

VOIDABLE MARRIAGE (ANNULMENT)--ISSUE OF IMPOTENCE--DEFENSE OF KNOWLEDGE.¹

The (*state number*) issue reads:

"Did the plaintiff know or should the plaintiff have known², prior to the marriage, that (*name spouse*) was physically, permanently and incurably impotent?"

You will answer this issue only if you have answered the (*state number*) issue "Yes" in favor of the plaintiff.

On this issue the burden of proof is on the defendant. This means that the defendant must prove, by the greater weight of the evidence, that prior to the marriage, the plaintiff knew or should have known that (*name spouse*) was physically, permanently and incurably impotent.

¹This instruction assumes that plaintiff's knowledge of the condition of impotence is relevant to his right to a decree of annulment and assumes also that plaintiff's lack of knowledge is matter to be raised in defense. That is the position taken in *Lovelace v. Lovelace*, 179 Ga. 822, 177 S.E.2d 685 (1934), in which the relevant Georgia statute was similar to N.C.G.S. § 51-3. It should be noted, however, that there is authority for the proposition that plaintiff's lack of knowledge is an essential element to be proved by him before a decree will be granted. See, e.g., 4 Am. Jur. 2d, Annulment § 53 (1962); 15 A.L.R. 2d 706; *Moore, Defenses Available in Annulment Actions*, 7 J. Family Law 239 (1967). Much of this authority, however, is based on cases decided under statutes that expressly require that a decree of annulment not be issued unless the plaintiff shows that he was "ignorant" of the condition of impotence at the time of the marriage. See, e.g., *Helen v. Thomas*, 52 Del. 1, 150 A.2d 833 (1959); *Rickards v. Rickards*, 53 Del. 134, 166 A.2d 425 (1960).

²The constructive knowledge standard is suggested by language in *Helen v. Thomas*, 52 Del. 1, 150 A.2d 833 (1959) and *Rickards v. Rickards*, 53 Del. 134, 166 A.2d 425 (1960).

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Finally, as to this (*state number*) issue on which the defendant has the burden of proof, if you find by the greater weight of the evidence that the plaintiff knew or should have known before the marriage that (*name spouse*) was physically, permanently and incurably impotent, then it would be your duty to answer this issue "Yes" in favor of the defendant.

If, on the other hand, you fail to so find, it would be your duty to answer this issue "No" in favor of the plaintiff.