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Proper Venue of Suit for Alimony Without Divorce - Ouster of Jurisdiction - Amendment - Woodcock v. Woodcock

PROPER VENUE OF SUIT FOR ALIMONY WITHOUT DIVORCE—OUSTER OF JURISDICTION—AMENDMENT—*WOODCOCK V. WOODCOCK*[1]

Plaintiff-appellee-wife resided in Baltimore City. Defendant-appellant-husband resided in Wicomico County. The wife filed a suit against the husband in Baltimore City,

[20] Supra, note 14.
[21] 127 Md. 21.

[1] 169 Md. 40, 179 Atl. 826 (1935).

alleging abandonment and desertion, and asking for alimony without divorce. Later the husband filed a suit against the wife in Wicomico County, alleging abandonment and desertion, and asking for a divorce *a mensa et thoro*. Shortly after this he appeared specially in the wife's suit in Baltimore City and filed a plea denying jurisdiction. Upon this plea the trial court found that the suit for alimony without divorce was improvidently brought in Baltimore City but permitted the plaintiff-wife to amend her bill of complaint to one for divorce *a mensa et thoro*. Upon such an amendment being made the trial court found that jurisdiction existed and thereupon overruled the plea to the jurisdiction and the motion to quash the service. The husband appealed. *Held*: Order reversed and bill of complaint dismissed. Whereas a suit for divorce may be brought either in the county where the husband or the wife resides, a suit for alimony alone may be brought only in the county where the defendant-husband resides under the usual rules and subject to the usual exceptions for suits generally. The husband's filing of the divorce suit in the county where he resided ousted the jurisdiction of the county where the wife resided. An alimony case may not be amended into one for divorce.

This case shows how a wife may be deprived of the tactical advantage of litigating her right to alimony in her own county by choosing one, instead of the other of two types of proceeding which, on the facts of her case, might be brought with equal ease and which would accomplish the same result. For, from a realistic standpoint, there is no essential difference between the granting of alimony without divorce and the granting of a divorce *a mensa*. They are similar in the five main essentials. The spouses are not free to marry others. Their respective rights in each other's property are not affected. Support is awarded the wife if she is entitled to it. The living apart of the spouses is legalized, viz., it is judicially established that the defendant has committed marital misconduct justifying the plaintiff in living separate from him. Further, the decree may be modified or set aside if subsequently occurring circum-

stances call for such action. Thus it is that, given proper territorial jurisdiction, it is immaterial to a wife who wishes to obtain support and legalize her living apart from her husband (without permitting him to remarry or losing her rights in his property) whether she sues for partial divorce or alimony alone without divorce.

However, it is only when the husband has committed cruelty, vicious conduct, or desertion and abandonment, that she may make this choice. If the misconduct on the part of the husband consists of adultery or impotency she must then choose between suing for alimony alone or for an absolute divorce, which latter will permit his re-marriage and deprive her of her dower rights. (The other two grounds set up by the Code[2] are out of the picture, inasmuch as premarital unchastity is a ground only in favor of the husband and the voidness *ab initio* of the marriage would probably preclude alimony anyhow). For the *Stewart* case[3] decided that a divorce *a mensa* could not be obtained on grounds specified to be grounds only for divorce *a vinculo*. Thus the wife whose husband has committed adultery (typically) must sue for alimony alone if she wishes to "tie him up". Substantially, it is the same as divorce *a mensa,* and the *Stewart* case indicated as much. The wife may sue for alimony alone on grounds which are grounds for either type of divorce.[4]

Thus it is that when the spouses reside in different counties in Maryland, the venue of the wife's action is determined by the type of proceeding that she chooses to bring. If she chooses to sue for whichever type of divorce she is entitled to she may elect to sue either in her county or in his[5] and may choose whichever one is tactically the more advantageous. If she prefers to bring the suit for alimony alone, as she must if the ground is adultery and she wishes to "tie up" her husband, then the rule of the *Woodcock* case forces her to bring the suit where her husband resides,

[2] Md. Code, Art. 16, Secs. 38, 39.
[3] Stewart v. Stewart, 105 Md. 297, 66 Atl. 16 (1907).
[4] The two most recent cases to this effect are Staub v. Staub, — Md. —, 183 Atl. 605, 608 (1936) and Cohen v. Cohen, — Md. —, 187 Atl. 104, 107 (1936).
[5] Md. Code, Art. 16, Sec. 37.

tactically disadvantageous though it may be. In the *Woodcock* case the wife could have brought the exactly similar action for divorce *a mensa* in her own county, and could have after the dismissal of her improvident bill for alimony alone, save that the husband's previous filing of his suit for divorce *a mensa* in his county precluded her and forced her to litigate there.

