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Robert B. Harwood
University of Alabama

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ALIMONY AFTER A DEGREE OF DIVORCE RENDERED ON CONSTRUCTIVE SERVICE

By Robert B. Harwood*

With the spectacle of several states competing for 'divorce business', and its accompanying flow of outside gold, the question of alimony after a decree of divorce rendered on constructive service assumes a prominence greater than at any time since the birth of *ex parte* divorces in American jurisprudence a few years more than a century ago.

In England, prior to 1858, jurisdiction over matrimonial causes was in the Ecclesiastical Courts, and divorces *a mensa et thoro* only were granted by these courts. In proceedings for divorce in the Ecclesiastical Courts, by Canon Law, and later by statute, no person could be cited out of his own diocese, so *ex parte* divorces were impossible. The only question dealt with by these courts analogous to alimony was in providing support for the wife living separate and apart from the husband by judicial decree.

The Ecclesiastical Courts were deprived of their jurisdiction over marital causes by the Act of August 28th, 1857 (20 and 21 Vict. C. 28), said act becoming operative in 1858. The jurisdiction of the Ecclesiastical Courts over marital causes, with the additional power of granting divorces *a vinculo matrimoni* was conferred on a court created by the Act, commonly called the Divorce Court.

Prior to that date (1858), complete severance of the marital tie could be obtained in England only by a special act of Parliament, or what is commonly called a legislative divorce, and alimony was never granted with such divorces. Then too, such

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*Associate Professor of Law, University of Alabama; A. B. 1922; LL. B. 1926, University of Alabama; LL. M. 1932, Harvard University; Assistant U. S. Attorney, Northern District of Alabama, 1933-35.
procedure was hedged with limitations and difficulties, making relief from this source impossible for most people.¹ Today, in England, not only is the Divorce Court clothed with power to grant divorces a vinculo, with alimony, but under circumstances to grant divorces in ex parte proceedings.² However, for the purposes of this paper, the situation in England concerning the granting of divorces and alimony will be of interest only in the period prior to the creation of courts of equity in this country, and the conferring upon these courts, by statute, jurisdiction over marital causes. For although new provisions were incorporated in these early statutes as to the powers of the newly created equity courts over marital causes, giving them power to decree divorces a vinculo, and to award alimony, these statutes were nevertheless construed in connection with the law upon the subject brought to this country from England, e. g. the law of the Ecclesiastical Courts.

Since alimony accompanying a divorce a vinculo was unknown in England at the time of the creation of the Equity Courts in this country, the statutes in the American states conferring power on these courts to grant divorces a vinculo, and to award alimony, created a situation incompatible with the English law upon the subject, and it was in attempting to interpret these statutes by the standards of the English law upon the subject at that time that created for the courts in this country their greatest difficulty.

Our courts were not burdened with the technical objections to granting ex parte divorces that faced the Ecclesiastical Courts, and the Common Law contained principles by which such a remedy could be worked out, so there fell to our courts the task of formulating and applying these principles.³ From Bishop⁴ we gather that the first ex parte divorce granted in the

¹"And there was no divorce court in 1800. At the commencement of the century, the marriage bond could be severed by nothing less than an act of Parliament. That is still, I believe, the law of Ireland, which is still without a divorce court. And before asking for an act of Parliament, the injured husband was required, first, to sue the adulterer at law and obtain a verdict against him for damages, and then to take proceedings in an ecclesiastical court for a decree of divorce a mensa et thoro. When he had succeeded in these two courts, he might commence his application to Parliament. In other words only a very wealthy man could obtain a divorce in England in 1800." Pound—"Readings on the History of the Common Law", p. 147.
²Matrimonial Causes Rules 1924, Rule 9.
⁴Ibid., Sec. 145.
United States was in 1832, in the Maine case of *Harding* vs. *Alden*, wherein the court granted the divorce even though the service attempted to be made on the husband in North Carolina was defective. The law concerning *ex parte* divorces developed meagrely for twenty years after the Maine decision, until the Supreme Court of Rhode Island threw a great light on the question in that splendid opinion written in the case of *Ditson* vs. *Ditson*. The Ditson case apparently furnished the necessary ferment, and the doctrine of *ex parte* divorces expanded rapidly in this country, and cases involving petitions for alimony after the rendition of such decrees began to appear in the reports.

