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JUDICIAL INTERPRETATION OF PHYSICAL CAPACITY TO MARRY

INEVITABLY in the course of the present revaluation of our laws and of the basis of our judicial thinking and institutions, the law affecting marriage must be critically examined. The nature of the relationship between husband and wife, the object of that relationship, the capacities which each must bring to it, and the rights and obligations of each to the other, must be factually examined in order that the law applied to them may be in keeping with their requirements.

Any consideration of the physical capacity for marriage must first ascertain what the legal ends and objects of matrimony are. Such a survey of ends must of necessity present the same difficulty which is to be found in the analysis of any universal institution. Time, place and *mores,* to say nothing of the possible combinations of human motives, present us with countless ends. The law cannot, of course, in specific terms provide therefor. What can be done is to provide a minimum requirement, in accordance with the particular custom and ideology of the country. A ready perception of the difficulties in establishing a universal rule may be grasped from the fact that, in this country, each of our states differs in its requirements for divorce, ranging in extreme from South Carolina, where no divorce obtains, to Nevada, which has tended to become the national safety-valve through which those too much pent up in their home jurisdictions may escape.

The common law countries seem, however, to have agreed upon two objects of matrimony, which may be enforced. One of those is the procreation of children and the protection of the family, and the second is that of indulgence of the sexual passions. Whether those ends have been met by the law as applied will be discussed hereinafter. To some extent, it would appear that the courts have set a rhetorical standard which has not been lived up to in the application of the law to litigated causes.

Lord Penzance[1] said, "* * * without sexual intercourse,

[1] G. v. G. Law Rep., 2 P. & M. 287, 291.

the ends of marriage—the procreation of children, and the pleasures and enjoyments of matrimony—cannot be attained." Just as Lord Penzance placed first the procreation of children, so Ayliff said, "As the first cause and reason of matrimony ought to be the design of having progeny * * *." [2] Similar statements have been made by the courts in this country in Turner v. Avery[3] and in Wendel v. Wendel.[4]

In Turner v. Avery, Chancellor Walker, discussing the observation by Lord Penzance, quoted above, that procreation of children is one of the prime ends of marriage, said, "I do not hesitate to say that it is the most important object of matrimony, for without it, the human race itself would perish from the earth." [5]

In England, in the leading case of D—e v. A—g,[6] Dr. Lushington said, "* * * without that power, neither of two principal ends of matrimony can be attained, namely, a lawful indulgence of the passions to prevent licentiousness, and the procreation of children according to the evident design of divine Providence."

Recently, our Court of Appeals, in the case of Mirizio v. Mirizio, said:

> "However much this relationship may be debased at times, it nevertheless 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. The mere fact that the law provides that physical incapacity for sexual relationship shall be ground for annulling a marriage is of itself a sufficient indication of the public policy that such relationship shall exist with the result and for the purpose of begetting offspring." [7]

It may be taken then that one of the principal legal ends of marriage is the procreation of children and the pro-

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[2] Ayl. Parer, 360.
[3] Turner v. Avery, 92 N. J. Eq. 473, 113 Atl. 710 (1921).
[4] Wendel v. Wendel, 30 App. Div. 447, 52 N. Y. Supp. 72 (2nd Dept., 1898).
[5] *Supra* Note 3.
[6] D—e v. A—g, 1 Rob. Eccl. 279, at 294 (1845).
[7] Mirizio v. Mirizio, 242 N. Y. 74, 150 N. E. 605 (1926), opinion per Hiscock, *Chief Justice*.

tection of the home. What then is the minimum requirement set by the law for the physical attainment of that object? What, in the last analysis, is the least which the law exacts of those who would marry, and, what is more important, what does the law set as the maximum of that which those who marry may expect of the spouse? Are the physical requirements of the law such as meet the expectation, or does the law as applied frustrate the desires of whose who may marry with the object in view of bearing and rearing children? In this jurisdiction, the requirements with regard to physical capacity are set forth in the Domestic Relations Law:

> "VOIDABLE MARRIAGES.—A marriage is void from the time its nullity is declared by a court of competent jurisdiction if either party thereto:
>
> (3) Is incapable of entering into the married state from physical cause;"[8]

The statute, as at present written, is substantially a reenactment of the original Domestic Relations Law of 1896. The Revised Statutes of 1828,[9] headed "Divorces on Ground of the Nullity of the Marriage Contract," provided that the Chancellor may, by the sentence of nullity, declare void the marriage contract upon the ground, among others, that one of the parties was physically incapable of entering into the marriage state. Section 7 of the Domestic Relations Law, which we have quoted, also provides, "That actions to annul a void or voidable marriage may be brought only as provided in the civil practice act and rules of civil practice."

The Civil Practice Act, section 1141, provides:

> "ACTION TO ANNUL A MARRIAGE ON THE GROUND OF PHYSICAL INCAPACITY. An action to annul a marriage on the ground that one of the parties was physically incapable of entering into the marriage state may be maintained by the injured party against the party whose incapacity is alleged; or such an action may be

[8] Dom. Rel. L., sec. 7.
[9] 2 R. S. 144, pt. 2, ch. 8, art 3, tit. 1.

> maintained by the party who was incapable against the other party, provided the incapable party was unaware of the incapacity at the time of marriage, or if aware of such incapacity, did not know it was incurable."

It is in the construction of the words "physical incapacity" and several expressions thereof in the statutes that we believe the courts have erred. The language of the statute "physically incapable" and "incapable * * * from physical cause," and in the Practice Act, "physically incapable of entering into the marriage state," permitted several constructions. The courts had open to them to say that physical incapacity was one of three things: one, incapacity to procreate children; two, incapacity to indulge the passions; and, three, incapacity to both indulge the passions and to procreate children. Upon the construction made by them much depended. Although the cases in which such construction might be of actual application are few, the influence upon society of a public policy with regard to the capacity to marry is great. Whether the law holds that the object of marriage is merely for the indulgence of passion, or that its object is lawful procreation of children and the protection of the family, might indicate the course of society.

Was marriage to be held to be merely an institution to prevent unlawful fornication and to minimize adulterous intercourse, and other such negative purposes (all of which have been given as reasons by courts in considering the question), or were the statutes to be interpreted affirmatively as giving a positive function to marriage? Was the object of marriage merely to prevent crime and unlawful intercourse, by making it possible for mere intercourse to be lawful? The answers to questions such as these, though given in but a few cases, nevertheless filter through and help to form the manners and morals of our social life. Declarations such as these are more than judgments in causes. They are the statements of public policy which determine the conduct of our adult population. It is the far-reaching effect of such decisions which makes their discussion valuable.

From the language of Hiscock, *J.*, in Mirizio v. Mirizio, to the effect that:

> "The mere fact that the law provides that physical incapacity for sexual relationship shall be ground for annulling a marriage is of itself a sufficient indication of the public policy that such relationship shall exist with the result and for the purpose of begetting offspring,"[10]

One might well gather that the provision of the law concerning physical incapacity for sexual relationship had been construed consistently with the declared public policy that such relationship shall exist for the purpose, and with the result, of begetting offspring. Such, however, is not the case. The first reported case in this jurisdiction, Devanbagh v. Devanbagh,[11] arose under the Revised Statutes of 1828. In his opinion, the Chancellor said:

> "When the Legislature conferred this branch of its jurisdiction upon the Court of Chancery it was not intended to adopt a different principle from that which had theretofore existed in England, and indeed in all Christian countries, as to the nature and extent of the physical incapacity which would deprive one of the parties of the power to contract matrimony."[12a]

