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ANNULMENT OF MARRIAGE FOR FRAUD

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THE mores[1] determine and fashion the law, and, although, when once established, the law may act as a check upon the development of the mores, in the end its form and provisions are determined by the mores. In no branch of the law is this principle more clearly manifest than in marriage, and in the topic proposed for discussion, this is particularly true. Professor Sumner says:

"The mores determine what marriage shall be, who may enter into it, in what way they may enter into it, divorce, and all the details of proper conduct in the family relation."[2]

"Wedlock is a mode of associated life. . . No rules or laws can control it. . . No laws can do more than specify ways of entering into wedlock, and the rights and duties of the parties in wedlock to each other, which the society will enforce."[3]

The early law, based upon the mores of that time, considered marriage itself solely from the standpoint of status. Everyone was married at puberty.[4] Having been born into a society with status fixed the parties themselves had no power to choose either as to entrance into marriage or to alter or vary the rules and principles which controlled. The idea of contract, therefore, did not have any influence in either the mores or the law governing marriage. Even at the present time the parties to the marriage cannot fix the terms of the contract.

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[1]The word "mores" in this paper is used in the sense described by Professor Sumner in his "Folkways," sections 40 to 44 and following. It is the "name for the folkways with the connotations of right and truth in respect to welfare, embodied in them." It is not synonymous with custom or morals but is the motivating will of the social group back of these manifestations, and it ante-dates them. It is "a dominating force in history, constituting a condition as to what can be done, and as to the methods which can be employed."

[2]Sumner, Folkways, sec. 357; Maine, Ancient Law pp. 149-154.

[3]Sumner, op. cit. sec. 364.

[4]Sumner, op. cit. sec. 73.

Religion also contributed a substantial influence. The church looked upon marriage as a sacrament. The status was sanctified and blessed by the church.[5] Annulment of marriage for fraud, as the law stands today, is remarkably affected by this influence, unconsciously perpetuated, of course, by the fact that most marriages are performed by a minister of the church. It was not, however, until comparatively recent times that the contract conception was sufficiently present in the mores to be reflected in the laws.

Much of the common law on the subject of marriage, in general, and annulment thereof, in particular, had its origin at a time when ecclesiastical influence was dominant, in which the dogmas of the church prevailed. It is not surprising that status cemented by God could not be considered avoidable because of fraud. To consider it voidable was impossible. Hence, there was no confusion in the law, based upon this prevalent conception. In England, the jurisdiction over matrimonial causes has been exercised since 1857, by the general law courts, but they had held to the conservative doctrine of the ecclesiastical courts. As late as 1897,[6] the statement of the ecclesiastical law on annulment for fraud, as made by Ayliffe's Parergon, was approved. The rule was, in effect, that a marriage could be annulled for that species of fraud which was styled "error personae," which meant that, through personation, or otherwise, the wrong person was married, but, "error in condition," or "error fortunae," or "error in quality," were not sufficient for annulment.

To be sure, the suggestion is made in *Scott v. Sebright*,[7] that fraud which would avoid an ordinary contract, would be sufficient to avoid a marriage, also, but this position was emphatically disapproved in the *Moss Case*, which limited that decision to its particular facts, namely, deception and force acting on a weakened mind, thus preventing marriage for lack of consent.

One is not surprised to find, therefore, the English court announcing a most rigid rule relating to annulment of marriage on the ground of fraud. In a recent leading case,[8] Sir F. H. Jeune, President, said:

"But, when in English law, fraud is spoken of as a ground for avoiding a marriage, this does not include such fraud as in-

[5]Sumner, op. cit. sec. 427-432.
[6]Moss v. Moss, [1897] P. 263, 77 L. T. 220, 45 W. R. 635. See 13 Harv. L. Rev. 110, 114.
[7](1886) 12 P. D. 21, 23.
[8]Moss v. Moss, [1897] P. 263, 77 L. T. 220, 45 W. R. 635.

duces a consent, but is limited to such fraud as procures the appearance without the reality of consent."

In an earlier case,[9] the same idea was advanced:

"The strongest case you could establish of the most deliberate plot, leading to a marriage, the most unseemly in all disproportions of rank, of fortune, of habits of life, and even of age itself, would not enable this court to release him from chains, which, though forged by others, he had riveted on himself. If he is capable of consent, and has consented, the law does not ask how the consent has been induced."

The spiritual courts and later, the secular courts, following the lead of the former, could adjudge that two persons, who apparently were married, really never were, but the dissolution of a real marriage could not be decreed.[10] Cases where marriages were annulled for impotence and lack of physical or mental capacity, which are collected in Halsbury's Laws of England,[11] are not inconsistent with the English rule respecting annulment for fraud, for there the reason for annulment was not fraud, but lack of capacity, and, in these particulars, the rule in England is not so rigid. These cases, and the recent radical changes in the matrimonial laws, together with the complete revolution in woman's status in general, reflect a change in the mores in England. Change, however, because of long tradition, comes more slowly there than in the United States, but it would seem that the time is not far distant when the changed mores will tell also upon the rule of annulment for fraud. Perhaps here is an instance in which the law delays and retards the development of the mores.

No such rigid rule as that held in England obtains in any jurisdiction in the United States. From the standpoint of our law, marriage is not a sacrament, but, at most, a status ushered in by contract. In a great many states marriage is defined simply as a "civil contract."[12] It has been pointed out,[13] however, that when "civil contract" is used in these statutes, the word "civil" is used in contrast with "sacred," meaning that no religious ceremony is needed; furthermore, that this was Judge Vann's meaning, in *Kujek v. Goldman*,[14] when he said: "Our law considers marriage in no other light than a civil contract."

[9] Sullivan v. Sullivan, (1818) 2 Hagg. Cons. 238, 248. See also Swift v. Kelley, (1835) 2 Knapp 257.

[10] 28 Law Notes 145; 68 U. of Pa. L. R. 77.

[11] Vol. 16, p. 471 and following.

[12] 22 Col. L. R. 662.

[13] Crouch, Annulment of marriage for fraud in New York. 6 Cornell L. Q. 401, 402.

[14] (1896) 150 N. Y. 176, 182, 44 N. E. 773.

It is an outstanding fact, nevertheless, that there were comparatively few cases of annulment for fraud in the United States before the last quarter of the last century, and it seems fairly obvious that some influence was keeping this type of case from litigation. It was not until a half century after the sweeping statutory changes, beginning in the second quarter of the nineteenth century, changes radically modifying the whole relationship and incidents of marriage, changes immeasurably enlarging woman's status in general, making her virtually sui juris, that annulment cases began to appear in large numbers. These changes seem to have been wrought by a difference in the mores which removed the restraining influence, resulting in numerous annulment cases, and an apparent weakening of the marriage tie at another point.

The prevailing idea in most jurisdictions still is, however, that a sound policy demands that marriage must be permanent and only sparingly avoided for most serious causes. Cases can be found, therefore, in all of the states, where the question has been before the courts, in which a rule, patterned on the English model, is formulated to further this conception of public policy. For instance, in the case of *Fisk v. Fisk*,[15] Rumsey J. said:

"Without examining fully into all the cases upon this subject, it may be sufficient to say that the rule is well settled that no fraud will avoid a marriage which does not go to the very essence of the contract, and which is not in its nature such a thing as either would prevent the party from entering into the marriage relation, or, having entered into it, would preclude performance of the duties which the law and custom imposes upon him or her as a party to the contract."

