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arbitrary and unreasonable classifications. In light of the fact that common-law marriages have recently been abolished in Indiana, it seems safe to infer that the decision in the final appeal would have been different if the law of Indiana had not been changed prior to the rendering of this decision.⁴⁰

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SIGNIFICANCE OF PUBERTY IN NONAGE MARRIAGES

Statutes in every state have raised the age required at common law to contract a valid marriage.¹ Originally this was the age of puberty, 12 years for the female and 14 years for the male.² By thus raising the required age, legislatures have created a gap between the age at which the parties are deemed to have physical capacity to consummate a marriage and the age required by statute for legal capacity to contract a valid marriage. A nonage marriage in which one of the parties has reached the age of puberty but not the age required by statute could be held to be either: (1) valid, (2) voidable, (3) or void.

Arkansas has had difficulty in dealing with this type of marriage. *State v. Graves*,³ the most recent Arkansas case involving nonage marriages, points up this problem. An Arkansas statute provides that males of the age of 18 and females of the age of 16 years "shall be capable in law of contracting marriage; if under these ages, their marriages shall be absolutely void."⁴ Harold Graves, 17 years of age, and Sandra Spearman, 13 years of age, both residents of Arkansas, went to Mississippi to get married. They were accompanied by the parents of the girl and the father of the boy. After the ceremony, the group returned to Arkansas, where the defendant and Sandra had lived as man and wife for a period of four days when an attendance officer at Sandra's school obtained a warrant charging Harold and Mr. and

⁴⁰*Union Trust Co. v. Grosman*, 245 U.S. 412, 417 (1918).

¹*Vernier*, American Family Laws § 29, at 116 (1931). This section says that 11 jurisdictions retain the common law age requirement. However, in the 1938 supplement to this treatise, § 29 says that 6 of the 11 states, have, by statute, raised the age required at common law. *Vernier*, American Family Laws § 29 (Supp. 1938). At the time of this writing the remaining 5 states, adhering to the common law rule in 1938, have raised the age required to contract unconditionally a valid marriage. Idaho Code § 32-202 (1947); Me. Rev. Stat. Ann. ch. 166, § 5 (1954); Md. Ann. Code art. 62, § 9 (1957); Mass. Ann. Laws ch. 207, § 7 (1955); Miss. Code Ann. § 460 (1942).

²*Keezer*, Marriage and Divorce §145 at 203 (3d ed. 1946).

³307 S.W.2d 545 (Ark. 1957).

⁴Ark. Stat. Ann. § 55-102 (1947).

Mrs. Spearman with contributing to the delinquency of a minor.⁵ The prosecution reasoned that the Mississippi marriage was void, and thus Sandra had been delinquent because of her cohabitation with the defendant. In deciding the guilt or innocence of the defendant, the court necessarily determined the validity of the marriage. The court held the marriage was not void, stating, "We have no statute which provides that marriages such as the one involved here... are void in the state of Arkansas."⁶ This decision was based on the conflict of laws principle that a marriage valid where performed is valid everywhere.⁷ As a result of this determination that the marriage was not void, the charge of contributory delinquency against the defendant was dismissed. Chief Judge Harris wrote a strong dissent saying that if a marriage by parties under the statutory age requirement was "absolutely void," it could not be valid under any circumstances.

Prior to 1941 the Arkansas statute provided that nonage marriages "are void."⁸ In cases involving nonage marriages the court, however, interpreted this statute to mean such marriages are voidable only, not void *ab initio*.⁹ In 1941 the legislature amended the statute by inserting the word "absolutely" before the word "void."¹⁰ In a 1944 case this amendment, though mentioned in the court's opinion, was ignored in determining a nonage marriage to be voidable only and not void *ab initio*.¹¹

In 1945 the case of *Ragan v. Cox*¹² came before the Arkansas court. This case involved the marriage of a twelve-year-old girl to her fifty-two-year-old uncle. While holding this marriage void on the ground that it was incestuous, the court, in dictum, said that on the ground of nonage alone the marriage would not be void, but merely voidable.¹³ On remand evidence was introduced showing the man was not the girl's uncle, but her great-uncle. Therefore the parties to the marriage were not within the degree of relationship prohibited by the statute.

⁵The opinion gives no explanation as to why D. H. Graves, defendant's father, who also accompanied the group to Mississippi and consented to the marriage, was not included in the warrant.

⁶307 S.W.2d at 550.

⁷Restatement, Conflict of Laws § 121 (1934).

⁸Ark. Rev. Stat. ch. 94, § 2 (1837) as cited in 307 S.W.2d at 549.

⁹*Witherington v. Witherington*, 200 Ark. 802, 141 S.W.2d 30 (1940); *Kibler v. Kibler*, 180 Ark. 1152, 24 S.W.2d 867 (1930).

