

## Legislative Recognition of the Divisible Divorce--New Protection for the Stay-at-Home Spouse

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to revocation,<sup>49</sup> or he may desire to withdraw it altogether. In the alternative, there could be a provision automatically terminating such authority upon the termination of the cause for its creation. The onus, however, should not be on the shareholder alone to revoke the authority at the risk of a possible injury to his interests by an unauthorized act.



#### LEGISLATIVE RECOGNITION OF THE DIVISIBLE DIVORCE—NEW PROTECTION FOR THE STAY-AT-HOME SPOUSE

Immediately upon the performance of the marriage ceremony, the husband by law, morals, and usage takes upon himself the responsibility of supporting his wife.<sup>1</sup> This duty arises notwithstanding the personal income or wealth of the wife or her ability to provide for herself and her family,<sup>2</sup> and continues until terminated by either the death of one of the parties,<sup>3</sup> or the cessation of the marital relationship by legal decree without provision for support.<sup>4</sup> Thus if the court did not exercise its discretionary power to award support in

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<sup>49</sup> N. Y. STOCK CORP. LAW § 47-a(c), (d) ("... [T]he proxy becomes revocable after the pledge is redeemed... the executory contract of sale... performed... the debt of the corporation... paid or [when] the period of employment... has terminated...").

<sup>1</sup> N. Y. DOM. REL. LAW § 51; see *Goldman v. Goldman*, 282 N. Y. 296, 299, 26 N. E. 2d 265, 266 (1940); *Oberlander v. Oberlander*, 179 Misc. 459, 467, 39 N. Y. S. 2d 139, 146 (N. Y. Dom. Rel. Ct. 1943); see GROSSMAN, *NEW YORK LAW OF DOMESTIC RELATIONS* 88 (1947); 41 C. J. S. 404.

<sup>2</sup> *DeBrauwere v. DeBrauwere*, 203 N. Y. 460, 96 N. E. 722 (1911); see *Clark v. Clark*, 203 Cal. 414, 264 Pac. 761 (1928); *Davis v. Davis*, 65 Cal. App. 499, 224 Pac. 478, 479 (1924); *Shebley v. Peters*, 53 Cal. App. 288, 200 Pac. 364, 366 (1921); *Rich v. Rich*, 12 N. J. Misc. 310, 171 Atl. 515, 519 (1934); *Coleman v. Coleman*, 37 Ohio App. 474, 175 N. E. 38, 39 (1930); *Matter of Harper*, 288 Pa. 52, 135 Atl. 617, 618 (1927); *Mihalcoe v. Holub*, 130 Va. 425, 107 S. E. 704, 706 (1921).

<sup>3</sup> See *Wilson v. Hinman*, 182 N. Y. 408, 410-412, 75 N. E. 236, 237-238 (1905); *Barnes v. Klug*, 129 App. Div. 192, 195, 113 N. Y. Supp. 325, 328 (1st Dep't 1908).

<sup>4</sup> *Staub v. Staub*, 170 Md. 202, 183 Atl. 605 (1936); accord, *Lynn v. Lynn*, 302 N. Y. 193, 97 N. E. 2d 748 (1951); see *McCoy v. McCoy*, 191 Iowa 973, 183 N. W. 377, 378 (1921); *Eldred v. Eldred*, 62 Neb. 613, 87 N. W. 340, 341 (1901); *People v. Schenkel*, 258 N. Y. 224, 226, 179 N. E. 474, 475 (1932). "Unless otherwise provided by local law, a decree of divorce by a court having jurisdiction of the cause and of the parties, dissolving the bonds of matrimony puts an end to all obligations of either party to the other, and to any right which either has acquired by the marriage... except so far as the court granting the divorce, in the exercise of an authority vested in it by the legislature, orders... alimony to be paid by one party to the other." *Barrett v. Failing*, 111 U. S. 523, 524-525 (1884).

an action where both parties have entered an appearance, the duty to support will not survive the termination.<sup>5</sup> But what are the wife's rights if the husband flees the marital domicile and obtains an *ex parte* divorce? Is she divested of her right to support as well as her marital status? This is the problem which faced the legislature of New York in 1948<sup>6</sup> and 1953,<sup>7</sup> and which found solution in the enactment of Section 1170-b of the Civil Practice Act which enables the court to award maintenance to an ex-wife under certain limited conditions.

