

The Validity and Utility of Separation Agreements in New York Law

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ST. JOHN'S LAW REVIEW

VOLUME XVI

APRIL, 1942

NUMBER 2

THE VALIDITY AND UTILITY OF SEPARATION AGREEMENTS IN NEW YORK LAW

IT is usually interesting to delve into a province of the law which contains conflicting and inconsistent decisions. Such study is profitable in that it affords an opportunity to look deeper into the true meaning of the law and the practical psychology of the courts. Our province is Domestic Relations.

Narrowing our field of observation for purposes of convenience, we focus upon separation agreements. This is quite a refinement since by studying separation agreements we exclude agreements between *H* and *W* executed before the marriage (antenuptial agreements), those made after the marriage but not involving a separation of the parties (postnuptial agreements),¹ and all types of property settlements. As a further convenience we shall limit our investigation to New York law. This last limitation will aid all of us regardless of the State jurisdiction we wish to analyze. The reason is that if we succeed in isolating our "germ" in one environment, it is relatively simple to watch and study it in other locations.

FACTORS WHICH AFFECT SEPARATION AGREEMENTS

A. Initial Validity at Early Law

No less than four factors militated against the validity of separation agreements at early common law. One was the

¹ Garlock v. Garlock, 279 N. Y. 337, 18 N. E. (2d) 521 (1939).

unity of man and wife. Since husband and wife were one person, and since a man can not contract with himself, *ergo* *H* could not contract with *W*.² The second was the settled policy against agreements looking toward the dissolution of the marriage relationship. The third was the fact that in England only the ecclesiastical courts had jurisdiction to interfere in matters affecting the marital *res*. Thus the inclusion of an *a fortiori* is impelled when we come to say that the parties themselves could not alter the marriage relationship. The final factor trampling the belabored separation contract was its indivisibility. That is, such contracts contain many clauses only one of which is the promise to live separate and apart. It is precisely this covenant which the above-enumerated factors struck. And since the separation clause is the heart of the contract, the entire contract fell with it.

How were these obstacles overcome?

There are three means through which the law grows: legislation, fictions, and equity. In our case it was not long before the paternal hand of equity reached out to help avoid manifest injustice. The injustice would arise when *W*, unprovided for when *H* ceased his payments under his contract, sued upon the contract, and was summarily thrown out. Since the contract was no good no suit could be maintained thereon. The equities of the case were with the wife, and courts of equity came to her aid. If the contract were made through the intervention of a trustee, the unity argument failed;³ if the contract were made after the parties had already separated, such separation was a *fait accompli*, and there no longer was any public policy to conserve;⁴ the American courts *vi et armis* construed the contracts as divisible;⁵ in England the courts of equity slowly took over the jurisdiction of the ecclesiastical courts, and in this country there never was a separate ecclesiastical court. With these conditions and reasoning it was not surprising to no-

² See 1 BLACKSTONE, COMMENTARIES 468; *Hendricks v. Isaacs*, 117 N. Y. 411, 22 N. E. 1029 (1889).

³ *Northrop v. Barnum*, 15 Wend. 167 (N. Y. 1836).

⁴ *Besant v. Wood*, L. R. 12 Ch. Div. 605 (1879).

⁵ *Rough v. Rough*, 195 S. W. 501 (Mo. App. 1917).

tice courts of equity in this country allowing parties to affect their marriage to the extent of a separation agreement.⁶

The historical steps involved in the granting of recognition to separation agreements were a bit different in New York. In this state at first there had to be a trustee, the parties had to be apart at the date of execution, a cause for divorce had to exist, and the agreement had to merit equitable relief in all respects.⁷ If all these conditions were satisfied, then did courts of equity grant relief to the wife suing upon the contract.

In 1896 the first Domestic Relations Law of New York was passed. Section 21 of this law sanctioned contracts between *H* and *W*. Thus a trustee was not necessary, and courts of law recognized separation agreements. Courts of law also held that if at the date of execution the parties were apart, or separated immediately thereafter, the agreement would be valid even though no grounds for divorce existed.⁸

The introduction of the separation agreement into the law courts in 1896 marked a significant change in its treatment and validity. Before enforcing a contract of any nature equity will subject it to a more stringent scrutiny than will a court of law. It must be remembered that the doctrine that fraud, duress, and coercion might overturn an otherwise valid contract, originated in equity and was later adopted by the law courts. In the case of separation agreements equity went further in requiring equitable circumstances as a condition precedent to relief. Law courts took over this type of scrutiny,⁹ but with a difference. When equity enforced the agreement, it did so to avoid injustice. That is, the contract was void unless a strong showing of equitable circumstances could be made. Sanctioned by the

⁶ *Westmeath v. Westmeath*, 1 Dow & Cl. 519 H. L. (1831); *Carson v. Murray*, 3 Paige 483, 500 (N. Y. Ch. 1832).

⁷ *Clark v. Fosdick*, 118 N. Y. 7, 22 N. E. 1111 (1886).

⁸ *Winter v. Winter*, 191 N. Y. 462, 84 N. E. 382 (1908); *Chamberlain v. Chamberlain*, 193 App. Div. 784, 184 N. Y. Supp. 464 (1st Dep't 1920).

⁹ Courts today say that *H* is in a position of trust and confidence, and must acquit himself *uberrima fide*. *Ducas v. Guggenheimer*, 90 Misc. 191, 153 N. Y. Supp. 591 (1915), *aff'd*, 173 App. Div. 884, 157 N. Y. Supp. 801 (1st Dep't 1916); *cf. In re Smith's Estate*, 243 App. Div. 348, 276 N. Y. Supp. 646 (1932). But see *In re McGlone's Will*, 258 App. Div. 596, 17 N. Y. S. (2d) 316 (2d Dep't 1940) for modern trend for only allowing the presumption of fraud after some slight evidence is introduced.

law, these agreements were valid unless inequitable circumstances were shown. In other words, there is here a difference in the mental resistance which the court directed at the validity of separation agreements.

In *Affleck v. Affleck*¹⁰ the court held that if the parties were apart right after the contract was entered into, there would be no public policy to conserve, and the agreement would be upheld. Here is an old equity case wherein a subsequent event—the separation—affected initial validity. The court in *Shepard v. Shepard*¹¹ said that if the consideration was suitable and meritorious, equity “would have been inclined to assist it”. *Simmons v. McElwain*¹² declares that an equity court would uphold such transactions “when it is necessary to prevent injustice”. With an inclination as revealed in the above quotations, the court very subtly allowed itself to be swayed by events occurring after the execution of the contract. The exact extent of this trend is difficult to delineate since the Domestic Relations Law of 1896 followed swiftly to cut off the cases in equity. Its chief importance lies in the historical background it provides for the modern treatment accorded separation agreements at law.

