the benefit of exemptions given residents of the state, it is void as abridging the privileges and immunities of citizens of the United States, and it is not remedied by allowing the nonresident to deduct from his tax a tax paid on such income in the state of his residence, if such state allows a like deduction by nonresidents within its borders; a state cannot barter away the rights of its citizens to the enjoyment of the privileges and immunities clause, and discrimination cannot be corrected by retaliation.[25]

JOHN N. HUGHES

ANNULMENT OF MARRIAGE FOR FRAUDULENT MISREPRESENTATION

The question whether a fraudulent misrepresentation as to fortune is ground for annulment of marriage was presented in New York in the recent case of *Shonfeld v. Shonfeld*.[1] Reversing the Appellate Division, the Court of Appeals, by a divided bench (4 to 3), decided that it was error to hold as a matter of law that the misrepresentation could not be material.

The court, speaking through Crouch, J., based its decision on the New York statute,[2] declaring that "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," as interpreted in *Di Lorenzo v. Di Lorenzo*.[3] As the fraud which will invalidate a marriage has never been precisely defined, the court is left free to meet each case as it arises. It need not necessarily concern what are commonly called the "essentials" of the marriage relation, but will be sufficient if it is material to the giving of consent, in the sense that if the misrepresentation had not been made, the consent would not have been given.

> The misrepresentation was not a mere exaggeration or misstatement of her means or prospects, which might or might not be an incentive to marriage. It was a definite statement of an existing fact without which, as the defendant clearly understood, no marriage was presently practicable.[3a]

A vigorous dissenting opinion was written by Crane, J., in which the construction of the statute given in the Di Lorenzo case, upon which the court relied, was critically assailed as dictum. A marriage is something more than a mere civil contract; it results in a status, to which legal rights and liabilities attach in which the state has an interest. Fraud which will invalidate such a

[25] Const., U.S., art. 4, § 2; Travis v. Yale & Towne Mfg. Co., 252 U.S. 60 (1920); 20 Col. L. Rev. 457 (1920); 18 Mich. L. Rev. 547 (1920); 29 Yale L. Jour. 799 (1920).

[1] 260 N.Y. 477, 184 N.E. 60 (1933), reversing 258 N.Y. S. 338.

[2] C. 14, § 10 of the New York Cons. Laws (Domestic Relations Law).

[3] 174 N.Y. 467, 67 N.E. 63, 63 L.R.A. 92 (1903). See also comments in 1 Corn. L. Quar. 48 (1916) and 6 Corn L. Quar. 199, 401 (1921).

[3a] Shonfeld v. Shonfeld, 260 N. Y. 477, 184 N.E. 60, 62 (1933).

relation must be serious and important and must be of such a nature as to mislead a reasonably prudent person. But

> the marriage in this case was a mere matter of bargain and sale. The woman bought the man for $6,000, and because she failed to have the money the man seeks to have the marriage annulled. . . . . Sufficient for this case to say that the mere statement of the woman that she had $6,000 was not sufficient to deceive a reasonably prudent and careful man, and under the circumstances stated here is not of sufficient importance to the marriage contract to move a court of equity to annul it.[3b]

It has been very generally stated in the reports and textbooks that the fraud which will invalidate a marriage contract must touch some of the so-called "essentials" of the marriage relation. A mere misrepresentation as to some of the "incidentals" of the relation is stated to be insufficient. Such "incidentals" have been stated to include fortune, rank, character, and health.[4] As to fortune and rank the decisions probably bear out the statement.[5] But there has been a growing tendency to relax the general rule as to character and health, especially where the complainant was young and inexperienced and the fraudulent misrepresentation or concealment has been particularly gross and would result in a shocking mismating, as where the defendant was a notorious criminal.[6] An Alabama court decreed an annulment for fraudulent representations as to name,

[3b] Shonfeld v. Shonfeld, 260 N. Y. 477, 184 N.E. 60, 62, 65 (1933).

[4] See Madden, Domestic Relations (1931), 15; Bishop, Marriage and Divorce (1892), § 459; Eversley, Domestic Relations (1926), 29; 18 R.C.L. 414; 38 C. J. 1302. Note Wakefield v. Mackay, 1 Phill. Ecc. 134, 1 Hagg. Consist. 394, where Lord Stowel said, "A man who means to act upon such representations (character, fortune, or health) should verify them by his own inquiries. The law presumes that he uses due caution in a matter in which his happiness for life is so materially involved, and makes no provision for the relief of a blind credulity however it may have been produced."

