View metadata, citation and similar papers at core.ac.uk

brought to you by CORE

provided by St. John's University School of Law

St. John's Law Review

Volume 25
Number 1 *Volume 25, December 1950, Number 1*

Article 4

May 2013

Separartion Agreements and Changed Conditions

Harold F. McNiece

John V. Thornton

Follow this and additional works at: https://scholarship.law.stjohns.edu/lawreview

Recommended Citation

McNiece, Harold F. and Thornton, John V. (1950) "Separartion Agreements and Changed Conditions," *St. John's Law Review*: Vol. 25 : No. 1 , Article 4.
Available at: https://scholarship.law.stjohns.edu/lawreview/vol25/iss1/4

This Article is brought to you for free and open access by the Journals at St. John's Law Scholarship Repository. It has been accepted for inclusion in St. John's Law Review by an authorized editor of St. John's Law Scholarship Repository. For more information, please contact selbyc@stjohns.edu.

ST. JOHN'S LAW REVIEW

Published semi-annually during the Academic Year by St. John's Law Review Association

VOLUME XXV DECEMBER, 1950 NUMBER 1

SEPARATION AGREEMENTS AND CHANGED CONDITIONS

HAROLD F. MCNIECE †
JOHN V. THORNTON ‡

I. INTRODUCTION

INFLATIONARY pressures on the American scene during the past decade have had substantial effects in almost every field of endeavor. Prices have experienced an almost jet-propelled rise. Labor unions have attempted to keep in step with or ahead of price rises by seeking wage increases for their members through the medium of the collective bargaining processes. The five-cent subway fare—even the traditional five-cent cigar—all these are relics of a past era.

Nor has the ivory tower of the law been untouched by these mundane financial considerations. Legal fees have increased; salaries paid to young lawyers have reached higher levels; and jury verdicts have soared, as many an inadequately insured defendant in a negligence case has discovered to his sorrow.[1]

† Member of the Faculty, St. John's University School of Law.
‡ Law Assistant to Hon. Charles W. Froessel, Associate Judge of the Court of Appeals of the State of New York.

[1] The courts themselves have taken cognizance of the rising price level in evaluating the reasonableness of verdicts. Thus in sustaining a $45,000 verdict in a personal injury action against a claim of excessiveness, a California court stated: "The decreased purchasing power of the dollar renders unpersuasive the cases cited by appellants from the 1930's and earlier. . . . 'It does not follow that because a plaintiff 36 years ago received a none too generous verdict, the award herein was too generous.'" Pederson v. Carrier *et al.*, 204 P. 2d 417 (Cal. App. 1949). *See also* Neddo v. State, 275 App. Div. 492, 90 N. Y. S. 2d 650 (3d Dep't 1949).

It is the purpose of this article to bring into focus an area of domestic relations law which has a direct relationship to this inflationary spiral. That is the area of the separation agreement. Viewed solely as an economic instrument, a separation agreement entered into during the nineteen thirties, when the dollar was worth much more than it is today, may have become virtually obsolete in the nineteen fifties. If the agreement was drawn during the thirties or even the early forties and provided for fixed periodic payments of so many dollars a week or a month, without any "escalator" clauses [2] to take care of increases in the husband's income and price rises, the chances are that the agreement now provides a very inadequate income for the support of the wife or the wife and children. While it may be urged that a well drafted separation agreement will have provided for such contingencies by means of an appropriate "escalator" clause, the answer is that, unfortunately, many separation agreements drawn ten or fifteen years ago did not contain such a provision for one reason or another. Indeed, such a provision is lacking even in some of those drawn today. Lawyers have not always been quick to appreciate the impact of sky-rocketing index numbers.

The present investigation will seek to show the historical background of inadequacy and changed conditions as a ground for avoiding separation agreements, will treat the major decisions which have dealt with the subject in New York, and will strive to give a reasonably accurate picture of the present status of the law. Emphasis will be upon the Court of Appeals decisions on the subject, but some attention will also be given to significant lower court holdings.

---

[2] The term "escalator clause" is used here to describe a provision in the separation agreement which insures the wife of an increase in her support allowance when the husband's salary and/or her need increases. For example, a separation agreement might be so drawn as to provide $50 a week as a minimum support allowance, with a further proviso that $7 a week additional be added to the $50 figure for each $1,000 of increase in the husband's annual salary over his salary at the time the agreement is made. The term also, of course, embraces any downward adjustments which may be provided for in given contingencies, such as a decrease in the husband's income.

