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Domestic Relations--Divorce--Alimony Provisions--Amendment Thereof (Goldman v. Goldman, 282 N.Y. 296 (1940))

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unity was adhered to even after the passage of the Enabling Acts,[16] the theory has suffered many inroads. For all legal purposes the husband and wife should no longer be considered as one person.[17]

S. L.

DOMESTIC RELATIONS — DIVORCE — ALIMONY PROVISIONS — AMENDMENT THEREOF.—Plaintiff appeals from a modification of a judgment of divorce which reduced the alimony provision of such judgment from $21,000 per annum to $14,000 per annum. While living apart plaintiff and defendant entered into a voluntary separation agreement on December 15, 1929. Several weeks later plaintiff obtained a divorce from defendant and the judgment, entered January 24, 1929, incorporated the stipulations of the separation agreement including the annual payment of $21,000 by the defendant for the support of the plaintiff and two children. The evidence proved that the defendant's income was much greater in 1929 than in 1938, and in 1929 the anticipation of his future income was based on foundations apparently secure. The plaintiff contends that the provisions for the support of wife and issue incorporated in a decree of divorce pursuant to a valid separation agreement of the parties may not be changed or modified without the consent of both parties thereto.[1] *Held,* the statutory power [2] of the court to modify its decrees is not affected by the fact that the decree adopted an agreement of the parties, though it is true that the contractual obligation could not be so modified without the consent of both interested parties. *Goldman* v. *Goldman,* 282 N. Y. 296, 26 N. E. (2d) 265 (1940).

New York courts unequivocally follow the majority opinion [3] in the United States to the effect that they have power to modify a judgment of divorce, though such be an adoption of an agreement of the parties.[4] In the instant case the Court of Appeals has clarified any doubt which may have arisen through the decision laid down in the

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[16] People *ex rel.* Troare v. McClelland, 146 Misc. 545, 263 N. Y. Supp. 403 (1933).

[17] Mattison v. N. Y. Cent. R. R., 23 N. Y. 529 (1862).

[1] Galusha v. Galusha, 138 N. Y. 272, 33 N. E. 1062 (1893).

[2] N. Y. CIV. PRAC. ACT §§ 1155, 1170.

[3] Herrick v. Herrick, 319 Ill. 146, 149 N. E. 820 (1925); Langrall v. Langrall, 145 Md. 340, 125 Atl. 695 (1924); Wilson v. Caswell, 272 Mass. 297, 172 N. E. 251 (1930); Fox v. Fox, 263 N. Y. 68, 188 N. E. 160 (1933); Levy v. Levy, 149 App. Div. 561, 133 N. Y. Supp. 1084 (1st Dept. 1912); Blake v. Blake, 15 Wis. 339, 43 N. W. 144 (1889). *Contra:* Connolly v. Connolly, 16 Ohio App. 92 (1922); Henderson v. Henderson, 37 Ore. 141, 60 Pac. 597 (1900).

[4] Kunker v. Kunker, 230 App. Div. 641, 246 N. Y. Supp. 118 (3d Dept. 1930) (A modification of an alimony provision of a decree of divorce based on a voluntary separation agreement was granted on proof by petitioner that justice so required).

case of *Galusha* v. *Galusha*.[5] As the Court succinctly points out, the instant case is different in that here the defendant does not attack the validity of the prior agreement. Where a court finds that two parties have entered into an agreement, it will not lend its aid to vacate or modify such agreement unless it is found to be fraudulent, voidable, illegal, unenforceable or tainted with duress. In the instant case the only aid requested from the court is that it modify its own decree; but not the mutual agreement made by the parties. Section 1155 of the New York Civil Practice Act[6] has empowered the courts of this State to modify a final judgment of divorce in so far as the alimony[7] provision is concerned, if justice so requires.[8] Similarly, Section 1170[9] of the Civil Practice Act makes provisions which, in effect, write a reservation into every final judgment of divorce and prolong the jurisdiction of the courts over the parties and the subject matter.[10] When a separation agreement is entered into by the parties, and, subsequently, a divorce is procured, the courts may direct the husband to pay the amount which the parties have agreed to constitute suitable provisions for the support of a wife and children. However, such a direction is no more inviolate from future change by the court than a judgment rendered after a controversy between the parties as to what suitable and just amount should be awarded the wife. The rights of the parties arise out of the judgment itself,[11] and such a judgment must be read as if it included an express reservation that it might be thereafter annulled, varied or modified pursuant to Section 1155 of the Civil Practice Act. The mere fact that a prior agreement existed

[5] Galusha v. Galusha, 138 N. Y. 272, 33 N. E. 1062 (1898) (the court refused aid to one seeking to have a decree modified by attacking the validity of the voluntary separation agreement of the parties).

