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Remarriage After Decree Imposing Waiting Period - Henderson v. Henderson

REMARRIAGE AFTER DECREE IMPOSING WAITING PERIOD[1]

Henderson v. Henderson[2]

Plaintiff-appellee-wife filed a bill in equity to obtain a divorce *a mensa et thoro* from defendant-appellant-husband alleging that the defendant, who, as she claimed, married her in Iowa in 1943, had committed cruelty and constructive desertion. In a cross-bill for an annulment of their marriage, defendant alleged that the Iowa marriage was invalid inasmuch as plaintiff was then still under the disability of an effective prohibition against remarriage in a

[1] For leading articles on the subject of marriage in Maryland, see Strahorn, *Void and Voidable Marriages in Maryland and Their Annulment*, 2 Md. L. Rev. 211 (1938), and Strahorn, *Fifteen Years of Change in Maryland Marriage and Annulment Law and Domestic Relations Procedures*, 13 Md. L. Rev. 128 (1953).

[2] 199 Md. 449, 87 A. 2d 403 (1951). This case is cited in Milton v. Escue, 201 Md. 190, 202, 93 A. 2d 258 (1952), as authority for the proposition that the Court of Appeals will recognize the validity of a common-law marriage arising in a jurisdiction which recognizes the validity of such marriages; noted, 13 Md. L. Rev. 261 (1953), on this point.

Virginia divorce decree,[3] of which he was at that time unaware. At the trial it was shown that the parties cohabited as husband and wife in the District of Columbia from the Spring of 1945 until June, 1946. The Chancellor granted plaintiff a divorce *a mensa et thoro* and other relief sought.[4] Defendant's cross-bill was dismissed, and he appealed. *Held:* Decree affirmed.

This case presents three main questions: (1) was the marriage performed in Iowa within the prohibited period of six months void; (2) if the Iowa marriage was void, had the parties entered into a common-law marriage elsewhere; and (3) if there was a common-law marriage, should it be recognized in Maryland? The Court of Appeals answered all three questions in the affirmative.

The first question brought before the Court the Virginia decree, imposing the waiting period, which was entered in accordance with the Virginia statute,[5] which provided:

> "On the dissolution of the bond of matrimony for any cause arising subsequent to the date of the marriage, neither party shall be permitted to marry again for six months from the date of such decree, and such bond of matrimony shall not be deemed to be dissolved as to any marriage subsequent to such decree, or in any prosecution on account thereof, until the expiration of such six months."

Whether a marriage of a divorced person within the prohibited period after divorce is void or merely voidable depends on the language of the statute and the construction given to it by the courts.[6] The Supreme Court of Appeals of Virginia held[7] in 1923 that a marriage of a person, who had been divorced in Virginia, within six months after the date of the decree, is absolutely void, even though the marriage is performed in another state, because the language of the statute making the decree effective only after the expiration of six months is entitled to full faith and

[3] The decree, dated Sept. 27, 1943, provided "that the bonds of matrimony which were created by the aforesaid marriage be and the same are hereby dissolved; but neither party hereto shall be permitted to marry again for a period of six months from the date of this decree"; *supra*, n. 2, 451.

[4] Custody of the child of their marriage was awarded plaintiff, with the right to defendant to see the child at reasonable times. Defendant was ordered to pay alimony, support of the child, and plaintiff's counsel fee; *supra*, n. 1, 450-1.

[5] Virginia Code (1919), Sec. 5113; Code of Virginia (1950), Sec. 20-118.

[6] Hall v. Baylous, 109 W. Va. 1, 153 S. E. 293, 69 A. L. R. 527 (1930); Schuchart v. Schuchart, 61 Kans. 597, 60 P. 311 (1900).

