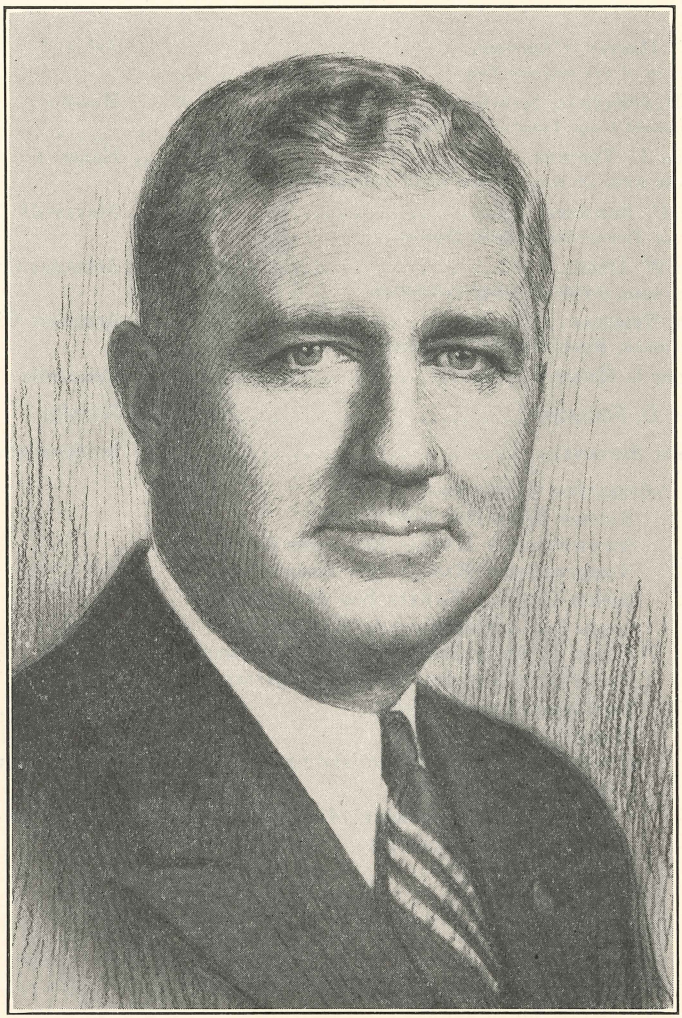
KANSAS JUDICIAL COUNCIL BULLETIN

APRIL, 1940 PART 1.—FOURTEENTH ANNUAL REPORT



RALPH T. O'NEIL

MEMBERS OF THE JUDICIAL COUNCIL

W. W. Harvey, *Chairman* ..... Ashland
Justice of the Supreme Court.

J. C. Ruppenthal, *Secretary* ..... Russell
Formerly Judge Twenty-third Judicial District.

Edward L. Fischer ..... Kansas City
Judge First Division, Twenty-ninth Judicial District.

Edgar C. Bennett ..... Marysville
Judge Twenty-first Judicial District.

Kirke W. Dale ..... Arkansas City
Chairman, Senate Judiciary Committee.

George Templar ..... Arkansas City
Chairman, House Judiciary Committee.

Charles L. Hunt ..... Concordia

Robert C. Foulston ..... Wichita

Chester Stevens ..... Independence

Coöperating with the—

Kansas State Bar Association,
Southwestern Kansas Bar Association,
Northwestern Kansas Bar Association,
North Central Kansas Bar Association,
Local Bar Associations of Kansas,
Judges of State Courts and Their Associations,
Court Officials and Their Associations,
The Legislative Council,
Members of the Press,
Other Organizations, and leading citizens generally throughout the state.

For the improvement of our Judicial System and its more efficient functioning.

TABLE OF CONTENTS

FOREWORD

We are pleased to present, as the frontispiece of this issue, the portrait of Ralph T. O'Neil, president of the Bar Association of the state of Kansas, and an article by him on "Advanced Legal Education in Kansas."

Mr. O'Neil has been in the active practice of law in Topeka about twenty-five years and is the senior member of the law firm of O'Neil, Hamilton (John D. M.) and Griffith (Barton E.). He is past commander of the state, also of the national, organization of the American Legion, is a member of the State Board of Regents, and has been active in civic and legal organizations.

His article discloses an important trend in the activities of the State Bar Association. For many years not much was done by it between its annual meetings, and these were largely social functions with a few addresses by outstanding members of the profession. While these features are retained, of recent years its meetings have taken on more of the educational features. Now much of the time of its annual meeting is taken up with sections devoted to the study and discussion of specific branches of the law, such as common carriers, insurance, oil and gas, probate law and procedure. Also, it publishes a well-edited Law Journal. These have been of great benefit to the practicing lawyer and have brought about an increased membership of the Bar Association. The lawyers of the state are learning how valuable to them the State Bar Association can be made to be.