The general problem analyzed in this article has not as yet received much discussion from the text writers. However, for some enlightenment, see LINDEY, SEPARATION AGREEMENTS § 7(XIX) *et seq.* (1937) and GROSSMAN, NEW YORK LAW OF DOMESTIC RELATIONS § 429 *et seq.* (1947).

This field is a very difficult one in which to generalize, and for that reason it has been found necessary to set forth the facts of the cases discussed in considerable detail, and also in some instances to quote from the language of the opinions. It is easy to err in analyzing the holdings in a very fluid legal realm by divorcing judicial syntax from factual context, and the rather extensive fact statements used herein are deliberately designed as antidotes to that tendency. Inclusion of the factual backgrounds, it is hoped, will also permit the reader to formulate his own conclusions as to the state of the law, rather than being led necessarily to accept the authors' views.

II. Early Holdings

Galusha v. Galusha [3] is the starting point in any analysis of this field. In that case the contract between the parties was made after an actual separation and through the intervention of a trustee. By its terms the husband agreed to give the wife $5,000 for the purchase of a house and lot, $1,000 for medical expenses, some articles of personal property, and, in addition thereto, to pay to the trustee for her benefit $100 monthly during her natural life. On the part of the wife and the trustee it was covenanted to "accept such payments in full payment and satisfaction, for the maintenance and support of said [wife] during her natural life . . . and to save [the husband] harmless from the payment of all sums of money for or on account of the full support, maintenance, medical attendance, and any and all expenses, legal or otherwise . . ." [4] of the wife.

Thereafter the wife obtained a divorce on the ground of adultery, and in the divorce action the trial court compelled the husband to pay such additional amount over and above that provided in the agreement as to it seemed just. The sum fixed was $3,750 which the husband was

[3] 116 N. Y. 635, 22 N. E. 1114 (1889). Some of the facts referred to in the text are taken from the opinion in a subsequent appeal in a later suit between the same parties, Galusha v. Galusha, 138 N. Y. 272, 33 N. E. 1062 (1893).

[4] 116 N. Y. 635, 642, 22 N. E. 1114, 1115 (1889).

ordered to pay annually as permanent alimony. In disapproving the result reached by the trial court and in holding the separation agreement to be a complete bar to such an award, the Court of Appeals used the following oft-quoted language:

> We have, then, a valid tripartite agreement .... The plaintiff did not, in her complaint, ask, as a part of the relief, that the separation agreement be set aside. She did not allege that it had been obtained fraudulently or by means of duress. In no way whatever was its validity attacked ....
>
> The authority conferred upon the court ... is not so broad and comprehensive as to admit of a construction conferring upon the court power to ... arbitrarily set aside a valid agreement, because in the judgment of the court one of the parties agreed to accept from the other a less sum of money than she ought.
>
> ... this authority to protect the wife in her means of support was not intended to take away from her the right to make such a settlement as she might deem best for her support and maintenance. The law looks favorably upon and encourages settlements made outside of courts between parties to a controversy. If, as in this case the parties have legal capacity to contract, the subject of settlement is lawful and the contract without fraud or duress is properly and voluntarily executed, the court will not interfere.[5]

It soon became evident, however, that in certain situations the court *would* "interfere."[6] Thus in *Hungerford v. Hungerford*[7] an action was brought to set aside an agreement under which the wife, in consideration of $1,000 and some articles of household furniture, agreed to relinquish all claims upon the husband for support during his life and upon his estate after his decease. It appeared that the husband, prior to the execution of the agreement, had maltreated the wife and had inflicted physical violence upon her to such

---

[5] *Id.* at 645, 22 N. E. at 1116.

[6] In the *Galusha* case itself, on a subsequent appeal in an action to open the judgment of divorce and to adjudge the separation agreement invalid, it was held that the complaint stated a cause of action. The question of improvidence was not directly involved in the subsequent appeal. However, the court held the complaint good on the basis of allegations that the execution of the agreement was procured by coercion and duress on the part of the husband. See 138 N. Y. 272, 278, 33 N. E. 1062 (1893).

[7] 161 N. Y. 550, 56 N. E. 117 (1899). *See also* Winter v. Winter, 191 N. Y. 462, 84 N. E. 382 (1908).

an extent that she could have successfully maintained against him an action for separation; that, while there was no express fraud or duress, still the agreement was executed by the wife inadvisedly and improvidently as the result of such ill-treatment; and that the provisions for the wife's support were entirely inadequate for the purpose and were not suitable or equitable, considering the husband's means.

The court pointed out that a contract between husband and wife was void at law and could be upheld solely in equity, and even there only when the provision for the maintenance of the wife was suitable and equitable,[8] and it affirmed, with little further discussion, the setting aside of the agreement.

