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An Act to Amend the Civil Practice Act in Relation to Discretionary Power of Courts to Grant Relief from Obligation to Pay Accumulated Installments of Alimony

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CURRENT LEGISLATION

AN ACT TO AMEND THE CIVIL PRACTICE ACT IN RELATION TO DISCRETIONARY POWER OF COURTS TO GRANT RELIEF FROM OBLIGATION TO PAY ACCUMULATED INSTALLMENTS OF ALIMONY.—There is a prevalent belief that the dissolution of marriage is within the scope of equity jurisprudence due to the fact that decrees affecting the status of marriage partake many of the characteristics of equity. Historically, however, they were never a part of classical equity. Since marriage was a sacrament, the ecclesiastical courts, rather than the chancery, concerned itself with such matters in the period prior to the "Reformation." Today, in England the Probate, Divorce and Admiralty Division of the High Court of Justice has exclusive jurisdiction to adjudicate on matrimonial disputes,[1] but nevertheless a decree for the payment of alimony is considered as an equitable debt and is enforceable only by equitable execution or by sequestration.[2] In New York, however, jurisdiction over matrimonial actions is now exclusively statutory, and since law and equity have been merged in this state, it has not been necessary to make a distinction as to the nature of such decrees except in theory. Where a money judgment has been entered, of course, there is no need to determine whether the nature of the action was originally legal or equitable. However, where alimony has been granted, but has not yet been reduced to a final judgment, the problem of whether a wife has a vested right thereto has arisen. If the suit were equitable in nature, there would be no question of vested rights, since the Chancellor could always modify his decrees. But because of a failure to clearly analyze this problem, some New York courts have held that the wife has a vested right to such accrued alimony. Therefore, the question whether a court may in its discretion cancel or reduce accrued arrears in alimony when it would be inequitable to enter a money judgment for all or part of the amount accrued, has resulted in a conflict among the various departments of the Appellate Division. In order to resolve this conflict, "An Act to amend the Civil Practice Act in relation to discretionary power of courts to grant relief from obligation to pay accumulated installments of alimony," [3] has been adopted by the New York Legislature on recommendation of the Law Revision Commission.[4] By the act the legislature has sought to make it clear that a court in its discretion may reduce or cancel the accrued

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[1] Matrimonial Causes Act of 1857, 20 & 21 VICT. c. 85.
[2] 16 HALSBURY, LAWS OF ENGLAND 521 (1st ed. 1911).
[3] Laws of N. Y. 1948, c. 212.
[4] N. Y. LAW REVISION COMMISSION REPORT, LEGIS. DOC. No. 65(E) (1948).

installments under a matrimonial decree. The amendment became effective March 21, 1948.

The following sections were specifically amended by the recent change:

(1) Section 1170 of the Civil Practice Act and its comparable sections: 1140, 1140-a, 1155, 1169 and 1170-a.

(2) Section 1171-b of the Civil Practice Act.

Section 1170 now grants discretion to the court, on application by either party, not only to modify alimony decrees or to insert provisions for alimony if none had been provided for, but it clearly states that the court may use this discretionary power to cancel or annul alimony accrued prior to the application, or to become due thereafter.[5]

In its present form Section 1171-b permits the court, when a wife seeks to reduce the accrued alimony owed her to a money judgment, to modify or annul the accrued alimony in its discretion. However, once a judgment for such arrears or any part thereof has been entered then the court no longer has any power to modify.[6]

