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Further Concerning Illicit Cohabitation of Parties as Affecting Contracts Made Between Them - Lynch v. Rogers

FURTHER CONCERNING ILLICIT COHABITATION OF PARTIES AS AFFECTING CONTRACTS MADE BETWEEN THEM

Lynch v. Rogers[1]

Plaintiff-appellee brought an action in assumpsit against defendant-appellant, administrator, for domestic services rendered by the plaintiff to decedent during his life. At the trial the defendant offered to prove that, during the course of plaintiff's employment, she had borne an illegitimate child by the deceased. The argument was advanced, therefore, that the contract was based on immoral consideration, and so should not be enforced. The Court of Appeals held, in affirming the trial court, that if the bargain was based on lawful consideration at the outset, and did not at that time contemplate the illicit relationship, the fact that such relationship subsequently ensued did not prevent recovery.

For the second time in recent years the Court of Appeals has been called upon to determine the effect of illicit cohabitation between two parties as affecting contracts made between them.[2] Prior to the present case, the leading authority in Maryland was the equity case of *Baxter v. Wilburn*.[3] There the plaintiff endeavored to secure spe-

[1] Lynch v. Rogers, 177 Md. 478, 10 A. (2d) 619 (1940).
[2] Baxter v. Wilburn, 172 Md. 160, 190 A. 773 (1937), noted (1938) 2 Md. L. Rev. 291.
[3] *Ibid.*

cific performance of a contract which was based entirely upon immoral consideration. The Court said:

> "Contracts based upon the consideration either past or future of illicit sexual intercourse, or stipulating for such future intercourse, or in any manner promoting or furnishing opportunity for unlawful cohabitation are void and unenforceable in equity."[4]

This statement would seem to establish the Maryland rule in equity, that contracts based upon either past, present, or future illicit cohabitation cannot be enforced.[5]

The present case, *Lynch v. Rogers,* being at law, opens the question of whether the Court of Appeals will follow the above mentioned equity rule in a case at law. This same question has been answered in the negative in some of the other state courts in this country, and by some of the text writers. These decisions and writers maintain that while contracts made either on present, or in contemplation of future illicit relations are void, yet contracts made in consideration of past cohabitation are valid.

The great weight of American authority holds that contracts based on nothing more than present cohabitation, or an agreement to cohabit in the future are void,[6] and this seems to be true even though the contracts were solemnized by the presence of a seal. The reason for these decisions is obvious. Contracts which require the parties thereto to do acts contravening public morality are repugnant to the law, and it follows, therefore, that the law will do nothing to aid these parties in enforcing their oblgiations.

A different philosophy is adopted, however, by a few courts when the question is not present or future cohabitation as consideration for a contract, but rather past illicit relationship as consideration. These courts seem to hold that such consideration is good and valid, and that the con-

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[4] *Ibid.*, 172 Md. 162.

[5] For further decisions of the Court of Appeals on contracts based on illegal consideration see Gotwalt v. Neal, 25 Md. 434 (1866); Lester v. Howard Bank, 33 Md. 558 (1871); Harrison v. Harrison, 160 Md. 378, 153 A. 58 (1930). See also the discussion in 2 Md. L. Rev. 291, *et seq.*

[6] Smith v. DuBose, 78 Ga. 413, 3 S. E. 309, 6 A. S. R. 260 (1887); Brown v. Tuttle, 80 Me. 162, 13 A. 583 (1888); Massey v. Wallace, 32 S. C. 149, 10 S. E. 937 (1890); Harrison v. Northwestern Mutual Life Ins. Co., 80 Vt. 148, 66 A. 787 (1907); Case v. Monk, 7 Ala. App. 419, 62 So. 268 (1913); McDonald v. Born, 135 Mich. 177, 97 N. W. 693 (1903); Randolph v. Stokes, 125 App. Div. 679, 110 N. Y. S. 20 (1908); Dougherty v. Seymour, 16 Col. 289, 26 P. 823 (1891); Harlow v. LaClair, 82 N. H. 506, 136 A. 128, 50 A. L. R. 973 (1927).

tracts based on such consideration should be enforced.[7] The reason for this point of view[8] is well stated in the following excerpt from an opinion of the South Carolina court, in the case of *Cusack v. White:*

> "The reason is, because where a woman has been seduced, her reputation is destroyed and herself exiled from the company and society of all the respectable part of the community, and hence she is entitled to some compensation or reparation for the injury from the author of her ruin."[9]

It can be seen from this statement that there are two objections to the point of view that past cohabitation is good consideration for a present contract. The first is the fact that past consideration alone is never enough to support a simple contract promise, and the second is that, in the majority of our jurisdictions, an immoral consideration will not support a contract.

