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ANNULMENT UNDER THE WASHINGTON DIVORCE ACT OF 1949

JOHN R. TOMLINSON

In the law of domestic relations, an annulment is to be distinguished from a divorce, in that a divorce is the termination, dissolution or suspension of a previously existing valid marriage; usually for some cause arising after the marriage, whereas an annulment is a court decree proclaiming that an ostensibly legal marital relationship is stripped of its color of legality, and declared void ab initio, for some reason existing at the time of the marriage.¹

The term "annulment" might also be distinguished from the term "decree of nullity," which when properly used would indicate a court order declaring the invalidity of a void marriage, whereas "annulment" would be applicable only as to those marriages which are voidable.² Unfortunately however, this distinction has seldom been made by the legislature,³ court,⁴ or attorneys⁵ in the state of Washington but rather

¹ KEEZER, MARRIAGE AND DIVORCE § 211 (3d. ed. 1946); Comment, 22 KAN. CITY L. REV. 109, 110 (1954); McDonald v. McDonald, 6 Cal.2d 427, 58 P.2d 163 (1936); Millar v. Millar, 175 Cal. 797, 806; 167 Pac. 394, 398 (1917).

² The suggested distinction would have the merit of delineating between a judgment declaring the non-existence of an alleged marriage and a judgment which destroys an existing but voidable relationship.

³ "Decree of nullity" is used but twice in the divorce act of 1949. It is first used in RCW 26.08.100 and then again in RCW 26.08.050. The latter statute reads as follows, "In the case of a void marriage, either party may apply for, and on proof obtain, a decree of nullity of marriage. . . ." This statute has superseded REM. REV. STAT. § 983 which utilized the phrase "decree of nullity" in much the same manner. It is suggested that the use in RCW 26.08.050 of "decree of nullity" is directly traceable to REM. REV. STAT. § 983 and that it was used more as a matter of convenience than from any specific intent upon the part of the legislature to distinguish "decree of nullity" from "annulment."

For an opinion to the contrary see Marsh, *The Uniform Divorce Recognition Act: Sections 20 and 21 of the Divorce Act of 1949*, 24 WASH. L. REV. 259, 269 (1949), where in speaking of RCW 26.08.060 he states, "That section seems to refer to voidable, not void, marriages; to annulment, not decree of nullity—concepts which are clearly differentiated in other sections of the same act and elsewhere in the Washington statutes."

Further evidence that the legislature has failed to differentiate between the terms "annulment" and "decree of nullity" is presented upon examining those statutes in which the legislature speaks in terms of annulment, yet they do not make clear whether they are referring to the annulment of a voidable marriage, or the annulment of a void marriage, or the annulment of both void and voidable marriages. For example see: RCW 26.08.060, RCW 26.08.080, RCW 26.08.090, RCW 26.08.110, RCW 26.08.130, RCW 26.08.140, RCW 26.08.150, RCW 26.08.170, and RCW 26.08.190.

⁴ The Washington court similarly has failed to recognize the suggested distinction between "annulment" and "decree of nullity." See *Harding v. Harding*, 11 Wn.2d 138, 147; 118 P.2d 789, 793 (1941), where the court speaks of "decree of nullity" of a voidable marriage. For examples of the court referring to "annulment" of void marriages see, e.g., *Buckley v. Buckley*, 50 Wash. 213, 96 Pac. 1079 (1908); *Beyerle v. Bartsch*, 111 Wash. 287, 190 Pac. 239 (1920); *Barker v. Barker*, 31 Wn.2d 506, 197 P.2d 439 (1948); *Sortore v. Sortore*, 70 Wash. 410, 126 Pac. 915 (1912); and *Hahn v. Hahn*, 104 Wash. 227, 229; 176 Pac. 3, 4 (1918).

⁵ See the argument of counsel in cases cited note 4, *supra*. See also the argument

the terms are commonly used interchangeably to signify the judicial recognition of the invalidity of void as well as voidable marriages. Consequently, confusion as to the precise meaning of these terms often results.

For a definition of the term void, the Washington court has paraphrased the common law and has held that the term void is to be used as, ". . . a convenient label to designate any marriage which because of the nature of the disability or impediment with which it is affected, is regarded by common law or statute, as an absolute nullity, incapable of ratification."⁶

As to the meaning of voidable, the Washington court again follows the common law interpretation and designates as voidable, ". . . any marriage subject to a disability or impediment of such degree or nature that the marriage is considered valid unless set aside by court decree, and subject in some cases to ratification by the parties."⁷

The significance of this distinction between void and voidable marriages is forcefully demonstrated by the case of *In re Hollingsworth's Estate*.⁸ There it was held that the marriage being voidable only, it is valid until annulled and cannot be collaterally attacked nor impeached after the death of one of the parties, but can only be attacked in a direct proceeding during the lifetime of both spouses. However, if the marriage had been found to be void, it would be a nullity with or without judicial decree and its validity could be impeached in any competent court whether the question arises directly or collaterally and whether the parties be living or dead.⁹

While it is generally conceded that a marriage void at its inception does not require the decree of any court to restore the parties to their original rights or to make the marriage void,¹⁰ yet even as to these void marriages a decree of nullity is often of the highest importance, both to

of the prosecuting attorney of King County in *Saville v. Saville*, 44 Wn.2d 793, 271 P.2d 432 (1954).

