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After the effort to forestall bankruptcy had proven unsuccessful, plaintiff sought to enforce a partnership obligation against the lenders. The Court, in holding them not liable, was of opinion that the lenders did not exercise primary control over the acts of the partnership. The control conferred upon the so-called trustees was found to be fully consonant with a desire on the part of the lenders to protect their loan and was not considered indicative of an assumption of the partnership relation.

It is interesting to note that the Court in its opinion relied solely upon two sections of the Partnership Law²⁴ as expressive of the law of this state. The case of *Cox v. Hickman* and the leading English cases in conformity therewith, together with decisions of the federal courts and of state courts of other jurisdictions formed the basis of this opinion. The instant case, however, goes further than any of those cited. Here the loan arrangement was not made in the interest of existing creditors who sought thereby to increase the amounts recoverable by them (as was the case in two of the three federal decisions cited),²⁵ but rather for the benefit of persons, previously unconcerned in the firm's affairs, who were investing new capital presumably in the hope of substantial profit. It is also interesting to note that the property supplied by the lenders constituted, from the time of the loan until the bankruptcy, the entire working capital of the firm. Since no question of liability by estoppel was presented in this case, it was the decision of the Court, that, despite the circumstances above mentioned, the intention of the parties not to constitute themselves partners should prevail.

This decision completely abrogates the rule formerly obtaining in New York, that, as to third parties, one not actually a partner could be held answerable for firm obligations upon proof that he shared, or had a right to share, in the profits of the business. With the exception of liability by estoppel, we can say, in the words of the Court, that "today only those who are partners between themselves may be charged for partnership debts by others."²⁶

H. G. H.

ANNULMENT OF MARRIAGE FOR FRAUD: FAILURE TO PARTICIPATE IN A RELIGIOUS CEREMONY.—The law governing annulment of marriage for fraud has been thrown into confusion by the recent decision of the

²⁴ N. Y. Part L. §§ 10, 11.

²⁵ *Giles v. Vette*, 263 U. S. 553, 44 Sup. Ct. 157 (1924); *In re Hoyne*, *supra*, note 22.

²⁶ *Martin v. Peyton*, *supra*, note 23, at 223, 158 N. E. at 80.

Appellate Division, First Department, in *Rutstein v. Rutstein*. In that case defendant had promised plaintiff that after the civil marriage she would embrace the Jewish faith and participate in a ceremonial marriage with him. After the civil ceremony but before the marriage was consummated she refused to fulfill her promise stating that she never intended to have a ceremonial marriage in the first place. *Held*: That the promise which was made, with the preconceived intention on the part of the defendant not to have the ceremonial marriage performed, was a fraud which, if relied on by plaintiff, justified the annulment of the civil marriage.¹ The holding is in accord with other decisions of this department² though it has never been considered good law by the bar;³ and Justices of the Second Department in similar cases have refused to grant annulment.⁴ The Court of Appeals, in *Mirizio v. Mirizio*⁵ appeared to have clarified this situation. In that case plaintiff and defendant were united in marriage by a civil ceremony. They entered into an agreement that they would not live together or consummate the marriage until performance of a religious ceremony, but after the civil ceremony defendant refused to have the religious ceremony performed. Plaintiff thereupon refused to consummate the marriage, left defendant and brought an action for separation, alleging abandonment and failure of the defendant to support and provide for her. The pertinent question was whether plaintiff's conduct was relieved of the feature of willful and inexcusable repudiation of her marriage contract by the agreement which was made that the marriage should not be consummated until a religious ceremony was

¹ 221 App. Div. 70, 222 N. Y. Supp. 688 (1927).

² *Watkins v. Watkins*, 197 App. Div. 489, 189 N. Y. Supp. 860 (1921); *Rosza v. Rosza*, 117 Misc. 728, 191 N. Y. Supp. 868 (Sup. Ct. 1922); *Rubinson v. Rubinson*, 110 Misc. 114, 181 N. Y. Supp. 28 (Sup. Ct. 1920).

³ See editorial N. Y. L. J., July 15, 1927.

