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**VOID AND VOIDABLE MARRIAGES IN MARYLAND  
AND THEIR ANNULMENT**

By JOHN S. STRAHORN, JR.\*

The essential task of this article will be to classify invalid or defective marriages in Maryland into those which are totally void and hence subject to collateral attack and those which are only voidable by appropriate steps of direct attack taken during the joint lifetime of the spouses.<sup>1</sup> But, as investigation of this question requires a survey of all the local law concerning the requirements of and impediments to a valid marriage, and, as well, an inquiry into the procedural aspects of annulment, the article will be, in effect, one on the broader questions of validity of marriage and annulment in Maryland.

**THE GENERAL DIFFERENCE BETWEEN TOTAL VOIDNESS  
AND VOIDABILITY**

Terminology presents the first problem. The phrase "totally void" will be used herein to express the idea of a marriage's possessing some defect rendering it susceptible to collateral attack, even after the death of one or both of the spouses. For such marriages no direct step or proceeding to annul is necessary, although the latter may be desirable. "Voidable" will be used to express the idea that the defect, at most, permits the validity of the marriage to be directly attacked by appropriate steps during the joint lifetime of the spouses, although without that the invalidity may not be asserted collaterally in any other proceeding. "Valid" and "completely valid" will be used interchangeably in the sense that the marriage meets all the requirements and encounters none of the impediments so that it can withstand both direct and collateral attack.

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<sup>1</sup> See, for an interesting historical discussion of the difference between direct and collateral attack, *Fornshill v. Murray*, 1 Bl. 479, 482-4 (1828).

In addition to the question of total voidness or mere voidability, there must be considered whether, if the marriage be only voidable, it may be avoided by simple private act, or a judicial proceeding is necessary. Related to this is the matter of ratification, which is possible for some, though not all, voidable marriages<sup>2</sup> and which is considered by some writers to be possible for certain marriages which are otherwise totally void. Whether such a latter class exists in Maryland law will be one of the inquiries of this article.<sup>3</sup> A certain confusion exists between a marriage's being totally void although capable of ratification, and its being voidable by private act without judicial proceeding.

Granting that ratification is possible, what conduct accomplishes it?<sup>4</sup> The most typical form recognized is indulgence in marital relations at a time when the impediment fact has been removed (insanity, intoxication, and duress), or is known to the one entitled to avail of it (fraud), or the "age of consent" had been reached (non-age).

Other conduct may suffice. Express assent, or assent implied from other conduct than marital relations may equal the latter if given or performed under the same circumstances. "Sleeping on one's rights" too long may, by the general equitable principle of laches, be as effectual as marital relations to ratify where ratification is possible. Waiver and estoppel must also be considered. The failure to take steps to avoid a voidable marriage before the death of one of the spouses would be substantially a ratification, although it is rarely thought of as such.

What of the legitimacy of the offspring of either a totally void marriage or a voidable one which has been properly avoided? The rule is that such children are illegitimate. One of the effects of total voidness is that illegiti-

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<sup>2</sup> The only type of "voidable" marriage which, under Maryland law, is incapable of ratification, is a marriage in one of the prohibited relationships. See *Infra, circa* note 72.

<sup>3</sup> See a dictum concerning this in *Harrison v. State, Use of Harrison*, 22 Md. 408, 489. 85 Am. Dec. 658 (1864).

<sup>4</sup> On ratification, see *Jones v. Jones*. 36 Md. 447, 455-7, 11 Am. Rep. 505 (1872).

macy may be asserted in any proceeding in which it is relevant. One of the results of avoiding a voidable marriage is the declaration that the marriage really never existed and that the offspring are bastardized *nunc pro tunc*.<sup>5</sup>

Some states, by statute, have attempted to ameliorate this unfortunate situation by legislative declaration of the legitimacy of the offspring of defective marriages.<sup>6</sup> Maryland has no such provision although one of our statutes does give the delusive appearance of attempting this objective. This is the *a vinculo* divorce statute<sup>7</sup> which, in addition to providing our three supervenient grounds<sup>8</sup> for absolute divorce, also includes three pre-venient grounds. These latter are impotence, the pre-marital unchastity of the wife, and that the marriage was null and void ab initio. The granting of divorces for these grounds really involves granting, in the name of divorce, what are substantially annulments.

At first sight this statute seems to attempt to preserve the legitimacy of the offspring of the marriages involved. But analysis discloses that this could hardly be so, although to date there has been no interpretation of the point by the Court of Appeals. In the case of impotence there can be no offspring to have their legitimacy saved. It is arguable that there could hardly be any motive to preserve it for the offspring of a woman who, by her pre-marital unchastity, has manifested a promiscuity which casts doubt on the paternity of her children born after marriage.<sup>9</sup> And, if "marriage null and void ab initio" means (as the writer believes it to mean) only totally void

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<sup>5</sup> Harlan, *Law of Domestic Relations in Maryland* (1909) 36. But see the *dissenting* opinion in *Lurz v. Lurz*, 170 Md. 423, 432, 438-9, 184 Atl. 906, 185 Atl. 676 (1936), where it is indicated that the offspring of a voidable marriage, born before the proceeding, are legitimate. For a note on the *Lurz* case, see (1937) 1 Md. L. Rev. 348.

<sup>6</sup> Some states provide for a type of annulment the effect of which is to annul the marriage from and after the date of the proceeding. Maryland has no such provision, although the divorce method may have been calculated to afford one.

<sup>7</sup> Md. Code, Art 16, Sec. 38, as amended, Md. Acts 1937, Ch. 396.

<sup>8</sup> *Viz.*, adultery, three years abandonment, and five years voluntary separation, the last named of which was added in 1937.

<sup>9</sup> The text statement to which this footnote is appended is obviously an attempted rationalization of the pre-marital unchastity ground, the desirability of which is another matter.

and does not include also marriages merely voidable, could not collateral attack on the legitimacy of the offspring still be made, even though the parents were divorced? Only if the legislature intended such a divorce to preclude later collateral attack on the marriage would the statute have the effect of preserving legitimacy. That remains to be seen if and when the Court ever has a case in point.<sup>10</sup>

It is conceivable, of course, that the Court will both interpret the pre-venient divorce statute to preserve the legitimacy of the offspring of the marriages coming thereunder, and to make "void ab initio" include not only totally void marriages but also merely voidable ones. Doing this would provide Maryland with a device for preserving the legitimacy of the offspring of defective marriages and with a generally applicable annulment procedure which would serve to terminate the defective marriages only as of the date of proceeding. Such an interpretation would do no more violence to language than has already been done in the instances to be discussed below of decisions reached in order to preserve legitimacy. It would serve to permit the party entitled to an annulment to ratify the marriage for the limited purpose of preserving legitimacy without totally ratifying it so as to debar him from his right to terminate.

The matter of legitimacy bulks large on the instant question of total voidness or voidability. The writer believes that the judicial inclination to uphold marriage and legitimacy<sup>11</sup> partly explains some Maryland rulings<sup>12</sup> which have seemingly preferred the result of "voidable" instead of "totally void". This general judicial bent in favor of marriage and legitimacy underlies many other rules dealing with marriage, particularly those concerning proof of mar-

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<sup>10</sup> Harlan, *loc. cit. supra* note 5, states that the issue are bastardized even when a *divorce* is granted for the ground of marriage void ab initio.

<sup>11</sup> In *Dimpfel v. Wilson*, 107 Md. 329, 337, 68 Atl. 561, 13 L. R. A. (N. S.) 1180 (1908), the Court referred to the Harrison case, *Supra* note 3, as showing the anxiety of the Court to avoid illegitimacy by finding marriages to be voidable rather than totally void.

<sup>12</sup> *Viz.*, the rulings in the cases of uncle and niece marriages, and the marriages of lunatics not under adjudication. Consider also the problem of the remarriage of the guilty party to a divorcee who is prohibited to remarry. All of these will later be discussed.

riage and of capacity to marry.<sup>13</sup> Holding (after one spouse is dead) that the marriage, at worst, was only voidable and that it is now too late to attack it, is a very apt judicial device for preventing the unfortunate consequence of branding the cohabitation as sinful and the offspring thereof as bastards.

Another general consideration which seems important is the analogy between the task of deciding either total voidness or voidability for marriages performed locally, and that of deciding whether to recognize as valid marriages which were valid where performed, but which would not have been if performed in Maryland. Thus the Maryland Court has indicated acceptance of the exception to the general Conflict of Laws rule of "valid where performed, valid everywhere" for those foreign marriages not only contrary to our local rules but also offensive to our strong public policy. Would not the Maryland Court's recognition that a given type of foreign marriage does so offend our strong public policy be ipso facto a ruling that the local prohibition was meant to make such marriages totally void? Should not the same answer be given for both problems?<sup>14</sup>

Then, if the Court of Appeals ever has to interpret the "void ab initio" ground for absolute divorce (assuming that this means "totally void"), further light may be thrown on the general question of what marriages are totally void and what ones voidable.<sup>15</sup>

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<sup>13</sup> Viz., the presumption of ceremonial marriage from cohabitation and repute, the rule of strict proof of an impediment first marriage which would render a later one bigamous, and the presumption of capacity to marry at the time of a later marriage, all later to be discussed.

<sup>14</sup> In *Fensterwald v. Burke*, 129 Md. 131, 98 Atl. 358, 3 A. L. R. 1562 (1916), the Court relied on an earlier ruling that an uncle-niece marriage was only voidable, *Harrison v. State*, Use of *Harrison*, *supra* note 3, as a precedent for finding that such a marriage did not come within the public policy exception.

<sup>15</sup> In *Dimpfel v. Wilson*, *supra* note 11, 107 Md. 329, 336, the Court said, with reference to the District of Columbia statute setting up pre-venient grounds for divorce: "It is one thing to prohibit a marriage and declare it null and void if made under certain conditions, and quite another to authorize a divorce—thereby making it voidable only and not ab initio void." Of course this would indicate that, in Maryland, impotence and pre-marital unchastity render marriages only voidable, but it could hardly cover the ground expressly stated to be "void ab initio." In the *Harrison* case, *supra* note 3, 22 Md. 468, 485, the Court (in another connection) used "void ab initio" as meaning what is here understood as "totally void."

Square rulings on the question of total voidness or mere voidability come, of course, only in cases where collateral attack on the marriage is attempted. Such a decision is unnecessary in a direct proceeding to annul, which may be brought either to accomplish the undoing of a marriage which is voidable only and in need of such proceeding or to serve as a declaratory judgment of the total voidness of a marriage which could be collaterally attacked.

#### THE REQUIREMENTS OF AND IMPEDIMENTS TO A VALID MARRIAGE.

A valid marriage results whenever a man and a woman engage in activity which by the *law of the place where it occurs* is recognized as making them husband and wife. There must be certain *conduct* engaged in by *competent parties* under circumstances whereby they *intend* matrimony and both understandingly and freely *consent* to acquiring that status. The italicized words indicate the ensuing sub-divisions to be: (1) Conflict of laws; (2) Formalities; (3) Competency of parties; and, (4) Intention and consent. Under each will be discussed the details of the rule, total voidness or voidability, and the proper procedure for annulment.<sup>16</sup>

##### (1) *Conflict of Laws.*

Conflict of Laws problems arise when the law of the state of celebration is such that the marriage, valid where performed, would not have been valid had the conduct occurred in Maryland, either because the formalities elsewhere allowed do not meet Maryland standards, or because the rules of competency are laxer.<sup>17</sup> With respect to those marriages which would not have been valid if locally performed the rule is to recognize them if valid

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<sup>16</sup> The last general heading of this article will be devoted to a comparative treatment of the different annulment procedures available in Maryland.

<sup>17</sup> Conflict of Laws problems of marriage usually concern either forms of solemnization or competency of parties. Rarely are there sufficient differences involving the contract impediments to create problems therefor.

where performed<sup>18</sup> unless doing so would run counter to the strong public policy of Maryland.

Differences in the requirement of formality of marriage have been held not to violate public policy, so that we have recognized marriages from other jurisdictions entered into either by non-religious ceremonies<sup>19</sup> there provided for, or by simple contract<sup>20</sup> there permitted.

It is in connection with certain aspects of the competency of parties that our Court has intimated it would apply the exception rather than the general rule in a sufficiently serious case. By a strong dictum in *Jackson v. Jackson*<sup>21</sup> the Court indicated that marriages "which are deemed contrary to the law of nature as generally recognized in Christian countries . . . (and those) . . . which the local law making power has declared shall not be allowed any validity" would not be recognized in Maryland even though valid where performed. It was indicated that this includes polygamous marriages; incestuous marriages involving brother and sister or direct ascendants and descendants (if such should anywhere be allowed); and marriages between persons of different races prohibited to intermarry in Maryland.

With reference to other prohibited degrees of relationship we must consider *Fensterwald v. Burk*<sup>22</sup> where an uncle and niece, forbidden to marry by Maryland law, left Maryland and were married in a jurisdiction permitting such marriages under the particular circum-

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<sup>18</sup> See *Fornhill v. Murray*, *supra* note 1, 1 Bl. 479, 485; and *Corrie's Case*, 2 Bl. 488, 499 (1830). Both recognize the general principle.

