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Article 7

# Contempt Proceedings for the Non-Payment of Alimony--A Consideration of Section 1172a of the Civil Practice Act

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of election for the city government and does not have to provide for the same method as is used to elect its members, it may by special law allow the voters of the city to choose their own method.[19] Hence there is no question here of an *ultra vires* act on the part of the city; it is merely acting under a special law.

Thus it is seen that under P. R. there is nothing inconsistent with the plurality system of voting; it does not prevent a voting *for all officers* so far as the intendment of that phrase is interpreted; the voter may vote for each candidate to be elected but with a slight variation of a serial order under which a vote is really a choice. It is within the power of a legislature to allow cities to choose their own method of election so far as secrecy of voting is not destroyed; the legislature is not compelled to prescribe the single member district system for the election of city councilmen; and, lastly, P. R. is not expressly nor impliedly prohibited.[20] In view of these facts the case for the constitutionality of P. R. in this state seems plausible.[21]

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## CONTEMPT PROCEEDINGS FOR THE NON-PAYMENT OF ALIMONY—A CONSIDERATION OF SECTION 1172A OF THE CIVIL PRACTICE ACT.

It has been generally held that contempt proceedings will be allowed for non-payment of alimony as a remedial process necessary to secure to the wife an allowance for the support and maintenance of herself and her children and to prevent them from becoming public charges.[1] The necessity for such proceedings justifies its allowance.

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[19] N. Y. CONST. Art. XII, §§ 2, 5.

[20] State *ex rel.* Otto v. Kansas City, 310 Mo. 542, 276 S. W. 389 (1925) (in which it was held that the departure by Kansas City from the Bicameral Council was valid, there being no constitutional or statutory provision requiring the council to consist of two houses).

[21] Commonwealth *ex rel.* McCormick v. Reeder, 171 Pa. 505, 33 Atl. 67 (1895). In this case an act providing for the election of a given number of judges notwithstanding the fact that an elector was not allowed to vote for as many persons as there were places to be filled was held constitutional. The question of limited voting was raised in two New York cases. People *ex rel.* Wood v. Crissey, 91 N. Y. 616 (1883); People *ex rel.* Watkins v. Perley, 80 N. Y. 624 (1880) (The question of constitutionality was not discussed and the case was decided on other grounds.). For a study of Cincinnati's experience with proportional representation see TAFT CITY ADMINISTRATION (2d ed. 1933) pp. 96-110. For an exhaustive study of proportional representation see HOAG AND HALLETT, PROPORTIONAL REPRESENTATION (1926).

[1] *Ex parte* Hall, 125 Ark. 309, 188 S. W. 827 (1916); Woodard v. Woodard, 172 Ga. 713, 158 S. E. 569 (1931); Heflinger v. Heflinger, 172 Ga. 889, 159 S. E. 242 (1931); Toth v. Toth, 242 Mich. 23, 217 N. W. 913, 56 A. L. R. 839 (1928); Romaine v. Chauncey, 129 N. Y. 566, 29 N. E. 826 (1892);

A mere order to pay alimony would often prove ineffectual. It is frequently the threat of incarceration that furnishes the only motive for compliance with the decree.[2] But despite recognition of the need and use for such proceedings, we find an enormous amount of litigation arising out of situations where the divorced or separated husband, against whom the decree has been rendered, seeks to avoid commitment on the ground that he is financially unable to comply with the order of the court. In New York, prior to September 1, 1933, the situation was especially deplorable. Upon motion by the wife, the defaulting husband was imprisoned, the court utterly disregarding his inability to comply with the decree.[3] It was only after commitment that the court would entertain a motion for his release upon the ground of financial inability.[4] In the interim, however, the husband was deprived of all opportunities to earn any money. The wife certainly did not experience any material benefits, and the community was shouldered with the burden of supporting a prisoner who was not a criminal but merely a victim of fortuitous circumstances. Furthermore, there was the possibility that the same community would have to support the wife and children as public charges. Finally, under the concerted pressure of many contributing factors, one of which was the then existing chaotic condition of the economic world, the legislature relieved this somewhat archaic conception of

