THE INHERENT JURISDICTION OF EQUITY TO NULLIFY MARRIAGE*

The general equity jurisdiction to nullify marriage, exercised by the New Jersey Court of Chancery, is based upon equitable, social and political principles.[1] This jurisdiction embraces situations where real and genuine consent is lacking because of fraud, duress, and other similarly effective causes. Considerations of public policy and communal morality have

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* The writer has drawn upon his article *"Nullity of Marriage for Fraud"* (1931) 19 Ky. L.J. 295.

[1] The source of this jurisdiction is explained in Carris v. Carris, 24 N. J. Eq. 514 (1873). Justice Bedle speaking for the Court of Errors and Appeals, said: "If the jurisdiction of the court is purely statutory, then there is no power in this state to declare the marriage of a lunatic, idiot, or infant, void. Such a marriage it is true, might be treated collaterally as void, but without the power stated, the ceremony that may have been performed in such a case could not be set aside by direct judicial action. And so in case of consent extorted by duress, where there may be a color of marriage, yet lacking the element of consent, which is necessary in every marriage. Cases of this character necessarily call for the existence of an adequate jurisdiction in every well organized and enlightened government, and it can hardly be supposed that our existing system of courts is impotent to furnish it. The doubt arises from the fact that no such jurisdiction was exercised by the ecclesiastical courts alone. Practically speaking, therefore, that jurisdiction was exclusive of the Court of Chancery, and for that reason there is a want of adjudication as to the dormant powers of this latter court. * * * Speaking generally then, the jurisdiction of our Court of Chancery to annul fraudulent contracts is sufficient to include the contract of marriage, and although a new application of it, I see nothing in the nature of the marriage relation, as viewed by our law, to prevent its exercise. The absence of ecclesiastical courts, the existence in the Court of Chancery of the general jurisdiction stated, and there being no provision in the constitution for a different tribunal, and consent being a common law essential to the marriage contract, all show that that jurisdiction must embrace the right to annul such a contract for a sufficient fraud. Apart from the implication in our constitution, and our system of courts, such is the opinion, in result, of learned writers, and is in accordance with respectable adjudication made without the aid of any statute conferring jurisdiction. * * * In England, the ecclesiastical courts were a part of the religious establishment of the government, and had jurisdiction over the marriage relation, as well in reference to the mere civil or common law features of it, as to its religious. Such a religious establishment being inimical to our institutions, the policy of our laws has been to distribute among the common law and equity courts, or special tribunals adopted or constituted for the purpose, as in the case of Prerogative and Orphans Courts, all the powers of the ecclesiastical courts which are necessary and proper for the protection and enforcement of civil rights. Whenever, then, it is necessary to secure a civil right, or to be redressed for civil wrongs, we naturally expect the proper jurisdiction to be found among the existing courts, even if those rights or wrongs were subjects of ecclesiastical jurisdiction." See also McClurg v. Terry, 21 N. J. Eq. 225 (1870); Anonymous, 24 N. J. Eq. 19 (1873); Steerman v. Snow, 94 N. J. Eq. 9, 118 Atl. 696 (1922).

See also *Jurisdiction in Nullity of Marriage,* 155 L. T. 546 (1923); *Nullity of Marriage,* 13 HARV. L. REV. 110 (1899).

received special regard and have had much to do with shaping the accepted tenets in this field. They arose in part from the needs and conditions of an era, the social and economic characteristics of which are no longer with us. By a sort of metamorphosis begun two or more generations in the past, we have grown into a different form—different not only in degree but in kind. We see all about us a much altered way of life of great complexity. It is marked by the creation of new, and the enlargement of existing demands upon human relationships. Legislative and judicial extensions of individual rights and duties add their weight. An inquiry into the fitness of our doctrines for present day needs is the primary purpose of this re-examination.

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The most prolific cause of this type of litigation is fraud. Fraud has been aptly termed by Lord Stair, *hydra multorum capitum.* It is presented in the form of willful misrepresentation, conscious concealment, statements of half truths, honest belief of things actually false, and in general of all of the diverse elements which make up a *suppressio veri* or a *suggestio falsi.* This alleged fraud is linked with one or more of a multi tude of subjects, among them insanity, epilepsy, tuberculosis, foul disease, ante-nuptial incontinence and pregnancy, religious belief, social and financial worth, and many others. These, in almost endless combinations and permutations with the *indicia* of fraud referred to, have resulted in a number of decisions, which, on close examination, reveal a consistent, schematic, and at the same time *progressive* doctrine.

Its historical background is interesting and important. The mutuality and reality of consent necessary to effect a marriage, which fraud tends to destroy or prevent, was formerly searched for no further than the external evidence of a meeting of the minds. This was regarded in some of the early cases as being the alpha and omega of inquiry. Lord Stowell expressed one view held on this subject in the following language:

> "Suppose a young man of sixteen, in the first bloom of youth, the representative of a noble family, and the inheritor of a splendid fortune; suppose that

> he is induced by persons connected with a female in all respects unworthy of such an alliance, to contract a marriage with her, after due publication of banns in a parish church, to which both are strangers, I say the strongest case you could establish, of the most deliberate plot, leading to a marriage the most unseemly in all disproportions of rank, of fortune, of habits of life, and even of age itself, would not enable this court to release him from chains which, though forged by others, he had riveted on himself. If he is capable of consent, and has consented, the law does not ask how the consent has been induced. His own consent however procured, is his own act, and he must impute all the consequences resulting from it, either to himself or to others whose happiness he ought to have consulted, to his own responsibility for that consent. The law looks no further.[2]

In the much quoted case of *Wakefield* v. *McKay,* the same jurist said: "The law * * * makes no provision for the relief of a blind credulity, however it may have been produced.[3]

This initial conception of consent which ascribed to it an all sufficient character, was supplanted by the more humane and logical view that a decree should be granted for fraud which struck at the *essentials* of the marital relation. In doing so, the courts were not without precedents. The ecclesiastical tribunals distinguished between *"error substantialis"* and *"error accidentalis."* The former was of such a nature as reached the

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[2] Sullivan v. Sullivan, 2 Hag. Con. 238, 161 Eng. Rep. 728 (1818). The facts in this case presented the interesting question whether a conspiracy to produce a marriage by fraud warrants a decree of nullity if the fraud be sufficient in kind and degree. The subject is infrequently presented and there is little direct authority for any particular view. Mr. Bishop has suggested the rule which should be adopted in principle, both for cases where the defendant was a party to the conspiracy and for those where he was entirely innocent. He says (Bishop, *Marriage, Divorce* and *Separation,* (1891) p.199): "When the marriage is the voluntary act of the parties to it, proceeding from voluntary choice, though at the same time deceitful practices by third persons led them to this choice, neither of them being cognizant of the fraud, it is good. But if one of them was cognizant of the fraud, and so voluntarily availed himself of it, whether he was a party to the originating of it or not, it should be deemed his fraud; and if sufficient in degree and kind should entitle the other party to have the marriage set aside." See also Barnes v. Wyethe, 28 Vt. 41 (1855).