<sup>19</sup> *Jackson v. Jackson*, 80 Md. 176, 191, 30 Atl. 752 (1894); *Jackson v. Jackson*, 82 Md. 17, 30, 33 Atl. 317, 34 L. R. A. 773 (1895); *Glaser v. Dambmann*, 82 Md. 643, 32 Atl. 522 (1895); *Redgrave v. Redgrave*, 38 Md. 93, 98 (1873); *Barnum v. Barnum*, 42 Md. 251, 298 (1875), where the Court found insufficient proof of a marriage before a Justice of the Peace in Arkansas; and *Hanon v. State*, 63 Md. 123 (1885), where it was held that testimony to the fact of marriage by a Justice of the Peace in Pennsylvania would be sufficient even without proof of the authority of such an official to perform marriages there.

<sup>20</sup> *Whitehurst v. Whitehurst*, 156 Md. 610, 145 Atl. 204 (1929), where, on conflicting proof, the Court (three dissenting) found a simple contract marriage to have been entered into in New York by writing in a prayer book, and that such conduct created marriage under the then New York law.

<sup>21</sup> *Supra* note 19, 82 Md. 17, 29-30. The same dictum is quoted with approval in *Fensterwald v. Burke*, *supra* note 14, 129 Md. 131, 137.

<sup>22</sup> *Supra* note 14.



stances. The case apparently recognized the validity of the marriage. The inference from the *Jackson* and *Fensterwald* cases is that all other less obnoxious prohibited degrees of relationship (all the affinity ones) would also come within the general rule rather than the exception so that if the marriage was valid where celebrated it will be held valid in Maryland.

While the language of the *Fensterwald* case recognized the complete validity of the marriage as created by the foreign law<sup>23</sup> yet its reliance on the *Harrison* case<sup>24</sup> creates some doubt whether the decision was for the complete validity of the foreign marriage or its being, at most, one only voidable during the joint lifetime, while the avoiding had not happened. A square ruling on the recognition of the foreign marriage would come only in a case of direct attack.<sup>25</sup> The Court cited the *Harrison* case as authority for the Maryland rule that uncle and niece marriages were only voidable and so was able to work it that the local law making power had not decided to deny all validity to such marriages. Thus, by using the analogy between the internal law problem of total voidness or voidability and the Conflict of Laws problem of public policy, the Court was able to find that the general rule, rather than the exception, applied.

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<sup>23</sup> Further as indicating that the *Fensterwald* case meant to rule for the complete validity of the marriage under the foreign law, consider that the opinion, *supra* note 14, 129 Md. 131, 134-7, went into detail in the matter of the constitutionality of the Rhode Island law's permitting the marriage of an uncle and niece of the Jewish faith, but not of others.

<sup>24</sup> *Supra* note 3. While the marriage in question in that case was performed in the District of Columbia, yet there was no Conflict of Laws aspect, as the applicable law was the Maryland Marriage Act of 1777, which had been adopted as the law of the District when it was separated from Maryland.

<sup>25</sup> The same result could have been reached in the *Fensterwald* case without going into the Conflict of Laws problem by dismissing the case for other reasons. The case was brought in an Equity court, after the death of the husband, to have the marriage annulled. It could have been dismissed on any one of three theories: (1) That a third person has no standing to sue to annul a marriage, *Ridgely v. Ridgely*, 79 Md. 298, 29 Atl. 597, 25 L. R. A. 800 (1894); (2) That the marriage of uncle and niece, under Maryland law, is only voidable by proceeding during the joint lifetime of the spouses, *Harrison v. State, Use of Harrison*, *supra* note 3; or (3) That a proceeding to annul a marriage between uncle and niece in Baltimore City may only be brought in the Superior Court, and not in an Equity court, *Ridgely v. Ridgely*, *supra* herein.

As showing that the Maryland version of the exception for public policy more concerns Maryland as a forum than as a state of domicile of the contracting parties<sup>26</sup> we must consider the Maryland rule that the validity of an out of state marriage will not be defeated (short of our rules of public policy) merely because the parties, domiciled in Maryland, deliberately left Maryland in order to evade our local marriage laws (as they did in the *Fensterwald* case) so as to find a state permitting a marriage here forbidden.<sup>27</sup> While this is occasionally done to evade our requirement of religious ceremony,<sup>28</sup> it can also serve to achieve marriage between persons related by affinity in some of the locally prohibited relations.<sup>29</sup>

A matter now only of historical interest in internal Maryland law, but still productive of Conflict of Laws problems, is that of the prohibition of the re-marriage of the guilty party to an absolute divorce.<sup>30</sup> The Maryland

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<sup>26</sup> Restatement, Conflict of Laws, Sec. 132, puts the exception to the general rule in terms of the public policy of the domicile of the contracting party, although, in Sec. 134, it recognizes that a forum may, for some reason of its policy as a forum, refuse to give a certain effect to a marriage otherwise valid. The dictum in the Jackson case indicates that Maryland, as a forum, will give no effect to a marriage violating its public policy, even though it be valid both by the law of place of contracting and of the domicile of the parties. For a treatment of the Maryland authorities under the Restatement, see Reiblich, Maryland Annotations to the Restatement of Conflict of Laws (1937), Secs. 121-136. There is authority from without the State that a state might recognize a marriage coming within the public policy exception for some purposes but not for others. Thus, under *Whittington v. McCaskill*, 65 Fla. 162, 61 So. 236, 44 L. R. A. (N. S.) 630, Ann. Cas. 1915B, 1001, we might recognize the marriage of a Negro and a white person, performed in a state sanctioning it, for the purpose of transmission of property to the surviving spouse or children, although we would not treat as lawful the cohabitation of the spouses under the marriage in Maryland. See also, *infra*, note 86.

<sup>27</sup> *Jackson v. Jackson*, *supra* note 19, 82 Md. 17, 29. See *infra*, notes 30 and 31 for cases involving the evasion of a prohibition against the remarriage of a guilty party to a divorce.

<sup>28</sup> Md. Code, Art. 27, Sec. 361, which formerly punished the act of leaving the state to evade the marriage license laws, has been repealed by Md. Acts 1927, Ch. 565.

<sup>29</sup> Of the two remaining requirements as to which we would recognize marriages not meeting our own standards, neither is such as to induce any one to leave the state the more easily to get married. Our rules of age and physical condition are as lax as those of any neighboring states. If the voters at the 1938 election approve the statute, Md. Acts 1937, Ch. 91, which provides for a 48 hour delay between the application for and issuance of a marriage license, there may be provided an administrative obstacle to hasty marriage which may motivate evasive marriages elsewhere, but many other states have similar provisions.

<sup>30</sup> For a brief period, Maryland had a statute empowering the Chancellor to forbid the remarriage of the guilty party to an absolute divorce, Md.

case of *Dimpfel v. Wilson*<sup>31</sup> shows how the Conflict of Laws problem can still arise. There the guilty party to a New York divorce was, by the then applicable New York law, forbidden to re-marry. As the New York courts interpreted the prohibition, it did not apply to marriages performed outside of New York.<sup>32</sup> The party went to the District of Columbia and entered into a second marriage, the validity of which was presented to the Maryland Court. The Court upheld the validity of the District of Columbia marriage primarily on the theory that it was only voidable by appropriate proceeding in the District, which had a statute making it a ground for divorce that one of the parties was under such a disability. The Court was thus able to work it that by the law of place of performance it was only voidable at most and so not subject to collateral attack in Maryland. This is an example of how the Court uses the device of voidability as distinguished from total voidness to carry out the judicial inclination to uphold marriage wherever possible.<sup>33</sup>

### (2) Formalities.<sup>34</sup>

While the legal theory in Maryland is that marriage is a civil contract yet, under *Fornhill v. Murray*<sup>35</sup> and *Denison v. Denison*<sup>36</sup> it can be entered into today<sup>37</sup> only through

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Acts 1872, Ch. 272, repealed by Md. Acts 1888, Ch. 486. *Elliott v. Elliott*, 38 Md. 357 (1873), held this retroactive and constitutional. *Garner v. Garner*, 56 Md. 127 (1881), held it improper for the Chancellor to enter such an order against a defendant who was not served with the process in the case. See also 17 Op. A. G. 239 (1932).

<sup>31</sup> *Supra* note 11.

<sup>32</sup> The Conflict of Laws problem would be more perplexing if either the state of the divorce or of the forum interpreted the prohibition to have extra-territorial effect.

<sup>33</sup> The question of the territorial jurisdiction of Maryland courts to annul marriages where the parties are domiciled elsewhere or the marriage ceremony occurred outside Maryland is discussed at the very end of this article.

<sup>34</sup> This section is concerned only with the Maryland rules concerning solemnization of marriage. Other types of formalities, permitted elsewhere, were treated in the preceding section.

<sup>35</sup> *Supra* note 1, 1 Bl. 479, 481-2. The later *Denison* case did not mention *Fornhill v. Murray*.

<sup>36</sup> 35 Md. 361 (1872). Many other Maryland cases state the requirement of religious ceremony, as incidental to applying the presumption of marriage from cohabitation and repute. These are referred to, *infra* note 52. See also *Cheseldine's Lessee v. Brewer*, 1 H. & McH. 152 (1739), which apparently recognized contractual marriage but which was distinguished

a religious ceremony. Practically all other American states permit some form of civil ceremony to accomplish marriage and a few remaining ones still allow the so-called<sup>38</sup> "common law" or simple contract marriage,<sup>39</sup> once permitted in almost all states. While the *Denison* case is the principal source of our mandatory requirement of a religious ceremony, statutory provisions have worked it out who may celebrate the ceremony required by that case, and have provided for exceptional situations.<sup>40</sup> It is little likely that the dearth of appellate law on who may celebrate marriage will be remedied, since the case of *Knapp v. Knapp*<sup>41</sup> decided that, even if the celebrant lacked appropriate authority, if the parties acted on the belief that he had it the marriage is valid.

The question of what constitutes an appropriate religious ceremony to achieve marriage was presented to the Court of Appeals in *Feehley v. Feehley*.<sup>42</sup> There a Catholic couple were married and then divorced. Each had at least one subsequent marital experience which also terminated. They decided to inter-marry again and a priest was called to effectuate their wishes. No license was procured. The priest proceeded, as he testified, to "bless their reunion," as he considered them already married to each other by virtue of the original marriage. The question whether this ceremony made them married was presented to the Court and it was held that a valid marriage resulted. From the *Feehley* and *Knapp* cases we must gather that no

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in the *Denison* case on the grounds that the case was imperfectly reported, came from a trial court, and that the real problem was that of proof of marriage by reputation. See also *Mitchell v. Frederick*, 166 Md. 42, 46, 170 Atl. 733, 92 A. L. R. 1412 (1934).

<sup>37</sup> Apparently Maryland once sanctioned marriage by civil, as well as by religious ceremony. See the statutes cited in *Fornhill v. Murray*, *supra* note 1, 1 Bl. 479, 482; and *Denison v. Denison*, *supra* note 36, 35 Md. 361, 379.

<sup>38</sup> The *Denison* case found that the common law of England required a religious ceremony, although most other American states have ruled that it permitted simple contract marriage.

<sup>39</sup> See *Whitehurst v. Whitehurst*, *supra* note 20, recognizing a simple contractual marriage under the applicable law.

<sup>40</sup> Md. Code Supp., Art. 62, Sec. 4. See Md. Code, Art. 27, Sec. 359, making criminal the act of an unauthorized person in performing the rites of marriage. Md. Code, Art. 27, Sec. 364, makes it criminal to give any reward to another for bringing persons to a Minister to be married.

<sup>41</sup> 149 Md. 263, 131 Atl. 329 (1925).

<sup>42</sup> 129 Md. 565, 99 Atl. 663, L. R. A. 1917C, 1017 (1916).

particular form of religious ceremony is essential under Maryland law so long as it is a religious ceremony incidental to the parties' own agreement to marry, conducted by some one believed by the parties to be an appropriate official to do so.<sup>43</sup>

Thus the theory of the religious ceremony as a marriage requirement in Maryland is that the ceremony does not make the parties married, but that the parties marry themselves by their contractual offer and acceptance.<sup>44</sup> The religious ceremony merely provides the legally required formal background for the contract—as would a seal, or paper and ink serve for contracts which must be sealed or in writing.

Our local requirement of religious ceremony raises some complicated problems of peculiar types of marriages. What of proxy marriages, marriage by telephone with the minister in Maryland and "on the wire," marriage at sea by the master of a vessel whose home port is Baltimore, and marriages by mail? None of these difficult problems has yet been ruled on by our Court.

Proxy marriages<sup>45</sup> (where the proxy appears at a Maryland ceremony) and telephone marriages are of dubious validity under the policy of the religious ceremony, both from the standpoint of having certain evidence of actual contract and that of requiring a solemn act as a sure indication of marital intention. Is a shipmaster ex officio the spiritual adviser of the ship's company of souls, so that we may count his marriage ceremony as religious and legally sufficient?<sup>46</sup> Marriages by mail between two points in Maryland are clearly invalid, as we do not sanction simple contract marriage, but if the offer be despatched to, and the

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<sup>43</sup> Consider *Samuelson v. Samuelson*, 155 Md. 639, 142 Atl. 97 (1928), treated *infra* under Intent, with reference to the marriage of a Jewish couple by a Christian minister with an alleged agreement for a subsequent ceremony by a Rabbi.

<sup>44</sup> On the civil nature of marriage, see 2 Alexander's *British Statutes*, 2nd ed., 1014.

