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**POWER TO MODIFY OVERDUE INSTALLMENTS  
OF ALIMONY**

*Winkel v. Winkel*<sup>1</sup>

The wife instituted suit for separate maintenance or alimony. The trial court awarded her a set weekly amount until further order of the court, beginning from the time that the wife should convey certain property to the husband. The conveyance was not obtained until several years later, and the husband made no payments during that time. Subsequent to this, the husband did not pay the weekly amounts but did pay the wife a weekly rental for the use of certain of her property, which rental was in

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<sup>1</sup> 178 Md. 489, 15 A. (2d) 914 (1940).

excess of the alimony payments. When this rental arrangement came to an end the wife filed a petition for an increase in the amount of her award. After protracted litigation, the original petition in the present case was filed by the wife, on October 5, 1937, for an increase in alimony, and also for the arrears due her through her husband's default. The husband's answer and demurrer were overruled.<sup>2</sup> The Chancellor in his decree reduced the amount of alimony as of October 5, 1937 (the date of the original petition), and computed the amount of arrears due the wife from the time of the conveyance of the property mentioned in the original decree to the date of the filing of the petition in question. The Court of Appeals affirmed the order of the Chancellor in lowering the amount of the award, and reduced the amount of past-due installments to exclude the period of time during which the rental payments were being made.

In the instant case the Court was faced with the problem of modification of installments of alimony which were in arrears and which had accrued during a period prior to the time of the filing of the petition by the wife. This is a problem that had not been directly faced or ruled on before by the Maryland Court. The two conflicting theories to be balanced are the protection of the finality of the wife's decree; and the possible protection afforded the husband, when financially unhealthy, from a rapacious wife.

The reason for reducing the amount of the award of past-due installments was, as stated by the Court, that during the interim period between the date when the alimony first became due, upon the conveyance of the property by the wife (which was a condition precedent to the effectiveness of the decree), and the cessation of the rental arrangement, the husband was paying a rental which was not proportionate to the value of the property, and which was over twice the amount of the alimony award. Although it was not paid as alimony, the wife, in suing for an increase in alimony on cessation of these payments, made no mention of a claim for this apparent arrearage in alimony. This seemed to indicate that the wife had waived payment of the then accrued installments, or had accepted the rent in lieu of them.

The decree as actually handed down seems to be in accord with the past decisions of the Court. The result

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<sup>2</sup> This ruling was affirmed on the earlier appeal of this case, 176 Md. 167, 4 A. (2d) 128 (1939).

was only to modify installments not technically overdue; only installments due from the time of the filing of the petition were modified. This was done because the decree expressly stated that the amounts were payable "pending further order of the Court", and the wife, by filing her petition, put the matter back into the hands of the Court, which, after its consideration, can make its modification effective at any time after the date of the petition. This was really not a question of modifying past-due installments, but a question of when the decree of the Court should take effect—retroactively from the beginning of the litigation or the filing of the petition, or from the time of handing down of the final order. In deciding that the Chancellor could make his order effective as of the time of the filing of the petition the Court would seem to have ample authority in Maryland (and elsewhere). However, before making these alterations in the order of the Chancellor, the Court went thoroughly into the question of a flat modification of the past-due installments of alimony, those due prior to the time of the filing of the petition by the wife. On this point the Court stated that, in conformity with previous Maryland cases and in line with Maryland domestic law, past-due installments were subject to modification, that is capable of being decreased and rescinded. It further stated that there was no law contrary to this in Maryland and that such would have been done in the present case had not the husband shown that he did not deserve such special treatment by the Court, as he was in arrears not because of unfortunate financial circumstances but because of his own contumacy. Thus, on the basis of *Skirven v. Skirven*,<sup>3</sup> the Court refused to accord him this special treatment and left the overdue alimony unmodified, although it asserted the power to do so in a proper case.

The Court, in reaching this rather new conclusion, cited numerous cases, but seemed to base its conclusion mainly on the *Braecklein* case,<sup>4</sup> the *Clarke* case,<sup>5</sup> the second *Marshall* case<sup>6</sup> and a few others.

