AN EVALUATION OF THE GROUNDS ON WHICH A MARRIAGE MAY BE VOID OR VOIDABLE

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Abstract

This paper evaluates the grounds on which a marriage maybe void or voidable. The paper states that, where a marriage is either void or voidable, nullity of marriage covers the situations and that marriage is an act which enables a man and a woman to accept each other as husband and wife, leading to marital relationship involving social expectations, reflecting the inherent culture of the people. The paper further states that, persons who intend to marry in Nigeria, may marry under the statute or under the various customary laws. The objective of this paper is to reveal the distinction between a void marriage and a voidable marriage. The researcher adopted the doctrinal research method. The paper recommends that parties who intend to marry under the statute should adhere strictly to the laws regulating marriage in the jurisdiction or locality where the marriage is intended to take place. The paper concludes that, a void marriage is a marriage without legal efficacy and incapable of being enforced by law. While, a voidable marriage is valid and not ipso factovoid, until sentence of nullity is obtained.

Keywords: Marriage, Man, Woman, Nullity, Void and Voidable.

Introduction

Marriage is the act of marrying, and the relationship existing between a husband and his wife or the state of being married.[1]It was stated in the case of *Ezennah v. Attah*[2] that "marriage is regarded as a very sacred institution both in our jurisprudence and in our sociology". However, a marriage celebrated between a man and a woman may be valid, void or voidable. Where a marriage is void or voidable, nullity of marriage covers such situations. The law governing nullity concerns how marriages may be either void or voidable. Thus, the meaning of nullity has to do with the annulment of a marriage. However, a void marriage is one that will be regarded by every court in any case in which the existence of the marriage is in issue, as never having taken place and can be so treated by both parties without the necessity of any decree annulling it.[3]A void marriage may also be defined as a marriage that is wholly ineffective, inoperative and incapable of ratification, so that nothing can cure it to become valid. Thus, void marriage can be said to be a marriage without legal efficacy and incapable of being enforced by law.[4] According to Black's Law Dictionary,[5] a void marriage is one not good for any legal purpose, the invalidity of which may be maintained in any proceeding between any parties, while voidable marriage is

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1 Bromley's Family Law 8thEdn (London: Butterworth) 192, p.20

2 (2004) 17 WRN 1, Per Niki Tobi JSC

3 *De Reneville v. De Reneville*, (1949) p.100, 111 C. A.

4 The above definition is that of the writer, (Mrs.) B. O. Alloh.

5 Henry Campbell Black, M.A., Black's Law Dictionary, 6th Edition, (West Group Publishing Co.) St. Paul, U.S.A. p. 1574.

one where there is an imperfection which can be inquired into only during the lives of both of the parties in a proceeding, to obtain a judgment declaring it void.

A voidable marriage on the other hand, is one which is treated as valid but owing to some defects either of the parties to the marriage, may have void it. That is, a marriage that is good while subsisting but may be annulled at the instance of some existing defect. The Black's Law Dictionary[6] has also defined voidable marriage to be a marriage that is initially invalid but that remains in effect, unless terminated by court order. This same dictionary further defined a void marriage by providing that, a marriage is voidable if either party is underage or otherwise legally incompetent, or if one party used fraud, duress, or force to induce the other party to enter the marriage. It provided further that, the legal imperfection in such a marriage can be inquired into only during the lives of both spouses, in a proceeding to obtain a judgment declaring it void and that a voidable marriage can be ratified once the impediment to a legal marriage has been removed. Where a marriage is considered to be void or voidable, nullity of marriage is initiated by a petition for nullity of a marriage, indicating whether it is on the ground that the marriage is void or voidable in accordance with the provisions of the Marriage Act[7] and the Matrimonial Causes Act[8]. A suit for nullity of marriage is one by which a party seeks to establish that owing to some defect, the marriage is invalid. Thus, in the proceedings for nullity, the celebration of marriage must be strictly proved.[9] The provisions of the Matrimonial Causes Act regulates matrimonial causes in Nigeria. This paper therefore examines the grounds on which a marriage may be void or voidable. It reveals the distinction between void and voidable marriage.

Conceptual Clarifications

This segment of the paper, examines the three relevant key concepts of a valid marriage, a void marriage and a voidable marriage to build a theoretical basis for the analytical evaluation of the distinction between a void and voidable marriage as follows:

(a) **A Valid Marriage:** This is a marriage that creates the legal status of husband and wife and the legal obligations arising from that status. It is a marriage celebrated in accordance with the provisions of the Marriage Act[10] or applicable customary law rules. A valid marriage can also be said to be a marriage which is in no sense defective and is, therefore, binding on the parties (and on everyone else). Thus, it is a marriage that has been ratified and therefore, not inchoate. A valid marriage can only be terminated by death or by a decree of divorce pronounced by a court, which decree acknowledges the existence of a valid marriage and then proceeds to put an end to it. A valid marriage is a marriage that is not void or voidable. There can never be a suit for nullity of marriage in respect of a valid marriage, as such marriage has no defect that could render it invalid. A marriage which has received all the formalities required by law, is said to be a valid marriage. It is a marriage that has legal strength or force, celebrated with proper formalities. Such marriage is capable

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6 Bryan A. Garner, Black's Law Dictionary, 8thEdn. (Thompson West Inc, U.S.A.) p. 994.

7 Cap. M6 LFN, 2004.

8 Cap. M7 LFN, 2004.

9 *Mbonu v. Mbonu* (1976) F.N.L.R, 57.

10 LFN 2004, Cap. M6.

of being justified or defended and has no defect. A valid marriage is therefore recognized and enforced by law.

(b) **A Void Marriage:** This is a marriage that is invalid. It is one without a binding force or legal efficacy and lacks obligation. It has been defined to mean, one not good for any legal purpose, the invalidity of which may be maintain in any proceeding between any parties.[11] A void marriage is invalid from its inception, and parties thereto may simply separate without benefit of court order of divorce or annulment.[12] It is a marriage that is void *ab initio*[13]. A void marriage is not really a marriage at all, in that, it never came into existence because of a fundamental defect. Thus, no decree of nullity is necessary to make it void. Parties can therefore, take the risk of treating the marriage as void without obtaining a decree.[14] But either of the spouses or any person having a sufficient interest[15] in obtaining a decree at any time, whether during the lifetime of the spouses or after their death can do so. In effect, the decree is a declaration that there is no and never has been a marriage between the parties to a void marriage.

(c) **A Voidable Marriage:** This is a marriage that is valid and not *ipso facto* void, until sentence of nullity is obtained. It has been defined to mean, one which is valid (not valid) when entered into and which remains valid until either party secures lawful court order dissolving the marital relationship.[16] A voidable marriage is treated as binding until its nullity is ascertained and declared by competent court. Thus, it is a valid marriage unless and until it is annulled. It is important to note that, it can be annulled only at the instance of one of the spouses during the lifetime of both, so that if no decree of nullity is pronounced during the lifetime of both spouses the marriage becomes unimpeachable as soon as one of them dies.

