

T H E L A W R E F O R M C O M M I S S I O N
AN COIMISIÚN UM ATHCHOÍRIÚ AN DLÍ

(LRC 9 - 1984)

REPORT ON NULLITY OF MARRIAGE

IRELAND
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INTRODUCTION

The law of nullity of marriage is concerned with the circumstances in which a marriage will be invalid according to the law of the State: it is not concerned with such questions as divorce (which is the legal termination of an existing valid marriage) or legal separation (which is also concerned with a valid marriage).

Nullity of marriage focuses on the state of affairs prevailing at the time the marriage is entered into and thus cannot be an answer to all problems which bring about marital breakdown. Even in legal systems where there is a divorce jurisdiction, nullity procedures are also part of the law because of the essential difference between the two.

The present law of nullity of marriage is to a large extent based on the principles applied by the Ecclesiastical Courts of the Church of Ireland before 1871. Those principles themselves derived from Pre-Reformation times. To an increasing extent in recent years, the High Court and Supreme Court have developed and extended these principles. Moreover, statutory reform has affected certain aspects of the law.

The subject of nullity of marriage has been under examination by the Commission for some time. On 26 August 1976, the then Attorney General, Mr Declan Costello, S.C., pursuant to the provisions of section 4(2)(c) of the Law Reform Commission Act 1975, referred to the Commission two aspects of the subject: the prohibited degrees of relationship in the law of marriage, and the application of foreign law in cases in which the Courts of this country have jurisdiction to grant a decree of nullity of marriage.

In August 1977, pursuant to the same statutory provisions, the then Attorney General, Mr Anthony Hederman, S.C., requested the Law Reform Commission to undertake an examination of and conduct research in the "Law relating to Nullity of Marriage" and, if it thought fit, to formulate proposals for its reform and to submit them to him. (A decision to the same effect had already been taken by his immediate predecessor, Mr John Kelly, S.C., and communicated to the President of the Commission, but the formal letter conveying the request had not been sent before Mr Kelly ceased to hold the office of Attorney General.) Mr Hederman had also suggested to the Commission that it might be convenient to incorporate in the examination the Commission's views or proposals relating to the two aspects of this subject which had already been submitted by Mr Costello in August 1976.

Having regard to the request of the Attorney General to the Commission to examine the law relating to nullity of marriage, it was thought that it would be appropriate to combine an examination of that subject with an examination of the question of existing matrimonial causes generally*. To this end the Commission wrote to each of the persons and organisations that made submissions in writing to the Office of the Attorney General relating to the discussion paper published by that Office in August 1976 and entitled "The Law of Nullity in Ireland". Many of these persons and bodies responded positively to the Commission and sent copies of the submissions they originally made and in some cases elaborated on them.

At an early stage in its research, it became clear to the Commission that much of the difficulty about the existing law

* The Law Reform Commission's Report on Divorce a Mensa et Thoro and Related Matters (LRC 8-1983) was transmitted to the Taoiseach, Dr Garret FitzGerald, T.D., on 16 December 1983.

of nullity could be traced to the fact that there was such a paucity of modern Irish jurisprudence. The courts had had no opportunity to develop the law in the light of modern advances in psychiatry and psychology. As the Commission continued with its deliberations, the courts increasingly were being presented with nullity cases involving issues of legal principle. Having observed the increasing number of cases in this area and the consequent judicial developments, the Commission considered it advisable to monitor the trend of these developments before committing itself to final recommendations on the subject. Several recent judgments on nullity of marriage have now been delivered and many aspects of the law which would have appeared to require reform some years ago have since been restated by the courts in modern terms. Of course, this does not mean that statutory reform of the law of nullity of marriage has been rendered otiose; merely that the position has been clarified significantly in recent years.

The present Report sets out detailed recommendations for reform of the law of nullity of marriage. The question of choice of law in nullity proceedings will be considered in a forthcoming Report by the Commission on private international law aspects of the subject.

In Part I of the Report the broad principles of the present law are described. Part 2 analyses the policy basis of the law and sets out proposals for reform. These proposals are summarised in Part 3.

PART I

THE PRESENT LAW

CHAPTER 1: GENERAL PRINCIPLES OF NULLITY OF MARRIAGE

The law of nullity of marriage is concerned with the circumstances in which a marriage, because of some vitiating element at the time it is entered into, is regarded by the law as not being valid¹. A marriage may be invalid for several reasons. For example, a "marriage" celebrated between persons of the same sex will not be legally effective². Similarly, a marriage celebrated by persons under the age of sixteen without the requisite approval of the President of the High Court will not be valid³. Other cases of invalidity relate to prior subsisting marriage⁴, failure to observe the necessary formal requirements⁵, mental incapacity⁶, duress⁷, mistake and fraud⁸, marriages between close relations⁹ and impotence¹⁰.

All of these grounds, save impotence and at least certain instances of mental incapacity, render a marriage void. Void marriages may be treated by any person as invalid without the

¹ See generally, Shatter, chs. 4-5, Jackson, passim., the Office of the Attorney General's Discussion Paper, The Law of Nullity in Ireland (Prl. 5628, 1976).

² Cf. infra, pp. 4-8.

³ Cf. infra, pp. 8-10.

⁴ Cf. infra, pp. 10-11.

⁵ Cf. infra, pp. 11-13.

⁶ Cf. infra, pp. 13-31.

⁷ Cf. infra, pp. 32-42.

⁸ Cf. infra, pp. 42-45.

⁹ Cf. infra, pp. 45-48.

¹⁰ Cf. infra, pp. 48-63.

necessity of a court decree of nullity (although in some cases of uncertainty it may be prudent to seek a decree of nullity). A voidable marriage is legally effective unless and until its validity is challenged by one of the parties to the marriage. The distinction between void and voidable marriages will be examined in detail below¹¹.

The law of nullity has developed historically from principles of canon law. When Henry VIII broke with Rome, ecclesiastical courts of the Church of Ireland continued broadly to apply these principles. In 1870, after the Church of Ireland was disestablished, jurisdiction in matrimonial matters was transferred to the civil courts. Section 13 of the Matrimonial Causes and Marriage Law (Ireland) Amendment Act 1870 required the civil courts to proceed on principles "which in the opinion of the . . . Court/s, shall be as nearly as may be conformable to the principles and rules on which the Ecclesiastical Courts of Ireland have heretofore acted and given relief." The courts have had regard to this provision, but especially in recent years they have shown an increasing tendency to develop these principles, in the light of recent advances in psychiatry and psychology.

A detailed analysis of the grounds rendering a marriage invalid follows.

¹¹ Cf. infra, pp. 72-73.

(a) Marriages Between Persons of the Same Sex¹²

In Hyde v Hyde¹³, marriage "as understood in Christendom" was described as "the voluntary union for life of one man and one woman to the exclusion of all others". That the parties to a marriage should be of different sexes as a requirement never questioned until recently. In other countries, changing mores and living patterns have led some to contend that a "marriage" between persons of the same sex should be regarded as valid. They point to the fact that the status of marriage confers a wide range of legal and social benefits on the spouses; they stress that heterosexual marriages are not automatically invalid by reason of the lack of capacity for sexual intercourse on the part of either spouse¹⁴, and that procreative incapacity does not affect their validity, and they contend that to deny persons of the same sex the capacity to marry is unjust and (in countries where there are constitutional guarantees respecting fundamental rights) unconstitutional¹⁵.

¹² See generally, W. O'Donnell & D. Jones, The Law of Marriage and Marital Alternatives, 46-50 (1982), Anon., Note: The Legality of Homosexual Marriages, (1973) 82 Yale L. J. 573; Smith, Comment: Transsexualism, Reassignment Surgery and the Law, (1971) 56 Cornell L. Rev. 963, at 1003-1008, Silverstein, Comment, (1973) 12 J. Family L. 607; Veitch, The Essence of Marriage - A Comment on the Homosexual Challenge, (1976) 5 Anglo-Am. L. Rev. 41, Karst, The Freedom of Intimate Association, (1980), 89 Yale L. J. 624, at 682-686.

¹³ L.R. 1 P.&D. 130, at 133 (per Lord Penzance, 1866). For analysis of the extent to which this description accurately represents the law in England today, see Poulter, The Definition of Marriage in English Law, (1979) 42 Modern L. Rev. 409.

¹⁴ A marriage is voidable on the ground of impotence, but must be regarded as valid until a decree of annulment is granted. It should be noted that sterility does not invalidate a marriage. See infra, p. 49.

¹⁵ See, e.g. Anon., The Legality of Homosexual Marriage, (1973) 82 Yale L. J. 573; Rivera, Our Straight-Laced Judges: The Legal Position of Homosexual Persons in the United States, (1979) 30 Hastings L.J. 799, at 874-878.

These arguments have met with little success so far in the judicial forum. The courts have taken the view, as expressed in a leading decision on the question in the United States, that

"the institution of marriage as a union of man and woman, uniquely involving the procreation and rearing of children within a family, is as old as the book of Genesis This historic institution manifestly is more deeply founded than the asserted contemporary concept of marriage and societal interests for which petitioners contend."¹⁶

Talbot (otherwise Poyntz) v Talbot¹⁷ is the only reported decision on the subject in these islands where both parties were unquestionably of the same sex - in this case female. Ormrod, J. "said that there was plainly no marriage and pronounced a decree"¹⁸ of nullity. A Canadian decision to similar effect is Re North and Matheson¹⁹.

A far narrower question, which could arise in our law, concerns the meaning of male and female. There may be cases where a person has physical sexual characteristics of both sexes. This may give rise to difficulty in deciding whether a marriage is valid²⁰. A somewhat different problem arises in respect of

¹⁶ Baker v Nelson, 291 Minn. 310, 191 N.W. 3d 185, (per Peterson, J., 1971), app. dismissed for want of a substantial federal question, 409 U.S. 810 (1972). See Silverstein, Comment: Constitutional Aspects of the Homosexual's Right to a Marriage Licence, (1973) 12 J. Family L. 607.

¹⁷ 111 Sol. J. 213 (P.D.A. Div., Ormrod, J., 1967).

¹⁸ Id., at 214.

¹⁹ 52 D.L.R. (3d) 380 (1974).

²⁰ See Kahn, The True Hermaphrodite - Of No Sex? (1981) 98 S. Afr. L. J. 111, Bartholemew, Hermaphrodites and the Law, (1960), 2 U. Malaya L. Rev. 83. Such cases in the past were generally treated as raising the issue of capacity to consummate rather than of sex determination: cf. Corbett v Corbett (orse. Ashley), [1971] P. 83, at 105 (Ormrod, J., 1970).

persons known as transsexuals. Such persons are of a psychological disposition that makes them believe that they are really members of the other sex trapped in the body of the wrong sex. They may seek an operation designed to make their bodies as similar as possible to the preferred sex. There is a view in some medical circles that such an operation may be therapeutically required, having regard to the severe depression - sometimes suicidal - which may affect these persons. Operations have been carried out in some countries. The medical debate has not yet been resolved²¹. So far as the law is concerned, the question may arise at some time after an operation has been performed as to whether such persons should still be regarded as being of their original sex.

This issue has given rise to much discussion in other countries²². It is noteworthy that in England during the passage of legislation introducing wide-ranging changes in the

²¹ See Bellin, Transsexual Surgery - A New Tort?, (1979) 17 J. of Family L. 487, at 490-491, Smith, Comment: Transsexualism, Sex Reassignment Surgery and the Law, (1971) 56 Cornell L. Rev. 963, Baker, Transsexualism - Problems in Treatment, (1969) 125 Amer. J. of Psychiat. 1412, Green, Newman & Stoller, Treatment of Boyhood Transsexualism, (1972) 26 Arch. Gen. Psychiat. 213, Socarides, The Desire for Sexual Transformation: A Psychiatric Evaluation of Transsexualism, (1969) 125 Amer. J. of Psychiat. 125, Oles, The Transsexual Client: A Discussion of Transsexualism and Issues in Psychotherapy, (1977) 47 Amer. J. of Orthopsychiat. 66, Armstrong, Transsexualism: A Medical Perspective, (1980) 6 J. of Med. Ethics 90, Roth, Transsexualism and the Sex-Change Operation, (1981) 49 Medico-Legal J. 5, at 15-16.

²² In England and the United States, a very great deal has been written on the subject. See, e.g., Kennedy, Transsexualism and Single Sex Marriage, (1973) 2 Anglo-Amer. L. Rev. 112, Thomson, Transsexualism: A Legal Perspective, (1980), 6 J. of Med. Ethics 92, Brent, Comment: Some Legal Problems of the Postoperative Transsexual, (1972) 12 J. of Family L. 405, Smith, supra, fn. 21, Lentz, (1975), 8 Akron L. Rev. 369, David, (1975) 7 Conn. L. Rev. 288, Holloway, (1968) 40 U. Colo. L. Rev. 281. For a Canadian analysis, see Kremer, An Examination of the Rights and Status of Post-Operative Transsexuals with a View to Reform, ch. 4 of the Legal Research Institute of the University of Manitoba's Law Reform Programme, vol. 1 (1973). In South Africa, the subject has provoked considerable

law of nullity in 1971, discussion of the subject of transsexual marriages took up a considerable portion of the parliamentary debates. There has been no judicial pronouncement on the question in this country, and the authorities in other jurisdictions are divided.

In England²³ and South Africa²⁴ it has been held that chromosomal, gonadal and genital criteria should determine the sex of a person for the purposes of the law of marriage and that it is not proper to apply a psychological criterion where these three criteria are consistent. In the United States of America, however, it has been held that

"for marital purposes if the anatomical or genital features of a genuine transsexual are made to conform with the person's gender, psyche or psychological sex, then identity by sex must be governed by a congruence of these standards."²⁵

fn. 22 Cont'd

discussion. See P. Boberg, The Law of Persons and the Family, 228-235 (1977), Strauss, Transsexualism and the Law, (1970) 3 Comp. & Int. L. J. of S. Afr. 348, Holloway, Transsexuals - Some Further Legal Considerations, (1972) 5 Comp. & Int. L. J. of S. Afr. 71, Strauss, Comment: The Sex Change Operation: Two Interesting Decisions, (1970) 87 S. Afr. L. J. 239, Lupton, The Validity of Post-Operative Transsexual Marriages, (1976) 93 S. Afr. L. J. 385, Taitz, The Legal Consequences of a Sex Change - A Judicial Dilemma, (1980) 97 S. Afr. L. J. 65, Thomas, Can the Lawyer Keep Up With the Doctor?, (1980) 97 S. Afr. L. J. 77.

²³ Corbett v Corbett (orse. Ashley), [1971] p. 83 (Ormrod, J., 1970), criticised by Smith in (1971) 56 Cornell L. Rev. 963, at 1006-1007, by Kennedy in (1973) 2 Anglo-Am. L. Rev. 112, at 120ff., by Poulter, (1979) 42 Modern L. Rev. 409, at 422-423 and by Parschin-Rybkin in (1972) 5 Ottawa L. Rev. 583. See also Morton, The Transsexual (sic) and the Law, 134 New L. J. 621 (27 July 1984).

²⁴ W. v W., 1976 (2) S.A. 308 (Witwatersrand Local Div., Nestadt, J., 1975), criticised by Lupton in (1976) 93 S. Afr. L. J. 385.

²⁵ M.T. v J.T., 140 N.J. Super. 77, 355 A. 2d 204 (App. Div., per Handler, J., 1976). See Poulter, *supra*, fn. 23, at 424-425, Browell (1977) 6 Capital L. Rev. 403. For analysis of developments along these lines in the Federal Republic of Germany, see Giesen, Transsexual Surgery and the Law, 1 Int. J. of Med. & L. 469 (1980).

The problem is a complex one²⁶. There is no way of predicting with any degree of certainty what approach an Irish Court would take on this question²⁷.

(b) Lack of Age (Nonage)²⁸

At common law, very few legal restrictions were placed in the way of marriage by minors. Fourteen years was regarded as the minimum age at which a boy could marry and twelve years for a girl.

The Marriages Act 1972²⁹ raised the minimum age for marriage to sixteen years, subject to an exemption being granted by the President of the High Court (or a Judge of that Court nominated by the President) when the marriage is justified by serious reasons and is in the interests of the parties to the intended

²⁶ Particular difficulties may arise where a person with the physical sexual characteristics of both sexes has undergone a medical operation designed to enhance the characteristics of one sex. Cf. In the Marriage of C. & D. (falsely called C.), (1979) F.L.C. 90 -636, critically analysed by Finlay, Sexual Identity and the Law of Nullity, (1980) 54 Austr. L. J. 115, and by Bailey (1979), 53 Austr. L. J. 659.

²⁷ It is possible that the European Convention for the Protection of Human Rights and Freedoms will play an important role in this area. In Van Oosterwijck v Belgium, Series A, No. 40, 3 E.H.R.R. 557 (1981), the European Court of Human Rights rejected a claim by a post-operative transsexual resulting from the failure of the State of Belgium to give official recognition to the post-operative sex assignment. The Court rejected the claim because the claimant had failed to exhaust domestic remedies. It is noteworthy that the European Commission had held in favour of the claimant, on the merits, under Articles 8 and 12 of the Convention. Another claim is at present under consideration by the Commission. See Pannick, Homosexuals, Transsexuals and the Sex Discrimination Act, [1983] Public L. 279, at 296-298.

²⁸ See Shatter, 38-39, Jackson, 25-27, Shelford, 282-285.

²⁹ No. 30 of 1972, section 1.

marriage. The Act provides that the consent of the guardians (normally the parents) is required for marriage by a person under the age of twenty-one, again subject to the power of the President of the High Court (or a Judge of that Court nominated by the President) to give the necessary consent where (inter alia) the guardians refuse to consent to the marriage³⁰.

The Law Reform Commission has examined the law relating to marriage by minors. Its provisional proposals were contained in its Working Paper No. 2-1977³¹, and its final proposals on the subject are set out in its Report No. 5-1983³².

In its Report, the Commission recommended that a marriage solemnised between persons either of whom is under the age of sixteen years should be void. This rule would apply to any marriage solemnised in the State, wherever the parties may have their habitual residence; it would, moreover, apply to any marriage solemnised outside the State where, at the time it was solemnised, the habitual residence of the parties, or of either of them, was in the State. The idea behind this latter recommendation was to discourage "forum shopping" by the sanction of invalidity.

The Commission also proposed that parental consent for the marriages of minors should be required. Where the parents disagreed, the minor would be entitled to seek the consent of the High Court, but where the parents were both opposed to the proposed marriage, there should be no recourse to the High

³⁰ Id., section 7.

³¹ Working Paper No. 2-1977, The Law Relating to the Age of Majority, the Age for Marriage and Some Connected Subjects, discussed by Duncan in (1979) 30 N. Ir. L. Q. 89, and by Shatter in The Irish Times, 2 May 1978.

³² LRC 5-1983, The Law Relating to the Age of Majority, the Age for Marriage and Some Connected Subjects.

Court. Having regard to the fact that, by reason of other recommendations, the age of majority (and consequently the right to marry without parental consent) would be reduced to 18, the Commission considered that:

"it would not be oppressive to require a minor in such circumstances to wait for what in many cases will be a period of months rather than years before being able to marry."³³

(c) Prior Subsisting Marriage³⁴

A marriage contracted during the subsistence of a previous valid marriage is void. This is so irrespective of whether either or both of the spouses believes in good faith that the later marriage is valid³⁵.

Where the previous marriage is void, it has for long been clear that the subsequent marriage is not thereby impugned, and may be contracted without the necessity of obtaining a decree declaring the previous marriage void. Where the previous marriage is voidable, the position was until recently less clear. The uncertainty on the point has been resolved by the High Court decision of F.M.L. & A.L. v An tArd Chláraitheoir na mPórsadh³⁶. Lynch, J. held that, where a decree of nullity of a voidable marriage is granted, its force is that of a judgment in rem, such as to make the marriage, which was up to

³³ Para. 62 of the Report.

³⁴ See Shatter, 40-41, 57, Jackson, 144-156, Shelford, 223-231.

³⁵ Miles v Chilton (falsely calling herself Miles), 1 Rob. Ecc. 684, 163 E. R. 1178 (1849. Cf. P. v P. (by amendment M'D. v P.), [1916] 2 I.R. 400 (C.A., aff'g. K.B. Div.).

³⁶ As yet unreported, High Ct., Lynch, J., 2 March 1984 (1983-4463P.).

then voidable only, void ab initio³⁷. Accordingly, it followed that a second marriage contracted before the decree of nullity has been made must, on the making of the decree be taken "always to have been valid"³⁸

(d) Formalities³⁹

The law relating to formalities of marriage is complex, extending over a wide range of statutory provisions as well as incorporating important principles established at common law. The present law is under the shadow of history, reflecting religious and political considerations extending far beyond those of marriage itself.

Very briefly, it may be said that the law envisages a system whereby marriages may be celebrated according to the rites of certain religious denominations of the Judæo-Christian tradition or, at the option of the parties, according to secular rites. Marriages according to Catholic rites are largely free from legislative control, although registration (which does not affect the validity of these marriages) has been governed by statute since 1863⁴⁰. In an important respect the civil law takes a different approach from that of the Catholic Church on the question of formal requirements: the absence of witnesses

³⁷ Cf. p. 6 of Lynch, J.'s judgment adopting as a correct statement of the law a passage from the judgment of Andrews, L.C.J., in Mason v Mason, [1944] N.I. 134, at 162 (K.B.D. (Mat.), 1943). Lynch, J. considered that this approach was preferable to that favoured in some English decisions, especially in the light of Article 41 Section 3 of the Constitution: p.5.

³⁸ P. 6 of Lynch, J.'s judgment.

³⁹ See Shatter, 41ff., Faloon, passim.

⁴⁰ Registration of Marriages (Ireland) Act 1863.

(apart from a clergyman in Holy Orders⁴¹) will not render a marriage celebrated according to Catholic rites void so far as the law of this country is concerned⁴² although such a marriage may be regarded as void by the Catholic Church.

Marriages celebrated otherwise than in accordance with the rites of the Catholic Church are subject to detailed statutory regulation⁴³. It appears, however, that in only a small number of cases will failure to comply with a statutory provision render a marriage void. Where the parties "knowingly and wilfully" marry in any place other than that in which the Banns were published or which was specified in the Licence or Notice and Registrar's Certificate, or where they "knowingly or wilfully" marry without due notice, Certificate of Notice or Licence or in the absence of a Registrar whose presence is required by statute, the marriage is "null and void"⁴⁴.

Where a marriage is celebrated after three months have elapsed since Notice of an intended marriage (prior to the issue of a Registrar's Certificate or Licence) has been entered by the Registrar, the marriage is void⁴⁵. Finally a marriage solemnised by a Protestant Episcopalian clergyman between a person who is protestant Episcopalian and a person who is not,

⁴¹ R. v Millis, 10 Cl. & Fin. 534, 8 E.R. 844 (1843), R. v Beamish, 7 H.L.C. 274, 11 E.R. 735 (1861).

⁴² Ussher v Ussher, [1912] 2 I.R. 445.

⁴³ See Shatter, 41-42, 44-53.

⁴⁴ Marriages (Ireland) Act 1844, section 49.

⁴⁵ Id., section 25. Cf. the Matrimonial Causes and Marriage Law (Ireland) Act 1870, section 35, which, like section 25, makes the licence in such circumstances "utterly void" but, unlike section 25, does not provide that "all other proceedings thereupon" shall be utterly void. It would seem, however, that if section 25 of the 1844 Act renders a marriage void (although it does not say so in express terms) section 35 of the 1870 Act, despite its less extensive formulation, could have a similar effect. If the licence on which the marriage purports to rely is "utterly void" it is difficult to see how the marriage would nonetheless be valid.

or by a Catholic clergyman between a person who is a Catholic and a person who is not, will be void where the parties to the marriage "knowingly and wilfully" marry without due notice to the Registrar, or without a Certificate of Notice duly issued or without the presence of two or more witnesses, or in a building not set apart for the celebration of Divine Service according to the rites of the religion of the clergyman in question⁴⁶.

Other provisions in the relevant statutes do not expressly provide that non-compliance with them renders the marriage void⁴⁷. In general it would seem⁴⁸ that they do not have this effect.

(e) Want of Mental Capacity

(i) Statutory Prohibition

An Act of 1811⁴⁹ renders void marriages contracted by a person found to be "a Lunatic by any Inquisition" or by a "Lunatic or Person under a Phrenzy, whose Person or Estate by virtue of any Act of Parliament shall be committed to the Care and Custody of Particular Trustees", where the marriage takes place before the person has been declared "of sane mind". A marriage contracted

⁴⁶ Matrimonial Causes and Marriage Law (Ireland) Act 1870, section 39.

⁴⁷ Indeed, the opposite effect is prescribed in respect of certain aspects referred to in section 32 of the Marriages (Ireland) Act 1844.

⁴⁸ Cf. Shatter, 53.

⁴⁹ 51 Geo. III, c. 37. See Shatter, 63, Abraham, 265, Shelford, 576.

in breach of the Act, even during a lucid interval⁵⁰, is void⁵¹ and there is no need to obtain a judicial decree to this effect⁵².

(ii) Common Law

Formerly, marriages by "idiots" were valid⁵³. In more recent times⁵⁴, this view has been abandoned. It is clear that a marriage will not be valid where either or both of the parties did not have sufficient mental capacity to understand the nature of the marriage contract and of the responsibilities normally attaching to marriage⁵⁵. Such lack of capacity may result from mental (or physical) illness, mental handicap,

⁵⁰ Turner v Meyers (falsely calling herself Turner), 1 Hag. Con. 414, at 417, 161 E.R. 600, at 601 (per Sir William Scott, 1808).

⁵¹ Cf. Browning v Reane, 2 Phill. Ecc. 69, at 90, 161 E.R. 1080, at 1087 (per Sir John Nicholl, 1812).

⁵² Ex parte Turning, 1 V. & B. 140, 35 E.R. 55 (1812), Elliott and Sugden v Durr, 3 Phill. Ecc. 16, at 19, 161 E.R. 1064, at 1065 (per Sir John Nicholl, 1812).

⁵³ See Rolle, 357, Blackstone, vol. 1, 426, Turner v Meyers (falsely calling herself Turner), supra, fn. 46, at 416-417 and 601, respectively (per Sir William Scott).

⁵⁴ "By 1745 the requirement of mental capacity was fully recognised by the common law": McCurdy, Insanity as a Ground for Annulment or Divorce in English and American Law, (1943) 29 Virginia L. Rev. 771, at 777.

⁵⁵ Turner v Meyers (falsely calling herself Turner), supra, fn. 46, at 418 and 601-602 respectively (per Sir William Scott), Harrod v Harrod, 1 K. & J. 4, at 7, 69 E.R. 344, at 346 (per Sir Page Wood V.C.), Countess of Portsmouth v Early of Portsmouth, 1 Hag. Ecc. 355, 162 E.R. 611 (1828), Durham v Durham, L.R. 10 P.D. 80, at 82 (Sir J. Hannen, P., 1885), Hunter v Edney (or se. Hunter), 10 P.D. 93, at 95 (Sir J. Hannen, P., 1881), Jackson v Jackson, /1908/ P. 308 (Bargrave Deane, J.), In the Estate of Park, Park v Park, /1954/ P. 89 (C.A., 1953), Larson v Larson, 192 N.E. 2d 594 (Ill. App. Ct., 1963), A. v B., /1920/ N.Z.L.R. 217, at 219 (Sup. Ct., Stout, C.J., 1919), as qualified by R. v R., /1947/ N.Z.L.R. 179, at 183 (Sup. Ct., Fair, J., 1946). See also J. v J., /1974/ N.Z.L.R. 498 (Sup. Ct., Roper, J.), Re McElroy, 93 D.L.R. (3d) 522 (Surr. Ct., Jud. Dist. of York, Ont., Honsberger, Surr. Ct., J., 1978).

alcohol, drugs or other causes⁵⁶. A marriage contracted during a lucid interval will not be invalid merely on account of the fact that the party concerned suffered from periods of insanity before or after the ceremony⁵⁷.

While the courts have generally concentrated on the question of a person's intellectual capacity to understand the nature of marriage and its obligations, recent developments make it clear that they are willing in certain circumstances to apply a broader test. In the High Court decision of R.S.J. v J.S.J.⁵⁸ in 1982, the petitioner sought a decree of nullity of his marriage with the respondent. At the time of the marriage the petitioner was 47, and his wife was 35. The marriage was not a success. The wife left the home only eight months after the wedding. The husband had committed what the Judge described as "a number of minor assaults" on his wife, and on one occasion had used "enough force to hurt and frighten her". But the basic reason for the wife leaving her husband was that she had become convinced that he did not want her in the home.

The husband petitioned for annulment on three grounds: duress, lack of mental capacity and incapacity "to maintain and sustain a normal relationship" with his wife or any children that there might be of the marriage. Barrington, J. without hesitation

⁵⁶ Cf. Legety v O'Brien, Milw. 325 (Dr Radcliff, 1834), Sullivan v Sullivan, 2 Hag. Con. 238, at 246, 161 E.R. 728, at 731 (1818) (aff'd., sub nom. Sullivan v Oldacre (falsely called Sullivan), 3 Phill. Edd. 45, 161 E.R. 1253 (1819). See also Tyler, Annot., 57 A.L.R. 2d 1250 (1958).

⁵⁷ Cf. Parker v Parker, 2 Lee 382, 161 E.R. 377 (1757), B. (orse. A.) v B., 27 L. R. Ir. 587 (Mat., Warren, J., 1891). See also De Nardo v De Nardo, 293 N.Y. 550, 59 N.E. 2d 241 (1944), criticised by Clark, 97.

⁵⁸ /1982/ I.L.R.M. 263 (High Ct., Barrington, J.).

held against the petitioner on the first two grounds, since there was clearly no evidence of either duress or of an incapacity to understand the nature of marriage and its obligations.

The third ground set forward by the petitioner raised an issue for which there was no precedent in Irish law.

The substantial ground put forward on behalf of the petitioner was that he suffered at all material times from schizophrenia or some similar illness which disabled him from forming and sustaining a normal relationship with the respondent or with any other woman. Barrington, J. did not regard the reference to any children there might be of the marriage as being a separate ground as, on the case presented, the petitioner's alleged inability to form a normal relationship with any child there might be of the marriage "was merely another symptom of the same illness which, it was alleged, would prevent him from forming a normal relationship with his wife."

At the outset of his analysis of the merits of this new ground, Barrington, J. stressed that in his opinion

"the illness of one of the parties, they both being in other respects capable of contracting a valid marriage, could not under any circumstances make a marriage void provided both parties knew of the illness and wished to get married. To hold otherwise would be an unwarranted interference with the right to marry. People have entered into a contract of marriage for all sorts of reasons and their motives have not always been of the highest. The motive for the marriage may have been policy, convenience, or self-interest. In these circumstances it appears to me that one could not say that a marriage is void merely because one party did not love or had not the capacity to love the other."⁵⁹

⁵⁹ [1982] I.L.R.M. 263, at 264. Cf. *infra*, pp. 64-65.

Counsel for the petitioner, however, submitted that the matter went deeper than this. He submitted that marriage implies an intention on behalf of the parties to live in some form of society together⁶⁰ and that if one of the parties - through illness in this case - has not the capacity to maintain and sustain a relationship with the other a real marriage becomes impossible.

Barrington, J. noted that the law had always accepted impotence as a ground for avoiding a marriage. But in ways what was contended for in the case before him was a much more serious impediment to marriage. He added:

"No doubt there have been happy marriages where one of the parties was impotent. But it is impossible to imagine any form of meaningful marriage where one of the parties lack the capacity of entering into a caring, or even a considerate, relationship with the other. There is of course the distinction that in the case of impotence providing the grounds for a decree of nullity, the marriage will not have been consummated and there will be no children. In the present case the marriage was consummated and there could have been children. On the other hand there is no child and one should deal with this case as one finds it."⁶¹

Barrington, J. referred to the decision of the Supreme Court in S. v S⁶², in 1976. There Kenny, J. had stated that the legislation of 1870 transferring nullity cases from the Ecclesiastical Courts of the Church of Ireland to newly

⁶⁰ The concept of a marital consortium is well established in tort law: cf. McMahon & Binchy, 412-415.

⁶¹ /1982/ I.L.R.M. 263, at 264.

⁶² Unreported, Sup. Ct., 1 July 1976, analysed by Shatter, 71-72, Duncan, Sex and the Fundamentals of Marriage, /1979-80/ Dublin U.L.J. 29. See further pp. 44-45, infra.

established civil courts

"did not have the effect of fossilising the law in its state in that year. The law is, to some extent at least, judge-made, and courts must recognise that the great advances made in psychological medicine since 1870 make it necessary to frame new rules which reflect these."

Barrington, J. added:

"If therefore it could be shown that, at the date of the marriage the petitioner, through illness, lacked the capacity to form a caring or considerate relationship with his wife I would be prepared to entertain this as a ground on which a decree of nullity might be granted."⁶³

On the facts of the case, Barrington, J. held that this ground had not been made out.

As will be readily appreciated, this ground involves a radical development and extension of the law. A number of questions immediately arise. First, what precisely are the parameters of "a caring or considerate relationship" with one's spouse? Perhaps this might be regarded as an inappropriate question in that it can fairly be said that such an intimate relationship as that of marriage cannot be easily categorised and that, if an attempt is made to reduce it to categories, then the scope of these categories will necessarily be to some degree uncertain. As against this, it may perhaps be replied that it is desirable that a ground for nullity have at least some clarity of content, if only because people will understandably wish to know whether or not they are validly married.

⁶³ [1982] I.L.R.M. 263, at 264.

Attempting to understand the meaning of a "caring or considerate" relationship, it should be noted that Barrington, J. stated by way of contrast that "... one could not say that a marriage is void merely because one party did not love or had not the capacity to love the other". The question thus arises as to the difference between a "loving" relationship, on the one hand, and a "caring or considerate" relationship, on the other. There must be a very wide range of opinion, in both medical and non-medical circles, as to what these different words or concepts involve. It is certainly possible, of course, for a person to have a "caring or considerate" relationship with another without loving the other, but what of the reverse situation? As regards the difference between a "caring" and a "considerate" relationship, it seems reasonable to assume that a "caring" relationship suggests a somewhat more intimate degree of commitment than does a "considerate" relationship. Both appear to be terms, not exclusively with a psychological or psychiatric dimension, but also with an element of moral value-judgment. To say of a person that he or she is "inconsiderate" or is not "caring" surely carries with it a suggestion of criticism (although capable of modification by subjective considerations). Presumably the type of "illness" envisaged would include illnesses of both a mental and physical nature. What is less clear is whether the courts would accept as a ground for an annulment an incapacity to form a caring or a considerate relationship which sprang from some cause other than illness - where, for example, a person's character was of this type, with no proof that he or she was physically or mentally ill.

The law was developed further in the decision of Costello, J. in *D. v C.*⁶⁴. The facts in the case were somewhat unusual.

⁶⁴ [1984] I.L.R.M. 173 (High Ct., 1983).

The petitioner claimed that the respondent was suffering from a manic depressive condition at the time of the marriage, which rendered him unable to understand the nature, purpose and consequences of the marriage contract and "unable to maintain and sustain a normal relationship with her and any children there might be of the marriage".

The marriage took place in 1974. The respondent was a recently qualified doctor. About four years after the marriage he began to take drugs and developed a degree of dependence on alcohol. He was hospitalised for periods from 1978 onwards.

