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“VOID” MARRIAGES AND “VOID” LAWS— ANALOGUES?†

CHARLES P. LIGHT, JR.*

Reasoning from analogy, we are told, can never be regarded as equivalent to proof. Indeed analogy is not a type of proof at all. But it “is commonly accepted as a legitimate ground of inference,” as “the most fruitful source of suggestions, of hypotheses.”¹ “The misuse of logic or philosophy [or analogy] begins,” says Judge Cardozo, “when its method and its ends are treated as supreme and final.”² Decidedly we shall not be guilty of such misuse. If anything, error will lie at the other extreme — in claiming nothing for analogy as a method, in evading even the customary conclusional statement, in allowing our inferences to remain “in reference,”³ despite the strictures of the dissentients in *Marcus Brown Company v. Feldman*.⁴

The scope of the paper is indicated by the caption. To answer its questioning, let us *first*, consider the existence and basis of a power⁴ in courts to review legislation, of a power in certain courts to investigate the validity of marriages; *secondly*, examine the conditions upon which such power of review will be exercised over legislation

†The problem of this paper has been suggested by concurrent use of McGOVNEY, *CASES ON CONSTITUTIONAL LAW* (1930) and McCURDY, *CASES ON PERSONS AND DOMESTIC RELATIONS* (1926). Practically all of the cases which are discussed herein will be found in one or the other of these excellent selections.

In arrangement, the paper follows that of Professor McGovney in Chapter I of his casebook. It is substantially the same as that which Professor Noel T. Dowling once used in his classes, with an added historical emphasis following Professor James Bradley Thayer (see Mr. McGovney's Preface).

After a fashion, the paper may be considered a partial review of a fresh presentation of cases upon the law common to American Constitutions.

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¹Paraphrased and quoted from *1* ENCYCLOPÆDIA BRITANNICA (14th ed. 1929) 864, 865.

²CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* (1921) 46. And see *ibid.* 30 as justifying the insertion, “or analogy”.

³250 U. S. 170, 200, 41 Sup. Ct. 465, 466 (1921): “We are not disposed to a review of the cases. We leave them in reference, as the opinion does, with the comment that our deduction from them is not that of the opinion.”

“Ability” would be a substitute. After the usage of Professor E. H. Warren, either “capacity” or “authority” could be used.

and over marriages; *thirdly*, determine the effect of invalidity^{4a} in the case of legislation and of marriages.

I. EXISTENCE OF POWER

The judicial exercise of the power to declare an act of legislature invalid because of conflict with a constitution is a peculiar American contribution to the science of law.⁵ The roots of the doctrine of judicial review⁶ stretch back to *Calvin's Case*⁷ and *Dr. Bonham's Case*,⁸ where Chief Justice Coke proclaimed that "Parliament could not take away that protection which the law of nature giveth unto [the subject];" that "when an Act of Parliament is against common right and reason... the common law will controul it, and adjudge such Act to be void." The American colonial judges were merely practicing what Coke preached when they refused to apply laws thought by them to be in conflict with fundamental law". The arguments of James Otis⁹ and George Mason,¹⁰ revolutionary arguments both, invoked "the Constitution" and "natural right and justice" to strike down laws. In the state courts after the Revolution the power was exercised, with temporarily uncomfortable results to the Rhode Island judiciary as graphically told in *Trevett v. Weeden*.¹¹ The language

^{4a}The term is used interchangeably with "unconstitutionality", as applied to statutes. But Chief Justice O'Neill of Louisiana denies that "validity" in a constitutional provision is the equivalent of "constitutionality". He said: "there is no reason to doubt that the omission of the word *constitutionality* was deliberate." His was a dissenting opinion in *Roberts v. Evangeline Parish School Board*, 155 La. 331, 337, 99 So. 280, 282 (1923).

⁵"A radical difference between the English and the American idea of a Constitution began to emerge from 1761 to 1765... The Americans meant by 'unconstitutional,' Acts absolutely illegal, Acts which Parliament had no power to pass and which were to be disregarded by the Courts and by the citizens of the Colonies." WARREN, CONGRESS, THE CONSTITUTION AND THE SUPREME COURT (1925) 14.

"The principle... is a product of American law, and, though now found in the jurisprudential systems of some other countries, has nowhere received the development and extended application that it has received in the United States." WILLOUGHBY, THE CONSTITUTIONAL LAW OF THE UNITED STATES (2nd ed. 1930) 13.

⁶Professor Corwin's volume bears this title. CORWIN, THE DOCTRINE OF JUDICIAL REVIEW (1914).

⁷Co. Rep. *1a, *14a (1608).

⁸Co. Rep. *114a, *118a (1610).

⁹In *Paxton's Case of the Writ of Assistance*, 1 Quincy 51 (Mass. 1761).

¹⁰In *Robin v. Hardaway*, 1 Jeff. 109 (Va. 1772).

¹¹THAYER, CASES ON CONSTITUTIONAL LAW (1895) 73-78.

and the decisions of the state judges in favor of the power undoubtedly were known to the members of the Convention of 1787.¹² They did not insert in the new Constitution a clause providing: the Supreme Court and the inferior federal courts shall have power to pass upon the constitutionality of acts of Congress and of state legislatures, whenever the case is otherwise properly before them.¹³ It was unnecessary, since "the Court they were erecting was to possess all the powers which were exercised by Courts *as Courts* in the States."¹⁴

In *Marbury v. Madison*,¹⁵ the Supreme Court asserted the existence of the power, in deciding that it should disregard^{15a} an act of Congress which attempted to enlarge its original jurisdiction. Chief Justice Marshall rested his decision upon the nature of written fundamental law, fortified by express texts: "The judicial Power shall extend to all Cases. . .,"¹⁶ "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof. . . shall be the supreme Law of the Land. . ."¹⁷ Justice Gibson of Pennsylvania, dissenting in *Eakin v. Raub*,¹⁸ refused to follow the Chief Justice in some of his reasoning, thinking that the power to declare an act of legislature unconstitutional must be expressly granted to a state court. Otherwise, he was "of opinion that it rests with the people, in whom full and absolute sovereign power resides, to correct abuses in legislation, by instructing their representatives to repeal the obnoxious act."¹⁹ But a clear majority of courts which passed upon the question at all came out strongly in favor of the existence of a power of judicial review of legislation.

¹²WARREN, *op. cit. supra* note 5, at 43.

¹³Drafted without benefit of a Committee of Detail or of Style.

¹⁴WARREN, *op. cit. supra* note 5, at 54, 55.

¹⁵1 Cranch. 137 (U. S. 1803).

^{15a}*Ibid.* 178, where the Chief Justice said: "...the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law. . . ." And *cf.* Chief Justice Taft in *Child Labor Tax Case*, 259 U. S. 20, 37, 42 Sup. Ct. 449, 450 (1922): "It is the high duty and function of this court. . . to decline to recognize or enforce seeming laws of Congress. . ."