Mr. O'Neil's article discloses the State Bar Association is now going further, by organizing and conducting legal institutes in various counties in the state. Some years ago, in discussing this subject in connection with losses occasionally suffered by clients because of dishonesty or unprofessional conduct of their attorneys, we had occasion to say: "Litigants suffer greater losses because of the inability of attorneys to know the best steps to be taken in their behalf than they do by the unprofessional conduct of attorneys." The more this thought is studied the more forcefully one is impressed by it. The field of legal practice is so broad, involving as it does almost every important activity of man, that continuous study is essential to usefulness of an attorney to his clients. The legal institute is, in part at least, the answer to the problem. While seasoned practitioners frequently find them helpful, young attorneys, with their minds filled with fundamental principles and varied theories, find them most useful. They are taking hold of this legal institute work with a zeal which assures their greater usefulness to their clients than their predesessors have been.

Within the last few years several cases have reached the supreme court involving a decree dividing property or awarding alimony or sums for support of children in divorce cases, which tend to indicate that counsel who prepared the decree, and possibly the judge who rendered it, either did not fully understand our statutes on the subject or did not use care in preparing the decree so as to have it accomplish the purposes later controversy over it indicated they intended to accomplish. The Council desired to study the subject with

the view of seeing if our statute should be amended, and if so in what respect. Hon. George Templar, a member of the Council, consented to make this study. The result of this study is contained in an article by him, published in this issue under the title "Alimony Awards under G. S. 60-1511." His conclusion is that the statute does not need amending, that the difficulties which have arisen have resulted from the fact that sometimes attorneys, trial courts, and at least on one occasion the supreme court, have not followed the statute carefully. The matter is important. Our reports show that from one-fourth to one-third of all civil actions disposed of by our district courts are divorce cases. In many of them property rights are involved. It is of the highest importance, of course, that decrees rendered in such cases not only conform to our statutes but that they embody the real purposes they are designed to accomplish. We will be glad to have suggestions from judges and lawyers on this subject, particularly from those who think our statutes on the subject could be clarified by amendments.

We are collecting data from the clerk of the supreme court, clerks of the district court, probate courts and county courts, respecting the business transacted in those courts within the year ending June 30, 1940, and pending on that date. Summaries compiled from this data will appear in our October BULLETIN.

Two changes from our former reports are made respecting the reports from probate courts: (1) Heretofore we have asked probate judges to report as pending all estates of decedents and all guardianship estates, not shown by their records as having been closed, without regard to the time the case originally was filed. It has developed that in most of the counties there are many old estates, so old that they must have been settled some way and forgotten, and yet no final orders closing the estates appear on the records of the court. This year we are asking probate judges not to report such cases if they have been inactive as long as five years. The Council is considering a bill to propose providing a method of showing on the record a presumption that the estate was probably closed, which presumption in a stated time will ripen into a final order closing the estate, if nothing is done in the meantime to indicate that it is still active. (2) The new probate code (§ 226, G. S. 1939 Supp. 59-2250) provides an independent procedure for determining the heirs of a decedent in certain cases. We have prepared a separate blank on which we are asking probate judges to report proceedings under this section.

The principal work of the Council for the present and the next few months, pertains to the functioning of the new probate code and property act. Mr. Bartlett's work on Kansas Probate Law and Practice, which we understand has a wide distribution in the state, has been helpful to probate judges and attorneys. On the whole, we find these new acts have been exceptionally well received. Naturally, quite a few questions have arisen. Many of these are cleared up by a more thorough study of these acts. Others are comparatively trivial. However, we welcome all queries or suggestions concerning them. The committee on Probate Code of the State Bar Association, Mr. E. C. Flood,

of Hays, chairman, will meet with the Council to study these matters, and a section for their consideration will be provided at the meeting of the State Bar Association at Wichita, May 24 and 25. Any action determined upon will be discussed in our later bulletins.

One thing is certain, the law relating to estates of decedents and wards and to probate court practice is receiving more intelligent attention from the members of the bar, and from many laymen, than it has received heretofore at any time in the history of our state. The importance of these matters is becoming more thoroughly understood. The results of this interest and study cannot help being beneficial. An appropriate set of laws pertaining to these subjects, and a probate judge competent to understand and apply them, make the probate court one of the most important units of our judicial system.

ADVANCED LEGAL EDUCATION IN KANSAS

By Ralph T. O'Neil

The subject of legal education and admission to the bar has been emphasized by the Bar Association of the state of Kansas for more than a quarter of a century. In 1921 the American Bar Association adopted certain standards of legal education for admission to the bar, and at that time Kansas was the only state that met these standards. In 1922 it was the privilege of the writer to represent the State Bar Association at the Root conference in Washington, D. C., where a program was considered to raise the standards of our profession and an effort made to increase requirements in all jurisdictions relative to admission to the bar. At that time many prominent lawyers had not attended law school. Conditions have changed, and today, with very few exceptions, nearly every member of the bar is a graduate of a law school and many lawyers have taken a general college course prior to legal training. The supreme court, the Board of Law Examiners and the legislature have taken an active interest in the program of the State Bar Association relating to legal education and, as a result, standards of admission to the bar have been adopted and maintained so that newly admitted members to our ranks begin their practice with a thorough legal and educational foundation.

