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clarified the landlord-tenant relationship by imposing on the landlord the duty to remove natural accumulations of snow and ice from common areas. The decision has also made the determination of liability a fair one by placing a very common and dangerous hazard within the scope of the negligence formula, which through its flexibility should allow adjustments of the needs of tenants living in modern multiple-unit dwellings to the limitations of the landlord's ability to remedy the danger.[41]

LARRY E. HEPLER

EFFECT OF AN INVALID REMARRIAGE ON ALIMONY PAYMENTS

Alimony decrees generally provide for termination of payment upon remarriage of the divorced wife.[1] Whether payments made under an alimony decree terminate upon a remarriage which is subsequently annulled is not entirely clear nor are the holdings uniform.

The New York case of *Denberg v. Frischman*[2] significantly clarified the laws as to the effect that a divorced wife's invalid remarriage has on a support obligation of her prior spouse. In this case the husband covenanted by separation agreement to pay the wife $50 per week support and to maintain certain insurance policies for her benefit as long as she remained unmarried. The wife remarried, but this second marriage was annulled in New Jersey, which does not authorize the granting of alimony in annulment proceedings. Consequently, the wife demanded resumption of payments from the first husband who instituted a declaratory judgment action. The New York Court of Appeals held that the separation agreement did not survive the remarriage.[3] It was immaterial whether the wife could obtain alimony

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543 (1951) (landlord must use reasonable care to keep common areas reasonably safe); Walker v. Memorial Hosp., 187 Va. 5, 45 S.E.2d 898 (1948) (hospital allowed to await end of storm before removing snow and ice); Williamson v. Wellman, 156 Va. 417, 158 S.E. 777 (1931) (landlord must use reasonable care to keep common approaches reasonably safe).

[41]Adoption of any other rule "would place thousands of city residents in jeopardy and would be inimical to modern urban life." Robinson v. Belmont-Buckingham Holding Co., 94 Colo. 534, 31 P.2d 918, 920 (1934).

[1]NIMKOFF, MARRIAGE AND THE FAMILY 641 (1947).

[2]17 N.Y.2d 778, 270 N.Y.S.2d 627, 217 N.E.2d 675 (1966), *cert. denied*, 385 U.S. 884, *affirming* 24 App. Div. 2d 100, 264 N.Y.S.2d 114 (1965).

[3]In Gaines v. Jacobsen, 308 N.Y. 218, 124 N.E.2d 290, *affirming* 283 App. Div. 325, 127 N.Y.S.2d 909 (1954), under similar circumstances the New York Court

from the second husband.[4] The intention of the parties at the time the agreement is made controls, and the agreement should not be subject to court modification because of a change in circumstances.

The Florida case of *Reese v. Reese*[5] reached a conflicting result. There the husband had been ordered by divorce decree to pay alimony of $520 per month. Subsequently, the wife innocently contracted a bigamous marriage which ended suddenly one and a half days later when her new spouse committed suicide. Cognizant of the remarriage, the husband moved to strike the alimony provision from the divorce decree. The Chancellor so ordered,[6] reasoning that when the wife obtained another source of support, the husband's obligation terminated and could not be revived. Although the wife was blameless, she intended to forfeit her existing source of support and accept support from her second mate. The fact that no valid marriage was contracted did not affect the forfeiture. However, in a 4-3 decision, the Supreme Court of Florida reversed, stating that the mere possibility of a right

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of Appeals held that a separation agreement was not reactivated by an annulment of the wife's second marriage because a New York statute allowed alimony from the second husband in an annulment proceeding. However, the *Denberg* court recognized that in *Gaines*, as specified in the agreement, Connecticut law rather than New York law was applicable. 124 N.E.2d at 292. There being no conclusive showing of Connecticut law, New York assumed the law of the two states was the same. Under this presumption, only New York common law was appropriate, thus precluding application of the New York statute. International Text-Book Co. v. Connelly, 206 N.Y. 188, 99 N.E. 722, 727 (1912).

