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A New York Judgment for Accrued Alimony--Is Notice Required for Due Process?

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NOTES AND COMMENT

A New York Judgment for Accrued Alimony—Is Notice Required for Due Process?

From a reluctant and embittered spouse, the collection of alimony often poses a difficult problem.[1] In New York, the aim of our procedure is to assure promptness of payment to a wife who is dependent upon alimony, lest she become a public charge. The New York State Legislature, cognizant of her difficult position, has provided three basic methods for the collection of the decreed alimony.

One method commonly used, though it is one which usually adds further animosity to already strained relations, is contempt.[2] A second method is sequestration and the appointment of a receiver.[3] Both the contempt and the sequestration proceedings may be based upon the original judgment or decree which directs the payment of alimony. The use of the latter, however, is limited to cases where there is property of the debtor within the state, and he cannot be served personally.

The third method for the collection of alimony, and the one which will occupy our interest in this note, is execution.[4] It was recognized and firmly established at an early date in the case of *Miller v. Miller* where the practice of issuing execution on the original judgment decreeing alimony, was sanctioned. There the court reasoned that: "No difficulty exists in the way of docketing such a judgment, nor in issuing execution upon it, from time to time, as the amounts recovered become due and payable." [5] With the case of *Thayer v. Thayer,*[6] which is recognized as the leading authority on this general phase of New York law, there was a change in view. The court there recognized a practical difficulty in the issuance of execution on the original judgment and made an attempt to circumvent it by requiring an order of the court to the clerk to docket as a new judgment the unpaid installments of alimony. This new procedure was designed to obviate any confusion with respect to the actual amount for which execution could be obtained. However, the court felt that this new docketing was purely a ministerial act, and that notice was not required on the

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[1] "That many husbands object to paying alimony can be fairly deduced from the number and variety of statutes providing for methods of enforcing the court's decree." Vernier and Hurlbut, *The Historical Background of Alimony Law and Its Present Statutory Structure* (1939) 6 Law and Contemp. Prob. 197, 204.

[2] N. Y. Civ. Prac. Act § 1172.

[3] N. Y. Civ. Prac. Act § 1171-a.

[4] N. Y. Civ. Prac. Act § 504.

[5] Miller v. Miller, 7 Hun 208, 209 (N. Y. 1876).

[6] 145 App. Div. 268, 129 N. Y. Supp. 1035 (1st Dep't 1911).

application to docket since this act was part of the original action. "Such an order is not the rendition of a new judgment for the amount, but merely a means of putting into practical effect the plaintiff's right to have her judgment put in such form that execution can be issued upon it." [7]

In 1939 the New York legislature enacted into statute form [8] the procedure which had been in use since the decision in the *Thayer* case. But this statute did not substantially alter the earlier practice. It "was designed to eliminate the burden of plenary or protracted litigation to enforce the wife's established rights under a matrimonial decree. It was intended to afford summary relief to the wife upon the non-payment of the alimony." [9]

In line with the trend of retaining jurisdiction evidenced by the *Thayer* case, final judgments decreeing alimony for many years, by statute in New York,[10] have been subject to modification for good cause shown upon the motion of either party in the discretion of the court. That statutory qualification has been interpreted by the Court of Appeals to authorize the retention of jurisdiction for the purpose of providing for the maintenance of the wife and children. "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] From this authority it would seem that for the purpose of enforcement, the personal jurisdiction upon which the original decree was based, subsists.

The New York procedure for the collection of alimony was recently the subject of a decision in the United States Supreme Court. In the case of *Griffin v. Griffin* [12] (Rutledge, Black, Frankfurter, JJ., dissenting), it was held that a New York judgment for accrued alimony, which had been entered in 1938 under the procedure set down

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[7] *Id.* at 270.

[8] N. Y. CIV. PRAC. ACT § 1171-b, L. 1939, c. 431, Amend. L. 1940, c. 226. "Where the husband, in an action for divorce, . . . , makes default in paying any sum of money as required by the judgment or order directing the payment thereof, the court may make an order directing the entry of judgment for the amount of such arrears, ... The application . . . shall be upon such notice . . . as the court may direct. Such judgment may be enforced by execution or in any other manner provided by law for the collection of money judgments. . . ."

