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LEGISLATIVE NOTE

RETROACTIVE APPLICATION OF NEW GROUNDS FOR DIVORCE UNDER §170 DOMESTIC RELATIONS LAW

Wedlock, as old men note, hath likened been
Unto a public crowd or common rout,
Where those that are without would fain get in
And those that are within would fain get out.

—Poor Richard's Almanack

I. Introduction

The first general divorce law in the State of New York was enacted in 1787, providing for judicial divorce on the grounds of adultery.[1] For nearly two centuries, adultery remained the sole ground for divorce in New York. Under new section 170 of the Domestic Relations Law, which took effect on September 1, 1967, New York has five grounds for divorce in addition to adultery:[2] cruelty; abandonment; imprisonment; judicial separation for two years; and separation pursuant to a written agreement for two years.

Now the New York courts are faced with the task of interpreting the new law. One of the many problems to be dealt with is whether the new grounds may be applied where a cause of action, such as cruelty or abandonment, took place prior to September 1, 1967. The purpose of this note is to explore the influences and alternatives which the courts must take into consideration in construing section 170 of the Domestic Relations Law.

II. Constitutional Prohibitions to Retroactive Application of the New Grounds

There is no doubt that marriage is a civil contract,[3] and yet it is more. It is a status, or institution, in which the state has a fundamental interest.[4] The question arises, therefore, as to how the state can control and regulate the marriage and its parties without violating the federal constitutional prohibition against impairment of contract.[5] In the case of *Hunt v. Hunt*,[6] it was stated:

1. H. Foster & D. Freed, Law and the Family § 6:2 (1966).
2. N.Y. Dom. Rel. Law § 170 (Supp. 1967). The new grounds for divorce are: cruelty; abandonment for two or more years; imprisonment for more than three years; separation pursuant to a judicial separation for two years; and separation pursuant to written separation agreement for two years.
3. Fearon v. Treanor, 272 N.Y. 268, 2 N.E.2d 815 (1936); Fisher v. Fisher, 250 N.Y. 313, 165 N.E. 460 (1929); Morris v. Morris, 31 Misc. 2d 548, 220 N.Y.S.2d (Sup Ct. 1961); Lorfice v. Lorfice, 148 N.Y.S.2d 578 (Sup. Ct. 1956); Dorgeloh v. Murtha, 92 Misc. 279, 156 N.Y.S. 181 (Sup. Ct. 1915).
4. Fearon v. Treanor, 272 N.Y. 268, 5 N.E.2d 815 (1936); Risk v. Risk, 169 Misc. 287, 7 N.Y.S.2d 418 (Sup. Ct. 1938); O'Conner v. Jackson, 74 F. Supp. 370 (W.D.N.Y. 1947). (The power to regulate marriages is one retained by the states.).
5. U.S. Const. art. I, § 10.
6. 131 U.S. Append. clxv, 24 L. Ed. 1109 (1879).

> In the Dartmouth College Case, 4 Wheat. 629, 4 L. Ed. 629, it was expressly said by Chief Justice Marshall, in delivering the opinion of the court, that the provision of the Constitution prohibiting States from passing laws impairing the obligation of contracts "had never been understood to embrace other contracts than those which respect property or some object of value, and confer rights which may be asserted in a court of justice." It never has been understood to restrict the general right of the Legislature to legislate upon the subject of divorces. Those Acts enable some tribunal not to impair a marriage contract, but to liberate one of the parties because it has been broken by the other. . . .[7]

Thus, initially the Court reasoned that since the marriage contract conferred no property rights, nor rights which may be asserted in a court of justice, dissolution of the contract would not be impairment in the constitutional sense. However, in *Maynard v. Hill*,[8] the Court did not attempt to distinguish the type of contract involved in marriage, but substituted a different standard in its place:

> [M]arriage is an institution of society, creating a *status* which may be regulated and controlled by public law; that legislation affecting the *institution* or annulling the relation between the parties is not within the prohibition of the Constitution of the United States against impairment of contracts. . . .[9]

This later and still recognized view, that marriage is a status, controls as to questions of federal constitutionality of divorce legislation.[10]

Under New York law, marriage is a "civil contract"[11] for purposes of solemnization, and in that sense is purely statutory.[12] However, New York, like the majority of states, considers marriage a status or institution,[13] and thus legislation concerning marriage is not affected by the New York constitutional prohibition against impairment of contract.[14]

If legislation concerning marriage is not constitutionally prohibited as an impairment of contract, what of retroactive application of divorce legislation? Since a divorce statute is not penal in nature, retroactive application will not

