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Award of Alimony Against Non-resident Defendant Having Property Within State - Keen v. Keen

AWARD OF ALIMONY AGAINST NON-RESIDENT DEFENDANT HAVING PROPERTY WITHIN STATE

Keen v. Keen[1]

A recent case, *Keen v. Keen,* has provided us with the first interpretation of the Maryland statute authorizing the award of alimony against a non-resident who is alleged to have property within the state.[2] That this should be the first time during the forty years in which the statute has been in effect, that the Court of Appeals has been called upon to interpret and apply it is somewhat surprising in the light of the voluminous amount of legal controversy that has arisen over the validity and application of similar statutes in other states. As to the validity of the basic principle embodied in such a statute, there is little or no conflict of views throughout the United States; it is in the application thereof that the difficulty and the variance of views arise, due especially to the language of each individual act and the procedure to be followed thereunder.

Mrs. Keen in 1946, seeking a divorce *a mensa* on the ground of desertion, filed her bill of complaint wherein permanent alimony, alimony *pendente lite,* and counsel fee were also prayed. The bill alleged that her husband was now believed to be a non-resident of Maryland; service

[1] 60 A. 2d 200 (Md. 1948).
[2] Md. Code (1939) Art. 16, Sec. 16.

by publication followed. A decree *pro confesso* having been passed, the Circuit Court for Wicomico County subsequently on August 30, 1946, passed a decree divorcing the appellee from the appellant, and ordering him to pay her the sum of $500 a month, plus counsel fees of the appellee. During this period no appearance was filed by or on behalf of the appellant. However, in November of 1946, counsel for the appellant entered what he called a special appearance for the defendant, and on the same day entered an appeal, though it was later dismissed. On June 6, 1947, the appellant filed a petition wherein he asked that the case be reopened and that he be allowed to file an answer, cross-examine witnesses and produce witnesses of his own. The appellant subsequently filed a motion to strike out the decree, contending that he was a non-resident upon whom no personal service had ever been made prior to the time of entering the decree, and that hence he had never been within the jurisdiction of the court. This motion was overruled and on November 19, 1947, the appeal in the instant case was filed.

As was stated in the bill of complaint, the appellant and the appellee were owners as tenants by the entireties of real estate in Wicomico County, most of which was then encumbered by a mortgage. They also owned jointly some War Savings Bonds, and it was further alleged that the appellant, then residing in Delaware, received as a salesman a salary of about $22,000 yearly. No property of the appellant in Maryland was ever brought under the jurisdiction of the Circuit Court by way of attachment, sequestration, or injunction prior to the passage of the decree of divorce with alimony. The issue presented to the Court of Appeals, therefore, was whether Section 16 of Article 16 authorized the entry of such a decree in personam, not specifically restricted to collection from property already under the jurisdiction of the court.

Statutes such as the one involved here are found in the great majority of states, dating back in their modern form, at least eighty years. The public policy embodied in such a law was well stated in the Vermont case of *Wilder v. Wilder*,[3] wherein the Court said, ". . . it does not follow that the jurisdiction of the person of the petitionee in such proceedings is essential to the validity of an order affecting his property found within the territorial jurisdiction of the court, or the power of the court to enforce its orders within such jurisdiction. If this were so, it would

[3] 93 Vt. 105, 106 A. 562 (1919).

be possible for the deserting husband, though possessed of visible property in abundance within the control of the court, to cross the state line, and in security, laugh at the inability of the law to afford relief to the abandoned wife and children. But the courts are not thus powerless to act. Means are available by which they can reach out and lay hands on the recreant husband's property, and appropriate it to the support of the dependent wife and child."[3a]

The rule supported by the weight of authority is that one of the requisites to a valid decree for alimony or maintenance, enforceable against the property which is within the jurisdiction of the court, of a non-resident husband who is served only constructively, and who does not appear, is that there must be something in the suit which makes it in effect a proceeding against the property; in other words, something which will serve to characterize it as a proceeding *in rem* or *quasi in rem,* as by description thereof in the petition and prayer for relief against the same, seizure of the property, injunction, receivership, etc.; that otherwise the decree cannot be enforced against property which the defendant may then have, or which he may thereafter acquire, within the jurisdiction of the court. In its opinion the Court of Appeals drew from a case which constitutes a landmark in the field of Conflict of Laws, *viz., Pennoyer v. Neff,*[4] decided in 1878 by the Supreme Court of the United States. Under an Oregon statute a money judgment had been rendered against a non-resident upon whom the only service of process had been by publication, no appearance having been entered by the defendant. Execution was issued on the judgment, and certain property was sold, although the property previously thereto never had been brought within the jurisdiction of the court. The Supreme Court held the money judgment void, saying, "Substituted service . . . may be sufficient to inform parties of the object of the proceedings taken, where property is once brought under the control of the court by seizure or some equivalent act . . . But where the entire object of the action is to determine the personal rights and obligations of the defendants, that is where the suit is merely *in personam,* constructive service in this form upon a non-resident is ineffectual for any purpose."[4a] Some thirty years ago the constitutionality of such a statute as ours was challenged in the case of *Penn-*