The Court put the rule of venue of alimony suits on the statute[6] which provides generally that a defendant shall not be sued out of his own county until after a summons therein shall have been returned *non est,* or he shall have absconded from justice and be found elsewhere, or where he resides in one county and has business or employment in another. While the Code *article* in question deals with process *at law* yet the specific mention of equity actions in the part of the section cited dealing with residence in one county and business or employment in another would seem to justify the application of it to equitable proceedings such as the alimony suit is. The Court pointed out that the concurrent jurisdiction in *divorce* cases for the court of either the plaintiff's or the defendant's county was of specific statutory origin and did not apply by analogy to alimony cases, the procedure in which antedates divorce and is of separate origin. Thus the venue question in suits for alimony is determined by the general equity procedure while in suits for divorce special provision is set up enabling the suit to be brought, on behalf of either spouse, in the county where either resides. An analogous proviso is found in the adoption statute,[7] which permits the filing of a petition for adoption either where the petitioner or the infant resides.

The next point in the case is the ouster of jurisdiction by the prior bringing of a similar action in a concurrent jurisdiction. The Court held that the filing of the husband's suit for divorce in Wicomico County ousted the only jurisdiction that existed in Baltimore City, that for a suit for divorce and that the wife could not be permitted, by amendment to the improvident alimony suit, to date back her suit

[6] Md. Code, Art. 75, Sec. 157.
[7] Md. Code, Art. 16, Sec. 74.

for divorce so that it would be brought before instead of after the husband's. Had the amendment been held proper, the wife's divorce suit in Baltimore City would by relation back, antedate the husband's in Wicomico and thus would have ousted the jurisdiction of that latter county. The decision in the case was pointed out to be an application of the usual rule that where two courts have concurrent jurisdiction over the same subject matter, that court first obtaining jurisdiction keeps it and the other court is not entitled to interfere.

Analogous provisions for ouster of jurisdiction when one of two or more concurrent jurisdictions entertains a case are to be found in other branches of the law. Thus in the statute[8] governing crimes on the Chesapeake Bay, outside the body of any county, it is provided that the offender may be tried in any county in which he is arrested or is first brought. So it is that with reference to crimes committed near to the county lines, that that one of the counties in question which first assumes jurisdiction by issuing process for the offender shall try the case.[9]

The inference from the *Woodcock* case is that the husband's filing a partial divorce suit in his county ousted the jurisdiction of the wife's county to entertain a similar suit. The further question arises whether one spouse's filing a suit for one type of divorce will oust the jurisdiction of the other county to entertain a suit for the other type of divorce, assuming that the grounds in the later suit allegedly *precede* the time of the filing of the former one. Distinguish *Williams v. Williams*,[10] which decided that the *granting* of a partial divorce in one county would not preclude the defendant therein from divorcing the plaintiff in the other county for *subsequently committed misconduct* (adultery). For that matter, will the wife's filing of an alimony suit in the husband's county preclude him from suing for either type of divorce in her county? Or will his suit for divorce in her county oust the jurisdiction of his county to entertain her alimony suit?

[8] Md. Code, Art. 27, Sec. 543.
[9] Md. Code, Art. 27, Sec. 545.
[10] 156 Md. 10, 142 Atl. 510 (1928).

It is submitted that upon principle the *Woodcock* case should provide the answer to all these questions. Thus it would be that the first proper filing of any one of the three possible types of suit, absolute divorce, partial divorce, or alimony alone, should oust the jurisdiction of the other county to entertain any of them there. All three types of action are predicated on an allegation of misconduct on the part of the defendant and of abstention from such misconduct by the plaintiff.

If competing actions for the separate types of divorce, or for one of these and for alimony are actually brought in the same county, the trial court, no doubt, would compel the cases to be merged. But this cannot be done when the competing actions are brought in different counties and it would seem that the rule of ouster of jurisdiction is then the only solution.

