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This is the second of two articles comparing the canonical rule of error and the American decisional and statutory rules of fraud in marriage. The first article, "Fraud and Error in the Canon Law of Marriage," appeared in 1 CATHOLIC LAWYER 83 (April, 1955).

MUTATIONS OF THE RULE OF FRAUD IN MARRIAGE

WILLIAM F. CAHILL, B.A., J.C.D.*

Voidable Marriages: A Jurisdictional Concept

FROM earliest times until the Divorce and Matrimonial Causes Act of 1857,¹ direct adjudication of the validity of marriage was reserved in England to the ecclesiastical courts. It appears, however, that the lay courts would find a marriage null on certain limited grounds, where that finding was collateral to a question properly before the common law courts or the Chancery. Of course, the finding of nullity of marriage was *res judicata* only between the parties to the suit in which that finding had been made. An example of such collateral finding is that of the New York Chancellor in *Aymar v. Roff*.²

Chancellor Kent ruled upon a form of marriage entered into by a girl under the age of 12, "as a frolic." She had disavowed her act before the Master of Rolls on her twelfth birthday, and again before the Chancellor some ten days later. The relief prayed and granted was not a direct declaration of nullity, but a decree restraining the defendant from any contact with the girl. It seems that the Chancellor founded his holding upon the common law which, according to Blackstone,³ made void *ab initio* the marriage of a girl under twelve.

A statute of Henry VIII,⁴ whose direct purpose was to limit the extent of certain canonical impediments to be adjudicated by the ecclesiastical courts of the Anglican Church, had the indirect effect of clearly limiting

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¹ 20 & 21 Vict., c. 85.

² 3 Johns. Ch. 49 (N.Y. 1817).

³ 1 Bl. Comm. *436.

⁴ 32 Henry VIII, c. 38 (1540).

the respective competencies of the ecclesiastical and lay courts in matters of marriage. The statute, in this latter respect, was not a pure novelty, but it gave to the lay courts a new power, predicated upon their acting to enforce the Act of Parliament, to inhibit petitioners from seeking decrees of nullity in the ecclesiastical courts upon grounds outside the statutory limits. More important for our purposes here, the Henrician statute limited collateral findings of nullity in the lay courts to three grounds: want of age, want of reason, and previous marriage with the spouse surviving. To these, the Statute 4 & 5 Philip and Mary, c. 8, added the want of consent of guardians of women less than fifteen years of age. There the matter stood in Blackstone's time, as he explains in Chapter 15 of his Commentaries.

Blackstone here introduces us to the terminology of "void marriage" and "voidable marriage" which is to recur again and again in the present discussion. In his time, and in the common law received here at the Revolution, a void marriage was one whose nullity could be declared collaterally in a lay court proceeding, while a voidable marriage was one which could not be declared null except by an ecclesiastical judge. Neither in the common law nor in the Canon Law was any marriage which had been valid at its inception capable of dissolution by court decree.

Canonical Rule: Void for Fraud in the Factum

Marriages alleged to be null for fraud were to be adjudicated in the ecclesiastical forum only; they could not be attacked, even collaterally, in a proceeding before a lay tribunal. If such question there arose, the proceeding halted until determination of that incidental question was had in the church court. The rule on fraud, or more properly

the rule on error, in those courts, was the same as that in the Code of Canon Law today. Marriage was a nullity if consent, though apparent, was not real. Consent in any of these four cases, and in these only, was not real consent: consent not directed to the person contemplated, consent directed to a union other than marital, consent which positive law made ineffective because based upon error of servile status of the partner, and consent vitiated by failure of a postulate which had been made a condition *sine qua non*.

In England the common usage was, even when speaking of Canon Law, to employ the term "fraud" instead of the canonically correct term "error." Fraud, of course, involves elements referable to two persons, the deceiver and the person deceived. The elements of materiality, falsity, and reliance, pertain to the victim's consent. That there was factual misrepresentation, made scienter, with intent to cause the victim to act thereon, has reference to the deceiver's guilt. Because the object of inquiry of the Canon Law in such cases of alleged nullity is the act of consent, considerations referable to the deceiver's guilt were not and are not important. It is imperative to keep this distinction in mind when we set out to compare the canonical rule in such cases with the rules developed in American law. Also helpful to the reader whose background is the common law is the similar distinction in the common law of fraud: "Fraud in the factum renders the writing void at law, whereas fraud in the treaty renders it voidable merely."⁵ The "factum" here is the marriage itself, created by consent of the parties; the "treaty" here includes all acts by which one is induced to consent to marriage,

⁵ Whipple v. Brown Bros. Co., 225 N.Y. 237, 241, 121 N.E. 748, 749 (1919) (per Collins, J.).

all acts by which his consent is procured. In the Canons, marriage is valid and never voidable where there is real consent to marry; marriage is never void or voidable because the real consent was procured or induced by error or by fraud, except in the statutory case of error as to slavery.

Direct Decrees of Nullity in Early American Courts

In the early years of American independence, the state courts afforded in cases of fraudulent marriage a single type of relief, the decree of nullity. There were not then statutes, such as have been later enacted in many of the states, authorizing divorce where a man married in ignorance of his wife's previous unchastity,⁶ or making a nullity *ab initio* and warranting divorce in any marriage obtained by fraud,⁷ or empowering the court to make a marriage void by its decree where consent thereto had been obtained by fraud.⁸ Therefore, the theory underlying the action was then in the American courts, as it had been in the ecclesiastical courts of England and as it is now in the tribunals of the Catholic Church, a singular and simple theory: where there was, through fraud in the factum, an appearance of consent without its reality, there was a marriage void *ab initio*.

