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ANNULMENT OF MARRIAGES IN MISSOURI

EDMOND R. ANDERSON, JR.*

INTRODUCTION

The basis and grounds for the remedy of annulment, and the varying effectiveness and requirements of these grounds as indicated by seventy-five years of Missouri appellate decisions, constitute the subject matter of this article. The remedy of annulment, of setting aside, or declaring null and void or non-existent certain marriages has wide application and may become even wider. The intention is to present the application and availability of the remedy in order to enhance its usefulness, and provide an understanding of the direction taken by the law of annulment of marriage in Missouri.

I. POWER OF COURTS TO ANNUL MARRIAGES

Missouri courts have recognized equity jurisdiction to annul, set aside, or declare non-existent certain marriages.¹ American courts of equity generally have exercised such jurisdiction within their power to rescind contracts based on fraud, mistake, lack of consent, and similar defects.² No Missouri statute grants a particular court the power to annul marriages. In fact, Missouri has no statute providing for the remedy of annulment.³ Yet Missouri courts of general jurisdiction, having equity powers, entertain annulment cases and recognize that these cases differ from divorce actions.⁴ Annulment actions are based upon grounds for setting aside the marriage as a contract. "Marriage is considered in law as a civil contract, to which

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1. *Worley v. Worley*, 176 S.W.2d 74 (Mo. App. 1943); *Henderson v. Henderson*, 265 Mo. 718, 178 S.W. 175 (1915), *appeal dismissed*, 248 U.S. 536 (1918).

2. See Speca, *The Development of Jurisdiction in Annulment of Marriage Cases*, 22 U. KAN. CITY L. REV. 109, 114-134 (1954).

3. MO. REV. STAT. §§ 451.010, 451.020, 451.030, 451.040 (1949 state requirements for valid marriage, declare certain marriages void, etc., but they do not provide for any remedies. MO. REV. STAT. § 452.010 expressly provides for the remedy of divorce from the bonds of matrimony. Other than enumerating certain grounds for divorce which were traditional grounds for annulment, there is no suggestion in § 452.010 or the whole of chapter 452 that the term "divorce" was intended to include the remedy of "annulment" as was sometimes put forth in centuries past (1 BLACKSTONE, COMMENTARIES 440).

4. In *Henderson v. Henderson*, 265 Mo. 718, 729, 178 S.W. 175, 177 (1915), *appeal dismissed*, 248 U.S. 536 (1918), the Supreme Court of Missouri stated:

the consent of the parties capable in law of contracting is essential."⁸ Circumstances which prevent a contract from arising, or permit an injured party to avoid a contract which did arise, are the operative facts in a successful annulment action. Of course, marriage contracts are not treated as ordinary commercial contracts.⁹ They will not lightly be set aside.

In these equitable actions, appellate courts can review the facts *de novo*.⁷ Some marriages capable of being annulled are void *ab initio*; others are merely voidable.⁸ Logically, a marriage void *ab initio* never was a valid marriage and would need no court decree declaring it so or annulling it. Nevertheless, Missouri courts have granted annulments in such cases to prevent confusion and uncertainty which might result otherwise.⁹ Missouri courts have awarded alimony pendente lite, suit money, costs of appeal, and counsel fees to a wife who defends an annulment action brought by her husband.¹⁰ Had she brought the action and the husband defended, she would have no right to such allowances.¹¹

"... The distinction between an action for divorce from the bonds of a valid marriage and an action in a court of equity to annul a void or voidable marriage, as applied to our Missouri statutes, seems to be that the latter largely follows the ancient jurisdiction of equity (Meredith v. Meredith, 79 Mo. App. 636; Ridgley v. Ridgley, 789 Md. 298 [29 Atl. 597, 25 L.R.A. 800]; and lies for causes existing at or before the marriage, while the former lies for causes which arose subsequent to the marriage, or for causes of which, though existing at the time of the marriage, the party seeking annulment was in ignorance...."

5. MO. REV. STAT. § 451.010 (1949).

6. *In re Guthery's Estate*, 205 Mo. App. 664, 226 S.W. 626 (1920); *Payne v. Burdette*, 84 Mo. App. 332, 337-338 (1900); *Walker v. Walker*, 316 Ill. App. 251, 44 N.E.2d 937 (1942).

7. *Guthery v. Ball*, 206 Mo. App. 570, 228 S.W. 887 (1921); *Gross v. Gross*, 96 Mo. App. 486, 70 S.W. 393 (1902); *Meredith v. Meredith*, 79 Mo. App. 636 (1899); *Chapline v. Stone*, 77 Mo. App. 523 (1898).

8. *Henderson v. Henderson*, 265 Mo. 718, 178 S.W. 175 (1915), *appeal dismissed*, 248 U.S. 536 (1918).

9. *Payne v. Burdette*, 84 Mo. App. 332, 337 (1900): "It is not disputed that the marriage of an insane person is void, and while in some jurisdictions it is thought not to be absolutely necessary to have a decree avoiding it, yet that it is generally prudent to do so...." *Guthery v. Ball*, 206 Mo. App. 570, 576, 228 S.W. 887, 889 (1921): "... It is quite apparent that no contract was entered into. The whole proceeding wherein the justice attempted to perform a marriage ceremony was ineffective for any purpose. While it might not have been necessary to have brought a suit to annul the alleged proceedings, we have no doubt that a suit is proper in order to prevent misapprehension and confusion as to the real status following the attempted ceremony." *Cf. Jandro v. Jandro*, 246 S.W. 609, 610 (Mo. App. 1923).

10. *Kruse v. Kruse*, 231 Mo. App. 1171, 85 S.W.2d 214 (1935); *Blankenmiester v. Blankenmiester*, 106 Mo. App. 390, 80 S.W. 706 (1904). See generally, Anno., *Right to Alimony, Counsel Fees, or Suit Money in Case of Invalid Marriage*, 4 A.L.R. 926 (1919); 110 A.L.R. 1283 (1937).

11. *Kruse v. Kruse*, *id.*

II. GROUNDS FOR ANNULMENT OF MARRIAGES

A. *In General*

Certain statutes¹² defining marriage as a contract requiring proper consent, providing procedures for the creation of a valid marriage, and prohibiting or declaring void particular marriages provide the grounds for annulment in Missouri. The historical equitable grounds, applied in connection with these statutes, however, give more meaning to the current body of Missouri law. The following material is therefore organized on a broader basis than the Missouri statutes. Seeking a minimum of overlap, the material is divided into problems involving marriages which are: 1) socially prohibited, 2) the fruit of contractual disabilities, not otherwise socially prohibited, and 3) merely voidable for lack of a real consent by one of the parties and not socially prohibited. Socially prohibited marriages include those which are consanguineous, miscegenations, or bigamous, those entered into by insane or feeble-minded persons, and those celebrated without proper formality. Marriages the result of contractual disabilities include those of minors, convicts, unconscious persons, and, prior to 1921, those of insane or feeble-minded persons. Marriages voidable for lack of a real consent include those induced by duress or fraud and those in which one of the parties has some disease or abnormality going to the essence of the marriage relationship, such as impotency.

Unless otherwise stated, the marriages hereafter considered were entered into in Missouri. If the marriage were entered into elsewhere, the law of its place of celebration may be applied to reach a different result.¹³

B. *Social Prohibitions*

1. Family Relationship

Marriages between parents and children, grandparents and grandchildren of every degree, brothers and sisters of the whole or half blood uncles and nieces, aunts and nephews, and first cousins are prohibited and declared absolutely void by statute, whether such persons are so related by

12. Mo. REV. STAT. §§ 451.010, 451.020, 451.030, 451.040, 451.080, 451.090 (1949).

13. *Henderson v. Henderson*, 265 Mo. 718, 178 S.W. 175 (1915), *appeal dismissed*, 248 U.S. 536 (1918).

birth in lawful wedlock or out of lawful wedlock.¹⁴ No Missouri case was found considering the question, but undoubtedly such a marriage could be annulled.¹⁵ Whether the prohibitions upon consanguineous marriages are reasonable, particularly in precluding marriages between first cousins, is another question.¹⁶ The Missouri statute does not appear to preclude valid marriages within the same degrees of affinity (relationships arising solely as result of someone's marriage, such as in-law relationships). No Missouri case has been found considering whether such marriages could be annulled.

2. Miscegenation

Marriages between "white persons and negroes or white persons and Mongolians" are prohibited and declared absolutely void by statute.¹⁷ Apparently such a marriage could be annulled. The St. Louis Court of Appeals assumed so back in 1914¹⁸ But today constitutional guarantees may bar such an annulment. The Supreme Court of California has declared a similar statutory prohibition on marriage unconstitutional as a violation of the equal protection clause of the Fourteenth Amendment to the Constitution of the United States.¹⁹ On the other hand, in *Naim v. Naim*,²⁰ the Supreme Court of Appeals of Virginia upheld a similar prohibition against interracial marriages, and permitted a white man to annul his marriage to a Chinese woman though the parties had gone to another state to marry. An appeal was taken to the Supreme Court of the United States. By a per curiam opinion, that court vacated the judgment of the highest court of Virginia and remanded the case to the Virginia courts to clarify the relationship of the parties to that Commonwealth, in order to clearly present a possible constitutional question of the validity of the miscegenation statute.²¹ Thus there is as yet no authoritative decision on the

14. Mo. REV. STAT. § 451.020 (1949).

15. See *Arado v. Arado*, 281 Ill. 123, 117 N.E. 816, 4 A.L.R. 28 (1917); *Ragan v. Cox*, 208 Ark. 809, 187 S.W.2d 874 (1945).

