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The Four Month Divorce "Cooling Off" Period In Virginia

In the face of increasing danger of injury resulting from improper publications, legal remedies are needed to protect the public without being unjust to the publisher. In view of the wide scope of many current publications, these remedies should be uniform from one jurisdiction to another. It is hoped, therefore, that legislators in jurisdictions not already clearly committed to a single publication rule will earnestly consider adoption of the uniform act. The primary evil of the common law rule, from a venue standpoint, is the possibility of the bringing of a multitude of suits, each upon the same publication, but within separate venues. This is specifically prevented by the Uniform Single Publication Act.[37] A provision designating a primary publication upon which the cause of action is to be based and from which the limitation period might be measured, however, should be included if the abuses nurtured by the multi-publication rule are to be thoroughly corrected. The desired result could be obtained by adding the following to the first section of the uniform act: [38] "This cause of action shall arise at the time such publication or exhibition or utterance is initially made." Such an amendment would clearly carry out the desire of the Commissioners on Uniform State Laws "to adopt the rule as it has been developed at common law in the states which have accepted it,"[39] and would be a sound step toward correcting our law in a limited area of the field of tortious publications—a field which is greatly in need of reform legislation.

JOSEPH C. KNAKAL, JR.

THE FOUR MONTH DIVORCE "COOLING OFF" PERIOD IN VIRGINIA

Faced with a steady increase in the divorce rate and family disorganization, many states have sought means to discourage divorce and to promote family unity. Since a great many people seek a divorce in order to marry someone else immediately thereafter, the divorce rate may be substantially decreased, or so the theory runs, by prohibiting remarriage within a specified time after the decree.[1] Thus some states grant an interlocutory decree which may not become final until a

[37]See note 7 Supra.
[38]Ibid.
[39]9C U.L.A. 172 (1952).

[1]See Burks, The Code of 1919, 5 Va. L. Reg. (N.S.) 97, 108 (1919).

later date.[2] During the interim period the parties are still husband and wife and, of course, neither can marry anyone else. Other states grant an absolute divorce but place a prohibition on remarriage until a specified time has elapsed after the decree is issued.[3]

Virginia recognized the problem and took steps towards its correction in 1918. The revisors of the Virginia Code of 1919 included a new section,[4] placing a prohibition on remarriage after divorces granted for causes arising subsequent to the date of marriage. Judge Burks, in commenting on the Code of 1919,[5] stated, "Divorces are steadily increasing in Virginia, as well as elsewhere, and are becoming so numerous that the evil strikes at the heart of our civilization. For manifest reasons the revisors inserted a new section declaring that 'On dissolution of the bond of matrimony *for any cause arising subsequent to the date of the marriage* neither party shall be permitted to marry again for six months from the date of such decree, and such bond of matrimony shall not be deemed to be dissolved as to any marriage subsequent to such decree, or in any prosecution on account thereof, until the expiration of such six months.' The time fixed by this section may be too short, but it furnishes a foundation for further legislation on the subject, if the General Assembly should see fit to enact it."[6]

This statute is unique in that under it a divorce is absolute for some purposes, while for the purpose of remarriage the parties are deemed to remain husband and wife for a period of four months (formerly six) after the decree is issued.[7] Thus, instead of being a

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[2]Cal. Civ. Code §§ 131, 132; Colo. Stat. Ann. c. 56, § 13 (1935); Del. Code Ann. tit. 13, §§ 1533, 1534 (1953); Mass. Ann. Laws c. 208, § 21 (1955); Neb. Rev. Stat. § 42:34 (1943); N.J. Rev. Stat. §§ 2A: 34-18, 34-19 (1951); R. I. Gen. Laws Ann. c. 416, § 19 (1938); Utah Code Ann. tit. 40, § 3-7 (1943); Wash. Rev. Stat. Ann. § 988 (Supp. 1957); Wis. Stat. § 247.37 (1955).

[3]Ala. Code Ann. tit. 34, § 38 (1940); Ariz. Rev. Stat. Ann. § 25-320 (1956); Iowa Code § 598.17 (1954); Kan. Gen. Stat. Ann. § 60-1512 (1949); Mass. Ann. Laws c. 208, § 24 (1955); Mich. Comp. Laws § 552.46 (1948) (prohibition may be placed on guilty party at court's discretion); Minn. Stat Ann. § 517.03 (West Cum. Supp. 1949); N.D. Rev. Code § 14-0502 (1943) (upon both parties at the discretion of the court); Okla. Stat. tit. 12, § 1280 (1951); Ore. Comp. Laws Ann. tit. 9, § 916 (Cum. Supp. 1943); Vt. Stat. § 3215 (1947); W. Va. Code Ann. § 4722 (1955); Wis. Stat. § 245.03 (1955).