[3] 1 Hag. Con. 394, 161 Eng. Rep. 593 (1807).

essence of the consent of the parties; the latter embraced accidental frauds, which did not affect the capacity of the parties to contract or to perform the duties imposed by the marital relationship, and which did not serve to destroy the essence of consent.[4]

It has become thoroughly established that the fraud upon which equity will act to nullify marriage must be extreme and must penetrate to the essentials of the relationship.[5] The rule

[4] Weill v. Weill, 104 Misc. 561, 172 N. Y. 589 (1918). It is an established policy of the New York Courts to treat consent as the essence of marriage. In Di Lorenzo v. Di Lorenzo, 174 N. Y. 467, 67 N. E. 63 (1903) the court said: "While, then, it is true that marriage contracts are based upon considerations peculiar to themselves, and that public policy is concerned with the regulation of the family relation, nevertheless, our law considers marriage in no other light than as a civil contract. Kujek v. Goldman, 150 N. Y. 176, 34 L. R. A. 156, 44 N. E. 773. The free and full consent which is of the essence of all ordinary contracts is expressly made by the statute necessary to the validity of the marriage contract. The minds of the parties must meet in one intention. * * * In this case the representation of the defendant was as to a fact, except for the truth of which the necessary consent of the plaintiff would not have been obtained to the marriage. It was designed to create a state of mind in the plaintiff, the operation of which would be to yield a consent to marry the defendant in the belief that he was rectifying a great wrong. The minds of the parties did not meet upon a common basis of operation." The court held that a marriage contract may be annulled by the court, where it was procured by fraudulent representations by the woman that during the man's absence from the state she had given birth to a child of which he was the father, and which she purported to exhibit to him, no such child ever having been born.

In Weill v. Weill, *supra*, a decree was granted for the fraudulent suppression of the fact that the defendant had previously been married.

In O'Connell v. O'Connell, 201 App. Div. 338, 194 N.Y.S. 265 (1922), nullity was decreed for fraudulent representations by the husband that he was of good personal habits and not addicted to the use of drugs, but it appeared that he was an incurable drug addict and had been dishonorably discharged from the Army for this reason.

In Truiano v. Truiano, 121 Misc. 635, 201 N.Y.S. 573 (1923), a decree was likewise granted for fraudulent representations by the husband that he was a citizen of the United States, with the result that under a Federal statute the plaintiff took the nationality of her husband and became incapacitated from pursuing her profession of teaching in the public schools.

See *Annulment of Marriage for Fraud in New York,* 6 Cornell L.Q. 401 (1921).

A somewhat similar doctrine is maintained in California. See Mayer v. Mayer, 207 Cal. 685, 279 P. 783 (1929) and Millar v. Millar, 175 Cal. 797, 167 P. 394 (1917).

[5] A marriage procured by fraud is voidable, not void. Carris v. Carris, *supra*, note 1; Crane v. Crane, 62 N.J.Eq. 21, 49 Atl. 734 (1901); Boehs vs. Hanger, 69 N.J.Eq. 10, 59 Atl. 904 (1905); Steerman v. Snow, 94 N.J.Eq. 9, 118 Atl. 696 (1922). This is the rule in most states. Smith v. Smith, 171 Mass. 404, 50 N. E. 933 (1898); Cummington v. Belchertown, 149 Mass. 223, 21 N.E. 435 (1889); Di Lorenzo v. Di Lorenzo, 174 N.Y. 467, 67 N. E. 63 (1903); McCullen v. McCullen, 162 App. Div. 599, 147 N.Y.S. 1069 (1914); Fisk v. Fisk, 6 App. Div. 432, 39 N.Y.S. 537; (1896); Price v. Tompkins, 108 Misc. 263, 177 N.Y.S. 548 (1919);

was first announced in this state in the leading case of *Carris* v. *Carris*,[6] where it was said:

> "* * * The mere presence of fraud in the contract is not sufficient to dissolve it. The fraud must exist alone in the common law essentials of it, and then not to have the effect of avoiding it against sound considerations of public policy. * * * In granting relief, courts should always be careful that no violence is done to the nature of the relation and to sound morals. It must be extraordinary fraud alone, that will justify an avoidance of the bond. * * *"
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> "* * * The general principle of the law is, that fraud in a material part, vitiates a contract, and the only reason why it does not apply with full force to the marriage contract, is, that marriage is *sui generis* in

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Williams v. Williams 71 Misc. 590, 130 N.Y.S. 875 (1911); Sheridan v. Sheridan, 186 N.Y.S. 470 (1921); Taylor v. Taylor, 181 N.Y.S. 894 (1920); Barnett v. Kimmell, 35 Pa. 13 (1859); Orchardson v. Cofield, 171 Ill. 14, 49 N.E. 197 (1897); Barclay v. Com., 116 Ky. 275, 67 S.W. 4 (1903); Tomppert v. Tomppert, 13 Bush 326 Ky. (1877); Tyson v. State, 83 Fla. 7, 90 S. 622 (1922); Farley v. Farley, 94 Ala. 501, 10 S. 646 (1892); Leavitt v. Leavitt, 13 Mich. 452 (1865); Keyes v. Keyes, 22 N.H. 553 (1851); Trammell v. Vaughan, 158 Mo. 214, 59 S.W. 79 (1900). The requirement that fraud must penetrate to the essentials of the marriage is stated in Carris v. Carris *supra;* Crane v. Crane, *supra;* Boehs v. Hanger, *supra;* Allen v. Allen, 85 N.J.Eq. 55, 95 Atl. 363 (1915); aff. 86 N.J.Eq. 441, 99 Atl. 309 (1916), among other decisions. For like decisions in other states, see Wells v. Talham, 180 Wis. 654, 194 N.W. 36 (1923); Varney v. Varney, 52 Wis. 120, 8 N.W. 739 (1881); Kawabata v. Kawabata, 48 N.D. 1160, 189 N.W. 237 (1922); Smith v. Smith, 205 Ala. 502, 88 S. 577 (1921); Johnson v. Johnson, 176 Ala. 449, 58 S. 418 (1912); Lyon v. Lyon, 230 Ill. 366, 82 N.E. 850 (1907); Richardson v. Richardson, 246 Mass. 353, 140 N.E. 73 (1923); Chipman v. Johnston, 237 Mass. 502, 130 N.E. 65 (1921); Batty v. Greene, 206 Mass. 561, 92 N.E. 715, (1910); Smith v. Smith, *supra;* Cummington v. Belchertown *supra;* Reynolds v. Reynolds, 3 Allen 605 (Mass. 1862); Williams v. Williams, 2 Harr. 39, 118 Atl. 638 (Del. 1922); Guthery v. Bell, 206 Mo. App. 570, 228 S.W. 887, (1921); Schaeffer v. Schaeffer, 160 App. Div. 48, 144 N.Y.S. 774 (1913); Fisk v. Fisk, 6 App. Div. 432, 39 N.Y.S. 537 (1896); Weill v. Weill, 104 Misc. 561, 172 N.Y.S. 589 (1918); Roth v. Roth, 97 Misc. 136, 161, N.Y.S. 99 (1916); Anonymous, 21 Misc. 765, 49 N.Y.S. 331 (1897); Shrady v. Logan, 17 Misc. 329, 40 N.Y.S. 1010 (1896); Beckermeister v. Beckermeister, 170 N.Y.S. 22 (1918); Vazakas v. Vazakas, 109 N.Y.S. 568 (1908). In New Hampshire, however, a contrary rule prevails. In Gatto v. Gatto, 79 N.H. 177, 106 Atl. 493 (1919) it was said: "That the fraud on account of which the marriage will be set aside must relate to a matter material to the marriage relation which the defrauded party could not, in the exercise of reasonable prudence, discover at the time, and the effect of which he has not waived when fully informed of it, is a principle readily deducible from many American authorities. It is not exclusively confined to the essentialia of the marriage relation as defined in the Reynolds case."

