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### Domestic Relations—Consent Judgments for Alimony—Subsequent Modification and Enforcement by Contempt

It appears that in the area of consent judgments in North Carolina, especially with respect to alimony decrees,<sup>1</sup> the subtleties of the form of the judgment play a major role in determining the subsequent rights of the parties. A recent case<sup>2</sup> serves notice of the unforeseen consequences that can result from a seemingly simple consent judgment involving alimony and support for a wife and child. The decision seems<sup>3</sup> to reiterate the general North Carolina rule that an award of alimony by virtue of a consent judgment is not enforceable by contempt and is not subject to modification without the consent of the parties.

It is a well-accepted rule that an alimony obligation pursuant to a court decree is not a debt within the meaning of the usual constitutional prohibition against imprisonment for debt.<sup>4</sup> Therefore, the husband can be held in contempt for a wilful failure to comply with the decree.<sup>5</sup> However North Carolina has repeatedly held that consent judgments based on agreement<sup>6</sup> of the parties do not rise to the dignity of an affirmative court decree so as to be enforceable by contempt.<sup>7</sup> This gen-

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payments in lieu of wages for a period during which the employee is absent from work on account of personal injuries or sickness are excludable from gross income to the extent of \$100 a week. This is one example of the difficulty that would be presented to a jury in determining the award in a personal injury action if they were allowed to consider the tax aspects.

<sup>1</sup> This Note will deal primarily with consent judgments entered only with respect to alimony decrees because the question of the propriety of contempt proceedings arises most frequently here. Most other judgments for the payment of money cannot be enforced by contempt proceedings because they are construed as imposing a debt within the meaning of the usual constitutional prohibition against imprisonment for debt.

<sup>2</sup> *Holden v. Holden*, 245 N. C. 1, 95 S. E. 2d 118 (1956).

<sup>3</sup> The factual situation is complicated and it is not exactly clear on what basis the court made its holding. The lower court altered a prior consent judgment awarding alimony payments to the wife, and later the court held the husband in contempt for failure to make the payments as specified in the altered decree. The supreme court reversed; one of the grounds apparently was that the original order, being a consent judgment, could not be modified nor enforced by contempt proceedings.

<sup>4</sup> *Ex Parte Hall*, 125 Ark. 309, 188 S. W. 827 (1916); *Ex Parte Silvia*, 123 Cal. 293, 55 Pac. 988 (1899); *In re Popejoy*, 26 Colo. 32, 55 Pac. 1083 (1899); *Bronk v. State*, 43 Fla. 461, 31 So. 248 (1901); *Hefflinger v. Hefflinger*, 172 Ga. 889, 159 S. E. 242 (1931); *Pain v. Pain*, 80 N. C. 322 (1879); 17 AM. JUR., *Divorce and Separation* § 666 (1938); Annot., 30 A. L. R. 130 (1924).

<sup>5</sup> In England even though a violation of an alimony decree is contempt of court the person himself cannot be attached, however. *De Lossy v. De Lossy* (1890) LR 15 Prob. Div. (Eng.) 115; 8 HALSBURY, LAWS OF ENGLAND 22 (3d ed. 1954).

<sup>6</sup> Prior to 1947 a consent judgment, being merely a contract between the parties, was not valid to pass an interest in real property unless the privy examination of the wife were taken. *Ellis v. Ellis*, 193 N. C. 216, 136 S. E. 350 (1927). In 1947 the statute relating to contracts between husband and wife was amended to add the present N. C. GEN. STAT. § 52-12 (d) (Supp. 1955): "This section shall not apply to any judgment of the superior court which, by reason of its being consented to by a husband and his wife, or their attorneys, may be construed to constitute a contract between such husband and wife."

<sup>7</sup> *Davis v. Davis*, 213 N. C. 537, 196 S. E. 819 (1938); *Webster v. Webster*,

eral rule was not applied in at least two earlier cases because the consent judgment specified that the husband would be subject to contempt proceedings on default, or the court in its decree reserved the right to make further orders in the cause.

In *Edmundson v. Edmundson*<sup>8</sup> the decree contained the following proviso: "The money payments provided herein shall be more than a simple judgment for debt. They shall be as effectively binding upon plaintiff [husband] as if rendered under and by virtue of the authority of [G. S. § 50-16] . . . and the failure of the plaintiff to make the payments . . . shall . . . subject him to such penalties as may be required by the court, in case of contempt of its orders."<sup>9</sup> The Supreme Court held this sufficient to enable the lower court to hold the husband in contempt for failure to comply with the decree. The judge in *Dyer v. Dyer*<sup>10</sup> stated in the decree that by the consent of the parties the husband was to pay wife a certain sum "pending further orders of this court."<sup>11</sup> This was held sufficient to create a definite decree of the court rather than a mere sanction of the contract of the parties; the decree was therefore enforceable by contempt.