### Background

In *Williams v. North Carolina*,<sup>8</sup> the United States Supreme Court decided that a state is bound to recognize a divorce or annulment decree granted by a court of a sister state, whenever that court has obtained jurisdiction over one of the parties. The decision, phrased in general terms, did not consider nor decide whether the decree terminated the incidents of the marriage, particularly the wife's right to support, as well as the marital status. However, a few years later in their consideration of a related problem,<sup>9</sup> three justices, in concurring opinions, shared the view that marital status and support are distinct conceptual entities, each meriting independent consideration under its own separate jurisdictional requirements.<sup>10</sup> While this recognition of the separability of a divorce decree may not appeal to the orderly mind, it does have the desired effect,<sup>11</sup> namely, of providing the court with a basis for awarding support to an ex-wife whose right to support would otherwise be cut off.

### Attempted Solutions

With this recognition of the permissibility of such relief, we find that although several states have considered this problem, no uniform results have been reached. New York,<sup>12</sup> among other states,<sup>13</sup> has

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<sup>5</sup> *Whitaker v. Whitaker*, 52 Ohio App. 223, 3 N. E. 2d 667 (1936); *Wilcox v. Wilcox*, 198 Okla. 370, 178 P. 2d 874 (1947); see 27 C. J. S. 944. *But cf.* *Estin v. Estin*, 296 N. Y. 303, 73 N. E. 2d 113 (1947), *aff'd*, 334 U. S. 541 (1948).

<sup>6</sup> Senate Introductory No. 2366 (1948); see *Morton v. Morton*, 99 N. Y. S. 2d 155, 166 (N. Y. Dom. Rel. Ct. 1950).

<sup>7</sup> Assembly Introductory No. 350 (1953).

<sup>8</sup> 317 U. S. 287 (1942).

<sup>9</sup> The case was concerned with whether a prior support provision survived an *ex parte* divorce decree.

<sup>10</sup> See *Esenwein v. Commonwealth*, 325 U. S. 279, 281 (1945) (concurring opinion).

<sup>11</sup> *Ibid.*; *Russo v. Russo*, 62 N. Y. S. 2d 514, 523 (N. Y. City Ct. 1946).

<sup>12</sup> *Adler v. Adler*, 192 Misc. 953, 81 N. Y. S. 2d 797 (N. Y. Dom. Rel. Ct. 1948). The Supreme Court has no inherent power to grant maintenance to a woman independent of statutory authority. *Ramsden v. Ramsden*, 91 N. Y. 281 (1883). There had been no statutory authority in New York.

<sup>13</sup> *McCormick v. McCormick*, 82 Kan. 31, 107 Pac. 546 (1910); Common-

refused to aid the wife, holding that a divorce decree ended not only the marriage but also all its natural incidents; still others, however, ignoring this view, have attempted to protect the economic interest of the wife. As early as 1869, an Ohio court,<sup>14</sup> while apparently recognizing the *ex parte* divorce decree, stated that support could be awarded to an ex-wife, without the aid of statute, since to decree otherwise would "... work a fraud upon the pecuniary rights of the wife."<sup>15</sup> This decision has been unaffected by the first *Williams*<sup>16</sup> case which now makes mandatory the recognition of the termination of the marital status. Whether this recognition ends the right to support as well as the status has yet to be affirmatively decided by the Supreme Court. As late as 1952, an Ohio court<sup>17</sup> considered this problem and once again awarded the wife support, stating that since there was no prior adjudication of the question of support, the full faith and credit clause did not apply to property interests. Similar relief has been granted the wife in other states<sup>18</sup> both before and after the *Williams* case, and it is felt that those states whose law was established prior to the *Williams* case probably will, as did the courts of Ohio,<sup>19</sup> remain consistent in their decision.

In New Jersey,<sup>20</sup> the court is authorized by statute to award alimony to an ex-wife. However, because of a fundamental principle of New Jersey divorce law, the statute has been so interpreted that the wife can collect alimony only if the husband caused the marital rift, and the wife was a successful plaintiff in the prior action.<sup>21</sup>

### *New York*

In New York, the Supreme Court<sup>22</sup> and the Domestic Rela-

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wealth v. Petrosky, 168 Pa. Super. 232, 77 A. 2d 647 (1951); *see* Commonwealth v. Esenwein, 348 Pa. 455, 35 A. 2d 335, 336 (1944), *aff'd*, 325 U. S. 279 (1945).