¹⁰Ark. Acts 1941, Act 32.

¹¹*Hood v. Hood*, 206 Ark. 1057, 178 S.W. 670 (1944).

¹²208 Ark. 809, 187 S.W.2d 874 (1945).

¹³*Id.* at 876.

Because of this new evidence the Supreme Court on the second appeal was unable to hold the marriage void on the ground of incest, and therefore held it void on the ground of nonage.¹⁴ In the opinion the court stated, "If we are at liberty to say that a man who has passed the half century mark may fraudulently procure a marriage license, and in consummation of lust induce a justice of the peace to intone the phrases that in more favorable circumstances would result in marriage—if this can be done with a twelve-year-old girl, it can be carried still further and serve to unite an octogenarian with a female child appropriated from the play room . . ." ¹⁵ This language seems to indicate that the peculiar facts of the case influenced the court to hold this marriage void because the relationship was shocking to the court's conscience. In the *Ragan* case the attack on the marriage was at the instance of the nonage party. The fact that a nonage party may attack a void or voidable marriage and a party who is of the age of legal consent may only attack a void marriage¹⁶ leaves some question as to whether the court would have held the marriage void if the nonage party was asserting the validity of the marriage. This is evidenced by the following language of the court: "In the circumstances of this case the pretended marriage between W. A. and Louise Ragan was—certainly as to the appellee [great-uncle] . . . a complete nullity. What effect the ceremony might have had upon any marriage status claimed by Louise does not enter into the discussion, because at her instance the records were purged."¹⁷ Therefore, it cannot be said with certainty whether the court determined this marriage to be void or merely voidable.

The dissent in *State v. Graves* appears to be arguing for the inclusion of nonage marriages within section 132(d) of the *Restatement of the Conflict of Laws* which sets out an exception to the principle that a marriage valid where performed is valid everywhere by invalidating a "marriage of a domiciliary which a statute at the domicil makes void though celebrated in another state."¹⁸ Adoption of the view proposed by the dissent would have the same effect as

¹⁴*Ragan v. Cox*, 210 Ark. 152, 194 S.W.2d 681 (1946).

¹⁵*Id.* at 685.

¹⁶Keezer, *Marriage and Divorce* § 144 (3d ed. 1946).

¹⁷194 S.W.2d at 685.

¹⁸Restatement, *Conflict of Laws* § 132(d) (1934). The dissenting judge states: "I feel that this Court should go further and add a fifth exception, namely, 'marriage of a domiciliary which the statute at the domicile makes void.'" Though the dissent states that "a fifth exception" should be added, he uses language that is the same as that of the fourth exception as stated in the Restatement, except for omitting the phrase, "though celebrated in another state." 307 S.W.2d at 551.

legislative adoption of a marriage evasion statute. Such a statute invalidates a marriage of a domiciliary contracted without the state for the purpose of evading the laws of domicile.¹⁹ It seems to be going too far to say the legislature intended the words "absolutely void" to have the effect of a marriage evasion statute when such a statute could have as easily been enacted.

If it had been the intent of the legislature to make all nonage marriages void *ab initio*, instead of merely voidable, then it seems pointless for the state to have another statute providing for annulment on the ground of want of age.²⁰ The wording of other statutes also leaves doubt as to what the legislature intended by "absolutely void." The statute dealing with miscegenation marriages provides that such marriages are "*illegal and void*."²¹ The statute dealing with marriages between persons within prohibited degrees of consanguinity provides that such marriages are "*incestuous and absolutely void*."²² Miscegenation and incestuous marriages fall within the recognized exceptions to the conflict of laws principle that a marriage valid where performed is valid everywhere.²³ It seems the legislature would have characterized nonage marriages with similar language, i.e., "illegal and absolutely void," so as to show a strong public policy against such marriages if it intended that these marriages should be void *ab initio* as are miscegenation and incestuous marriages.

The majority opinion in *State v. Graves*, in determining that the marriage was not void, is consonant with prior decisions of the Arkansas courts,²⁴ with the exception of the second appeal in the *Regan* case.²⁵ The decision also seems to be in accord with a majority of other jurisdictions.²⁶ Although all states have raised the common law

¹⁹Restatement, Conflict of Laws § 132, comment c (1934). Massachusetts has a typical marriage evasion act that provides, "If any person residing and intending to continue to reside in this commonwealth is disabled or prohibited from contracting marriage under the laws of this commonwealth and goes into another jurisdiction and there contracts a marriage prohibited and declared void by the laws of this commonwealth, such marriage shall be null and void for all purposes in this commonwealth with the same effect as though such prohibited marriage had been entered into in this commonwealth." Mass. Ann. Laws Ch. 207, § 10 (1955).

