1-1-1963

Domestic Relations

Maynard Jackson

80 SHEETS

MADE IN U. S. A.

31-487 White
31-587 Red
31-687 Yellow
31-787 Blue
31-887 Green

Maynard Holbrook Jackson, Jr.
NAME

1927 Cecil Street - Durham, N.C.
ADDRESS

Domestic Relations
SUBJECT

Mr. Sampson

(4th Ed.) Goodell & Jacobs, Dom. Rels. (+ Supplement)

ASSIGNMENT: GS. 49, GS. 50, GS. 51 and GS. 52 and GS. 52 (A) in supplement.

References:
McGuinty (Casebook)
Compton (cases)
Nelson - Divorce + Annulment
Vernier - Amer. Family Laws
Keezer - Marriage + Divorce
Rbt. E. Lee - Family Laws (N.C.) (pamphlet form).
Madden - Persons + Dom. Rels. (a little old - 1931).
Harper, Family Law

Policy Considerations

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Emphasis will be placed on part II of the casebook. Chaps. I and II of Part II will be covered carefully.

Part IV (Parent + Child) will be loosely covered. Chaps. I and II of Part III will be covered casually, if at all.

PART I. FAMILY ORGANIZATION

(CHAP. I) The Contract to Marry

Marriage — has two meanings:

(1.) The relation of a man + woman legally designated as H + W. Sometimes called a status or institution.

(2) The act ~~or to~~ by wh the parties ~~enter~~ into the relation of marriage.

This course is very greatly influenced by religious and sociological considerations. NOTE THIS CAREFULLY.

Marriage is said to be a civil K. But, it is not a K as we know it, but it's called a K often to distinguish it from a religious institution. 50 States agree that marriage is a civil K.

"Civil K" really means that mutual consent is necessary to a valid marriage.

N.C. does not recog. a C.L. marriage unless non-citizens (and

perfected in another State and then brought into N.C. The difficulty is one of proof.

CONSENT —

All States require mutual consent. There must be freedom of choice. In this sense it is called a civil K.

Marriage v. Civil K —

(1.) U.S. Const. does not apply to "marriage K." Maynard v. Hill.

(2.) Marriage cannot be avoided by an infant if he is of marriageable age. In N.C. you may marry at 18 w/o consent of parents; between 16 and 18 w/ consent of parents; between 14 and 16 w/ consent of parents or Director of Welfare if the girl is pregnant by the boy or has had his child.

MARRIAGEABLE AGE IN N.C.

At C.L., 14 (boys) and 12 (girls) were marriageable ages; inchoate marriage at 7.

(3.) Cannot rescind marriage K w/o decree of court.

(4.) The terms of the marriage K are fixed by LAW, not the parties. Some incidents of marriage are:

(a.) Wife owes H duty of service

(b.) H owes W duty of support.

(c.) Duty to support children born of the marriage.

* K TO MARRY — * (i.e., Engagements)

This is different from marriage as a K. The K to marry is called an engagement or betrothal. What are the legal consequences of it?

Wightman v. Coates Case (ch.K.) — says that a betrothal ~~is~~ can be valid as a legally binding K. The use of the words "marry me" and "yes, I'll marry you" are not necessary, but are helpful as proof of a K to marry. So, whether ~~y~~ was a K to marry is a question of fact for the jury, and is seldom overruled on appeal.

K Objective Test — we look at the manifestations of the parties regardless of subjective intentions.

Other factors as proof:

(1.) Closeness of association — "perhaps the majority of cts." say that proof of sexual intercourse is admissible as evid. of the K to marry. Other cts. say that it is inadmissible because it would seem to sanction ~~not~~ meretricious relations of sexual nature.

(p.2) Action for br/promise to marry must be supported by proof of a mutual engagement. A promise may be inferred, and direct proof is unnecessary. If the verdict of the jury will be affirmed unless "ridiculous in the face of inconsistent and unbelievable testimony."

Test of K to Marry

Proof of Sexual Intercourse

(p.4)

When the facts are the same upon wh recovery for seduction and recovery for br/prom. of marriage are sought, it is compulsory that such recovery for br/prom of marr. be sought in one action, in the sense that a judgment awarding dams. in an action upon such a state of facts becomes a final adjudication of the P's entire right of recovery thereon, regardless of how P may be pleased to characterize her cause of action or pray for relief therein.

The action for br/prom is peculiar. While it is in form upon K, and in truth based upon it and its breach, the dams. are governed by principles wh apply to actions for personal torts.

The right of action is so personal in its nature that it will NOT survive to or against personal reps.

Seduction may be proved in aggravation of dams.

Rieger v. Abrams (1917) (cl.K.)

167 P. 76 (ACTION FOR BR/PROMISE)

Held, D-boy should prevail w/ respect to his affirmative defense based on res judicata. The previous recovery for seduction was a bar to the action for br/promise.

Assign. - read thru p. 38.

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At C.L., the K to marry was recognized as an enforceable K in the sense that you would be an action for br/promise to marry. Recognized in N.C. 71 N.C. 297 - said action for br/K to marry would not abate upon death. (?) See also 3 N.C. 350.

Defenses to actions for br/K to marry:

(1.) Res judicata

(2.) Fatal malady or communicable disease. See Shepler v. Chamberlain, (p. 11)

(3.) Made to wait an unreas. time for marriage. 68 Wash. 1, 122 P. 316.

(4.) Lack of affection. Split here. Some say it should only mitigate dams. and not be a complete defense. (See note (2) page 12: ie #3.)

Gen. Rules of Public Policy

(5) Statutory prohibitions. In Nicholas v. Holder, (p. 14), the court said that although the statute spoke of "marry", it includes agreements to marry. * Public Policy is against anything that contemplates or perpetrates the dissolution of marriage. * Thus, any K to marry made during marriage to another will be void. Thus, under this statute (divorce for mental cruelty) a K to marry or a marriage w/in one year next after divorce will be unenforceable.

(6.) Bad moral character — jail record, Communist, sexually immoral. But pre-marital sexual intercourse w/a third party would not be a ground for dissolution of a marriage. Only a defense to br/promise.

(7.) Statutory abolition of causes of action like br/promise, alienation of affections, criminal conversation and seduction. "Heart Balm" Statutes.

* SEDUCTION *

No seduction at C.L. as a crime.

DEFINITION

Means intercourse between man and woman secured under a promise ~~of~~ to marry.

In N.C., no promise to marry needed; may be under any fraud, artifice or other fraudulent inducement. In N.C. (GS. 14-180) it is a

crime and a tort. It is a felony. 171/837 - male of 18 may be indicted for seduction.

Subsequent marriage will = bar to prosecution (N.C.).

Tort criminal action requires the woman to be "innocent" and virtuous. Not so for the tort action.

183/46
86/91

Majority of states require promise to marry.

But, Criminal seduction requires an uncond. promise to marry.

⊛ Elements of crim:

(1.) Innocence + virtue of woman. (not required in tort of seduction.)
(2.) Promise to marry.
(3.) Carnal intercourse induced by such promise.

PROPER PARTY P

At C.L., the action could not be brought by the woman seduced; must be by the father for loss of services. By statute in N.C., the woman seduced must bring the action herself unless she is a minor, or is a major and lives w/ her father and renders at least some minimal services.

86 N.C. 91 - financial cond. of D - man is competent assvid. in deter. question of damages.

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11 Feb 63 - missed class.

Sec. 2 Statutory Abolition of "Heart Balm"

Some stats abolished only br/prom. suits; some abolished that plus alien. of affec. and crim. conver.; and some (N.Y.) had omnibus statute wh abolished ANY right of action, whatever its form, that was based upon such a breach; thus, the breach is no longer a legal wrong. See Thibault v. Lalumiere (p. 23.)

Sec. 3. Interference w/ the K To Marry

Brown v. Pickstein (p. 27) — The prevention of a marriage by the interference of a third person cannot, in gen., in itself, be a legal wrong. Thus if one, by solicitations, or by the arts of ridicule or otherwise, shall induce one to break off an existing K of Marriage, no action will lie for it, however malicious and contemptible and blamable may be the conduct. But a loss of marriage may be such a special injury as will support an action of slander or libel, where the party was induced to break off the engagement by false and damaging charges not actionable per se. REASON FOR RULE: interested third parties' advice and comments may better ensure the permanency of the subsequent marital relationship.

Sec. 4. Effect of the Termination of the K To Marry

The weight of authority holds that any gift to a person to whom the donor is engaged to be married, made in contemplation of marriage, is conditional and upon breach of the marr. engagement by the RECEIPIENT, the donor may recover

the prop. Per Restat., Restitution, the basis for recovery is quasi K[ind], as it is considered that it is unjust for a donee to retain the fruit of a broken promise. - The conditional nature of the gift may be implied in fact or imposed by law in order to prevent unjust enrichment.

Under the N.Y. view of "heart-balm" stats. it is the theory of those cases (Thibaudt v. Lalumiere, e.g.) that the so-called heart-balm stats. not only bar breach of marr. Ks but any other proceeding wh directly or indirectly arises out of the breach. Under that view gifts in contemplation of marriage may not be recovered even tho' unjust enrichment may result to the donee. Minority View.

