

## Alimony in Annulment Actions

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right direction. Judicial interpretation will eventually make specific its general terms and establish a guide for its enforcement.

LAWRENCE D. BELL.

ALIMONY IN ANNULMENT ACTIONS.—Although the legislature has recently changed the statutory rules which provide some of the legal remedies for discontented spouses, few students of the law of Domestic Relations would venture to predict that these changes will be received by the public with great acclamation. For many years the science and philosophy of the legal regulation and control of marriage has presented to the legislature some of its most perplexing problems. Many of those who believe that the families are the fundamental groups upon which our society is based and the primary units of our economic system deeply lament our quite un-uniform state laws of marriage. Different culture groups and religious organizations have urged the legislature to adopt a great variety of drastically divergent points of view in respect to marital problems. The legislature, consequently, has been extremely cautious, and as a result changes in the law have been made only after extensive hesitation. Many persons believe, therefore, that the rules of this particular category of our law have become somewhat antiquated. Hence, a change of these rules is often regarded as a dilatory enactment which should have been made years ago.

Recently the Civil Practice Act has been changed by adding a new section numbered 1140-a<sup>1</sup> and by amending Section 1169.<sup>2</sup> These amendments set forth the first statutory authorization for the allowance of alimony in annulment actions in New York. Previously alimony in these cases had been awarded as an impliedly necessary exercise of the statutory power to entertain annulment actions.<sup>3</sup> The interpretation to be given to these statutes may be inferred in part,

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<sup>1</sup> N. Y. CIV. PRAC. ACT § 1140-a as added by N. Y. Laws 1940, c. 226, § 2. "When an action is brought to annul a marriage or to declare the nullity of a void marriage, the court may give such direction for support of the wife by the husband as justice requires. . . . This section shall apply to any action brought by either the husband or the wife or by any other person in the lifetime of both parties to the marriage."

<sup>2</sup> N. Y. CIV. PRAC. ACT § 1169 (this section governing alimony and expenses in actions for divorce and separation now includes actions to annul a marriage and actions to declare the nullity of a void marriage).

<sup>3</sup> *Higgins v. Sharp*, 164 N. Y. 4, 8, 58 N. E. 9, 10, *aff'd*, 51 App. Div. 631, 64 N. Y. Supp. 1137 (2d Dept. 1900) ("The power to allow alimony and counsel fee to the wife in order to enable her to live pending the action, and to present her defense, if she has one, must be regarded as incidental and necessary in all matrimonial actions. Without such power the rights of the woman, in many cases, could not be adequately protected"). See *North v. North*, 1 Barb. Ch. 241 (N. Y. 1845); *Griffin v. Griffin*, 47 N. Y. 134 (1872); *Brinkley v. Brinkley*, 50 N. Y. 184 (1872).

therefore, from the trend in New York as indicated by decisions prior to these enactments.

Alimony is defined as "the allowance made to a wife out of her husband's estate for her support".<sup>4</sup> The right to alimony is dependent on the marital status; it exists by virtue of the obligation of the husband to support his wife. It is, perhaps, essential to distinguish between the two classes of alimony. An allowance made for the support of the wife during a matrimonial suit is temporary alimony or alimony *pendente lite*; at the termination of the suit a provision for the support of the wife is permanent alimony.<sup>5</sup> The right to alimony has always accrued to a wife alone. The statutes evoke no change in this regard, for they expressly provide "for support of the wife by the husband". Formerly in annulment actions, temporary alimony was awarded to a wife who was without means to defend the suit.<sup>6</sup> Where the action was to declare the nullity of a void marriage, it appears to have been a condition precedent to the granting of alimony that the wife assert the validity of the marriage as a defense.<sup>7</sup> These allowances were made, presumably, on the theory that the marriage is valid until the courts have pronounced it invalid, and the obligation to support continues until that time. If the action was brought by the wife, as a general rule, no temporary alimony was granted to the wife because she was repudiating that which was the basis of her claim to support.<sup>8</sup> Further, if an interested third party sought an annulment, alimony and counsel fees were not allowed.<sup>9</sup>

Heretofore, permanent alimony was never granted in an annulment action in New York. The courts felt that in the absence of express statutory direction they did not possess the authority to grant the same.<sup>10</sup> That such legislation was necessary had been contended, for a marriage though voidable may have given rise to effects that cannot be equitably adjusted merely by the restoration of the parties to their former status. "Broadly speaking the same considerations may be present in marriages terminated by annulment as through divorce and the same rights and remedies would seem to be appli-

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<sup>4</sup> BLACK, LAW DICTIONARY (3d ed. 1933) 92.