16. Note, *Consanguineous Marriages—A Scientific Approach*, 15 ST. LOUIS L. REV. 175 (1930).

17. Mo. REV. STAT. § 451.020 (1949).

18. *Marre v. Marre*, 184 Mo. App. 198, 168 S.W. 636 (1914).

19. *Perez v. Sharp*, 32 Cal.2d 711, 198 P.2d 17 (1948), commented on at 17 U. KAN. CITY L. REV. 146 (1949).

20. 197 Va. 80, 87 S.E.2d 749 (1955).

21. *Naim v. Naim*, 350 U.S. 891 (1955).

question. But in view of the trend against interracial prohibitions, Missouri courts should be reluctant to grant an annulment on this ground alone.

In the only reported Missouri case found on point, *Marre v. Marre*,²² Louis sought to annul his marriage to Agnes on the ground that she was a negress. Persons in the neighborhood testified that they thought Agnes' family were negroes. A salesman so testified because a department store, where Agnes had been employed, was in the habit of employing colored girls to work in the department where Agnes had been located. He admitted, however, that the store had no rule to that effect. A grocer so testified because he had received a trunk from Agnes and delivered it to a negro, who was in fact a colored schoolteacher friend of Agnes. Louis testified seeing negroes visiting Agnes' family home and one of her sisters walking the street with a negro woman. Agnes had spent over six years of her childhood in a Roman Catholic institution for the education of young girls and was enrolled there as an Indian. Agnes' mother testified that there was no negro blood in the family, that the family had lived in Mexico, and that one of their immediate ancestors was a Mexican. Two of Agnes' sisters had married white men. The St. Louis Court of Appeals declared that the burden was on the plaintiff (Louis) to show that Agnes was a negress and that he had not sustained this burden. The court stated that a "trace" of negro blood would not suffice to ground such an annulment. One-eighth or more negro ancestry was required.

Even if the prohibition upon interracial marriage be constitutional, the *Marre* case indicates that the plaintiff must show the defendant is of a different racial color in order to be entitled to an annulment. In situations where the parties marry without realizing their different racial colors, one-eighth negro ancestry can be difficult to prove. The plaintiff may also be one-eighth the same racial color. Then the marriage would not be miscegenations. Though the "one-eighth" rule appears more satisfactory than a "trace" rule, in this connection, any such rule is hard to apply.²³

22. 184 Mo. App. 198, 168 S.W. 636 (1914).

23. This difficulty in application led the Supreme Court of California in *Perez v. Sharp*, *supra* note 19, to hold such a prohibition on interracial marriage void for vagueness.

3. Mental Incapacity

Marriages between persons "either of whom is insane, mentally imbecile, feeble-minded or epileptic, are prohibited and declared absolutely void" by statute.²⁴ This was not part of the statutory law prior to 1921. Before that time, mental incapacity bore upon the person's ability to enter into the contract of marriage. The present statute declaring: "Marriage is considered in law as a civil contract, to which the consent of the parties capable in law of contracting is essential,"²⁵ was then deemed applicable to the mentally incapacitated spouse. When the proper facts were shown, an annulment was possible either under the law before or after 1921. Prior to 1921, however, there was considerable question whether such a marriage was void or merely voidable.²⁶ If merely voidable, the marriage was not subject to attack after the death of one of the spouses to the prejudice of the survivor.²⁷ The present statute, prohibiting and declaring these marriages "absolutely void," apparently permits collateral attacks on the validity of the marriage at any time before or after the death of one or both of the spouses.²⁸

Despite the seemingly clear force of the statute,²⁹ the fact of insanity or feeble-mindedness alone has not been thought sufficient for an annulment in recent cases. In *Forbis v. Forbis* (1955),³⁰ the Springfield Court of Appeals pointed out that "mental capacity may be co-existent with mental illness."³¹ The reason seems to be that insanity is difficult to define satis-

24. Mo. REV. STAT. § 451.020 (1949). No epileptic cases were found.

25. Mo. REV. STAT. § 451.010 (1949).

26. *Guthery v. Ball*, 206 Mo. App. 570, 228 S.W. 887 (1921); *In re Guthery's Estate*, 205 Mo. App. 664, 226 S.W. 626, (1920); *Henderson v. Henderson*, 265 Mo. 718, 178 S.W. 175 (1915), *appeal dismissed*, 248 U.S. 536 (1918); *Henderson v. Henderson*, 141 Mo. App. 540, 126 S.W. 203 (1910); *Chapline v. Stone*, 77 Mo. App. 523 (1898).

27. *Henderson v. Henderson*, *Henderson v. Henderson*, *In re Guthery's Estate*, *supra* note 26.

28. In *Henderson v. Henderson*, 178 S.W. 175, 265 Mo. 718 (1915), *appeal dismissed*, 248 U.S. 536 (1918), however, the court, in dictum, cast doubt upon whether an annulment ought to be granted even in the case of a void marriage, after the death of one of the spouses, "for mere lucre's sake."

29. "All marriages between . . . persons either of whom is insane, mentally imbecile, feeble-minded or epileptic, are prohibited and declared absolutely void; . . ." Mo. REV. STAT. § 451.020 (1949).

30. 274 S.W.2d 800 (Mo. App. 1955).

31. *Id.* at 807.

factorily.³² Older Missouri cases did not go so far.³³ In another recent case, *Ertel v. Ertel*,³⁴ the appellate court approved the trial court's refusal to submit to the jury the question: "Was Elmer Ertel at the time of his marriage to Inez Casley on October 3, 1940, a feeble-minded person?" The appellate court thought the trial court was right in submitting, instead: "Did Elmer Ertel at the time of his marriage to Inez Casley on October 3, 1940, have sufficient understanding to know the nature of the contract of marriage and the duties and responsibilities which it created?"

The important determination in the Missouri cases has been whether the alleged mentally incapacitated spouse was *capable of understanding, at the time of the marriage, the nature of the marriage relationship and the duties and obligations assumed by the contracting parties*.³⁵ If the alleged insane or feeble-minded spouse has that quantum of capacity to understand, he or she is not " 'insane' within the contemplation of Section 451.020."³⁶ This suggests that the real social prohibition is against the marriage of persons who cannot understand the nature of marriage, and its duties and responsibilities, rather than being directed against the marriage of insane or feeble-minded persons as such. This is as it should be.

A number of reported Missouri cases have considered the problem of what constitutes mental incapacity upon which to ground an annulment. In *Forbis v. Forbis*,³⁷ the parties were married on February 12, 1951. On January 4, 1952, the wife started at the husband with a butcher knife. A number of incidents followed culminating in an adjudication of her insanity on July 3, 1953. A physician who had attended the wife for over six years, much of which took place prior to the marriage, testified that she had "become mentally ill much before 1951" and that "for years" she had been

32. *Id.* at 805, 806. Cf. *Ertel v. Ertel*, 313 Ill. App. 326, 40 N.E.2d 85 (1942) applying Missouri law.

33. Compare *Westermayer v. Westermayer*, 216 Mo. App. 74, 267 S.W. 24 (1924); *Chapline v. Stone*, 77 Mo. App. 523 (1898).

34. 313 Ill. App. 326, 40 N.E.2d 85 (1942). The court applied Missouri law because the parties had been married in Missouri.

35. *Forbis v. Forbis*, 274 S.W.2d 800 (Mo. App. 1955); *Worley v. Worley*, 176 S.W.2d 74 (Mo. App. 1943); *Westermayer v. Westermayer*, 216 Mo. App. 74, 267 S.W. 24 (1924); *In re Guthery's Estate*, 205 Mo. App. 664, 226 S.W. 626 (1920); *Payne v. Burdette*, 84 Mo. App. 332 (1900); *Chapline v. Stone*, 77 Mo. App. 523 (1898); *Ertel v. Ertel*, 313 Ill. App. 326, 40 N.E.2d 85 (1942). Cf. Note, *Mental Incapacity as Affecting Consent to the Marriage Contract*, 14 ST. LOUIS L. REV. 422 (1929).

36. *Forbis v. Forbis*, 274 S.W.2d at 806 (Mo. App. 1955).

37. 274 S.W.2d 800 (Mo. App. 1955).

