

Marriage - Effect of Cohabitation and Good Faith after Removal of Impediment to Marriage Illegally Contracted

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Marriage—Effect of Cohabitation and Good Faith After Removal of Impediment to Marriage Illegally Contracted.—An action was brought for divorce from bed and board by Erna Hoffman, plaintiff, against Oakley Hoffman, defendant, who filed a counter claim for divorce from the bond of matrimony, and prayed for an annulment in the alternative. The case was tried to the court. The basis of defendant's prayer for annulment was that plaintiff had secured a divorce from a former husband in Wisconsin and married the defendant in Illinois within a year, and returned to Wisconsin where the parties resided continuously up to the commencement of the present action and that the marriage to the defendant within the year was illegally contracted and was void under the provisions of sections 245.03(2) and 245.04 of the Wisconsin Statutes prohibiting remarriage until one year after a divorce is granted and also holding void a marriage contracted outside the state to circumvent Wisconsin law. The trial court found that the Waukegan marriage had been validated under Section 245.35 of the Wisconsin Statutes providing that "If a person during the lifetime of a husband or wife with whom the marriage is in force, enters into a subsequent marriage contract in accordance with the provisions of section 245.12, (the curative statute will not operate unless the contracting parties entered a ceremonial marriage in accordance with section 245.12), and the parties thereto live together as man and wife and such subsequent marriage contract was entered into by one of the parties in good faith, in the full belief that the former husband or wife was dead, or that the former marriage had been annulled, or dissolved by a divorce, or without knowledge of such former marriage, they shall, after the impediment to their marriage has been removed by the death or divorce of the other party to such former marriage, if they continue to live together as husband and wife in good faith on the part of one of them, be held to have been legally married from and after the removal of such impediment, and the issue of such subsequent marriage shall be considered as the legitimate issue of both parents."

Defendant appealed. The Supreme Court ruled that in as much as the marriage was entered into by Mr. Hoffman in good faith and in full belief that the former marriage of the plaintiff had been dissolved by a divorce; and the impediment to the marriage of the parties having been thereafter removed by said divorce becoming absolute, and the parties having continued to live together as husband and wife, the parties must be held to have been legally married from and after the removal of the impediment under the provision of sec. 245.35, Stats.¹

removal of the impediment under the provision of sec. 245.35, Stats. *Hoffman v. Hoffman*, 243 Wis. 83, 7 N.W. (2d) 428 (1943).¹

The curative statute is thus held to validate a marriage, entered into in good faith by one of the parties, and made out of the state to circumvent the law by the other party, a marriage void at its inception under sec. 245.04.² The element of good faith was satisfied by the fact that the defendant believed he was entering into a marriage valid in law at the time of contracting.

In coming to its conclusion the court specifically pointed out that good faith in Wisconsin does not refer solely to the fact that the parties have lived together as husband and wife after the removal of the impediment, but one of the parties must be entirely ignorant of the impediment before the marriage is celebrated.³ In some jurisdictions good faith implies living together as husband and wife after removal of the impediment, even though both of the parties knew of the impediment to their subsequent marriage.

Common law also recognized marriages as valid after the removal of impediments, provided that there was continued cohabitation and the element of good faith. The tendency of the courts was to do everything possible to uphold the marriage.

In an early English case, *Campbell v. Campbell*,⁴ known as the Breadalbane case, a married woman eloped and lived in adultery with her paramour under pretense by both that they were married. After the death of the woman's first husband they continued to live together. The House of Lords adjudged that though the beginning of the relationship was adulterous, yet the status of marriage commenced as soon as the parties were made capable of contracting marriage by the death of the woman's husband.

In *Davis v. Whitlock*⁵ the court stated that the tendency in this country is to criticize *Campbell v. Campbell* as going too far, and to hold that where the relationship was meretricious in the beginning, it cannot be converted into a marriage by the mere removal of the

¹ In accord with the principal case: *Turner v. Turner*, 189 Mass. 373, 75 N.E. 612 (1905); *Commonwealth v. Stevens*, 190 Mass. 280, 82 N.E. 33 (1907); *Smith v. Smith*, 61 App. D.C. 157, 58 F. (2d) 883 (1932); *Gardner v. Gardner*, 232 Mass. 253, 122 N.E. 308 (1919); *Whippen v. Whippen*, 173 Mass. 560, 51 N.E. 174 (1898); *Estate of Tufts*, 228 Wis. 221, 280 N.W. 309 (1938).

² In accord: *Lanham v. Lanham*, 136 Wis. 360, 117 N.W. 787 (Wis. 1908); *State v. Tutty*, 41 Fed. 753 (E.D. Ga. 1890); *Pennegar v. State*, 87 Tenn. 244, 10 S.W. 305 (1889); *McLennan v. McLennan*, 31 Ore. 480, 50 Pac. 802 (1897); *Estate of Stull*, 183 Pa. St. 625, 39 Atl. 16 (1898).

³ In accord: *Estate of Tufts*, 228 Wis. 221, 224, 280 N.W. 309, 311 (1938).

⁴ *Campbell v. Campbell*, 1 H. L. Sc. 182.

⁵ *Davis v. Whitlock*, 90 S.C. 233, 73 S.E. 171 (1911).

obstacle. There must be some subsequent agreement to be husband and wife.⁶

In *Lanham v. Lanham*⁷ the facts showed the parties were married in Michigan for the purpose of evading the Wisconsin statute prohibiting remarriage within one year of the granting of the divorce. This case was decided prior to the passage of the Uniform License Law of 1917. The Supreme court ruled that when cohabitation is illegal in its inception, the relationship between the parties will not be transformed into marriage by evidence of continued cohabitation, or by any evidence short of establishing the fact of an actual contract of marriage after the bar has been removed. If the parties had married in good faith, common law would have recognized them as validly married after the removal of the obstacle.⁸

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⁶ In accord: *Williams v. Williams*, 46 Wis. 464, 1 N.W. 98 (1879); *Spencer v. Pollock*, 83 Wis. 215, 53 N.W. 490 (1892); *Smith v. Reed*, 145 Ga. 724, 89 S.E. 815 (1916); *Clarke v. Barney*, 240 Okla. 455, 103 P. 598 (1909).

⁷ *Lanham v. Lanham*, 136 Wis. 360, 117 N.W. 787, 17 L.R.A. (N.S.) 804 (1908).

⁸ In accord: *Davis v. Whitlock*, 90 S.C. 233, 246, 73 S.E. 171 (1911); *Eaton v. Eaton*, 66 Neb. 676, 92 N.W. 995 (1902); *Adger v. Ackerman*, 115 Fed. 124 (C.C.A. 8th, 1902); *Chamberlain v. Chamberlain*, 68 N.J. Eq. 736, 62 Atl. 680 (1905); *Poole v. People*, 24 Colo. 510, 52 Pac. 1025 (1898); *Schuchart v. Schuchart*, 61 Kan. 597, 60 P. 311 (1900); *Barker v. Valentine*, 125 Mich. 336, 84 N.W. 297 (1900); *Mudd v. Perry*, 108 Okla. 168, 235 P. 479 (1925); 38 *Corpus Juris* 1297; 18 *Ruling Case Law*, 436; 1 *Bishop on Marriage, Divorce and Separation*, Sections 970, 979. A discussion of the content of this recent decision can be found in *American Jurisprudence*, Vol. 35, Sec. 201, p. 313.