⁶ *In re Romano's Estate*, 40 Wn.2d 796, 803; 246 P.2d 501, 505 (1952); 1 BISHOP, MARRIAGE, DIVORCE AND SEPARATION, § 258 (1891); KEEZER, *op. cit. supra*, note 1, § 310; 2 SCHOULER, MARRIAGE, DIVORCE, SEPARATION AND DOMESTIC RELATIONS, § 1081 (6th ed. 1921).

⁷ *In re Romano's Estate*, *supra*, note 6. See 1 BISHOP, *op. cit. supra*, note 6, § 259 where it is stated that, "A marriage is voidable when for its constitution there is an imperfection which can be inquired into only, during the lives of both of the parties, in a proceeding to obtain a sentence declaring it null. Until set aside, it is practically valid; when set aside, it is rendered void from the beginning."

⁸ 145 Wash. 509, 261 Pac. 403 (1927).

⁹ 2 SCHOULER, *op. cit. supra*, note 6; 1 BISHOP, *op. cit. supra*, note 6; *In re Gregorson's Estate*, 160 Cal. 21, 116 Pac. 60 (1911).

¹⁰ *Sortore v. Sortore*, *supra*, note 4; *State v. Yoder* 113 Minn. 503, 130 N.W. 10 (1911).

the individuals concerned and to the community, for then the issue of the status of the parties, and their children is put at rest while the parties are living and the evidence is still readily obtainable.¹¹

Generally under early English law, whether a marriage was to be considered void or voidable depended upon the nature of the impediment.¹² The canonical impediments,¹³ such as consanguinity, impotence, and affinity rendered the marriage voidable, whereas the civil impediments,¹⁴ which included prior marriage and idiocy, and generally coincided with the common law notions of capacity to contract, rendered the marriage void.

While the Washington law of domestic relations, as suggested earlier, has essentially followed the early English authorities, yet certain variations from the decisions of these authorities have developed.

The principle statutes upon which the Washington court bases its classification of marriages as either void or voidable, are RCW 26.04.020¹⁵ and RCW 26.04.030,¹⁶ which specify that certain marriages are prohibited. However these statutes do not further designate whether such prohibited marriages are to be considered as being void or voidable, and hence such determination is necessarily left to the discretion of our court.

The Washington court in interpreting the meaning of the word prohibited, in this context, has determined in accord with the present general legislative tendency in the United States¹⁷ that those marriages

¹¹ For Washington cases granting a decree recognizing the invalidity of void marriages see *Knoll v. Knoll*, 104 Wash. 110, 176 Pac. 22 (1918); *Buckley v. Buckley*, *supra*, note 4; *Hahn v. Hahn*, *supra*, note 4; and *Sortore v. Sortore*, *supra*, note 4.

¹² 22 KAN. CITY L. REV., *supra*, note 1.

¹³ So named because they were the impediments primarily recognized by the English Ecclesiastical courts under canonical rules. See 1 BISHOP, *op. cit. supra*, note 6, §§ 262, 265.

¹⁴ So named because they were the impediments primarily recognized by the English lay tribunals. See 1 BISHOP, *op. cit. supra*, note 6, § 265.

¹⁵ RCW 26.04.020 prohibits the following marriages: "(1) When either party thereto has a wife or husband living at the time of the marriage. (2) When the parties thereto are nearer of kin to each other than second cousins, whether of the whole or half blood, computing by the rules of the civil law. (3) Marriage to one's father's sister or brother, mother's sister or brother, son, daughter, sister, brother, son's son or daughter, daughter's son or daughter, brother's son or daughter, or sister's son or daughter."

¹⁶ RCW 26.04.030 provides that the following marriages shall be prohibited: "No woman under the age of forty-five years, or man of any age, unless he marries a woman over the age of forty-five years, either of whom is a common drunkard, habitual criminal, epileptic, imbecile, feeble-minded person, idiot, or insane person or person who has theretofore been afflicted with hereditary insanity, or who is afflicted with pulmonary tuberculosis in its advanced stages, or any contagious venereal disease, unless the female party to such marriage is over the age of forty-five years."

¹⁷ 2 SCHOULER, *op. cit. supra*, note 6, § 1081, declares that, ". . . the legislative tendency today is to make marriages voidable rather than void, wherever the impediment is such as might not have been known to both parties before marriage, and where public policy does not rise superior to all considerations of private utility."

which fall within the prohibitions of RCW 26.04.020¹⁸ shall be void,¹⁹ whereas those marriages prohibited by RCW 26.04.030²⁰ shall be construed as voidable. It should be noted, that this interpretation of the word prohibited, differs from the early English decisions, in that marriages within certain forbidden lines of consanguinity have been reclassified from voidable to void,²¹ and lack of capacity because of insanity, or the like, is now construed as rendering the marriage voidable rather than void.²²

A further legislative enactment classifying marriages as voidable is RCW 26.04.130 which specifies that when either party to a marriage is incapable of consenting thereto for lack of legal age or a sufficient understanding, or when the consent of either party is obtained by force or fraud, then such marriage is voidable.

