1-1-1967

The Historical Evolution of the Concepts of Void and Voidable Marriages

Paul J. Goda S.J.
Santa Clara University School of Law, pgoda@scu.edu

Recommended Citation
7 J. Fam. L. 297

The Historical Evolution Of The Concepts Of Void And Voidable Marriages

PAUL J. GODA, S.J.*

The distinction between void and voidable marriages arose in cases where property was the main issue and as a result of conflicts of jurisdiction between ecclesiastical and temporal courts. If the marriage could be civilly attacked after the death of one of the spouses, then it had been a void marriage; if it could not be attacked, even though canonically invalid, the marriage was voidable but not avoided.

Property cases were usually handled by temporal courts, whereas cases involving the validity of the marriage were heard in ecclesiastical courts. However, after the Reformation property and relational aspects of marriage were no longer heard separately. This was necessitated by Henry VIII's predicament: in order to obtain his annulment(s) he had to forbid appeals to Rome; thus he had to put marriage under the same procedure as property claims.

Not until 1598 was the term voidable used in an issue between husband and wife and not after the death of one of them. From this point, old property solutions to problems after the death of one of the partners became applicable to the marriage itself during the life of the partners.

Early American courts accepted the distinction between canonical and civil disabilities as the rationale for void (civilly disabled) and voidable (canonically disabled) marriages. But the modern basis for the distinction should be the seriousness of the defect. Whatever the rationale, society's interest in the status of marriage as a support for firm family relationships is still partially borne by the distinction between void and voidable marriages, although historically the distinction was never meant to be such a buttress.

To trace the evolution of a legal concept over some nine hundred years is to see a panorama of the life of man. Behind the dry words of legal terminology lies the treasure of economic bustle, the political emotion of personal desire. This is especially true in the most universal and intimate of human institutions, marriage. In tracing the history of the distinction between void and voidable marriages, the stir of passion beneath the surface of the law is still at work, ready to unleash

*Member of the California Bar.

the furor of the many social groups who have an interest in defining the bounds of marriage.

The beginning of the distinction between void and voidable marriages goes back to 1085 when William I referred cases involving the guidance of souls to ecclesiastical courts. Before that time, the various causes had been treated indiscriminately, apparently by clergymen, in various courts.[1]

Over a period of centuries, the ecclesiastical and temporal courts attempted to reach an equilibrium as to the causes over which they would have jurisdiction. Some disputes as to property could be handled in either ecclesiastical or temporal courts when the property was connected with marriage rights, but Glanville tells us that the jurisdiction of the ecclesiastical courts was limited when the plea in defense was that the plaintiff was not the lawful wife.[2]

The canon law of the ecclesiastical courts was primarily designed to determine the validity of marriages and to see if the two spouses were living in a state of sin. Thus, the diriment impediments of consanguinity, affinity, public decency, solemn vows, orders, prior bond, crime, and perhaps disparity of cult could be pointed out by anyone because with these impediments, the spouses were living in sin. Lack of consent, impotence and lack of age were limited to denouncement by the spouses.[3] It is true that annulment may have required judicial process, but a man would not be a bigamist if he married again after an invalid marriage without going through the courts.

The English courts which had jurisdiction over marriage problems achieved their equilibrium in marriage cases by distinguishing those cases which were concerned with property as the main issue from those which were primarily concerned

---

1. F. MAKOWER, THE CONSTITUTIONAL HISTORY AND CONSTITUTION OF THE CHURCH OF ENGLAND, 417 and 465 (1895).

2. *Id.* at 424.

3. 1 A. ESMEIN, LE MARIAGE EN DROIT CANONIQUE 452 (2d ed. 1929). *Editor's Note: But see* Moore, *Defenses Available in Annulment Actions*, 7 J. FAM. L. 239 at 248 n. 40 for a slightly broader list of diriment impediments including nonage and impotence.

with validity of the marriage. The latter remained a purely spiritual problem under the ecclesiastical courts, which were concerned with the care of souls and always subject to appeal to Rome, once canon law had developed universal norms and Europe had arisen from the limitations of the Dark Ages.