In 1820, Chancellor Kent of New York declared the nullity of a marriage which the petitioner had entered while in a state of mental derangement, from which state she had recovered at the time of the action.⁹ Here, the Chancellor hesitated to decree nullity upon the common law premises, for the suit was "*instituted purposely to declare*

such a marriage void."¹⁰ He therefore predicated his decree upon the general powers of chancery in reference to lunatics. That jurisdiction, he asserts, was inherent in chancery, though direct adjudication of nullity of marriage was reserved, in England, to the ecclesiastical courts. Kent's assumption is that in America, where no ecclesiastical courts are established by municipal law, the latent matrimonial aspect of the chancery jurisdiction of lunacy must be considered to come into free operation.

His successor, Chancellor Sanford, in *Ferlat v. Gojan*,¹¹ makes a similar argument to establish his power of decreeing nullity of a marriage contracted under fraud and duress. Here it is the general power of chancery to adjudge the nullity of contracts fraudulently executed, which is extended to decree a marriage void, where, "in England, the ecclesiastical courts would have cognizance of such a question and would annul the marriage."¹² Sanford's finding of fact is well within the rule of fraud in the English ecclesiastical courts: "though she gave an apparent consent at the moment of the celebration, yet it fully appears that this consent was feigned . . . and that this marriage was a foul fraud practiced upon her by the defendant."¹³

In *Clark v. Field*,¹⁴ the Supreme Court of Vermont, on an appeal from chancery, reached a result quite similar as extending chancery jurisdiction of void contracts to declare nullity of a marriage celebrated without real consent. The woman there was shown to have understood and intended, to the knowledge of the man, that she was not married by the ceremony unless they should

⁶ 1 Md. Code 76, §25 (1860); Va. Code 530, §6 (1860).

⁷ Ga. Code §§30-102, 30-103, 30-104.

⁸ N.Y. Rev. Stat., Pt. II, c. 8, tit. 1, §4 (1828).

⁹ *Wightman v. Wightman*, 4 Johns. Ch. 343 (N.Y. 1820).

¹⁰ *Id.* at 346.

¹¹ 1 Hopk. Ch. 478 (N.Y. 1825).

¹² *Id.* at 495.

¹³ *Id.* at 493.

¹⁴ 13 Vt. 460 (1841).

have another solemnization. The court makes the point that she did not consent to marriage *in praesenti*.¹⁵

Chancellor Zabriskie of New Jersey, in *McClurg v. Terry*,¹⁶ found that he had authority to declare void a marriage solemnized by the parties acting in jest. He relied upon the construction of chancery powers in the *Ferlat* and *Clark* cases, and invoked a grant implied in the State Constitution, where the Chancellor was vested with chancery powers withdrawn from the legislature. The legislature had had power to declare marriages void.¹⁷

The New York Chancellors had gone beyond the powers of the lay judges of England. Kent's holding of nullity in the *Wightman* case was not collateral to the issuance of an injunction, as his finding of nullity in the *Aymar* case had been. The decision in *Wightman v. Wightman* was a direct adjudication of the nullity of a lunatic's marriage. Sanford, finding nullity for fraud and duress in the *Ferlat* case, went further and invaded the class of marriages which, in Blackstone's classification,¹⁸ were *voidable* only.

Kent, speaking *obiter* in the *Wightman* case, had speculated that an American chancellor might declare null any marriage contracted contrary to natural law.¹⁹ But Sanford held that the chancery powers over lunatics' contracts and to declare nullity of contracts void for fraud or duress marked the limit of the New York chancellor's power to adjudicate directly nullity of marriage. He therefore found he had not jurisdiction to declare the nullity of a marriage in

which the husband was alleged to be impotent.²⁰ Referring to the *Wightman* and *Ferlat* cases, he said, "These marriages were clearly void; and this court pronounced the sentence of nullity. If these two decrees are denominated divorces, they do not arrogate to this court any general power of divorce, in cases not prescribed by our statutes."²¹

New York Statute: Voidable Means Rescissible

The New York divorce statute to which Sanford referred had been enacted in 1787;²² the sole ground in the statute was adultery. Another statute, enacted in 1788,²³ implied that the courts had power of declaring nullity of marriage, as it exempted from the penalties of bigamy a person who remarried "where the former marriage hath been or shall be, by the sentence or decree of any such court, declared to be void and of no effect." The Commissioners to Revise the Statute Laws noted Sanford's holding in the *Burtis* case, "that the whole jurisdiction of the court of chancery in relation to marriage, except where the contract is void on the same ground that other contracts may be avoided, is conferred and limited by statute."²⁴ They recommended that, in several specified circumstances, the marriage be in law, not absolutely void, but "void from the time its nullity shall be declared by a court of competent jurisdiction."²⁵ Included in this section, as enacted, were marriages contracted in want of age or understanding, in want of physical capacity, and "when the consent of either party shall

²⁰ *Burtis v. Burtis*, 1 Hopk. Ch. 557 (N.Y. 1825).

²¹ *Id.* at 567.

²² Laws of N.Y. 1787, c. 69.

²³ Laws of N.Y. 1788, c. 24.

²⁴ 2 N.Y. State Comm'rs to Revise the Statute Laws on N. Y., Report 2 (1828).

²⁵ *Ibid.*

¹⁵ *Id.* at 475.

¹⁶ 21 N.J. Eq. (6 C.E. Greene) 225 (1870).

¹⁷ *Id.* at 229.