Next to consider the problem, this time from a somewhat different angle, was *Chamberlain v. Cuming* decided by the Appellate Division, Second Department, and affirmed without opinion in the Court of Appeals.[9] There it was held that in a suit on a separation agreement the defendant husband could not introduce evidence tending to show that his financial condition had materially changed since the making of the agreement, that he had subsequently sustained business reverses, and that he was no longer able to pay the sums due under the contract. The Appellate Division, sustained by the highest court, was of the opinion that the evidence sought to be elicited was wholly immaterial because a change in the financial condition of the husband would not operate to relieve him from his obligation under the agreement.[10] Thus

---

[8] *Id.* at 553, 56 N. E. at 118. Of course, under present law a contract between husband and wife is valid at law except that they may not contract "to alter or dissolve the marriage or to relieve the husband from his liability to support his wife." N. Y. DOM. REL. LAW § 51.

[9] 99 App. Div. 561, 91 N. Y. Supp. 105 (2d Dep't 1904), *aff'd without opinion*, 184 N. Y. 526, 76 N. E. 1091 (1906).

[10] Two later cases which involve analogous problems are Stoddard v. Stoddard, 227 N. Y. 13, 124 N. E. 91 (1919), and Johnson v. Johnson, 206 N. Y. 561, 100 N. E. 408 (1912). In the *Johnson* case the complaint alleged that the wife signed the agreement, knowing that its terms were unjust and unfair, because of the husband's cruel treatment, his undue influence, etc., and it asked that the agreement "be set aside so far as it limits the plaintiff to the sum of $25 per week . . . and that at least the sum of $3,000 a year be allowed to her for life together with a sum to defray the counsel fees and expenses of this action . . . ." *Id.* at 565, 100 N. E. at 409. The court held that it could not, as requested by the wife, award counsel fees nor could it annul the allowance provision and leave the rest of the agreement intact, thus substituting its de-

this case presented the converse of the usual situation—instead of the wife seeking an increase in the support allowance because of changed conditions, the husband sought a decrease on the same ground.

III. LATER DECISIONS

The principle of *Hungerford v. Hungerford*[11] was reaffirmed and given additional vitality in a well-known case decided in 1921.[12] There, after 22 years of marriage, the parties separated. The husband agreed to pay the wife, who was represented by counsel at the time, the sum of $8,400 for her support and maintenance and in full satisfaction and release of any right of dower in the husband's realty and of any and all claims against him. The agreement also recited that a division of personal property (household goods, ornaments, etc.) theretofore made should not be questioned.

Some time later the wife brought an action to set aside the agreement giving as one reason that the provision made

---

cision for the agreement of the parties as to the amount of the allowance. For a still later case discussing a similar problem, *see* Carlson v. Carlson, 269 App. Div. 21, 53 N. Y. S. 2d 735 (4th Dep't 1945).

In the *Stoddard* case, the agreement provided: "In the event that there should be any material change in the circumstances of either of the parties hereto either party hereto shall have the right to apply to any court of competent jurisdiction for a modification of the provisions herein regarding the amounts to be paid hereunder by the party of the first part (the husband) to the party of the second part hereto (the wife)." 227 N. Y. 13, 15, 124 N. E. 91 (1919). After making the stipulated payments for several years, the husband brought an action, alleging that his income had become greatly impaired and that of his wife considerably increased, and that he was no longer able to make the payments provided for, and praying in part that the amounts due under the original terms of the agreement be reduced or that the separation agreement be adjudged no longer in force. The court found the complaint did not state a cause of action, saying at pages 20-1: "In the first place, the amount of allowance for support . . . is so far an integral part of the agreement . . . that I doubt whether it could be set aside without annulling . . . the entire agreement. But beyond this the court cannot reform an agreement entered into by parties by making a new agreement or provision for them in the place of the one which they have adopted. (*Hughes v. Cuming,* 165 N. Y. 91, 96, 97.)"

[11] 161 N. Y. 550, 56 N. E. 117 (1899).