B. Public Policy

As stated above the basis of the law courts' jurisdiction over separation agreements was Section 21 of the Domestic Relations Law of 1896. In effect that provided that *H* and *W* could contract with one another, but not to relieve *H* of his duty of support, nor alter the marriage relationship. Embodied in these last two exceptions is the codification of the public policy attaching to these contracts. We shall consider them separately.

As to whether or not the contract alters the marriage relationship, the law is relatively simple. A mere separation affects not at all the marriage since the parties remain man and wife. Only a divorce will alter it. And so contracts conditioned upon, or in aid of, a divorce are void.¹³ This rule

¹⁰ 64 How. Pr. 380 (N. Y. 1882).

¹¹ 7 Johns. Ch. 57, 61 (N. Y. 1823).

¹² 26 Barb. 419, 422 (N. Y. 1857).

¹³ *Schley v. Andrews*, 225 N. Y. 110, 121 N. E. 812 (1919); *Train v. Davidson*, 20 App. Div. 577, 47 N. Y. Supp. 289 (2d Dep't 1897).

savors of collusion. Yet in New York the two are distinct. Collusion is a good defense to divorce, and is defined as any fabrication of evidence or imposition upon the courts.¹⁴ A contract whereby the husband gives his wife money or valid proof to prosecute a *bona fide* suit is not collusion. Yet the agreement is against public policy. If on a construction and interpretation of the contract it can be said it aids the court in determining the relief to be granted after a judicial divorce, or if it does not tend to favor divorce, then public policy will not strike it.¹⁵

Contracts in aid of a judicial separation would seem to be good since such separation does not affect the marriage tie. No cases have been found on this point.¹⁶ Contracts requiring *W* to abandon her right to an appeal of a divorce decree are struck by the same considerations as are agreements in aid of divorce.¹⁷

Turning to agreements relieving *H* of his duty of support, we first consider the case of *Pettit v. Pettit*¹⁸ which arose in 1887, prior to the Domestic Relations Law of 1896. That case contained the *dictum* that " * * * the consideration for the husband's promise to support his wife is his relief from liability for her support." If this is so, then all separation agreements fly in the teeth of the statute providing that *H* and *W* can not contract to relieve the former of his duty of support.¹⁹ Cases arising subsequently explained away this embarrassing *dictum* by pointing out that an adequate payment, far from relieving, fulfilled the duty of support. It was also declared that the statute was enacted to enlarge the rights of married women, and thus to hold that all separation contracts were declared illegal by statute would be to take away rather than add to a married woman's

¹⁴ *Rosenzweig v. Rosenzweig*, 231 App. Div. 13, 246 N. Y. Supp. 231 (2d Dep't 1930).

¹⁵ *Hammerstein v. Trust Co.*, 211 N. Y. 611, 105 N. E. 1085 (1914).

¹⁶ But *cf.* *Galusha v. Galusha*, 116 N. Y. 635, 642, 22 N. E. 1114 (1889), where a contract for an immediate separation made through the intervention of a trustee was upheld.

¹⁷ N. Y. L. J., Nov. 3, 1938, p. 1459, col. 7.

¹⁸ 107 N. Y. 677, 14 N. E. 500 (1887).

¹⁹ The *Pettit* case was forced to make the quoted dictum because it did not wish to say that the promise to live separate and apart was the consideration for *H*'s promise to pay.

rights.²⁰ An inadequate provision for support will of course have the effect of relieving *H* of his marital duty, and is void.²¹

1. Concerning the Duty to Support—An Analysis

Since separation agreements do not relieve *H* of his duty to support, what happens to this duty while the contract is in effect? Does it continue? Is it in abeyance? Does it vanish?

Following the leading case of *Clark v. Fosdick*²² the authorities are one in stating that in the absence of an intention to the contrary, a divorce does not terminate a separation agreement. Divorce terminates the duty to support.²³ Since the duty to support does not carry the contract down with it, the reasoning must be that the duty to support is liquidated as of the date of the execution of the contract.²⁴

"His obligation to support his wife is a continuing one, so long as that relation exists, and he ought not to be permitted to escape his responsibility for her support even though he paid what he agreed to pay at the time the separation agreement was made", says *Harding v. Harding* at page 722 of the Appellate Division report.²⁵ Here then is authority for the proposition that the duty to support is a continuing one. The best way to reconcile these two views is to say that the duty to support is in abeyance since

* * * the contract may * * * by the assent of the parties to it, be terminated, and once this is done, then the marital obligation of the husband to support his wife again comes into existence.²⁶

It is submitted that this latter reasoning is correct. The only fly in the ointment is that courts like that in *Harding v. Harding* are constantly using language indicating that the duty to support is a continuing one. In most cases such

²⁰ *Effray v. Effray*, 110 App. Div. 545, 97 N. Y. Supp. 286 (1st Dep't 1905).

²¹ *Glusker v. Glusker*, 108 Misc. 287, 177 N. Y. Supp. 582 (1919).

²² See note 7, *supra*.

²³ See *People v. Schenkel*, 258 N. Y. 224, 179 N. E. 474, 475 (1932).

²⁴ (1913) 13 Col. L. Rev. 168; (1927) 27 Col. L. Rev. 608.

²⁵ 203 App. Div. 721, 197 N. Y. Supp. 78 (1922), *aff'd*, 236 N. Y. 514, 142 N. E. 264 (1923).

²⁶ *Randolph v. Field*, 165 App. Div. 279, 150 N. Y. Supp. 822 (1914).

reasoning must invalidate a separation agreement after a divorce.²⁷ Since the language is always pure *dicta*, it is wise to disregard it, and hope that its use will be discontinued.

We run into difficulty when, after there has been a divorce, one of the parties desires to set the agreement aside. Now there is nothing to spring up. Since divorce ended the duty to support, once the agreement is removed, nothing remains. *Hamlin v. Hamlin* wrestled with this problem.²⁸

The *Hamlin* case held that by virtue of the contract, the court forebore awarding alimony, but that the agreement of the parties was insufficient to deprive the court of the sweeping, remedial powers vested in it by Sections 1155 and 1170 of the New York Civil Practice Act. The policy of the Act was to grant courts continuing jurisdiction to modify alimony relief, and like policy demanded that the courts exercise this power in spite of the divorce and separation agreement. This case shows that it is important for a court to embody the separation agreement in its decree so that there will be no question of the court's later power to make modifications. In a more drastic way it would be better if the rule were adopted that a divorce *ipso facto* terminates all separation agreements. Then the court would have to make alimony provisions which are more expedient and equitable by virtue of the pertinent provisions of the Civil Practice Act than a separation agreement.

