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Injunction--Migratory Divorce--Right of Domiciliary to Enjoin Prosecution of Ex Parte Foreign Divorce Action (Garvin v. Garvin, 302 N.Y. 96 (1951))

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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

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[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.

of feelings [7] does not warrant the intervention of the equity powers of a court.

Subsequent to the above decision the Appellate Division, First Department, in *Pereira v. Pereira*,[8] at the instance of a wife who had previously obtained a judgment of separate maintenance, granted a temporary injunction enjoining the husband from proceeding in a foreign divorce action. The court distinguished the *Goldstein* case on the grounds that: (1) at the time the latter case was decided matrimonial domicile was the basis upon which the issuance of a divorce decree was predicated,[9] (2) subsequent to the *Goldstein* case mere domicile [10] of either spouse, guilty or not,[11] was a sufficient jurisdictional basis for the issuance of a decree, and (3) because of this change in the law the burden of overcoming the prima facie validity accorded to a foreign decree of divorce was placed upon the nonmigratory spouse. Apparently the court felt this burden of proof constituted the irreparable injury necessary to warrant the issuance of an injunction.

The instant case upholds the reasoning of *Pereira v. Pereira* and other lower court holdings [12] to the effect that since the jurisdictional principle upon which *Goldstein v. Goldstein* relied is no longer law, the latter case cannot be considered a controlling authority.[13] It is interesting to note, however, that although the present case involved the granting of an injunction to prevent the impairment of plaintiff's rights in the separation action,[14] the rationale of the case is broad enough to cover *all* situations where the migratory husband attempts to procure a "fraudulent" divorce.[15] This conclusion is

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

[8] 272 App. Div. 281, 70 N. Y. S. 2d 763 (1st Dep't 1947).

[9] Haddock v. Haddock, 201 U. S. 562 (1906).

[10] Williams v. North Carolina, 317 U. S. 287 (1942).

[11] *Ibid.*

[12] Palmer v. Palmer, 268 App. Div. 1010, 52 N. Y. S. 2d 383 (3d Dep't 1944); Ciacco v. Ciacco, 50 N. Y. S. 2d 398 (Sup. Ct. 1944); Ashkenaz v. Ashkenaz, 180 Misc. 580, 41 N. Y. S. 2d 388 (Sup. Ct. 1943). See Note, 13 BROOKLYN L. REV. 148 (1947) for a comprehensive discussion of the lower court holdings since the *Goldstein* case.

[13] "Back in the days when *Haddock v. Haddock* . . . made void foreign judgments of the kind being attempted here, our court held . . . that such injunctive relief was unnecessary for . . . the spouse who . . . could not be bound thereby anyhow . . . ." Garvin v. Garvin, 302 N. Y. 96, 101 (1951).

[14] Plaintiff-wife sought the injunction as an incident to her separation action. The court held applicable to the action Section 878(1) of the New York Civil Practice Act which authorizes an injunction where the defendant, during the pendency of the action, is about to do an act in violation of plaintiff's rights respecting the subject of the action and tending to render the judgment ineffectual. *Id.* at 103.

[15] One of the questions certified which the court answered in the affirmative was: "2. Was it proper for the Supreme Court to grant the restraining order . . . as an aid to the prosecution of this action, *or the protection of her marital status* . . . ?" (Italics added.) The court also stated: "If the husband be allowed to prosecute his foreign suit to judgment, the wife, to save her rights

buttressed by the fact that the court cited with approval the *Pereira* case wherein the wife was granted an injunction enjoining a foreign divorce action even though she had previously obtained a judgment of separate maintenance. The *Pereira* case, in distinguishing *Estin v. Estin*[16] (wherein it was held that rights obtained under a judgment of separation were not affected by a subsequent valid *ex parte* divorce), observed that it was not so much concerned with protecting private rights established under the separation judgment as it was with protecting those rights flowing from the marital status itself.[17] On this basis it would appear that a domiciliary spouse may maintain an *independent* action for an injunction against the prosecution of a foreign divorce action merely upon a showing that the migratory spouse is a domiciliary of the forum.[18]

The court in the *Pereira* case also expressed the hope that the finding on domicile by the forum would have some influence on the foreign court if the husband, in disobedience to the injunction, proceeded in his action. It is doubtful whether the foreign court will give much, if any, weight to this jurisdictional finding even if it had been contested by the husband in the injunction forum.[19] The injunction, however, is not without a deterrent effect. The husband may be punished for contempt when he returns to the injunction forum [20] and, more important, may be estopped from setting up the decree in any subsequent action by the wife.[21]

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as wife, will have to bring a new suit to set aside the foreign decree and in that suit will have to bear the heavy burden of striking down the prima facie effect of the foreign court's finding of residence." Garvin v. Garvin, 302 N. Y. 96, 102 (1951). This reason is broad enough to cover the case where the wife brings an independent action for an injunction.

