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Notes

ANNULMENT OF MARRIAGE UNDER DECLARATORY JUDGMENTS ACT—Two recent decisions, *Duchi v. Duchi*,¹ and *McCalmont v. McCalmont*,² the former granting a decree of nullity of a purporting marriage under the recent Declaratory Judgments Act³ and the latter refusing to grant a decree under the same act, present an interesting question on the subject of the annulment of marriages in this commonwealth.

By common law principles and by statutory provisions many purporting marriages in this commonwealth are void or voidable. Thus, since the essentials to all contracts, capacity and consent, must be present to constitute a valid marriage,⁴ a marriage entered into by a person when insane is absolutely void,⁵ and if the appearance of consent was based on mistake as to the legal effect of the ceremony, as where one party acts in jest,⁶ or on a mistake as to the identity of the person,⁷ the purporting marriage is likewise void. Bigamous marriages,⁸ marriage of divorced person with paramour,⁹ and incestuous marriages in cases of persons related in a direct lineal line, or of brother and sister¹⁰ are likewise absolutely void.

Other marriages forbidden by reason of consanguinity¹¹

¹11 Pa. D. & C. 610 (1928).

²93 Pa. Super. 203 (1928).

³June 18, 1923, P. L. 840.

⁴In re Stevenson, 272 Pa. 291; Torrence's Est., 47 Pa. Super. 509; Wandall's Est., 29 Pa. Dist. 1132.

⁵In re Newlin, 231 Pa. 312; may be declared so even after death of either or both parties, Bell v. Bennett, 73 Ga. 784; Hagenon v. Hagenon, 258 Ill. 197, 101 N. E. 606.

⁶Barclay v. Com., 116 Ky. 275, 76 SW 4; Blumenthal v. Blumenthal, 31 N. J. Eq. 194; McClurg v. Terry, 21 N. J. Eq. 225; Barnes v. Wyethe, 28 Vt. 41.

⁷Delpit v. Young, 51 La. Ann. 923, 25 S. 547; Meyer v. Meyer, 7 Oh. Dec. (Reprint) 627; 2 Kent Comm. p. 77.

⁸Klass v. Klass, 14 Pa. Super. 550.

⁹Adams v. Adams, 2 Chest. Co. 560; Stull's Est. 183 Pa. 625.

¹⁰Sutton v. Warren, 10 Metc. (Mass.) 451, 452; Wightman v. Wightman, 4 Johns Ch. (NY.) 343.

¹¹Act of Mar. 13, 1815, sec. 5, P. L. 150; Act of June 24, 1901, P. L. 597.

or affinity¹² are merely voidable.¹³ Likewise impotency,¹⁴ fraud or duress,¹⁵ intoxication¹⁶ and non-age¹⁷ existing at the time of the marriage, make the purporting marriage voidable.

But only in the case of a bigamous marriage have our statutes provided for an annulment¹⁸ and even in that case it is provided that the procedure shall be the same as in cases of divorce. The Act of 1815 declares marriages within certain degrees of consanguinity and affinity "void to all intents and purposes."¹⁹ They are in fact only voidable²⁰ and the said act makes no reference to the annulment of such void (voidable) incestuous marriages, but provides that "It shall and may be lawful for the courts of common pleas to grant divorces from the bonds of matrimony in such cases." However such a divorce has the effect of an annulment.²¹ Our statutes also provide for the granting of divorce for impotency²² existing, or for fraud or duress²³ practiced, at the time of the marriage. Such divorces also have the effect of annulments.

In summary we note, that Pennsylvania has a divorce procedure, with the effect of an annulment, for bigamous and incestuous marriages, and for marriages voidable for impotency existing at, and for fraud or duress practiced at, the inception of the marriage. But there is no procedure whatsoever to annul purporting marriages on the

¹²See acts in preceding note.

¹³Walter's App., 70 Pa. 392; Parker's App., 44 Pa. 309; Schofield v. Schofield, 51 Pa. Super. 564.

¹⁴A. C. v. B. C., 11 Wkly. N. C. (Pa.) 479; A. C. v. B. C., 10 Wkly. N. C. J. 569; and cases cited 38 C. J. p. 1288, sec. 18.