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7. 24 L. Ed. at 1110.
8. 125 U.S. 190 (1888).
9. *Id.* at 214. (Emphasis added.)
10. *See* H. Foster & D. Freed, *supra* note 1, at § 1:2; 1 J. Bishop, Marriage, Divorce and Separation § 1480 (1891). *See also* Milwaukee County v. M.E. White Co., 296 U.S. 269 (1935); Home Bldg. Loan Ass'n v. Blaisdell, 290 U.S. 298 (1934); Baker v. Kilgore, 145 U.S. 487 (1892); Tipping v. Tipping, 82 F.2d 828 (D.C. Cir. 1936); Meister v. Moore, 96 U.S. 76 (1878).
11. N.Y. Dom. Rel. Law § 10 (1964). *See also* cases cited in *supra* note 3.
12. Burtis v. Burtis, 1 Hopk. Ch. 557 (N.Y. 1825); Wood v. Wood, 2 Paige 108 (N.Y. 1830).
13. Fearon v. Treanor, 272 N.Y. 268, 5 N.E. 815 (1936); Risk v. Risk, 169 Misc. 287, 7 N.Y.S.2d 418 (Sup. Ct. 1938).
14. *Contra,* Clark v. Clark, 10 N.H. 380, 34 Am. Dec. 165 (1839); Greenlaw v. Greenlaw, 12 N.H. 200 (1837). *Accord,* Cavanaugh v. Valentine, 181 Misc. 48, 41 N.Y.S.2d 896 (Sup. Ct. 1934).

be subject to ex post facto constitutional prohibitions.[15] Further, there is no deprivation of life, liberty or property without due process of law, since marriage is purely a domestic relationship where there are no vested property rights involved.[16]

III. The History of Adultery as a Ground for Divorce in New York

Adultery had been the sole ground for divorce in New York from 1787 to 1967. Until 1879 the guilty party in a divorce action was forbidden to remarry, but the law was then relaxed so as to permit remarriage if the court modified the decree.[17] Despite changing social conditions, New York was adamant in returning adultery as its sole ground for divorce.[18] As a result, a strange development took place concerning the termination of the marital relationship. The function served by additional grounds for divorce in other jurisdictions was partially achieved by different modes in New York. For example, New York courts indirectly encouraged migratory divorces by a reluctance to permit collateral attacks upon New Yorkers' migratory divorce decrees.[19] Also, the ease with which one could obtain an annulment, especially on the ground of fraud,[20] made this procedure a much used[21] "substitute" ground for divorce in New York. In addition, "since over ninety percent of New York divorces are uncontested and are usually heard by referees, there is no ironclad assurance that New York divorces in fact rest upon a real, as distinguished from a simulated or imaginary, adultery."[22] Thus, in the past courts liberally enforced the rules governing annulment and separation to offset the inequities of a single ground divorce rule.[23] This further produced an attitude that where the marriage was no longer viable, and conciliation was impossible, most judges have been disposed to grant whatever remedy was available to facilitate the termination of the *de jure* marital status where such status no longer existed *de facto*.[24]

15. Maynard v. Hill, 125 U.S. 190 (1888); Leon v. Torruella, 99 F.2d 851 (1st Cir. 1938); Tipping v. Tipping, 82 F.2d 828 (D.C. Cir. 1936).

16. Maynard v. Hill, 125 U.S. 190 (1888); Arnett v. Reade, 220 U.S. 311 (1911).

17. [1879] N.Y. Sess. Laws ch. 321.

18. *See* N. Blake, The Road to Reno ch. 6 (1962); P. Jacobson, American Marriage and Divorce 112-18 (1959).

19. *See, e.g.*, Matter of Rhinelander, 290 N.Y. 31, 47 N.E.2d 681 (1943).

20. *See* Note, *Annulments for Fraud—New York's Answer to Reno?* 48 Colum. L. Rev. 900 (1948). *See also* P. Jacobson, *supra* note 18, at 115; Note, 52 Colum. L. Rev. 621 (1952) (corroboration in divorce and annulment proceedings).

21. According to P. Jacobson, *supra* note 18, at 113-14, New York annually accounts for one-third to one-half of all annulments in the United States and in at least ten counties annulments annually exceed divorces.

22. H. Foster & D. Freed, *supra* note 1, at § 6:1, *citing* P. Jacobson, *supra* note 18, at 115-16, where it is related that in 1948 the New York City District Attorney smashed a "divorce ring" of professional co-respondents and hundreds of uncontested cases were removed from the supreme court calendar at the request of counsel. In all, the number of decrees dropped by one-third in New York City in 1948. *See also* Note, *Collusive and Consensual Divorce and the New York Anomaly*, 36 Colum. L. Rev. 1121 (1936).

23. *See supra* notes 17-20.

