

6-1-1949

Pleading -- Appealability of Decree Allowing Alimony Pendente Lite

Follow this and additional works at: <http://repository.law.miami.edu/umlr>

Recommended Citation

Pleading -- Appealability of Decree Allowing Alimony Pendente Lite, 3 U. Miami L. Rev. 634 (1949)
Available at: <http://repository.law.miami.edu/umlr/vol3/iss4/13>

This Case Noted is brought to you for free and open access by Institutional Repository. It has been accepted for inclusion in University of Miami Law Review by an authorized administrator of Institutional Repository. For more information, please contact library@law.miami.edu.

The Florida statute which governs the creation and priority of liens on automobiles provides that a repairman may acquire a lien prior to all others which accrue thereafter by performing labor on the machine with the consent of the absolute or limited owner.¹³ The statute only requires "limited ownership" in order to create a relationship of privity between the owner and mechanic, thus entitling the latter to a lien for repairs superior to the lien of the conditional vendor.¹⁴ The court in the instant case interprets the term "limited owner" to include a conditional vendee, in accord with the majority view.¹⁵

The holding of the principal case conforms to earlier decisions on similar cases affecting chattel mortgages on automobiles¹⁶ and the priority of liens on real property.¹⁷

The purpose of the conditional sale is to give the buyer immediate use. Yet the only method of obtaining protection that the conditional vendor now has, from the time that the contract of sale is made and the date that it is recorded (four days in his case), is to keep possession of the automobile.

PLEADING—APPEALABILITY OF DECREE ALLOWING ALIMONY PENDENTE LITE

Plaintiff, who was separated from her husband, brought suit in equity for maintenance and for support of the minor children of the marriage. On motion of the plaintiff, the court ordered temporary alimony to be paid by the defendant, pending outcome of the action. Defendant appealed from this order. Plaintiff moved to dismiss the appeal on the ground that the order was interlocutory and therefore non-appealable. *Held*, motion denied. The order for temporary alimony is a final decree from which an appeal will lie. *Hiss v. Hiss*, 64 A.2d 173 (Conn. 1949).

The question of whether an independent review or appeal will lie from an order denying or allowing alimony pending the outcome of an action for divorce, separation, or separate maintenance is one upon which unanimity of decision is absent, although, perhaps, much desired.¹ Here, the court stated

13. FLA. STAT. §§ 85.01, 85.07 (1941).

14. FLA. STAT. § 85.25 (1941).

15. *Chapman v. St. Stephens Church*, 105 Fla. 683, 10 So.2d 324 (1942); *Gutnecht v. Johnson*, 62 Cal. App.2d 315, 144 P.2d 854 (1944); *Universal Credit Co. v. Marks*, 164 Md. 130, 163 Atl. 810 (1933); 15 HUNDY, ENCYCLOPEDIA OF AUTOMOBILE LAW 113 (9th ed. 1931). *Contra*: *Hartford Accident & Indemnity Co. v. Spofford*, 126 Me. 392, 138 Atl. 769 (1927).

16. *Fritz v. Miami Industrial Bank*, 143 Fla. 342, 196 So. 689 (1940) (mortgagee with recorded mortgage has lien prior in dignity to garageman's liens for repairs).

17. *Hub Supply Co. v. Bunedin Real Estate Co.*, 100 Fla. 47, 129 So. 904 (1930) (mortgagee, not having recorded purchase money mortgage until after mechanic without notice completed work, though mechanic's lien was filed subsequent to recording of mortgage, held estopped to claim priority over mechanic's lien).

1. *Kapp v. Kapp*, 31 Nev. 70, 99 Pac. 1077 (1909).

that this decree was final because the rights of some or all of the parties were concluded and that further proceedings after the entry of the order or decree could not affect them.² In effect, the court held that the decree was one arising out of a proceeding which was wholly independent of the main action for separation, in no way determined by it, and complete within itself.³

It has been stated that the husband would have no relief in the final decree if it should appear that he had suffered an injustice in the granting of the temporary alimony, and, therefore, a decree granting alimony pendente lite to the wife should be the subject of an appeal.⁴ Essentially, many jurisdictions regard this order to pay alimony as a money judgment,⁵ which may be appealed as a matter of right.⁶ In an unusual case, one court said that since temporary alimony was ordered to be paid as a condition precedent to a further hearing on the merits of the main action, it must of necessity be appealable.⁷

Although it is in the interest of the state that all questionable features of a divorce, separation, or separate maintenance action be fully investigated through an appeal,⁸ some courts hold the order allowing or denying temporary alimony to be merely an interlocutory⁹ or interim order¹⁰ that may be modified, changed, or vacated at any time before the final decree in the main action is entered by the lower court, and, as such, not subject to an independent appeal.¹¹ These courts remark that since the object of temporary alimony is to provide for the immediate wants of the wife, the allowance of an appeal on such an order with the accompanying delay would, in many cases, leave the wife without funds and force her to accept support at the hands of charity.¹² In these jurisdictions such an order is appealable, if at all, only when the trial court has abused its discretion. As instances of such

2. *E.g.*, *Rutherford v. Rutherford*, 152 Pa. Super. 517, 32 A.2d 921 (1943) (commission for contempt shows the final character of the order); *Greer v. Greer*, 110 Colo. 92, 130 P.2d 1050 (1942); *State ex rel. Taylor v. Superior Court*, 151 Wash. 568, 276 Pac. 866 (1929).

