FAMILY LAW---CLEAN HANDS DOCTRINE IN ANNULMENTS RESTRICTED*

Within the last year two decisions emanating from widely separated areas of the country point to a long overdue change in the sufficiency of fraud required to obtain annulments. Both held that a woman who impelled a man to marry her by false representations that she was carrying his child had perpetrated such a fraud that equity would grant relief even though the couple had engaged in premarital sexual intercourse.

TRADITIONAL VIEW

These decisions represent a marked departure from the traditional view concerning the sufficiency of fraud necessary to sustain an action for annulment. The courts have generally held that where the parties have engaged in premarital sexual intercourse, a husband would be denied an annulment even though induced to marry by his wife's claim that she is pregnant by him. Underlying this view is the rationale that no relief will be afforded a husband who created his own dilemma.

Until recently, the New Jersey Courts have consistently adhered to this view. Rhoades v. Rhoades[1] was an action for separate maintenance. Defendant husband in his answer and counterclaim for annulment

1. 7 N.J. Super. 595, 72 A.2d 412 (Chan. Div. 1950), aff'd, 10 N.J. Super. 432, 77 A.2d. 273 (App. Div. 1951).

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denied the validity of the marriage, contending that plaintiff had induced the marriage by falsely representing that she had borne him a child. Granting the plaintiff's motion to dismiss the counterclaim, the Court held that the fraud sufficient to nullify a consummated marriage must be of an extreme kind and affect the essentials of the marriage contract. The Court found that the wife's false representations did not constitute such fraud.

In Seilheimer v. Seilheimer[2] the husband was induced to marry by the wife's fraudulent representation that she had had sexual relations with no one but him. Actually, at the time of the representation, she was aware of her pregnancy by another man. Again, the Court, in denying defendant relief,applied the clean hands doctrine, finding defendant barred by his premarital relations with plaintiff.

NEW OUTLOOK

In Parks v. Parks,[3] a novel decision handed down by the Kentucky Court of Appeals, the Court made a stark departure from former holdings. Here plaintiff sought an annulment on the ground that he was impelled to marry defendant by her false representation that he had made her pregnant. After living together as a married couple for one week, plaintiff dis-

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2. 40 N.J. Equity 412, 2 Atl. 376 (1885).

3. 418 S.W. 2d 726 (Ct. App. Ky. 1967).

covered that defendant never had any reason to believe that she was pregnant. Immediately plaintiff ceased to cohabit with defendant and instituted this action. When the trial court denied relief, plaintiff appealed. The Court of Appeals reversed holding that a husband is entitled to an annulment where his wife falsely represents her pregnancy in order to induce marriage, and the husband upon discovering the fraud ceases cohabitation.

Applying reasoning analogous to that in Parks, the Superior Court of New Jersey in the case of B. v. S.[4] also departed from the prior rationale. In B. v. S. plaintiff husband, a Caucasian, was induced to marry his wife, also a Caucasian, by her deceptive representation that she was carrying his child. Upon ascertaining that the baby born to his wife had Negroid features, and could not have been his, he sued for annulment. After determining that the child's father was a Negro with whom defendant wife had had voluntary sexual intercourse before marrying plaintiff, the Court granted an annulment to the husband stating that these past decisions expressed the "thinking of Victorian days:"

> That was an era when law was established too often without regard to the realities of human frailty. We should not be bound by strict and unrelenting views which can only cause heartache and misery out of proportion to conduct.[5]

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4. 99 N.J. Super. 429, 240 A.2d 189 (Chan. Div. 1968).

5. Id. at 433, 240 A.2d at 191.

CHANGING SOCIAL ATTITUDES

When compared with the traditional view, this is the better reasoning, in light of contemporary standards of justice and social mores. The former view no longer satisfies the needs of our society, the ultimate standard upon which the continued wisdom of a legal rule is based.

