St. John's Law Review

Volume 13, April 1939, Number 2 Article 12

# Domestic Relations--Annulment--Foreign Divorce--Estoppel (Risk v. Risk, 169 Misc. 287 (1938))

St. John's Law Review

DOMESTIC RELATIONS — ANNULMENT — FOREIGN DIVORCE — ESTOPPEL.—Action for annulment on ground that the defendant had never obtained a valid divorce from her first husband and hence there was never a valid marriage. Defendant set up a Mexican divorce in which she and her first husband appeared by attorney. A further defense was that, since the plaintiff had been a moving factor [1] in this Mexican divorce, he was now estopped from denying its validity. *Held,* annulment granted. A decree of divorce which is a nullity, cannot be made valid by way of estoppel, even against the one who aided in procuring such decree. *Risk* v. *Risk,* 169 Misc. 287, 7 N. Y. S. (2d) 418 (1938).

At common law, annulment proceedings depended entirely on the general equities of the courts.[2] Today, however, annulment proceedings are entirely regulated by statute [3] in this state, and may proceed on the ground that the marriage is absolutely void [4] or that it is merely voidable.[5] Marriages absolutely void, are void *ab initio* and never had any valid existence,[6] while voidable marriages are valid until declared by the courts to be void.[7] This action is brought under Section 6 of the New York Domestic Relations Law, which states, "A marriage is absolutely void if contracted by a person whose husband or wife by a former marriage is living * * * ". This section has been interpreted as meaning that the marriage is void *ab initio,* rather than merely voidable [8] and as such is not capable of ratification, nor by good faith, can it be made valid.[9] Whether or not this statute applies in this case, depends on the validity of the Mexican divorce obtained by the defendant from her first husband. Marriage

---

[1] Plaintiff induced the defendant to obtain the divorce and he paid the expenses and promised he would never contest it. Instant case at 420.

[2] 2 SCHOULER, MARRIAGE, DIVORCE, SEPARATION AND DOMESTIC RELATIONS (6th ed. 1921) § 1156.

[3] N. Y. CIV. PRAC. ACT § 1132: "An action may be maintained to procure a judgment declaring the nullity of a void marriage or annulling a voidable marriage * * *."

[4] N. Y. DOM. REL. LAW § 6; Atkinson v. Atkinson, 217 App. Div. 96, 216 N. Y. Supp. 395 (2d Dept. 1926) (a final judgment declaring marriage void destroys *ab initio* the marital relation); Renzo v. Reid Ice Cream Corp., 254 App. Div. 794, 4 N. Y. S. (2d) 274 (3d Dept. 1928), *rev'd on other grounds,* 279 N. Y. 83, 17 N. E. (2d) 778 (1938); 2 SCHOULER, *op. cit. supra* note 2, at 1355.

[5] N. Y. DOM. REL. LAW § 7, declares a marriage to be void from the time its nullity is declared by reason of fraud, duress, non-age, want of understanding or lunacy for a specified period. McCullen v. McCullen, 162 App. Div. 599, 147 N. Y. Supp. 1069 (1st Dept. 1914); Shonfield v. Shonfield, 260 N. Y. 477, 184 N. E. 60 (1933) (equity is applied in fraud cases and other cases where marriage is merely voidable).

[6] See note 4, *supra.*

[7] See note 5, *supra.*

[8] Atkinson v. Atkinson, 217 App. Div. 96, 216 N. Y. Supp. 395 (2d Dept. 1926), cited *supra* note 4; Renzo v. Reid Ice Cream Corp., 254 App. Div. 794, 4 N. Y. S. (2d) 274 (3d Dept. 1938), *rev'd on other grounds,* 279 N. Y. 83, 17 N. E. (2d) 778 (1938).

[9] Spyros v. Spyros, 142 Misc. 802, 254 N. Y. Supp. 81 (1932).

is more than a civil contract because it involves the state as a third party,[10] so that where the jurisdictional requirements [11] are not met in the foreign divorce decree, this state may inquire into such jurisdiction and refuse to recognize the decree.[12] Foreign decrees whether obtained in Mexico or elsewhere cannot be validly granted where no *bona fide* residence or domicile is had; this, on the doctrine that parties cannot confer jurisdiction by consent.[13] The defendant herein having failed to prove a valid divorce seeks to restrain the plaintiff from proceeding with his suit by setting up an estoppel, the effect of which would be to restrain the plaintiff from prosecuting this action, because of his conduct.[14]

The weight of authority leans toward the view that the doctrine of estoppel cannot be applied in an annulment case, where the marriage is absolutely void, rather than voidable.[15] The rule was well stated in the case of *Simmons* v. *Simmons*,[16] wherein it was said, "The equitable rule, that he who comes into equity must come with clean hands, has no application where its enforcement would result in sustaining an act declared to be void, or against public policy." [17]

---

[10] Levey v. Levey, 88 Misc. 315, 150 N. Y. Supp. 610 (1914); Szlanzis v. Szlanzis, 255 Ill. 314, 99 N. E. 640 (1912).

[11] The need for uniform divorce legislation is shown by the amendment passed by the legislature of Montana recently, which was vetoed by the Governor, and not as yet passed over his veto, limiting the residence requirements for divorce to thirty days, in an attempt to obtain some of Nevada's divorce trade. The bill introduced was House Bill No. 96 to amend the Rev. Code of Montana (1935) § 5766.