[12] Tirrell v. Tirrell, 232 N. Y. 224, 133 N. E. 569 (1921). In that case McLaughlin, J., dissented, stating: "It is not suggested that any fraud, deception or coercion was practiced upon her (the wife), or that she was deceived in any way as to defendant's financial condition, or as to the terms of the agreement or release. She was the best judge of what she needed for support. (*Winter v. Winter,* 191 N. Y. 462.)" *Id.* at 232, 133 N. E. at 571.

for her was inequitable and grossly inadequate in view of the situation of the parties and the earning capacity and property interest of the husband. The Court of Appeals went into an extended analysis of the rather comfortable financial status of the husband at the time the agreement was made, pointing out that the wife had at the time of the agreement, and still had, no income or means of support except what she received from the husband, and concluded that the agreement should be set aside.[13]

A new element was injected into the picture with *Goldman v. Goldman*.[14] There the wife obtained a divorce a few weeks after the parties had entered into a separation agreement. The judgment in the divorce action, rendered in 1929, incorporated the stipulations of the separation agreement. Both the agreement and the judgment required that the husband pay the wife $21,000 annually and certain other stipulated special expenses. In 1938 Special Term modified the provisions of the 1929 judgment so as to reduce the allowance to $14,000 a year, the husband's income having declined considerably. The Court of Appeals, after reaffirming the rule of the two *Galusha* cases[15] (discussed *supra*), pointed

---

[13] The court was of the view that "a suggestion that he [the husband] has discharged the legal obligation resting upon him by providing substantially a sum equal to his net income for one year, for the support of his wife during her lifetime, and that such measure of support is fair, adequate and equitable, is fallacious." *Id.* at 231, 133 N. E. at 571. *Cf.* Cain v. Cain, 188 App. Div. 780, 177 N. Y. Supp. 178 (4th Dep't 1919). *See also* Harding v. Harding, 203 App. Div. 721, 197 N. Y. Supp. 78 (4th Dep't 1922), *aff'd*, 236 N. Y. 514, 142 N. E. 264 (1923), wherein the wife, seeking to set aside a separation agreement for fraud and inadequacy, attempted to examine the husband before trial as to his financial condition for a number of years up to the time of trial. The husband objected on the ground that the years after the execution of the agreement were immaterial inasmuch as the critical date for determining adequacy or inadequacy was the date of the agreement. However, it was held that the husband could be examined for all years up to the date of the trial. A case in similar vein subsequent to the *Harding* decision is Rosenthal v. Rosenthal, 230 App. Div. 483, 245 N. Y. Supp. 253 (1st Dep't 1930). *See also* Brooklyn Trust Co. v. Lester, 239 App. Div. 422, 267 N. Y. Supp. 827 (2d Dep't 1933).

At least one writer has expressed the view that the *Harding* case was clearly wrong because the current finances of the husband are immaterial in a suit to set aside a separation agreement and should not be the subject of an inquiry. "The *Harding* case and its followers remain on the books to confuse the law. A reversal by the Court of Appeals is sorely needed." Roberts, *The Validity and Utility of Separation Agreements in New York Law*, 16 ST. JOHN'S L. REV. 185, 197 (1942).

[14] 282 N. Y. 296, 26 N. E. 2d 265 (1940).

[15] See note 3 *supra*.

out that those cases did not decide the question presented, and then held:

. . . that the power of the court to direct a husband to make suitable provision for the support of his wife is complemented by the power to annul, modify or vary the direction thereafter and that a party invoking the power of the court to give such direction cannot be heard to say that the direction so given is not subject to modification thereafter.[16]

Thus the court decided that the direction as to support payments in the 1929 judgment had to be read just as if it included an express reservation that it might thereafter be annulled, varied or modified, pursuant to court order.[17]

---

[16] 282 N. Y. 296, 305, 26 N. E. 2d 265, 269 (1940). The court specifically reserved the question of the extent to which the *contractual* obligation of the husband to pay the $21,000 might have been affected by the court's direction to pay a lesser sum, stating at page 305: "We point out here that the direction of the court that the defendant shall pay to the plaintiff a sum less than he agreed to pay does not relieve the defendant of any contractual obligation. The direction of the court may be enforced in manner provided by statute and the plaintiff may still resort to the usual remedies for breach of a contractual obligation if there has been such a breach, but we do not now decide whether the parties intended that the contractual obligation of the defendant should survive where the court has modified a direction to the defendant to pay the sum fixed by contract."

The scope of the *Goldman* decision on this point was subsequently explained in Schmelzel v. Schmelzel, 287 N. Y. 21, 38 N. E. 2d 114 (1941), where Judge Finch declared that: "The decision in the *Goldman* case reaffirmed the rule as announced in the cases of *Galusha v. Galusha* (116 N. Y. 635; 138 N. Y. 272, 274) that a decree or a subsequent order in a matrimonial action does not destroy the agreement or deprive the parties of their rights thereunder." *Id.* at 26, 38 N. E. 2d at 116. The *Schmelzel* case itself decided that where a separation agreement, incorporated in a separation decree, provided for payments of $250 a month for the wife, Special Term had no right thereafter to increase the payments to $350 a month and allow counsel fees. However, since the agreement was free of any fraud or duress and no question of inadequacy was involved, the case is only collateral authority on the proposition under discussion in the present investigation.

