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DURESS AND FRAUD AS GROUNDS FOR THE ANNULMENT OF MARRIAGE

ROBERT C. BROWN*

A very cursory examination of the Digests will convince one that the subject of duress and fraud as grounds for the annulment of a marriage is a very live and active one. The past few decades have seen a multiplication of cases decided in this subject. This is only one example of the disturbing effect on family life of the complicated and strenuous conditions of our modern civilization; but it is certainly a very conspicuous one.

But an even greater contrast will be found in the attitude of the courts in this matter. Formerly this attitude was one of uncompromising rigidity; the circumstances of fraud or duress which would induce the courts to annul a marriage had to be extreme, not to say outrageous. Today the picture has been greatly changed, at least in most jurisdictions. The tendency is toward much greater liberality. Bishop was certainly a somewhat liberal writer for his day (1891); but a greater contrast can hardly be imagined between what he says about this subject and what is said by such a modern author as Madden, who avowedly does nothing other than to summarize the actual decisions of the courts. The subject is obviously in a state of flux, and from that standpoint the great number of modern decisions is rather to be expected.

Fraud and duress are undoubtedly distinct; but they are so closely analogous as to justify treatment together. For one thing, the courts often fail to distinguish them. Thus the leading case of Ferlat v. Gojon is treated by the court as a case of fraud whereas it actually primarily involved duress. So a particular case may involve both, so that if relief cannot be given on one of these grounds it may nevertheless be granted on the other.

Fraud is often used to put the victim in such a position that he may be more readily subjected to duress. It would seem, therefore, that the courts are not to be severely criticized for failing in all instances to distinguish sharply between duress and fraud, since they are so closely intermingled in fact.

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1 Bishop on Marriage, Divorce and Separation (1891), chapter XIII.
2 Madden on Persons and Domestic Relations (Hornbrook Series) (1931), pp. 9-22. Contrast also the article by Friedman in 32 Amer. L. R. 568, published in 1898, with the article by Vanneman in 9 Minn. L. R. 497, published in 1925. Both of the articles relate to fraud as ground for the annulment of a marriage, but are as widely apart as the poles in their point of view.
3 1 Hopk. Ch. (N. Y.) 478 (1825). See also Cox v. Cox, 110 Atl. 924 (N. J. Eq., 1909).
4 Scott v. Shufeldt, 5 Paige (N. Y.) 43 (1835).
5 Bartlett v. Rice, 72 L. T. 122 (1894); Sloan v. Kane, 10 How. Pr. (N. Y.) 66 (1854).
Another analogy between fraud and duress in matrimonial matters is that the effect of both is the same. On principle, this result is to make the marriage voidable not void.\(^6\) In spite of some confusion in the authorities, this is the usual decision of the courts, where the problem is presented, as for instance where the question is as to the validity of a second marriage contracted by the victim of the fraud or duress.\(^7\) It is generally held that neither duress\(^8\) nor fraud\(^9\) nor both together\(^10\) will make the marriage wholly void; though there is apparently some authority to the contrary.\(^11\) From this it would follow that neither fraud nor duress is ground for collateral attack on a marriage. Thus the heirs of one of the parties cannot generally have the marriage set aside on the ground of fraud or duress practiced upon such spouse;\(^12\) though, of course, the death of the spouse after having commenced suit does not cause the suit to abate.\(^13\)

A third analogy, though growing out of the one just mentioned, is that a marriage resulting from either fraud or duress is very readily validated so as to become fully binding. Even in jurisdictions not recognizing common law marriages, the right to take advantage of the defect is lost by acquiescence falling far short of what is necessary to constitute the most informal of marriages. This will be discussed more at length hereafter;\(^14\) it is mentioned here not only to show that fraud and duress are closely analogous, but also that a marriage resulting from either or both of them is very far from a nullity.

**Duress**

In considering duress in connection with marriages, the first problem is as to its nature. The answer is that it is essentially the same as elsewhere in the law. Actual force, or serious threats of it, obviously constitute duress in this connection.\(^15\) But it is not limited to the matters stated above. The force may be mental as well as physical.\(^16\) If the complaining spouse can show that he was actually and intentionally coerced to marry, no matter what

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\(^6\) 2 Schouler on Marriage, Divorce, Separation and Domestic Relations (1921), sec. 1081. See also Bishop, supra, note 1. The statutes on this point are however somewhat confused. See 1 Vernier, "American Family Laws", pp. 237 ff.

\(^7\) Jackson v. Winne, 7 Wend. (N. Y.) 45 (1831), where it was held that a second marriage following a marriage resulting from alleged duress, was wholly void and the children of such second marriage illegitimate.


\(^10\) Tyson v. State, 83 Fla. 7, 90 So. 622 (1922).

\(^11\) Taylor v. White, 160 N. C. 38, 75 S. E. 941 (1912); In re Moncrief's Will, 235 N. Y. 390, 139 N. E. 550 (1923). These cases probably depend upon peculiar statutes. Cf. note 6, supra. There is also a rather vague dictum to the same effect in Kopke v. State, 43 Mich. 41 (1880).

\(^12\) Steicher v. Steicher, 251 N. Y. 366, 167 N. E. 501 (1929); Price v. Tompkins, 108 Misc. 263, 177 N. Y. Supp. 548 (1919). In Orchardson v. Cofield, 171 Ill. 14, 49 N. E. 197 (1897) such a collateral attack for fraud by heirs was permitted; but here the marriage was contrived by the surviving husband primarily to induce the wife to leave her property to him and thereby to defraud her heirs.


\(^14\) See page 490 below.

\(^15\) Bartlett v. Rice, supra, note 5; Ferlat v. Gojon, supra, note 3.

\(^16\) Scott v. Sebright, 12 P. D. 21 (1886); Ford v. Steier, (1896) P. D. 1; Moser v. Long, 8 Oh. App. 10 (1916).
precise means were utilized, he has shown at least a prima facie case of duress.

In this connection the relationship between the parties is, of course, important. Indeed, this may be the very point upon which the question of the existence of duress turns. Where one of the parties is legally or actually in a fiduciary relationship to the other, very slight influence thus exerted may constitute such duress as to justify invalidating the marriage between them.

On the other hand, to invalidate a marriage, duress must be very clearly shown, and must exist to a somewhat greater degree than is necessary for the invalidation of most other transactions—as, for example, an ordinary contract. It must never be lost sight of that a marriage is not a mere agreement, but a status, in which the public, and the state as representing it, are interested. The public interest demands the stability of marriages, except where the conditions are so intolerable as to make the severance more desirable than the continuance. Duress is such a condition, but only if it is fairly serious.

But the problem still remains whether there is to be an objective standard of duress. The problem is whether it is necessary that the facts indicate duress in the normal case and with people of ordinary characteristics, or whether it is sufficient to show actual coercion in the very case and with the kind of person who was actually the victim. There is some authority that it must be sufficient to overcome the will of a person of ordinary firmness. But the weight of modern authority is probably to the contrary, holding that if there were coercion in fact the marriage should be dissolved, even though a more determined person would have been able to resist such pressure.

This latter view appears to be correct on principle. The marriage resulting from undoubted coercion is just as intolerable to the victim as one resulting from sufficient duress to overcome a person of ordinary firmness would be to that kind of a victim. Furthermore, duress is a voluntary act, and it may reasonably be supposed that the person exerting it knows about and relies on the lack of firmness of his victim. An objective standard or duress unjustifiably permits such advantage to be taken.

Quite frequently this duress is exerted by making threats of injury to the relatives or friends of the victim. Should the victim be permitted to have an annulment of a marriage resulting from such threats? The answer

17 Cooper v. Crane, (1891) P. 369 (here the spouses were cousins). Cf. Ford v. Steir, supra, note 16, where the wife was coerced into consenting to the marriage through the undue influence of her mother.

18 Lacoste v. Guidroz, supra note 8, where the court ordered a new trial to ascertain the precise relationship between the parties, so as to be better able to decide as to the existence of duress.

19 Avakian v. Avakian, 64 N. J. Eq. 89, 60 Atl. 521 (1905); Harford v. Morris, 2 Hag. Con. 423 (1776). Parliament denied relief to a young girl coerced into marriage by the brother of her guardian, who took advantage of her dependent position (Field's Marriage Annulling Bill, 2 H. L. C. 48 (1848). This seems an indefensible result; but, of course, it was not strictly a judicial decision.

