

NOTES

THE APPLICATION OF THE "CLEAN HANDS" DOCTRINE IN ANNULMENT SUITS WHERE THERE HAS BEEN A PRE-EXISTING VALID MARRIAGE—A recent line of cases has called attention to the change in attitude by the courts of New Jersey as to their requirement of "clean hands" on the part of a petitioner who seeks the annulment of a marriage on the ground that there has been a pre-existing valid marriage by one of the parties. The turning point in the New Jersey cases is generally said to be the decision in *Tyll v. Keller*,¹ where the Court of Errors and Appeals denied relief to a petitioner who failed to prove by a preponderance of the evidence that he did not know at the time of the marriage that the defendant had a legal husband still living. Before this decision, it may be safely said that New Jersey courts did not require the petitioner seeking an annulment to come into the Court of Chancery with spotless hands, except perhaps where he or she was the party still bound by a prior lawful union. In one such case, where the petitioner had committed bigamy in contracting the marriage he now sought to dissolve, a decree of annulment had been refused.² The most extreme advance in the present line of cases was reached in a very recent decision of an advisory master,³ where a petitioner, who was innocent of his spouse's then existing valid marriage at the time of the ceremony, but learned the facts after two years and continued to live with his wife "off and on" for approximately three years more before commencing annulment proceedings, was denied relief.

In analyzing the course of the annulment decisions in New Jersey where a pre-existing valid marriage is asserted as the ground therefor, the nature of the proceeding must be constantly kept in mind. It is purely a proceeding *quia timet*,⁴ for the parties to such a second marriage are incapable of entering into a valid contract of marriage when one or both has a legal spouse still living, and any such attempted union is void at the outset without the requirement of a judicial decree to that effect. Distinction must be made between absolutely void marriages and marriages which are only voidable and may be annulled.

To understand the nature and extent of the jurisdiction of the Court of Chancery over annulment of marriages, the history of the proceeding must be briefly noted. During the early days of English judicial history, jurisdiction for the annulment of marriages reposed in the ecclesiastical courts, marriage being considered a divine matter about which the temporal courts could not be informed. Divorce for subsequent cause was possible only by Act of Parliament. The temporal courts would recognize absolute nullities and treat such marriages as void in collateral proceedings, on the general legal theory that there

¹94 N.J. Eq. 427 (E & A 1922).

²Rooney v. Rooney, 54 N.J. Eq. 231 (Ch. 1896).

³Ancrum v. Ancrum, 9 N.J. Misc. 795, 156 Atl. 22 (Ch. 1931).

⁴BIDDLE, N. J. DIVORCE PRACTICE (2d Ed. 1912) 48.

had been no capacity to contract, but the ecclesiastical courts alone could declare such marriages void in proceedings brought directly for that purpose. Moreover, the ecclesiastical courts also could annul a matrimonial union where a "canonical impediment" (*e.g.* fraud, nonage) existed, *i.e.* where the marriage was only voidable, but the temporal courts would not even recognize such annulments.⁵ About the middle of the last century, the annulment jurisdiction of the ecclesiastical courts was transferred to a new court called the "court for divorce and matrimonial causes".⁶

Jurisdiction for annulment based upon causes affecting the essentials of the marriage as thus developed in this new court and recognized by the English common law, has been held in the leading case of *Carris v. Carris*⁷ to have developed upon the Court of Chancery of New Jersey even without any further legislation. Beside the historical reasons therefor, the court in this case⁸ held that justification for such jurisdiction was also to be found in the inherent power of a Court of Chancery to annul any contract for fraud in its inception in respect to some essential of the contract. The court there emphasized the delicacy of the question, the peculiarity of the relationship and contract involved and the necessary part which public policy, good morals and the interest of the state must play in annulling any contract which cannot be dissolved by mere act of the parties.