Analyzing the above facts we see that though a divorce terminates the marital *res* and thus destroys the basis for the husband's duty of support, nonetheless there exists enough of a vestige of this duty to enable a court of law to place the former husband under a support decree. In the eyes of the law, divorce does not terminate the duty to support.

C. Considerations of Present Validity

We have said that an adequate provision for *W's* sup-

²⁷ See notes 19 and 24, *supra*.

²⁸ 224 App. Div. 168, 230 N. Y. Supp. 51 (4th Dep't 1928).

²⁹ See *Harding v. Harding*, note 25, *supra*; *Brown v. Brown*, 122 Misc. 714, 203 N. Y. Supp. 793 (1924), *rev'd*, 239 N. Y. 518, 147 N. E. 177 (1924); *Rosenthal v. Rosenthal*, 230 App. Div. 483, 245 N. Y. Supp. 253 (1st Dep't 1930); *Perrin v. Perrin*, 140 Misc. 406, 250 N. Y. Supp. 588 (1931).

port does not relieve *H* of his duty of support. This is a simple statement with a complex explanation. The complexities arise out of the word adequate. To begin with, since adequacy relates to the question of relief from the duty of support, it should be included in our discussion of public policy. However, adequacy is more subtle than that classification. When a wife receives an inadequate sum for her support, it is probable that there was some element of fraud, mistake, or coercion involved or that such elements will be alleged in the wife's cause of action.²⁹ In other words adequacy and inadequacy are intimately tied up with these other factors affecting the validity of separation agreements, and for purposes of convenience we shall discuss adequacy here with those other factors. In effect, inadequacy is but another species of overreaching since an inadequate provision of support is invariably the result of a hard bargain driven by *H* who is in a position of trust and confidence.

Adequacy is a slippery word. We must first find a definition, and then we must devise a test. Adequacy is an equitable term whose legal counterpart is sufficiency. When a law court speaks of adequacy it thus demonstrates that it is dealing with a subject having an equitable past. By reason of this past, courts today apply an equitable scrutiny to separation agreements. Thus something less than fraud or duress—coercion and overreaching—are enough to overturn the contract.³⁰

A support provision is adequate when it is equal to the husband's duty of support. The pertinent inquiry is now as to how to test or measure this duty. First, the duty is relative. That is, if the wife has means of her own and agrees to use such means, then a small sum may be adequate. In fact, if the wife is wealthy, no provision at all, or \$1 may be adequate.³¹ There are cases *contra*, holding that provisions of \$1 or nothing are void on their face.³² Such holdings are erroneous in that they lose sight of the fact that the duty to

²⁹ *Brooklyn Trust Co. v. Lester*, 239 App. Div. 422, 267 N. Y. Supp. 827 (2d Dep't 1933); *Hamlin v. Hamlin*, note 28, *supra*; *Ducas v. Guggenheimer*, note 9, *supra*.

³¹ *In re Kiltz's Will*, 125 Misc. 475, 211 N. Y. Supp. 450 (1925); *Rosenblatt v. Rosenblatt*, 209 App. Div. 373, 204 N. Y. Supp. 676 (3d Dep't 1924).

³² *Dworkin v. Dworkin*, 247 App. Div. 213, 286 N. Y. Supp. 982 (1st Dep't 1936); *Golden v. Golden*, 17 N. Y. S. (2d) 76 (App. T. 1st Dep't 1939).

support is a relative term.³³ From the trend of present-day decisions it would appear that a contract wherein the wife gave the husband a sum for support, would not be against public policy. These cases go so far as to say that a wealthy wife may be under a duty to support her husband.³⁴ In the light of these pronouncements, it is incorrect to declare that a \$1 or less provision for *W* by *H* is void at once. Rather, the correct approach is that such provision is valid until it is proven at a trial that in view of all the circumstances, it did not measure up to the duty to support.³⁵

From the foregoing it is apparent that a separation agreement can not be attacked collaterally. Its validity can only be impinged by a direct action in court, and not by affidavits as is the case on a motion.³⁶

Where adequacy is in issue the financial condition of *W* will be taken into account since it can fairly be said that by signing the contract *W* agreed to use her funds to the extent of providing herself with the necessary support.³⁷

D. The Effect of Events Subsequent to Execution

It is clear that the time for measuring the financial condition of *H* is the date of execution of the contract.³⁸ That is, only inadequacy at the date of execution of the agreement will render it void. However, there is language in the cases which would indicate that inadequacy may later develop and overturn the contract. Such language is always *dicta* and is

³³ *Vallee v. Vallee*, 154 Misc. 620, 277 N. Y. Supp. 877 (1935); *Hungerford v. Hungerford*, 161 N. Y. 550, 56 N. E. 117 (1900).

³⁴ *Hodson v. Stapleton*, 248 App. Div. 529, 290 N. Y. Supp. 570 (4th Dep't 1936); *Picker v. Picker*, unreported, N. Y., May 8, 1936, reprinted LINDEY, SEPARATION AGREEMENTS AND ANTE-NUPTIAL CONTRACTS (1937) 241.

³⁵ *In re Halstead's Estate*, 168 Misc. 832, 6 N. Y. S. (2d), *aff'd*, 280 N. Y. 691, 21 N. E. (2d) 199 (1938); *In re Warren*, 207 App. Div. 793, 202 N. Y. Supp. 586 (4th Dep't 1924); see (1925) 25 Col. L. Rev. 934. If the contract is too sweeping and purports to relieve *H* of the duty to support for all future times and circumstances, then it may be void on its face. See *Pignatelli v. Pignatelli*, 169 Misc. 534, 8 N. Y. S. (2d) 10, 18 (1939).

³⁶ *In re Tierney's Estate*, 148 Misc. 378, 266 N. Y. Supp. 51 (1933); see *Harding v. Harding*, note 25, *supra*; *Cain v. Cain*, 188 App. Div. 780, 177 N. Y. Supp. 178 (4th Dep't 1919).

³⁷ *In re Kiltz's Will*, note 31, *supra*; see p. 192, *supra*.

³⁸ *Hungerford v. Hungerford*, note 33, *supra*; *Vallee v. Vallee*, note 33, *supra*.

misleading. It is so misleading as to call for a detailed history of the erroneous *dicta*.

*Winter v. Winter*³⁹ was a case involving a suit by a wife on a separation contract. The defense was that the contract was void as contravening Section 51 of the Domestic Relations Law. The court held that if the provision for support was adequate, the contract was not void. In 84 N. E. at page 386 it expounded:

If it should turn out that the provision for the support of the wife was inadequate, and that she accepted it unadvisedly and imprudently, a court of equity has power to set it aside.