<sup>14</sup> Cox v. Cox, 19 Ohio St. 502 (1869).

<sup>15</sup> *Id.* at 512.

<sup>16</sup> Williams v. North Carolina, 317 U. S. 287 (1942).

<sup>17</sup> Melnyk v. Melnyk, 49 Ohio Ops. 22, 107 N. E. 2d 549 (1952).

<sup>18</sup> Gray v. Gray, 61 F. Supp. 367 (E. D. Mich. 1945); Pawley v. Pawley, 46 So. 2d 464 (Fla.), *cert. denied*, 340 U. S. 866 (1950); Thurston v. Thurston, 58 Minn. 279, 59 N. W. 1017 (1894); Toncray v. Toncray, 123 Tenn. 476, 131 S. W. 977 (1910); Cook v. Cook, 56 Wis. 195, 14 N. W. 33 (1882).

<sup>19</sup> Melnyk v. Melnyk, *supra* note 17.

<sup>20</sup> N. J. REV. STAT. tit. 2, c. 50, § 37.

<sup>21</sup> "While the section of our statute which confers authority on Chancery to decree alimony after divorce, does not in terms restrict the authority to cases in which the wife is the innocent party, yet the nature of alimony imposes the limitation. . . . Where it is the wife's misconduct that brings about the dissolution, the husband's duty to support her ends with the dissolution. . . ." Lum v. Lum, 138 N. J. Eq. 198, 47 A. 2d 555, 557 (1946), *rev'd on other grounds*, 140 N. J. Eq. 137, 53 A. 2d 309 (1947).

<sup>22</sup> N. Y. CIV. PRAC. ACT §§ 1140-a, 1170.

tions Court,<sup>23</sup> although authorized to award maintenance and support, have in the past granted such relief only (1) if there was a valid existing marriage<sup>24</sup> or (2) in the absence of a marriage, a special statute authorized such relief.<sup>25</sup> Since the New York courts do not have the inherent power to award alimony,<sup>26</sup> they have denied support to the unprovided-for stay-at-home spouse after a valid *ex parte* divorce.<sup>27</sup> Some of the lower courts, however, have expressed the opinion that they do possess the necessary power to award support in such a situation, but have nevertheless failed to do so.<sup>28</sup> An opportunity to resolve this controversy seems to have been presented to the Court of Appeals but once. However, inasmuch as the specific issue was not properly before the court, its determination remained in doubt with the cause being remanded to the lower court with vague instructions for its disposal.<sup>29</sup> That court denied the wife relief on grounds other than those suggested by the Court of Appeals,<sup>30</sup> declaring, however, that such direction did "not preclude the petitioner from entitlement to maintenance and support. . . ." <sup>31</sup>

<sup>23</sup> N. Y. CONST. Art. VI, § 18; N. Y. DOM. REL. CT. ACT § 91(2); see *Morton v. Morton*, 99 N. Y. S. 2d 155, 167 (N. Y. Dom. Rel. Ct. 1950); *Adler v. Adler*, 192 Misc. 953, 959, 81 N. Y. S. 2d 797, 802 (N. Y. Dom. Rel. Ct. 1948).

<sup>24</sup> N. Y. CIV. PRAC. ACT § 1170; see *Jones v. Jones*, 108 N. Y. 415, 423, 15 N. E. 707, 708 (1888) ("The right to maintain an action for divorce in this state presupposes the existence of the relation of husband and wife."); *Fischer v. Fischer*, 254 N. Y. 463, 466, 173 N. E. 680, 682 (1930) ("In every action for separation the primary fact to be proved is an existing marriage. . .").

<sup>25</sup> N. Y. CIV. PRAC. ACT § 1140-a; see Sparacio, *Alimony and the Bigamist*, 21 ST. JOHN'S L. REV. 1 (1946).

<sup>26</sup> *Ramsden v. Ramsden*, 91 N. Y. 281 (1883); see *Weintraub v. Weintraub*, 302 N. Y. 104, 108, 96 N. E. 2d 724, 727 (1951); *Romaine v. Chauncey*, 129 N. Y. 566, 571, 29 N. E. 826, 827 (1892); *Erkenbrach v. Erkenbrach*, 96 N. Y. 456, 458-465 (1884) (containing an excellent historical survey of the acquisition by the New York courts of the power to award alimony); *Gibson v. Gibson*, 81 Misc. 508, 511, 143 N. Y. Supp. 37, 39 (Sup. Ct. 1913).