The considerations thus advanced in the *Carris* case⁹ seem to have formed the guide and keynote for New Jersey courts in annulment cases up until the almost unexplainable decision in *Tyll v. Keller*.¹⁰ Except in one case where the bigamous party himself sought the annulment on the ground of prior existing valid marriage,¹¹ "clean hands" on the part of the petitioner for annulment on the ground of prior existing valid marriage were not required by the New Jersey courts.¹² The English authorities are clear that no such equitable defense or requirement was possible or necessary before the ecclesiastical courts¹³ from which tribunals the Court of Chancery ultimately derived its jurisdiction in this respect.

The reasoning which was followed before 1922 in rejecting the applicability of the "clean hands" doctrine to such cases seems sound and commendable. The opinion of Vice-Chancellor Learning in *Davis v. Green*¹⁴ is especially noteworthy in this regard. It is to be

⁵ See L. R. A. 1916 C 690.

⁶ 20 & 21 Victoria, Chap. 85.

⁷ 24 N.J. Eq. 516 (E & A 1873).

⁸ *Carris v. Carris*, *supra* note 7.

⁹ 24 N.J. Eq. 516 (E & A 1873).

¹⁰ *Supra*, note 1.

¹¹ *Rooney v. Rooney*, *supra* note 2.

¹² *Dare v. Dare*, 52 N.J. Eq. 195 (Ch. 1893); *Freda v. Bergman*, 77 N.J. Eq. 46 (Ch. 1910); *Davis v. Green*, 91 N.J. Eq. 17 (Ch. 1919). But see *Schaffer v. Krestovnikow* 88 N.J. Eq. 192 (Ch. 1917). See *Gibbs v. Gibbs* 92 N.J. Eq. 542 (Ch. 1921).

¹³ *Miles v. Chilton*, 1 Rob. Ecc. 684; *Andrews v. Ross*, 14 Pro. Div. 15.

¹⁴ 91 N.J. Eq. 17 (Ch. 1919).

noted that in this case the court granted a decree of annulment to a bigamous petitioner, in direct contradistinction to the *Rooney* case.¹⁵ The court here emphasized the fact that matrimonial unions attempted where one or both of the parties had a pre-existing legal marriage were void without the aid of judicial decree and that a decree of annulment is sought merely to establish for all time the status of the parties.

Without a judicial decree of annulment being granted when sought, the lapse of time and the loss of evidence may render it increasingly difficult or impossible to ascertain the true status of the parties at some later date. The remarriage of the petitioner after the divorce or decease of the present lawful spouse, or the remarriage of the defendant, may expose to grave doubts the validity of a later lawful marriage and the legitimacy of lawful children, and consequently affect property and personal rights for generations to come. In fact to refuse a decree of annulment is almost tantamount to the court recognizing, for many practical purposes, the possibility of a person having two legal wives or husbands at the same time. Certainly it seems that the application of an equitable maxim must be subservient to important considerations of public policy.¹⁶ When the defendant is innocent of any wrong doing the parties are not in *pari delicto* and the "clean hands" maxim should clearly have no application.

The Court of Errors and Appeals seems to have momentarily lost sight of these considerations and consequences when it changed the whole course of New Jersey decisions by the unfortunate result it reached in *Tyll v. Keller*.¹⁷ The court there bound itself to the strict application of the maxim by a decision on a question of burden of proof and decided the issue without citation of relevant authority or reference to any of the well-reasoned preceding cases. It is to be noted that the petitioner was not guilty of bigamy in contracting the union in question since he had never been married before, but the court by adding the further requirement of proof by the petitioner of his innocence and ignorance of any prior existing lawful marriage by the defendant at the time of the union sought to be annulled distorted the entire earlier line of New Jersey authority. The court held that this petitioner had not sustained this burden and consequently his action must fail. This requirement of proof has since been insisted upon in all such cases.¹⁸ This rule of proof has been adopted apparently as a rule of substantive law in such situations and the "clean hands"

¹⁵ *Supra*, note 2.

¹⁶ 2 Pom. Eq. Juris, Sec. 941.