With the statement of the rule, agreement in the various states ceases. What shall be considered material fraud, sufficient to go to the "very essence" of the contract is a matter of dispute and difference of opinion. On the one hand, are the jurisdictions, the clear majority, which follow the lead of the Massachusetts court in modifying the English rule as sparingly as possible. On the other hand, there are a few courts, representing, possibly, the modern trend, which, following the lead of the New York courts since 1903, adopt a very liberal view, in fact, treat the marriage contract in this particular, the same as an ordinary contract.

It is believed that all courts in the United States would grant an annulment, at the instance of an innocent husband, for mis-

[15](1896) 6 App. Div. 432; 39 N. Y. S. 537. See also 73 U. of Pa. L. R. 193, 196.

representation or concealment of existing pregnancy at the time of the marriage. The leading case is *Reynolds v. Reynolds*[16] in which the husband was innocent of antenuptial sexual relations with the defendant and she concealed the fact that she was pregnant by another man, at the time of the marriage. The court placed its reasons for decreeing annulment upon two grounds; first, that the woman was incapable of contracting in that she could not perform the marriage obligations in her then state of temporary impotence, second, policy. Respecting the first reason, it has been pointed out,[17] that at most, this was but a temporary incapacity, and as such probably insufficient to annul the marriage. It is doubtful if any court would extend this doctrine to every case of temporary incapacity.[18] The second was the real reason and here is presented a policy which is necessarily inconsistent with that other policy of permanence first mentioned. It would be harsh, indeed, to force upon an innocent husband spurious offspring. The court, accordingly, for the first time, departed from the strict rule and annulled the marriage for the fraud. It is important to note that while reasons of a contractual nature were assigned the real reason was one of policy.

What is the effect on the plaintiff's right to annulment in such cases, of his own ante-nuptial sexual intercourse with the defendant? The decisions on this question are in hopeless conflict. In some jurisdictions such an act entirely precludes the plaintiff from securing an annulment of the marriage,[19] even though time showed that he could not have been the father of the child. Two reasons

[16](1862) 3 Allen (Mass.) 605. (This case was adversely criticized in Moss v. Moss, [1897] P. 263, 77 L. T. 220, 45 W. R. 635. See also Donovan v. Donovan, (1864) 9 Allen (Mass.) 140; Baker v. Baker, (1859) 13 Cal. 87; Hardesty v. Hardesty, (Cal. 1924) 223 Pac. 951; Carris v. Carris, (1873) 24 N. J. Eq. 516. (Further New Jersey cases in note 86 post.) Fontana v. Fontana, (1912) 77 Misc. Rep. 28, 135 N. Y. S. 220.

[17]Fessenden, Nullity of Marriage, 13 Harv. L. R. 110, 119.

[18]68 U. of Pa. L. R. 77.

[19]Foss v. Foss, (1866) 12 Allen (Mass.) 26; Crebore v. Crebore, (1867) 97 Mass. 330, 93 Am. Dec. 98; Safford v. Safford, (1916) 224 Mass. 392, 113 N. E. 181, L. R. A. 1916F 526. Mason v. Mason, (1924) 164 Ark. 59, 261 S. W. 40; Frank v. Frank, (1892) 3 Cal. Unrep. 656, 31 Pac. 571, 18 L. R. A. 375; Sissung v. Sissung, (1887) 65 Mich. 168, 31 N. W. 770 dissenting opinion of Justice Sherwood and Justice Champlin; Fairchild v. Fairchild, (1887) 43 N. J. Eq. 473, 11 Atl. 426; States v. States, (1883) 37 N. J. Eq. 195; Bahrenburg v. Bahrenburg, (1914) 88 Misc. Rep. 272, 150 N. Y. S. 589; Beckermeister v. Beckermeister, (1918) 170 N. Y. S. 22; Scroggins v. Scroggins, (1832) 14 N. C. 535; Westfall v. Westfall, (1921) 100 Ore. 224, 197 Pac. 271, 13 A. L. R. 1428; Hoffman v. Hoffman, (1858) 30 Pa. St. 417; Tait v. Tait, (1893) 3 Misc. Rep. 218, 23 N. Y. S. 597. See Nelson, Divorce and Separation 610.

have been assigned; first, that the plaintiff can have no standing in a court of equity,[20] or that he is particeps criminis with the defendant, second, that the plaintiff is precluded because of his own credulousness or imprudence. The first of these reasons is seldom found and it has been expressly denied in a recent case.[21]

Several courts, however, insist that such a plaintiff is too credulous. A man who intermarries with a woman whom he knows to be unchaste, whom he has debauched, who is pregnant, without taking steps to ascertain the truth of her statements as to the paternity of the unborn child, acts with blind credulity, said a Massachusetts[22] court. His knowledge is sufficient to put a prudent man on inquiry. Such inquiry would reveal facts of intimacy with other men, and, delay in marriage, or possibly a medical examination, would disclose the truth about the child's paternity. His good motives in not making inquiry will not aid him to escape from his obligations by showing facts which reasonable inquiry would have divulged. Or as a Michigan judge[23] suggested, his own intercourse should warn the plaintiff of the kind of woman he is dealing with and so put him on his guard, thus requiring a high degree of vigilance.

On the other hand, a recent decision[24] very strongly presents exactly the opposite view. The court there said:

"To say that under such circumstances the man has no right to rely upon the woman's statements that he is the father of the child she is bearing, and that he must make inquiry elsewhere as to her chastity, is to negative all virtue, all truthfulness, and all decency in every woman that may have been imprudent enough

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[20]Seilheimer v. Seilheimer, (1885) 40 N. J. Eq. 412, 2 Atl. 376. See 9 Col. L. R. 334.

[21]Winner v. Winner, (1920) 171 Wis. 413, 177 N. W. 680, 11 A. L. R. 919.

[22]Foss v. Foss, (1866) 12 Allen (Mass.) 26.

[23]Sissung v. Sissung, (1887) 65 Mich. 168, 31 N. W. 770. Opinions of Justices J. Morse and Campbell.