Prior to the enactment of the divorce act of 1949 an annulment could be obtained in Washington for a voidable marriage.²³ Whether such a remedy is still available is the problem with which the remainder of this discussion shall be concerned.

¹⁸ *Supra*, note 15.

¹⁹ This includes those marriages within the forbidden line of consanguinity as specified by RCW 26.04.020. Note that 2 SCHOUER, *op. cit. supra*, note 6, § 1091 indicates that at common law marriages within certain lines of consanguinity rendered the marriage voidable rather than void. However, as pointed out by 1 BISHOP, *op. cit. supra*, note 6, § 276, there was an exception to this principle, ". . . in those cases where the marriage is considered as incestuous by the law of Christianity, and as against natural law. And these exceptions relate to marriages in the direct lineal line of consanguinity, and to those contracted between brothers and sisters; and the exceptions rest on the ground that such marriages are against the laws of God, are immoral and destructive of the purity and happiness of domestic life."

Bigamous marriages are uniformly held to be void by the Washington court. Cf. *Powers v. Powers*, 117 Wash. 248, 200 Pac. 1080 (1921); *Valentine v. Valentine*, 31 Wn.2d 650, 198 P.2d 494 (1948); *Beyerle v. Bartsch*, *supra*, note 4.

²⁰ *Supra*, note 16.

²¹ *Johnson v. Johnson*, 57 Wash. 89, 106 Pac. 500 (1910); *State v. Nakashima*, 62 Wash. 686, 114 Pac. 894 (1911).

²² It has been the common law view since earliest times that insanity renders the marriage void. KEEZER, *op. cit. supra*, note 1, § 212; 1 BISHOP, *op. cit. supra*, note 6, § 285; *In re Romano's Estate*, 40 Wn.2d 796, 246 P.2d 501, 505 (1952); 76 A.L.R. 769 (1932). Hence in order for the marriage of an insane person to be held voidable rather than void a legislative reclassification of such marriages must be deemed to have taken place. That such a reclassification has taken place in Washington is indicated by *In re Hollingworth's Estate*, 145 Wash. 509, 261 Pac. 403 (1927), where it was held that the marriage of a feeble minded person, prohibited by RCW 26.04.030, ". . . the statute not providing that it shall be void, is voidable only, and cannot be impeached after the death of one of the parties." See an interpretative analysis of the *Hollingworth* opinion in 3 WASH. L. REV. 57 (1928) where it is suggested that the court in the *Hollingworth* case by so construing the statute has taken a position in accord with the great weight of authority.

²³ In *Waughop v. Waughop*, 82 Wash. 69, 143 Pac. 444 (1914), the court granted an annulment of a marriage, voidable because of the plaintiff's mental incompetency. Cf. *Arey v. Arey*, 22 Wash. 261, 60 Pac. 724 (1900) in which the court granted the annulment of a marriage, voidable because of the non-age of one of the parties at the time of entering into the marriage relation.

This problem has acquired significance largely because of the enactment in the divorce act of 1949 of RCW 26.08.040 and RCW 26.08.-030, which grant specific advantages to one seeking an annulment or decree of nullity, rather than a divorce.

The contrasting time requirements upon the bringing of an action for annulment or decree of nullity as opposed to those requirements necessary to be met in order to bring an action for divorce, place a premium upon the seeking of such annulment or decree of nullity in those situations in which time is of importance.²⁴ While RCW 26.08.040 places a limitation that no divorce can be tried nor any decree of divorce entered therein until the complaint has been on file for ninety days and until ninety days have elapsed from the date of service of summons upon the defendant, yet no comparable limitation is placed upon the procurement of an annulment or decree of nullity. Hence, an annulment or decree of nullity is available notwithstanding the fact that the ninety day waiting period required in order to bring an action for divorce is not complied with.

It should also be noticed that Rem. Rev. Stat. § 984, which required the plaintiff in an action for annulment or decree of nullity, to have been a resident of the state for one year prior to filing his complaint, has been superseded by RCW 26.08.030 which retains the one year residency requirement as a prerequisite to the filing for divorce, but eliminates it as a requirement to be fulfilled prior to the bringing of an action for annulment or decree of nullity.

A further boon to one seeking an annulment was the enactment of RCW 26.08.060 which provides for the legitimacy of those children conceived or born during the existence of a marriage of record which is later declared void and entitles such children to all the rights of legitimate children notwithstanding the subsequent annulment of the marriage. This statute substantially eliminates the threat of such children being declared illegitimate and hence abrogates illegitimacy as an obstacle to the obtaining of an annulment or decree of nullity.²⁵

²⁴ For example, where the person seeking the annulment is a woman with child by a man not her husband and she wishes to annul her present marriage and marry the father of her unborn child so as to give this child the name of its natural father, it is essential that she remarry prior to the birth of the child.

²⁵ For a discussion of the common law policy which unjustly penalized the issue of annulled marriages by declaring them illegitimate, see 1 VERNIER, *AMERICAN FAMILY LAWS*, § 48 (1931). See also a report on proposed changes in the divorce law of the State of Washington given at the 1947 annual meeting of the Washington State Bar Association and reported in 22 WASH. L. REV. 17, 19 (1947), indicating the need of a statute legitimizing children born of a marriage which is subsequently annulled. In this report it is said, "You would be amazed at the number of annulment cases in King County for instance, which by the fact that they declare the marriage void of record, by the same token make the children illegitimate."