The position taken in the above two cases was recognized in *Lentz v. Lentz*.<sup>12</sup> In a per curiam decision, the court decided there could be no contempt proceeding under the particular consent judgment in issue, saying: "There is no provision in the judgment in the present action that leaves the matter open, or any provision giving the court discretionary power. . . ."<sup>13</sup> Thus it appears that in order for the wife to hold a coercive hand over the husband's head it would be wise to request the court to write in an express provision for contempt or to reserve future powers of modification.

The principal case seems to be in line with previous North Carolina decisions on this point because the lower court's decree contained no language such as that in the *Edmundson* and *Dyer* decrees. The court stated in the principal case: "The judgment merely sets out the payments agreed upon for the support of the defendant [wife] . . . and the court did not decree that the payments should be made by the plaintiff."<sup>14</sup> Thus the net effect is that the court has merely affirmed the agreement of the parties and it will be enforceable as an ordinary contract.

213 N. C. 135, 195 S. E. 362 (1938); *Lentz v. Lentz*, 194 N. C. 673, 140 S. E. 440 (1927). N. C. GEN. STAT. § 1-247 (1953) was amended in 1947 to provide that a judgment by confession enforceable by contempt could be entered for alimony or for support of minor children. The purpose of the amendment is to have a simplified method of converting an agreement between the parties into a judgment enforceable by contempt. See *Case Survey*, 25 N. C. L. REV. 376, 389-90 (1947) for a brief comment on this.

<sup>8</sup> 222 N. C. 181, 22 S. E. 2d 576 (1942); Note, 21 N. C. L. REV. 307 (1943).

<sup>9</sup> *Edmundson v. Edmundson*, 222 N. C. 181, 182, 22 S. E. 2d 576, 578 (1942).

<sup>10</sup> 212 N. C. 620, 194 S. E. 278 (1937).

<sup>11</sup> *Id.* at 621, 194 S. E. at 279.

<sup>12</sup> 194 N. C. 673, 140 S. E. 440 (1927).

<sup>13</sup> *Id.* at 674, 140 S. E. at 440.

<sup>14</sup> *Holden v. Holden*, 245 N. C. 1, 6, 95 S. E. 2d 118, 122 (1956).

North Carolina seems to be in the minority concerning the effect of a consent judgment from the standpoint of enforceability. Most jurisdictions hold that once the agreement of the parties is incorporated into the court decree,<sup>15</sup> or is simply restated in the form of a decree,<sup>16</sup> the contract is superseded by the court order and it has the full force and effect of a decree enforceable by contempt. The fact that the decree consists entirely of the parties' agreement, without further orders from the court, does not appear to preclude enforceability by contempt proceedings. However if the decree merely refers to the agreement and the terms of the agreement are not actually set out in the decree, it is still a contract and not enforceable by contempt.<sup>17</sup>

Another consequence of holding the court order to be a mere approval of the agreement of the parties and not a court decree is that it cannot be modified without the consent of the parties unless it was unfair to the wife or was obtained by fraud or mutual mistake. This is in line with many previous North Carolina decisions concerning consent judgments, not only in divorce and separation cases but also in other areas.<sup>18</sup>

As a general rule an alimony decree, unless awarded in conjunction with an absolute divorce,<sup>19</sup> can be modified on the application of either

<sup>15</sup> *Sessions v. Sessions*, 178 Minn. 75, 226 N. W. 701 (1929); *Karteus v. Karteus*, 67 N. D. 297, 272 N. W. 185 (1937); *Gloth v. Gloth*, 154 Va. 511, 153 S. E. 879 (1930); see *Holloway v. Holloway*, 130 Ohio St. 214, 216, 198 N. E. 579, 580 (1935): "A decree which incorporates an agreement is a decree of court nevertheless, and as soon as incorporated into the decree the separation agreement is superseded by the decree, and the obligations imposed are not those imposed by contract, but are those imposed by decree, and enforceable as such. . . . Where a court, in its divorce decree, adopts the language of a separation agreement, it does not thereby reduce the status of the decree to that of a mere contract. While a contract may become a decree of court, a decree of court cannot assume the status of a mere contract."

<sup>16</sup> *Ex Parte Dukes*, 155 Ark. 24, 243 S. W. 863 (1922); *Cox v. Cox*, 197 Ga. 260, 29 S. E. 2d 83 (1944); *Estes v. Estes*, 192 Ga. 94, 14 S. E. 2d 681 (1941); *Barrett v. Barrett*, 287 Ky. 216, 152 S. W. 2d 610 (1941); *Hargis v. Hargis*, 252 Ky. 198, 66 S. W. 2d 59 (1933).