On the evidence the petitioner would have had no difficulty in establishing that in 1983 the respondent was suffering from a manic depressive condition, complicated by a recent history of drug and alcohol dependence. In certain circumstances this type of evidence would entitle a spouse to a decree for legal separation (divorce a mensa et thoro); but the petitioner was anxious to obtain an annulment of the marriage. In order to do this, it would be necessary for her to establish that the respondent at the time of the marriage was suffering from such mental incapacity as to render the marriage invalid.

A difficulty facing the petitioner was that the psychiatrist who was called to give evidence by the respondent was not willing to express a view on the respondent's mental condition several years previously when the marriage took place in 1974. The psychiatrist had started treating the respondent only in 1978. Costello, J. was satisfied, however, that he could rely on the diagnosis as to the respondent's condition in 1974 made by the psychiatrist called by the petitioner. This psychiatrist never actually examined the respondent clinically because the respondent refused to be examined by him. This psychiatrist's diagnosis was based almost entirely on what he had been told by the petitioner herself and, to a much lesser extent, on

certain diaries and letters that the respondent had written. This might seem to be a fairly uncertain basis for diagnosis: the psychiatrist was, after all, relying on what was effectively secondary evidence from a person deeply affected by the issue. However, Costello, J. recorded as "a crucial conclusion of fact"⁶⁵ that he found the petitioner to be a truthful and intelligent witness with a good and accurate memory, who gave her evidence in a calm and detached manner. Costello, J. added:

"I had no difficulty in believing what she told me. My assessment of the petitioner's reliability was the same as that of the psychiatrist called on her behalf. He stated that he was impressed by her as an intelligent, solid and steady personality, as a consistent, reliable and perceptive informant with a capacity for clear and detailed accounts of her husband's mental state and behaviour. The evidence which she gave in court of her husband's moods and behaviour was in substance and very frequently in detail similar to the account which she gave to the psychiatrist whom she consulted about this case. In so far therefore as his professional opinion and diagnosis of the respondent was based on the veracity and reliability of the petitioner's evidence, I am satisfied that the petitioner's psychiatrist was fully entitled to rely on it."⁶⁶

The evidence in the case need not be described in any detail. The psychiatric evidence was to the effect that the respondent suffered from a manic depressive illness which was present throughout the duration of his relationship with the petitioner before, at the time of, and after their marriage. The manic depressive illness was characterised by five distinctive mood stages. Costello, J. found that in these five stages, the

⁶⁵ Id., at 176.

⁶⁶ Id., at 177.

respondent had "a consistent mental state and behaviour, each of which in a different way affected his ability to sustain a 'normal' relationship with his wife".⁶⁷

The manic state was characterised by intense hyperactivity, inability to sleep or rest, continuous good humour, inexhaustible energy and ambitions and expansive thinking, together with extravagant spending bouts. Thinking was flippant, with inability to sustain a single line of action or thought. Unrealistic decisions were made without awareness of the consequences and without planning in a coherent manner.

Costello, J. noted:

"In such states a sufferer from mania relates more easily to strangers than to close relatives. The petitioner was in transition from a stranger to a close relative in the early stages of their relationship. Once their relationship came closer to marriage and in the manic phases of his illness it is clear that the respondent was unable to relate to her and his illness explains his conduct during and after the wedding ceremony."⁶⁸

In the next phase, the hypomanic phase, the respondent exhibited a different set of personality characteristics. Costello, J. noted that:

"He then tended to be over-active, over-energetic and was obsessively concerned with his goals relating to his medical work to the exclusion of all other considerations. In this mood he was irritable, decisive and his relationship with the petitioner changed. He showed no concern for her or interest in her activities."⁶⁹

⁶⁷ Id., at 185.

⁶⁸ Id.

⁶⁹ Id.

When the respondent was in a level and normal mood (which, the Judge noted, "occurred very rarely indeed"⁷⁰) he acted in a consistent and predictable way. In the next phase, of moderate depression, his mood and behaviour was again different. His talk content was depressive. He tended to be angry and critical and talked of suicide. In such moods he could not attend to his work and frequently missed work. Again during this period, the Judge found, he could not relate to the petitioner. All these characteristics were exacerbated in the periods of the deep depression from which from time to time the respondent suffered.

Costello, J. summarised his findings as to the medical evidence as follows:

"Accepting as I do this diagnosis I am satisfied that the respondent suffered from a psychiatric illness both before his marriage, at the time of his marriage and subsequent to his marriage. It was a cyclical manic-depressive disorder which resulted in disturbance in mood states which affected his personality and behaviour.

The empathy which ought to develop between spouses did not occur because of these changes in mood and his erratic behaviour, and they explain why the petitioner felt that at no time during her marriage did she have a sharing relationship with her husband. I am satisfied that the respondent's illness at the time of his marriage was sufficiently severe as to impair significantly his capacity to form and sustain a normal viable marriage relationship with the petitioner."⁷¹

Turning to the legal implications of these medical findings, Costello, J. rejected without apparent difficulty the petitioner's first argument that the respondent was unable fully

⁷⁰ Id.

⁷¹ Id. Costello, J. also referred to evidence from other sources which indicated that the respondent suffered from mental illness before he met the petitioner.

to understand the nature, purpose and consequences of the marriage contract. He considered that, although it was true that the respondent had been in a manic state on the day of his marriage, nevertheless, prior to this, he had taken part in the arrangements for the wedding, and the decision to marry had been a longstanding one⁷².

The petitioner's second argument was that, at the time of the marriage, the respondent was suffering from such disease of the mind that he was unable to maintain and sustain a normal relationship with her or any children there might be of the marriage. Costello, J. accepted that this was a good ground for granting a decree of nullity. He said:

"The Courts have never approached claims for nullity decrees merely by applying principles of contract law or statutory prohibitions and even when marriages have been entered into with complete freedom untainted with illegality, they may be declared null and void if one of the spouses is impotent at the time of the marriage and unable to consummate it⁷³. But marriage is by our common law (strengthened and reinforced by our constitutional law) a life long union, and it seems to me to be perfectly reasonable that the law should recognise (a) the obvious fact that there is more to marriage than its physical consummation and (b) that the life long union which the law enjoins requires for its maintenance the creation of an emotional and psychological relationship between the spouses. The law should have regard to this relationship just as it does to the physical one. It should recognise that there have been important and significant advances in the field of psychiatric medicine since 1870 and that it is now possible to identify psychiatric illnesses, such as for example manic depressive illness, which in some cases may be so severe as to make it impossible for one of the partners to the marriage to enter into and sustain the relationship which should exist between married couples if a life long union is to be possible. Extending the law by reasoning by analogy is as old as the common law itself

⁷² Cf. *id.*, at 187.

⁷³ Citing *McM. v McM.*, [1936] I.R. 217.

.... and so it seems to me (as it did to Mr Justice Barrington in R.S.J. v J.S.J.⁷⁴) that if the law declares to be null a marriage on the grounds that one spouse is through physical disability incapable of the physical relationship required by marriage it should do likewise where one spouse is through a psychiatric disability unable to enter into and sustain a normal inter-personal relationship which marriage also requires. Therefore in the light of the respondent's psychiatric illness from which he suffered at the time of the marriage and which incapacitated him in the way I have described the petitioner has made out a prima facie Case for the relief claimed."⁷⁵

Costello, J. was satisfied that the petitioner had not "approved" (i.e. affirmed the validity of) the marriage by her conduct in not seeking a decree of nullity for several years, by which time two children had been born. The evidence made it clear, said the Judge, that she had not known that the respondent had suffered from a psychiatric illness at the time of the marriage until several years after the ceremony had taken place. Furthermore, until she obtained legal advice shortly before the institution of the nullity proceedings the petitioner had been unaware that her husband's illness entitled her to a nullity decree.

Having considered and rejected a number of possible bars to annulment⁷⁶, Costello, J. gave a decree for annulment "because the respondent at the time of the marriage was suffering from a psychiatric illness and as a result was unable to enter into and sustain a normal marriage relationship with the petitioner"⁷⁷.

⁷⁴ [1982] I.L.R.M. 263 (High Ct., Barrington, J.).

⁷⁵ [1984] I.L.R.M. 173, at 188-189.

⁷⁶ Including approbation: see further pp. 67-69, infra.

⁷⁷ [1984] I.L.R.M., at 195.

The implications of this decision require detailed consideration. The first matter that must be examined is the extent to which the case alters the previously established law. Parts of Costello, J.'s judgment suggest that he considered that the decision was entirely novel⁷⁸. Yet elsewhere in the judgment Costello, J. accepted that R.S.J. v J.S.J.⁷⁹ was a case in which a decree was sought (albeit not obtained) on "the very ground"⁸⁰ on which the petitioner relied in D. v C. It would seem, therefore, that Costello, J. was satisfied that he was applying the same ground for annulment as was recognised as a valid ground in R.S.J. v J.S.J. But is this so? In R.S.J. v J.S.J., as we have seen, Barrington, J. accepted as a ground for a decree of nullity that:

"at the date of the marriage [one party] through illness, lacks the capacity to form a caring or considerate relationship with [the other party]."

Yet Costello, J.'s articulation of the ground speaks specifically of "a psychiatric illness" - involving a limitation not mentioned by Barrington, J.⁸¹ Moreover, Costello, J. speaks simply of incapacity "to enter into or sustain a normal

⁷⁸ See, for example, [1984] I.L.R.M. 173, at 175:

"These are matrimonial proceedings in which the wife petitions for a decree of nullity, accepting that if she is to succeed the Court must extend the principles on which heretofore decrees have been granted and base its conclusion that the marriage was invalid on a ground which has not previously been successfully pleaded in our civil courts."

See also id., at 187.

⁷⁹ Supra, fn. 58.

⁸⁰ [1984] I.L.R.M. 173, at 188.

⁸¹ This could be important in a case where, on account of physical injury or illness a party to a marriage could not enter into or sustain a normal relationship. On Costello, J.'s formulation, no ground of annulment would be made out.

marriage relationship"⁸² with the other party, again a formulation rather different from Barrington, J.'s reference to incapacity "to form a caring or considerate relationship"⁸³ with the other party. Whatever uncertainties of application apply to the concept of "a caring and considerate relationship", there would seem to be different uncertainties attaching to the deceptively simple-sounding concept of "a normal marriage relationship". What is a normal marriage relationship? Is the answer to the question dependent on statistics as to the relative frequency of different types of relationship or is it dependent on less easily measurable and more evaluative criteria? If the latter (which is probably Costello, J.'s preference⁸⁴) what are these evaluative criteria? Although Costello, J.'s judgment gives more basis for inferring some of these criteria, it does not attempt to prescribe a definite list of these criteria.

Obviously, in a case where the degree of incapacity is serious, it would be relatively easy for a Court to hold that there was an incapacity to enter into or sustain "a normal marriage relationship" but in less serious cases is the concept of a normal marriage relationship sufficiently clear to enable a Court to make a decree annulling the marriage? It is possible that a wide range of "abnormal" or perhaps simply eccentric, behaviour may come before the Court in future years. It is difficult to make any confident prediction as to where the

⁸² Emphasis added.

⁸³ Emphasis added.

⁸⁴ Note the normative dimension to Costello, J.'s statement (/1984/ I.L.R.M., 173, at 189) that a psychiatric illness may in some cases be so severe as to make it impossible to enter into and sustain "the relationship which should exist between married couples". This appears to be the interpretation of D. v C. favoured by Hamilton, J. in M.(otherwise O.) v O., unreported, High Ct., 24 January 1984 (1982-9M).

Court will draw the line in deciding whether to annul the marriages in question.

An important issue raised by R.S.J. v J.S.J. and D. v C. has also arisen in subsequent High Court decisions. As has been mentioned, both Judges referred to "illness" as the necessary source of the functional disability - Costello, J. qualifying this by the further requirement that the illness be "a psychiatric" one. If "illness" - and especially "mental illness" - must be established as a pre-condition of entitlement to a decree this could involve the courts in a difficult and possibly futile task of determining whether or not a particular person's inability to form a caring or considerate, or normal, relationship resulted from what may legitimately be characterised as an "illness". In the face of considerable disagreement among psychiatrists as to the "proper" definition of mental illness⁸⁵, the courts might find this avenue of investigation proving to be a dead end.

In E.P. v M.C.⁸⁶, in March 1984, Barron, J. considered the question. The petitioner alleged that he married the respondent, who was pregnant with his child, because she had told him that, if he did not do so, she would have an abortion. The parties lived together in the respondent's parents' home from the time of their marriage until four months after the birth of their child. They then moved into their own home. Within three days the respondent wanted to terminate the marriage. Her attitude then was that she had only married to avoid the shame of a pregnancy outside marriage and to provide a name for her child. She said that, having got what she wanted, the marriage was over. She left the petitioner less than six weeks later.

⁸⁵ See further, pp. 97-98, *infra*.

⁸⁶ Unreported, High Ct., Barron, J., 13 March 1984 (1982-22M).

The principal ground on which the petitioner sought a decree of nullity was that of duress⁸⁷; but the petitioner also pleaded as a ground that the respondent had "never intended to enter into a proper and lasting marriage."

In support of the latter ground, the petitioner relied on R.S.J. v J.S.J. and D. v C.

Barron, J. refused to grant a decree. He said:

"Both of these cases proceed on the basis that the respondent was suffering from a mental illness. There is no suggestion that the respondent in the present case is suffering from any illness whatsoever. Undoubtedly, the evidence shows that she was spoiled, that she preferred life as a single person, and that she was totally unprepared to accept the obligations of marriage. Nevertheless, there is no evidence whatsoever that she was ill."⁸⁸

In M. (otherwise O.) v O.⁸⁹, a judgment of Hamilton, J. delivered just under seven weeks before E.P. v M.C. (otherwise P.) but not circulated until afterwards, the petitioner sought an annulment on the grounds inter alia that the respondent lacked the capacity to form or alternatively to maintain or sustain a lasting marital relationship with the petitioner by reason of his homosexual nature and temperament.

Hamilton, J. quoted with approval the central extract from Costello, J.'s judgment in D. v C.⁹⁰ and the statement of Kenny, J. in S. v S.⁹¹ to the effect that "the Courts recognise

⁸⁷ Cf. infra, pp. 40-41.

⁸⁸ P.10 of Barron, J.'s judgment.

⁸⁹ Unreported, High Ct., Hamilton, J., 24 January 1984 (1982-9M).

⁹⁰ Cf. supra, pp. 24-25.

⁹¹ Unreported, Supreme Court, 1 July 1976 (1-1976).

that the great advances made in psychological medicine since 1870 make it necessary to frame new rules which reflect these". Hamilton, J. said:

"Consequently it appears to me that if the petitioner establishes that the respondent was at the time of her marriage to him and by reason of his homosexuality incapable of entering into and sustaining the relationship which should exist between married couples if a life long union is to be possible, then she would be entitled to the relief which she seeks, a decree of nullity."⁹²

These were "obviously questions of fact"⁹³, the onus on the petitioner being "to establish them to a high degree of probability"⁹⁴.

A medical witness for the petitioner had given evidence that a person with homosexual tendencies and who had engaged in homosexual practice would have extreme difficulty in forming, maintaining and sustaining a lasting marital relationship. Hamilton, J. observed that:

"It is only if this was established in respect of the respondent that the petitioner would be entitled on the basis of the decision in D. v C. to a decree of nullity."⁹⁵

Hamilton, J. rejected the plaintiff's case on the basis that the evidence showed that, although the respondent had had a homosexual relationship before his marriage, "the sexual relationship between the petitioner and the respondent had

⁹² P.3 of Hamilton, J.'s judgment.

⁹³ Id.

⁹⁴ Id.

⁹⁵ Id., p. 5.

continued on a satisfactory basis from the date of the marriage until the date on which difficulties arose between the petitioner and the respondent".⁹⁶ With regard to these difficulties - on which Hamilton, J. did not elaborate - the Court accepted the evidence of the respondent. The difficulty with the evidence of the plaintiff's medical witness, in Hamilton, J.'s view, was that it was given on the basis of researches which had been carried out and that the witness had not been granted an occasion to examine or discuss the problems with the respondent.

In M. (otherwise O.) v O., the Court made no express reference to proof of mental illness as a precondition of entitlement to a decree. Nor had the petitioner expressed her grounds for annulment in terms of the illness, mental or physical, of the respondent. It would, perhaps, be reading too much into the decision to regard it as an authority recognising that proof of mental illness is not required in relation to this ground. The petitioner had adduced evidence given by a medical witness, and Hamilton, J. quoted without dissent a passage from Costello, J.'s judgment in D. v C. in which "a psychiatric disability" had been expressly mentioned.

An unresolved question concerns the issue of void and voidable marriages. Costello, J. clearly favoured the view that the ground recognised in D. v C. rendered a marriage voidable. Barrington, J. in R.S.J. v J.S.J. raised, but did not resolve, this issue in relation to the ground for nullity articulated in that decision.

Finally, it should be noted that the Supreme Court has yet to speak on the whole question of the extent to which want of mental capacity invalidates a marriage.

⁹⁶ Id.

(f) Duress⁹⁷

Duress is a ground rendering a marriage void. What constitutes duress:

"must be a question of degree, and may begin from a gentle form of pressure, to physical violence, accompanied by threats of death."⁹⁸

The reported decisions involve such matters as a threat to make the petitioner bankrupt if the marriage did not take place⁹⁹ a threat to injure or kill the petitioner¹⁰⁰ or another¹⁰¹, fear of political persecution¹⁰² or of conviction or imprisonment resulting from a false charge¹⁰³, undue influence over the petitioner's personality¹⁰⁴ and a threat to commit suicide¹⁰⁵.

⁹⁷ See Shatter, 65-67, 138-139, Browne, 263-264, Shelford, 213-221, Jackson, 282-289, Kingsley, Duress as a Ground for Annulment of Marriage, (1959) 33 So. Calif. L. Rev. 1, Brown, Duress and Fraud as Grounds for the Annulment of Marriage, (1935) 10 Indiana L. J. 471, at 471-479, Cross, Annot., 16 A.L.R. 2d 1430 (1951).

⁹⁸ Griffith v Griffith, [1944] I.R. 35, at 42 (High Ct., Haugh, J., 1943). Cf. H. v H., [1954] P. 258, at 268 (Karminski, J., 1953).

⁹⁹ Scott v Sebright, 12 P.D. 21 (Butt, J., 1886).

¹⁰⁰ Bartlett (falsely called Rice) v Rice, 72 L.T. 123 (Sir P.H. Jeune, P., 1894), Hussein (orse. Blitz) v Hussein, [1938] P. 159 (Henn Collins, J.).

¹⁰¹ Cf. E.P. v M.C. (otherwise P.), unreported, High Ct., Barron, J., 13 March 1984 (1982-22M).

¹⁰² H. v H., [1954] P. 258 (Karminski, J., 1953), criticised by Stone in (1954) 17 Modern L. Rev. 149.

¹⁰³ Griffith v Griffith, *supra*, fn. 98, Buckland v Buckland, [1968] P. 296 (Scarman, J., 1965); see Manchester (1966) 29 Modern L. Rev. 622.

¹⁰⁴ B. v D., unreported, High Ct., Murnaghan, J., 20 June 1973.

¹⁰⁵ S. v O'S., unreported, High Ct., Finlay, P., 10 November 1978, Harford v Morris, 2 Hag. Con. 423, 161 E.R. 792 (1776). See, however, Field's Marriage Annuling Bill, 2 H.L.C. 48, 9 E.R. 1010 (1848), Cooper falsely called Crane v Crane, [1891] P. 369 (Collins, J.), Kecsemethy v Magyer, 2 Fed. L. R. 437 (N.S.W. Sup. Ct., Nield, J., 1961).

The test applied in determining whether duress vitiated consent is a subjective one¹⁰⁶. In many cases it is the respondent who exercised the duress, but this is not essential: it may have been exercised by a third party, either in conjunction with the respondent¹⁰⁷ or in circumstances where the respondent was not responsible¹⁰⁸.

Until very recently, it seemed clear that, in order to constitute duress, the fear must not have been "properly"¹⁰⁹ or "justly"¹¹⁰ imposed. This issue arose most clearly where a man was induced to marry a woman or girl as a result of a threat by her or her parents to take criminal proceedings against him for having had sexual relations with her¹¹¹. In the leading Irish decision of Griffith v Griffith¹¹², in 1943, Haugh, J.

¹⁰⁶ Cf. K. v K., unreported, High Ct., O'Keefe, P., 16 February 1971, B. v D., unreported, High Ct., Murnaghan, J., 20 June 1973, Griffith v Griffith, /1944/ I.R. 35 (High Ct., Haugh, J., 1943), M.K.(otherwise M.McC.) v F. McC., /1982/ I.L.R.M. 277 (High Ct., O'Hanlon, J.), A.C.L. v R.L., unreported, High Ct., Barron, J., 8 October 1982, Scott v Sebright, 12 P.D. 21, at 24 (Butt, J., 1886), Hussein (orse. Blitz) v Hussein, /1938/ P. 159, at 160 (Henn Collins, J.), Bartlett (falsely called Rice) v Rice, 72 L.T. 122, at 124 (Sir F.H. Jeune, P., 1894). Some English decisions have adopted a more objective approach: see O'Reilly, (1972) 7 Ir. Jur. (n.s.) 352.

¹⁰⁷ Cf. Griffith v Griffith, /1944/ I.R. 35 (High Ct., Haugh, J., 1943), Scott v Sebright, 12 P.D. 21 (Butt, J., 1886), Ford (falsely called Stier) v Stier, /1896/ P. 1 (Gorell Barnes, J., 1895).

¹⁰⁸ E.g. M.K.(otherwise M.McC.) v F.McC., /1982/ I.L.R.M. 277 (High Ct., O'Hanlon, J.), A.C.L. v R.L., unreported, High Ct., Barron, J., 8 October 1982, H. v H., /1954/ 1 All E.R. 1 (P.D.A. Div., Davis, J., 1958), Buckland v Buckland (orse. Camilleri), /1968/ P. 296 (Scarman, J., 1965), Szechter (orse Karsov) v Szechter, /1971/ P. 286 (Sir Jocelyn Simon, P., 1970). Cf. Anon., Note, (1930), 30 Colum. L. Rev. 714.

¹⁰⁹ Griffith v Griffith, /1944/ I.R. 35, at 43 (High Ct., Haugh, J., 1943).

¹¹⁰ Id., at 44.

¹¹¹ See Neville Brown, (1968) The Shotgun Marriage, 42 Tulane L. Rev. 837, Wadlington, Shotgun Marriage by Operation of Law, (1967) 1 Ga. L. Rev. 183.

¹¹² /1944/ I.R. 35, at 42-43, 44 (High Ct., 1943). See Coghill, (1945) 19 Austr. L. J. 9.

stated:

"The form of duress alleged in this case is the threat of a criminal prosecution made by the respondent and her mother, whereby /the petitioner/ was accused of unlawful carnal knowledge of the respondent then under seventeen years, with the result that she was then made pregnant by him This threat with the consequent scandal and publicity to him and to his family, along with the fear of conviction and imprisonment, resulted in the marriage, according to the petitioner.

Unfortunately, as I too well know from my experience at the Bar, and as Attorney-General, marriages frequently result from threats of this precise nature. Many such cases have passed through my hands in recent years. In some cases the marriage followed a threat of prosecution; in other cases the man charged did not agree to marry until after the preliminary hearing before a District Justice, and after he had been returned for trial. If that was the sole matter I had to consider and determine, this case would cause me no difficulty. Assuming that marriages have resulted from a fear so imposed, they are clearly valid and binding on both parties. The man is free to elect between the scandal and possible punishment, on the one hand, or the marriage to the girl he has wronged on the other. But the fear imposed must be properly imposed, that is, the charge of paternity must be true

Duress or intimidation may produce a fear that may lead to marriage, but if such fear is justly imposed, the resulting marriage when contracted is valid and binding. Fraud or misrepresentation alone, and without duress, will not invalidate a marriage, unless it produces the appearance without the reality of consent."

This approach has been criticised¹¹³ but was applied in a subsequent decision¹¹⁴ to a threat to take civil legal proceedings (presumably for affiliation or seduction)¹¹⁵.

¹¹³ Cf. Manchester, Marriage or Prison: The Case of the Reluctant Bridegroom, (1966) 29 Modern L. Rev. 622, at 629. See also Neville Brown, supra, fn. 11, at 857.

¹¹⁴ K. v K., unreported, High Ct., O'Keefe, P., 16 February 1971, analysed by O'Reilly in (1972) 7 Ir. Jur (n.s.) 352.

¹¹⁵ In K. v K., a threat was also made to inform the petitioner's parents and his sister, who was a nun.

Four recent High Court decisions considered the subject of duress in relation to marriages contracted where the woman is pregnant. In the first, M.K. (or M.McC.) v F.McC.¹¹⁶, decided in March 1982, the petitioner at the time of the marriage was nineteen years old and pregnant. She and her boyfriend had married after "a series of harrowing scenes"¹¹⁷ in both households. The petitioner's mother had become "terribly distressed"¹¹⁸ at the news of her daughter's pregnancy and said to her (according to the petitioner's evidence): "You are going to have to get out and get married". At the same time "stormy scenes"¹¹⁹ were taking place in the respondent's home. His father refused to speak to him or have anything to do with him. The respondent testified that "the trend was: 'You are to get married' - no options open - no advice by anyone - I had nowhere to go." "I was told I would have to get married. I was led to believe that there was no other option open to me. I cracked up under pressure - acted irresponsibly."¹²⁰ The situation in the respondent's home was so bad that he had to leave home and go to live with a friend who later acted as best man at the wedding.

O'Hanlon, J. gave a decree of nullity. He made a detailed review of the judicial precedents, contrasting "the more stringent approach to the law of duress"¹²¹ taken in some of them (including Griffith v Griffith¹²²) with "the broader

116 /1982/ I.L.R.M. 277 (High Ct., O'Hanlon, J.).

117 Id., at 278.

118 Id.

119 Id.

120 Id.

121 Id., at 282.

122 /1944/ I.R. 35.

application of the principles of duress"¹²³ evident in the more recent decisions of B. v D.¹²⁴ and S. v O'S.¹²⁵.

O'Hanlon, J. concluded that in the case before him he should take the broader view of the concept of duress and that there was justification for declaring the marriage void. He was

"satisfied that the will, not of one partner but of both husband and wife, was overborne by the compulsion of their respective parents and that they were driven unwillingly into a union which neither of them desired, or gave real consent to, in the true sense of the word, and which was doomed to failure from the outset In both cases I believe the will was overborne by compulsion by persons to whom they had always been subject in the parent and child relationship and that the duress exercised was of a character that they were constitutionally unable to withstand."¹²⁶

The second recent decision, A.C.L. v R.L.¹²⁷, decided in October 1982, also involved a marriage where the petitioner had been subject to strong pressure by her parents to marry, but in some important respects the facts of the two cases were otherwise different. The petitioner began living with the respondent in 1976 when she was twenty-nine years old. Shortly afterwards she became pregnant. She and the respondent moved to London where the baby was born. The couple then returned to Ireland and continued to live together. After their return to Ireland, they went to the petitioner's parents' home to tell them that the petitioner had had a child. On hearing the news her parents immediately pressed the petitioner to name a

¹²³ [1982] I.L.R.M. 277, at 282.

¹²⁴ Unreported, High Ct., Murnaghan, J., 20 June 1973 (1971, No. 26M).

¹²⁵ Unreported, High Ct., Finlay, P., 28 February 1979 (1978 No. 18M).

¹²⁶ [1982] I.L.R.M. 277, at 282-283.

¹²⁷ Unreported, High Ct., Barron, J., 8 October 1982 (1981-28M).

wedding date, making it clear to her that they expected her to become a married woman as soon as possible. Her brothers and sisters took the same view and pressed her to do so for their parents' sake. The petitioner accordingly agreed to get married as soon as possible to please her family. Without their persuasion, Barron, J. held, "the parties would have got married but not as soon."¹²⁸ The marriage turned out unsuccessfully and the petitioner sought a decree of nullity on the ground of duress.

Barron, J. rejected the petition. He considered that the petitioner had "had a free choice and that she expressed it to please her parents."¹²⁹ He quoted the passage from Griffith v Griffith¹³⁰ in which Haugh, J. had stated that a man "is free to elect between the scandal and possible punishment on the one hand, or the marriage to the girl he has wronged, on the other". Barron, J. considered that, in the case before him, the position in which the petitioner found herself had been "brought about by her own conduct. She had the choice between marriage on the one hand and possible alienation of her parents on the other."¹³¹ There was no evidence, he said, that the petitioner's family had acted in any way improperly. They were doing what they believed was for her best.

Barron, J. next considered the question of duress in J.R. (otherwise J.McG.) v P. McG.¹³², in February 1984. The petitioner was a woman who, over twenty years previously, had married the respondent, a member of another religious

¹²⁸ P. 9 of Barron, J.'s judgment.

¹²⁹ Id.

¹³⁰ [1944] I.R. 35, at 43.

¹³¹ P. 11 of Barron, J.'s judgment.

¹³² Unreported, High Ct., Barron, J., 24 February 1984 (1982-6M).

denomination, when she was pregnant with his child. The petitioner claimed that she had married as a result of her mother's attitude and on account of her financial position. Her mother was an "extremely bigoted"¹³³ woman "who was not prepared to tolerate the society of Roman Catholics"¹³⁴ and "whose attitude to sex was that of total intolerance"¹³⁵. When her mother heard that the petitioner was pregnant, she permitted her to remain in her house but not as a member of the family. On the one occasion the respondent called to the house he was physically assaulted by the petitioner's mother. As an alternative to marriage, the petitioner approached her father's relatives who lived in her home town but "as they had previously experienced the antagonism of her mother they were sympathetic but not prepared to be involved."¹³⁶

The petitioner "did not have the financial resources to fend for herself. Marriage seemed to her to be the only course open"¹³⁷.

Barron, J. dismissed the petition. In his view

"the pressures imposed on the petitioner were not nearly as serious or as compelling as she now imagines them to have been. Marriage to the respondent may not have been an ideal marriage from her point of view even at that date. Nevertheless I am satisfied that she was not totally averse to the idea. If she had been, I feel that other assistance would have been available to her and I am

¹³³ P. 1 of Barron, J.'s judgment.

¹³⁴ Id.

¹³⁵ Id.

¹³⁶ Id., pp. 3-4.

¹³⁷ Id., p. 5.

reasonably sure that even as a last resort her own brother in Northern Ireland would have provided for her during her pregnancy and afterwards."¹³⁸

Barron, J. analysed the ingredients of duress as a ground for annulment. He said:

"Duress must be such that the apparent consent to marry is not a true consent. It can operate in one of two ways. It can operate so that the party under the duress fails to apply his or her mind to the question of giving consent. In such cases, the duress creates a form of bondage. The party concerned may not even be aware that such bondage exists¹³⁹.... Duress can also operate to compel the party under the duress to make a decision to give his or her consent to escape the consequences which will otherwise follow. Such a party knows that his or her consent is not a true consent and is in effect consenting not to being married but to escaping from the threat. Such a marriage is a sham or device to procure a particular result, i.e. freedom from the particular threat to which he or she is subjected."¹⁴⁰

It was the latter type of duress which was alleged by the petitioner. Barron, J. said:

"Of course the attitude of the petitioner's mother was a compelling factor towards her decision to get married. Equally her economic situation was a further compelling factor. But this does not mean that when she agreed to become engaged and then to become married that these two factors were the only factors bearing on her mind and that her consent was not a true consent."¹⁴¹

¹³⁸ Id., p.6.

¹³⁹ Barron, J. cited M.K. (otherwise M. McC.) v F. McC. and S. v O'S., unreported, High Ct., Finlay, P., 10 November 1978 as examples of this form of duress.

¹⁴⁰ P. 7 of Barron, J.'s judgment.

¹⁴¹ Id., pp. 7-8.

To test whether or not duress had affected the mind of a party to a marriage "so that the marriage was a mere device to escape the pressures imposed"¹⁴², it was necessary to look to how that party acted not only before the marriage ceremony itself but also afterwards. Barron, J. referred to three English decisions¹⁴³ in which the petitioner had married in order to escape from imprisonment or political repression. He noted that in none of these cases had the parties resided together after the ceremony nor had any of these marriages been consummated. The ceremonies had "clearly been a sham and a device to ensure the safety of the petitioner".¹⁴⁴

Barron, J. commented:

"These cases show a stark contrast from the present. I do not suggest that a decree of nullity cannot be granted unless the circumstances are as obvious as in these three cases. But they do show that wherever the dividing line must be drawn, the present case does not lie on the side where the marriage can be annulled. The petitioner intended to marry the respondent and to hold herself out as being so married. In my view that marriage was not brought about through duress."¹⁴⁵

The final decision that must be considered, again one of Barron, J., in E.P. v M.C. (otherwise P.)¹⁴⁶ was handed down in March 1984. The decision, which has already been mentioned¹⁴⁷

¹⁴² Id., p. 8.

¹⁴³ Parojic v Parojic, [1959] 1 All E.R. 1 (P.D.A. Div., Davies, J., 1958), Szechter v Szechter, [1971] P. 286 P.D.A. Div., Sir Jocelyn Simon, P., 1970), H. v H., [1945] P. 258 (P.D.A. Div., Karminski, J., 1953).

¹⁴⁴ P. 8 of Barron, J.'s judgment.

¹⁴⁵ Id., pp. 8-9.

¹⁴⁶ Unreported, High Ct., Barron, J., 13 March 1984 (1982-22M).

¹⁴⁷ Supra, pp. 28-29.

in the context of mental incapacity, involved a petition for nullity by a man who had married the respondent in order to prevent her having an abortion.

Barron, J. rejected the petition. On the question of duress he said:

"Duress must be of such a nature that there is the appearance without the reality of consent. Where consent is procured through fear for the life of another, the party consenting is fully aware that he is giving his consent to a ceremony of marriage but at the same time is in reality consenting to save that life. For this reason, the marriage is a sham. It is merely a device to remove the threat to the life of that other. If the petitioner had given his consent in this case solely for the purpose of saving the life of his unborn child, this would have constituted a ground for a decree of nullity. But the petitioner would have had to establish that the marriage was such a device to procure this end. If, as in this case, the parties had a normal engagement followed by a normal marriage and held themselves out as being a married couple it cannot be said that the marriage ceremony was a sham."¹⁴⁸

Having regard to the difference in emphasis between some of the recent decisions, it is not easy to state with complete confidence the existing law on the subject of duress. It seems clear that the principle of the "just threat" as expounded in Griffith v Griffith does not apply to cases where the party involved fails to apply his or her mind to the question of giving consent¹⁴⁹. As to its status in cases where the party did apply his or her mind but opted to marry to escape the threat, doubts must remain, in view of Barron, J.'s interpretation

¹⁴⁸ Supra, fn. 146.

¹⁴⁹ Cf. McK. (otherwise M. McC.) v F. McC., [1982] I.L.R.M. 277 (High Ct., O'Hanlon, J.), J.R. (otherwise McG.) v P. McG., unreported, High Ct., Barron, J., 24 February 1984 (1982-6M).

of the scope of the ground of duress, which appears to be narrower than that adopted in some earlier Irish decisions.

(g) Mistake and Fraud¹⁵⁰

It is clear that mistake or fraud will render a marriage void in at least three cases: (a) where either party is mistaken as to the nature of the ceremony; (b) where either party is mistaken as to the identity of the other party; (c) where fraud and duress or mental incapacity falling short of insanity combine to bring about the appearance, but not the reality, of consent.