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2 SCHOULER, MARRIAGE, DIVORCE, SEPARATION AND DOMESTIC RELATIONS (6th ed. 1921) § 1835. *Contra: In re* Kinsolving, 135 Mo. App. 631, 116 S. W. 1068 (1909); Francis v. Francis, 192 Mo. App. 710, 179 S. W. 975 (1915) (the courts of Missouri holding that a decree for alimony creates but a debt, imprisonment for which is prohibited by the federal constitution). The true doctrine, however, is that a decree for alimony is essentially different from an ordinary debt or judgment for money. It is an order compelling a husband to support his wife and this is a public as well as marital duty—a moral as well as a legal obligation. The liability is not based upon a contract to pay money but upon the refusal to perform a duty. The imprisonment is not ordered simply to enforce the payment of money, but to punish for the willful disobedience of a proper order of a court of competent jurisdiction. West v. West, 126 Va. 696, 101 S. E. 876 (1920).

[2] Roper v. Roper, 242 Ky. 683, 47 S. W. (2d) 517 (1932); Potters v. Potters, 133 Misc. 28, 231 N. Y. Supp. 33 (1928).

[3] Strobridge v. Strobridge, 21 Hun 288 (N. Y. 1880); Ryckman v. Ryckman, 34 Hun 235, 98 N. Y. 639 (1885); Delanoy v. Delanoy, 19 App. Div. 295, 46 N. Y. Supp. 106 (1st Dept. 1897); Compton v. Compton, 125 App. Div. 859, 110 N. Y. Supp. 775 (1st Dept. 1908); Thompson v. Thompson, 197 App. Div. 228, 188 N. Y. Supp. 785 (2d Dept. 1921); Young v. Young, 35 Misc. 335, 71 N. Y. Supp. 944 (1901). *Contra:* Noland v. Noland, 29 Hun 63 (N. Y. 1883) (wherein at p. 631 the court said: "Imprisonment and consequent disgrace should not be put upon a person who is too poor to pay").

[4] JUDICIARY LAW § 775, as amended by N. Y. Laws 1933, c. 688: "where an offender, imprisoned as prescribed in this article is unable * * * to pay the sum * * * required to be paid * * *, the court * * * may, in its * * * discretion, and upon such terms as justice requires, make an order, directing him to be discharged from the imprisonment." Staples v. Staples, 206 App. Div. 196, 200 N. Y. Supp. 583 (1st Dept. 1923); Politano v. Politano, 146 Misc. 792, 262 N. Y. Supp. 802 (1933).

justice and passed Section 1172a of the Civil Practice Act.[5] The important feature of this Act is contained in subd. 3, which in effect, permits a defendant, upon a motion to punish him for contempt for non-compliance with the provisions of an alimony decree, to interpose as a valid defense his financial inability to make payment and to ask the court for a modification of the decree.[6] In this enactment the legislature has adopted the rule of the weight of authority as expressed in the decisions of the majority of the states.[7]

What is now the status in New York of the husband who has defaulted in his alimony payments? If he has already been incarcerated, the relief afforded to him by subd. 1 of the Section[8] is not novel, for even prior to its enactment, the husband could, under Section 750 of the Judiciary Law[9] petition the court for his release from imprisonment upon the ground of financial inability to make payments. The important feature of the statute, contained in subd. 3 represents an improvement upon former procedure in so far as it permits the husband to interpose his plea of poverty as a defense to a motion by the wife to punish him for contempt. But how shall the court determine whether or not the defendant is in fact without means? Shall the burden be placed upon the defendant to conclusively prove his financial inability to pay, or shall there be demanded of the wife proof sufficient to establish the financial means of the husband to comply with the decree? It is with a considera-

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[5] N. Y. CIV. PRAC. ACT (1933) § 1172a.