[4]In refusing to reinstate support from a prior spouse Herscher v. Herscher, 51 Misc. 2d 921, 274 N.Y.S.2d 295 (Civ. Ct. 1966), citing *Gaines* and *Denberg*, also concluded that it was legally immaterial whether a right of support was acquired by the wife's void remarriage. The court stated that the wife, of her own volition, remarried for better or worse, thus intending to abrogate all benefits under the separation agreement. A woman is entitled to make decisions affecting both personal and property interests. A correlative of such right is the acceptance of the resultant consequences.

[5]192 So. 2d 1 (Fla. 1966), *reversing* 178 So. 2d 913 (Fla. Dist. Ct. App. (1965).

[6]Under Florida law it is settled that a wife may allege as ground for divorce and permanent alimony the fact that her husband had a prior living spouse at time of the marriage. Brown v. Brown, 186 So. 2d 510 (Fla. 1966). While technically the purpose of divorce is to end a valid marriage, under FLA. STAT. ANN. § 65.04 (9) (1943), a divorce may be granted to adjudicate the nullity of a void marriage. Burger v. Burger, 166 So. 2d 433 (Fla. 1964). Although annulment is not a basis for permanent alimony, Young v. Young, 97 So. 2d 470 (Fla. 1957), FLA. STAT. ANN. § 65.08 (1953) provides that in a divorce issued at the suit of the wife, the court may award alimony to her as the circumstances of the case warrant. Presumably where either party had a spouse living at the time of the marriage it would be proper to petition for annulment or divorce. CARSON, THE FAMILY, MARRIAGE AND DIVORCE 125 (1950). It is interesting that in Eggleston v. Eggleston, 156 Ohio St. 422, 103 N.E.2d 395 (1952), where a statute provided bigamy as a ground for divorce, divorce, as opposed to annulment, was held to be the exclusive remedy so as to ensure that the wife would not be deprived of the alimony to which she was entitled.

to alimony in connection with a void marriage does not terminate a prior support decree.[7]

Where an ex-wife is given a lump sum alimony award[8] or where alimony is a subsitute for dower or a property settlement,[9] her remarriage does not extinguish liability for payment of this amount. Further, by agreement incorporated in a divorce decree, the parties may specify that the husband will pay his divorced wife fixed sums at regular intervals for her life, such payments to be unaffected by her remarriage.[10] However, such sums do not constitute alimony in the traditional sense.[11] Hence, in such circumstances, there is no conflict with the principle that remarriage by an ex-wife is a valid reason for a reduction or elimination of periodic alimony upon application of the husband.[12] The reason is that a wife should be supported by the spouse with whom she is cohabiting rather than by one whom she has divorced.[13] Thus it is implicit in a divorce decree that periodic alimony payments which are without limit in number of payments or total amount end on the wife's remarriage.[14]

When a decree provides for termination of alimony payments upon remarriage of the divorced wife, it is necessary to ascertain whether the remarriage contemplated must be valid or whether a ceremony alone is sufficient to end such obligation. Three alternatives have been employed: (1) a full application of a relation back fiction which makes the annulled marriage void *ab initio* thus permitting reinstatement of alimony payments as though the second marriage never occurred, (2) a modified application of relation back which revives alimony from the date of the annulment rather than from the time the second

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[7]FLA. STAT. ANN. § 65.09 (1943) provides for separate maintenance and support unconnected with divorce. However, Dawson v. Dawson, 164 So. 2d 536 (Fla. Dist. Ct. App. 1964), held that such support cannot be awarded to other than a lawful wife. In *Reese* the Supreme Court of Florida concluded that in the absence of a valid marriage, to establish that the wife acquired a right of support from her putative husband, would conflict with the *Dawson* decision. It may be noted that alimony from a bigamous husband by an innocent wife under Florida law is not "unconnected with divorce." On the contrary, it is an incident of divorce. See note 6 *supra*.

[8]Dobson v. Dobson, 320 Ill. App. 687, 51 N.E.2d 1010 (1943); Gilcrease v. Gilcrease, 186 Okla. 451, 98 P.2d 906 (1939).

[9]Hartigan v. Hartigan, 142 Minn. 274, 171 N.W. 925 (1919).

