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THE LAW COMMISSION

PUBLISHED WORKING PAPER NO: 20

First Programme - Item X

FAMILY LAW

Nullity of Marriage

14th June, 1968

The Law Commission will be grateful if comments can be sent in by 1st January, 1969. All correspondence should be addressed to:-

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Nullity of Marriage

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NULLITY OF MARRIAGE

Introduction

Scope of Paper

1. This Paper, in accordance with the terms of item XIX of the Second Programme of Law Reform of the Law Commission, will examine the existing law of nullity of marriage, the division of annulled marriages into void and voidable ones, whether the existing law and this division are satisfactory and whether any alteration is desirable in the status or effect of voidable marriages. The law of marriage, (i.e. the law governing the rites and ceremonies of marriage), the jurisdiction of the courts and the recognition of foreign decrees are outside the scope of the Paper. Polygamous marriages are also outside its scope.

2. While the Law Commission has reached conclusions on some matters and has put forward proposals in this Paper, such conclusions and proposals are provisional only and may well be modified in the light of the views expressed in response to this Paper. It is not for the Law Commission, but for Parliament in the light of public opinion, to settle controversial social questions and our function is to examine those questions in order to assist the legislature and the general public to form an opinion as to what alterations in the law may be necessary or desirable. We have, therefore, attempted to set out the arguments for and against different proposals and have ventured to put forward our own provisional opinions and conclusions only where we considered that these might be helpful. We shall be grateful if comments can be sent to the Law Commission by 1st January, 1969.

3. The main conclusion reached by the Law Commission so far is that the threefold distinction between valid, voidable and void marriages should be maintained, because it corresponds to factual differences in the situation of the parties which call for different kinds of relief from the courts. A void marriage, which the interests of society do not permit to be a marriage at all, normally requires no intervention by the courts and the parties are free to disregard it without taking any formal step to have it set aside. At the other end of the scale is the valid marriage which can only be ended by death or divorce.

If the Divorce Reform Bill now before Parliament passes into law, the only ground for divorce will be irretrievable breakdown of the marriage. In between the void and the valid marriages is the voidable marriage which is in some way incomplete or defective; it differs from a void marriage in that there exists a legal tie which cannot be disregarded without an order of the court terminating the tie, and it differs from a valid marriage in as much as it would be inappropriate to talk of the breakdown of something that had never been perfected and the parties arguably have no duty to seek to be reconciled or to wait for a period before seeking relief.

References and Abbreviations

4. The following abbreviations will be used:-

Gorell Commission	Report of Royal Commission on Divorce and Matrimonial Causes 1912, Cd. 6478
Morton Commission	Report of Royal Commission on Marriage and Divorce 1956, Cmd. 9678
Church Report	Report of Commission appointed by the Archbishops of Canterbury and York, entitled "The Church and the Law of Nullity of Marriage," S.P.C.K. 1955
Putting Asunder	Report of a group appointed by the Archbishop of Canterbury, S.P.C.K. 1966.

Statistics on Nullity

5. The following are the figures of nullity petitions filed and nullity decrees granted during the years 1961 to 1966 inclusive:-

PETITIONS							
	1961	1962	1963	1964	1965	1966	Average
Void Marriages	73	94	63	72	69	76	75
Voidable Marriages:							
Incapacity	155	141	145	133	146	146	144
Wilful Refusal	174	169	207	164	164	196	179
Incapacity and Wilful Refusal	349	363	471	453	499	530	444
Unsound Mind or Epilepsy	17	19	13	9	9	16	14
Pregnancy	8	18	17	16	21	23	17
Venereal Disease	5	3	3	-	3	12	4
Total	781	807	919	847	911	999	877

DECREES NISI							
	1961	1962	1963	1964	1965	1966	Average
Void Marriages	32	52	61	58	70	70	57
Voidable Marriages:							
Incapacity	228	299	331	351	338	339	314
Wilful Refusal	234	176	319	295	327	318	278
Unsound Mind or Epilepsy	5	17	11	14	11	19	13
Pregnancy	6	8	17	10	13	14	11
Venereal Disease	1	2	2	-	3	4	2
Total	506	554	741	728	762	764	675

By way of comparison, in 1966 there were set down 46,890 petitions for divorce and there were made 41,081 decrees nisi of divorce. Accordingly nullity is of much less importance than divorce. On the other hand the law is not wholly clear or satisfactory in all respects and its clarification and reform is a necessary preliminary to a codification of Family Law.

I EXISTING GROUNDS OF NULLITY

Summary of the Grounds

6. The grounds on which a marriage is void are:

(1) invalid ceremony of marriage;

(2) non-age;

(3) prohibited degrees (i.e. consanguinity and affinity);

(4) prior existing marriage;

(5) insanity at the time of marriage;

(6) lack of consent. (1)

Grounds (1) to (3) are governed by the Marriage Act 1949. Grounds (4) to (6) are grounds on which a marriage was void in ecclesiastical law, which became a part of our matrimonial law by virtue of the Matrimonial Causes Act 1857, s.22, now replaced by the Supreme Court of Judicature (Consolidation) Act 1925, s.32.

7. The grounds on which a marriage is voidable are:

(1) impotence;

(2) wilful refusal to consummate the marriage;

(3) unsoundness of mind, mental disorder or epilepsy at the time of the marriage;

(4) venereal disease in a communicable form at the time of the marriage;

(5) pregnancy by a man other than the husband at the time of the marriage;

Ground (1) is derived from ecclesiastical law; grounds (2) to (5) are statutory and are governed by the Matrimonial Causes Act 1965, s.9.

8. The essential differences between void and voidable marriages are: a void marriage is not really a marriage at all, in that it never came into existence because of a fundamental defect; no decree of nullity is necessary to make it void and parties can take the risk of treating the marriage as void without obtaining a decree, which is in effect a declaration that there is not and never was a marriage; any person having a sufficient interest in obtaining a declaration of nullity may

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(1) There are, however, recent dicta to the effect that lack of consent may make a marriage voidable and not void, but the better view is thought to be otherwise; see this point discussed in "Void and Voidable Marriages" by Dimitry Tolstoy, Q.C. (1964) 27 M.L.R. 385.

petition for a decree at any time, whether during the lifetime of the spouses or after their death. A voidable marriage is a valid marriage unless and until it is annulled and it can only be annulled at the instance of one of the spouses during the lifetime of both, so that if no decree of nullity is pronounced during the lifetime of both spouses the marriage becomes unimpeachable as soon as one of the spouses dies.

Void Marriages

Invalid Ceremony of Marriage

9. Formalities of Marriage

We intend to circulate later a paper dealing generally with the law of marriage and, therefore, we do not propose to comment in this paper on the formalities of marriage or on the circumstances in which failure to comply with such formalities makes the ceremony void.

10. Marriage of Infants

An infant between the age of 16 and the age of majority (at present 21)[1A], not being a widower or widow, requires the consent of his parents, parent or guardian, or of the court, or of certain officials, as the case may be, for marriage under the superintendent registrar's certificate or by common licence.[2] No consent is required by law to an infant's marriage after publication of banns[3] and it is clear, from the information we have obtained, that it is a simple matter for an infant to evade the law and to be married without the requisite parental consent. If an infant does succeed in marrying without the requisite consent, his marriage is nevertheless valid.[4] We think that the law as to parental consent, considering the ease with which it can be evaded, is unsatisfactory and we intend to cover these matters in a future paper on the law of marriage.

(1A) The Latey Committee on the Age of Majority (1967, Cmnd 3342) has recommended that the age of majority shall be reduced to 18 and the Government has announced that it accepts this recommendation.

(2) Marriage Act 1949, s.3(1), (2)

(3) The parent's only remedy is to declare his opposition to the marriage in church at the time of the publication of the banns; ibid., s.25(c).

(4) Marriage Act 1949, s.48(1)

Non-age

11. A marriage between two persons either of whom is under the age of sixteen is void.(5) The Latey Committee(6) was unanimous that sixteen should remain the minimum age of marriage and this is also our view. We deal later (paras 50-53) with suggestions to alter the law so as to make under-age marriages valid in certain circumstances.

Prohibited Degrees

12. The persons whom one may not marry by reason of consanguinity or affinity are set out in the First Schedule to the Marriage Act 1949. They are:

For a man	For a woman
1. Mother	1. Father
2. Daughter	2. Son
3. Grandmother	3. Grandfather
4. Granddaughter	4. Grandson
5. Sister	5. Brother
6. Aunt	6. Uncle
7. Niece	7. Nephew
8. Father's, son's grandfather's or grandson's wife	8. Mother's, daughter's, grandmother's or granddaughter's husband
9. Wife's mother, daughter, grandmother or granddaughter.	9. Husband's father, son, grandfather or grandson.

(5) Marriage Act 1949, s.2; this section applies to a marriage wherever celebrated if one of the parties is domiciled in England: Pugh v. Pugh [1951] P. 482. A marriage between parties under the age of sixteen is regarded as valid by English law if by the law of their domicil both parties have capacity to marry under that age and if the marriage is celebrated in a country where such a marriage is valid: M. v. K. (1968) Times, March 29. It may be of interest to compare the marriage age in other countries; the lower figures in brackets show the minimum age at which permission to marry may be granted by a court or other public authority with or without parental consent. Australia: 18 and 16 (16 and 14); New Zealand: 16 for both sexes; Canada: 16 to 14 according to Province; France: 18 and 15 with permission to marry earlier possible; Republic of Ireland: 14 and 12; Italy: 16 and 14 (14 and 12 possible); Japan: 18 and 16; Sweden: 21 and 18 with permission to marry earlier possible; Switzerland: 20 and 18, (18 and 17); U.S.A.: 20 to 14 for males and 18 to 12 for females according to State with permission to marry under the prescribed age in some States; West Germany: 18 and 16, with permission to marry earlier possible. The Latey Committee examined the age-limits in foreign countries and concluded that "before one could apply, as appropriate to England, the age-limits in another country one would have to ascertain that the social conditions were broadly comparable:" Report of the Committee on the Age of Majority, 1967, Cmnd. 3342, para. 52.

(6) Report of Committee on Age of Majority, 1967, Cmnd. 3342, paras. 166-177.

These prohibited degrees of relationship include half-blood[7] and illegitimate[8] relationships. These prohibitions apply to all marriages in England and to the marriage abroad of a person domiciled in England.[9]

13. An adopter and the person whom he adopts under an adoption order are deemed to be within the prohibited degrees and they continue to be so notwithstanding that someone else adopts that person by a subsequent adoption order.[10] The relationship arising between persons as a result of an adoption is examined in para. 18.

14. The prohibited degrees of relationship fall into two categories: consanguinity, i.e. relationship by blood, and affinity, i.e. relationship by marriage. The two categories must be examined separately when discussing whether the existing prohibitions should be modified.

15. Consanguinity

There is presumably a consensus of opinion that a man should not marry his daughter, granddaughter, mother, grandmother or sister. It is in fact a criminal offence for a man to have sexual intercourse with such female relations (including half-blood and illegitimate), with the exception of his grandmother.[11] The remaining prohibited degrees of consanguinity are in the case of a man, his aunt and niece and, in the case of a woman, her uncle and nephew. A man and his great-aunt and his great-niece, or a woman and her great-uncle and great-nephew, are not within the prohibited degrees. The question whether the existing prohibited degrees of consanguinity are adequate or whether they should be altered is partly biological and partly social and moral.

(1) In so far as the question is biological, the answer will depend on an evaluation of scientific evidence. The marriage of uncle and niece, or nephew and aunt is permitted in some countries and by some religions[12] and it may be

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(7) R. v. Brighton (Inhabitants) (1861) 1 B. & S. 447; Marriage Act 1949, s.78(1); Marriage (Enabling) Act 1960, s.1(2).

(8) Restall v. Restall (1929) 45 T.L.R. 518

(9) De Wilton v. Montefiore [1900] 2 Ch. 481

(10) Adoption Act 1958, s.13(3).

(11) Sexual Offences Act 1956, ss.10, 11.