The miscellaneous gifts of personal prop. other than the engagement ring are mere personal gratuities, incidental to the marital quest, upon wh the law imposes no cond. of return and are more nearly akin to a Xmas present.

(Chap. 2) Marriage.
(Sec. 1) Nature of Marriage 13 Feb. 63

(p. 50) Popham v. Duncan

There can be no ante-nuptial or post-nuptial agreements that will vary the incidents of the marriage, and they are gen. deemed void.

7 A.L.R. 826

G can be such agreements that don't vary the incidents of marriage, and they are usually ltd. to settlement of prop. These settlements are valid ordinarily and in N.C., but G.S. 47-25 requires they be registered to be valid as against 3rd parties. And see 71/539; 59/120; G.S. 52-13; 34 N.C. L.R. 571; 244/489; 246/694; G.S. 39-13.1, .2 - .3; 44 A.L.R.2d 1587. Re guaranty Ks: 242/686.

G.S. 47-25
71/539
59/120
52-13
246/694

Conds. precedent to divorce (to be pleaded):
(1.) Juris. of the court
  (a.) Domicile
  (b.) Actual residence
(2.) Valid marriage.

Machimson v. Id (p. 52)

Gen. Rule: A valid marriage at the place of celebration is valid everywhere. Gen. Rule.

DEFINITION: Marriage is the voluntary union of one man and one woman to the exclusion of all others.

Also, miscegenous marriages would often fall w/in #2. →

Exceptions to gen. rule:
(1.) Incestuous
(2.) Against strong public policy of the forum.
(3.) Polygamous

(Sec. 2) * THE LAW GOVERNING MARRIAGE *

Brook v. Brook (p. 60)

The mode of the marriage depends upon the law of the place of the marriage; but the essentials of the marriage are governed by the law of the domicile.

N.C. will not recog. a marriage in another state of domicilliaries on they left N.C. for the purpose of evading N.C. law.

S.C. recog. C.L. marriages but N.C. does NOT.

So, N.C. reaches the same conclusion as the Brook case.

Some "Essentials":
(1.) Age
(2.) Consanguinity & affinity (degree of)
(3.) Capacity
(4.) Phy. capacity
(9.) Ability to consent.

All courts do not ascribe the same weight to essentials.

Brook case gen. followed as

UDNY V. UDNY, (p. 59) - "NO man shall be w/o a domicile, and to secure this result the law attributes to every indiv. as soon as he is born the dom. of his father, if the child be legitimate, and the dom. of the mother if illegitimate. This has been called the DOM. OF ORIGIN and is involuntary. Other domiciles, including dom. by operation of law, as on marriage, are domiciles of CHOICE.

for as the principle is concerned. See p. 62 & 63 for the " .

N.C. capacity to marry: GS. 51-3:

(1.) No marriage between Negroes and whites. Miscegenation.
(2.) No marriage between whites and Indians, nor between Negroes and Indians of Roberson County.
(3.) W/o parental consent - 18. W/ consent of parents - 16. Girl 14 may if she has had child by the boy or is pregnant w/ license from officer of state.
(4.) Must not be impotent.
(5.) Mental competency.

Validity of marriage as far as mode of celebration, we look to the law of the place of celebration. Kochanski Case, (pb 73) one step further than Brook v. Ill because during war, there may be no sovereign. Ct. said that the English C.L. could be applied rather than the Polish law.

N.C. Law per Statute - see p. 3 of notes. In N.C., parents of non-age marrieds may seek annulment.

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(Sec. 3) * Marriage Formalities *

Dalrymple v. Dalrymple (p. 81)

Court said Canon Law was the basis of marriage in Scotland. Civil case.

This case shows that at early C.L. y was marriage per verba de praesenti ("C.L. marriage").

Regina v. Millis (p. 86)

Criminal case. Case said exact opposite of Dalrymple by saying that the marriage per v. d. p. was valid as between them but "that such a never constituted a full and complete marriage in itself, unless made in the presence and w/ the intervention of a minister in holy orders."

Categories of Statutes (general):

(1.) Stats. recognizing the validity of the marriage by y's non-compliance w/ certain provision.

(2.) Stats expressly declaring C.L. marriages valid.

(3.) Same . . . as invalid.

(4.) Marriages w/o solemnization are not valid.

5.

N.C. requires ceremonial marriage.

Five states require (Ga., Ill., Md., N.C. and Ohio) banns or notice before some religious society of an intent to marry. N.C. requires 5 days notice, but does not ~~require~~ apply to notice by newspaper so long as that notice appears at least 5 days before the marriage ceremony. See G.S. 1-58.1.

Fenton v. Reid (p. 89)

This case shows American recognition of C.L. marriages (N.C. does not recog. C.L. marriages). It is suspected that great Chancellor Kent wrote the opinion.

Meister v. Moore (1877) (p. 92)

The stat. was held ~~regulatory~~ [redacted] declaratory, and C.L. marriage cannot be struck out unless done so expressly and in terms.

In N.C., a child of any ceremonial marriage, no matter how imperfect the marriage, is legitimate except miscegenous marriages.

In N.C., if putative father

G.S. 50-1

later marries (after birth of the child) and acknowledges the child, that child will be deemed legitimate.

C.L. MARRIAGES — Grigsby v. Reib (p. 98)

4 are different types of C.L. marriages:

(1.) per verba de praesenti – mere present exchange of promises to take effect presently.

(2.) By promise subsequente copula – promises + sexual intercourse.

(3.) By habit and repute.

(S.C., 1959) Campbell v. Christian (p. 104)

Held, valid prior C.L. marriage as they lived together 24 years EVEN THOUGH she said she had never considered herself his wife! She was an ignorant woman and thought that a ceremony was necessary; but had she known, so says the Ct., she would have considered herself as wife.

Two ways to be illegitimate:

(1.) If the man + woman are unmarried + the father is unknown.

(2.) If the man + woman are

unmarried and the father is known.

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De facto officer is suff in N.C., but y may be some conflict.

G.S. 51-1 – ceremonial marriage by J.P., or minister or priest, & the officiating party must pronounce them as married. 28/23 (better rule).

254 F.2d 683

ABSENTEE MARRIAGES

Marriages by proxy, mail and telephone are valid or invalid depending upon the wording of statutes. But, generally, they are valid in states recognizing C.L. marriages except on specifically prohibited by statute.

Walker v. Matthews (p. 109)

ESTOPPEL

Court said that Mattie was estopped to claim that she was the widow of Geo. Walker because of her subsequent and continuing marriage by lawful celebration to Josh Minter.

N.C. applies this doctrine of "estoppel."

REFERENCE

See vol. 1, secs. 81-91 of Veneer + sec. 25 (re formalities).

Marriage Disabilities

DOCTRINE OF PUTATIVE MARRIAGE - a putative marriage is one wh has been K^d in good faith & in ignorance of some existing impediment on the part of at least one of the K^ing parties. 3 circumstances must concur to = this species of marriage:

(1.) There must be bona fides on the part of at least one of the parties at the time of marriage and during his or her life.

(2.) Marriage must be duly solemnized.

(3.) Marriage must have been considered lawful in the estimation of the parties or of that party who alleges the bona fides.

INSANITY

97/252 (idiacy)

At C.L., there were two broad classifications of disabilities:

(1.) Canonical -
- (A.) Consanguinity
- (B.) Affinity
- (C.) Impotency

Usually considered only voidable; and if not attacked during life of both parties, it would be void always. Only direct attack.

(2.) Civil - these were deemed void because the parties were deemed w/o capacity to K. May be attacked (121/397) after death of either or both, and may be attacked collaterally.

Insanity rendered the marriage void absolutely.

N.C. (Sims v. Sims, 121 N.C. 297: parties legally declared insane before death = void marriage), however, says that absent legal or judicial declaration of insanity, the marriage is only voidable.

Majority rule says that on statutes today use "void" they will be interpreted as meaning "voidable."

In N.C., if issue is born, the marriage is not attackable collaterally except in two cases:

(1.) Miscegenation
(2.) Bigamy

168 N.C. 411 - Except on the same party has been defrauded into marriage, the marriage is attackable only by the legal rep. of the husband.

Note: all of these rules apply only on the insanity, etc., exist at the time of marrying.

*Incestuous Marriages -

At C.L., voidable only and not subject to attack after death of one of the parties. G.S. 50-4 and 91 N.C. 293 in accord (but N.C. has never had a father-daughter case or one that close).

*IMPOTENCY

To be an impediment, it must exist at time of marriage, continue after, and, in many jurs., be incurable. Voidable only.

*Non-age

Voidable only.

192 S.W. 658

*FRAUD OR DURESS

Ord'y, voidable, not void. It must go to the essentials of the marriage. 192 S.W. 658.

*Interracial Marriages - Not a bar at C.L., but some states say they are void.

*Stat. Prohibitions after Divorce - e.g., Cannot marry w/in one year after divorce. N.C. does not have this. On found, the marriage w/in the state w/ the statute w/in the prohibited time is a nullity.