The decisions have been far less uniform than their somewhat limited number would have indicated, due apparently to a lack of a thorough understanding of the history of the law of divorce and alimony, and also to a decided tendency of the courts to use one of classical jurisprudential approaches solely, to the exclusion of the other methods of approach.

The cases fall entirely too neatly into one or the other of the groups recognized by the student of jurisprudence, depending on whether the judge deciding the case belonged to the historical, analytical, or philosophical school. These divisions are strikingly illustrated by the cases bearing on the problem under discussion, and there are a few recent cases indicating that the courts may adopt the developing sociological approach to this question, which approach, because of its individualization of each case, should prove most effective in handling a question of this sort.

The question as to whether the wife may obtain alimony in a subsequent proceeding instituted after an *ex parte* divorce seems to fall naturally into four divisions:

1. *Where the wife obtains the divorce, and alimony is awarded in a later proceeding.*

The cases coming within this group show very markedly that a metaphysical criteria of justice to the wife, that is, of giving to the wife what the court thought in justice she should have, was the determining factor of the decisions. The historical background of divorce and alimony, and a strict analysis of the

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*29 Greenl. 140.*
*4 R. I. 87.*
statute conferring jurisdiction over marital causes in the court takes second place to equity and intuition.

An outstanding case falling within this group, and one that is often referred to in decisions subsequent to its rendition, is Spradling vs. Spradling,\textsuperscript{7} an Oklahoma case decided in 1919. In this case the wife had obtained an \textit{ex parte} divorce in Kentucky, suing later for alimony in Oklahoma, where the husband had then established his domicile. In allowing the wife alimony the court said: "The very gist of the present action is the enforcement of the natural and legal duty of a man to support his former wife and children of his marriage although the marital tie has been severed for his fault in a former action in which the performance of such duty could not be compelled."

A large number of cases are cited and commented upon by the court in the course of the opinion, though an examination of some of these cases, Turner vs. Turner,\textsuperscript{8} Adams vs. Abbott,\textsuperscript{9} Rogers vs. Rogers,\textsuperscript{10} and Wright vs. Wright,\textsuperscript{11} will prove disappointing, for there is little in these cases that offers much aid in assisting a court to arrive at a correct solution of the problem that confronted the court in the Spradling case, so while one might agree with the solution reached, the treatment of the material and technique of its application is disappointing.

Under similar facts, and writing to the same point, the Utah Court, in Hulton vs. Dodge,\textsuperscript{12} said, "It would be a travesty on justice and a sad commentary upon the power of judicial tribunals generally if the courts were powerless to grant relief in a case of this kind, where the jurisdiction of the defendant is

\begin{itemize}
\item \textsuperscript{7} 74 Okla. 276.
\item \textsuperscript{8} In the Turner case, 44 Ala. 437, the court merely retained jurisdiction first acquired, although another state subsequently acquiring jurisdiction awarded a decree before the Alabama court heard the case.
\item \textsuperscript{9} 21 Wash. 29. Careful reading of this case shows that alimony was refused in the lower court, and that the lower court's decision was affirmed. The higher court, in its opinion, used misleading language which read alone would lead one to believe that alimony was allowed.
\item \textsuperscript{10} 54 Ky. 364. The question involved in this case was the recognition of a foreign judgment for alimony awarded improperly in an Ohio court, after a divorce obtained in Kentucky, at which the wife was present and contested the suit.
\item \textsuperscript{11} 24 Mich. 180. In this case a statute affecting the question was the deciding factor, whereas no such statute was present in the Spradling case.
\item \textsuperscript{12} 58 Utah 228.
\end{itemize}
afterwards seasonably obtained and the rights of third parties have not intervened.'"

The method of the Utah court in its handling of this question in Hulton vs. Dodge\(^{13}\) is certainly the more satisfactory. After dismissing the attempted reservation of the question of alimony as being beyond the power of the court awarding the decree on constructive service only, the court decided the question entirely on its own moral merits, and did not attempt to strengthen its decision by a lengthy review of authorities of doubtful application, yet arrived at the same conclusion reached by the Oklahoma court in the Spradling case.

The courts in some instances have allowed their chivalrous instincts to carry them to great lengths in their efforts to see that the *quondam* wife is the recipient of what their conception of justice and equity demands that she obtain, and which she was prevented from receiving in the proceeding wherein the decree of divorce was granted, due to the operation of the Due Process clause of the Constitution and the necessity of constructive service in that proceeding.

