Marquette Law Review

Volume 32
Issue 2 *September 1948*

Article 13

Domestic Relations - General Statute of Limitiations as Bar to Divorce Action

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the contracts of its promoters. The rule is just and should not be weakened."[11]

Nevertheless we feel Mr. Isaacs is correct when he advocates that a corporation need not come into existence free of all contracts but that by statute, after a certain point is reached, the corporation can succeed the promoter. The promoter who purports to act for the corporation should be labeled or registered, and the scope of his power should be strictly defined. But within that scope he should be able to bind the corporation. Protection against misrepresentation could be afforded the public and the future stockholders of the corporation by statutory provision for administrative control of promotion and extension of "blue sky" provisions to such contracts. In this way the responsibility on these pre-incorporation contracts, which vitally affect the value of the stock of the corporation that is later formed, will be clearly defined instead of being subject to twilight zone reasoning of the courts in trying to find corporate ratification or adoption.

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Domestic Relations—General Statute of Limitation as Bar to Divorce Action — Plaintiff, husband, and defendant, wife, intermarried on the 8th day of May, 1926. Since 1932 the defendant has been an inmate of an asylum for the insane. The plaintiff alleges that from the time of the marriage until the time that defendant was committed, she had been guilty of a course of cruel and inhuman treatment toward him. Defendant demurred on the ground that the action was barred by the general statute of limitation.[1] This statute provides that where an action was cognizable by a court of chancery on or before Feb. 28, 1857, and no other statute of limitation applies to it, it must be brought within ten years. The order sustaining the demurrer was affirmed. *Held:* the jurisdiction of the court over divorce being purely statutory and an action of divorce being cognizable in a court of chancery prior to 1857, the general statute of limitation stands in bar of this divorce action since it was not brought within ten years. *Zlindra v. Zlindra, 252 Wis. 606, 32 N.W.(2d) 656 (1948).*

The application of a general statute of limitation to a divorce action is not a new one. The case at hand is novel inasmuch as it is the first case in Wisconsin which has allowed the general statute to bar a divorce action. Textwriters are almost unanimous in their declaration that a general statute of limitation cannot bar such an action.

"Statutes of limitation in the mere ordinary words common in our states, are not extended to suits for divorce."[2]

[11] Park v. Modern Woodmen, 181 Ill. 214, 54 N.E. 932, 938 (1899).
[1] Wis. Stat. (1947), 330.14, 330.18(4).
[2] 2 Bishop, Marriage, Divorce and Separation 426.

The reason for this view is clear when one examines the early cases on the subject. Where a divorce was sought on the ground of desertion, a Georgia court ruled that although the action had not been brought within the period prescribed by the general statute of limitation, that statute could not be presented in bar.[3] The reasoning of the court was that since divorce suits were originally tried in ecclesiastical courts, mere statutory provisions could not reach them. The court then found its precedent in English cases. Furthermore, in 1881, more courts inclined to the view that contracts of marriage were not like other contracts, and the notion was prevalent that to make of the marriage contract a thing merely statutory was to deny it its dignity in the threefold relationship of man, the state and God. Hence, the courts of that era found it easy to confine actions for divorce to equitable rules.

In a Utah case,[4] the wife suffered cruelty sufficient to have warranted divorce. A year after the marriage the parties obtained a "church divorce" which was merely an agreement between the parties, witnessed by their church, to the effect that they would no longer continue in the married state. Plaintiff wife "remarried" but upon discovery that she was still married to the defendant, the parties to the second ceremony separated. She brought her suit for divorce after the statutory period had run but the court overruled a demurrer based upon a general statute of limitation. While this decision has been cited in the *Zlindra* case[5] in support of the old rule, the dicta in the Utah case[6] clearly indicate that the court felt that a change in the rule might be forthcoming, for it was careful to limit its decision to the facts of the case. It then went on to say that a lapse of time alone might be sufficient to bar an action of divorce.

