St. John's Law Review

Volume 21, November 1946, Number 1 Article 1

Alimony and the Bigamist: A Comment on Section 1140-a of the New York Civil Practice Act

Charles M. Sparacio

ST. JOHN'S LAW REVIEW

VOLUME XXI NOVEMBER, 1946 NUMBER 1

ALIMONY AND THE BIGAMIST: A COMMENT ON SECTION 1140-a OF THE NEW YORK CIVIL PRACTICE ACT

PRIOR to 1940, the concept of alimony awards in matrimonial actions in New York State had been crystallized by legislative enactment and judicial decision into well known and definitive molds. It was well settled that alimony was a periodic allowance payable to an innocent wife from her husband's estate as a result of disorganization of the matrimonial relation which resulted in divorce or separation.[1] Such allowance was either temporary or permanent. A temporary allowance would be awarded the wife during the pendency of a divorce or separation action; the permanent award ensued upon the success of the wife in prevailing as a plaintiff. By the express terms of the statutes, permanent alimony was awardable to the wife only where the underlying action was for divorce or separation.[2]

---

[1] N. Y. CIV. PRAC. ACT § 1169 as it existed prior to 1940 provided: "In an action for divorce or separation, the court, in its discretion, during the pendency thereof, from time to time, may make and modify an order or orders requiring the husband to pay any sum or sums of money necessary to enable the wife to carry on or defend the action, or to provide suitably for the education and maintenance of the children of the marriage, or for the support of the wife, having regard to the circumstances of the respective parties."

[2] N. Y. CIV. PRAC. ACT § 1170 as it existed prior to 1940 provided: "Where an action for divorce or separation is brought by either husband or wife, the court, except as otherwise expressly prescribed by statute, must give, either in the final judgment, or by one or more orders, made from time to time before final judgment, such directions as justice requires, between the parties, for the custody, care, education, and maintenance of any of the children of the marriage, and where the action is brought by the wife, for the support of the plaintiff . . . ."

In annulment proceedings the rules were, of necessity, different due to the peculiar nature of an action to annul a marriage. Here, as the decree established that no marriage at all had existed, no award of permanent alimony could be made; the judicial attitude was that in the absence of express statutory mandate the authority was lacking.[3] This rule was applied in hard and fast strictness—regardless of the necessity of the wife or the wrong of the husband, and without the guilt or innocence of the wife operating as a factor in the establishment of a norm. Alimony *pendente lite* would be granted to a defendant wife in equity, as an incidental and necessary power to exercise properly jurisdiction over the action, where she affirmatively asserted the validity of a marriage [4] and lacked funds to defend the suit.[5] On the other hand, were she bold enough to be plaintiff, no award of temporary support could be made due to the judicial conviction that this would be equivalent to approbation of an inconsistent position on the part of the plaintiff, for by bringing the action the plaintiff wife asserted that no marriage existed; yet, she was seeking the attribute of a marriage—support—in demanding such temporary allowance.[6] This position was attributable to a judicial failure to discern that the seeking of support by the putative wife while awaiting final determination of her claim was not

---

[3] Park v. Park, 24 Misc. 372, 373, 53 N. Y. Supp. 677 (Sup. Ct. 1898) ("The foundation of the right to alimony being the duty of the husband to support his wife . . . obviously, if the woman be not his wife, she can have no claim to alimony. . . . Upon principle, there can be no provision for alimony in a decree of nullity . . . , and the Code does not authorize it.")

[4] Higgins v. Sharp, 164 N. Y. 4, 8, 58 N. E. 9, 10 (1900) ("The power to allow alimony and counsel fee to the wife in order to enable her to live pending the action, and to present her defense, if she has one, must be regarded as incidental and necessary in all matrimonial actions. Without such power the rights of the woman in many cases, could not be adequately protected.") Brinkley v. Brinkley, 50 N. Y. 184 (1872); Griffin v. Griffin, 47 N. Y. 134 (1872); North v. North, 1 Barb. Ch. 241 (N. Y. 1845).

[5] Erlanger v. Erlanger, 173 App. Div. 767, 159 N. Y. Supp. 353 (2d Dep't 1916) Oppenheimer v. Oppenheimer, 153 App. Div. 636, 138 N. Y. Supp. 643 (1st Dep't 1912).