It should be noted that the considerations of public policy have not been considered strong enough to prevent the application of the clean hands doctrine where annulment was sought of marriages which were only voidable. *Gibbs v. Gibbs*, 92 N.J. Eq. 542 (Ch. 1921).

¹⁷ 94 N.J. Eq. 427 (E & A 1922).

¹⁸ *Fromm v. Huhn*; 95 N.J. Eq. 729 (E & A 1923); *Keller v. Linsenmeyer*, 101 N.J. Eq. 664, 676 (Ch. 1927); *Vanaman v. Vanaman*, 103 N.J. Eq. 400, 403 (Ch. 1928).

doctrine has since been followed,¹⁹ although in two cases different Vice-Chancellors have questioned the advisability of the rule and the soundness of its basis.²⁰ The recent case of *Ancrum v. Ancrum*²¹ seems to require one further step in the petitioner's proof. While the petitioner there was himself capable of contracting a lawful marriage and was ignorant of the defendant's legal disability at the time of the latter's second union, it was further required that the petitioner show that he remained ignorant and spotless in his matrimonial conduct, up to the time of the bringing of the annulment proceeding. The decision is probably excusable on its facts, and the Advisory Master felt constrained to follow *Tyll v. Keller* on the general proposition, but, as has already been pointed out, this latter decision appears to be unfortunate to say the least.

The annulment statute itself throws practically no light on the change in point of view of our court. Its language is in substance the same as at the time when *Davis v. Green*²³ was decided,²⁴ and the various decisions have made no important reference thereto.

The weight of authority in other jurisdictions is clearly in line with the earlier trend of the New Jersey cases and the "clean hands" and "*pari delicto*" doctrines have been uniformly held inapplicable to this situation, where the party seeking relief knew of the prior marriage but was not himself disqualified to contract a lawful union.²⁵ In one jurisdiction relief by annulment is restricted by statute to allow relief only to the innocent or injured party,²⁶ and in two other states

¹⁹ *Dolan v. Wagner*, 95 N.J. Eq. 1 (Ch. 1923); supplemental opinion 95 N.J. Eq. 8 (Ch. 1923); supplemental opinion affirmed, 96 N.J. Eq. 298 (E & A 1924). *Ancrum v. Ancrum*, *supra*, note 3.

²⁰ *White v. Kessler*, 101 N.J. Eq. 369 (Ch. 1927), annulment refused, court feeling bound by *Tyll v. Keller*.

Penello v. Penello, 97 N.J. Eq. 921 (Ch. 1925), annulment refused on ground of lack of domicile but the Vice-Chancellor declared his opinion that the petitioner's conduct in marrying a second time in the honest belief that a former valid marriage was void should not be sufficient to bar her annulment action.

²¹ *Supra*, note 19.

²² *Supra*, note 17.

²³ *Supra*, note 14.

²⁴ "1. Causes for decree of nullity. Decrees of Nullity of marriage may be rendered in all cases where: 1. Other wife or husband living, either of the parties has another wife or husband living at the time of the second or other marriage * * *" Laws of 1931, Chap. 311. This part of the statute is the same as originally enacted by P. L. 1907, P. 475.

²⁵ *Momie v. Contagian*, 45 La. Ann. 419, 12 So. 623 (1893); *Hahn v. Hahn*, 104 Wash. 227, 176 Pac. 3 (1917); *Simmons v. Simmons* 19 F(2d) 690 (D. of Col. 1927); *Pettit v. Pettit*, 105 App. Div. 312, 93 N.Y.S. 1001 (1905) (court exercised its discretion). See *Snell v. Snell*, 191 Ill. App. 239 (1915); *Brown v. Brown*, 153 App. Div. 645, 138 N.Y.S. 602 (1912). In *Simmons v. Simmons*, *supra*, an annulment was decreed even though the petitioner knew of the other party's prior existing marriage, aided her in procuring a void divorce therefrom, and then entered into a ceremony of marriage with her. Cf. *Margulies v. Margulies*, 109 N.J. Eq. 391 (Ch. 1931), where a petitioner who induced and paid for a foreign divorce was held to be unable to later attack its validity.

