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Divorce - Alimony - Right to Alimony Survives Divorce Where Court Lacked Personal Jurisdiction over Absent Spouse

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case. This view rests on the following reasons: (1) "additur" would bring the litigation to a more speedy and economical conclusion; (2) discretionary power given a judge in remittitur cases should not be denied in comparable "additur" situations; (3) even though "additur" was not practiced at common law, other modern trial procedures such as the requirement of both a special and general verdict and the granting of a new trial on the issue of damages alone were equally unknown to the common law.[14]

There is no North Dakota Statute expressly granting to the courts the power to use an "additur" and research has not revealed any North Dakota case sanctioning "additur"; however, remittitur is clearly allowable in North Dakota[15] and a trial court has the power to correct a verdict when it is insufficient as not covering the issues.[16] North Dakota courts have customarily extended relief in cases of inadequate damages by granting a new trial;[17] but, it would seem there is a legal basis which would permit the use of "additur" by North Dakota Courts.[18] It is submitted that adoption of the holding of the instant case would increase the efficiency of the courts without violating the discretionary power of the court or depriving the litigants of their rights.

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DIVORCE — ALIMONY — RIGHT TO ALIMONY SURVIVES DIVORCE WHERE COURT LACKED PERSONAL JURISDICTION OVER ABSENT SPOUSE. — A Nevada court granted a divorce to a husband although the wife had not been served with process, was not domiciled in the state, and did not appear in the action. Subsequently the wife instituted proceedings for separation and maintenance in New York. On writ of certiorari to the Court of Appeals, the Supreme Court of the United States *held,* two Justices dissenting, that a decree granting alimony to the wife did not deny full faith and credit to the Nevada divorce, even though such divorce purported to terminate the wife's right to alimony, *Vanderbilt v. Vanderbilt,* 77 Sup. Ct. 1360 (1957).

Since *Williams v. North Carolina I,*[1] it has been settled that a divorce granted by a court to one of its domiciliaries is entitled to full faith and credit[2] nothwithstanding that the defendant spouse was not subject to the in personam

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14. See Gebzel v. Halvorson, 80 N.W.2d 859 (Minn. 1957); *supra* note 5 at 490, (dissent); Blunt v. Little, 3 Fed.Cas. 760, No. 1578 (C.C.D.Mass. 1822) (Remittitur was first allowed in the United States . . . Justice Story presiding.).

15. N. D. Rev. Code § 28-1902 (5) (1943); Zisgler v. Ford Motor Co., 67 N.D. 286, 272 N.W. 743 (1937); Emery v. Midwest Motor, 79 N.D. 27, 54 N.W.2d 817, 823 (1952) (Dictum).

16. N. D. Rev. Code § 28-1507 (1943).

17. N. D. Rev. Code § 28-1907 (1943); Haser v. Pape, 78 N.D. 481, 50 N.W.2d 240 (1951); Jacobson v. Horner, 49 N.D. 741, 193 N.W. 327 (1923); (In Deschane v. McDonald, Dist. Ct. of 1st Judicial Dist., N. D. 1956, the court held that the verdict was inadequate and granted a new trial on the issue of damages alone. Court stated that the decision did not pass upon the question of "additur.").

18. N. D. Const. art. 1, § 7, "The right of trial by jury shall be secured to all, and remain inviolate"; (It should be noted that this provision is substantially identical to the Minnesota Constitution cited footnote 1, *Supra.*)

1. 317 U.S. 287 (1942).
2. U.S. Const. Art. IV, § I.

jurisdiction of the court rendering the divorce.[3] But since *Estin v. Estin*[4] it has been an unsettled question whether the absent spouse's rights of property and support are affected by a decree of this type terminating the marital status.[5] The *Estin* case declared that such divorces are "divisible" in character, effective to terminate the marital status but not the obligation of the husband to support his wife where the obligation had, prior to the divorce, been formalized in a decree of separate maintenance. The rationale of this decision was that such a proceeding sounded in rem, that the only res before the court in such an action was the marital status itself, and that the divorce forum had no jurisdiction to affect other personal obligations[6] without first acquiring personal jurisdiction over the absent defendant.[7] The principal case is significant and important beyond the *Estin* decision, since it now establishes the point that the obligation of support need not be incorporated beforehand in a decree of maintenance in order to survive the termination of the marriage brought about by an ex parte divorce.[8]

The dissenting opinion of Justice Harlan took the position that a domicile on the part of the wife in New York *at the time of the Nevada decree* was a condition precedent to a subsequent action for alimony.[9] The argument proceeded on the theory that if the wife did not have domicile in New York at the time of the divorce, she had no rights to alimony under the law of New York after the divorce. Most cases dealing with this point, however, deny that domicile is a jurisdictional prerequisite to a decree of alimony.[10] The concept of domicile is under increasing attack as a rational criterion of jurisdiction in these types of divorce cases, and the steady trend of Supreme Court cases has been away from it ever since the famous dissent of Mr. Justice Rutledge in *Williams v. North Carolina II*[11]. The principal case itself is the latest development in this process and makes it clear that the Supreme Court is in fact engaged in a diligent search for a more satisfactory basis of jurisdiction in matrimonial cases. The same tendency is clearly indicated in recent decisions of state courts.[12]

The rule of the instant case is not applicable, of course, in those states

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3. Court has power to adjudicate martial status of its own domiciliaries.

4. 334 U.S. 541 (1948).

5. See 64 Harv. L. Rev. 1287 (1951).

6. Analytically, consortium would seem to be a personal obligation, but apparently the United States Supreme Court feels it is not within the meaning of this rule. While it is logically indefensible it is submitted that pragmatically this point of view is justified since the right of consortium is not enforceable by judicial processes and the consortium itself may be terminated by a unilateral action of a spouse without regard to court decree.

7. See Pennoyer v. Neff, 95 U.S. 714 (1877).

8. It should be noted that a spouse who appears before the foreign divorce court subjects him or herself to the court's jurisdiction giving the court the right to finally adjudicate the alimony question. See Yarborough v. Yarborough, 290 U.S. 202 (1933); Bates v. Bodie, 245 U.S. 520 (1918).

9. Vanderbilt v. Vanderbilt, 77 Sup. Ct. 1360, 1368 (1957) (Dissent.)

10. *E. g.*, Jarvis v. Jarvis, 304 Ky. 253, 200 S.W.2d 475 (1947); *Contra* Eckstrom v. Eckstrom, 98 N.H. 177, 96 A.2d 574 (1953).

11. 325 U.S. 226, 244 (1945) (dissent). Sherrer v. Sherrer, 334 U.S. 343 (1948) This case held a divorce granted by a state in which neither party was domiciled to be valid as between the parties. May v. Anderson, 345 U.S. 528 (1953) *held* that domicile is unimportant in child custody proceedings and clearly foreshadowed the result in the instant case.

12. See *E. g.*, Lewis v. Lewis, 311 P.2d 917 (Cal. 1957); Nelson v. Nelson, 71 S.D. 342, 24 N.W.2d 327 (1946).

where alimony is granted only as an incident of divorce proceedings.[13] In most jurisdictions of this country, however, the decision will provide a solution for the problem of obtaining support faced by a wife who is sued for divorce in a foreign state. The action for alimony launched by the wife in this case was brought pursuant to a New York statute intentionally designed to meet this problem.[14] It is submitted that the enactment of such a statute in this state is extremely desirable.

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13. See N.J. Rev. Stat. 2:50-39 (1937); Peff v. Peff, 2 N.J. 513, 67 A.2d 161 (1949).
14. N.Y. Civ. Prac. Act, § 1170-b (1956 Supp.).