[6] Sweet v. Sweet, 132 Misc. 386, 220 N. Y. Supp. 317 (Sup. Ct. 1928); Kellogg v. Kellogg, 122 Misc. 734, 203 N. Y. Supp. 257 (Sup. Ct. 1924); Jones v. Brinsmade, 183 N. Y. 258, 76 N. E. 22 (1905); Bloodgood v. Bloodgood, 59 How. Pr. 42 (N. Y. 1880); Bartlett v. Bartlett, 1 Clarke Ch. 460 (N. Y. 1841).

necessarily inconsistent. Such temporary allowance could well have been regarded as a welfare or protective measure, of short duration, while the validity of the claim was probed. Certainly she would have been entitled to support from the husband without the bringing of an action—at least as to necessaries.[7] Nevertheless, judicial conservatism prevented the taking of the step. The prevailing views were summed up by the Court of Appeals in *Jones v. Brinsmade*:[8] ". . . it seems both unjust and inconsistent that a wife should be allowed alimony and counsel fee out of her husband's estate to establish the invalidity of her marriage, on the theory that by virtue of the marriage relation the husband is bound to provide for her, when if she is successful in that suit her status will be the same as if she had never married him."

New York was not alone in this position. By the overwhelming weight of authority in the United States, the bringing of the action by the wife barred her from claim of support. Only when she was defendant and the existence of the marital relation was in dispute—and there was no clear and convincing evidence against the existence of the marriage—would an award be made.[9]

Some of the hardship under these rules called for reform. The Law Revision Commission of New York devoted its efforts to a survey of the problem and in 1940 recommended to the New York State Legislature sweeping changes which affected the entire field of alimony allowances.[10] Among the principal recommendations of the Commission was the proposed new Section 1140-a of the Civil Practice Act, which was adopted and became a law effective September 1, 1940, thus becoming part of New York's first statutory authorization for the allowance of alimony in annulment actions.

---

[7] For these latter views, *see* Gore v. Gore, 44 Misc. 323, 89 N. Y. Supp. 902 (Sup. Ct. 1904), *aff'd*, 103 App. Div. 74, 92 N. Y. Supp. 634 (3d Dep't 1905); Allen v. Allen, 59 How. Pr. 27, 8 Abb. N. C. 175 (N. Y. 1880), which at the time were recognized as the minority views.

[8] 183 N. Y. 258, 263, 76 N. E. 22, 24 (1905).

[9] Huffman v. Huffman, 51 Ind. App. 330, 99 N. E. 769 (1912); Ricard v. Ricard, 143 Iowa 182, 121 N. W. 525 (1909); Gard v. Gard, 204 Mich. 255, 169 N. W. 908 (1918); Willits v. Willits, 76 Neb. 228, 107 N. W. 379 (1906).

[10] N. Y. Law Revision Commission Report, Legis. Doc. No. 65 (H) (1940).

Section 1140-a provides:

When an action is brought to annul a marriage or to declare the nullity of a void marriage, the court may give such direction for support of the wife as justice requires. Such direction may be made in the final judgment in such action, or by one or more orders from time to time before final judgment. Upon the application of either the husband or wife, upon notice to be given as the court shall direct, the court may annul or modify such direction, or in case no such direction shall have been made, in a judgment hereafter given, may amend it by inserting such direction. This section shall apply to any action brought by either the husband or the wife or by any other person in the lifetime of both parties to the marriage.

Analysis of the added section discloses three principal situations in which it is applicable. First, temporary [11] alimony is now awardable to the wife whether she be plaintiff or defendant. Second, permanent alimony is clearly awardable where she is the plaintiff and successful. Third, due to the express wording of the section, permanent alimony may be awardable even where the wife is defendant and loses the action, for the statute declares: "This section shall apply to any action brought by either the husband or the wife . . ." Tentatively, and until further judicial interpretation, no too serious objection can be taken to the award of temporary alimony in cases where the wife is plaintiff or defendant—regardless of her innocence or wrongdoing. And, where the wife is plaintiff and successful, and the fault was that of the husband and the marriage was of appreciable duration, an award of permanent alimony can well be regarded as proper, if for no other reason than to compensate for lost opportunity. Where the husband is the wrongdoer he should bear the burden. It is with the third possible situation that fault, if any, must be found; that injustice, despite care and vigilance, may creep in. May a wife

