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the determination of Congress."[136] But in either event, since it is a competition problem which is sought to be remedied, any restrictions which might be placed upon labor practices should be limited to those which tend to affect the product market—not the labor market. In this connection, the issue of whether such activities involve valid union objectives is of vital importance.

When Senator McClellan presented his antitrust proposal[137] to Congress, he stated:

> I hope that public hearings on this measure will be held early in the next session of the Congress [87th Cong., 2d Sess.] and that all interests will be given an opportunity to be heard.[138]

It might be well to add, with respect to this bill or any other proposal, antitrust or labor, that the Senator's wish, that all be heard, should only be granted upon the stipulation that the clichés, "pro-labor" and "anti-labor," "pro-management" and "anti-management," be abandoned.[139] In the past such phrases have constituted major stumbling blocks in the discussion of much needed legislation. The present situation is a serious one. Political implications must be kept to a minimum;[140] the public interest demands that a more fruitful level of thought obtain.

ANNULMENT OF MARRIAGE IN NEW YORK FOR FRAUD BASED UPON RELIGIOUS FACTORS

Since the only ground for divorce in New York is adultery,[1] it is not surprising that the courts of New York have been the forum for an unusually large number of suits for annulment. Of the grounds provided by statute for annulment of marriage,[2] fraud is the most commonly used. It has been aptly

136. Allen Bradley Co. v. Local 3, Int'l Bhd. of Elec. Workers, 325 U.S. at 810.

137. S. 2573, 87th Cong., 1st Sess. (1961).

138. 107 Cong. Rec. at 18946.

139. E.g., for a rather critical view of Senator's McClellan's bill see Int'l Teamster, March 1962, p. 17.

140. In this connection, it might be well to note the words of Senator McClellan: "I am not unmindful of the political risks one takes when he insists that we should have a rule of law and not a rule of economic force . . . . [W]hat I am doing is not popular politically . . . ." 107 Cong. Rec. at 18946.

1. N.Y. Civ. Prac. Act § 1147.

2. Voidable: non-age, N.Y. Dom. Rel. Law § 7(1), N.Y. Civ. Prac. Act § 1133; want of understanding, N.Y. Dom. Rel. Law § 7(2); idiocy, N.Y. Civ. Prac. Act § 1136; lunacy, N.Y. Civ. Prac. Act § 1137; physical incapacity, N.Y. Dom. Rel. Law § 7(3), N.Y. Civ. Prac. Act § 1141; force or duress, N.Y. Dom. Rel. Law § 7(4), N.Y. Civ. Prac. Act § 1139; fraud, N.Y. Dom. Rel. Law § 7(4), N.Y. Civ. Prac. Act § 1139; five years' incurable insanity, N.Y. Dom. Rel. Law § 7(5).

Void: incest, N.Y. Dom. Rel. Law § 5; former spouse living, N.Y. Dom. Rel. Law § 6; N.Y. Civ. Prac. Act § 1134.

described as "New York's answer to Reno."[3] One of the essentials of a marriage is that it must be contracted with the consent of the parties thereto;[4] such consent is lacking where a party consents to the marriage by reason of fraud.[5] Section 7 of the Domestic Relations Law[6] provides that under such circumstances the marriage is void from the time its nullity is declared by a court of competent jurisdiction. Since the statutes do not explicitly say what fraud is, the courts are free to meet each case as it arises and to judge the defendant's conduct by the test of fair and conscientious dealing.[7]

The fraudulent misrepresentation must be of a material fact,[8] so that if it had not been practiced the party who was deceived would not have consented to the marriage.[9] The plaintiff must also show that the party deceived had the right to rely upon such representation, in the sense that it was such as would have influenced an ordinarily prudent and intelligent person into giving his consent to the marriage.[10] Although there is some authority which states

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A marriage may be "dissolved" if a spouse is absent for five years and believed to be dead. N.Y. Dom. Rel. Law § 7-a. A marriage automatically "terminates" on the sentence of either party to life imprisonment. In re Lindewall, 287 N.Y. 347, 39 N.E.2d 907 (1942); Wilder v. Wilder, 181 Misc. 1059, 43 N.Y.S.2d 287 (Sup. Ct. 1943); Bond v. Bond, 162 Misc. 449, 295 N.Y. Supp. 24 (Sup. Ct. 1937). See also N.Y. Dom. Rel. Law § 6(2).