Distinction between Void and Voidable Marriage

An invalid marriage may be a marriage that is void or voidable.[17] A marriage is void, where it has never existed under existing laws. A marriage of that nature is void *ab initio,* and as a result, the parties have never acquired the status of husband and wife. While a voidable marriage is one that is good while subsisting, such marriage may be annulled at the instance of one or both parties owing to some existing defect. Voidable marriage cannot be brought to an end by a party to the marriage without filing for its annulment in a court of competent jurisdiction. This is however contrary to the rule in commercial contracts. Such marriage can only be annulled by a court of competent jurisdiction. It is not necessary to obtain a court decree in the case of a void marriage. This is because, the parties to the marriage were never married and have never been husband and wife. A decree may however be obtained in order to allay doubts as to the fact that,

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11 Henry Campbell Black, Black's Law Dictionary, Sixth Edn. (St. Paul; West Publishing Co.) 1990, 1574.

12 Darling v. Darling, 44 Ohio App.2d 5, 355 N.E.2d 708, 710, 73 O.O. 2d 5.

13 *Minder v. Minder*, 83 N.J. Super. 150, 199 A.2d 69, 71.

14 Lord Green M.R. in *De Reneville v. De Reneville* (1948) 115, P. 100.

15 This means, as always in English Law, the possibility (however remote) of a pecuniary advantage (however slight).

16 *Darling v Darling*, 44 Ohio App. 2d 5, 355 N.E. 2d 708, 710, 73 0.02d 5

17 Section 34 of MCA, 2004.

there has never been a marriage. In the case of *De Reneville v. De Reneville*,[18] Lord Green succinctly put the distinction between void and voidable marriage thus:

> a void marriage, is one that will be regarded by every court in any case in which the existence of the marriage is in issue as never having taken place and can be so treated by both parties to it without the necessity of any decree annulling it: a voidable marriage is one that will be regarded by every court as a valid subsisting marriage until a decree annulling it has been pronounced by a court of competent jurisdiction...

Flowing from the above, the distinction between valid, void and voidable marriages can be summarized as follows:

(a) A valid marriage is one that is not defective and therefore, binding on the parties and the general public. Such marriage can only be terminated by death or by a decree of divorce.

(b) A void marriage is not really a marriage as it never came into existence because of a fundamental defect. Such marriage is said to be void *ab initio* and no decree of nullity is necessary to make it void. Parties to the marriage can take the risk of treating the marriage as void without obtaining a decree.[19] Either of the spouses or any person having a sufficient interest[20] can challenge the validity of the marriage, during the lifetime of the spouses or after their death that, there is not and never has been a marriage.

(c) A voidable marriage is a valid marriage unless and until it is annulled at the instance of one of the spouses during the lifetime of both. Where no decree of nullity is pronounced during the lifetime of both spouses, the marriage becomes unimpeachable as soon as one of the spouses dies.

The invalidity of a void marriage may be asserted by any person, but only a party to voidable marriage may assert its invalidity because, until it is annulled, the marriage is valid. Moreover, on the death of a husband to a void marriage, the validity of the marriage may be challenged in order to show that the surviving wife is not the widow of the deceased. Such action is usually taken to establish that the surviving wife is not entitled to his property. However, in the case of a voidable marriage with respect to the death of a husband, the validity of the marriage cannot be questioned by a third party because, up to the death of the husband, it was a valid and subsisting marriage and so the right of the wife as a widow cannot be challenged by any one.

By approbation, a marriage that is voidable can be given legal effect by the conduct of the parties thereto. Thus, a party to a voidable marriage may by his act put it out of his power to obtain a decree of nullity. This is not the case with a void marriage as such marriage cannot be given legal effect. Lord Watson explained the principle of approbation in the case of *G. v. M*.[21] as follows:

> …in a suit for nullity of marriage there may be facts and circumstances proved which so plainly imply, on the part of the complaining spouse, a recognition of the

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[18] 1949 p. 100, 111 (C.A.) See also *Skenconsult v. SekondyUkey* (1981) 1 SC p. 6 at p. 12.

[19] Lord Green M.R. in *De Reneville v. De Reneville* (1948) p. 100, 115, C.A.

[20] This means, as always in English Law, the possibility (however remote) of a pecuniary advantage (however slight).

[21] [1885] 10 AC 171, 197-8 (HL)

> existence and validity of the marriage, as to render it most inequitable and contrary to public policy that he or she should be permitted to go on to challenge it with effect.

Approbation may occur from the overt act of a party to the marriage[22] or where there is delay in petitioning for nullity,[23] or where marital benefits of marriage have been accepted.[24] It should be noted however that, a delay may be satisfactorily explained away.[25]

Grounds on which a Statutory Marriage may be Void

The grounds on which a marriage may be void *ab initio*, contained in the Matrimonial Causes Act[26] under Section 3(1) are examined as follows:

(a) Existing Lawful Marriage

Section 3(1)(a) of the Matrimonial Causes Act, 2004 provides that where either of the parties to a marriage is at the time of its celebration lawfully married to some other person, such marriage will be null and void.[27] Section 33(1) of the Marriage Act concerns a situation where a customary law marriage precedes a statutory marriage with a different person.[28] The section provides that:

> No marriage in Nigeria shall be valid where either of the parties thereto at the time of the celebration of such marriage is married under customary law to any person other than the person with whom such marriage is had.[29]

The above applies only to statutory marriages celebrated in Nigeria under the Marriage Act. Where the marriage is contracted outside Nigeria, the validity of the foreign marriage will properly be determined by the application of the conflict rules as to the capacity to marry.[30]In order to invalidate a marriage celebrated under the Marriage Act on the ground of a prior marriage celebrated under native law and custom, the latter marriage must be established by a high degree of certainty. Thus, in the case of *Abisogun v. Abisogun*,[31] it was stated that:

> With respect, I cannot share the view of the learned trial judge that to prove a marriage in accordance with Native Law and custom in order to invalidate another marriage, the 'ipse dixit' alone of the parties to the alleged marriage backed up by the evidence of the brother, whilst others alleged to be aware of the marriage are alive,, is enough to discharge the onus of proof required to prove such marriage by Native law and custom. I would add that in order to invalidate a marriage celebrated under the Marriage Ordinance on the ground of a prior marriage by

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22 *W v. W* (1952) 1 All ER 858.
23 *Scott v. Scott* (1959) 1 All ER 531
24 *Nash v. Nash* (1940) 1 All ER 206.
25 *Clifford v. Clifford* (1948) 1 All ER 394.
26 LFN, 2004, Cap. M7.
27 *Nwankpele v. Nwankpele* (1973) UILR 84.
28 *Ojo v. Ojo*, Suit No. A/4D/72 (Unreported), High Court, Aba, Umezinwa, 1stDecember, 1972.
29 Section 33 (1) of the Marriage Act, LFN 2004.
30 Pam v. Pam (1977) 11 CC HCJ 2589.
31 [1963] 1 All NLR 237, 242.

