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would return our courts to the common law interpretation of restitution of property rights for an innocent donor. However, even if the donor who was not innocent was allowed to recover, would not one of the basic policies of the heart-balm legislation still be served, that of reducing the economic duress that can influence unwilling marriages? It seems that in the area of restitution of property rights that legislation might even forge on beyond the common law recovery notions, without any detriment to heart-balm policies, and even with a chance at greater promotion of those same policies.

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Plaintiff-wife, a New York resident, was legally separated from the defendant-husband who was an alleged resident of New York State at all times. The defendant obtained a Mexican divorce without the appearance of the plaintiff. Subsequently, the plaintiff sought a declaratory judgment, pronouncing the Mexican divorce decree invalid for lack of jurisdiction and declaring that she was still the defendant's lawful wife. Upon hearing of a motion to dismiss the complaint for failure to state a cause of action, *held:* a doubtful Mexican divorce decree is grounds for a declaratory judgment to determine marital status, and remarriage of one of the parties is not a prerequisite for such a declaratory judgment. *Grutman v. Grutman,* 7 Misc.2d 236, 166 N.Y.S.2d 315 (Sup. Ct. 1957.)

In New York State, the marital status of the parties is a proper *subject matter* for a declaratory judgment. *Lowe v. Lowe,* 265 N.Y. 197, 192 N.E. 291 (1934). The grant of a declaratory judgment lies in judicial discretion, but is not to be granted without substantial grounds. *Engel v. Engel,* 275 App. Div. 14, 87 N.Y.S.2d 1 (1st Dep't 1949). The problem in this area of law is the determination of what circumstances produce substantial grounds for a declaratory judgment.

A separation decree adjudicates an existing marital status only at the time of the decree. *Statter v. Statter,* 2 N.Y.2d 668, 672, 163 N.Y.S.2d 13, 16 (1957). If the divorce decree was prior to the separation decree, its invalidity would have been adjudicated by necessity and an action for a declaratory judgment would be rejected as superfluous. *Garvin v. Garvin,* 306 N.Y. 118, 116 N.E.2d 73 (1951).

However, a separation decree cannot decide what has not yet come into existence. A separation decree does not foreclose the possibility of a later divorce and would not affect the possibility of a declaratory judgment action attacking the later divorce.

In *Rosenbaum v. Rosenbaum,* 309 N.Y. 371, 130 N.E.2d 902 (1955), the court held that where a Mexican divorce decree was being sought, which would obviously be invalid on the stated facts, it was not necessary to enjoin the dependant from procuring the decree. The utility of a similar argument in a declaratory judgment action is prevented as the majority further reasoned that the plaintiff had an adequate remedy at law by utilizing a declaratory judgment procedure. In both actions the plaintiff is attempting to secure her marital rights. From this perspective, it appears logically inconsistent to allow an obviously void Mexican divorce decree as grounds for a declaratory judgment, but not grounds for an injunction preventing its procurement. The distinction is best understood by noticing the differences in the form of relief. The injunction is a form of personal restriction, whereas a declaratory judgment is an amicable action, at least in appearance.

The typical situation where an action is brought to determine the marital status of the parties by a declaratory judgment is after an *ex parte* foreign divorce and the remarriage of that party. These cases are not numerous because: the declaratory judgment procedure is of a comparatively recent growth, the *ex parte* foreign divorces are usually acquired by cooperation between the parties, the divorced spouse may elect to take no action or resort to some form of coercive remedy. Jacobs, *The Utility of Injunctions and Declaratory Judgments in Migratory Divorce,* 2 LAW AND CONTEMP. PROB. 370 (1935). Cases granting a declaratory judgment determining an existing marriage after an *ex parte* foreign divorce without a remarriage are exceedingly rare. *Long v. Long,* 281 App. Div. 254, 119 N.Y.S.2d 341 (1st Dep't 1953): *Martin v. Martin,* 131 N.Y.S.2d 96 (Sup. Ct. 1954).

Prior to the instant case, the lack of remarriage in such a situation was not mentioned in the courts' opinions. It seems clear, however, that remarriage of one of the parties after an *ex parte* foreign divorce merely compounds the confusion and the threat to the original spouse's marital status and rights. No person would expend time and money for a divorce decree, even one of questionable validity, without the thought of a possible utilization. Any use of such a decree attacks the marital status and rights of the other spouse. A declaration by the court of an existing marriage before a possible remarriage would protect the questionably divorced spouse from uncertainty of her status and rights, deter the divorcing spouse from entering into an invalid second marriage, and protect a hypothetical third person from such an invalid marriage. For these reasons it is within the public interest that remarriage of one of the parties be not a prerequisite to a declaratory judgment to determine marital status after an *ex parte* foreign divorce.

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