[10]See, *e.g.*, Sullivan v. Sullivan, 215 Ala. 627, 111 So. 911 (1927); Spear v. Spear, 158 Md. 672, 149 Atl. 468 (1930).

[11]149 Atl. at 469.

[12]Nelson v. Nelson, 282 Mo. 412, 221 S.W. 1066 (1920); Brandt v. Brandt, 40 Ore. 477, 67 Pac. 508, 510-11 (1902); Durfee v. Durfee, 61 R.I. 51, 199 Atl. 747 (1938).

[13]McClure v. McClure, 4 Cal. 2d 356, 49 P.2d 584 (1935); Kirkbride v. Van Note, 275 N.Y. 244, 9 N.E.2d 852, 854 (1937).

[14]Austad v. Austad, 2 Utah 2d 49, 269 P.2d 284, 290 (1954).

marriage occurred thus precluding support from two sources at the same time, and more recently, (3) discarding relation back and denying reactivation of alimony on the basis that the second marriage ceremony, although creating no valid status, is a sufficient remarriage to terminate support. Application of these alternatives is illustrated by the following cases.

In *Sutton v. Leib*[15] a divorce decree compelled the husband to pay $125 per month alimony as long as the order continued in effect or until the wife's remarriage. Thereafter the wife commenced a bigamous relationship with one Henzel which was annulled three years later. The Court of Appeals for the Seventh Circuit concluded, under Illinois law, that a void marriage is no marriage, that the second husband had no obligation of support, that any support so provided was gratuitous and that the former husband was never relieved of his duty of support even momentarily. Therefore, the prior husband was required to pay both future alimony and that which accrued during the bigamous marriage—all to the benefit of the wife and the detriment of the husband.[16] The court refused to limit relation back to allow for maintenance received from the second husband on ground that the marriage was not voidable but void.[17]

The second alternative was applied in *Sleicher v. Sleicher*,[18] a New York case no longer law in that state, where a divorced wife had a voidable second marriage annulled and was entitled to no support in connection with the annulment. While relation back was used to revive support under a separation agreement with a former husband,

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[15]199 F.2d 163 (7th Cir. 1952).

[16]Other cases have refused to terminate alimony where the divorced wife contracted an invalid second marriage which ended in annulment. See Robbins v. Robbins, 343 Mass. 247, 178 N.E.2d 281 (1961); Boiteau v. Boiteau, 227 Minn. 26, 33 N.W.2d 703 (1948); Minder v. Minder, 83 N.J. Super. 159, 199 A.2d 69 (Ch. 1964); Cecil v. Cecil, 11 Utah 2d 155, 356 P.2d 279 (1960).

[17]In a prior decision in this case, 188 F.2d 766 (7th Cir. 1951), the United States Court of Appeals affirmed a District Court finding that inasmuch as Henzel's divorce from his first wife was valid in Nevada, the wife's marriage to Henzel was also valid in that state and survived a New York annulment thereof. Thus the New York annulment, being denied full faith and credit, did not revive the first husband's alimony payments in Illinois. On certiorari the United State Supreme Court held that Henzel's Nevada divorce was not binding on the New York court since both parties were not present. However, the New York annulment, both parties being before the court, was *res judicata* and must be given full faith and credit throughout the nation thus requiring Illinois to treat the Nevada marriage as void. Nevertheless the Court concluded that Illinois, or a federal court sitting therein, could determine the effect of an annulment on a prior alimony obligation, the Constitution requiring no uniformity among the states in this respect. 342 U.S. 402 (1952). On remand the Court of Appeals reached the conclusion set forth in the text.

[18]251 N.Y. 366, 167 N.E. 501 (1929).

the court recognized that the fiction ignored the existence of a relationship between the wife and her second spouse only in order to reach a desired result. Therefore payments were restored from the date of the annulment rather than the time of marriage since the wife received support from another source during this period. Thus a modified relation back shielded the wife against the possibility of becoming a public charge while protecting the former husband against accrued alimony payments.