"a mental problem." He was a general practitioner, who had done some work in a mental institution back in 1934. The court concluded that there was nothing to show the wife's mental incapacity at the time of the marriage. Evidence of her mental condition before or after the marriage ceremony is of probative value only insofar as it raises a reasonable inference as to mental incapacity at the time of the ceremony. Marriages being presumed valid, persons being presumed sane, and no specific evidence having been presented as to the wife's mental capacity at the time of the marriage or at any time near that date, the annulment was denied.

In *Ertel v. Ertel*,³⁸ Elmer had been adjudged a feeble-minded person and a guardian appointed, by a competent court, just nineteen days after the marriage. Elmer had raised and marketed certain small crops in a satisfactory manner. He had driven an automobile for a number of years. He had worked as a farm hand for different employers at various times in a satisfactory manner. The court thought that the adjudication of feeble-mindedness was not conclusive on the question presented, that the proof of feeble-mindedness at the time of the marriage was not sufficiently clear and definite, and affirmed the trial court's refusal to annul the marriage.

In *Worley v. Worley*,³⁹ about five or six weeks after the marriage, Orville, believing something was wrong with his wife Helen, took her to a physician. Upon examination, the physician determined that she was mentally deficient or feeble-minded, and that her condition was of long standing and permanent. The owner of the farm upon which Orville was working testified that he had seen Helen play wildly with the cattle in the pasture and sit sleeping for long periods of time, and that he thought she was feeble-minded. Orville had seen little of Helen before the marriage. Their courtship had been by correspondence, and Orville had been impressed with the letters he had received from Helen before the marriage. After the marriage Helen told him that her mother and sister had actually written the letters. The Springfield Court of Appeals affirmed the trial court's decree annulling the marriage declaring that the trial court could have found that Helen's "mentality was such that she couldn't comprehend or

38. 313 Ill. App. 326, 40 N.E.2d 85 (1942). The court applied Missouri law because the parties had been married in Missouri.

39. 176 S.W.2d 74 (Mo. App. 1943).

understand a marriage contract, or realize her duties and responsibilities thereunder.”⁴⁰

In *Westermayer v. Westermayer*,⁴¹ Walter's parents sought to annul his marriage to Florence. In November 1918, Walter, suffering from dementia praecox, was placed in a sanitarium. In March 1919, he was adjudged insane by a probate court and his father appointed his guardian. He improved somewhat so that in August 1919, his parents removed him from the sanitarium and took care of him at home. He went out occasionally and even stayed at the home of Florence's parents for about a week. He did queer and ridiculous acts. He wrote incoherent letters to public officials. His conversation was little better. On October 7, 1919, Walter and Florence were married by a justice of the peace in Alton, Illinois. On October 11, 1919, they were married again in a church in St. Louis. About this time Walter's parents, not having learned about the marriage of their son, decided to take him back to the sanitarium because he was not getting any better at home. He was again placed in the sanitarium. Testimony of the sanitarium personnel was to the effect that Walter was hopelessly insane, incurably so, and such that he could not have understood the nature of the marriage relationship. Florence, the minister at the church wedding, and numerous other lay witnesses testified that nothing appeared to be wrong with Walter at the times of the marriages. Some of these witnesses had visited Walter in the sanitarium, some time after the marriage, and testified that he was sane while incarcerated there. The trial court had refused an annulment on the ground that though Walter was insane while in the sanitarium both before and after the marriage, the preponderance of evidence favored his knowing what he was doing and understanding the nature of the marriage contract at the time of his marriage. The St. Louis Court of Appeals reversed, declaring that common sense precluded permitting the marriage to stand on the evidence of insanity presented. Florence and the lay witnesses, who testified that Walter appeared to be all right, were thought by the court to be somewhat interested in the outcome of the case, and therefore, their testimony was given little weight, particularly since some of them had testified that Walter was all right while in the sanitarium. The testimony of the reputable sanitarium personnel was entitled to a lot more weight. Also the court was impressed with the fact that the parents

40. *Id.* at 78.

41. 216 Mo. App. 74, 267 S.W. 24 (1924).

had incarcerated Walter in the sanitarium again in October, believing they would never have done so unless necessary. The family was rather well-to-do. His insanity was incurable and was of a kind which would not have permitted "lucid intervals" of the competency necessary to contract a valid marriage.

In *re Guthery's Estate*,⁴² involved a marriage between William Guthery and Ella Ball, his housekeeper for a number of years previously, at about 11:00 A.M. on the day that William died at about 7:00 P.M. The justice of the peace who performed the ceremony testified that, upon his arrival, William was stretched out in bed, asleep or in a stupor. Ella helped him up so he could shake hands with the justice. He apparently recognized the justice. A male nurse helped William sit upright. Upon request, he wrote his name and the city and state. The letters were well formed though written nervously. Then the male nurse laid William back in bed. To the justice's question whether he realized he was marrying Ella Ball, William said, "Uh-huh," and nodded his head. Paralysis had deprived him of his speech and this was all he said while the justice was there. William took hold of Ella's hand when the judge asked them to join hands. The male nurse testified that William could use his right arm well enough to drink water from a glass. William's physician testified that he had visited the parties shortly before the marriage and that William's mental condition was such that he could not have understood the nature of the act of marriage. Other expert testimony was to the same effect. The Kansas City Court of Appeals affirmed an issuance of letters of administration to Ella. The court stated that there was ample evidence to support a finding that William was mentally capable of understanding the nature of the marriage ceremony, in view of the strong presumption of legality in favor of a marriage, and the fact that at most only property rights were involved. However, in *Guthery v. Ball*,⁴³ the same court affirmed an annulment on the entirely different ground that William was unconscious at the time of the marriage ceremony. The court then declared that its prior decision did not preclude the subsequent contrary result, since the appellate court was not called upon to review the facts *de novo* in the prior action, that action being merely to determine who was entitled to letters of administration.

42. 205 Mo. App. 664, 226 S.W. 626 (1920).

43. 206 Mo. App. 570, 228 S.W. 887 (1921).

In *Henderson v. Henderson*,⁴⁴ Ernest, for some time, before and after his marriage to his nurse Helen, was in bad physical and mental condition. He was not able to care for himself. Numerous lay witnesses testified that he appeared mentally competent at or near the time of the marriage, which took place in Hot Springs, Arkansas, while Ernest was there for medical treatment. A physician who had been treating him testified that he was sane. One of the plaintiffs, a brother who is now attacking the marriage, had written to Ernest, shortly before the marriage, that he thought Ernest seemed much better and had good recuperative powers. Helen had taken extraordinary care of Ernest. His sisters and brothers apparently planned to replace her as his nurse. Shortly thereafter they were married. At the ceremony, Ernest told the minister that she was a good nurse and he wanted her permanently. The Kansas City Court of Appeals affirmed a refusal to annul the marriage, declaring that there was no preponderance of evidence to show any want of mental capacity in Ernest, and that such mental incapacity must be shown by clear and cogent evidence after the death of one of the parties. The Supreme Court of Missouri⁴⁵ affirmed, on the different ground that the law of Arkansas, which governed since the marriage was solemnized there, by statute, which needed considerable interpretation, merely declared this marriage voidable, and that it could not then be annulled after the death of one of the spouses.⁴⁶ The court also thought that affirmance could alternatively be predicated upon the ground employed by the Kansas City Court of Appeals.

In *Gross v. Gross*,⁴⁷ Abraham and Minnie were married in Russia in 1888. They lived together until about 1900, except for the time she was interned for her mental affliction in an asylum. An expert physician, who had supervision over her at the asylum, testified so as to warrant the inference that Minnie was only "periodically insane," that she had "intervening intervals of lucidity," and that, while she had had attacks before, she had also been "lucid" for considerable periods during her married life. The St. Louis Court of Appeals affirmed a refusal to annul the marriage on the ground that Minnie and Abraham ratified the marriage by living to-

44. 141 Mo. App. 540, 126 S.W. 203 (1910).

45. *Henderson v. Henderson*, 265 Mo. 718, 178 S.W. 175 (1915), *appeal dismissed*, 248 U.S. 536 (1918).

46. In *Vance v. Hinch*, 222 Ark. 494, 261 S.W.2d 412 (1953), the Supreme Court of Arkansas approved the Missouri Court's interpretation of the Arkansas statute in the *Henderson* case.

47. 96 Mo. App. 486, 70 S.W. 393 (1902).

gether during her "lucid intervals." At that time, informal "common law" marriages were valid in Missouri, making it possible for parties to become married regardless of the validity of the ceremonial marriage. Since 1921, "common law" marriages thereafter contracted are null and void.⁴⁸ The authoritative value of the *Gross* case would seem limited to marriages solemnized some time before 1921. Nevertheless, it is another example of a determination of the mental capacity of the spouses at the time of the "marriage."

In *Payne v. Burdette*,⁴⁹ Alvora had been regularly adjudged a person of unsound mind and a guardian was appointed by the probate court. About four years later, while the adjudication of the probate court was still in force, Alvora married Ola. The trial court refused to regard the adjudication of the probate court as conclusive evidence of insanity at the date of the marriage, and, upon a hearing, found that at the time of the marriage Alvora had the mental capacity to legally contract the marriage relation. The Kansas City Court of Appeals affirmed stating:

"... marriage, ... is a contract so peculiarly individual and personal as not to permit of any one acting for the party concerned The . . . [statute] declares that the consent of the parties capable in law of contracting is essential. These words do not mean that the parties shall be capable in law to make contracts generally, for we know that a minor may contract a legal marriage. They mean that the parties must be capable in law of consummating a valid marriage contract. . . .