It was in the former category of cases in which property was the main issue that the distinction between void and voidable marriages arose. It should be noted immediately, that, in such cases, there was no appeal to Rome.[4]

As is apparent, the separation of church and state in pre-Reformation days posed its own peculiar problems to be resolved. Here, a property difference was resolved in favor of the state, even though in theory ecclesiastical courts may have had jurisdiction of the underlying cause.

Another example of a differentiation in approach involved the distinction between special and general bastardy. The marriage of the parents would retroactively legitimatize a child in the eyes of the Church but not before the common law. The common law courts in special bastardy proceedings would ask whether someone was a bastard because born before the marriage of his parents. The ecclesiastical courts had jurisdiction of general bastardy, whether a man was a bastard here and now.[5]

---

4. 4 BRACTON, DE LEGIBUS ANGLIAE 501 (1881). Bracton stipulated: And because the inquest is committed only to the persons and ordinaries comprised in the letters of the lord the king, the jurisdiction is not extended to other persons, and especially not beyond the kingdom; because if the bishop upon the appeal of either party being interposed to the lord the pope should halt and not inquire further, prejudice might be done thereby to the lord the king, because in this manner the pope might in cases of this kind indistinctly and as it were indirectly judge concerning a lay fee in regard of the marriage, because this is an incident and not a principal matter, as the lay fee is.

5. 2 F. POLLOCK and F. MAITLAND, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I 127-28 (2d ed. 1905).

Such a situation arose because the Church emphasized the consensual nature of marriage, putting the responsibility on individuals so that words of future promise plus physical consummation or words of present promise would prevail over any later ceremony in a church. But the common law wanted regularity and proof in order to pass land. Thus in possessory actions where there was a *de facto* marriage, the defendant could not plead a void marriage but only the lack of a marriage celebrated in the face of the Church.[6] Pollock and Maitland noted:

> It is easy, however, to slip from the proposition that no woman can claim dower unless she has been endowed at the church door, into the proposition that, so far as concerns the exaction of dower, no marriage is valid unless it is contracted before the face of the church.[7]

It is interesting to note that the Church solved some of the harshness of its impediments by holding that offspring of putative marriages were legitimate as long as there were *bona fides*. But in the 14th century in England, such legitimacy became dependent on the fact that the parents while living were never "divorced," that is, never had their marriage annulled.[8] This is apparently one of the direct precursors of the distinction between void and voidable marriages.

Bracton recognized that "a man cannot have two legitimate wives at once and together, although he may sometimes have more than one in fact, he cannot however have of right more than one."[9] But he lists defenses which a tenant may make to a woman who seeks dower: a) that the couple were never espoused and had no connection, b) that if there was a connection, she was only a concubine, c) that if espoused, he had already married another woman in law and her only in fact, d) that if espoused, an annulment had been pronounced,

---

6. 2 *id.* at 381.

7. *Id.* at 375.

8. *Id.* at 377; *contra* D. P. FLOOD, THE DISSOLUTION OF MARRIAGE 86 (claims this is a post-Reformation distinction).

9. 4 BRACTON, *supra* note 4, at 469.

or e) even if a lawful marriage, the woman was so young that she could not have sexual intercourse or the marriage was not at the church door. Bracton goes on to say that these defenses are not to be raised in a secular court since they relate to a spiritual matter,[10] but all the defenses point to a void marriage except the one of not being married at the church door.

If the legitimate wife did not attack the wrongful wife during her life while she was within the kingdom, then after the husband's death she could not impeach the rights of the *de facto* wife.[11] Procedurally, this was a voidable marriage which was never avoided.

