consent, while in Massachusetts the fraud must go the very foundation of the marriage.

From the instant case it is difficult to determine which rule Missouri follows. There have been no previous decisions on the question in Missouri.[7] In the instant case, since the fraud went to the sexual aspect of the marriage, the court could be said to have followed the Massachusetts rule. On the other hand, the court could have been following the New York rule inasmuch as there was a concealment which induced the plaintiff's consent to the marriage. Neither the language of the opinion nor the cases cited therein clarify the ambiguity.[8]

Where annulment is not a practical remedy, divorce may also be granted for concealment of a venereal disease. Where divorce is granted for concealment of a venereal disease, it is granted on grounds of cruelty.[9] To secure a divorce on that ground, defendant must have known he had the venereal disease,[10] and he must have concealed it.[11] Usually, however, any state of facts rendering a marriage wholly or partly invalid from the beginning is grounds for annulment.[12] Of the alternative measures of relief, the better would seem to be annulment. This is true because in annulment there are no problems raised as to support of the defendant, disposition of property, *et cetera*. On the other hand, if there are children, the better solution would be divorce, since questions of legitimacy, and support of the issue can be more easily resolved. J. E.

EQUITY—SPECIFIC PERFORMANCE—STATUTE OF FRAUDS—ORAL CONTRACT TO CONVEY LAND—[Missouri].—*X* orally promised to convey or devise certain real property to plaintiff if she would care for him for the rest of his life. Plaintiff did so, performing manifold household duties and ministering generally to his needs until his death a year later. When his will

7. In Jordan v. Missouri & Kan. Tel. Co. (1909) 136 Mo. App. 192, 116 S. W. 432, the Missouri Court merely gave full faith and credit to a New York judgment.

8. The court said that such fraud pertains to an essential of the marriage relation and entitled plaintiff to an annulment of the marriage; thus following the Massachusetts rule. But the court also said that it is not necessary that plaintiff state in his petition that he was misled in giving his consent, but that it appears so from necessary intendment; thus bringing in a consideration of the New York rule.

9. Bowman v. Bowman (Del. 1934) 6 Harr. 84, 171 Atl. 444; Holmes v. Holmes (1919) 186 Iowa 336, 170 N. W. 793, 8 A. L. R. 1534; Danielly v. Danielly (1922) 93 N. J. Eq. 556, 118 Atl. 335; McMahen v. McMahen (1898) 186 Pa. 485, 40 Atl. 795, 41 L. R. A. 802.

10. Holmes v. Holmes (1919) 186 Iowa 336, 170 N. W. 793, 8 A. L. R. 1534; Carbajal v. Fernandez (1912) 130 La. 812, 58 So. 581; Curtiss v. Curtiss (1922) 243 Mass. 51, 136 N. E. 829; Lazarwitz v. Lazarwitz (1928) 102 N. J. Eq. 132, 139 Atl. 881; Abramowitz v. Abramowitz (Sup. Ct. 1913) 140 N. Y. S. 275.

11. Holmes v. Holmes (1919) 186 Iowa 336, 170 N. W. 793, 8 A. L. R. 1534; Leach v. Leach (Me. 1887) 8 Atl. 349; Abramowitz v. Abramowitz (Sup. Ct. 1913) 140 N. Y. S. 275.

12. 1 Vernier, *American Family Laws* (1931) 239, sec. 50.

was read, it was found that he had devised the property to another. Plaintiff brought a bill for specific performance against the promisor's executrix, alleging full performance on her part. Defendant pleaded in bar the statute of frauds.[1] *Held:* Specific performance decreed. To deny specific performance would be to work an "equitable fraud," since plaintiff had fully performed the services required of her under a fair and conscionable contract. *Bick v. Mueller.*[2]

Missouri has long granted specific performance of oral promises to convey real property, when personal services have been performed as consideration therefor.[3] It is necessary, however, that there be clear and convincing proof that a contract existed,[4] and that its terms were fair and conscionable.[5] Moreover, the services relied on must be referable solely to the terms of a contract to convey land and must be inexplicable on other grounds.[6] If such proof be made, the courts have held that the promisor may not interpose the statute of frauds as a defense, since to do so would be to work a hardship on the promisee who has fully performed.[7]

There is, however, an exceptional situation in which even clear proof of an oral contract to convey and of full performance of the required services will not suffice to prevent the operation of the statute. In *Selle v. Selle,*[8] where the services performed were of brief duration, were not arduous, and were easily reducible to their monetary value, the court denied specific performance, but granted relief, independently of the contract, in *quantum*

1. R. S. Mo. (1929) sec. 2967, provides in part that "No action shall be brought * * * upon any contract made for the sale of lands, tenements, hereditaments, or an interest in or concerning them * * * unless the agreement upon which the action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith * * *."

2. (Mo. 1940) 142 S. W. (2d) 1021.

