Comments

MARRIAGE AFTER DIVORCE IN ARIZONA

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A judgment of divorce *a vinculo matrimonii,* from the bond of matrimony, as opposed to a judgment *a mensa et thoro,* from bed and board, is a decree of total dissolution of the marriage relation.[1] After an absolute divorce the parties regain their status as single persons and, as such, they possess the right to marry again. This right, however, has been restricted by statute in Arizona, as well as in many of the other states.[2] The Arizona statutory restriction provides:

> Either party may marry again only after one year has elapsed from the date of the judgment of divorce, but if proceedings are begun prior to the expiration of the one year period to set aside the judgment, then neither party may marry again until the proceedings are finally terminated.[3]

The question of whether an Arizona marriage which violated the statute could be collaterally attacked was decided in *Davis v. Industrial Comm'n.*[4] The decision in the case was limited to the narrow question of whether the prohibited marriage was void, thus making the marriage susceptible to a collateral attack; the court was therefore not required to determine under what circumstances such a marriage might be avoided. Whether the effect of the statute is to cause an imperfect marriage to be created in some circumstances has yet to be determined.

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[1] See Williams v. Williams, 33 Ariz. 367, 265 Pac. 87 (1928).

[2] See 2 VERNIER, AMERICAN FAMILY LAWS § 92 (1932); Note, 36 VA. L. REV. 665 (1950).

[3] ARIZ. REV. STAT. ANN. § 25-320(B) (1956).

[4] 88 Ariz. 117, 353 P.2d 627 (1960). The decision in this case was thought to be clearly predictable since the decision in Horton v. Horton, 22 Ariz. 490, 198 Pac. 1105 (1921), which first construed the restrictive clause, then contained in REV. STAT. § 3864 (1913), as amend., Ariz. Sess. Laws 1917, Ch. 54. Although the *Horton* case involved a direct attack on a marriage obtained in New Mexico to avoid the restriction of the Arizona statute, and was decided, in part at least, on the doctrine of *lex loci contractus,* the court nevertheless held that the statute did not render the marriage void. The great weight of authority in other jurisdictions has also held that a statute prohibiting a remarriage after divorce without declaring the marriage void does not subject the marriage to collateral attack. See, *e.g.,* Park v. Barron, 20 Ga. 702 (1856); Mason v. Mason, 101 Ind. 25 (1884); Conn v. Conn, 2 Kan. App. 419, 42 Pac. 1006 (1895); Opdyke v. Opdyke, 237 Mich. 417, 212 N.W. 95 (1927); State v. Yoder, 113 Minn. 503, 130 N.W. 10 (1911); Woodward v. Blake, 38 N.D. 38, 164 N.W. 156 (1917); Annot., 69 A.L.R. 537 (1930); Annot., 47 A.L.R.2d 1394 (1956).

In the *Davis* case the petitioner and her husband had married within three weeks from the date of divorces by each from their respective spouses. In a claim arising out of the accidental death of petitioner's husband, the Industrial Commission denied the petitioner compensation upon the findings that her marriage to the deceased was void under the statutory prohibition and that the procurement of the marriage license by false representations rendered the marriage void.[5] On certiorari to the supreme court, the award denying compensation to the petitioner was set aside. The court held the marriage was not void by force of the statutory restiction for the reason that ". . . unless the statute declares it to be void the court has no authority to invade the legislative field and supply the penalty."[6]

The language of the decision which generates the question with which the practitioner will now be most concerned regarding the effect of the statute under discussion is as follows: "Having reached the conclusion that the marriage in the instant case is *voidable* only . . . it is not subject to collateral attack. . . ."[7] (Emphasis added.) Thus, the question arises as to when, and under what circumstances, if ever, a marriage entered into in violation of the Arizona statute might be avoided by the parties to the marriage in an annulment proceeding.

The legislative purpose in providing a statutory restriction on the right to remarry after divorce was considered in the *Davis* case. The court concluded that the statute was a ". . . declaration of public policy designed to preserve the marital relation."[8] More specifically, such restrictions have been said to be for the purpose of encouraging reconciliation and preventing hasty remarriages,[9] and for removing one of the most frequent causes of divorce, the desire of one of the parties to marry another (thus at the same time removing the temptation to secure the divorce by collusion.)[10] Although the Arizona court seems clearly to have concluded that the legislative purpose was preventative in theory, it has been declared elsewhere that the purpose of such a prohibition is to punish.[11]

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[5] The court held that such false representations in the procurement of a marriage license, *i.e.*, the representation that neither party had been divorced during the preceding year, did not render the marriage void. See Switchman's Union of No. Am. v. Gillerman, 196 Mich. 141, 162 N.W. 1024 (1917); *Ex Parte* Hollopeter, 52 Wash. 41, 100 Pac. 159 (1909).

[6] 88 Ariz. 117, 120, 353 P.2d 627, 628 (1960).

[7] *Id.* at 121, 353 P.2d at 628 (1960).

[8] *Ibid.*

[9] Hall v. Baylous, 109 W. Va. 1, 153 S.E. 293, 295 (1930).