The most extravagant example of this type of quasi charity is to be seen in two Illinois cases Karcher vs. Karcher,\(^{14}\) and Darnell vs. Darnell.\(^{15}\) The Illinois courts will not allow alimony subsequent to a decree of divorce, unless the right to award alimony later is specifically reserved in the decree granting the divorce.\(^{16}\) In the Karcher case it was held that this reservation could be made even in cases where service of process was constructive, and the court admittedly had no jurisdiction to award alimony, and further, that the court would award alimony to the wife upon obtaining jurisdiction of the husband, if such reservation had been made. However this decision seems mild when compared with the Darnell case, supra, for at least in the Karcher case the reservation made use of had been made by an Illinois court, whereas in the Darnell case the court made use of a reservation to award alimony contained in the *ex parte* decree rendered by a court of another state on which to base its right to entertain the wife's petition for al-

\(^{13}\) Note 12, *supra*.
\(^{14}\) 204 Ill. 210.
\(^{15}\) 212 Ill. App. 601.
\(^{16}\) Lennahand vs. O'Keefe, 107 Ill. 620.
Unblushingly, the Illinois court allowed the wife to obtain alimony in the *Darnell* case, supra, after she had located her husband in Chicago, saying: "Since the Minnesota court had no power to award alimony, and since the question was expressly reserved to the courts of this State, or for any court obtaining jurisdiction of the question, the question of alimony was in no way determined. . . . We think that the fact that the decree was entered in Minnesota should make no difference."

To say the least, it would have made entertaining reading had the court gone further and attempted to explain just why it made no difference that the decree had been entered in Minnesota.

The fallacy of the above reasoning is at once apparent, but it is so clearly and succinctly put by an Iowa court, speaking in a case in which the facts were practically on all fours with the facts in the *Darnell* case, that I will simply quote an excerpt from that opinion. The Iowa court said:18 "So in the case at bar, the court was without jurisdiction to make any award on the subject of alimony in the original proceeding, and no jurisdiction, by attachment or otherwise, of any property of the appellant. It could make no valid order respecting alimony. The cause proceeded to final decree. Such decree, when so entered, was binding on both parties. If the court had no jurisdiction in the original proceeding to make any binding award of alimony, it necessarily and logically must follow that the court had no jurisdiction in rendering the final decree in said cause to make any order respecting the subject of alimony, by continuance of said cause as to said subject matter, or reservation of the question. It could not reserve jurisdiction of a question of which it did not have jurisdiction."

In fairness it should be said that the Illinois courts are particular in requiring that it be clear that a reservation to award alimony at a later date was actually made by the court rendering the decree, for in one case the court refused to per-

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17 In the *Darnell* case, supra note 15, the wife had obtained a decree for divorce in Minnesota, constructive service being obtained on the husband, who at the time was confined in Leavenworth Prison, in Kansas. The Minnesota court awarded the wife a divorce, and custody of the child of the marriage. The decree further averred that no alimony was awarded, but the question was specifically reserved for the circuit court of Cook County, Illinois, or such other court as should have jurisdiction.

18 *Doeksen v. Doeksen* (Iowa), 210 N. W. 545.
mit an attempted award of alimony, in a proceeding where the service of process was constructive, to suffice as a reservation of the question of alimony at a later date.\textsuperscript{10}

It has been held that the fact that the wife accepted alimony out of property situated in the state granting the divorce on constructive service, will not estop her from a later proceeding in the domicile of the husband for additional alimony, where it clearly appears that in the divorce proceedings the court did not have jurisdiction to take cognizance of real estate then owned by the husband in other jurisdictions, and could not, without consent of the parties, consider the same in fixing the amount of alimony.\textsuperscript{20} It appears to this writer that this decision is correct, for if a jurisdiction is going to allow the former wife to recover alimony in a later proceeding, there is no reason at hand to prevent that jurisdiction, under the above facts, from augmenting the amount of alimony the wife was able to obtain, where her ability in the jurisdiction awarding the decree was limited to the amount of the property of the respondent's then actually in the state.

2. \textit{Where the wife obtains the divorce, and alimony is refused in a later proceeding.}

   Historically, and probably analytically, the cases refusing the wife alimony, after she has been the one to obtain the divorce, are more accurate than the philosophical, metaphysically inclined, cases that allow the wife to obtain alimony under such circumstances.

