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INJUNCTIONS — POWER TO RESTRAIN FOREIGN DIVORCE PROCCEDINGS — DECLARATORY JUDGMENT AS ADEQUATE LEGAL REMEDY — Plaintiff petitioned a New York court to restrain her husband from prosecuting an action for divorce in a Florida court, alleging that the parties were married in New York, had lived there as husband and wife for twelve years, were still residents of New York, and that the defendant's business was located in the state. The complaint also alleged that the defendant had abandoned the plaintiff without cause; that plaintiff could not bear the expense of defending the Florida action and, in the event of judgment, would lose her status as wife and her concomitant property rights. *Held*, this is not a proper case for the exercise of equity jurisdiction. Two judges dissented in separate opinions. *Goldstein v. Goldstein*, 283 N. Y. 146, 27 N. E. (2d) 969 (1940).

The great weight of authority is that the state of the domicile may restrain the prosecution of a divorce action in a foreign court which lacks jurisdiction to grant the decree.[1] In these cases the issuance of the injunction is usually based

[1] Forrest v. Forrest, 2 Edm. Sel. Cas. (N. Y.) 180 (1850); Huettinger v. Huettinger, (N. J. Eq. 1899) 43 A. 574; Kempson v. Kempson, 58 N. J. Eq. 94, 43 A. 97 (1899); Miller v. Miller, 66 N. J. Eq. 436, 58 A. 188 (1904); Gwathmey v. Gwathmey, 116 Misc. 85, 190 N. Y. S. 199 (1921), affd. 201 App. Div. 843, 193 N. Y. S. 935 (1922); Greenberg v. Greenberg, 218 App. Div. 104, 218 N. Y. S. 87 (1926); Johnson v. Johnson, 146 Misc. 93, 261 N. Y. S. 523 (1933); Richman v. Richman, 148 Misc. 387, 266 N. Y. S. 513 (1933); Dublin v. Dublin, 150 Misc. 694, 270 N. Y. S. 22 (1934); Knapp v. Knapp, 12 N. J. Misc. 599, 173 A. 343 (1934); Perlman v. Perlman, 113 N. J. Eq. 3, 165 A. 646 (1933); Di Brigida v. Di Brigida, 116 N. J. Eq. 208, 172 A. 505 (1934); Borda v. Borda, 44 R. I. 337, 117 A. 362 (1922). And see Kittle v. Kittle, 8 Daly (N. Y. Common Pleas) 72

upon one or more of three grounds: first, that the foreign litigation is an attempt to evade the laws of the domicile; [2] second, that the prosecution of the foreign suit without intent to establish a bona fide residence in the foreign jurisdiction is a fraud on the court and the plaintiff; [3] and, third, that requiring the petitioner to protect her interests in the foreign suit imposes undue hardship.[4] The court in the instant case proceeded on the ground that, since the foreign decree would be void for want of jurisdiction, there would be no need for an injunction.[5] The court's reasoning appears to rely upon the availability and the adequacy of a declaratory judgment in New York pronouncing the Florida divorce invalid.[6] Such a declaratory judgment would probably be res judicata [7] and entitled to full faith and credit,[8] thus removing any cloud which may exist upon

(1878); Streitwolf v. Streitwolf, 58 N. J. Eq. 563, 41 A. 876, 43 A. 683 (1898); Von Bernuth v. Von Bernuth, 76 N. J. Eq. 177, 73 A. 1049 (1909); Jeffe v. Jeffe, 168 Misc. 123, 4 N. Y. S. (2d) 628 (1938).

[2] Gwathmey v. Gwathmey, 116 Misc. 85, 190 N. Y. S. 199 (1921); Greenberg v. Greenberg, 218 App. Div. 104, 218 N. Y. S. 87 (1926); Johnson v. Johnson, 146 Misc. 93, 261 N. Y. S. 523 (1933).

[3] Kempson v. Kempson, 58 N. J. Eq. 94, 43 A. 97 (1899); Forrest v. Forrest, 2 Edm. Sel. Cas. (N. Y.) 180 (1850); Dublin v. Dublin, 150 Misc. 694, 270 N. Y. S. 22 (1934); Di Brigida v. Di Brigida, 116 N. J. Eq. 208, 172 A. 505 (1934); Johnson v. Johnson, 146 Misc. 93, 261 N. Y. S. 523 (1933); Knapp v. Knapp, 12 N. J. Misc. 599, 173 A. 343 (1934).

[4] Kempson v. Kempson, 58 N. J. Eq. 94, 43 A. 97 (1899); Forrest v. Forrest, 2 Edm. Sel. Cas. (N. Y.) 180 (1850); Gwathmey v. Gwathmey, 116 Misc. 85, 190 N. Y. S. 199 (1921); Greenberg v. Greenberg, 218 App. Div. 104, 218 N. Y. S. 87 (1926); Johnson v. Johnson, 146 Misc. 93, 261 N. Y. S. 523 (1933); Richman v. Richman, 148 Misc. 387, 266 N. Y. S. 513 (1933); Jeffe v. Jeffe, 168 Misc. 123, 4 N. Y. S. (2d) 628 (1938).

[5] Since the ex parte divorce is based upon a jurisdictional fact which may be collaterally attacked, other states need not recognize it. New York is strict in refusing to do so, Greenberg v. Greenberg, 218 App. Div. 104, 218 N. Y. S. 87 (1926); thus, there would be no need for plaintiff to defend the foreign action. However, a majority of the states will recognize the ex parte divorce for reasons of comity; if the marital domicile is in such a state, it may be vital that the plaintiff defend the foreign action. Should she do so, the peril arises of having a ruling of jurisdiction entitled to full faith and credit. See Stoll v. Gottlieb, 305 U. S. 165, 59 S. Ct. 134 (1938); 46 YALE L. J. 159 (1936).