20 Main v. Main, 113 Misc. 165, 74 So. 138 (1917); Owings v. Owings, 146 Md. 416, 118 Atl. 858 (1922). Bishop (supra, note 1) seems to lose sight of this principle as to duress, even though he rather over-emphasizes it with respect to fraud.

21 Marre v. Marre, 184 Mo. App. 198, 168 S. W. 636 (1914). There is a clear statement to the same effect in the recent case of Doscher v. Schroder, 105 N. J. Eq. 315, 147 Atl. 781 (1929), though this is perhaps little more than a dictum, as it seems that relief was properly denied because of other circumstances. Cf. Field's Marriage Annulling Bill, Supra, note 19.

of the courts seem to be unanimously in the affirmative23 on the theory that such threats would as effectively and as unjustifiably coerce the victim into consenting to the marriage as if the harm were threatened to himself. This reasoning would appear to be sound, and the results of the cases justifiable.

But more complicated is the problem when the threats are of injury to the victim, but are made not by the girl but by her relatives and friends.24 Here reference may properly be made to the man as the victim of the threats, since practically all the cases involve situations where he has, or is supposed to have, compromised the virtue of the girl, and her family and friends desire to compel him to marry her. If there is an actual show of arms and the ceremony is thus in the presence of armed men, there can, of course, be no doubt that the husband can have the marriage annulled for duress.25 If no arms actually appear, but threats of death or serious bodily harm are made, the result is the same,26 unless it is obvious that the man did not take the threats seriously.27

Since such threats do not come from the girl, it may be material to inquire whether it makes any difference whether or not she knows about them. This question is not ordinarily regarded as particularly important; certainly it will not be considered by the courts unless explicitly raised.28 The weight of authority denies annulment even where there was undoubted duress of this kind, if the girl herself was not a party to it and knew nothing about it.29 But there is at least one case holding that the girl's innocence does not constitute a defense to her husband's suit for annulment on this ground.30 On theory, the majority opinion seems the correct one; but it may be doubted whether this specific problem would arise very often. If the duress is substantial, the situation would be extremely rare where the girl would be wholly without knowledge of it.

But of course it is not sufficient in any of these cases to show that the threats were made; it must also be shown that they actually caused the marriage.31 This is a general rule, but is applied very strictly in this class of cases. A rather amusing example of the lengths to which this is carried, at least by some courts, is the Louisiana case of Boulterie v. Demarest,32 where the plaintiff had made "remarks" about the defendant, and was there-

23 Fratello v. Fratello, supra, note 22; Warren v. Warren, 199 N. Y. Supp. 856 (1923). See also Nicholson v. Nicholson, 174 Cal. 391, 163 Pac. 219 (1917). In Capasso v. Colonna, 95 N. J. Eq. 35, 122 Atl. 378 (1923) relief was denied on the ground that the woman, who was induced to marry by threats directed against her brother, might have warned him and thus enabled him to protect himself. It is submitted that this decision is unjustifiably narrow; but it does not constitute an authority against the proposition of the text.

24 See Marks v. Crume, 16 Ky. L. R. 707, 29 S. W. 436 (1895).
27 Honnet v. Honnet, 33 Ark. 156 (1878); Pray v. Pray, 128 La. 1037, 55 So. 666 (1911).
28 Houle v. Houle, supra, note 8.
31 Marre v. Marre, supra, note 21; Beeks v. Beeks, 66 Fla. 256, 63 So. 444 (1913); Wimbrough v. Wimbrough, 125 Md. 619, 94 Atl. 168 (1915); Owings v. Owings, supra, note 20. In all these cases annulment was denied, partly at least, because the alleged duress was found not to have been the real reason for the marriage.
32 126 La. 278, 52 So. 492 (1910).
fore forced by her relatives (who were armed) to marry her. But since he did so without any apparent protest, the court thought that he acted willingly, and declined to annul the marriage for duress. This was in the face of the fact that the wife after the wedding carried out the threats which her family had made, by herself actually shooting her husband—though apparently not fatally, since he was alive to bring his unsuccessful action for annulment!

But though this principle may be carried too far, it is undoubtedly sound. The reason is that the man has in most of these cases actually done wrong to the girl, and he morally ought to undo this wrong by marrying her. It is therefore not unreasonable, or at least is consistent with sound public policy, to consider that his primary intent was to do what he ought to do rather than to escape the deserved punishment threatened by her family.

Somewhat akin to this problem is the situation where a man who has wronged a girl marries her so as to escape prosecution and judicial punishment for this misdeed. There can be no question that there is duress in fact here, especially when, as is often the fact, he is actually under arrest when he consents to the marriage. But sound public policy prohibits the annulment under such circumstances. He marries to escape trial and presumably punishment according to law; his marriage should therefore be binding upon him. When the courts say, as they sometimes do, that these circumstances do not constitute duress, their reasoning is subject to severe criticism; but the result which they generally reach, of refusing to annul the marriage, is entirely sound.

This result is reached without regard to the precise nature or ground of the prosecution, provided it is for a wrong done to the girl which can be substantially remedied by marrying her. Thus in Sickles v. Carson, a case where the plaintiff married the defendant to escape a prosecution for bastardy, the court in denying annulment said:

"If a single man, who is in lawful arrest under a bona fide regular proceeding in bastardy on the examination of a single woman, chooses, as a means of avoiding the legitimate consequences of the proceeding, to marry her, surely he cannot be permitted to relieve himself of the obligations which he thus assumes, merely on the ground that he, at the time of the marriage, was under such arrest. The arrest is not, of itself, enough in such a case to constitute duress of imprisonment." 36

The same result has been reached in other cases of marriage to escape bastardy proceedings, even though the man was actually not the father of the child, the position of the courts being that he should contest the proceedings, and if he marries to avoid this, he is bound by the marriage.

A similar result is reached with respect to marriages to escape seduction proceedings. Mere threats of such a prosecution may in fact constitute duress, but a marriage resulting therefrom is ordinarily binding. And even though the man is actually under arrest for the alleged seduction when he

33 Meredith v. Meredith, 79 Mo. App. 636 (1899); Shepherd v. Shepherd, 174 Ky. 615, 192 S. W. 658 (1917); Kelly v. Kelly, 206 Ala. 304, 69 So. 508 (1921).
34 Eg. in Jackson v. Winne, supra, note 7.
35 26 N. J. Eq. 440 (1875).
36 26 N. J. Eq. 442.
consents to the marriage, yet this of itself does not give him grounds for
annulment,\(^{40}\) especially when the state statutes explicitly provide that such
a marriage is a defense to the charge.\(^{41}\) It is the same principle that if he
avoids the burden and risk of defending himself from the charge in court
by marrying the prosecutrix, the marriage is binding upon him.

The rule is the same as to prosecutions for rape,\(^{42}\) abortion,\(^{43}\) and similar
statutory charges.\(^{44}\) And it has been held that when a man is under arrest
in a civil suit for breach of promise and marries the plaintiff, he cannot have
the marriage annulled for duress.\(^{46}\)

Even when the circumstances are considerably more oppressive upon the
man than the mere arrest, the result is not necessarily changed. Thus the
mere fact that the proceedings were illegal (though not in bad faith) will
not constitute a cause for annulment.\(^{46}\) Nor is the fact that the judge
demands excessive bail\(^{47}\) or tells the accused that the punishment is greater
than is allowed by law,\(^{48}\) a necessary ground for annulment of the marriage
to which he consents as a result of his arrest. It has even been held that
where a man is accused of statutory rape and marries the prosecutrix as a
result of being informed that the penalty was death, when in fact it was only
imprisonment, he cannot have the marriage dissolved on account of duress.\(^{49}\)

