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Torts–Liability in Damages for Obtaining Annulment of Marriage by Fraud

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sured's knowledge of the breach, holds that the warranty is not violated by the act of the third person if such act is not under the control of the insured, and the insured has taken reasonable precautions to prevent the act.¹⁶ Where a policy contained a strict prohibition against smoking in or about the building, and third parties by permission on the premises did smoke, the insurance company is nevertheless liable if the insured took reasonable precautions to prevent it.¹⁷ An employee of the insured carried a can of gasoline on the premises with an avowed purpose to burn the house, and it was so used without the insured's knowledge or complicity. Such an act was held not a "keeping, using, or allowing gasoline on the premises" within the meaning of the policy.¹⁸

—AUGUST W. PETROPLUS.

TORTS — LIABILITY IN DAMAGES FOR OBTAINING ANNULMENT OF MARRIAGE BY FRAUD. — *H* had his marriage with *W* annulled because no decree of *W*'s divorce from her first husband in Kentucky appeared on the records there. By fraud *H* prevented *W*'s appearance in the annulment proceeding and a decree was granted *H* by default, but *H* continued to live with *W*, concealing the annulment from her until his remarriage with *G*. The Kentucky court thereafter entered a *nunc pro tunc* order, dissolving *W*'s first marriage as of the date prior to her marriage with *H*. *W* sued *H* in chancery to vacate the annulment decree;¹ and though *W* was awarded costs, the court refused to vacate the decree because of the intervention of the rights of *G*, an innocent third party.² Now *W* sues *H* at law for damages caused by his fraud in securing the annulment and in actively concealing this fact until his remarriage, which barred her subsequent suit to vacate the decree. On demurrer the majority of the court decided the declaration set out an actionable wrong which arose after the cessation of coverture. *Cameron v. Cameron*.³

The weight of authority refuses to permit husband and wife

¹⁶ *Aurora Fire Ins. Co. v. Eddy*, 55 Ill. 213 (1870).

¹⁷ *Ibid.*

¹⁸ *Queen Ins. Co. v. Van Giesen*, 136 Ga. 741, 72 S. E. 41 (1911).

¹ 105 W. Va. 621, 143 S. E. 349 (1928).

² 107 W. Va. 655, 150 S. E. 225 (1929).

³ 162 S. E. 173 (W. Va. 1932), *Hatcher and Lively, JJ.*, dissenting.

to sue each other for torts committed during coverture;⁴ the fact that the parties are divorced at the time suit is brought makes no difference.⁵ This is the West Virginia rule.⁶ Consequently the court made the question of the exact point at which this tort arose a paramount one in reaching their decision. The tort was said to be based on "fraud in securing the annulment of their marriage". The majority of the court were constrained to consider the tort stated by the declaration as arising after coverture, hence actionable under the general rule.⁷ The minority inclined to the view that the tort occurred during coverture.⁸ The actual wording of the declaration would seem to admit of either interpretation.⁹ And perhaps a statement by the attorney for *H* in his petition for rehearing partly explains the attitude of the dissent in refusing

⁴ *Thompson v. Thompson*, 218 U. S. 611, 31 S. Ct. 111 (1910); *Peters v. Peters*, 156 Cal. 32, 103 Pac. 219, 23 L. R. A. (N. S.) 699 (1909); *Peters v. Peters*, 42 Iowa 182 (1875); *Dishon v. Dishon*, 187 Ky. 497, 219 S. W. 794, 13 A. L. R. 625 (1920); *Strom v. Strom*, 98 Minn. 427, 107 N. W. 1047, 6 L. R. A. (N. S.) 191 (1906); *Butterfield v. Butterfield*, 195 Mo. App. 37, 187 S. W. 295, 197 S. W. 374 (1916); *Schultz v. Schultz*, 89 N. Y. 644 (1882); *Wilson v. Barton*, 153 Tenn. 250, 233 S. W. 71 (1926); *Speer v. Sykes*, 102 Tex. 451, 119 S. W. 86 (1909); *Keister v. Keister*, 123 Va. 157, 96 S. E. 215, 1 A. L. R. 439 (1918). *Contra*: *Brown v. Brown*, 88 Conn. 42, 89 Atl. 889 (1914); *Johnson v. Johnson*, 201 Ala. 41, 77 So. 335 (1917); *Fitzpatrick v. Owens*, 124 Ark. 167, 136 S. W. 832, 187 S. W. 460 (1916); *Gilman v. Gilman*, 78 N. H. 4, 95 Atl. 657 (1915); *Crowell v. Crowell*, 180 N. C. 516, 105 S. E. 206 (1920); *Fiedler v. Fiedler*, 42 Okla. 124, 140 Pac. 1022, 52 L. R. A. (N. S.) 189 (1914); *Prosser v. Prosser*, 114 S. C. 45, 102 S. E. 787 (1922). See also McCURDY, *Torts Between Persons In Domestic Relation* (1930) 43 HARV. L. REV. 1030.

⁵ *Phillips v. Barnet*, L. R., 1 Q. B. D. 436 (1876); *Main v. Main*, 46 Ill. App. 106 (1891); *Abbott v. Abbott*, 67 Me. 304 (1877); *Bandfield v. Bandfield*, 117 Mich. 80, 75 N. W. 287, 40 L. R. A. 757 (1898); *Strom v. Strom*, *supra* n. 4; *Lillienkamp v. Rippetoe*, 133 Tenn. 57, 179 S. W. 628 (1915); *Keister v. Keister*, *supra* n. 4; *Schultz v. Christopher*, 65 Wash. 496, 118 Pac. 629, 38 L. R. A. (N. S.) 780 (1911). See also McCURDY, *op. cit. supra* n. 4.