Suit costs and fees,²⁶ support of children,²⁷ authority of the court to make disposition of the property of the parties,²⁸ and alimony,²⁹ are further factors which need not be a hindrance to the pursuit of annulment or decree of nullity, in that by statute³⁰ they have become as readily available in suits for annulment or decree of nullity as they are in actions for divorce.

With this background securely in mind, the recent Washington decision of *Saville v. Saville*,³¹ decided by Department 1 of the Supreme Court of the State of Washington on July 1, 1954, properly can be considered. This case concerned a wife's suit to annul a marriage upon

²⁶ RCW 26.08.090 provides that pending an action for divorce or annulment the court may make, and by attachment enforce, . . . such orders relative to the expenses of such action, including attorney's fees, as will insure to the wife an efficient preparation of her case and a fair and impartial trial thereof. Upon the entry of judgment in the superior court, reasonable attorney's fees may be awarded either party, in addition to statutory costs. Upon any appeal, the supreme court may in its discretion award reasonable attorney's fees to either party for services on the appeal, in addition to statutory costs." For further statutory provisions granting the court discretion to award suit costs and attorney's fees, in annulment actions see RCW 26.08.190, and RCW 26.08.110. For case authority holding that the court in an action for annulment has discretion to award such suit money and attorney's fees as it shall deem just, see *Arey v. Arey*, 22 Wash. 261, 60 Pac. 724 (1900).

²⁷ Washington statutes providing for the support and care of children are RCW 26.08.060, RCW 26.08.170, and RCW 26.08.110. Note that these statutes authorize the court in annulment actions to make such order for the custody, care, maintenance, education, and support of the minor children of the invalid marriage as may seem necessary and proper, and that such orders are subject to modification as in actions for divorce. Cases recognizing the authority of the court to make proper provision for the care, custody and maintenance, of the minor child in a nullity proceeding, are *Peterson v. Peterson*, 164 Wash. 573, 3 P.2d 1007 (1931); *Barker v. Barker*, 31 Wn.2d 506, 197 P.2d 439 (1948); *accord*, *Barett v. Barett*, 210 Cal. 559, 292 Pac. 622 (1930).

²⁸ RCW 26.08.110 gives the court authority in annulment actions to make, ". . . such disposition of the property of the parties, either community or separate, as shall appear just and equitable, having regard to the respective merits of the parties, to the condition in which they will be left by such divorce or annulment, to the party through whom the property was acquired, and to the burdens imposed upon it for the benefit of the children, . . ." See *Buckley v. Buckley*, 50 Wash. 213, 96 Pac. 1079 (1908), and *Sortore v. Sortore*, 70 Wash. 410, 126 Pac. 915 (1912), which support the authority of the court to make disposition of the property of the parties.

²⁹ See RCW 26.08.110 and RCW 26.08.090 which indicate that the right to alimony is as clearly given, by the divorce act of 1949, in the case of annulment as it is in divorce. 1 VERNIER, AMERICAN FAMILY LAWS, *op. cit. supra*, note 25, § 53, indicates that there is a split of authority upon the question of whether alimony should be granted in annulment actions. However, he represents that alimony in annulment actions is justified in that often the mere restoration of the parties to their former rights, existing at the time of their marriage, would not guarantee justice to the parties. "Broadly speaking, the same considerations may be present in marriages terminated by annulment as through divorce, and the same rights and remedies would seem to be applicable. Therefore, it is not surprising to find, in connection with annulment actions, provisions for temporary and permanent alimony, as well as for restitution and division of the property of the parties."

³⁰ The Washington statutes cited in notes 26, 27, 28, and 29 are typical examples of the confusion which can result because of the failure of the legislature to use precise terminology. Hence it is not clear whether the legislature, in using the term "annulment" in these statutes was referring to the annulment of a voidable marriage, the annulment of a void marriage, or the annulment of both voidable and void marriages.

³¹ 44 Wn.2d 793, 271 P.2d 432 (1954).

grounds that she was induced to enter into it by the fraudulent misrepresentations of her husband. The Superior Court of King County entered a decree of annulment upon the default of the husband, and the prosecuting attorney pursuant to the authority vested in him by RCW 26.08.080,³² appealed to the Supreme Court.³³

There was no question but that the wife was induced to enter into the marriage through the fraud of the defendant. However, it was the appellant's contention that whatever jurisdiction the court formerly had to annul voidable marriages was withdrawn by the divorce act of 1949, and that only void marriages could now be annulled.

The court refused to accept fully the argument of the appellant, and expressed no opinion as to his broad thesis that it was the legislative intent that the remedy of annulment no longer was to be available in cases where the marriage was voidable. Rather, the court narrowed the decision to only those marriages described as voidable by RCW 26.04.-130³⁴ and for which the remedy of divorce is provided by RCW 26.08.-020(1).³⁵ As to these marriages the court held that annulment no longer is available and that divorce is now the exclusive remedy.

