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Article 10

Homosexuality - A New Ground for Annulment?

policy of the state. It was their contention that the law of New York has always looked at the gambler as an outlaw, and considered the operation of a gambling house a crime. This historic fact is so indicative of New York's public policy that our courts must be closed to the type of suit herein involved. The very facts that casino gambling is today outlawed and the contract, if made here, would likewise be illegal, clearly express New York's public policy and therefore all other considerations are irrelevant.

The legalization of pari-mutuel betting and bingo is not believed to indicate a trend; rather the people of this state have differentiated between these forms of gambling and the kind here in question. The minority underlines its position by emphasizing the fact that while pari-mutuel betting and bingo are legal in many states, only one state (Nevada) licenses gambling casinos.[22] The conclusion of the minority was that the operation of a gambling house is definitely contrary to New York's public policy and that our courts should refuse plaintiff's claim regardless of comity or principles of the law of contracts.

The instant case defines those factors which will be given consideration by the courts in determining our state's public policy. The public policy of this state is not determinable by mere reference to our domestic laws. The legality or illegality of the activity upon which the foreign right is based is not to be given sole consideration. Courts must now look beyond a literal interpretation of the law, and give cognizance to the prevailing "social and moral attitudes of the community."[23]

Under the concept of public policy advanced by the instant case, it would seem that all foreign-based contractual rights, if valid where made, are entitled to enforcement in New York unless inherently heinous or clearly violative of our basic moral tenets, the obvious example of which would be a contract to commit a crime. Aside from this obvious case, the problem arises as to exactly how and by what means a court is to determine the prevailing moral attitude of the members of a community on any given question.

[22] *Id.* at 19, 203 N.E.2d at 215, 254 N.Y.S.2d at 534. Even in Nevada gambling debts cannot be the basis for a valid lawsuit. Nevada Tax Comm. v. Hicks, 73 Nev. 115, 310 P.2d 852 (1957).

[23] Intercontinental Hotels Corp. v. Golden, *supra* note 16, at 14, 203 N.E.2d at 212, 254 N.Y.S.2d at 530-31.

Homosexuality—A New Ground for Annulment?

Plaintiff petitioned the court to annul the marriage of her deceased niece to the defendant. Petitioner alleged that the defendant had induced his wife to enter the marriage by fraudulently misrepresenting his age, origin, ancestry and his intent to have normal sexual relations, in addition to concealing the fact that he was a homosexual. The allegation that the defendant concealed the fact that he was a homosexual was dismissed for insufficiency of evidence, while the other factual issues presented to the jury were resolved in favor of annulment. The Appellate Divi-

sion affirmed in a three-two decision, *holding* that the questions of misrepresentation were factual and that the determinations of the jury were not against the weight of the evidence. *Sophian v. Von Linde,* (App. Div. 1st Dep't), 152 N.Y.L.J., Dec. 15, 1964, p. 1, col. 7.

In an annulment action in New York, a petitioner may successfully proceed on the ground of fraud.[1] In order to make out a prima facie case, a premarital fraudulent intent must be established.[2] In addition, the petitioner must prove he was induced to enter into the marriage by a fraudulent misrepresentation of an essential or material fact.[3] Thus, New York courts require that the misrepresentation be the "but for" cause of the marriage and one upon which an ordinary prudent man would rely.[4] Furthermore, it must be proved by evidence which is "substantial and reliable enough to satisfy the conscience of the trier of the facts."[5]

Certain instances of fraudulent concealment can categorically be said to provide grounds for annulment.[6] Concealment of an intent not to have normal sexual relations with the marriage partner is one example. The view of a majority of the New York courts is that when one enters into the marriage contract, he or she impliedly promises to perform all the duties incident thereto. Engaging in normal sexual relations is such a duty.[7]

In New York, a misrepresentation as to a person's social status, origin, citizenship, fortune or temper may be of such a character as to be a material misrepresentation upon which an annulment can be granted.[8]

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[1] N.Y. DOM. REL. LAW § 140(e); De Baillet-Latour v. De Baillet-Latour, 301 N.Y. 428, 94 N.E.2d 715 (1950); Roger v. Roger, 24 Misc. 2d 566, 198 N.Y.S.2d 657 (Sup. Ct. 1960).