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<sup>3</sup> *Skirven v. Skirven*, 154 Md. 267, 140 A. 205 (1928).

<sup>4</sup> *Braecklein v. Braecklein*, 136 Md. 32, 109 A. 546 (1920).

<sup>5</sup> *Clarke v. Clarke*, 149 Md. 590, 131 A. 821 (1925).

<sup>6</sup> *Marshall v. Marshall*, 164 Md. 107, 163 A. 874 (1932). The other (first) *Marshall* case, *Marshall v. Marshall*, 162 Md. 116, 59 A. 269 (1932), involved the question whether, after awarding a wife an *a vinculo* divorce without any order for alimony, the court could later modify the decree by ordering alimony to be paid.

The main pillar of the theory of the law pronounced is the *Marshall* case.<sup>7</sup> In this case the parties entered into an agreement, which was incorporated into the decree, that the husband pay the wife a certain sum until her death or remarriage, and in event of either, then to the children until their death or marriage. After several years the husband ceased payments because of financial inability, but he later came into more money and the wife obtained an order for the arrears. The Chancellor then rescinded this order and disallowed the wife's claim for the payments in arrears and relieved the husband of liability to pay temporarily. On appeal the Court of Appeals reversed this order of the Chancellor, the reversal being based on the ground that the payments in this case were not "true" alimony, not being of such nature as to answer to the definition of alimony in Maryland. However the Court, in citing this case in the *Winkel* opinion, interprets this reversal of the order of the Chancellor because not "true" alimony as being an approval in general by the Court of the attempt of the Chancellor to modify past-due installments. The Court states it to be the "negative form" of this action. It would seem odd that precedent should be found in a reversed lower court case, merely because the reversal was not on the particular point, when the same point was not brought up in that appeal. It is to be noted that the amount of the award in the *Marshall* case included maintenance for children. Thus, as to the entire amount, the defect of not being true alimony would be involved, whereas the question as to modification of past-due installments of alimony would cover only that portion of it which was to be treated by the parties as alimony. It is a long jump to say that the Court, by holding that the Chancellor could not modify past-due installments of *contract* alimony and maintenance, does hold that the Chancellor *can* modify past-due installments of *true* alimony.

The case of *Fairbanks v. Fairbanks*,<sup>8</sup> cited by the Court as the present method of suspending payments past-due, and as bringing out the point that if the Court can suspend installments it can alter them, does not support the instant decision. There the Chancellor did hold the arrears "in abeyance" but, as was stated,<sup>9</sup> the husband was with-

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<sup>7</sup> *Marshall v. Marshall*, 164 Md. 107, 163 A. 874 (1932).

<sup>8</sup> *Fairbanks v. Fairbanks*, 169 Md. 212, 181 A. 233 (1935).

<sup>9</sup> *Fairbanks v. Fairbanks*, 169 Md. 212, 220-221, 181 A. 233 (1935).

out property and the wife's only present remedy was to have the husband up for contempt and the order did not preclude the wife from filing such a petition. An alteration or flat modification of the amount due, by the Court, would have precluded her from recovering these amounts at any future time.

The Court cites the *Braecklein* case<sup>10</sup> as further authority for the power to modify, by rescission or reduction, an alimony decree, even after enrollment and with no express reservation contained in the decree. In that case the lower court entered a decree for the wife allowing her \$18 weekly, but the husband was to be credited for such sums as the wife received from certain joint property. Later, after the enrollment of this decree, the lower court ordered that that part pertaining to the payment of alimony be rescinded and vacated. The Court of Appeals affirmed the power of an equity court to modify "that part of a decree providing for alimony, whether the decree grants a divorce a mensa or a vinculo". But the Court noted that the alimony granted was half of the alleged income from the joint property and presumed that the award had been incorporated to assure the obtention of this amount by the wife, and to keep the matter under the control of the Court until the exact income could be determined. It then remarked that probably the Court rescinded the order to prevent the wife from receiving over half of the income if the amounts decreased. However, it remanded the case to give opportunity to find if such presumptions were true. This is probably the one case that gets close to supporting the stand of the Court in the instant case, because a conditional approval was there given to the rescission of an alimony decree. But the Court, in considering this case did not treat the decree vacated as one of "true" alimony, but really one based on the division of property, with a decree directed at the husband so that this division could be effectuated more readily. In any other set of facts the result could not stand up. Were it not based on obligations already legally enforceable and which continued after the rescission, would it not cause the wife to be indebted to the husband for payments already made? Certainly the Court would not alter any decree to a degree that entered into the minus category, and which would overstep any of the reasoning favoring alterations by the courts. Obviously this

