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Divorce--Full Faith and Credit--Maintenance Award After Foreign Ex Parte Divorce Held Valid (Vanderbilt v. Vanderbilt, 1 N.Y.2d 342 (1956))

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adopting a statute which will clearly define this particular offense, a good model for which would be Section 812 of the New York Penal Law.[24]

DIVORCE — FULL FAITH AND CREDIT — MAINTENANCE AWARD AFTER FOREIGN EX PARTE DIVORCE HELD VALID. — Plaintiff-wife brought an action for separation and support and maintenance. The parties married in Connecticut and established domicile in California. Thereafter, the husband removed to Nevada, the wife to New York. In March 1953, the husband sued for divorce, obtaining a valid decree based on constructive service of the wife. The separation action, instituted by the wife in April 1954, was barred by the husband's decree, but the Court awarded maintenance under the Civil Practice Act, Section 1170-b. *Held:* full faith and credit had been afforded Nevada's decree, which, though valid as to marital status, was invalid as to the property rights of the wife. *Vanderbilt v. Vanderbilt,* 1 N.Y.2d 342, 135 N.E.2d 553 (1956).

Prior to the decision in *Haddock v. Haddock,*[1] most states afforded full faith and credit to *ex parte* divorce decrees based on constructive service.[2] However, New York felt it was not bound to recognize them.[3] With the *Haddock* decision, the policy of New York became the law of the land. Later in *Williams v. North Carolina,*[4] the Supreme Court ruled that foreign *ex parte* divorces could not be denied recognition simply because they were based on constructive service.

With the advent of the *Williams* case, the New York courts were powerless in a good many cases to assist a stay-at-home spouse.[5] The

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[24] See note 7 *supra.* This statute is recommended in every respect except for the punishment provided. It is submitted that consideration should be given to making this crime a felony rather than a misdemeanor.

[1] 201 U.S. 562 (1906). The Court held that as the matrimonial domicile was in New York, the Connecticut divorce forum did not have jurisdiction to grant an *ex parte* divorce decree entitled to full faith and credit in New York.

[2] See GOODRICH, CONFLICT OF LAWS 408 (3d ed. 1949).

[3] See Winston v. Winston, 165 N.Y. 553, 59 N.E. 273 (1901), *aff'd per curiam,* 189 U.S. 506 (1903); Matter of Kimball, 155 N.Y. 62, 49 N.E. 331 (1898), *appeal dismissed,* 174 U.S. 158 (1899); People v. Baker, 76 N.Y. 78 (1879).

[4] 317 U.S. 287 (1942).

[5] See Adler v. Adler, 192 Misc. 953, 81 N.Y.S.2d 797 (N.Y. Dom. Rel. Ct. 1948); "Standish" v. "Standish," 179 Misc. 564, 40 N.Y.S.2d 538 (N.Y. Dom. Rel. Ct. 1943). *But cf.* Franklin v. Franklin, 189 Misc. 442, 71 N.Y.S.2d 234 (N.Y. Dom. Rel. Ct. 1947). A New York wife was granted maintenance. The court said that the husband's foreign *ex parte* divorce was not valid as severing her right to maintenance.

courts were not empowered to entertain separate actions for alimony,[6] since alimony was granted only as an incident of a matrimonial action.[7] In 1953, the Legislature, acting on the recommendation of the New York Law Revision Commission,[8] amended the Civil Practice Act to provide:

> In an action for divorce, separation or annulment, or for a declaration of nullity of a void marriage, where the court refuses to grant such relief by reason of a finding by the court that a divorce, annulment or judgment declaring the marriage a nullity had previously been granted to the husband in an action in which jurisdiction over the person of the wife was not obtained, the court may, nevertheless, render in the same action such judgment as justice may require for the maintenance of the wife.[9]