[6] "3. Any person may assert his financial inability to comply with the directions contained in an order or judgment made or entered in an action for divorce or separation or an action for the enforcement in this state of a judgment for divorce or separation rendered in another state, as a defense in a proceeding instituted against him under section 1172 of this act or under the judiciary law to punish him for his failure to comply with such directions and, if the court, upon the hearing of such contempt proceeding, is satisfied from the proofs and evidence offered and submitted that the defendant is financially unable to comply with such order or judgment, it may, in its discretion, until further order of the court, make an order modifying such order or judgment and denying the application to punish the defendant for contempt."

[7] Peel v. Peel, 50 Iowa 521 (1879); Wells v. Wells, 99 Wash. 492, 169 Pac. 970 (1918); Stuart v. Stuart, 130 Wash. 68, 226 Pac. 133 (1924); Staples v. Staples, 87 Wis. 592, 58 N. W. 1036 (1894).

[8] "1. Any person who, by an order or judgment made or entered in an action for divorce or separation or an action for the enforcement in this state of a judgment for divorce or separation rendered in another state, is directed to make payment of any sum or sums of money, and against whom an order to punish for contempt of court has been made pursuant to the provisions of section 1172 of this act or the judiciary law may, if financially unable to comply with the order or judgment to make such payment, upon such notice to such parties as the court may direct, make application to the court for an order relieving him from such payment and such contempt order. The court, upon the hearing of such application, if satisfied from the proofs and evidence offered and submitted that the applicant is financially unable to make such payment may, in its discretion, until further order of the court, modify the order or judgment to make such payment and relieve him from such contempt order."

[9] *Supra* note 4.

tion of this important question of burden of proof in conjunction with a discussion of the purpose and effect of Section 1172a, that the remainder of this note will concern itself.

A reading of the statute discloses no hard and fast rule governing the granting of the relief contemplated therein. To attempt the formulation of such a rule would be sheer folly as each case presents a human problem peculiarly its own, calling for a decision based upon a careful consideration of the facts and circumstances surrounding the individual case. Instead, such relief is placed within the "discretion of the court." [10] While this phrase is not susceptible of accurate definition, it can hardly be contended that it confers upon the court the right to arbitrarily place the burden of proof upon either party, depending upon the judge's personal sociological views on the subject of contempt proceedings. "Discretion," wrote Lord Mansfield, "must not be arbitrary, vague or fanciful, but legal and regular." [11] In exercising their "discretionary powers" the judges are to be governed by definite, uniform principles designed to produce a decision based upon sound and deliberate judgment so as to advance the ends of justice.[12] We have seen, that prior to 1933, the law in New York permitted a defendant to plead poverty only after he had been committed to prison.[13] The rigors of this system, bitterly referred to as "petticoat justice" by Judge Bonynge,[14] were recognized by the courts who therefore were rather prone to release a defendant from imprisonment upon petition.[15] In those cases, however, the defendant's inability to pay was somewhat easy to determine since it was obvious that he could not earn any money while in jail especially where the income was wholly derived from salary or wages. Therefore, in the absence of evidence tending to show that the defendant was contumacious in conduct, the courts were justified in accepting the plea of poverty and releasing the husband from jail. But that situation is hardly parallel with that which exists today. The husband today, upon interposing his defense of poverty to a motion to have him punished for contempt has not yet been in-

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[10] "* * * the court * * * may, in its discretion, * * * make an order * * * denying the application to punish the defendant for contempt." See *Editorial*, 90 N. Y. L. J. 992, Sept. 25, 1933.

[11] Rex v. Wilkes, 4 Burr. (K. B.) 2527, 2539 (1770).

[12] Platt v. Munroe, 34 Barb. 291, 292 (N. Y. 1861).

[13] *Supra* note 4.

[14] See Politano v. Politano, 146 Misc. 792, 262 N. Y. Supp. 802 (1933).

