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rough balance between the interests of disabled parties and the interests of the living. From a reading of the cases involving the "Dead Man" statute it is difficult to decide if it has worked any great hardship. When the statute is invoked the testimony is barred and one cannot tell what might have been the result had the testimony been admitted. However, regardless of any possible hardship, it is felt that the statute should be examined to see if it has outlived its purpose.⁸⁷ It was not enacted to protect a confidential relation, but was enacted to prevent fraud and unjust claims. At the present time, with the wide scope of cross-examination allowed, it is probable that a just result may be reached by allowing the unprotected party to testify and permitting the jury to decide the weight it will give to this testimony.⁸⁸ The legislature though protecting the estates of disabled parties must also protect the living and the interests of justice.

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Annulment Problems in Ohio

WHEN THE courts of Ohio are called upon to annul a marriage or determine the effect of the relations of the parties to an apparent marriage, the question often arises as to whether such marriage was valid, voidable or void. Whether the circumstances which make an annulment possible render a marriage void or only voidable is decisive in determining who may question its validity,¹ when the issue may be raised,² and what rights attach to the relationship.

The general equitable powers granted to the common pleas courts of Ohio form the basis of their jurisdiction over annulment of marriages.³ The existence and effect of the various grounds for annulment depend entirely upon judicial pronouncements, there being no statutes on annulment in Ohio.

At early common law, the existence of a civil disability, which went to the intention and consent to enter into such a contract, made a marriage

¹"The general rule as to estoppel arising from the marriage relation is that where a marriage is shown to be void, neither of the parties nor his or her representatives can, by any acts, be estopped from denying the voidness of the marriage, especially if neither believed a valid marriage to exist." 35 AM. JUR. 213.

²A void marriage may be attacked either before or after the person alleged incompetent dies. *Heath v. Heath*, 25 Ohio N.P. (N.S.) 123 (1924). A voidable one may not. *Heyse v. Michalske*, 31 Ohio L. Abs. 484 (1940).

³OHIO GEN. CODE § 11215. *Madden v. Shallenberger*, 121 Ohio St. 401, 169 N.E. 450 (1929); *Waymire v. Jetmore*, 22 Ohio St. 271 (1872); *Clowry v. Clowry*, 16 Ohio C. C. 302 (1898); *Vernon v. Vernon*, 9 Ohio Dec. Repr. 365 (1884).

void.⁴ The existence of a canonical disability, such as physical incapacity, consanguinity or affinity, made it voidable.⁵ Since then, for reasons of public policy, the demarcation has been relaxed, so that no present general classification or definition distinguishing void and voidable marriages is entirely satisfactory.⁶

Courts in Ohio have held that marriage in which one of the parties has a prior living spouse is void,⁷ as is a marriage between an uncle and a niece,⁸ a marriage of a mental incompetent,⁹ one in which the consent of one of the parties was obtained under duress,¹⁰ and one in which the parties knew there was no intention to keep the promises.¹¹ On the other hand, a proxy marriage without cohabitation,¹² a marriage between first cousins,¹³ one procured by fraud,¹⁴ and one in which a party is physically incapable of fulfilling the marital duties¹⁵ have been held to be voidable.

⁴ MADDEN, DOMESTIC RELATIONS 7 (1931).

⁵ State v. Moore, 1 Ohio Dec. Repr. 171 (1845); 26 OHIO JUR. 46.

⁶ "A marriage may be considered voidable although prohibited by law when it is possible, under any circumstances, for the parties to contract the marriage, and subsequently to ratify it, while it should be considered void if it is impossible for them subsequently by any conduct to ratify it, and if the statute expressly declares that the marriage is void." 35 AM. JUR. 212; Approved in Heyse v. Michalske, 31 Ohio L. Abs. 484 (1940).

⁷ Williams v. Williams, 90 Ohio App. 369, 106 N.E.2d 655 (1951); State v. Moore, 1 Ohio Dec. Repr. 171 (1845); Briscoe v. Reed, 9 Ohio Dec. Repr. 360 (1883) where defendant's prior wife made it possible for plaintiff to institute bastardy proceedings, as an unmarried woman.

In Kennelly v. Cowle, 4 Ohio N.P. 105 (1897) the wife was held not entitled to dower where the husband had a prior living wife. Fultz v. Fultz, 9 Ohio N.P. (N. S.) 593 (1910); Falkoff v. Sugarman, 26 Ohio N.P. (N. S.) 81 (1925). Cf. Smith v. Smith, 5 Ohio St. 32 (1855).

