

ANNULMENT OF MARRIAGES: AN ANALYSIS OF INDIANA LAW

When the Indiana courts are called upon to annul a marriage or declare it a nullity, the problem of jurisdiction often arises. Questions also arise as to who may contest the validity of such a marriage and within what time must it be contested. The answers will turn upon whether the marriage is void or voidable. Assuming these problems are met, then the court must deal with possible defenses to an action to annul a voidable marriage. In some instances, the courts imply a common-law marriage where the impediment that caused a marriage to be void has subsequently been removed. Annulment cases often raise the question of property distribution. Even more important is the consideration of the legitimacy, custody and care of the children born of such an ostensible marriage. In annulment actions, the purported wife's interest must also be protected; thus, if the wife is a defendant in an annulment suit, a court of equity has the power to grant support pendente lite and money for adequate defense.

General History of Annulment

The legal power to annul marriages stems from the ecclesiastical courts of England. Courts of equity assumed the exercise of the power of annulment in this country.¹ Also power of annulment has been granted by statute in many jurisdictions.² There are two purposes for which annulment proceedings may be used: the obtaining of a judicial declaration of the invalidity of a marriage contract which is void by reason of law of the commonwealth where it was solemnized and to have a voidable marriage judicially made void.³

Indiana statutes declare certain marriages void and others voidable. The following marriages are declared void: (1) a marriage entered into by persons nearer of kin than second cousins;⁴ (2) when either party at the time of such marriage had a wife or husband living; (3) where one

1. The Indiana Supreme Court has stated that the rules of the ecclesiastical courts of England were a part of the common law of that country. Since Indiana adopted the common law of England, it follows the power of annulment is a part of the law of Indiana. *Teft v. Teft*, 35 Ind. 44 (1871).

2. IND. ANN. STAT. § 44-106 (Burns 1952). See summary of statutes in 3 NELSON, *DIVORCE AND ANNULMENT* 615 (2d ed. 1945).

3. *Henneger v. Lomas*, 145 Ind. 287, 44 N.E. 462 (1896); *Shafe v. Shafe*, 101 Ind. App. 200, 198 N.E. 826 (1935); *Huffman v. Huffman*, 51 Ind. App. 330, 99 N.E. 769 (1912); 3 NELSON, *DIVORCE AND ANNULMENT* § 31.03 (2d ed. 1945). A void marriage makes cohabitation at all times illegal, while a voidable marriage protects intercourse between the parties for the time being and furnishes the usual incidents of survivorship. 2 SCHOULER, *MARRIAGE AND DIVORCE* § 1081 (6th ed. 1921).

4. IND. ANN. STAT. § 44-103 (Burns 1952).

party is a white person and the other party has one-eighth or more Negro blood; (4) when either party at the time of such marriage is insane or idiotic.⁵ If either of the parties to a marriage shall be incapable, from want of age⁶ or understanding,⁷ or the marriage is procured through fraud of one of the parties, then upon application by the under-aged party or the innocent party in a case of fraud the voidable marriage may be declared void.⁸

The court, in *Pry v. Pry*,⁹ states that the distinction between a void and voidable marriage is that in the latter there must be a judicial declaration which is not the case when the marriage is void. Void marriages were said to be "good for no legal purpose and its invalidity may be shown in any court between any parties either in the lifetime of the ostensible husband and wife or after the death of either or both of them."¹⁰ However, ordinary prudence demands that there be a declaration of the parties' status, which may be brought into question in a future collateral action.

Right to Institute and Maintain an Annulment Suit

In Indiana certain marriages are void,¹¹ yet the statute¹² which declares certain marriages void without legal proceedings does not include marriages prohibited because of insanity. Although this seems to imply

5. IND. ANN. STAT. § 44-104 (Burns 1952).

6. Males must be of age eighteen [18] and females of age sixteen [16]. IND. ANN. STAT. § 44-101 (Burns 1952). The 1957 legislature amended this to allow marriages of underaged parties where the female is pregnant. IND. ANN. STAT. § 44-101 (Burns Supp. 1957).

7. In *Wiley v. Wiley*, 75 Ind. App. 456, 123 N.E. 252 (1919), the court considered the question of whether "want of . . . understanding" was equivalent to "insane or idiotic" which makes a marriage void. It was held "want of . . . understanding" did not mean insanity, for the statute gave a cause of action only to the incapable party and no other party had been authorized to bring the suit on behalf of the incapable party. A contrary holding would, in effect, deny the insane the protection of his property from the unscrupulous who marry such a person in hope of pecuniary gain. Thus, it appears that "want of . . . understanding" refers to the want of understanding that is presumed of a child under the legal age of marriage.

8. IND. ANN. STAT. § 44-106 (Burns 1952). For a discussion of the various types of fraud see Brown, *Duress and Fraud as Grounds for the Annulment of Marriage*, 10 IND. L. J. 473 (1935).

9. 225 Ind. 458, 75 N.E.2d 909 (1947).

10. *Wiley v. Wiley*, 75 Ind. App. 465, 123 N.E. 255 (1919). A divorce is distinguished from an annulment proceeding in that the former presupposes the validity of the marriage contract whereas the latter assumes its invalidity. *Henneger v. Lomas*, 145 Ind. 287, 44 N.E. 462 (1896); 3 NELSON, DIVORCE AND ANNULMENT § 31.04 (2d ed. 1945). A divorce action is caused by something which has occurred since the marriage. A single exception is impotency, existing at the time of the marriage. IND. ANN. STAT. § 3-1201 (Burns 1946). On the other hand, an annulment or nullity suit is based on some cause which was present at the time of the ostensible marriage.

