Case Notes

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CASE NOTES

ANTI-LAPSE STATUTES.—In 1540, four years after the Statute of Uses, the English Parliament enacted the Statute of Wills, which for the first time in history permitted the devise of legal interests in land generally. Since that eventful year, the courts have been faced with intricate questions of construction and interpretation regarding devises of land. By the act of Parliament, section xxxiii of the Wills Act was passed which provided against the technical lapse as at common law. In construing this statute and others similar in their nature, one must bear in mind the two antagonistic forces under which the court had to labor when passing upon a case involving this statute: first, the element of restraint, or stare decisis; second, the liberal movement towards freer alienation of land, increased political rights, and greater social liberty.

At common law, when a testator made a will in favor of some devisee or legatee, in esse, who before the period of distribution had arrived had died, the gift was said to have lapsed. The property would then become intestate, if realty; and if personalty, it would fall into the residuum. In the greater number of cases, this defeated the intent of the testator, since he made a will only for the purpose of preventing intestacy. The state legislatures and the English Parliament, realizing the failure of the law in this respect, passed statutes in their respective jurisdictions tending to change this.

The statutes against lapsed devises and legacies in the respective states are similar in their nature; they differ only as to the degree of consanguinity that is necessary before the statute will be applicable. The courts have been unanimous in deciding that the statute will apply where the intended devisee or legatee is an individual (who meets with the requirements of the particular statute as to consanguinity) who has predeceased the testator. The real controversy arises, however, where the gift is to a class, rather than to an individual. A number of courts,

1 32 Hen. VIII, Ch. 1.
2 Sections xxxiii of the English Wills Act:
   “And be it further enacted that where any person being a child or other issue of the testator to whom any real or personal estate shall be devised or bequeathed for any estate or interest not determinable at or before the death of such person shall die in the lifetime of the testator, leaving issue, and any such issue of such person shall be living at the time of the death of the testator such devise or bequest shall not lapse, but shall take effect as if the death of such person had happened immediately after the death of the testator, unless a contrary intent shall appear by the will.”
3 The Pennsylvania statute is applicable when the claimant is issue of a devisee of legatee who stood in a relationship of brother or sister or of close consanguinity to the deceased; whereas, under the Illinois statute the one claiming must be issue of a child or grandchild of the testator.
including those in England, state that the statute has no application to class gifts; others, including Illinois, state that the statute does apply to class gifts.

The question was directly raised in England by the case of Brown v. Hammond. One Hicks by will bequeathed an estate for life to his widow, but if she were to remarry, the property was to be sold and distributed equally amongst his children, their heirs and assigns as tenants in common. The testator, at the date of his will, had two daughters, one of whom predeceased him, leaving two children surviving. When the widow died, the executor sought to have the will construed to determine whether the deceased daughter's children would take her share. The court had to decide the questions whether there was a gift over to the children upon the death of the widow, and whether the statute had application in order to allow the children of the deceased child to take her share as tenant in common. As to the first question, the court ruled that a gift by implication was created. The court was then faced with the problem whether or not section xxxiii of the Wills Act was applicable. The court sustained the defendant's argument, which was made in the following words: "Under a gift to a testator's children as a class, no child predeceasing the testator can take anything whatever. . . . Such a gift is read as if it had been, 'to such of my children as may survive me.' If so, the child who predeceased the testator is not, in the words of the 33d section, 'a person to whom any real or personal estate is devised or bequeathed.'"

In taking this view of the case, the decision was technically sound for the reason that a lapsed legacy or devise is one which never vests or takes effect, its failure being due to the incapacity or unwillingness of the donee to take before he obtains a vested interest. The donee in the preceding case was in existence and willing to take. The class, which must be ascertained as to its members after the termination of the life estate, take to the exclusion of all others; therefore, the devise or legacy vests in the members of the class and does not lapse with the death of one who might have been a member of the class if he had survived. Upon a strict construction of the statute, it can have no application to gifts to a class.

An argument in favor of the application of the statute in the foregoing case was that the intent of the testator must have been that all the children should take. The court, in disposing of this contention, stated that the testator must be treated as having had that intention, subject, however, to the rule of construction which the authorities had well established, and of which he must

be presumed to have been informed; that is, that under a gift by
his will to his children, those only could take who should be in
existence at the time of his death. Lastly, the court remarked
that it was not the intent of the legislature to have the statute
apply to class gifts; otherwise, they would have expressly so pro-
vided. The same doctrines have been announced in other English
cases.

