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The writer favors the opposite position, namely, that no abrogation should be granted, in cases where the basis for the petition is pecuniary interests, such as title to property, heirship, and the like. Either on the grounds of estoppel, or simply in principles of equity, adoptive parents should not be permitted to alter the status of the child as it best suits their financial interests for the moment.

*Joseph T. Helling.*

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### *Domestic Relations*

#### CIVIL CONSEQUENCES OF MARRIAGE WITHIN STATUTORY PROHIBITION: EFFECT OF A REMOVAL OF THE IMPEDIMENT

In the United States statutory provisions concerning marriage are multiple and diversified. The legislatures of each state, empowered by constitutional authority to protect and safeguard public morals, have enacted what may be termed protective standards in regard to classes of people who may legally enter into a marital relationship. This power to forbid certain types of marriages is indisputable.<sup>1</sup> Generally, a formally celebrated marriage is valid for all purposes. To this postulate, however, there are two well recognized exceptions: (1) marriages deemed contrary to the Christian Law of Nature, and (2) marriages which the law making body of the forum regards as inimical to the welfare of its citizens.

Ascertaining the civil effects of a prohibited marriage involves essentially a determination of whether the specific marriage is void or merely voidable. A void marriage usually permits of no rights to either party, whereas a marriage deemed voidable possesses legal significance in every aspect until directly attacked.<sup>2</sup> Difficult is the task confronting a court in the interpretation of many of these statutes which are all but clear in their meaning. A statute may employ the word "void" in its provisions, but where legislative intent clearly indicates that the word should be interpreted as meaning "voidable," there is little hesitancy to so declare.<sup>3</sup> The trend is away from the stigmatic word "void," especial-

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<sup>1</sup> *Haddock v. Haddock*, 201 U.S. 562, 572 (1906); *Gould v. Gould*, 78 Conn. 242, 61 Atl. 604 (1905); *Cunningham v. Cunningham*, 206 N.Y. 341, 99 N.E. 845 (1912).

<sup>2</sup> *Sutton v. Leib*, 199 F.2d 163, 164 (7th Cir. 1952); *Hitchens v. Hitchens*, 47 F. Supp. 73, 76 (D.D.C. 1942); *Ex parte Bowen*, 247 S.W.2d 379 (Ky. 1952); *Simpson v. Neely*, 221 S.W.2d 303 (Tex. Civ. App. 1949); *In re Romano's Estate*, 40 Wash. 796, 246 P.2d 501 (1952).

<sup>3</sup> *Harrison v. State*, 22 Md. 468 (1864); *Hall v. Baylous*, 109 W.Va. 1, 153 S.E. 293, 296 (1930), stating: "Admitting that the decisions are in confusion and that the word 'void' used in the statutes may be interpreted as 'voidable,' all decisions are

ly where the impediment is such that it may not have been easily ascertained by both parties prior to their contract.<sup>4</sup> The legal difference between a marriage contract and other contracts adds impetus to this disapprobation of the word "void."<sup>5</sup>

A marriage is considered voidable when under any circumstances it is possible for the respective parties to contract the marriage, or subsequently to ratify it by other acts manifesting an intent to continue their relationship.<sup>6</sup> It is void if a statute expressly declares it so, or if subsequent ratification is impossible.<sup>7</sup> A marriage held to be void *ab initio* is valid for no legal purpose, and its invalidity may be maintained in any court proceeding, at any time, whether the question arises directly or collaterally.<sup>8</sup> Most jurisdictions require no decree of its nullity.<sup>9</sup> A voidable marriage and its imperfections may be inquired into only during the lives of the contractants and only in a suit instituted specifically for that purpose.<sup>10</sup> The death of one of the parties serves to bar controversy and accords to the survivor all resultant rights.<sup>11</sup>

The purpose of this writer in Part I is to enumerate generally what civil rights are acquired by the parties to a relationship prohibited by statute. Part II will concern the effect of the removal of the disability upon the marriage and the rights of the parties concerned.

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in accord that, where the intent of the lawmakers can be ascertained by use of well-known rules of constructions, the word should always receive its natural force and effect."

<sup>4</sup> See 1 SCHOULER, MARRIAGE, DIVORCE, SEPARATION AND DOMESTIC RELATIONS § 14 (6th ed. 1921). "Statutes both in England and America have greatly modified the ancient law of valid marriages, and it can only be affirmed in general terms that the legislative tendency is to make marriages voidable rather than void, wherever the impediment is such as might not have been readily known to both parties before marriage, and where public policy does not rise superior to all considerations of private utility. Modern civilization strongly condemns the harsh doctrine of *ab initio* sentences of nullity. . . ."

<sup>5</sup> *State v. Yoder*, 113 Minn. 503, 130 N.W. 10, 11 (1911), states: "The marriage contract is sui generis, and essentially differs from the ordinary affairs of life, and the rules and principles of law controlling contract rights . . . should not be held in all respects applicable to the marriage contract."

<sup>6</sup> *Jones v. Jones*, 119 Fla. 824, 161 So. 836 (1935); *Fensterwald v. Burk*, 129 Md. 131, 98 Atl. 358 (1916), *dismissed*, 248 U.S. 592 (1918); *Fearnow v. Jones*, 34 Okla. 694, 126 Pac. 1015, 1018 (1912).

<sup>7</sup> *State v. Yoder*, 113 Minn. 503, 130 N.W. 10 (1911); *Fearnow v. Jones*, 34 Okla. 694, 126 Pac. 1015 (1912); *Toler v. Oakland Smokeless Coal Corp.*, 173 Va. 425, 4 S.E.2d 364 (1939).

<sup>8</sup> *Sutton v. Leib*, 199 F.2d 163 (7th Cir. 1952); *Simpson v. Neely*, 221 S.W.2d 303, 308 (Tex. Civ. App. 1949); *In re Romano's Estate*, 40 Wash.2d 796, 246 P.2d 501, 506 (1952).

<sup>9</sup> *Sutton v. Leib*, 199 F.2d 163 (7th Cir. 1952); *United States v. Lutwak*, 195 F.2d 748, 754 (7th Cir. 1952) (See cases cited therein).

<sup>10</sup> See cases cited in *Hitchens v. Hitchens*, 47 F. Supp. 73, 77 (D.D.C. 1942); *In re Romano's Estate*, 40 Wash.2d 796, 246 P.2d 501 (1952).

<sup>11</sup> 1 BISHOP, MARRIAGE, DIVORCE AND SEPARATION § 258 (1891).