In Brenholtz v. Brenholtz, 19 Ohio L. Abs. 309 (1935), a separation agreement incorporated in a divorce decree, whereby the husband agreed to pay a stipulated sum monthly to the wife during her life or until she remarried, was held enforceable after the annulment of a marriage entered into by the wife with a third person who had a wife living and undivorced at the time.

In Smith v. Smith, 72 Ohio App. 203, 50 N.E.2d 889 (1943), the plaintiff was not estopped from a divorce by principles of "clean hands" because he knew of the invalidity of the defendant's Mexican divorce. Blaustein v. Blaustein, 77 Ohio App. 281, 66 N.E.2d 156 (1946) Crane v. Ward, 5 Ohio L. Abs. 98 (1926).

⁸ Heyse v. Michalske, 31 Ohio L. Abs. 484 (1940).

⁹ Waymire v. Jetmore, 22 Ohio St. 271 (1872); Goodheart v. Spear, 18 Ohio C. C. 679 (1893); Heath v. Heath, 25 Ohio N.P. (N.S.) 123 (1924). However, if the marriage was celebrated in another state, where it was valid, the Ohio courts will not avoid it. Seabold v. Seabold, 84 Ohio App. 83, 84 N.E.2d 521 (1948).

¹⁰ Smith v. Smith, 47 Week. L. Bull. [Ohio] 137 (1902).

¹¹ Conley v. Conley, 28 Ohio Op. 289 (1943).

It has also been recognized generally that a qualified consent gives rise to no marriage. MADDEN, DOMESTIC RELATIONS 8 (1931).

¹² Respole v. Respole, 34 Ohio Op. 1, 70 N.E.2d 465 (1946).

¹³ Walker v. Walker, 54 Ohio L. Abs. 153, 84 N.E.2d 258 (1948)

Ohio cases have held that a marriage in which one of the parties has a prior living spouse may be "ratified" by continued cohabitation after removal of the disability.¹⁶ This would seem to be in contradiction to the general concept of a void marriage. From the reasoning of these cases, however, it would seem that such "ratification" is not a retroactive affirming of the original contract but rather the creation of a common law marriage by an implication of the continuance of the original matrimonial promise *in praesenti*. Thus, it is the creation of a new relationship and not the affirmation of an old one.

It has been held in Ohio that the existence of a prior living spouse as a ground for divorce¹⁷ has not changed the rule that a marriage contracted by one with a prior living spouse is void.¹⁸ A recent Ohio Supreme Court decision,¹⁹ however, has held that in such a situation a divorce action, *not* an annulment action, is a proper proceeding.

Misapplication of the term "ratification" has resulted in confusion in determining whether the marriage of one under the statutory age of consent,²⁰ but above the common law age of consent,²¹ is void or voidable.

The weight of authority in the United States construes such a marriage

¹⁴ Meyer v. Meyer, 7 Ohio Dec. Repr. 561, *aff'd*, 7 Ohio Dec. Repr. 627 (1878); Miller v. Miller, 1 Ohio Dec. 354 (1900).

Generally, mistake as to the nature and legal consequences of the ceremony, or as to the identity of the other party, also renders a marriage voidable. MADDEN, DOMESTIC RELATIONS 9 (1931).

¹⁵ McDowell v. Sapp, 39 Ohio St. 558 (1883).

¹⁶ Johnson v. Wolford, 117 Ohio St. 136, 157 N.E. 385 (1927); Hale v. Graham, 85 Ohio App. 447, 86 N.E.2d 330 (1948); Ryan v. Ryan, 84 Ohio App. 139, 86 N.E.2d 44 (1948); Jenkins v. Jenkins, 30 Ohio App. 336, 164 N.E. 790 (1928); Johnson v. Dudley, 3 Ohio N.P. 196 (1896). *But cf.* Lumas v. Lumas, 26 Ohio App. 502, 160 N.E. 480 (1927), *cert. denied*, 25 Ohio L. Rep. 638 (1927).

Such ratification plus acknowledgement of a child legitimates that child regardless of its date of birth. OHIO GEN. CODE § 10503-15; Ives v. McNicoll, 59 Ohio St. 402, 53 N.E. 60 (1898); Wright v. Lore, 12 Ohio St. 619 (1861); Clinton County Nat. Bank & Trust Co. of Wilmington v. Todhunter, 43 Ohio App. 289, 183 N.E. 88 (1931).