[24]Winner v. Winner, (1920) 171 Wis. 413, 177 N. W. 680, 11 A. L. R. 919. See also the following: Lyman v. Lyman, (1916) 90 Conn. 399, 97 Atl. 312, L. R. A. 1916E 643. See comments, 16 Col. L. R. 604; Wallace v. Wallace, (1908) 137 Ia. 37, 114 N. W. 527, 126 A. S. R. 253, 15 Ann. Cas. 761, 14 L. R. A. (N.S.) 544; Jackson v. Ruby, (1921) 120 Me. 391, 115 Atl. 90, 19 A. L. R. 77. See comments 6 MINNESOTA LAW REVIEW 416; Gard v. Gard, (1918) 204 Mich. 255, 169 N. W. 908, 11 A. L. R. 923; Ritayik v. Ritayik, (1919) 202 Mo. App. 74, 213 S. W. 883; Steimer v. Steimer, (1902) 37 Misc. Rep. 26, 74 N. Y. S. 714. (The case is decided on a point of evidence. The court expressed doubt as to the law on the main problem.) Barden v. Barden, (1832) 14 N. C. 548; Long v. Long, (1877) 77 N. C. 304, 24 Am. Rep. 449; Bryant v. Bryant, (1916) 171 N. C. 746, 88 S. E. 147, L. R. A. 1916E 648.

to anticipate with her lover the rights of the marriage relation. Such a lapse from good morals should not be held destructive of every ethical instinct of the woman and render her unworthy of belief as to assertions fraught with such serious import, and whose truth she alone knows. . . No right-minded man guilty of having wronged a woman, or sharing a wrong with her, would so act. He would do as plaintiff did in this case, marry her. That is the only honorable reparation possible,—the only method of legitimatizing the offspring which he believes to be his, and of saving the honor of the woman he has promised to marry. The act of marriage in such a case is not the result of negligent credulity, but of honorable motives to repair, as far as possible, wrongs inflicted or shared by him. Such conduct should be encouraged, to the end that lesser wrongs be remedied, instead of being followed by greater ones."

With this view a Michigan judge would not agree. He said: "And it seems to me the fraud in this case is a more potent reason for a nullification of the marriage ceremony than it would be in a case where the man was ignorant of the pregnancy. In such a case the woman makes no representations, except as the concealment may tend in that direction; but here a false statement is made, of her condition and an appeal based thereon, to the better and kindlier nature of the man, who, moved thereby, undertakes to make restitution for his supposed wrong, and, in so doing, falls easily into the trap laid for him by a wanton and designing woman. He is certainly entitled to a release."

A degree of prudence is expected of one entering into any sort of contract and some care should be required of a plaintiff when contracting a marriage and many cases show that this is essential. A few, chosen almost at random, will suffice to illustrate. A designing woman, who had not been pregnant at all but who had had sexual intercourse with the plaintiff, falsely represented to him, upon his return after a long absence, that she had given birth to a child which was his and produced a child which she had secured for the occasion. He believed her and married her and after several years' cohabitation asked annulment for the fraud.[25] The court thought "The artifice was such as to deceive a *reasonably prudent person* and to appeal to his sense of honor and duty." But a plaintiff was thought to be credulous who married a woman on her representation that she was a widow, when she, in fact, had never been married and was the mother of an illegitimate child, where he had been guilty of intercourse with

[25]DiLorenzo v. DiLorenzo, (1903) 174 N. Y. 467, 67 N. E. 63, 63 L. R. A. 92, 95 A. S. R. 609.

her and *knew of such intimacy by her with other men.* The court said:

"He who knowingly bathes in a polluted stream, deliberately contributing contamination to its waters, should not reasonably be surprised at any consequent revelations as to the character or extent of its original defilement."[26]

Likewise where the plaintiff had the defendant thrown into jail on a bastardy charge, and then secured his release on their marriage, it was held, the defendant having deserted her, that she could not have the marriage annulled for fraud in that he did not intend at the time of the marriage to carry out the contract. The court declared that it was the first time any one who had forced a marriage upon an unwilling defendant ever had had the temerity to come into court and ask annulment for a fraud respecting the defendant's mental attitude towards her. She was not prudent.[27] It is obvious that a very young and inexperienced girl will not be held to the same degree of prudence as is required of others.[28] Moreover, a different degree of care is necessary in matters of rank, social position, wealth, etc., than in the serious fraud under consideration, pregnancy. While the decided trend is, therefore, to allow a plaintiff to rely upon the statements of the defendant, he must use some prudence, and even in case of immoral conduct with the defendant he should not be entirely precluded from reliance upon her statements.

Massachusetts further modified the English rule in cases of misrepresentations as to the existence or concealment of a venereal disease by holding such sufficient fraud for which to decree annulment. With this holding other states generally agree. While it is admitted that the case differs from the "concealment of pregnancy" cases in that there is no danger of spurious offspring being born to the husband, and that phase of public policy is not present, yet it is considered that concealment of or misrepresentations respecting the presence of these diseases is so essential to marriage as to avoid it. The court, however, restricted the decision to its particular facts and made controlling, the fact that the marriage was not consummated.[29] The merits of this position will be con-

[26]Bahrenburg v. Bahrenburg, (1914) 88 Misc. Rep. 272, 150 N. Y. S. 589.

[27]Beckermeister v. Beckermeister, (1918) 170 N. Y. S. 22.

[28]Brown v. Scott, (1922) 140 Md. 226, 117 Atl. 114 (criticized in 71 U. of Pa. L. R. 85); Corder v. Corder, (1922) 141 Md. 114, 117 Atl. 119; Browning v. Browning, (1913) 89 Kan. 98, 130 Pac. 852, L. R. A. 1916C 737. See Bishop, Marriage and Divorce sec. 506.

sidered later, but its importance in the opinion of the Massachusetts court is seen in the *Vondal Case*,[30] where it was held that if the disease had been sufficiently treated so as not to be contagious and the wife thus not endangered, then the marriage could not be annulled even though danger of transmission of the disease to children still existed.

In the case of *Anders v. Anders*,[31] however, the Massachusetts court came very near departing from its long established doctrine and used language which seriously endangers it. The defendant, in that case, wished to secure a name for her illegitimate child so that she could return to Europe and avoid shame for herself and child. She therefore induced the plaintiff to marry her concealing the fact that she never intended to assume the marital relations but to abandon him immediately after the ceremony. This she did. The court was troubled with the *Cowles Case*,[32] which had held that refusal of intercourse was not a ground for nullifying a marriage, but stated that in that case the court "did not have in mind the case of a woman going through the marriage ceremony with a preconceived intention never to allow marital intercourse." It was then ruled that since an ordinary contract could be avoided for intent never to abide by it entertained at the time, "a fortiori the same result must follow in case of a contract to enter into 'the holy estate of matrimony.'" Of course the marriage was not consummated. This case stands alone in Massachusetts and might be thought to indicate a different trend were it not for more recent decisions which strongly restate the former rule.[33]

Concealment of impotence is ground for annulment even in England although not on the ground of fraud, but of physical incapacity to marry. In the United States, where concealment or

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[29]Smith v. Smith, (1898) 171 Mass. 404, 50 N. E. 933, 41 L. R. A. 800, 68 A. S. R. 440.

[30]Vondal v. Vondal, (1900) 175 Mass. 383, 50 N. E. 586, 78 A. S. R. 502.

In the following cases annulment was granted for fraud respecting venereal diseases; Kochler v. Kochler, (1919) 137 Ark. 302, 209 S. W. 383, (dictum); Crane v. Crane, (1901) 62 N. J. Eq. 21, 49 Atl. 734; Anon., (1897) 21 Misc. Rep. 765, 149 N. Y. S. 331; Svenson v. Svenson, (1904) 178 N. Y. 54, 70 N. E. 120; Jacobson v. Jacobson, (1923) 207 App. Div. 238, 202 N. Y. S. 96; Ryder v. Ryder, (1892) 66 Vt. 158, 28 Atl. 1029, 44 A. S. R. 833.