⁴ "A marriage contract may be avoided like any other contract and especially if it has not been consummated, when it was procured by fraud. But the fraud must consist of a false representation expressly or impliedly made, of an existing fact that is a material consideration to the wronged party. * * * Defendant's statement was merely a promise and not the assertion of an existing fact. He did not state that anything was, but only that something would be. He promised that at a future time there would be the other service. No fraud arises from such a promise. It is not a representation. It is a mere forecast or prophecy. It asserts nothing. It merely predicts. The plaintiff was not justified in relying on it, and cannot be relieved of the marriage compact though the defendant failed to fulfill his pledge." *Schachter v. Schachter*, 109 Misc. 152, 178 N. Y. Supp. 212 (1919); *Neletta v. Neletta*, N. Y. L. J., June 15, 1918. But see, *Cohan v. Cohan*, 206 App. Div. 627 (1923), following *Watkins v. Watkins*, *supra*.

⁵ 242 N. Y. 74, 150 N. E. 605 (1926).

performed. The highest court held that the State, as a matter of long continued policy, had fixed the status of the marriage contract as a civil contract which when once executed became binding and carried with it certain rights, duties and obligations, and the parties to such a contract, lawfully and completely entered into could not modify its effect, postpone its consummation and lessen its undoubted and fundamental obligations by a private agreement of the nature involved. Lehman, J., dissented on the broad general ground that the majority opinion was wrong, and Crane, J., on other grounds, though not differing from the main view.

If, therefore, the latter case enunciates the law that failure by one spouse to fulfill a promise to participate in a religious ceremony, which promise is void by operation of law, does not excuse an abandonment by the other spouse, it would seem to follow that a breach of such promise would not support an action for annulment, for if the promise is void *ab initio* it is void for all purposes. An attempt is made in the Rutstein case to distinguish *Mirizio v. Mirizio* on the theory that it did not appear in the latter case that plaintiff was induced to enter into the civil marriage because of the representation or promise of the defendant that the parties would *later* be married by a priest, or that she was led into consenting thereto as a result of any fraud, which was the ground upon which the plaintiff sought relief in the former action.⁶ The Appellate Division is guilty of grave error here because in the *Mirizio* case, just as in the *Rutstein* case, *there was* a promise made by defendant *before* the civil marriage took place that after the civil marriage a ceremonial marriage would be solemnized.⁷ The Court further stated that as plaintiff in the *Mirizio* case had breached the contract herself by refusing to consummate the marriage she could not recover; whereas in the *Rutstein* case plaintiff asked for annulment on the ground that there never was any lawful contract between the parties, since it was induced by fraud. If this is the distinction it appears to be one without a difference. The agreements in *Rutstein v. Rutstein*, and in *Watkins v. Watkins*,⁸ upon the authority of which the former case was decided, appear to be exactly similar. All such agreements are void as against public policy⁹ whether made before or after the marriage contract¹⁰

⁶ 221 App. Div. 70, 75, 222 N. Y. Supp. 688.

⁷ *Mirizio v. Mirizio*, *supra*, note 5, Lehman, J., dissenting, 89.

⁸ *Supra*, note 2.

⁹ "The real question presented to us in this case is whether the parties to such a (marriage) contract lawfully and completely entered into may modify its effect, postpone its consummation and lessen its undoubted and fundamental obligations by private agreements between themselves.
* * * In my opinion such a course as is now suggested we ought to

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and it has been held that the obligations of the marriage contract are so fixed that they may not be modified by private agreement or the religious tenets of the parties.¹¹ In his dissenting opinion, Judge Crane says, "If she (plaintiff) refuses to live with him (defendant) until a religious ceremony is performed, then judgment should be given for the defendant."¹² In commenting upon the inconsistency between the Rutstein and Mirizio cases, a learned scholar has said, "If the agreement not to consummate the marriage until after the performance of a religious ceremony was such a promise or agreement which could be enforced by our courts or recognized by them for the purpose of affording relief to the injured party, the Court of Appeals would not have referred to such an agreement as a 'subversive private agreement.'"¹³ Judge Andrews of that court construed the effect of the Mirizio case similarly.¹⁴ The agreements between the husband and wife in the Mirizio, Rutstein and Watkins cases, *supra*, were all invalid as against public policy and could not form the basis of any action for annulment or for separation. "If such an agreement be void, then obviously its breach can give rise to no legal consequences, and thus there can be no fraud."¹⁵ In a number of cases arising in the lower courts the Mirizio case has been

set out upon of recognizing modifications of the marriage contract by private agreement would lead to disruption of that contract and disaster in the attempt to enforce it. * * * While she has been drawn into an unfortunate situation by what seems to be the failure of her husband to keep his promise, her agreement in my opinion furnishes no just reason for allowing her in violation of all contractual considerations to compel enforcement of a contract which she, for inadequate legal reasons, refuses to observe. Public policy in such a vital matter as the marriage contract should not be made to yield to subversive private agreements and personal considerations." *Mirizio v. Mirizio, supra*, note 5, 83, 84.