In summary, "there is no English law of marriage"[12] for the period up to the Reformation. The ecclesiastical courts had jurisdiction over all marriage causes. But where a question of property arose after death of one of the spouses, there was no appeal to Rome. The ecclesiastical courts acted as the king's court to determine who had rights to the property. If the marriage could be attacked, then it had been a void marriage. If it could not be attacked, even though canonically invalid, the marriage was voidable but not avoided. This distinction was based on a property relation and not used to determine canonical validity of marriages.

With the Reformation starts the English law of marriage. Although there was little change in the marriage laws, Haw does indirectly admit the broader change by decrying the shift from an emphasis on marital status to contract.[13] Actually, the ecclesiastical courts maintained *de facto* control over marriage causes until 1857.[14] But there was a real change and the change was deep:

> The divorce question made . . . solution impossible. The Pope, coerced by Charles V, could not grant the divorce; and therefore a break with Rome became necessary. Although the break was accomplished with as little external change as pos-

---

10. *Id.* at 497-99.

11. *Id.* at 541.

12. F. MAITLAND, ROMAN CANON LAW IN THE CHURCH OF ENGLAND 39 (1898).

13. R. HAW, THE STATE OF MATRIMONY 52, x-xi (1952).

14. 1 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 622-3 (7th ed. 1956).

> sible, it necessarily involved an altogether new view as to the relations between Church and State. In the preambles to Henry's statutes we can see the gradual elaboration of the main characteristics of these changed relations of Church and State —the theory of the Royal Supremacy. The dual control over things temporal and things spiritual is to end. The crown is to be supreme over all persons and causes. The canon law of the western church is to give place to the "King's Ecclesiastical Law of the Church of England."[15]

It should be added that these issues divide men today, not only concerning the bounds of marriage but in religion and politics. But when these issues originally divided men, they affected the history of the concepts of void and voidable marriages. What was once a distinction based on the need for procedural certainty in handling property, became a basis for refusing to back the indissolubility of marriage by the power of the state.

The ecclesiastical courts had to follow the statutes of the land. Temporal jurisdiction perforce took over and united what had been separate: the property and relational aspects of marriage. This is what, it seems to me, has ultimately led to the triumph of marriage as a contract.

Maitland summarized the basic change at the time of the Reformation:

> In the first place, we have come upon what must be called a sudden catastrophe in the history of the spiritual courts. Henceforth they are expected to enforce, and without complaint they do enforce, statutes of the temporal legislature, acts of the English parliament. Henceforth not only is their sphere of action limited by the secular power—that is a very old phenomenon—but their decisions are dictated to them by acts of parliament—and that is a very new phenomenon.[16]

When Henry VIII could not obtain an annulment on the grounds that the dispensation under which he married Catherine was invalid, in other words a voidable marriage, he was driven to claim that the Pope's power to dispense was *ultra vires* because the Pope could not dispense with the degrees mentioned in Leviticus as God's law, in other words, a void marriage.[17] But in order to make the procedure legal, Henry

---

15. *Id.* at 588-89.

16. MAITLAND, *supra* note 12, at 90-91.

17. 1 P. HUGHES, THE REFORMATION IN ENGLAND 161, 164, 204 (1956).

had to forbid appeals to Rome, and put marriage itself under the same procedure as property claims. He did this by the Statute of Appeals which was not a limitation on the Church, as Provisors and Praemunire had been, but outright abrogation of an entire relationship.

There followed the series of acts which laid down, repealed, relegislated, and abrogated in turn, by legislative fiat under regal pressure, the laws relating to marriage.[18] At the end of this process of legislative revision, little was specifically changed in the matrimonial law as such. However, lay judges were appointed to the ecclesiastical courts and the study of canon law was forbidden.

The first case that I have been able to discover mentioning the term "voidable" was in 1598. In a divorce case *causa frigiditatis,* the two parties were declared free to remarry. They both remarried and had children but on discovery of fraud were forced to cohabit together again. No writ of prohibition was allowed, the Church having been deceived in the first judgment. The second marriage was called voidable.[19] This is apparently the first time in the reports that the term was used in issue between the husband and wife and not after the death of one of them. This would, of course, bastardize the children of the second marriage. The marriage was subject to attack only during the lifetime of the parties.