[6] *Supra,* note 1.

> many respects, and should not be vitiated even if fraudulent, when against 'good policy, sound morality, and the peculiar nature of the relation.' To be free from that restriction, the fraud must be of an extreme kind, and in an essential of the contract. * * * "

Judicial opinion as to what constitutes an essential of marriage has been undergoing a change. The early American and English decisions were extensively influenced by the undertaking of the parties to take each other for better or worse, in sickness and in health; and by the nature of the demands made upon the marital relationship by the then comparatively simple social organization. The trend of modern decisions indicates a recognition that what was previously deemed non-essential, may well be of utmost importance today. But a proper appreciation of just what is meant by the *essentialia* of marriage, and a consequent proper translation of the term into judicial action, may be prevented by a popular misconception created by the foundation cases of the doctrine, *Reynolds* v. *Reynolds,*[7] and *Carris* v. *Carris.* It was held in the former that equity will nullify a marriage at the suit of a husband who had no connection with his wife prior to their marriage, upon proof that an ante-nuptial pregnancy of the wife, fraudulently concealed, has been followed by the birth of a child after marriage.[8] It has been widely

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[7] 3 Allen 605 (Mass. 1862).

[8] See also DiTullio v. DiTullio, 102 N.J.Eq. 141, 140 Atl. 10 (1928); aff. 104 N.J.Eq. 496, 146 Atl. 913 (1929); Sinclair v. Sinclair, 57 N.J.Eq. 222, 40 Atl. 679 (1898); States v. States, 37 N.J.Eq. 195 (1883). To the same effect are Fontana v. Fontana, 77 Misc. 28, 135 N.Y.S. 220 (1912); Shrady v. Logan, 17 Misc. 329, 40 N.Y.S. 1010 (1893); Baker v. Baker, 13 Cal. 87 (1859); Franke v. Franke, 3 Cal. Unrep. Cas. 656, 31 P. 571 (1892); Jackson v. Ruby, 120 Me. 391, 115 Atl. 90 (1921); Steele v. Steele, 104 N.C. 631, 10 S.E. 707 (1890); Sweeney v. Sweeney, 96 Vt. 196, 118 Atl. 882 (1922); Harrison v. Harrison, 94 Mich. 559, 54 N.W. 275 (1893); Nadra v. Nadra, 79 Mich. 591, 44 N.W. 1046 (1890); Sissung v. Sissung, 65 Mich. 168, 31 N.W. 770 (1887); Reynolds v. Reynolds, *supra,* note 7; Ritter v. Ritter, 5 Blackf. 81 (Ind. 1839). No relief can be secured by one who had illicit relations with his wife prior to their marriage. Fairchild v. Fairchild, 43 N.J. Eq. 473, 11 Atl. 426 (1887); Seilheimer v. Seilheimer, 40 N.J.Eq. 412, 2 Atl. 376 (1885); Lyman v. Lyman, 90 Conn. 399, 97 Atl. 312; (1916); Hoffman v. Hoffman, 30 Pa. 417 (1858); McCulloch v. McCulloch, 69 Tex. 682, 684, 7 S.W. 593 (1888); Westfall v. Westfall, 100 Or. 224, 197 P. 271, (1921); Crehore v. Crehore, 97 Mass. 330, (1867). Nor can a cause of action be founded upon false representations by the woman, that she is pregnant by the complainant. Fairchild v. Fairchild, *supra.* Tait v. Tait, 3 Misc. 218, 23 N.Y.S. 597 (1893); Mason v. Mason, 164 Ark. 59, 261 S.W. 40 (1924); Todd v. Todd, 149 Pa. 60, 24 Atl. 128

concluded that this decision stands for the proposition that fraud is to be measured by its effect upon the ability to produce issue. This conclusion is erroneous.

The decision is based upon two principal grounds: first, that the woman, during the period of her gestation, is incapacitated from making and executing a valid contract of marriage with a man who takes her as his wife in ignorance of her condition and upon the faith of representations that she is chaste; second, that a husband has a right to require that his wife shall not bear to his bed aliens to his blood and lineage. It is pointed out in discussing this reason, that the husband is presented with the alternative of disowning the child, thereby publishing to the world the shame of the woman who was still to remain his wife, or of admitting the child of another to share in his bounty and receive support in his household.

The first of these reasons rests upon a temporary incapacity of the wife to bear children. With the birth of the child then in the mother's womb, the inability to fulfill the object of propagation is entirely removed. The parties have taken each other for a lifetime. Should the law regard as unsubstantial the short period of time during which the wife is incapacitated from bearing off-spring to her husband? If any consistency is to be maintained with the rule that fraud in connection with mere ante-nuptial incontinence is not a sufficient ground for nullity,[9] this reason can give little support to the decision.

In the second reason we find a sounder basis for the decision.[10] It was explained in the *Carris* case, (which presented a similar fact situation) by the observation that if the fraud charged should be permitted to succeed, " * * * shame and en-

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(1892); Hoffman v. Hoffman, 30 Pa. 417 (1858); Gondouin v. Gondouin, 14 Cal. App. 285, 111 P. 756 (1910).

See also 9 MINN. L. REV. 497 (1925) and 73 U. of Pa. L. Rev. 195 (1925).

[9] Entsminger v. Entsminger, 99 Kan. 362, 161 P. 607 (1916); Browning v. Browning, 89 Kan. 98, 102; 130 P. 852 (1913); Wilcox v. Wilcox, 171 Cal. 770, 155 P. 95 (1916); Butler v. Butler, 204 App. Div. 602, 198 N.Y.S. 391 (1923); Glean v. Glean, 70 App. Div. 576, 577, 75 N.Y.S. 622 (1902); Leavitt v. Leavitt, 13 Mich. 452 (1865); Hull v. Hull, 191 Ill. App. 307 (1915); Beckley v. Beckley, 115 Ill. App. 27 (1904); Steele v. Steele, 96 Ky. 382, 29 S.W. 17 (1895); Hedden v. Hedden, 21 N.J.Eq. 61 (1870); Smith v. Smith, 8 Or. 100 (1879); Varney v. Varney, 52 Wisc. 120, 8 N.W. 739 (1881).

