ALIMONY PENDENTE LITE IN NEW JERSEY

As the title indicates, the problem discussed in this paper shall be confined solely within the limits of the subject alimony pendente lite, or temporary alimony, as it is sometimes called.[1] It is an award of a sum of money[2] to the wife during the pendency of a divorce action, whether it be for an absolute divorce or an annullment action, or judicial separation, as distinguished from permanent alimony, an award made to the now ex-wife after the dissolution of the marriage by a court of competent jurisdiction, or a wife judicially separated from her husband.

The theory upon which an award of alimony is made is that the husband has a common law obligation and duty to support his wife,[3] which obligation he can not abandon.[4] Since alimony therefore is nothing more than a decree of a court ordering the husband to continue to perform his common law duty to support his wife, it is necessary that such an award be predicated upon the relationship of husband and wife. It is also essential to such to an award that the marriage of the parties be admitted or proven before the court should undertake to make an award of alimony. Prima facie proof of the existence of such a rela-

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1. Henceforth the term alimony pendente lite whenever used in this paper will be referred to as alimony, unless otherwise noted.

2 Sometimes the courts in decreeing an award of alimony include in such an award an allowance both for counsel and minor children. Its correct meaning is as used by the Ecclesiastical Courts—solely for the support of the wife. See also BISHOP, MARRIAGE AND DIVORCE, sec. 351, Vol 2 (5th ed.).

3. Since the husband has no duty to support his wife except at his domicile, in order for the wife to get alimony she must show justification or consent of the husband as to why she is not living with him. During the pendency of the divorce action, it is necessary that the parties be living apart. See Marsh v Marsh, 14 N.J.Eq. 315, 318 (1862); Chapman v. Chapman, 25 N.J.Eq. 394, 395 (1874); Westerfield v. Westerfield, 36 N J Eq 195, 196 (1882).

4 White v. White, 87 N J.Eq 354, 100 Atl 235 (1917) states that the husband can not contract out of this duty, which is imposed on him by law.

tionship is sufficient. As one writer explains it: "An obligation to pay alimony will not be enforced unless the very status which occasions and justifies it is sought to be or is actually impaired."

A brief survey of the historical development of this subject will tend to clarify the very basis of this type of an award. The Ecclesiastical Court or the Spiritual Court, as it was sometimes called, was the only court in England[5] having jurisdiction to grant a divorce,[6] and as an incident of this power it would make an award of alimony. Under the Ecclesiastical Court practice an award of alimony was made only in favor of the wife in an action for divorce mensa et thoro, whether she be the plaintiff or the defendant in the action. Furthermore, it could be granted only as an incident to an action for divorce mensa et thoro having no separate or independent significance of its own. In short, the aggrieved wife could not, no matter to what extent her desperation may have been, come into the Ecclesiastical Court and pray for an allowance of alimony without at the same time asking for a divorce mensa et thoro.[7]

"Under the unwritten law of the Ecclesiastical Court, alimony was a money judgment against the person of the husband[8] and was payable in instalments, thus carrying out the notion

5. The Matrimonial Causes Act of 1857 set up a new court to hear divorce actions known as the Divorce and Matrimonial Causes Court. However, it may be mentioned at this point that during the period of the Commonwealth of England, the Ecclesiastical Court was abolished and the Equity Court was expressly authorized by articles in their commission to decide causes of alimony. See BISHOP, MARRIAGE AND DIVORCE, sec. 353, Vol. 2 (5th ed.)

6. Prior to the Matrimonial Causes Act of 1857 the only possible type of judicial divorce was a divorce mensa et thoro, which today is known as a limited divorce or judicial separation.

7. The wife was left to her common law right of pledging her husband's credit.

8. "It is to the advantage of the husband as well as the wife, that the wife be given temporary alimony for he is liable at common law for necessaries furnished the wife during the pendency of the suit for divorce, the same as though it was not pending. Therefore, if he pays temporary alimony he is relieved of further responsibility from the time temporary alimony was decreed"—BISHOP, MARRIAGE AND DIVORCE, sec. 401 (5th ed.).

that it was in enforcement of the husband's duty of support."[9] Therefore, an order of the court to the husband to pay his wife alimony is a decree in personam, although the divorce proceeding itself is considered as an in rem procedure.

In the United States some jurisdictions have held that even in the absence of a statute empowering the Equity Courts with jurisdiction over such matters, the Equity Courts could compel the husband to continue to support his wife by ordering him to pay her alimony. In such jurisdictions it has been held that a divorce statute is not necessary to permit the Equity Court to award a wife alimony. The reason advanced for assuming this jurisdiction is the old equity court standby—inadequacy of the legal remedy. Another reason advanced is that if the wife is not given this relief by the court of equity, we would be compelling her to seek a divorce when in part she may be unwilling to do so, and therefore to allow an independent suit for alimony is desirable for it tends to discourage suits for divorce.

The Court of Equity of New Jersey has repeatedly stated that the law of the Ecclesiastical Courts of England is not a part of the common law of this state. It has also been repeatedly stated by our equity court that it did not inherit jurisdiction over divorce matters and its related incidents from the Chancery Courts of England because the Chancery Court of England had no jurisdiction over divorce actions.[10] Our equity court not being the prototype of the Ecclesiastical Court, nor inheriting anything from the English equity court in this particular field, it has maintained the position that it is without original jurisdiction over cases involving the litigation of matrimonial affairs.[11] Under such a state of facts whatever power our equity court has to grant a divorce, and award alimony is purely statu-

9. VERNIER, AMERICAN FAMILY LAW, p. 283, Vol. 2.

10. See footnote 5.

11. Margarum v. Margarum, 57 N.J.Eq. 249, 41 Atl. 357 (1898), Equity Court has no jurisdiction under its general equity powers to make a decree for support because of the husband's failure to maintain his wife.

tory.[12] However, in spite of the frequent statements of the court that it is without original jurisdiction in cases dealing with alimony and divorce it must be kept in mind that many of the practices of the Ecclesiastical Court have become part of the rules of procedure and practice of our equity court once it was given by statute the power to grant divorces.

In the year of 1794 the legislating body of New Jersey enacted the first divorce statute in the state. It may be stated here that ever since that date alimony has been awarded as an incident to an action for divorce.[13] The equity court having been given jurisdiction over divorce actions, it would seem to follow as a consequence of such jurisdiction that it would have power to award alimony as an incident to the divorce action without the aid of an independent statute covering the question of alimony.[14] Although this appears to be the most logical deduction which could be made based on the enactment of a divorce statute, yet it is not the one which has been most consistently followed by the equity court.[15] The answer to this question has been laid to rest by the statute of 1902 and subsequent statutes covering divorce by including the phrase, "pending a suit for

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12. Yule v. Yule, 10 N.J.Eq. 138, 144, 145 (1854); Rockwell v. Morgan, 13 N.J.Eq. 119, 120, 121 (1860). In the case of Yule v. Yule, 10, N.J.Eq. 138, 144 (1854) an exception to the rule that equity's power is purely statutory is in a situation where the husband without justification abandons his wife or where he is separated from his wife and fails to provide for her. It is not, however, a real exception because the statute in force at the time of this case provided for this so-called apparent exception. See BISHOP, MARRIAGE AND DIVORCE, sec. 357 (5th ed.); Lynde v. Lynde, 54 N.J.Eq. 473, 35 Atl. 641 (1896); Anshutz v. Anshutz, 16 N.J.Eq. 162 (1863).

13. Today the question of divorce and allowance of alimony is governed by section 2:50-37 of the Revised Statutes, which was section 25 under the Act of 1907.

14. See VERNIER, AMERICAN FAMILY LAW, Vol. 2, p. 309.

15. See Porter v. Porter, 15 N.J.Eq.Misc. 691, 194 Atl. 792 (1937) in which case it was held that the jurisdiction of the Court of Chancery to award alimony is purely statutory. See also Wigder v. Wigder, 14 N.J.Misc. 880, 188 Atl. 235 (1936). In the face of these two recent cases the court in the years prior to the enactment of the statute of 1902 granted alimony in an action for divorce, although the divorce statute made no reference whatsoever to alimony.

divorce and nullity, or after decree of divorce, it shall be lawful for the Court of Chancery to make such order touching the alimony of the wife . . . "

Section 2:50-37 of the Revised Statutes provides for the methods of enforcing an award of alimony. The court may require the husband to give security so as to assure the court that he will duly perform the order, but if he should fail or refuse to do so it is within the power of the court to order an immediate sequestration of both his real and personal property as an assurance to the wife that the court order will be carried out. This section also permits the court to enforce its order "By such other lawful ways and means as is usual, and according to the course and practice of the Court of Chancery." Within this latter category open to the court are such means as the appointment of a receiver; or an injunction[16] enjoining the husband from selling, conveying or giving away his property; or setting aside a conveyance fraudulently made by the husband;[17] or by contempt;[18] or by execution;[19] or a lien may be created on the husband's property as each instalment falls due provided the

16. This relief is given whenever the conveyance is made in anticipation of or during the divorce action. The wife must show that a decree for alimony will be practically worthless and unenforceable unless the husband be restrained from conveying away his property for the purpose of defeating her claim to alimony. This injunction is only temporary and will terminate upon the entry of the decree of alimony provided the husband gives security for the payment of the award. See Anshutz v. Anshutz, 16 N.J.Eq. 162 (1863). This method is used in New Jersey since there is no statute declaring such a transfer of property void, if such a conveyance was made with the intent to defeat the wife's claim to alimony.

