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Domestic Relations—Support and Remarriage

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Courts have generally held that abandonment must be persistent and stubborn, rather than an isolated act.[3] An offer to return, if made in good faith within a reasonable time after the original act, will relieve the abandoner.[4] As a consequence, when a wife makes an offer to return, the husband must accept the offer or thereby abandon her.[5]

Although the trial court had rendered judgment for the husband in the instant case, the Appellate Division found that the wife's offer was made in good faith and within a reasonable time (two weeks) after leaving, so her actions did not constitute an abandonment, since they had not "frozen into a permanent attitude"; the judgment of the trial court was therefore reversed,[6] leaving the parties in their original position.

The Court of Appeals accepted the findings of the Appellate Division, and determined that since the wife's actions did not constitute an abandonment the husband was bound to accept her offer to return, and his failure to do so constituted an abandonment on his part.

A dissent voted to affirm the judgment of the Appellate Division. Although neither the opinion of the Court of Appeals nor the memorandum decision of the Appellate Division gives a full account of the facts, the dissent would seem to be unfounded, since the facts as given leave no doubt that an abandonment did take place and the question would seem to be only which party was at fault.

Support and Remarriage

Plaintiff wife had been married to defendant; a divorce was granted her with provisions for support as previously arranged in a separation agreement, until she should die or remarry. Five years later she did remarry, and so advised defendant. Subsequently her second marriage was annulled, on the grounds that her husband was still legally married, and after a short time she brought this suit to renew her support from her first husband. Judgment was rendered for the husband.[7]

The basic problem before the Court was whether a marriage declared a "nullity" could still constitute a remarriage for purposes of the support provisions. The Court was faced with their decision in *Sleicher v. Sleicher*,[8] which had decided

3. *Silberstein v. Silberstein*, 218 N. Y. 525, 113 N. E. 495 (1916).
4. *Bohmert v. Bohmert*, 241 N. Y. 446, 150 N. E. 511 (1926).
5. *Ibid.*
6. 283 App. Div. 1054, 131 N .Y. S. 2d 886 (1st Dep't 1954).
7. *Gaines v. Jacobsen*, 308 N. Y. 218, 124 N. E. 2d 290 (1954).
8. 251 N. Y. 366, 167 N. E. 501 (1929).

an identical situation in favor of the wife, adopting the legal fiction that the annulment "related back" to the beginning of a marriage and the marriage was considered never to have existed.[9] Even in that case, however, the legal fiction was modified, since the husband was required to pay only from the time of the annulment rather than throughout the entire second marriage.[10]

The Court pointed out that the decision in the *Sleicher* case was the only means of allowing the wife a source of support, since at that time no support could be had from an anulled marriage.[11] However, after the *Sleicher* case, the Civil Practice Act was amended to permit a court to grant support in an annulment action.[12]

The fundamental function of alimony is to provide support for a wife not otherwise supported, and in New York alimony automatically ceases upon remarriage;[13] the subsequent fortunes of the remarriage do not affect this.[14] The purpose of the *Sleicher* holding was only to remedy the one situation in which a wife had no source of support. By the amendment of the Civil Practice Act the legislature itself corrected the defect; thus the Court of Appeals felt that the justification for the *Sleicher* decision had ended. As in all normal cases of remarriage under New York law, the wife must look only to her last husband for support.

The Court recognized the unfortunate repercussions of their decision in the instant case, since the second husband had died while the action was pending, but nevertheless felt that the plaintiff was "no different from any other woman whose source of support has come to an end through death."[15]

Medical Care of Children

In a proceeding by the Commissioner of Social Welfare to obtain custody of a twelve year old boy whose father, because of his personal philosophy, refused to allow an operation on the son's hairlip and cleft palate, the Court (reversing the Appellate Division)[16] reinstated the Children's Court decision.[17] Although

9. *Id.* at 366, 167 N.E. at 502.
10. *Id.* at 371, 167 N. E. at 503.
11. See *Jones v. Brinsmade,* 183 N. Y. 258, 76 N. E. 22 (1905).
12. N. Y. CIV. PRAC. ACT § 1140-a.
13. It would seem that New York is in the minority on this point. The majority of courts hold that remarriage is a ground for modification, but does not automatically stop alimony. *Morgan v. Morgan,* 211 Ala. 7, 99 So. 185 (1924). See annot. 64 A. L. R. 1273 (1929).
14. *Nelson v. Nelson,* 282 Mo. 412, 221 S. W. 1066 (1920).
15. 308 N. Y. at 226, 124 N. E. 2d at 295.
16. *In re Seiferth, Jr.,* 285 App. Div. 221, 137 N. Y. S. 2d 35 (4th Dep't 1955)
17. 127 N. Y. S. 2d 63 (1954).