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Entry of Order and Final Judgment in Action to Annul a Marriage or for Divorce

Judson F. Schiebel

If an attorney's charging lien should be extended, so as to include services performed in procuring awards or refunds in the ever-increasing proceedings which are now being brought before various officials, commissions, and boards, that remedy must come from the legislature. The courts can not extend the clear limitation imposed by the statute.

Although the *Petition of Nathan* [6] is sometimes cited as being demonstrative of an attorney's lien failing to attach because the attorney has failed to begin an action, thus not being entitled to compensation, nevertheless, the attorney by his effort had caused a settlement in the case.[7] It is true there was no action started in any court, but the City of New York had settled after the attorney had filed a notice of claim for personal injuries. The petitioner, the attorney, alleged that this was a special proceeding within the meaning of Section 475 of the Judiciary Law, and that his attorney's lien should attach to the proceeds of the settlement in his client's favor. In writing the opinion of the court, Judge Elder stated: [8]

. . . Assuming that there is included in this phrase, a proceeding comprising a notice of claim and notice of intention to sue, and a subsequent settlement, nonetheless, this provision would still be ineffectual to vest this court with jurisdiction to act in the case at bar, for the statute, it will be noted, limits the proceeding to any State or Federal Department; the filing of a claim pursuant to the mentioned section of the Administrative Code of the City of New York is not such a proceeding as comes within the purview of Section 475 of the Judiciary Law.

From the foregoing cases, it can readily be seen what the conditions were which prompted the amending of Section 475 of the Judiciary Law. Effective September 1, 1946, an attorney who agrees to carry on any action or proceeding before a municipal board will not be required to rely solely upon his client's integrity in collecting his fee. Such attorney will have his remedy through the attachment of the lien pursuant to the express provisions of the Judiciary Law.

RICHARD VAN STEENBURGH.

ENTRY OF ORDER AND FINAL JUDGMENT IN ACTION TO ANNUL A MARRIAGE OR FOR DIVORCE.—Chapter 203 of the New York Laws of 1946 to become effective September 1, 1946, was enacted primarily amending Civil Practice Act, Section 1176. The new Section 1176 states, in substance, that an interlocutory decree in an action brought for an annulment or a divorce shall become a final judgment as of course three months after entry of such decree unless for sufficient cause the court in the meantime shall have otherwise ordered. The section ends here as to the judgment and thus after September 1, 1946, no divorce or annulment shall ever fail of its effect through possible neglect to file an application with a court for entry of final judgment.

[6] Petition of Nathan, 178 Misc. 226, 33 N. Y. S. (2d) 612 (1942).
[7] United States v. Guarantee Trust Co., 60 F. Supp. 103, 105.
[8] Petition of Nathan, 178 Misc. 226, 227.

The new section has a new paragraph added as follows: "At the request of an interested party the county clerk shall certify that the interlocutory judgment has become the final judgment as of course, attach the original certificate to the interlocutory judgment, and indicate the issuance of the certificate in his minutes of the action." [1]

A study of several cases will, I think, serve to reveal the evils of the prior statute which allowed the practice of including in the interlocutory decree a provision for entry of final judgment to be entered within thirty days after the expiration of three months after the entry of the interlocutory judgment. If such timely entry of final judgment were not made, final judgment could not be entered except by order of the court on application and sufficient cause being shown for delay.

In *Kellogg v. Kellogg* [2] an application for a final decree was made on July 11, 1917, almost two years after the entry on July 23, 1915, of the interlocutory decree of divorce. The court in this case denied plaintiff's application on the ground that the only attempt to excuse the delay was an agreement between plaintiff and his attorney to ignore the express provisions of the statute in that no final judgment should be had or applied for until such time as it suited plaintiff's convenience to pay his attorney's fee. The court further held that the defendant's failure to oppose the application was immaterial. The court withheld the right of a final decree from the plaintiff, who had proven his case in court in order to enforce the provisions of the statute. Thus plaintiff was deprived of everything he had fought for and seemingly won because his attorney had delayed in applying for final judgment.