<sup>27</sup> *Adler v. Adler*, *supra* note 23. *But cf.* *Lavigne v. Lavigne*, 280 App. Div. 854, 113 N. Y. S. 2d 521 (3d Dep't 1952).

<sup>28</sup> See *Gittelman v. Gittelman*, 192 Misc. 334, 337, 80 N. Y. S. 2d 695, 697 (N. Y. Dom. Rel. Ct. 1948); *Franklin v. Franklin*, 189 Misc. 442, 443, 71 N. Y. S. 2d 234, 235-236 (N. Y. Dom. Rel. Ct. 1947). *But see* *Morton v. Morton*, 99 N. Y. S. 2d 155, 161-167 (N. Y. Dom. Rel. Ct. 1950).

<sup>29</sup> See *Franklin v. Franklin*, 295 N. Y. 431, 435, 68 N. E. 2d 429, 430 (1946). "On a further hearing . . . consideration should be given to the following provision of the Domestic Relations Court Act of the City of New York:

"If the marriage relationship shall have been terminated by final decree [of divorce] . . . valid in the State of New York . . . an order for support . . . [may be] enforced in the family court . . . for the benefit of a child of such marriage." (§ 137, subd. 1.)" (emphasis added). *Ibid.*

<sup>30</sup> *Franklin v. Franklin*, *supra* note 28. The court held that the wife would be entitled to support only on the public charge basis but that under the facts of the case she was not even entitled to relief on this ground.

<sup>31</sup> *Franklin v. Franklin*, *supra* note 28 at 443, 71 N. Y. S. 2d at 236.

Several other New York cases have indicated the desire of the court to protect the economic interest of the wife against *ex parte* divorces. In *Estin v. Estin*,<sup>32</sup> a prior support order granted by a New York court was permitted to survive the *ex parte* divorce. The same effect was given to a private support agreement entered into by the parties in *Russo v. Russo*,<sup>33</sup> wherein the court stated that the violence done to our public policy by the required acceptance of a sister state's decree should not be extended to the abrogation of a contract validly entered into. In still another case, *Palmer v. Palmer*,<sup>34</sup> the court held that even in the absence of a prior support order or agreement, the wife was entitled to maintenance notwithstanding the prior divorce. There the wife commenced an in personam action against her husband for separation. The husband fled to Nevada and obtained an *ex parte* divorce, despite an injunction issued against him by the New York court. In the separation action it was decided that, although New York was required to recognize the decree of the Nevada court as binding under the full faith and credit clause of the Constitution, the decree did not affect the court's power to estop the husband from raising it as a defense in an action by the wife for support and maintenance.

Following the decision in the *Estin* case, the New York legislature made a somewhat inadequate attempt to protect the economic interest of the wife. Through the enactment of the Uniform Support of Dependents Act,<sup>35</sup> New York, in conjunction with forty-one other states and territories<sup>36</sup> which passed similar legislation,<sup>37</sup> enabled certain dependent persons to secure support from the one legally responsible therefor, although that party is neither before the court nor has left property in the state where the dependent person resides. Under its provisions, the dependent can commence a support action in the forum and, pursuant to the terms of this Act, the respondent court is authorized to personally serve the defendant, and then to hear and decide the issue of support. The decision, filed in New York, becomes part of the record which the respondent can thereafter be compelled to recognize under threat of contempt proceedings in the latter's state.<sup>38</sup> However, the section has proved inadequate. Administration has been limited to the Domestic Relations Court, and awards have been nominal. The Act, inasmuch as its enumeration

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<sup>32</sup> 296 N. Y. 308, 73 N. E. 2d 113 (1947), *aff'd*, 334 U. S. 541 (1948).

<sup>33</sup> 62 N. Y. S. 2d 514 (N. Y. City Ct. 1946).

<sup>34</sup> 184 Misc. 291, 53 N. Y. S. 2d 784 (Sup. Ct. 1945).