> Native Law and Custom, the latter marriage must be established by a high degree of certainty.

In the case of *Adegbola v. Folarami,*[32] the position of a subsequent statutory marriage celebrated abroad was considered. This is a case in which one Harry Johnson married a woman called Oniketan, by Native law and custom, and they were blessed with one child, called Adegbola who is the plaintiff in this case. Harry Johnson was later captured as a slave and taken to Trinidad in the West Indies where he received the Christian faith. While in Trinidad he married one Mary Johnson in a Catholic Church. At this time, Johnson's wife by Native law and custom was alive and was residing at their home at Awe. In the year 1876, Harry Johnson returned to Lagos with his wife Mary. Harry Johnson died intestate in or about 1900. On the death of Mary Johnson, Adegbola claimed to inherit a house built by her father in Lagos and it became necessary to determine the validity of the Christian marriage. It was held by the Divisional Court that, the Christian marriage must be presumed to be valid. The opinion of the lower court was confirmed on appeal by the full court. And the court stated[33] that:

> Although there is no direct evidence that the Native polygamous marriage which Harry Johnson contracted before he was seized as a slave was dissolved, I think that the proper presumption on the facts is that Harry Johnson, before he contracted his marriage with Mary Johnson, considered that he and his partner to the Natives marriage were absolved from all obligations to one another. And that he was free to contract a Christian marriage…

The court also found that Harry Johnson, had separated from his customary law wife for thirty-five years, before he became converted to Christianity which resulted to his Christian marriage to Mary. Although there was no evidence that bride price had been refunded. It is important to note however that, mere separation for a very long time without the refund of bride price does not constitute divorce under customary law. Thus making the decision of the court in the above case questionable. In the case of *Oshodi v. Oshodi,*[34] Section 33(1) of the Marriage Act was considered. In this case, a wife by name Folashade petitioned for divorce on the grounds of cruelty and adultery. In 1954, the respondent contracted a valid marriage with one Sikiratu under Yoruba Islamic law and custom pertaining to the Ahmadia. The respondent and the petitioner were married under Yoruba law and custom in 1955. They were both aware of the 1954 marriage and the three of them lived together before the petitioner and the respondent left Nigeria for England. The petitioner and the respondent went through the English form of marriage in 1956. It was the contention of the respondent that the English marriage of 1956 was a nullity, and that as a result the petitioner was not entitled to the relief sought. It was then stated by Caxton Martins, Ag. J. that, as the 1956 marriage was not celebrated in Nigeria, the provision of Section 33(1) was not relevant. He then held obiter that, if the petitioner and the respondent had married in Nigeria under the Marriage Act a caveat would have been successfully lodged, as the 1954 marriage was an existing marriage that is valid.[35] With respect to the validity of the English form

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[32] [1921] 3 NLR 89.

[33] At p. 92.

[34] [1963] 2 All NLR 214.

[35] At p. 216.

of marriage, the judges were of the view that the reasoning in the case of *Asiata v. Goncallo*,[36] should be considered and on the basis of the reasoning concluded that as the respondent had not renounced his faith as a follower of the Holy Prophet; the 1954 marriage was still subsisting, and the English marriage was therefore a nullity.[37]

It is submitted that the right decision was reached by the learned judge, on a wrong reasoning as the decision in the case of *Asiata v. Goncalo* ought to be restricted to the particular fact of that case. The fact is that under Nigerian law, he lacks the capacity to contract a valid monogamous marriage with another person.[38] Section 35 of the Marriage Act provides as follows:

> Any person who is married under this Act, or whose marriage is declared by this Act to be valid, shall he incapable, during the continuance of such marriage, of contracting a valid marriage under customary law.

Under this provision, the subsisting marriage must have been celebrated in accordance with the Marriage Act in Nigeria. Thus, where a party to a valid subsisting statutory marriage in Nigeria decides to contract a subsequent customary law marriage, such subsequent marriage will be null and void. In the case of *Onwudinjoh v. Onwudinjoh*,[39] a man by name Jeremiah married a woman called Agnes under the Marriage Act in Makurdi in 1926. While Agnes was still alive, Jeremiah purported to marry one Chinelo by native law and custom. It was held by Ainley, C. J. that, by reason of Section 35 of the Marriage Act, the customary law marriage was null and void. It is submitted that Section 35 does not apply to cases where the prior marriage is a monogamous one celebrated outside Nigeria. Moreover, in the case of *Asiata v. Goncallo*,[40] Elese who was taken to Brazil as a slave married Selia in accordance with Moslem rites and he subsequently married her in a Christian church. On the return of Elese and Selia to Lagos, Elese married Asatu in accordance with Moslem rites, while Selia was alive, but subsequent to the passing of the Marriage Ordinance 1884. Griffith J. while determining the validity of the marriage to Asatu, held the subsequent customary law marriage valid on the following grounds:

(i) that Elese's presence in Brazil was not free, he being taken there as a slave;
(ii) that Nigeria was not a Christian country, and by customary law a man can legally have several wives;
(iii) that Elese was a bonafide follower of the Prophet, and as such was legally entitled to marry several wives; and
(iv) that Selia did not appear to have raised the slightest objection to her husband's subsequent marriage.

It is submitted that this decision is not a good law because it means that Moslem law, being regarded as a customary law would enable any person who had contracted customary law marriage to have the capacity of contracting another customary law marriage after contracting a valid monogamous marriage, if the above decision is to be followed. However, the mere fact that

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[36] [1900] 1 NLR 41.
[37] At p. 21.
[38] By contracting the second marriage, he has committed the offence of bigamy under Section 370 of the Criminal Code Act, LFN 2004, Cap. C38.
[39] [1957] II ERLR 1.
[40] [1900] 1 NLR 41

customary law marriage was blessed in the church, does not, ipso *facto*, accord the said customary law marriage the garb of marriage under the Act. Where a person who is married under the Marriage Act purports to marry a third party either under the Marriage Act or under a foreign marriage law, the subsequent marriage will be void *ab initio* as the person lacks the capacity to contract a subsequent marriage, while the previous marriage is subsisting[41]

(b) Prohibited Degrees of Affinity or Consanguinity.

The prohibited degrees of affinity and consanguinity are set out in the first schedules of the Matrimonial Causes Act.[42] They are:

Consanguinity	and	Affinity

Thus, marriage of a man is prohibited if the woman is, or has been his

Ancestress	wife's mother
Descendant	Wife's grandmother
Sister	Wife's daughter
Father's sister	Wife's son's daughter
Mother's sister	Wife's daughter's daughter
Brother's daughter	Father's wife
Sister's daughter	Grandfather's wife
	Son's wife
	Daughter's son's wife

Marriage of a woman is prohibited if the man is, or has been, her

Ancestor	Husband's father
Descendant	Husband's grandfather
Brother	Husband's son
Father's brother	Husband's Son's son
Mother's brother	Husband's daughter's son
Brother's son	Mother's husband
Sister's son	Grandmother's husband
	Daughter's husband
	Son's daughter's husband
	Daughter's daughter's husband

It is immaterial whether the relationship is of the whole blood or half-blood, or whether it is traced through, or to any person of illegitimate birth.

