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# DECISIONS

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DOMESTIC RELATIONS—INVALIDITY OF VIRGIN ISLANDS STATUTE MAKING SIX WEEKS' PHYSICAL PRESENCE PRIMA FACIE EVIDENCE OF DOMICILE IN DIVORCE ACTIONS.—The United States Supreme Court has sustained a judgment of the Court of Appeals for the Third Circuit, affirming the dismissal of a bill of divorce by the District Court of the Virgin Islands for want of jurisdiction.[1] The bill had been filed by the plaintiff immediately following the completion of six weeks' continuous presence in the Islands, as permitted under section 9(a) of the Virgin Islands divorce law.[2] This section makes six weeks' "presence" prima facie evidence of domicile, and avoids the necessity of proving domicile if process is served personally or the defendant appears generally.

The Supreme Court now holds that the Virgin Islands Organic Act[3] did not empower the Islands' Legislative Assembly to enact such a divorce law. As pointed out by the Court, the Assembly's power to legislate was limited by Congress to the enactment of laws of "local application" only, and that the law in question was not concerned with local needs, but was designed to attract tourists.

The United States acquired the Virgin Islands by purchase from Denmark in 1917. By the Organic Act of 1936, Congress empowered the Legislative Assembly of the Islands to enact laws on "all subjects of local application not inconsistent with . . . this title or the laws of the United States made applicable to said Islands."[4] This Act also gave the District Court of the Virgin Islands jurisdiction over all divorce cases.[5]

In the exercise of the power conferred upon it by Congress, the Legislative Assembly in 1944 passed a divorce law which made six weeks' "residence" of an "inhabitant" sufficient to give jurisdiction to the local court in divorce cases.[6] In 1952, the Court of Appeals for the Third Circuit construed "inhabitant" and "residence" to mean "domiciliary" and "domicile".[7] A subsequent amendment by the legislature making six weeks' "physical presence" alone sufficient for divorce jurisdiction was vetoed by the Governor. However, the Legislature then enacted section 9(a), which was in effect at the time this divorce action was brought.[8]

Territories are divided into two classes: (1) those which are *incorporated,* having the potentiality for statehood; and (2) those which are *unincorporated,* which are

[1] Granville-Smith v. Granville-Smith, 349 U. S. 1, 75 S. Ct. 553, 99 L. Ed. 445 (1955).

[2] Bill No. 55, 17th Legislative Assembly of the Virgin Islands of the United States, 3d Sess. (1953). Section 9(a) reads as follows: "Notwithstanding the provisions of Section 8 and 9 hereof, if the plaintiff is within the district at the time of the filing of the complaint and has been continuously for six weeks immediately prior thereto, this shall be prima facie evidence of domicile, and where the defendant has been personally served within the district or enters a general appearance in the action, then the Court shall have jurisdiction of the action and of the parties thereto without reference to the domicile or to the place where the marriage was solemnized or the cause of action arose."

[3] 49 Stat. 1807 (1936), 48 U. S. C. § 1391.

[4] 49 Stat. 1814, 48 U. S. C. § 1406(4).

[5] 49 Stat. 1807, 48 U. S. C. § 1405(a).

[6] Bill No. 14, 8th Legislative Assembly of the Virgin Islands of the United States, 1st Sess. (1944).

[7] Burch v. Burch, 195 F. 2d 799 (3d Cir. 1952).

[8] *Supra,* note 2.

not thought of as future states.[9] Legislative power of the "incorporated" territories extends to rightful subjects of legislation not inconsistent with the Constitution or laws of the United States.[10] However, the legislative power of the "unincorporated" territories, of which the Virgin Islands is one, is restricted to laws of "local application"[11] or laws "not locally inapplicable."[12]

Congress, in passing the Organic Acts of Alaska[13] and Hawaii,[14] both incorporated territories, specifically limited local jurisdiction over divorce cases to those actions in which the plaintiff had resided in the territory for at least two years. It did not appear reasonable to the Supreme Court in the instant case that Congress intended to give the Islands more freedom in the field of divorce legislation than that enjoyed by the incorporated territories.

"Local application" clearly implies a limitation to the needs of the inhabitants and is restricted to relations *within* the Islands.[15] The Court said that the issue was whether Section 9(a) was "concerned with the needs and interests of the local population."[16]

In 1940, 34 divorces were granted in the Islands (1.4 divorces per 1,000 population). After the Divorce Act of 1944, however, the divorce rate rapidly increased until the peak was reached in 1952 with 343 divorces (14.3 divorces per 1,000 population). The annual figure dropped to 236 in 1953, and between January and November, 1954, only 111 divorces were granted.[17] This decrease was probably due to the decision of the Court of Appeals for the Third Circuit in *Alton* v. *Alton,*[18] which held Section 9(a) to be in violation of the "due process" guaranteed by the U. S. Constitution and the Virgin Islands Organic Act. Although the Supreme Court granted certiorari in the *Alton* case, the subject matter became moot during the intervening period and there was no disposition of the case on the merits.

There has been a wide disproportion between marriages and divorces in the Islands. The United States Census in 1950 showed that only 416 widowed or divorced men and 1,105 widowed or divorced women resided in the Islands. The divorces in 1951 totaled 312, or only 104 less than all the widowed or divorced male population of the Islands.[19] Two components of the Islands, the Municipality of St. Croix and the Municipality of St. Thomas and St. John, are nearly equal in population. In 1940, St. Croix granted 18 divorces and St. Thomas and St. John 16. However, St. Croix granted only 33 in 1952, while St. Thomas and St. John granted 310. The only explanation for this disparity is that, due to greater facilities, more *tourists* go to St. Thomas and St. John.[20]

[9] Cincinnati Soap Co. v. United States, 301 U. S. 308, 309, 57 S. Ct. 764, 769, 81 L. Ed. 1122, 1128 (1936).