---

18. In 1533, 25 Hen. VIII c.22 declared Henry's marriage with Catherine invalid because the marriage had been within the Levitical degrees. But the law pertaining to affinity was not applicable where there had been intercourse with a close relative of the prospective spouse. This of course left the way open for marriage to Anne Boleyn. 28 Hen. VIII c.7 held that marriage against God's law was prohibited and included carnal offenses within the Levitical degrees to cover the annulment of the marriage with Anne Boleyn. In 1540, 32 Hen. VIII c.38 laid down the law against pre-contract where there was no bodily knowledge. In the same year, 32 Hen. VIII c.25, declared the annulment by the clergy of England of the marriage with Anne of Cleves.

By 1 Mary c.1, Mary effectively declared that she was legitimate, as might be expected, and abrogated 25 Hen. VIII c.22 and parts of 28 Hen. VIII c.7. 1 and 2 Phil. & M. c.8 repealed portions of 28 Hen. VIII c.7 and 32 Hen. VIII c.38 and thus returned marriage laws to what they had been before the Reformation. 1 Eliz. 1 repealed 1 and 2 Phil. & M. c.8 except as specified and thus revived the portion of 32 Hen. VIII c.38 that "no reservation or prohibition, God's law except, shall trouble or impeach any marriage without the Levitical degrees."

19. Bury's Case, 77 Eng. Rep. 207 (C.P. 1598).

In *Harrison v. Burwell,* during the reign of Charles II, the court claimed that the law courts had full cognizance of marriages in or out of the Levitical degrees.[20] But five years later, *Hill v. Good* determined that 1 Eliz. c.1 had revived applicable portions of 25 Hen. VIII c.22 to explain what God's law was and that this determination belonged to the ecclesiastical courts since the temporal courts could not impeach marriages even if they were outside of the Levitical degrees. The court held that "the matter being wholly of ecclesiastical cognizance," the act of 32 Hen. VIII would not allow the temporal courts to determine what God's law was by allowing a writ of prohibition—except for precedent.[21] Thus the court contradicted itself and took for granted that a writ of prohibition would be allowed; it then went on to muddy the waters by saying that no writ could be granted here.

In 1812, in one of the few ecclesiastical cases on the point, the authorities come together. *Elliott and Sugden v. Gurr* states:

> The canonical disabilities, such as consanguinity, affinity, and certain corporal infirmities, only make the marriage voidable, and not *ipso facto* void, until sentence of nullity be obtained; and such marriages are esteemed valid unto all civil purposes, unless such sentence of nullity is actually declared during the lifetime of the parties.
>
> . . . Civil disabilities, such as a prior marriage, want of age, idiocy, and the like, make the contract void ab initio, not merely voidable; . . . no sentence of avoidance is necessary.
>
> . . . But it is so laid down by Bracton and Holt; and it is thus stated by Lord Coke (CoLitt 33a), "If a marriage *de facto* be voidable by divorce, in respect of consanguinity, affinity, precontract, or such like . . . yet if the husband die before any divorce, then, for that it cannot now be avoided, the wife *de facto* shall be endowed; for this is *legitimum matrimonium quoad dotem.*"[22]

What happened was that the old property solutions to problems after death of one of the partners became applicable to the marriage itself during the life of the parties after the Reformation had intermingled concepts of the two jurisdictions. It should be said here that 5 and 6 Will. IV c.54 in

---

20. Harrison v. Burwell, 124 Eng. Rep. 1039 (C.P. 1667).
21. Hill v. Good, 124 Eng. Rep. 1085 (C.P. 1672).
22. 2 Phill. Ecc. 16, 161 Eng. Rep. 1064 (1812).