3. *Sharon v. Sharon*, 67 Cal. 185, 7 Pac. 456 (1885) (validity of the order for alimony pendente lite does not depend in any way on the result of the divorce action); *Ahrens v. Ahrens*, 299 Ky. 497, 185 S. W.2d 694 (1945); *State ex rel. Gercke v. Seddon*, 93 Mo. 520, 6 S. W. 342 (1887). *Contra*: *Kapp v. Kapp*, *supra*.

4. *Sharon v. Sharon*, *supra*; *accord*, *Hecht v. Hecht*, 28 Ark. 92 (1872) (recovery of the money paid by the husband would have passed beyond the power of the court); *In re Finkelstein*, 13 Mont. 425, 34 Pac. 847 (1893).

5. *Blake v. Blake*, 80 Ill. 523 (1875); *Brown v. Brown*, 223 Ind. 463, 61 N. E.2d 645 (1845); *Grairer v. Grairer*, 200 La. 775, 8 So.2d 697 (1942).

6. *Grairer v. Grairer*, *supra*.

7. *Schummer v. Schummer*, 61 S. D. 305, 248 N. W. 492 (1933).

8. *Dochelli v. Dochelli*, 125 Conn. 465, 3 A.2d 666 (1939).

9. *Duss v. Duss*, 92 Fla. 1081, 111 So. 382 (1926); *Keester v. Keester*, 125 Ore. 60, 253 Pac. 12 (1927); *Humphrey v. Humphrey*, 98 Utah 596, 102 P.2d 315 (1940).

10. *State ex rel. Blackaby v. Cullison*, 31 Okla. 187, 120 Pac. 660 (1912); *Book v. Book*, 59 Wyo. 423, 141 P.2d 546 (1943).

11. *Colby v. Colby*, 200 La. 321, 7 So.2d 924 (1942); *Gordon v. Gordon*, 91 S. C. 245, 74 S. E. 360 (1912); *accord*, *Miller v. Miller*, 200 La. 43, 20 So.2d 419 (1944).

12. *Duss v. Duss*, 92 Fla. 1081, 111 So. 382 (1926) (alimony is the natural legal duty of the husband to support his wife and children); *State ex rel. Blackaby v. Cullison*, *supra*.

abuse are rare, there is generally no right of appeal.¹³ Since the order can be vacated or modified by the trial court at any time before entry of a final decree in the main action, an immediate appeal is refused,¹⁴ but a few jurisdictions allow an appeal from this interlocutory decree as an incident to the appeal from the final decree;¹⁵ or by other prescribed procedures.¹⁶

The Pennsylvania courts are unique in their treatment of the order for temporary alimony. Where a motion for alimony pendente lite has been granted, an appeal is allowed,¹⁷ but where such motion has been denied, an appeal is not allowed.¹⁸ No clear reason is given by the courts for this distinction.¹⁹

Allowing an appeal in this situation may cause the wife to suffer hardships by the stay of the order pending the outcome of the appeal. On the other hand if no appeal is allowed, the wife is helpless until the final decree is entered; and with respect to the husband, he may be forced to pay an unjustifiably large amount in the interim before the final decree. The most equitable procedure is to allow an appeal in all instances, and to allow the wife temporary alimony pending an appeal by the husband from a decree allowing alimony pendente lite.²⁰ In this way, the loss, if there be a loss, is negligible, and it is placed, for the most part, on the party who can better afford it.

PROCEDURE—CONSTRUCTION OF FLORIDA STATUTE RELATING TO DEPOSITIONS AS INCLUDING WRITTEN INTERROGATORIES

After the declaration had been amended, defendants served written interrogatories on the plaintiff. Plaintiff filed objections, alleging that the Florida deposition statute¹ contemplates the taking of oral depositions only and does

13. *Kapp v. Kapp*, *supra*; *Abrams v. Rosenthal*, 153 La. 459, 96 So. 32 (1923); *accord*, *Colby v. Colby*, *supra*; *Call v. Call*, 65 Me. 407 (1876) (no exceptions allowed from trial court's discretion).

14. *Kapp v. Kapp*, *supra*; *Earls v. Earls*, 26 Kan. 178 (1881); *Randall v. Randall*, 156 Miss. 656, 126 So. 484 (1930). *Contra*: *Carroll v. Carroll*, 48 La. Ann. 835, 19 So. 872 (1896); *Gordon v. Gordon*, 91 S. C. 245, 74 S. E. 360 (1912).

15. *Hay v. Hay*, 40 Idaho 159, 232 Pac. 895 (1924); *Boerio v. Boerio*, 134 Pa. Super. 501, 4 A.2d 614 (1939); *Keester v. Keester*, *supra*.

16. *Mancil v. Mancil*, 240 Ala. 404, 199 So. 810 (1941) (mandamus is the appropriate remedy); *Ex parte Apperson*, 235 Ala. 266, 178 So. 37 (1937); *Clark v. Clark*, 155 Fla. 574, 20 So.2d 900 (1945) (writ of certiorari); *Grimes v. Posecai*, 175 La. 1, 142 So. 703 (1932) (mandamus).

17. *Rutherford v. Rutherford*, 152 Pa. Super. 517, 32 A.2d 921 (1943).

18. *Boerio v. Boerio*, *supra*.

19. *White v. White*, 86 Cal. 212, 24 Pac. 1030 (1890) (with respect to the right of appeal, no distinction between an order denying and an order allowing alimony pendente lite); *accord*, *Wallace v. Wallace*, 189 Ky. 451, 225 S. W. 31 (1920).

20. *People ex rel. Earle v. Circuit Court*, 169 Ill. 201, 48 N. E. 717 (1897).

1. FLA. STAT. § 91.30 (1947). This act says *inter alia*, "Depositions in Chancery and Civil cases . . . are permitted to be taken . . . pursuant to the Federal Rules of Civil Procedure."