<sup>5</sup> *Ibid.*

<sup>6</sup> *Openheimer v. Openheimer*, 153 App. Div. 636, 138 N. Y. Supp. 643 (1st Dept. 1912); *Erlanger v. Erlanger*, 173 App. Div. 767, 159 N. Y. Supp. 353 (2d Dept. 1916).

<sup>7</sup> *North v. North*, 1 Barb. Ch. 241 (N. Y. 1845); *Griffin v. Griffin*, 47 N. Y. 134 (1872); *Wabberson v. Wabberson*, 27 Misc. 125, 57 N. Y. Supp. 405 (1899); *Higgins v. Sharp*, 164 N. Y. 4, 58 N. E. 9, *aff'd*, 51 App. Div. 631, 64 N. Y. Supp. 1137 (2d Dept. 1900).

<sup>8</sup> *Meo v. Meo*, 2 N. Y. Supp. 569 (1888); *Heron v. Heron*, 28 Misc. 323, 59 N. Y. Supp. 861 (1899). *Contra*: *Allen v. Allen*, 59 How. Pr. 27 (N. Y. 1880); *Gore v. Gore*, 44 Misc. 323, 89 N. Y. Supp. 902 (1905), *aff'd*, 103 App. Div. 74, 92 N. Y. Supp. 634 (3d Dept. 1905).

<sup>9</sup> *Farnham v. Farnham*, 227 N. Y. 155, 124 N. E. 894 (1919).

<sup>10</sup> *Park v. Park*, 24 Misc. 372, 373, 53 N. Y. Supp. 677 (1898) ("Upon principle there can be no provision for alimony in decree of nullity, and the Code does not authorize it").

cable."<sup>11</sup> If one reads the present statutes literally, it appears that a substantial change has been effectuated. They provide that alimony may be granted to a wife whether she is the plaintiff<sup>12</sup> or the defendant in the annulment action. This provision is also extended in order to include within its purview actions brought by a third party during the lifetime of both parties to the marriage. Consequently, guilt or innocence is not a material factor. It is to be noted that the enactments in question are more liberal than those granting relief in divorce and separation actions. In the latter cases, permanent alimony is awarded in actions brought by the wife.<sup>13</sup> The present statute contains no such limitation.

Whether future analysis will deem these provisions mandatory or merely advisory presents a difficulty. The legislature has provided what may be a modifying clause by inserting the phrase "as justice requires". If this clause is used as a basis for granting or denying relief, it may be contended that there will be little or no change in the trend as it existed prior to the enactment of the statutory change. However, if this "loophole" phrase is not construed as a discretionary guide for ascertaining in what instances alimony should be granted, but instead it is held to apply only to the amount to be given,<sup>14</sup> then the statute indeed works a substantial change.

MARY E. BROPHY.

NEW YORK CIVIL PRACTICE ACT § 347—TESTIMONY IN ACTION BASED ON ACCIDENT INVOLVING NEGLIGENCE OR CONTRIBUTORY NEGLIGENCE.—At early common law persons having no religious belief, insane persons, those convicted of crimes, deaf and dumb persons and parties to the action or interested in its outcome were disqualified as witnesses.<sup>1</sup> Today by various enabling statutes and decisions the tendency is to rest in the triers of the facts the ultimate value to be given to testimony, the source being a fact to be weighed in such determination. Thus a person is not rendered incompetent because of his religious belief or disbelief.<sup>2</sup> Persons are not excluded merely

<sup>11</sup> 1 VERNIER, *AMERICAN FAMILY* (1931) 266.

<sup>12</sup> *Anonymous v. Anonymous*, 174 Misc. 496, 21 N. Y. S. (2d) 71 (1940) (where plaintiff had married a man who had another wife living. Plaintiff brought an action for support. The court held that she could institute an action for annulment and get a direction for support under Section 1140-a of the Civil Practice Act).

<sup>13</sup> N. Y. CIV. PRAC. ACT §§ 1155, 1164, 1170.

<sup>14</sup> LAW REVISION COMMISSION, LEGIS. DOC. (1940) No. 65 (H) 59.

<sup>1</sup> RICHARDSON, *EVIDENCE* (5th ed. 1936) § 454.

<sup>2</sup> N. Y. CONST. ART. I, § 3 ("no person shall be rendered incompetent to be a witness on account of his opinions on matters of religious belief").