"... In all those matters which a guardian may transact and perform for his ward, the judgment of lunacy should, during the guardianship, be held to be conclusive. But in those matters which can not be performed by a guardian, such judgment ought not to be conclusive."⁵⁰

In *Chapline v. Stone*,⁵¹ George and Lizzie were married in 1879. They lived together for about eighteen years during which time Lizzie kept house for George and was neat about her person. But her mind never developed

48. MO. REV. STAT. § 451.040(5) (1949).

49. 84 Mo. App. 332 (1900).

50. *Id.* at 338-339.

51. 77 Mo. App. 523 (1898).

like her body and she had difficulty grasping ideas. People had to explain things to her like to a child. At best she learned to do things by imitation. The trial court's refusal to annul the marriage was reversed by the St. Louis Court of Appeals by a divided court. The majority believed Lizzie to be an idiot, and thus at no time during her life did she possess "sufficient mind and memory to comprehend the nature and obligations of the marital relation, or sufficient mental capacity to make any contract whatever." The dissenting judge thought that the test should be whether Lizzie's mind could and did act rationally regarding the marriage. Her keeping house for eighteen years and being neat about her person satisfied that test, and furthermore, proved that she was no idiot.

These cases clearly demonstrate that mental capacity at the time of the marriage is the determinative fact. It is a question of fact. Almost any evidence bearing upon this fact is relevant and material. Even testimony of lay witnesses can weigh heavily as shown by *Henderson v. Henderson*. The opinion of physicians, whether having mental treatment experience or not, of sanitarium personnel, and even of owners of farms, as to whether the particular person was capable of understanding the nature of marriage, appear to have some probative force in varying strength. Adjudications of insanity or feeble-mindedness are not conclusive, although certainly strong evidence. Makeweight arguments like "a lesser degree of mental capacity for marriage is necessary than for commercial contracts" are on the way out.⁵² The kind of insanity or type of feeble-mindedness are very important as *Westermayer v. Westermayer* and *Gross v. Gross* point out. With our present knowledge of the mind, this kind of evidence must invariably increase in importance. The courts are looking carefully at the particular person to see whether he could have understood the nature of marriage. If he could not, society prohibits and declares his "marriage" void; the courts will hasten to annul it. If he could, his insanity or feeble-mindedness doesn't make much difference, at least in an annulment action.

4. Prior Marriage Not Dissolved

"All marriages, where either of the parties has a former wife or husband living, shall be void, unless the former marriage shall have been

52. *Forbis v. Forbis*, 274 S.W.2d 800, 806 (Mo. App. 1955); Cf. Note, *Mental Incapacity as Affecting Consent to the Marriage Contract*, 14 ST. LOUIS L. REV. 422 (1929).

dissolved.”⁵³ Bigamous marriages are void. They can be annulled.⁵⁴ If there is any question whether the former spouse is still living, the party seeking the annulment must prove it.⁵⁵

In *Pain v. Pain*,⁵⁶ Elizabeth brought an action for divorce against Rufus. Rufus, by cross-bill asked that the marriage be declared a nullity because Elizabeth's former husband A.N. Clark was still living. Elizabeth had married Clark in 1875. Clark left her in 1877 without known cause, and had never returned. He had not been heard of by anyone to Elizabeth's knowledge until after she had instituted the present case. She waited nine years. Then she married Rufus in good faith believing Clark to be dead. Evidence at the trial established that Clark was still alive and living in Kansas. The St. Louis Court of Appeals affirmed a decree annulling the marriage. The court stated:

“Counsel . . . now insists, that if A.N. Clark deserted plaintiff and left the state in 1877, and had not been heard of by any one where he lived for seven years prior to the plaintiff's marriage to the defendant, then the plaintiff, in marrying defendant, had a right to act on the legal presumption of Clark's death, and, if she married the second time in good faith, believing Clark to be dead, her marriage with defendant was valid. . . . The plaintiff's . . . contention is contrary to the whole doctrine of the Christian marriage. The law is that no length of separation can dissolve the marriage ties her belief in the death of her first husband on account of his continual absence for more than seven years, and her good faith in contracting the second marriage, would shield and protect her from criminal prosecution, but could not give any validity to the second marriage.”⁵⁷

Though apparently not raised in *Pain v. Pain*, in an action for annulment on the ground that the prior marriage of the defendant was not dissolved, the plaintiff will normally be faced with the presumption that the prior marriage was severed by divorce. The presumption is raised to protect

53. MO. REV. STAT. § 451.030 (1949).

54. *Pain v. Pain*, 37 Mo. App. 110 (1889). Cf. *Golden v. Whiteside*, 109 Mo. App. 519, 84 S.W. 1125 (1905).

55. *Carr v. Carr*, 232 S.W.2d 488 (Mo. 1950).

56. 37 Mo. App. 110 (1889).

57. *Id.* at 114.

the validity of present marriages and is very difficult to rebut.⁵⁸ In an annulment action, directly testing the validity of a present marriage, the strongest evidence would be required to rebut the presumption.

5. Ceremonial Marriage Formalities Not Fully Performed

“451.040. 1. Previous to any marriage in this state, a license for that purpose shall be obtained from the officer authorized to issue the same, and no marriage hereafter contracted shall be recognized as valid unless such license has been previously obtained, and unless such marriage is solemnized by a person authorized by law to solemnize marriages

“4. Any person violating the provisions of this section shall be guilty of a misdemeanor.

“5. Common law marriages hereafter contracted shall be null and void.

“6. Provided, however, that no marriage shall be deemed or adjudged invalid, nor shall the validity thereof be in any way affected on account of any want of authority in any person so solemnizing the same . . . if consummated with the full belief on the part of the persons, so married, or either of them, that they were lawfully joined in marriage.”⁵⁹

“451.080. The recorders of the several counties of this state, and the recorder of the city of St. Louis, shall, when applied to by any person legally entitled to a marriage license, issue the same. . . .”⁶⁰

No Missouri case was found directly raising the question whether these statutory provisions create any grounds for annulment. Being declared “null and void,” a common law marriage could be annulled, but no litigant would be likely to claim that a common law marriage was celebrated in

58. See generally, *Reger v. Reger*, 316 Mo. 1310, 293 S.W. 414 (1927); *Phillips v. Wilson*, 298 Mo. 186, 250 S.W. 408 (1923); *Jackson v. Phelan*, 237 Mo. 142, 140 S.W. 879 (1911); *Woods v. American Coal & Ice Co.*, 25 S.W.2d 144 (Mo. App. 1930); *De Ra Luis v. Carter Carburetor Co.*, 94 S.W.2d 1130 (Mo. App. 1936); Anno., *Presumption as to Validity of Second Marriage*, 14 A.L.R.2d 7 (1950).

59. Mo. REV. STAT. § 451.040 (1949). The omitted portions relate to a waiting period before the license can be issued and when such waiting period may be dispensed with.

60. Mo. REV. STAT. § 451.080 (1949).

Missouri after 1921 anyway. More likely cases would involve a defective issuance of the marriage license or an improper solemnization when both parties knew the person solemnizing the marriage was not authorized by law⁶¹ to do so. Under section 451.040, subsection 6, if, when either person being married believed he was lawfully joined, the marriage should not "be deemed or adjudged invalid," *a fortiori*, when neither thought so, the marriage would "be deemed or adjudged invalid." Such a marriage would be similar to a common law marriage, and as with common law marriages, should be invalid, or even "null and void," to effect a consistent legislative approach.⁶²

A defective issuance of the marriage license situation has come before the Supreme Court of Missouri in a prosecution for bigamy, *State v. Eden*.⁶³ Eden had gone through a marriage ceremony with Edith in 1939, living with her for a while, and with Letta in 1941, living thereafter with the latter. Eden contended that the marriage to Edith should not "be recognized as valid", and thus was void and of no legal effect, by reason of what are now sections 451.040 and 451.080. He testified that he had obtained that marriage license from Bradford, a justice of the peace, when the actual county recorder was one Long. Apparently, Long was not in the office when Eden came to buy his marriage license. Since by section 451.080, the recorder must issue licenses, Eden claimed the license was not "obtained from the officer authorized to issue" licenses, as required by what is now section 451.040, subsection 1, and thus the marriage could not "be recognized as valid." The Supreme Court affirmed the conviction on the ground that the marriage was at least not void *ab initio* and was therefore valid until adjudicated otherwise. The court stated:

"... As we construe the language ... 'no marriage hereafter contracted shall be recognized as valid', etc., it was not intended to render void *ab initio* a ceremonial marriage solemnized under the

61. MO. REV. STAT. § 451.100 (1949) provides: "Marriages may be solemnized by any licensed or ordained preacher of the gospel, who is a citizen of the United States, or who is a resident of this state and a pastor of any church in this state, or by any judge of a court of record, except judges of the probate court."