Since the Root conference in 1922 the American Bar Association has increased its activities pertaining to legal education and admission to the bar. Numerous activities are now sponsored by the Council of the American Bar Association on legal education and admission to the bar, which include a program for the maintenance of higher standards of bar admission; sponsorship of the organization of a national conference of bar examiners; publication of an annual review of legal education, establishing contact by law students with members of the practicing bar; coöperation between bar examiners and law school and, within recent years, a program of advanced legal education for the practicing lawyer.

In Kansas we are today emphasizing advanced legal education for the practicing bar just as for more than twenty years we have sponsored higher standards for admission to the bar.

Organization of Sections

Our Association at our annual meetings has adopted the custom of the American Bar Association of organizing sections to be held in connection with the program of the annual meeting of the State Bar Association. At the annual meeting last year most lawyers took an active interest in these sections and the meetings were well attended. This year there will be four sections on subjects that are of a particular interest to the bar and it is anticipated that there will be an increased attendance at the section meetings. At these sections some outstanding lawyer will present a subject, the speaker will then be followed by one or more critics and there will follow an open discussion by other lawyers, which results in a general "swapping" of ideas, all of which should be stimulating and of practical benefit. Mr. W. D. P. Carey of Hutchinson, Kan., is chairman of this committee and has so organized the sections for the State Bar Association to be held at Wichita that an excellent program at each section is assured.

LEGAL INSTITUTES

It has been customary for other professions and occupations to have clinics, specialized instruction and postgraduate courses. We are living in the day of the specialist. Physicians, surgeons and dentists have had for many years the advantage of professional clinics which are well attended and very beneficial. It is also common for many members of these professions to take postgraduate courses. Salesmen in all branches of industry have meetings where specialized instructions are given to the personnel who represent a particular business or industry. In the engineering world advanced instruction is being given to representatives of that business and engineering courses are sponsored by the larger corporation not only for graduate engineers but for men employed in the mechanical branches of the industry. In such lines of business as banking and insurance, advanced courses based on modern experience are most common and very instructive. Even in the athletic world a high school or college coach must attend a clinic on basketball, football, track and other sports to reach a maximum degree of efficiency.

In the legal profession specialized instruction for the practicing lawyer is more or less modern, but today it has become exceedingly important as changing economic and social conditions increase the number of legal problems presented to the practicing lawyer.

In Kansas we have a committee on legal institutes and John H. Hunt, Jr., of Topeka, is this year's chairman of that committee. This committee has arranged for institutes to be held so that the lawyers in practically every part of the state can have the advantage of attending one or more of the institutes. The institutes are held during the day and evening. Two speakers are provided by the State Bar Association and there is a general discussion by members of the bar of the subjects presented. In the evening, there is a dinner or social gathering held in connection with the institute. These institutes give the practicing lawyer practical information that he needs on the particular subjects discussed and permit him to associate with other members of the profession in his section of the state whom he learns to know better socially and professionally. In Kansas we have given these gatherings the name of Legal Institutes, which is the name usually adopted in other states, but sometimes the gatherings are called clinics, courses in advanced education, or practicing law courses.

The first attempt to conduct a legal institute was at Cleveland, Ohio, nearly ten years ago when Dean Pound of the Harvard Law School was invited to give a series of six lectures on the subject, "Recent Developments in the Law of Equity of Interest to Practicing Lawyers." In New York and California somewhat similar activities were inaugurated. At the time of the American Bar meeting at Boston, a resolution was presented and adopted by the house of delegates which in effect requested an investigation relative to the manner in which advanced legal education could be made practical and available to the practicing lawyer. This resolution was referred to the Council on legal education and admission to the bar, and at the Kansas City meeting of the American Bar Association the Association resolved to sponsor and encourage a nationwide program of post-admission education for the benefit of the legal profession and at this meeting appointed a committee, naming W. E. Stanley of Wichita, now vice-president of the Bar Association of the state of Kansas,

to carry out the program of advanced legal education. Mr. Stanley has been chairman of this committee during subsequent years and is largely responsible for the progress and success of the program of legal institutes which are now being conducted quite generally all over the country.

