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Domestic Relations - Impotency as Ground for Annulment

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English case of *Warlow v. Harrison* has been converted to stare decisis through the judicial legitimization of the instant case. Thus, the phrase, "without reserve," is of great legal significance, and must be treated with due respect by both the auctioneer and the owner.

The right of the bidder to retract his bid still remains, up to the moment the hammer falls. But, there is some possibility that the bidder, too, may be prevented from retracting his bid should an auction be advertised "without reserve." The 1952 "Official Draft" of the Uniform Commercial Code, being prepared under the guidance of the National Conference of Commissioners of Uniform State Laws, provides, in section 2–328, that "in an auction without reserve, the goods cannot be withdrawn nor a bid retracted." Similarly in the editorial comment following the above section it is stated: "The present section changes the prior rule by prohibiting the withdrawal of bids as well as of the goods in auctions 'without reserve.'" This legislative provision would have the effect of interpreting the act of placing goods for sale at an auction advertised to be "without reserve," as constituting an irrevocable offer, as in the instant case, which is immediately perfected into a contract of sale upon the receipt of the highest bid, which may not be withdrawn.

DOMESTIC RELATIONS–IMPOTENCY AS GROUND FOR ANNULMENT

The plaintiff and defendant had been married and subsequently divorced by a decree of the Superior Court of Cook County, Illinois, in 1947. This decree gave plaintiff the custody of their minor son and also decreed alimony to be paid to her monthly until she either remarried or died, whichever occurred first. In June, 1950, plaintiff was remarried and moved to California with her new husband. They cohabited there until the beginning of November, when they separated. Defendant ceased the alimony payments upon the remarriage and received no protest. In July of 1951, plaintiff filed for and was granted an annulment from her second husband in California, pursuant to the California statute allowing annulment of a marriage due to impotency of one of the parties.[1] As soon as the decree was entered making the marriage null and void, plaintiff demanded resumption of the alimony payments from the defendant, and continued these demands upon her return to Glencoe, Illinois, in August of 1951. When her demands were not heeded, plaintiff then petitioned for a rule requiring defendant to show cause why he should not be held in contempt of court for failure to pay alimony. This petition was dismissed in the Superior Court of Cook County. On appeal, the Illinois Appellate

[1] California Civil Code (Deering, 1949), § 82.

Court affirmed the decision of the lower court on the ground that the annulment obtained in California has no force or effect in Illinois, since impotency is not a ground for annulment in Illinois, and therefore, that the California decree of annulment for this ground did not revive the obligation to pay alimony, such obligation having been terminated by plaintiff's remarriage. *Linneman v. Linneman*, 1 Ill. App. 2d 48, 116 N.E. 2d 182 (1953).

The *Linneman* case represents a case of first impression in the courts of Illinois in regard to impotency as a ground for annulment of a marriage. While impotency, or physical inability to consummate a marriage, has been a ground for divorce in Illinois since 1827,[2] the court points out that it has never been held to be a ground for annulment, nor has any statute so provided.[3]

A question of Conflict of Laws was raised by this decision, since a valid annulment decree, rendered in California in accordance with the law of that forum, was not given full faith and credit in Illinois. This question was resolved upon the theory that the law governing a marriage is the law of the state where the marriage was entered into. Thus, for a valid decree of annulment to be recognized in Illinois courts, grounds must exist which would allow the marriage to be annulled in Illinois. This line of reasoning is supported by other cases in Illinois,[4] as well as Colorado,[5] the federal courts,[6] and the *Restatement of Conflict of Laws*.[7]

For an historical backround on impotency as a basis for annulment, we must go back to the old English law where grounds for annulment were divided into canonical and civil disabilities. The canonical disabilities—consanguinity, affinity, impotency—rendered the marriage voidable, allowing the parties to avoid the marriage only during their lifetimes, and also providing that continued cohabitation, without protest, would serve as a ratification of the voidable marriage. However the civil disabilities—insanity, prior-existing marriage—rendered the marriage void. The canonical disabilities came under the jurisdiction of the ecclesiastical courts in England, and, since these courts were not recognized as courts of record, American courts of equity, before enabling statutes were enacted, held that they had no power to annul voidable marriages.[8] At the present

[2] Ill. Rev. Stat. (1827), p. 181; Ill. Rev. Stat. (1953), c. 40, § 1.