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[5] N. Y. Civ. Prac. Act § 1170 (with amended sections in italics). "Custody and maintenance of children, and support of plaintiff in action for divorce or separation. Where an action for divorce or separation is brought by either husband or wife, the court, except as otherwise expressly prescribed by statute, must give, either in the final judgment, or by one or more orders, made from time to time before final judgment, such directions as justice requires, between the parties, for the custody, care, education, and maintenance of any of the children of the marriage, and where the action is brought by the wife, for the support of the plaintiff. The court, by order, upon the application of either party to the action, or any other person or party having the care, custody and control of said child or children pursuant to said final judgment or order, after due notice to the other, to be given in such manner as the court shall prescribe, at any time after final judgment, may annul, vary or modify such directions, or in case no such direction or directions shall have been made, amend it by inserting such direction or directions as justice requires for the custody, care, education and maintenance of any such child or children or for the support of the plaintiff in such final judgment or order or orders. *Subject to the provisions of section eleven hundred seventy-one-b the authority granted by this section shall extend to unpaid sums or installments accrued prior to the application as well as to sums or installments to become due thereafter.*

[6] N. Y. Civ. Prac. Act § 1171-b (with amended sections in italics). "Enforcement by execution of judgment or order in action for divorce, separation or annulment. Where the husband in an action for divorce, separation, annulment, or declaration of nullity of a void marriage, or a person other than the husband when an action for an annulment is maintained after the death of the husband, makes default in paying any sum of money as required by the judgment or order directing the payment thereof, the court *in its discretion* may make an order directing the entry of judgment for the amount of such arrears, *or for such part thereof as justice requires having regard to the circumstances of the respective parties,* together with ten dollars costs and disbursements. The application for such order shall be upon such notice to the husband or other person as the court may direct. Such judgment may be enforced by execution or in any other manner provided by law for the collection of money judgments. The relief herein provided for is in addition to any and every other remedy to which the wife may be entitled under the law; *provided that when a judg-*

Previous to the present amendment, Section 1140 dealing with annulment and Section 1155 dealing with divorce were cloaked in language similar to that of Section 1170 (divorce and separation) permitting the court to "amend, vary or modify such directions" for support. Section 1169, pertaining to divorce, separation and annulment, allowed the court to "make and modify" alimony orders. Section 1170-a, dealing with support of children when divorce, separation or annulment is denied, granted to the court discretion to "annul, vary or modify." It will be noted that even prior to the present changes Section 1170 and its comparable sections permitted the court to use its discretionary power to annul or modify directions under a matrimonial decree. The confusion, however, arose because none of these sections clearly stated whether or not this discretionary power was applicable to accrued alimony.

Since the courts of New York have jurisdiction over divorce, separation and annulment only because they have been authorized by statute, the power to modify or amend these decrees must be conferred by statute.[7] Therefore, Section 1771 of the Code of Civil Procedure (now Section 1170 of the Civil Practice Act) was amended [8] to provide that on application of either party the court did have the power to modify the matrimonial decree. This section had the effect of writing into each decree the reservation of power to modify. But this section was silent as to the power of the court to modify, or cancel accrued arrears of alimony. Even in 1925 when Section 1170 [9] was amended, no words were used which would clearly show it was intended to apply to accrued alimony.

As a result of this lack of clarity a split of authority has arisen among the departments of the Appellate Division. The question was never decided by the Court of Appeals. The First Department had held, in *Kraus v. Kraus*,[10] that where alimony has accrued under the terms of a decree the wife has a vested right therein, of which she cannot be deprived by any subsequent action of the courts or legislature. An entirely contrary holding had been laid down by the Second and Third Departments.[11] In 1946 the Supreme Court of

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ment for such arrears or any part thereof shall have been entered pursuant to this section, such judgment shall thereafter not be subject to modification under the discretionary power granted by this section; and after the entry of such judgment the judgment creditor shall not thereafter be entitled to collect by any form of remedy any greater portion of such arrears than that represented by the judgment so entered."

[7] Livingston v. Livingston, 173 N. Y. 377, 66 N. E. 123 (1903).

[8] Laws of N. Y. 1895, c. 891.

[9] Laws of N. Y. 1925, c. 240.

[10] Krauss v. Krauss, 127 App. Div. 740, 111 N. Y. Supp. 788 (1st Dep't 1908).

