

## Grounds for Annulment

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# JURISPRUDENCE

## GROUNDNS FOR ANNULMENT

Paradoxically, it is no virtue to be virtuous in America today. Organized crime reaches its tentacles into every major city in the nation, and into many of the smaller towns. Gamblers are protected by corrupt politicians, and bribery, or "small gifts," to influential men in Washington has become an everyday affair. Juvenile delinquency is at an all-time high. It would be surprising, indeed, if the sexual standards of the country were left untouched by this general degeneration. The recent *Kinsey Report* did its best to assure us that male sexual deviates were in such a majority that they constitute the norm. Two separate and independent surveys<sup>1</sup> show that 68% of the married women in the United States have had some pre-marital sexual experience. Of necessity this general attitude has seriously affected the institution of marriage. The family is the basic unit of our social life, but so rent and torn has it become in recent years that its very existence is threatened. Divorce has become easy, and, therefore, frequently indulged in. In the calendar year 1948, no less than 94,579 marriages were dissolved in nineteen states alone.<sup>2</sup> In some states, notably Florida, Arkansas, and Nevada, divorce has become a leading industry. Easy divorces are facilitated by negligible residence requirements,<sup>3</sup> and by tolerant and kindly judges.

<sup>1</sup> Terman, L.M., *Psychological Factors in Marital Happiness, 1938, and Sex Habits of: European Women vs. American Women, March, 1951*. The rapid rate at which morals in this respect have deteriorated is illustrated by Dr. Terman. According to his survey, of the women who were married before 1912, only 12% had pre-marital sexual experience; of the women who married during and immediately after World War I, 26% were non-virgins at the time of marriage; this percentage increased to 49% for those women who married in the 1922-1931 period; and of the women who married between 1932 and 1937, 68% had sexual intercourse prior to marriage. One can only speculate on the effect that World War II has had on these figures. The latest survey would tend to show that the figure is still 68%, but apparently this percentage represents all women tested, and the percentage for the 1937-1950 period would have to be considerably greater to counterbalance the smaller percent for earlier years.

<sup>2</sup> The nineteen states indicated, together with the marriages dissolved by divorce or annulment are as follows: Alabama, 9,699; Connecticut, 2,847; Delaware, 415; Florida, 18,015; Idaho, 3,190; Iowa, 5,609; Maryland, 5,999; Minnesota, 4,678; Mississippi, 6,697; Montana, 2,090; Nebraska, 2,752; New Hampshire, 1,260; Oregon, 6,405; South Dakota, 1,030; Tennessee, 8,292; Utah, 2,199; Virginia, 7,081; Wisconsin, 5,075; and Wyoming, 1,246. These statistics are taken from "Divorce and Annulment Statistics: Specified States, 1948," *Vital Statistics—Special Reports, Vol. 35, No. 12, National Office of Vital Statistics, Federal Security Agency, August 7, 1950, p. 165*.

<sup>3</sup> Nevada acquires jurisdiction after only six weeks residence by the party seeking the divorce; Wyoming requires only 60 days residence; While Florida acquires jurisdiction after 90 days. Some states have no residence requirements where grounds for divorce fall within specified limits, usually that the parties were residents at the time the grounds arose, and that the grounds arose within the state. For examples of this, see *Minn. Stat. (1945) sec. 518.01; Wis. Stat. (1949) sec. 247.06*.

Easy divorces are not within the grasp of everyone however. Until 1949, South Carolina granted no divorces.<sup>4</sup> The State of New York grants a divorce only on the grounds of adultery. Other states have provisions which, while not necessarily making divorce difficult, make it at least inconvenient.<sup>5</sup> For those who, for financial, health, or other reasons, cannot travel to other jurisdictions to obtain their divorces, a different method has been used to secure the dissolution of their marriages. This is dissolution by annulment.

However little can be said for the severance of the marriage tie by divorce, there can be little doubt but that annulment, *properly understood and properly applied*, is a legitimate and moral method of ending a marital relationship. Whereas a decree of divorce has for its object the termination of a valid marriage, for some cause arising after the celebration of that marriage, a decree of annulment is merely a judicial declaration that the marriage has been void and of no force from its inception, by reason of some cause existing prior to or concurrent with the marriage ceremony.