[10] Heflinger v. Heflinger, 136 Va. 289, 118 S.E. 316 (1923).

[11] See Kingsley, *Remarriage After Divorce*, 26 So. CALIF. L. REV. 280 (1953); 1 BISHOP, MARRIAGE, DIVORCE AND SEPARATION § 703 (1891). *But cf.* Nicholas v. Holder, 244 S.W.2d 313, 317 (Tex. Civ. App. 1951), where the court expressly declared that the purpose of the Texas statute was not intended as a punishment.

As a deterrent to persons contemplating divorce the statute, if heeded, no doubt successfully implements the declared public policy. If, however, the legislative mandate is ignored (and no large amount of conjecture is required to suppose what action persons contemplating a marriage after divorce in violation of the statute will take upon explanation by counsel of the legal status of the second marriage) it is difficult to predict how the courts will give effect to the statute, since the *Davis* interpretation, if the basic policy of preservation of the marital relation is to be furthered. If under any circumstances the prohibited marriage is allowed to be annuled on the theory that the statute creates an impediment[12] to a marriage otherwise perfected under the marriage laws, the declared purpose of the restriction has been defeated, for a second marriage has been put asunder. Such a result might also necessitate the conclusion that the legislature intended to create a new ground for annulment,[13] thus further weakening the marriage contract. The divorce courts, faced with the apparent anomaly of the *Davis* decision, that although the statute was designed to preserve the marriage it nevertheless provides grounds for annulment of that marriage, will no doubt attempt to give effect to the often declared public policy of preservation.[14]

In other jurisdictions, the problem presented in a proceeding to annul the prohibited second marriage has received varied treatment.[15] The cases arise generally under two basic types of restriction, the situation which arises, as in Arizona, under an absolute divorce decree with a statutory limitation on remarriage, and that which arises under an interlocutory decree of divorce.[16] The courts in jurisdictions which have held that the restriction creates merely a voidable marriage have generally applied the doctrine of clean hands or allowed the defense of estoppel as a means of affecting the public policy of preservation

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[12] ARIZ. REV. STAT. ANN. § 25-301 (1956) provides that: "Superior courts may dissolve a marriage, and may adjudge a marriage to be null and void when the cause alleged constitutes an impediment rendering the marriage void." The annulment statute has been construed as rendering the marriage voidable only for certain causes, Southern Pacific Co. v. Industrial Comm'n, 54 Ariz. 1, 91 P.2d 700 (1939).

[13] The recognized grounds for annulment are, generally, the disabilities of lack of mutual assent because of mistake, duress and fraud; insanity; nonage; consanguinity and affinity; and impotency, which render the marriage voidable; and prior marriage undissolved which renders the marriage void. See generally, MADDEN, PERSONS AND DOMESTIC RELATIONS, §§ 6-18 (1931); Fessenden, *Nullity of Marriage*, 13 HARV. L. REV. 110 (1899).

[14] See Gordon v. Gordon, 35 Ariz. 357, 278 Pac. 375 (1929); Kinsley v. Kinsley, 388 Ill. 194, 57 N.E.2d 449 (1944); Mason v. Mason, 101 Ind. 25 (1884); Hall v. Baylous, 109 W. Va. 1, 153 S.E. 293 (1930).

[15] See Annot., 15 A.L.R.2d 706 (1951).

[16] For more detailed classification and analysis of statutes which restrict the right to marry again after a divorce decree, see 2 VERNIER, AMERICAN FAMILY LAWS § 92, Table XLIX (1932); Kingsley, *Remarriage After Divorce*, 26 So. CALIF. L. REV. 280 (1953); Note, 36 VA. L. REV. 665 (1950).

of the marriage.[17] Where, however, the courts find that the prohibition renders the marriage void, the decisions generally grant the annulment.[18]

The decisions of the Texas courts should be considered in determining the problem since the Arizona statute was adopted from that state. The Texas statute[19] provides that "neither party to a divorce suit, where a divorce is granted upon the ground of cruel treatment, shall marry any other person for a period of 12 months."[20] The first case construing the Texas statute was *Ex parte Castro*.[21] The court there denied the state the right to collaterally attack the prohibited marriage and held that the marriage was not void but merely voidable. However, the court indicated that the second marriage might be annulled in a proper case by one who had a "justiciable interest" therein. In the case of *Evans v. Hunt*,[22] which involved a collateral attack upon the marriage, the court found no justiciable interest which would warrant such an attack. In *Gress v. Gress*[23] the husband, who sought an annulment on the basis of the statute, had knowledge of his wife's prior divorce. A decree was denied on the basis of estoppel.[24] The Texas court still adhered, however, to the doctrine of the *Castro* case, that such a marriage was voidable at the suit of one having a justiciable interest herein, but determined that a person entering into a marriage with knowledge of facts which rendered it voidable was estopped from asserting those facts. It would thus seem that if the party bringing the suit has knowledge of the prior divorce, he is precluded under the equitable doctrine from asserting that the statutory restriction has caused an inchoate marriage.