[2] Roger v. Roger, *supra* note 1, at 567, 198 N.Y.S.2d at 659. Under this view a "change of heart" *after* marriage, *e.g.,* not to have children, would be insufficient grounds for annulment.

[3] Di Lorenzo v. Di Lorenzo, 174 N.Y. 467, 471, 67 N.E. 63, 64 (1903); LONG, DOMESTIC RELATIONS § 42 (3d ed. 1923).

[4] Di Lorenzo v. Di Lorenzo, *supra* note 3, at 474-75, 67 N.E. at 65; *accord,* Shonfeld v. Shonfeld, 260 N.Y. 477, 184 N.E. 60 (1933). The fraud complained of must not be as to trifles. See, *e.g.,* Woronzoff-Daschkoff v. Woronzoff-Daschkoff, 303 N.Y. 506, 104 N.E.2d 877 (1952); Schaeffer v. Schaeffer, 160 App. Div. 48, 144 N.Y. Supp. 774 (2d Dep't 1913); Griffin v. Griffin, 122 Misc. 837, 204 N.Y. Supp. 131 (Sup. Ct.), *aff'd,* 209 App. Div. 833, 205 N.Y. Supp. 926 (2d Dep't 1924).

[5] Roger v. Roger, *supra* note 1, at 568, 198 N.Y.S.2d at 659; *accord,* De Baillet-Latour v. De Baillet-Latour, *supra* note 1, at 434, 94 N.E. 2d at 717. N.Y. DOM. REL. LAW § 144(2) requires that "in any action, whether or not contested, brought to annul a marriage, the declaration or confession of either party to the marriage is not alone sufficient as proof, but other satisfactory evidence of the facts must be produced."

[6] *E.g.,* Smith v. Smith, 112 Misc. 371, 184 N.Y. Supp. 134 (Sup. Ct. 1920) (hereditary insanity); Sobal v. Sobal, 88 Misc. 277, 150 N.Y. Supp. 248 (Sup. Ct. 1914) (tuberculosis); Fontana v. Fontana, 77 Misc. 28, 135 N.Y. Supp. 220 (Sup. Ct. 1912) (pregnancy by another at the time of marriage); Anonymous, 21 Misc. 765, 49 N.Y. Supp. 331 (Sup. Ct. 1897) (venereal disease).

[7] Fundaro v. Fundaro, 272 App. Div. 825, 70 N.Y.S.2d 510 (2d Dep't 1947); Eldredge v. Eldredge, 43 N.Y.S.2d 796 (Sup. Ct. 1943); Note, 48 COLUM. L. REV. 900 (1948).

[8] See Shonfeld v. Shonfeld, *supra* note 4. Since *Shonfeld,* marriages have been annulled for the following misrepresentations: fraudulent misrepresentation as to love and affection (Miodownik v. Miodownik, 259 App. Div. 851, 19 N.Y.S.2d 175 (2d Dep't 1940)); husband represented that he was of good character when he had pleaded guilty to a felony (Graves v. Graves, 27 Misc. 2d 436, 52 N.Y.S.2d 622 (Sup. Ct. 1945)); misrepresentation as to American citizenship (Laage v. Laage, 176 Misc. 190, 26 N.Y.S.2d 874 (Sup. Ct. 1941)); misrepresentation inducing wealthy man to marry a foreign girl who intended no permanent relationship (Ryan v. Ryan, 156 Misc. 251, 281 N.Y. Supp. 709 (Sup. Ct. 1935)). See

However, the general rule in other jurisdictions is that misrepresentations as to fortune, social position, character and other personal traits do not affect the validity of a marriage.[9]

Case law dealing with fraud as a ground for annulment appears relatively settled except in the area of concealment of homosexuality, an examination of which presents several interesting problems.[10] Many jurisdictions have considered the legal difficulties involved in this area, and with varying degrees of consistency have regarded homosexuality as a ground for *divorce*.[11] However, it appears that no jurisdiction has yet employed it as a basis for annulment. Since homosexuality is traditionally neither a ground for divorce nor annulment in New York, its courts have never been squarely faced with these problems.[12] Consequently, none has explained when and if homosexuality may be used as a basis for annuling the marriage.

