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Domestic Relations—Reciprocal Support Statutes—Constitutionality

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a further action for alimony.[7] If the right is a separate "personal right" then a court would have no jurisdiction to rule upon it in the absence of personal service on the party to whom the "right" belongs.[8]

New York statutory provisions deem it a personal right.[9] The constitutionality of such a statute hinges upon the interpretation given by the Supreme Court to the so-called doctrine of "divisible divorce" in *Estin v. Estin*.[10] If the *Estin* decision was based upon the rationale that a separation order secured prior to the divorce vests a personal right in the wife to alimony, the question as to the extent of the "divisible divorce" doctrine has been left open. However, it would seem, in view of *Armstrong v. Armstrong*,[11] that the Supreme Court has recognized the broad interpretation favored by the majority in the instant case. A final determination may be forthcoming in view of the fact that certiorari has been granted in the *Vanderbilt* case.[12]

The dissent, in taking the narrow view, has expressed a fear that New York will become a haven for non-resident wives who have had *ex parte* divorce decrees taken against them. The majority, it may be noted, took special cognizance of the fact that the plaintiff had entered New York prior to the divorce with the intent to set up a domicile, thus indicating a restrictive application of the section in question.

Reciprocal Support Statutes

The New York Uniform Support of Dependents Law[13] provides a method for a non-resident wife or child to enforce the father's duty to support his wife

7. See *Querze v. Querze*, 290 N. Y. 13, 47 N. E. 2d 423 (1943) and *Erkenbrach v. Erkenbrach*, 96 N. Y. 456 (1884). Prior to section 1170-b a valid divorce decree was a bar to a subsequent action for alimony; the right to support was not in and of itself a basis for a cause of action. But see *Lynn v. Lynn*, 302 N. Y. 193, 97 N. E. 2d 748 (1951), *cert. den.*, 342 U. S. 849 (1951) in which the severability of the right to support was alluded to. In the *Lynn* case the Nevada court had had personal jurisdiction over the wife and therefore the precise question involved here was not decided.

8. *Pennoyer v. Neff*, 95 U. S. 714 (1877). Personal service is required as a basis for a personal judgment.

9. See note 1 *supra*.

10. 296 N. Y. 308, 73 N. E. 2d 113 (1947), *aff'd*, 334 U. S. 541 (1948). The case indicated that each state has the power to make its own provisions as to the survival of the right to support but that, at least in the situation where a prior separation agreement has been obtained, an *ex parte* decree may not affect it.

11. 350 U. S. 568 (1955). The majority took the view that the Florida court had intended to leave the question open despite the specific denial of alimony rendered by that court. Though the Court thus avoided the constitutional question it is an indication that its attitude is one of agreement with the personal right doctrine. The concurring justices felt that the constitutional question had to be decided and argued in conformance wih the instant opinion. See also *Hopson v. Hopson*, 221 F. 2d 839 (D. C. Cir. 1955).

12. See note 2 *supra*.

13. McK. UNCONSOL. LAWS §§2111-2120.

and minor children where personal jurisdiction over the father cannot be obtained without the expense and delay of a journey to New York. Under the Act the claimant may initiate a proceeding demanding support in the state of her residence or domicile.[14] A transcript of the proceedings including claimant's petition is forwarded to New York where a hearing is held.[15] If defendant controverts or denies a material allegation of the petition, the New York proceedings will be stayed and a transcript forwarded to the court wherein claimant initiated proceedings.[16] Her testimony and evidence is then forwarded to New York where the hearing is resumed.[17] Briefly, the initiating court becomes an adjunct to the New York court for the purpose of taking claimant's testimony and evidence.

In *Landes v. Landes*,[18] the constitutionality of this Act was before the Court of Appeals for the first time. Claimant had initiated proceedings against respondent in California for the support of their minor child and the transcript had been forwarded to New York for determination and enforcement. Respondent attacked the constitutionality of the Act on the grounds, inter alia, that it denies the safeguards accorded an individual when prosecuted for a crime, to wit, the right to confront and cross-examine the witnesses against him[19] and that a proceeding of this sort is quasi-criminal in nature. The Court held, affirming the Appellate Division,[20] that the Act, at least insofar as it reciprocally enforces support of a minor child, is constitutional.