The final point in the case concerned the power to amend the bill for alimony alone to one for divorce *a mensa*. The Court held that a bill for alimony alone could not be amended to one for divorce. As it was too late—jurisdiction being ousted—to bring a new suit for partial divorce, the wife was unable to litigate in Baltimore City. In another case, the wish to amend rather than to dismiss and start anew might be induced by a desire for starting the alimony earlier or because personal service had been originally obtained but would be unlikely in a new suit. While the Court referred to the intervening ouster of jurisdiction in ruling that no amendment could be made yet it may be taken that they would rule similarly whatever the point that made an amendment tactically essential to the plaintiff's case. The Court quoted *Miller's Equity Procedure* to the effect that an amendment cannot be allowed to make a new bill.[11] The Court cited and distinguished the *Wald* case[12] but did not refer to the *Stewart* case.[13]

The *Stewart* case was the one where the wife sought a partial divorce for adultery. This the Court refused on the

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[11] Sec. 186.
[12] Wald v. Wald, 161 Md. 493, 159 Atl. 97 (1932)
[13] Stewart v. Stewart, supra note 3.

ground that a partial divorce could be sought only for the enumerated grounds, which did not include adultery, the latter being a ground for an absolute divorce only. The Court remanded the case, however, with leave to the plaintiff to amend her bill to one for alimony alone without divorce, to which she was entitled on the ground of adultery.

In the *Wald* case a similar statement was made by way of dictum which the court stated in the course of modifying its action granting the wife an absolute divorce when she had asked only for alimony without divorce. The Court said, in the opinion on motion to modify: "Since an early date, the wife, although entitled to a divorce, may, in this jurisdiction, elect to proceed against the husband for alimony only, and thus she has the choice between a suit for divorce with alimony or for alimony without divorce. She may make this choice either when she begins her suit, or during the course of the litigation, or, under proper circumstances, after an adjudication and remand on appeal."[14]

Thus the *Stewart* and *Wald* cases seem to hold that a bill for divorce may be amended to a bill for alimony alone, either by the "amendment" permitted by the *Stewart* case or by the "choice" permitted by the *Wald* case. Is the *Woodcock* case consistent with these in denying the wife permission to amend a bill for alimony into one for divorce? The answer would seem to be that it is. The *Stewart* and *Wald* cases permit the plaintiff to amend by taking out something which was once in the bill. That which is left was in the bill when it was originally filed. The *Woodcock* case forbids the adding of something which was not in the bill when it was filed, viz., a prayer for a divorce. Furthermore the prayer added is granted, if at all, under an entirely different principle of law. Alimony alone without divorce is granted under a principle going back to 1689. Divorce with or without alimony has a different statutory origin and goes back only to the statute of 1841. Alimony is granted under either of these routes, divorce under one. It would seem consistent to permit the subtraction of something by amendment but not to permit the addition of something dependent

[14] 161 Md. 493, 502-3.

on an entirely different jural explanation. Of course, the argument against the *Woodcock* case is that it is equally a departure to permit a bill for divorce to be amended to one for alimony alone because it represents a shift to a type of proceeding of entirely different origin, and that it would be no worse to permit alimony alone to become divorce than to permit divorce to become alimony alone, as is permitted by the *Stewart* and *Wald* cases.

In view of the fact that the original bill in the wife's suit in the *Woodcock* case contained the standard prayer for "general relief" the case must be taken as deciding that the prayer for general relief in an alimony case does not include a prayer for whatever type of divorce the plaintiff's allegations would entitle her to. For if it did, amendment would be unnecessary and the case would be from the start a divorce suit and hence properly brought at the wife's residence. On the other hand, a statement in the *Wald* case intimates that if the wife files a cross-bill to the husband's suit for divorce, and asks only for alimony and general relief, she may be awarded a divorce under this cross-bill: ". . . if either matrimonial offense were established, a decree of absolute divorce with alimony, was within the prayer for general relief."[15] Thus it would seem to be that an original bill for alimony and general relief does not include an implicit prayer for divorce, but a cross-bill to that effect does. But this distinction seems reasonable. In the first place, when the wife's prayer for alimony is by way of cross-bill, the question of the desirability of *divorcing* the parties has been laid before the court by the husband's original bill, while it has not so been presented when the wife seeks alimony alone by an original bill.

