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# Domestic Relations—Nunc Pro Tunc Orders Under the Code of Civil Procedure Section 1776

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characterization of the plea control the court . . . in its construction of the pleading nor legal effect thereof, nor the wrong shown by the facts, nor as to the relief or remedy to be granted . . . " To the writer this appears to be the better view.

*Nunc Pro Tunc* ORDERS UNDER THE CODE OF CIVIL PROCEDURE SECTION 1774.

The purpose of a *nunc pro tunc* order is to install in the record a fact which, through mistake, oversight, or other error, has been omitted from the record.[13] "While a court may record an existing fact *nunc pro tunc,* it cannot record a fact as of a prior date when it did not then exist." [14]

In the case of *Cornell v. Cornell,*[15] the plaintiff wife obtained an interlocutory divorce decree from Elven Cornell in 1915. In 1930 she remarried. Elven died in 1938, and her second husband died in 1956. The latter's will left his residuary estate to the intervenor in the present case. The plaintiff elected to take her intestate share. The intervenor contended that since no final judgment was entered upon plaintiff's interlocutory divorce decree, her marriage in 1930 was void. This is a suit to have that final decree entered *nunc pro tunc.* The Court of Appeals reversed the Appellate Division and entered the order.

The Appellate Division had reversed the trial court,[16] and denied such an order relying on the 1909 case of *In re Crandall's Estate.*[17] In that case, the husband obtained an interlocutory divorce decree. He then died after the interlocutory period had expired without a final judgment being entered. After his death, his former attorney sought a *nunc pro tunc* order to have such judgment entered. The Court of Appeals held that Section 1774 of the Code of Civil Procedure prevented such an order.

In the *Cornell* case, the plaintiff's first husband died before Section 1176 of the Civil Practice Act came into effect,[18] therefore Section 1774 of the old Code controls this case as well. The relevant portion provided, "Within thirty days after the expiration of said period of three months final judgment shall be entered as of course . . . unless for sufficient cause the court in the meantime shall have otherwise ordered." [19]

The Court in the *Crandall* case held that ". . . the entry of final judgment, especially under the circumstances presented to us, [is not] automatic and of course." [20] These circumstances were that the husband, who had obtained the

13. Merrick v. Merrick, 266 N.Y. 120, 194 N.E. 55 (1934).
14. Guarantee Trust Co. v. Philadelphia, Reading & N.E. R.R. Co., 160 N.Y. 1, 7, 54 N.E. 575, 577 (1899). See also, Mohrmann v. Kob, 291 NY. 181, 51 N.E.2d 921 (1934).
15. 7 N.Y.2d 164, 196 N.Y.S.2d 98 (1959).
16. 9 A.D.2d 11, 189 N.Y.S.2d 812 (3d Dep't 1959).
17. 196 N.Y. 127, 89 N.E. 578 (1909).
18. This amendment became effective September 1, 1946. The N.Y. Civ. Prac. Act replaced the Code of Civ. Proc. in 1920.
19. The several amendments to the N.Y. Code of Civ. Proc. § 1774 did not alter this language between the time of the Crandall case and the original divorce suit between the Cornells in 1915.
20. Supra note 17 at 131, 89 N.E. 580 (1909).

interlocutory decree, had made no attempt to have final judgment entered during his life. Sometime after his death his former attorney sought to have the final judgment entered *nunc pro tunc* under a theory of laches with which the Court was very unimpressed. In view of these circumstances it denied the *nunc pro tunc* order, reasoning that because the purpose of the three month interlocutory period was to enable the court to prevent collusive arrangements, automatic entry of final judgment would defeat this purpose. While this reasoning may have considered the lack of equity of the plaintiff's case, it appears either to have ignored the words "... as of course ... unless ... the court ... shall have otherwise ordered" of Section 1774, or to have said that these words do not mean what they say.