<sup>45</sup> On proxy marriages, see Lorenzen, *Marriage by Proxy and the Conflict of Laws* (1919), 32 Harv. L. Rev. 473; and Restatement, *Conflict of Laws*, Sec. 124.

<sup>46</sup> On marriages at sea, see (1929) 38 Yale L. J. 1129; and Restatement, *Conflict of Laws*, Sec. 127. See Baltimore Evening Sun, April 29, 1938, for mention of such a marriage performed on a ship of the Baltimore Mail Line.

acceptance be mailed from a jurisdiction permitting "common law" marriage, by usual Conflict of Laws rules,<sup>47</sup> a valid marriage results, even though the offer was sent from and the acceptance received in Maryland.

Maryland has a definite set of rules concerning the issuance and use of marriage licenses.<sup>48</sup> The *Feehley* case<sup>49</sup> held that the requirement of a license was only directory and not mandatory so that if a proper religious ceremony did occur without a license a valid marriage would, nevertheless, occur. The result is that, while the parties and celebrant will be guilty of crime for marrying without a license,<sup>49a</sup> the marriage itself is as valid as if one had been procured. That the license requirement is directory, of course, automatically solves any legal difficulties that might arise from the use of an imperfect license, one improperly secured, one procured from the wrong county seat,<sup>50</sup> or one not returned to the issuing clerk. These imperfections do not matter, either.

While it is customary to have witnesses to a marriage, there is no legal requirement of attesting or even present witnesses for normal marriage ceremonies. Special provi-

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<sup>47</sup> Restatement, Conflict of Laws, Sec. 125. See also (1919) 32 Harv. L. Rev. 848.

<sup>48</sup> The Maryland marriage license rules are of administrative, rather than legal significance. They are found in Md. Code and Md. Code Supp., Art. 62, Secs. 4-13, 16-17. They include provisions for the form of the license, for the Clerk to examine the applicant as to the competency of the parties, for the keeping of records and the use of certified copies in evidence, for the Clerk to refuse the license if he discovers an impediment, for reporting marriages to the State Bureau of Vital Statistics, and for the keeping of records of foreign marriages. *State v. Davis*, 70 Md. 237, 16 Atl. 529 (1889), involved the Clerk's accounting for license fees collected; and *State v. Floto*, 81 Md. 600, 32 Atl. 315 (1895), was a case of perjury in the application for a license.

<sup>49</sup> *Supra* note 42, 129 Md. 565, 568. See also the trial court opinion of Bond, J., in the *Feehley* case, 3 Balt. C. Rep. 439, which dealt extensively with the question of the need for the license. See also *Pontier v. State*, 107 Md. 384, 391, 68 Atl. 1059 (1908), reflecting a similar rule with reference to the New Jersey requirement of a marriage license.

<sup>49a</sup> On the criminal aspects of the marriage license laws, see: Md. Code, Art. 27, Sec. 360 (criminal for parties to marry without a license); Md. Code, Art. 27, Sec. 362, and Md. Code, Art. 62, Sec. 11 (criminal for minister to perform marriage without a license); Md. Code, Art. 62, Sec. 13 (criminal for minister to fail to return the certificate to the Clerk); Md. Code, Art. 27, Sec. 361, which formerly punished the act of leaving the state to evade the license laws, has been repealed, *supra* note 28.

<sup>50</sup> The license is only good in the county or city where issued, Md. Code Supp., Art. 62, Sec. 4.

sion for Quaker marriage before 12 witnesses is made, in lieu of celebration by a religious official.<sup>51</sup>

If the mandatory requirement of religious ceremony be lacking, the marriage is totally void and may not be ratified. However, this result is limited to extreme cases as a result of the rules we have seen above, making authority of celebrant, special type of ceremony, and license immaterial. Further, both the presumption of necessary ceremony from cohabitation and repute and proof by declarations also aid in making indirect proof of the mandatory ceremony.<sup>52</sup> So it is that the judicial bent toward upholding the marriage flourishes in this area, almost as much as if it were possible to hold the marriage either only voidable or capable of ratification.

May an annulment (i. e., a declaratory judgment of total voidness) be secured on the ground of no proper solemnization? The statutory annulment procedure does not cover this impediment. Perhaps a divorce could be secured for "marriage void ab initio".<sup>53</sup> The availability of the general procedure for annulment in equity is doubtful unless lack of formality be considered one of the "contract impediments" for which that annulment route is available.

### (3) Competency of Parties.

Five elements enter into the question of competency or the capacity of a person for becoming married. Legally recognized objectionable aspects of the following five qualities, which furnish the sub-divisions, may prove to be impediments to a valid marriage: (A) Subsisting prior marriage; (B) Relationship; (C) Race; (D) Age; and (E) Physical condition.<sup>54</sup>

<sup>51</sup> See also *Fensterwald v. Burke*, *supra* note 14, which treated of the Rhode Island statute recognizing the Jewish marriage ceremonies.

<sup>52</sup> These propositions have been discussed and treated in some twenty-odd Maryland cases, not to be cited here. For an excellent analysis of them and of the whole problem indicated by the title, see Myerberg, *Proof of Marriage in Maryland* (1938) 2 Md. L. Rev. 120.

<sup>53</sup> But then it might be argued that a divorce suit may not be brought without alleging and proving a marriage to have occurred.

<sup>54</sup> Mental condition as an impediment to marriage is discussed *infra* under Intention and Consent, inasmuch as insanity appears either as an impediment to capacity to contract or as a material fact the fraudulent concealment of which might, in a strong enough case, work an actionable

### A. *Subsisting Prior Marriage (Bigamy).*

If, at the time of the marriage in question, one of the parties was already married to another person under a prior valid marriage which had not been dissolved by death, absolute divorce,<sup>55</sup> or annulment, the later marriage is totally void and may not be ratified.<sup>56</sup> The law of this impediment is simple—prior marriage still existing makes later one totally void. The difficult problem is to apply the law to the facts. Was there in fact a prior marriage? Did it continue until the time of the later marriage? By setting up rules to govern the investigation of these two questions the Maryland Court has carried forward its bent toward favoring marriage and legitimacy, so that this impediment is very hard to avail of on collateral attack save in most extreme cases. This achieves almost the same result which would follow from holding the marriage only voidable. For that matter direct attack has been but little more successful.<sup>57</sup>

Thus, on the first point, the Court refuses to apply the normal presumption from cohabitation of the prior marriage's happening where there is shown a later ceremonial marriage between one of the parties to the cohabitation and a third person.<sup>58</sup> The theory is that the presumption of

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fraud on the other party. Another heading which would appear at this point, were it not obsolete, is that for Civil Status. At one time special rules governed the capacity of slaves to marry. See *infra* notes 82 and 95.

<sup>55</sup> The problem of the prohibition of the re-marriage of the guilty party to an absolute divorce (now obsolete in Maryland) was discussed *supra* under Conflict of Laws.

<sup>56</sup> Although most such marriages involve the crime of bigamy, the marriage will still be civilly void even though, for some reason of the criminal law, guilt of that crime is not imposed. Thus, for instance, it is not imposed if the impediment spouse had, at the time of the later marriage, been absent and unheard of for seven years. Md. Code, Art. 27, Sec. 23, as amended, Md. Acts 1937, Ch. 142. On the crime of bigamy see also *Barber v. State*, 50 Md. 161 (1878); and *Pontier v. State*, *supra* note 49.

<sup>57</sup> In *LeBrun v. LeBrun*, 55 Md. 496 (1881), the Court refused such an annulment for lack of sufficiently clear proof that the first husband was alive at the time of the second marriage under attack. In *Ewald v. Ewald*, 167 Md. 594, 175 Atl. 464 (1934), the husband sought an annulment on the ground that his wife's divorce from her former husband had been secured on a false showing of jurisdictional facts. The Court held it too late thus to attack the divorce. In *Ridgely v. Ridgely*, *supra* note 25, granting the annulment was avoided by the device of holding that a third person (the impediment spouse himself) had no standing in court to seek to annul a marriage, even if it could be shown to be bigamous.

<sup>58</sup> *Jones v. Jones*, 45 Md. 144, 157-9 (1876); and *Jones v. Jones*, 48 Md. 391, 30 Am. Rep. 466 (1878).



innocence of bigamy in the later marriage overcomes the presumption of former marriage otherwise raised by the cohabitation.<sup>59</sup>

Further to make proof of the impediment first marriage difficult, the Court, in *Bowman v. Little*,<sup>60</sup> indicated that the fact of a later marriage would require unusually strict direct proof of a former impediment marriage of one of the spouses. In the *Bowman* case the Court found to be unpersuasive certain evidence of the former marriage which was of unusual weight, and adhered to a rule that, were it to be followed in all cases regardless of later marriage, would make direct proof of marriage almost impossible.<sup>61</sup>

Then, even if the first marriage's occurrence has been sufficiently proved, there still remains a judicial device to avoid applying the instant impediment. This is the presumption, recognized in *Schaffer v. Richardson*,<sup>62</sup> that the impediment spouse died, or a divorce was secured, in the interval between the two marriages. This presumption is probably more often impossible to rebut than otherwise in collateral attack cases. It happened that, in *Bowman v. Little*, the presumption could have been too easily rebutted,<sup>63</sup> and so, to reach the end of upholding the second marriage and the legitimacy of its offspring, the case had to be put on the more dubious point of insufficient proof of the first marriage. In the normal situation, disproof of the

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<sup>59</sup> This same presumption of innocence of bigamy underlies the requirement of direct, not presumptive proof of the impediment first marriage when a prosecution for bigamy because of the later ceremonial marriage is brought. Distinguish *O'Leary v. Lawrence*, 138 Md. 147, 113 Atl. 638 (1921), where the problem was whether to presume a ceremonial marriage when the only proof was of successive cohabitations with two different men. Consider also the other cases cited, *infra*, note 66.

<sup>60</sup> 101 Md. 273, 61 Atl. 223, 657, 1084 (1905). Compare *Boone v. Purnell*, 28 Md. 607, 630, 92 Am. Dec. 713 (1868), where the Court said the evidence of the impediment marriage did not amount to "strict proof," and *Redgrave v. Redgrave*, *supra* note 19, 38 Md. 93, 98-102, where the Court also found the impediment marriage insufficiently proven.

<sup>61</sup> Consider *Fornhill v. Murray*, *supra* note 1, 1 Bl. 479, 480-1, 485, where, on sufficient proof of the impediment marriage and the spouse's survivorship, two later marriages were held void.

<sup>62</sup> 125 Md. 88, 93 Atl. 391 (1915). See also *Hensel v. Smith*, 152 Md. 380, 136 Atl. 900 (1927); *Mitchell v. Frederick*, *supra* note 36, 162 Md. 42, 46; and *LeBrun v. LeBrun*, *supra* note 57, 55 Md. 496, 503-4. Contrast *Fornhill v. Murray*, *supra* note 1, referred to *supra* note 61, where there was no mention of presumed divorce.

<sup>63</sup> On the facts it would have been possible to trace the acts of both spouses so as to prove the non-happening of a divorce.

presumed divorce requires proof of a negative, which is particularly difficult when the one who was twice married had disappeared during the interval between the marriages and could, somewhere during that interval, have secured a divorce.

The statement above that marriages subject to this defect are totally void and may not be ratified poses the question of the status of the two parties to the defective second marriage after the impediment first spouse dies or a divorce is secured. Cohabitation after such time is not allowed of itself to serve as a ratification.<sup>64</sup>

But the question arises: Why should not such subsequent cohabitation create the normal presumption of a valid ceremony performed after impediment removed? The statement in *Barnum v. Barnum*<sup>65</sup> that no presumption of marriage arises from a cohabitation shown to have been illicit in its inception would seem to answer the question in the negative, although it must be remembered that later cases<sup>66</sup> have indicated that, even after a cohabitation illicitly commenced, indirect proof may suffice to prove that a marriage later occurred. It would seem more consistent with the judicial inclination to uphold marriage and legitimacy to presume a necessary ceremonial marriage from cohabitation after impediment removed, or even to allow subsequent cohabitation to serve as an outright ratification. With respect to the former proposition, it must be remembered that the Court has stated <sup>66a</sup> that the rule of presumed continuance of an illicit relation only applies when "there is no impediment to marriage." From that it might be taken that the refusal to presume a marriage from cohabitation only applies to a cohabitation which is illicit for lack of solemnization, and not to a situation where there is the impediment of bigamy later removed.

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<sup>64</sup> *Mitchell v. Frederick*, *supra* note 36, 166 Md. 42, 46; and a dictum in *Jones v. Jones*, *supra* note 4, 36 Md. 447, 455-6.

<sup>65</sup> *Supra* note 19, 42 Md. 251, 296-7.

<sup>66</sup> *Jones v. Jones*, *supra* note 58, 45 Md. 144, 155-6; *Jackson v. Jackson*, *supra* note 19, 80 Md. 176, 192-3. Contrast *O'Leary v. Lawrence*, *supra* note 59, where the desire to hold a child legitimate apparently outweighed the illicit nature of the cohabitation.

<sup>66a</sup> *Jones v. Jones*, *supra* note 58, 45 Md. 144, 155; and *O'Leary v. Lawrence*, *supra* note 59, 138 Md. 147, 152.