Under Section 3(1)(b) of the Matrimonial Causes Act, a marriage shall be void where the parties are within the prohibited degrees of consanguinity or, subject to Section 4 of the Matrimonial Causes Act, of affinity. However, in certain circumstances, it may be possible for persons within the prohibited degree of affinity to marry each other with the consent of a High Court Judge. Section 4 of the Matrimonial Causes Act 2004, provides for the celebration of marriage between

[41] R v. Princewill (1963) NNLR 54.

[42] Cap. M7 LFN, 2004.

persons that are within the prohibited degrees of affinity in exceptional circumstances. Section 4(1) to (3) provides as follows:

(1) Where two persons who are within the prohibited degrees of affinity wish to marry each other, they may apply, in writing, to a judge for permission to do so.
(2) If the judge is satisfied that the circumstances of the particular case are so exceptional as to justify the granting of the permission sought, he may by order, permit the applicants to marry one another.
(3) Where persons marry in pursuance of permission granted under this section, the validity of their marriage shall not be affected by the fact that they are within the prohibited degrees of affinity

(c) Formal Invalidity

The formal validity of a marriage is governed by the *lex loci celebrationis*, that is, the law of the place of celebration. It is the *lex loci celebrationis* that determines whether the local rules as to form were complied with.[43] By the provision of Section 3(I)(c) of the Matrimonial Causes Act 2004, a marriage is void where the marriage is not a valid marriage under the law of the place where the marriage takes place, by reason of a failure to comply with the requirements of the law of that place with respect to the form of solemnisation of marriages.

Moreover, Section 33(2) of the Marriage Act, 2004 provides that 'a marriage shall be null and void if both parties knowingly and willfully acquiesce in its celebration without compliance with some formalities prescribed under Section 33(2)(a)(b)(c) and (d). Under this provision, both parties to the marriage had knowledge of the defect in the formalities, but the marriage will be void if it is shown that they willfully agreed to proceed with the celebration of the marriage. In the case of *Obiekwe v. Obiekwe*,[44] the parties celebrated their marriage at the Holy Ghost Roman Catholic Church, Enugu, on the 30th day of December, 1961. The respondent gave the statutory notice of marriage, but the registrar's certificate was not obtained before the celebration of the marriage. The wife thereafter petitioned for judicial separation and the respondent contended that their marriage was not valid under the Marriage Act as no registrar's certificate had been obtained. The respondent further contended that as they were already married under customary law, they only wanted a religious ceremony, which did not constitute a legal marriage under the Act. The petitioner's case was that, she did not know precisely the formalities that were necessary and that she left everything to her husband. Furthermore, she was aware that the notice of marriage had been given and that she assumed that all the necessary requirements had been complied with. It was her intention to be married under the Marriage Act. The court found that, neither party was aware of the necessity of obtaining the registrar's certificate. That the petitioner did not know whether a certificate was issued or not and was also ignorant of the fact that the certificate was necessary. The Judge then held that, the petitioner did not knowingly and willfully acquiesce in the celebration of the marriage without a registrar's certificate. While interpreting the phrase 'knowingly and willfully' the learned Judge stated that:

> knowingly by itself might be ambiguous, but 'willfully' must, I think, mean a deliberate act. The attitude of mind must, 1 think, 'I know there ought to be a

[43] *Apt. v. Apt* (1948) p. 83 (CA).
[44] [1963]17 ENLR 196.

> certificate; I know there is not a certificate nevertheless I shall go through the ceremony.[45]

A marriage will be regarded as valid under the Act in some circumstances where, parties intending to contract a statutory marriage marry in church without complying with the requirements of the Marriage Act. Thus, in the case of *Akuwudike v. Akuwudike*,[46] the parties got married on the 31st day of May, 1958 at St. Mary's Catholic Church, Port Harcourt, in the presence of a Roman Catholic Priest and two witnesses. The parties did not give notice of marriage in accordance with the Marriage Act, and they did not obtain the registrar's certificate. Infact, the priest performed a 'Roman Catholic Marriage', which was not in compliance with the Marriage Act. The wife later petitioned for divorce and it was contended on behalf of the respondent that the court had no jurisdiction to entertain the petition as the marriage was performed solely in accordance with the rites of the Roman Catholic Church, without complying with the requirements of the Marriage Act. It was also argued that, the marriage which was celebrated without the necessary registrar's certificate was void. It was held by ldigbe J. (as he then was), that:

> ….if it was the intention of the parties to get married under the Ordinance and they believed that they went through a form of' marriage recognised by law (i.e. the Ordinance), then if the marriage had been performed by a minister of religion in a place of worship licensed under the Ordinance. (Cap. 115) for the purposes, the marriage in my view, would not be void merely by reason of non-compliance with sections 11 and 13 unless it was affirmatively shown that parties (both parties) willfully and knowingly failed to comply with the said sections—see subsections 33(2) of Cap. 115.[47]

From the decisions reached in the above cases, it is clear that both parties to the marriage must have been guilty of knowingly and willfully celebrating the marriage in spite of the known defect and the invalidity will only operate when the action of the parties is deliberate, and taken with full knowledge of any existing defect. However, in the case of *Bello v. Bello*,[48] the parties were married at the Celestial Church of Christ, Queen Elizabeth Road, Ibadan. The church issued the parties a certificate of marriage but it was adduced in evidence that, the church where the marriage took place was not licensed for the celebration of marriage. It was held that the marriage was celebrated in violation of section 33(2)(a) of the Marriage Act and therefore void *abinitio* under section 3(l)(c) of the Matrimonial Causes Act, 1970. It is submitted that the learned trial judge took the right decision based on the fact that, the church was not licensed for the celebration of marriage, but he however, failed to consider whether the parties must have knowingly and willfully celebrated the marriage in an unlicensed place.

(d) Lack of Real Consent

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45 *Akwudike v. Akwudike* (1963) 7 EWLR 5.

46 [1963] 7 ENLR 5.

47 [1963] 7 ENLR 5,6.

