Florida Law Review

Volume 3 | Issue 3 Article 8

October 1950

Alimony: Possibility of Collection from Ne Exeat Bond

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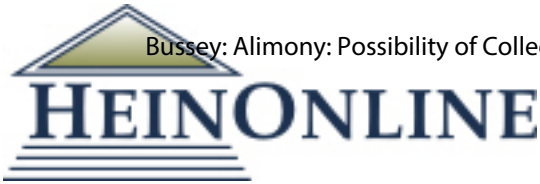

CASE COMMENTS

ALIMONY: POSSIBILITY OF COLLECTION FROM NE EXEAT BOND

Pan-American Surety Co. v. Walterson, 44 So.2d 94 (Fla. 1950)

In a divorce proceeding the chancellor issued a writ of ne exeat ordering the husband to be taken into custody until he posted bond. The husband filed a ne exeat bond conditioned both on his appearing and abiding by the court's orders, with defendant as surety. Subsequently the wife obtained a decree which provided that she could recover on the bond if the alimony were not paid. The husband failed to pay, and the chancellor issued an order to show cause why the defendant surety company should not forfeit the bond. The husband had at all times been within the jurisdiction of the court. From a judgment for the plaintiff, defendant appealed. HELD, the bond was an appearance bond only, and, since the husband remained within the court's jurisdiction, the chancellor erred in ordering the payment of alimony out of its proceeds. Judgment reversed.

The writ of ne exeat was originated by English kings during the early period of the common law[1] to furnish a means of preventing subjects from leaving the realm.[2] Although originally employed by the state for political purposes, the writ was subsequently extended for use by equity courts in disputes.[3] Under the early English practice, ecclesiastical courts alone had the power to decree alimony, although chancery courts did aid them in the exercise of this power by issuing writs of ne exeat when it appeared that the husband was about to leave the realm to avoid payment.[4] In order to invoke this equity assistance, however, certain prerequisites had to be met: alimony had to be actually decreed[5] and the complainant had to show that the husband was about to quit the country.[6] If these conditions were met, a writ of ne exeat would issue ordering the sheriff to detain the body

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[1] 2 KENT, COMM. *34; 2 STORY, COMMENTARIES ON EQUITY JURISPRUDENCE 799 *et seq.* (13th ed. 1886).

[2] Read v. Read, 1 Ch. Cas. 115, 22 Eng. Rep. 720 (1668).

[3] *See* Boehm v. Wood, Turn. & R. 332, 343, 37 Eng. Rep. 1128, 1132 (1823).

[4] 2 STORY, COMMENTARIES ON EQUITY JURISPRUDENCE 802 (13th ed. 1886).

[5] Dawson v. Dawson, 7 Ves. Jr. 174, 32 Eng. Rep. 71 (1803); Shaftoe v. Shaftoe, 7 Ves. Jr. 172, 32 Eng. Rep. 70 (1802).

[6] Coglar v. Coglar, 1 Ves. Jr. 94, 30 Eng. Rep. 246 (1790).

of the husband.[7] A bond or other security in the amount of the alimony decree[8] could be obtained by the respondent and posted in lieu of his detention by the sheriff.[9]

Historically, it was beyond the scope of the writ to require a bond conditioned on the payment of alimony.[10] The bond was in the nature of equitable bail;[11] its sole purpose was to insure the respondent's presence in court at the time of the decree.[12] If the respondent violated this condition, the proceeds of the bond were paid to the court,[13] since the offense was against the court and not the complainant.[14]

In Florida, the complainant is required to post a bond prior to the issuance of the ne exeat writ.[15] Non-observance of this prerequisite renders the writ voidable rather than void, and this defect is reviewable only on a direct appeal.[16] In practice, however, the courts at times disregard the requirement that the complainant post bond if the wife has been rendered penniless by the husband's action.[17] The writ itself, directing the sheriff to hold the defendant in custody until either cash or a bond is posted,[18] issues only upon the filing of a bill of complaint in equity.[19] It is not necessary, however, that a subpoena be first served on the party.[20] The writ is not subject to collateral attack by habeas corpus unless void on its face.[21]

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[7]*See* Boehm v. Wood, Turn. & R. 332, 336, 37 Eng. Rep. 1128, 1129 (1823).

[8]Shaftoe v. Shaftoe, 7 Ves. Jr. 172, 32 Eng. Rep. 70 (1802).

[9]See note 7 *supra.*

[10]*See* Bronk v. State, 43 Fla. 461, 476, 31 So. 248, 253 (1901).