Under what procedure may one obtain, by way of annulment, a judicial declaration of the total voidness of a bigamous marriage? The statutory procedure (which provides both for a civil petition and criminal prosecution) is especially set up for this and the following impediment. It is an open question whether provision for this impediment in the statutory procedure precludes obtaining a divorce therefor on the theory of marriage void *ab initio*.<sup>67</sup> The *Ridgely* case<sup>68</sup> seems to imply that the setting up of the statutory procedure was meant to preclude the general equity type of annulment for this defect.

### B. Relationship.

Blood relations forbidden to inter-marry include brother and sister, parent and child, grand-parent and grand-child, uncle and niece, and aunt and nephew. Of the affinity relationships of both the "in-law" and "step" kinds, it is forbidden for a person to marry his or her spouse's parent, grand-parent, child<sup>69</sup> or grand-child; or to marry the spouse of his or her parent, grand-parent, child, or grand-child.<sup>70</sup>

There is no prohibition of the marriage of first cousins, of step-sister and step-brother, nor of brother-in-law and sister-in-law. There has been no ruling whether adoptive relationships come within the prohibited degrees, although by analogy to the prohibition of affinity relationships, it might seem they would. Relationships of the half-blood have been held to come within the enumerated degrees by a ruling

<sup>67</sup> The trial court opinion in *Darling v. Darling*, Daily Record, December 27, 1937, mentioned, but did not decide this point. The Court held it improper to attempt to annul a bigamous marriage by a bill in equity under the general equitable method, as, in *Baltimore City*, the proper court is the Superior Court, Md. Code, Art. 62, Sec. 14. With reference to using the divorce method, the Court intimated that, in the particular case, it would have been futile to have attempted this by amending to a bill for divorce on the ground of marriage void *ab initio*, as the bigamy was not proven. A statement in *Ridgely v. Ridgely*, *supra* note 25, 79 Md. 298, 305, 308-9, gives the impression that the divorce method may not be used, but it may have been referring only to annulments, as such. The Court said that the statutory method was "... the only source from which any Court in Maryland derives the power to pass such a sentence or judgment for that cause. . . ."

<sup>68</sup> *Supra* note 25, and, as discussed, *supra* note 67.

<sup>69</sup> See, for an amusing interpretation of the similar prohibition of marriages to relations by affinity, *Back v. Back*, 148 Iowa 223, 125 N. W. 1009, L. R. A. 1916C, 752, Ann. Cas. 1912B, 1025 (1910).

<sup>70</sup> Md. Code, Art. 62, Secs. 1, 2.

of the Attorney General in the case of half-uncle and half-niece.<sup>71</sup>

Factual proof of the impediment of forbidden relationship being obviously free from normal difficulty, the major question hereunder would seem to be whether the too-close relationship of the parties makes the marriage totally void or only voidable. This problem has been presented in Maryland in *Harrison v. State*.<sup>72</sup> It so happens that in this case, the only one of relationship under local law yet to be reported in Maryland, the relationship involved was the least obnoxious of the prohibited *blood* relationships, i. e., uncle and niece. As yet there has been no ruling on the prohibited affinity relationships, although it may probably be assumed that all of these are no more obnoxious than the least obnoxious of the blood relationships, and so come under the rule therefor. The conclusion the Court reached in the *Harrison* case, after considerable research into the Common and Ecclesiastical laws, was that the statute meant to make marriages of uncle and niece in Maryland only voidable and not totally void. *Fensterwald v. Burk*,<sup>73</sup> in one aspect, at least reached the same conclusion, although it probably went even further and recognized the complete validity of such a marriage under the law of the place of performance, which permitted it.

The plain word "void"<sup>74</sup> in the statute and the criminal penalties<sup>75</sup> both for the marriage and for sexual relations cast doubt on the judicial conclusion that uncle and niece marriages are only voidable, but other factors indicate that it was not unreasonable to rule this way. These latter include the facts that a severer criminal penalty is provided for marriages of brother and sister and those in direct line

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<sup>71</sup> Paradoxically enough, there is less common blood, and so less danger from "inbreeding" in the case of half-uncle and half-niece, than there is in the permitted marriage of first cousins.

<sup>72</sup> *Supra* note 3.

<sup>73</sup> *Supra* note 14.

<sup>74</sup> Md. Code, Art. 62, Sec. 1.

<sup>75</sup> Md. Code, Art. 27, Sec. 314 (the incest statute, which punishes sexual relations between those related by *consanguinity* who are prohibited to marry); Md. Code, Art. 27, Sec. 355 (punishes the act of marrying within three degrees of direct, and one of collateral relationship by *consanguinity*); Md. Code, Art. 27, Sec. 356 (punishes the act of marrying within the other prohibited relationships); Md. Code, Art. 27, Sec. 357 (punishes a minister for marrying persons within any of the prohibited relationships).

than is the case for the other prohibited degrees,<sup>76</sup> that uncle and niece marriages performed prior to 1860 were expressly validated in the prohibitory statute,<sup>77</sup> that the uncle and niece situation is on the periphery of the prohibited blood degrees and approaches the less obnoxious prohibited affinity relationships, and finally, the judicial inclination to uphold marriage whenever possible in order to secure legitimacy.

One could, of course, criticise the decision by comparison to the dictum in *Jackson v. Jackson*<sup>78</sup> to the effect that marriages of negroes and whites, contrary to our statute, are so void that they cannot even be recognized when they were performed in a state permitting them. The statute there, like the one for uncle and niece, uses the word "void"<sup>79</sup> and provides criminal penalties. One gets the definite impression, by contrasting the two cases, that the Court has in the miscegenation instance so twisted the word "void" that it means more totally void than usual, and subject to the Conflict of Laws exception, while in the uncle and niece situation it has twisted it in the other direction to make it mean less void than usual, i. e., only voidable by proceeding.

What of the total voidness or voidability of marriages of brother and sister, parent and child, grand-parent and grand-child? For the purposes of the Conflict of Laws situation, these forbidden marriages are classed with the inter-racial ones and are said<sup>80</sup> to violate our strong public policy so that even their possible complete validity by the law of the place of performance would not be recognized. If, as the Court indicated in the *Fensterwald* case, total voidness for purposes of internal law should be determined by the same standards as for the public policy exception to the usual conflicts rule, these marriages would then by our view be totally void, whether performed in a state sanction-

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<sup>76</sup> This assumes that the first degree of collateral consanguinity referred to in Md. Code, Art. 27, Sec. 355, includes only brother and sister. The punishment for such marriages is a fifteen hundred dollar fine or banishment from the state, while that for the less obnoxious marriages is only a five hundred dollar fine.

<sup>77</sup> Md. Code, Art. 62, Sec. 3.

<sup>78</sup> *Supra* note 19, 82 Md. 17, 29-30.

<sup>79</sup> Md. Code Supp., Art 27, Sec. 365. To be sure, this says "forever prohibited and void" rather than merely "void" but the difference seems unimportant.

<sup>80</sup> *Jackson v. Jackson*, *supra* note 19, 82 Md. 17, 29.

ing them, or in Maryland. But the language of the *Harrison* case is broad enough to declare for the mere voidability even of these marriages, whether performed in Maryland or elsewhere. The points set out above as making plausible the actual decision on the facts of the *Harrison* case would, however, justify distinguishing between the two groups of forbidden relationships.

What procedures may be used for avoiding, or declaring the invalidity of marriages defective for relationship? The statutory procedure is especially provided for this ground. To the extent to which these marriages are only voidable, the divorce ground of "void ab initio" would seem to be unavailable (assuming that the latter means "totally void"). Provision of the statutory procedure precludes the use of the general equitable method.<sup>81</sup>

### C. Race (*Miscegenation*).<sup>82</sup>

White persons and Malaysians are forbidden to intermarry and both are forbidden to marry Negroes or persons of Negro descent to the third generation.<sup>83</sup> The statutory mode of expression to cover persons of mixed white and Negro blood is an awkward one and makes doubtful just what proportion of Negro blood will disqualify one from marrying a pure white person or Malayan. It is suggested that if the person in question has some non-Negro blood and that if all of his parents and grand-parents also had some, he is eligible for purposes of the statute, even though he is predominantly Negro.<sup>84</sup>

Is a marriage which is definitely under the statutory ban totally void or only voidable? While no Maryland case has ever dealt directly with either the prohibition generally or the specific problem, a strong dictum in *Jackson v. Jackson*<sup>85</sup>

<sup>81</sup> *Supra* notes 67 and 68.

<sup>82</sup> See *Butler v. Boarman*, 1 H. & McH. 371 (1770), concerning statutes passed about the status of white women who married Negro slaves. Further as to slave marriages, see *Jones v. Jones*, *supra* note 4, and *Jones v. Jones*, *supra* note 58, 45 Md. 144, 159. Md. Code, Art. 62, Sec. 15, ratified the marriage of colored people occurring before 1867.

<sup>83</sup> Md. Code Supp., Art 27, Sec. 365.

<sup>84</sup> This assumes that "to the third generation" involves counting the person in question himself as the first generation. Otherwise the text statement should include great-grandparents.

<sup>85</sup> *Supra* note 19, 82 Md. 17, 30.

has indicated that such a marriage, forbidden by our statute, is so totally void that it cannot be recognized even when performed in a state sanctioning such marriages. As has been suggested, this should also determine the issue of total voidness or voidability for the purpose of internal law. This is particularly so in view of the fact that the *Jackson* case dictum put this type of marriage under the part of the exception to the conflicts rule for those marriages which "the local law making power has declared shall not have any validity."<sup>86</sup>

Granting such marriages to be totally void, what procedures are available for directly declaring that quality. The statutory procedure does not apply. No doubt, a divorce on the ground of marriage void ab initio could be procured. It is doubtful that an annulment under the general equity practice could be secured. A successful criminal prosecution for entering into the unlawful marriage<sup>87</sup> (if the ceremony occurred in Maryland) or for illicit cohabitation<sup>88</sup> in Maryland under such an invalid marriage might accomplish the result of a judicial declaration of nullity, even though this does not come under the statutory method, which makes specific mention of criminal prosecution as an annulment device.

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<sup>86</sup> The application of this public policy exception makes legalized polygamy possible. Thus if a white man marries a Negress in a Northern state permitting it and keeps her there, and later comes to Maryland and marries a white woman and keeps her here, he may divide his time between his two wives and, in each state, will be regarded as lawfully married to the local woman and may not be prosecuted for any crime connected with his marital adventures. On this see Long, *Domestic Relations*, Third Edition, Sec. 86. See, however, *supra*, note 26, concerning the possibility that, following authority from without the State, Maryland might recognize an interracial marriage, valid where performed, for limited purposes other than that of sanctioning the cohabitation of the spouses within Maryland. Should such a doctrine be applied to the situation outlined above, Maryland might recognize the New York marriage for purposes of incapacitating the man from entering into a subsequent ceremony in Maryland, with the result that such ceremony would be criminally bigamous.

<sup>87</sup> The marriage is criminal under Md. Code Supp., Art. 27, Sec. 365, and the minister is punishable under Md. Code, Art. 27, Sec. 358.

<sup>88</sup> There is apparently no criminal punishment for a single act of sexual intercourse between persons of different races prohibited to marry, but if such persons live together continuously under a void marriage they can be prosecuted for the common law crime of illicit cohabitation. Then, too, a white woman who "shall suffer or permit herself to be got with child by a negro or mulatto" is punishable under Md. Code, Art. 27, Sec. 415.

*D. Age.*

For lack of any Maryland case on the impediment of non-age, and for lack of any local statute definitely changing the common law rule,<sup>89</sup> it must be assumed that the latter rule prevails today on this point. Thus, if one of the parties is under the age of 7, the marriage is totally void. If the male is over the age of 14 and the female over the age of 12 (the "ages of consent") the marriage is completely valid. As to marriages between 7 and 12 or 14, the common law rule was that they were inchoate or imperfect, subject to ratification<sup>90</sup> when the immature person reached the "age of consent" and capable of disaffirmance by private act, without the need for judicial proceeding, by either the immature or (if one was above age) the mature person.

This poses the question whether such marriages, where one of the parties is between 7 and the age of consent, are to be classed as totally void but subject to ratification, or as voidable only but by private act without need for judicial proceeding. This would be of importance in the event that one of the parties died or married a third person before either ratification at age or positive disaffirmance at any time had occurred, and the question came up on collateral attack. There is no Maryland decision about it. Judge Harlan's Maryland syllabus<sup>91</sup> on the subject seems to classify such marriages as totally void but subject to ratification, so that on such collateral attack the marriage would be held not to exist. The Ohio minority rule is to this effect.<sup>92</sup> The weight of authority under the common law rule, on the other hand, seems to favor mere voidability so that it would seem, on such collateral attack, that the decision should be in favor of the marriage.

What is the effect of the Maryland statute<sup>93</sup> which requires consent of parents or guardian before a marriage

<sup>89</sup> On the common law rule, see Long, *Domestic Relations*, Third Edition, Sec. 27.

<sup>90</sup> For a reference to the ratification problem, see *Jones v. Jones*, *supra* note 4, 36 Md. 447, 456.

<sup>91</sup> Harlan, *op. cit. supra* note 5, 20.

<sup>92</sup> *Shafher v. State*, 20 Ohio 1 (1851).