[16] 296 N. Y. 308, 73 N. E. 2d 113 (1947), *aff'd*, 334 U. S. 541 (1948).

[17] Pereira v. Pereira, 272 App. Div. 281, 289, 70 N. Y. S. 2d 763, 769 (1947).

[18] A mere *threat* to institute foreign divorce proceedings is not a sufficient basis for the issuance of an injunction. De Raay v. De Raay, 255 App. Div. 544, 8 N. Y. S. 2d 361 (1st Dep't 1938), *aff'd*, 280 N. Y. 822, 21 N. E. 2d 879 (1939). *Contra:* Kahn v. Kahn, 325 Ill. App. 137, 59 N. E. 2d 874 (1945).

[19] "Where the equity defendant appears in the foreign divorce court . . . assuming the court learns of the injunction, what effect should be given thereto? Nevada could then make a further finding of domicil (it being a jurisdictional fact) and determine for itself that the divorce plaintiff was there domiciled. This would not necessarily go counter to the determination of the enjoining state; recognition could be given to the finding of domicil there up to the time of the injunction, after which there had been a change." Jacobs, *The Utility of Injunctions and Declaratory Judgments in Migratory Divorce*, 2 LAW AND CONTEMP. PROB. 370, 389 (1935). *Cf.* Palmer v. Palmer, 184 Misc. 291, 53 N. Y. S. 2d 784 (Sup. Ct. 1945) (the Nevada court granted a decree of divorce although it had been served with a certified copy of the injunction).

[20] ". . . the Nevada finding might well not find favor with the courts of New York . . . . The courts of the enjoining state would undoubtedly punish for contempt upon a return thereto." Jacobs, *supra* note 19, at 389.

[21] *Cf.* Palmer v. Palmer, 184 Misc. 291, 53 N. Y. S. 2d 784 (Sup. Ct. 1945). Here the plaintiff-wife as an incident to a separation action obtained an injunction enjoining the prosecution of a foreign divorce action. The court

Interstate injunctions do not, in theory, clash with the right that a husband has to seek in good faith a new domicile, and there obtain the relief afforded by its courts, since such injunctions are premised upon a finding that the husband is, in fact, a domiciliary of the forum. It follows therefore, on principle, that it is immaterial whether the injunction is in form temporary or permanent—in either event it will lose all efficacy if the husband thereafter obtains a new bona fide domicile.[22]

Although an *ex parte* foreign divorce decree based on a sham domicile is as invalid today as it was before the *Williams* case[23] the court, in the instant case, held that the prima facie validity which must now be accorded such decrees constituted a sufficient basis for the issuance of an injunction. No doubt the court was not unaware of the fact that even the so-called void decree before the *Williams* case was not wholly without an injurious effect upon the non-migratory spouse.[24] Whether or not the issuance of interstate injunctions may lead to socially desirable results,[25] it seems clear that the injunctive process will now receive greater use as a means of deterring those spouses whose only intent is to obtain foreign divorce decrees based on a sham domicile.

INJUNCTION—UNFAIR COMPETITION—INTERVENTION TO PROTECT MODERN BUSINESS INTERESTS.—The Metropolitan Opera Association sought to enjoin defendant's unauthorized manufacture and sale of "off the air" recordings of the Metropolitan's opera performances. An intervening plaintiff recording company had, by

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refused to allow the husband to set up in a supplemental answer a Nevada decree procured in disregard of the injunction.

[22] See Note, 13 BROOKLYN L. REV. 148, 161, n. 66 (1946); 28 ILL. L. REV. 295, 296 (1933).

[23] Before the *Williams* case a spouse seeking to impeach a foreign decree had to show that the foreign court lacked jurisdiction over the matrimonial domicile; today it must be proved that the migratory spouse was not domiciled in the foreign jurisdiction. The distinction is in the quantity and quality of proof required to upset the foreign decree.

[24] A direct financial injury might possibly result to the wife even under the void decree. The husband might marry again. If the second "wife" sued for separate maintenance the husband would be estopped from setting up the void decree under the rule of Krause v. Krause, 282 N. Y. 355, 26 N. E. 2d 290 (1940). The husband would then be under a duty to support two wives thus affecting the amount of support the first wife would obtain. For a discussion of other injuries, not financial, which a wife may sustain as a result of a void decree, see Greenberg v. Greenberg, 218 App. Div. 104, 218 N. Y. Supp. 87 (1st Dep't 1926); Comment, 9 FORD. L. REV. 376 (1940).

[25] "In all the cases where an injunction has issued against foreign divorce, there has been an actual family break-up. . . . If anything, it [the injunction] is likely still further to widen the breach." Jacobs, *supra* note 19, at 390.