

March 1955

Alimony—Rights of Divorced Wife to Payments After Death of Divorced Husband

G. W. S. G.

West Virginia University College of Law

Follow this and additional works at: <https://researchrepository.wvu.edu/wvlr>



Part of the [Family Law Commons](#)

Recommended Citation

G. W. S. G., *Alimony—Rights of Divorced Wife to Payments After Death of Divorced Husband*, 57 W. Va. L. Rev. (1955).

Available at: <https://researchrepository.wvu.edu/wvlr/vol57/iss1/10>

This Case Comment is brought to you for free and open access by the WVU College of Law at The Research Repository @ WVU. It has been accepted for inclusion in West Virginia Law Review by an authorized editor of The Research Repository @ WVU. For more information, please contact researchrepository@mail.wvu.edu.

CASE COMMENTS

ALIMONY—RIGHTS OF DIVORCED WIFE TO PAYMENTS AFTER DEATH OF DIVORCED HUSBAND.—*P*, divorced wife, filed motion for judgment against executrix of estate of divorced husband to recover payments accruing after husband's death under a decree by which *P* had been granted a divorce *a vinculo matrimonii*. *Held*, on appeal, affirming the action of the circuit court in dismissing the motion, that in the absence of stipulation or contract between the parties to the contrary, such decree did not survive the death of the husband to charge his estate with unmatured payments. *Foster v. Foster*, 77 S.E.2d 471 (Va. 1953).

The statutes controlling the decision in the case were set out in the opinion as VA. CODE §§ 20-107, 108 and 109 (Michie, 1950), whose pertinent provisions are, "Upon decreeing . . . a divorce . . . the court may make such further decree as it shall deem expedient concerning the estate and maintenance of the parties, or either of them, and the care, custody and maintenance of their minor children. The court may, from time to time afterward . . . upon petition of either parent . . . revise and alter such decree concerning the care, custody and maintenance of the children and make a new decree concerning the same . . . Upon petition of either party the court may increase, decrease, or cause to cease any alimony that may thereafter accrue." The quoted provisions are virtually the same as those in W. VA. CODE c. 48, art. 2, § 15 (Michie, 1949).

The decision in the instant case completes a series of four decided in the two jurisdictions construing the respective statutes relating to alimony and minor children support payments accruing after the death of the divorced husband. They have reached a complete anomaly. The Virginia court has reached the conclusion that it has no power under the statute to decree alimony payments to extend beyond the death of the husband, *Foster v. Foster*, *supra*, but does have the power to bind the husband's estate for payments for the support and maintenance of his minor children which become due after his death. *Morris v. Henry*, 193 Va. 631, 70 S.E.2d 417 (1952). The West Virginia court, on the other hand, finds the statute gives it power to require that alimony be paid to the wife throughout her life, *Hale v. Hale*, 108 W. Va. 337, 150 S.E. 748 (1929), but leaves it unable to bind the husband's estate for payments accruing after his death for the support and main-

tenance of his minor children. *Robinson v. Robinson*, 131 W. Va. 160, 50 S.E.2d 455 (1948).

Both jurisdictions agree that a contract between the parties, approved by the court, will survive the husband's death if clearly expressed in such terms. *Moore v. Crutchfield*, 136 Va. 20, 116 S.E. 482 (1923); *Jennings v. First National Bank*, 116 W. Va. 409, 180 S.E. 772 (1935).

In the instant case the Virginia court acknowledges that, in contrast to divorces *a mensa et thoro* which are controlled by common law, divorces *a vinculo matrimonii* are wholly creatures of statute. It expressly finds the Virginia statute not of sufficient breadth to enable a Virginia court of equity to decree payments of alimony to extend beyond the husband's death. The theory upon which it rests its decision is the common law duty of the husband to maintain his wife. When the marriage is dissolved, the statute is held to create a duty of maintenance in substitution for that imposed by the common law which ceases with the termination of the marriage relationship. Since the common law duty does not survive the husband's death, the court, by analogy, refuses to extend the statutory duty beyond that time.

The theory of the West Virginia court, as expressed in the *Hale* case, is that since the wife's right to participate in the husband's estate is cut off by the divorce decree, the court may, in a proper case, give the wife a substituted right of participation by charging the husband's estate for continued alimony payments after his death. The West Virginia statute was held broad enough to permit such a decree.

In *Morris v. Henry*, *supra*, the Virginia court recognized the ending at death of the husband's common law duty to provide for his minor children but pointed out that the needs of the minor children do not end with the father's death. That where the family relations remain intact there may be no great danger of his use of his arbitrary power to disinherit them; but when, through the father's fault, the family has been broken up, and his children become in a sense the wards of the court, this power is taken from him and he may be compelled to give security for their support that will be binding on his estate; citing with approval, *Miller v. Miller*, 64 Me. 484 (1874). A denial of such power to a court of equity would, in some cases, seriously impair its ability to care for infants.