[3a] *Supra,* n. 3, 106 A. 562, 563.
[4] 95 U. S. 714 (1877).
[4a] *Supra,* n. 4, 727.

ington v. Fourth National Bank,[5] an Ohio case which eventually went up to the Supreme Court, the non-resident husband contended that the action of the Ohio court was a violation of due process. After the wife had filed her bill seeking divorce and alimony, the court enjoined the bank, wherein the non-resident husband had an account, from paying out any money to him. Service was by publication only. The Supreme Court, acknowledging that the Fourteenth Amendment to the United States Constitution does not abridge the jurisdiction which a state possesses over property within its borders, regardless of the owner's presence, dismissed as without legal significance the husband's contention that in this type of suit no obligation to pay alimony arose until culmination of the suit, and that therefore the court had no power to enjoin disbursement until liability for alimony had been conclusively adjudicated. The Court said, "The only essentials to the exercise of the State's power are presence of the *res* within its borders, its seizure at the commencement of proceedings, and the opportunity of the owner to be heard. Where these essentials exist, a decree for alimony against an absent defendant will be valid under the same circumstances and to the same extent as if the judgment were on a debt—that is, it will be valid not *in personam,* but as a charge to be satisfied out of the property seized."[6] The Court further held that the injunction which issued against the bank was as effective a seizure as the customary garnishment or taking on trustee process. The manner in which a court lays hands upon the property within the state is regulated by local law, and now that the constitutionality of this type of statute has been established, subsequent decisions—and they are many—have been confined to determining whether or not the steps taken under such laws are in conformity with the procedural due process as outlined in the *Pennington* case.

In 1936 the New York Court of Appeals handed down, in *Geary v. Geary*,[7] a decision which develops with admirable clarity the type of procedural due process that is constitutionally requisite. A resident wife was granted a decree of separation and an order to the non-resident defendant to pay her each month $3000 for her support and the support of her two minor children. After service by publication had been effected, an order of sequestration

[5] 243 U. S. 269 (1917).
[6] *Supra*, n. 5, 272.
[7] 272 N. Y. 390, 6 N. E. 2d 67 (1936).

was later passed, and a receiver appointed to take charge of the defendant's property within New York; the final judgment continued this receiver in control of the property. The defendant contended that because publication was made prior to the order placing his property in the hands of the receiver, the court lacked jurisdiction to subject the property to the payment of alimony, on the theory that possession of specific property constituting a *res* is the foundation of jurisdiction in an action *in rem*. This contention was rejected, however, the Court saying, "A matrimonial action often has a dual aspect. In one aspect it is substantially a proceeding in rem, since its purpose is to alter the matrimonial status of the parties; in the other aspect it is a proceeding in personam since its purpose is to compel a defendant to perform his obligation to furnish his wife and children with support."[7a] And further, "The rule . . . that seizure must precede *assumption of jurisdiction* by the court in the action applies only to the assumption of jurisdiction in the action upon rights in the defendant's property. . . . [No violation of due process occurs] . . . so long as under the New York statute seizure must precede inquiry or adjudication as to the award of alimony, or the application of property of the defendant to the payment of such an award so that the defendant may have the opportunity to be heard upon that inquiry."[7b] It is therefore clear now that to obtain jurisdiction to render such a judgment, it is constitutionally necessary that the property be attached or otherwise proceeded against before rendition of the judgment.

The rule in many jurisdictions seems to be that attachment or actual seizure of the property at the beginning or during the pendency of the suit for alimony or maintenance is not essential to the court's jurisdiction to render a decree therefor, on substituted service against a nonresident who does not appear, provided some other method of proceeding against the property is taken in the case. Thus in many states, among them Wyoming, Arkansas, Illinois, Iowa, Kansas, North Carolina, Ohio and Vermont, where an award against specifically described property has been sought, the proceeding has frequently been regarded as one *in rem* or *quasi in rem*, so as to give the court jurisdiction over the property, even though the nonresident husband has not been personally served.[8] Of

[7a] *Supra*, n. 7, 71.
[7b] *Supra*, n. 7, 72.
[8] 29 A. L. R. 92.