And, after citing Brown v. Brown[13] and Weld v. Weld,[14] among others, discussed the question of impotence and said, "* * * mere sterility can, in no case, form a sufficient ground for a decree of nullity." This case has since achieved authority and has, in fact, been accepted in other jurisdictions as laying down the so-called American Doctrine.[15] Close scrutiny of the language used by the Court is, therefore, justified. It may be doubted that the statement of the Court "that these principles had theretofore existed in all Christian countries" was true. Bishop, in his work on "Marriage and Divorce," [16]

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[10] *Supra* Note 7.
[11] Devanbagh v. Devanbagh, 5 Paige 554 (N. Y., 1836).
[12] *Supra* Note 9.
[12a] *Supra* Note 11.
[13] Brown v. Brown, 1 Hagg. Eccl. Rep. 523 (1828).
[14] Weld v. Weld, 2 Lee's Eccl. Ca. 580 (1731).
[15] Anonymous 89 Ala. 291, 7 So. 100 (1890).
[16] 1 Bishop, Marriage and Divorce (6th ed., 1881), Book III, ch. XX, sec. 325.

casts some doubt on it and indicates quite clearly that in Scotland, at least, the burden of the cases was the inability to beget children and that in those countries in which the Canon Law had force, the inability to procreate was regarded as impotence sufficient to warrant the annulling of a marriage. He quotes from Fraser, who says:

> "The 98th Constitution of Leo, the philosopher, expresses at great length the utter abhorrence of the emperor at the doctrine that the *potentia copulandi* without the power of procreating children was sufficient. The most eminent commentators on the Canon Law are of the same opinion. Brower argues the point with great warmth holding as his leading principle, that marriage is not instituted for the satisfying of lust, or the exciting of passion but the begetting of children."[17]

In passing, although it does not contradict the remark that such was the law in Christian countries, it may be pointed out that under the ancient Hebraic Law, the procreation of children was regarded as the principal object of marriage. So much so, that the power to declare a marriage null and void where sterility existed was taken away from the parties and given to the courts, so that a marriage which had been childless for ten years might be annulled, the parties unwilling.[18]

In considering the effect of Devanbagh v. Devanbagh,[18a] it should further be noted that neither of the two English cases, cited by the Court would serve as authority for the statement that mere sterility could in no case form a sufficient ground for a decree of nullity. In Brown v. Brown,[19] in judgment by Sir John Nicholl, he said, "Mrs. Brown was past the age of child bearing at the time of the marriage: therefore the primary and most legitimate object of wedlock, the procreation of issue, could not operate; and a

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[17] 1 Fraser Dom. Rel. (2nd ed., 1876), p. 85.
[18] Moses Mielziner, The Jewish Law of Marriage and the State (1884), p. 125.
[18a] *Supra* Note 11.
[19] Supra Note 13.

man of sixty who marries a woman of fifty-two should be content to take her *tanquam soror.*" It is obvious that this judgment of Sir John Nicholl was not to the effect that procreation in marriage was not a prime object thereof and that the incapacity therefor was not a sufficient cause in law to invalidate it, but rather that because of the age of the parties that object did not operate. Quite to the contrary, the opinion would indicate that, as a general rule, the inability to procreate would operate as an inducing cause to invalidate marriage, but because of the exceptional circumstances, *i.e.,* the age of the parties, the general rule could not be applied. By its dependence upon the exceptional circumstances of the parties, the opinion is to be construed as laying down an entire opposite rule to that adopted by the Chancellor in Devanbagh v. Devanbagh.[19a]

So, also, the second case cited by the Chancellor, Weld v. Weld,[20] was decided on a question of consummation and triennial cohabitation. The question of sterility was not before the Court and was not adjudicated.

Furthermore, this statement by the Chancellor was mere dictum, as the issue in the Devanbagh case was whether or not the Court would annul a marriage on the ground of impotence, where there is a probability of capacity and where the testimony shows that there is good reason to believe that the disability may be removed by a slight surgical operation. Nevertheless, this dictum became the leading case in what is known as the American Doctrine, to the effect that what the Court called "mere sterility" is not a sufficient cause for the annulment of a marriage. The law thus said to those living under it, that while it is true that the object of matrimony is to beget children, yet the inability so to beget is not an inability which disqualifies for marriage. This paradox has led the courts on to say that the impotence recognized by the law is impotence which would prevent the indulgence of the sexual passions.