In civil law, however, this simple concept has been sadly confused by three factors. The first is that anomaly, the voidable marriage. Logically it would seem that the outcome of every marriage ceremony<sup>6</sup> must be either a valid marriage, because all of the prerequisites to a valid marriage are present, or an invalid or void marriage, because one or more of the prerequisites is absent. This, however, is not the case. By defining marriage as nothing more than a civil contract, the state has let in contractual concepts that have no place in the sacramental, or even the purely natural, union of man and woman. Thus, most states have statutes prohibiting the marriage of minors below specified ages. But contrary to the normal expectation, an attempted marriage by such a minor does not result in a void marriage, but in a voidable one. For it is elementary law that contracts between minors are voidable by either party,<sup>7</sup> and contracts between a minor and an adult are voidable by the minor. Until avoidance, all such contracts are valid. By the same token, marriages entered into by force or fraud are voidable, since the law for contracts in general is such.<sup>8</sup> We have, therefore, a betwixt and between status of marriage—one which was entered

<sup>4</sup> On April 15, 1949, Governor J. Strom Thurmond signed into law a bill allowing divorce on the grounds of adultery, desertion for a period of one year, physical cruelty, or habitual drunkenness.

<sup>5</sup> For example, Massachusetts has a residence requirement of three years where both parties were residents at the time of marriage, and five years in all other cases.

<sup>6</sup> The terms "ceremony" and "celebration," as everywhere used in this article, are used to include common law marriages in those states which recognize them.

<sup>7</sup> Restatement of Contracts, sec. 431, comment b (1933).

<sup>8</sup> Restatement of Contracts, sec. 467(1) (1933).

into invalidly, but which is valid until declared void on the whim of the "innocent" party.

A second element of confusion rests on the fact that, because of jurisdictional differences<sup>9</sup> and because of the concept of the voidable marriage, a court may have the authority to declare a conjugal union void only from the date of the decree.<sup>10</sup> But this is nothing more than divorce! If a marriage is void, then it is void because it was never validly contracted. And if a marriage is valid, then it does not retroactively become void. The arbitrary establishment of any later date than the time of celebration as the effective date of avoidance is sheer nonsense, for, by definition of terms, such a marriage must be void ab initio.

The grounds for annulment, as laid by the legislatures and interpreted by the courts, make up the third and most pernicious factor lending confusion to this segment of the law. To repeat our earlier statement, since a decree of annulment is granted for a cause which prohibited the celebration of a valid marriage, necessarily all such grounds must exist antecedently to or concurrently with the celebration of the marriage. It therefore follows that any grounds arising subsequently are barren grounds with respect to this decree, irrespective of their character. Nevertheless, the statistical compilation published by the National Office of Vital Statistics<sup>11</sup> shows that in the year 1948 annulments were granted in at least two states for abandonment, conviction of crime, cruel and inhuman treatment, non-support, and habitual intemperance. To call such dissolutions annulments is not, in the idiom of the day, calling a spade a spade. It is, in fact, not even properly calling it a shovel. In order to clarify the status of existing state laws, an examination of those factors which invalidate a marriage would probably be helpful.

In general, there are three conditions necessary to the establishment of a valid marriage: (1) celebration as prescribed by competent authority; (2) free consent of the parties; and (3) the absence of any diriment impediment, i.e., the absence of any factor prescribed by law as absolutely nullifying the marriage. If any of these three conditions be not fulfilled, then there is no marriage, and a declaration of nullity is proper to establish the status of the parties.

The first condition prescribes that that marriage be celebrated in the manner set down by the authority within whose province it is to regulate that marriage. All jurisdictions regulate the celebration of marriages in some manner, prescribing licensing, blood tests, and the like. And whereas the Catholic Church considers that the solemnization of

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<sup>9</sup> An example of this situation is found in the case of *Dodds v. Pittsburgh, M. & B. Rys. Co.*, 107 Pa. Super. 20, 162 A. 468 (1932).

<sup>10</sup> Restatement of the Conflict of Laws, sec. 115 (1934).