3. Comment, 48 Colum. L. Rev. 900 (1948).

4. Shonfeld v. Shonfeld, 260 N.Y. 477, 184 N.E. 60 (1933). N.Y. Dom. Rel. Law § 10 provides: "Marriage, so far as its validity in law is concerned, continues to be a civil contract, to which the consent of parties capable in law of making a contract is essential." Marriage is regulated and controlled by law based on principles of public policy affecting the welfare of the people of the state, the state as well as the parties being a party to every marriage. Reese v. Reese, 179 Misc. 665, 40 N.Y.S.2d 468 (Sup. Ct.), aff'd, 268 App. Div. 993, 51 N.Y.S.2d 685 (2d Dep't 1943). "This statute declares it [marriage] a civil contract, as distinguished from a religious sacrament, and makes the element of consent necessary to its legal validity. . . . It is declared a civil contract for certain purposes, but it is not thereby made synonymous with the word contract employed in the common law or statutes. . . . It cannot be dissolved by the parties . . . nor released with or without consideration. The relation is always regulated by government. . . . It partakes more of the character of an institution regulated and controlled by public authority, upon principles of public policy, for the benefit of the community." Wade v. Kalbfleisch, 58 N.Y. 282, 284, 17 Am. Rep. 250, 252 (1874).

5. Waff v. Waff, 189 Misc. 372, 71 N.Y.S.2d 775 (Sup. Ct. 1947).

6. N.Y. Dom. Rel. Law § 7(4).

7. Waff v. Waff, 189 Misc. 372, 374, 71 N.Y.S.2d 775, 777 (Sup. Ct. 1947). See also Longtin v. Longtin, 22 N.Y.S.2d 827 (Sup. Ct. 1940).

8. Roger v. Roger, 24 Misc. 2d 566, 203 N.Y.S.2d 576 (Sup. Ct. 1960).

9. Shonfeld v. Shonfeld, 260 N.Y. at 481, 184 N.E. at 61; Di Lorenzo v. Di Lorenzo, 174 N.Y. 467, 67 N.E. 63 (1903); Watkins v. Watkins, 197 App. Div. 489, 189 N.Y. Supp. 860 (1st Dep't 1921); Girshick v. Girshick, 44 N.Y.S.2d 432 (Sup. Ct. 1943); Griffin v. Griffin, 122 Misc. 837, 204 N.Y. Supp. 131 (Sup. Ct. 1924).

10. Di Lorenzo v. Di Lorenzo, 174 N.Y. 467, 67 N.E. 63 (1903); Marks v. Marks, 283 App. Div. 1136, 131 N.Y.S.2d 513 (Sup. Ct. 1954); Croce v. Croce, 199 Misc. 635, 100 N.Y.S.2d 97 (Sup. Ct. 1950); Pawlowski v. Pawlowski, 65 N.Y.S.2d 413 (Sup. Ct. 1946).

that the plaintiff must prove that the fraud goes to the essentials of the marriage contract[11]—that is, the rights and obligations connected with cohabitation and consortium attached by law to the marital status,[12]—it is more widely accepted that the misrepresentation need not necessarily concern these *essentialia*. Rather it must relate to matters which have a direct and vital bearing upon the marital happiness and health of the one who was misled.[13]

In cases where the alleged fraud relates to a party's religious beliefs or religious practices a serious dilemma must be resolved. As one court has stated, "The right of the individual to his religious conviction is so ingrained in our philosophy of government and life that courts hesitate not to give full credence to such a claim."[14] Yet, it is also true that courts are composed of practical men who are obliged by experience to recognize that, like many of our freedoms, religion can be used by the unscrupulous "as a convenient cloak to conceal many faults."[15]