## I

## A. Effects of a bigamous marriage.

All jurisdictions in the United States, by statute or judicial decision, uniformly condemn bigamous marriages and provide for civil and criminal sanctions. Statutes in most states derive their provisions basically from common law principles; enacting that marriage by one spouse during the life of the other is null and void *ab initio*, thus barring any marital rights gained from legal union and bastardizing all issue. Legislatures of many states, however, realizing the need for the protection of innocent parties and unoffending children have stipulated certain exceptions to this harsh rule. In other instances, courts applying the familiar maxims of equity have rendered decisions giving at least some satisfaction to the innocent party, oftentimes a difficult task in light of many of the modern statutes. Many statutes specifically provide that issue of marriages null and void in law are to be considered legitimate in spite of the fact that the relationship is meretricious. Included in many of these statutes are issues of bigamists.<sup>12</sup>

The invalidity of a bigamous marriage may be maintained in any type proceeding, whether the question arises directly or collaterally,<sup>13</sup> and at any time.<sup>14</sup> Consequently, it has "no standing in court," and may be disregarded as ever having been a marriage.<sup>15</sup> Consent of the parties will in no way cure a marriage when it is void *ab initio*,<sup>16</sup> nor will the subsequent divorce of the illegally married spouse from his or her first mate.<sup>17</sup> A few jurisdictions provide for annulment or make bigamy a ground for divorce, but this by no means serves to validate the union prior to judicial dissolution.<sup>18</sup> A decree of nullity by the court does no more than judicially declare void what was already void in fact.<sup>19</sup> One of the purposes of statutory provision for annulment is to enable affected parties to secure a binding judicial record so that the invalidity of the marriage cannot later be disputed.<sup>20</sup> However, it has been held in Pennsylvania that a marriage void *ab initio* must be annulled as a matter of record before either party is again free to marry.<sup>21</sup>

<sup>12</sup> For an example of a case construing such a statute see *Shamblin v. State Compensation Comm'r*, 122 W.Va. 652, 12 S.E.2d 527 (1940).

<sup>13</sup> *Jardine v. Jardine*, 291 Ill. App. 152, 9 N.E.2d 645 (1937).

<sup>14</sup> *Ex parte Bowen*, 247 S.W.2d 379 (Ky. 1952).

<sup>15</sup> *United States v. Lutwak*, 195 F.2d 748 (7th Cir. 1952).

<sup>16</sup> *Poole v. Schrichte*, 39 Wash.2d 558, 236 P.2d 1044 (1951).

<sup>17</sup> *Pewitt v. Pewitt*, 192 Tenn. 227, 240 S.W.2d 521 (1951).

<sup>18</sup> *Pettit v. Pettit*, 105 App. Div. 312, 93 N.Y. Supp. 1001 (3d Dep't 1905); *Klaas v. Klaas*, 14 Pa. Super. 550 (1900); *Cook v. Cook*, 116 Vt. 374, 76 A.2d 593, 597 (1950) (stating that the purpose of the annulment statute is to preserve "the good order of society and for the peace of mind of all persons concerned. . .")

<sup>19</sup> *Stierlen v. Stierlen*, 6 Cal. App. 420, 92 Pac. 329 (1907); *Cook v. Cook*, 116 Vt. 374, 76 A.2d 593, 597 (1950).

<sup>20</sup> *Cook v. Cook*, 116 Vt. 374, 76 A.2d 593 (1950).

<sup>21</sup> *Kooistra v. Kooistra*, 28 Del. Co. 19 (1938).

At common law, and unless interdicted by statute, a marriage contracted in good faith after seven years absence of a spouse is usually held to be voidable, and its invalidity would necessarily have to be attacked in a suit instituted for that purpose.<sup>22</sup> Presumptions based on absence vary from two to seven years, with some statutes demanding additional proof of the death of the missing spouse.<sup>23</sup> In New York, absence of one spouse for more than seven years affords no presumption of death, but a subsequent solemnly celebrated marriage by the remaining spouse is valid even though the first spouse may yet be living.<sup>24</sup> In California, evidence supporting the existence of the first mate does not controvert the presumptive validity of the second marriage but is merely evidence that divorce or an annulment has not been obtained.<sup>25</sup> Perhaps the majority of jurisdictions are in accord. The holding of the Mississippi court seems unduly strict. In *Frank v. Frank*,<sup>26</sup> the court held that absence for the statutory period and reappearance by the absconding spouse renders the second marriage void *ab initio*. The better rule, followed in many states, is to make the second marriage merely voidable,<sup>27</sup> the courts recognizing that the person at fault in such situations is usually the absent spouse.

Although good faith will not affect the voidness of a bigamous marriage, the guilty party is usually precluded, by decision, from seeking the aid of a court of equity.<sup>28</sup> A woman living illicitly with a married man and performing the duties of a married woman but who has knowledge of the impediment acquires no rights from the relationship.<sup>29</sup> Contrary to the rule that a husband or wife cannot sue for a tort committed by the other during coverture one case held that the supposed wife may be sued in malicious prosecution.<sup>30</sup> The legal wife also may be pre-

<sup>22</sup> *Grand Lodge K. of P. v. Barnard*, 9 Ga. App. 71, 70 S.E. 678, 680 (1911)

<sup>23</sup> For a compilation of the statutory absence periods of each state see 1 VERNIER, *AMERICAN FAMILY LAWS* § 46 (2d ed. 1931). A case involving a typical statute is *Woodmen of the World v. Irick*, 58 F. Supp. 202 (E.D. S.C. 1944).

<sup>24</sup> *Hatfield v. United States*, 127 F.2d 575 (2d Cir. 1942).

<sup>25</sup> *Goff v. Goff*, 52 Cal. App.2d 23, 125 P.2d 848 (1942).

<sup>26</sup> 193 Miss. 605, 10 So.2d 839 (1942) (a dissent urged a contrary decision because of bastardization of the issue of the second marriage).

<sup>27</sup> *E.g.*, CAL. CIV. CODE § 61 (1949).

<sup>28</sup> *Rooney v. Rooney*, 54 N.J. Eq. 231, 34 Atl. 682 (Ch. 1896); *Berry v. Berry*, 130 App. Div. 53, 114 N.Y. Supp. 497 (1st Dep't 1909).

<sup>29</sup> *Beidler v. Beidler*, 161 Fla. 250, 43 So.2d 329 (1949) (where the failure of the wife to disclose her prior existing marriage gave rise to an action in fraud for monies expended in her support and for the purchase of other property by her); *Duenser v. Supreme Council*, 262 Ill. 475, 104 N.E. 801 (1914) (barring the right of support); *Di Donato v. Di Donato*, 156 Pa. Super. 382, 40 A.2d 892 (1945) (barring support even though husband was not innocent); *Smith v. Smith*, 255 Wis. 96, 38 N.W.2d 12 (1949) (refusal of an equitable distribution of property).

<sup>30</sup> *Watson v. Watson*, 39 Cal.2d 305, 240 P.2d 1005 (1952). *But cf.* *Callow v. Thomas*, 322 Mass. 550, 78 N.E.2d 637 (1948).

cluded from any claim against her first husband where equitable principles forbid.<sup>31</sup>

Property, both real and personal, acquired by participants to a void marriage during their relationship will usually be apportioned ratably if the "clean hands" theory is not strained.<sup>32</sup> In most states, the party seeking relief is left to his remedies as an unmarried individual,<sup>33</sup> namely: joint effort by agreement,<sup>34</sup> enforcement of the community property plan, utilized mostly in the western states,<sup>35</sup> or mere unjust enrichment.<sup>36</sup> Where community property rights are recognized it is immaterial how the property was acquired.<sup>37</sup> It is essential, however, that the moving party must have married in good faith.<sup>38</sup>

A conveyance of real estate to the cohabitators as man and wife does not create a tenancy by the entirety. The parties become tenants in common, giving the heirs of the respective parties their consequent rights.<sup>39</sup> However, it has been held that if one of the parties, on the decease of the other, conveys to bona fide purchasers, the heirs of the dead spouse may not be heard to complain, their equities being superceded by the innocence of the grantees.<sup>40</sup> The courts are in conflict as to whether property given or conveyed between the spouses as husband and wife should be given effect. Generally, good faith decides the fate of the wife.<sup>41</sup> If the grantor is the innocent party, it would seem the more equitable rule to set aside such conveyance and at least restore the status quo.<sup>42</sup>

Parties to a marriage which is formally celebrated but to which an impediment exists are participants to a common law putative marriage

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<sup>31</sup> *In re Fingerlin's Estate*, 167 Misc. 770, 4 N.Y.S.2d 668 (Surr. Ct. 1938).

