Florida Law Review

Volume 4 | Issue 2 Article 4

July 1951

Constitutional Law: Right to Attack "Void" Foreign Divorce Decree

William E. Nodine

NOTES

CONSTITUTIONAL LAW: RIGHT TO ATTACK "VOID" FOREIGN DIVORCE DECREE

Because rigid application of estoppel doctrine in cases involving attack on "void" divorces could virtually substitute consent for domicil as an essential element of a valid divorce, many courts have hesitated to hold the attacking party estopped.[1] Possibly the reason is that he furthers not only his own interest but also the state's interest in checking circumvention of its divorce laws. Throughout the past half-century there has been a great deal of litigation concerning the rights of variously situated persons to attack foreign divorce decrees.[2]

At the turn of the century the Supreme Court of the United States held that the full-faith-and-credit clause of the Constitution[3] did not require the state of "matrimonial domicil" to recognize an ex parte divorce granted in another state[4] or even a divorce in which both parties had appeared.[5] The last decade, however, has seen a complete change in this matter. The Court has held that an ex parte divorce in one state must be recognized under the full-faith-and-credit clause in another state, provided that the party who secured the divorce was domiciled in the divorcing state.[6] Then in 1948 another big step was taken when it was held that, if both parties appear in the divorce proceedings and would thereby be barred in the divorcing state, the full-faith-and-credit clause will prohibit either of those parties from attacking that decree in another state.[7]

In *Johnson v. Muelberger*,[8] decided March 12, 1951, the United

[1]*E.g.*, Andrews v. Andrews, 188 U.S. 14 (1903); Hollingshead v. Hollingshead, 91 N.J. Eq. 261, 110 Atl. 19 (Ch. 1920).

[2]See Jacobs, *Attack on Decrees of Divorce*, 34 MICH. L. REV. 749 and 959 (1936).

[3]U.S. CONST. Art. IV, §1, provides: "Full Faith and Credit shall be given in each State to the public Acts, Records, and Judicial Proceedings of every other State."

[4]Haddock v. Haddock, 201 U.S. 562 (1906); Bell v. Bell, 181 U.S. 175 (1901).

[5]Andrews v. Andrews, 188 U.S. 14 (1903).

[6]Williams v. North Carolina, 317 U.S. 287 (1942). Another state can inquire into the question of domicil, however, and is not bound by the recital in the ex parte decree, Williams v. North Carolina, 325 U.S. 226 (1945).

[7]Coe v. Coe, 334 U.S. 378 (1948); Sherrer v. Sherrer, 334 U.S. 343 (1948).

[8]71 Sup. Ct. 474 (1951), Frankfurter, J., dissenting, *reversing In re* John-

States Supreme Court extended further the application of the full-faith-and-credit clause, with a consequent diminution of the right to attack divorces of sister states. After the death of decedent's first wife he remarried twice, and in this case the daughter of the first marriage contested the right of the third "wife" to claim a widow's share in his estate. The decedent's second wife had secured a Florida divorce in which he had entered an appearance, and the daughter, alleging that the woman now claiming to be the decedent's widow was never legally married to him, attacked this divorce on the ground of lack of Florida domicil on the part of either spouse. The New York court allowed this, although it recognized that the parties to the Florida divorce, namely, the decedent and his second wife, would be precluded from attacking it. The court interpreted the Florida decision in *State* ex rel. *Willys v. Chillingworth*,[9] to mean that the daughter would not be precluded from attacking the decree in Florida and hence that she should not be prevented from attacking it in New York.