[15] In the Politano case, *supra* note 14, the evidence showed that the husband had suffered severely as a result of the depression and was apparently unable to make any alimony payments, while the wife was childless and earned her own living. The court, citing N. Y. CONST. Art. 1, § 5, which declares "excessive bail shall not be required nor excessive fines imposed, *nor shall cruel and unusual punishment be inflicted,*" released the husband from imprisonment. (Italics ours.) In the case of Tenchini v. Tenchini, reported in 92 N. Y. L. J. 607:3, Sept. 1, 1934, the court allowed the husband to be placed in the custody of his counsel after he had proved that as a result of his confinement his business had suffered to the point where he was being dispossessed.

carcerated. His income and earning capacity are not known to the court. Are we to adopt the proposition that the court should deny the wife's motion and accept the husband's plea of poverty merely because he advances affidavits stating his inability to comply with the decree? The resulting evils of such a practice are too self-evident to admit of argument. It would seem then, that something more than the mere statement of poverty in the affidavits of the husband is necessary to produce a clear picture of the defendant's financial status.

An examination of the reports of other jurisdictions discloses the interesting fact that the weight of authority holds to the proposition that the burden of conclusively proving his financial inability to comply with an alimony decree is upon the defendant husband and that affidavits merely stating his inability, as distinguished from affidavits stating *facts* tending to prove his inability to pay, are in themselves insufficient to establish such inability.[16] Nor is this an unreasonable requirement. The defendant's financial condition and ability to pay are matters peculiarly within his own knowledge. They could not be known with any degree of certainty by the wife nor could she easily produce evidence to maintain the proposition were the burden of proof placed upon her.[17] It is impossible to deny the logical presumption that in fixing the amount of alimony to be paid, the court fully investigated the defendant's pecuniary condition and resources and directed him to pay only such reasonable sum as he was able to pay; consequently when it is shown that he has disobeyed the order of the court, a *prima facie* case of contempt is made against him and the burden is therefore upon him to show that it was not in his power to obey the decree.[18] If the defendant can by uncontroverted evidence establish the fact that his failure to pay the judgment awarded his wife as alimony is the result of lack of funds, the *prima facie* case is overcome and it would be a distinct error to keep him confined under a contempt order.[19] Where the circumstances of the case do not justify commitment, such commitment would be defeating the very purpose sought to be accomplished. As pointed out by the court in *Tenchini* v. *Tenchini*,[20] "certain it is that his financial position is not being improved by his remaining in jail, and his ability to take care of the alimony and counsel fees for which

[16] Shaffner v. Shaffner, 212 Ill. 492, 72 N. E. 447 (1904); Hurd v. Hurd, 63 Minn. 443, 65 N. W. 728 (1896); Ramsay v. Ramsay, 125 Miss. 185, 87 So. 491 (1921); Clark v. Clark, 152 Tenn. 431, 278 S. W. 65 (1925); Branch v. Branch, 144 Va. 244, 132 S. E. 303 (1926).

[17] Holtham v. Holtham, 6 Misc. 266, 26 N. Y. Supp. 762 (1893); State v. Cook, 66 Ohio St. 566, 64 N. E. 567, 58 L. R. A. 625 (1902); Andrew v. Andrew, 62 Vt. 495, 20 Atl. 817 (1890).

[18] *In re* Rasmussen, 56 Cal. App. 368, 205 Pac. 72 (1922); Collins v. Collins, 158 So. 915 (Miss. 1935); Armijo v. Armijo, 29 N. M. 15, 217 Pac. 623 (1923); Strobridge v. Strobridge, 21 Hun 288 (N. Y. 1880).

[19] Heflinger v. Heflinger, 172 Ga. 889, 159 S. E. 242 (1931); Peel v. Peel, 50 Iowa 521 (1879); and cases cited *supra* note 7.