[9] McCanliss v. McCanliss, 268 App. Div. 138, 141, 49 N. Y. S. (2d) 289 (2d Dep't 1944).

[10] N. Y. CIV. PRAC. ACT § 1170, L. 1921, c. 199; L. 1925, c. 240; L. 1934, c. 521; formerly C. C. P. § 1771, L. 1895, c. 891. ". . . The court, by order, upon the application of either party to the action, . . . at any time after final judgment, may annul, vary or modify such directions, . . . for the custody, . . . and maintenance of any such child or children or for the support of the plaintiff in such final judgment or order or orders."

[11] Fox v. Fox, 263 N. Y. 68, 70, 188 N. E. 160, 161 (1933); Hoops v. Hoops, 292 N. Y. 428, 55 N. E. (2d) 488 (1944).

[12] 327 U. S. 220, 90 L. ed. 534 (1946).

by the *Thayer* case, was void for want of due process because it was entered without notice to the defendant. In deciding an appeal from an order of the District Court of the District of Columbia granting a motion for summary judgment based upon the New York judgment, the court had to construe Section 1170 of the Civil Practice Act, as interpreted by the New York courts, and the procedure provided by the *Thayer* case. The decision reached goes beyond any prior case in the field of due process.

II

The unquestioned keystone in the constitutional structure, which safeguards individual rights, is the requirement of due process. Inherent in this doctrine is the necessity for jurisdiction before a court may presume to adjudicate the personal or property rights of any person. The essential minimum factor universally required for jurisdiction is notice. For it has been variously held that other factors might be dispensed with so long as some procedure is followed which is reasonably calculated to give notice to the defendant that his personal or property rights are the subject of a judicial proceeding.

In the case of a proceeding *in personam,* personal service of process is the rule, though in recent years other factors, such as residence, doing business, or use of the state highways, have displaced personal service as the exclusive method of obtaining jurisdiction for the purpose of issuing a personal judgment. But even in the last-mentioned cases, *some* procedure for giving notice is required. Justice Rutledge, in his dissenting opinion in the *Griffin* case, points out, however, that this notice is "notice in the *jurisdictional* sense contemplated by the *Pennoyer v. Neff* line of decisions." (Italics supplied.)[13]

We will infer for the purpose of this discussion, dealing with the collection of alimony judgments, that personal jurisdiction was originally acquired. When a court has properly acquired this jurisdiction and a party has had full and complete opportunity to defend on the merits, is notice of each subsequent step in the litigation required in order to satisfy due process? In the past, the cases held that it is not.[14] In addition, it was felt that the actual procedure to be followed subsequent to obtaining jurisdiction is a matter for the individual state to determine.[15]

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[13] *Id.* at 238.

[14] ". . . the established rules of our system of jurisprudence do not require that a defendant . . . should, after a judgment has been rendered against him, have a further notice and hearing before supplemental proceedings are taken to reach his property in satisfaction of the judgment." Sanford, *J.*, writing for the Court in Endicott-Johnson Corp. v. Encyclopedia Press, Inc., 266 U. S. 285, 288, 69 L. ed. 288, 292 (1924).

[15] "Whether judgments shall be paid in a lump sum or by instalments and in either event whether execution shall issue and be levied by one form of procedure or another, with or without further notice, are matters wholly of policy within state power to determine, raising no question of constitutional import." Rutledge, *J.*, dissenting in Griffin v. Griffin, *supra* note 12, at 241.

When we look to the procedure provided by New York statute and decisions [16] it would seem clear that this state regards the new judgment for accrued alimony as a part of the original action, and as a method of enforcing its original decree. Although, admittedly the better procedure might be to give notice at every vital stage of a judicial proceeding, notice need only be given once in order to satisfy the demands of the due process clause of the 14th Amendment to the Federal Constitution. It is submitted that the notice given in the original action was sufficient to satisfy the jurisdictional requirement for due process.