The Supreme Court reversed on the ground that Florida would have barred the daughter from attacking, and that consequently full faith and credit demanded that New York also preclude such attack. The Court correctly points out that the *Willys* case is not on all fours with the factual situation here presented, inasmuch as in that case a prior divorce of the "widow," not of the decedent, was attacked, and consequently the decedent himself could not be precluded on the ground of res judicata. Parenthetically, it should nevertheless be noted that Florida has recently held him estopped under such circumstances.[10] In the *Willys* case the daughter had sought, in the circuit court in Palm Beach County, a declaration that the third "wife" was not her father's widow, and the Supreme Court of Florida granted the "wife" a writ of prohibition on the ground of improper venue; since the divorce was granted in Dade County, the action by the daughter to set it aside should have been brought in that county. The Supreme Court of the United States recognizes that the Florida Court did employ some strong dictum:[11] "The rule is settled in this state that respondent, being heir to her father's estate, has a right to question the validity of his marriage to petitioner"; but it dismisses

son's Estate, 301 N.Y. 13, 92 N.E.2d 44 (1950).

[9]124 Fla. 274, 168 So. 249 (1936).

[10]Gaylord v. Gaylord, 45 So.2d 507 (Fla. 1950); deMarigny v. deMarigny, 43 So.2d 442 (Fla. 1949).

[11]124 Fla. at 278, 168 So. at 251.

this dictum with the statement:[12] "This observation was not directed at circumstances where res judicata could bind the parent."

Nevertheless, if the parent is effectively bound by his marriage to the divorcee and precluded from attacking her prior divorce, as later Florida cases indicate,[13] the view that Florida would allow the daughter to attack the divorce under those facts logically justifies a similar attack by a child when the parent is precluded by res judicata occasioned by his appearance in the prior divorce proceeding.

After what it considers a successful distinguishing of the *Willys* case, the Supreme Court presents alternative rationales on which Florida could hold the daughter precluded: (1) she is in privity with her father and is therefore bound by his estoppel; or (2) she is a stranger to the decree and consequently has no standing to attack it.

The Court cites no Florida authority for the first alternative but merely states:[14]

> "If the laws of Florida should be that a surviving child is in privity with its parent as to that parent's estate, surely the Florida doctrine of res judicata would apply to the child's collateral attack as it would to the father's."

Apparently the Supreme Court is here thinking of the rule that estoppel of an ancestor also estops heirs claiming under him;[15] but there is considerable difference between a dispute between two persons such as the purported widow and the child, both of whom are claiming an interest in the estate of the decedent, and a dispute between an heir and some third party who had a claim against the decedent in his lifetime.[16] In the latter situation, if the decedent would have been estopped as against the third party, the disability should descend to his heir; but in the former the estoppel of the ancestor can hardly be used by one claimant of his estate against another claimant in a comparable position. This distinction has, however, been overlooked by some courts, which have used the general rule of estoppel of an

---

[12]71 Sup. Ct. at 478.

[13]See note 10 *supra.*

[14]71 Sup. Ct. at 478.

[15]*E.g.,* Watt v. Lee, 238 Ala. 451, 191 So. 628 (1939); Gillig v. Stofer, 279 Ky. 349, 130 S.W.2d 762 (1939); Thompson v. Hudgens, 161 S.C. 450, 159 S.E. 807 (1931).

[16]See *In re* Lindgren's Estate, 293 N.Y. 18, 55 N.E.2d 849 (1944).

heir to preclude him from attacking a divorce in instances in which he was attempting to prevent the "widow" from claiming a share in the estate.[17] The Supreme Court is likewise overlooking this distinction when it suggests that the Florida law may hold the daughter precluded because of her privity with her father.

In regard to the alternative rationale for the Florida law, the Court continues:[18]

> "If on the other hand, Florida holds, as New York does in this case, that the child of a former marriage is a stranger to the divorce proceedings, late opinions of Florida indicate that the child would not be permitted to attack the divorce, since the child had a mere expectancy at the time of the divorce."

The opinion discusses *deMarigny v. deMarigny*[19] and *Gaylord v. Gaylord*,[20] which state that one cannot attack a divorce decree unless he has at the time an existing right interfered with by it.[21] Mention is made of the Florida Court's approval of the statement to this effect in Freeman on *Judgments*.[22] Each of these cases, however, involved an attack on a divorce by one who subsequently married the divorcee rather than by children of the prior marriage, and it is possible that a distinction can be made between attacks by these two classes of persons.

