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HOW DOES EPILEPSY AFFECT THE VALIDITY OF MARRIAGES

Doctor William G. Lennox (a leading medical authority on epilepsy) in his article on this disease[1] classifies epilepsy into two groups: first, that in which an inborn hereditary tendency seems the predominant, though not the exclusive factor. The seizures characteristic of this group are called genetic (idiopathic) seizures, and in this form the disease may be called true epilepsy. In the second group, some post conceptual environmental condition seems the predominant, though not the exclusive factor. In this group the seizures are called acquired (symptomatic) seizures.[2] Only the idiopathic type of epilepsy is transmissible to offspring. The law should not be concerned with symptomatic epilepsy; but in practice few courts make a distinction between the two.

Doctor Lennox has pointed out that true epilepsy, or so-called idiopathic epilepsy, usually begins to be manifested around the pubescent period and is generally progressive, while no physical basis for its presence is discoverable. It is defined as a group of symptoms appearing in connection with the repeated occurrence of convulsive seizures. The convulsive attack is not the essential factor in epilepsy. The main factor is the episodic disturbances of the central nervous system.

From the legal point of view, the court in *Busch v. Gruber*[3] defined epilepsy as a chronic disease of the nervous system attended by brain deterioration, which is progressive, is congenital, and likely to be transmitted by marriage and childbearing, and is considered incurable. Proof of epilepsy is not proof of insanity, except that one is considered temporarily insane during the course of an epileptic seizure. Epilepsy may cause insanity, but does not constitute it, and the two should not be confounded.[4] In *Gould v. Gould*[5] the court said that it is a matter of common knowledge, of which courts will take judicial notice, that epilepsy is a disease of a serious character, tending to weaken mental force, and often descending from parent to child, or entailing upon the offspring of the sufferer some other grave form of nervous malady.

The subject of epilepsy has by no means gone unnoticed by legislatures. As early as 1895, Conneticut enacted a statute[6] which as revised in 1902 provided as follows:

> Every man and woman, either of whom is epileptic, imbecile, or feeble-minded, who shall intermarry, or live together as husband and wife, when the woman is under forty-five years of age, shall be imprisoned not more than three years. . . .

In 1905 the Supreme Court of Errors of Connecticut upheld the constitu-

1. Contained in Cecil, Textbook of Medicine, 1382, W. B. Saunder Co., 1943.
2. Ibid.
3. 98 N.J. Eq. 1, 131 Atl. 101 (1925).
4. Oborn v. State, 143 Wis. 249, 126 N.W. 737 (1910).
5. 78 Conn. 242, 61 Atl. 604 (1905).
6. Pub. Acts 1895, Pac. 667, C. 325, Cf. Gen. St. 1902, § 1354 (Conn.).

tionality of this statute in the case of *Gould v. Gould.*[7] In this case the parties were married in 1899. Several years later the plaintiff learned of this statute, left the defendant, and brought this suit for a decree of annulment or a divorce. One of the grounds for divorce in Connecticut was "fraudulent contract." The Connecticut court held that a marriage of this type, in violation of the statute, was voidable, not void. The court reached this result by concluding that the Legislature by merely prescribing a criminal penalty intended to leave the effect of a marriage contracted in violation of the Act of 1895 to be determined by the general principles of the common law, and that at common law a marriage brought about by the fraud of one of the parties was voidable. The case was remanded for trial, as a divorce case, upon the issue of fraud.

Since 1895 several states have enacted similar statutes, among them being Kansas, New Hampshire, North Dakota, Utah, Washington, and Wisconsin.[8] The Minnesota statute is more inclusive than that of Connecticut. It provides that:

> No marriage shall be contracted . . . between persons either one of whom is epileptic, imbecile, feebleminded, or insane. . . .[9]

This places an absolute restriction upon the marriage ceremony. In the Minnesota case of *Behsman v. Behsman*[10] the husband sought to annul a marriage on the ground that unknown to him his wife was an epileptic at the time of the marriage. The court refused the annulment because (according to the court's view) the failure of the wife to reveal that she was afflicted with epilepsy was innocent and not fraudulent. However, the court indicated by way of dictum that if fraud or concealment had been shown, a decree of annulment would have been granted, based on the Minnesota statute which provided that no epileptic shall marry.