The English case of *In re Harvey’s Estate*⁶ raised another
question of construction. The testator, Admiral Sir Edward Har-
vey, by his will dated November 10, 1857, bequeathed his residu-
ary personal estate to trustees, upon trust, one-fourth of which
was for the benefit of his daughter and her assigns for life, and
which from and after her death was to go to her lawfully begot-
ten issue who should reach the age of twenty-one. The testator’s
daughter married and had one child, a daughter, who reached the
age of twenty-one and married Alfred Gillow. Mrs. Gillow died
in 1864, intestate, leaving one child who survived the testator,
who died in May of 1865.

The court, citing authority for its argu-
ments,⁷ stated that in
view of precedent established by the earlier decisions it could not
hold that the statute applied. One will notice that in this case
the legacy lapsed absolutely. There was only one member in the
class, and she predeceased the testator. The property, therefore,
became intestate. The court in this case went even further than
the cases it cited as authority and held that the statute had no
application even in a situation where the gift to a class lapsed
absolutely, and the property became intestate. The court re-
marked that if the statute were held to be applicable in this latter
case and not in the prior case, anomalous situations would be
created. If a testator had children, three of whom predeceased
him, and the gift was to a class of children, the survivor would
take to the exclusion of all the others. If, however, all four
predeceased the testator, then all four would take, due to the fact
that a lapse had occurred. It, therefore, was not the intent of the
legislature to create such an aberration; for that reason the stat-
ute had no application. It seems that in the latter case the court
by its own arguments admitted the weakness of its prior de-
cisions, in which the doctrine was laid down that the statute
could apply only in cases where there was a strict lapse at com-
mon law. In the case of *In re Harvey’s Estate* the court was

⁶ 1 Ch. 567 (1893).

⁷ Browne v. Hammond, Johns. 210, 70 Eng. Rep. 400 (1858); Olney v. Bates,
3 Drew. 319, 61 Eng. Rep. 925 (1855). In these two cases there was no strict
lapse as known at the common law. Upon the death of the testator there were
living members to represent the class; thus, the gift did not lapse, but the sur-
vivors took the estate to the exclusion of the members who had predeceased the
testator.
faced with facts that constituted a true lapse, and, notwithstanding this, they decided that the statute had no application. The English view has been accepted in a number of jurisdictions in the United States.\(^8\) Canada has also taken the English view.\(^9\)

Georgia, in the case of *Davis v. Sanders*,\(^10\) decided that where there was a bequest to a class and some of the members predeceased the testator, they could not take by reason of a statute preventing a lapse; but it was further stated by way of dictum that if all of the members of the class were to predecease the testator, the code would be applicable to prevent intestacy. The latter statement was not necessary to the decision, however, for the facts before the court presented an issue only where the one member of the class predeceased the testator, other members of the class outliving him.

An interesting question was presented in the case of *Young v. Robinson*.\(^11\) The attorney for the petitioners argued that because of the broad language used in the statute,\(^12\) it must have been the intent of the legislature to have the code apply to a class gift. The court held, however, that where there were members of a class living at the death of the testator, notwithstanding that some members of the class may have predeceased him, the statute will have no application for the reason that there has been no strict lapse. It was not the intent of the legislature to change or alter any of the existing rules in the construction of wills, but simply to provide for cases where a common law lapse occurred.

It will be noticed that in all of the past cases the courts have strictly interpreted the use of the word "lapse." In a limited number of states where the courts have given a strict interpretation to the statutes, the legislature by subsequent amendments has provided expressly that anti-lapse provisions were to apply to class gifts. Such is the situation in Kentucky and Georgia.

In other states, by a liberal construction, such statutes are said to be applicable to class gifts. In 1872, the Illinois legislature enacted and approved an act in reference to the law of

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\(^8\) Young v. Robinson, 11 Gill and J. (Md.) 328 (1840); Trenton Trust & Safe-Deposit Co. v. Sibbitts, 62 N. J. Eq. 131, 49 A. 530 (1901); Security Trust Co. v. Lovett, 78 N. J. Eq. 445, 79 A. 616 (1911); Davis v. Sanders, 123 Ga. 177, 51 S. E. 298 (1905).