III

But in the *Griffin* case the court held that the 1938 New York judgment for accrued alimony was void, because "there is an assertion of power in the court to enter a money judgment and issue execution upon it without notice." [17] Thus "there was a want of judicial due process, and hence want of that jurisdiction over the person of petitioner prerequisite to the rendition of a judgment *in personam* against him." [18] It is evident from the decision that the court believed the act of docketing that judgment to be a separate and distinct proceeding from the action which preceded it; such belief is not in accord with the view taken by the New York courts.

However, it is believed that the Supreme Court would not have taken that stand had it not been for the view it took of the right given to the debtor by Section 1170 of the Civil Practice Act to apply for alteration of the alimony decree because of inability to pay. Chief Justice Stone thought that this was a substantial right which was being summarily foreclosed by the procedure followed in this case. Let us examine that right.

Section 1170 provides that a court may modify, alter, or annul any direction in a judgment, or order, providing for alimony upon the application of either party.[19] It is important to note here that the *directions* in the original judgment and the *installments* accruing under those directions are two different things. Today the law in New York is settled that the directions in the judgment may be modified.[20] What is the law with respect to accrued installments? The Supreme Court believed that the New York procedure under this section provided for modification *nunc pro tunc* as to previously accrued installments. The section itself does not mention the words *nunc pro tunc* [21] and until recently it was not questioned that this merely authorized modifications as to future installments. Judge

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[16] See notes 7, 8, 9, 10 and 11 *supra.*
[17] Griffin v. Griffin, 327 U. S. 220, 231, 90 L. ed. 534, 540 (1946).
[18] *Id.* at 228.
[19] See note 10 *supra.*
[20] Hoops v. Hoops, 292 N. Y. 428, 55 N. E. (2d) 488 (1944).
[21] See note 10 *supra.*

Stone cited three New York cases, *Van Dusen v. Van Dusen, Cunningham v. Cunningham* and *Eisinger v. Eisinger,*[22] which are said to hold that as to already-accrued installments the power to annul or modify exists when a change of circumstances is shown. Unfortunately, these cases are only published as memoranda. The *Cunningham* case cites no authority and the *Eisinger* case cites the *Van Dusen* case. The *Van Dusen* case, which is the earliest, gives as its authority, the cases of *Kirkbride v. Van Note* and *Karlin v. Karlin.*[23] However, neither of these stands for the proposition that a husband has the right to show "that circumstances have so changed as to justify a reduction of alimony already accrued." [24]

In the *Kirkbride* case, it was held that Section 1159 of the Civil Practice Act,[25] which provides for the modification of an alimony decree where the wife remarries, is mandatory as a matter of *public policy*. Pursuant to that statute, the right of the wife to alimony, and the need therefor, ceases upon her remarriage. And at any time thereafter, the husband may have the provisions which direct payment, stricken from the decree. It would seem clear that in such a case no alimony will accrue from the date of the wife's remarriage, whether or not the judgment is physically modified. This case, therefore, does not assert the power to alter the obligation of the husband to pay any installments which have *accrued.*

The *Karlin* case dealt with a situation where the parties of their own accord agreed in writing to a settlement different from that set forth in the decree of divorce. The wife, in fact, waived her right to any future installments so that none ever accrued. The lower court was only enforcing the valid agreement of the parties when it modified the decree *nunc pro tunc* as of the date of the agreement. And in the case of *Cunningham v. Cunningham,*[26] the original decree provided for alimony for the wife, and payments for the maintenance of two minor children. The modification sanctioned was with respect to the payments for the maintenance of the children subsequent to their attaining majority. Properly speaking, therefore, in those cases the alteration did not concern accrued alimony. It appears that there is a dearth of authority in New York holding that accrued installments are subject to modification *nunc pro tunc.*

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[22] Van Dusen v. Van Dusen, 258 App. Div. 1020, 17 N. Y. S. (2d) 96 (3d Dep't 1940); Cunningham v. Cunningham, 261 App. Div. 973, 25 N. Y. S. (2d) 933 (2d Dep't 1941); Eisinger v. Eisinger, 261 App. Div. 1031, 26 N. Y. S. (2d) 22 (3d Dep't 1941).