62. The whole of section 451.040 was not enacted at the same time. In 1921, subsection 1 was amended to read as it presently does and what are now subsections 5 and 6 were added. What are now subsections 2, 3, and 4 were added in 1943. 24 V.A.M.S. § 451.040, p. 17.

63. 350 Mo. 932, 169 S.W.2d 342 (1943).

forms of, and in apparent compliance with, the marriage statutes, as in the case at bar.”⁶⁴

“... the most that can be said of the defective issuance of the license, if such it was, is that it rendered the marriage merely voidable, and it was therefore to be treated as valid until declared void by competent authority; . . . We express no opinion as to whether, on the facts assumed, the defect was so gross as to have justified a decree of nullity in a proceeding brought for that purpose. . . .”⁶⁵

Certainly *State v. Eden* has not foreclosed the possibility of an annulment in such a case.

C. Contractual Disabilities

1. Physical Incapacity

In *Guthery v. Ball*,⁶⁶ the marriage ceremony between William and his housekeeper Ella Ball took place at about 11:00 A. M. of the day William died at about 7:00 P. M. After William's last stroke of paralysis some time earlier, he was unconscious practically all the time until his death. The doctor who attended his last illness saw him at 10:30 A.M. on the day of his death. At that time he laid with his mouth open, in a stupor, was dying, and had “the death rattle in his throat.” The doctor returned at 4:00 P.M. and 6:45 P.M. At each time there was no change in William's condition; he continued to be in a dying state. Two other witnesses, who visited him that day, testified that William did not recognize them and was dying. Another witness testified that all during his last illness, William did not appear other than unconscious. The justice of the peace who married William and Ella Ball, however, testified that while he was there, William was helped to sit up and shook hands with the justice, recognizing him. Upon being propped up by a male nurse, William wrote his name and the city and state. The letters were well formed though written nervously. To the justice's question whether he realized he was marrying Ella Ball,

64. *Id.* at 937, 169 S.W.2d at 345.

65. *Id.* at 937, 169 S.W.2d at 345.

66. 206 Mo. App. 570, 228 S.W. 887 (1921). *Cf. In re Guthery's Estate*, 205 Mo. App. 664, 226 S.W. 626 (1920), considered in greater detail, *supra*, p. 128.

William said, "uh-huh" and nodded his head. He took hold of Ella's hand when the justice said, "Join hands." The male nurse testified that William could drink water from a glass holding it with his right arm. The Kansas City Court of Appeals deferred to the conclusion of the chancellor who tried the case, and, in affirming an annulment of the marriage, the court held that "death had struck" William, "he was in a death stupor," "the death rattle was in his throat," and he was wholly incapable of knowing what he was doing at the time of the ceremony. The court thought that two factors were necessary for the making of any contract:⁶⁷ mental consent, and actual physical assent to the agreement. William was unconscious or inert and could give no physical assent to the contract. There was a total absence of any contract of any kind. *Guthery v. Ball* was the only case found presenting an actual physical incapacity to contract marriage. Impotency, which does not prevent the formation of a valid marriage, is considered *infra*, pp. 146-147.

2. Mental Incapacity

Prior to the statutory provision in 1921 that "marriages between . . . persons either of whom is insane, mentally imbecile, feeble-minded or epileptic, are prohibited and declared absolutely void",⁶⁸ such marriages could be annulled on the ground of mental incapacity to contract marriage. The Missouri cases found considering the question are discussed in detail, *supra*, pp. 124-131.

3. Statutory Incapacity

a. *Minors*

"451.090. 1. No recorder shall in any event except as herein provided issue a license authorizing the marriage of any person under fifteen years of age; provided, however, that said license may be issued on order of the circuit or probate court of the county in which said license is applied for, such license being issued only for good cause shown and by reason of such unusual condition as to make such marriage advisable.

67. "Marriage is considered in law as a civil contract, to which the consent of the parties capable in law of contracting is essential." Mo. REV. STAT. § 451.010 (1949).

68. Mo. REV. STAT. § 451.020 (1949).

"2. And no recorder shall issue a license authorizing the marriage of any male under the age of twenty-one years or of any female under the age of eighteen years, except with the consent of his or her father, mother or guardian, which consent shall be given at the time, in writing, stating the residence of the person giving such consent, signed and sworn to before an officer authorized to administer oaths. . . ."

An action for an annulment on the ground of nonage or lack of parental consent could only arise after the perpetration of fraud on the recorder or as a result of the recorder improperly performing his duty.⁶⁹ He should be careful to whom he issues a marriage license.

These statutory provisions carry the implication that certain young persons cannot consent to a marriage contract. Perhaps section 451.090, subsection 1 makes fifteen years the age of consent required for marriage. But, the marriage of a person below that age should not be void *ab initio*. That underage person may wish to affirm or retain the marriage. The statute does not declare such a marriage null or void, and the proviso of subsection 1 expressly permits underage marriages by court order in unusual conditions. The marriage should be voidable by or on behalf of the underage person. This would protect the young person who might otherwise be taken advantage of by some sharp practice. The spirit of the statute indicates that such a minor would not be able to consent so as to bind himself irrevocably to a marriage contract. No Missouri case considering the question was found. It is hard to believe that any court would deny an annulment to a person under fifteen years of age. Yet, to prevent illicit and unfortunate relations, the underage person should be permitted to claim a valid marriage if desired.

As to males between fifteen and twenty-one and females between fifteen and eighteen, parental consent is required. The likelihood of fooling a recorder is more possible within these age groups. No authoritative Missouri case was found determining whether such a marriage, entered into without parental consent, could be annulled. In *Cox v. Denney*,⁷¹ the

69. MO. REV. STAT. § 451.090 (1949).

70. Section 451.090, subsection 3 requires the recorder to state in the marriage license whether the parties, or either of them, are of age, and if not, the recorder must state their ages. Presumably then, the recorder will ask the parties their ages. Cf. MO. REV. STAT. § 451.080 (1949) as to form of the marriage license.

71. 224 Mo. App. 1047, 34 S.W.2d 528 (1931).

father of a sixteen-year-old girl sought to annul her marriage. The Springfield Court of Appeals, declining to consider whether the marriage might be annulled, decided that the father certainly could not do so, when there was nothing to indicate he had brought the action in her behalf and had not joined her as a party. In *Walker v. Walker*,⁷² an Illinois Appellate Court considered whether a seventeen year old girl could annul her marriage to a twenty year old boy, which was solemnized in Cape Girardeau, Missouri. The Illinois court deemed the Missouri statute applicable because the marriage took place there. Neither had secured the consent of his parents, and they had not cohabited after the marriage. The court could find no Missouri case declaring such a marriage voidable. Applying general law, the court thought that since the statute merely prohibited the issuance of a license for that kind of marriage, and did not declare it null or void, the statute was not intended to prevent the formation of a binding marriage. The marriage could not be annulled under the Missouri statute. Similar statutes in other states have been held to indicate no legislative intent to raise the age of consent required for marriage.⁷³ The parental consent provisions are considered merely directory and do not affect the validity of the marriage.⁷⁴

b. *Convicts*

In *Jandro v. Jandro*,⁷⁵ Mayme sought to annul her marriage to Frank. They met and became engaged in the fall of 1921. Frank told her that he was employed by the United States government for the purpose of detecting persons engaged in the unlawful traffic in narcotics, and in such capacity was operating in the State Penitentiary at Jefferson City. He was always dressed in civilian clothes when he called upon Mayme, and he drove the warden's car. On December 26, 1921, they went to California, Missouri where he procured a marriage license. They were married and returned to Jefferson City that evening. They never lived together as husband and wife. In a few days, Mayme discovered that her supposed husband was in

72. 316 Ill. App. 251, 44 N.E.2d 937 (1942).

73. Recent Decisions, 15 ST. LOUIS L. REV. 102 (1929). The writer of the article, after discussing *Sawyer v. Slack*, 196 N.C. 697, 146 S.E. 864 (1929), which held that a statute requiring parental consent alone would not permit a minor to annul his marriage solemnized without such parental consent, thought the Missouri statute would be similarly construed.

