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# The Ohio Law of Marriage

Hugh A. Ross

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**Erratum**

In Ross, *The Ohio Law of Marriage*, 14 W. RES. L. REV. 724 (1963), Ohio Substitute House Bill No. 467 was discussed in a Postscript at page 763. When the article originally went to press the bill was pending before the Ohio Legislature. Immediately before the issue was printed, however, the author was informed erroneously by a private legislative reporting service that the bill had died in committee, as was indicated in the Postscript. In fact, the bill was enacted on June 6, 1963 as Ohio Revised Code sections 3105.31-.32 and became effective September 24, 1963.

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# The Ohio Law of Marriage

*Hugh A. Ross**

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## PART I. INTRODUCTION

### *Section 1 — Scope and Organization*

It is sometimes assumed that Family Law is not the kind of legal area — like Contracts or Trusts — that can be reduced to a coherent set of working rules. Among the obstacles cited are the variations between different states, the lack of agreement as to the scope of the field, the marked disagreements on the policy underlying much of our family law, especially the law of divorce and marriage, and the fact that much of our family law, both in its adoption and its administration, is strongly influenced by nonlegal factors.

THE AUTHOR (B.S., LL.B., Wisconsin, LL.M., S.J.D., Michigan) is a Professor of Law at Western Reserve University and a contributor to numerous legal periodicals. Since 1959, Professor Ross has served as University Counsel for Western Reserve University. He is a member of the American, Ohio, Wisconsin, and Cleveland Bar Associations.

As to the first obstacle, state variations, the solution adopted here is to concentrate on Ohio law. Only where there are no authoritative and recent Ohio cases have I gone outside the state, and then I have tried to use materials from states with a domestic relations policy as expressed in the statutes and cases similar to that of Ohio.

Regarding the second obstacle, disagreement as to the scope of the area, I have concentrated on a single aspect of domestic relations law, the formation of the marital status.

Concerning obstacle number three, the controversial nature of the subject, I can only state that the purpose is to present an honest and accurate analysis of the law. However, it would be almost impossible — and certainly very dull — to write in this field without taking sides on specific cases or theories. In every case where a preference has been expressed, I have tried to indicate conflicting policies and reasons for the choice. This article is based primarily on decisions of the past twenty years. The purpose is to give an up-to-date picture of the law, uncolored by the pattern of decisions rendered at a time when the attitude of the courts and society as a whole was considerably different than it is today. This is not to intimate that there is no value in the older decisions, but simply to recognize that times have changed and that to some extent the law has followed.

Finally, as to the last obstacle, the prevalence of nonlegal material in the area, it is my firm belief that the lawyer who knows all the law is only half-equipped to serve his clients in a domestic relations problem. The client who consults an attorney about a divorce or annulment problem is usually not interested in the law as such, but is deeply concerned with the human aspects of his personal tragedy, and he expects his at-

torney to share his concern. A knowledge of the law is not enough to deal successfully with a complex family problem and an emotionally disturbed client. The standard skills of the lawyer must be augmented by an additional group of techniques which relate to the attitudes and motivations of the parties. In addition, the attorney who handles a domestic relations problem may be called on to work closely with a court social worker, psychiatrist, doctor, minister, or marriage counselor. I have not discussed these extra-legal techniques in the text because others more competent have written elsewhere on the subject, a complete discussion would unduly lengthen the article, and because the subject is national in scope and not appropriate to an article on local substantive law. However, I strongly urge that every attorney in the field should broaden his knowledge of the nonlegal problems.[1-1]

As indicated, this article is a survey of the Ohio law on the formation of the marital status. Logically, the law of annulment should be treated, along with divorce, as part of the broad subject of the breakup of the family unit. However, the grounds for annulment relate to the failure to follow certain formalities in the creation of the marriage, or to the effect of disabilities, and for this reason this article on marriage also sets forth the substantive law of annulment. The procedural law of annulment is not discussed here, except that the two special procedural problems of choice of law and choice of divorce or annulment in Ohio are included at the end of the article.

For convenience in cross-referencing, the text of the article and the corresponding footnotes have been broken into separate sections.

### *Section 2 — Nature of Marriage*

While the word "marriage" has both legal and social connotations, as a legal term it is ambiguous in that it refers to two distinct concepts.

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1-1. There are a number of recently published books which are concerned either with the need for reform of our domestic relations law or with the overall picture. These books are recommended for law students and lawyers who do not specialize in domestic relations law as an invaluable aid to understanding the depth of the field and the relations between law and policy. The seasoned practitioner will find that these volumes may challenge him to reexamine some of his conceptions and they also will help him predict trends in this area.

One of the best recent publications is a group of four studies made of the organization and functions of domestic relations courts, prepared for the Interprofessional Commission on Marriage and Divorce Laws, an organization sponsored by the American Bar Association. These detailed case studies in judicial administration are published in VIRTUE, FAMILY CASES IN COURT (1956) (published by Duke University Press). The book is of special interest to Ohio lawyers as one study is devoted to a detailed description of the Family Court of Lucas County (Toledo) Ohio, whose presiding judge is chairman of the Interprofessional Commission and is one of the pioneers in the movement for domestic relations reform.

The best recent work on practice in the domestic relations area is SPELLMAN, SUCCESSFUL MANAGEMENT OF MATRIMONIAL CASES (1954) (published by Prentice-Hall). Written by an experienced trial lawyer from New York, this book is of interest to every practicing attorney. The chapters on pleading and trial procedure are based on New York law and are of little value outside of New York. However, the chapters on attorney-client relations and the lawyer's role in reconciliation should be read by every member of the profession.

"Marriage" means the legal status of wedlock. The term also refers to the act or contract necessary to enter into the status. The confusion arising from these separate meanings is compounded by the phrase so common in statutes and opinions: "marriage is a civil contract."

Marriage is *civil* in that no religious ceremony is necessary as a prerequisite to a legal marriage. The entry into marriage is a *contract,* although a special type. Like other contracts, it consists of an *agreement* between parties who have legal *eligibility* to marry. The contract is unlike other contracts in that there are special rules relative to formalities and eligibility which do not apply to ordinary contracts.

Marriage is also a *status*, involving certain rights and duties. These incidents are determined by the law and not by the parties. An example of the confusion between marriage as a contract and marriage as a status is found in Ohio Revised Code section 3103.01: "Husband and wife contract towards each other obligations of mutual respect, fidelity, and support." As a general statement of the law, the statute is clearly incorrect. The obligations mentioned arise from the status of marriage, and not from the contract; thus the parties could not expressly except the obligations of support from their marriage agreement.[2-1] The fact that marriage is primarily a status is shown by the case of *Maynard v. Hill*,[2-2] where the United States Supreme Court held that a legislative divorce did not violate the prohibition against state action which impairs the obligation of contracts.

Since marriage is a status with primarily local incidents, it is of state rather than federal concern. It seems clear that a state could abolish statutory marriage, abolish divorce, grant a divorce for any reason, or attach any obligation to the status without running afoul of the federal constitution.[2-3] The strength of this "local concern" doctrine is revealed by *State v. Agler*.[2-4] The defendant was a foreign diplomat stationed in Cleveland who was sued for divorce in a state court in Ohio. In spite of the language of the Constitution and the federal statutes which provide that federal courts have exclusive jurisdiction of all suits against foreign diplomats, the Ohio court was held to have jurisdiction.

### *Section 3 — Policy in Favor of Freedom of Choice*

Public policy strongly favors freedom of choice in regard to marriage. The decision whether or not to marry and the choice of a spouse is to be left to the persons most directly concerned. Thus, it is generally

2-1. OHIO REV. CODE § 3103.06.

2-2. 125 U.S. 190 (1888).

2-3. This assumes, of course, that procedural due process was complied with and that the legislation was not retroactive so as to impair vested property or contract rights.

2-4. 280 U.S. 379 (1930), *affirming* 119 Ohio St. 484, 164 N.E. 524 (1928).

held that a condition in a will or deed which is in general restraint of marriage is void, as is a condition which has this effect although not expressly stated.[3-1] On the other hand, conditions in partial restraint of marriage are valid if reasonable.[3-2] A condition not to marry a particular person, a member of a specific race or religion, or a prohibition against youthful marriage is usually held valid. About the only valid general restraint on marriage is a prohibition against remarriage by a widow or divorced spouse. Illustrative of the policy favoring free choice are cases which hold that corporate articles which tend to encourage hasty or unwise marriage are invalid,[3-3] contracts of marriage brokers are illegal,[3-4] and no action lies against a person who induces another to breach a promise to marry.[3-5]

Similarly, a contract or condition which tends to terminate an existing marriage is void. In two Ohio cases, a clause in a will left property to a remainderman if his wife were dead or divorced at the termination of the life estate. In both cases, the courts held the condition void and the remainderman took the legacy absolutely.[3-6]

## PART II — FORMALITIES IN THE CREATION OF THE MARITAL STATUS

### *Section 4 — Statutory Marriage*

Every state has a statute setting forth certain formalities which should be complied with by the parties to be married. Such a marriage is commonly referred to as a ceremonial marriage, or more accurately as a statutory marriage, as opposed to a common-law marriage. The state statutes are basically similar and include most of the provisions listed below. Like most such statutes, the Ohio Revised Code (Chapter 3101) is detailed and largely self-explanatory, and therefore is not discussed in detail in this article.

*Common Statutory Marriage Provisions*

(1) Minimum age of marriage. OHIO REV. CODE § 1301.01.

(2) Consent of parents if parties are minors. OHIO REV. CODE §§ 1301.01-.04.

3-1. King v. King, 63 Ohio St. 363 (1900) (dictum). See also cases collected in 3 PAGE, WILLS § 1302 (3d ed. 1941).

3-2. Saslow v. Saslow, 104 Ohio App. 157, 147 N.E.2d 262 (1957).

3-3. Attorney Gen. v. Marital Endowment Corp., 257 Mich. 691, 242 N.W. 297 (1932).

3-4. Morrison v. Rogers, 115 Cal. 252, 46 Pac. 1072 (1896).

3-5. Stiffler v. Boehm, 206 N.Y. Supp. 187 (Sup. Ct. 1924). See also 21 VA. L. REV. 125 (1934); 26 ILL. L. REV. 454 (1931).

3-6. Fineman v. Central Nat'l Bank, 161 N.E.2d 557 (Ohio P. Ct. 1959). Moores v. Guryne, 33 Ohio C.C. Dec. 463, 15 Ohio C.C.R. (n.s.) 31 (1911).

(3) Application for marriage license. OHIO REV. CODE § 3101.05.
(4) Blood test required. OHIO REV. CODE § 3101.05
(5) Official record of marriage. OHIO REV. CODE § 3101.13.
(6) License authorizing certain persons to officiate at marriage. OHIO REV. §§ 3101.08-.12.

The Ohio statute is unusual in one respect. Most states permit nonresidents to marry in their state. In Ohio, however, the wife must be a resident of the state and of the county where she applies for the license, unless the husband is in the armed forces.[4-1]

In states which have abolished common-law marriage, a common problem is the effect on the marriage of noncompliance with the technical requirements of the statute. This problem has not arisen in Ohio nor is it likely to so long as Ohio allows common-law marriages, since a defective statutory marriage is almost always valid as a common-law marriage.[4-2] In states which do not permit common-law marriages, the courts generally hold that bona fide substantial compliance with the statute is sufficient. Thus, technical irregularities, such as failure to file application for the license in advance, failure to observe the statutory waiting period, issuance of the license to a minor without parental consent, or failure of the judge or clerk to sign the license, do not invalidate the marriage.[4-3] Further, the doctrine of the *de facto* officer would validate a marriage where the person officiating acts in good faith as a person authorized to perform marriages, even though in fact he is not authorized. Thus, a justice of the peace whose term had expired or an unordained acting minister could perform a valid ceremony.[4-4]

### *Section 5 — History of Common-Law Marriage*

Ohio is one of the eighteen states which recognize marriages based on agreement between the parties without compliance with statutory procedures. The validity of such a marriage first came before an American court in *Fenton v. Reed*,[5-1] an 1809 decision of the New York Court of Appeals. The court upheld the marriage on the ground that no formal ceremony was required by the common law. It seems clear that the decision was incorrect. First, the court overlooked an early New York statute which prescribed marriage formalities and provided that an at-

4-1. OHIO REV. CODE § 3101.05.

4-2. Carmichael v. State, 12 Ohio St. 553 (1861).

4-3. Rediker v. Rediker, 212 P.2d 612 (Cal. App. 1950); Partwood v. Partwood, 109 S.W.2d 515 (Tex. Civ. App. 1937).

4-4. Knapp v. Knapp, 149 Md. 263, 131 Atl. 329 (1925); Note, 34 HARV. L. REV. 782 (1926).

5-1. 4 Johns. R. 52 (N.Y. 1809).

tempt to marry without compliance with the statute was a criminal offense. Second, the court assumed incorrectly that informal marriage was sanctioned by the common law of England at the time of the American Revolution. The fact was that informal marriage was tolerated by the Roman law from the time of the Roman Republic and by the Church in medieval times. Such marriages were recognized by the English canon-law courts until abolished by the Marriage Act of 1753. Since that time, informal marriages have been invalid in England, and the English courts have held that informal marriage has never been a part of the English common law.