\(^9\) Clark v. Sinclair, 2 Ont. L. Rep. 349 (1901); Re Williams, 5 Ont. L. Rep. 345 (1903); In re Clark, 8 Ont. L. Rep. 599 (1904).

\(^10\) 123 Ga. 177, 51 S. E. 298 (1905).

\(^11\) 11 Gill and J. (Md.) 328 (1840).

\(^12\) Md. Rev. Stat., Ch. 295 (Act of 1832):

"Be it enacted ... That all devisees or legatees shall be deemed taken to be within the provisions and true intent and meaning of said 4th section of the act of 1810 who shall be or who are actually and specially named as devisees or legatees, or who shall be mentioned, described, or in any manner referred to, or designated or identified as devisees or legatees in and by the will."
descent, a part of which made provision against lapse of a devise or legacy. One of the earliest cases in Illinois, *Rudolph v. Rudolph*, raised the statute. The testator by his will provided that on the termination of a life estate which he gave his wife, his property was to be divided equally among his children. Three children survived the testator. A fourth, after the will was executed but before the death of the testator, died, leaving two children, who now claimed their parent's share of the estate by reason of the Illinois statute. The court stated that the statute was remedial in its nature; that as such, it should be interpreted broadly; that it must be presumed, in the absence of an intent to the contrary, that the will was made in view of statutes then existing, and that the statutory provisions were intended by the testate to prevail in case of a contingency not provided for in the will.

In *Kehl v. Taylor*, the testator, William M. Miller, had five children during his life, three of whom died prior to the making of the will in question. Two of the children died intestate leaving no child, or children, or descendants thereof. The third, Nancy Bell Walton, died August 19, 1886, leaving her surviving a daughter, the appellant. The wife of the testator and two daughters were living at the time the will was executed on March 29, 1888; the wife has since died, however. By the third clause of the will, the testator devised and bequeathed to his wife certain lands for and during her natural life, and at her death to his children in fee simple absolute, share and share alike. The question presented was whether the defendant, grandchild, could take her parent's share of the estate by reason of the statute when in fact her parent died before the will in question was executed. The court ruled that the grandchild could take her parent's share. The court said: "We think the construction most in harmony with both the spirit and intention of the act as well as the policy of our law is that which allows all devisees or legatees of the class named in the statute to take, irrespective of the time of their death, either before or after the time of the execution of the will, so long as their death occurred prior to that of the testator, leaving issue, and no provision is made for such contingency. Justice and equity would seem to require that

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13 Smith-Hurd's Ill. Rev. Stat. (1933), Ch. 39, par. 11:
"Whenever a devisee or legatee in any last will and testament, being a child or grandchild of the testator, shall die before such testator, and no provision shall be made for such contingency, the issue, if any there be, of such devisee or legatee, shall take the estate devised or bequeathed as the devisee or legatee would have done had he survived the testator, and if there be no such issue at the time of the death of such testator, the estate disposed of by such devise or legacy shall be considered and treated in all respects as intestate estate."

14 207 Ill. 266, 69 N. E. 834 (1904).
15 275 Ill. 346, 114 N. E. 125 (1916).
all children, in the absence of special circumstances, should in-
herit equally from their parents. . . .” The court, continuing,
ruled that the evident purpose and policy of the act and the
mischief intended to be remedied must be taken into considera-
tion. The statute is remedial and is to be liberally construed; it
is to apply, notwithstanding that the death of the proposed
legatee or devisee who was a member of the class occurred before
or after the date of the execution of the will.

The court remarked that all men are presumed to know the
laws and to make their wills with its essential provisions in view.
The majority of the states follow the Illinois view in cases where
the death of the issue occurs after the making of the will. The
courts favoring this view base their arguments on that of public
policy and a liberal construction of a remedial statute. Illinois
stands in the minority, however, on the position that the stat-
ute has application regardless of when the member of the class
died, whether it be before or after the making of the will. In
taking this position, the court has probably gone too far in inter-
preting the legal effect of the statute.