---

[11] At the same time that § 1140-a was added to the N. Y. Civ. Prac. Act, § 1169 of the N. Y. Civ. Prac. Act which theretofore provided for temporary alimony only in divorce and separation actions, was amended to include annulment actions within its scope. However, the provisions of § 1140-a (". . . such direction (for support) may be made in the final judgment in such action, or by one or more orders from time to time before final judgment.") seems also to authorize temporary alimony.

against whom a legal impediment to marriage exists, and who with knowledge of the impediment enters into a marriage, and later brings action to annul the marriage with her innocent spouse, still receive an award of permanent alimony despite her wrongdoing? This question remained unanswered until the decision in *Johnson v. Johnson.*[12]

In the *Johnson* case, the Court of Appeals passed on the meaning and effect of Section 1140-a of the Civil Practice Act in affirming the award of permanent alimony in an action *where a legal impediment to a valid marriage existed solely against the wife.*

In this action, suit was originally commenced by plaintiff wife against defendant husband on a complaint in which she sought a separation. Defendant interposed an answer in which he counterclaimed for an annulment upon the ground that at the time of the marriage alleged in the complaint, plaintiff was still the wife of another. At Special Term (Walsh, J.),[13] a separation was granted; defendant's counterclaim was dismissed; and, plaintiff was awarded alimony for her support in addition to support for a child of the parties. On appeal,[14] the Appellate Division (2d Dep't) modified the judgment on the law and on the facts, and affirmed as modified, the provision for permanent alimony. In so modifying, plaintiff's complaint for separation was dismissed, and defendant was awarded judgment on his counterclaim for annulment. The Appellate Division adopted defendant's proposed findings that, "the marriage of the parties hereto was and is void, under Section 6, Domestic Relations Law; that it be declared *void ab initio* . . . and that defendant is entitled to judgment on the counterclaim. . . ." Upon appeal to the Court of Appeals, *held,* per Fuld, J., all of the justices who took part therein concurring, judgment of the Appellate Division affirmed.

The basis of the affirmance by the Court of Appeals lay in the interpretation of the provisions of Section 1140-a.

---

[12] 295 N. Y. 477, 68 N. E. (2d) 499 (1946).

[13] Not officially reported.

[14] Johnson v. Johnson, 270 App. Div. 811, 59 N. Y. S. (2d) 698 (2d Dep't 1946).

The court, in answering the contention of the defendant husband that the Legislature had intended the statute to apply only to an award of permanent alimony against a bigamist husband and not to a case where the wife was the bigamist, said:

> True enough, the prime evil which the Commission sought to remedy was the unhappy plight of the innocent wife married to a bigamist husband; under the law as it then existed, she could terminate this undesirable and illegal relationship only at the cost of relinquishing all claim to support, while the offending husband could, at his pleasure, avail himself of the invalidity of the marriage—void because of his own misdeed—and slough off the financial responsibilities which he had voluntarily assumed. . .
>
> Moreover, the statute is not, by its terms, limited to cases where the wife is the innocent party; such a limitation would certainly be most unreasonable and unjust, for example, in the case where the marriage is voided because of the wife's insanity. (Cf. *Bancroft v. Bancroft,* 288 N. Y. 323.) To escape such a result, the draftsmen and the Legislature eschewed the rigidity of a mandatory "direction for support" subject to an ironclad limitation. Instead, they left it to the court's own discretion in all cases, granting the court power to "give such direction . . . as justice requires."
>
> Phrased in general fashion the provision is sufficiently broad to cover such a case as the present, and direction for support of the wife on the record before us cannot be said to have been an abuse of discretion.

