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Domestic Relations--Divorce--Right to Alimony Terminates upon Remarriage--Relief on Separation Agreement (Severance v. Severance, 260 N.Y. 432 (1933))

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case the defendant failed to retire bonds each year and the plaintiff was thereby deprived of his equal chance and right to have his bonds retired.[6] There was, therefore, not an anticipatory but an actual breach of the contract for which plaintiff had a right to immediately maintain his action and not wait until 1940. This was not an installment contract.[7]

J. P.

DOMESTIC RELATIONS—DIVORCE—RIGHT TO ALIMONY TERMINATES UPON REMARRIAGE—RELIEF ON SEPARATION AGREEMENT. —Plaintiff and defendant entered into a separation agreement providing primarily for the separate support and maintenance of the plaintiff, wife. Subsequently alimony was awarded to the wife by a judgment of divorce in her favor. Plaintiff remarried and the defendant moved to strike from the judgment the provisions for alimony. *Held,* The provisions for alimony should be stricken out, without prejudice to plaintiff's right to seek relief under the separation agreement. *Severance* v. *Severance,* 260 N. Y. 432, 183 N. E. 909 (1933).

Where the plaintiff in a divorce action remarries after the final judgment has been entered, the court upon proper application of the defendant, *must* modify the judgment by striking out the provisions for alimony.[1]

A separation agreement which provides for future support and maintenance is in recognition of the husband's continuing liability to support his wife.[2] The consideration for the husband's agreement to pay is his release from obligation, except as under the separation agreement.[3] Some cases hold that a valid separation agreement is not abrogated by a subsequent judgment of divorce

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[6] *Supra* note 2.

[7] Roehm v. Horst, 178 U. S. 1, 20 Sup. Ct. 780 (1899); Foxell v. Fletcher, 87 N. Y. 476 (1882); Lorillard v. Clyde, 122 N. Y. 41, 25 N. E. 292 (1890); Wharton & Co. v. Winch, 140 N. Y. 287, 35 N. E. 589 (1893); McCready v. Lindenborn, 172 N. Y. 400, 65 N. E. 208 (1902); Kelly v. Security Mutual Life Ins. Co., *supra* note 4.

[1] N. Y. CIVIL PRACTICE ACT §1159. The section is mandatory. Mowbray v. Mowbray, 136 App. Div. 513, 121 N. Y. Supp. 45 (1st Dept. 1910); Severance v. Severance, 235 App. Div. 799, 255 N. Y. Supp. 998 (2d Dept. 1932); Linton v. Hall, 86 Misc. 560, 149 N. Y. Supp. 385 (1914); Dumproff v. Dumproff, 138 Misc. 298, 244 N. Y. Supp. 597 (1930).

[2] Galusha v. Galusha, 116 N. Y. 635, 643, 22 N. E. 1114, 1116 (1889); Winter v. Winter, 191 N. Y. 462, 473, 474, 84 N. E. 382, 386 (1908); Lawson v. Lawson, 56 App. Div. 535, 537, 67 N. Y. Supp. 356, 357 (2d Dept. 1900); Effray v. Effray, 110 App. Div. 545, 547, 97 N. Y. Supp. 286, 287 (1st Dept. 1905); Dower v. Dower, 36 Misc. 559, 561, 73 N. Y. Supp. 1080, 1081 (1901).

[3] Pettit v. Pettit, 107 N. Y. 677, 679, 14 N. E. 500, 502 (1887).

granting alimony;[4] or at least by a divorce where no provision for alimony is made.[5] And the courts have repeatedly refused to grant alimony where there is a prior separation agreement in full force and effect [6] unless the allowance under the separation agreement is inadequate.[7] "The rational of the cases seems to be that some provision must be had for the maintenance of the wife, either by the award of alimony or by the provisions of the agreement, and that the husband should not be placed under double liability." [8]

The general rule is that a valid separation agreement may only be terminated by the acts [9] or mutual consent of the parties, or by the court in an action brought for that purpose.[10] However, in the case of the separation agreement which provides for future support and maintenance but does not fix a date of duration, as until the parties are divorced [11] or remarry [12] or until death,[13] it

[4] Hughes v. Cuming, 36 App. Div. 302, 55 N. Y. Supp. 256 (2d Dept. 1899), *rev'd* (on other grounds), 165 N. Y. 91, 58 N. E. 794 (1900). However, upon a new action involving the same issues the granting of alimony was held erroneous, but neither the granting of the order nor the acceptance of alimony under the error constituted a waiver of the separation agreement, Chamberlain v. Cuming, 37 Misc. 815, 76 N. Y. Supp. 896 (1902); see, also, Chamberlain v. Cuming, 99 App. Div. 561, 91 N. Y. Supp. 105 (2d Dept. 1904), *aff'd*, 184 N. Y. 526, 76 N. E. 1091 (1906); Hofman v. Nestel, 146 App. Div. 305, 130 N. Y. Supp. 775 (2d Dept. 1911). *But* the separation agreement and the husband's liability thereunder is abrogated if the husband divorces the wife, Boate v. Boate, 114 Misc. 321, 187 N. Y. Supp. 321 (1921).

[5] Carpenter v. Osborn, 102 N. Y. 552, 7 N. E. 823 (1886); Clark v. Fosdick, 118 N. Y. 7, 22 N. E. 1111 (1889).

