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Domestic Relations--Second Marriage Invalid When Contracted Before Finality of Interlocutory Decree to Earlier Marriage (Landsman v. Landsman, 302 N.Y. 45 (1950))

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the cares and problems of labor, traffic and competition is not an abuse of this police power.[26]

It is for the legislature to determine what occupations should be restrained as interfering with the rest and leisure of the first day of the week.[27] It may direct its police power against what it deems the evil of non-observance of Sunday laws without necessarily covering the entire field of possible abuse.[28] "The lack of abstract symmetry does not matter." [29] The statute cannot be set aside because it incidentally injures a particular business while it permits certain others to remain open provided that the discrimination is consistent with the purpose of the statute.[30]

"The legislature is free to make classifications in the application of a statute which are relevant to the legislative purpose. The ultimate test of validity is not whether the classes differ but whether the differences between them are pertinent to the subjct with respect to which the classification is made." [31] General public selling on Sunday is a particular abuse of the customs of the community and inherently different from laboring on Sunday or the selling of the particular commodities permitted by Section 2147.

It is submitted that the conclusion of the court was consistent with the legislature's intent and with prior interpretations of the statute. While it is customary to think of the Sunday laws as obsolete "blue laws", a reasonable consideration of their benefits will reveal that it is necessary for a well-ordered and refined society to abstain from labor and business one day a week.

DOMESTIC RELATIONS—SECOND MARRIAGE INVALID WHEN CONTRACTED BEFORE FINALITY OF INTERLOCUTORY DECREE TO EARLIER MARRIAGE.—Plaintiff married defendant prior to the finality of an interlocutory decree of annulment of the defendant's previous marriage. Plaintiff sought an annulment upon these facts.[1] Defendant asked judgment for a decree of separation on the ground that plaintiff deceived her as to the effectiveness of her interlocutory decree and the validity of their marriage. *Held,* judgment for de-

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[26] Hennington v. Georgia, 163 U. S. 299 (1896).

[27] Petit v. Minnesota, 177 U. S. 164 (1900); Neuendorff v. Duryea, 69 N. Y. 557 (1877).

[28] Central Lumber Co. v. South Dakota, 226 U. S. 157 (1912).

[29] Patsone v. Pennsylvania, 232 U. S. 138, 144 (1914).

[30] Asbury Hospital v. Cass County, 326 U. S. 207 (1945); *accord,* Patsone v. Pennsylvania, 232 U. S. 138 (1914).

[31] Asbury Hospital v. Cass County, 326 U. S. 207, 214 (1945).

[1] N. Y. CIV. PRAC. ACT § 1134. "An action to annul a marriage upon the ground that . . . the former marriage [was] . . . in force, may be maintained . . . ."

fendant reversed. Plaintiff's attempted marriage to defendant was without validity from its inception [2] since an interlocutory decree of annulment contemplates a final decree before it will effectively dissolve a marriage.[3] Thus he may seek an annulment although he does not come into court with "clean hands." Defendant is not entitled to a judgment of separation despite her having acted in good faith. *Landsman v. Landsman*, 302 N. Y. 45, 96 N. E. 2d 81 (1950).

A marriage is absolutely void if contracted by a person whose spouse by a former marriage is living, unless there has been an effective divorce or annulment.[4] By attacking the validity of a divorce decree [5] of a prior marriage of his present spouse, a party can establish the continuing existence of a valid marital relation by his spouse at the time of their marriage.[6] The latter marriage being of no effect the second spouse is consequently entitled to a decree of nullity.[7]

In instances where equitable considerations have been applied, however, such a decree has not been granted.[8] In such cases, therefore the parties to both marriages are uncertain as to their status.[9] This has resulted whether the question was presented affirmatively through an annulment action [10] or by way of counterclaim [11] or affirmative defense.[12] Generally the doctrine of "clean hands" [13] or estoppel [14] has been the basis for refusal in such cases. The public

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[2] N. Y. DOM. REL. LAW § 6.

[3] Matter of Crandall, 196 N. Y. 127, 89 N. E. 578 (1909); Pettit v. Pettit, 105 App. Div. 312, 93 N. Y. Supp. 1001 (3d Dep't 1905). An interlocutory decree contemplates a final judgment. N. Y. CIV. PRAC. ACT § 1176. "Three months after the entry of the interlocutory judgment in an action brought for judgment annulling a marriage . . . such interlocutory judgment shall become the final judgment. . . ."