74. *Id.*

75. 246 S.W. 609 (Mo. App. 1923).

the penitentiary as a convict. He was serving a two year sentence from December 6, 1920. The Kansas City Court of Appeals remanded, "with directions that judgment be entered annulling the marriage, and restoring to plaintiff the right to her former name." The court stated that Frank was, at the time of his pretended marriage to plaintiff, a convict, "with all civil rights suspended, and was wholly incapable of entering into any contract," citing Section 2291 R.S. 1919.⁷⁶ No marriage contract had been entered into; the formal ceremony was a "mere show."⁷⁷

D. Lack of Real Consent to the Contract

1. Duress

The marriage relationship or contract is based upon consent of the parties exercising their own free will. If the marriage was the product of duress or force and fear, the coerced spouse did not exercise his own free will. In the absence of special reasons for upholding the marriage, the coerced spouse would be entitled to an annulment.⁷⁸ Such a marriage is not void *ab initio*, but merely voidable. The coerced spouse may wish to continue the marriage, and he certainly can do so. The marriage is valid in all respects unless and until the coerced spouse obtains an annulment. A delay in seeking such an annulment militates against the likelihood of actual coercion at the time the marriage was entered into.⁷⁹ The Missouri cases have been reluctant to annul marriages on the ground of duress.⁸⁰ In order to be sufficient for an annulment, there "must be fear of that degree of violence, threatened and impending, or actually inflicted, which is sufficient to overcome the mind and will. . . ."⁸¹ More important, however, other reasons for upholding the marriage or explaining why the

76. "A sentence of imprisonment in the penitentiary for a term less than life suspends all civil rights of the persons so sentenced during the term thereof . . ." This provision now appears as Mo. REV. STAT. § 222.010 (1949).

77. 246 S.W. at 610.

78. *Meredith v. Meredith*, 79 Mo. App. 636 (1899). See generally, Anno., *What Constitutes Duress Sufficient to Warrant Divorce or Annulment of Marriage*, 16 A.L.R.2d 1430 (1951).

79. *Marre v. Marre*, 184 Mo. App. 198, 168 S.W. 636 (1914).

80. *Kruse v. Kruse*, 231 Mo. App. 1171, 85 S.W.2d 214 (1935); *Marre v. Marre*, 184 Mo. App. 198, 168 S.W. 636 (1914); *Blankenmiester v. Blankenmiester*, 106 Mo. App. 390, 80 S.W. 709 (1904); *Meredith v. Meredith*, 79 Mo. App. 636 (1899).

81. *Marre v. Marre*, 184 Mo. App. 198, 204, 168 S.W. 636, 639 (1914). Cf. *Meredith v. Meredith*, 79 Mo. App. 636, 646-647 (1899).

supposedly coerced spouse entered into the relationship may preclude the annulment.

In *Meredith v. Meredith*,⁸² Henry Meredith and Ada Brown had become intimate resulting in her pregnancy. Sometime later Henry went to the Brown home and was met by Brown (Ada's father), who had procured a marriage license, a justice of the peace named Harrison, and two witnesses. Brown had two revolvers. Henry testified that Brown told him he was to marry Ada that night, and if he didn't, he would get the contents of the two guns. Henry testified that Brown was excited, and he believed that Brown would use the guns. He testified further that Brown stood by and blocked the only door leading out of the room, and that the other persons present would not interfere with what Brown was doing or might do. Henry and Ada were married that night at the Brown home. The St. Louis Court of Appeals stated that if this evidence could be accepted with full credit, "there would be no difficulty in finding that he was moved by the influence of impending danger to his life, or of irreparable bodily injury, to marry the defendant, and we could unhesitatingly affirm the judgment. . . ."⁸³ The trial court had granted Henry an annulment. But Harrison testified that Brown, though having a gun or two, reasoned in a persuasive, gentlemanly manner with Henry, that Henry was not alarmed, and in fact was defiant. Harrison reasoned with Henry, pointing out that he had caused Ada's ruin and that he ought to marry her like a man. The two witnesses also reasoned with Henry in a similar manner. It was only after all of this that Henry decided to go through with the marriage. The next day, Henry told Harrison that he was willing to live with Ada, but, if he did, his mother would disinherit him. The St. Louis Court of Appeals reversed and thus denied the annulment. That Henry was defiant rather than alarmed would not permit the inference of duress to be drawn in view of all the circumstances. The court stated:

" . . . In every case of this character regard shall be had to the age, the sex and situation of the party. Force that would overcome and intimidate a mentally feeble person, or one void of courage, would not daunt a strong person or one of heroic courage. Applying these doctrines . . . taking into view the age of plaintiff

82. 79 Mo. App. 636 (1899).

83. *Id.* at 644.

(twenty-eight years), his sex, the situation in which he was placed, and the moral obligation he was under to marry the defendant, and to legitimize his unborn child, we are not persuaded that his will was so far overcome by the threats of Brown, that through fear of loss of his life or great bodily harm, he consented to marry the defendant. . . . Harrison testified, and he is not contradicted in his statement, that he told plaintiff he was not there to marry him by force. . . . Threats and acts of intimidation do not necessarily prove duress, and where the party was under a moral obligation to enter into or discharge a contract, the presumption is that he acted from a sense of moral duty, and this presumption should be weighed in the scale against evidence of duress . . .⁸⁴

In *Marre v. Marre*,⁸⁵ Louis sought to annul his marriage to Agnes on the ground of duress. On several occasions, Agnes' brother told Louis that he would kill him unless he married his sister, the last occasion being two days before the wedding. On one of these occasions, the brother brandished a gun. This brother was known in the neighborhood and apparently had never harmed anyone. He was a quarrelsome fellow who had been in and out of asylums; he was mentally unsound. The day before the wedding, Agnes' mother prevailed upon Louis to come with her to to see Agnes who was in bed seriously sick as a result of a pregnancy he had caused. Louis testified that Agnes' mother locked the door to the room after they were all present, and told him that she would kill him if he did not promptly marry Agnes. If she couldn't do it herself. she would call her son (the mentally unsound brother) to do it for her. The brother was in the house at the time, but apparently Louis did not know that. Louis left the home that evening and returned with a marriage license and justice of the peace the next day, when he and Agnes were married. Louis' parents lived next door to Agnes' family home. Agnes' mother denied making any threats and testified she could not have locked the door while they were in Agnes' room because that door had no lock. The St. Louis Court of Appeals denied the annulment. The court observed that Louis, thirty-one years old, was in the prime of his life, whereas Agnes' mother was sixty-six. Louis had overnight to consider the matter, and, if he were really frightened, he could have appealed to his

84. *Id.* at 646-647.

85. 184 Mo. App. 198, 168 S.W. 636 (1914).

family, friends, or the police for protection, or have escaped. Agnes' pregnancy was caused by Louis, so there is a presumption that he acted from a sense of moral duty which "shall be weighed in the scale against the evidence of duress."

In *Blankenmiester v. Blankenmiester*,⁸⁶ Edgar sought to annul his marriage to Julia on the ground that he had been coerced by her father's threats to prosecute him for a felony. He had been charged with her seduction under promise of marriage, as per Section 1844, R.S. 1899,⁸⁷ and was under arrest when the marriage took place. The St. Louis Court of Appeals, reluctant to summarize the evidence so as to give it publicity, was willing to accept the trial court's finding against duress, and denied the annulment. The court stated: "Whether he married to extricate himself from his trouble or from preference, his action was voluntary in a legal sense." On similar facts, the St. Louis Court of Appeals in *Kruse v. Kruse*⁸⁸ deferred to the determination of the trial court, thought the evidence did not merit publication, and denied an annulment. Again the court thought that the marriage, as extrication from a criminal penalty, for seduction under promise of marriage or for rape, was voluntary action in a legal sense.

2. Fraud

Like duress, fraud prevents the free exercise of consent to the marriage contract by the innocent spouse. Had he known the true facts, he would not have consented to the marriage. A marriage induced by fraud is not void *ab initio*. The innocent spouse has the right to continue the marriage.⁸⁹ Under certain circumstances, it is voidable at the suit of the innocent spouse. In any event, the marriage is valid for all purposes unless and until an annulment is obtained.⁹⁰

86. 106 Mo. App. 390, 80 S.W. 706 (1904).

87. "If any person shall, under or by promise of marriage, seduce or debauch any unmarried female of good repute under twenty-one years of age, he shall be deemed guilty of a felony, and upon conviction thereof, be punished by imprisonment in the penitentiary not less than two nor more than five years, or by fine not exceeding one thousand dollars, and imprisonment in the county jail not exceeding one year; but, if before judgment upon an indictment, the defendant marry the woman thus seduced, it shall be a bar to any further prosecution of the offense, ..." This provision, as amended, now appears as Mo. REV. STAT. § 559.310 (1949).

88. 231 Mo. App. 1171, 85 S.W.2d 214 (1935).

89. *Jordan v. Missouri & Kansas Telephone Co.*, 136 Mo. App. 192, 198-199, 116 S.W. 432, 433-434 (1909).

90. *Id.*

The circumstances under which a marriage induced by fraud can be annulled have given the courts considerable difficulty. To rescind or avoid any contract for fraud, there must have been an intentional misrepresentation of a material fact or state of facts relied upon by the innocent party to his detriment. Whether the fact or state of facts misrepresented were material in the sense required and whether the innocent party relied thereon are the real problems in the reported American cases.⁹¹ A few Missouri cases have considered these problems. In Missouri, if the fact misrepresented "pertains to an essential of the marriage relation," it is material in the sense required.⁹² Exactly what constitutes "an essential of the marriage relation" is not clear. Equally unclear is whether any fact or state of facts other than pertaining to "an essential of the marriage relation" could be sufficiently material upon which to ground an annulment for fraud.

