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Alimony—Divorce—Power of a Court to Modify Allowances Based on Contract

COMMENT ON RECENT DECISIONS

ALIMONY—DIVORCE—POWER OF A COURT TO MODIFY ALLOWANCES BASED ON CONTRACT.—[Missouri].—The plaintiff and the defendant prior to the rendition of the divorce decree, and on the same day the petition for divorce was filed, entered into a written contract settling and adjusting all of their property rights among themselves. Plaintiff was granted a divorce and judgment was entered in her favor, for the payment of alimony from month to month at the rate of five hundred dollars per month so long as she remained single and unmarried, as provided in the contract. Subsequently the defendant on application had the allowance reduced to three hundred dollars per month due to his changed financial condition. The plaintiff appealed, insisting that the rights of the parties were governed by the contract. *Held;* Reversed.[1] The marital duty of a husband to support his wife exists only during his lifetime. Any award which might extend beyond his death is not an award of "alimony" but merely an approval of the contractual obligation, which can only be modified by consent.

Although post-nuptial agreements[2] as well as property settlements growing out of the marital relation are valid,[3] the difficulties are apparent when such contracts and the decree are interwoven in the same divorce litigation. In a few jurisdictions when the court employs the agreement of the parties in the decree, it ratifies a prior contract and on ordinary contract principles the decree cannot be modified except by consent.[4] This result while seemingly more consistent with contract theory, results in binding the parties strictly to the terms of a contract which may later prove inequitable.[5] Another reason advanced for denying modification is that since the parties are *sui juris* and the obligations in substance contractual, consent is necessary.[6] Such a holding ignores the proposition that the rights arise from the decree itself, as to which the agreement is but evidence.[7] The prevailing opinion is that the exercise of the power to modify is not affected by the fact that the decree is based on an agreement of the parties.[8] The

1. North v. North, No. 33,888 (Mo. S. Ct., Nov., 1936).

2. Dorsett v. Dorsett, 90 S. W. (2d) 188 (Mo. App., 1936); Crenshaw v. Crenshaw, 276 Mo. 471, 208 S. W. 249 (1918); Gilsey v. Gilsey, 195 Mo. App. 407, 193 S. W. 858 (1917).

3. See cases supra, note 2.

4. Dickey v. Dickey, 154 Md. 675, 141 Atl. 387, 58 A. L. R. 634 (1928); Conway v. Conway, 298 Pac. 744 (Kans., 1931); Stanfield v. Stanfield, 22 Okla. 574, 98 Pac. 334 (1908).

5. Where such contracts prove to be insufficient and unconscionable they may be modified. Hamlin v. Hamlin, 230 N. Y. Supp. 151 (1928).

6. Pryor v. Pryor, 88 Ark. 302, 114 S. W. 700, 129 Am. St. Rep. 102 (1908); Henderson v. Henderson, 37 Ore. 141, 60 Pac. 597, 48 L. R. A. 766 (1900); but cf. Phy v. Phy, 116 Ore. 31, 236 Pac. 751 (1925).

7. See Wallace v. Wallace, 74 N. H. 256, 67 Atl. 580 (1907).

8. Worthington v. Worthington, 224 Ala. 237, 139 So. 334 (1932); Epps v. Epps, 218 Ala. 667, 120 So. 150 (1929); Holmes v. Holmes, 186 Ark. 251, 53 S. W. (2d) 226 (1932); Wilson v. Wilson, 186 Ark. 415, 53 S. W.

contract becomes merged in the decree and thereby loses its contractual nature at least to the extent that modification is permitted,[9] rights thereafter resting on the decree and not the agreement;[10] and this is so even where the decree settles property rights.[11]

The logic of the court in holding that a dead man has no duty to pay alimony is unassailable, yet in reaching this result two prior Missouri cases[12] had to be expressly overruled. It is submitted that such a holding flies in the face of the statute,[13] and if permitted to stand, it will be an easy matter for the parties by contract to defeat its purpose. They should not by private agreement be permitted to abrogate laws enacted from consideration of public concern,[14] since they are presumed to contract with the statute in mind.[15] Furthermore the state has a social and financial interest in the performance of the husband's duty to support his wife,[16] and since alimony in a divorce *a vinculo* is but a statutory substitute for this common law duty,[17] it would be more in accord with the public interest to permit regulation. Indeed the statute itself reserves the power to modify the decree to comport with the changed circumstances of the parties.[18]

J. L. A.

APPEAL AND ERROR—COURTS—EJECTMENT TO RECOVER POSSESSION AS ACTION INVOLVING TITLE—[Missouri].—The petition in an ejectment suit alleged that the plaintiff was entitled to the possession of certain real estate, unlawfully withheld by the defendant and that the defendant had

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(2d) 990 (1932); Ross v. Ross, 1 Cal. (2d) 381, 35 P. (2d) 316 (1934); Armstrong v. Armstrong, 132 Cal. App. 609, 23 P. (2d) 50 (1933); Canary v. Canary, 89 Colo. 483, 3 P. (2d) 802 (1931); Maginnis v. Maginnis, 323 Ill. 113, 153 N. E. 654 (1926); Herrick v. Herrick, 319 Ill. 146, 149 N. E. 820 (1925); Wilson v. Caswell, 272 Mass. 297, 172 N. E. 251 (1930); Eddy v. Eddy, 264 Mich. 328, 249 N. W. 868 (1933); Randall v. Randall, 181 Minn. 18, 231 N. W. 413 (1930); Lewis v. Lewis, 53 Nev. 398, 2 P. (2d) 131 (1931); Reynolds v. Reynolds, 53 R. I. 326, 166 Atl. 686 (1933). For a collection of earlier cases and a statement that this is the general rule see 58 A. L. R. 630.

9. Worthington v. Worthington, 224 Ala. 237, 139 So. 334 (1932).

10. Herrick v. Herrick, 319 Ill. 146, 149 N. E. 820 (1925).

11. Belding v. Huttonlocker, 177 Iowa 440 (1916); Skinner v. Skinner, 205 Mich. 243, 171 N. W. 383 (1919); Lally v. Lally, 152 Wis. 56, 138 N. W. 651 (1912); Goldfish v. Goldfish, 184 N. Y. Supp. 512 (1920); affd. 230 N. Y. 606, 130 N. E. 912 (1921).

12. Brown v. Brown, 209 Mo. App. 416, 239 S. W. 1093 (1932); Hayes v. Hayes, 75 S. W. (2d) 614 (Mo. App., 1934).

13. R. S. Mo. 1929, secs. 1355, 1361.

14. Walter v. Walter, 189 Ill. App. 345 (1914).

15. Smith v. Smith, 94 Cal. App. 35 (1932); Herrick v. Herrick, 319 Ill. 146, 149 N. E. 820 (1925).

16. Cary v. Cary, 112 Conn. 256, 152 Atl. 302 (1930).

17. 2 Schouler, *Domestic Relations* (6th ed. 1921) sec. 1796, 1797.

18. Eddy v. Eddy, 264 Mich 328, 249 N. W. 868 (1933); R. S. Mo. 1929, secs. 1355, 1361.