[4] *Ibid.*

[5] This is usually done by showing that the court granting the divorce lacked jurisdiction of either party in that action.

[6] See note 3 *supra.*

[7] Brown v. Brown, 153 App. Div. 645, 138 N. Y. Supp. 602 (1st Dep't 1912); Heflinger v. Heflinger, 136 Va. 289, 118 S. E. 316 (1923); N. Y. CIV. PRAC. ACT § 1134. *Cf.* Stein v. Dunne, 119 App. Div. 1, 103 N. Y. Supp. 894 (1st Dep't 1907).

[8] Kaufman v. Kaufman, 177 App. Div. 162, 163 N. Y. Supp. 566 (1st Dep't 1917); Berry v. Berry, 130 App. Div. 53, 114 N. Y. Supp. 497 (1st Dep't 1909).

[9] Krause v. Krause, 282 N. Y. 355, 360, 26 N. E. 2d 290, 292 (1940). "Nothing in this decision should be taken to mean that because the defendant may not in these proceedings avail himself of the invalidity of his Nevada decree he is not the husband of his first wife." Kaufman v. Kaufman, 177 App. Div. 162, 163 N. Y. Supp. 566 (1st Dep't 1917).

[10] Hubbard v. Hubbard, 228 N. Y. 81, 126 N. E. 508 (1920); Kaufman v. Kaufman, 177 App. Div. 162, 163 N. Y. Supp. 566 (1st Dep't 1917).

[11] Villafana v. Villafana, 275 App. Div. 810, 89 N. Y. S. 2d 389 (1st Dep't 1949).

[12] Margulies v. Margulies, 109 N. J. Eq. 391, 157 Atl. 676 (Ch. 1931).

[13] Berry v. Berry, 130 App. Div. 53, 114 N. Y. Supp. 497 (1st Dep't 1909).

[14] Margulies v. Margulies, 109 N. J. Eq. 391, 157 Atl. 676 (Ch. 1931); Kaufman v. Kaufman, 177 App. Div. 162, 163 N. Y. Supp. 566 (1st Dep't 1917); 1 FREEMAN, JUDGMENTS § 320 (5th ed 1925).

policy and interest of the state and the fear that the "divorced wife" may become a public charge [15] have also influenced the decisions. In addition the courts have held that a person may not impeach a judgment where he was a party to the action [16] or which is not injurious to his pre-existing interests [17] where he was not a party to the action. But despite the general application of these principles of equity and law, some courts have persisted in granting the second spouse an annulment. They have done this even in the face of such obviously unconscionable conduct as where the second spouse: had knowledge of the doubtful validity of the first divorce; [18] devised the plan [19] or supplied the funds for its fraudulent procurement; [20] had been married to the "divorced wife" for fifteen years and had a ten-year-old child.[21]

The New Yorks courts had followed the equitable principles herein discussed with some consistency [22] until the decisions of *Fischer v. Fischer* [23] and *Lefferts v. Lefferts*.[24] In these two cases, the Court of Appeals refuted all previous considerations of equity and relied instead upon the principle that when a party seeks a divorce or separation, the primary fact to be proved is an existing marriage between the parties.[25] If the defendant denies this allegation, plaintiff is put to her proof.[26] A failure to then establish the allegation prevents the plaintiff from succeeding in her cause of action.[27] Though defendant does not thereby procure a dissolution of his marriage to the plaintiff, the result to him is the same. He is thus relieved of a spouse which he considers to be undesirable but his legal obligation for her support remains.[28]

The principal case seems to rectify the anomaly [29] in existence since the *Fischer* case which prevented enforcement of the second