The prosecuting attorney based his contention that the courts of this state no longer are authorized to annul voidable marriages, upon certain changes in the law accomplished by the divorce act of 1949, which he advocated were indicative of the legislative intent.³⁶

These changes were the elimination of the one year residency requirement, previously necessary in order to obtain an annulment or decree

³² Which provides that, ". . . It shall be the duty of the prosecuting attorney to appear upon the trial of every default or noncontested divorce or annulment case, and in such other divorce cases as the presiding judge may direct, as a party to said action and to advise the court, . . . The prosecuting attorney shall have the same right to appeal as other parties to the action."

³³ Upon the appeal counsel for respondent submitted no brief and the court refused to allow him to make an oral argument. Therefore the court in the Saville case was confronted with a decidedly one sided argument in favor of the appellant, with little indication in the appellant's brief of any possible case for the respondent.

³⁴ RCW 26.04.130. "When either party to a marriage is incapable of consenting thereto for want of legal age or a sufficient understanding, or when the consent of either party is obtained by force or fraud, such marriage is voidable, but only at the suit of the party laboring under the disability, or upon whom the force or fraud is imposed."

³⁵ RCW 26.08.020. "Divorce may be granted by the superior court on application of the party injured for the following reasons: (1) When the consent to the marriage of the party applying for the divorce was obtained by force or fraud, and there has been no voluntary cohabitation after the discovery of the fraud, or when either party shall be incapable of consenting thereto, for want of legal age or a sufficient understanding."

³⁶ See a report of the Committee on Divorce Law, submitted at the 1948 annual meeting of the Washington State Bar Association, in 23 WASH. L. REV. 320 (1948); also an interpretative analysis of the divorce law of 1949, in 24 WASH. L. REV. 123 (1949).

of nullity; the restatement of the first ground for divorce, RCW 26.08.-020(1), formerly Rem. Rev. Stat. § 982(1), to include every ground which is set forth in RCW 26.04.130 pertaining to voidable marriages; and the repeal of Rem. Rev. Stat. § 983, and the enactment of RCW 26.08.050 in its place.

Regarding the elimination of the one year residency requirement in actions for annulment or decree of nullity,³⁷ the prosecuting attorney apparently took the position that it was not within the contemplation of the legislature when enacting the divorce act of 1949 to eliminate this safeguard without also restricting the situations within which an annulment would thereafter be available, and therefore annulments of voidable marriages were to be barred.

Conceding that the argument of the prosecutor is of some merit, yet it cannot fairly be said to be indicative of the legislative intent to preclude the remedy of annulment for voidable marriages.³⁸ Rather this elimination of the one year residency requirement as a condition precedent to the procurement of an annulment could just as well be taken as legislative recognition of a liberal policy encouraging the invalidation of all objectional marriages, including therein voidable as well as void marriages.³⁹

Another of the changes urged by the prosecutor to be suggestive of the legislative intent to withdraw the remedy of annulment for voidable marriages is the restatement of the first ground for divorce, to include

³⁷ See RCW 26.08.030 which supersedes REM. REV. STAT. § 984.

³⁸ As indicated in 23 WASH. L. REV. 320 (1948), and 24 WASH. L. REV. 123 (1949), it apparently was the intent of the subcommittee of the State Bar's Legislative Committee to draft a bill that would no longer permit the annulment of voidable marriages. A bill subsequently was drafted pursuant to the subcommittee's recommendations and was submitted to the 1949 session of the Washington State Legislature, where it was passed without substantial amendment. However, what the subcommittee of the State Bar Association intended to do and what actually was done are not necessarily identical. For example in the report of the subcommittee of the state bar, reprinted in 23 WASH. L. REV. 320, 321 (1948), it is said that, "Section 8449 (now RCW 26.04.130) setting forth the grounds for voidable marriages is also to be amended to conform with the amendments to Section 983 to make the only grounds for annulment a void marriage, . . ." That REM. REV. STAT. § 8449 was not so amended becomes obvious upon examination of RCW 26.03.130 which is the exact counterpart of section 8449. Note that this statute has remained unchanged since it was originally enacted in 1881. See CODE of 1881 § 2381.

³⁹ For a contrary opinion see 24 WASH. L. REV. 123, 124 (1949), where it is said, ". . . It was felt that the one-year residence requirement should not apply to actions in which the relief sought is simply judicial recognition of the invalidity of a marriage. . . . Throughout the committee's study and drafting of the act of 1949, the approach to annulments has been based on the belief that marriages should be held valid except where the law declares that they are absolutely void, such as where bigamy is proved." Hence it would appear that the intent of the drafting committee was to dispense with the one year residence requirement only as pertaining to actions for a decree of nullity. However, here again what was intended to be done and what actually was done are not identical.

every ground which is set forth in RCW 26.04.130 relating to voidable marriages.⁴⁰

The Washington court refused to fully accept this argument of the prosecutor. However upon such restatement of the first ground for divorce it attached particular significance and held that such statutory amendment is indicative of the legislative intent to make divorce the exclusive remedy for those marriages described as voidable by RCW 26.04.130, and for which the remedy of divorce is prescribed by RCW 26.08.020 (1).⁴¹

The court in arriving at this decision, circumvented the fact that Rem. Rev. Stat. § 8449 had not been repealed by the divorce act of 1949 but rather has remained the same as prior to the passage of the 1949 enactment, by reasoning that since RCW 26.04.130 (Rem. Rev. Stat. § 8449) does not specify the remedy to be followed it is merely definitive in effect.⁴² It is submitted however, that by so holding our court apparently has overlooked a body of prior Washington case law on this point.