(12) See for instance Cheni v. Cheni [1965] P. 85 (marriage of uncle and niece valid by Egyptian and Jewish law); De Wilton v. Montefiore [1900] 2 Ch. 481 (marriage of uncle and niece in Germany); Peal v. Peal [1931] P. 97 (marriage in India of nephew and aunt by half-blood with dispensation of Roman Catholic Church).

that there is no adequate biological objection to such marriages. Similarly, there may be no adequate biological objection to the marriage of a man with his grandparent's sister[13] or of a woman with her grandparent's brother, and these relationships may have been omitted from the prohibited degrees for this reason. If, however, there are biological reasons against any particular union, that would constitute a good reason for prohibiting the union. We would welcome advice on these questions: e.g. is marriage between an uncle and niece of the half-blood any more objectionable than a marriage of first cousins? Conversely, is marriage between first cousins objectionable if their respective parents are two brothers who married two sisters?

(2) In so far as the question raises social and moral problems, the answer must depend on public opinion. Would public opinion tolerate or object to marriages between uncle and niece or nephew and aunt and, if it objects to such unions, does it wish to extend the prohibition to great-uncle and great-niece and great-nephew and great-aunt? 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 brother and sister even if there were no biological reasons against such union. There are some matters of conviction on which men hold strong feelings of right and wrong though they cannot place their finger on any particular reason for this conviction. Thus, the prohibition against the adopter marrying the person adopted is based, in part at least, on moral grounds as there cannot be any biological reason for this prohibition.

16. Affinity

The prohibited degrees of affinity fall into two categories: those which prohibit a man from marrying his father's or grandfather's wife and his son's or grandson's wife and those which prohibit him from marrying his wife's mother, grandmother, daughter or granddaughter (and

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(13) This is a less fantastic possibility than the marriage of a man to his grandmother which is expressly forbidden; moreover the great-aunt may be considerably younger than the grandparent, particularly if the relationship is half-blood or illegitimate.

the equivalent male relations in the case of a woman). The historical objection to such unions was based on the ground that husband and wife were one, so that relationship by marriage was equivalent to relationship by blood. This reasoning is unlikely to appeal to-day and one must ask whether there exist social or moral reasons against such unions. As in the case of consanguinity, there are undoubtedly people who feel that such unions are morally wrong and should not be permitted. On the other hand, there are others who feel that such unions are no more objectionable than what was permitted by the Marriage (Prohibited Degrees of Relationship) Acts 1907 to 1931 and the Marriage (Enabling) Act 1960.(14)

17. The Morton Commission had as part of their terms of reference "to consider whether any alteration should be made in the law prohibiting marriage with certain relations by kindred or affinity."(15) The Commission recommended that the then existing prohibition against a man marrying his divorced wife's sister, niece or aunt (or a woman marrying her divorced husband's brother, nephew or uncle) should be removed(16) and this recommendation resulted in the passing of the Marriage (Enabling) Act 1960.(17) In addition to this proposal there were "a few witnesses" who proposed that all prohibitions on marriage with relations by affinity should be abolished.(18) The Commission's Report does not say whether there was any evidence in support of altering the prohibited degrees of consanguinity and, if there was such evidence, it cannot have been regarded as weighty. The Commission recommended that there should be no change in the law relating to the marriage of persons within the prohibited degrees of relationship other than that mentioned above and which resulted in the 1960 Act.(19) Unless there is evidence to show that public opinion has changed since 1955 and now desires a revision of the existing prohibited degrees, it is probably better to make no further alteration in them.

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(14) See para 17 and note (17)

(15) Morton Commission, p. iv

(16) Ibid, para. 1167

(17) The Deceased Wife's Sister's Marriage Act 1907 allowed marriage between a man and his deceased wife's sister; the Deceased Brother's Widow's Marriage Act 1921, allowed marriage between a man and his deceased brother's widow; the Marriage (Prohibited Degrees of Relationship) Act 1931 allowed marriage between persons and their deceased spouse's nephew, niece, uncle or aunt and between persons and their deceased nephew's, niece's, uncle's or aunt's widow or widower. These Acts have been repealed and re-enacted by the Marriage Act 1949 s.1(2) and First Schedule, Part II.

(18) Ibid, para 1159

(19) Ibid, para 1170

Adoption

18. Adoption raises some difficult questions and views on them would be much appreciated:

(1) Adoption poses the problem of the relationship between the adopted child and his blood relations. The prohibited degrees of consanguinity and affinity continue to attach to a person notwithstanding his adoption, though both the child and his adopting parents may be, and frequently are, unaware of the identity of the child's natural parents; likewise the child's natural parents may be, and frequently are, unaware of the identity of the adopting parents and lose all trace of the child itself. In the result, the child may in adult life meet and marry a person within the prohibited degrees of relationship and perhaps discover accidentally that his marriage is void. It is impossible to say whether, and if so how frequently, there occur these consequences of adoption. In so far as they do occur, they appear to raise an insoluble problem to which we cannot at present see any answer.

(2) Adoption also poses the problem of the relationship between the adopted child and the family circle into which he has been adopted. If the purpose of adoption is to place the adopted child as nearly as possible into the position of a natural child of the adopting parents and as a full member of his new family, the question arises whether the law sufficiently achieves this result in the sphere of matrimonial relationship where the adopted child is treated differently from natural children. The law apparently only prohibits marriage between the adopting parent and the adopted child, so that the adopted son can marry his "sister," i.e. the adopter's daughter, whether natural or adopted, or his "niece"; likewise, the adopter can marry his adopted son's widow or divorced wife (he cannot marry his natural son's widow or divorced wife).(20) We would like

(20) It may be of interest to compare the position of the adopted child in some other European Countries: in Finland and Poland, marriage is prohibited between the adopter and the adopted child; in West Germany and Greece, between the adopter and the adopted child or his or her descendants; in Switzerland, between the adopter and the adopted child or the adopted child's spouse and between the adopter's spouse and the adopted child; in France and Italy between the adopter and the adopted child, his or her descendants or spouse, between the adopter's spouse and the adopted child, and between the adopted child and the adopter's natural and adopted children; in Italy dispensation can be granted to allow marriage within any of these prohibited degrees, but in France a dispensation can only extend to allow marriage between an adopted child and the adopter's natural or adopted children.

to know whether the general view is that this state of things is satisfactory or whether the law should go further and treat the adopted child as if, for the purposes of marriage, he was in fact a natural child of the adopting parents, so that the prohibited degrees of consanguinity and affinity applicable to the adopting parents' natural children should likewise apply to the adopted child.

We would welcome advice on both these matters.

Prior Existing Marriage

19. It is thought that no comment is needed on this ground.

Insanity

20. Consent is an essential ingredient of a valid marriage and a marriage is void if a spouse is incapable of giving his consent because of his unsoundness of mind. A person is regarded as being capable of giving consent if he is capable of understanding the nature of marriage, which involves a mental capacity to appreciate the responsibilities normally attaching to marriage.(21) A person of unsound mind may contract a valid marriage during a lucid interval when he understands the nature of marriage,(22) but that marriage may be voidable in certain circumstances under the Matrimonial Causes Act 1965, s.9.(23)

21. We think that a test of what constitutes unsoundness of mind rendering a marriage void is satisfactory and should not be modified; any higher test might result in elderly and mentally retarded persons being incapable of contracting a valid marriage, while any lesser test might result in persons of unsound mind being capable of contracting a valid marriage. However, consideration should be given to the question whether persons with serious inheritable mental defects should not be altogether prohibited from marrying. Whether or not such a prohibition is desirable and the definition of the class of persons to whom it should apply is a question on which it is difficult to express a view in the absence of scientific evidence and views are invited on this matter.(24)

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(21) Re Park [1954] P. 112, C.A.; Hill v. Hill [1959] 1 W.L.R. 127, P.C.

(22) Turner v. Myers (1808) 1 Hag. Con. 414

(23) See para 29

(24) There was a precedent for a total prohibition in the Marriage of Lunatics Act 1811, which provided that the marriage of a lunatic so found by inquisition or of a person who or whose estate had been committed to the care and custody of trustees under any statute was void, but this Act was repealed by the Mental Health Act 1959, and there is now no statutory prohibition against marriage by a person of unsound mind.

Lack of Consent

22. A valid marriage requires free consent (a) to marry and (b) to marry a particular person. Heads (a) and (b) present no difficulties and if a person goes through a ceremony of marriage not realising that it is such a ceremony,(25) or if he goes through a marriage ceremony with A believing him to be B(26) the marriage is void. As to free consent, threats or duress can engender such fear as to vitiate consent, in which case the marriage is void.

23. The various factors which do or do not vitiate consent must be examined separately.

(1) Fear vitiates consent if it is of sufficient degree to do so, if it is reasonably entertained and if it arises from circumstances for which the petitioner is not himself responsible.(27) Thus, where a woman was forced by her father's threats to marry(28) or where a man married through fear of false criminal charges being preferred against him,(27) the marriage was in each case void, but in the latter case the marriage would apparently have been valid if the threats had been to prefer against the man charges in respect of crimes which the man had in fact committed.

(2) Fraud does not vitiate consent unless it brings about a mistake as to the ceremony or the persons. Fraudulent misrepresentation or concealment which induces consent does not vitiate the consent provided the consent is given freely and not under duress, even though it would never have been given but for the misrepresentation or concealment;(29) thus, where the wife concealed from her husband

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(25) Mehta v. Mehta [1945] 2 All E.R. 690. (wife thought marriage ceremony was ceremony of conversion to Hindu religion).

(26) R. v. Millis (1844) 10 Cl & Fin 534, 785-6

(27) Buckland v. Buckland [1967] 2 W.L.R. 1506

(28) Parojic v. Parojic [1958] 1 W.L.R. 1280

(29) Swift v. Kelly (1835) 3 Knapp 257 at 293: 'No marriage shall be void merely upon proof that it had been contracted upon false representations, and that but for such contrivances, consent would never have been obtained. Unless the party imposed upon has been deceived as to the person, and thus has given no consent at all, there is no degree of deception which can avail to set aside a contract of marriage knowingly made;" Moss v. Moss [1897] P. 263 at 267-269: 'No fraudulent concealment or misrepresentation enables the defrauded party who has consented to the marriage to rescind it ..... when in English law fraud is spoken of as a ground for avoiding a marriage, this does not include such fraud as induces a consent, but is limited to such fraud as procures the appearance without the reality of consent. The simplest instance of such fraud is personation."

that at the time of the marriage she was pregnant per alium, the marriage was valid[30] (though it might now be voidable under the Matrimonial Causes Act 1965, s.9).

(3) As regards mistake as to the other party to the marriage, only mistake as to the identity of that party vitiates consent. A mistake as to fortune, health, status, moral character or other quality does not affect the validity of the marriage, except that mental disorder, pregnancy per alium, venereal disease and epilepsy are grounds on which a marriage is voidable under Matrimonial Causes Act 1965, s. 9 (see para 28). A mistake as to the nature of the ceremony vitiates consent,[25] but a mistake as to the effect of the marriage does not vitiate consent: thus a husband's mistaken belief that a foreign marriage imposed a duty on the spouses to live together and that his wife would be allowed to accompany him to England[31] or the husband's belief that he was entering into a polygamous marriage whereas in fact it was monogamous[32] (or, presumably, vice versa), does not invalidate a marriage.

(4) Intoxication to the extent of inducing in a person a "want of reason or volition amounting to an incapacity to consent" will make a marriage void.[33] A mock marriage in a masquerade is void for want of real consent.[34]

24. There are two aspects of the law on lack of consent arising from duress or mistake on which we would appreciate views:

(1) As stated in para 23(1) fear does not vitiate consent unless (inter alia) it arises from circumstances for which the petitioner is not himself responsible. Thus, if the petitioner has in fact committed a crime and is threatened with exposure unless he marries and if he, through fear of exposure, does marry, the marriage is valid notwithstanding the threat, because, in such event the petitioner's fear arises from circumstances for which he is himself responsible. We would like to have views as to whether the existing law on this

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(30) Moss v. Moss [1897] P. 263

(31) Way v. Way [1950] P. 71, 79-80; overruled on other points sub. nom. Kenward v. Kenward [1951] P. 124, 135, 136, C.A.