[10] *E.g.,* 37 Stat. 514 (1934), 48 U. S. C. § 77.

[11] *Supra,* note 3.

[12] Christianson v. Kings County, 239 U. S. 356, 36 S. Ct. 114, 60 L. Ed. 327 (1915).

[13] 37 STAT. 514 (1912), 48 U. S. C. § 45.

[14] 31 STAT. 150 (1910), 48 U. S. C. § 519.

[15] Puerto Rico v. Shell Oil Co., 302 U. S. 253, 58 S. Ct. 167, 82 L. Ed. 235 (1937).

[16] *Supra,* note 2.

[17] *Supra,* note 1 at 13, 75 S. Ct. 553, 560, 99 L. Ed. 445, 453.

[18] Alton v. Alton, 205 F. 2d 667 (3d Cir. 1953), *cert. granted,* 347 U. S. 610, 74 S. Ct. 736, 98 L. Ed. 987 (1953).

[19] STATISTICAL ABSTRACT OF THE UNITED STATES: 1954, p. 939 (U. S. Bureau of the Census 1954).

[20] See *Virgin Islands Report,* pp. 125-127, Sen. Comm. on Interior and Insular

As pointed out by the Supreme Court, the leading proponents of the earlier, vetoed version of 9(a) had frankly stated that their purpose was to attract an outside "divorce business." The decision also noted the contrast between the six weeks' divorce domicile provision, and the one-year residence requirement for voting. Taken all together, these findings raised "controlling doubts" in the minds of the Court as to the "local" application of Section 9(a), which, in the Court's opinion, was not concerned with the needs and interests of the local population, but rather was designed "for export".

The instant decision, while concerned only with the divorce laws of a non-sovereign jurisdiction, seems to point the way toward a closer examination of the domicile requirements of those states where "divorce business", as a chief contributor to local prosperity, continues to attract foreign litigants.

DOMESTIC RELATIONS—RIGHT OF TWELVE YEAR OLD CHILD TO CHOOSE HIS OWN RELIGION DESPITE CONTRARY ANTENUPTIAL AGREEMENT BETWEEN PARENTS.—The Court of Appeals, by a divided court, has affirmed a decision of the Appellate Division that a twelve year old boy is not bound to pursue his religious education in accordance with an antenuptial agreement made by his parents before he was born and enforced by the Supreme Court when he was eight years old.[1]

Appellant and respondent, the parents of the boy, Malcolm, entered into an antenuptial agreement that all children of their union were to be raised in the Roman Catholic faith. The husband was a Catholic, and the wife at the time of the marriage was a Lutheran. Malcolm, the only child of the marriage, was born in 1940 and baptized as a Catholic. When Malcolm was about six years old, his mother, contrary to the agreement, brought the child to a Christian Science Sunday school.

In 1949, an annulment action was brought by the husband, based on the breach of this antenuptial agreement. The wife prevailed in her counterclaim for a separation and obtained the custody of Malcolm. The judgment provided, however, that the boy be educated in the Roman Catholic religion, pursuant to the antenuptial agreement, and that he be required to attend a parochial school.

Malcolm had attended Christian Science Sunday school regularly during the two and one half years prior to the 1949 decree. He then began attending Catholic services every Sunday with his father, and transferred from public school to a parochial school.

This situation continued until June, 1952, when the mother brought a motion seeking modification of the 1949 judgment and asking that the boy be permitted to attend the public schools and receive instruction in Christian Science. She asserted that the child had been mentally disturbed, unhappy, misplaced and ill-adjusted due to the transfer to the parochial school; and she asserted that it was the personal and individual desire of Malcolm to attend public school and the Sunday School of the Christian Science Church.

At the hearings before the referee in January, 1953, when the boy was twelve years old, evidence was presented that in addition to attending Catholic Church serv-

Affairs, 83 Cong., 2d Sess. (1954); VIII VIRGIN ISLANDS MAGAZINE (Special Edition 1954) 7 *et seq.;* MURRAY, THE COMPLETE HANDBOOK OF THE VIRGIN ISLANDS 12-100 (New York, 1951).

[1] Martin v. Martin, 308 N .Y. 136, 123 N. E. 2d 812 (1954).

ices with his father every Sunday since May, 1949, Malcolm had also attended Christian Science services on Wednesday evenings with his mother since the summer of 1951. This last appeared to have been at the boy's personal request and insistence.

The referee questioned Malcolm at length and reported that:

"The boy is now over twelve years of age. He has testified, he has testified intelligently, he is a boy who has a mind of his own. I know of no way that this Court can make a decree which would strip him of his independent judgment in matters of this kind. . . .

"This Court is only concerned with this boy's welfare, and I am completely convinced that neither the mother's wishes nor the father's wishes should control what is here to be done, but, rather, I propose to do that which I believe is best for the boy, and I am going to grant the application made."

The Appellate Division affirmed, without writing a majority opinion.[2] Two of the judges dissented, arguing that a child's religious preferences must be guided by his parents until his mind is sufficiently mature to make his own decisions. The view of the dissent was that this degree of maturity could not be reached at the age of twelve, and that the mother should be required to fulfil her promise to obey the earlier decree of the court.[3]

The Court of Appeals, in affirming *per curiam,* found:

". . . ample evidence to support both the findings that the youngster was old enough to testify intelligently and the conclusion that the modification was for his best interest and welfare. . . ."[4]

Two more judges dissented in the Court of Appeals. The minority opinion[5] took the position that enforcement of the antenuptial agreement would certainly not injure the boy. They disputed the assertion that a child of twelve was competent to make a choice of such significance, and cited a number of New York statutes[6] to show that children of various ages suffer legal incapacities which are reflected in protective legislation.

