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THE ANNULMENT OF MARRIAGES IN PENNSYLVANIA

F. EUGENE READER*

Prior to the amendatory act of 1935, hereinafter set out, there was only one ground for the annulment of a marriage in Pennsylvania. That was where one of the parties to an alleged marriage had a spouse living at the time. With the remedy so confined a wholly unsatisfactory situation was presented with respect to the law of marriage, in that in all the other cases where a purported marriage was as a matter of law void and no marriage at all there was no method whereby a judicial declaration of its invalidity could be obtained. An attempt was made to overcome this defect by presenting a bill in equity asking for a decree that such a marriage was void, but it was held that a court of equity has no jurisdiction to annul a marriage.1 When this method proved unsuccessful it was thought that a way out would be to have the court make a declaration of invalidity under the declaratory judgments act, but the decision in McCalmont v. McCalmon2 precluded the use of this remedy.

The seriousness of this omission in our remedial law of marriage can be explained by an illustration. Suppose that A and B go through a ceremony of marriage, but B is insane at the time and hence incapable of consenting to be married. This purported marriage, due to the lack of consent, is wholly void and could be attacked collaterally, even after the death of the parties, in any proceeding where it would be material.3 However, there is no way to obtain a decree of annulment or a judicial declaration of its invalidity. Now suppose that B thereafter brought proceedings against A for support. A could introduce evidence to prove that B was at the time of the purported marriage insane and hence that A and B were not husband and wife. If this were found as a fact B’s action would be dismissed. Now suppose A married C and was prosecuted for bigamy. Again A would have to bring in his witnesses and establish as a fact B’s insanity at the time of the ceremony. Here the jury might find as a fact that B was not insane at that time and A would be convicted; for the finding of insanity and no

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1 Pitcairn v. Pitcairn, 201 Pa. 368 (1902).
2 293 Super. 203 (1928). Any doubt on this score was settled by the Act of Apr. 25, 1935, P.L. 72; 12 P. S. Sect. 836, which provides, inter alia, that "proceeding by declaratory judgment shall not be permitted in any case where a divorce or annulment of marriage is sought."
3 Newlin’s Estate, 231 Pa. 312 (1911); 76 A. L. R. 772.
marriage as an incident to the support order, would not be res judicata nor at all binding in this entirely separate and distinct criminal prosecution. Again it might happen that upon A's death B would claim a share in his estate, as his widow. If so, the question of the fact of her insanity at the time of the purported marriage would again be a collateral issue and for the purpose of this proceeding, this finding of fact might be either way. Thus the question of whether A and B were legally married might arise time and again and the question would never be settled once and for all, as it would be by an annulment decree.

To fill this void in the remedial law section twelve of the divorce law was amended by the Act of 1935 to read:

"In all cases where a supposed or alleged marriage shall have been contracted, which is absolutely void by reason of one of the parties thereto having a spouse living at the time of the supposed or alleged marriage, or, if, for any other reason, the supposed or alleged marriage was absolutely void when contracted, such supposed or alleged marriage, may upon the application of either party be declared null and void. . . ."  

When this amendatory provision was first introduced in the General Assembly it provided for an annulment when the supposed marriage was "absolutely void or voidable." The elimination of this "or voidable" phrase before final enactment was prompted by sound reasons, an appreciation of which requires a consideration of certain fundamental concepts and distinctions.

**FUNDAMENTAL DISTINCTIONS**

A marriage is designated as a void marriage when, due to some fact or circumstance existing at the time of the purported marriage, there was and could not be any marriage at all. On the other hand, a voidable marriage refers to the situation where, due to some fact present at the time of the marriage, one or both of the parties is given a choice of either treating the marriage as valid or of rendering it invalid, by an act or by judicial proceedings. Whereas a void marriage has

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4The question might arise collaterally in a divorce proceeding, a prosecution for adultery, a claim for support or against A's estate by a woman he subsequently married, a dispute as to whether title to land was held as an estate by the entireties, in a proceeding involving the legitimacy of a child to the first or subsequent marriage, etc.


6The italicized words were added by the amendment.

7See the discussion infra, pages 44-45.

8As where a party to a marriage entered into when one or both of the parties was under the common law age of consent, disaffirmed it after the age of consent was reached; no judicial annulment being necessary. Infra, note 29.