[10] *Cf.* Bishop, *op. cit. supra,* note 2, p. 212.

tire alienation are the inevitable consequences. Surely, there can be no good policy in such action as will either compel parties to live together under these circumstances having only the shadow of marriage, or compel them, as would be more likely, to live totally separated, a continual annoyance to each other, and a source of the greatest unhappiness."

This then, is the root of the matter—shame and entire alienation—the rise of an adamant barrier between the parties. Capacity for procreation of sound issue still exists. It is possble for the parties physically to carry on as husband and wife and to rear a family. The foundation upon which the decision is built is not physical, but mental and biological—the almost instinctive abhorrence aroused by the spectacle. The alienation brought about by the birth of an illegitimate child, regarded in the *Carris* decision as the matter of utmost importance, may be produced by other means and with just as total and complete effect. It is not going beyond the plain purport of these initial expressions to grant a decree of nullity for any cause which is calculated to produce an irreparable disruption of the matrimonial entity. This does not mean that the caprice or fancy of the individual litigant before the court is to enter into the determination of the issue. In addition to causes which touch the matter of propagation, there are forces inherently charged with energies to produce an insuperable alienation of the parties. Each, *ex proprie vigore,* renders marriage a nullity in fact.

A number of New Jersey decisions which have resulted in the granting of decrees for fraud, are rested upon considerations which relate to matters other than the ability of the parties to produce issue. In *Crane* v. *Crane,*[11] Chancellor Magie in the course of an opinion in which he decided that a decree should be granted for fraudulent misrepresentations respecting freedom from syphilis, said:

> "When a wife has discovered that her husband is infected with that disease, this court has held, in

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[11] 62 N.J.Eq. 21, 49 Atl. 734 (1901). A similar result was reached in Svenson v. Svenson, 178 N.Y. 54, 70 N.E. 120 (1904); Meyer v. Meyer, 49 How. Pr. 311 (N.Y. 1875); Ryder v. Ryder, 66 Vt. 158, 28 Atl. 1029 (1892); C— v. C— 158 Wis. 301, 148 N.W. 865 (1914); Smith v. Smith, 171 Mass. 404, 50 N.E. 933 (1898). *Cf.* Vondal v. Vondal, 175 Mass. 383, 56 N.E. 586 (1900).

> accord with decisions elsewhere, that she is justified in refusing to permit marital intercourse, and when he knowing, or having reason to believe, he is infected, persists in maintaining marital intercourse with her, he is guilty of extreme cruelty, for which a divorce will be decreed."

The basis of this decision was stated by Vice Chancellor Leaming in *Allen* v. *Allen,*[12] to be that the disease necessarily or appropriately terminates the marriage relation because it could not be continued except at the risk of infection.

In *Davis* v. *Davis,*[13] a decree was granted for the fraudulent concealment of chronic tuberculosis. Vice Chancellor Lane said:

> "It is well known, aside now from the medical testimony in this case, that close contact with one suffering from tuberculosis involves great danger of transmission, both through infection and contagion. It is almost impossible to conceive the ordinary relationship of husband and wife existing without that danger ever present."

The potential danger to the other party constituted an independently sufficient reason for these decisions. To avoid the danger of infection the only course open to the wife would have resulted in an alienation possessing all of the attributes of that which was impending in the *Carris* case. In the *Davis* opinion it was said that petitioner would be deprived of the "close intimacy to which she was entitled."

These decisions in effect hold that the opportunity for normal and constant association is an essential of marriage. This conclusion finds additional support in several opinions which discuss frauds relating to insanity or diseased mental condition.[14] In *Allen* v. *Allen,* a decree was denied to a wife

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[12] 85 N.J.Eq. 55, 95 Atl. 363 (1915).

[13] 90 N.J.Eq. 158, 106 Atl. 644 (1919). See also Sobol v. Sobol, 88 Misc. 277, 150 N.Y.S. 248 (1914), and *cf.* Goldstein v. Greifinger, 107 N.J.Eq. 52, 151 Atl. 734 (1930).

[14] The authorities are in disagreement on this question but it is submitted that the better view and the one consistent with the trend of modern decisions, is that a decree should be granted. Some of the cases which take this position are Keyes v. Keyes, 22 N.H. 553 (1851); Gross v. Gross, 96 Mo. App. 486, 77 S.W. 393

from whom her husband concealed the fact that he was afflicted with heriditary insanity. The learned Vice Chancellor before whom the case was tried found that the proof of the allegation that the defendant was afflicted with a taint of insanity was inadequate, but he observed:

> "I think it will be found that in the absence of statutes specifically authorizing a decree of annulment, or declaring the marriage unlawful at the time it was contracted, no satisfactory authority exists to support the view that a marriage contract voidable only, can be annulled by a court of equity for fraudulent concealment by a party touching his or her physical condition except in the extreme instances already referred to of disease of either party of a nature to render contact seriously dangerous to the other or pregnancy of the wife."

The Court of Errors and Appeals affirmed the decree upon the ground that there was no adequate proof that the defendant was afflicted with a taint of insanity, and said:[15]

> "Reaching this conclusion, for the reasons stated, we find it unnecessary to consider the interesting question discussed by the learned Vice-Chancellor in his opinion, viz., whether the fact that one of the parties to a marriage is insane at the time when the marriage takes place, and intentionally conceals that fact from the other party to the marriage, affords just ground for its annulment."

In *Davis* v. *Davis,* Vice Chancellor Lane expressed his disagreement with the dictum of Vice Chancellor Leaming in the *Allen* case in this language:

> "If the Vice Chancellor meant to express an opinion that the existence of the condition indicated by the Court of Errors and Appeals would not be sufficient ground for relief, I think he is opposed by the weight

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(1902); Smith v. Smith, 112 Misc. 371, 184 N.Y.S. 134 (1920). *Contra,* Hamaker v. Hamaker, 18 Ill. 138 (1856); Cummington v. Belchertown, 149 Mass. 223, 21 N.E. 435 (1889); Lewis v. Lewis, 44 Minn. 124, 126 N.W. 323 (1890); Robertson v. Roth, 163 Minn. 501, 204 N.W. 329 (1925).

[15] 86 N.J.Eq. 441, 99 Atl. 309 (1916).

of authority."