The latest case construing the Illinois statute was Schneller v.
Schneller. John Schneller willed an estate to his three children,
Melchior, Christian, and Marie Schneller, or the survivor of them,
to be distributed share and share alike. Christian Schneller pre-
deceased the testator leaving the plaintiff, a daughter, who now
claims that by reason of the statute she is entitled to the share
her parent would have taken had she survived the testator. The
attorneys for the defense contended that by the use of the words
“survivor or survivors,” the case was taken out of the statute;
they contended that this amounted to an expression of intent on
the part of the testator not to have the statute apply. The court
decided, however, that after looking at all the evidence and con-
struing the whole will, the testator did not show sufficient intent
not to have the statute apply; the mere use of the technical
phrase “survivor or survivors of them” was not sufficient to
show that the testator did not want the statute to apply.

Massachusetts had to construe its act in the case of Galloupe
v. Blake. The executors petitioned for instructions. The
testator bequeathed to his cousins, C. Mason and C. Frothing-
ham, the son and daughter of I. Frothingham or the survivor
of them, $5,000 in equal shares. The two legatees in question
predeceased the testator. The appellants, who were children of
deceased devisees and legatees, sought the share that their
parents would have received had they survived the testator. The
court dispensed with one question by saying that the gift was

\(^{16}\text{356 Ill. 89, 190 N. E. 121 (1934).}\)

\(^{17}\text{248 Mass. 196, 142 N. E. 818 (1924).}\)
to a class; the individualism was used merely as a means of identification; the word "cousin" created the collective element making it a class gift. As to the application of the statute, the court stated that where a gift was made to a class of relatives of the testator, the statute operated to change the rule of the common law that a class is to be determined as of the time of distribution; that where a gift was made to a class of relatives and one of them died before the testator, the issue of such deceased person who would otherwise have been a member of the class took that person's share. The same reasons were expressed in other cases.\textsuperscript{18}

\textit{In re Nicholson's Will},\textsuperscript{19} an Iowa case, decided that the statute against lapse applied to a gift to a class; the court based its argument on the position that since the statute was remedial it should receive a liberal construction in order to advance the remedy and suppress the mischief. Since a will speaks from the day of the testator's death, the number of the class, where the devise is to a class, is prima facie to be determined upon the death of the testator.\textsuperscript{20} But this is not an unyielding rule even at common law. The will itself may indicate a contrary intent, and if that be so, this intent will be adopted and enforced.\textsuperscript{21}

Where, however, there is a statute against lapse in the state, that is sufficient to show a contrary intent, and such class will be determined at the time the will is made.

It is clear that the statute and the conventional rules regarding gifts to a class are to a large extent incompatible. Presumably, at common law, one reason why there could be no other result than to hold to the rule of construction adopted for class gifts was the fact that there could be a gift only to those alive at testator's death, no other results were possible; dead children could not take, the will was ambulatory, and there was no provision for substitution. Under the statutes, while dead children still cannot take, their issue can and do. Therefore, we must presume that the testator knows of the statute. The statute requires us to presume (in the absence of a provision to the contrary) that the testator would wish the legatee's issue to take. The common law rule thus appears to be a rule of construction based on considerations which no longer exist. Under a statute, a testator who says "my child," is taken now to mean "my

\textsuperscript{18} Bray v. Pullen, 84 Me. 185, 24 A. 811 (1892); Clifford v. Cronin, 97 Conn. 434, 117 A. 489 (1922); Missionary Society v. Pell, 14 R. I. 456 (1884); Moore v. Weaver, 82 Mass. 305 (1860).

\textsuperscript{19} 115 Iowa 493, 88 N. W. 1064 (1902).

\textsuperscript{20} Ruggles v. Randall, 70 Conn. 44, 38 A. 885 (1897); Richardson v. Willis, 163 Mass. 130, 39 N. E. 1015 (1895).

\textsuperscript{21} In re Swenson's Estate, 55 Minn. 300, 56 N. W. 1115 (1893); Bailey v. Brown, 19 R. I. 669, 36 A. 581 (1897).
child or his issue, if any, should my child not survive me," it
becomes illogical and almost ridiculous to assume that under
the same statute a testator who says "my children" means "only
such children as shall survive me," instead of "my children or
their issue, if any, should any of my children not survive me."
The reason for the rule at common law being abrogated by the
statute, the rule itself should cease.

W. J. J. WAHLER

MAY ALIMONY BE GARNISHED OR ATTACHED AS A DEBT?—
Until about five years ago, the courts were in hopeless conflict
on the question whether alimony may be garnished or attached
as a debt. It is surprising that in a day of manifold increase in
the number of divorces and time of depression, with its accom-
panying lack of purchasing power, there have not been more
decisive cases on the question.