[12] Haddock v. Haddock, 201 U. S. 562, 26 Sup. Ct. 525 (1906); Andrews v. Andrews, 188 U. S. 14, 23 Sup. Ct. 237 (1902); May v. May, 251 App. Div. 63, 64, 295 N. Y. Supp. 599, 600 (4th Dept. 1937): "Marital status of the parties resident in this state is a matter of exclusively domestic concern. We are not required to recognize this judgment of a Court of a foreign country as having effect upon the matrimonial status of citizens of this state. To do so would be contrary to our public policy in its protection of marriage and morality."

[13] May v. May, 251 App. Div. 63, 295 N. Y. Supp. 599 (4th Dept. 1937); Coakley v. Coakley, 161 Misc. 867, 293 N. Y. Supp. 421 (1937).

[14] See note 1, *supra*.

[15] Brown v. Brown, 153 App. Div. 645, 138 N. Y. Supp. 602 (1st Dept. 1912); Coakley v. Coakley, 161 Misc. 867, 293 N. Y. Supp. 421 (1937); People v. Kay, 141 Misc. 574, 252 N. Y. Supp. 518 (1931) (no estoppel can ever exist where marriage is void); Simmons v. Simmons, 19 F. (2d) 690 (App. D. C. 1927); Szlanzis v. Szlanzis, 255 Ill. 314, 99 N. E. 640 (1912); Davis v. Green, 91 N. J. Eq. 17, 20, 108 Atl. 772, 773 (1919) (relief will not be denied in *pari delicto* actions where public policy is involved). "* * * Where the marriages were voidable only, the same courts appear to have discerned no such public interest and to have been accordingly free to deny relief to the wrongdoer * * *." Davis v. Green, *supra*.

[16] 19 F. (2d) 690, 691 (App. D. C. 1927).

[17] *Contra:* Berry v. Berry, 130 App. Div. 53, 114 N. Y. Supp. 497 (1st Dept. 1909) (plaintiff within five years of his wife's disappearance, without reason to believe her dead, married again; when he sought annulment of the second marriage on the ground that he had a wife living, it was refused on equitable grounds); Derby, *Obligation of Invalid Divorce on Person Who Induced It and Married Person Procuring It* (1934) 12 N. Y. U. L. Q. REV.

Many cases are cited by the defense to show that estoppel should be applied, but they are all distinguished in the instant case by the court on the grounds that, (1) the marital status of the parties is directly involved and no pecuniary considerations are presented;[18] (2) New York State is the marital domicile and is therefore a party to the transaction;[19] (3) the plaintiff did not seek to impeach a decree obtained in his favor.[20]

S. C. S.

FACTOR'S ACT—APPLICATION—PROPERTY OBTAINED BY COMMON LAW LARCENY.—The plaintiff, a jeweler, intrusted a diamond ring to an employee to sell to a stated person at a stated price. Pursuant to a preconceived plan to convert the ring, the employee pawned it with the defendant, the latter acting in good faith. In an action to recover possession of the ring, *held,* for the plaintiff. The Factor's Act[1] is no defense to an action by an owner to recover possession

---

31; Purrington, *Of Matrimonial Actions as Equity Suits and of the Pleadings Therein* (1909) 9 COL. L. REV. 321; *cf.* Brown v. Brown, 153 App. Div. 645, 138 N. Y. Supp. 602 (1st Dept. 1912) (where the plaintiff was a woman who married the defendant, knowing he was already married, it was held that the marriage was absolutely void and that relief could not be refused). This case limits Berry v. Berry, *supra,* to the point where a guilty party seeks the aid of a court of equity to relieve himself from his own wrongdoing, and is based on Stokes v. Stokes, 198 N. Y. 301, 91 N. E. 793 (1910). However, the cases of Brown v. Brown, *supra* and Stokes v. Stokes, *supra,* virtually overrule Berry v. Berry, *supra.* There are a large number of cases holding that estoppel should be applied, but they are merely *dicta,* as in those cases the action was for annulment under Section 7 of the Domestic Relations Law which deals with voidable marriages. Rubman v. Rubman, 140 Misc. 658, 251 N. Y. Supp. 474 (1931) (annulment for fraud); Pettit v. Pettit, 105 App. Div. 312, 93 N. Y. Supp. 1001 (3d Dept. 1905) (court granted an annulment decree here, saying, however, that it may be refused for equitable reasons); Taylor v. Taylor, 63 App. Div. 231, 71 N. Y. Supp. 411 (1st Dept. 1901), *aff'd,* 173 N. Y. 266, 65 N. E. 1098 (1903) (decree refused here, but marriage was voidable and not void).

[18] Brown v. Brown, 242 App. Div. 33, 272 N. Y. Supp. 877 (4th Dept. 1934), *aff'd,* 266 N. Y. 532, 195 N. E. 186 (1935) (action on a contract made at time of marriage).

[19] Hubbard v. Hubbard, 228 N. Y. 81, 86, 126 N. E. 508, 509 (1920): "The State of New York was not a party to any of the marital transactions of the parties involved in this action." The annulment was herein refused.

[20] Starbuck v. Starbuck, 173 N. Y. 503, 508, 66 N. E. 193, 194 (1903): "A party * * * may not be heard to impeach a decree * * * which he himself has procured * * * in his own favor."

[1] N. Y. PERS. PROP. LAW § 43: "Every factor or other agent, * * * not having the documentary evidence of title, who shall be intrusted with the possession of any merchandise for the purpose of sale * * * shall be deemed to be the true owner thereof, so far as to give validity to any contract made by such agent with any other person, for the sale or disposition of * * * such merchandise for any money advanced * * * by such other person upon the faith thereof."