Mistake as to the nature of the ceremony is a rare occurrence but decisions have been reported¹⁵¹ in which such a mistake has been made. Where the parties are aware that the ceremony

¹⁵⁰ See Shatter, 64-65, Rogers, 643-644, Shelford, 221-223, Kingsley, Fraud as a Ground of Annulment of Marriage, (1945) 18 So. Calif. L. Rev. 213, Vanneman, Annulment of Marriage for Fraud, (1925) 9 Minn. L. Rev. 497, Hunt, Error in the Contract of Marriage, (1962) 79 S. Afr. L. J. 423, (1963) 80 S. Afr. L. J. 97, 231, Sayre, A Rationale of Antenuptial Representations and Promises, (1943) 91 U. Pa. L. Rev. 735.

¹⁵¹ E.g. Hall (orse. Barrar) v Hall, 24 Times L. R. 756 (Gorell Barnes, P., 1908) (decree granted although Gorell Barnes, P. had difficulty in believing "that two people could be such awful fools"), Lieberman (orse. Szapira) v Lieberman, The Times, 24 January 1899, p.14 (P.D.A. Div., Gorell Barnes, J.), Neuman v Neuman (orse. Greenberg), The Times, 15 October 1926, p.5 (P.D.A. Div., Lord Merrivale, P.), Ford (falsely called Stier) v Stier, /1896/ P. 1 (Gorell Barnes, J., 1895), Valier v Valier, 113 L.T. 830 (P.D.A. Div., Lord Merrivale, P., 1925) (Italian Count "not quick in the uptake" when spoken to in English" induced by English woman to go through marriage ceremony, believing it to be a betrothal), Kelly (orse. Hyams) v Kelly, 49 Times L.R. 99 (P.D.A. Div., Lord Merrivale, P., 1932), Mehta (orse. Kohn) v Mehta, /1945/ 2 All E.R. 690 (P.D.A. Div., Barnard, J.), Sobush v Sobush, /1931/ 2 W.W.R. 900 (Sask. Q.B., Taylor, J.), Vamvakidis v Kirkoff, /1930/ 2 D.L.R. 877 (Ont. Sup. Ct., App. Div., 1929), In re Ah Lie, 1 B.C.R. 261 (Div. Ct., 1884) (Chinese girl married according to Wesleyan rites "thought she was being taken before a police court").

confers on them the status of married persons in the country where it is celebrated¹⁵², but do not regard themselves as married according to the tenets of their religion, their marriage is valid, and may not be annulled on this ground¹⁵³.

Mistake as to the identity of the other party will render a marriage void. The authorities on this question are relatively scarce. It appears that the concept of "identity" will be construed narrowly¹⁵⁴. Error as to the qualities of the other spouse, such as character and background, will not render a marriage void¹⁵⁵.

Some old decisions¹⁵⁶ hold that fraud combined with duress or mental incapacity falling short of insanity may produce the appearance without the reality of consent. Fraud may arise in combination with duress in two types of situation: where the

¹⁵² Cf. MacDougall v Chitnavis, 1937 S.C. 390, Kenward v Kenward, [1951] p. 124 (C.A.), Jackson, 298-299.

¹⁵³ Cf. Ussher v Ussher, [1912] 2 I.R. 445 (K.B. Div.), Keolman v Laasdaal, 9 W.W.R. (n.s.) 381 (B.C. Sup. Ct., Wilson, J., 1953), Caro (otherwise Cebryk) v Cebryk, 54 W.W.R. 447 (Alta. Sup. Ct., Kirby, J., 1965).

¹⁵⁴ See C. v C., [1942] N.Z.L.R. 346 (Sup. Ct., Callan, J.) and cf. Allardyce v Mitchell, 6 W.W. & a'B. (I.E. & M.C.) 45 (1869). Error as to the name of a party, involving no confusion as to identity in the mind of the other party, will not render a marriage void: cf. R. v Inhabitants of Burton-upon-Trent, 3 M. & S. 537, 105 E.R. 712 (1815), Heffer v Heffer, 3 M. & S. 265, 105 E.R. 611 (1812). An Australian decision, C. v D. (falsely called C.), (1979) F.L.C. 90-636, has held that mistake as to identity extends to a mistake as to sexual identity. For criticism, see Finlay, Sexual Identity and the Law of Nullity, (1980) 54 Austr. L.J. 115, at 118-119.

¹⁵⁵ Cf. Moss v Moss (orse. Archer), [1897] P.263 (Sir F.H. Jeune, P.), Lang v Lang, 1921 S.C. 44 (Inner House, 1920), Ewing v Wheatley, 2 Hag. Con. 175, at 182-183, 161 E.R. 706, at 709 (per Sir William Scott, 1814), Swift v Kelly, 3 Knapp 257, 12 E.R. 648 (1835).

¹⁵⁶ Cf. Countess of Portsmouth v Earl of Portsmouth, 1 Hag. Ecc. 355, 162 E. R. 611 (1828), Harford v Morris, 2 Hag. Con. 423, 161 E.R. 792 (1776), Harrod v Harrod, 1 K. & J. 4, 69 E.R. 344 (1854), Browning v Reane, 2 Phill. Ecc. 69, 161 E.R. 1080 (1812).

duress in its own right would probably have been sufficient to vitiate consent¹⁵⁷, and where the duress, being the result of a "just" or "proper" threat¹⁵⁸, would not in the circumstances¹⁵⁹ have rendered the marriage void.

A decision of the Supreme Court in 1976 may give reason to believe that the ground of mistake or fraud is capable of judicial extension beyond the limits set out above. In S. v S.¹⁶⁰, the respondent refused to have sexual intercourse with the petitioner at any time after the marriage. The marriage was annulled, the majority¹⁶¹ holding that the respondent was impotent. Kenny, J., however, having held that the respondent was not impotent, stated that

"the intention to have sexual intercourse is such a fundamental feature of the marriage contract that if at the time of the marriage either party has determined that there will not be any during the marriage and none takes place and if the parties have not agreed on this before the marriage or if the age of the parties makes it impossible that they could have intercourse, a spouse who is not aware of the determination of the other is entitled to have a declaration that the marriage was null. The intention not to have or permit intercourse has the result that the consent which is necessary to the existence of a valid marriage does not exist."¹⁶²

¹⁵⁷ Cf. Scott (falsely called Sebright) v Sebright, 12 P.D. 21 (Butt, J., 1886), S. v O'S., unreported, High Ct., Finlay, P., 10 November 1978.

¹⁵⁸ Cf. Griffith v Griffith, [1944] I.R. 35 (High Ct., Haugh, J., 1943), K. v K., unreported, High Ct., O'Keefe, P., 16 February 1971.

¹⁵⁹ Cf. supra, p. 41.

¹⁶⁰ Unreported, Supreme Ct., 1 July 1976, analysed by Duncan, Sex and the Fundamentals of Marriage, [1979-80] Dublin U. L. J. 29.

¹⁶¹ Griffin and Henchy, JJ.

¹⁶² P. 3 of Kenny, J.'s judgment.

Griffin, J. evinced little sympathy for this approach¹⁶³, but Henchy, J. appears to have accepted that a petition based on fraud would lie if it could be shown that the husband had been aware of his "emotional and sexual capacity" at the time of the marriage¹⁶⁴. It would seem, therefore, that a secret intention not to have sexual intercourse during marriage may constitute a ground for annulment¹⁶⁵. Whether other types of fraudulent misrepresentation or non-disclosure constitute a ground for annulment must await future judicial exegesis.

(h) Prohibited Degrees¹⁶⁶

In Ireland, as in every other country, there are legal controls on marriages between persons closely related by blood (consanguinity). There are also controls on marriages between persons closely related through marriage (affinity). In many other countries the prohibitions based on affinity, if they exist at all¹⁶⁷, are more narrowly drawn¹⁶⁸.

¹⁶³ Griffin, J. noted that:

"In the Court, counsel for the wife, although they did not abandon the allegation of fraud, did not press their argument on that ground, in my view wisely."

¹⁶⁴ P. 4 of Henchy, J.'s judgment.

¹⁶⁵ Whether the ground should be categorised as one of mistake or fraud is not clear: cf. Duncan, supra, fn. 160, at 36-37.

¹⁶⁶ See Shatter, 39-40, Rogers, 644-645, Burn, 439-350a, Shelford, 154-183.

¹⁶⁷ In Australia, for example, the Family Law Act 1975, (No.53) abolished prohibitions on marriage based on affinity: see Finlay, (1975), Farewell to Affinity and the Calculus of Kinship, 5 U. Tasmania L. Rev. 16. The same position prevails in Sweden and most Communist countries.

¹⁶⁸ Cf., e.g., the law in France (Civil Code, articles 161-164), Italy (Civil Code, article 87), the Netherlands (Civil Code, Section 1, article 41).

Marriages celebrated in breach of those prohibitions are void¹⁶⁹. Relationships of the half-blood have the same effect as those of the whole blood.

The prohibited degrees are wide-ranging in relation to both consanguinity and affinity. They are the result of a complicated legislative history¹⁷⁰, which raises some degree of uncertainty as to their precise scope. The present position appears to be as follows:

A man may not marry his

1. Grandmother
2. Grandfather's wife
3. Wife's grandmother
4. Father's sister
5. Mother's sister
6. Father's brother's wife
7. Mother's brother's wife
8. Wife's father's sister
9. Wife's mother's sister
10. Mother
11. Stepmother
12. Wife's mother
13. Daughter
14. Wife's daughter
15. Son's wife
16. Sister
17. Son's daughter
18. Daughter's daughter
19. Son's son's wife
20. Daughter's son's wife

¹⁶⁹ Marriage Act 1835, section 2 (5 & 6 Will. 4, c.54) (Lord Lyndhurst's Act). Originally, such marriages were void, but gradually they came to be regarded as voidable. The 1835 Act restored the former position, possibly for reasons more connected with private interests than with public social policy: cf. Parl. Debs. 4th Series, vol. 169, col. 1153 (22 February 1907).

¹⁷⁰ Cf. 28 Hen. 8, c.2 (1537), 33 Hen. 8, c.6 (1542), 3 & 4 P. & M. c.8 (1556), 2 Eliz. 1, c.1 (1560), Statute Law Revision (Ireland) Act 1878, (41 & 42 Vict., c.57), Deceased Wife's Sister's Act 1907 (7 Edw. 7, c.47), Deceased Brother's Widow's Act 1921 (11 & 12 Geo. 5, c.24), Statute Law Revision (Pre-Union Irish Statutes) Act 1962 (No. 29).

21. Wife's son's daughter
22. Wife's daughter's daughter
23. Brother's daughter
24. Sister's daughter
25. Brother's son's wife
26. Sister's son's wife
27. Wife's brother's daughter
28. Wife's sister's daughter

A woman many not marry her:

1. Grandfather
2. Grandmother's husband
3. Husband's grandfather
4. Father's brother
5. Mother's brother
6. Father's sister's husband
7. Mother's sister's husband
8. Husband's father's brother
9. Husband's mother's brother
10. Father
11. Stepfather
12. Husband's father
13. Son
14. Husband's son
15. Daughter's husband
16. Brother
17. Son's son
18. Daughter's son
19. Son's daughter's husband
20. Daughter's daughter's husband
21. Husband's son's son
22. Husband's daughter's son
23. Brother's son
24. Sister's son
25. Brother's daughter's husband
26. Sister's daughter's husband
27. Husband's brother's son
28. Husband's sister's son.

Although (since 1907) a man may marry his deceased wife's sister, and (since 1921) a woman may marry her deceased husband's brother, neither may marry if the first marriage comes to an end by divorce rather than by death¹⁷¹.

¹⁷¹ See Shatter, 40.

It appears that persons related by or through adoption are not subject to any prohibitions so far as marriage between them is concerned. No legislative provision touches on the question save section 24 of the Adoption Act 1952, which provides that, on an adoption order being made, the adopted child "shall be considered with regard to the rights and duties of parents and children in relation to each other as the child of the adopter or adopters born to him, her or them in lawful wedlock". Clearly, the provision does not prohibit a marriage between an adopted child and the natural child of his or her adoptive parents. It may be argued, moreover, that its terms do not clearly prohibit a marriage between an adopted child and his or her adoptive parents, although the intent if not the terms of the provision would suggest strongly that such a marriage was not envisaged as being lawful. Of course, a marriage between an adopted child and persons related to him by blood will not cease to fall within the prohibited degrees by reason of the making of the adoption order.

(i) Impotence¹⁷²

In B---n v B---n¹⁷³, Dr Lushington gave an explanation why impotence invalidates a marriage:

"Without entering into any minute discussion as to all the purposes for which marriage was intended, it is obvious that the capacity of sexual intercourse is in all cases, save when age may seem to preclude it, to be deemed a most important essential; essential, because the procreation of children is one of the chief objects of marriage¹⁷⁴, essential, because the lawful indulgence of the passions

¹⁷² See Shatter, 68-75, Browne, 273-276, Shelford, 201-213.

¹⁷³ 1 Sp. Ecc. & Ad. 248, 164 E.R. 144 (P.C., 1854).

is the best protection against illicit intercourse; and to these considerations may be added the well-known fact that, in most cases where the incapacity is on the side of the husband the health of the wife cannot escape serious injury."¹⁷⁴

The principal features of the ground of impotence may be noted briefly. The essence of this ground, which renders a marriage voidable¹⁷⁵, is incapacity to have sexual intercourse. Procreative capacity is not relevant: sterility is not a ground for annulment¹⁷⁶. Sexual intercourse in this context "is ordinary and complete intercourse; it does not mean partial and imperfect intercourse: yet not every degree of imperfection would deprive it of its essential character. There must be degrees difficult to deal with; but if so imperfect as scarcely to be natural legally speaking, it is no intercourse at all."¹⁷⁷

The decisions are to the effect that, whilst erection and penetration without emission may constitute "intercourse"¹⁷⁸ brief penetration without emission may not suffice¹⁷⁹. In England it has been held¹⁸⁰ that sexual intercourse accompanied

¹⁷⁴ Ibid, at 259-260 and 150-151 respectively.

¹⁷⁵ McM. v McM. & McK. v McK., [1936] I.R. 177 (High Ct., Hanna, J., 1935, P. v P. (by amendment M.C.D. v P.), [1916] 2 I.R. 400 (K.B. Div.).

¹⁷⁶ D-e v A-g, 1 Rob. Ecc. 279, at 296, 163 E.R. 1039, at 1044 (per Dr Lushington, 1845).

¹⁷⁷ Id., at 298 and 1045, respectively.

¹⁷⁸ R. v R. (orse. F.), [1952] 1 All E.R. 1194 (P.D.A. Div., Mr Commr Bush-James, Q.C.).

¹⁷⁹ W. (orse. K.) v W., [1967] 1 W.L.R. 1554 (P.D.A. Div., Brandon, J.).

¹⁸⁰ Baxter v Baxter [1948] A.C. 274 (H.L.(Eng.), 1947), analysed by Gower, in (1948) 11 Modern L. Rev. 176 and by Anon., in (1948) 64 L.Q. Rev. 161.

by the use of contraceptives constitutes consummation. It would appear that the same approach would be taken in this country¹⁸¹.

Impotence may be absolute or relative. It is absolute where a party is incapable of intercourse with any person, and is relative where a party is incapable of intercourse with the other party to the marriage. Relative impotence, which is sometimes referred to as impotence quoad hunc or quoad hanc¹⁸², renders a marriage voidable in the same way as absolute impotence does.

The Courts have generally taken the position that impotence may constitute a ground for annulment only where the condition is incurable¹⁸³. They do not require, however, that the impotent party undergo a serious operation under pain of otherwise being found potent¹⁸⁴. Moreover, where the affected party refuses

¹⁸¹ In N.F. v M.T. (otherwise F.), [1982] I.L.R.M. 545 (High Ct., O'Hanlon, J.) the use of contraceptives was mentioned but the question whether it would preclude consummation was not considered.

¹⁸² Irish decisions on this type of impotence include McM. v McM. & McK. v McK., [1936] I.R. 177 (High Ct., Hanna, J., 1935), R.M. v M.M., 76 I.L.T.R. 165 (High Ct., O'Byrne, J., 1941), S. v S., unreported, Sup. Ct., 1 July 1976. See also N.F. v M.T. (orser. F.), *supra*, fn. 181, at 547. For reference to the older decisions, see C. (orser. H.) v C., [1921] P. 399, at 400-402 (Lord Birkenhead, L.C.).

¹⁸³ Cf. A. v A. sued as B., 19 L. R. Ir. 403 (Mat., Warren, J., 1897), Brown v Brown, 1 Hag. Ecc. 523, 162 E.R. 665 (1828), D--e v A--g, 1 Rob. Ecc. 279, 163 E.R. 1039 (1845), A. v B., L.R. 1 P.D. 559, at 562 (Sir J.P. Wilde, 1868).

¹⁸⁴ W-- v H--, 2 Sw. & Tr. 240, 164 E.R. 987 (1861). In G. v G., 25 Times L. R. 328 (1908), the English Court of Appeal held that the respondent was impotent although the operation necessary to cure the condition was "small and harmless".

to undergo the necessary medical treatment a decree may be granted to the other spouse¹⁸⁵.

Where a spouse refuses to consummate the marriage, this will not be a ground for annulment¹⁸⁶, unless the refusal may be traced to "such a paralysis and distortion of will as to prevent the victim thereof from engaging in the act of consummation"¹⁸⁷. The distinction between "a paralysis and distortion of will" and the free exercise of the will may be a difficult one to make in particular cases where a spouse displays a strong aversion to sexual relations, since it raises a question more in the realm of philosophy than in that of psychology or psychiatry¹⁸⁸.

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- ¹⁸⁵ L. v L. (falsely called W.), 7 P.D. 16 (Sir James Hannen, P., 1882), P. v L. (falsely called P.), 3 P.D. 73n (Sir J. Hannen, P., 1873) (wife refused to "submit to remedies" to make her sexual organs capable of intercourse; strong aversion to sexual relations, which she regarded as being "like the beasts of the field"; decree granted). See also N.F. v M.T. (orse. F.), supra, fn. 142 (refusal by wife to submit to medical examination taken into account in determining whether marriage had been consummated).
- ¹⁸⁶ Subject to the possibility of a clear adoption by the Supreme Court of Kenny, J.'s criterion expressed in S. v S., unreported, Sup. Ct., 1 July 1976, discussed supra, pp. 44-45. It should be noted that this criterion would not permit a decree to be granted on proof of mere wilful refusal to consummate: it would be necessary to show that an intention not to consummate the marriage existed at the time the marriage was celebrated.
- ¹⁸⁷ G. v G., [1924] A.C. 349, at 367 (H.L. (Sc.), per Lord Shaw). Cf. McH. v McH. & McK. v McK., [1936] I.R. 177, at 201 (High Ct., Hanna, J., 1935). See also 12 Family L. 101 (1982).
- ¹⁸⁸ Cf. the effective rejection of the medical evidence by O'Byrne, J., in R.M. v M.M., 76 I.L.T.R. 165 (High Ct., 1941), (aff'd. Sup. Ct., 1942). It is most unlikely that this approach would be adopted by a court today: cf. N.F. v M.T. (orse. F.), supra, fn. 181, and S. v S., supra, fn. 182. See also Duncan, Sex and the Fundamentals of Marriage, [1979-80] Dublin U. L. J. 29, at 34. Canadian courts were quicker to recognise invincible repugnance as constituting impotence: see, e.g. Heil v Heil, [1942] S.C.R. 160 (1941), Hall v Hall, 4 D.L.R. 631 (Man. C.A.); cf. Bethell v Bethell, [1932] O.R. 30 (Sup. Ct., Hodgins, J.A.).

Right of Spouse to Petition on Account of His or Her Own
Impotence

The question whether a spouse is entitled to petition for a decree on account of his or her own impotence raises issues that have not been finally settled in this country.

In Norton v Seton¹⁸⁹, in 1817, the petitioner, seven years after marrying the respondent, sought an annulment on the grounds of his own incapacity resulting from "bodily defect". The petition was rejected by Sir John Nicholl, who was clearly affected by the long delay in taking proceedings and by the fact that, at the time of the proceedings, the respondent was pregnant. The Court inferred from the evidence that, at the time of the marriage, the petitioner had been aware of his condition of impotence.

The Canon Law was examined by the Court. Sanchez¹⁹⁰ was quoted, wherein the author required that, before the impotent party could petition, it would have to be shown that he was ignorant of his condition at the time of marriage and that his wife affirmed his testimony. Neither element was established in the case before the Court.

Sir John Nicholl stated:

"It is a maxim that no man shall take advantage of his own wrong; it is the principle of the canon law itself, the principle of reason and justice. There is no instance of a suit brought by a person alleging his own incapacity: there is so strong a presumption for the marriage that no

¹⁸⁹ 3 Phill. Ex. 147, 161 E.R. 1283 (1817). See further, Shelford, 208-210, Burn, vol. 2, 5011, Rogers, 642.

¹⁹⁰ Sanchez, Book 7.

sentence is ever pronounced against it, except on the fullest authority; and if a mistake is made, the marriage is not held dissolved, but to be renewed. This is a situation in which the law of England would not place the parties. On the whole I am not satisfied that the party would be entitled to the sentence prayed."¹⁹¹

In Miles v Chilton¹⁹², in 1849, a decision dealing with a bigamous marriage, Dr Lushington referred to Norton v Seton¹⁹³ at some length. He stated:

"I do not mean to say that Sir John Nicholl was not perfectly justified in thinking his own reasons sufficient for refusing to entertain that suit, but at the same time I cannot honestly refrain from saying that there were grounds, if not counter-balanced by others, which ought to have induced him to have admitted that libel."¹⁹⁴

In A. v B.¹⁹⁵, Sir J.P. Wilde stated that

"it is obvious that this matter of impotence is one which ought to be raised only by the party who suffers an injury from it, and who elects to make it a ground for asking that the contract of marriage should be annulled."

This might appear to exclude the possibility of an impotent spouse petitioning - unless he could be regarded as a "party

¹⁹¹ Id., at 163-164 and 1289, respectively.

¹⁹² 1 Rob. Ecc. 684, 163 E.R. 1178 (1849).

¹⁹³ Supra, fn. 189.

¹⁹⁴ Supra, fn. 192, at 699 and 1183, respectively. It has been observed that Dr Lushington had been junior counsel in Norton v Seton, and that the views expressed in Miles v Chilton regarding that decision "may to that extent be regarded as slightly prejudicial": Harthan v Harthan, [1949] P. 115, at 119 (C.A., per Phillimore, counsel for appellant, [1948]). See also B---n v B---n, 1 Sp. Ecc. & Ad. 248, at 354, 164 E.R. 144, at 148 (per Sir John Dodson, 1854).

¹⁹⁵ L.R. 1 P.D. 559, at 562 (Sir J.P. Wilde, 1868).

who suffers an injury from it". It should be noted, however, that Sir J.P. Wilde was contrasting voidable marriages with void marriages and was directing his opposition to the right of third parties (rather than the spouses themselves) to take proceedings seeking the annulment of a voidable marriage.

The issue of whether an impotent spouse could petition was not of importance in the case. Moreover, some of the judge's observations¹⁹⁶ would appear capable of extension to petitions by impotent spouses.

In Halfen v Boddington¹⁹⁷, in 1881, the petitioner sought a decree for the restitution of conjugal rights against the respondent. The respondent filed an answer alleging acts of violence on the part of the petitioner and seeking a judicial separation. Before the hearing, however, the petitioner agreed to substitute a petition for nullity on account of the respondent's impotence. A decree nisi of nullity was pronounced in due course. Later the petitioner refused to make the decree absolute and applied to have her petition dismissed. The respondent opposed the application.

Sir James Hannen, P. held that the respondent's opposition should be dismissed, on the basis that the petitioner should be free, as in divorce proceedings¹⁹⁸, to decide not to proceed for a decree absolute after the decree nisi has been awarded.

¹⁹⁶ "Now, if the parties themselves in a case of impotency, are content with the consortium vitae, and prefer to maintain the bond of matrimony intact, would it not be almost intolerable that a third person should have the right to insist upon an inquiry into the nature of their physical defects?" (Id., at 563 (emphasis added).) Note that Sir J.P. Wilde did not say "the injured spouse".

¹⁹⁷ 6 P.D. 13 (Sir James Hannen, P., 1881).

¹⁹⁸ Ousey v Ousey, 1 P.D. 56 (1875).

He considered that it was not necessary to express an opinion on "the very difficult question"¹⁹⁹, whether a suit could be instituted for a decree of nullity by the husband in whom the defect was alleged to exist. At the conclusion of his judgment, however, Sir James Hannen, P. observed that the respondent was not in any way "damnified" by the holding against his present application, since it was

"open to him, if he should be so advised, to institute a separate suit for a decree of nullity of marriage upon the grounds which have been brought forward in the case."²⁰⁰

The subject was discussed in some detail in the Irish decision of A. v A. sued as B.²⁰¹, in 1887. There, the petitioner sought the annulment of his marriage on account of his impotence. The respondent had left seven months after the marriage was celebrated and a month later had sought an annulment in the Catholic Ecclesiastical Court, which granted a decree two years later.

The respondent demurred. Warren, J. overruled the demurrer, not being

"prepared to hold, on demurrer, that in no possible case could a suit be maintained by an impotent man."²⁰²

Warren, J. disposed of the question as follows:

"The view which I am disposed to take of the law is that:-

¹⁹⁹ Supra, fn. 197, at 14.

²⁰⁰ Id., at 15.

²⁰¹ 19 L. R. Ir. 403 (Mat., Warren, J., on appeal, C.A., 1887).

²⁰² Id., at 412.

An impotent spouse cannot maintain a nullity suit merely on the ground of his or her own impotency - other considerations than sexual intercourse enter into the contract. A woman may have married for support and protection: she may find her husband incapable, and may elect to put up with this loss in order to retain the other advantages of matrimony; but if she desires to retain these advantages she must also herself be willing to discharge her duties - to live with the man as his sister, and give to him help and comfort. If the woman altogether repudiates the relation of wife and the obligations of the marriage contract, so far as they are capable of being performed, then I think that the impotent husband may show that there is no verum matrimonium, and maintain the suit."²⁰³

Warren, J. stressed that, in Norton v Seton²⁰⁴, there had been special circumstances distinguishing it from the case before him and that the Judge had strongly relied on these circumstances. These included the fact that the petitioner in Norton v Seton was assumed by the Court to have been aware of his impotent condition at the time of the marriage. Warren, J. also stated that he did not think that much assistance could be derived from a consideration of the Canon Law, and that his decision was not founded in it:

"The law of Ireland and England is not the same as the Canon Law on the subject of impotence."²⁰⁵

On appeal, the Court of Appeal took the same view of the law. Lord Ashbourne again stressed that Norton v Seton²⁰⁶ had been decided on its special facts. He considered that the wife in

²⁰³ Id., at 412-413.

²⁰⁴ Supra, fn. 189.

²⁰⁵ Supra, fn. 201, at 413.

²⁰⁶ Supra, fn. 189.

the case before him had elected to repudiate the marriage. Sir Michael Morris, C.J. and Barry, L.J. also considered that the wife had repudiated the marriage, and FitzGibbon, L.J. regarded her as having "avoided" it.

In G. v G. (falsely called K.)²⁰⁷, the English Court of Appeal affirmed a decree annulling a marriage at the suit of a wife. Cozens-Hardy, M.R. is reported as having stated that

"he desired to adopt the principle of the Irish Courts, laid down in A. v A.²⁰⁸, in which a strong Court decided that a decree of nullity may be granted at the suit of an impotent person. This was, however, a discretion which the Court should exercise very carefully."²⁰⁹

The case is a difficult one for a number of reasons. First, the decree had apparently been granted by the Court below on the basis of the husband's incapacity relative to his wife, when in truth the spouses' incapacity to consummate resulted from the fact that "the generative organs of the husband were unusually large, whilst those of the wife were somewhat small"²¹⁰. The Court of Appeal required that the decree be modified "so as to avoid any reflection upon the general capacity of the husband"²¹¹. Secondly, the husband, far from repudiating the marriage, was at all times willing to resume cohabitation - indeed the wife's annulment petition was a counterclaim to proceedings by the husband for restitution of conjugal rights. Accordingly, although the Master of the

²⁰⁷ 25 Times L. R. 328 (C.A., 1908).

²⁰⁸ Supra, fn. 201.

²⁰⁹ Supra, fn. 189, at 329.

²¹⁰ Id., at 328. Cf. Harthan v Harthan, [1949] P. 115, at 130 (C.A., per Lord Merriman, P., 1948).

²¹¹ Id., at 329.

Rolls stated that he desired "to adopt the principle of the Irish Courts, laid down in A. v A.²¹²²¹³, it is clear that the limitation in that decision requiring repudiation of the marriage by the other spouse was not applied in G. v G. (falsely called K.)²¹⁴

In Davies (otherwise Mason) v Davies²¹⁵, in 1934, Langton, J. granted a decree on the basis of the petitioner's incapacity, where the respondent had repudiated the marriage. He explained that he did so

"on the ground that the respondent has repudiated the marriage contract although the petitioner was actually the party owing to whose misfortune the jurisdiction of the Court arises. I expressly refrain from laying down affirmatively that there is jurisdiction to entertain a suit merely on the ground of the incapacity of the petitioner, if there has been no repudiation of the contract by the other spouse."²¹⁶

In the Irish decision of MCM. v MCM. and McK. v McK.²¹⁷, in 1935, the subject was exhaustively analysed by Hanna, J. The Judge favoured the view that an impotent spouse might petition not only where the other spouse had repudiated the marriage but also in other, more broadly defined, circumstances where "the moral equities of the case"²¹⁸ required it. Hanna, J. said

²¹² Supra, fn. 201.

²¹³ Supra, fn. 207, at 329.

²¹⁴ Supra, fn. 207.

²¹⁵ /1935/ P. 58.

²¹⁶ Id., at 60.

²¹⁷ /1936/ I.R. 177 (High Ct., Hanna, J., 1935).

²¹⁸ Id., at 203, stating the "fundamental principle" he perceived in A. v A. (sued as B.), 19 L. R. Ir. 403 (1875) and Davies (otherwise Mason) v Davies, /1935/ P. 58 (Langton, J., 1934).

that he had

"formed a definite opinion that the decree for nullity of marriage cannot, according to the principles of the Ecclesiastical Law as administered in our Matrimonial Courts, be granted to a petitioner on the ground merely of a petitioner's own impotence, but it is clearly established that if a petitioner can, in addition to proof of his own impotency, satisfy the Court that there has been, and is, conduct on the part of the respondent which has destroyed the verum matrimonium, e.g., by a genuine and deliberate repudiation of the marriage contract and its obligations, the Court may ex justa causa grant the relief."²¹⁹

This passage appears clearly to hold that the entitlement of an impotent spouse to sue is not restricted to cases where the other spouse has repudiated the marriage.

In Harthan v Harthan²²⁰ in 1948, the English Court of Appeal analysed in detail the entire subject of the entitlement of an impotent party to petition for annulment. The Court took a somewhat different view from that favoured in A. v A. (sued as

²¹⁹ [1936] I.R. 177, at 219-220.

²²⁰ [1949] P. 115 (C.A., 1948), analysed by Bevan, Limitations on the Right of an Impotent Spouse to Petition for Nullity, 76 L. Q. Rev. 267 (1960). Harthan was applied by the Court of Appeal in Pettit v Pettit, [1963] P. 177 (C.A., 1962), where the difference between the discretionary bar of approbation and the discretion which the Court must exercise in respect of a petition by an impotent petitioner was well articulated. Another English decision on the subject subsequent to Harthan is R. v R. (orse. F.), [1952] 1 All E.R. 1194 (P. D. A. Div., Mr Cmmr. Bush-James). There the petitioner who pleaded his own impotence had left his wife for another woman (with whom he had had successful sexual relations) after about ten years of marriage. The petition was dismissed on the ground that the marriage had in fact been consummated (albeit without emission on the husband's part). No reference was made to the entitlement of the husband to petition, possibly because the issue was overlooked, or perhaps because the petition was in any event not going to succeed.

B.)²²¹, McM. v McM. & McK v McK.²²² and a number of English²²³ and Australian²²⁴ authorities. On the question of the necessity of repudiation of the marriage by the other spouse, Lord Merriman, P. was of opinion that

"the sounder view is that the reaction of the respondent to the situation created by the impotence of the petitioner should be taken into account in considering whether the circumstances of the case as a whole, including the respondent's attitude, are such as to debar the impotent spouse from suing. It is manifestly impossible to speak otherwise than in general terms, for the circumstances will vary infinitely. The real antithesis, it seems to me, is between saying on the one hand that the impotent spouse has no cause of action unless the other spouse has repudiated the marriage, whatever that phrase may mean, and on the other hand allowing the impotent spouse the right to sue unless in the circumstances of the case it is unjust that he or she should do so."²²⁵

Lord Merriman expressed "complete agreement" with the conclusion of the Lord President (Normand) in the Scottish decision of F. v F.²²⁶, where the Lord President had said:

"In principle any person who has a title and interest in the subject-matter of an action is a competent pursuer, and it is a general rule of our law that title rests upon interest. There are exceptions to this general rule, but I know of none which bears relevantly on the present question. Taking the general rule as a useful test, it can hardly be questioned that the impotent spouse has an equal interest with the potent spouse in a question which

²²¹ Supra, fn. 201.

²²² Supra, fn. 217.

²²³ Davies (orse. Mason) v Davies, supra, fn. 218.

²²⁴ B. v M., [1942] Q.W.N. 5, B. v B., [1942] Q.W.N. 23 (cited therein).

²²⁵ Supra, fn. 220, at 143-144.

²²⁶ 1945 S.C. 202, at 208.

vitally affects his or her status. The bond of a marriage which cannot be consummated, it may be added, can be as irksome and humiliating to the impotent as to the other spouse. If, therefore, the impotent spouse is to be denied the remedy, it is necessary to inquire what is the supposed ground for this denial. Lord Fraser speaks of the potent spouse as the party aggrieved. But, with respect, both alike are aggrieved; and to treat the potent spouse as alone aggrieved is to imply that the impotent spouse is in some sense a defaulter, as though he or she had failed to implement a contract and was debarred from founding on his or her default Where the incapacity results from a physical or temperamental condition, for which the sufferer is not responsible, he cannot be debarred from the remedy on the ground that he has defaulted in his obligations. There may, of course, be circumstances which will bar the impotent spouse. If, for example, he or she entered into marriage knowing the defect, the other spouse would indeed be entitled to complain, and to plead the suppressio veri in bar of the action. But the report in the present case does not mention any facts suggestive of a plea of personal bar, and it is not necessary to consider further what circumstances would properly give rise to it. The only other ground for refusing the remedy to the impotent spouse that has been put forward is that it is contrary to public policy that the remedy should be open to anyone but the potent spouse. But I cannot see any reason for thinking that the public interest is injured by allowing the impotent spouse an equal right to sue"

In the Irish decision of R. (orser. W.) v W.²²⁷ in 1980, the question of the entitlement of an impotent spouse to petition was considered. Finlay, P. stated that it had been urged on him during the course of the legal argument that there were grounds for doubting the necessity for a repudiation as laid down in A. v A. (orser. B.)²²⁸ and McM. v McM. & McK. v McK.²²⁹,

²²⁷ Unreported, High Ct., Finlay, P., 1 February 1980.

²²⁸ Supra, fn. 201.

²²⁹ Supra, fn. 217.

and that

"more recent decisions, in particular that of Harthan v Harthan²³⁰ in the Court of Appeal in England containing a close analysis of the older decisions would indicate that repudiation is not necessary though there may be circumstances which may bar from relief a person petitioning for nullity on the basis of his own impotence such as a knowledge of the defect at the date of the marriage."²³¹

Having regard to his finding that the respondent had "unequivocally"²³² repudiated the marriage, Finlay, P. considered that it was

"not necessary to decide the larger question arising from the conflict between the reasoning in this decision and the reasoning of the Irish decisions to which I have referred and I expressly reserve my view on that point."²³³

This statement must be regarded as casting a shadow on the continuing force of the McM.²³⁴ approach to the question.