<sup>32</sup> *Garza v. Fernandez*, 74 Ariz. 312, 248 P.2d 869 (1952), the fact of the existence of a meretricious relationship does not bar claims to property acquired during the period thereof, where such claim is based upon general principles of law without regard to the existence of a marital status. See also *Smith v. Smith*, 255 Wis. 96, 38 N.W.2d 12 (1949), where a court of equity would not aid the bigamists in dividing their property.

<sup>33</sup> *Baker v. Baker*, 222 Minn. 169, 23 N.W.2d 582 (1946).

<sup>34</sup> *Bracken v. Bracken*, 52 S.D. 252, 217 N.W. 192, 194 (1927). The same rule would apply in case of an implied agreement, *Chrismond v. Chrismond*, 211 Miss. 746, 52 So.2d 624 (1951). Partnership distribution was involved in *Poole v. Schrichte*, 39 Wash.2d 558, 236 P.2d 1044 (1951).

<sup>35</sup> *Santos v. Santos*, 32 Cal. App.2d 62, 89 P.2d 164 (1939).

<sup>36</sup> See cases cited in *Anderson v. Anderson*, 7 Cal.2d 265, 60 P.2d 290, 291 (1936).

<sup>37</sup> *Santos v. Santos*, *supra* note 35.

<sup>38</sup> *Vallera v. Vallera*, 21 Cal.2d 681, 134 P.2d 761 (1943).

<sup>39</sup> *Kerivan v. Fogal*, 156 Fla. 92, 22 So.2d 584 (1945); *Debnam v. Debnam*, 63 Pa. D. & C. 700 (1948) (a petition for partition was dismissed, the parties erroneously believing their acquisition to be by the entireties).

<sup>40</sup> *Kerivan v. Fogal*, 156 Fla. 92, 22 So.2d 584 (1945).

<sup>41</sup> *Taylor v. Taylor*, 66 Cal. App.2d 390, 152 P.2d 480 (1944); *In re Seifert's Estate*, 145 Misc. 503, 260 N.Y. Supp. 397 (Surr. Ct. 1932).

<sup>42</sup> *Kantor v. Kantor*, 133 N.J. Eq. 491, 33 A.2d 110 (Ch. 1943).

if such disability is unknown to either or to both of them. Such innocence in marriage is protected by statute and decision in a decided majority of jurisdictions. The majority rule, however, requires a formal ceremony in addition to absolute good faith.<sup>43</sup> Third party information is insufficient to break the element of bona fides,<sup>44</sup> nor does the ill repute of the moving party.<sup>45</sup> A putative relationship ceases upon the acquisition of knowledge of the impediment, and the rights obtained include only those existing prior to such actual knowledge.<sup>46</sup> The good faith of at least one of the parties also serves to legitimate all issue of the union.<sup>47</sup> The putative relationship is termed confidential, consequently the rights accruing are those put into the marriage by the respective parties.<sup>48</sup> The agreement of the parties as to how the property acquired by them was to be held guides the extent of the relief.<sup>49</sup> Errors of law or fact do not preclude recovery by the innocent spouse.<sup>50</sup>

Many jurisdictions, including New York, apply the principles of estoppel to aid in the protection of the innocent, holding in effect that obligations assumed by the guilty spouse may not be repudiated.<sup>51</sup> One court held that the second marriage must continue in effect, if the first husband has been sentenced to death, until termination by the innocent party.<sup>52</sup> The Ohio Supreme Court has been most liberal in holding that even though the wife knew of the impediment and continued living meretriciously, she possessed an insurable interest.<sup>53</sup>

#### B. Effect of Marriage by Parties Under Statutory Age.

The necessary age in which a marriage contract may legally be entered into has undergone a decided change since early common and canon law. The required age, however, differs radically among the states and differs decidedly from the legal age demanded in other types of

<sup>43</sup> *Papoutsis v. Treviano*, 167 S.W.2d 777 (Tex. Civ. App. 1942). *But cf. In re Jackson's Estate*, 112 Cal. App.2d 16, 245 P.2d 684 (1952); *Succession of Marinoni*, 183 La. 776, 164 So. 797 (1935) (good faith alone was held to be sufficient).

<sup>44</sup> *Howard v. Ingle*, 180 So. 248 (La. App. 1938).

<sup>45</sup> *Ibid.*

<sup>46</sup> *Barkley v. Dumke*, 99 Tex. 150, 87 S.W. 1147, 1148 (1905).

<sup>47</sup> *Scott v. Brown Paper Mill Co.*, 174 So. 212 (La. App. 1937).

<sup>48</sup> *Anderson v. Anderson*, 7 Cal.2d 265, 60 P.2d 290 (1936) (equal division of property); *Walker v. Walker*, 330 Mich. 332, 47 N.W.2d 633 (1951) (contribution for unjust enrichment).

<sup>49</sup> *Eaton v. Eaton*, 125 S.W.2d 624 (Tex. Civ. App. 1939).

<sup>50</sup> *Succession of Lynch v. United States*, 17 F. Supp. 674 (W.D. La. 1936), woman who in good faith remarried, believing conviction and sentencing of her husband to a penitentiary gave her an automatic divorce was a putative wife despite a mistake of law. *Cf. In re Lindewall's Will*, 287 N.Y. 347, 39 N.E.2d 907 (1942).

<sup>51</sup> *Krause v. Krause*, 282 N.Y. 355, 26 N.E.2d 290 (1940).

<sup>52</sup> *Jones v. Jones*, 249 App. Div. 470, 292 N.Y. Supp. 705 (3d Dep't 1937), *aff'd*, 274 N.Y. 574, 10 N.E.2d 558 (1937).