¹⁸ 1 Bl. Comm. *434 *et seq.*

¹⁹ *Wightman v. Wightman*, 4 Johns. Ch. 343, 347-351 (N.Y. 1820).

have been obtained by force or fraud."²⁶ The Revisors' note points out "some of these marriages are absolutely void, by the existing law (referring to Blackstone, Commentaries, c. 15). But it is believed that the interests of society and of the parties concerned, will be best promoted by placing them on the ground stated in this section."²⁷ Clearly, then, the purpose and effect of the Revised Statutes were to make such marriages voidable only, that is to say, they were to be valid for all purposes in the law unless and until a competent court should "declare their nullity."²⁸

The New York law on fraudulent marriage here departed from the theory underlying Sanford's decision in the *Ferlat* case, which same theory he expounded more fully in the *Burtis* opinion. The motives for the change may have been good and proper in the judgment of the Revisors and of the Legislature. It has been suggested that the motives were to afford the court more effective means of enforcing marital obligations and of controlling collusive actions, especially where fraud or duress was the ground asserted. But we are directly concerned here, not with the sociological motives, but with the juridical effect of the change. Fraudulent marriage, under this New York statute, was no longer void, and there was now no necessity that the fraud be proved to have such character as to make away with "the reality of consent." The consent might be real enough, but if it were fraudulently obtained, it would be good ground for a decree. We will later trace the vagaries of the New York rule of fraud which followed upon this departure from true declarations of nullity as

²⁶ N.Y. Rev. Stat., Pt. II, c. 8, tit. 1, §4 (1828).

²⁷ 2 N.Y. State Comm'rs to Revise the State Laws on N.Y., Report 3 (1828).

²⁸ Cf. 1 Bishop, Marriage and Divorce §§258, 259 (1891); 1 Bl. Comm.* 434.

the proper remedy in such cases and from the theory that marriage procured by fraud was either void *ab initio* or it was valid.

New Jersey Case: Rescission by Chancery Power

A similar result was obtained in New Jersey without aid of a statute.²⁹ The magic there was worked by invocation of two lines of cases which are fundamentally incompatible. Judge Van Syckle, in dissent, remarks, "The cases (which we have listed as the second line) . . . are under a statute extending divorce power to cases of fraud, and are, therefore, of no authority here."³⁰

The first line of cases comprises those used above to indicate development of the doctrine that chancery is competent to declare on marriages void *ab initio* because there was no real, but only apparent consent.³¹ The second line of cases was decided *under statutes* which empowered the courts to grant divorce, or to dissolve marriage, or to annul, as of the time of the decree, marriages in which consent had been obtained by fraud.³²

The radical fallacy lies, as Van Syckle pointed out, in confusing decrees of divorce or dissolution with simple declarations of the fact of nullity. Though the Massachusetts statute spoke of marriages "supposed to be void, or the validity . . . doubted, either for fraud or any legal cause,"³³ the court said in the *Reynolds* case, "The statute does not

²⁹ *Carris v. Carris*, 24 N.J. Eq. (9 C.E. Greene) 516 (1873).

³⁰ *Id.* at 532.

³¹ See notes 1, 8, 10, 13, 15 *supra*.

³² *Baker v. Baker*, 13 Cal. 87 (1859); *Ritter v. Ritter*, 5 Blackf. 81 (Ind. 1839); *Morris v. Morris*, Wright 630 (Ohio Ch. 1834); *Donovan v. Donovan*, 91 Mass. (9 Allen) 140 (1864); *Reynolds v. Reynolds*, 85 Mass. (3 Allen) 605 (1862).

³³ Mass. Stat. 1855, c. 27, reenacted in Gen. Stat. c. 107, §4.

provide that fraud shall vitiate a contract of marriage, but only confers an authority on the court to decree a dissolution of the marriage for such cause, as in other cases of nullity."³⁴ And the California statute ". . . provided that a divorce might be granted 'when the consent of either of the parties to the marriage was obtained by force or fraud, upon the application of the injured party.'"³⁵ The Indiana statute upon which was based the decision in *Ritter v. Ritter*,³⁶ which case is cited in the *Reynolds* decision, "enacts that the Circuit Courts shall have power to grant divorces for any other cause, and in any other case, where the Court, in their discretion, shall consider it reasonable and proper. . . ."³⁷ We have not seen the report of the *Morris* case,³⁸ also cited in *Reynolds v. Reynolds*, but Justice Field says of it, "A divorce was decreed. . . ."³⁹ Since in all these cases, the court is not declaring a factual nullity but decreeing a dissolution, we must insist that the requirement that real consent shall have been lacking at the time of celebration is quite beside the point. If the court were to declare that the marriage is in fact a nullity, it must find such fraud as made the consent ineffective from the beginning. But if the court is presuming to dissolve a marriage, it need not find lack of true consent; it is free, upon this premise, to dissolve the marriage or not according as it finds or does not find circumstances of injustice, inequity or even of hardship connected with the fraud and sufficient to motivate reasonably the use of discretion.

The cases of this second line, like the case before the New Jersey Court of Errors, were of a peculiar type. All involved concealment

of premarital pregnancy by a man other than the complainant, who had had no carnal knowledge of his future wife. All the cases advert to the horrendous result of sustaining the marriage. The innocent dupe would be forced to maintain bastardy proceedings to free himself from responsibility for the child thrust upon him, and be bound thereafter to the woman he had thus publicly pilloried; or he must in secret bitterness maintain the child as his own. If ever there was an example of the old saw "hard cases make bad law," it is here. That they are hard cases goes without saying.

Reynolds v. Reynolds: the Essentials Enlarged

The making of a bad law is most clearly illustrated in the decisions of Chief Justice Bigelow in the *Reynolds* and *Donovan* matters. He draws a clear distinction in the *Donovan* opinion between the rules of evidence to be employed and the rule of materiality to be applied. As to the first, "In determining on the validity of such contract, in order to ascertain whether it shall be adjudged void on the ground of fraud under Gen. Sts. c. 107, §4, the same rules of evidence are to be applied as to other civil contracts."⁴⁰ As to the second, "There must be satisfactory proof either of misrepresentation or concealment of some essential fact . . . a particular fact which formed the basis or contributed an essential ingredient to the contract. . . . The fact that the respondent was pregnant with child by a man other than the petitioner at the time the contract of marriage was entered into was material, and went to the essence of the contract. This was settled on full consideration in *Reynolds v. Reynolds*."⁴¹ In the *Reynolds* case, he had said, "Nothing can then avoid it which does

³⁴ *Reynolds v. Reynolds*, *supra* note 32 at 606.