As to what constitutes "repudiation" of the marriage the position is to some degree uncertain. In A. v A. sued as B.²³⁵ the Court of Appeal held that a wife had repudiated the marriage where she left her husband and instituted proceedings in the Ecclesiastical Court of the Catholic Church. In

²³⁰ Supra, fn. 220.

²³¹ Page 14 of Finlay, P.'s judgment.

²³² Id., p. 15.

²³³ Id.

²³⁴ Id.

²³⁵ 19 L. R. Ir. 403 (1887).

MCM. v MCM.²³⁶, however, Hanna, J. held that a wife had not repudiated the marriage where she left her husband "on account of his violence and neurasthenic condition over sexual matters", her husband having obtained permission for the couple to live apart pending the institution of proceedings for a religious annulment. Hanna, J. was "satisfied that she would not in any way repudiate the marriage contract (which to her was a sacrament) save under a decree of her own church"²³⁷. It seems that desertion²³⁸ or the obtaining of nullity proceedings in a foreign jurisdiction²³⁹ may amount to repudiation. In Davies (otherwise Mason) v Davies²⁴⁰, the husband's repudiation was based on the allegation that he had not provided a home for his wife or contributed anything to her support, that he was unconcerned for her welfare, had lost interest in attempting sexual intercourse and had said that he had no intention of living with his wife and she could go her own way.

²³⁶ [1936] I.R. 177.

²³⁷ Id., at 199.

²³⁸ Cf. B. (otherwise C.) v B., [1942] Q.W.M. 23.

²³⁹ Cf. B. v M. (falsely called B.), [1942] Q.W.N. 5 (cited in Harthan v Harthan, supra, fn. 220).

²⁴⁰ [1935] P. 58.

CHAPTER 2: MARRIAGES FOR A LIMITED PURPOSE¹

The Courts in this country have not been called upon to determine the validity of a marriage that has been entered into for some ulterior purpose, such as to gain immigration or tax privileges, or to legitimate a child. In England, the view has been taken that in the absence of duress, such marriages should be regarded as valid². In most other common law jurisdictions the same view has been favoured³ but in some civil law jurisdictions⁴ these marriages are not valid, unless followed by a substantial specified period of cohabitation. A dictum of Barrington, J., in the recent decision of

¹ See Wade, Limited Purpose Marriages, (1982) 45 Modern L. Rev. 159, Irvine, Sham Marriages, 1963 Scot. L. T. 93, Horton Rogers, Sham Marriages, (1974) 4 Family L. 4, Bromley, Note: The Validity of Sham Marriages Procured by Fraud: Johnson (falsely called Smith) v Smith, (1969) 15 McGill L. J. 319, Anon., Note: Sham Marriages, (1953) 20 U. Chic. L. Rev. 710.

² H. v H., [1954] P. 258, at 267 (Karminski, J., 1953), Silver (orse. Kraft) v Silver, [1955] 1 W.L.R. 728 (P. D. A. Div., Collingwood, J.), Vervaeke v Smith (Messina and Attorney General Intervening), [1982] 2 All E. R. 144 (H.L.(Eng.)), noted by St. J. Smart, 99 L. Q. Rev. 24 (1983). Scottish Law favours a different approach: cf. Orlandi v Castelli, 1961 S.C. 113.

³ As to Canada, see Iantsis (falsely called Papatheodorou) v Papatheodorou, [1971] 1 O.R. 245 (C.A., 1970), overruling Johnson (falsely called Smith) v Smith, [1968] 2 O.R. 697 (High Ct., Stewart, J.), Iantsis has been applied in Feiner v Demkowicz (falsely called Feiner), 42 D.L.R. (3d) 165 (Ont. High Ct., 1973), Garcia v Garcia, 18 R.F.L. (2d) 249 (Ont. High Ct., 1980) and Ciresi v Ahmad, 142 D.L.R. (3d) 364 (Alta. Q. B. Smith, J., 1982). In the United States, however, some courts have held that marriages designed to derive an immigration benefit are not valid. Other cases hold to the contrary: see, Clark, 114-118.

⁴ E.g. Italy (C.C. Title IV, Article 123). In South Africa limited purpose marriages are valid: see e.g. Van Oosten v Van Oosten, 1923 C.P.D. 238 (Van Zyl, J.), Martens v Martens, 1952 (3) S.A. 771 (Witwatersrand Local Div., Clayden, J.).

R.S.J. v J.S.J.⁵ would suggest support for the view that marriages for ulterior, or limited, purposes should in at least some cases be regarded as valid. He stated:

"People have entered into a contract of marriage for all sorts of reasons, and their motives have not always been of the highest. The motive for the marriage may have been policy, convenience, or self-interest. In these circumstances it appears to me that one could not say that a marriage is void merely because one party did not love or had not the capacity to love the other."

In two recent Irish decisions⁶, Barron, J. has referred to marriages that are "a sham". In both instances Barron, J. was speaking in the context of duress and it would not appear proper to draw any conclusion from these remarks, one way or the other, as to the validity of a "sham" marriage where duress was not in issue.

⁵ [1982] I.L.R.M. 263, at 264 (High Ct., Barrington, J.).

⁶ J.R. (otherwise McG.) v P.McG., unreported, High Ct., Barron, J., 24 February 1984 (1982-6M), E.P. v M.C. (otherwise P.), unreported, High Ct., Barron, J., 13 March 1984 (1982-22M).

CHAPTER 3: BARS TO A DECREE

(a) Validation (or Ratification) of a Void Marriage¹

The concept of ratification of a void marriage is difficult to justify in logic², and some commentators have doubted whether it can be part of the law. If a marriage is void it may be treated as such by the parties themselves and by other persons without the necessity of obtaining a decree of nullity. Since this is so, serious problems might result if the void marriage could subsequently be validated. Doubts could arise respecting the marital status of the parties and the effectiveness of transactions carried out on the basis (correct at the time) that the marriage was void.

It appears that these difficulties are more theoretical than real. Marriages that are void on the ground of bigamy, nonage, formal defect or prohibited relationship involve a clear public interest consideration militating against the possibility of subsequent validation. Accordingly the Courts have held that marriages void on these grounds may not be validated or, as they sometimes have expressed it, the parties are not estopped from denying their invalidity³. Where marriages are void on the ground of lack of consent (by reason of duress, fraud,

¹ See Shatter, 78-79, Tolstoy, Void and Voidable Marriages, (1964), 27 Modern L. Rev. 385, Tolstoy, The Validation of Void Marriages, (1968) 31 Modern L. Rev. 656, Lasok, Approbation of Marriage in English Law and the Doctrine of Validation, (1963) 26 Modern L. Rev. 249.

² Cf. Ussher v Ussher, [1912] 2 I.R. 445, at 480 (K. B. Div., per Lord O'Brien, L.C.J.).

³ Cf. e.g., Square v Square (otherwise Bewicke); Cowan (otherwise Youek) v Cowan, [1935] P. 120 (Langton, J.), Hayward v Hayward (otherwise Prestwood), [1961] P. 152 (Phillimore, J., 1960).

mistake or mental incapacity⁴), however, the defect is of personal, rather than public, dimensions, so the objection to ratification is perhaps less serious. Having regard to the dangers inherent in acting on the assumption that a marriage is void on the ground of lack of consent, third parties may in practice seek to obtain a judicial decree of annulment before acting. Moreover, the uncertainty as to whether marriages invalid on the ground of lack of consent are void or merely voidable⁵ is another good reason for caution on the part of persons in their dealings in relation to such marriages.

(b) Approbation⁶

Many expressions have been used to describe the type of conduct on the part of the petitioner that may preclude him or her from relief in respect of a voidable marriage. Such terms as "insincerity", "estoppel", "unfairness", "acquiescence", "lack of just entitlement" and "unseemliness" have been used, as well as approbation, which is the expression normally used to describe this bar.

⁴ There is now some doubt as to the extent (if at all) to which such marriages are void. It seems that mental incapacity, of the kind or kinds first recognised in recent High Court decisions, may render the marriage voidable. Cf. supra, p. 31. It is uncertain whether lack of mental capacity, as previously administered by the courts, renders a marriage void or voidable.

⁵ Cf. p. 73, infra.

⁶ See Shatter, 76-77, Jackson, 331ff, Lasok, Approbation of Marriage in English Law and the Doctrine of Validation, (1963) 26 Modern L. Rev. 249, Moore, Defences Available in Annulment Actions, (1967) 7 J. Family L. 239, at 249ff.

The bar applies only to voidable marriages⁷. The essence of approbation is that the petitioner, with knowledge of the facts and the law respecting the position, has so conducted himself or herself that it would be unfair to grant him or her a decree⁸.

The conduct of the petitioner is judged by an objective standard, "without regard to concealed thoughts"⁹. Delay in taking proceedings may well militate against the petitioner, who is

"bound to have evinced impatience under a sense of wrong, and a reasonable activity in complaint and redress."¹⁰

The Courts have adopted a flexible approach, however. Length of time since the marriage, though significant, does not in itself determine whether a decree will be refused, since the petitioner may have delayed out of motives of humanity towards the other spouse¹¹.

The birth of a child is not necessarily a bar to a decree on the basis of approbation¹². Adoption of a child will

⁷ D. v C., [1984] I.L.R.M. 173, at 189 (High Ct., Costello, J. 1983).

⁸ Cf. G. v M., 10 App. Cas. 171 (H.L.(Sc.), 1885), N.F. v M.T. (orse. F.), [1982] I.L.R.M. 545 (High Ct., O'Hanlon, J.), D. v C., *supra*, fn.7, at 191.

⁹ Scott v Scott (orse Fone), [1959] P.103, at 108 (Sachs, J., 1958). See also W. v W., [1952] P. 152 (C.A.).

¹⁰ M. (falsely called C.) v C., L.R. 2 P. & D. 414, at 419 (Lord Penzance, 1872).

¹¹ Cf. E-- v T-- (falsely called E--), 3 Sw. & Tr. 312, 164 E.R. 1295 (1863), N.F. v M.T. (orse. F.), *supra*, fn. 8.

¹² Cf. Jackson, 348, D. v C., *supra*, fn. 7.

generally be regarded as constituting approbation¹³, the courts taking the view that taking such a step may be regarded as a vote of confidence by the petitioner in the marriage.

(c) Collusion¹⁴

A decree of nullity may be refused on the basis of collusion. Collusion "means essentially an agreement between the parties so that the true case is not presented to the Court."¹⁵ The Courts have frequently proclaimed themselves to be on guard against such an eventuality. Collusion has been found not to exist in several recent decisions in which the issue has been raised in this country¹⁶, but in the High Court decision of E.P. v M.C. (otherwise P.)¹⁷, in 1984, Barron, J. found that there had been collusion in the following circumstances. The petitioner claimed that his marriage with the respondent was invalid on the ground of duress. He alleged that he had married her when she was pregnant with his child because she

¹³ W. v W., [1952] P.152 (C.A.). See also B. v B., [1954] N.Z.L.R. 358 (C.A., 1952, aff'g Sup. Ct., Gresson, J., 1952). Cf. Slater v Slater, [1953] P.235 (C.A., 1952) (no approbation as adoption took place before petitioner had knowledge that she had any remedy). See also, to similar effect, L. v L., [1954] 2 N.Z.L.R. 386 (Sup. Ct., McGregor, J., 1953).

¹⁴ See Shatter, 78-79.

¹⁵ E.P. v M.C. (otherwise P.), unreported, High Ct., Barron, J., 13 March 1984 (1982-22M), at p. 5.

¹⁶ E.g. Griffith v Griffith, [1944] I.R. 35 (High Ct., Haugh, J., 1943), K. v K., unreported, High Ct., O'Keefe, P., 16 February 1971, B. v D., unreported, High Ct., Murnaghan, J., January 1973, M. v M., Sup. Ct., unreported, Sup. Ct., 8 October 1979, R. (otherwise W.) v W., unreported, High Ct., Finlay, P., 1 February 1980, M.K. (otherwise M.McC.) v F.McC., [1982] I.L.R.M. 277 (High Ct., O'Hanlon, J.), A.C.L. v R.L., unreported, High Ct., Barron, J., 8 October 1982 (28M-1981).

¹⁷ J.R. (otherwise McG.) v P.McG., unreported, High Ct., Barron, J., 24 February 1984 (1982-6M).

had told him that, if he did not do so, she would have an abortion. The respondent's solicitors had sent two letters to the petitioner's solicitors. In the first, they had written that, provided "proper arrangements" were entered into by the petitioner for the maintenance of the child (and of the respondent until a decree of nullity was obtained), the respondent would not contest the petition. The second letter had been more explicit. Part of it was as follows:

".... Our client instructs us that she is prepared to co-operate with your client and agrees that it was not her intention at the time of the agreed marriage to cohabit with him. Clearly a consultation would need to take place to allow your counsel to clearly understand the nature of our client's proposed evidence. No doubt you will write to us about that in due course."

Barron, J. accepted¹⁸ that "the fact that one of the parties to a matrimonial suit does not appear does not establish collusion". But following the analysis of collusion in the English decision of Churchward v Churchward¹⁹ (which was concerned with collusion in relation to divorce proceedings), Barron, J., said:

"In the present case, there is no specific agreement to procure the initiation and prosecution of the suit or not to defend it nor has any specific fact been concealed. Nevertheless the two letters ... show clearly the mind of the respondent which was to ensure that the relief sought in these proceedings was obtained on terms agreeable to her. This attitude must and does lead me to have a suspicion that if the respondent had given evidence the case might well have appeared differently. The onus of

¹⁸ P. 5 of Barron, J.'s judgment.

¹⁹ [1895] P. 7.

proof is on the petitioner to establish that there are no reasonable grounds for thinking that the true case has not been presented to the Court. In my view this onus has not been discharged. On this ground alone, the petitioner is not entitled to the relief sought"²⁰

In M. v M.²¹, in 1979, the Supreme Court considered the position where no evidence is adduced of pre-trial negotiation or agreement. The Supreme Court held that a decree should not have been refused by the trial judge on the basis of collusion, where the evidence of the parties, and of the medical witnesses, concerning the respondent's impotent condition, had not been challenged by the Court. Henchy, J. stated:

"In my judgment, having regard to the unanimity of the evidence given and the conduct of the case generally, it was not open to the judge to refuse a decree of nullity for the reasons given. It is not in accordance with the proper administration of justice to cast aside the corroborated and unquestioned evidence of witnesses, still less to impute collusion or perjury to them, when they were not given any opportunity of rebutting such an accusation. To do so in this case was in effect to condemn them unheard, which is contrary to natural justice."²²

²⁰ Pages 7-8 of Barron, J.'s judgment.

²¹ Unreported, Supreme Court, 8 October 1979.

²² P. 4 of Henchy, J.'s judgment. See also R.S.J. v J.S.J., [1982] I. L. R. M. 263, at 265 (High Ct., Barrington, J.).

CHAPTER 4: VOID AND VOIDABLE MARRIAGES¹

Although the distinction did not originally exist in the law it has been the position for several centuries that a marriage may be void or voidable. There are several important differences between these categories. Perhaps most important is the distinction regarding nullity proceedings. In the case of voidable marriages a decree of nullity is required; but with void marriages, no decree is necessary. Any court and any person may treat void marriages as void without being concerned to obtain a judicial imprimatur (although in practice certain categories of void marriages would raise such a doubt as to their validity that a decree might be essential to resolve the issue).

The next most important distinction is that the validity of a void marriage may be challenged by any person with a sufficient interest², even after the death of the parties, whereas a voidable marriage may be challenged only by one of the parties during the lifetime of both; until it is annulled it is regarded as valid.

Other differences may be noted. Children of a void marriage are illegitimate. Children of voidable marriages will be regarded as legitimate unless and until the marriage is

¹ See Shatter, 60-61, Newark, (1945), The Operation of Nullity Decrees, 8 Modern L. Rev. 203 (1945), Tolstoy, Void and Voidable Marriages, (1964) 27 Modern L. Rev. 385, Goda, The Historical Evolution of the Concepts of Void and Voidable Marriages, (1967) J. Family L. 297, Moore, Defenses Available in Annulment Actions, (1967), 7 J. Family L. 239, at 241-249, McM. v McM. & McK. v McK., [1936] I.R. 177, at 214-216 (High Ct., Hanna, J., 1935), D. v C., [1984] I.L.R.M. 173, at 189-190 (High Ct., Costello, J., 1983).

² Cf. Jackson, 100-102.

annulled, whereupon they are retrospectively rendered illegitimate. Formerly it was not generally appreciated that there could be children of a voidable marriage where one of the parties was impotent (the only ground that, until recently at all events, was generally considered to render a marriage voidable). It is now realised that this is wrong: the child may have been conceived before the marriage at a time when the impotent condition did not exist, or may have been conceived by fecundatio ab extra or by artificial insemination homologous (A.I.H.)³.

Marriages that are void are those invalid on the grounds of nonage, prior subsisting marriage, prohibited degrees of relationship, formal defect and lack of consent (other than at least certain instances of mental incapacity⁴ which render a marriage voidable). Impotence also renders a marriage voidable.

³ See further our Report on Illegitimacy, paras. 100-101, (LRC 4-1982).

⁴ Controversy has surrounded the question whether marriages void for lack of consent are void or voidable. The better view appeared to be that they are void: cf. Tolstoy, Void and Voidable Marriages, (1964) 27 Modern L. Rev. 385. As has been mentioned, however, in R.S.J. v J.S.J., /1982/ I.L.R.M. 263 (High Ct.), Barrington, J. raised, but did not resolve, the question whether the ground of incapacity, on account of illness, to form a caring or considerate relationship with one's spouse rendered a marriage voidable, and in D. v C., /1984/ I.L.R.M. 173 (High Ct., 1983), Costello, J. clearly held to be voidable a marriage where a person is unable, on account of a psychiatric illness, to enter into and sustain a normal marriage relationship with his or her spouse.

CHAPTER 5: ALIMONY¹

A wife is entitled to alimony pendente lite in nullity proceedings, provided that the fact of marriage is admitted or proved². Permanent alimony may not, however, be awarded³. Where a marriage is declared void, it would normally be possible for proceedings to be brought by the woman against the man under the affiliation code. The man would usually have "contributed to the maintenance of the child within three years after the birth of the child"⁴, in which case an order for maintenance may be made "at any time after the contribution"⁵, provided paternity can be established - a requirement that should not prove difficult in many cases. It should be noted that the affiliation code was not designed to deal with cases of void or voidable marriages and that such relief as may be available under it is to a large extent accidental.

¹ See Shatter, 79, Browne, 280, Rogers, 38.

² Cf. Bird (alias Bell) v Bird, 1 Lee 209, 161 E.R. 78 (1753), Countess of Portsmouth v Earl of Portsmouth, 3 Add. 63, 162 E.R. 404 (1826), Smyth v Smyth, 2 Add. 254, 162 E.R. 287 (1824), Miles v Chilton, 1 Rob. Ecc. 684, 163 E.R. 1178 (1849).

³ Bird (alias Bell) v Bird, 1 Lee 621, 161, E.R. 227 (1754).

⁴ Section 2(2)(b) of the Illegitimate Children (Affiliation Orders) Act 1930 (no. 17), as amended by section 28(1) of the Family Law (Maintenance of Spouses and Children) Act 1976 (no. 11).

⁵ Id.

CHAPTER 6: EFFECTS OF NULLITY¹

A void marriage does not give rise to the legal effects that flow from a valid marriage. The children of a void marriage are not legitimate, even where both the parties acted in good faith. No maintenance or succession or other property rights attaching to marriage apply to the parties to a void marriage.

The position regarding a voidable marriage that has been annulled is substantially the same. The children are not legitimate and no maintenance, succession or other property rights attaching to the marriage will apply. That said, it is, of course, true that a voidable marriage may possibly never be impugned by either party or a petition may be made many years after the marriage has taken place. During the period that no challenge to the validity of the marriage has been made, it will be regarded as valid and the rights and obligations attaching to a valid marriage will apply. When a decree of annulment is granted, although the marriage is retrospectively declared void, not all property transactions will be undone. Money transferred by one spouse to another before the marriage in consideration of the marriage may be returned on the basis of a total failure of consideration², save to the extent that it has been expended for the benefit of the parties³.

Other aspects of the property relations of parties to a voidable marriage have been considered in English decisions.

¹ See Shatter, 79.

² P. v P. (by amendment M'D. v P.), [1916] 2 I.R. 400 (C.A., 1916, aff'g. K. B. Div., 1915).

³ Cf. id., at 442 (C.A., per Molony, L.J., approving of the approach favoured in the King's Bench Division).

In Dunbar v Dunbar⁴, Warrington, J. held that the doctrine of advancement⁵ should apply to voidable marriages. He considered himself bound by the authority of a previous decision⁶ dealing with the doctrine in the context of divorce, but argued that:

"Independently of authority I can see no principle on which I should imply any condition /that the marriage will not be annulled subsequent to the transaction to which the doctrine of advancement is said to apply/. The doctrine of advancement depends on th/e fact/ that from the relationship of the parties the Court infers that the purchase is intended for the benefit of the wife, or it may be the child, in whose name the purchase is made. The Court makes that inference from the relationship of the parties, and the inference is that that was the intention of the donor at the time the gift was made. But at the time this gift was made there was nothing in the mind of the donor as to the validity or the invalidity of his marriage. The plaintiff was at that time his wife. They were living together, and there was nothing whatever that I can see to lead the Court to suppose that the presumed intention in this case was different to the presumed intention in any other case. It seems to me therefore, that I must hold that the doctrine of advancement applies prima facie to this purchase."⁷

Warrington, J. contrasted the position of the parties to a voidable marriage with that of the parties to a void marriage,

⁴ /1909/ 2 Ch. 639 (Warrington, J.), cited in argument in P. v P. (by amendment M'D. v P.), supra, but not in the judgments delivered in the Court of Appeal. At trial, Madden, J. (at 411) misrepresented the scope of the holding in Dunbar v Dunbar, limiting it to cases of divorce, rather than of voidable marriage.

⁵ Cf. Wylie, paras. 9.044, 9.047, 9.056-9.057.

⁶ Thornley v Thornley, /1893/ 2 Ch. 299 (Romer, J.).

⁷ Supra, fn. 4, at 645.

by noting that the marriage before him was

"not a void marriage in the sense in which before the recent Act⁸ the marriage with a deceased wife's sister was a void marriage. That was no marriage at all, and the parties might just as well, so far as legal consequences are concerned, have lived together without going through any ceremony."⁹

Warrington, J.'s approach on the question of the doctrine of advancement is doubtless defensible on the ground of commonsense and practicality. Whether the distinction between voidable and void marriages may be drawn as easily as Warrington, J. suggests is, however, doubtful. There are several instances where a void marriage could have been contracted where both parties reasonably and honestly believed that the marriage was valid¹⁰. In such cases, even though the law regards the couple as not being validly married, the social reality may be otherwise.

In In re Wombwell's Settlement, Clerke v Menzies¹¹, a settlement was made by the plaintiff in contemplation of the marriage of his son, whereby money was transferred to trustees to be held upon trust for the settlor "until the said intended marriage" and thereafter upon the trusts of the settlement. The marriage took place but was subsequently annulled on the ground

⁸ Deceased Wife's Sister Act 1907.

⁹ Supra, fn. 4, at 644.

¹⁰ For instance, where a marriage was celebrated after erroneous (but convincing) information had been received of the death of a former spouse, where a marriage was celebrated between an adopted person and his natural sister or aunt, neither party being aware of the relationship, or where a marriage was void on the ground of nonage, the date of birth having been wrongly described in the birth certificate.

¹¹ [1922] 2 Ch. 298 (Russell, J.).

of the son's impotence, the decree (as customary) declaring the marriage "to be and to have been absolutely null and void". Russell, J. held that the expression in the settlement "until the said intended marriage" meant a valid and effectual marriage and that accordingly the settlor was absolutely entitled to the settled funds, under the express trust in his favour. Russell, J. referred to P. v P.¹² and to the Australian decision of Bishop v Smith¹³ which had held the opposite to what P. v P.¹⁴ had decided and which had not been followed by P. v P.¹⁵ although it had been drawn to the Court's attention. Russell, J. viewed the Court of Appeal's reasoning in P. v P.¹⁶ "as sound rather than that of the Australian judges."¹⁷

One obiter statement by Russell, J. is also worthy of attention. He stated:

"It is quite true that no claim could be made by the settlor for the return of the payments made by the trustees during the time when the validity of the marriage was not questioned, for, unless and until the wife intervened, all parties were bound to treat the marriage as valid and effectual."¹⁸

¹² [1916] 2 I.R. 400.

¹³ 1 Vict. L. R. 313.

¹⁴ Supra, fn. 12.

¹⁵ Id.

¹⁶ Id.

¹⁷ Supra, fn. 11, at 301.

¹⁸ Id., at 308. See also In re Garnett; Richardson v Greenep, 74 L. J. (Ch.) 570 (Kekewich, J., 1905) (settlement required that money be paid to trustees within year of marriage being "solemnized"; payment made one day after decree of annulment of the marriage on the ground of impotence; money had to be repaid as, in the event, it could not be said that the marriage had been "solemnized").

Brief reference may be made to the decision of Dodworth v Dale¹⁹, where Lawrence, J. held that the annulment of a voidable marriage on the ground of the wife's incapacity did not render the husband retrospectively liable for tax during the period between the celebration of the marriage and the decree of annulment on the basis that he was a single person. Lawrence, J. stated:

"There are, so far as I know, no authorities which doubt the proposition . . . that what has been done during the continuance of the de facto marriage cannot be undone - cannot be overturned by the operation of law."²⁰

Dodworth v Dale²¹ was approved of by the English Court of Appeal in In re Eaves; Eaves v Eaves²². There, a widow was entitled during her widowhood to certain property, her son being entitled to an absolute interest thereafter. In 1925, in contemplation of entering a marriage with a second husband, she handed over the property to her son. The marriage was annulled twelve years later. The Court held that she had lost all claim to an interest in the property even though her status had reverted to that of a widow. The Court stressed the "well settled"²³ nature of the rule that until a decree of annulment of a voidable marriage is obtained the parties must be treated as married people and that transactions concluded

¹⁹ [1936] 2 K.B. 503 (Lawrence, J.).

²⁰ Id., at 519. It is clear from the authorities discussed by Lawrence, J. (including P. v P., supra, fn. 12) that only voidable marriages fall within the term "de facto marriage" adopted in this passage.

²¹ Supra, fn. 19. .

²² [1940] Ch. 109 (C.A., 1939).

²³ Id., at 177 (per Clauson, L.J.).

on that footing should not be undone. Goddard, L.J. stated that, in his opinion, it could

"make no difference that the transaction now called in question took place a month or so before the marriage was celebrated. The parties deliberately put an end to the trust on the footing that the marriage was about to take place, as it did, and though the son would no doubt have been liable to replace the fund had the ceremony not been performed, when once it was, both the legal and equitable interest was vested in him, and the trust was by the common consent of both parties interested therein effectively wound up."²⁴

The principle of not overturning transactions done during the period before a voidable marriage is annulled was reiterated by Vaisey, J., in In re Ames' Settlement; Dinwiddy v Ames²⁵, but subject to the proviso that

"it is not supposed that that includes things which are not done during the continuance of the marriage but which might flow from the things which were done during the continuance of the marriage."²⁶

Thus, where a marriage settlement had provided that, in default of issue, the settled funds were to be held in trust (after specified life interests) for the benefit of the persons who would have been the next of kin of the husband had he died possessed of them intestate and unmarried and, as it transpired, the marriage was annulled on the ground of the husband's impotence, Vaisey, J. held that there had been a complete

²⁴ Id., at 120.

²⁵ [1946] Ch. 217, at 222 (Vaisey, J.).

²⁶ Id.

failure of consideration and that the fund was held as a resulting trust for the settlor's executors. Vaisey, J. did

"not think that that hypothetical class of next-of-kin (who were only brought in, so to speak, and given an interest in the fund on the basis and footing that there was going to be a valid marriage between /the particular parties/) have really any merits in equity, and I do not see how they can claim under the express terms of a document which, so far as regards the persons with whom the marriage consideration was concerned, has utterly and completely failed."²⁷

The facts of In re Dewhirst, Flower v Dewhirst²⁸ were not dissimilar to those in In re Eaves but, so far as Harman, J. was concerned, they contained an important difference. In In re Dewhirst, a testator had directed that income of his residuary estate be paid to his "dear wife during her lifetime provided she shall so long continue my widow". The wife remarried after the testator's death but the marriage was annulled on the ground of her husband's impotence.

Harman, J. held that the wife was entitled thereafter to be treated as a widow. His rationalisation of the decisions was coherent and is worthy of quotation in full:

"It seems to me that there is an apparent difference of judicial views on this subject, but I think it can be explained in this way. It is one thing to say that a person is entitled to property or rights after the annulment of the marriage, but it is quite another thing to upset transactions, completed or made permanent, while the marriage was current.²⁹ There is no doubt that, during that time, the whole world is bound to accept the fact that the spouses have the status of married people,

²⁷ Id., at 223.

²⁸ [1948] Ch. 198 (Harman, J.).

²⁹ Citing Dredge v Dredge, [1940] Ch. 109.

and all the results which flow from that necessarily follow. I need not decide to-day whether, if the wife had claimed the income during the time between the celebration of her second marriage and its annulment, she could have succeeded. The only point actually decided in In re Eaves³⁰ is that a transaction, which was completed in reliance on the coming into effect of the new status of the plaintiff, and within the period before the dissolution of her second marriage, would not be upset. It may very well lead to different results, according to whether the transaction in question is before or after the decree."³¹

In Re d'Altroy's Will Trusts: Crane v Lowman³², a testatrix willed her residuary estate on protective trusts for a man for life as long as he should remain the widower of his deceased wife. At the time of the death of the testatrix, he had remarried but that marriage was subsequently annulled on the ground of his new wife's incapacity. The trustees retained the residuary estate and its income pending determination of the question whether he was entitled to a life interest in the residuary estate.

Pennycuik, J. held that he was. He rejected the argument that, since the next-of-kin had taken a vested interest in possession immediately on the death of the testatrix, they could not subsequently be divested of it. In his view, a

³⁰ Supra, fn. 22. See, however, the obiter remarks of Goddard, L.J., id., at 123.

³¹ Supra, fn. 28, at 205. Cf. Greystoke, (1968) Note, 32 Conv. (n.s.) 144, at 146-417 who argues that a true construction of a will might well lead to the conclusion in many cases that the testator intended the beneficiary to lose finally the specified interest on contracting a marriage even though that marriage might eventually be annulled.

³² [1968] 1 All E.R. 181 (Ch. Div. (Pennycuik, J.), 1967). For criticism of the decision, see Tiley (1969) 32 M.L.R. 210, Greystoke, (1968) 32 Conv. (n.s.) 144.

vesting in possession should not be treated as tantamount to an actual transfer and only actual transfers should rest undisturbed.

In In re Rodwell decd., Midgeley v Rumbold³³, Pennycuick, J. followed his own decision in Re D'Altroy's Will Trusts³⁴ and held that a woman who had been married, but whose marriage had been annulled before her father's death (on the ground of her husband's impotence), was "a daughter who has not been married" within section 1(1)(b) of the Inheritance (Family Provision) Act 1938³⁵.

Pennycuick, J. regarded the question as one of statutory construction. In his view, the words in the section were addressed to the moment of the death of the testator, and

"the position is that the moment the decree of nullity became absolute then in the eye of the law the daughter never has been married."³⁶

Finally reference may be made to four English decisions in relation to separation agreements made by parties to marriages that are subsequently declared void. In the first, Galloway v Galloway³⁷, a separation agreement made by parties to a marriage that turned out to be bigamous was held by the King's Bench Division to be void. Ridley, J. stated that the agreement had been based on a mistake of fact, namely, "the

³³ [1970] Ch. 726 (Pennycuick, J., 1969).

³⁴ Supra, fn. 32.

³⁵ (1 & 2 Geo. 6, c. 45) (as amended by Intestates' Estate Act 1952, Schedule 3 (15 & 16 Geo. 6 & 1 Eliz. 2, c. 64)).

³⁶ Supra, fn. 33, at 731.

³⁷ 30 Times L. R. 531 (K. B. Div., Ridley & Bray, JJ., 1914).

belief of both parties that they were respectively husband and wife"³⁸. The second decision, Law v Herragin³⁹, involved facts similar to those in Galloway v Galloway⁴⁰, which Peterson, J. applied, holding the deed of separation to be void.

In Fowke v Fowke⁴¹, however, Farwell, J. held that a covenant in a deed of separation to pay the wife an annuity so long as she should continue to lead a chaste life was not affected by a subsequent decree of nullity based on the wife's incapacity to consummate the marriage. Farwell, J. rejected the argument that the agreement had been entered into under a mistake of fact, on the basis that the parties must have been aware of the fact that the marriage had not been consummated and that if either of them was not aware of the husband's right to have the marriage annulled on this account, "that ignorance . . . was clearly a mistake of law and not a mistake of fact."⁴²

The English Court of Appeal, in Adams v Adams⁴³, took the same view of this question in relation to a voidable marriage. Scott, L.J. distinguished the Irish decision of P. v P.⁴⁴ primarily on the basis that, in that case, an ante-nuptial settlement, rather than a separation agreement, had been the subject-matter of litigation⁴⁵. The Court relied on previous

³⁸ Id., at 532.

³⁹ 33 Times L. R. 381 (Chy. Div., Peterson, J., 1917).

⁴⁰ Supra, fn. 37.

⁴¹ [1938] Ch. 774 (Farwell, J.).

⁴² Id., at 783.

⁴³ [1941] 1 K.B. 536 (C.A.).

⁴⁴ [1916] 2 I.R. 400 (K. B. Div.).

⁴⁵ Supra, fn. 43, at 544. The fact that no attempt had been made by the Court to undo the part of the transaction that had been carried out by the (apparent) husband was stressed by Scott, L.J.

decisions⁴⁶ which had held that a divorce decree would not necessarily have the effect of discharging a spouse from liability under a separation agreement. This reliance is difficult to understand, since, as Farwell, J. had readily conceded in Fowke v Fowke⁴⁷, the situation of the parties after divorce is completely different from that arising after a decree of annulment of a voidable marriage.

Another effect of the granting of a decree of nullity of a voidable marriage has been noted earlier. In the High Court decision of F.M.L. & A.L. v An tArd Chláraitheoir na mPósadh⁴⁸, in 1984, Lynch, J. held that, on the granting of such a decree, a marriage to another person contracted during the currency of the voidable marriage is retrospectively validated. The decision did not specifically address the question of the legitimacy of children born of the second union before the first is declared null and void. Clearly they are illegitimate until the decree of nullity is made. Whether, on the granting of the decree they acquire a legitimate status is not certain. It may be that in such circumstances these children, if born after the marriage between their parents, should be deemed always to have been legitimate. It is possible that certain restrictive provisions⁴⁹ of the Legitimacy Act 1931 could be invoked against such a finding, but in view of the fact that

⁴⁶ Charlesworth v Holt, L.R. 9 Ex. 38 (1873), May v May, [1929] 2 K.B. 386 (C.A.).

⁴⁷ Supra, fn. 41, at 779.

⁴⁸ Unreported, High Ct., Lynch, J., 2 March 1984 (1983-4463P.).