The extremes to which some courts have gone in applying the doctrine of equitable estoppel is exemplified in the recent California decision of *Spellens v. Spellens*.[25] The California statute provides for an

[17] Mason v. Mason, 101 Ind. 25 (1884); Gress v. Gress, 209 S.W.2d 1003 (Tex. Civ. App. 1948).

[18] See Sullivan v. Sullivan, 219 Cal. 734, 28 P.2d 914 (1934); Szlauzis v. Szlauzis, 255 Ill. 314, 99 N.E. 640 (1912); Pettit v. Pettit, 105 App. Div. 312, 93 N.Y. Supp. 1001 (1905); Blinn v. Blinn, 122 Pa. Super. 452, 186 Atl. 281 (1936); Heflinger v. Heflinger, 136 Va. 289, 118 S.E. 316 (1923); Hahn v. Hahn, 104 Wash. 227, 176 Pac. 3 (1918); Annot., 15 A.L.R.2d 706 (1951).

[19] TEX. REV. CIV. STAT. art. 4640 (1948).

[20] It is interesting to consider what the purpose of this statute is, in light of its application to both parties, but restriction only to divorce grounded upon cruelty. One writer has stated that statutes such as the Texas statute "defy classification both in logic and in underlying policy." Note, 36 VA. L. REV. 665, 667 (1950). The Texas court, however, stated in the case of Nicholas v. Holder, 244 S.W. 313, 317 (Tex. Civ. App. 1951), that the purpose is to encourage the remarriage of the parties; that cruelty was the only ground for divorce in Texas where the parties would be likely to remarry.

[21] 115 Tex. 77, 273 S.W. 795 (1925).

[22] 195 S.W.2d 710 (Tex. Civ. App. 1946).

[23] 209 S.W.2d 1003 (Tex. Civ. App. 1948).

[24] The court declared that being a voidable contract of marriage, and valid until declared invalid by a judgment of annulment, it was subject like every other voidable contract to the defense of estoppel. Gress v. Gress, *ibid.*

[25] 49 Cal. 2d 210, 317 P.2d 613 (1957).

interlocutory judgment[26] which becomes final after one year.[27] An attempted second marriage before the final decree is void[28] and the California courts have consistently so held.[29] In the *Spellens* case the husband to the second marriage had induced the plaintiff to marry him in Mexico before a final decree on the representation that such a marriage would be valid everywhere. Plaintiff's later suit for separate maintenance was defended on the ground that the attempted marriage prior to a final decree was void. The Supreme Court of California held that the husband was estopped from asserting the invalidity of the marriage and awarded separate maintenance. A concurring opinion[30] stressed that the marriage was void ab initio.[31]

In what circumstances a party might have such a justiciable interest in the suit that an annulment would be granted is uncertain. The party seeking the decree would seem to be restricted to one having no knowledge of the alleged impediment. In such a case, however, it is not clear how mere nondisclosure of the prior divorce could alone constitute a sufficient ground for annulment without an express statutory provision. Although no cases have been found, the *Gress* case gives rise to the strong inference that a party without knowledge might obtain the annulment. However, in the face of the decisions which have consistently held that misrepresentation regarding a previous divorce, made to induce a Catholic to marry the one making the false representation, was not sufficient misrepresentation to constitute a basis for annulment,[32] such a conclusion would be highly doubtful. It would be difficult to imagine a fact situation in which a lack of knowledge of a prior divorce could constitute a more meritorious cause.

It is concluded that the statute was not intended to provide an additional ground for annulment. However, an annulment proceeding wherein the statute is asserted as an impediment which would render the marriage voidable, may reasonably be expected to arise in light of *Davis* which infers that the statute forms a basis for such suit. Should such a case arise, it would probably be a rare situation wherein the requisite knowledge to estop the party bringing the suit from asserting the impediment is absent.

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[26] CAL. CIV. CODE § 131 (1956).

[27] CAL. CIV. CODE § 132 (1956).

[28] For a discussion of void and voidable marriages, see 7 STAN. L. REV. 529 (1955).

[29] Sullivan v. Sullivan, 219 Cal. 34, 28 P.2d 914 (1934); Means v. Means, 40 Cal. App. 2d 469, 104 P.2d 1066 (1940).

[30] 49 Cal. 2d 210, 317 P.2d 613 (1957).

[31] For other cases applying estoppel to bar a party from asserting the invalidity of a marriage declared to be void, see Vitoff v. Vitoff, 90 N.Y.S.2d 534 (Sup. Ct. Kings County 1948); Bonney v. Bonney, 65 N.Y.S.2d 488, *aff'd without op.*, 271 App. Div. 1060, 70 N.Y.S.2d 133 (1947); Lodati v. Lodati, 49 N.Y.S.2d 805, *aff'd without op.*, 268 App. Div. 1003, 52 N.Y.S.2d 119 (1944). *Contra*, Landsman v. Landsman, 302 N.Y. 45, 96 N.E.2d 81 (1950).

[32] Oswald v. Oswald, 146 Md. 313, 126 Atl. 81 (1924); Cassin v. Cassin, 264 Mass. 28, 161 N.E. 603 (1928); Wills v. Talham, 180 Wis. 654, 194 N.W. 36 (1923).