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## Divorce--Effect of General and Penal Restrictions on Extraterritorial Subsequent Marriages of Divorced Persons

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In the brief compass of this note, it has been possible to review only a few of the decisions of a comparatively small number of courts which have had to deal with special interrogatories; but from a brief review such as here undertaken, and bearing in mind that the problem herein discussed is statutory in nature, the conclusion that may well be reached is that the practice noted in recent decisions of the West Virginia Supreme Court of Appeals not only indicates a departure from the rule of construction applied to the statute permitting special interrogatories, previously well settled in this state, but also that perhaps it may not be strictly in accord with the adjudications of the courts of most of the other states having similar statutory provisions.

—G. D. H.

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**DIVORCE—EFFECT OF GENERAL AND PENAL RESTRICTIONS ON EXTRATERRITORIAL SUBSEQUENT MARRIAGES OF DIVORCED PERSONS.**—The West Virginia Code provides that neither party to a divorce suit shall again marry until six months after the date of the decree, except to each other, and that the court has the power to decree that the guilty party shall not again marry for such period after the date of the decree as the court shall deem wise, provided that it be not over five years. It is further provided that if either of the parties shall marry within the prohibited periods, except to each other, the marriage shall be void, and the party shall be criminally liable as if no divorce had been granted.<sup>1</sup> These drastic provisions when the restricted party does marry in defiance of the court should be especially noted. After the expiration of one year from the date of the decree the court may modify the restraint imposed on the guilty party if good reason is shown for such action.<sup>2</sup>

The restrictions to prevent divorced persons marrying again after a decree granted fall within two distinct classes,—one, the same time restriction is put on both parties regardless of guilt; and two, the restriction is imposed only on the guilty party. These have been handled so differently in the various jurisdictions that they are best hand-

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<sup>1</sup> W. VA. CODE, 1923, c. 64, §14.

<sup>2</sup> *Supra*, n. 1.

led as separate topics, in considering how the West Virginia court could well construe its code provisions when parties so bound do contract marriage outside of the state and return to live in it. The cases decided by the West Virginia court construing these code provisions are few in number. It has been decided generally that the only authority a court of equity has to forbid marriage after granting a decree of divorce is that allowed by statute, and therefore the court can set no limitations other than those the legislature has seen fit to set,<sup>3</sup> as statutes extending the jurisdiction of courts are to be construed strictly so that the courts' power will not be unduly extended in derogation of existing law.<sup>4</sup>

The first class of restrictions,—forbidding both parties to marry again, with the same time limitation on both regardless of guilt,—naturally assumes the greatest importance, as it applies to all divorces granted, so that the chances for its violation are much more numerous than is true of the purely penal restraint on the guilty party, which lies in the discretion of the court.

Some light on the problem can be had from the statutory law of Virginia, with a decision of the court construing it. The Virginia code provides that when a divorce is granted for any cause arising subsequent to marriage, neither party can marry again for six months from the date of the decree; and the marriage is not dissolved as to any marriage contracted after the decree, or in any prosecution therefore, until the expiration of the six months.<sup>5</sup> It further provides that if any person marry, having a husband or wife living, the marriage is void.<sup>6</sup> Under these provisions the court held at the suit of the *guilty* party,—the woman having been innocent,—that when a divorced person married a woman out of the state, within the six month period set by law as a restriction on marriage of divorced persons, both being domiciled in Virginia, and returning there to live, the marriage was void.<sup>7</sup> In an older leading Virginia case it was decided that a marriage validly contracted in another jurisdiction between a white and a negro, both resident in Vir-

<sup>3</sup> Underwood v. Underwood, 83 W. Va. 272, 98 S. E. 207 (1919).

<sup>4</sup> LEWIS' SUTHERLAND, STATUTORY CONSTRUCTION, 2nd Ed., §573 (1904).

<sup>5</sup> V. A. CODE, 1924, §5113.

<sup>6</sup> V. A. CODE, 1924, §5087.

<sup>7</sup> Hefinger v. Hefinger, 136 Va. 289, 118 S. E. 316 (1923).

ginia and returning there to live, was void in Virginia because against the public policy of that state, as exemplified in their statute making such marriage void.<sup>8</sup> The decision in the divorce case would seem to be consistent with the decision in the latter case, where the general rule,<sup>9</sup>—that a marriage valid where celebrated is valid everywhere,—is approved of, but the exception is laid down that as such marriage is against the public policy of the state of domicile it will not be recognized. In other words, there seems to be apparent the idea that both the state of marriage and the state of domicile will pass upon the validity of marriages of persons therein domiciled who go out of a state to marry in spite of its laws, and return to live in the state whose laws are being defied.<sup>10</sup>

In jurisdictions other than Virginia and West Virginia the restrictions on both parties equally, regardless of guilt, will be generally enforced even if the persons are married in another state where such marriage is valid.<sup>11</sup> An English case treats such a restriction as a condition subsequent, and holds that a party so bound cannot contract a valid marriage until the time limit has expired, on the ground that there is no capacity to marry until this condition has determined.<sup>12</sup> Virginia follows this view.<sup>13</sup> If the public policy of the state is to prevent hasty marriages of divorced persons, or to allow time for an appeal, this seems to be a reasonable view.

Marriages by divorced persons, with time restrictions on marrying again not yet expired, are commonly held void by the courts if the statute they are interpreting expressly declares such a marriage void.<sup>14</sup> They so hold,—even if the marriage is contracted in another state where the parties go to avoid the prohibition,—if they return to the state of domicile where the divorce was granted and the restraint im-

<sup>8</sup> *Kinney v. Commonwealth*, 30 Gratt. (Va.) 853 (1878).

