be given the same effect in another state wherein the decree was questioned. But, because of the conflicting interest involved, the Court permitted an intrusion upon the rule, limited to those cases in which the state of the wife's domicile had already expressed its concern by (1) granting the wife a judgment for alimony and (2) treating such judgment as surviving the termination of the status.

The Court in the *Estin* case was approaching a rational and practical solution to the problem of balancing between the interests of the divorcing state, on the one hand, and the state of the wife's domicile, on the other. But because of the two limitations mentioned above, situations could arise in which the solution offered by *Estin* would be inadequate. Such a case was *Vanderbilt v. Vanderbilt.*[14] In that case the husband and wife were domiciled in California at the time of their separation. After their separation, he went to Nevada and established residence. She went to New York (which may have been her original home), but because of a one year's residency re-

[14] 354 U.S. 416 (1957).

quirement[15] could not file suit for alimony. The husband, under no such limitation, obtained a divorce in Nevada which provided that both husband and wife were "freed and released from the bonds of matrimony and all the duties and obligations thereof."[16] The wife, immediately upon the termination of her disability, but after the divorce, brought suit for alimony in New York and attached the husband's property there. Under the *Williams* case[17] and *Thompson v. Thompson*,[18] it would appear that New York would be compelled to give full faith and credit to the Nevada decree and deny relief to the wife because she had not reduced her rights to a judgment as required by the *Estin* case. It is obvious that to prevent such injustice some extension of *Estin* was needed.

But the Court did not merely extend *Estin*. It said that the requirement of a pre-existing judgment, which was treated as of critical importance in the *Estin* case, was immaterial. It further stated:

> [T]he Nevada decree, to the extent it purported to affect the wife's right to support, was *void* and the Full Faith and Credit Clause did not obligate New York to give it recognition. (Emphasis supplied).[19]

The issue actually before the court was whether New York had to give the Nevada decree *full* faith and credit, or whether it might give it only limited recognition in light of its paramount concern with the divorced wife's position. As in *Estin*, some intrusion would be made upon the full faith and credit provision if the wife were allowed to recover. In *Estin* such intrusion was felt to be justified because New York, by giving the wife a judgment and treating it as surviving the divorce, had evidenced a concern with the broken marriage before Nevada had anything to do with it. How simply the Court could have extended that case by holding that where a state, by statute or otherwise, gives "spouses" there domiciled a right to action which survives an ex parte divorce decree, the sister-state decree cannot terminate those existing rights. This would have adequately balanced between New York's interest and that of Nevada and yet would have resulted in only slight impairment of the full faith and credit provision. If the wife were domiciled in New York at the time of divorce, she could bring the later action. If she did not come into the jurisdiction until after the divorce, she would never have been a "spouse" there and thus could not have qualified under its law to recover alimony. In those jurisdictions which follow the common law rule that the right to alimony ends with the termin-

[15] New York Civil Practice Act, § 1165-a.

[16] In Nevada such a decree has the effect of denying alimony. Sweeney v. Sweeney, 42 Nev. 431, 179 P. 638 (1919).

[17] 317 U.S. 287 (1942).

[18] 226 U.S. 551 (1912).

[19] 354 U.S. 416, 419 (1957).

ation of the marriage (unless reduced to a judgment at the time of the divorce) the wife could not maintain a suit for alimony after an ex parte divorce. This result would follow, not because the decreeing jurisdiction purported to destroy these rights, but because the jurisdiction in which the divorced wife resides recognizes them only during the existence of the marriage. In this way the Court could have made each state supreme in that area which was of paramount concern to it.

Admittedly, the *Vanderbilt* case is susceptible of the above interpretation if limited to its facts. But the language of the Court to the effect that the Nevada decree was *void* to the extent that it purported to terminate the wife's rights to alimony leaves considerable doubt about the limits of its application. If the language is construed literally, then, under *Pennoyer v. Neff*,[20] Nevada could not enforce that portion of its own decree as far as it affected the wife's right to alimony.

We may safely generalize that, while an ex parte divorce decree is void in so far as it purports to affect the wife's rights to alimony, and property, the question can later be litigated only in those jurisdictions which do *not* treat these rights as existing only during the continuation of the marital status.