A specific problem is whether alimony, past due or to become
due in the future, in the hands of the husband, may be subject
to garnishment or attachment as a debt by the wife or by cred-
itors of the wife, who have furnished necessaries to her, subse-
quent to the decree, with or without reliance on such alimony.

Several classes of cases, which apparently belong to the same
category and have often been cited by the courts in determining
the question—to the great confusion of the profession—when
closely inspected reveal that they have added complications which
take them out of the class of cases mentioned. Of such nature
are the cases where the wife’s creditors are seeking to attach
alimony for debts incurred prior to the divorce decree, the lead-
ing case on which is Romane v. Chauncey;¹ cases where the debts
were incurred for general expenses, not necessaries, after the
divorce decree; and cases where debts were incurred for neces-
saries furnished to the wife, but the alimony was intended for
the maintenance of wife and children, such as the case of Van
Valkenburgh v. Bishop.²

The entire confusion seems to hinge on the definition of the
word "debt," and whether alimony is a debt owing or to become
owing to the wife. The Supreme Court of Illinois has defined the
action of debt as follows: "The action of debt lies for the recov-
ery of a sum certain, whether arising by contract or imposed by
law, and lies for the recovery of any liability when the sum is
certain or is capable of being readily reduced to a certainty.³³

² See also Fickel v. Granger, 83 Ohio St. 101, 53 N. E. 527, 32 L. R. A. (N. S.)
² 70, 21 Ann. Cas. 1347 (1910); Kingman v. Carter, 8 Kan. App. 46, 54 P.
³ 13 (1898).
⁴ 164 N. Y. S. 86 (1917).
⁵ People v. Dummer, 274 Ill. 637, 113 N. E. 934 (1916).
The element of certainty or ability to reduce to a certainty is essential to the action of debt.

A recent case which brings the question to the fore is *Emigrant Industrial Savings Bank v. Lehman.* In this case, the alimony was intended for the support of the wife and children, and the creditors of the wife were seeking to attach the alimony for expenses incurred for the benefit of the wife and children. The City Court refused to take jurisdiction, requiring the creditors to file a bill in equity in the Supreme Court, which had issued the divorce decree, saying that that court was better informed as to the nature of the decree and the amounts intended for the support and education of the children and how much was awarded for the maintenance of the wife. In other words, the court refused to attach or garnishee the alimony, but required the creditors to file their bill in equity, thus permitting the court of equity to pass on the reasonableness of the charges, in consonance with the entire purpose and object of alimony. The court in effect said that alimony is not a debt within the purview of the garnishment statute.

It is upon the question of whether alimony is a debt which may be attached that the courts were until recently in hopeless conflict, although in many states the garnishment statutes are alike. We may be aided in the understanding of the many contrary decisions if we can conceive of the word “debt” as having no fixed legal meaning. Alimony is sometimes said to be a debt and sometimes not a debt. The word has several recognized meanings which vary greatly according to the subject matter and language used in connection with it. But the courts in their contrary decisions do not refer to the various meanings of the word “debt” but attempt to reconcile the cases by pure reasoning.

In substance, the argument on the one side that alimony may be attached or garnisheed is that alimony past due or to become due is as much a debt of record until the decree has been recalled as is any other judgment for money. This is supported by a large number of the older cases.5

The argument on the other side is that the allowance of alimony is not in the nature of an absolute debt, arising out of contract, but is a penalty imposed for a failure to perform a duty to support, and that it is changeable even when in arrears, upon showing of good cause, thus injecting an uncertainty into

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4 270 N. Y. S. 589 (1933).
5 Barber v. Barber, 21 Howard 582 (1858); Conrad v. Everich, 50 Ohio St. 476, 35 N. E. 58 (1893); Kelso v. Lovejoy, 76 Ohio St. 598, 81 N. E. 1189 (1905); Chase v. Chase, 105 Mass. 385 (1870); Burrows v. Purple, 107 Mass. 428 (1871); Garnishment of Alimony by Wife's Creditor, 8 Or. L. Rev. 300 (April, 1928).
the amount. This view seems to be gradually gaining support from the more recent decisions. 6

There are two phases of this question, however, upon which the courts seem to be in uniformity. That is, that alimony is not such a debt as is provable in bankruptcy, 7 nor is it such a debt within the meaning of that term as used in the Constitution prohibiting imprisonment for debt. 8 In these decisions, the courts seem to be very clear and firm in their distinctions between alimony and the ordinary debt, yet some of the very same courts will allow alimony to be attached as any ordinary debt, which bears out the suggestion that the word “debt” may have several meanings.