17. David v. David, 111 N.J.Eq. 493, 501, 162 Atl 583 (1932); Clark v. Clark, 13 N.J Misc. 49, 176 Atl. 81 (1935); Finn v. Finn, 26 N J.Eq. 290 (1875).

18 Adams v. Adams, 83 Atl. 190 (N.J.Ch. 1912). The husband's obligation to support his wife is not considered a debt, and therefore the use of contempt proceeding for the enforcement of alimony payments is not unconstitutional. See also note in 12 COL. L. R. 638. However, it is within the discretion of the court whether or not contempt proceeding will be permitted against a defaulting husband. Flower v. Flower, 49 Atl. 58 (N.J. 1901). See Lief v. Lief, 14 N.J.Misc. 27, 178 Atl. 762 (1935). During an appeal from an order of alimony, the court

decree was filed in the office of the Clerk of the Supreme Court.[20] A decree of alimony is considered as a debt of record just as any other money judgment, and the wife as a consequence occupies the position of a judgment creditor with all the rights of a person occupying such a position.[21] A writ of ne exeat is another means open to the court by which it can prevent its orders from becoming ineffective. The writ restrains the husband from leaving the state until he has given adequate security for the due performance of the court's order. The court may issue such a writ even before a decree of alimony has been rendered, provided the wife introduces sufficient proof of the husband's intent to leave the jurisdiction.[22] However, if the court had no jurisdiction over the subject matter or the parties at the time the writ was issued such issuance is improper and will be set aside on application by the husband for such purpose.[23]

An assignment of the wife's right to future instalments of alimony is ineffective because the claim is held to be a personal

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will not permit the husband to be declared in contempt. See Robinson v. Robinson, 86 N.J.Eq. 165, 92 Atl. 94 (1934); Bourgeais, 108 N.J.Eq. 598, 156 Atl. 2 (1931). See also 8 A. L. R. 1156.

19. Cohen v. Cohen, 15 N.J.Misc. 666, 667, 194 Atl. 257 (1937). "If the defendant had the ability to pay the sums he has not paid, it seems that execution would have compelled the payment."

20. Section 2:29-58 of Revised Statutes. The statute declares judgment to be a lien on the real estate of the husband, and the court construes an award of alimony to be a judgment within the statute. See Warren v. Warren, 92 N.J.Eq. 334, 112 Atl. 729 (1921) in which case the court declared that a money judgment of equity has by statute the force and effect of a judgment at law, and a decree of alimony fastens to the property, as a lien as it occurs; Stay v. Stay, 41 N.J.Eq. 370, 2 Atl. 638 (1886); Vreeland v. Jacobus, 19 N.J.Eq. 231 (1868). Alimony not yet due is not a lien on the husband's property because court says it does not as yet resemble a judgment at law.

21. Vreeland v. Jacobus, 19 N.J.Eq. 231 (1868).

22. Yule v. Yule, 10 N.J.Eq. 138 (1854).

23. Anshutz v. Anshutz, 16 N.J.Eq. 162 (1863); Elmendorf v. Elmendorf, 58 N.J.Eq. 113, 44 Atl. 164 (1899); Dithmar v. Dithmar, 68 N.J.Eq. 533, 59 Atl. 644 (1905); Keirigan v. Keirigan, 15 N.J.Eq. 146 (1862).

one.[24] An adjudication in bankruptcy does not excuse the husband from his obligation to pay alimony, accrued or future payments.[25]

In the marital proceeding, whether such proceeding be for a judicial separation or a dissolution of the bonds of matrimony, it has always been held that it is within the discretion of the Chancery Court to determine upon the required amount of evidence presented[26] whether or not the wife in the particular case is entitled to have granted to her by court decree an allowance of alimony.[27] Although it is entirely a matter of discretion on the part of the court, it is nevertheless guided in the exercise of this power by certain well defined rules of law and procedure. The factors which guide the court in the exercise of this power will be discussed in other parts of this article.

The amount to be awarded to the wife is also within the discretion of the court,[28] and it is not reversible unless there was a manifest abuse of its discretionary power.[29] An abuse is shown by the fact that the allowance of alimony was decreed in the total absence of evidence of the husband's financial ability. However, the amount awarded is always less than the amount which would be awarded had it been a question of permanent alimony. This is so because alimony is granted with-

24. Lynde v. Lynde, 64 N.J Eq. 52 Atl 694, 736 (1902); Irwin v. Irwin, 98 N.J.Eq. 454, 457, 131 Atl. 304 (1926). The reason offered is that it would defeat the purpose of an alimony award. "The right to future instalments of alimony is a personal one and in no sense a property right, a right in its nature not susceptible of either enjoyment or assignment by her in anticipation." "Greenberg v. Greenberg, 99 N.J.Eq. 461, 467, 133 Atl. 768 (1926). The same reasoning does not apply to accrued alimony because the purpose for which it has been awarded has been accomplished in some way. See 12 COL. L. R. 638.

25 See 39 A.L.R. 1283, 1284, 1288.

26. Glasser v. Glasser, 28 N.J.Eq. 22 (1877).

27. Amos v. Amos, 4 N.J.Eq. 171 (3 Green's Rep 1842); Streitwolf v. Streitwolf, 58 N J.Eq. 570 (1899).

28. Marker v. Marker, 11 N.J Eq 256 (3 Stockton's Rep 1856)

29 Marker v. Marker, 11 N J Eq 256 (1856)

out a full consideration of the merits of the controversy,[30] and merely intended as temporary support for the wife. Therefore, the amount awarded her should be limited to the actual needs of the wife so as to permit her to live comfortably during the pendency of the proceeding. In the case of *Germond v. Germond*[31] Chancellor Walworth said: "As a general rule, to guard against any abuse of the privilege of the wife to obtain a temporary support pending a suit for divorce or separation, and to prevent the bringing of improper suits for the mere purpose of obtaining a support during a protracted litigation, the temporary alimony must be limited to the actual wants of the wife[32] until the termination of the suit in her favor establishes the fact she has been abused and is entitled to a more liberal allowance."

While the parties are cohabiting as husband and wife, the determination of the amount the wife is entitled to receive is to a great degree within the husband's discretion. However, when cohabitation ceases, as necessarily must be the situation when an action for divorce is pending, the amount to be awarded is no longer within the husband's discretion. Some courts in determining the amount to be awarded take into consideration possible inheritances of the husband.[33] Bishop believes the source of the husband's income should be the determining factor in arriving at the amount to be allowed. The New Jersey cases consider the earning capacity, present and future,[34] station in

30. Finn v. Finn, 26 N.J.Eq. 290, 293 (1875); Streitwolf v. Streitwolf, 38 N.J.Eq. 570, 574 (1899). In Dougherty v. Dougherty, 8 N.J.Eq. 540 (1851), the court went into the merits. This is contra to the general rule. See BISHOP, MARRIAGE AND DIVORCE, sec. 403 (5th ed.).

31. 2 Paige 643.

32. Amos v. Amos, 4 N.J.Eq. 171 (1842).

33. See 66 A.L.R. 219. No New Jersey cases cited in this note.

34. Finn v. Finn, 26 N.J.Eq. 290.

life.[35] age and social conditions of the husband and wife.[36]

In a dictum in the case of *Amos v. Amos*[37] the court believed that a wife who was the defendant in a divorce action did not have as just a ground for expecting an allowance of alimony, as when she was the plaintiff in the action. The court, however, went on to qualify this statement by adding that in either case the court at its discretion can make an allowance to the wife. This dictum was soon discarded[38] as an ill advised rule to use. As the cases now stand the court no longer places a premium on the fact that the wife is the plaintiff or the defendant in the action, but rather looks to the evidence as presented by the parties to guide it in the exercise of its discretion.