The type of organization for a legal institute in a large city is somewhat different than the organization of the institute in smaller communities. In the larger cities there are sufficient members of the bar to pay lecturers and these lecture courses can be easily financed by the sale of tickets. In these cities the institutes are important and practical, but the institutes are even more useful to lawyers in the smaller communities. In the larger cities lawyers have become specialized as tax experts, experts on estates, patent law, corporate practice, bankruptcy and other specialized subjects and often lawyers do not attempt to go out of their particular field. In Kansas the public expects the practicing attorney to know the Kansas statutes, the federal statutes, the branches of administrative law and be well versed in all the various legal questions and problems. We must be prepared to serve our clients. The present year in Kansas we have been most fortunate in having Mr. Hunt as chairman of the committee on legal institutes. This committee has been most active. They have prepared a list of subjects and procured speakers particularly well informed on the subject to be discussed. At this time that committee has sponsored the holding of nearly twenty institutes. Attorneys from sixty percent of the counties and nearly 1,000 members of the bar have attended the institutes which have been conducted with a minimum expense. Over 5,000 mimeographed pieces of literature have been mailed in connection with the legal institute program. The mailing of the programs and data concerning the institute have cost the Bar Association of the state of Kansas less than $250. The price of the banquet ticket usually covers all other expenses in connection with the institute.

The committee has selected speakers for each subject who have had extensive practice and experience in that particular subject, and the practical benefit to some of us who have not had the experience of the speaker has been most valuable and we are today having the benefit of a postgraduate course and advanced legal education in almost any subject that might be beneficial to any of us as practicing lawyers.

The primary purpose of the Bar Association of the state of Kansas is to assist the courts and public in honestly and fairly administering justice; to adopt such standards in our profession so that none but those who are faithful to their trust and to their clients can practice in this state; and to assist in regulating the practice of law so that the members of the bar will so conduct themselves that the public will have respect for and confidence in the legal profession. In addition, the Bar Association should render the individual lawyer a valuable practical service. The Bar Association, by providing advanced legal education to the practicing lawyer through the legal institutes, is giving the profession technical and practical information on various subjects which enables a lawyer to render greater service to his clients and also personally benefit from this advanced legal education he is receiving. The sponsorship of legal institutes by the Bar Association of the state of Kansas has already become of real and practical value in the field of the practice of law. It is suggested that the members of the bar who have not already taken ad-

vantage of these institutes coöperate with the Bar Association and with communities and cities where the institutes are held so that in the future this program can expand.

The Bar Association of the State of Kansas is proud of the results accomplished in promoting advanced legal education in the state of Kansas, and the Association invites comments and suggestions from all practicing attorneys as to how this program can be made more effective.

ALIMONY AWARDS UNDER G. S. 60-1511

By GEORGE TEMPLAR

In divorce actions where property rights, their settlement and division are involved, occasionally decrees have been written, approved by counsel and by judges which did not by their terms and provisions, carry out the true intention of the parties or of the court entering the decree. Litigants have been deprived of their equitable and legal rights, counsel have been embarrassed, some have expressed indignation at the interpretation placed on the decrees which they thought were carefully drawn. Some anxiety exists in the minds of many members of the bar when confronted with the duty of skillfully drawing a divorce decree with an alimony provision that is enforceable.

The section of the statute involved is section 678, chapter 182 of the Laws of 1909, now G. S. 60-1511.

It will be noted that the wife may receive an award of alimony under one of several different provisions of this statute:

A. If the husband be found at fault, as is generally the case:
   (1) The wife shall be restored to all the property she owned before her marriage; and
   (2) That property acquired by her in her own right after the marriage, not previously disposed of; and
   (3) In addition to this, she shall be allowed such alimony as the court shall think reasonable,
      (*a*) This alimony may be allowed in real or personal property, or both, or
      (*b*) The alimony may consist of a sum of money, payable either in gross or in installments.

B. If the wife be found at fault:
   (1) She shall be restored to the property owned by her before, or separately acquired after the marriage, not previously disposed of; and
   (2) Such share in her husband's real or personal property, or both, as seems just and equitable to the court;
   (3) No provision permits an award of alimony under this part of the statute;

C. The statute then provides that as to property jointly acquired by the parties during marriage, the court shall make a just and equitable division:
   (1) By a division in kind, or
   (2) By setting the same apart to one of the parties, and
   (3) Requiring the other to pay such sum as may be just and proper to effect a fair division.

The supreme court of Kansas, on several occasions, has interpreted this statute especially in its application to decrees of alimony in favor of a wife, some of these rules established in interpreting the statute, might be noted, as follows:

(1) No modification of an award of alimony or of a division of property may be made after the judgment of divorce becomes final where the court awarding the divorce has jurisdiction of the parties to the action.

(2) An award of alimony is ordinarily not a lien upon the property of the husband unless it is so decreed by the court.

(3) All property rights and alimony must be settled and determined at the time a divorce is granted.

(4) Unpaid installments of alimony may be the basis of a claim against an estate of a deceased husband or it may be made the basis of an independent action on which judgment may be rendered and execution levied thereon upon the husband's property.