³⁵ *Baker v. Baker*, *supra* note 32 at 102.

³⁶ *Supra* note 32.

³⁷ *Id.* at 82.

³⁸ *Supra* note 32.

³⁹ *Baker v. Baker*, *supra* note 32 at 104.

⁴⁰ *Donovan v. Donovan*, *supra* note 32.

⁴¹ *Ibid.*

not amount to a fraud in the *essentialia* of the marriage relation."⁴² He had ruled out concealment of unchastity and false representations of virtue as going to the *essentialia*, but he went on to assert, "It is not going too far to say, that a woman who has not only submitted to the embraces of another man, but who also bears in her womb the fruit of such illicit intercourse, *has during the period of her gestation incapacitated herself from making and executing a valid contract of marriage with a man who takes her as his wife in ignorance of her condition and on the faith of representations that she is chaste and virtuous.* In such a case, the concealment and false statement go directly to the *essentials of the marriage contract.* . . ."⁴³ We have supplied emphasis in the quotation to point out what seems to be the only fulcrum of reasoned argument. It repeats in substance the argument of Justice Field in *Baker v. Baker*.⁴⁴ It assumes the old ecclesiastical rule that the marriage is void *ab initio* where real consent is lacking, but we submit that it misapplies the rule. Where a party is truly and permanently impotent at the time of marriage, there might be made out an argument that real consent was lacking; one may be said to be incapable of consenting to do what he is incapable of doing. But that a woman who is now capable of intercourse, though for a time incapable of conceiving the child of her husband, is incapable of consenting to marriage certainly does not follow. If it did follow, no sterile woman would be capable of marital consent, and even one presently incapable of intercourse by reason of temporary illness could not validly marry.

The Civilians' Rule

The Chief Justice of Massachusetts re-

jects as too severe the opinion of the commentators on the civil law to the effect that premarital unchastity of a woman is good ground for "impeaching and vacating the marriage."⁴⁵ Bigelow cites "Voet, 24, 2, 15" as supporting that view which he rejects. Yet when we turn to the writings of the Dutch jurist at the place cited we find that Voet's case is the same as Bigelow's: "On the petition of one party, marriage should be declared null by the public authority whenever one has in ignorance married a woman corrupted and made pregnant by another, if, after discovering her violation, he has not cohabited with her or in any other way forgiven the offense."⁴⁶ Voet's minor premise is the same as Bigelow's: that the husband's error concerns a matter which goes to the essence of marriage. It seems not impertinent that we examine Voet's development of the argument.⁴⁷

Voet points out that such a marriage is held valid in the Canon Law of the Catholic Church.⁴⁸ Voet argues that it should not be so because the Canon Law held invalid a marriage contracted by a freeman with a slave, if the free person were ignorant of the other's servile condition.⁴⁹ He ignores the fact that Catholic theologians and canonists have always held that the nullity of such a marriage does not result from any natural insufficiency of the freeman's consent, but from a positive impediment estab-

⁴² *Reynolds v. Reynolds*, *supra* note 32 at 608.

⁴³ 4 Voet, *Commentarius ad Pandictas* 127 (4th ed. Bassoni, Remonini, 1827).

⁴⁴ The views expressed by Voet were also expressed by Beza and Brouwer. According to Philip A. Putnam, Assistant Librarian of the Harvard Law School Library, the works of all three jurists were accessible to Chief Justice Bigelow at the library in Cambridge in 1862.

⁴⁵ c. Quod autem, C. 29, q. 1, of the Decree of Gratian.

⁴⁶ cc. 3, 4 C. 29, q. 2; compare Canon 1083, §2 n. 2, C.I.C.

⁴² *Reynolds v. Reynolds*, *supra* note 32 at 608.

⁴³ *Id.* at 609.

⁴⁴ 13 Cal. 87, 103 (1859).

lished by church law.⁵⁰ Voet bolsters his argument by an appeal to the Roman Law⁵¹ which permitted an action for restitution to the buyer of a woman slave represented to be a virgin but found not to be in that condition. Surely the case is not parallel. A man marrying establishes a peculiar personal relation between himself and the woman he marries; there is no such personal relation between the buyer and the property he purchases. Further, it is not clear that the buyer's action for restitution indicates that the sale was a nullity; rather it seems to have imposed an affirmative duty upon the seller to hand back the price upon surrender of the slave. Finally, Voet relies upon the text of Deuteronomy, 22; 20,21 and the Novella (93) of the Emperor Leo. The Scripture text, especially when compared with other verses in the same chapter where similar penalties of death were imposed upon the guilty woman whether she was actually married or only espoused, whereas such sins when committed by girls who were neither married nor engaged were not punished by death, indicates that the offense is technically an adultery. The usual bill of divorce is not mentioned, for the woman is executed immediately upon her conviction. The Emperor's decree had no reference to voiding or dissolving a marriage, but permitted an offended fiance to rescind his engagement and refuse to marry the violated woman.⁵²

Not all the classical Protestant jurists were of Voet's opinion. Pufendorf remarks upon the law of Deuteronomy discussed above, calling it "Jewish civil Law,"⁵³ and "very peculiar." His exposition of the "law

⁵⁰ Cf. St. Thomas Aquinas, Suppl. Q. 52 A. 2, 6.

⁵¹ Digest 19. 1. 11. 5.

⁵² 3 Corpus Juris Civilis 823 (Leipzig, 1854).

⁵³ Pufendorf, Of The Law of Nature and Nations 587 (4th ed., Kennett transl., 1729). The phrase suggests that Pufendorf believed the law was intended to operate only within the Jewish nation.

of nature" runs very close to what we have seen to be the Canon Law: "In like manner, if there were a Mistake, either as to the Person, the Object of Consent, or in any Quality, either relating to Matrimony itself, or serving as a Condition on which the Consent was built . . . the contract was manifestly void."⁵⁴

The New York Rules

Because the relief of annulment of marriage for fraud has had its widest use and broadest development in New York, our discussion of the mutations of the materiality rule in such actions will be limited to the jurisprudence of that state only. In the New York courts, it seems, four general rules of materiality have operated: the essentialia rule, the consent rule, the *Griffin* rule, and the rule of matters *vital* to the consent.

