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Nullity of Marriage Because of Simulated Consent

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In light of the above observations, a third rationale is possible; that is, admitting the *Hayes* interpretation to read a constitutional test into Article 3863.

It can be said that even when one has it within his discretion to perform or not to perform, he is nevertheless under a ministerial duty to exercise his discretion in a lawful manner. That lawful manner is determined by the grant of authority he has received and by the United States Constitution. As noted above,[35] the Constitution requires that discretionary duties not be performed in an arbitrary, capricious, or unreasonable manner. A "ministerial" duty, provided by the clear command of the Constitution, exists to exercise one's authority and discretion in a reasonable fashion. Thus, the courts could uphold the statute by reading a "reasonableness" requirement into the definition of "ministerial."

The holding of *Hayes* unnecessarily limits the use of mandamus, and though not necessary under the Code, is unconstitutional unless tempered with a "reasonableness" requirement.[36] The proper and more desirable conclusion is that the jurisprudentially created "gross abuse" exception is not precluded by the Code of Civil Procedure.

Jerry F. Davis

NULLITY OF MARRIAGE BECAUSE OF SIMULATED CONSENT

The Twenty-Second Judicial District Court declared null a marriage in which the man's consent was obtained because of the woman's mistaken claim that she was pregnant.[1] The record shows that the formalities of law necessary for a valid marriage were observed and that the outward manifestations of the parties were to enter into a valid marriage. The girl believed she was pregnant and in order to avoid the embarrassment and

cepted from the provisions of the act. *Id.* 49:951(2)(C). Thus, as beneficial as the Administrative Procedure Act is, it does not moot the arguments presented in this Note, especially when one begins to enumerate the many remaining state, parish, and municipal agencies which are vested with discretion which, if abused, could easily prejudice substantial rights.

35. *See* text at notes 26-31 *supra.*

36. It is interesting to note that in the Introduction to Title III of the *Louisiana Code of Civil Procedure (Extraordinary Remedies)* it is stated, in a "Summary of Procedural Changes in Title III" by the late Henry G. McMahon that: "The *only changes* in the procedural rules governing the extraordinary remedies of habeas corpus, mandamus, and quo warranto are those made by Art. 2823 [which relates to service of habeas corpus]." (Emphasis added.)

1. McDonald v. Galloway, No. 29063, La. 22d Judicial District (1968).

difficulties that would result, the man who believed himself responsible for what they both thought her condition to be agreed to participate in a marriage ceremony. The marriage was not consummated and upon learning the woman was not pregnant, the man sued for a declaration of nullity. The plaintiff alleged that he had never consented to marriage, or at most his consent was only simulated, for his primary motivation was not matrimony. The judge did not issue a written reason for judgment.

According to Article 90[2] of the Louisiana Civil Code there is no marriage unless both parties were *willing* to contract, were *able* to contract, and *did contract pursuant to the forms and solemnities prescribed by law.* In the instant case, there was no question of the validity, or capacity, of the parties to contract marriage, nor did the parties fail to pursue the forms and solemnities prescribed by law in giving outward manifestations of consent. Thus if the decision in the instant case is to be justified under the legislation it must be either because the manifestation of consent by one or both of the parties was made unwillingly within the terms of the legislation, or because Article 90 contemplates it may be shown that the manifestation of consent, though freely made, was not accompanied by an actual internal or subjective intent to contract marriage.

Can it be said the man in this case was "unwilling" to contract marriage? Of the articles following Article 90 in the Civil Code, only Article 91[3] speaks of unwillingness to marry, and it does so only in the context of stating three instances in which an outward manifestation of consent will not be considered freely made: when given to a ravisher (abductor); when exerted by violence; and when there is a mistake respecting the person. Of these three instances only the third, mistake respecting the person, might possibly be applicable, and then only if that phrase can be construed to include mistake respecting a *quality* of the other person and pregnancy *vel non* is to be considered such a quality. The Louisiana jurisprudence restricts the phrase to that of mistake in the identity of the other person.[4]

2. LA. CIV. CODE art. 90.

3. *Id.* art. 91: "No marriage is valid to which the parties have not freely consented. Consent is not free:

"1. When given to a ravisher, unless it has been given by the party ravished, after she has been restored to the enjoyment of liberty;

"2. When extorted by violence;

"3. When there is mistake respecting the person, whom one of the parties intended to marry."

4. Delpit v. Young, 51 La. Ann. 923, 25 So. 547 (1899).

Most French writers place a similar restriction on the identical phrase in French Civil Code,[5] but other French writers and some French decisions have acknowledged nullity in instances of mistake as to a substantial quality of the other person.[6] Planiol cites French cases where marriages were declared null because of the quality of person of one of the parties. One was where a woman married a freed convict without knowledge of his past conviction and two others were cases of French women having married German citizens believing them to be French. The English Matrimonial Causes Act of 1937 lists six conditions, which may be considered as quality of the person, that render a marriage voidable; but mistaken belief in pregnancy is not among them.[7] It does not appear that there is any basis in the Louisiana legislation or jurisprudence that would furnish a justification for holding that pregnancy *vel non* is a "mistake respecting the person" that would render a marriage null.