[31]Anders v. Anders, (1916) 224 Mass. 438, 113 N. E. 203.

[32]Cowles v. Cowles, (1873) 112 Mass. 298.

[33]Chipman v. Johnston, (1921) 237 Mass. 502, 130 N. E. 65, 14 A. L. R. 119; Richardson v. Richardson, (1923) 246 Mass. 353, 140 N. E. 73.

misrepresentations are made respecting it, annulment will be decreed for fraud.[34]

That the modification of the English rule in Massachusetts and the jurisdictions following that doctrine is limited to fraud respecting pregnancy, concealment of venereal diseases and impotence is manifest when other instances of fraud are considered. It has been held, but more often stated in dicta, that fraud consisting of concealment or misrepresentations as to chastity,[35] character,[36] rank, wealth or fortune,[37] name or past life,[38] age,[39] disease other than venereal,[40] physical condition,[41] citizenship,[42] prior marriage or divorce,[43] intention not to assume marriage relations,[44] and

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[34]Gilford v. Oxford, (1832) 9 Conn. 321. See 16 Col. L. R. 525.

[35]Reynolds v. Reynolds, (1862) 3 Allen (Mass.) 605; Smith v. Smith, (1898) 171 Mass. 404, 50 N. E. 933, 41 L. R. A. 800, 68 A. S. R. 440; Fisk v. Fisk, (1896) 6 App. Div. 432, 39 N. Y. S. 537; Domschke v. Domschke, (1910) 138 App. Div. 454, 122 N. Y. S. 892, (this case refused to follow an earlier case, Glean v. Glean, (1902) 70 App. Div. 576, 73 N. Y. S. 622). See 11 Col. L. R. 88, 24 Harv. L. R. 157; Barnes v. Barnes, (1895) 110 Cal. 418, 42 Pac. 904; Browning v. Browning, (1913) 89 Kan. 98, 130 Pac. 852, L. R. A. 1916C 737; Entsminger v. Entsminger, (1916) 99 Kan. 362, 161 Pac. 607; Shrady v. Logan, (1896) 17 Misc. Rep. 329, 40 N. Y. S. 1010; Smith v. Smith, (1879) 8 Ore. 100; Varney v. Varney, (1881) 52 Wis. 120, 8 N. W. 739, 38 Am. Rep. 726.

In 68 U. of Pa. L. R. 77, it is said: "It is certainly startling to hear that as far as the essentials of the marriage relation are concerned there is no difference between common strumpets and those who are most dear to us. Yet it is obvious that precisely that limitation is necessary if we desire to exclude ante-nuptial incontinence from the rule."

[36]Williamson v. Williamson, (1910) 34 App. D. C. 536, 30 L. R. A. (N.S.) 301; Wier v. Still, (1870) 31 Ia. 107.

[37]Williams v. Williams, (Del. 1922) 118 Atl. 638; Reynolds v. Reynolds, (1862) 3 Allen (Mass.) 605, (dictum); Wier v. Still, (1870) 31 Ia. 107; Jakar v. Jakar, (1920) 113 S. C. 295, 102 S. E. 337; Allen's Appeal, (1892) 99 Pac. 196, 44 Am. Rep. 101.

[38]Chipman v. Johnston, (1921) 237 Mass. 502, 130 N. E. 65, 14 A. L. R. 119.

[39]Corder v. Corder, (1922) 141 Md. 114, 117 Atl. 119; Lyndon v. Lyndon, (1873) 69 Ill. 44; Christlieb v. Christlieb, (1919) 71 Ind. App. 682, 125 N. E. 486; Williams v. Williams, (1911) 71 Misc. Rep. 590, 130 N. Y. S. 875.

[40]Lyon v. Lyon, (1907) 230 Ill. 366, 83 N. E. 850, 13 L. R. A. (N.S.) 996; Richardson v. Richardson, (1923) 246 Mass. 353, 140 N. E. 73; Cunningham v. Belchertown, (1889) 149 Mass. 435, 4 L. R. A. 131; Lewis v. Lewis, (1890) 44 Minn. 124, 46 N. W. 323, 9 L. R. A. 505, 20 A. S. R. 559. See comment 8 MINNESOTA LAW REVIEW 341.

[41]Wendel v. Wendel, (1898) 30 App. Div. 447, 56 N. Y. S. 72. See 21 Col. L. R. 99. Kraus v. Kraus, (1899) 6 Ohio N. P. 248 (concealment that defendant wore a glass eye).

[42]Kawabata v. Kawabata, (N. D. 1922) 189 N. W. 237; Jakar v. Jakar, (1920) 113 S. C. 295, 102 S. E. 337 (but see strong dissenting opinion.)

[43]Oswald v. Oswald, (1924) Md. 126 Atl. 81. See comments 34 Yale L. J. 207, 73 U. of Pa. L. R. 195. Donnelly v. Strong, (1900) 175 Mass. 157, 53 N. E. 892; Trask v. Trask, (1915) 114 Me. 60, 95 Atl. 352; Clarke v. Clarke, (1860) 11 Abb. Pr. (N.Y.) 228; Boehs v. Hanger, (1905) 69

love[45] do not affect an essential of the marriage and are not sufficient grounds for annulment.[46]

Prior to 1903, New York courts agreed very closely with the Massachusetts cases, although there were occasional departures therefrom. It was said in *Clarke v. Clarke:*[47]

"That the misrepresentation made by the defendant 'was not a fraud in or as to a material matter or thing, within the ordinary or legitimate purposes of marriage, and the supposed intention or purpose of parties in contracting marriage. The plaintiff had a fancy that she would never marry a man who had been divorced from his wife. She had a right to indulge this fancy, but it does not follow because she was deceived and induced unknowingly to marry a divorced man, that she should be indulged in such fancy afterwards to the extent of having her marriage judicially declared void.' "

In a much later case,[48] where the same objection was raised the court stated that what is fraud—

"Is left to be determined on the general principles applicable

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N. J. Eq. 10, 59 Atl. 904; Bannon v. Bannon, (1922) 50 Wash. L. R. 22, 23 A. L. R. 178.

Despite the fact that all of these cases deny annulment where the defendant has misrepresented the truth about a former divorce or the death of a divorced wife or husband, it is suggested in 33 Yale L. J. 209, that the mores of a sect should be sufficient to justify the court in granting annulment. This suggestion, it is believed, is entirely sound. Certainly, as is pointed out in 73 U. of Pa. L. R. 195, 199, to refuse annulment in such cases to a devout Catholic or the members of any other sect, whose religious tenets impose strong disapprobation or even severe sanctions on members marrying under such circumstances, is to work a great hardship. No serious considerations of public policy are aligned against granting annulment in such cases.

[45]Johnson v. Johnson, (1912) 176 Ala. 449, 58 So. 418, 39 L. R. A. (N.S.) 518, Ann. Cas. 1915A 828.

