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MARRIAGE AND DIVORCE — POWER OF COURT TO MODIFY DECREE FOR ALIMONY OR PROPERTY SETTLEMENT AS AFFECTED BY AGREEMENT OF THE PARTIES — Contracts settling the property interests of a husband and wife or providing for support of the wife or for both of these ends are no doubt valid in all jurisdictions where the parties may contract with each other if the purpose is not to facilitate divorce or future separation.[1] Even at common law, separation agreements could be made, however, through the intervention of a trustee.[2] If not invalid, the contract may ordinarily be enforced in an action on the promise. But, when a divorce is decreed, it is quite often the practice to incorporate in the divorce decree the provisions of the contract providing for the alimony or support payments, and sometimes property settlement provisions as well. One advantage to the party in whose favor the obligation to pay support money runs is the rapidity and efficiency of contempt proceedings to enforce the decree based on the contract. Often, however, a later change in the circumstances of the parties renders a change in the agreement and decree desirable. Similarly, one of the parties may fear the use of contempt proceedings and seek modifica-

[56] Davis, "Revolution in the Supreme Court," 166 ATLANTIC MONTHLY 85 at 95 (1940). Likewise, the principle so often applied by the Court of presuming the constitutionality of a statute should, in doubtful cases such as that under discussion, prevail. Justice Murphy, however, indicates that any enactments by legislatures concerning cases of this type will be subjected to close scrutiny by the Court. See Thornhill v. Alabama, 310 U. S. 88 at 106, 60 S. Ct. 736 (1940).

[57] 48 YALE L. J. 308 (1938).

[1] See 6 WILLISTON, CONTRACTS, rev. ed., § 1743 (1938). In Hammerstein v. Equitable Trust Co., 156 App. Div. 644 at 649, 141 N. Y. S. 1065 (1913), it was said, "In matrimonial actions, brought in good faith, the parties may relieve the court by agreement . . . of the duty of fixing an amount of alimony. Such an agreement, openly made and submitted to the court, is not against the policy of the law but is in conformity with the general rule which favors ending litigation by agreement where possible."

[2] Galusha v. Galusha, 116 N. Y. 635, 22 N. E. 114 (1889).

tion in order to eliminate that danger.[3] The question of the court's power to modify the decree despite the contract incorporated therein or adopted as the basis of the decree then becomes crucial. Moreover, it is important to know whether the modification when granted will vary only the scope of the obligation enforceable by contempt, or will actually alter the entire obligation arising from either contract or decree or both.

In seeking an answer to these questions it seems advisable to consider, first, the authority generally conferred by statutes upon courts in respect to alimony decrees and property settlements. This is necessary because of the legislative nature of divorce and divorce courts. Then, it is proposed to survey briefly some of the theories and distinctions which have been utilized by the courts, before attempting an evaluation of the problems involved and before attempting an answer to the general questions on the power to modify an alimony decree based on agreement and the effect of modification.

I.

It may be said to be generally true that the court entering the decree has power to modify the decree, even though based upon an agreement of the parties.[4] However, the statutory powers of the court having cognizance of a divorce action are so varied that it is impossible to suggest the rationale of the varied lines of authority without having some regard, at least, to such general questions as: (1) Has the court power to modify a decree of alimony not based upon agreement? (2) Has the court power to order a disposition of the property of the parties? and (3) If so, can it later vary that disposition?

In some thirty-five of the American jurisdictions there are statutory provisions authorizing the modification of a decree for alimony.[5] In others the decree may be modified when there has been a retention of jurisdiction by the court in the decree.[6] In still others the decree may be modified regardless of reservation or statute, upon the theory that alimony is in its nature not a final thing.[7] Assuming that the power

[3] See, e.g., Goldman v. Goldman, 282 N. Y. 296, 26 N. E. (2d) 265 (1940), and the cases cited in succeeding notes, which illustrate many of the reasons prompting the applications for modification.

[4] Worthington v. Worthington, 224 Ala. 237, 139 So. 334 (1932); Canary v. Canary, 89 Colo. 483, 3 P. (2d) 802 (1931); Eddy v. Eddy, 264 Mich. 328, 249 N. W. 868 (1933); Wilson v. Caswell, 272 Mass. 297, 172 N. E. 251 (1930); and see annotations, 58 A. L. R. 639 (1929), and 109 A. L. R. 1068 (1937).