[6] Galusha v. Galusha, *supra* note 2; Grube v. Grube, 65 App. Div. 239, 72 N. Y. Supp. 529 (1st Dept. 1901); Greenfield v. Greenfield, 161 App. Div. 573, 146 N. Y. Supp. 865 (1st Dept. 1914); Randolph v. Field, 165 App. Div. 279, 150 N. Y. Supp. 822 (1st Dept. 1914); Beebe v. Beebe, 174 App. Div. 408, 160 N. Y. Supp. 967 (2d Dept. 1916); Davis v. Davis, 195 App. Div. 430, 186 N. Y. Supp. 805 (3d Dept. 1921); Butler v. Butler, 206 App. Div. 214, 201 N. Y. Supp. 111 (2d Dept. 1923); Rosenblatt v. Rosenblatt, 209 App. Div. 373, 204 N. Y. Supp. 676 (4th Dept. 1924); Ascher v. Ascher, 213 App. Div. 183, 210 N. Y. Supp. 515 (1st Dept. 1925); Solomene v. Solomene, 229 App. Div. 728 (2d Dept. 1930); Taylor v. Taylor, 32 Misc. 312, 66 N. Y. Supp. 561 (1900). But it must clearly appear that one of the terms of the separation agreement provided for the future support of the wife, Kelly v. Kelly, 61 Misc. 480, 115 N. Y. Supp. 587 (1908).

[7] Lehmann v. Lehmann, 137 Misc. 8, 244 N. Y. Supp. 265 (1930); see also Galusha v. Galusha, *supra* note 2, at 646, 22 N. E. at 1117.

[8] Ryan, *J.*, in Horschthal v. Horschthal, 134 Misc. 479, 480, 235 N. Y. Supp. 451, 452 (1929).

[9] Zimmer v. Settle, 124 N. Y. 37, 26 N. E. 341 (1891); Dudley v. Fifth Avenue Trust Co., 115 App. Div. 396, 100 N. Y. Supp. 934 (1st Dept. 1906), *aff'd*, 188 N. Y. 565, 80 N. E. 1109 (1907).

[10] Butler v. Butler, *supra* note 6, at 216, 201 N. Y. Supp. at 113.

[11] Atherton v. Atherton, 155 N. Y. 129, 49 N. E. 933 (1898), *rev'd* (on other grounds), 181 U. S. 155, 21 Sup. Ct. 544 (1901); Shurman v. Shurman, 148 N. Y. Supp. 947 (1914).

[12] Clark v. Fosdick, *supra* note 5; Levy v. Levy, 149 App. Div. 561, 133 N. Y. Supp. 1084 (1st Dept. 1912); Van Horn v. Van Horn, 196 App. Div. 472, 188 N. Y. Supp. 98 (1st Dept. 1921); Westover v. Westover, 133 Misc. 510, 232 N. Y. Supp. 184 (1929).

[13] Galusha v. Galusha, *supra* note 2; Barns v. Klug, 129 App. Div. 192, 113 N. Y. Supp. 325 (1st Dept. 1908).

would be more equitable for the courts to hold—that upon the remarriage of the plaintiff, the continuing obligation having terminated and the absolute right to alimony being abrogated, the separation agreement, in so far as it provides for future support and maintenance, should also terminate. In the instant case, the Court expressly refrained from giving an opinion as to the wife's right to support under the contract.[14]

P. V. M., JR.

INFANTS—CONFESSION MADE BY DELINQUENT BOY WITHOUT WARNING OF SELF-INCRIMINATION—PROPER.—The defendant infant under the age of sixteen years broke into a store and stole $12.00. He was charged in Children's Court with juvenile delinquency. The hearing, which was held in the Children's Court, was as follows: The boy was present in company with his mother, sister, and the family clergyman. Before the boy was questioned by the judge, he was advised, as well as the others present, that he might have the aid of counsel if he or the others so desired. The testimony of the boy sustained the charge beyond any doubt; indeed there was a full admission and no attempt at denial. The boy was thereupon adjudged a delinquent child and was committed to a State Industrial School. On appeal, *held,* juvenile delinquency proceeding not being a criminal one, there was neither right to nor necessity for procedural safeguards prescribed by the Constitution and Statute.[1] *People* v. *Lewis,* 260 N. Y. 171, 183 N. E. 353 (1932).

No act or omission is a crime except as prescribed by Statute.[2] As the power to declare what act or omission is a crime rests solely with the Legislature, there is no doubt that it has the power to declare that an act done by a child shall not be a crime, although the same act, if committed by an adult, would be a crime.[3] Under Statute [4] the concept of crime and punishment disappears where an act or omission of an infant under sixteen years would be a crime if he were an adult. All suggestion and taint of criminality was intended to be and has been done away with by Statute.[5] For the

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[14] Severance v. Severance, instant case, at 433, 183 N. E. at 909.

[1] Children's Ct. Act of N. Y. (1930) §45.

[2] N. Y. PENAL LAW (1909) §22—People v. Knapp, 206 N. Y. 373, 99 N. E. 841 (1912).

[3] *Supra* note 1.

[4] *Ibid.*

[5] *Supra* note 1, par. 8: "This act shall be construed to the end that the care, custody and discipline of the children brought before the Court shall approximate as nearly as possible that which they should receive from their parents, and that as far as practicable they shall be treated not as criminals but as children in need of aid, encouragement and guidance."