<sup>53</sup> *Rakeshaw v. Cincinnati*, 69 Ohio App. 504, 44 N.E.2d 278 (1942).

contract.<sup>54</sup> This difference has caused more than little discussion, many authors feeling the marriage age minimum is yet too low.<sup>55</sup>

The common law age limits of twelve for the female and fourteen for the male have generally been raised by statute to the age of sixteen for the female and eighteen for the male.<sup>56</sup> At common law, the marriage of a person under the legal age was not void *ab initio*, but possessed the status of mere voidability.<sup>57</sup> American statutes in great uniformity follow this rule although the word "void" is frequently used in the statute.<sup>58</sup> The result follows that legality is given to the relationship and its validity will be questioned only in a suit instituted for that purpose.<sup>59</sup> As a voidable marriage, the consequent duties and obligations must be fulfilled.<sup>60</sup> A minority of the statutes specifically provide that marriage by persons under the legal age is absolutely void and requires no decree for its nullity. However, a moving party is given the right to an adjudication as to the date of birth of the spouse in question and a determination of voidness if the age is lacking.<sup>61</sup>

Annulment of a marriage by parties under the statutory age is not a matter of right; the discretion of a court of equity must be invoked.<sup>62</sup> Non-age alone is insufficient as an inducement for a court to decree a solemnly celebrated marriage void.<sup>63</sup> There must be circumstances tending to show complete error by the parties. A decree of annulment, in most states, renders the marriage void *ab initio*,<sup>64</sup> and ceases all existing rights.

Issue born of participants to such a marriage previous to a decree of annulment are deemed to have been born in wedlock and are therefore

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<sup>54</sup> 1 VERNIER, AMERICAN FAMILY LAWS § 29 (1931).

<sup>55</sup> PECK, THE LAW OF PERSONS OR DOMESTIC RELATIONS 6 (1913): "While other contracts may be made by persons of twenty-one years of age or over, the marriage contract — the most important of all, and the one in which imposition is at least as likely to be practiced, and youth and inexperience as likely to lead one to act unwisely as in any other — may be entered into by boys and girls of much younger age."

<sup>56</sup> For a table giving the statutory age limits in each jurisdiction see 1 VERNIER, AMERICAN FAMILY LAWS § 29 (1931).

<sup>57</sup> See cases cited in *Jordan v. Manning*, 2 Tenn. C.C.A. 130 (1911).

<sup>58</sup> For an example of such judicial interpretation see *Keith v. Pack*, 182 Tenn. 420, 187 S.W.2d 618 (1945).

<sup>59</sup> *Kibler v. Kibler*, 180 Ark. 1152, 24 S.W.2d 867 (1930); *Cruickshank v. Cruickshank*, 193 Misc. 366, 82 N.Y.S.2d 522 (Sup. Ct. 1948).

<sup>60</sup> *Kibler v. Kibler*, 180 Ark. 1152, 24 S.W.2d 867 (1930).

<sup>61</sup> For an example of such a statute and decision see *Evans v. Ross*, 309 Mich. 149, 14 N.W.2d 815 (1944).

<sup>62</sup> *Mitchell v. Mitchell*, 219 Ark. 69, 239 S.W.2d 748 (1951) (the word "may" used in the statute does not mean "shall"); *Selakoff v. Selakoff*, 196 Misc. 544, 92 N.Y.S.2d 144 (Sup. Ct. 1949).

<sup>63</sup> *Gerardi v. Gerardi*, 69 F. Supp. 296 (D.D.C. 1946).

<sup>64</sup> *Anonymous v. Anonymous*, 85 A.2d 706 (Del. 1951), *aff'd sub nom.*, *Du Pont v. Du Pont*, 90 A.2d 468, *cert. denied*, 344 U.S. 836 (1952).



legitimate.<sup>65</sup> It has even been held that it is immaterial whether the child was conceived prior to or subsequent to the marriage ceremony.<sup>66</sup> This holding was pursuant to a statute in force in most states creating a strong, though rebuttable, presumption of legitimacy, and mere evidence of non-paternity and subsequent annulment was insufficient to rebut the presumption. New York statutes are construed as stating that the ceremony itself is the only factor which will legitimate issue of the relationship.<sup>67</sup> However, it was expressed that the realization of the identity of the parents ought to be sufficient to protect the unoffending child. The children, after annulment, are entitled to support notwithstanding the fact that the mother has lost all her marital rights.<sup>68</sup> The party chargeable with support must provide more than mere necessities; the contribution must be for guidance, care, nursing and education commensurate with financial ability.<sup>69</sup> Even where the mother remarries, a child of the first marriage will be considered a dependent of the father if acts of the father indicate such to be his desire.<sup>70</sup>

A woman called upon to defend in an annulment proceeding is usually entitled to recover attorney's fees and other expenses on appeal, and the rule applies even though there is cohabitation subsequent to the attainment of a majority.<sup>71</sup> New Mexico has one of the more liberal provisions, stipulating that alimony must be paid in spite of the annulment until the under-age female married to a male over the prohibited age has arrived at her majority or has remarried.<sup>72</sup>

### C. Effect of Remarriage Within a Prohibited Statutory Period.

Subsequent to an absolute divorce, either party is free to remarry; the effect of the decree is the restoration of the contractants to the status

<sup>65</sup> *Sirois v. Sirois*, 94 N.H. 215, 50 A.2d 88, 89 (1946); *Stone v. Stone*, 193 Okla. 458, 145 P.2d 212 (1944).

<sup>66</sup> *Stone v. Stone*, 193 Okla. 458, 145 P.2d 212 (1944).

<sup>67</sup> *Bentley v. Bentley*, 191 Misc. 972, 76 N.Y.S.2d 877, 879-80 (N.Y. Dom. Rel. Ct. 1948), held: "A child, when born in wedlock or out of wedlock, is a child and should be so regarded within the meaning of the law. This Court has been created largely for the protection of children. I never could understand why a child born out of wedlock should be called illegitimate. If there is any illegitimacy connected with the birth of the child, it lies upon the shoulders of the parents and should rest there. The child is only the victim if it suffers by reason of the fact that the parents had not gone through a marriage ceremony."

<sup>68</sup> *Kibler v. Kibler*, 180 Ark. 1152, 24 S.W.2d 867, 869 (1930) (holding that the obligations continue and the father's duty to the child may be enforced by appropriate order of the court). *Accord*, *Hood v. Hood*, 206 Ark. 1057, 178 S.W.2d 670, 673 (1944); *May v. Meade*, 236 Mich. 109, 210 N.W. 305 (1926).

<sup>69</sup> *Bentley v. Bentley*, 191 Misc. 972, 76 N.Y.S.2d 877, 880 (N.Y. Dom. Rel. Ct. 1948).

<sup>70</sup> *May v. Meade*, 236 Mich. 109, 210 N.W. 305 (1926).

<sup>71</sup> *Stone v. Stone*, 193 Okla. 458, 145 P.2d 212 (1944); *Portwood v. Portwood*, 109 S.W.2d 515 (Tex. Civ. App. 1937).