(32) Kassim v. Kassim [1962] P. 224

(33) Sullivan v. Sullivan (1818) 2 Hag. Con. 238, 246

(34) Moss v. Moss [1897] P. 263, 269

point is regarded as being satisfactory, or whether the test of duress vitiating consent should not depend on the effect of the duress on the petitioner's mind; that is to say, if the petitioner has committed some misdeed and is threatened with exposure unless he marries, should the threat amount to duress if in the circumstances of the case it deprives the petitioner of freely consenting to the marriage? Whichever solution is adopted, it will still be necessary, for duress to be established, to show that the fear was of a sufficient degree to vitiate consent and that it was reasonably entertained. If the threat of exposing the petitioner's conduct were made capable of amounting to duress, should the nature of the conduct in respect of which exposure is threatened be relevant? For instance, should the consequence of the threat be different according to whether (1) the petitioner is threatened with exposure of a crime which he has in fact committed unless he marries the woman in question, or (2) the petitioner is threatened with affiliation proceedings unless he marries the woman by whom he has had a child?

(2) As stated in para 23(3), a mistake as to the effect of the ceremony (as opposed to a mistake as to the nature of the ceremony) does not vitiate consent. The question arises whether the rule should remain as it is or whether a mistake as to the effect of the ceremony should invalidate the marriage for lack of consent. For instance, should a person who thinks that the marriage which he is contracting is monogamous, whereas it is in fact polygamous,[32] be able to have the marriage avoided? Should a mistaken belief that a marriage imposes a duty to cohabit[31] entitle a party to have the marriage avoided? If mistake as to the effect of the ceremony were a ground for avoiding the marriage, it would be necessary to determine what mistakes are sufficiently fundamental to entitle a party to relief, for it would be going too far to suggest that any mistake, however insignificant, as to the mutual obligations of the spouses would suffice for this purpose. One solution might be to enact that a mistake as to the effect of the ceremony, if sufficiently fundamental as to the obligations of marriage, would suffice, leaving the court to decide each case on its merits and, in due course, to formulate a principle. Another solution might be to confine relief to cases where the mistake as to the effect of the

ceremony was induced by fraud. Yet another solution might be to confine mistake to the case where a person believes the marriage to be monogamous, whereas it is in fact polygamous, and vice versa.

Impotence

25. Impotence (or incapacity) is inability to consummate the marriage. Such inability can arise from a physical defect or from a mental condition, such as invincible repugnance to the sexual act; it also happens that a person may be generally capable of having sexual intercourse, but, owing to some cause such as hysteria, is incapable of performing it with the other spouse.(35) In all such cases the marriage can be annulled on the petition of either party provided the impotence exists at the time of marriage(36) and is incurable or curable only by an operation attended with danger;(37) in the case of a respondent, a defect which is curable but which the respondent refuses to have cured is regarded as being incurable.(37)

Sterility per se is not impotence,(38) so that voluntary sterilisation before marriage is no ground for relief.(39)

Respondent's Wilful Refusal to Consummate the Marriage

26. This ground was introduced as a ground for nullity by the Matrimonial Causes Act 1937, and has since been frequently criticised because, as a ground for nullity, it offends against the principle that the impediment avoiding the marriage must exist at the time of the marriage. The Morton Commission,(40) the Church Report(41) and Putting Asunder(42) all advocated that wilful refusal to consummate should, for this reason, cease to be a ground for nullity and be treated as relevant to divorce.(43)

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(35) This is known as impotence quoad hunc or quoad hanc.

(36) Impotence arising after marriage is no ground of complaint either in nullity (Brown v. Brown (1828) 1 Hag. Ecc. 523) or divorce P. v. P. [1965] 1 W.L.R. 963, 968; Sheldon v. Sheldon [1966] P. 52, 78).

(37) S. v. S. [1956] p. 1. In the case of elderly people where a party is impotent because of advanced age, the right to have the marriage annulled may be barred by approbation: Morgan v. Morgan [1959] P. 92.

(38) L. v. L. (1922) 38 T.L.R. 697

(39) Baxter v. Baxter [1948] A.C. 274, overruling J. v. J. [1947] P. 158

(40) Paras 88, 89, 283

(41) Pages 38, 48

(42) Pages 67, 124-125

(43) Wilful refusal to consummate is a ground for divorce in Australia and the restriction on presenting a petition within three years of marriage does not apply to this ground: Matrimonial Causes Act (Aust.) 1959, ss. 28, 43(2).

27. Notwithstanding these views, we think that wilful refusal to consummate should remain a ground for nullity. Our reasons are:

(1) Wilful refusal to consummate is in most cases the alternative allegation to impotence[44] as it is often uncertain whether the respondent's failure to consummate is due to one cause or the other; the petitioner may not know whether the respondent refuses to consummate the marriage because he is impotent and is unable to have sexual intercourse or whether because, though able to have sexual intercourse, he does not want to have it; in such cases the court must draw an inference from the evidence before it and it seems unreal that the relief granted to the petitioner - nullity or divorce - should depend in any given case on the court's view of the reasons which prevented the respondent from consummating the marriage.

(2) Failure to consummate, whether it be because the respondent is unable or because he is unwilling to have sexual intercourse, deprives the marriage of one of its essential purposes and, in either case, precludes the marriage from becoming a reality. Parties would think it strange that the nature of the relief should depend on the court's decision whether non-consummation was due to the respondent's inability or whether it was due to his unwillingness. From their point of view the relevant fact would be that the marriage had never become a complete one. To tell them that, in the eyes of the law, if failure to complete it was due to one cause they can have their marriage annulled, whereas if it was due to another they must have it dissolved, would seem a strange quirk of the law.

(3) The circumstances in which the court can entertain suits for nullity and divorce at present[45] are not the same: for instance, the court has jurisdiction to hear a suit for nullity where, irrespective of domicile, both parties are, or the respondent alone is, resident in England, but there is no jurisdiction (except under the provisions of the Matrimonial Causes Act 1965, s.40) to hear a suit for divorce unless both parties are domiciled in England; therefore, if wilful refusal

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(44) See the statistics set out in para 5

(45) The question of jurisdiction in divorce and nullity is under consideration by the Law Commission, but it would be unsafe to assume that the grounds of jurisdiction for both reliefs would be made identical.

to consummate were to become a ground for divorce while impotence remained a ground for nullity, a petitioner might find himself unable to allege the two grounds in the alternative, although he himself may not know which is the effective cause preventing consummation of his marriage.

(4) A petition for divorce may not be presented until three years have elapsed from the date of marriage, unless the court gives leave to present an earlier petition on the ground of exceptional hardship suffered by the petitioner or of exceptional depravity on the part of the respondent.(46) The need to wait three years before being able to start proceedings to terminate the marriage would be a substantial (though not necessarily an exceptional) hardship on a young man or woman whose partner is unable or unwilling to consummate the marriage.

Grounds under Matrimonial Causes Act 1965, s.9(1), (b), (c) and (d)

28. The grounds under s.9(1)(b) are that at the time of the marriage either party to the marriage

(1) was of unsound mind, or

(2) was suffering from mental disorder within the meaning of the Mental Health Act 1959(47) of such a kind or to such an extent as to be unfitted for marriage and the procreation of children, or

(3) was subject to recurrent attacks of insanity or epilepsy.

29. Ground (1) appears at first sight to cover the same situation as does insanity as a ground for declaring a marriage void (para 20). This, however, is not so. For a marriage to be void on the ground of insanity the spouse must be incapable of understanding the nature of marriage, whereas s.9(1)(b) is wider in its connotation. The expression "of unsound mind" appearing in s.1(1) as a ground for divorce (and the same expression in s.9(1)(b) has presumably the same meaning) has been construed to designate a person who is incapable of managing himself and his affairs including the problems of work, society and marriage judged

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(46) Matrimonial Causes Act, 1965, s.2

(47) Mental Health Act 1959, s.4(1): "In this Act 'mental disorder' means mental illness, arrested or incomplete development of mind, psychopathic disorder, and any other disorder or disability of mind."

by the ability of the reasonable person to manage his affairs.[48] A spouse may well understand the nature of marriage at the time of its celebration, but be incapable generally of managing himself and his affairs. The Morton Commission[49] recommended that this part of s.9(1)(b) should be re-drafted "so as to make it clear that it refers only to a person who has gone through a ceremony of marriage with a full understanding of the nature of that ceremony and what it imports but who nevertheless was of unsound mind at the time." This is in line with the view of the Gorell Commission[50] who first recommended the addition of this ground of nullity to cover the case "where the other party, though of sufficient understanding to consent to a marriage, is, at the time of the marriage ..... of unsound mind in other respects." We think that the recommendations of the Morton Commission should be adopted - certainly when the law is codified, if not before.

30. No alteration is recommended in s.9(1)(c) and (d) (the respondent at the time of the marriage suffering from a venereal disease in a communicable form or being pregnant per alium). The provision of New Zealand Law[51] that the wife should be able to have the marriage annulled on the ground that at the time of the marriage some woman other than the wife was pregnant by the husband is not recommended. There is no analogy between such a case and the case of the wife who enters the marriage carrying in her body an alien child who is to be born into the family which the marriage has created.

31. The grounds under s.9(1)(b), (c) and (d)[52] are subject to three limitations contained in s.9(2):

(1) the petitioner must at the time of the marriage be ignorant of the facts alleged;

(2) proceedings must be instituted within a year from the date of the marriage;

(3) marital intercourse with the consent of the petitioner must not have taken place since the petitioner discovered the existence of the grounds for a decree.

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(48) Whysall v. Whysall [1960] P. 52; Robinson v. Robinson [1965] P. 192; Woolley v. Woolley [1968] P. 29.

(49) Para 275

(50) Para 353

(51) Matrimonial Proceedings Act (N.Z.) 1963, s.7(1)(a).

(52) See para. 28.

32. Limitation (1) is reasonable. The petitioner who enters the marriage with knowledge that there exists a particular defect in one or other of the spouses should not be able to claim that the marriage is invalid on account of that very defect.

33. Limitation (2) lays down a time limit for bringing proceedings and this limitation should be reconsidered. The court has no discretion to enlarge the time limit, even in the case of fraud on the respondent's part.(53) The Morton Commission(54) heard evidence that this restriction results in hardship in that a would-be petitioner may not become aware of the facts in time to enable him to take proceedings; for instance when he goes abroad immediately after the marriage. Two main proposals were suggested for modifying the present time-limit: first, that the court should have a discretion to enlarge the time-limit and, secondly, that the time-limit should be retained but should run from the date of discovery of the matter of complaint and not from the date of marriage. The Morton Commission "on balance" preferred the first proposal on the ground that it would produce greater certainty. But it seems to us that uncertainty is inherent in both proposals. The existence of a discretionary power to enlarge the time for instituting proceedings of necessity means that the status of the marriage remains uncertain so long as it is open to a party to apply for leave to present a petition notwithstanding the expiry of the time-limit.

34. Nevertheless, we agree with the Morton Commission that it is preferable to have a time-limit from the date of marriage. But we think that the existing time-limit of one year from marriage is too short. In addition to the example given by the Morton Commission (where a petitioner goes abroad), there may be circumstances where one year does not give sufficient time for discovery of the defect and the institution of proceedings, always allowing for the human element of hesitation as to whether, having discovered the defect, to bring proceedings or not. One method of enlarging the time-limit is by expanding the scope of the Limitation (Enemies and War Prisoners) Act 1945,(55) which suspends the time-limit under s.9(2) while either party is an enemy or is detained in enemy territory. The proceedings in such a case may be instituted within

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(53) Chaplin v. Chaplin [1949] P. 72

(54) Paras 284, 285

(55) The Act is still law by virtue of the transitional provisions in the Matrimonial Causes Act 1950, s.34(2)(c) and the Matrimonial Causes Act 1965, Sch. I para 1(b) although it would only become applicable in the event of war.

a year from the date when that party ceased to be an enemy or to be so detained. Other circumstances, such as a party going abroad or being confined to hospital, could be added to the 1945 Act and have a like suspensory effect. This method would not cover all causes for excusable delay (e.g. where the petitioner has discovered the defect but has not appreciated its significance) and we think that it would be more satisfactory to substitute, say, three years for the existing time-limit of one year. We think, too, that the three years should run from the date of marriage, as we agree with the Morton Commission that it would be undesirable to introduce the possibility of the marriage being annulled because of the discovery at a late stage of facts rendering the marriage voidable, e.g. the husband discovering after thirty years that the first child was not his.