11. IND. ANN. STAT. §§ 44-103, 104 (Burns 1952).

12. IND. ANN. STAT. § 44-105 (Burns 1952). It appears the omission of insanity was an oversight by the legislature.

that there must be a legal declaration of nullity in this instance, there is no apparent reason for this distinction. The alternative possibility is that "want of . . . understanding"¹³ refers to marriage of insane persons and thus requires action by the incapable party; but this was refuted in *Wiley v. Wiley*.¹⁴

In *Pence v. Aughe*,¹⁵ the question arose whether a guardian of an insane person may institute or maintain an annulment suit in the name of any person other than the incapable party. The question was answered in the negative. The proposition that a guardian of an incompetent could not institute an action on the latter's behalf was suggested in the *Wiley* case,¹⁶ where *Pence v. Aughe* was cited as authority. However, the court in the *Pence* case did not state that the guardian could not bring the action in the name of the incompetent party.

In *Bruns v. Cope*,¹⁷ the marriage was collaterally attacked on the ground that one of the parties to the marriage was of unsound mind. The court held that in a statutory action by heirs for partition of land of an alleged insane decedent a marriage may not be collaterally attacked. Rather, if the petitioning party is entitled to any relief it must result from direct attack in appropriate equitable proceedings. The *Wiley* case criticized that holding as contrary to the general rule.¹⁸ Although none of the cases cited as authority for the general rule involve the validity of a marriage because of alleged insanity, they do contain collateral attacks on the marriage in a statutory action by heirs of parties to the marriage. However, in *Redden v. Baker*,¹⁹ a case involving an action by the guardian of an adjudged insane person to set aside a conveyance, the court in dicta stated that according to some of the cases the marriage was a nullity, and would be so declared by the court upon "proper application." This seems to hint that such a marriage cannot be declared a nullity by collateral attack. *Langdon v. Langdon*²⁰ presented a theory contrary to the *Bruns* case. This case follows the general rule of *Wiley v. Wiley*, for the court allowed a collateral attack on a marriage void on account of insanity. The issue was not raised as to whether a collateral attack was proper. Thus perhaps in practice the court has overruled the *Bruns* case. Assuming *Bruns v. Cope* is still good law, these cases can

13. IND. ANN. STAT. § 44-106 (Burns 1952).

14. 75 Ind. App. 456, 123 N.E. 252 (1919).

15. 101 Ind. 317 (1884).

16. 75 Ind. App. 456, 123 N.E. 252 (1919).

17. 182 Ind. 289, 105 N.E. 471 (1914).

18. The court cites *Boulden v. McIntire*, 119 Ind. 574, 21 N.E. 445 (1889), *Wenning v. Teeple*, 144 Ind. 189, 41 N.E. 600 (1896), *Teter v. Teter*, 101 Ind. 129 (1884) as upholding the general rule.

19. 86 Ind. 191 (1882).

20. 204 Ind. 321, 183 N.E. 400 (1932).

be reconciled if they are construed to hold that a marriage which is void without legal proceedings, *as set out by statute*,²¹ need not be attacked directly to be annulled. As stated in the introductory paragraph of this section, this statute does not include marriages in which one of the parties is insane. Thus, to annul a marriage alleged to be void because of insanity of one of the parties would require a direct attack. Although this interpretation may be contrary to the language of the *Wiley* case, it is important to note that the court did not have to hold on this issue, for in that case there was a direct attack to have the marriage declared void.²²

The more typical annulment situation involves a marriage void for one of the possible reasons other than insanity, all of which are absolutely void without any legal proceedings.²³ It is stated in the *Wiley* case that the general rule is that if the ostensible marriage is void a person is not compelled to bring any action to have it adjudged void, and the attack may be collateral. Although the court was not required to hold on this issue, it seems that this is the law in Indiana, with the possible exception of insanity.²⁴ In the *Wiley* case in dicta the court said an attack was proper during "the lifetime of the ostensible husband and wife or after the death of either or both of them."²⁵

On the other hand a voidable marriage,²⁶ that is, where one of the parties is incapable from want of age or understanding or when the marriage is procured by the fraud of one of the parties, is treated differently by the courts. In *Adkins v. Holmes*,²⁷ the court cited quite extensively the English common law on voidable marriages. The court quoted Justice Story who, in effect, had stated that voidable marriages are voidable only during the lives of the parties and if not so avoided during their lives they are deemed valid for all purposes.

21. IND. ANN. STAT. § 44-105 (Burns 1952).

22. In *Baglan v. Baglan*, 102 Ind. App. 576, 4 N.E.2d 53 (1936), an action to receive compensation instituted by the widow of the deceased, the question arose whether evidence as to alleged insanity should be admitted in a proceeding before the Industrial Board. The court held it should have been admitted. However, this is perhaps of little bearing on our problem for the situation comes up before the Industrial Board which has no power to annul marriages. Rather, it must function by determining who are the dependents of a deceased employee.

23. IND. ANN. STAT. § 44-105 (Burns 1952).

24. See, *e.g.*, *Sclamberg v. Sclamberg*, 220 Ind. 209, 41 N.E.2d 801 (1942); *Teter v. Teter*, 88 Ind. 494 (1883); *Light v. Lane*, 41 Ind. 539 (1873).

25. 75 Ind. App. 456, 465, 123 N.E. 252, 255 (1919). Also see *Langdon v. Langdon*, 204 Ind. 321, 183 N.E. 400 (1932). This is followed in effect, but not discussed in *Teter v. Teter*, 101 Ind. 129 (1884).

26. IND. ANN. STAT. § 44-106 (Burns 1952).

27. 2 Ind. 197 (1850). In this particular case, the court dealt with incestuous marriages, which at common law were voidable; however, such marriages have subsequently been made void by statute in Indiana. Nevertheless, the language summarizing the common law remains important.