*Sec. 4 (A.) Family Relationship *

Ragan v. Cox (p. 126)

(63 S.E. 2d 746)

This marriage could be attacked on three grounds: incest, non-age and fraud. See 172/612; 63 S.E. 2d 746. A civil action for damages would lie (and here did), and depending on the facts, the theory could be either in tort or in K for services performed (63 S.E. 2d 746).

*G.S. 51-1

(1.) 18 and over - O.K. (girl + boy)

*(E

(2.) 16 to 18 - (boy and girl) special license from Registrar of Deeds + permission from parents.
(3.) 12 to 16 - on girl is pregnant + putative father consents to marriage, license may issue w/ consent of one parent.

(E.) PRIOR MARRIAGE STILL IN FORCE 4 March 1963

MAJORITY RULE *

G.S. 50-11.1 - see 160/38, Taylor v. White - a former marriage decreed void for duress is void AB INITIO, and a subsequent marriage before the decree will not be invalid once the decree comes after the second marriage and on the decree is ab initio.

Reynolds v. U.S. (p. 188)
Freedom of religion does not extend to the right to practice illegal acts. Plural marriages are universally barred.

Spears v. Spears
34 A.L.R. 464
11. L.R.A.N.S. 102
Re presumptions flowing from marriage:
(1.) Proof of a marriage in fact, the law presumes validity. One of the strongest presumptions known to the law.
(2.) On the fact of marriage by an ordained minister is proved

28/23; 109/780

it will be presumed to have been in accord w/ the law.

Here, in Spears, 4 are two presumptions concerned:

(1.) Presumption of continuity of the marriage.

(2.) Presumption of validity of marriage.

#1 continues until death or divorce.

To show invalidity of second marriage, the party must prove that death nor divorce ended the 1st marriage. (This is proving a negative: very hard!) — This case put an almost impossible burden on the 1st wife: to get records of the divorce proceedings in every county in every ct. in wh deceased resided (residence in divorce stats. means domicile + plus residence). — This goes to the absolute extreme re degree + amount of proof to rebut the 2nd presumption. See 225/156; N.C. does not go as far as Spears case. Also 192 F.2d 936.

HEAVY BURDEN OF PROOF TO REBUT PRESUMPTION OF VALIDITY

CL of d

Also, 120 F. Supp. 26 (these last two cases are based on N.C. law: only those counties on these roads evid. that decedent had lived.

Post and Kolesnik Marriage License (p. 201)

Q. Re spouse missing for X no. of years w/o tidings: what is the effect? =

N.C. raises presump. of death at the end of seven years. It does not estab. a time at wh the missing spouse is supposed to have died, but only says that at the end of 7 years he or she is dead. This avoids prosecutions for bigamy. = THIS IS THE OVER-WHELMING MAJORITY RULE. See 151 So. 745 (1934, Miss.); 114 Mass. 563, Glass v. Id. (p. 207)

C.L. Rule of presumption of death = 7 years.

Anon. v. Anon.

Under the Enoch Arden statute, the remarried spouse must get a decree of annulment of the first marriage before remarrying even on the missing spouse of marriage #1 was absent w/o tidings for 5 years.

Longhran v. Longhran (p. 212)

A stat. of D.C. prohibiting remarriage of an adulterer is penal in nature + has no extra-territorial effect. Thus, P was entitled to

Read to p. 268

dower in D.C. under full faith and credit.

If D.C. had had a marriage evasion statute, & it was shown that the parties had tried to establish domicile in Fla. FOR THE PURPOSE OF EVADING D.C. LAW, the marriage in Fla. would not be valid because D.C. would ~~not~~ say that they had not changed their domicile from D.C. to Florida.

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233/449, 64 S.E. 2d 422 - re effect of prior marriages. A decree of annulment of a prior marriage after a second marriage has been effected does not have retroactive effect. If bigamous when Ked, it is bigamous always. — This case conflicts w/ other authority. In Taylor v. White, the opposite was held, but this is the ruling law on this question.

Minority Rule
(contra to Taylor v. White, supra p. 21.)

*(Sec. 5) Consent and Intention of the Parties

(A) Abnormal Conduct of Both Parties

Davis v. Davis (p. 222)

14 A.L.R. 2d 624 at 628 = The rule of law: marriage entered into in jest, on a dare, or in levity will fail for want of mutual consent PROVIDED that they do not cohabit thereafter.

(170 Ga. 743) Rule of Law (MAJORITY)

A high degree of proof of jest, etc. is required. Usually, a formal wedding before a minister may initiate the allegation of jest + lack of mutual consent.

Stone v. Stone (p. 226)

Minority view here: Ct. was probably moved by sentiment.

The majority rule is stated in 14 A.L.R. at 625.

Ct. talked of fraud, but was not really fraud here.

Schibi v. Schibi (p. 228)

Premarital agreement to annul marriage. Girl (D) was pregnant by P. After marriage, D reneged. D. Pregnancy was a prime consideration + the fact that P was the avowed + admitted father. Re false claim of

11 A.L.R. 931 - false claim of pregnancy.

14/535 - Scroggins v. Sk.

14/548 - Barton v. Sk

11/746

pregnancy, See 11 A.L.R. 931.
In Schiki case, the parties intended the marriage to be valid to allow for the legitimacy of the child. 28 N.E. 681 in accord.

* (B.) ABNORMAL CONDUCT OF ONE PARTY *

(1.) FRAUD

Reynolds v. Reynolds (p. 231)
P married D who had rep. that she was chaste & virtuous. After marriage, she had a child conceived by an unknown man prior to the marriage.
Held, pregnancy of the woman at the time of marriage is sufficient ground for annulment (divorce, too, in N.C.). Reason: wife not able to fulfill conds. of the K of marriage because she is not then able to bear the husband's kids.
If the H&W had pre-marital sexual rels., some courts say that so long as they (or P) can prove the father was a third party, it can be an annulment.
Some cts. say that "fun before marriage will bar the claim of a third party."

To get annulments, the fraud or misrep. must be of a material fact; it must go to the essentials of the K OF marriage. This is The Rule.

Schonfeld v. Id. (p. 239)

This case went very far to grant annulment even tho' there was no fraud as to any essential of marriage. - N.Y. was very liberal here. Much negative reaction to this case.

Worongoff - Daschkow v. Id (p. 244)

This case was a reaction to the Schonfeld case; no annulment, even though it should have been granted.

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Akrep v. Akrep (p. 249)

Misrepresentation as to D's intent to go thru w/ religious ceremony after civil ceremony, the fact of no religious ceremony, and an unconsummated marriage will justify annulment. The fraud is promising to go thru w/ the religious ceremony w/o the intent to fulfill the promise.

Note Mirizio Case on p. 252.
The main case is the rule.

Miller v. Miller (p. 253)

A pre-nuptial intent to abstain from marital sexual relations = ground for annulment.

If refusal to indulge was post-nuptial, the pre-nuptial intent to abstain being lacking, that would not be a ground for annulment because it was no fraud vitiating the consent of the willing and moving party (the P).

In reality the only real proof of intent of refusal to indulge is the fact of non-indulgence.

See notes 6 + 7, p. 257.

A rep. of ability to have children is implied in the marriage K.

* Inability to have kids — If W knows (or H) before marriage, it is a duty to disclose. If the barren party does not know before marriage, no grounds for annulment.

(2.) DURESS

Fratello v. Id (p. 258)

Duress: an actual or threatened violence or restraint of a man's person contrary to law to compel him to enter into a K or to discharge one. Marckley v. Id, (p. 264): threat of law suit or criminal prosecution ≠ grounds for annulment.

Y is a presump. of legitimacy of any child born at any time during marriage, and y are only two ways of rebutting this:

(1.) Non-access, or
(2.) Impotency.

Marriage to the offended = defense to prosecution of rape or seduction in N.C.

At C.L., if Kid born one day even before marriage: bastard. If born one day after marriage, legitimate. — Changed by stat. now.

At C.L., Kid born after annulment = bastard

H. v. H. (p. 261)

W married her French second coesin to escape Hungary. Ct. said the duress need not emanate from the party to the K of marriage.

The threat must be such, generally, to deprive the moving party of his free will.

In Marckley case, it was said that the holding applies on

3 S.W. 2d 672, Lee v. Lee (Ark.) — in accord w/ Hv. H.

the threatened party was guilty of the crime or tort. But, if innocent, it may be economic duress (Dalzell's article states that the fear of financial burdens resulting from litigation (maybe suff.)).

(Part 2) * FAMILY DISORGANIZATION *

See G.S. 50-1

(Chap. 1) * ANNULMENT *

(Sec. 1) General - some states confuse the matter by using "annulment" and "divorce" interchangeably.

130/562 - in divorce, H always liable for his own ct. costs. whether he must pay W's ct. costs is up to the juris. of the court.

In N.C., as far as procedure is concerned, annulment and ~~proc~~ divorce are treated alike.

160/38 - in annulment actions, ~~y~~ can be alimony pendente lite. G.S. 50-15; 69/319 construes statute.

In N.C., an action for annulment is treated like an action for divorce as far as procedure is concerned. Lee v. Lee.