*Fenton v. Reed* had a very important influence upon the other state courts, and when the Ohio Supreme Court was first faced with the problem, the court upheld common-law marriages,[5-2] citing cases from New York, California, Missouri, and Mississippi, all of which were based on *Fenton v. Reed*. They completely ignored the substantial body of case law which had rejected common-law marriage.[5-3]

Thus, remarkably, the important subject of the validity of an informal marriage in Ohio is at least partially based on the false premises accepted as correct by the New York Court.[5-4]

### *Section 6 — The Legal Effect of a Common-Law Marriage*

There is a popular misconception among laymen that a common-law marriage is somehow less binding than a statutory or ceremonial marriage. This view is clearly incorrect. Legally, a common-law marriage is just as valid for all purposes as any other kind of marriage. Like other marriages, a common-law marriage can only be terminated by death or divorce. Thus, a man who contracts a common-law marriage and then without benefit of divorce marries again can be prosecuted for bigamy.[6-1] Likewise, a death-bed repudiation of a common-law marriage by one of the parties is completely ineffective.[6-2]

The misconception referred to above has been given currency by occasional dicta in opinions of Ohio courts. In *Estate of Redman*, the Ohio Supreme Court said, "such informal marriages are seldom recognized and are held valid by courts only to protect the rights of innocent per-

5-2. Carmichael v. State, 12 Ohio St. 553 (1861).

5-3. The first American case to reject common-law marriage was Milford v. Worcester, 7 Mass. 48 (1810).

5-4. The most detailed judicial discussion of the history of common-law marriage is found in *In re* Robert's Estate, 58 Wyo. 438, 133 P.2d 492 (1943). See also KEEZER, MARRIAGE AND DIVORCE §§ 28-30 (3d ed. 1946).

6-1. Umbenhour v. Umbenhour, 12 Ohio C.C.R. (n.s.) 289 (Cir. Ct. 1909), *aff'd*, 85 Ohio St. 238, 97 N.E. 832 (1912).

6-2. *In re* Barrett, 48 Ohio Bull. 222 (P. Ct. 1904). See also Drach v. Drach, 9 Ohio N.P. (n.s.) 353 (Hamilton County Ct. 1910).

sons."[6-3] This statement, which was dictum in the *Redman* case, has been interpreted to mean that common-law marriages will be recognized only to protect the legitimacy of children, a doctrine which is applied in some states. Yet it is clear that the statement did not really mean what it seems to, but means rather that the marriage may be upheld at the behest of the parties to it.[6-4] The statement is indicative of the confusion between the effect of a common-law marriage and the amount of proof necessary to sustain it. An analysis of the cases decided since the *Redman* case demonstrates that the courts are more apt to sustain a common-law marriage where the rights of children or other heirs are involved. Where the issue of validity is raised by the parties themselves for selfish reasons, as for example in support or probate cases, the courts will scrutinize the evidence closely and require proof of the alleged marriage by clear and convincing evidence.[6-5]

### *Section 7 — The Essentials of a Common-Law Marriage*

The first essential of a common-law marriage is the capacity of the parties to contract marriage. The rules as to capacity are the same for a common-law marriage as for a statutory marriage and are dealt with in later sections of this article.

The second essential element of a common-law marriage is a contractual agreement to presently enter into the marital status. No particular form or wording is necessary. The contract need not be in writing, nor witnessed.[7-1] The contract must be made *per verba de praesenti, i.e.,* by words in the present tense. Dictum in some of the older cases indicated that mutual promises to marry in the future, followed by cohabitation, would constitute a valid marriage. This supposed rule has been expressly rejected in Ohio[7-2] and apparently is not accepted in any state today.

There is one area where the Ohio law on common-law marriage is still in doubt. Are the elements of capacity and agreement the only es-

6-3. 135 Ohio St. 554, 558-59, 21 N.E.2d 659, 661 (1939). See also *In re* Speeler's Estate, 22 Ohio L. Abs. (P. Ct. 1936).

6-4. Markley v. Hudson, 143 Ohio St. 163, 54 N.E.2d 304 (1944).

6-5. *Ibid.;* Umbenhower v. Labus, 85 Ohio St. 238, 97 N.E. 832 (1912); Gatterdam v. Gatterdam, 86 Ohio App. 29, 85 N.E.2d 526 (1949). The burden of proving the agreement by clear and convincing evidence may be almost impossible to overcome in some situations. A recent court of appeals decision held that where the alleged common-law wife tried to qualify as a widow of the deceased, the "dead man" statute prevented her from testifying as to the agreement. Lynch v. Romas, 139 N.E.2d 352 (Ohio Ct. App. 1956). As further evidence of a recent trend toward imposing a high standard of proof in these cases, see *In re* Estate of Maynard, 117 Ohio App. 315 (1962); Skorapa v. Skorapa, 177 N.E.2d 310 (Ohio P. Ct. 1961); Etter v. Von Aschen, 163 N.E.2d 197 (Ohio P. Ct. 1959); Brastein v. Sedivy, 153 N.E.2d 541 (Ohio P. Ct. 1957).

7-1. See cases cited in note 6-5 *supra.*

7-2. Duncan v. Duncan, 10 Ohio St. 181 (1859).

sentials of a valid common-law marriage, or is performance of the agreement also required? A few states have held that performance of the agreement, *i.e.,* cohabitation as husband and wife, usually evidenced by reputation of the marriage in the community, is required before such a marriage becomes valid. The great weight of authority is that cohabitation is not required. A typical statement of the majority rule is found in a Minnesota case where the court said:

> The whole law on the subject is that, to render competent parties husband and wife, they must and need only agree in the present tense to be such, no time being contemplated to elapse before the assumption of the status. If cohabitation follows, it adds nothing in law, although it may be evidence of marriage. It is mutual, present consent, lawfully expressed, which makes the marriage.[7-3]

Another clear-cut example of the majority rule is *Great Northern Ry. v. Johnson,*[7-4] where the bride and groom, living in different states, attempted to contract a common-law marriage by mail. The offer of present marriage was accepted by mail, and the husband died before any cohabitation occurred. The court held that the marriage was valid.

In spite of occasional text statements to the contrary, this problem has never been adjudicated in any reported Ohio case. In all of the Ohio cases there was proof of cohabitation, so that any statement by the court that cohabitation and "holding out" are essential elements of a marriage was clearly dictum. In *Umbenhower v. Labus,*[7-5] the leading Ohio case on common-law marriage, the syllabus states that an agreement *in praesenti* followed by cohabitation and reputation establishes a valid marriage, thus inferring that cohabitation is essential. Yet the opinion states, "the evidence of the marriage, in part at least, consists in the immediate and continued course of conduct of the parties in reference to each other in their domestic and social life."[7-6] This quotation indicates that the court thought of cohabitation essentially as strong evidentiary proof of the agreement, but not essential to the marriage where the agreement can be proved by other means. The later case of *Markley v. Hudson*[7-7] repeated the syllabus of the *Umbenhower* case, and also repeated the quotation given above as syllabus number two, thus failing to resolve the matter. A substantial number of lower courts have repeated the syllabus of the *Umbenhower* case and stated as dictum that cohabitation is required. Two recent cases are the only ones in which the problem is carefully considered, and both cases in dictum state a preference for

7-3. Estate of Hulett, 66 Minn. 327, 69 N.W. 31 (1896).

7-4. 254 Fed. 683 (8th Cir. 1918).

7-5. Umbenhower v. Labus, 85 Ohio St. 238, 97 N.E. 832 (1912).

7-6. *Id.* at 244, 97 N.E. at 833.

7-7. 143 Ohio St. 163, 54 N.E.2d 304 (1944).

the majority view. In *Leibrock v. Leibrock*, the court states: "There is ample respectable authority holding that cohabitation and reputation are not essential to a common-law marriage . . . cohabitation and reputation merely become evidential facts which permit the existence of the contract to be inferred."[7-8] In *Gatterdam v. Gatterdam*,[7-9] the court concludes that the language of the *Umbenhower* and *Markley* cases lends strength to the theory that reputation and cohabitation are only evidential elements, and the *sine qua non* of common-law marriage is the agreement. In both of these cases the conclusions expressed were dictum as cohabitation was proved.

Several conclusions can be drawn from the cases. First, it is agreed by all that a contract *in praesenti* is a requisite of common-law marriage. The agreement need not be expressly proved, but can be inferred from cohabitation and reputation.[7-10] Second, the question of whether cohabitation and reputation are evidential elements only, or are vital prerequisites to the marriage, has not yet been decided in Ohio and could be decided either way.

The issue will probably arise where the husband dies shortly after the agreement and the wife is claiming a widow's share. If there is no cohabitation proved, and the only evidence of the agreement is the testimony of the alleged wife, the court need not decide if cohabitation is necessary. It could rule against the marriage on the ground that the unsupported testimony of one party does not satisfy the requirement that the agreement must be proved by clear and convincing evidence. If the agreement is clearly proved, such as where it is written, as in the *Great Northern Railway* case *supra*,[7-11] or where there are independent witnesses to an oral ceremony, the court will have to face the issue. It is submitted that in such a case the court should follow the majority view and uphold the marriage. If the minority rule is followed, the next question is the quantum of proof of cohabitation and reputation necessary. This is difficult to determine, and a rule which requires only clear proof of the agreement is much easier to administer. Further, it is clear that no cohabitation is necessary for a valid statutory marriage. There is some utility in adopting a consistent rule which applies to all marriages, as long as the statutory ceremony or the common-law contract can be clearly established. Finally, if the minority rule is adopted, it seems logically inconsistent to say that the relations between the parties do not ripen into marriage until an indefinite period of cohabitation and "hold-

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7-8. 107 N.E.2d 418, 422 (Ohio C.P. 1952).

7-9. 86 Ohio App. 29, 85 N.E.2d 526 (1949).

7-10. Markley v. Hudson, 143 Ohio St. 163, 54 N.E.2d 304 (1944).

7-11. 254 Fed. 683 (8th Cir. 1918).

ing out" has occurred, and yet provide, as the Ohio law does, that such cohabitation is a criminal offense.[7-12]

*Section 8 — Proxy and Absentee Marriages*

A proxy marriage is one in which one or both of the principals are absent and are represented by an agent or proxy who is present with authority to act for his principal in the marriage ceremony. An absentee marriage is one in which the parties contracting marriage are not in each other's physical presence, but perform the ceremony at a distance. An example of the latter is a war-time trans-Pacific radio-telephone marriage, where the wife was on a telephone in Florida, the husband was on another telephone overseas, and the officiating minister was on an extension in Florida. The marriage was held to be a valid ceremonial marriage by the Florida Attorney General.[8-1]

Historically, such marriages were recognized by the Catholic Church about 1300 A.D. and are expressly authorized today in most Latin American countries.[8-2] A few states have legislation on the subject, but the great majority neither expressly prohibit nor approve such marriages. The Ohio statute requires the personal presence of both parties when applying for a license although there is no express requirement of personal presence at the ceremony.[8-3] By implication, a proxy or absentee marriage would probably not qualify as a valid statutory marriage under Ohio law.

During World War II and the Korean conflict, there were a number of proxy and absentee marriages, the validity of which has been tested in several recent cases. Most courts hold that the law of the jurisdiction where the ceremony is held governs the validity of a proxy marriage, and if valid where performed, it is valid everywhere. Thus, a Mexican double-proxy marriage between an overseas soldier and an Ohio girl was held valid by an Ohio court where the ceremony was a valid statutory marriage under the law of Mexico.[8-4] In the case of an absentee marriage, such as one by telephone where the marriage purports to be a ceremonial marriage, the law of the state where the minister is located governs, rather than the law of the states from which the parties are telephoning.[8-5] Where an absentee marriage is treated as a common-law marriage, the contract must be divided into an offer and an acceptance,

7-12. OHIO REV. CODE § 2905.08 forbids cohabitation in a state of fornication.

8-1. FLA. OPS. ATT'Y GEN. 490 (1943-44).

8-2. Lorenzen, *Marriage by Proxy*, 32 HARV. L. REV. 473 (1919).

8-3. OHIO REV. CODE § 3101.05.

8-4. Hardin v. Davis, 30 Ohio Op. 524 (C.P. 1945).

8-5. FLA. OPS. ATT'Y GEN. 490 (1943-44).

and the law of the state where the acceptance occurs governs the validity of the marriage.[8-6]

In jurisdictions where a common-law marriage is valid, a proxy or absentee marriage is valid unless the state requires cohabitation in addition to an agreement.[8-7] In a recent case, a soldier in Burma married a girl in West Virginia by proxy. Upon his return from service and prior to any cohabitation, he sued in an Ohio court for annulment. The court held that the marriage was not a valid ceremonial marriage since the West Virginia statutes did not expressly authorize proxy marriages. This seems to be a questionable decision since the statute does not forbid them, and the weight of recent authority seems to validate such a marriage unless expressly prohibited.[8-8] The court then considered the marriage a common-law marriage and held that it was valid since West Virginia law requires both agreement and cohabitation.[8-9]

Such marriages have been sustained in other recent cases outside of Ohio[8-10] and probably would be sustained in Ohio as valid common-law marriages. They would certainly be valid if the Ohio courts were to adopt the majority view that cohabitation is not an essential of a common-law marriage.[8-11] It should be noted that at one time proxy marriages were a common method of evading the immigration laws. However, the McCarran-Walter Act of 1952[8-12] provides that for immigration and naturalization purposes, proxy and absentee marriages are not valid unless the marriage has been consummated.