During the past five years of the depression, the courts have had numerous occasions to pass on the question of whether alimony is such a debt as is provable in bankruptcy or a debt for which the Constitution prohibits imprisonment. In these decisions, the firm stand taken by the court and the strong language used in differentiating alimony from the ordinary debt, in addition to the cases directly in point, where attachment or garnishment was refused, indicate a trend away from the old doctrine that alimony may be attached or garnisheed as any common debt. The states of Iowa and New York have furnished excellent examples of the development of this phase of the law. A short review of the cases in these two states will best illustrate the variable attitudes of the courts on this interesting question and will serve to indicate the trend of recent decisions.

One of the first of the Iowa cases bearing on this question is Daniels v. Lindley, 9 in which the court said that the claim of

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9 44 Iowa 567 (1876).
CASE NOTES

wife for alimony is not in the nature of a debt, and she is not a creditor of the husband. The opinion indicates that alimony is not a debt but does not squarely decide that question.

Four years later, in 1880, the court said in Whitcomb v. Whitcomb that the judgment for alimony is but a debt and the plaintiff is not entitled to rights greater than those of the holder of any other judgment.

But, in Picket v. Garrison, decided in 1888, the court supported Daniels v. Lindley and said that alimony is not a debt in the ordinary term, yet it is a right which becomes vested and cannot be defeated by a fraudulent conveyance.

However, it is in the later cases that the confusion is distinctly brought out. In Schoonley v. Schoonley, the question came squarely before the court, and in a four to three decision the court decided that alimony reduced to judgment for a fixed amount was a debt and subject to garnishment. The minority opinion presents a learned and exhaustive study in detail, defending the proposition that alimony is not such a debt as may be attached in a common action of debt. The majority opinion was followed substantially in Keyser v. Keyser, where the court regarded alimony as a rather stable sum, which could only be modified on showing of substantial change. By this time, the opinion in Iowa in favor of attaching alimony as a debt had become so strong that one commentator asserted that it took a statute to avoid the result of Schoonley v. Schoonley.

But in Malone v. Malone, decided in 1927, the trend seems to have started in the other direction. The court in that case decided that there was nothing to garnishee if notice was served before the alimony was due, but did not discuss whether alimony was a debt that could be garnisheed. The Iowa court went a step further in this direction when it decided in Peck v. Peck that money payable by a husband to the wife under a divorce decree solely for support of minor children was not subject to garnishment for wife's personal debts.

In the same year, the court decided another case which sup-

10 52 Iowa 718, 2 N. W. 1000 (1880).
11 76 Iowa 347, 41 N. W. 38 (1888).
12 44 Iowa 567 (1876).
14 193 Iowa 16, 186 N. W. 438 (1922).
16 184 Iowa 835, 169 N. W. 56 (1917).
18 207 Iowa 1008, 222 N. W. 534 (1929).
ported *Malone v. Malone* and held that alimony instalments past due and those which were due on the day that garnishment was served might be attached, but not those which were not yet due. The decision seems to indicate in this case that alimony not due is uncertain, being conditioned upon the event that the wife be living on the day that the instalment is due.

However, in 1931, in a strong and decisive opinion, the court clearly took the stand that unpaid alimony in the hands of the husband's executor, due the divorced wife was not subject to garnishment, although the creditors' judgments were for necessities furnished to the wife for support and maintenance after, and in reliance on, the divorce and alimony decree; and by this opinion expressly overruled *Schoonley v. Schoonley* and adopted the minority opinion in that case. The court further held that alimony was not a property right but a personal right for support, not assignable by the wife to another, nor capable of enjoyment by her in anticipation, citing *Lynde v. Lynde*, the leading case on this question. The circle was thus completed and the court was again, in part, following *Daniels v. Lindley*, decided in 1876.

