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"ALIMONY" FOR THE SUPPORT OF BOTH WIFE AND CHILD

*Cohen v. Cohen*¹

The plaintiff-appellant-wife was awarded an absolute divorce and \$7.50 per week for the "support of herself and the infant child." The husband failed to pay, and the wife sought to enforce payment through contempt proceedings. The husband's contention was that the provision was not in fact alimony, but that part of it must be regarded as a provision for the support of the infant, which provision could not be enforced by imprisonment for contempt.² The Chancellor held that under the terms of the decree the award provided for the support of the infant child, as well as alimony for the wife and could not be enforced by an action for contempt and so dismissed the contempt proceedings. The wife appealed. *Held*: The Chancellor erred in dismissing appellant's petition to have appellee held in contempt of court.

This case is of great significance, in the light of the *Bushman* case,³ in which the court held, in brief, that though provisions for the support of the children and the maintenance of the wife are commonly embraced in the same decree, those for the support of the children are not alimony, and consequently that part of the decree is within the protection of the constitutional inhibition against imprisonment for debt, and obedience thereto cannot be enforced by imprisonment as for contempt of court.

The Constitution of Maryland⁴ provides that "No person shall be imprisoned for debt." The term "debt" as used in this section means an obligation arising otherwise than from a sentence of a court for a breach of the peace or crime.⁵ This would lead one to believe that a decree of a court of equity for "alimony" would be but a debt and hence not enforceable by imprisonment for contempt. The law, however, is otherwise, for it has been repeatedly held in our courts that alimony is not a debt, and payment can

¹ 197 Atl. 564 (Md. 1938).

² Md. Constitution, Art. 3, Sec. 38; Md. Code, Art. 26, Sec. 4; Miller, Equity Procedure, Sec. 244; *Bushman v. Bushman*, 157 Md. 166, 174; 145 Atl. 488 (1929).

³ *Bushman v. Bushman*, *supra* note 2.

⁴ Art. 3, Sec. 4.

⁵ 5 Md. 337, 350 (1854); 120 Md. 553, 564; 87 Atl. 1080 (1913).

be enforced by imprisonment for contempt.⁶ This is also the view held by the text writers.⁷

The Court, in *Dickey v. Dickey*,⁸ expressed itself as follows:

“However, the obligation to pay alimony in a divorce proceeding is not regarded as a debt but a duty growing out of the marital relationship and resting upon a sound public policy, and so this obligation may be enforced by attachment of the person for contempt, and the defendant may be imprisoned unless he can purge himself of the contempt by paying or by showing that he has neither the estate nor the ability to pay.”

A provision by a court of equity for the support of a child is a debt within the meaning of the Constitution.⁹ In addition, the section of the Maryland Code¹⁰ dealing with the enforcement of decrees in equity provides “. . . but where the decree only directs the payment of money, no defendant shall be imprisoned . . .” This latter principle has been upheld by our courts¹¹ and text writers.¹²

The point to be considered now is what constitutes alimony. In the *Bushman* case¹³ it was stated that “Alimony is a periodical allowance for the wife’s support when she is separated or divorced from her husband, and so is in the form of a sum of money to be paid from time to time out of the property or wages of the husband. It continues during the joint lives of the husband and wife, or so long as they live apart.” In the determination of the amount of alimony to be awarded the wife, the court may consider the father’s obligation to support his infant children,¹⁴ but the father’s liability to support children is governed by

⁶ *Feigley v. Feigley*, 7 Md. 537, 563 (1855); *McCurley v. McCurley*, 60 Md. 185, 189 (1883); *Mann v. Mann*, 144 Md. 518, 524; 125 Atl. 74 (1924); *Dickey v. Dickey*, 154 Md. 675, 681, 141 Atl. 387 (1928); *Bushman v. Bushman*, 157 Md. 166, 170; 145 Atl. 488 (1929).

⁷ Schouler, *Marriage and Divorce* (6th ed.) Secs. 1843, 1850, 1851, 1853. 2 *Bishop, Marriage and Divorce*, 2005, Secs. 834, 1096. Miller, *Equity Procedure*, Sec. 244, n. 4.

⁸ *Supra*, note 6.

⁹ Art. 3, Sec. 38; *Bushman v. Bushman*, *supra* note 2, 157 Md. 171.

¹⁰ Art. 16, Sec. 205.

¹¹ *Miller v. Gittings*, 85 Md. 601, 618 (1879); *Keighler v. Ward*, 8 Md. 254 (1855); *Dickey v. Dickey*, *supra* note 6.

¹² Miller, *Equity Procedure*, Secs. 242, 244, 270; Phelps, *Equity Jurisprudence*, Sec. 124.

¹³ *Supra* note 2, 157 Md. 172.