¹⁵Barnett v. Kimmell, 35 Pa. 13, (fraud); Richards v. Richards, 19 Pa. Co. 322, (duress).

¹⁶Prine v. Prine, 36 Fla. 676, 18 S 781, 34 LRA 87.

¹⁷See generally Tiffany, Dom. Rel. p. 21 and 22 LRA. NS. 1202; Marriage within the age of consent seems to be neither strictly void nor strictly voidable, but rather inchoate and imperfect. 2 Kent. Com. 78, 79; 1 Bishop, secs. 143-153; 1 Bl. Com. 436.

¹⁸Act of Apr. 14, 1859, P. L. 647, amend. Mar. 29, 1927, P. L. 71.

¹⁹Act of Mar. 13, 1815, P. L. 150, sec. 5.

²⁰Parker's App., 44 Pa. 309; Walter's App., 70 Pa. 392.

²¹Faust v. Faust, 25 Pa. Dist. 952; McClain v. McClain, 40 Pa. Super. 248.

²²Act of Mar. 13, 1815, P. L. 150, sec. 1., reenacted and amended, June 28, 1923, P. L. 886.

²³Act of May 8, 1854, P. L. 644.

ground of insanity,²⁴ intoxication, mistake, jest, non-age,²⁵ or other legal incapacity.²⁶ However, the nullity of a void marriage may be shown in any legal proceeding where it is a pertinent matter.²⁷

Thus if a marriage is absolutely void or voidable, no sentence of avoidance is absolutely necessary²⁸ - "yet, as well for the sake of good order of society as for the peace of mind of all persons concerned, it is expedient that the nullity of the marriage should be ascertained and declared by the decree of a court of competent jurisdiction."²⁹

Many states have statutes giving jurisdiction in suits for nullity of marriage, and it is held almost universally in this country that a suit to annul an invalid marriage will lie, independently of any statutory authority therefor. Such suits are held to be within the ordinary jurisdiction of the courts of equity.³⁰ But in this Commonwealth it has been held that the courts do not have such jurisdiction independent of statute.³¹ Thus many invalid or voidable marriages can only be attacked collaterally, and at a time when so questioned, witnesses and parties may be dead or unavail-

²⁴The Act of Apr. 13, 1843, P. L. 233, sec. 8, amend. Apr. 18, 1905, P. L. 211, does not make insanity a ground for divorce. *Baughman v. Baughman*, 34 Pa. Super. 271. The act with its amendment relates to procedure only, and does not declare a new cause of action. Divorces erroneously entered under this act were validated by the Acts of May 3, 1909, P. L. 390, sec. 1, and May 13, 1927, P. L. 991, sec. 1.

²⁵*Seibert v. Seibert*, 3 Pa. D. & C. 142.

²⁶As spouse divorced for adultery is forbidden to marry the paramour during life time of spouse by first marriage. Act of Mar. 13, 1815, 6 Sm. L. 286, 289, sec. 9.; and cases cited in note 9, *supra*.

²⁷*Heffner v. Heffner*, 23 Pa. 104; *Thomas v. Thomas*, 124 Pa. 646; *Wayne Twp. v. Porter Twp.*, 138 Pa. 181; *Clark's Est.*, 173 Pa. 451; *Divver's Est.*, 22 Pa. Super. 436.

²⁸But the act of Mar. 27, 1903, P. L. 102, makes it a misdemeanor—"if any person who has entered into a contract of marriage with another person, whether the marriage be valid in law or not, shall, while the other contracting party be alive, and before said marriage has been declared void or annulled by the decree of a proper court of record, go through any form of marriage recognized as binding under the laws of this commonwealth with any other person,—and—where the first marriage shall be valid in law, the second and all subsequent marriages shall be bigamous and void".

²⁹2 Kent. Com. 76.

³⁰See *Tiffany, Dom. Rel.*, p. 60, and cases there cited.

³¹*Pitcairn v. Pitcairn*, 201 Pa. 368.

able, and during the interim property and civil rights of the parties remain uncertain and unfixed. The merits of having the status of the parties determined judicially in a direct proceeding cannot be questioned, but prior to 1923, no such procedure was available in this Commonwealth. Does the Declaratory Judgments Act give the needed remedy?