With the possibility of an application of relation back a husband whose wife had remarried was left in a state of uncertainty as to when he might be obliged to resume alimony payments should the marriage subsequently be annulled. However, a relation back fiction became unnecessary where by statute a wife could be granted alimony from her reputed spouse even in an invalid marriage. Such a statute[19] was enacted in New York after *Sleicher* was decided thus paving the way for elimination of the second alternative as the New York rule. Since "the purpose of an award of alimony is support for a divorced wife not otherwise supported,"[20] when this new statutory source of maintenance was created, there was no need for a former husband's obligation to continue. Thus a third alternative arose in *Gaines v. Jacobsen*[21] where by separation agreement, to be interpreted by Connecticut law, the husband agreed to pay the wife $1668 per year for support and to maintain a $10,000 life insurance policy for her benefit until her remarriage. Five years later the wife married one Harragan and informed the first husband that he could stop the alimony payments. Later the wife had this bigamous marriage annulled in a New York court, making no claim for support against Harragan, who was insolvent. A year and a half later she brought suit for reinstatement of the separation agreement provisions. The court was of the opinion that the parties did not intend that the duty of support should be determined by the validity of the second marriage, but rather that a ceremony alone should be sufficient to terminate payments. Thus the

[19]The N.Y. CIV. PRAC. ACT § 1140-a (subsequently incorporated into N.Y. DOM. REL. LAW § 236) provides: "When an action is brought to annul a marriage or to declare the nullity of a void marriage, the Court may give such direction for support of the wife by the husband as justice requires." This provision applies to annulment of either a void or voidable marriage. Johnson v. Johnson, 295 N.Y. 477, 68 N.E.2d 499 (1946). Some other states have statutes providing for alimony for the wife upon termination of an invalid marriage. See, *e.g.*, CONN. GEN. STAT. ANN. § 46-28 (1960); ILL. ANN. STAT. ch. 40, § 40-20 (Smith-Hurd 1956).

[20]167 N.E. at 503.

[21]308 N.Y. 218, 124 N.E.2d 290, *affirming* 283 App. Div. 325, 127 N.Y.S.2d 909 (Sup. Ct. 1954).

wife's ineffective remarriage was adequate to end the former husband's obligation of support.[22]

The *Gaines* decision gave rise to the question whether the third alternative of terminating alimony on the basis of a second marriage ceremony alone was available where no statutory support from the second husband in an invalid marriage was permitted. The facts in *Gaines* indicated that the New York statute was not the sole ground of decision[23] inasmuch as the second husband's insolvency and death made it impossible for the court to grant the wife support from him.[24] This observation was made in the California case of *Sefton v. Sefton*[25] in which a separation agreement offered $275 per month alimony until the death or remarriage of the wife. In addition, a California statute[26] contained a provision for termination of alimony on remarriage unless the parties agreed otherwise in writing. In argument for resumption of alimony following the annulment of her second ceremonial marriage the wife asserted that the annulment voided her marriage *ab initio* thus reviving the separation agreement under the relation back principle which she alleged was applicable since California had no statute affording alimony in an annulment suit. The court refused to apply this outmoded fiction, the original purpose of which was to promote justice between the parties.[27] Instead it found that the

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[22]Other cases have reached this same result where the wife contracted an invalid second marriage. *See* Husted v. Husted, 222 Cal. App. 2d 50, 35 Cal. Rptr. 698 (Dist. Ct. App. 1963); Price v. Price, 24 Cal. App. 2d 462, 75 P.2d 655 (Dist. Ct. App. 1938); Torgan v. Torgan, 410 P.2d 167 (Colo. 1966); Linneman v. Linneman, 1 Ill. App. 2d 48, 116 N.E.2d 182 (1953); Lehman v. Lehman, 225 Ill. App. 513 (1922); Keeney v. Keeney, 211 La. 585, 30 So. 2d 549 (1947); Gerrig v. Snierson, 344 Mass. 518, 183 N.E.2d 131 (1962); Gevis v. Gevis, 147 N.Y.S. 2d 489 (Sup. Ct. 1955); Dorn v. Dorn, 282 App. Div. 597, 126 N.Y.S.2d 713 (Sup. Ct. 1953); Yetman v. Yetman, 91 N.Y.S.2d 512 (Sup. Ct. 1949); Spatz v. Spatz, 10 Misc. 2d 1, 171 N.Y.S.2d 157 (N.Y. Mun. Ct. 1958); Elam v. Elam, 182 Va. 469, 29 S.E.2d 222 (1944).