G.S. 50-11; 50-11.1 - re legitimacy of kids of void & voidable marriages

Alimony only in:

(1.) Action for alimony w/o divorce;

(2.) Divorce a mensa et thoro.

However, on one of these is given, & H later gets absolute divorce, alimony will survive (except on divorce gotten on ground of adultery). So, if you have a W for client, tell her to get a mensa ~~et~~ thoro.

13 March 63

Whitney v. Whitney (p. 271)
No divorce here because there never was a valid marriage. It was bigamous. So, the H was allowed to benefit by his bigamy.

⊛ Theory of annulment: y was no valid marriage at all.
⊛ Theory of divorce: y is a valid marriage wh becomes dissoluble subsequently.

4 A.L.R. 926
ALIMONY IN ANNULMENTS

Annulment v. divorce:
(1.) Ann't = no right to alimony, pendente lite, atty. fees (except on changed by stat.)

⊛ In action by H v. W for Ann't, if the existence of the marital rel. is in actual dispute, & clear proof is not made v. its validity, the W may be given alimony pendente lite, atty fees & suit money.

(18 So. 781; 47 N.Y. 134)

On existence of marr. is not estab. or admitted, no assistance to W from means of H in action for Ann't by H.

In action by W (absent stat.) no alimony, atty fees or suit money because she is

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2 N.Y. Supp 369

in fact denying existence of marr.

Dec W is seeking ~~[redacted]~~ divorce + H alleges void marr., W entitled to alimony p.l.; atty fees + suit money. N.Y. follows this Ct + Ga. (Georgia)

Action by W for divorce & existence of marr. is not admitted by H nor even tentatively shown by W, she gets nothing. 45 L.R.A. 713 (or 113 maybe). Ga. follows this.

Ruling on alimony p.l., on allowed, has no bearing on action by W for divorce in N.C.

219/299 - Ct may refuse alimony p.l. on W able to support herself.

Alimony; rule of thumb = 1/3 of husband's income.

Pleas in bar to alimony: deed of separation or pre-nuptial K so providing, esp W's signature.

* (Sec. 2) JURISDICTION *

Romatz v. Romatz (p. 275)

Equity has inherent juris. to hear actions for annulment

and this power can be traced back to the C.L.

There is no C.L. of divorce. It is statutory.

Majority rule says that Equity also succeeds to the Ecclesiastical cts. of C.L. (this case in accord), & therefore, canonical disabilities will be grounds for annulment in Equity (e.g., impotency).

128 A.L.R. 61

Michigan had the power to annul the Ohio marriage because the parties were domiciliaries of Michigan.

Rule of Law

* The court of the domicile has the power to annul a marriage celebrated elsewhere w/o expressly holding that its juris is exclusive of any other state and of the state on celebrated. Esp. true on the parties were domiciled in the forum state at the time of marriage.

Assign. — next six cases.

18 March 63

In going thru this section, you must distinguish between juris. in rem & in personam, between local & transitory actions.

Re juris. of domicile over annulments of marriages celebrated outside of the forum state, see 128 A.L.R. 61.

Hanson v. Hanson (p. 283)

Mass., the domicile of both P and D, annuled N.H. marriage: the court gets juris. from the fact that they are both domiciled in Mass.

If both parties, at time of marriage, are foreign to the forum state, but later become domiciled in the forum state, the ct. has power to annul.

If one of the parties is domiciled at time of foreign marriage, the domicile state may annul IF proper service can be made on the non-domiciled party. This is true even tho the domicile

N.Y. statute —

(1.) If one is domiciled & one is not & marriage took place in N.Y., N.Y. has juris.

(2.) If one is domiciled & one is not & marriage took place w/o N.Y., N.Y. has juris. PROVIDED that the domiciliary was resident of N.Y. for at least one full year before action.

of the one moving party has never been the common domicile of both.

Majority of courts recog. annulment action as in personam.

Mazzei v. Cantales (p. 287)
Annulment is not an action in rem because y is no res since the "marriage" is void. — This seems to be a triumph of judicial niceties over common sense. The holding implies that if the marriage were only voidable y may be a res over wh they could take juris.

17 N.E. 874
Titus v. S.

* Constructive service on non-domiciliary — on marriage was celebrated elsewhere, constructive service will not give ct. juris. by publication or service w/o the state despite (115 N.W. 484) a stat. authorizing constr. service in divorce actions. See 21 N.E. 435; 91 P. 189 (contra); contra to main case, also, Bing Gee case (note p. 290): y is a res (status) before the court in an annulment action, and y may be constr. service on the basis of the divorce stat. authorizing same.

66 A. 1133, Avakian v. Id.

Quaere state juris. over annulments on the marriage did not take place & and neither party is or was domiciled in? = Avakian v. Avakian 66 A. 1133 — no juris. here. At least one of the parties must be domiciled, and most states (e.g.) in divorce require a duration of domicile (e.g. 6 mos. in N.C.

1-98 (5) - permits constr. service (maybe 1-104 (1)) in annulment actions.

(SEC. 3) * PARTIES *

Turner v. Turner (p. 293)

A parent is a proper party plaintiff to have the marriage ~~is~~ set aside on his written consent was obtained by fraud.

G.S. 51-2 - In N.C., on parents give no consent, and the children misrep. their ages to the registrar, the parent is a proper party Pt to an annulment.

* Absent Statute, parent is NOT a proper party to annulment.

Assignment: next eight cases.

20 MARCH 63

[See stmt. p. 292 for best stmt. regarding proper parties.]

If the marriage is made voidable on grounds wh affect the capability of the parties to give the consent necessary for a valid marriage K, the right of annulment is usually lodged in the incapable party or persons acting in his behalf.

Or marriages have been made voidable for reasons not affecting the consensual powers of the parties, but on grounds of societys disapproval of certain moral, social, or physiological factors present in some cases, the right to annul is given to both parties, w/o regard to innocence or culpability, because in any such case the welfare of the community conds first and the intent or motive of individuals is wholly secondary.

Hoadley v. Hoadley (p. 298)

H v. W for annulment after 10 years of marriage on grounds of insanity of W at time of marriage, and her consequent incapacity to consent.

Due to statute leaving out H as a proper party to bring annulment on ground of

insanity, S/W.

Generally, however, H can bring annulment on:

(1.) He was ignorant of the W's insanity, or

(2.) He was deceived re W's state of sameness.

Even in these cases, however, if H later discovers insanity and subsequently cohabits, he will be estopped to gain annulment. The reason: public policy and the desire to prevent people from being taken advantage of.

* (Sec. 4) DEFENSES *

White v. Kessler (p. 301)

Clean Hands

Court refused the decree of annulment because H did not have clean hands. — Minority view.

Majority View —

The doctrine of "clean hands" or "pari delicto" does not apply to estop the P, in an action for annulment, from showing the invalidity of a void marriage. Accord, Landsman v. Landsman, (p. 305).

PRIOR DIVORCE PETITION
See 232/557

Powell v. Powell (p. 307)

Minority Rule – previous petition for divorce does not estop petitioner from seeking annulment, and would not constitute an election of remedies.

Majority Rule –
H/W would = election of remedies and bar the subsequent annulment.

Bracksmayer v. M (p. 311)

CONDONATION

Cohabitation – the living together as H and W and includes their sexual relation.

A defense could be "condonation" – forgiveness and cohabitation after knowledge of the "wrong". But, here y was no cohabitation because no sex after knowledge of "wrong" of D(H).

* (Sec. 5). CONSEQUENCES (OF ANNULMENT) *

Re Moncrief's Will (p. 313)

At C.L., a child is "illegitimate if born at any time before marriage. – Now changed by statute.

Assignment: Chap. 2 (after remainder of Chap. 1, part 2).

25 March 63

Bell v. Bell (p. 318)

Ct may be alimony pendente lite in an annulment proceeding even on the ct. is w/o juris. of the s/m.

Wigder v. Wigder (p. 321)

No permanent alimony in annulment proceedings, except on changed by statute (only 11 states have stat.). Majority rule.

Johnson v. Johnson (p. 323)

N.J. by statute allows permanent alimony after annulment.

At C.L. an annulment expunged any rights or expectations a woman might have had w/ respect to property other than such she might have brought to the marriage.

Schlamberg v. Schlamberg (p. 325)

Prop. divided among the parties at annulment because the W has contributed by her efforts, etc. So, out of $16,500 net estate W got $1000.00 property settlement. Reason: it would be inequitable to refuse same, regardless of reason

for same.

Gaines v. Jacobsen (p. 330)

Sleicher v. Sleicher, 251 N.Y. 366, represents the majority rule among states w/o stats. allowing alimony in annulment proceedings.

Deed of separation between P and H-1 (D) "until she (P) re-marries." Held, the P was not entitled to back alimony even though her subsequent marriage was annulled. "The subsequent fortunes of the remarriage, and whether or not it is later terminated, are in no way material to the agreement; the H's obligations are by its terms to continue only until she re-marries, and y is nothing in the agreement which can serve as a basis for subsequently reviving those obligations.