⁴⁹ Section 1(2) of the Act provides that:

"Nothing in this Act shall operate to legitimate a person unless the father and mother of such person could have been lawfully married to one another at the time of the birth of such person or at some time during the period of ten months preceding such birth."

the validation of the marriage is accomplished by the operation of common law principles, this seems unlikely. A more speculative issue concerns the status of children born before a bigamous marriage between their parents, where that marriage is retrospectively validated by the subsequent decree of nullity in respect of the prior marriage. It is possible (but not certain) that on the granting of the decree, such children would be held to have been legitimated retrospectively by the marriage of their parents. One can only speculate on the extent to which the Court would rely on common law principles rather than on the Legitimacy Act 1931 in such a case.

PART 2

PROPOSALS FOR REFORM OF THE LAW

CHAPTER 7: INTRODUCTION

In this chapter we analyse the policy basis of the present law and make proposals for its reform. We begin by considering the existing grounds for nullity of marriage. We then consider possible new grounds for nullity. After this we analyse the bars to granting a decree of nullity. Next we consider whether the existing distinctions between void and voidable marriages should be retained. We go on to analyse the effects of nullity and other miscellaneous aspects of the subject. We conclude with a consideration of the question of retrospection.

At the outset of our analysis, it is perhaps worth stressing the nature and purpose of our deliberations. Our Report is designed to reform the law of nullity of marriage. The law of nullity of marriage is concerned with circumstances in which a marriage is, from its commencement, invalid: this is in contrast to divorce and legal separation which are not concerned with the circumstances prevailing at the commencement of the marriage, but rather with circumstances arising after the commencement of the marriage.

Another basic question of policy should be addressed at the outset of our analysis. This concerns the relationship between the law of the State and the canon law as administered by the ecclesiastical tribunals of the Catholic Church. Under present law, decrees of nullity of marriage given by these ecclesiastical tribunals have no legal validity: only the decrees of the courts of the State are legally binding. The courts of the State generally apply principles of canon law as administered by the ecclesiastical courts of the Church of Ireland before 1870¹, although in recent years there has been

¹ Cf. the Matrimonial Causes and Marriage Law (Ireland) Act 1870, section 3.

some development of legal principles in the light of advances in psychiatry and related disciplines. In our deliberations, we have not proceeded on the basis that the State law of nullity should give legal recognition to the decrees of the ecclesiastical courts of the Catholic Church. If such a change were to be made, it would, in our view, be a matter for political rather than legal determination. It is, however, worth noting that, under existing State law, especially in the light of more recent developments, the grounds for annulment, in their scope if not their classification, differ far less radically from those recognised by the ecclesiastical courts of the Catholic Church than is perhaps generally appreciated. It seems to us that there has been little public perception of these developments and that, on this account, much of the public discussion of the divergence between the two legal systems is to an extent out of focus.

CHAPTER 8: CHANGES IN EXISTING GROUNDS FOR ANNULMENT

(a) Marriages Between Persons of the Same Sex

The subject of marriages between persons of the same sex¹ is one that has occasioned much interest in some other countries recently, but it can be disposed of fairly briefly in the present Report. A number of aspects of the subject may be mentioned in turn.

The first question that arises is whether unions between persons of the same sex should be treated by the law as valid marriages. This argument has been made in some countries (in particular the United States²), so far with little success. It is contended that the important legal and social benefits flowing from the matrimonial state should not be denied to persons of the same sex who cohabit on a long-term basis. This argument does not commend itself to us³. We do not consider that unions between persons of the same sex should be treated as marriages.

The next issue is whether the legislation should attempt to define sexual identity, for the purposes of the law of marriage. This question might arise in cases of persons born with ambiguous sexual characteristics or in respect of post-operative transsexuals. As has been mentioned, there has been some litigation on this issue in a number of countries.

¹ Cf. pp. 4-8, supra.

² See, e.g., Anon., Note: The Legality of Homosexual Marriages, (1973), 82 Yale L. J. 573, at cf. supra, pp. 4-5.

³ We are conscious of the fact that a judgment in this matter extends outside the compass of "lawyers' law" into broader fields of social policy.

We consider that the better approach would be for the legislation not to attempt such a definition. Other countries have not done so, and it can be argued that to do so would be undesirable, since scientific knowledge and medical opinion on this subject are not static.

The third issue is a technical drafting point, which nonetheless may be mentioned to avoid confusion in public discussion of our proposals. We consider that, if a union between persons of the same sex is not to be valid, there is no necessity for the legislation specifically to provide that such a union is void. It should be regarded as simply not a marriage at all - a marriage inexistant⁴, or Nichtehe⁵, as it would be described in Civil Law systems. To describe such unions as "void" could attach a juristic significance to them which, in our view, is unnecessary and unwise⁶.

Finally, the question arises as to whether the Court's powers to make property and maintenance orders, which we will propose⁷ in respect of void and voidable marriages, should extend to unions between persons of the same sex. In favour of doing so, it might be argued that such unions are sufficiently close to heterosexual unions in their social, rather than legal,

⁴ Cf. G. Marty & P. Raynaud, Droit Civil: Les Personnes, (P. Raynaud), tome 1, 2e vol., 136-140 (3e ed., 1976) Cohn, The Nullity of Marriage: A Study in Comparative Law and Legal Reform, Part I, (1948) 64 L. Q. Rev., 324, at 331-338.

⁵ Cf. Muller-Freienfels, Family Law and the Law of Succession in Germany, (1967) 16 Int. & Comp. L. Q. 409, at 431.

⁶ In England (Matrimonial Causes Act 1973, section 1(c)) and Northern Ireland (Matrimonial Causes (Northern Ireland) Order 1978, section 11(1)(c)) marriages between parties who are not respectively male and female are specifically declared void. One effect of this is that such unions fall within the scope of the Court's power to make ancillary orders as to property and maintenance, an implication considered in the text immediately following.

⁷ Infra, pp. 173ff.

dimensions, to warrant the Court having such powers. As against this, it seems to us to be quite inappropriate for the Court to be charged with such a jurisdiction (apart altogether from the inherent difficulty of defining which unions would fall within its scope). In one case a strong argument could be made out for such powers: this arises where a person is deceived by another of the same sex into entering what he or she believes to be a valid marriage. It seems to us, however, that in such a case existing principles of contract, tort and property law are sufficiently malleable to ensure that justice will be done.

(b) Nonage

The law relating to the marriage of minors has been the subject of detailed proposals by the Commission in Working Paper No. 2-1977⁸ and Report No. 5-1983⁹. The main features of these proposals are described in Chapter 1¹⁰. These proposals, if they are to be given legislative effect, will (it may be presumed) form part of an Age of Majority Act. We reiterate in the present Report our proposals made in Report No. 5-1983 on the subject of the marriage of minors.

(c) Prior Subsisting Marriage

The present law relating to prior subsisting valid marriage as a ground that renders a marriage void is largely satisfactory.

⁸ Working Paper No. 2-1977, The Law Relating to the Age of Majority, the Age for Marriage and Some Connected Subjects, ch. 4.

⁹ L.R.C. No. 5-1983, Report on the Law Relating to the Age of Majority, the Age for Marriage and Some Connected Subjects.

¹⁰ Supra, pp. 9-10.

Later in this Report, consideration will be given to the questions whether a marriage void on this ground should be capable of subsequent ratification¹¹ or whether the ground should render a marriage voidable¹².

We do not consider that the proposed legislation should attempt to resolve in an ad hoc fashion any divergence between the law of the State and the Canon law relating to annulment of marriage as administered in the ecclesiastical tribunals of the Catholic Church. The judgments of the ecclesiastical tribunals in nullity suits have no legal effect, but some persons whose marriages have been annulled in those tribunals and who have not been prohibited by those tribunals from remarrying¹³ presumably consider themselves free in conscience to remarry but may not realise that before doing so they must first have their marriage annulled in the courts of the State. In our view, a law recognising as valid the decrees of the ecclesiastical tribunals would raise Constitutional issues. Accordingly, since this question would be a matter for political rather than legal determination, we make no recommendation that such a change be made in the law.

(d) Formalities

The present law regarding the formalities of marriage is complex in its statutory formulation, although it works well in practice. There is a clear need to update and consolidate the

¹¹ Infra, p. 153.

¹² Infra, p. 162.

¹³ A prohibition on remarriage (without the special permission of the local Bishop given only after a most thorough scrutiny) has been made in a majority of ecclesiastical annulments.

statutes on this subject, but this task is a large one, which would take some considerable time to accomplish.

The law relating to invalidity of marriage based on formal defects has given rise to little call for change. Pending a major overhaul of the marriage laws, it may be argued that the proposed legislation on nullity should make no change in the grounds that at present clearly render a marriage void by reason of formal defect. Against this approach, it might be argued that the present law relating to formalities of marriage raises a number of important questions of social policy, which should be resolved before legislation is proposed on the subject in the present Report. For instance, the present law raises issues regarding the extent to which the formalities required by religious denominations should be part of the civil law, and, if so, which denominations should be recognised as capable of prescribing legally effective formal requirements relating to marriage.

It is our view that, whatever merits the argument for delay may have, to accede to it would mean that publication of the present Report would be put back for a considerable period. We consider that it is better to publish the Report now, making no proposals for change regarding the formalities of marriage, pending the detailed examination of this aspect of the law. Thus, marriages would continue to be void in circumstances where they are void under the existing law¹⁴.

¹⁴ Cf. Article 13(1)(c) of the Matrimonial Causes (Northern Ireland) Order 1978, which provides that a marriage is void on the ground "that it is not a valid marriage by reason of non-compliance with any statutory provision or rule of law governing the formation of marriage".

(e) Want of Mental Capacity

As has already been indicated¹⁵, the law relating to want of mental capacity is in a state of development, and it is difficult to describe its principles with precision. We considered three possible avenues of reform. The first would be to limit the ground of want of mental capacity to cases where either party lacks the ability to understand the nature of marriage and its obligations. The second would be to let the courts continue to develop the law without statutory delimitation. The third would be to prescribe in legislative terms a definition of want of mental capacity.

(i) Incapacity to Understand the Nature of Marriage and its Obligations

The argument in favour of the first option is essentially one of prudence: to permit marriages to be annulled on account of factors other than intellectual capacity could extend the scope of nullity unduly. As against this it is difficult in principle to justify a position whereby a marriage may be invalidated where a party, by reason of his or her mental condition, is unable to appreciate the nature of the obligations of marriage, but not invalidated where, although able to appreciate the nature of these obligations, the party, by reason of mental illness or other lack of capacity, is incapable of carrying them out.

¹⁵ Supra, p. 15ff.

(ii) Continuation of the Common Law Approach

The second possible approach, which we have mentioned¹⁶, would be for the existing common law position to continue, rather than be subject to a specific legislative definition of mental illness or disorder. There is much to recommend this approach. The existing law has not met with any substantial public criticism and, in the light of the difficulties of interpretation which any statutory definition would necessarily involve, it might be considered more desirable to leave matters as they are, letting the courts develop the law unhindered by legislative controls.

There are, however, some difficulties associated with this approach. The uncertainty of certain aspects of the existing law may present difficulties for some spouses, as well as for others who may be affected by the question of the validity or invalidity of a particular marriage. There is, moreover, a possibility that the courts could develop a criterion of mental incapacity which would be too flexible in that it could result in decrees of nullity being made in inappropriate cases. Some people might, for example, view with concern the developments that have already taken place whereby a marriage may be annulled on the basis of lack of capacity on account of illness to form a caring or considerate relationship with one's spouse¹⁷, or incapacity, on account of psychiatric illness, to

¹⁶ Supra, p. 95.

¹⁷ Cf. R.S.J. v J.S.J., [1982] I.L.R.M. 263 (High Ct., Barrington, J.).

enter into and sustain a normal marriage relationship with one's spouse¹⁸.

As against this, it could be argued that, even with a specific legislative criterion of lack of mental capacity, a court disposed to take a "liberal" view of the case would be free to do so. The only practical way of limiting this discretion might be to restrict the ground to that of lack of capacity to understand the nature of marriage and its obligations - a solution that does not appeal to us.

Before recommending or rejecting the continuance of the common law approach, we consider it desirable to set out our analysis of the third option, to introduce a statutory definition of want of mental capacity as a ground for nullity of marriage.

(iii) A Statutory Definition of Want of Mental Capacity

To prescribe a legislative definition of want of mental capacity may at first appear to have much to recommend it, but it also raises some problems. First, it is inherently difficult to define mental illness or want of capacity since there is considerable disagreement among psychiatrists as to what constitutes a mental illness. There is a respectable (albeit unorthodox) view that the very concept of mental disorder is inherently meaningless, being a projection of society's moral and social values on to conduct that is troublesome to others.

A more moderate divergence of opinion affects such questions as

¹⁸ D. v C., [1984] I.L.R.M. 173 (High Ct., Costello, J., 1983).

whether psychopathy¹⁹, homosexuality²⁰, alcoholism²¹, drug addiction²² or other personality traits constitute "mental illnesses", and if they do, the extent to which they do.

Secondly, there is a danger that, if a legal definition of mental illness or want of capacity is provided in legislation, it may inhibit psychiatrists, who have to respond to developments and changes in the concept of mental illness or lack of capacity which may occur subsequent to the enactment of the legislation²³.

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- ¹⁹ Cf. R. Smith, The Psychopath in Society, Ch. 1 (1978), P. Clyne, Guilty but Insane, Ch. 19 (1973), B. Wootton, Social Science and Social Pathology, 249-251 (1959), Craft, The Moral Responsibility for Welsh Psychopaths, in A. de Reuck & R. Porter Eds., The Mentally Abnormal Offender, 91ff. (1968), Treves-Brown, Who is the Psychopath? (1977) 17 Med. Sc. & L. 56, Prins, Who is the Psychopath, A Rejoinder and a Comment, (1977) 17 Med. Sc. & L. 283, Welshe-Brennan, Classification Inconsistencies in Defining the Criminally and Mentally Abnormal, (1978) 18 Med. Sc. & L. 283, Shepherd & Sartorius, Personality Disorder and the International Classification of Diseases, (1974) 7 Psycholog. Med. 141, Arrington, Practical Reason, Responsibility and the Psychopath, (1979) 9 J. Theory Soc. Behaviour 71, Gunn, Criminal Behaviour and Mental Disorder, (1977) 130 Br. J. Psychiat. 317, at 325-326, Lewis, Psychopathic Personality: A Most Elusive Category, (1974) 4 Psycholog. Med. 133.
- ²⁰ Cf. M. Schofield, Sociological Aspects of Homosexuality, 160ff. (1965), D. Altman, Homosexual: Oppression and Liberation, 42-49 (1971), C. Wolff, Love Between Women, Ch. 2 (2nd ed., 1973), Kameny, Gay Liberation and Psychiatry, Ch. 5 of H. Ruitenbeek, Homosexuality: A Changing Picture, (1973). See further, *infra*, pp. 105-107.
- ²¹ Jellinek, The Disease Concept of Alcoholism, 80-82 (1960), Gunn, *supra*, fn. 19, at 324, Seevers, Psychopharmacology of Alcohol Dependence, 29th Int. Congress of Alcohol and Drug Dependence, Sydney, February 1970, pp. 94ff. (1971), N. Kessel & H. Walton, Alcoholism, Ch. 7 (1966), T. Paolino & B. McCrady, The Alcoholic Marriage, Ch. 2 (1977), B. Ritson & C. Hassall, The Management of Alcoholism, Ch. 1 (1970).
- ²² Cf. Russell, What is Dependence?, Ch. 17 of G. Edwards, M. Russell, D. Hawks & M. MacCafferty, Drugs and Drug Dependence, (1976).
- ²³ Cf. Gunn, *supra*, fn. 19, at 325.

Thirdly, it is difficult to define mental illness in such a way as to ensure that the concept would not be extended too far in practice. Since there is a considerable lack of unanimity among the psychiatric profession as to what constitutes mental illness²⁴, it is possible that "liberal" psychiatric evidence would be given in nullity proceedings, which the Court would either have to respect (thereby extending the effect of the ground very far) or to reject (thus coming into open conflict with the psychiatric profession). Of course no blame could attach to the psychiatrist, since his or her evidence would be perfectly legitimate according to broad norms of his or her profession. The responsibility would lie with the legislation which brought about this dilemma for the court.

Perhaps it is premature to point to these problems without having a particular statutory definition under scrutiny; obviously the difficulties will be greater or smaller, according to the particular draft adopted by the legislation. On this account it seems useful to look briefly at the experience in England, where the common law ground of insanity has been supplemented by the ground of mental disorder since 1937²⁵. The present law on the subject is contained in section 12 of the Matrimonial Causes Act 1973, which provides that a marriage celebrated after 31 July 1971 is voidable on the ground (inter alia):

²⁴ Cf. Presley & Walton, Dimensions of Abnormal Personality, (1973) 122 Br. J. Psychiat. 269, at 275, Walton & Presley, Use of a Category System in Diagnosis of Abnormal Personality, (1973) 122 Br. J. of Psychiat. 259.

²⁵ Matrimonial Causes Act 1937, section 7(1)(b) (1 Edw. 8 & 1 Geo. 6, c.57), consolidated in Matrimonial Causes Act 1950, section 8(1)(b) (14 Geo. 6, c. 25), amended by Mental Health Act 1959, 7th Schedule (7 & 8 Eliz. 2, c. 72), consolidated in Matrimonial Causes Act 1965, section 9(1)(b) (c. 72), amended by Nullity of Marriage Act 1971, section 2(d) (c. 44), consolidated in Matrimonial Causes Act 1973, section 12 (c. 18).

"(d) that at the time of the marriage either party, though capable of giving a valid consent, was suffering (whether continuously or intermittently) from mental disorder within the meaning of the Mental Health Act 1959 of such a kind or to such an extent as to be unfitted for marriage."

Mental disorder is defined in the Mental Health Act 1959²⁶ as meaning:

"mental illness, arrested or incomplete development of mind, psychopathic disorder, or any other disorder or disability of mind"

Psychopathic disorder is, in turn, defined²⁷ as meaning:

"a persistent disorder or disability of mind (whether or not including subnormality of intelligence) which results in abnormally aggressive or seriously irresponsible conduct on the part of the patient, and requires or is susceptible to medical treatment."²⁸

It is clear that the potential scope of invalidity prescribed by section 12 of the Matrimonial Causes Act 1973²⁹ is very

²⁶ Section 4(1) (7 & 8 Eliz. 2, c. 72).

²⁷ Id., section 4(4).

²⁸ A provision that appears to be relevant as qualifying the scope of the definition of mental disorder is section 4(5) of the 1959 Act, which provides that nothing in that section is to be construed as implying that a person may be dealt with under the 1959 Act as suffering from mental disorder, or from any form of mental disorder described in that section, by reason only of promiscuity or other immoral conduct. While it is not certain that section 4(5) would have the effect of limiting the scope of "mental disorder" for the purposes of the 1973 Act, the better view would appear to be that it does.

²⁹ C. 18.

wide. In Bennett v Bennett³⁰, Ormrod, J. stated in relation to section 9 of the Matrimonial Causes Act 1965³¹ - similar for practical purposes to section 12 of the 1973 Act - that it required

"extremely careful construction and extremely careful administration, because it might easily be used to enlarge enormously the grounds for nullity unless great care is taken in its application."

He considered that section 4 of the Mental Health Act³²

"... clearly includes not only psychotic illness but neurotic illness as well, and thus begins by enormously enlarging the field."³³

The only way in which this very large field was cut down was the requirement that the party should suffer from a mental disorder "of a kind or to such an extent as to be unfitted for marriage"³⁴ Ormrod, J. stated:

"'Unfitted' is a word which is not easy to construe³⁵. It might be given a very wide interpretation on the one hand, or a very narrow one on the other. It is quite plain, to my mind, having regard to the context in which its amendment was made, with the background of mental

³⁰ [1969] 1 W.L.R. 430, at 433 (P. Div., Ormrod, J., 1968).

³¹ C. 72.

³² 7 & 8 Eliz. 2, c. 72.

³³ [1969] 1 W.L.R. 430, at 433.

³⁴ Prior to 1971, the words "and the procreation of children" followed. Ormrod, J.'s treatment of this aspect of the section is not discussed here as it is not of present relevance.

³⁵ See also the uncertainty expressed by Friedman, Mental Incompetency - Part I, (1963) 79 L. Q. Rev. 502, at 520.

deficiency in mind, that Parliament cannot possibly have intended to use the word 'unfitted' in an extended sense at all. This must really mean something very much like the test of unsoundness of mind although perhaps not quite the same; it really must mean something in the nature of 'Is this person capable of living in a married state and of carrying out the ordinary duties and obligations of marriage?' I do not think it could possibly be given any wider meaning than that."³⁶

Ormrod, J. considered that:

"It can only be those unfortunate people who suffer from a really serious mental disorder who can positively be stated in humane terms to be incapable of marriage. They must be thought by other people to be unfitted for marriage, but there are a great many people who are successfully and happily married who would be described by many of their neighbours as unfitted to marry. In fact, in this court in its Divorce jurisdiction one sees a great many people of whom it could be said, loosely, that they were unfitted to be married."³⁷

The Discussion Paper published by the Office of the Attorney General in 1976 made proposals that went beyond the law in England. It recommended³⁸, first, that provisions on the lines of the English legislation should be introduced into our law; but the Discussion Paper went somewhat further:

"The definition of 'mental disorder' in the Mental Health Act 1959³⁹ deals with mental illness and psychopathic disorder. It is proper, however, that account should be taken of the insights which advances in psychiatry and psychology have given into aspects of human personality. It is clear that there exist defects of personality which

³⁶ [1969] 1 W.L.R. 430, at 434.

³⁷ Id.

³⁸ The Law of Nullity in Ireland, para. 15(b).

³⁹ No. 72.

though not capable of being characterised as 'mental disorder' (within the definition given above) may render the person suffering from them unfit for the responsibilities of a life-long union and the foundation of a family. It is, for example, certain that cases exist where a spouse may at the date of the marriage be so immature or may have such an arrested sense of responsibility as to render him or her unfit for marriage as if he or she has been a victim of a mental illness. A modern statement of the law relating to marriage should take note of such facts. It must, of course, be recognised that it is not possible to define by statute the degree of personality defect which would justify an annulment decree being made. Accordingly, considerable discretion must be given to the Court to decide each case on its own evidence (including the evidence of psychiatrists and psychologists in appropriate cases). This fact, however, should not preclude the enactment of a provision which would allow an annulment of a marriage when the evidence establishes the unfitness of a spouse by reason of a defective personality. In this connection it is to be borne in mind that ecclesiastical Courts exercising nullity jurisdiction are required to consider and adjudicate upon evidence bearing on an allegation that the personality of a respondent spouse was subject to such a defect as to render him or her unfitted for marriage. It is recommended therefore that the term 'mental disorder' should be so defined as to include arrested or incomplete development of personality of such a kind as to render the person suffering from it unfitted for marriage and that where such a condition exists the marriage should be regarded as a void one."⁴⁰

This proposal provoked considerable controversy in medical, political and religious circles⁴¹. It was well received by some persons and groups; but others took a different view. One of the most frequently expressed arguments against the proposal was that, where a marriage had been celebrated many years previously, it would be difficult for a psychiatrist to testify as to the capacity of the parties at the time of marriage,

⁴⁰ Id., para. 15(c).

⁴¹ The various viewpoints are summarised by Binchy, Divorce in Ireland: Legal and Social Perspectives, 2 J.Div., 99, at 103-104 (1978).

judged by the proposed criterion⁴². It was also contended that the proposal was part of an attempt to make the law of the State accommodate the nullity jurisprudence of the Catholic Church tribunals, and that it was an attempt to introduce divorce "by the back door".

Our Recommendations

After much consideration we have concluded that the best approach is for the legislation to give some guidance to the Courts on the question of want of mental capacity as a ground for nullity of marriage. We take the view that this guidance should be expressed in broad and general terms, so as not to restrict the courts unduly. Accordingly, we recommend that a marriage should be invalid on the ground of want of mental capacity where, at the time of the marriage, either spouse is unable to understand the nature of marriage and its obligations or where a spouse enters a marriage when, at the time of the marriage, on account of his or her want of mental capacity, he or she is unable to discharge the essential obligations of marriage.

We consider that this broadly defined ground will afford the courts the appropriate degree of flexibility in deciding cases where want of mental capacity is alleged to have invalidated a marriage.

⁴² Cf. *id.* Of course this objection would apply to any criterion of mental incapacity other than a very restrictive one. The question of a person's mental state at some considerable time in the past has arisen in other areas of the law. The experience of the courts has been that psychiatrists have been able to give evidence on the question. See also *D. v C.* [1984] I.L.R.M. 173 (High Ct., Costello, J., 1983).

The Marriage of Lunatics Act 1811

The next question that requires resolution is whether the Marriage of Lunatics Act 1811⁴³ should be retained, amended or abolished.

The Act was repealed in England in 1959, and no equivalent legislation exists in most other common law countries. It is, however, worthy of note that in a number of civil law jurisdictions there are provisions similar to the 1811 Act.

In favour of continuing the broad policy of the Act (subject to modernisation), it may be argued that it constitutes a sound, albeit somewhat approximate, test of validity of marriage and that it prevents marriages which would be likely to be void on the ground of insanity from taking place. Against this, it can be argued that it is overinclusive, in that it renders void a marriage that would be valid if judged by the common law test of insanity.

On balance we prefer the argument against the continuation of the policy of the Act and accordingly we recommend that the 1811 Act should be repealed.

(f) Homosexual Orientation

It is useful in the present context to refer to the question of homosexual orientation as a possible ground for nullity of marriage. The empirical evidence⁴⁴ indicates that a homosexual

⁴³ Cf. *supra*, pp. 13-14.

⁴⁴ Cf. Coburn, Homosexuality and the Invalidation of Marriage, (1960) 20 *Jurist* 441, at 447-448, O'Gorman, Difficulties Associated with Marriage Between Heterosexuals and Homosexuals, 8 *Br. J. of Sexual Med.* 46 (May 1981).

orientation is not generally changed by marriage although in some cases, of course, the spouses may live together in perfect harmony. Under the present law, the non-homosexual party to such a marriage will be able to obtain a decree of divorce a mensa et thoro where the homosexual party has committed a homosexual act⁴⁵. It seems to us proper that a marriage should be capable of being annulled where one of the parties has so strong a homosexual orientation as to make it impossible for the couple to live a normal married life. In the light of Hamilton, J.'s judgment in M. (otherwise O.) v O.⁴⁶, in January 1984, it seems clear that, in some cases of homosexual orientation the court, under present law, may hold that there was an incapacity on account of that orientation to enter into and sustain "the relationship which should exist between married couples if a life long union is to be possible"⁴⁷. The question arises as to how this ground for annulment should be categorised. An immediate objection to placing it within the context of want of mental capacity is that it may encourage litigants to raise the issue of whether a homosexual orientation is an illness⁴⁸. It does not seem to us necessary or appropriate to require petitioners to make the case that such orientation is an illness.

On balance we consider that the better approach would be for the legislation to provide that a marriage may be annulled, on the petition of either party, where one party has at the time

⁴⁵ See Shatter, 131, Geary, 350-351, N. v N., 3 Sw. & Tr. 234, 164 E.R. 1264 (1852), Bromley v Bromley, 2 Add. 152, note (c), 162 E.R. 252 (1793), Mogg v Mogg, 2 Add. 292, 162 E.R. 301 (1824); cf. Gardner v Gardner, [1947] 1 All E.R. 630, Spicer v Spicer, [1954] 1 W.L.R. 1051. For the Commission's recommendations as to reform, see Report on Divorce a Mensa et Thoro, pp. 34-35 (LRC 8-1983).

⁴⁶ Unreported, High Ct., Hamilton, J., 24 January, 1984 (1982-9M).

⁴⁷ P. 3 of Hamilton, J.'s judgment.

⁴⁸ Cf. supra, p. 98.

of the marriage so strong a homosexual orientation as to make it impossible for the couple to form a genuine life-long marriage relationship. The criterion must necessarily be expressed in general terms. As our recommendation makes clear, it would be possible for the homosexual party, as well as the other party, to petition for annulment. The position we favour in respect of this ground is the same as what we will propose in relation to impotence, viz., that either of the parties may petition. Such considerations as the fact that the party with the homosexual orientation was aware of his or her orientation before the marriage or the fact that the other party had been informed of the condition before the marriage would not, in themselves, affect this entitlement, but would be taken into consideration in deciding whether or not to apply the broad discretionary power to refuse to grant a decree of nullity.

One other aspect of this question should be noted. In many cases the true orientation of a homosexual person may take some years to reveal itself fully to that person and his or her partner⁴⁹. This does not mean, of course, that the person "becomes" homosexual; rather is it the case that the innate characteristic, present at the time the marriage was celebrated, is manifested later. In this respect there are legal parallels between a homosexual orientation and a condition of impotence which may reveal itself fully only after the marriage has been celebrated. Although the time scale may be far longer in the case of a homosexual orientation, we do not consider that this factor, in itself, would involve undue difficulties for the court.

⁴⁹ Cf. O'Gorman, Difficulties Associated with Marriages Between Heterosexuals and Homosexuals, 8 Br. J. of Sexual Med. 46, at 48-49 (May 1981).

(g) Duress

The present law relating to duress appears to us in general to be satisfactory. The courts in their recent decisions on this subject appear to have found that the existing rules may be applied without undue technicality. There does not therefore appear to be any need for the legislation to attempt to prescribe an all-embracing definition of duress: to do so seems uncalled for and could run the risk of introducing unnecessary confusion into the law as regards the precise scope of the legislative definition.

The one aspect of the subject which requires special consideration is that relating to a "just threat". As has been pointed out earlier⁵⁰ the clear view of the courts formerly was that a marriage contracted as a result of a true accusation of paternity and threats to take legal action, civil or criminal, against the father might not be annulled. In Griffith v Griffith⁵¹, in 1943, Haugh, J. stated:

"Assuming that marriages have resulted from a fear so imposed, they are clearly valid and binding on both parties. The man is free to elect between the scandal and possible punishment, on the one hand, or the marriage to the girl he has wronged, on the other. But the fear imposed must be properly imposed, that is, the charge of paternity must be true."

As has also been mentioned, recent High Court decisions take somewhat differing approaches to the question. Although they are difficult to reconcile, it seems that the effect of the decisions is that in some cases external pressure to marry,

⁵⁰ Supra, pp. 33ff.

⁵¹ [1944] I.R. 35, at 43 (High Ct., 1943).

involving a "just threat", may have the effect of vitiating the consent of the party affected by the threat.

It appears that where, as a result of a "just threat" a party "fails to apply his or her mind to the question of giving consent"⁵², the marriage may be declared invalid. It also appears that where a party consents to marry as "a sham or a device to procure a particular result, i.e. freedom from the particular threat to which he or she is subjected,"⁵³ the marriage may be annulled, although the extent to which this principle applies to "just threats" is not clear. Barron, J. expressed the principle without qualification in J.R. (otherwise McG.) v P. McG.⁵⁴, but in A.C.L. v R.L.⁵⁵ one reason why Barron, J. rejected the petition was that "the position in which the petitioner found herself was brought about by her own conduct"⁵⁶.

Whatever the uncertainties may be about the existing law, we have come to the conclusion that the legislation should make it clear that a petition for nullity of marriage based on duress should not be dismissed by reason only of the fact that a party married as a result of a "just threat". Of course it would be necessary to establish that the other ingredients of duress were present; moreover, the circumstances leading up to the marriage could be taken into account by the court in determining whether or not to apply the general discretionary bar to the granting of a decree which we shall be proposing later in the Report⁵⁷.

⁵² J.R. (otherwise McG.) v P. McG., unreported, High Ct., Barron, J., 24 February 1984 (1982-6M), at p. 7 of Barron, J.'s judgment.

⁵³ Id.

⁵⁴ Supra, pp. 37-30.

⁵⁵ Unreported, High Ct., 8 October 1982 (28M-1981) - pp. 36-37, supra.

⁵⁶ P. 11 of Barron, J.'s judgment.

⁵⁷ Infra, pp. 153-155.

(h) Fraud, Mistake and Non-disclosure

Under present law, as has been stated, fraud or mistake will render a marriage void in only very narrow circumstances. The question arises as to whether this ground should be of a more wide-ranging nature⁵⁸.

In favour of a general ground based on fraud or mistake, rather than the present circumscribed approach, it can be argued that the validity of a marriage must depend on the validity of consent and that to speak of a marriage that is valid, although consent was not valid on account of fraud or mistake, is surely contradictory. If this is so and if it can be shown that a party did not validly consent, whether on account of mistake or of fraud practised on him, that should be the end of the matter: such a marriage should not be regarded as valid.

The argument is a strong one and, in its own terms, is difficult to deny. There are, however, some practical objections which should be taken into consideration.

First, there is the possibility that if a general principle of fraud or mistake were introduced as a ground of nullity, its potential scope of application would be very wide and, once introduced, could become difficult to control⁵⁹.

⁵⁸ Some of the difficulties are analysed by Duncan, Sex and the Fundamentals of Marriage, [1979-80] Dublin U. L. J. 29, at 37-41.

⁵⁹ This was the experience in New York, which until 1967 had a restrictive divorce law, but expanded the ground of fraud in nullity cases very far. See O'Connor, Recent Developments in the Irish Law of Nullity, [1983] D.U.L.J. 168, at 182-185, Franck, The Annulment of Marriage in New York: "Until Fraud Do Us Part", (1961) 1 U. Brit. Columbia L. Rev. 471, Twiss, Comment: Annulment for Fraud in New York, (1960) 24 Albany L. Rev. 125.

Secondly, it is not easy to draft a criterion which would cover all cases that are intended to be covered but which would exclude all other cases. A general ground of fraud or mistake would inevitably involve an element of uncertainty in individual cases. There are disadvantages in placing some marriages under a cloud in this fashion.

These practical arguments have considerable force. Nevertheless we consider that some extension of the present ground would be desirable, provided that it could meet the following tests, namely, that:

- (1) its scope is relatively clear;
- (2) it is not capable of undue extension;
- (3) it cannot easily be invoked by spouses who are merely anxious to seek a way out of marriage.

These tests seem essential to avoid the introduction of an undue degree of instability into the law.

After much consideration, we have come to the conclusion that the best approach would be for the legislation to include, in addition to the existing grounds of fraud and mistake⁶⁰, a new

⁶⁰ We have seen that, under present law, fraud or mistake may be the basis of a decree of nullity in at least three cases: (a) where either party is mistaken as to the nature of the ceremony; (b) where either party is mistaken as to the identity of the other party; (c) where fraud and duress or mental incapacity falling short of insanity combine to bring about the appearance, but not the reality, of consent. From a drafting standpoint, the first and second of these cases appear to cause no difficulty. As regards the third case we think that the best approach would be for the legislation to contain no specific reference to it as a substantive ground for annulment. Instead, the types of situations covered by it would fall within the separate grounds of duress and want of mental capacity, respectively. There seems to us much to be said in favour of this approach which would avoid the difficulties of drafting

ground, namely, that a party was induced to enter into a marriage as a result of a fraudulent misrepresentation made by or on behalf of the other party to the marriage.

A number of features of this new ground should be noted. First, the misrepresentation would have to be fraudulent, rather than innocent or negligent. The considerable volume of case law which has been built up in respect of the tort of deceit⁶¹ should act as a guide on this matter. Secondly, it would be necessary to show that the party had been induced by the misrepresentation rather than some other factor to enter the marriage. The tort of deceit⁶² provides some guidance in resolving cases where a party may have been affected by more than one factor, but we consider that the legislation should make it clear that the ground should be established only in cases where, but for the fraudulent misrepresentation, the party would not have entered the marriage.