All of these cases involve actual duress and somewhat serious oppression;
but the results are justifiable because of the considerations of public policy
involved. However, it would seem that the result should be changed where
the criminal proceedings have not been brought in good faith. One case\(^{50}\)
argues to the contrary, saying that if the accused man has not had sexual
intercourse with the prosecutrix he must have known that she was unchaste,
and so that the proceedings were fraudulent. This argument wholly ignores
the practical coercion of which the accused is the victim and the difficulty
which a person accused of such a crime has of persuading the jury of his
innocence.\(^{61}\) To be sure, this handicap always exists, and cannot generally
be avoided; but it is certainly unfair to permit the defendant to have this
advantage when the plaintiff acts in bad faith. Accordingly, the weight of
authority is that a marriage induced by criminal proceedings brought by a
woman in bad faith may be annulled for duress.\(^{62}\) This is especially clear
if the accused was young and inexperienced, and advantage was consciously
taken of this fact.\(^{53}\)

\(^{40}\) Johns v. Johns, 44 Tex. 40 (1875); Marvin v. Marvin, 52 Ark. 425, 12 S. W.
875 (1890); Copeland v. Copeland, 21 S. E. 241 (Va., 1895); Blankenmiester v. Blan-
kenmiester, 106 Mo. App. 390, 80 S. W. 706 (1904); Jacobs v. Jacobs, 146 Ark. 45, 225
S. W. 22 (1920); Newman v. Sigler, 220 Ala. 426, 125 So. 666 (1930). In Kibler v.
Kibler, 180 Ark. 1152, 24 S. W. (2d) 867, annulment on the ground of duress was
denied under these circumstances; but it was allowed because the plaintiff was under
the age of consent.


\(^{42}\) Huntley v. State, 98 Tex. Cr. 530, 266 S. W. 505 (1924).

\(^{43}\) Frost v. Frost, 42 N. J. Eq. 55 (1886).

\(^{44}\) Medrano v. State, 32 Tex. Cr. 214, 22 S. W. 684 (1893); Lacoste v. Guidroz,
supra, note 8; Thompson v. Thompson, 148 La. 499, 87 So. 230 (1921).

\(^{45}\) State v. Davis, 79 N. C. 603 (1878).

\(^{46}\) Schwartz v. Schwartz, supra, note 29.


\(^{48}\) Ingle v. Ingle, 38 Atl. 953 (N. J. Eq., 1897); Sherman v. Sherman, 174 Ia. 145,
156 N. W. 301 (1916).

\(^{49}\) Rogers v. Rogers, 151 Miss. 644, 118 So. 619 (1928).

\(^{50}\) Griffin v. Griffin, 130 Ga. 527, 61 S. E. 16 (1908).

\(^{51}\) Scott v. Shufeldt, supra, note 4; Ingle v. Ingle, supra, note 48.

\(^{52}\) Smith v. Smith, 51 Mich. 607, 17 N. W. 76 (1883); Shoro v. Shoro, 60 Vt. 268,
14 Atl. 177 (1888).

\(^{53}\) Hawkins v. Hawkins, 142 Ala. 571, 38 So. 640 (1905).
The problem of duress as a ground for the annulment of a marriage is therefore one primarily of fact. But duress must be more clearly shown, and must in fact be more serious, than in most other connections. Furthermore, actual duress may not under circumstances be ground for the annulment of a marriage where considerations of public policy make such relief undesirable. But in spite of all these complications the law seems to be developing to a fairly satisfactory situation with respect to this matter.

Fraud

If the subject of duress as a ground for the annulment of marriages be regarded as somewhat complicated, that of fraud is certainly confusion worse confounded. This is not merely because the identification of fraud is here, as elsewhere, a difficult problem, but because the effect of various kinds of fraud and the circumstances surrounding it differ in matrimonial cases from most other kinds.

In the first place, the test of fraud, like that of duress, is more rigid here than in most sorts of cases; though, as already pointed out, the more recent cases show a strong tendency toward greater liberality. But when fraud is relied on as ground for the annulment of a marriage, it must be even more clearly shown than in most other connections, furthermore, undoubted fraud will frequently be regarded as insufficient ground for the annulment of a marriage when it would be enough for almost any other sort of relief. The courts often say that the fraud must go "to the essence" of the marriage relation in order to serve as grounds for annulment. Here again we have an application of the rule that marriage is not a mere agreement, but rather a status in the stability of which the public is interested. But as will presently appear, the courts differ almost without limit as to their application of the foregoing rules.

All courts, however, would probably agree that fraud can be taken advantage of only by the spouses, and if they want to permit the marriage to stand, no one else can object. It seems also that fraud of third persons to which the spouse did not consent, is not a ground for annulment even though it may give a cause of action at law to the deceased spouse against the person who thus fraudulently inveigled him into an undesirable marriage. Furthermore, the clean hands doctrine applies in this sort of case, as well as others where equitable relief is sought, and the plaintiff seeking annulment will be barred by any inequitable conduct toward his spouse or even toward the court.

55 See the articles by Emmerglick in 19 Ky. L. J. 295 (1931), on "Nullity of Marriage for Fraud," and in 2 Mer. Beas. L. R. 47 (1932) on "The Inherent Jurisdiction of Equity to Nullify Marriage."
58 E. g. in Chipman v. Johnson, supra, note 57.
59 McKinney v. Clarke, 2 Swan (Tenn.) 321 (1852). But it is not a defense that the spouse asking annulment is acting primarily in behalf of some other party. Barnes v. Wyethe, 28 Vt. 41 (1855).
60 See Keyes v. Keyes, 22 N. H. 553 (1851).
63 Clickner v. Clickner, 95 N. J. Eq. 479, 123 Atl. 373 (1924).
It is hardly surprising that the various jurisdictions are quite far from agreement with respect to the proper solution of the various phases of this complicated problem; indeed, it often appears impossible to reconcile all the decisions in a single jurisdiction. But at least three typical approaches to the problem may be quite clearly recognized in common law jurisdictions.

The first of these is the very strict view generally adhered to in England, and most clearly represented in the leading case of Moss v. Moss, holding that a husband cannot get his marriage annulled for the fraud of his wife in concealing from him her pregnancy by another man at the time of the marriage. The court says that the only fraud which will permit the annulment of a marriage is one which procures the appearance of consent without its actuality. If fraud induces consent it is not ground for annulment.

This appears to be a simple and logical solution. But on analysis it raises the distinctly embarrassing question whether any such fraud can possibly exist. The very act of marrying is itself one of consent, and so if the English rule means what it says, the result is that no marriage can ever be annulled in England for fraud. The Moss case suggests that if A is induced by fraud to marry B when he intends to marry C, that is a case where the fraud prevents any real consent, and so the marriage can be annulled. But this is obviously unsound; in the case supposed A certainly does consent to marry B, even though he supposes her to be C, just as truly as if he intended to marry B, but supposed her to be a different kind of person from what she actually was. The English rule is thus inconsistent (for marriages are occasionally annulled for fraud even in that country), and must be regarded as all the more arbitrary because the arbitrariness is not clearly understood or at least recognized by the courts. It may be rationalized as a very strict rule; but any attempt to take it out of the ambit of judicial discretion is doomed to failure.

Probably no American courts would even avow attempting to follow the English rule, nor to wholly inhibit the exercise of judicial discretion in this matter. But certain states are very much stricter than others. What may be called the strict American view (but one considerably more liberal than the English view) is typified by such states as Massachusetts and Illinois. Here the public interest in the stability of marriages is in the forefront of the judicial thinking, and the result is a tendency to deny annulment except in rather extreme cases. The liberal American view, typified by New Jersey and even more clearly by New York, is still a matter largely of discretion, but with the tendency in favor of granting an annulment. Here the courts are thinking primarily of the undesirableness of such marriages and therefore that they should be annulled unless there are strong reasons to the contrary.

Since the difference between these two extreme American views is one largely of point of view and emphasis, it is not always easy to tell into which category any particular state falls or even to recognize general tendencies. It is believed, however, that the present tendency, even in the conservative states, is generally in the direction of greater liberality. This seems desirable, if not carried too far, as the public interests are hardly served by the enforced continuance of a marriage resulting from the gross fraud of one of the spouses. The only danger is that this movement will go so far as to make annulment for fraud practically a matter of course, as seems to be the law.

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64 (1897) P. 263.
65 See Chipman v. Johnson, supra, note 57.
66 See Lyon v. Lyon, 230 Ill. 366, 82 N. E. 850 (1907).
67 See Ysern v. Horter, 91 N. J. Eq. 189, 110 Atl. 31 (1920).
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in some civil law countries; but this danger is probably not immediate anywhere in America.