24. Interview with William Lawless, Justice, Sup. C., 8th Jud. Dist., Nov., 1967.

It may be concluded that the courts of the State have tried to stay in tune with changing social patterns concerning divorce by offsetting a one-ground rule with a liberal, and even permissive, interpretation of the law pertaining to separation, annulment, and uncontested divorce actions.[25] This may result in a similar liberal or permissive attitude in the courts when the question of interpretation of the new divorce grounds, as to retroactivity, comes before them.[26]

IV. Interpretation of New York Domestic Relations Law, Section One Hundred Seventy

A. *Divorce Is Purely Statutory in New York*

The New York courts have consistently held that divorce law is purely statutory,[27] as opposed to a common law action. However, even though the power of the courts in a divorce action is confined to the exercise of express powers conferred by statute, application of the statute requires the exercise of such incidental powers as are commensurate with the full exercise of relief prayed for.[28] The divorce action takes place before a court of equity,[29] with the result that the court is bound by the express powers enumerated in the statute, and its exercise of incidental powers will be within its equitable discretion. This does not mean, however, that a court's equity powers may be invoked to change statutory requirements and procedure.[30] The distinction is that it is the statute which controls the equity allowed, not the equity which controls the interpretation of the statute. In other words, a court in interpreting section 170 will be bound by the cannons of construction to construe its express powers, and then will exercise its equitable powers to administer those express powers.

B. *Canons of Construction*

Generally, statutes are to be construed as prospective only, except where the statute deals with procedure or remedy as opposed to substantive rights.[31] However, no retroactive effect may be attributed to a statute granting a new remedy where no remedy existed before, in the absence of express words or necessary implication requiring such interpretation.[32] This gives rise to three

25. The power to grant divorces was transferred from the legislature to the Court of Chancery by [1787] N.Y. Sess. Laws ch. 69; *See also* Moot v. Moot, 214 N.Y. 204, 108 N.E. 424 (1915).

26. H. Foster & D. Freed, *supra* note 1, at § 6:1.

27. Burtis v. Burtis, 1 Hopk. Ch. 556 (N.Y. 1825); Wood v. Wood, 2 Paige 108 (N.Y. 1830); Walker v. Walker, 155 N.Y. 77 (1898).

28. Ackerman v. Ackerman, 200 N.Y. 72, 93 N.E. 192 (1910); Erkenbrach v. Erkenbrach, 96 N.Y. 456 (1884).

29. *See supra* note 25.

30. Powell v. Powell, 282 App. Div. 99, 122 N.Y.S.2d 281 (4th Dep't 1953).

31. Micamold Radio Corp. v. Beedie, 156 Misc. 390, 282 N.Y.S. 77 (Sup. Ct. 1935); Hollenback v. Born, 238 N.Y. 34, 143 N.E. 782 (1924).

32. Western New York & Pa. Ry. v. City of Buffalo, 176 Misc. 350, 27 N.Y.S.2d 249 (Sup. Ct. 1941).

questions: (1) Does the express wording of section 170 indicate retroactive application? (2) What method of discovery is used to find a necessary implication requiring retroactive application? (3) Does section 170 grant new remedies where none existed before?

1. *The Wording of the Statute*

Section 170, New York Domestic Relations Law, reads: "Action for divorce. An action for divorce *may be* maintained by a husband or wife to procure a judgment divorcing the parties and dissolving the marriage. . . .[33] The words *may be* would seem to indicate "prospective only" intent in the application of the new grounds. In an early New York case,[34] where a new section had been added to the statute providing for limited divorces extending the right to cases in which it had not theretofore existed, it was stated:

> In order to give her the benefit of the remedy which the bill seeks, the revised statutes, as applicable to her case, must be construed to have a retrospective effect. It is a rule however, never to apply a statute retrospectively by mere construction. If its terms are such as clearly to indicate that the Legislature intended it should operate upon and apply to past transactions of a civil nature, then the courts may permit it to so apply. . . . But, if a statute is silent in its terms or at all ambiguous in relation to its effect and application to past events, courts of justice are bound not to apply to any other than to those which have arisen since the law took effect and are not at liberty to consider it other than as a prospective law operating prospectively upon the affairs and conduct of men.[35]

Thus, section 170 would appear to allow only prospective application. Simply on the basis of statutory construction there are cases in other states which both uphold and contest this reasoning. In *Barrington v. Barrington*,[36] the Supreme Court of Alabama held a divorce statute prospective only since to hold the opposite would "give new legal effect to conduct or conditions occurring or existing prior to its enactment, thereby imposing upon any person unanticipated disabilities or alterations of legal status, [which] is retrospective in a sense odious to the law."[37] The language found to be prospective only read: "when the wife without support from him has lived separate and apart from bed and

33. Emphasis supplied. The language of §§ 170(5), (6) has been purposely omitted since these subsections are retroactive by virtue of [1966] N.Y. Sess. laws ch. 254, § 15 and any implications of that provision will be discussed in the text accompanying *infra* notes 83-95. [1966] *id.* provides: "This act shall take effect September first, nineteen hundred sixty-seven provided that the two year period specified in subdivisions five and six of section one hundred seventy . . . shall not be computed to include any period prior to September first nineteen hundred sixty-six . . . . "

34. Jarvis v. Jarvis, 3 Edw. Ch. 462 (N.Y. 1841).

35. *Id.* at 464.

36. 200 Ala. 315, 76 So. 81 (1917). (A strong dissent and three concurring opinions make this case a valuable summary of the law involved in retroactivity and divorce in general.)