[20] Reported in 92 N. Y. L. J. 607:3, Sept. 1, 1934.

the wife prays and which has been awarded to her is no nearer payment by reason of his lodgment in jail." It is not the desire of the court to deprive a man of his liberty and it demands of the defendant no more than distinct reasonable proof of his inability to pay and that such inability is honest and is not due to acts of his own volition.[21] Of course, where the defendant contumaciously renders himself unable to obey the decree by transferring his property,[22] secreting the same[23] or remarrying,[24] he cannot successfully plead inability to pay as a defense;[25] some courts having gone so far as to hold that a recusant defendant can be imprisoned for contempt even where his inability to pay alimony is a result of his refusal to work.[26]

With the above principles in mind, we turn to an examination of several of the cases decided in New York under the section in order to observe the manner in which the courts have dispensed the relief contemplated therein. In the case of *Bamboschek* v. *Bamboschek*,[27] the wife made the usual motion to have the husband punished for contempt because of his failure to pay the alimony awarded to her. The proof offered by the defendant in his affidavit revealed that he had no assets, was heavily in debt, and that several large

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[21] State v. Nichol, 142 Ore. 235, 20 P. (2d) 221 (1933).

[22] Carogano v. Carogano, 231 App. Div. 77, 246 N. Y. Supp. 345 (1st Dept. 1930) (the court refused to release the defendant from imprisonment because he had transferred his property, secured a foreign divorce and had remarried).

[23] Roberts v. Fuller, 210 Iowa 956, 229 N. W. 163 (1930); De Ruiter v. De Ruiter, 28 Ind. App. 9, 62 N. E. 100 (1901) (the court herein allowed the wife to have a conveyance set aside as fraudulent, upon showing that it was made in order to defeat her right to alimony).

[24] Newburn v. Newburn, 210 Iowa 639, 231 N. W. 389 (1930); Kinney v. Kinney, 231 S. W. 267 (Mo. App. 1921); Lord v. Lord, 37 N. M. 24, 16 P. (2d) 933 (1932); Ryer v. Ryer, 33 Hun 16 (N. Y. 1884) (husband's inability to pay alimony was due to the fact that he had remarried in another state contrary to the decree of divorce rendered in New York. The court denied his motion to be released from imprisonment for contempt); State v. Brown, 31 Wash. 397, 72 Pac. 86 (1903).

[25] Selph v. Selph, 27 Ariz. 176, 231 Pac. 921 (1925); Anthony v. Anthony, 1 N. E. (2d) 999, (Ind. 1936) (relief from contempt order denied where it appeared that the husband was acting in bad faith in failing to carry out the decree); Ryerson v. Ryerson, 194 Minn. 350, 260 N. W. 530 (1935); KEEZER, A TREATISE ON THE LAW OF MARRIAGE AND DIVORCE (2d ed. 1923) § 793.

[26] Fowler v. Fowler, 61 Okla. 280, 161 Pac. 227 (1916). The weight of authority however, is to the contrary, on the theory that a court cannot compel a defendant to seek employment and thereby derive the means wherewith to pay the alimony allotted. Webb v. Webb, 140 Ala. 262, 37 So. 96 (1904); Wells v. Wells, 99 Wash. 492, 169 Pac. 970 (1918); see 2 SCHOULER, *ob. cit. supra* note 1, § 1843; see Fredenberg v. Fredenberg, 149 Misc. 391, 266 N. Y. Supp. 698 (1933) (the court holding that a defendant may not escape punishment for failure to pay alimony by reason of his physical condition, allegedly preventing him from performing manual labor, where such condition is the result of his dissolute habits, and his failure to demonstrate that he has made fair and reasonable efforts to comply with the decree).

[27] 150 Misc. 885, 270 N. Y. Supp. 741 (1934), *aff'd, and modified,* 241 App. Div. 530, 271 N. Y. Supp. 1097 (1st Dept. 1934).