[3] Linneman v. Linneman, 1 Ill. App. 2d 48, 116 N.E. 2d 182 (1953).

[4] Reifschneider v. Reifschneider, 241 Ill. 92, 89 N.E. 255 (1909); Lehmann v. Lehmann, 225 Ill. App. 513 (1922).

[5] Payne v. Payne, 121 Colo. 212, 214 P. 2d 495 (1950).

[6] Carr v. Carr, 82 F. Supp. 398 (D.C. D.C., 1949).

[7] § 115.

[8] Anonymous, 24 N.J. Eq. 19 (1873); Burtis v. Burtis, 1 Hopk. Ch. 557, 14 Am. Dec. 563 (N.Y., 1825).

time, only twenty American jurisdictions have statutes relating to impotency as a ground for annulment,[9] with one of these prohibiting marriage,[10] and another making the marriage void.[11]

When courts of record in England began to hear matrimonial causes, impotency was held to be a ground for annulment on the theory that to hold otherwise might increase the prevalence of fornication and adultery. This allowed the injured spouse to remarry and enjoy a normal marital life. A doctrine of triennial cohabitation was developed as a basis for annulment of marriage on the ground of impotency. This doctrine provided that if the wife was still a virgin and apt after cohabitation for a three-year period, there was a rebuttable presumption that the husband was impotent, and if the presumption were not satisfactorily rebutted, an annulment could be decreed.[12] Cohabitation for a period less than three years was deemed insufficient, and in the case of *Marshall, f.c. Hamilton v. Hamilton*,[13] where action was brought after two years and ten months, the wife was instructed to return to cohabitation until the full three years had elapsed. At the end of three years and a few months, upon petition, the wife received an annulment based upon the non-rebutted presumption of impotency of her husband.[14]

The case of *F., f.c. D. v. D.*[15] set aprecedent in England, allowing an annulment at the end of only eighteen months of cohabitation, on the basis that since the wife has proved the incurable impotency of her husband, it would serve no purpose to force her to return for another like term of cohabitation before she could petition for an annulment. The court here decided that the doctrine of triennial cohabitation is only applicable when the impotency is left to be presumed and is not fully proved.

The court in the case of *Stagg, f.c. Edgecombe v. Edgecombe*[16] refused a wife's petition for annulment brought only a few months after her marriage. The court recognized the doctrine, of triennial cohabitation, but held it could be relaxed if the impotency has been adequately proved, provided it was present at the time of the marriage, incurable,

[9] Arkansas, California, Delaware, District of Columbia, Georgia, Hawaii, Idaho, Iowa, Michigan, Montana, New Jersey, New York, North Carolina, North Dakota, South Dakota, Texas, Vermont, Virginia, West Virginia, and Wisconsin.

[10] Georgia.

[11] North Carolina.

[12] Tomkins v. Tomkins, 92 N.J. Eq. 113, 111 Atl. 599 (1920).

[13] 3 Swa. & Tr. 517 (Prob., 1864).

[14] Marshall, f.c. Hamilton v. Hamilton, 3 Swa. & Tr. 592 (Prob., 1864).

[15] 4 Swa. & Tr. 86 (Prob., 1865).

[16] 3 Swa. & Tr. 240 (Prob., 1863).

and unknown to the spouse. However, only a few months was not sufficient time to determine that the impotency was incurable.

The doctrine of triennial cohabitation was applied in New Jersey in 1920 in the case of *Tomkins v. Tomkins*,[17] which appears to be the only recorded American case applying the doctrine. Here, there was an unconsummated marriage for a period of five years when the wife petitioned for a decree of annulment. The annulment was awarded on the grounds that the virginity and aptness of the wife after more than three years cohabitation raised the presumption of impotency of the husband which was not rebutted by him.