Thirdly, and in contrast to the tort of deceit, we consider that the ground of fraudulent misrepresentation in nullity should apply only where the party affected by the misrepresentation was a person specifically intended to be so affected⁶³. The tort of deceit does not require this degree of specificity but in the context of nullity of marriage we consider it essential.

Fourthly, it should be noted that we propose that a fraudulent misrepresentation made on behalf of the other party to the marriage should fall within the scope of the ground. This

fn. 60 Cont'd

complex specific statutory criteria relating to the interrelationship between fraud, duress and mental incapacity, which could result in the introduction of uncertainty as to what precisely fell within their terms.

⁶¹ Cf. McMahon & Binchy, 389-390, Salmond & Heuston, 367-368, Fleming, 598-599.

⁶² Cf. McMahon & Binchy, 391-393, Salmond & Heuston, 396, Fleming, 601.

⁶³ Cf. Salmond & Heuston, 369.

should include only cases where the person making the misrepresentation does so with the authority of the other party to the marriage. It should not be necessary that the person making the misrepresentation is acting fraudulently provided the party on whose behalf it is made knows of the falsity of the representation and its likely effect on the party to whom it is addressed, and fraudulently intends the misrepresentation to have this effect.

A final point should be noted. We consider that only the deceived party should be entitled to invoke this ground. It would be improper, in our view, for the party who made or authorised the fraudulent misrepresentation to be permitted to invoke the misrepresentation as a ground for a decree.

As regards the types of fraudulent misrepresentation which could fall within the scope of the new ground, we are satisfied that the Courts will be able to ensure that a decree will be granted only in cases where, but for the misrepresentation, the party would not have entered the marriage. Necessarily, since human beings are so diverse in their attitudes and responses, the range of facts capable of falling within the scope of the new ground is broad. A broad range of facts is already discernible under some existing grounds for nullity, notably mental incapacity and duress.

Inevitably, if there is to be a general ground of fraudulent misrepresentation, the question must arise as to the circumstances in which fraudulent misrepresentation concerning character, religion, family or personal background, wealth, education or employment should be held sufficient to constitute the basis of a decree.

Such a ground is not part of the law of England, but exists, in various formulations, in the law of a number of other countries.

In the United States, courts have granted annulments on such a ground⁶⁴, but, save in New York⁶⁵, have not done so very frequently. There are precedents in favour of annulling marriages on the basis of a fraudulent non-disclosure of unchastity in aggravated circumstances, but misrepresentations as to wealth or social position will not normally be sufficient⁶⁶.

Courts in the United States have been reluctant to grant a decree where there has been a false representation regarding previous marital status⁶⁷. Of particular relevance to this country are the decisions holding that a misrepresentation by a Catholic either that his civilly-divorced first wife is dead or that he never had been married previously should not be a ground for annulment. The courts have taken the view that to give consideration to the other spouse's religious beliefs "would elevate the law of the individual or of the church above the law of the land, which alone the courts are bound to administer."⁶⁸

This approach has been criticised by Professor Robert Kingsley, as follows:

⁶⁴ See G.J.C., Annot., 14 A.L.R. 121 (1921).

⁶⁵ Cf. the articles cited at p. 110, fn. 59, supra.

⁶⁶ Cf. Kingsley, Fraud as a Ground of Annulment of Marriage, (1945) 18 S. Calif. L. Rev. 213, at 224-225. A single decision to the contrary cited by Kingsley, Raia v Raia, 214 Ala. 391, 108 So. 11 (Sup. Ct., 1926), stressed the immature age and retarded mental capacity of the petitioner as reinforcing factors.

⁶⁷ Cf. W.A.S., Annot., 23 A.L.R. 180 (1923).

⁶⁸ Boeks v Hanger, 59 Atl. 904, at 905 (N. J. Ct. of Chy., per Magie, Ch., 1905). See also, to similar effect, Bannon v Bannon, 50 Wash. L. Rep. 22, 23 A.L.R. 178 (D. C. Sup. Ct., 1922). See, however, State Compensation Fund v Foughty, 13 Ariz. App. 381, 476 P. 2d 902 (1970).

"If a bona fide religious scruple against marriage with a divorcee in fact exists (as distinguished from a mere personal aversion), the party is as much barred from marital relations as where the spouse is diseased, and probably more so than where he discovers her antenuptial pregnancy; yet we give effect to the purely personal aversion in the latter case."⁶⁹

Many civil law codes permit some scope for annulment on the basis of fraud or mistake as to character or background. In Italy, for example, Article 122 of the Civil Code provides that a marriage may be attacked:

"by that spouse whose consent was given as a result of a mistake as to the identity of the person or of an essential mistake concerning personal qualities of the other spouse.

A mistake concerning personal qualities is essential when, having regard to the conditions of the other spouse, it is determined that the latter would not have given his consent if he had known them exactly and provided the mistake relates to:

- (1) the existence of a physical or psychical illness or of a sexual anomaly or deviation such as can prevent the development of marital life;
- (2) the existence of a verdict of conviction for a non culpable crime with a sentence to imprisonment for not less than five years, except where rehabilitation has been granted before the celebration of marriage. The action for annulment may not be brought until the verdict has become final;
- (3) a declaration of habitual or professional delinquency;
- (4) the fact that the other spouse was convicted for crimes concerning prostitution to a sentence of not less than two years. The action for annulment may not be brought until the sentence has become final;
- (5) a state of pregnancy caused by a person other than the subject who was affected by the mistake, provided that a disclaimer of paternity pursuant to

⁶⁹ Kingsley, supra, fn. 66, at 228, fn. 95.

article 233 occurred, if the pregnancy was brought to conclusion.

The action may not be brought if there was cohabitation for one year after the discovery of the mistake."

Article 124 of the Swiss Civil Code permits a person to seek an annulment where he was induced to enter the marriage:

"by mistaken impression that the other party possessed certain qualities so indispensable that their absence makes life in common intolerable."

Impotence and wilful refusal to consummate the marriage fall within the scope of this provision.

Fraud is the subject of Article 125, which provides that a marriage may be avoided by one of the parties to it:

"1. Where he has been wilfully deceived by the other party with the connivance of that party as to the latter's moral integrity and has thereby been induced to contract the marriage"

In support of permitting the general ground of fraudulent misrepresentation to extend to fraudulent misrepresentations as to character or background, it can be argued that a spouse's character and background must largely affect his or her capacity to discharge his or her obligations relating to marriage. Fraud as to such matters must, therefore, strike at the root of the matrimonial relationship, and is thus an appropriate ground for annulment. To limit the grounds based on fraud to those concerned with sexual or reproductive capacity or performance would, it may be argued, be an unnecessarily narrow approach.

The main argument⁷⁰ against extending this ground to fraudulent misrepresentation as to character or background is that the law might be seen to support social policies of dubious merit in certain cases. Where a woman married a man earning £5,000 per annum believing his representation that he is worth £20,000 per annum, or where a woman married a man believing his representation that he has obtained a professional qualification, it could be considered improper for the law to admit of the possibility of an annulment based on her disappointment on finding out the true position.

We appreciate the force of this objection but we consider that it can itself be criticised. Whether or not we would wish it otherwise, some people as a matter of fact do attach considerable importance to the question of the character, financial resources or personal background of their prospective spouse. If it can be shown that they entered a marriage by reason of a fraudulent misrepresentation relating to such a matter made by or on behalf of the other party, and that they would not otherwise have entered the marriage, then we consider that the balance of the argument is in favour of permitting the general ground of fraudulent misrepresentation to apply. This is not to say, of course, that any exaggerations as to wealth or background will cast a shadow over the validity of the marriage. Several important elements⁷¹ must be established before the ground applies. Moreover, even in cases where the ground is held to apply, the discretionary bar to a decree which we shall later be proposing⁷² may preclude relief.

⁷⁰ Apart from the arguments mentioned supra, pp. 110-111, which apply to the ground generally.

⁷¹ Supra, pp. 112-113.

⁷² Infra, pp. 153-155.

As well as the ground of fraudulent misrepresentation, we consider that certain cases of fraudulent non-disclosure should also afford grounds for nullity of marriage. As in the case of fraudulent misrepresentation we are concerned with instances where, but for the non-disclosure, the other party would not have entered the marriage.

(a) Intention Not to Consummate the Marriage

The first of these cases is that of fraudulent non-disclosure of an intention at the time of entering the marriage not to consummate the marriage. Under present law some recognition has already been given to this ground. In the Supreme Court decision of S. v S.⁷³, Kenny, J. held that it affects "such a fundamental feature of the marriage contract"⁷⁴ that it should be a ground for annulment under existing law. It is worth noting that, in Switzerland, Article 124 of the Civil Code, as interpreted by the courts, permits annulment on the ground of mistake where there is a wilful refusal to consummate the marriage.

We consider that the legislation should include this ground under the heading of fraudulent non-disclosure. A drafting point which should be mentioned here is that "consummation" in the present context should be defined so as to include cases of sexual relations where the couple use contraceptives⁷⁵.

⁷³ Unreported, Supreme Court, 1 July 1976. See further pp. 44-45.

⁷⁴ P. 5 of Kenny, J.'s judgment.

⁷⁵ Cf. pp. 49-50, supra.

(b) Non-disclosure of an Intention to Desert Immediately and Permanently

In some cases a person may marry, fraudulently failing to disclose an intention to desert his or her partner immediately and permanently. In such circumstances it is possible that the marriage may be consummated and on that account the immediately preceding ground (ground (a)) would not apply. We consider that in such cases a decree of nullity may be appropriate. A number of points should be noted. First, the ground would apply only to cases where it can be established that the intention to desert immediately and permanently existed at the time of entering the marriage. Secondly, the desertion must in fact have taken place immediately and (so far as may be discerned by the Court) permanently. Although we consider that it would be imprudent for the legislation to specify an exact time limit (24 hours, or seven days, for example) within which the desertion must have taken place, we wish to stress that the legislation should make it clear that "immediate" should be understood narrowly and that this requirement should not in any circumstances be construed broadly.

(c) Fraudulent Non-disclosure of Unqualified Intention Never to have Children

The next possible ground based on fraudulent non-disclosure is the secret intention never to have children. Whatever the present status of the view that precreation is one of the primary purposes of marriage, it would appear likely that most people would agree that the desire to have children is a justifiable expectation on the part of a spouse when entering marriage. Prospective spouses may, of course, agree between themselves not to have children or to postpone attempting to

have children for some time, but, where no such agreement has been made and the circumstances are not such as to put the prospect of children out of the question⁷⁶, there is a strong argument that the wilful failure to communicate an intention not to have children existing from the date of the marriage should be a ground for annulment.

As against this, three arguments can be made. First, it may be contended that such questions as whether spouses should have children, and, if so, how many and when, are too much a matter depending on the individual and changing circumstances of the parties for the law of nullity to play a useful or effective role⁷⁷. Secondly, it may be said that the intention to have, or not to have, children is frequently qualified rather than absolute: the intention may be there but subject to considerable qualifications. For example, a man might secretly intend not to have any children unless the family income exceeds £20,000 per annum. His wife might well regard this as an unjust condition. In such a case the law could either take the approach that only an intention never to have children in any circumstances whatsoever should be a ground for annulment or it could enter the perilous area of attempting to distinguish between just and unjust qualifications to the intention to have children. The latter approach would surely be inadvisable; the former would, it may be said, be so restricted as to result in the failure to give a remedy to many of the deserving cases that might arise. Thirdly, the introduction of such a ground might facilitate collusive petitions in

⁷⁶ Where the wife is beyond the normal age for child-bearing, for example, or where one of the parties is suffering from a condition of sterility, known to the other.

⁷⁷ A constitutional issue regarding marital privacy might also arise; cf. McGee v A.G., [1974] I.R. 284 (Sup. Ct., 1973) (a decision not, however, concerned with the intention of one spouse, against the wishes of the other, to practise contraception).

respect of childless marriages⁷⁸. These arguments have some force, but on balance we feel that the argument in favour of the proposed new ground is stronger.

Accordingly, we recommend that a petitioner should be entitled to a decree of nullity where he or she was induced to marry by reason of the fraudulent non-disclosure⁷⁹ by the respondent of the respondent's unqualified intention never to have children with the petitioner.

(d) Fraudulent Non-disclosure of Sterility

The next possible ground for annulment based on fraud is the wilful failure of one spouse to inform the other that he or she suffers from a condition of sterility⁸⁰. The condition may arise from an operation authorised by the fraudulent spouse or from natural causes.

We consider that the fraudulent non-disclosure of a condition of sterility is an appropriate ground for annulment for much the same reason as the ground just considered⁸¹, namely, that

⁷⁸ Cf. Anon., Note, (1945) 61 L. Q. Rev. 324, at 325.

⁷⁹ It should be noted that in cases of fraudulent misrepresentation, as opposed to non-disclosure, it would, of course, be possible that a case might be made out under the general ground we have proposed supra, pp. 111-113. The same point should be noted with regard to the other specific instances of non-disclosure which we have considered above and will consider below.

⁸⁰ In the United States, the fraudulent concealment of sterility or the fraudulent assertion that one is fertile may constitute grounds for annulment: see, e.g. Aufort v Aufort, 9 Cal. App. (2d) 310, 49 P.2d 620 (Dist. Ct. App., 1935), noted by Gang in (1936) 9 S. Calif. L. Rev. 412, Tucney v Avery, 92 N. J. Eq. 473, 113 Atl. 710 (Ct. of Chy., 1921).

⁸¹ That is, the non-disclosure of an unqualified secret intention never to have children.

it is normally a justifiable expectation for a prospective spouse to look forward to having children and that, if the other spouse fraudulently fails to disclose to him or her a physical condition that makes this impossible, the marriage should be regarded⁸² as invalid.

A number of possible objections to this proposed ground may be considered. First, it may be argued that it is anomalous that the existence of a ground of nullity should depend on the spouse's knowledge of the existence of a defect and not on the existence of the defect itself. As against this it can be argued that this difference is not anomalous but is based on a sound social policy. Infertility is a widespread phenomenon - it affects perhaps one in ten marriages. It would be quite wrong for all these marriages to be regarded as voidable, and this has never been our law nor the law of most other countries. Nevertheless, where a prospective spouse fraudulently conceals his or her condition from the other party, this may reasonably be regarded as vitiating the consent of the other party in such circumstances as will entitle the other party to a decree.

Secondly, it might be said that, although in some cases knowledge by a prospective spouse of his or her condition will be clear and unambiguous, in many other cases it will be far less certain. A spouse may have a strong suspicion that all is not well but there may be an element of self-deception in an attempt to come to terms with this distressing possibility. To render a marriage invalid on the basis of such an uncommunicated suspicion could, it may be argued, be quite unfair to the sterile party.

⁸² Subject to the discretionary bar, proposed *infra*, pp. 153-155, where it would not in all the circumstances be proper to grant a decree.

The simple reply to this objection is that it is valid so far as it goes but that it can and should be met by drafting the legislative provision regarding this ground so as to make it clear that only a clear knowledge of the condition would give rise to the operation of the ground.

Accordingly, we recommend that the legislation should specify as a ground for annulment that the respondent at the time of the marriage was fully aware that he or she suffered from a condition rendering him or her permanently incapable of having children, and that by reason of the fraudulent non-disclosure of this fact by the respondent to the petitioner the petitioner married the respondent.

(e) Fraudulent Non-disclosure of a State of Pregnancy by Another Man as a Possible Ground for Annulment

The next possible ground for annulment is that of fraudulent non-disclosure by the respondent, at the time of the marriage, that she was pregnant by a man other than the petitioner and that the petitioner was not aware of the fact. In England pregnancy per alium has been a ground for annulment since 1937⁸³. In New Zealand, legislation in 1963 carried the position further by providing that a wife could seek a dissolution of a voidable marriage where at the time of the marriage some other woman, unknown to her, was pregnant by her

⁸³ Matrimonial Causes Act 1937, section 71(d). See now the Matrimonial Causes Act 1973, section 12(f). Courts in the United States have taken the same approach for well over a century: see Reynolds v Reynolds, 3 Allen (85 Mass.) 605 (1862). The same position prevails in South Africa: see Hunt, Error in the Contract of Marriage, Part I, (1962), 79 S. Afr. L. J. 423, at 426ff. In Italy, article 122, para. (5) of the Civil Code is to the same effect.

husband⁸⁴. This provision has been strongly criticised by one commentator⁸⁵ and was rejected by the English Law Commission⁸⁶.

A central question must therefore be asked at the beginning of our analysis: what is the basis of the argument that pregnancy per alium should be a ground for nullity of marriage? Is it error, namely that the husband is mistaken as to the paternity of the child? Is it the fraud of the mother, in "foisting" a child on a man who is not the father? Or could it possibly be that the birth of the child is consistent only with prior unchastity on the part of the woman?

We reject completely the third rationale as a possible basis, in itself, for annulment on the grounds of fraudulent non-disclosure⁸⁷.

We are satisfied that the general ground of fraudulent misrepresentation which we have already proposed should apply to cases of pregnancy per alium but we do not consider that the fraudulent non-disclosure of a condition of pregnancy by another man should be a ground for annulment. We do not consider it

⁸⁴ Matrimonial Proceedings Act 1963, section 18(2)(d).

⁸⁵ Inglis, 85. Also criticised in Anon., Review of Legislation 1963, 1 N. Z.U.L. Rev. 323, at 328-329 (1964). Honoré, 15, appears to support the provision on the grounds of sexual equality.

⁸⁶ Law Com. No. 33, para. 75.

⁸⁷ Cf. Lang v Lang, 1921 S.C. 44, at 51-53 (per Ld. Pres. Clyde). In the United States, non-disclosure of pre-marital unchastity is not generally regarded as a good ground for annulling a marriage: Kingsley, Fraud as a Ground for Annulment of Marriage, (1945) 18 S. Calif. L. Rev. 213, at 225-227. In aggravated cases, as where the unchastity was incestuous (Gatto v Gatto, 79 N.H. 177, 106 Atl. 493 (Sup. Ct., 1919), noted by Anon., in (1920) 29 Yale L. J. 365 and by H.P., in (1919) 68 U. Pa. L. Rev. 77) or where the other spouse was very young (Ysern v Horter, 91 N. J. Eq. 189, 110 Atl. 31 Ct. of Chy; 18 year-old girl, marriage unconsummated), decrees have been made.

desirable that the principle of uberrima fides should apply in this context. The distinction between fraudulent misrepresentation and fraudulent non-disclosure will necessarily be a narrow one in some cases but it is the function of the courts in a wide range of areas (including mental incapacity and duress under existing law) to be prepared to draw narrow distinctions where appropriate.

(f) Fraudulent Non-disclosure of Physical or Mental Illness as a Possible Ground for Nullity of Marriage

The next question is whether the fraudulent non-disclosure by a spouse of the fact that he or she is suffering from a physical or mental illness should be a ground for annulment.

Such a ground, or a provision similar to it, exists in the law of a number of countries. In Italy, for example, a marriage may be annulled where consent was given as a result of an essential mistake concerning the personal qualities of the other spouse. A mistake concerning personal qualities is essential "when having regard to the conditions of the other spouse, the mistaken spouse would not have given his consent if he had known them exactly and provided the mistake relates to inter alia :

".... the existence of a physical or psychical illness or of a sexual anomaly or deviation such as can prevent the development of marital life"⁸⁸

In Switzerland, a marriage may be avoided by one of the parties:

⁸⁸ Article 122 of the Civil Code.

"... where a disease has been concealed from him which gravely endangers his own health or that of his issue."⁸⁹

In Rumania, marriages may not be celebrated unless and until the prospective spouses declare that they are mutually informed as to the condition of the health of the other⁹⁰.

Article 42 of Yugoslavia's Federal Basic Law of Marriage mentions "a continuous, dangerous or serious disease" as an example of an essential quality rendering a marriage voidable if the other spouse was in error about it.

In the United States a marriage may be annulled where a spouse, at the time the marriage is contracted is, unknown to the other spouse, suffering from a disease "of such a nature as to make marital intercourse dangerous to the innocent party, as well as to the possible issue of such marriage⁹¹". Most of the decisions have been concerned with diseases of a venereal nature⁹² but in 1919, in Davis v Davis⁹³, the New Jersey Court of Chancery annulled a marriage where the respondent had failed to inform his wife before the marriage that he was suffering from chronic tuberculosis. Lane, V.C. said:

"It is well known that close contact with one suffering from tuberculosis involves great danger of transmission both through infection and contagion. It is almost impossible to conceive the ordinary relationship of

⁸⁹ Article 124 of the Civil Code.

⁹⁰ Article 10 of the Family Code.

⁹¹ Kingsley, Fraud as a Ground of Annulment of Marriage, (1945) 18 S. Calif. L. Rev. 213. See also Hunt, Error in Contract of Marriage, Part II, (1963) 80 S. Afr. L. J. 94, at 114-115.

⁹² See W.A.S. Annot., 5 A.L.R. 1016, at 1022ff. (1920).

⁹³ 90 N.J. Eq. 158, 106 Atl. 644 (Ct. of Chy., 1919), analysed by Anon., Note: Annulment of Marriages on the Ground of Fraud (1915), 2 Va. L. Rev. 465.

husband and wife existing without that danger being ever present. There is always also great danger of transmittal of the disease to offspring, and ... if the disease is not transmitted, there are likely to be transmitted characteristics which predispose towards the development of the disease. False representations with respect to its existence go then, I think, to an essential of the marriage relation. They are very different from representations with respect to health in general. They are more akin to representations of freedom from leprosy or diseases of similar nature.

I cannot agree that the only diseases which affect the essentials of the marriage relation are those of a venereal nature. I can see nothing whatever in good policy, sound morality or the peculiar nature of the marriage relation which would warrant the court, after having found the fraud, denying relief. Neither good morals nor public policy are subserved by compelling parties to live together as man and wife, with the ever-present danger of infection, and beget offspring liable to be tuberculously inclined, nor are they subserved by compelling a woman, who has married under a misapprehension with respect to the fact, to continue to be bound to a man affected with tuberculosis without having the close intimacy to which she is entitled."⁹⁴

In England since 1937⁹⁵ a marriage may be annulled on the ground that the respondent (unknown to the petitioner) was at the time of the marriage suffering from a venereal disease in a communicable form. The English Law Commission in 1970 recommended⁹⁶ no change in the law regarding this ground, and the legislation of 1971⁹⁷ gave effect to this recommendation.

Some of the principal arguments in favour of introducing a ground of nullity based on fraudulent non-disclosure of illness will now be considered.

⁹⁴ Id., at 645-646 (Atl.).

⁹⁵ Matrimonial Causes Act 1937, section 7(1)(c).

⁹⁶ Law Com. No. 33, para. 75.

⁹⁷ Nullity of Marriage Act 1971, section 2(e); see now the Matrimonial Causes Act 1973, section 12(e).

First, it can be argued that the fraudulent non-disclosure of a serious disease may in some cases be of greater practical significance than the fraudulent non-disclosure of a condition of sterility. The other spouse may literally be risking his or her life by entering such a marriage. Certainly the health of the spouse or of his or her children may be imperilled.

Secondly, this ground has been part of the law in a number of countries without any apparent evidence of the abuse or undue extension feared by the Morton Commission⁹⁸ in England.

Thirdly, (and more narrowly), venereal disease or other diseases affecting the reproductive organs may be regarded as so strongly connected with basic functions of married life - sexual intercourse and reproduction - as to justify the law making a fraudulent non-disclosure in relation to them a specific ground for annulment.

A number of arguments against introducing such a ground into our law must now be considered.

First, it may be said that its potential scope could be very wide. Unless the legislation attempted to define "disease or illness", the possibility of undue extension of the ground would be a real one.

A few questions will, perhaps, make this argument clearer. Would the ground extend only to a disease or illness associated with sexual intercourse or reproduction or would it go further so as to include diseases or illnesses that affect the ability of a spouse to discharge the obligations normally associated with marriage - such as to provide support for the members of

⁹⁸ Report of the Royal Commission on Marriage and Divorce, 1951, para. 269 (Cmd. 9678, 1956).

the family or a roof over their heads? Would the non-disclosure of a condition of terminal cancer ever fall within the scope of the ground? To what extent would mental illnesses be included⁹⁹? What approach would be taken to physical diseases that may have consequences in relation to mental capacity?

Secondly, it may be argued that the remedy of a decree of nullity is not the appropriate one where a spouse wilfully fails to disclose a condition of venereal disease. Such conduct is clearly a serious wrong towards the other spouse but a decree of nullity is not the proper remedy: a tort action for damages would be one avenue of recovery; a right to a decree for legal separation on the ground of cruelty (or unreasonable behaviour¹⁰⁰) would be another. The objective of nullity proceedings is not to right a "wrong", in the tort sense of the word.

On balance we consider that the arguments against introducing this ground are stronger than those in favour of it. Accordingly, we do not recommend that the legislation should include a ground relating to the fraudulent non-disclosure of a serious disease or illness.

⁹⁹ Cf. R.S.J. v J.S.J., [1982] I.L.R.M. 263 (High Ct., Barrington, J.), discussed supra, pp. 15ff. It should be noted that Barrington, J. made it clear that, if both parties knew of the illness, no ground of nullity could arise. But it should also be noted that Barrington, J. referred to "illness" (not "mental illness") as the source of the inability on the part of a spouse to form a caring or a considerate relationship with the other spouse. To this extent, our law already recognises undisclosed illness as the basis for a decree of annulment. It appears that the essence of the ground articulated by Barrington, J. is not that of fraud, but rather of incapacity.

¹⁰⁰ Cf. our Report on Divorce a Mensa et Thoro, p. 37 (LRC 8-1983).

(i) Prohibited Degrees of Relationship

Under present law, the prohibited degrees of relationship are very widely drawn¹⁰¹. The question arises as to whether the law on this subject should be changed.

It is instructive to look to the law of other jurisdictions and to recent developments in a number of countries. In most civil law¹⁰² and communist¹⁰³ countries the prohibited degrees are narrowly drawn. The same is true in some common law jurisdictions¹⁰⁴.

The law on this subject reflects biological, religious and social considerations which may be mentioned briefly. There is evidence that children of close relations are more likely than the average to suffer from genetic defects: their chances of doing so increase significantly where the relationship is in the first degree - brother and sister or parent and child. The principal religious denominations in this country prescribe restrictions on marriage between close relatives. There are social reasons for discouraging sexual relations among family members: sexual tensions have been regarded as disruptive of family harmony and stability¹⁰⁵.

¹⁰¹ See pp. 45-48, *supra*.

¹⁰² Cf. the law in France (Civil Code, articles 161-164, 366), Italy (Civil Code, articles 87, 117), the Netherlands (Civil Code, Section 1, article 41), Switzerland (Civil Code, article 100).

¹⁰³ Cf. the law in the U.S.S.R. (Sedugin, 47-48), Poland (Family and Guardianship Code, article 14), the German Democratic Republic (Family Code, article 8), Bulgaria (Family Code, article 10), Rumania (Family Code, articles 6, 8), Czechoslovakia (Family Code, section 12), Yugoslavia (Basic Law of Marriage, articles 18-20, 22).

¹⁰⁴ E.g. Australia (Family Law Act 1975, section 51(5)-(6)).

¹⁰⁵ Cf. Honoré, 80, Noble & Ma, Incest, (1978) 4 J. Med. Ethics 64, at 65-66.

The present law extends beyond relationships based on blood (consanguinity) to those based on marriage (affinity). It appears, however, that it does not render void marriages contracted by persons related by adoption.

In our view, consanguineous relationships raise somewhat different issues of policy from those raised by relationships based on affinity or adoption. Accordingly each category will be considered in turn.

(1) Prohibitions Based on Consanguinity

(a) Genetic Considerations

There is an enhanced risk of genetic damage for the issue of persons closely related to each other:

"There is evidence that the children of close relatives are more likely than average to suffer from genetic defects and that the chances increase rapidly if the union is between relatives in the first degree, such as brother and sister, mother and son, father and daughter."¹⁰⁶

If there were no other reason for the law to prohibit marriages among close relations, genetic considerations could be regarded as a sufficient justification, at all events where the relationship between the parties is very close (parent and child, brother and sister), but it would be difficult to determine where the line should be drawn according to genetic considerations alone.

¹⁰⁶ Honoré, 80.

(b) Religious Considerations

The Catholic Church has a wide range of prohibited degrees based on consanguinity but dispensation can cut down their scope considerably. Some Protestant denominations also retain broad prohibitions on marriages between persons related by blood.

The question as to the extent to which the law should have regard to religious considerations is, of course, a difficult one but in the present context may be resolved more easily than might be expected. If it is considered desirable, the law may prohibit marriages between persons in only a limited range of relationships, whilst specifying that this does not in any way oblige the various religious denominations to change their rules on the subject so as to require them to marry any couple whom they do not wish to marry.

(c) Social Considerations

The prohibition on marriage among close relations is based on the policy of preventing sexual desires from disturbing family development¹⁰⁷. This policy is, of course, of particular relevance to the relationships between parents and children and between brothers and sisters.

Our Recommendations

In approaching the question as to which relationships based on consanguinity should be prohibited, it would seem clear that marriages between parents and children and between all other

¹⁰⁷ Cf. Noble & Ma, supra, fn. 105, at 65.

direct ancestors and descendants, and between brothers and sisters should be prohibited. This appears to be the law in all countries. It seems equally clear that marriages between first cousins should be permitted. The key issues are whether uncle and niece or aunt and nephew should be permitted to marry, and whether great-uncle and great-niece or great-aunt and great-nephew should be permitted to marry.

In favour of permitting marriages between uncle and niece, or aunt and nephew, it may be argued that the law in a number of countries permits such marriages, with no evidence, so far as we could discern, of damage to family relationships.

As against these arguments, a number of opposing arguments may be made.

First, although it may be true that the problem of sexual disturbance between uncle and niece or aunt and nephew may arise relatively infrequently, it would be wrong to underestimate its significance¹⁰⁸. There are many families where uncles or aunts are closely integrated in a family: to introduce an entitlement to marry could well be disruptive in a number of cases.

Secondly, genetic considerations would raise some degree of uncertainty as to the desirability of such marriages.

¹⁰⁸ Cf. Honoré, 81:

"There are, it seems to me, good reasons why a man should not marry his aunt or niece, even if sexual relations between them are lawful, as they already are. The point of the ban is to keep the sort of relaxed family tie which we have with our aunts, uncles, nephews and nieces: subtly different from that with parents and grandparents, children and grandchildren, yet adding greatly to the strength of family feeling and to the security of those who enjoy it."

This question (as indeed also related questions on the subject) should probably be regarded as susceptible to resolution by reference to public opinion rather than precise legal analysis¹⁰⁹. On the premise, however, that our views on the question should be disclosed, we wish to state that on balance we consider that the arguments against making a change have more force and accordingly we recommend that the present prohibition on marriage between uncle and niece or aunt and nephew should remain part of our law.

The question whether marriages should be permitted between great-uncle and great-niece or between great-aunt and great-nephew can be dealt with somewhat more briefly. The arguments against such marriages are less strong than those against marriages between uncle and niece or between aunt and nephew, but nonetheless have some force.

The genetic argument has considerably less force. The argument relating to sexual disturbance in the family will in most cases have a different emphasis than in relation to uncles and nieces, or aunts and nephews. A significant difference of age between the parties is, of the nature of things, more likely to occur - although of course in specific cases there may be no significant age difference.

On balance we consider that the better approach would be for the legislation to retain the present prohibition on marriages

¹⁰⁹ Cf. Law Com. No. 33, para. 52:

"... Many people would no doubt instinctively hold the view that such marriages are unnatural and wrong, just as they would view with revulsion a marriage between a brother and sister, even if there were no biological reason against such a union. There are some matters of conviction on which men hold strong feelings of right and wrong though they cannot place their fingers on any particular reason for this conviction."

between a great-uncle and great-niece or between a great-aunt and great-nephew.

(2) Prohibitions Based on Affinity

The present law relating to prohibitions on marriages between persons related by affinity is very broad. The policy considerations regarding this subject are somewhat different from those affecting consanguinity.

A number of arguments may be made against the approach of the present law.

First, there are no genetic reasons why persons related by affinity should not marry.

Secondly, it may be argued that there is an inconsistency in the policy effected by the present law. Thus, for example, a man may marry his sister-in-law (when his wife is dead) but not persons related by marriage who are far more distantly related to him. A social argument invoked to justify the change ultimately effected by the 1907 Act was that it was proper that a man of moderate means should be entitled to marry his deceased wife's sister where the sister had come into his home to rear his children on account of his inability to pay for domestic assistance¹¹⁰. This argument would go some way towards explaining this inconsistency but certainly not all the way, since many marriages must have been contracted under both the 1907 and 1921 Acts in which no trace of these social conditions existed.

¹¹⁰ See the First Report of the Commission Appointed to Enquire into the State and Operation of the Law of Marriage as Relating to the Prohibited Degrees of Affinity, and to Marriages Solemnised Abroad or in the British Colonies, xi-xii (1848).

The third argument against the present approach of the law is that the legislation on nullity of marriage should place no necessary obstacles in the path of those who wish to marry. If the prohibitions regarding affinity are regarded as being based primarily on religious considerations of a somewhat refined nature, this might not be considered as a sufficient justification for their inclusion in the legislation, since the legislation would not require members of any religious denomination to marry anyone in circumstances where the denomination in question would not regard the marriage as valid.

A number of arguments in favour of the prohibited degrees of relationship based on affinity must also be considered.

First, the prohibitions are based on an historical cultural tradition, which has the general support of the religious denominations. Unless a convincing case can be made in favour of change it may be argued that the present approach should not be disturbed.

Secondly, no concern has been expressed in public discussion about the present approach¹¹¹.

Thirdly, and it would appear, most importantly, it may be argued that prohibitions based on affinity have a sound social justification. It is interesting in this context to recall the eloquent argument made in a memorandum submitted by the Archbishop of Canterbury, on behalf of the Church of England, to the Morton Commission, against the proposal that a man should be permitted to marry his divorced wife's sister during the lifetime of his former wife, and against the proposal that a

¹¹¹ This factor weighed heavily with the English Law Commission in its deliberations on the same question: Law Com. No. 33, para. 54.

woman should be permitted to marry her divorced husband's brother during the lifetime of her former husband:

".... The family is and ought to be a secure, stable unit from which is excluded by universal custom any sex interest between its members. The person who is introduced by marriage into a family adopts as his or her own the brothers and sisters of the other partner in marriage. It is supremely important for the stability of the family unit and for the protection of its members from indulging in unlicensed thoughts or desires that there should be the strongest possible barrier against any thought or possibility of marriage with the brothers and sisters of a partner. The proposal hitherto has been for marriage with a divorced wife's sister or divorced husband's brother; but there would be no ground for excluding marriage with nieces or nephews of the divorced partner, and thus extending the area within which complication could arise.

Death is one thing: it is not likely that one partner would actively desire the death of the other partner; still less that he or she would seek to cause death. If death arises, it is ab extra and it brings a release from the formerly existing situation. The partner thus released may legitimately and without any threat to the family stability and in accordance with the Church's canon law seek to marry the deceased partner's brother or sister.

The ending of a marriage by divorce is an altogether different matter. It is not a natural event like death, but an unnatural and artificially caused event. It can be planned for and brought about. The possibility of marrying a divorced partner's brother or sister casts a terrible shadow backwards. The 'triangle' of emotions is taken into the circle of the family. Affections in danger of being attached to the brother-in-law or sister-in-law are no longer suppressed as improper and incapable of fulfilment. A divorce is always a possibility and the affections, being capable of fulfilment, may cease to be regarded as altogether improper and may be allowed to develop instead of being suppressed.

