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"Clean Hands" Not Required for Bigamy Annulment - Townsend v. Morgan, alias Townsend, et.al.

"CLEAN HANDS" NOT REQUIRED FOR BIGAMY ANNULMENT

Townsend v. Morgan, alias Townsend, et al.[1]

In this case the plaintiff—appellant—husband brought a suit for annulment of marriage, alleging bigamy, against defendant — appellee — wife. There was joined as a co-defendant a building association, for the purpose of the further relief of clarifying title to certain real estate in-

[1] 63 A. 2d 743 (Md. 1949).

volved in the situation.[2] The plaintiff had been married before, and had last heard from his absent first wife some nine or ten years before the marriage to the defendant. Whether he had believed his first wife to be either dead or divorced is obscure, but she was still alive and not yet divorced[3] from him at the time of the second marriage to the defendant. The trial court denied the annulment on the ground that the "clean hands" doctrine deprived the plaintiff of equitable relief. On appeal, the Court of Appeals reversed the trial court and ordered the granting of the annulment and other relief.[4]

This note is being written in terms of the law as it stood at the time of the decision of the case by the Court of Appeals. Since then, the Legislature has passed a statute[5] purporting to preserve the legitimacy of the issue of marriages which are annulled. What effect this statute will have remains to be seen, and it will be subsequently discussed in the REVIEW in proper course. An offhand judgment would be that the statute should have no effect on the specific doctrine of this case, although it will probably have some slight impact on the matter of whether annulments are to be granted.

The opinion of the Court surveyed very thoroughly the complicated history of annulment procedures in Maryland, which had culminated in the then latest revisions by the Legislature of 1947. This history and the latest revisions have also been treated in the REVIEW in one of the issues published since that Legislature.[6]

It is interesting to note that the case here was instituted against the defendant wife both by her maiden name and the married name. There seems to be no set rule about this,

[2] Plaintiff also sought partition of the property held by him and his second wife as tenants by the entireties, and so he joined as co-defendant a building association which held the mortgage on the property, for the purpose of clearing the whole matter up.

[3] The plaintiff himself obtained a divorce from his first wife after the time of the marriage to the second. He did this because of doubt as to the title to the property, and he obtained it in the interim between taking the title to the property in the name of himself and his second wife and later having the ground rent also put in their names as tenants by the entireties. Of course, this divorce was not in time to save the validity of the second marriage, and it is but an accident in the case and in this discussion of it.

[4] A minor aspect of the case also rejected the defendant's contention that the bill was multifarious, and it was ruled that it was proper to join both an annulment suit and a bill for the partition of the property. It is not proposed in this note to give formal treatment to this aspect of the case, although the REVIEW may treat the point later in another connection, in the course of contrasting this case with certain other recent cases involving the secondary point.

[5] Md. Laws 1949, Ch. 29 adding Md. Code Supp. (1947) Art. 16, Sec. 41B.

[6] Comment, *Annulment Jurisdiction Clarified* (1948) 9 Md. L. Rev. 63.

and some Maryland annulment cases have been docketed in the married name and some in the maiden name of the wife. It seems that, regardless of the rule, the practice adopted here is the better one, in that it makes for successful searching of the records whenever it is sought to trace the pedigree of one whose marriage may have been annulled.

The Court pointed out that the clean hands doctrine cannot be followed when the result would be to sustain a relation which is denounced by a statute or is contrary to public policy. In annulment proceedings for bigamy, the interest of the State is paramount to the grievances of the parties, and the interests of unborn children may be affected, and consequently they felt that this was no proper place for the clean hands doctrine. That would be proper, however, if it were an ordinary contract, where one contracting party who had acted unfairly was seeking the aid of a court of Equity in the matter.

The Court cited the *Simmons* case[7] from the District of Columbia, which is perhaps one of the leading ones on the matter; and as well another Maryland case[8] where the illicit relationship between the parties made no difference, and it was held that the mistress could maintain a bill to remove the forged deed as a cloud on prior acquired title, notwithstanding the illicit relationship. In fact, it should be noted that, in that Maryland case, the situation was almost equivalent to that of the principal one now being noted. The impediment in question was forgery of the deed, which the Court pointed out made the transaction a complete nullity, which did not need a proceeding so to declare, although one was desirable, hence "clean hands" would not be a requirement for the relief sought, inasmuch as the whole transaction (as in the principal case, the bigamous marriage) could be attacked collaterally. Furthermore, the Court pointed out that a bigamous marriage is void, not voidable, and cannot be ratified by continuing to live together after the time as of which the parties become eligible to marry each other. Nor, lacking the institution of common law marriage in Maryland, can a subsequent and valid marriage for the first time be spelled out by their agreeing to continue to live together after the impediment is removed. Nothing short of a sufficient

[7] Simmons v. Simmons, 19 F. 2d 690, 54 A. L. R. 75, 57 App. D. C. 216 (1927).