The instant case raised the constitutional question whether New York could invoke Section 1170-b when the Nevada decree had purported to terminate the husband's obligation to support. Judge Fuld in his dissenting opinion pointed out the problem. The decree "... recited that the marriage between the parties was 'dissolved absolutely and forever, and *they hereby are freed and released from the bonds of matrimony and all the duties and obligations thereof.*' Under Nevada's decisional law, it seems clear that, in the absence of a provision either awarding alimony to the wife or reserving jurisdiction to do so, 'there can be no grant of alimony after such a divorce.'"[10] He argued that if full faith and credit was to be given the Nevada decree, then New York had to give to it the same effect as it had in Nevada.[11]

Many states have tried to solve the problem of the stay-at-home wife. Ohio approves "... the rule that such a decree [*ex parte*] as it concerns the denial of alimony to the wife is not entitled to full faith and credit in another state. A decree of that kind is one *in personam* and requires either an appearance by, or lawful personal service on, the wife, in order to have extra-territorial effect."[12] A Kansas statute provides that full faith and credit shall be afforded foreign *ex parte* decrees as to marital status in the event defendant is a resident of Kansas at the time of judgment. However, "... all matters relating to alimony ... shall be subject to inquiry and de-

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[6] N.Y. CIV. PRAC. ACT §§ 1140-a (annulment), 1155 (divorce), 1164 (separation), 1169 (temporary alimony).

[7] Ramsden v. Ramsden, 91 N.Y. 281 (1883). See Johnson v. Johnson, 206 N.Y. 561, 100 N.E. 408 (1912).

[8] REP. N.Y. LAW REVISION COMMISSION 468 (1953). See Fuld, *The Commission and the Courts*, 40 CORNELL L.Q. 646, 655-56 (1955).

[9] N.Y. CIV. PRAC. ACT § 1170-b.

[10] Vanderbilt v. Vanderbilt, 1 N.Y.2d 342, 354, 135 N.E.2d 553, 559 (1956) (dissenting opinion).

[11] *But see* Judge Fuld's opinion in Lynn v. Lynn, 302 N.Y. 193, 200, 97 N.E.2d 748, 751, *cert. denied*, 342 U.S. 849 (1951).

[12] Armstrong v. Armstrong, 162 Ohio St. 406, 123 N.E.2d 267, 269 (1954), *aff'd*, 350 U.S. 568 (1956).

termination . . . in the courts of this state. . . ." [13] In *Fincham v. Fincham*,[14] the court stated that "our statute provides that such a divorce shall be valid in so far as it dissolves the marriage relation, but unless the defendant in the action in the foreign state was personally served with summons in that state, or appeared there and actually litigated . . . the rights to alimony . . . those questions can be litigated in this state. . . ." [15] Minnesota allows a suit for alimony after a valid *ex parte* foreign divorce. "The question of alimony is not res adjudicata by reason of the judgment of divorce. . . . That judgment establishes nothing except that the marriage relation has been . . . destroyed . . . all other questions are res nova." [16]

The majority in the instant case based its decision on the ". . . rationale, not the special facts of Estin and Armstrong. . . ." [17] This "rationale"—the divisible divorce doctrine—is the result of dicta uttered by the Supreme Court in prior decisions. But the question raised in the instant case has not been directly answered by the Supreme Court. The "rationale" was foreshadowed in *Williams v. North Carolina*.[18] The Court observed that ". . . no question as to extraterritorial effect of a divorce decree insofar as it affects property in another State" was involved.[19] Justice Douglas, concurring in *Esenwein v. Commonwealth ex rel. Esenwein*,[20] stated that there is a

> . . . basic difference between the problem of marital capacity and the problem of support. . . . In other words, it is not apparent that the spouse who obtained the decree can defeat an action for maintenance . . . in another State by showing that he was domiciled in the State which awarded him the divorce. . . . But I am not convinced that in absence of an appearance or personal service the decree need be given full faith and credit when it comes to maintenance or support of the . . . spouse. . . .[21]

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[13] KAN. GEN. STAT. ANN. § 60-1518 (1949).

[14] 174 Kan. 199, 255 P.2d 1018 (1953).