<sup>93</sup> Md. Code, Art. 62, Sec. 7. Distinguish the older statute which punishes a minister for marrying a male under 21 or a female under 16 without parental consent, Md. Code, Art. 27, Sec. 363.



license shall issue if either the female be under the age of 18 or the male under 21? If a couple, one of whom is under the stated age, are married, either without any license, or under a license obtained by perjury as to age, forged consent, or connivance of issuing clerk, is the marriage valid or defective? Although no Maryland case has squarely ruled on it, the legal understanding is (lay belief to the contrary) that such a marriage (if the parties are above 12 and 14) is completely valid and may neither directly nor collaterally be attacked for non-age. The parties, the clerk, the minister may be guilty of crimes<sup>94</sup> in connection with the forbidden marriage, but despite this the marriage is valid,<sup>95</sup> inasmuch as the requirement of parental consent is only directory and not mandatory. This would seem to follow from the *Feehley* case<sup>96</sup> which held the general license requirement only directory. If a marriage without any license can be valid, so, too, should one under a license which ought not to have been procured. The implications of the *Corder* case<sup>97</sup> would also support the conclusion, for there the annulment was granted, not for non-age, but for fraudulent representations, although the parties were under 18 and 21 and parental consent was lacking.<sup>98</sup> The same conclusion was indicated by a dictum in the dissenting opinion in the recent *Lurz* case.<sup>99</sup>

Despite the rule that such marriages are completely valid, it is understood that trial courts in Maryland do occasionally grant annulments in cases where the principal or only impediment factor is the lack of consent by parents to the marriage of a child under 18 or 21. Two things may explain this apparent discrepancy between the book-law and the practice. One is that possibly many of these cases are

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<sup>94</sup> I. e., for perjury, for malfeasance in office, or for the minister's marrying without parental consent, under the statute cited *supra* note 93.

<sup>95</sup> For an analogy, see *Jones v. Jones*, *supra* note 58, 45 Md. 144, 159, to the effect that the (now obsolete) crime of a minister's marrying slaves without the master's consent did not render the marriage void.

<sup>96</sup> *Supra* note 42.

<sup>97</sup> *Corder v. Corder*, 141 Md. 114, 117 Atl. 119 (1922).

<sup>98</sup> In *Montgomery v. U'Nertle*, 143 Md. 200, 122 Atl. 357 (1923), both the parties were under the ages for parental consent, but no mention of the impediment of non-age was made. The case was successfully brought for "fraud and deceit" on the basis of intoxication.

<sup>99</sup> *Supra* note 5, 170 Md. 428, 432, 435, discussed in (1937) 1 Md. L. Rev. 348, 353-4.

uncontested and the Chancellors grant the annulments because they seem for the best interests of the parties, although, were the cases appealed, the decrees would not stand up. The other is that the *Corder* case pointed the way to obtaining annulments in plausible fashion through the device of alleging a fraudulent mis-representation of some material fact, in addition to the lack of parental consent, which is itself not operative for an annulment. In fact, in that case, one of the two misrepresentations successfully relied on was to the effect that the parties were old enough to get married in Maryland without parental consent.

What procedure is available for annulling such a marriage as can legally be annulled for non-age? Neither the statutory nor the divorce procedure is available. It is questionable whether the general equitable procedure may be used (unless this be counted a "contract impediment"), although that could be used in cases similar to the *Corder* case if allegations of some fraud are added to those of the lack of parental consent. Possibly there is no procedure for non-age alone, but this would not be intolerable inasmuch as *this* type of voidability may be availed of by private act.

#### *E. Physical Condition (Impotence).*

While some other states have come around to imposing certain requirements, such as a physical examination, or a Wassermann test, or have prohibited the marriage of persons afflicted in certain ways, Maryland has not, as yet, adopted any of these measures. The only requirement of physical condition which the law of Maryland imposes for a valid marriage is that the parties must be capable, at the time of the marriage, of normal sexual intercourse. While in the common law system generally effect is usually given to this requirement by making impotence a ground for annulment, under the Maryland law it is a ground for absolute divorce.<sup>100</sup>

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<sup>100</sup> Md. Code, Art. 16, Sec. 38, as amended Md. Acts 1937, Ch. 396. The principal Maryland case on impotence is *J. G. v. H. G.*, 33 Md. 401, 3 Am. Rep. 183 (1870). See also *Staub v. Staub*, 170 Md. 202, 183 Atl. 605 (1936), a case in which alimony was sought for the impotence of the husband, but was denied on the ground that the marriage had already terminated through an Arkansas divorce secured by the wife. See also a dictum in *Corrie's case*, *supra* note 18, 2 Bl. 488, 490.

The impotence, to be actionable, must exist at the time of the marriage and must be permanent and incurable.<sup>101</sup> There must be distinguished the wilful refusal of intercourse by a spouse capable thereof, which under Maryland law will constitute abandonment and entitle to an absolute divorce after three years.<sup>102</sup> Impotence must also be distinguished from sterility<sup>103</sup> (incapacity to procreate or to bear children, although there exists capacity for intercourse) which, of itself, is no legal impediment to the marriage, although the fraudulent concealment of known sterility (as for other physical defects) might, in a strong enough given case, be held to work an actionable fraud.

Both under the general view and the peculiar Maryland version of the doctrine (divorce ground) the conclusion is that impotence renders a marriage only voidable by proceeding and that the only local proceeding available therefor is a suit for divorce *a vinculo*. The statutory proceeding for annulment has no mention of this ground and it is extremely doubtful that a general equitable proceeding for annulment would lie.<sup>104</sup>

#### (4) *Intention and Consent (The Contract Impediments).*

Even when locally appropriate conduct is engaged in by competent parties, the marriage relation does not result unless, further, the parties intended matrimony and freely and understandingly consented thereto. If there be lacking

<sup>101</sup> Important problems in suing for divorce for impotence are those of proof and corroboration. See, on the rule of triennial cohabitation, that failure to consummate the marriage after three years is presumptive proof of impotence, *Tompkins v. Tompkins*, 92 N. J. Eq. 113, 111 Atl. 599 (1920).

<sup>102</sup> *Fleegle v. Fleegle*, 136 Md. 630, 110 Atl. 889 (1920); *Ruckle v. Ruckle*, 141 Md. 207, 118 Atl. 472 (1922).

<sup>103</sup> Impotence is defined in *J. G. v. H. G.*, *supra* note 101, 33 Md. 401, 405-6: ". . . it is well settled that if by reason of malformation or organic defect existing at the time of the marriage, there cannot be natural and perfect coition, *vera copula*, between the parties; and it appears that the defect is permanent and incurable; the case comes within the legal definition of impotence. . . ."

<sup>104</sup> This suggests the inquiry why a plaintiff would prefer to litigate impotence by a general bill in equity rather than by one for divorce. Religious distaste for the name "divorce" might be one reason. To avoid waiting until a two year residence had been acquired might be another. The requirement of corroboration in "divorce" cases might be still another.

actual intention to become married to the particular person, or if through mental defect or intoxication there was no capacity to consent, or if the apparent consent was obtained through fraud or duress, no completely valid marriage results. Thus the ensuing sub-divisions of this section are: (A) Intention; (B) Insanity; (C) Intoxication; (D) Fraud; and, (E) Duress. These might be called the "contract impediments".<sup>105</sup>

Because, with minor exceptions, the same answers are to be given for all five of these problems, and so as to avoid unnecessary duplication, there will first be discussed for the five jointly whether the defects make marriages totally void or voidable, and the appropriate procedure for annulling marriages thus defective.

To reach a conclusion whether these various "contract impediments" render a marriage totally void or only voidable (and if the latter, whether by proceeding or private act) is not an easy task. There is almost a complete dearth of Maryland authority<sup>106</sup> and, at the same time, disagreement among the writers and the persuasive precedents as to the common law generally.<sup>107</sup> There is a specific Maryland ruling<sup>108</sup> (later to be discussed in detail) that insanity affecting contractual capacity renders the marriage totally void if the lunatic be under certain types of adjudication but only voidable otherwise.

The conclusion here advanced is that all these defective marriages are at most only voidable by proceeding during the joint lifetime of the spouses, save for the case of insanity of one under adjudication and, possibly, such a complete

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<sup>105</sup> They are called "contract impediments" because of the statements to be found in Maryland cases, *infra* note 164, that the jurisdiction of equity to annul therefor depends on the inherent jurisdiction of equity courts over contracts.

<sup>106</sup> The statement in *Ridgely v. Ridgely*, *supra* note 25, 79 Md. 298, 307, seems to contemplate voidability by the reference to the need for "prompt application." This statement is cited in *Owings v. Owings*, 141 Md. 416, 421, 118 Atl. 858 (1922). See also the dissenting opinion in *Lurz v. Lurz*, *supra* note 5, 170 Md. 428, 432.

<sup>107</sup> See, for instance, Harlan, *op. cit. supra* note 5, 9-10, 14., classifying them as void but capable of ratification, and Long, *Domestic Relations*, Third Edition, Sec. 16, classifying them as voidable by private act.

<sup>108</sup> *Ewing v. Moore*, 1836, referred to in 2 Alexander's *British Statutes*, Second Edition, 1014. This was unreported and no opinion was filed by the Court.

lack of marital intention as really involves no marriage ceremony ever intended to be performed. This latter would include situations where none of the parties or others present (as in a marriage rehearsal or in a play) considered the external conduct as accomplishing marriage (apparent lack of intent); and also fraud in the *esse contractus*, where one of the parties had no intent at all. On the other hand, this leaves as only voidable those marriages where the defect is secret lack of marital intention, including mistake; insanity without complete adjudication; intoxication; fraud in the procurement; and duress. Five considerations support the conclusion that these marriages are only voidable.

The first is the discernible judicial inclination to uphold marriage and legitimacy wherever possible. This has already been seen not only to cause specific holdings of "voidable" but to appear in various other ways of present interest.

The second is the analogy to these specific holdings of "voidable" for certain other impediments. Are the marriages outlined immediately above any more desirable of being held totally void than one between uncle and niece?<sup>109</sup> Would not insanity without adjudication go even more to the essence of the marriage contract than the other contract impediments set out? If the marriage of one under a prohibition of his remarriage after divorce is only voidable,<sup>110</sup> so too should be those under discussion.

The third consideration is the possibility of ratification, which exists for all these defective marriages.<sup>111</sup> The usual rule is that a marriage capable of ratification is only voidable, and vice versa, and that a totally void marriage may not be ratified.<sup>112</sup> Thus it is that the writer disagrees with the classification of "neither strictly void nor strictly voidable, but totally void unless ratified" for these marriages.

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<sup>109</sup> *Harrison v. State*, Use of *Harrison*, *supra* note 3.

<sup>110</sup> *Dimpfel v. Wilson*, *supra* note 11.

<sup>111</sup> *Owings v. Owings*, *supra*, note 106, 141 Md. 416, 421, a case which was factually one of duress, although the allegation was of lack of mental capacity. The Court in discussing the possibility of ratification, treated the marriage as "voidable." See also *Ridgely v. Ridgely*, *supra* note 25, 79 Md. 298, 307-8.

<sup>112</sup> In Maryland, one exception to this is the case of uncle and niece marriages under the *Harrison* case, *supra* note 3.

The existence of such a class for these marriages is supported neither by Maryland cases nor the general weight of authority.<sup>113</sup>

The fourth consideration involves whether these impediments may be availed of equally by both spouses. Grave doubt exists, in the law generally, whether this is so, particularly with regard to whether the sane or sober spouse may sue to annul (or attack collaterally) a marriage so tainted. The possibility of ratification by the other would seem to indicate that he could not. Clearly the spouse guilty of the fraud or duress could not assert it.<sup>114</sup> To the extent to which these grounds are "one-sided", further weight is given to the conclusion that they render the marriages only voidable. If totally void, either spouse, or even a third person (on collateral attack) could assert the defect.

The fifth factor is the expedient argument that the nature of the impediments is such that it is desirable to have the evidence adjudicated at as early a date as is possible and thus during the joint lifetime of the spouses, in a direct proceeding. The evidence bearing on these contract impediments is so likely to be confusing and conflicting that it is much more desirable than otherwise that it be adjudicated while it is still fresh. Annulment proceedings exist for this purpose.

This last proposition brings into focus the question whether, if these marriages be merely voidable and are not totally void, the avoiding may be accomplished by private act of disaffirmance or must be done by judicial proceeding to annul.<sup>115</sup> The analogy to the law of contracts, which is what makes these matters impediments to marriage at all, would seem to permit of the former. But even then it must be remembered that the law of contracts has not always permitted the party thus entitled to disaffirm to do so by

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<sup>113</sup> The Harrison case, *supra* note 3, 22 Md. 468, 489, stated the existence of such a class, but without reference to any particular type of marriage. It is submitted that the class of "totally void but subject to ratification" is confused with "voidable by private act" which is clearly the situation for marriages between the age of 7 and the 12-14 "ages of consent."

<sup>114</sup> *Ridgely v. Ridgely*, *supra* note 25, 79 Md. 298, 307-8; *Whitehurst v. Whitehurst*, *supra* note 20, 156 Md. 610, 619.

<sup>115</sup> See *supra* note 111.

private act for all such impediments and thereby to resist enforcement of the contract. The rule once was that equity alone could handle fraud in the inducement of a sealed contract.<sup>116</sup> Marriage is certainly as formal and dignified a contract as is one under seal. Then, too, it must be remembered, that while marriage is a contract, it may not be rescinded by mutual agreement, as for other contracts. That we force the parties to go into court to bring the contract to an end for supervenient grounds should indicate that we should also force them to go into court to take advantage of the privilege of rescission for the pre-venient grounds which provide the contract impediments.