[8] Maskell v. Hill, 55 A. 2d 842 (Md. 1947).

new ceremony after the time of eligibility will take away the voidness of a bigamous marriage.

The Court also emphasized that the fact that the husband was immune from criminal prosecution for the crime of bigamy,[9] because his first wife had been absent more than seven years did not save the civil validity of his marriage to his second wife, which was nevertheless void if the first wife was still alive and undivorced at the time of the second marriage. This serves to emphasize a point often overlooked, that there is no necessary relation between the criminal punishability for participating in a marriage and the end product of civil validity of the status resulting from the ceremony. Conversely, there are instances where persons may be criminally punishable and yet the marriage will be totally valid and be neither void nor voidable.[10]

With reference to the clean hands argument, it should be pointed out that the plaintiff's bill of complaint in effect did allege that he had clean hands. It alleged that he was mistaken in his belief that he could lawfully marry the defendant at that time, and it argued that he did not seek immoral relations, and that as soon as he discovered doubts in the matter he himself obtained a divorce from the first wife. Be that as it may, the case was heard on demurrer in the trial court on the grounds of clean hands, and the trial court denied the relief, and erroneously accepted the doctrine that unclean hands, if so, would disentitle to the annulment. The Court of Appeals reversed, and, by its language, indicates that even one who is knowingly a bigamist may nevertheless seek an annulment despite the uncleanness of his hands.

Thus the Court put the granting of the annulment on the ground that the impediment of bigamy, when proved, makes the marriage totally void so that no proceeding is necessary in order to annul it. It should be permitted each partner, even though there was knowledge of bigamy at the time, to claim a ruling in the matter. This points out that the nature of an annulment of a totally void marriage is something different from an annulment of a merely voidable one.[11] In the former case the annulment is merely a declaratory ruling of an impediment, which can be asserted for the first time collaterally in any case where

[9] Md. Code (1939) Art. 27, Sec. 19.

[10] *E.g.*, violation of the marriage age statute, as is brought out in Comment, *infra*, n. 26.

[11] In general on this, see Strahorn, *Void and Voidable Marriages in Maryland and their Annulment* (1938) 2 Md. L. Rev. 211.

the question is in focus. In the latter situation an annulment is a necessary step in order to permit the defect in the marriage to be asserted in any other connection.

It is well that this case forces us to realize the juridical difference between the two types of annulments, those for void marriages, and those for voidable marriages. It forces thinking about the numerous problems held in common by all declaratory procedures, be they general declaratory procedures under the Uniform Act, or the older and more specific procedures which are in effect declaratory procedures, such as bills to impress a trust, *a mensa* divorce, quieting of title, and the like. The REVIEW has discussed in another connection certain of the common qualities of declaratory procedures, particularly the territorial jurisdiction one, in noting the case of *Ortman v. Coane*,[12] a case involving a bill to impress a trust on corporate stock.

There are three procedures in Maryland for annulling a bigamous marriage, bill in equity for annulment,[13] bill for divorce because void *ab initio*,[14] and incidentally in connection with a criminal conviction of one or both of the parties of bigamy.[15] The third one would not have been available in this case, because the husband waited more than the seven-year period beyond which one may marry without danger of criminal prosecution. But, despite this, his marriage is civilly void, and it can be otherwise annulled or collaterally attacked when the problem arises. The mere fact that certain considerations exempt him from criminal guilt does not save the civil validity of the marriage which is in question here.

Then, too, it might be that he would have been immune from guilt, even within seven years, if he had sufficient *bona fide* belief in his wife's being dead or divorced. This would depend upon whether Maryland accepts the English rule of the *Tolson* case[16] or the prevailing American rule to the contrary. The American rule does not allow a mistake of fact within seven years to be a defense.[17] Furthermore, the criminal procedure would not be available for a bigamous marriage which took place outside of Maryland, because criminal jurisdiction to try the case would be lack-

[12] Ortman v. Coane, 181 Md. 596, 31 A. 2d 320, 145 A. L. R. 1388 (1943), noted in Note, *Action to Impress Trust on Stock is in Personam* (1944) 8 Md. L. Rev. 289.

[13] Md. Code Supp. (1947) Art. 16, Sec. 38.

[14] Md. Code Supp. (1947) Art. 16, Sec. 40.

[15] Md. Code Supp. (1947) Art. 62, Sec. 16.

[16] Regina v. Tolson, 2 Q. B. D. 168 (1889).