[6] N. Y. Civ. Prac. Act § 1155 ("The court, in the final judgment dissolving the marriage in an action for divorce brought by the wife, may require the defendant to provide suitably for the education and maintenance of the children of the marriage, and for the support of the plaintiff, as justice requires having regard to the circumstances of the respective parties; and, by order, upon the application of either party to the action, and after due notice to the other, to be given in such manner as the court shall prescribe, at any time after final judgment whether heretofore or hereafter rendered, may annul, vary or modify such a direction * * *").

[7] Herrick v. Herrick, 314 Ill. 146, 149 N. E. 820 (1925) ("Alimony" does not arise from any business transaction, but from the relation of marriage, and is not founded on contract, but on the natural and legal duty of the husband to support the wife, and is that allowance out of the estate of her husband which is made to a woman on a decree of divorce for her support); Collins v. Collins, 80 N. Y. 1 (1898) ("The matter of alimony is regulated by statute").

[8] Walker v. Walker, 155 N. Y. 77, 49 N. E. 663 (1898) (Prior to 1891 the courts had no authority to change the amount of alimony in New York State allowed after a final judgment had been entered).

[9] N. Y. Civ. Prac. Act § 1170 ("The court, by order, upon the application of either party to the action, * * * 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 * * *").

[10] Fox v. Fox, 263 N. Y. 68, 188 N. E. 160 (1933).

[11] Wilson v. Caswell, 272 Mass. 297, 172 N. E. 251 (1930).

between the parties cannot and does not limit the powers of the court conferred by statute. Nevertheless, courts in awarding alimony have no power to abrogate or modify any provisions of a separation agreement without the mutual consent of the parties,[12] and, though the terms of a separation agreement have been incorporated in a subsequent decree of divorce, the statutory authority to modify alimony awards does not warrant the alteration of such prior separation agreement.[13] The contractual obligation is still enforceable in courts of law, but the special and drastic remedies afforded by statute[14] for failure to adhere to an alimony judgment can be resorted to only where there is a failure to pay the amount fixed in the modified judgment.

S. C.

DOMESTIC RELATIONS — FOREIGN DIVORCE — JURISDICTION — ESTOPPEL.—(First Case) Defendant and his first wife were domiciled in this state. While retaining his residence here, defendant went to Reno, Nevada, where he obtained a decree of divorce from his wife who neither appeared nor was personally served in that action, but who at all times remained a resident of New York State. Subsequently, defendant married the present plaintiff, who now sues him for separation. Defendant contends this action cannot be maintained as the Nevada decree is invalid in this state and that he is therefore not legally married to plaintiff. *Held,* the Nevada court, having no jurisdiction, could not render a decree that would be valid here;[1] however, defendant sought the judgment and may not now be heard to impeach it.[2] *Krause* v. *Krause,* 282 N. Y. 355, 26 N. E. (2d) 290 (1940).

(Second Case) Plaintiff sues defendant for separation. Plaintiff had been previously married to a Canadian citizen who was a resident of Quebec. While living separate and apart from him, she met the defendant. Solely through defendant's aid, she came to New York and then went immediately to Nevada where she obtained upon service by publication a divorce from her husband, in which action both plaintiff and defendant took part. Defendant claims the Nevada divorce is invalid. *Held,* plaintiff, having invoked the jurisdiction of the Nevada court, would be estopped from denying the validity of its

[12] Galusha v. Galusha, 138 N. Y. 272, 33 N. E. 1062 (1893).
[13] Henderson v. Henderson, 37 Ore. 141, 60 Pac. 597 (1900).
[14] See N. Y. CIV. PRAC. ACT §§ 1171, 1171-a, 1171-b, 1172.

[1] Winston v. Winston, 165 N. Y. 553, 59 N. E. 273 (1901); Hubbard v. Hubbard, 228 N. Y. 81, 126 N. E. 508 (1920); Lefferts v. Lefferts, 263 N. Y. 131, 188 N. E. 279 (1933).
[2] Starbuck v. Starbuck, 173 N. Y. 503, 66 N. E. 193 (1901); Hynes v. Title Guarantee and Trust Co., 273 N. Y. 612, 7 N. E. (2d) 719 (1937); Brown v. Brown, 242 App. Div. 33, 272 N. Y. Supp. 877 (4th Dept. 1934).