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Bradbury Pleading and Practice Reports, Volume 3

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meet its obligations, nothing more can be required." (See *Kujek v. Goldman*, 150 N. Y. 176; *Reynolds v. Reynolds*, 3 Allen (Mass.) 605.) On appeal (174 N. Y. 472) the court of appeals held that "there is no valid reason for excepting the marriage contract from the general rule"—i. e., of fraud, as above stated. In this we think the court erred. In *Svenson v. Svenson*, 78 A. D. 536; the court recognizes the general rule that "ill health although concealed or misrepresented will not itself justify an annulment." Yet the rule has no application to "a disease which involves contagion in the marital relation." (On appeal, 178 N. Y. 54.)

This reasoning is followed in the principal case. The court took judicial notice of the fact that tuberculosis is such a disease that "through the close tie of the marital relation grave and disastrous results from infection may be caused to the other party and possible evil consequences to the offspring of such a marriage."

It is imperative that this doctrine be not extended too far. The facts of the principal case are apparently strong. There was an actual misrepresentation to an inquiry. Whether the nature of his disease imposed a positive duty upon him to make it known, is not in issue. (Am. & Eng. Encyc. 14, p. 69-71.) A physician testified that defendant is incurable. The danger of annulling a marriage upon a physician's opinion is very obvious. Cohabitation lasted for a few days and ceased immediately upon discovery of the fraud. The court does not go into the question whether reasonable prudence could have discovered the nature of the disease.

The dangers of collusion are great. There was no defense offered in the principal case. There is, therefore, little likelihood of an appeal; the decision, though in its nature *exparte*, will serve as a precedent.

BOOK REVIEWS.

BRADBURY' PLEADING AND PRACTICE REPORTS, VOLUME 3.
edited by Harry B. Bradbury (The Banks Law Publishing Co.).

Reviewers, we think, may be separated into two classes. The attitude of one class is typified by that of William Style, who, as long ago as 1658, wrote the "The Epistle Dedicatory," which is prefixed to his reports, that "the Press hath been very fertile in this our Age, and hath brought forth many, if not too many births of

this nature." The other class is imbued with the spirit of that great master of the intricate art of pleading, Baron Parke, who, as Serjeant Ballantyne informs us in his recollections, sacrificed promptness at dinner on the altar of a fine point of demurrer. As for us, we trust we are not so oblivious to the toil incident to the preparation of a book for the legal profession as to receive it ungraciously, after the manner, whether real or affected, of reviewers of the former class.

Mr. Bradbury's latest addition to his series of reports is one to delight the heart and mind of a Baron Parke. It is filled to overflowing, like "a gift-ship to Belgium," with decisions which adjudge points in pleading and practice that are of great interest and extreme nicety. The usefulness of the book is enhanced by the addition (*e. g.*, page 3, *et seq.*, and page 16, *et seq.*), of exhaustive notes. The work, of course, is designed purely for members of the bar. But we venture the opinion that familiarity with its pages will compensate the law-student for his labor, for, as it was anciently quaintly said (*Co. Litt.*, §534), "know, my son, that it is one of the most honorable, laudable, and profitable things in our law, to have the science of well pleading in actions reals and personals; and therefore I counsaile thee especially to imploy thy courage and care to learn this."

We cannot but commend an undertaking such as this, that will put in enduring form many of the short decisions now preserved in *The New York Law Journal*, which illuminate the path to judgment. The utility of printing charges of trial judges is open to doubt. As a rule, they are extemporaneous, and lack, however accomplished the deliverer, that acute analysis which is the fruit of discriminating research and long meditation. On the other hand, we heartily approve of the idea of following an opinion with the pleadings, orders and other forms, discussed by the court or used by counsel.

If Mr. Bradbury has erred in the discharge of his editorial duties, his failings may be said to be negative rather than positive. Perhaps we expect too much of him. If so, his is the fault, and his admirable "Rule of Pleading" the proximate cause thereof.

Appropos of *Cabe May Glass Co. v. Jetter Brewing Co.*, (City Ct., 1912), at page 34, which held that a denial of knowledge or information, etc., is frivolous, if interposed by a corporation sued

for goods sold and delivered. Apparently, the learned editor has overlooked *Scranton & Lehigh Coal Co. v. Hetkin & Co.*, 78 Misc. 512, 138 N. Y. Supp. 617 (1912), a case where such a denial was declared to be proper by a court sitting, to use the dictum of MacLean, J., across the "affluent East river, which often divides law and practice as did the Mahratta ditch, upon one brink of which the widow's suttee was commended to and of the pious, while on the other it was abhorrent to the law and religion." (*Baum v. Elias*, 64 Misc. 43, 44, 117 N. Y. Supp. 935 [1907].) While we think the *Cape May* case (supra) is impeccably correct, attorneys in the Second Judicial Department, we believe, will continue to treat the *Scranton* case (supra) as binding upon them, until it is overruled.

Is *Florsheim v. Berlinger* (City Ct., 1911), at page 40, sound? With us, the taint of usury will render a note void, as between the immediate parties thereto, to say the least. Where then a defendant tacitly admits the making and existence of a note (which means, to be sure, nothing less than a valid note), by omitting to deny the plaintiff's allegations thereof, logical consistency would seem to require that that defendant should be precluded thereby from thereafter setting forth the defense of usury (see *Fleischmann v. Stern*, 90 N. Y. 110 (1881), and *Banser v. Richter*, 68 Misc. 192, 123 N. Y. Supp. 678 [1910]). Is not, therefore, the opposite result attained by the court in the *Florsheim* case (supra) untenable? It must remain a matter of regret that Mr. Bradbury has not favored us with his opinion on this question.

The head-note to *Speedwell Motor Car Co. v. Boyce* (Sup. Ct., 1913), at page 324, is misleading. It is true the court held that a motion for bill of particulars may be based upon an attorney's affidavit. But the head-note is inadequate, because it omits to indicate that the court carefully limited its ruling to the "circumstances of this case." Indeed, the editor's failure to state the facts robs the case, as reported, of practical value. But in any event the true rule is, in our opinion, that "the affidavit of an attorney will only be received when it is shown that he is the only person who has knowledge of the subject-matter of the litigation, or that it is not possible to obtain the affidavit of the party, and that the attorney has received from the party full information of the subject-matter and makes full disclosure of what the information consists" (*Mungall v. Bursley*, 51 App. Div. 380, 64 N. Y., Supp. 674 [1910]).

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