of property held by both spouses has been established, "all property of the parties held by the entireties is affected, not merely the unit that has been improperly drawn upon".

256 Pa. Super. at 96, 389 A.2d at 918, citing *Stemniski v. Stemniski*, 403 Pa. 38, 42, 169 A.2d 51, 53 (1961).

We conclude therefore, as we are urged to do by John, that if Rosa misappropriated joint property, all of the parties' entireties property should be partitioned.

Even our brief review of the testimony establishes that Rosa left with her husband's consent and that whatever she took with her, he was pleased to see her and that property go. He did not then consider it to be misappropriation of property and consented to her taking it. He never manifested any displeasure by asking her to return any of the property to him or to permit him to use it. We conclude therefore that in these circumstances Rosa did not misappropriate any jointly owned property and that, therefore, there are no grounds to partition the parties' jointly owned property.

DECREE NISI

December 4, 1979, the prayer of John A. Hampton's complaint to partition the jointly owned property of John A. Hampton and Rosa M. Hampton is denied. The costs of these proceedings shall be paid by John A. Hampton.

This decree nisi shall become absolute unless exceptions are filed within ten (10) days.

KNEPPER v. KNEPPER, C.P. Fulton County Branch, No. 95 of 1978 - C

Divorce - Pa. RCP 1009(a) - Reinstatement of Complaint - Jurisdiction - Indignities

1. The effect of failure to serve a divorce complaint within the prescribed thirty day period is to render the service a nullity.

2. Service of an expired complaint does not give the court jurisdiction

over the person of the defendant.

3. An attempt to correct late service by filing a Praecipe for Reinstatement Nunc Pro Tunc is an ineffective procedure.

4. A defendant's drunkenness, no matter how excessive, is not an indignity.

5. Plaintiff's hearsay testimony regarding defendant's association with other women is insufficient to establish indignities.

Merrill W. Kerlin, Esq., Master

Lawrence C. Zeger, Esq., Attorney for Plaintiff

OPINION AND ORDER

KELLER, J., December 4, 1979:

The Master in the above-captioned case has recommended to the Court that the plaintiff be denied a divorce a.v.m. from the defendant because of a procedural defect, and on the basis of a failure to establish legally sufficient grounds for divorce under Pennsylvania law. The record shows that the Complaint in Divorce was filed on May 19, 1979, and was served on June 20, 1979. Pennsylvania Rule of Civil Procedure 1121(b) provides, "Except as otherwise provided in this chapter, the procedure in the action shall be in accordance with the rules relating to the action of assumpsit." Pa. R.C.P. 1009(a) states that the complaint "shall be served by the sheriff within thirty (30) days after issuance or filing." The Complaint in Divorce in the present action was served on the thirty second (32) day after filing, using Pa. R.C.P. 106 for the computation of time. The effect of a failure to serve the complaint within the prescribed thirty (30) day period is to render the service a nullity; no valid service had been made upon the defendant. The procedure for reinstating a complaint which has not been served within the prescribed thirty (30) day period is stated in Pa. R.C.P. 1010. The law is clear on this point. If a complaint in divorce has not been served within thirty days after filing, valid service cannot be made upon the defendant unless and until the complaint is reinstated upon praecipe to the prothonotary.

In the present case, plaintiff caused the complaint to be served more than thirty days after it was filed and reinstated it afterwards. This error in sequence is fatal to the action. The defendant is clearly prejudiced by such an impermissible procedure. Defendant was served with a complaint which had expired, and, therefore, was under no legal compulsion to

respond in order to preserve his rights.

Service of an expired complaint does not give the Court jurisdiction over the person of the defendant. Had the defendant elected to respond by entering a general appearance, then we could consider the question whether he waived the improper service and voluntarily submitted to the jurisdiction of the Court. *Bentley v. Bentley*, 66 D&C 596 (1948). However, in the case at bar, defendant did not enter any appearance, and the failure to serve the complaint according to the Rules of Civil Procedure rendered the service of the complaint a nullity.

An attempt to correct the late service by filing a praecipe for reinstatement nunc pro tunc is a unique, but patently ineffective procedure. The Rules of Civil Procedure establish the procedure for reinstatement at Rule 1010. There is no provision for filing a praecipe to reinstate nunc pro tunc; such a procedure would permit the Court to take jurisdiction over the person of defendant without notice to that defendant. Having been served with a complaint rendered a nullity by improper service, the defendant could, with assurance that his rights were not in jeopardy, ignore the action. Reinstatement nunc pro tunc by praecipe gives the defendant no notice that those same rights are in jeopardy. Pa. R.C.P. 248 allows modification of all time limits by written agreement of the parties or by order of court. Actions which are attempted by a party "nunc pro tunc" are effected under Rule 248, which insures proper notice to the parties.

Review of the transcript of the Master's hearing in this case supports the Master's opinion that the plaintiff has failed to sustain her burden of proof; she has not made out a case for divorce by clear and satisfactory evidence creating a preponderance of evidence in her favor. *Taddigs v. Taddigs*, 200 Pa. Super. 29, 186 A. 2d 455 (1962); *Smith v. Smith*, 206 Pa. Super. 310, 213 A. 2d 94 (1965). A divorce decree must be founded upon compelling reasons and upon evidence that is clear and convincing. *Walper v. Walper*, 198 Pa. Super. 409, 182 A. 2d 209 (1962).

The only evidence of indignities offered was testimony about defendant's excessive drinking of intoxicants, and plaintiff's testimony of hearsay regarding her husband's association with "other women." None of the testimony is sufficient to establish indignities to the person of the plaintiff. The Superior Court has consistently held that drunkenness, no matter how excessive, is not an indignity. *Schrock v. Schrock*, 241 Pa. Super. 53, 359 A. 2d 435 (1976); *Shoemaker v. Shoemaker*, 199 Pa. Super. 61, 184 A. 2d 282 (1962). Plaintiff did not

testify to defendant having committed any improper acts, such as physical violence, vulgarity or unmerited reproach while intoxicated.

Further, the testimony regarding defendant's association with other women is vague and unconvincing. Plaintiff has no actual knowledge of such associations, so that the nature and extent of any friendships or relationships between defendant and another woman could not be considered. *Lapiska v. Lapiska*, 202 Pa. Super. 607, 198 A. 2d 386 (1964). Although evidence of defendant's conduct after separation is relevent to shed light on the parties behavior prior to the separation, *Kramer v. Kramer*, 194 Pa. Super. 538, 168 A. 2d 624 (1961); such evidence is not admissible for the purpose of proving indignities. *Scott v. Scott*, 21 Cumb. 24 (1971). Plaintiff, has, therefore, failed to sustain her burden of proof. Either this failure or the procedural defect in service alone would mandate a denial of the relief requested by plaintiff in the divorce complaint, and a dismissal of that complaint.

ORDER OF COURT

NOW, this 4th day of December, 1979, the plaintiff's exceptions to the report of the Master are dismissed. The plaintiff's action for divorce a.v.m. is denied.

Costs to be paid by the plaintiff.

Exceptions are granted the plaintiff.

HARRISON v. HARRISON, C.P. Franklin County Branch, F.R. 1979-975

Custody - Child's Preference - Age and Sex of Child

1. Some weight must be given to an 11 year old child's preference as to which parent she prefers to reside with, however, her expressions are not controlling on the court.

2. The stated preference of a four or five year old is not entitled to much weight by the court.

3. The age and sex of the child is a keystone factor in any custody determination.