## PART III — DISABILITIES

### *Section 9 — General*

As already noted in Section 2 *supra,* entry into marital status consists of a contract evidenced by certain *formalities* in its execution and consisting of a mutual *agreement* between parties who have legal *eligibility* to marry. Where any one of these three factors is absent, the marriage is either void or voidable.

8-6. In Great Northern Ry. v. Johnson, 254 Fed. 683 (8th Cir. 1918), the groom sent a letter from Minnesota, proposing immediate marriage. The bride received the letter in Missouri, signed her acceptance on a duplicate copy, and mailed it to the groom. The court upheld the marriage as a valid absentee common-law marriage under Missouri law.

8-7. United States v. Layton, 68 F. Supp. 247 (S.D. Fla. 1946); Noted 32 IOWA L. REV. 774 (1947); 21 SO. CALIF. L. REV. 206 (1948); 25 TEXAS L. REV. 681 (1947).

8-8. See cases cited Howery, *Marriage by Proxy and Other Informal Marriages,* 13 U. KAN. CITY L. REV. 38 (1944). See also 33 DECS. COMP. GEN. 446, 447 (1954); 32 DECS. COMP. GEN. 144 (1952), holding that the majority common-law rule in the states is that proxy marriages are valid unless expressly prohibited by statute or judicial decision, and that the majority common-law view validates common-law marriage where no cohabitation has occurred.

8-9. Respole v. Respole, 70 N.E.2d 565 (Ohio C.P. 1956).

8-10. United States v. Barrons, 91 F. Supp. 319 (N.D. Calif. 1950); Fernandes v. Fernandes, 87 N.Y.S.2d 707 (App. Div. 1949); Ferraro v. Ferraro, 77 N.Y.S.2d 246 (Kings County Ct. 1948).

8-11. See notes 7-3 — 7-11 *supra.*

8-12. McCarran-Walter Act, U.S.C. § 1101(a)(35) (1953).

Certain factors which impair the validity of a marriage relate to the agreement itself. Like other contracts, the marriage contract must be made by persons who have mental capacity to contract. The rules relating to insanity and intoxication are essentially the same for both types of contracts. Nonmarital contracts by minors are voidable, and in the marital area we have a parallel rule. For policy reasons, the rules here are different, and the term "nonage" is used in marriage law because the alternatives, "infancy" or "minority," have a technical meaning in contract law; they refer to someone who is not yet twenty-one years of age. Finally, marriages like other contracts may be avoided if the agreement is the result of fraud, duress, or mistake. Marriage is usually much more difficult to avoid on these last three grounds than most contracts because of a strong public policy in favor of preserving an existing marital status.

Assuming that the parties have complied with the formalities and have made a valid agreement, there remain certain classes of defects which relate to eligibility to enter into marital status. The first group of factors relates to the physical health of the parties. A second category includes factors which make it unlawful for a person to marry anyone who comes from a specified group or class. Incestuous marriages are included in this category, barring marriage between persons of a certain relationship by blood or marriage. Miscegenous marriages between persons of different races are also included. The third defect is a disability imposed by the law which makes it impossible for a person who is already married to contract a valid marriage with anyone. At common law, a bigamous marriage was absolutely void. This rule has been modified somewhat in Ohio. Further, a marriage which is bigamous in inception, but where cohabitation occurs after the impediment is removed, may be a valid common-law marriage.[9-1]

### *Section 10 — Relation Between Disabilities and Annulment Law*

Most of the cases involving disabilities are annulment cases. For this reason, the nature of the rules and the effect of a particular disability in making a marriage either void or voidable depend in some degree upon the development of annulment law. Historically, the judicial disaffirmance of a voidable marriage was referred to as an annulment action, while a declaration that a marriage was void was properly called a declaration of nullity or a libel of nullity. This distinction is still adhered to in some states, but in Ohio and in this article, the term annulment is used to refer to either type of action.

At the time of the American Revolution, the English common-law

9-1. See Section 20 *infra.*

courts had not established a body of law dealing with marriage or annulment since jurisdiction in annulment cases was exclusively vested in the ecclesiastical courts. After the separation from England, it was universally conceded that no court in this country directly succeeded to the jurisdiction or body of substantive law of the canon-law courts. Thus, the problem arose as to what law should be applied. A few states solved the problem by legislation, adopting a detailed annulment code. In Ohio there has been no such statutory treatment of the subject. In the absence of statute, most states, including Ohio, have held that the equity courts have inherent jurisdiction to annul marriages, just as they may rescind other contracts.[10-1] American courts have generally held that an equity court can annul a marriage for civil disability, but not for canon-law disability unless some statute indicates that the policy of the state is in accord with the canon-law rule. Thus, defects which would render any contract invalid, such as fraud, duress, or insanity, constitute civil defects and no statute is necessary. However, defects which have no parallel in normal contract recision cases, such as the defects of impotency or incest, are treated as canon-law disabilities and not part of normal equity jurisprudence.

### *Section 11 — The Effect of the Disability: Void or Voidable*

The question of whether a particular defect renders a marriage void or voidable will be discussed in subsequent sections in connection with each specific defect. A few introductory observations are worth inserting at this point so that the conflicting doctrines may be reconciled. Generally, the older decisions classified each defect as void or voidable, the choice resting largely upon historical precedent. Under early common law, canon-law disabilities apparently rendered a marriage voidable, and the marriage was valid for all purposes until avoided by court decree. Where the court was faced with a civil defect, the usual solution was to adopt the comparable rule from contract law. The normal contract rule seems to be that insanity voids a contract, while fraud, duress, and minority render a contract voidable.[11-1] These rules, to some extent, have been assimilated into marriage law.

Where a court concludes that a defect renders a marriage *voidable*, the usual consequences attached by the law are as follows:

(1) The marriage can be ratified by acts or conduct of the parties after the defect is removed.

(2) The marriage is valid until avoided by a court decree, that is,

10-1. Waymire v. Jetmore, 22 Ohio St. 271 (1872).

11-1. RESTATEMENT, CONTRACTS §§ 13, 18, 431(b), 476 (1932).

no self-help remedy is permitted. The parties cannot disaffirm the marriage by walking away from it.

(3) The marriage can be disaffirmed only in a direct suit between the parties to the marriage. No collateral attack on the marriage is permitted.

Where a court concludes that a marriage is *void,* the usual incidents attached to the finding are the converse of the above. That is:

(1) Ratification is ineffective.

(2) The marriage is invalid without the necessity of a court decree.

(3) Collateral attack on the marriage is permitted.

It should be apparent that the terms void and voidable are simply verbal labels used to describe the total of the above three factors.[11-2] It also is clear that there is no logical necessity for classifying marriage in only two ways, void or voidable, in terms of the above three rules. Thus, it would be possible to hold that a marriage is void in that no court decree is necessary and collateral attack is permitted, and still hold that ratification is possible. This is exactly what the Supreme Court of Ohio has done as to nonage marriages.[11-3]

The point is that a court should not blindly attach the label void or voidable to a defect without understanding the effect of the label. Fortunately, most modern courts do look to the effects of the label and decide that the marriage is void or voidable on the basis of policy considerations. One of these considerations involves the strength of public policy against the marriage. Thus, if there is very stong sentiment against a particular marriage, for example, a miscegenous marriage in the South, the court will usually declare the marriage void. If the marriage is between first cousins, the court will usually hold such a marriage voidable as there is no strong public bias against such a marriage.[11-4] Another factor which often influences the court is the relative ease of proof. Where a defect is difficult to prove, and is of the type which could be invented years after the marriage to evade obligations of support, the court is apt to hold such a marriage voidable and then bar the plaintiff on the basis of unclean hands or ratification. The defects of fraud and insanity are examples of this situation.

A final word of caution is necessary. In most judicial opinions, the

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11-2. The three factors listed are not the only incidents of the labels void and voidable, although they are the most common. Several courts have held that lack of clean hands is a defense in an annulment action based on a voidable marriage, but not in an action based on a void marriage. Further, the decree in an annulment of a void marriage is sometimes related back to the time of the marriage, whereas it becomes effective only when rendered in the case of a voidable marriage. To the extent that an annulment decree relates back to the date of the marriage, see Note, 7 STAN. L. REV. 529 (1955).

11-3. Shafher v. State, 20 Ohio 1 (1851).

11-4. Walker v. Walker, 84 N.E.2d 258 (Ohio C.P. 1948).

statement that a marriage is void or voidable is dictum. In the typical annulment case, the suit is between the parties, collateral attack or ratification is not involved, and the decision would be the same whether the marriage were treated as void or voidable.

### *Section 12 — Insanity and Intoxication*

A person who is insane or mentally ill at the time of the marriage ceremony cannot contract a valid marriage. The mental incapacity must exist at the time of the ceremony, and if the ceremony takes place during a lucid interval, the marriage will be valid. The test of capacity to marry is essentially the same as the test used in cases of capacity to make a contract, deed, or will. In one case, the court said that each party to the marriage must understand the nature of the marital contract and the duties and responsibilities of the marital status.[12-1]

The Ohio cases are in accord with the weight of authority in other states that neither guardianship nor commitment by the probate court are conclusive on the issue of mental capacity.[12-2] The cases generally hold that the burden of proving insanity is on the person attacking the marriage, since sanity is presumed and there is a strong presumption favoring the validity of a marriage which complies with legal formalities. Where marriage takes place during a period when the person is under guardianship for insanity or subject to a judicial commitment order, the courts hold that the decree is prima facie evidence of insanity, and sanity must be proved by clear and convincing evidence.[12-3] The cases which hold that commitment to a mental hospital is not conclusive of capacity to marry were all decided prior to the enactment in 1939 of Ohio Revised Code section 5122.36. This statute provides, with certain exceptions, that indeterminate hospitalization under court order is also an adjudication of mental incompetency.[12-4] This statute appears to make evidence of commitment conclusive on the issue of capacity to marry. The only Ohio decision on this issue assumed that this was the effect of the statute,

12-1. Dozer v. Dozer, 8 Ohio L. Abs. 507 (Ct. App. 1930). Note that the language used to describe the test is essentially the same as that used by the Ohio Supreme Court to describe testamentary capacity. See Niemes v. Niemes, 97 Ohio St. 145, 119 N.E. 503 (1917).

12-2. Dozer v. Dozer, *supra* note 12-1; McCleary v. Barcalow, 6 Ohio C.C.R. 481 (Cir. Ct. 1891); Heath v. Heath, 25 Ohio N.P. (n.s.) 123 (C.P. 1924); Goodheart v. Ransley, 11 Ohio Dec. Reprint 655 (C.P. 1892), *aff'd,* Goodheart v. Speer, 18 Ohio C.C.R. 679 (Cir. Ct. 1893).

12-3. Heath v. Heath, *supra* note 12-2.

12-4. Prior to the revision of the Mental Hospitalization Act, effective October 25, 1961, the comparable section was OHIO REV. CODE § 5123.57, which provided that a patient in a state mental hospital was incompetent to enter into any agreement without probate court approval. Apparently the new statute applies to patients in private hospitals as well, so long as they are under court commitment. The statute applies to both patients in residence, and to patients on "trial visit" or out-patient status. The present section, 5122.36, was amended again during the past session of the legislature. See H.R. 758, 105th Gen. Assembly (1963).

but held that the statute did not invalidate a marriage by a patient on a trial visit from an Ohio mental hospital where the marriage took place outside Ohio.[12-5]

There are no Ohio cases directly in point on whether an insane marriage is void or voidable, although the cases contain dictum both ways.[12-6] The lower courts in Ohio have held that the insane party to the marriage can ratify the marriage after he becomes sane, thus indicating that the marriage is merely voidable.[12-7] There are no Ohio cases in which the issue involved a collateral attack on such a marriage, nor are there any cases involving the right of the parties to disaffirm the marriage by actions other than court decree.

Suit to annul the marriage may be brought by the guardian or by the party who was insane, provided he is sane at the time he brings the action.[12-8] If the sane spouse sues the spouse under guardianship for divorce, the guardian may cross-petition for an annulment without the consent of his ward.[12-9] In one case, the guardian filed the action prior to the death of the ward, and the court held that the action did not abate, but could be continued by the administrator of the deceased.[12-10]

There are no cases in Ohio involving the right of the sane spouse to sue for annulment. Generally, the right of the sane party to annul depends on whether the defect renders the marriage void or voidable. Those states which by statute or case law hold the marriage void permit the sane partner to sue unless he had knowledge of the insanity at the time of the marriage.[12-11]

Intoxication caused by alcohol or narcotics at the time of marriage invalidates the marriage for the same reason that insanity avoids it: the lack of intelligent consent. Although there are no Ohio cases on the subject, the rules of insanity probably would be applied. Cases from other states indicate that intoxication alone will seldom serve to invalidate a marriage. As stated by a Texas court: "To avoid a contract on this ground, the obligor must have been so drunk as to have dethroned

12-5. Seabold v. Seabold, 84 Ohio App. 83, 84 N.E.2d 521 (1948). See also OHIO OPS. ATT'Y GEN. 7106 (1956).