In *Matter of Crandell* [3] the husband had received an interlocutory decree of divorce on May 28, 1906, which called for entry of final judgment and in order to become effective should have been followed by the entry of a separate final judgment. The husband died January 23, 1907, without ever having had a final judgment entered in his favor. The wife sued for letters of administration. Although a final judgment of divorce was entered, on order of the Supreme Court, after the husband's death, the Court of Appeals held that the action abated with the death of the husband and since final judgment had not been procured prior to husband's death the wife was entitled to letters of administration. Thus a wife against whom he had obtained a judgment of divorce became entitled to rights as a loyal and dutiful widow because of the failure to enter final judgment prior to the husband's death.

The Judicial Council recommended the deletion of the provision relating to entry of a separate final judgment in Section 1176 of the

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[1] N. Y. Laws 1946, c. 203, § 1, effective September 1, 1946.

[2] Kellogg v. Kellogg, 183 App. Div. 236, 171 N. Y. Supp. 39 (4th Dep't 1918).

[3] Matter of Crandall, 196 N. Y. 127, 89 N. E. 578 (1909).

Civil Practice Act and the codification of the practice relating to the issuance of a certificate of finality by the County Clerk in order to eliminate differences in practice as to types of interlocutory decrees rendered in the various departments of the state and thus make such procedure uniform throughout New York State.[4] Thus, the automatic type of interlocutory judgment which now prevails in most counties becomes the only type authorized by statute after September 1, 1946.

Thus the possibility of marriages, entered into by one of the parties more than three months after granting of the interlocutory decree, being declared bigamous and void is now obviated.[5] The County Clerk will now attach the original certificate of finality to the interlocutory judgment and indicate the issuance of a certificate of finality in his minutes of the action thus obviating the necessity of searching the file and the clerk's minute book more than once for orders affecting the validity of the judgment.[6]

Section 7-a of the Domestic Relations Law is similarly amended, effective September 1, 1946, in order to keep all divorce, annulment or dissolution of marriage actions in conformity.[7]

JUDSON F. SCHIEBEL.

RIGHT OF PARTNERSHIP TO SUE OR BE SUED IN ITS OWN NAME. —At common law a partnership could not sue or be sued in its own name but only in the name of all its individual members.[1] This followed naturally from the doctrine that a partnership was not a distinct legal entity but merely an aggregate of individuals. In suits in which the partnership was the defendant, this became particularly undesirable because of the many instances when it was quite difficult to ascertain who all the members of the partnership were.[2]

Although the non-entity theory has been well recognized, from time to time, either by judicial interpretation or by legislative enactment, partnerships have been clothed with entity characteristics for certain purposes. Thus in equity this has been common practice as far as "the keeping of accounts" is concerned or in "marshaling the

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[4] 12 Judicial Council Reports, 1946, p. 239.
[5] Pettit v. Pettit, 105 App. Div. 312, 93 N. Y. Supp. 1001 (3d Dep't 1905).
[6] N. Y. Laws 1946, c. 203, § 1, effective September 1, 1946.
[7] N. Y. Laws 1946, c. 203, § 2, effective September 1, 1946.

[1] J. V. Baldwin and Son v. Caflish, 182 App. Div. 477, 170 N. Y. Supp. 354 (4th Dep't 1918); Union Wine Co. v. Green, 62 Misc. 551, 115 N. Y. Supp. 921 (Sup. Ct. 1909); Calumet and Hecla Mining Co. v. Equitable Trust Co., 186 App. Div. 328, 174 N. Y. Supp. 317 (1st Dep't 1919).

[2] By statute it has been made a misdemeanor to fail to file a certificate giving the true names of the partners where the firm name does not bear the surnames of the partners; however, this statute has no civil effect. See N. Y. PENAL LAW § 440b.