<sup>72</sup> N.M. STAT. ANN. § 65-109 (1941).

of single persons. This rule is applicable only in the absence of a statutory prohibition, and thirty-six American jurisdictions have by express legislation limited this right of remarriage.<sup>73</sup> The purpose of such legislation is to prevent "temptations" which frequently arise to secure a decree of divorce for "collusive" benefits.<sup>74</sup> Generally, statutes enacted regarding such marriages are of three types: (1) those declaring marriage within the prohibited time to be void;<sup>75</sup> (2) those declaring void a marriage pending time for appeal;<sup>76</sup> and (3) those which merely prohibit remarriage within an express period of time.<sup>77</sup> The majority provision stipulates that such marriages, without reference to guilt or innocence, are in contravention to public law and therefore absolutely void.<sup>78</sup> A minority holding deems remarriage within the prohibited period to be merely a voidable relationship and valid for all purposes in spite of the prohibition, the reason being that the statute fails to expressly declare the nullity.<sup>79</sup>

The courts are divided as to whether there is an absolute right to decretal dissolution when the parties possessed actual knowledge of the impediment. Generally a court of equity will not annul a marriage where the contractants disregard any statute and then seek equitable relief.<sup>80</sup> Other cases have held that in light of the voidness of a prohibited second marriage, an annulment will be decreed without reference to guilt or innocence.<sup>81</sup> Where the parties are in *pari delicto*, they will be left in the position in which the court found them even though fraud is shown.<sup>82</sup>

The respective parties to a marriage within the prohibited time after divorce gain no marital rights. The supposed wife acquires no claim

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<sup>73</sup> For a compilation of the law in the states see 2 VERNIER, AMERICAN FAMILY LAWS § 92 (1932).

<sup>74</sup> Heflinger v. Heflinger, 136 Va. 289, 118 S.E. 316, 323 (1923).

<sup>75</sup> *In re Elliott's Estate*, 165 Cal. 339, 132 Pac. 439 (1913) (a void marriage and may be questioned by anyone interested); *Pettit v. Pettit*, 105 App. Div. 312, 93 N.Y. Supp. 1001 (3rd Dep't 1905) (such marriage void regardless of where contracted).

<sup>76</sup> *Wallace v. McDaniel*, 59 Ore. 378, 117 Pac. 314 (1911).

<sup>77</sup> Exemplary of such a statute is that applied in *Opdyke v. Opdyke*, 237 Mich. 417, 212 N.W. 95 (1927).

<sup>78</sup> *Hahn v. Hahn*, 104 Wash. 227, 176 Pac. 3 (1918).

<sup>79</sup> 1 BISHOP, MARRIAGE, DIVORCE AND SEPARATION § 435 (1891). For an example of the application of a typical statute see *Gress v. Gress*, 209 S.W.2d 1003 (Tex. Civ. App. 1948).

<sup>80</sup> *White v. Kessler*, 101 N.J. Eq. 369, 139 Atl. 241 (Ch. 1927).

<sup>81</sup> *Blinn v. Blinn*, 122 Pa. Super. 452, 186 Atl. 281 (1936); *Hahn v. Hahn*, 104 Wash. 227, 176 Pac. 3 (1918).

<sup>82</sup> *Szlauzis v. Szlauzis*, 255 Ill. 314, 99 N.E. 640 (1912). In this case the wife, who had no intention of performing the marital duties, acquired all of the husband's property in anticipation of the marriage. She was allowed to keep title, even though her admitted motive was to secure possession of the property and then abandon the husband.

against her husband or his heirs.<sup>83</sup> Nor would the husband be entitled to such rights as to sue on the wife's behalf.<sup>84</sup> It has even been held that the wife may be ejected as a trespasser.<sup>85</sup> It has also been held that in spite of a second marriage by a wife to one unable to marry, she still retains her marital rights accruing from her first husband so that death of the husband will give her those benefits she would normally possess.<sup>86</sup>

The jurisdiction holding that remarriage prior to the expiration of the statutory period is merely voidable demand direct attack during the lifetime of both of the parties; otherwise, rights acquired during the relationship will not be disturbed.<sup>87</sup> Under the estoppel theory, the husband if he is alone guilty will be refused an annulment by the inequity of his actions.<sup>88</sup>

Unless interdicted by a "saving" statute, the issue of marriages prohibited because of non-compliance with the statutory time limit are considered illegitimate and deprived of all civil rights.<sup>89</sup> It is to be remembered, however, that a majority of the jurisdictions in the United States have "good faith" statutes which apply to certain marriages null and void in law, and such confer all legal rights granted to heirs at law.<sup>90</sup>

Remarriage within the statutory period pending appeal is considered void *ab initio* by states having such legislation, and is creative of no rights to either party.<sup>91</sup> This rule applies even though the marriage is contracted in a sister state having no such legislation.<sup>92</sup> However, the same case held that if the appeal is not completely perfected within the allotted time, the living party will be considered the lawful heir. In light of a presumption of legality, the parties who would otherwise be interested will be deemed to have waived their respective rights.

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<sup>83</sup> *Barfield v. Barfield*, 139 Ala. 290, 35 So. 884 (1903); *Baker v. Baker*, 168 Ga. 478, 184 S.E. 151 (1929) (loss of dower); *Dye v. Dye*, 140 App. Div. 309, 125 N.Y. Supp. 242 (1st Dep't 1910) (barring the right to alimony); *Atkeson v. Sovereign Camp*, 90 Okla. 154, 216 Pac. 467 (1923) (denying the benefit of an insurance policy). *But cf.* *Freeman v. Fowler Packing Co.*, 135 Kan. 378, 11 P.2d 276 (1932) (workmen's compensation payments were allowed on the theory that a subsequent common law marriage had been effected); *Vitoff v. Vitoff*, 90 N.Y.S.2d 534 (Sup. Ct. 1948) (right of support was decreed under the common law marriage).

<sup>84</sup> *Tozier v. Haverhill and A St. Ry. Co.*, 187 Mass. 179, 72 N.E. 953 (1904).

<sup>85</sup> *Kennedy v. Orem*, 31 Pa. Co. Ct. 476 (1905).

<sup>86</sup> *Gulf States Steel Co. v. Witherspoon*, 214 Ala. 529, 108 So. 573 (1926); *Hall v. Baylous*, 109 W.Va. 1, 153 S.E. 293 (1930).

<sup>87</sup> *Woodward v. Blake*, 38 N.D. 38, 164 N.W. 156 (1917).

<sup>88</sup> *Gress v. Gress*, 209 S.W.2d 1003 (Tex. Civ. App. 1948).

<sup>89</sup> *Peerless v. Burckhard*, 90 Wash. 221, 155 Pac. 1037 (1916).

<sup>90</sup> Typifying such a statute is that contained in *Thomas v. Murphy*, 107 F.2d 268 (D.C. Cir. 1939), where it was held that even though the marriage was prohibited judicial cognizance would be taken of the status of husband and wife to protect innocent parties.

<sup>91</sup> *McLennan v. McLennan*, 31 Ore. 480, 50 Pac. 802 (1897).

<sup>92</sup> *Wallace v. McDaniel*, 59 Ore. 378, 117 Pac. 314 (1911).

The marriage being void, land conveyed to the parties as man and wife passes to them as a joint tenancy or a tenancy in common; the rights of tenants by the entireties simply do not accrue. An attempted sale by the surviving spouse results only in the sale of the interest of the grantor and the legal heirs of the deceased party have claim to the remaining share.<sup>93</sup>

When the decree of divorce specifically prohibits remarriage during the lifetime of the other spouse, a presumption of death after the expiration of the statutory period of absence does not apply. It has been held that there must be actual proof of the decease of the other spouse.<sup>94</sup>

D. Effect of a Miscegenetic Marriage.

Geographically, the states having legislation prohibiting marriage between members of the Caucasian race and races of "other types" are easily definitive. Basically, the problem is social, with factors creative of racial prejudice playing the dominant part. In the United States, the South and the Far West may be termed appropriately the "strict adherents" to the theory of the necessity of class distinction.