12-6. McDowell v. Sapp, 39 Ohio St. 558 (1883) (insane marriage voidable and may be ratified — dictum); Waymire v. Jetmore, 22 Ohio St. 271 (1872) (insane marriage void — dictum); Benton v. Benton, 16 Ohio C.C.R. (n.s.) 121 (Cir. Ct. 1909) (insane marriage void — dictum); Heath v. Heath, 25 Ohio N.P. (n.s.) 123 (C.P. 1924) (insane marriage void but could be ratified — dictum); Goodheart v. Ransley, 11 Ohio Dec. Reprint 655 (C.P. 1892) (void but could be ratified — dictum).

12-7. See cases in note 12-6 *supra.*

12-8. *Ibid.*

12-9. Duncan v. Duncan, 88 Ohio App. 243 (1950).

12-10. Heath v. Heath, 25 Ohio N.P. (n.s.) 123 (C.P. 1924).

12-11. The problem is discussed in detail in Hoadley v. Hoadley, 244 N.Y. 424, 155 N.E. 728 (1927). See also Friedman v. Friedman, 64 N.Y.S.2d 660 (Sup. Ct. 1946).

reason, memory and judgment. . . ."[12-12] As a practical matter, suits to avoid a marriage for intoxication are almost never successful. In this field, judges and jurors view with extreme scepticism the plaintiff who testifies that he was so drunk that he did not know what he was doing, and yet admits that he stood up before the minister without falling flat on his face.[12-13]

### *Section 13 — Nonage*

The "age of consent" is the age at which a person can enter into a valid marriage; and a marriage in which one or both of the parties is below this age is referred to as a "nonage" marriage. Unlike other contracts, a marriage entered into by a minor who is over the age of consent cannot be avoided when the minor reaches majority. This is because marriage is not only a contract, but also a status involving social interests and interests of third persons such as children. But a minor's promise to marry can be avoided like any other contract, as none of the incidents of the status have been assumed.

The age of consent under the common law was 14 for males and 12 for females. A marriage below the age of 7 was void, and a marriage over age 7 and below the age of consent was voidable. The present statute provides that males aged 18 and females aged 16 may marry.[13-1] The other provisions of the marriage chapter have been held to be directory rather than mandatory — thus the lack of a license does not invalidate a marriage. One might assume that the age statute would be construed the same way, but the Ohio courts have without exception held that the statute does more than fix the age at which a license may issue; it fixes the age of consent.[13-2] Thus, it seems clear that a marriage below the statutory age is invalid whether it is a ceremonial or a common-law marriage. The same section of the code also provides, in equally mandatory terms, that the consent of the parents must be obtained if the party is under age 21, and yet Ohio, as most states, holds that lack of parental consent has no effect on the validity of the marriage.[13-3]

Although a nonage marriage is invalid, it may be ratified when the

12-12. Wells v. Houston, 23 Tex. Civ. App. 629, 648, 57 S.W. 584, 594 (1900). See also Annot., 57 A.L.R.2d 942 (1958).

12-13. Feigenbaum v. Feigenbaum, 210 Ark. 186, 194 S.W.2d 1012 (1946) (plaintiff alleged under influence of codeine appeared normal to license clerk and justice of peace — annulment denied); Christoph v. Sims, 234 S.W.2d 901 (Tex. Civ. App. 1950) (plaintiff intoxicated, but could drive his car — annulment denied); Price v. Price, 190 Atl. 104 (Del. Super. Ct. 1937). *But see* Mahan v. Mahan, 88 So.2d 545 (Fla. 1956); Annot., 57 A.L.R. 2d 1246 (1958).

13-1. OHIO REV. CODE § 3101.01.

13-2. Holtz v. Dick, 42 Ohio St. 23 (1884); Shafher v. State, 20 Ohio 1 (1851).

13-3. Holtz v. Dick, *supra* note 13-2.

underage party reaches the age of consent.[13-4] Most of the ratification cases involve continued cohabitation, but any unambiguous act is sufficient. Thus, in one case the court held that the wife, although presently living apart from her husband, could ratify her nonage marriage by a letter addressed "Dear Husband."[13-5]

Absent ratification, it is clear that the underage spouse can have the marriage annulled either before or after reaching the age of consent. Some very harsh language has been used by courts and text writers as to the right of a person under the age of consent to avoid a marriage which has been consummated, and yet the general rule is to grant the annulment as a matter of right, regardless of the equitable rule of clean hands. There are several cases in which an underage male married a girl, lied about his age to her, perjured himself in the license application, deserted the girl and the child born of the marriage just before reaching the statutory age, and nevertheless was granted a decree of annulment from an equity court.[13-6]

There is little case law in Ohio on the right of anyone other than the underage party to avoid the marriage. The general rule is that in the absence of an express statute, only the underage party can annul. The other spouse cannot avoid the marriage simply because his spouse has such a privilege.[13-7] Although there are no cases on the subject, it is possible that the spouse who is over the age of consent could annul for fraud if the underage party had misrepresented his age. Most states also have held that the parents of the underage party cannot annul the marriage. There are two Ohio cases in accord.[13-8]

It is not clear whether a nonage marriage in Ohio is void, voidable, or something in between. The confusion stems from the earliest case to reach the Ohio Supreme Court, *Shafher v. State*,[13-9] an 1851 case which is still the leading supreme court opinion on this subject. In this case, the court held that an underage marriage could be disaffirmed or avoided by the underage party by means other than a judicial decree. As pointed out in Section 11 *supra,* the normal rule is that a voidable marriage is treated as valid until it is declared invalid by a court decree. In the *Shafher* case, the boy married while underage, deserted his wife, and remarried without having his first marriage annulled. A conviction of bigamy was set aside, and the court said that an underage marriage was void, but could be rati-

13-4. *Ibid.; In re* Zemmick, 76 N.E.2d 902 (Ohio Ct. App. 1946).

13-5. Holtz v. Dick, 42 Ohio St. 23 (1884).

13-6. Carlton v. Carlton, 76 Ohio App. 338, 64 N.E.2d 428 (1945); Swenson v. Swenson, 179 Wis. 536, 192 N.W. 70 (1923).

13-7. 3 NELSON, DIVORCE AND ANNULMENT § 31.09 (2d ed. 1945).

13-8. Klinebell v. Hilton, 2 Ohio L. Abs. 637 (Ct. App. 1924); Peefer v. State, 42 Ohio App. 276, 182 N.E. 117 (1931) (dictum).

13-9. 20 Ohio 1 (1851).

fied. The decision did not indicate whether the operative act of avoidance was the desertion of the first wife or the later marriage. In either case, the theory is irreconcilable with the orthodox view that a nonage marriage is only voidable. For this reason, the Ohio view has been sharply criticised by text writers and courts of other states as contrary to both reason and the weight of authority.[13-10]

If the *Shafher* case is still the law in Ohio, then a nonage marriage is void because no annulment is necessary, and is also voidable since it is not subject to collateral attack.[13-11] Since the *Shafher* decision, lower courts which have dealt with the problem have reached conflicting decisions. Some courts have said that the marriage is void[13-12] while others have held it voidable.[13-13] In many of the cases, the language used was dictum and the same result would have been reached under either theory. In none of the cases was the problem of the *Shafher* case considered, *i.e.*, the right to avoid without judicial action. The cases which squarely hold the marriage voidable are all cases denying collateral attack. Examples are the case which holds that the state cannot attack the marriage by convicting one spouse of contributing to the delinquency of his child bride,[13-14] and *Courtright v. Courtright*,[13-15] which was affirmed without opinion by the supreme court, holding that where the underage wife dies before reaching the age of consent, her brothers cannot attack the marriage in an heirship proceeding.

The text writers and opinions which have criticized the *Shafher* decision have assumed that the doctrine is too deeply intrenched in Ohio law to be overturned. Surprisingly, no one has pointed out what seems to this writer a fatal flaw in the reasoning of the supreme court in that case. The court said that the parties could avoid the marriage without a decree because equity courts did not have annulment jurisdiction and no statute authorized annulment for this cause. "For our law furnishes no method

13-10. Owen v. Coffey, 201 Ala. 531, 78 So. 885 (1918); Walls v. State, 32 Ark. 565 (1877); State v. Cone, 86 Wis. 498, 57 N.W. 50 (1893).

13-11. Holtz v. Dick, 42 Ohio St. 23 (1884) (dictum that parents could not collaterally attack an under-age marriage).

13-12. Carlton v. Carlton, 76 Ohio App. 338, 64 N.E.2d 428 (1945); Gill v. Gill, 2 Ohio L. Abs. 14 (Ct. App. 1923); State v. Wilcox, 26 Ohio N.P. (n.s.) 343 (Juv. Ct. 1926); Ott v. Ott, 3 Ohio Dec. (N.P.) 684 (C.P. 1895); Vernon v. Vernon, 9 Ohio Dec. Reprint 365 (C.P. 1884).

13-13. *In re* Zemmick, 76 N.E.2d 902 (Ohio Ct. App. 1946); Peefer v. State, 42 Ohio App. 276, 182 N.E. 117 (1931); Klinebell v. Hilton, 25 Ohio N.P. (n.s.) 167 (C.P. 1924); Allen v. Allen, 21 Ohio L. Rep. 313 (C.P. 1923); Pearlman v. Pearlman, 27 Ohio N.P. (n.s.) 46 (C.P. 1923).

13-14. Peefer v. State, *supra* note 13-13. *But see* State v. Gans, 168 Ohio St. 174, 151 N.E.2d 709 (1958). In the *Gans* case the parents of the nonage bride were convicted of "acting in a way tending to cause delinquency" when they encouraged her to enter into an out-of-state marriage which was apparently valid when made. Every argument the court used to convict the parents applied with equal force to the husband.

13-15. 11 Ohio Dec. Reprint 413 (C.P. 1891), *aff'd*, 53 Ohio St. 685 (1895).

of obtaining a judicial sentence for annulling such a marriage; unless the parties have the means of escape in their own hands, none exist."[13-16] If this rule was ever the law, it was clearly repudiated by the same court in the later case of *Waymire v. Jetmore*.[13-17] Thus, it appears that the rule of the *Shafher* case, which has caused so much difficulty, rests on an incorrect assumption of law.

## *Section 14 — Fraud*

Outside of Ohio, fraud is probably the most common ground for annulment. There are very few Ohio cases on fraud, probably because the Ohio courts are quite liberal in granting divorces for cruelty and gross neglect. In Ohio, fraud is a ground for both annulment and divorce, and the problems that result from this dual position are treated in Section 22 *infra.*

The general rules on fraud are easy to state, but extremely difficult to apply. When men and women are courting each other, they are apt to indulge in all sorts of exaggerations, evasions, or actual lies with respect to such matters as past history, character, or future prospects. If every misrepresentation were a ground for annulment, no marriage would be safe from attack. A certain amount of "puffing" is allowable and inevitable in the courtship, just as it is in commercial transactions. Since the real question is how much fraud is necessary to justify an annulment, the answer will depend largely upon the facts of the particular case.[14-1]

Generally, a marriage which is induced by fraud is voidable rather than void, and cohabitation after knowledge of the fraud is treated as an act of ratification or as a waiver of the defect, and will defeat any claim for annulment.[14-2] An action for annulment is not the exclusive remedy of the fraud victim; he may also bring an action for damages.[14-3]

Although the rule is seldom stated, the cases clearly indicate that if the marriage has not been consummated, it may be annulled for such fraud as would render an ordinary contract voidable, at least in cases where the marriage is promptly disaffirmed before any change of status has occurred.[14-4] Thus, the minimum essentials for such an annulment would be:

13-16. State v. Shafher, 20 Ohio 1, 6 (1851).

13-17. 22 Ohio St. 271 (1872).

14-1. Probably the most complete list of recent fraud cases, classified by general fact situations, may be found in 3 NELSON, DIVORCE AND ANNULMENT §§ 31.29-.44 (2d ed. 1945).

14-2. Fenicchia v. Fenicchia, 110 N.Y.S.2d 110 (Sup. Ct. 1952).

14-3. Heath v. Heath, 85 N.H. 419, 159 Atl. 418 (1932); Cohen v. Kahn, 28 N.Y.S.2d 847 (Sup. Ct. 1941).

14-4. Akrep v. Akrep, 1 N.J., 268, 63 A.2d 253 (1949).

(1) A deception, which may be either an affirmative false representation or concealment of a fact where the law holds that there is a duty to speak.

(2) The deception must be intentionally or negligently made — innocent misrepresentation is not a ground for annulment.

(3) The deception must have been a material element in inducing the party deceived to enter the marriage and must have been relied upon.

In analyzing fraud cases from other states, it is important to distinguish the New York cases. Since the turn of the century, the New York courts have treated the marriage contract as any other contract. Whether the marriage is consummated or not, the only requirements for annulment are the three listed above. The test applied is that the deception must be so material that if it had not been practiced, the victim would not have consented to the marriage. Also, the fraud must be of such a nature as to deceive a person of reasonable prudence. Although recent New York cases indicate that the rule may no longer apply in New York, this test of fraud is still referred to as the New York rule or "materiality" test. The majority of states, including Ohio, have adopted the stricter "essentials" test or *essentialia* doctrine. Under this concept, the fraud not only must be material, but must also relate to the very *essence* of the marital relation, at least in cases where the marriage has been consummated. The justification for the "essentials" test is that the state has a special interest in preservation of the marital status.