   The greatest fault to be found with this group of cases is that they are too prone to look at form, to the exclusion of substance. This is especially true when the formalism goes to the extent of denying the wife the right to alimony because she "voluntarily" obtained the divorce decree, and should thereby, and for that reason, be estopped from asserting her claim to sustenance at a subsequent time. This is mentioned as a reason for denying alimony in several cases.\textsuperscript{21} The effect is to penalize the wife for exercising a right which in many cases she has no other choice than to exercise, as a practical matter. It is prob-

\textsuperscript{10} Kelley v. Kelley, 233 Ill. App. 203.
\textsuperscript{20} Bodle v. Bates, 95 Nebr. 757.
\textsuperscript{21} McCoy v. McCoy, 191 Iowa 973; Darby v. Darby, 151 Tenn. 287; McFarland v. McFarland, 43 Ore. 978.
ably correct to say that only in the rarest of instances is any divorce proceeding voluntary, or rather the voluntary act of the party instituting the proceeding. Such an action is in reality the result of the acts of both parties, and can be said to be the voluntary act of the complainant only to the extent that the proceedings were instituted by him or her. Certainly where the wife has been abandoned, or abused to the extent of giving her a just cause for divorce, it is unfair to her to say that she "voluntarily" obtained the divorce, and for this reason should be denied a claim for maintenance due to her from the husband, who could not be made to perform this duty by the court granting the divorce merely because he was out of its jurisdiction.

The historical, or the analytical approach, or the two in combination, are chiefly used by the courts that refuse the wife alimony where she has been the one to obtain the divorce on constructive service.

In a proceeding in Arkansas under such circumstances, in 1867, the court stated that Arkansas does not recognize the inherent right of a court of chancery to award alimony, and that therefore it must be guided by the terms of the Arkansas statute on divorce, which the court proceeded to construe to mean that alimony could be awarded only at the time of the granting of the divorce. The question of res judicata was not discussed, nor were the historical elements involved in the problem given much attention. The decision was produced largely by a technical analysis of the statute. It so happened in this case that the wife had married a second time, the second husband being dead at the time of the action for alimony. This led the court to remark that if the wife were allowed to obtain alimony from her first husband now, she could have obtained it during her second marriage, which would have brought about the situation of the second husband joining his wife in alimony proceedings against the first husband for her support.

23 If this was said seriously by the court it overlooked the essential basis of alimony, sustenance and support for the wife, and for this of course, the second husband would have been responsible during the life of the second marriage. It would have been easier for the court to have invoked the doctrine of laches in this case, since a long number of years had elapsed between the time of the divorce and the filing of the suit for alimony.
One case within this group attempted to posit the right of the wife to alimony squarely on whether the husband, or the wife, secured the ex parte divorce, allowing it if the husband had been the one to institute the proceeding, and denying it if the wife had. The theory of this case was that where the husband secured the ex parte divorce the proceedings were in fraud of the wife's right of maintenance and support, while refusal under the latter circumstance was because the relation of the husband and wife being dissolved, there was no longer any legal obligation on the part of the husband to provide for his wife's maintenance. Logically, the reasoning in the latter case fits either situation about as well. This case was later overruled, and the wife can now secure alimony in that jurisdiction regardless of whether the ex parte proceedings were instituted by her, or her former husband.

This idea of no legal duty toward the wife after the rendition of the divorce decree has been carried to such an extreme by one court that it refused to allow the wife in her own name, and in behalf of the minor child of the marriage, to obtain an order, or judgment, requiring the former husband to pay alimony to her, in order to support the child whose custody had been awarded her in the divorce decree. The wife was left to an original action to recover of the father of the child, her former husband, the amount of the expenditures made by her after the divorce, for the proper maintenance of the child, whose support was legally due from the father.

The court of one state blandly announced that the wife deprived herself of the right to alimony by obtaining the divorce, which was based on constructive service on the husband, for, if alimony in addition to the decree of divorce was desired she could have brought her suit for divorce against the husband in the state of his residence, and had him served personally with process, and could then have asserted her right to alimony.

This alternative so generously offered the wife is a shallow, and for many practical reasons, a non-existent right. In the first place, the absent spouse must be located, and secondly,

24 Eldred v. Eldred, 62 Nebr. 613.
26 Hall v. Hall, 141 Ga. 361.
27 Darby v. Darby, note 21, supra.
many states have required periods of residence as a condition to obtaining divorces in their tribunals. Granting that these difficulties be met it might still be well nigh impossible, as a practical matter, for the wife to pursue her suit in a foreign and perhaps distant jurisdiction.