⁶ See *Bennett v. Bennett*, 37 W. Va. 396, 397, 16 S. E. 638 (1892); *Bolyard v. Bolyard*, 79 W. Va. 554, 91 S. E. 529, L. R. A. 1917D, 440 (1917); *Clifton v. Clifton*, 83 W. Va. 149, 150, 98 S. E. 72 (1919).

⁷ ". . . there is presented here the claim of a feme sole against her former husband for damages for fraudulent destruction by him of her status as feme covert. As basis for her suit she relies, not on the machinations of the husband preliminary to the climax of his alleged fraud, but upon the consummated act of destruction of her status." Maxwell, J., concurring in *Cameron v. Cameron*, *supra* n. 3, at 175.

⁸ "A summary of plaintiff's complaint is that through the willful deception of her by the defendant (during coverture) he fraudulently procured the termination of their marriage. In other words, the wrong she charges is against her wifehood." Hatcher, J., dissenting in *Cameron v. Cameron*, *supra* n. 3 at 176.

⁹ The defendant, *H*, annulled the marriage by fraud practiced on *W* in violation of ". . . every duty that he as husband owed to this plaintiff, and by his said fraud and deceit so alleged has destroyed all the marital rights of this plaintiff and her status as the lawful wife of the said defendant."

to recognize the cause of action.¹⁰ Thus one cannot say that the particular result in this case was right or wrong, but in theory so extraordinary a tort should be compensated for, and to that extent the majority view appears preferable.

But assuming that the result of the case is desirable, could we not treat it as an exception to the general rule in intermarital suits, which it factually appears to be? Should the court pay "lip service" to the general rule that a wife cannot sue her husband by putting such a construction as they did on the declaration in this case? The reason behind the rule for prohibiting intermarital suits¹¹ does not lie in this case; *cessante ratione legis, cessat ipsa lex*. *H's* tort was a direct destruction of the marital relation and of *W's* status itself; not an injury recovery for which would tend to destroy the status and relation. Add to this the fact that all equitable relief is barred by *H's* fraud, and it would seem that such a tort should be an exception to the general rule forbidding such suits. The case on its facts is without precedent, the question is *res integra*, and the tort so unusual as to fall outside of the general rule. But will the decision stand in the way should the court wish to reach a contrary result? Clearly not, by a little judicial legerdemain the tort may be treated as occurring during coverture and the principal case can be thus distinguished.

Two other courts have refused to grant damages for the fraudulent procurement of divorce decrees.¹² In both cases, however, the divorce decree itself stood unattacked by any suit in equity to set it aside for fraud. The equitable suit has long been recognized as the remedy against such a fraudulent decree.¹³ These cases then intimate that the question of fraud is *res judicata* because the di-

¹⁰ "It may be that Cameron's (defendant's) record is not such as to qualify him to undertake the quest of the Holy Grail, but neither would that of the former Mrs. Cameron (plaintiff) commend her to the role of a wife of Caesar." Defendant in Error's Brief in support of Petition for Rehearing, p. 17.

¹¹ "Instead of settling, a divorce would unsettle all matters between married persons. . . . With divorces as common as they are now-a-days, there would be new harvests of litigation. If such a precedent were permitted, we do not see why any wife surviving the husband (might not) plunder the estate." *Abbott v. Abbott*, *supra* n. 5, at 67 Me. 307-308.

"Whether the exercise of such jurisdiction would be promotive of the public welfare and *domestic harmony* is at least a debatable question." *Thompson v. Thompson*, *supra* n. 4, at 218 U. S. 616-618.

¹² *Nicholson v. Nicholson*, 113 Ind. 131, 15 N. E. 223 (1888); *Tuttle v. Tuttle*, 48 N. D. 10, 181 N. W. 898 (1921).

¹³ FREEMAN, JUDGMENTS (5th ed., 1925) § 308; *Abbott v. Abbott*, *supra* n. 5.

voice decree stands unattacked.¹⁴ In the principal case, however, *W* had attacked the annulment decree in an equity suit, and the fraud was legally established.¹⁵ As the ordinary remedy is in equity and the divorce cases have required it, the equitable suit in fact amounts to a condition precedent to the right to sue at law in the principal case. Consequently the extraordinary tort of the principal case will become practically unique, because the reason for denying equitable relief there was an unusual circumstance.

—HENRY P. SNYDER.

¹⁴ "The settled policy of the law forbidding that a matter once adjudicated shall be again drawn into issue while the former adjudication remains in force does not permit the prosecution of an action for obtaining a judgment by false and fraudulent practices or by false and forged evidence." FREEMAN, JUDGMENTS (5th ed., 1925) § 782. See also *Engstrom v. Sherbine*, 137 Mass. 153 (1884); *Hillsborough v. Nichols*, 46 N. H. 379 (1866); FREEMAN, *op. cit. supra* n. 14, § 905.

¹⁵ ". . . . it is clearly apparent from the evidence that she was misled and imposed upon by her husband in connection with that matter" *Cameron v. Cameron*, *supra* n. 2, at 107 W. Va. 658.