[17] *See also* Fox v. Fox, 263 N. Y. 68, 188 N. E. 160 (1933). The statute under which the court has the power to modify is Civil Practice Act § 1155 which provides: "The court, in the final judgment dissolving the marriage in an action for divorce brought by the wife, may require the defendant to provide suitably for the education and maintenance of the children of the marriage, and for the support of plaintiff, as justice requires, having regard to the circumstances of the respective parties; and, by order, upon the application of either party to the action, and after due notice to the other, to be given in such manner as the court shall prescribe, at any time after final judgment whether heretofore or hereafter rendered, may annul, vary or modify such a direction. . . ." The above quoted words were in the statute at the time of the *Goldman* case (*supra* note 16). Subsequent to that case, the following additional language has been added: "Subject to the provisions of section eleven hundred seventy-one-b the authority granted by this section shall extend

Next link in the chain of decisions was *Kyff v. Kyff*,[18] wherein the husband pursuant to a separation agreement paid the wife the lump sum of $3,000 "in full satisfaction for all claim for support and maintenance of every kind." [19] Ten years elapsed, and then the wife sued for divorce. At the trial it was established that the wife had expended the entire $3,000, that her sole source of income consisted of a salary of $10 a week which she earned as a waitress, and that the husband's income was approximately $50 a week. Upon these facts Special Term required the husband to contribute $7 a week to the wife. It was held that the release executed by the wife as a part of the separation agreement did not bar the court from exercising its discretion to award alimony.

In this case the Court of Appeals, after pointing out that under the law of New York a husband and wife cannot contract to relieve the husband from the liability to support his wife,[20] attempted to draw a distinction between an agreement which seeks to "purchase exemption" for a husband from his duty of support (such an agreement being forbidden by law) and an agreement which tries only to determine the "measure" of the support allowance (such an agreement being a valid one). The distinction is difficult to draw, yet important, and the exact language of the court is therefore worthy of careful note. It stated:

. . . a wife may not voluntarily release her husband from his *duty* to support her and neither may the husband for a consideration purchase exemption from that duty. . . . Nonetheless, where the husband and wife agree upon the *measure* of the support which they deem proper for the benefit of the wife, then the court will not compel the

---

to unpaid sums or installments accrued prior to the application as well as to sums or installments to become due thereafter."

[18] 286 N. Y. 71, 35 N. E. 2d 655 (1941).

[19] *Id.* at 72, 35 N. E. 2d at 656.

[20] This principle is established by the express language of Domestic Relations Law § 51. As illustrative of the recent interpretation of this section, *see* Haas v. Haas, 298 N. Y. 69, 80 N. E. 2d 337 (1948). There a separation agreement provided maintenance to the wife on condition that she refrain from engaging in a business competitive with that of her husband. The agreement was held void as an attempt to relieve the husband of his duty to support the wife.

husband to support the wife in a greater sum . . . unless the amount agreed upon is plainly inadequate.[21]

Having set up this dichotomy, the court then concluded that the agreement before it was not a valid one "whereby the husband and the wife have mutually agreed upon the scale on which the husband shall support the wife," but rather a forbidden "attempt by the husband to purchase exemption from his continuing duty" of support.[22]

Thus it is seen that the court was beginning to draw a definite line of demarcation between a lump sum settlement agreement which it tended to regard as an invalid purchase of exemption from the duty of support, and a periodic payment agreement which it looked upon as a legitimate determination of the measure of the duty of support. This distinction was forcefully reiterated by Judge Desmond in a 1943 case [23] wherein he said:

. . . the *Galusha* and *Goldman* cases had to do with agreements for regular, substantial, periodic payments to the wives, representing admeasurements and determinations, in dollars, of the husbands' continuing obligations to support their wives. . . . But an agreement to pay, and a payment of, a lump sum to a wife in return for a release of the husband from all future liability for the wife's support, is something quite different. By such an agreement the husband does not recognize, and join with his wife in measuring, his persisting liability to support her. In lump sum agreements, the husband buys his release for a price.[24]

However, the apparent symmetry in the earlier decisions soon proved fanciful rather than real, when in *Dolan v. Dolan* the Court of Appeals without opinion [25] affirmed the Appellate Division, Third Department [26] which had per-

---

[21] 286 N. Y. 71, 74, 35 N. E. 2d 655, 657 (1941). The *Kyff* case cited with approval many of the prior authorities discussed heretofore in the text, including Galusha v. Galusha, 138 N. Y. 272, 33 N. E. 1062 (1893); Hungerford v. Hungerford, 161 N. Y. 550, 56 N. E. 117 (1899); Tirrell v. Tirrell, 232 N. Y. 224, 133 N. E. 569 (1921); and Goldman v. Goldman, 282 N. Y. 296, 26 N. E. 2d 265 (1940).