It seems manifest that the court felt that it was carrying out the intent of the Legislature as prompted by the Law Revision Commission. It is submitted that there is at least room for doubt on this score, and that the decision may well pave the way for the substitution of an annulment action in place of the illegal and discredited suits for breach of promise, alienation of affection, seduction, etc., which were swept away by our Legislature in 1935 [15] as a direct result of the public outcry against the scandals attendant upon such actions. It was then legislatively recognized that innocent persons were being victimized—through the instrumentality of the judicial process—by "unscrupulous

[15] N. Y. CIV. PRAC. ACT § 61-a-I.

persons for their unjust enrichment" which resulted in humiliation and pecuniary damage to many innocent persons and in the perpetration of gross frauds [16]—to say nothing of the resulting reflection on the courts.[17]

We have in the principal case the situation where a bigamist wife has successfully received permanent alimony from a court of equity although the facts as found established her to be the sole wrongdoer. The decision did not rest upon estoppel and that rule was not invoked—nor was it adverted to. Here the wife alone was guilty of the criminal act which invalidated the purported second marriage. This holding can best be appreciated by comparison of the language of the Law Revision Commission in its study on the matter: "Neither the good faith and innocense of the wife in contracting the marriage nor the nature of the relation which has in fact existed between the parties can at present be considered." [18] Nevertheless we are told: ". . . the statute is not, by its terms, limited to cases where the wife is the innocent party; such a limitation would certainly be most unreasonable and unjust . . ." [19] Apparently, the former law was bad because the innocent wife was denied relief; to remedy this mistake we are now to penalize the innocent husband and award the fruits of the decision to the guilty wife. By legitimate inference certainly the good faith of the husband at the time of the marriage should also be considered; because it can be fairly assumed that the Legislature did not intend to shift the burden of a legal wrong from the wife in an annulment action over to the husband. It is submitted that before such a radical change is declared to be in existence, clearer proof of such intent should be found than there is in the words of the statute as it exists. Construction such as this results in aid to a wrongdoer; this is an anomaly in the law which heretofore, at

---

[16] N. Y. Civ. Prac. Act § 61-a.

[17] Fearon v. Treanor, 273 N. Y. 645, 8 N. E. (2d) 36 (1937).

[18] N. Y. Law Revision Commission Report, Legis. Doc. No. 65 (H) 9 (1940).

[19] Johnson v. Johnson, 295 N. Y. 477, 68 N. E. (2d) 499 (1946).

least, has refused its aid to those enmeshed in a criminal or illegal transaction because of their own culpable fault.[20]

The Commission also stated in its report: "Nor does the law recognize that the State may have an interest in compelling the husband to contribute to the support of a wife who may be incapable of maintaining herself and the children of the marriage." [21] Obviously, the Commission was referring to the danger of the wife becoming a public charge.

Again, it was noted: "It encourages relationships which the law condemns, both by relieving a husband who contracts a bigamous marriage of the financial responsibility which he voluntarily assumed and which he ought to be estopped to deny, and also by requiring the wife, who discovers the invalidity of the marriage, and wishes to terminate the marriage to give up all claim to support." [22]

It is reasonably fair to assume that the Commission had in mind the good faith of the wife in contracting the marriage, the danger of her becoming a public charge, and the thought that where the impediment existed against the husband he should be estopped from asserting the invalidity of the marriage, so that the wife could terminate the relationship without giving up all claim for support. In view of these fair and just principles it is somewhat difficult to determine precisely what lent the wife in the *Johnson* case to the solicitous commendation of the court—save and except that a reading of the trial record reveals that she was "married" to the defendant for sixteen years. To accept this as the basis for the award however is to argue that a meretricious relationship, if continued long enough, is the equivalent of a valid marriage. That this poses a moral and social problem evidently matters little—as does the seeming fact that the benefits of marriage may be obtained without a marriage existing at all. This convenient solution will, no doubt, free many from the perplexities attendant upon the procuring of

---

[20] Watts v. Malatesta, 262 N. Y. 80, 186 N. E. 210 (1933); Riggs *et al.* v. Palmer *et al.*, 115 N. Y. 506, 22 N. E. 188 (1889).

[21] N. Y. LAW REVISION COMMISSION REPORT, LEGIS. DOC. No. 65 (H) 9 (1940).

