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Divorce--Right to Discontinue Action (Slade v. Slade, 241 App. Div. 465 (1st Dept. 1934))

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being final, the recipient has a vested right[3] which the legislature cannot arbitrarily confiscate, recall, or put again in jeopardy.[4] While this statute is remedial,[5] requiring that no judgment be granted for any residue of the debt remaining unsatisfied where the mortgaged property shall be sold during the emergency, except after an appraisal and the reasonable market value of same has been ascertained,[6] and should therefore be liberally construed,[7] a construction which would give it retroactive operation is not favored by the courts.[8] Unless the language clearly and plainly indicated a contrary purpose, a prospective construction will always be given.[9] In the instant case, the statute became effective in the interim between the rendering of judgment and sale of the property and therefore has no effect.

A. S. G.

DIVORCE—RIGHT TO DISCONTINUE ACTION.—*W* instituted an action for separation in which she obtained judgment and alimony. The parties then entered into a separation agreement wherein a different financial arrangement was made. While the separation suit was pending, but before judgment *H* went to Nevada and obtained a divorce, *W* not appearing therein. Thereafter *H* remarried in a foreign state. Thereupon, *W* commenced two actions: (1) against *H* and his alleged second wife for a declaratory judgment and (2) against *H* for specific performance of the separation agreement. Personal service was had in each action. As a result of conferences, *W* discontinued the two suits and brought an action for divorce against *H*, who in consideration thereof agreed to make certain payments to her. The divorce action was started in good faith, *H* being personally served. However, *H* defaulted on his payments and refused to comply with the terms of the separation agreement, whereupon *W* moved for leave to discontinue her divorce action. From a denial of the motion *W* appealed. *Held*, reversed, the special circumstances present herein permit the granting of *W's* motion to

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

[4] Matter of Greene, 166 N. Y. 485, 60 N. E. 183 (1901).

[5] Instant case.

[6] N. Y. CIVIL PRACTICE ACT §1083 a.

[7] Hudler v. Gloden, 36 N. Y. 446 (1867); Ayers, *et al.* v. Lawrence, *et al.*, 59 N. Y. 196 (1874); Berger, *et al.* v. Varrelmann, 127 N. Y. 287, 27 N. E. 1065 (1891); Allen v. Stevens, 161 N. Y. 143, 55 N. E. 568 (1899).

[8] Walker v. Walker, 155 N. Y. 77, 49 N. E. 663 (1898); Livingston v. Livingston, *supra* note 3; Wilson v. Hinman, 182 N. Y. 411, 75 N. E. 236 (1905).

[9] Walker v. Walker, *supra* note 8; Benton v. Wickwore, 54 N. Y. 226 (1873); Goillotel v. Mayor, *etc.*, of the City of New York, 87 N. Y. 441 (1882); Jacobus v. Colgate, 217 N. Y. 235, 111 N. E. 837 (1916).

discontinue. *Slade* v. *Slade,* 241 App. Div. 465, 272 N. Y. Supp. 700 (1st Dept. 1934).

The Rules of Civil Practice provide that an action or a special proceeding may be discontinued by the filing with the clerk of the court in which such action or proceeding may be pending of a stipulation in writing for such discontinuance, signed by the attorneys of record for all parties, and further that such stipulation shall have the same effect as an order of discontinuance.[1] The granting of such order by the court is an exercise of its discretionary power, it being empowered to grant or refuse an application for leave to discontinue on payment of costs.[2] Such application is addressed to the legal, not the arbitrary, discretion of the court and it can not capriciously deny it.[3] The court has a right to refuse permission wherever circumstances exist which afford a basis for the exercise of legal discretion and has only to consider whether anything has occurred since the commencement of the action which would so prejudice *H's* interests in the event of discontinuance as to require a denial.[4] In matrimonial actions, there are two reasons why the rule which guides the court in determining whether to allow a discontinuance in ordinary actions is not applicable in full: (a) the rights to the parties to the record are not alone to be considered, for the public is regarded as a party and must be treated as such by the court;[5] and (b) because of the public interest the court has been invested with a wider discretion in the control of the course of procedure in matrimonial actions than in others.[6] In the exercise of this discretion it has been held that "a party should no more be compelled to continue a litigation than to commence one, except where substantial rights of other parties have accrued and injustice will be done to them by permitting the discontinuance."[7] Furthermore, the petitioner not being entitled to a discontinuance as a matter of right the court possesses the power to impose such terms as it may think just, for having the right to refuse the request if it so wills,[8] if it impose conditions which the petitioner is unwilling or unable to comply with, he is in no worse condition than he would have been if the refusal had been absolute.[9] The equities of the parties litigant must be given consideration and if it can be shown that one of the parties