It now becomes necessary to analyze certain typical forms of fraud in relation to annulment of marriages. The first of these is the concealment by one of the spouses of a chronic disease with which he had become infected before the marriage. If a venereal disease or one otherwise involving the sexual organs is involved, the authorities seem to be unanimous that an annulment will be granted. It makes no difference whether the guilty spouse actually represents that he is in good health, or merely conceals the disease by saying nothing about it. The danger of infection of the innocent spouse and of the children abundantly justifies this result; but the same rule is applied where this danger is not present because the disease is later cured or because it is not of an infectious nature.

With respect to other diseases, the rule is not so clear. Concealment of tuberculosis seems to be regarded as ground for annulment, the courts considering this disease almost equally dangerous to the other spouse and the children. It would seem that the rule as to epilepsy should be the same. Curiously enough, however, the weight of authority seems to be to the contrary, and even the liberal state of New York seems to be committed to the doctrine that concealment of this disease is not ground for annulment.

As to insanity, the situation is somewhat peculiar. It would seem that an intentional concealment of a decided tendency toward this disease is fraud with respect to as vital matter as can well be imagined. But there is authority that such fraud is not on a sufficiently important matter to justify annulment of the marriage. Such decisions in conservative jurisdictions are perhaps not very surprising; but one regrets to see New York reach the same conclusion on the basis of the perhaps logical but certainly rather absurd reasoning that an insane person cannot make a real representation and so cannot be guilty of fraud. The truth seems to be that the New York

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69 See the comment by Professor Lorenzen in 28 Yale L. J. 272 (1919).
71 Crane v. Crane, 62 N. J. Eq. 21, 49 Atl. 734 (1901).
73 Svenson v. Svenson, 178 N. Y. 54, 70 N. E. 120 (1904).
74 Meyer v. Meyer, 49 How. Pr. (N. Y.) 311 (1875). Here the husband was given an annulment for the fraud of the wife in concealing the fact that she had leucorrhoea in an extremely serious and disgusting form.
77 Lyon v. Lyon, supra, note 66; Richardson v. Richardson, 246 Mass. 353, 140 N. E. 73 (1923).
79 Keys v. Keys, supra, note 60. This case was, however, substantially overruled by Heath v. Heath, 159 Atl. 418 (N. H., 1932). See also Smith v. Smith, 112 Misc. 317, 184 N. Y. Supp. 134 (1920). Of course annulment should not be granted if the concealment of a tendency toward insanity was not intentional. Buechler v. Simon, supra, note 56.
courts have become fearful that they were too liberal in permitting annulment on the ground of fraud and desired to set a limit; but it is submitted that this particular limit is arbitrary and unfortunate.

Another class of fraud cases is when the woman has become pregnant before the marriage. One type of cases is where her intercourse has been with some man other than the one whom she now desires to marry and she induces the marriage by concealing the resulting pregnancy.

As has already been seen, the English courts deny annulment under these circumstances. But the American courts are apparently unanimously of the opposite opinion and will always grant annulment. The leading case is Reynolds v. Reynolds, where the result is grounded upon the two arguments, first that a pregnant woman is not in a position to have intercourse with her husband, and also that the husband will be put in the position of having to acknowledge another’s child as his own. Bishop has shown quite effectively that these arguments are not sound. A merely temporary inability to have sexual intercourse is certainly no ground for annulment of the marriage, and if the husband can prove that a child of his wife is not his, he need not acknowledge it even if it is born during the marriage. But the result is nevertheless sound, not only as a matter of elementary fairness to the much-wronged husband, but also as a matter of public policy which would be served, rather than harmed, by the annulment of such a vicious marriage. Some of the important American cases on this point are cited in the footnote. A statute making it a defense to an action for annulment for fraud that the other party has voluntarily cohabited with the fraudulent party after the fraud, was held not to apply to the case of a husband who had cohabited with his wife before he discovered that she was pregnant by another man.

If the wife conceals her pregnancy, the American cases, then, have no hesitation in annulling for fraud. But suppose she discloses her pregnancy and falsely accuses the man whom she now desires to marry of being the one responsible. Is he entitled to an annulment of the marriage into which she thereby fraudulently inveigled him?

The obvious objection is that he does not come into court with clean hands, as he must have had intercourse with his wife before the marriage; otherwise he would not have believed her representations. This objection is well expressed in the following language from the leading case of States v. States:

"Now is he entitled to the aid of a court of conscience? Can a man who has been guilty of one of the grossest acts of immorality, expect any court to undo the toils which envelop him because of such immorality? Would any court, after listening to his confession, be justified in dissolving his fetters? I think not. He transgressed; and this transgression blinded him; otherwise, too, he would have been free from importunities to marry, and from all false statements as to his liability.""
ANNULMENT OF MARRIAGE

This argument seems quite convincing, and is followed by probably the weight of American authority. It is not a question of fraud in fact, nor that the fraud does not relate to an essential matter of the marriage relation. The reason is in essence that while the husband has been grossly defrauded, and with respect to a vital matter, yet his own wrong-doing has put him into the position to be defrauded, and he does not therefore appeal to the conscience of a court of equity.

But there is weighty and growing authority to the contrary. The leading case on this side is Di Lorenzo v. Di Lorenzo, where it was held that a husband who had put himself into this unfortunate predicament was nevertheless entitled to an annulment of the marriage. The court relies on a New York statute, but this seems little more than declaratory of the common law. Nor does the court attempt to meet the arguments for the opposite view which have already been stated. It is suggested that the strongest argument in favor of the view that annulment should be granted under these circumstances is simply one of public policy; that such a marriage is inherently vicious, and notwithstanding the misdoings of the husband, the marriage should be annulled, not so much in his interest as in the interest of family stability (which is more important than the stability of merely legal marriages) and public morality.

At any rate there is considerable backing in the cases for this view. The courts which take it sometimes point out that the lack of vigilance of the plaintiff should not bar him. This seems correct enough, as a general rule, since an inquiry from a young man to his fiancee as to her chastity would be tactless, to say the least. But if they have already had sexual intercourse, the case might be changed.

It is perhaps unnecessary to undertake the rather difficult task of deciding which of these contradictory views is preferable. It is sufficient to note that both exist and are well supported by authority. Perhaps the opinion may be hazarded that in view of the general tendency toward liberality, the view of the Di Lorenzo case will probably eventually prevail in all but the most conservative jurisdictions.

When we pass to a consideration of other less specific kinds of fraud we are met by the general and very often stated rule that misrepresentations as to merely personal characteristics are not grounds for annulment of the marriage. To have this effect, the misrepresentations must go to the very essence of the marriage, and mere exaggerations or even actual misstatements as to the existence of personal virtues are not regarded as thus essential. The correctness of this rule as a general proposition seems not open to

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90 Foss v. Foss, 12 All. (Mass.) 26 (1865); Crehore v. Crehore, 97 Mass. 330 (1867); Safford v. Safford, 224 Mass. 392, 113 N. E. 181 (1916); Hoffman v. Hoffman, 30 Pa. 417 (1858); Sherman v. Sherman, supra note 29; Westfall v. Westfall, 100 Ore. 224, 197 Pac. 271 (1921); Mason v. Mason, 164 Ark. 59, 261 S. W. 40 (1924). It is immaterial that the husband has made a careful investigation of the wife's condition before he marries her. Arno v. Arno, 265 Mass. 282, 163 N. E. 861 (1928). But see adverse criticism of this case in 9 B. U. L. R. 56 (1929).

91 This erroneous reasoning is made use of in Helfrick v. Helfrick, 246 Ill. App. 294 (1927).


94 E. g. Gard v. Gard, supra, note 93.


96 Chipman v. Johnson, supra, note 57. See also Heath v. Heath, supra, note 79.
doubt. No doubt engaged couples rarely are wholly frank with each other, and it is hardly expected that they will be. To allow an annulment for every such misstatement would amount to a judicial recognition of companionate marriage—a change which while possibly desirable, is hardly within the proper ambit of judicial power at the present time.