The advantage of the New York rule is that it is relatively easy to administer. There is a very substantial body of general contract law regarding what is material. The "essentials" rule is difficult to apply because there is a wide area of disagreement as to what constitutes the essentials of the marital relation. The principle disadvantage of the New York rule, and a problem which has caused New York courts a great deal of difficulty is that the relative ease of obtaining an annulment for fraud is an invitation to perjury or collusion. In some of the cases, the fraud appears to have been invented long after the marriage, and the action is used as a substitute for divorce, without the provisions for continued financial support which apply to the usual divorce case.

Some of the factors which clearly relate to the essentials of marriage and which are generally held to justify annulment of a consummated marriage are:

(1) A concealed intent not to engage in sex relations.[14-5]

(2) Concealment of sterility, or the inability to procreate.[14-6]

(3) Concealment of the fact that one spouse is afflicted with a

14-5. Miller v. Miller, 1 Ohio Dec. 354 (C.P. 1894).

14-6. Aufort v. Aufort, 9 Cal. App. 2d 310, 49 P.2d 620 (1935).

disease which is both serious and communicable, such as tuberculosis;[14-7] or a disease which would seriously interfere with the attainment of certain physical objects of marriage, namely intercourse and the birth of healthy children. On this last basis, it is generally held that concealment of a venereal disease is justification for annulment.[14-8]

(4) Concealment of the fact that the wife is pregnant by another man at the time of the marriage.[14-9] Where the husband engaged in sexual relations with the wife prior to marriage, the general rule is to deny the husband an annulment, both where the woman induced the marriage by falsely claiming pregnancy when in fact she was not pregnant,[14-10] and where she claimed to be pregnant by the husband when in fact she was pregnant by another.[14-11]

It is generally held that the following types of fraud do not relate to the essentials and do not justify annulment, except possibly in New York:

(1) Concealment or misrepresentation as to pre-marital lack of chastity. Thus, where the wife had been the mistress of another man, had been previously divorced for her own adultery, or had given birth to an illegitimate child, concealment of this activity does not justify annulment.[14-12]

(2) Concealment or misrepresentation of a previous marriage or divorce. Thus, no annulment was permitted where the wife represented herself to be a widow, although in fact she was a divorcee with a living ex-husband, and her second husband was a Roman Catholic.[14-13] The few cases which relax this harsh rule are generally those involving an unconsummated marriage, an express misrepresentation as opposed to a concealment, or a youthful or weak-willed victim of the fraud.[14-14]

(3) Concealment or misrepresentation of past insanity, or commitment to a mental hospital.[14-15] Of course if the marriage is entered

14-7. Davis v. Davis, 90 N.J. Eq. 158, 106 Atl. 644 (Ch. 1919).

14-8. Stone v. Stone, 136 F.2d 761 (D.C. Cir. 1943); C. v. C., 157 Wis. 301, 148 N.W. 865 (1914).

14-9. Vorvilas v. Vorvilas, 252 Wis. 333, 31 N.W.2d 586 (1948). See also Annot., 13 A.L.R. 1428 (1921).

14-10. Mason v. Mason, 164 Ark. 59, 261 S.W. 40 (1924); Levy v. Levy, 309 Mass. 486, 34 N.E.2d 650 (1941).

14-11. Kawecki v. Kawecki, 67 Ohio App. 34, 35 N.E.2d 865 (1941); Foss v. Foss, 12 Allen 26 (Mass. 1866). See Annot., 13 A.L.R. 1428 (1921).

14-12. Foy v. Foy, 57 Cal. App. 2d 334 (1943); Anonymous v. Anonymous, 85 A.2d 706 (Del. Sup. 1951); Joy v. Joy, 12 Ohio Dec. 574 (C.P., 1900). *Contra,* McAndrew v. McAndrew, 194 Ky. 755, 240 S.W. 745 (1921).

14-13. Cassin v. Cassin, 264 Mass. 28, 161 N.E. 603 (1928); Oswald v. Oswald, 146 Md. 319, 126 Atl. 81 (1924). See also Annot., 58 A.L.R. 319 (1929).

14-14. Christlieb v. Christlieb, 71 Ind. App. 682, 125 N.E. 486 (1919).

14-15. Robertson v. Roth, 163 Minn. 501, 204 N.W. 329 (1925). See Annot., 39 A.L.R. 1345 (1925).

into at a time when the spouse is insane, the lack of mental capacity will excuse the fraud, but the marriage may be annulled for insanity under the rules discussed in Section 12 *supra*.[14-16]

(4) Concealment or misrepresentation as to age, health, or physical characteristics. Thus, an Ohio court denied an annulment where the bride wore glasses to conceal a glass eye.[14-17]

(5) Concealment or misrepresentation as to past or present financial condition, social position, occupation, education, etc.[14-18] Thus, an annulment was denied where the husband represented himself as wealthy when in fact his business was bankrupt.[14-19] The strict rule denying annulment is sometimes relaxed where the fraud is gross and the victim is young and immature, or aged and feeble.[14-20]

(6) Concealment or misrepresentation as to nationality or citizenship. Generally, fraud as to national origin, race, or citizenship does not go to the essence of the marriage,[14-21] but New York courts have held that a false representation of American citizenship warrants annulment, especially where the guilty husband was subject to deportation for illegal entry.[14-22]

(7) Concealment or misrepresentation of an ulterior or unworthy motive, such as a marriage for money alone, a marriage to gain a new citizenship or avoid deportation, or a marriage entered into for the sole purpose of legitimatizing a child born of the parties.[14-23] An increasing number of courts have recently allowed annulment where the fraud was extreme and the victim was immature or not in a position to investigate the truth of the representations.[14-24]

There are four areas of fraud where the rules have not yet crystallized,

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14-16. Storf v. Papalia, 46 A.2d 907 (N.J. Ch. 1946).

14-17. Kraus v. Kraus, 6 Ohio N.P. 248 (C.P. 1899).

14-18. Meyer v. Meyer, 7 Ohio Dec. Reprint 561 (C.P. 1878), *aff'd*, 7 Ohio Dec. Reprint 627 (Dist. Ct. 1879).

14-19. Marshall v. Marshall, 212 Cal. 736, 300 Pac. 816 (1931). See Annot., 75 A.L.R. 663 (1931).

14-20. Entsminger v. Entsminger, 99 Kans. 362, 161 Pac. 607 (1916); Brown v. Scott, 140 Md. 258, 117 Atl. 114 (1922); Dooley v. Dooley, 93 N.J. Eq. 22, 115 Atl. 268 (Ch. 1921). See Annot., 22 A.L.R. 818 (1922).

14-21. Wetstine v. Wetstine, 114 Conn. 7, 157 Atl. 418 (1931).

14-22. Domaskinos v. Domaskinos, 325 Mass. 217, 89 N.E.2d 766 (1950) (application of New York law); Protopapas v. Protopapas, 47 N.Y.S.2d 460 (Sup. Ct. 1943); Laage v. Laage, 26 N.Y.S.2d 874 (Sup. Ct. 1941); Truiano v. Truiano, 201 N.Y. Supp. 573 (Sup. Ct. 1923).

14-23. Salzberg v. Salzberg, 107 N.J. Eq. 524, 153 Atl. 605 (Ct. Err. & App. 1931); Campbell v. Moore, 189 S.C. 497, 1 S.E.2d 784 (1939); Harding v. Harding, 11 Wash. 2d 138, 118 P.2d 789 (1941).

14-24. Security-First Nat'l Bank v. Schaub, 71 Cal. App. 2d 467, 162 P.2d 966 (1945); Titcomb v. Titcomb, 160 Fla. 320, 34 So.2d 742 (1948); Sampson v. Sampson 332 Mich. 214, 50 N.W.2d 764 (1952).

and the few cases involved are divided on whether the fraud relates to the essence of the marriage or not. These are:

(1) Concealment of a past history of serious criminal activity. The Ohio courts have not discussed this problem, and the decisions from other jurisdictions are in conflict. A California court stated as dictum that concealment of a prior conviction for a crime involving moral turpitude would justify annulment.[14-25] A New York court held that concealment of a prior conviction for rape related to the essence of the marriage,[14-26] although Florida has held to the contrary.[14-27]

(2) It already has been noted that concealment of a serious illness which is communicable or which could be inherited by children is a ground for annulment. There are numerous illnesses which do not fall into these categories, but which do prevent a husband from supporting his wife. There are no cases which have determined whether the successful concealment of an illness which results in permanent disability is a ground for annulment. The issue was raised, but not decided in a recent Connecticut case.[14-28]

(3) As to false promises relative to present or future religious faith, the cases are in conflict. The problem is complicated by the constitutional provisions relative to freedom of worship and separation of church and state. Generally, breach of a pre-marital agreement to renounce a religious faith, accept a new faith, or raise children in a specified faith, is not a ground for annulment.[14-29] In Ohio, a common pleas court held that breach of a pre-nuptial agreement by the wife to renounce her religious faith could not be considered gross neglect of duty. The court said that to allow such a ground for divorce would violate the wife's constitutional right to freedom of religion.[14-30] A number of courts have allowed an annulment for fraud where both parties were already of the same faith, and one spouse violated an agreement to follow a civil ceremony with a religious ceremony. Thus, two New Jersey cases granted annulment where, after a civil ceremony, the husband refused to be married in the Roman Catholic Church.[14-31] In one case both

14-25. Mayer v. Mayer, 207 Cal. 685, 279 Pac. 783 (1929).

14-26. Giannotti v. Giannotti, 60 N.Y.S.2d 74 (Sup. Ct. 1946).

14-27. Savini v. Savini, 58 So.2d 193 (Fla. 1952).

14-28. Nerini v. Nerini, 11 Conn. Supp. 361 (Super. Ct. 1943).

14-29. Hickman v. Hickman, 10 S.W.2d 738 (Tex. Civ. App. 1928). *Contra,* Williams v. Williams, 86 N.Y.S.2d 490 (Sup. Ct. 1947).

14-30. Apple v. Apple, 28 Ohio N.P. (n.s.) 620 (C.P. 1931). As to the general problem of the relation between the constitutional doctrine of freedom of religion and domestic relations law, see Hackett v. Hackett, 150 N.E.2d 431 (Ohio Ct. App. 1958), *affirming* 146 N.E.2d 477 (Ohio C.P. 1957), *appeal as of right denied,* 168 Ohio St. 373, 154 N.E.2d 820 (1958); Note, 72 HARV. L. REV. 372 (1958); Note, 10 W. RES. L. REV. 397 (1959).

14-31. Akrep v. Akrep, 1 N.J. 268, 63 A.2d 253 (1949); Nocenti v. Ruberti, 3 A.2d 128 (N.J. Eq. 1933). See also Samuelson v. Samuelson, 155 Md. 639, 142 Atl. 97 (1928);

parties were Catholics, and in the other the wife was Catholic and the husband falsely represented that he was of the same religion.

(4) It has already been said that a concealed intent not to consummate a marriage by refraining from sex relations or concealment of the fact of sterility are both recognized grounds for annulment.[14-32] In recent years, a number of courts have been faced with the problem of a concealed intent held by one spouse at the time of the marriage not to engage in sex relations unless contraceptives are used. Most of the courts which have passed on this problem in recent years have held that such fraud does relate to the essence.[14-33] Of course, the problem of proof is a difficult one in a case of this type,[14-34] and the plaintiff is sometimes denied relief because of acquiescence in the use of contraceptives.[14-35] In some states an unjustified insistence on such devices has also been treated as a ground for divorce under the heading of desertion, cruelty, or gross neglect.

*Section 15 — Duress*

In general, where the consent of a party has been obtained by violence or threats of physical harm, the victim of the coercion may have the resulting marriage annulled. The threat need not be directed at the victim. Thus, threats of harm to one in whose welfare a party has a vital interest may be duress.[15-1] Generally, a threat of harm to reputation or to financial condition is insufficient. In a recent Arkansas case, annulment was denied where the woman threatened that if the man did not marry her she would commit suicide and would publicly involve his name in her death.[15-2] The majority of courts rely on a subjective standard, and the annulment will be granted if the will of the particular plaintiff was overcome, even though a person of ordinary firmness would not have relented.[15-3]

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Labbate v. Labbate, 69 N.Y.S.2d 867 (Sup. Ct. 1947); Brillis v. Brillis, 4 N.Y.2d. 125, 149 N.E.2d 510 (1958).

14-32. See notes 14-5 and 14-6 *supra.*

14-33. Maslow v. Maslow, 117 Cal. App. 2d 237, 255 P.2d 65 (1953); Stegienko v. Stegienko, 295 Mich. 530, 295 N.W. 252 (1940); Coppo v. Coppo, 297 N.Y. Supp. 744 (Sup. Ct. 1937).

14-34. See Richardson v. Richardson, 103 N.Y.S.2d 219 (Supp. Ct. 1951); Witten v. Witten, 109 N.Y.S.2d 254 (Sup. Ct. 1951).