[4]Va. Code Ann. § 5113 (1919), now Va. Code Ann. § 20-118 (1950).

[5]An address before the Virginia State Bar Association, May 16, 1919.

[6]Burks, The Code of 1919, 5 Va. L. Reg. (N.S.) 97, 108, (1919).

[7]"The Parties to the first marriage were absolved from many of the obligations imposed by that marriage, but not from the obligation to refrain from marrying another during the six months. As to this obligation, they continue to be husband and wife for six months from the date of the decree for divorce, and neither could lawfully intermarry with another." Heflinger v. Heflinger, 136 Va. 289, 304, 118 S.E.

mere penal statute, this provision renders all marriages entered into within the prohibited time absolutely void. Futhermore, the operation of the statute is not confined to Virginia, but has extraterritorial effect. In *Heflinger v. Heflinger*,[8] the leading case construing the statute, the husband obtained a divorce from his wife in Virginia. A month later, he and another woman, who was also a citizen and resident of Virginia, went to Maryland, where they were married, and then returned to Virginia to live. A few months thereafter, marital troubles having arisen, the husband brought suit for an annulment of the marriage. In affiirming the annulment of the marriage, the Supreme Court of Appeals discussed in detail the statute's extraterritorial effect.[9] The general rule that a marriage valid where performed is valid everywhere was held to be inapplicable in this situation.[10] The court reasoned that since for purposes of remarriage the bond of matrimony was not dissolved until six months after the decree, the husband was still married to his former wife at the time of the second ceremony in Maryland. Thus the parties were brought within the meaning of the Virginia statute which provides in part that "If any persons, resident in this state ... one of whom has a former husband or wife living ..., shall, with the intention of returning to reside in this state, go into another state or country and there intermarry, and return to and reside in this state, cohabiting as man and wife, such marriage shall be governed by the same law, in all respects, as if it had been solemnized in this state."[11]

The court further said that, so far as remarriage within the prohibited period was concerned, the divorce in Virginia had no more effect than a decree nisi, and the parties were incapable of contracting a

316, 321 (1923). See also In re Peart's Estate, 277 App. Div. 61, 97 N.Y.S.2d 879, 885 (1st Dep't 1950), noted in 8 Wash. & Lee L. Rev. 183 (1951), in which a New York court commented upon the Heflinger case, supra, as follows: "Moreover, taking the opinion as a whole, what do we find? The parties are and are not divorced. For all purposes except one, they are divorced and the decree is final at once." But see 7 Va. L. Reg. (N.S.) 801, 818 (1922).

[8]136 Va. 289, 118 S.E. 316 (1923).

[9]The court also discusses at length the applicability of the equitable doctrine of "clean hands," as applied to divorce litigation. The defendants wife attempted to invoke the "clean hands" doctrine in order to prevent the husband from benefiting from his own wrong. The court held that the public interest in invalidating the marriage could not be denied by the application of the doctrine of "clean hands." Id. at 296, 118 S.E. at 318.

[10]The court stated that there are two well recognized exceptions to the general rule: (1) marriages contrary to the laws of nature as generally recognized in Christian countries, and (2) marriages forbidden as a matter of public policy of the state. This situation apparently fell within the latter exception. See Id. at 303, 118 S.E. at 320.

[11]Va. Code Ann. § 5089 (1919).

valid marriage anywhere. Thus, reasoned the court, if the question had arisen in Maryland, the Maryland court would have had to give effect to the Virginia statute under the full faith and credit clause of the Federal Constitution.[12]

In *Humphreys v. Baird*,[13] the Supreme Court of Appeals pointed out that the statute expressly applies only to divorces for causes arising subsequent to the date of matrimony. Also, it is not applicable to situations where one of the parties is dead, or legally presumed to be dead, at the time of the decree, or where one of the parties dies subsequent to the decree before the expiration of the prohibited period.[14]

Since enactment, this statute has been twice amended: in 1934 and again in 1944. The first amendment added the proviso that nothing in the statute should be construed to prevent the divorced parties from remarrying each other during the prohibited period.[15] This change seems to have been designed merely to reinforce the purpose of the statute—i.e., to encourage reconciliation of the parties. The 1944 amendment reduced the period of prohibition from six months to four months.[16]