Then, too, in the cross-bill situation, the permission to the wife to extend her bill for alimony and general relief to one for divorce without even taking the trouble to amend is plausible, for the reason that the tactical points that make it desirable for a husband to oppose amendment are, by the nature of the situation, missing. Both the husband and the wife are satisfied with the venue, the husband by having

[15] 161 Md. 493, 502.

brought the suit there and the wife by choosing there to file a cross-bill. There is no question of obtaining service upon the husband as he has run the risk of *any* cross-bill by bringing the case in the first place. The alimony has already started and its initial date will be the same in either event. So it is that to permit a substantial "amendment" of a cross-bill through the guise of the prayer for general relief is not inconsistent with refusing an amendment of an original bill to the same end.

And yet the Court's implicit refusal in the *Woodcock* case to allow the prayer for general relief to cover a request for divorce might seem inconsistent with the attitude expressed in *Hill v. Pinder*,[16] to the effect that the prayer for general relief will permit the Court to adapt the relief to the nature of the case and to give any relief consistent with and warranted by the allegations of the bill. Divorce is granted for exactly the same allegations as alimony alone.

The *Woodcock, Stewart* and *Wald* cases were concerned with the power to amend an alimony suit to a divorce one and vice versa. An analogous problem remains—to what extent may an *a mensa* divorce case be amended to an *a vinculo* one and vice versa?

There seems to be no Maryland case squarely deciding anything about whether a partial divorce suit may be amended to an absolute one. Yet decisions on analogous points seem to suggest that the rule is against allowing the amendment.

The *Stewart* case emphasized the essential difference in the two types of divorce. This would seem to indicate that no amendment could be permitted, as an amendment will not be permitted to make a new cause of action.[17]

Then, the implications of the two *Schwab* cases would point the same way. The first such case[18] held that an original bill for partial divorce for cruelty, vicious conduct and abandonment could not be extended by *supplemental bill* to one for absolute divorce for adultery committed after the

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[16] 150 Md. 397, 133 Atl. 134 (1926). This was not a divorce case.
[17] Miller, op. cit. supra note 11.
[18] Schwab v. Schwab, 93 Md. 382, 49 Atl. 331 (1901).

filing of the original bill. The second *Schwab* case[19] held that an original bill for absolute divorce for adultery could not be supplemented by allegations of further adultery after the filing of the bill. By analogy it would seem that neither could amended bills be filed for the same purposes. It would seem that analogies hold between amendments for further facts occurring before the filing of the bill and supplemental bills for those facts occurring thereafter.

The *Woodcock* case itself would seem to apply by analogy to prove that a partial divorce suit may not be amended into an absolute one. If an alimony suit may not be amended to a divorce suit, why should that which is substantially equivalent to an alimony suit—a partial divorce suit—any more be permitted to be amended into a higher type of divorce suit?

And yet the *Woodcock* case might be explained away on its facts on the ground that there was no properly brought suit before the court to be amended. The Court might permit a suit once brought in the proper jurisdiction, i. e., an alimony suit in the husband's county, or a partial divorce suit in either county, to be amended to a divorce, or an absolute divorce case, respectively, on the theory that there was jurisdiction from the beginning.

On the other hand, the matter of amending an absolute suit to a partial one is somewhat of a different problem. If the plaintiff is the wife, she may accomplish the substantial effect of amending to a partial divorce by amending her original suit for absolute divorce to one for alimony alone under the *Stewart* case, or by choosing to take alimony under the *Wald* case.

Then, regardless of which spouse is plaintiff, an implied amendment from absolute divorce to partial divorce is permitted by the statute,[20] which provides that where an absolute divorce is asked and the proof shows grounds for partial divorce the court may grant the latter. In substance this makes any prayer for absolute divorce automatically include a prayer for partial divorce so that not even the

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[19] Schwab v. Schwab, 96 Md. 592, 54 Atl. 653 (1903).
[20] Md. Code, Art. 16, Sec. 39.

formality of an amendment is needed, if the proof subsequently shows that a prayer for partial divorce should have been made instead of or in addition to one for absolute divorce.