

COLLATERAL ATTACK ALLOWED ON FOREIGN DIVORCE SECURED BY FRAUD

Schwartz v. Schwartz

113 Ohio App. 275, 173 N.E.2d 393 (1960)

Defendant was married in New York in 1926. In 1934, he and his first wife agreed to be divorced. Pursuant to this agreement the defendant staged a fictitious adultery scene. In 1935, defendant and the plaintiff in the instant case were married. Plaintiff now seeks an annulment in Ohio alleging that the defendant was never legally divorced from his first wife as that divorce was secured by fraud.

Two issues were presented to the Court of Appeals for decision. The first concerned the propriety of praying for an annulment rather than a divorce since a prior existing marriage is a ground for divorce in Ohio.¹ The second issue was whether a foreign divorce decree can be collaterally attacked in Ohio on the ground that fraudulent evidence was used in obtaining the decree. The court reversed the trial court and held that both annulment and collateral attack were proper.

The controversy as to whether an annulment is a proper remedy arose out of the case of *Eggleston v. Eggleston*² in which it was held that the divorce statute is exclusive of any other remedy when it specifically mentions a particular ground. Since a prior existing marriage is one of the enumerated grounds for divorce,³ the defendant contended that an annulment is not a proper remedy. The authority which the court cites in the instant case⁴ as holding that an annulment is a proper remedy is based on an assumption of the legislative purpose in making a prior existing marriage a ground for divorce.⁵ At common law a second marriage was void when a prior marriage still existed.⁶ In such a situation an annulment was the proper remedy since it merely declared the second marriage to be nonexistent. Such a determination, however, often had undesirable consequences. When there was no marriage, there was no duty to support the wife and consequently no alimony.⁷ Furthermore, if there were no marriage, any issue born of the union was illegitimate. There was also a problem as to property settlements since, without a marriage, the only manner in which a woman could acquire a property interest was to establish that a partnership existed.⁸

Since a divorce includes a determination of alimony and a division of

¹ Ohio Rev. Code § 3105.01 (1953).

² 156 Ohio St. 422, 103 N.E.2d 395 (1952).

³ Ohio Rev. Code § 3105.01 (1953).

⁴ *Nyhuis v. Pierce*, 65 Ohio L. Abs. 73, 114 N.E.2d 75 (Ct. App. 1952).

⁵ One must always assume what the legislative purpose was since Ohio has no official material to document any legislative history.

⁶ *Smith v. Smith*, 5 Ohio St. 32 (1855).

⁷ *Fickel v. Granger*, 83 Ohio St. 101, 93 N.E. 527 (1910).

⁸ *Christopher v. Christopher*, 56 Ohio L. Abs. 449, 94 N.E.2d 50 (C.P. 1950).

property, making a prior existing marriage a ground for divorce solved both problems. A divorce, of course, keeps the children legitimate.⁹ Because it appeared that many of the grounds for divorce were added only because of the shortcomings of annulment, authority developed to the effect that if the problems contemplated by the legislature did not exist, then there was no reason to limit the remedy to divorce.¹⁰ Because in the instant case there appeared to be no problems of alimony or property settlement, the court ruled that the plaintiff was entitled to an annulment.

With the determination that an annulment was a proper remedy it became necessary to decide if grounds for an annulment could be established. That is, it became necessary to decide if, in fact, a prior marriage was still in existence. Plaintiff contended that if the defendant used fraud to secure his divorce it was not valid and, therefore, he was still married to his first wife. The testimony in the trial of the instant case clearly indicated that fraud was used to secure the New York divorce. The trial court held, however, that the issue of fraud could not be raised by the plaintiff because to do so would be a violation of the "full faith and credit" clause of the United States Constitution.

As the court points out, the older view was that the issue of fraud on the law of the forum could be raised only in the court which originally granted the judgment.¹¹ The modern view, which this court accepts, is that under certain circumstances a collateral attack on grounds of fraud is permissible.¹² The problem, however, is in determining exactly what circumstances are required to permit collateral attack.

One factor is that only people who are themselves innocent of any part in establishing the fraud may attack it in a collateral proceeding.¹³ Thus, a husband who was responsible for the fraud cannot assert the invalidity of his prior divorce.¹⁴ But even a party who is innocent of any part in the fraud must have some legally acceptable interest in the decision to attack it. The court in the instant case was faced with the fact that there are few cases in the country and none in Ohio that hold that a wife has any right that is sufficiently affected by a prior fraudulent divorce to collaterally attack that decision.

The instant case created new law in Ohio by its holding that a second wife does have a sufficient interest to attack a prior divorce. While the Ohio court cited foreign cases¹⁵ in support of its decision, it did not discuss the rationale of those decisions. Undoubtedly this was because the cases cited by the court do not themselves give very convincing reasons why a

⁹ Under present law the children would remain legitimate even if an annulment were granted. Ohio Rev. Code § 2105.18 (1943): "The issue of parents whose marriage is null in law shall nevertheless be legitimate."

¹⁰ *Nyhuis v. Pierce*, *supra* note 4.

¹¹ *Schwartz v. Schwartz*, 113 Ohio App. 275, 173 N.E.2d 393 (1960).

¹² *Ibid.*

¹³ *Roche v. Roche*, 199 Misc. 306, 102 N.Y.S.2d 844 (Sup. Ct. 1951).

¹⁴ *Green v. Green*, 77 Ariz. 219, 269 P.2d 718 (1954).

¹⁵ *Schwartz v. Schwartz*, *supra* note 11, at 279, 173 N.E.2d at 395.

second wife should be allowed to attack a prior divorce. As one court in another state said: "There is a strong public policy against disturbing or declaring invalid a judgment of divorce, especially after a long period of time."¹⁶ The court is undoubtedly correct in this statement. To set aside a contract made twenty years ago involves only economic overtones and not any strong public policy. But to tell two people who have been living together for twenty years¹⁷ that they are not married, and in legal contemplation never have been married, clearly involves the interest of the public. It is still the general consensus of opinion that when a man and woman live together for a long period of time, they should do so in a state of matrimony. In allowing someone to attack a divorce of long standing who was not a party to that divorce, albeit a second wife, a court should make clear its reasoning.

Furthermore, the court in the instant case speaks always in terms of "fraud" without specifying what kind of fraud. The implication is that *any* fraud practiced in a prior divorce will invalidate that divorce. In a great number of divorce cases there is at least an implicit understanding between the parties that it will not be seriously contested. Yet the law of Ohio and most states makes this fraud upon the court.¹⁸ A literal interpretation of this case means that such a divorce is invalid no matter where obtained. From this it follows that a great number of people who think that they have remarried legally may be surprised to learn that they are still married to their first spouse. As a prior undissolved marriage is a ground for divorce in Ohio (besides being a ground for annulment), a person may very well find himself subject to two divorce suits at once.

¹⁶ *Wilber v. Calvan*, 221 La. 451, 59 So. 2d 451 (1952).

¹⁷ The parties in the instant case had been married for over twenty years.

¹⁸ For a collection of cases, see Annot., "Collusion as a bar to divorce," 109 A.L.R. 832 (1937).