Chancellor Walker expressed the same view *obiter* in *Daniele* v. *Margulies.*[16]

These decisions indicate with a considerable degree of certainty that a decree will be granted for the fraudulent concealment of insanity, for the same reason which forms one of the

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[16] 95 N.J.Eq. 9, 121 Atl. 772, (1923). In Buechler v. Simon, 104 N.J.Eq. 572, 146 Atl. 420 (1929), it was sought to nullify a marriage for the reason that the defendant, twenty years before her marriage had been confined in an insane asylum for what she believed to be a nervous breakdown, ever since which confinement she had manifested good health. Without deciding that the condition for which she had been confined was in fact insanity, because it clearly appeared that the defendant was not guilty of any fraud whatever, Vice Chancellor Backes said:—

"Concealment of incarceration in a lunatic asylum, standing alone, is not a ground for annulment. It does not touch the marriage essentials and falls within the line of false representation as to family, fortune, or external conditions, and as to these the parties take each other for better or for worse, as declared in the Carris case. * * * * *

"An affliction of the nervous system, of hereditary influence, predisposing to insanity, is not itself a fraud, and ground for annulling a marriage, 'unless,' as observed in one of the cases, 'the law guarantees to every husband a rational mental standard for the mind of a wife." To propound as a doctrine of law that it is a fraud would render vulnerable every marriage to a spouse inheriting a frail nervous system of the manic depressive type, and the number is not inconsiderable, or one of potential paretic inheritance to the fourth generation of syphilitic infection, or one the subject of any other heritable disorder that may eventually lead to insanity. Such departure from accepted principles governing the marriage relation is for legislative, not judicial consideration."

A consideration of this case raises an interesting question with respect to the applicability of Section 105 c. of the Crimes act. That section provides, (Comp. Stat. page 1778):

"It shall be unlawful hereafter for any person who has been confined in any public asylum or institution as an epileptic, or insane or feeble-minded patient, to intermarry in this state, without a certificate from two regularly licensed physicians of this state that such person has been completely cured of such insanity, epilepsy or feeble mind, and that there is no probability that such person will transmit any of said defects or disabilities to the issue of such marriage; any person of sound mind who shall intermarry with any such epileptic, insane or feeble-minded person, with knowledge of his or her disability, or who shall advise, aid, abet, cause or assist in procuring any marriage contrary to the provisions of this act, shall be guilty of a misdemeanor."

A somewhat related provision is contained in the Marriage Act, (Cum.Supp, Comp.Stat. p. 1828), in the following language:—

"No license to marry shall be issued when either of the contracting parties, at the time of the application * * * * is or has been an inmate of any insane asylum or institution for indigent persons, unless it appears that such person has been satisfactorily discharged from such asylum or institution."

It was contended that these statutory requirements put the defendant on notice to inform the petitioner. It appeared that she did not know the law. The court found that these regulations did not by their own potency affect the legality of forbidden marriages and that while the matter of the defendant's ignorance of the law would be of no avail upon a prosecution for a violation thereof, it could be looked to for the purpose of the pending litigation.

bases for the decision in the *Davis* case, viz.: the effect of the condition upon the ordinary association between husband and wife. The danger to be apprehended from tuberculosis so far as the other spouse is concerned, is such that it can only be averted by a separation. The consequences to such other spouse, should a fraudulently concealed condition of insanity awake from its quiescent condition, will likewise render inevitable an exitence in "the shadow of marriage," devoid of the normal cohabitation which is the right of the defrauded party.[17]

The decisions present one additional indication that the courts will look to realities rather than to atrophied precedents. Notwithstanding earlier deliverances to the effect that nullity would not be decreed for causes which tended to prevent the procreation of *sound* and *healthy* issue, and that legislation was necessary to bring about any other result, the court has since announced a contrary doctrine. In *Crane v. Crane*[18] it was said:

> "Misprepresentation as to freedom from disease in general or concealment of the existence of a disease, although one in common apprehension communicable and transmissible to offspring * * * fall within the line

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[17] An additional reason is the predisposition to insanity transmitted to children. See *Heredity in Nervous and Mental Diseases*—Report of the Association for Research in Nervous and Mental Diseases (N.Y. 1925); H. Douglas Singer and William O. Krohn, *Insanity and Law* (1924); Smith E. Jelliffe and William A. White, *Diseases of the Nervous System* (1923).

In those states which apply the doctrine of *essentialia* it is generally held that a consummated marriage cannot be annulled for a misrepresentation of age. Fodor v. Kunie, 92 N.J.Eq. 301, 112 Atl. 598 (1921); Lyannes v. Lyannes, 171 Wis. 381, 177 N.W. 683 (1920); Williams v. Williams, 71 Misc. 190, 130 N.Y.S. 875 (1911). The rule is likewise as to false representations concerning character, fortune, habits, temperament and the like. Carris v. Carris, 24 N.J.Eq. 514 (1873); Boehs v. Hanger, 69 N.J.Eq. 10, 59 Atl. 904 (1905); Trask v. Trask, 114 Me. 60, 95 Atl. 352 (1915); Browning v. Browning, 89 Kan. 98, 108 Pac. 852 (1913); Smith v. Smith, 8 Or. 100 (1897).

Whether a cause of action can be founded upon concealment or misrepresentation as to former marriage or divorce is the subject of a conflict in the decisions. A negative view is stated in Donnelly v. Strong, 175 Mass. 157, 55 N.E. 892 (1900); Wells v. Talham, 180 Wis. 654, 194 N.W. 36 (1923). *Contra*, Wemple v. Wemple, 170 Minn. 305, 212 N.W. 808 (1927); Weill v. Weill, *supra*, note 4; Roth v. Roth, 97 Misc. 136, 161 N.Y.S. 62 (1916).

Relief will be granted for fraud with respect to the requisite intent to live in a matrimonial relationship. Bolmer v. Edsall, 90 N.J.Eq. 299, 106 Atl. 646 (1919); Millar v. Millar, *supra*, note 4; Anders v. Anders, 222 Mass. 478, 113 N.E. 203 (1916).

[18] *Supra*, note 11.

> of false representations as to family, fortune or external condition, declared * * * to be insufficient to justify the annulment of marriage. As to such and like matters the parties take each other for better or for worse."

And in *Allen* v. *Allen*[19] it was stated:

> "The importance of healthful offspring cannot be overestimated, but that consideration appropriately belongs to the legislature."

The later decisions, obviously influenced by a consideration of the unnatural and anti-social results which would flow from this earlier doctrine, have stated as thoroughly independent reasons for the granting of decrees, the disastrous effect upon the health of offspring by the subject of the fraud.

Thus in *Gruber* v. *Gruber*,[20] the fraud related to the disease of epilepsy, a chronic malady of the nervous system attended by brain deterioration, which is progressive, congenital and likely to be transmitted to offspring, and is considered incurable. In granting a decree Chancellor Walker rested his decision upon reported cases in other states which dwell upon the factor of transmittal to offspring and the prepetuation of the disease.[21]

In the *Davis* case the court said of tuberculosis:

> "There is always also great danger of transmittal of the disease to offspring, and as I have stated before, if the disease itself is not transmitted, there are likely to be transmitted characteristics which predispose toward the development of the disease."

While this matter of sound and healthy issue is closely related to propagation, these decisions, by their recognition of the irrepressible appeal of fact, support the view that nullity should be decreed for fraud as to any condition which is impregnated with forces destructive of a matrimonial union.[22]

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[19] *Supra*, note 12.

[20] 98 N.J.Eq. 1, 131 Atl. 101 (1925).