<sup>11</sup> *Op. cit.*, pp. 166-168.

the marriage of its members, because a divinely instituted sacrament, is in the hands of the Church rather than in the hands of the State, still Catholics are bound in conscience to observe these laws because just and for the common good. Non-observance, while sinful, does not invalidate the marriage, though at civil law an annulment for an unlicensed marriage is sometimes granted. However, most states, while forbidding these marriages, generally recognize their validity. There is no doubt but what the state, in its discretion, may grant such annulments in all cases where it has the proper governance of the marriage. State statutes must be individually examined to determine the position of that jurisdiction in regard to the validity of marriages not solemnized in accordance with the law.

The second condition requires that each party freely give his or her consent to the marriage contract.<sup>12</sup> It is basic that no one may be forced into contractual obligations against his will. This is most particularly true of the marriage contract. For this reason the legislatures have decreed that a marriage entered into by reason of fraud, duress, non-age, insanity, or mistake or joke may be annulled at the suit of the party under the disability, and sometimes at the suit of the other party. A lack of consent is implicit in each of these grounds, with the possible exception of fraud, and it is upon this that their validity exists as grounds for annulment.

Fraud is now a most popular ground for annulment proceedings. A marriage based upon a fraudulent representation is considered in civil law as no marriage at all, simply because consent was given to the union as represented to the defrauded party, and not to the marriage as it actually existed. Such a ground as this easily lends itself to abuse. Consider, for example, a case as reported by Mr. A. E. Hotchner in an article written for *This Week Magazine*.

"'Now tell the judge,' one lawyer said, 'why you want an annulment.'

"'Well,' said his client, a pert young lady of 25 or so, 'when he was taking me out before we got married, he used to always tell me how much better off I'd be married to him than working and living with my parents. He told me no wife of his would ever have to work. Well, I believed him and we got married . . .'

"'You married him believing you would never have to work?' the lawyer interjected.

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<sup>12</sup> "Yet, although matrimony is of its very nature of divine institution, the human will, too, enters into it and performs a most noble part. For each individual marriage, inasmuch as it is a conjugal union of a particular man and woman, arises only from the free consent of each of the spouses; and this free act of the will, by which each party hands over and accepts those rights proper to the state of marriage, is so necessary to constitute true marriage that it cannot be supplied by any human power." Pope Pius XI, Encyclical, *Casti Connubii*, 1941.

"'I certainly did,' his client answered, 'but soon after he lost his business and he got a job that didn't pay very well so I took back my old position. I've been working now for three years.'

"The annulment was granted without further questioning."<sup>13</sup>

As is obvious, the element of fraud is only superficially present in this case, if indeed it exists at all. In consenting to the marriage contract (part of which reads "for better or for worse, for richer or for poorer"), no person may reserve to himself the right to withdraw if the rosy dreams of youth fail to materialize. Nor does a promise based on expectancy constitute a misrepresentation. The ordinary tenets of contract law, even, will seldom admit of this. In order to obviate this type of annulment proceeding, some courts have defined fraud much more strictly. As a result, there are current today two conflicting views on the adequacy of fraud as grounds for annulment.

Representative of the first view is New York which holds that if consent to marriage was induced by a misrepresentation, no matter what that representation may have been, good grounds for annulment are present.<sup>14</sup> It was in New York that the annulment reported by Mr. Hotchner was granted. That annulment, however, was an unauthorized extension of this rule, for there was no actual misrepresentation present there. At the other end of the ladder is the holding of Wisconsin, which has adopted the position that, although marriage is considered by the state as a purely civil contract, false representations which would set aside ordinary civil contracts are not necessarily sufficient to void the contract of marriage. The Wisconsin view is that the false representations must go to the essentials of the marriage contract.<sup>15</sup>

Thus we have two varying expressions of the law. But which, if either, of these accords more closely to right reason and good morals? There is in every marriage contract, as in every purely civil contract, elements which are substantial and elements which are accidental. Clearly, where a party has been defrauded on a substantial element of the marriage, it is then void. Thus, where there is error concerning the person of the defrauding party, the marriage is void. This is most clearly illustrated in the case where there has been a substitution of twins. For in such a case the consent of the two contracting parties would not join. For example, A would consent to marry B; but B is not present to accept A's consent, C does this; however, A's consent never went

<sup>13</sup> A. E. Hotchner, "The New Annulment Racket," *This Week Magazine*, January 21, 1951, p. 7.