[5] 2 VERNIER, AMERICAN FAMILY LAWS, § 106 (1931), and 1938 Supp.

[6] E.g., Ohio, Folz v. Folz, 42 Ohio App. 135, 181 N. E. 658 (1932) (reservation became part of agreement of parties and permitted modification).

[7] E.g., Emerson v. Emerson, 120 Md. 584, 87 A. 1033 (1913); Alexander v. Alexander, 13 App. D. C. 334 (1898); see note 71 A. L. R. 723 (1931).

to modify a decree for alimony exists, it still does not follow that a court may modify its disposition of the property of the parties. Indeed, it is only in about half of the jurisdictions of the United States that any power exists in the court to make a property settlement with any degree of discretion and in fifteen the court may divide the property of the parties as it thinks just without reference to the title.[8] In two of the states, North Dakota and Iowa, the power of the courts to modify or change property dispositions is conferred by the statutes.[9] Independently of such provisions as these, probably modification would not be permitted past term time, or whatever analogous period is allowed by statute, since it is supposed that ordinarily property dispositions are intended to be final, and as a matter of practical convenience should be.

2.

With this general picture of the statutes in mind, it seems desirable to survey briefly some of the theories and distinctions suggested in the adjudicated cases in which the power of a court to modify a decree based upon agreement was considered. Assuming that without the agreement the court would have power to change its decree, the basic problem presented is in the conflict of two opposing ideas. On the one hand, it may be said that the parties, having made a contract, admittedly valid and admittedly fair when made, should be held to that contract, and the fact that the alimony decree is based upon the contract does not matter. On the other hand is the consideration that in fact the agreement has been made the basis of a decree which is not distinguishable in its other consequences from those of an ordinary decree for alimony[10] and that the parties cannot by contract alter the power of the court to modify its decrees.

Without attempting to decide between these conflicting arguments, it seems desirable to consider some of the solutions offered to the problem presented.

According to the force of the fair contract idea, it has been held that where the agreement is a contract and not a mere stipulation made in the course of trial the court will not subsequently modify the contract,[11]

[8] 2 VERNIER, AMERICAN FAMILY LAWS, § 96 (1931) and 1938 Supp.

[9] Iowa Code (1939), §§ 10481, 10483; N. D. Comp. Laws (1913), § 4405.

[10] Note that if there are property settlement provisions in the decree, it may be distinguishable from the ordinary consequences of a decree in that it may not be enforced by contempt in some jurisdictions. Schnitzer v. Buerger, 237 App. Div. 622, 262 N. Y. S. 385 (1933).

[11] Henderson v. Henderson, 37 Ore. 141, 60 P. 597, 61 P. 136 (1900); Law v. Law, 64 Ohio St. 369, 60 N. E. 560 (1901); Connolly v. Connolly, 16 Ohio App. 92 (1922) [cf. Folz v. Folz, 42 Ohio App. 135, 181 N. E. 658 (1932), where there was a reservation of control which became part of the agreement]; Stanfield v. Stanfield, 22 Okla. 574, 98 P. 334 (1908); Ettlinger v. Ettlinger, 3 Cal. (2d) 172,

save of course for equitable grounds such as fraud, duress, mistake, or the like.[12] The desirability of this approach depends almost entirely upon the force which is to be given to the argument against impairing the contract, fairly made by the parties and approved by the court in the decree.

Another approach, giving weight to the arguments both for and against modification, solves the problem of modification by distinguishing between contracts providing for alimony or support, and those providing for property settlements. Alimony or support provisions may be modified when incorporated into the decree, property settlement provisions may not be.[13] It will be seen that this solution channelizes the operation of the decree. In regard to alimony provisions, it is to be treated like any other decree, for the courts are not to be ousted of their powers by the mere existence of a contract upon which the decree is based.[14] On the other hand, much may be said for the different result reached in the property settlement case. In the first place, independently of agreement the court would have no power to make property provisions in many jurisdictions. Consequently, property settlements can hardly be said to be within the operation of statutes empowering courts to make decrees for alimony. Similarly, even if the power exists

44 P. (2d) 540 (1935); Hargis v. Hargis, 252 Ky. 198, 66 S. W. (2d) 59 (1933) [cf. Boehmer v. Boehmer, 259 Ky. 69, 82 S. W. (2d) 199 (1935), where there was a retention of control by reservation]. See also annotations 58 A. L. R. (1929), 109 A. L. R. 1068 (1937). In Oregon there is a statutory power to modify alimony decrees, and also in California. In Ohio, Oklahoma and Kentucky there seem to be no such provisions. See note 5, supra.