[23] Kirkbride v. Van Note, 275 N. Y. 244, 9 N. E. (2d) 852 (1937); Karlin v. Karlin, 280 N. Y. 32, 19 N. E. (2d) 669 (1939).

[24] Griffin v. Griffin, 327 U. S. 220, 227, 90 L. ed. 534, 537 (1946).

[25] Since renumbered § 1172-c, L. 1940, c. 226 (first sentence).

[26] 261 App. Div. 973, 25 N. Y. S. (2d) 933 (2d Dep't 1941).

IV

On the other hand there is long and respected line of authority in New York to the effect that accrued but unpaid installments of alimony are vested rights which are not subject to modification *even by the legislature.*[27] The character of alimony in New York was exhaustively treated in *Sistare v. Sistare,* where the United States Supreme Court found, in the then existing statutes, no "power to revoke or modify an installment of alimony which had accrued prior to the making of an application to vary or modify" the original judgment.[28] The *Sistare* case cited *Livingston v. Livingston,*[29] which is the basic case in New York regarding the character of alimony. Oddly this case was not cited in *Griffin v. Griffin,* although it is still respected as authority by the Court of Appeals.[30] And in the *Karlin* case, *supra,* which the Supreme Court does cite, Judge Loughran made clear that it was not intended to overrule *Livingston v. Livingston.*[31] Since the *Sistare* case, Section 1170 has been amended several times.[32] However, the amendments do *not* give the court power to modify with respect to accrued installments (as the *Griffin* case holds the 1925 amendment did),[33] either expressly or by implication, as construed by the New York courts.[34] The rule in New York, as laid down by the cases, is that the original decree, if granted subject to Section 1170 of the Civil Practice Act, *is* subject to the power of the court to strike out or modify any provisions which direct the payment of alimony *as to future installments.*[35] However, the courts have steadfastly held that *already accrued* alimony under such provisions cannot be touched.[36]

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[27] "These past due sums have become vested rights of property in the plaintiff . . . ." Harris v. Harris, 259 N. Y. 334, 337, 183 N. E. 7, 8 (1932); Parkinson v. Parkinson, 222 App. Div. 838, 226 N. Y. Supp. 454 (2d Dep't 1928); Krauss v. Krauss, 127 App. Div. 740, 111 N. Y. Supp. 788 (1st Dep't 1908).

[28] Sistare v. Sistare, 218 U. S. 1, 22, 54 L. ed. 905 (1910).

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

[30] Moufang v. State of New York, 295 N. Y. 121, 65 N. E. (2d) 321 (1946); Waddey v. Waddey, 290 N. Y. 251, 49 N. E. (2d) 8 (1943).

[31] "*Livingston v. Livingston* (*ubi supra*) holds nothing to the contrary," Karlin v. Karlin, 280 N. Y. 32, 36, 19 N. E. (2d) 669, 670 (1939).

[32] N. Y. CIV. PRAC. ACT § 1170, L. 1921, c. 199; L. 1925, c. 240; L. 1934, c. 521; formerly C. C. P. § 1771, L. 1895, c. 891.

[33] Griffin v. Griffin, 327 U. S. 220, 226, 90 L. ed. 534, 536 (1946).

[34] "Installments of alimony thus awarded by a final judgment create vested rights which the court has no power to nullify." Treherne-Thomas v. Treherne-Thomas, 267 App. Div. 509, 512, 46 N. Y. S. (2d) 679, 682 (1st Dep't 1944).

[35] See notes 10 and 11 *supra.*

[36] See notes 27 and 34 *supra;* Wiseman v. Wiseman, 172 Misc. 114, 14 N. Y. S. (2d) 521 (1939); McPartland v. McPartland, 146 Misc. 672, 261 N. Y. Supp. 844 (1932).