[22] N. Y. LAW REVISION COMMISSION REPORT, LEGIS. DOC. No. 65 (H) 9, 10 (1940).

a valid foreign divorce. Divorces would not be necessary if this trend is carried to its logical (or illogical) extreme. All the benefits of marriage can be obtained without being free so to contract, or, if free, by not so contracting at all. At any time the relation may be dissolved by unilateral action and the benefits gathered by a strained construction of laws passed by a beneficent Legislature—which, on the other hand, has steadfastly refused to lower the barriers to permit divorce in New York on grounds other than adultery. The question is squarely presented: Should judicial sanctity be given to the relationship merely because the parties go through a marriage in form only? Will this lead to a discouragement or to an encouragement of the illegal relationship? As a result of this decision cannot a woman enter into a bigamous marriage, or one which she knows can be surely annulled, and when she finally tires of the relationship, bring an annulment action and, surrounding herself with a false aura of pity and sympathy, ask and finally be awarded permanent alimony? The desired result is thus achieved; instead of receiving a lump sum as was the result in the former abolished action for breach of promise, she may now receive a handsome annuity or pension. True, it can well be argued that the discretionary power of the court will prevent such happenings or abuses and that it was the credulous juries in the now abolished actions that were the ones that made the awards possible. But this too begs the question for, if the juries are to be blamed, should not the judges who, with our statutory safeguards, failed to act? [23]

It is likewise reasonably evident that the award in the *Johnson* case was not based upon the theory that the plaintiff wife was likely to become a public charge. A reading of the trial record discloses that she was not in danger of becoming such, for, by her own admissions, at the trial, she had on deposit in banks at the time of the motion for temporary alimony and counsel fees at least $10,000, and had a fair expectancy of receiving a substantial sum in addition thereto. Neither is there any finding in the case that the

[23] N. Y. Civ. Prac. Act §§ 549, 457-a.

plaintiff contracted the bigamous second marriage in good faith, although, in substance, she did testify that she thought her first marriage was not a marriage at all, and had not at the time realized that she had gone through a marriage ceremony. She stated substantially that she thought she was going to the marriage license bureau only to procure a license and that somewheres in the hustle and bustle she ended up by being involved in a marriage ceremony—though she did not realize its nature. This chronicle is highlighted by the interesting fact that she was accompanied by her brother, presumably of mature years and experience, and another relative. It should be borne in mind that two witnesses are necessary for a civil ceremony of marriage. Suffice it to say, that although the plaintiff was upheld by the trial judge in her contention that no prior valid marriage had taken place because of lack of intent on her part to enter into the ceremony, this conclusion was set aside by the Appellate Division and an opposite finding substituted therefor. If it be argued that she innocently believed she could contract a valid second marriage and therefore came within the good faith and innocence notion suggested by the Law Revision Commission, can it be said that the defendant husband was acting in bad faith? Or, is his innocence and good faith to be utterly disregarded and not a fact or circumstance to be considered? Certainly, it is reasonable to suppose that this information on the prior marriage would ordinarily come only from those who best knew about it, principally his wife. This again is highlighted in the *Johnson* case for neither of the appellate tribunals invoked the doctrine of estoppel against the defendant husband and thus seemingly acquitted him of fault.

In conclusion—and retrospect—it must be agreed that the law in New York prior to the amendments and additions of 1940 was in many respects harsh and unwise in its treatment of the innocent wife who was without funds. Harsher still was the rule which relegated her to charity or to assistance of friends if she prosecuted her suit and was victorious. To the loser then went the spoils; the victor was actually the vanquished.

The efforts to ameliorate this unpleasant situation however should not go so far as to award every wife—regardless of fault of the husband—a permanent share of such husband's income. Such a remedy should exist only where the equity in favor of such an award is clear, imperative, and compelling—for after all, it is still true that the basis of every annulment action is to deny the existence of a valid marriage. To award the attributes of a cherished and honorable estate to the morally blemished is to substitute the profane for the sacred; to award such attributes to situations where no marriage in fact existed, and such lack of validity was due to bigamy or other serious wrong of the wife, and where no element of estoppel can be found against the husband, coupled with the fact that there is no danger of the wife becoming a public charge, is to cheapen the value of marriage, and may well prevent the successful remarriage of the innocent husband who cannot well afford to support two wives at once, and to open once more the doors of our courts to the conniving and unscrupulous. This would be tantamount to a renewal of our once bitter experience.

It is submitted that the *Johnson* decision represents a dangerous and unworkable proposition which should be rectified in short order by legislative action or by a stricter and less liberal interpretation of the annulment alimony statutes by our courts. This would not be retrogression; it would merely restate the most fundamental rule of equity—that he who comes there must come with clean hands.

CHARLES M. SPARACIO.

St. John's University School of Law.