Fraudulent Promise To Embrace Faith of Spouse

Actions for annulment in New York based upon a fraudulent promise to convert to the religious faith of the spouse have, over the years, grown in number. *Taylor v. Taylor*[16] was the first reported case brought on this ground. The decision was quite obviously dictated by the extreme facts of the case. The couple had five children; they had been married for thirteen years, and the wife was apparently motivated to bring the action by reason of her husband's imprisonment. In refusing to grant the annulment the court was careful to point out that "the allegation is a material one. To one truly religious and a devout communicant of a religious faith, it would be a matter of transcending importance, overshadowing any material considerations. If such an allegation can be supported by proof . . . she is entitled to an annulment of the marriage."[17] The *Taylor* reasoning was accepted and the same conclusion followed in later cases,[18] the court in each instance finding insufficient credible evidence

11. Di Pillo v. Di Pillo, 17 Misc. 2d 673, 184 N.Y.S.2d 892 (Sup. Ct. 1959). See also Musso v. Musso, 143 N.Y.S.2d 331 (Sup. Ct. 1955); Smith v. Smith, 44 N.Y.S.2d 826 (Sup. Ct. 1943).

12. See Woronzoff-Daschkoff v. Woronzoff-Daschkoff, 303 N.Y. 506, 511, 104 N.E.2d 877, 880 (1952); Shonfeld v. Shonfeld, 260 N.Y. 477, 184 N.E. 60 (1933); Di Lorenzo v. Di Lorenzo, 174 N.Y. 467, 67 N.E. 63 (1903).

13. Woronzoff-Daschkoff v. Woronzoff-Daschkoff, 303 N.Y. 506, 104 N.E.2d 877 (1952); Lapides v. Lapides, 254 N.Y. 73, 80, 171 N.E. 911, 913 (1930); Marks v. Marks, 283 App. Div. 1136, 131 N.Y.S.2d 513 (3d Dep't 1954); Roger v. Roger, 124 Misc. 2d 566, 203 N.Y.S.2d 576 (Sup. Ct. 1960); Hochman v. Hochman, 68 N.Y.S.2d 886 (Sup. Ct. 1947).

14. Vonbiroganis (Von Brack) v. Von Brack, 64 N.Y.S.2d 885, 887 (Sup. Ct. 1946).

15. Ibid.

16. 181 Misc. 306, 47 N.Y.S.2d 401 (Sup. Ct. 1943).

17. Id. at 306-07, 47 N.Y.S.2d at 401.

18. Dodge v. Dodge, 64 N.Y.S.2d 264 (Sup. Ct. 1946); Kubistal v. Kubistal, 116 N.Y.L.J. 110 (Sup. Ct. July 18, 1946).

to support the wife's allegation that her husband did in fact promise to embrace her religion after marriage.

A more hostile appraisal of the materiality of misrepresentations pertaining to a party's religion was made in *Nilsen v. Nilsen*.[19] There the court said that "a false representation to fulfill a contract, which contract violates the public policy of this State, should not be a ground for an action to annul a marriage for fraud."[20] It doubted whether the consent of a reasonably prudent person would have depended upon a promise to embrace a different religion. The court stated:

> To a reasonably prudent person, embracing a particular religion is not a matter of signing a book and paying dues. It involves some understanding and some acceptance of religious beliefs, moral law and forms of worship. People do not acquire these as they do a suit of clothes. People in good faith may attempt to adopt a particular religion and never succeed.[21]

In dismissing the complaint, the court warned that recognition of the alleged fraud "eventually would require the civil courts to undertake to solve problems and to answer questions which are outside the civil aspects of marriage and should be left with the parties and their respective religious affiliations for possible solution."[22]

Later cases have ignored the *Nilsen* warning. In *Williams v. Williams*,[23] it appeared that the plaintiff, a Roman Catholic, had first declined the defendant's proposal of marriage because he was not a Catholic; that defendant represented to plaintiff that he would convert to Catholicism and live and practice that faith; that the parties were married only after the defendant had obtained instructions from a priest; and that for a short time defendant ostensibly complied with the practice of the Catholic faith, but then declined to go to church and stated that he never did believe the teachings of the Catholic Church and that his promise to do so was made solely for the purpose of inducing the plaintiff to marry him. Upon learning these facts the plaintiff ceased marital relations with the defendant. In granting the annulment, the court noted that the plaintiff had demanded not merely an outward compliance with the form of conversion, but the actual living in the marital status in accordance with her faith.[24] It said:

> For the plaintiff to live with the defendant as his wife would be repugnant in every aspect of their lives together. By his acts and promises he grossly deceived her and induced her to enter a marriage based upon representations that were cruel in their falsity. . . . The fraud . . . which was to him but an empty gesture but to the plain-

19. 66 N.Y.S.2d 204 (Sup. Ct. 1946).
20. Id. at 206.
21. Id. at 207.
22. Ibid.
23. 194 Misc. 201, 86 N.Y.S.2d 490 (Sup. Ct. 1947).
24. Id. at 202, 86 N.Y.S.2d at 491.

tiff a thing of tragic implications, is so serious that the plaintiff is entitled to the relief which she seeks.[25]

Since the *Williams* decision, the cases have taken for granted the materiality of the fraud.[26] The problem now is one of proof. Thus in *Howardell v. Howardell*,[27] the court had to determine whether the defendant actually practiced a fraud in promising to convert or whether the promise, made in good faith, was not fulfilled because of sincere religious doubts. There it was found that the wife had been induced to enter a civil marriage in reliance upon the defendant's promise to become a Catholic and to have the marriage solemnized in the Catholic Church. After the civil ceremony, the defendant went to the rectory once and refused to become a Catholic. The court held that "one visit, and no more, plainly indicated a superficiality and captiousness that does not merit credence or serious treatment . . ."[28] and therefore granted the annulment. It intimated, however, that the annulment would have been refused "if the defendant had undergone a course of instructions and then did not go forward because of spiritual scruples, or doubts, or hesitations of the mind. . . ."[29]

Annulment of Marriage for Fraudulent Refusal To Perform Religious Ceremony

A party who consents to enter marriage on condition that the civil ceremony will be followed by a religious ceremony may have a cause of action for annulment if after the civil ceremony the other party refuses to perform the religious ceremony.[30] The person seeking annulment must establish that the promise

25. Id. at 202-03, 86 N.Y.S.2d at 492.

26. Howardell v. Howardell, 1 Misc. 2d 941, 151 N.Y.S.2d 265 (Sup. Ct. 1956); Villani v. Villani, 207 Misc. 629, 139 N.Y.S.2d 724 (Sup. Ct. 1955); Sadler v. Sadler, N.Y.L.J., Nov. 21, 1961, p. 16, col. 5M (Sup. Ct.).

27. 1 Misc. 2d 941, 151 N.Y.S.2d 265 (Sup. Ct. 1956).

28. Id. at 942, 151 N.Y.S.2d at 267.

29. Ibid.

30. See, e.g., Aufiero v. Aufiero, 222 App. Div. 479, 226 N.Y. Supp. 611 (1st Dep't 1928); Rutstein v. Rutstein, 221 App. Div. 70, 222 N.Y. Supp. 688 (1st Dep't 1927); Watkins v. Watkins, 197 App. Div. 489, 189 N.Y. Supp. 860 (1st Dep't 1921). Mirizio v. Mirizio, 242 N.Y. 74, 150 N.E. 605 (1926), may at first glance appear contra, but it can in fact easily be distinguished. The parties were married in a civil ceremony and had agreed that they would not live together or consummate the marriage until performance of the Catholic ceremony. Mrs. Mirizio refused to consummate the marriage because her husband declined to go through with the promised ceremony and, as a result, they never lived together. She then brought an action under N.Y. Civ. Prac. Act § 1162 demanding a separation with provision for support. The husband defended on the ground that his act of not supporting her was justified by her refusal to discharge her marital obligations. The court of appeals, Judge Lehman dissenting, dismissed the wife's complaint with strong language: "[M]odifications of the marriage contract by private agreement would lead to disruption of that contract and disaster in the attempt to enforce it." 242 N.Y. at 84, 150 N.E. at 609. There is, however, no incompatibility between the Mirizio holding and the many cases before and after it which have granted annulments for a fraudulent promise to supplement a civil marriage with a religious ceremony. Mrs. Mirizio's misfortune was that she chose the wrong remedy, separation. Rutstein v. Rutstein, supra, an annulment action,

respecting the religious ceremony was a vital element inducing consent to the civil marriage.[31]