48 Suit No. 1/144/76 (Unreported), High Court, Ibadan, July 29, 1976.

Parties to a marriage must freely give their consent as absence of consent will invalidate the marriage. However, there are situations where a party may consent, but his or her consent may not be real. Some of such cases shall now be considered as follows:

1. Fraud or Duress

Fraud has to do with some dishonest misrepresentation by a party to the marriage, which has caused the consent of the other party to be obtained. It has been stated that, by the fraud, the dishonest party procured the form without the substance.[49]

Duress may occur as a result of force, fear or fraud. Such fear may be sufficiently grave. The standard is however subjective as it need not be shown that a normally tough minded person would have been afraid, and provided the individual concerned was in genuine fear. Duress has to do with compulsion that affects the mental attitude of the party whose consent is in question. Duress means any unlawful threat or coercion used by a person to induce another to act or to refrain from acting, in a manner he or she otherwise would not or would.[50] Duress subjects a person to improper pressure which overcomes his will and coerces him to comply with demand to which he would not yield if acting as a free agent.[51]

Fraud on the other hand, is a false representation of a matter of fact, whether by words or by conduct, by false or misleading allegations, or by concealment of that which should have been disclosed, which deceives and is intended to deceive another so that he shall act upon it to his legal injury.[52] Fraud has also been defined as anything calculated to deceive, whether by a single act or combination, or by suppression of truth, or suggestion of what is false, whether it be by direct falsehood or innuendo, by speech or silence, word of mouth or look or gesture.[53] With respect to duress it must be shown that the duress created a state of fear or apprehension which has prevented that party from freely consenting to the marriage. Thus, in the case of *Szecher (OrseKarso) v. Szecher (OrseKarso),*[54] the effect of duress was formulated as follows:

> In order for the impediment of duress to vitiate an otherwise valid marriage, it must be proved that the will of one of the parties thereto has been overborne by genuine and reasonably held fear, caused by threat of immediate danger (for which the party is not himself responsible), to life, limb or liberty, so that the constraint destroy the reality of consent to ordinary wedlock.[55]

Moreover, it does not matter whether the party whose consent was obtained is more susceptible to pressure than a person of ordinary courage.[56] In the case of *Scott v. Selbright*,[57] the respondent threatened the petitioner before the marriage was celebrated that, unless she accepts to marry him, he would see that bankruptcy proceedings would be instituted against her and that he would

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49 *Moss v. Moss* (1981) p. 263, 268-9.
50 Black's Law Dictionary, 6th Edn., p. 504.
51 Ibid.
52 Ibid. at p. 660.
53 Ibid.
54 [1971] 2 WLR 170, 180.
55 Ibid.
56 *Scott v. Selbright* (1886) 12 p. 24.
57 Ibid.

falsely allege that he had seduced her, and that he would finally shoot her. The threat by the respondent induced the petitioner to marry him. However, she petitioned for nullity. It was held by the court that the marriage was void.

Duress need not be induced by the other party to the ceremony, but it must arise from external circumstances for which the petitioner is not himself responsible. In the case of *Buckland v. Buckland*,[58] the petitioner who was employed as a policeman in the Dockyard area in Malta, was falsely charged by the Maltege girl. His dockyard superintendent confirmed that he would have no chance of acquittal on the charge before a Maltese court, and would probably be imprisoned for up to two years. He then agreed to marry the girl and the marriage ceremony took place on the evening. He later petitioned for nullity and his petition was granted.

Where there is no evidence of threat, then that cannot be duress. Thus, in the case of *H v. H*,[59] the petitioner was a woman aged 18, who was resident in Hungary in 1949. But because she was anxious to leave the country, went through a ceremony of marriage with a French national and obtained a French passport. She left Hungary and never cohabited with her husband. However, a decree of nullity was granted. The choice in this case, was between continuing to live under a government she feared and entering into an unwanted marriage to enable her emigrate. And having chosen the unwanted marriage and then, achieved her exodus why should she also be relieved of the marriage? It should be noted that, there was no evidence of threats to her. It is submitted that this decision is doubtful.

It is immaterial whether the person making the threat is capable of executing it. In the case of *Parojcic v. Parojcic*,[60] a father terrified his daughter with threats to send her back to Yugoslavia, and struck her when she refused to marry the man of his choice. The marriage was eventually celebrated in a registrar's office, but the bride never saw or communicated with the respondent. She later petitioned for nullity. A decree of nullity was granted on the ground of duress exerted by the bride's father. According to Davies J., the petitioner's consent was negative by the father's threats. Whether he could have sent her back to Yugoslavia or not was immaterial. Both of them believed it was possible and this made the threat more real to the petitioner.

In the rather similar case of *Singh v. Singh*,[61] the parties were Sikhsand, and in accordance will Sikh custom, the wife's parents arranged her marriage. Her parents told her that her husband was educated and handsome. However, when she eventually met him at the registrar's office for the marriage ceremony, she thought he was not as described by her parents. And so, she did not wish to go through with the civil ceremony, but as a result of obedience to her parents' wishes and because of her religious faith, she went through with it. In accordance with their religion, they were expected to consummate the marriage. The wife refused to attend the religious ceremony or to have anything to do with her husband. She later petitioned for nullity on the ground of duress induced by parental coercion. It was held by the trial judge that duress was not established as there was no evidence of any force or fear or threat and her petition was therefore dismissed. On

[58] [1968] p. 296 C.A.
[59] [1954] p. 258 C.A.
[60] [1958] 1 W.R.L. 1280.
[61] [1971] P. 226 C.A.

appeal, while dismissing the appeal, the court held that to establish duress as vitiating consent to a marriage, the petitioner must show that his will was overborne by genuine fear, induced by threats of immediate danger to life, limb or liberty.

Moreover, section 3(1)(d)(ii) of the Matrimonial Causes Act, 2004 provides that a marriage is void where the consent of either of the parties is not a real consent because that party is mistaken as to the identity of the other party, or as to the nature of the ceremony performed.

(e) Mistake

In order for mistake to invalidate a marriage, the mistake must be as to the nature of the ceremony or the identity (not the characteristics) of the other party. Thus, in the case of *C v. C*,[62] the husband represented to his wife that he was a well known pugilist before the marriage was celebrated. This misrepresentation influenced her to marry him. On discovery the falsity of the representation, the wife petitioned for nullity on the ground that she was mistaken as to the man she married. It was held by the court that, the action would fail because her mistake was as to the attributes and not the identity of the respondent.

In the case of *Valier v. Valier,*[63] an Italian who does not have a good understanding of English language, met and became friendly with an English girl, while residing, and working in England. She then invited him to meet her in an office where he will sign a paper. The office happened to be a marriage registry, where the parties got married. The husband believed that the ceremony was for betrothal only and not marriage ceremony. He did not understand the ceremony to be a marriage. However, there was no subsequent cohabitation or consummation of the marriage. When the husband sought for declaration that the marriage was void, Lord Merrivale held that the marriage was void because, matrimony is the acceptance by the mutual consent of the parties, of the married state with the knowledge of the nature of the undertaking and generally of the consequences of the tie which is created.[64] Infact, the Italian was mistaken as to the nature of the ceremony, and he did not give his free consent to the marriage that took place. Similarly, in the case of *Mehia v. Mehia*,[65] an English *w*oman was able to avoid a ceremony conducted in Hindustani, which mistake as to the effects of the marriage, for example, mistakenly thinking it was a polygamous ceremony, is not a ground to declare a marriage void.[66]

(f) Mental Disorder

A marriage is void where the consent of either of the parties to the marriage is not a real consent because of mental disorder.[67] Thus, where either party was so mentally infirm that he could not understand the nature of the ceremony, the marriage will be void. In the case of *Re Park*,[68] a 78 years old man who was very rich was in a state of confusion following two heart attacks. There was no doubt that he intended to marry a second time because, before leaving his home for the

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62 [1949] NZLR 356.

