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Marriage - Restitution or Other Disposition of Property, and Compensation - Right of Putative Wife to Property Jointly Accumulated

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although some early cases in the United States did make such a distinction and allowed the plaintiff to recover where the tort had been one of negligence.¹⁴

Of some encouragement to those who advocate a change in the law on this point, is the decision of the Minnesota court in an early case which repudiated the entire doctrine as being purely technical, wrong in principle and in no sense a rule of property.¹⁵ Prior to the instant case, Minnesota was the only jurisdiction adopting outright repudiation of the doctrine, yet Missouri, in a comparatively late decision, held that the doctrine did not apply except where the title to the property was directly in controversy.¹⁶ The only North Dakota case in point involved a counterclaim in which it was alleged that damage had been done to the defendant's property located in Minnesota. The North Dakota court refused to allow recovery on the counterclaim, holding that it was a local action to be tried in Minnesota.¹⁷

In the instant case the Arkansas court has based its deviation from the rule upon the constitutional right of every individual to a remedy at law. In states whose constitutions provide such a right,¹⁸ this would appear to be a sound basis for allowing an otherwise remediless plaintiff to recover, and for affording the courts an opportunity to dispense with an obviously inequitable rule.

EDWARD E. DESSERT

MARRIAGE—RESTITUTION OR OTHER DISPOSITION OF PROPERTY, AND COMPENSATION—RIGHT OF PUTATIVE WIFE TO PROPERTY JOINTLY ACCUMULATED—Plaintiff and defendant were both previously married. The plaintiff separated from her husband in 1937 and moved into the home of the defendant in 1941. Subsequently she obtained a divorce on 90 days residence in Arkansas and ceremonially married the defendant in 1945. In 1948 the plaintiff's first husband secured a divorce from her, after which she again married the defendant in Mississippi. Through their joint efforts, plaintiff and defendant accumulated a good deal of property. Plaintiff sued for divorce. Without determining the validity of the plaintiff's Arkansas divorce, the court held that she was not married to the defendant because of the defendant's pre-existing marriage, that she had entered into the illicit relationship in good faith, and granted a decree annulling the marriage and awarding the plaintiff certain real property as her equitable share of the property accumulated by the joint efforts of the parties during their relationship before and after the purported marriages. *Chrismond v. Chrismond*, 52 So.2d 624 (Miss 1951).

14. Scott, *Fundamentals of Procedure in Actions at Law* 7, n.9 (1922).

15. *Little v. Chicago, St.P.,M. & O.Ry.Co.*, 65 Minn. 48, 67 N.W. 846, 847 (1896) "If the courts of England, . . . were at liberty to invent a fiction in order to change the ancient rule that all actions were local, . . . we cannot see why the courts of the present day should deem themselves slavishly bound by those limitations."

16. *Ingram v. Great Lakes Pipe Line Co.*, 153 S.W.2d 547 (Mo.App., 1941) (destruction of spring by blasting, title only incidentally involved).

17. *Farmer v. Dakin*, 28 N.D. 452, 149 N.W. 354 (1914).

18. North Dakota Const. Art. I, §22, "All courts shall be open, and every man for any injury done him in his lands, goods, person or reputation shall have remedy by due process of law, and right and justice administered without sale, denial or delay. . . ."

The common law confers no civil rights on marriage void *ab initio*.¹ Upon annulment the parties revert to the status they enjoyed at the time they entered the relationship.² The wife acquires no right to alimony.³ Neither dower nor curtesy arises from the illicit relationship,⁴ nor does the woman acquire any right to share in the property which she helped to accumulate during the purported marriage.⁵ The tendency now is to award the putative wife a share in the property accumulated during the meretricious relationship⁶ or to compensate her for services rendered.⁷ This doctrine is recognized under the civil law⁸ and made its way into this country through those states having a civil law background.⁹ All jurisdictions except Louisiana have since adopted, in greater or lesser degree, the common law, but some of the vestigia pertaining to the rights of the parties remains. Community property jurisdictions have permitted division of property accumulated jointly in such situations by applying an analogy to the community property statutes¹⁰ which were derived from the law of Spain.¹¹ Other jurisdictions have awarded a division of property to the putative wife using partnership or quasi-partner-

1. *Carpenter v. Smith*, 24 Iowa 200 (1868).