[17] Geisselman v. Geisselman, 134 Md. 453, 107 A. 185 (1919) which by *dictum* indicates a view *contra* the English rule.

ing. Then, it would have to be brought as an equitable proceeding, or a bill for divorce, based on the residence of either party here at the time of the divorce proceedings.

It can be speculated as to how far the doctrine of this case, that unclean hands are no bar, will be extended to annulments for the other possible impediments that can be litigated. No doubt it will be extended to lack of ceremony, miscegenation, adjudicated insanity, and perhaps apparent lack of marital intention, which are the other "void" grounds.[18]

Whether it will be extended to the voidable impediments is another matter. Certainly it should not apply to those that involve the contract elements,[19] *i.e.*, intent, insanity,[20] intoxication, fraud, and duress. The extant law of these indicates that only the aggrieved or injured party can seek annulment for these reasons, so that the party who has unclean hands, the other party in the picture, should not be allowed to litigate. It would be hard to imagine that one who secretly intended not to marry where the other had so intended, or that one who knowingly married an insane person or a drunken person, or who perpetrated the fraud, or inflicted the duress, should be allowed to seek annulment for these reasons. The answer seems clear about that.

On the other hand, for the voidable impediment of relationship it would seem that clean hands should not be necessary. This is for the reason that when the courts[21] declare such marriages to be only voidable, they must have realized that in practically every situation, save the very unlikely one of ignorance of being related, both parties are aware that they are violating the law when they marry within too close degree.

For the impediment of impotence, which is probably only a voidable one, as the only doctrine about it in Maryland is that it is a divorce ground,[22] the answer seems ob-

[18] This classification accepts the ideas presented in the article cited, *supra*, n. 11, 2 Md. L. Rev. 211, 224, 231, 237-8.

[19] *Ibid.*, 236 *et seq.*

[20] Consider Hoadley v. Hoadley, 244 N. Y. 424, 155 N. E. 728, 51 A. L. R. 844 (1927), which held that the sane spouse, even where he had been ignorant of the contractual insanity of the defendant, could not seek annulment for that cause.

[21] Harrison v. State, Use of Harrison, 22 Md. 468 (1864), held that a marriage of uncle and niece, performed in violation of Maryland law, was at worst only voidable. Contrast Fensterwald v. Burke, 129 Md. 131, 98 A. 358, 3 A. L. R. 1562 (1916), which recognized the full validity of such a marriage, valid where performed in another State, by an unusual exception for a specified religion.

[22] Md. Code Supp. (1947) Art. 16, Sec. 40.

scure. The statute does not make it clear whether it means to permit the impotent spouse to be plaintiff and to be allowed to assert his or her own impotence. The only Maryland case[23] has been one brought against the impotent party by the other spouse. There is doctrine from another state[24] that the impotent spouse may not be party plaintiff for this reason, unless a statute so permits. Of course, a difference exists between one who was unaware of his or her impotence and seeks to be plaintiff, and one who, knowing of the impotence, married the defendant and later seeks annulment for that reason. In this latter situation it would seem more appropriate to apply the clean hands doctrine than in the former, other things equal.[25]

For the impediment of age, special considerations might obtain in view of the fact that opinion[26] has it that violation of the age statutes makes the marriage neither void nor voidable anyhow, and that the common law rule of voidness under seven and voidable from seven to twelve (female) or fourteen (male) is the rule in force, although no proceeding was necessary for avoidance under the common law rule. Thus it would seem that the doctrine of this case would apply to both void and voidable child marriages.

The rule of the case seems eminently sound, and it serves to clarify the law, and further to accentuate the distinction between totally void and merely voidable marriages, an important distinction in Maryland law. Space does not permit comparison of the Maryland ideas about the rule with those of other states where different considerations obtain. For instance, some states have a peculiar doctrine that a marriage is void from and after the time it is annulled, whereas the Maryland doctrine seems to be that a void marriage is void from the beginning, and the annulling of a voidable marriage has the effect of declaring that it had been void from the beginning, although the annulment is a necessary step so to rule.

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[23] J. G. v. H. G., 33 Md. 401 (1870).

[24] Anon. v. Anon., 69 Misc. 489, 126 N. Y. S. 149 (1910).

[25] The question of any difference between a plaintiff who can assert ignorance of, although not complicity in the impediment asserted, and one who clearly has "unclean hands" is little likely to arise in connection with the "voidable" impediments. The *Hoadley* case, *supra*, n. 20, denied annulment for insanity to one in the former situation. But for insanity, the question of the distinction is little likely to arise within the framework of the voidable impediments.

[26] See Comment, *A Query About the New Marriage Age Law* (1939), 3 Md. L. Rev. 340, discussing what is now Md. Code Supp. (1947) Art. 62, Sec. 7.