judgments had been entered against him. It can be conceded therefore, that the defendant satisfactorily sustained the burden of proving his financial inability. The lower court properly denied the motion to punish for contempt but further granted the defendant's cross-motion for relief under this section by entirely eliminating from the decree the provision for payment of alimony.[28] In this the court erred. The true purpose and intention of the statute is to suspend the auxiliary remedy of incarceration for the enforcement of a judgment given to the wife under Section 1172 of the Civil Practice Act and to prevent a recurrence of such situations where through imprisonment the defendant is deprived of any opportunity to perform the terms of the decree. While the court may sometime be confronted with a situation, where, because of the financial independence and excellent earning capacity of the wife, it would be unjust and grossly inequitable to award alimony, we must keep in mind that such cases are outstanding exceptions. The legislature did not intend this section to be used by the courts as a means of modifying the common-law obligation of the husband to support his wife, an obligation which is as binding after the breach by the husband of a marital covenant as before, entitling the wife to a divorce or separation.[29] On appeal, the Appellate Division modified the decree of the *Bamboschek* case by disallowing the cross-motion for the elimination of the alimony provision in the original decree and affirmed the denial of plaintiff's motion to punish for contempt. The defendant was also directed to pay one-third of his earnings each week to the plaintiff, and to submit to the attorney for the plaintiff every two months a sworn statement of his earnings.[30] Cases decided subsequently to the *Bamboschek* case seem to be well within the purpose of the statute. In the case of *Sampson* v. *Sampson,*[31] the alimony was found to be excessive and beyond the defendant's ability to pay. It was therefore reduced to an amount commensurate with his earnings and the defendant's motion to be relieved from a contempt order was granted. In both of the following cases, *Birdsall* v. *Birdsall* [32] and *Singer* v. *Singer,*[33] the defendants were released from prison and the payments of alimony were suspended for limited periods of time. By *suspending* the payments the courts did not, of course, entirely erase them from the original decrees, as was attempted by the lower court in the *Bamboschek* case. The purpose of the suspensions was to give the defendants an opportunity to seek employment and thereby acquire the means to resume the payment of their obligations. An interesting question, not quite pertinent to the discussion, develops from the above situations. Upon the defendants

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[28] *Ibid.*
[29] See Conrad v. Everich, 50 Ohio St. 487, 35 N. E. 58, 59 (1893).
[30] 241 App. Div. 530, 271 N. Y. Supp. 1097 (1st Dept. 1934).
[31] 243 App. Div. 636, 276 N. Y. Supp. 898 (2d Dept. 1935).
[32] 246 App. Div. 879, 284 N. Y. Supp. 856 (3d Dept. 1936).
[33] 246 App. Div. 850, 285 N. Y. Supp. 16 (2d Dept. 1936).

subsequently becoming financially able to make the payments, would they be obligated for the amounts for which they would ordinarily have been liable were it not for the suspensions? It would seem, that the answer is in the negative, for, if the alimony payments had been reduced instead of suspended, and thereafter increased upon application of the wife, it is not likely that the increase would be retroactive, no matter how financially able the defendant might have become.

In conclusion, it is apparent that the trend in New York is to forbear the enforcement of a contempt order where the result would not serve the ends of justice. This trend is in harmony with that of the majority of other jurisdictions.[34] Such forbearance is not to be exercised, however, on the strength of mere statements of a party under oath that he is financially unable to comply with an alimony decree [35] since there is no inherent power in the court to relieve a defendant merely as a matter of grace or mercy.[36] With the rate of divorce ever on the increase,[37] easy evasion of alimony payments would go far to encourage individuals to revolt against the obligations of the marriage bond and to repudiate personal obligations to the wife and to the community.

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[34] Orcutt v. Orcutt, 63 N. D. 207, 247 N. W. 372 (1933); Woodard v. Woodard, 172 Ga. 713, 158 S. E. 569 (1931).

[35] Clark v. Clark, 152 Tenn. 431, 278 S. W. 65 (1925); Holtham v. Holtham, 6 Misc. 266, 26 N. Y. Supp. 762 (1893); and cases cited *supra* note 16.

[36] Moore v. McMahon, 20 Hun 44 (N. Y. 1880); Matter of Canakos, 60 Misc. 63, 11 N. Y. Supp. 601 (1908).

[37] The number of divorces has increased from about 10,000 a year in 1867 to more than 200,000 in 1929. Population increased during that period about 300%, marriages almost 400% and divorces about 2,000%. Thus the rate of divorce increased about five times as rapidly as the proportion of married population in the United States over a period of 63 years. See CAHEN, STATISTICAL ANALYSIS OF AMERICAN DIVORCE (1932).