Generally, marriages prohibited are those between whites and Negroes or Mongolians, with the various statutes differing on their definitions regarding Negro blood. The term Mongolian is held to include Chinese, Japanese, Malaysians and Koreans. The great majority of the states having such statutes expressly enact that inter-racial marriages are void *ab initio*<sup>95</sup> and require no decretal order of dissolution.<sup>96</sup> Only one state, West Virginia, provides that these marriages must be judicially decreed a nullity before they may be collaterally attacked.<sup>97</sup> An interesting effect of miscegenetic marriages centers about penal consequences, many states providing for criminal penalties for participants to such a marriage.<sup>98</sup> It has been held that the prohibition of inter-racial marriages does not violate the anti-discrimination amendments of the Constitution, the prohibition applying equally to both whites and Negroes.<sup>99</sup> But the statute must be neither arbitrary nor unreasonable, or it will receive condemnation as a denial of equal protection of the laws.<sup>100</sup>

Miscegenetic marriages being void, there can be no claim to any marital rights; <sup>101</sup> the community property states even deprive the con-

<sup>93</sup> Wright v. Kaynor, 150 Mich. 7, 113 N.W. 779 (1907).

<sup>94</sup> *In re Tabor*, 31 Misc. 579, 65 N.Y. Supp. 571 (Surr. Ct. 1900).

<sup>95</sup> State v. Pass, 59 Ariz. 16, 121 P.2d 882 (1942); *In re Stark's Estate*, 48 Cal. App.2d 209, 119 P.2d 961 (1942); Carter v. Veith, 139 La. 534, 71 So. 792 (1916); *In re Takahashi's Estate*, 113 Mont. 490, 129 P.2d 217 (1942); Eggers v. Olson, 104 Okla. 296, 231 Pac. 483 (1924).

<sup>96</sup> Carter v. Veith, 139 La. 534, 71 So. 792 (1916).

<sup>97</sup> W.VA. CODE ANN. § 4701 (1949).

<sup>98</sup> Jackson v. City and County of Denver, 109 Colo. 196, 124 P.2d 240 (1942).

<sup>99</sup> *Ibid.*

<sup>100</sup> Perez v. Leppold, 32 Cal.2d 711, 198 P.2d 17, 29 (1948).

<sup>101</sup> Stevens v. United States, 146 F.2d 120 (10th Cir. 1947) (a miscegenetic marriage was held not to revoke a prior will); Long v. Brown, 186 Okla. 407, 98 P.2d

tractants of any claim under that system of property ownership.<sup>102</sup> It has been held, that a Negro mistress may be devised the estate of a white testator where the parties live together but do not consider themselves as man and wife. The court held that the parties had not intended to be married; thus the rule was not applicable.<sup>103</sup>

A more prevailing problem concerning miscegenetic marriages arises when the parties leave the state of their domicile and contract marriage in a sister state which has no such statutory prohibition and then return to the original state. The intent of the parties is the dominant factor guiding a court in determining whether the marriage is to be recognized. It is generally conceded that if the intent was a circumvention of the statute, comity will not demand that validity be given to the union.<sup>104</sup> If the parties act with no intent to evade the prohibition, equitable protection will be afforded them. In *Miller v. Lucks*,<sup>105</sup> the contractants, a white man and a Negress, left the State of Mississippi, married, and set up domicile in the State of Illinois. The Mississippi court held that in light of the fact that there was no intent to evade the statute, the husband was entitled to inherit real property of the Negress which was situate in Mississippi in spite of the prohibition.

Issue of a miscegenetic marriage, where prohibited, are, strictly speaking, bastards,<sup>106</sup> unless there is the interdiction of a legitimating statute. States having such legislation preserve the rights of the children as natural born heirs.<sup>107</sup> However, before the legitimating statute becomes operative, there must have been a ceremony and an honest belief in the validity of the marriage.<sup>108</sup> Children born prior to the ceremony are deemed illegitimate, although they may later be acknowledged.<sup>109</sup> The statute is also held inapplicable when the marriage ceremony is celebrated outside the state in an effort to evade the prohibition.<sup>110</sup>

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28 (1939) (the heir of a creek Indian mother was held to own the land in question and could bring ejectment despite a sale by the Negro husband); *Baker v. Carter*, 180 Okla. 71, 180 P.2d 85 (1937) (alimony was denied to the complainant, there never having been a marriage).

<sup>102</sup> *Eggers v. Olson*, 104 Okla. 297, 231 Pac. 483, 486 (1924); *Ryan v. Barthelmy*, 32 So.2d 467, (La. App. 1947) (recording of a homestead declaration by the Negro wife was held to be of no effect, the supposed wife possessing no property rights against the vendee of her husband).

<sup>103</sup> *Dees v. Metts*, 245 Ala. 307, 17 So.2d 137 (1944).

<sup>104</sup> *In re Takahashi's Estate*, 113 Mont. 490, 129 P.2d 217 (1942).

<sup>105</sup> 203 Miss. 824, 36 So.2d 140 (1948).

<sup>106</sup> *In re Stark's Estate*, 48 Cal. App.2d 209, 119 P.2d 961 (1941).

<sup>107</sup> *E.g.*, LA. CIV. CODE ANN. arts. 117-18 (West 1952).

<sup>108</sup> *In re Walker's Estate*, 5 Ariz. 70, 46 Pac. 67 (1896).

<sup>109</sup> *Bates v. Meade*, 174 Ky. 545, 192 S.W. 666 (1917).

<sup>110</sup> *Greenhow v. James' Ex'r*, 80 Va. 636, 647 (1885), but a strong dissent held that the law is "founded in the enlightened humane policy which disdains to visit the sins of the parent upon the unoffending child."

An unique set of circumstances was presented in *Application of Barug*.<sup>111</sup> The petitioner for naturalization, a party to a previous interracial marriage, was questioned as to his requisite "good moral character." The court held that his rights were predicated upon his good faith, not an "abstruse quantity." As he was firm in the belief of the validity of his actions, the petitioner was not denied naturalization.

#### E. Effect of an Incestuous Marriage.

An incestuous marriage denotes the union of a man and woman who are within the prohibited degrees of relationship, either by consanguinity or affinity. Consanguinity embraces all persons of common ancestral blood; affinity includes the relationship arising from marriage and existing between one spouse and the blood relations of the other spouse. At common law and in the absence of a statute providing otherwise, such a marriage is merely voidable during the lives of the parties, and unless so avoided, must be deemed valid for all civil purposes.<sup>112</sup> However, the greater number of statutes in force in American jurisdictions provide generally that marriages within these prohibited degrees are void *ab initio*,<sup>113</sup> and require no decree of dissolution.<sup>114</sup> A minority of the states have enacted that incestuous marriages, although null and void in law, are valid for all purposes until a decretal order of nullity has been issued.<sup>115</sup> So strong is the sentiment against this type of marriage in some states that an annulment will be granted regardless of where the ceremony was performed,<sup>116</sup> and the ancient maxim of equity demanding "clean hands" of the moving party is ignored when incest is involved.<sup>117</sup>

Good faith by at least one of the parties believing in the validity of the ceremony will produce civil protection under statutes in many states in spite of the nullity.<sup>118</sup> Bona fide will also serve to legitimate all offspring, most states expressly providing that even though a specific marriage is null and void in law, the issue will nonetheless be considered

<sup>111</sup> 76 F. Supp. 407 (N.D. Cal. 1948).