<sup>14</sup> "If the plaintiff proves to the satisfaction of the court that, through 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." *Di Lorenzo v. Di Lorenzo*, 174 N.Y. 467, 474, 67 N.E. 63, 65, 63 L.R.A. 92, 95, 95 Am. St. Rep. 609, 613 (1903).

<sup>15</sup> *Wells v. Talham*, 180 Wis. 654, 194 N.W. 36, 33 A.L.R. 27 (1923).

out to C. Another case of substantial fraud is found where the defrauding party, *at the time of the marriage*, has no intention of surrendering his or her body to the other party. This marriage would be void for the reason that the very essence of the marital compact is the right of the conjugal act.

Where only the accidentals of a marriage are involved, avoidance is not morally possible. Qualities of the defrauding party such as health, virginity, wealth, and the like are mere accidents. What then of a man who has been defrauded into believing before marriage that his spouse is a virgin, but who finds this to be untrue later? His consent nevertheless goes out to this woman who has lied to him, despite the fact that it might not have gone out had he been apprised of all of the facts. The misrepresentation does not rob his act of consenting of its effectiveness.<sup>16</sup>

Assuming the correctness of these distinctions, Wisconsin would seem to have the more technically correct view. As a consequence, the Wisconsin position attains a most desirable result: the strengthening of the marriage bond and the maintenance of the family. In applying this law, however, the Wisconsin Supreme Court handed down an unfortunate decision in the case of *Wells v. Talham*.<sup>17</sup> The complaint alleged, in that case, that an elderly Roman Catholic entered into a marriage agreement with a Protestant who falsely represented that she was a widow and had never been divorced. Actually she had been divorced, and her first husband was still living. She knew it was against the laws of the Roman Catholic Church for the complainant to marry her under the circumstances, and knew that he might be excommunicated for so doing. She further agreed to have a Catholic ceremony performed if the complainant would first marry her in a Methodist Episcopal ceremony. After the Protestant ceremony, the defendant refused to carry out this promise. The annulment was denied on the ground that the defendant's misrepresentation did not go to the essence of the marriage contract, since, civilly, the defendant was free to marry. Logically, the court was correct in its decision, insofar as this decision was based on an insistence that the essentials or substance of the marriage be involved, inasmuch as, under American law, the court was bound to recognize the defendant's divorce. However, what the court neglected to consider here was the complaint's attitude toward the marriage ceremony in which he took part. He did not, would not, and according to the tenets of his faith, could not, consider the Methodist Episcopal

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<sup>16</sup> Marriages have been dissolved on these grounds. Cf. *Gatto v. Gatto*, 79 N.H. 177, 106 A. 493 (1919). The same court refused an annulment on these same grounds thirteen years later in *Heath v. Heath*, 85 N.H. 419, 159 A. 418 (1932).

<sup>17</sup> *Supra*, Note 15.

ceremony as valid. This was his reason for insisting on a subsequent Catholic ceremony. Therefore, his consent did not go out to the defendant at that prior ceremony in any greater sense than it would have at a dress rehearsal of the marriage. And where his consent failed to go out, no marriage could result. Yet the Wisconsin court left him in the legal position of being a married man.<sup>18</sup>

The ground of duress or force is undoubtedly a valid ground for annulment, since consent to such a marriage is made in fear of bodily harm. Consent so procured is consent of the lips only, and not of the mind. It is, therefore, no consent as will result in a binding contract. Although there are exceptions, the courts are fairly well agreed that marriages entered into under duress are voidable.<sup>19</sup> There is authority to the effect that the duress must come from the defendant or at his or her instigation,<sup>20</sup> but this has little foundation in reason, since force is force from whatever source it may come. However, if it is shown upon trial that the duress or force used was slight, there is less justification for the granting of an annulment. For, where the force is slight or negligible, the consent was freely given, even though reluctantly.