2. *Price v. Price*, 124 N.Y. 589, 27 N.E. 383 (1891); *Carpenter v. Smith*, 24 Iowa 200 (1868): "The above statement is often made by the courts, but is not entirely correct. In the case of a void marriage, the status of the parties never really changed at all, in the view of the common law. Annulment did not, therefore, alter any pre-existing status or relationship, but merely served as a judicial declaration of the rights of the parties."

3. *Reed v. Reed*, 85 Miss. 126, 37 So. 642 (1905) (Marriage is the very foundation of the wife's right to support); *Stewart v. Vandervort*, 34 W. Va. 524, 12 S.E. 736 (1890) (no alimony in absence of statute) *Contra*, *Strode v. Strode*, 3 bush. 227, 96 Am. Dec. 211 (Ky. 1867) (putative wife awarded alimony).

4. *Price v. Price*, 124 N.Y. 589, 27 N.E. 383 (1891).

5. *Schmitt v. Schneider*, 109 Ga. 628, 35 S.E. 145 (1900) ("That he may have perpetrated a fraud upon her gives her no title, legal or equitable, to property acquired by him in his own right, although it may have been purchased with his ill-gotten gains"); *DeFrance v. Johnson*, 26 Fed. 891 (D. Minn. 1866).

6. *King v. Jackson*, 196 Okla. 327, 164 P.2d 974 (1945); *Schneider v. Schneider*, 183 Cal. 335, 191 Pac. 533 (1920). *Contra*, *Schmitt v. Schneider*, *supra* note 5; *Note*, 76 U. of Pa. L. Rev. 439 (1927).

7. *E.g.*, *Walker v. Walker*, 330 Mich. 332, 47 N.W.2d 633 (1951); *In re Fili's Estate*, 241 Iowa 61, 40 N.W.2d 286 (1949); *Roberts v. Roberts*, 64 Wyo. 433, 196 P.2d 361 (1948). *Contra*, *Cooper v. Cooper*, 147 Mass. 370, 17 N.E. 892 (1888).

8. *Lee v. Smith*, 18 Tex. 142, 145 (1856): "In Spanish law, such marriage is designated as putative, and the consort who enters into such matrimony ignorant that her partner has a wife or husband living is in law not only innocent of crime, but has all the rights, incidents and privileges pertaining to a lawful marriage."

9. *McCaffrey v. Benson*, 40 La. Ann. 10, 3 So. 393 (1888): "But as article 117 of our Code has been taken literally from article 201 of the Code Napoleon . . . Our researches have led us to the conclusion that, when both the parties to a marriage subsequently declared null, were in good faith, one of the civil effects was the legal community or partnership of acquets and gains which results from a lawful marriage; and that the relative rights of the parties must be tested under the same laws which govern the community rights inter sese of lawfully married spouses." See also *Burr v. Wilson*, 18 Tex. 368, 370 (1857).

10. *Schneider v. Schneider*, 183 Cal. 335, 191 Pac. 533 (1920): "Even though it may be true that there is no community property where there has not been a valid marriage, the courts may well, in dividing gains made by the joint efforts of a man and woman living together under a voidable marriage, which is subsequently annulled, apply, by analogy, the rules which would obtain with regard to community property, where a valid marriage is terminated by the death of the husband or by divorce." See also *Coats v. Coats*, 160 Cal. 671, 118 Pac. 441 (1911); *Buckley v. Buckley*, 50 Wash. 213, 96 Pac. 1079 (1908).

11. *Spreckels v. Spreckels*, 116 Cal. 339, 48 Pac. 228 (1897); *Strong v. Eakin*, 11 N.M. 107, 66 Pac. 539 (1901).

ship,¹² joint adventure,¹³ and principles of equity¹⁴ as the bases for their decisions.