Fraud Going to the Essence of the Contract

The essentialia rule is perhaps most clearly stated in *Fisk v. Fisk*.⁵⁵ There it was said, "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 the husband or the wife *as a party to that contract*."⁵⁶ In that case, the defendant wife had been previously married and validly divorced, while the plaintiff supposed she had never been married; she was, therefore, in the law, capable of marriage with him, and so relief was

⁵⁴ *Ibid.*

⁵⁵ 6 App. Div. 432, 39 N.Y. Supp. 537 (1st Dep't 1896).

⁵⁶ *Id.* at 434, 39 N.Y. Supp. at 539 (emphasis added).

denied. The holding had been the same in an earlier similar case.⁵⁷ But the second marriage was bigamous and void where the divorced person was under prohibition to marry,⁵⁸ and where the defendant had left a wife abroad and it was not known whether she was alive or dead when he remarried.⁵⁹

It was held that the defendant was incapacitated for marriage where she was pregnant by another at the time.⁶⁰ Marriage was annulled where one party had, when marrying, intentions to reject the marital obligations totally,⁶¹ or with reference to the procreation of children.⁶²

Venereal disease has been held to incapacitate a person for marriage.⁶³ Sterility⁶⁴ and that sort of epilepsy which does not

render sexual relations dangerous⁶⁵ do not incapacitate a person for marriage.

It was held that the plaintiff, who, because of her religious beliefs, felt she could not permit sexual relations to a man she had married in a civil ceremony, was bound to the marriage though he refused religious solemnization.⁶⁶

It will be seen that the statement of the essentialia rule in the *Fisk* case brings it well within the ancient rule that there is nullity where consent is only apparent and not real. Some of the applications cited are not within the Canon Law rule of substantial error because they go beyond the canonical concept of matrimonial capacity, as in the case of a divorced person whose spouse survives; or because they are premised on facts which in the canonical view are not substantial to the marital relation, such as pregnancy at the time of marriage and venereal infection; or because the substantial nature of the canonical requirement of religious celebration is not recognized. In spite of such applications of the rule, the spirit of the ancient principle survives where the object of inquiry is a fraud touching the "factum" of the contract, and causing nullity *ab initio*.

Fraud Procuring the Consent

The consent rule, as usually stated and applied, looks to fraud in the "treaty," which fraud is said to warrant dissolution or rescission of the marriage. In *DiLorenzo v. DiLorenzo*,⁶⁷ the court declared, "it is sufficient that *we rely upon the plain pro-*

⁵⁷ *Clarke v. Clarke*, 11 Abb. Pr. 228 (N.Y. 1860).

⁵⁸ *Blank v. Blank*, 107 N.Y. 91, 13 N.E. 615 (1887); *Roth v. Roth*, 97 Misc. 136, 161 N.Y. Supp. 99 (Sup. Ct. 1916).

⁵⁹ *Minner v. Minner*, 238 N.Y. 529, 144 N.E. 181 (1924).

⁶⁰ *Shrady v. Logan*, 17 Misc. 329, 40 N.Y. Supp. 1010 (Sup. Ct. 1896); *cf. Reynolds v. Reynolds*, *supra* note 32.

⁶¹ *Feynman v. Feynman*, 168 Misc. 210, 4 N.Y.S. 2d 787 (Sup. Ct. 1938); *Lewine v. Lewine*, 170 Misc. 120, 9 N.Y.S. 2d 869 (Sup. Ct. 1938); *Ryan v. Ryan*, 156 Misc. 251, 281 N.Y. Supp. 709 (Sup. Ct. 1935); *Sheridan v. Sheridan*, 186 N.Y. Supp. 470 (Sup. Ct. 1921); *Moore v. Moore*, 94 Misc. 370, 157 N.Y. Supp. 819 (Sup. Ct. 1916); *Robert v. Robert*, 87 Misc. 629, 150 N.Y. Supp. 366 (Sup. Ct. 1914).

⁶² *Coppo v. Coppo*, 163 Misc. 249, 297 N.Y. Supp. 744 (Sup. Ct. 1937); *Miller v. Miller*, 132 Misc. 121, 228 N.Y. Supp. 657 (Sup. Ct. 1938).

⁶³ *Meyer v. Meyer*, 49 How Pr. 311 (N.Y. 1875).

⁶⁴ *Chavias v. Chavias*, 194 App. Div. 904, 184 N.Y. Supp. 761 (2d Dep't 1920); *Wendel v. Wendel*, 30 App. Div. 477, 52 N.Y. Supp. 72 (2d Dep't 1898); *Schroter v. Schroter*, 56 Misc. 69, 106 N.Y. Supp. 22 (Sup. Ct. 1907); *Devanbagh v. Devanbagh*, 5 Paige Ch. 554 (N.Y. 1836).

⁶⁵ *Lapides v. Lapides*, 254 N.Y. 73, 171 N. E. 911 (1930); *McGill v. McGill*, 179 App. Div. 343, 166 N.Y. Supp. 397 (4th Dep't 1917), *aff'd mem.*, 226 N.Y. 673, 123 N.E. 877 (1919).

⁶⁶ *Mirizio v. Mirizio*, 242 N.Y. 74, 84, 150 N.E. 605, 609 (1926).