In *Watson v. Watson*,⁹³ Regina misrepresented and concealed from William the fact that she was afflicted with syphilis. This pertained to "an essential of the marriage relation and obviously entitles plaintiff to an annulment of the marriage."⁹⁴ Regina apparently realized she had or might have had the disease before the marriage because, when William learned about it after the marriage and questioned her, she replied that she had been raped when she was young. William's reliance was shown by his inquiries to her, before the marriage, as to the condition of her health and as to whether she had any venereal disease. Regina had assured him that she had nothing the matter with her. The court thought "such reliance appears by necessary intendment" and a specific allegation that William had relied upon the misrepresentation was unnecessary.

91. See generally, *Reynolds v. Reynolds*, 3 Allen 605 (Mass. 1862); *Brown v. Scott*, 140 Md. 258, 117 Atl. 114, 22 A.L.R. 810 (1922); *Akrep v. Akrep*, 1 N.J. 268, 63 A.2d 253 (1949); *Woronzoff-Daschkow v. Woronzoff-Daschkow*, 303 N.Y. 506, 104 N.E.2d 877 (1952); *Shonfeld v. Shonfeld*, 260 N.Y. 477, 184 N.E. 60 (1933); Anno., *Misrepresentation or Mistake as to Identity or Condition in Life of One of the Parties as Affecting Validity of Marriage*, 75 A.L.R. 663 (1931); Anno., *Concealment of Pregnancy as Ground for Annulment of Marriage or Divorce*, 13 A.L.R. 1435 (1921); Anno., *Concealed Premarital Unchastity as Ground for Divorce or Annulment of Marriage*, 82 A.L.R. 532 (1933); Recent Decisions, 26 WASH. U.L.Q. 274 (1941).

92. *Watson v. Watson*, 143 S.W.2d 349 (Mo. App. 1940).

93. *Id.*

94. *Id.* at 350. Recent Decisions, 26 WASH. U.L.Q. 274 (1941); in discussing this case, the author suggests that venereal disease pertains to two "essentials" of the marriage relation: the legalization of sexual relations and the procreation of children. Cf. *Jordon v. Missouri & Kansas Telephone Co.*, 136 Mo. App. 192, 198-199, 116 S.W. 432, 433-434 (1909).

No other Missouri case was found granting an annulment on the ground of fraud. In *Kruse v. Kruse*,⁹⁵ Russell sought to annul his marriage to Dorothy. One of the grounds alleged was fraud in that Dorothy had falsely represented to him that she was pregnant by him, when in fact she was pregnant by another man, and that he relied upon her representations and would not otherwise have gone through with the marriage. Russell and Dorothy had had sexual relations prior to the marriage. Since he apparently seduced her under promise of marriage and raped her because she was under sixteen and could not consent,⁹⁶ the St. Louis Court of Appeals doubted that his actual motive for marrying her was her misrepresentation as to by whom she was pregnant. Extrication from criminal penalties seemed at least as likely a motive. In other words, the court was not convinced that Russell had relied upon the misrepresentation. The court nowhere indicated that this kind of misrepresentation of fact was not material in the sense required for an annulment for fraud. Pregnancy by another man would certainly pertain to "an essential of the marriage relation."⁹⁷ Among the purposes of marriage would be the immediate capacity to procreate children and the procreation of children of the actual husband and wife.

In *Henderson v. Henderson*,⁹⁸ Ernest, while in bad physical and mental condition, married his nurse Helen. She herself had admitted that there could be no normal marital relations between them. She was only thirty-five years old, and Ernest was apparently near death. The Kansas City Court of Appeals thought that Helen must have married Ernest, now dead, for his money and to inherit his property. But the court questioned whether this was fraud. Men and women marry for varying reasons.⁹⁹ Perhaps Helen misrepresented nothing. Perhaps Ernest did not rely on her ardent love and affection. Perhaps he suffered no detriment because he died rather soon afterwards. But more important, perhaps the motive of marriage for money, even if misrepresented, is not material in the sense required to ground an annulment for fraud.

In *Rankin v. Rankin*,¹⁰⁰ a divorce action on the ground of indignities and

95. 231 Mo. App. 1171, 85 S.W.2d 214 (1935).

96. See Mo. REV. STAT. §§ 559.260, 559.300 (1949).

97. See *Reynolds v. Reynolds*, 3 Allen 605 (Mass. 1862). Cf. *Mason v. Mason*, 164 Ark. 59, 261 S.W. 40 (1924).

98. 141 Mo. App. 540, 126 S.W. 203 (1910) considered in greater detail, *supra*, p. 129.

99. *Id.* at 560, 126 S.W. at 209.

100. 17 S.W.2d 381 (Mo. App. 1929).

thus of questionable value as support for the basis of an action for an annulment, but perhaps indicative of the feeling of the Kansas City Court of Appeals on the matter of fraud, that court, regarding the wife's good faith in entering the marriage, stated:

"It is held that even where there is no agreement that the parties are to love and cherish each other that such an agreement is implied in the contract of marriage unless eliminated by agreement of the parties, and that if one party has no love for the other but detests the thought of living with him and fails to make that condition known he or she is guilty of conduct tantamount to a fraud. . . ."¹⁰¹

In *Viermann v. Viermann*,¹⁰² August sought to annul his marriage to Mary on the ground of fraud. He was eighty-three and she sixty-nine, at the time of the marriage. Both had been married before. August had asked Mary if she were physically fit to perform her marital duties, if she was "still potent," if she had any "drawback pains," and the like. Mary assured him that there was nothing to impede her performing all her marital duties. After the marriage, Mary refused to have sexual relations with August. On one attempt at intercourse, full penetration was impossible and Mary hollered, "It hurts." Upon August's insistence, Mary went to a physician thereafter, but no medical evidence as to her condition was introduced at the trial. The St. Louis Court of Appeals refused an annulment on the ground that the impotency must be shown to be permanent and incurable. In other words, even though possible misrepresentation and reliance be present, if the misrepresented fact be sexual potency, it will not be material in the sense required unless permanent and incurable impotency be shown. It can be said that only then would it pertain to "an essential of the marriage relation," although it does interfere for a while until cured even though it be curable.

Impotency, having before been convicted of felony or infamous crime, and pregnancy by any other man than the intended husband, at the time of the marriage, are grounds for divorce in Missouri.¹⁰³ The legislature thought these matters important to the satisfactory marriage. They should be equally

101. *Id.* at 382.

102. 213 S.W.2d 259 (Mo. App. 1948).

103. Mo. REV. STAT. § 452.010 (1949).

important in an annulment action.¹⁰⁴ When one of these facts is misrepresented and the other spouse relies thereon, that fact should be material in the sense required for an annulment on the ground of fraud. Impotency and pregnancy by another man pertain to "an essential of the marriage relation." Conceivably, having before been convicted of felony or infamous crime does not. This is one example of a situation which may sometime force the Missouri courts to clarify the meaning of what "pertains to an essential of the marriage relation," or to decide if something less will suffice as material upon which to ground an annulment for fraud.

3. Impotency

Viermann v. Viermann,¹⁰⁵ an action for an annulment on the ground of fraudulent concealment of impotency, was treated by the St. Louis Court of Appeals as if it were an action on the ground of impotency. The court, in denying the annulment because there had been no showing that the impotency was permanent and incurable, stated:

"... To warrant a court in setting aside a marriage on the ground of impotency, it must appear that the impotency is permanent and incurable . . . the evidence shows that the connection had between the parties was of an imperfect character, but it does not show that it was due to any incurable condition. In fact, there was no evidence produced from which the cause of defendant's inability to afford plaintiff sexual gratification could be determined. From the evidence presented, it is just as reasonable to suppose that it was due to nervousness or temporary obstruction, as to find that it was due to an incurable malformation of defendant's sexual organs."¹⁰⁶

Certainly malformation of sexual organs could establish incurable im-

104. When the ground for divorce arose at the time of the marriage, there is no reason why it should not be a ground for an annulment. The only reason why a divorce should be socially preferred to an annulment is that the latter has retroactive effect declaring that the marriage never existed. But when the ground for divorce arose at the time of the marriage, in theory the divorce could be obtained minutes later. An annulment would be just as practical, and perhaps less troublesome for the parties thereafter in respect to reputation, marital rights, and the like. Even if this reasoning is not necessarily sound, misrepresentation or concealment of what is a ground for divorce should be a ground for an annulment for fraud.

105. 213 S.W.2d 259 (Mo. App. 1948), considered in greater detail, *supra*, p. 145.

106. *Id.* at 261.

potency. Just what other evidence would suffice to show permanent and incurable impotency is subject to conjecture.