35. Limitation (3) has been construed to mean that a petitioner who has before him facts from which he, as a reasonable man, knows or ought to know of the existence of grounds for a decree, has "discovered" their existence, so that marital intercourse thereafter will debar him from a decree.(56) The point whether knowledge of the law, as well as of the facts, is necessary before a petitioner can be said to know of the existence of grounds for a decree has been left open.(57) This limitation works harshly for it imposes an objective test in what is essentially a personal and subjective relationship. If this limitation is to remain and marital intercourse with knowledge of the defect is to be an absolute bar, such knowledge should not be the knowledge of the hypothetical reasonable man on the Clapham omnibus, but real knowledge on the petitioner's part and a full appreciation by him that the defect is a ground for terminating the marriage. Otherwise it is unjust to deprive him of relief merely because, not realising that he has grounds for terminating the marriage, he tries to make the best of it and does not immediately break off marital relations. Moreover, the law encourages reconciliation, a factor strongly stressed in recent legislation on condonation and desertion,(58) and if a petitioner discovers the existence of a defect, e.g. epilepsy or pregnancy per alium, he should not be placed

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(56) Smith v. Smith [1948] P. 77

(57) Stocker v. Stocker [1966] 1 W.L.R. 190

(58) Matrimonial Causes Act 1965, ss. 1(2), 42(1) and (2). See also the Divorce Reform Bill, cl. 3. Alternatively, if it is felt that marital intercourse should remain the effective test, there could be introduced a provision on the lines of s.42(1) of the 1965 Act, which reads: "Any presumption of condonation which arises from the continuance or resumption of marital intercourse may be rebutted by evidence sufficient to negative the necessary intent."

in the position that if he attempts a reconciliation and it fails he thereby loses all right to relief. If the bar to a decree were to be approbation (as to which see para 37) rather than marital intercourse, the difficulties outlined above would largely disappear. The marriage in question being voidable, presumably approbation in any case applies, but the question does not in practice arise in view of the strict requirements of s.9(2).

36. We, therefore, recommend that s.9(2) should be amended so that a decree of nullity would not be granted unless

(1) the petitioner was at the time of the marriage ignorant of the facts alleged; and

(2) proceedings were instituted within three years of the date of marriage; and

(3) the petitioner has not approbated the marriage after discovery of the facts.

II APPROBATION

37. The doctrine of approbation applies to voidable marriages only, i.e. to marriages voidable on the grounds of impotence and wilful refusal to consummate;[59] and, presumably, to the grounds under the Matrimonial Causes Act, s.9(1)(b), (c) and (d),[60] though the limitation of one year for bringing proceedings and of no marital intercourse taking place after discovery of the defect make the point largely academic. No comment is thought necessary on the doctrine itself except in relation to the birth of a child or an attempt to have a child. Approbation means the existence of facts and circumstances which so plainly imply on the part of the complaining spouse a recognition of the existence and validity of the marriage as to render it unjust between the parties and contrary to public policy to permit him or her to challenge its validity.[61] But a spouse cannot be said to have recognised the existence and validity of the marriage unless he has knowledge both of the facts and of the law, so that his ignorance that

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(59) Scott v. Scott [1959] P. 103

(60) See paras 28 to 30.

(61) G. v. M. (1885) 10 A.C. 171; W. v. W. [1952] P. 152

in law he would be entitled on the facts to have the marriage annulled, prevents his conduct from amounting to approbation.(62) Thus, there was no approbation where a wife, not realising at the time that the marriage could be annulled, was artificially inseminated by a donor and, when she failed to conceive, the parties adopted a child.(63) But even with knowledge of the law the party who consents to artificial insemination cannot be said to approbate the marriage if he takes this step in the hope of producing normality in sexual relations and not as acquiescence in the abnormal marriage.(64)

38. Both the Morton Commission(65) and the Church Report(66) dealt with the point and expressed their conclusions somewhat differently. The Morton Commission said:

> "Consent to an act which is likely to produce a child of the wife is in our view so fundamental a step that it must be taken to mean that the parties acquiesce in the marriage. Accordingly, we recommend that the fact that the parties to a marriage have consented to the artificial insemination of the wife, with the seed of either the husband or a donor, should be a bar to proceedings by either spouse for nullity of marriage on the ground of impotence."

The Church Report said:

> "We are concerned at the way in which decrees of nullity have been granted on proof of incapacity to penetrate notwithstanding the fact that a child has been born as a result of imperfect intercourse or of artificial insemination with the seed of some other man but with the husband's consent ..... We do not think that annulment should be permitted on grounds of impotence where a child has resulted from the joint act or with the mutual consent of both parties ..... We recommend that the doctrine of approbation should be invoked whenever a child has resulted from the joint act, or with the consent of both parties (e.g. by artificial insemination or legal adoption), and that in such case the marriage should not be voidable even though the legal test of capacity has not been satisfied."

It will be noted that whereas the Morton Commission think that artificial insemination of the wife with the husband's consent should be sufficient to prevent annulment of the marriage, the Church Report thinks that this consequence should not follow unless "a child has resulted from the joint act, or with the consent of both parties."

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(62) Tindall v. Tindall [1953] P. 63; Slater v. Slater [1953] P. 235

(63) Slater v. Slater, supra

(64) R.E.L. v. E.L. [1949] P. 211

(65) Paras 286, 287

(66) Pages 39, 47

39. The arguments in favour of the Church Report may be expanded as follows. The Morton Commission has selected artificial insemination as a bar to nullity without regard to its consequences, i.e. whether it results in the birth of a child or not. Except that artificial insemination requires outside assistance, in what way is it any different in quality or effect from the act of a husband, who while unable to penetrate the wife, is able to ejaculate into her vagina? This doubtless happens in many marriages when one or other of the spouses is impotent, but no-one has suggested that this act should necessarily amount to approbation. Even if, as a result of this act, the wife gives birth to a child, this circumstance would not necessarily amount to approbation under the present law. Is not the birth of a child even a more fundamental step than just artificial insemination of the wife? This is not to say that artificial insemination of the wife will not amount to approbation; whether it will or not can be left to be answered by the present law of approbation. But the birth of a child, whether as a result of artificial insemination by the husband, or by a donor with the husband's consent, or as a result of the husband's insemination of the wife during imperfect intercourse, amounts, as it were, to setting the seal on the marriage and the marriage should no longer be voidable even if the legal test of capacity has not been satisfied. It should make no difference whether insemination of the wife by the husband is by mutual consent or accidental; if by mutual consent, then the case is on a par with, if not stronger than, artificial insemination; if it is accidental in the course of attempts at intercourse,(67) it still results "from the joint act, or with the consent, of both parties" who do something which they must know might lead to the wife becoming pregnant.

40. As against this argument it may be said that logically approbation must depend on the conduct of the parties and not on what may happen as a result of their conduct. If their conduct is such as might have produced a child then either this is approbation or it is not: what happens subsequently is logically irrelevant. And if what happens subsequently is of any relevance, why should not conception rather than birth be the test? Is nullity to be possible only if the decree can be obtained before the birth, or if the wife has a miscarriage or an abortion? Why should it make any difference whether the child dies before birth or an hour afterwards? Is it indeed in the interests of the child that his parents should be denied relief because he had been born?

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(67) Snowman v. Snowman [1934] P. 186; Clarke v. Clarke [1943] 2 All E.R.540

41. While we do not recommend any change in the law of approbation, in view of the importance of these arguments we invite views as to the points made by the Morton Commission and the Church Report.

42. There are conflicting authorities[68] on whether approbation is an absolute or discretionary bar, and we think that it should be an absolute bar. It is of general advantage to know as soon as possible and with as much certainty as possible whether a marriage is valid or not and undesirable uncertainty may arise if, notwithstanding approbation, the parties are free to challenge the marriage at any time, in the hope that the court will exercise its discretion to declare the marriage invalid. The validity or invalidity of the marriage should not depend on the court's discretion, but should be determined by the relevant facts. We, therefore, recommend that approbation should operate as an absolute bar.

III SHOULD INSANITY AND LACK OF CONSENT MAKE A MARRIAGE VOIDABLE INSTEAD OF VOID?

43. It was a doctrine of canon law[69] which was adopted by English ecclesiastical law that a marriage void on the ground that there was no consent at the time of the marriage could be ratified by a consent voluntarily given subsequently, whereupon the consent was deemed to relate back to the time of the marriage. The absence of consent could result from a party's inability to consent because of his unsoundness of mind or from being temporarily deprived of his freedom of choice by compulsion or through a mistake or other circumstances. In the former case the void marriage could be ratified during a lucid interval or when sanity returned[70] and, in the latter case, when the compulsion or other circumstances were removed.[71] By the Matrimonial Causes Act 1857, s.22 and the Supreme Court of Judicature (Consolidation) Act 1925, s.32[72] ecclesiastical law is administered by the

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(68) Discretionary: Scott v. Scott [1959] P. 92; Copham v. Copham (1959) Times, Jan. 15; W. v. W. (1961) 105 S.J. 182; absolute: G. v. G. [1961] P. 87.

(69) Decretals of Gregory IX, Bk. IV, tit. 7, Ch. 2, (1227)

(70) Mrs Ash's Case (1702) Freeman C.C. 259; Shelford's Law of Marriage and Divorce, 1841, p. 197. See also Ellis v. Bowman (1851) 17 L.T. (o.s.) 10.

(71) Swinburn's Treatise of Espousals, 1686, p.38, Ayliffe's Parergon, 1726, p. 361; Poynter's Doctrine of Practice of the Ecclesiastical Court, 1824, p. 138; Roger's Ecclesiastical Law, 1841, p. 564; Shelford's Law of Marriage and Divorce, 1841, p.214.

(72) Baxter v. Baxter [1948] A.C. 274, 285; Matalon v. Matalon [1952] P. 233, 237.

Divorce Court in nullity proceedings and the doctrine of ratification was acknowledged by Lord Merrivale, P. in a case where the petitioner went through a ceremony of marriage believing it to be a betrothal ceremony.(73)

44. The doctrine of ratification is in effect the application of the doctrine of approbation to marriages void for absence of consent and it has been proposed to us that such marriages should be made voidable so as to allow for their approbation and so that they could be valid unless the parties themselves took steps to have them annulled. Whereas a bigamous marriage or one within the prohibited degrees can, both in theory and practice, be treated as void without the necessity of a decree of nullity, a marriage alleged to be void on the ground of insanity or lack of consent cannot in practice be treated as a void marriage without the court first investigating the circumstances and making a decree, so that the transfer of such a marriage from the void into the voidable category of marriages would not create hardship to the parties. The case for such transfer is much stronger in the case of a marriage void for lack of consent where a party should be (and already is under the doctrine of ratification) free to decide for himself whether he wishes the marriage to take effect; why, if the parties wish their marriage to be valid, should they run the risk of having the marriage impeached by third parties? The case of insanity, i.e. incapacity to consent, is more difficult in that the insane party may be unable, by reason of his mental disability, to institute proceedings to annul his marriage.(74)

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(73) Valier v. Valier (1925) 133 L.T. 830 ("I must consider whether there has been anything in the petitioner's subsequent conduct which amounted to a ratification. The case would be a very different case if, after the petitioner realised that a marriage ceremony had been performed, the parties had proceeded to take each other as man and wife.") The doctrine of ratification is purely canonical in origin and cannot be explained on logical grounds. In the words of Lord O'Brien, C.J., in Ussher v. Ussher [1912] 2 I.R. 455, 480; "As was asked with much emphasis by counsel during the argument, how could the marriage be validated if it was altogether void? Such a proposition it was contended, finds no support from 'reason'. I am afraid there are many things lying at the root, at the foundation, of the Christian religion, mysteries of faith, for an elucidation of which we should appeal to 'reason' in vain."

(74) Though in both Australia and New Zealand absence of consent, whether by reason of insanity or compulsion, make the marriage void, in most states of the U.S.A. absence of consent, for either reason, makes the marriage voidable; in South Africa mental incapacity makes the marriage void and lack of consent makes it voidable.

45. We think that lack of consent should render a marriage voidable and not void and we also think that there should be a time-limit for bringing proceedings on this ground. We, therefore, recommend that lack of consent be subject to the three-years' time-limit suggested in para 34 in respect of the grounds of nullity under the Matrimonial Causes Act 1965, s.9(1)(b), (c),(d).