The true reason underlying the decisions falling within this group is that the rendition of the divorce decree is *res judicata* of all questions relating to alimony, because of these court's conception of the inseparability of alimony from divorce. Illustrative of this view is the language of the Iowa court in *McCoy vs. McCoy*,28 where, in denying the wife alimony the court said: "Alimony is an incident of the marital relation; it may be allowed as a part of the divorce decree; severance of the marriage by a divorce decree, without alimony, terminates the right to alimony."

3. *Where the husband obtains the divorce, and alimony is granted in a later proceeding.*

The problem with which the court deals in determining whether the *ex parte* divorce of the husband should cut off the right of the wife to claim support from him thereafter is one that immediately arouses an attitude of sympathy toward the former wife that is not as strongly felt in the cases falling within the two groups just discussed, in which groups the wife had been the one to obtain the divorce. Even to the most cynical it must seem unfair to permit the marriage to be destroyed by the husband, in many cases without any actual notice to the wife whatsoever, and then say to her that her right to seek alimony from the husband at a later time had been lost with the destruction of the marriage, even though had she been present alimony might have been granted her.

Although there is a worthy motive for broadly searching for justice in such cases, it has proven troublesome for some courts to work out the problem directly, and a few have taken devious and unusual routes to reach their desired end of enabling the wife to maintain her action. The courts of two states, Michigan29 and Wisconsin,30 have done so by allowing

28 Note 21, supra.
30 Cook v. Cook, 56 Wis. 195.
the wife, after the divorce obtained *ex parte* by the husband in another jurisdiction, to entertain an action for divorce for the purpose of decreeing to her, as incidental thereto, alimony and a share in her husband's property. This is, as well put by one court, killing something already dead, as far as the divorce is concerned, and it is hard to see why these courts did not allow the wife simply to proceed alone for alimony, rather than pursue such a roundabout course to the same end. However, the Michigan case (*Wright vs. Wright*, supra) is really governed by a statute on divorce, which names as one of the grounds of divorce in Michigan, in the discretion of the Chancellor, the fact that the other party had secured a divorce against a resident of Michigan in the courts of some other state. This is still grounds for a divorce in that state.\footnote{If the Michigan courts recognized as valid divorces secured *ex parte* in other jurisdictions, it would appear that about the only effect of the statute referred to above is to allow the wife to secure alimony, in Michigan, after such proceedings by the husband, and a simpler way to have accomplished this would be to have provided for alimony proceedings in such instances. The statute today is found in Comp. Laws of Mich. 1929, Sec. 1728 (6).}

No such statute affected the Wisconsin case however. The court of that state, in *Cook vs. Cook*,\footnote{Note 30, supra.} took the view that, although Wisconsin does not allow an action for alimony, independent of divorce proceedings, still where the wife was a resident of Wisconsin, and the husband secured the divorce in another state by constructive service only, the status of the wife in Wisconsin was still that of a married woman, if the Wisconsin courts so wished to regard it, since each state has the right to regulate the status of its own citizens, although as regards the husband the divorce was to be considered as valid. For the purpose of the present suit the wife would be regarded as a married woman, in order that a divorce and alimony might be granted her.\footnote{It may sometimes be justifiable to use this divided *rem* theory in order to work out certain results that can be reached in no other way, but it seems unsatisfactory because it necessarily leads to the anomalous situation of looking on one of the parties as married, and the other as divorced. Since other methods were at hand for the court to proceed to the same conclusion, it is regrettable that it should have adopted this unsatisfactory method of reaching its end.}

The reasoning in two Minnesota cases,\footnote{Thurston v. Thurston, 58 Minn. 279; Searles v. Searles, 140 Minn. 385.} under similar cir-
cumstances, is more direct. While holding the divorce valid as to both parties, the court allowed the wife alimony, saying that the ex parte divorce being in rem only, is neither res judicata, nor an estoppel, as to the question of alimony, a personal action.