But the rule is too general to be very significant without a rather careful consideration of its particular applications. Of these, one of the most striking, as well as one most closely related to the kinds of fraud already considered, is that misrepresentations of a spouse as to his former chastity—or rather lack of it—are not grounds for annulment of the marriage. The same is true as to concealment of previous unchastity. It would seem that this is a matter having a very vital relation to the marriage. The rule is often defended by the argument that otherwise a woman who has fallen from virtue would never be able to reform and so get married; but it would seem that she might well commence her reformation by telling the truth. The rule does have the advantage of treating both sexes alike, as it would obviously be impracticable to compel the man to tell his fiancee about his indiscretions. It is held to be immaterial that the man has been a corespondent in a divorce suit or that the woman has had an illegitimate child, so long, of course, as she is not pregnant at the time of the marriage. The rule seems very broad, but may be justifiable as a matter of public policy.

A somewhat clearer application of this principle is with respect to the concealment or even actual misrepresentation as to former marriages of the spouse. It is generally held that this, too, is fraud with respect to a mere personal characteristic, so that it is not ground for the annulment of a marriage induced by it. The fact that the former marriage was terminated by a divorce and that the other spouse is clearly understood to have had a vigorous objection to marrying a divorced person does not ordinarily change this result. It has even been held that membership by the deceived spouse in a religious denomination which forbids the marriage of a divorced person does not enable him to procure an annulment on the ground that he was deceived into participating in this form of forbidden nuptials.

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97 Probably the most frequently cited authority in favor of this general proposition is the well-considered dictum in Reynolds v. Reynolds, supra, note 83. Authorities on this point include Varney v. Varney, 52 Wis. 120, 8 N. W. 739 (1881) and Steele v. Steele, 96 Ky. 382, 29 S. W. 17 (1895). See also Leavitt v. Leavitt, 13 Mich. 452 (1865).


99 See the dictum in Reynolds v. Reynolds, cited in note 97, supra.

100 But see the defense of this rule in Bishop, supra, note 1, secs. 497 ff.


102 Shady v. Logan, supra, note 98.


104 Clarke v. Clarke, 11 Abb. Pr. (N. Y.) 228 (1869) where the court says that the wife's known repugnance to marrying a divorced person is a "mere fancy". See also, Pellerin v. Pellerin, 123 Misc. 355, 206 N. Y. Supp. 33 (1924) and Trask v. Trask, 114 Me. 60, 95 Atl. 352 (1915). In Wilcox v. Wilcox, 171 Cal. 770, 155 Pac. 95 (1916) the wife had never gotten a divorce from her former husband and it was not shown that he was dead; yet annulment of a second marriage was denied.

105 Boebs v. Hanger, 60 N. J. Eq. 10, 59 Atl. 903 (1905) followed in Cassin v. Cassin, 264 Mass. 23, 161 N. E. 603 (1928); Wells v. Talham, 180 Wisc. 654, 194 N. W. 37 (1923); Oswalt v. Oswalt, 146 Md. 313, 126 Atl. 81 (1924) (but see ad-
Here again the problem is one of balancing conflicting interests. No doubt the mere fact of a previous marriage is not a very vital matter, even though it may have ended in a divorce. But if conscious fraud is used to obviate religious objections it would seem that relief might well be given.

Still more obvious is the rule that misrepresentations as to age will not ordinarily be grounds for the annulment of a marriage induced by them. Even though the misrepresentation affects the relative age of the spouses or results in the fraudulent spouse not being bound by the marriage, the rule is the same. And, at least as a general proposition, it seems quite obviously correct.

Turning from these representations of somewhat definite facts to problems involving somewhat less easily measurable characteristics, it is fairly obvious that the scope of fraud as ground for annulment is very narrow. Thus what are found to be misrepresentations as to the character and temperament of the spouse making such representations are not normally a basis for invalidating the marriage resulting therefrom. They generally only amount to more or less gross exaggerations; but even when there is an undoubted misrepresentation annulment will not ordinarily be granted.

Representations as to wealth and social standing are in the same category. They, too, do not ordinarily give the party deceived by such misrepresentations any ground for claiming an annulment to the marriage. The same has also been held with respect to a representation by a man to a woman whom he was asking to marry that he was an American citizen whereas in fact he was an alien.

Where false protestations of affection are used to induce a marriage desired for some other reason the law might well be different. It is true that this is a problem of ascertaining mental conditions, which obviously involves practical difficulties of proof; but on the other hand it would be difficult to imagine a more vital matter in connection with marriage. There are, however, authorities holding that this is unsufficient grounds for annulment; though in some cases the difficulty seems to be that the fraud did not actually contribute materially toward producing the consent to the marriage.

It would appear, then, that only certain very narrowly defined classes of fraud will of themselves constitute even prima facie grounds for the annulment of marriage.
ment of a marriage; and that fraud as to personal characteristics, even though they be matters of real consequence in their effect upon the happiness of the married life, will not be regarded under normal conditions as sufficient to justify such annulment. But none of the courts, at least in this country, have adhered with extreme rigidity to these classifications. It is recognized that the problem is basically one of judicial discretion and that circumstances in certain cases may justify the annulment of a marriage even when the fraud itself is no greater, or conceivably even less, than in other cases where it has been denied. In particular, fraud which would otherwise be quite insufficient for this purpose may nevertheless justify an annulment of the marriage if the victim was not in a position to evaluate the fraudulent representations as well as would normally be the case, and this incapacity was consciously taken advantage of by the other party.116

Thus if the victim of the fraud was a person of advanced age and therefore of impaired mental faculties, a marriage into which a younger person has inveigled him may be annulled even though the actual fraud was with relation to a matter not severally regarded as grounds for annulment.117 This is especially true when religious peculiarities are also present and are taken advantage of.118 But here again this is a question of degree and of judicial discretion, and the mere fact that the plaintiff in the annulment suit was of an advanced age at the time of the marriage will not entitle him to relief if it appears that he was of unimpaired mentality and as able to take care of himself as a younger person.119

More frequently, however, the victim of the fraud is not old but rather very young and consequently inexperienced and easily led. Here too fraudulent representations of a nature wholly insufficient in ordinary circumstances to justify the annulment of a marriage may sometimes have that effect.120 It is true that mere allegations of the youth and inexperience of the plaintiff are not of themselves grounds for annulment.121 Actual misconduct on the defendant's part must be shown,122 and the plaintiff may be barred by his own wrongful acts.123 But practically all authorities admit that youth and inexperience of the plaintiff will sometimes justify relief when it would be denied to a more mature person.

These exceptions to the rigid rule that annulment will never be granted for fraud in connection with mere personal characteristics of the spouse are really partial negations of it. The truth seems to be that there neither is, nor ought to be, any definite categories of fraud which invariably will or will not constitute grounds for the annulment of a marriage. The courts are increasingly coming to recognize that the matter is basically one of judicial discretion, and that in the exercise of this discretion there are many other circumstances to be considered, and have at times even greater importance, than the mere question as to the nature of the fraud. As already pointed out,124

116 See Bishop, supra, note 1, secs. 505 ff.
118 Hides v. Hides, supra, note 22; Orchardson v. Coffield, supra, note 12.
120 Lewis v. Lewis, supra, note 80; Clark v. Field, 13 Vt. 460 (1841); Robertson v. Cole, 12 Tex. 356 (1854); Moot v. Moot, 37 Hun (N. Y.) 288 (1885).
121 Safford v. Safford, supra, note 90.
122 Green v. Green, 77 Fla. 101, 80 So. 739 (1919); Mason v. Mason, supra, note 90.
123 Smith v. Smith, 205 Ala. 502, 88 So. 577 (1921). In Mayer v. Mayer, 207 Cal. 685, 279 Pac. 783 (1929) a young wife was denied annulment in spite of the rather serious fraud of her older husband, because she did not really marry in good faith; she was a social butterfly and desired to continue to live with her wealthy father in New York rather than with her husband in California.
124 See p. 479, supra.
the courts are and ought to be less ready to grant an annulment of marriage for fraud than to give other sorts of relief; but this too is a question of public policy and any such rules should not be applied woodenly. In particular, the courts should consider not only the age of the deceived party and other similar circumstances, but also not primarily what kind of fraud it was but how serious it was. It is perfectly evident that fraud as to some kinds of personal characteristics—as where a hardened criminal represents himself to be a man of unsullied character—would be just as devastating to an innocent girl whom he thus induced to marry him as any misrepresentations as to (say) his physical condition could possibly be; and yet according to the rigid analytical test outlined above this is a representation relating merely to his personal characteristics and so not grounds for annulment.