[21] See McGill v. McGill, 163 N.Y.S. 462, 99 Misc. 86 (1917); rev. 179 App. Div. 343, 166 N.Y.S. 397 (1917); Gould v. Gould, 78 Conn. 242, 61 Atl. 604 (1905); *Annulment of Marriage for Epilepsy*, 28 Law Notes 145 (1924).

[22] It is widely maintained that, with respect to a considerable number of forms of insanity, a predisposition to the disease may be transmitted from parent to

It is important to bear in mind that the broad equitable conception of actual fraud has not been applied in this state in actions of this type.[23]

In *Beuchler* v. *Simon*,[24] Vice Chancellor Backes, upon reviewing the numerous decisions, said:

> "The jurisdiction to relieve for fraud and the petitioner's right to relief must be found in deceitful suppression of the truth. The suppression must have been willful with intent to deceive. The equitable acceptation of fraud, that a harmful untruth though innocently uttered is fraudulent, as explained in *Cowley* v. *Smyth*, 45 *N. J. Law* 380, is not pertinent, for the defendant made no representation. Silence, resting in honest belief of things false, is not actionable at law or in equity. All the cited cases of annulment rest on deceit. * * * The cases of annulment in this state are all predicated upon willful misrepresentation or intentional suppression.[25]

The nature of the action and the social importance of the subject matter, adequately warrant this rule.

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child. The Courts receive evidence, where the issue warrants it, that other members of the family of the individual who is afflicted with insanity were likewise tainted. See the cases quoted in Herzog, *Medical Jurisprudence*, Sec. 631, 699 (1931), and the authorities set forth under note 17, *supra*.

[23] In connection with the decisions cited *infra* see Bournonville v. Cain, 104 N.J.Eq. 310, 145 Atl. 482 (1929), where it was contended that the petitioner, seeking an annulment because of a prior and existing marriage of the defendant, was not circumspect, and did not come into court with clean hands. The Court said:—

"An all sufficient answer to this is that it was his privilege to believe the woman he was taking to wife and to confide in her representations as he did in her marriage vow. An ardent and enthralled lover is not beset with doubt and suspicion. When the spell is upon him caution takes wings; and happily so for mankind. Better a supine lover than a disappointed suitor. And he is not to be discouraged in his blind faith nor disciplined for his obsession."

[24] *Supra*, note 16. See also Kaufman v. Kaufman, 86 N.J.Eq. 132, 97 Atl. 490 (1916), and Crane v. Crane, *supra*, note 11.

[25] In Turner v. Avery, 92 N.J.Eq. 473, 113 Atl. 710 (1921), in which a decree was granted for failure of the defendant to disclose her sterility, Chancellor Walker said:—

"False pretences are of two kinds—*suggestio falsi*, or affirmative false representation, and *suppressio veri*, or withholding the truth when it should be uttered. In Nicholson v. Janeway, 16 N.J.Eq. 285, it was held that undue concealment of a fact to the prejudice of another, which one party is bound in conscience and duty to disclose to the other, and in respect to which he cannot innocently be silent, constitutes a fraud against which equity will relieve."

A very different formula is employed where the marriage is unconsummated, and with good reason. The mere speaking of words by the parties, and the functional performance of certain acts by a person authorized to conduct a marriage ceremony, do not have a mystic or catalytic effect of themselves. It is the subsequent *relationship,* which is the result of the *voluntary* act of the parties, which produces a status. If, immediately upon the conclusion of the ceremony of marriage, or shortly thereafter and before cohabitation, the parties should separate, their condition is not so materially altered by the celebration of the marriage rites, as to require the application of the same principles which are dictated in a case where they live together as husband and wife and perhaps establish a home and bring children into the world.

The ablest statement of the rule applied in these cases is contained in *Ysern* v. *Horter*.[26] The petitioner, a young girl of eighteen, shortly after leaving school and following an acquaintance with the defendant for two or three weeks, married him upon representations that he was of good moral character. Immediately after the ceremony he proceeded to tell his wife of seductions he had perpetrated in the past and of other immoralities. She immediately left him. Vice Chancellor Stevenson said:

> "So far as the question has been discussed in reported American cases in other jurisdictions and by the text writers, I find substantial agreement to the effect that an unconsummated marriage is little more than an engagement to marry—that there is no reason

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[26] 91 N. J. Eq. 189, 110 Atl. 31 (1920). See also Cox v. Cox, 110 Atl. 924, (N. J. Ch. 1909); Wier v. Stile, 31 Iowa 107 (1870); Lyndon v. Lydon, 69 Ill. 43, (1873); Robertson v. Cole, 12 Tex. 356 (1854); Corder v. Corder, 117 Atl. 119 (Md. 1922); Brown v. Scott, 117 Atl. 114 (Md. 1922). In the last cited case it was said:

> "* * * where a fraud practised upon a person of immature years or weak mind, of such a character as to necessarily affect the health or well-being of the person injured, and where the true facts are such that no person of ordinary prudence would have made the contract with knowledge of them, induces such person to enter into a marriage contract, that contract may be avoided upon the application of the injured person, provided the application is made promptly upon the discovery of the fraud, where the status of the parties has not been affected by the intervention of the rights of children, born or unborn."

based on public policy why, for instance, a young girl should be tied forever to an escaped criminal simply because of a ceremony of marriage to which she was induced by a fraudulent representation by her spouse that he was a person of good character, respectable standing in society and of large fortune . . .

"My conclusion on the whole case, is, that it is unnecessary to determine whether the defendant's fraud related to a 'common law essential' of the marriage. I know of no authority for the proposition that such an inquiry must be made except in cases where the marriage has been consummated and in the leading case (*Carris* v. *Carris*) in which such inquiry was adjudged necessary, not only had the marriage been consummated, but a child had been born whom a decree of nullity would bastardize. It would be rash for me to undertake—unnecessarily, I think, for the purpose of this case—to define a term of somewhat vague import which so far has been left undefined. If the common law 'essentials' of a marriage consist exclusively of marital intercourse, and the incidents which usually follow, such as the establishment of a home and the birth of children, it certainly may be argued with force that the fraud proved in the present case did not relate to an 'essential' element of the petitioner's marriage. Possibly, if the phrase under consideration is retained, the 'common law essentials' of a consummated marriage may be defined within narrower limits than the 'common law essentials' of an unconsummated marriage.

"For all present purpose I think it is enough to find as I do, that the evidence in this case exhibits (1) a 'sufficient fraud' to warrant the annulment of (2) an unconsummated marriage, and that (3) such annulment, under the circumstances, will not be 'against sound considerations of public policy.' "

A similar result was reached in *Dooley* v. *Dooley*,[27] but in *Wood-*

[27] 93 N. J. Eq. 22, 115 Atl. 268 (1921).

ward v. *Heichelbech*,[28] a decree was denied a mature business woman for representations relating to the financial worth of the defendant.