[22] 286 N. Y. 71, 74, 35 N. E. 2d 655, 657 (1941).

[23] Jackson v. Jackson, 290 N. Y. 512, 49 N. E. 2d 988 (1943).

[24] *Id.* at 516, 49 N. E. 2d at 990. Similar language was used by Judge Fuld in the later case of Haas v. Haas, 298 N. Y. 69, 72, 80 N. E. 2d 337, 339 (1948).

[25] 296 N. Y. 860, 72 N. E. 2d 603 (1947).

[26] 271 App. Div. 851, 66 N. Y. S. 2d 70 (3d Dep't 1946).

mitted an attack on a *periodic payment settlement.*[27] There the agreement had been entered into in June, 1934 and provided $60 a month for the support of the wife and two children, aged seven and nine. At the trial the husband, a lawyer, gave no figures as to his income during 1934, but it appeared that in 1935 he started to work for the Federal Government at $3,600 a year and that thereafter his salary increased quite steadily over the years. During 1934 he maintained an automobile. The evidence also showed that, after the parties separated in 1934, the wife went to live in New York City where an apartment cost her $40 a month; food for herself and the children, $13 a week; clothing, $20 a month; supplies, $10 a month; and medical and dental care, $10 a month. This made a total of over $130 a month or more than twice the amount specified in the agreement. In setting aside the agreement, the Appellate Division, whose decision the Court of Appeals affirmed, made findings of fact to this effect:

(1) At the time the agreement was made the amount agreed to be paid the plaintiff for her support and that of the children of the marriage was inadequate and improvident. (2) That subsequent to the execution of the separation agreement the earnings and income of the defendant have been substantially increased and are now sufficient to justify the payment of a larger amount than provided for by the separation agreement.[28]

---

[27] See in the same vein Rubinfeld v. Rubinfeld, 264 App. Div. 888, 35 N. Y. S. 2d 781 (2d Dep't 1942), *appeal dismissed* (non-final order), 289 N. Y. 838, 47 N. E. 2d 439 (1943), where the Appellate Division allowed an attack on a periodic payment settlement which was to endure for five years, rather than for life. That court stated: "The agreement between the parties was valid as measuring the support to be provided by defendant for five years, but in so far as the agreement purported thereafter to exempt him from his duty to provide continuing support for plaintiff, it was invalid . . . (Kyff v. Kyff, 286 N. Y. 71, 73, 74). It is of no moment that in the case cited the money was paid in a lump sum, while in the case at bar payment extended over a period of years. In each case, the purpose was to exempt the husband from his continuing duty from the time of payment of the agreed amount."

See also Leeds v. Leeds, 265 App. Div. 189, 38 N. Y. S. 2d 515 (1st Dep't 1942), where it appeared that the payments of $27.50 a week might cease altogether during the wife's lifetime, upon the death or marriage of the child, or upon the child reaching its majority. The court was of the view that a possible construction of the agreement was that the intention was unlawfully to relieve the husband of the obligation to support his wife.

[28] Dolan v. Dolan, 271 App. Div. 851, 66 N. Y. S. 2d 70, 72 (3d Dep't 1946).

Thus the high court sanctioned the annulment of a separation agreement which was not an effort by the husband to purchase exemption from his duty of support—at least not in the same sense as a lump sum settlement is—but was rather a measurement by the parties of the husband's duty of support. In so doing the court modified the previous distinction between lump sum and periodic payment settlements, and recognized that even the latter could be attacked upon a proper showing of inadequacy at the time of execution.

The most recent holding by the high court on this subject is *Pomerance v. Pomerance.*[29] There the amended complaint alleged a separation agreement entered into in 1939 whereby the husband agreed to pay the wife $30 a week for the support of herself and their daughter, then eight years of age.[30] It also alleged that at the time of the drawing of the agreement the husband "claimed and stated" that his gross annual income was $4,000, and that the wife accepted the $30 a week "because of her destitute circumstances and by reason of her weak, nervous and run-down condition," although insufficient and inadequate at that time for the maintenance and support of her needs and those of the child. The amended complaint further alleged that at the time the wife signed the separation agreement she was in debt and had been left without any funds whatsoever by the husband, and that her poor physical and nervous condition was caused by the husband's conduct towards her. It was also alleged that the needs of the wife and daughter had materially increased since the signing of the agreement; that the allowance was now "totally insufficient and inadequate"; and that the husband was now earning upwards of $25,000 a year.