[5] Mayer v. Mayer, 207 Cal. 685, 279 Pac. 783 (1929); Marshall v. Marshall, 212 Cal. 736, 300 Pac. 816, 75 A.L.R. 661 (1931); Williams v. Williams, 32 Del. 39, 118 Atl. 638 (1922); Wier v. Still, 31 Iowa 107 (1870); Chipman v. Johnston, 237 Mass. 502, 130 N.E. 65, 14 A.L.R. 119 (1921), discussed in 19 Mich. L. Rev. 881–82; Heath v. Heath, 159 Atl. 418 (N.H. 1931), disapproving liberal dicta in Gatto v. Gatto, 79 N.H. 177, 106 Atl. 493 (1919); Woodward v. Heichelbech, 97 N.J. Eq. 253, 128 Atl. 169 (1925); Jakar v. Jakar, 113 S.C. 295, 102 S.E. 337 (1919), although the defendant was admittedly a "villain of the deepest dye"; and probably Klein v. Wolfsohn, 1 Abb. N. Cas. 134 (N.Y. 1876). Contra, Robert v. Robert, 150 N.Y.S. 366 (1914); and Raia v. Raia, 214 Ala. 391, 108 So. 11 (1926), where the complainant was very young and allegedly feeble-minded. For dicta in accordance with the general rule as to fortune and rank, see Lyon v. Lyon, 230 Ill. 366, 82 N.E. 850 (1907); Bielby v. Bielby, 333 Ill. 478, 165 N.E. 235 (1929); Brown v. Scott, 140 Md. 258, 117 Atl. 144, 22 A.L.R. 810 (1922); Keyes v. Keyes, 26 N.Y.S. 910 (1893); Fish v. Fish, 39 N.Y.S. 537 (1896); Glean v. Glean, 75 N.Y.S. 622 (1902); Bahrenburg v. Bahrenburg, 150 N.Y.S. 589 (1914); Minner v. Minner, 238 N.Y. 529, 144 N.E. 781 (1924); Lapides v. Lapides, 254 N.Y. 73, 171 N.E. 911 (1930); Maynard v. Hill, 125 U.S. 190 (1888). For dicta as to sufficiency of such fraud, see Gatto v. Gatto, 79 N.H. 177, 106 Atl. 493 (1919), where the court very caustically assails the argument of public policy; disapproved in Heath v. Heath, 159 Atl. 418 (N.H. 1932); Cox v. Cox, 110 Atl. 924 (N.J.Eq. 1919); Caruso v. Caruso, 104 N.J.Eq. 588, 146 Atl. 649 (1929).

[6] Brown v. Scott, 140 Md. 258, 117 Atl. 144, 22 A.L.R. 810 (1922).

character, and financial ability, where the complainant was very young and allegedly feeble-minded.[7]

But even in the absence of such special circumstances, some courts have decreed an annulment where there has been gross misrepresentation as to character.[8] A New York court held a misrepresentation as to honesty sufficient.[9] Facts suggesting the existence of a conspiracy to defraud an old man (the complainant) of his property by marriage were held sufficient by the Michigan Supreme Court.[10] And annulments have recently been granted in New York for the false representation of the defendant that he loved the complainant and had money where his purpose in getting married was to evade the immigration laws,[11] and for a misrepresentation as to citizenship where it resulted in the expatriation of the complainant.[12]

The early New York cases, supported by several recent decisions and numerous dicta, were generally to the effect that marriage is something more than a contract; it is a status.[13]

But the conception of marriage as predominantly contractual was developed in 1903 when the New York Court of Appeals decided *Di Lorenzo v. Di Lorenzo*.[14]

It is upon the authority of this case that the Shonfeld case is decided, as well as many of the other New York cases to be considered. It is the argument of the dissenting justices that this statement in the Di Lorenzo case is dictum and therefore not binding on the New York Court of Appeals. But is it? It is submitted that the fraud in the Di Lorenzo case (representation to the complainant that the child shown him by the defendant was theirs when in fact the

[7] Raia v. Raia, 214 Ala. 391, 108 So. 11 (1926).