¹⁰ "But a husband and wife cannot contract to alter or dissolve the marriage, or to relieve the husband from the liability to support the wife." N. Y. Dom. Rel. L. § 51. In commenting upon this statute, Hiscock, Ch. J., in *Mirizio v. Mirizio, supra*, note 5, at p. 84, states: "While section 51 of the Domestic Relations Law in providing that the husband and wife cannot contract to 'alter or dissolve the marriage' refers to an agreement after the marriage has been contracted, of course its plain purpose would be violated by allowing parties to make such an agreement for the purpose of altering the marriage contract just as it was being entered into."

¹¹ *Mirizio v. Mirizio, supra*, note 5, 93.

¹² *Ibid.* 88.

¹³ *Supra*, note 3.

¹⁴ Address before the New York City Bar Association, March 24th, 1927.

¹⁵ *Supra*, note 3.

given the weight of overruling the rule of law laid down in *Watkins v. Watkins*, *supra*.¹⁶

While the distinguishing features thus appear to be lost, nevertheless on principle it is submitted that a wiser policy dictates that relief should be afforded in actions of this nature. As was said by Hiscock, Ch. J., "The refusal of husband or wife without any adequate excuse to have ordinary marriage relations with the other party to the contract strikes at the basic obligations springing from the marriage contract when viewed from the standpoint of the State and of society at large. * * * This relationship * * * is the foundation upon which must rest the perpetuation of society and civilization. If it is not to be maintained we have the alternatives either of no children or of illegitimate children, and the state abhors either result."¹⁷ Taking this statement of the public policy at its face value, the State is concerned with preserving the marital relationship so that it may continue to exist. But how it may benefit by enforcing the validity of a marriage induced by false promises is not clear. Certainly the courts cannot believe that by refusing to declare the marriage annulled the parties to it may be induced to consummate their marriage. It is hardly likely that a husband or wife who has been induced to enter into the marriage contract by false promises, especially where the religious element enters, will overlook the other spouse's default. Where relief is denied, the only remedy left to the innocent party is by way of the divorce courts. If the State does not encourage divorce directly, it will not do so indirectly, and divorce is, by far, a greater evil than annulment.

Since it was first definitely decided that a marriage may be annulled for any fraud or deception which would invalidate or authorize the cancellation of any contract,¹⁸ the tendency of New York Courts is to

¹⁶ "Plaintiff seeks to have the civil marriage annulled for the reason that defendant failed to keep the promise exacted by him from her to have a religious marriage ceremony in addition to the civil marriage ceremony, and in this way, misled her. I think the breach of such promise, stipulation or agreement, as a basis for the annulment of the civil marriage on the ground of fraud, is against public policy and violative of the plain purpose and principle underlying section 51 of the Domestic Relations Law, and that at least to this extent the reason underlying the *Mirizio* decision runs counter to the decision of the Appellate Division in *Watkins v. Watkins*." *Raphael v. Raphael*, N. Y. L. J., p. 460, opinion by Burr, Official Referee, April 27, 1927. See also, *Aufiero v. Aufiero*, opinion by Mullan, J., N. Y. L. J., p. 1065, June 1, 1927; *Roche v. Roche*, opinion by Mullan, J., N. Y. L. J., p. 1498, June 27, 1927.

¹⁷ *Mirizio v. Mirizio*, *supra*, note 5, 81.

¹⁸ Marriage has all the elements of a simple contract, founded upon the consideration of mutual duties and obligations. Upon this basis, there-

treat the marriage contract purely as an ordinary one, without regard to the higher and greater responsibilities which enter into the relationship between husband and wife.¹⁹ An example of this is found in the cases which hold that promises to participate in a religious ceremony do not relate to existing facts but are merely future promises and therefore are not actionable as fraudulent.²⁰ It is said that "marriage while a civil contract is, from its very nature, exempt from some of the considerations which might apply to an ordinary contract. * * * Therefore a party would not be held to violate his contract and to abandon his spouse for some inconsequential dereliction of duty which might effect a repudiation of an ordinary contract."²¹ This is sound logic and good policy, but if it is not applicable in a case such as *Mirizio v. Mirizio*, then it loses something of its force.