III. PARTIES ENTITLED TO ANNUL MARRIAGES

Generally, a void marriage can be collaterally attacked by any interested person, even after the death of one or both of the spouses. The Supreme Court of Missouri has wondered whether this is proper "for mere lucre's sake."¹⁰⁷ Otherwise, the Missouri cases assume that collateral attack by interested strangers is possible.¹⁰⁸

On the other hand, a voidable marriage can only be annulled by or on behalf of the innocent party who has the right to obtain an annulment. Collateral attacks have not been permitted by the Missouri courts.¹⁰⁹ In *Cox v. Denney*,¹¹⁰ John Cox sought to annul the marriage of his daughter Ethel, who was only sixteen years of age at the time of the marriage. There was nothing to show that the action was brought for her benefit or with her knowledge and consent. She was not made a party to the action either as plaintiff or defendant. No service of process was made upon her. There was no record that she was in court at the trial or that she knew anything about the proceeding. A child had already been born of the marriage. The Springfield Court of Appeals affirmed a refusal to grant an annulment on the ground that the daughter was an interested party, and as such must be made a party to the action before her rights may be determined.

IV. EQUITABLE DEFENSES IN ANNULMENT ACTIONS

Being within equity jurisdiction, courts may deny an annulment if the plaintiff's conduct has been inequitable. Cohabitation after knowledge of the defect rendering the marriage void or voidable, failure to diligently bring an action to annul, knowledge of the defect prior to the marriage, and even

107. *Henderson v. Henderson*, 265 Mo. 718, 178 S.W. 175 (1915), *appeal dismissed*, 248 U.S. 536 (1918).

108. *In re Guthery's Estate*, 205 Mo. App. 664, 226 S.W. 626 (1920); *Henderson v. Henderson*, 141 Mo. App. 540, 126 S.W. 203 (1910); *Ertel v. Ertel*, 313 Ill. App. 326, 40 N.E.2d 85 (1942) applying Missouri law.

109. *Cox v. Denney*, 224 Mo. App. 1047, 34 S.W.2d 528 (1931); *In re Guthery's Estate*, 205 Mo. App. 664, 226 S.W. 626 (1920); *Henderson v. Henderson*, 265 Mo. 718, 178 S.W. 175 (1915), *appeal dismissed*, 248 U.S. 536 (1918); *Henderson v. Henderson*, 141 Mo. App. 540, 126 S.W. 203 (1910). See generally, Anno., *Right to Attack Validity of Marriage After Death of Party Thereto*, 76 A.L.R. 769 (1932).

110. 224 Mo. App. 1047, 34 S.W.2d 528 (1931).

unclean hands are examples of such inequitable conduct.¹¹¹ Missouri courts have been reluctant to deny annulments by reason of equitable defenses when the ground rendering the marriage void or voidable was clear.¹¹² When the ground for annulment was unclear, Missouri courts have denied annulments on the equitable defenses raised,¹¹³ or used the equitable defenses as makeweight arguments in denying the annulment because the ground alleged was not sufficiently shown.¹¹⁴

In *Chapline v. Stone*,¹¹⁵ George sought to annul his marriage to Lizzie on the ground of her feeble-mindedness at the time of the marriage. Her feeble-mindedness was clear. George had lived in the home of Lizzie's parents for four months prior to the marriage. They spent the first thirteen years of their married life in the home of her parents. George realized she was suffering from some mental incapacity but tried to make the best of it and avoid notoriety. At first he had attributed some of her "oddities" to the fact that she was hard of hearing. They spent the last of their eighteen years of married life alone in a four room house. Thereafter, Lizzie was declared insane by a competent court. The St. Louis Court of Appeals, by a divided court, reversed the trial court's refusal to annul. The appellate

111. See generally, Anno., *Cohabitation of Persons Ceremonially Married After Learning of Facts Negating Dissolution of Previous Marriage of One, as Affecting Right to Annulment*, 4 A.L.R.2d 542 (1949); Anno., *Right of Party to Marriage Who Was Aware of its Invalidity Because of a Former Undissolved Marriage, to a Decree of Annulment*, 54 A.L.R. 80 (1928); Anno., *Antenuptial Knowledge Relating to Alleged Grounds as Barring Right to Annulment*, 15 A.L.R.2d 706 (1951).

112. *Chapline v. Stone*, 77 Mo. App. 523 (1898); *Pain v. Pain*, 37 Mo. App. 110 (1889). Cf. *Needham v. Needham*, 299 S.W. 832, 834-835 (Mo. App. 1927), an action for divorce by the husband on the ground that the wife was pregnant with another man at the time of the marriage. The St. Louis Court of Appeals granted the divorce under what is now Mo. REV. STAT. § 452.010 (1949), in spite of the fact of premarital sexual relations between these two parties which was raised as a defense. The court stated: "In passing . . . it may not be amiss to make some slight reference to the general rule that relief will ordinarily not be granted upon the ground here alleged (especially where . . . an annulment is asked from a court of equity), if it is shown that the husband knew that the woman he married was unchaste, and, particularly, if he himself had been guilty of prenuptial intimacy with her. However, the authorities hold, whether wisely or not, that such premarital intimacy between the parties is not a bar to the granting of the decree, when, as in our own state, the remedy is one expressly created by statute. . . . The reason for this distinction is that the statute itself makes no exception because of the husband's prior participation in his wife's incontinency, and that, consequently, no such exception will be read into the statute by implication or construction."

113. *Slais v. Slais*, 9 Mo. App. 96 (1880).

114. *Marre v. Marre*, 184 Mo. App. 198, 168 S.W. 636 (1914); *Gross v. Gross*, 96 Mo. App. 486, 70 S.W. 393 (1902).

115. 77 Mo. App. 523 (1898).

court pointed out that there were strange features of the case and perhaps equitable considerations, "but all this does not make that valid which in the beginning was invalid." A vigorous dissent thought that Lizzie's feeble-mindedness was not clear, that George had not been diligent in bringing this action, and that a man who lived with her parents for over thirteen years should not now be permitted to cast her out.

In *Slais v. Slais*,¹¹⁶ William sought to annul his marriage to Mary on the ground of her insanity. The parties had been married before for eight years, when Mary obtained a divorce on October 15, 1874. On January 24, 1875, they were married again after Mary's request that William take her back and her promises that she'd quit complaining and scolding him, would not bring up old troubles, and they'd live like a newly married couple. The day after, Mary started complaining as badly as ever, crying, and saying that he did not give her enough money. Mary's mind was ill-balanced at all times. She was eccentric and irritable by disposition. At the time of the trial she had become positively insane. A physician, who had not seen her at the time of the marriage or known of her mental condition then, testified, "that she was totally incompetent to understand the obligations of any contract" on that day. The St. Louis Court of Appeals affirmed the trial court's refusal to annul the marriage. The court stated:

"Here the conduct of the plaintiff does not enable him with good grace to ask for relief. Apart from the circumstances under which the decree of divorce was evidently granted, the solemn obligations of marriage were again put on with as little ceremony as they had been shuffled off. The first complaint of the husband is, not that his wife was insane,—that seems to have been an afterthought,—but that she behaved just as she had behaved before the remarriage. . . . The opinion of the physician, . . . is to be taken for what it is worth; and what it is worth is very little, in view of the husband's own testimony, and of the fact that he, who had lived with her for eight years, married her believing her apparently to be no worse than she had been before the separation."¹¹⁷

In *Chapline v. Stone*, the ground for annulment seemed clear to the majority of the court, so the equitable defenses of lack of diligence, possible

116. 9 Mo. App. 96 (1880).

117. *Id.* at 97-98.

knowledge of the defect before the marriage, and cohabitation and benefits accepted after knowledge didn't make much difference. In *Slais v. Slais*, the ground for annulment was not so clear, and the plaintiff spouse should have known of the insanity, if it were present. The matter of insanity was apparently an afterthought anyhow. In *Gross v. Gross*,¹¹⁸ the husband did not diligently bring his action to annul, and the court thought that the parties had ratified the marriage during one of the wife's "lucid intervals" even if she were insane at the time of the marriage. In *Pain v. Pain*,¹¹⁹ eight or ten days before the parties separated, the husband had heard a rumor in the neighborhood that the wife's prior husband was still living. The St. Louis Court of Appeals did not refuse to grant the husband an annulment because of his cohabitation after such knowledge. The court said that the doctrine of "condonation" was applicable only to valid marriages and in divorce actions. Furthermore, the court thought that the knowledge must have come from a reliable source, and that mere rumors would be insufficient to render his subsequent cohabitation inequitable. Finally, in *Marre v. Marre*,¹²⁰ the St. Louis Court of Appeals thought that delay in bringing an action for an annulment on the ground of duress threw some doubt upon whether the marriage was in fact the result of coercion when other reasons for the parties marrying were present. Also, the court thought that sexual relations prior to marriage demonstrated unclean hands on the part of the plaintiff husband. The court used these as makeweight arguments in otherwise denying an annulment. The force of an equitable defense can be affected by the particular ground upon which an annulment is sought as well as upon the strength of the plaintiff's case.

118. 96 Mo. App. 486, 70 S.W. 393 (1902).

119. 37 Mo. App. 110 (1889).

120. 184 Mo. App. 198, 168 S.W. 636 (1914).