The question of whether or not the wife was in a position to support herself in the absence of an allowance of alimony was never an acute one until after the passage of the Married Women's Act of 1852.[39] The Married Women's Act in no way relieves the husband of his common law duty to support his wife during the continuance of the marriage, which includes the time of the pendency of a divorce action. Prior to the date of 1852 a wife had no legal capacity to hold legal title to property in her own name. This was a common law rule which by its operation would leave a married woman destitute if during the marital litigation no provision was made by court decree requiring the husband to support her. The upshot of this common

35. Station of life simply means the style in which the parties have lived during cohabitation, and not how they could have lived had they wanted to live according to their means.

36. Marker v Marker, 11 N.J.Eq 256 (1856).

37. 4 N.J Eq. 171, 172 (1842).

38. Johnson v Johnson, 4 N.J. L J. 241 (1881. "Even though the wife is the defendant and she applies for alimony in a suit brought by the husband for divorce, she is entitled to it as a matter of course" The term "as a matter of course" should not be interpreted to mean "as a matter of right." It is simply a discretionary power of the court, although as a matter of fact it is granted freely on proof of marriage and pendency of the divorce action See 24 L R A 137; 21 L R A 310; 10 L.R.A. 568.

39. 2 Revised Statutes 37:2-12 (1937)

law rule in the years prior to 1852 was for the courts to state the position of the wife without the wink of an eye lash as that of a privileged suitor[40] in the sense that if she had made out a proper case or defense, depending on whether she was the plaintiff or the defendant, the court would make an award of alimony almost as a matter of course, since the problem of independent means of the wife was hardly if ever present. However, since the passage of the Married Women's Act the independent means of the wife is a factor to be taken into consideration by the court whenever confronted with the question of an award of alimony. One should not, however, confuse the purpose and result of this legislation. The enactment of this statute created the capacity henceforth for a married woman to own and to hold property in her own name, but did not vest title to any property in her. Nevertheless, the validity of the former argument that the wife is entitled to alimony practically as an absolute right[41] can no longer be made with all its former vitality. It is now necessary to prove, besides injury and a meritorious cause of action, the necessity of financial aid.[42] In short, the Married Women's Act has changed the rule of common law, imparting to a married

40. Marker v. Marker, 11 N.J.Eq. 256 (3 Stockton's Ch. Rep. 1856). In this case the husband was suing for an absolute divorce on the grounds of five years desertion. The wife filed a petition for temporary alimony. The court found the wife to have been justified in leaving her husband because of his adulterous conduct. The court on p. 258 said: "In a suit between husband and wife, whether the wife be the complainant or defendant, as a general rule, the wife, as a privileged suitor, is entitled to costs and alimony." Though the case came up after 1852, there is justification for the statement made by the court because the parties were married before 1852, and therefore all the property was held by the husband. See also Amos v. Amos, 4 N.J.Eq. 171 (1842). The court on p. 172 said: "The court has always found it necessary to aid the wife in the prosecution of the suit, the husband having the whole estate."

The writer has been unable to find any divorce actions in which the problem of "sole and separate estates" was raised.

41. At common law temporary alimony was considered practically as an absolute right, because it was given as a matter of course.

42. Westerfield v. Westerfield, 36 N.J.Eq. 195; Wittlinger v. Wittlinger, 13 N.J.Misc. 349, 178 Atl. 97 (1935).

woman the right of ownership and disposition of property which she may have at the time of her marriage, or which she may acquire at sometime during coverture. As a result whenever, the wife files an application for alimony the question of whether she has property or income independent of her husband's will be considered, and the court will exercise its discretion in the allowance of alimony in the light of financial ability[43] of the respective parties.[44] If the wife has suitable means of support, there is no reason for granting her alimony.[45] No broad general rule can be laid down, for each case will depend for its determination on its own particular facts, and circumstances plus the discretion of the court.

Where the wife has separate property but the income from which is not sufficient to maintain her in the station of life to which she had become accustomed during coverture, the vexing problem arises as to whether or not she should be required to sell or mortgage the corpus or such part of it as will be necessary for her support before she can be permitted to call upon her husband for alimony. If we require her to sell or mortgage the corpus, we may thereby be forcing her to do so at a price not commensurate with the value of the property because of the urgency of the situation. Therefore according to the better view this is unnecessary[46] because of the practical injustice which will result from such a step, and therefore it is not unfair in such a situation to require the husband to pay her alimony.

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43. Westerfield v. Westerfield, 36 N.J. 195 (1882)—the wife's application for alimony denied because evidence shows her income to be $1400 a year, and the husband's is only $500 a year. See also Suydam v. Suydam, 79 N.J.Eq. 144, 80 Atl. 1057 (1911); Finn v. Finn, 26 N.J.Eq. 290 (1875).

44. The poverty of the husband should not be a material fact, if he is able bodied. Non-income producing property owned by the wife should not defeat her application for alimony.

45. The fact that the wife's parents are in a position to support her will not excuse the husband from paying alimony.

46 Bishop on Marriage and Divorce (6th ed.) vol. 2, p. 392.

In *Westerfield v. Westerfield*[47] the court said: "When the reason on which the old rule rested (that the husband had the wife's property) no longer exists and when the reason of the law ceases, the law itself ceases." As broad as that statement is, that is how limited its application should be. It should be confined to cases in which the wife has a sufficient income of her own,[48] and not as a rule resulting from the passage of the Married Women's Act. In the case under discussion the Chancellor properly exercised his discretion in denying the wife alimony because her income was three times the amount of the husband's income. Therefore, on the facts of the case his statement was a justifiable one.

The more inequitable view is expressed in the case of *Anthony v. Anthony*[49] that if the wife possessed property which she ought to sell, then it would be her duty to do so and thereby relieve the husband of his duty to support her during the pendency of the divorce suit. The court excluded from this class such things as clothes and jewelry.

Where a wife has some income, but which amount is not sufficient to support and maintain her properly during the pendency of the divorce action, it is generally held that it is proper for the court to compel the huusband to contribute an amount which, together with the wife's income, will be sufficient to support her in the required style.[50] It is no more than fair that equity in good conscience should require the husband to devote part of his income so when added to the wife's it will be adequate enough to insure comfort to her during the litigation.

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47. 36 N.J.Eq. 195, 197 (1882).

48. Verbeeck v. Verbeeck, 93 N.J.Eq. 17, 115 Atl. 136 (1921)—the wife supported herself; she was also guilty of laches. Parker v. Parker, 2 N.J.Misc. 1052 (1924); McPherson v. McPherson, 9 N.J.Misc. 4, 152 Atl. 646 (1930); Finn v. Finn, 26 N.J.Eq. 290 (1875)—the court took into consideration the amount the wife may be reasonably expected to derive from her separate estate.

49. 9 N.J. L.J. 369 (1886).

50. Perkins v. Perkins, 42 Atl. 336 (N.J.Eq. 1899).

In the case of *McEwen v. McEwen*[51] the wife, the plaintiff, filed a bill for divorce on the grounds of abusive and ill-treatment. The action was begun on August 26, 1854, and on August 31, 1854, the defendant was by court decree declared to be legally insane. Soon thereafter the wife filed a petition requesting an award of alimony. After due consideration of the matter the court denied the plaintiff an award of alimony, although on the facts of the case the wife was entitled to alimony putting aside momentarily the question of the husband's insanity. The primary reason the wife's petition resulted in a negative reply from the court was the feeling that to make an award of alimony would cause undue embarrassment should an attempt be made to enforce it, nor would a court feel justified in allowing contempt proceedings to be instituted against a person in the defendant's position. The subsidiary reasoning seems to lie in the realm of fault, something which the court did not feel justified in imputing to an insane person. The only rationalization for the decision in this case in the light of the law on the subject of alimony and liability of an insane person for his torts lies in the emotional reaction of a feeling of pity for a person such as the defendant in this proceeding.

It is important to bear in mind that the decision of the *McEwen* case applies only where the husband was insane at the time of the commission of the alleged acts.[52] It is no defense to the husband, if at the time of his acts of cruelty he was actuated merely by insane delusions.[53] This is a limitation on the harsh rule of the *McEwen* case.

The court could have required the posting of security for the due performance of the decree, and thus avoid the question of undue embarrassment in the enforcement of its decree, and at the eame time award the wife the relief she justly deserved. If

51. 10 N.J.Eq. 286 (2 Stockton's Rep. 1854).

52. 14 Va. L.J. 312.

53. Smith v. Smith, 33 N.J.Eq. 458 (6 Stewart 1881).

the husband was the owner of property, this could have been posted as security. This is a suggestion offered as a means of getting around the result reached in the *McEwen* case.

As the matter now stands on the books, the *McEwen* case being the only case in New Jersey on the precise point involved, it must be recognized as an exception to a well established rule that a husband who is shown to be clearly at fault is under a duty to support his wife during the pendency of a matrimonial proceeding.