* (Chap. 2.) DIVORCE AND JUDICIAL SEPARATION *

(Sec. 2) JURISDICTION

Wood v. Wood (p. 348)

Minority Rule Residence is generally required as a basis of jurisdiction

N.C. requires 6 mos. residence.
Most states = 3 mos.
Nevada = 6 weeks.

in divorce actions, but domicile is not a requirement of the U.S. Const. Domicile is a matter of state law only. (U.C.G.S. 50-18 - servicemen).

Alton v. Alton, (note p. 355)
Domicile = Const. requirement for juris over divorce. - Hastie, J. dissents.

Voss v. Voss (p. 353)
N.J. stat. required domicile of at least one of the parties to divorce (an action quasi in rem). W resided in N.J., but H was domiciled in N.Y., and the domicile of the H is the domicile of the W had deserted H. See secs 27 + 28 of Restat. Conf/Laws re separate domicile of W. See also sec. 10 of Restat/Conf.
Question of domicile determined by law of the forum.

Jennings v. Jennings (p. 355)
Domicile is constitutionally required for juris. over divorce. Majority Rule.

So, u are two requirements for juris. in divorce:
(1.) Residence of at least one of the parties for the stat. period.
(2.) Domicile of at least one of the parties.

Legislature (Art. 10) cannot grant divorces in N.C. And major. of states.

Further requirements:
(3.) The court must be stat. empowered to decide divorce actions.
(4.) Service per statute.

Hartigan v. Hartigan (p. 358)
On ct. did not in fact have juris., and this is subsequently revealed through the collusion of H+W who worked a fraud upon the court, the decree will be set aside.
Alabama + Nevada = easiest states for divorces.

NAME CASE

* Williams v. N. Car. (I) (p. 370)
Criminal case for bigamous cohabitation, but case stands for the best stmt. of the juris. requirements for divorce.

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It only takes the domicile of one party to give the State of Nevada juris, regardless of the fault of that one party.

Wms. v. N. Car. (II) (p. 378)
The parties were not domiciled in Nevada.

Assign. — 8 cases.

27 March 63

Types of cla:
(1.) Transitory
(2.) Local
Another form of action classification:
(1.) In personam
(2.) In rem
(a.) Quasi in rem.

An in rem action requires that the state have juris. of the S/M of the action.

In divorce, at least one of the parties to the divorce action must be domiciled in that state. Wms v. N. Car. (I). Williams v. N.C. relies on Haddock v. Ill., wh estab. the essential of "matrimonial domicile", but the Sup. Ct. overruled Haddock; and since N.C. did not make it clear on wh of

several grounds it depended to refuse to recog. the Nevada decree, the Sup. Ct. reversed the N.C. decision.

In Williams v. N.C. (II), J/N.C. because it deter. that Wms. was never domiciled in Nevada. The question of domicile was for the jury, and the Nevada decree was only entitled to be considered as prima facie evid of domicile, and may be rebutted. THE QUESTION OF DOMICILE IN DIVORCE ACTIONS IS A QUESTION OF FACT THAT EACH STATE MAY DETERMINE FOR ITSELF BECAUSE DOMICILE GOES TO THE QUESTION OF JURIS. IN DIVORCE ACTIONS, AND F. F. and C. DOES NOT REQUIRE SAME TO all JUDGMENTS, BUT TO ALL valid JUDGMENTS.

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1 April 63

Before Wms v. N.C., the rule was ~~that~~ in divorce actions (quasi in rem), both P & D had to be before the court, ~~P or D~~ must have ~~satis.~~ stat. residence stat. and had been domiciled ~~y~~, ~~and~~ or the granting state must have been the matrimonial domicile (and the domicile of H = domicile of W). — The Haddock Case rule. But, big fault of Haddock = matrimonial domicile: Mat. dom. = H's domicile unless he had wrongfully left his W. This was too ~~tenuous~~ a ground on which to base the juris. of a court.

Wms v. N.C. said that nothing more is required than residence and domicile of one party, the P. It specifically overruled Haddock v. Haddock. The decree of F-1 (Nevada) = only prima facie evid. of Nev. domicile.

Domicile is not a requirement of the U.S. Const. (14th Amend.). Wms case implies this. Alton v. Alton held this inferentially (also Woods v. Wood).

Sherrer v. Sherrer (p. 385)

The requirements of F.F.&C. bar a D from collaterally attacking a divorce decree on juris. grounds in the courts of a sister State or if has been participation by the D in the divorce proceedings, or the D has been accorded full oppor. to contest the juris. issues, and on the decree is not susceptible to such collateral attack in the cts. of the State rendered the decree. —

This case has been attacked. See note 2 (p. 389: whether a third party can attack a decree in a state other than F-1 depends on whether he could have attacked it in F-1.

In Wm's case, if D & his W-2 had gone to S.C. & live, would S.C. have had juris. to bring bigamous cohabitation? (Remember that S.C. had no prior interest.) This has not been decided.

50 Col. L.R. 833 - Read
(30 S.E. 2d 108;
192 N.C. 728)
18 Fla. 345

50 Col. L.R. 833.
1. heirship 4.
2. Leptinsky
3. Dower

Read: 244/286 - required.
(93 S.E. 2d 618), Carpenter v. Id

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Note (2), p. 391 - Johnson v. Muelberger, 340 U.S. 581, 71 S.Ct. 474, 95 L.Ed. 552 - "When a divorce cannot be attacked for lack of juris. by parties actually before the court or strangers in the rendering state it cannot be attacked by them anywhere in the Union."

In Re Codling's Estate (p. 393)

H was domiciled at time of divorce in La. on the divorce was granted. La. stat. pub did not provide for service on W-1 (D here) who had previously moved to State of Washington and had no notice of the divorce. This suit: W-2 v. W-1 re deter. rights of administration. Was the La decree entitled to f.f.& c. in Washington despite lack of notice to D (W-1)? Was their procedural due process of law? That depends on State law on it relates to domiciliaries.

Procedural due process raises two questions:

(1.) Was there compliance

w/ the statute?

(2.) Did the stat. meet minimum standards of fairness?

If proc. D/P does not met, the decree would be void even in La., and, ∴, not entitled to f.+c. in any other state except that wh is accorded it in La.

Held, "In a divorce proceeding juris. of the person of an absentee or nonresident D is not required when the action is brought in the state of the matrimonial domicile of the parties. Each state has full power and authority to deter. the mode, manner, time + place of prosecution of a proceeding for the dissolution (sic - one "l") of a marriage, and this would include a determination of the kind + character of notice or process to be given or served upon the D in the action and the mode + manner of such service, and when the stat. procedure is strictly followed in the state of the matrimonial domicile of the parties the decree

is entitled to full faith and credit in every other state.*

Chermak v. Chermak (p. 399)

When is a judgment void? If a judg. is rendered or the Ct. has juris. over the parties, it will be valid even tho erroneous. (See G.S. 1-220 - judg., order, verdict in a civil case may be set aside (even though the term of Ct. has ended) for fraud, mistake, excusable neglect, etc., w/in one year after rendition.)

49 A.L.R. 1206 - fraud
126 A.L.R. 390 - perjured testimony as extr. fraud

75 S.E. 2d 485, Patrick v. Id. (N.C.)

Extrinsic fraud - fraud wh does not relate to the issues of the case. It goes to the fraud in procuring the exercise of juris. of the Ct., or fraud wh, in fact, prevents a trial of the issues in the case, will warrant the vacation of a judgment. — Only extrinsic fraud will warrant setting aside the judgment.

Intrinsic fraud - fraud wh relates to the issues of the

case. "A ct. will not set aside a judg. because it was founded on a fraudulent instrument."

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Krause v. Krause (P-1404)

In general, a person who invokes the jurisdiction of a court will not be heard to repudiate the judgment which that court entered upon his seeking and in his favor.

The first decree was invalid, but the defendant (!) was estopped from pleading it. "To refuse to permit this D to escape his obligation to support P does not mean that the courts of this State recognize as valid a judgment of divorce wh necessarily is assumed to be invalid in the case at bar, but only that it is not open to DEFENDANT in these proceedings to AVOID the responsibility which he VOLUNTARILY incurred."

52

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10 APRIL 63

SEC. 3 Statutory Grounds

Three basic grounds for divorce:

(1.) Adultery – in every state.
(2.) Desertion – except N.Y. & N.C.
(3.) Cruelty

H
D – N.Y., N.C.
C

Abandonment is not the same as desertion (requires intent).

DESERTION

Differs from abandonment because the latter accrues immediately and the former usually must satisfy some special period. But, abandonment, too, requires an intent.

Two years separation = ground for divorce ~~a mensa et~~ a vinculo.

Elements of Desertion:
1. Cessation of cohabitation.
2. Intent to desert + not resume cohabitation.
3. Absence of consent.
4. Failure of any justification.

Constructive desertion – one party makes things so bad at home that the other is forced to leave, the one at home is guilty of constructive desertion.

CRUELTY

Usually requires physical violence or the threat of same. But, y are others:

(1.) Refusal of sexual intercourse,
(2.) Excessive demands for " " in

one juris.
(3.) Indulgence in extra-marital sex.
(4.) Homosexuality
(5.) Drunkenness or drug addiction.
(6.) Venereal disease & forcing sex while having same.
(7.) Imputing want of chastity.
(8.) et al.