37. *Id.* at 316, 76 So. at 82.

board of the husband for five years next preceding the filing of the bill. . . ."[38] It was further stated that no statute, including the instant one, could be granted retroactive application since the legislative intent is neither clearly expressed nor unequivocally implied. In *Pierce v. Pierce*,[39] the court held that the language: "Divorces may be granted . . . (8) Where the parties are estranged and have lived separate and apart for eight years or more . . . ,"[40] on its face, does not relate back and therefore can not be granted retroactive application. There are other cases that have held similar statutes to be prospective on the basis of an interpretation of the language alone.[41] Section 170 would seem to fall within the same category with those prospective only cases.

In the case of *Schuster v. Schuster*,[42] the court held the language: "When for any reason the husband and wife *have not lived or cohabited* together as husband and wife for a period of five years or more,"[43] was a clear indication of retroactive intent since the present perfect tense was used. There are other cases where the use of the present perfect tense has been construed as a clear indication that retroactive application was intended.[44] Retroactive intent was found in *Jones v. Jones*,[45] where the statute read "If any person *hath been* or *shall be* injured in any of the above ways [indicating divorce grounds] mentioned. . . ."[46]

There are many other cases holding divorce statutes retroactive, but not on the basis of language alone.[47] In *Dowie v. Becker*,[48] the theory was utilized:

> The act is *remedial* in its nature, and it took effect upon people as it found them. It is simply retroactive to this extent: That it affected the rights of persons already in existence from the passage of the act

38. *Id.*
39. 107 Wash. 125, 181 P. 24 (1919).
40. *Id.* at 127, 181 P. at 26.
41. *See, e.g.*, McCraney v. McCraney, 5 Iowa 232, 68 Am. Dec. 702 (1857); Scott v. Scott, 6 Ohio 534 (1884); Buckholts v. Buckholts, 24 Ga. 238 (1858); Shelburn v. Shelburn, 6 Me. 210 (1829); Tufts v. Tufts, 8 Utah 142, 30 P. 309 (1892); Burt v. Burt, 168 Mass. 204, 46 N.E. 622 (1897); Giles v. Giles, 22 Minn. 348 (1876).
42. 42 Ariz. 190, 23 P.2d 559 (1933).
43. Schuster v. Schuster, 42 Ariz. 190, 23 P.2d 599 (1933). (Emphasis supplied.)
44. *See, e.g.*, Hagen v. Hagen, 205 Va. 791, 139 S.E.2d 821 (1965); State v. First Jud. Dist. Ct., 53 Nev. 386, 2 P.2d 129 (1931). *See also* Cole v. Cole, 27 Wis. 531 (1869); Phillips v. Phillips, 22 Wis. 256 (1867) (The Statute began, *"Whenever* the husband and wife *shall have voluntarily lived* . . . " which led the court to say in both cases, that the use of "whenever" clearly indicates any point in time including that prior to the enactment of the statute.) (Emphasis supplied.)
45. 2 Overt. 2, 5 Am. Dec. 645 (Tenn. 1804).
46. *Id.* at 5, 5 Am. Dec. at 646 (Emphsis supplied.).
47. Tipping v. Tipping, 82 F.2d 828 (D.C. Cir. 1936); Peavy v. McCombs, 26 Idaho 143, 140 P. 965 (1914); Stallings v. Stallings, 177 La. 488, 148 So. 687 (1933); Dowie v. Becker, 149 La. 159, 88 So. 777 (1921; Hava v. Chavigny, 143 La. 365, 78 So. 594 (1918); Hurry v. Hurry, 144 La. 877, 81 So. 378 (1918); Vincent v. LeDoux, 146 La. 160, 83 So. 439 (1919); McCubbin v. McCubbin, 163 La. 20, 111 So. 481 (1927); Campbell v. Campbell, 174 Md. 229, 198 A. 414 (1938); Gertes v. Gertes, 196 Minn. 599, 265 N.W. 811 (1936); George v. George, 41 P.2d 1059 (Nev. 1935); Long v. Long, 206 N.C. 706, S.E. 85 (1934); McKenna v. McKenna, 53 R.I. 373, 166 A. 822 (1933); Canavos v. Canavos, 205 Va. 744, 139 S.E.2d 825 (1965); Todd v. Todd, 202 Va. 153, 115 S.E.2d 905 (1960).
48. 149 La. 159, 88 So. 777 (1921).

> and was not confined merely to rights and persons coming under its terms in the future. It is a statute giving the personal status of married persons, and giving the remedy to those who have lived separate and apart for more than seven years.[49]

2. *Method of Discovery Used in Finding the Necessary Implication of Retroactive Intent.*

A court must find either specific language or necessary implication that the legislature intended a statute to be retroactive. Since the majority of cases holding statutes retroactive do not do so on the basis of language alone, they must be decided as a matter of necessary implication.[50] The discovery of necessary implication by a court is most often made by characterizing the statute as remedial.[51] And what is the effect of a characterization of a statute as remedial?

