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Attachment and Garnishment--Divorce Action--Suit Money and Temporary Alimony

J. E. C.
West Virginia University College of Law

ATTACHMENT AND GARNISHMENT — DIVORCE ACTION — SUIT MONEY AND TEMPORARY ALIMONY. — The respondent in a divorce action sought by prohibition to prevent a judge from enforcing an attachment pending in his court. Respondent was sued for a divorce in West Virginia, and being a nonresident, service was had by publication. Later complainant filed an affidavit for attachment on the ground that respondent was a nonresident, and asserted that she was entitled to suit money and temporary alimony. The Chesapeake and Ohio Railroad Company, respondent's employer in Virginia, was suggested on the attachment and answered that it owed respondent wages, whereupon the railroad was ordered by the court to pay the amount due to the clerk of the court who thereafter paid it to complainant's attorney. Writ of prohibition awarded. *Held,* that attachment being a harsh remedy, purely statutory, and hence to be strictly construed, our attachment statute covering any claim or debt arising out of contract, or damages for any wrong, would not be construed to include a claim for suit money and temporary alimony. *De Lung v. Baer.*[1]

There are very few cases on this problem of permitting an attachment in a divorce action before there has been a decree. The majority of these cases permit such an attachment, but it should be noted that they were decided under statutes expressly permitting attachment in a divorce action.[2] In only one case was an attachment of this kind permitted without express statutory authorization.[3] But a number of cases hold that the wife's inchoate right to alimony makes her a creditor of the husband, so that under a statute against fraudulent conveyances, she might have her husband's attempted conveyance of realty to avoid payment of ali-

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[1] 189 S. E. 94 (W. Va. 1936).

[2] Daniels v. Morris, 54 Iowa 369, 6 N. W. 532 (1880); Smith v. Smith, 61 Iowa 138, 15 N. W. 867 (1883); Sebree v. Sebree, 30 Ky. L. Rep. 670, 99 S. W. 282 (1907); Cecil v. Cecil, 200 Ky. 453, 255 S. W. 64 (1923); Smith v. Smith, 120 Me. 379, 115 Atl. 87 (1921); Burrows v. Purple, 107 Mass. 428, 434 (1871); Hill v. Hill, 196 Mass. 509, 82 N. E. 690 (1907); Poleti v. Poleti, 75 N. H. 607, 76 Atl. 191 (1910).

[3] Forrester v. Forrester, 155 Ga. 722, 118 S. E. 373 (1923). In this case the Georgia court said that equity had jurisdiction to attach independently of statute; but the West Virginia court has decided that attachment is purely statutory in this state, as shown by the cases of Delaplain & Co. v. Armstrong & Ulrich, 21 W. Va. 211 (1882); Cosner's Adm'r v. Smith, 36 W. Va. 788, 15 S. E. 977 (1892); Home Distilling Co. v. Himmel, 74 W. Va. 756, 82 S. E. 1094 (1914); Lamb v. Kelley, 97 W. Va. 409, 416, 125 S. E. 102 (1924).

mony set aside.[4] And there are cases permitting the enforcement of an allowance of alimony from the property of an absent defendant, seized at the commencement of the divorce action by attachment or similar process.[5] This implies that the wife's right of alimony is regarded in some states as a definite equitable claim against the real or personal property of the nonresident defendant. Thus it seems that the West Virginia Supreme Court might have reached an opposite result under our statute and have found that the wife's claim for alimony and suit money was such an equitable claim as was contemplated by our statute of attachment.

On the other hand, it has been decided that even after the decree for alimony has been made, attachment would not lie, for it was regarded as not being a "debt" under the attachment statute, since there might be imprisonment for failure to pay alimony, and if this were regarded as a "debt", it would be imprisonment for debt in violation of the law of the state.[6] In the principal case there had been no personal service on the respondent, and it has been held on numerous occasions that decrees for suit money and alimony are personal decrees, enforceable only where there has been personal service.[7] In West Virginia a decree for alimony and suit money has been considered not a debt, in order that there might be no violation of the provision against imprisonment for debt, when a person is attached for contempt for failure to pay the amount decreed.[8]