The majority of the cases on this proposition have arisen in New York, although there are a few from other jurisdictions, and the only definite statement that can be made regarding them is that they are in hopeless confusion. Concerning attack by subsequent spouses, one

---

[17] *In re* Davis' Estate, 38 Cal. App.2d 579, 101 P.2d 761 (1940); Watson v. Watson, 172 S.C. 362, 174 S.E. 33 (1934). In the *Watson* case, however, the equities favored the alleged widow. Though hesitant about marrying the decedent because of the questionable validity of his Nevada divorce, she finally consented upon his persuasion that the divorce was valid. Since he was in very poor health during all of the five years of their married life and she took care of him very unselfishly, the court deemed her entitled to a widow's share in his estate.

[18] 71 Sup. Ct. at 478.

[19] 43 So.2d 442 (Fla. 1949).

[20] 45 So.2d 507 (Fla. 1950).

[21] deMarigny v. deMarigny, 43 So.2d 442, 447 (Fla. 1949); Gaylord v. Gaylord, 45 So.2d 507, 509 (Fla. 1950).

[22] 1 FREEMAN, JUDGMENTS §319 (5th ed. 1925); *cf.* Mumma v. Mumma, 86 Cal. App.2d 133, 194 P.2d 24 (1948).

line of authority holds them estopped, another not; with respect to attack by a child of the divorcee the same division exists. For the sake of clarity, attacks by these two classes of persons will be discussed separately.

ATTACK BY SUBSEQUENT SPOUSE

In New York, many of the cases have allowed a subsequent spouse to have his marriage annulled by attacking the prior divorce of his mate.[23] Not only New York but also Delaware, Massachusetts, South Carolina, and Vermont have allowed a spouse to attack a prior divorce.[24] In the *Ainscow, Porter* and *Nimmer* cases,[25] the heir of the deceased second spouse, rather than the spouse himself, was attacking the earlier divorce of the putative widow, but this fact was unimportant because the subsequent spouse was held not precluded and therefore his heirs were not estopped. The rationale of the *Ainscow* and *Nimmer* cases is that the alleged widow cannot rely on estoppel of the heir, inasmuch as she is in pari delicto with the decedent by virtue of her participation in planning and procuring the divorce. The *Porter* theory, on the other hand, is that the second husband, although not a party to the divorce proceeding, can attack it collaterally when it threatens his rights.

Other cases, going not quite so far, have allowed the second husband to defend against his wife's action for support by asserting the invalidity of her divorce from her first husband. They expressly state, however, that the holding might be to the contrary if he were

[23]Davis v. Davis, 279 N.Y. 657, 18 N.E.2d 301 (1938); Lefferts v. Lefferts, 263 N.Y. 131, 188 N.E. 279 (1933); Jackson v. Jackson, 274 App. Div. 43, 79 N.Y.S.2d 736 (1st Dep't 1948); Honig v. Honig, 267 App. Div. 908, 47 N.Y.S.2d 623 (2d Dep't 1944); deMarigny v. deMarigny, 196 Misc. 719, 92 N.Y.S.2d 217 (Sup. Ct. 1949); Swanston v. Swanston, 76 N.Y.S.2d 175 (Sup. Ct. 1947); Lane v. Lane, 188 Misc. 435, 68 N.Y.S.2d 712 (Sup. Ct. 1947); Brunel v. Brunel, 64 N.Y.S.2d 295 (Sup. Ct. 1946); Sandberg v. Sandberg, 54 N.Y.S.2d 830 (Sup. Ct.), *aff'd*, 269 App. Div. 821, 56 N.Y.S.2d 204 (1st Dep't 1945); Ohlson v. Ohlson, 54 N.Y.S.2d 900 (Sup Ct. 1945); Rosenberg v. Perles, 182 Misc. 727, 50 N.Y.S.2d 24 (Sup. Ct. 1944); Lotz v. Lotz, 49 N.Y.S.2d 319 (Sup. Ct. 1944); Heusner v. Heusner, 181 Misc. 1015, 42 N.Y.S.2d 850 (Sup. Ct. 1943); Risk v. Risk, 169 Misc. 287, 7 N.Y.S.2d 418 (Sup. Ct. 1938); Schik v. Schik, 6 N.Y.S.2d 949 (N.Y. Dom. Rel. Ct. 1938).