The modern trend also permits the putative wife to recover on an implied contract for services rendered during the supposed coverture.¹⁵ This view has been rejected in Massachusetts¹⁶ but has been generally accepted in other jurisdictions. A few jurisdictions have resolved the problem by statutory enactment of a form of alimony.¹⁷ Indications are, however, that the courts will go no farther in granting relief to a putative wife than dividing property jointly accumulated, awarding compensation for services rendered or affording relief in the form of statutory alimony.¹⁸ The instant case seems well founded on modern precedent. While it may be argued that this doctrine is in derogation of the common law, the adoption of that body of law does not preclude modification to meet local conditions.¹⁹

HAROLD O. BULLIS

TORTS — CONDITION AND USE OF BUILDINGS — STOREKEEPER'S LIABILITY FOR THE ACTIONS OF A CROWD. Plaintiff went to the defendant's store in response to the advertisement of a sale. A large crowd was awaiting the opening of the store. When the doors were finally opened, the crowd surged forward and pushed the plaintiff into a showcase, injuring her. The plaintiff sued, charging that the defendant knew the dangerous propensity of the crowd, yet delayed the opening so that photographers could get pictures of the crowd of customers. Negligence was charged in (1) failure to police the premises, (2) failure to open the door at the advertised hour, (3) failure to rope off the entrance, and (4) failure to police the entrance to prevent the crowd's pushing and shoving. It was *held*, that the pleadings stated a cause of action.

12. *Fung Dai Kim Ah Leong v. Lau Ah Leong*, 27 F.2d 582 (9th Cir.), *cert. denied*, 278 U.S. 636 (1928) (admitted that technically no partnership, trust, agreement, express or implied contract existed, but allowed a division of property on the basis of unjust enrichment); *Krauter v. Krauter*, 79 Okla. 30, 190 Pac. 1088 (1920); *Werner v. Werner*, 59 Kan. 399, 53 Pac. 127 (1898): "The court has the same power to make equitable divisions of the property so accumulated as it would have in case of the dissolution of a business partnership."

13. *Beuck v. Howe*, 71 S.D. 288, 23 N.W.2d 744 (1946) (recovery denied on ground that evidence did not warrant the conclusion that defendant contributed substantially to acquisition of the property); *Bracken v. Bracken*, 52 S.D. 252, 217 N.W. 192 (1927).

14. *King v. Jackson*, 196 Okla. 327, 164 P.2d 974 (1946); *Sclamberg v. Sclamberg*, 220 Ind. 209, 41 N.E.2d 801 (1942) (incestuous marriage, valid under Russian law; held, equity has power to grant relief in such circumstances).

15. Cases cited note 7, *supra*.

16. *Cooper v. Cooper*, 147 Mass. 370, 17 N.E. 892 (1888).

17. *Stapleburg v. Stapleburg*, 77 Conn. 31, 58 Atl. 233 (1904) (alimony awarded under statute permitting the court upon declaring a marriage void to award alimony as it might have done in a divorce proceeding if the parties were married); *Barber v. Barber*, 74 Iowa 301, 37 N.W. 381 (1888) (statute permitting court to decree compensation as in case of divorce if contract entered into in good faith); *Vanvalley v. Vanvalley*, 19 Ohio St. 588 (1869).

18. *Ft. Worth & R. G. Ry. Co. v. Robertson*, 131 S.W. 400 (Tex Civ. App. 1910) (reversing a decision permitting a putative wife to recover for injuries to deceased husband which did not cause his death, holding that to permit recovery would extend to a putative wife all the rights of a valid marriage); *Woods v. Hardware Mut. Casualty Co.*, 141 S.W.2d 972 (Tex.Civ.App. 1940) (putative wife not allowed to claim workman's compensation.)

19. *Fung Dai Kim Ah Leon v. Lau Ah Leong*, 27 F.2d 582 (9th Cir.), *cert. denied*, 278 U. S. 636 (1928).