This decision of the Court of Appeals holds that the child's welfare is paramount, and that a child old enough to testify intelligently should be allowed his own choice in matters of religion, notwithstanding an antenuptial parental agreement to the contrary. It seems that this decision brings the law of New York into accord with the general rule of England, and of the other jursdictions of the United States.

ATTORNEYS' LIENS—HELD APPLICABLE TO SETTLEMENT OF FOREIGN JUDGMENT.—In an action to enforce an attorney's lien on a cause of action, judgment for defendants was reversed.[1] H. P. Drewry, an English corporation, obtained a judgment in Great Britain

[2] 283 App. Div. 721, 127 N. Y. S. 2d 851 (1st Dep't 1954).

[3] *Id.* at 722, 127 N. Y. S. 2d at 856.

[4] *Supra,* note 1.

[5] *Ibid.*

[6] N. Y. ALCOHOLIC BEVERAGE CONTROL L. §§ 100, 126; PARI-MUTUAL REVENUE L. § 8; N. Y. DOM. REL. L. §§ 15-a, 72; N. Y. LABOR L. § 130; N. Y. EDUC. L. Art. 65, Part I; N. Y. GEN. CITY L. § 18-b; N. Y. PENAL L. §§ 484, 486; N. Y. PERS. PROP. L. § 163; N. Y. DEBTOR AND CREDITOR L. § 260; N. Y. JUD. L. § 474; N. Y. CORRECTION L. § 485; N. Y. VEH. AND TR. L. § 20; N. Y. CONST. art. VI § 18; N. Y. MENTAL HYGIENE L. § 132; N. Y. SOC. WELF. L. § 373; N. Y. CODE CRIM. PRO. §§ 483, 913-m; N. Y. CITY DOM. REL. CT. ACT, § 88, subd. 5.

[1] Morgan v. H. P. Drewry et al., 285 App. Div. 135, N. Y. S. 2d 171 (1st Dep't 1955).

against Onassis, and retained plaintiff attorneys to bring a New York action to enforce that judgment. While the New York action was pending, Drewry and Onassis, defendants in the instant case, reached a settlement of their controversy without plaintiff attorneys' knowledge. In deciding for the plaintiffs, the Appellate Division pointed out that an attorney's lien attaches to a settlement reached between litigants, both under a recognized rule of the common law and by statute.[2]

Section 475 of the Judiciary Law provides that an attorney who has appeared for a party in litigation has a lien upon his client's claim or cause of action, as well as upon the proceeds thereof. Furthermore, this lien cannot be affected by any settlement the parties may arrive at, either before or after judgment.

As an English judgment is recognized in New York on the principle of comity,[3] and as such a judgment creates a cause of action, the situation is one which is clearly covered by the provisions of Section 475.[4] It follows, therefore, that the attorney plaintiffs, from the time they commenced the New York action on behalf of Drewry, had a lien upon Drewry's cause of action and upon the proceeds that might be realized therefrom. This right was not affected by the settlement independently made between the parties who are defendants in the instant cases.

In construing Section 475 in 1938, the Appellate Division, First Department, ruled that "the statutory lien of an attorney is not limited to the proceeds of the action in which the services were rendered, but attaches to his 'client's cause of action' and to any recovery thereof even though in a different action."[5] The statute was held to be remedial in character and to be construed liberally, so as to aid the Legislature's intent to furnish security to attorneys by giving them a lien upon the subject of the action.[6]

At common law, an attorney had a "special", or "charging" lien for his services rendered in procuring a judgment, decree or award for his client,[7] in addition to his retaining lien.[8] The rationale which justifies the conferral of this right, was expressed by the Supreme Court of Kansas as follows: "Courts have never hesitated to give an attorney a lien for his fees upon a fund which his labors have created or assisted to bring into existence unless some consideration of public policy or other reason stood in the way of such equitable allowance."[9] This lien does not rest upon possession, but is founded on the right of an attorney to be paid his fees and disbursements out of the judgment which he has obtained for his client, and was given recognition in this form by early English decisions.[10] In most of the States in this country, the attorney's rights depend entirely upon statutes, the constitutionality of which has been upheld.[11] Many of these statutes have greatly enlarged the scope of the common law charging

2 N. Y. JUDICIARY L. § 475.

3 New York, L. E. & W. Ry. Co. v. McHenry, 17 Fed. 414 (2d Cir. 1895).

4 Heakes v. Heakes, 157 Ga. 863, 122 S. E. 177 (1924); Topeka v. Ritchie, 102 Kan. 384, 170 Pac. 1003 (1918); Ritchie v. McMullen, 159 U. S. 235, 40 L. Ed. 133, 16 S. Ct. 171 (1895).

5 *Matter of Lourie,* 254 App. Div. 555, 3 N. Y. S. 2d 191 (1st Dep't 1938).

6 Fischer-Hansen v. Brooklyn Heights R. R., 173 N. Y. 492, 499, 66 N. E. 395, 403 (1903); Herlihy v. Phoenix Assur. Co. Ltd., 274 App. Div. 342, 83 N. Y. S. 2d (3d Dep't 1948).