[24]Ainscow v. Alexander, 27 Del. Ch. 545, 39 A.2d 54 (1944); Old Colony Trust Co. v. Porter, 324 Mass. 581, 88 N.E.2d 135 (1949); *Ex parte* Nimmer, 212 S.C. 311, 47 S.E.2d 716 (1948); Cook v. Cook, 76 A.2d 593 (Vt. 1950).

[25]See note 24 *supra.*

seeking affirmative instead of defensive relief.[26]

Many of the cases allowing the subsequent spouse to attack reason along this line: the divorce decree is absolutely void because the court granting it had no jurisdiction, neither party having been domiciled within the state of its rendition; and since no one can obtain rights under a void decree the misconduct of the subsequent spouse does not estop him from attacking it.[27] That this is approaching the problem from the wrong end has been suggested, inasmuch as the first inquiry should be into the capacity of the attacker to object to the decree and not into the validity of the decree.[28] However logical this criticism may be, the fact nonetheless remains that in these cases the first consideration is often the validity of the decree, with only secondary, if any, discussion of the standing of the complaining party to attack.

An additional element appears in many of these cases: the subsequent spouse aided in procuring the divorce, and therefore the court could have based an estoppel on this fact. Nevertheless, the former spouse has been allowed to attack the decree later in spite of complicity therein ranging from mere awareness that the wife contemplated going to Nevada for a divorce,[29] to presence in conferences with the attorney about it,[30] to actively inducing and advising the party to obtain it,[31] and, in some instances, to paying all or part of the incidental expenses.[32] One who persuades a married person to get a divorce and pays the cost thereof should not, after marrying the divorcee, be permitted later to have his marriage annulled on the

[26]Maloney v. Maloney, 22 N.Y.S.2d 334 (Sup. Ct. 1940), *aff'd*, 262 App. Div. 936, 29 N.Y.S.2d 419 (4th Dep't 1941), *aff'd*, 228 N.Y. 532, 41 N.E.2d 934 (1942).

[27]*E.g.*, Lane v. Lane, 188 Misc. 435, 68 N.Y.S.2d 712 (Sup. Ct. 1947); Heusner v. Heusner, 181 Misc. 1015, 42 N.Y.S.2d 850 (Sup. Ct. 1943); Risk v. Risk, 169 Misc. 287, 7 N.Y.S.2d 418 (Sup. Ct. 1938); Schik v. Schik, 6 N.Y.S.2d 949 (N.Y. Dom. Rel. Ct. 1938); Cook v. Cook, 76 A.2d 593 (Vt. 1950).

[28]See Note, 17 BROOKLYN L. REV. 70 (1950).

[29]Lane v. Lane, 188 Misc. 435, 68 N.Y.S.2d 712 (Sup. Ct. 1947).

[30]Lotz v. Lotz, 49 N.Y.S.2d 319 (Sup. Ct. 1944).

[31]Lefferts v. Lefferts, 263 N.Y. 131, 188 N.E. 279 (1933); Brunel v. Brunel, 64 N.Y.S.2d 295 (Sup. Ct. 1946); Sandberg v. Sandberg, 54 N.Y.S.2d 830 (Sup. Ct.), *aff'd*, 269 App. Div. 821, 56 N.Y.S.2d 204 (1st Dep't 1945); *see* Schik v. Schik, 6 N.Y.S.2d 949, 952 (N.Y. Dom. Rel. Ct. 1938).

[32]Jackson v. Jackson, 274 App. Div. 43, 79 N.Y.S.2d 736 (1st Dep't 1948); Heusner v. Heusner, 181 Misc. 1015, 42 N.Y.S.2d 850 (Sup. Ct. 1943); Risk v. Risk, 169 Misc. 287, 7 N.Y.S.2d 418 (Sup. Ct. 1938).

ground of the invalidity of that divorce.