> [A] remedial statute must be liberally construed, so as to effectuate its object and purposes. Although due regard will be given the language used, such an act will be construed, when its meaning is doubtful, so as to suppress the mischief at which it is directed, and to advance or extend the remedy provided, and bring within the scope of the law every case which comes clearly within its spirit and policy.[52]

The effect of a characterization of a statute as remedial, therefore, is that it negates the requirement of express words in order to authorize a retroactive construction.[53] In fact, the construction of a remedial statute requires the legislature to expressly state that only prospective operation was intended in order to restrain the court from finding a retroactive intent.[54]

A remedial statue is difficult to define since, in a sense, all statutes are remedial in that they are enacted to remedy an existing situation. An attempted definition of a remedial statute reads: "A remedial statute has for its object, . . . the redress of some existing grievance or introduction of some regulation or proceeding conducive to public goods."[55] The courts have assumed that the term "remedial" has a limited meaning in two respects: Usually, "remedial" is used in connection with legislation not penal or criminal in nature; and "remedial" as applied to procedural statutes which do not affect substantive rights.[56]

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49. *Id.* at 160, 88 So. at 779 (Emphasis supplied.).
50. *See* text and cases cited at *supra* notes 44 & 47.
51. *See generally* Heimanson, *Remedial Legislation*, 46 Marq. L. Rev. 216 (1962).
52. Lande v. Jurisich, 59 Cal. App. 2d 613, 139 P.2d 657 (1943). *See also* Harrison v. Mary Bain Estates, 2 Misc. 2d 52, 152 N.Y.S.2d 239 (Sup. Ct. 1956); Westinghouse Elec. Corp. v. Pacific Gas & Elec. Co., 326 F.2d 575 (9th Cir. 1964).
53. Burch v. Newbury, 1 Barb. 648, 10 N.Y. 374 (1852); Brower v. Brower, 1 Abb. Ct. App. Dec. 214, 9 Leg. Obs. 196 (N.Y. 1851); Jacobus v. Colgate, 217 N.Y. 235, 111 N.E. 837 (1916); Fetes v. Volmer, 58 Hun. 1, 11 N.Y.S. 552 (1890); Matter of Hoople, 93 App. Div. 486, 87 N.Y.S. 842, *rev'd on other grounds*, 179 N.Y. 308, 72 N.E. 229 (1904); Matter of N.Y. Express Co., 23 Hun. 615 (N.Y. App. Div. 1st Dep't 1881); People *ex rel.* Gabriel v. Warden, 109 Misc. 248, 178 N.Y.S. 595 (Sup. Ct. 1919); People *ex rel.* Pels v. Board of Supervisors, 63 Barb. 83, *rev'd on other grounds*, 65 N.Y. 300 (1875).
54. Cole v. Cole, 27 Wis. 531 (1869). *See* also cases cited in *supra* note 44.
55. Hook v. Whitlock, 2 Edw. Ch. 304, 310, *aff'd*, 7 Paige 373 (N.Y. 1835).
56. *See* J. Sutherland, Statutory Construction, § 5704 (3d ed., Supp. 1966). *See also*

An example of a remedial statute which was held procedural, as opposed to substantive, and therefore retroactive, was the New York "Long-Arm" statute.[57] Examples of remedial statutes which are not penal or criminal in nature are vehicle and traffic laws[58] and workman's compensation acts.[59] Divorce legislation may qualify under either or both of the above definitions of a "remedial" statute, depending on the remedy granted by the specific act.[60]

The rules of construction for remedial statutes are many and varied.[61] A statute which relates to practice, procedure, or remedy is remedial and therefore retroactive, since there are no vested rights in any particular form of procedure.[62] However, a statute, even though it be remedial, may not be retroactively applied when a "new right" is established.[63] It is difficult to discern from the case law whether a disqualifying "new right" means a new right of possession, that being a substantive legal right, or a mere remedy,[64] and even if it is a mere remedy, whether retroactive application would have the effect of creating a new right of action which was forbidden in a number of cases.[65] The answer seems to lie in the distinction that a mere remedy means an added procedure to enforce a pre-existing right, rather than a remedy which simultaneously creates and enforces a right.[66] Statutes providing a remedy for a pre-existing right where none existed previously,[67] and adding to the remedies

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Harbek v. Pupin, 123 N.Y. 115, 25 N.E. 311 (1890); Southbridge Finishing Co. v. Golding, 2 A.D.2d 430, 156 N.Y.S.2d 542 (4th Dep't 1956).

57. N.Y. CPLR § 302 (Supp. 1967). *See* Longines-Wittnauer Watch Co. v. Barnes & Reinecke, Inc. 15 N.Y.2d 442, 261 N.Y.S.2d 8, 209 N.E.2d 68, *cert. denied sub nom.*, 383 U.S. 905 (1965); Rietsch v. Societe Ananyme Des Automobiles Peugeot, 45 Misc. 2d 294, 256 N.Y.S.2d 772 (Sup. Ct. 1965). *See also* Tebedo v. Nye, 45 Misc. 2d 222, 256 N.Y.S.2d 235 (Sup. Ct. 1965); Ellis v. Newton Paper Co., 44 Misc. 2d 134, 253 N.Y.S.2d 47, *rev'd on other grounds*, 24 A.D.2d 871, 264 N.Y.S.2d 414 (2d Dep't 1964); O'Connor v. Wells, 43 Misc. 2d 1075, 252 N.Y.S.2d 583 (Sup Ct. 1964); Perlmutler v. Standard Roofing & Tinsmith Supply Co., 43 Misc. 885, 252 N.Y.S.2d 583 (Sup. Ct. 1964).