<sup>17</sup> *Lazar v. Superior Court*, 16 Cal. 2d 617, 620, 107 P. 2d 249, 250 (1940) ("If a property settlement agreement is complete in itself and is merely referred to in a divorce decree or approved by the court but not actually made a part of the decree, then the provisions of such agreement cannot be enforced by contempt proceedings."); *Stanley v. Stanley*, 226 N. C. 129, 37 S. E. 2d 118 (1946); *Brown v. Brown*, 224 N. C. 556, 31 S. E. 2d 529 (1944).

<sup>18</sup> *Spruill v. Nixon*, 238 N. C. 523, 78 S. E. 2d 323 (1953) (easement); *Lee v. Rhodes*, 227 N. C. 240, 41 S. E. 2d 747 (1947) (ejectment); *King v. King*, 225 N. C. 639, 35 S. E. 2d 893 (1945) (assumpsit); *Keen v. Parker*, 217 N. C. 378, 8 S. E. 2d 209 (1940) (ejectment); *Weaver v. Hampton*, 201 N. C. 798, 161 S. E. 480 (1931) (action against county commissioners for corrupt refusal to perform duties); *Morris v. Patterson*, 180 N. C. 484, 105 S. E. 2d 25 (1920) (separation agreement).

<sup>19</sup> If the alimony is decreed pursuant to an absolute divorce, the general rule is that it cannot be subsequently modified. *Kenard v. Kenard*, 131 Fla. 473, 179 So. 660 (1938); *Hardy v. Pennington*, 187 Ga. 523, 1 S. E. 2d 667 (1939); *Duff v. Duff*, 275 Ky. 367, 121 S. W. 2d 933 (1938); *Stewart v. Stewart*, 127 Pa. Super. 567, 193 Atl. 860 (1937). In North Carolina this problem will not arise because there can be no permanent alimony granted in conjunction with an absolute divorce. N. C. GEN. STAT. § 50-11 (Supp. 1955), *Duffy v. Duffy*, 120 N. C. 346, 27 S. E. 28 (1897). But where there is a valid separation agreement followed by

party according to their varying circumstances,<sup>20</sup> and this is true even though there was no provision in the decree allowing for a modification.<sup>21</sup> However, the parties can make an agreement between themselves as to a proper sum to be paid, subject to the approval of the court that it is fair to the parties at the time it is made. This will be enforceable as a contract<sup>22</sup> and will not be subject to modification without the consent of the parties.<sup>23</sup> But if the court renders an alimony decree which is based upon,<sup>24</sup> adopts, or incorporates<sup>25</sup> an agreement entered into by the parties, the general trend is to the effect that it can be modified.<sup>26</sup> There is a distinction between judgments based on the agreement of the parties and consent judgments in the technical sense. The generally prevailing rule, as in North Carolina, is that the latter cannot be modified,<sup>27</sup> although the former can be.

North Carolina follows a consistent pattern in saying consent judg-

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an absolute divorce, the agreement stands and is enforceable as a contract. *Jenkins v. Jenkins*, 225 N. C. 681, 36 S. E. 2d 233 (1945); *Lentz v. Lentz*, 193 N. C. 742, 138 S. E. 2d 12 (1927).

<sup>20</sup> *Robinson v. Robinson*, 250 Ky. 488, 63 S. W. 2d 605 (1933); *Weiner v. Weiner*, 242 App. Div. 847, 275 N. Y. Supp. 177 (2d Dep't 1934); *Gloth v. Gloth*, 154 Va. 511, 153 S. E. 879 (1930); Annot., 71 A. L. R. 700 (1931).

<sup>21</sup> *Anderson v. Anderson*, 124 Cal. 48, 56 Pac. 630, 57 Pac. 81 (1899); *Sperry v. Sperry*, 80 W. Va. 142, 92 S. E. 574 (1917). As a general rule past due installments are not subject to modification. COHEN, DIVORCE AND ALIMONY IN NORTH CAROLINA 172 (1949). Therefore the past due installments can be enforced in a foreign State. *Barber v. Barber*, 323 U. S. 77 (1944). But since future payments are subject to modification by the court granting the decree, there will normally be no judgment in a foreign State as to these future payments. *Lynde v. Lynde*, 181 U. S. 183 (1901).

<sup>22</sup> The leading case of *Archbell v. Archbell*, 158 N. C. 408, 74 S. E. 327 (1912) was the first acknowledgment by North Carolina that separation agreements entered into between husband and wife were not against public policy, provided there were certain safeguards for the protection of the wife and society.