¹⁶UNITED STATES CONSTITUTION, Art. III, § 2, Cl. 1.

¹⁷*Ibid.* Art. VI. Cl. 2.

¹⁸12 S. & R. 330 (Pa. 1825).

¹⁹*Ibid.* 355. In the yellowed volume containing the opinion, at p. 346, Vincent L. Bradford, Esq., the donor, has pencilled: "This opinion is plausible, but without force. In 1 Cranch. 175-6 the argument of Marshall, C. J. has the force of demonstration."

Gibson, J., *ibid.* 344, prefaced his opinion thus, at 345: "I am aware, that a right to declare all unconstitutional acts void, without distinction as to either

Is there a parallel development in the field of nullity of marriage cases? In England, before 1857,²⁰ only the ecclesiastical courts annulled marriages. The states of North America, after the Revolution as before, possessed no ecclesiastical courts.²¹ The question then arose, in the absence of any statute expressly conferring the annulling power upon a court of the state, could any court pronounce sentence of nullity? Chancellor Kent of New York answered in the affirmative in *Wightman v. Wightman*,²² holding that a court of equity could annul a marriage between two persons, one of whom was insane at the time of the ceremony. An argument *ex necessitate* was made:

"The fitness and propriety of a judicial decision, pronouncing the nullity of such a marriage, is very apparent, and is equally conducive to good order and decorum, and to the peace and conscience of the party. The only question, then, is, To what Court does the jurisdiction of such a case belong? There must be a tribunal existing with us competent to investigate such a charge, and to afford the requisite relief; and the power, I apprehend, must reside in this Court. . . ."²³

Putting to one side the meaning of "nullity" and substituting "act of Congress" for "marriage" in the quotation, by a little stretching one can imagine John Marshall thinking these words when *Marbury v. Madison*²⁴ was before him for decision.

Following the precedent set by Kent, Chancellor Sandford of New York, in *Ferlat v. Gojon*,²⁵ annulled a marriage procured by fraud and duress, although there was no statute expressly conferring such power. He thought "[i]t would be deplorable, that in a case of fraud so

constitution, is generally held as a professional dogma; but, I apprehend, rather as a matter of faith than of reason. I admit that I once embraced the same doctrine, but without examination. . . ."

See BEARD AND BEARD, *THE AMERICAN LEVIATHAN* (1930) 30-33 for an illuminating discussion of "Interpretation by the Rational Method", Marshall's favorite method.

²⁰2 HALSBURY, *THE LAWS OF ENGLAND* (1910) 505: "During the nineteenth century the jurisdiction of the ecclesiastical courts was considerably curtailed. . . [T]heir jurisdiction in matrimonial causes was transferred to the newly established Divorce Court," by the Matrimonial Causes Act of 1857.

²¹Anonymous, 24 N. J. Eq. 19, 24 (1873), quoting from 2 BISHOP, *MARRIAGE AND DIVORCE* (4th ed. 1864) § 291.

²²4 Johns. Ch. 343 (N. Y. 1820).

²³*Ibid.* 346. To the same effect see 2 KENT, *COMMENTARIES ON AMERICAN LAW* (11th ed. 1867) 39, 40.

²⁴*Supra* note 15.

²⁵1 Hopk. Ch. 478 (N. Y. 1825).

gross, there should be no adequate remedy."²⁸ Again the appeal to necessity as a justification.

The early American cases wherein courts held statutes unconstitutional, were the product of revolutionary arguments, arguments from necessity. How else could James Otis attack the "writ of assistance"?²⁷ Necessity, it seems, is at times also the mother of jurisdiction. So, the early decisions of the New York chancellors annulling marriages were the offspring of necessity. In more recent times, a New Jersey chancellor annulled a marriage-in-jest, although he admitted that "[a] literal construction of these acts and constitutional provisions, would not seem to vest in this court the power of declaring marriages void, except in the cases specified. . . ."²⁸ He applied the method of Kent to the interpretation of statutes and constitution and reached the same conclusion.

However surprising geographically, in one state at least, the revolutionary argument from necessity did not prevail. South Carolina's court of equity, in *Mattison v. Mattison*,²⁹ refused to declare a marriage void on the ground that the complainant was suffering from delirium tremens at the time of the ceremony. The reason given was, that such cases were cognizable in England by the ecclesiastical courts alone, that there was no state statute conferring ecclesiastical jurisdiction upon the equity court, hence it could not act.

There is wisdom in Kent's argument that, inasmuch as a court of equity will annul ordinary contracts where there was fraud, it should do the same in the case of marriages, where necessity demands that a decree issue. This is not quite the same kind of necessity as that which led the early judges to hold legislation invalid. But in so far as legislation clearly conflicts with specific provisions of a written constitution, the public necessity would seem to require that some court adjudge the fact. When invalidity hinges upon one of the vaguer clauses, like Due Process, the necessity argument in constitutional cases is less clear.³⁰

An outstanding case of a change of heart as to the existence of power to review legislation is that of Justice Gibson of Pennsylvania.

²⁸*Ibid.* 495. Here the chancellor also stated: "In England, the ecclesiastical courts would have cognizance of such a question, and would annul the marriage; but it seems, that even in England, the court of chancery would also have jurisdiction of such a case, as a fraud." But *Moss v. Moss*, [1897] P. D. 263, refutes this.

²⁷True, the writ issued despite Otis' appeal to "The Constitution".

²⁸*Zabriskie, C.*, in *McClurg v. Terry*, 21 N. J. Eq. 225, 229 (1870).

²⁹1 Strobh. Eq. 387 (S. C. 1846).

³⁰See Frankfurter, *A Note on Advisory Opinions* (1924) 37 HARV. L. REV. 1002.

Twenty years after his dissent in *Eakin v. Raub*,³¹ the learned³² chief justice, during the argument in *Norris v. Clymer*,³³ spoke in favor of the power for two reasons of which the second was: "...from experience of the necessity of the case."³⁴ The necessity mentioned here is referable, it would seem, to a belief that the legislature could not be trusted to restrain itself agreeably to the constitution.

Following a familiar classification,³⁵ interests which lead to recognition of a power in equity courts to annul marriages are these: (a) individual interests of the parties in "peace and conscience", honor, peace of mind, probably in property matters, possibly of children in their status; (b) a social interest in "good order and decorum" of members of the community; (c) a public interest in the conservation of the courts' time,³⁶ by settling once for all the question whether a marriage is valid.

Corresponding interests in the case of disregarding legislation are these: (a) an individual interest in protection against encroachments by government, often upon property; (b) a social interest in favor of exercising the power of judicial review, often in favor of giving legislatures a freer rein to permit experimentation; (c) possibly, a slight public interest in judicial time saving.

Accepting Mr. Epaphroditus Peck's statement that "[t]he statutes of nearly all the states define as causes for divorce facts which really made the marriage a nullity from the beginning,"³⁷ the foregoing discussion of general equity jurisdiction to annul marriages perhaps will

³¹*Supra* note 18.