Without a doubt a father is primarily liable for the support of his minor children despite lack of custody and despite the residence of the child elsewhere.[21] Further, it cannot be denied that the welfare of the child is of prime importance

14. *Id.* §2116 (a).
15. *Id.* §2116 (c).
16. *Id.* §2116 (f).
17. *Id.* §2116 (g), (h).
18. 1 N. Y. 2d 358, 135 N. E. 2d 562 (1956), *appeal docketed*, 25 U. S. L. WEEK 3155, (U. S. Oct. 12, 1956) (No. 507). Respondent's appeal to the Supreme Court is on the grounds that the Act is in violation of U. S. CONST. art. I, §10, cl. 3 in that it is an agreement between the States without the consent of Congress and further that it denies equal protection of the laws in violation of U. S. CONST. art. IV. §2, cl. 1. It is submitted that the decision is sound and will be affirmed. The agreements or compacts between the States which the Constitution has reference to are those which interfere with the supremacy of the United States. *Virginia v. Tennessee*, 148 U. S. 503 (1892). The Act in question is hardly such a threat. See *Duncan v. Smith*, —— Ky. ——, 262 S. W. 2d 373 (1953) for an interesting theory that such laws do not even constitute agreements. As evidenced by *In re Cattalini*, 72 Cal. App. 2d 662, 165 P. 2d 250 (1920), the California law with regard to a father's liability for the support of his minor children is substantially the same in effect as the New York law. Therefore there can be no question but that such laws afford equal protection. Similar acts have been held constitutional in *Mahan v. Reed*, 240 N. C. 641, 83 S. E. 2d 706 (1954); *Pennsylvania v. Warren*, 204 Md. 467, 105 A. 2d 488; *Smith v. Smith*, 125 Cal. App. 2d 154, 270 P. 2d 613 (1954).
19. U. S. CONST. amend. VI; N. Y. CONST. art. I, §6.
20. 1 A. D. 2d 772, 149 N. Y. S. 2d 216 (1956).
21. *Laumeier v. Laumeier*, 237 N. Y. 357, 143 N. E. 219 (1924).

both from the standpoint of the child itself and the interest which the state has by virtue of its social welfare laws. The only remaining question is whether the New York procedure of enforcing this duty in the situation contemplated by the Act denies due process to a prospective respondent.

Due process, of course, does not guarantee any particular type of procedure in the state system but it does require that the procedures which are employed be fair.[22] The patent necessity of cross-examination to a fair hearing has been emphasized by many writers.[23] It would be impossible for a court sitting in New York to determine the credibility of a complainant or witness in California unless there is direct evidence contradicting the testimony thus obtained.

It is submitted by the writer that, although the decision upon this point is correct, the grounds set forth by the Court, that this is a civil suit and not a criminal action, are somewhat weak. The Act is directed toward the errant father and is a means of overcoming his ability to use lack of jurisdiction as a shield against this responsibility. The respondent may always submit himself to the jurisdiction of the initiating court in order to confront the complainant and her witnesses.[24] The respondent has a choice, albeit an expensive one, in the instant situation. It would seem that better social policy would dictate that the expense of travel should be placed upon the one who has shirked his duty than upon the one to whom the duty is owing. Due process has not been denied—it merely has been used as a bargaining tool.

Foreign Custody Decrees

In *Bachman v. Mejias*[25] the controversial[26] question of custody of children was again before the Court of Appeals. Respondent had taken her child to New York in defiance of an order of a Puerto Rico Court which had previously given custody to the child's grandparents. The prior decree had provided for readjudication after a hearing. Evidence tended to show that the child's social development was retarded as a result of his separation from his mother, brother and sister. Petitioner commenced habeas corpus proceedings in New York for the return of the child.[27] The Court held, reversing the Appellate Division,[28] that the writ was properly denied.

22. *Dohany v. Rogers*, 281 U. S. 362 (1930).
23. See, *e.g.*, 5 WIGMORE, EVIDENCE §1367 (3d ed. 1940); Stryker, *Cross-Examination*, 2 BUFFALO L. REV. 45 (1952).
24. MCK. UNCONSOL. LAWS §2118; *Smith v. Smith*, 125 Cal. App. 2d 154, 270 P. 2d 613 (1954). The *Smith case* presents an excellent resume of the purposes and procedures of reciprocal support laws.
25. 1 N. Y. 2d 575, 136 N. E. 2d 866 (1956).
26. Ehrenzweig, *Interstate Recognition of Custody Decrees*, 51 MICH. L. REV. 345 (1953).
27. *People ex rel. Pruyne v. Walts*, 122 N. Y. 238, 25 N. E. 266 (1890).
28. 1 A. D. 2d 319, 151 N. Y. S. 2d 48 (2d Dep't 1956).