Special Term dismissed the complaint. In dismissing, Mr. Justice Walsh, a jurist who has made a particular study of problems in the matrimonial field, wrote a comprehensive opinion in which he made a thorough canvass of many of the authorities which have been referred to heretofore in this

[29] 271 App. Div. 1027, 69 N. Y. S. 2d 72 (2d Dep't 1947), *aff'd,* 301 N. Y. 254 (1950). *See also* 272 App. Div. 768, 70 N. Y. S. 2d 143 (2d Dep't 1947).

[30] For the complete text of the complaint see the Court of Appeals Record on Appeal at folios 19-45.

article.[31] In the opinion he pointed out the distinctions which the Court of Appeals had made between lump-sum and periodic payment settlements and concluded that the complaint did not contain allegations sufficient to undermine a periodic payment agreement. The Appellate Division reversed Special Term on the law, with a brief memorandum opinion [32] and certified to the Court of Appeals this question:

Does the amended complaint state facts sufficient to constitute a cause of action? [33]

The Court of Appeals answered the question in the affirmative.[34] A closely divided court was of the view that the complaint was adequate, while a minority argued vigorously to the contrary. In sustaining this pleading the court apparently demonstrated that it was not going to require very great specificity in alleging such a cause of action so long as the pleading set forth ultimate facts tending to show inadequacy at the time the agreement was made. The close division in the highest court, with three justices apparently agreeing with the disposition made by Justice Walsh at Special Term, underscores the great difficulties involved in drawing the line in these borderline cases.[35]

IV. Present Status of the Law

Recapitulating, we can see two opposed tendencies manifesting themselves in these decisions. One is the tendency

---

[31] Justice Walsh's opinion appears at folios 46-54 of the Court of Appeals Record on Appeal.

For an excellent study of modern marriage problems see Mr. Justice Walsh's article, *Marriage and Civil Law*, 23 St. John's L. Rev. 209 (1949), which he describes as "an appeal to do the kind of basic thinking so necessary in this vital aspect of our culture, indeed of the very life of our nation."

[32] 271 App. Div. 1027, 69 N. Y. S. 2d 72 (2d Dep't 1947).

[33] 272 App. Div. 768, 70 N. Y. S. 2d 143 (2d Dep't 1947).

[34] 301 N. Y. 254 (1950).

[35] An earlier case similar in many ways to the *Pomerance* decision except that it did not involve the question of the adequacy of a pleading was Perrin v. Perrin, 140 Misc. 406, 250 N. Y. Supp. 588 (Sup. Ct. 1931). There the husband who was a dentist was ill and unable to work. The parties entered into a separation agreement which provided only a small sum for the wife's support. Later the husband recovered his health and resumed his practice. The court permitted the agreement to be set aside upon the somewhat novel theory of mistake at the time of execution of the agreement, the mistake being as to the precise state of the husband's health.

to uphold the inviolability of all contracts, including separation agreements, once they are made. The other is the tendency to give to the separation agreement a unique character, quite different from that of all other contracts, and to recognize in it an interest of the state in the preservation in full effect of the husband's duty to support, regardless of what arrangements the parties themselves may seek to make.[36]

These opposite tendencies reflect themselves in two distinct lines of decisions. On the one side are the cases involving lump-sum settlements, or even periodic settlements limited to a relatively short period of time.[37] Such settlements are very likely to be proscribed by the courts on the ground that they are attempts to purchase exemption from the duty of support, in violation of the express statute (Domestic Relations Law § 51) forbidding such exemption. It seems that little is necessary to undermine such a lump-sum contract. If scrutiny of the agreement indicates that it was in any way improvident at the time made and if the wife is presently in need, the agreement is very likely to be voided. Indeed it may not be too much to say that such an agreement can be attacked purely on the ground that the wife's present reasonable needs are not being supplied, although no Court of Appeals case seems, at least in its language, to have gone quite that far.