46. On balance we think that insanity at the time of marriage - that is, absence of mental capacity to understand the nature of marriage (see para 20) - should continue to render a marriage void. Our reason for this view is, first, that a marriage, where one of the parties is in this mental state and does not understand what he is doing, is meaningless and, secondly, that the insane party is, in general, unable to consult a solicitor or take intelligent advice as to what action he should pursue with regard to the marriage, i.e. he cannot make a rational decision whether to accept the marriage or to take steps to have it set aside. At the same time, we appreciate that there are arguments in favour of making insanity a ground for rendering a marriage voidable, which may be summed up as follows:-

(1) Marriages are voidable under the Matrimonial Causes Act 1965, s.9 on the ground of unsoundness of mind[75] or recurrent attacks of insanity and is there any compelling reason why the same should not apply to the unsoundness of mind which now makes a marriage void?

(2) It may seem artificial that the marriage of a person subject to recurrent attacks of insanity should be absolutely void if the celebration of the marriage coincides with an attack, but is valid, though voidable, if the attack takes place the day before or the day after the celebration.

(3) There are marriages of insane persons which benefit such persons. If, for instance, a woman marries an insane man and is willing to look after him and her care and presence are beneficial to the man, why should the marriage be null and void and why should third parties be allowed to interfere with it by having it declared to be a nullity?

(4) Under existing law a third party can, with leave of the court, institute nullity (and divorce) proceedings on behalf of the insane person as his next friend;[76] this is a safeguard in the event of its being in the interest of the insane person to obtain a decree of nullity, the insane person being himself unable to take this step because of his mental condition.

(75) See para 29 as to the meaning of unsoundness of mind in s.9.

(76) Mental Health Act 1959, s. 103

47. A further proposal which has been made to us is that insanity should render a marriage voidable, but that third parties having a sufficient interest should be able (as they are now able because the marriage is void) to attack the marriage. This would constitute an exception to the rule that only the parties may attack the validity of a voidable marriage and the effect of the exception would be to make the marriage valid unless avoided in a nullity suit by a spouse or by a third party with a sufficient interest, instead of the marriage being void as is now the case. If this proposal were adopted, it would be necessary to decide whether third parties should be able to attack the marriage:

(1) at any time, whether during the life of the spouses or after the death of one of them;

(2) only during the life of the spouses, so that, as in the case of other voidable marriages, the marriage ceases to be subject to attack as soon as one party to it is dead;

(3) only after the death of one of the spouses, thereby leaving the spouses free from outside interference during their joint lives.

48. As a further alternative, insanity could be governed by the Matrimonial Causes Act 1965, s.9 and be subject to the proposed three years' time-limit (see para 34 and 36), after which the marriage could not be challenged either by a spouse or by a third party. Thus, it would be known within three years of marriage whether a marriage was being challenged and once three years had elapsed from the date of marriage, the only voidable marriages which could be annulled would be those voidable for impotence or wilful refusal to consummate.(77)

49. We think that the question whether insanity which makes a person incapable of understanding the nature of marriage should render the marriage void or voidable is a difficult one and we have attempted to set out the considerations for and against several possible alternatives. While we have stated our provisional view (para 46), we invite views on this question.

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(77) In para 60 we discuss the possibility of making the three years' time-limit apply to these marriages.

IV SHOULD AN UNDER-AGE MARRIAGE BE VOIDABLE OR RATIFIABLE?

50. It has been proposed to us that a marriage in which one spouse is, or both spouses are, under the age of sixteen at the time of marriage, should be either voidable or ratifiable, instead of being void as is the case under existing law. The distinction between these two proposals is: if the under-age marriage were made voidable, such a marriage would be valid unless it were annulled; if it were made ratifiable, it would be void unless the ratifying act took place.(78) We would welcome views on both proposals.

51. The arguments in favour of making the marriage voidable may be summarised as follows:-

(1) If the parties marry genuinely believing that they are both of marriageable age, it is hard on them if subsequently - perhaps many years later - they discover that their marriage was void; likewise, one party may fraudulently lead the other party to think that he or she is of marriageable age and the other party would be led into entering a marriage believing it to be valid whereas it would in fact be void. It may be possible for the parties, on discovering the true facts to marry and thereby rectify the position, but this possibility would not be available if they had separated and one or other refused to marry or if one or both were dead; in such event children and other persons might be adversely affected.

(2) Society should not interfere with a marriage which is valid from the ceremonial aspect unless it is contrary to public policy to regard the particular marriage as valid, and why should it be contrary to public policy to treat as valid a marriage which both parties, now of the age of marriage, want to preserve?

52. The arguments against making the under-age marriage voidable (instead of its being void, as under existing law) may be summarised as follows:-

(1) The marriage could not then be annulled if it had been approbated. Where both parties know that one or other

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(78) In some countries there is provision for marriage below the statutory marriage age and below the age of consent to sexual intercourse: see note 5.

is, or both are, under-age when entering into the marriage, both parties must surely be approbating the marriage, so that no decree of nullity would be possible and the marriage would be for all time valid. On the other hand, if one or both of the parties entered into the marriage innocently believing that both parties were over sixteen, there could not be approbation by the innocent party until he or she discovered the mistake. Therefore, in some cases a petition might be presented many years after the marriage with the result that the very uncertainty as to the status of the marriage which both we and the Morton Commission want eliminated (see para 33) would be brought into existence. This difficulty could, however, be overcome if the under-age marriage were made subject to the three-years' time limit which we suggest should be applicable to certain petitions for nullity under the Matrimonial Causes Act, 1965, s.9(1)(b), (c), (d) (see paras 34 and 48).

(2) The substantial objection to making an under-age marriage voidable is of a social nature. Does society think it right to fix an age below which, as a matter of public policy, no person should be able to marry, or does it hold the view that if two people nevertheless contrive to be married below that age, they should be left free to decide whether their marriage is to be valid or void?

(3) Society has fixed the minimum age for marriage at sixteen. Until 1929 the minimum age was fourteen for a boy and twelve for a girl, the reason for such ages being apparently due to the medieval conception that at those respective ages children reached the age when they became capable of sexual intercourse and evil would ensue if they were not then able to marry.(79) The Age of Marriage Act 1929(80) raised the minimum age of marriage to sixteen for both sexes, this age being chosen because sexual intercourse with a girl under sixteen was (and still is) a criminal offence and it was considered

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(79) Lords' Debates (on Age of Marriage Act) 1929, Vol. 72, Col. 961

(80) Repealed and reenacted in the Marriage Act 1949, s.2

wrong for marriage to take place at an age earlier than the age at which the girl could lawfully consent to sexual intercourse. The suggestion that an under-age marriage should be voidable (and not void) was rejected for this reason. To quote from the speeches in Parliament during the debates on the 1929 Act:

> "Everybody will agree that something should be done to prevent the cloak of marriage being thrown over an act which is declared to be a crime and punishable under our law ..... It is a simple thing to say that we will not, from this day forward, countenance the marriage of a girl under the age of sixteen when we say that the ordinary act [of sexual intercourse] with her under the age of sixteen is an offence and is a criminal offence and that it is not to be made an innocent offence merely by marriage ..... All that the Bill is attempting to do is to enact that that which is a criminal offence should not be rendered an act for which no punishment or penalty can be imposed provided there is marriage ..... If a thing is wrong under the age of sixteen, how can it become right if it is cloaked by a marriage? (81) That a man may marry a girl and may under the cloak of marriage commit against her what we all now accept as a definite wrong against the girl's immaturity and against her inability to undertake the terrific responsibility of relations with a man ..... is to destroy the whole foundation of the measure. (82) We are satisfied that to leave the law as it stands, that under the age of sixteen this offence is a crime and yet marriage should be legal is quite indefensible. We do not think it is possible to allow the law to continue as it is now that this illegal act should be condoned by marriage." (83)

(4) In 1967 the Latey Committee were unanimously of opinion that it is "essential that the minimum age for marriage and the age of consent to sexual intercourse should be the same." (84)

(5) It may seem hard on innocent persons who after years of marriage discover that the marriage is void because a party was under age at the time of marriage, but this result flows from the law's requirements as to the observance of fundamental conditions as a foundation for

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(81) Lords' Debates, vol. 72, cols. 1211, 1213; vol. 73, cols. 414, 415. (Marquis of Reading)

(82) Ibid., vol. 72, col. 1209 (Lord Buckmaster)

(83) Ibid., vol. 72, col. 969 (Marquis of Salisbury on behalf of the Government)

(84) Report of the Committee on the Age of Majority, 1967, Cmnd. 3342, para 177.

a valid marriage and its refusal to treat cohabitation as equivalent to matrimony. The parties are in a similar predicament where after years of "married life" the parties discover that their marriage is void because a former spouse was still alive at the date of marriage.

53. The alternative proposed to us is that an under-age marriage should become valid by ratification if the parties cohabit until the age of majority. We have examined this proposal but have rejected it and our main reasons for its rejection are:

(1) Allowing an earlier marriage to be subsequently validated would be tantamount to condoning the criminal offence of having sexual intercourse with a girl under sixteen. If the Police know that the girl was married under sixteen and that the man has had sexual intercourse with her, are they to prosecute or to hold their hand till it is known whether the marriage has been ratified or not? Is marriage to a girl under sixteen to be one way of getting round the criminal law?

(2) Under the proposal the marriage remains void unless the parties cohabit until majority. It follows that the marriage must be treated as a void marriage, and no-one can safely treat it as a valid marriage, unless and until ratification is established by some procedure, presumably in court, which would provide for trial of the issue where necessary. If so, the parties could equally well get married again. The only hardship would be where one or both parties die without discovering the defect, but this applies to all cases of defects, e.g. honest but mistaken belief that a former marriage has been validly dissolved by a foreign decree.

(3) Since the marriage is void between the date of marriage and attainment of majority, the irate parent (or anyone else with a sufficient interest) can, during that period, obtain a decree of nullity as of right. What is the legal position to be if the parties continue to cohabit till majority notwithstanding the decree?

(4) What is the position to be if

(a) parties intend to ratify the marriage by cohabitation but one of them dies on the eve of attaining his or her majority?

(b) parties cohabit till they are 20, then fall apart and resume cohabitation at 22?

(5) How is ratification to be proved if years later, after both the parties are dead, a child of theirs discovers that one of the parties was under sixteen at marriage and all that is known is that they lived together for a few years (but not precisely how long) and then parted?

(6) To allow ratification of an under-age marriage after reaching the age of majority would be placing in the way of determined young people a temptation to get married under-age in the knowledge that they have it in their power to validate the marriage as soon as they reach the requisite age.(85)

V SHOULD THE CONCEPT OF A VOIDABLE MARRIAGE BE RETAINED?

54. Prior to the Reformation all marriages were either valid or void and the concept of a voidable marriage did not exist; a nullity decree could be obtained from the Ecclesiastical Courts declaring a marriage void on any ground (including impotence) at any time by any person with a sufficient interest. After the Reformation marriage ceased to be a sacrament and the Common Law courts felt free to interfere with the Ecclesiastical Courts' power to annul marriages. They conceded that certain marriages, e.g. where there was a prior existing marriage or lack of consent, were no marriages at all and refrained from interfering in such cases, but in the case of pre-contract,(86) marriage within prohibited degrees and impotence they used the royal writ of prohibition to forbid the Ecclesiastical Courts from annulling marriages after the death of one of the spouses. Hence marriages void on one of those grounds became unimpeachable immediately one of the

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(85) The provision of the French and Italian Civil Codes whereby the wife's pregnancy validates an under-age marriage appears to be an even worse temptation to headstrong young people determined to evade the law.

(86) If A promised to marry B and then married C without the promise to marry B having been rescinded with B's consent, A's marriage to C was void on the ground of pre-contract.

spouses died and in time such marriages came to be regarded as valid unless annulled during the lifetime of both spouses. Pre-contract was abolished by the Marriage Act 1753 (Lord Hardwicke's Act), and marriages within the prohibited degrees were made void by the Marriage Act 1835, so that thereafter impotence remained the only ground on which a marriage was voidable. A voidable marriage which was annulled was treated as being void ab initio and the issue as illegitimate. The decree, in the case both of a void and voidable marriage, was and still is the same; it declares the marriage "to have been and to be absolutely null and void to all intents and purposes in the law whatsoever." This wording is misleading in the case of a voidable marriage, but is understandable on historical grounds.