[12] This exception should be kept in mind in all of the statements made regarding the lack of power to modify. As to whether it should be modified in equity or in the divorce court, see Smith v. Smith, 334 Ill. 370, 166 N. E. 85 (1929).

[13] Goldfish v. Goldfish, 193 App. Div. 686, 184 N. Y. S. 512 (1920), affd. 230 N. Y. 606, 130 N. E. 912 (1921); North v. North, 339 Mo. 1226, 100 S. W. (2d) 582 (1936) (statute permits modification of alimony award, see note 6, supra); Joachim v. Joachim, 267 Ill. App. 237 (1932) (statute permits modification of alimony). Compare Johnson v. Johnson, 104 Cal. App. 283, 285 P. 902 (1930), with Ettlinger v. Ettlinger, 3 Cal. (2d) 172, 44 P. (2d) 540 (1935), where a property settlement by agreement incorporated into the decree of separation was held not modifiable. The distinction is also indicated by a comparison of Henderson v. Henderson, 37 Ore. 141, 60 P. 597, 61 P. 136 (1900), with Phy v. Phy, 116 Ore. 31, 236 P. 751, 240 P. 237 (1925) (alimony provisions may be modified if not made in consideration of restitution of property brought to the husband by the wife or a partition of property accumulations). Accord, Simpson v. Simpson, 154 Ore. 396, 60 P. (2d) 936 (1936). To somewhat the same effect is Biggs v. Biggs, 117 W. Va. 431, 185 S. E. 857 (1936) (alimony may be modified but not reduced beyond the extent husband's contractual promise is based on valuable consideration).

[14] Oakes v. Oakes, 266 Mass. 150, 165 N. E. 17 (1929); Wallace v. Wallace, 74 N. H. 256, 67 A. 580 (1907); Eddy v. Eddy, 264 Mich. 328, 249 N. W. 868 (1933).

to make such provisions, ordinarily there is no provision for subsequent alteration of the settlement once made. Indeed, if the court may be said to have retained jurisdiction of the cause so that it has power independently of statute to modify decrees, still ordinarily practical convenience and the intention of the parties would seem to make for finality in property dispositions as opposed to continuing payments for support. This consideration applies, of course, whether there is power to make property dispositions or not and whether there is an agreement or not. If there is no power to make a property settlement independently of agreement, the reasoning suggested in the case of *Johnson v. Johnson*[15] by the California court indicates an additional objection to the allowance of modification of property provisions. There it was suggested that even an alimony decree might not be modified where it was in favor of the guilty party and where the court would have had no power to award alimony to the guilty party independently of the contract. The distinction between property and alimony agreements has, then, the great virtue that it is in accord with the usual statutory schemes for adjustment and settlement of the obligations of the marital status upon divorce. The difficulty is the drawing of the line between provisions for alimony for support and provisions for settlement of property interests.[16]

One theory upon which the difficult task of distinguishing between provisions for settlement of property interests may be eliminated is that of merger.[17] An ordinary contractual obligation is often said to merge

[15] 104 Cal. App. 283, 285 P. 902 (1930). The trouble with the result of this decision is that the innocent husband is given no relief because he is innocent, though relief might have been given if the husband were the guilty party. The equities would seem to me to demand that the guilty party be estopped from raising the objection. Further, the analogy to merger of a contract in judgment becomes ever closer where the contract is the sole authority for the decree.

[16] A consideration of the cases cited in note 13, supra, will indicate something of the difficulties. It is supposed that among the considerations would be the manner of payment, the question whether the liability was supported by consideration other than a forebearance to demand alimony or was supported by property exchanges, whether there was any indication that the money was to be used for support, etc. The question what provisions are for support and what for settlement of property interests would depend, it seems, upon the facts of each agreement.