The latest Court of Appeals case concerning the subject of modification *nunc pro tunc* is *Waddey v. Waddey*.[37] There the court dealt with the application of Section 1172-c of the Civil Practice Act,[38] which provides for modification because of the wife's misconduct, and its retrospective effect upon decrees granted prior to its enactment. The court held that as to the provisions directing the payment of alimony, the statute had no retrospective effect in spite of the fact that the decree was granted originally subject to Section 1170, as it was in the *Griffin* case. In a dissent which claimed that the statute could operate as to decrees entered prior to its enactment without being unconstitutional, Judge Desmond recognized that *accrued installments,* however, could not be touched, when he said, "the alimony payments forfeited were those which were to come due in the future." [39]

From this it follows that in New York the right granted to a husband by Section 1170 of the Civil Practice Act to show changed circumstances and an inability to pay applies to prospective installments only. Any modification of already accrued installments would be held as unconstitutional in view of the consistent position taken by the Court of Appeals. It is submitted that the husband does not have a right to have accrued installments modified or annulled *nunc pro tunc.*

Although the court in the *Griffin* case based its decision principally upon the supposed right of the husband to have accrued installments modified *nunc pro tunc,* passing reference was made to his right to show payment. The majority thought that this right also was cut off by the new judgment, though the discussion on this point was inadequate.

When an application is made by the wife for an order to the clerk to docket the new judgment it is necessary for her to allege non-payment. In the event that payment has in fact been made, it is difficult to imagine any case when the wife could consciously claim non-payment in order to obtain the judgment, or, having obtained the judgment, assert it in another state without there being actual fraud on her part. This is considered to be a fraud on the court which renders the judgment void.[40] The determination of that fact, moreover, is not limited to the state of issuance, but even the courts

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[37] Waddey v. Waddey, 290 N. Y. 251, 49 N. E. (2d) 8 (1943).

[38] N. Y. CIV. PRAC. ACT § 1172-c. Modification of judgment or order in action for divorce or annulment. ". . . 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, . . . may modify such final judgment and any orders made with respect thereto by annulling the provisions of such final judgment . . . directing payment of money for the support of such wife."

[39] Waddey v. Waddey, 290 N. Y. 251, 260, 49 N. E. (2d) 8, 13 (1943).

[40] Stevens v. Central Natl. Bank, 144 N. Y. 50, 39 N. E. 68 (1894); Van Cortlandt v. Underhill, 17 Johns. 405 (N. Y. 1819).

in other states where the new judgment is sought to be asserted can determine the question without violating the full faith and credit clause.[41] It would seem that the husband does not lose the benefit of his payment when the judgment is entered because he may thereafter assert her fraud, with his payment as its basis, to defeat any proceeding on the new judgment in any other state.

Unquestionably notice of some sort, not necessarily personal, should be given in the interest of fair play, as the New York statute does provide. However, it is once more submitted that the husband is not being deprived of any right and that notice is not required in this proceeding to acquire jurisdiction or satisfy due process.

What other defenses can the husband raise when an attempt is made to collect alimony? It is said that he may defend on the grounds of death, remarriage, misconduct, or waiver.[42] On the basis of the New York decisions it would seem that no alimony *vests* subsequent to remarriage, misconduct, or waiver.[43] There is no controversy concerning death since both the obligation to pay and the right to receive alimony cease at the death of either party.

From the above we may conclude that the entry of this judgment does not foreclose any defenses either for domestic or full faith and credit purposes.[44]

V

Since the debtor does not lose any defenses when a judgment is docketed pursuant to the procedure of the *Thayer* case or Section 1171-b, does its docketing substantially affect his rights in any other way so as to create the need for notice? The New York courts hold that he does *not* lose any substantial right when the new judgment is entered.[45] In fact, from the time of the *Thayer* case this docketing has been regarded as merely a ministerial act. When an original judgment decreeing the payment of alimony is entered, the obligation to pay is crystalized into an installment status. As each month rolls around, an installment becomes due. This the husband knows without any reminder; he also knows that if he is unable to pay he may

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[41] Davis v. Cornue, 151 N. Y. 172, 45 N. E. 449 (1896); Rutledge, *J.*, dissenting in Griffin v. Griffin, 327 U. S. 220, 243, 90 L. ed. 534, 547 (1946); Frankfurter, *J.*, dissenting in Griffin v. Griffin, 327 U. S. 220, 249, 90 L. ed. 534, 549 (1946).