55. The result of the historical development of the law was that the status of a voidable marriage - whether it was valid or void - and the status of the issue were in suspense until the death of one of the parties. Though uncertainty as to the status of the issue has been removed by legislation (see Matrimonial Causes Act 1965, s.11, which enacts that the issue of a voidable marriage which is annulled are legitimate), uncertainty as to the status of the marriage itself still remains and the present law may be summarised as follows: so long as a decree of nullity has not been pronounced, the marriage is a valid subsisting marriage, the spouses have the status of husband and wife[87] and the marriage must be treated as valid by all parties, but a decree of nullity, when made, is retrospective and amounts to a declaration that there is no marriage.[88] Thus, an ante-nuptial settlement being in consideration of a contemplated valid marriage, fails for lack of consideration on a decree of nullity being pronounced,[89] but a post-nuptial settlement or other transaction effected on the basis that there is a valid marriage in existence at that time cannot be set aside upon the marriage being annulled.[90] Similarly, the marriage being valid, the wife automatically acquires the husband's

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(87) Re Wombwell's Settlement [1922] 2 Ch. 298; Fowke v. Fowke [1938] Ch. 774; De Reneville v. De Reneville [1948] P. 100, C.A.

(88) Dormer v. Ward [1901] P. 20, C.A.; Re Eaves [1940] Ch. 109, C.A.; Re Adams [1951] Ch. 716. Thus a widow who remarries and whose remarriage is annulled for impotence reverts to her status of widowhood: Re Dewhirst [1948] Ch. 198; Re d'Altroy's Will Trusts [1968] 1 W.L.R. 120

(89) Re Wombwell's Settlement, supra; Clifton v. Clifton [1936] P. 182; The Divorce Court can, under the Matrimonial Causes Act 1965, s.17(1) vary the settlement by directing that it does not lapse, but this power may not extend to funds settled by third parties: ibid.

(90) Re Eaves, supra (transaction between two beneficiaries of trust) Fowke v. Fowke, supra. (separation agreement); Adams v. Adams [1941] 1 K.B. 36, C.A. (same); Re Dewhirst, supra at 205; Re d'Altroy's Will Trusts [1968] 1 W.L.R. 120.

domicile and, on the marriage being annulled, she retains it until she acquires another of her own volition.(91) The law, however, is not without doubts. Thus, if a party to a voidable marriage remarries during the lifetime of the other party without a decree of divorce or nullity having been made, that remarriage is clearly bigamous and void, but if the voidable marriage is subsequently annulled, does the retrospective effect of the decree wipe out, as it were, the voidable marriage and render the remarriage valid because, as a result of the decree, no prior marriage was in existence at the time of the remarriage? In Wiggins v. Wiggins(92) it was held that the remarriage remained bigamous notwithstanding the annulment of the prior marriage. But the court declined to follow the N. Irish case of Mason v. Mason(93) where on similar facts the remarriage was held valid, and made no reference to Newbould v. A.G.(94) where Lord Merrivale's decision under the Legitimacy Act 1926 shows that he would have found the remarriage to have been valid. Moreover, the court purported to hold as it did because of what the Court of Appeal said in De Reneville v. De Reneville.(95) But the Court of Appeal was not giving a decision on the retrospective effect of the decree, which, in that case, had not been made; nor was any doubt cast by the Court of Appeal on Newbould v. A.G. If the reasoning in Mason v. Mason is preferred to the reasoning in Wiggins v. Wiggins, then there follows the odd consequence that the remarriage would be declared void if at the date of the proceedings there had been no decree of nullity in respect of the prior marriage, but it would be declared valid if before the date of the proceedings the prior marriage had been annulled.(96)

56. The present law in relation to the consequences of a decree of nullity of a voidable marriage is uncertain and inconvenient and we think that this situation could be improved by legislation in one of the following ways:

(1) The decree could annul the marriage from the date of the decree. This is the Australian solution where the

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(91) De Reneville v. De Reneville, supra at 111, 112

(92) [1958] 1 W.L.R. 1013

(93) [1944] N.I. 134; the judgment of Andrews, C.J., was described by Bucknill, L.J., in De Reneville v. De Reneville [1948] P. 100, 120 as a "considered and helpful judgment."

(94) [1931] P. 75

(95) [1948] P. 100 C.A.

(96) The position seems to be the same in the case of a criminal prosecution for bigamy: see the wording of the Offences Against the Person Act 1861, s. 57 and Mason v. Mason [1944] N.I. 134, 164-165.

decree "annuls the marriage from and including the date on which the decree becomes absolute"; Matrimonial Causes Act 1959 (Aust.), s. 51.

(2) The decree could remain exactly as it is now, that is to say, annulling the marriage, qua a marriage, ab initio, but the legal effect of the decree could expressly be made the same as if the marriage had been dissolved or annulled from the date of the decree.(97) This seems to be the German solution.(98)

(3) Voidable marriages could be abolished and the existing grounds making a marriage voidable could be made grounds for divorce.

57. The arguments in favour of alternative (3), that is substituting divorce for nullity of a voidable marriage, are, quite simply, that the two remedies are in substance similar and the difference between them is really only a matter of form;(99) in each case there is a marriage valid until the decree is made and that decree terminates the marriage, but, in the case of nullity, the decree misleadingly declares the marriage to have never existed; that being so, it is more logical to terminate the marriage by a divorce(1) which records the realities of the situation.(2)

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(97) This principle has already been adopted with regard to legitimacy of children; see Matrimonial Causes Act 1965, s. 11: "Where a decree of nullity is granted in respect of a voidable marriage, any child who would have been the legitimate child of the parties to the marriage if at the date of the decree it had been dissolved instead of being annulled shall be deemed to be their legitimate child."

(98) This statement is based on the thesis by Dr I. Wanska (Institute of Advanced Legal Studies Library); Article 29 of the German Marriage Law No. 16 states only that the marriage is terminated on the date on which the decree of nullity is pronounced.

(99) Turner v. Turner (1888) 13 P.D. 37, 40; Inverclyde v. Inverclyde [1931] P. 29, 42.

(1) "It may be that it would be more logical to treat impotence as a ground of divorce, as it is in America, where the jurisdiction is not hampered by the rules of the Canon Law:" Eaves v. Eaves [1940] 1 Ch. 109, 122.

(2) If the existing grounds for nullity of a voidable marriage were made grounds for divorce, it would nevertheless be necessary to place them in a category separate from the existing grounds for divorce: It would be inappropriate to make a petitioner wait three years from the date of marriage before presenting a petition on the ground of impotence or wilful refusal to consummate, a limitation which applies to the existing grounds for divorce: Matrimonial Causes Act 1965, s.2; the limitation whereby proceedings under s.9(1)(b), (c) or (d) must be instituted within one year of marriage, a period which we suggest should be extended to three years, (see paras 34, 36) would equally be inappropriate in the context of the three years' limitation applicable to divorce suits.

58. The arguments in favour of retaining nullity of a voidable marriage, as in alternatives (1) and (2) are:

(1) It is not true to say that the difference between a decree of a voidable marriage and a decree of divorce is a mere matter of form. It may be that the consequences of the two decrees are substantially similar, but the concepts giving rise to the two decrees are quite different: the decree of nullity recognises the existence of an impediment at the time of the marriage which prevents the marriage from being effective, while the decree of divorce records that some cause for terminating the marriage has arisen since the marriage.

(2) This distinction between a cause existing at the time of marriage, as a result of which the marriage is imperfect and could be avoided, and a cause arising after a valid marriage has come into existence as a result of which the marriage could be dissolved, may be of little weight to the theoretical lawyer, but is a matter of essence in the jurisprudence of the Christian Church.

(3) The Church of England attaches considerable importance to consent as a prerequisite to marriage. Consent to marriage includes consent to sexual relations and, hence, impotence can be regarded as having the effect of vitiating consent.(3) Likewise, the grounds under s.9(1)(b), (c) and (d) (mental disorder, epilepsy, pregnancy per alium or venereal disease) fall under the head of conditional consent(4) and are acceptable to the Church. Except with regard to wilful refusal to consummate, which the Church of England considers should cease to be a ground for nullity and be a ground for divorce (see para 26), the Church is satisfied with the existing law of nullity.(5) Therefore, so radical a change as is involved in the substitution of a decree of divorce for a decree of nullity in respect of matters which the Church regards as relevant to the formation of marriage and irrelevant to divorce, is likely to be unwelcome to the

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(3) Church Report, p. 30

(4) Ibid, pp. 28, 38-39, 47-48

(5) Ibid, p. 29

Church. Such a change is also likely to be unwelcome to the Roman Catholic Church. It is also likely to be resented by people not necessarily belonging to either Church who associate a stigma[6] with divorce and who would therefore prefer to see such matters as impotence, epilepsy and mental disorder, which are illnesses, remain grounds for annulling the marriage rather than causes for dissolving it.

(4) It may be that many people do not appreciate the distinction between divorce and nullity. They, presumably, would not oppose turning a nullity of a voidable marriage into a divorce. If, however, such a change is likely to cause offence to a substantial minority, then the proposal cannot be recommended unless some worthwhile advantage is to be gained from the change, whereas the only advantage to be gained from the change is that the present voidable marriage will fit in more "neatly" among divorces than among nullities.[7]

59. We are, therefore, opposed to the abolition of voidable marriages and think that they should be retained but the effect of the decree of nullity should be modified as postulated in para 56(1) or (2), i.e. either (1) the decree should annul the marriage from the date of the decree, or (2) the decree should annul the marriage ab initio (as now), but the legal effect of the decree should be the same as it would be if the marriage had been annulled from the date of the decree. As between these two alternatives the principal considerations are:

(1) Alternative (1), by abolishing the legal fiction that there never had been a marriage, would reflect the factual situation, i.e. the existence of a valid marriage from the date of the marriage ceremony until the date of the decree and the non-existence of the marriage as from the date of the decree.

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(6) The stigma attached to divorce is not likely wholly to be removed by the provisions of the Divorce Reform Bill which requires proof that the marriage has broken down owing to inter alia the adultery, behaviour or desertion of the spouse being divorced.

(7) In New Zealand the decree of nullity of a voidable marriage has been replaced by a decree of "dissolution of a voidable marriage": Matrimonial Proceedings Act 1963 (N.Z.), s.18. We have rejected this solution for the same reasons as we have rejected the substitution of divorce for nullity of a voidable marriage and for the additional reason that we think that a new form of relief which combined in its terminology the concepts of both divorce and nullity may create unnecessary difficulties.

(2) Alternative (2) would have the same legal consequences and effect as alternative (1), but as the decree would declare (as it does now) the marriage "to have been and to be absolutely null and void," the parties could say that their union had never been a valid marriage and that they had never been man and wife. This last consideration may be of importance to some persons; on the other hand, provided the decree is a decree of nullity, the date from which it annuls the marriage - whether it be ab initio or from the date of the decree - may not be of importance. We would welcome views as to whether alternative (1) or alternative (2) is to be preferred. Our provisional view is that alternative (1) is to be preferred.

VI SHOULD IMPOTENCE AND WILFUL REFUSAL TO CONSUMMATE CEASE AFTER THREE YEARS FROM MARRIAGE TO MAKE THE MARRIAGE VOIDABLE?

60. It has been proposed to us that a marriage voidable for impotence or wilful refusal to consummate should be subject to the three years' time-limit from the date of marriage,(8) so that the marriage would cease to be voidable at the end of that period and would thereafter be a valid marriage terminable only by divorce. The argument in favour of this proposal is that all uncertainty as to the status of the marriage would disappear after three years when the marriage would become indubitably valid. Nevertheless, having examined this proposal we do not favour it, our principal reasons being:

(1) The arguments set out in paras 54-59 in favour of retaining nullity of a voidable marriage apply to this proposal.

