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therefore, considered independent covenants so as not to vitiate an entire separation agreement.[6] Today, there is authority recognizing molestation in a broader sense and the perfect validity of molestation clauses when applied to other than the historic area.[7] Hence, the question posed by this case to the Court of Appeals is, "If molestation can be construed as a broad term, appearing in a valid covenant of a separation agreement, must this covenant be still considered as independent, or may it be considered a dependent covenant such as visitation rights?"[8]

The Court of Appeals differentiated visitation rights from "molestation clauses" on the basis of historical growth and a closer connection of the support provision with a visitation right. A possible example of this closer connection, appearing to this writer, could be the utilization of the visitation right by the separated spouse, to perceive if the support payments were actually utilized as agreed.

Continuing, the Court said, "Consistency requires that a covenant against all kinds of molestation should be treated as independent." Consistency of law, in the opinion of the writer, is the virtuous end result of similarily reasoned cases, but is not a reason for a decision itself. The case is justified, in actuality, by the lack of any benefits to be derived from a change from the historic pattern. As the Court pointed out, separated spouses are a troublesome relationship where bitter invectives or humiliating behavior can be expected. If such acts were allowed to become a litigous basis for ending a separation agreement, the effect would be to destroy their primary objective—some stability where little appears to exist. Such destruction is unnecessary inasmuch as protection against grievous molestation is still provided the spouse, based on tort law or upon the independent covenant itself.

Support Order for Resident Spouse Against Whom Ex-Parte Divorce Is Given

Section 1170-b of the New York Civil Practice Act[9] allows a wife to bring an action for support and maintenance after an *ex parte* divorce decree is obtained

6. Landes v. Landes, 94 Misc. 486, 159 N.Y. Supp. 586 (Sup. Ct. 1916).
7. Lindey, SEPARATION AGREEMENTS AND ANTI-NUPTIAL CONTRACTS 108-109 (1953), also proclaims such covenants are to be considered independent.
8. Duryea v. Bliven, 122 N.Y. 567, 25 N.E. 908 (1890).
9. N. Y. CIV. PRAC. ACT §1170-b provides:

> 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 . . .

against her. Prior to this section, a valid divorce decree was a bar to a subsequent action for alminoy.[10] For this reason, the Law Revision Commission of 1952 recommended this section as "necessary to protect a New York wife whose right to support may now be cut off by an *ex parte* foreign divorce decree."[11] After holding section 1170-b to be constitutional,[12] *Vanderbilt v. Vanderbilt*,[13] in 1956, held that the phrase "New York wife" is not limited merely to those spouses who lived with their husbands in this state, but is properly applicable where a wife, after separation but prior to ar *ex parte* Nevada divorce, established her domicile in New York. This decision expressly left open the question whether the wife would have the same right to come into the state after a foreign divorce and take advantage of section 1170-b.[14]

Loeb v. Loeb[15] exemplifies this situation exactly and presents this question to the Court of Appeals. The majority of the court held that such a plaintiff who has had no contact with New York at any time during the period of her marriage; may not be regarded as a "New York wife" and does not come within the ambit and purpose of this statute. The purpose of section 1170-b is to protect wives who are unable to pursue their itinerant spouses and obtain support rights in foreign jurisdictions. Such a policy is not furthered by allowing emigrant wives to journey to this state to avail themselves of this remedy. Such a substantive grant of a forum to all wives, wherever located, would be against our public policy.

The dissenting opinion points out that New York has the constitutional power to apply section 1170-b and suggests the test for this section's applicability to be in the phrase "when justice so requires." This standard would allow the New York courts more discretion and could still be used to prevent mere forum shopping.

However, it is the writer's opinion that the phrase "when justice so requires" is a discretionary phrase to be used by the courts only within the limits of the legislative intent. The phrase "New York wives" as used by the Law Revision Commission is a definite indication that the legislative intent was for the limited application of this statute to wives who had some marriage contact with this state.

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10. Erkenbrach v. Erkenbrach, 96 N.Y. 456 (1884); Querze v. Querze, 290 N.Y. 13, 47 N.E.2d 423 (1943).
11. 1953 REPORT OF N. Y. LAW REV. COMM. 468.
12. For a comment on the Court of Appeals decision upholding the constitutionality of this section, see 6 BUFFALO L. REV. 188 (1957).
13. 1 N.Y.2d 342, 153 N.Y.S.2d 1 (1956); *aff'd* 354 U.S. 416 (1957).
14. *Id.* at 351, 153 N.Y.S.2d at 8.
15. 4 N.Y.2d 542, 176 N.Y.S.2d 590 (1958).