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Domestic Relations--Separation Agreements--Subsistence After Issuance of Court's Decree (Murray v. Murray, 278 App. Div. 183 (1st Dep't 1951))

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DOMESTIC RELATIONS — SEPARATION AGREEMENTS — SUBSISTENCE AFTER ISSUANCE OF COURT'S DECREE.—During the pendency of a separation action, plaintiff and her husband contracted whereby he agreed to pay her 210 dollars per week until she remarried or died. The parties stipulated that their agreement should only become binding from the date of the judicial decree of separation, and that it should be incorporated therein. Subsequent to the court's separation award, the defendant succeeded in having the decree modified, so that the plaintiff's alimony was reduced to 160 dollars per week. Plaintiff sued for the difference between the reduced amount awarded by the court and the amount specified in the contract. *Held,* summary judgment for the plaintiff reversed. Before obligations under a separation agreement and a separation decree can exist concurrently, the contractual obligation must exist independently of the judicial action taken. *Murray v. Murray,* 278 App. Div. 183, 104 N. Y. S. 2d 44 (1st Dep't 1951).

The validity of separation agreements entered into between husband and wife after separation for legal cause has been repeatedly recognized.[1] When these agreements include provisions for alimony, the courts are inclined to adhere to the judgment of the parties respecting support except where fraud, duress, or inadequacy require impeachment of such agreements.[2] Since the prime concern of the wife is to have some assurance that the alimony will be paid, these agreements are frequently incorporated into the decree of the court,[3] thereby exposing the recalcitrant husband to the judicial sanction of contempt in case of non-performance. Such incorporation, however, does not prevent the court from modifying the judicial decree.[4] In the event of a subsequent modification, a controversy often arises as to whether the original terms of the contract still subsist, and are enforceable by an action on the contract.

In determining whether the contract has an existence apart from the judicial decree, the courts have repeatedly referred to the dictum in *Goldman v. Goldman,*[5] wherein it was stated that rights under an agreement may survive modification of a decree, if such was the manifest intention of the parties.[6] In the absence of invalidating

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[1] Galusha v. Galusha, 116 N. Y. 635, 22 N. E. 1114 (1889); Clark v. Fosdick, 118 N. Y. 7, 22 N. E. 1111 (1889).

[2] Hungerford v. Hungerford, 161 N. Y. 550, 56 N. E. 117 (1900); Galusha v. Galusha, 138 N. Y. 272, 33 N. E. 1062 (1893); Pomerance v. Pomerance, 271 App. Div. 1027, 69 N. Y. S. 2d 72 (2d Dep't 1947), *aff'd,* 301 N. Y. 254, 93 N. E. 2d 832 (1950); Almonte v. Almonte, 259 App. Div. 311, 19 N. Y. S. 2d 153 (1st Dep't 1940); *cf.* Everitt v. Everitt, 201 N. Y. Supp. 305 (Sup. Ct. 1923).

[3] Wimpfheimer v. Wimpfheimer, 262 App. Div. 304, 29 N. Y. S. 2d 102 (1st Dep't 1941).

[4] Kunker v. Kunker, 230 App. Div. 641, 246 N. Y. Supp. 118 (3d Dep't 1930).

[5] 282 N. Y. 296, 26 N. E. 2d 265 (1940).

[6] "The direction of the court may be enforced in manner provided by statute and the plaintiff may still resort to the usual remedies for breach of

circumstances, therefore, subsequent New York cases have sustained the terms of the original contract when the language has expressly indicated such an intent.[7] Thus, where a contract provided that the provisions in any divorce decree should in no way affect the obligations imposed by the agreement, the court concluded that an independent contract obligation existed.[8] But where the language of the agreement neither clearly nor expressly stipulated for the continuance of the contractual obligations after the issuance of the judicial decree, the courts have been reluctant to find that the parties intended such a result by implication.[9] Nevertheless, there has been some indication that the courts may find, from the general tenor of the entire agreement, that the parties did not intend their contract to merge in the judicial decree, but to exist concurrently therewith, even though the parties had not expressly so provided.[10]

In the present case, no express provision for the subsistence of the contractual rights was made, and the court apparently followed those decisions which emphasize the reluctance of the New York courts to imply such a provision. Since the agreement was to be binding only upon the award of a judicial decree, the court concluded that no concurrent obligation arose; rather there was a merger of the agreement into the decree due to the dependence of the former on the latter.