In the instant case, the Court found that sufficient evidence had been presented to the jury to justify an annulment on the basis of the alleged misrepresentation by the defendant of his age, origin, and ancestry, and also upon his concealment of a preconceived intent not to engage in normal sexual relations. Although the dismissal of the action based on homosexuality was affirmed, the Court stated that such dismissal was not on the merits, and implied that had sufficient evidence been introduced tending to establish the defendant's homosexual inclinations, an annulment might possibly have been granted on that ground alone.

The dissenting justices did not believe that the evidence produced at the trial was sufficient to annul the marriage on the basis of the alleged fraudulent misrepresentations by the defendant as to his age, origin and ancestry or the concealment by him of his intention not to have normal sexual relations. However, the minority found that the evidence introduced to establish the defendant's homosexuality was sufficient to "justify a jury granting the annulment. . . ."[13] Despite the disagreement between the majority and minority

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generally Note, *Annulment of Marriage for Fraud,* 32 CORNELL L.Q. 424 (1947); see also Drexler, *Annulment of Marriage for Fraud in New York,* 71 U.S.L. REV. 318 (1937).

[9] *E.g.,* Marshall v. Marshall, 212 Cal. 736, 300 Pac. 816 (1931); Williams v. Williams, 32 Del. 39, 118 Atl. 638 (1922); Heath v. Heath, 85 N.H. 419, 159 Atl. 418 (1932). Unlike New York, most states will not annul a marriage merely because the fraud is the "but for" cause of the marriage. Only when the fraud goes to the essentials of the marriage relation, such as a concealment of a disease which would make marital intercourse dangerous, will they grant an annulment. See 32 COLUM. L. REV. 1240 (1933); 32 CORNELL L.Q. 424 (1947); 46 HARV. L. REV. 1034 (1933).

[10] See generally Cavanagh, *Sex and the Law —A Symposium: I Sexual Anomalies,* 9 CATHOLIC LAW. 4, 23-25 (1963); Ritty, *Sex and the Law—A Symposium,* 10 CATHOLIC LAW. 90 (1964); Coburn, *Homosexuality and the Invalidation of Marriage,* 20 JURIST 441 (1960).

[11] *E.g.,* Currie v. Currie, 120 Fla. 28, 162 So. 152 (1935); Crutcher v. Crutcher, 86 Miss. 231, 38 So. 337 (1905); H. v. H., 59 N.J. Super. 227, 157 A.2d 721 (1959); Santos v. Santos, 80 R.I. 5, 90 A.2d 771 (1952).

[12] In Cohen v. Cohen, 200 Misc. 19, 103 N.Y.S. 2d 426 (Sup. Ct. 1951), a New York court refused to grant a *divorce* to a wife who proved her husband committed sodomy. The court stated that New York has no common-law jurisdiction over the subject of divorce. Consequently, since the only statutory ground for divorce is adultery, and since the plaintiff had not established that ground, she could not succeed. The court expressed no opinion as to whether it would have granted an annulment on the same facts.

[13] Sophian v. Von Linde, (App. Div. 1st Dep't), 152 N.Y.L.J., Dec. 15, 1964, p. 3, col. 3 (dissenting opinion).

as to the sufficiency of proof, both opinions seemingly agree that an annulment might well be granted upon the presentation of ample evidence of the homosexuality of a marriage partner.

It seems surprising that despite New York's comprehensive treatment of annulment, the problem of homosexuality has never been adequately considered. The instant case indicates only that under some undefined circumstances, homosexuality might provide the basis for annulment. However, the Court does not consider the consequent problems that may result in its application.[14]

When the issue next comes before the courts, different approaches may be utilized in its resolution. In granting an annulment, the court could rely on traditional grounds. For example, since homosexuality is partly psychological, one basis for the annulment could be mental disease.[15] Another traditional ground for the annulment could be impotency,[16] for it is reported that fifty per cent of *genuine* homosexuals are functionally impotent.[17] In addition, if the homosexual is incapable of consummating the marriage, or is incapable thereafter of engaging in normal sexual relations, *and* had concealed this fact before the marriage, the court could use fraud as the basis for annulment.[18]