[11] Cunningham v. Cunningham, 261 App. Div. 973, 25 N. Y. S. 2d 933 (2d Dep't 1941); Eisinger v. Eisinger, 261 App. Div. 1031, 26 N. Y. S. 2d 22 (3d Dep't 1941).

the United States had this question before it in *Griffin v. Griffin.*[12] In that case a New York court entered a decree of divorce for the wife in 1924. In 1926 the decree was modified to provide that the husband should pay the wife alimony. Both parties were then residents of New York and the proceedings were contested. In 1936 the court entered an order declaring that the husband owed the wife accrued alimony for the period ending October 25, 1935. This proceeding also was contested. In 1938, *without notice* to the husband, the wife docketed a judgment against him. The judgment was in an amount embracing what was due on the 1936 order plus alimony arrears and interest from October 25, 1935 to the date of the 1938 order. The wife sued in the district court of the District of Columbia on the 1938 judgment and was awarded the full amount. On appeal the Supreme Court held that since the wife did not give notice to the husband, when she made a motion to docket the judgment in 1938, she could only recover the amount due up to October 25, 1935. The Court was of the opinion that the husband should have been given notice because, under Section 1170 of the Civil Practice Act, he can show cause to have the accrued arrears modified. The Court said, "We have examined the New York law, and conclude that the 1926 New York alimony decree was, under the New York practice, subject to some power of modification *nunc pro tunc* as to alimony accrued but unpaid up to the time of modification. See New York Civil Practice Act § 1170; Laws 1925, c. 240. Under the local practice, alimony which has accrued under a decree of divorce may not be collected by execution unless and until a judgment for the amount of alimony accrued but unpaid is docketed by order of the court which issued the decree. . . . And upon a motion to docket as a judgment, arrears of alimony awarded under a prior decree, the husband may defend on the grounds that . . . circumstances have so changed as to justify a reduction of alimony already accrued by modification of the alimony decree." [13]

We have now presented the first conflict which the presently worded sections seek to resolve. That is, Section 1170 and its comparable sections, all of which contain language granting the court discretion to alter matrimonial decrees requiring the payments of money, now contain clear language which states that the discretionary power to modify granted in those sections applies to accrued alimony as well as to future installments to become due thereafter.

Let us assume, for purposes of illustration, that a wife has been awarded permanent alimony in a final decree and that her husband has defaulted in payment of the installments due. What remedies are

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[12] 327 U. S. 220, 90 L. ed. 635 (1946).

[13] Griffin v. Griffin, 327 U. S. 220, 226, 90 L. ed. 635, 639 (1946); *see also* Van Dusen v. Van Dusen, 258 App. Div. 1020, 17 N. Y. S. 2d 96 (3d Dep't 1940); Cunningham v. Cunningham, 261 App. Div. 973, 25 N. Y. S. 2d 933 (2d Dep't 1941); Eisinger v. Eisinger, 261 App. Div. 1031, 26 N. Y. S. 2d 22 (3d Dep't 1941).

at the wife's command to enforce the collection of such arrears? Prior to 1939 she could bring contempt proceedings, sequester his property or reduce the accrued alimony to a judgment and levy execution under Section 504 of the Civil Practice Act. However, the Court of Appeals has held that the latter remedy could not be utilized for temporary alimony.[14] The reason for the distinction was said to be that the statutes which authorize temporary alimony [15] and the means for its enforcement [16] rested exclusively on statutory provisions which were not to be extended by implication.[17] Since the statute which created the right also made provision for relief by sequestration and contempt, these two were deemed the only remedies by which it was enforceable. Furthermore, if the wife sought to collect accrued temporary alimony she was compelled to utilize these remedies before the final decree was entered. This resulted from a holding by the Court of Appeals that all proceedings to compel the payment of temporary accrued alimony were limited to the action in which the order for alimony had been granted.[18] To alleviate this situation and to afford the wife an extra remedy, the legislature in 1939 adopted Section 1171-b, Civil Practice Act.[19] As a result of this legislation, a wife who is owed alimony, counsel fees, and other similar sums which the court has ordered or decreed in matrimonial litigation may now:

(1) make a motion under Section 1172, Civil Practice Act, to hold the husband in contempt of court. However, one should note that under Section 1172-a the court, in its discretion, may relieve him temporarily from contempt if he is financially unable to pay in part or in whole;

(2) make a motion under Section 1171, Civil Practice Act, to sequester the husband's property and the court may order that from the proceeds such sums shall be paid as justice requires. Again, one should observe that this remedy may be withheld in the court's discretion;

(3) make a motion under Section 1171-b, Civil Practice Act, to enter a money judgment which is collectible by execution or any other appropriate process that the law provides. Although the latter section was created for the purpose of enabling the wife to collect temporary accrued alimony after the final decree had been entered, it was drawn broadly enough to include permanent alimony as well.[20]

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[14] Doncourt v. Doncourt, 245 App. Div. 91, 281 N. Y. Supp. 535 (1st Dep't 1935), *aff'd without opinion*, 275 N. Y. 470, 11 N. E. 2d 302 (1937).

[15] N. Y. CIV. PRAC. ACT § 1169.

[16] N. Y. CIV. PRAC. ACT §§ 1171, 1172.

[17] Beadleston v. Beadleston, 103 N. Y. 402, 8 N. E. 735 (1886).

[18] Matter of Thrall, 12 App. Div. 235, 42 N. Y. Supp. 439 (1896), *aff'd*, 153 N. Y. 644, 47 N. E. 1111 (1897).

[19] Laws of N. Y. 1939, c. 431.

[20] The language of Section 1171-b permits entry of judgment for "any sum

It is under the third remedy that a second conflict has arisen. Has a court, on application for an order directing entry of judgment under Section 1171-b for alimony that has accrued, any discretionary power to withhold judgment or grant it only in reduced amount where circumstances make complete collection inequitable? The Second, Third and Fourth Departments hold that granting of a judgment is discretionary.[21] The First Department, however, in *Treherne-Thomas v. Treherne-Thomas*[22] has declared that accrued alimony under a final decree creates vested rights which that court is powerless to nullify. Therefore, a judgment "must" be entered, in the absence of such positive defense as payment, for the full amount.

Since the other two remedies for the collection of temporary accrued alimony (contempt and sequestration) are discretionary, it would seem, unless an intent to the contrary was expressed by the legislature, that the new remedy under 1171-b should also be discretionary. No such intent is expressed and nothing in the history of the section indicates that the legislature's use of such language as "the court *may* make an order directing the entry of judgment" was ever intended to be construed as *"must* make an order."[23] Nevertheless a sharp difference has arisen in those decisions construing the section.

As currently amended, the legislature has sought to resolve this conflict by inserting into Section 1171-b the words "in its discretion" before the word "may." Therefore, on an application by either party, for a money judgment under Section 1171-b, after having given such notice as the court shall prescribe, the court has been given discretion to extinguish part or all of the accrued alimony when the circumstances of the case make it equitable to do so.

As a result of the various interpretations of Sections 1170 and 1171-b of the Civil Practice Act prior to the current amendment, courts of other jurisdictions have been beset with difficulties whenever they have attempted to enforce a New York decree involving the controverted sections. Under the full faith and credit clause of the Constitution of the United States, a sum which is fixed and owing under a New York judgment, may be the basis of an action in an-

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of money . . . ." Thus it is broad enough to cover alimony proper as well as counsel fees and expenses. It should also be noted that applying the section to permanent alimony merely restates an existing power to enter a money judgment on accrued arrears under Section 504 of the Civil Practice Act.

[21] McCanliss v. McCanliss, 268 App. Div. 138, 49 N. Y. S. 2d 289 (2d Dep't 1946); Eisinger v. Eisinger, 261 App. Div. 1031, 26 N. Y. S. 2d 22 (3d Dep't 1941); Gehring v. Gehring, 262 App. Div. 1065, 30 N. Y. S. 2d 257 (4th Dep't 1941).

