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"The Issue of Marriages Deemed Null in Law . . . Shall Nevertheless Be Legitimate"

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VIRGINIA SECTION

NOTE.**“The Issue of Marriages Deemed Null in Law * * *
Shall Nevertheless Be Legitimate”**

So, in effect, wrote Thomas Jefferson as a member of a committee appointed in 1776 by the General Assembly of Virginia to prepare changes in the existing legal system. It became law in Virginia in 1785 as section 17 of the law of descent.¹ It is one of the first Ameri-

1. For a detailed history of the origin and development of this statute in Virginia, *see* *Withrow v. Edwards*, 181 Va. 344, 25 S. E. (2d) 343 (1943).

can statutes designed to ameliorate the unfortunate status of illegitimate children at common law, and has been widely copied.² Since it is a well-known rule of statutory interpretation that a construction given a statute by the state of its origin is impliedly adopted by the legislature of a state which subsequently itself adopts the statute, the Virginia cases are of quite general interest. The tendency of the times is shown by the increase in the number of such statutes, and greater liberality in their interpretation. Although such statutes are in derogation of the common law they are generally held to be remedial in their nature and are therefore usually construed liberally to accomplish the beneficent purpose for which intended.³ Since these enactments are frequently a part of the intestate laws of the State (as in Virginia) a strict interpretation would lead to the unfortunate result that the issue of void marriages would be legitimate *only* for the purpose of inheritance. That this is clearly *not* the law is shown by the fact that the Supreme Court of Appeals in Virginia has considered this statute for the purposes of determining whether the plaintiffs were "children" within the meaning of a clause in a will devising property to trustees for the use of A and B for their joint lives, and if either should die without children, the whole for the use of the survivor for life, and at his death to the children of the survivor in fee,⁴ whether or not the father owed a duty to support such issue,⁵ and whether or not the issue of such a marriage are children of the father within the meaning of death-by-wrongful-act statutes.⁶

But what is a "void marriage" and what is the distinction between "no marriage" and a "void marriage"? In Virginia four types of marriages have been held void without decree: (1) bigamous marriages;⁷ (2) marriages between a white person and a colored person;⁸ (3) marriages knowingly made to any person who has been lawfully adjudged to be insane, epileptic or feebleminded and duly admitted as a patient or inmate in any State hospital or colony;⁹ and,

2. By "at least three States in the Union—Kentucky, Ohio, and Arkansas," Mr. Justice Hudgins in *Withrow v. Edwards*, *supra*, note 1. As of January 1, 1931, there were twenty-three American jurisdictions having such a statute. See 1 VERNIER, *AMERICAN FAMILY LAWS* (1931) § 48. At least two States have adopted a similar statute since that date; GA. CODE ANN. (Park. et al., 1936) tit. 53, § 104; KAN. GEN. STAT. ANN. (Corrick, 1935) c. 23, § 124. The apparent discrepancy between the above estimates may be due in part to variations in the wording of the statutes.

3. "These statutes are remedial in their nature and should be liberally construed," *Goodman v. Goodman*, 150 Va. 42, 142 S. E. 412 (1928). While this seems obvious, there is authority that such statutes should be strictly construed. See *Holmes v. Adams*, 110 Me. 167, 85 Atl. 492 (1912), where it was held that a Nevada statute legitimating the issue of void marriages did not entitle such issue to inherit through their parents but only from their parents.

4. *Greenhow v. James*, 80 Va. 636 (1885).

5. *McClagherty v. McClagherty*, 180 Va. 51, 21 S. E. (2d) 761 (1942).

6. *Withrow v. Edwards*, *supra*, note 1.

7. VA. CODE ANN. (Michie, 1942) § 5087.

8. *Id.*

9. VA. CODE ANN. (Michie, 1942) § 5088b. But marriages prohibited because of consanguinity or affinity, or because of insanity (where there has