The Washington court in strong dicta previously had stated that Rem. Rev. Stat. § 8449⁴³ is a remedial statute. Perhaps the most recent case discussing this point is *In re Romano's Estate*⁴⁴ where the court in referring to *In re Hollingworth's Estate*,⁴⁵ said, ". . . While RCW 26.04.130 relating to remedies, previously referred to, was part of

⁴⁰ It should be noted that this change upon which the prosecutor has placed great emphasis merely added the provision, ". . . or when either party shall be incapable of consenting thereto, for want of legal age or a sufficient understanding," to the first ground for divorce. Prior to the enactment of the divorce act of 1949 a dual remedy of divorce annulment had been provided by REM. REV. STAT. § 8449, and by REM. REV. STAT. § 982 (1), when the consent to the marriage of the party applying for the divorce or annulment was obtained by force or fraud and there had been no voluntary cohabitation after the discovery of the fraud. Hence since the Saville case concerned a marriage induced by fraud and the injured party prior to the enactment of the divorce act of 1949 had the dual remedy of either divorce or annulment, how can it now be said that the plaintiff has only the single remedy of divorce when the portions of both REM. REV. STAT. § 982 (RCW 26.08.020 (1)) and REM. REV. STAT. § 8449 (RCW 26.04.130) pertaining to fraud have not been altered. However this argument was ignored by both the prosecuting attorney and the court in the Saville case.

⁴¹ *Saville v. Saville*, 144 Wash. Dec. 729, 732, 271 P.2d 432, 434 (1954). "In our opinion, the effect of the 1949 enactment is to make divorce the exclusive remedy for dissolving marriages which are voidable under RCW 26.04.130. The inclusion in the amended form of RCW 26.08.020(1), setting out the first statutory ground for divorce, of all the circumstances which render a marriage voidable under RCW 26.04.130, could have no other purpose." Note that the court ignores the argument as to dual remedies of both divorce and annulment as set out in note 40.

⁴² *Saville v. Saville*, *supra*, note 41, "It may be noted that RCW 26.04.130, relating to voidable marriages, does not specify the remedy to be followed. Hence, no question of repeal by implication of RCW 26.04.130 is presented."

⁴³ See RCW 26.04.130.

⁴⁴ 40 Wn.2d 796, 804; 246 P.2d 501, 506 (1952).

⁴⁵ 145 Wash. 509, 261 Pac. 403 (1927).

the statute law of this state, the statute was not referred to and the case was decided on the basis of common law principles."⁴⁶

A host of other Washington cases similarly have emphatic dicta bearing directly upon this issue which, even though dicta, should be entitled to some weight as an indication of prior courts' views regarding RCW 26.04.130 as a remedial statute.⁴⁷ Although the court in these cases denied the annulment sought either because the parties bringing the action were improper parties under the statute⁴⁸ or because of failure of proof that the marriage was voidable,⁴⁹ the dicta is to the

⁴⁶ The Romano case concerned a suit brought by the legatees under a will which was purportedly revoked by the subsequent marriage of the testator, now deceased. These legatees seek to re-establish the will by having the marriage declared void as of the date of the ceremony. Their attack on the marriage is based upon the mental incompetence of Romano at the time he entered into the marriage, and upon the fact that the marriage was procured by fraud and duress practiced by the defendant. Romano was never able to consummate the marriage, nor did he ever voluntarily cohabit with the defendant. A short time thereafter Romano was judicially declared incompetent and about two years later he died without regaining his sanity. One of the reasons given by the court in holding for the defendant is that even though the marriage was voidable, Romano's heirs were precluded from collaterally attacking it, in that they were not parties, "... laboring under the disability, or upon whom the force or fraud is imposed," as specified by RCW 26.04.130. This case is significant in that even though the annulment is not allowed, yet the court in referring to RCW 26.04.130 treats it as a remedial statute.

⁴⁷ *In re Hollopeter*, 52 Wash. 41, 100 Pac. 159 (1909); *Harding v. Harding* 11 Wn.2d 138, 118 P.2d 789 (1941); *Cushman v. Cushman*, 80 Wash. 615, 142 Pac. 26 (1914); *Tisdale v. Tisdale* 121 Wash. 138, 209 Pac. 8 (1922).

⁴⁸ *In re Hollopeter*, *supra*, note 47; *In re Romano's Estate*, 40 Wn.2d 796, 246 P.2d 501 (1952). The Hollopeter case concerned an action brought by the parents of a minor child to secure the annulment of the child. The court denied the annulment on the basis that BAL. CODE § 4477 (RCW 26.04.130) allowed such actions only at the suit of the party laboring under the disability or upon whom the force or fraud is imposed.