On the ground that the parties to a marriage contract must be of a certain age, prescribed by statute, before they are capable of giving their consent to marriage, all states grant annulments to parties marrying under this age. The ages vary from state to state. Under the common law this age was 14 for males and 12 for females, and some jurisdictions still follow this rule. A great many other states have raised the age limit. In Wisconsin, for example, the male must be 18 and the female 15 years of age.<sup>21</sup> Such marriages are considered voidable, however, and not void, providing the parties have at least reached the age of reason, which is considered to be reached at 7 years.<sup>22</sup> Marriages below that age are, of course, void. While this attitude may be questionable on the basis of logic, since a person has either reached an age at

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<sup>18</sup> The court's further point, made in reference to the defendant's promise to have a Roman Catholic ceremony performed, that a marriage should not be annulled on the ground of broken promises, is well taken. *New York*, on the other hand, has granted annulments for this reason in *Taylor v. Taylor*, 181 Misc. 306, 47 N.Y.S. (2d) 401 (Sup. Ct. 1943); *Hubner v. Hubner*, 64 N.Y.S. (2d) 513 (Sup. Ct. 1946); *Vonbiroganis v. Von Brock*, 64 N.Y.S. (2d) 885 (Sup. Ct. 1946); and *Cart v. Cart*, 28 N.Y.S. (2d) 61 (Sup. Ct. 1941).

<sup>19</sup> Cases on this point are collected in 91 A.L.R. 414 (1934).

<sup>20</sup> "To be available as a ground for relief it must appear that the duress of the party asking to be relieved was occasioned by the other contracting party, or that he knowingly used or availed himself of such duress as a means of procuring the contract sought to be annulled." *Sherman v. Sherman*, 20 N.Y.S. 414 (1892).

<sup>21</sup> Wis. Stat. sec. 245.02 (1949).

<sup>22</sup> "The American jurisdictions have quite generally followed the principle that marriages where one or both parties are under the age of consent are not void, but only voidable. Some have done this by express statute; in others the same result is reached by judicial decision." I Vernier, *American Family Laws* (1931), p. 118.

which he may freely consent to the marriage contract or he has not, strong policy reasons dictate the state's acceptance of the rule. The impetuosity of youth would often lead to tragic results were such marriages declared absolutely valid. And on the other hand, where they considered absolutely void, there would be many problems concerning estates and legitimacy that would inevitably lead, in many instances, to palpable injustice. Whether such policy reasons are sufficient to countenance the invalidating of a marriage freely consented to by parties capable of consuming it is another question. If we are to take the position, as we do, that marriage, whether natural or sacramental, is an indissoluble union, then certainly these considerations do not warrant the granting of annulments. But in all cases where the state has the governance of the marriage tie, it is undoubtedly within its rights in prescribing such rules as diriment impediments if it deems this advisable. This, however, would make the marriage void rather than voidable.

There is no question but what persons who are insane or who are idiots at the time of their marriage are incapable of consenting to the marriage contract, and no one seriously disputes this. Thus, an annulment is properly granted on the grounds of idiocy or insanity. There is, however, some question as to the quantum of insanity necessary to render the giving of consent impossible. The law quite universally holds that a person may be sane enough to consent to marriage and yet be insane in all other respects. Judge Pattison, in expounding on this point in *Elfont v. Elfont*,<sup>23</sup> said:

"The well-settled rule or principle of law, both in this state and elsewhere, by which we are to be controlled, is that, to render a marriage invalid because of insanity on the part of one of the parties to the contract, it must be shown clearly and convincingly that such party was unable to understand the nature of the contract of marriage and to appreciate the legal consequences naturally deducible therefrom. Every variation from a normal mental condition is not in itself enough to avoid the marriage contract. The mental defect or derangement must be one having a direct bearing upon such contract. If the party entering the marriage relation has sufficient capacity to understand the nature of the contract and the duties and responsibilities which it creates, the marriage will be valid. Mere weakness or imbecility of mind is not sufficient, nor eccentricity or partial dementia, but it must be such a general mental derangement as prevents the party from comprehending the nature of the contract of marriage and from giving to it his free and intelligent consent."<sup>24</sup>

To the medical profession, on the other hand, a person is either insane or he is not. If he is insane on one subject, this insanity infects

<sup>23</sup> 161 Md. 458, 157 A. 741 (1932).