⁶⁷ 174 N.Y. 467, 67 N.E. 63 (1903).

vision of our statute and upon the application to the case of a contract of marriage of those salutary and fundamental rules, which are applicable to contracts generally when determining the validity. 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 contract of marriage and which was *of such a nature as to deceive an ordinarily prudent person*, he has been victimized, *the court is empowered to annul the marriage.*"⁶⁸

Decree of annulment was here granted, as the man's consent to marry was procured by false representations that he was father of the child of which the woman had been delivered before the marriage. The court found that the plaintiff had had a "right to rely" upon the woman's statement, though an earlier case⁶⁹ had denied a man such relief where he (like the plaintiff in *DiLorenzo's* case) had had warning of the woman's bad character through her submission to him in pre-marital relations. That earlier view was adopted by the Supreme Court in a 1933 decision⁷⁰ notwithstanding the ruling in *DiLorenzo*.

*Domschke v. Domschke*⁷¹ extended the *DiLorenzo* rule to a woman's representation that she had been married and had borne her child in wedlock, where she had never been other than mistress to the child's father.

Concealment of prior divorce was held material under this rule, though the person

⁶⁸ *Id.* at 474-475, 67 N.E. at 65.

⁶⁹ *Tait v. Tait*, 3 Misc. 218, 23 N.Y. Supp. 597 (Super. Ct. 1893).

⁷⁰ *Donovan v. Donovan*, 147 Misc. 134, 263 N.Y. Supp. 336 (Sup. Ct. 1933).

⁷¹ 138 App. Div. 454, 122 N.Y. Supp. 892 (2d Dep't 1910).

who had obtained the decree was clearly not legally incapable of contracting a second time.⁷² There was a similar holding where the defendant had concealed annulment of an earlier marriage.⁷³

Where the man had concealed a disease involving sterility after the woman had inquired of his capacity to beget a child, annulment was granted.⁷⁴

Even before the *DiLorenzo* case, courts of first instance had held that the continuance of criminal activity after marriage gave ground for an annulment action by the other party,⁷⁵ though that view had been reproved by the judges of the Appellate Division in the *Fisk* opinion.⁷⁶ After the *DiLorenzo* case was decided, the Appellate Division found no difficulty in granting annulments where the fraud had to do with criminal character, at least when the criminality was found to be of a particularly aggravated sort: drug addiction⁷⁷ and a record of seven felony convictions.⁷⁸

Without discussing the question of incapacity to contract, the court found that failure to disclose an infection of venereal disease, though there had been no inquiry and no affirmative representation, would be

⁷² *Costello v. Costello*, 155 Misc. 28, 279 N.Y. Supp. 303 (Sup. Ct. 1934).

⁷³ *Weill v. Weill*, 104 Misc. 561, 172 N.Y. Supp. 589 (Sup. Ct. 1918).

⁷⁴ *Williams v. Williams*, 11 N.Y.S. 2d 611 (Sup. Ct. 1939).

⁷⁵ *King v. Brewer*, 8 Misc. 587, 29 N.Y. Supp. 1114 (Super. Ct. 1894); *Keyes v. Keyes*, 6 Misc. 355, 26 N.Y. Supp. 910 (Super. Ct. 1893).

⁷⁶ *Fisk v. Fisk*, 6 App. Div. 432, 436, 39 N.Y. Supp. 537, 540 (1st Dep't 1896).

⁷⁷ *O'Connell v. O'Connell*, 201 App. Div. 338, 194 N.Y. Supp. 265 (1st Dep't 1922).

⁷⁸ *Harris v. Harris*, 201 App. Div. 880, 193 N.Y. Supp. 936 (1st Dep't 1922).

sufficient fraud to warrant annulment of marriage.⁷⁹

A 1928 statute⁸⁰ gave to the sane spouse an action for dissolution when the other was insane at the time of marriage or later. In adjudicating a marriage contracted before this enactment it was held that if the defendant had suffered insanity before the marriage, but being sane at that time, concealed the earlier affliction, there was fraud sufficient to warrant annulment.⁸¹

If there had been justified reliance upon a misrepresentation of intent to have a religious ceremony — not a sincere promise later broken⁸² — the court found such fraud as would ground action for annulment.⁸³

The *Griffin* Rule

“The *Griffin* rule”⁸⁴ had a short life. It applied to unconsummated marriages the *DiLorenzo* standard and to consummated marriages a rule of public policy stated in terms of the essentials of the marital status.⁸⁵ It was formulated in Special Term, and was never directly embraced by the Court of Appeals or by the Appellate Division. The courts had for many years invoked the distinction between causes sufficient to annul an unconsummated marriage and those required where the marriage con-

⁷⁹ *Jacobson v. Jacobson*, 207 App. Div. 238, 202 N.Y. Supp. 96 (2d Dep’t 1923).

⁸⁰ Laws of N.Y. 1928, c. 589, incorporated in N.Y. Dom. Rel. Law §7(5).

⁸¹ *Alter v. Alter*, 250 App. Div. 428, 294 N.Y. Supp. 195 (2d Dep’t 1937).

⁸² *Schachter v. Schachter*, 109 Misc. 152, 178 N.Y. Supp. 212 (Sup. Ct. 1919).

⁸³ *Rutstein v. Rutstein*, 221 App. Div. 70, 222 N.Y. Supp. 688 (1st Dep’t 1927).

⁸⁴ So called in Gershenson, *Fraud in the New York Law of Annulment*, 9 B’klyn L. Rev. 51 (1939).

⁸⁵ *Griffin v. Griffin*, 122 Misc. 837, 204 N.Y. Supp. 131 (Sup. Ct.), *aff’d mem.*, 209 App. Div. 883, 205 N.Y. Supp. 926 (2d Dep’t 1924).

tract “had ripened into the marital status.” Actually it was no more than a policy statement, for it is a commonplace that the parties have all the rights and duties of status immediately upon a valid contract.⁸⁶ The *Griffin* rule, when it was stated in 1924, seemed to offer a formula for some restraint upon the almost pure common contract doctrine advanced in *DiLorenzo*, and followed in the *Svenson* and *Domschke* cases. Only one recent case invokes the *Griffin* rule, and it is there applied in rejecting a petition alleging misrepresentation in pre-marital promises of the woman to remain a dutiful wife. Apparently the marriage had been consummated, and the court held that in the circumstance fraud was not material unless it went to the essentials of the contract.⁸⁷

Fraud in an Element Vital to Consent

The field seems now to be held by the “vital consent” rule. The older public policy doctrine, stated in *Keyes v. Keyes*,⁸⁸ was recalled in *Sobol v. Sobol*⁸⁹ and was restated by the Court of Appeals in *Lapides v. Lapides*,⁹⁰ in the following terms, “While the law books may treat marriage as a civil contract, yet it is a contract which the public is interested in preserving. *The fraud which may dissolve the marriage tie must relate to something vital.*”⁹¹

⁸⁶ See *Schonfeld v. Schonfeld*, 260 N.Y. 477, 482, 184 N.E. 60, 62 (1933) (dissenting opinion).