58. City of St. Louis v. Carpenter, 341 S.W.2d 786 (Mo. 1961).

59. Davis v. United Fruit Co., 120 So. 2d 273 (La. App. 1960); Mlodozeniec v. Worthington, 9 A.D.2d 21, 189 N.Y.S.2d 468 (3d Dep't 1959).

60. *See* cases cited in *supra* note 44.

61. *See generally* J. Sutherland, Statutory Construction, §§ 2201-24, 5701-04 (1943); A. Lenhoff, On Legislation, 323-43 (1949); Smith, *Retroactive Laws and Vested Rights*, 5 Tex. L. Rev. 231 (1927); Heimanson, *Remedial Legislation*, Marq. L. Rev. 216 (1962).

62. Tellier v. Edwards, 354 P.2d 925(Wash. 1960); *See also* Kugel v. Telsey, 250 App. Div. 638, 295 N.Y.S. 148 (2d Dep't 1937).

63. Jacobus v. Colgate, 217 N.Y. 235, 111 N.E. 837 (1916); Lewittes & Sons v. Perlow, 254 App. Div. 94, 2 N.Y.S.2d 916 (1st Dep't 1938); Carder Realty Corp. v. State, 260 App. Div. 459, 23 N.Y.S.2d 395 (3d Dep't 1940); Wilner Friends Credit Ass'n v. Scheffres, 175 Misc. 909, 25 N.Y.S.2d 664 (N.Y.C. Ct. 1941); Western New York & Penn. Ry. v. City of Buffalo, 176 Misc. 350, 27 N.Y.S.2d 249 (Sup. Ct. 1941).

64. National Park Bank v. Goddard, 9 Misc. 626, 30 N.Y.S. 417 (1894), *aff'd*, 87 Hun. 487, 34 N.Y.S. 1144, (1895), *aff'd*, 156 N.Y. 657, 50 N.E. 1119 (1898).

65. Gotham Nat'l Bank of New York v. Strunsky, 162 Misc. 673, 293 N.Y.S. 961 (Sup. Ct. 1936); City of Buffalo v. New York Tel. Co., 165 Misc. 904, 1 N.Y.S.2d 842 (Sup. Ct. 1937).

66. Wilner Friends Credit Ass'n v. Scheffres, 175 Misc. 909, 25 N.Y.S.2d 664 (N.Y.C. Ct. 1941).

67. City of Salt Lake v. Branch, 6 F.2d 355 (5th Cir.), *cert. denied*, 269 U.S. 565 (1925); Flournoy v. State, 230 Cal. App. 2d 520, 41 Cal. Rptr. 23 (1965); Davis v. Jones, 247 Iowa 1031, 78 N.W.2d 6 (1956); Opinion of the Justices, 101 N.H. 515, A.2d 49 (1957); Jackson v. State, 261 N.Y. 134, 184 N.E. 735 (1933).

already in existence,[68] are valid when applied to future[69] or past transactions.[70]

3. *Whether Section 170 Grants New Remedies Where None Existed Before*

Can it be said that section 170 merely grants or adds new remedies for the enforcement of existing rights? Prior to September 1, 1967, a person could pray for separation on the same grounds now contained in section 170.[71] Apparenty, his remedy was the right to legally terminate one incident of the marital status (*e.g,* bed and board). There is a problem as to whether absolute divorce determines the same right, or some greater right. It would seem that the right must be greater, since the remedy of divorce terminates not only certain incidents of the martial status, but the status itself. But is a greater right necessarily a new right? The question must be answered in the negative, for the right may be greater, but not necessarily new, since it can only be measuring in terms of remedy[72] which (having run the full cycle) is a matter of procedure.

The courts, perhaps recognizing this circuitry, have not shackled themselves with such distinctions. Rather, they have characterized divorce statutes as remedial (without distinction) and thus entitled to liberal construction. Such construction usually follows the pattern:

> Divorce statutes concern the good order of society. If, contemplating the interest involved as public, it is for the public order and profit that marriage be disoluable after the transpiring of a particular delictum it can make no difference what was the date of the delinquency, or whether, before or after the statute was enacted. Hence, when the legislative intent does not directly appear in the statutory words, they should be applied equally to past and future transactions.[73]

C. *Influences Affecting Interpretation*

A remedial statute is to be given a liberal construction, and this construction should include retroactive application. The method of construing legislation as to retroactivity is that of intelligently balancing and discriminating be-

68. United States v. Willage Corp., 298 F.2d 816 (4th Cir. 1962); Bowles v. Strickland, 151 F.2d 419 (5th Cir. 1945); United States v. Fullerton: 87 F. Supp. 359 (D. Mass. 1949); Gramner v. Roman, 174 So. 2d 443 (Fla. App. 1965); Manuel v. Carolina Cas. Ins. Co., 136 So. 2d 275 (La. App. 1961); Durocher v. Myers, 84 Mont. 225, 274 P. 1062 (1929); Skipper-Bivens Oil Co. v. State, 115 S.W.2d 1016 (Tex. Civ. App. 1938).