Persuaded by such considerations, a goodly number of courts have held the subsequent spouse precluded from attacking the prior divorce decree.[33] These cases are based upon various theories: one who induces a person to get a divorce and then marries in reliance on the faith of that divorce should not be allowed to attack it;[34] the doctrine of the *Coe*[35] and *Sherrer*[36] cases means that "full faith and credit" requires precluding not only the parties to the proceeding but also all third parties;[37] or a husband who continues to cohabit with his wife after learning of the circumstances of her prior divorce is in no position to attack that divorce and is "not at liberty to play fast and loose" with the wife.[38]

In *Shea v. Shea*[39] the wife had obtained a divorce from her first husband in Illinois, with both parties appearing in the proceeding. She married Mr. Shea, who subsequently died, and then sought a decree declaring her his widow. The decedent's executor opposed the suit on the ground that her Illinois divorce was invalid for lack of domicil, but the court refused to allow this attack. The only factual distinction between this situation and those discussed above is that

---

[33]Mussey v. Mussey, 251 Ala. 432, 37 So.2d 921 (1948); Harlan v. Harlan, 70 Cal. App.2d 657, 161 P.2d 490 (1945); *In re* Anderson's Estate, 121 Mont. 515, 194 P.2d 621 (1948); Weise v. Hughes, 1 N.J. Super. 104, 62 A.2d 695 (1948); Kinnier v. Kinnier, 45 N.Y. 535, 6 Am. Rep. 132 (1871); Kaufman v. Kaufman, 177 App. Div. 162, 163 N.Y. Supp. 566 (1st Dep't 1917); Bane v. Bane, 196 Misc. 318, 80 N.Y.S.2d 641 (Sup. Ct. 1948), 1 STAN. L. REV. 333 (1949); Holloway v. Holloway, 187 Misc. 388, 63 N.Y.S.2d 915 (Sup. Ct. 1946); Pandelides v. Pandelides, 182 Misc. 819, 47 N.Y.S.2d 247 (Sup. Ct. 1944); Oldham v. Oldham, 174 Misc. 22, 19 N.Y.S.2d 667 (Sup. Ct. 1940); Heller v. Heller, 172 Misc. 875, 15 N.Y.S.2d 469 (Sup. Ct. 1939), *aff'd*, 259 App. Div. 852, 19 N.Y.S.2d 509 (2d Dep't 1940), *aff'd*, 285 N.Y. 572, 33 N.E.2d 247 (1941).

[34]Mussey v. Mussey, Harlan v. Harlan, Kaufman v. Kaufman, Pandelides v. Pandelides, Oldham v. Oldham, *supra* note 33.

[35]Coe v. Coe, 334 U.S. 378 (1948).

[36]Sherrer v. Sherrer, 334 U.S. 343 (1948).

[37]Bane v. Bane, 196 Misc. 318, 80 N.Y.S.2d 641 (Sup. Ct. 1948), criticized at 1 STAN. L. REV. 333 (1949) as an unfounded extension of the *Coe* and *Sherrer* doctrines.

[38]Heller v. Heller, 172 Misc. 875, 877, 15 N.Y.S.2d 469, 471 (Sup. Ct. 1939), *aff'd*, 259 App. Div. 852, 19 N.Y.S.2d 509 (2d Dep't 1940), *aff'd*, 285 N.Y. 572, 33 N.E.2d 247 (1941).

[39]270 App. Div. 527, 60 N.Y.S.2d 823 (2d Dep't 1946)

here the executor of the subsequent spouse, rather than the spouse himself, made the attack; and in the court's opinion this made no difference. The primary basis for the decision seems to be the sociological argument that it would be socially detrimental to permit persons to seek annulment of their marriages by attacking prior divorces of their spouses. Along this line, the court states:[40]

> "It would be intolerable to allow a third party or a stranger collaterally to disturb the validity of a matrimonial status or judgment where both the original parties thereto appeared and were barred from questioning its validity. To afford such an opportunity would give rise to widespread social disorder and create a fertile field for blackmail."