³²Used in all sincerity, both here and hereafter.

³³2 Pa. 277 (1846).

³⁴*Ibid.* 281. To insure fairness to Judge Gibson, let it be said that in *Eakin v. Raub*, *supra* note 18, at 356, he did admit the existence of the power whenever there should arise "monstrous violations of the constitution", "such as taking away the right of trial by jury, the elective franchise, or subverting religious liberty." But any such changes, he thought, would amount to "a revolution, which, to counteract, would justify even insurrection; consequently, a judge might lawfully employ every instrument of official resistance within his reach. "...[W]hile the citizen should resist with pike and gun, the judge might cooperate with *habeas corpus* and *mandamus*."

³⁵See Pound, *Interests of Personality* (1915) 28 HARV. L. REV. 343, 445. But the application is obviously the writer's.

³⁶*Cf.* Beale, *The Proximate Consequences of an Act*, (1920) 33 HARV. L. REV. 633, 640: "...the court can give to the tracing of the consequences of any particular act only its fair share of all the available time, considering the other acts which are waiting its attention."

³⁷PECK, *THE LAW OF PERSONS AND OF DOMESTIC RELATIONS* (3rd ed. 1930) 159.

have lost its appeal for the utilitarian, and must look for sympathetic response to the historically minded. But constitutional review is not covered by constitutional provisions, save negatively through limitations upon its exercise.³⁹

³⁹In Colorado, it was provided that judicial review should be exercisable only by the state supreme court, subject to approval or rejection by the people. This constitutional provision was held invalid as to federal questions in *People v. Western Union Telegraph Co.*, 70 Colo. 90, 198 Pac. 146 (1921), and as to state questions in *People v. Max*, 70 Colo. 100, 198 Pac. 150 (1921). In North Dakota, a decision of unconstitutionality is no longer a matter of majority vote, but at least four of the five judges of the supreme court must concur. This provision of the constitution was sustained without much discussion in *Daly v. Beery*, 45 N. D. 287, 178 N. W. 104 (1920). Justice Gibson of Pennsylvania once might have agreed with these remarks of Robinson, J., at 306, 178 N. W., at 111: "The power which courts have assumed, by a bare majority of one, to hold void acts of Congress and legislative enactments, may soon be a *thing of the past*. If the court have the power, by any majority, to hold void an act submitted to and approved by *the people*, the power is too dangerous and arrogant for use, except on occasions very extraordinary." (Italics are the writer's.) But the remarks are in conflict with the more optimistic view, expressed in *THE NATION* while the *Legal Tender Cases*, 12 Wall. 457 (U. S. 1872), were under fire: "...the value of a judgment does not depend on the number of Judges who concur in it—Judges being weighed, not counted..." 3 WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* (1924) 247. In Ohio, it takes the concurrence of "at least all but one" of the supreme court judges to upset a law, save where the intermediate court of appeals has upset it first. The provision was applied in *DeWitt v. State*, 108 Ohio St. 513, 141 N. E. 551 (1923). See particularly the Note in the Syllabus by the Court, at 514, 141 N. E., at 551.

No reference to these or similar limiting provisions has been found in STIMSON, *THE LAW OF THE FEDERAL AND STATE CONSTITUTIONS OF THE UNITED STATES* (1908). In 12 C. J. 779 (1917), it is said: "In some jurisdictions, certain inferior courts are forbidden by constitutional or statutory provisions to pass on the constitutionality of statutes." Illinois cases are cited. Mr. Warren has discussed the North Dakota and Ohio provisions in his chapter on "Minority Decisions", *op. cit. supra* note 5, 186-190. And see MCGOVNEY, *CASES ON CONSTITUTIONAL LAW* (1930) 64-68 and notes.

Are "the people" of the twentieth century coercing the justices, as the justices of the fourteenth century used to coerce those of the people who happened to be jurors? Cf. Anonymous Case, 41 Lib. Assisarum 11 (1367), also in POUND & PLUCKNETT, *READINGS IN THE HISTORY AND SYSTEM OF THE COMMON LAW* (3rd ed. 1927) 155, 156: "In another assise before the same justices at Northampton, the assise was sworn; and they all agreed but one, who would not agree with the xi, and afterwards they were remanded, and remained all day and the next day without eating or drinking, and afterwards the justices demanded of him if he would agree with his companions, and he said never, for he would die first in prison. Wherefore they took the verdict of the xi and commanded him to prison..."

II. EXERCISE OF POWER

Turning from the existence of a power of judicial review to its exercise, it is common learning that a "case or controversy" is necessary in the federal courts before judicial power can attach.³⁹ The Supreme Court of the United States "has steadily set its face from the beginning"⁴⁰ against the giving of "merely advisory"⁴¹ opinions upon the constitutionality of legislation. The practice in the supreme courts of several states includes the giving of such opinions.⁴² It has not escaped criticism: "The accidents of litigation may give time for the vindication of laws which *a priori* may run counter to deep prepossessions or speculative claims of injustice."⁴³ The longer a law thought constitutionally doubtful when enacted is given a chance to prove itself in actual practice, the less the likelihood that it will later be declared invalid⁴⁴—a sort of perverse⁴⁵ but benevolent laches.

In the case of long continued delay in instituting proceedings to annul a marriage for impotency, where there was ground all along to do so, courts will decline to grant relief. The chancellor will look at the marriage and at the time elapsed and may decide not to "meddle with what the party complaining shows by conduct through a considerable series of years to be no grievance."⁴⁶ There is this difference between the two cases. In the constitutional case, the complainant does not lose a right he would otherwise have had because of his own insincerity, the rule in the marriage case. Rather, because of the passage of time, relief originally certain against questionable legislation, may be denied. It is not the loss of a "right", but the denial of the existence of a constitutional "wrong".

³⁹Muskrat v. United States, 219 U. S. 346, 31 Sup. Ct. 250 (1911).

⁴⁰*Ibid.* 362, 31 Sup. Ct., at 256.

⁴¹Mr. Justice Stone in *Fidelity Nat. Bank. & Co. v. Swope*, 274 U. S. 123, 134, 47 Sup. Ct. 511, 515 (1927).

⁴²Hudson, *Advisory Opinions of National and International Courts* (1924) 37 HARV. L. REV. 970, 977 and 978.

⁴³Frankfurter, *op. cit. supra* note 30, at 1005, being a *caveat* to the article cited *supra* note 42.

⁴⁴Moreover, a decision of invalidity may be reversed, where to "hold the acts . . . invalid must cause, throughout the country, great business derangement, widespread distress, and the rankest injustice." Practically speaking, there was reversal in the *Legal Tender Cases*, 12 Wall. 457, 529 (1872).

⁴⁵WARREN, *op. cit. supra* note 38, at 243: "Of course, the answer to all this [i. e., the quotation *supra* note 44] was, that the Court should not concern itself with 'consequences' . . ."