69. *See* cases cited in *supra* notes 64, 65.

70. Pope v. United States, 323 U.S. 1 (1955); Continental Cal. Co. v. Phoenix Const. Co., 46 Cal. 2d 423, 296 P.2d 801 (1956); Studstill v. Aetna Cas. & Sur. Co., 201 Ga. App. 766, 115 S.E.2d 374 (1960); Barcleen v. Howard, 299 S.W.2d 249 (Ky. 1959); Pepin v. Beaulier, 102 N.H. 84, 151 A.2d 230 (1959); Phipps v. Sutherland, 201 Va. 488, 111 S.E.2d 422 (1959); Henry v. McKay, 164 Wash. 526, 3 P.2d 145 (1931); Leuch v. Egehoff, 260 Wis. 356, 51 N.W.2d 7 (1952).

71. N.Y. Dom. Law § 200 (Supp. 1967).

72. There are no different property rights under divorce since the doctrine of separability controls, see *Note,* 17 Buffalo L. Rev. — (1967).

73. 1 J. Sutherland, Statutory Construction § 2203 (3d ed., Supp. 1966). *See* Smith, *Retroactive Laws and Vested Rights,* 6 Tex. L. Rev. 409 (1928).

tween the reasons for and against retroactivity.[74] Section 170, as pointed out earlier,[75] does not infer that retroactive application was intended. However, subsections 170(5), (6) do seem to indicate retroactive intent through the use of the present perfect tense.[76] Retroactivity of these two subsections is more of a certainty in light of the New York Session Laws of 1966, chapter 254, section 15.[77] In effect, section 15 allows subsections 170(5), (6) to be retroactive one year prior to the effective date of section 170. That is, the tolling of the two year period of separation under subsections 170(5), (6) will commence for decrees and agreements dated September 1, 1966 or later. The implications of section 15 could be that all of the section 170 grounds are retroactive with only a time limitation on subsections (5) and (6). It may be, however, that the Legislature intended to restrict retroactive treatment to the only two subsections which were clearly meant to be retroactive (according to decisions in other states),[78] and did not consider the other grounds to be open to retroactive interpretation.

It might also be argued that since the statute is silent as to the retroactivity of subsections 170(1), (2), (3), the interpretation must be in favor of retroactivity. The reason for such interpretation would be that since the statute is remedial, the Legislature must state explicitly that retroactivity was not intended in order to defeat such an interpretation.[79] This argument was made and sustained in a recent unreported Supreme Court case from the Second Judicial District of New York.[80] Mr. Harry Hilton Spellman, chairman of the special committee on matrimonial law of the New York City Bar Association, commenting on this decision, stated: "There is absolutely no question that the abandonment provision is retroactive."[81] Mr. Spellman, who helped draft the new divorce law, further stated:

> The statute [referring to subsection 170(2)] is purposely silent on the time limit because abandonment is a continuing offense. Why should a woman who is abandoned five or ten years ago be required to count the abandonment only back to the time the law became effective? That would be grossly unfair.[82]

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74. *See* generally Smith *supra* note 73.
75. *See* text at *supra* notes 34-49.
76. N.Y. Dom. Rel. Law §§ 170(5) ("The husband and wife *have lived separate and apart* . . . ."), (6) ("The husband and wife *have lived* separate and apart . . . .") (Supp. 1967). (Emphasis supplied.)
77. *See supra* note 33.
78. *See supra* note 44.
79. *See supra* notes 53, 54.
80. New York Times, Nov. 8, 1967, at 49, col. 7 ("Justice Hugh S. Coyle ruled that the abandonment provision of the state's new divorce law is retroactive, making an offense before enactment of the law a ground for divorce."