The husband being under a legal duty to support and maintain his wife, in addition to his duty to society to do so, a presumption is raised that she is entitled to it, until such a time as is shown that she has forfeited her right thereto.[54] "Since in a technical sense, at least, almony is a money decree against the husband's person, to supply the wants of his wife,"[55] her lack of good faith in prosecuting the action will result in a forfeiture of this right.[56] Alimony being a matter within the court's discretion and not an absolute right in the wife,[57] the element of good faith is a very important factor for the court's consideration.[58] Therefore, a suit commenced by the wife from a motive of malice or oppression amply demonstrates a total absence of good faith. In the case of *Snydam v. Snydam*[59] the wife was the

54. 6 A.L.R. 6 annotation on defenses available to the husband to show that the wife has in some way forfeited her right to support.

55. Vernier, American Family Law, p. 265 (Vol. II).

56. Kirrigan v. Kirrigan, 15 N.J.Eq. 146 (2 McCarter 1862). In this case the court was not convinced that the wife's suit for divorce was instituted in good faith, but rather for the purpose of recovering money from her husband or to compel support. Also the plaintiff was not the defendant's wife because the defendant had gotten a divorce from the plaintiff in Indiana, in which proceeding the plaintiff had put in a general appearance. The plaintiff now alleged, that the Indiana divorce was gotten by fraud. The court said the Indiana divorce is to be considered valid until she can clearly prove fraud: Doughtery v. Doughtery, 8 N.J.Eq. 540 (1851).

57. Marker v. Marker, 11 N.J.Eq. 256 (1856).

58. Glasser v. Glasser, 28 N.J.Eq 22 (1877).

59. 79 N.J.Eq. 144, 80 Atl. 1057 (1911).

defendant. She made an application for alimony, and the court queries whether her denial under oath of the charges against her must be in good faith in order to entitle her to alimony.[60]

Absence of good faith on the part of the wife may be shown by an unreasonable delay in prosecuting the action.[61] and if such be the situation an award of alimony will not be decreed by the court. An unreasonable delay in instituting suit may show that the wife had and still has sufficient independent means of her own.

When an action is instituted for the annullment of the marriage, a distinction must be drawn between the cases in which the wife is the plaintiff, and those in which she is the defendant for the problems thereby raised are essentially distinct and independent.

The problem of where the wife is the plaintiff will be discussed first. As our fundamental premise it may be stated that when the wife institutes an action to annul the marriage she is not entitled to an award of alimony. This is so because she is denying that a marital status ever existed thereby repudiating the basis on which the husband's duty to support her rests. Therefore, whenever a wife denies that a marriage ever existed or attacks the validity of the marriage, it follows that she cannot consistently claim that the defendant is under any obliga-

60. Vernier expresses the same idea. He believes alimony should be allowed even to a guilty wife on the grounds that it is just as easy for her to starve or be a charge on the state as an innocent wife, and also because fault entirely is never all on one side. Therefore, he believes the question of the needs of the wife and corresponding ability of the husband to pay rather than fault should be the important question.

61. Anthony v. Anthony, 11 N.J.Eq. 70 (1855). The wife lived apart from her husband for five years without applying to the court for aid, and this is the first time she has applied to the court for support. Verbeeck v. Verbeeck, 93 N J Eq 17 (1921); Pitel v. Pitel, 90 N.J.Eq. 366 (1919)—in this case prior litigation showed that the wife was the deserter, and the husband in good faith had tried to induce her to return, but she has continued in her refusal to do so. Her petition for alimony has not shown a change in attitude towards her husband, nor on his part towards her, since the termination of the prior litigation.

tion to support her, as we have already seen for the latter right to exist, there must be a showing of the existence of the former.[62] Where the wife sues for annullment and the evidence shows she was aware of the incapacity to enter into a lawful marriage, an award of alimony is properly denied.[63]

In a case where the wife sues to have her marriage to the defendant declared void because of some defect which rendered the marriage voidable, she should be awarded an allowance of alimony. To allow her alimony in a case of a voidable marriage is not a deviation from the general rule because until a marriage has been declared void by the court a valid marriage is in existence between the parties. The mere fact that the wife brings suit to have the marriage set aside is not in itself an assurance that the court will do so. It is beyond question that in an action to have a voidable marriage set aside an allowance of alimony should be allowed where the defendant denies the allegations in the plaintiff's bill. The defendant by denying the charges made against him is in effect urging upon the court that a valid marriage exists, and if such be his convictions it is not unfair to order him to pay the plaintiff alimony.

In an action instituted by the husband to annul the marriage, and the wife in her answer denies the allegations made in the husband's bill she should be entitled to an award of alimony.[64]

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62. Knott v. Knott, 51 Atl. 15 (N.J. Ch. 1902). Both parties admitted that a marriage was void *ab initio*. The court properly denied an award of alimony. Case can also go on the ground of improbability of success of proving a lawful marriage on final hearing. Also see BISHOP, MARRIAGE AND DIVORCE, sec. 8055 (5th ed.).

63. Sinclair v. Sinclair, 57 N.J.Eq. 222, 40 Atl. 679 (1898).

64. Vandergrift v. Vandergrift, 30 N.J.Eq. 76 (1878). The husband is suing to have the marriage set aside on the ground that the defendant had a husband living at the time she married him. The court stated that to deny the wife alimony would prevent her from defending, thereby permitting a bad cause, if such be the situation, to succeed. Also there is the presumption that the first marriage has been dissolved by either death or divorce, and until the contrary is proven the presumption in favor of the validity of the present marriage overrides the presumption in favor of the continuance of the prior marriage. Also by suing

In the case of *Friedman v. Friedman*[65] the husband sued to have marriage declared void on the ground that the defendant had a husband living at the time of her marriage to him. The defendant in her answer alleges her prior marriage to be invalid because her former husband had a wife living and undivorced at the time she married him. The defendant's application for alimony was denied. The plaintiff has sustained the burden of proof because the marriage in litigation is his marriage to the defendant, which he alleges to be invalid. The defendant on the other hand attempts to sustain its validity by an allegation of a prior invalid marriage on her part. The defendant is admitting the allegations made in the plaintiff's bill, but is seeking to avoid its consequences by showing a prior invalid marriage. The plaintiff's allegation of invalidity, has been substantiated by the defendant's answer, and so the presumption of a marriage between plaintiff and defendant has been overcome. The burden of proving the invalidity of the prior marriage is upon the defendant. An analogy may be drawn between this case and one in which the wife is the plaintiff in an action for divorce. She must make out a prima facie case of the existence of a marital relation before she can become entitled to an allowance of alimony. Here she need not establish a de jure marriage, but merely introduce sufficient facts from which an inference of a marital status may arise. This seems to have been the line of reasoning of the court.

The court having before it an application for alimony assumed such an award could not be made unless the marriage in question was admitted by the parties. In the absence of such an admission, an investigation, which in effect is a trial on the

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for annullment of the marriage the husband is admitting a marriage has taken place, but is seeking to have it set aside because of some legal defect See also Vroon v. Marsh, 29 N J.Eq. 15 (1878). See article in 18 ILL. L. R. 528, *Alimony Pendente Lite in Annullment and Divorce Cases*, wherein the wife is the defendant by R. N Golding.

65. 49 N J Eq. 102, 23 Atl 113 (1891)

merits of the controversy, of the question of the marriage is first necessary before alimony can be awarded. If this is the position of the court, which seems to be a reasonable deduction to be drawn from the court's holding, then it is contra to the case of *Vandergrift v Vandergrift,*[65a] which held that a marriage having been shown to have taken place and to have been in existence but which is being sought to be avoided because of some legal defect existing at the time the marriage in question came into existence, the burden of proof of its invalidity is upon the husband. On an application for alimony the rule being that the court will not go into the merits of the case, the wife's denial in her answer of the alleged charge is a sufficient basis on which an alimony award can be made. If a denial of the alleged charge is sufficient basis for making the award, there is no valid reason which can be advanced why alimony should be denied simply because she took one step more than a mere denial; that is, went on to show that a prior marriage of her's never had any legal existence. She should not be penalized because her attorney instead of merely entering a denial of the alleged charge and stopping there, which then would have entitled her to alimony, went on to enter an anticipatory defense. The court has by its decision placed the wife at a distinct disadvantage in respect to the prosecution of the action.

Also evidence by the wife of the marriage need not be in the nature of absolute proof of that fact but merely is required to show probability of proving a marriage with the plaintiff on final hearing.[65b] On this point the court took the contrary view.

Public policy being in favor of sustaining a marriage and against divorces, alimony should have been awarded to the defendant in this case on this basis. The result of the court's ruling tends to defeat the purpose of this policy.