The present case recognizes the dubious accuracy of the *Crandall* decision, but being reluctant to overrule it entirely, attempts to set forth certain situations in which the *Crandall* case might still apply, such as denying a *nunc pro tunc* order where one of the parties to a divorce action has died before the three month period has elapsed. However, all divorce actions cease on the death of one of the parties because the relationship sought to be dissolved no longer exists. Furthermore, no party to a divorce action who has been granted an interlocutory decree, whether dead or alive, is entitled to final judgment until three months have elapsed. The present decision also points out the unusual facts of the *Crandall* case, which, in essence, are not so very different from the facts of the present case.[21] Therefore, the Court could not avoid the conclusion that any part of that decision which conflicts with the present one must be overruled. Thus, little, if any, life remains in the *Crandall* decision.

The Court of Appeals, in the *Cornell* case, ruled that since the plaintiff's first husband did not die until after the three month interlocutory period had expired, and since the Court did not otherwise order, the plaintiff was entitled to a final judgment as of course. Failure to enter such judgment was a ministerial mistake, and therefore it should now be entered *nunc pro tunc*. In so holding, the Court adopted what appears to be the majority rule, namely, that so long as a final decree could have been entered during the lives of both parties to the action, the death of one of the parties does not preclude *nunc pro tunc* entry of the judgment.[22] This ruling, which will direct the remaining cases that may arise under Section 1774 of the old Code, at least complies with the language of this Section and probably its spirit as well.

The successor to Section 1774 is Section 1176 of the Civil Practice Act.[23] It reads, "Three months after the entry of the interlocutory judgment ... [it] shall become the final judgment as of course unless for sufficient cause the court in the meantime shall have otherwise ordered." One case has stated the purpose of this amendment as being "... to obviate the objectionable procedural con-

21. Although the equities in the Cornell case are very favorable to the plaintiff for she did devote 26 years of her life to her second husband.
22. See 104 A.L.R. 664 (1936).
23. Supra note 18.

sequences which might have affected the substantive rights of the parties."[24] With Section 1176 itself and this statement of its purpose in mind, the Court of Appeals in the present case stated, as dictum, that this Section by itself would have required a *nunc pro tunc* order in this case if plaintiff's first husband had not died before it became effective. This dictum, however, is not nearly so apparent from the phrasing of Section 1176, the language being almost identical to that of the superseded Section 1774, as it is from the new interpretation which this Court gives to Section 1774 of the old Code.

## EVIDENCE

ALLEGING PRIOR CONVICTION IN THE INDICTMENT

Before 1959, Section 275(b) of the Code of Criminal Procedure provided: "The indictment shall not allege that defendant has previously been convicted of any crime nor shall it set forth any record thereof, unless such prior conviction affects the degree of the crime charged in the indictment."[1]

In *People v. Johnson*,[2] defendants were convicted of the crimes of burglary in the third degree,[3] and possession of burglars' instruments after prior conviction.[4] On appeal they argued that the trial court committed reversible error in allowing evidence of defendants' prior convictions to be read to the jury. They maintained that this violated Section 275(b) of the Code of Criminal Procedure, as quoted above.

The Court of Appeals held that it was not reversible error for the trial court to permit a stipulation as to defendants' prior convictions to be read to the jury. In arriving at this determination, the Court reasoned that as the degree of crime under Section 408 of the Penal Law was clearly affected by a prior conviction,[5] the exception reserved in Section 275(b) ". . . unless such prior conviction affects the degree of the crime charged in the indictment" applies. Consequently, allowing the District Attorney to allege the prior conviction in

24. Johnson v. Johnson, 198 Misc. 691, 694, 98 N.Y.S.2d 336, 340 (Sup. Ct. 1950).

1. This Section was amended in 1959 (L 1959 ch. 221) adding the words "or offense" after "of any crime" and "or is an element of such crime" after "indictment." Such terms were not part of the statute when first brought into question in the Johnson case.
2. 8 N.Y.2d 183, 203 N.Y.S.2d 809 (1960).
3. N.Y. Penal Law § 404:
A person who: 1. With intent to commit a crime therein, breaks and enters a building, or a room or any part of a building or; 2. Being in any building commits a crime therein, and breaks out of the same is guilty of burglary in the third degree.
4. N.Y. Penal Law § 408:
A person who . . . has in his possession in the day or night time any engine, machine, tool . . . or implements adapted, designed or commonly used for the commission of burglary, larceny or other crime under circumstances evincing an intent to employ . . . shall be guilty of a misdemeanor, and if he has been previously convicted of any crime, he is guilty of a felony.
5. Ibid.