It appears from the language of the statute that only the incapable party or the defrauded party may bring the suit. This is substantiated by dicta in *Pence v. Aughe*,²⁸ where the court stated that if a party to a marriage were incapable of contracting such marriage, from want of age, then the legal guardian of such party could not in his own name as guardian maintain the suit for the annulment of such marriage. This does not mean that a party under age may not seek a decree of avoidance with the aid of a next friend. Since the statute requires the party who is incapable or defrauded to attack, it logically appears to follow, as stated in the common law, that such an attack must be during the life of the party given such power. It is pointed out in *Christlieb v. Christlieb*²⁹ that if the parties are of legal age³⁰ to be married, the lack of parental consent as required for a license does not make a marriage void or voidable. Applicants for marriage licenses who require consent are females not yet eighteen or males not yet twenty-one.³¹ The statutes leave unassailable a marriage for which a license is issued in violation of the license regulations.³²

The Indiana courts have asserted that every force of the law is in favor of matrimony.³³ Therefore, when a marriage, whether regular or not, has been shown in evidence the law raises a strong presumption of its legality. Thus the party objecting has the burden of proof and must in every particular make the facts appear, against the pressure of this presumption, that the marriage is illegal and void. This makes it impossible to try the issue as an ordinary question of fact.³⁴

In Indiana all courts of equity jurisdiction have inherent power to decree void marriages a nullity.³⁵ The Indiana statute which deals with voidable marriages provides that any court having jurisdiction to decree

28. 101 Ind. 317 (1884).

29. 71 Ind. App. 682, 125 N.E. 486 (1919).

30. See note 6 *supra*.

31. IND. ANN. STAT. § 44-202 (Burns Supp. 1957).

32. IND. ANN. STAT. §§ 44-201-213 (Burns 1952). "No marriage shall be void or voidable for the want of license or other formality required by law, if either of the parties thereto believed it to be a legal marriage at the time." IND. ANN. STAT. § 44-302 (Burns 1952). This section was repealed by the 1957 legislature in connection with the abolition of common-law marriages. However, the failure to comply with the license regulations does not cause the marriage to be void or voidable, for a penalty is the only sanction imposed.

33. *Boulden v. McIntire*, 119 Ind. 574, 21 N.E. 445 (1889); *Castor v. Davis*, 120 Ind. 231 (1889); *Franklin v. Lee*, 30 Ind. App. 31, 62 N.E. 78 (1902); 1 BISHOP, MARRIAGE, DIVORCE AND SEPARATION § 956 (2d ed. 1891).

34. *Ibid.* The strength of this presumption increases with the lapse of time during which the parties cohabit as husband and wife. *Teter v. Teter*, 101 Ind. 129 (1884).

35. *Pry v. Pry*, 225 Ind. 458, 75 N.E.2d 909 (1947); *Wiley v. Wiley*, 75 Ind. App. 456, 123 N.E. 252 (1919).

a divorce may declare a voidable marriage void.³⁶ The question of jurisdiction arose in *Pry v. Pry*,³⁷ where an East Chicago City Court had decreed an annulment of a voidable marriage. It was held that the judgment was without jurisdiction, for the act establishing the city court specifically denied it the jurisdiction to try actions of divorce. Thus the court in effect said there is no non-statutory jurisdiction to annul voidable marriages, but upholds the power of all courts to recognize the invalidity of void marriages.³⁸

The ability of an Indiana court to get jurisdiction over a person in an annulment action was raised in *Shafe v. Shafe*.³⁹ In this case the marriage took place in the state of Alabama and thereafter the couple moved to Indiana. After a six weeks' stay in Indiana, the wife returned to her home in Alabama. During this time she showed signs of insanity. The annulment action by the husband is based on alleged insanity of his wife. Notice of the filing and pendency of this action was given by publication.⁴⁰ The wife contended that in an action against a non-resident, who is outside the state, for annulment of marriage on the grounds of insanity, unlike in a divorce action, the court cannot get jurisdiction over the person of the defendant. She also alleged that publication of notice or summons outside the state is not a legal service. The husband relied on the language of the Indiana statute⁴¹ pertaining to actions for voidable marriages, which sanctions the same proceedings that are provided for in applications for divorce. However, the court pointed out that this statute does not pertain to or authorize such proceedings with regard to annulment on account of insanity. The court proceeded to state that process by publication is unknown at common law and no statute authorizes such for an action to annul a void marriage due to insanity. As to the service of the summons by reading it to the wife in Alabama, the court held this was not sufficient to give the court jurisdiction over the defendant. In order to obtain jurisdiction over the person of the wife who

36. IND. ANN. STAT. § 44-106 (Burns 1952). Before the 1937 amendment, which added the provision concerning fraud, the Indiana courts held that any court having jurisdiction of courts of equity could annul a marriage on account of fraud. *Henneger v. Lomas*, 145 Ind. 287, 44 N.E. 462 (1896); *Bishop v. Redmond*, 83 Ind. 157 (1882); *Tefft v. Tefft*, 35 Ind. 44 (1871); *Christlieb v. Christlieb*, 71 Ind. App. 682, 125 N.E. 486 (1919).

37. 225 Ind. 458, 75 N.E.2d 909 (1947).

38. There is a distinction to be noted between courts of "equity jurisdiction" as compared to "all courts" as used in this paragraph. Any court can recognize the invalidity of a void marriage, but only a court of equity jurisdiction has inherent power to decree a void marriage a nullity. For courts of equity jurisdiction see IND. ANN. STAT. §§ 4-101 to 4-3054 (Burns 1946).

39. 101 Ind. App. 200, 198 N.E. 826 (1935).