<sup>35</sup> N. Y. UNCONSOLIDATED LAWS §§ 2111-2120. The purpose of this uniform act is to secure support in civil proceedings for dependent wives, children and poor relatives from persons legally responsible for their support. *Id.* § 2111. See Legis., 24 ST. JOHN'S L. REV. 162 (1949).

<sup>36</sup> See note to N. Y. UNCONSOLIDATED LAWS §§ 2111-2120 in 1953 Cumulative Annual Pocket Part at p. 46.

<sup>37</sup> *Ibid.*

<sup>38</sup> N. Y. UNCONSOLIDATED LAWS § 2116.

of the persons liable for support does not include an ex-husband,<sup>39</sup> has failed to afford the ex-wife the power to collect the support to which she is entitled.

### *The Statute*

Despite all these inroads on the effect of the *ex parte* decree, a New York court, as late as 1948, still held that it could not grant aid to an unprovided-for ex-wife.<sup>40</sup> In 1953, therefore, the legislature,<sup>41</sup> recognizing the necessity of protecting a domiciliary wife against being cut off from her source of support by a deserting husband, authorized the court to grant maintenance in an action brought by her for divorce, separation, annulment or the declaration of the nullity of a void marriage.<sup>42</sup> Where the wife submits herself to the jurisdiction of the foreign court, or where she brought the prior action, the section is inapplicable since by her actions the resulting decree would be *res judicata* of all the issues that were, or could have been presented, including that of alimony.<sup>43</sup> It is apparent, therefore, that the statute has application only where the stay-at-home spouse has been unsuccessful in her prosecution of the marital action due to her husband's prior procurement of an *ex parte* decree<sup>44</sup> since success in that action would have entitled her to alimony under the existing statutory provisions,<sup>45</sup> and the new section would be superfluous. Thus, the statute does not create an action for support alone, but permits the award of maintenance as an incident to one of the recognized marital actions.<sup>46</sup>

### *Jurisdiction*

The decree of a foreign court is entitled to full faith and credit only if the court making such decree had competent jurisdiction over the subject matter to be affected thereby.<sup>47</sup> Thus, in order to understand the jurisdictional prerequisites to its utilization, and finding no special statutory jurisdictional requirements governing the section

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<sup>39</sup> *Id.* § 2113.

<sup>40</sup> *Adler v. Adler*, 192 Misc. 953, 81 N. Y. S. 2d 797 (N. Y. Dom. Rel. Ct. 1948).

<sup>41</sup> Laws of N. Y. 1953, c. 663.

<sup>42</sup> N. Y. CIV. PRAC. ACT § 1170-b.

<sup>43</sup> *Ibid.*; see 17 AM. JUR. 482.

<sup>44</sup> N. Y. CIV. PRAC. ACT § 1170-b.

<sup>45</sup> *Id.* §§ 1155, 1164, 1170.

<sup>46</sup> *Id.* § 1170-b.

<sup>47</sup> *Williams v. North Carolina*, 325 U. S. 226 (1945); *Griffin v. Griffin*, 327 U. S. 220 (1946). ". . . [T]he judgment as to property rights is not conclusive unless both parties had their day in court." *Melnik v. Melnik*, 49 Ohio Ops. 22, 107 N. E. 2d 549, 550 (1952). In addition, the petitioning wife must satisfy the jurisdictional prerequisite for the maintenance of her marital action. See N. Y. CIV. PRAC. ACT §§ 1147, 1165-a.

under consideration,<sup>48</sup> we must look to the ordinary requirements for an alimony decree. Since alimony is fundamentally an in personam type of relief,<sup>49</sup> the court may award alimony if it has acquired jurisdiction over the person of the defendant. This may be effected by personal service within the jurisdiction;<sup>50</sup> general appearance in the action;<sup>51</sup> service upon a designee of the defendant within the state;<sup>52</sup> or consent in advance to the acquisition of personal jurisdiction.<sup>53</sup>