⁴⁶*Kirschbaum v. Kirschbaum*, 92 N. J. Eq. 7, 15, 111 Atl. 697, 700 (1920).

The constitutional issue may be raised by violating the law,⁴⁷ suffering prosecution, defending upon the ground of invalidity; by suit to restrain enforcement of the statute;⁴⁸ by suit for a declaratory judgment upon constitutionality;⁴⁹ upon petition for a writ of habeas corpus. As Professor McGovney has pointed out,⁵⁰ some courts allow the writ of habeas corpus to issue before criminal trial, in order to test the constitutionality of the statute which the defendant is alleged to have violated. But some have refused the writ for the same purpose, after trial and conviction. Here, failure to act seasonably merely results in defendant's inability to use a speedy isolation method of settling the constitutional question. It does not amount to the loss of all claim to relief, as in the nullity cases mentioned above, but to the loss of a particular remedy.

III. EFFECT OF INVALIDITY

Having considered the existence and modes of exercise of power in courts to pass upon the validity of marriages and of laws, next we shall determine the effect in each case of a decision of invalidity with a view to making comparisons. The terms "void" and "voidable" will furnish a starting and focal point for the essay.

a. Marriages—Void or Voidable?

What is the meaning of void marriage? Blackstone meant, one entered into where there were civil disabilities⁵¹ which "previously hinder the junction". Nonage was a disability of this sort. Even so, when the party under age reached the age of consent, he (she) might "disagree and declare the marriage void, without any divorce or sentence in the spiritual court."⁵² On the other hand, voidable marriages to Blackstone were those which were required to be set aside by sentence of the ecclesiastical court. Canonical disabilities,⁵³ for example

⁴⁷Hatch v. Reardon, 204 U. S. 152, 27 Sup. Ct. 188 (1907).

⁴⁸Tyson & Brother—United Theatre Ticket Offices, Inc. v. Banton, 273 U. S. 418, 47 Sup. Ct. 426 (1927).

⁴⁹See Borchard, *The Supreme Court and the Declaratory Judgment* (1928) 14 A. B. A. J. 633.

⁵⁰In a note which collects the cases. MCGOVNEY, *op. cit. supra* note 38, at 199.

⁵¹Classified as follows: "1. Impediments...a prior marriage, or having another husband or wife living... 2. Age...want of age... 3. Assent of others...want of consent of parents or guardians... 4. Mental capacity...want of reason..." 1 BL. COMM. (4th Cooley ed. 1899) *435-439.

⁵²*Ibid.* *436.

⁵³Blackstone's complete list: precontract, consanguinity, affinity and "some particular corporal infirmities." *Ibid.* *434.

consanguinity, he says, "only make the marriage voidable, and not *ipso facto* void, until sentence of nullity be obtained."

Perhaps misapplying Blackstone's language that a marriage where one of the parties was under the age of consent was void,⁶⁴ the Supreme Court of Ohio, in *Shaffer v. The State*, held that this meant the marriage was not a marriage "until confirmed by cohabitation after arriving at the age of consent."⁶⁵ The lower court had charged "that unless he *dissented* from the contract on arriving at such age, and gave the wife notice of the fact, he could not avoid it." The supreme court's answer to this was: "We think acts of *assent* after age must be shown to bind him."⁶⁶ However, in the Alabama case of *Beggs v. The State*,⁶⁷ the view of the Ohio trial court was followed: a marriage between persons not of the age of consent is "imperfect, becoming perfect only by affirmance when the requisite age is obtained. Until disaffirmance, it is a marriage in fact, and the second marriage of either party is bigamy."⁶⁸

Blackstone, in other words, used "void" and "voidable" with reference to court action: a void marriage needed none to declare it void, a voidable marriage was an avoidable marriage, one which required a court decree to set it aside. However, both the Ohio case and the case from Alabama treat marriages under age as voidable in an analytical sense: one following the contracts usage of valid until disaffirmed,⁶⁹ the other (having a faint agency tinge), invalid unless affirmed. In neither was court action necessary to affirmance or disaffirmance.

Support for the view taken in *Shaffer v. The State*⁶⁰ seems to be found in *Wightman v. Wightman*.⁶¹ In the latter case the ceremony was performed when the wife was insane. The chancellor said:

⁶⁴Further along, Blackstone said: "...this marriage is only inchoate and imperfect; and, when either of them comes to the age of consent aforesaid, they may disagree and declare the marriage void, without any divorce or sentence in the spiritual court." *Ibid.* *436.

⁶⁵20 Ohio 1, 6 (1851).

⁶⁶*Ibid.* 7. This view may have been taken because at the time Ohio law furnished "no method of obtaining a judicial sentence for annulling such a marriage; unless the parties have the means of escape in their own hands, none exist." *Ibid.* 6. This is but a differing manifestation of the argument from necessity.

⁶⁷55 Ala. 108 (1876).

⁶⁸*Ibid.* 113.

⁶⁹1 WILLISTON, CONTRACTS (1920) 14: "Unless rescinded, however, a voidable contract imposes on the parties the same obligation as if it were not voidable."

⁷⁰*Supra* note 55.

⁷¹*Supra* note 22.

"...though such marriages be *ipso facto* void, yet it is proper that there should be a judicial decision to that effect..."⁶² What is the meaning of *ipso facto* void? A total nullity, so that no act of a party can improve the situation? No, for even "if a party contracted marriage when a lunatic," if he later "agreed to it, and consummated it, in a lucid interval, it would be good."⁶³ Thus, the marriage is void if so declared by a court, and void if the insanity remains (*ipso facto*), but is capable of ratification by later lucid consent given by the formerly incompetent party.

Recapitulating,⁶⁴ a marriage, imperfect because of nonage, insanity, duress, fraud, or mistake, is said to be void. No decree of nullity or other court action is necessary to set it aside. The parties by their conduct may disaffirm the marriage. In this sense it is voidable. So they may (must under *Shaffer v. The State*⁶⁵) affirm it by their conduct.

A marriage, defective because of impotency or consanguinity, is voidable,⁶⁶ is "valid for all civil purposes unless sentence of nullity be obtained in the lifetime of the parties."⁶⁷ Court action is necessary to set it aside. Otherwise, by acquiescence it may be validated forever. By their personal conduct alone the parties cannot disaffirm the marriage.

This should be noted: a marriage, under any of the several disabilities considered above, is given some effect. In no case is the situation of the parties after the ceremony what it would have been had no "marriage" taken place.

⁶²*Supra* note 22, at 345.

⁶³*Supra* note 22, at 345, citing Ash's case, Prec. Ch. 203, 1 Eq. Cas. Abr. 278, pl. 6. (1702).