[22] 267 App. Div. 509, 46 N. Y. S. 2d 679 (1st Dep't 1944).

[23] It would appear that such a construction is not unnatural or strained. Consequently, since the legislature drew the remedial statute broad enough to include accrued permanent alimony as well as temporary it would seem that the discretionary power was applicable to the former also.

other state.[24] However, courts in other states and the federal courts have found it very difficult to enforce alimony decrees for they were not certain as to whether the statutes of New York permitted reduction of accruals or whether the amount due was a fixed sum. As a consequence, other jurisdictions enforced the accumulated installments or refused to do so depending on what they believed to be the New York law.

The following illustration will elucidate this point in the conflict of laws. In *Sistare v. Sistare*[25] a wife brought an action in Connecticut to recover a judgment against her husband for arrears of alimony under a New York separation decree. The Connecticut tribunal denied recovery for it was of the opinion that under the law of New York the accrued installments remained subject to the court's discretion and could be modified or cancelled. Upon an appeal to the Supreme Court of the United States it was there decided that the accruals were not subject to reduction.[26] However, the Supreme Court took an opposite stand in *Griffin v. Griffin*.[27] In that case, as indicated above, the court construed Section 1170 to mean that arrears of alimony were subject to changes.

The uncertainty which has confronted the courts of other states is sought to be remedied by the provision now contained in Section 1171-b. It is to be noted, however, that whereas the section now permits a court to annul or modify accrued alimony, when the wife once makes a motion to reduce it to a judgment, such judgment, if duly entered, is no longer subject to any further discretionary modifications.

It is noteworthy that the amendments to the various sections create retrospective legislation. In view of the constitutional questions raised by retrospective legislation we will discuss the effect of the amendments on accrued alimony prior to the date the present amended sections went into effect. As a rule of statutory construction the provisions of a statute will not be applied retroactively unless the intent of the legislature clearly requires such interpretation.[28] Neither Section 1170 and its comparable sections nor Section 1171-b had clearly expressed the intent of the legislature that they should apply retrospectively. These sections, prior to the present amendments, did not even contain clear language to show that they might be applied retroactively in respect to decrees rendered *after* their effective dates. But as the sections stand today, the legislative intent to apply retrospectively is clearly expressed. This, of course, means that decrees rendered after the effective date of the present sections

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[24] RESTATEMENT, CONFLICT OF LAWS § 464 (1934).

[25] 218 U. S. 1, 54 L. ed. 905 (1910).

[26] The decision was based on the theory that Section 1771, Civil Practice Act (now Section 1170 of the Civil Practice Act), did not grant discretion to the court to annul or modify accrued alimony.

[27] 327 U. S. 220, 90 L. ed. 635 (1946).

[28] Walker v. Walker, 155 N. Y. 77, 49 N. E. 663 (1898).

are subject to retrospective modification. But does that mean that decrees prior to the effective date may be modified? In *Livingston v. Livingston* [29] our highest state court held that even though a legislature does expressly declare its intent that the act should apply retrospectively, it would not be effective as to decrees entered prior to the date it went into effect.

In *Waddey v. Waddey*,[30] a wife, in 1925, was granted a divorce decree and awarded alimony. Thereafter she led an immoral life. In 1938 Section 1172-c, Civil Practice Act, was passed which permitted a court, on application by the husband, to cancel the alimony awarded upon proof that the wife was leading an unchaste existence and was holding herself out as the wife of another. When the husband sought to avail himself of this statute, the Court of Appeals, in reversing a judgment for the husband, held that the statute would not affect decrees entered prior to the effective date of the statute. The husband there contended that even without the 1938 statute he is entitled to relief, in the discretion of the court, under Section 1170. It will be remembered that the adoption of Section 1170 had the effect of writing into each decree a reservation of power to modify; and since that section was passed prior to the date of entry of the final decree in question the husband was of the opinion that Section 1170 should govern. But the court, after holding Section 1170 inapplicable,[31] by way of dictum, traced the history of the section. It stated that its provisions, in respect to modifying or annulling directions, have been in effect since 1895 either in the Code of Civil Procedure or the Civil Practice Act. Where claims had been made that these provisions were retroactive it was held that it had no effect prior to its effective date.