AWARD OF TRUE ALIMONY NOT SUBJECT TO MODIFICATION

It was determined by our court in the early case of *Mitchell v. Mitchell,* 20 Kan. 665, that the above-quoted statute, which has been unaltered since 1870, carried no provision authorizing the judgment for alimony to be afterward increased or diminished. In that case a husband, upon a showing in a subsequent term to that in which the judgment awarding the wife alimony was rendered, that his means had become greatly depleted, obtained from the trial court an order reducing the alimony award. On appeal the supreme court reversed this order and held that such a judgment for alimony cannot be changed in another proceeding, and at a subsequent term of court, on account of changes in the circumstances of the parties and further, that *the district court had no right to modify the judgment in consequence of facts thereafter occurring.* The syllabus of that case reads:

"Alimony allowed to a wife on a decree for divorce from the bonds of matrimony by reason of the fault or aggression of the husband, under the statute in this state, is to be based upon the circumstances of the parties at the time of the divorce, and is not to be modified by subsequent changes in these circumstances. The court has no power, on subsequent application showing circumstances thereafter arising, to increase or diminish the allowance given in the original judgment."

The supreme court has held to this rule through a long line of decisions. An earlier case, that of *Lewis v. Lewis,* 15 Kan. 181, where a divorce decree barred the defendant wife from any interest in plaintiff's property, the trial court, upon the wife's application, set aside the decree because of a finding that the service was invalid and then awarded the wife a portion of the property. On appeal the supreme court reversed the order, finding the service defective and set aside the order giving the wife any property, saying:

"Where the decree of divorce contained no other order concerning property than one barring defendant from all right and interest in the property of the plaintiff, held, that this order must stand with the decree, and, the decree being undisturbed, the order cannot be set aside."

The rule against modification was held to apply even where the husband obtained a divorce in another state while the wife was a resident of Kansas, and where the decree of divorce made no reference to alimony or property rights. See *McCormick v. McCormick,* 82 Kan. 31.

Nor can the trial court, entering a decree of divorce, enlarge its power by a recital in a decree of divorce that jurisdiction is retained and thereafter

tamper with the substance of the judgment concerning property rights and alimony. See *Noonan v. Noonan,* 127 Kan. 287.

Another point worthy of note is the fact that an award of permanent alimony must be for a specific and definite amount, and while the amount fixed may properly be made payable in installments, a running of award of so much per month for an indefinite period is void and unenforceable. A decree must specify a definite aggregate sum to be paid. See *Revere v. Revere,* 133 Kan. 300.

Some of the confusion complained of by attorneys has arisen from the loose and careless usage and application of the word "alimony." For example, the court decided in the case of *Hayden v. Hayden,* 74 Kan. 725, that where an award of alimony had been made to a wife who deserted a husband, taking with her an infant child which she later sent back to him, the alimony award might be reduced on appeal because it was obvious that a part of the money so awarded had been intended for the support of the child. A better reason might have been assigned that under the statute where the divorce is granted because of the fault or aggression of the wife, no provision is made for an alimony award as such and so this judgment was not really an award of alimony but must have been, as suggested by the court, a child support order.

Alimony is defined in *Bank v. Dondelinger,* 103 Kan. 444, as being "An allowance made by order of court."

In *Bowers v. Bowers,* 70 Kan. 164 (1904) (1 c. p. 167), it is pointed out that:

"In enacting the two sections the legislature undoubtedly had in view the distinction recognized between alimony and an equitable division of property. The principal distinction appears to be that alimony has for its basis maintenance only, while a division of property has for its basis the giving to each party the portion of the property justly and equitably due, without regard necessarily to the necessities of the case."

Alimony is defined in *Johnson v. Johnson,* 57 Kan. 343, as follows:

"Alimony is an allowance, which by order of court, the husband, or former husband, is compelled to pay to his wife, or former wife, from whom he has been legally separated or divorced, for her support and maintenance."

The court recognized the real distinction between a judgment for alimony and a division of property in the much later case of *Hendricks v. Hendricks,* 136 Kan. 71, and in the opinion points out the confusion created by the misuse of the word "alimony," it was said:

"The division of property is an essentially different thing from the awarding of alimony.

> "'The distinction between an allowance of alimony and a division of property is discussed at length and clearly recognized in the case of *Bacon v. Bacon,* 44 Wis. 197. In 2 Am. & Eng. Encyc. Law 92, alimony is thus defined; "alimony is an allowance, which, by order of court, the husband, or former husband, is compelled to pay to his wife, or former wife, from whom he has been legally separated or divorced, for her support and maintenance." (*Johnson v. Johnson,* 57 Kan. 343, 348, 46 Pac. 700; *Stoner v. Stoner,* 134 Kan. 356, 359, 5 P. 2d 847.)'