7 Wylie v. Cox, 15 How. (U. S.) 415, 14 L. Ed. 753 (1853).

8 McPherson v. Fox, 96 U. S. 404, 24 L. Ed. 746 (1877).

9 Costigan v. Stewart, 76 Kan. 353, 91 Pac. 83 (1907).

10 Nevills v. Ballard, 18 P. R. 134 (1898).

11 Standige v. Chicago R. Co., 254 Ill. 524, 98 N. E. 963 (1912).

lien, extending it to cover charges for litigation incident to or occurring out of the principal object of the employment.[12] However, some statutes are more restrictive and specifically limit the charging lien to services rendered during a lawsuit.[13]

Here, although Drewry was entitled to settle its action against Onassis before judgment, its New York attorneys were not thereby deprived of their right to be paid for their services.[14] The court felt that such a result was in accordance with the equities since Onassis had actual or constructive knowledge that plaintiffs had rendered services for Drewry and that a dispute over fees existed.[15] With such knowledge, Onassis was bound to retain sufficient funds to discharge the plaintiffs' lien. His failure to do so made him liable to plaintiffs under the rule that the attorney's lien attaches to the settlement itself as soon as the agreement to settle is concluded.[16] The law will not permit such a defendant to say that he has nothing in his hands to satisfy the lien of his adversary's attorney. Accordingly, Onassis was held to have settled with Drewry at his own peril and his failure to withhold funds sufficient to meet the lien of Drewry's attorney subjected him to liability in that amount.[17]

LABOR LAW—LABOR MANAGEMENT RELATIONS ACT—RIGHT OF EMPLOYER TO ADDRESS EMPLOYEES ON COMPANY TIME AND PROPERTY.—Several days prior to an election directed by the National Labor Relations Board (on a petition filed by a labor union for certification as bargaining representative of respondent's employees at one of its variety stores) respondent's manager held meetings on store property during working hours. At these meetings, the manager made anti-union but uncoercive speeches to the employees. Thereafter, a general organizer of the union requested the store manager to allow union agents equal opportunity to speak to the employees on the respondent's property during working hours. This request was refused.

At the election, a majority of the voting employees voted against representation by the union, which filed charges with the NLRB that the employer violated Section 8(a)(1) of the National Labor Relations Act, as amended by the Labor Management Relations Act in 1947. On a petition by the Board for enforcement of its order, based on a finding that the respondent had violated the Act in rejecting the union's request and was not protected by the free speech provisions of the Section 8(c),[1] enforcement

[12] 97 A. L. R. 1139 N. (1913).

[13] N. Y. JUDICIARY L. § 475-a.

[14] Matter of Levine, 154 Misc. 700, 274 N. Y. Supp. 36 (Surr. Ct. N. Y. Co. 1935), *aff'd*, 247 App. Div. 191, 286 N. Y. Supp. 513 (1st Dep't 1936).

[15] Peri v. N. Y. C. & H. R. R. R., 151 N. Y. 521, 46 N. E. 849 (1897).

[16] Fischer-Hansen v. Brooklyn Heights R. R., 173 N. Y. 492, 66 N. E. 395 (1903); Levy v. Hirschberg, 85 Misc. 249, 148 N. Y. Supp. 422 (N. Y. C. Mun. Ct. 1914); Oishei v. Metropolitan St. R. Co., 110 App. Div. 709, 97 N. Y. Supp. 447 (1st Dep't 1906).

[17] Fischer-Hansen v. Brooklyn Heights R. R., 173 N. Y. 492, 66 N. E. 395 (1903); Sargent v. McLeod, 209 N. Y. 360, 103 N. E. 164 (1913); Levy v. Grand Central Wicker Shop, 249 N. Y. 168, 163 N. E. 244 (1928).

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[1] "The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit." Act of July 5, 1935, c. 372, § 8, 49 Stat. 452, as amended, 29 U. S. C. § 158(c).

was denied, with one judge dissenting.[2] An employer who expresses anti-union views on his premises during working hours is protected in doing so by the provisions of Section 8(c) of the National Labor Relations Act, as amended by the Labor Management Relations Act, and is not under a legal obligation to give an equal amount of working time on the premises to the union.

The instant *Woolworth* case deals with the so-called "captive audience" doctrine, first enunciated by the Board in the *Clark Bros.* case,[3] which held that an employer commits an unfair labor practice in making an anti-union speech on company property during working time and that the "captive audience" context in which the speech is delivered deprives it of the constitutional protection of the right of free speech.

The legislative history of the Labor Management Relations Act makes it clear that Section 8(c) was enacted to nullify the holding in the *Clark Bros.* case.[4] But in *Bonwit Teller, Inc.*,[5] decided after the enactment of Section 8(c), the Board held that an employer who delivers an anti-union address commits an unfair labor practice if he denies a request by the union to reply on his time and property. A divided court granted enforcement of the Board's holding in the *Bonwit Teller* case.[6] The *Woolworth* decision expressly disagrees with the holding of the Second Circuit in the *Bonwit Teller case,* although pointing out factual differences in the two cases. A reconstituted Board has more recently repudiated the *Bonwit Teller* doctrine, reasoning that *"Bonwit Teller* was the discredited *Clark Bros.* doctrine in scant disguise, hence contrary to the provisions of Section 8(c) as evidenced by its declared Congressional purpose."[8]

However, the Board has consistently held that Section 8(c), while insulating the employer from charges of unfair labor practice, does not detract from the Board's right to control the election process, and in the exercise of that control, to set aside elections upon the ground of employer interference, which falls short of being unfair labor practice.[9]

In line with this point of view, the Board has recently prescribed as an election rule, a prohibition against employers' speeches to employees on company premises during working hours within twenty-four hours prior to a scheduled Board election.[10] An employer's violation of this rule constitutes cause for setting an election aside, and the directing of a new election. The resulting possibility of successive elections, following repeated violations of the twenty-four hour rule, raises the question whether a hospitable reception of Section 8(c) should not require that the rule in representation cases be the same as that governing unfair labor practice cases.

[2] N. L. R. B. v. F. W. Woolworth Co., 214 F. 2d 78 (8th Cir. 1954).

[3] Clark Bros. Co., Inc., 70 N.L.R.B. 802 (1946).

[4] This was recognized by the Board in Babcock & Wilcox & Co., 77 N.L.R.B. 577 (1948); S. & S. Corrugated Paper Machinery Co., Inc., 89 N.L.R.B. 1363 (1950).