This quotation merely speaks of inadequacy at the date of execution, yet it is easy to see how this slightly ambiguous quotation, standing alone, might convey the impression that subsequent events may affect the agreement.

*Perrin v. Perrin*⁴⁰ uses language similar to that above-quoted. In this case also the court found a factor existing at the date of execution which vitiated the contract. It was a slim factor as can be seen from the facts. *H*, a dentist, was ill, and could not work. The parties then executed a separation agreement wherein the wife of necessity accepted a small provision for her support. Later *H* recovered and resumed his lucrative practice. Here is a clear case where subsequent events seem to be affecting the agreement. However, the rule of law is that subsequent events can not overturn a contract valid and adequate at the date of its execution.⁴¹ The court squirmed out of the hole by relying on mistake existing at the date of execution. The mistake was as to the exact state of *H*'s health. The court said that both parties were unaware of the exact nature of his illness, and that this mistake was enough to enable them to set the agreement aside. Remembering that very often a doctor does not know

³⁹ 191 N. Y. 462, 84 N. E. 382 (1908).

⁴⁰ Note 29, *supra*.

⁴¹ In *Tirrell v. Tirrell*, 232 N. Y. 224, 133 N. E. 569 (1929), the wife, awarded a lump sum, sued to set it aside, alleging nervousness and inadequacy. There was a specific finding of no fraud, and that *W* was attended and advised by her own attorney. The Appellate Division found the contract fair and equitable; the Court of Appeals found the lump sum equalled only one year's income for *H* and thus inadequate when made.

the exact nature of an illness, it seems the court went to great lengths to remedy an inequitable situation.

Though the *Perrin* case voices the rule that subsequent events can not affect an otherwise valid agreement, it demonstrates that in fact the rule is not so significant as it appears. It is not difficult to see the exact effect which the subsequent events had on the court.⁴²

Another example of a court setting aside an agreement for other factors, and uttering surplus verbiage about subsequent events is *Hamlin v. Hamlin*⁴³ which says that

On a proper showing equity will interfere for the protection of the wife as changing circumstances may require, not limiting itself to cases where fraud or overreaching may have entered into her contract.

Under our previous discussion⁴⁴ we have decided that while a separation agreement is in effect, the duty to support is in abeyance. Thus if the agreement is set aside for any reason, the duty springs up again. Now that duty is measured by the current financial condition of *H*.

*Harding v. Harding*⁴⁵ was a case wherein *W* sued to set aside a separation contract, alleging fraud and inadequacy. *W* sought to examine *H* before trial as to his financial condition for many years up to the date of trial. *H* objected, saying that the years after the date of the execution of the contract were immaterial since it is the financial condition of *H* at that time that is sufficient to test adequacy. The Court of Appeals held that *H* could be examined before trial on his finances for all years up to the date of trial. The *Harding* case cited *Tirrell v. Tirrell* for the proposition that changing events may affect the contract. The *Tirrell* case never stood for such a doctrine. That case merely held that the contract involved was bad since the support money was inadequate at the time of the execution.⁴⁶ The *Harding* case was clearly influenced by some loose verbiage in the *Tirrell* opinion.

⁴² For correct rule see note 41, *supra*; *Cain v. Cain*, note 36, *supra*; *Hungerford v. Hungerford*, note 33, *supra*; *Vallee v. Vallee*, note 33, *supra*.

⁴³ Note 28, *supra*.

⁴⁴ See Sec. 1, *Concerning the duty to support—An Analysis*, p. 190, *supra*.

⁴⁵ Note 25, *supra*.

⁴⁶ Note 41, *supra*.

Later cases have followed the *Harding* case.⁴⁷ Limiting these cases to their facts and holdings, all they mean is that *H* can be examined as to his finances for all years up to the date of trial. However, the language of these cases would indicate that they go much broader—that in all cases subsequent affluence of *H* will invalidate an otherwise valid agreement. To wit:

Plaintiff still being defendant's wife and the obligation still resting upon him by law to support her according to his circumstances in life, has the right to know what his circumstances are, and should not be limited to ascertaining his financial condition at the time the contract was made.⁴⁸

We have said that during the pendency of a separation agreement the duty of support is in abeyance.⁴⁹ Also that an agreement can not be set aside by affidavits on motions.⁵⁰ A hearing for an examination before trial is on motion, and thus the contract must be deemed valid during such motion. Therefore, since the agreement is still in effect on the motion for an examination before trial, the duty to support is still in abeyance and the only measure of adequacy is *H*'s financial condition at the date of the execution of the contract. It is therefore submitted that the *Harding* case and its followers are wrong.

At the trial the agreement might be set aside, and then *W* might sue for a separation, if such grounds exist, and obtain alimony based on the current finances of *H*. Thus conceivably, the finances of *H* up to the date of the trial might be material. However, in the *Harding* case and the others following it, there was no prayer for a separation, and since in New York alimony is only obtainable in a separation or divorce action, the current finances of *H* could never become material. It is therefore error to allow an examination before trial of *H* for financial years up to the date of trial where *W* has not a cause of action for separation or divorce.

Subsequent cases have seized upon the *Harding* case and tried to make it stand for the broad proposition that subse-

⁴⁷ Rosenthal v. Rosenthal, note 29, *supra*; Brown v. Brown, note 29, *supra*.

⁴⁸ Harding v. Harding, note 25, *supra*.

⁴⁹ Note 44, *supra*.

⁵⁰ Cf. note 35, *supra*.

quent events can influence an otherwise valid agreement. *Brooklyn Trust Co. v. Lester*⁵¹ contains the following:

The husband is not thereby relieved of his duty of support if he had failed in the agreement to make ample provision for her, or if *his subsequent affluence makes the provision insufficient.* (Italics added.)

For this the court cited the *Harding* case.

The above errors are either *dicta* or else involved in motions for examinations before trial. In an opinion of a court rendered after a full trial, it was held that in an action to set aside a separation agreement, subsequent affluence of *H* will not be sufficient to set aside the agreement.⁵² This is the correct rule.⁵³ To adopt the contrary rule would be to render separation agreements ineffective. The finances of *H* must usually vary from time to time, and thus it would be foolish and useless to go through the formality of making a contract which can not last very long. Moreover, it has never been questioned but that subsequent financial reverses of *H* will not suffice to render void an otherwise valid agreement.⁵⁴

The *Harding* case and its followers remain on the books to confuse the law. A reversal by the Court of Appeals is sorely needed.

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. Using this reason-

⁵¹ Note 30, *supra*.

⁵² *Crowell v. Crowell*, 135 Misc. 530, 238 N. Y. Supp. 44, *aff'd*, 229 App. Div. 771, 242 N. Y. Supp. 811 (1st Dep't 1929).