"The legislature intended that the trial court should have a wide discretion in adjusting property rights in divorce proceedings, and this court has repeatedly held that it will not interfere with the division or adjustment made by the trial court unless it is clear that the trial court has violated some positive rule of law, or the judgment rendered is so at variance with a just division or

award that this court can say from the record that there was an abuse of the discretion of the court. (*Johnson v. Johnson*, 66 Kan. 546, 72 Pac. 267; *Putman v. Putman,* 104 Kan. 47, 177 Pac. 838; *Tillery v. Tillery,* 115 Kan. 81, 222 Pac. 100.) This court, however, has not hesitated to reverse the decision of the lower court where it has failed to follow the definite rules prescribed by the legislature. It is definitely established that permanent alimony, when permitted under the statute, must be definitely fixed. The judgment is a final determination of the rights of the parties and not subject to future revision by the court. (*Conway v. Conway,* supra.) Apparently there has developed a practice in the trial courts, as well as in this court, to use interchangeably the terms 'alimony' and 'division of property,' which has in some instances led to confusion. The appellee cites the case of *Metcalf v. Metcalf,* 132 Kan. 535, 296 Pac. 353, in which it was said:

> "'Where a divorce is granted by reason of the fault or aggression of the wife, the court must grant her as alimony such share of her husband's property as to the court may appear just and reasonable, . . .'

"This was a misuse of the term 'alimony' as it is generally recognized and defined by this court. (*Johnson v. Johnson,* supra.)"

However, in the case of *Bassett v. Waters,* 103 Kan. 853, a distinction is made by the court. It was there said that "the court had power to decree alimony to the wife in the form of support periodically, which would be subject to modification on account of changed circumstances." This language can hardly be reconciled with the rule in the Mitchell case, followed repeatedly. Neither is such a statement authorized or supported by the statute. The court then held that a bare judgment for alimony, payable in three installments, was collectible the same as any other judgment for debt.

The decision in the Bassett case cites *Scott v. Scott,* 80 Kan. 489, as authority for the statement that "the court had power to decree alimony to the wife in the form of support payable periodically, which would be subject to modification on account of changed circumstances, or to award her permanent alimony in form of a final judgment," enforciable as an ordinary judgment at law. A careful study of the Scott case reveals that neither of the statements quoted above are supported by the rules set out in the earlier case.

The Scott case did suggest that it was possible to make a judgment for alimony a lien upon the husband's property, but it must be done in the decree, and the opinion further points out that a judgment for alimony is not ordinarily enforceable by lien and execution, but by attachment for contempt. The decision also quotes the statute requiring alimony to be granted in a fixed sum, but payable in gross or in installments. It may readily be seen that the Scott case is no authority for the rule in the Bassett case. Some of the confusion may have arisen over the use of the word "alimony," as pointed out. The Scott case dealt with an award of support money for minor children and, while it was called alimony, was not a true alimony award.

The award in the Bassett case appears to have been a genuine alimony award and this is the only basis upon which the peculiar ruling of the court in that case could be distinguished. It was not an award for child support as was true in the Scott case, the later Chumos case, 105 Kan. 374, or an award made to carry out a division of property as in the Drury case (infra).

In the Scott case a true alimony award was made for $250, which appears to have been paid, a further award of "$20 per month" was made the wife for the support of minor children. It was default in payment of these install-

ments of "support money," which the court inadvertently called alimony, that lead to much confusion.

The court in *Drury v. Drury,* 141 Kan. 511, held that where a judgment for alimony had been decreed to be a lien on certain real estate of the husband, that judgment could not be modified at a subsequent term of the court, where the modification attempted was to transfer the lien for alimony from one piece of property to another. Citing *Colt Co. v. Clark,* 125 Kan. 722, holding the judgment void.

This Drury case was again in supreme court, being reported in 143 Kan. at page 83, there the court held:

"In the view we take of the case a determination of one of the issues is decisive of this appeal. The issue is, can a party to a divorce action in which alimony and property rights of the parties are finally and permanently adjudicated, sell under execution property which was specifically set aside to one spouse as his sole and separate property, free and clear of any right, title or interest of the other, to satisfy an award of alimony for which lien was fastened only on other specific property? The answer must be in the negative. To hold otherwise would render the decree a nullity. It would completely destroy that portion of the judgment which sets aside certain property to the husband as his sole and separate property."

The sound argument in the opinion of this case shatters the reasoning of the Bassett case and is as surely applicable to a true alimony award of a sum of money as it is to an award of money out of the property of the husband in making a property division.

ALIMONY JUDGMENT AS LIENS

While the general statute, G. S. 60-3126, makes judgment liens on real estate of the debtor within the county, a judgment for permanent alimony does not create such a lien unless the decree of the court rendering the judgment so provides.