All this is a special danger today in those many cases where a married couple is living with in-laws. Even the remote possibility of being able to marry an 'in-law' brother or sister, nephew or niece by bringing about a divorce might be enough to create suspicions and uneasiness and to jeopardise a marriage, especially under the unnatural strains caused when young married couples

have to live in the home of an 'in-law'.¹¹²

(It is worth noting that the Commission¹¹³ did not accept this argument. It considered that the risk of temptation within the family was less serious than the benefits which a change in the law would confer. Accordingly, it recommended a change on these lines, which was carried out four years later by the Marriage (Enabling) Act 1960.)

The problem of marriages between persons related by affinity assumes more serious dimensions where there is, in law or in fact, a relationship akin to that of parent and child between the parties. The relationship between stepparents and stepchildren (especially in cases where both parents are still alive) has involved much uncertainty internationally as to what are the most appropriate legal policies to apply in respect of such matters as guardianship, custody, access and adoption¹¹⁴.

¹¹² Royal Commission on Marriage and Divorce, Report: 1951-1955 (Cmd. 9678, 1956) (para. 21 of dissent by Sir Frederick Borrows).

¹¹³ With these dissentients: Lord Morton, Mr Fletcher and Sir Frederick Borrows. Sir Frederick Borrows quoted from the Archbishop of Canterbury's submission, stated that the General Assembly of the Church of Scotland and the representatives of the Free Church were against the proposal and that "the attitude in opposition of the Roman Catholic Church is without question" (p. 344, para. 22) and expressed the belief that the overwhelming mass of public opinion took the same view. For current thinking of the Church of England on the subject, see No Just Cause: The Law of Affinity in England and Wales: Some Suggestions for Change, a Report by a Group Appointed by the Archbishop of Canterbury (1984).

¹¹⁴ See, e.g. Maddox, 192-195, Berkowitz, Legal Incidents of Today's "Step" Relationship: Cinderella Revisited, (1971) 4 Family L. Q. 209, Deutsch, Open Adoption: Allowing Adopted Children to "Stay in Touch" with Blood Relatives, (1983) 22 J. of Family L. 59, at 69-70, Maidment, The Step Relationship and Its Legal Status, (1976) 5 Anglo-Amer. L. Rev. 259, Maidment, Access and Family Adoptions, (1977) 40 Modern L. Rev. 293, Bisset-Johnson, Children in Subsequent Marriages - Questions of Access, Name and Adoption, ch.38 of J. Eekelaar & S. Katz eds., Marriage and Cohabitation in Contemporary Societies (1980), Bisset-Johnson, Step-Parent Adoptions in England and Canadian Law, in I. Baxter & M. Erberts eds., The Child and the Courts (1978).

Moreover, it appears that the relationship between stepparents and stepchildren where both parents are alive may be affected by a significant degree of sexual tension¹¹⁵. One important reason for this appears to be that "the incest taboo is weakened because of the non-biological relationship between family members"¹¹⁶.

Would it be desirable policy for the law to permit marriages between stepparents and stepchildren in these circumstances? Should not the law have regard to the fact that the parties may be in a relationship very similar to that of a biological family relationship?

Before attempting to resolve this fundamental question it is desirable to refer to a possible alternative approach, which may appear to offer a compromise solution. This approach would permit widely drawn prohibitions on marriage between persons related by affinity but subject to a discretionary judicial power to permit marriages between such persons where the circumstances were "so exceptional as to justify the granting of the permission"¹¹⁷ or where the Court was "satisfied that neither party to the intended marriage has by his or her conduct caused or contributed to the cause of the termination of any previous marriage of the other party" This latter provision is contained in section 15 of New Zealand's Marriage

¹¹⁵ Cf., e.g. Visher & Visher, Common Problems of Stepparents and their Spouses, (1978) 48 J. of Orthopsychiat. 252, at 257, Messinger, Walker & Freeman, Preparation for Remarriage Following Divorce: The Use of Group Techniques, (1978) 48 Amer. J. of Orthopsychiat. 263, at 270-271, Finkelhor, Risk Factors in the Sexual Victimization of Children, (1980) 4 Child Abuse & Neglect 265, at 269.

¹¹⁶ Visher & Visher, supra, at 261. See also Cherlin, 87-88.

¹¹⁷ This approach was favoured in section 20 of Australia's Matrimonial Causes Act 1959 and in section 19 of Tasmania's Marriage Act 1942. It is no longer part of Australian law because, by the Family Law Act 1975, all prohibitions on marriage between persons related by affinity were removed. In several European countries, a dispensation system also operates.

Act 1955. In applying the section it appears that the New Zealand Courts have been anxious not to lay down absolute principles which would fetter the exercise of discretion which the provision involves¹¹⁸. In In re Hoskin and Pearson¹¹⁹, where a stepfather and stepdaughter sought permission to marry, Shorland, J. stated:

"The real question which arises is what are the principles which should guide the Court in the exercise of its discretion in determining whether consent to marry should be given or refused It is plain that the Legislature has amended the law to permit of marriage between parties standing in the relationship in which the present parties stand, in circumstances in which the Court thinks it proper to grant its sanction. The Legislation contains no guide, however, as to the principles to be applied in determining the matter, but it obviously recognises that in certain circumstances such a marriage should be sanctioned. Giving the matter the best consideration that I can, it seems to me that there are certain matters which must be considered in order to arrive at a proper determination of such a question, and without attempting an exhaustive statement of the relevant considerations, it seems to me that one consideration which must be considered is what were the realities of the technical relationship of stepfather and stepdaughter from the time that relationship first came into existence, to the date of the application? Is it a relationship which is of the nature of guardian and ward? Is it a relationship in which the technical stepfather has in age and practical matters and aspects stood in something like a true father's position to his stepdaughter, or is it more technical than real? Such consideration will, I think, aid in solving, or helping to solve, the question whether the proposed marriage would be abhorrent to public opinion informed of the details.

Another consideration, I think, is to have regard to the realities of the situation which exists, for the purpose of determination of what course is most likely to serve

¹¹⁸ Cf. In re Woodcock and Woodcock, [1957] N.Z.L.R. 960 (C.A., 1957, and Sup. Ct., Greeson, J., 1956), In re Hoskin and Pearson, [1958] N.Z.L.R. 604 (Sup. Ct., Shorland, J.).

¹¹⁹ Supra, fn. 118, at 607.

the best interests of public morality as it is likely to have been expressed in public opinion.

Another consideration which seems necessary is to attempt to determine whether or not the wish to marry springs from any ulterior motive such as the desire to acquire material gain, coming, for example, from some man of age and experience looking in the direction of a young and inexperienced girl possessed of wealth.

Another consideration must, I think, be what will be the consequences of the birth of children, which is a probable, if not inevitable result of marriage? Will it be likely to create difficulties or prejudice the existing families of children?

There are other considerations, but the ones I have referred to are some of the considerations which have been present in my mind."

After much consideration, we have come to the conclusion that the best approach would be for the law to abolish all prohibitions based on affinity. We are of the view that any restriction, whether specific or discretionary, would be likely to prove inappropriate or less than fully satisfactory in specific cases. As to the problem of stepparents and stepchildren in a family-type relationship, we see two principal difficulties in introducing a prohibition. First, since a prohibition would have little or no justification in cases where a family-type relationship was not present, the question would arise as to the degree of family-type relationship which would be so strong that it could be considered inappropriate to permit a marriage. Secondly, the problem posed by family-type relationships is not limited to cases where a step relationship exists between the parties. It could arise in less formalised circumstances - as where a man comes to live with the mother of a girl and he subsequently forms a relationship with the girl and wants to marry her. The difficulties involved in attempting to draft a law to deal with these types of

situations¹⁵¹ appear to us to outweigh the advantages.

We should stress that, under our recommendations, no religious donomination would be required to marry any persons who are within degrees of relationship which are prohibited by the donomination in question.

(3) Prohibitions Based on Adoption

Under present law, as has been stated, it appears that marriages between persons related by adoption are valid. A convincing argument may be made that, at least in the case of parents and their adoptive children (if such marriages are not already prohibited by section 24 of the Adoption Act 1952), the social considerations against marriage are compelling. The same applies (with perhaps slightly less force) to marriages between adoptive brothers and sisters¹⁵². The policy of adoption should be as far as possible to integrate the adopted children into the adopting family¹⁵³.

¹⁵¹ Some of the difficulties are apparent in the recommendations on the subject made by the Group Appointed by the Archbishop of Canterbury, in their Report, No Just Cause: The Law of Affinity in England and Wales: Some Suggestions for Change (1984).

¹⁵² By "adoptive brothers and sisters" we mean adopted children in relation to the natural children of their adoptive parents and in relation to other adoptive children of their adoptive parents.

¹⁵³ Cf. The English Law Commission's Report on Nullity, para. 50 (Law Com. No. 33, 1970) and the Report of the Departmental Committee on the Adoption of Children, para. 333 (Cmd. 5107, 1972). See also Re Broddy & Director of Vital Statistics, 142 D.L.R. (3d) 151, at 154 (Alta. C.A., per Kerans, J.A., 1982):

"In my view there is a traditional and functional nexus between the establishment of a system of adoption and the prohibition of inter-marriage between those affected by the new relationship.

In our view, the proposed legislation should render void marriages between a parent and his or her adoptive child and between adoptive brothers and sisters. The prohibition should apply even where the adoption order for some reason ceases to have effect. As under present law, a marriage between a person who has been adopted and his or her natural relations should be void.

As in our discussion of relationships based on affinity, the problem of family-type relationships arises in our discussion of relationships based on adoption. It is possible to envisage

fn 153 Cont'd

To so conclude, one need first recall why intrafamilial marriages are prohibited. The prohibition applies to affinity as well as consanguinity and cannot therefore be justified only for genetic reasons. What affinity and consanguinity have in common is proximity. The prohibition has a social purpose: by forbidding marriage inside the family unit, society reinforces acceptable standards of parental and sibling behaviour.

The concept of modern adoption is that the adoptee will be accepted fully into the family unit. Given the societal view of the family relationship, the adoption concept would not gain wide acceptance if adoptive parents, for example, could marry their adopted children. The imposition of notional consanguinity and affinity is a rational and functional aid to the legislative goal of public acceptance of the idea of adoption."

The subject was considered in the Report of the Review Committee on Adoption Services: Adoption (Pl. 2467, 1984). The Report stated, in para. 13.11:

"Adoption creates a legal bond between the child and his adopters, but insofar as an adopted child and a natural-born child of the adoptive family is concerned, it does not impose the statutory bar relating to marriage that normally exists between a brother and sister. This, in our view, is in conflict with the concept of adoption as being the full integration of the child into his adoptive family, with the same statutory rights and obligations as a natural-born child of that family. We consider that the normal statutory bar relating to marriage between a brother and sister should apply in the case of adopted children. Accordingly, we recommend that the appropriate legislative changes be made to bring adopted children within the prohibited degrees of marriage in relation to brothers and sisters within the adoptive family. Such a change in the law should not invalidate an existing marriage."

cases where, although no formal adoption took place, a child became effectively integrated in a new family. Would it be proper to permit a marriage between the child and a person who is in loco parentis to the child?

Again, for reasons similar to those already expressed in relation to prohibitions based on affinity, we have come to the conclusion that on balance it is better not to include prohibitions on marriage where the relationship falls short of legal adoption.

(j) Impotence

The present law relating to impotence appears to us generally to work well in practice, and no substantial changes seem to be desirable. Four aspects of the subject, however, require special consideration.

The first is the question of the entitlement of a spouse to petition on the basis of his or her own impotence. This area of the law is somewhat uncertain. The present apparent requirement that the other spouse must, for example, have repudiated the marriage before a decree may be made seems to amount to an attempt to ensure that an impotent spouse will not take advantage of the other spouse where the other spouse has been willing to make a success of the marriage in spite of the petitioner's condition. It appears to us that the present law gives effect to this in a somewhat crude fashion, and that it suffers from two principal weaknesses: first, the concept of "repudiation" may be difficult to determine with any degree of certainty in particular cases¹⁵⁴; secondly, it is quite

¹⁵⁴ Cf. Harthan v Harthan, [1948] P. 115 (C.A., 1948). See further, p. 59, supra.

possible to conceive of cases where, although the respondent had not repudiated the marriage, it would nonetheless be proper to grant a decree.

Accordingly, it appears to us that the best approach for the law to take would be to avoid laying down any specific limitation upon the right of an impotent spouse to petition for annulment, whether or not he or she was aware of the condition. The most sensitive and adaptable approach would be to let the question whether a decree should be granted be determined subject only to the general discretion, on the part of the Court, which we will propose below, to refuse a decree where in all the circumstances it would not be proper to grant one. Such discretion could without difficulty respond to such factors as the prior knowledge of the condition on the part of the petitioner (or respondent) and the attitude and conduct of the respondent in respect of the marriage. Accordingly, we recommend that no specific limitation on the right of an impotent spouse to petition for annulment should be included in the legislation.

The next question which requires consideration is whether the present law regarding invincible repugnance to sexual intercourse should be changed. At present, the Court is required to make a difficult distinction which is not reducible to simply a medical issue, between "a paralysis and distortion of the will" such as to prevent the victim from engaging in the act of intercourse, on the one hand, and the exercise of free will by a party who simply does not wish to have sexual relations, on the other. On occasion (though not in recent years) this has resulted in a controversial decision by the Court¹⁵⁵.

¹⁵⁵ Cf. R.M. v M.M., 76 I.L.T.R. 165 (High Ct., O'Byrne, J., 194, aff'd Sup. Ct., 1942).

In our view, no change in the law on this matter is desirable.
We are confident that the courts today are capable of determining this question in a sensitive and realistic manner.

The third question that requires consideration is whether the wilful refusal by a spouse to consummate the marriage should be a ground for annulment, without the necessity of establishing that the refusal resulted from a condition of impotence, whether physical or psychological.

In our view, no change should be made in the present law so as to make the wilful refusal to consummate a marriage a ground for nullity. The law of nullity has been based on vitiating elements existing at the time of marriage rather than those that may arise subsequently. This is of fundamental importance, particularly in relation to such specific matters as impotence and mental incapacity, where the approach has always been that the occurrence of such factors subsequent to the marriage cannot be a ground for annulment (unless, of course, they amount to evidence of the existence of a defect at the time of the marriage). Furthermore, to make wilful refusal to consummate the marriage a ground for annulment might well raise difficulties under Article 41 of the Constitution.

An important question arises as to how the rejection of the ground of wilful refusal to consummate the marriage may be reconciled with the proposed new ground of fraudulent non-disclosure of an intention not to consummate the marriage. Wilful refusal cannot automatically of itself be regarded as constituting fraud: a person who had no intention, prior to its celebration, not to consummate the marriage might change his or her mind immediately afterwards. Nevertheless, the wilful refusal to consummate a marriage would in many cases amount to convincing evidence of a prior intention not to consummate it, and, where such intention had not been disclosed

to the other party, a strong case of fraudulent non-disclosure could be made out. The distinction may be a difficult one for the Court to draw in particular cases (as, indeed, may be a similar distinction between impotence arising before and after the marriage). Nevertheless, the difference in principle is clear.

The final question that requires consideration is whether the failure to consummate a marriage for some reason other than impotence at the time of marriage or fraudulent misrepresentation or non-disclosure should be a ground for annulment. Where a person within an hour after the marriage ceremony is injured in a traffic accident and rendered incurably impotent or mentally disabled, it could be said that the marriage has not really "got going" and that the future inability to have sexual relations should be regarded as vitiating a central feature of the marriage relationship.

As against this, it can be argued, first, that the same objections can be made to this proposal as to the proposal regarding wilful failure to consummate the marriage: namely, that it offends against the basic principle of nullity law according to which the time of marriage should be regarded as the time at which vitiating elements must be present. Arguments ad misericordiam should not be allowed to interfere with this policy, since, wherever the line is drawn, an ad misericordiam argument can always be made just beyond that point. Accordingly, we do not propose any change in the law to enable a marriage to be annulled in such circumstances.

CHAPTER 9: POSSIBLE NEW GROUNDS

A number of possible new grounds for annulment merit consideration.

The first of these relates to marriages for a limited purpose¹. Marriages for a limited purpose raise important questions regarding the law of annulment. Discussion of the subject is sometimes rendered imprecise by the failure to appreciate that the concept of a marriage for "a limited purpose" has relatively indefinite boundaries. It may range from a marriage entered into for the purpose of defeating the provisions of a country's immigration law, the parties intending never to live together, to something far closer to the conventional notion of the marriage relationship, as where the parties agree before marriage to marry for companionship only, deferring the question whether they will have sexual relations during the marriage until some time in the future. It may involve cases where one of the parties, rather than both, may have an intention that the parties should not live as a married couple.

In favour of the view that marriages for a limited purpose should not be valid, it has been argued that consent to marriage does not mean merely consent to go through a ceremony and that it must involve consent "to be husband and wife as that phrase is usually construed in our society".² If the parties are agreed that the marriage is to be an empty shell, there is little purpose, it has been argued, in the law holding otherwise. In so far as such marriages are held valid to thwart the designs

¹ Cf. *supra*, p. 54.

² Clark, 118. See also Wade, *Limited Purpose Marriages*, (1982) 45 *Modern L. Rev.* 159, I.M.T., *A Footnote: Sham Marriages in Scotland*, (1983) 99 *L.Q.Rev.* 30.

of parties who seek to use their married status for ulterior motives, it has been argued that "punishment or vindictiveness has no place"³ in marriage law.

It can, however, be argued that marriages for a limited purpose should be valid. First, there is the important problem of definition as to where the line is to be drawn regarding limited or ulterior purpose⁴. Wherever it may be drawn, it would seem impossible to avoid a significant degree of uncertainty as to the validity of a number of marriages where the spouses sincerely desire the marriage to be valid, although their relationship may differ in some important respects from the norm. Secondly, insofar as other legislation - the immigration laws, for example - may be abused by persons entering sham marriages, it is not necessary for the marriage law to declare the marriage void: the immigration legislation can be amended to cover the abuse⁵. Thirdly, under existing law, supplemented by proposals we have already made in our Report relating to fraudulent misrepresentation, fraudulent non-disclosure, want of mental capacity and duress, the number of "limited purpose" marriages falling outside the scope of the grounds for nullity would not

³ Clark, 118. That there is no divorce jurisdiction in the State is a factor which should be borne in mind in this context.

⁴ Cf. Horton Rogers, Sham Marriages, (1974) 4 Family L. 4, at 7 (footnotes omitted):

".... [M]arriages of convenience may be undertaken for all sorts of ... reasons and in all these cases there may be differing degrees of departure from what is regarded as 'normal' marriage. Once a court is prepared to countenance an attack on the validity of a marriage because it does not conform with what is 'normal' it is immediately faced with serious problems of vagueness, problems which are exacerbated when it is remembered that it may be necessary for parties to prove a marriage for all sorts of purposes outside the context of court proceedings. Far better that a marriage valid in point of form between parties who have the capacity to contract it should not be impeachable on the basis of its departure from the 'normal' or the parties' ulterior purpose."

⁵ Cf. id.

be likely to be large. In particular, our proposal regarding a fraudulent non-disclosure of an intention to desert the other party immediately and permanently would cover the great majority of cases where "limited purpose" marriages are entered into with one of the parties having a secret unilateral intention to use the marriage ceremony to attain another purpose (such as acquiring an immigration entitlement).

We have concluded that on balance the better approach would be for the legislation to provide that marriages for a limited purpose should continue to be valid.

A second possible new ground for annulment is sterility. It will be recalled that we have already proposed that the fraudulent non-disclosure of a permanent condition of sterility should be a ground for annulment. What is now under consideration is the far broader ground of sterility, whether or not the affected party or the other party was aware of the condition at the time of the marriage.

In favour of introducing the ground, it may be argued that the capacity to have children is such an important feature of marriage that its absence should render a marriage null.

It appears to us, however, that the arguments against introducing this proposed ground are far stronger. The ground could cause hardship and possible injustice in many cases⁶. The incidence of childlessness among married couples is extensive, perhaps one in ten marriages. To cast a shadow of invalidity over these marriages does not appear to us to be a desirable social policy.

⁶ On the basis that the marriage would be voidable (which would be the only practical option), the discretionary bar proposed (*infra*, pp. 153-155) in respect of voidable marriages would admittedly lessen the potential scope of hardship.

The third possible new ground for annulment is the fact that a spouse suffers from a condition of epilepsy. We wish to stress that mention is made of this possible ground only because it has been part of the law of some other jurisdictions⁷ and it might be considered by some persons to be a suitable one for introduction here. In our view such a ground should clearly not be introduced. Whatever distressing effects a serious condition of epilepsy may have on either party to a marriage, it does not seem proper that the validity of the marriage should on that account be impugned.

⁷ Including England between 1937 and 1971. The Royal Commission on Marriage and Divorce 1951-1955 (the Morton Commission) in its Report in 1956 (Cmd. 9678, para. 282) examined the question whether the ground should be retained, and (subject to drafting changes) recommended that it should continue part of the law. The English Law Commission in its Report on Nullity (Law Com. No. 33, para. 73, 1970) recommended the abolition of the ground on the basis that epilepsy was not a mental illness and that it "responds to treatment and can be kept under control".

In the United States, several states formerly had statutes prohibiting the marriage of persons suffering from epilepsy. See Mitchell, The Legal Problems of Epilepsy, (1956) 29 Temple L.Q. 364, at 366-368, Anon., Note, (1937) 32 Ill. L. Rev. 327. In recent years most of these statutes have been repealed, and their constitutionality must be in some doubt. See Foster, Marriage: A "Basic Civil Right of Man", (1968) 37 Fordham L. Rev. 51, at 64.

CHAPTER 10: BARS TO A DECREE

(a) Ratification (or Validation) of a Void Marriage

Under present law certain types of void marriages may be ratified by the parties. Under proposals made below, we will be recommending that all marriages that are invalid on account of lack of consent (including marriages where a party suffers from lack of mental capacity) as well as marriages invalid on account of homosexual orientation, fraudulent misrepresentation and fraudulent non-disclosure should be voidable rather than void. Under the proposed legislation, marriages may be void on the following grounds only: prohibited degrees of relationship, formal defect, bigamy and nonage. Under existing law no ratification may take place in such cases. There is a general objection to the concept of ratification of void marriages under all these stated grounds: if the law has rendered void a marriage contracted between brother and sister, or with a thirteen-year-old, or with a person who is already validly married or where the ceremony takes place in breach of the formal requirements, it seems quite improper that the parties themselves by their conduct should be entitled to make that marriage valid. The social policy served by rendering such marriages void would be subverted if the parties had such a power.

Furthermore, other persons would be placed in a most unsatisfactory position in their dealings with the parties to such marriages. They could never be sure that a marriage which was void would not at some time in the future be retrospectively validated. (In practice, under existing law, third persons must normally regard marriages void for lack of consent as valid until a decree of annulment has been made.)

In regard to the specific grounds rendering a marriage void, it may be argued that bigamy and nonage should be regarded in a somewhat different light from prohibited degrees of relationship and formal defects. The vitiating elements in respect of bigamy and nonage (namely, the prior validly subsisting marriage and the failure to have reached the minimum age for marriage) may be removed or, at least rendered less relevant, by the passage of time: for example, the prior spouse may die¹, the underage party may reach the minimum age for marriage. In contrast, a marriage in breach of the prohibited degrees of relationship or contrary to the formal requirements cannot be transformed in this fashion.

In some countries marriages void on the ground of bigamy or nonage may be validated after the vitiating element has been removed. We propose below that such marriages should remain void rather than voidable. It is our view that it would be inconsistent with this policy and would lead to the difficulties and confusion already described for the legislation to provide that such marriages should be capable of ratification.

Accordingly, we recommend that, as a general principle, void marriages should not be capable of ratification. (As to the position where a void marriage is contracted during the currency of a voidable marriage which is subsequently annulled (see infra, pp. 162-163).

(b) Approbation

The concept of approbation under present law serves the desirable function of enabling the Court to refuse to grant a

¹ Where the first marriage is voidable and is subsequently declared void in a decree of nullity, different considerations arise. For our proposals on this question, see infra, pp. 162-163.

decree where the petitioner, with knowledge of the existence of a ground for annulment, has so conducted himself or herself towards the respondent that it would in the circumstances be unjust to grant a decree.

Under our proposals, a marriage will be voidable on the ground of impotence, duress, mistake, lack of mental capacity, fraudulent misrepresentation, fraudulent non-disclosure and homosexual orientation. Accordingly, the practical significance of the bar of approbation would be greatly increased.

The present law on the subject works well in practice and no criticism of it has been made. Nevertheless, we consider that it would benefit from certain changes.

It would not appear desirable for the bar to concentrate exclusively on the relationship between the petitioner's conduct and that of the respondent. This interpersonal factor is of course important in many cases, but there are cases in which the rights of other parties weigh more heavily. An obvious example arises where the petitioner, having adopted a number of children, subsequently seeks to have the marriage declared void. Conversely, there may be cases where the conduct of the petitioner in its own right rather than its effect on the respondent might be such as to render it improper to grant a decree.

Accordingly, we consider that it would be desirable for the legislation to provide a more generally-expressed criterion whereby the Court may refuse to grant a decree where in all the circumstances it would not be proper to grant one. In this regard, the conduct of the parties, before and after they went through the ceremony of marriage, would clearly appear to be a matter worthy of consideration, as well as the time that has

elapsed since the ceremony and the position of the parties and the children at the time of the proceedings. Most of these factors are already taken into consideration by the Court under the approbation concept, but we consider that it would be desirable for them to be specified expressly in the legislation.

Time Limit for Taking Proceedings

An important question in this context is whether the bar proposed above should be supplemented by a time-limit within which proceedings for a voidable marriage may be taken.

Time limits exist in the nullity law of many other countries. They are mainly of two kinds: either a specified limit from the date of the marriage² or a specified limit from the time when the ground of annulment became known to the petitioner or when he or she became free to take the proceedings³.

In favour of time limits, it can be argued, first, that, if applied with fairness and care, they can assist the policy of encouraging stability of marriage by removing the right to petition from persons who have long **previously** become aware of the defect and were free to have the marriage annulled. In effect, they clarify and render certain the policy that is at the base of the concept of approbation.

² As in England: Nullity of Marriage Act 1971 section 3(2) (c.44), now Matrimonial Causes Act 1973, section 3(2) (c. 18). Cf. the Royal Commission on Marriage and Divorce Report: 1951-1955, paras. 284-285 (Cmd. 9678, 1956), and the English Law Commission's Working Paper (W.P. No. 20, paras. 33-34, 60, 1968) and Report (Law Com. No. 33, paras. 79-86, 1970).

³ As in most civil law jurisdictions (e.g. France, (C.C. article 131), Italy (C.C., articles 117-120, 122-123), the Netherlands (C.C., Book One, Title 5, section 1, articles 127-128), and Spain (C.C., article 102). In the United States, the Uniform Marriage and Divorce Act, section 208(b) favours the same approach.

Secondly, it has frequently been argued⁴ that, after a certain time, it becomes unrealistic, if not practically impossible, for the Court to determine what the position was at the time of the marriage. A specific time-limit therefore may relieve the Court of this difficult task.

Against this approach it can be argued that it is fundamentally unjust that a party who would otherwise be entitled to a decree should be deprived of it merely because a specified period of time had elapsed. Moreover, the failure by a spouse to petition within the time-limit may be attributed in some cases to commendable behaviour on his or her behalf. The decision to take annulment proceedings based on a ground that renders a marriage voidable will in many instances involve much heart-searching on the part of the petitioner, who may well delay taking proceedings from motives of humanity and concern for the other spouse.

Thirdly, it can be argued that, if a time limit is not provided in the legislation, this does not mean that the issue of delay is thereby removed from the Court's consideration as a factor to be taken into account in determining whether a decree of annulment should be made. In the new discretionary bar to proceedings that we propose as a replacement for the present law of approbation we recommend that specific reference be made to the time that has elapsed since the parties went through the ceremony of marriage.

Fourthly, it can be argued that both types of time-limit which exist in the law of some other countries have their drawbacks. The absolute type of time-limit⁵, whereby a decree is barred after a specified period of time after the marriage, can work

⁴ See, e.g., Shatter, 84-85. Cf. supra, p. 104, fn. 42.

⁵ As, for example, in England, cf. fn. 2, supra.

hardship and possible injustice in certain cases, as in proceedings based on fraud or mistake where the petitioner does not become aware of the true state of affairs until after the time limit has been reached or, in proceedings based on duress, where the petitioner does not become free of the duress in time. The more sophisticated type of time-limit⁶ meets this objection but at the price of uncertainty, since it may be far from clear when the petitioner became sufficiently aware of the facts or free to take proceedings for annulment.

On balance, we consider that it would be better for the legislation not to include any time limit. We are confident that the discretionary bar which we have proposed will be sufficiently flexible to ensure that the law is sensibly applied. To sum up our position, therefore, we recommend that in proceedings in respect of a voidable marriage the Court should be empowered not to grant a decree if, having regard to all the circumstances of the case, including the conduct of the parties before and after they went through the ceremony of marriage and the position of the parties and the children, it considers that it would not be proper to do so. That power should not be subject to any specified time limit.

(c) Collusion

The present law relating to collusion is in some respects uncertain and difficult to justify⁷. Clearly, it is correct that the Court should refuse to grant a decree where the parties have conspired to give false evidence to establish a ground for

⁶ As in the law of most civil law jurisdictions: cf. fn. 3, supra.

⁷ For a helpful analysis see the English Law Commission's Report on Nullity of Marriage, para. 37 (Law Com. No. 33, 1970).

annulment: but the reason for refusing the decree is not the conspiracy but the fact that no ground for annulment really exists. The Court would equally correctly refuse to grant a decree where one party without the knowledge of the other falsified such evidence.

To concentrate on collusion is therefore unhelpful, and, indeed, positively confusing in respect of void marriages⁸. A void marriage may be treated as such by all persons without the necessity of obtaining a decree. What, therefore, is the position of a marriage admittedly void where the parties have colluded over important aspects of the case but not over the central matter of its validity? If the Court refuses to grant a decree, third persons (and, presumably, the parties themselves) may nonetheless treat it as void. The Court will therefore have been involved in an exercise in futility.

Somewhat different considerations arise in respect of voidable marriages, since the conduct of the parties may be relevant in certain cases in determining whether a decree should be made, and, in this regard, collusion regarding matters other than the central issue of the validity of the marriage may be important.

We consider that the essence of the concept of collusion is the falsity of the evidence rather than the complicity of the parties. However much a Court may desire not to be "a Court of convenience to release ill-assorted spouses from a marriage bond because it is irksome to one, if not both"⁹, the fact remains that a void marriage is no less void because the parties wish to obtain a decree confirming that this is so. While,

⁸ Cf. Shatter, 78-79.

⁹ McM. v McM. & McK. v McK., [1936] I.R. 177, at 187 (High Ct., Hanna, J., 1935).

therefore, the Court should be empowered to refuse to grant a decree where the evidence is insufficient (whether on account of lack of veracity, irrelevance, or otherwise), there seems to be no need for the Court to invoke the concept of collusion in this regard.

In proceedings relating to a voidable marriage, again the concept of collusion does not appear to be necessary or helpful. Under the broad discretionary bar we have proposed¹⁰, conduct that is now described as collusion would become merely a "circumstance" to which the Court is to have regard in determining whether to make or refuse a decree. Where the collusion consisted of fabricated evidence of the very ground of annulment, the Court would of course be obliged to refuse a decree, since no case would have been made out. Where, however, it affected a peripheral matter, the Court would have regard to it as a factor but not the sole determining factor, in deciding whether to grant a decree.

Accordingly, we recommend that the legislation should contain no reference to collusion as a ground for refusing to grant a decree of annulment.

¹⁰ Supra, pp. 153-155.

CHAPTER 11: VOID AND VOIDABLE MARRIAGES

Introduction

The present distinction between void and voidable marriages works well in practice but is somewhat difficult to defend on grounds of logic. Under Canon Law, all invalid marriages were void, but gradually¹, the intervention of the Common Law courts led to the fashioning of the concept of a voidable marriage. A number of questions must be considered in relation to the present law on the subject.

It does not seem to us advisable to abolish the concept of a voidable marriage. The present law relating to voidable marriages has much to be said for it from the standpoints of justice and social policy. We would regard it as quite improper if third parties was able to treat a marriage as void where one of the parties were impotent and the other party nonetheless wished not to impugn the validity of the marriage. To enable such a marriage to be attacked after the death of the spouses would appear equally undesirable from the standpoint of social policy.

What Grounds should Render a Marriage Voidable rather than Void?

It remains to consider whether certain grounds for nullity that at present render a marriage void should instead render it voidable.

The first of these grounds is that of a formal defect. It seems to us that it would clearly not be desirable for this ground to

¹ See the references cited on p. 46, fn. 169, supra.

render a marriage voidable. To do so would in certain cases effectually remove the requirement of compliance with due formality in contracting marriage.

Similarly, it does not appear to us desirable that a marriage within the prohibited degrees of relationship should be voidable: the notion of a marriage between a brother and sister being incapable of being impugned save by the parties themselves is clearly unsustainable.

Marriages now void on the ground of nonage present the first reasonably strong case for changing the classification to that of voidable². In favour of such a change it may be argued that the law in a number of other countries³ regards such marriages as voidable (or at least capable of subsequent ratification by the parties). Moreover, where an underage marriage has been celebrated some time previously and the parties are anxious to

² The issue is well analysed by the English Law Commission in its Report on Nullity, paras. 16-19 (Law Com. No.33, 1970). In our Report No. 5, The Law Relating to the Age of Majority, the Age for Marriage and Some Connected Subjects, (LRC 5-1983), we have recommended that a marriage invalid on the ground of nonage should be void.

³ In civil law jurisdictions, the position generally is that the validity of a marriage may not be attacked where the underage party has reached full age (or a specified age thereafter) or is pregnant: see, e.g. France (C.C. art. 185), Italy (C.C. art. 118) the Netherlands (C.C. Section 1, art. 74), Switzerland (C.C. art. 128).

In the United States underage marriages may be ratified, usually by cohabitation after the underage child reaches full age; in some states courts have held that unless the underage party disaffirms the marriage on reaching the required minimum age, it will be binding. See generally 52 Am. Jur.: Marriage, para. 16 (2nd ed., 1970). Section 208(b)(b) of the Uniform Marriage and Divorce Act automatically validates all underage marriages unless a declaration of invalidity (annulment) has been obtained prior to reaching the age of eighteen. For criticism of this provision, see Podell, The Case for the Revision of the Uniform Marriage and Divorce Act, (1973), 18 S. Dakota L. Rev. 601, at 605.

make a success of it, it might be considered to be an undesirable social policy for the marriage to be regarded as void.

There are, however, arguments which we regard as compelling against making underage marriages voidable. First, if the social policy of legislation on marriage is that no marriage may be validly celebrated under a specified age, it does not appear sensible for the law to permit persons by acting in defiance of it to defeat that policy. Secondly, if these marriages were regarded as voidable, considerable uncertainty would attach to them, since third parties would act with respect to them at their peril. Thirdly, in the case of parties who are willing to make a success of an underage marriage, they already have the simple expedient of marrying each other after both have reached the minimum age for marriage.

Accordingly, we do not recommend that marriages at present void on the ground of nonage should become voidable.