The mere fact that a person says he is a Protestant or a Catholic or a Jew is insufficient. But if he shows by competent evidence that he has a genuine affiliation with the religion he professes and that a marriage in that religion was a primary consideration, then a prenuptial promise may have some meaning.[32]

The plaintiff must further prove that, while the defendant ostensibly consented to a religious ceremony, so as to mislead the plaintiff to do that which otherwise would not have been done, there was present a silent determination not to have a religious ceremony.[33] Thus, in *Anonymous v. Anonymous*,[34] it appeared that both parties at the time of the civil ceremony agreed not to consummate the marriage until a rabbinical marriage had been performed. Shortly thereafter, and while making arrangements for the Jewish ceremony, the wife sustained an injury to the spinal cord which prevented a consummation of the marriage. The husband brought an action for annulment, claiming that the civil ceremony was not to be binding until the religious ceremony was performed. The court held that, in the absence of fraud in the promise of a religious ceremony, the civil ceremony is binding even without consummation. "There being no fraud in the inception of the marriage, the law recognizes no privately imposed conditions that would alter the marital status."[35] The court went on to state that the marital status is "too much a matter of public

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pointed out that Mirizio was predicated upon an existing contract and was in furtherance thereof. 221 App. Div. at 75-76, 222 N.Y. Supp. at 694. Thus the only proposition that can validly be derived from Mirizio is that by refusing to consummate the marriage the plaintiff was guilty of such misconduct as to bar her claim for separation and support while the misconduct continued. Mirizio v. Mirizio, 248 N.Y. 175, 161 N.E. 461 (1928). Accord, Diemer v. Diemer, 8 N.Y.2d 206, 168 N.E.2d 654, 203 N.Y.S.2d 829 (1960).

31. Hubner v. Hubner, 64 N.Y.S.2d 513 (Sup. Ct. 1946).

32. Ibid. Numerous decrees of annulment have been denied because of the plaintiff's failure to prove the crucial importance of the religious ceremony. See, e.g., Troisi v. Troisi, 156 N.Y.S.2d 289 (Sup. Ct. 1956); Kurrus v. Kurrus, 136 N.Y.S.2d 395 (Sup. Ct. 1954); Iten v. Iten, 64 N.Y.S.2d 882 (Sup. Ct. 1946).

33. Watkins v. Watkins, 197 App. Div. 489, 189 N.Y. Supp. 860 (1st Dep't 1921). There, an orthodox Jewish girl sought an annulment after the defendant refused to permit the performance of the promised rabbinical marriage. The court granted the annulment, stressing that the promise "was made by the defendant with the intent to deceive and defraud the plaintiff and with the intent on his part not to carry out his promise. . . ." Id. at 490, 189 N.Y. Supp. at 861. The pertinent questions which the courts will consider in determination of annulments of this character are: "Did defendant represent to plaintiff that he would marry plaintiff in her church? Did defendant at the time not intend to keep such promise? Did plaintiff believe the representation to be true? Did the misrepresentation induce the plaintiff to consent to the marriage? Did she rely on the promise?" Borgstedt v. Borgstedt, 64 N.Y.S.2d 888-89 (Sup. Ct.), aff'd on rehearing, 188 Misc. 183, 67 N.Y.S.2d 66 (Sup. Ct. 1946).

34. 49 N.Y.S.2d 314 (Sup. Ct. 1944).

35. Id. at 316. See also Malachick v. Malachick, 296 N.Y. 553, 68 N.E.2d 862 (1946) (memorandum decision); Bentz v. Bentz, 188 Misc. 86, 67 N.Y.S.2d 345 (Sup. Ct. 1947).

concern to allow the parties to tinker with it according to their own notions of what is expedient or proper."[36]

Lorifice v. Lorifice[37] applied this reasoning to a slightly varied set of facts. There a civil marriage was performed in Italy but with the agreement that there would be a Roman Catholic ceremony after the bride's immigration to the United States. After her arrival in America, the parties, apparently experiencing a change of heart, refused to have the religious ceremony performed. An annulment was refused because it was not shown that at the time of their civil marriage either party had any fraudulent intent.