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<sup>10</sup> *Braecklein v. Braecklein*, 136 Md. 32, 109 A. 546 (1920).

decision can only be cited as authority, if at all, as the case was remanded, for the same peculiar facts as it had.

The *Clarke* case<sup>11</sup> was also quoted at length in the instant case as to the power of the equity courts to exercise a continuing jurisdiction over alimony, with the power to increase or decrease. This case is merely a short case overruling the lower court in sustaining a demurrer to the petition of the wife asking that alimony be granted. Here the divorce was a mensa and alimony had been refused in the original decree. This decision reaffirmed the continuing jurisdiction of the courts in an a mensa case whether or not alimony had been granted. But there was not a hint of possible retroactive effect in the decree.

As a heading for a review of the cases as to this point the Court states the conclusion written by Judge Offutt in the *Knabe* case to be the conclusion reached by this Court:<sup>12</sup>

“So the law of this State now is that where alimony is allowed in a decree awarding a divorce a mensa or a vinculo, or in a decree awarding alimony alone, the jurisdiction of the court as to alimony is continuing, whether reserved or not, and so much of the decree as relates to the allowance of alimony may be from time to time changed and the allowance increased or decreased, or otherwise modified, so as to conform to the changed conditions.”

A long line of cases is cited as approving. There can be no doubt that this is the law of Maryland and that it was correctly applied in the *Knabe* case—where it was referring to future alimony. But it is not authority for any order to modify past due installments. The language is obviously only intended to apply to future installments. What would be the purpose of stating that past due installments can be increased? What would be the purpose of increasing them? Obviously were such considered seriously, where changed conditions are such that an increase in alimony is desired and needed, a party asking for an increase in past-due installments would be admitting laches and basing the request thereon. However, such statements as the above can not be claimed to be any authority for the present question, they were made with-

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<sup>11</sup> 149 Md. 590, 131 A. 821 (1925).

<sup>12</sup> *Knabe v. Knabe*, 176 Md. 606, 616, 6 A. (2d) 366 (1939); noted (1939) 3 Md. L. Rev. 367.

out any thought of such question arising—and in all probability with the idea that Maryland had followed the general rule as to this matter.

The Court states that "No decisions have been found to be in conflict with the views here expressed." Yet close reading of the decision in *Kalben v. King*,<sup>13</sup> which this Court has cited on the rule as to limitations, and also as flatly advocating that a one year limit be applied, will show a dictum rather contrary to the result reached in this case. There the refusal of the Chancellor to allow the wife to collect 8 years of accrued past due installments was because these arose from alimony pendente lite and the wife had been guilty of laches. Further, it was proved that the wife had abandoned the suit and now had come in at the death of the husband to claim against the estate. The Court properly found the Chancellor was correct and made this statement:<sup>14</sup>

"In a *pending* suit reasonable limitation would be the rule of the ecclesiastical courts, which limited the period for the recovery of arrears of alimony to one year. This rule, however, would be applied only to pending suits, as a *final decree carries with it the right to recover arrears for twelve years.*"

This would seem to mean that the Court in that case thought that as to arrears from a final decree, as distinguished from alimony pendente lite, the wife had a right to recover them during the limitation period, that whether or not it be called a "duty" and not a debt, nevertheless the right to collect them should stand for the full period of limitations with the full indicia of the lasting and irrevocable debt of record.

Further, in the *Winkel* case, the Court dismisses the *Rosenberg* case<sup>15</sup> as having no application and as merely holding that under the rule for full faith and credit to be given to a foreign decree the Court could not presume the decree to be revocable and non-final. In that case the question concerned collecting past-due installments on a decree entered by a Virginia court. The Maryland Court allowed this to be done, presuming the Virginia decree to be final. However, there was no Virginia law proved in the *Rosenberg* case. The Judicial Notice statute was

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<sup>13</sup> *Kalben v. King*, 166 Md. 632, 172 A. 80 (1934).