<sup>112</sup> *Bonham v. Badgley*, 7 Ill. (2 Gilm.) 622 (1845).

<sup>113</sup> 1 VERNIER, *AMERICAN FAMILY LAWS* § 38 (1931).

<sup>114</sup> *Osoinach v. Watkins*, 235 Ala. 564, 180 So. 577 (1938); *Ragan v. Cox*, 208 Ark. 809, 187 S.W.2d 874 (1945); *Ex parte Bowen*, 247 S.W.2d 379 (Ky. 1952).

<sup>115</sup> *Johnson v. Landefeld*, 138 Fla. 511, 189 So. 666 (1939); *Goldman v. Dithrich*, 131 Fla. 408, 179 So. 715, 716 (1938) (interpreting West Virginia law). *Accord*. *Walker v. Walker*, 54 Ohio L. Abst. 153, 84 N.E.2d 258 (1948).

<sup>116</sup> *Johnson v. Johnson*, 57 Wash. 89, 106 Pac. 500 (1910).

<sup>117</sup> *McClain v. McClain*, 40 Pa. Super. 248 (1909); *Martin v. Martin*, 54 W.Va. 301, 46 S.E. 120 (1903). *Arado v. Arado*, 281 Ill. 123, 117 N.E. 816, 818 (1917) states: "The general rule that equity will not entertain the complaint of one who comes into the court with unclean hands does not apply, and if a party to an illegal marriage is so wanting in honor as to be willing to publish his own criminal offense and disgrace and humiliate his children and one with whom he has lived in the marital relation, the public interest requires that he should not be prevented from doing so. The defendant was not barred from alleging the illegality of the marriage."

<sup>118</sup> *E.g.*, note 107 *supra*.

legitimate.<sup>119</sup> It has even been held that such a statute is applicable if the children are begotten prior to the void ceremony, and the children thereby are not stigmatized.<sup>120</sup> However, the birth of issue to the participants of an incestuous marriage is not of itself sufficient to render the marriage merely voidable.<sup>121</sup>

In the absence of innocence, no marital or property rights accrue to either party to the marriage,<sup>122</sup> but the result is otherwise if the statute requires judicial recognition of the nullity during the lives of the parties.<sup>123</sup> Under the last stated holding, death of one spouse before issuance of a decree of voidness will afford the parties concerned and their issue rights of heirship.

The husband to an incestuous marriage may also be liable for damages if the wife was ignorant of the impediment. This holding is born out by the decision in *Ragan v. Cox*,<sup>124</sup> wherein the plaintiff, a twelve year old girl, brought an action for damages against her uncle and a justice of the peace who performed the ceremony, alleging that the defendants had knowledge of the impediment and that she was in complete ignorance. She claimed loss of reputation. The court held that the two men were jointly liable for their actions.

New York perhaps has taken the initial step in recognizing the validity of such a marriage specifically prohibited by its laws. The plaintiff married her uncle in a foreign country where the marriage was also prohibited, but in that country an exemption was recognized when approval was obtained from civil authorities, as had been done. The court held that under these facts they had no right to question the marriage.<sup>125</sup>

## II

### Effect of the Removal of an Impediment.

Continued cohabitation subsequent to the removal of an impediment to an otherwise validly contracted marriage entered into in good faith constitutes a valid informal marriage. But this rule is sustained only in those states which recognize common law marriage. This principle is often confused with the theory of ratification of a previous marriage

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<sup>119</sup> For an application of such a statute see *Mund v. Rehaume*, 51 Colo. 129, 117 Pac. 159 (1911).

<sup>120</sup> *Bates v. Meade*, 174 Ky. 545, 192 S.W. 666 (1917).

<sup>121</sup> *Walker v. Walker*, 54 Ohio L. Abst. 153, 84 N.E.2d 258 (1948).

<sup>122</sup> *Osoinach v. Watkins*, 235 Ala. 564, 180 So. 577 (1938); *Ex parte Bowen*, 247 S.W.2d 379 (Ky. 1952). *But cf.* *Johnson v. Landefeld*, 138 Fla. 511, 189 So. 666 (1939).

<sup>123</sup> *Tyler v. Andrews*, 40 App. D.C. 100 (1913).

<sup>124</sup> 208 Ark. 809, 187 S.W.2d 874 (1945).

<sup>125</sup> *Campione v. Campione*, 201 Misc. 590, 107 N.Y.S.2d 170 (Sup. Ct. 1951), (construing N.Y. DOMESTIC RELATIONS LAW § 5).

which has been dissolved. The impediment, however, precludes the validity of the former marriage and ratification is not applicable.<sup>126</sup>

The test to determine whether a common law marriage has been contracted demands a bona fide agreement *in praesenti* to live as man and wife, and cohabitation under the presumption of that relationship.<sup>127</sup> It has been said, however, that consent itself is sufficient to validate the marriage, it being unnecessary to have cohabitation after the removal of the impediment.<sup>128</sup> After the removal of the disability to a validly contracted marriage, the requisite intent is said to continue from the original void ceremony,<sup>129</sup> or the matrimonial consent may also be inferred from the acts of the parties.<sup>130</sup> It is immaterial whether the initial ceremony was solemnly celebrated<sup>131</sup> or merely informal at the time of contract.<sup>132</sup> The doctrine applies in all cases where it is possible for the impediment to be removed. A valid informal marriage assented to only for a specific purpose with an intent to terminate the relationship upon the achievement of that purpose is deemed not to establish any marital union and is void.<sup>133</sup> By the same token, a common law marriage after the disability removed is terminated only by death of one of the parties or by dissolution by a court of competent jurisdiction.<sup>134</sup>

Immediately upon the removal of the impediment the relationship becomes valid for all purposes.<sup>135</sup> However, it is generally conceded that the parties must possess the present intent to continue as man and wife even after the removal of the impediment, or such removal is meaningless.<sup>136</sup> Cohabitation itself is insufficient; there must be some proof or inference of a plan to accept each other maritally. However, it has been held that although the removal of the disability is unknown to the parties, a common law marriage may still be effected by uninterrupted cohabitation and reputation after removal of the impediment.<sup>137</sup> Even if the parties are aware of the disability, a valid informal marriage may result if, at the time of removal, a contract for an *in praesenti* marital

<sup>126</sup> Lewis v. Dep't of Labor and Industries, 190 Wash. 620, 70 P.2d 298 (1937).

<sup>127</sup> Levanosky v. Levanosky, 311 Mass. 638, 42 N.E.2d 561, 562 (1942); Brodock v. Brodock, 243 Mich. 505, 220 N.W. 720 (1928).