⁶⁴See the Introduction to MAY, MARRIAGE LAWS AND DECISIONS (1929) 8-10. This Manual should prove invaluable. Witness its scope: "It attempts *only* to combine comprehensively under a uniform set of headings all the statutory regulations of marriage and all the pertinent court decisions relating to marriage, within the limits to be explained, in each jurisdiction of the continental United States." (Italics are the writer's.)

⁶⁵*Supra* note 55.

⁶⁶But Kent said, "unlawful, *ab initio*..." *Supra* note 22, at 348.

⁶⁷*Bowers v. Bowers*, 10 Rich. Eq. 551, 556 (S. C. 1858). And to the same effect as to impotency, see *Steerman v. Snow*, 94 N. J. Eq. 9, 118 Atl. 696 (1922). "Whether a marriage between persons within the prohibited degree of relationship is void is a question on which decisions differ, the difference often resting on the varying terms of the respective statutes." PECK, *op. cit supra* note 37, at 140.

b. *Laws (Marriages)—the Nature of the Remedy*

Before discussing the meaning of "void" as a prefix to "law", it will be well to look at the nature of the remedy where the law is alleged to be of this kind. Let the cases speak for themselves. "The function of the judicial department with respect to legislation deemed unconstitutional is not exercised *in rem*, but always in *personam*."⁶⁸ "[T]he decision affects the parties only, and there is no judgment against the statute."⁶⁹ A "former decision can not be pleaded as an estoppel, but can be relied on only as a precedent."⁷⁰ True, "all people... ought and usually do consider that particular question as settled and binding; but this is only so by... [reason of] the credence which the people have in the opinions of such courts."⁷¹

This language may be applied as well to the case of collateral attack upon the validity of a marriage alleged to be defective for some civil reason like fraud or lack of consent. The solution of the issue in the collateral proceeding⁷² may hinge upon the validity of the marriage. The court then "pronounces the marriage valid or void, only for the purpose of deciding the particular suit in which the question arises; and the decision is conclusive, for no other purpose. The question... may be again and again litigated, in other suits and in other courts; and it may receive different decisions from different tribunals."⁷³ As "[a] statute unconstitutional properly remains on the statute books as a part of the written law,"⁷⁴ so a marriage pronounced invalid in a collateral proceeding is yet a marriage and may be held valid in other proceedings.

There is one case, *Miller v. State Entomologist*,⁷⁵ whose language goes far toward giving an effect "quasi in rem" to a decision that a statute is *valid*. In this case a Virginia statute was attacked on

⁶⁸Lang v. Mayor of Bayonne, 74 N. J. L. 455, 459, 68 Atl. 90, 92 (1907). See Hohfeld, *Fundamental Legal Conceptions As Applied in Judicial Reasoning* (1917) 26 YALE L. J. 710, for criticism of these Latin phrases and of their use.

⁶⁹Shephard v. Wheeling, 30 W. Va. 479, 483, 4 S. E. 635, 637 (1887).

⁷⁰*Ibid.*

⁷¹Norwood v. Goldsmith, 168 Ala. 224, 235, 53 So. 84, 87 (1910).

⁷²"... such as prosecutions for bigamy, actions of dower, suits in which marital rights are claimed, or any other proceeding involving the legality of the marriage." Ferlat v. Gojon, *supra* note 25, at 494.

⁷³Ferlat v. Gojon, *supra* note 22, at 494.

⁷⁴State of Iowa v. O'Neil, 147 Iowa 513, 520, 126 N. W. 454, 456 (1910). And see Shephard v. Wheeling, *supra* note 69, at 483, to the effect that a court decision of invalidity "does not strike the statute from the statute-book..."

⁷⁵146 Va. 175, 135 S. E. 813 (1926).

various grounds, but its constitutionality was upheld. The late Judge Burks' opinion reads:

"The same objections [to the statute] and some others have been raised in the instant case. So far as the facts of the two cases are the same, the *Bowman Case* [upholding the statute] stands until reversed. All objections to the constitutionality of the statute are concluded by the *Bowman Case*, whether brought to the attention of the court in that case or not."⁷⁶

The Judge reasons:

"This must be so of necessity, for if a statute is unconstitutional for any reason, it is a void statute, and 'whenever a statute is enforced by a judgment or decree of a court, it is a judicial determination that the statute is a valid enactment and is free from all constitutional objections.'⁷⁷"

This conclusion hardly jibes with the accepted theory regarding the functions of a supreme court in a constitutional case, thus expressed by Mr. John W. Davis: "...surely they do not go one step beyond the administration of justice to individual litigants."⁷⁸ Professor Hudson's narrative⁷⁹ continues:

"But Lord Birkenhead^[80] found Mr. Davis' refinement 'a little subtle', and expressed the view that 'when an issue challenged by an individual raises the question whether a law is constitutional or not the decision of the Supreme Court [of the United States] decides this question for all time, and if the decision is against the legislature the attempted law is stripped of its attempted authority.'"

Judge Burks' opinion, like that of the late Lord Chancellor, may portray more accurately the realities (probabilities) of the case,⁸¹ an estimate extenuatory not affirmative.

⁷⁶*Supra* note 75, at 180, 135 S. E., at 814. With the last clause of the quotation *cf.* GREEN, JUDGE AND JURY (1930) 22: "There can be no such thing as acceptable lump-sum judgments on complex transactions. Complicated data can only be handled reliably by breaking them into parts and examining them bit by bit." and see Biklé, *Judicial Determination of Questions of Fact Affecting the Constitutional Validity of Legislative Action* (1924) 38 HARV. L. REV. 6.

⁷⁷*Supra* note 75, at 180, 135 S. E., at 814. (Italics are the writer's.)

⁷⁸Hudson, *op. cit. supra* note 42, at 974, quoting from (1923) 9 A. B. A. J. 553, 557. ⁷⁹*Ibid.* quoting from (1923) 9 A. B. A. J. 553, 579.

⁸⁰An Associated Press dispatch from London, Sept. 30, 1930, reads: "The Earl of Birkenhead (F. E. Smith), a lawyer and politician and one of the most romantic (Lord High Chancellor at 47) and colorful figures in British public life, died from pneumonia today. He was 58 years old."

⁸¹See the Note, *What is the Effect of a Court's Declaring a Legislative Act Unconstitutional?* (1926) 39 HARV L. REV. 373.