The courts have recognized that the marital relation gives rise to higher obligations than those arising from contract and tort, and one of these obligations is the duty of the husband to support the wife. The right of the wife to suit money to prosecute her divorce action has also become almost a matter of right. Therefore it would seem that the wife should be entitled to attach the property of a nonresident respondent to protect these rights. But under the West Virginia attachment statute as construed in this

[4] Livermore v. Boutelle, 77 Mass. 217, 220 (1858); Thurston v. Thurston, 58 Minn. 279, 59 N. W. 1017 (1894); Murray v. Murray, 115 Cal. 226, 274, 47 Pac. 37 (1896); Hinds v. Hinds, 80 Ala. 225, 227 (1885).

[5] Hanscom v. Hanscom, 6 Colo. App. 97, 39 Pac. 885 (1895); Thurston v. Thurston, 58 Minn. 279, 59 N. W. 1017 (1894); Wood v. Price, 79 N. J. Eq. 1, 9, 81 Atl. 1093 (1910) (statutory provision).

[6] Toth v. Toth, 242 Mich. 23, 217 N. W. 913 (1928).

[7] Baylies v. Baylies, 196 App. Div. 677, 188 N. Y. S. 147 (1921); Bridges v. Bridges, 46 R. I. 191, 125 Atl. 281 (1924); Baker v. Baker, 136 Cal. 302, 68 Pac. 971 (1902); Hood v. Hood, 130 Ga. 610, 61 S. E. 471 (1908); Coger v. Coger, 48 W. Va. 135, 35 S. E. 823 (1900).

[8] Smith v. Smith, 81 W. Va. 761, 765, 766, 95 S. E. 199 (1918).

case such a result is impossible. The only solution of this problem seems to be a definite statutory enactment by the legislature, permitting attachment of the property of a nonresident respondent in a divorce action. Such statutes exist in a number of states, a good example being that in Massachusetts,[9] and it is suggested that the West Virginia legislature should enact such a statute.

J. E. C.

CONSTITUTIONAL LAW — BANKRUPTCY — CONSTITUTIONALITY OF THE AMENDED FRAZIER-LEMKE ACT. — Wright, a Virginia farmer, petitioned for relief under the amended Frazier-Lemke Act,[1] providing for a three-year debt moratorium for insolvent farm owners. A mortgagee moved that the case be dismissed on the ground that the Act was unconstitutional in that it effected a deprivation of creditors' property without due process of law. The district court sustained the motion,[2] and the judgment was affirmed by the circuit court of appeals.[3] The Supreme Court granted *certiorari*. *Held*, that the amended Frazier-Lemke Act is constitutional, not being in violation of the Fifth Amendment. Judgment reversed. *Wright v. Vinton Branch of the Mountain Trust Bank of Roanoke, Va.*[4]

The first Frazier-Lemke Act[5] provided that if a farmer were unable to obtain a composition under Section 75 of the Bankruptcy Act,[6] his property should be appraised, and he might, if the creditor consented, purchase the property at the appraised value, agreeing to make deferred payments of the purchase price. If the creditor refused his assent, all proceedings should be stayed for five years, the debtor retaining possession of the property under the supervision of the court, paying a reasonable rental. At the end of five years the debtor might pay into court the appraised value of the property and be discharged. The Supreme Court held this Act unconstitutional in *Louisville Joint Stock Land Bank v.*

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[9] "Upon a libel by a wife for divorce for a cause accruing after marriage, the real and personal property of the husband may be attached to secure suitable support and maintenance to her and to such children as may be committed to her care and custody." Mass. Gen. Laws 1932, c. 208, § 12.

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[1] 49 Stat. 943-955 (1935), 11 U. S. C. A. § 203 (s) (1927).

[2] *In re* Sherman, 12 F. Supp. 297 (1935).

[3] Wright v. Vinton Branch of the Mountain Trust Co. of Roanoke, Va., 85 F. (2d) 973 (C. C. A. 4th, 1936).

[4] 57 S. Ct. 556 (1937).

[5] BANKRUPTCY ACT § 75(s), 48 Stat. 1289 (1934).

[6] 11 U. S. C. A. § 203 (1927).