63 *Supra*.

64 At p. 832.

65 [1943] 2 All E.R. 690.

66 *Kassim v. kassim* (1962) P. 224.

67 Section 3 (1) (d) (iii) of the MCA, 2004.

68 [1954] p. 112,127.

ceremony, he looked at a portrait of his first wife and said aloud that whatever happened, nobody would ever take her place. The court then held that, he knew that the ceremony was one of marriage, and that the marriage was valid. The marriage therefore revoked his earlier will. In this case, the man died 17 days after the ceremony and on the afternoon after the ceremony of marriage he executed a new will in the same complicated terms as an earlier will, but with additional provision for the second wife. The widow was successful in showing that he was incapable of understanding the will when he executed it and it was set aside. The marriage effectively revoked the earlier will and the widow was therefore entitled to the whole of the estate on intestacy. However, in this case, Lord Singleton, L.J. formulated the applicable test as follows:

> Was the [party] ... capable of understanding the nature of the contract into which he was entering, or was his mental condition such that he was incapable of understanding it? To ascertain the nature of the contract of marriage a man must be mentally capable of appreciating that it involves the responsibilities normally attaching to marriage. Without that degree of mentality, it cannot be said that he understands the nature of the contract.

Thus, the party mentally affected may petition.[69]

(e) Marriageable Age

By the provision of Section 3(1)(e) of the Matrimonial Causes Act, 2004 a marriage is void where either of the parties is not of marriageable age. It should be noted however, that the Marriage Act, 2004 and the Matrimonial Causes Act, 2004 did not prescribe any marriageable age. As a result of this lacuna in the law, it is submitted that Section 3(1)(e) of the Matrimonial Causes Act, has no effect whatsoever, until age limit is provided by the law.

Grounds on which a Statutory Marriage may be Voidable

Section 5 of the Matrimonial Causes Act, 2004 stipulates the grounds on which marriage will be voidable. These grounds are examined as follows:

(a) Incapacity to consummate the marriage

Under Section 5(1)(a) of the Matrimonial Causes Act, 2004 a marriage is voidable where either party to the marriage is incapable of consummating the marriage. The incapacity to consummate the marriage is in relation to sexual intercourse, and infertility is not a ground for nullity. In the case of *L. v. L.*,[70] the wife was incapable of childbearing, but as inability to consummate the marriage was not proved, the husband's petition was refused.

Consummation has been defined as the completion of a thing, especially of a marriage by complete sexual intercourse.[71] The Black's Law Dictionary[72] defines "consummation" as the

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69 *Idenhen v. Idenhen* (1958) 1 W.L.R. 1041.

70 [1922] 38 T.L.R 697.

71 Mozley & Whiteley's Law Dictionary, 9th Edn., by John B. Saunders, p.78.

72 Sixth Edition, p. 318.

completion of a marriage by cohabitation, that is, sexual intercourse between spouses. Impotence is a major cause of incapacity to consummate. A person that is impotent is one who is incapable of having normal sexual intercourse. The incapacity must exist both at the time of the wedding ceremony and that of the hearing of the petition. Where the incapacity to consummate has been rectified before the date of the hearing, or if at the hearing there is no evidence that the defect may without danger be rectified to enable sexual intercourse, and where the respondent undertakes that the necessary measures will be taken, the marriage will not be annulled.[73] Moreover, supervening incapacity is not a ground of nullity.[74] Furthermore, incapacity to consummate may arise from a mental condition such as invincible repugnance to sexual intercourse.[75] Incapacity to consummate may exist only in relation to the other spouse, in which case, there is incapacity *quoadhunc* or *quoadhanc*.[76] That is a situation where the incapacity to consummate relates to a particular person, so that the person is capable of having sexual intercourse, but he is unable to have sexual intercourse with a particular person.

There is presumption of incapacity to consummate the marriage, where the marriage is not consummated after a reasonable period and the person who is incapable to consummate refuses to submit to medical examination. Thus, in the case of *Akpan v. Akpan*,[77] the parties got married in London on the 28th day of January, 1965. They cohabited in London and in Nigeria. Throughout the period of their cohabitation they shared the same bed, but there was no sexual intercourse between them. Evidence was given that the respondent attempted several times to have sexual intercourse but was unable. He never had erection on each of the occasion. The husband who is the respondent refused to submit to medical examination and medical report and medical evidence established the fact that the petitioner was able to consummate the marriage. It was held by the court that, failure to consummate the marriage was due to the incapacity of the respondent. Moreover, a male who has undergone a sex change operation is physically incapable of consummating a marriage. In the case of *Corbett v. Corbett*[78] Ormrod, J. held that a male who has undergone a sex change operation was physically incapable of consummating a marriage, and that using the artificial cavity could never constitute a true intercourse.

Either party to a marriage may petition for nullity, provided he or she did not know of the incapacity at the date of the wedding and has a justifiable sense of grievance. Moreover, a petitioner may plead his or her own incapacity in applying for a decree. In the case of *Harthan v. Harthan*,[79] the husband was allowed to avoid the marriage because of his own psychological incapacity twenty-two years after the wedding. But at that time parties had lived apart for at least twelve years.

Section 35(a) of the Matrimonial Causes Act, 2004 provides that "a decree of nullity of marriage shall not be made upon the petition of the party suffering from the incapacity to consummate the

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73 *S.Y. v. S.Y.* (1963) p. 37 C.A.
74 *Brown v. Brown* (1828) 1 Hag. Ecc. 523.
75 *G. v. G.* (1924) A.C. 349.
76 Ibid.
77 Suit No. WD/12/67 (Unreported), s High Court, Lagos, 27 July 1968.
78 [1970] 2 WLR. 1306.
79 [1949] P. 115 C.A.

marriage, on the ground that the marriage is voidable by virtue of section 5(I)(a) of this Act, unless that party was not aware of the existence of the incapacity at the time of the marriage. However, in the case of *Pettit v. Pettit*,[80] a husband was not granted a decree, although he proved his own incapacity.

(b) Unsoundness of mind, mentally defective, insanity or epilepsy

Under Section 5(1)(b) of the Matrimonial Causes Act, 2004 a marriage is voidable where at the time of marriage either party to the marriage is:

i) of unsound mind; or
ii) a mental defective, or
iii) subject to recurrent attacks of insanity or epilepsy.