⁴⁹ *Harding v. Harding*, 11 Wn.2d 138, 147; 118 P.2d 789, 793 (1941); *Cushman v. Cushman*, *supra*, note 47; *Tisdale v. Tisdale*, *supra*, note 47. In the *Harding* opinion the court recognized that RCW 26.04.130 relates to remedies and said, "... that, under REM. REV. STAT. § 8449, facts might be shown justifying a court in annulling a marriage for fraud, at the instance of the party upon whom the fraud was imposed, ..." However the annulment was not allowed in that there was no evidence presented to show that the failure to consummate the marriage by cohabitation was pursuant to any intent formed prior to the marriage ceremony. Note that the court in *Saville v. Saville*, 44 Wn.2d 793, 271 P.2d 432 (1954), took notice of the discussion in the *Harding* opinion pertaining to REM. REV. STAT. § 8449, but characterized it as pure dictum, and hence not entitled to appreciable weight in influencing their decision.

In the *Cushman* and *Tisdale* cases, the court while recognizing that REM. REV. STAT. § 8449 was a remedial statute yet denied the annulment upon the ground that the marriage was not voidable. The annulments were sought upon the basis that under the provisions of REM. REV. STAT. § 8449 the parties were incapacitated from contracting a valid marriage because of want of "legal age." However the court held that by "legal age" is meant the common law age of consent to marry of fourteen for males and twelve for females and since in both cases the parties exceeded this "legal" age the marriages were not voidable and the annulments were denied. Note that under this decision neither RCW 26.04.130 nor RCW 26.04.210, which prescribes the required age necessary to obtain a marriage license and without parental consent, alter the rule that in order for the marriage to be held voidable the parties must be under the common law age of consent to marry.

effect that if the parties were qualified for an annulment it would be under the authority of RCW 26.04.130.

*Arey v. Arey*⁵⁰ is another Washington decision apparently recognizing RCW 26.04.130 as a remedial statute. The case concerned an appeal taken from the refusal of the lower court to award suit money and attorney's fees in conjunction with an award of annulment of a voidable marriage. Significantly the court cited Bal. Code § 4477, which is identical to RCW 26.04.130, as authorizing the annulment. The judgment of the lower court as to the suit money and attorney's fees was reversed, however, in all other respects its decision was affirmed. Hence, the Supreme Court in effect ratified the lower decision granting the annulment of the voidable marriage.⁵¹

Therefore logic indicates that the inclusion in the amended form of RCW 26.08.020(1), setting forth all the circumstances which render a marriage voidable under RCW 26.04.130, could indeed have some other purpose than to make divorce the exclusive remedy for such voidable marriages. Rather, these statutes should be construed as providing a dual remedy of either divorce or annulment, RCW 26.08.020(1) authorizing divorce, and RCW 26.04.130 sanctioning annulment.⁵²

A final ground urged by the prosecuting attorney in *Saville v. Saville*⁵³ in support of the theory that the legislative intent in enacting the divorce act of 1949 was to preclude the remedy of annulment for voidable marriages, was the repeal of Rem. Rev. Stat. § 983⁵⁴ and the enactment of RCW 26.08.050⁵⁵ in its place.

In refutation of this argument it should be observed that the appli-

⁵⁰ 22 Wash. 261, 60 Pac. 724 (1900).

⁵¹ *But see* Cushman v. Cushman, 20 Wash. 615, 623, 142 Pac. 26, 28 (1914). The court distinguished the Arey case upon the basis that, ". . . The only error there assigned was the refusal of the lower court to award suit money and attorney's fees, the appeal being taken from an order sustaining a demurrer to the complaint upon the ground that it did not state facts sufficient to authorize such awards. The court did not review the judgment of annulment, since no appeal was taken from the judgment and no one was complaining of the finding of the lower court upon the dissolution of the marriage." However it should be noted that the issue under consideration in the Cushman case was whether the marriage was voidable, and the court was not concerned with determining the statutory authority under which the marriage, if voidable, should be annulled. Hence the Arey case is still a valid example of the court applying RCW 26.04.130 in a remedial manner.

⁵² As apparently was the case for marriages induced by fraud prior to the enactment of the divorce act of 1949. See note 40.

⁵³ 145 Wash. Dec. 729, 732; 271 P.2d 432, 434 (1954).

⁵⁴ REM. REV. STAT. § 983. "When there is any doubt as to the facts rendering a marriage void, either party may apply for and on proof obtain a decree of nullity of marriage."

⁵⁵ RCW 26.08.050. "In the case of a void marriage, either party may apply for, and on proof obtain, a decree of nullity of marriage. Such complaint shall be filed in the county in which plaintiff is a bonafide resident at the time of commencing such action."

cation by our court of Rem. Rev. Stat. § 983⁵⁶ has previously been confined to only those marriages which were void rather than voidable,⁵⁷ and that Rem. Rev. Stat. § 8449⁵⁸ was recognized as the appropriate remedial statute for voidable marriages.⁵⁹ Therefore the repeal of Rem. Rev. Stat. § 983 should logically have no effect on such voidable marriages. Furthermore the court expressly holds that they will not interpret RCW 26.08.050 in the manner urged by appellant in that marriages may be voidable for reasons other than those specified in RCW 26.04.130, and for such marriages the statute provides no remedy, for example, those marriages which are voidable in that they are prohibited by RCW 26.04.030.⁶⁰