²⁰Ark. Stat. Ann. § 55-106 (1947).

²¹Ark. Stat. Ann. § 55-104 (1947). (Emphasis added).

²²Ark. Stat. Ann. § 55-103 (1947). (Emphasis added).

²³Restatement, Conflict of Laws §§ 121, 132 (1934).

²⁴*Ragan v. Cox*, 208 Ark. 809, 187 S.W.2d 874 (1945); *Hood v. Hood*, 206 Ark. 1057, 178 S.W.2d 670 (1944); *Witherington v. Witherington*, 200 Ark. 802, 141 S.W.2d 30 (1940); *Kibler v. Kibler*, 180 Ark. 1152, 24 S.W.2d 867 (1930).

²⁵194 S.W.2d at 681.

²⁶*Taylor v. Taylor*, 249 Ala. 419, 31 So. 2d 579 (1947); *Smith v. Smith*, 205 Ala. 502, 88 So. 577 (1921); *People v. Souleotes*, 26 Cal. App. 309, 146 Pac. 903 (1915);

age requirements,²⁷ many courts hold marriages by parties under the statutory age voidable rather than void.²⁸ Only three of the seventeen jurisdictions searched follow the strict statutory interpretation of minimum age requirements, advocated by the dissent in the principal case.²⁹ These three jurisdictions, however, have raised the age limits only slightly.³⁰ For example, in *Hayes v. Hay*,³¹ the Georgia court, by strictly construing the statute providing that a girl must be fourteen years of age to contract marriage,³² held the marriage of a twelve-year-old girl to be void. New Hampshire has retained the common law age of 14 for males, while raising the age for females from 12 to 13.³³

The so-called age of consent, as it existed at common law, was closely related to a person's physical capacity to enter into the marriage state. By raising this age, modern statutes have created an age of consent that is unrelated to physical development and rests solely on public policy as interpreted by the legislature. When persons who have reached the age of puberty, but not that of legal consent, nevertheless undertake to contract a marriage, what will be its effect? The answer the courts generally give is that the marriage is voidable. By interpreting such marriages as voidable, the courts have raised the age span at which a marriage was voidable at common law, [7-14 for

In re Kemp, 192 Misc. 267, 78 N.Y.S.2d 588 (Dom. Rel. Ct. N.Y. County 1948); *Anonymous v. Anonymous*, 176 Misc. 850, 29 N.Y.S.2d 331 (Dom. Rel. Ct. N.Y. County 1941); *Parks v. Parks*, 218 N.C. 245, 10 S.E.2d 807 (1940); *Sawyer v. Slack*, 196 N.C. 697, 146 S.E. 864 (1929); *Keith v. Pack*, 182 Tenn. 420, 187 S.W.2d 618 (1945); *Needham v. Needham*, 183 Va. 681, 33 S.E.2d 288 (1945); *Kirby v. Gilliam*, 182 Va. 111, 28 S.E.2d 40 (1943).

²⁷See note 1 *supra*.

²⁸See note 24 *supra*. The requirement of parental consent for nonage parties will not be discussed in this article. For discussion of this issue see Kingsley, *The Law of Infants' Marriages*, 9 Vand. L. Rev. 593 (1956).

²⁹*Hayes v. Hay*, 92 Ga. App. 88, 88 S.E.2d 306 (1955); *Mims v. Hardware Mut. Cas. Co.*, 82 Ga. App. 210, 60 S.E.2d 501 (1950); *Powell v. Powell*, 97 N.H. 301, 86 A.2d 331 (1952); *Ex parte Tucker*, 219 P.2d 245 (Okla. Crim. App. 1950); *Scott v. State*, 85 Okla. Crim. 213, 186 P.2d 336 (1947).

³⁰The following states, by statute, have raised the age required of females at common law contract a valid marriage by 1, 2, and 3 years respectively: N.H. Rev. Laws ch. 338, § 4 (1942); Ga. Code tit. 53, § 102 (1933); Okla. Stat. tit. 43, § 3 (1951).

³¹92 Ga. App. 88, 88 S.E.2d 306 (1955).

³²Ga. Code tit. 53, § 102 (1933).

³³N.H. Rev. Laws ch. 338, § 4 (1942). There are some jurisdictions which hold a marriage involving parties above the common law age of consent but below the legal age of consent to be entirely valid. These jurisdictions, however, are in the minority. *Parton v. Hervey*, 67 Mass. (1 Gray) 119 (1854); *Hunt v. Hunt*, 172 Miss. 732, 161 So. 119 (1935); *State v. Ward*, 204 S.C. 210, 28 S.E.2d 785 (1944); *State v. Sellers*, 140 S.C. 66, 134 S.E. 873 (1926).