[17] This theory is most clearly announced in Worthington v. Worthington, 224 Ala. 237, 139 So. 334 (1932); Adams v. Adams, 229 Ala. 588, 159 So. 80 (1934); Lewis v. Lewis, 53 Nev. 398, 2 P. (2d) 131 (1931); and Çanary v. Canary, 89 Colo. 483, 3 P. (2d) 802 (1931). In the last case the agreement seems to have been a property settlement, but modification was allowed, though in Colorado there are no clear statutory provisions permitting a property settlement to be modified. Merger is also found in other cases either explicitly with reference to alimony, or impliedly. So, Joachim v. Joachim, 267 Ill. App. 237 (1932) [cf. Smith v. Smith, 334 Ill. 370, 166 N. E. 85 (1929) (contract may be attacked only in equity for fraud—evidently

in the obligation created by a judgment.[18] Upon this analogy, it is said that the contract of the parties, which is incorporated into the decree and which the court orders the party against whom the decree is rendered to perform, merges in the decree. The decrees of the court being ordinarily subject to subsequent modification, this decree may likewise be modified and because the contract has merged in the decree there is no alteration or impairment of the contractual obligation. If strictly adhered to, the doctrine of merger would lead to the conclusion that all portions of the decree may be modified, be they provisions for property settlement or for support.[19] This would involve a rejection of the idea that property settlements are ordinarily intended as final, would disregard the fact that the court can generally make no property dispositions independently of agreement, nor modify dispositions once made, even where it possesses the power to make property settlement; and, of course, if carried to its logical conclusion, the merger theory completely evades the argument against alteration of a contract fairly made by the parties and constitutes a rejection of whatever policy arguments there may be against modification of all or part of the agreement.

At this point some light on the questions of policy involved may be gained by a consideration of the approach indicated in the New York decisions. The highly important question of the effect of the modification of the decree upon the contractual obligation has been previously mentioned. Similarly it is apparent that generally courts have accepted the necessity for facing one horn of a dilemma; i.e., they have considered either that both the decree and contract are changeable or that neither is changeable. The New York cases, however, have developed a highly logical reconciliation of these two points by holding

not completely merged at any rate)]; Nicolls v. Nicolls, 211 Iowa 1193, 235 N. W. 288 (1931) (in dealing with Iowa cases it should be remembered that in Iowa property settlements may not only be made by the court, but also may be modified, see note 9, supra); Oakes v. Oakes, 266 Mass. 150, 165 N. E. 17 (1929); Wilson v. Caswell, 272 Mass. 297, 172 N. E. 251 (1930); Skinner v. Skinner, 205 Mich. 243, 171 N. W. 383 (1919); Eddy v. Eddy, 264 Mich. 328, 249 N. W. 868 (1933); Blake v. Blake, 75 Wis. 339, 43 N. W. 144 (1889); Warren v. Warren, 116 Minn. 458, 133 N. W. 1009 (1912); Wallace v. Wallace, 74 N. H. 256, 67 A. 28 (1907); Le Beau v. Le Beau, 80 N. H. 139, 114 A. 28 (1921); Herrick v. Herrick, 319 Ill. 146, 149 N. E. 820 (1925), affirming 236 Ill. App. 478 (1925). These last cases tend to emphasize the argument that the court may not be ousted of its jurisdiction, but, unlike New York decisions such as Goldman v. Goldman, 282 N. Y. 296, 26 N. E. (2d) 265 (1940), there is no intimation that the contractual obligation may be independent of the decree as modified. Thus, it seems proper to consider them as primarily predicated on a merger theory.

[18] 2 FREEMAN, JUDGEMENTS, 5th ed., § 546 (1925).