[46]Schaeffer v. Schaeffer, (1913) 160 App. Div. 48, 144 N. Y. S. 774; Griffin v. Griffin, (1924) 122 Misc. Rep. 837, 204 N. Y. S. 131.

[46]"In that contract of marriage which forms the gateway to the status of marriage, the parties take each other for better, for worse, for richer, for poorer, to cherish each other in sickness and in health; consequently a mistake whether resulting from accident, or indeed, generally from fraudulent practices, in respect to the character, fortune, health, does not render void what is done." Bishop, Marriage and Divorce, sec. 167.

In sec. 168 he continues: "that the nature of marriage contract forbids its validity to rest upon any stipulations concerning these accidental qualities. If a man should, in words, agree with the woman to be her husband only on condition of her proving so rich, so virtuous, so wise, so healthy, of such a standing in society, yet if he afterwards celebrates the nuptials on her representing herself to possess the stipulated qualities, while in truth she is destitute of them, still, in such celebration he says to her, in effect, and in law, 'I take you to be my wife whether you have the qualities or not, whether you have deceived me or not.' In other words he waives the condition."

[47](1860) 11 Abb. Pr. (N.Y.) 228.

[48]Fisk v. Fisk, (1895) 12 Misc. Rep. 466, 34 N. Y. S. 33.

to all contracts, subject only to such restrictions and modifications as necessarily arise and grow out of the peculiar nature of the contract of marriage,"

and the following from *Long v. Long*[49] is quoted approvingly:

"There is, in general, no safe rule but this: 'The persons who marry agree to take each other as they are, and we cannot but say that nothing could be more dangerous than to allow those who have agreed to take each other in terms for better, for worse, to be permitted to say that one of the parties is worse than expected.' "

On appeal the *Fisk Case*[50] was affirmed, the court very carefully differentiated the marriage contract from other contracts, and continued:

"The fraud which will induce the court to set aside a contract of marriage is something different from the fraud which will induce the court to set aside an ordinary contract". . .

It is interesting to note that the court in this case quotes with approval and follows an Iowa case[51] although in doing so it rejects a case in its own jurisdiction on the same facts where the court reached a contrary conclusion.[52] That case and others indicative of a more liberal trend were disapproved:

"We are aware that there are some cases in this state which have gone beyond the rules laid down above, and sought to annul a marriage for less cogent reasons."[53]

This rejected liberal tendency, however, became the rule in New York in 1903 with the announcement of the decision of *Di Lorenzo v. Di Lorenzo*[54] by the court of appeals. Mr. Justice Gray there said:

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[49](1877) 77 N. C. 304, 24 Am. Rep. 449.

[50](1896) 150 N. Y. 176, 182, 44 N. E. 773.

[51]Wier v. Still, (1870) 31 Ia. 107.

[52]Keyes v. Keyes, (1893) 6 Misc. Rep. 355, 26 N. Y. S. 910. This is one of the first, if not the first case to depart from the strict rule in New York. Mr. Justice McAdams said: "The difficulty in inducing courts to act upon this provision" (Code, sec. 1743) "is the stupefying fear that dissolution may lead to carelessness and blind credulity on the part of those contemplating marriage. But 'love is blind,' always has been and will be. Nothing born of the law will prevent indiscreet and unsuitable marriages. The average individual judges and acts on appearances, on his own likes and dislikes; and if he or she exercises his or her best judgment, and is deceived by the arts and wiles of an unscrupulous, designing person, there should be no unwillingness, in a proper case, to afford relief to the injured, when it can be done without injury to any one except the guilty."

[53]The same principle as announced in the Fisk Case is thus stated in Shrady v. Logan, (1896) 17 Misc. Rep. 329, 40 N. Y. S. 1010, "The motion is not to be entertained that the marriage relation the stability of which is sedulously cherished and supported by the law as a cardinal principle of public policy, is to be dissolved by those false pretenses

"It seems to me that the intention of our law is to rate frauds which go to the essence of the marriage contracts and relation, the same as frauds in general in respect to contracts."

It seems impossible to state a more complete reversal of position. Marriage is now to be looked upon exactly as any other civil contract, it is no longer sui generis, and the ordinary contract rule[55] is adopted to determine what fraud is material.

Two considerations have been present in cases of annulment for fraud prior to this decision: a contract element and the element of public policy,[56] the latter meaning that marriage must in the law be looked upon as a permanent institution and avoided for the most serious frauds only. Now the latter element seems to be eliminated. That sort of public policy did not enter into the consideration. Judge Gray said:

"If the plaintiff proves to the satisfaction of the court that, through misrepresentation of some fact, which was an essential element in the *giving of his consent* to the marriage and which was of such a nature as to deceive an ordinarily prudent person, he was victimized, the court has *power* to annul the marriage."

The court deliberately excludes consideration of the policy of permanency and "looks upon marriage in no other light than as a civil contract." But it should be observed that the court has the "power" to decide in each case whether the fraud is sufficient for a decree of annulment.

When one goes through the decisions in the New York courts under this rule one cannot avoid an uneasy feeling that in many instances the defrauded party was "victimized" very much to his liking, and used this method as an easy means of escape from the marriage. The result is that the undefined "material fact" is left to the sound discretion of the court. If there is any danger in the rule it will be in the manner in which this discretion is exercised.[57]

Working under this rule marriages have been annulled for

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that suffice for the rescission of ordinary contracts of commerce." See also King v. Brewer, (1894) 8 Misc. Rep. 587, 29 N. Y. S. 1114.

[54](1903) 174 N. Y. 467, 67 N. E. 63, 63 L. R. A. 92, 95 A. S. R. 609.

[55]To make clear the rule intended Mr. Justice Gray quotes the following from 2 Parsons, Contracts, 8th ed., 895: "If the fraud be such that, had it not been practiced, the contract would not have been made, or the transaction completed, then it is material to it; but if it be shown or made probable that the same thing would have been done by the parties, in the same way, if the fraud had not been practiced, it cannot be deemed material."

[56]6 Cornell L. Q. 405, see also 20 Col. L. R. 708.

[57]6 Cornell L. Q. 409.

misrepresentations that the defendant did not have tuberculosis,[58] epilepsy,[59] that the defendant made false statements about things admittedly non-essential,[60] concealed mental disorders in his or her family,[61] concealed intention never to assume marital relation,[62] misrepresented facts about use of drugs,[63] misstated the use that would be made of money with clear intention to defraud,[64] falsely stated that he or she was never married,[65] lied about honesty,[66] concealed intention not to carry out marriage agreement,[67] misrepresented facts about chastity,[68] about former marriage and annulment,[69] about citizenship,[70] fraudulently threatened to reveal indiscretions of the plaintiff before marriage which would make her ashamed,[71] fraudulently suppressing the fact that there were legal impediments to the marriage,[72] and fraudulently represented that a Jewish ceremony would be secured following a civil ceremony.[73]

It should not be supposed, however, that any sort of misrepresentation or concealment will be sufficient fraud for annulling a marriage even though the plaintiff alleged that he would not

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[58]Sobol v. Sobol, (1914) 88 Misc. Rep. 277, 150 N. Y. S. 248, See 36 U. of Pa. L. R. 460.