40. A summons was served on the wife in Alabama. *Shafe v. Shafe*, *Ibid.*

41. IND. ANN. STAT. § 44-106 (Burns 1952).

has no residence within the state there must be "actual service of notice within the jurisdiction, either upon him or someone authorized to accept service in his behalf, or by his waiver, by general appearance. . . ." ⁴² Thus even though the solemnization of the marriage occurred in another state the method of attack is governed by the law of Indiana.

In determining whether a marriage is valid the courts look to the law of the jurisdiction where the marriage took place.⁴³ An exception to this general principle is a marriage which is sufficiently repugnant to the policy of the jurisdiction in which the parties are presently domiciled. In *Sclamberg v. Sclamberg*⁴⁴ the trial court found the marriage between an uncle and niece by consanguinity to be void. The marriage had been performed in Russia and was within the law of that foreign country. When the case was appealed, both of the parties agreed that their marriage was void as decreed by the trial court as a conclusion of law, thus it was not an issue in the case. The court did say it was of the opinion that the trial court's conclusions of law were proper. It appears that this represents the type of case which the Indiana courts would hold sufficiently repugnant to the public policy of the state. However, since the *Sclamberg* case does not represent a holding on this point and in light of the wording of the statute that "all marriages prohibited by law on account of consanguinity, affinity, difference of color, or whether either party thereto has a former wife or husband living, *if solemnized within this state*, shall be absolutely void without any legal proceeding,"⁴⁵ it cannot be said the conflict of laws aspect of annulment of marriages has been settled.

Support Money in an Annulment Suit

When a marriage is annulled the wife has no right to alimony.⁴⁶ It has been held that the wife who has fully discharged the duties of a wife will not be required to account for money granted for her support before the annulment action.⁴⁷ In this case there was an attempt to require an accounting for money granted by the court as support money while she was wife and guardian of her insane husband. The court stated it was not called upon and would not answer the question as to an application for future support. When the wife is a defendant in an annulment suit,

42. 101 Ind. App. 206, 198 N.E. 828 (1935).

43. *Bolkovac v. State*, 229 Ind. 294, 98 N.E.2d 250 (1951); *Shafe v. Shafe*, 101 Ind. App. 200, 198 N.E. 826 (1935).

44. 220 Ind. 209, 41 N.E.2d 801 (1942).

45. IND. ANN. STAT. § 44-105 (Burns 1952). (Emphasis added.)

46. *Sclamberg v. Sclamberg*, 220 Ind. 209, 41 N.E.2d 801 (1942). Also see *Henneger v. Lomas*, 145 Ind. 287, 44 N.E. 462 (1896).

47. *Huffman v. Huffman*, 51 Ind. App. 330, 99 N.E. 769 (1912).

the grounds of which she denies under oath, a court of equity has the power upon proper showing to require the husband to support *pendente lite* and provide means for adequate defense; however, the court will refuse to grant those benefits where it is obvious at the time of application that there never was a marriage between the parties or that it was void *ab initio*.⁴⁸ The court in *Pry v. Pry*⁴⁹ in effect upheld this reasoning by requiring that there be at least a voidable marriage. Also the court held that the trial court had a right to dispose of the wife's application of support allowance and attorney fees before hearing whether either party was entitled to have the marriage annulled.

Consequences of a Void or Voidable Marriage

A void marriage is of no legal consequence and a voidable marriage is deemed valid only until avoided.⁵⁰ When a voidable marriage is set aside, it is rendered void from the beginning.⁵¹ Even though this is true, the marriage, while it lasted, is a fact that a decree of nullity or avoidance cannot erase. Generally, the question of property settlement will arise in an annulment suit. This issue was presented in *Scramberg v. Scramberg*,⁵² where the parties lived together for eleven years, but since their marriage was void the court could not grant a divorce or award alimony. The court held it could grant equitable relief to the wife.⁵³ It appears the court accepted a sort of "quasi partnership" theory as to the relation of the parties. The court asserted that if a court of equity has jurisdiction over both of the parties and their property, then there exists an inherent power to adjudge the marriage void and to settle their property rights acquired during the existence of the marriage relationship.⁵⁴

The trial court in *Huffman v. Huffman*,⁵⁵ annulled a void marriage because of insanity and settled property questions between the parties. One piece of real estate was purchased with money of the husband, an insane person, title to which was taken in their joint names. It was ad-

48. This will be determined from the pleading of the case, her admissions, or otherwise. *Brown v. Brown*, 223 Ind. 463, 61 N.E.2d 645 (1945).

49. 225 Ind. 458, 75 N.E.2d 909 (1947).

50. *Adkins v. Holmes*, 2 Ind. 197 (1850); *Huffman v. Huffman*, 51 Ind. App. 330, 99 N.E. 769 (1912).

51. *Henneger v. Lomas*, 145 Ind. 287, 44 N.E. 462 (1896); 1 BISHOP, MARRIAGE, DIVORCE AND SEPARATION § 259 (2d ed. 1891).

52. 220 Ind. 209, 41 N.E.2d 801 (1942).

53. In the opinion the following is quoted approvingly: "If equity is privileged to apply civil-law rules where the common law is unable to give an adequate remedy, no reason is given why the principle of those cases should not be generally adopted, and the woman given the benefit of a rule which certainly works equity in the premises, and prevents the infliction of a gross wrong." *Id.* at 213, 41 N.E.2d at 803.

54. *Scramberg v. Scramberg*, 220 Ind. 209, 41 N.E.2d 801 (1942).

55. 51 Ind. App. 330, 99 N.E. 769 (1912).

judged by the trial court that such property would be held in the future by a tenancy in common. This was indirectly approved by the appellate court, for the court gave as its reason for reversal only that the wife could not claim one third interest in the proceeds of a guardian sale of property to which her husband alone held title. The court states that the fact that the marriage was recognized as existing at the time of sale does not assist the wife in claiming a one third interest in the proceeds of such sale, for such interest must depend on a valid marriage.