Many courts are avowedly treating the problem from this viewpoint. Probably the leading case is Brown v. Scott. Here a young and inexperienced school girl was induced by a young man, but one already a hardened criminal, to marry him on the basis of his representation that he was a World War hero now holding a confidential position with the government. The wedding took place soon after the Armistice, which will explain why such representations would be particularly effective in inducing the affections of this inexperienced girl. In fact the husband had spent most of the war period in prison and was arrested immediately after the wedding and sentenced to several years imprisonment for impersonating a Federal officer. The wedding had been secret, although the wife's family had met and been considerably captivated by the attractive pseudo-hero. On suit by the wife for annulment the Maryland Supreme Court granted it. The court relied considerably upon the youth and inexperience of the plaintiff but also was influenced by the extreme character of the fraud—even though it was a fraudulent representation as to the defendant's personal characteristics. The court explained its position by saying:

“To approve and sanction a fraud so gross and destructive, and to condemn this school girl to live out her life bound by the ties of marriage in an alliance so degrading would be revolting to the common sense of justice, and would profane the very marriage relationship itself.”

It is submitted that this strikes exactly the right note. No doubt the plaintiff acted very foolishly and would have benefited by an application of family discipline of the time-honored sort; but to condemn her to a life partnership with such a criminal is a punishment out of all proportion to her offense. Furthermore—and this is even more important—to compel this marriage to continue is not merely unnecessary from the point of public policy but would be wholly vicious. The public is interested in the stability of marriages in general—but not this kind of a marriage. The case, and the point of view which is exemplified, are worthy of all commendation. Some other modern decisions have reached the same result under similar circumstances.

125 140 Md. 258, 117 Atl. 114 (1922). See the comment on this case in 22 Col. L. R. 662 (1922).
126 117 Atl. 119.
127 Christlieb v. Christlieb, 71 Ind. App. 682, 125 N. E. 486 (1919); Corder v. Corder, 141 Md. 114, 117 Atl. 119 (1922); Ysern v. Horter, supra, note 67; Dooley v. Dooley, 93 N. J. Eq. 22, 115 Atl. 268 (1921); Raia v. Raia, 214 Ala. 391, 108 So. 11 (1926); Wemple v. Wemple, 170 Minn. 305, 212 N. W. 808 (1927); Reynolds v. Reynolds, 171 Minn. 340, 214 N. W. 650 (1927). See also the New York cases cited in note 172, below. Such cases as Jakar v. Jakar, supra, note 109, where relief was denied, seem indistinguishable, except that there the plaintiff was older and presumably less unsophisticated.
Gatto v. Gatto\textsuperscript{128} is another case which rather distinctly exemplifies this modern trend. Here the man inquired as to his fiancee's chastity. She assured him that she was unsullied, but the fact was that she had long been guilty of incest with her father. It was held that the husband was entitled to an annulment of the marriage when, after the wedding, he discovered the facts of the case. The court points out the necessity of broader and less rigid tests in this matter than the courts have previously used, and pours very well deserved ridicule upon the English cases. Indeed the case has been interpreted as standing for the proposition that any fraud "that vitiates an ordinary contract avoids a contract of marriage",\textsuperscript{129} but it is not believed that the court meant to go so far.\textsuperscript{130} The point is that the test is really one of public policy and the only proper solution is through the exercise of sound judicial discretion in each particular case. These matters are far removed from commercial matters, and as to them neither predictability nor even stability of the law is particularly necessary or desirable.

There are other applications of this rule that fraud which relates merely to personal characteristics and is not in itself extremely serious may nevertheless under peculiar circumstances give grounds for the marriage to be annulled at the suit of the innocent party. Thus where a girl inquired as to comparatively trivial matters respecting her fiancee's past life and he answered her falsely the marriage was annulled, the court saying that it was sufficient that the fraud was with respect to a matter of importance to the particular spouse and that the plaintiff here showed that it was material to her by inquiring about it.\textsuperscript{131} So where the man falsely represented to the woman that he was a United States citizen and by marrying him she expatriated herself, she was held entitled to an annulment even though she was relieved from such expatriation by a subsequent statute.\textsuperscript{132}

It is believed that none of these cases are necessarily inconsistent with the rule that fraud to be a ground for the annulment of a marriage must be more extreme than to obtain most other sorts of relief; but they do unquestionably show that the law in this matter is in a state of flux and that it is tending toward a less rigid and more liberal point of view.\textsuperscript{133} This development is highly commendable, so long at least as it is not carried so far as to make a marriage as easily dissoluble for fraud as a simple contract.

One or two subordinate problems should be mentioned before leaving this subject. The first of these is as to whether mere concealment will constitute fraud in this connection or whether actual misrepresentations are required. There are authorities that mere concealment is not enough\textsuperscript{134} but in most cases it will appear on analysis that what the court really means is that the alleged fraud is in its nature insufficient to justify annulment of the marriage even though it had been exercised by active misrepresentations.\textsuperscript{135} Where the court regards the grounds as clearly sufficient, as in the case of

\begin{itemize}
  \item \textsuperscript{128} 79 N. H. 177, 106 Atl. 493 (1919).
  \item \textsuperscript{129} 68 U. of Pa. L. R. 77 (1919).
  \item \textsuperscript{130} Cf. 73 U. of Pa. L. R. 195 (1925). At any rate, the Gatto case was distinctly limited, though not overruled, by Heath v. Heath, supra, note 79.
  \item \textsuperscript{131} Libman v. Libman, 102 Misc. 443, 169 N. Y. Supp. 900 (1918).
  \item \textsuperscript{133} Even Massachusetts shows the effect of this tendency toward liberalization. Batty v. Greene, 206 Mass. 561, 92 N. E. 715 (1910), where however the relief given to the deceived husband was not annulment, the guilty wife being dead, but rather a claim against her estate, disregarding the marriage. So relief is sometimes, though rarely, given in Illinois. Pyott v. Pyott, 191 Ill. 230, 61 N. E. 88 (1901).
  \item \textsuperscript{134} Donnelly v. Strong, supra, note 98; Vondal v. Vondal; supra, note 70; Browning v. Browning, 89 Kans. 98, 130 Pac. 852 (1913); Lapides v. Lapides, supra, note 78.
  \item \textsuperscript{135} E. g. Vondal v. Vondal, supra, note 70.
\end{itemize}
serious diseases and pregnancy of the woman or other vital matters mere concealment will be regarded as sufficient. The only distinction, would seem to be that a fraudulent intention may be more difficult to show in the case of mere concealment than where there are active misrepresentations.

Another problem is as to effect of promises without any intention to carry them out. Are such promises fraudulent? It is sometimes argued that they are not because they relate only to future actions, and fraud must relate a present situation. It is submitted, however, that this argument is unsound. A promise without intention to carry it out is present fraud since there is at least an implied representation by making the promise that the promisor intends to fulfill it. On this point the authorities are conflicting.

Closely related to the above is the problem as to fraudulent intention not evidenced by express promise. It would seem on principle that relief should ordinarily be given, though of course the problem of proving the alleged fraud will be more difficult. There are a number of authorities to this effect. For example, it is held that a fixed but secret intention of one of the spouses not to have sexual intercourse after the marriage constitutes such fraud as will justify the other in asking an annulment; though of course the mere fact that intercourse is refused after marriage does not necessarily prove an intention which existed before the marriage to make such refusal. But here too there is authority the other way though it is rather curious to observe that it is much more clearly in the minority than are the cases holding that an express promise without intention to performance is not fraudulent.