<sup>24</sup> *Ibid.*, p. 746.

and affects his whole mental capacity. Partial insanity, then, is a psychic impossibility. If this view is correct, and we have no reason to doubt it, then insanity is an absolute bar to marriage. No amount of apparent lucidity concerning marriage would give a person so afflicted the freedom to consent to a marital union. And since, as we have said, the validity of marriage rests in part on free consent thereto, all such marriages are void. Nevertheless, though the study of the mind is outside of the field of law, still the courts are justified in slowly accepting the medical viewpoint, since knowledge of the mind is admittedly incomplete.

As to marriage entered into by mistake or joke, such marriages are void for lack of consent. It seems to us basic that if a person does not intend to get married when he goes through the ceremony, then he is not married; or if he does not intend to marry the particular person with whom he goes through that ceremony, then he is not in fact marrying that person. The jurisdictions hold this viewpoint with great regularity.

The law, with singular uniformity, describes all marriages entered into under these five disabilities, which we have denominated lack of consent, as voidable.<sup>25</sup> That is to say, they may, through ratification, later become valid marriages not subject to annulment proceedings. Or, if not ratified, they may be declared null and void. Barring both ratification and annulment, they remain in that indeterminate stage of nothingness of which we have previously spoken. If not avoided before death, the law usually presumes ratification and prohibits collateral attacks on their validity.

Yet the law has some justification for its illogical position. Marriage is a right natural to all men not under a prohibitory disability. And though Church and State may regulate marriage, they may not take this natural right away.<sup>26</sup> Therefore it follows that while the Church and State may demand that all marriages within their jurisdiction be performed in accordance with its decrees, and may make all marriages not so performed illicit, they may not decree such marriages invalid. Such being the case, any union contracted by mutual consent of the parties is a valid marriage. In legal parlance this is termed a common law marriage. Where, therefore, lack of consent prevents the fruition of a binding marriage at the time of the ceremony, there is

<sup>25</sup> There are, of course, exceptions under every point, but an absolute uniformity on any rule of law seems to be a well-recognized impossibility. Even those laws labeled "uniform" are often altered before being incorporated into the statutes of those states adopting them.

<sup>26</sup> "To take away from man the natural and primeval right of marriage, to circumscribe in any way the principal ends of marriage laid down in the beginning by God Himself in the words 'Increase and multiply,' is beyond the power of any human law." Pope Leo XIII, Encyclical, *Rerum Novarum*, 15 May, 1891.

nothing to prevent a later marriage between the parties by mutual consent. So what was a void marriage in the first instance (not the nebulous voidable one) becomes, *as of the date of consent*, a valid one. Many states have outlawed the common law marriage, and are content to term this later marriage a ratification of the legally prescribed ceremony. If the state wishes to use this devious method, there is apparently no reason why it should not, since the proper end is attained.

The third and last condition essential to a valid marriage is the absence of any diriment impediment. In general, those impediments imposed by the civil law are previous marriage not dissolved, consanguinity, affinity, miscegenation, and certain conditions of health and physical limitations. The first three may be disposed of quickly. Whatever may be the prevailing American view as to the propriety of taking on a succession of spouses, the law is quite clear that this is a monogamous country—that only one wife or one husband at a time will be tolerated.<sup>27</sup> While a person has a spouse living, therefore, he is absolutely prohibited from contracting a second marriage. As far as this goes it is correct and in accord with the natural law and scriptural authority.

Both Church and State have the authority to prohibit marriages within certain degrees of consanguinity (blood relationship) or affinity (the relationship of a person to the blood relations of his spouse). The natural law forbids only one such marriage—that of consanguinity in the first degree of the direct line. All other prohibited degrees are based on positive law. And, although every man has a natural right to marry, he does not have a natural right to marry any particular person where the common good is thereby endangered. Both health and morality affect the common good, and, since both are inherent in consanguineous and affinitive marriages, the regulating agencies of Church and State may morally impose such limits as they deem desirable or necessary to promote the better health and morality of the community. Vernier<sup>28</sup> states that all 51 American jurisdictions have statutes prohibiting certain consanguineous marriages, and that there is a surprising degree of uniformity in these laws. However, 26 states do not make affinity an impediment to marriage.<sup>29</sup>

A less valid impediment imposed by many states is that of disparity of race. At the present time 29 states prohibit the intermarriage of

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<sup>27</sup> For an interesting case discussing the right of an individual to practice polygamy on religious grounds, see *Reynolds v. United States*, 98 U.S. 145, 25 L. Ed. 244 (1878).