⁵³ *Cain v. Cain*, note 36, *supra*; *Brown v. Brown*, note 29, *supra* (lower court opinion).

⁵⁴ *Chamberlain v. Cuming*, 99 App. Div. 561, 91 N. Y. Supp. 105, *aff'd*, 184 N. Y. 526, 76 N. E. 1091 (1904).

ing the trend of modern cases is toward recognizing extreme poverty as a factor which will be sufficient to overturn an otherwise valid agreement.⁵⁵

Legislation also has been aware of this problem. It has dealt with it by setting up the Domestic Relations Court.⁵⁶ In this court *W* can secure an order for her support even though there is a separation agreement outstanding. It would seem wise to allow the same relief in the regular courts. That is, allow complete poverty to overturn the agreement and thus free *W* to get any relief to which she is entitled.

Suppose *H* threatens to become a public charge. Should this enable him to set the contract aside? Courts have said that *W* may be under a duty to support *H* if *H* is destitute.⁵⁷ Since *H* is destitute, the agreement means little because in any event *W* can recover nothing from her spouse. However, the arrears do accumulate. This accumulation may be enough to prevent *H* from afterward staging a business comeback. Under the provisions of Section 17 of the Chandler Act⁵⁸ these arrears would not be dischargeable in bankruptcy. If a married couple become public charges for three years, and then the husband reestablishes himself, the hus-

⁵⁵ *Veeck v. Veeck*, 215 App. Div. 705, 212 N. Y. Supp. 933 (1st Dep't 1927); *Crowell v. Crowell*, note 52, *supra*; cf. *Harding v. Harding*, note 25, *supra*.

⁵⁶ The Domestic Relations Court was set up for the city of New York and its jurisdiction is limited to that city. In other parts of the state the same relief may be obtained through Code of Criminal Procedure § 899, subd. 1, providing that persons who leave their wives or children in danger of becoming public charges are disorderly persons. The punishment for this misdemeanor is that the husband furnish a bond to the Overseer of the Poor for the support of the charges. Otherwise *H* goes to jail. If the wife shows she is a public charge, a separation agreement would not help *H*. The reason is that as between *H* and the state, it is for *H* to support *W*. Cf. GILBERT, N. Y. CODE OF CRIMINAL PROCEDURE (1939) § 899, subd. 1 and annotation.

By the Laws of 1933, c. 482, the Domestic Relations Court was set up to assume jurisdiction over cases arising under the above subdivision in New York City. The proceedings are not criminal in nature. If *W* is or threatens to become a public charge, she can secure a support order for payments up to \$50 per week. This order is punishable for contempt. Laws of 1933, c. 482, § 137, provides that " * * * an agreement to separate shall in no way preclude the filing of a petition for the support of a wife who is likely to become a public charge."

This court is a public policy court and, as such, merely reflects the method with which the legislature chooses to cope with the pressing domestic relations problems of today.

⁵⁷ Cf. note 34, *supra*.

⁵⁸ 11 U. S. C. A. § 35 (1938).

band need not reimburse the State. In all respects the couple can begin over again. It would seem that *H* living separate and apart should also be able to start fresh with a clean slate.

At any event the agreement is not punishable by contempt.⁵⁹

To summarize: Fraud, duress, coercion, overreaching, weakness, nervousness, mistake, inadequacy as of the date of execution, *W*'s becoming or threatening to become a public charge, lack of advice, and public policy against relieving of support and against divorce all will enable a court to set aside the contract.

E. Termination of a Separation Agreement

Judicially a separation agreement can only be terminated by an action to set aside, and not on a motion.⁶⁰ The contract can not be modified by the court; it can only be set aside *in toto*.⁶¹ In other words, the courts will not undertake to redraft a contract for the parties. By mutual agreement the parties can terminate their contract, in the same manner as an ordinary contract is ended.⁶² Reconciliation of the parties together with an intent to resume permanent cohabitation will also result in a termination.⁶³ And once thus terminated, the agreement will not revive when later the parties re-separate.⁶⁴

An offer in good faith by one of the parties to resume cohabitation will only result in a termination if on construction the court can say the agreement was temporary in nature. If it was intended that the contract last for longer than a temporary interval, an offer by one party to resume cohabitation is unavailing in so far as termination is con-

⁵⁹ *Kunker v. Kunker*, 230 App. Div. 641, 246 N. Y. Supp. 118 (3d Dep't 1930).

⁶⁰ Note 35, *supra*.

⁶¹ *Stoddard v. Stoddard*, 227 N. Y. 13, 124 N. E. 91 (1919).

⁶² See quotation from *Randolph v. Field*, p. 190, *supra*. If the contract is under seal, it cannot be modified orally, by an unexecuted promise. *Enthoven v. Enthoven*, 225 App. Div. 309, 232 N. Y. Supp. 599 (1st Dep't 1929).

⁶³ *Brody v. Brody*, 190 App. Div. 806, 180 N. Y. Supp. 364 (1st Dep't 1920).

⁶⁴ *In re Landon's Estate*, 149 Misc. 832, 269 N. Y. Supp. 275 (1933).

cerned.⁶⁵ The Restatement of Contracts, Section 584, adopts the rule that in any case a *bona fide* offer by one party will *per se* terminate the agreement. This latter view is desirable since it is consonant with the settled policy against disruption of the marriage, and does not allow the contract to stand in the way of cohabitation.

As to whether or not a separation agreement will survive divorce or remarriage is a matter of construing the contract.⁶⁶ Generally, courts favor that construction which make it terminate at the death of the husband, although the agreement is capable of lasting till the wife's death.⁶⁷

It is submitted that divorce should *ipso facto* terminate the agreement. Divorce ends the marriage relationship, and there is no need to foster and scrutinize these contracts whose purpose is to effectuate an amicable settlement *extra curiam* of domestic differences. Once the quarrel is submitted to a court, the private transactions of the parties should end. Particularly should this be so in view of the broad provisions of the statute in regard to the support of a wife or children in case of divorce, separation, and more recently, annulment.⁶⁸ To allow a separation agreement to exist side by side with an alimony decree is to have the anomalous situation wherein a court can modify the alimony but is powerless to do the same with the contract. The result is that under the decree *H* is bound to pay an amount different than the contract sum.⁶⁹ Thus, in effect, the power of the court is nullified, and the beneficial aspects of the broad statutes are lost. Alimony is more effective and efficient than a contract provision.⁷⁰

The reasoning to support the rule that divorce ends a

⁶⁵ *Calkins v. Long*, 22 Barb. 97 (N. Y. 1855); *cf.* 40 A. L. R. 1227.