The proper procedure for annulling a marriage affected by one of the contract impediments is by a bill in equity under the general equity practice. The statutory annulment procedure is inapplicable, by its own limitations. The divorce procedure is also inapplicable, unless these grounds shall be held to make marriages totally void, or unless "void ab initio" shall be interpreted to include "merely voidable."

#### A. Intention.

Marriage, like any express contract, requires that the operative conduct be committed with intention to be bound. Thus, even if competent persons engage in appropriate conduct, unless both really intend matrimony, no valid marriage results.

The Maryland Court, by entertaining two cases thereon, has impliedly recognized the possibility that actual lack of marital intention may defeat a marriage with appropriate ceremony, although, in both cases, it found sufficient intention to be present in fact. In *Brooke v. Brooke*,<sup>117</sup> the husband, prior to the marriage had declared to the wife-to-be: "I will marry you, but understand I will never live with you." The Court held that this did not negative sufficient marital intention, particularly as he did, subsequently, cohabit with the wife and later became the father of one or

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<sup>116</sup> 12 R. C. L. 408.

<sup>117</sup> 60 Md. 524 (1883). Accord, *Wimbrough v. Wimbrough*, 125 Md. 619, 629, 94 Atl. 168, Ann. Cas. 1916, E, 920 (1915).

more of her children. This both served to ratify, if there were no intention, and, as well as circumstantial proof that he did entertain the necessary intention at the time of the marriage. It would seem that, even aside from the subsequent conduct, the decision in the *Brooke* case would be correct. His statement prior to the marriage did not show the absence of any marital intent, but the absence of intent to consummate, which latter event is not necessary to the legal validity of a marriage.

The *Brooke* case does suggest the problem whether a secret intention not to have sexual relations after marriage would avail the *other* party to the marriage as a ground for annulment. While it is doubtful that it would, under the *Brooke* case, count as lack of marital intention, still it might be held, in a strong enough case, to work a fraud on the other party entitling to an annulment therefor. For that matter after three years of wilful refusal to consummate, the other party could obtain an absolute divorce for abandonment.<sup>118</sup>

The other Maryland case is *Samuelson v. Samuelson*,<sup>119</sup> where (the spouses being of the Jewish faith) the plaintiff alleged that the marriage, before a Christian minister, was regarded by both as merely the engagement contract, contemplated to be followed by a ceremony before a Rabbi (which had never happened) which was to be the true marriage ceremony. The defendant denied any such agreement and the Court found that none existed although it intimated that even if it had been proved the annulment would not have been granted.

From the two cases we can gather the rule to be that where the parties go through a normal marriage ceremony (believed by the celebrating minister to be such) sufficient marital intention will be presumed and a secret lack of marital intention, while possibly operative in a sufficiently strong case, will be most difficult to prove.<sup>120</sup>

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<sup>118</sup> *Supra* note 102.

<sup>119</sup> *Supra* note 43.

<sup>120</sup> See *Whitehurst v. Whitehurst*, *supra* note 20, 156 Md. 610, 619, pointing out that a secret lack of marital intent would not avail that spouse if the other spouse believed marriage was contemplated.



The problem of mistake arises in this category, although there are no Maryland rulings on it.<sup>121</sup> If a sufficiently strong case of mistake should be judicially deemed to entitle to annulment, it would be on the theory that the mistaken party never entertained a real marital intention to contract with the party mistakenly dealt with or that fraud procured the apparent consent.

If the parties go through the external marriage ceremony under circumstances when neither of them nor the apparently celebrating official considers that the marriage is intended, probably the "marriage" is totally void. This would seem to follow with respect to marriages in a play or pageant, or a rehearsal of a marriage intended to follow regularly later. Marriages in jest, or to deceive a third party present more difficult and as yet unsolved problems in Maryland.

### B. Insanity.<sup>122</sup>

The Maryland case of *Elfont v. Elfont*<sup>123</sup> decided that if, at the time of the marriage, one of the parties, from mental defect, was "unable to understand the nature of the contract of marriage and to appreciate the legal consequences naturally deducible therefrom" the marriage is invalid. The difficult question, of course, is to apply this test to the facts and that was the main problem in the *Elfont* case, which found that the husband was sufficiently sane to meet the test, and so the annulment was refused.

An English statute<sup>124</sup> applicable in Maryland declares "null and void to all intents and purposes whatsoever" the

<sup>121</sup> Other than the dictum in *Brown v. Scott*, 140 Md. 258, 236-7, 117 Atl. 114, 22 A. L. R. 810 (1922), with reference to mistake as to the person; and, with reference to mistake as to the ceremony, the extract from the dissenting opinion in *Lurz v. Lurz*, *supra* note 5, 170 Md. 428, 432, 434: "His statement that he did not understand what the ceremony was is wholly inconsistent with his statement that he was induced to go through it by threats of imprisonment."

<sup>122</sup> See *Yake v. Yake*, 170 Md. 75, 183 Atl. 555 (1936), a case involving an annulment for insanity, but with no law thereof involved. See also *Fornshill v. Murray*, *supra* note 1, 1 Bl. 479, 481; and *Corrie's Case*, *supra* note 18, 2 Bl. 488, 490.

<sup>123</sup> 161 Md. 458, 157 Atl. 741 (1931). The same test with reference to intoxication was stated in *Montgomery v. U'Nertle*, *supra* note 98, 143 Md. 200, 207. See also *Owings v. Owings*, *supra* note 106, a case factually one of duress where it was alleged that, from violence, plaintiff was unconscious of what he was doing and was incapable of contracting.

<sup>124</sup> 15 Geo. 2, Cap. 30, 2 Alexander's British Statutes (2nd Ed.) 1014.

marriages of all "Lunaticks" who are under certain named types of adjudication. These include adjudication by an Inquisition under a Commission under the Great Seal of Great Britain, and Parliamentary commitment of both person and estate to the care and custody of particular trustees. Assuming that these are analogous, respectively, to the Maryland sheriff's jury adjudication, and to any judicial commitment of both person and property to trustees, the statute would then apply to these latter. The unreported Maryland case of *Ewing v. Moore*<sup>125</sup> held that lunatic marriages other than those specifically enumerated in the statute were voidable only. Apparently then, under the statute, the fact of the existence of the specified types of adjudication is conclusive of lack of capacity to understand marriage, and the marriage of such a lunatic may not even be ratified in a lucid interval, so long as the adjudication remains in force.<sup>126</sup>

On the other hand, if the party in question, though incompetent to comprehend the ceremony in fact, is not under any such specified forms of adjudication, the marriage is, at worst, only voidable, and may be ratified by cohabitation thereunder in a lucid interval.<sup>127</sup> The statute did not apply (and was not mentioned) in the *Elfont* case, because the only adjudication was a Veteran's Guardianship proceeding which was neither a sheriff's jury case nor a complete adjudication both of person and property. It is perfectly plausible, of course, that one may be incompetent to handle his property and still have sufficient mental capacity to comprehend the significance of the marriage ceremony. In the law generally there are different standards of mental incompetency for different purposes. One rule applies to marriages and contracts, another to capacity to make a will, still another to capacity to testify as a witness,<sup>128</sup> another to

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<sup>125</sup> *Supra* note 108.

<sup>126</sup> On this see the note, 2 Alexander's British Statutes (2nd Ed.) 1014-1015.

<sup>127</sup> On ratification, see *Jones v. Jones*, *supra* note 4, 36 Md. 447, 456.

<sup>128</sup> *Weeks v. State*, 126 Md. 223, 227, 94 Atl. 774 (1915), held the witness sane enough to testify, although she was the prosecutrix in a case of carnal abuse of a mental defective and so, allegedly, was not sane enough to consent to intercourse.

capacity to entertain a criminal intent, and so on with examples too numerous to mention.

### C. Intoxication.

The nominal test for intoxication as an impediment to marriage is the same as that for insanity, i. e., whether the spouse was too drunk to understand the nature of the contract of marriage and to appreciate the legal consequences. As for insanity, the difficult question is the fact one whether the party in question was *that* drunk at the time of the ceremony. This was the problem in the sole Maryland case of *Montgomery v. U'Nertle*.<sup>129</sup> There, on conflicting testimony, the court found that the plaintiff-husband was sufficiently drunk that he could not comprehend the ceremony, and so awarded the annulment, finding also in his favor on the conflicting testimony whether the marriage was ratified by cohabitation in a sober interval. In the *U'Nertle* case the court suggested<sup>130</sup> that, had there been pre-marital relations (as is the rule for fraud and duress) stronger proof would be necessary of the alleged grounds for annulment.

### D. Fraud.

If a sufficiently strong case is made out that a spouse's consent to the marriage ceremony was induced by a fraudulent misrepresentation as to or concealment of a fact material to the marriage relation, the marriage is at least voidable by proceeding on the theory of fraud in the procurement. Total voidness would probably result if the fraud practiced amounted to fraud in the *esse contractus*.<sup>131</sup>

It is simple enough to state the rule—the difficulty lies in its application and in ascertaining what facts are so material to the marriage that their misrepresentation or concealment will constitute an actionable fraud. Of the three reported Maryland cases involving fraud, standing

<sup>129</sup> *Supra* note 98. While the case was factually one of intoxication, the case was brought on the theory of "fraud and deceit."

<sup>130</sup> *Supra* note 98, 143 Md. 200, 206.

<sup>131</sup> Only cases factually involving fraud will be treated in this section. Cases involving other impediments, although mentioning fraud, are treated elsewhere where they properly belong. Others, merely stating the source of the power of Equity courts to annul marriage for fraud are collected, *infra*, note 164.

alone and uncomplicated by intoxication or duress, two are apparently liberal in favor of the annulment, and one is stricter and denies it.

In *Brown v. Scott*<sup>132</sup> the annulment was granted on the following facts: Plaintiff wife was school-girl of good family. Defendant was an older man, an ex-convict and reprobate, who falsely represented himself as of good family, a former Harvard student, a wounded war veteran, and a secret-service man. Swayed by these representations, plaintiff married him. He was shortly thereafter convicted of crime and, at the time of the case, was in a penitentiary. The Court of Appeals found that a sufficiently strong case of fraud was shown for annulment. The Court emphasized the extreme youth of the plaintiff and intimated that an older woman, who should more easily have been on guard against such deception, might not so readily have been awarded an annulment for the fraud.

In *Corder v. Corder*<sup>133</sup> misrepresentations as to past personal history, among others, were present. There, defendant husband, then chauffeur for the girl's father, after unsuccessfully attempting her seduction, induced her to go from her home in Pennsylvania into Maryland to be married, on the combined false representations, first, that his past life had been above reproach, and, second, that they were old enough by Maryland law to obtain a license without parental consent. The Court found this a sufficiently strong case of fraud and granted the annulment.

It is interesting to note the emphasis there on the misrepresentation as to the Maryland marriage license law. Usually, misrepresentations as to matters of law are held not actionable frauds, either civilly or criminally.<sup>134</sup> But the *Lurz* case<sup>135</sup> (primarily one of duress) also recognized that the defendant's falsely persuading plaintiff that a criminal prosecution can be brought may constitute actionable fraud and/or duress, although threats of lawful prosecution will not.

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<sup>132</sup> *Supra* note 121.

<sup>133</sup> *Supra* note 97.

<sup>134</sup> 12 R. C. L. 295 (civil); and *State v. Edwards*, 178 Minn. 446, 227 N. W. 495, 65 A. L. R. 1253 (1929) (criminal).

<sup>135</sup> *Supra* note 5.

From the *Brown v. Scott* and *Corder* cases we must take it that the Maryland Court is liberal in granting annulments because of fraud as to prior misconduct of the defendant. *Oswald v. Oswald*,<sup>186</sup> on the other hand, indicates a stricter view of another type of allegedly material fact. There the defendant wife, who had a living divorced former husband, induced the plaintiff husband, a devout Roman Catholic, to marry her on her false representation that her former husband was dead. On discovering that she was a divorced woman he ceased living with her and sought an annulment for the misrepresentation of what, to him and those of his belief, was a very material fact. The Court denied the annulment.

While this was an unhappy case for the Court to have to decide, yet the decision is, all things considered, probably correct. In the first place, the religious disbelief in divorce that made this misrepresentation material to plaintiff was one squarely at variance with the law's chosen step of granting divorces. In the second place, the only thing that could make the type of fact misrepresented material to any large number of people (without which it could hardly be objectively material) was that it was a belief held by members of a particular sect. But for the law to give ear to the wishes of a particular sect would itself be improper and violative of the separation of Church and State. By the same token which made the point material at all, the law had to ignore it.<sup>187</sup>

Other types of fraud occasionally presented elsewhere have not arisen in our Court. The problem of the wife's misrepresentation as to or concealment of her prior unchastity (which might be held a species of fraud) is locally dealt with by our *a vinculo* divorce statute<sup>188</sup> which makes the wife's pre-marital unchastity a ground for absolute divorce. This probably precludes the possibility of obtention of an annulment therefor on the ground of fraud even should this

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<sup>186</sup> 146 Md. 313, 126 Atl. 81 (1924).