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[1] N. Y. Civil Practice Rule (1929) No. 301.
[2] Carleton v. Darcy *et al.,* 75 N. Y. 375 (1878).
[3] Winans v. Winans, 124 N. Y. 140, 145, 26 N. E. 293 (1891).
[4] *Ibid.;* Winston v. Winston, 21 App. Div. 371, 47 N. Y. Supp. 399 (1st Dept. 1897); Borda v. Borda, 43 R. I. 384, 113 Atl. 118 (1921).
[5] Colvin v. Colvin, 2 Paige 385, 386 (N. Y. 1831); Blevins v. Blevins, 131 Misc. 315, 316, 226 N. Y. Supp. 553 (1928).
[6] Winans v. Winans, *supra* note 3; White v. White, 167 Wis. 615, 168 N. W. 704 (1928).
[7] *In re* Butler v. Jarvis, Jr., 101 N. Y. 307, 4 N. E. 518 (1886); Miller v. Katz, 143 Misc. 411, 256 N. Y. Supp. 654 (1932).
[8] Carelton v. Darcy *et al., supra* note 2.
[9] *In re* Application of the Waverly Waterworks, 85 N. Y. 478 (1881).

will be unjustly discriminated against by permitting the discontinuance it will be denied.[10]

The motion for leave to discontinue being addressed to the discretion of the court, the decision thereon will not be disturbed unless there was evident misapprehension of the facts or of the parties or an abuse of discretion on the part of the court.[11] In the case at bar the special circumstances and equities involved are such as to differentiate it from those cases where a discontinuance will not be permitted.

H. H. H.

DOMESTIC RELATIONS—SEPARATION—RESIDENCE.—This action is brought by the wife for separation from her husband on the ground of abandonment and failure to support. The parties were married in the state of Illinois and soon after came to this state and resided here sporadically for about fourteen months. Thereafter husband and wife removed to California and while there separated. Thereafter the wife came to New York and brought this action for separation. *Held,* wife could maintain an action against husband for separation and maintenance, where both parties had previously resided in the state for more than one year and wife was a resident at commencement of action. *McDonald* v. *McDonald,* 241 App. Div. 457, 273 N. Y. Supp. 217 (1st Dept. 1934).

Where marriage was consummated without the state [1] plaintiff can only maintain an action [2] in the state against a non-resident defendant [3] when the parties have "at some time" been residents [4] of

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[10] Van Alen v. Schermerhorn, 14 How. Pr. 287 (N. Y. 1856); Keene v. Keene, 189 N. Y. Supp. 284 (1921).

[11] Levey v. Levey, 169 App. Div. 966, 153 N. Y. Supp. 1125 (2d Dept. 1915); Crosley v. Fitzpatrick, 23 Weekly Digest 35 (1886).

[1] Simmons v. Simmons, 208 App. Div. 195, 203 N. Y. Supp. 215 (1st Dept. 1924).

[2] Barber v. Barber, 137 App. Div. 665, 122 N. Y. Supp. 452 (1st Dept. 1910).

[3] Bierstadt v. Bierstadt, 29 App. Div. 210, 51 N. Y. Supp. 862 (4th Dept. 1898); May v. May, 233 App. Div. 519, 253 N. Y. Supp. 606 (1st Dept. 1931); McColl v. McColl, 112 N. Y. Supp. 519 (1908).

[4] Perrin v. Perrin, 140 Misc. 406, 250 N. Y. Supp. 588 (1931) (a person is domiciled where he has his true, fixed permanent home and principal establishment, to which, whenever absent, he intends to return; there must be a union of residence with intent to establish a domicile but it may exist without actual residence). See also Kleinrock v. Nantex Mfg., 201 App. Div. 236, 194 N. Y. Supp. 142 (2d Dept. 1922) for interpretation of "residence."