A divorce decree by a court having jurisdiction of the subject matter and the parties is held to be an adjudication between the divorced parties of all property rights or questions growing out of such marriage.⁵⁶ Such a decree as between the divorced parties conclusively settles the fact that they were duly married to each other, which implies the capacity of each to enter into the contract of marriage. Thus the Indiana Supreme Court⁵⁷ held that the decree precludes an attack on a transfer of property per an antenuptial agreement on the basis that the marriage was void due to the husband's insanity. It is implied that the only way to raise the issue of nullity is to have the divorce set aside in a proper proceeding.

The children of void and voidable marriages are with a single exception spared the burden of illegitimacy. The statute⁵⁸ pertaining to voidable marriages declares that "the children of such marriage begotten before the same is annulled, shall be legitimate." It is further provided "the issue of a marriage void on account of consanguinity, affinity, or difference of color shall be deemed to be legitimate."⁵⁹ Finally it is provided "when either of the parties to a marriage, void because a former marriage exists undissolved, shall have contracted such void marriage in the reasonable belief that such disability did not exist, the issue of such marriage begotten before the discovery of such disability by such innocent party shall be deemed legitimate."⁶⁰ The single glaring exception which appears not to be covered is the status of children of a marriage void on account of insanity. There seem to be no reported cases in Indiana which hold directly on this issue. At common law the children of marriages which were void or declared void were held to be illegitimate.⁶¹ Since the law of Indiana is based on the common law, in the absence of statutes to the contrary, this common law rule would seem to represent

56. *Walker v. Walker*, 150 Ind. 317, 50 N.E. 68 (1897).

57. *Ibid.*

58. IND. ANN. STAT. § 44-106 (Burns 1952).

59. IND. ANN. STAT. § 44-107 (Burns 1952).

60. IND. ANN. STAT. § 44-108 (Burns 1952); *Light v. Lane*, 41 Ind. 539 (1873). A strict construction of this statute would demand that one of the parties be without knowledge of such disability.

61. 1 VERNIER, AMERICAN FAMILY LAWS § 48 (1931).

the Indiana law in relation to the illegitimacy of children of a void marriage due to insanity.

Another question presented in annulment suits is who obtains custody of the children and can the court decree provide for this. In *Pry v. Pry*⁶² the court speaking in regard to voidable marriages, in dicta, stated that the legislature has granted jurisdiction to annul marriages only to courts having jurisdiction to decree divorces, for a court with this jurisdiction can make and enforce any necessary orders for the care, custody, support, and education of the children of such marriages. There is no Indiana statute that provides for the courts to decree the custody of children of an annulled marriage,⁶³ although approximately one half of the states have statutes on the subject.⁶⁴

In other jurisdictions which do not have a statute providing for courts to decree custody of children in annulment proceedings the courts have gotten around this obstacle by several approaches. The California Supreme Court states that since it is agreed that the court has the power to hold that a marriage is void, then it would be indeed a narrow view to take that the court could give no further relief, such as awarding the custody of the children born during such marital relation.⁶⁵ This same reasoning was approved by the Utah Supreme Court⁶⁶ which then continued to say that this holding is entirely in accord with modern trends of procedure. Both of the courts noted that this approach to the issue avoids a multiplicity of suits. In regard to the question of voidable marriages, the case of *Stone v. Stone*⁶⁷ was decided in a manner which lends support to dicta in the Indiana case of *Pry v. Pry*. The Supreme Court of Oklahoma, in the *Stone* case, first established that they have no statute on the subject, but the court stated that there is a statute which declares children of a voidable marriage legitimate. On the basis of this statute, the Court held it must be deemed impliedly to grant the power to provide for the future custody and support of the children. The statute referred to by the Court is in effect the same as the Indiana statute.⁶⁸ Another possible approach to the problem is illustrated by a California case.⁶⁹ The California Supreme Court stated that there exists a statute

62. 225 Ind. 458, 75 N.E.2d 909 (1947).

63. Indiana has a statute pertaining to custody of children when a divorce is involved. The statute is as follows: "The court in decreeing a divorce, shall make provision for guardianship, custody, support and education of the minor children of such marriage." IND. ANN. STAT. § 3-1219 (Burns 1946).

64. 1 VERNIER, AMERICAN FAMILY LAWS § 54 (1931).

65. *Figoni v. Figoni*, 211 Cal. 354, 295 Pac. 339 (1931).

66. *Jenkins v. Jenkins*, 107 Utah 239, 153 P.2d 262 (1944).

67. 193 Okla. 458, 145 P.2d 212 (1944).

68. IND. ANN. STAT. § 44-106 (Burns 1952).

69. *Barrett v. Barrett*, 210 Cal. 559, 292 Pac. 622 (1930).

on divorce which gives the court the power to provide for custody in divorce actions. This statute is similar to Indiana's.⁷⁰ In this case, it was held that the divorce section applies by implication to annulments.⁷¹

The common law invests courts of equity with jurisdiction, independent of any statutes, over the custody of infant children.⁷² Since Indiana has adopted the common law, the courts having equity jurisdiction appear to have the right to declare the custody of the children in an annulment action.⁷³ However, a simple solution for this difficulty is to pass legislation, such as Massachusetts has passed, which give the courts a like power to make orders relative to the care, custody, and maintenance of the minor children as upon a decree of divorce.⁷⁴