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[15] Krause v. Krause, 282 N. Y. 355, 26 N. E. 2d 290 (1940).
[16] Krause v. Krause, 282 N. Y. 355, 26 N. E. 2d 290 (1940); Brown v. Brown, 242 App. Div. 33, 272 N. Y. Supp. 877 (4th Dep't 1934); Starbuck v. Starbuck, 173 N. Y. 503, 66 N. E. 193 (1903).
[17] Hall v. Hall, 139 App. Div. 120, 123 N. Y. Supp. 1056 (1st Dep't 1910); 1 FREEMAN, JUDGMENTS § 319 (5th ed. 1925); 3 FREEMAN, JUDGMENTS § 1439 (5th ed. 1925).
[18] Davis v. Davis, 279 N. Y. 657, 18 N. E. 2d 306 (1938).
[19] Frey v. Frey, 59 F. 2d 1046 (D. C. Cir. 1932).
[20] Simmons v Simmons, 19 F. 2d 690 (D. C. Cir. 1927).
[21] Kiessenbeck v. Kiessenbeck, 145 Ore. 82, 26 P. 2d 58 (1933).
[22] See note 8 *supra*.
[23] 254 N. Y. 463, 173 N. E. 680 (1930).
[24] 263 N. Y. 131, 188 N. E. 279 (1933).
[25] Jones v. Jones, 108 N. Y. 415, 15 N. E. 707 (1888).
[26] Fischer v. Fischer, 254 N. Y. 463, 173 N. E. 680 (1930).
[27] *Ibid.*
[28] Johnson v. Johnson, 295 N. Y. 477, 68 N. E. 2d 499 (1946). N. Y. CIV. PRAC. ACT § 1140-a. For an interesting discussion of this point, see Sparacio, *Alimony and the Bigamist: A Comment on Section 1140-a of the New York Civil Practice Act*, 21 ST. JOHN'S L. REV. 1 (1946).
[29] *See* Krause v. Krause, 282 N. Y. 355, 361, 26 N. E. 2d 290, 293 (1940) (Loughran, J., dissenting).

marriage when put in issue by the defendant, although it did not permit its formal dissolution by annulment.[30]

INJUNCTION—MIGRATORY DIVORCE—RIGHT OF DOMICILIARY TO ENJOIN PROSECUTION OF EX PARTE FOREIGN DIVORCE ACTION.—In an action by a wife for separation and alimony the complaint alleged that defendant, desiring a divorce, had abandoned plaintiff. The answer admitted the abandonment, claimed it was justified, but consented to a separation with alimony to be fixed by the court. After issue joined plaintiff moved to enjoin defendant from proceeding with a Virgin Islands divorce action alleging that his residence there was sham and only for the purpose of obtaining a divorce. *Held,* temporary injunction during the pendency of the action granted. When a wife sues for separation and the husband goes to another jurisdiction and attempts to get a divorce there without appearance by the wife there is necessity for intervention by a court of equity for the protection of the wife. The bases for plaintiff's fears are the "full faith and credit" and "prima facie weight" holdings of *William v. North Carolina.*[1] *Garvin v. Garvin,* 302 N. Y. 96 (1951).

The discretionary issuance by equity of injunctions is commonly asserted to rest upon the irreparable injury which would result to the petitioning party were the restraining order not granted.[2] Irreparable injury is said to exist when some legal wrong has been done or threatened and when there exists in the moving party some substantial legal right to be protected.[3]

The law is well established that a court of equity has the inherent power to enjoin and restrain residents of its jurisdiction from prosecuting an action commenced in a foreign jurisdiction.[4] However, in *Goldstein v. Goldstein*[5] it was held by the Court of Appeals that a permanent injunction would not issue at the instance of the petitioning domiciliary on the grounds (1) that a foreign divorce decree issued by a court not having jurisdiction of the matrimonial domicile, being void, injures no one,[6] and (2) that an injury

[30] Villafana v. Villafana, 275 App. Div. 810, 89 N. Y. S. 2d 389 (1st Dep't 1949).

[1] 317 U. S. 287 (1942); 325 U. S. 226 (1945).

[2] WALSH, A TREATISE ON EQUITY § 57 (1930).

[3] Baumann v. Baumann, 250 N. Y. 382, 165 N. E. 819 (1929); Gold v. Gold, 158 Misc. 570, 287 N. Y. Supp. 217 (Sup. Ct. 1936).

[4] Cole v. Cunningham, 133 U. S. 107 (1890). See Pound, *The Progress of the Law—Equity,* 33 HARV. L. REV. 420, 425 (1920).

[5] 283 N. Y. 146, 27 N. E. 2d 969 (1940). For a criticism of the *Goldstein* case, see Comment, 9 FORD. L. REV. 376 (1940).

[6] "The plaintiff has nothing to fear from the action . . . against her in Florida for . . . a judgment entered therein would be a nullity." Goldstein v. Goldstein, *supra* note 5 at 148, 27 N. E. 2d at 969.