But the difficulty with this rule is that a state in which the wife never resided, until years after the divorce, could give her a judgment against the husband or his property even though such state had never been concerned with the marriage. Conceivably, the husband actually introduced evidence in the divorce action showing that the wife was not entitled to alimony. Nonetheless, the wife can now wait until such evidence has dissipated to bring her action and thereby catch the husband defenseless. It may be that at the time of the divorce he had little or no property. But the wife can wait years until he amasses a fortune and then sue him.[21] Such a result is clearly inequitable and contrary to the policy of putting legal liabilities to rest if not acted upon within a reasonable time.

The rule of the *Vanderbilt* case has also created doubts about the legal consequences of certain situations in which there was formerly a great degree of certainty and predictability. Suppose a state gave the wife a personal judgment for alimony before the divorce and treated it as surviving an ex parte divorce. Then the husband obtains an ex parte divorce in another state in which such judgments do not survive. Is the divorcing state bound to enforce the judgment of the

[20] 95 U.S. 714 (1877).

[21] That the wife might wait years before bringing action is illustrated by Haddock v. Haddock, 201 U.S. 562 (1906).

first state? Or suppose she catches him in a third state? Would that state be bound by the judgment of the first state or could it exercise discretion as to which rule it would follow? Suppose the wife appears specially and contests the jurisdiction of the rendering state to grant the divorce. Is she then bound by a decree which purports to terminate her alimony rights? Or because she made no general appearance is it still void to that extent? Again, suppose that the jurisdiction in which she seeks alimony treats the right thereto as surviving, except where the wife is found to be at fault. If the ex parte divorce was granted on the basis of the wife's fault, would that finding be binding upon the state wherein the alimony was sought? Or would it be a denial of due process to treat it as conclusive, since the wife was not personally before the court? Or, would the second state have discretion in determining how it should be treated? Time will probably reveal many other questions arising because of this decision.

It should also be noted that the *Vanderbilt* decision did not appear to turn at all upon the fact that she had established her residence in New York prior to the divorce. Is this fact critical, or do we now have migratory alimony as well as migratory divorce?

The *Vanderbilt* case, like the *Haddock* case, in its attempt to solve a social problem and balance the interest of various states, created more and worse problems than it solved. This result is typical of the experimental approach to the problem. The Court has vascillated between the extremes represented by *Atherton* and *Williams* on the one hand, *Haddock,* and now *Vanderbilt,* on the other. It is certainly to be desired that the Court, having come so close to a satisfactory solution to this problem in *Estin,* will not react from *Vanderbilt* by returning to the *Atherton* extreme. Rather it is hoped that the court will take the first opportunity to find a workable solution somewhere between *Estin* and *Vanderbilt* by placing limits about the latter case. Only in this way can it give effect to the full faith and credit clause and yet justify, on policy grounds, some intrusion upon that rule by those states having a legitimate concern with a particular domestic relation.

Effect of the Divisibility Concept

In summary, under Supreme Court decisions the extraterritorial effect of an ex parte divorce decree which purports to cut off the absent wife's rights to alimony is somewhat hazy. But this much appears certain: under the combined effect of *William v. North Carolina* (I),[22] *Estin v. Estin*[23] and *Vanderbilt v. Vanderbilt*[24] a state must

[22] 317 U.S. 287 (1942).
[23] 334 U.S. 541 (1948).
[24] 354 U.S. 416 (1957).

recognize a divorce granted by a sister-state having jurisdiction over the plaintiff by reason of his being a bona fide resident thereof. But it need not recognize the decree insofar as it purports to end the wife's rights to alimony if the state in which the decree is questioned treats these rights as surviving the termination of the marital status. The question immediately arising is, does Kentucky treat such rights as surviving the divorce?

Effect of the Divisibility Concept on the Termination of Alimony Rights in Kentucky

Generally, in Kentucky, the wife's right to alimony must be established when the divorce is granted or else it is terminated. This rule was established in *Campbell v. Campbell.*[25] In that case the wife brought an action for divorce and had a decree. At the next term of court she attempted to assert a claim for alimony and enforce it against the property of her husband who had since left the state. The Court of Appeals held that her right ended with the divorce. It based its decision, in part, upon its interpretation of a statute empowering the courts to allow alimony upon the granting of a divorce to mean *only* upon the granting of a divorce where one was granted.[26] The court said in the *Campbell* case:

> While in this State alimony has not been regarded as an incident of the divorce, this is true only where the marital relation is continued. But where that relation is terminated without claim or reservation in the judgment of divorce concerning future support by way of alimony, all such rights of the parties must be deemed as fixed and settled by the judgment.[27]

Dictum in the case of *Logsdon v. Logsdon*[28] indicates that the rule does not prohibit *direct* attacks upon denials or omissions of alimony but only *collateral* attacks. In that case the wife attempted to obtain a divorce and alimony in Edmonson County Circuit Court alleging that the divorce obtained by the husband in McLean County Circuit Court was procured through fraud. The Court of Appeals, while sustaining the dismissal of the wife's action, pointed out that she could obtain alimony in one of three ways: (1) by direct appeal in the original action instituted by the husband, (2) by having the decree set aside by the court rendering it and then counter-claiming for divorce and alimony or (3) upon having it set aside, by bringing a separate action in any other court which might have jurisdiction.

[25] 115 Ky. 656, 74 S.W. 670 (1903).
[26] Ky. Stat. § 2122 (1899). The provisions of the statute, indeed almost the identical wording, are embodied in Ky. Rev. Stat. § 403.060 (1) (1959).
[27] 115 Ky. 656, 659, 74 S.W. 670 (1903).
[28] 204 Ky. 104, 263 S.W. 728 (1924).

The principle applied in the *Campbell* case[29] is equally applicable where the wife seeks alimony in Kentucky after the husband obtains an ex parte divorce in another jurisdiction. Thus, the court said in *Hughes v. Hughes,* when such a situation arose:

> A woman does not, by marriage, acquire any property rights in her husband, as she would in a horse, when she buys it, but she does acquire certain marital rights which are the basis of her claim for maintenance, support, or alimony; but, when those marital rights are destroyed, as happened here when the Illinois court entered this decree of divorce, she has no further claims upon the husband.[30]

Exceptions

It is clear from these cases that Kentucky does not treat the right to alimony as surviving a divorce decree. But there are at least two exceptions to the rule which must be accounted for.

The first such exception appears in *Lyon v. Lyon.*[31] There the wife was permitted to bring a suit for alimony subsequent to the divorce when the question had been specifically reserved in the divorce proceeding.

The second exception can be illustrated by *Hanks v. Hanks.*[32] There the wife sued for divorce but did not request alimony because she had sufficient property of her own (but which had been deeded to her by the husband during the marriage). When the husband sued for restoration of the property the court upheld the right of the wife to counter-claim for alimony since she had foregone those rights in reliance upon her possession of the property in controversy.

Some Cases Distinguished

There is another class of cases which appears to abrogate the general rule. But close scrutiny of these cases reveals that they do not come under the rule at all. They do not involve survival of the right to alimony as such. They turn upon fraud, statutory provisions, or the fact that a Kentucky court had already obtained jurisdiction of the alimony action before a foreign court rendered the decree of divorce offered as a bar to the action for alimony.

Fraud, Misrepresentation, and Mistake

One of the clearest cases of fraud was the case of *Asher v. Asher.*[33] In that case the husband filed, in the wife's name, a petition which she had signed under duress two years earlier. The husband, apparently by counterclaim, was awarded a divorce. The wife, upon dis-

[29] See note 25 supra.
[30] 211 Ky. 799, 806, 278 S.W. 121, 124 (1925).
[31] 243 Ky. 246, 47 S.W. 2d 1072 (1932).
[32] 282 Ky. 236, 138 S.W. 2d 362 (1940).
[33] 249 Ky. 215, 60 S.W. 2d 592 (1933).

covery that she had been divorced, petitioned to have the decree set aside and for divorce and alimony. The trial court found that upon the evidence the husband was not entitled to a divorce but that the wife was. However, because of the nature of a divorce,[34] the court would not set it aside but did allow alimony. Upon appeal by both parties the Court of Appeals sustained the trial court's action. In *Hughes v. Hughes*,[35] the court indirectly upheld the wife's right to alimony, even after a final divorce, where the court found that the husband had induced the wife not to appear and contest the action with assurances that he had withdrawn the action. The court held that the giving up of her rights to secure alimony after a divorce fraudulently obtained by the husband was sufficient consideration to support the husband's promise to pay her a stipulated sum.