> [T]he conduct of the defendant bars a finding, incumbent upon the plaintiff to establish, that the defendant misrepresented a material fact made with the intention to induce him to enter into the contract of civil marriage and without which the plaintiff would not have done so. *An intent to deceive at the time the promise was made* is essential.[38]

It is significant to note that the annulment was denied in *Lorifice* even though both parties were recognized as apparently being devout Catholics,[39] to whom a religious ceremony would be of great importance. The case, therefore, clearly demonstrates that a fraudulent intent at the time of the promise is a *sine qua non* to an annulment based on fraud.

Unfulfilled Promises for a Second Religious Ceremony

Prospective spouses of different religious creeds sometimes agree that they will have their marriage solemnized according to the rites of both faiths. In no case has a New York court granted an annulment where there was already one religious ceremony and the unfulfilled antenuptial promise was for a second religious ceremony.[40] In *Hubner v. Hubner*,[41] the husband sought an annulment on the ground that the wife promised to marry him in a Protestant ceremony after they had been married in a Catholic ceremony, but refused to go through with the Protestant rite. The court stated:

> This case should be distinguished from those where the parties first marry before the civil authority and contemplate a subsequent religious ceremony. No case has come to the attention of the court granting an annulment for refusal to have a second religious ceremony.[42]

In *Hubner*, the parties lived together only a short time. No child was born

36. 49 N.Y.S.2d at 316. The fact that the husband claimed marital status in his income tax returns and Navy allotments weakened his contention that neither party had considered the civil marriage binding.

37. 148 N.Y.S.2d 578 (Sup. Ct. 1956).

38. Id. at 582.

39. Id. at 579.

40. Borgstedt v. Borgstedt, 64 N.Y.S.2d 888 (Sup. Ct.), aff'd on rehearing, 188 Misc. 183, 67 N.Y.S.2d 66 (1946); Hubner v. Hubner, 64 N.Y.S.2d 513, aff'd, 188 Misc. 125, 67 N.Y.S.2d 70 (Sup. Ct. 1946). See also Samuelson v. Samuelson, 155 Md. 639, 142 Atl. 97 (1928). Compare Wells v. Talham, 180 Wis. 654, 194 N.W. 36 (1923).

41. 64 N.Y.S.2d 513 (Sup. Ct. 1946).

42. Id. at 513-14.

of the marriage, and the plaintiff testified that the marriage had not been consummated. The court, in a subsequent hearing[43] refused to distinguish *Borgstedt v. Borgstedt*,[44] where the marriage was consummated and there was one child. There, it was alleged by the wife that the defendant fraudulently refused to fulfill a promise to have an Episcopalian ceremony follow a Catholic marriage rite. The court denied the annulment and stated:

> The parties in effect claim that they made a private agreement that in the future there would be a second ceremonial marriage. Logically, the plaintiff must claim that this was of such importance to her that if the promise were not kept, she would not consider herself married. The law does not recognize any such private agreement and it is difficult to see how a prohibited agreement can be recognized as the basis of a prenuptial fraud.[45]

The court seems to indicate that once there has been one religious ceremony, the beliefs of the parties have been sufficiently respected. Courts refuse to cancel the effect of the first ceremony for lack of a second, because it is reasoned, though not with compelling logic, that this would be equivalent to a conclusion by the court that the first religious ceremony is not binding until and unless ratified by the second, and therefore to a certain extent inferior to that of the second church.[46] Such a determination, according to such reasoning, would be beyond the authority of the court, because it is against public policy for a court to favor one religion over another.[47]