[7] Heflinger v. Heflinger, 136 Va. 289, 118 S. E. 316, 32 A. L. R. 1088 (1923).

credit in every other state.[8] However, in *Dimpfel v. Wilson*[9] the Maryland Court of Appeals took the position that a decree of divorce prohibiting the defendant from remarrying during the lifetime of the plaintiff had no effect beyond the limits of the state in which such decree was made, and did not in itself render invalid the remarriage of the defendant in another state, when such marriage would otherwise be valid, thereby lining up with the rule generally recognized throughout the country at that time that such a prohibition has no extraterritorial effect.[10] In *Van Voorhis v. Brintnall*[11] it was held that the statutes prohibiting the second marriage of the person divorced on the ground of adultery, during the lifetime of the former spouse, and declaring such second marriage void, had no application, as they were in the nature of a penalty, and had no effect outside of the state, in the absence of express terms showing a legislative intent to give them such effect. In *Bannister v. Bannister*,[12] however, the Court of Appeals quoted with approval from *Harrison v. State*[13] as follows:

> " 'The right to confirm is the necessary corollary of a power to dissolve marriage by divorce . . . Where the parties contracting marriage labor under legal disabilities, the contract is liable to be dissolved by the Courts or affirmed by the Legislature'."

Assuming, as it here did, *without deciding*, that the Iowa marriage was void, the Court of Appeals had no difficulty disposing of the second question. Acknowledging that common-law marriages are recognized in the District of Columbia,[14] the Court of Appeals cited *Thomas v. Murphy*[15] and *Parrella v. Parrella*,[16] holding that the re-

[8] Federal Constitution, Art. 4, Sec. 1.

[9] 107 Md. 329, 68 A. 561 (1908).

[10] The Court of Appeals in that case, *ibid*, 336, said:

> "It is one thing to prohibit a marriage and declare it null and void if made under certain conditions, and quite another thing to authorize a divorce — thereby making it voidable only and not *ab initio* void."

[11] 86 N. Y. 18, 40 Am. Rep. 505 (1881).

[12] 181 Md. 177, 180, 29 A. 2d 287 (1942). Appellant here contended that his marriage to the appellee was not valid in Maryland because it took place before the appellee's interlocutory decree of divorce, in California, had become final. The Court of Appeals, however, held the marriage valid in view of a statute passed by the state of domicil where the divorce was granted empowering courts to make *nunc pro tunc* orders in certain cases where steps to make the decree final had not been taken. Noted in 7 Md. L. Rev. 254 (1943).

[13] 22 Md. 468, 493, 85 Am. Dec. 658 (1864).

[14] See Thomas v. Holtzman, 7 Mackey 62, 66, 18 D. C. 62, 66 (1888).

[15] 107 F. 2d 268 (C. A., D. C., 1939).

[16] 120 F. 2d 728 (C. A., D. C., 1941).

moval of an impediment to marriage while parties continue to live together as husband and wife in the District of Columbia gives rise to a common-law marriage.[17] The cohabitation of the parties as husband and wife in the District of Columbia from the Spring of 1945 until June, 1946, cannot be explained on any theory other than that they agreed to be husband and wife, thereby entering into a common-law marriage under the law of the District of Columbia.

As to the third question — whether the common-law marriage should be recognized in Maryland — the Court of Appeals applied the general rule.[18] It is desirable that there should be uniformity in the recognition of the marital status, so that persons legally married according to the laws of one state will not be held to be living in adultery in another, and that children begotten in lawful wedlock in one state will not be held illegitimate in another.[19] The state has the sovereign power to regulate marriages, and accordingly can determine who shall assume and who shall occupy the matrimonial relation within its borders. Such effect as may be given by one state to the marriage laws of another is merely because of comity, or because public policy and justice demand the recognition of such laws.[20] However, the state is not bound to give effect to marriage laws which are repugnant to its own laws and policy. Marriages which are tolerated in another state but are condemned by the State of Maryland as contrary to its public policy will not be held valid in this state.[21] The statutory provisions for solemnizing marriages relate to form and ceremony and do not cause a marriage entered into in some other jurisdiction to fall within the general rule that a mar-

[17] See also McVicker v. McVicker, 130 F. 2d 837 (C. A., D. C., 1942), where the parties were married in Virginia before the end of the six months waiting period described by the decree which divorced the husband from his former wife, but relying on the ceremonial marriage lived together as husband and wife in the District of Columbia more than two years. *Held* — that the removal of the impediment to marriage while the parties continued to live together as husband and wife gave rise to a common-law marriage.