[5] 96 N.L.R.B. 608 (1951).

[6] Bonwit Teller, Inc. v. N.L.R.B., 197 F. 2d 640 (2d Cir. 1952), *cert. den.*, 345 U. S. 905, 73 S. Ct. 644, 97 L. Ed. 1342 (1952), explained and limited in N L.R.B. v. American Tube Bending Co., 205 F. 2d 45 (2d Cir. 1953).

[7] Livingston Shirt Corp., 107 N.L.R.B. 400 (1953). The decision of the Board is limited to cases where union non-access is denied during working time, and does not necessarily extend to situations where access to company property is prohibited on other than working hours.

[8] *Id.* at 411.

[9] Metropolitan Life Ins. Co., 90 N. L. R. B. 935 (1950).

[10] Peerless Plywood Co., 107 N. L. R. B. 427 (1953), applied in Spottswood Specialty Co., 107 N. L. R. B. 1094 (1954).

In larger perspective, it would seem that the *Bonwit Teller* doctrine has an element of undue subtlety, and frustrates a legislative policy. It is submitted that Section 8(c) unwisely repudiated the "captive audience" doctrine and created an unseemly situation in which men are put under compulsion to listen, whereas the national labor policy otherwise stresses freedom in choosing union representation.

CRIMINAL LAW—DOMESTIC RELATIONS—LARCENY BY HUSBAND OF WIFE'S PROPERTY.—The time-honored question of whether a husband may be convicted for the larceny of the separate property of his wife has been answered in the affirmative by the Court of Appeals in *People v. Morton.*[1] Sections 50 and 51 of the Domestic Relation Law, which give married women the right to own property, and to sue and be sued with respect to such property, were held to nullify the old common law rule that there could be no theft by a husband of his wife's property, since said wife at common law could have no separate property. This decision affirmed an order of the Appellate Division, reversing the County Court, which had dismissed the indictment for lack of legal sufficiency.

Evidence before the grand jury established the fact that Harry Morton had taken about $350 of his wife's monies which she had hidden in a paint store she owned. He was indicted for the crime of grand larceny, second degree, on the basis of her testimony, despite the fact that defendant and complainant were living together as husband and wife at the time of the theft.

Granting the defendant's motion for dismissal upon the grand jury minutes, the trial judge declared that "The State of New York is a common law state. An act or omission which was not deemed criminal at common law does not become criminal unless it be so designated by statutory decree."[2]

Upon the State's appeal to the Appellate Division, the determination of the trial court was held to be erroneous, and the order was unanimously modified reinstating the indictment.[3]

The Court of Appeals, speaking through Judge Desmond, stated that since the wife's property rights are fully protected in civil actions,[4] "to make such protection efficient and complete she should be allowed to appear as complainant against her husband when he steals her money or valuables."[5] The Court pointed out that there were two bases for the common law rule that there "could be no such thing as a theft by a husband from his wife."[6] These were: 1. the absence of any separate right of property in a married woman; and 2. "the merger of their beings in the unity of marriage."[7] The Court concluded that neither of these contentions has survived since the passage of Secs. 50 and 51 of the Domestic Relations Law.

In New York, prior to 1937, it was held that the Married Women's Act did not abrogate the merger of husband and wife in the unity of marriage, and thus that neither spouse could sue the other civilly for personal injuries wrongfully inflicted upon

[1] People v. Morton, 308 N. Y. 96, 123 N. E. 2d 790 (1954).

[2] 204 Misc. 1063, 1064, 127 N. Y. S. 2d 246, 247 (County Ct. Kings 1953).

[3] 284 App. Div. 413, 132 N. Y. S. 2d 302 (2d Dep't 1954).

[4] Neilitz v. Neilitz, 307 N. Y. 882, 122 N. E. 2d 924 (1954); Wood v. Wood, 83 N. Y. 575 (1881); Wright v. Wright, 54 N. Y. 437 (1873); Whitney v. Whitney, 49 Barb. 317 (N. Y. 1867).

[5] *Supra,* note 1, at 99, 123 N. E. 2d at 791.

[6] *Id.* at 98, 123 N. E. 2d at 790.

[7] *Ibid.*

the other.[8] However, even though a husband was not liable civilly for a trespass on the person of his wife, he could be prosecuted in a criminal action for such a trespass. By Chapter 669 of the Laws of 1937, however, the legislature amended Sec. 57 of the Domestic Relations Law, thereby permitting one spouse to sue the other for personal injuries. Relying on the principle of this amendment, the Court in the instant case concluded that the legal fiction of unity of husband and wife has been completely abolished for all purposes, both civil and criminal.

Defendant had contended before the Court of Appeals that the statutory definition of larceny had not changed materially since 1830.[9] He argued that since the early statutes did not cover misappropriation of a wife's property by her husband, and since the Married Women's Acts did not refer to larceny, the criminal law, (as distinguished from the civil law of property rights), remained unchanged. The argument was advanced that since there was no statute making such a misappropriation a crime, that such a result would be strictly judicial legislation.

The Court of Appeals disposed of this contention by pointing out that the larceny statutes refer to the wrongful taking of property of another, and that by virtue of the Married Women's Acts, the wife is now "another". Thus the present larceny statutes protect the married woman, as well as any other lawful owner of property, despite the absence of amendments to such statutes.