As a rule of evidence the burden of proof in a case is always

65a. 30 N.J.Eq. 76 (1878).

65b. Vandergrift v. Vandergrift, 30 N.J.Eq. 76 (1878).

on the plaintiff, although the burden of going forward may shift to the defendant, and therefore the court confused these two rules of evidence in coming to its conclusion. However, this confusion may be fatal as was aptly demonstrated by this court. The husband was attacking the validity of his marriage to the defendant and the court should have held that the burden proving such invalidity rests upon him and not the defendant, who was seeking to sustain its validity.

The court also lost sight of the presumptions in favor of the validity of marriage.[65c]

Another problem is raised by cases in which the wife sues for divorce, and the husband opposes her application for alimony by setting up in his answer a prior marriage of the plaintiff, wife. This problem was involved in the case of *Cary v. Cary*.[66] The defendant in his answer alleges that the plaintiff

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65c See discussion of the presumption in footnote 64.

66. 32 N.J.Eq. 25 (1880). Judgment for the defendant on another point. See Vreeland v. Vreeland, 18 N.J Eq. 43 (1866). The defendant denies the fact of marriage alleging that the plaintiff wife got someone to impersonate him at the ceremony. There was no evidence of cohabitation or that he treated the plaintiff as his wife publicly. Court denied the plaintiff an order for alimony saying: "Where the real controversy in the suit is, as here, between the parties, whether that relation exists, or ever did exist, the order can not be made on the mere allegation or exparte affidavit of the wife. For otherwise a man might be made to pay expenses of a woman who claims him as husband and to support her as long as the suit could be spun out." See also Robinson v. Robinson, 82 N.J.Eq. 466, 88 Atl. 951 (1913). The plaintiff and the defendant married on July 15, 1902. At that time the plaintiff had a divorce suit pending against her former husband; a decree was granted 23 days after her marriage to the defendant. The plaintiff alleges that she believed that at that time she married the defendant that she had been divorced from her former husband. The defendant was ignorant of all this until the commencement of this suit. The plaintiff was denied an award of alimony on the ground that the question here was a marriage or no marriage. The marriage being in substantial doubt an award of alimony can not be made. The plaintiff has the burden of proof of establishing the existence of the marital relation If neither party knew of the impediment to their marriage, then on removal of the obstacle their continued cohabitation would by inference create the necessary consent for the creation of the marital relation. However, such a presumption can not work in the plaintiff's favor because she

had a husband living at the time of his marriage to her. The court held that while the defendant denies that there was a marriage de jure between himself and the plaintiff, yet he admits a marriage de facto, which is sufficient ground on which to base an order for alimony, if a proper case otherwise were presented.

Before the wife's application for alimony can be allowed in an action for divorce, it must appear to the satisfaction of the court that the marital relation exists between the parties to the action. The foundation for this rule is that the wife's right of support from her husband, which duty is imposed on him by law without regard for his consent, arises out of a subsisting marriage relation, and if this can not be shown no right of support exists.[67]

The application for an allowance of alimony, which stands solely on the grounds of necessity,[68] should be made by the wife, whether she be the plaintiff or defendant in the divorce action, sometime prior to the rendering of the final decree of divorce or dismissal of the action by the court for until then the suit is pending.[69] The reason for this requirement is that his duty of support is a continuous one enduring throughout the existence of the marital status, which includes the time the divorce action

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knew there was a prior existing marriage which was in the process of being dissolved. It therefore fell upon her shoulders to determine whether a dissolution had actually come about. There is no evidence of new consent. The result in this case is criticized in 18 Ill. L. R. 528. The burden should be on the husband to show the invalidity of the marriage, since he is the one who is attacking the existence of the marriage.

67. Vreeland v. Vreeland, 18 N.J.Eq. 43 (1866); Knott v. Knott, 51 Atl. 15 (N.J. 1902).

68. Westerfield v. Westerfield, 36 N.J.Eq. 195 (1882)—it must appear that the wife is unable to carry on the suit or support herself pending the suit, which is a settled principle of equity and not a matter of discretion.

69. Comp. Statute 1910, sec. 25, p. 2035—The statute says alimony is to be allowed in a pending suit for divorce, which is the equivalent to saying sometime before final decree.

is pending,[70] and all the court is doing by its decree is to enforce by its order the continuance of this duty, unless the husband shows strong evidence why this duty should not be continued by him.

The wife in filing an application for alimony has open to her one of two methods by which she can accomplish this purpose. She may do it by means of an application to the court through the Chancellor or a Vice-Chancellor, on notice to the husband, based upon a petition and affidavits expressing the necessity for an allowance of alimony; or she may do it by means of an order to show cause and a verified petition.[71] The affidavit is to be an expression of the true circumstances of the party. An allegation of the marital status should appear in the petition. When she is the plaintiff in the action the grounds[72] on which her action for divorce are based should appear along with an allegation that the statements made are true. The corroboration by affidavits of others is necessary because it is an action for divorce. It is encumbent upon the wife to make out a prima facie case, and corroborating affidavits are in aid of making out such a case.[73]

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70 Hatch v. Hatch, 83 N.J.Eq. 168, 93 Atl. 700 (1914).

71. The court in the exercise of its discretion may require only oral evidence, if it so desires.

72. Anshutz v. Anshutz, 1 Green 162 (1863)—in order to entitle a wife to maintain a bill for divorce, there must be an abandonment of the wife or a separation from her without justifiable cause, and an omission to suitably maintain and provide for her and these facts must be changed in the bill and sustained by proof.

73. Earl v. Earl, 79 N.J.Eq 517 (1911)—the plaintiff wife filed a petition for alimony and in this application the only proof of the alleged matrimonial offense of adultery was the sworn statements of the wife. The court denied the wife alimony, but without prejudice to the renewal of the application on sufficient proof. The court on page 518 said: "This is not a case in which a wife is required to preponderate in the proofs on preliminary application in order to prevail. . . *But, nevertheless, in order to entitle herself to alimony pendente lite she must make out a prima facie case, and the testimony of the injured party alone does not make a prima facie case in a suit for divorce.* (My own italics.) In this state a divorce is never granted on the uncorroborated testimony of the complaining party (see 45 Eq. 341; 62 Eq. 189). Therefore, the oath of the

If the wife is the defendant in the divorce action, an allegation denying the charges made against her by her husband should be made.[74] The affidavits should not be sworn to before the attorney of either party.[75]

Where the husband is the defendant, he may resist his wife's application for alimony by filing with the court denials of the charges made against him in the form of affidavits, along with an allegation of his inability to pay or the wife's ability to support herself.[76] In the case of *Pullen v. Pullen*[77] the court on page 311 said: "A party ought not to be permitted to present any defense to a petition for alimony after answer has been filed which is not set up in his answer, but which, if set up and established, would be a bar to the original proceeding."

Anthony v. Anthony[78] was a case in which the husband sued the wife for a divorce on the grounds of desertion. The wife put in as a defense to the charges a sworn answer. The court said it may be used as an affidavit on a motion for alimony, although by statute an answer to a petition for divorce need not to be

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petitioner alone is not a sufficient foundation for a decree, nor is it sufficient to entitle the petitioner to preliminary relief, for she must on the application at least show the court that she has such a case as, if proved on final hearing, will entitle her to the relief she seeks. And this, of course, is entirely aside from the defendant's denial." See also Ballentine v. Ballentine, 5 Eq. 471, 476 (1846); Dougherty v. Dougherty, 8 Eq. (4 Halst.) 540 (1851).

74. Suydam v. Suydam, 79 N.J.Eq. 144 (1911).

75. Pullen v. Pullen, 17 Atl. 310 (1889) (Ct. of Ch.).

76. Anthony v. Anthony, 9 N.J. L.J. 369 (1886). The husband's affidavits stated that the wife had sufficient property in her own right to support herself. The court said his affidavits ought to state what the plaintiff's property is, so the court can determine whether the plaintiff should be made to dispose of it for her support. Until the defendant presents to the court that it is the type of property which the wife ought to sell and use the proceeds for her support, she is to be allowed alimony ($10 per week allowed).

77. 17 Atl. 310 (1889, Ct. of Ch.)—the court intimates that had the defendant been sincere in not having introduced the evidence when he filed his answer, it would be allowed at this time.

78. 11 N.J.Eq. 70 (3 Stockton's Ch. Rep., 1855).

sworn to. In the case of *Tyrell v. Tyrell*[79] the defendant husband put in a sworn answer denying the charge of cruelty. The court in this case also permitted a sworn answer to be read as an affidavit. This practice of permitting a sworn answer to be read also as an affidavit by the defendant, whether it be the wife or the husband, is to be discouraged because it is contra to the spirit and letter of the statute.[80] The court in *Bray v. Bray*[81] stated the proper procedure to be used "the statute provides that answers to bills for divorce shall not be under oath. But on application by the wife for temporary alimony, when the bill is filed by the husband and charges adultery, oath of the wife denying the charge of adultery seems to be required, to entitle her to temporary alimony. The court practice is to file an answer without oath and to introduce into the petition for temporary alimony a distinct denial of the adultery, and swear to the petition."