¹⁴ *Ibid.*, 157 Md. 170; *Wygodsky v. Wygodsky*, 134 Md. 344, 106 Atl. 698 (1919); *Hood v. Hood*, 138 Md. 355, 364, 113 Atl. 895 (1921) (as to alimony pendente lite); 2 *Bishop, Marriage, Divorce, and Separation*, 401-407; 2 Schouler, *Marriage and Divorce*, Secs. 1814-1817 inc.

different principles.¹⁵ Although the court may consider the children in determining the amount of alimony, and may impose provisions for support of children in the same decree with the provisions for the maintenance of the wife, the provisions for the support of children are not "alimony" and the husband's refusal to pay money to support children is a refusal to comply with a divorce decree which imposes an obligation in the nature of a debt and obedience to that part of the decree cannot be enforced by imprisonment for contempt of court.¹⁶ The rule therefore is settled, in the cases where a single decree contains *separate* provisions for the wife and for the children. The provision for the wife is alimony and enforceable by imprisonment for contempt. The provision for the children is a debt and within the protection of the constitutional inhibition against imprisonment for debt.¹⁷ The *Bushman* case makes it even more clear that the husband cannot be imprisoned, in the case of an equity decree in a mere custody proceeding,¹⁸ for in this proceeding there can be no provision made for the wife.

The principal case, however, presents still a further problem—what if there is but one provision that purports to provide for both the wife and child. Is such a provision alimony, or does the fact that it extends to the child, prevent it from being such? In *Roberts v. Roberts*,¹⁹ the Court, by way of dictum, and relying in part on *Bushman v. Bushman*²⁰ said: "Although an allowance in that form is frequently made, the better practice is to separate the respective allowances made for the support of the wife and of minor children, for the allowance for the support of the children is not alimony . . ." Yet the Court in the case under discussion,²¹ without any reference to *Roberts v. Roberts* laid down the rule that a provision of "alimony for the support of the wife and child" is alimony and hence is enforceable by imprisonment for contempt. It justified its decision by saying that the decree went no further than to recognize the needs of the wife in fixing the amount of alimony.

While there may be a constitutional barrier to prevent the imprisonment of a father who fails to provide for his

¹⁵ *Bushman v. Bushman*, *supra* note 2, 157 Md. 170.

¹⁶ *Ibid.*, 157 Md. 171.

¹⁷ *Ibid.*

¹⁸ Md. Code, Art. 16, Sec. 80.

¹⁹ 160 Md. 513, 524; 154 Atl. 95 (1931).

²⁰ *Supra* note 2, 157 Md. 170.

²¹ *Supra* note 1.

child under an equity decree, yet this does not mean that the same result cannot be achieved by means of another procedure,²² namely, a criminal prosecution. We have a statute²³ which provides, in brief, that when one, without just cause, deserts or wilfully neglects to provide for the support and maintenance of his wife or minor child, he is guilty of a misdemeanor. After conviction thereunder, instead of imposing punishment the trial court, in its discretion, may pass an order directing the defendant to pay a certain sum weekly for the space of three years to the wife. The defendant is then released from custody on probation, for that period. A separate procedure is set up for Baltimore City,²⁴ whereby the bulk of these cases may be handled by the Domestic Relations Department of the States Attorney's office without the necessity of a court hearing. This criminal punishment, however, cannot be used to aid a wife in enforcing payment of support of children when that support has been granted by an *equity* court in connection with a suit for divorce, or otherwise, because of the constitutional inhibition against imprisonment for debt. If the case is handled in the Domestic Relations Department or in the Criminal Court, it is handled on the basis of a criminal prosecution for non-support. All orders for support passed by either of these agencies are effective from the date of passage and are not made retroactive to include any arrears that may have accumulated under decrees of the equity courts. The case in hand, therefore, has cleared up the confusion which existed as to whether the Domestic Relations Department or the Equity Court was the proper agency to give the wife relief by way of punishing the husband under such a decree.

The principal case does suggest one problem, the answer to which seems in doubt. Granting that one may be punished for contempt for disobeying a single decree providing both for wife and child, and that the better practice is to make separate provisions therefor, may the husband-father, by timely appeal, secure a correction of an actually imposed decree and a splitting apart of the two provisions? Should he thus be permitted to avoid a contempt sentence by paying only the part set aside for the wife? A search of the possibly applicable authorities discloses no answer.

²² For a comparative treatment of the various procedures for obtaining a court order for regular payments of support to a child, see note (1937) 2 Md. L. Rev. 60.

²³ Md. Code, Art. 27, Secs. 87, 88, 89.

²⁴ Md. Code Supp., Art. 27, Secs. 87A-87E.

Perhaps the form of the decree is discretionary with the Chancellor, not to be disturbed on appeal. Perhaps it is best not to permit a defendant to be under a greater sanction for one part of the decree than for the other.

If this be so, then (if the Chancellor be willing to make but a single order) a father can only get the benefit of the *Bushman* case's exemption from contempt sentence when the order for the support of the child is imposed in a mere custody case, or, if in a divorce case, where the wife, either for economic or conduct reasons, is entitled to no alimony at all. So long as fathers who do not support their children may be punished under the alternative criminal method, and so long as husbands may be punished both by this method and for contempt of court, any step which limits the doctrine of the *Bushman* case is to be applauded.