In the case of a Roman Catholic seeking an annulment, the petition has sometimes been dismissed in even stronger terms. Such a plaintiff is held to the same religious principles which he asserts as the basis of relief. Thus one court, turning the tables on the Catholic plaintiff, has said: "The plaintiff sets up the standards by which her case is to be judged."[48] In applying them the court noted that "a practical Catholic would not consent to be married in a religious ceremony outside her own church."[49] In *McHale v. McHale*,[50] a Catholic husband who was married to the defendant by a clergyman of another faith sought an annulment because his wife refused to have a Catholic ceremony performed. Here the court grounded its denial on a finding that the husband was in fact defrauded of nothing since by marrying outside his church he incurred automatic excommunication.[51] Similarly, a marriage will not be annulled on the ground of a fraudulent misrepresentation by the husband, prior to the marriage, that he was a practicing Catholic, where the evidence showed that the defrauded party had flouted the precepts of the Catholic Church by

43. Hubner v. Hubner, 188 Misc. 125, 67 N.Y.S.2d 70 (Sup. Ct. 1946).
44. 64 N.Y.S.2d 888 (Sup. Ct.), aff'd on rehearing, 188 Misc. 183, 67 N.Y.S.2d 66 (Sup. Ct. 1946).
45. 188 Misc. at 187, 67 N.Y.S.2d at 70.
46. Ibid.
47. Knibbs v. Knibbs, 94 N.J. Eq. 747, 121 Atl. 715 (Ct. Err. & App. 1923).
48. Borgstedt v. Borgstedt, 64 N.Y.S.2d 888, 889 (Sup. Ct. 1946).
49. Ibid.
50. 188 Misc. 165, 67 N.Y.S.2d 794 (Sup. Ct. 1947).
51. Ibid.

marrying in a civil ceremony.[52] Under the circumstances, these cases take what appears to be the wisest approach. Contrary rulings quite logically would undermine the cardinal rule that where fraud is alleged, its materiality must be shown.

Duty To Cease Cohabitation

In addition to the matters of proof already discussed, a plaintiff seeking annulment on religious grounds in New York must comply with Section 1139 of the Civil Practice Act. The section provides that "a marriage shall not be annulled . . . on the ground of fraud, if it appears that, at any time before the commencement [of the action] . . . , the parties voluntarily cohabited as husband and wife, with a full knowledge of the facts constituting the fraud." This, of course, places upon the party seeking an annulment the duty to cease cohabitation upon discovery of the fraud.[53]

In most of the cases in which an annulment was granted for failure to go through with a promised religious ceremony, the marriage was, when the plaintiff first became aware of the fraud, not consummated by cohabitation.[54] There is, however, some authority permitting the annulment to be granted despite consummation, where the cohabitation was of short duration,[55] or took place by means of force,[56] one court even suggesting that the reasonableness and prudence of each individual's conduct should be the court's divining rod.[57] But the general rule for all annulments based on fraud seems to be equally

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52. Musso v. Musso, 143 N.Y.S.2d 331 (Sup. Ct. 1955).

53. Taylor v. Taylor, 181 Misc. 306, 47 N.Y.S.2d 401 (Sup. Ct. 1943). See also Schulman v. Schulman, 257 App. Div. 1002, 13 N.Y.S.2d 611 (2d Dep't 1939); Russo v. Russo, 168 Misc. 551, 5 N.Y.S.2d 845 (Sup. Ct. 1938).

54. E.g., Brillis v. Brillis, 4 N.Y.2d 125, 149 N.E.2d 510, 173 N.Y.S.2d 3 (1958); Rutstein v. Rutstein, 221 App. Div. 70, 222 N.Y. Supp. 688 (1st Dep't 1927); Watkins v. Watkins, 197 App. Div. 489, 189 N.Y. Supp. 860 (1st Dep't 1921).