[18] Jackson v. Jackson, 82 Md. 17, 28, 33 A. 317 (1895); Bannister v. Bannister, *supra*, n. 12.

[19] Medway v. Needham, 16 Mass. 157, 8 Am. Dec. 131 (1819); Lando v. Lando, 112 Minn. 257, 127 N. W. 1125 (1910).

[20] Toler v. Oakwood Smokeless Coal Corporation, 173 Va. 425, 4 S. E. 2d 364, 127 A. L. R. 430 (1939), criticized in 18 N. Car. L. Rev. 130 (1940).

[21] An illustration of this exception to the general rule arises from the Maryland statute declaring void any marriage of a white person to a negro. In Jackson v. Jackson, *supra*, n. 18, 30, the Court of Appeals said that, although such marriages may be valid elsewhere, they will be absolutely void in Maryland as long as the statutory prohibition remains unchanged.

riage valid where solemnized or contracted is valid everywhere. The Court of Appeals has adopted the generally accepted rule that a valid common-law marriage entered into in a jurisdiction which recognizes its validity will be recognized as valid in another, regardless of the rule prevailing in the latter jurisdiction as to the validity of common-law marriages.[22]

Returning to the question which the Maryland Court of Appeals did not have to decide, i. e., whether the Iowa marriage was valid or void, there is found to be considerable conflict and confusion of decision and theory in the reported cases as to the effect of a prohibited remarriage in a state other than that in which the divorce was obtained. It has been held[23] that where a party to a divorce went to another state and married there in violation of the prohibition against remarriage in the divorce decree, and the parties then moved to a third state, the marriage was void there in view of the full faith and credit provision of the Federal Constitution. In that case it was said that the marriage would not be recognized by the courts of a third state where the parties became domiciled, where the laws of such third state evince the same public policy as the state of the divorce as to remarriage. The opinion noted:

> "Reasonable restrictions against speedy remarriage of divorced parties are becoming more common in the statutes of our states, and their intentional violation should find no sanction in states having similar restrictions. Only by each state enforcing public policies common to it and other states can our divorce laws be freed from the odium of being wilfully violated with impunity."

On the other hand there are decisions[24] holding that a marriage will be recognized as valid in the third state although a statute or decree of divorce of one state prohibited it and the marriage took place in another state.

Where a decree of divorce must under the Federal Constitution be given full faith and credit in another state,

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[22] Whitehurst v. Whitehurst, 156 Md. 610, 145 A. 204 (1929).

[23] Hall v. Industrial Commission, 165 Wis. 364, 162 N. W. 312, 314 (1917).

[24] Goodwin v. Goodwin, 158 App. Div. 171, 142 N. Y. Supp. 1102 (1913); Criss v. Industrial Commission, 348 Ill. 75, 180 N. E. 572 (1932); Fisch v. Marler, 1 Wash. 2d 698, 97 P. 2d 147 (1939); Bauer v. Abrahams, 73 Colo. 509, 216 P. 259 (1923).

this means not *"some"* but *"full"* faith and credit. Thus, if a state is required to give full faith and credit to the decree at all it should give such recognition to every portion of it. Hence, a prohibition against remarriage enforcible in the state where the decree is granted should likewise be enforcible in every other state. Despite what has just been said, however, *up to now the decisions reported*[25] *have largely been to the contrary.* Where a party is forbidden by a divorce decree to remarry and goes to another state and there marries, that marriage is usually recognized not only in the state where it is performed *but also in the state where the decree of divorce was granted.*

In *Dimpfel v. Wilson*[26] a prohibition in a decree of divorce rendered in New York, against the remarriage of the guilty party during the life of the innocent one, was held not to constitute a restraint within the meaning of an Act of Congress applicable to the District of Columbia, so as to make it a ground for divorce that the marriage was contracted while either of the parties had a former husband or wife living. The Court of Appeals observed that the policy for Maryland was that no such prohibition should be imposed, and that there could be no reason for its courts construing such a statute to be extraterritorial, *but added that the result in this case should be governed by the law of the District of Columbia when the marriage took place, and the construction placed on the New York statute, when the decree was passed.* It will be observed that in *Dimpfel v. Wilson* the inquiry was, in the main, directed to the question of the effect of the prohibition in the New York decree upon the validity of the marriage according to the law of the District of Columbia, whereas in most of the cases (including the present case under comment), in which the question of the validity of the remarriage arose in a third state, the issue discussed has been merely whether the court of the forum would accord extraterritorial effect to the prohibition in the decree, and there has been no specific consideration of the question of whether such prohibition in the foreign decree would affect the validity of the remarriage, tested by the law of the place where it was celebrated.