[19] Canary v. Canary, 89 Colo. 483, 3 P. (2d) 802 (1931) (property settlement provisions may be modified).

the decree alterable, but refusing to hold that the contract is changed by alteration of the decree. This interesting development seems to have resulted from the fact that the basic approach of the New York courts has been from the enforcement aspect of the decree. In many of the New York cases attention is called to the fact that the party seeking modification fears primarily the use of contempt proceedings to enforce the contract incorporated into the decree.[20] This factor is quite evident in a recent court of appeals decision[21] in which modification of the decree was allowed although the decree was based upon contract. No holding was made on the question of the rights of the parties on the contract. In *Kunker v. Kunker*[22] it had been held, previously, that the power of the court to modify its decrees could not be limited by a contract of the parties, again with the same refusal to pass on the question of the rights of the parties on the contract. Similarly in *Schnitzer v. Buerger*[23] the appellate division had said that the property settlement provisions of the contract could not be the basis of contempt proceedings and as a matter of practice should not be incorporated in the decree, while alimony provisions of the contract might be modified. If it is improper to incorporate the property settlement provisions in the decree, and if contempt proceedings cannot be used to enforce those provisions, it seems clear that subsequent modification of a property settlement so incorporated cannot be had. In New York, then, as held by the recent case of *Goldman v. Goldman*,[24] property settlement contracts do not merge in the decree. Likewise, the alimony provisions can hardly be said to merge either, for the courts, both appellate division and court of appeals, have consistently refused to pass upon

[20] See Goldfish v. Goldfish, 193 App. Div. 686, 184 N. Y. S. 512 (1920), affd. 230 N. Y. 606, 130 N. E. 912 (1921); Kunker v. Kunker, 230 App. Div. 641, 246 N. Y. S. 118 (1930); Staehr v. Staehr, 237 App. Div. 843, 261 N. Y. S. 103 (1932); Schnitzer v. Buerger, 237 App. Div. 622, 262 N. Y. S. 385 (1933).

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

[22] 230 App. Div. 641, 246 N. Y. S. 118 (1930). Two recent taxation cases involved taxability of the income from a trust set up by separation agreement incorporated in a decree. One of them, Helvering v. Fitch, 309 U. S. 149, 60 S. Ct. 427 (1940), involved Iowa law, the other, Helvering v. Leonard, 310 U. S. 80, 60 S. Ct. 780 (1940), New York law. The latter case seems to disregard the possibility that in New York the only effect of modification of the decree is to vary the scope of contempt proceedings, leaving contractual obligations enforceable in an action on the contract. Probably, however, this would not alter taxability of the income to the grantor, since the property provisions of the trust are subject to change for different considerations than ordinary contracts. See Hamlin v. Hamlin, 224 App. Div. 168, 230 N. Y. S. 51 (1928) and cases cited infra, note 34. The subject is discussed in 38 MICH. L. REV. 1285 (1940).

[23] 237 App. Div. 622, 262 N. Y. S. 385 (1933).

[24] 282 N. Y. 296, 26 N. E. (2d) 265 (1940). Accord: Schnitzer v. Buerger, 237 App. Div. 622, 262 N. Y. S. 385 (1933).

whether the parties still have a right of action for breach of the contract.[25] The *Goldman* case, as the last decision of the court of appeals, leaves us, therefore, with modification permitted, despite a contract, so as to alter the obligation for which contempt process may be used as a method of enforcement; remedy upon the contract remains unless it may be said that the contract was intended to end at the rendering of the decree.[26] Somewhat this same idea has been indicated in West Virginia.[27] Viewed broadly, the New York suggestion, so logically irreproachable in going between the horns of the dilemma, seems desirable in denying contempt sanctions for enforcement of the property provisions and in allowing the scope of the alimony obligation enforceable by contempt to be modified. However, whether the allowance of an action on the contract, after modification of the decree, is desirable seems open to question.

3.

Up to this point it has been sought to suggest first, the general statutory and common-law picture of the power of a court to modify its alimony decrees, second, the power to make and modify property settlements between the parties to a divorce action, and third, some of the distinctions and reasoning used in cases where the decree was based upon an agreement of the parties. No attempt has been made to define what constitutes incorporation into the decree,[28] nor to distinguish

[25] See cases cited supra, notes 20 to 23. See also comment in 6 N. Y. UNIV. L. REV. 295 (1929).

[26] This was intimated in the Goldman case as a possibility; otherwise it seems assumed that the contract may be enforced in an action upon the promise. Goldman v. Goldman, 282 N. Y. 296, 26 N. E. (2d) 265 at 269 (1940). Similarly, Staehr v. Staehr, 237 App. Div. 843, 261 N. Y. S. 103 (1933).