In *Caruso* v. *Caruso*[29] an important qualification of the doctrine is stated. The defendant (husband) married the petitioner because she became pregnant, for which he was responsible. The fraud relied upon was that the defendant secretly resolved before the marriage not to live with the petitioner as husband and wife. Chancellor Walker said:

> "While this, it seems, would be good ground for nullity under the general jurisdiction of the court if the marriage were unconsummated, it seems to me this marriage was consummated in theory and contemplation of law, that is, in the sense that consummation (sexual intercourse) preceded solemnization.* * * Now if the law, as it does, legitimates issue begotten, but not born until after the parents marry, then, in the very nature of things, it would seem that by relation back it would, in effect, legitimate the sexual intercourse which was responsible for the pregnancy, which resulted in issue born, which it certainly legitimates."

It is the basic idea of Equity, due regard being given to all other considerations, which supports the nullity of unconsummated marriage for fraud involving matters substantially important to a union of mutual productiveness.

II

Duress is frequently referred to as a distinct ground for nullity. In its essence however, it is simply the absence of real and genuine consent produced in a particular manner. A marriage produced by duress is nothing more than a yielding of the lips, not of the mind.[30] In *Avakian* v. *Avakian*,[31] it is pointed

[28] 97 N. J. Eq. 253, 128 Atl. 169 (1925).

[29] 104 N. J. Eq. 588, 146 Atl. 649 (1929).

[30] Bishop, *Marriage, Divorce* and *Separation* (1891) Sec. 539. See also Collins v. Ryan, 49 La. Ann. 1710, 22 S. 920 (1897); Kelley v. Kelley, 206 Ala. 334, 89 S. 508 (1921); Thorne v. Farrer, 57 Wash. 441, 107 Pac. 135 (1910).

A marriage induced by the threat of a lawful prosecution for seduction or bastardy, will not be annuled. Frost v. Frost, 42 N. J. Eq. 55, 6 Atl. 282 (1886); Seyer v. Seyer, 37 N. J. Eq. 210 (1863); Sickles v. Carson, 26 N. J. Eq. 440 (1875); Griffin v. Griffin, 130 Ga. 527, 61 S. E. 16 (1908); Thorne v. Farrer, *supra*.

[31] 69 N. J. Eq. 89, 60 Atl. 521 (1905), aff. 69 N. J. Eq. 834, 66 Atl. 1133 (1906).

out that since marriage is a civil contract it may be avoided for duress which prevents consent.

Difficulties encountered in cases of this kind do not consist of any uncertainty in the law on the subject, but in its application. The *Avakian* decision is founded upon a number of English authorities which point out that while public policy requires that marriages should not be lightly set aside, this means only that great care and circumspection should be exercised by the court, but otherwise does not alter the principle that marriage can only be produced by real consent and will be annulled for effective duress.

The *Avakian* decision may be considered as disagreeing with a definition of duress for these cases, which would limit it to mean the creation of such fear as would impel a person of *ordinary* courage and resolution to yield to it. On the contrary, it stands for the proposition, stated in cases cited with approval, that whenever from natural weakness of intellect or from fear, whether reasonably entertained or not, either party is *actually* in a state of mental incompetence to resist pressure inproperly brought to bear, there may be a want of genuine consent. Vice Chancellor Pitney stated that it is important in all cases to consider any ascendancy which the defendant may have over the petitioner arising from a confidential or similar relationship. In reaching the conclusion that the marriage was produced by duress and that the subsequent cohabitation was likewise the result of duress, he referred to the tender age of the petitioner (a little more than fourteen years), her immature judgment, and her helpless condition. She was abandoned by a man in whose custody she had been placed by her father in Armenia for the purpose of bringing her to this State. She was placed in the hands of the defendant, who threatened her with violence and kept her in a state of almost complete seclusion in order to induce her to marry him. The Court found that she submitted to his dominion because she thought it was unavoidable and her fate. It is obvious from these various conclusions that the decision is based upon undue pressure applied to a person of less than normal adult judgment and resistance.

No departure from this view is indicated by the decision of

Chancellor Walker in *Capossa* v. *Colonna*,[32] where it was said:

> "Duress is defined to be that degree of constraint or danger either actually inflicted or threatened and impending, which is sufficient in severity or in apprehension to overcome the mind of a person of ordinary firmness."

The petitioner in this case was in no sense under the dominion of the defendant and it is not intimated in the opinion that she was incompetent in any respect. Relief was denied because she was thoroughly free to act, there being no effective constraint.

The same can be said of the petitioner in *Doscher* v. *Schroeder*[33] where a decree was denied. She unwittingly confessed to the defendant a youthful indiscretion, and in order to induce her to marry him, the defendant threatened to tell her parents what she had admitted to him. She accordingly married him but lived with her parents, and for more than two months she failed to tell them about the marriage. Then, induced by the continued threats of the defendant, she informed them of her marriage and went to live with her husband, but separated from him within a few weeks. The definition applied in the *Capossa*

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[32] 95 N. J. Eq. 35, 122 Atl. 378 (1923). The Court said:

"Now, as to the charge of duress: The petitioner's uncorroborated testimony on this subject is as follows: 'Q. How did you happen to marry Nicola Colonna? A. He threatened me at the factory one day, he said if I did not go to New York and marry him he would kill my brother. I was scared and went in the morning to New York; was married in the morning. * * *'

"Surely, this young woman had time for reflection. She had time over night, and instead of going to New York in the morning to marry the defendant she should have informed her brother so that he might have had the defendant arrested and bound over to keep the peace. Besides, duress is a question of fact; and I find as a fact that there was no duress."

[33] 105 N. J. Eq. 315, 147 Atl. 781 (1929). Compare Qualey v. Waldron, 126 La. 258, 52 S. 479 (1910), where a decree was granted for duress. The facts are set forth in the following language in the opinion of the court:

"Early in the morning of February 24, 1908, the plaintiff was assaulted in his office by two armed relatives of the defendant, and was induced by violence and threats to consent to the celebration of a hasty marriage between himself and the defendant. Plaintiff, a young man twenty-four years old, was escorted by the two armed men to the house of the priests, thence to procure a marriage license and a wedding ring, thence to the church; and the escorts were present during the performance of the marriage ceremony. Then the parties separated, the plaintiff going to the house of his father. A month later the present suit was instituted." A factor of the utmost importance in these cases is the effective continuation of the duress.

case was again adopted by the Chancellor, but he distinguished the *Avakian* case because it involved a petitioner 14 years of age, without friends or money, immature, and entirely within the control of the defendant. This is certainly a recognition of the soundness of the general rule stated by Vice Chancellor Pitney, and it must be taken that each of these opinions was intended to dispose of nothing more than the particular suit of the competent party who brought it.

A definition of duress for cases of this type, which would preclude the court from granting relief to one of weak intellect or immature years and judgment for pressure which might not have the same effect upon one of sounder intellect and greater fortitude, would be an anomaly.[34] The Court of Chancery has been at all times particularly solicitous of the rights and welfare of the aged, the immature, and the mentally weak. It is the guardian of infancy. It is not to be supposed that it would relax its vigilance, no matter how difficult it might be to arrive at the truth, in cases where the duress is not extremely intense, but is exercised upon one of less than normal capacity. It acts upon the principle that courts exist to deal with actual conditions as they are found and to render the best judgment which man can devise.