It would seem, therefore, that Sections 1170 and 1171-b will not affect decrees prior to their effective dates. As a result of these recent amendments, the husband may now make a motion to cancel the accrued arrears under Section 1170 and its comparable sections and to reduce the amount of each installment he may have to pay in the future. It will not avail the wife to contend that she has a vested right, for the legislature has now clearly resolved this question, thus indicating that, in effect, matrimonial actions are to be considered as basically equitable in nature. Under Section 1171-b a court, in its discretion, may expunge or reduce accumulated arrears when it would be inequitable to enter a money judgment for all or part of the amount accumulated. However, once a money judgment has been entered the judgment shall thereafter not be subject to modification under the discretionary power granted by Section 1171-b. New York has now

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[29] 173 N. Y. 377, 66 N. E. 123 (1903).
[30] 290 N. Y. 251, 49 N. E. 2d 8 (1943).
[31] It was held inapplicable because Section 1170 was not passed to authorize a court to annul provisions of alimony for the misconduct of the wife by an immoral course of living.

created a workable rule which will enable the courts of other jurisdictions to enforce the judgment without the necessity of interpreting for itself the law of New York on this subject.

MORRIS SILVERMAN.

AMENDMENT TO THE CIVIL PRACTICE ACT RELATING TO COUNTERCLAIMS IN MATRIMONIAL ACTIONS.—In March, 1948, the legislature of New York enacted a bill [1] repealing Section 1168 of the Civil Practice Act [2] which read as follows:

> COUNTERCLAIM IN MATRIMONIAL ACTION. Where an action for divorce, separation or annulment is brought by either husband or wife, a cause of action for divorce, separation or annulment against the plaintiff and in favor of the defendant may be interposed in connection with a denial of the material allegations of the complaint, as a counterclaim.

The repeal of this section was recommended by the Judicial Council of the State of New York in furtherance of the Council's general policy to foster legislation which will effect the determination of as many controversies as possible in one action thus avoiding multiplicity of suits.[3] Section 266, Civil Practice Act, as amended in 1936, which defines counterclaims generally, is broad enough in terms to include the counterclaims referred to in Section 1168. However, the courts have construed Section 1168 to be a limitation on Section 266, as shall appear later, and as a result, counterclaims have been denied which should have been allowed.

Since under Section 266, as it originally stood, only such counterclaims were permissible as tended to defeat or diminish plaintiff's recovery,[4] it was necessary to enact Section 1168 which in its original form permitted counterclaims for divorce or separation in divorce or separation actions, so that a matrimonial counterclaim of a nature different from that in the complaint could properly be interposed. In 1936, in recognition of the general desirability of avoiding multiplicity of suits, the legislature repealed the old Section 266 and added the present section: [5]

> COUNTERCLAIM DEFINED. A counterclaim may be any cause of action in favor of the defendants or some of them against the plaintiffs or some of them, a person whom a plaintiff represents or a plaintiff and another person or persons alleged to be liable.

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[1] Laws of N. Y. 1948, c. 282.
[2] Laws of N. Y. 1937, c. 525.
[3] N. Y. JUDICIAL COUNCIL REPORT, LEGIS. DOC. No. 13, p. 20 (1946); N. Y. JUDICIAL COUNCIL REPORT, LEGIS. DOC. No. 2, p. 15 (1936); N. Y. JUDICIAL COUNCIL REPORT, LEGIS. DOC. No. 1, pp. 1, 44 (1935).
[4] N. Y. CODE OF CIVIL PROCEDURE § 501; Zawadsky v. Zawadsky, 169 Misc. 404, 7 N. Y. S. 2d 966 (Sup. Ct. 1938).
[5] Laws of N. Y. 1936, c. 324.