It would appear then that the American law with reference to fraud as ground for annulment of marriage is somewhat unsettled but with a tendency toward liberality. The courts, without losing sight of the desirability of reasonable stability of marriages, are nevertheless considering each case upon its own merits and reaching their results in accordance with the actual

137 Donovan v. Donovan, supra, note 83.
140 Aufiero v. Aufiero, 222 App. Div. 479, 226 N. Y. Supp. 611 (1928). And see Steerman v. Snow, 94 N. J. Eq. 9, 118 Atl. 696 (1922), holding that a representation by a man that he was not impotent when he knew that he was, is fraud justifying the annulment of his marriage. Concealment by the wife of her known sterility has the same effect. Turner v. Avery, 97 N. J. Eq. 473, 113 Atl. 710 (1921).
141 Additional authorities that annulment cannot be granted on account of a fraudulent promise are Samuelson v. Samuelson, 155 Md. 639, 142 Atl. 97 (1928), Schachter v. Schachter, 109 Misc. 152, 178 N. Y. Supp. 212 (1919), and Mirizio v. Mirizio, 242 N. Y. 74, 150 N. E. 605 (1926). But see. a later decision in the Mirizio litigation in 248 N. Y. 175, 161 N. E. 461 (1928). Robinson v. Robinson, 110 Misc. 114, 181 N. Y. Supp. 28 (1920) is an authority that relief will be given on this ground. See also Robert v. Robert, 87 Misc. 629, 150 N. Y. Supp. 819 (1914).
144 Osbon v. Osbon, 185 Minn. 229, 204 N. W. 894 (1932).
145 Johnson v. Johnson, 257 Ill. App. 587 (1930). Cf. Caruso v. Caruso, 104 N. J. Eq. 588, 146 Atl. 649 (1929) where the court denied annulment to a wife even when she showed that the husband never intended to perform his marital duties; but the court thought that her own condition of pregnancy was the chief inducement for the plaintiff's consenting to the marriage.
146 See the cases cited in notes 139 to 141, supra.
circumstances of that case. In particular the nature of the fraud is not always decisive; the weight is put upon the real importance and seriousness of the fraud rather than upon the category into which it happens to have been put by analytical jurists.

Importance of Consummation of the Marriage

As already pointed out, a marriage which results from duress or fraud is not a nullity and can be made fully binding by ratification. Ratification requires much less than is needed even for a common law marriage where that is legal, though it is of course not effective unless done after the duress has ceased to operate or the fraud has been discovered. A mere delay for an unreasonable period before bringing suit for annulment may be regarded as a ratification. So the voluntary entering into a separation agreement will be regarded as a ratification; and so will mere endearing letters to the spouse.

But, of course, the commonest form of ratification is by cohabitation; and this is spoken of generally as a consummation of the marriage. There can be no doubt that such consummation by cohabitation will very greatly restrict the right of annulment otherwise existing, though, of course, it is not decisive either way. One can hardly accept the dictum of the New Jersey Court of Chancery that “an unconsummated marriage is little more than an engagement to marry” but it is certainly true that an unconsummated marriage is much more readily dissolved for duress or fraud than one where there has been cohabitation. Indeed, voluntary cohabitation after the duress or fraud has ceased to operate is a practically conclusive bar to an annulment suit, even though it may last only a very short period. On the other hand cohabitation as a result of continuing duress, or before the fraud is discovered, is obviously not a bar to an annulment suit, though it may have its effect connection with the burden of proof. But even in such a case a long continued cohabitation though in good faith may induct the courts in the exercise of its discretion not to decree an annulment.

But after all, consummation in its technical sense or even cohabitation in its broadest sense is not nearly so important as the existence or possibility of children. The existence of children is not an absolute bar to an annulment but it is, of course, a circumstance which will tend strongly in the direction of denying it unless there are very strong reasons the other

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147 See p. 474, supra.
148 Hampstead v. Plaistow, supra, note 37; Pellerin v. Pellerin, supra, note 104.
149 Copeland v. Copeland, supra, note 40; Kelley v. Kelley, supra, note 33.
150 Butler v. Butler, supra, note 103.
152 See Bishop, supra, note 1. See also Fesenden, “Nullity of Marriage”, 13 Harv. L. R. 110 (1899).
153 Ysern v. Horter, supra, note 67, at 110 Atl. 36.
155 Lenoir v. Lenoir, supra, note 85; Koecher v. Koecher, supra, note 70.
156 Thompson v. Thompson, supra, note 44, where the cohabitation lasted only 3 days; Lyannes v. Lyannes, supra, note 107, where it lasted only one day; Merrell v. Moore, 47 Tex. Civ. App. 200, 104 S. W. 514 (1907).
157 Harrison v. Harrison, supra, note 85; C v. C, supra, note 72; Di Lorenzo v. Di Lorenzo, supra, note 92 (here the cohabitation lasted 8 years); Sobol v. Sobol, supra, note 75.
158 Whitehouse v. Whitehouse, supra, note 57.
160 Leavitt v. Leavitt, supra, note 97.
way.\textsuperscript{161} On the other hand, if the victim of the fraud or duress erroneously believing the marriage to be void has married someone else and has had children by the second spouse, the existence of such children will constitute a strong moral argument for annuling the previous marriage and thereby making the children of the second marriage legitimate.\textsuperscript{162}

The chief objection to annuling a marriage where there are children is of course, that the annulment operates retrospectively and thereby makes the children illegitimate. However, there are often—perhaps generally—statutes providing that the children of an annulled marriage are nevertheless legitimate. However, this saves the child merely from legal bastardy and they should not be left to the mere protection of a statute if this can be avoided,\textsuperscript{163} particularly as the statute is sometimes construed very narrowly, so that the protection is not always as broad as is really needed.\textsuperscript{164}

The result seems to be that consummation of a marriage by cohabitation is an important but not decisive objection to its annulment. The same may be said of the existence of children of the marriage except that the objection to an annulment is here very much greater, even if a statute saves the children from illegitimacy. A ratification of the marriage is a serious though not an absolute bar to suit for annulment. But such a ratification should not be considered to exist unless the duress has ceased to operate or the fraud has been discovered before the acts relied upon as ratification.

\textit{New York Cases With Regard to Fraud}

As already pointed out the State of New York has gone farther than any other American jurisdiction in permitting annulment of marriages for fraud. It is possible that this may be due to the fact that there is only one ground for divorce in that state;\textsuperscript{165} or it may be as Professor Vanneman\textsuperscript{166} suggests that the general feeling on such matters—the social mores as he calls it—is more liberal in that state than in most others. Whatever the reason the fact is plain; and this justifies a brief separate consideration of the New York decisions.

Indubitably there have been, and quite recently, narrow decisions in New York—some as narrow as any other state.\textsuperscript{167} But these decisions are not typical at least of the more modern cases; so far as they are recent they seem, as already said, to represent an almost panicky feeling that the court is going too far in this matter and that it should therefore set up rather arbitrary limitations.

It will be remembered that New York was the leader in sustaining the doctrine that a man is entitled to annulment of his marriage induced by the fraudulent representation of the woman that he was the father of the child with whom she was already pregnant.\textsuperscript{168} Here a tendency shows to favor

\textsuperscript{161} Libman v. Libman, supra, note 131; O'Connell v. O'Connell, 201 App. Div. 338, 194 N. Y. Supp. 265 (1922); Jacobson v. Jacobson, supra, note 72. In these cases annulment was granted even though there were children; but the court admitted that this circumstance made it hesitate.

\textsuperscript{162} Clark v. Field, supra, note 120.

\textsuperscript{163} Griffin v. Griffin, supra, note 114; Caruso v. Caruso, supra, note 145; Robertson v. Roth, supra, note 80.

\textsuperscript{164} In re Montcrief's Will, supra, note 11.

\textsuperscript{165} This suggestion is made in Wells v. Talham, supra, note 105.

\textsuperscript{166} Supra, note 2.

\textsuperscript{167} See e. g. Chaddock v. Chaddock, supra, note 81; Mirizio v. Mirizio, supra, note 141; Horowitz v. Horowitz, supra, note 81; Lapides v. Lapides, supra, note 78. See also Glean v. Glean, 70 App. Div. 576, 75 N. Y. Supp. 622 (1902).

\textsuperscript{168} Di Lorenzo v. Di Lorenzo, supra, note 92.
the victim of the fraud even though he himself is not wholly virtuous; and the same tenderness toward defrauded spouses appears in other connections. However, the court has not usually lost sight of the fact that the problem is one of degree and judicial discretion and has not ordinarily laid down any very rigid rules.\textsuperscript{169} For instance, in the important case of Domschke v. Domschke\textsuperscript{170} the problem was presented as to whether a husband could get an annulment by reason of the representations of his wife before the marriage that she had been married to a previously designated third person and had had a child by him. In fact she had been the mistress of the father of her child and the child was, of course, illegitimate. There was the additional circumstance that the parties had cohabited six years, but this was before the discovery of the fraud. The court divided three to two, but the majority was in favor of allowing the annulment. There was a vigorous dissenting opinion. But both sides apparently agreed that the problem was one of the exercise of discretion.