Must plead specifically the acts alleged to = cruelty.

In modern div. law, ADULTERY is the voluntary sexual intercourse of a married man or woman w/ a person other than the offender's W or H.

Adultery – the act of adultery must be intended. So, rape ≠ adultery; an insane person cannot commit legal adultery.

Usually, must be penetration of the sex organs.

To prove adultery, or to infer same, you may show:
(1.) Disposition, and
(2.) Opportunity.

Competence to Testify

8-56

At C.L., husband & W were incompetent to testify against each other. * But, under statute (8-56), H & W are

competent to testify for or v. the other except:

(1.) In any action involving adultery, except that it may be testimony to prove the fact of marriage. Reason for this: to prevent collusion. But, the party charged w/ adultery may deny same by testimony. On both H+W are parties.

(2.) In any action for or on account of criminal conversation. (adultery) ← On H or W is a party against a third person. But, this does not prevent a H or W from testifying for or against the other (one to the mar. since this is not an action between H & W. So, H & W are competent in an action for crim. conv. (An action against a third person).

At C.L., H & W incompetent in crim. cases to testify against the other. G.S. 8-57 - completely removes incompetency as far as testimony FOR D is concerned, but not as far as AGAINST. ~~The~~ The incomp. applies only on the H or W is a D in a crim. case. Spouse of co-D as to whom a nol pros has been

taken, may testify & the remaining D even tho the testimony would be derogatory of the other spouse. If when H & W are both on trial, neither can implicate the other. If the incompetence to testify re acts before div., continues after div. except re bigamy, assault and battery.

G. S. 8-57 - failure to testify FOR will not raise an inference of guilt of accused.

H & W Privileged Communications -

Neither can be compelled to disclose.

Requirements:

(1.) Must be confidential
(2.) Not acts or matters expected to be divulged.
(3.) Made during marriage.
(4.) Privilege that of the witness only, so if the spouse - witness wishes, he may testify & divulge.

Majority rule: privilege goes to both the spouse - witness and the spouse - accused.

Testimony re Non-access —
H + W incompetent on
prot. P. non-access would
bastardize the issue. Third
party would have to testify.

* (Sec. 4) DEFENSES *

1. Gen. Denial
2. Denial of juris. of Ct.
3. Denial of existence of marriage.
4. Recrimination
5. Condonation
6. Connivance
7. Collusion

In N.C. these exist by virtue of C.L. In some states, they exist by virtue of statute.

Defined — a rule or doctrine wh precludes one spouse from obtaining a divorce from the other, on the spouse seeking a div. has himself or herself been guilty of conduct wh should entitle the opposite spouse to a divorce.

Read to p. 488

RECRIMINATION

Most writers agree this should not be a defense because it is based on the premise that the evil is the divorce, and does not recognize that divorce should be the best way out of an already bad situation. Shows that divorce stats. often rely on the idea of fault.

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17 April 63

Doctrine of Comparative Rectitude - if both spouses are at fault in the eyes of the law, the spouse least at fault may be given a divorce in the discretion of the court.
— An "easing away" from defense of recrimination.

22 April 63

Durham County Superior Court and Durham County Civil Court are the only two courts wh may award divorces.

If D is not before the ct. stats. must be complied w/ re service. 6 mos. stat. separation period in N.C.

Specific facts concerning divorce must be alleged in pleading.

Condonation— act wh would give D, had he been a P, a cause for divorce.

The court refuses to put all grounds for divorce on same level! Adultery is of the highest nature.

An abandonment on the part of P would bar action.

See G.S. 50-7, 50-5; 167 N.C. 346; 92 N.C. 180; 72 N.C. 530; 94 N.C. 527; G.S. 1-220.

Condonation is forgiveness upon cond.

After commission of an act justifying divorce by

CONDONATION

The forgiveness must be volun. and intentional. Knowledge and not mere suspicions of a spouses derelictions is essential to acts of condonation.

But, the wrong may be revived w/in a reas. time. "Reas. time = question of fact."

Defined — forgiveness express or implied by one spouse for a breach of marital duty to the other.

by the other party, a divorce action will not lie on the parties have after lived together for 10 years.

A H cannot obtain divorce from W on the ground of adultery by W after he had separated from her (abandoned her??) and the separation was affected by the H.

Connivance — usually applied to adultery. It is consent and acquiescence in the probable foreseable consequences. May be implied from the acts & omissions of the complainant naturally tending to bring about the adultery, or otherwise showing the complainant's consent thereto. May arise from affirmative action (e.g., a "set up") or from inaction (based on a duty to avert the natural consequences of the offending spouse's conduct).

Collusion — usually a fraud on the court. It is an agreement between both parties to do an act otherwise sufficient to support divorce, but which, due to the agreement, is vitiated in its effect because the agreement = condonation, a defense to divorce. Collusion = a defense to divorce.

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24 April 63

Read: chaps 49, 50, 51 & 52 & 52(a)
— Required; on test!

(PART 3.) HUSBAND & WIFE

(Sec. 2) Interference w/ the H & W Rel. By Third Parties

(A) ALIENATION OF AFFECTIONS AND ENTICEMENT

A/A = tort action.

Curry v. Kline (p. 492)

If y was no affection remaining to be alienated, y could be no c/a for A/A.

Elements: (A/A)

(1.) P must be married — even voidable marriage.

(2.) Affection between H and W — sometimes bridged by presumption of affection. Some cts. say that y need not really be affection, and that the H and W could be living apart but have hope of reconciliation.

(3.) Must be knowingly or intentionally done (objective test of intent).

(4.) Wrongful act must be the controlling or substantial cause of the alienation.

Rank v. Kuhn (p. 496)

W = P. One of the leading cases giving W ability to bring A/A. Further,

mere loss of H's affections not sufficient to render D liable unless her misconduct was a substantial factor in causing such loss.

Further, there is a presumption of affection between H and W. = Rebuttable presumption (really an inference). "Even if P and her H were living unhappily together before D appeared and were somewhat estranged, this would constitute no bar to the action, but should be considered only in assessing the damages."

In Mass., A/A not recog. It merely aggravates the damn. on the W is debauched or enticed away.

Presumption that parent is acting in the child's behalf and action for A/A would usually not lie against a parent. However, it may be rebutted (see note (1), p. 570).

(B) Criminal Conversation

c/c = tort action.

Read 29 N.C. L.R. 178 — re loss of Consortium from injury to one spouse.

c/c has same elements as A/A except ~~as~~ need be no affection between H & W shown, and you must plead & prove adultery.

(C.) Injury to the Spouse

In the states w/ c/a for c/c, wife can also recover on the proves the D's acts were intentional.

N.C. LAW

G.S. 52-1 wiped away concept of ownership of W by H. See also 52-10. She's entitled to her own earnings for her services.

Dam. for injuries to W ~~neg.~~ caused are recoverable only by W and he can only recover for special expenses caused. Vice Versa. But either can recover for injuries to the other for intentional injuries caused to the

Consortium includes:
(1.) Sex
(2.) Society
(3.) Service - main one.

spouse. The dams. recovered are for loss of consortium, services and society. ✱ This is a separate c/a from the injured spouse's c/a v. tortfeasor. The two cannot even be joined in the same complaint.

Effect of C/N of Injured Spouse

But, the C/N of one spouse will bar the action of the uninjured spouse suing for consequential damages for loss of consortium, etc. in states which allow that action even for negl. inflicted injuries.

A prior adjudication of C/N of W would not (perhaps the majority rule) bar H's suit for loss of consort. because H was not a party to the W v. D suit, and, thus, would be no res judicata.

Perhaps only the minority of states (183 F.2d 811 - required) allow the uninjured spouse to recover for injuries negl. caused. 224/821.

At C.L., W had duty to render service (still true), but this is a duty w/o remedy now.
H has duty to support W.

A/A by child = NO.

108 A.L.R. 521; 172/661

Q. Can child sue on parents' affections are alienated ([1935], 195 Minn. 378, 263 N.W. 154) And home is broken up. ?= W/ only two exceptions. NO. But, maybe in the future the child will have the right. — Reason for no action by child today: may be many kids and D would be subjected to many suits.

* Children — *
Parent entitled to income of minor child living at home, who is not emancipated. 192/475.

241 N.C. 37 - joinder allowed only because the father was acting as the "next friend" of ~~the~~ his child.

Assignment - read 8 cases from p. 539.

192/475 - parent entitled to....
172/690 - suit by parent for loss of services of child.
162/283
241/37 allowed joinder of parent's and child's actions. But many cts. don't allow joinder here (140/140).

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In N.C. a parent is not liable for the kid's torts (151/299) solely on the basis of that relationship. But, if the (162/95) parent approves, or if the kid = an agent, ∴ can be liability.

A child not emancipated cannot maintain (185/577; 229/503) tort action ∀ parent, and vice versa.

If a parent is negl., but the kid is responsible for the direct tortious action, parent liable. e.g., kid driving car + parent in the car. This raises presumption of control by parent (rebuttable), and the second theory of liab. = "family purpose doctrine". Under F.P.D., parent need not be in the car. If kid on mission for parent, strict agency rel. arises and parent liable on that theory.