[59]McGill v. McGill, (1917) 99 Misc. Rep. 86, 163 N. Y. S. 462, reversed in 179 App. Div. 343, 166 N. Y. S. 397 on newly discovered facts rather than on principle of law. See comment 17 Col. L. R. 350.

[60]Libman v. Libman, (1918) 102 Misc. Rep. 443, 169 N. Y. S. 900.

[61]Smith v. Smith, (1920) 112 Misc. Rep. 371, 184 N. Y. S. 134.

[62]Moore v. Moore, (1916) 94 Misc. Rep. 390. 157 N. Y. S. 819; Barnes v. Wyethe, (1855) 28 Vt. 41; Miller v. Miller, 31 Weekly L. Bul. 141; Bishop v. Redmond, (1882) 83 Ind. 157; Henneger v. Lomas, (1896) 145 Ind. 287, 44 N. E. 462, 32 L. R. A. 848.

[63]O'Connell v. O'Connell, (1922) 201 Misc. Rep. 338, 194 N. Y. S. 265.

[64]Roberts v. Roberts, (1914) 87 Misc. Rep. 629, 50 N. Y. S. 366.

[65]Minner v. Minner, (1924) 238 N. Y. 529, 144 N. E. 781 (dictum).

[66]Sheridan v. Sheridan, (1921) 186 N. Y. S. 470. See 30 Yale L. J. 769. Harris v. Harris, (1922) 193 N. Y. S. 936 (memorandum decision reversing lower court).

[67]Moore v. Moore, (1916) 94 Misc. 390, 157 N. Y. S. 819.

[68]Domschke v. Domschke, (1910) 138 App. Div. 454, 122 N. Y. S. 892; Butler v. Butler, (1923) 204 Misc. Rep. 602. 198 N. Y. S. 391 (dictum).

[69]Weill v. Weill, (1918) 104 Misc. Rep. 561. 172 N. Y. S. 589.

[70]Truiano v. Truiano, (1923) 121 Misc. Rep. 635, 201 N. Y. S. 573. See comments 8 MINNESOTA LAW REVIEW 341, 24 Col. L. R. 433, 33 Yale L. J. 793.

[71]Warren v. Warren, (1923) 199 N. Y. S. 856 (duress was present too).

[72]Roth v. Roth, (1916) 97 Misc. Rep. 136, 161 N. Y. S. 99.

[73]Rubinson v. Rubinson, (1920) 110 Misc. Rep. 114, 181 N. Y. S. 28; Watkins v. Watkins, (1921) 197 Misc. Rep. 489, 189 N. Y. S. 860; Rozsa v. Rozsa, (1922) 117 Misc. Rep. 728, 191 N. Y. S. 868; contra, Schachter v. Schachter, (1919) 109 Misc. Rep. 152, 178 N. Y. S. 212. (Representation was treated as respecting a future event and plaintiff not warranted in relying upon it.)

have entered into the marriage had he known the truth. There have been occasional cases in which the court, in the exercise of a sound discretion, has refused annulment. A misrepresentation as to age,[74] as to love,[75] and innocent false statements respecting impotence[76] have been held insufficient. In a recent decision[77] the judge very strongly disapproved the trend under the liberal rule.[78] In this case the plaintiff discovered after seventeen years of married life, and after the birth of two children, now nearly grown, that his wife misstated the truth when she declared before their marriage, that she loved and honored him. Alleging that he would not have entered into the marriage had he known the truth, he asked for annulment for fraud. The court, in the exercise of discretion, found that the fraud here was immaterial. The court then strongly emphasized the distinction between those marriages which have and those which have not been consummated.

Consummation is not essential to a valid marriage.[79] The courts of many jurisdictions, nevertheless, refer to it as a controlling element in a great many cases. In the *Smith Case*,[80] the Massachusetts court said:

"Their [the parties to the marriage] status up to the time of the ceremony is that of parties to an executory contract. Their

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[74]Williams v. Williams, (1911) 71 Misc. Rep. 590, 130 N. Y. S. 875. See 20 Col. L. R. 708.

[75]Schaeffer v. Schaeffer, (1903) 160 App. Div. 48, 144 N. Y. S. 774. The court said in this case: "But I think we have not yet arrived at the legal stage which requires an annulment of a marriage because one party or both parties were untruthful to each other in their protestation of all consuming and undying love. Marriage is yet a status, on which depends the idea of a family, and on which in turn has arisen the structure of civilization as we know it."

[76]Chavias v. Chavias, (1920) 64 N. Y. L. J. 533, see 21 Col. L. R. 99.

[77]Griffin v. Griffin, (1924) 122 Misc. Rep. 837, 204 N. Y. S. 131.

[78]It has been suggested that the freedom with which the New York courts grant annulment for fraud may be explained, in a measure at least, by the fact that absolute divorce may be obtained for one cause only. 33 Yale L. J. 209, 20 Col. L. R. 708, Wells v. Talham, (Wis. 1923) 194 N. W. 36, 39. But South Carolina, a jurisdiction even less liberal than New York in the matter of divorce, is also very reluctant to annul marriages for fraud. Jakar v. Jakar, (1920) 113 S. C. 295, 102 S. E. 337. It is submitted that the explanation is to be found in the mores of the two states. The people of New York have accepted the most modernized view of the marriage relation while those in South Carolina still cling to the older conception. Perhaps the strong dissenting opinion in the South Carolina case is indicative of a changing view even in that state.

[79]Franklin v. Franklin, (1891) 154 Mass. 515, 28 N. E. 681. See 34 Harv. L. R. 218, 22 Col. L. R. 66; Williams v. Williams, (1911) 71 Misc. Rep. 590, 130 N. Y. S. 875; Wier v. Still, (1870) 31 Ia. 107; Thompson v. Thompson, (Tex. 1918) 202 S. W. 175, affirmed in 203 S. W. 939.

[80](1898) 171 Mass. 404, 50 N. E. 933, 41 L. R. A. 800, 68 A. S. R. 440.

status as soon as the ceremony is performed is that of persons legally married, who, with the sanction and under the forms of the law, have assumed new relations to each other and to the state. But these new relations are then rather inchoate than complete, and they do not assume their perfected form so as to have their full possible effect upon the parties and the community until consummation of the marriage. There are, therefore, reasons why a fraud like that in the present case, discovered before consummation of the marriage and at once made a ground for separation, should move the court more strongly in favor of the libelant than if the discovery had come later."

The inference from the opinion seems warranted that if the woman, the plaintiff, had not made the discovery that her husband had syphilis until after consummation that the annulment would not have been granted. It is difficult to see why, from a contract standpoint, she would not have been just as much defrauded had the discovery been made after consummation. The "mysterious sanctity of the consummated marriage"[81] would have prevented her seeking annulment for fraud. Hence it is not the mere status of marriage that prevents annulment for fraud, but status plus something. This case holds that it is status plus consummation. The *Griffin Case*[82] seems to require something still further. The court there quoted the following from Nelson:

"If, before *children are begotten,* before *debts are created, real estate involved,* and the community have long *recognized the relation,* the injured party seeks relief from fraud, error, or duress, it seems clear that no consideration of public policy will prevent a court from annulling a marriage where the relation has not fully ripened into the complications of a *public* status. In such a case the marriage is but little more than a contract, and, in view of the serious consequences to follow, the degree of fraud which vitiates a contract should be sufficient."