⁶⁶ *Fleischman v. Ferguson*, 223 N. Y. 235, 119 N. E. 400 (1916); *Clayburgh v. Clayburgh*, 218 App. Div. 411, 218 N. Y. Supp. 457 (1st Dep't 1926); *Westover v. Westover*, 133 Misc. 510, 232 N. Y. Supp. 184 (1929); *cf.* *Bankers' Trust Co. v. Willis*, 248 App. Div. 753, 288 N. Y. Supp. 773 (2d Dep't 1936).

⁶⁷ *In re Junge*, 125 Misc. 707, 212 N. Y. Supp. 119 (1925); *Brooklyn Trust Co. v. Lester*, note 30, *supra*; *cf.* also 100 A. L. R. 500.

⁶⁸ C. P. A. §§ 1170, 1171, 1172.

⁶⁹ *Goldman v. Goldman*, 282 N. Y. 296, 26 N. E. (2d) 265 (1940).

⁷⁰ *Kunker v. Kunker*, 230 App. Div. 641, 246 N. Y. Supp. 118 (3d Dep't 1930); *Winburn v. Winburn*, 200 App. Div. 26, 192 N. Y. Supp. 280 (1st Dep't 1922).

separation agreement is that one of the implied conditions of every such contract is that it terminate on divorce.⁷¹

Any default in payments, or any breach of a substantial nature, gives the other party an election.⁷² As in all cases of election, mistake will prevent it from becoming binding.⁷³ The doctrine of anticipatory breach of contract is inapplicable to a separation agreement.⁷⁴

Since a divorce does not necessarily terminate the contract, suing for divorce is neither a repudiation nor an election.⁷⁵ A separation agreement bars the institution of a separation action. Thus suing for a separation is equal to a suit to set aside the agreement, and is an election and a repudiation.⁷⁶ A request for permanent alimony where *W* is under no mistake as to her rights, is equal to a repudiation and an election.⁷⁷ Although the same cases lump temporary alimony with permanent alimony, it is submitted that since temporary alimony is not an adjudication of any rights, but merely a matter of discretion with the court to insure a fair trial, it should not be a repudiation or an election. A request for counsel fees will not amount to a repudiation or election if the separation agreement makes no provision for them.⁷⁸

It is submitted that suing for an annulment should not work a rescission since such suit is not inconsistent with the continued existence of the contract.⁷⁹ In the case of annulment there is the initial question of whether or not there is a contract at all. Since there is no marriage, the duty to

⁷¹ Cf. (1913) 13 Col. L. Rev. 168; (1927) 27 Col. L. Rev. 608.

⁷² *Henry v. Harrington*, 193 N. Y. 218, 86 N. E. 29 (1908); *Landes v. Landes*, 94 Misc. 486, 159 N. Y. Supp. 586, *aff'd*, 172 App. Div. 758, 159 N. Y. Supp. 230 (1st Dep't 1916).

⁷³ *Benesch v. Benesch*, 106 Misc. 395, 173 N. Y. Supp. 629 (1918).

⁷⁴ *Bauchle v. Bauchle*, 185 App. Div. 590, 173 N. Y. Supp. 292 (1st Dep't 1918).

⁷⁵ Cf. *Gray v. Gray*, 149 Misc. 273, 267 N. Y. Supp. 95 (1932).

⁷⁶ *Obrien v. Obrien*, 252 App. Div. 427, 299 N. Y. Supp. 511 (4th Dep't 1937); *Lawsberg v. Lawsberg*, 171 App. Div. 354, 156 N. Y. Supp. 1050 (3d Dep't 1916).

⁷⁷ *Randolph v. Field*, note 26, *supra*; *Newport v. Newport*, 131 Misc. 851, 228 N. Y. Supp. 313 (1928); cf. *Ozmore v. Ozmore*, 179 Ga. 339, 175 S. E. 789 (1923).

⁷⁸ *Sockman v. Sockman*, 252 App. Div. 914, 300 N. Y. Supp. 187 (4th Dep't 1937).

⁷⁹ *Butler v. Butler*, 206 App. Div. 214, 201 N. Y. Supp. 111 (2d Dep't 1923).

support or the promise to live apart can not be the consideration. However, there are other promises upon which the contract can hang. For example, the promise to bring the annulment action or the promise not to rely on alimony provisions after the annulment action are good consideration.⁸⁰ Of course, if none of the above factors is present, then if for example, *H* were validly married to another, a separation agreement between *H* and another will fail because of an absence of consideration.⁸¹ Since an annulment decree relates back to the date of the alleged marriage,⁸² it would seem that suing for an annulment should amount to an election or repudiation. If there exists other consideration, then that will be a sufficient answer. If not, we may employ the reasoning of former Chief Judge Cardozo,⁸³ and say that the relation back of decrees is a fiction which will never work injustice by carrying with it an equitable separation contract.

Where *H* breaks the contract by failing to make the required payments, and *W*, exercising her election, rescinds the agreement, *W* can nonetheless recover all payments due under the contract up to the date of her effective rescission.⁸⁴

Where *H* is in default, *W* may waive her rights by sleeping on them for an unreasonable length of time.⁸⁵

THE EFFECT OF A SEPARATION AGREEMENT⁸⁶

A. Effect on the Duty to Support

Normally a wife has three methods by which she can enforce the duty to support: 1. She can pledge *H*'s credit, 2. She can sue criminally or in the Domestic Relations Court,

⁸⁰ *Shaff v. Shaff*, 175 Misc. 339, 23 N. Y. S. (2d) 651 (1940).

⁸¹ *Abrams v. Abrams*, 150 Misc. 660, 270 N. Y. Supp. 841 (1934).

⁸² *Matter of Moncrief*, 235 N. Y. 390, 139 N. E. 550 (1923).

⁸³ *American Surety Co. v. Connor*, 251 N. Y. 1, 8, 166 N. E. 783 (1929); *Sleicher v. Sleicher*, 251 N. Y. 366, 369, 167 N. E. 501 (1929).

⁸⁴ *Breiterman v. Breiterman*, 239 App. Div. 709, 268 N. Y. Supp. 628 (1st Dep't 1934).

⁸⁵ *Bartholomaeus v. Bartholomaeus*, 259 App. Div. 1040, 20 N. Y. S. (2d) 945 (2d Dep't 1940); *Ross v. Ross*, 252 App. Div. 831, 299 N. Y. Supp. 325 (3d Dep't 1937).

⁸⁶ The present discussion will emphasize the administrative aspect of separation agreements. For a comprehensive study of the testamentary effect of such agreements see (1934) 4 BROOKLYN L. REV. 139.

or 3. She can sue for a divorce or separation, and in such suit obtain alimony.