[8] Dooley v. Dooley, 93 N.J.Eq. 22, 115 Atl. 136 (1921); contra, Wier v. Still, 31 Iowa 107 (1870).

[9] Sheridan v. Sheridan, 186 N.Y.S. 470 (1921).

[10] Gillett v. Gillett, 78 Mich. 184, 43 N.W. 1101 (1889) (a very incomplete report).

[11] Rubman v. Rubman, 251 N.Y.S. 474 (1931) (excellent survey of cases).

[12] Truiano v. Truiano, 201 N.Y.S. 573 (1923), discussed in 24 Col. L. Rev. 433, 8 Minn. L. Rev. 341, and 33 Yale L. Jour. 793 (1924).

[13] Fish v. Fish, 39 N.Y.S. 537 (1896); Svenson v. Svenson, 178 N.Y. 54, 70 N.E. 120 (1904); Schaeffer v. Schaeffer, 144 N.Y.S. 774 (1913); Miner v. Miner, 238 N.Y. 529, 144 N.E. 781 (1924); and see Lapides v. Lapides, 254 N.Y. 73, 171 N.E. 911 (1930) for approval of this "status" theory of marriage.

[14] 174 N.Y. 467, 67 N.E. 63, 63 L.R.A. 92 (1903) where the court said

> While, then, it is true that marriage contracts are based upon consideration peculiar to themselves and that public policy is concerned with the regulation of the family relation, nevertheless, our law considers the marriage in no other light than as a civil contract. . . . . There is no valid reason for excepting marriage contracts from the general rule (of contracts). . . . . If the plaintiff proves to the satisfaction of the court that through a misrepresentation of some fact, which was an essential element in the giving of his consent to the contract of marriage and which was of such a nature as to deceive an ordinarily prudent person, he has been victimized, the court is empowered to annul the marriage.
>
> It is to be observed that the New York courts have not carried the contractual concept of marriage to its logical extreme of permitting the parties mutually to rescind or abandon the contract.

defendant had given birth to no child at all) would not be sufficient ground for the annulment of the marriage in most jurisdictions. That fraud did not go to any of the so-called "essentials" of the marriage. But it was a material inducement (i.e., saving the honor of the defendant, legitimating the child, etc.) to the complainant's consenting to the marriage. It may be that the construction of the statute given by the Court of Appeals in that case was questionable, as the court has repeatedly admitted, since and lastly in the Shonfeld case, that the statute was merely declaratory of the existing law; and it would seem that such a fraud would be insufficient before.[15] But in deciding the Di Lorenzo case as it did it was necessary for the Court of Appeals to make such a broad statement as to the contractual nature of marriage. And it has been repeatedly followed in New York.[16]

The cases cited by Judge Crouch in his opinion do fully bear out his conclusion that the fraud need not necessarily go to the essentials of the marriage.[17] And in 1914 the Appellate Division of the New York Supreme Court decreed an annulment where the complainant was induced to marry the defendant by his misrepresentation that they would put their money together and buy a hotel, and it appeared that the defendant had never any intention of carrying out his declared intention.[18]

It is thus seen that the decision in the Shonfeld case is not at all revolutionary in New York, that substantially identical facts were held ground for annulment almost two decades ago, that it is a logical result of the principles announced in

[15] Klein v. Wolfsohn, 1 Abb. N. Cas. 134 (1876). Note the construction given to similar statutes as merely declaratory in Lewis v. Lewis, 44 Minn. 124 (1891); Willets v. Willets, 76 Neb. 228 (1906); Thorne v. Farrar, 57 Wash. 441 (1910); Wells v. Talham, 180 Wis. 654, 194 N.W. 36, 33 A.L.R. 827 (1923).

[16] See Domschke v. Domschke, 122 N.Y.S. 892 (1910); Robert v. Robert, 150 N.Y.S. 366 (1914); Griffin v. Griffin, 204 N.Y.S. 131, aff'd in 205 N.Y.S. 926 (1924); Rutstein v. Rutstein, 222 N.Y.S. 688 (1927); Beard v. Beard, 238 N.Y. 599, 144 N.E. 908 (1924), aff'g. 201 N.Y.S. 886 (1924). See further the cases cited in Crouch, Annulment of Marriage for Fraud in New York, 6 Corn. L. Quar. 401 (1921). Judge Crouch says, at p. 405,