14-35. In Maslow v. Maslow, 117 Cal. App. 237, 255 P.2d 65 (1953), acquiescence for 6 months barred the action. In Baxter v. Baxter, 117 L.J.H.L., (n.s.) 479 (1948), 10 years acquiescence was not a bar.

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15-1. Warren v. Warren, 199 N.Y. Supp. 856 (Sup. Ct. 1923); Fratello v. Fratello, 193 N.Y. Supp. 865 (Sup. Ct. 1922). *Contra,* Capasso v. Colonna, 95 N.J. Eq. 35, 122 Atl. 378 (Ch. 1923).

15-2. Feigenbaum v. Feigenbaum, 210 Ark. 186, 194 S.W.2d 1012 (1946); *accord,* Fluharty v. Fluharty, 193 Atl. 838 (Del. Super. Ct. 1937). *Contra,* Scott v. Sebright, 57 L.T.R. (n.s.) 421 (P. Ct. 1886).

To warrant annulment, the coercion must have been present throughout the entire transaction, and if the plaintiff had a reasonable opportunity to escape, relief will be denied.[15-4] The threats need not come from the defendant in the annulment action, and annulment will be granted where the coercion is exercised by friends or relations of the defendant. A New York court has held that annulment will not be granted unless the defendant was a party to the duress or was aware of it.[15-5] This seems wrong in principle since annulment is granted to allow the plaintiff to escape from a marriage to which he did not consent, rather than as a punishment for misconduct of the defendant — one case so holds.[15-6]

There are some cases where it is clear that the consent of the party was obtained by duress; yet the demands of public policy will override the interests of the plaintiff and the court will find that there was no duress. Thus, where a man has had intercourse with a girl and then consents to marriage to avoid prosecution for bastardy, seduction, or statutory rape, annulment will not be granted unless the charge was made without probable cause.[15-7] In this situation an annulment will usually be denied the man, but in one such Ohio case the court granted the wife an annulment on the ground that the man, the victim of the duress, never intended to consummate the marriage and was therefore guilty of fraud.[15-8] The strict rule denying annulment where the threatened prosecution is based on probable cause, even though the man is in fact innocent, is sometimes relaxed where the man is immature and is given no chance to consult with friends or counsel.[15-9] The rule may also be overlooked where the man is ill and believes that if convicted of nonsupport of the illegitimate child, his term in the workhouse will kill him.[15-10]

Although there is dictum on both sides in Ohio cases, it is generally held that a coerced marriage is voidable rather than void, and annulment will not be granted if the parties ratify the marriage.[15-11] Consummation is very strong evidence of intent to ratify, but consummation under duress will not ratify the marriage.[15-12]

15-3. Smith v. Smith, 47 Ohio Bull. 137 (C.P. 1902); Cannon v. Cannon, 7 Tenn. App. 19 (1928).

15-4. Phipps v. Phipps, 216 S.C. 248, 57 S.E.2d 417 (1950). See Annot., 16 A.L.R.2d 1426 (1951).

15-5. Sherman v. Sherman, 20 N.Y. Supp. 414 (C.P. 1892).

15-6. Lee v. Lee, 176 Ark. 636, 3 S.W.2d 672 (1928).

15-7. Smith v. Saum, 324 Ill. App. 299, 58 N.E.2d 248 (1944). See also cases collected in Annot., 16 A.L.R.2d 1426, 1436 (1951).

15-8. Miller v. Miller, 1 Ohio Dec. 354 (C.P. 1894).

15-9. Smith v. Smith, 51 Mich. 607, 17 N.W. 76 (1883).

15-10. Smith v. Smith, 47 Ohio Bull. 137 (C.P. 1902).

15-11. Norvell v. State, 193 S.W.2d 200 (Tex. Crim. App. 1946). See also cases collected in Annot., 91 A.L.R. 414 (1934).

15-12. Fowler v. Fowler, 131 La. 1088, 60 So. 694 (1913).

*Section 16 — Mistake and Lack of Mutual Consent*

A mistake as to the name, character, or past history of a party to a marriage will ordinarily not affect the validity of a marriage, either under the doctrine of mistake or under the doctrine of fraud. Thus, the mere assumption of a false name by one party will not justify annulment. A true mistake as to identity, however, as where a person is substituted for the one who intended to marry, will render the marriage voidable.[16-1]

A mistaken belief by one or both parties that the ceremony performed is not a marriage, but is a religious or engagement ceremony is a sufficient ground for annulment by the mistaken party.[16-2] In such a case, there is no real consent, even though the forms of marriage are complied with.

When the marriage is contracted as a joke or jest, a few courts have denied annulment,[16-3] but the weight of authority today is that such a marriage is voidable when there is clear evidence that both parties lacked real intent to enter a permanent marriage.[16-4] The majority view has been cited with approval in a recent Ohio case.[16-5]

The most difficult problem in this area is the requirement of mutual consent. The majority of courts hold that when both parties intend to enter the legal status of matrimony, the marriage is valid, and a mutual understanding that the marriage was not to be consummated and would be annulled will be disregarded. Thus, a recent Connecticut decision held that recognition of such an agreement would be contrary to public policy.[16-6] In a few states, apparently including Ohio, the opposite view is taken. Thus, in *Stone v. Stone*,[16-7] a young girl became pregnant. The father was unavailable for marriage, so it was agreed that a family friend would marry her to give a name to the child. Both parties intended that they would never assume any relation of husband and wife, and they separated immediately after the ceremony. The court held that it was the marriage which was contrary to public policy rather than the reservations, and granted the annulment. In a similar Ohio case, the court granted the annulment, stating: "A child needs help in a social order that styles him, instead of his guilty parents, as being 'illegitimate' . . . . The court

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16-1. Meyer v. Meyer, 7 Ohio Dec. Reprint 561 (C.P. 1878), *aff'd*, 4 Ohio Bull. 368 (Dist. Ct. 1879). See cases collected in Annot., 75 A.L.R. 663 (1931).

16-2. Mehta v. Mehta, 2 All E. R. 690 (P. Ct. 1945).

16-3. See Hand v. Berry, 170 Ga. 743, 154 S.E. 239 (Ch. 1930), and cases collected in Annot., 14 A.L.R.2d 624 (1950).

16-4. Davis v. Davis, 119 Conn. 194, 175 Atl. 574 (1934); McClurg v. Terry, 21 N.J. Eq. 225 (Ch. 1870); Meredith v. Shakespeare, 96 W. Va. 229, 122 S.E. 520 (1924).

16-5. Conley v. Conley, 28 Ohio Op. 289 (C.P. 1943), *aff'd* by court of appeals without opinion.

16-6. Schibi v. Schibi, 136 Conn. 196, 69 A.2d 831 (1949). See cases collected in Annot., 14 A.L.R. 2d 624 (1950); Comment, *Sham Marriages*, 20 U. CHI. L. REV. 710 (1953).

16-7. 159 Fla. 624, 32 So.2d 278 (1947).

prefers not to punish either party for their honorable conduct in formulating a plan that permitted the child to be born in wedlock."[16-8]

### *Section 17 — Physical Health*

There are three physical conditions which might give rise to a defective marriage: impotency, syphilis, and epilepsy. The annulment of a marriage for any one of these defects should not be confused with annulment for fraudulent concealment of serious illness.[17-1] The distinction is clearly illustrated by the rule that sterility or the inability to procreate is not a defect, but concealment of sterility is fraud which relates to the essentials of the marriage and may be a ground for annulment.[17-2] The justification for the different treatment of the two situations lies in the presence of fault in the fraud case.

As to syphilis, Ohio Revised Code section 3101.06 provides that no marriage license shall issue to any person with communicable syphilis. The statute is silent as to the validity of a marriage contracted in violation of its provisions, and there are no Ohio cases indicating whether such a marriage would be valid. The few cases from other jurisdictions hold that where the legislature has clearly indicated that a syphilitic should not marry, such a marriage is voidable.[17-3]

Until 1959, the same statute also applied to the marriage of an epileptic, a disability which is more difficult to justify and which applies to a much larger segment of the population. Although neither venereal disease nor epilepsy were defects at common law or canon law, most states today have statutory prohibitions against the marriage of epileptics, based on the assumption that it is an inherited disease. It is now generally recognized that epilepsy is not inheritable and that it can be kept under control by drugs. Practically, the prohibition is impossible to enforce. The result is that several states have recently repealed the marriage ban. Where the statute does not spell out the effect of violation of the ban, the few cases indicate that the marriage is voidable only,[17-4] although one

16-8. Conley v. Conley, 28 Ohio Op. 289, 289-90 (C.P. 1943), *aff'd* by court of appeals without opinion.

17-1. On occasion the courts confuse the two doctrines. Thus, in Tompkins v. Tompkins, 92 N.J. Eq. 113, 111 Atl. 599 (Ch. 1920), the court referred to impotency as a type of fraud, in spite of the fact that the impotent husband was apparently unaware of his condition at the time of marriage.

17-2. See Section 14 *supra.*

17-3. Doe v. Doe, 165 Atl. 156 (Del. Super. Ct. 1933); Christensen v. Christensen, 144 Neb. 763, 14 N.W.2d 613 (1944). See also Note, 43 HARV. L. REV. 1311 (1930); Note. 35 YALE L.J. 640 (1926).

17-4. Gould v. Gould, 78 Conn. 242, 61 Atl. 604 (1905); Behsman v. Behsman, 144 Minn. 95, 174 N.W. 611 (1919). A recent article on the marriage problem of the epileptic is Fabing & Barrow, *Medical Discovery as a Legal Catalyst: Modernization of Epilepsy Laws to Reflect Medical Progress,* 50 NW. U.L. REV. 42 (1955).

case held that the marriage was void and subject to collateral attack by the heirs of a party to the marriage.[17-5] It is difficult to justify such a harsh result where the parties knew of the defect and expressly waived it.

Impotency was a canon-law disability recognized by the English ecclesiastical courts. The theory was that an annulment would be granted to the nonimpotent spouse to discourage the temptation to commit adultery, which would arise if the annulment were denied. As noted in Section 10 *supra*, a canon-law disability requires some expression of legislative policy disapproving of such a marriage before an equity court can grant an annulment. The policy in Ohio is found in the divorce statute, Ohio Revised Code section 3105.01, where impotency is listed as a ground for divorce. Apparently in Ohio, impotency is both a ground for annulment and a ground for divorce.[17-6] The procedural problems that arise from this dual position are treated in Section 22 *infra*. Although there are no cases in point, it can be assumed that impotency as a ground for divorce incorporates the substantive rules of impotency as developed in annulment actions. In a similar situation, an Ohio court held that when the legislature included "fraudulent contract" as a ground for divorce without defining the term, the statute incorporated the substantive annulment law of fraud.[17-7]

The legal definition of impotence refers to the inability of the parties to participate in ordinary or natural and complete sexual intercourse.[17-8] Either husband or wife may be impotent, although the correct medical term for impotency in a woman is "true frigidity." The origin of impotency is immaterial, and an annulment may be granted where the inability is caused by venereal disease,[17-9] physical deformity,[17-10] or even psychiatric factors.[17-11] Some persons are impotent as to their spouse, but able to have intercourse with others. This condition, known as impotency *quod hanc*, justifies a decree of annulment.[17-12]

Impotency as a ground for annulment must have existed at the time of the marriage, must have continued to the time of the trial, and must be incurable. If the defect can be cured, but only by a dangerous or painful operation, the impotency is considered incurable and an annulment will be granted.[17-13] Where the defect can be remedied by a simple surgi-

17-5. *In re* Cannon's Estate, 221 Wis. 322, 266 N.W. 918 (1936).

17-6. McDowell v. Sapp, 39 Ohio St. 558 (1883) (dictum).

17-7. Meyer v. Meyer, 7 Ohio Dec. Reprint 561 (C.P. 1878), *aff'd*, 7 Ohio Dec. Reprint 627 (Dist. Ct. 1879).

17-8. Donati v. Church, 13 N.J. Super. 454, 80 A.2d 633 (1951).

17-9. Ryder v. Ryder, 66 Vt. 158, 28 Atl. 1029 (1894).

17-10. A. v. A., 89 Ala. 291, 7 So. 100 (1890).

17-11. Kaufman v. Kaufman, 164 F.2d 519 (D.C. Cir. 1947).

17-12. *Ibid.*; S. v. S., 192 Mass. 194, 77 N.E. 1025 (1906); Tompkins v. Tompkins, 92 N.J. Eq. 113, 111 Atl. 599 (Ch. 1920).