<sup>187</sup> See for a somewhat similar case of the unfortunate clash between the legal and religious views of marriage, *Mirizio v. Mirizio*, 242 N. Y. 74, 150 N. E. 605, 44 A. L. R. 714 (1926).

<sup>188</sup> Md. Code, Art. 16, Sec. 38, as amended, Md. Acts 1937, Ch. 396.

be held an actionable fraud.<sup>139</sup> If the pre-marital unchastity was known to the husband at the time of the marriage,<sup>140</sup> or should have been known to him because of his own relations with her,<sup>141</sup> he cannot obtain the divorce. The analogy to the fraud cases holds on this point.

Whether a husband can obtain an annulment for fraud when the wife induces him to marry by falsely alleging pregnancy to have resulted from their illicit relations is an unsettled question in Maryland law,<sup>142</sup> although it is doubtful that he may, in view of the rule of high burden of proof when pre-marital relations have occurred.<sup>143</sup>

It was previously suggested that a sufficiently strong case of misrepresentation as to or concealment of prior insanity, or sterility (as distinguished from impotency), or other physical defect might be held to work an actionable fraud. Cases of alleged misrepresentation of age have arisen in the trial courts. It would seem that if age is material at all the problem is more one of impotence or of fraudulent concealment of sterility, to be handled under such names.<sup>144</sup>

Not only has the Court indicated that pre-marital relations make the burden of proving fraud very difficult to sustain, but, conversely, in the *Corder* case<sup>145</sup> it was suggested that, if the marriage was not consummated,<sup>146</sup> weaker proof of fraud than otherwise would be actionable. Regardless

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<sup>139</sup> In *Hoff v. Hoff*, 162 Md. 248, 251, 159 Atl. 591, 82 A. L. R. 528 (1932), doubt was expressed that this would be an actionable fraud in the absence of statute.

<sup>140</sup> *Wiegand v. Wiegand*, 155 Md. 643, 645-7, 142 Atl. 188 (1923) (husband must be corroborated as to his lack of knowledge); and *Hebb v. Hebb*, 135 Md. 697, 111 Atl. 240 (1919) (husband has burden of showing both his ignorance of the fact and the absence of any facts to put him on guard).

<sup>141</sup> *Hoff v. Hoff*, *supra* note 139.

<sup>142</sup> *Ibid*, 162 Md. 248, 251, expresses doubt that the fraud would be actionable even in this case.

<sup>143</sup> A leading case from without the State on this point is *DiLorenzo v. DiLorenzo*, 174 N. Y. 467, 67 N. E. 63, 63 L. R. A. 92, 95 Am. St. Rep. 609 (1903), where the representation was that the defendant had given birth to a child by the plaintiff.

<sup>144</sup> *Quaere* is there any difference between misrepresentation and concealment in Maryland marriage law.

<sup>145</sup> *Supra* note 97, 141 Md. 114, 120. In *Brown v. Scott*, *supra* note 121, 140 Md. 259, 268, 270, it was suggested that the annulment would not as readily be granted if children had been born of the marriage.

<sup>146</sup> Distinguish, of course, marital relations with knowledge of the fraud, which constitute a ratification.

whether the fact of consummation<sup>147</sup> is or should be legally operative in annulment cases, it is inescapable that it is one of the "secret equities" which may affect findings on the facts. The emphasis on it is a manifestation of the judicial inclination to uphold marriage, as for that matter is the rule of difficult burden of proof if pre-marital relations have occurred.

### *E. Duress.*

Actionable coercion, compulsion, or duress prevents that free exercise of the will which is necessary to an express contract, including that of marriage. Investigation of the matter of duress *vel non* is complicated by the rule (recognized for fraud and intoxication as well) that, where pre-marital relations have occurred, the burden of proving the duress is extremely difficult to sustain.<sup>148</sup> Put into homelier language, the rule might be stated: "Where the parties ought to be married, they stay married!" Pre-marital relations had occurred in each of the three reported Maryland cases on duress, and, no doubt, such will have happened in the great majority of duress cases that will arise.

The earlier *Wimbrough*<sup>149</sup> and *Owings*<sup>150</sup> cases were somewhat similar in that both involved pre-marital relations and conflicting evidence of the extent of the inducements offered by the defendant-wife's relatives to persuade the plaintiff to become a bridegroom. In each case, both because of the conflict of the testimony and the extra-high burden of proof, the Court was able to deny the annulment for insufficient proof of actionable duress.

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<sup>147</sup> In this connection consider a dispatch in the Baltimore Sunday Sun, March 20, 1938, about the unearthing in Leningrad of a Czarist decree annulling a marriage because of the lack of consent by the groom's father which decree also expressly declared that the bride should be considered a virgin. No doubt such a point would be considered a non-justiciable question in Maryland law and entirely without the scope of the prayer for general relief in equity.

<sup>148</sup> *Wimbrough v. Wimbrough*, *supra* note 117, 125 Md. 619, 622-3; *Owings v. Owings*, *supra* note 106, 141 Md. 416, 420; *Montgomery v. U'Nertle*, *supra* note 98, 143 Md. 200, 206.

<sup>149</sup> *Supra* note 117.

<sup>150</sup> *Supra* note 106. The plaintiff alleged physical violence rendering him mentally incapable, rather than fear of harm. The Court held this not proven and also held he had ratified by voluntary cohabitation after the ceremony.

The most recent case of *Lurz v. Lurz*,<sup>151</sup> while apparently more favorable to the annulment for duress, came up on demurrer and was never prosecuted to a decision on the merits. There the plaintiff-husband alleged both his immaturity and that the defendant threatened him with arrest for the non-support of the (as yet unborn) child and so fraudulently persuaded him he could be arrested and induced him to marry against his will. The Court held plaintiff's bill sufficient to require an answer, although it was indicated that the pre-marital relations would impose the very high burden of proof. The case emphasized that a threat of lawful criminal prosecution (as for bastardy) would not be an actionable duress, although a threat of an unlawful or an impossible one would be. The division in the Court was as to the tenor of defendant's alleged threats in this regard.

If, for lack of pre-marital relations, the normal burden of proof applies, or if the abnormal one can be met, the rule seems to be that the duress, to be actionable, "must exist at the time of the actual ceremony, so as to disable the one interested from acting as a free agent, and protest must be made at that time."<sup>152</sup> This dictum would indicate that it is rather difficult ever to obtain an annulment for duress.

#### PROCEDURAL ASPECTS OF ANNULMENT AND SIMILAR PROCEEDINGS.

Assuming now that a given marriage is either totally void or voidable, what are the various procedures available to declare its total voidness or accomplish its avoiding. There will be discussed in turn the three definite types of annulment proceedings provided in Maryland. These are the statutory method, the divorce method, and the general equity method. Then, under the heading of "miscellaneous methods" there will be an inquiry whether any other procedures are available in Maryland for obtaining declaratory judgments about the validity of a marriage, along with a discussion of the general question of who may sue to annul.

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<sup>151</sup> *Supra* note 5.

<sup>152</sup> *Owings v. Owings*, *supra* note 106, 141 Md. 416, 419.



Finally will be a treatment of territorial jurisdiction to annul.<sup>153</sup>

#### A. *The Statutory Method.*

For the two impediments of prior subsisting marriage (bigamy), and prohibited relationship (incest), a Maryland statute<sup>154</sup> provides a special annulment method. On the civil side of the courts, provision is made for the filing of a petition by one of the parties in either the Superior Court of Baltimore City or the Circuit Court of one of the counties. Recognition is also given by the statute that successful criminal prosecutions for the named types of defective marriages will also serve to annul them.

The reference to the Superior Court of Baltimore is an historical anomaly, explained by the fact that, when the statute was passed, that court had Equity powers later taken away without a correlative change in the statute. In the counties the same court has both law and equity powers, so that the only problem there is how and where to docket a petition under the statute. Civil proceedings under the statute simulate the equity practice because it is provided that the testimony shall go into the appellate record and be considered *de novo* by the Court of Appeals.<sup>155</sup>

A difficult problem posed by the statute is whether it is exclusive in the field of annulment. While it does not prevent the exercise of the divorce method for the *specific* grounds that method covers, or the use of the general equity power to annul for the contract impediments, a more perplexing matter is whether it precludes using the other methods for the two grounds enumerated in the statute. It would seem<sup>156</sup> that it does so preclude using the general equity method for them, but it remains to be decided whether a marriage which is totally void for bigamy may be also attacked by a suit for absolute divorce on the theory of "void ab initio".<sup>157</sup>

<sup>153</sup> See *Miller v. Miller*, 159 Md. 204, 150 Atl. 451 (1930), on the effect of denial of annulment as *res adjudicata* of the validity of the marriage.

<sup>154</sup> Md. Code, Art. 62, Sec. 14.

<sup>155</sup> This would apply only to proceedings on the *civil* side under the statute, for the Maryland rule is that criminal cases may not be appealed on the evidence.

<sup>156</sup> *Supra* notes 67 and 68.

<sup>157</sup> *Ibid.*

### B. *The Divorce Method.*

The setting up of the three Maryland pre-venient grounds for absolute divorce<sup>158</sup> (impotence, pre-marital unchastity of the wife, marriage "void ab initio") substantially accomplishes the granting of annulments in the name of divorce. For the first two named,<sup>159</sup> this method is probably the exclusive method of annulment. As the third ground, marriage void ab initio, has never been ruled on,<sup>160</sup> many questions remain open under it, such as those of legitimacy, alimony,<sup>161</sup> and whether other annulment methods are available in the alternative.

Another point is whether marriages which are voidable only may be attacked under this procedure. The answer is probably not, particularly as a statement in the *Harrison* case,<sup>162</sup> made for another purpose, treated "totally void" and "void ab initio" as synonymous.<sup>163</sup> Thus, if this ground is ever interpreted, we may receive further rulings on what impediments make for total voidness, rather than mere voidability.

### C. *The General Equity Method.*

The inherent power of courts of Equity over contracts and their reformation and rescission for defects concerned with intention and consent has been held<sup>164</sup> to confer jurisdiction on Maryland Equity courts to annul marriages for the "contract impediments" despite the lack of mention of

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<sup>158</sup> Md. Code, Art. 16, Sec. 38, as amended Md. Acts 1937, Ch. 396.

<sup>159</sup> On these, see the treatment above, *circa* notes 100-4 (impotence); and notes 138-143 (pre-marital unchastity).

<sup>160</sup> It was mentioned in *LeBrun v. LeBrun*, *supra* note 57, 55 Md. 496, 502-3. See also *Dimpfel v. Wilson*, *supra* note 11, 107 Md. 329, 334, referring to the District of Columbia pre-venient divorce statute.

<sup>161</sup> *Yake v. Yake*, *supra* note 122, held that no alimony could be awarded in an annulment suit. See *Staub v. Staub*, *supra* note 100, where alimony was sought for impotence, but denied on the ground that the marriage relation had already terminated.

<sup>162</sup> *Supra* note 3, 22 Md. 468, 485.

<sup>163</sup> See *Stewart and Carey, A Digest of the Law of Husband and Wife as Established in Maryland* (1881) 13, n. 12, suggesting that voidable marriages should also come under the divorce ground.

<sup>164</sup> *Fornshill v. Murray*, *supra* note 1; *LeBrun v. LeBrun*, *supra* note 57; *Ridgely v. Ridgely*, *supra* note 25; *Wimbrough v. Wimbrough*, *supra* note 117; *Corder v. Corder*, *supra* note 97; *Brown v. Scott*, *supra* note 121; *Oswald v. Oswald*, *supra* note 136.

such impediments in the statute setting up an annulment procedure for bigamy and incest.

The question is: What grounds thus come within the inherent power of courts of Equity over contracts? It has already been suggested that bigamy and incest, impotence and pre-marital unchastity are excluded, respectively, because already provided for in the statutory and divorce methods. The early cases recognizing the inherent Equity power, stated it to be a power to deal with fraud and duress affecting contracts. The Court has since entertained, without discussion of the point, cases involving intent, insanity, and intoxication.<sup>165</sup> But what of the remaining impediments: Lack of solemnization, miscegenation, and age? Are these, too, "contract impediments" so as to come within this general equity method? Lack of solemnization and miscegenation probably could be litigated under the divorce method, as making the marriage void ab initio, as could a marriage where one party was under the age of 7. Possibly that method was meant to be exclusive for those impediments. But what of the marriage of one between 7 and the 12-14 ages of consent, which is only voidable? Is there any method for it? Possibly a method is unnecessary, inasmuch as this is the one type of voidability which may be accomplished by private act.

#### D. *Miscellaneous Methods.*

In exploring the question whether there exist any additional local methods for obtaining a direct adjudication declaring the total voidness of a marriage<sup>166</sup> two collateral questions appear and will influence the whole discussion. One is whether a third person may sue to annul a marriage allegedly defective, and the other is whether there exists any procedure, available either to the spouses or a third person, for petitioning to have the marriage declared valid, rather than invalid, which latter is the objective of the typical an-

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<sup>165</sup> Samuelson v. Samuelson, *supra* note 43 (intent); Elfont v. Elfont, *supra* note 123 (insanity); Montgomery v. U'Nertle, *supra* note 98 (intoxication).