The next type of marriage which is at present void but which might become voidable is the marriage that is void on the ground of a prior subsisting valid marriage. In some countries such a marriage is either voidable or capable of subsequent ratification when the prior marriage has terminated. In our view, it would be clearly undesirable on the grounds of social policy that a bigamous marriage should be voidable and incapable of attack by third parties. Accordingly, no change in the law to this effect is recommended.

We should mention at this point the recent High Court decision of F.M.L. & A.L. v An tArd Chláraitheoir na mPósadh⁴, to which

⁴ Unreported, High Ct., Lynch, J., 2 March 1984 (1983-4463P).

we have referred already. The effect of this decision is that, where a party to a voidable marriage has entered into a subsequent marriage before a decree of nullity of the voidable marriage has been granted, then, on the granting of that decree, the subsequent marriage (which was until then void) is retrospectively validated. We are satisfied that this rule should continue to apply under the proposed legislation. On balance, it appears to us to represent the better solution to a difficult problem⁵.

The final type of marriage that requires consideration is one that is invalid on the ground of lack of consent (whether from mental incapacity or otherwise). Under present law, it appears that a marriage invalid for lack of consent is generally⁶ void but may be ratified subsequently by the affected party when the cause of the lack of consent - mistake, or duress, for example - is removed. This gives rise to difficulties at a theoretical level, since, if a marriage is void, it may be treated as being devoid of legal effect without the necessity of taking nullity proceedings. If such a marriage may subsequently be validated, difficulties and confusion may arise as to the effect and present status of actions done during the period that the marriage was (rightly) regarded by all as void. These difficulties may be more theoretical than real because third parties would clearly be acting at their peril if they chose to treat a marriage as void on the basis of lack of consent without first having obtained a court decree to this effect⁷.

⁵ The decision throws up some interesting questions as to the legitimacy of any children born of the subsequent union. Cf. p. 85, *supra*. It is to be noted that, if legislative effect is given to our recommendations for reform contained in our Report on Illegitimacy (LRC 4-1982) no difficulties on this issue should arise.

⁶ As to the exception in relation to at least some cases of mental incapacity, see p.73, fn. 4, *supra*.

⁷ Cf. Law Com. No. 33, para. 12.

In our view, it would be most desirable that marriages at present void on the ground of lack of consent should be voidable rather than void. Such a change in the law would in respect of most marriages falling within this category merely give effect to the practical reality of the position under present law, which is that the affected party (and not any outsider) decides whether the marriage should be impugned. The problems outlined above regarding the position of third parties would no longer arise.

One objection to making such a change is that in certain cases of duress, fraud or error, it might be desirable for a third party to be permitted to challenge the validity of the marriage since the affected party to the marriage might be in no position to do so, precisely because he or she is the victim of the duress, fraud or error which vitiated his or her consent. While this objection has some theoretical force, we do not consider that it is of sufficient strength to outweigh the definite and obvious advantages of making such marriages voidable rather than void.

Consideration must be given to marriages entered into by persons suffering from mental incapacity. These raise particular difficulties, for three principal reasons:

First, in contrast to many cases of duress, fraud and mistake, mental incapacity is often a long-term condition. One cannot therefore rely on the vitiation element being removed in due course, as one normally can in relation to duress, fraud and mistake.

Secondly, the possibilities of abuse of a person suffering from mental incapacity by a scheming spouse are real. In such cases the incapacitated spouse may well be kept away from legal advice or even from friends and relations who might act on his or her behalf.

Thirdly, where a party's mental incapacity is of an extreme nature it may seem inappropriate that the law should afford it even the transient legitimate status of a voidable marriage. It can be argued that such a travesty of matrimonial consent should clearly be stigmatised as void, since it is, to quote the English Law Commission, "meaningless".

For these reasons, there appears to be a strong argument for the legislation to render marriages vitiated by mental incapacity void rather than voidable.

Against these arguments, it is worth referring to the English Law Commission's argument that the equities may go the other way in some cases. A woman who had married a man of unsound mind and was willing to look after him should not be exposed to an attempt by a third party to have the marriage annulled⁸.

On balance we consider that the better approach would be for all marriages vitiated by mental incapacity to be rendered voidable, but that protection should be given to an incapacitated person against being victimised.

The simplest protection would be for the legislation to provide that proceedings for annulment on this ground may be brought on behalf of the spouse alleged to be incapacitated by any person who "appears to the Court to be a proper person to take such proceedings in the interest of such spouse". Such a provision would not render the marriage void, since proceedings could not be taken after the death of one of the spouses, and the marriage would have to be treated as valid until a decree of annulment had been made. Accordingly, we recommend that proceedings for

⁸ Law Com. No. 33, para. 14. The broad discretionary bar to granting a decree which we have proposed above would be particularly appropriate in such a case.

annulment on this ground may be taken on behalf of the party whose consent is alleged to have been vitiated by mental incapacity, by any person who appears to the Court to be a proper person to take such proceedings.

So far as our proposed grounds of homosexual orientation, fraudulent misrepresentation and fraudulent non-disclosure are concerned, we recommend that they should render a marriage voidable rather than void. The clear weight of policy considerations appears to us to be in this direction.

CHAPTER 12: EFFECTS OF NULLITY

Under present law, one effect of nullity of marriage is that any children born of the union are illegitimate. This consequence is one that receives little support today. Indeed the concept of illegitimacy has come under increasing attack on the basis that it penalises innocent persons. There have been calls for the abolition of the concept and for the extension to children born out of wedlock of all rights to which children born within marriage are entitled.

In September 1982, we published a Report on Illegitimacy¹, in which we made radical proposals for reform of the law. We recommended that legislation should remove the concept of illegitimacy from the law and equalise the rights of children born outside marriage with those of children born within marriage. If these proposals become law the difficulties in relation to nullity of marriage will be resolved. We do not think it advisable in the present Report to make recommendations other than on the assumption that our proposals in relation to illegitimacy will in due course be implemented. Accordingly we do not propose to consider whether, as a "second-best" substitute, in the specific context of nullity, our law should adopt the concept of the putative marriage² or follow statutory provisions in other countries³ falling well short of abolition of the concept of illegitimacy.

¹ Law Reform Commission, Report on Illegitimacy (LRC 4-1982).

² See Cohn, The Nullity of Marriage: A Study in Comparative Law and Legal Reform: Part I, (1948) 64 L. Q. Rev. 324, at 331ff. Briere, La Mariage Putatif, (1960) 6 McGill L. J. 217.

³ Cf. Jackson, 50-53, Samuels, Note: Legitimacy and the Void Marriage, (1966) 29 Modern L. Rev. 559.

As regards other consequences of nullity of marriage, under present law, as a general rule, no economic rights or liabilities generally flow from a union that is null⁴. This is, of course, a logical approach, but it has been criticised, especially in recent years, on the basis that it may cause hardship and possible injustice in some cases.

In England, Northern Ireland, Australia, Canada and the United States, the trend has been for legislation to extend the power of the Courts to make orders relating to property and maintenance in nullity proceedings.

Civil law jurisdictions have favoured the concept of the putative marriage, which confers generous rights on spouses (and their children), provided they acted in good faith.

A number of arguments may be made against any change in the present law so as to enable the Court to make wide-ranging orders regarding maintenance and property.

First, it may be said that it would be illogical for the law to provide that a marriage that is null should nonetheless give rise to such important rights and liabilities in respect of property and maintenance.

Secondly, it can be argued that for the law to take such a step might be regarded as blurring the concept of nullity so as to make annulment proceedings more akin to dissolution.

⁴ Until a voidable marriage has been declared null by the Court, it will not, of course, be regarded as of no legal effect, but once a decree has been made, the marriage must be regarded by all persons as of no legal effect: cf. P. v P. (by amendment McD.), [1916] 2 I.R. 400 (K.B.D.). Unravelling the property implications of the decree may prove difficult: see, supra, pp. 75ff.

Thirdly, it may be argued that it could be an undesirable social policy for the law to give important legal rights to persons who have entered void marriages in certain instances. The obvious case is where parties go through a ceremony of marriage, both being fully aware that it is bigamous.

Fourthly, in defence of the present law, it may be argued that its apparent harsh logic disguises an important element of judicial discretion, hidden within the concepts of approbation and (to a lesser extent) ratification. In effect, these concepts, where they apply, permit the Court to refuse to grant a decree of annulment where, having regard (among other matters) to whether the petitioner derived a financial benefit from the respondent, it would be wrong to grant a decree.

Fifthly, it may be argued that the existing legal protection for parties who have entered marriages that are void or voidable is of considerably greater strength than has been recognised. The general principles of the law of tort, contract and property would appear to be clearly capable of rendering significant protection⁵ to persons who entered a marriage as a result of fraud or duress.

These arguments have some force but opposing arguments also require consideration.

First, it may be said that considerations of strict logic should not dictate a legal policy where there are pressing countervailing considerations of justice and humanity.

⁵ Cf. e.g., Shaw v Shaw, [1954] 2 Q.B. 429 (C.A.) (bigamous marriage induced by fraud; action for breach of promise alleging breach of implied warranty that fiance was not already married; successful: damages compensated the plaintiff (the defendant having died) on the basis of what she would have received from his estate had she been his widow).

Secondly, the criticism that the law should not give important legal rights to those who have entered void marriages with their eyes open, if a valid one, can always be dealt with by a specific limitation on the right to receive property or maintenance in such cases.

Thirdly, it can be argued that for the law to prescribe that parties to an annulled marriage should owe no financial obligations towards each other, however justifiable a solution it might be in logic, is scarcely a defensible social policy, and is certainly one that would be likely to have little support in the community.

On balance, we consider that the arguments in favour of introducing broad judicial powers regarding property and maintenance rights of parties to an annulled marriage outweigh those in favour of retaining the existing law on the subject. Accordingly, we recommend that the legislation should introduce broad judicial powers regarding property and maintenance rights of parties to an invalid marriage.

The range of powers that might be given to the Court is, of course, a matter that requires consideration. A number of aspects of the subject will be considered in turn.

Maintenance Pending Suit

Under present law alimony pendente lite may be awarded in nullity proceedings but no permanent alimony may be awarded. Within these limitations, the Court has an unfettered discretion as regards what order it is to make.

The historical background should not be ignored. On marriage, the wife's property fell under the husband's control, and,

unless alimony was awarded, she might be unable to obtain legal representation. With the Married Women's Property Acts, this consideration lost much of its force. Furthermore, it was not until 1976⁶ that the Court was empowered to award maintenance to a spouse who was living with the other spouse, except in proceedings for nullity or divorce a mensa et thoro. The passage of legislation in that year meant that thenceforth failure to provide "proper" maintenance would be sufficient to enable a maintenance order to be made, even where the spouses continued to live together.

These developments may be considered to constitute a potent reason for the proposed legislation on nullity to abolish the concept of alimony pending suit.

As against this, it may be argued that the existing law has occasioned no public criticism, that similar provisions exist in a number of other countries and that it is desirable to retain a judicial power to award maintenance pending suit, if only as a protection for the economically weaker party in deserving cases.

On balance, we consider that the legislation should include a power to award maintenance pending suit in nullity proceedings.

If such a power is to be included, the question arises as to whether it should be limited to cases of particular need or urgency or to cases where the machinery for relief under other existing legislation is appropriate. We consider that it would not be advisable to limit the scope of the legislation in this way. It seems reasonable to rely on the good sense of the Court in the discharge of its powers relating to maintenance pending suit.

⁶ Cf. the Family Law (Maintenance of Spouses and Children) Act 1976 (No. 11).

A question that must also be considered is whether the power to award maintenance (and to make other property and maintenance orders) should extend to orders in favour of husbands. At present an order may be made only in favour of wives.

We consider that the power should be extended to both sexes without discrimination. To do otherwise might raise Constitutional doubts and would be quite inconsistent with the legislation in this country, over the past twenty years in particular, which has tended towards placing the parties to a marriage on an equal legal footing.

The next question is whether the Court should be given power, on the application of either party, to award maintenance pending suit in favour of the children. At present no such power exists, although it is reasonable to assume that an order in favour of a wife will take account of the fact that she has a number of children who are looking to her for their support.

It seems to us clearly desirable that the Court, on the application of either party, should be empowered to make an order for maintenance pending suit in favour of the children. Their claim to support can scarcely be questioned. Apart from the inconsistency that would attach to limiting the entitlement to either spouse, there would be technical objections to such limitation⁷.

Finally, it seems desirable that, where the Court makes an order for maintenance pending suit, any order for maintenance under

⁷ For example, a maintenance order made under the Family Law (Maintenance of Spouses and Children) Act 1976 could not be fully terminated when making an order for maintenance pending suit, since that part of it relating to orders for maintenance under the Guardianship of Infants Act 1964, could not be disturbed.

the Family Law (Maintenance of Spouses and Children) Act 1976 or section 11 of the Guardianship of Infants Act 1964 should cease to have effect unless, and except to the extent that, the Court otherwise provides. Complications could follow from having two orders for maintenance in operation simultaneously.

Financial Orders on Granting a Decree

Under present law, the parties to a marriage that is annulled have no rights or obligations towards one another as regards maintenance or property. They are placed in the position of persons who were never married to each other⁸.

The question arises as to what powers should be given by the proposed legislation to the Court to make orders respecting such property or maintenance rights and obligations. In our view, for the reasons we already mentioned, wide-ranging powers should be given to the Court in this matter. As regards maintenance the Court should be empowered to make an order for payments by either party for the benefit of the other party and any of the children, and an order securing such payments. The power to award a lump sum payment also seems to us desirable.

As regards property orders, we consider that a wide discretion should be given to the Court, including the power to make an order, with the consent of a party, for the transfer of property from that party to the other or to any of the children or an order for the settlement of property for the benefit of either party or any of the children and for the variation of any ante-nuptial or post-nuptial settlement (including one made by will or codicil).

⁸ See, however, pp. 75ff., *supra*, discussing how the Court untangles the property relationship of parties to a voidable marriage that is annulled.

Factors to Which the Court is to Have Regard when Determining Financial Orders

We consider that the Court should have regard to all the circumstances of the case when deciding whether to make a financial order (that is, an order regarding maintenance or property) and, if so, what it should be. It would appear desirable for the Court to attach particular importance to the economic circumstances of the parties and the children: the resources available, the financial needs, the standard of living of the family, and the contribution made by each of the parties to the welfare of the family, including any contribution made by looking after the home or caring for the family.

As well as this, importance should be attached to the personal circumstances of the family: the age of the parties and the children, and any physical or mental disability of either of the parties or any child.

Succession Rights

Parties to a void marriage or a voidable marriage that has been annulled have no succession rights or obligations respecting each other. Their children, who are illegitimate, are in the position of all illegitimate children as regards succession: they have limited statutory rights in their mother's estate and no statutory rights in respect of their father's estate⁹. This position will, of course, be transformed if our

⁹ Cf. our Report on Illegitimacy, paras 88-96 (LRC 4-1982). See also In the Goods of Walker Deceased: O'Brien v M.S. and the Attorney General, Supreme Court, 20 January 1984 (83-1982).

recommendations on the abolition of the concept of illegitimacy are given effect through legislation¹⁰.

Our position regarding the succession rights of children in this context is straightforward: we simply propose that these children should be in the same position as children born to parents who are validly married. We reiterate our recommendations made in our Report on Illegitimacy, generally and in this specific context.

On the question of succession rights of the parties to a void marriage or a voidable marriage that has been annulled, we consider that the best approach would be for the legislation not to create any succession rights; the Court, in making financial orders at the time it makes a decree of nullity will, of course, do so on the basis that no succession rights will accrue to either party. This proposal is in line with the proposal made in relation to legal separations in our Report on Divorce a Mensa et Thoro and Related Matters¹¹.

¹⁰ Cf. id., especially paras 295ff.

¹¹ LRC 8-1983, at pp. 59-61.

CHAPTER 13: MISCELLANEOUS MATTERS

(a) Parties to Proceedings

Under present law, only the parties to the marriage whose validity is in question may take proceedings where the marriage is alleged to be voidable. Where the marriage is void, however, it may be treated as such by all persons (including the parties themselves) without the necessity of a decree. Persons with a pecuniary interest may take proceedings to have the marriage declared void.

It is not proposed that the general rule regarding voidable marriages should be altered: the only change we have recommended is in the context of marriages voidable on the ground of lack of mental capacity, where we have proposed¹ that the Court should have a discretionary power to permit third persons to take proceedings.

The position regarding void marriages is somewhat different. We consider that the legislation should change the entitlement to take proceedings, by giving the Court a discretion to permit proceedings to be taken:

"by any person with an interest (whether pecuniary or otherwise) in the outcome of the proceedings".

We do not think that it is proper to restrict a priori access to those with an economic interest. There may be other cases where the Court would consider it desirable to permit a person with an interest to take the proceedings. We take this opportunity to make it clear that in this Report we do not

¹ Supra, pp. 165-166.

attempt to consider the question of court jurisdiction. This is a matter to be determined by the Oireachtas from time to time, balancing on the one hand the seriousness of the proceedings and, on the other, the question of costs.

(b) Application of Principles of Ecclesiastical Law

Section 13 of the Matrimonial Causes and Marriage Law (Ireland) Amendment Act 1870² provides that:

"In all suits and proceedings the Court for Matrimonial Causes and Matters shall proceed and act and give relief on principles and rules which, in the opinion of the said Court, shall be as nearly as may be conformable to the principles and rules on which the ecclesiastical courts of Ireland have heretofore acted and given relief, but subject to the provisions herein contained, and to the rules and orders to be made by the said Court under this Act."

The question arises as to whether the same policy should be part of the proposed legislation.

In favour of abandoning any reference to the principles on which the Ecclesiastical Courts acted it may be argued that, in a statute setting out for the first time in this country the grounds for nullity, together with detailed and wide-ranging reforms regarding ancillary matters, it would be quite inappropriate to perpetuate the principles of a Court that ceased to operate well over a century ago and which, when it did operate, was dealing with a society radically different from our own.

As against this, a number of practical arguments may be made.

² 33 & 34 Vict., c. 110.

First, the proposals regarding the grounds for nullity that have been made above have been based on the premise that the existing law in respect of a number of grounds can be carried by statute into the future, without the necessity of prescribing in statutory form the details of the existing law. If section 13 of the 1870 Act were to be abolished and the grounds merely stated in laconic form, such as "duress" or "impotence", for example, the courts would be given a carte blanche to create what they wished of the substance of these grounds, without regard for the limitations of the present law. This was the experience of Australia³ after the passage of legislation in 1975. It would create intolerable uncertainty in our law if the same position were to obtain here. The alternative of drafting in detail in the statute the features of the present law would turn the statute very quickly into an unwieldy compendium of nullity law.

Secondly, the experience in this country has been that the requirement to have regard to the law of the former Ecclesiastical Courts has been a stabilising, but not oppressive, influence on the development of nullity jurisprudence. The Courts have shown themselves well able to develop new principles and practices where the former ones seem no longer to be adequate; they have displayed a corresponding willingness to develop new principles where they consider them to be desirable.

We consider that the best solution would be for the proposed legislation to repeal section 13 of the 1870 Act but to provide that, save to the extent that the proposed legislation expressly changes the law, the principles of the present law shall continue to apply⁴. This would mean that the dangers of a

³ Cf. In re Deniz, 31 Fed. L.R. 114 (Fam. Ct. of Austr., 1977).

⁴ Cf. the position in England, described by Latey, 203 and see Harthan v. Harthan, [1949] P. 115, at 126-219 (C.A., per Lord Merriman, P., 1948).

carte blanche approach would be removed and that the restraining influence of section 13 of the 1870 Act would continue to operate, albeit probably with somewhat less "moral force" than under present law.

(c) Retrospection

An important question of policy arises in respect of whether the legislation should apply to all marriages or only those celebrated after the passage of the Act.

The changes that have been proposed in this Paper fall into three categories: (a) grounds; (b) bars to a decree; (c) consequences of a decree (including orders respecting property and maintenance). In our view both (b) and (c) should apply retrospectively. Apart from the fact that we consider that our proposals make the law fairer and more humane, we do not think it realistic to argue that anyone would have intentionally entered into a void or voidable marriage on the basis of his or her understanding of the law as to bars to a decree or the financial consequences of a decree.

The real problem arises in respect of category (a). As a general principle, it may be said to be improper that a marriage valid when contracted should be retrospectively rendered null. As against this it can be argued that each ground should be separately considered in order to determine whether the policy of retrospection should apply to it. We consider it desirable to follow the broad rule that, if a ground under the proposed legislation is identical with, or very closely similar to, an existing ground, retrospection should apply; if otherwise, no retrospection should apply.

On this basis, the grounds of formal defect, bigamy, mistake,

duress, lack of mental capacity and homosexual orientation, should all be retrospective, without any problem arising. The remaining grounds are:

- (i) prohibited degrees of relationship;
- (ii) impotence;
- (iii) fraudulent misrepresentation; and
- (iv) fraudulent non-disclosure.

The first ground is prohibited degrees of relationship. A somewhat unusual problem arises here since (apart from the case of adoptive relationships, which we will consider below) the proposed ground will be narrower than under present law. Thus, in fact, if the legislation applied to marriages contracted before it was enacted, it would have the effect of retrospectively validating certain marriages. There are precedents in this country⁵ and elsewhere for legislation having such an effect. Difficulties might arise in relation to property and other transactions which took place on the basis that such marriages were void. Of greatest importance is, of course, the possibility that a person who had entered a marriage now void but valid under the proposed legislation may have subsequently entered another marriage on the basis (at present correct) that he or she was free to do so. What should be the status of the first and the second marriage?

We consider that the only course is for the legislation to provide that no marriage celebrated before its enactment which was void on the ground of prohibited degree of relationship should be validated retrospectively by the legislation.

The changes we have proposed with regard to adoptive relationships involve a different issue, since they would render invalid

⁵ Marriages Act 1972, section 2. See Shatter, 53-54.

marriages which are under present law valid. We are satisfied that the legislation clearly should not apply retrospectively in this context.

The next ground that must be considered is impotence. The only change that we have proposed in respect of this ground is that an impotent party should be permitted to petition in respect of his or her own impotence, subject to our proposed discretionary bar which amounts to a somewhat extended version of approbation under present law. As we mentioned earlier⁶, the right of an impotent spouse under present law to petition is a matter of some uncertainty: the better view would appear to be that the limitations previously recognised by the Courts may well not be continued (at least in their full force) in the future.

Having regard to this relatively minor extension - if it be one at all - which we propose and also to the fact that cases of injustice are not easy to envisage (since the discretionary bar is designed precisely to ensure that cases of injustice will not arise), we consider that the ground of impotence should be fully retrospective.

The remaining grounds which must be considered are those of fraudulent misrepresentation and fraudulent non-disclosure. Having regard to its novelty, we think that the ground of fraudulent misrepresentation should not be retrospective. As we mentioned⁷ in the discussion of the latter ground, the first heading - fraudulent non-disclosure of an intention not to consummate the marriage - seems already to be part of our law⁸.

⁶ Supra, pp. 52-63.

⁷ Supra, p. 118.

⁸ S. v. S., unreported, Supreme Ct., 1 July 1976.

The other headings have not yet arisen for consideration in the Courts as to whether or not they are part of the law.

From the standpoint of the potential respondent, it can be argued that legislation should not invalidate a marriage that was valid when entered into. If under present law, "trompe, qui peut", it may be said to be improper for the legislation to change policy retrospectively.

As against this, it can be argued that the potential respondent has few equities on his or her side. The type of conduct which these grounds embrace may be considered unpraiseworthy. The fact that the present law has sheltered the respondent up to now should not, it may be said, be a reason for affording him or her any further protection. On balance, we consider that the grounds of fraudulent non-disclosure, other than fraudulent non-disclosure of an intention not to consummate the marriage, should not be retrospective.

It would, of course, always be possible after the proposed legislation has been enacted, for a party to a marriage contracted before the legislation was enacted to attempt to convince the Court that, under the law before the legislation was enacted, a decree of nullity might properly have been made in the circumstances of the case. We would not wish to prevent such an argument being made; nor do we consider it our function to attempt to predict how such an argument would fare.

PART 3

SUMMARY OF RECOMMENDATIONS

SUMMARY OF RECOMMENDATIONS

1. Unions of persons of the same sex should not be treated as marriages (p. 90).
2. No definition of sexual identity, for the purpose of marriage, should be included in the legislation (p. 91).
3. "Marriages" of persons of the same sex should be regarded as being of no legal effect whatsoever - not even having the status of void marriages (p. 91).
4. The Court's power to make orders relating to maintenance and property in nullity proceedings (as to which see paragraphs 45ff, infra) should not extend to unions between persons of the same sex (pp. 91-92).
5. The legislation should not attempt to resolve in an ad hoc fashion any divergence between the law of the State and the Canon Law relating to annulment of marriage as administered in the ecclesiastical tribunals of the Catholic Church (p. 93).
6. Marriages should continue to be void on the ground of lack of due formality in circumstances where they are void under the existing law (p. 94).
7. A marriage should be invalid on the ground of want of mental capacity where, at the time of the marriage, either spouse is unable to understand the nature of marriage and its obligations or where a spouse enters a marriage when, at the time of the marriage, on account of his or her want of mental capacity, he or she is unable to discharge the essential obligations of marriage (p. 104).

8. The Marriage of Lunatics Act 1811 should be repealed (p. 105).
9. A marriage should be capable of being annulled, on the petition of either party, where one party has at the time of the marriage so strong a homosexual orientation as to make it impossible for the couple to form a genuine life-long marriage relationship (pp. 106-107).
10. The legislation should not attempt to prescribe an all-embracing definition of duress (p. 108).
11. The legislation should make it clear that a petition for nullity of marriage based on duress should not be dismissed by reason only of the fact that a party married as a result of a "just threat" (p. 109).
12. The legislation should include, in addition to the existing grounds of fraud and mistake, a new ground, namely that a party was induced to enter into a marriage as a result of a fraudulent misrepresentation made by or on behalf of the other party to the marriage (pp. 111-112).
13. The new ground proposed in paragraph 12 should include the following features:
 - (a) The misrepresentation would have to be fraudulent, rather than innocent or negligent (p. 112).
 - (b) It would be necessary to show that the party had been induced by the misrepresentation rather than some other factor to enter the marriage: the ground should be established only in cases where, but for the fraudulent misrepresentation, the party would not have entered the marriage (p. 112).
 - (c) The ground should apply only where the party affected

by the representation was a person specifically intended to be so affected (p. 112).

- (d) So far as the ground includes a fraudulent misrepresentation made on behalf of a party to the marriage, it should include only cases where the person making the misrepresentation does so with the authority of the party to the marriage. It should not be necessary that the person making the misrepresentation is acting fraudulently provided the party to the marriage knows of the falsity of the misrepresentation and its likely effect on the party to whom it is addressed, and fraudulently intends the misrepresentation to have this effect (p. 112-113).
 - (e) Only the deceived party should be entitled to invoke this ground (p. 113).
14. Certain cases of fraudulent non-disclosure (specified infra) should afford grounds for nullity of marriage (p. 118).
 15. Fraudulent non-disclosure of an intention at the time of entering the marriage not to consummate the marriage should be a ground for a decree of nullity (p. 118).
 16. Fraudulent non-disclosure of an intention permanently to desert one's partner immediately after the marriage should be a ground for a decree of nullity. This ground would apply only to cases where it can be established that the intention to desert immediately and permanently existed at the time of entering the marriage. The desertion must in fact have taken place immediately and (so far as may be discerned by the Court) permanently. The legislation should make it clear that "immediate" should be understood narrowly and that this requirement should not in any circumstances be construed broadly (p. 119).

17. A petitioner should be entitled to a decree of nullity where he or she was induced to marry by reason of the fraudulent non-disclosure by the respondent of the respondent's unqualified intention never to have children with the petitioner (p. 121).
18. It should be a ground for annulment that the respondent at the time of the marriage was fully aware that he or she suffered from a condition rendering him or her permanently incapable of having children, and that, by reason of the non-disclosure of this fact by the respondent to the petitioner, the petitioner married the respondent (p. 123).
19. Marriages between parents and children and between all other direct ancestors and descendants, and between brothers and sisters should be prohibited (pp. 132-133).
20. Marriages between first cousins should be permitted (p. 133).
21. Marriages between uncle and niece or aunt and nephew should be prohibited (p. 134).
22. Marriages between great-uncle and great-niece or between great-aunt and great-nephew should be prohibited (pp. 134-135).
23. The legislation should abolish all prohibitions based on affinity (p. 141).
24. The legislation should render void marriages between a parent and his or her adoptive child and between adoptive brothers and sisters. The prohibition against such marriages should apply even where the adoption order for some reason ceases to have effect. As under present law,

a marriage between a person who has been adopted and his or her natural relations should be void (p. 143).

25. No specific limitation on the right of an impotent spouse to petition for annulment should be included in the legislation (p. 145).
26. The legislation should not change the law relating to invincible repugnance to sexual intercourse (pp. 145-146).
27. Wilful refusal to consummate the marriage should not be a ground for annulment (p. 146).
28. Non-consummation which does not result from impotence or is not affected by fraudulent misrepresentation or non-disclosure should not be a ground for annulment (p. 147).
29. The legislation should not invalidate marriages for a limited purpose (p. 150).
30. Sterility should not be a ground for annulment (p. 150).
31. Epilepsy should not be a ground for annulment (p. 151).
32. Subject to paragraph 41 below, void marriages should not be capable of ratification (p. 153).
33. The legislation should provide a more generally-expressed criterion than under present law, whereby the Court may refuse to grant a decree where in all the circumstances (including the conduct of the parties before and after they went through the ceremony of marriage and the position of the parties and the children) it would not be proper to grant one (pp. 154-155, 157).

34. The legislation should not include any time-limit within which annulment proceedings should be taken (p. 157).
35. The legislation should contain no reference to collusion as a ground for refusing to grant a decree of annulment (p. 159).
36. The concept of a voidable marriage should not be abolished (p. 160).
37. Formal defect should continue to render a marriage void (pp. 160-161).
38. Prohibited degrees of relationship should continue to render a marriage void (p. 161).
39. Nonage should continue to render a marriage void (p. 162).
40. Prior subsisting marriage should continue to render a marriage void (p. 162).
41. The legislation should incorporate the rule, recognised at common law, that, where a party to a voidable marriage has entered into a subsequent marriage before a decree of nullity of the voidable marriage has been granted, then, on the granting of that decree, the subsequent marriage (which was until then void) should be retrospectively validated (p. 163).
42. Marriages at present void on the ground of lack of consent should be voidable (p. 164).
43. Proceedings for annulment on the ground of mental incapacity should be capable of being taken, on behalf of the party whose consent is alleged to have been vitiated

on this account, by any person who appears to the Court to be a proper person to take such proceedings (pp. 165-166).

44. The proposed grounds of homosexual orientation, fraudulent misrepresentation and fraudulent non-disclosure should render a marriage voidable (p. 166).
45. Broad judicial powers regarding property and maintenance rights of parties to an invalid marriage should be included in the legislation (p. 170).
46. The legislation should include a power to award maintenance pending suit in nullity proceedings (p. 171).
47. This power (and the power to make other property and maintenance orders) should be extended to both sexes without discrimination (p. 172).
48. The Court should be empowered to make an order for maintenance pending suit in favour of the children (p. 172).
49. Where the Court makes an order for maintenance pending suit, any order for maintenance under the Family Law (Maintenance of Spouses and Children) Act 1976 or section 11 of the Guardianship of Infants Act 1964 should cease to have effect unless, and except to the extent that, the Court otherwise provides (pp. 172-173).
50. Wide-ranging powers should be given to the Court regarding financial orders. As regards maintenance, the Court should be empowered to make an order for payments by either party for the benefit of the other party and any of the children and an order securing such payments. The power to award a lump sum should also be given to the Court (p. 173).

51. As regards property orders, a wide discretion should be given to the Court, including the power to make an order, with the consent of a party, for the transfer of property from that party to the other or to any of the children, for the settlement of property for the benefit of either party or any of the children and for the variation of any ante-nuptial settlement or post-nuptial settlement (including one made by will or codicil) (p. 173).
52. The Court should have regard to all the circumstances of the case when deciding whether to make a financial order (that is, an order regarding maintenance or property) and, if so, what it should be. The Court should attach particular importance to the economic circumstances of the parties and the children: the resources available, the financial needs, the standard of living of the family and the contribution made by each of the parties to the welfare of the family, including any contribution made by looking after the home or caring for the family. Importance should be attached to the personal circumstances of the family: the age of the parties and the children, and any physical or mental disability of either of the parties or any child (p 174).
53. Children of persons whose marriage is void or voidable should have the same succession rights as children born to parents who are validly married (p. 175).
54. Parties to a void marriage or a marriage that has been annulled should have no succession rights in each other's estate (p. 175).
55. The legislation should enable any person with an interest (whether pecuniary or otherwise) in the outcome of the proceedings to petition for a decree of nullity of a void

(but not a voidable) marriage (p. 176).

56. The legislation should repeal section 13 of the Matrimonial Causes and Marriage Law (Ireland) Amendment Act 1870, while providing that, save to the extent that the legislation expressly changes the law, the principles of the present law are to continue to apply (p. 178).
57. The provisions in the legislation regarding the bars to, and consequences of, a decree of nullity should apply to marriages celebrated before the enactment of the legislation (p. 179).
58. The grounds of formal defect, bigamy, mistake, duress, lack of mental capacity and homosexual orientation should apply retrospectively (pp. 179-180).
59. No marriage celebrated before the enactment of the legislation which was void on the ground of prohibited degree of relationship should be validated retrospectively by the legislation (p. 180).
60. The ground of impotence should be fully retrospective (p. 181).
61. The proposed ground of fraudulent misrepresentation should not be retrospective (p. 181).
62. The proposed ground of fraudulent non-disclosure, other than fraudulent non-disclosure of an intention not to consummate the marriage, should not be retrospective (p. 182).

[On the subject of marriage of minors, we reiterate our proposals made in our Report on the Law Relating to the Age of Majority, the Age for Marriage and Some Connected Subjects (LRC 5-1983): see supra, p. 92.]

BIBLIOGRAPHY

- G. ABRAHAM The Law and Practice of Lunacy in Ireland (1886).
- W. BLACKSTONE Commentaries on the Laws of England (1765).
- P. BROMLEY Family Law (6th ed., 1981).
- A. BROWNE Ecclesiastical Law of Ireland (1803).
- R. BURN Ecclesiastical Law (9th ed., 1842).
- A. CHERLIN Marriage, Divorce and Remarriage (1981).
- H. CLARK Handbook on the Law of Domestic Relations (1968).
- W. FALOOD Marriage Law of Ireland (1871).
- J. FLEMING The Law of Torts (6th ed., 1983).
- N. GEARY The Law of Marriage and Family Relations (1892).
- A. HONORÉ Sex Law (1977).
- B. INGLIS Family Law (2nd ed., 1968).
- J. JACKSON The Formation and Annulment of Marriage (2nd ed., 1969).
- W. LATEY The Law and Practice of Divorce and Matrimonial Causes (15th ed., 1973).
- B. MADDOX Step-parenting: How to Live with Other Peoples' Children (1980 ed.).
- B. McMAHON & W. BINCHY Irish Law of Torts (1981).
- F. ROGERS Ecclesiastical Law (2nd ed., 1849).
- SALMOND & HEUSTON The Law of Torts (18th ed., R.F.V. Heuston & R.S. Chambers, 1981).
- P. SEDUGIN The Soviet Legislation on Marriage and the Family (Trans by N. Bobrov, 1973).
- A. SHATTER Family Law in the Republic of Ireland (2nd ed., 1981).
- L. SHELFORD The Law of Marriage and Divorce (1841).
- J. WYLIE Irish Land Law (1975).