In all the cases cited it is to be noted that the marriages were never consummated. Immediately upon discovery of the fraud or upon ascertaining that the other spouse never intended to have a religious ceremony, the innocent spouse repudiated the marriage contract, and except in the case of *Mirizio v. Mirizio*, sought merely to be relieved from the act which was occasioned by the fraud. Had there been co-habitation or consummation of the marriage then the marriage would have ripened into a status which it would not be wise to dissolve;²² likewise, if one spouse cohabited with the other with full knowledge of the fraud²³ or failed to act promptly

fore, its dissolution, in so far as the effect of fraud on it is concerned, must depend upon contractual principles. *Di Lorenzo v. Di Lorenzo*, 174 N. Y. 467, 67 N. E. 63 (1903); *Kujek v. Goldman*, 150 N. Y. 182, 44 N. E. 773 (1896).

¹⁹ "The better view would seem to be that marriage is more than a civil contract. The peculiar rule of New York State to the contrary is practically alone in its view which reduces the status to that of a contract." "Effect of Fraud on the Marital Relationship," an article, by John E. Leddy, N. Y. L. J., Oct. 16, 17, 18, 1924.

²⁰ *Supra*, note 4.

²¹ *Mirizio v. Mirizio*, *supra*, note 5, 80.

²² This is not a rule of law strictly, but one of public policy. *Pellerin v. Pellerin*, 123 Misc. 552, 206 N. Y. Supp. 34 (Sup. Ct. 1924).

²³ "Of course, if the plaintiff had consented to the consummation of the marriage without the performance of the promise concerning the religious ceremony, that would constitute a waiver of the fraud and preclude the maintenance of the action, for she would necessarily know before consenting to such cohabitation that the defendant had been guilty of fraud." *Watkins v. Watkins*, *supra*, note 2; *Jacobson v. Jacobson*, 207 App. Div. 238, 202 N. Y. Supp. 96 (2nd Dept., 1923); *McGill v. McGill*, 179 App. Div. 343, 166 N. Y. Supp. 397 (4th Dept., 1917); *Butler v. Butler*, 204 App. Div. 602, 198 N. Y., Supp. 391 (1st Dept., 1923); *Domschke v. Domschke*, 138 App. Div. 462, 122 N. Y. Supp. 892 (2nd Dept., 1910).

upon its discovery.²⁴ But as was said in *Weill v. Weill*,²⁵ "The rule now seems to be that if the fraud be such that had it not been practiced the contract would not have been made, or the transaction of marriage completed, then it is material (*error substantialis*); but if it be shown or made probable that the same thing would have been done by the same parties in the same way if the fraud had not been practiced, it cannot be deemed material (*error accidentalis*)." The materiality of the fraud practiced should not only determine whether the defrauded party is entitled to relief, but from the *Weill* case, *supra*, it should be asked would the marriage have taken place had the fraud not been practiced. If the answer is in the negative then the plaintiff is entitled to relief.

L. L. W.

LIABILITY OF DOMINANT CORPORATION FOR ACTS OF SUBSIDIARY.

The advantages of conducting a business in the corporate style are probably legion, and the limited liability obtained through the use of this "form" is undoubtedly one of the chief inducements to persons to adopt this method. In this connection, the question of liability of the parent corporation for acts of its subsidiary is worthy of consideration and the recent decision of the Court of Appeals in *Berkey v. Third Avenue R. Co.*¹ presents excellent material for a discussion of this interesting proposition.

Plaintiff, alighting from a street car, sustained injuries by reason of the motorman's negligence. The franchise to operate cars over the route used by plaintiff was owned exclusively by the Forty-second Street, Manhattanville and St. Nicholas Railway Co., but the car upon which plaintiff was riding bore the inscription "Third Ave. System," was owned by it and leased to the Forty-second Street Co. It was against the Third Ave. System that plaintiff prosecuted her action. She sought to charge it with liability by the establishment at the trial of facts showing that substantially all the stock of the Forty-second Street Co. was owned by it; that the same persons were officers of both companies and that the two boards of directors were almost identical in membership.

Plaintiff's argument was that defendant controlled the operations of the Forty-second Street Co. and was the real owner thereof dis-

²⁴ "The aggrieved party must act promptly upon discovery or the relief will not be afforded. In this respect at least the parties are bound by the same rules governing the rescission of contracts in equity, and the greatest diligence is required of plaintiff." *Butler v. Butler*, *supra*, note 22, *Wallich v. Wallich*, N. Y. L. J., June 12, 1925.

²⁵ 104 Misc. 561, 562, 172 N. Y. Supp. 589 (Sup. Ct., 1918)

¹ 244 N. Y. 84, 155 N. E. 58 (1926)