(4) common law marriages.¹⁰

According to some authorities a bigamous ceremonial marriage must have been entered into honestly and in good faith by at least one of the parties for the statute to apply. Otherwise, it is argued, there is no marriage at all—not even a void one.¹¹ Yet most (but not all) of the statutes say nothing about the good faith of the parties, and if the statute makes no such requirement a decision insisting on good faith is contrary not only to the letter but to the spirit of the statute which is obviously designed to protect the “innocent and unoffending” offspring. The idea that the crime of bigamy, or even that of miscegenation, can be eliminated by stigmatizing the children of such marriages is simply absurd, for people who are so infatuated with each other that they are willing to commit a felony by contracting an illegal marriage will not be deterred on the one hand, or encouraged on the other hand, by the thought that possible issue may be illegitimate or legitimate. It just is not “cricket” to punish the children for the crimes of their parents.¹² Fortunately, however, there are a number of decisions which either ignore any question of good faith or expressly repudiate that requirement.¹³ For example, in the Virginia case of *Goodman v. Goodman*¹⁴ a child was born before the marriage of the parents, who subsequently contracted a void bigamous marriage. The father, both before and after the void marriage, recognized the child as his own. Under a statute providing for the legitimation of bastards by recognition and the subsequent intermarriage of their parents,¹⁵ it was held that the subsequent marriage need not be a valid marriage, and hence the child born before such void marriage was entitled to inherit from the father to the exclusion of the father's brothers.¹⁶

If the marriage is void because miscegenous¹⁷ there is a sharp conflict of authority as to whether or not the issue are legitimate. The leading Virginia case is *Greenhow v. James*¹⁸ where one Dade Hooe, a white man, cohabited with one Hannah Greenhow, a colored woman, for upwards of forty years and until his death. There were eleven children borne of this illicit union. The parties were legally married

been no adjudication) are not *per se* void, VA. CODE ANN. (Michie, 1942) § 5088.

10. *Offield v. Davis*, 100 Va. 250, 40 S. E. 910 (1902).

11. *Stripe v. Meffert*, 287 Mo. 366, 229 S. W. 762 (1921).

12. Cf. the problem as to whether or not the negligence of a parent should be imputed to the child. The New York case of *Hartfield v. Roper*, 21 Wend. 615 (N. Y. 1839) so holding is now clearly the minority rule. See *Warren v. Manchester St. Ry.*, 70 N. H. 352, 47 Atl. 735 (1900), and RESTATEMENT, TORTS (1934) § 488.

13. Requirement of good faith expressly repudiated in *Harris v. Harris*, 85 Ky. 49, 2 S. W. 549 (1887). For collection of cases, see 84 A. L. R. 501-505 (1933).

14. *Supra*, note 3.

15. VA. CODE ANN. (Michie, 1942) § 5269.

16. *Contra*: *Adams v. Adams*, 154 Mass. 290, 28 N. E. 260 (1891).

17. Although Kentucky adopted the Virginia statute, miscegenous marriages are excepted from its operation. KY. REV. STAT. ANN. (Baldwin, 1943) § 391.100.

18. *Supra*, note 4; and see *Stones v. Keeling*, 5 Call. 143 (Va. 1804).

in the District of Columbia for the express purpose of legitimating the children. This marriage, of course, was void in Virginia, which was at all times the matrimonial domicile of the parties. By a three-to-two decision the Virginia Supreme Court of Appeals held that even if the children should be regarded as issue of the marriage, the statute legitimating the issue of void marriages had no application to miscegenous marriages since such marriages were not in contemplation of the legislature at the time the act was passed in 1785. It is submitted that the minority of the court were right. The statute does not distinguish between void miscegenous marriages and void bigamous marriages. At that time, just as it is now, bigamy was punished more severely than miscegenation.¹⁹ It would be just as logical to hold that the rest of the statute of descent did not apply to Negroes because the legislature did not have them in mind in 1785. If Negroes acquire a new status, and the legislature keeps the old laws, it would seem that it was the intention of the legislature that the Negro should come under the old laws still in force, for better or for worse, until changed by the legislature.

The leading case in conflict with *Greenhow v. James*²⁰ is *Re Atkins*,²¹ in which an Indian man married a Negro woman in Oklahoma where such marriages were absolutely void. It was held (two of nine judges dissenting) that issue of the marriage were legitimate. "In the mind of this simple red man these children were his children."²² In such cases there is no reasonable doubt as to the usual intentions of the deceased intestate. It is the primary purpose of the intestate laws to carry out that intention—not to defeat it. And since such intention was given effect in *Re Atkins, supra*, the decision in that case was eminently proper. To allow the intestate's property to go to his collateral relatives under such circumstances is as unnatural as the miscegenous marriage itself.