[42] Griffin v. Griffin, 327 U. S. 220, 227, 90 L. ed. 534, 537 (1946).

[43] Kirkbride v. Van Note, 275 N. Y. 244, 9 N. E. (2d) 852 (1937) (remarriage); Waddey v. Waddey, 290 N. Y. 251, 49 N. E. (2d) 8 (1943) (misconduct); Karlin v. Karlin, 280 N. Y. 32, 19 N. E. (2d) 669 (1939) (waiver).

[44] Sistare v. Sistare, 218 U. S. 1, 54 L. ed. 905 (1910).

[45] "It added nothing to the defendant's burden, and did not amount to a new judgment against him. Nor did it give the plaintiff any remedy to which she was not already entitled. It simply removed the technical difficulties which seemed to stand in the way of the exercise of her undoubted right to enforce payment of the alimony by execution." Thayer v. Thayer, 145 App. Div. 268, 270, 129 N. Y. Supp. 1035, 1036-7 (1st Dep't 1911).

apply to have the directions as to future installments modified. It stands to reason that he should be alert to assert his cause for his own protection. This burden of vigilance is no more onerous than any other in life.

It is well to note that the right given to the husband to apply for modification under Section 1170, and the right given to the wife to docket her judgment by Section 1171-b, are mutually independent. Neither mentions the other, nor has any case in New York ever held that one depended upon the other. The right of the wife to docket is not subject to any right of the husband to modify, as the *Griffin* case appears to hold. "Although section 1171-b provides that the court 'may' make an order directing the entry of judgment for the amount of any arrears . . . it was not intended that discretion should reside in the court to refuse a money judgment for alimony due and unpaid after a final decree. Installments of alimony thus awarded by a final judgment create vested rights which the court has no power to nullify. (*Livingston v. Livingston,* 173 N. Y. 377; *Harris v. Harris,* 259 N. Y. 334.)" [46]

If no new rights are created in the wife, nor any right of the husband taken away by this proceeding, which has been construed by the New York courts to be a part of the original action, it is difficult to see where there was a federal question for the Supreme Court to decide, or how there was any violation of the due process requirement of notice.

In 1938, the New York procedure, following the *Thayer* case, provided that the new judgment could be docketed *ex parte.*[47] Therefore the judgment in the *Griffin* case should have been held valid. But what as to judgments docketed under Section 1171-b (since 1939)? The statute provides that the application shall be "upon such notice to the husband as the court may direct." Certainly we can imagine situations in which notice would be less than useless, no matter how given. Considering the reason for the procedure,[48] its nature,[49] and the wording of the statute, it is submitted that the judge should be permitted to dispense with notice in his discretion. It would be constitutional unless we are to extend the requirements of due process as set forth by *Pennoyer v. Neff* [50] beyond any point heretofore reached.

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[46] Treherne-Thomas v. Treherne-Thomas, 267 App. Div. 509, 512, 46 N. Y. S. (2d) 679, 682 (1st Dep't 1944).

[47] The New York judgment in the Griffin case was entered before the enactment of § 1171-b N. Y. Civ. Prac. Act.

[48] McCanliss v. McCanliss, 268 App. Div. 138, 141, 49 N. Y. S. (2d) 289, 292 (2d Dep't 1944).

[49] See notes 9 and 45 *supra;* Wiseman v. Wiseman, 172 Misc. 114, 14 N. Y. S. (2d) 521 (Sup. Ct. 1939).

[50] Pennoyer v. Neff, 95 U. S. 714, 24 L. ed. 565 (1877).