Some other courts, when confronted with the problem of the wife's petition for alimony, after the husband has obtained a divorce based on constructive service, meet the situation by applying the rules of practice laid down in their respective civil codes.35

In contrast to the foregoing cases which employ such varied routes to allow the wife alimony are those which approach the question with the idea of abstract, metaphysical justice as the supreme guiding light. Heading such a group of cases is Cox vs. Cox36 an Ohio case decided in 1869. In this case the husband had divorced the wife in Indiana. The wife, unaware of the husband's divorce, later brought an action in Ohio for divorce and alimony, obtaining personal service on the husband there. The court, in granting her alimony, said: "In arriving at this conclusion we make no distinction between a decree rendered under the circumstances of this case in a foreign, and one rendered in a domestic, tribunal. In either case to give to a decree thus obtained the effect claimed for it, would be to allow it to work a fraud upon the pecuniary rights of the wife. Such a result, in our opinion, is rendered necessary by no prin-

35 Cralle v. Cralle, 79 Va. 182; Honaker v. Honaker, 218 Ky. 212. Here the court said: "Where the wife is before the court by personal service she may not proceed for the first time to obtain alimony after a final judgment in the cause and before which she did not make such application—Campbell v. Campbell, 115 Ky. 656. This does not apply to those cases brought before the court by constructive service only. On the contrary, Sec. 414 of the Kentucky Civil Code of Practice prescribes the method by which such non-resident defendants may re-open a judgment within five years after its rendition, and obtain relief to which his showing may entitle him. This section was applied in Hughes v. Hughes, 162 Ky. 505, to a proceeding by a non-resident wife who had been denied alimony in the prior divorce judgment obtained by the husband."

It is regrettable that the court did not decide this case by another method, for not much light is thrown on the situation of the wife who might not bring her action within the five-year period prescribed by the statute, and too, since the husband secured the ex parte divorce in Kentucky, it is not clear what would have been the position of the wife had she not been the defendant, or had the divorce been secured in some other jurisdiction.

36 19 Ohio State 502.
principle of comity, or public policy—the only grounds on which ex parte decrees of divorce are authorized and supported.” The doctrine set forth in Cox vs. Cox was followed and approved in a later Ohio case, Woods vs. Waddie.\textsuperscript{37}

An even more satisfactory decision is that of Crawford vs. Crawford,\textsuperscript{38} which was decided by the Supreme Court of Mississippi in 1930. In this case, the husband divorced the wife in an ex parte proceeding, the wife at the time being confined in the state insane hospital. Service was had as provided by statute, by serving a copy of process on the superintendent of the hospital. The wife did not appear, nor did she know of the action. A decree of full divorce was granted the husband. Afterward, the wife brought an action for alimony. In allowing the lower court’s award of alimony to stand, the Supreme Court of Mississippi said it was of the opinion that the rule is, that if good cause be shown for not presenting the question of alimony at the time the decree of divorce is taken, then the decree, under such circumstances, is not res judicata as to alimony. To the writer, this appeals more than any other rule as offering the best method of arriving at a true answer to the problem under consideration. Such a rule tends towards an individualizing of these cases, which is the only way in which they should be handled.

Much earlier, in 1843, a Mississippi court had allowed the wife alimony in a proceeding instituted after a decree of divorce rendered against her on constructive service. This was in the case of Shotwell vs. Shotwell.\textsuperscript{39} In that case, Chancellor Scott, after a lengthy discussion of English and American cases states that the powers of the Chancery court were commensurate with those of the Ecclesiastical Courts of England and as it was not only allowable, but customary, for those courts to allow alimony in a subsequent proceeding, the Chancery court should allow a separate action for alimony, subsequent to a decree for divorce obtained at the instance of the wife.\textsuperscript{40}

\textsuperscript{37} 44 Ohio St. 449.
\textsuperscript{38} 130 So. 668.
\textsuperscript{39} Sm. and M. Chancery 51.
\textsuperscript{40} The Chancellor’s analogy of the powers of the Chancery Court to those of the Ecclesiastical Courts of England is not well drawn, since the Ecclesiastical Courts granted only legal separations. Therefore, alimony, in the sense that it is usually used today, that is as support following a full divorce, was unknown. As stated in the first part of
4. Where the husband obtains the divorce, and alimony is refused in a later proceeding.

Cases falling within this group are not numerous, apparently being confined to Georgia, Illinois, and Kansas. Since a statute now controls the situation in Kansas, it can be said that this severe way of handling the wife, divorced by the husband in *ex parte* proceedings, is confined to Georgia and Illinois.