At the turn of the century the change in thought began to manifest itself in the courts of other states. In 1905 an Iowa court held that a general statute of limitation would act as a bar in an action on a contract between a husband and wife.[7] In 1906, a Kansas court held that the general statute of limitation of that state did not apply to divorce actions,[8] but that decision did not effect the New York courts when, seven years later, they expressed the strong view on the matter which they maintain today. Under the law of New York there is a fixed limitation for every cause of action whether legal or equitable.[9] This case rendered obsolete, at least in New York, the theory that a purely equitable action could be barred only under the doctrine of laches. It

[3] Mosely v. Mosely, 67 Ga. 92 (1881).
[4] Tufts v. Tufts, 16 L.R.A. 482, 8 Utah 142 (1892).
[5] Zlindra v. Zlindra, 32 N.W.(2d) 656, Wisconsin (1948).
[6] Fn. 4, supra.
[7] In re Deaner, 126 Ia. 701, 102 N.W. 825 (1905).
[8] Cullison v. Cullison, 73 Kan. 281, 85 P. 289 (1906).
[9] Sturm v. Sturm, 141 N.Y.S. 61, 80 Misc. 277 (1913).

held that a general ten year statute of limitation applies to an action for divorce for cruelty. North Carolina, in 1924, showed signs of changing to the thinking of the New York courts when it was said in a case that if a divorce action could be barred at all by a statute of limitation, it would be by the general statute.[10] The more recent decisions come largely from New York and hold that in cases of separation the general statute of limitation will act as a bar.[11]

From the foregoing it is clear that Wisconsin has fallen in with the recent trend. However, the court in its decision in the *Zlindra* case[12] did not merely follow precedent for it arrived at its conclusion entirely by its own reasoning. The court traces the statutory history of divorce actions in this state. The statutes of 1849 conferred upon the circuit courts of the state jurisdiction over divorce cases.[13] When the general statute of limitation was rewritten in 1878, the Revisors said specifically that it was to apply to all actions including those which were formerly cognizable only in a court of chancery. Thus a divorce action, which was cognizable only in a court of chancery prior to 1849, was clearly within the intent of the legislators when they rewrote the general statute of limitation after having given statutory jurisdiction over divorce actions to the circuit courts.

In view of the fact that divorce actions traditionally have been brought in courts of equity, the question arises as to why the doctrine of laches was not invoked in the principal case.[14] This may be because it is doubtful that the action could have been barred under the doctrine. One textwriter says of the doctrine of laches that it is an instance of the exercise of the reserved power of equity to withhold relief otherwise regularly given where in the particular case the granting of such relief would be unfair and unjust.[15] The essential aspect of laches is that where, during a lapse of time, there has been a change of position of one of the parties such as would make the granting of relief work an unjust hardship, the court of equity will not grant that relief. In the principal case the defendant was committed to an asylum for the insane and, being in that condition, the granting of the divorce would hardly have imposed upon her an unjust hardship. Therefore, if the action were to be barred at all in Wisconsin it would have to be barred

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[10] Garris v. Garris, 188 N.C. 321, 124 S.E. 314 (1924).
[11] Guerin v. Guerin, 217 N.Y.S. 1, 127 Misc. 745 (1926); Hunt v. Hunt, 273 N.Y.S. 194, 152 Misc. 364 (1934); Rothman v. Rothman, 67 N.Y.S.(2d) 96 (1946).
[12] Fn. 5, supra.
[13] Wis. Stat. (1849), Chap. 79, sec. 8.
[14] "It seems that while actions for divorce are not barred by the general statutes of limitation, still laches in suing for relief may justify the court in denying relief and dismissing the proceedings. . . ." 9 R.C.L. 169.
[15] Walsh, *A Treatise on Equity*, Callaghan and Company, (National Textbook Series, 1930).

strictly because of the lapse of time. In view of the fact that the doctrine of laches probably would not apply, the only bar based purely on lapse of time applicable to divorce actions would be the general statute of limitation.

Up to this point this discussion has been confined to the subject of barring divorce actions solely on the basis of general statutes of limitation. To avoid confusion it should be pointed out that statutes of a slightly different type have been held to bar such actions in a number of cases. These statutes, however, are not general but are designed to limit the time within which divorce actions based upon certain grounds such as cruelty and adultery may be brought. As such they are specific statutes of limitation and operate the same as do other specific statutes. These statutes operate absolutely, leaving no discretion in the court, and they need not be pleaded in defense.[16] Wisconsin does not have such legislation and hence the only statute that could possibly be applied in the principal case is the general one, upon which the demurrer was based.

Whether or not annulment actions will be treated in the same manner as actions for divorce is doubtful. Although no cases have been found on the subject, it would seem that there is no reason why the doctrine of the principal case should not be extended to include some actions for annulment. Where a plaintiff has not ratified a voidable marriage and yet has failed to bring an action for a period in excess of ten years, it seems reasonable that he, too, would be barred from bringing his action for annulment. On the other hand, where the marriage was void ab initio the defendant will probably not be allowed, by pleading the general statute, to render that valid which was void from its inception.

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[16] Fn. 2, supra.