¹⁷ OHIO GEN. CODE § 8003-1 (1).

¹⁸ Williams v. Williams, 90 Ohio App. 369, 106 N.E.2d 655 (1951); State v. Moore, 1 Ohio Dec. Repr. 171 (1845).

The purpose generally attributed to the inclusion of this ground in Ohio General Code Sec. 8003-1 was to permit the judicial determination and removal from the marriage records of the record of a marriage contract between parties who are not bound thereby. Smith v. Smith, 5 Ohio St. 32 (1855); Kennelly v. Cowle, 4 Ohio N.P. 105 (1897); Basile v. Basile, 86 Ohio App. 535, 93 N.E.2d 564 (1948).

¹⁹ Eggleston v. Eggleston, 156 Ohio St. 422, 103 N.E.2d 395 (1952).

²⁰ OHIO GEN. CODE § 8001-1 (eighteen years for males and sixteen years for females.)

²¹ MADDEN, DOMESTIC RELATIONS 28 (1931) (fourteen years for males and twelve years for females.)

to be merely voidable.²² The Ohio Supreme Court, in *Shafher v. State*,²³ held a marriage by a male under eighteen years of age to be void, although he could ratify it after reaching that age. In that case, Shafher appealed a conviction for bigamy. He had married one woman when he was sixteen. After leaving her, he cohabited with a second woman, whom he married after reaching eighteen. The court said that the first marriage was void and remained so unless acts of assent by him after reaching eighteen could be shown.²⁴ The court based its holding upon the old English view of nonage as a civil disability, which rendered the marriage void.²⁵

Later, the Ohio Supreme Court held that the marriage of a girl of fifteen became "irrevocable" upon ratification after reaching sixteen.²⁶ She had ratified solely by writing letters to her spouse, addressing him as her husband, and signing them by her Christian and his surname. Since the only evidence of ratification in the case was these letters, the court seemed to treat the marriage as voidable, rather than void, by holding that the husband might sue for alienation of affections. The court held that the parents of the girl could not entice her away from her husband merely because she was under age and had married without their consent.

Since then, cases in the lower courts have reiterated the doctrine of *Shafher v. State*.²⁷ However, in those cases the marriages had been ratified by cohabitation after the statutory age of consent was reached.

Then, in *Courtright v. Courtright*,²⁸ a lower court expressly held, in a decision which was affirmed without opinion by the Supreme Court of

²² MADDEN, DOMESTIC RELATIONS 28 (1931).

²³ 20 Ohio 1 (1851)

²⁴ The court also stated that if the first marriage were said to bind him unless he dissented therefrom after reaching the age of eighteen, the acts of Shafher were sufficient to constitute such dissent.

²⁵ It reasoned that unless such marriages were declared absolutely void youths would be irrevocably bound to a marriage in which advantage had been taken of their immaturity, the law furnishing no method of obtaining an annulment. *Shafher v. State*, 20 Ohio 1, 7 (1851).

²⁶ *Holtz v. Dick*, 42 Ohio St. 23 (1884).

²⁷ *Gill v. Gill*, 2 Ohio L. Abs. 14 (1923); *In re Zemmick's Estate*, 49 Ohio L. Abs. 353, 76 N.E.2d 902 (1946); *Ott v. Ott*, 3 Ohio N.P. 161 (1893), the marriage is void to the extent that the party under age may ignore it without judicial annulment or decree of divorce, and may marry again without bigamy; *Vernon v. Vernon*, 9 Ohio Dec. Repr. 365 (1884); *Heath v. Heath*, 25 Ohio N.P. (N.S.) 123 (1924); *State v. Wilcox*, 26 Ohio N.P. (N.S.) 343 (1926); *Pearlman v. Pearlman*, 27 Ohio N.P. (N.S.) 46 (1928); *Carlton v. Carlton*, 76 Ohio App. 338, 64 N.E.2d 428 (1945).

In *Moser v. Long*, 8 Ohio App. 10 (1916), the court went so far as to hold the marriage of a seventeen year old girl voidable where there was no cohabitation and a prompt repudiation, on the theory that the statute requiring parental consent was more than a directive statute. This idea has since been repudiated. *Allen v. Allen*, 21 Ohio L. Rep. 313 (1923); *Pearlman v. Pearlman*, 27 Ohio N.P. (N.S.) 46 (1928).

