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Article 8

Domestic Relations - Marriage - Annulment for Fraud

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Wisconsin courts admit evidence of acquiescence in the truth of direct accusations by silence, and follow the majority rule in permitting this evidence even though the accused was under arrest when the inculpatory statement was made. *Hardy* v. *State,* 150 Wis. 176 136 N.W. 638 (1912); *Manna* v. *State,* 179 Wis. 384, 192 N.W. 160 (1922); *McCormick* v. *State, supra.*

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Domestic Relations—Marriage—Annulment for Fraud.—Plaintiff sought an annulment of her marriage on the ground of fraud alleging that the defendant obtained her consent by falsely representing that he was a naturalized American citizen when in fact he was a citizen of Germany. The court granted the annulment under the New York doctrine which holds that any misrepresentation is sufficient to justify an annulment if it is so material that the deceived party would not have consented to the marriage except for such misrepresentation. It was stated that the plaintiff's insistence that her spouse be an American citizen could not be regarded as the expression of a frivolous desire in view of the present-day emphasis on the privilege of American citizenship and the plaintiff's pride in the fact that her family was of American origin. *Laage* v. *Laage,* 9 U.S. L. WEEK 2642 (N.Y. 1941).

This problem was discussed, but not decided in *Kawbata* v. *Kawabata,* 48 N.D. 1160, 189 N.W. 237 (1922), (1923) 2 WIS. L. REV. 117. A minority of the court stated that a man's misrepresentation that he is a citizen of the United States would seem to justify an annulment of his marriage to a United States citizen whose citizenship in America is affected by marriage to a foreigner.

The extent to which some courts, led by New York in *Di Lorenzo* v. *Di Lorenzo,* 174 N.Y. 467, 67 N.E. 63 (1903), had relaxed the older and more strict views as to the degree or kind of fraud which would be sufficient to annul the marriage contract was indicated in 23 MARQ. L. REV. 147, noting *Nocenti* v. *Ruberti,* 3 Atl. (2d) 128 (N.J. 1939), where an annulment was granted because the man misrepresented that he would marry the plaintiff according to the rites of the Roman Catholic Church within a year after their marriage by a civil ceremony.

More recently the broad New York rule has been applied to annul a marriage where the bridegroom stated immediately following the ceremony that he believed the marriage to have been mistakenly performed and then, within fifteen minutes after leaving the justice of the peace, departed from his bride and was not heard from again. The court said that fraud sufficient to annul any civil contract will justify the annulment of a marriage, especially where the marriage has not been consummated "and has not ripened fully into the complications of a public status involving considerations of questions of public policy." *Lewine* v. *Lewine,* 170 Misc. 120, 9 N.Y. S. (2d) 869 (1938).

Although mere sterility is not sufficient to justify an annulment, a New York court has annulled for fraud a marriage where the husband had failed to disclose a physical infirmity which made him sterile even though he had not known of his sterility at the time of the marriage. Because of the known infirmity he was held to have been put on inquiry which, if pursued by a physical examination, would have disclosed the sterility. Since he knew his prospective wife wanted a family, his concealment of the known infirmity was held to be a fraud sufficient to annul the marriage which but for the concealment would not have been contracted. *Williams* v. *Williams,* 11 N.Y. S. (2d) 611 (1939).

But New York recently refused an annulment to a petitioner who alleged that the defendant had fraudulently promised to love and cherish him, but after the marriage had failed to do so, holding that a mere change of mind is not sufficient to justify an annulment. The petition also had alleged a fraudulent representation by the defendant that she desired a family, but that after the marriage she had taken measures to prevent the conception of more than two children. This was not a sufficient allegation of fraud, the court held, in the absence of a further allegation that the defendant had misrepresented her intent at the time of expressing her wish. *Longtin* v. *Longtin,* 22 N.Y.S. (2d) 827 (1940).

Annulments have been granted for fraud where a citizen of a foreign country married a citizen of the United States only for the purpose of gaining preferential entry into America under the immigration laws. *Bracksmayer* v. *Bracksmayer,* 22 N.Y.S. (2d) 110 (1940); *Miodownik* v. *Miodownik,* 259 App. Div. 851, 19 N.Y.S. (2d) 175 (1940); reargument denied, 20 N.Y.S. (2d) 670 (1940); *Lederkremer* v. *Lederkremer,* 173 Misc. 587, 18 N.Y.S. (2d) 725 (1940).

But an annulment will be denied where the fraud has been condoned by the plaintiff's acts of continuing the marital relationship after he has discovered the defendant's fraud. *Morris* v. *Morris,* 13 Atl. (2d) 603 (Del. 1940); *Wirth* v. *Wirth,* 23 N.Y.S. (2d) 289 (1941).

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Torts—Bailments—Presumption and Burden of Proof as to Negligence of Bailee.—Plaintiff stored certain automobiles in the garage owned by defendants. While so stored and while the defendants' employees were on duty, the automobiles were stolen. In an action to recover damages for the loss, based on negligence, it was held, that when the bailor has proved the bailment and the damage or loss, the bailee then has the burden of showing that the damage or loss was not due to his negligence, and that he stands the risk of non-persuasion on the point. *Romey* v. *Covey Garage,* 9 U. S. L. Week 2626, 111 P. (2d) 545 (Utah 1941).

Most jurisdictions apply the doctrine of res ipsa loquitur in situations like that of the principal case. These courts hold that when the bailor shows the fact of the bailment, and that the goods were not returned or were returned in a damaged condition, he has made out a prima facie case, and the bailee must come forward and rebut the presumption of negligence that arises. However, there is a marked difference of opinion as to how much proof is necessary to rebut this presumption.

In some jurisdictions a small amount of proof is held sufficient. Thus where the plaintiff showed that his automobile had been stolen while in the parking lot of the defendant, it was held that although a prima facie case in favor of the plaintiff arises upon proof of delivery of and failure to return the bailed property, it disappears on a showing by either the bailor or bailee that the loss was caused by fire or theft, and the plaintiff must then prove that the theft was due to the defendant's negligence. *Edwards Hotel Co.* v. *Terry,* 185 Miss. 824, 187 So. 518 (1939). In a similar case, where the plaintiff's horses were burned to death while in the exclusive possession of the defendants under a bailment contract, the court said that a presumption of negligence arises when the bailed property is destroyed while in the defendant's exclusive possession, but that this presumption is overcome by a showing that the loss occurred through the operation of forces not within the bailee's control, and that the plaintiff then has the