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[25] Among the many decisions holding that a statutory prohibition against the remarriage of a divorced person has no extra territorial effect may be cited the following: Goodwin v. Goodwin, *ibid;* Dudley v. Dudley, 151 Iowa 142, 130 N. W. 785 (1911); Dimpfel v. Wilson, 107 Md. 329, 68 A. 561 (1908); Pickard v. Pickard, 45 N. W. 2d 269 (Iowa, 1950).

[26] *Ibid.*

In the absence of statute[27] to the contrary, after the granting of an absolute divorce, either party may remarry, but this rule does not apply until the divorce has become final. Even in states having statutes prohibiting remarriage, it is clear that the parties may remarry each other following a divorce.[28] There seems to be no doubt as to the power of the states to enact a statute prohibiting remarriage within a certain time after the decree, and such a statute has been held constitutional.[29] In some cases the prohibition prevents remarriage unless the court grants an order giving leave to the parties. Under such a statute[30] the court has power, upon a showing of good behavior, to permit the prohibited party to remarry. Other statutes[31] impose a time limit upon remarriage and permit remarriage after the expiration of that period. Statutes in other states prohibit the guilty party from remarrying during the lifetime of the innocent one[32] or prohibit either or both parties from ever remarrying.[33] These statutes can apparently all be sustained under the general authority which the state has over the marriage of its citizens.

The effect of a remarriage in violation of a statute or decree depends largely upon the statute itself. In some cases such a remarriage has been held to be void where it took place within the state where the divorce was granted; in other jurisdictions such marriages have been held voidable only. Moreover, it has been held[34] that where the statute forbids such a marriage *without declaring it void*, it will not be so held as the law favors the validity of marriages wherever possible.

Where a marriage is void at the time it is entered into, it cannot be validated at a time when validity can result without in some manner taking the necessary steps for a new marriage. Thus, a marriage illegal because entered into contrary to a prohibition against remarriage within a certain period from the date of the decree of divorce does not become legal by the cohabitation of the parties after

[27] Maryland and the following states have no such statute: Arkansas, California, Colorado, Connecticut, Delaware, Florida, Idaho, Illinois, Kentucky, Maine, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, Ohio, Rhode Island, South Carolina, Tennessee, Washington, and Wyoming.

[28] Oliphant v. Oliphant, 177 Ark. 613, 7 S. W. 2d 783 (1928).

[29] Hobbs v. Hobbs, 279 Ill. 163, 116 N. E. 629 (1917).

[30] Garner v. Garner, 56 Md. 127 (1881).

[31] *Supra*, n. 6.

[32] Cole v. Parton, 172 Tenn. 8, 108 S. W. 2d 884 (1937).

[33] Rhodes v. Miller, 189 La. 288, 179 So. 430 (1938).

[34] Woodward v. Blake, 38 N. D. 38, 164 N. W. 156 (1917).

the expiration of the period, but this rule is not applied where, as in the case under comment, the subsequent cohabitation satisfies the requirements of a common-law marriage. Where a marriage is void if entered into by one of the parties after the divorce but within the prohibited period and where common-law marriages are void, a remarriage remains void although the parties continue to live together as man and wife after the termination of the prohibited period.[35] The mere belief of the guilty party that he has a right to remarry does not make his marriage valid.