Ohio,²⁹ that the marriage of a girl of fifteen was voidable, not void. It stated that:

The statutes of this state provide, that a female may enter into the marriage relation upon arriving at the age of sixteen years, but do not declare that a marriage by her under that age is void. Hence, where a female over the common law age of twelve years, though under the statutory age of sixteen years, enters into the marriage relation in this state, while such marriage would be voidable at the election of the infant, it is by no means void³⁰

By this decision the husband was held entitled to his share of the wife's estate although she died before reaching the age of sixteen.

Two notable cases, *Klinebell v. Hilton*³¹ and *Peefer v. State*,³² have followed the *Courtright* case. In *Klinebell v. Hilton*, the common pleas court declared that the parents of a fourteen year old girl had no right to have the marriage annulled contrary to her wishes, for the power to avoid such a marriage lay only in the parties themselves. In *Peefer v. State*, a court of appeals likewise held such a marriage to be voidable solely at the option of the minor. Here the defendant, a forty year old man, had married a girl of fourteen in Kentucky. After they returned to Ohio, the defendant was indicted for contributing to the delinquency of a minor.³³ The court said that there could be no conviction unless it was determined that she was a delinquent. The court reasoned that she was not a delinquent unless she violated an Ohio law,³⁴ which she did not do unless the Ohio law makes the marriage void and not just voidable at her option.³⁵ By this decision, the court inferentially nullified an earlier case³⁶ in which a defendant in similar circumstances was convicted on the authority of *Shaffer v. State*.

At least a part of the confusion is due to the fact that those Ohio cases which hold the nonage marriages voidable ignore the cases in Ohio which

²⁸ 11 Ohio Dec. Repr. 413 (1887).

²⁹ *Courtright v. Courtright*, 53 Ohio St. 685 44 N.E. 1134 (1895).

³⁰ 11 Ohio Dec. Repr. 413 (1887).

³¹ 25 Ohio N.P. (N.S.) 167 (1924).

³² 42 Ohio App. 276, 182 N.E. 116 (1931).

³³ OHIO GEN. CODE § 1639-45 which at that time was OHIO GEN. CODE § 1654.

³⁴ Since this case, the definition of a delinquent child, OHIO GEN. CODE § 1639-2, was amended so that now a delinquent child includes any child, "5. who attempts to enter the marriage relation in this or any other state without the consent of its parents, custodian, legal guardian or other legal authority, as required by the laws of this state." There have been no reported cases found which mentioned this amendment as effecting the validity of such a marriage.

³⁵ The law of the state in which a marriage is celebrated is the law that governs the capacity of the parties to enter into the contract of marriage and the validity of a marriage of persons domiciled in this state, except when the statutes of this state declare such marriage void or when its celebration offends a strong public policy of this state. *Seabold v. Seabold*, 84 Ohio App. 83, 84 N.E.2d 521 (1948).

³⁶ *State v. Wilcox*, 26 Ohio N.P. (N.S.) 343 (1926).

hold the marriages completely void, while the latter ignore the former. In recent decisions, a fifteen year old boy has been denied an annulment because of a prospective offspring,³⁷ while a seventeen year old boy has been granted an annulment where there was a child.³⁸

The courts of Ohio have held that where the relation of the parties, through consanguinity or affinity, is close enough to fall within the Ohio criminal incest statute,³⁹ that is, where they are closer than first cousins, the marriage is void *ab initio*.⁴⁰ However, when first cousins marry in violation of the marriage statute,⁴¹ the marriage is voidable only, although one of the parties may be denied an annulment because of the equitable doctrine of clean hands.⁴²

The general rule is that the right to alimony attaches only to a valid marriage.⁴³ As to alimony *pendente lite*, the situation is somewhat different. The statutory provision for alimony *pendente lite*⁴⁴ was enacted to assist the wife in her action for divorce or separate maintenance.⁴⁵ Such temporary award may be granted even though at the final hearing the court may find in fact that no valid marriage existed. If the evidence, presented at the hearing for temporary alimony, as to the invalidity of the marriage is

³⁷ *Broadus v. Lear*, 22 Ohio L. Abs. 336 (1935) held the marriage voidable in contradiction to the *Shaffer* case because of the importance of the public policy against allowing the birth of illegitimate children. But see OHIO GEN. CODE § 10503-15.