It is to be remembered that alimony provisions of a judicial decree are abrogated by the death of *either* the husband or the wife or by her remarriage.[11] The agreement in the principal case provided for the support until the *wife* remarried or died. Such language would seem to indicate an intent to bind the husband's estate to a contractual obligation even though the judicial obligation would cease upon the husband's death. Such intent, as manifested by the language of the agreement, would have the effect of creating an agreement separate and apart from the judicial decree. Although the conditioning of the agreement on the award of the separation decree postponed

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a contractual obligation if there has been such breach, but we do not now decide whether the parties intended that the contractual obligation of the defendant should survive where the court has modified a direction to the defendant to pay the sum fixed by contract." *Id.* at 305, 26 N. E. 2d at 269.

[7] Wersinger v. Cook, 187 Misc. 1059, 66 N. Y. S. 2d 238 (Sup. Ct. 1946) (The contract itself stated that, "this agreement shall survive an action of divorce."); *cf.* Bell v. Bell, 171 Misc. 605, 13 N. Y. S. 2d 500 (Sup. Ct. 1939) ("This agreement shall remain in full force and effect unless mutually modified or cancelled.").

[8] Holahan v. Holahan, 191 Misc. 47, 48, 79 N. Y. S. 2d 786, 787 (Sup. Ct. 1947), *aff'd mem.*, 298 N. Y. 798, 83 N. E. 2d 696 (1949).

[9] Jaeckel v. Jaeckel, 179 Misc. 994, 40 N. Y. S. 2d 491 (Sup. Ct. 1943); Chester v. Chester, 171 Misc. 608, 13 N. Y. S. 2d 502 (Sup. Ct. 1939); Matter of Johnson, 185 Misc. 352, 56 N. Y. S. 2d 771 (Surr. Ct. 1945).

[10] Matter of Van Arsdale, 190 Misc. 968, 75 N. Y. S. 2d 487 (Surr. Ct. 1947); *see* King v. King, 103 N. Y. S. 2d 865, 868 (Sup. Ct. 1951).

[11] N. Y. Civ. Prac. Act § 1172-c; Wilson v. Hinman, 182 N. Y. 408, 75 N. E. 236 (1905).

the effectiveness of the agreement until the decree was awarded, it is submitted that the parties probably did not intend the same act which gave life to the agreement to result also in its death.

FOREIGN CORPORATION—JURISDICTION BASED ON SINGLE TORT. —A Massachusetts corporation negligently caused damage to the plaintiff's house in Vermont while repairing the roof. The plaintiff instituted an action against the corporation in Vermont by serving process on the secretary of state. Such service was made pursuant to a statute of that state which subjected to its jurisdiction a foreign corporation which committed a tort within its borders.[1] The defendant appeared specially and moved to dismiss the complaint on the ground that the statute was unconstitutional as a violation of due process in that it made the commission of an isolated act a basis of *in personam* jurisdiction. *Held,* motion denied. A state has the power to subject to the jurisdiction of its courts by statute a foreign corporation which commits a tort within its borders. *Smyth v. Twin State Improvement Corp.,* 80 A. 2d 664 (Vt. 1951).

The rudiments of due process require that a court, in order to render an *in personam* judgment, must have jurisdiction over the person of the defendant. If such jurisdiction is lacking, the judgment is void.[2]

Traditional concepts of due process permit jurisdiction to be based on presence,[3] consent,[4] or submission to the jurisdiction.[5] The presence of an individual defendant presents no difficulties since he has an actual physical existence in the jurisdiction. However, a corporation, being a creature of the law, presents a problem in that it is deemed to have no existence outside the jurisdiction which gave it life.[6] Notwithstanding this concept of limited existence, a corporation is permitted to carry on its business in other jurisdictions through agents.[7] As a consequence, the corporation enters into a series of

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[1] VT. STAT. § 1562 (1947): "If a foreign corporation makes a contract with a resident of Vermont to be performed in whole or in part by either party in Vermont, or if such foreign corporation commits a tort in whole or in part in Vermont against a resident of Vermont, such acts shall be deemed to be doing business in Vermont . . . and shall be equivalent to the appointment by such foreign corporation of the secretary of the state . . . to be its true and lawful attorney upon whom may be served all lawful process in any actions . . . arising from or growing out of such contract or tort."

[2] Pennoyer v. Neff, 95 U. S. 714 (1887).

[3] International Shoe Co. v. Washington, 326 U. S. 310 (1945).

[4] Morris & Co. v. Skandinavia Ins. Co., 81 F. 2d 346 (7th Cir. 1936).

[5] Simons v. Inecto, Inc., 242 App. Div. 275, 275 N. Y. Supp. 510 (3d Dep't 1934).

[6] See Waters-Pierce Oil Co. v. Texas, 177 U. S. 28 (1900).

[7] See Bank of Augusta v. Earle, 13 Pet. 519 (U. S. 1839).