The traditional view relies upon two outmoded concepts. First, since premarital sexual intercourse is an illegal act the man who engages in it, being in pari delicto, may not seek redress in the courts for any misconduct of the woman growing out of such relations. Second, any single man who engages in premarital sexual intercourse with a single woman bears a social obligation to marry her.[6] The first concept has frequently been misapplied to make the husband the victim of a fraud in which he did not participate. Thus, in Parks, the wife never had any reason to believe she was pregnant. She perpetrated the fraud out of a desire to be married to John Parks. Her fraud did not necessarily grow out of premarital sexual relations. Realistically, the fact of the sexual relations in this case may have only facilitated the wife's successful perpetration of the fraud upon John Parks.

Furthermore, the illegality of premarital sexual intercourse is not such as to merit the inequitable rule that a man will be forever precluded from relief against the fraud of the woman, which fraud was merely made

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6. Seilheimer v. Seilheimer, Supra note 3 at 727.

possible by such activity. The woman could not legally compel the man to marry her because he had illegal sexual relations with her. Participation in such illicit relations is rarely penalized under criminal laws today.[7] (For example, in New York State, where until 1967, a divorce could only be granted on the grounds of adultery, there were less than five criminal convictions for such conduct.[8])

The only justification for invoking the pari delicto doctrine is that it might deter illegal sexual intercourse. But as the frequency of such activity shows, the fear of unpleasant consequences is insufficient to deter many persons. Therefore, the doctrine cannot be sustained on this ground.[9]

If the traditional doctrine had been applied, Parks would have produced the inequitable result of rewarding the defendant for a palpable fraud thereby punishing the husband, for his effort to act honorably and do the "right thing."

Stubborn adherents to the traditional view on the sufficiency of the fraud necessary to sustain an annulment contend that allowing relief to persons in the position of the Parks plaintiff, weakens the institution of

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7. Sherwin, Law and Sexual Relationships, Journal of Social Issues (April, 1966), p. 111.

8. Id.

9. Seilheimer v. Seilheimer, Supra note 3 at 727.

marriage. But such reasoning seems to frustrate the design and purpose of the marriage. Surely, the ends of marriage cannot be achieved by forcing a husband to continue a marriage brought about by such deception. The environment which such a marriage would provide for rearing children is questionable at best.

The second concept, the existence of a social obligation on the part of a man to marry a girl with whom he engages in sexual intercourse, is no longer viable. The comments of the judge in B. v. S. are a candid recognition of this fact. Contemporary social attitudes have been marked by a much greater tolerance for such activity than prevailed during the first quarter of the twentieth century. The history of change in sexual values in the United States has been spurred by the attainment of greater equality and personal freedom by women.[10] Where in the past the emphasis was placed on a woman's virginity at the time of marriage, today many men expect virginity only until the woman falls in love, which may mean when she agrees to go steady, or becomes engaged.[11] Factors which have contributed to these new social attitudes include:

> technological changes, rationality, anonymity, altered familial functions, equal status for women, freedom of the young, the dating system, the romantic love complex, an acceptance of play morality,

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10. Bell, Parent - Child Conflict in Sexual Values, Journal Social Issues (April, 1966), p. 35.

11. Id. at 36.

coeducational colleges, and so forth.[12]

This is not to suggest that American society today advocates premarital sexual relations for women or that the number of female transgressions is proportionately greater than it was twenty years ago. The proportion has remained unchanged for the past forty-five years. The current social attitude toward such activity is much more tolerant. These facts have been substantiated by the Kinsey Reports and similar sociological studies conducted during the 1950's and 1960's.[13]

Laws concerning sexual activity are, like public highways, often outmoded on the day they are opened. Such laws, which are actually a codification of social attitudes and policies already long in existence, frequently become inappropriate shortly after their enactment. In the United States there is a normal lag which has always existed between the evaluation of new mores and their codification into laws.[14] The decisions in Parks and B. v. S. seem to correct one aspect of this obsolescence, and to be a step forward in the development of laws dealing with the sufficiency of the fraud necessary to sustain a suit for annulment.

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12. Kaudsen and Pope, Premarital Sexual Norms, the Family and Social Change, Journal of Marriage and the Family, (August, 1965) p. 315.

13. Reiss, The Sexual Renaissance: A Summary and Analysis, Journal of Social Issues (April, 1966) pp. 125-126.

14. Supra note 7 at 121.