²⁶ *Thompson v. Thompson*, 10 Phila. (Pa.) 131 (1874); *Baker v. Baker*, 84 Pa. Super. Ct. 544 (1925); *Mallon v. Mallon*, 87 Pa. Super. Ct. 43 (1925).

relief seems to be so limited by the courts themselves without the aid of a statute.²⁷ Most jurisdictions, however, grant decrees of annulment even when the proceeding is brought by the party who is legally disqualified from marrying again because of a pre-existing lawful union.²⁸ It is also significant to note that courts in other states have granted a decree of annulment to a petitioner where the factual situation was essentially the same as that in the *Ancrum* case.²⁹

THE DOCTRINE OF RES JUDICATA IN NEW JERSEY—Both precedent and logic dictate the universal rule of the common law that a fact or question properly raised in a suit, and determined by a court of competent jurisdiction, is as between the parties to the action and their privies, conclusively settled thereby so long as the judgment remains unreversed.¹ Decisions so holding are legion.² As early as 1850 we find the New Jersey Court of Errors and Appeals affirming a judgment based upon a verdict reached by the application of this principle.³ Other cases in New Jersey to the same effect are not scarce,⁴ and the rule is as well established in equity as at law.⁵

The doctrine so frequently enunciated rests upon the broad ground of public policy emphasizing the desirability of peace and

²⁷ *Berry v. Berry*, 130 App. Div. 53, 114 N.Y.S. 497 (1909); *Tefft v. Tefft*, 35 Ind. 44 (1871).

²⁸ *Szlauszis v. Szlauszis*, 255 Ill. 314, 99 N.E. 640 (1912); *Lynch v. Lynch*, 34 R. I. 261, 83 Atl. 83 (1912); *Martin v. Martin*, 54 W.Va. 301, 46 S.E. 120 (1903); *Heflinger v. Heflinger*, 136 Va. 281, 118 S.E. 316 (1923); *Rogers v. Holmshaw*, 3 Swabey & T. 509; 164 Eng. Rep. 1373 (1864). See 1 *VISION, MARRIAGE, DIVORCE AND SEPARATION*, Sec. 722 (where this view is stated as the weight of authority).

²⁹ *Pain v. Pain*, 37 Mo. App. 110 (1889); *Seacord v. Seacord*, 139 Atl. 80 (Del. 1927). See *Stokes v. Stokes*, 198 N.Y. 301, 91 N.E. 793 (1910), *rev'd* 128 App. Div. 838, 113 N.Y.S. (1908).

¹ 34 C.J. 868-869 n. 59, citing over 500 cases.

² See *Supra* note 1.

³ *Ward v. Ward*, 22 N.J.L. 699 (E&A 1850). In this case A sued B for raising a dam and causing A's land to be overflowed. In a prior suit B had sued A for breaking the dam, in which suit A had justified his actions, claiming B had raised the dam too high. Upon this issue the jury found for A, thereby establishing the justification. In the instant suit the trial court charged the jury as a matter of law to find that the dam was raised too high and this instruction was sustained by the Court of Errors and Appeals without an opinion. In the course of his charge to the jury, Mr. Chief Justice Green said, "I take the well settled rule to be this, that when a material traversable fact, directly in issue between two parties has been ascertained by the finding of a jury and judgment final has been rendered upon that verdict, and remains unreversed, that finding is conclusive between those parties, and it does not lie in the mouth of either afterwards to gainsay it." Page 707.

⁴ *Hancock v. Singer Manufacturing*, 62 N.J.L. 289 (E. & A. 1898); *Gyarfas v. Karpf*, 83 N.J.L. 387 (Sup. 1912).

⁵ *Spingarn v. Spingarn*, 8 N.J. Misc. 423, 150 Atl. 764 (Ch. 1931), and cases there cited. It has been suggested that the equity cases are not binding upon the law courts but in view of the logical basis of the doctrine, *infra*, there seems to be no reason for the distinction.