It was formerly the general view that such prohibitions on remarriage had no effect whatever on marriages solemnized in another jurisdiction, but the courts are gradually taking *a less liberal view* so that now such marriages, although still upheld where made, are frequently dicountenanced in the state of domicil, especially where the parties went to the other state for the purpose of avoiding the prohibition. Every state has power to enact laws to personally bind its citizens while in a foreign jurisdiction and to declare that marriage between its citizens in foreign states in disregard of the statutes of their state of domicil will not be recognized in the courts of the latter state though valid where celebrated. Thus, where a statute is enacted *with a positive incapacity for marriage,* a marriage contracted in disregard of the statutory prohibition wherever contracted may in some cases be held void.[36] This is particularly true where the parties have gone to the other jurisdiction for the purpose of remarriage and to avoid the prohibition.[37]

In many cases statutes prohibiting the marriage of the party at fault have been construed as penal in nature and have no extraterritorial effect.[38] In this view marriages contracted outside the state have been considered valid in states having such statutes. There are many decisions holding that a statute prohibiting the remarriage of a divorced person have no extraterritorial effect and, therefore, a marriage celebrated in another state in violation of such prohibition is valid. In some of these decisions it was held that a prohibition on remarriage was effective only in the juris-

[35] Wilson v. Cook, 256 Ill. 460, 100 N. E. 222 (1912).

[36] Wilson v. Cook, *ibid;* Atkeson v. Woodmen of the World, 90 Okla. 154, 216 P. 467 (1923); Brand v. State, 242 Ala. 15, 6 So. 2d 446 (1941); Heflinger v. Heflinger, 136 Va. 289, 118 S. E. 316, 32 A. L. R. 1088 (1923).

[37] Knoll v. Knoll, 104 Wash. 110, 176 P. 22, 11 A. L. R. 1391 (1918).

[38] Loughran v. Loughran, 292 U. S. 216 (1933); In re Green's Estate, 155 Misc. 641, 280 N. Y. Supp. 692 (1935), aff'd. 246 App. Div. 583, 284 N. Y. Supp. 370 (1935); Montgomery v. Gable, 61 Ga. App. 859, 7 S. E. 2d 426 (1940).

diction where the decree was granted and did not invalidate a marriage in another jurisdiction.[39]

Where the prohibited remarriage is solemnized not in the domicil of the parties where the divorce was granted, but in another state, the weight of authority[40] seems to be to the effect that a statute prohibiting a divorced party from remarrying has no extraterritorial effect. This means that if the marriage is valid in the state where it is solemnized, it will be recognized in the state in which the divorce was obtained.

It has been stated[41] to be the rule that the validity of a marriage is to be determined by the law of the state where it is entered into. If valid there, it is to be recognized as valid in the courts of the domicil unless contrary to the prohibitions of natural law or the express prohibitions of its statutes. Some courts have laid down a different rule, holding that a marriage by one forbidden to remarry, celebrated in a state to which the parties go to avoid the prohibition, will not be recognized in the state where the divorce was granted. This is particularly true where it is obvious that the sole purpose of marrying in the foreign state is to avoid the statutory prohibition.[42] Generally speaking, however, such marriages have been held void because of the statutory provisions by which they are prohibited.[43]

Where the party prohibited from remarrying leaves the state in which the divorce was granted and goes to another state, not for the purpose of remarrying, *but with the bona fide intention of changing his residence and acquiring a new domicil*, the marriage will likely be held valid.[44] There are, however, decisions to the contrary.[45] Where one of the parties to the remarriage was innocent it was held[46] in a

[39] For such example, see Dimpfel v. Wilson, 107 Md. 329, 68 A. 561 (1908).

[40] WARREN, SCHOULER DIVORCE MANUAL (1944), p. 483.

[41] Van Voorhis v. Brintnall, 86 N. Y. 18, 40 Am. Rep. 505 (1881); Thorp v. Thorp, 90 N. Y. 602 (1882).

[42] Brand v. State, *supra*, n. 36. The RESTATEMENT, CONFLICT OF LAWS (1934), Sec. 129, holds the view that if the marriage is otherwise valid, it is not invalid because the parties to the marriage went into another state in order to avoid the requirements of the law of their domicil.