An examination of the majority of the cases cited as authority for the view that past cohabitation represents good consideration will reveal that in almost every instance there was something more by way of consideration than the mere fact of cohabitation.[10] The question has come up often in an action on a bond,[11] and it has been held that the sealed instrument imputed consideration to the agreement which would not be rebutted by showing that the real consideration in fact was illicit cohabitation.[12] This is precisely the view taken by the leading English case on

[7] Smith v. Du Bose, *supra* n. 6; Burton v. Belvin, 142 N. C. 151, 55 S. E. 71 (1906); Burgen v. Straughan, 30 Ky. 583 (1832); Wyant v. Lesher, 23 Penn. 338 (1854); Denton v. English, 11 S. C. L. 581, 10 Am. Dec. 638 (1820); Brown v. Kinsey, 81 N. C. 245 (1879).

[8] "Although in a few jurisdictions it would seem that contracts in consideration of past illicit relations are against public policy, generally such contracts are commended and are neither void or immoral, but instead are legal and valid, and this is especially true where they are supported by other considerations." 17 C. J. S. 649.

[9] Cusack v. White, 2 Mill. (S. C.) 279, 284, 12 Am. Dec. 669, 672 (1818).

[10] It should be remembered, however, that if the illicit intercourse took the form of a seduction, no consideration would move from the woman in agreeing not to sue her paramour for that tort, because she could not be the proper party plaintiff.

[11] Apparently, recovery was once allowed to a woman on a bond given to her as a "premium pudicitiae". These cases arose where a woman of once immoral character agreed to live a virtuous life in the future. See Clarke v. Periam, 2 Atk. 333 (1741). But similar agreements in the form of simple contracts were not enforced. Binnington v. Wallis, 4 Barn. and Ald. 650 (1821).

[12] See Brown v. Kinsey, 81 N. C. 245 (1879), where it was decided that the fact that a bond is executed in consideration of past cohabitation does not affect its validity. For similar decisions see Denton v. English, 11 S. C. L. 581, 10 Am. Dec. 638 (1820); Massey v. Wallace, 32 S. C. 149, 10 S. E. 937 (1890).

this subject, one that has been cited many times as authority for the American view.[13]

A great number of our American law courts have adopted the view that past cohabitation will not, in itself, be good consideration to support a present contract.[14] This view is supported by Professor Williston, in his treatise on Contracts.[15] Also in the light of the fact that ordinarily, neither moral obligation, nor consideration that is wholly past, will support a present contract, there would seem clearly to be no basis for contract relief simply because the past consideration was illicit cohabitation.[16]

The one class of cases remaining for analysis are those where the agreement, at the outset, is based on otherwise good consideration, but subsequently the parties engage in illicit cohabitation. This type of situation is by no means novel to the courts, and in such instances the great weight of authority is that the mere fact that the parties to an agreement are maintaining illicit sexual relations does not render the agreement invalid.[17] The reasoning behind these decisions lies in the fact that though the conduct of the parties may be immoral, yet this immorality imposes no legal inhibition upon them in making contracts which are otherwise based on good and valid consideration. Although this legal problem may arise in a number of different ways, one of the most common instances is an action brought by a domestic servant against her employer on the contract of hire. This was exactly the situation in *Lynch v. Rogers,* and, during the course of the decision, the Court of Appeals clearly layed down the rule that in such instances Maryland is in accord with the majority view.[18]

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[13] Turner v. Vaughan, 2 Wilson 339 (1767).

[14] Baker v. Couch, 74 Col. 380, 221 P. 1089 (1923); In re Green (D. C. N. Y.) 45 F. (2d) 428 (1930); Hagen v. MacVeagh, 288 Ill. App. 1, 5 N. E. (2d) 577 (1936); Swartz v. Bachman, 267 Pa. 185, 110 A. 260 (1920); Clark's Adm'r v. Callahan, 216 Ky. 674, 288 S. W. 301 (1926).