Difficult problems could arise if the homosexual activity complained of does not fall within traditional categories.[19] Suppose, for example, that a person has engaged in occasional acts of homosexuality prior to marriage.[20] Suppose, further, that he does not view himself as a homosexual and has no aversion to heterosexual relations. He then meets someone of the opposite sex, marries, and consummates the marriage. Both partners engage in normal sexual relations and perform all the duties incident to the marriage. Subsequently, however, an old "acquaintance" appears and a homosexual act is committed. His spouse discovers this and petitions the court to annul the marriage. Ostensibly, the court must determine the grounds upon which to predicate the annulment. Since the respondent did not view himself as a homosexual, there was no preconceived intent to deceive and, hence, fraud could not be a basis for the annulment.[21] Palpably, impotency would be inapplicable here. In addition, the court would probably be hard put to grant the annulment for mental disease on the basis of one overt act of homosexuality committed after the marriage. Analogous difficulties are apparent when we consider the *latent* homosexual. As distinguished from the *bisexual* or *pseudohomosexual* described above, the acts of homosexuality on the part of the *latent* homosexual may initially occur after marriage.[22]

Although the impotency of the *genuine* homosexual will provide a basis for annulment, it is apparent that the behavior of

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[14] For a general discussion of homosexuality, see PLOSCOWE, SEX AND THE LAW 195-215 (1st ed. 1951).

[15] See Note, *supra* note 8; see also Drexler, *supra* note 8. *Cf.* ASS'N OF AMERICAN LAW SCHOOLS, SELECTED ESSAYS ON FAMILY LAW 352 (1950).

[16] For an excellent discussion, see Annot., 65 A.L.R.2d 776 (1959).

[17] Coburn, *supra* note 10, at 458.

[18] See authorities cited note 7 *supra*.

[19] Freitag v. Freitag, 40 Misc. 2d 163, 242 N.Y.S.2d 643 (Sup. Ct. 1963).

[20] Kinsey reports that thirty-seven per cent of the male population has had some homosexual experience after the beginning of adolescence. PLOSCOWE, *op. cit. supra* note 14, at 207.

[21] Cases and statute cited notes 1 & 2 *supra*.

[22] See authorities cited note 10 *supra*.

the *pseudohomosexual* and *latent* homosexual may not fall within the traditional categories and, hence, many suits grounded upon such behavior must fail unless a new ground for annulment is created, viz., homosexual activity per se. Homosexuality is regarded by many jurisdictions as an infamous indignity to the marriage partner, which makes the marriage so revolting that it becomes impossible for the other party to discharge the marital duties, and defeats the entire purpose of the marital relation.[23]

If New York is willing to accept the proposition that homosexual activity is so revolting as to defeat the whole purpose of the marital relation, and is willing to apply this rationale to suits for annulment, then homosexual activity per se might be considered a basis for annulling the marriage. This approach may be feasible in view of New York's strict divorce laws which do not provide any escape from the marriage for a party suffering such indignities. However, if New York does recognize homosexual activity per se as a ground for annulment on the theory that it defeats the purpose of the marital relation, it will then have to deal with the additional problems of defining and classifying those types and degrees of homosexual activity which do in fact make marriage unworkable.

[23] See authorities cited note 11 *supra*. Much of the sexual satisfaction of male and female homosexuals involves behavior that violates sodomy and crime-against-nature statutes. PLOSCOWE, *op. cit. supra* note 14, at 195-208.

College Education Held a "Necessary" in Alimony Decree

Petitioner sought modification of a prior support order to include payment for her son's college education. The Family Court of New York, in ordering the father to pay an additional fifteen dollars a week during the school year, *held* that a father's duty to educate his children includes the providing of a college education if the child exhibits "special aptitude" and the father has the ability to pay. *Weingast v. Weingast,* 255 N.Y.S.2d 341 (Family Ct. 1964).

A father, whether or not he has custody of his children, is required to provide them with "necessaries."[1] While some degree of education was deemed a "necessary" at common law,[2] one of the earliest reported cases in this country, *Middlebury College v. Chandler,*[3] held that a college education is not a "necessary." The court in that case denied a student's claim that his father's estate was liable for tuition in his stead, on the ground that his father would have been liable for his "necessaries."

Eighty years later, in the leading case of *Esteb v. Esteb,*[4] the Washington Supreme Court deemed a college education, under the facts and circumstances involved, a "necessary," and ordered a divorced

[1] 39 AM. JUR. *Parent & Child* § 41 (1942).

[2] BLACKSTONE, COMMENTARIES 450 (American ed. 1847).

[3] 16 Vt. 683, 42 Am. Dec. 537 (1844).

[4] 138 Wash. 174, 244 Pac. 264 (1926).