[15] Fincham v. Fincham, 174 Kan. 199, 255 P.2d 1018, 1025 (1953); *accord*, Willoughby v. Willoughby, 178 Kan. 62, 283 P.2d 428 (1955). The court did not pass on the constitutionality of the statute as the question was not properly before it.

[16] Thurston v. Thurston, 58 Minn. 247, 59 N.W. 1017, 1019 (1894); *accord*, Malcolm v. Malcolm, 345 Mich. 720, 76 N.W.2d 831 (1956). The court reached its decision by "paraphrasing" Armstrong v. Armstrong, 350 U.S. 568 (1956). *Contra*, Commonwealth v. Petrosky, 168 Pa. Super. 32, 77 A.2d 647 (1951); Peff v. Peff, 2 N.J. 513, 67 A.2d 161 (1949).

[17] Vanderbilt v. Vanderbilt, 1 N.Y.2d 342, 350, 135 N.E.2d 553, 557 (1956).

[18] 317 U.S. 287 (1942).

[19] Williams v. North Carolina, 317 U.S. 287, 293 n.4 (1942). See Maynard v. Hill, 125 U.S. 190, 206 (1888). A legislative divorce ended the marital status but the Court said a different question would arise if the divorce should attempt to interfere with vested property rights.

[20] 325 U.S. 279 (1945). Husband's action to revoke Pennsylvania support order was defeated by the wife's collateral attack on the husband's Nevada *ex parte* divorce decree.

[21] Esenwein v. Commonwealth *ex rel.* Esenwein, 325 U.S. 279, 281 (1945).

In *Estin v. Estin* [22] the wife had obtained a support order in New York prior to her husband's Nevada *ex parte* divorce. In a later suit by the wife for arrears in alimony in New York, the court said ". . . the fact that marital capacity was changed does not mean that every other legal incidence of the marriage was necessarily affected." [23] In *Armstrong v. Armstrong*,[24] an Ohio court awarding the wife alimony was held to have afforded full faith and credit to a Florida *ex parte* divorce decree which recited " 'that no award of alimony be made.' " [25] The Court held that ". . . the Florida court did not purport to adjudicate the absent wife's right to alimony." [26] The concurring opinion of Justice Black refused to side-step the constitutional question. The decree " '. . . *specifically decreed* that no award of alimony be made to the defendant. . . .' " [27] Relying on the *Estin* case Justice Black continued that because ". . . Mrs. Estin's claim to support had been reduced to judgment . . . is not a meaningful distinction. Mrs. Armstrong's right to support before judgment, like Mrs. Estin's after judgment, is the kind of personal right which cannot be adjudicated without personal service." [28]

Relying on the dicta in the *Estin* and *Armstrong* cases, the majority in the instant case found that there was no conflict between their decision and the full faith and credit clause. In effect, the Court says that marriage as well as divorce could be called "divisible." Marriage is thus two separate things—marital status and its legal incidents.[29] It presents an interesting picture. A wife can be deprived of marital status by mere constructive service; but she cannot be deprived of support by a foreign court lacking in personam jurisdiction.

LIS PENDENS — CANCELLATION FOR FAILURE TO COMMENCE ACTION ENDS PRIVILEGE.—Plaintiff filed in *County Court* a summons, complaint and a notice of pendency of action involving an alleged contract to sell real property, but failed to serve the defendant. Before cancellation of this notice became effective, plaintiff filed a second lis pendens in *Supreme Court* in the same cause and served the defendant. The defendant moved to cancel the new lis pendens. The

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[22] 334 U.S. 541 (1948).
[23] Estin v. Estin, 334 U.S. 541, 545 (1948).
[24] 350 U.S. 568 (1956).
[25] Armstrong v. Armstrong, 350 U.S. 568, 571 (1956).
[26] *Id.* at 569.
[27] *Id.* at 575.
[28] *Id.* at 577.
[29] See Bingham, *The American Law Institute vs. the Supreme Court: In the Matter of Haddock v. Haddock*, 21 CORNELL L.Q. 393, 401 (1936).