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# Is Alimony a Vested Property Right?

# DIVORCE

## IS ALIMONY A VESTED PROPERTY RIGHT?

Appellant wife obtained a final decree of divorce in 1928 which embodied a provision for payment of alimony. Respondent husband applied to the court in June, 1938, to have the alimony provision annulled, basing his application on a statute of 1938.[1] The court ordered the alimony allowance eliminated,[2] and from this order an appeal was taken. Held, reversed. The alimony allowed by a final judgment is a vested property right. Waddey v. Waddey, —— N.Y. ——, 49 N.E. (2d) 8 (1943).

An absolute divorce and the rights incident to it are purely statutory.[3] Courts derive jurisdiction to grant divorces solely from statutes which expressly confer such jurisdiction upon them.[4]

The text of the 1938 statute[5] covered the relationship which existed between appellant and another man;[6] therefore, if the statute was literally interpreted and applied retroactively to the 1928 divorce decree, the court could have annulled the alimony provisions. However, the court followed the established rule of statutory construction that the provisions of the statute would not be applied retrospectively

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21. Hill v. Texas, 316 U.S. 400 (1941); Yu Cong Eng v. Trinidad, 271 U.S. 500 (1925); Yick Wo v. Hopkins, 118 U.S. 356 (1885).
22. See instant case at 1385.

1. N.Y. Laws 1938, c. 161; N.Y. Civil Practice Act §1172-c, second sentence, which states: "The court in its discretion upon application of the husband on notice, upon proof that the wife is habitually living with another man and holding herself out as his wife, although not married to such man, may modify such final judgment and any orders made with respect thereto by annulling the provisions of such final judgment or orders or of both, directing payment of money for the support of such wife."
2. Waddey v. Waddey, 259 App. Div. 852, 20 N.Y.S. (2d) 406 (2d Dep't 1940).
3. 1 Bl. Comm. *441; 2 Bishop, "Marriage, Divorce, and Separation" (1891) §1039.
4. Ackerman v. Ackerman, 200 N.Y. 72, 93 N.E. 192 (1910); Wilson v. Hinman, 182 N.Y. 408, 75 N.E. 236 (1905); Madden, "Persons and Domestic Relations" (1931) §82.
5. See note 1 supra.
6. " . . . counsel for the defendant [respondent] was instrumental in causing the introduction in and passage by the Legislature of the 1938 amendment. . . . " See instant case at 10.

unless it clearly was the intent of the legislature.[7] The intent not appearing here, the court applied the statute prospectively and not in the retroactive sense.[8]

No effect was given to a statute[9] which had been on the books since 1895 and which empowered the court to modify alimony provisions.[10] Since the final decree of divorce was given in 1928, it was subject to the statute of 1895. The court in Fox v. Fox said, "The effect of the statute [§ 1170] is to write a reservation into every final judgment of divorce. The jurisdiction of the court over the parties and over the incidental subject-matter is prolonged; and to that extent the action may be said to be pending within the meaning and intent of section 1169 of the Civil Practice Act."[11]

But the court in the case at hand maintained that " . . . the right of appellant to alimony became a vested property right upon the entry of the judgment and could not be affected by subsequent legislation."[12] To establish this position it cited the leading case of Livingston v. Livingston,[13] which held that alimony was a vested property right upon decree and could not be varied by subsequent legislation. It is to be noted, however, that at the time the Livingston case was decided there was no statute already on the books which gave the courts power to modify alimony provisions while there was such a statute[14] at the date of this case. The court, then, had the power to modify the alimony terms in the instant case by reason of the existing statute, but refused to do so by resorting to the Livingston holding which, it is believed, is not in point, for although " . . . a final judgment of divorce is a vested right, the judgment . . . was granted subject to the then existing right of the court at any time subsequent . . . to annul, vary or modify the directions as to alimony therein contained."[15] Exercising this power, the court could have modified the alimony directions because the divorce judgment

7. Walker v. Walker, 155 N.Y. 77, 49 N.E. 663 (1898); New York & Oswego Midland R. R. v. Van Horn, 57 N.Y. 473 (1874). Contra: Edmunds v. Edmunds, [1926] Prob. 202. Sutherland, "Statutory Construction" (1891) §463; Sutherland, "Statutory Construction" (Horack's ed. 1943) §§2201, 3102; Note (1935) 97 A.L.R. 1188.
8. Instant case at 9; cf. Eaton v. Davis, 176 Va. 330, 10 S.E. (2d) 893 (1940).
9. N.Y. Laws 1895, c. 891; N.Y. Civil Practice Act §1170, second sentence, which states in effect that the court may, upon application by either party to the action, pursuant to final judgment and after due notice to the other party, annul, vary, or modify directions contained therein for the support of the wife.
10. Instant case at 10.
11. 263 N.Y. 68, 70, 188 N.E. 160, 161 (1933); see Judge Desmond, dissenting in instant case at 12.
12. Instant case at 10.
13. 173 N.Y. 377, 66 N.E. 123 (1903). Contra: Eaton v. Davis, 176 Va. 330, 10 S.E. (2d) 893 (1940).
14. N.Y. Civil Practice Act §1170; see note 9 supra.
15. Waddey v. Waddey, 168 Misc. 904, 6 N.Y.S. (2d) 163, 166 (Sup. Ct. Kings Co. 1938).

was not final; moreover, no vested rights were created in the appellant since the decree was subject to future modification in the court's discretion.[16]

Respondent sought to have future alimony payments forfeited. "The misconduct for which the forfeiture of alimony was . . . imposed was misconduct after the date of the statute,[17] and the alimony payments forfeited were those which were to come due in the future. In no real sense can such a use of the statute be considered to be retrospective."[18]

The court had power to modify the alimony provisions;[19] the action was pending;[20] the legislature had determined grounds for the court's acting;[21] appellant was included under the legislative determination;[22] therefore, it is submitted that it was within the court's discretion to have considered the annulment of alimony under the divorce decree of 1928 as to those payments which were to come due after the 1938 statute[23] became effective.[24]

## MILITARY SERVICE

### REGISTRANT'S DUTY TO INFORM SELECTIVE SERVICE BOARD OF HIS MAILING ADDRESS

Petitioner, a Houston, Texas, registrant under the Selective Training and Service Act of 1940,[1] was classified 1-A by his local board, which advised him that he would be inducted in twenty or thirty days. With this knowledge, petitioner became a merchant seaman for a short trip to New York City, leaving word with the National Maritime Union's Houston office to forward his mail to its New York office. The local board was also advised of the registrant's shipping, and was requested to send his induction notice to the union's Houston office. This notice was mailed and forwarded to the New York City Office, but petitioner, who had meanwhile signed on for a foreign voyage from New York City, never received the notice although he was in New York harbor and had received assurances from the union's executive officer that he would be contacted when the notice arrived. Petitioner was convicted in a federal district court for a knowing failure to keep his draft board advised of the address where mail

16. See Judge Desmond, dissenting in the instant case at 12; also see note 9 supra.
17. March 26, 1938.
18. See Judge Desmond, dissenting in the instant case at 12, 13.
19. See note 14 supra.
20. Fox v. Fox, 263 N.Y. 68, 70, 188 N.E. 160, 161 (1933).
21. N.Y. Civil Practice Act §1172-c; see note 1 supra.
22. See notes 1 and 6 supra.
23. See note 21 supra.
24. See note 17 supra.

1. 54 Stat. 885 (1940), 50 U.S.C.A. §301 et seq. (Supp. 1943).