Dean Pound, in ‘Interpretations of Legal History’ says that there was a persistent tendency among lawyers of the 19th Century in England, and in America, influenced by analytical jurisprudence and the dogma of the separation of powers, to insist that the lawyer, and judge, and jurist had nothing to do with ethics; that they were concerned only with a critique of law, drawn from the law itself by an analysis of its content. This attitude is found to be present in the decisions of the courts above mentioned, as they approach the question of whether to allow the wife alimony in a later proceeding, where the *ex parte* divorce has been obtained by the husband. Their refusal to allow alimony under such circumstances can be accounted for in no other way.

The Georgia court’s attitude on this question is in accord with its attitude generally toward all questions arising in connection with any attempt on the part of the wife to obtain alimony, after the rendition of the decree of divorce. At least the Georgia court exercises the virtue of consistency.

However it is more or less of a shock to find Illinois cases in this group, as such treatment of the wife, under the circumstances, seems incongruous with the attitude of the courts of this state toward her in the *Karcher* and *Darnell* cases.41

The Kansas court has performed some juristic acrobatics in handling this question, first holding in 1894 that a divorce, obtained in Colorado by the husband after constructive service only on the wife, barred an action by the wife in Kansas to determine property rights, or alimony.42 However one cannot

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44 Notes 14 and 15, supra.
44 Roe v. Roe, 52 Kan. 724.
help but feel that the court was influenced to some extent by the facts in this case.43

Two years later this question was again before the Kansas court, in Rodgers vs. Rodgers,44 and this time the wife was allowed alimony to the extent of the homestead interest in property in Kansas, despite the fact that the divorce the husband had obtained in West Virginia, ex parte, purported to bar the wife's right to property owned by the husband, the court properly holding that the West Virginia decree, dealing with property in Kansas could have no extraterritorial effect. This holding seems, in effect, to overrule Roe vs. Roe, supra, the earlier case.

Again in 1910 the Kansas court had this question before it, in McCormick vs. McCormick,45 and this time refused the wife alimony, thus reverting to the rule pronounced in Roe vs. Roe. This about face however was the result of a statute by then in the Kansas Code.46

In the Illinois case of Hazzard vs. Hazzard,47 the husband had obtained an ex parte divorce in 1910 on the grounds of desertion. In December, 1918, the wife filed a bill for review, alleging that William Hazzard, the husband had died, making the appellant in this case who was the administrator of William Hazzard's estate the defendant. The court in a short opinion held that where the marriage relation is broken by death, or dissolved by divorce, the wife cannot afterward maintain a suit for alimony. Here again the thought occurs that the court may have been influenced by the facts, for it could be argued that the death of the husband, and the laches of the

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43 These facts are as follows: After a forced wedding in April, 1887, the husband, who was respondent above, left the day following the marriage, going to Colorado. A child was born the following July. The husband obtained an ex parte divorce in Colorado, and the following year he returned to Kansas and married a Miss Perry. Seven years later the first wife commenced her action for alimony.
44 56 Kan. 483.
45 82 Kan. 31.
46 By Chapt. 184 of the Laws of 1907, the Kansas Legislature made the recognition and enforcement of foreign divorce decrees, based on publication service, the same as accorded decrees rendered by the courts of Kansas with respect to all persons, and the status of all persons affected. In McCormick v. McCormick, note 45, supra, a decree rendered in Missouri, ex parte, was held to be as effectual as though founded on personal service, and right to alimony was thereby barred.
petitioner, in addition to the severance of the marital tie by divorce, were the deciding factors in the holding.

The decision in this group least beclouded by the facts on which it is rendered is the Georgia case of Joyner vs. Joyner. The wife finding the husband in Georgia after he had obtained a divorce in Kansas based on constructive service, instituted a proceeding for alimony. The Supreme Court of Georgia, apparently without much worry as to the pure morality of its decision, made short shrift of the question by declaring that "alimony will not be allowed to the wife on a separate proceeding, after a total divorce has been granted at the instance of the husband."

It is appropriate here, as a contrast to the Kansas statute requiring that foreign ex parte divorce decrees be placed on the same footing as decrees rendered in a Kansas court, to call attention to the non-statutory rule in Pennsylvania that a decree of divorce obtained in a foreign jurisdiction, upon a respondent upon whom no personal service was had, and to whom no notice was given other than by publication, has not extraterritorial effect in Pennsylvania, and support and maintenance proceedings will be allowed on behalf of the wife upon her finding the allegedly divorced husband within that jurisdiction.

Factors considered in fixing amount of alimony when allowed subsequent to the decree of divorce.