<sup>9</sup> STORY, CONFLICT OF LAWS, 7th Ed. §113 (1872); AMERICAN LAW INSTITUTE, CONFLICT OF LAWS, Statement No. 2, §121 (a).

<sup>10</sup> AMERICAN LAW INSTITUTE, CONFLICT OF LAWS, Statement No. 2, §121 (b); EVERSLEY, DOMESTIC RELATIONS, 4th Ed. c. 16, §1 (1926).

<sup>11</sup> *Lanham v. Lanham*, 136 Wis. 360, 117 N. W. 787 (1908).

<sup>12</sup> *Warter v. Warter*, 15 Pro. Div. 152 (1890).

<sup>13</sup> N. 6, *supra*, where the court says, "The time when the divorce decree was to become operative had not yet arrived, and until it did become operative there was no divorce that fully dissolved the bond of the former marriage. \* \* the decree of divorce is not operative at all as to a subsequent marriage until the expiration of six months from the date of the decree. \* \* If not effective as a complete divorce in Virginia until the expiration of six months, it was not so effective in Maryland."

<sup>14</sup> 2 SCHOULER, MARRIAGE, DIVORCE, SEPARATION AND DOMESTIC RELATIONS, 6th Ed. §1924 (1921).

posed.<sup>15</sup> If the statute under which the divorce was granted so provides, such marrying party will be liable to criminal prosecution, but it can only be for the crime which the statute names and not for criminal contempt for violating the order of the court granting the divorce decree.<sup>16</sup> The courts lay emphasis on the fact that the statutes treat the innocent and the guilty alike,—where such is the fact,—and hold that if a legislature defines the public policy in a state to be against allowing speedy marriages after a divorce, in any event, a marriage contracted in disregard of the positive statutory prohibition will be void wherever contracted.<sup>17</sup> It is also, however, flatly laid down that restrictions on marriage after a divorce cannot have any extraterritorial effect, and that a party contracting a second marriage in a foreign state and returning to the state of domicile cannot be punished for bigamy.<sup>18</sup> This last statement, however, need not influence the West Virginia court, because the legislature has provided that any married person who, during the life of the husband or wife, marries another person within the state, or, if the marriage takes place outside of the state, cohabits in the state with such other person, shall be guilty of bigamy and be confined in the penitentiary.<sup>19</sup>

In the light of the wording of the West Virginia statutes, and of the adjudications in various jurisdictions on the point, it would seem that as to the fixed, statutory six months restriction to prevent either divorced person from marrying again within that time, the legislature intended to have such marriages held void no matter where contracted. This view is further strengthened by the fact that the marriage shall be void and the party shall be criminally liable as if no divorce had been granted. In interpreting statutes restricting marriage after granting a decree of divorce the courts have been markedly influenced by the presence or absence of such provisions,<sup>20</sup> as indicating legislative intent.

The other restriction,—on the guilty party alone,—pre-

<sup>15</sup> *Supra*, n. 13, §1980.

<sup>16</sup> *Supra*, n. 13, §1933.

<sup>17</sup> *Wilson v. Cook*, 256 Ill. 460, 100 N. E. 222 (1912).

<sup>18</sup> *KEEZER, MARRIAGE AND DIVORCE*, 2nd Ed. 631 (1923).

<sup>19</sup> *W. VA. CODE*, 1923, c. 149, §1.

<sup>20</sup> *Supra*, n. 13, §§1924, 1930, 1933.

sents a somewhat different aspect, in that it seems to be of a penal nature, and it is generally held that a penal law can have no extraterritorial effect.<sup>21</sup> So far as such marriages *within* the state are concerned it has been held in West Virginia that such restriction is valid and enforceable as a reasonable regulation of marriage and divorce. In the same case the provision for criminal prosecution is expressly held good; and also that the section of the code allowing restraints on divorced persons marrying again and fixing penalties for a violation of it, repeals another statutory provision which stated that a divorced person who married would not be liable for prosecution for bigamy.<sup>22</sup> The law being valid as to marriages contracted within the state the question arises as to whether the West Virginia court would recognize one validly contracted, in another state under its laws, by a party so restricted. It will be noted that the code places the two classes of restrictions on an equal footing, and puts the same penalty on both. Does this not indicate that they should be treated alike? The correct result would seem to be, as stated above, that the first class of restrictions should bind the parties no matter where they are married. It would therefore seem that, as statutes are to be construed as a whole with reference to any particular subject,<sup>23</sup> the legislature intended the second class to be on the same footing, and that marriages contracted in other states in violation of the restriction on the guilty party should be held void in West Virginia, and the guilty party be criminally punished as if no divorce had ever been granted. This view is further strengthened on the theory that,—by the express statutory provision,<sup>24</sup> making a married person, marrying again in another state, and cohabiting with the other person in this state, guilty of bigamy,—the legislature intended to penalize foreign marriages which are deemed to be against the public policy of the state.<sup>25</sup>

—C. P. W.

<sup>21</sup> *Commonwealth v. Lane*, 113 Mass. 458 (1873); STORY, *CONFLICT OF LAWS*, 7th Ed. §620 (1872).

<sup>22</sup> *State v. Snyder*, 89 W. Va. 96, 108 S. E. 588 (1921).

<sup>23</sup> 2 LEWIS' SUTHERLAND, *STATUTORY CONSTRUCTION*, §344 (1904).

<sup>24</sup> W. VA. CODE, 1923, c. 149, §1.

<sup>25</sup> *Supra*, n. 21, §443.