Shifting to marriages, where a decree of annulment is secured, "the proceeding is *in rem*, strictly so called; it is upon *the matter* of the marriage, to determine simply whether such marriage exists. . . . And when a determination is had in a proceeding *in rem*, it binds the whole world and not only the parties to it; it makes it a marriage or no marriage."⁸³ Superficially, the nearest thing to such proceeding in the case of legislation is the declaratory judgment. But the assumed similarity is imaginary, for a declaration of unconstitutionality binds only as far as does a decision in the ordinary case or controversy.⁸⁴

c. *Laws (Marriages)—Analysis of Invalidity*

In contemplating the effects of unconstitutionality the first dictum which comes to mind is that of Mr. Justice Field: "An unconstitutional act is not a law; . . . it is, in legal contemplation, as inoperative as though it had never been passed."⁸⁵ Elsewhere,⁸⁶ Professor Tooke has demonstrated that this sweeping assertion was not necessary to the decision of the case. Still it remains, receiving succor from another precept, "all persons are presumed to know the law,"⁸⁷ meaning all persons are presumed to know whether the law is constitutional or unconstitutional, and "if they act under an unconstitutional enactment of the legislature, they do so at their peril, and must take the consequences."⁸⁷ As applied to officers of the law who have arrested persons under an act which has "passed the legislature with every formula of law," this is hard doctrine. An Alabama case admits as

⁸³McClurg v. Terry, *supra* note 28, at 227, 228 (1870).

⁸⁴"Except for such coercive decree, the judgment differs in no essential respect from any other judgment between opposing parties. The judgment merely declares the rights of the parties on formal complaint or petition, as in any other suit, without necessarily invoking the sheriff's process of execution." Borchard, *op. cit. supra* note 49, at 633. Professor Borchard says that some twenty-three states have now adopted the procedure (1928).

According to 9 U. L. A., Supplement, 1929, fourteen states have adopted the Uniform Declaratory Judgments Act.

⁸⁵Norton v. Shelby County, 118 U. S. 425, 442, 6 Sup. Ct. 1121, 1125 (1886).

⁸⁶Tooke, *De Facto Municipal Corporations Under Unconstitutional Statutes* (1928) 37 YALE L. J. 935, 945.

⁸⁷Summer v. Beeler, 50 Ind. 341, 342 (1875).

⁸⁷*Ibid.* It is not entirely clear whether the officers who made the arrest acted before or after the act in question was declared unconstitutional. The act was passed Feb. 27, 1873 and was held invalid in an opinion filed "November Term, 1873". Inasmuch as "the defendants answered. . . in justification under the. . . said law", the inference is that they arrested plaintiff before any declaration of invalidity.

much by calling this "a presumption often violent but always necessary."⁸³

Judges have laid restraining hands upon the full implications of the dictum in the *Norton* case.⁸⁹ Starting, we may assume, with the equally respectable dictum that "every possible presumption is in favor of the validity of an act of" the legislature "until overcome beyond rational doubt,"⁹⁰ the North Carolina Supreme Court has held that officers are protected against punishment for complying with a statute later declared unconstitutional. They say:

"Until the subsequent statute was *declared* to be unconstitutional by competent authority, the defendants, under every idea of justice and under our theory of government, had a right to presume that the law making power had acted within the bounds of the Constitution, and their highest duty was to obey."⁹¹

Again, it has been held⁹² that a sheriff, acting under a warrant fair on its face, is protected, although the warrant issued pursuant to the terms of an ordinance subsequently declared unconstitutional. The distinction is "observed between mere excess of jurisdiction and the clear absence of all jurisdiction over the subject-matter"⁹³ in the court issuing the warrant.

The dictum in *Norton v. Shelby County*,⁹⁴ that an unconstitutional law is as inoperative as though it had never been passed, could mean that the law was a complete zero before any court decision. What the case decides is, that upon the facts retrospective operation must be given to the decision of invalidity. Language fully as emphatic as Mr. Justice Field's appears in a Florida case:

"...the constitution by its dominant force renders the enactment inoperative *ab initio*, and bonds issued thereunder are void because issued without authority of law."⁹⁵

This court likewise gave retrospective effect to its decision, where action under the law in question took place before any court had passed upon its validity. That it would not press this view too far,

⁸³Norwood v. Goldsmith, *supra* note 71, at 234, 53 So., at 87.

⁸⁴*Supra* note 84.

⁸⁵Adkins v. Children's Hospital, 261 U. S. 525, 544, 43 Sup. Ct. 394, 396 (1923).

⁸⁶State v. Goodwin, 123 N. C. 697, 702, 31 S. E. 221, 222 (1898). (Italics are the writer's.)

⁸⁷Rush v. Buckley, 100 Maine 322, 61 Atl. 774 (1905).

⁸⁸*Supra* note 92, at 331, 61 Atl., at 778.

⁸⁹*Supra* note 84.

⁹⁰State ex rel. Nuveen v. Greer, 88 Fla. 249, 259, 102 So. 739, 743 (1924).

however, is apparent from the admission in the opinion that "[r]ights acquired under a statute while it is duly adjudged to be constitutional are valid legal rights that are protected..."⁹⁶ But, if the constitution "operates to make the statute void from its enactment,"⁹⁷ after a primary decision, why does it affect the law only prospectively where the judges upon second thought have changed their minds? Twisting a metaphor, a possible explanation is, that those mistaken for judicial absolutists are at heart but pragmatists in absolutist clothing.^{97a} Even they, during the palmier days of the ab initio regime, scarcely would have made allusion to an unconstitutional law as "a statute which is itself immoral."⁹⁸

Additional instances of a gentler doctrine as to the effect of invalidity are found in *Sessums v. Botts*,⁹⁹ from Texas, and *Shepherd v. Wheeling*,¹⁰⁰ from West Virginia. The Texas courts adopts this sane view:

"It is true that when an act has been *declared* unconstitutional, then it is as though it had never been; but we do not think that the author in the text [Judge Cooley], or the cases cited by him, intended to announce the doctrine that an unconstitutional law could be no protection to officers or citizens, before the same had been passed upon and adjudged invalid."¹⁰¹

Here is a wholehearted declaration that prospective effect will be given to the decision of invalidity, without the temporal qualification of *Nuveen v. Greer*.¹⁰² The upshot of the Texas case is that the unconstitutional law is not strictly speaking void. It affords protection, it is valid until declared invalid, and such invalidity is forward looking. To quote from the West Virginia decision:

"Respect for the Legislature, therefore, concurs with well-established principles of law in the conclusion that such act is not void, but voidable only..."¹⁰³

Decrees of annulment of marriage once operated ab initio to make

⁹⁶*Supra* note 95, at 265, 102 So., at 745.

⁹⁷*Supra* note 95, at 264, 102 So., at 745.

^{97a}*Cf. CARDOZO, op. cit. supra*, at 102.

⁹⁸Collins, J., in *Minnesota Sugar Co. v. Iverson*, 91 Minn. 30, 40, 97 N. W. 454, 458 (1903). The words were used in holding unconstitutional a sugar bounty law. This may explain their heat.

⁹⁹34 Texas 335 (1871).

¹⁰⁰*Supra* note 69.

¹⁰¹*Supra* note 99, at 349.

¹⁰²*Supra* note 95.