9As where, under the Canon Law, annulment proceedings were employed because of the fraud of the other party to the marriage.
no legal effect whatever and could not be given validity by the acts of the parties to it, a voidable marriage is a valid and binding marriage until disaffirmed and the original defect in it may be cured by the ratification of the innocent party.\textsuperscript{10} At the common law, the following marriages were voidable: where one or both of the parties were under the age of consent;\textsuperscript{11} where the marriage was incestuous;\textsuperscript{12} where it was induced by fraud;\textsuperscript{13} where the consent of one of the parties was obtained by duress;\textsuperscript{14} and where one of the parties was impotent.\textsuperscript{15} Where a party was under the age of consent or where a marriage was incestuous either party could avoid it. Unlike the other voidable marriages neither party to an incestuous marriage could ratify it so as to cure the defect and render it incapable of being annulled. In all the other types of voidable marriages, only the innocent or injured party could annul it, and that party could ratify the marriage and render it indissoluble.

\textsuperscript{10}In general with respect to void and voidable marriages see: L.R.A. 1916C, 690; Fessenden, Nullity of Marriage, (1899) 13 Harv. L. R., 110, pp. 112-113.

\textsuperscript{11}Infra. note 29.

\textsuperscript{12}See Bowers v. Bowers, 10 Rich. Eq. (S. C.) 551, 73 Am. Dec. 99, 101, (1858); Boylan v. Deinzer, 45 N. J. Eq. 485, 18 Atl. 119 (1889); L.R.A. 1916C, 723; 76 A.L.R. 776. Although the Pennsylvania statutes expressly state that incestuous marriages are "void to all intents and purposes," and that marriages of first cousins are "void," in view of the fact that the statutes also provide that if such marriage is not dissolved during the life time of the parties its unlawfulness shall not be inquired into after the death of either party and that parties to such a marriage may obtain a divorce, it would seem that such marriages are voidable only and hence can not be collaterally attacked, but are valid unless terminated by a divorce during the life of parties. See Act of March 31, 1860, P.L. 382, Sect. 39, 18 P. S. Sect 731; Act of March 13, 1815, P.L. 150, 6 Sm. L. 286, Sect. 5, 48 P. S. Sect. 163; Act of June 24, 1901, P.L. 597, Sects. 1 & 2, 48 P. S. Sects. 165, 166; Act of May 2, 1929, P.L. 1237, Sect. 10, 23 P. S. Sect. 10.

The only two cases involving this question merely decided that such a marriage could not be attacked after the death of a party thereto. By way of dictum, in Parker's Appeal, 44 Pa. 309, 312 (1863) it was said that such a marriage is "not void, but voidable"; while in Walter's Appeal, 70 Pa. 392, 395, (1872) it is said that such a marriage is absolutely void and could be collaterally attacked in any proceedings prior to the death of the parties thereto. And see Bapa v. Bapa, 22 D. & C. 153 (1934).

\textsuperscript{13}At the common law there really was no such ground as fraud for avoiding a marriage. As said in Moss v. Moss, [1897] P. 263, "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." That is, fraud meant deception as to the nature of the ceremony or the identity of the other party and not some misrepresentation which induced an actual consent to the marriage. No such rigid rule ever obtained in this country. Marriage was a status which had its inception in a contract and, like any contract, if one party's consent was induced by fraud that party could either disaffirm or ratify the contract. However, what fraudulent representations are sufficient to render a marriage voidable presents a problem entirely different from what is sufficient fraud to avoid an ordinary contract and this problem is without the scope of this paper.

\textsuperscript{14}L. R. A. 1916C, 706; 91 A. L. R. 414 (Showing there is some authority to the effect that such a marriage is void under the common law).

\textsuperscript{15}See 1 Vernier, American Family Laws, 197; L. R. A. 1916C, 694.
The distinction between the two remedies available in Pennsylvania for the termination of a marriage should also be noted. An annulment is a retroactive judicial declaration that the parties concerned never were married. The effect of the decree is to render illegitimate any children that may have been born to the union and it constitutes a pronouncement that the usual legal incidents of the status of marriage never accrued. A divorce, on the other hand, is a declaration that the parties have been validly married, and are husband and wife and this status has been terminated by the decree. Children born or en ventre sa mere prior to such decree are legitimate and all the legal incidents of marriage existed up to the time of the decree. Under the common law an annulment was the remedy for either a void or voidable marriage, so that, as to the latter, when a spouse made an election to avoid the marriage by annulment proceedings the decree was given a retroactive effect so as to render the marriage void ab initio. In Pennsylvania, however, the policy has been to make these voidable marriages terminable only by a divorce. By so confining the remedy it makes it impossible for the injured spouse to make his or her election have a retroactive effect with the attendant unfair and unjust results. Thus, physical disability, relationship, and fraud, force, or coercion are grounds for divorce only in Pennsylvania, whereas they were grounds for annulment under the common law and are grounds for annulment under the statutory provisions of many states today.