17-13. Anonymous, 158 N.Y. Supp. 51 (Sup. Ct. 1916).

cal operation and the defendant refuses to submit to treatment, there is a split of authority. The New York cases hold that failure to submit to treatment for impotency is not a ground for annulment,[17-14] while other courts have held that impotency is nonetheless grounds for annulment as incurable if the impotent party wilfully and without justification refuses treatment.[17-15]

Proof of impotency is difficult, especially if the defendant is a woman, and usually expert medical or psychiatric testimony is required. Thus, in a recent case a psychiatrist was allowed to testify as to his conclusions relative to impotency, although the basis of his testimony depended on what the spouses had told him.[17-16] In a few cases, American courts have applied a presumption developed in the English courts and known as "the rule of triennial cohabitation." Under this doctrine, proof that the wife is potent and is still a virgin three years after marriage raises a presumption that the husband is impotent. The presumption is conclusive in England, but a New Jersey court used it to shift the burden of going forward with evidence.[17-17] In impotency cases, the courts have often asserted the power to order both parties to submit to a medical examination,[17-18] and apparently this practice applies in Ohio.[17-19] In a recent Delaware case, the court held that the refusal of the defendant to submit to a physical examination was evidence of his impotency.[17-20]

Impotency renders a marriage voidable rather than void. Therefore, the impotent party cannot annul the marriage,[17-21] and cohabitation after knowledge of the defect amounts to ratification.[17-22] If the lack of capacity is known before the marriage, or if it might reasonably have been expected because of the age of the parties, no annulment will be granted.[17-23]

### *Section 18 — Incest*

For religious and eugenic reasons, marriages are prohibited where the parties are within a specified degree of relationship. The term "inces-

17-14. The New York cases are discussed in Anonymous, *supra* note 17-13.

17-15. Griffith v. Griffith, 162 Ill. 368, 44 N.E. 820 (1896); Mutter v. Mutter, 123 Ky. 754, 97 S.W. 393 (1906).

17-16. Kaufman v. Kaufman, 164 F.2d 519 (D.C. Cir. 1947).

17-17. Tompkins v. Tompkins, 92 N.J. Eq. 113, 111 Atl. 599 (Ch. 1920). See also Heller v. Heller, 116 N.J. Eq. 543, 174 Atl. 573 (Ct. Err. & App. 1934).

17-18. D. v. D., 41 Del. 263, 20 A.2d 139 (1941).

17-19. S. S. Kresge Co. v. Trester, 123 Ohio St. 383, 175 N.E. 611 (1931). As to psychiatric examinations, see Kelley v. Smith & Oby Co., 129 N.E.2d 106 (Ohio C.P. 1954).

17-20. S. v. S., 42 Del. 192, 29 A.2d 325 (1942).

17-21. Anonymous v. Anonymous, 126 N.Y. Supp. 149 (Sup. Ct. 1910).

17-22. Kirschbaum v. Kirschbaum, 92 N.J. Eq. 7, 111 Atl. 697 (Ch. 1920).

17-23. Steerman v. Snow, 94 N.J. Eq. 9, 118 Atl. 696 (Ch. 1922); Hatch v. Hatch, 110 N.Y. Supp. 18 (Sup. Ct. 1908).

tuous" is applied to such a marriage, but the rules governing incest are not the same in domestic relations law as in the criminal law. The prohibited relationship may exist by reason of consanguinity (blood relationship) or by affinity (relation by marriage). A man's relations by affinity are the blood relations of his wife. The rules of consanguinity apply to relatives of the half blood[18-1] and to illegitimate relations,[18-2] although apparently not to relatives by adoption.[18-3]

In England, a series of statutes enacted during the reign of Henry VIII established first cousin marriage as valid and marriage between those closer than cousins by consanguinity or affinity as voidable.[18-4] The English statutes are probably old enough to be considered as part of our common law, and some courts have so held. The majority of courts hold, however, that the disability is a canon-law impediment, and that a marriage between relatives is valid in the absence of statute, unless the relation is so close as to shock the conscience, such as a marriage between brother and sister or within the lineal line.[18-5]

In Ohio, there are two statutes dealing with incest, but they are both unclear as to whether such a marriage is void or voidable, and regarding affinity as a defect. The marriage statute, Ohio Revised Code section 3101.01, provides that persons "not nearer of kin than second cousins" may join in marriage. The criminal statute, Ohio Revised Code section 2905.07, provides that it is a felony for persons nearer of kin by consanguinity or affinity than cousins to have intercouse together. The Ohio courts have held that a marriage prohibited by the criminal statute is void and subject to collateral attack after the death of both parties.[18-6] However, a first cousin marriage, which is not criminal, but falls within the prohibition of the marriage statute, is only voidable.[18-7] The Ohio courts have not followed the strict English rule under which affinity was a permanent bar. The court has held that the relation by affinity ceases when the marriage that creates the relationship ceases. Thus, a man could marry his stepdaughter or mother-in-law after the termination of the first marriage by death or divorce.[18-8]

A number of states recognize as valid a Jewish marriage between

18-1. Audley v. Audley, 187 N.Y. Supp. 652 (Ct. App. 1921).

18-2. State v. Lee, 196 Miss. 311, 17 So.2d 277 (1944).

18-3. Morgan v. State, 11 Ala. 289 (1847).

18-4. Statutes of 25 Hen. 8, c. 22, 28 Hen. 8, c. 7, and 32 Hen. 8, c. 38.

18-5. Wightman v. Wightman, 4 Johns. Ch. R. 343 (N.Y. 1820); Bowers v. Bowers, 10 Rich. Eq. 551 (S. C. 1858).

18-6. Heyse v. Michalske, 31 Ohio L. Abs. 484 (P. Ct. 1940).

18-7. Mazzolini v. Mazzolini, 168 Ohio St. 357, 155 N.E.2d 206 (1958); Walker v. Walker, 84 N.E.2d 258 (Ohio C.P. 1948). See Note, 18 U. CINC. L. REV. 549 (1949).

18-8. State v. Brown, 47 Ohio St. 102, 23 N.E. 747 (1890) (dictum); Noble v. State, 22 Ohio St. 541 (1872). The Ohio cases are discussed in Back v. Back, 148 Iowa 223, 125 N.W. 1009 (1910).

uncle and niece where it is permitted by the church. The majority rule is that such a marriage, if valid where contracted, is valid everywhere.[18-9] The Ohio Supreme Court has held to the contrary, at least where the marriage contravenes the criminal statute.[18-10] An out-of-state marriage between first cousins which was valid where made would be valid in Ohio since the criminal policy of the state would not be violated.[18-11]

### *Section 19 — Miscegenation*

Thirty states, generally in the South and West, prohibit marriages between Caucasians and Negroes or between Caucasians and Asiatics. Although the United States Supreme Court has never passed on the constitutionality of such a prohibition, most states have upheld their validity. A California court stands alone in its recent decision that such a statute violates the fourteenth amendment.[19-1] There is no miscegenation statute in Ohio, and a common-law inter-racial marriage has been expressly upheld.[19-2]

### *Section 20 — Bigamy*

In Ohio, bigamy is both a ground for annulment and a ground for divorce. The procedural problems which result from this dual position are treated in Section 22 *infra.*

The Ohio marriage statute expressly states that persons not having a husband or wife living may be joined in marriage.[20-1] The cases make it clear that Ohio has adopted the general rule that a prior undissolved marriage is a complete bar and renders the second marriage void. The rule applies with equal force where the first marriage was a common-law union.[20-2]

The second marriage is treated as a nullity, and neither the marital status nor the usual incidents of the status can arise from it. Thus, the second wife is not entitled to dower or support,[20-3] and the innocence or good faith of one or both of the spouses is immaterial.[20-4] Further, the lack of good faith on the part of one of the spouses will not bar his an-

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18-9. *In re* May's Estate, 305 N.Y. 486, 114 N.E.2d 4 (1953). See note, 15 OHIO ST. L.J. 220 (1954).

18-10. State v. Brown, 47 Ohio St. 102, 23 N.E. 747 (1890).

18-11. Mazzolini v. Mazzolini, 168 Ohio St. 357, 155 N.E.2d 206 (1958).

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19-1. Perez v. Lippold, 32 Cal. 2d 711, 198 P.2d 17 (1948).

19-2. Jenkins v. Jenkins, 30 Ohio App. 336, 164 N.E. 790 (1928).

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20-1. OHIO REV. CODE § 3101.01.

20-2. *In re* Zemmick, 32 Ohio Op. 504 (P. Ct. 1945), *aff'd,* 76 N.E.2d 902 (Ohio Ct. App. 1946).

20-3. Smith v. Smith, 5 Ohio St. 32 (1855).

20-4. Williams v. Williams, 90 Ohio App. 369, 106 N.E.2d 655 (1951).

nulment action on the ground of estoppel or unclean hands.[20-5] Since the second marriage is void rather than voidable, the spouses need not seek a divorce or annulment, but can terminate the pretended relationship by simple separation. Thus, the innocent spouse can enter into a valid marriage with another without waiting for the dissolution of the bigamous marriage.[20-6]

Since a bigamous marriage is void rather than voidable, it is obvious that there can be no ratification by continued cohabitation after the dissolution of the first marriage. However, in Ohio and other states which recognize common-law marriages, the practical effect of continued cohabitation after dissolution of the first marriage may be similar to ratification. Of course, if a new agreement made after the first marriage is dissolved can be proved, a new and valid common-law marriage will be recognized. If there is no evidence of a new agreement other than continued cohabitation, the court may still presume that a new common-law marriage developed when the impediment was removed.[20-7]

### *Section 21 — Choice of Laws*

The authorities and the few cases are agreed that among the states, the state of the domicile has the greatest interest in the marital status of its citizens. Accordingly, where the validity of a marriage is questioned in a state which is neither the domicile nor the place where the marriage took place, the forum should look to the law of the state of domicile, including its law of conflicts.[21-1]

20-5. Smith v. Smith, 72 Ohio App. 203, 50 N.E.2d 889 (1943).

20-6. Williams v. Williams, 90 Ohio App. 369, 106 N.E.2d 655 (1951).

20-7. Where there is evidence that the parties have entered into a bigamous common-law or ceremonial marriage, at a time when one or both are ineligible to marry because of another existing marriage, and the parties continue to live together after the impediment is removed (*i.e.*, by death or divorce of the other spouse), the cases can be divided into three general categories:

(a) Where both parties were aware of the impediment, the courts apply the presumption that a relationship meretricious in origin is presumed to continue as such, so that no new agreement of common-law marriage will be presumed.

(b) Where both parties were not aware of the impediment, the courts presume that a new agreement for a common-law marriage was entered into when the impediment was removed (or more accurately, that the original agreement was a continuing one).

(c) Where one party, but not both, was aware of the impediment, the courts are split. However, the Ohio Supreme Court has held that in this situation the continued cohabitation is equivalent to a new agreement. Johnson v. Wolford, 117 Ohio St. 136, 157 N.E. 385 (1927). See Ryan v. Ryan, 84 Ohio App. 139, 86 N.E.2d 44 (1948); Hale v. Graham, 85 Ohio App. 447, 86 N.E.2d 330 (1948); Mieritz v. Insurance Co., 8 Ohio N.P. 422 (C.P. 1901). See also Notes in 12 CORNELL L.Q. 513 (1927); 2 CORNELL L.Q. 117 (1917); 6 MICH. L. REV. 247 (1908); 6 U. PITT. L. REV. 104 (1940); 13 VA. L. REV. 579 (1927); 26 YALE L.J. 145 (1916).

21-1. Hall v. Industrial Comm'n, 165 Wis. 364, 162 N.W. 312 (1917); RESTATEMENT, CONFLICTS OF LAWS § 121, comment *d* (1934); GOODRICH, CONFLICT OF LAWS § 117 (3d ed. 1949). There are no cases on how this rule would operate if the husband and wife are separated and are domiciled in different states which have conflicting conflicts rules. Illogical

For example, husband and wife are first cousins and domiciled in Wisconsin where first cousin marriage is void. Intending to return to Wisconsin, they are married in New York where such a marriage is valid. Later, while still domiciled in Wisconsin, the husband dies owning real property in Ohio. The wife's attempt to enforce dower rights in the Ohio court is resisted by the husband's heirs on the ground that the marriage is void. The Ohio court should hold that the marriage is void. The fact that Ohio law holds such a marriage void or voidable, and the Ohio conflicts rule that a marriage which is valid where made is valid everywhere should have no bearing on this result. The marriage would be void because Ohio courts should look to Wisconsin, the state of domicile, and in particular to its conflicts rules. Wisconsin's rules are not the normal conflicts rules, but provide by statute that a marriage of Wisconsin residents is void if they are married outside of the state to evade local requirements.[21-2]

As indicated above, the basic common-law conflicts rule followed in Ohio is that a marriage which is valid where made is valid everywhere, and a marriage which is defective where made is equally defective elsewhere.[21-3] The basic rule is applied even though the parties are married outside of Ohio for the sole purpose of evading the Ohio requirements and intend to resume their Ohio domicile after the marriage.[21-4]

The basic rule is subject to three well-established exceptions, two of which are recognized in Ohio:

(1) The state of the domicile will not recognize a polygamous marriage, even though valid where made.

(2) The state of the domicile will not recognize a marriage between persons so closely related that the marriage is contrary to a strong public policy. Some states have held that first-cousin marriages, although valid where contracted, will not be recognized. However, a recent Ohio case holds that a first-cousin marriage which was valid where made is valid in Ohio.[21-5] Presumably, Ohio would not validate a marriage of persons closer than first cousins.

(3) The southern states generally hold that an interracial marriage is so violently opposed to public policy that such a marriage is void, even though valid where contracted.

