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Domestic Relations--Doctrine of Unclean Hands (Cole v. Cole, 100 App. Div. 296 (3d Dep't 1944))

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to have made the oral agreement is no longer able to make a denial.[5]

In the present case, the court dismissed the complaint for to do otherwise would be to frustrate the above intention of the legislature. It was further intended by the legislature that this provision was to cover agreements made to take effect at or after death,[6] and inasmuch as in this case the alleged agreement could not be completed until the promisor's death, it was void. This is directly in line with the majority of decisions in New York. In a recent case[7] in point, it was held that an oral agreement by an employee irrevocably designating plaintiff sole beneficiary of employee's interest at his death in New York City Retirement Fund was void under this same provision of the Statute of Frauds.

The intention of the legislature in passing a statute of frauds and this amendment has always been to prevent fraud. Consequently if the court had upheld the claim, the evils against which the statute was aimed would continue. There still would be possible the type of litigation which is based upon alleged oral promises of persons no longer able to make denials. There still would be the opportunity for exactions from deceaseds' estates because the representatives of the estates were unable to meet the allegations of claimant or felt compelled in a spirit of caution to make settlement of "strike" claims rather than risk heavier loss on unjustifiable claims which might deceive a court or jury.

G. R.

DOMESTIC RELATIONS—DOCTRINE OF UNCLEAN HANDS.—New York courts, in two decisions recently handed down, have shown themselves to be stringent enforcers of the "clean hands" maxim. In the case of *Cole v. Cole,* a decree of annulment was granted the respondent on the ground that he was induced into marriage with the appellant by her false and fraudulent statements that she was "with child". The appellant, an employee in the home of the respondent's parents, had been indulging in illicit relations with the respondent for many months when she began to evidence signs of what she claimed to be pregnancy. A physician, called on the respondent's behalf at the trial, testified that he was visited by the appellant prior to the marriage and the symptoms she evidenced would indicate pregnancy to a layman. Under pressure from the appellant, and realizing that if she were pregnant, he was the father, respondent married her. Some time after the marriage, while she and the respondent were riding in an automobile, the appellant confided to him information to the effect that she had intentionally misrepresented her condition in

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[5] Matter of Quigley's Estate, 179 Misc. 210, 38 N. Y. S. (2d) 330 (1942).
[6] *In re* Ditson's Estate, 177 Misc. 648, 31 N. Y. S. (2d) 468 (1941).
[7] Bayreuther v. Reinish, 264 App. Div. 138, 34 N. Y. S. (2d) 674, *aff'd,* 290 N. Y. 553 (1942).

order to get him to marry her. Secreted in the back of the car was respondent's mother and it was her testimony coupled with his that established the fraud to the satisfaction of the court. An appeal was taken by the wife to the Supreme Court. *Held,* judgment reversed.

"If the appellant is to be condemned for her unconventional conduct, the respondent is likewise. He does not come into a court of equity with clean hands, and may not have relief in this ecclesiastical branch of the Supreme Court. Pregnancy might naturally be expected from his conduct with the appellant, and as a matter of law, he is not entitled to a decree dissolving the contract into which he entered." Also it might be reasonably inferred that the representations of the appellant were made in good faith. The testimony of the physician, to an extent, corroborated her, whereas the respondent's mother might be considered an "interested" witness. Therefore, the burden of proof cast upon the respondent seemed not to be adequately met. *Cole v. Cole,* 100 App. Div. 296 (3d Dep't 1944).

Similarly, in the second case in point, the plaintiff was denied the relief sought on the same equitable ground. There, the plaintiff assisted the defendant in procuring a divorce from her former husband for ulterior reasons relating to the Selective Service Act.[1] He married her, although fully aware that her interlocutory decree of divorce [2] had not yet become final. In an annulment action brought by the plaintiff, the court gave judgment for the defendant. *Held,* affirmed. "The 'clean hands' maxim requires that he who has done inequity in respect to the subject matter of an action may not have equity as a matter of the affirmative exercise of the power by a court of equity." *Lodati v. Lodati,* 52 N. Y. S. (2d) 119 (1944).