<sup>166</sup> The problem is that of further procedures for obtaining declaratory judgments of complete validity or total voidness, as sufficient procedures for avoiding voidable marriages already exist.

nulment methods. Discussion can best be built around the leading Maryland case of *Ridgely v. Ridgely*.<sup>167</sup>

In that case Mrs. Ridgely left Maryland and went to South Dakota where she obtained a divorce from Mr. Ridgely which was of questionable validity because of the doubtful nature of her necessary domicile in South Dakota. She subsequently married one Hyatt. Mr. Ridgely, not accepting the South Dakota divorce, brought a suit in Maryland against her, asking that the court annul her marriage to Hyatt on the ground that the South Dakota divorce was void and she was still married to Ridgely. The Court dismissed Mr. Ridgely's bill on the ground that he was not a party to the marriage sought to be annulled and so had no standing in court to seek an annulment.<sup>168</sup> The Court pointed out that an annulment could be sought for such a ground (bigamy) by the statutory method and that the statute itself limited actions on the civil side thereunder to petitions filed by one of the parties to the marriage. The Court implied that could the case have been brought under the general equity method, a third person *might* have some standing to prosecute the annulment. It is doubtful, however, that this suggestion will stand up, for it is hard to see how a third person has any standing to attack a contract generally for one of the contract impediments. Particularly when we remember that the contract impediments to marriage are such that the injured party may ratify the marriage, and that it is doubtful that the other party may himself seek to annul even if not ratified, it is hard to see how any third party would have any standing in a court of Equity to attack a marriage which is thus voidable. Of course, a third party would have no standing under the divorce method. Thus we may say that annulment suits under the three basic methods set out above may be brought only by one of the spouses

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<sup>167</sup> *Supra* note 25.

<sup>168</sup> *Fensterwald v. Burke*, *supra* note 14, involved an attempt by a third person, after the death of one spouse, to bring a direct proceeding to annul the marriage. As the court found the marriage valid in law and fact, it was unnecessary to take up the point of the capacity of a third person to sue to annul.

(or a type of representative appropriate for suits generally).<sup>169</sup>

But the question is, is there any other type of proceeding by which a third person can obtain an immediate direct ruling on the invalidity of a given marriage, or whereby one may ask for a ruling in favor of his own marriage? If we visualize that Mr. Ridgely probably wanted an immediate declaratory ruling that he was still married to Mrs. Ridgely, against the day when her possible predecease might entitle him to claim a widower's property rights, let us see what else a plaintiff in his position could have done to obtain that, when he was denied the use of any of the three normal annulment methods.

Even under the statutory method itself, such a plaintiff might have had the wife prosecuted criminally for bigamy, if the second ceremony had occurred in Maryland or for cohabitation here if otherwise. But criminal prosecutions do not start themselves. Many officials must be persuaded to act before one is successfully concluded. Even without the mention of it in the statute, a criminal prosecution would serve to obtain a judicial declaration of nullity.<sup>170</sup> In addition to those affected by bigamy and incest, inter-racial marriages are the only ones<sup>171</sup> for which criminal prosecutions might so serve.<sup>172</sup>

To achieve his assumed desire, such a plaintiff could try certain other methods that substantially involve collateral attack, but which would be of such a deliberate nature as to approach direct attack. He could sue the wife for absolute

<sup>169</sup> There has been no ruling in Maryland on the capacity of a parent on behalf of an infant, or a guardian on behalf of an insane person, to seek to annul a marriage against the wishes of the substantial plaintiff. This point was suggested in the Elfont case, *supra* note 123, but did not have to be decided, as the court found Elfont sane enough to have entered into the marriage. Suffice it to say that if the annulment is denied, there is no problem, and if it is granted, implicit in its granting is a finding that it is for the best interests of the incompetent person to have the annulment.

<sup>170</sup> There might be some doubt whether a criminal conviction would be res adjudicata of the validity of the marriage in a different, civil case. Perhaps the express mention of criminal convictions in Md. Code, Art. 62, Sec. 14, was meant to make such convictions res adjudicata.

<sup>171</sup> See *supra* notes 87 and 88 concerning the distinction between criminal prosecutions for the ceremony and for cohabitation thereunder.

<sup>172</sup> There are no criminal aspects directly involved in impotence and the contract impediments, and the criminality involved in cases of non-age and improper solemnization does not affect the validity of the marriage.

divorce for her allegedly adulterous cohabitation with the second husband. But obtaining this would preclude him from later claiming a widower's rights. He could sue for partial divorce for desertion, and this, if obtained, might be *res adjudicata* that she was still his wife and that the suspected divorce was invalid. This would come as close as anything to giving him his desired declaratory judgment in favor of the continued validity of *his* marriage to her. He might sue the second husband for alienation of affections and/or criminal conversation. But how many of these, years later perhaps, would serve as completely as an annulment to counteract the presumption either of the validity of the second marriage or of the preceding divorce, especially when the witnesses of the circumstances of her residence in the divorce granting state would long since have vanished.

Would any of our local procedures for preserving evidence<sup>173</sup> against a future need for its use serve to accomplish what such a plaintiff would want? Until a ruling otherwise, it can be said that it is doubtful. We have no Declaratory Judgment statute at law and only a nominal one in Equity.<sup>174</sup> Both from its own content and the interpretative cases, it is apparent that the latter can rarely be used and not at all in this situation. Other states have such statutes which are so used.

But the question remains: Should there not be made available some procedure for obtaining a declaratory judgment as to the validity of a marriage, whether it be desired to attack or sustain it. The statutory annulment is probably not broad enough to permit a civil petition by one of the spouses seeking to sustain, as well as to attack, the validity of a marriage possibly tainted by incest and bigamy.<sup>175</sup> The divorce procedure, obviously, works only in the direc-

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<sup>173</sup> I. e., proceedings for the perpetuating of testimony and for taking testimony *de bene esse*.

<sup>174</sup> Md. Code, Art. 16, Secs. 28-34.

<sup>175</sup> The first part of Md. Code, Art. 62, Sec. 14, authorizes the named courts to "inquire into, hear and determine the validity of any marriage." This might seem to authorize declaratory judgments *pro* and *con* for *any* impediment. But the latter part of the same sentence: "and may declare any marriage contrary to the table of this article, or any second marriage, the first subsisting, null and void . . ." would seem to indicate that the purpose of the statute was only to permit attacks on marriage for the two named impediments.

tion of attack. The general equity method probably works the same way. Statutory reform of the situation could well provide both for declaratory judgments in favor of marriages and for codification of our present overlapping and conflicting annulment procedures.

In favor of an extensive declaratory judgment practice for marriages is the argument that if it is fair to allow marriages to be directly attacked by various methods involving mere declaratory judgments, it is equally fair to provide means for the assurance of those who wish to rely on them. So long as we do give spouses indefeasible claims in the property of the other spouses upon death it should seem fair to enable the evidence bearing on such claims to be adjudicated while still fresh, as was apparently sought in the *Ridgely* case. We would not have to regress as far as the old English suit for the restitution of conjugal rights in order to do justice in this regard.

But, as supporting the status quo, is the known judicial inclination to favor marriage and legitimacy. The *Ridgely* case itself shows that if we should permit declaratory judgments in favor of first marriages we may allow third persons to attack later marriages which are functioning *de facto*. This would depart from the discernible judicial trend toward favoring the later and normally functioning marriage.

#### E. Territorial Jurisdiction to Annul.<sup>176</sup>

If an annulment proceeding is brought in the proper Maryland court between parties both domiciled here, and concerning a marriage performed in the State, no Conflict of Laws problems arise. Complications arise when one or both the spouses is domiciled elsewhere and/or the ceremony was performed elsewhere. As has been pointed out in the Maryland Annotations to the Restatement of Conflict of Laws,<sup>177</sup> the Court of Appeals has assiduously avoided<sup>178</sup>

<sup>176</sup> On this point, see Myerberg, *Jurisdiction to Annul a Marriage*, Daily Record, August 4, 1931.

<sup>177</sup> Reiblich, Maryland Annotations to the Restatement of Conflict of Laws (1937), Sec. 115.

<sup>178</sup> The question has been raised in two Maryland cases. In *Elfont v. Elfont*, *supra* note 123, 161 Md. 458, 474, the Court ruled that the territorial

making a square ruling on this territorial jurisdiction point. The decisions are consistent with the theory that Maryland has jurisdiction either if the ceremony was performed here,<sup>179</sup> or if the parties are domiciled here at the time of the proceeding,<sup>180</sup> or even with the broader theory that personal jurisdiction over the parties (aside from any other factor) would support an annulment proceeding.<sup>181</sup> Likewise, they are not inconsistent, necessarily, with the view adopted by the Restatement<sup>182</sup> that the state may annul a marriage under the same jurisdictional circumstances as would enable it to grant a divorce. However, in the absence of an expressed opinion on the subject by the Court of Appeals, we can only speculate as to the merits of the three possible bases of jurisdiction.

The rule of jurisdiction based on domicile simulates that for the granting of divorce and is the one approved by the Restatement. It may be taken that, so long as we grant divorces where only one spouse is domiciled here and where both marriage and misconduct occurred elsewhere,<sup>183</sup> we would also grant annulments on the same basis.<sup>184</sup> The grounds for the annulment would be determined according to the law of the state whose law determined the validity of

jurisdiction point, raised for the first time on appeal, was raised too late to be considered. They also denied the annulment on the merits, so that nothing was lost by their refusal to consider the other point. In *Corder v. Corder*, *supra* note 97, 141 Md. 114, 117, the Court answered the plea to the jurisdiction by confusing it with a plea concerning the power of Equity to grant annulments rather than one to the territorial jurisdiction of Maryland courts.

<sup>179</sup> In the following cases the Court entertained annulment suits on the merits where the ceremony had been performed in Maryland, although the parties were domiciled elsewhere at the time of the suit: *Brown v. Scott*, *supra* note 121; *Corder v. Corder*, *supra* note 97; *Montgomery v. U'Nertle*, *supra* note 98.

<sup>180</sup> In the following cases the Court considered on the merits suits where the ceremony was performed elsewhere, although the parties were here domiciled at the time of the suit: *Fensterwald v. Burke*, *supra* note 14; *Oswald v. Oswald*, *supra* note 136; *Elfont v. Elfont*, *supra* note 123.

<sup>181</sup> Dicta in *Corder v. Corder*, *supra* note 97, 141 Md. 114, 117; and *Elfont v. Elfont*, *supra* note 123, 161 Md. 458, 474.

<sup>182</sup> Restatement of Conflict of Laws, Section 115.

<sup>183</sup> Md. Code Supp., Art. 16, Sec. 37.

<sup>184</sup> *Quaere*: If Plaintiff is domiciled in Maryland, but Defendant is not, what method is available for serving Defendant if personal service may not be secured. Both the divorce and general equity methods already have devices for service by publication. Would the same method be used, by analogy, in the Superior Court of Baltimore City under the statutory method?



the marriage, i. e., place of celebration, subject to our public policy exception.<sup>185</sup>

The rule of jurisdiction based on ceremony in Maryland, even though both parties are elsewhere domiciled at time of suit, also seems plausible, for it would seem appropriate to have the annulment suit recorded in the same county seat as that where the marriage license record is located, and conducted by the courts most familiar with the applicable law and best situated to obtain all the evidence concerning the facts surrounding the ceremony.

For that matter, taking jurisdiction solely on the basis of both parties being before the Court, regardless of domicil or place of ceremony, has a certain amount of plausibility. There is not the same objection that there would be to allowing a state to grant a divorce without domicil of at least one party. Even if annulment jurisdiction is thus assumed, the same decision will (presumably) be made as in the courts of the state of domicil or ceremony, viz., one according to the law of place of celebration. In divorce cases on the other hand, the grounds are determined by the law of the forum, and to allow the parties to choose their forum, without regard to domiciliary considerations, would allow them to choose states having easy divorce.<sup>186</sup>

Of course, if the annulment be sought by the *divorce* method in Maryland, the jurisdictional rules appropriate for divorce proceedings generally must be satisfied, and thus residence of at least one of the spouses in Maryland would be requisite,<sup>187</sup> and that for two years if the grounds occurred without the state.<sup>188</sup> It is submitted that if the marriage occurred outside the state, then the pre-venient grounds of impotence and marriage void ab initio also occurred outside. Pre-marital unchastity would probably be determined according to the place where the act occurred. Then, if the annulment be sought by criminal prosecution, either under the statutory method or otherwise, such a prosecution in Maryland would have to be predicated upon

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<sup>185</sup> Restatement of Conflict of Laws, Sec. 186.

<sup>186</sup> To be sure, our public policy exception for inter-racial marriages might lead to our annulling a marriage which would not be invalidated elsewhere.

<sup>187</sup> *Supra* note 183.

<sup>188</sup> Md. Code, Art. 16, Sec. 40.

some criminal conduct within Maryland, either the marriage ceremony, or the local cohabitation under a ceremony performed elsewhere.

There has been no case determining the circumstances under which Maryland will recognize as valid an annulment decree rendered in another state. Suffice it to say that we should probably recognize one granted under circumstances under which we, ourselves, would grant one. The full faith and credit clause would compel recognition of many foreign annulment decrees, and if, as indicated above, we would entertain jurisdiction ourselves very freely, we should probably go even farther than required and recognize all of the kind that we would grant.<sup>189</sup>

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<sup>189</sup> The text above analogizes the situation to that for divorces, for which see Reiblich, *Maryland Annotations to the Restatement of Conflict of Laws*, Sec. 113.