The problem at which this statute is directed, the disintegration of family life, is still acute in Virginia. Its effectiveness in curbing the divorce rate would be very difficult to measure, but many practicing attorneys feel that it has had little, if any, effect. Some years ago, a movement within the Virginia State Bar Association was unsuccessful in repealing or amending the statute, largely because of the feeling of many lawyers that although the law was ineffective in accomplishing its purpose, at least it caused no harm.[17] This observation cannot be sup-

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[12]U.S. Const. art IV, § 1. But see In re Peart's Estate, in which the Appellate Division of New York held that a Virginia divorce did not have the effect of a decree nisi, but rather was a final and absolute decree of divorce coupled with a prohibition against remarriage. The court justified its refusal to follow the construction placed upon the statute by the Virginia Supreme Court of Appeals, saying: "Generally speaking, we would be bound by the construction placed upon the statute of another state by the highest court of that state. We have great respect for the Virginia court rendering this decision. But when that court uses language construing a statute which is not necessary for the decision of the case before it, and sets forth what is and what is not entitled to full faith and credit in another state, I do not conceive its views to be binding upon us." 27 App. Div. 61, 97 N.Y.S.2d 879, 885 (1st Dep't 1950).

[13]197 Va. 667, 90 S.E.2d 796 (1956).

[14]Simpson v. Simpson, 162 Va. 621, 175 S.E. 320 (1934).

[15]Va. Acts 1934, c. 287.

[16]Va. Acts 1944, c. 142.

[17]At the 1935 meeting of the Virginia State Bar Association, the Committee on Legislation and Law Reform recommended the repeal of Va. Code Ann. § 5113 (1919). The report was referred to the Committee on Resolutions, which proposed,

ported. Any statute which has the effect of avoiding marriages will frequently work a hardship on someone, as some women who have thought they were widows of veterans of World Wars I and II have learned to their sorrow. Survivors of veterans are entitled to gratuitous benefits from the federal government. Until recently, however, the claimant had to be the legal widow of a veteran before she became eligible to receive any benefits.[18] If it appeared that the parties were married while either was under the statutory prohibition, according to the *Heflinger* decision, the marriage was void. The claimant thus could not qualify as the veteran's widow, and she would be unable to participate in the benefits. Consider, for example, a husband who is a veteran of World War I. He obtains a Virginia divorce from his first wife on February 1, 1942, and marries a second woman in another state on May 30, 1942, the second "wife" not knowing of the previous marriage and divorce. The couple return to Virginia and live happily together until the husband dies in 1958. The second "wife" applies to the Veterans Administration for widows' benefits and learns to her surprise that under Virginia law she is not a widow—that, in fact, she has not been married all these years and is not entitled to a stipend from the government.

The Veterans Administration can alleviate some of the harsh consequences of this statute by giving a narrow construction to the *Heflinger* decision. Moreover, where the claimant and decedent have traveled, after the prohibited period, to a state which recognizes common law marriage, a valid common law marriage may be found to exist, al-

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rather than to repeal the section, to amend it so as to leave it to the discretion of the judge whether to impose the period of prohibition upon the parties. The following are excerpts from the floor discussion on this proposal:

"Judge W. T. McCarthy, of Cherrydale: Mr. President, my experience has been that this section is one of the greatest disgraces on our statute books....

"Judge E. Hugh Smith, of Heathsville: One of the reasons for putting that provision in the Code is that when a party is given a divorce, the other party takes it to the Supreme Court, and after six months the Supreme Court denies the divorce, where are you? That is the reason it was put in there.

"Mr. James G. Martin: The six months' idea had nothing to do with appeal. It was put in by the codifiers so that people would not get divorces. It has done no one any good, and it allows people to marry in good faith and then find out that the man or woman did not have the right to marry."

The recommendation of the Committee on Resolutions was adopted. 47 Virginia State Bar Association 48-49 (1935).

[18]This situation has been alleviated in some degree by a recently passed federal statute, which provides that where the marriage is void because of a legal impediment, the purported marriage shall be deemed valid if the woman did not know of the impediment and lived with the veteran five years before his death. 71 Stat. 90 (1957), as amended, 71 Stat. 485 (1957), 38 U.S.C.A. § 2103 (1957).

though the ceremonial marriage performed during the prohibited period was void.