[23]It is noteworthy that while Section 1140-a of the Civil Practice Act (subsequently incorporated into N.Y. DOM. REL. LAW § 236) became effective on September 1, 1940, on facts virtually identical to those in *Gaines* a New York court held in 1951 that a former husband's duty of support under a separation agreement was revived when a divorced wife's remarriage was annulled. Berrigan v. Broadhead, 105 N.Y.S.2d 308 (City Ct. 1951).

[24]In this connection the court stated: "That the second husband has died is unfortunate, but [the wife's] plight is no different from that of any woman whose source of support has come to an end through death. Having remarried, she chose to abandon her right to support from [her former husband]....[H]aving made her choice, she is bound by it, although subsequent events prove it to have been an improvident one." 124 N.E.2d at 295.

[25]25 Cal. 2d 872, 291 P.2d 439 (1955).

[26]CAL. CIV. CODE § 139.

[27]A full application of the relation back fiction with respect to annulment is to treat a marriage as though it never existed. The relation back doctrine is a useful legal tool so long as it comports with the general purpose of legal fictions which

marriage ceremony constituted a remarriage within the statutory and agreement provisions on which the husband could justifiably rely in recommitting his assets without fear of alimony being revived at a later date.[28] While the wife was innocent in contracting the voidable marriage, her former spouse was also guiltless in the venture. As between these two parties, the wife, who took the active part, should bear the responsibility. Thus a marriage ceremony alone was sufficient to permanently terminate alimony even though California had no statute offering relief to the wife. The court noted that in *Gaines* the wife was not advantaged by the New York statute, and in fact chose not to invoke it because of the insolvency of her second spouse.[29]

The principal case of *Denberg v. Frischman,* in expounding upon *Gaines,* clearly states the rule that any duty which has been imposed on a husband to provide continuing support to a divorced wife terminates on her remarriage, and cannot be revived even though such remarriage is invalid, irrespective of whether the wife can obtain support from the second husband. This rule is correct whether founded on public policy or on the manifest intention of the parties that alimony should cease upon the divorced wife's participation in a marriage ceremony.[30] Justice requires that a woman look to the last of successive husbands for support and that she not be allowed to choose between the more profitable of the two sources. *Reese* failed to recognize and apply this principle and thus reached an unjust con-

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"is to reconcile a specific legal result with some premise.... Where no intellectual premises are assumed, the fiction has no place." Fuller, *Legal Fictions,* 25 ILL. L. REV. 513, 514 (1931).

[28]In a concurring opinion in the District Court of Appeals decision, Justice Kaufman stated:

> It is my view that a reasonable construction of clauses in property settlement agreements between spouses about to be divorced providing that payments to the wife will cease upon her remarriage mean exactly that. It is the fact of the ceremonial remarriage that is in the minds of the parties and causes the payments to cease under the property settlement agreement. An annulment of the remarriage by the wife can not give new life to the husband's obligation which has terminated by the remarriage.
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> In some cases it is months or even years before an annulment of the remarriage is sought by the wife. It is reasonable to say that the husband's obligation of support under such an agreement can be reinstated at the whim of the wife and at a time to be set by her?

Sefton v. Sefton, 279 P.2d 576, 578 (Dist. Ct. App.), *aff'd,* 25 Cal. 2d 872, 291 P.2d 439 (1955).

[29]25 Cal. 2d 872, 291 P.2d 439, 442 (1955).

[30]In the majority opinion in *Gaines* Judge Fuld stated: "In the ordinary case it is far more likely that justice will be served by not disturbing the first husband's discharge, and by leaving the wife to seek support... from her second husband...." 124 N.E.2d at 295.