<sup>128</sup> Sturm v. Sturm, 111 N.J. Eq. 579, 163 Atl. 5, 9 (Ch. 1932).

<sup>129</sup> Addison v. Addison, 186 Ga. 155, 197 S.E. 232, 233 (1938).

<sup>130</sup> Dibble v. Dibble, 88 Ohio App. 490, 100 N.E.2d 451, 460 (1950); Bowles v. McCarty, 195 Okla. 252, 157 P.2d 179 (1945).

<sup>131</sup> Addison v. Addison, 186 Ga. 155, 197 S.E. 232, 233 (1938); Nicholas v. Idaho Power Co., 63 Idaho 675, 125 P.2d 321 (1942); Hess v. Pettigrew, 261 Mich. 618, 247 N.W. 90 (1933).

<sup>132</sup> Oatis v. Mingo, 199 Miss. 896, 26 So.2d 453 (1946); Sturm v. Sturm, 111 N.J. Eq. 579, 163 Atl. 5, 9 (Ch. 1932).

<sup>133</sup> United States v. Lutwak, 195 F.2d 748 (7th Cir. 1952).

<sup>134</sup> Dibble v. Dibble, 88 Ohio App. 490, 100 N.E.2d 451 (1950).

<sup>135</sup> Hoffman v. Hoffman, 242 Wis. 83, 7 N.W.2d 428 (1943).

<sup>136</sup> Jones v. General Motors Corp., 310 Mich. 605, 17 N.W.2d 770 (1945).

<sup>137</sup> Hess v. Pettigrew, 261 Mich. 618, 247 N.W. 90 (1933).



relationship is entered into.<sup>138</sup> A new agreement must also be in force where the parties discontinue cohabitation after the impediment has been removed.<sup>139</sup> It is not mandatory that both contractants believe in the validity of the marriage ceremony; good faith by either is sufficient to establish the requisite proof of a non-meretricious relation.<sup>140</sup> As in an otherwise valid marriage, both parties must assume all marital duties and obligations and will be given all usual property rights.<sup>141</sup>

If the relationship is meretricious in its inception and is accepted as such by the parties, the illicity of the union will be presumed to continue and will not ripen into marriage, unless there is a strong showing that a new contract has been entered into or that the former relationship has been altered.<sup>142</sup> This is especially true where the intent of the parties was originally illicit and the removal of the impediment has been unknown to them.<sup>143</sup>

Some states, including Massachusetts, have provided another means of validating a marriage prohibited by statute, but in which the disability has been removed. Although a common law marriage will not be given recognition, statutory enactment affirms all marriages after the impediment has been removed if the original ceremony was entered into in good faith by both participants.<sup>144</sup>

Even though a void or voidable ceremony was performed in a jurisdiction which does not recognize common law marriages, such a marriage may result if the parties later establish domicile in a state which does recognize common law marriages and there is a continuance of the consent to abide as man and wife.<sup>145</sup> This same rule applies when the statutory formalities are not complied with in the state where the ceremony was initially contracted. The setting up of domicile in a second state results in a valid informal marriage, unless also prohibited in that state.<sup>146</sup>

<sup>138</sup> *Pierce v. Pierce*, 379 Ill. 185, 39 N.E.2d 990 (1942) (construing Nevada law); *In re Franchi's Estate*, 119 N.J. Eq. 457, 182 Atl. 887, 891 (Prerog. Ct.), *aff'd*, 121 N.J. Eq. 47, 187 Atl. 371 (Ct. Err. & App. 1936).

<sup>139</sup> *Anonymous v. Anonymous*, 174 Misc. 906, 22 N.Y.S.2d 598 (N.Y. Dom. Rel. Ct. 1940).

<sup>140</sup> *Hoffman v. Hoffman*, 242 Wis. 83, 7 N.W.2d 428 (1943).

<sup>141</sup> *In re Lambert's Estate*, 116 Ind. App. 293, 62 N.E.2d 871 (1945) (wife was entitled to share in the estate of the deceased); *Oatis v. Mingo*, 199 Miss. 896, 26 So.2d 453 (1946) (a deed not signed by the common law wife is void); *Consolidated Underwriters v. Taylor*, 197 S.W.2d 216 (Tex. Civ. App. 1946) (wife was entitled to workmen's compensation).

<sup>142</sup> *Jones v. Kemp*, 144 F.2d 478 (10th Cir. 1944).

<sup>143</sup> *Monroe v. Kantor*, 10 N.J. Misc. 942, 161 Atl. 833 (Workmen's Comp. Bureau, Dep't Labor 1932).

<sup>144</sup> For an example of such a statute see *Hopkins v. Hopkins*, 287 Mass. 542, 192 N.E. 145 (1934).

<sup>145</sup> *Sturm v. Sturm*, 111 N.J. Eq. 579, 163 Atl. 5 (Ch. 1932).

<sup>146</sup> *Grammas v. Kettle*, 306 Mich. 308, 10 N.W.2d 895 (1943).

*Conclusion*

It is unquestioned that since the era of common law, state legislatures, guided by humane considerations, have done much to protect and provide for innocent parties to an impeded marriage. Included in these statutes are the unoffending children born of the union. However, there is a great statutory divergence as to the particular types of impediments which will not deprive a child of the status of legitimacy.<sup>147</sup> Although statutes in many states provide for legitimatization of the issue of all prohibited marriages, prejudice in certain jurisdictions is said to be too dominating a factor for some legislatures to provide to that extent. Bastardy, attended with all its undesirable consequences, still prevails in these jurisdictions without regard to the element of good faith on the part of either of the contractants.

It is difficult to conceive of any valid basis for this difference in policy as reflected in statutory impediments which will deprive the children of a given marriage of legitimacy. Concededly, a statute, providing that issue of a particular marriage are to be considered bastards, will afford some incentive to the parties to refrain from open meretriciousness. However, it is also true that in many of these marriages, regardless of the type of impediment, one or both of the parties will be in complete ignorance of the disability. Nevertheless, the children are stigmatized. Such a situation is most undesirable both as to an innocent spouse and the unoffending children.

It is submitted that, in all prohibited marriages, the test of legitimacy should be dependent upon the good faith of either or both of the parties to the contract, not the public feeling of a particular state. Granted that bigamy, "etc." is disdainful to all and in many cases should be punishable, this is no reason why innocence should suffer. The distinction between good and bad faith is not to be denied.

A typification of an ideal statute would be that of Louisiana, which provides: <sup>148</sup>

The marriage, which has been declared null, produces nevertheless its civil effects as it relates to the parties and their children, if it has been contracted in good faith.

If only one of the parties acted in good faith, the marriage produces its civil effects only in his or her favor, and in favor of the children born of the marriage.

Thus, "though a child may be adulterine in fact, it may be legitimate for all purposes of inheriting from its parents, if one or either of them intermarried in good faith."<sup>149</sup> Law is regarded as being founded on humane

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<sup>147</sup> 1 VERNIER, AMERICAN FAMILY LAWS § 48 (1931).

<sup>148</sup> LA. CIV. CODE ANN. arts. 117-18 (West 1952).

<sup>149</sup> Gaines v. Hennen, 65 U.S. 553 (1861).