(2) The introduction of a three-years' time-limit would in some cases place parties in a difficult situation. Some forms of impotence are incurable, but others, particularly if they are due to mental causes, are

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(8) We have suggested that this time limit should apply in the case of of a petition under the Matrimonial Causes Act, 1965, s.9(1)(b), (c) and (d) (para 34) and in the case of lack of consent if this were made a ground for making the marriage voidable (para 48).

curable or pass with time. Even if the impotence is incurable, this may not be known to the aggrieved party who, wanting the marriage to succeed, may continue to hope that consummation might be possible in time. Similarly, wilful refusal to consummate may be overcome by perseverance, as where a wife through frigidity or nervousness refuses to allow intercourse for a long period after marriage. Even after the aggrieved party has come to realise that the non-consummation is due to the other party's wilful refusal, it frequently happens that he nevertheless still continues his attempts to have the marriage consummated hoping that his efforts will eventually overcome the other party's reluctance. All such attempts by the aggrieved party are surely to be commended and should not be discouraged by an arbitrary time-limit, the effect of which would be to place the aggrieved party in the dilemma of electing between giving up his efforts to make a success of the marriage and taking his decree of nullity, or continuing his efforts and losing his decree.

(3) If after three years the marriage ceased to be voidable and could thereafter only be terminated by divorce, the aggrieved party who left the non-consummating spouse after the three years might be obliged to wait a further three years before a divorce on the ground of desertion (if there is no other ground) became possible.(9) The practical result might be that a young man or woman, who continued his or her efforts to consummate the marriage beyond three years, would be unable to have the marriage terminated till at least six years had elapsed from the date of marriage.

(4) If after the three years (i.e. after the marriage had ceased to be voidable), the aggrieved party left the impotent spouse, the aggrieved party would then be in desertion (since impotence is an illness which does not justify a party leaving the impotent spouse:(10) and

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(9) If the Divorce Reform Bill becomes law in its present form, it may still be necessary to wait two years under clause 2(1)(c) (desertion) or 2(1)(d) (separation).

(10) See footnote 36, supra

after another three years,[11] the impotent spouse would be able to divorce the aggrieved party on that ground. On the other hand, if the refusal to consummate was due to wilful refusal, the aggrieved party could leave and allege constructive desertion or, possibly, cruelty. In the result, if after the three years the aggrieved party left because the marriage had not been consummated but did not know whether the non-consummation was due to impotence or wilful refusal, he or she would be guilty of a matrimonial offence if the court found impotence to be the cause of non-consummation, but he or she would be blameless if the court found the cause to be wilful refusal to consummate.

VII PARTIES TO A NULLITY SUIT

Void Marriage

61. In addition to the spouses themselves, anyone with a sufficient interest in obtaining a declaration of nullity may petition; a slight pecuniary interest is sufficient[12] and anyone whose title to property would be affected, or on whom a legal liability might be cast by the natural result of the marriage - the birth of issue - has a right to contest its validity.[13] Thus, a sister having a contingent interest under a settlement if her brother died without issue can contest the validity of her brother's marriage[12] and formerly a father could contest his son's or daughter's marriage because he might be liable to support his grand-children under the Poor Relief Act 1601, s.7.[13] In the latter case the Privy Council, then the final court in matrimonial matters, said that any legal interest, however small, was unquestionably sufficient, even if the interest was of an extremely minute and contingent character;[14] indeed, they went on to say that the inhabitants of a parish, who might be liable to support the issue of the marriage, might possibly have had such an interest. In that same case, the lower court held[15] that the father of an infant child had a moral interest entitling him to petition and that such moral interest extended to adult children residing in their father's house, but the Privy Council,

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(11) Two years if the Divorce Reform Bill becomes law.

(12) Farnouth v. Watson (1811) 1 Phil. 355

(13) Ray v. Sherwood (1837) 1 Moo. P.C. 353 at 399,400

(14) Ibid. at 402

(15) Ray v. Sherwood (1836) 1 Curt. 193 at 227

while expressly refraining from dealing with either point, preferred to rest their case on the ground of the grandfather's possible liability to support his grandchildren. In view of the insignificant nature of the pecuniary interest needed to give the petitioner the right to sue it is perhaps surprising that a relative's spes successionis, the right to inherit on an intestacy, which could be defeated by a valid marriage, is not a sufficient interest entitling the relative to contest the marriage during the spouse's lifetime.(16) But after the spouse's death the relative has such an interest if his right of succession is affected by the validity of the spouse's marriage.(17)

62. The respondent to the suit is the other spouse, or both spouses are respondents if the suit is brought by a third party;(18) in addition, any person may be given leave to intervene in the suit.(19)

Voidable Marriages

63. In the case of impotence no-one other than one of the spouses is allowed to petition.(20) The general view is that the same applies in the case of grounds other than impotence, and this view is supported by obiter dicta in the House of Lords.(21) The other spouse is respondent and the court has power (as it has in all matrimonial suits) to give third parties leave to intervene.(19)

64. We think that in the case of a voidable marriage the position should remain as it now is, that is to say the suit must be brought during the lifetime of both parties(22) and the grounds of nullity should be treated as

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(16) Ray v. Sherwood (1835) 1 Curt. 173; 193 at 225; but the Privy Council expressly left the point open: (1836) 1 Moo. P.C. 353 at 390; in J. v. J. [1953] P.186, which was a niece's petition, the point was not decided as the niece attempted to petition as the wife's next friend and not in her own right.

(17) Re Park [1954] P.112, C.A.

(18) Wells v. Cotham (1863) 3 Sw. & Tr. 364.

(19) Matrimonial Causes Act 1965, s.44.

(20) A. v. B. (1868) 1 P. & D. 559; Inverclyde v. Inverclyde [1931] P.29, 41; Harthan v. Harthan [1949] P.115, 132.

(21) Ross-Smith v. Ross-Smith [1963] A.C. 280 at 306, 348. In the case of nullity on grounds set out in s.9(1)(b), (c) and (d) (mental disorder, epilepsy, venereal disease and pregnancy per alium), the limitations in s.9(2), namely that the court must be satisfied that the petitioner was ignorant of the defect at the time of the marriage and that no sexual intercourse took place after he discovered it, indicate that the legislature had in mind that no-one but a spouse could be petitioner.

(22) Subject to any statutory time-limit: See Matrimonial Causes Act 196[illegible] s.9(2) and our proposal in para 34.

matters of personal complaint, so that only a spouse should be able to petition to have the marriage annulled.[23] Only the other spouse should be respondent to the suit, though the court should retain its existing power to allow a third party to intervene.

65. Who should be able to petition in a void marriage? The existing law is that, in addition to the spouses themselves, any person who has a pecuniary interest in having a declaration of nullity should be able to petition. It is tempting to exclude persons with insignificant interests, but it is difficult to see where the line could be drawn.[24] Our provisional view is that the law should remain as it is. We would welcome views as to whether the law should be altered.

66. Who should be made a party to a petition in a void marriage? A decree declaring a marriage to be void affects the children of the spouses who may be bastardised and lose rights of property as a result of a finding that a marriage is void;[25] yet children are not given any notice of the proceedings and may not even know that proceedings are on foot. The children of a void marriage are legitimate if at the time of the act of intercourse resulting in the birth (or at the time of the marriage if later) one spouse or both reasonably believed that the marriage was valid.[26] Therefore, the issues determining whether a child is legitimate are: First, is the marriage valid or void? And, secondly, if the marriage is void, did the spouse or spouses reasonably believe it to be valid at the relevant time? As to the first issue, a decree of nullity is a judgment in rem which is, therefore, conclusive on the children. As to the second issue, a finding that the spouse had or had not the requisite belief could only be binding

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(23) See paras 47 to 48 where we invite views as to creating a possible exception in the case of insanity.

(24) In some countries persons with a moral interest can also petition: e.g. in France: the ascendants or the family council, the lawful spouse in the case of bigamy by the other spouse, the public prosecutor; in West Germany: the lawful spouse in the case of bigamy and the public prosecutor; in Switzerland: the public authority.

(25) For an example of what can happen, see Plummer v. Plummer [1917] P. 163, C.A. where after a decree of nullity had been pronounced a guardian ad litem of the child of the marriage was appointed, the child was given leave to intervene for the purpose of appealing against the decree and the decree was rescinded on appeal.

(26) Legitimacy Act 1959, s.2. A further prerequisite to legitimation is that the child's father must be domiciled in England at the child's birth, or, if the father died before birth, immediately before his death: ibid.

(if at all, since legitimacy is not an issue in the suit and a custody order can be made whether or not the children are legitimate) between the parties to the proceedings, namely the spouses. However, if the court finds that one spouse or both had the requisite belief[27] that would for practical purposes go a long way towards, if not be conclusive as, a finding of legitimacy. Similarly, if the court made a finding, albeit obiter, that neither spouse had the requisite belief, such finding would presumably be a reflection of the evidence and the existence of such evidence would be a substantial, if not conclusive, obstacle to a subsequent legitimacy petition. Either finding would be made on the basis of the spouses' evidence untested by cross-examination on the question of legitimacy (or, if the petition is undefended, completely untested) and, possibly in the absence of other relevant evidence. Moreover, if the children were of tender years at the time of the nullity suit and if after reaching their majority they found it advisable to initiate legitimacy proceedings, their parents might by then not be available to give evidence.

67. We, therefore, recommend that the children (if any) of the spouses should be made parties to a petition for nullity of a void marriage. We appreciate that this would add somewhat to the expense of the proceedings and that in many cases the interests of the children would not suffer even if they were not made parties and separately represented. But in view of the small number of petitions[28] we do not regard the additional expense as adequate reason for dispensing with a safeguard which can only be certain of operating when needed if it is made mandatory in all cases.

VIII SHOULD NULLITY PROCEEDINGS BE COMBINED WITH (1) PROCEEDINGS TO DECLARE THE MARRIAGE VALID, AND (2) LEGITIMACY PROCEEDINGS?

68. There arises a further question: should nullity proceedings be combined with proceedings for a decree of validity of the marriage, so that the result of the proceedings would be a declaration that the marriage is either valid or void? If that were done and the same proceedings investigated the question of legitimacy of children, then the result of the suit for nullity would be to settle once and for all both the status of the marriage and the status of the children. Proceedings for declaration of validity of

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(27) See, for instance, Collett v. Collett [1967] 3 W.L.R. 280 at 287 where the court made this finding.

(28) An average of 75 a year: see para 5

a marriage or of legitimacy are governed by the Matrimonial Causes Act 1965, s.39, which requires that the Attorney-General be made a party and provides that the court shall direct what other persons must be given notice of the application so that they may apply to intervene if their interests are affected. This is a valuable safeguard[29] for third parties may be adversely affected if a marriage is declared to be valid or if children are held to be legitimate, e.g. they may have rights under a settlement contingent on a spouse dying unmarried and/or without legitimate issue. The Attorney-General is made a party as "the repository of the public conscience"[30] and his presence has the advantage that he can investigate the issues impartially and the result of his investigations could be of assistance to the court, in the same way as where the Official Solicitor appears for a respondent of unsound mind.

69. The disadvantages of combining jurisdictions are:

(1) Under existing procedure the court, on a nullity petition, has only to consider the one issue raised by the petitioning spouse, i.e. is the marriage void on the ground alleged? If that ground is established the court declares the marriage to be void. If the ground is not established, the court dismisses the petition but without proceeding to declare the marriage valid, though the dismissal of the petition may remove the only doubt as to the validity of the marriage and in practice generally amount to a finding that the marriage is valid. But this is not necessarily so as there may be some other ground on which the marriage could be attacked by the petitioner and the court would need to have evidence that none of these grounds exists before it made a declaration that the marriage is valid. This should normally present no difficulty, but what is the court to do if the petitioner, not at all anxious to have his marriage declared valid, refuses or is unable to give the additional evidence? Suppose the petitioner fails to establish the ground he had alleged, but it appears that the marriage might be void on some other ground, such as affinity or bigamy, which for the

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(29) Collett v. Collett [1967] 3 W.L.R. 280, 287 ("These are important safeguards because the rights of third parties may be adversely affected by a declaration that a marriage is valid and, consequently, that the children of the marriage are legitimate.")

(30) Edwards, The Law Officers of the Crown, 1964, p. 287

moment he is unable to establish but which he wants to keep in reserve hoping that evidence will become available later - how can the court declare the marriage to be valid knowing that there is a real possibility that it is void? The court not being satisfied that the marriage is void is not the same as the court being satisfied that the marriage is valid.

(2) If legitimacy proceedings were combined with the nullity suit, the children, if infants, would be represented by their guardian ad litem who would see that their interests are safeguarded. If, however, the children are of age and take no part in the proceedings, is the court to make a finding of legitimacy or illegitimacy on what may be incomplete evidence?