Although this language is general and apparently would bar attacks by any third person, the danger that the court is trying to obviate, namely, widespread social disorder and blackmail, is present primarily in cases of attack by the subsequent spouse and not to any high degree in cases of attack by a child of a prior marriage.

Attack by Child of Divorced Spouse

The leading case, prior to *Johnson v. Muelberger,* on attack by children of a prior marriage was In re *Lindgren's Estate,*[41] decided by the New York Court of Appeals in 1944. With the husband and wife both domiciled in New York, the husband went to Florida and there procured an ex parte divorce. Two years later the wife applied to the Florida court to have the decree amended *nunc pro tunc* so as to show her appearance, which was allegedly omitted through inadvertence of her counsel. The Florida court so amended the decree, and soon thereafter the husband remarried and in 1942 died. The first wife, as guardian of the minor issue of her marriage with the decedent, applied for letters of administration on his estate. Her application was opposed by the second "wife," who was entitled to letters under New York law if the widow of the decedent.[42] The court decided that the child did have the right to attack the Florida divorce, inasmuch as neither party to the divorce had a bona fide domicil in Florida. Although the court assumed that the parties

---

[40]*Id.* at 530, 60 N.Y.S.2d at 827.
[41]293 N.Y. 18, 55 N.E.2d 849 (1944).
[42]N. Y. Surrogate's Court Act §118.

themselves could not attack the decree, it held that the child, who was not a party to the divorce proceeding, should not be estopped.

A later New York case[43] held the child estopped, however, and predicated the *Lindgren* result on the ex parte nature of the divorce proceeding, the wife having entered no appearance until two years later in her motion for amendment *nunc pro tunc*. This limitation is scarcely warranted by the language of the *Lindgren* opinion, which indicates that the child was not estopped despite estoppel of the divorced parents by virtue of their appearance:[44]

> "The petitioner attacks the validity of the Florida decree in behalf of the decedent's daughter — not in behalf of the decedent or of his estate or of the petitioner herself. . . . In each instance we are dealing with matters personal to the claimant; not to the decedent or his estate. As to the child they are independent rights to which she claims to be legally entitled as the sole distributee of her father's estate. Of course the child was not a party to the Florida divorce action and accordingly the judgment then entered was not conclusive upon her or upon the rights now asserted in her behalf."

In the *Urquhart* case[45] an analogous though somewhat different problem arose. The wife was granted a divorce in Arkansas after the husband had entered an appearance, although both were residents of New York. The husband remarried but still cohabited with and had a child by his "former" wife. That child sought recognition of his legitimacy, which in turn required proof that the Arkansas divorce of his parents was void. He was accorded the right to attack the decree, even though his parents were estopped by their appearance in the divorce proceeding, and on remand the lower court held that neither party was domiciled in Arkansas and that the decree was accordingly void.[46]

The court here recognized a problem confronting the Florida Court in the *deMarigny*[47] and *Gaylord*[48] cases but apparently overlooked

[43] *In re* Driscoll's Will, 194 Misc. 711, 86 N.Y.S.2d 742 (Surr. Ct. 1949).

[44] *In re* Lindgren's Estate, 293 N.Y. 18, 23, 55 N.E.2d 849, 851 (1944).

[45] Urquhart v. Urquhart, 272 App. Div. 60, 69 N.Y.S.2d 57 (1st Dep't), *aff'd*, 297 N.Y. 689, 77 N.E.2d 7 (1947).

[46] 196 Misc. 664, 92 N.Y.S.2d 484 (Sup. Ct. 1949).

[47] deMarigny v. deMarigny, 43 So.2d 442 (Fla. 1949).

[48] Gaylord v. Gaylord, 45 So.2d 507 (Fla. 1950).

in the *Lindgren* case as well as in many others. As a general rule, one other than a party cannot attack a judgment unless it interferes with some right of his existing before rendition of the judgment.[49] In attempting to overcome this difficulty the opinion states:[50]

> "The impact of the judgment of the sister state upon him would deprive him of his legitimacy. This is as real and unfair a consequence unless he can be heard now as though he had been in being and deprived of opportunity to intervene in a matrimonial action wherein his legitimacy was at stake."