The truth is that the only effect that consummation, or the lack of it, can have in any case is to furnish a foundation to the judge for the exercise of a judicial discretion and to afford a guide to him in the administration of justice in the particular case. The court must be trusted in the performance of his judicial function to safeguard public policy. In fact, public policy is and should be the determining element and a present day policy rather than

[81]Gotto v. Gotto, (1919) 79 N. H. 177, 106 Atl. 493.

[82](1924) 122 Misc. Rep. 837, 204 N. Y. S. 131. Mr. Justice Lazansky seems very much in doubt about the problem. He said: "Until final authority speaks upon the subject I shall adopt" the rule of the Svenson Case, (1904) 178 N. Y. 541, 70 N. E. 120, where the distinction is very fully developed. See also 2 Nelson, Divorce and Separation, sec. 600, 602.

that of a former century. In *Gotto v. Gotto*[83] Mr. Justice Walker said:

"The only ground upon which the suggested doctrine of consummation becomes of importance is that the possibility of the birth of children establishes a public policy that precluded a decree of nullity for fraud which would bastardize the children. But this consideration does not establish the validity of the marriage as a contract in which consent is essential."

The suggestion seems cogent that the danger of bastardizing the children that may have been begotten is eliminated by statute in many jurisdictions[84] and such a course is readily available to others. The distinction is clearly error when considered from the viewpoint of contract, and when considered from the policy angle it is equally wrong. It is impossible to lay down a rule because a sound policy in one case may be best conserved by adhering to the distinction and in another case by disregarding it. This is, in fact, exactly what the courts do.[85] The court must exercise a wise discretion in each case and the accident of consummation should not be considered more than as a guide to the court in reaching a decision.

[83]Gotto v. Gotto, (1919) 79 N. H. 177, 106 Atl. 493.

[84]22 Col. L. R. 662.

[85]For instance, in New York, where the distinction between consummated and unconsummated marriages has been stated so frequently, the decisions do not allow it to control. Where the fraud was respecting the paternity of a child, DiLorenzo Case, (1903) 174 N. Y. 467, 67 N. E. 63, 63 L. R. A. 92, 95 A. S. R. 609; or the concealment of epilepsy, McGill Case, (1917) 99 Misc. Rep. 86, 163 N. Y. S. 462; or a misrepresentation as to the use of drugs, O'Connell Case, (1922) 201 Misc. Rep. 338, 194 N. Y. S. 265; or as to venereal disease, Jacobson Case, (1923) 201 App. Div. 238, 202 N. Y. S. 96; or tuberculosis, Sobol Case, (1914) 88 Misc. Rep. 277, 150 N. Y. S. 248; although in each case the marriage was consummated, yet the decree annulled the marriage. The court in the last case stated in effect, that in his discretion he must decide in each case when the status began. On the other hand, when the misrepresentation was as to antenuptial "love and honor," Griffin Case, (1924) 122 Misc. Rep. 837, 204 N. Y. S. 131, although the marriage had been consummated for seventeen years the court refused the decree of annulment. A review of the decisions by the court caused the judge much despair as to the real effect of consummation. Where the marriage was not consummated and the misrepresentation or concealment was respecting venereal disease, (Svenson Case, (1904) 178 N. Y. 54, 70 N. E. 120; or a former annulled marriage, Wiell Case, (1918) 104 Misc. Rep. 561, 172 N. Y. S. 589, or a promise to have a Jewish ceremony, Rubinson Case and others, supra note 73; the court in each case granted the annulment. On the other hand, where the marriage was not consummated and the fraud was as to age, Williams Case, (1911) 71 Misc. Rep. 590, 130 N. Y. S. 875; or refusal to carry out a promise to have a Jewish ceremony, Schachter Case, (1919) 109 Misc. Rep. 152, 178 N. Y. S. 212, (probably not followed) the annulment decree was refused. These cases sufficiently show that the court exercised discretion in each in the furtherance of public policy and did not apply a rule of thumb in the matter of consummation.

There are, then, three clearly defined lines of authority on this subject. The English courts are the strictest and require fraud of a degree that prevents the mind from following the act. The moderate or middle group courts, led by Massachusetts and representing the clear weight of authority, will annul marriages for misrepresentation or concealment of pregnancy, venereal diseases and impotence if the marriage is not consummated, but will not extend the causes for annulment. Lastly, the liberal group of states, led by New York which treat marriage in this respect as any other contract.

There is a strong tendency on the part of several states which have long belonged in the moderate group to adopt in a measure the liberal view. Among these states are New Jersey,[86] New

[86]Prior to 1920 the New Jersey court followed the Massachusetts rule and held that the concealment of pregnancy, Carris v. Carris, (1873) 24 N. J. Eq. 516; Sinclair v. Sinclair, (1898) 57 N. J. Eq. 222, 40 Atl. 679, of impotence, Steerman v. Snow, (1922) 94 N. J. Eq. 9, 118 Atl. 696, and of syphilis, Crane v. Crane, (1901) 62 N. J. Eq. 21, 49 Atl. 734, were sufficient grounds for annulling for fraud a consummated marriage, because such concealment went to the "essence" of the marriage relation. The Crane Case is especially interesting because of the dictum that concealment of any other diseases, even though commonly thought to be communicable to offspring, would be insufficient for annulment. But misrepresentations that the defendant had not been divorced, Boehs v. Hanger, (1905) 69 N. J. Eq. 10, 59 Atl. 904, and concealment of insanity in the defendant's family, Allen v. Allen, (1915) 85 N. J. Eq. 55, 95 Atl. 363, were held not sufficient fraud to annul the marriage which had been consummated. Where the marriage was not consummated, however, concealment of an intention not to submit to sexual intercourse, Bolmer v. Edsell, (1919) 90 N. J. Eq. 299, 106 Atl. 646, and concealment or misrepresentations about past life or character, Ysern v. Horter, (1920) 91 N. J. Eq. 189, 110 Atl. 31 (see comment 34 Harv. L. Rev. 218) were held sufficient fraud for annulment. In the last case, which may be considered the leading case in this jurisdiction Stevenson, V. C. said: ". . . an unconsummated marriage which is infected by fraud of any kind whatsoever, which would render a contract voidable, is avoidable at the option of the injured party if promptly disaffirmed before any change of status has occurred . . . Suppose a woman is induced to marry a man by his representation that he is of noble family and great wealth. It turns out that the man is poor and of lowly origin, or even a criminal. My study of this case has brought me to the firm conclusion that, if the woman discovers the fraud before the marriage is consummated and promptly repudiates it, she has a right to a judicial annulment."

The following cases are in accord with this doctrine: Cox v. Cox, (1920) 110 Atl. 924, where a young girl was imposed upon; Turney v. Avery, (1921) 92 N. J. Eq. 473, 113 Atl. 710, where the defendant concealed the fact that her ovaries had been removed; Dooley v. Dooley, (1921) 93 N. J. Eq. 18, 115 Atl. 268, where the defendant lied about his profession and fortune.