> It wiped out any limitation of the field of materiality which, for considerations of public policy, had been confined to facts going to the essence of the marriage relation. It applied to the marriage contract the rule applicable to all other contracts that the misrepresentation of any material fact, including consent, justifies rescission. . . . . Public policy does not enter into the matter. . . . . The court, deliberately as it seems, excluded its consideration. At the very outset of its opinion it stamped as error the holding of the Appellate Division that considerations of public policy took the marriage relation so far out of the domain of ordinary contracts as not to warrant annulment. While it recognized that public policy is concerned with the regulation of the family relation, "Nevertheless," it said, "our law considers marriage in no other light than as a civil contract"; and hence that there was no valid reason for excepting the marriage contract from the general rule. When the cases in this and other states holding the older doctrine were pressed to the attention of the court, it put them aside without attempt at explanation or differentiation and, relying upon the plain provisions of our statute and the established rules applicable to contracts generally, laid down the rule quoted above.

[17] Domschke v. Domschke, 122 N.Y.S. 892 (1910); contra Glean v. Glean, 75 N.Y.S. 622 (1902).

[18] Robert v. Robert, 150 N.Y.S. 366 (1914).

the Di Lorenzo case, and that it is probably in line with the changed social attitudes toward marriage.[19]

A factor of undoubted significance in the development of this liberal attitude of the New York courts toward annulment is the restriction of absolute divorce to only one ground, namely, adultery.[20]

With this decision, the New York Court of Appeals seems to have definitely accepted the logical result of the Di Lorenzo case; and there seems to be considerable reason and justification for the decision, in view of the statutory situation. But it can well be doubted whether the courts of other jurisdictions will follow, unless they should become convinced that there is less "public policy" in denying relief where the domestic difficulties have already been aired in court than in granting it at the request of the parties, where divorce is difficult or undesirable.

CLIFFORD J. HYNNING

THE CONSTITUTIONALITY OF THE DECLARATORY JUDGMENT

Proponents of the declaratory judgment as a necessary procedural reform[1] may well be heartened by a recent decision[2] handed down by the United States Supreme Court. After a steady march of approval through numerous state courts,[3] the constitutionality of the declaratory judgment as a "case" or "controversy" received a set back at the hands of our highest tribunal in a number

[19] See Ogburn, The Changing Family, 23 Pub. Am. Sociological Soc., 124–133 (1928), reprinted in Reuter and Runner, The Family (1931), 150–156. Also see Recent Social Trends (1933), 661–708. Vanneman, Annulment of Marriage for Fraud, 9 Minn. L. Rev. 497, says, at page 517,

> The mores of the day are not the same as of a hundred years ago. People look upon the marriage relation differently. This point is evident at every point in the marriage relation. It is submitted that a judicious application of the liberal view of the New York courts is in harmony with present day social attitudes, and that the law cannot hope to modify social concepts but will eventually itself be modified thereby as the present trend rather definitely shows.

[20] See Wells v. Talham, 180 Wis. 654, 194 N.W. 36, 33 A.L.R. 827 (1923), suggesting this explanation.

[1] Borchard, The Constitutionality of Declaratory Judgments, 31 Col. L. Rev. 561 (1931), The Declaratory Judgment—A Needed Procedural Reform, 28 Yale L. Jour. 1, 105 (1918), The Declaratory Judgment in the United States, 37 W.Va. L. Rev. 127 (1931), Judicial Relief for Peril and Insecurity, 45 Harv. L. Rev. 793 (1932); Cooper, Locking the Stable Door Before The Horse Is Stolen, 16 Ill. L. Rev. 436 (1921); Dodd, Progress of Preventive Justice, 6 Am. Bar Ass'n. Jour. 151 (1920); Rice, The Constitutionality of the Declaratory Judgment, 28 W. Va. L. Rev. 1 (1921); Sunderland, Modern Evolution in Remedial Rights—The Declaratory Judgment, 16 Mich. L. Rev. 69 (1917).

[2] Nashville, Chattanooga and St. Louis Railway v. Ray C. Wallace, Comptroller of the Treasury of Tennessee, etc., 53 Sup. Ct. 345 (1933).

[3] For a complete tabulation of states and decisions therein, see Borchard, The Constitutionality of Declaratory Judgments, 31 Col. L. Rev. 561, notes 3 and 4 (1931).