The court accepted a "substitute" for a right in existence at the time of the divorce proceeding because the consequences of estopping the child later were just as deleterious to him.[51] Most of the other cases allowing third parties to attack the divorce proceeding appear to overlook this difficulty completely.[52]

Because of the *Lindgren* and *Johnson* cases, the New York courts were quite definitely committed to the proposition that a child of a divorcee could attack the divorce and thereby prevent a subsequent wife from claiming a widow's share in the divorcee's estate. The *Johnson* decision, before the Supreme Court reversed it, was followed twice by the New York surrogates,[53] who evidently regarded the point as pretty well settled.

COMPARISON

In those cases involving attack on a prior divorce by a subsequent spouse attempting to annul his later marriage, the courts are about evenly split, whereas a substantial majority allow attack by a child of a prior marriage. Is there any logical reason for such a distinction?

---

[49]1 FREEMAN, JUDGMENTS §319 (5th ed. 1925).

[50]At p. 62, 69 N.Y.S.2d at 60.

[51]Florida, too, leans toward removal of the stigma of illegitimacy; *cf.*, in the field of annulment, Note, 3 U. OF FLA. L. REV. 339 (1950).

[52]*E.g.*, *In re* Johnson's Estate, 301 N.Y. 13, 92 N.E.2d 44 (1950); Farah v. Farah, 196 Misc. 460, 92 N.Y.S.2d 187 (Sup. Ct. 1949); *In re* McCarthy's Estate, 193 Misc. 264, 83 N.Y.S.2d 6 (Surr. Ct. 1948); *In re* Knowlton's Will, 192 Misc. 1032, 81 N.Y.S.2d 752 (Surr. Ct. 1948). *Contra:* Hansberger v. Hansberger, 182 Ga. 495, 185 S.E. 810 (1936); Hynes v. Title Guarantee & Trust Co., 273 N.Y. 612, 7 N.E.2d 719 (1937).

[53]*In re* Niles' Will, 99 N.Y.S.2d 238 (Surr. Ct. 1950); *In re* Torkkila's Estate,

From a sociological viewpoint, this question can definitely be answered in the affirmative. As pointed out in the *Shea* case,[54] it would lead to widespread social disorder and blackmail to allow a person knowing all the circumstances of the divorce to marry a divorcee and then, tiring of the marriage, to have it annulled by attacking the prior divorce. The bench is not inclined to lend aid to a person who plays fast and loose with his spouse and turns metitorious relationships into meretricious ones.[55]

Such policy considerations must have been in the mind of the Florida Court in the *deMarigny* case:[56]

> ". . . it is our view that the interests of society, would be better served by an adoption of the lesser of two evils—non datur tertium. We mean that if the parties are left as the court found them an alleged fraud upon the court might thus appear to be sanctioned; yet, on the other hand, a judgment favorable to the appellant-petitioner [second wife seeking to annul her marriage because of alleged invalidity of her husband's prior divorce] would amount to a judicial determination that both the appellant-petitioner and the appellee-respondent Alfred F. deMarigny had lived in a manifest state of adultery and would open wide an avenue for fraud (not to mention blackmail) of a character most difficult to discover . . . . It is our conclusion that the lesser evil would result from a judgment unfavorable to the appellant-petitioner's position and that decency, good morals and the welfare of society would be more nearly satisfied by such ruling. Certainly, such a decision would be less inimicable to the interests of our citizens as a whole than one favorable to the appellant-petitioner for the latter, in our opinion, could lead to 'widespread social disorder.' See Shea v. Shea 270 App. Div. 527, 60 N.Y.S. 2d 823, at page 827."

The same sociological premise appears in the *Gaylord* case, which

---

98 N.Y.S.2d 460 (Surr. Ct. 1950).

[54]*See* Shea v. Shea, 270 App. Div. 527, 530, 60 N.Y.S.2d 823, 827 (2d Dep't 1946).