Therefore the court in *Saville v. Saville*,⁶¹ concludes that, “. . . Unless all of the circumstances which render a marriage voidable under RCW 26.04.030 are included within the statutory grounds for divorce, annulment is the only remedy.” However a question arises as to the statutory authority authorizing the annulment of such voidable marriages. RCW 26.04.130 cannot provide the requisite authority in that the court states that it is not a remedial statute, nor is RCW 26.08.050 applicable in that by its terms it applies to void marriages only. Hence the court has placed itself in a dilemma where in order to support its decision in *Saville v. Saville*,⁶² it must hold that RCW 26.04.130 is not remedial in those situations where the parties to the voidable marriages are qualified for a divorce under RCW 26.08.020(1), but is remedial in those cases where the marriage is voidable by virtue of RCW 26.04.030. Whether such a construction of RCW 26.04.130 actually is in accord with the legislative intent is extremely doubtful.

However, until the *Saville*⁶³ case is overruled by subsequent case authority, or until there is a legislative amendment to the divorce act of 1949, the only remedy for those marriages which are voidable under the authority of RCW 26.04.130 and also are included within the pur-

⁵⁶ REM. REV. STAT. § 983 until amended by the divorce act of 1949 had remained unchanged since its original enactment in 1881. See CODE of 1881 § 2001.

⁵⁷ Buckley v. Buckley, 50 Wash. 213, 96 Pac. 1079 (1908); Sortore v. Sortore, 70 Wash. 410, 126 Pac. 915 (1912); Hahn v. Hahn, 104 Wash. 227, 176 Pac. 3 (1918); Beyerle v. Bartsch, 111 Wash. 287, 190 Pac. 239 (1920); and Barker v. Barker, 31 Wn.2d 506, 197 P.2d 439 (1948).

⁵⁸ See RCW 26.04.130.

⁵⁹ Cases cited note 22, *supra*; *In re Romano's Estate*, 40 Wn.2d 796, 246 P.2d 501 (1952); and Arey v. Arey, 22 Wash. 261, 60 Pac. 724 (1900).

⁶⁰ RCW 26.04.030, *supra*, note 16.

⁶¹ 145 Wash. Dec. 729, 732; 271 P.2d 432, 434 (1954).

⁶² *Ibid.*

⁶³ *Ibid.*

view of RCW 26.08.020(1) is divorce.⁶⁴ But as to those marriages which are voidable and are not included within RCW 26.08.020(1), such as marriages prohibited by RCW 26.04.030, the remedy of annulment apparently is still available, even though the statutory authority authorizing such an annulment remains in doubt.

⁶⁴ Note that the further problem is presented as to the degree of fraud necessary before the court will allow the divorce under RCW 26.08.020(1). While there are no Washington cases squarely in point, the general rule appears to be that the fraud in order to be actionable must go to the essence of the marriage contract, such as an intent formed prior to the marriage to deny the prospective spouse his conjugal rights. See *Harding v. Harding* 11 Wn.2d 138, 118 P.2d 789 (1941). Hence the fraudulent misrepresentations of one party as to birth, social position, fortune, temperament, love and affection cannot vitiate a marriage contract. See *Bolmer v. Edsall*, 90 N.J. Eq. 299, 106 Atl. 646 (1919); *Anders v. Anders*, 224 Mass. 438, 113 N.E. 203 (1916); *Millar v. Millar*, 175 Cal. 797, 167 Pac. 394 (1917); *Baird v. Baird*, 125 Mont. 122, 232 P.2d 348 (1951); *Bragg v. Bragg*, 219 Cal. 715, 28 P.2d 1046 (1934).

The recent case of *Rosender v. Rosender*, 276 P.2d 338, 341 (Kan., 1954) seems to extend the doctrine that the fraud to be actionable must go to the essence of the marriage contract. The court in dictum said, "... one induced by fraudulent concealment to marry an epileptic, forbidden by the mentioned statute to marry, is entitled to a divorce on the ground of fraudulent contract. The fraud which makes the contract of marriage fraudulent is a fraud in law and upon the law. Such a fraud is accomplished whenever a person enters into this contract knowing that he is an epileptic, yet in order to induce the marriage, designedly and deceitfully conceals that fact from the other party who is ignorant of it and has no reason to suppose it to exist." However, the court denied the divorce because of the failure of the plaintiff to sustain the burden of proving the facts necessary to constitute the fraudulent contract.

It should be noted that RCW 26.04.030 and KAN. G. S. 1949, 23-120, similarly prohibit the marriage of an epileptic, and also that RCW 26.04.210 and KAN. G. S. 1949, 23-21, both require that the parties upon applying for a marriage license make an affidavit that they are not afflicted with epilepsy. Hence the dictum in the *Rosender* case becomes significant in that it suggests that the remedy of divorce may be available under RCW 26.08.020(1) to those marriages which are prohibited under RCW 26.04.-030, (at least to the marriage of an epileptic) upon the ground of fraudulent contract. However whether the Washington court would wish to so extend the general rule that the fraud to be actionable must go to the essence of the marriage contract is subject to serious doubt by virtue of the holding in the *Saville* case.