The development of the law on this subject in New York is equally interesting. In an early case decided in 1892, alimony was sought to be attached for debts created prior to the decree. The court, in a long and learned opinion, refused to attach the alimony and proceeded to explain the differences between alimony and the ordinary debt. But what was said about debts accruing subsequent to the decree was mere dictum, as it was not necessary to the decision in that case. About eleven years later, the court handed down a decision in *Livingston v. Livingston*, which contained an indication that alimony was a debt. This was later contradicted in *Van Valkenburgh v. Bishop*.

In *Zwingmann v. Zwingmann*, decided in 1912, a retired policeman moved from the state to avoid liability on a judgment for alimony. A state statute made the pension fund exempt from attachment for debt, but the court permitted the fund to be sequestered for the payment of alimony.

In the same year, the court said in *West v. Washburn* that

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20 204 Iowa 625, 215 N. W. 625 (1927).
21 Malone v. Moore, 212 Iowa 58, 236 N. W. 100 (1931).
22 184 Iowa 835, 169 N. W. 56 (1917).
24 44 Iowa 567 (1876).
27 164 N. Y. S. 86 (1917).
28 134 N. Y. S. 1077 (1912).
29 138 N. Y. S. 230 (1912).
an attachment in a proceeding in tort was improper, such attachment being proper only in the case of a claim for necessaries. A few years later, in Van Valkenburgh v. Bishop,\(^{30}\) it was decided under the Code Civil Practice Act, paragraph 1391, providing execution may issue against wages, debts, etc., of a judgment debtor, that alimony due the judgment debtor was not a debt subject to execution, especially where it was partly intended for support of the debtor's daughter. This was followed in a measure by Maurice Baskin and Company v. Howe,\(^{31}\) in which a creditor of the wife was seeking to attach alimony awarded for the support of wife and children. The court refused to permit the attachment on the ground that the creditor had failed to show the portion of the alimony intended for the wife. The court went on to say that only that portion of the alimony allotted to the wife which was not needed for her support might be applied to a judgment against her for necessaries.

Two years later, in Anna Tappe, Inc. v. Battelle,\(^{32}\) the court said that alimony could not be attached for claims antedating the decree, but that it could be attached for claims arising subsequent to the allowance of alimony, particularly for necessaries, and continued to say that equity may interfere in a proper case to the extent necessary to protect sustenance of wife or children against claims of judgment creditors arising subsequent to the allowance of alimony. It is this last provision which persuaded the court in the recent New York case, Emigrant Industrial Savings Bank v. Lehman\(^{33}\) to refuse attachment of alimony on the ground that if equity may be resorted to for protection, the judgment creditor should file his bill in equity in the first instance and ask that some part of the alimony be applied upon his judgment for necessaries. Thus, the court refused to attach alimony as a debt but left the judgment creditor to his remedy in equity.

Even the Supreme Court of the United States has been guilty of some degree of variableness upon the question of the definition of the word "debt." In Barber v. Barber,\(^{34}\) decided in 1858, the court said that each instalment of alimony, decreed to a wife in a divorce of separation from bed and board, was, as it fell due, as much a debt of record, before the decree was recalled as was any other judgment for money. The case includes a dissenting opinion by Mr. Justice Daniel on this very point. Nearly half a century later, the court in deciding that alimony, past due or to

\(^{30}\) 164 N. Y. S. 86 (1917).
\(^{31}\) 233 N. Y. S. 648 (1929).
\(^{32}\) 249 N. Y. S. 589, 140 Misc. 49 (1931).
\(^{33}\) 270 N. Y. S. 589 (1933).
\(^{34}\) 21 How. (U. S.) 582 (1858).
become due, is not provable in bankruptcy, in *Audubon v. Shufeldt*, 85 said:

"Alimony does not arise from any business transaction but from the relation of marriage. It is not founded on contract, express or implied, but on the natural and legal duty of the husband to support the wife. The general obligation to support is made specific by the decree of the court of appropriate jurisdiction. Generally speaking, alimony may be altered by that court at any time, as the circumstances of the parties may require. The decree of a court of one state, indeed, for the present payment of a definite sum of money as alimony, is a record which is entitled to full faith and credit in another state, and may therefore be there enforced by suit. . . . But its obligation in that respect does not affect its nature. In other respects, alimony cannot ordinarily be enforced by action at law, but only by application to the court which granted it, and subject to the discretion of that court. Permanent alimony is regarded rather as a portion of the husband's estate to which the wife is equitably entitled, than as strictly a debt; alimony from time to time may be regarded as a portion of his current income or earnings; and the considerations which affect either can be better weighed by the court having jurisdiction over the relation of husband and wife than by a court of a different jurisdiction.