55. Aufiero v. Aufiero, 222 App. Div. 479, 226 N.Y. Supp. 611 (1st Dep't 1928).

56. Zmyslinski v. Zmyslinski, 151 N.Y.S.2d 774 (Sup. Ct. 1956).

57. Iten v. Iten, 64 N.Y.S.2d 882, 883-84 (Sup. Ct. 1946): "Doubtless many a person, who, in the early days of a marriage, has cause seriously to question the intention of a spouse to fulfill some pre-marital promise which appeared to him or her so essential or material as to be the inducing cause of the marriage, has believed it a duty to continue the marital relation in the hope that patience and time might dissolve the difficulty. To say that by such honest endeavor a person ratifies the contract and waives the deception would be to put a premium on hasty action at the first breath of suspicion and condemn one who sacrifices for a time his own scruples in a sincere effort to preserve the home. In annulment cases, where the plaintiff is permitted to tell the story, it is often difficult to determine with exactitude the point where patient honest effort to correct the disturbing factor passes into that confirmation and ratification which constitutes voluntary cohabitation and therewith consummation. The only divining rod known to the law is what a reasonably prudent person would do under the circumstances. The courts have recognized that proof in these cases should be strong and convincing . . . . [S]train caused by the uncertainties of war under which many of our young people labored must be given due consideration in determining whether one acted with reasonable prudence."

applicable to religious fraud: cohabitation with knowledge or reasonable apprehension of the fraud waives the right to annulment.[58]

Although the courts have only infrequently expressly stated so, it would appear that the absence of consummation is a factor weighed heavily in favor of a plaintiff seeking annulment because prior to cohabitation the state and community have acquired no substantial interests.[59] Where the marriage has been consummated, and the community has long recognized the relation, the relationship has ripened into a public status, possibly involving children, the creation of debts, and real estate, and thus considerations of public policy apply which do not apply, at least not to the same degree, in an unconsummated marriage. In the latter case, since the marriage is little more than a paper contract, a lesser degree of fraud would seem to be sufficient to annul it.[60]

Conclusion

General dissatisfaction with a spouse may, in suits of this nature, be the real motivation, rather than religious scruples. The courts should, therefore, give greater heed to the admonition that "religion, like many of our freedoms, can be used as a convenient cloak to conceal many faults."[61] In order to discourage the unscrupulous from using alleged religious fraud as an easy means of relieving themselves of their contractual obligations, courts should, as in *McHale*,[62] give full consideration to the attitude of the particular religion toward the conduct of the plaintiff. Since the plaintiff is relying upon those tenets as the basis of his relief, it would be unreasonable to grant the annulment if his actions have been incompatible with the deep religious faith he now alleges.[63] With regard to the granting of annulments for failure to fulfill a promise to embrace the spouse's religion, it would seem that the courts have already gone too far. In the ordinary case, it is questionable whether a reasonably prudent person would or should seriously rely upon a promise of conversion. It would seem that in the ordinary case if religious unity in the marital state were truly a material factor to the plaintiff, then he would have insisted that the arrangements for conversion be effectuated before marriage. In any event, the courts should certainly follow the dicta in *Howardell*[64] and deny an annulment on this ground if the defendant refused to convert because of spiritual scruples or doubts. To do otherwise would be an unfortunate and obnoxious intrusion by the courts into matters which are only tangentially within their purview.

58. See cases cited supra note 30.

59. Svenson v. Svenson, 178 N.Y. 54, 70 N.E. 120 (1904); Watkins v. Watkins, 197 App. Div. 489, 189 N.Y. Supp. 860 (1st Dep't 1921); Cart v. Cart, 28 N.Y.S.2d 61 (Sup. Ct. 1941); Lewine v. Lewine, 170 Misc. 120, 9 N.Y.S.2d 869 (Sup. Ct. 1938); Rubman v. Rubman, 140 Misc. 658, 251 N.Y. Supp. 474 (Sup. Ct. 1931).

60. Svenson v. Svenson, 178 N.Y. 54, 70 N.E. 120 (1904).

61. Vonbiroganis (Von Brack) v. Von Brack, 64 N.Y.S.2d 885, 887 (Sup. Ct. 1946).

62. 188 Misc. 165, 67 N.Y.S.2d 794 (Sup. Ct. 1947).

63. Vonbiroganis (Von Brack) v. Von Brack, 64 N.Y.S.2d 885, 887 (Sup. Ct. 1946).

64. Howardell v. Howardell, 1 Misc. 2d 941, 942, 151 N.Y.S.2d 265, 267 (Sup. Ct. 1956).