¹⁰³*Supra* note 69, at 484, 4 S. E., at 638.

the offspring illegitimate.¹⁰⁴ Statutory enactments in the United States have altered this rigorous rule by providing for prospective operation from the date of the decree.¹⁰⁵ What has been done by legislatures for annulment decrees may properly be done by courts themselves when they declare laws invalid. Chancellor Kent went far in holding¹⁰⁶ that equity should take jurisdiction to decree nullity of marriage, without a statute so providing. It would have been too much to expect him to depart from the canon law model and, *ex proprio vigore*, decree prospective nullity. But McLain, J., in *Iowa v. O'Neil*¹⁰⁷ did not think it too much to give only prospective operation to his declaration that a law was unconstitutional: "If we should sustain the conviction [by giving retrospective effect to the decision of invalidity], we would do so in the belief that the case was one in which executive clemency ought to be exercised."¹⁰⁸ He declined to pass the burden along to the governor, but assumed it himself. Chancellor Kent had not as free a hand to alter the nature of nullity decrees; their scope was well defined years before. But a decision of unconstitutionality, peculiarly American,¹⁰⁹ need not have so crystallized a content. "In considering this question," also, "we must never forget, that it is a *constitution* we are expounding."¹¹⁰

In the absence of other solutions, unless prospective effect be given to a decision of unconstitutionality, hardship is bound to follow. The self-imposed canons of interpretation,¹¹¹ under which courts avoid holding a law invalid, implicitly recognize this. To give an ab initio effect to the invalidity of a law is harsher at times than it is to apply the doctrine of trespass ab initio to the acts of an officer entering premises under an authority granted by law. The remarks of Professor Bohlen and Mr. Shulman,¹¹² with interpolations, are pertinent here:

¹⁰⁴See *Wolf v. Wolf*, 111 Misc. 391, 181 N. Y. Supp. 368 (Sup. Ct. 1920) (nonage), and *Bowers v. Bowers*, *supra* note 67 (consanguinity).

¹⁰⁵See for example, *Perkey v. Perkey*, 87 W. Va. 656, 106 S. E. 40 (1921).

¹⁰⁶In *Wightman v. Wightman*, *supra* note 22.

¹⁰⁷*Supra* note 74.

¹⁰⁸*Supra* note 74, at 521, 126 N. W., at 456.

¹⁰⁹But increasingly less so, as is pointed out in *WARREN, op. cit. supra* note 5, at 161.

¹¹⁰Marshall, C. J., in *M'Culloch v. Maryland*, 4 Wheat. 316, 407 (1819).

¹¹¹COOLEY, *CONSTITUTIONAL LIMITATIONS* (8th ed. 1927) c. VII. 1 THAYER, *op. cit. supra* note 11, at 171, calls these, "administrative rules in constitutional law".

¹¹²Bohlen and Shulman, *Effect of Subsequent Misconduct Upon a Lawful Arrest* (1928) 28 COL. L. REV. 841, 849.

"Certainly the fiction^[123] of trespass [invalidity] *ab initio* ought to be banished^[124] . . . from the law . . . The argument against its retention as a deterrent to official [legislative] misconduct has already been set forth above."

It is not usual to justify invalidity *ab initio* by calling it a deterrent to the enactment of fewer unconstitutional laws by legislatures. Such is an inarticulate possibility.

What can be done to assuage the hardship produced by retrospective invalidity where courts apply that rule? One situation stands out. The defendant has violated a statute of the state. Upon complaint, a magistrate issues a warrant, fair on its face for plaintiff's arrest. The sheriff executes the warrant. After his release, plaintiff sues the sheriff for false imprisonment. The sheriff defends upon the statute creating the offense. Plaintiff counters by attacking the validity of the statute. A court taking the strict view of unconstitutionality will hold the sheriff liable in damages.¹²⁵ We thus have the spectacle of the executive arm of the government being made to suffer for an act enjoined by the judicial branch, consonant to the solemn act of the legislative department, as a result of a later conclusion reached by the supreme judicial branch. This is "separation of powers".

In another type of case the unfortunate results of imposing liability upon the officer have been portrayed:

"A health officer, for example, who in good faith believes a horse to have glanders or anthrax and thereupon orders it shot may, on the verdict of a lay jury that he was mistaken, find himself subjected to heavy damages, without support or sympathy

¹²³Or, "presumption often violent but always necessary," *Norwood v. Goldsmith*, *supra* note 88.

¹²⁴From here the sentence reads: "at least from the law of arrest."

¹²⁵*Sumner v. Beeler*, *supra* notes 86 and 87, *semble*. TORTS RESTATEMENT (Am. L. Inst. 1927) TENTATIVE DRAFT No. 3, 102 reads: "*Special Note*: The early American cases held with substantial unanimity that a person serving a warrant of a court takes the risk that the court had actual jurisdiction to issue it and was liable if the court had not jurisdiction, irrespective of the reason for its lack thereof." For a criticism of this rule in 1910, see (1910) 13 HARV. L. REV. 407, commencing: "The liability of an officer who executes a law which it later held void is one of the unsatisfactory phases of the American doctrine of unconstitutional legislation." The TORTS RESTATEMENT, *supra*, at 99, refuses to follow this rule: "...it is immaterial whether the invalidity of the statute or ordinance is due... (c) to the fact that the statute or ordinance is unconstitutional as offending any clause... other than a clause which restricts the jurisdiction which the State can confer upon the courts, bodies or officials created and appointed by it."

from the Government, with the result that his successors or colleagues will probably decline thereafter to assume such risks and will permit the community at large to bear the risk and the danger. . . . This defective social engineering can only be rightly improved by placing the risk of honest official mistakes upon the community, where it properly belongs."²¹⁶

But the risk of just such evil results is appreciable as well, where officers are penalized for failing to guess properly the constitutionality of the operative statute. Diagnosticians of the validity of statutes are not more numerous among sheriffs, than prognosticators of equine diseases among health officers.

Likewise then, in the case of the unconstitutional statute, the suggestion is made that the burden of loss should not be placed upon the sheriff (retrospectivity), nor be thrown back upon the citizen arrested (prospectivity), but should be rested upon the state, the community, as a kind of insurance against the legitimate human errors which servants in its three branches are prone to make. Should such liability tend to improve the quality of the public service, having made the social pocket nerve to twitch, so much the better. Adapting Professor Borchard's thesis to the present case, "whether. . . this conclusion [be reached] upon a theory of *respondeat superior* or upon a theory of community assumption and distribution of risk for accidents and negligence in the public service, . . . a community that has been able to appreciate the sound public policy and efficiency of workmen's compensation legislation,"²¹⁷ should cease lending a deaf ear. It has been said that "[I]ability for conduct follows, usually belatedly, popular conceptions of justice."²¹⁸ Then it is not too soon to speak here, where liability is belated, where popular conceptions as well seem to lag.

The solution of community responsibility seems fairer than that of immunity for the officer, since the correlative of his immunity is a disability in the citizen arrested. It may be urged that half a loaf is better than none, that prospectivity is a sound principle, hence the officer should be protected. But this is not a question whether half a loaf is better than none, rather, whether one half loaf is to be preferred to the other half of the same loaf.