The legitimacy of the issue of common law marriages in States where such marriages are void have been held to be legitimate in States having the statute under discussion.²³ It has been contended that the statute applied only to void ceremonial marriages, but one looks in vain for any such limitation in the statute, and the decisions holding the issue legitimate clearly carry out the intentions of the Legislature in enacting the statute, and are to be commended.²⁴ One of the commonest cases to arise, however, is that in which parties who know of some impediment to the marriage, and know of the serious

19. At that time miscegenation was punishable by confinement in the penitentiary from two to five years, and bigamy from three to eight years; now miscegenation is from one to five years and bigamy is still from three to eight years. See Acts of 1877-8, pp. 301-2 (Virginia), and VA. CODE ANN. (Michie, 1942) §§ 4938 and 4546.

20. *Supra* note 4.

21. 151 Okla. 294, 3 P. (2d) 682 (1931).

22. Mr. Justice Cullison in his majority opinion. *Re Atkins, supra*, note 20.

23. *Font v. Hanlin*, 113 W. Va. 752, 169 S. E. 743 (1933); *McClagherty v. McClagherty, supra*, note 5.

24. See Note (1929) 29 Col. L. Rev. 839, on *Kester v. Kester*, 106 W. Va. 615, 146 S. E. 625 (1929).

criminal penalty which may attend such a marriage, live together as man and wife without getting married. Here, unfortunately, the cases hold unanimously that meretricious cohabitation is not even a void marriage. Issue are said to be born "clear out of wedlock." "The legislature did not attempt to make concubinage marriage."²⁵ Now no one contends the marriage is legal, or that the parties are husband and wife. But why do we not have a void common law marriage in these cases? Are the children of such unions to be punished merely because their parents preferred to commit a misdemeanor (*e. g.*, living in adultery), rather than a felony (*e. g.*, bigamy)? Is not a void common law marriage a void marriage? Should we draw petty distinctions between a void marriage, a voidable marriage, and no marriage at all, to the injury of the issue? It is submitted that where the parties have cohabited as man and wife and there is no reasonable doubt as to the paternity of the issue, then such issue should be held to be legitimated by the statute. This would exclude the case of the issue of promiscuous intercourse, not for the purpose of discouraging such intercourse, or for the purpose of punishing such issue, but because in such cases there is serious doubt as to the identity of the father and, even if the latter be established, it is not clear whether or not the father would presumably wish such issue to be regarded as his children and heirs at law.

A great many involved questions have arisen with reference to such statutes in the realm of conflict of laws.²⁶ Two illustrative cases will suffice for present purposes. In *re Bruington's Estate*²⁷ actually held that a child born and domiciled in New Jersey and legitimated there under the New Jersey statute was not a legitimate child entitled to realty of an intestate in New York on the ground that a New Jersey statute could not make the issue of a bigamous marriage legitimate in New York. On the other hand, in the Virginia case of *Withrow v. Edwards*,²⁸ a child of a bigamous marriage was born in South Carolina where there is no legitimating statute. The parents moved to Virginia. The father was killed in an automobile accident and the question arose as to whether or not the child was legitimate and hence a child of the father under the Virginia death-by-wrongful-act statute.²⁹ The court properly held that the child was entitled to the sum recovered. It repudiated the theory that illegitimacy is a fixed, permanent status. The decision can be supported on three distinct grounds: (1) That Virginia as an incident to its sovereignty has the right to determine the status of its citizens, and under the statute legitimating children of void marriages, it is immaterial where the void marriage took place; (2) the statute at the very least is a statute of descent and means that the child is legitimate for the pur-

25. See *Differari v. Terry*, 128 Tex. 521, 99 S. W. (2d) 290 (1936).

26. For an able discussion of this subject, see Note, *Legitimation of the Issue of Invalid Marriages in the Conflict of Laws* (1937) 46 YALE L. JOUR. 1049.

27. 160 Misc. 34, 289 N. Y. Supp. 725 (Surr. Ct., N. Y. Co., 1936).

28. *Supra*, note 1.

29. VA. CODE ANN. (Michie, 1942) §§ 5786-5788.

pose of inheritance, whatever may be its status in other places or for other purposes; and (3) the word "children" in death by wrongful act statutes is not limited to *legitimate* children only.³⁰ The conclusion to be drawn from these two cases is that in the interest of justice, where the law of more than one state is involved the law of the state most favorable to legitimacy should be applied.³¹

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30. See *Middleton v. Luckenback S. S. Co.*, 70 F. (2d) 326 (C. C. A. 2d, 1934) (wrongful death in collision on high seas), commented upon in (1934) 21 VA. L. REV. 120.

31. See *Legitimation of the Issue of Invalid Marriages in the Conflict of Laws*, *loc. cit. supra*, note 26.

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