If, then, the act of 1935 had made voidable marriages subject to annulment, it would have flatly reversed the long established policy of this state; and that was not the purpose of the amendment. Its object was merely to correct an omission in the remedial law. Further, if the statute had so provided it would have thrown considerable confusion into our law of marriage and divorce. For example, the question would have arisen as to whether thereafter an annulment was the exclusive remedy for a voidable marriage, formerly covered in the grounds for divorce, or whether the injured spouse was to have a choice of either remedy. The "or voidable" clause was wisely eliminated. Therefore, as the law of Pennsylvania now stands, any void marriage and only a void marriage may be annulled.

16 See 1 Vernier, Supra note 15, pp. 237-238.  
18 This result was reached in N. Y. although the statute provides that voidable marriages are "void from the time their nullity shall be declared by a court of competent authority." Re Moncrief's Will, 235 N. Y. 390, 139, N. E. 550, 27 A. L. R. 1117 (1923).  
19 Act of May 2, 1929, P. L. 1237, Sect. 10, 23 P. S. Sect. 10. The clause as to impotency was taken from the Act of March 13, 1815, P. L. 150, as reenacted by the amendment of June 28, 1923, P. L. 886; that as to fraud force, or coercion, from the Act of May 8, 1854, P. L. 644; and that as to marriages between two persons within the prohibited degrees of consanguinity or affinity from the Act of March 13, 1815, P. L. 150, Sect. 5.
VOID MARRIAGES

To present an adequate picture of the effect of the statute it might be well to examine briefly the specific types of marriages which are, as a matter of law, absolutely void. By a rough classification a purported marriage is void and hence can be annulled, (a) where one, or both, of the parties does not consent to becoming married, or (b) where one of the parties is by law rendered incapable of entering into the marriage regardless of consent.

Under the first category fall the following situations: where a party was insane at the time of the purported marriage and hence incapable of giving an intelligent consent;20 where a party was so intoxicated at the time of the marriage as to be incapable of giving an intelligent consent;21 where the ceremony was performed in jest and not intended to be a contract of marriage;22 and where, because of a mistake as to the nature of the ceremony or as to the identity of the other party, a party to the marriage never intended nor consented to be married at all, or to marry the other party to the ceremony.23 Though marriage is a status it has its inception in a contract, which, like any contract, can be entered into only by the mutual consent of the parties. Such consent being absent in these cases there can be no marriage at all. They differ from a marriage induced by fraud or duress in that there consent has been given, but due to the fraud or duress the innocent party may, as in any ordinary contract, disaffirm the marriage. The language in a few of the cases to the effect that a marriage entered into in jest, or while insane or intoxicated, may be ratified by cohabitation24 is not sustained by logic or policy. A mutual intention to become married, and not cohabitation, establishes the status. Of course, if after the insanity or intoxication ceases, or after a marriage in jest, the parties cohabit with the intention of becoming husband

20Newlin's Estate, 231 Pa. 312 (1911).
21Montgomery v. U'Nertle, 143 Md. 200, 122 Atl. 357 (1923); Bickley v. Carter, 79 S. W. (2nd.) 436 (Ark. 1935); Dunphy v. Dunphy, 161 Cal. 380, 119 Pac. 512, 38 L. R. A. (N. S.) 818 (1911); Prine v. Prine, 36 Fla. 676, 18 So. 781, 34 L. R. A. 87 (1895); but see Barber v. People, 203 Ill. 543, 68 N. E. 93 (1903) (saying such a marriage is voidable only and not void).
22McClurg v. Terry, 21 N. J. Eq. 225 (1870); Crouch v. Wartenberg, 66 W. Va. 664, 104 S. E. 117, 11 A. L. R. 212 (1920); Crouch v. Wartenberg, 91 W. Va. 91, 112 S. E. 234 (1922). The same legal effect follows, of course, where the marriage was not in jest, but where the parties go through a marriage ceremony in order to accomplish some ulterior motive and without any intention of becoming husband and wife. So, see Dorgeloh v. Murtha, 92 Misc. 279, 156 N. Y. S. 181 (1915); and cf. Barker v. Barker, 88 Misc. 300, 151 N. Y. S. 811 (1914). This latter case is cited in Note (1921) 21 Col. L. R. 194, as holding that such a marriage is voidable and not void. However, the court merely held that evidence by one of the parties of a mental reservation or secret intention not to be married is not admissible to invalidate a complete ceremonial marriage. In the Dorgeloh case, supra, the same marriage was annulled as void where it was shown that neither party intended to be married.
24See Prine v. Prine, supra, note 21, 18 So. 781, at 785 (intoxication or insanity); Meredith v. Shakespeare, 96 W. Va. 229, 122 S. E. 520, 526 (1924) (jest).
and wife it will create a valid common law marriage. However, a marriage is created here at that subsequent time, because of the mutual marital intent and it is not a case of ratification of a marriage contract that never existed. It may be said that it would be good policy to have such subsequent cohabitation automatically create the status of marriage, but there has never been a policy in the law which made cohabitation alone, even if issue resulted, create a marriage. The act may be criminal, but it can not make parties husband and wife unless both of them consent to becoming husband and wife. There is no more reason for holding that cohabitation creates the status of marriage where it follows a non-consensual ceremony than where it was preceded by no ceremony at all; though such ceremony may be indicative in a particular case that such subsequent cohabitation was accompanied by marital intent.