The first recorded American case on the question of impotency as a ground for annulment, the *Anonymous* case,[18] decided in New Jersey in 1873, held that since impotency was a canonical ground cognizable by the ecclesiastical courts, in the absence of express statutory provision, it could not be recognized as a ground for annulment. Later New Jersey cases did hold that impotency was a recognizable ground for annulment of a marriage, if, at the time of entering into the marriage, the defendant was incurably impotent, and this fact was unknown to the injured party at the time.[19] These decisions, however, were rendered after the New Jersey legislature had enacted the appropriate statute.[20]

The *Steinberger v. Steinberger*,[21] *VandenBerg v. VandenBerg*,[22] and *Anonymous v. Anonymous*[23] cases exemplify the decisions of the New York courts allowing annulments on the ground of impotency pursuant to statute. These cases hold that since consummation is an implied part of the marriage contract, if one party can show that the other was incurably impotent at the time of the marriage, and remains so until an action is brought, the New York statute will allow a decree of annulment to be granted. The *Anonymous* case[24] held that the impotency must have been present at the time of the marriage, and if caused by an accident after marriage but before consummation thereof will not serve as a ground for annulment. The Delaware courts[25] also have followed

[17] 92 N.J. Eq. 113, 111 Atl. 599 (1920).

[18] 24 N.J. Eq. 19 (1873).

[19] Singer v. Singer, 9 N.J. Super. 397, 74 A. 2d 622 (1950); Heller v. Heller, 116 N.J. Eq. 543, 174 Atl. 573 (1934); Grobart v. Grobart, 107 N.J. Eq. 446, 152 Atl. 858 (1931); Steerman v. Snow, 94 N.J. Eq. 9, 118 Atl. 696 (1922).

[20] N.J. Rev. Stat. (1907), p. 475; N.J. Rev. Stat. (1937), § 2:50–1.

[21] 33 N.Y.S. 2d 596 (1940).

[22] 197 N.Y. Supp. 641 (1923).

[23] 49 N.Y.S. 2d 314 (1944).

[24] Ibid.

[25] S. v. S., 3 Terry 192, 29 A. 2d 325 (Del., 1942); D. v. D., 2 Terry 263, 20 A. 2d 139 (Del., 1941).

these New Jersey and New York decisions, referring to statutory provisions.[26]

On the other side of the question is the Arizona case where the court held that annulment on grounds of impotency could not be granted because not specifically provided for by statute,[27] although impotency was a ground for divorce under the Arizona divorce statute.[28]

The only recorded case in the federal courts, the case of *Carr v. Carr*,[29] held that although impotence is a valid ground for annulment in the District of Columbia by statute, the fact that the marriage was entered into in Maryland requires that the law of Maryland be applied. Since there is no enabling statute in Maryland, impotence is no ground for an annulment, and the petition was denied.

Although the question was not raised in the instant case,[30] other jurisdictions have ruled on the definition of impotency to be used in the interpretation of the available statutes. The *Devanbagh v. Devanbagh*,[31] *Turney v. Avery*,[32] and *Donati v. Church*[33] cases point out that there is a marked difference between impotency and sterility. In the former, sexual intercourse is impossible, while in the latter, intercourse is possible, but such intercourse would not lead to procreation. Thus, these courts hold that the ability to have sexual intercourse is the test to be applied to determine impotency, and not the ability, or lack of it, to propagate the species. A very recent English decision is in accord with these cases, wherein intercourse without insemination was considered good consummation of the marriage to the extent that impotency did not exist.[34]

We now see that there are two distinct views present in the United States in regard to impotency as a valid ground for the annulment of a marriage. The wealth of cases seems to be in those jurisdictions where there is a statute expressly allowing such ground to be used, although these jurisdictions are in the minority numerically. The decision in the *Linneman* case does not appear to be in conflict with the other views expressed, since there is no express statutory provision in Illinois. Therefore, it appears that the Illinois courts will follow this decision until such time as the Illinois legislature sees fit to enact the proper statutory provision to the contrary.

[26] Del. Rev. Code (1915), § 3004; Del. Rev. Code (1935), § 3497.

[27] Southern Pac. Co. v. Ind. Comm., 54 Ariz. 1, 91 P. 2d 700 (1939).

[28] Ariz. Rev. Code (1928), §§ 2166, 2178.

[29] 82 F. Supp. 399 (D.C. D.C., 1949).

[30] 116 N.E. 2d 182 (Ill., 1953).

[31] 5 Paige 554, 28 Am. Dec. 443 (N.Y., 1836).

[32] 92 N.J. Eq. 473, 113 Atl. 710 (1921).

[33] 13 N.J. Super. 454, 80 A. 2d 633 (1951).

[34] R. v. R., otherwise F., [1952], 1 All E.R. 1194, 1 T.L.R. 1201 (P.D.A.).