III

There is a type of case commonly described as presenting an absence of real or mutual consent. This description is inapt, for in all of the cases under the general equity jurisdiction there is a want of genuine consent. It might be better to refer to these decisions as indicating a want of matrimonial purpose or capacity. In *McClurg* v. *Terry*,[35] the parties were married upon their return with a group of friends from an excursion, as a

[34] Compare Salzberg v. Salzberg, 107 N.J.Eq. 524, 153 Atl. 605 (1931) where the Court of Errors and Appeals held:—

"In order to determine what will constitute sufficient fraud to annul a marriage, regard must be had for the whole status of both parties and the circumstances which induced the contract."

Although the court was dealing with fraud, it indicated that its disposition to look to the whole status of both parties is referable to the nature of the proceeding and its subject matter.

jest, mutually carried out as such in the exuberance of good spirits which attended the gathering. They did not afterwards treat the ceremony as having made them man and wife. The Court said:

> "Mere words without any intention corresponding to them, will not make a marriage or any other civil contract. But the words are the evidence of such intention, and if once exchanged, it must be clearly shown that both parties intended and understood that they were not to have effect. In this case the evidence is clear that no marriage was intended by either party; that it was a mere jest got up in the exuberance of spirits to amuse the company and themselves. If this is so, there was no marriage."

In *Selah* v. *Selah*,[36] the petitioner was so intoxicated at the time the ceremony was performed that he did not comprehend what was taking place. A decree was granted upon the authority of the *McClurg* case.

While each of these cases presented a ceremony without subsequent consummation, a like result was reached in *Daniel* v. *Margulies*[37] where the marriage was consummated. The defendant was actually insane at the time the ceremony was performed. In concluding a consideration of some of the decisions relating to fraud, Chancellor Walker said:

> "Besides, insanity cannot be said to be fraud. It is want of capacity—capacity to consent, in the absence of which the law declares the marriage to be invalid."

The consummation preceded discovery of the insanity, and after a separation a child was born. The decision was put squarely on the general jurisdiction of the court and not upon the statute.

A mistake as to the legal effect of the ceremony performed, by either one or both of the parties, may furnish a ground for

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[35] 21 N.J.Eq. 225 (1870). A few States maintain a contrary doctrine. See for example Hand v. Berry, 154 S.E. 299 (Ga. 1930).

[36] 23 N.J.Eq. 185 (1872).

[37] *Supra*, note 16.

nullity.[38] Relief may also be obtained where the mistake relates to the identity of the person.[39]

Some courts declare in general terms that where there is a manifest consent to matrimony, the law will not look behind it or inquire into alleged secret mental reservations.[40] In New Jersey this doctrine is not entertained to the extent to which other states have carried it. In *Bolmer* v. *Edsall*[41] Chancellor Walker held that where one of the parties to a marriage ceremony determines in advance that he or she will not engage in sexual intercourse with the other after marriage, and does not disclose it to the other, and carries out such determination, the offending spouse commits a fraud in the contract of marriage affecting an essential of the marital relation, against which the injured party may be relieved by annulment.

IV

Statutory provisions relating to jurisdiction for the purpose of nullity upon statutory grounds, do not apply where that relief is sought from the general equity power of the court.[42] Jurisdiction in such cases depends upon domicile in fact. When the petitioner is domiciled in this State the Court of Chancery has power to annul a foreign marriage.[43] Not being derived from the statute, this inherent jurisdiction over questions aris-

[38] Barnes v. Wyethe, 28 Vt. 41 (1855); Clark v. Field, 13 Vt. 460 (1841). Compare McClurg v. Terry, *supra*, and Blumenthal v. Tannenholz, 31 N.J.Eq. 194 (1879).

[39] Delpit v. Young, 51 La. 923, 25 S. 547 (1899); Rex v. Burton-Upon-Trent, 3 M.&S. 537, 105 Eng. Rep. 772 (1815).

[40] Wimbrough v. Wimbrough, 125 Md. 619, 94 Atl. 168 (1915); Hilton v. Roylance, 24 Utah 129, 69 P. 660 (1902); Moore v. Moore, 94 Misc. 370, 157 N.Y.S. 819 (1916). Compare Jackson v. Jackson, 113 Atl. 495 (N.J.Ch. 1921).

[41] 90 N.J.Eq. 299, 106 Atl. 646 (1919).

[42] Avakian v. Avakian, 69 N.J.Eq. 89, 60 Atl. 521 (1905); Sculareks v. Gullett, 106 N.J.Eq. 369, 150 Atl. 826 (1930); Antione v. Antione, 132 Miss. 442, 96 S. 305 (1923); Schneider v. Rabb, 100 Tex. 211; 97 S.W. 463 (1906). In Harral v. Harral, 39 N.J.Eq. 279 (1884), Justice Depue, speaking for the Court of Errors and Appeals, pointed out the principal factors which determine domicile in the following language: "* * * that place is the domicile of a person in which he has voluntarily fixed his habitation, not for a mere temporary or special purpose, but with a present intention of making it his home, unless or until something which is uncertain or unexpected shall happen to induce him to adopt some other permanent home."

[43] See cases *supra*, note 42. For an incisive discussion of this subject see Goodrich, *Jurisdiction to Annul a Marriage*, 32 HARV. L. Rev. 806 (1919).

ing out of contracts *inter partes* is not limited by the provisions of our statute.

In *Avakian* v. *Avakian,* it was suggested that under these circumstances it might be sufficient, in order to confer jurisdiction on the court, to effect personal service upon the defendant in this State, without any residence of the petitioner herein, in a case where the marriage has been celebrated in some other jurisdiction. This proposition, while logically consistent, does not seem to be warranted by the nature of the subject matter and the general policy of the court with respect to litigation between non-residents of this State.[44]

V

The inherent soundness of the doctrine of *essentialia* and its flexibility to permit an advance *pari passu* with changed social conditions are the highest recommendations which could be given to it. It is particularly adapted to preserve the developing considerations of policy and morality. A rapidly advancing civilization has placed upon the home a greater obligation than it ever had. The family as a unit is suffering from the pull of outside forces which tend to weaken the cords holding it together. The law governing nullity of marriage, as it emanates from the exercise of the inherent jurisdiction, is cautiously but with progressive purpose, shaping to meet the new problems arising from the social and economic trends.

LEONARD J. EMMERGLICK.

Newark, N. J.

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[44] In Sielcken v. Sorenson, 111 N.J.Eq. 44, 161 Atl. 47 (1932) the court refused to entertain jurisdiction of actions between citizens of another State, for causes of action which arose in their State, when it appeared that the courts of that State afforded adequate relief and that there was no especial reason for intrusion by the Court of Chancery. The bill was for a partnership accounting and obviously did not present a subject matter of the unique nature of an action to nullify marriage. The reasoning from the decision of the court, to a suit for nullity, would seem to be *a fortiori.*