Under the second category fall bigamous marriages and a marriage between a spouse divorced for adultery and the co-respondent. It must be remembered that in all of these enumerated situations the purported marriage is wholly void and could be collaterally attacked in any proceeding where the validity of the marriage is material, even after the death of the parties. Hence it is not necessary to procure an annulment, but, as we have seen, such a decree is a very desirable remedy in that it is a final and conclusive declaration of invalidity.

INFANT MARRIAGES

The status of infant marriages in Pennsylvania requires a more extended discussion. At the common law the age at which an infant could consent to a valid and binding marriage was fixed at fourteen for males and twelve for females. Where either party was below seven years of age the purported marriage was wholly void, but when both parties were over seven and either or both were under the age of consent the marriage was voidable only and not void. Where only one of the parties was below the age of consent, either party could disaffirm

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25 Heffner v. Heffner, 23 Pa. 104 (1854); Thomas v. Thomas, 124 Pa. 646 (1889); Clark's Estate, 173 Pa. 451 (1896); and cases infra notes 27, 28.

26 The Act of March 13, 1815, P.L. 150, 6 Sm. L. 286, 23 P. S. Sect. 92, provides, "The husband or wife, who shall have been guilty of the crime of adultery, shall not marry the person with whom the said crime was committed during the life of the former wife or husband." In Estate of Steel, 183 Pa. 625 (1898), it was held that this statute imposes a personal incapacity to marry anywhere. Hence where the ex-husband married the corespondent in Maryland, both being domiciled in Pennsylvania, the purported marriage was absolutely void and she could not claim against his estate (his first wife having survived him). On the effect of such statutory provisions generally see: Restatement, Conflict of Laws, Sect. 130; Loughran v. Loughran, 292 U. S. 216, 54 S. Ct. 684, 78 L. Ed. 1219 (1934).

27 Newlin's Est., 231 Pa. 312 (1911) (insanity); Wayne Twp. v. Porter Twp., 138 Pa. 181 (1890) (bigamy); Estate of Steel 183 Pa. 625 (1898) (respondent marries corespondent).

28 So, if A marries B, who is already married, and then marries C without procuring an annulment of the first marriage, the marriage to C is valid. Klaas v. Klaas, 14 Super. 550 (1900).
the marriage upon the attainment of that age by the one that was under age. Further, unlike other voidable marriages, the marriage could be avoided and rendered void ab initio by the act of disaffirmance of a party and no decree of annulment was necessary. If, when the age of consent was reached the parties continued to live together, or otherwise affirmed the marriage, it could not thereafter be avoided but was treated as a valid marriage from the beginning.29

In the majority of the states in this country, statutes have expressly raised the age at which infants become capable of entering into a binding marriage.30 There is no such statute in Pennsylvania. There are only two statutory provisions which mention the age of the parties to a marriage. One act,31 dealing with the issuance of a marriage license, provides, that "if any of the persons intending to marry by virtue of such license shall be under twenty-one years of age, the consent of their parents or guardians shall be personally given before such clerk. . . ." It is obvious that this provision does not prohibit infants from marrying and has nothing to do with the capacity of an infant to contract a marriage. All states require parental consent to the marriage of minors below certain ages, but such requirements are only made a condition precedent to the issuance of a license and if the parties are over the age of consent, but under the age at which parental consent is required, it is universally held that the marriage is fully valid although parental consent was not obtained.32 The other act33 provides that "no license to marry shall issue, if either applicant therefore be under the age of sixteen years: Provided, that a judge of the orphans' court shall have discretion to authorize a license to be issued by the clerk . . . in special cases where one or both persons are under the age of sixteen years." This provision also merely imposes a condition to the issuance of a license and therefore in itself should not affect the validity of a marriage though a party to it is under that age. Our statutes provide in considerable detail for the procedure necessary for a formal and ceremonial marriage. So, a license must be obtained, three days must intervene between the application for the grant of a license, the parties are to be questioned and must swear to certain facts concerning their birth, age, prior marriage, etc.; and the above age provisions are but a part of this formal procedure. These provisions are