Ordinarily the question as to the amount of alimony to be given, where same is allowed subsequent to a divorce decree, is determined in the same way that the court determines the amount when the question is raised at the time the decree is rendered. However, where the husband acquires additional property subsequent to the decree of divorce the problem presents a new facet.

One line of authorities hold that after acquired property cannot be considered in fixing the amount of alimony in such cases, while an equally respectable group of cases are to the effect that after acquired property may be taken into considera-

48 131 Ga. 217.
49 Schuler v. Schuler, 2 D. C. 552 (Pa.).
50 Van Orsdale v. Van Orsdale, 67 Iowa 35; Cralle v. Cralle, Note 35, supra.
tion by the court in determining the amount of alimony to be awarded.\textsuperscript{51}

**Statutory Regulations**

Other than statutes governing divorce and alimony in general terms, few states have enacted any specific regulations that will furnish the courts much assistance in solving the question under consideration.

A few states have so worded their statutes governing the award of alimony that they can be interpreted in only one way, either as allowing alimony after divorce, or as not allowing it. For instance, the Massachusetts statute on that subject reads as follows: "Upon divorce, or petition at any time after divorce, the superior court may decree alimony to the wife, or a part of her estate in the nature of alimony to her husband."\textsuperscript{52} New Jersey, and Rhode Island also have statutes effecting the allowance of alimony after divorce decrees.

Florida has enacted a provision that alimony is unconnected with divorce.\textsuperscript{53}

Then there is the Michigan statute, the effect of which is to put a resident of Michigan, after a divorce has been obtained in another state by the other spouse, in the same position when seeking alimony, as though the divorce had not been obtained, for the obtaining of this divorce in the other state is a ground for securing a divorce in Michigan by the resident thereof.\textsuperscript{54}

Kansas, as before stated, has provided by statute that a divorce secured in any state in the United States, on constructive service, shall have the same force as though the decree had been rendered in a Kansas court.\textsuperscript{55}

Undoubtedly legislation in this field is beneficial only as it tends to individualize each case. Certainty is not a particularly desired end. For that reason legislation is helpful only in those jurisdictions whose courts have felt their free approach to this question burdened by the doctrines of *res judicata*, the in-separableness of divorce and alimony, etc. No criticism is meant

\textsuperscript{51} Toncray v. Toncray, 123 Tenn. 476; Cox v. Cox, 20 Ohio St. 439; Searles v. Searles, Note 34, supra.

\textsuperscript{52} Massachusetts Gen. Stats. 1921, C. 208, Sec. 34.

\textsuperscript{53} Florida Code, Sec. 3196.

\textsuperscript{54} Comp. Laws of Michigan 1929, Sec. 1278 (6).

\textsuperscript{55} Revised Stats. of Kansas, Sec. 107–1518.
of the decisions in which these concepts are put forward—much is to be said in favor of the correctness of their application—but certainly courts should be freed of such mechanical impediments to a desired end by legislative aid if they have not felt that they could dispose of such obstacles themselves.

CONCLUSION

There is some evidence of the development of the desired rule of individualization to be found in the decisions. The embryonic beginning of such a rule is seen in Eldred vs. Eldred, where in refusing a petition for alimony the Nebraska court, in 1901, distinguished the facts in this case from those in an earlier Nebraska case where alimony had been granted by pointing out that in the earlier case the husband had been the one to obtain the divorce. Thus whether the husband or the wife had been the one to obtain the divorce makes the decision depend, at least to that extent, on the facts. We find this distinction again made in a Tennessee case decided in 1925, and apparently this distinction is still the rule in that jurisdiction.

In 1930, in the case of Crawford vs. Crawford, the supreme court of Mississippi held in effect that while good cause must be shown as to why the claim for alimony was not presented at the time the decree was taken, if such cause can be shown then the petition for alimony will be examined on its merits. Such treatment of the problem practically reaches the stage of individualization, and thus makes for a surer way of arriving at a just decision than does the mechanical application of judicial rules, which sometimes blinded the courts to the abstract justice involved in this question.

56 Note 24, supra.
57 Cochrane v. Cochrane, 42 Nebr. 612.
58 This distinction no longer made in Nebraska. Wife now allowed to obtain alimony after ex parte divorce even though she had been complainant in divorce proceedings. See Bodie v. Bates, 95 Nebr. 757.
59 Darby v. Darby, Note 21, supra.
60 Crawford v. Crawford, 130 So. 688.