What is the effect of a separation agreement upon the above?

If *H* provides *W* with sufficient money to purchase necessities, and with ready cash with which to make present purchases, a tradesman who furnishes *W* with necessities will not be able to collect their value from *H*.⁸⁷ If there is a separation agreement between the parties then unless the court hearing the tradesman's suit also has the wife before it, and unless it has jurisdiction to set aside the agreement, the tradesman is precluded.⁸⁸ If the court has jurisdiction to set aside the agreement and the wife is also before the court, the court will treat the suit as a joinder of an action to set aside and an action for goods sold.⁸⁹ Where the above two conditions do not exist, *H* has a defense.

Where *H* has defaulted, repudiated, or in any way broken the contract, the pledging of *H*'s credit by *W* should be deemed such inconsistent action as to amount to a rescission. In order to preserve the agreement, *W* should only be allowed to proceed upon the theory that the contract is still in force, *i.e.*, sue upon the contract. Thus where *H* is in default, the pledging of his credit should *ipso facto* terminate the agreement, leaving *H* with no defense to the tradesman's suit.

In a criminal court or in the Domestic Relations Court a separation agreement is of no effect since these courts are merely enforcing the public policy that as between the state and the husband, the latter ought to bear the burden of supporting an indigent wife.⁹⁰

The effect of a separation agreement upon *W*'s right to bring suit for divorce or separation and in that suit obtain alimony, is more complex.

A separation agreement will not preclude the institution

⁸⁷ *Rochester Hospital v. Ingstrum*, 171 Misc. 288, 13 N. Y. S. (2d) 792 (1939).

⁸⁸ *Krieger v. Krieger*, 162 Misc. 930, 296 N. Y. Supp. 261 (1937); *cf.* *Zysman v. Zysman*, 140 Misc. 617, 251 N. Y. Supp. 355 (1931); *Harding v. Harding*, note 25, *supra*.

⁸⁹ Cases note 88, *supra*.

⁹⁰ Note 56, *supra*.

of a divorce action.⁹¹ An express provision in the contract that the parties shall not sue for divorce, is void.⁹² If the agreement contains a clause that *H* will not molest *W*, the institution of divorce proceedings is not a violation of such clause.⁹³

In spite of early cases to the contrary,⁹⁴ it is law today that a separation agreement will bar the institution of an action for separation.⁹⁵ This, however, does not mean very much when we notice that a court can consider a separation action as a joinder of an action to set aside the agreement and the action for separation.⁹⁶ Nevertheless, if *W*'s complaint does not allege facts going to the validity of the separation agreement, then the agreement will bar the institution of separation proceedings.

If sufficient facts are alleged so that the court will treat the action as a joinder of two actions, and if the court sets the agreement aside, another problem arises. What was the effect of the separation agreement upon the grounds for separation?

During the existence of a separation agreement there can be no abandonment.⁹⁷ The agreement should be treated like condonation. That is, once the agreement is set aside or rescinded, composed grounds should once again be available to *W*.⁹⁸ However, when the contract is set aside, *W*, as a condition precedent to suit, must offer and allege her willingness to cohabit with *H*.⁹⁹ Such offer if accepted amounts to a condonation; if not accepted, to a valid ground for judicial separation.¹⁰⁰

⁹¹ *Pettit v. Pettit*, 107 N. Y. 677, 14 N. E. 500 (1887).

⁹² *Galusha v. Galusha*, 116 N. Y. 635, 22 N. E. 1114 (1889).

⁹³ *Hughes v. Cuming*, 165 N. Y. 91, 58 N. E. 794 (1904).

⁹⁴ *Landes v. Landes*, 94 Misc. 486, 159 N. Y. Supp. 586, *aff'd*, 172 App. Div. 758, 159 N. Y. Supp. 230 (1st Dep't 1916).

⁹⁵ *Drane v. Drane*, 207 App. Div. 217, 201 N. Y. Supp. 756 (1st Dep't 1923); *Kamrath v. Kamrath*, 231 App. Div. 533, 247 N. Y. Supp. 493 (3d Dep't 1931).

⁹⁶ Cases note 88, *supra*. Observe also that where *H* has committed such a breach as to give *W* an election, the institution of a separation action is an election to rescind. Note 76, *supra*.

⁹⁷ *Reischfield v. Reischfield*, 100 Misc. 561, 166 N. Y. Supp. 898 (1917).

⁹⁸ *Benesch v. Benesch*, note 73, *supra*; *Beebe v. Beebe*, 174 App. Div. 408, 160 N. Y. Supp. 967 (2d Dep't 1916); *Drane v. Drane*, note 95, *supra*.

⁹⁹ *Reischfield v. Reischfield*, note 97, *supra*; *Sturm v. Sturm*, 80 Misc. 277, 141 N. Y. Supp. 61 (1912).

¹⁰⁰ The difficulties which encompass a court when the above reasoning is

Since a separation agreement does not preclude the institution of divorce proceedings, does the separation agreement condone adultery? Of course, if the agreement is set aside, the adultery is available as a grounds for divorce. It is submitted that a subsisting contract should condone prior adultery for the parties consented to stay apart knowing of the adultery. In this way the policy against divorce will be satisfied, and the agreement will be serving a useful purpose in keeping the case out of the courts. If the adultery occurs after the agreement is executed, or if the adultery were not known to the aggrieved party at the time of the execution, then such adultery may be relied upon in a divorce action.¹⁰¹

1. Effect Upon Alimony

An action to set aside a separation agreement is not a matrimonial action, and so neither temporary alimony nor counsel fees are allowable.¹⁰² In a divorce action, a valid

disregarded is illustrated by the case of *Schmelzel v. Schmelzel*, 287 N. Y. 21, 38 N. E. (2d) 114 (1941).

In this case the separation agreement provided that if any support were decreed by a court, the support provisions of the contract should be incorporated in the decree. The wife subsequently brought an action for separation alleging abandonment and cruelty. The court upheld the validity of the agreement but proceeded to award a decree of support for the wife which incorporated the support provisions of the contract. The court erred in not realizing that a valid separation contract precludes the institution of a separation action and also condones the grounds for the separation. Later the husband's income increased and the wife applied to the court for an increase in her support provisions. The Court of Appeals held that the contract was valid and, as such, binding upon the court and preventing it from modifying the decree of support. C. P. A. § 1170 expressly gives the court this power of modification and no agreement of the parties can deprive the court of such power. This the court overlooked. And so, by a combination of blunders and errors, there is enough illogical reasoning on the books thoroughly to befuddle the courts, to say nothing of the lawyers. The separation agreement involved did not oblige the court hearing the separation action to entertain the suit. It contained no provision mentioning separation actions. And even if it did have such a provision, the court should not have allowed the contract of the parties to bind them on such a point. The extent of the confusion now introduced can be fairly well judged by a reading of all the cases in notes 104, 105, 106, *infra*, in conjunction with the *Schmelzel* case. In fine, *Goldman v. Goldman* said that there were two rights involved: contract rights and decree rights. Though the contract rights could not be altered by the court, still the decree was always under its absolute power. The *Schmelzel* case must be *contra* since it holds the contract to be binding upon the decree.