[27] In Biggs v. Biggs, 117 W. Va. 431, 185 S. E. 857 (1936), it was said that the decree might be changed only to the extent that the husband's promise was not based upon valuable consideration. The same sort of refusal to allow diminution of the agreement provisions that are based upon restitution of whatever property the wife may have brought to the husband or upon partition of property provisions is found by way of dicta in Simpson v. Simpson, 154 Ore. 396, 60 P. (2d) 936 (1936). Thus, it seems that the obligation of the contract is not to be altered by modification beyond limits but may be up to those limits. The New York position is more sweeping, of course, since the entire decree may be altered as to alimony or support provisions; but note that a greater right on the contract is presumably possible in New York than in West Virginia or Oregon. Another similarity to the New York rule in regard to property settlements is found in Moore v. Crutchfield, 136 Va. 20, 116 S. E. 482 (1923) (no jurisdiction to enforce compliance with contract for property settlements by contempt or to modify later).

[28] See, for examples of what constitutes incorporation, Oakes v. Oakes, 266 Mass. 150, 165 N. E. 17 (1929) (order to pay alimony in accordance with the agreement on file); Erickson v. Erickson, 181 Minn. 421, 232 N. W. 793 (1930); cf. Armstrong v. Armstrong, 132 Cal. App. 609, 23 P. (2d) 50 (1933) (not incorporated, though

between provisions for alimony and provisions constituting a property settlement.[29] It is conceived that the basic questions in regard to the power of a court to modify decrees for alimony which are based upon a contract cannot be solved by definition, and it is thought that the solution should lie in an evaluation of the ends which will be accomplished by the various theories and their social desirability.

In the first place, should the fact that there is incorporated into the decree a contract of the parties as to support alter the power of the court over such decree? Assuming that the court has power by statute to modify a decree not based on contract, it would seem that in the view of most courts there is no sufficient reason to take the decree based on contract out of the operation of the statute as to the alimony provisions. That the interest of the state in the marital status and the dissolution thereof is sufficient reason to support such a view hardly seems to require demonstration. Somewhat more difficulty is presented if there is no statutory authority for modification of a decree for alimony. But, assuming that the court has, independently of statute, power generally to modify decrees for alimony in a proper case by reservation or otherwise, it is thought that again the same result should ensue.[30] The obligation to pay alimony or support money to a divorced wife is one peculiarly justified by considerations of social desirability and generally prescribed as a consequence to dissolution of the marital relation. Being a continuing obligation, and being subject to scrutiny of the courts as to fairness and adequacy at its inception, it should so remain and the contract of the parties should not be allowed to oust the court of power otherwise exerciseable.[31] Further, it must be remembered that the alimony obligation of the contract has become enforceable by contempt process due to incorporation in the decree and there seem to be strong reasons why such a drastic sanction should not be available without power in the court to regulate the extent of the obligation for whose enforcement the sanctions may be used.

The solution indicated in the New York decisions accords with the policy last suggested. But it leaves unanswered the more important question whether the court should have power to modify the entire obligation. If the parties are still bound under the contract, presumably

contained in complaint, but not referred to in the decree). See also Nelson v. Vassenden, 115 Minn. 1, 131 N. W. 794 (1911). If the policy reasons here suggested are sound, perhaps there should be no worry as to incorporation.

[29] For examples of agreements held not to be for alimony, see Dickey v. Dickey, 154 Md. 675, 141 A. 387 (1928); Newbold v. Newbold, 133 Md. 170, 104 A. 366 (1918); Emerson v. Emerson, 120 Md. 584, 87 A. 1033 (1913); North v. North, 339 Mo. 1226, 100 S. W. (2d) 582 (1936); Moore v. Crutchfield, 136 Va. 20, 116 S. E. 482 (1923). See also note 16, supra.

[30] Accord: Folz v. Folz, 42 Ohio App. 135, 181 N. E. 658 (1932).