Both the reasoning and the result of the Court of Appeals decision follow a pattern of case law adopted by other jurisdictions which have passed Married Women's Acts similar to §§ 50 and 51 of the Domestic Relations Law. Contrary reasoning has been followed in a few other states which hold that the Married Women's Acts affect property rights and contracts only, and do not permit a modification of the status of marriage by permitting a criminal action in the case of a theft of the property of a spouse.[10]

The full significance of the decision in the instant case is best reflected by the opinion of Justice Bedlock in the Appellate Division decision in this case. The Justice said: "The law is not static. The public policy of one generation may not, under changed conditions, be the public policy of another. Where the reason for a rule ceases, the rule also ceases. In a determination of the problem here presented, 'we cannot turn the clock back' to 1829, when the Revised Statutes incorporated the substance of the present definition of larceny. 'We must consider' the rights of a spouse with relation to the other 'in the light of its full development and its present place in American life throughout the Nation.' "[11]

[8] Caplan v. Caplan, 268 N. Y. 445, 198 N. E. 23 (1935); Shubert v. Shubert Wagon, 249 N. Y. 253, 146 N. E. 42 (1928); La Van Allen v. La Van Allen, 246 N. Y. 571, 159 N. E. 656 (1927); Schultz v. Schultz, 89 N. Y. 644 (1882).

[9] Revised Statutes of N. Y. 1829, Part IV, Chap. 1. Title III, Art. 5; *cf.* N. Y. Penal Code, Sec. 528 (1881) and present N. Y. PENAL L. § 1290.

[10] State v. Koontz, 125 Kan. 216, 257 Pac. 944 (1927); Beasley v. State, 138 Ind. 552, 38 N. E. 35 (1894); Hunt v. State, 72 Ark. 241, 79 S. W. 769 (1904); State v. Herndon, 158 Fla. 115, 27 So. 2d 833 (1946); Whitson v. State, 65 Ariz. 395, 181 P. 2d 822 (1947).

[11] *Supra,* note 3 at 417, 132 N. Y. S. 2d at 307.

FEDERAL IMMUNITY STATUTE—POWER OF FEDERAL COURT TO COMPEL TESTIMONY DESPITE POSSIBLE SELF-INCRIMINATION.—The constitutionality of the recently enacted Federal immunity statute[1] was put in issue for the first time before the United States District Court for the Southern District of New York, in the case of *In re William Ludwig Ullman.*[2]

The statute provides that a witness who might otherwise be privileged to refuse to testify under the protection of the Fifth Amendment, may, if he is accorded a grant of immunity, be compelled to testify before Congress and its committees, or before any grand jury or court of the United States "in the course of any investigation relating to any interference with or endangering of, or any plans or attempts to interfere with or endanger the national security of the United States by treason, sabotage, espionage, sedition, seditious conspiracy or the overthrow of its government by force or violence. . . ."

The instant court proceedings involved an application by the United States Attorney for an order directing one William Ullman to answer questions before a grand jury which was inquiring into matters involving national security. Ullman had refused to answer these grand jury questions, invoking the privilege against self-incrimination under the Fifth Amendment. In an opinion by Judge Weinfeld in January, 1955, the court granted the application and directed Ullman to answer the questions propounded to him.

This judgment was affirmed by the Court of Appeals in April, 1955.[3]

Ullman opposed the government's application on five specific grounds: First, he urged that the statute was unconstitutional and in contravention of his rights under the Fifth Amendment in requiring him "to be a witness against himself."[4] He recognized that immunity statutes have been upheld since *Brown* v. *Walker*[5] in 1895, but cited the dissenting opinion in that case and urged reconsideration in the light of the punitive sanctions and the social and economic consequences which follow self-exposure under a grant of immunity. The trial court pointed out that any question of overruling *Brown* v. *Walker* was exclusively within the province of the Supreme Court, and not the District Court; that similar objections had been rejected by the Supreme Court as recently as *Smith* v. *United States*[6] in 1949; and that immunity statutes had been before the Supreme Court in seven cases[7] subsequent to *Brown* v. *Walker.*

The second contention of the witness was that the statute failed to grant complete immunity because it still left him subject to prosecution under state laws. He argued that Congress did not have the constitutional power to bar state prosecutions,

[1] 68 STAT. 833 (1954), 18 U. S. C. § 3486.

[2] 128 F. Supp. 617 (S. D. N. Y. 1955).

[3] *In re* Ullman, — F. 2d — (2d Cir. 1955); N. Y. Times, April 5, 1955, p. 15, col. 4.

[4] 128 F. Supp. 617, 620, 621.

[5] 161 U. S. 591, 16 S. Ct. 644, 40 L. Ed. 819 (1895).

[6] 337 U. S. 137, 147, 69 S. Ct. 1000, 1009, 93 L. Ed. 1264, 1272 (1949).

[7] Jack v. Kansas, 199 U. S. 372, 26 S. Ct. 78, 50 L. Ed. 234 (1905); Heike v. United States, 227 U. S. 131, 33 S. Ct. 226, 57 L. Ed. 450 (1913); United States v. Monia, 317 U. S. 424, 63 S. Ct. 409, 87 L. Ed. 376 (1943); Feldman v. United States, 322 U. S. 487, 64 S. Ct. 1082, 88 L. Ed. 1408 (1944); Shapiro v. United States, 335 U. S. 1, 68 S. Ct. 1375, 92 L. Ed. 1787 (1948); Smith v. United States, 337 U. S. 137, 69 S. Ct. 1000, 93 L. Ed. 1264 (1949); Adams v. Maryland, 347 U. S. 179, 74 S. Ct. 442, 98 L. Ed. 608 (1954).

and, even assuming that it had such power, the statute merely prohibited the use of testimony in a state prosecution and did *not* immunize the witness against prosecution in any state court so long as the testimony itself was not used. The court answered these arguments by citing the holding of the Supreme Court in *Murdock* v. *United States*.[8] There the high court said that the privilege against self-incrimination could not be invoked before a federal tribunal where incrimination was feared under state law. Consequently, whatever objections might be raised to the rule in the *Murdock* case, the decision "is a sufficient answer to the witness' contention as long as its authority remains unimpaired."[9]