The other means open to the wife by which she can apply for alimony is to file a verified petition, the allegations of which must be corroborated by the affidavits of others in addition to her own. The wife in her petition prays that an order to show cause may be made requiring her husband to show cause at a time and place to be set forth in such order, why an order should not be made requiring him to pay his wife an allowance of alimony. The advantage in using this form rather than the one by notice is that the court may require the order to be returned by the husband within a period of less than five days, which is the time prescribed when the application is made in the form of notice on the husband.[82] A true copy of this order,

79. 3 Atl. 266 (1886, Ct. of Ch.).

80. 1 R.S.—2.50-26 (1937)—provides that in suits for divorce the answer shall not be sworn to.

81. 6 N.J.Eq. 27 (2 Halsted's Rep., 1846).

82. The practice today is: if there be any reason for giving shorter notice than five days, it may be done by notice after first securing the permission of the court, and stating such fact in the notice.

after being duly certified, is to be served on the husband or his attorney, if such attorney has appeared of record, along with true copies of the petition and affidavits.

Whenever an application for alimony has been made to the court, the court may if it so desires refer the application to a Special Master,[83] whose duty it is to hear testimony of both parties, and determine what amount should be awarded the wife, if any at all. However, the court itself sometimes fixes the amount of alimony without any reference whatsoever to a master, when the affidavits of the husband and wife have been presented to the court for the purpose of determining the amount to be awarded.[84] Also when neither party requests that the matter be referred to a master, the court may on its own accord award the amount of alimony.[85] In the case of *Johnson v. Johnson*[86] the defendant wife filed a petition for alimony alleging that the husband was the owner of a hotel worth from $10,000 to $15,000. The court granted the wife an allowance of $15 per week stating that reference to a master is hardly necessary. Since the allowance of alimony is a matter of judicial discretion, it is not necessary or proper that the question whether an award is to be made and the amount to be awarded be submitted to a jury.[87]

In a situation where the court deems it advisable to refer the matter to a Special Master, the court will base its order on his findings.

Although an application has been made to the Court of Chancery for an allowance of alimony, and the court has jurisdiction over the subject matter—the divorce suit—and the situation is

83. Walling v. Walling, 16 N.J.Eq. 389 (1863). Ordinarily the matter should be turned over to a master to determine the real facts of the controversy, but here the parties requested the court to do it.

84. Bray v. Bray, 6 N.J.Eq. 27 (1846).

85. Miller v. Miller, 1 Sexton 386 (1 N.J.Eq., 1831).

86. 4 N.J. L.J. 241 (1881).

87. Amos v. Amos, 4 N.J.Eq. 171 (3 Green's Rep., 1842).

such that it may acquire jurisdiction over the parties to the controversy, yet the court is without authority to hear such an application until it has secured jurisdiction over the parties. The rule is frequently stated that the suit for divorce must be actually pending for until then the court has not actually gained jurisdiction over the parties. Thus the award can not be allowed, if it is to have any binding effect upon the husband, until he has made an appearance or has been served within the state with process, for until such time the suit is not pending before the court and jurisdiction over the defendant's person has not been acquired. The reason for the requirement that the court acquire jurisdiction over the parties as a prerequisite to making an award of alimony is that the decree is one in personam. However, if an application for alimony is made by the wife prior to service of process on the husband, the validity of such application should be uneffected providing it is not actually heard until after such time as the husband has been served with process. If the wife is the defendant in the divorce action, the court should refrain from making an award of alimony until she made an appearance.

Our next problem is to look at the situation where the wife sues for divorce in New Jersey against her non-resident husband. The generally accepted rule is that a personal decree or judgment for alimony rendered in a proceeding for divorce in favor of the wife against her non-resident husband, who has not been served within this state nor has put in a general appearance is void in New Jersey, as well as in every other state.[88]

88. Elmendorf v. Elmendorf, 58 N.J.Eq. 113, 44 Atl. 164 (1899, Ct. of Ch.) In this case the defendant deserted the plaintiff in New Jersey, the matrimonial domicile in 1881, and in 1887 the plaintiff sued the defendant for divorce and alimony. The husband was personally served at his residence in Missouri. He never appeared. The wife was granted a divorce. Sometime later the husband came into New Jersey requesting the discharge of an *ne exeat* order. The court discharged the *ne exeat* order on the ground of lack of personal jurisdiction over the defendant at the time the order was entered, and therefore the award of alimony was held to be invalid. To the same effect see Lynde v. Lynde, 54

However, constructive service at the domicile of the husband, who is temporarily absent from the state is held to be good service.[89] A husband is not in contempt when he fails to pay alimony under an order, when such order was not served on him or his attorney.

In cases where the husband is a non-resident of New Jersey but owns property within the state, this property may be sequestered and the question concerning alimony may proceed as one quasi in rem. The order for alimony will be binding only to the extent of the property the husband owns in the state. In *Maloney v. Maloney*[90] a writ of sequestration was issued against the defendant husband directed to the master in Chancery ordering the master to immediately sequester the husband's estate and to restrain him from encumbering, pledging or transferring any of the property he owns in New Jersey. The Divorce Statute in New Jersey gives the court authority in cases where the husband can not be found and served with process, to sequester his property and effects within the state so as to compel his appearance and performance of any orders that may be made in the divorce action. However, the statute provides that such writs shall be issued only upon special order, and upon clear proof of the allegation that the defendant can not be found

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N.J.Eq. 473 (1896, Ct. of Ch.); McGuinness v. McGuinness, 68 Atl. 768 (N.J., 1908). In the latter case the defendant was a resident of Pennsylvania, and divorce proceedings were begun in New Jersey. The husband was served in Pennsylvania, but put in no appearance in the divorce action. An *ex parte* proceeding was had in which the wife was given a divorce and alimony. The husband made no alimony payments, and as a result his property was sequestered and the income therefrom was used to pay the wife her alimony. The court held the order of sequestration to be invalid because of lack of personal jurisdiction over the husband. But see Onken v. Onken, 123 N.J.Eq. 156 (1936, Ct. of E. and A.) where there was a substituted service on a non-resident husband. He appeared by attorney and the court held the appearance to be general.

89. Hervey v. Hervey, 56 N.J.Eq. 166, 38 Atl. 767 (1897); Hervey v. Hervey, 56 N.J.Eq. 424, 59 Atl. 762 (1897).

90. 12 N.J.Misc. 397, 174 Atl. 28 (1934); 358 A.L.R. 1084, a general discussion of sequestration.

within the state. The order is to contain a declaration that when the defendant does not appear the decree shall be enforceable only out of the property sequestered.[91] The fact that the New Jersey was the matrimonial domicile is not a sufficient basis on which the court can render a quasi in rem decree.[92]

The court in the exercise of its judicial discretion may insert in the decree of alimony that the husband give security for the due performance of the decree. In the case of *DeLukaesevies v. Nagle*[93] the court ordered the sequestration of the husband's property and the appointment of a receiver, who took possession of the property pursuant to the provision in the divorce statute authorizing the court to award and issue process for the immediate sequestration of personal property and the rents and profits of the husband's real property, if he should fail to give security for the payments of alimony. The court said such process does not divest the husband of all interest in the property, but leaves an interest which may be sold on execution by his creditors.

If the court makes an award of alimony, it may in such decree order the commencement of payments to be from the date the decree of alimony was entered; or it may order the husband to pay from the date suit for divorce was commenced; or it may order the husband to pay alimony from the date the motion for alimony was made by the wife.[94] If during the period of separation and before the award of alimony, the wife pledges the husband's credit for necessaries such sums should not be deducted from the amount of alimony allowed, because until the award was made and while living apart justifiable from her husband

91. Wood v. Price, 79 N.J.Eq. 1, 81 Atl. 1093 (1911), *aff'd* in 79 N.J.Eq 620, 81 Atl. 983 (1911)—a proceeding in *rem quasi in rem* is permissible under the 14th amendment.

92. Elmendorf v. Elmendorf, 58 N J.Eq. 113, 44 Atl. 164 (1899); Hervey v. Hervey, 56 N.J.Eq. 424, 39 Atl. 762 (1897).

93. 89 N J.Eq. 106, 103 Atl. 375 (1918).