In a case entitled "Anonymous," the doctrine was thus stated:

[19a] *Supra* Note 11.

[20] *Supra* Note 14.

> "The meaning of the words 'physically incapacitated,' as here used, is substantially the same as that of the word 'impotent,' frequently met with in divorce proceedings. It means powerless, or wanting in physical power, to consummate the marriage. Animal desire between the sexes is one of the incitements to matrimony, the lawful gratification of which is encouraged and protected alike by moral sentiment and municipal regulation. Copulation or coition—the act of gratifying sexual desire, is the consummation of marriage, inability to accomplish which, when it proceeds from incurable physical imperfection, or malformation is precisely what our statute means and expresses by the words 'physically and incurably incapacitated.' "[21]

This legal attitude toward marriage, which cannot help but be repulsive to all those who think in terms of marriage as being an institution wherein children may be lawfully begotten and reared, has been accepted by the courts in this state, as is seen from Schroter v. Schroter[22] and Wendel v. Wendel.[23]

In the Wendel case, at special term,[24] the Court did not consider the effect of Devanbagh v. Devanbagh,[24a] but it analyzed, to some extent, the decision in D—e v. A—g.[24b] The Court said:

> "Other text writers equally recognize the protection of the family as one of the great objects of marriage, but most of them, so far as I have been able to discover, have fallen into the error of regarding the decision of Deane v. Aveling, 1 Rob. Ecc. 279, as establishing the contrary principle."

The Court then points out that what was said by Dr. Lushington in that case was mere dictum, and concludes his argument on the subject, saying:

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[21] *Supra* Note 15.
[22] Schroter v. Schroter, 56 Misc. 69, 106 N. Y. Supp. 22 (1907).
[23] *Supra* Note 4.
[24] Wendel v. Wendel, 22 Misc. 152, 49 N. Y. Supp. 375 (1897).
[24a] *Supra* Note 11.
[24b] *Supra* Note 6.

> "The reasoning of Dr. Lushington in Deane v. Aveling is not satisfactory, and the case not being authority on the question at issue here, I hold that within the meaning of our statute, a person destitute of child-bearing organs is physically incapable of the chief and higher purpose of matrimony and consequently, of entering the marriage state."

On appeal to the appellate division, the judgment of the Court below was reversed. The appellate division said, with regard thereto:

> "The Court held that because of the loss of her ovaries, the defendant was incapable of conception, and, therefore, of entering into the marriage state. While this conclusion is in harmony with those higher ideals of the marriage state, which ought not to be disturbed except upon grave consideration of public policy, we are forced to conclude that the learned trial Court has not fully considered the effect of such a rule and that it ought not to receive the sanction of this court."

and said further:

> "It seems to us clear, therefore, that it cannot be held as a matter of law that the possession of the organs necessary to conception are essential to entrance to the marriage state, so long as there is no impediment to the indulgence of the passions incident to this state."

After quoting the dictum in the Devanbagh case, that mere sterility can in no case form a sufficient ground for a decree of nullity, the Court said:

> "While the policy of the law undoubtedly contemplates the possibility and the probability of issue, it cannot be held as a matter of law that the physical incapacity to conceive is a bar to entering the marriage state."

The measure of impotence has, therefore, been established to be ability to indulge in the sexual passions, not the ability to procreate.[25]

The attempt by a judge, at special term, to apply as a test for capacity the ability to procreate, that being a test of capacity for what the Court felt was the chief and higher purpose of marriage, was reversed, and, in the course of that reversal, the Court indicated that in the decided cases in this jurisdiction, public policy required that marriages be annulled only in cases where the impotence created no possibility of sexual indulgence. Between such a public policy and the public policy which must have been the intention of the Court of Appeals, in the Mirizio case, there is an utter cleavage. That cleavage must, in the practical application of the law by the courts, be resolved. The spread between the ideal and the fact must be lessened. It is not enough that the courts should state that the ideals of marriage are the procreation of children and the protection of the home. There must also be harmonious practice.