Surveying the decisions of the *Cole* and *Lodati* cases, their common basis becomes apparent. While it is true that upon the facts of the *Cole* case, the conclusion might be reached that no fraud existed, the main ground upon which the case was decided was upon the theory, "He who seeks equity must do equity." The *Lodati* case, on the other hand, embodied a definite and sole reliance upon the "clean hands" maxim. For there, the second marriage of the defendant under the facts presented would seem to have been an absolute nullity, yet because the plaintiff had so fraudulently colluded in the creation of the wrongful status, he was estopped from denying its validity. The equitable doctrine adhered to in the cases at bar is neither a very new nor a very radical one. Courts of equity being "tribunals of good conscience", have insisted on the utmost good faith of their

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[1] SELECTIVE TRAINING AND SERVICE ACT, 50 U. S .C. A. appendix 8, 301 *et seq.* (1940).

[2] In those jurisdictions where under the statutes an interlocutory judgment or decree *nisi* is granted, the marriage relation is not terminated until the entry of the final decree, and, therefore, prior to the entry of the final judgment or decree, the parties have no right to remarry. 9 R. C. L. 503.

litigants, and where the plaintiff has assisted,[3] encouraged or acquiesced [4] in the wrong of the defendant, the weight of judicial authority in most of the states has been to deny the relief petitioned for. The case of *Di Lorenzo v. Di Lorenzo* [5] was relied upon by the plaintiff to sustain the decree in the *Cole* case. But regarding the *Di Lorenzo* decision the court said: "It is not an authority under the facts here pesented." [6] In 1893 the New York court refused relief under circumstances very similar to those of the *Cole* case.[7] While the *Gordon* case,[8] decided in 1929, embodied a contrary view, the leading case of *Donovan v. Donovan* [9] subsequently re-established the law that under the doctrine of "unclean hands", the fact that a woman not pregnant induced a man to marry her by misrepresenting that she was pregnant, did not warrant an annulment action brought by him, a party to the illicit relations. The result reached in the *Lodati* case is likewise in line with this established rule of "good conscience".

Marriage "is an institution in the maintenance of which in its purity the public is deeply interested." [10] It is because of this necessary significance which society attaches to it that the marriage contract is taken out of the realm of the ordinary contract. Therefore, in passing upon the laws regarding marriage, the courts must do so with the broad outlook of the public good in mind. The marriage contract in each of the cases at bar had its inception in wrongful conduct. Conduct participated in equally by the plaintiff and the defendant, and while each marriage "might be termed a failure from the time of its ceremonial, the result may be imputed to its . . . origin rather than to any imperfection in the institution itself." [11] The function of the court, therefore, should be to discourage the conduct resulting in such marriage. This may be best accomplished not by invalidating the status created by the wrongdoing, but by imposing upon the wrongdoer the penalty of abiding by the contract he created. The *Cole* and *Lodati* cases are in line with this view.

P. K. W.

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[3] Kaufman v. Kaufman, 177 App. Div. 162, 163 N. Y. Supp. 566 (1917). "The public policy of this state not to recognize a divorce decree of a sister state obtained upon constructive service will not be invoked to annul a marriage for the benefit of one who aided the wife in obtaining a divorce in another state and subsequently married her."

[4] Heller v. Heller, 259 App. Div. 852, 19 N. Y. S. (2d) 509 (1940).

[5] Di Lorenzo v. Di Lorenzo, 174 N. Y. 467 (1903).

[6] In the *Di Lorenzo* case, cited *supra* note 5, a woman produced an infant, displaying it to the man and falsely stating it was their child.

[7] Tait v. Tait, 3 Misc. 218, 23 N. Y. Supp. 597 (1893).

[8] Gordon v. Gordon, 225 App. Div. 822, 232 N. Y. Supp. 541 (2d Dep't), *resettled*, 233 N. Y. Supp. 770 (1929). Decree was granted in an action for annulment based on the false representations of the defendant as to pregnancy.

[9] Donovan v. Donovan, 147 Misc. 134, 263 N. Y. Supp. 336 (1933).

[10] Maynard v. Hill, 125 U. S. 190, 8 Sup. Ct. 723, 31 L. ed. 654 (1888).

[11] Tait v. Tait, cited *supra* note 7.