Unsoundness of mind involves a situation whereby a party is so mentally infirm that he could not understand the nature of the ceremony he is undertaking and he is incapable to manage himself and his affairs.[81] Section 5(2) of the Matrimonial Causes Act, 2004 defined a 'mental defective' as a person who, owing to an arrested or incomplete development of mind, whether arising from inherent causes or induced by disease or injury, requires oversight, care of control for his own protection or for the protection of others and is, by reason of that fact, unfitted for the responsibilities of marriage. Mental deficiency may exist at birth. It may also arise as a result of disease or injury. Insanity may not be continued. Once it has been shown that the propositus suffers from some mental deficiency at the time of the marriage, the court would not embark on an assessment of the extent of the derangement.[82] Insanity does not involve dullness of intellect.[83]

The law regards a spouse who is of unsound mind or a mental defective as being incapable of carrying on a normal married life.[84] Moreover, if a spouse is at the time of the marriage subject to recurrent attacks of insanity or epilepsy, and where the insanity recurs periodically, with intervals of quiescence in between, the marriage will be voidable.[85] Where the marriage takes place during a lucid interval and the affected spouse is subject to further recurrence of attacks of insanity, the marriage will be voidable. Thus, in the case of *Hunpony-Wusu v. Hunpony-Wusu*,[86] the wife had suffered two fits of unsoundness of mind before the marriage, but was not insane at the time the marriage was celebrated. After the marriage, she suffered two fits of insanity. It was held by the Supreme Court that she was subject to recurrent attacks of insanity at the time, of the marriage.

Section 35(b) of the Matrimonial Causes Act 2004 provides that, a decree of nullity of marriage shall not be made upon the petition of the party suffering from the disability of the disease, on the ground that the marriage is voidable by virtue of section 5(1)(b) or (c) of this Act. Thus, a marriage will not be decreed voidable at the petition of the party suffering from the mental

[80] *Whysall v. Whysall* (1960) p. 52, 64-65.
[81] *Smith v. Smith* (1940) P. 179.
[82] *Hancock v. Peaty* (1867) LR 1 P& D 335.
[83] *Harrod v. Harrod* (1854) 1 K & J 4, 69 ER 344.
[84] *Whysall v. Whysall* (1960) P. 52, 66.
[85] *Bennett v. Bennett* (1969) 1 WLR 430.
[86] (1969) 1 All NLR 62.

deficiency or epilepsy. It is important to note however, that the burden of proving that a party was insane at the time of the marriage lies on the party asserting it.[87]

(iii) Communicable Venerable Disease

Section 5(1)(c) of the Matrimonial Cause Act, 2004 provides that a marriage shall be voidable where at the time of marriage either party to the marriage is suffering from a veneral disease in a communicable form. Veneral disease in a communicable form may be proved in various ways. For example, by the calling of medical evidence. However, where a spouse proves that he or she is suffering from veneral disease and where he or she has not had sexual intercourse with any other person, a rebuttable presumption will be raised that the veneral disease was contracted from the other spouse. However, the respondent can rebut the presumption by medical proof that, he is not suffering from the disease.[88]By virtue of section 35(b) of the Matrimonial Causes Act, 2004 a decree of nullity in respect of a voidable marriage cannot be granted at the suit of the party suffering from veneral disease in a communicable form on the ground of that disease.

(iv) Pregnancy of the Wife by a Person other than the Husband

Under section 5(1)(d) of the Matrimonial Causes Act, 2004 a marriage shall be voidable where at the time of marriage the wife is pregnant by a person other than the husband. By virtue of section 35(c) of the Matrimonial Causes Act, 2004 a wife that is pregnant cannot obtain a decree of nullity on the ground of her pregnancy. The section provides that, a decree of nullity of marriage shall not be made upon the petition of the wife, on the ground that the marriage is voidable by virtue of section 5(1)(d) of this Act.

The court will refuse to make the decree of nullity where the petitioner had knowledge of the pregnancy at the time they were getting married. This is because it would amount to an approbation of that fact. Moreover, if the husband is aware of the pregnancy at the time of the marriage and he approve of it, or where he had encouraged the association that gave rise to the pregnancy when the marriage was imminent, he will not succeed if he petitions the court for relief.[89] In the case of *W v. W* (No. 4),[90] the husband petitioned for nullity on the ground that his wife was pregnant by another man at the time of their marriage and sought to prove that the child that was born soon after their marriage was not his. He requested the court to order blood tests of the spouses and the child. It was held by the court of appeal that, it had no inherent or statutory power to order such a blood test, which in any case would not settle the matter conclusively. However, if the parties should submit to blood tests, the result of the test may corroborate other evidence to prove the paternity of the child.[91]

Nullity under Customary Law Marriage

Customary law marriage may be void or voidable in certain circumstances such as when parental consent was not obtained because, in such a case, there will be no proper person to receive the

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87 *Durham v. Durham* (1985) 1 TLR 338

88 *Anthony v. Anthony* (1919) 35 TLR 203.

89 Section 37 (a) MCA, Cap M7, LFN 2004.

90 [1963] 2 All ER 841 (CA).

91 *Liff v. Liff* (1948) WN 128.

bride price and where the parties to the marriage are related by blood or marriage. Moreover, where the bride price was not paid by the groom to the family of the bride.

Circumstances in which a Marriage may be Void under Customary Law

In certain circumstances marriage may be void under customary law. We shall examine the circumstances as follows:

(a) Parental Consent

Parental consent is an essential requirement of a valid customary law marriage. Thus, where there is no parental consent before customary law marriage is celebrated, the marriage will be void because, there will be no valid arrangement for the payment or waiver of the bride-price. Moreover, without parental consent, there cannot be a proper 'giving' away of the bride, under customary law. However, there exist an exception to this rule in the Western Region Marriage, Divorce and Custody of Children Adoptive By-Laws Orders 1958 which is also applicable to Delta and Edo States. By the provisions of this law, a competent customary court may order a marriage to proceed without parental consent under Section5 of the said law. The questions that remain to be answered is whether, such marriages celebrated without parental consent can be recognized under customary law as being a valid marriage. The answer is that such marriages are usually not given recognition under customary law.

(b) Prohibited Degrees of Consanguinity and Affinity

Marriage under customary law is prohibited between person within certain degrees of consanguinity or affinity. Thus, under customary law, marriage between persons related by blood is prohibited. However, a man may marry a distant relation and in such a case, the families of the spouses will have to perform sacrifice of expiation. Once such sacrifice has been performed, then there will be a valid customary law marriage between the parties. The only exception to this iswhere, a distant and inconsequential relationship is severed by sacrifice of expiation, in which case the parties concerned can validly marry each other. It should be noted however, that under customary law, marriage between persons within the prohibited degrees of relationship is void and such marriage constitutes an abomination.

(c) Non-Payment of Bride Price

Under customary law, bride price is an essential constituent of customary law marriage. Where bride price is not paid, there will be no marriage and where there is celebration without the payment of the bride price, the marriage will be void. It is the bride price that seal the union and so it is a very important aspect of customary law, without which there is no valid customary law marriage. It should be noted however, that nonpayment of bride price renders a customary law marriage void.

Circumstance in which a Marriage is Voidable under Customary Law

Under customary law, the only known case of voidable marriage occurs in respect of child marriage. It occurs for example, where the parent of an infant consent to the marriage of the infant, and such consent is sufficient for the marriage as the parent has consented on behalf of their infant child. However, when the infant becomes of age, the infant will have to confirm or void the marriage so contracted. Thus, an infant girl who eventually reaches the age of puberty

may refuse to be a party to the marriage for which she did not give her consent. In such a case, her parents are obliged to refund the bride price to the husband.[92]Therefore, customary law marriage involving an infant shall be voidable until she reaches the age of puberty and thereby ratify the marriage so contracted by consenting to the marriage.

