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Domestic Relations--Ex Parte Divorce--Effect of Prior Support Order--Estoppel (MacKay v. MacKay, 279 App. Div. 350 (1st Dep't 1952))

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DOMESTIC RELATIONS—EX PARTE DIVORCE—EFFECT OF PRIOR SUPPORT ORDER—ESTOPPEL.—In 1947, in New York, plaintiff wife secured a separation decree containing provisions for her support and for the custody and support of her minor children. In 1951, plaintiff secured a divorce in Nevada, based on constructive service. Upon her return to New York plaintiff sued to have defendant adjudged in contempt for failing to comply with the custodial provisions of the prior decree.[1] Defendant made a cross motion to strike the provisions for the wife's support from the separation decree.[2] Special Term denied defendant's cross motion. *Held,* on appeal, the order denying defendant's cross motion is reversed. A husband may be relieved from payment of alimony pursuant to a New York separation decree entered before the wife's procurement of a foreign *ex parte* divorce. The wife is ". . . estopped to claim the alimony provisions in her favor." *MacKay v. MacKay,* 279 App. Div. 350, 110 N. Y. S. 2d 82 (1st Dep't 1952).

Since the celebrated decision of *Williams v. North Carolina I,*[3] a divorce based on constructive service has been entitled to full faith and credit, so long as the petitioner, at the time of suit, is a bona fide domiciliary of the state which issues the decree.

Some of the questions growing out of the *Williams* adjudication involve the effect of such a decree upon the support provisions of a prior separation order where: (a) the husband procures the migratory divorce, the wife not appearing; (b) the husband procures the migratory divorce, the wife appearing personally; and (c) the wife procures the migratory divorce, the husband not appearing.

The first problem was before the New York court in *Estin v. Estin.*[4] The husband migrated to Nevada, became a bona fide domiciliary and there procured a divorce based on constructive service. New York consequently was compelled to recognize the decree and the concomitant dissolution of the marital res; nevertheless it was decided that the separation order survived. The court reasoned that since the duty to support was an incident *separable* from the marital res it could survive independent of that status.[5] The United States

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[1] Special Term adjudged defendant in contempt of the custodial provisions. Upon appeal, this order was reversed.

[2] The cross motion also contained a prayer that the defendant be relieved from further obligation to support the children under the decree. This part of the motion was denied at Special Term. The Appellate Division affirmed.

[3] 317 U. S. 287 (1942).

[4] 296 N. Y. 308, 73 N. E. 2d 113 (1947).

[5] It would be well to note at this point a situation wherein the husband migrates and procures a valid *ex parte* divorce, the wife not having previously procured a support order. Query: May the wife sue for alimony for the first time after the dissolution of the marital res? A New York court, in an opinion postdating the *Williams* and *Estin* cases, involving the right to support pursuant to Section 91 of the Domestic Relations Court Act, answered in the negative. Adler v. Adler, 192 Misc. 953, 81 N. Y. S. 2d 797 (N. Y. Dom. Rel. Ct. 1948).

Supreme Court, in affirming the decision, approved of the theory of separability.[6] It was made clear by that tribunal, however, that the survival of a support order is dependent strictly upon the *policy of the state* involved.[7] In keeping with that ruling, the highest court of Oregon subsequently asserted its prerogative, and declined to follow the separability theory by holding that a valid *ex parte* divorce was competent to terminate a prior support order.[8]

It should be noted that in the *Estin* case, the Supreme Court specifically avoided answering the question of whether the wife would be deprived of a support provision, when she had made a personal appearance in an action commenced by the husband.[9] It is conjectural why the court made an express reference to the question, and then left it open.[10]

In New York, very recently, the Court of Appeals answered the question negatively in *Lynn v. Lynn*.[11] It was there held that a divorce action commenced by the husband in Nevada, in which the wife *personally appeared,* superseded a prior New York separation order, though the wife made no claim for alimony in the divorce proceeding, and none was awarded.

The policy of all states in favor of support is evident; indeed, a husband is not afforded many opportunities to escape the obligation in any jurisdiction. He may be sued for alimony in some states, although the wife had previously migrated to procure a foreign *ex*

In 1948, a bill was introduced into the New York Senate containing provisions which sanctioned a suit for alimony by the wife subsequent to a valid *ex parte* foreign divorce. The bill was defeated. See Morton v. Morton, 99 N. Y. S. 2d 155, 166 (N. Y. Dom. Rel. Ct. 1950).