Where the wife failed to raise the question of alimony because of the honest but mistaken belief that she and her husband, through their respective attorneys, had reached a compromise and formed a contract, the court, in *Reynierson v. Reynierson*,[36] permitted her to bring the action separately after the divorce. Specific statutory provision is made for such situations in Kentucky Rules of Civil Procedure, rule 60.02, which permits a party to be relieved from a judgment, order or proceeding for reasons of fraud, misrepresentation, or other misconduct of the adverse party or for justifiable mistake. But this relief is available only if the motion is made within a reasonable time.

Statutory Provisions

In addition to the provision discussed immediately above there are others which bear upon the question as to when a wife may enforce her right to alimony after a divorce. One such provision is contained in Kentucky Revised Statutes, section 23.035. Under it a Circuit Court is impowered to reverse, vacate, or modify its own judgment or order. But if the wife attempts to have a divorce set aside, she must show fraud going to the jurisdiction of the court or else must act during the term in which the divorce was granted and before the other party has relied to his detriment.[37] Otherwise she could only have it set aside

[34] "Decrees of divorce are given a special sanctity in Kentucky. They can not be reversed by [the Court of Appeals] . . . KRS 21.060, and they can not be reached by a motion for a new trial on grounds discovered after the term . . . nor by motion for a new trial by a defendant constructively summoned. . . ." Kenmont Coal Co. v. Fisher, 259 S.W. 2d 480, 482 (Ky. 1953).

[35] 162 Ky. 505, 172 S.W. 960 (1915).

[36] 303 S.W. 2d 252 (Ky. 1957).

[37] Bushong v. Bushong, 283 Ky. 36, 140 S.W. 2d 610 (1940); Crowe v. Crowe, 264 Ky. 603, 95 S.W. 2d 251 (1936); Ramsey's Executor v. Ramsey, 233 Ky. 507, 26 S.W. 2d 37 (1930).

to the extent that it denied alimony. In either case she would then have to act within five years in order to obtain a divorce or alimony in her own behalf. This follows from the provision that in seeking a divorce she must allege that the cause of the divorce occurred within five years next preceding the commencement of the action.[38]

Kentucky Rules of Civil Procedure, Rule 4.01, also offers relief to the wife constructively summoned. Under it a party constructively summoned, upon application to the court, shall be permitted to defend within one year after judgment except in divorce cases. While the decree of divorce itself may not be attacked, it would appear that a denial or omission of alimony may be.[39]

Prior Jurisdiction of Kentucky Court

The recent case of *Cooper v. Cooper*[40] tends to cause confusion as to what is the general rule in Kentucky as to the survival of the right to alimony. In that case the husband obtained a divorce in Florida in an action in which the wife appeared. During the subsequent trial of the wife's suit for alimony in Kentucky, the husband set up the Florida decree as a bar to the action. In spite of this, the wife was awarded alimony and the Court of Appeals sustained the award. But the important feature of that case was that prior to the wife's appearance in the Florida suit she had already instituted her suit in Kentucky, which suit was pending at the time the Florida Court obtained jurisdiction over her. The court said that survival of the wife's rights was not in question. It existed at the time when the Kentucky suit was brought, the marriage not having yet been terminated, and Kentucky's jurisdiction was not destroyed by the Florida decree. In addition, the court said:

> Under ordinary circumstances, the Florida decree would be conclusive of the question of alimony. Hughes v. Hughes, 211 Ky. 799, 278 S.W. 121. A principle peculiar to Florida law, however, creates a distinguishing feature necessitating a result contra to that obtained in the Hughes case, supra. . . The effect of this [Florida] decision is to render the determination of fault upon the part of a defendant wife inconclusive of her right to alimony. . . . If the Florida decree would not have precluded the appellant's seasonable demand for alimony there, it should not preclude it here.[41]

The *Cooper* case was cited as authority for a similar holding in *Taylor v. Taylor*.[42] There the wife had already instituted her suit

[38] Ky. Rev. Stat. § 403.035 (3) (1959). See also Honaker v. Honaker, 218 Ky. 212, 291 S.W. 42 (1927), which involved an earlier form of this statute.

[39] This interpretation was applied in Asher v. Asher, 249 Ky. 215, 60 S.W. 2d 592 (1933) and Honaker v. Honaker, 218 Ky. 212, 291 S.W. 42 (1927), and see dictum to that effect in Logsdon v. Logsdon 204 Ky. 104, 263 S. W. 728 (1924).