<sup>23</sup> *Pryor v. Pryor*, 88 Ark. 302, 114 S. W. 700 (1908); *North v. North*, 339 Mo. 1226, 100 S. W. 2d 582 (1936); *Morris v. Patterson*, 180 N. C. 484, 105 S. E. 25 (1920); *Sinkler v. Sinkler*, 49 N. D. 1144, 194 N. W. 817 (1923); *Buckminster v. Buckminster*, 38 Vt. 248, 88 Am. Dec. 652 (1865).

<sup>24</sup> *Douglas v. Willcuts*, 296 U. S. 1 (1935); *Briggs v. Briggs*, 178 Ore. 193, 165 P. 2d 772 (1946); Annot., 166 A. L. R. 666 (1947).

<sup>25</sup> *Worthington v. Worthington*, 224 Ala. 237, 139 So. 334 (1932); *Warren v. Warren*, 116 Minn. 458, 133 N. W. 1009 (1912); *Hough v. Hough*, 26 Cal. 2d 605, 160 P. 2d 15 (1945).

<sup>26</sup> There is a recognized split as to whether alimony decrees based on agreements are subject to modification. See *KEEZER, MARRIAGE AND DIVORCE* 716 (3d ed. 1946); Note, 44 HARV. L. REV. 127 (1930); Note, 27 ORE. L. REV. 130 (1948). The reason usually given for allowing a modification is that as the court has the duty to grant alimony it is not bound by the agreement of the parties concerning the amount to be awarded; consequently, the agreement cannot hinder the court from modifying the decree. Cf. *Commissioner v. Maresi*, 156 F. 2d 929 (2d Cir. 1946).

Occasionally a distinction is made that if the judgment orders payment of something other than alimony in the technical sense of the word, it will be enforceable as a contract between the parties rather than as an obligation arising out of the marital relationship. *Bushman v. Bushman*, 157 Md. 166, 145 Atl. 488 (1929); *Dickey v. Dickey*, 154 Md. 675, 141 Atl. 387 (1928).

<sup>27</sup> *Keach v. Keach*, 217 Ky. 723, 290 S. W. 708 (1927); *Karnes v. Black*, 185 Ky. 410, 215 S. W. 191 (1919); *McArthur v. Thompson*, 140 Neb. 408, 299 N. W. 519 (1941); *Brady v. Hyman*, Tex. Civ. App., 230 S. W. 2d 342 (1950).

ments can neither be modified nor enforced by contempt, whereas the majority rules refuse modification but allow contempt proceedings. It is submitted that as to contempt the majority is the better view; otherwise the judgment is of no practical value to the wife other than as a judicial affirmation of the contract existing between the parties. She would be as well off without the decree because she can enforce it only by the usual methods of enforcing contracts. By the same token, it is thought that the minority view as to modification is preferable. If a judge with veto power over the terms of the agreement approves them and sets them out in the decree, this should be sufficient adoption of the terms to make them a part of the decree.

In view of the distinction made in North Carolina between consent judgments and ordinary alimony decrees, however, it is advisable that the attorney carefully word the form of the judgment so as to preserve in the court further rights in the cause. As seen in the *Edmundson* and *Dyer* cases, the subsequent rights of the parties are materially affected by the technical form of the judgment.

HAMLIN WADE

#### Domestic Relations—Consequences of a Voidable Divorce Decree

In the recent case of *Harmon v. Harmon*,<sup>1</sup> the husband, after obtaining a decree of absolute divorce on grounds of two years separation, remarried. Thereafter, the first wife was successful in her motion in the cause to have the divorce decree set aside, because the clerk of court had not mailed to her a copy of the notice of service by publication as required by statute.<sup>2</sup> The trial judge gave an order vacating the decree, but did not dismiss the action and ordered the clerk to make proper service of process on the defendant wife. Upon proper service of process, the wife filed her answer setting up as a defense to the divorce action the cohabitation arising out of the second marriage as adulterous and therefore a bar to her husband's action. The Supreme Court rejected the wife's contention and affirmed the divorce decree. The court stated that since the husband had done all that was required of him by law and there was no evidence of any intentional wrong or fraud on his part in the procurement of the divorce decree, his cohabitation with the second wife up to the time he knew the decree would be set aside was not adulterous so as to bar his right of action.

This appears to be the first case in which the Supreme Court of North Carolina has considered the effect of an error in the procedure of service of process by publication pursuant to N. C. GEN. STAT. § 1-99.2

<sup>1</sup> 245 N. C. 83, 95 S. E. 2d 355 (1956).

<sup>2</sup> N. C. GEN. STAT. § 1-99.2(c) (1953): "The clerk shall mail a copy of the notice of service of process by publication to each party whose name and residence or place of business appear in the verified pleading or complaint. . . ."