³⁸ *Carlton v. Carlton*, 76 Ohio App. 338, 64 N.E.2d 428 (1945). The plaintiff lived with his wife only one month.

³⁹ OHIO GEN. CODE § 13023.

⁴⁰ *Heyse v. Michalske*, 31 Ohio L. Abs. 484 (1940), here an uncle and niece married.

⁴¹ OHIO GEN. CODE § 8001-1, "Who may contract matrimony. Male persons of the age of eighteen years, and female persons of the age of sixteen years, not nearer of kin than second cousins

⁴² *Walker v. Walker*, 54 Ohio L. Abs. 153, 155-156, 84 N.E.2d 258, 259-260 (1948) citing *Lamneck*, OHIO DIVORCE AND ALIMONY 200 (1948). The marriage of first cousins is valid in Ohio if valid where made. *Slovenian Mutual Benefit Assn. v. Knafelj*, 36 Ohio App. 562, 173 N.E. 630 (1930). No action can be maintained for breach of contract of marriage where the parties were first cousins. *Reed v. Reed*, 49 Ohio St. 654, 32 N.E. 750 (1892).

⁴³ 35 AM. JUR. 227; *accord Short v. Short*, 61 Ohio L. Abs. 49, 102 N.E.2d 719 (1951).

But it is to be noted that where an action for divorce is brought on the ground that one of the parties had a spouse living at the time of the marriage alimony may be granted. OHIO GEN. CODE § 8003-1; *Eggleston v. Eggleston*, 156 Ohio St. 422, 103 N.E.2d 395 (1952); *Vanvalley v. Vanvalley*, 19 Ohio St. 588 (1869)

⁴⁴ OHIO GEN. CODE § 8003-15.

⁴⁵ *Smith v. Smith*, 37 Ohio L. Abs. 468, 48 N.E.2d 661 (1942).

It would seem fairly clear from the position of the section allowing alimony *pendente lite*, within the chapter on divorce and alimony actions, and the wording of the section itself, that it was not designed to cover actions for annulment. However, it would seem that some such allowance ought to be made in cases where a party is required to defend an action for annulment. That the statute should apply in such cases, see *Smith v. Smith*, *supra* at 469, 48 N.E.2d at 661.

controverted, the court may in its discretion grant an award of alimony *pendente lite* if it believes that the plaintiff has a fair prospect of success in her action for divorce or separate maintenance.⁴⁶ The court, however, is without legal discretion to make an award where at the hearing for temporary alimony it is admitted that the marriage relied upon was not a valid marriage.⁴⁷

SUMMARY

The law in Ohio seems to be that the marriage of one who has a prior living spouse is void.⁴⁸ However, if after the death of that spouse or a divorce from him, the parties continue to cohabit, the previously void marriage may be "ratified."⁴⁹

In the case of a marriage by a person who is under the statutory age of consent but over the common law age, the law appears uncertain. Whether such a marriage is void as under the doctrine of the *Shaffer* case⁵⁰ or merely voidable as was held in the *Courtright* case,⁵¹ is a question still open for final judicial determination.

Where the marriage of two parties is in violation of the Ohio incest statute, the marriage is clearly void.⁵² On the other hand, if the marriage contravenes the marriage statute alone, it is voidable.⁵³

In an action for divorce or separate maintenance, alimony *pendente lite* may be awarded to a party, the validity of whose marriage is in issue, if the court acting in its discretion finds from the evidence presented in the hearing for temporary alimony that there is a reasonable likelihood that a valid marriage exists.⁵⁴

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⁴⁶ *Wilson v. Wilson*, 45 Ohio L. Abs. 494, 68 N.E.2d 149 (1945).

⁴⁷ In *Wolfer v. Wolfer*, 19 Ohio App. 12, 14 (1923), it was stated "the court is not required to go into the merits of the cause to allow alimony *pendente lite* and expenses necessary to prosecute the suit, but a valid marriage is a prerequisite to an allowance of alimony." *Fultz v. Fultz*, 9 Ohio N.P. (N.S.) 593 (1910).

⁴⁸ See note 7 *supra*.

⁴⁹ See note 16 *supra*.

⁵⁰ 20 Ohio 1 (1851).

⁵¹ 53 Ohio St. 685, 44 N.E. 1134 (1895).

⁵² See notes 39, 40 *supra*.

⁵³ See notes 41, 42 *supra*.

⁵⁴ See notes 46, 47 *supra*.