[40] 314 Ky. 413, 234 S.W. 2d 658 (1950).

[41] Id. at 417, 234 S.W. 2d at 660.

[42] 242 S.W. 2d 747 (Ky. 1951).

for alimony when the husband filed suit for divorce in Nevada. Again the court pointed out that:

> Appellant's [wife] action was instituted in Kentucky during the existence of the marriage relation and before Nevada had any concern over it. Jurisdiction of the Kentucky court over the subject matter of the action continued notwithstanding the subsequent granting of the divorce to appellee [husband] in Nevada.[43]

Another case of like import is that of *Davis v. Davis*[44] which differed from the *Taylor* case only in that the wife's action had been stricken from the docket (with leave to re-instate on motion) before the husband obtained the Nevada divorce. It was reinstated after the divorce and proceeded to a judgment which was upheld on appeal.

It is important to distinguish this type of case from those in which Kentucky had never taken cognizance of the wife's right to alimony until after a decree of divorce had been entered in another jurisdiction as in the *Hughes* case.[45]

Summary

The general rule in Kentucky is that an action for alimony cannot be brought by a wife after the marriage has been terminated. However, when the right has been specifically reserved or is sought to be exercised as a counterclaim to the husband's suit for restoration to him of property held by the wife, she may prevail. In addition, if the husband has fraudulently obtained a divorce to which he was not entitled, or has fraudulently prevented the wife from defending the suit, she may attack it in the court where rendered or by direct appeal (subject to procedural limitations). The same is true where the wife failed to raise the question of alimony due to a justifiable mistake concerning a compromise agreement. Or, if the decree was rendered on constructive service, she may, within one year and on motion to the court in which it was rendered, appear and defend. Finally, if she institutes her action before the decree of divorce is rendered in another state, she may pursue it to a judgment.

The important thing to note is that only three of these exceptions and distinctions could possibly aid a wife divorced by the courts of a sister state. It is clear that the rule of prior jurisdiction by a Kentucky court will. It is conceivable that the rule as to specific reservation of the question might, though the *Cooper* case is the closest thing to a holding that can be offered. It is also conceivable that a wife divorced by an out of state decree might be able to take ad-

[43] Id. at 749.
[44] 303 S.W. 2d 256 (Ky. 1957).
[45] 211 Ky. 799, 278 S.W. 121 (1925).

vantage of the rule permitting the right to alimony to be asserted as counter-claim to a husband's action for return of property previously conveyed to the wife. However, the *Hanks* case,[46] which established that exception, did so on the basis of her reliance upon such ownership and her failure to raise the question as a result of such reliance. In addition, that case involved a suit initiated by the wife.

Conclusion

It would appear that under the Supreme Court decisions discussed previously, a wife who suffers a divorce obtained in another jurisdiction by the husband on constructive service could not, ordinarily, obtain an award of alimony in Kentucky. This result follows, not from any purported termination of these rights by the decreeing state, but from the fact that these rights ordinarily cease to exist in Kentucky after the termination of the marital status.

But Kentucky husbands who are deserted by their wives and who have obtained Kentucky divorces may not have similar protection in other jurisdictions. The deserting wife could go to New York and there attach property which the husband might own in that state (e.g., stock in a New York corporation) or secure personal service on him there and get an award of alimony. It is problematical whether Kentucky would enforce such a judgment rendered on personal service. It is certain that whether Kentucky would be *required* to enforce it has not yet been determined by the Supreme Court. This is one of the important questions left undetermind by the *Vanderbilt* case.[47]

Two inequities are inherent in this situation. First, a Kentucky wife who is unjustifiably divorced by her husband in another jurisdiction is left without means of obtaining support from him in this state. Secondly, a Kentucky husband, who justifiably obtains a divorce here against a wife no longer resident, may, years later and in another state, be compelled to support her long after his evidence of her infidelity or wrongdoing has ceased to exist. The first of these inequities could be remedied by a Kentucky judicial decision or a statute making the right to alimony survive an ex parte decree. The second inequity can only be remedied through restricting the *Vanderbilt* case by Supreme Court decision or a federal statute further implementing the Full Faith and Credit Clause of the United States Constitution.[48]

James H. Byrdwell

[46] See note 32 supra.
[47] 354 U.S. 416 (1957).
[48] Art. IV. § 1.