On the other hand periodic payment settlements are very difficult to attack.[38] Such settlements may be annulled but, questions of fraud, duress, and undue influence aside, to achieve such annulment it is necessary to show that the agreement was improvident *when made,* as well as that it now works unfairly to the wife.[39] Facts must be pleaded and proved to show this inadequacy at the time of the making of the contract; however, the facts relied upon to show

---

[36] It seems well recognized as a general proposition that the state has an interest in the marriage contract which becomes vested at the moment the marital status is created. *See, e.g.,* Anonymous v. Anonymous, 186 Misc. 772, 62 N. Y. S. 2d 130 (Sup. Ct. 1946); Shea v. Shea, 270 App. Div. 527, 60 N. Y. S. 2d 823 (2d Dep't 1946).

[37] See, *e.g.,* cases cited *supra* notes 7, 12, 18 and 27.

[38] See, *e.g.,* cases cited *supra* notes 3, 10, 25 and 29.

[39] *See* Dolan v. Dolan, 296 N. Y. 860, 72 N. E. 2d 603 (1947).

this inadequacy need not be alleged with great specificity, for a rather generalized pleading will at least survive a motion to dismiss.[40]

There is also another group of cases to be considered. If the separation agreement is included in a court decree, then the court will retain power over the parties to the extent that the court can modify its own decree in respect of support payments.[41] That is, once the support provisions are incorporated as part of a court decree, they are subject to modification by the court which made the decree. As a contract between the parties, however, entirely apart from the decree, such provisions may still retain efficacy,[42] or on the other hand, they may be deemed to have merged in the decree. Under what circumstances such merger may be effectuated is a problem outside the scope of the present discussion.[43]

Have these cases achieved a fair and workable rule of law in this field? It is believed that they have. While distinction between lump-sum and periodic payment settlements is perhaps overstressed, the distinction is not without substance. The "presumption" which the courts seem to attach to periodic payment agreements in favor of their validity is a recognition of the fact that such agreements provide at least a modicum of support for the wife during her life and thus minimize the danger of her becoming a public charge. The lump-sum agreement, on the other hand, provides no such assurance unless the settlement is very munificent, and even then it may be expended imprudently by the wife within a short space of time.

A possible weakness in the rule applied to periodic payment settlements may perhaps lie in the requirement that the wife show improvidence at the time the agreement was made and not merely that in the light of present circumstances it is inadequate or incommensurate with the husband's income. Yet, perhaps this weakness is an inevitable one if separation

---

[40] As shown by Pomerance v. Pomerance, 301 N. Y. 254 (1950).
[41] Goldman v. Goldman, 282 N. Y. 296, 26 N. E. 2d 265 (1940).
[42] Schmelzel v. Schmelzel, 287 N. Y. 21, 38 N. E. 2d 114 (1941).
[43] For a cogent analysis and a collection of the pertinent authorities on the problem of merger of support agreements in matrimonial decrees, see TRIPP, A GUIDE TO MOTION PRACTICE § 152 (1949).

agreements are to have any meaning at all. Were *present* inadequacy a ground in and of itself to upset such agreements, it is certain that any separation agreement would always be of very doubtful enforceability. It may, however, be argued with some force, that natural justice demands that a wife be able to attack an agreement which is presently inadequate, regardless of the fact that a rule permitting her to do so would lend much less certainty to such agreements and thus offend, at least to some extent, the policy of the law in favor of final settlements of controversies outside of court.[44] The effort of the present article is not to pass upon the merits of such arguments, but merely to indicate the present status of the law and the problems involved therein.

In any event, a counsel of caution should be given to all who draw separation agreements. In fairness to both parties and in protection of both, it would seem wise, at least in the absence of specific overriding considerations militating against such action, to insert an "escalator" clause providing for reduction of payments in certain fixed contingencies, such as decreases in the husband's income and substantial increases in the purchasing power of the dollar, and, conversely, for increases of such payments commensurate with increases in the husband's wages and increases in general price levels.[45]

---

[44] Thus one writer comments: "The rule that subsequent affluence of *H* will not avail to invalidate a separation agreement has all the grace of simplicity, but may work hardship. It is best to impose some limit upon it. The best limit is the absolute impoverishment of *W*. That is, even though a contract may have been fair and equitable in all respects at the date of execution, if, through ignorance or misfortune, *W* is reduced to absolute poverty, then it is proper that *H* should provide for her. If *H* does not, then the wife will become a public charge and the State will have to support her. As between the State and *H* it is the duty of *H* to bear the burden." Roberts, *The Validity and Utility of Separation Agreements in New York Law,* 16 ST. JOHN'S L. REV. 185, 197 (1942).

[45] While it may at first seem unusual to recommend insertion of an inflation-deflation clause, there seems to be no reason why such a clause cannot be satisfactorily employed, perhaps utilizing some relatively unbiased economic index, such as that of the Bureau of Labor Statistics.