Defenses to Annulment Suits

In *Mason v. Mason*,⁷⁵ the Indiana Supreme Court dealt with the question of estoppel. The facts established that the plaintiff had been formerly married and had secured a divorce in which her former husband was served notice by publication. By statute in Indiana,⁷⁶ when the only notice given is by publication it is required that the party obtaining a divorce shall not remarry for a period of two years. In this case the wife married within the two year period. After living with her husband for four years she filed for divorce. The second husband interposed the defense that the marriage was in the first instance void and continued to be void. It was held that the marriage was merely voidable. The answer of the husband admitted that he had lived with his wife with knowledge of all of the facts for two years after the decree against her former husband had become final. The court held that this amounted to an unconditional ratification of the marriage and a full recognition of its validity. Thus the husband was estopped from setting up the unlawfulness of the marriage, in the initial instance, as a defense to the complaint against him for divorce. The court in dicta states that if the husband had married his wife in ignorance of the inhibition resting upon her he could within a reasonable time have procured an annulment of the marriage. This

70. See note 63 *supra*.

71. After this case was tried in the lower court, the state passed legislation which specifically provided authority for the courts to decree custody of minor children in annulment actions. CAL. CIV. CODE § 84 (Deering 1950).

72. *Decker v. Decker*, 176 Ala. 299, 58 So. 195 (1912); STORY, EQUITY JURISPRUDENCE § 1341 (13th ed. 1886).

73. However, it is said that no inherent power abides in a court of equity to determine as to custody of the children upon an annulment of a marriage. 38 C. J., *Marriage* § 136 (1925).

74. MASS. ANN. LAWS c. 207 § 18 (1955). For a discussion of considerations in granting custody of children, see 2 IND. L. J. 325 (1926).

75. 101 Ind. 25 (1884).

76. IND. ANN. STAT. § 3-1224 (Burns 1946).

dicta is of little help, for it fails to state upon what date the reasonable time starts to run. It is most likely that the time begins to run from the date that he has knowledge of the inhibition.⁷⁷

When one of the parties is incapable from want of age the marriage is voidable and may be declared void upon application by the incapable party. However, the ability to annul the marriage will terminate upon ratification. When the incapable party reaches the legal age⁷⁸ for marriage, the action to annul must be taken within a reasonable time or such lapse of time will constitute ratification.⁷⁹ Continuing to live together after reaching the age of consent is generally sufficient affirmance.⁸⁰ A marriage procured through fraud is voidable and it appears the defrauded party must make a timely application to have it declared void.⁸¹ The common law rule is that it be made within a reasonable time after discovery.⁸²

Apparently the mere passage of time does not estop one of the parties to a marriage from having it annulled. The court in *Tefft v. Tefft*⁸³ upheld a complaint of a husband to annul a marriage on the basis of fraud. The fraud was alleged to have been committed at the time of the marriage. They were married in 1839 and lived together until 1868, when he discovered the facts and false representations. After this discovery he did not cohabit with her. At the time this case was before the court a marriage procured by fraud was void *ab initio*.⁸⁴ It has been held by the Indiana Supreme Court that a void marriage cannot be ratified.⁸⁵ This holding was voiced again in *Wiley v. Wiley*. However, the court in the *Wiley* case points out that there is a real and substantial difference between a common-law marriage and ratification. The cases which deal with void marriages inherently raise the issue of a common-law marriage.

77. However, would a reasonable time be limited to the period of existing impediment?

78. See note 6 *supra*.

79. *Henneger v. Lomas*, 145 Ind. 287, 44 N.E. 462 (1896); MADDEN, PERSONS AND DOMESTIC RELATIONS § 13 (1931).

80. *Holtz v. Dick*, 42 Ohio St. 23, 51 Am. Rep. 791 (1884); MADDEN, PERSONS AND DOMESTIC RELATIONS § 13 (1931).

81. See generally, *Henneger v. Lomas*, 145 Ind. 287, 44 N.E. 462 (1896); *Bishop v. Redmond*, 83 Ind. 157 (1882); *Tefft v. Tefft*, 35 Ind. 44 (1871); 1 BISHOP, MARRIAGE, DIVORCE AND SEPARATION §§ 452-528 (2d ed. 1891); 3 NELSON, DIVORCE AND ANNULMENT §§ 31.29, .30 (2d ed. 1945).

82. *Brown v. Scott*, 140 Md. 258, 117 Atl. 114, 22 A.L.R. 810 (1922).

83. 35 Ind. 44 (1871). One of the allegations was that the wife was still legally married to her former husband. This was not discussed by the court.

84. *Tefft v. Tefft*, 35 Ind. 44 (1871).

85. *Teter v. Teter*, 88 Ind. 494 (1883) (had husband living at time of subsequent marriage); *State v. Gibson*, 36 Ind. 389 (1871) (marriage between Negro and white); *Wiley v. Wiley*, 75 Ind. App. 456, 123 N.E. 252 (1919) (insanity).

In *Teter v. Teter*⁸⁶ the parties of the marriage believed it to be a valid marriage. Both parties married in the belief that the husband's divorce with his former wife was final. The belief of the wife continued until after the husband's death. A final decree never was entered as a judgment, and four months passed before his former wife obtained a valid divorce. Notice was given by publication, and this explains why the husband did not know of the action. The court stated that there is a strong presumption in favor of a marriage from a cohabitation apparently matrimonial when the parties are in good faith. On this reasoning, the court stated the evidence required the court to presume a marriage subsequent to the decree of divorce. It was not stated what evidence would be sufficient to overcome the presumption of a valid marriage. When the case was subsequently before the court, it was held that no formal ceremony was required, and that if the motives of the parties were good and there existed a present mutual intent to marry, that was all which was required. In dicta it was stated that the mutual consent required could be found at the time of the initial ceremony. Thus the fact that the parties never knew during their married life that their initial marriage was void did not prevent the court from holding there had been a common-law marriage subsequent to the removal of the legal impediment.