<sup>28</sup> *Op. Cit.*, pp. 173-174.

<sup>29</sup> The jurisdictions without statutes on this subject are: Arizona, Arkansas, California, Colorado, Delaware, Florida, Idaho, Illinois, Indiana, Kansas, Louisiana, Minnesota, Montana, Nebraska, Nevada, New Jersey, New York, New Mexico, North Carolina, North Dakota, Ohio, Oregon, Utah, Washington, Wisconsin, and Wyoming.

whites and Negroes, and 14 states prohibit such marriages between whites and Mongolians. In at least two cases the applicable statutes have been held constitutional.<sup>30</sup> The Supreme Court of California, however, with three dissents has found the California statute unconstitutional.<sup>31</sup> The invalidity of this impediment does not rest on constitutional grounds, however, but upon moral grounds. The argument begins with our basic premise: that all men have a natural right to marry. If this be so, then the regulatory power of the state is confined to prohibiting only those marriages which impair the common good for reasons of health or morality. It was at one time believed by many in this country that a mixture of races would result in inferior beings. This myth, conceived in ignorance and suckled by bigotry, has long since been exploded.<sup>32</sup> Indeed, very often the genes of two races supplement each other to great advantage, producing brilliant and talented men. It must be conceded that physical disharmonies, such as big hands with small arms, sometimes appear. But it could hardly be said that this affects the health of the individual in any manner. Similarly, morality is in no way determined or affected by interracial marriages. The miscegenation statutes have, therefore, no basis in reason, and are, at the very least, unjust. Their only reason for existence lies in the bigotry of some of our lawmakers, and this seems small justification for denying to man rights which have been granted to him by God.

The last of the impediments imposed by the states are those based on physical impairment. First and foremost of these is impotence. Father Edwin Healy explains why impotence is a valid bar to marriage when he says:

“The essence of matrimony consists in this, that each party confers upon and receives from the other the perpetual and exclusive use of the body in relation to the marital act. One who is impotent, therefore, could not satisfy the conditions of this contract, and so the natural law makes marriage for him impossible.”<sup>33</sup>

But every case of impotence is not a bar to marriage, for the marital act is not an inherent impossibility where impotence is only a temporary condition. And it is only this inherent impossibility that raises the bar. Further, if the condition occurs after marriage, it cannot nullify what was, at its inception, a valid marriage. We say, then, that for the impediment of impotence to render a marriage of no force, it must be both

<sup>30</sup> *Green v. State*, 58 Ala. 190 (1877); *Blake v. Sessions*, 99 Okla. 59, 220 P. 876 (1923).

<sup>31</sup> *Perez v. Lippold*, 32 Cal. (2d) 711, 198 P. (2d) 17 (1948).

<sup>32</sup> For a brief but thorough discrediting of the most popular misconceptions concerning race, see Ruth Benedict and Gene Weltfish, *The Races of Mankind*, New York, Public Affairs Committee, Inc., 1943.

<sup>33</sup> Edwin F. Healy, S.J., *Marriage Guidance*, 1942, p. 201.

permanent and antecedent to the marriage.<sup>34</sup> In some states impotence is held to be grounds for divorce rather than for annulment.<sup>35</sup>

Sterility, unlike impotence, is not an impediment to matrimony, since it does not frustrate the marital act. The jurisdictions seem uniform in holding that, in the absence of fraud by concealment, it does not constitute grounds for annulment.