⁸⁷ *Washburn v. Washburn*, 62 N.Y.S. 2d 569 (Sup. Ct. 1946).

⁸⁸ 6 Misc. 355, 26 N.Y. Supp. 910 (Super. Ct. 1893).

⁸⁹ 88 Misc. 277, 279, 150 N.Y. Supp. 248, 249 (Sup. Ct. 1914).

⁹⁰ 254 N.Y. 73, 171 N.E. 911 (1930).

⁹¹ *Id.* at 80, 171 N.E. at 913.

Some of the misrepresentations which have been held vital in recent cases are these: the man had said he would afford a good home for the middle-aged woman and her children in a congenial atmosphere;⁹² the wife who had been silent before marriage on the matter of children, afterward insisted on the right to decide when she should become pregnant;⁹³ concealment of guilt of the crime of rape struck directly at the happiness of the marital relation, though nine years had elapsed since the marriage.⁹⁴

The courts have held the following misrepresentations not vital: as to wealth, family, social position, and that the man, before marriage, had not accepted money from other women;⁹⁵ that the man was of Polish descent when actually he was German;⁹⁶ failure to disclose mental illness, not in the person married, but in members of the family.⁹⁷

It was said that there was no right to rely on representations that there would be a religious ceremony later, as the petitioner had not exercised the care of an ordinarily prudent person to determine the genuinity of the other's willingness to have the ceremony.⁹⁸ It was held to be contrary to public policy to grant an annulment because a wife after marriage refused to keep a pre-marital promise. She had said that for the

sake of her husband's happiness, she would give in adoption another man's child of which she was pregnant at the time of her marriage.⁹⁹

There was found to be no fraud on the petitioner where, though a previous marriage was concealed on the license application, the fact had been known to him;¹⁰⁰ nor where the woman married knowing the man drank, though it was only after marriage she discovered he had been twice convicted for intoxication more than five years before the marriage.¹⁰¹

The Right to Rely and Conditioned Consent

The basic doctrine of the consent rule as enunciated in the *DiLorenzo* case, that failure of a motive or cause for which one consents to the marriage will make the marriage voidable, is rejected by the Canon Law, as it was in the common law. But those cases under the consent rule which predicate the "right to rely" upon a representation made after inquiry follow a rationale not entirely dissimilar from that of the canonists treating of marriage made void by failure of a condition *sine qua non*. Thus, the *Domschke* decision intimates that a man may stipulate for the chastity of the woman he marries.¹⁰² The *Williams* decision found that the woman had inquired of her fiance's ability to beget a child.¹⁰³ In the *Smith* case, there had been particular inquiry as to the health of the woman, and

⁹² *Waff v. Waff*, 189 Misc. 372, 71 N.Y.S. 2d 775 (Sup. Ct. 1947).

⁹³ *Schulman v. Schulman*, 180 Misc. 904, 46 N.Y.S. 2d 158 (Sup. Ct. 1943).

⁹⁴ *Giannotti v. Giannotti*, 60 N.Y.S. 2d 74 (Sup. Ct. 1946).

⁹⁵ *Woronzoff-Daschkoff v. Woronzoff-Daschkoff*, 303 N.Y. 506, 104 N.E. 2d 877 (1952).

⁹⁶ *Pawloski v. Pawloski*, 65 N.Y.S. 2d 413 (Sup. Ct. 1946).

⁹⁷ *Natoli v. Natoli*, 72 N.Y.S. 2d 708 (Sup. Ct. 1947).

⁹⁸ *Vonbirogano v. Von Brock*, 64 N.Y.S. 2d 885 (Sup. Ct. 1946).

⁹⁹ *Kingsbury v. Kingsbury*, 75 N.Y.S. 2d 699 (Sup. Ct. 1947).

¹⁰⁰ *Factor v. Factor*, 184 Misc. 861, 55 N.Y.S. 2d 183 (Sup. Ct. 1945).

¹⁰¹ *Trefry v. Trefry*, 189 Misc. 1013, 76 N.Y.S. 2d 323 (Sup. Ct. 1947).

¹⁰² *Domschke v. Domschke*, 138 App. Div. 454, 457, 122 N.Y. Supp. 892, 895 (2d Dep't 1910).

¹⁰³ *Williams v. Williams*, 11 N.Y.S. 2d 611, 613 (Sup. Ct. 1939).

as to the presence of "anything going to come between us to make life unhappy."¹⁰⁴ None of these circumstances, upon its face, indicates clearly a determination in the mind of the injured party to contract marriage *only if* the other were chaste, or fertile, or in sound mental health. But all of them suggest a doubt entertained before marriage concerning the condition inquired of, and with proper evidence it might have been shown that the doubt had been so serious and the determination so strong that the condition made an object of inquiry had been made also an effective condition *sine qua non*.