94. Finn v. Finn, 26 N.J.Eq. 290 (1875).

she has authority to pledge his credit. However, where the decree of alimony orders payments to commence as of the date of separation, then it is proper to deduct the amount of the debts incurred by the wife during the period of separation and the time of making the award. The case of *Glasser v. Glasser*[95] is a case in which the wife sued her husband for divorce, and the husband in his answer denied every material allegation made by the plaintiff. The wife's affidavits in reply were not sufficient to countervail the defendant's denials. The court denied the wife an award of alimony on the ground, that as the case now stands it is not likely that she will succeed in this action. However, the court went on to say: "If on further progress of the cause, the plaintiff shall be able to satisfy the court of the merits of her complaint, a renewal of her application would be successful, and the court can then, in fixing the period from which the alimony shall begin, cover all the time which would be embraced in an order for alimony made by this application." Any indebtedness incurred by the wife after the commencement of the award of alimony, which are in the nature of ordinary and usual expenses, should be held to be the personal obligation of the wife. If the husband assumed and satisfied such an obligation, he should be permitted to get a court order relieving him of that amount as compensation for having paid a personal of obligation of his wife.

An allowance of alimony is to continue throughout the pendency of the suit, which includes the time of the pendency of the appeal. Therefore, it is inartistic for the court to say the alimony payments are to be made until the court orders its discontinuance, for an award of alimony can not extend beyond

95. 28 N.J.Eq. 22 (1877); Doughtery v. Doughtery, 8 N.J.Eq. 540 (1851). Court denied an award of alimony saying that as the case now stands on the pleadings and affidavits, it is apparent that there is no foundation for the bill However, if at a later stage of the proceeding it should appear that the order now applied for should be made, the allowance can be ordered from this time or such other as the court shall fix.

the pendency of the suit.[96]

A dismissal of the divorce suit by the court terminates the wife's right to any future instalments of alimony.[97] This is a natural consequence resulting from the dismissal of the action, because the suit is no longer pending before the court, nor has the court jurisdiction over the parties any longer. Yet the right to accrued payments may endure dismissal of the action, if the court in its decree of dismissal inserts a clause saving the wife's right to such payments.[98] In the case of *Stephen v. Stephen*,[99] which was an action for divorce by the wife against her husuntil after final hearing. The application for alimony, however, was made early in the suit. The wife was granted a divorce, and the question of alimony was then referred to a Special Master to determine the amount due from the time of

96. Swallow v. Swallow, 84 N.J.Eq 109, 92 Atl. 872 (1914).

97. Swallow v. Swallow, 84 N.J.Eq. 109, 92 Atl. 872 (1914). There is no distinction between a final decree of divorce and a final decree dismissing a petition for divorce as respects its effect in terminating an interlocutory order for alimony.

98. Lief v. Lief, 14 N.J.Misc. 27 (1935)—husband in arrears $115 at the date of final decree, which denied the wife a divorce and decree made no mention of alimony. The wife brings the present contempt charges against her husband for the said arrears of alimony. The court on page 29 said: "Assuming (but not deciding) that the wife had a vested right to the instalments as they accrued; it does not follow that such right survived the decree, or that this court can or should thereafter enforce it by contempt orders. The order for temporary alimony was interlocutory in its nature. The final decree failed to reserve any right under the order. The decree supersedes the order and disposes of it. The court speaks only through the decree, which is as eloquent in its omission as in its express provisions. Every preceding order in the suit is terminated upon the entry of the final decree unless there be an express reservation. It must be assumed that the decree settles and disposes of the whole controversy between the parties and of everything incidental or ancillary thereto." The court went on to express the view that contempt is an extraordinary remedy, and therefore if she has any right under the circumstances she should seek its enforcement by ordinary process of execution. See also Swallow v. Swallow, 84 N.J.Eq. 109, 92 Atl. 872 (1914). All interlocutory orders in a cause are superseded by the final decree; Kelly v. Kelly, 121 N.J.Eq. 361, 189 Atl. 665 (1937).

99. 103 N J.Eq. 203, 142 Atl. 817 (1928).

the commencement to the termination of the suit. But before the master made a report of his findings, the wife died. The administration of the wife's estate is now suing for the amount of alimony due from the commencement to the termination of the suit. The court reiterated the doctrine that alimony is a personal right to the wife only, and her death terminates the action, which can not be revived by her personal representative. The court went on to say that the wife's suit for alimony, incidental to her divorce suit, is a separate,[100] even tho not independent, cause of action; and her death before the final hearing on that cause of action, notwithstanding a decree of divorce having been entered can not be revived by her personal representative.

Where the wife is the defendant in the action, whether such action be one for divorce or annullment, the final decree of divorce or annullment, or a dismissal of such an action abates the wife's right to all future instalments of alimony, and all accrued payments in the absence of a reservation in the decree saving her right to them. The basis for this conclusion is that the entry of the final decree dissolves the relationship upon which status the order for alimony is founded,[101] and therefore any order based upon this relationship will lose its validity.

In the case of *McGrail v. McGrail*[102] there was a motion to

100. At page 204-205: "Alimony is a separate cause of action because by suing for divorce does not entitle the wife to alimony; whether she is entitled to alimony depends on issues separate and distinct from the issue as to divorce and involving for its determination matters of evidence different from, or at least additional to, the evidence required for determination of divorce issue." The court went on to say that the right to alimony is not an absolute right, but rather one which rests in sound judicial discretion.

101. Vice Chancellor Green in 51 N.J.Eq. 537 said: "It is, by its terms, limited in time to the pendency of the action. It necessarily ceases to be operative on a final decree being entered. That result would have been reached in any determination of the cause. If the wife has been successful, it would have been necessary to provide by decree for permanent alimony; "if the husband, the order, of course would not be continued."

102. 51 N.J. 537, 26 Atl. 705 (1893, Ct. of Ch.).

show cause by the plaintiff wife why the defendant husband, should not be committed for contempt for his refusal to pay her alimony. During the pendency of the divorce suit the wife was awarded alimony. On final hearing the husband on his cross bill was granted a divorce for his wife's adultery, and therefore the order to pay alimony was at an end. The wife appealed and the husband was ordered to pay alimony during the pendency of the appeal. The Court of Errors and Appeals reversed the decree of the Court of Chancery, which court had granted the husband a divorce, and the wife urges on the court that by reason of this reversal the original order of the Court of Chancery is revived. The court on page 540 said: "Its order is not revived because alimony pendente lite is limited to pendency of the suit and ceases on final decree being entered. The decision of the Court of Errors and Appeals only reversed the Chancery Court, but did not make any direction as to alimony and this court can only enter decree as made by the Court of Errors and Appeals."

Entry of a decree nisi after final hearing in which the wife, the defendant, was found to be guilty of the charge made against her, is not of itself effective to vacate the original order for alimony. This is so because the marital status still exists, and continues to exist unless the court makes an order to the contrary concerning the alimony award.[103]

103. The Chancellor in Warwick v. Warwick, 76 N.J.Eq. 474, 475, 75 Atl. 164 (1910) said: "While I entertain the view that the decree *nisi* should not be treated as operative of its own force, to discharge the order for alimony, I think it entirely clear that in a case where at final hearing this court ascertains the facts to be of such a nature that alimony *pendente lite* could not have been appropriately allowed had such facts been known to the court when the order for alimony *pendente lite* was made, this court should on application made for relief against the outstanding order terminate such order. . . The application of guilt is final so far as this court is concerned, in the absence of course shown for relief against that adjudication. It seems manifest, therefore, that the order for alimony *pendente lite*, which was made on the assumption of innocence on the part of the wife, should now be terminated, in the absence of any cause shown by her why doubts should be entertained touching the adjudication which was made at final hearing."

The court can if it so desires make the termination of an award of alimony conditional.[104]

The question of revision of the alimony award is within the discretion of the court, to increase or decrease the amount, on application by either party.[105] It is necessary that good cause be shown before the applicant can expect the court to exercise its discretionary power.[106] In the case of *Von Bernuth v. Von Bernuth*[107] the original award of $46 per week included an allowance for the wife and the children. The husband on application for revision of the order showed that the children refused ever to see him. The court while in a sympathetic mood reduced the allowance to $10 per week. From the facts it is not very clear whether the revision of the order in any way affected the amount allowed the wife for her own support.

Whenever the court makes an award of alimony, such decree is not the proper subject for review[108] before the Court of Errors and Appeals.[109]

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104. Watson v. Watson, 2 N.J.Misc. 598 (1924). The court said that if the husband would drop a certain Miss M. K. out of his life entirely, he is entitled to have his wife return to him. The termination of the alimony award is conditional on the husband performing the condition and furnishing his wife with a home commensurate with his income. If he should fail to live up to these two conditions, the wife by application can have the alimony award reinstated

105. Whenever modification of the alimony award is desired, the party asking for such relief should file a petition in which should be set forth the grounds on which the modification is prayed. Then the burden is on the other party to show cause why the order should not be modified. The court may refer it to a Special Master, as done in making an original award of alimony. See Amos v. Amos, 4 N.J.Eq. 171 (1842).