Conclusion

This paper has examined the grounds on which a marriage may be void or voidable. The paper has revealed that, a void marriage is a marriage without legal efficacy and incapable of being enforced by law. While, a voidable marriage is validated not *ipso facto* void, until sentence of nullity is obtained. The paper further reveals that, a marriage is void where:

(1) The parties are not respectively male and female.[93] It is important to note that, the Matrimonial Causes Act did not define male and female. But Ormrod J. has stated that, having regard to the essentially heterosexual character of marriage, the criteria must be biological for even the most extreme degree of trans-sexualism. Cannot reproduce a person who is naturally capable of performing the essential role of woman in marriage.

(2) The parties are within the prohibited degrees of relationship, either by consanguinity (blood) or affinity (marriage).[94]

(3) One of the parties is already lawfully married.[95]

(4) Either of the parties is below 21 years of age. In the England, a party with English domicile who is more than 16 cannot marry anyone under 16 anywhere, even if that party has capacity, by her domiciliary law.

(5) Where certain formalities have not been complied with. For example, where banns of marriage have not been duly published. It is important that, banns should be published in the names by which the parties are usually known. However, they will be held to be duly published unless there is a fraudulent intention to conceal a party's identity. If a party to a marriage would have banns called in the name by which he was known in the district, when the use of a legal name might lead to uncomfortable enquiries, one of the purposes of the Marriage Act would be defeated in such a case.

(6) Issue relating to polygamous marriage entered into.[96]

Moreover, it is important to note the following facts about a void marriage:

(a) A decree annulling a void marriage is advisable as the facts may be in dispute or it may not be known what the law is or whether the parties come within it.

(b) A decree is also valuable as it enables the parties to get financial provision under the Matrimonial Causes Act.

(c) The spouses or any person with a sufficient interest may seek a nullity decree.

(d) A petition for nullity may be filled at anytime as there is no time limit on the petition, which may be brought even if both spouses are dead.

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92 Talbot, P.A. In the Shadow of the Bush (Heinemann, London 1912), 111.

93 Section 111(a)(2)

94 Section 11 (a)(i)

95 Section 11(6)

96 Section 11(1)(d).

(e) A decree of nullity is only declaratory because there has never been a marriage. Therefore, if property is transferred on the assumption that persons are spouses, it may be recovered on the ground that the transaction is void because of mistake of fact.
(f) A void marriage is not subject to the bar of statutory appropriation,[97] though it is arguable that such a marriage may be ratified.[98]
(g) Children of a void marriage may be legitimate.[99]

On the other hand, a voidable Marriage is one that will be regarded by every court as a valid subsisting marriage until a decree annulling it is pronounced by a court of competent jurisdiction.[100] Therefore, a voidable marriage can be summarized as follows:

(a) A decree is needed.
(b) A voidable marriage can only be challenge by the parties themselves.
(c) A voidable marriage becomes unimpeachable on the death of one of the parties to the marriage.
(d) The effects of the decree of nullity in respect of a voidable marriage is only prospective.[101]
(e) Statutory approbation is an absolute bar.[102]

Thus, a marriage is voidable where either party did not validly consent to it, whether in consequences of duress, mistake, unsoundness of mind or otherwise. For example, for duress to exist, there must exist the following:

(a) Fear of a sufficient degree to vitiate consent.[103]
(b) The fear must be reasonably entertained.[104] Note that this is seemingly inconsistent with the decision reached in the case of *Scott v. Selbright,*[105] where a subjective test was laid down. A subjective test is applied where the fear emanates from a party himself or a party acting through his servants or agents. Moreover, an objective test is applicable where the fear emanates from a source other than a party to the marriage.[106]s
(c) The fear must arise from some external circumstances for which he was not himself responsible.

Moreover, for mistake to exist, the following should be noted.

(a) Mistake as to identify, but not as to fortune, health, moral character or other quality,
(b) Another vitiating factor is, mistake as to the nature of the ceremony, but not as to the effects of marriage. For example, where a person thinks that a polygamous ceremony was a monogamous one.

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97 Section 13 of the English Matrimonial Causes Act, 1973.
98 *Valier v. Valier* (1925) 133 L.T. 830.
99 Section 1, of the Legitimacy Act 1976.
100 Per Lord Greene M.R. in *De Reneville v. De Reneville* (1948) 1 All E. R. 56.
101 Section 13 of the English Matrimonial Causes Act, 1973.
102 Ibid.
103 Section 3(1)(d) of the MCA 2004
104 Section 3(1)(d)(i) of the MCA 2004.
105 Parties to a marriage must freely consent to the union.
106 *Wakefield v. Mackay* (1809) 1 Hag. Con. 394, 398.

For unsoundness of mind to vitiate, the question to be asked is, is the party concerned capable of understanding the nature, of the contract into which he is entering? To do this, a man must be mentally capable of appreciating that it involves the responsibilities normally attaching to marriage.[107] It is however important to note the following:

(1) One can be mentally incapable due to addition to drugs or possibly being under an hypnotic trance or in extreme ill-health or intoxication. [108]

(2) A marriage will be voidable where, at the time of the marriage either party, although capable of giving valid consent, was suffering, either continuously or intermittently, from mental disorder, of such a kind and to such an extent as to be unfitted for marriage. A person is unfitted for marriage when he is incapable of living in the married state, and of carrying out the ordinary duties and obligations of marriage.[109]

(3) A marriage will be voidable where at the time of the marriage, one of the parties was suffering from veneral disease in a communicable form. It is irrelevant how it was contracted. Communicable means communicable to anyone.

(4) A marriage will also be voidable where at the time of the marriage, the respondent is pregnant by some person other than the petitioner.

(5) A marriage will be voidable where the marriage has not been consummated owing to the incapacity of either party to consummate it. Consummation requires sexual intercourse after the marriage. What is required is an act of intercourse. It is not necessary that, that act might result in the birth of a child. The intercourse must be ordinary and complete, and not partial and imperfect.[110] There must be full penetration though there need not be emission of sperm into the vagina. Penetration must be more than transient.[111] A marriage can be consummated notwithstanding the husband's use of sheath.[112]

(6) A marriage will also be voidable where the marriage has not been consummated owing to the willful refusal of the respondent to consummate it. The words connote a settled and definite decision came to without just excuse.

The effect of a decree of nullity in respect of a voidable marriage is to annul the marriage and it is prospective only. While, it is not necessary to annul a void marriage because it never existed.

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[107] Where one of the parties is mentally incapable of understanding the nature of the marriage contract, the marriage will be null and void.

[108] Mentally incapable may be due to drunkenness.

[109] This can be caused by unsoundness of mind.

[110] *D v. A* (1845) 163 ER, 1039.

[111] *W v. W* (1966) 2 All E.R. 889.

[112] *Baxter v. Baxter* (1947) 2 All E. R. 886; (1948) A.C. 274.