Attorney for the plaintiff . . . Marshall S. Goldman, argued that the legislature had been silent on whether the offense of abandonment had to be committed after the law became effective (Sept. 1, 1967), as would be required concerning most offenses.").
81. *Id.*
82. *Id.*

V. Conclusion

A number of cases have recently been decided interpreting the new grounds. A few unreported cases in Supreme Court, 8th Judicial District, did not even question whether the new grounds were retroactive in granting divorces based on subsections 170(1), (2) (3).[83] In *Fitzpatrick v. Fitzpatrick*,[84] the court allowed plaintiff to amend her complaint for separation on the grounds of cruelty, to add divorce on the same grounds, provided "the cause of action for divorce . . . *arises* and the action based thereon is commenced subsequent to September 1, 1967, the effective date of the new statute."[85] Therefore, this court apparently felt that the statute could not be given retroactive application since it required that the cause of action arise subsequent to the effective date of the new legislation. In *Smith v. Smith*,[86] the court said, in reference to new section 210 of the Domestic Relations Law (which exempts abandonment from the five year statute of limitations for a cause of action for divorce):

> I must accept the statutory provision excepting abandonment from the five year limitation as a binding expression of the Legislature's view that this is a continuing offense which in effect deems each additional day a fresh violation of the marital obligations. I do not believe that adoption of this view in the case before me conflicts with the rules of construction in regard to retroactivity of so-called remedial legislation (*see* Walker v. Walker, 155 N.Y. 77, 82, 49 N.E. 663, 664). Sweeping claims for retroactivity covering this new legislation have been advanced by some writers (*see* Gershenson, "A Brief for Retroactivity," N.Y.L.J. 7/24/67, 7/25/67). However, there are serious questions as to whether these claims are justified by the legislative intent as disclosed in the Joint Legislative Report or the Report of Proceedings before the Senate in the debate on April 26, 1966. I do not therefore at this time feel that the principles and rules of law involved in this case should be extended beyond the facts before me.[87]

In *Packer v. Packer*,[88] the court found, in a default judgement, no obstacle to retroactivity as to the abandonment provision [subsection 170(2)] stating: "Though the statute provides no express answer to this fundamental question, this court concludes that the plaintiff should not be required to wait another two years before seeking relief pursuant to this statute . . . [which] should be construed as being retroactive."[89] Much the same approach was used in *Taplinger v. Taplinger*,[90] where the court held the new statute retroactive, stating: "The Court will not permit the legislative intent to be thwarted for technical

83. Supreme Court, 8th Jud. Dist. has had a number of recent decisions allowing retroactive application of N.Y. Dom. Rel. Law §§ 170(1), (2), (3), (4), Interview with Nelson Johnson, Clerk, Special Term, 8th Jud. Dist. Nov., 1967.
84. 55 Misc. 2d 7, 284 N.Y.S.2d 355 (Sup. Ct. 1967).
85. *Id.* 8-9, 284 N.Y.S.2d at 357-58. (Emphasis supplied.)
86. 55 Misc. 2d 172, 284 N.Y.S.2d 501 (Sup. Ct. 1967).
87. *Id.* at 173-74, 284 N.Y.S.2d at 503.
88. 55 Misc. 2d 74, 284 N.Y.S.2d 300 (Sup. Ct. 1967).
89. *Id.* at 74, 284 N.Y.S.2d at 301.
90. 55 Misc. 2d 103, 284, N.Y.S.2d 794 (Sup. Ct. 1967).

reasons. It is clear that the Legislature intended to liberalize the provisions of the Domestic Relations Law to make the securing of a divorce decree more easily attainable . . . . "[91] Therefore, presumably on the basis of finding that the new statute is, according to the language in the *Smith* case, "so-called remedial legislation,"[92] a court will implicitly construe section 170 as retroactive. As a result of such classification, little or no attention is paid to the classical notions of statutory construction. This has the effect of giving an appearance of judicial *law-making* as opposed to *discovery of the law.* Recent Supreme Court decisions in the area of civil rights and criminal procedure may lead one to suppose that the jurisprudence technique of discovery of law is morabund. However, it is an important part of the decision-making process that the layman be comforted by the conservatism of the courts. The concepts of tradition and precedent also serve to buttress the court's decisions from criticism that judges are making law. A decision based on a "so-called theory," or based on the court's feeling that "there is no reason why the law shouldn't be read in such and such a way," is not in harmony with the classical views on judicial construction. The main reason for such a liberal attitude toward the construction of the new law is a liberal attitude toward the law itself. It was so long in coming, and the situations and results under the prior law were so unreasonable, that courts have fettered their interpretation with the mechanics of construction. Whereas the attitude of liberality may be justified, the need for stability and tradition in the decisions of our courts is more important in view of the prevailing attitudes of the public toward obedience to law and self-restraint. Thus the end may be justified, but the means need a closer scrutiny to fulfill their role as a stabilizing force in society.[93]

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91. *Id.* at 105, 284 N.Y.S.2d at 796.
92. Smith v. Smith, 55 Misc. 2d at 174, 284 N.Y.S.2d at 503.
93. *See* Yoli v. Yoli, 55 416, 285 N.Y.S.2d 470 (Sup. Ct. 1967). The court considers more carefully the problem of construction and cites the above decision accompanying *supra* notes 80-92, stating: "There have been other determinations by courts which have been 'reported' unfortunately only in the daily papers. *In none of these decisions has the problem of retroactivity been brought to the fore and fully discussed.* It is, I believe, essential that we have an expression of opinion by an appellate court at the earliest possible moment." *Id.* at 420, 285 N.Y.S.2d at 475. (Emphasis supplied.)