A recent Ohio Supreme Court decision seems out of line with the basic conflicts rule as applied to nonage marriages. In *State v. Gans*,[21-6]

as it may seem, the only expedient answer would be to refer to the conflicts law of the state of last matrimonial domicile. *But see* GOODRICH, *op. cit. supra* § 118 for a contrary view.

21-2. WIS. STAT. ANN. § 245.04 (1957).

21-3. Mazzolini v. Mazzolini, 168 Ohio St. 357, 155 N.E.2d 206 (1958). *In re* Estate of Maynard, 117 Ohio App. 315 (1962).

21-4. Peefer v. State, 42 Ohio App. 276, 182 N.E. 117 (1931).

21-5. Mazzolini v. Mazzolini, 168 Ohio St. 357, 155 N.E.2d 206 (1958).

21-6. *Ibid.*

the parents took their 11-year-old daughter from Ohio to West Virginia, where she lied about her age, was married, and returned to Ohio to live, all with the knowledge and consent of her parents. The bride, groom, and parents were at all times domiciled in Ohio. The parents were convicted of "acting in a way tending to cause delinquency in such child" and the conviction was affirmed. Without commenting on the merits of the criminal aspect of the case, it seems clear that the decision indirectly changes the accepted law on nonage marriages. A court of appeals had held that where a nonage marriage was valid where made, the husband could not be convicted of contributing to the juvenile delinquency of his 15-year-old wife.[21-7] In the *Gans* case, the supreme court expressly declined to pass on the validity of the marriage, although the dissenting opinion pointed out that under West Virginia law it was valid. The interesting thing about the opinion is that every argument the court uses to convict the parents of tending to cause delinquency applies with equal force to the husband. If this analysis is correct, we have the anomolous situation where the marriage is valid in Ohio, except that the husband can be jailed for entering into a valid marriage.

Although the Ohio courts have not ruled on the following situations, presumably they would be decided in accord with the weight of authority.

(1) The basic rule is that a marriage, invalid where contracted, is invalid in the forum. What does "invalid" mean? Clearly it includes both void and voidable marriages, but should the effect of the defect as to void or voidable be governed by the law of the domicile or the law of the state where the marriage occurred?[21-8] Assume that a particular defect, such as fraud, renders a marriage void in Iowa and voidable in Ohio. Should an Ohio court allow a collateral attack on an Iowa marriage where the issue is raised in Ohio? Both Goodrich[21-9] and the Restatement of Conflicts are silent on this point, but the sparse authority indicates that the state of domicile, which is usually the forum, should apply its own rules to determine the incidents of a marital defect. Thus, a Texas court validated a marriage which was voidable only in the state where contracted.[21-10]

(2) A substantial number of states attempt to prohibit hasty remarriage after divorce. About one-third of the states prohibit both parties from remarrying within a certain time, usually one year. Other states restrict or prohibit the remarriage of the guilty party. Ohio has no such restriction. A clear majority of states have held that such a prohibition is penal in character, has no extra-territorial effect, and a mar-

21-7. Peefer v. State, 42 Ohio App. 276, 182 N.E. 117 (1931).

21-8. Regarding the difference between "void" and "voidable" as applied to marital defects, see Section 11 *supra*.

21-9. GOODRICH, *op. cit. supra* note 21-1.

21-10. Portwood v. Portwood, 109 S.W.2d 515 (Tex. Civ. App. 1937).

riage contracted in violation of the restriction outside the state of divorce, will be recognized, even by the state of divorce.[21-11] An increasing number of states phrase the restriction in terms of a conditional or interlocutory decree, so that the divorce becomes final only when the period of time has run. It is generally agreed that an out-of-state marriage entered into before the final decree is issued is void and bigamous, not only in the state of domicile, but wherever the question is raised.[21-12]

### *Section 22 — Choice of Remedies — Divorce or Annulment*

Conceptually, a decree of divorce is a decree which terminates a marital status because of some cause or event which arose after the status was entered. On the other hand, an annulment decree is one which either terminates the status (in the case of a voidable marriage) or which declares that there never was a marital status (in the case of a void marriage); but in both cases the basis of the action is some event or condition which existed at the time the alleged marriage was contracted. Accordingly, most states hold that the two actions are mutually exclusive. That is, there can be no annulment of a legally valid marriage. Conversely, there can be no divorce where the marriage is defective, or as it is more commonly phrased, a valid marriage is a jurisdictional prerequisite to a divorce action.

The difficulty in Ohio is that the divorce statute, enacted in 1853, includes ten grounds for divorce, three of which are clearly grounds for annulment: impotency, fraudulent contract, and bigamy.[22-1] The statute does not explain whether these three grounds refer to events which happened at the time of the marriage or subsequently, but two of them, bigamy and fraud, by their very nature obviously refer to entry into the marital status. The statutory reference to impotency as a ground for divorce could be construed as impotency which occurs after entry into the status, but the Ohio courts have never followed this line of reasoning, although it is consistent with the conceptual basis of divorce. In addition, the three grounds are not defined in the statute, but the Ohio courts have always incorporated the substantive law of annulment in arriving at definitions of the statutory terms.[22-2]

21-11. Loughran v. Loughran, 292 U.S. 216 (1934).

21-12. See Oliver v. Oliver, 185 F. 2d 429 (D.C. Cir. 1950), and cases cited therein.

22-1. The present statute is OHIO REV. CODE section 3105.01, which reads in part: "The court of common pleas may grant divorces for the following causes:

(A) Either party had a husband or wife living at the time of the marriage from which the divorce is sought . . . (D) Impotency . . . (F) Fraudulent contract . . . ."

22-2. See the Ohio cases on fraud, impotency, and bigamy in Sections 14, 17, and 20 *supra,* and Meyer v. Meyer, 7 Ohio Dec. Reprint 561 (C.P. 1878), *aff'd,* 7 Ohio Dec. Reprint 627 (Dist. Ct. 1879).

Prior to 1952, there was no speculation in Ohio opinions as to the dual nature of these three grounds, and very little as to the reason why the legislature distinguished three of the many grounds for annulment and designated them as grounds for divorce. There is a passing reference in one supreme court case, suggesting that this was done so that the good faith victim of a bigamous marriage could terminate the marriage and also obtain alimony.[22-3] This suggestion, based upon the fault of the defendant, could logically explain the special distinction for bigamy and fraud, although it is difficult to see how the rationale would be applied to impotency which does not involve fault. The suggested rationale of the statute was strengthened by an 1869 supreme court opinion, holding that the victim of a bigamous marriage, apparently without knowledge of the defect, was entitled to alimony when she sued for divorce on the grounds of bigamy.[22-4]

The implication of the above suggestion is that the bigamous spouse can get an annulment of the second marriage (because the marriage is void, not voidable), and the other spouse has an option: she can sue for annulment without alimony, or, if she married in good faith, unaware of the impediment, she can sue for divorce and alimony.

Apparently the implications of this suggestion were never pursued, and the lower courts seemed to follow the practice of granting either a divorce or an annulment, depending on the request of the plaintiff, without any distinctions based on good faith, knowledge of the impediment, or comparative fault.

This situation changed in 1952 with the decision in *Eggleston v. Egglestone.*[22-5] In this case, the husband married the wife at a time when he had a prior wife living. The second wife had no knowledge of the bigamy. The parties lived together for ten years and had two children. The second wife discovered that her marriage was bigamous and sued for divorce on the grounds of bigamy, cruelty, and neglect. As an alternative to divorce she asked for an annulment. The trial court held that she was entitled to an annulment, but denied her a divorce, alimony, or child support on the theory that no divorce can be granted for a void marriage. The wife appealed and the Ohio Supreme Court reversed, indicating that this is the exact situation for which the statute was intended, *i.e.,* a divorce plus alimony for the good faith victim of bigamy.

It seems clear that the decision in the *Eggleston* case was correct in light of the facts of that case. The subsequent difficulty has been caused by the fact that the court, as an additional or alternate ground for deci-

22-3. Smith v. Smith, 5 Ohio St. 32 (1855).

22-4. Vanvalley v. Vanvalley, 19 Ohio St. 588 (1869).

22-5. 156 Ohio St. 422, 103 N.E. 395 (1952).

sion, added the statement that where the legislature has set forth a marital defect as a ground for divorce, the statute provides the exclusive remedy. The statement was also set forth in the official syllabus, and in Ohio the syllabus is the law of the case.

The difficulty is that the statement was unnecessary to the decision of the case, and if read literally would indicate that the courts no longer have jurisdiction to grant annulments for bigamy, fraud, or impotency. The difficulty is compounded by the subsequent decision of *Basickas v. Basickas*,[22-6] where a divorce was granted in an incestuous marriage between uncle and niece. The court said that such a marriage was forbidden by statute, making the marriage a fraud upon the state. Accordingly, a divorce for fraud was granted, and the court indicated that annulment would not be a proper remedy under the rule of the *Eggleston* case. The court neglected the judicial history which indicates that "fraud" in the statute means fraud between the parties, and not fraud upon the state. If the court's reasoning is carried to its logical conclusion, then all marital defects are frauds upon the state, and if the dictum in the *Eggleston* case is followed, then divorce is the exclusive remedy for all marital defects and there is no longer any annulment jurisdiction in Ohio.

Since the *Eggleston* case, there have been four lower court opinions on the problem which have arrived at conflicting results. As already indicated, the *Basickas* decision follows the dictum of the *Eggleston* case and indicates that divorce is the exclusive remedy for all three grounds, regardless of the good faith of the parties or the existence of a *de facto* marital relationship. *Abelt v. Zeman* is in accord.[22-7] In *Nyhuis v. Pierce*,[22-8] the court granted an annulment, pointing out that the *Eggleston* case could and should be limited to its facts, and that an annulment for bigamy should be granted where the parties never lived together. In the most recent case, an Ohio court of appeals granted an annulment for bigamy without any discussion of the problem raised by the *Eggleston* case.[22-9] The court also held, without any specific discussion of the question, that the Ohio rule on choice of remedies (annulment or divorce) would apply to a marriage which took place in Pennsylvania. This decision was in accord with the principle mentioned in the preceding section of this article that the effect of a defect, whether void or voidable, ought to be determined by the law of the domicile.

It would seem that this is an area which should be clarified, either by decision or by statute by going back to the original reason for includ-

22-6. Basickas v. Basickas, 93 Ohio App. 531, 114 N.E.2d 270 (1953).

22-7. 173 N.E.2d 907 (Ohio C.P. 1961). See also subsequent opinion in 179 N.E.2d 392 (Ohio C.P. 1961).

22-8. 114 N.E.2d 75 (Ohio Ct. App. 1952).

22-9. Schwartz v. Schwartz, 113 Ohio App. 275, 173 N.E.2d 393 (1960).

ing annulment grounds in the divorce statute, *i.e.,* the provision for a divorce with alimony for the unwitting victim of a defective marriage. Where the purpose of the action is to set the record straight as to the invalidity of a bigamous marriage, or where the parties, for personal or religious reasons, prefer annulment to divorce, there should be no objection to an annulment.

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## POSTSCRIPT

A bill to codify the Ohio law of annulment was pending before the 105th General Assembly. The original version of the bill was drafted by members of the Family Law Committee of the Ohio Bar Association. It was Substitute House Bill No. 467, which passed in the House, but did not emerge from committee before adjournment in the Senate. The chance of passage, however, in the next session is apparently quite good. Some of the features of the bill are as follows:

(1) By implication, but not by express language, the new annulment statute is exclusive, *i.e.,* all annulment actions are statutory, and historical grounds for annulment which are not in the statute are no longer grounds for annulment.

(2) All of the grounds for annulment which were discussed in this article are listed as statutory grounds, except that mistake, impotency, and incest are omitted.

(3) The procedural sections of the divorce chapter will apply to annulment actions. These include:

(a) Plaintiff must be a resident of the state for one year (apparently jurisdictional).

(b) Venue is the county of marriage or the county where plaintiff has resided for 90 days.

(c) Temporary alimony and child support are authorized.

(d) Mandatory case worker investigation is provided if the parties have children under age 14.

(e) Annulment may not be granted on the testimony or admissions of a party unsupported by other evidence.

(4) Specific periods of limitation are established for bringing the action.

(5) The statute does not specify whether specific defects render the marriage void or voidable, although ratification is listed as a defense to several grounds (nonage, insanity, fraud, and duress).

(6) Parents can have a nonage marriage annuled. This is a change in existing law.

(7) Mental incompetency is not enough for an annulment, but a

marriage can be annuled if one party was under an adjudication of incompetency at the time of the marriage, apparently even if the marriage took place during a lucid interval.

(8) The statute includes a new ground for annulment: that the marriage was never consummated although otherwise valid.

(9) The problem of the *Eggleston* case is not dealt with directly. In its original form, the bill made divorce the exclusive remedy for impotency; annulment was the exclusive remedy for bigamy; and the remedies for fraud were divorce or annulment. In its present form, the grounds of bigamy, fraud, and impotency are left in the divorce statute, and bigamy and fraud are also statutory grounds for annulment. Therefore, the initial choice as to these two grounds is with the plaintiff, and if one spouse asks for annulment and the other counterclaims for divorce, the court apparently has discretion as to the appropriate remedy.

(10) The statute clearly authorizes an order of child custody and support incident to an annulment action. It is not so clear as to whether permanent alimony is authorized, although apparently it is not.