However, where in personam jurisdiction cannot be obtained, but the defendant has property in the jurisdiction, the court possesses the power to award some relief. In *Geary v. Geary*<sup>54</sup> the court was able to award support to the wife of an absent defendant in her separation action by the use of the property sequestered prior to judgment, pursuant to Section 1171-a of the Civil Practice Act. The question arises as to whether or not this same procedure may be followed where there is no husband-wife relationship to support the original marital action. Although the language of the sequestration statute does not preclude an affirmative answer, a close reading of the pertinent sections of the Civil Practice Act would indicate that this section would not suffice as a basis for granting the wife relief. Under Section 1170-b, the wife may be required to make a fictional allegation of a valid marriage. However, Section 1171-a, although allowing a wife, *in such an action*, to sequester her husband's property so that it may be applied ". . . to the payment of such sums as the court may deem proper . . . for the support of the wife. . . ." would seem to be predicated upon a valid cause of action. While the relief afforded by the section is not expressly conditioned upon the wife's success in the marital action, nor upon the dismissal of the wife's cause for lack of jurisdiction, to allow it to be used in a situation arising under Section 1170-b where the cause of action alleged may be fictional, would seem an improper application of the statute.

There is a further provision of the New York Civil Practice Act which gives the court the in personam jurisdiction necessary for an enforceable award of support.<sup>55</sup> Under Section 235, the court obtains personal jurisdiction over the husband provided he is person-

<sup>48</sup> *Id.* § 1170-b.

<sup>49</sup> See *Rigney v. Rigney*, 127 N. Y. 408, 413, 28 N. E. 405, 406 (1891), *rev'd on other grounds sub nom.* *Laing v. Rigney*, 160 U. S. 531 (1896).

<sup>50</sup> N. Y. CIV. PRAC. ACT § 225; see PRASHKER, *NEW YORK PRACTICE* 122 (2d ed. 1951).

<sup>51</sup> N. Y. CIV. PRAC. ACT § 237; see PRASHKER, *op. cit. supra* note 50, at 123; 27 C. J. S. 1007.

<sup>52</sup> N. Y. CIV. PRAC. ACT § 227; see PRASHKER, *op. cit. supra* note 50, at 122.

<sup>53</sup> *Ibid.* For in personam effect of personal service without the state on a domiciliary pursuant to Section 235 of the Civil Practice Act see text to note 55 *infra*.

<sup>54</sup> 272 N. Y. 390, 6 N. E. 2d 67 (1936). The judgment, however, is effective only to the extent of the value of the property attached.

<sup>55</sup> N. Y. CIV. PRAC. ACT § 235.

ally served with process outside New York while still a resident or domiciliary of this state. However, the use of this section in a situation arising under Section 1170-b would be a limited one. It would be necessary for the husband to *re-establish* his domicile in New York in order that Section 235 be applicable. If the wife could prove that he was a resident of this state at the time of the prior decree, she would at the same time prove that the state granting the divorce never acquired the jurisdiction necessary to grant a binding decree.<sup>56</sup> In such an instance, the wife could not come within the protection of Section 1170-b since that section authorizes a court to award maintenance only if it “. . . refuses to grant such relief [separation, divorce or annulment] by reason of a finding by the court that a divorce . . . had previously been granted. . . .” However, the wife is not thereby remediless, for in so proving the fraudulent residence of the husband, she may maintain her own marital action based on the existence of a subsisting marriage and obtain support as an incident thereto.<sup>57</sup>

### *Finality of the Decree*

As in the case of other support provisions of the Civil Practice Act,<sup>58</sup> the court after due notice to the other party may annul, vary, or modify the relief granted pursuant to this section.<sup>59</sup> This statute, read in conjunction with Section 1171-b of the Civil Practice Act, has written into every such decree the power to alter accrued as well as future installments of maintenance. The court may, if it feels the burden on the former husband has become oppressive and excessive, reduce the amount already owing to the wife.<sup>60</sup> However, this power raises the question as to the recognition that a decree under Section 1170-b must be accorded by other states. In *Sistare v. Sistare*,<sup>61</sup> the Supreme Court declared that an alimony decree is entitled to full faith and credit provided it is not subject to retrospective modification by the state granting it. Later, the Court, in *Griffin v. Griffin*,<sup>62</sup> held that a foreign jurisdiction was not required to recognize a New York decree fixing an amount *due* from the husband if he was not given sufficient notice of the proceedings, on the ground that it would be a violation of procedural due process to deprive the husband of his right to reduce the amount of accrued alimony. The

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<sup>56</sup> For a court to have the power to award an *ex parte* divorce, the petitioner must be domiciled in its jurisdiction. If he is not, the decree is not binding on the other states. *Williams v. North Carolina*, 325 U. S. 226 (1945).