²¹⁶Borchard, *Government Liability in Tort* (1924) 34 YALE L. J. 1, 129, 229, at 8.

²¹⁷*Ibid.* 258. And see Smith, *Frolic and Detour* (1923) 23 COL. L. REV. 444, 716.

²¹⁸Seavey, *Negligence—Subjective or Objective?* (1927) 41 HARV. L. REV. 1, 28.

Realization of state responsibility^{118a} is so remote as to be fanciful, it may be objected. If so, and remaining the while in the realm of fancy, consider: as an alternative to the solution by way of immunity to the officer, as a substitute for direct community responsibility, would an enterprising agglomeration like Lloyd's sponsor the insurance of officers against the risks of unconstitutionality? "Insurances against outbreak of war, against changes in State Administrators when elections are pending, against changes in an elected assembly which may prejudice or advantage the interests of the assured, all come within the scope of Lloyd's."¹¹⁹

No great objections of policy are perceived to insurance in the narrow field here suggested. If, however, the insurance were extended to cases of industrial or social legislation generally, there is doubt. It could be objected that the possibly large sum which the insurer would stand to lose by a court decision of unconstitutionality might influence him to use undesirable pressure toward suppressing litigation. The objection of a learned acquaintance is that "the situation of the sheriff does not seem to be very serious or likely to arise sufficiently often as to warrant the proposal of any new form of insurance"; that the case "can be better dealt with by reliance on the legislative branch for appropriation to cover damages which he has had to pay for his official acts." In any event, to conclude the partial excursus, the statutory "mortality" tables would provide interesting legal reading. The table for Acts of Congress held unconstitutional by the Supreme Court of the United States would be astonishingly short: from 1789 to 1924, according to Mr. Charles Warren's compilation, "there have actually been held unconstitutional only forty-nine Acts of Congress and one Joint Resolution."¹²⁰

d. *Comparison and Contrast*

Contrasting a law alleged to be unconstitutional to a marriage under a civil disability, we have seen that a court does not adjudge in rem against the law, although it does so against the marriage. No conduct of a party subject to the law can directly affect its validity. He

^{118a}See (1931) 44 HARV. L. REV. 432.

¹¹⁹WRIGHT AND FAYLE, A HISTORY OF LLOYD'S (1928) 442. Since the writing of the present paper, the following sentence by Dean Smith, *supra* note 117, at 459, 460, has been rediscovered: "Furthermore, through the agency of insurance it would be possible to effectuate a spreading of practically all forms of losses, and it is the opinion of the writer that within the next hundred years the possibilities of the principle of insurance will lead to very marked changes in the prevailing attitude towards the whole subject of legal responsibility."

¹²⁰WARREN, *op. cit. supra* note 5, at 34; and see also Chapter 9.

may sit still and say nothing, but that is not curative non-action. With marriage, conduct directly affects the situation.

There is similarity between the two, in that their validity can be questioned in a collateral proceeding, as distinguished from one in rem. But even this fails, for the collateral procedure is exclusive in the law's case.

What shall be said of the position of the questionable law and of the marriage doubted for civil disability, before any type of decision of invalidity has been given? Even where a law is patently in conflict with a constitutional prohibition, if no one raises the question in a "case", can the law be treated by interested persons as a nullity? If most persons approved it and acted in accordance with it, but a few disapproved, the advocates conceivably might acquiesce in the ignoring of it by the few in order to prevent their securing an adverse decision. "The good sought in unconstitutional legislation", says Chief Justice Taft, "is an insidious feature, because it leads citizens and legislators of good purpose to promote it, without thought of the serious breach it will make in the ark of our covenant. . ."¹²¹ But constitutionality is often a close question dependent upon innumerable factors, is often much more than the simple "determination of the existence of harmony or conflict between two legal texts. . ."¹²² So, in the case of the patently questionable law and of the law whose invalidity is doubtful, persons will continue to act until a decision of invalidity. That is, a law *declared* unconstitutional has meaning for use, whereas a law-not-yet-declared-invalid is not an indispensable concept. This opinion does not conflict with the statement that "every man is his own constructionist".¹²³ It does counteract a possible implication from the statement, that the law as it issues is impregnated with invalidity. The meaning, however, is this: one is his own constructionist at his peril of guessing rightly, lest by later court decision he suffer for his distorted prevision. "Proof of negligence in the air, so to speak, will not do", says Sir Frederick Pollock.¹²⁴ No more will proof of invalidity in the mind of the citizen do. The only proof that avails must be directed to the minds of the judges. Its effect, as manifested in a judicial decision, is the significant thing.

A marriage under civil disability is said to be void. And in the case of marriage with a person completely insane, void ipso facto without court decree to that effect. A law not yet declared invalid

¹²¹Child Labor Tax Case, *supra* note 15a, at 37, 42 Sup Ct., at 450.

¹²²Biklé, *supra* note 76, at 6.

¹²³Norwood v. Goldsmith, *supra* note 71, at 234, 53 So., at 87.

¹²⁴POLLOCK, THE LAW OF TORTS, (13th ed. 1929) 468.

may be an unnecessary concept, but not so a marriage of this type before a decision. The unhappy position of offspring at once comes to mind. Even so, the necessity argument in favor of equity jurisdiction to decree nullity emphasized the importance of a decree or of a persuasive collateral finding against the marriage. Hence the effect of a sentence of nullity, how it operates, is equally as important as the situation of the parties before sentence.

Comparing a questioned law to a marriage, defective for impotency or consanguinity, we found this point in common, both are valid until a court decides otherwise. But this breaks down, for the decision cannot be effective against the law as such, against these marriages the decision must be of this type. In other respects, the impossibility of collateral attack upon the marriage and the ability of the parties thereto directly to affect their situation by conduct, the case of the law presents a contrast.

IV. SUMMATONAL

Examination into the bases of judicial power to try the validity of laws and of marriages has elicited this common factor: each is rooted in necessity.

Concerning the modes of exercising the power in the two cases, a contrast was presented: whereas, direct action may always be secured against a marriage of the type considered, against the law only "collateral" attack is permissible.

The quality of a decision of invalidity is dependent upon the nature of the available remedy. We found there contrast and similarity: in the case of the law, a complainant had to be satisfied with a decision "in personam"; against some defective marriages he had a choice of "in personam" or "in rem" relief; against others, he was confined to an assault "in rem".

Likewise, with respect to the substantive effects of invalidity, we had both similarity and contrast. Against marriages the decree of nullity operates retrospectively. So, some courts hold, does the decision of unconstitutionality affect the law. Statutes providing for prospective decrees of nullity have their counterparts in decisions holding laws invalid from the time of the decision.

Finally, it was submitted, that the position of importance properly accredited to the void marriage, not yet so pronounced, is undeserved in the case of the law, not yet declared invalid.

To the query with which this effort is titled, we may answer in the words of an eminent juriconsult and mentor: "A little, but not too much."