As to other diseases and afflictions, the law is not quite so uniform. According to Vernier:

"Only three states, North Carolina, North Dakota, and Washington, prohibit the marriage of persons having tuberculosis 'in the infectious stages' (North Carolina), or 'in its advanced stages' (North Dakota and Washington). In three other states the statutes are of broader application. Delaware prohibits the marriage of a party who has any 'communicable diseases the nature of which is unknown to the other party'; Indiana prohibits the marriage of any persons who is 'afflicted with a transmissible disease'; and in Pennsylvania there is, indirectly, such a prohibition in the form of a requirement that upon application for a license the parties must declare that they do not have any transmissible disease."<sup>36</sup>

Also in the case of epilepsy, some states regard the marriage of epileptics as void,<sup>37</sup> some as voidable,<sup>38</sup> while others regard them as valid, providing the element of fraud does not enter in, even in the face of prohibitory statutes.<sup>39</sup>

It is perhaps reasonable to speculate that the reason for the great diversity in the laws concerning contagious diseases and epilepsy is that they do not rest on any firm ground in reason. Surely such persons are capable of giving free consent to the marriage contract, and surely they are capable of consummating the marriage. If the other party to the marriage knows of and consents to marriage with a person so afflicted, such would seem to be a valid marriage under the natural law. If the other party does not know, the marriage, while sinful to the diseased person, is yet valid. But what of the authority of the state to impose impediments for reason of health? It will be remembered that when we spoke of this previously, we stated that while the state may prohibit the

<sup>34</sup> Accord: *Devanbagh v. Devanbagh*, 5 Paige (N.Y.) 554, 28 Am. Dec. 443 (1836).

<sup>35</sup> See, for example, Mass. Gen. Laws (1932), c. 208, sec. 1.

<sup>36</sup> I Vernier, *American Family Laws* (1931), p. 199. See North Carolina Ann. Code (1935), sec. 2500a; North Dakota Comp. Laws (1913), secs. 4373-4378; Washington Rev. Stat. (Remington, 1932), sec. 8439.

<sup>37</sup> *In re Canon's Estate*, 221 Wis. 322, 266 N.W. 918 (1936). Section 245.03(1) of the Wisconsin Statutes (1949) provides ". . . No insane, imbecile, feeble-minded or epileptic person or idiot shall be capable of contracting marriage."

<sup>38</sup> *Gould v. Gould*, 78 Conn. 242, 61 A. 604, 2 L.R.A. (N.S.) 531 (1905).

<sup>39</sup> *Behsman v. Behsman*, 144 Minn. 95, 174 N.W. 611, 7 A.L.R. 1501 (1919). Section 517.03 of the Minnesota Statutes (1945) provides that, "No marriage shall be contracted . . . between persons either one of whom is epileptic. . . ."

marriage of a person to some particular person for reasons of health, it was not within the power of the state to forbid marriage absolutely to a man not otherwise incapacitated by the natural law. But when the state forbids a tubercular or an epileptic to contract marriage, it is forbidding him absolutely. Thus the state is exceeding the power which it morally possesses.

The scope of this article has been to survey the general grounds for annulment. Some grounds we have found to be invalid as opposed to the natural law. Some we have found valid, but abused. And in others we have seen a correct application of the annulment proceedings. Much could be said that we have not said. Indeed, volumes could be written on our every paragraph. But we are limited in space and scope herein. Therefore, to contain our thoughts within the narrow bounds of this paper, we have had to assume many premises, and have baldly stated others without proof. Basic to our argument is the premise that marriage is of divine institution, which, when validly contracted, is indissoluble except by death. We have further postulated that there is a natural law to which the state, as well as all men individually, is subject; and finally that it is in the interest of the state to preserve the marriage bond contracted by its citizens.

If, therefore, this article seems an oversimplification of the law, we ascribe it to two reasons: first, we did not attempt to prove our every statement, for this would be folly in so little space, and such proof is readily available to any who seek it; and second, the law itself has become unnecessarily confused. This is a day when words no longer mean the same thing when used by different people—as witness the use of the word “democracy” by the United States and its totally different use by Russia. Marriage was once considered a permanent union of one man and one woman for the purpose of procreation and mutual love and affection. A declaration of annulment once meant that the parties separating were never validly married by reason of some prohibiting defect existing at the time of the attempted marriage. It would be far better, we think, were the country to “retrogress” to this position once more. The current craze of swinging from spouse to spouse, as a monkey swings from tree to tree, is destroying the very roots of our existence—the God-fearing, God-loving family.

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