<sup>57</sup> N. Y. CIV. PRAC. ACT §§ 1140-a, 1155, 1164, 1170.

<sup>58</sup> *Id.* §§ 1140, 1140-a, 1155, 1170.

<sup>59</sup> *Id.* § 1170-b. “The court, by order, at any time thereafter . . . may annul, vary or modify such judgment.”

<sup>60</sup> *Id.* § 1171-b.

<sup>61</sup> 218 U. S. 1 (1910).

<sup>62</sup> 327 U. S. 220 (1945); see Note, 21 ST. JOHN'S L. REV. 49 (1946).

cause was then remanded to the lower court for a determination of the wife's right to collect the accrued amount, based on the original divorce and alimony decree. Whether, therefore, a foreign court will recognize a wife's rights arising under Section 1170-b remains in doubt. There appears to be authority both for and against this proposition.<sup>63</sup> It would seem that to insure recovery to a wife in an out-of-state action, the wisest course would be a proceeding under Section 1171-b to reduce the support order to final judgment.

### *Constitutionality*

Due to the unsettled nature of our divorce laws as well as the divergence of opinion among the members of our courts, as well as the Supreme Court,<sup>64</sup> it is highly probable that this section will be contested as being violative of the full faith and credit clause. Article IV, Section 1 of the United States Constitution requires that full faith and credit be given in each state to the ". . . judicial Proceedings of every other state." It is applicable, however, only when the court rendering the judgment or granting the decree has competent jurisdiction over the action.<sup>65</sup> While prima facie recognition must be given to the judgment or decree of a sister state, the question of jurisdiction is always open to re-examination by an interested court, and if the original court did not have the proper jurisdiction then the issue there determined can be the subject of further litigation. Applying these rules to the problem under consideration we find that every marital action in which support is sought has a dual aspect—partly in personam (alimony) and partly in rem (divorce).<sup>66</sup> Therefore if a court has only in rem jurisdiction, its decision, even if ostensibly applied to both the marital status and support, will be entitled to full faith and credit only as to the part over which the court had jurisdiction. Since there is only in rem jurisdiction in a valid *ex parte* decree, only that part of the decree affecting the marital status of the parties will be recognized and ". . . the divorce decree is not entitled to full faith and credit when it comes to maintenance and support."<sup>67</sup>

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<sup>63</sup> See Scales, *Enforcement of Foreign "Non-Final" Alimony and Support Orders*, 53 COL. L. REV. 817 (1953). The Supreme Court has expressly refused to state whether a judgment for accrued alimony, which is subject to modification, is entitled to full faith and credit. See *Barber v. Barber*, 323 U. S. 77, 81 (1944).

<sup>64</sup> In many recent cases on domestic relations including the *Williams*, *Estin* and *Eisenwein* cases, the judges have filed dissenting or concurring opinions. These dissenting and concurring opinions are recognized by the justices as a warning that the minority does not consider the question closed. See 31 A. B. A. J. 113, 167 (1945).

<sup>65</sup> *Williams v. North Carolina*, 325 U. S. 226 (1945).

<sup>66</sup> See *Rigney v. Rigney*, 127 N. Y. 408, 412, 28 N. E. 405, 406 (1891), *rev'd on other grounds sub nom. Laing v. Rigney*, 160 U. S. 531 (1896).

<sup>67</sup> *Franklin v. Franklin*, 189 Misc. 442, 443, 71 N. Y. S. 2d 234, 235 (1947).

Although the purpose of Section 1170-b of the Act is not to protect the wife from domestic *ex parte* decrees, but rather from foreign decrees, the section has been made so applicable.<sup>68</sup> The reason for this inclusion is to comply with the caveat of Justice Frankfurter in *Estin v. Estin*<sup>69</sup> to the effect that there must be no discrimination between domestic and foreign decrees. Aside from this precautionary factor, however, the application of Section 1170-b to a domestic decree is unnecessary since New York courts have for several years possessed the power to add a support provision to a marital decree granted in this state at any time after final judgment.<sup>70</sup>