Further, in answering the witness' arguments, the court did not limit itself to the citation of the rule in the *Murdock* case. It observed that at the time of the passage of this statute, Congress "intended to afford a witness the fullest protection by enlarging the scope of immunity *to bar state prosecutions* as well as the use of evidence in state courts concerning any matter as to which his testimony has been compelled." (Emphasis supplied).[10] With respect to the power of Congress to prohibit state prosecutions, the court pointed out that the statute in question is specifically restricted to offenses involving treason, sabotage, sedition and conspiracy to commit any of the foregoing, and took the position that "Congress has the constitutional power, certainly with respect to matters touching upon the national defense or security, to provide for a grant of immunity in exchange for compelled testimony which is broad enough to prohibit state prosecutions."[11]

The third objection of the witness was that the statute was unconstitutional in that it required the court to perform a non-judicial function. He argued that the procedure by which the court was called upon to approve an application for a grant of immunity gave the court, in effect, a veto power over a determination of the United States Attorney that the public interest required that immunity be granted to the witness. This would give the court a power which is peculiarly within the province of either the legislative or executive branches and such power would do violence to the concept of separation of powers. With respect to this contention, the court took the position that the statute did not grant such powers but, on the contrary, limited the court's function to determining whether "the application complies with the requirements specified in that section before the witness may be ordered to answer." "This," the court declared, "is clearly a judicial function."[12]

The court did point out, however, that the statutory provisions whereby immunity might be granted to witnesses appearing before *Congress or its committees* is considerably different from the provisions that apply to grand jury or court proceedings involving national defense or security. It indicated that with respect to the provisions governing Congress or its committees, the language of the statute "purports to vest discretion in the court and specifically requires its *approval* of any grant of immunity." (Emphasis supplied).[13]

The fourth contention of the witness was that the court should overrule the determination by the United States Attorney that a grant of immunity, in return for compelled testimony, was in the public interest. Here, the court stated that "since the statute does not vest power in the court to review the determination of the United

[8] 284 U. S. 141, 52 S. Ct. 63, 76 L. Ed. 210 (1931).
[9] 128 F. Supp. 617, 622.
[10] *Id.* at 624.
[11] *Id.* at 622.
[12] *Id.* at 625, 626.
[13] *Id.* at 624.

States Attorney as concurred in by the Attorney General,"[14] this contention of the witness must necessarily fail.

With respect to the final objection of the witness which challenged the propriety of the questions asked, the court took the position that "since the questions appear to come within the framework of an inquiry into national defense or security, the witness 'is not entitled to urge objections of incompetency and immateriality such as a party might raise since this is no concern of his.'[15]"[16] Finally, the court declared that an order compelling the witness to testify in relation to his membership and the membership of others in the Communist party did not violate his rights under the First Amendment. The court said that any question on this score was concluded in *Josephson* v. *United States*[17] where the power of Congress to inquire into membership in the Communist party had been upheld against a similar objection.

This decision was unanimously affirmed three months later by the United States Court of Appeals for the Second Circuit.[18] The three judges participating each wrote a separate opinion. Judge Clark expressed regret that the Court was bound in this case by the long-standing law on the subject. Judge Galston indicated that in the absence of ruling cases he would have voted for reversal. Judge Frank, writing the opinion of the Court, seemed to express the attitude of the entire tribunal when he said: "Accordingly, [Ullman's] argument must be addressed, not to our ears, but to eighteen others in Washington."[19]

MILITARY LAW—DISCHARGE WITHOUT HONOR FROM NEW YORK NATIONAL GUARD "BY COMMAND OF THE GOVERNOR" HELD NOT SUBJECT TO JUDICIAL REVIEW.—The Court of Appeals has held, with one dissent, that a "Discharge without Honor" given to an enlisted man in the New York State National Guard by the Chief of Staff "By Command of the Governor" is not subject to judicial review.[1]

The respondent, Gerard E. Nistal, after several previous periods of federal military service, each terminated by an honorable discharge, enlisted in the New York Air National Guard in 1947. To the question on the application form, "Were you ever convicted . . . of any offense," Nistal indicated, "No." He did so after inquiring of the recruiting officer whether his two previous convictions by courts-martial, recorded on his discharge certificates, required an affirmative answer. In response, the officer said that the question referred only to criminal convictions in civilian courts. In December, 1950, Nistal requested an honorable discharge before his enlistment expired, in order to assume a position in the defense effort of the United States. After a hearing before a Discharge Board, Nistal was discharged "without honor" because of his "fraudulent enlistment," in that he failed to list his two convictions by courts-martial. The order granting this discharge was signed by the appellant, Hausauer, as Chief of Staff "By Command of the Governor."

[14] *Id.* at 628.

[15] Blair v. United States, 250 U. S. 273, 282, 39 S. Ct. 468, 471, 63 L. Ed. 979, 984 (1919).

[16] 128 F. Supp. 617, 628.

[17] 165 F. 2d 82 (2d Cir. 1947). *Accord:* Barsky v. United States, 167 F. 2d 241 (D. C. Cir. 1948); Lawson v. United States, 176 F. 2d 49 (D. C. Cir. 1949).

[18] *Supra,* note 3.

[19] — F. 2d —, —.

[1] Nistal v. Hausauer, 308 N. Y. 146, 124 N. E. 2d 94 (1954).

In June, 1952, Nistal filed a petition[2] in the Supreme Court under Article 78 of the Civil Practice Act for an order directing Hausauer to issue him an honorable discharge. Hausauer made a cross-motion to dismiss[3] the proceedings for want of jurisdiction and for failure to bring the action within the requisite time.[4] Special Term granted the cross-motion, and dismissed the proceedings on the jurisdictional ground.[5] In so doing, it held that the relief demanded was solely within the power of the Governor.