In *Scott v. Scott,* 80 Kan. 489, the court, after quoting the statute governing the question involved, stated:

"The court is thus given absolute control of the matter. It may, within reasonable limits, dispose of the husband's property as it sees fit. It may take from him anything he has and give it to the wife. And this necessarily implies that it may create a lien for her benefit upon any real estate he possesses. (*Blankenship v. Blankenship,* 19 Kan. 159.) Obviously it also has the power to free any particular tract from all lien, so as to enable the husband to pass a title clear of any claim on the part of the wife. Probably by the use of language indicating such purpose it may give its decree awarding a fixed sum as alimony the precise effect of an ordinary money judgment, collectible by execution and operating as a lien on the husband's real estate. But the question of present moment is, what was the intention of the court in this case? Where alimony is ordered to be paid in installments, and nothing is said as to the manner of its collection, we think the fair inference is that the court intends the order to be enforced, not by lien and execution—a remedy manifestly ill adapted to the purpose, but by attachment for contempt if payment is not made—a remedy always available (14 Cyc. 799) and ordinarily efficacious."

It should be considered that the rule is fixed that a judgment for alimony is not a lien upon real estate of husband unless it is made so by the court entering it and, furthermore, that the method of enforcing such a judgment is

by attachment of the defaulting former husband and his punishment by contempt.

It was also said in the case of *Drury v. Drury,* supra, that:

"Upon a dissolution of the marriage relation the court winds up its affairs. It settles the property rights of the parties. (R. S. 60-1511.) It retains jurisdiction to change orders relating to the custody, control and education of children, if such there are. (R. S. 60-1510.) Jurisdiction to modify the judgment as to interest in property is not retained. In commenting on that precise subject, this court, in the case of *Conway v. Conway,* 130 Kan. 848, 288 Pac. 566, said:

> "'No such power was granted with respect to settlement of property interests, and the omission is tantamount to express denial.' (p. 851.)"

This rule was adherred to in *McGill v. McGill,* 101 Kan. 324.

The question came before the court again in *Fey v. Johns,* 112 Kan. 385, there a judgment for a specified amount was rendered against the husband and made a lien against his salary. She died, the husband refused to pay installments due on award to administrator and he levies an execution. The court held that the husband's real estate was not subject to lien and execution under the judgment because it was not specifically made so by the decree. The Bassett case was passed over with the comment that the court did not consider the subject of lien in the decree involved.

In the case of *Stoner v. Stoner,* 134 Kan. 356, cited in the Drury case (143 Kan. *supra*), the judgment for installments to be paid by husband in carrying into effect a division of property was specifically made a lien on the real estate of the husband. The court cited the Bassett case, *supra,* as authority for the proposition that a provision in a decree providing for the payment of the judgment in installments did not destroy its finality or the lien imposed by the court to secure these payments. But in the Bassett case, no such lien was granted by the court, yet it was held that the judgment was enforceable by execution in face of the decision in the Scott case that such a judgment, where not made a lien, was enforceable by means of contempt proceeding, inferentially holding at least, that execution was not proper.

Awards for child support made to a wife, while not true alimony awards, and though subject to modification by the court as circumstances, are not liens on a husband's property unless specifically made so, according to the decision of *Beasley v. Salkeld,* 131 Kan. 211, where it was said:

"In this action the court held that the allowance made in the divorce proceeding was not such a judgment as is enforceable in an action in the nature of a creditor's bill to set aside a conveyance of real estate. The court had the power in the divorce proceeding to make its judgment a lien on the real estate of Salkeld, but did not do so. It decreed that he should pay, from month to month, installments for the support of the children. The allowances made were not final, but were subject to change, and in fact were modified."

ALL PROPERTY RIGHTS ARE SETTLED WHEN A DIVORCE DECREE IS GRANTED

It has been held many times that the final judgment in an action for divorce settles all property rights of the parties and is a bar to any subsequent action by either party to determine the question of alimony, or any property rights which might have been settled by such judgment.

This position was taken in the case of *Chapman v. Chapman,* 48 Kan. 636, where a wife had obtained a divorce decree in Ohio and with it a judgment

for alimony in a specified sum. The judgment for alimony became dormant, and in an action brought in Kansas on the judgment, such judgment was held unenforceable, and further that the divorced wife had no interest or lien in property which she claimed had been fraudulently conveyed by him during the marriage, reaffirming the rule that the effect of a divorce obtained by a wife is to exclude her from any interest in his property, not specially mentioned, reserved or provided in the decree of divorce.

And to the same effect is *Roe v. Roe,* 52 Kan. 724, where it was said:

"The final judgment in an action granting a divorce settles all property rights of the parties, and is a bar to an action afterward brought by either party to determine the question of alimony, or any property rights which might have been settled by such judgment." (Syllabus.)

This statement is still the law of this state, although in the decision of *In re Smith,* 74 Kan. 452, it was determined that where a divorce was granted, and through the fraud of the husband, and where no provision was made for alimony, the trial court could, as in the case of any other judgment, permit the decree to be impeached, and if such showing of fraud be sufficient to sustain proceedings to set the decree aside, then a proper award of alimony could be made without disturbing the decree of divorce.