### Conclusion

This section appears to be a laudable addition to the law of New York pertaining to support, for its beneficial effect extends not only to the wife and her domicile but also to the development of a sounder national policy towards the divorce problem. A wife will be benefited by the statutory assurance that her husband cannot avoid his duty of support by obtaining an uncontested divorce. The State of New York will benefit from the continued support of the wife since the possibility of the wife becoming a public charge will be reduced. In addition the section may tend to stabilize the basic unit of our society, the family, by reducing the number of divorces, especially *ex parte*, obtained by errant husbands. Section 1170-b will force a husband either to support his wife or to withdraw both himself and his property from the state. The only person adversely affected by the statute will be the husband who has attempted to escape his contractual duty. No longer will he be able to force his wife to follow him to, and litigate her right to support in, the forum chosen by him.<sup>71</sup> It must be remembered, however, that the husband may still obtain a binding divorce from his wife in an action in which she does not appear. The husband's economic status alone, not his marital status, is affected.

Moreover, the statute should lessen to a certain degree the encroachment of the divorcing state on the sovereignty of the wife's forum. Because of the joint effect of Article IV, Section 1 of the United States Constitution and the first *Williams* case, the divorcing state is allowed to force its judgment upon a sister state which has jurisdiction over the marital res and an equally strong, if not stronger,

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<sup>68</sup> See 1953 LEG. DOC. NO. 65(K), REPORT, N. Y. LAW REVISION COMMISSION (1953) (New York Legislative Service Advance Sheet).

<sup>69</sup> 334 U. S. 541 (1948) (dissenting opinion). See also note 68 *supra*.

<sup>70</sup> N. Y. CIV. PRAC. ACT §§ 1140-a, 1170.

<sup>71</sup> Since the wife could not obtain relief here she would have to go to the state which had jurisdiction over the husband and petition *that* court for alimony or attack the decree on jurisdictional grounds.

interest in the relationship of the parties.<sup>72</sup> This recognition of the decree as terminating the marital status of the parties is necessary for the benefit of the federal union.<sup>73</sup> Nevertheless, since the same considerations are not applicable to the *incidents* of marriage,<sup>74</sup> Section 1170-b appears to escape constitutional censure.

In order to guarantee the ex-wife the maximum economic protection provided for by Section 1170-b, she should be permitted to obtain the authorized support even if the New York courts cannot obtain jurisdiction over the husband or his property. It is submitted that this might be accomplished by amending the Uniform Support of Dependents Act to include in its definition of persons liable for support, an ex-husband, thereby providing that notwithstanding the fact that he has obtained in any state or country a final *ex parte* decree of divorce, he shall be deemed legally liable for the support of his former wife.



#### SOME OBSERVATIONS ON THE NEW YORK CITY TRANSIT AUTHORITY

##### *Development of New York City Transportation Facilities*

In 1827, Abraham Brower offered for the price of one shilling to transport passengers in a specially constructed carriage along Broadway as far as Bleeker Street, thus instituting the first urban transportation system in the United States.<sup>1</sup> Several years later horse-drawn omnibuses carried passengers from the Battery to Bond Street for twelve and one-half cents.<sup>2</sup> By 1835, over one hundred of these omnibuses regularly transported passengers in New York City;<sup>3</sup> by 1855, 593 omnibuses were licensed to carry passengers over twenty-seven established routes.<sup>4</sup> Despite this phenomenal expansion and widespread popularity, the omnibus was soon outmoded. Competition from a newly developed method of transportation—the

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<sup>72</sup> Since divorce jurisdiction depends on control over the marital res, the fora of both the husband and wife have concurrent power to grant a decree. The forum of the wife, however, has a greater interest in the incidents of the marriage, especially support, inasmuch as it may be called upon to support the wife should the husband fail to perform his duty.

<sup>73</sup> See *Esenwein v. Commonwealth*, 325 U. S. 279, 282 (1948). This recognition of the divorce decree will avoid bigamous relationships and the stigmatization of the innocent children of the remarriage.

<sup>74</sup> See *Esenwein v. Commonwealth*, *supra* note 73; *Russo v. Russo*, 62 N. Y. S. 2d 514, 522 (N. Y. City Ct. 1946).

<sup>1</sup> MILLER, *FARES, PLEASE!* 1 (1941).

<sup>2</sup> *Id.* at 5.

<sup>3</sup> *Ibid.*

<sup>4</sup> Hecker, *History of Urban Transportation* in *PRINCIPLES OF URBAN TRANSPORTATION* 1 (Mossman ed. 1951).