1835 declared that marriages between parties within the prohibited degrees of consanguinity and affinity were to be void and this is the state of British marriage law today. This later statute is closer than the case law to what Henry VIII did in predicating his break with Rome on the Pope's inability to dispense with certain impediments to marriage.

In view of the confusion in the British courts as to the roots of the concepts of void and voidable, it is small wonder that American courts, who were an ocean removed from British courts and who, in addition, never had ecclesiastical courts, also indiscriminately adopted the doctrine of void and voidable marriages to cover both the problems of annulment during life and property problems after the death of one of the spouses. An early case laid down the doctrine in 1845:

> There is a distinction in the law between void and voidable marriages, where, even, they were regularly solemnized. The latter, which are sometimes called marriages *de facto*, are such as are contracted between persons, who have capacity to contract marriage, but are forbidden by law from contracting it with each other: as to which, therefore, there was a jurisdiction in the spiritual courts to declare the nullity of the marriage. But until the nullity was thus declared, as an existing marriage, it was recognized as valid both in the canon and common law; and, as there can be no proceeding in the ecclesiastical court against the parties, after their death or that of one of them, that event virtually makes the marriage good *ab initio* to all intents, and the wife and husband may have dower and curtesy and the issue will be legitimate. . . . But where the marriage is between persons, one of whom has no capacity to contract marriage at all, as where there is a want of age, or understanding, or a prior marriage still subsisting, the marriage is void absolutely and from the beginning, and may be inquired of in any court.
>
> . . . Owing to the peculiar division of jurisdiction between the ecclesiastical and common law courts in England, it was held in early periods, that no special matter, avoiding a marriage, as bigamy for example, could be specially pleaded in a real action, but that the plea must be in the general form of *ne unques accouple in legal matrimonie*, and that, upon issue joined thereon, a writ was sent to the bishop of the diocese . . . and his certificate in return was conclusive both of the fact and legality of the marriage.[23]

23. Gathings v. Williams, 27 N.C. Rep. 487, 493-94, 44 Am.Dec. 49, 50-51 (1845).

The Maryland courts in 1864 reached the same conclusions but with a better rationale:

> The Canon and Civil Law, regulating marriages, was a part of the Common Law, administered by ecclesiastical and civil tribunals in England, and transplanted to the colonies by our ancestors, without introducing corresponding courts to enforce them. In the first year of the organization of the State Government, 1777, ch. 12, the General Assembly passed the Act entitled "An Act concerning Marriages." This Act was declaratory of the Canon as a part of the common law, prohibiting marriages between persons related in such degrees of consanguinity and affinity as previously prevented their lawfully joining in matrimony. The disabilities enumerated, are all canonical disabilities, and not those known to the law as civil disabilities. Canonical disabilities were such as rendered the marriage voidable and not void. They required the judgment of an Ecclesiastical Court, during the lives of the parties, to make them effective, as causes of a divorce. On the other hand civil disabilities, such as arose "*pro defectu concensus,*" for want of a capacity to contract, or physical infirmity *ipso facto* avoided the marriage without the action of the courts. . . . Ecclesiastical judgments were pronounced "*pro salute animae,*" to vindicate the divine law, not to assist the rights of property, and therefore were limited to the lives of the parties.[24]

Bishop, in his classical work, follows the history of this last decision, the *Harrison* case, and opts for the distinction between canonical and civil disabilities as the rationale for void and voidable marriages.

> And we may infer, that in all cases in which the question of the validity of a marriage arose in the common law courts, and was not referred for decision to the spiritual, the marriage was held to be good, unless some civil impediment were shown. If the temporal courts had possessed the jurisdiction to decide upon the canonical infirmities, those infirmities like the civil, would have rendered the marriage void. And hence the rule, that the canonical impediments render the marriage voidable, and the civil render it void.[25]

Bishop takes issue with Chief Justice Ruffin, who wrote the *Gathings v. Williams* decision, by simply stating that a mar-

---

24. Harrison v. State, 22 Md. Rep. 468, 483-84, 85 Am. Dec. 658, 660-61 (1863).

25. 1 J. BISHOP, COMMENTARIES ON THE LAW OF MARRIAGE AND DIVORCE 91, 96, (4th ed. 1864).

riage is voidable because it is canonical.[26] Ruffin at least acknowledged the origin of the need to protect property interests after the death of a spouse as the source of the distinction, as does the Maryland court in *Harrison v. State*.