[6] Estin v. Estin, 334 U. S. 541 (1948). The decision was based on two grounds. The Court reasoned that since the support order vested the wife with a property right, she could not be divested of the order in the absence of in personam jurisdiction. Secondly, it was asserted that inasmuch as New York had a vital interest in the economic welfare of its domiciliary, it could compel the ex-husband to continue to support, notwithstanding the dissolution of the marital res.

[7] *Id.* at 544.

[8] Rodda v. Rodda, 185 Ore. 140, 200 P. 2d 616 (1948), *cert. denied,* 337 U. S. 946 (1949). It had at this time been established that a support order is a property right. (See note 6 *supra.*) The question arises: Was the wife deprived of property without due process of law? This has been answered in the negative by a law review writer on the ground that the support order was a property right terminable upon divorce. Thus when the divorce occurred she was not deprived of property without due process; all that happened was that the condition subsequent (the divorce) took effect. Morris, *Divisible Divorce,* 64 HARV. L. REV. 1287, 1296 (1951).

[9] Estin v. Estin, 334 U. S. 541, 544 (1948).

[10] It has been held in Ohio that under such circumstances, the divorce does not supersede the prior support order. Manney v. Manney, 59 N. E. 2d 755 (Ohio 1944). (The issue of alimony was not litigated in the divorce suit.) The court relied on Metzger v. Metzger, 32 Ohio App. 202, 167 N. E. 690 (1929).

[11] 302 N. Y. 193, 97 N. E. 2d 749, *cert. denied,* 72 Sup. Ct. 72 (1951).

parte divorce.[12] New York has carried the policy to the extreme of awarding alimony to a bigamist.[13]

Still, the policy is not inflexible. Prior to the *Estin* case it was consistently held in New York that a wife would be estopped from enforcing a prior support order if she took it upon herself to migrate and dissolve the marriage in a suit based on constructive service.[14]

However, Judge Callahan, dissenting in the instant case, stated that these holdings were based on the concept that the survival of a support order in a separation decree depended upon the continuance of the marriage, a concept which, he argued, was altered by the *Estin* case, and by the theory of separability therein promulgated.[15] The intimation was that the prior holdings are no longer binding and that the wife now should be entitled to the support provisions of a prior separation decree regardless of who procured the foreign divorce. This would seem consonant with the *Estin* decision, since in both instances the support order would survive the divorce. As a practical matter, however, such a conclusion would have a pernicious effect upon the enforcement of the divorce laws of New York State.

It would open a broad new vista to those seeking to evade the New York divorce laws. A wife would be permitted to first obtain, in New York, a separation decree with its attendant support provision, and then to obtain a "bargain counter" divorce in a sister state. She could thus have her "easy" divorce, and a New York support provision, too—without having to contend with this state's stringent divorce laws. Fortunately, this possibility is nullified by the present holding.

EQUITY—RIGHT OF SUBVENDEE TO SPECIFIC PERFORMANCE.—Defendant railroad contracted to sell forty-one acres of land to co-defendant vendee. Plaintiff, assignee of the subvendee of eleven acres of this tract, sued for (1) specific performance of the vendor-vendee contract, and (2) specific performance of his assignor's con-

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[12] Woods v. Waddle, 44 Ohio St. 449, 8 N. E. 297 (1886); Spradling v. Spradling, 74 Okla. 276, 181 Pac. 148 (1919); Adams v. Abbott, 21 Wash. 29, 56 Pac. 931 (1899).

[13] Johnson v. Johnson, 295 N. Y. 477, 68 N. E. 2d 499 (1946). See Sparacio, *Alimony and the Bigamist: A Comment on Section 1140-a of the New York Civil Practice Act*, 21 ST. JOHN'S L. REV. 1 (1946).

[14] Harris v. Harris, 197 App. Div. 646, 189 N. Y. Supp. 215 (1st Dep't 1921); Glennan v. Glennan, 197 Misc. 899, 97 N. Y. S. 2d 666 (Sup. Ct. 1950); Gibson v. Gibson, 81 Misc. 508, 143 N. Y. Supp. 37 (Sup. Ct. 1913).

[15] MacKay v. MacKay, 279 App. Div. 350, 358, 110 N. Y. S. 2d 82, 90 (1st Dep't 1952).