[55]See Heller v. Heller, 172 Misc. 875, 15 N.Y.S.2d 469 (Sup. Ct. 1939), *aff'd*, 259 App. Div. 852, 19 N.Y.S.2d 509 (2d Dep't 1940), *aff'd*, 285 N.Y. 572, 33 N.E.2d 247 (1941).

[56]deMarigny v. deMarigny, 43 So.2d 442, 446 (Fla. 1949).

quotes from a California opinion[57] as follows:[58]

> " 'To hold otherwise [that is, to allow the subsequent spouse to have his marriage annulled] protects neither the welfare nor morals of society but, on the contrary, such holding is a flagrant invitation to others to attempt to circumvent the law, cohabit in unlawful state, and when tired of such situation, apply to the courts for a release from the indicia of the marriage status.' "

Because of the importance that the Florida Court puts on such considerations, it may be questioned whether the real basis of the decisions is (1) a sweeping rule that no person can attack a divorce decree unless he has at its rendition a property interest in being that it interferes with — a rule that the United States Supreme Court assumes as the law of Florida in applying this doctrine to preclude an heir from attacking the divorce; or (2) grave concern as to the sociological implications of allowing subsequent spouses to attack. On this latter basis, attack by such spouses should be forestalled; but the safeguarding of society does not require extension of the doctrine so as to bar children.

Conclusion

The United States Supreme Court has interpreted the Florida law to permit a child of a divorcee to attack her divorce for the purpose of preventing a putative widow from claiming. The opinion recognizes that there is dictum to the contrary in the *Willys* case,[59] but adopts the position that the Florida cases denying a subsequent spouse the right to attack virtually hold that the heirs are barred. This is at best an argument from analogy. As indicated above, the New York cases have been quite definite in allowing the heir to attack, and evenly split on permitting the spouse to attack, thereby indicating that these two types of attack are not necessarily the same. Moreover, the stronger policy reasons for precluding attack by a spouse do not apply to attack by an heir.

The most that can be said for the Florida position is that it is in-

---

[57]Harlan v. Harlan, 70 Cal. App.2d 657, 161 P.2d 490 (1945).

[58]Gaylord v. Gaylord, 45 So.2d 507, 509 (Fla. 1950).

[59]State *ex rel.* Willys v. Chillingworth, 124 Fla. 274, 278, 168 So. 249, 251 (1936).

definite, with a dictum stating that the child can attack, and with recognizably distinguishable cases possibly indicating that he cannot. Since this uncertainty is present, was the Supreme Court justified in upsetting the interpretation of Florida law advanced by the New York Court of Appeals?[60]

Johnson v. Muelberger is a further extension of the full-faith-and-credit clause toward prevention of attacks on foreign divorces. The current policy of the Supreme Court leads in effect to the conclusion that, if both parties appear in the divorce proceedings, full faith and credit prevents any attack on the decree by any person in another state. That such finality of marital status is an admirable conclusion would probably be admitted by many disinterested persons; but if this conclusion be based on the law of the state where the divorce was granted, the Court should impartially ascertain the law of that state and should not reverse the finding of a court of another state when its interpretation is not unreasonable. If the ratio decidendi of the *Johnson* case is followed, the Supreme Court must in all cases ascertain the law of the divorcing state and in instances of doubt resolve the issue in favor of precluding attack, even though this involves overruling an equally sound interpretation to the contrary by a court of some other state.

WILLIAM E. NODINE

LIQUIDATED-DAMAGES CLAUSES IN REAL ESTATE CONTRACTS

Wrongful invasion of legally recognized personal or property rights is compensated under our legal system either by a form of specific relief or by a money judgment for damages. Generally, the remedial character of the common law contemplated a pecuniary award calculated to compensate for legal wrong.[1] Because money is rarely an accurate substitute for the performance of a contract, however, and because the damages attending breach are difficult of ascertainment,

[60]Query: When the child and the parties to the Florida divorce proceeding reside outside Florida, how can the child obtain a determination of the Florida law by the Florida courts?

[1]See 1 SEDGWICK, MEASURE OF DAMAGES §2 (9th ed. 1912).