The West Virginia court, in *Robinson v. Robinson*, *supra*, comes to the opposite conclusion by holding that the decree pro-

viding for support of minor children in a divorce suit does not add anything to the father's common law obligation, which ceases at his death, but merely serves to enforce it; that the only right such child has in his father's estate is the right of inheritance. The distinction drawn here is that, while the wife's rights in the husband's estate are cut off by the divorce, the children remain their father's heirs.

It is to be noted that the statutes of both states apply the same terms alike to both alimony and child support decrees.

The right to receive and the duty to pay alimony are personal and generally considered to terminate on the death of either party, where no statute to the contrary exists and the decree is silent on the subject. Many cases hold that courts generally have the power, under statutes, to provide for the continuance of alimony after the husband's death but, where such power exists, the decree must expressly provide for such continuation. 27 C.J.S. § 240. Alimony payable until the further order of the court does not survive the husband's death. *Lennahan v. O'Keefe*, 107 Ill. 620 (1883). The Illinois court held in the same case that it would take an extraordinary case to justify the postponement of creditors and heirs to the payment of both alimony and dower, currently, during the life of the divorced wife (decree of absolute divorce did not automatically cut off dower in Illinois).

An equity court may decree alimony to be a lien on defendant's land, *Foggin v. Furbee*, 89 W. Va. 170, 109 S.E. 754 (1921), though payable in installments in the future. *Goff v. Goff*, 60 W. Va. 9, 53 S.E. 769 (1906). Decree awarding divorced wife alimony constitutes a lien on divorced husband's realty in West Virginia. *United States v. Spangler*, 94 F. Supp. 301 (S.D. W. Va. 1950). The effect of such a lien is well illustrated in that case. "There is no way of knowing the exact amount owing under such a decree, as in the case of an ordinary judgment ordering the payment of a specified sum. And since the amount of the payments under the decree may be increased or decreased as the court sees fit, the ascertainment of the total even by the use of life expectancy tables is made impossible. Accordingly, such a decree will more frequently than not serve to restrain completely both the transfer and the incumbrance by the husband of his realty, because all those whose rights in the husband's land are acquired subsequently in time to the entry of the decree, having either actual or constructive notice thereof, are faced with the peril of having their entire equity therein taken from them by the enforcement of that lien against

the land. . . . And there is no clear authority that such a lien may be discharged by either payment of a fixed sum or transfer of specific property." *Id.* at 303.

Owing to the recency of both the *Foster* and *Morris* cases, the question would appear settled in Virginia. However, the West Virginia cases present a greater uncertainty.

Martin v. Martin, 33 W. Va. 695, 11 S.E. 12 (1890), held erroneous a decree granting a wife alimony for her life. The *Hale* case, in arriving at a contrary holding, made no mention of this earlier case. *Games v. Games*, 111 W. Va. 327, 161 S.E. 560 (1931), held alimony not to be an estate, nor a portion of the husband's estate to be assigned to the wife; but merely an allowance out of his estate. A final decree for future alimony is not a vested property right. *Eaton v. Davis*, 176 Va. 330, 10 S.E.2d 893 (1940). The word "alimony" comes from the Latin "alimonia," meaning sustenance, and means therefore, the sustenance or support of the wife by her divorced husband and stems from the common-law right of the wife to support by her husband. *Ibid.*

The holding in the *Hale* case, decided in 1929, that alimony decreed to a wife for life is payable out of the husband's estate after his death, has been rendered doubtful by this language used in the more recent *Robinson* case: "but in view of our more recent decisions on the question, we doubt whether the rule laid down in the *Goff* and *Hale* cases should be applied as the settled law of this State, in respect to allowing liens to accrue after the death of a decedent against whom a decree for the payment of money in installments has been entered." 131 W. Va. at 171, 50 S.E.2d at 461.

"To sum up the whole matter, we are of the opinion that a decree in a divorce suit against a father, for the payment of money for the support of his children, becomes ineffective on his death; and that in the ordinary case, the same rule should apply to an alimony decree to a wife, though conceding that under the rule of *Hale v. Hale*, *supra*, situations may arise under which the Court would be warranted in decreeing alimony for the life of the wife." *Id.* at 173. 50 S.E.2d at 462. (Italics supplied.)

G. W. S. G.

AUTOMOBILE REGISTRATION—OWNER OF AUTOMOBILE LEASED FOR COMPENSATION WITHOUT A DRIVER ENTITLED TO CLASS "A" REGISTRATION AND LICENSE PLATES.—Original mandamus proceeding by automobile lessors against Commissioner of Motor Vehicles to compel issuance of class "A" automobile registration and license