<sup>14</sup> 166 Md. 632, 639-40, 172 A. 80, 83 (1934).

<sup>15</sup> *Rosenberg v. Rosenberg*, 152 Md. 49, 135 A. 840 (1927).

not yet in force,<sup>16</sup> and the Court, in making its presumption of foreign law, would not presume a law different from the domestic law. Obviously, the Court was presuming similar law and was applying Maryland law as it saw it. Had the Court thought that decrees were modifiable in Maryland as to unpaid past due installments, it would not go out of its way to presume a different law elsewhere. It cannot be said that it would be required to by the full faith and credit clause, because that only requires that the same degree of credit be given a foreign decree as would be given to it in its own state. If the forum's own decrees were not final it would not be obliged to presume the foreign decree to be final (and normally would not so presume) and so entitled to greater enforcement than its own. The Court stated:<sup>17</sup>

“The finality of the decree as of right of the plaintiff to payments fully matured under its provisions must be presumed where there is no proof of Virginia law to the contrary. The obligation to give full faith and credit to the decree sued on does not permit the assumption that the right which it declared and secured was subject to an unexpressed and unproved power of revocation.”

The main authority relied on in the *Rosenberg* case was *Sistare v. Sistare*,<sup>18</sup> which had held that Connecticut had to give effect to an alimony decree of another State so as to allow recovery of the unpaid installments, overriding the local interpretation of the New York law on the power of the New York courts to modify as to these unpaid installments, and stating that such should never be assumed by the Court unless express authority was given for doing so. The Supreme Court, in reference to the full faith and credit to be given, held that the determining factor was whether the state of issuance of the decree gave it final effect, or whether in that state it was subject to modification as to past due installments.

This examination into cases from which the Court has found its precedents has not been solely with the purpose of attacking the logic of the Court, nor to point out any possible errors in interpretation of these cases which the

<sup>16</sup> After the passage of the Judicial Notice act, Md. Code (1939) Art. 35, Secs. 56-62, the question as to the presumption of foreign law has become moot.

<sup>17</sup> *Rosenberg v. Rosenberg*, 152 Md. 49, 52, 135 A. 840 (1927).

<sup>18</sup> *Sistare v. Sistare*, 218 U. S. 1 (1910).

Court may have indulged in. It has been to show that from a careful examination of past cases in point in Maryland, it is very possible to arrive at the opposite conclusion from that arrived at by the Court, that the final decision as to the law on this point is really being made for the first time as an outright statement of law in this case (and if anything, it is being made contrary to the existing authority of the *Rosenberg* case). And, it is felt that the Court in making this statement is really finally settling or possibly changing a point on which there has been no direct holding, and in so doing it should have been guided, not only by possible nuances found in past cases or in presentations on the law as found in the briefs of the interested counsel, but also by the effect such decision will have on the domestic law of Maryland.

Whether or not the Court has correctly interpreted the law, there can be no doubt that from some angles the result does not appear too desirable. Further, the Court, after making an affirmative holding on the law, then decided that it should not be applied in the present case because of the "dirty hands" of the cross-petitioner. It would seem that as there was no need for the Court to be so forthright and positive in stating the law, that the Court might possibly have been humble enough to leave it to be decided at a later time when it was found to be definitely necessary; and then only after further and full argument was had again on this very point. Certainly there would seem to be no great rush to put Maryland in a position where its law is declared to be contrary to that of the majority of the other states, and to the decision of the Supreme Court of the United States.<sup>19</sup>

The full results of this decision are not yet determinable, but an important and obvious question is the position of the wife if the husband moves into another jurisdiction. As the judgment is not final, full faith and credit requirements do not cloak it as of right. It might voluntarily be recognized,<sup>20</sup> but it is doubtful that many states would so act, for the foreign states would then be giving more effect to the Maryland judgment than the forum state did. Probably most states would refuse to allow a suit based on an alimony decree from Maryland as a debt of record.<sup>21</sup>

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<sup>19</sup> *Lynde v. Lynde*, 181 U. S. 183 (1901).