A common-law marriage will not be implied in all cases where the marriage in the first instance was void, even though there is cohabitation after the impediment is removed.⁸⁷ The court, in *Compton v. Benham*,⁸⁸ cited approvingly the rule that when there is an apparent lawful marriage which due to certain facts was illicit in its beginning it is presumed to continue illicit. In order to rebut such a presumption it must be proved that the relation changed into one of actual matrimony by mutual consent. The husband in this new case knew of the subsequent divorce by his former wife, but failed to tell his present wife. Upon these facts the court stated that she should not be presumed to have done a thing the necessity of which had never been made known to her. The appellate court in effect upheld its prior reasoning of the *Compton* case when it decided *Simms v. Kirk*.⁸⁹ In this case the appellate court sustained the finding of the trial court that there was no common-law marriage between the parties. At the time of the ostensible marriage, the husband had a lawful wife, and he knew this; but he had not told his second wife of this at any time during their married relationship. Two years after

86. 88 Ind. 494 (1883).

87. *Compton v. Benham*, 44 Ind. App. 51, 85 N.E. 365 (1909).

88. *Ibid.*

89. 81 Ind. App. 515, 144 N.E. 146 (1924).

the pretended marriage the first wife secured a divorce, thus removing the impediment and the parties continued to live together for ten years. Yet the court refused to find a common-law marriage. Meretricious relationship is presumed to continue until it is proved that it has changed into an actual contract of marriage.⁹⁰ In *Young v. General Baking Co.*,⁹¹ the court followed the reasoning of the *Compton* case, but the court did not make it clear whether the parties knew that there was an impediment when they entered into an apparent common-law marriage.

A possible means of distinguishing the *Teter* case from the *Compton* case is when the parties are ignorant of the impediment they will be deemed to have subsequently entered into a common-law marriage. This type of fact situation is then distinguishable from those cases which involve marriages in which one or both parties had knowledge of the impediment. The Indiana Supreme Court upheld the reasoning of the *Teter* case in *Eddington v. Eddington*.⁹² One important point that was not discussed in this case was whether both of the parties were ignorant of the impediment at the time of the void ceremonial marriage. The court merely held that the evidence that they lived together for nine years after the first wife obtained a divorce was sufficient to sustain a finding of a common-law marriage.

A recent Indiana Supreme Court case, *Anderson v. Anderson*,⁹³ which discusses common-law marriages, lends support to the line of reasoning of the *Compton* case. The court stated that "where the relations of the parties are illicit in the beginning, the rule is well settled in Indiana that there must be clear evidence of an actual contract of marriage independent of any presumption before the court will find there was a common-law marriage."⁹⁴ This case involved a different fact situation than the *Teter* case. Here the parties started living together with no present intent to have a common-law marriage; thus it was illicit in the beginning. The issue was whether the parties subsequently contracted a valid common-law marriage. In both cases the relations of the parties were illicit in the beginning. Therefore perhaps by implication the Indiana Supreme Court has overruled *Teter v. Teter*, and *Eddington v. Eddington*. Also the court stated that the existence of a common-law marriage is dependent upon a contract of marriage between the parties in words of present tense. This reasoning appears to fly in the teeth

90. *Mayes v. Mayes*, 84 Ind. App. 90, 147 N.E. 630 (1925). This case has a different fact situation, but cites *Compton v. Benham*, 44 Ind. App. 51, 85 N.E. 365 (1909), as controlling.

91. 104 Ind. App. 658, 12 N.E.2d 1016 (1937).

92. 213 Ind. 347, 12 N.E.2d 758 (1938).

93. 235 Ind. 113, 131 N.E.2d 301 (1956).

94. *Id.* at 118, 131 N.E.2d at 304.

of the *Teter* case. The court in the *Anderson* case relied on *In re Dittman's Estate*,⁹⁵ for a summary of the law of common-law marriages in Indiana. In this latter case, the appellate court attempted to distinguish the *Teter* case on the basis that it relates only to cases where there is evidence that there was a holding out or an open acknowledgment by the parties of the relationship of husband and wife to the community. There was no mention made of this possible exception in the *Anderson* case, rather the court seemed intent upon requiring a contract between the parties in the present tense regardless of their open acknowledgment.

The Indiana state legislature has declared all common-law marriages null and void that are consummated after January 1, 1958.⁹⁶ It appears that the abolition of common-law marriages will have an adverse effect upon those parties who have lived together without knowledge of their void marriage.

Before the question of a possible common-law marriage becomes an issue, it must be shown that the ostensible marriage of the parties was void. There are several conflicting presumptions which arise in relation to a marriage said to be void on account of one of the parties having a husband or wife living. *Cooper v. Cooper*⁹⁷ discusses the presumption of death of the prior spouse. It states that the law raises a presumption that a person absent and unheard of is living until seven years have passed. However, if the other party enters into marriage before the passing of seven years the presumption of the innocence of such marriage counters the life presumption. Although conflicting presumptions will be weighed, the court in general prefers the presumption of innocence, making the second marriage good. When a suit is brought after the seven years have elapsed and the party is deemed legally dead, the court presumes the death was prior to the second marriage.⁹⁸

The fact a prior spouse is shown to be still alive does not destroy the prima facie legality of the last marriage. Rather the presumption is that the former marriage has been legally dissolved. The burden of proof that it has not been dissolved rests upon the party attempting to

95. 124 Ind. App. 198, 115 N.E.2d 125 (1953). Also see *Common Law Marriage—A Legal Anachronism*, 32 IND. L. J. 99 (1956).

96. IND. ANN. STAT. § 44-111 (Burns Supp. 1957). See Small, *So We Killed the Common Law Marriage or, Did We Kill the Common Law Marriage?* RES GESTAE (THE INDIANA STATE BAR ASSOCIATION) (September, 1957).