Situations similar to that of Brown v. Scott\textsuperscript{171} have arisen several times in New York and the courts seem to have agreed that circumstances of this sort are sufficient to justify an annulment.\textsuperscript{172} It is admitted, however, that this is a matter of discretion so that relief will not always be given even in the case of a rather gross fraud if it appears that the girl was in a position to take care of herself reasonably well.\textsuperscript{173}

No serious objection can be reasonably made to the previous cases, at least in their point of view. But the very recent case of Shonfeld v. Shonfeld\textsuperscript{174} fairly takes the breath away from even the most extreme advocates of liberalism in this particular. Here the plaintiff (the man) desired to marry the defendant but felt that he did not have enough money. The defendant told him that she had some and would be glad to help him when he got a definite proposition. The proposition came quite promptly for going into the jewelry business; but for this the plaintiff needed at least $7,000. The defendant told him that she had $8,000 which she would be glad to put into the business. She was herself active in the negotiations for establishing it, but declined to put up any actual cash until the plaintiff had married her. He consented to do so, only to find to his horror that she had no money and had never had it, nor the intention of getting any.

The husband sued for an annulment on the ground of fraud and was granted it by the majority of the New York Court of Appeals, the opinion being written by Judge Crouch. The reasoning was that the marriage was solely induced by this fraudulent representation as to the defendant’s financial condition and that the defendant clearly understood that this was the most vital matter connected with it. Judge Crane, with whom Judges Lehman and O’Brien concurred, wrote a dissenting opinion which begins unfeelingly, but one is tempted to feel, quite accurately.

\textsuperscript{169} The comment of Friedman in 1898 (supra, note 2) that “The New York decisions are indefensible on any theory of marriage law which regards the marriage contract as in any way different from an ordinary commercial contract” is even now hardly justified. Some cases like Weill v. Weill, 104 Misc. 561, 172 N. Y. Supp. 589 (1918) have language almost this broad; but in this case and most of the others, the result is justifiable as a matter of the exercise of proper judicial discretion. Cf. Rubman v. Rubman, supra, note 68, and Rozsa v. Rozsa, 117 Misc. 728, 191 N. Y. Supp. 868 (1922).


\textsuperscript{171} Supra, note 125.

\textsuperscript{172} Keyes v. Keyes, 6 Misc. 355, 26 N. Y. Supp. 910 (1893); King v. Brewer, 8 Misc. 587, 29 N. Y. Supp. 1114 (1894); Truiano v. Truiano, supra, note 132.

\textsuperscript{173} Cf. Rubman v. Rubman, supra, note 68.

\textsuperscript{174} 260 N. Y. 477, 184 N. E. 60 (1933). It must be admitted, however, that the case goes little farther than the previous decision in Robert v. Robert, supra, note 141.
"The marriage in this case was a mere matter of bargain and sale. The woman bought the man for $6,000, and because she failed to have the money the man seeks to have the marriage annulled. The question really is whether the marriage ceremony in this state is of any binding force or whether it is an empty ceremony."\textsuperscript{176}

To the writer it appears that Judge Crane has not very greatly overstated the case. One may grant that the defendant here is not entitled to commendation or to any particular consideration; a fraudulent party never is. But the case seems to utterly ignore the public interest in the stability of marriage and to make marriages substantially no more binding than any other agreement. It cannot be denied, as has indeed been persistently urged here, that the question is one of judgment and is not to be answered by any rigid tests; but in the writer's judgment, at any rate, this case has gone too far.\textsuperscript{178} It may be noted that Justice Crouch himself before he went on the Court of Appeals discussed this very matter and concluded his article\textsuperscript{177} on this subject as follows:

"Many cases come into court, which on the untested evidence adduced on behalf of plaintiff seem hard; so the tendency is to relax. That way lies danger."

Has not the learned justice fallen into the very pitfall against which he has previously warned?

There is, therefore, some danger that the New York courts are becoming too liberal in this matter and are going the way of some of the continental jurisdictions where marriage is annulled for duress or fraud practically as a matter of course.\textsuperscript{178} However, it must be recognized that even the Shonfeld case does not go so far as this and if the New York courts stop at this point no great harm has been done. But it is to be hoped that they will not lead other courts much farther afield.

\textit{Conclusion}

The subject of duress as a ground for the annulment of marriage appears to be in a fairly satisfactory state. It is now reasonably settled, at least in its main outlines, and yet not so rigidly so as not to permit the exercise of reasonable and desirable judicial discretion.

The subject of fraud in the same connection is far more decidedly in a state of flux. The courts are now generally cutting loose from the old rigid restrictions and considering each case on its merits, particularly in regard to the interests of the defrauded party and of the public. All this is commendable, since this is a subject as to which there is no necessity that the law should be very predictable or stable. The only danger, and one which has become quite acute in New York, is that the trend towards liberality and individuality should be carried so far as to destroy all standards. However, on the whole, this danger is not as yet pressing; and the general tendency which has just been mentioned is desirable. A marriage which results from fraud or duress of any substantial consequence is not one in the stability of which the public normally has a substantial interest. In fact the public inter-

\textsuperscript{175}184 N. E. 62.
\textsuperscript{176}The case has, however, received some favorable comment. See 46 Harv. L. R. 1034, and 28 Ill. L. R. 124.
\textsuperscript{177}"Annulment of Marriage for Fraud in New York", 9 Corn. L. Q. 401 (1921).
\textsuperscript{178}See Lorenzen, supra, note 69.
est coincides with the personal interests of the spouse who is the victim of the fraud or duress. Unless there be some strong reason to the contrary, such marriages should in the interest of all concerned, including the public, be put an end to by annulment.

THE BASIS OF THE IMMUNITY OF AN EMPLOYER OF AN INDEPENDENT CONTRACTOR

FOWLER V. HARPER*

Between the specious and often artificial legalistic concepts in which opinions of courts are couched and the plausible rationalizations devised by ingenious law professors, it is often difficult to determine the actual forces which have made the law, at any given time, what we find it to be. Man is a rational creature in one sense, but a thoroughly irrational one in another and by far the more important sense. He is adept in fashioning logical and even practical ratiocinations for his conduct to make it appear proper if not inevitable. But, on the whole, he has not developed the capacity for following a course of planned conduct according to blue prints prepared by the most competent social engineers. Thus, a rule of law is found in the reports to be based upon one or more supposed Blackstonean “reasons”. In the juristic literature, the principle is based upon a pyramid of premises and inferences or upon an array of actual or fictitious social and economic considerations which are supposed to furnish an adequate social policy for the principle. It is seldom that a rule is frankly stated to be the law because a complex con-jury of popular notions make the principle appropriate. And still less often is such a reason offered as an adequate justification for a rule of law. Nevertheless, these vague and nebulous popular notions variously branded as “public opinion”, “common sense”, “the general feeling of mankind” and the like are probably responsible for more rules of law than any other single factor and, it is submitted, such a basis for a legal principle is probably the soundest and most adequate that can be found. The fact that such a basis frequently defies accurate analysis because of the impossibility of attributing the exact effect of the myriad of considerations of the experience and heritage of a given generation which constitute the motive power behind social forces, makes it none the less important. By overlooking such forces, we are apt the more easily to be misled in making predictions as to what courts will hold in a given situation. Accordingly, a consideration of the basis for the curious rules and exceptions thereto with respect to the liability of an employer of an independent contractor, must not ignore these variable and illusory factors.

In any discussion of supposed policies involved in the law pertaining to liability for the torts of an independent contractor, it may be worthwhile to recall that, as a matter of legal history, the idea of vicarious responsibility for torts committed in the course of service rendered to one person by another was introduced first, and the general immunity for the misconduct of independent contractors carved out of that principle as a situation to which the principle was inappropriate. Proper emphasis on the problem may thus be obtained by restating it in the following form, “What is the basis for the special insulation of one who employs an independent contractor?” Instead of inquiring what are the reasons for holding liable an employer for the mis-

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