The Appellate Division (two justices dissenting without opinion) reversed the order and reinstated Nistal's petition.[6] The court contended that the appeal presented an important question relative to the power of judicial review. It held that the act to shorten the term of Nistal's enlistment was an executive function, but that the "without honor" characterization of his discharge was tantamount to the exercise of a judicial function. It said that a characterization which impugned the character or reputation of a citizen could only be made by a court, notwithstanding the fact that a trial might disclose that there were good reasons for the action taken by an administrative Discharge Board.[7]

The Appellate Division argued that neither *Reid v. United States*,[8] nor *Matter of Bianco v. Austin*,[9] two cases relied upon by Special Term, supported the position of Hausauer in this case. On the contrary, it contended that the latter case recognized the jurisdiction of the state courts to secure the discharge of a member of the National Guard of New York State. The Court also relied on *People ex rel. Smith v. Hoffman*,[10] which held that the Supreme Court has power to issue a writ of certiorari to review the determination of a military board of examination.

Upon application, the Appellate Division certified to the Court of Appeals questions as to jurisdiction of subject matter, jurisdiction over the person of Hausauer, and sufficiency of the petition.

In reversing the Appellate Division and reinstating the order of Special Term dismissing the petition, the Court of Appeals held that while it had in personam jurisdiction over Hausauer, it lacked jurisdiction over the subject matter. It held that shortening the term of enlistment was a discretionary act of the executive, not subject to court review; and further, that even if the executive decision were judicial in nature, but was made by the governor or by his order, it would not be subject to review on a writ of certiorari.[11]

The *Hoffman* case,[12] which held that a decision by a military board concerning the fitness of a commissioned officer was a judicial determination subject to court review, was distinguished by the Court on the ground that Nistal was an enlisted man. The

[2] Nistal v. Hausauer, 203 Misc. 89, 115 N. Y. S. 2d 75 (Sup. Ct., Spec. T., N. Y. Co., 1952).

[3] N. Y. Civ. Prac. Act, § 1293.

[4] N. Y. Civ. Prac. Act, Art. 78.

[5] See note 2, *supra*.

[6] Nistal v. Hausauer, 282 App. Div. 7, 121 N. Y. S. 2d 712 (1st Dep't 1953).

[7] *Ibid.*

[8] 161 Fed. 469 (S. D. N. Y. 1908), *writ of error dismissed*, 211 U. S. 529, 20 S. Ct. 171, 53 L. Ed. 313 (1908).

[9] 204 App. Div. 34, 197 N. Y. Supp. 328 (1st Dep't 1922).

[10] 166 N. Y. 462, 60 N. E. 187, 54 L. R. A. 597 (1901).

[11] People ex rel. Broderick v. Morton, 156 N. Y. 136, 50 N. E. 791, 66 Am. St. Rep. 547, 41 L. R. A. 231 (1898).

[12] 166 N. Y. 462, 60 N. E. 187, 54 L. R. A. 597 (1901).

result in the *Hoffman* case was dictated by a provision of the State Constitution[13] which requires a trial and findings for the removal of an officer, but is silent as to enlisted men. Here, the Court of Appeals found that Nistal's voluntary application reposed ". . . discretion in the military authorities as to what kind of discharge should be granted. . . ;"[14] and the Court concluded in the words of Special Term, that ". . . since the Governor has, through his Chief of Staff, ordered this discharge in the present case, the civil courts cannot review it."[15]

The Court admitted that this form of discharge was probably damaging to Nistal's reputation and to his prospects in life, but pointed out that the question before the court was a purely legal issue as to whether the discharge can or cannot be reviewed by the civil courts. Quoted with approval was the admonition of the United States Supreme Court that ". . . judges are not given the task of running the army. . . ."[16]

In the *Hoffman* case,[17] the Court of Appeals observed that there was a conflict between the courts of the different states as to the right of civilian courts to review the judgments of military tribunals,[18] and that although the courts of England do review such judgments, they do so with extreme caution.[19] The general rule appears to be that *federal* civil courts will review military decisions only in *habeas corpus* proceedings,[20] and will refuse to do so with reference to determination of army discharge review boards.[21]

[13] N. Y. CONST. Art. XII, § 6.

[14] 308 N. Y. 146, 147, 124 N. E. 2d 94, 97 (1954).

[15] *Id.* at 149, 124 N. E. 2d at 97.

[16] Orloff v. Willoughby, 345 U. S. 83, 73 S. Ct. 534, 544, 97 L. Ed. 842, 852 (1953), *reh. denied,* 345 U. S. 931, 73 S. Ct. 779, 97 L. Ed. 1360 (1953).

[17] 166 N. Y. 462, 60 N. E. 187, 54 L. R. A. 597 (1901).

[18] Durham v. United States, 4 Hayw. (Tenn.) 54 (Sup. Ct. Errors and App., 1817); State v. Davis, 4 N. J. L. 311 (Sup. Ct., 1816); Re Contested Election of Brigadier General, 1 Strobh. (S. C.) 190 (Ct. of Appeals, 1847).

[19] Grant v. Gould, 2 H. Black. 69, 101, 126 Eng. Rep. 434, 451 (1792); In re Mansergh, 1 Best & Smith 400, 121 Eng. Rep. 764 (1861); 1 Winthrop M. L. 57 (1847); In re Poe, 5 Barn. & Ad. 681, 110 Eng. Rep. 942 (1833).

[20] Burns v. Wilson, 346 U. S. 137, 73 S. Ct. 1045, 97 L. Ed. 1508 (1953).

[21] Gentila v. Pace, 90 U. S. App. D. C. 75, 193, 196 Fed. 2d 924, 926 (D. C. Cir. 1951), *cert. denied,* 342 U. S. 943, 72 S. Ct. 556, 96 L. Ed. 702 (1952).