A modern author has suggested that "Divorce, legal recognition of the *dissolubility* of marriage, renders obsolete a doctrine based on the *indissolubility* of marriage."[27] This is in opposition to the older theory that he conceives it:

> Theoretically, there are no marital consequences incident to a defective marriage since it is treated, under one of two principles, as never having existed. A defective marriage is classified as either "void" or "voidable," depending upon the seriousness of the defect. Conceptually, a void marriage simply did not exist and this is incapable of possessing marital consequences. A voidable marriage, on the other hand, is valid until annulled; only then is the marriage considered a legal nullity. The annulment "relates back" to the ceremony, voiding the marriage *ab initio*.[28]

The author well perceives that the concept of defectiveness should not obscure the relationships that did exist, but he fails to point out that seriousness of defect is a modern basis for the distinction between void and voidable marriages.[29] The less serious the defect, the more weight should be put on the fact that the man and the woman lived together so that there should be some sort of legal consequence of their relationship.

Part of this legal consequence must relate to property. This was the reason for the original distinction in concepts of void and voidable. But, unfortunately, the distinction between void and voidable marriages must also bear the weight of determining the validity of marriages. It is small wonder, then, that the author of the Stanford Law Review article quoted above feels that the distinction is outmoded and that there are simpler ways of handling the problem.

Under the aspect of property, the tendency of the law's concern for marriage will be the same as for a civil contract.

---

26. *Id.* at 96-97.

27. Note, *The Void and Voidable Marriage: A Study in Judicial Method*, 7 STAN. L. REV. 529, 536 (1955).

28. *Id.* at 530.

29. *Id.* at 539.

Granting that the relational aspects of marriage are primarily the concern of persons growing out of their religious attitudes or their ethics and that in a pluralistic society, divorce is not only unlikely to be eliminated but to become a necessity, there should still be some law of status to safeguard the need of society to foster firm family relationship.

At the present time, this interest in a firm family relationship is still partially borne by the distinction between void and voidable marriages—the last outpost of the doctrine of the indissolubility of marriage in the legal field, although it was never meant to be such. But the doctrine does so only as a historical remnant, not as a vital reality.

It has been officially suggested by the California Governor's Commission on the Family that the concept of voidable marriage be dropped from the law:

> We are convinced that the essential question presented in the annulment of a voidable marriage does not differ from that presented in any dissolution of marriage case. To oversimply state the case, if the parties can live and function successfully with the alleged impediment, then the marriage is viable and should not be dissolved. If they cannot, then the marriage has broken down in fact and should be ended at law. We believe, therefore, that the successful operation of the Family Court demands that the same standard govern annulments of voidable marriages as governs other dissolution proceedings, and we recommend the elimination of the specific fault annulment grounds; the removal of the annulment of avoidable marriages as a separate form of action; and the coalescence of all dissolution proceedings (save for declarations of nullity in the case of void marriages) into a single form of action governed by a single standard.[30]

The suggestion to eliminate voidable marriages is tied in with the elimination of the fault concept of adversary proceedings in divorce cases and, more importantly, positively tied in with officially sanctioned investigation as to the possibility of reconciliation in a Family Court.[31] It is here that society can help protect the status of the family in a realistic way, and not merely by the external forms of conceptual indissolubility which underlie the distinction between void and voidable marriages.

---

30. REPORT OF THE GOVERNOR'S COMMISSION ON THE FAMILY, 35-36 (Sacramento, California, Dec. 1966).

31. *Id.* at 17-18, 20, 23.