In the case of Davis v. Davis, (1919) 90 N. J. Eq. 158, 106 Atl. 644, it was held that a consummated marriage could be annulled because of the defendants concealing the fact that he had tuberculosis. This case is disapproved in the Ysern Case, (1920) 91 N. J. Eq. 189, 110 Atl. 31 because it was thought to be bad policy. The court said: "The marriage had been

Hampshire,[87] Texas,[88] California[89] and perhaps to a less degree, Maryland.[90]

There can be no sort of question that the marriage relation and its incidents have been greatly modified by statute and decision since the days when the doctrine of annulment had its origin. It is submitted that the conception of that day is as inapplicable and unworkable today in the matter of annulment as it would be if the attempt were made to apply it to marriage itself and its incidents. It would seem that conservatism of the courts in this regard will not long restrict the wishes of society in respect to its policy. It seems cogent to inquire to what extent the courts, by a strict rule, should attempt to continue an earlier century's notion of social policy.

There is of course a difference of opinion on the question of what a sound policy is. Two recent decisions illustrate this dif-

consummated; the parties had lived together as husband and wife for six months, and a child had been born, which, however, lived only a few days. The surmise is unavoidable that, if the petitioner had stood before the court as the mother of a family of children of which the defendant was the father, the court would not have found it so easy to reach the conclusion that there were no considerations opposed to annulment based on 'good policy, sound morality and the peculiar nature of the marriage relation.'" Very likely so, but it should be noted that she did not so stand, and it is better policy to protect possible issue from the dangers from such a disease than to bind the parties to the action to an indissoluble union.

It would seem, therefore, that the New Jersey court is committed to the unsound distinction between consummated and unconsummated marriages and follows the New York doctrine only as to the latter, adhering to the Massachusetts rule in the former.

[87]Keyes v. Keyes (1851) 22 N. H. 553; Farmington v. Somerworth, (1863) 44 N. H. 589; Hampsted v. Plaistow, (1869) 49 N. H. 84; Gotto v. Gotto, (1919) 79 N. H. 177, 106 Atl. 493. This case has been quoted from in the text and should become a leading case on this subject. See comment 69 U. of Pa. L. R. 80.

[88]Thompson v. Thompson, (Tex. 1918) 202 S. W. 175, aff. in 203 S. W. 939.

[89]Millar v. Millar, (1917) 175 Cal. 797, 167 Pac. 394, Ann. Cas. 1918E 184. This is the leading case in California. Other cases supra notes 16 and 19 seem to indicate that this jurisdiction accepts the liberal view about to the same extent as New Jersey.

[90]In the case of Oswald v. Oswald, (Md. 1924) 126 Atl. 81, the plaintiff asked annulment because of false statements by the defendant that her former husband was dead. The marriage was according to the rites of the Catholic church, of which the plaintiff was a devout member. On discovering that the defendant had divorced her former husband, who was still living, the plaintiff immediately separated from his wife. The court refused annulment for fraud. There is no sort of doubt that the hardship upon the plaintiff was great. Two years previous to this case the Maryland court, in Brown v. Scott, (1922) 140 Md. 226, 117 Atl. 114 criticized in 71 U. of Pa. L. R. 85, had annulled a marriage for fraud which consisted of false representations as to character, standing socially, etc., representations not in the least more serious from the point of view of physical ability to carry out the marriage than in the Oswald Case, (Md.

ference. In *Oswald v. Oswald*[91] the court approved the following rule:

"The policy depends not alone on the vital importance of the dissolution of the marriage relation to the parties directly concerned. It rests on the deep concern of the state that the *integrity* of the marriage contract shall as far as possible, be *preserved*."

Here is a clear declaration that marriage is a permanent institution and its permanence must be preserved. As one would expect this court requires the fraud to go to the "essence" of the contract. On the other hand, in the *Gotto Case*[92] the court referring to this doctrine said:

"But why is there no legal redress? Why is justice denied him in this situation which the law would be swift to afford him in the case of an ordinary civil contract? The usual answer is that the distinction is based upon grounds of public policy which seeks to render the marriage status permanent and unassailable. . . . But as the status must result from the contract, there can be no status in the absence of a contract, and there can be no contract in the absence of a free and mutual understanding and agreement. There is no public policy which binds parties to contracts they never made, either expressly or by reasonable implication. . .

"The public policy of this state, evidenced by the statutes, the decisions or the general consensus of opinion, does not regard a fraudulent marriage ceremony as sacred or irrevocable by judicial actions; it does not encourage the practice of fraud in such cases by investing a formal marriage, entered into in consequence of deceit, with all the force and validity of an honest marriage. While marriage is a contract attended with many important and peculiar features in which the state is interested, and while it is one of the fundamental elements of social welfare, its transcendent importance would seem to demand that wily and designing people should find it difficult to successfully perpetrate fraud and deceit as inducements to the marriage relation, rather than that such base attempts should be regarded as of trivial importance and be wholly disregarded by the courts.

"Neither the restricted rule of law as administered in England, nor the Massachusetts modification of it which has been sanctioned in some other jurisdictions, is supported by convincing legal reasoning, or justified by a sound public policy. The law does not

1924) 126 Atl. 80, and yet the court granted an annulment decree. So also in the Corder Case, (1922) 141 Md. 114, 117 Atl. 119, the court seemed to follow the liberal view. To be sure much is made of the age and condition of the plaintiff, but this decision also seems out of harmony with the doctrine of the Oswald Case. It is submitted that the start made in these two cases might well have been follwed up in the Oswald Case and the liberal rule announced. That case, however, is a clear retrenchment from the position of the former cases.

[91](Md. 1924) 126 Atl. 80.

[92](1919) 79 N. H. 177, 106 Atl. 493.

require that the parties should take each other 'for better or for worse' as is assumed by some writers."

Furthermore, the state is becoming more and more interested in the sort of children that are likely to be born of marriage. The eugenic laws of some of the states manifest a beginning.[93] It would seem that the state should be vastly more anxious to dissolve a marriage in which one or both of the parties is afflicted with a transmittible venereal disease, with a strain of insanity in the family which is inheritable, with a trend toward tuberculosis or with a physical or mental history or any other character fraught with serious danger to unborn children, than to place its seal upon such marriages and thus perpetuate the weakness or evil to a future generation, and even create public charge and burden. Even in the most frivolous cases of pretended injury by fraud it should be remembered that the marriage in the particular instance has failed. The refusal of annulment will not make this particular marriage function for society. To annul such marriages might afford bad precedent. This seems to be the chief concern of some courts.

The mores of the day is not the same as of a hundred years ago. People look upon the marriage relation differently. This change is evident at every point in the marriage relation. It is submitted that a judicious application of the liberal view of the New York courts is in harmony with present day social attitude, and that the law cannot hope to modify social concepts but will eventually itself be modified thereby as the present trend rather definitely indicates.

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[93] 17 Col. L. R. 350, 27 Harv. L. R. 573.