Conclusions

The present New York situation pleases no one. So small a proportion of the decided cases are reported that it is practically impossible to determine with certainty what rules or policies are generally controlling in the decisions of the trial judges. Some of those who advocate as an ultimate desideratum a "legal provision for divorce by mutual consent" limited only by use of a conciliation service, provision for the children's welfare and fair adjustment of property rights, complain that some trial judges are applying the "essentialia" rule of materiality and "imposing unjustifiably severe moral standards as a basis for finding the petitioner's hands too 'unclean' for relief in equity."¹⁰⁵ Others feel that the findings of trial courts sometimes exceed even the limits of the very liberal rule of considerations "vital" to the consent, and that the standards of proof are often very low.

Whatever be the fact as to the actual practice of the trial judges, it seems clear

that the rule recognized by the appellate courts, requiring that the fraud be "vital" to the consent, affords no clearly objective standard for limiting the pure "consent" rule laid down in the *DiLorenzo* case. Whether or not the inferior courts are actually attempting to apply the standards established, there is no doubt that the standards themselves are so broad as to give the judges a scope of discretion which has little limit short of their views of social expediency. The judges have now, in the area of fraud, a power, which in 1827 was exercised by the legislature, to regulate marriage under no more definite standard than the "interests of society and of the parties concerned."¹⁰⁶

The logic of this development was inexorable, if not always obvious, once the law departed from the canonical and common law concept that marriage validly contracted cannot be avoided or dissolved. The fallacy pointed out by Judge Van Syckle¹⁰⁷ which confuses the decree of nullity with decrees of divorce or dissolution, has entrapped our people and our legislature by causing them to insist upon a strict divorce statute while accepting complacently an annulment statute whose limits are as vague in doctrine as they are vagrant in application. And the fallacy has so ensnared some of our legal minds that they reject or at least fail to comprehend a principle once a commonplace in marriage law and still clearly effective in contract and agency doctrines: that a contractual or consensual relation is radically void and a nullity always if, and only if, the consent of the parties is wanting.

¹⁰⁴ *Smith v. Smith*, 112 Misc. 371, 373, 184 N.Y. Supp. 134, 136 (Sup. Ct. 1920).

¹⁰⁵ See Note, 48 Col. L. Rev. 900, 915-917 (1948).

¹⁰⁶ 2 N.Y. State Comm'rs to Revise the Statute Laws on N.Y., Report 3 (1828).

¹⁰⁷ *Carris v. Carris*, 24 N.J. Eq. (9 C.E. Greene) 516, 532 (1873).

THE NEW-YORK CITY-HALL RECORDER.

VOL. II.

For June, 1817.

NO. 6.

AT a COURT of OYER and TERMINER and general Gaol Delivery, holden at the Court House* in the Village of Richmond, in and for the County of Richmond, on Saturday, the 31st day of May, in the year of our Lord, one thousand eight hundred and seventeen—

BEFORE

The Honourable

WILLIAM W. VAN NESS, one of the Justices of the Supreme Court of Judicature of the state of New York.

JOHN GARRETSON and } Judges of the court
JOHN VAN PELT, } of Common pleas,
in and for the County of Richmond.

THOMAS LESTER, District Attorney,
JONATHAN LEWIS, Clerk.

"O fortunatos numquam, sua si bona norint,
Agricolas! quibus ipsa, procul discordibus armis,
Fudit homo facilem victum justissima tellus.

Extrema per illos,

Justicia excedens ferris vestigia fecit."

Virg. Georg. II.

O happy husbandmen, did ye but know
Your own felicity! Remote from scenes
Of war and desolation dire: behold! the earth,
Far more beneficent, pours from her bosom
Around—on every side, her numerous blessings.

When Justice took her flight, from earth to heaven,
She left the traces of her footsteps last among
you.

(MURDER—MANSLAUGHTER.)

CHRISTIAN SMITH'S CASE.

LESTER, Counsel for the prosecution.

PRICE, WALLIS, and PHOENIX, Counsel for
the prisoner.

Though confessions made in confidence to a divine of the Roman Catholic order, whose duty it is to receive auricular confessions according to the canons of that church, will not be received in evidence, yet, admissions made by a prisoner to a divine of the protestant churches, will be received.

It is murder for a man, with malice aforethought, to discharge a loaded musket at another, by means of which death ensues, though the deceased was, at the time, committing a trespass on the prisoner.

* The crowd of people was so great, that the court was adjourned for the trial, to the church.

Where, however, in such case, there appeared to have been a violent quarrel, for a number of years, and frequent lawsuits between the prisoner and the deceased, neighbours to each other, in which the latter appeared, rather, to be the aggressor; and the deceased is found by the prisoner, before daylight, in his enclosure, committing a trespass on him, and the circumstances are sufficient to induce the belief that the prisoner, when he left his house with a gun, or other deadly weapon, had no particular malice towards the deceased, and in discharging the gun during, or after a violent struggle, was actuated, rather by a momentary phrenzy, than by malice aforethought; the jury, judging of the law for themselves, acquitted the prisoner.

Countrymen, this case contains for you, much useful instruction. Here you may learn the awful consequence of harbouring, for a long period, a settled malignity against a neighbour: you may profit by the example afforded by the two wretched men, the subjects of the following case, whose private feuds were so destructive, so deadly, as to produce the melancholy catastrophe about to be unfolded.

Few, very few among you, rightly appreciate the peculiar blessings afforded you by a bountiful Providence. Retired from the bustle and confusion incidental to a city life, you may rest in peace "under your own vine and fig-tree, where none can make you afraid." You rise in the morn, and walk abroad—At every step, you inhale the fragrance of the fields, and the tender music of the grove salutes you—On what side soever you turn your eyes, you may discover the unbounded benevolence of that Being, who

"Hath made all nature rapture to the eye,
And music to the ear."

It is your duty—God commands, and your own happiness requires, that you should cultivate peace, and friendship, and brotherly love, and exercise, among each other, all the social and lovely charities of life. By so doing, you may render each hamlet delightful—each village a paradise.

But if, on the other hand, ye suffer the malevolent passions to pervade your bosoms, if among you, envy rears her snaky crest at the prosperity of a neighbour, and you cherish hatred and malice against a brother,

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