29See: Schouler, Marriage, Divorce, Separation, and Domestic Relations (6th Ed. 1921), sect. 20; Madden, Persons and Domestic Relations (1931) pp. 28-32; 1 Bishop, Marriage, Separation and Divorce (1891), sect. 149; 1 Black. Comm. 436; cf. Pollack and Maitland, History of English Law (2nd Ed. 1923) ii, pp. 389-390 (to the effect that only the party under age could disaffirm). 30For example, the Alabama statute provides: "A male under the age of seventeen, and a female under the age of fourteen years, are incapable of contracting marriage." Beggs v. State, 55 Ala. 108 (1876).


aimed at the prevention of hasty and ill considered marriages, or marriages which, due to the physical or mental health of the parties, are apt to be unsuccessful. However, such a formal marriage is only one way in which parties may be married. Our courts have interpreted these statutory provisions as being directory only and therefore there can be a common law marriage though no license was obtained at all, or it was improperly issued. A fortiori any acts that are a prerequisite to obtaining a license may be dispensed with and all that is necessary for a valid marriage is the mutual consent of the parties. There is no reason why infants who have reached the common law age of consent can not, by lying to the license clerk, or by not procuring a license at all, enter into a valid marriage which is binding and not terminable by judicial proceedings. It seems clear that the common law rules concerning the age of consent are still the law of Pennsylvania today.

It would seem therefore that if a case should arise in Pennsylvania where one of the parties to a marriage was below the age of fourteen or twelve, respectively, either party could, when the one under the age of consent reached that age, disaffirm it and thus render the marriage void ab initio. Since such act itself renders the marriage void from the beginning it would follow that after such disaffirmance either party could bring annulment proceedings.

INCONSISTENT PROVISIONS IN THE DIVORCE LAW

There is an inconsistency in the Divorce Law as it now reads which, unexplained, might be misleading. Whereas section twelve, as above quoted, confines annulment proceedings to void marriages, section fifteen of that law provides, inter alia, that "petitions for the annulment of void or voidable marriages may be exhibited to the court of common pleas of the county where the marriage was contracted . . ." The explanation of this contradictory language is this. Two bills amending the Divorce Law were introduced in the House of Representatives on February 18, 1935. One of these amended section twelve of the act by adding that marriages "void when contracted or voidable" could be annulled. The other amended section fifteen by providing that libels in divorce

34The recent case of McGrath's Est., 319 Pa. 309, 179 Atl. 599 (1935) contains a full exposition of the Pennsylvania law concerning common law marriages.
35This conclusion has been reached in several lower court cases: Greene v. Brandt, 13 D. & C. 712 (1927); Shouey v. Shouey, 16 D. & C. 693 (1930); Seibert v. Seibert, 3 D. & C. 142 (1923); Marich's Est., 8 D. & C. 645 (1923). Cf. Penxa v. Tanno, 15 D. & C. 79 (1930) and Hullahan v. Fritz, 24 Luz. 182 (1925), where marriages were annulled by a decree in equity (!) where girls aged thirteen and seventeen, respectively, obtained a license by falsifying and were married. 
37Both bills were introduced by Mr. Sowers and referred to the Committee on Judiciary General on Feb. 19. See original bills, cited in notes 38 and 39 infra.
could be exhibited in the court of common pleas of the county where either libellant or respondent resides and by correcting the reference to petitions "for the annulment of bigamous marriages" to read "the annulment of void or voidable marriages." The former bill was passed by the House of Representatives without change, but was amended in the Committee on Judiciary Special of the Senate by striking from it the reference to voidable marriages. As so amended it was enacted into law. The latter bill, however, was never amended and was enacted and approved by the Governor before the former bill was reported out of the Senate committee; so that the committee evidently was not aware of the "or voidable" phrase in that bill when it deleted that provision from the other bill.

In view of this explanation of the wording of the two sections and in view of the fact that section twelve is a substantive one, conferring the power to grant annulments, while section fifteen is procedural, dealing with jurisdiction and venue, there can be no question that the amendment to section fifteen does not confer any power upon the courts of common pleas to annul voidable marriages.

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