(3) It would be necessary to serve all persons who might be affected as provided in s. 39, thereby increasing the costs.

70. The advantages of combining jurisdictions are:

(1) In almost all cases there will be no doubt as to the marriage being valid once the court has disposed of the ground or grounds which are alleged to make it void and it will only be in a small minority of cases that the court would feel unable to pronounce the marriage to be valid. The statute could guard against such cases by providing that on dismissing a petition the court, only if satisfied that the marriage is valid, should declare it so to be. Similarly, the court could be left with a like discretion in respect of the issue of legitimacy.

(2) The persons who, in addition to the Attorney-General, would need to be given notice of the proceedings are probably the same both in proceedings to establish the validity of a marriage and in legitimacy proceedings; there must be few marriages in which property rights of persons other than the spouses and the children will be affected by the validity of the marriage or the legitimacy of the children.

(3) The cost of giving notice to the persons affected would be small; there would be the cost of making the Attorney-General a party but he need not incur further costs if on investigation he is of opinion that he cannot help the court by being represented.

71. On balance, we think that a combination of jurisdictions would create more problems than it would solve, and would needlessly complicate a nullity suit and would increase its cost. Suits of nullity of void marriage are very few[31] and the present system appears to work satisfactorily and should not be altered. Is there a more compelling reason for declaring the marriage to be valid after the dismissal of a petition for nullity of a void marriage than there is after dismissal of a petition for divorce? Though in theory the marriage, in either case, might still be impeached, in practice the parties leave the court knowing that their marriage is valid.

IX POSSIBLE ADDITIONAL GROUNDS OF NULLITY

72. Three possible additional grounds of nullity were examined by the Morton Commission:[32]

(1) fraudulent or wilful concealment of material facts which if known to the petitioner might have caused him to forego marriage;

(2) grave disease or abnormality;

(3) treatment, medical or surgical, which has resulted in sterility.

73. The Morton Commission rejected all three grounds for the following reasons: Ground (1) was thought to be too wide, so that it would cause a great deal of uncertainty. It would give rise to difficulties of interpretation and there would be danger that a widening interpretation might in time allow marriages to be annulled on the flimsiest pretext. Ground (2) was thought to be lacking in precision and, though the court might in time evolve some working rule, this would almost certainly be arbitrary in its results. Ground (3) was rejected principally because some kinds of treatment make a person sterile, whereas other kinds make

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(31) The average is 75 a year: see para 5

(32) Paras 267-272

it uncertain whether or not the person treated becomes sterile, and great difficulty and unhappiness might arise if the second category of treatment were excluded from relief, because of the element of doubt present, and the first category provided for. The Morton Commission's conclusions was that the existing grounds of nullity cover the major cases of hardship and that an extension would create more difficulties than it would remove. The Church of England is satisfied with the existing grounds of nullity and is opposed to extending them.(33)

74. We are inclined to think that the Morton Commission came to the right conclusion. Ground (1) amounts to an allegation of fraud and the ease with which such a ground can be extended to include minor complaints was shown, for example, by the New York law which had fraud as a ground for annulling a marriage; this was interpreted as meaning any suppression, evasion or representation as to health, status, wealth, character, criminal convictions, chastity, pregnancy, prior marriage, citizenship or drug addiction.(34) Ground (2) is too vague to be satisfactory. Ground (3) is a proposal which, if accepted, must logically include natural sterility as a ground of nullity and this has never been a ground for nullity; the Church Report also rejects ground (3).(35) Other grounds examined and rejected by the Church Report were homosexuality and defective intention, the former for the reason that it should be further examined from the medical point of view(36) and the latter for the reason that in a society where marriage must be contracted in set forms the consent expressed by going through the ceremony of marriage must prevail.(37)

75. Our provisional view is that there is no need for adding new grounds of nullity. Nevertheless, we set out below further possible grounds of nullity for consideration and views are invited as to whether these or any other grounds should be added to the existing grounds of nullity. We think that any additional grounds should be specific and that a general ground based on fraud or concealment of a material fact should not be adopted for the reasons stated above. Consideration might, however, be given to the inclusion in the Matrimonial Causes Act 1965, s. 9(1)(b), (c), (d) (see paras 28, 30) of the following grounds:

(1) Certain illnesses.

The illnesses which are at present grounds for nullity are mental disorder, epilepsy and venereal disease at

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(33) Church Report, pp. 29, 39-41

(34) J.R. Clevenger, "Annulment of Marriage," 1946; Busman v. Busman (1931) 251 N.Y.S. 474

(35) Church Report, pp. 39-40

(36) Church Report, pp. 40-41

(37) Church Report, pp. 26-28, 41

the time of the marriage. Consideration could be given to other illnesses, if any, which on medical evidence, either because of their effect on the other spouse or because they are hereditary, are sufficiently disruptive of marital life, to be made express grounds for annulling the marriage.

(2) A spouse being a habitual drunkard or drug addict. This is a ground for a separation order in the magistrates' court[38] and consideration could be given to making it a ground for nullity where, unbeknown to the other party, a spouse is a habitual drunkard or drug addict at the time of marriage.

(3) A spouse having been convicted of certain offences or served a certain term of imprisonment. This ground would not eliminate the hard case of a wife who finds herself married to a man who is "on the run," but who has not been convicted of any offence. Such a case was Spitalnick v. Spitalnick[39] where the husband was arrested on the wedding day. There, however, the non-disclosure of his criminal past aggravated the wife's shock and was held to be cruelty, so that she obtained a divorce on that ground. On the other hand, this ground would eliminate the hardship of such a case as Priestley v. Priestley[40] where, after marriage, the husband disclosed to the wife that he was a convicted criminal, but it was held that no exception could be taken to the manner of his disclosure and there was, therefore, no cruelty on his part.

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(38) Matrimonial Proceedings (Magistrates' Courts) Act 1960, s.1(1)(f). S. 16 of the Act defines a "habitual drunkard" or "drug addict" as a person (not being a mentally disordered person within the meaning of the Mental Health Act 1959) who, by reason of habitual intemperate drinking of intoxicating liquor, or of habitual taking or using, otherwise than upon medical advice, of any drug to which any of the provisions of the Dangerous Drugs Act 1951, for the time being applies, is at times dangerous to himself or others, or is incapable of managing himself or his affairs, or so conducts himself that it would not be reasonable to expect a spouse of ordinary sensibilities to continue to cohabit with him.

(39) The Times Newspaper, 24 May 1956.

(40) The Times Newspaper, 7 November 1958; ibid. 19 June 1959, C.A.

(4) A spouse concealing his matrimonial status, e.g. whether he had been married before. Where a wife discovered after marriage that her husband had been twice married and twice divorced, that he had children by both marriages and an illegitimate child by another woman, this non-disclosure did not of itself give her any ground of complaint, but she obtained a divorce on the ground of cruelty in that the husband, by disappearing and leaving her to discover his past, aggravated the shock she was bound to suffer by her discovery.(41) The wife would have had no remedy at all (except possibly on desertion in due course) if, because of a robust constitution, the shock failed to cause injury or apprehension of injury to her health.(42)

X COLLUSION

76. In the Ecclesiastical Court(43) collusion was an absolute bar to obtaining a decree of nullity whether of a void or voidable marriage and it continues to be an absolute bar in nullity suits to-day.(44) Now that collusion has been made a discretionary bar in suits for divorce and judicial separation(45) and it is being proposed that in those suits it should be abolished altogether,(46) the question arises as to what part, if any, collusion should play in suits for nullity. Collusion means an agreement or bargain between the parties whereby the initiation of the suit is procured or its conduct provided for and it ranges from agreements involving maintenance to arrangements to pervert the course of justice by presenting a false case. There appears to be no good reason why arrangements with regard to maintenance, if they do not involve deception

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(41) Carpenter v. Carpenter [1955] 1 W.L.R. 669

(42) If the Divorce Reform Bill becomes law, the wife would probably be able to obtain a divorce on these facts without showing injury or apprehension of injury to health; see cl. 2(1)(b).

(43) Crewe v. Crewe (1800) 3 Hag. Ecc. 123; Donegal v. Donegal (1821) 3 Phil. 597; Pollard v. Wybourn (1828) 1 Hag. Ecc. 725

(44) Matrimonial Causes Act, 1857, ss. 22, 41; Judicature (Consolidation) Act 1925, s. 32; Synge v. Synge [1900] P. 180, 205, 206. See also Matrimonial Causes Rule 9(2), Form 2 which required the petition to state whether there is collusion.

(45) Matrimonial Causes Act 1965, s.5, re-enacting the provisions of the Matrimonial Causes Act 1963, s.4.

(46) Divorce Reform Bill, cl. 9(3)

of the court, should be a bar to obtaining a decree of nullity of a voidable marriage, and still less so a decree of a void marriage. On the other hand, obtaining a decree by the presentation of a false case is obviously objectionable. This, however, does not necessarily have anything to do with collusion; in an undefended case the petitioner may present a false case without there necessarily being any collusion with the respondent. In Scotland there has never been any bar based on collusion or deceit and apparently the need has never been felt. If it is discovered that in truth there were no grounds for the decree, the decree will not be made absolute - not because of deceit but because of the absence of grounds. If, despite the deceit, there were good grounds for annulment it may be more appropriate to punish the deceiver by some such means as a prosecution for perjury, rather than by refusing a decree.

77. We think that the effect of collusion on proceedings for nullity must depend on what is decided in relation to divorce. Should collusion remain a discretionary bar in divorce suits, it should equally be a discretionary bar in nullity suits. If it should be abolished in relation to divorce it should equally be abolished in relation to nullity.

XI SUMMARY OF QUESTIONS AND PROVISIONAL CONCLUSIONS

78. (1) While we do not ourselves recommend any alteration in the prohibited degrees which render a marriage void, we invite views on this and on the application of prohibited degrees in relation to adopted children. (paras 12-18).

(2) Views are invited on whether persons with certain mental defects should be incapable of contracting marriage (para 21).

(3) Views are invited on whether the law concerning duress and mistake in relation to lack of consent should be altered (para 24).

(4) Wilful refusal to consummate the marriage should remain a ground for nullity (paras 26, 27).

(5) The Matrimonial Causes Act 1965, s. 9(1)(b) should be redrafted to make clear that it refers to a party who, though of sufficient understanding to consent to a marriage, is of unsound mind in other respects (para 29).

(6) In the Matrimonial Causes Act 1965, s. 9(2) three years and approbation of marriage should be substituted for one year and absence of marital intercourse after discovery of the defect (paras 33, 34, 36).

(7) Views are invited on whether artificial insemination of the wife or adoption or birth of a child resulting from the joint act or with the consent of both parties should not per se constitute a bar to the annulment of a voidable marriage (paras 38-41).

(8) Approbation should be an absolute bar to the annulment of a voidable marriage (para 42).

(9) Lack of consent (otherwise than by reason of insanity rendering a person incapable of consenting to marriage) should render a marriage voidable and not void and there should be a time-limit of three years for instituting proceedings (para 44, 45). There should not be any time-limit in the case of marriages voidable for impotence or wilful refusal to consummate (para 60).

(10) We are inclined to the view that insanity rendering a person incapable of consenting to marriage should continue to render a marriage void, but views are invited on this subject (paras 46-49).

(11) Our view is that it is not practical for a marriage where one party is, or both are, under sixteen to be ratifiable (para 53). We invite views as to whether such a marriage should remain void or be voidable (paras 51, 52).

(12) Voidable marriages should be retained, but notwithstanding the annulment, the marriage should be treated as having been valid until the decree and views are invited as to the form of the decree (paras 54-59).

(13) While our view is that in the case of a void marriage the only third parties who should be able to obtain a declaration of nullity are those who have a pecuniary interest, we invite views whether the law in this respect should be altered (para 65).

(14) In the case of a void marriage any child of the parties should be made a party to the suit (paras 66, 67).

(15) Proceedings for nullity of a void marriage should not be combined with proceedings to declare a marriage valid or the children legitimate, both of which should remain separate proceedings (paras 68-71).

(16) While our view is that there should not be any extension of the existing grounds of nullity, we invite views as to possible additional grounds (paras 72-75).

(17) Collusion should not be an absolute bar in nullity but, at the most, a discretionary bar and should be abolished if it is abolished in divorce proceedings (paras 76, 77).