The reason for the general acceptance and widespread adoption³² of this procedural reform is largely attributed to its intrinsic merits in effecting the removal of clouds from legal relations and in simplifying the adjudication of contested issues, and in preventing, rather than merely curing, legal injury.³³

"The purpose" of the act "is to settle and to afford from uncertainty and insecurity with respect to rights, status and other legal relations, and is to be liberally construed and administered."³⁴ Certainly its purpose would justify its use in declaring invalid marriages, void.

It confers jurisdiction to determine and declare "rights, status and other legal relations" which are affected by, or as to which a question arises under a statute, contract, etc.³⁵ A question as to the validity of a marriage is one which concerns the "status" of the man and woman under the marriage "contract," and in most instances is also a question "arising under a statute." Therefore a declaration of annulment of a marriage would appear to come directly within the enumerated powers of Section 2. More than that, Section 5, specifically provides that the enumerated powers do not limit and restrict the general powers in any proceeding where declaratory relief is sought, in which a judgment or decree will terminate the controversy or remove an uncertainty. Who would deny that such a decree would not remove much uncertainty in all cases of invalid or voidable marriages?

In the case of *Duchi v. Duchi*, *supra*, a decree was granted under the Declaratory Judgments Act, annulling a marriage between first cousins.

³²For comment on Declaratory Judgments consult list of articles cited in 34 Har. L. R. 697; for list of states passing the Uniform Declaratory Judgments Act see footnote p. 466 of Kariher's Petition, 284 Pa. 455, where cases upholding its constitutionality are also cited.

³³Borchard in 34 Har. L. R. 697.

³⁴Sec. 12, "Construction", Declaratory Judgments Act, *supra*.

³⁵Sections 1 and 2, Declaratory Judgments Act, *supra*.

In the case of *McCalmont v. McCalmont*, *supra*, the petitioner was the paramour of a woman divorced for adultery in Pennsylvania. He married the said woman in Maryland during the life time of her former husband. Both were residents of Pennsylvania and the Act of Mar. 13, 1815, 6 Sm. L. 286, sec. 9, forbade such marriage. The court refused the petition for a declaratory judgment on two grounds: First, that the act should not be resorted to where, as here, a method has already been established for the speedy determination of the issues involved, citing *List's Est.*, 284 Pa. 255; Second, that it is a matter of judicial discretion whether or not jurisdiction will be taken of any particular case.

Its second reason is sustainable,³⁶ but the first is not as no other remedy of any kind is available to annul a marriage on the facts of the instant case.³⁷ In *List's Est.*, *supra*, a decree was asserted to be unwarranted by reason that an equally speedy determination of the question could be had under a proceeding *already pending*.³⁸ The case of *McCalmont v. McCalmont*, *supra*, being sustainable on the ground that the court could by the exercise of judicial discretion refuse to render a declaratory judgment - cannot be cited as an authority that a marriage will not be declared invalid under the act in a proper case.

Since other jurisdictions provide adequate procedure for annulment, cases of invalid marriages are not so likely to arise in other jurisdictions under the Declaratory Judgments Act, and no cases have as yet been digested. But several cases in England, where the act has been in existence since 1852, have made declarations of the status of parties under purporting marriages.³⁹

Our supreme court has said that the act can be made of real use⁴⁰ and if a case involving the annulment of a marriage is brought before it under the Declaratory Judgments Act, may it act accordingly.

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³⁶Kariher's Petition, *supra*.; Sec. 6. of the act, *supra*.

³⁷Note 25, *supra*.

³⁸Accord, *Dempsey's Est.*, 288 Pa. 459.

³⁹In *re Phillips* (1919), 1 Ch. 128, 88 L. J. Ch. N. S. 27, 120 L. T. N. S. 213, 35 Times L. R. 98, 63 Sol. Jo. 116; *Despatie v. Tremblay* (1921), 1 A. C. (Eng.) 702, 124 L. T. N. S. 674 (1921) W. N. 67, 27 Times L. R. 395, 90 L. J. P. C. N. S. 121,

⁴⁰Kariher's Petition, *supra*.