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Cecil v. Farmers National Bank--Termination of Limited Divorces

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the lien before that time is general in nature and not specifically binding upon any particular property.[19]

In conclusion: a writ of execution delivered to the proper official and properly endorsed by him (1) creates a lien upon the property of the debtor against whom the execution was issued (2) protects the creditor through priority of lien against subsequent writs of execution, except the subsequent execution which is first levied (3) protects the creditor against bona fide purchasers of real property only after the creditor has filed a lis pendens notice.

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CECIL V. FARMERS NATIONAL BANK—TERMINATION OF LIMITED DIVORCES

In *Cecil* v. *Farmers National Bank*[1] the Kentucky Court of Appeals had before it a very novel and interesting question. The suit was brought by an alleged widow to establish a right of dower. She had married the deceased in 1941, but had obtained a divorce from bed and board from him in 1943. A property settlement by which the plaintiff accepted $2,000 from her husband "in full settlement of her distributive right in his estate" was incorporated into the separation decree. Six months later the parties became reconciled, moved to another town and lived together as man and wife until his death in 1949. Neither of the parties ever petitioned for an annulment or modification of the separation decree. The question before the court was: did the reconciliation of the parties, who thereafter lived together as man and wife and so held themselves out to the general public believing that it was unnecessary to remarry, annul the separation decree and set aside their agreement wherein she relinquished her dower in his estate? The court held that it did not. However, they further stated, "this does not mean they could not mutually rescind their property settlement incorporated in the divorce judgment." Thus, the court sent the case back to determine the question of rescission.

The court was undoubtedly sound in holding that the parties could not by mere reconciliation and subsequently living together as man and wife abrogate the decree of limited divorce. The Kentucky Statutes permit the granting of a divorce from bed and board for any

[19] C.T.C. Investment Co. v. Daniel Boone Coal Corporation, 58 F. 2d 305 (E.D. Ky. 1931).

[1] 245 S.W. 2d 430 (Ky. 1952).

cause that the court in its discretion considers sufficient.[2] They also make provision regarding the legal effect of such divorces on subsequently acquired property.[3] Further and most important, they provide that the judgment "may be revised or set aside at anytime by the court rendering it."[4] The Kentucky Civil Code of Practice also has a section governing the procedure for setting aside such divorces.[5] In the light of these statutes and code provisions the Court said:

> "These statutes provide upon what grounds a divorce from bed and board may be obtained, how it differs from an absolute divorce and the procedure to be followed in annuling the judgment in each form of action. In this jurisdiction marriage and divorce are purely statutory and common law marriage is not recognized. The statutes just referred to are conclusive on the question of annuling the divorce."[6]

While the Kentucky Court in its opinion recognized several foreign decisions holding that a divorce from bed and board is not a final proceeding and that a reconciliation may put an end to the judgment,[7] it felt that the interest of the public and the state in marital and domestic relations is of sufficient importance to warrant the necessity of a court order as a prerequisite to any legal change in such a relation. As the court said:

> ". . . the state is concerned with marriage and divorce, whether it be an absolute divorce or a divorce from bed and board, and the Legislature having provided how the judgment in each character of divorce may be annulled, the couple desiring an annulment must pursue the course prescribed in the statutes."[8]

Assuming that the court in holding that the parties could "mutually rescind" their property settlement were referring to a rescission by mere mutual expressions of consent, the soundness of the holding may very well be questioned. By the property settlement the wife had "accepted $2,000 from Charles in full settlement of her distributive right in his estate." It may well be asked: Could such an agreement be rescinded?

That the widow's right of dower is an individual interest which vests at the time of the marriage or as to subsequently acquired prop-

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[2] KY. REV. STAT. 403.050 (1948).
[3] *Ibid.*
[4] *Ibid.*
[5] KY. CODE CIV. PRAC. ANN. sec. 427 (Carroll 1948).
[6] 245 S.W. 2d 430, 432 (Ky. 1952).
[7] Pettis v. Pettis, 91 Conn. 608, 101 Atl. 13 (1917); Stuart, State ex rel. v. Ellis, 50 La. Ann. 559, 23 So. 445 (1898); People ex rel. Commissioners v. Cullen, 153 N. Y. 629, 47 N.E. 894 (1897).
[8] 245 S.W. 2d 430, 433 (Ky. 1952); that the state is an interested party see discussions 27 C.J.S. 528 (1941); 17 AM. JUR. 155 (1938); MADDEN, DOMESTIC RELATIONS 263 (1931).

erty at the time of acquisition by the husband and is a "vested interest" which can be released or extinguished by her by a lawful agreement has long been settled.[9] Although such agreements are carefully scrutinized by the courts as to fairness and freedom from coercion, if they meet these requirements they become subject to the general law applicable to contracts.[10]

Thus, the question becomes: Can an agreement to accept a valuable and fair consideration in return for which one waives his distributive right in another's estate be rescinded by the mutual assent of the parties after it has been completely performed by one party?

Unless the consideration given for the waiver of the interest is returned or some other consideration is given by the party seeking to establish a mutual rescission, such a rescission would be unenforceable. It is a well established doctrine that where rescission of a contract is sought, the plaintiff must restore the defendant to the position he occupied before the contract was made.[11]

It is also well established that a unilateral contract, or a bilateral contract which has become unilateral by complete performance on one side, cannot be discharged by a rescission that consists merely of mutual expressions of assent to rescind.[12] This is based on the reason that only one of the parties has any right under the contract and the other has only a burden thereunder. Thus one of the parties has everything to gain and nothing to lose, while the other has everything to lose and nothing to gain.[13] One of the parties has given no consideration and the attempted rescission by mutual assent is unenforceable. Therefore it is urged that, unless the widow in the *Cecil* case returned the $2,000 she received under the property settlement or gave some other good and valuable consideration to support the attempted mutual rescission, such rescission would be unenforceable and she would have no claim whatsoever against the deceased's estate.

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[9] Wigginton v. Leech's Adm'x., 285 Ky. 787, 149 S.W. 2d 531 (1941); Rogers v. Isaacs, 6 Ky. Opn. 518 (1872); Winter-Smith v. Goodwin, 4 Ky. Opn. 67 (1870).

[10] Rosh v. Bogart, 226 Ala. 284, 146 So. 814 (1933); Appeal of Carter, 59 Conn. 576, 22 Atl. 320 (1890); Johnson's Adm'r v. Johnson, 231 Ky. 740, 22 S.W. 2d 124 (1929); Loud v. Loud, 67 Ky. 453 (1868); Pippin v. Sams, 174 S. C. 444, 177 S.E. 659 (1934).

[11] C. C. Leonard Lumber Co. v. Reed, 314 Ky. 703, 236 S.W. 2d 961 (1951); Davis v. Motor Car Finance Co., 274 Ky. 547, 119 S.W. 2d 881 (1938); Black Motor Co. v. Green, 258 Ky. 72, 79 S.W. 2d 409 (1935); Johnson v. Baker, 246 Ky. 604, 55 S.W. 2d 404 (1933).

[12] CORBIN, CONTRACTS 990 (1952); WILLISTON, CONTRACTS 882 (Stud. ed. 1938); RESTATEMENT, CONTRACTS sec. 406 comment (c) (1933); 17 C.J.S. 921 (1939); 12 AM. JUR. 1031 (1938).

[13] CORBIN, CONTRACTS 990 (1952).