[15] 6 WILLISTON, CONTRACTS (Rev. ed. 1938) 4940, Sec. 1745.

[16] The reasoning of the South Carolina Court, in Cusack v. White, *supra* n. 9, may be a good argument for establishing relief for the injured female regardless of contract, but it does not account for the damage its result would do to the normal contract rules, if past cohabitation alone is accepted as consideration.

[17] Emmerson v. Botkins, 26 Okla. 218, 109 P. 531, 29 L. R. A. (N. S.) 786, 138 Am. St. Rep. 953 (1910); Potter v. Gracie, 58 Ala. 303, 29 Am. Rep. 748 (1887); Yowell v. Bottom, 175 Ky. 635, 194 S. W. 768 (1917); Stewart v. Waterman, 97 Vt. 408, 123 A. 524 (1924).

[18] The Court, at 177 Md. 489, quoted the following rule as advocated by the RESTATEMENT OF THE LAW OF CONTRACTS:

> "A employs B as a domestic servant. Subsequently A seduces B and continues to have sexual intercourse with her. The employment is not therefore rendered illegal and B can recover wages." 2 RESTATEMENT, CONTRACTS, 1100, Sec. 589.

An analogous situation to the one under discussion arises in those cases where an action is brought upon a breach of promise to marry. It has been uniformly held that a promise to marry, based on the consideration that the woman would submit to illicit sexual relations, is void, and no recovery can be had for its breach.[19] If it is apparent, however, that the promise was based on otherwise good consideration, the mere fact that the parties had illicit relations, either before or after the promise was made, will not bar the plaintiff from relief on an action for the breach of that promise.[20]

It has been suggested by some writers, however, that when the courts are called upon to rule on a contract where the parties thereto are living in an immoral state, the presence of such a relationship should call for the utmost scrutiny on the part of the courts in passing upon the validity of the agreement.[21] The reason for this position is that in many instances the type or class of the contract in question is such that would spring naturally from the existence of immoral relations. It is felt, therefore, that clear and convincing proof of the otherwise good consideration must be shown to neutralize any unfavorable inferences the court or the public might entertain from the character of the agreement. But this suggestion does not go so far as to break down any of the well established rules of evidence. The Maryland Court of Appeals recognized this fact in *Lynch v. Rogers,* when it refused to allow mere hearsay evidence or general reputation to establish the fact that the consideration, at the outset, was present or future illicit cohabitation.

It is evident, therefore, that in so far as the question of illicit cohabitation as consideration for a contract has been presented to the Maryland law courts, the decisions are clearly in accord with the weight of authority. However, the question of whether the general rule as laid down

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[19] Edmonds v. Hughes, 115 Ky. 561, 74 S. W. 283 (1903); Hanks v. Naglee, 54 Cal. 52, 35 A. R. 37 (1880); Olgium v. Apodaco, 228 S. W. 166 (1921); Gagush v. Hoeft, 198 Mich. 263, 164 N. W. 400 (1917); Burke v. Shaver, 92 Va. 345, 23 S. E. 749 (1895); Connolly v. Bollinger, 67 W. Va. 30, 67 S. E. 71 (1910).

[20] Thorn v. Tetrick, 93 W. Va. 455, 116 S. E. 762 (1923); Klitzke v. Davis, 172 Wisc. 425, 179 N. W. 586 (1920). Also see Edwin v. Jones, 192 Mo. App. 326, 180 S. W. 428 (1915), where the court held that even though defendant had promised to marry plaintiff on the expressed consideration that she would submit to sexual intercourse, yet if afterwards, while both were unmarried, there was an understanding independent of the act of intercourse, that they would marry each other, the plaintiff could recover on breach of promise.

[21] 12 Am. Jur. 675.

in *Baxter v. Wilburn*, to the effect that neither past nor future illicit sexual intercourse will be considered valid consideration for a contract, will be followed by our law courts is still unanswered. It would seem, however, that both by the weight of authority and by the weight of good reasoning, the rule as there laid down is sound.