[31] See cases cited supra, note 14.

it is still enforceable by an action thereon, although it may no longer be enforced by contempt proceedings. To hold that the contractual rights of the parties survive the decree seems to leave the party in whose favor modification was ordered in substantially the same position as before. Instead of the deep blue sea of contempt process, he is confronted with the devil of sheriff's sale. If it be conceded that justice demands modification of the agreement in any particular case, then it seems that the deserving party should be relieved not merely from the duty of paying under pain of contempt but from the duty of paying at all. The contractual obligation to pay support money may, therefore, properly be considered as having merged in the decree, since otherwise the substance of the court's power to prescribe the alimony to be paid is substantially limited by the contract of the parties.[32]

Having concluded that merger should result as to alimony provisions, it by no means follows that the provisions for property settlement should follow the same course. If a court has no power to decree a property settlement at all, it is rather difficult to consider an agreement to have merged in the decree.[33] The want of power to render such a decree without agreement would tend to show that the interest of the state in such matters is thought to be satisfactorily disposed without judicial interferences. Further, property settlements are ordinarily intended to be final and complete. Likewise, considerable practical convenience results if the property dispositions are final. These latter objections would, it seems, also apply if there is even a broad statutory power to make property dispositions in the divorce action. Consequently, unless there is a general power both to make and subsequently to change property dispositions, the decree based upon an agreement of the parties should not be subject to subsequent modification except, of course, for reasons which would justify modification of decrees generally or for equitable reasons looking toward rescission or reformation.

It is obvious that the conclusions suggested above are based to a large extent upon the statutory powers of the courts in a divorce action. Since legislative authority is necessary for divorce at all by judicial action, it seems proper that the consequences of a divorce decree should be largely determined in relation to the particular statutory scheme in each jurisdiction. While it is no doubt true that in practice the parties are generally allowed to determine their rights by agreement, still there seems to be no sound reason why the agreements should be held by the courts to limit the scope of the statutory powers of the courts in divorce

[32] See comment 6 N. Y. UNIV. L. REV. 295 (1929), and cases cited supra, note 17.

[33] For if the court has no power to render the decree, how can it have any effect? See Schnitzer v. Buerger, 237 App. Div. 622, 262 N. Y. S. 385 (1933), and Johnson v. Johnson, 104 Cal. App. 283, 285 P. 902 (1930).

actions.[34] Arguments regarding the impairment of the obligations of a contract do not seem exactly in point. It must first be determined whether the parties may be allowed to create obligations, by contract, which cannot be modified under a statutory power or reservation of jurisdiction to determine the adequacy and propriety of the arrangements both present and future. Whenever, then, there exists a general power in the courts to make and modify either alimony or property provisions or both, it seems to the writer that there are sound reasons why the parties should not be allowed to limit the powers of the court by merely securing incorporation of the agreement in the decree.[35]

Roy L. Rogers

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[34] See Hammerstein v. Equitable Trust Co., 156 App. Div. 644, 141 N. Y. S. 1065 (1913), quoted in note 1, supra; Wilson v. Caswell, 272 Mass. 297, 172 N. E. 251 (1930).

In this connection it may be mentioned that it is an interesting point as to what authority the two Galusha cases, 116 N. Y. 635, 22 N. E. 1114 (1889), supra, note 2, and 138 N. Y. 272, 33 N. E. 1062 (1893), still have in New York. In the Goldman case it was said that their authority was unimpaired, Goldman v. Goldman, 282 N. Y. 296, 26 N. E. (2d) 265 (1940). But, in view of that decision and the language in cases such as the Hammerstein case, supra, it may be doubted that a separation agreement is still binding upon the court as to its allowance for alimony. See Harding v. Harding, 203 App. Div. 721, 197 N. Y. S. 78 (1922). At any rate, under the Galusha cases the agreement was only binding if fair when made, and these cases seem to establish that it may be modified for changed circumstances contrary to dicta in the first Galusha case, while the second Galusha case admitted modification for fraud.

[35] One more point should be noticed. In many states there seems to be no power to make a property settlement. In this situation, not only does it seem that the property settlement agreement should not merge in the decree so as to permit alteration under a general power to modify alimony provisions, but it also seems doubtful that contempt proceedings should be available for enforcement of the property provisions. Besides the New York cases discussed in the text, see cases cited note 27, supra.