Another basis of criticism, which alone justifies repealing or amending the statute, is that it introduces uncertainty into Virginia law. Just what is the status of the divorced parties during the four month period? In other words, for what purposes is the divorce final and for what purposes does it act only as a decree nisi?[19] What effect does it have on property rights? May one party be compelled to testify in a criminal proceeding against the other? May a party who remarries during the prohibited period be prosecuted for bigamy? The statute is very unclear on these questions, and the Supreme Court of Appeals has not had the opportunity to clarify it. Until the statute is repealed or amended, or until the Supreme Court of Appeals considers these questions, an entirely unnecessary state of confusion will exist in Virginia law.

This statute is inherently productive of hardship; its only justification is the overwhelming public interest in favor of stability of the home. Since the statute does not accomplish its purpose, it follows that it should be amended or repealed. One possibility would be to amend the statute so as to give it the effect of a penal statute. A person contracting marriage during the prohibitory period would be guilty of a misdemeanor, but the marriage would be valid.

It appears unlikely that any measure that operates *after* the divorce will have any degree of success in reducing the divorce rate. By the time the parties have procured a divorce, the damage to the marital relationship has been done, and the possibility of their remarrying each other is slight. A more sensible approach would be to provide for some type of waiting period *before* the divorce, during which the parties might have the opportunity to cool off and effect a reconciliation. The theory is that if the marriage is to be saved, this must be done during the critical period prior to an embittering court battle. Thirteen states have statutes providing for a lapse of time between the institution of the suit and the hearing or entry of decree.[20] Illinois began experimenting in 1953 with this approach when the legislature enacted statutes requiring the complainant to file a statement of intention to institute the action at least sixty days before actually filing

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[19]See note 7 supra.

[20]Ariz. Rev. Stat. Ann., Civ. 54(c) (1956); Colo. Stat. Ann. c. 56 § 10(1) (1935), Laws 1945, p. 316, § 2; Conn. Gen. Stat. § 7333 (1949); Ill. Ann. Stat. c. 40, §§ 23-29 (Smith-Hurd 1953); Ind. Stat. Ann. § 2-801 (Supp. 1957); Kan. Gen. Stat. Ann. § 60-1517 (1949); Mich. Stat. Ann. § 25.89(2) (1957); Neb. Rev. Stat. § 42-305.02 (1943); Ohio Rev. Code Ann., § 3105.09 (Baldwin 1953); S.C. Code § 20-108 (1952); Tex. Rev. Civ. Stat. art. 4632 (Supp. 1956); Vt. Stat. § 3255 (1947) (if children are involved); Wash. Rev. Stat. § 982, Rev. Code of Wash. tit. 26, § 26.08.040.

the complaint for divorce. During this sixty day waiting period the judge was authorized to invite the parties into his chambers for the purpose of attempting to effect a reconciliation.[21]

From July 1953 through March 1954 the filing of actions for divorce in Cook County declined 37.57 per cent, while divorces granted declined 37.09 per cent.[22] However, in *People ex rel. Christiansen v. Connel*,[23] the Supreme Court of Illinois held the statute to be violative of the Illinois Constitution.[24] Therefore, in 1955, the legislature enacted other laws, this time providing for a sixty day waiting period after instituting the action for divorce, and omitting the provision which allowed the court to attempt a reconciliation.[25] This legislation was upheld in *People ex rel. Doty v. Connell*.[26] Under the new statutes there has been a substantial reduction in the number of divorce decrees entered, despite the fact that the courts do not actively promote reconciliations.[27]

It is submitted that Virginia's statute is impractical and unrealistic. In many instances it has been productive of severe hardship. At best, the statute can be said to breed unnecessary confusion in the minds of attorneys and judges. The approach adopted by the state of Illinois seems not only clear and workable, but it also appears to be accomplishing for Illinois the purpose for which the Virginia statute was designed—and which it has failed to accomplish. The General Assembly of Virginia might well profit by a consideration of Illinois' answer to this problem.

S. JAMES THOMPSON, JR.

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[21]Ill. Ann. Stat. c. 40, §§ 23-29 (Smith-Hurd 1953).

[22]Miner, The "Cooling Off" Divorce Law, 42 A.B.A.J. 1131, 1132 (1956).

[23]2 Ill. 2d 332, 118 N.E.2d 262 (1954).

[24]The court held that the statute violated § 19 of article II of the Illinois Constitution, which affords the litigant an unqualified right of immediate access to the courts, the right to obtain justice freely and without delay. An additional constitutional objection, held the court, was the fact that the statute imposed nonjudicial functions upon the judge.

[25]S.H.A. §§ 7a, 30, 31, 32 (1956).

[26]9 Ill. 2d 390, 137 N.E.2d 849 (1956).

[27]Miner, The "Cooling Off" Divorce Law, 42 A.B.A.J. 1131 (1956).