That practice need not of necessity present difficulties due to exceptional cases. While it is true that people marrying after the first flush of youth may marry for reasons other than the begetting of progeny, and while it is equally true that the circumstances of particular marriages may indicate their specific objects and ends, nevertheless both by statute and judicial decision, such exceptions may be recognized and provision made therefor. There is authority for this course in the immediate field. Brown v. Brown[25a] was such a case, as likewise was Hatch v. Hatch.[26]

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[25] Griffith v. Griffith, 162 Ill. 368, 44 N. E. 820 (1896); Payne v. Payne, 46 Minn. 467, 49 N. W. 230 (1891); Kirschbaum v. Kirschbaum, 92 N. J. Eq. 7, 111 Atl. 697 (1921); Turner v. Avery, *supra* Note 3; Deitch v. Deitch, 162 App. Div. 25, 146 N. Y. Supp. 1019 (2nd Dept., 1914), *aff'd* 213 N. Y. 708, 108 N. E. 1092 (1915); Riley v. Riley, 73 Hun 575, 26 N. Y. Supp. 164 (1893); Gore v. Gore, 103 App. Div. 168, 93 N. Y. Supp. 396 (3rd Dept., 1905); Geis v. Geis, 116 App. Div. 362, 101 N. Y. Supp. 845 (1st Dept., 1906); McNair v. McNair, 140 App. Div. 226, 125 N. Y. Supp. 1 (2nd Dept., 1910); Cohn v. Cohn, 21 Misc. 506, 48 N. Y. Supp. 173 (1897); Schroter v. Schroter (1907), *supra* Note 22; Hatch v. Hatch, 58 Misc. 54, 10 N. Y. Supp. 18 (1908); Anonymous v. Anonymous, 69 Misc. 489, 126 N. Y. Supp. 149 (1910); Anonymous, 158 N. Y. Supp. 51 (1916); Elser v. Elser, 160 N. Y. Supp. 724 (1916); Hule v. Hule, 166 N. Y. Supp. 615 (1917); VandenBerg v. VandenBerg, 197 N. Y. Supp. 641 (1923).

[25a] *Supra* Note 19.

[26] Hatch v. Hatch, *supra* Note 25.

In Hatch v. Hatch, Judge Pound said:

> "The courts decline to grant annulment for physical incapacity where, by reason of the advanced years of the parties at the time of the marriage, the desire for support and companionship, rather than the usual motives of marriage, must have actuated them. 19 Am. & Eng. Ency. of Law (2nd ed.), 1169."

And, in Wendel v. Wendel, similar conclusions were indicated, where by reason of an operation procreation had become impossible, the Court pointing out that no essential difference existed between incapacity caused by an operation and incapacity caused by the passage of time.

That a statute providing for annulment may be drawn in such form so as to leave discretion in the Court to enable it to take into consideration particular circumstances, is evident when one considers the amendment to paragraph 1 of section 7 of the Domestic Relations Law, providing for annulment for nonage. That statute was amended in 1922, to read:

> "Sec. 7. VOIDABLE MARRIAGES.
>
> 1. Is under the age of legal consent, which is eighteen years, provided that such nonage shall not of itself constitute an absolute right to the annulment of such marriage, but such annulment shall be in the discretion of the court which shall take into consideration all the facts and circumstances surrounding such marriage."

A statute providing that the measure of incapacity should be that which prevents the procreation of children and yet which would leave to the sound judicial discretion of the court, decision in the light of the surrounding facts and circumstances, would be forward-looking and would bring our law determining legal capacity to marry in line with the high public policy declared by the Court of Appeals.

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