And in *Moore v. Moore,* 119 Kan. 704, the court again decided that the amount of alimony adjudged by a final decree of divorce is the final measure of liability for alimony.

The opinion in the Drury case, *supra,* sheds further light on the proposition that a decree of divorce is final. It reads further, quoting:

"In the case of *Noonan v. Noonan,* 127 Kan. 287, 273 Pac. 409, the rule was stated thus:

> "'The substance of the judgment concerning property rights or permanent alimony cannot be subsequently tampered with under color of such reserved jurisdiction. (*Booth v. Booth,* 114 Kan. 377, 219 Pac. 513.)'" (p. 289.)

While it appears in the Drury case that the court has attempted to distinguish the Bassett case, and the distinction is perhaps marked, the Bassett case has no support in the statute nor in any of the landmark cases decided by the court. It should be overruled by the court and much confusion on the problems of alimony would be at an end. All the other cases decided hold that no lien for an alimony judgment exists on the property of a husband unless it is specifically made so by the judgment of divorce and all rights between the parties are finally determined and settled as far as property rights are concerned when the decree is granted, whether mentioned or not.

The comparatively late case of *Mayfield v. Gray,* 138 Kan. 156, followed this rule and holds, quoting that where a wife has signed a note which is given to and held by the husband at the time a decree of divorce is entered, in a later suit by the assignee of the note it will be presumed that the indebtedness was settled between the husband and wife on the note in the divorce action even though no reference was made to it in that proceeding or in the judgment of divorce.

The writer is not now referring to awards of support money for minor children. The rules there are somewhat different and decrees and judgments in such cases appear to be subject to modification at any time and to any extent, being circumscribed only by the sound discretion barrier.

UNPAID INSTALLMENTS OF ALIMONY COLLECTIBLE

While it is doubtless the recognized general rule that installments of alimony, past due and unpaid, cannot be collected by execution unless specifically made a lien, it should be remembered that there are other methods of doing indirectly what cannot be done directly.

Unpaid installments of alimony not made a lien on husband's property may be made basis of suit against him, and a judgment rendered in such an action will permit its collection by execution on his property. (*Cheever v. Kelly,* 96 Kan. 269.)

Also, it has been decided that while installments of alimony due from husband do not constitute a lien on the property of the husband where not so decreed, still, upon his death, such installments may be made the basis of a claim against his estate and be payable out of proceeds of real estate sold to pay debts. (See *Lydick v. Lydick,* 147 Kan. 385.)

In conclusion it would appear that under G. S. 60-1511, awards of alimony, as such, can be granted only when the husband is found to be at fault. This award of alimony is final, it cannot be altered, modified or changed in any manner by the court in a subsequent proceeding or at a later term. The judgment granting the award is not a lien upon any property left standing in the husband's name, whether mentioned in the decree or not, or upon any property awarded to him by the court or set aside to him, unless such a lien is specifically impressed by the judgment itself, except that where the alimony award is made not as a division of property nor as child support, but in the form of a true alimony award; in that event, following the rule in the Bassett case, such an alimony judgment would be assignable and enforceable by execution against the husband's property. The outright overruling of the Bassett case by the supreme court would put all alimony awards on an equal footing, as they should be.

Under the statute, no alimony award as such can be made to a wife if she is found to be at fault, although the husband could be required to pay her an award of money in making an equitable property division. This would not be a lien on the husband's property unless made so by the decree.

Under the statute all rights are finally determined by the divorce judgment, including rights in property and, whether mentioned or not, the law presumes that all matters that could or should have been settled, were disposed of when the divorce was granted.

Again, under the statute, awards of alimony as such while they may be payable in gross or in installments, must be for a definite fixed total sum, else the award is void and unenforceable.

Even where an award of alimony is specifically decreed not to be a lien on a husband's property, still a separate action may be maintained for unpaid installments due and judgment obtained therein upon which an execution may issue, and where an award of alimony is not made a lien on a husband's property, it may still be enforceable as a claim against his estate in event of his death before it is paid, and paid out of his real estate.

Awards for child support, many times erroneously called alimony, are subject to modification and change at any time by the court, the extent of such changes being limited only by the court's sound discretion, and this must

necessarily be so to meet changing circumstances and conditions, but even these are not liens unless made so by the decree of the court.

Lastly, the writer suggests that the present statute has remained the law of the state over sixty years. More careful application of the statute by courts and attorneys would prevent much of the trouble now encountered in alimony matters. Changes in the statute could only add to confusion, and while the present statute is awkward, we have no assurance that another one would be any clearer after it ran the gauntlet of legislature debate, consideration and amendment.

Sec. 562, P. L. & R.
U. S. POSTAGE
PAID
Topeka, Kansas
Permit No. 421

PRINTED BY KANSAS STATE PRINTING PLANT
W. C. AUSTIN, STATE PRINTER
TOPEKA 1940
18-3750