[6] Baumann v. Baumann, 250 N. Y. 382, 165 N. E. 819 (1929); Lowe v. Lowe, 265 N. Y. 197, 192 N. E. 291 (1934); but see Somberg v. Somberg, 263 N. Y. 1, 188 N. E. 137 (1933).

[7] Apparently there is no decision directly in point. However, courts have intimated that the issues settled by the judgment would be res judicata as between the parties, providing the parties were properly before the court. Girard Trust Co. v. Tremblay Motor Co., 291 Pa. 507, 140 A. 506 (1928); Kariher's Petition (No. 1), 284 Pa. 455, 131 A. 265 (1925); see also, Borchard, "The Uniform Act on Declaratory Judgments," 34 HARV. L. REV. 697 at 713 (1921).

[8] That a declaratory judgment should be entitled to full faith and credit has been suggested by Professor Jacobs. Jacobs, "The Utility of Injunctions and Declaratory Judgments in Migratory Divorce," 2 LAW & CONTEM. PROB. 370 at 397 (1935). This position is supported by the case of Atherton v. Atherton, 181 U. S. 155, 21 S. Ct. 544 (1901). However, the decision does not preclude the possibility that a

the petitioner's status as wife. However, should the defendant remarry, serious questions would arise as to the adequacy of the declaratory judgment. From a practical point of view, "The world will hear for a moment, or not at all, of the declaratory judgment, but will continue to see the deserted plaintiff on the one hand and, on the other, the husband and his paramour consorting as man and wife." [9] Plaintiff could not restrain them from living together or prevent the second wife from using the name of Mrs. Goldstein.[10] And she may find herself in the embarrassing position of having a husband with another wife, inasmuch as the second marriage might be valid in Florida.[11] Should the plaintiff delay in protecting her rights, a presumption arises even in New York in favor of the second marriage, and if the delay is for a considerable period of time, the presumption becomes so strong that it may be nearly impossible to overcome.[12] The second wife may herself sue for a divorce, in which case she may secure claims against the defendant's property,[13] thus impairing the property interest of the plaintiff. It is suggested that to preclude such difficulties, an injunction constitutes the most adequate form of relief. Though perhaps not entitled to full faith and credit,[14] such an injunction would be recognized by some of the states for reasons of comity.[15] Furthermore, should the defendant, as in the instant case, hold property in the state of the domicile, or, should it be likely that he will return to the state, the deterrent aspect of the injunction

declaratory judgment in New York subsequent to the Florida divorce decree would be necessarily obligatory in Florida. See the language used in Haddock v. Haddock, 201 U. S. 562, 26 S. Ct. 525 (1906); and see, McClintock, "Fault as an Element of Divorce Jurisdiction," 37 YALE L. J. 564 at 576 (1928). As to this conflicts problem, see also, Beale, "Haddock Revisited," 39 HARV. L. REV. 417 (1926); Bingham, "The American Law Institute vs. The Supreme Court (In the Matter of Haddock v. Haddock)," 21 CORN. L. Q. 393 (1936). It is not within the scope of this article to discuss at length the conflicts of law problem involved. However, it may be said that if a declaratory judgment given by New York were clearly entitled to full faith and credit in Florida, the decision in the instant case would be justified.

[9] 43 HARV. L. REV. 477 at 480-481 (1930).

[10] Baumann v. Baumann, 250 N. Y. 382, 165 N. E. 819 (1929); Lowe v. Lowe, 265 N. Y. 197, 192 N. E. 291 (1934). As to the social undesirability of such an injunction, see 43 HARV. L. REV. 477 at 481 (1930).

[11] Greenberg v. Greenberg, 218 App. Div. 104, 218 N. Y. S. 87 (1926). And see note 8, supra.

[12] In re Hughson's Estate, 173 Cal. 448, 160 P. 548 (1916); Haile v. Haile, 40 Okla. 101, 135 P. 1143 (1913); Spears v. Spears, 178 Ark. 720, 12 S. W. (2d) 875 (1928); Lathan v. Lathan, 175 Ark. 1037, 1 S. W. (2d) 67 (1927); 30 HARV. L. REV. 500 (1917).

[13] Krause v. Krause, 282 N. Y. 355, 26 N. E. (2d) 290 (1940); for an interesting application of this principle, see Ridder v. Ridder, 175 Misc. 84, 22 N. Y. S. (2d) 749 (1940).

[14] The Supreme Court has not decided this point. But see, Union Pac. R. R. v. Rule, 155 Minn. 302, 193 N. W. 161 (1923); and see Foster, "Place of Trial of Civil Actions," 43 HARV. L. REV. 1217 (1930).

[15] Gilman v. Ketcham, 84 Wis. 60, 54 N. W. 395 (1892); Fisher v. Pacific Mutual Life Ins. Co., 112 Miss. 30, 72 So. 846 (1916); Allen v. Chicago Great Western R. R., 239 Ill. App. 38 (1925). *Contra*, State ex rel. Bossung v. District Court of Hennepin County, 140 Minn. 494, 168 N. W. 589 (1918).

would be very effective.[16] Earlier New York decisions have shown commendable liberality in making the declaratory judgment available in this situation; it seems anomalous that such extension of declaratory relief should now lead to a restriction of the efficient and well established remedy of injunction.

[16] The defendant's property in the state could be sequestered, or the defendant himself could be confined. A solution worked out by the New Jersey court was a decree ordering the defendant to petition the foreign court to set aside the divorce decree. Kempson v. Kempson, 63 N. J. Eq. 783, 52 A. 360, 625 (1902).