course, even in these states a mere general allegation in the petition of ownership of land within the state will not suffice. Probably one of the reasons which prompt these courts to adopt a less stringent procedure in the matter is the belief that according to the common experience of mankind, the owner of property keeps some oversight of it, wherever situated, and will probably be apprised of the seizure thereof, and so warned of the purpose of the seizure. Thus in the case of *Wesner v. O'Brien,*[9] the Court held that mere particular description of the land in the bill of complaint and in the published notice was sufficient, saying that seizure of land in such a case is little more than a form; that the essential matter is that the defendant shall have legal notice of the proposed appropriation, and that this was afforded by the published notice. From the standpoint of practical remedy, it is said, it would be futile to require seizure of land which cannot be removed from the jurisdiction. However, other states, such as Missouri, Georgia, New York, and now Maryland, too, take the view that mere description of the property and a prayer for awarding alimony therefrom are not sufficient. In many instances, however, this conflict of authority can be directly attributed to the variance among the different statutes.

The *Pennington* case[10] illustrated the use of an injunction as a means of bringing a non-resident's property under the jurisdiction of the court. The taking of the property under control of a receiver appointed for that purpose has been held such seizure as to impress upon the action the character of a proceeding *in rem,* so as to render the property liable for a judgment for alimony, based on constructive service. Thus in the case of *Rhoades v. Rhoades,*[11] a temporary receiver was appointed at the beginning of the action, who took possession of the land in controversy and collected the rents and profits therefrom. The Court held there that this was a sufficient seizure of the property to bring it within the control of the court at the time of the rendition of the judgment. At various times it has been contended that filing the bill of complaint itself operated as a *lis pendens* against the property, but in the present case before the Court of Appeals such a contention was expressly repudiated. The Court relied on *Feigley v. Feigley,*[12] an old Maryland case wherein a divorce and alimony were sought. The Court there said, "The doctrine of *lis*

[9] 56 Kan. 724, 44 P. 1090 (1896).
[10] *Supra,* n. 5.
[11] 78 Neb. 495, 111 N. W. 122 (1907).
[12] 7 Md. 537 (1855).

pendens has no application whatever to this case. *Lis pendens* is a proceeding directly relating to the thing or property in question."[12a] The Virginia Court has taken a similar view in *Bray v. Landergren*,[13] saying that a *lis pendens*, filed in a divorce suit, was not a seizure, but was only a warning to others who might have dealings with the property that their rights would depend upon the judgment in the pending action.

Had counsel for Mr. Keen in the present case not filed an order for an appeal and not filed a petition for reopening the case, Mr. Keen would not have become subject to the jurisdiction of the Wicomico County court. The Court of Appeals unequivocally held that the judgment for alimony was void because, there having been no personal service upon him, no attempt was made, either to limit its application to property within the State, or to limit its application to property which had been previously seized in order to give the court jurisdiction over it. The Court further held, however, that by filing an order for an appeal the defendant had made a general appearance and submitted himself to the lower court's jurisdiction, for as it said, "An appeal from a decree covers all questions which may be involved in that decree, and is not confined to those provisions which the appellant may contend are void."[14] The appellant's fatal error in attempting to file a special appearance in order to take an appeal from the decree proved a costly one, and could have been avoided had a special appearance been made only to move for striking out of the decree, on jurisdictional grounds. Of course, subsequently filing a petition to reopen the case removed all doubt as to whether the appellant had subjected himself to the jurisdiction of the Wicomico court.

Hence, we have at last definite interpretation of Section 16, one that should eliminate most doubt thereon in future application of the statute. As the Court said, ". . . a court has jurisdiction to seize property belonging to a non-resident defendant before a decree is passed, and can then pass its decree directing that such property or its proceeds shall be applied to the payment of alimony."[15] Where, as in the *Keen* case, the property is held by the entireties and a divorce *a mensa* is sought, the proper procedure would seem to be, as the Court said by way of *dicta*, to grant a

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[12a] *Supra*, n. 12, 563.
[13] 161 Va. 699, 172 S. E. 252 (1934).
[14] *Supra*, n. 1, 205.
[15] *Ibid.*

receivership over such property during the pendency of the proceedings for the purpose of collecting the rents and income and eventually applying such proceeds to support the wife. In the case of a bank account, the proper procedure would probably be to employ the injunction as was done in the *Pennington* case.[16] The Court's language seems to make it fairly clear, at least, that merely describing the property specifically in the bill of complaint and in the published summons will not be sufficient to give a court jurisdiction over the property. The position taken by our Court of Appeals in the matter is directly in conformity with that taken by the New York Court of Appeals, and therefore we may well look to past decisions of that Court in seeking more concrete examples of the procedure that is most adaptable to the various factual situations that may arise.

[16] *Supra*, n. 5.