[11]*See* Johnson v. Clendenin, 5 Gill & J. 463, 481 (Md. 1833); Nelson v. Sanderson, 285 Mass. 583, 586, 189 N.E. 792, 793 (1934); Gibert v. Colt, Hopk. Ch. 496, 500 (N.Y. 1825).

[12]Nelson v. Sanderson, 285 Mass. 583, 189 N.E. 792 (1934); Foote v. Foote, 102 N.J. Eq. 291, 140 Atl. 312 (Ct. Err. & App. 1928).

[13]*See* Thomas v. Martin, 100 Fla. 146, 150, 129 So. 602, 603 (1930); Johnson v. Clendenin, 5 Gill & J. 463, 482 (Md. 1833). *Contra:* Harris v Hardy, 3 Hill 393 (N.Y. 1842).

[14]*See* Thomas v. Martin, *supra* note 13; Johnson v. Clendenin, *supra* note 13; Nelson v. Sanderson, 285 Mass. 583, 586, 189 N.E. 792, 793 (1934).

[15]FLA. STAT. §62.19 (1949).

[16]Bronk v. State, 43 Fla. 461, 31 So. 248 (1901).

[17]CARSON, LAW OF THE FAMILY, MARRIAGE AND DIVORCE 628 (1950).

[18]*See* Lieberman v. Lieberman, 43 So.2d 460, 461 (Fla. 1949).

[19]Friedland v. Isquith, 106 N.J. Eq. 344, 150 Atl. 840 (Ch. 1930); *see* Hagen v. Viney, 124 Fla. 747, 755, 169 So. 391, 394 (1936); Bronk v. State, 43 Fla. 461, 472, 31 So. 248, 252 (1901).

[20]*See* State v. Browne, 105 Fla. 631, 637, 142 So. 247, 250 (1932); MacDonough v. Gaynor, 18 N.J. Eq. 249, 250 (Ch. 1867).

[21]State v. Browne, *supra* note 20, at 634, 142 So. at 249.

The ne exeat bond, in Florida, may be conditioned either upon appearance before the court at the time of rendering the final decree[22] or, in suits for divorce, upon performance of the court's decree.[23] If, in a divorce suit, the bond is conditioned on appearance alone and the husband fails to appear, the governor cannot enforce the bond by a show cause order but must resort to an action at law.[24]

Several attempts have been made by complainant-wives to collect alimony from the proceeds of a ne exeat bond. The Florida Supreme Court has been reluctant to give effect to Section 65.11 of *Florida Statutes 1949*, originally passed in 1828,[25] which provides that the court may make such order as will secure the payment of the wife's alimony.[26] In *Thomas v. Martin*[27] the plaintiff-wife, who had secured an alimony decree, sued the defendant surety company at law in the name of the governor, the bond running to him. The Court denied a recovery and stated that the governor should sue for the use of the county rather than for the use of plaintiff, since the bond was conditioned only upon the husband's appearance and no mention was made in the bond concerning the payment of alimony. In *Lieberman v. Lieberman*[28] the plaintiff-wife advanced the theory that the surety had loaned the cash to the defendant-husband as bail and, since loaned money is the property of the obligor, the Court should order this sum held to secure the payment of the alimony decreed. This contention was rejected by the Florida Court on the ground that, since the money was lent for a specific purpose conditioned only upon the defendant's presence, the fulfillment of the condition necessitated the return of the sum furnished as bail.

The Supreme Court has allowed alimony to be recovered from the proceeds of a ne exeat bond in only one case.[29] In that case the bond was conditioned upon the defendant's presence as well as upon his paying all sums then due and coming due by reason of the court's decree. Even though the plaintiff-wife did not allege that the defendant was absent from the jurisdiction, the Court allowed her to

[22]*See* Lieberman v. Lieberman, 43 So.2d 460, 463 (Fla. 1949).

[23]FLA. STAT. §65.11 (1949), American Surety Co. v. Gedney, 123 Fla. 703, 167 So. 355 (1936).

[24]Wolfe v. Garcia, 72 Fla. 491, 73 So. 593 (1916).

[25]Fla. Terr. Act of Oct. 31, 1828, §13.

[26]See Bronk v. State, 43 Fla. 461, 31 So. 248 (1901).

[27]100 Fla. 146, 129 So. 602 (1930).

[28]43 So.2d 460 (Fla. 1949).

[29]American Surety Co. v. Gedney, 123 Fla. 703, 167 So. 355 (1936).