After ruling out the applicability of the three conditions listed in Article 91, for showing "unwillingness" to marry, the next inquiry must concern the exclusiveness of the listing. Is it possible that certain frauds and mistakes may be within the intent of that article? In most American jurisdictions a marriage which has been induced by a fraud or deceit may be declared a nullity where it is a fraud or deceit that affects in a vital way the very essence of the marriage relation.[8] At least three states have granted annulments where the female fraudulently claimed to be pregnant by the man she married when in fact she was not pregnant. New York as early as 1903 granted an annulment in such a case.[9] In 1961 Wisconsin expressly overturned its previous jurisprudence and declared null a marriage where the female fraudulently claimed to be pregnant.[10] Kentucky did so last year.[11] What these courts would have done had the claim of pregnancy been mistake rather than fraud is not known. In the Kentucky case one of the concurring judges said his opinion might have been different had it been mistake. Why this should make a difference is not easy to understand, since in either case the consenting male acted upon a belief that the claim was true when in fact it was not.

5. FRENCH CIV. CODE art. 146.
6. PLANIOL, CIVIL LAW TREATISE no. 1061 (La. St. L. Inst. transl. 1959).
7. THE REPORT OF A COMMISSION APPOINTED BY THE ARCHBISHOPS OF CANTERBURY AND YORK, THE CHURCH OF ENGLAND 23 (1955).
8. 4 AM. JUR. 2d, *Annulment of Marriage* § 12 (1962).
9. Di Lorenzo v. Di Lorenzo, 67 N.E. 63 (N.Y. App. 1903).
10. Masters v. Masters, 13 Wis. 2d 332, 188 N.W.2d 674 (1961).
11. Parks v. Parks, 418 S.W.2d 726 (Ky. App. 1967).

The French Civil Code and the Louisiana Civil Code omit all reference to fraud as a basis of nullity. Planiol states this omission in the French Code was intentional because in marriage "he deceives who can."[12] Thus, the French sources from which the Louisiana Code article was taken tend to support a belief that it was the intention of the legislature to omit fraud as a basis of nullity. In at least one case involving consent to marriage, *Delpit v. Young*,[13] the Louisiana Supreme Court has rejected the opinions of the French writers, in favor of a more strict interpretation of the three conditions listed in Article 91. Although it appears that there is not an absolutely firm basis to determine the three conditions listed in Article 91 which render consent unfree are exclusive or if some forms of fraud and mistake of fact that go to the essence of the marriage relation are within the intent of the article; the *Delpit* case seemingly indicates that the Louisiana courts will tend to interpret the three conditions very strictly. But even if these three conditions are not exclusive, little, if any, support can be found for finding that a mistaken belief that the woman was pregnant can be considered as within the intent of that article.

Assuming legal *unwillingness* to manifest consent does not exist in this case, it is necessary to turn to the question, whether within the terms of Article 90, consent may be said to exist when there is no actual internal or subjective intent corresponding to the freely given manifestation of consent. A previous writer in the *Louisiana Law Review* suggests that marriages may be a nullity in certain cases upon a proper showing that consent was simulated because in such a case there is no meeting of the minds as to the principal cause of the marriage contract.[14] This proposition has not been ruled upon in the jurisprudence of this state. It was raised in a recent case, but was avoided by other means.[15] Canon law, the remote ancestor of our marriage laws, provides that internal consent of the mind is always presumed to have been in agreement with that externally expressed, but it also provides that this presumption may be overcome by contrary proof.[16] Additionally canon law provides that consent to marriage may be conditional, and if the condition

12. PLANIOL, CIVIL LAW TREATISE no. 1057 (La. St. L. Inst. transl. 1959).
13. Delpit v. Young, 51 La. Ann. 923, 25 So. 547 (1899).
14. Comment, 20 LA. L. REV. 560, 580 (1960).
15. Parker v. Saileau, 213 So.2d 190 (La. App. 3d Cir. 1968).
16. T. BOUSCAREN & A. ELLIS, CANON LAW, A TEXT AND COMMENTARY 551 (3d ed. 1957).

fails then there is no consent.[17] The report of a commission appointed by the Archbishops of Canterbury and York in 1955 points out that English law looks to consent as expressed and will not allow the parties to derogate privately from their public professions.[18] Even a private written agreement entered into before marriage that the parties will never live together does not render an English marriage invalid.[19] The report emphasizes the obvious abuses that may result from a recognition of simulated or conditional consent as a basis of nullity. It does not seem illogical to assume that had the framers of our Code intended that a serious, public manifestation of consent, by one of sound mind and in full control of his faculties, could be overcome by proof of an absence of actual internal consent they would have so stated in clear explicit terms. On the other hand it would seem logical that where a party was insane, under the influence of narcotics or alcohol, or was otherwise not in control of his mental faculties, a finding of no consent would be within the intent of Article 90 even though there was a public manifestation of consent.

It does not appear that there is a basis within Article 90 for finding an absence of consent in this case. Neither is there a basis for finding that the consent was not freely given if we look only to the three conditions listed in Article 91. Should our courts hold that the three conditions listed in Article 91 are not exclusive they will then be faced with the problem of where to draw the line. This writer suggests that expansion of the conditions listed in Article 91 is a legislative matter and if social conditions today indicate a need to expand the list of causes that will render consent to marriage unfree, the expansion should be made by the legislature and not the judiciary.

Roy L. Wood

SUFFICIENT MEANS UNDER ARTICLE 160 OF THE LOUISIANA CIVIL CODE

Article 160 reads: "When the wife has not been at fault, and she has not sufficient means for her support, the court may allow her, out of the property and earnings of her husband, alimony which shall not exceed one-third of his income . . . This alimony

17. *Id.* at 556.

18. THE REPORT OF A COMMISSION APPOINTED BY THE ARCHBISHOPS OF CANTERBURY AND YORK, THE CHURCH OF ENGLAND 27 (1955).

19. *Id.*