[43] Atkeson v. Woodmen of the World, *supra*, n. 36; Bennett v. Anderson, 20 Tenn. App. 523, 101 S. W. 2d 148 (1936); Fisch v. Marler, 1 Wash. 2d 698, 97 P. 2d 147 (1939); Wheelock v. Wheelock, 103 Vt. 417, 154 A. 665 (1931); Huard v. McTeigh, 113 Or. 279, 232 P. 658, 39 A. L. R. 528 (1925); Royal v. Royal, 324 Mass. 613, 87 N. E. 2d 850 (1949).

[44] Owen v. Owen, 178 Wis. 609, 190 N. W. 363, 32 A. L. R. 1100 (1922); Webster v. Modern Woodmen of America, 192 Iowa 1376, 186 N. W. 659 (1922).

[45] Such as Newman v. Kimbrough, 59 S. W. 1061 (Tenn., 1900).

[46] Gardner v. Gardner, 232 Mass. 253, 122 N. E. 308 (1919).

state not ordinarily recognizing marriages in violation of prohibitions that the marriage might be valid.

The Restatement[47] gives the rule concerning the remarriage after one party to a divorce is forbidden to remarry as follows:

> "If, by a decree of divorce validly granted in one state, one party is forbidden for a certain time or during his life to marry again, and he goes into another state and marries in accordance with the law of that state, the marriage, unless invalid for other reasons, is valid everywhere, even in the state in which the divorce was granted."

The Restatement, however, distinguishes this case from one where the decree is provisional only until the lapse of a certain time, or is a decree *nisi*, or is an interlocutory decree, which does not become absolute until after further proceedings or the lapse of a certain time, in which case neither party ceases to be married until the expiration of the given time, and neither can marry again in any state, since such marriage would be bigamous. Where the statute of the state of domicil of one or both parties prohibits both of them from remarrying for a stated time or during the life of the other party after a divorce granted in such state and that statute is by its provisions applicable to a marriage of a domiciliary in another state or if it is interpreted by the court as being applicable, the remarriage in the other state by such a domiciliary will be invalid everywhere. If a person so prohibited from remarrying changes his domicil, the statute will no longer be applicable to the remarriage of such person. However, if the divorce is granted at the domicil of one party only, a statute prohibiting the remarriage of the parties, even when interpreted as applicable to a remarriage in another state, will not prevent the party not domiciled in that state from remarrying in another state.

The Restatement view[48] that a marriage which is against the law of the state of domicil of either party, although the requirement of the law of the state of celebration has been complied with, will be invalid everywhere if the marriage is polygamous, incestuous, miscegenetic, or made void by a

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[47] RESTATEMENT, CONFLICT OF LAWS (1934), Sec. 130.

[48] *Ibid*, Sec. 132.

statute of the domciliary state, is the view of the Court of Appeals.[49]

Generally speaking, a marriage will be recognized in the state where it is solemnized although it was entered into in violation of a prohibition in a divorce decree granted in another state.[50] Obviously, however, the marriage could not be recognized as valid if under the statute of the other state the prior marriage was deemed not to be dissolved until the expiration of a waiting period.[51] The usual rule seems to be that in the absence of a statute of the domiciliary state expressly regulating marriage abroad, the statute of the place where it is solemnized governs the validity of the marriage, unless held to be odious to public policy,[52] but a marriage that is void where it is solemnized will not be recognized in another state.[53]

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[49] See the Maryland case of Bannister v. Bannister, 181 Md. 177, 29 A. 2d 287 (1942), noted in 7 Md. L. Rev. 254 (1943), which shows the willingness of the Court of Appeals to apply these principles.

[50] In re Ommang's Estate, 183 Minn. 92, 235 N. W. 529 (1931), criticized in 16 Minn. L. Rev. 172, 184 (1932). See RESTATEMENT, CONFLICT OF LAWS (1934), Sec. 131, illustration 2, which would decide the first point in the instant case the other way.

[51] Johnson v. State Compensation Commissioner, 116 W. Va. 232, 179 S. E. 814 (1935).

[52] Earle v. Earle, 141 App. Div. 611, 126 N. Y. Supp. 317 (1910).

[53] Huard v. McTeigh, *supra*, n. 43.