106. Markin v. Markin, 10 N.J. L.J. 301 (1887) The wife in her application for an increase in amount of alimony produced evidence of ill health and consequently unable to work. The application for increase was allowed.

107. 76 N.J.Eq. 200, 74 Atl. 252 (1909).

108. Courts which allow a decree of alimony to be appealed hold it to be a final judgment, and therefore is conclusive on any question, and a decree of this nature possess all the elements of a final judgment. The appellate court only considers the question of the amount awarded.

109. Ternau v. Ternau, 99 N.J.Eq 426, 131 Atl. 887 (1926, Ct. of E. & A.). Chancery Court made an award of alimony of $6 per week, and soon thereafter

Section 2:50-37 of the Revised Statutes, formerly section 25 of the Divorce Act of 1907, says orders for alimony may be revised and altered by the court from time to time as should be required by the circumstances of the case. Although the statute itself is clear and explicit concerning the authority of the court to revise alimony awards, yet the court by its decisions has shown an unwillingness to accept the words of the statute at their face value. As a result the status of accrued alimony can not be said to be entirely settled in New Jersey. In the case of *Wilson v. Wilson*,[110] which was an action for separate maintenance, the court in a dicta on page 45 said: "Orders for alimony pendente lite may be modified from time to time, in the court's discretion, retrospectively as well as prospectively, even to the extent of extinguishing the husband's obligation to pay arrearages." Whereas in the case of *Poeter v. Poeter*[111] the court on page 694 said: "There is a vested right in sums past due and a subsequent order of modification can not operate retroactively to disturb such vested right." Therefore, according to the most recent cases touching on this point, the law seems to be, although not under all circumstances, that accrued alimony has taken on the characteristic of a vested right. The court by holding accrued payments of alimony to be vested is the equivalent to saying that the moment an instalment of alimony becomes due, the court no longer has jurisdiction over

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the husband asked the court to vacate this order. The court denied this motion, as well as one for a rehearing on the application for alimony. The husband appealed challenging the validity of such orders. The Court of Errors and Appeals held the decree of alimony to have been properly made and affirmed it. As for the denial of the rehearing on the decree for alimony, it was held to be within the discretion of the court and not subject to review by this court.

110. 14 N.J.Misc. 33, 181 Atl. 257 (1935, Ct. of Ch.).

111. 15 N.J.Misc. 691, 194 Atl. 792 (1937, Ct. of Ch.). See also to the same effect Cohen v. Cohen, 15 N.J.Misc. 666, 194 Atl. 257 (1937); Flavell v. Flavell, 15 N.J.Misc. 167, 176, 189 Atl. 639 (1937); Balton v. Balton, 86 N.J.L. 69, 89 Atl. 1014, *aff'd* in 86 N.J.L. 622, 92 Atl. 389 (1914); Williams v. Williams, 12 N.J.Misc. 641, 644, 174 Atl. 423 (1934). The court refused to enforce payment of accrued alimony where the husband had been ill, or out of work or out of funds.

the controversy to that extent. This seems to be inconsistent with the theory of alimony, because until final decree or dismissal of the action the court has jurisdiction over both the subject matter of the controversy and the parties thereto. The court by imparting to accrued alimony the characteristic of a vested right is taking away from itself a power which in theory it should have and which in practice it should continue to have throughout the marital litigation. Furthermore, an allowance of alimony is merely the enforcement by a court decree of the husband's former common law duty to support his wife. Therefore, there is no reason why the husband should be placed in a worse position by reason of the divorce action than he would have been in, had no such suit been brought. The decision of the *Poeter* case does place him in a worse position thereby making an alimony award punitive to the extent to which it has accrued, rather than a continuation of his duty to support his wife according to his financial ability.[112]

An award of alimony decreed to the wife by reason of her fraudulent representations as to her financial worth, may be set aside on application by the husband showing the true state of facts. He may also recover back the sums he paid.[113]

Where a wife takes an appeal,[114] whether she was the plaintiff or defendant in the action, and such appeal is in good faith, she is entitled to an award of alimony.[115] The court is governed by the same general principles that guide the trial court in making

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112. UNIVERSITY OF NEWARK L. R. (Spring 1938, p. 33), *Accrued Alimony—Not a Vested Right*, by L. J. Emmerglick.

113. Wittinger v. Wittinger, 13 N.J.Misc. 349, 178 Atl. 97 (1935). The wife withdrew all the funds from the joint bank account, and in her application for alimony said she was destitute. The court ordered her to repay the sums she received from the time of commencement of the payments.

114. The wife has the right to appeal whether her petition was dismissed or relief was granted the husband. See McGrail v. McGrail, 51 N.J.Eq. 537 (1893); Disborough v. Disborough, 51 N.J.Eq. 306 (1893).

115. Disborough v. Disborough, 51 N.J.Eq. 306, 28 Atl. 3 (1893). The husband must pay alimony from the date of filing the notice of appeal by the wife.

an award of alimony. If the wife wishes an allowance of alimony during the pendency of the appeal, she should file such application with the Court of Errors and Appeals. But if the Court of Errors and Appeals is not in session, or if the said court directs the wife to make such application to Court of Chancery, then the latter Court will exercise jurisdiction and make an award of alimony pending the appeal. The power of the Court of Chancery to make an award of alimony pending appeal is not limited to instances where the above mentioned circumstances are present, but rather this power is a general one. Although it has such jurisdiction the Court of Chancery will generally refuse to exercise it in the absence of the special circumstances because an appeal from its order can be taken which will thereby result in a stay of its decree. Furthermore, the case now being in the Court of Errors and Appeals, it is only proper that the application should be made before that court. On the other hand, if the application should be made to the Court of Errors and Appeals, and that Court refers the matter to the Court of Chancery, and the latter Court enters a decree of alimony, its order can not be appealed from because in a sense it is the decree of the Court of Errors and Appeals. One can not appeal an order from the Court of Errors and Appeals. However, if the Court of Errors and Appeals rejects the application for alimony, the Court of Chancery will not exercise its jurisdiction to make an award of alimony if an application is made to it.

In the case of *Robinson v. Robinson*[116] an appeal was filed in

116. 86 N.J.Eq. 165, 92 Atl. 94 (1914). The husband refused to make the payments asserting that the appeal operated to stay the execution of the decree of Court of Chancery. See also Bourgeais v. Bourgeais, 108 N.J.Eq. 598, 156 Atl. 2 (1931). The Court of Chancery awarded the wife $500 a month alimony *pendente lite*. The husband paid one month, and then filed an application for appeal from such order for alimony. The wife then brought contempt proceedings for non-payment of the second month's instalment saying an appeal does not act to stay the order unless the court orders a stay. The court reiterated the rule laid down in Robinson v. Robinson On page 599 the court said "The subject

the Court of Errors and Appeals by the wife to permit the Chancery Court to enforce its decree of permanent alimony pending the appeal. Such order was denied by the Court of Errors and Appeals, but the Court said an allowance of alimony may be awarded pending the appeal, and such order may be made in this court or by application to the Chancery Court. An appeal was taken by the husband in the case of *Burton v. Burton*[117] to set aside an order for alimony made on insufficient notice. The court held that an order for alimony pending appeal will not be set aside on the ground that it was awarded on informal notice to the counsel of the husband, when he had actual notice and a term of court has since elapsed. The court further stated that the point raised by the husband was a mere technicality, and too much time has elapsed from the time the award was made for the court to now take notice of or to permit its order to be the subject of attack.

Whenever an application for alimony pending appeal has been made, the question of the good faith of the wife may be determined by a review of the testimony in the Chancery Court.[118] Where an application for alimony pending appeal has been made, and the court denies such application, a renewal of the application at a subsequent session of the court will not be permitted unless a petition for reargument has been made and the court grants the wife's prayer for reargument.[119]

The means by which an order for alimony pending appeal are enforced are similar to those used in enforcing alimony payments made under the original bill in the Court of Chancery.

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of the appeal is alimony and to enforce such decree of alimony would impair or destroy *pro tanto* so far as the husband is concerned, the subject of the appeal—to wit—the question of the right of the wife to compel the husband to pay her alimony, therefore the wife's application is denied."

117. 18 N.J.L.J. 137 (1894).

118. Cook v. Cook, 18 N.J.L.J. 136 (1895)

119. Cook v. Cook, 18 N.J.L.J. 249 (1895).

The law of alimony, like many other branches of the law, has not remained static but rather has adapted itself to changes with the change of times and the development of the law itself.

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