3. Gupton v. Gupton (1870) 47 Mo. 37; Sutton v. Hayden (1876) 62 Mo. 101; Berg v. Moreau (1906) 199 Mo. 416, 97 S. W. 901, 9 L. R. A. (N. S.) 157; Ver Standig v. St. Louis Union Trust Co. (1939) 344 Mo. 880, 129 S. W. (2d) 905. On the statute of frauds in Missouri, see Williams, Missouri Law on Performance of Oral Contracts as Method of Validation When Statute of Frauds is Invoked (1935) 20 ST. LOUIS LAW REVIEW 97.

4. For cases denying specific performance see: Rosenwald v. Middlebrook (1904) 188 Mo. 58, 86 S. W. 200; Russell v. Sharp (1905) 192 Mo. 270, 91 S. W. 134, 111 Am. St. Rep. 496.

5. Kirk v. Middlebrook (1906) 201 Mo. 245, 100 S. W. 450; Jones v. Jones (1933) 333 Mo. 478, 63 S. W. (2d) 146; Walker v. Bohanon (1912) 243 Mo. 119, 147 S. W. 1024.

6. Forrister v. Sullivan (1910) 231 Mo. 345, 132 S. W. 722. See Van Epps v. Redfield (1897) 69 Conn. 104, 36 Atl. 1011; Burns v. McCormick (1922) 233 N. Y. 230, 135 N. E. 273.

7. In Berg v. Moreau (1906) 199 Mo. 416, 97 S. W. 901, 906, Judge Lamm stated: "Nevertheless, equity did not come to destroy the law, but to fulfill the law. The very heart of the statutory purpose to be subserved, the remedy to be advanced, being to prevent the commission of frauds and perjuries, that purpose is subserved in equity by not allowing the statute as a defense when to allow such defense would be itself to commit a fraud against the promisee who has performed the contract."

8. (1935) 337 Mo. 1234, 88 S. W. (2d) 877, comment (1936) 21 ST. LOUIS LAW REVIEW 262, comment (1936) 1 Mo. L. Rev. 202.

meruit. The doctrine of the *Selle* case and the holding of the instant case provoke a fundamental question: Why should specific performance be granted generally when the consideration given by the promisee was personal services, but denied when the promisee has merely paid money?[9]

The object of the court in both types of cases is to make whole the promisee. When money has been paid, that object can be attained by a recovery for money had and received, and there is no need to enforce the oral contract in the face of the statute of frauds. So, too, when services can be compensated accurately by payment of money, as in the *Selle* case, a recovery in *quantum meruit* is adequate. The test should be nothing so mechanical as the relative duration of the services, nor their relative arduousness, though these may be pertinent factors. The question should be: Are the services of such a sort that they can be computed with comparative accuracy in terms of dollars and cents? If so, the statute should be given effect and specific performance denied. When, however, as in the principal case, an attempt to evaluate the services would force the court to weigh imponderables, *quantum meruit* would be at best an inaccurate remedy. In such a case, assuming that the contract has been properly proved, the statute should be disregarded and specific performance granted.[10]

W. L. P.

INSURANCE—ASSIGNMENT TO ONE WITHOUT AN INSURABLE INTEREST—EXTENT OF RECOVERY—[Pennsylvania].—Four policies of insurance were issued by the defendant company on the life of the deceased, payable to his estate. Each policy was subsequently assigned to the plaintiff, who had no insurable interest in the life of the deceased. It does not appear whether the intent to assign was conceived before the policies were issued to the deceased. *Held:* The assignment of an insurance policy to one who has no insurable interest, whether in good faith or not, is as contrary to public policy as the original issuance of a policy to such a person, and the assignee may recover only the amount expended by him in keeping the policy alive. *Werenzinski v. Prudential Insurance Co.*[1]

In limiting the assignee's recovery to the amount paid out by him in keeping the policy in force, even where there was no antecedent agreement to assign, the instant case represents the minority rule.[2] The cases following this rule are founded chiefly on the language of Mr. Justice Field of the United States Supreme Court in *Warnock v. Davis:* "The assignment of a policy to a party not having an insurable interest is as objectionable as the taking out of a policy in his name."[3] The holding of the *Warnock*

9. See Wheeler v. Dake (1908) 129 Mo. App. 547, 107 S. W. 1105; 2 Williston, *Contracts* (2d ed. 1936) 1432, sec. 494.

10. For a similar view see Note (1930) 19 Ky. L. J. 69.

1. (Pa. 1940) 14 A. (2d) 279.

2. Downey v. Hoffer (1885) 110 Pa. 109, 20 Atl. 655; Taussig v. United Security Life Ins. and Trust Co. (1911) 231 Pa. 16, 79 Atl. 810.

3. Warnock v. Davis (1881) 104 U. S. 775, 779.