"The allowance of alimony is not in the nature of an absolute debt. It is not unconditional and unchangeable. It may be changed in amount, even when in arrears, upon good cause shown to the court having jurisdiction."

However, in 1910, in the case of *Sistaire v. Sistaire*, 86 the Supreme Court of the United States reversed the Supreme Court of Connecticut and sustained *Barber v. Barber* 7 and held that past due instalments of alimony are as much a judgment of record as any other, and a foreign state may issue a judgment on such instalments of alimony as they fall due, such judgment being entitled to recognition in every other state under the full faith and credit clause of the Constitution. The court considers the status of past due instalments in the state where decree is rendered as to whether they are absolute in terms or conditional. If they cannot be modified after they have accrued, the decree of the court of equity may be given effect as a judgment debt.

The English cases on this subject seem to show more consistency. As early as 1884, no action was allowed upon an order of alimony. 88 Shortly thereafter, alimony was held not to be

86 218 U. S. 1, 30 S. Ct. 682 (1910), reversing 80 Conn. 1.
87 21 How. (U. S.) 582 (1858).
such a debt as was provable in bankruptcy.\textsuperscript{39} In 1907, the King's Bench held that no action would lie in the King's Bench Division to recover arrears under an order of the Probate and Divorce Division, because such an order was not a final and conclusive judgment upon which an action of debt to enforce it might be maintained.\textsuperscript{40} This was followed in the recent case of \textit{Morton v. Brinsley},\textsuperscript{41} where a wife attempted to collect past due alimony. The court held that the action of debt would not lie because the judgment was not final and conclusive, and in order for the wife to recover, she must follow the Debtor's Act.

The question in issue has never been decided by the Supreme Court of Illinois. In an early appellate court case,\textsuperscript{42} decided in 1888, the court permitted an action of debt to be brought by a mother for alimony past due intended for the support of the child. That is the only expression of the courts of review in Illinois on alimony payable in instalments. It is singular to note that although some courts have had several opportunities to express themselves on this interesting issue, it has never reached the Supreme Court of Illinois.

However, in \textit{Dow v. Blake},\textsuperscript{43} an action of debt was permitted for alimony decreed by a Wisconsin court, but such alimony was rendered in favor of the wife as her full and final share and allowance of the property of the husband, subject to change only in time and manner of payment, and not in amount. The court laid particular stress upon the fact that it was a final decree, especially as to amount.

In two cases,\textsuperscript{44} in which the Supreme Court of Illinois held that alimony was not such a debt as was provable in bankruptcy, and that imprisonment for non-payment thereof did not violate the constitutional rights preventing imprisonment for debt, the court made a sharp distinction between alimony and the ordinary debt and declared that the liability to pay alimony was not founded upon a contract, but was a penalty imposed for a failure to perform a duty.

In the light of the recent strong and persuasive opinions of the New York and the Iowa courts,\textsuperscript{45} in addition to the several

\textsuperscript{40} Robbins v. Robbins, [1907] 2 K. B. 13.
\textsuperscript{41} [1933] Ch. 669.
\textsuperscript{42} Lancaster v. Lancaster, 29 Ill. App. 510 (1888).
\textsuperscript{43} 148 Ill. 76, 35 N. E. 761 (1893).
\textsuperscript{44} Deen v. Bloomer, 191 Ill. 416, 61 N. E. 131 (1901); Welty v. Welty, 195 Ill. 335, 63 N. E. 161 (1902).
\textsuperscript{45} Emigrant Industrial Savings Bank v. Lehman, 270 N. Y. S. 589 (1933); Malone v. Moore, 212 Iowa 58, 236 N. W. 100 (1931).
other decisions directly in point, the trend seems to be away from the attachment or garnishment of alimony as a debt, not with the intent to deny relief to creditors, but to require them to apply to the court granting the alimony, thus permitting the court to pass on the reasonableness of their claims and to provide adequate protection to the various beneficiaries of the alimony.

R. A. REMPERT

Festervand v. Laster, 15 La. App. 159, 130 So. 634 (1930); Wright v. Wright, 93 Conn. 296, 105 A. 684 (1919).