¹⁰¹ *Braunstein v. Braunstein*, 257 App. 206, 12 N. Y. S. (2d) 491 (1st Dep't 1939); *Hann v. DeFreest*, 178 N. Y. Supp. 414 (1919).

¹⁰² *Davis v. Davis*, 195 App. Div. 430, 186 N. Y. Supp. 805 (3d Dep't 1921).

separation agreement precludes the awarding of temporary alimony or counsel fees.¹⁰³ Since a separation action can only be instituted if there is no valid agreement, this problem does not there arise.

The cases say that a court can not award alimony inconsistent with an unimpeached separation agreement even though such agreement does not oust the court's jurisdiction to award alimony.¹⁰⁴ This limitation is meaningless when we note that an alimony award may later be freely modified even though it is based upon a valid separation agreement.¹⁰⁵ Even if the court forebears to award alimony, still, upon application, the court may yet award it although it be different than the contract sum.¹⁰⁶

The result of the above is that a court can modify alimony, but can not affect a separation agreement thus leaving two inconsistent amounts which *H* must pay.¹⁰⁷ Alimony may be enforced by sequestration, contempt, and the giving of security and may be modified, while a contract sum is not subject to these.¹⁰⁸ In a word, the separation agreement is useless in view of the broad effect of alimony and the broad powers over alimony which the court retains. The only sensible way out is to say that a divorce will in all cases terminate a separation agreement. This leaves the court free to utilize the broad powers which it was the legislative intent they should exercise in such cases. It also does away with the sloppy situation wherein a useless contract exists side-by-side with an alimony award.¹⁰⁹

After alimony has been awarded, the cases are not clear as to whether or not the parties can modify it by agreement. Such an agreement is not a separation agreement, but is best discussed here to complete the picture. Most cases hold that a divorce decree may be modified by contract, while a separa-

¹⁰³ *Kamrath v. Kamrath*, 231 App. Div. 533, 247 N. Y. Supp. 493 (3d Dep't 1931). But see note 78, *supra*.

¹⁰⁴ *Galusha v. Galusha*, 138 N. Y. 272, 33 N. E. 1062 (1893); (1930) 30 COL. L. REV. 1206.

¹⁰⁵ *Salmon v. Salmon*, 261 N. Y. 646, 185 N. E. 775 (1933).

¹⁰⁶ CIV. PRAC. ACT § 1170; see *Hamlin v. Hamlin*, note 28, *supra*.

¹⁰⁷ *Bell v. Bell*, 171 Misc. 605, 13 N. Y. S. (2d) 500.

¹⁰⁸ *Kunker v. Kunker*, 230 App. Div. 641, 246 N. Y. Supp. 118 (3d Dep't 1930).

¹⁰⁹ Cf. note 100, *supra*.

tion decree can only be changed by a court order.¹¹⁰ There are some cases which hold that even a separation decree may be changed by contract if there is consideration for such contract.¹¹¹

This conflict in the cases is not of great significance since the modification is binding only as to executed performances. That is, the modification affects only payments actually made on past installments.¹¹² As to future installments the court still retains its broad powers which can not be altered by any agreement between the parties. This is true even though a party expressly waives his right to apply to a court for a modification.¹¹³

A separation agreement gives *W* the status of a creditor who can attack fraudulent conveyances,¹¹⁴ and neither alimony nor the sum due under a separation agreement is dischargeable in bankruptcy.¹¹⁵ By virtue of a separation agreement *W* can set up her own separate domicile, thus preventing *H* from setting up a new matrimonial domicile.¹¹⁶ This last consideration is important when later *H* moves into some different jurisdiction and there obtains a divorce without an appearance by *W*.

A separation agreement has its definite place in the law. And that place is all the more important in a jurisdiction such as New York which will grant divorces but for one ground. Though separation decrees may be awarded more liberally in New York, still a separation agreement has certain definite advantages. A separation action involves unfavorable publicity, besides entailing considerable expense. And in the end the result is the same as under a separation agreement because often the court permits the attorneys to draw up the form of decree which he later signs. With either

¹¹⁰ *Windle v. Heard*, 254 App. Div. 875, 4 N. Y. S. (2d) 977 (2d Dep't 1938).

¹¹¹ *Aldrich v. Aldrich*, 220 App. Div. 555, 222 N. Y. Supp. 56, *app. dism'd*, 247 N. Y. 563, 161 N. E. 183 (1927).

¹¹² *Salmon v. Salmon*, note 105, *supra*; 84 A. L. R. 299.

¹¹³ *Miller v. Miller*, 256 App. Div. 918, 9 N. Y. S. (2d) 202 (1st Dep't 1938, 1939).

¹¹⁴ *Enthoven v. Enthoven*, 167 Misc. 686, 4 N. Y. S. (2d) 514 (1938).

¹¹⁵ FED. BANKRUPTCY ACT, 52 STAT. 581 (1938), amended in 11 U. S. C. A. § 35 (1938).

¹¹⁶ *Perrin v. Perrin*, 140 Misc. 406, 250 N. Y. Supp. 588 (1931); *cf.* *Winston v. Winston*, 165 N. Y. 553, 59 N. E. 273 (1901).

an agreement or the separation decree neither party may remarry.

There are cases where the parties are unable to come to any amicable agreement, and they perforce must resort to a court to untangle their differences. These are the unfortunate cases. However, if the parties themselves are able to make their own arrangements, the result will be much more beneficial than if they are obliged to follow the dictates of a solution imposed upon them. Also two attorneys are usually able to work out some arrangement as well as and sometimes better than a judge who is harassed by an overcrowded calendar.

If the action of separation were abolished, the parties would be forced to come to an agreement themselves without court help. Necessity, as it is said, being the mother of invention, I personally believe that good results, otherwise not possible, would eventuate. Let it be remembered that if the parties are of such a frame of mind that it is an absolute impossibility for them to come to an agreement, then in that case a court decree could not be of any help either. From the other angle, much judicial time and patience would be saved.

While everything which tends to impair a marriage should be deprecated, still, since it is not feasible to force two people to live together, the only practical treatment is to allow the two angry parties to make fair provisions for their separation.

PAUL ROBERTS.