<sup>20</sup> *Holton v. Holton*, 153 Minn. 346, 190 N. W. 542 (1922).

<sup>21</sup> This case, *Holton v. Holton*, cited in the preceding note, is cited as deciding that Minnesota will recognize the decree of a foreign state even if such is modifiable. But the court in its decision quotes several cases

In this place the result from the *Staub* case<sup>22</sup> might be considered. By that case if the wife gets a divorce out of the state with no alimony, she can not get alimony in Maryland later, as the status on which the jurisdiction rests to give alimony is gone. Inversely then, would Maryland recognize alimony granted out of state to accompany a divorce granted in Maryland? Seemingly not. So, to get a decree enforceable in Maryland and also out of the state, the wife would be compelled to get her divorce in another jurisdiction, on the basis of residence recognized by Maryland, with alimony granted there, and then bring the decree into this State and get it enforced.

The ultimate result aimed at by the decision in the *Winkel* case is good, the protection of the husband from the past claims of the wife when his financial situation is such that payment is impossible, and the accumulation of past-due installments creates a financial embarrassment to him. In most instances the case of the wife has the aroma of laches around it, as deliberate delay many times is involved. But it would seem that a desirable result could be reached in other ways without the resultant nullifying of the foreign effect of alimony decrees. The use of the doctrine of laches to invalidate claims that cover a long period where the delay is the wife's fault, has been efficacious. It was used early in domestic law. The *De Blasquire* case<sup>23</sup> is an excellent example of this and is no authority for the decision in this case, though it was cited as such. Another example is *Kalben v. King*,<sup>24</sup> discussed earlier, applying laches to pendente lite alimony. Another method was shown in the *Fairbanks* case.<sup>25</sup> Upon proper cause shown, the Court could hold the past due arrears in abeyance and treat the future payments in whatever way desirable.

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from other jurisdictions, all to the effect that the power to modify alimony decrees as to past-due installments is not to be interpreted as given to any court in the absence of a direct and uncontrovertible statute. Its conclusion was that the foreign decree (Oregon decree) would be recognized even if it were modifiable, until the filing of a petition for modification. The summary of the law as discussed by this court on the point of modification, with citations to recent cases based on the supreme court decision mentioned above, *Lynde v. Lynde*, 181 U. S. 183 (1901), show the overwhelming strength of the cases against modification. As to the statement that the power to modify as to past-due installments should not be presumed in a court in the absence of express statute, it is obvious that there is no such statute in Maryland.

<sup>22</sup> *Staub v. Staub*, 170 Md. 202, 183 A. 605 (1936).

<sup>23</sup> *De Blasquire v. De Blasquire*, 3 Hagg. Ecc. 322, 162 Eng. Repr. 1173 (1830).

<sup>24</sup> *Kalben v. King*, 166 Md. 632, 172 A. 80 (1934).

<sup>25</sup> *Fairbanks v. Fairbanks*, 169 Md. 212, 181 A. 233 (1935).

This would seem to reach a desirable result. If the wife can show that conditions have changed and the husband is capable of paying those amounts, and the actions of the wife warrant such payment, then such debts could again be allowed. (In the cited case the Court stated that the wife could at any time have the husband up for contempt, unless he could show the financial inability which was alleged by him. It probably would be better if the 'in abeyance' decree were more controlling.) This treatment would keep the entire matter within the conscience of the Court, with an elastic standard, but with the outside effect of finality. The decree would not be modifiable as to past amounts, the Court merely would not recognize the right of the wife to get beneficial effect from the decree, i. e., would not hold the husband in contempt.

In conclusion, it might be suggested that, in view of the effect of this decision and of the fact that the law announced was not really necessary, nor was it applied, but was actually dictum, the Court in considering future cases on this point can, without any earthshaking results, ignore and override this decision by following the interpretation indicated in such earlier and sounder cases as *Rosenberg v. Rosenberg* and *Kalben v. King*.