Parent has duty to control and correct his kids. ∴, a parent cannot stand idly by w/o stopping the child. If he does, parent liable. Also, if child has propensity to

commit certain torts, you, as a parent, have the duty to correct the child. But, lack of opportunity of parent to meet his duty = defense: Question of fact.

1-538.1

The above rule of C.L. (parent not liable for torts of the kid) has been changed in N.C. by G.S. 1-538.1 which makes parents responsible for the torts (probably only the malicious and willful acts) of the child up to $500.00. This stat. has not been interpreted, but it probably applies only to willful and malicious torts of the child.

229/503

Vicarious Liability of Parents Eer to Child

Although the kid ord. cannot sue the tortious parent, if the parent injures the kid while the parent is acting as Ees for his Eer w/in the scope of his agency, the kid can sue the Eer. 229/503.

— Could Eer v. parent — Ee to (Eee) indemnify himself? This is unanswered, but it is doubtful because

that would be like letting child sue parent, and ~~that~~ would be doing indirectly what is not allowed to be done directly.

(Subsec. D.) * INJUNCTION TO PROTECT MARITAL ~~RIGHTS~~ pymt. of * No injunction for debts because State Constitutions forbid imprisonment for debt, and an injunction is enforced by imprisonment for failure to comply.

Baumann v. Baumann (p. 539)

Did P have a prop. right in the name "Baumann" (her married name) so that equity will restrain w-2 (D) from using it? Held, no. The declaratory judg. invalidating divorce by H from P, and, consequently, the marriage between P and H, had achieved all that P needed anyway.

* W is no prop. right in the marriage name.

Garvin v. Garvin (p. 544)

Rule of Law: A spouse can obtain an injunction against divorce proceeding in a foreign state by the other spouse, on the divorce proceeding would prejudice her pending action or would deprive her of

Assignment:
Take 10 cases.

Given cause, a libelant is entitled as of right to a divorce.

prop. to wh she would be entitled but for the divorce sought by the other spouse.

An antenuptial agreement ~~not~~ to divorce cannot bar either party from seeking divorce. Dumais v. Dumais, p. 550 note.

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(Sec. 3) * H and W Rel. as re Responsibility for Torts and Crimes *

Bryant v. Smith (p. 551)

Exceptions to majority rule:
(1.) Family car doctrine.
(2.) Household accident cases.
(3.) Vicious domestic animals.

H not liable for W's torts: majority rule.

* Curtis v. Ashworth, 165 Ga. 782, 142 S.E. 111, 59 A.L.R. 1457 - H is no longer liable for the independent torts of his W not committed by his command or w/ his consent, and in wh he does not in any way participate. Reasons the bases of the C.L. rule no longer exist.

People v. Statley (p. 558)

C.L. Rule

N.C. seems to follow the C.L. rebuttable presumption that crimes committed by W in H's presence were done under his coercion and command. (156/648; 166/373)

This (main) case holds that the C.L. rule no longer applies.

People v. Martin (p. 563)

Conspiracy

It is perhaps the prevailing view that, today, husband and w can conspire. Not so at C.L. due to unity fiction.

Defamation

Statements made between H and W cannot be the subject of defamation. But, if third party tells W defamatory stmt. re H, H can have c/a against third party because of wrongful publication here.

* (SEC. 4) TORTS AND CRIMES AS BETWEEN H & W *

Thompson v. Thompson (p. 565)

Held, "The stat. was not intended to give a right of action as against the H, but to allow the W, in her own name, to maintain actions of tort which at C.L. must be brought in the joint names of herself and H."

So, W not allowed to sue H for intentional tort of "A+B."

W not allowed to sue H here for tort of "A+B." (4 to 3 vote.)

* Split of authority here and see note 2, p. 569.

10/5/16

King v. Gates (p. 571)

Per prevailing view, one spouse can be guilty of arson for burning the prop. of the other.

W allowed to sue H's administrator for H's negl. torts. W could have sued H for the negl. tort had he lived. But, the stat. was inter-

read notes between the cases in these sections. —T.I. (see p. 574)

preted to apply only to W v. H, and did not allow H to sue W. But, G.S. 52-10.1 (1951) has changed that (p. 574) so that H and W are given a c/a against each other.

Brown v. Josser (p. 576)

English Rule in accord. The bases for the C.L. have ceased to exist. So, the reasons for the rule failing, the rule, too, should be abandoned.

If the court were to follow the C.L. rule of disability, the c/a arising from the antenuptial tort injuring F's fiancée should be barred by their subsequent marriage before judgment.

But, the court here said that it preferred the modern (now majority) rule that H and W have c/a against each other for torts.

May v. Palm Beach Co. (p. 580)

Read this carefully and note Restat. Agency rule on p. 582. And see note 4, p. 585 (Col. L.R. has criticized this.) (See p. 74, infra)

Emp held liable to W of Emp who was using Co. auto w/ its consent on a purely personal mission at the time the tort occurred. (The Emp) may be liable for an act as to wh the agent has a PERSONAL IMMUNITY from suit. ... If an H has an immunity from liability as distinguished from a privilege of

acting, the Principal does not share the immunity. Thus, if a S, while acting w/in the scope/emt, negl. injures his W, the M is subject to liability.

Larceny

Can H be guilty of larceny of W's prop.? Cts. are split here. People v. Morton, (p. 585), says yes.

* (CHAP. 2) ECONOMIC RELATIONS *

(Sec. 1) Antenuptial Agreements

On the S/F declares A/N K "invalid" or "void" absent a memorandum in writing, the post/N memorandum cannot validate the oral K.

Ante-nup. A^nts cannot affect:
(1.) Duty to support
(2.) Right to live together.
(3.) Right to have kids.
(4.) Duty of W to render services.

A/N A^nts okay in N.C. if they are:
(1.) fair
(2.) full disclosure
(3.) don't vary obligations imposed by law

(145/312) ⇒

115 S.E. 73 (Ga. case - T.I.)

A/N A^nts should be written and registered. 47-25.

G.S. 52-13
39-13
47-25

French v. McAnarney (p. 589)

H has the duty - imposed by law, to support W. A marriage cannot be avoided or the obligations imposed by law as incident to the rel. of H and W be relaxed by previous agreement between the parties. ... It is v. the policy of the law that the validity of a K of marriage

Ante-nup. A^nt not to support W or give her any part of his estate was held void for lack of consid.; but, even if it had been consid., it was against pub. policy.

Discussed Tolley case p. 593. Under the S/F, an A^nt "made

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or its effect upon the status of the parties should be in any way affected by their preliminary or collateral agreements."

The enlarged ~~K~~ capacity conferred upon married women by statute does not relieve the H from this liability.

upon consideration of marriage" ~~must~~ shall be in writing and signed by the party to be charged.

assign. Read 10 cases from p. 595.

May v. Palm Beach Chem. Co. (cont'd.) (p. 580)

See p. 72, supra.

"... the basis for liability in this agency ~~L~~ implied — in — law arising from the operation of an automobile w/ the owner's knowledge and consent, is the same as in the ord. P-A or M-S status; and ~~—~~ cases dealing w/ the subsidiary issue of marital identity in the latter situation may be appropriately considered in disposing of this appeal!"

French v. McAnarney (cont'd.)

The great wt. of author. supports the view that such an antenuptial K as is herein issue is contrary to public policy and is unenforceable.

Accord: Smith v. Smith, 154 Ga. 702, 115 S.E. 73 (1922)

Parties may by antenuptial K vary substantially the prop. rights of the spouses arising out of marriage. This right exists at C.L. and by statute.

Postnuptial Ks may change the rights of parties w/ respect to property and to cohabitation provided they are fair, made w/ due formality, & contemporaneously w/ or after actual separation

TELLEZ V. TELLEZ (p. 503) –

The K was void in the 4th sec. of the S/F, in that it was an oral K made upon consid. of marriage, and in that it was an oral K for the sale of land.

Held, this K was void. "A K whereby the H agrees to pay his W for his care, wh is part of her duties as a W, is w/o consideration, against pp. + void." This is true even about statute.

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A/N K may re-adjust the rights of the parties on the K is fair under the circumstances of the case, however. But, the French v. McAnarney type of agreement is not allowed.

Neely's Appeal (p. 595)

Elderly people married after H insisted W sign A/N K giving her $600 yearly after his death in lieu of taking against his will. Because they were old, it was reasonable to expect that H wanted to provide for his children by his previous marriage. W had not contributed to the acquisition of H's estate anyway, and it would not be unfair to not allow her to share in the benefits.

Mathis v. Crane (p. 598)

Held, one of the principal elements to the validity of an ante-nuptial K is that the prospective H must be fair and make a full disclosure of the extent of his property. Here, H fraudulently misrep. his worth. – So, Ct. of Ap. could set this K aside.

See Newton v. Pickell, p. 607.

Cohn v. Cohn (p. 612)

The rule is ~~that~~ an A/N K wh provides for, facilitates or tends to induce a separation or divorce of the parties after marriage is contrary to public policy and is therefore void. The state has a legitimate interest in the preservation of the marital relation and the fulfillment of obligations incident to the marriage status. T/P(w)/Aff'd.