97. 86 Ind. 75 (1882).

98. Bishop states that it is not pressing the presumption of innocence very far to place the time of death near the person's disappearance, rather than the end of the seven year period. 1 BISHOP, MARRIAGE, DIVORCE AND SEPARATION § 955 (2d ed. 1891).

impeach the second marriage.⁹⁹ There can be no presumption of either death or divorce where both of the parties knew their cohabitation was adulterous in its inception, because one of the parties had a lawful living spouse.¹⁰⁰

The general presumption favoring marriage is expressed in the maxim *semper praesumitur pro matrimonio*, always presume marriage.¹⁰¹ *Langdon v. Langdon*¹⁰² substantiates this general reasoning, for it holds that even assuming the marriage was void initially, because one party was insane, this does not mean the party was insane at death some five and one half years later. Since there was no claim that the party remained insane it was presumed that there was a restoration of sanity. Thus a good common-law marriage was established. The court states the presumption of legality of marriage is stronger than the presumption of continued insanity.

The prohibition of a marriage where one of the parties is white and the other possesses one eighth or more Negro blood was upheld in *State v. Gibson*.¹⁰³ Regulation and control of marriages is fundamental to society. Because of the nature of such marriages the impediment cannot be subsequently removed; thus there can be no common-law marriage of the parties.¹⁰⁴

Conclusion

In brief, a survey of the cases and pertinent statutes discloses that all courts have the jurisdiction to recognize a void marriage as null and void. However, only courts which have jurisdiction to decree a divorce

99. *Wenning v. Teeple*, 144 Ind. 189, 41 N.E. 600 (1895). See also *Continental Roll & Steel Foundry Co. v. Slocum*, 111 Ind. App. 438, 41 N.E.2d 635 (1942); *Ross v. Red Cab Co.*, 105 Ind. App. 440, 14 N.E.2d 333 (1938); *Dunn v. Starke Co. Trust and Sav. Bk.*, 98 Ind. App. 86, 184 N.E. 424 (1933).

100. *Nossaman v. Nossaman*, 4 Ind. 648 (1853). This line of cases, note 99 *supra*, by implication overruled *Wiseman v. Wiseman*, 89 Ind. 479 (1883), which held there cannot be a presumption against the continuance of a marriage contract. A recent appellate court decision appears in effect to take a stand inconsistent with the prior cases when it states the woman could not be the "wife" of the deceased, regardless of the manner in which and time during which she had openly lived with him as such, for all during that time she had a living husband. There is no discussion of presumptions. *Williams v. Spring Hill Coal Co.*, 118 Ind. App. 443, 79 N.E.2d 414 (1948). The two cases cited as authority, *Compton v. Benham*, 44 Ind. App. 51, 85 N.E. 365 (1909), and *Meham v. Edward Valve, etc., Co.*, 65 Ind. App. 342, 117 N.E. 265 (1917), do not sustain this holding. Thus it appears that this case is poor law or the court simply failed to discuss the evidence presented before the Industrial Board of Indiana.

101. 1 BISHOP, MARRIAGE, DIVORCE AND SEPARATION § 956 (2d ed. 1891). Also see *Brokaw v. Brokaw*, 97 Ind. App. 607, 187 N.E. 691 (1933).

102. 204 Ind. 321, 183 N.E. 400 (1932).

103. 36 Ind. 389 (1871).

104. *Inland Steel Co. v. Barcena*, 110 Ind. App. 551, 39 N.E.2d 800 (1941). See *Perez v. Lippold*, 32 Cal.2d 711, 198 P.2d 17 (1948), where the Supreme Court of California declared the anti-miscegenation statute unconstitutional.

may avoid a voidable marriage. It appears, with the possible single exception of insanity, that a void marriage may be collaterally attacked. A direct proceeding is required in the case of a voidable marriage, and it must be brought by the party defrauded or underage. In the instance of a void marriage, jurisdiction over the person follows the common law, but proceedings applicable to a divorce must be followed in voidable marriages. The cases illustrate that voidable marriages may be ratified. On the other hand, there can be no ratification of void marriages. In the past the courts have often prevented unfortunate and needless complications by implying a valid common-law marriage. Questions concerning property settlements of ostensible marriages have been answered by characterizing the marriages as "quasi-partnerships." The children of such marriages are by statute declared legitimate. However the legislature has not granted the courts power to grant custody of children in annulment proceedings. Finally, the case discloses that there will be no award of alimony in annulment proceedings, but support pendente lite and money for adequate defense will be granted in certain instances of a voidable marriage.

THE AVAILABILITY OF WRITTEN INSTRUCTIONS TO THE JURY IN INDIANA

Many American jurisdictions either permit or require the sending of written instructions into the jury room in a civil trial.¹ Although there is evidence that the majority of Indiana trial courts refuse to allow this practice,² there is neither a statutory provision nor a Supreme Court Rule

1. Tabular summary of law of other jurisdictions, Appendix I.

2. The *Indiana Law Journal* has conducted a survey of Indiana Circuit and Superior Courts in an attempt to gather data concerning the practice of sending written instructions to the jury room. Fifty returns were received of a total of ninety-four questionnaires, equalling a fifty three per cent return. Below is a facsimile of the questionnaire with the final results indicated:

In answering the following questions please assume (a) a civil jury trial (b) that counsel has requested that the court instruct the jury in writing.

I. When may a copy of the written instructions be sent in with the jury as they retire to the jury room? (Please check one.)

76%	Never	2%	Upon request of the jury
16%	With consent of both parties	4%	A matter of judicial discretion
0%	Upon request of either party	2%	Always

II. With what frequency do the following occur? (Assume 5 jury trials as a basis, *i.e.*, how many out of five.)