The Wisconsin court took a somewhat different view of this Minnesota statute in the case of *Kitzman v. Kitzman.*[11] Here the plaintiff and defendant were refused a marriage license in Wisconsin and they went to Minnesota, obtained a license, were married before a justice of the peace, and received a marriage certificate from such justice in the proper form. They returned to Wisconsin and lived. The defendant was afflicted with epilepsy when married. Several months later the wife commenced the action gainst her husband and his guardian, asking that the marriage ceremony be declared a valid marriage, and that the proceedings pending to commit the defendant to the county insane asylum be stayed. The court held the marriage ceremony voidable in Minnesota, as being against the prohibition of the Minnesota statute, and contrary to the public policy

7. Note 5 supra.
8. Kan. Gen. Stat. (Corrick, 1949) §§ 23-120 to 123; N.H. Rev. Lews (1942) c. 338, § 10, Amend. N.H. Laws (1949), c. 121; N.D. Rev. Code §§ 14-0307, 14-0317 (3) (1943); Utah Code Ann. § 40-1-2 (1) (1943); Rem. Rev. Stat. § 8439 (Wash. 1931); Wis. Stats. § 245.03 (1951).
9. M.S.A. 517.03.
10. 144 Minn. 95, 174 N.W. 611 (1919).
11. 167 Wis. 308, 166 N.W. 789 (1918).

of Wisconsin as well. Accordingly, the Wisconsin court annulled the marriage, but without any showing of fraud.

The *Kitzman* opinion reasoned that since Minnesota had provided by Sec. 7106, Minn. Stats. 1913 that marriages prohibited by law on account of consanguinity, or because either party had a former spouse living, if solemnized within Minnesota should be absolutely void without any legal proceedings, then all other marriages contracted contrary to other statutory prohibitions than those two so specified are voidable only, and valid until dissolved by judicial decree.[12] Therefore, under the two general types of statutes, Connecticut and Minnesota, we may say that a marriage in violation of either type of statute is voidable, but not void. The Minnesota court required proof of fraud, as did the Connecticut court. But Wisconsin, interpreting the Minnesota statute, held that a showing of fraud is unnecessary under such a statute as existed in Minnesota.

In the absence of a statute prohibiting marriage between persons either of whom is epileptic, the courts have generally held that if the afflicted person conceals the fact of epilepsy, a fraud results which "goes to the essentials" of the marriage relationship. Historically, the doctrine began with holding that concealment of a venereal disease prior to marriage constitutes fraud of such a character that it affects the essence of the marriage. *Sobel v. Sobel*[13] is an example of a decision which extended the rule for annulment of marriage in the case of fraudulent concealment to other than venereal diseases. This rule was held to include epilepsy in the case *Busch v. Gruber*.[14] There the defendant was suffering from epilepsy prior to the marriage. He concealed this fact from his prospective wife and affirmatively represented to her that he was in good health. Shortly after the marriage he had an epileptic fit, and after discovery, his wife, the paintiff, left him. The court held that the wife was entitled to an annulment. In this case the defendant not only suppressed the truth about his condition prior to the marriage, but falsely represented that he was in good health. (This is apparently the type of fraud which the Minnesota court would require.)

In New York there were two earlier decisions on the subject.[15] The court dismissed the complaint in the *Elser* case saying that there was no evidence of fraud. One year later, in the case of *McGill v. McGill*,[16] the court found that the plaintiff voluntarily cohabited with defendant as his wife, with full knowledge of the facts constituting the alleged fraud upon him. It was held that such voluntary cohabitation precluded any annulment of the marriage by reason of the alleged fraud based on concealment

12. 167 Wis. 308, 166 N.W. 789 (1918).
13. 88 Misc. Rep. 277, 150 N.Y.S. 248 (1914).
14. 98 N.J. Eq. 1, 131 Atl. 101 (1925).
15. Elser v. Elser, 160 N.Y.S. 724 (1916); McGill v. McGill, 179 App. Div. 343, 166 N.Y.S. 397 (1917), affirmed without opinion in 226 N.Y.S. 673 (1917).
16. McGill v. McGill, 179 App. Div. 343, 166 N.Y.S. 397 (1917), affirmed without opinion in 226 N.Y.S. 673 (1917).

of epilepsy. The holding in the Appellate Division did not overrule or modify the Supreme Court's decision[17] in the same case, that epilepsy is sufficient ground for annuling a marriage for fraud.

In the case of *Lee v. Lee*[18] the court held that epilepsy is not of itself ground for annulment of marriage, but if so severe as to prevent a normal marital life, then the court will grant a decree of annulment providing that knowledge of the condition was purposely concealed before the marriage and that the parties did not cohabit after the discovery of the condition. This holding was dictum, since the proceeding was an application for support money, filed in the Domestic Relations Court which in New York had no jurisdiction to annul a marriage.