A postnuptial K of separation will be valid only if the marriage is on the rocks, the parties are in fact separated or one is contemplating the immediate separation from the other spouse.

Seuss v. Schukat (p. 616)

A separation and reconciliation are acts of the parties, and in the absence of other considerations ~~obligations~~ obviously do not affect prop. rights under an A/N K. A DIVORCE, on the other hand, is effected by a judicial

decree which completely severs the marital relation. An existing H/W agreement made in contemplation of the particular marriage is, after its dissolution, to no purpose or effect and necessarily is terminated.

NOTE (3), (p. 620), Turner v. Turner - Ordinarily, a separation K is rescinded by reconciliation of the parties. But, any prop. conveyances made by them during separation are valid. Should get reconveyance after reconcil.

Failure to seek reconveyance after reconciliation = acquiescence + raises presumption that H intended W to keep the property.

So. Ohio Bank v. Burkhart

A MATERIAL breach of an agt K, that will avoid obligation of the other to perform. (p. 621)

"A W who seeks to enforce prop. rights under an antenuptial K must show that she has fulfilled her part of the marriage relation." (— or was prevented from doing so by the spouse's acts.)

Thus, the party seeking to enforce an A/N K must prove performance of all conds. precedent, such as the execution of the duties incident to the marriage.

Read:
253/620
225/189
255/315
} Assign. at least to p. 669 (but read 15 cases)

225/681 — effect of div. on A/N K.
158/408 - separ. K
225/358 cf. ⚖

Read: Family Law p. 163 to p. 166 (in Mr. Sampson's office)

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Assignment (final) to p. 704, + esp. cases on pp. 780, 785, 790 + 793 (all re concept of divisible divorce)

G.S. 52-15 = no H liable for any dams. accruing due to tort of W nor for any costs or fines incurred in such criminal proceeding.

G.S. 52-10.1 = H + W have c/a v. each other for torts to their person or prop. as if they were unmarried.

G.S. 52-10 = earnings of W by virtue of any K for her personal service and any dams. for personal interest or any tort sustained by her can be recovered by her suing alone, and such earnings or recovery shall be her sole and separate prop. as fully as if she had remained unmarried.

G.S. 52-13 = Ks between H + W not forbidden by 52-12 + not incompatible w/ p.p. are valid, + any person of full age about to be married + subject to 52-12 may release or quitclaim such rights wh they might respect-

only acquire or may have acquired by marriage in the prop. of each other, and such releases may be pleaded in bar of any action or proceeding for the recovery of the rights + estates so released.

Lead: 246/694, Stokes v. Smith — (re prop); 246/575; 34 N.C.L.R. 571.

Re conveyances of land held by the entireties from one to another directly, 244/489; 39-13.1 thru 13.3. It is allowed by statute in N.C. See 44 A.L.R. 1 22 587.

Re guaranty H's by W for her H, see 242/686 (Note K between H + W w/in purview of 52-12; As W may execute collateral obligations as guarantor, or be primarily liable as surety.) See G.S. 39-15.

* (Sec. 2) In An Organized Family *

Perry v. Stancil (p. 626)
W can convey her prop. to H by deed w/o having her H's signature.

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Any deed by W to third party w/o H's signature is VOID in N.C.

Hypo: W makes K to convey R/A to X. W defaults. X v. W for SP. perf. — J/W = Ct. could only command execution of a deed, and a deed w/o H's signature would be void. Thus, he could not be compelled to sign deed because he (H) was not a party to K. But, W could be held liable for dams. to X.

Priory Exams in N.C. —

No longer required of W after 1945. But, if conveyance is between H & W, priory exam is still required.

Owens v. Owens (p. 633)

W's Right of Eviction

A W who leaves her H w/o him having given her lawful cause to do so may evict him from poss. of all real estate owned by her as her sole prop.

Scanlon v. Scanlon (p. 638)

Majority Rule - when the H purchases real estate and the title to the prop. or the interest therein is taken in the W's name, instead of presuming a resulting trust as would be the case between strangers (purchase money resulting trust), it is a presumption that a gift was intended. It can be rebutted by clear, cogent & convincing proof based on all the facts

Barber v. Carolina Auto Sales (p. 647)

Gen. Rule: A W is not the agent of her H by virtue of the marital rel. between them. Two exceptions:

(1) Agency theory - express or implied.
(2) Ratification

Necessaries

But, H always liable for debts incurred by W for necessaries. See note, p. 650.

McGehee v. McGehee (p. 651)

At C.L., H & W could not be partners.

Held, H & W can become

ptnrs. N.C. in accord.

See Notes, p. 658.

H cannot recover consequential dams. for injuries to his W.

See Blaechinska Case, p. 659.

Felice v. Felice (p. 664)

W worked for ptnrship of wh H was a ptnr. She was allowed recovery for compensation for work done for the ptnrship.

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Estin v. Estin (p. 780)

DIVISIBLE DIVORCE

If H. gets div. from W in state of domicile, and the div. is good, is the W foreclosed from getting alimony? Not necessarily, and this is the concept of "divisible div." The div. action is either in rem or quasi in rem but alimony rights are vested prop. rights and are in personam. ⊗ Therefore ex parte div. by a W cannot declare H liable for alimony

unless that C. has personal juris. of H. In that case, if H has prop. in decreeing state, W could have that prop. sequestered and have the judg. stats against it; but, that judg. would not run against the H personally.

Armstrong v. Armstrong (p. 790)

Ou a H gets an ex parte div. in Fla. and W subsequently got alimony decree in Ohio, the latter decree is valid because the Fla. judg. was in rem and later the status, not the in personam incidents.

A state statute in W's state providing that an ex parte foreign div. will end W's rights to alimony may be unconstitutional, but the Sup. Ct. has not decided this.

May v. Anderson (p. 901)
345 U.S. 528

CUSTODY OF CHILDREN

Re custody of children (an in personam action).

G.S. 50-13, 17-40, 50-16, + 17-39: re rights of parties to custody of children. — If you want custody decided, it may be by writ of habeas

17-39 } writ of habeas corpus.
17-40 }

243/702 kid must be in State

N.C. Rule
205/742

corpus under G.S. 17-39.

42/696 - action may be brought by putative father.

In the absence of unfitness, a parent has the natural right to the custody of the child.

243/702 - A decree of custody will be valid only if the child is in the decreeing state of N.C.

205/742 - custody may be deter. after div.

229/81 - 235/218 - these cases say that on one parent sneaks kid out of state before final judg. of decree is rendered, the decree awarding custody would be void in N.C.

Whether in habeas corp. proceeding attacking right of mother to retain custody of her minor kids, Ohio court MUST give F.F. & C. to Wis. decree awarding custody to M when that decree is obtained by M in Wis. ex parte proceeding and kids are NOT in Wis.? NO, Wis. had no in personam juris. over W.

But, MAY Ohio give F.F. &C.

No alimony w/ absolute div. in N.C.

W, get alimony w/o div. or div. a mensa et thors first, then go for absolute div. G.S. 50-11

11 states give H alimony from W (by stat.).

110/558

to the Wis. decree? This is undecided, but logically we should say that Ohio should not give F.F.+C. to the Wis. decree, because W was entitled to her day in Ct and Wis. had no in personam juris. over W.

Father has C.L. duty to support his kid, and it is a crime to fail to support them, legit. + illegit. 110/558. G.S. 14-322+326 - crim. statutes. G.S. 49 - et seq. - duty to support illegit. children.

The duty of support is a C.L. duty, too, and child has C.L. right to enforce that.

G.S. 50-11 - Effects of an Absolute Div.

* (B.) SUPPORT AND MAINTENANCE *

Comm. v. Berfield (p. 670)

(See p. 671.) H had duty to support W, and W may look to a fund payable to her H, however safeguarded by law or by the language of its creation, from attachment by theirs.

The act of Congress not allowing attachment of R.R. Retirement Pensions applies only while the funds are in the hands of the govt.; but once those funds

reach H's hands, they can be attached in enforcement of H's obligation of support.

McGuire v. McGuire

On H & W are living together, the C. will not step in and declare upon what standard H must support her.

Alimony s/o div. in N.C.

(1.) H must separate & fail to support, or ...
(2.) Be a drunkard & spendthrift, or ...
(3.) Give W grounds for div.

Read (but not on exam): case p. 832, and Sistare v. Sistare, p. 825

Mihalcoe v. Holub (p. 680)

P = W's mother. P supported W and W's two minor children in P's house (while H, the D, had deserted W.) P v. D upon acct. for board and lodging.

D alleged that a presumption of gift between close blood relatives should bar P absent an express K between P & D that D will pay. — Held, no. J/P.

"An implied promise may be relied upon because the law, wh imposes upon the H + father a legal duty, will itself presume a promise to pay from the benefit conferred. (P+W) :: The rel. of the parties, is a circumstance, and may often be an important one, proper for consideration in deter. whether the support furnished was due to a purely voluntary assumption or gratuity on the part of the person seeking to hold the H or father liable; but that circumstance ALONE is NOT enough to require proof of an express K as a cond. to the recovery."

Finis!

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