In the case of *Richardson v. Richardson*[19] the problem was presented for the first time in Massachusetts. In this case the wife knew she was afflicted with epilepsy prior to her marriage. She had told her prospective husband that when she overworked she had fainting spells, which were not serious. Several weeks after the marriage the husband discovered her true condition and petitioned for an annulment. In denying the petition, the court held that concealment of epilepsy prior to the marriage was not a ground for annulment, evidently because it did not go to "the essentials" of marriage. Here the court refused to extend the rule for annulment of marriage in the case of fraudulent concealment to other than venereal diseases, the court saying:

> We are not aware of any case in this commonwealth where the fraudulent concealment of a disease other than venereal has been considered on the question under consideration except Cummington v. Belchertown. It was held that concealment of the fact that the woman had been insane previous to her marriage, she being sane at the time of the marriage, did not constitute such fraud as entitled her husband to have the marriage dissolved even though subsequently she became incurably insane.

In Wyoming no statute exists involving epilepsy as a ground for either divorce or annulment of marriage, nor is there any case authority.

Doctor Lennox points out that eugenics is the principal prophylaxis against genetic epilepsy. To reduce epilepsy in succeeding generations, eugenics would need to be applied not only to persons subject to genetic seizures, but also to persons with other hereditary cerebral diseases, especially of the "seizure discharge" type.[20]

Thus we see that in states which have statutes the courts agree that such marriage is voidable, not void. The courts in these states do not agree as to the circumstances under which they will grant a decree of annulment. The decisions differ as to what is necessary to constitute fraud.

17. 163 N.Y.S. 462 (1917).
18. Lee v. Lee, 43 N.Y.S.2d 652 (1942).
19. 246 Mass. 353, 140 N.E. 73 (1923).
20. Contained in Cecil, Textbook of Medicine, 1382, W. B. Saunder Co., 1943.

Some courts hold that the marriage in violation of a statute is voidable even in the absence of fraud or concealment.

There seems to be ample authority to the effect that an annulment will be granted on proof of fraudulent concealment of epilepsy. In Massachusetts, however, fraudulent concealment of epilepsy is not a ground for an annulment.

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EQUITABLE RELIEF IN LIBEL AND SLANDER

Ever since 1818 when the English decision by Lord Eldon in the case of *Gee v. Pritchard*[1] propounded the feudalistic dictum that injunctions can only be granted in cases involving property rights, the American courts have had an extremely difficult time granting injunctive relief to those who are suffering primarily only a loss to their names and reputations. That the rule in *Gee v. Pritchard*[2] was only dictum, and that the English courts ceased to worry about it long ago,[3] seems to make little impression here. If our courts can find no property right involved in a case, they will quite probably refuse injunctive relief.[4] This dictum of the English court seems especially unfortunate when, after stating it, they then went on in the case to find a property right in a personal letter written by the plaintiff to the defendant, and on this theory proceeded to grant an injunction against the publication of the letter by the defendant. Many courts today do not really insist on this property right to give equitable relief, but they do follow the dictum to the extent of refusing relief in cases which show no more than an injury to personality alone, as in libel and slander.

The dictum has become such strong authority that many times the courts of this country have decided a case with the flat statement that it is a well settled point of law that equity will not act to enjoin libel or slander where no propery rights are involved in the issue.[5] Other courts have refused the relief by deciding that they would be violating the constitutional rights of freedom of speech and the press and to a trial by jury.[6] This, of course, was the reasoning behind the dictum in the English case.

However, many of the courts today, realizing that the law remedy for damages in cases of libel or slander is often so uncertain and impossible as to be no remedy at all, have found a number of exceptions to the dis-

1. Gee v. Pritchard, 2 Swanst. 402, 36 Eng.Rep. 670 (1818).
2. Ibid.
3. Dixon v. Holden, L.R. 7 Eq. 488, 20 L.T. 357, 17 W.R. 482 (1868); Bonnard v. Perryman, 2 Ch. 269 (1891).
4. Francis v. Flinn, 118 U.S. 385, 30 L.Ed. 165, 6 S.Ct. 1148 (1885); Covell v. Chadwick, 153 Mass. 263, 26 N.E. 856, 25 Am.St.Rep. 65 (1890); Brandreth v. Lance, 8 Paige (N.Y.) 24, 34 Am.Dec. 368 (1839); Kwass v. Kersey, ...W.Va. ....., 81 S.E.2d 237 (1954).
5. Ibid.
6. Brandreth v. Lance, supra note 4; Kwass v. Kersey, supra note 4.